CSU
College of Law Library

Cleveland State University
EngagedScholarship@CSU

Law Faculty Books

Faculty Scholarship

8-2016

Law of Wills

Browne C. Lewis
Cleveland-Marshall College of Law, Cleveland State University

Follow this and additional works at: https://engagedscholarship.csuohio.edu/fac_books

 Part of the Estates and Trusts Commons, and the Property Law and Real Estate Commons

How does access to this work benefit you? Let us know!

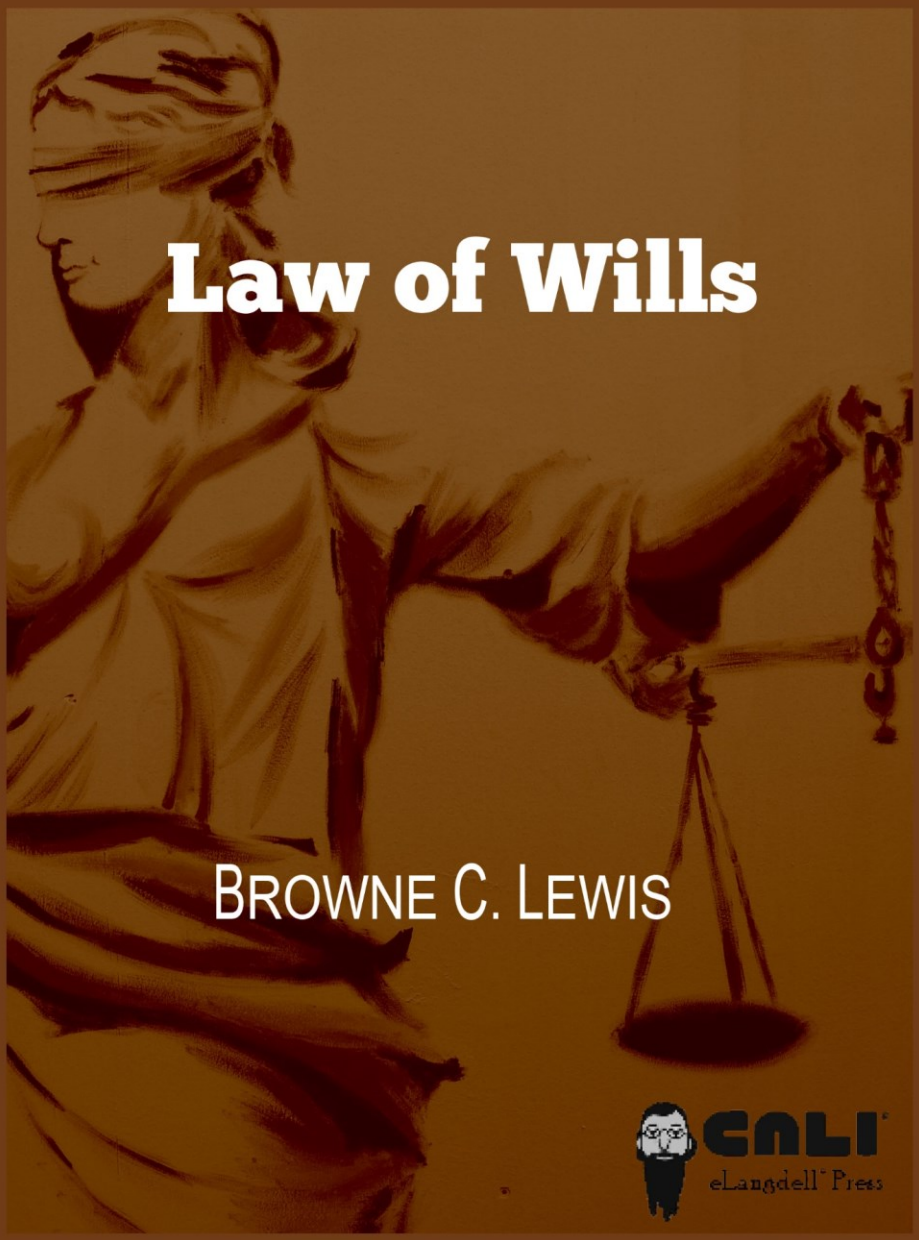
Recommended Citation

Lewis, Browne C., "Law of Wills" (2016). *Law Faculty Books*. 30.
https://engagedscholarship.csuohio.edu/fac_books/30

This Book is brought to you for free and open access by the Faculty Scholarship at EngagedScholarship@CSU. It has been accepted for inclusion in Law Faculty Books by an authorized administrator of EngagedScholarship@CSU. For more information, please contact research.services@law.csuohio.edu.

MSL
ACADEMIC ENDEAVORS

Law of Wills



BROWNE C. LEWIS

CALI
eLangdell Press

Law of Wills

Browne C. Lewis
Leon and Gloria Plevin Professor of Law and
Director, Center for Health Law & Policy

Cleveland-Marshall College of Law

CALI eLangdell Press 2016

About the Author

Professor Lewis is the Leon & Gloria Plevin Professor of Law and the Director of the Center of Health Law & Policy at Cleveland-Marshall College of Law. Prior to joining the faculty at Cleveland-Marshall, Professor Lewis was an associate professor at the University of Detroit Mercy School of Law, a visiting professor at the University of Pittsburgh School of Law, a summer visiting professor at Seattle University School of Law and a legal writing instructor at Hamline University School of Law. Professor Lewis has also taught in the American Bar Association CLEO Summer Institute.

Professor Lewis has been a visiting scholar at the Brocher Foundation in Geneva, Switzerland, the Hasting Center, and Yale University's Interdisciplinary Center for Bioethics. As a Senior Fulbright Specialist, Professor Lewis conducted research at Hebrew University and Haifa University in Israel. Professor Lewis was also a Core Fulbright Scholar at King's College in London, and a Robert Wood Johnson Public Health Law Scholar in Residence at the Cleveland Public Health Department.

Professor Lewis writes in the areas of estate planning, probate and reproductive law. Her article on human oocyte cryopreservation was recently published in the Tennessee Law Review. In 2012, New York University Press published Professor Lewis' book on paternity and artificial insemination. Professor Lewis has recently completed a book on posthumous reproduction for Routledge Press.

Notices

This is the first edition of this casebook, updated June 2016. Visit http://elangdell.cali.org/ for the latest version and for revision history.

This work by Browne C. Lewis is licensed and published by CALI eLangdell Press under a Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International (CC BY-NC-SA 4.0). CALI and CALI eLangdell Press reserve under copyright all rights not expressly granted by this Creative Commons license. CALI and CALI eLangdell Press do not assert copyright in US Government works or other public domain material included herein. Permissions beyond the scope of this license may be available through feedback@cali.org.

In brief, the terms of that license are that you may copy, distribute, and display this work, or make derivative works, so long as

- you give CALI eLangdell Press and the author credit;
- you do not use this work for commercial purposes; and
- you distribute any works derived from this one under the same licensing terms as this.

Suggested attribution format for original work:

Browne C. Lewis, *Law of Wills*, Published by CALI eLangdell Press. Available under a Creative Commons BY-NC-SA 4.0 License.

CALI® and eLangdell® are United States federally registered trademarks owned by the Center for Computer-Assisted Legal Instruction. The cover art design is a copyrighted work of CALI, all rights reserved. The CALI graphical logo is a trademark and may not be used without permission.

Should you create derivative works based on the text of this book or other Creative Commons materials therein, you may not use this book's cover art and the aforementioned logos, or any derivative thereof, to imply endorsement or otherwise without written permission from CALI.

This material does not contain nor is intended to be legal advice. Users seeking legal advice should consult with a licensed attorney in their jurisdiction. The editors have endeavored to provide complete and accurate information in this book. However, CALI does not warrant that the information provided is complete and accurate. CALI disclaims all liability to any person for any loss caused by errors or omissions in this collection of information.

About CALI eLangdell Press

The Center for Computer-Assisted Legal Instruction (CALI®) is: a nonprofit organization with over 200 member US law schools, an innovative force pushing legal education toward change for the better. There are benefits to CALI membership for your school, firm, or organization. ELangdell® is our electronic press with a mission to publish more open books for legal education.

How do we define "open?"

- Compatibility with devices like smartphones, tablets, and e-readers; as well as print.
- The right for educators to remix the materials through more lenient copyright policies.
- The ability for educators and students to adopt the materials for free.

Find available and upcoming eLangdell titles at elangdell.cali.org. Show support for CALI by following us on Facebook and Twitter, and by telling your friends and colleagues where you received your free book.

Table of Contents

Law of Wills ii
About the Author i
Notices ii
About CALI eLangdell Press iii
Preface xx
Part I – The Intestacy System 1
Chapter One: Ethically Representing the Elderly Client 1
1.1 Introduction 1
1.2 Client Identification 1
1.3 Conflict of Interest 2
Chase v. Bowen, 771 So.2d 1181 (Fla. Dist. Ct. App. 2000) 2
1.4 Confidentiality 3
A. v. B., 726 A2d 924 (N.J. 1999) 3
Notes, Problems, and Questions 9
American Bar Association Model Rule 1.6 Confidentiality of Information 11
1.5 Competency 11
American Bar Association Model Rule 1.14 Client With Diminished Capacity 12
In re Disciplinary Action Against Kuhn, 785 N.W.2d 195 (N.D. 2010) 12
Notes, Problems, and Questions 18
Estate of Schneider v. Finmann, 933 N.E.2d 718 (N.Y. 2010) 19
1.5.2 The Intended Beneficiary 20
Sisson v. Jankowski, 809 A.2d 1265 (N.H. 2002) 20
Ethics Exercise One 25
Ethics Exercise Two 25
Chapter Two: Intestacy System (Basic Overview) 27
2.1 Introduction 27
2.2 Distribution Under the Intestacy System 27
2.2.1 Uniform Probate Code § 2-103. Share of Heirs other than Surviving Spouse ... 28
2.3 Descendants 28

2.3.1 Illustration One 28
2.3.2 Illustration Two 29
2.3.3 Two Important Rules to Remember 29
2.4 The Meaning of Representation 30
2.4.1 English per stirpes 30
2.4.2 Modern per stirpes 31
Notes and Questions 32
2.4.3 A Case Illustration 32
In re Estate of Evans, 827 N.W.2d 313 (Neb. App. 2013) 32
Notes, Problems, and Questions 38
2.4.4 Per capita at each generation (1990 Uniform Probate Code) 38
UPC § 2-106(b) 39
2.4.5 Comparison 40
Problems 41
2.5 Ancestors, Collaterals and Others. 42
2.5.1 Parents 42
Uniform Probate Code § 2-114. Parent and Child Relationship. 42
In re Estate of Fleming, 991 P.2d 128 (Wash. Ct. App. 2000) (Voluntary Termination of Parental Rights) 42
New Jersey Div. of Youth and Family Services v. M.W., 942 A.2d 1 (N.J. App. Div. 2007) (Involuntary Termination of Parental Rights) 45
Notes, Problems, and Questions 57
2.5.2 Other Ancestors and Collaterals 58
In re Wolbert's Estate, 135 A.2d 533 (N.J. Super. Ct. App. Div. 1957) 59
2.5.3 Laughing Heirs 61
2.5.4 Escheat 61
Uniform Probate Code § 2-105 No Taker. 61
2.5.6 Advancements 61
Tankesley v. Thompson, 469 S.E.2d 853 (Ga. App. Ct. 1996) 62
Uniform Probate Code § 2-109 63
Va. Code Ann. § 64.206. Advancements brought into hotchpot 63
2.5.7 Computation of Shares-Hotchpot Method. 63

Problems and Questions 64

Chapter Three: Intestacy System (Surviving Spouse) 65

3.1 Introduction 65

Uniform Probate Code § 2-102. Share of Spouse. 66

Problems 66

3.2 Definition of Spouse 67

3.2.1 Putative Spouse 67

M.S.A. § 518.055 Putative Spouse (Minnesota) 67

Estate of Leslie, 689 P.2d 133 (Cal. 1984) 68

Notes, Problems, and Questions 77

Estate of Hafner, 184 Cal. App. 3d 1371 (Cal. App. Ct. 1986) 78

3.2.2 Common Law Spouse 89

In re Estate of Duval, 777 N.W.2d 380 (S.D. 2010) 89

Notes, Problems, and Questions 94

3.2.3 Same-Sex Spouse 95

3.2.4 Other Issues Impacting the Status of Surviving Spouse 95

3.2.4.1 Legal Separation 96

Estate of Lahey, 76 Cal App. 4th 1056, 91 Cal. Rptr. 30 (Ct. App. Cal. 1st Dist. Div. 5, 1999) 96

Notes, Problems, and Questions 98

3.2.4.2 Abandonment 98

Estate of Joyner v. Joyner, 753 S.E.2d 192 (Ct. App. N.C. 2014) (Constructive Abandonment) 98

Notes, Problems, and Questions 100

3.3 What does it mean to survive? 101

3.3.1 Common Law 102

3.3.2 Original Uniform Simultaneous Death Act 102

Matter of Bausch's Estate, 100 Misc.2d 817 (N.Y. 1979) 102

Problems 103

3.3.3 UPC and Modern USDA (120 Hour Rule) 104

Uniform Probate Act § 2-104. Requirement that Heir Survive Decedent for 120 Hours. 104

Stephens v. Beard, 428 S.W.3d 385 (Ct. App. Tex. 2014) 104

3.3.4 Brain Death vs. Hearth Death 107

In re Haymer, 450 N.E.2d 940 (Ill. App. 3d 1983) *107*

3.4 Other Surviving Spousal Resources **111**

3.4.1. Social Security and Retirement Benefits **112**

3.4.2. Homestead, Personal Property Set-Aside, and Family Allowance **112**

3.4.3 Dower **113**

Ohio Revised Code Ann. 2103.02 ..... *113*

Armstrong v. Armstrong, 715 N.E.2d 207 (Ohio App. Ct. 1998) *113*

3.4.4 Fractionalize Forced Share **115**

In re Estate of Soard, 173 S.W.3d 22 (Tenn. App. Ct. 2005) *115*

Chapter Four: The Intestacy System (Marital and Adopted Children) **128**

4.1 Introduction **128**

4.2 Marital Children **128**

4.2.1 Posthumously Born Children **128**

Morrow v. Scott, 7 Ga. 535 (Ga. 1849) *128*

Uniform Probate Code § 2-108 Afterborn Heirs *129*

Class Discussion Tool One **129**

4.3 Adopted Children **130**

4.3.1 Legal Adoption **131**

McKinney's D.R.L. § 117(b) Right to inherit from and through the biological parents eliminated after adoption *131*

Aldridge v. MIMS, 884 P.2d 817 (N.M. 1994) *131*

Ellis v. West, 971 So. 2d 20 (Ala. 2007) *134*

Right to inherit from biological parent retained after adoption **136**

In re Estate of Moore, 25 P3d 305 (Oklahoma 2001) *136*

In re Estate of Wulf, 167 N.W.2d 181 (Neb. 1969) *138*

The right to inherit from two lines **140**

Uniform Probate Code § 2-113 ..... *140*

Jenkins v. Jenkins, 990 So. 2d 807 (Miss. App. Ct. 2008) *141*

Notes and Questions **145**

4.3.2 Equitable Adoption **145**

Right to inherit from the intended adoptive parents **145**

O'Neal vs. Wilkes, 439 S.E.2d 490 (Ga. 1994) *146*

Welch vs. Wilson, 516 S.E.2d 35 (W. Va. 1999) *149*
Notes and Questions **152**
Right to inherit from biological parents **153**
Gardner v. Hancock, 924 S.W.2d 857 (Mo. 1996) *153*
Notes and Questions **155**
The right to inherit through the intended adoptive parents **156**
Bd. of Education of Montgomery County v. Browning, 635 A.2d 373 (Md. 1994) *156*
Notes and Problems **164**
4.3.2 Adult Adoption **166**
The right to inherit through the adoptive parents **166**
In the Matter of the Petition of P.A.L., 5 P.3d 390 (Colo. 2000) *166*
Tinney v. Tinney, 799 A.2d 235 (R.I. 2002) *168*
Notes and Questions **170**
Right to inherit through adoptive parents **171**
In re Estate of Brittin, 664 N.E.2d 687 (Ill. 1996) *171*
In re Ellison Grandchildren Trust, 261 S.W.3d 111 (Tex. 2008) *175*
4.3.3 Stepparent Adoption **187**
Uniform Probate Code § 2-114 Parent and Child Relationship *187*
Uniform Adoption Act § 4-103 (1994) *188*
Impact on the right to inherit from biological parent(s) **188**
Estate of Jacobs, 719 A.2d 523 (Me. 1998) *188*
Impact on the right to inherit through biological parent(s) **190**
In re Estate of McQuesten, 578 A.2d 335 (N.H. 1990) *190*
Chapter Five: Intestacy (Non-Marital Children, Stepchildren and Foster Children) **194**
5.1 Introduction **194**
5.2 Non-Marital Children **195**
5.2.1 The Right to Inherit From Mothers **195**
Levy v. Louisiana, 391 U.S. 68 (1968) *196*
Notes and Questions **197**
Ohio Revised Code Annotated *198*

5.2.2 The Right to Inherit From Fathers 198

Lalli v. Lalli, 439 U.S. 259 (1978) 198

Notes and Questions 204

Phillips v. Ledford, 590 S.E.2d 280 (N.C. App. 2004) 205

Notes and Questions 207

Notes and Questions 208

5.2.3 Right to Inherit Through Fathers 209

In re Dumaine, 600 A.2d 127 (N.H. 1991) 209

Notes and Questions 213

Uniform Parentage Act § 202. No Discrimination Based on Marital Status. 213

Notes and Questions 214

Sample State Statutes 215

Notes and Questions 219

5.3 Stepchildren and Foster Children 219

5.3.1 Stepchildren/Foster Children are not entitled to inherit 219

Wyo. Stat. Ann. § 2-4-104 (1977) 220

5.3.2 Stepchildren/Foster Children may inherit if the necessary relationship exists 220

West's Ann. Cal. Prob. Code § 6454 220

Estate of Claffey, 257 Cal. Rptr. 197 (Cal. App. 3d 1989) 220

5.3.3 Stepchildren/Foster Children may inherit if there are no other heirs available 223

MD Code, Estates and Trusts, § 3-104 223

Estate of Smith, 299 P.2d 550 (Wash. 1956) 224

Estate of Joseph, 949 P.2d 472 (Cal. 1998) 227

Notes and Questions 236

Chapter Six: Intestacy (Children of Assisted Reproductive Technology) 237

6.1 Introduction 237

6.2 Posthumously Conceived Children 238

6.2.1 The Right to Inherit From Fathers 239

Astrue v. Capato ex. Rel. B.N.C., 132 S. Ct. 2021 (2012) 239

Woodward v. Commissioner of Social Sec., 760 N.E.2d 257 (Mass. 2002) 241

Notes and Questions **251**

Khabbaz v. Commissioner of Social Security Administration, 930 A.2d 1180 (N.H. 2007) *252*

In Re Estate of Kolacy, 753 A.2d 1257 (N.J. 2000) *256*

Questions **261**

Finley v. Astrue, 270 S.W.3d 849 (Ark. 2008) *261*

Questions **266**

6.2.2 The Right to Inheritance Through Fathers **266**

In re Martin, 841 N.Y.S.2d 207 (N.Y. Sur. Ct. 2007) *266*

Notes and Questions **270**

Statutes Addressing the Inheritance Rights of Posthumously Conceived Children **270**

Questions **271**

Questions **273**

Problems **274**

6.3 Children Conceived Using Artificial Insemination **275**

6.4 The Paternity of the Inseminated Woman's Husband **275**

6.4.1 Consenting Husband is the Legal Father **276**

6.4.1.1 Written Consent **276**

Lane v. Lane, 912 P.2d. 290 (N.M. 1996) *276*

Notes and Questions **282**

6.4.1.2 Verbal Consent **282**

K.S. v. G.S., 440 A.2d 64 (N.J. Super. Ct. App. Div. 1981) *283*

6.4.1.3 Presumed Consent **286**

W.W. v. W.W., 51 A.D.3d 211 (N.Y. App. Div. 2008) *286*

Notes and Questions **290**

6.4.1.4 Implied Consent **290**

In re Baby Doe, 353 S.E.2d 877 (S.C. 1987) *290*

Notes and Questions **292**

6.4.2 Nonconsenting Husband is not the Legal Father **292**

Marriage of Witbeck-Wildhagen, 667 N.E.2d 122 (Ill. App. Ct. 1996) *292*

Notes and Questions **296**

6.5 The Paternity of the Sperm Donor **297**

6.5.1 The Sperm Donor is not the Legal Father 297

Lamaritata v. Lucas, 823 So. 2d 316 (Fla. Dist. Ct. App. 2002) 297

Questions 299

6.5.2 The Sperm Donor May Be the Legal Father 299

Shultz v. Shultz, 923 A.2d 473 (Pa. Super Ct. 2007) 299

Sample Statutes 303

6.6 Children Conceived Through Surrogacy Arrangements 304

6.6.1 The Possibility of Inheriting From the Woman 304

6.6.1.1 The Genetics/Blood Test 304

Belsito v. Clark, et al., 644 N.E. 2d 760 (C.P. Ct. Oh. 1994) 304

Notes and Questions 312

6.6.1.2 The Gestational Test 313

A.H.W. and P.W. v. G.H.B., 772 A.2d 948 (N.J. 2000) 314

Note and Questions 316

6.6.1.3 The Intent Test 317

Johnson v. Calvert, 851 P.2d. 776 (Cal. 1993) 317

6.6.1.4 The Best Interests of the Child Test 323

Johnson v. Calvert, 851 P.2d. 776 (Cal. 1993) 323

Notes and Questions 324

6.6.1.5 The Totality of the Circumstances 324

In re C.K.G., 173 S.W. 3d 714 (Tenn. 2005) 324

6.6.2 The Possibility of Inheriting Through The Woman 337

Matter of Petition Of Successor Trustees for the Construction of three inter vivos trusts created in 1959 f/b to the Issue of K. Doe, C. Doe, and M. , 793 N.Y.S. 2d 878 (2005) 337

Part II —The Testacy System 341

Chapter Seven: Testamentary Freedom 341

7.1 Introduction 341

7.1.1. The Decedent's Right to Control the Distribution of Property 341

Hodel v. Irving, 481 U.S. 704 (1987) 341

Notes and Questions 346

Ostrander v. Preece, 196 N.E. 670 (Ohio 1935) 346

Notes, Problems, and Questions **348**
7.2 The Decedent's Right to Place Restrictions on the Right to Inherit **349**
7.2.1 Some Restrictions are Unreasonable **349**
Maddox & al. v. Maddox's adm'r & als., 11 Grat., Va. 804 (Va. 1854) *349*
7.2.2 Some Restrictions are Reasonable **355**
Shapira v. Union National Bank et. al., 315 N.E.2d 825 (Ohio 1974) *355*
In re Estate of Feinberg, 919 N.E.2d 888 (Ill. 2009) *359*
Notes, Problems, and Questions **372**
Chapter Eight: Disinheritance **374**
8.1 Introduction **374**
8.2 Exceptions **374**
8.2.1 Forced Heirs **374**
LSA. C.C. Art. 1493. Forced heirs *374*
8.3 Negative Disinheritance **374**
8.3.1 Example **375**
8.3.2 UPC § 2-101 Intestate Estate **375**
In re Estate of Melton, 272 P.3d 668 (2012) *375*
8.4 Expressed Disinheritance by the Testator **383**
Estate of D.M.R., 735 N.E.2d 359 (Mass. 2000) *384*
Notes and Questions **388**
8.5 Disinheritance by Operation of Law (Slayer Rule) **388**
West's Alaska Statutes Annotated § 13.12.803. Effect of homicide on intestate succession, wills, trusts, joint assets, life insurance, and beneficiary designations *389*
8.5.1 Application of the Slayer Statute **389**
8.5.1.1 Slayer Is Legally Disinherited **389**
In the Matter of the Estate of Blodgett, 147 P.3d 702 (Alaska 2006) *389*
8.5.1.2 Slayer's Descendant May Not Be Legally Disinherited **393**
In the Matter of the Estate of Van Der Veen, 935 P.2d 1042 (Kan. 1997) *393*
8.5.2 Exceptions **396**
8.5.2.1 Assisted Suicide **396**
In re the Estate of Schunk, 760 N.W.2d 446 (Wis. 2008) *396*
8.5.2.2 Mentally Incompetent Slayer **400**

Estate of Armstrong v. Armstrong, 170 So.3d 510 (Miss. 2015) *400*
Notes and Questions **406**
Problems **407**
Chapter Nine: Testamentary Capacity (Mental Competency and Insane Delusion) **409**
9.1. Introduction **409**
9.2 Testamentary Capacity **410**
In re Estate of Romero, 126 P.3d 228 (Colo. App. 2005) *410*
Notes, Problems, and Questions **414**
Matter of Estate of Oliver, 934 P.2d 144 (Kan. App. 1997) *415*
Notes, Problems, and Questions **419**
Paine v. Sullivan, 950 N.E.2d 874 (Mass. App. 2011) *420*
Notes, Problems, and Questions **425**
9.3 Insane Delusion **426**
Matter of Estate of Killen, 937 P.2d 1368 (Ariz. App. 1996) *426*
Matter of Estate of Watlack, 945 P.2d 1154 (Wash. App. 1997) *432*
Notes, Problems, and Questions **436**
Class Discussion Tools **436**
Chapter Ten: Testamentary Capacity (Undue Influence, Duress and Fraud) **438**
10.1 Introduction **438**
10.2 Undue Influence/Duress **438**
10.2.1 Presumption of Undue Influence **438**
Noblin v. Burgess, 54 So.3d 282 (Miss. 2010) *439*
In re Estate of Saucier, 908 So. 2d 883 (Miss. Ct. App. 2005) *444*
Problems **448**
10.2.2 Undue Influence **449**
In re Estate of Schoppe, 710 N.W.2d 258 (Iowa Ct. App. 2005) *449*
Notes, Problems, and Questions **453**
10.2.3 Duress **454**
In re Estate of Rosasco, 31 Misc. 3d 1214(A), 927 N.Y.S.2d 819 (N.Y. Sur. Ct. 2011) *455*
10.3 Fraud **463**

10.3.1 Fraud in the inducement **463**
10.3.2 Fraud in the Execution **464**
10.4 Intentional Interference With An Inheritance Expectancy (IIE) **464**
§ 774B Intentional Interference with Inheritance or Gift *465*
Schilling v. Herrera, 952 So. 2d 1231 (Fla. App. 2007) *465*
Notes, Problems, and Questions **470**
Class Discussion Tool **471**
Chapter Eleven: Attested Wills **472**
11.1 Introduction **472**
Va. Code Ann. 64.2-403. Execution of wills; requirements *472*
11.2 Writing **472**
N.R.S. 133.085. Electronic will (Nevada) *472*
Problems **473**
11.3 Signed by the Testator **474**
11.3.1 Signature Problems **474**
Taylor v. Holt, 134 S.W.3d 830 (Tenn. Ct. App. 2003) *474*
Matter of Will of Bernatowicz, 233 A.D.2d 838 (N.Y. App. Div. 1996) *477*
Notes, Problems, and Questions **479**
11.4 In the Presence **479**
11.4.1 Line of Sight **480**
Walker v. Walker, 174 N.E. 541 (Ill. 1930) *480*
11.4.2 Conscious Presence **483**
Whitacre v. Crowe, 972 N.E.2d 659 (Ohio Ct. App. 2012) *483*
12.5 Witnesses **489**
A.C.A. § 28-25-102. Competency, etc., of witnesses *489*
Scandurro v. Beto, 234 S.W.2d 695 (Tex. Civ. App. 1950) *490*
Problems **493**
11.6 Revocation **494**
M.G.L.A. 190B § 2-507 Revocation by writing or by act (Mass.) *494*
11.6.1 By Later Writing **495**
Problems **495**

11.6.2 By Physical Act 496
11.6.2.1 Attempted Destruction 496
Thompson v. Royall, 175 S.E. 748 (Va. 1934) 496
11.6.2.2 Presumption of Destruction 498
Edmonds v. Edmonds, 772 S.E.2d 898 (Va. 2015) 498
Harrison v. Bird, 621 So.2d 972 (Ala. 1993) 507
Notes, Problems, and Questions 508
11.6.3 Dependent Relative Revocation and Revival (DRRR) 509
11.6.3.1 DRRR 510
Kroll v. Nehmer, 705 A.2d 716 (Md. 1998). 510
Notes, Problems, and Questions 517
11.6.3.2 Revival 517
N.C.G.S.A. § 31-5.8.Revival of revoked will 518
VA Code Ann. § 64.2-411. Revival of wills after revocation 518
20 Pa.C.S.A. § 2506. Revival of revoked or invalid will 518
MCA 72-2-529. Revival of revoked will (Montana) 518
Problems 518
11.6.4 Revocation by Changed Circumstances 519
11.6.4.1 Spouses 519
11.6.4.1.1 Divorce 519
Davis v. Aringe, 731 S.W.2d 210 (Ark. 1987) 519
11.6.4.1.2 Marriage 522
Estate of Murrary, 193 Cal. Rptr. 355 (1983) 522
11.6.4.2 Children 524
11.6.4.2.1 Omitted Children 524
UPC § 2-302. Omitted Children 524
Problems 525
11.6.4.2.2 After Born Children 526
Hedlund et al. v. Miner et. al., 69 N.E.2d 862 (Ill. 1946) 526
Notes and Questions 531
Chapter Twelve: Non-Attested Wills 533

12.1 Introduction **533**
12.2 Holographic Will **533**
Uniform Probate Code § 2-502. Execution; Witnessed or Notarized Wills; Holographic Wills. *533*
12.2.1 Testamentary Intent **533**
In re Kimmel's Estate, 278 Pa. 435 (Pa. 1924) *534*
Estate of Southworth, 51 Cal. App. 4th 564 (Cal. Ct. App. 1996) *537*
Problems **542**
12.2.2 In the Testator's Handwriting **543**
Matter of Estate of Hand, 684 A.2d 521 (N.J. 1996) *543*
12.2.3 Material Portions **546**
Matter of Estate of Krueger, 529 N.W.2d 151 (N.D. 1995) *546*
12.2.4 Preprinted Forms **548**
In re Will of Ferree, 848 A.2d 81 (N.J. 2003) *548*
12.3 Nuncupative Wills **553**
T. C. A. § 32-1-106. Nuncupative wills (Tenn.) *553*
Problems **554**
Chapter Thirteen: Additional Doctrines Impacting Wills **556**
13.1 Introduction **556**
13.2 Incorporation by Reference **556**
§ 2-510. Incorporation by Reference *556*
13.2.1 In Existence **556**
Cyfers v. Cyfers, 759 S.E.2d 475 (W. Va. 2014) *556*
Clark v. Citizens Nat. Bank of Collingswood, 118 A.2d 108 (N.J. Super. Ct. App. Div 1955) ... *562*
13.2.2 Description and Intent **567**
Clark v. Greenhalge, 582 N.E.2d 949 (Mass. 1991) *567*
Problems **571**
13.3 Integration **572**
In re Morrison's Estate, 220 P.2d 413 (Cal. Ct. App. 1950) *572*
Problems **576**
13.4 Republication by Codicil **576**
Restatement (Third) of Property (Wills & Don. Trans.) § 3.4 (1999) *576*

§ 4-512. Events of Independent Significance. *578*

Problems **579**

13.6 Interaction Between the Doctrines **579**

Walsh v. St. Joseph's Home For Aged, 303 A.2d 691 (Del.Ch. 1973) *579*

13.7 Contracts Relating to Wills **581**

13.7.1 Contract to Make a Will **582**

Uniform Probate Code § 2-514. Contracts Concerning Succession *582*

Newton v. Lawson, 720 S.E.2d 353 (Ga. Ct. App. 2011) *582*

Problems **586**

13.7.2 Contract Not to Revoke a Will **586**

Problems **587**

Chapter Fourteen: Mistakes and Curative Doctrines **588**

14.1 Introduction **588**

14.2 Drafting Errors **588**

In re Gibb's Estate, 111 N.W.2d 413 (Wis. 1961) *588*

14.3 Execution Errors **592**

14.3.1 Strict Compliance **592**

In re Pavlinko's Estate, 148 A.2d 528 (Pa. 1959) *592*

14.3.2 Substantial Compliance **598**

Matter of Will of Ranney, 589 A.2d 1339 (N.J. 1991) *599*

14.3.3 Harmless Error/Dispensing Power **606**

In re Estate of Ehrlich, 47 A.3d 12 (N.J. Super. Ct. App. Div. 2012) *606*

In re Estate of Sky Dancer, 13 P.3d 1231 (Colo. App. 2000) *613*

Chapter Fifteen: The Stale Will Problem **617**

15.1 Introduction **617**

15.2 Common law/Default Lapse Rules **617**

15.2.1 Specific and General Devises **617**

15.2.2 Residuary Devises **618**

15.2.3 No Residue-of-a Residue Rule **618**

15.2.3 Class Devises **619**

Matter of Seaman, 196 Misc. 202 (N.Y. Sur. Ct. 1949) *619*

Matter of Kalouse's Estate, 282 N.W.2d 98 (Iowa 1979) *620*

Nolan v. Borger, 203 N.E.2d 274 (Ohio Prob. 1963) *628*

15.2.4 Void Devises **634**

In re Estate of Russell, 444 P.2d 353 (Cal. 1968) *634*

Notes, Problems, and Questions **640**

M.S.A. § 524.2-603. Antilapse; deceased devisee; class gifts; words of survivorship (Minn.) *642*

14.3.1 Devisee Predeceases the Testator **642**

Gianoli v. Gabaccia, 412 P.2d 439 (Nev. 1966) *642*

In re Estate of Evans, 326 P.3d 755 (Wash. Ct. App. 2014) *644*

15.3.2 Testator's Contrary Intent **650**

15.3.2.1 Language of the Will **651**

M.S.A. § 524.2-603. Antilapse; deceased devisee; class gifts; words of survivorship (Minn.) *651*

Ruotolo v. Tietjen, 890 A.2d 166 (Conn. App. Ct. 2006) *651*

15.3.2.2 Alternative Disposition **658**

Kubiczky v. Wesbanco Bank Wheeling, 541 S.E.2d 334 (W. Va. 2000) *658*

15.4 Ademption **665**

15.4.1 Ademption by Extinction **665**

Stewart v. Sewell, 215 S.W.3d 815 (Tenn. 2007) *665*

Notes, Problems, and Questions **675**

Uniform Probate Code § 2-606. Nonademption of specific devises: Unpaid proceeds of sale, Condemnation, or insurance; Sale by conservator or agent *676*

15.4.2 Ademption by Satisfaction **676**

In re Estate of Condon, 715 N.W.2d 770 (Iowa Ct. App. 2006) *677*

SDCL § 29A-2-609. Ademption by satisfaction (S.D.) *680*

Problems **681**

15.5 Other Doctrines Relevant to Will Property **681**

15.5.1 Exoneration of Liens **681**

VA Code Ann. § 64.2-531. Nonexoneration; payment of lien if granted by agent *682*

Estate of Fussell v. Fortney, 730 S.E.2d 405 (W. Va. 2012) *682*

15.5.2 Abatement **687**

Part III — Nonprobate Transfers **688**

Chapter Sixteen: Will Substitutes 688
16.1 Introduction 688
16.2 Life Insurance 688
16.2.1 Changing the Beneficiary 689
Carruthers v. $21,000 (Formerly New York Life Ins. Co.), 434 A.2d 125 (Pa. Super. 1981) 689
Doss v. Kalas, 383 P.2d 169 (Ariz. 1963) 691
Notes, Problems, and Questions 693
16.3 Private Retirement Accounts 694
Egelhoff v. Egelhoff ex rel. Breiner, 532 U.S. 141 (2014) 695
Questions 703
16.4 Joint Bank Accounts 703
In re Estate of Platt, 772 N.E.2d 198 (Ohio Ct. App. 2002) 704
Notes, Problems, and Questions 707
16.5 Concurrently Owned Real Property 708
16.6 Inter Vivos Trusts 708
16.6.1 Creation of a Trust 709
16.6.1.1. Intent 709
Frazier v. Hudson, 130 S.W.2d 809 (Ky. Ct. App. 1939) 709
Bothe v. Dennie, 324 A.2d 784 (Del. 1974) 712
Notes and Problems 716
16.6.1.2. Property 717
In re Estate of McDowell, 781 N.W.2d 568 (Iowa Ct.App. 2010) 717
16.6.2 Modification/Revocation of a Trust 722
Chiles v. Chiles, 242 S.E.2d 426 (S.C. 1978) 722
Notes, Problems, and Questions 724

Preface

Both lay persons and budding lawyers continue to be interested in the area of estates and trusts. While I was writing this book, several celebrities died. Certain deaths really attracted the attention of the public. Facebook and other social media sites were full of dedications to Prince when his death was announced. Robin Williams spent his life making us laugh; the tragic circumstances of his death made us sad. After all of the tears, memorials and speculations ceased, people started searching the Internet for copies of the wills. They were interested in the worth of the various estates and the manner in which those estates would be distributed. They were shocked when Prince died without leaving a will. They watched legal experts go on television to explain the consequences of Prince's failure to execute a will. At times, the media coverage was like watching the introduction to a Wills & Trusts class. Prince died a single man with no children. He was survived by several whole-blood and half-blood siblings. There were even persons coming forth claiming to be his non-marital children. When cases like this occur, people realize that estate planning and probate law are still interesting and relevant.

The purpose of this casebook is to train the students to think and act like estate planning attorneys. This book is meant to be used in conjunction with a book on the law of trusts. The focus of the book is problem-solving and legal application. The book includes numerous problems, so the students can learn to apply the law they learn from reading the cases. It also contains collaborative learning exercises to encourage students to engage in group problem-solving. This book contains less policy than traditional casebooks in the area. Instead the book contains numerous problems that will enable the students to understand and apply the black letter law. The book is divided into three parts to reflect the main types of issues that students will encounter if they practice elder or estate planning law. The order of the book mirrors the manner in which estate planning law is practiced in the real world.

The book starts with an examination of the intestacy system because the majority of people die without executing a will. Therefore, most of the legal issues an estate planning lawyer faces center around the intestacy system. Unlike the typical wills casebook, this book provides a detailed discussion of the intestacy system. A chapter on ethics is included because estate planning attorneys encounter ethical issues that are different from persons practicing in other areas of law.
The second part of the book includes an exploration of the testacy system. It is arranged so professors can lead students from the client interview to the will execution. The first three chapters of this section deal with issues that directly impact the existence of the inheritance system. It analyzes a person's ability to control the disposition of his or her property after death. This serves as the students' first introduction to the power of the "dead hand". These chapters are included to start a public policy discussion about the rights of the dead, the right of heirs, and the necessity of an inheritance system. I tell my students that, when executing a will, they must think of the ways that it can be contested. In addition, I tell them that a will can be contested on two fronts-an attack on the testator and an attack on the will. Two chapters in this part highlight the various ways that someone might question the testator's ability to execute a valid will.

The final chapters in this unit show the issues that can be raised to dispute the validity of the will. They also explain the different types of wills that are available. The final part of the book deals with non-probate transfers. These chapters are included to show students the other devises that people can use to dispose of their property. That knowledge is important because a significant

number of people use these devices to transfer their property. For example, at the end of the semester, my students have to draft a will based upon a fact pattern that I give them. I intentionally include non-probate property in order to see if they will attempt to distribute that using the will.

Most of the litigation that occurs in the estates and trusts area center around family disputes. Consequently, the book devotes a significant amount of time analyzing family dynamics. To that end, the book discusses the ways in which families are legally formed.

Part I – The Intestacy System

Chapter One: Ethically Representing the Elderly Client

1.1 Introduction

As an estate planning attorney most of the clients you encounter will be elderly or vulnerable in some way. This is the case because the young and the healthy do not usually think about estate planning. Representing elderly clients can be challenging for a variety of reasons. This chapter will examine some of the most common problems an estate planning attorney may face when representing an elderly or disabled client. All lawyers are bound by the rules of professional responsibility. The fact that estate planning attorneys are often considered to be lawyers for the "entire family" may lead to conflicts of interests and other ethical problems.

The law is moderately clear-cut when it comes to the rights and responsibilities of minor children. For example, the law makes it clear that, as a general rule, persons under the age of majority are prevented from entering into transactions that are legally binding. In additional, parents are permitted to speak for their minor and/or permanently disabled children. Nevertheless, it is unclear when the tables should be turned. When should children be allowed to make decisions for their elderly parents? This inquiry presents problems for practicing lawyers. Adult children frequently believe that the moment their parents start having cognitive problems it is legally permissible for them to make decisions for their parents. The baby boomers are aging, so the elderly population will continue to increase. Therefore, attorneys are going to find themselves representing a greater number of elderly clients.

The representation of elderly clients may present unique challenges for estate planning attorneys. Lawyers who represent older clients often fail to follow some of the Model Rules of Professional Conduct. For instance, attorneys typically have discussions with their elderly clients in the presence of their adult children. That makes sense as a practical matter because the adult child is often the one who contacts the attorney, arranges the meeting, and brings the elderly client to the attorney's office. Yet, that action may cause the attorney to violate Model Rule 1.6 that protects the client's confidentiality.

1.2 Client Identification

All lawyers have an ethical obligation to make it very clear who they represent. The person who hires the attorney and pays the bills may not be the client. The client is the person whose interests are most at stake in the legal planning or legal problem. The attorney owes the professional duties of competence, diligence, loyalty and confidentiality to the client, not the family. It is crucial to make this distinction in estate planning law cases because family members may be involved in the legal concerns of the older person, and may even have a stake in the case. It is possible, in some situations, for an attorney to represent more than one member of the same family. For instance, that may be a common practice when the attorney is dealing with a married couple.

1.3 Conflict of Interest

Lawyers have an ethical duty to avoid conflicts of interest. This means that, in most situations, a lawyer may only represent one individual. For example, when legal estate planning involves property, such as the family home, in which several people have an interest, these interests are actually or potentially conflicting. Sometimes joint representation is possible, even with a potential conflict of interest, if the client gives informed consent to the representation in writing. However, the attorney should be very careful. This is particularly true when the client is an elderly person executing a will or a testamentary trust because there is a third party who has the potential to benefit from the attorney's actions. The next case involves a situation where the lawyer represented the testator and a devisee.

Chase v. Bowen, 771 So.2d 1181 (Fla. Dist. Ct. App. 2000)

HARRIS, J.

Naomi Chase sued Lennon Bowen for legal malpractice because he prepared her mother's revised will omitting Naomi as a beneficiary and instead making major bequests to her mother's business associates, the Lavenders. Her claim is based on her allegation that Bowen was "her lawyer" as well as the lawyer for her mother and the Lavenders and that Bowen was "mandated ... by the ethical obligations imposed by his profession" to notify her, her mother and the Lavenders of his "irreconcilable conflict of interest" in preparing her mother's rewrite of her will. The trial court's summary judgment in favor of Bowen is now before us. We affirm.

Although there is no dispute that Bowen has from time to time during the relevant years represented the daughter, her mother and the Lavenders, the record is not clear exactly what, at the time of the preparation of the mother's contested amended will and trust, the nature of Bowen's alleged representation of Naomi was. She alleges only that, "Beginning in 1988 and continuing through 1996, ... Bowen drafted will and trust documents for [Naomi] and redrafted the will and amended the trust agreement of [the mother]."

Naomi apparently believes that Rule 4–1.7, "Conflict of Interest; general rule," requires that if a lawyer represents a group of people in one matter or in various matters, he must necessarily get the approval of all in order to represent any one of such group in an unrelated matter. We do not so read the rule. If a lawyer prepares the wills of various members of a family, he thereby assumes no obligation to oppose any testator or testatrix from changing such will. Nor is he precluded from assisting such testator or testatrix in the redrafting. There are no allegations that Bowen conspired with the Lavenders to induce the mother to change her will nor is there an allegation that Bowen used his influence to bring about the mother's change of heart. Naomi simply had no legal right to object to Bowen representing her mother when the mother desired to change her previous will prepared by him.

We believe the supreme court in *The Florida Bar v. Moore,* 194 So.2d 264, 269 (Fla. 1966), explained the principle behind the rule when it stated:

> We are of the opinion that a lawyer represents conflicting interests, within the

> meaning of the Canon, when it becomes his duty, on behalf of one client, to contend for that which his duty to another client would require him to oppose.

It is our view that a lawyer who prepares a will owes no duty to any previous beneficiary, even a beneficiary he may be representing in another matter, to oppose the testator or testatrix in changing his or her will and, therefore, that assisting in that change is not a conflict of interest.

AFFIRMED.

1.4 Confidentiality

Lawyers have an obligation to keep information and communication between them and their clients confidential. Thus, attorneys cannot share client information with other family members without obtaining approval from the clients. The amount of information a client is willing to permit his or her attorney to disclose may vary. Some clients may be comfortable having their attorneys share all of the information and having family members participate in the discussions. On the other hand, some clients may only want their family members to be given general updates. There are also clients who may demand complete confidentiality. The attorney needs to establish the limitations of disclosure during the initial consultation. In all cases, one of the attorney's main objectives should be to keep his or her clients fully informed. In some cases, accomplishing that goal may be complicated by the duty to keep certain information confidential.

Confidentiality issues often occur when an attorney chooses to represent two or more persons with competing interests. A prime example of this situation is when a husband and wife retain an attorney to execute a will. Lawyers routinely take these types of cases because many couples may want reciprocal wills. There are several reasons why this type of dual representation can lead to problems. First, one party may have a secret that is relevant to the distribution of the estates. For instance, if a husband is having an affair, the wife may not be willing to make him the sole beneficiary of her estate. The lawyer usually becomes aware of the other woman when the man seeks to include her in his testamentary plans by secretly leaving her a portion of his estate. Second, one or both of the clients may be in a second marriage. This is relevant because there may be children who are not children of the second marriage. Consequently, one or both of the clients may try to get the attorney to draft a testamentary document that leaves a portion of the estate to a child without the stepparent's knowledge. Finally, for whatever reason, one of the parties may contact the attorney to have his or her will modified in a way that is detrimental to the other party. Since the purpose of reciprocal or mutual wills is to make sure that each person inherits the other person's estate, the modification may put the attorney in the position of acting in a way that is not in the best interests of one of his or her clients.

A. v. B., 726 A2d 924 (N.J. 1999)

POLLOCK, J.

This appeal presents the issue whether a law firm may disclose confidential information of one co-client to another co-client. Specifically, in this paternity action, the mother's former law firm, which contemporaneously represented the father and his wife in planning their estates, seeks to disclose to

the wife the existence of the father's illegitimate child.

A law firm, Hill Wallack (described variously as "the law firm" or "the firm"), jointly represented the husband and wife in drafting wills in which they devised their respective estates to each other. The devises created the possibility that the other spouse's issue, whether legitimate or illegitimate, ultimately would acquire the decedent's property.

Unbeknown to Hill Wallack and the wife, the husband recently had fathered an illegitimate child. Before the execution of the wills, the child's mother retained Hill Wallack to institute this paternity action against the husband. Because of a clerical error, the firm's computer check did not reveal the conflict of interest inherent in its representation of the mother against the husband. On learning of the conflict, the firm withdrew from representation of the mother in the paternity action. Now, the firm wishes to disclose to the wife the fact that the husband has an illegitimate child. To prevent Hill Wallack from making that disclosure, the husband joined the firm as a third-party defendant in the paternity action.

In the Family Part, the husband, represented by new counsel, Fox, Rothschild, O'Brien & Frankel ("Fox Rothschild"), requested restraints against Hill Wallack to prevent the firm from disclosing to his wife the existence of the child. The Family Part denied the requested restraints. The Appellate Division reversed and remanded "for the entry of an order imposing preliminary restraints and for further consideration."

Hill Wallack then filed motions in this Court seeking leave to appeal, to present oral argument, and to accelerate the appeal. Pursuant to *Rule* 2:8–3(a), we grant the motion for leave to appeal, accelerate the appeal, reverse the judgment of the Appellate Division and remand the matter to the Family Part. Hill Wallack's motion for oral argument is denied.

I.

Although the record is both informal and attenuated, the parties agree substantially on the relevant facts. Because the Family Part has sealed the record, we refer to the parties without identifying them by their proper names. So viewed, the record supports the following factual statement.

In October 1997, the husband and wife retained Hill Wallack, a firm of approximately sixty lawyers, to assist them with planning their estates. On the commencement of the joint representation, the husband and wife each signed a letter captioned "Waiver of Conflict of Interest." In explaining the possible conflicts of interest, the letter recited that the effect of a testamentary transfer by one spouse to the other would permit the transferee to dispose of the property as he or she desired. The firm's letter also explained that information provided by one spouse could become available to the other. Although the letter did not contain an express waiver of the confidentiality of any such information, each spouse consented to and waived any conflicts arising from the firm's joint representation.

Unfortunately, the clerk who opened the firm's estate planning file misspelled the clients' surname. The misspelled name was entered in the computer program that the firm uses to discover possible conflicts of interest. The firm then prepared reciprocal wills and related documents with the names of the husband and wife correctly spelled.

In January 1998, before the husband and wife executed the estate planning documents, the mother coincidentally retained Hill Wallack to pursue a paternity claim against the husband. This time, when making its computer search for conflicts of interest, Hill Wallack spelled the husband's name correctly. Accordingly, the computer search did not reveal the existence of the firm's joint representation of the husband and wife. As a result, the estate planning department did not know that the family law department had instituted a paternity action for the mother. Similarly, the family law department did not know that the estate planning department was preparing estate plans for the husband and wife.

A lawyer from the firm's family law department wrote to the husband about the mother's paternity claim. The husband neither objected to the firm's representation of the mother nor alerted the firm to the conflict of interest. Instead, he retained Fox Rothschild to represent him in the paternity action. After initially denying paternity, he agreed to voluntary DNA testing, which revealed that he is the father. Negotiations over child support failed, and the mother instituted the present action.

After the mother filed the paternity action, the husband and wife executed their wills at the Hill Wallack office. The parties agree that in their wills, the husband and wife leave their respective residuary estates to each other. If the other spouse does not survive, the contingent beneficiaries are the testator's issue. The wife's will leaves her residuary estate to her husband, creating the possibility that her property ultimately may pass to his issue. Under N.J.S.A. 3B:1-3, the term "issue" includes both legitimate and illegitimate children. When the wife executed her will, therefore, she did not know that the husband's illegitimate child ultimately may inherit her property.

The conflict of interest surfaced when Fox Rothschild, in response to Hill Wallack's request for disclosure of the husband's assets, informed the firm that it already possessed the requested information. Hill Wallack promptly informed the mother that it unknowingly was representing both the husband and the wife in an unrelated matter.

Hill Wallack immediately withdrew from representing the mother in the paternity action. It also instructed the estate planning department not to disclose any information about the husband's assets to the member of the firm who had been representing the mother. The firm then wrote to the husband stating that it believed it had an ethical obligation to disclose to the wife the existence, but not the identity, of his illegitimate child. Additionally, the firm stated that it was obligated to inform the wife "that her current estate plan may devise a portion of her assets through her spouse to that child." The firm suggested that the husband so inform his wife and stated that if he did not do so, it would. Because of the restraints imposed by the Appellate Division, however, the firm has not disclosed the information to the wife.

II.

This appeal concerns the conflict between two fundamental obligations of lawyers: the duty of confidentiality, *Rules of Professional Conduct* (RPC) 1.6(a), and the duty to inform clients of material facts, RPC 1.4(b). The conflict arises from a law firm's joint representation of two clients whose interests initially were, but no longer are, compatible.

Crucial to the attorney-client relationship is the attorney's obligation not to reveal confidential information learned in the course of representation. Thus, RPC 1.6(a) states that "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation,

except for disclosures that are impliedly authorized in order to carry out the representation." Generally, "the principle of attorney-client confidentiality imposes a sacred trust on the attorney not to disclose the client's confidential communication." *State v. Land*, 73 N.J. 24, 30, 372 A.3d (1977).

A lawyer's obligation to communicate to one client all information needed to make an informed decision qualifies the firm's duty to maintain the confidentiality of a co-client's information. RPC 1.4(b), which reflects a lawyer's duty to keep clients informed, requires that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." *See also Gantam v. De Luca,* 215 N.J. Super. 388, 397, 521 A.2d 1343 (App.Div.1987)(stating that attorney has continuing duty "to inform his client promptly of any information important to him"); *Passanante v. Yormark*, 138 N.J.Super. 233, 238, 350 A.2d 497 (App.Div.1975) ("[An attorney's] duty includes the obligation of informing his client promptly of any known information important to him."). In limited situations, moreover, an attorney is permitted or required to disclose confidential information. Hill Wallack argues that RPC 1.6 mandates, or at least permits, the firm to disclose to the wife the existence of the husband's illegitimate child. RPC 1.6(b) requires that a lawyer disclose "information relating to representation of a client" to the proper authorities if the lawyer "reasonably believes" that such disclosure is necessary to prevent the client "from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another." RPC 1.6(b)(1). Despite Hill Wallack's claim that RPC 1.6(b) applies, the facts do not justify mandatory disclosure. The possible inheritance of the wife's estate by the husband's illegitimate child is too remote to constitute "substantial injury to the financial interest or property of another" within the meaning of RPC 1.6(b).

By comparison, in limited circumstances RPC 1.6(c) permits a lawyer to disclose a confidential communication. RPC 1.6(c) permits, but does not require, a lawyer to reveal confidential information to the extent the lawyer reasonably believes necessary "to rectify the consequences of a client's criminal, illegal or fraudulent act in furtherance of which the lawyer's services had been used." RPC 1.6(c)(1). Although RPC 1.6(c) does not define a "fraudulent act," the term takes on meaning from our construction of the word "fraud," found in the analogous "crime or fraud" exception to the attorney-client privilege. *See N.J.R.E.* 504(a)(excepting from attorney-client privilege "a communication in the course of legal service sought or obtained in the aid of the commission of a crime or fraud"); Kevin H. Michels, *New Jersey Attorney Ethics* § 15:3–3 at 280 (1998) ("While the RPCs no longer incorporate the attorney-client privilege into the definition of confidential information, prior constructions of the fraud exception may be relevant in interpreting the exceptions to confidentiality contained in *RPC* 1.6(b) and (c) ....") (internal citation omitted). When construing the "crime or fraud" exception to the attorney-client privilege, "our courts have generally given the term 'fraud' an expansive reading." *Fellerman v. Bradley*, 99 N.J. 493, 503-04, 493 A.2d 1239 (1985).

We likewise construe broadly the term "fraudulent act" within the meaning of RPC 1.6(c). So construed, the husband's deliberate omission of the existence of his illegitimate child constitutes a fraud on his wife. When discussing their respective estates with the firm, the husband and wife reasonably could expect that each would disclose information material to the distribution of their estates, including the existence of children who are contingent residuary beneficiaries. The husband breached that duty. Under the reciprocal wills, the existence of the husband's illegitimate child could affect the distribution of the wife's estate, if she predeceased him. Additionally, the husband's child support payments and other financial responsibilities owed to the illegitimate child could deplete

that part of his estate that otherwise would pass to his wife.

From another perspective, it would be "fundamentally unfair" for the husband to reap the "joint planning advantages of access to information and certainty of outcome," while denying those same advantages to his wife. Teresa S. Collett, *Disclosure, Discretion, or Deception: The Estate Planner's Ethical Dilemma from a Unilateral Confidence,* 28 *Real Prop. Prob. Tr. J.* 683, 743 (1994). In effect, the husband has used the law firm's services to defraud his wife in the preparation of her estate.

The New Jersey *RPC*s are based substantially on the *American Bar Association Model Rules of Professional Conduct* ("the *Model Rules*"). RPC 1.6, however, exceeds the *Model Rules* in authorizing the disclosure of confidential information. A brief review of the history of the *Model Rules* and of RPC 1.6 confirms New Jersey's more expansive commitment to the disclosure of confidential client information.

In 1977, the American Bar Association appointed a Commission on Evaluation of Professional Standards, chaired by the late Robert J. Kutak. The Commission, generally known as the "Kutak Commission," originally proposed a rule that permitted a lawyer to disclose confidential information in circumstances comparable to those permitted by RPC 1.6, The House of Delegates of the American Bar Association, however, rejected the Kutak Commission's recommendation. As adopted by the American Bar Association, *Model Rule* 1.6(b) permits a lawyer to reveal confidential information only "to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." Unlike RPC 1.6, *Model Rule* 1.6 does not except information relating to the commission of a fraudulent act or that relating to a client's act that is likely to result in substantial financial injury. In no situation, moreover, does *Model Rule* 1.6 require disclosure. Thus, the *Model Rules* provide for narrower disclosure than that authorized by RPC 1.6.

In 1982, this Court appointed a committee to consider the *Model Rules.* The committee, chaired by the Honorable Dickinson R. Debevoise, became known as the "Debevoise Committee." It determined that the original provisions proposed by the Kutak Commission more closely reflected the existing ethics rules in New Jersey. Thus, the Committee concluded that *Model Rule* 1.6 would "narrow radically the circumstances in which New Jersey attorneys either may or must disclose the information of their clients' criminal or fraudulent behavior." *Report of the New Jersey Supreme Court Committee on the Model Rules of Professional Conduct* (1983), *reprinted in* Michels, *supra,* Appendix D at 1043. When adopting the *RPC* s, this Court substantially followed the recommendation of the Debevoise Committee. Described as an "openly-radical experiment," Geoffrey C. Hazard, Jr. & W. William Hodes, 2 *The Law of Lawyering* § AP4:104 (1998), RPC 1.6 "contained the most far-reaching disclosure requirements of any attorney code of conduct in the country," Leslie C. Levin, *Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others*, 47 Rutgers L. Rev. 81, 92 (1994).

Under RPC 1.6, the facts support disclosure to the wife. The law firm did not learn of the husband's illegitimate child in a confidential communication from him. Indeed, he concealed that information from both his wife and the firm. The law firm learned about the husband's child through its representation of the mother in her paternity action against the husband. Accordingly, the husband's expectation of nondisclosure of the information may be less than if he had communicated the information to the firm in confidence.

In addition, the husband and wife signed letters captioned "Waiver of Conflict of Interest." These

letters acknowledge that information provided by one client could become available to the other. The letters, however, stop short of explicitly authorizing the firm to disclose one spouse's confidential information to the other. Even in the absence of any such explicit authorization, the spirit of the letters supports the firm's decision to disclose to the wife the existence of the husband's illegitimate child.

Neither our research nor that of counsel has revealed a dispositive judicial decision from this or any other jurisdiction on the issue of disclosure of confidential information about one client to a co-client. Persuasive secondary authority, however, supports the conclusion that the firm may disclose to the wife the existence of the husband's child.

The forthcoming Restatement (Third) of The Law Governing Lawyers § 112 comment *l* (Proposed Final Draft No. 1, 1996) ("the *Restatement* ") suggests, for example, that if the attorney and the co-clients have reached a prior, explicit agreement concerning the sharing of confidential information, that agreement controls whether the attorney should disclose the confidential information of one co-client to another. *Ibid.* ("Co-clients ... may explicitly agree to share information" and "can also explicitly agree that the lawyer is not to share certain information ... with one or more other co-clients. A lawyer must honor such agreements."); *see also Report of the ABA Special Study Committee on Professional Responsibility: Comments and Recommendations on the Lawyer's Duties in Representing Husband and Wife,* 28 Real Prop. Prob. Tr. J. 765, 787 (1994)("Although legally and ethically there is no need for a prior discussion and agreement with the couple about the mode of representation, discussion and agreement are the better practice. The agreement may cover ... the duty to keep or disclose confidences."); American College of Trust and Estate Counsel, *ACTEC Commentaries on the Model Rules of Professional Conduct* 65–66 (2d ed. 1995) ("When the lawyer is first consulted by the multiple potential clients the lawyer should review with them the terms upon which the lawyer will undertake the representation, including the extent to which information will be shared among them.").

As the preceding authorities suggest, an attorney, on commencing joint representation of co-clients, should agree explicitly with the clients on the sharing of confidential information. In such a "disclosure agreement," the co-clients can agree that any confidential information concerning one co-client, whether obtained from a co-client himself or herself or from another source, will be shared with the other co-client. Similarly, the co-clients can agree that unilateral confidences or other confidential information will be kept confidential by the attorney. Such a prior agreement will clarify the expectations of the clients and the lawyer and diminish the need for future litigation.

In the absence of an agreement to share confidential information with co-clients, the *Restatement* reposes the resolution of the lawyer's competing duties within the lawyer's discretion:

> [T]he lawyer, after consideration of all relevant circumstances, has the ... discretion to inform the affected co-client of the specific communication if, in the lawyer's reasonable judgment, the immediacy and magnitude of the risk to the affected co-client outweigh the interest of the communicating client in continued secrecy.

[*Restatement (Third) of The Law Governing Lawyers, supra,* § 112 comment *l*.]

Additionally, the *Restatement* advises that the lawyer, when withdrawing from representation of the co-clients, may inform the affected co-client that the attorney has learned of information adversely affecting that client's interests that the communicating co-client refuses to permit the lawyer to

disclose. *Ibid.*

In the context of estate planning, the *Restatement* also suggests that a lawyer's disclosure of confidential information communicated by one spouse is appropriate only if the other spouse's failure to learn of the information would be materially detrimental to that other spouse or frustrate the spouse's intended testamentary arrangement. (citations omitted).

Because Hill Wallack wishes to make the disclosure, we need not reach the issue whether the lawyer's obligation to disclose is discretionary or mandatory. In conclusion, Hill Wallack may inform the wife of the existence of the husband's illegitimate child.

Finally, authorizing the disclosure of the existence, but not the identity, of the child will not contravene N.J.S.A. 9:17-42, which provides:

> All papers and records and any information pertaining to an action or proceeding held under [the New Jersey Parentage Act] which may reveal the identity of any party in an action, other than the final judgment or the birth certificate, whether part of the permanent record of the court or of a file with the State registrar of vital statistics or elsewhere, are confidential and are subject to inspection only upon consent of the court and all parties to the action who are still living, or in exceptional cases only upon an order of the court for compelling reason clearly and convincingly shown.

The law firm learned of the husband's paternity of the child through the mother's disclosure before the institution of the paternity suit. It does not seek to disclose the identity of the mother or the child. Given the wife's need for the information and the law firm's right to disclose it, the disclosure of the child's existence to the wife constitutes an exceptional case with "compelling reason clearly and convincingly shown."

The judgment of the Appellate Division is reversed and the matter is remanded to the Family Part.

Notes, Problems, and Questions

1. The secret child problem is more common than you would think. What are some steps that the attorney can take during the initial consultation to ensure that he or she is not faced with the situation involved in *A. v. B.?*

2. Why did the attorney for the firm argue that the state rules of professional conduct required the firm to tell the wife about her husband's non-marital child? Why did the court reject that argument?

3. Why did the court hold that the firm was permitted to disclose the existence of the child under the state rules of professional conduct?

4. If the court had applied the ABA Model Rules of Professional Conduct instead of the state rules, might the outcome of the case have been the same? Why? Why not?

5. What safeguards should an attorney representing co-clients take with regards to confidential

information?

6. In a jurisdiction that adopts the Restatement (Third) of The Law Governing Lawyers, what would be the possible outcome of the case?

7. Wallace has been retained by Harold and Wanda to prepare wills pursuant to an arrangement under which each spouse agrees to leave most of his or her property to the other. Shortly after the wills are executed, Harold (unknown to Wanda) asks Wallace to prepare an inter vivos trust for Jeremy, the man that Harold has been having an affair with for the last ten years. Harold has kept the fact that he is bisexual from Wanda for many years. Prior to the execution of the wills, Harold did not tell Wallace about Jeremy. Harold states that Wanda would be distraught at learning of Harold's infidelity and of Harold's silence and that disclosure of the information could destroy their marriage. As a result, Harold directs Wallace not to inform Wanda. The inter vivos trust that Harold purposes to create would not materially affect Wanda's own estate plan or her expected receipt of property under Harold's will, because Harold proposes to use property designated in Harold's will for a favorite charity to fund the proposed trust. Under the ABA Model Rules, is Wallace required to disclose the affair to Wanda? Is Wallace permitted to disclose the affair? What result under the Restatement? What result under the rules of professional conduct in your state?

8. Same facts as Problem 7, except that Harold's proposed inter vivos trust would significantly deplete Harold's estate to Wanda's material detriment and in frustration of the spouses' intended testamentary arrangements. Harold wants to create the trust because Jeremy is HIV positive and cannot work. Under the ABA Model Rules, is Wallace required to disclose the affair to Wanda? Is Wallace permitted to disclose the affair? What result under the Restatement? What result under the rules of professional conduct in your state?

9. The American College of Trust and Estate Counsel (ACTEC) favors a discretionary rule. It recommends that the "lawyer should have a reasonable degree of discretion in determining how to respond to any particular case." The ACTEC suggests that the lawyer first attempt to convince the client to inform the co-client. When urging the client to disclose the information, the lawyer should remind the client of the implicit understanding that all information will be shared by both clients. The lawyer also should explain to the client the potential legal consequences of non-disclosure, including invalidation of the wills. Furthermore, the lawyer may mention that failure to communicate the information could subject the lawyer to a malpractice claim or disciplinary action. The ACTEC reasons that if unsuccessful in persuading the client to disclose the information, the lawyer should consider several factors in deciding whether to reveal the confidential information to the co-client, including: (1) duties of impartiality and loyalty to the clients; (2) any express or implied agreement among the lawyer and the joint clients that information communicated by either client to the lawyer regarding the subject of the representation would be shared with the other client; (3) the reasonable expectations of the clients; and (4) the nature of the confidence and the harm that may result if the confidence is, or is not, disclosed.

10. Lawyer has represented Percy and June, his wife, for many years in a range of personal matters, including estate planning. Percy and June have substantial individual assets, and they also own substantial jointly-held property. Recently, Lawyer prepared new updated wills that Percy and June signed. Like their previous wills, their new wills primarily benefit the survivor of them for his or her life, with beneficial disposition at the death of the survivor being made equally to their children. Several months after the execution of the new wills, Percy confers separately with Lawyer. Percy

reveals to Lawyer that he has just executed a codicil prepared by another law firm that makes substantial beneficial disposition to a woman with whom Percy has been having an extra-marital relationship. Under the ABA Model Rules, is Lawyer required to disclose information about the codicil to June? Is Lawyer permitted to disclose the affair? What result under the Restatement? What result under the rules of professional conduct in your state?

American Bar Association Model Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interests arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

1.5 Competency

Lawyers have special ethical responsibilities in working with clients whose capacity for making decisions may be diminished. Lawyers must treat the impaired person with the same attention and respect to which every client is entitled. This means meeting privately with the client and giving him or her enough time to explain what he or she wants. If the client is unable to make

decisions due to diminished capacity, and is at risk of serious physical, financial, or other harm, the ethics rules require attorneys to consider actions to protect that client. Nevertheless, the attorney has to be cautious when taking steps to protect the interests of a diminished client.

American Bar Association Model Rule 1.14 Client With Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting individuals or entities that have the ability to take action to protect the client, and in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

****

(d) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6(a) to reveal information about the client, but only to the extent necessary to protect the client's interests.

In re Disciplinary Action Against Kuhn, 785 N.W.2d 195 (N.D. 2010)

PER CURIAM.

A hearing panel of the Disciplinary Board recommended attorney Gerald A. Kuhn be suspended from the practice of law for ninety days and pay the costs of the disciplinary proceeding in the amount of $2,654.07 for violating N.D.R. Prof. Conduct 1.7(a), Conflict of Interest, and 1.14, Client With Limited Capacity. Counsel for the Disciplinary Board urges this Court to accept the hearing panel's recommendation. Kuhn objects to the hearing panel's conclusions, arguing they are not supported by clear and convincing evidence. Determining there is clear and convincing evidence Kuhn violated N.D.R. Prof. Conduct 1.14, we direct that Kuhn be suspended from the practice of law for ninety days and that he pay the costs of the disciplinary proceeding in the amount of $2,654.07.

I.

Kuhn has been licensed to practice law in the courts of North Dakota since July 8, 1974. Shortly after he started his practice, he began to do tax work for Jake Leno. In 2005, Kuhn wrote a will for Jake Leno. In that will, Jake Leno devised his condominium to his daughter, Kathleen McKinley.

In 2006, McKinley filed a petition for appointment of a guardian/conservator for Jake Leno. The district court appointed Guardian and Protective Services, Inc. ("GAPS") as Jake Leno's temporary guardian/conservator. The district court also appointed a physician, guardian ad litem, and visitor to

meet with Jake Leno and report back to the district court.

The court-appointed physician reported Jake Leno suffered from "Parkinson's disease with concurrent adult onset diabetes" and "some short term memory loss," and indicated Jake Leno needed full-time care. The guardian ad litem reported she "firmly believe[d] that the proposed ward needs a guardian." Jake Leno's former home health care provider informed the guardian ad litem Jake Leno "has Parkinson's disease and dementia of the Alzheimer's type." The court-appointed visitor also recommended Jake Leno needed a guardian/conservator.

At the hearing on the guardianship/conservatorship petition, Kuhn represented Jake Leno's sons, Ronald Leno and Randy Leno. Ronald Leno and Randy Leno testified they were willing to serve as Jake Leno's guardians/conservators. Jake Leno testified he did not think he needed a guardian/conservator. The district court found Jake Leno "has a current medical diagnosis of Parkinson's disease with adult onset diabetes and exhibits short term memory loss." The district court concluded Jake Leno was incapacitated and appointed GAPS full guardian and conservator, with full control over his place of residence, legal matters, financial matters, and medical treatment.

In 2007, an unidentified person contacted Kuhn's office and told Kuhn's receptionist Jake Leno wanted his will changed. Kuhn testified at the disciplinary hearing that he thought an employee of GAPS had contacted his office to change the will. However, Kuhn acknowledged he did not contact GAPS to verify whether one of its employees had called his office. Kuhn learned later one of Jake Leno's caregivers had contacted his office. After speaking with Jake Leno, Kuhn drafted a new will that gave all of Jake Leno's property, including the condominium, to the three children equally, instead of devising the condominium solely to McKinley.

Kuhn testified that at the time he wrote the will he "knew [Jake Leno] had been declared incompetent" and "there was allegations that he had dementia of the Alzheimer's type." Kuhn took two of his employees to Jake Leno's apartment to act as witnesses as Jake Leno executed the new will. Kuhn testified at the disciplinary hearing regarding his state of mind:

> I was a little uneasy because he was in-under a judicial order that said he was incompetent. So I questioned him, I questioned his caregiver to ask her how he's doing. And she said, "Oh, he's fine. He knows what's going on, and, Jake, he knows." And I questioned him in front of the witnesses-in front of the two witnesses about the will. Told him exactly what he was doing. And said, "Now, are you sure this is what you want to do? This is what's going to happen." And he said, "Yes." So, I mean, my impression that day was that he was fine.

A year later, McKinley sent a letter to Kuhn protesting his actions regarding Jake Leno's new will. Kuhn, as preparer of the will, subsequently filed a petition seeking an order determining the validity of the will. The district court dismissed the petition, stating, "[T]he guardianship/conservatorship created for the Ward Jake Leno, granted to the appointed guardian/conservator full authority for all legal matters on behalf of Jake Leno, effective as of the date of appointment. The attempted execution of a Will thereafter by the Ward Jake Leno is therefore without legal authority and therefore invalid." Kuhn did not appeal the district court's order.

In 2009, counsel for the Disciplinary Board filed a petition alleging Kuhn had violated N.D.R. Prof. Conduct 1.2(a), Scope of Representation and Allocation of Authority Between Client and Lawyer; 1.4(a)(2) and (b), Communication; 1.7(a) and (c), Conflict of Interest; and 1.14, Client With Limited

Capacity, by his actions regarding Jake Leno's guardianship/conservatorship hearing and second will. The allegations in the Petition for Discipline of misconduct assert a violation of N.D.R. Prof. Conduct 1.7 (a) and (c) which provide that a lawyer shall not represent a client if the lawyer's ability to consider, recommend, or carry out a course of action on behalf of the client will be adversely affected by the lawyer's responsibilities to another client, and a lawyer shall not represent a client if the representation of that client might be adversely affected by the lawyer's responsibilities to another client, in that Kuhn represented Ronald Leno and Randy Leno at the guardianship/conservatorship hearing and thereafter drafted a new will for Jake Leno, purportedly on Jake Leno's behalf, which favored the interests of Ronald Leno and Randy Leno.

The allegations in the Petition for Discipline of misconduct assert a violation of N.D.R. Prof. Conduct 1.14, Comment 5

> which provides that if the client has an appointed representative, the lawyer should ordinarily look to the representative for decisions on behalf of the client, in that Kuhn prepared a new will for Jake Leno without having first looked to Guardian & Protective Services, Inc., as the court-appointed guardian and conservator of Jake Leno, for decision-making authority to make a new will.

The hearing panel found "Kuhn's testimony that he believed that GAPS was aware of Jake Leno's desire to make a new will is not credible." The hearing panel concluded Kuhn had violated N.D.R. Prof. Conduct (a), Conflict of Interest, because he:

> Represented Ronald and Randy, who were seeking appointment as guardians/conservators over Kuhn's long-time client, Jake, and then drafted a new will for Jake, which favored the interests of Ronald and Randy, after Kuhn had represented Ronald and Randy at the guardianship/conservatorship hearing and after Jake had been judicially declared incapacitated.

The hearing panel also concluded Kuhn violated N.D.R. Prof. Conduct 1.14, Client With Limited Capacity, when he "prepared a new will for Jake without communicating with or securing decision-making authority from GAPS, the court-appointed guardian and conservator with full authority over Jake's legal matters." In recommending discipline, the hearing panel considered the following aggravating factors:

Standard 9.22(a), N.D. Stds. Imposing Lawyer Sanctions, a prior disciplinary offense;
Standard 9.22(c), a pattern of misconduct;
Standard 9.22(h), vulnerability of the victim, and
Standard 9.22(I), substantial experience in the practice of law.

The hearing panel considered as a mitigating factor Standard 9.32(e), "full and free disclosure to disciplinary board or cooperative attitude toward proceedings." N.D. Stds. Imposing Lawyer Sanctions 9.32(e). The hearing panel considered suspension the most appropriate sanction under N.D. Stds. Imposing Lawyer Sanctions 4.32 and 8.2 and recommended Kuhn be suspended from the practice of law for ninety days and pay the costs of the disciplinary proceeding in the amount of $2,654.07.

Kuhn subsequently filed an objection to the hearing panel's report. Kuhn objected to the hearing

panel's finding that his testimony was not credible. He also objected to the hearing panel's conclusions that he had violated N.D.R. Prof. Conduct 1.7(a) and 1.14.

II.

This Court reviews disciplinary proceedings de novo on the record. *Disciplinary Board v. Askew*, 2010 ND 7, 776 N.W.2d 816 (citing *Disciplinary Board v. Light*, 2009 ND 83, 765 N.W.2d 536). Counsel for the Disciplinary Board must prove each alleged violation by clear and convincing evidence, which means the trier of fact must be reasonably satisfied with the facts the evidence tends to prove and thus be led to a firm belief or conviction. *Id.* "We give due weight to the findings, conclusions, and recommendations of the Disciplinary Board, but we do not act as a mere rubber stamp for the Board." *Id.*

A.

Rule 1.7(a) of the North Dakota Rules of Professional Conduct states, "A lawyer shall not represent a client if the lawyer's ability to consider, recommend, or carry out a course of action on behalf of the client will be adversely affected by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests." The hearing panel concluded Kuhn violated the rule when he:

> Represented Ronald and Randy, who were seeking appointment as guardians/conservators over Kuhn's long-time client, Jake, and then drafted a new will for Jake, which favored the interests of Ronald and Randy, after Kuhn had represented Ronald and Randy at the guardianship/conservatorship hearing and after Jake had been judicially declared incapacitated.

Kuhn argues the hearing panel's conclusion is not supported by clear and convincing evidence. He asserts no conflict existed because he did not represent Jake Leno at the time of the guardianship/conservatorship hearing, and he did not represent Ronald Leno and Randy Leno at the time Jake Leno made his second will. Counsel for the Disciplinary Board did not allege Kuhn had violated N.D.R. Prof. Conduct 1.9, Duties to Former Client. Rather, counsel for the Disciplinary Board argues clear and convincing evidence shows Kuhn's alternating representation of Jake Leno and his sons created a conflict of interest under N.D.R. Prof. Conduct 1.7(a).

The record does not include clear and convincing evidence Jake Leno was Kuhn's client at the time of the guardianship/conservatorship hearing. The record indicates Kuhn did tax work for Jake Leno multiple times since 1974 and drafted a will for him in 2005. The record does not explain the course of dealing between Kuhn and Jake Leno; whether Jake Leno hired Kuhn on retainer or whether they entered into a new contract each time Jake Leno requested Kuhn perform a task. Without such an explanation, Jake Leno's status as a current or former client of Kuhn is unclear. *See* Restatement (Third) of the Law Governing Lawyers § 31(2)(e) (2000) (explaining the relationship between a lawyer and a client "ends as provided by contract or because the lawyer has completed the contemplated services"). The record also does not include an explanation of Jake Leno's understanding of his professional relationship with Kuhn. *See* Restatement (Third) of the Law Governing Lawyers §18(2) (2000)(stating a contract between a lawyer and a client should be construed "as a reasonable person in the circumstances of the client would have construed it"). In examining the allegations in the petition for discipline and the findings of the hearing panel we are

uncertain as to the client relationships that existed at the times the hearing panel found the violations to have occurred. Rule 1.7(a) prohibits a lawyer from representing a client if it will adversely affect the lawyer's responsibilities to another client. The rule does not prohibit all alternating representation but appears to assume a client relationship at the time of the violation. Without clear and convincing evidence Jake Leno was Kuhn's client at the time of the guardianship/conservatorship hearing, the hearing panel's conclusion that Kuhn violated N.D.R. Prof. Conduct 1.7 (a), Conflict of Interest, is not supported by the record.

B.

Rule 1.14 of the North Dakota Rules of Professional Conduct states, in pertinent part:

> (a) When a client's capacity to make adequately considered decisions in connection with a representation is limited, whether because of minority, mental impairment, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
>
> (b) When the lawyer reasonably believes that the client has limited capacity, is at risk of substantial physical, financial, or other harm unless action is taken, and the client cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian.

Comment 5 of the rule states, "If the client has an appointed representative, the lawyer should ordinarily look to the representative for decisions on behalf of the client. The lawyer should be cognizant of the extent of the powers and duties conferred upon the client's appointed representative." N.D.R. Prof. Conduct 1.14, comment 5. The hearing panel concluded Kuhn violated Rule 1.14 when he "prepared a new will for Jake without communicating with or securing decision-making authority from GAPS, the court-appointed guardian and conservator with full authority over Jake's legal matters."

Kuhn argues he did not violate Rule 1.14 because he was abiding by his client's wishes. Kuhn cites Comment 3 of Rule 1.14:

> The fact that a client is a minor or has limited capacity does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has an appointed representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication. Appointed representatives include guardians ad litem, conservators, guardians, individuals appointed in a durable power of attorney or in an advanced health care directive.

Kuhn argues he was fulfilling his duty to give Jake Leno attention and respect when he drafted the new will.

Kuhn concedes he had a responsibility to communicate with Jake Leno's guardian/conservator, but Kuhn testified he believed he was acting with the consent of GAPS. The hearing panel found this testimony was not credible. "[W]e defer to the hearing panel's findings on the credibility of a

witness, because the hearing panel has the opportunity to observe the witness's demeanor and hear the witness testify." *Askew*, 2010 ND 7, 9, 776 N.W.2d 816 (citing *Disciplinary Board v. Johnson*, 2007 ND 203, 743 N.W.2d 117).

Counsel for the Disciplinary Board cites North Dakota Ethics Opinion No. 09-03. In that opinion, the requesting attorney represented a criminal defendant who had been declared incapacitated and had a guardian with full authority over legal matters. N.D. Ethics Opinion 09-03 at 1. The requesting attorney asked the ethics committee of the State Bar Association of North Dakota whether he was obligated to communicate with the guardian against his client's wishes, and whether he was obligated to communicate with the guardian regarding entry of pleas, waiver of jury trial, or whether his client would testify. *Id.* The ethics committee cited favorably the Massachusetts Supreme Court's opinion in *Guardianship of Hocker*, 439 Mass. 709, 791 N.E.2d 302 (2003). *Id.* at 5-6. The Massachusetts Supreme Court stated:

> When a person is adjudicated incompetent ... the necessary effect ... is that the ward is in law ... incapable of taking care of himself, as to all the world. The permanent guardian stands in the place of the ward in making decisions about the ward's well-being, and the guardian is held to high standards of fidelity in exercising this authority for the ward's benefit. To be sure, an adjudication of incompetency ... does not obviate the need for a guardian or judge to consult a ward's feelings or opinions on a matter concerning his care. It does not make the ward any less worthy of dignity or respect in the eyes of the law than a competent person. It does not deprive the ward of fundamental liberty interests. But the rights and interests of one adjudicated to be incompetent must of necessity and for the benefit or advantage of the ward, often be vindicated in a manner different from that of the mentally competent.

Id. (quoting *Hocker*, 791 N.E.2d at 307) (internal quotes and citations omitted). The ethics committee concluded the requesting attorney was ethically obligated to communicate with his client's guardian, but that it was a legal question beyond the committee's purview whether the guardian or the client had the authority to make decisions regarding a plea, waiver of jury trial, or whether the client would testify. *Id.* at 8.

The record shows Kuhn knew Jake Leno had been declared incapacitated and GAPS had been named his guardian with full authority over his legal matters. Kuhn was present at the guardianship hearing. He reviewed all the documents indicating Jake Leno suffered from Parkinson's disease and short-term memory loss. He concedes it was his responsibility to communicate with Jake Leno's guardian. He failed to meet this responsibility, however. Kuhn's understandable desire to give his client attention and respect does not overcome Jake Leno's incapacity to make legal decisions on his own behalf. Kuhn did not look to Jake Leno's appointed representative, as required by N.D.R. Prof. Conduct 1.14, comment 5. Kuhn persisted in executing a will that was invalid because of Jake Leno's incapacity. Furthermore, we do not ignore the fact the second will drafted by Kuhn benefitted Ronald Leno and Randy Leno, Kuhn's clients at the guardianship/conservatorship hearing. Clear and convincing evidence indicates Kuhn violated N.D.R. Prof. Conduct 1.14.

The hearing panel considered suspension to be the appropriate sanction under Standard 4.32 of the North Dakota Standards for Imposing Lawyer Sanctions. Standard 4.32 states, "Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a

client the possible effect of that conflict, and causes injury or potential injury to a client." In light of our determination that clear and convincing evidence does not exist to prove Kuhn violated N.D.R. Prof. Conduct 1.7, the proper sanction is more appropriately considered under Standards 6.22 and 8.2.

Standard 6.22 states, "Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding." The Standards define "knowledge" as "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." The record indicates Kuhn was present at the guardianship/conservatorship hearing, heard all the testimony, and reviewed all the exhibits. He knew GAPS had been declared Jake Leno's full guardian/conservator with authority over legal matters. Despite this knowledge, Kuhn drafted a will for Jake Leno without receiving permission or authorization from GAPS, thus violating the order establishing GAPS as Jake Leno's guardian/conservator. Suspension is the appropriate sanction under Standard 6.22.

The hearing panel determined suspension to be an appropriate sanction under Standard 8.2, which states, "Suspension is generally appropriate when a lawyer has been reprimanded for the same or similar misconduct and engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession." Kuhn has previously consented to discipline. In 2002, Kuhn served as guardian ad litem for a ward. The hearing panel concluded Kuhn violated N.D.R. Prof. Conduct 1.4(b), Communication, when he failed to advise parties to a real estate transaction that the ward had a guardian ad litem and evidence indicated he was incapacitated. The Board also found Kuhn violated N.D.R. Prof. Conduct 1.7(a) and (c), Conflict of Interest, when he provided legal advice to the parties with regard to the real estate transaction. Kuhn consented to a reprimand from the hearing panel for his violations. Under Standard 8.2, suspension is the appropriate sanction.

III.

On the basis of the record, we reject the hearing panel's finding that Kuhn violated N.D.R. Prof. Conduct 1.7(a), Conflict of Interest, and accept the hearing panel's finding that Kuhn clearly and convincingly violated N.D.R. Prof. Conduct 1.14, Client With Limited Capacity. We order Kuhn be suspended from the practice of law for ninety days, effective August 1, 2010, and that he pay the costs of the disciplinary proceeding in the amount of $2,654.07.

Notes, Problems, and Questions

1. Rule 1.14 requires an attorney to respect and protect his or her client. Even though the client's capacity may be diminished in some way, the attorney is not supposed to treat the client like a child. The rule requires a balanced approach. The attorney has to be mindful of the client's impairment. Nonetheless, the attorney still has to reasonably accommodate the client's impairment so they can maintain a normal attorney-client relationship. The diminished client is entitled to all of the rights and responsibilities of any other client. If the client is unable to meet those responsibilities, the attorney is duty-bound to seek assistance for the client.

2. In the *Kuhn* case, the attorney prepared a will for a man who had been declared mentally

incompetent by a court without bothering to contact the man's guardian. Kuhn did not appear to benefit from his client's will. Thus, his actions were probably not motivated by a desire to take advantage of the client. However, he was sanctioned because his actions did not meet the reasonableness threshold. Might the outcome of the case have been different if the attorney had not known about the guardianship?

3. An attorney met with John Wilson, an 81 year old man, to discuss preparing a testamentary trust. At the initial meeting, John gave the attorney a $1000 check for his retainer fee. When the attorney took the check to John's bank to cash it, the cashier told him that John did not have enough money in his account to cover the amount of the check. The attorney's shock showed on his face. In response, the cashier said, "Over the last few months, Mr. Wilson has taken large amount of money out of his account. He comes in at least twice a week to make a withdrawal. Then, he goes to the parking lot across the street and hands the money to strangers. He hasn't been right since he had his stroke." What, if anything, is the attorney ethically required to do based upon his conversation with the cashier? If he is paid for his services, should he draft the will?

1.6 Duty to Third Parties

A will and other testamentary documents speak at death. Thus, by the time the estate planning attorney's error is discovered, the client who contracted to have the will prepared is dead. This limits the pool of persons who can sue the attorney for malpractice. Future estate planning attorneys should not take any solace from that fact. Malpractice cases against estate planning attorneys have increased since courts have relaxed the privity requirements and permitted suits by third parties.

1.6.1 The Personal Representative

Estate of Schneider v. Finmann, 933 N.E.2d 718 (N.Y. 2010)

JONES, J.

At issue in this appeal is whether an attorney may be held liable for damages resulting from negligent representation in estate tax planning that causes enhanced estate tax liability. We hold that a personal representative of an estate may maintain a legal malpractice claim for such pecuniary losses to the estate.

The complaint alleges the following facts. Defendants represented decedent Saul Schneider from at least April 2000 to his death in October 2006. In April 2000, decedent purchased a $1 million life insurance policy Over several years, he transferred ownership of that property from himself to an entity of which he was principal owner, then to another entity of which he was principal owner and then, in 2005, back to himself. At his death in October 2006, the proceeds of the insurance policy were included as part of his gross taxable estate. Decedent's estate commenced this malpractice action in 2007, alleging that defendants negligently advised decedent to transfer, or failed to advise decedent not to transfer, the policy which resulted in an increased estate tax liability.

Supreme Court granted defendants' motion to dismiss the complaint for failure to state a cause of action. The Appellate Division affirmed (60 A.D.3d 892, 876 N.Y.S.2d 121 [2009]), holding that, in

the absence of privity, an estate may not maintain an action for legal malpractice. We now reverse and reinstate plaintiff's claim.

Strict privity, as applied in the context of estate planning malpractice actions, is a minority rule in the United States. In New York, a third party, without privity, cannot maintain a claim against an attorney in professional negligence, "absent fraud, collusion, malicious acts or other special circumstances" (*Estate of Spivey*, 138 A.D.2d 563, 564, 526 N.Y.S.2d 145[2d Dept.1988]). Some Appellate Division decisions, on which the Appellate Division here relied, have applied strict privity to estate planning malpractice lawsuits commenced by the estate's personal representative and beneficiaries alike (*Deeb v. Johnson*, 170 A.D.2d 865, 566 N.Y.S.2d 688 [3d Dept. 1991]; *Spivey*, 138 A.D.2d at 564, 526 N.Y.S.2d 145; *Viscardi v. Lerner*, 125 A.D.2d 662, 663-664, 510 N.Y.S.2d 183 [2d Dept. 1986]; *Rossi v. Boeher*, 116 A.D.2d 636, 498 N.Y.S.2d 636, 498 N.Y.S.2d 318 [2d Dept.1986]). This rule effectively protects attorneys from legal malpractice suits by indeterminate classes of plaintiffs whose interests may be at odds with the interests of the client-decedent. However, it also leaves the estate with no recourse against an attorney who planned the estate negligently.

We now hold that privity, or a relationship sufficiently approaching privity, exists between the personal representative of an estate and the estate planning attorney. We agree with the Texas Supreme Court that the estate essentially " 'stands in the shoes' of a decedent" and, therefore, "has the capacity to maintain the malpractice claim on the estate's behalf" (*Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780, 787 [Tex.2006]). The personal representative of an estate should not be prevented from raising a negligent estate planning claim against the attorney who caused harm to the estate. The attorney estate planner surely knows that minimizing the tax burden of the estate is one of the central tasks entrusted to the professional. Moreover, such a result comports with EPTL 11-3.2(b), which generally permits the personal representative of a decedent to maintain an action for "injury to person or property" after that person's death.

Despite the holding in this case, strict privity remains a bar against beneficiaries' and other third-party individuals' estate planning malpractice claims absent fraud or other circumstances. Relaxing privity to permit third parties to commence professional negligence actions against estate planning attorneys would produce undesirable results—uncertainty and limitless liability. These concerns, however, are not present in the case of an estate planning malpractice action commenced by the estate's personal representative.

Accordingly, the order of the Appellate Division should be reversed, with costs, and defendants' motion to dismiss the complaint denied.

1.5.2 The Intended Beneficiary

Sisson v. Jankowski, 809 A.2d 1265 (N.H. 2002)

BROCK, C.J.

The United States District Court for the District of New Hampshire (*McAuliffe,* J.) has certified the following question of law, *see Sup.Ct.R.* 34:

> Whether, under New Hampshire law and the facts as pled in plaintiff's verified complaint, an attorney's negligent failure to arrange for his or her client's timely execution of a will and/or an attorney's failure to provide reasonable professional advice with respect to the client's testamentary options (e.g., the ability to cure a draft will's lack of a contingent beneficiary clause by simply inserting a hand-written provision), which failure proximately caused the client to die intestate, gives rise to a viable common law claim against that attorney by an intended beneficiary of the unexecuted will.

For the reasons stated below, we answer the certified question in the negative.

Because this question arose in the context of a motion to dismiss and absent a copy of the plaintiff's complaint, we assume the truth of the factual allegations recited by the court in its certification order, and construe all inferences in the light most favorable to the plaintiff. *Hungerford v. Jones*, 143 N.H. 208, 209, 722 A.2d 478 (1998).

In December 1998, the decedent, Dr. Warren Sisson, retained the defendants, Attorney Jankowski and her law firm, Wiggin & Nourie, P.A., to prepare his will and other estate planning documents. According to the plaintiff, Thomas K. Sisson, the decedent informed Attorney Jankowski that he was suffering from cancer, did not want to die intestate, and, therefore, wished to prepare a will that would pass his entire estate to the plaintiff, his brother. The decedent told Attorney Jankowski that he was particularly interested in ensuring that none of his estate pass to his other brother, from whom he was estranged. The record, however, does not reflect any request by the decedent that the will be executed by a date certain.

Attorney Jankowski prepared a will and other estate planning documents and, in mid-January 1999, mailed them to the decedent for his review and execution. The decedent was injured in mid-January, however, and, therefore, did not receive the documents until January 22, 1999, when a neighbor delivered them to him at a nursing home. Three days later, the plaintiff contacted Attorney Jankowski to tell her that the decedent wanted to finalize his estate planning documents quickly because of his deteriorating condition.

On February 1, 1999, Attorney Jankowski and two other law firm employees visited the decedent in the nursing home to witness his execution of the estate planning documents. The decedent executed all of the documents except his will. After Attorney Jankowski asked him whether the will should include provisions for a contingent beneficiary, the decedent expressed his desire to insert such a clause, thereby providing that his estate would pass to a charity in the event the plaintiff predeceased him.

According to the plaintiff, the decedent's testamentary intent was clear as of the end of the February 1, 1999 meeting: the unexecuted will accurately expressed his intent to pass his entire estate to the plaintiff. Nevertheless, rather than modifying the will immediately to include a hand-written contingent beneficiary clause, modifying it at her office and returning later that day for the decedent's signature, or advising the decedent to execute the will as drafted to avoid the risk of dying intestate and later drafting a codicil, Attorney Jankowski left without obtaining the decedent's signature to the will.

Three days later, Attorney Jankowski returned with the revised will. The decedent did not execute it,

however, because Attorney Jankowski did not believe he was competent to do so. She left without securing his signature and told him to contact her when he was ready to sign the will.

The plaintiff twice spoke with a Wiggin & Nourie attorney "to discuss Attorney Jankowski's inaction regarding the will." The attorney told him that he had spoken to other firm members about the situation. Nevertheless, after February 4, 1999, Attorney Jankowski made no attempt to determine whether the decedent regained sufficient testamentary capacity to execute his will.

The decedent died intestate on February 16, 1999. His estate did not pass entirely to the plaintiff as he had intended, but instead was divided among the plaintiff, the decedent's estranged brother, and the children of a third (deceased) brother. The plaintiff brought legal malpractice claims against the defendants, alleging that they owed him a duty of care because he was the intended beneficiary of their relationship with the decedent.

For the purposes of this certified question, there is no dispute as to the decedent's testamentary intent: he wanted to avoid dying intestate and to have his entire estate pass to the plaintiff. Nor does the plaintiff claim that the defendants frustrated the decedent's intent by negligently preparing his will. Rather, the plaintiff asserts that the defendants were negligent because they failed to have the decedent execute his will promptly and to advise him on February 1 of the risk of dying intestate if he did not execute the draft presented at that meeting.

The narrow question before us is whether the defendants owed the plaintiff a duty of care to ensure that the decedent executed his will promptly. Whether a duty exists is a question of law. *Hungerford*, 143 N.H. at 211, 722 A.2d 478. A duty generally arises out of a relationship between the parties. *See MacMillan v. Scheffy*, 147 N.H. 362, 364, 787 A.2d 867 (2001). While a contract may supply the relationship, ordinarily the scope of the duty is limited to those in privity of contract with one another. *Id.* We have, in limited circumstances, recognized exceptions to the privity requirement where necessary to protect against reasonably foreseeable harm. *See Hungerford*, 143 N.H. at 211, 722 A.2d 478. "[N]ot every risk of harm that might be foreseen gives rise to a duty," however. *Id.* (quotation and brackets omitted). "[A] duty arises if the likelihood and magnitude of the risk perceived is such that the conduct is unreasonably dangerous." *Id.* (quotation and brackets omitted).

"When determining whether a duty is owed, we examine the societal interest involved, the severity of the risk, the likelihood of the occurrence, the relationship between the parties, and the burden upon the defendant." *Id.* Ultimately, whether to impose a duty of care "rests on a judicial determination that the social importance of protecting the plaintiff's interest outweighs the importance of immunizing the defendant from extended liability." *Walls v. Oxford Management Co.,* 137 N.H. 653, 657, 633 A.2d 103 (1993).

In *Simpson v. Calivas*, 139 N.H. 1, 4, 650 A.2d 318 (1994), we recognized an exception to the privity requirement with respect to a will beneficiary and held that an attorney who drafts a testator's will owes a duty to the beneficiaries to draft the will non-negligently. In *Simpson*, a testator's son sued the attorney who drafted his father's will, alleging that the will failed to incorporate his father's actual intent. *Id.* at 3, 650 A.2d 318. The will left all real estate to the plaintiff, except for a life estate in "our homestead," which was left to the plaintiff's stepmother. *Id.* The probate litigation concerned whether "our homestead" referred to all of the decedent's real property, including a house, over one hundred acres of land and buildings used in the family business, or only to the house, and perhaps limited surrounding acreage. *Id.* The plaintiff argued that the decedent intended to leave him the

buildings used in the family business and the bulk of the surrounding land in fee simple. *Id.* at 4, 650 A.2d 318. The plaintiff lost the will construction action, and then brought a malpractice action against the drafting attorney, arguing that the decedent's will did not accurately reflect his intent. *Id.* at 3, 650 A.2d 318.

We held that the son could maintain a contract action against the attorney, as a third-party beneficiary of the contract between the attorney and his father, and a tort action, under a negligence theory. *Id.* at 7, 650 A.2d 318. With respect to the negligence claim, we concluded that, "although there is no privity between a drafting attorney and an intended beneficiary, the obvious foreseeability of injury to the beneficiary demands an exception to the privity rule." *Id.* at 5-6, 650 A.2d 318.

Simpson is consistent with the prevailing rule that a will beneficiary may bring a negligence action against an attorney who failed to draft the will in conformity with the testator's wishes. (citations omitted)

Simpson is not dispositive of the certified question, however. The duty in *Simpson* was to draft the will non-negligently, while the alleged duty here is to ensure that the will is executed promptly. Courts in several jurisdictions have declined to impose a duty of care where the alleged negligence concerns the failure to have the will executed promptly. (citations omitted) The majority of courts confronting this issue have concluded that imposing liability to prospective beneficiaries under these circumstances would interfere with an attorney's obligation of undivided loyalty to his or her client, the testator or testatrix.

In *Krawczyk v. Stingle*, 208 Conn. 239, 543 A.2d 733 (1988), for instance, the decedent had met with his attorney approximately ten days before he died and informed her that he was soon to have open heart surgery and wanted to arrange for the disposition of his assets without going through probate. Accordingly, he directed the attorney to prepare two trust documents for his execution. *Id.* at 734. Completion of the trust documents was delayed, and by the time they were ready for execution, the decedent was too ill to see his attorney. He died without signing them. *Id.*

The Connecticut Supreme Court concluded that imposing liability to third parties for negligent delay in executing estate planning documents would contravene a lawyer's duty of undivided loyalty to the client. *Id.* at 736. As the court explained:

> Imposition of liability would create an incentive for an attorney to exert pressure on a client to complete and execute estate planning documents summarily. Fear of liability to potential third party beneficiaries would contravene the attorney's primary responsibility to ensure that the proposed estate plan effectuates the client's wishes and that the client understands the available options and the legal and practical implications of whatever course of action is ultimately chosen. These potential conflicts of interest are especially significant in the context of the final disposition of a client's estate, where the testator's testamentary capacity and the absence of undue influence are often central issues.

Id.

The Massachusetts Supreme Judicial Court has similarly reasoned that:

> [I]n preparing a will[,] attorneys can have only one client to whom they owe a duty of undivided loyalty. A client who engages an attorney to prepare a will may seem set on a particular plan for the distribution of her estate.... It is not uncommon, however, for a client to have a change of heart after reviewing a draft will.... If a duty arose as to every prospective beneficiary mentioned by the client, the attorney-client relationship would become unduly burdened. Attorneys could find themselves in a quandary whenever the client had a change of mind, and the results would hasten to absurdity. The nature of the attorney-client relationship that arises from the drafting of a will necessitates against a duty arising in favor of prospective beneficiaries.

Miller, 725 N.E.2d at 550-51 (quotation, ellipses and brackets omitted).

We have recently reaffirmed the importance of an attorney's undivided loyalty to a client. *See MacMillian,* 147 N.H. at 365, 787 A.2d 867. In *MacMillan*, we declined to extend *Simpson* to permit the buyers in a real estate transaction to sue the sellers' attorney who prepared a deed, which failed to include a restrictive covenant. We ruled that there was no evidence that the primary purpose of employing the attorney to draft the deed was to benefit or influence the buyers. *Id.* Accordingly, we held that the buyers were not the intended beneficiaries of the attorney's services. *Id.* Moreover, we held that it was imprudent to impose liability upon the attorney under these circumstances because doing so would "interfere with the undivided loyalty which the attorney owes his client and would detract from achieving the most advantageous position for his client." *Id.* (quotation omitted).

Both parties cite compelling policy considerations to support their arguments. The plaintiff asserts that there is a strong public interest in ensuring that testators dispose of their property by will and that recognizing a duty of an attorney "to arrange for the timely execution of a will" will promote this public interest. He further argues that "[t]he risk that an intended beneficiary will be deprived of a substantial legacy due to delay in execution of testamentary documents" requires the court to recognize the duty he espouses. The defendants counter that recognizing a duty to third parties for the failure to arrange for the timely execution of a will potentially would undermine the attorney's ethical duty of undivided loyalty to the client.

After weighing the policy considerations the parties identify, we conclude that the potential for conflict between the interests of a prospective beneficiary and a testator militates against recognizing a duty of care. "It is the potential for conflict that is determinative, not the existence of an actual conflict." *Miller*, 725 N.E.2d at 550. Whereas a testator and the beneficiary of a will have a mutual interest in ensuring that an attorney drafts the will non-negligently, a prospective beneficiary may be interested in the will's prompt execution, while the testator or testatrix may be interested in having sufficient time to consider and understand his or her estate planning options. As the Massachusetts Supreme Judicial Court recognized:

> Confronting a last will and testament can produce complex psychological demands on a client that may require considerable periods of reflection. An attorney frequently prepares multiple drafts of a will before the client is reconciled to the result. The most simple distributive provisions may be the most difficult for the client to accept.

Id. at 551.

Creating a duty, even under the unfortunate circumstances of this case, could compromise the attorney's duty of undivided loyalty to the client and impose an untenable burden upon the attorney-client relationship. To avoid potential liability, attorneys might be forced to pressure their clients to execute their wills summarily, without sufficiently reflecting upon their estate planning options.

On balance, we conclude that the risk of interfering with the attorney's duty of undivided loyalty to the client exceeds the risk of harm to the prospective beneficiary. For these reasons, we join the majority of courts that have considered this issue and hold that an attorney does not owe a duty of care to a prospective will beneficiary to have the will executed promptly. Accordingly, we answer the certified question in the negative.

Remanded.

Ethics Exercise One

Attorney Oscar Walker represented Melvin and Gloria Patterson in a real estate transaction. During the course of that representation, Oscar and Gloria had an affair. A few years later, while intoxicated, Gloria told Oscar that her daughter, Isabella, was a product of their affair.

A few years later, Oscar ran into Melvin in the parking lot of their health club. At that time, Melvin asked Oscar if he was legally required to leave his property to his children. In response, Oscar told Melvin that children did not have a legal right to inherit. A few years later, Gloria filed for divorce and retained Oscar to represent her in the matter. At that time, Gloria made Oscar promise not to reveal Isabella's true paternity.

After the divorce was final, Melvin hired an attorney to establish a testamentary trust. Under the terms of the trust, Melvin left one-third of his property to Isabella, and the other two-thirds to his son, Damon, who was an attorney. When Melvin passed away, Isabella retained Walker to contest Melvin's will because of undue influence on the part of Damon.

Ethics Exercise Two

After Curtis Jackson's wife Beatrice died, his only living heirs were his niece Ellen Blackman, and his nephews Thomas Jackson, Michael Levinson and Justin Powell.

In 2010, Curtis suffered a mild heart attack a few months after his 70th birthday. Ellen urged her uncle to get one of his attorneys to prepare his will so he could have his affairs in order. However, Curtis told her he was afraid to think about dying. Finally, Curtis told Ellen that he was ready to get his affairs in order. Consequently, Ellen set up an appointment for Curtis to meet with her attorney. At the last minute, Curtis changed his mind and did not attend the meeting. This process was repeated on at least two occasions.

In 2012, Curtis told Ellen that he was ready to do some estate planning. He asked her to assist him with the matter. Therefore, Ellen paid her attorney, Paul Johnson, to prepare a will for Curtis. She

paid for Johnson's services because she wanted the instruments prepared before her uncle again changed his mind. At the time he prepared the will, Johnson had been Ellen's attorney for ten years.

When Curtis passed away in 2015, he had an estate worth over 50 million dollars. Curtis' will provided for the following disposition of his estate: half of the estate was left to Ellen, and the other half of the estate was to be divided between Curtis' three nephews. The nephews want to set aside the probate of the will on grounds that, at the time Johnson prepared the will, he was Ellen's attorney.

Please address the ethical issues that arise as a consequence of the above scenarios.

Chapter Two: Intestacy System (Basic Overview)

2.1 Introduction

On April 21, 2016, superstar Prince Roger Nelson died at the age of 57. A few days later, the media reported that he had died without a will. Prince, an unmarried man, was survived by his siblings. People were shocked that Prince died intestate because he left a multiple million dollar estate. The intestacy system controls the distribution of the part of the decedent's estate that is not disposed of by will. In addition, the system comes into play when the probate court completely or partially invalidates the testator's will. Intestacy statutes may also be germane in cases where courts have to define terms that are included in validly executed wills and trusts. The main objective of this chapter is to examine the system that is in place to deal with the property of persons who die without leaving a plan for the disposition of their estates. Like Prince, a significant number of people in the United States die intestate. Thus, it is critical for students to have a good understanding of the laws governing the intestacy system. The intestacy statutes of all fifty states and the District of Columbia discuss the amount of the decedent's estate that the surviving spouse has a right to receive. The options available to the surviving spouse will be discussed in the next chapter. This chapter analyzes the disposition of the portion of the decedent's estate that is left after the surviving spouse has received his or her share. The first part of the chapter deals with distributions to the decedent's descendants. The second part explains the interests ancestors, collaterals and others may have in the decedent's estate. The most effective way to teach the material contained in this chapter is to use the problem-solving method. Therefore, the chapter contains mostly problems.

2.2 Distribution Under the Intestacy System

When the legislature created the intestacy system, the primary goal was to establish a system that would enable the probate court to carry out the decedent's presumed intent. The presumption is that, after the surviving spouse has received a portion of the estate, a reasonable person would want the remainder of his or her assets divided among his or her children. Thus, the probate system favors *legal* children.[1] Chapters Four, Five and Six explains the definition of a "legal child" for intestacy purposes.

After the spouse receives his or her elective share, the decedent's children split his or her property. If the decedent is a person who never conceived or adopted children, the decedent's estate is divided between the decedent's surviving parent(s). If the decedent is not survived by parents, his or her estate is distributed to his or her siblings if any survive the decedent. The estate of a person who dies with no surviving children, parents or siblings goes to that person's collateral relatives. If a person's bloodline has ended, his or her property escheats to the state. I explain the distribution by telling my students to first look down for children, then look up for parents, and finally to look out for siblings.

[1] For thorough discussion of the inheritance rights of children, please see Browne Lewis, The Inheritance Rights of Children: Cases and Materials (Carolina Academic Press, 2010).

2.2.1 Uniform Probate Code § 2-103. Share of Heirs other than Surviving Spouse

Any part of the intestate estate not passing to the decedent's surviving spouse under Section 2-102, or the entire intestate estate if there is no surviving spouse, passes in the following order to the individuals designated below who survive the decedent:

(1) to the decedent's descendants by representation;

(2) if there is no surviving descendant, to the decedent's parents equally if both survive, or to the surviving parent;

(3) if there is no surviving descendant or parent, to the descendants of the decedent's parents or either of them by representation;

(4) if there is no surviving descendant, parent, or descendant of a parent, but the decedent is survived by one or more grandparents or descendants of grandparents, half of the estate passes to the decedent's paternal grandparents equally if both survive, or to the surviving paternal grandparent, or to the descendants of the decedent's paternal grandparents or either of them if both are deceased, the descendants taking by representation; and the other half passes to the decedent's maternal relatives in the same manner; but if there is no surviving grandparent or descendant of a grandparent on either the paternal or the maternal side, the entire estates passes to the decedent's relatives on the other side in the same manner as the half.

2.3 Descendants

The term "descendant" is broader than the word "child". For intestacy purposes, it includes all persons who proceed from the body of the decedent. When a person dies intestate, the estate goes to his or her lineal descendants. Parents and other ancestors do not have the right to inherit unless the person does not have any lineal descendants (child, grandchildren, great grandchildren etc.). Let's look at some illustrations.

2.3.1 Illustration One

> LaToya, a widow, died intestate leaving behind four children, Greta, Malia, Juanita, and Sasha. LaToya's estate will be split into four portions because she had four surviving children and no surviving spouse.

Illustration One shows that it is not complicated to determine the manner in which a decedent's property should be divided under the intestacy system. Nonetheless, the formula for distributing an intestate decedent's estate can become complex if one or more of the decedent's children does not survive the decedent. Under the intestacy system, the decedent's child(ren)'s descendants can inherit his or her estate by representation.[2] This means that the issue of the decedent, including his or her grandchildren, great grandchildren etc., represents his or her deceased

[2] This term will be explained later in the chapter.

children for purposes of the distribution of his or her estate. The next illustration will help the student visualize this principle.

2.3.2 Illustration Two

> Diane died in 1978. She was survived by her husband Clyde and their eight children, Corey, Gigi, Christopher, Elizabeth, Stephanie, Marcia, Timothy, and Oscar. In 1986, Marcia died of a massive heart attack while riding a roller coaster. Marcia was survived by her husband, Jarvis, and her three daughters, Wanda, Ruth and Tracie. When Clyde died in 2000, he was survived by seven of his children, Marcia's husband and Marcia's three daughters.
>
> Clyde's estate would be divided into eight portions because that is the number of his original children. Each of Clyde's surviving children would receive a one-eighth share of his estate. The share of the estate that would have gone to Marcia, the child who predeceased Clyde, would be divided between her three daughters. As a result, Clyde's estate would be distributed as follows: Corey (1/8), Gigi (1/8), Christopher (1/8), Elizabeth (1/8), Stephanie (1/8), Timothy (1/8), Oscar (1/8), Wanda (1/24), Ruth (1/24) and Tracie (1/24). Since most intestacy statutes exclude sons-in-law and daughters-in-law, Jarvis, Marcia's husband, would not be entitled to receive any part of Clyde's estate.

In all jurisdictions, the intestacy system allows descendants of the decedent to inherit by representation. Consequently, Marcia's daughters would have the right to receive her share of Clyde's estate. The definition of "taking by representation" varies from state to state. The shares that the descendants receive depend upon which one of the three commonly used methods of representation that is applied. The main difference in each method is where the division into portion occurs. The decedent's estate may be divided at the generational level immediately below the decedent or the generational level where a live descendant exists. This will be explained in more detail later in this chapter.

2.3.3 Two Important Rules to Remember

The three systems of representation will be discussed in the next section. In order to fully comprehend how the decedent's estate will be divided, it is important to know two rules.

Rule One: The descendants whose parents are living do not receive a share of the decedent's estate.

Example:

Miguel, a widower, had three children, Juan, Carlos and Isabella. Unfortunately, Miguel lost his son Carlos in a car accident. Carlos was survived by two children, Manuel and Alejandro. Juan has a son named Mateo. Isabella had two children, Elena and Joaquin. Miguel died survived by Juan, Isabella, Manuel, Alejandro, Mateo, Elena and Joaquin.

Explanation:

Carlos' children take his share by representation of their dead father. Miguel's estate is distributed as follows: Juan (1/3), Isabella (1/3), Manuel (1/6), and Alejandro (1/6). Manuel and Alejandro split their father's share of their grandfather's estate. Even though they are Miguel's grandchildren, Mateo, Elena and Joaquin are not entitled to a portion of Miguel's estate because their parents survived Miguel.

Rule Two: Once a blood line dies out, it is ignored in the division of the decedent's estate.

Example:

Rebecca, a widow, had three children, Noah, Jacob and Ava. Unfortunately, Jacob was killed in an airplane crash. Jacob did not have any children. Noah had two children, Joshua and Eli. Ava had three children, Daniel, Caleb and Hannah. When Rebecca died, she was survived by Noah, Ava, Joshua, Eli, Daniel, Caleb and Hannah.

Explanation:

Rebecca's estate will be divided into three parts to represent her three original children. Each of Rebecca's children is entitled to receive a third of her estate. Since Jacob died without surviving descendants, his share of Rebecca's estate will be divided between his siblings, Noah and Ava. Noah will receive his one third of his mother's estate plus one sixth of Jacob's interest in the estate. Thus, Noah's interest in Rebecca's estate will total one-half. Like Noah, Ava will end up receiving one-half of Rebecca's estate. To avoid the complex computations, it is easier to ignore Jacob's interest and to divide Rebecca's estate into two shares. You will get the same result using either method.

2.4 The Meaning of Representation

In this chapter, we have mentioned "taking by representation" several times. It is now time to explain exactly what that means. The definition of "representation" is relevant even when a person dies with a validly executed will or a testamentary trust. This is the case because those testamentary documents often refer to property being distributed by "representation". When probating the estate, the court will often use the definition of "representation" that is contained in the intestacy statute.

2.4.1 English per stirpes

This method is also called strict per stirpes because it requires a strict application of the rule. The decedent's estate is divided at the generational level directly under the decedent irrespective of whether or not there is a surviving descendant at that level. Under this system, the estate must be divided into as many parts as there are living children of the decedent and deceased children who have descendants living. Each child that dies before the decedent is represented by his or her surviving children. The children are injected into their parent's place starting at the first generation below the decedent.

Example:

Lauren, a widow, had two children, Jada and Cornell. Unfortunately, Lauren lost her son, Cornell, in a boating accident. Cornell was survived by one child, Madison. Sadly, a year later, Jada was killed when her parachute failed to open during an air show. Jada was survived by two children, Aaliyah and Destiny. Lauren died intestate; she was survived by Madison, Aaliyah and Destiny.

Explanation:

Under this method, Lauren's estate is divided into two shares at the level of her children. It does not matter that both of Lauren's children predeceased her. Madison would receive Cornell's one-half share of the estate. Aaliyah and Destiny would split Jada's one-half share of the estate. Although they are all her grandchildren, Madison would receive a larger share of the estate. Do you think this is what Grandmother Lauren would have wanted?

2.4.2 Modern per stirpes

Another name for this method is per capita with representation. Under this approach, if any children survive the decedent, the decedent's estate would be distributed in the same way that it would be under the English per stirpes method. If this scheme is used, the outcome would be different if all of the decedent's children predeceased him or her. If the decedent is not survived by children, the estate would be divided equally between the survivors of the first generation in which there are living descendants. The partition of the decedent's estate transpires at the generational level closest to the decedent where there is at least one surviving descendant. The deceased descendants at that generation are represented by their descendants.

Example:

Monica, a widower, had four children, Jennifer, Ross, Camille, and Sandra. Jennifer had two children, Zachery and Molly. Ross had one child, Deanna. Camille had three children, Betsy, Irene, and Glynn. Sandra had one child, LaNitra. All of Monica's children predeceased her, and she was survived by Zachery, Molly, Deanna, Betsy, Irene, Glynn, and LaNitra.

Explanation:

Monica's estate would be divided at the level where she has at least one survivor. Since all of Monica's children predeceased her, her estate would be split at the generation of her grandchildren. Each grandchild would be treated equally. Thus, Zachery, Molly, Deanna, Betsy, Irene, Glynn, and LaNitra would each receive a one-seventh share of the estate.

If Monica's estate was distributed in a jurisdiction that had adopted the English per stirpes approach, the result would be different. The estate would be divided at the generation closest to Monica regardless of whether or not she had a surviving child. Thus, Monica's estate would be split at her children's generation. Monica had four children; therefore, her estate would be divided into four shares. The resulting distribution of her estate would be as follows: Zachery and Molly would split Jennifer's one-fourth; Deanna would receive Ross' one-fourth; Betsy, Irene, and Glynn would split Camille's one-fourth; and LaNitra would receive Sandra's one-fourth.

Notes and Questions

1. As the above example shows, the Modern per stirpes system treats all of Monica's grandchildren equally. If the English per stirpes approach is used, some of Monica's grandchildren will receive larger shares than the others. Which distribution do you think Monica would have chosen? What might be the justification for the Modern per stirpes approach?

2. The Modern per stirpes systems has been adopted by almost half of the jurisdictions in the United States. From a public policy standpoint, which approach do you think is better?

3. The intestacy system is meant to carry out the decedent's presumed intent. Which approach do you think enables the probate court to achieve that objective?

4. The examination of the manner in which the intestacy system treats descendants has been kept general for the sake of simplicity. It may be more complex to apply the statute of a particular state. For purposes of this course, the students only need to comprehend the basic underlying principles.

2.4.3 A Case Illustration

The debate about the meaning of "representation" continues. The purpose of the following case is to demonstrate the difference between the two systems of distribution. The court discusses three assignments of error. However, only one is relevant to the discussion of intestate distribution. Thus, the case has been edited accordingly.

In re Estate of Evans, 827 N.W.2d 313 (Neb. App. 2013)

SIEVERS, Judge.

FACTUAL BACKGROUND

The decedent, Donald J. Evans, died intestate on October 2, 2011. At the time of his death, Donald was domiciled in Wallace, Nebraska. Donald was not married at the time of his death, and he had no surviving children or issue. Donald's parents were deceased at the time of his death. Donald had three brothers, Robert Evans, Stewart Evans, and Frederick Evans, but all three brothers predeceased Donald. Of the brothers, Robert did not have any children. Stewart had three children: Susan Evans Olson (Susan), Anna Evans, and Mary C. Evans. Anna predeceased Donald and did not have any children. Frederick had two children: Ted L. Evans and John Evans. John predeceased Donald and did not have any children. Thus, Donald was survived by nieces Susan and Mary (via Stewart) and nephew Ted (via Frederick).

PROCEDURAL BACKGROUND

On March 8, 2012, Ted filed a petition for a formal adjudication of intestacy, a determination of heirs, and an appointment of a personal representative of Donald's estate. Ted alleged that a statement of informal probate was entered on November 1, 2011, appointing Ted and Mary as copersonal representatives of the estate. Although the appointment does not appear in our record, their prior appointment as copersonal representatives is an undisputed fact. In his petition, Ted

nominated himself as the sole personal representative of the estate and alleged that he had priority status as an heir entitled to at least 50 percent of the estate as a resident of Nebraska, whereas Susan and Mary were Colorado residents.

On March 23, 2012, Mary filed an objection and responsive pleading, alleging that Ted was not entitled to 50 percent of the estate. Mary asked that the court continue its appointment of copersonal representatives, as entered on November 1, 2011, and that it make a determination as to the share to which each heir is entitled. Mary did not petition for Ted's removal as copersonal representative.

A hearing was held on April 16, 2012, on Ted's petition for formal adjudication. Ted testified on direct examination that he believed Donald died without a will. However, on cross-examination, Ted testified that Donald set up a will in 2010 with a bank, but that Donald tore up the will in September 2011, a month prior to his death. Ted testified that he, along with the bank officer who wrote the will, was present when Donald tore up his will. Ted testified that Donald also had the bank draw up a trust, but that he tore the trust document up at the same time he tore up his will. Exhibits 2 and 3, copies of Donald's destroyed will and trust, were received into evidence, but are not part of the requested bill of exceptions. Ted testified that exhibits 2 and 3 were copies of the documents that Donald had torn up. He also agreed that under the will and trust documents that were torn up, the estate was to be divided one-third each to Susan, Mary, and Ted. There is no claim in this appeal that either of such documents is effective.

Ted testified that as copersonal representative, he sent Mary various requests to sign checks to reimburse Ted for various expenses, including expenses incurred prior to Donald's death and expenses for Donald's funeral. Some of the expenses incurred prior to Donald's death included hotel rooms for Ted and his wife to be close to Donald, such as when Donald was in the hospital. Ted testified that he asked Mary to sign off on a total of $5,600 to $5,700 worth of reimbursements to him. While Ted did not testify that Mary refused the requests for reimbursements, Mary later testified that she did in fact refuse such requests. Ted asked the court to appoint him to be the sole personal representative of Donald's estate.

Mary testified that a preliminary inventory of Donald's estate showed a value of $2.9 to $3 million. Mary testified that Ted sent bills to her and wanted her to sign off on checks so that he could be paid for various claims that he had filed. Mary testified that she was reluctant to sign because some of the bills seemed to be duplicative or did not pertain to estate business. Mary also testified that she did not sign the estate inventory sent to her by Ted's attorney because she felt there were some omissions and because she and her attorney were trying to investigate. Mary testified that she had also not yet signed the paperwork to transfer certain stock to the estate—she stated that she had not refused to sign the paperwork, but, rather, that she had not signed it yet. She also testified that she and Ted each proposed a different bank for the estate account. Mary testified that she had no personal communication with Ted and that they each have an attorney.

Mary testified that she has been an officer-director and coowner of an investment advisory firm in Denver, Colorado, for the past 20 years. She testified that her firm manages "high, aggressive growth portfolios" and that they "invest them in securities for high net growth and ultra high net worth clients." Mary testified that she holds a securities license as a stock-broker or advisor. Mary testified that Ted lacks the securities experience needed for an estate as large as Donald's. While Mary initially testified that she would like to continue as copersonal representative of the estate, she

later verbally asked during her testimony that the court appoint her to be the sole personal representative or, in the alternative, that the court appoint a neutral third party. Finally, Mary testified that she objects to Ted's claim that he is entitled to 50 percent of the estate. She thinks that the estate should be divided one-third each to Susan, Mary, and Ted.

In its journal entry and order filed on May 31, 2012, the county court found that Donald died intestate on October 2, 2011. The court found that prior to his death, Donald executed a last will and testament and the "Donald J. Evans Revocable Trust" (exhibits 2 and 3), but that the documents were allegedly destroyed by Donald. Therefore, the court determined that the estate would be divided in accordance with the provisions of intestate succession as set out in Neb. Rev. Stat. § 30-2303 (Reissue 2008). The court stated that in accordance with § 30-2303(5) relative to intestate succession, " 'if there is no surviving issue, parent, issue of a parent, grandparent or issue of a grandparent, the entire estate *passes to the next of kin in equal degree*.' " The court determined that Susan, Mary, and Ted were Donald's " 'next of kin' " and that each heir stands in equal degree of kinship to the other. The court specifically found and ordered that under § 30-2303, Susan, Mary, and Ted shall each inherit one-third of the entire estate.

The court noted that Ted and Mary had previously accepted appointment as copersonal representatives. However, the court found that Ted and Mary were "annoyed" with each other, that communication between them had in essence stopped, and that any interaction had been handled through their respective attorneys. The court found that the conflict substantially hinders the administration of the estate and removed them both as copersonal representatives. The court, citing Neb. Rev. Stat. §§ 30-2412(b)(2) and 30-2456 (Reissue 2008), appointed Steven P. Vinton, an attorney, as successor personal representative. Ted appeals.

ASSIGNMENTS OF ERROR

Ted claims that the trial court erred in (1) determining that the estate passes to Susan, Mary, and Ted in equal shares; (2) removing Ted as a personal representative; and (3) appointing a successor personal representative who does not have priority for appointment.

STANDARD OF REVIEW

In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court. *In re Estate of Cooper*, 275 Neb. 322, 746 N.W. 2d. 663 (2008). On a question of law, however, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Id.*

ANALYSIS

Division of Donald's Estate.

Ted's first assignment of error is that the trial court erred in determining that the estate passes to the next of kin in equal shares. All of the parties, including Ted, Mary, and Vinton, agree that § 30-2303 applies, which statute provides:

> The part of the intestate estate not passing to the surviving spouse under section 30–2302, or the entire intestate estate if there is no surviving spouse, passes as follows:

(1) to the issue of the decedent; if they are all of the same degree of kinship to the decedent they take equally, but if of unequal degree, then those of more remote degree take by representation;
(2) if there is no surviving issue, to his parent or parents equally;
(3) if there is no surviving issue or parent, to the issue of the parents or either of them by representation;
(4) if there is no surviving issue, parent or issue of a parent, but the decedent is survived by one or more grandparents or issue of grandparents, half of the estate passes to the paternal grandparents if both survive, or to the surviving paternal grandparent, or to the issue of the paternal grandparents if both are deceased, the issue taking equally if they are all of the same degree of kinship to the decedent, but if of unequal degree those of more remote degree take by representation; and the other half passes to the maternal relatives in the same manner; but if there be no surviving grandparent or issue of grandparent on either the paternal or the maternal side, the entire estate passes to the relatives on the other side in the same manner as the half;
(5) if there is no surviving issue, parent, issue of a parent, grandparent or issue of a grandparent, the entire estate passes to the next of kin in equal degree, excepting that when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor shall be preferred to those claiming through a more remote ancestor.

All parties agree that § 30-2303(3) applies and that the entire estate passes to the issue of the parents by representation. Further, the parties agree that the trial court incorrectly applied § 30-2303(5) after finding that there was no issue of the parents. The trial court failed to identify Susan, Mary, and Ted as the issue of Donald's parents. Susan, Mary, and Ted, as the three surviving grandchildren of Donald's parents, are the "issue of the parents" of Donald. "Issue of a person means all his or her lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of child and parent contained in the Nebraska Probate Code." Neb. Rev. Stat. § 30-2209(23) (Cum.Supp.2012). Thus, it is clear from the record that § 30-2303(3) controls and that Donald's entire estate should be distributed to the issue of his parents, by representation.

Ted claims that Susan, Mary, and he should take proportionate shares of the estate by representation, with Susan and Mary each inheriting one-quarter of the estate through their deceased father and Ted inheriting one-half of the estate through his deceased father. Ted reaches this result because § 30-2303(3) states that the issue of the parents take "by representation," rather than providing that issue take when they are "next of kin in equal degree," as provided in § 30-2303(5). Mary counters that the estate is to be divided equally among the surviving heirs in the nearest degree of kinship, with Susan, Mary, and Ted each receiving an equal one-third share because they all have the same degree of kinship to Donald.

Neb. Rev. Stat. § 30-2306 (Reissue 2008) provides the operative definition of the phrase "by representation," as used in § 30-2303(3), as follows:

> If representation is called for by this code, the estate is divided into as many shares as there are surviving heirs in the nearest degree of kinship and deceased persons in the same degree who left issue who survive the decedent, each surviving heir in the nearest degree receiving one share and the share of each deceased person in the same degree being divided among his issue in the same manner.

Ted argues § 30-2306 means that the surviving issue of Stewart, namely Susan and Mary, would receive one share and that he, as the sole surviving issue of Frederick, would receive one share. Ted's end result would have Susan and Mary splitting Stewart's one-half share and Ted receiving Frederick's one-half share.

Ted misapplies § 30-2306. The portion applicable to our facts here provides: "If representation is called for by this code, the estate is divided into as many shares as there are *surviving heirs in the nearest degree of kinship* ...." § 30-2306 (emphasis supplied). Because none of Donald's brothers survived him, there are no surviving heirs in the nearest degree of kinship, namely Donald's siblings. Thus, the probate court must look to the next degree of kinship, or the next generation, which contains at least one surviving heir. The first generation which has living issue is composed of Donald's parents' grandchildren, who also are Donald's two nieces and his nephew. There must be at least one survivor in a degree of kinship. Here, because none of Donald's siblings survived him, the nearest degree of kinship to him containing a survivor was the generation containing two nieces and a nephew. And we note that Donald had no deceased nieces or nephews who have surviving issue. Susan, Mary, and Ted, who are all in an equal degree of kinship to one another, should, therefore, each receive a one-third share.

Ted relies on *In re Estate of Tjaden*, 225 Neb. 19, 402 N.W. 2d 288 (1987), for the proposition that the term "right of representation"" under Nebraska law means distribution on a per stirpes basis, resulting in a 50–percent share. However, *In re Estate of Tjaden* involved the construction of a testator's intent where there was a will and, thus, is distinguishable:

> "This Court is of the opinion that the clear intent of the testator was to provide for a division by a 'per stirpes' division among identified beneficiaries, their issue or descendents. Clearly, the decedent intended to divide her estate, after specific requests [sic], equally among her brothers and sisters and the issue of deceased brothers and sisters or the issue of deceased issue of deceased brothers and sisters...."

225 Neb. at 22, 402 N.W.2d. at 291. The *In re Estate of Tjaden* court quotes *Gaughen v. Gaughen*, 172 Neb. 740, 112 N.W.2d 285 (1961), for the description of distribution per stirpes:

> "Distribution per stirpes is a division with reference to the intermediate course of descent from the ancestor. It gives the beneficiaries each a share in the property to be distributed, not necessarily equal, but [, rather,] the proper fraction of the fraction to which the person through whom he claims from the ancestor would have been entitled."

225 Neb. at 27, 402 N.W.2d at 293. The court concludes, "in a per stirpes distribution, ordinarily applicable in an intestate's estate, there is a division of property among a class or group of distributees who take the share which a decedent would have taken if such decedent were alive, taking such share by the right of representing the decedent." Id. at 28, 402 N.W.2d at 294.

The parties are all applying a form of distribution traditionally referred to as "per stirpes distribution" in interpreting the words "by representation" found in § 30-2303(3) and defined in § 30-2306, but Ted is applying the older version of per stirpes distribution, referred to as "strict per

stirpes," "classic per stirpes," or "English per stirpes." Mary and Vinton are applying the modern version of per stirpes distribution, referred to as "modern per stirpes," "modified per stirpes," or "American per stirpes." These terms are well explained in Samuel B. Shumway, Note, *Intestacy Law—The Dual Generation Dilemma—Wyoming's Interpretation of Its 130–Year–Old Intestacy Statute. Matter of Fosler,* 13 P.3d 686 (Wyo. 2000), 2 Wyo. L. Rev. 641 (2002). We borrow liberally from that article and summarize as follows: The difference between strict per stirpes and modern per stirpes is the generation at which shares of the estate are divided. Strict per stirpes begins at the generation closest to the decedent, regardless of whether there are any surviving individuals in that generation, whereas modern per stirpes begins at the first generation where there is living issue. Thus, the distinction between strict per stirpes and modern per stirpes will be most evident in instances where all of the heirs in the closest degree of kinship are deceased. In the present case, as earlier detailed, all of Donald's closest heirs, his parents and siblings, were deceased at the time of his death, and thus, the next generation with living members is Donald's parents' grandchildren: Susan, Mary, and Ted. Shumway concludes that although the strict per stirpes system was the early standard for America, the majority of states now follow a different system of distribution.

According to Shumway's article, 23 states have adopted some variation of modern per stirpes distribution, including Nebraska. Shumway explains that the distinction between modern per stirpes and strict per stirpes is that, in the latter system, the estate is divided into shares at the generation nearest the decedent regardless of whether there are living members, whereas in modern per stirpes, the estate is divided into equal shares at the nearest generation with surviving heirs. Nebraska is one of the 23 states that has adopted some variation of modern per stirpes distribution, because it has adopted the original 1969 Uniform Probate Code, a form of modern per stirpes. *See* Shumway, *supra. See, also*, 1974 Neb. Laws, L.B. 354. Section 30-2306 is modeled after the original Uniform Probate Code. See Unif. Probate Code, rev. art. II, § 2–106, 8 (part I) U.L.A. (1998). In comparing the language of the two provisions, they are the same. See, Restatement (Third) of Property: Wills and Other Donative Transfers § 2.3 (1999); Edward C. Halbach, Jr., *Uniform Acts, Restatements, and Trends in American Trust Law at Century's End*, 88 Cal. L. Rev. 1877, 1904-05 (2000) ("a modernized *per stirpes* (or taking 'by right of representation' with the representation beginning with equal division in the nearest descendant generation in which there are living members (the 'stock' generation) with representation thereafter for deceased members' issue) has come to be the prevalent current view, with reinforcement from the original (1969) Uniform Probate Code").

Therefore, in the end, it is clear that the county court applied the incorrect statutory provision, but achieved the correct result. The probate court applied § 30-2303(5)) when it should have applied § 30-2303 (3), because the parents of Donald did have surviving issue as defined in § 30-2209 (23). Susan, Mary, and Ted each take a one-third share of the estate, as they take by representation as defined in § 30-2306. Therefore, we affirm the county court's division of Donald's estate.

CONCLUSION

Although the trial court incorrectly applied § 30-2303(5), the correct end result was reached with regard to the distribution of Donald's estate. Susan, Mary, and Ted are each entitled to a one-third share of the estate. We remand the cause to the county court for further proceedings consistent with this opinion.

Notes, Problems, and Questions

1. What would be the distribution of Donald's estate under the English per stirpes system? Under the Modern per stripes system? Which outcome do you think Donald would have preferred?

2. Let's change the facts so that Donald was survived by his brothers, Stewart and Frederick. What would be the distribution of Donald's estate under the English per stirpes system? Under the Modern per stirpes system?

3. Let's change the facts so that Donald was survived by only his brother, Stewart. What would be the distribution of Donald's estate under the English per stirpes system? Under the Modern per stirpes system?

4. Let's change the facts so that all three of Donald's brothers predeceased him, but Ted died leaving a son, Marvin. Thus, Donald would have been survived by his nieces, Susan and Mary, and his great-nephew, Marvin. What would be the distribution of Donald's estate under the English per stirpes system? Under the Modern per stirpes system?

5. These are the facts of the case: Donald had three brothers, Stewart, Frederick and Robert. Robert did not have any children. Stewart had three children, Susan, Anna and Mary. Frederick had two children, Ted and John. Susan, Anna, Mary, Ted and John did not have any children. Stewart, Frederick and Robert predeceased Donald. Anna and John also died prior to Donald. **Let's change the facts to include the following.** Susan had a son, Glover. Mary had two children, Bonita and Henry. John has four children, Gail, Samuel, Pauline and Jason. Ted had one child, Kevin. Donald is only survived by John and Mary. What would be the distribution of Donald's estate under the English per stirpes system? Under the Modern per stirpes system?

6. In the *Evans* case, the court relied on the 1969 version of the Uniform Probate Code. According to the court, the 1969 version of the UPC was a form of the Modern per stirpes system. For reasons that will be discussed in the next section, the UPC changed its approached with the 1990 amendments from per capita by representation to per capita at each generation. After you review the UPC section, come back to the *Evans* case and determine how Donald's estate would have been distributed had the court applied the 1990 version of the UPC?

2.4.4 Per capita at each generation (1990 Uniform Probate Code)

The majority of jurisdictions have adopted some form of the Uniform Probate Code (UPC). Thus, key provisions of that Code will be discussed throughout this text. If you are studying in a jurisdiction that has not adopted the UPC, it may still be helpful to use parts of the Code for comparative purposes.

A shortcoming of the English and the Modern per stirpes approaches is that descendants who are equally related to the decedent may take unequal shares of the estates. For instance, some of the decedent's grandchildren may receive a greater share of the estate than others. Consider a brief example. A has three daughters, B, C and D. B has one child, E. C has two children F and G. D has three children H, I and J. A dies survived by D. The following distribution would occur under either per stirpes system: A's estate will be divided into 3 shares. D will receive 1/3 of the estate. B's child,

E, will receive her 1/3 share of the estate. C's two children, F and G, will split her 1/3, so they will each receive 1/6 of the estate.

Although E, F, G, H, I, and J are all A's grandchildren, they are treated differently. It is reasonable that H, I and J not receive anything from the estate because they are yielding to their mother, D. It is presumed that D will provide for her children, so they are not overly disadvantaged. Nonetheless, there appears to be no strong justification for permitting E to take a bigger share of A's estate than her cousins F and G. Should F and G be penalized because their mother had more children than B? Do you think this is what A would have wanted? Relying on a survey conducted by Fellows of the American College of Trust and Estate Counsel, the drafters of the UPC concluded that A would probably answer the question in the negative.[3] Consequently, the UPC was revised to adopt the system of representation referred to as per capita at each generation. The revised provision is set forth below.

UPC § 2-106(b)

(b) [Decedent's Descendants.] If, under Section 2-103(1), a decedent's intestate estate or a part thereof passes "by representation" to the decedent's descendants, the estate or part thereof is divided into as many equal shares as there are (i) surviving descendants in the generation nearest to the decedent which contains one or more surviving descendants and (ii) deceased descendants in the same generation who left surviving descendants, if any. Each surviving descendant in the nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if the surviving descendants who were allocated a share and their surviving descendants had predeceased the decedent.

Under the UPC system, the division of the decedent's estate first transpires at the level closest to the decedent where there is at least one living descendant. This step results in the same distribution that would occur under the Modern per stirpes system. The difference in the two approaches is the manner in which the decedent's surviving grandchildren are treated. When the Modern per stirpes system is applied, those descendants are treated equally. The UPC system mandates that the shares of deceased persons on the level closest to the decedent be treated as one pot. The shares in that pot are divided equally among the representatives on the next generational level.

Example:

Hillary, a widow, had three children, Yvette, Raymond, and Margaret. Yvette had one child, Carmen. Raymond had two children, Kathleen and Russell. Margaret had one child, Luke. Hillary was survived by Carmen, Kathleen, Russell, Margaret and Luke.

[3] The results indicated that majority of persons surveyed preferred that persons equally related receive equal shares of their estates. Young, "Meaning of 'Issue' and 'Descendants,'" 13 ACTEC Probate Notes 225 (1988).

Explanation:

Hillary's estate is divided into three parts because there is one survivor, Margaret at the generation of Hillary's children. This is exactly what would have happened under the English and Modern per stirpes systems.

Under the English and Modern per stirpes systems, Margaret would have gotten one-third of the estate; Carmen would have gotten Yvette's one-third; and Kathleen and Russell would have split Raymond's one-third. Luke would not have gotten a share because Margaret survived Hillary.

Under the UPC's approach, Margaret would have gotten one-third of the estate; the two-thirds that Yvette and Raymond would have gotten had they survived Hillary would be divided equally among Carmen, Kathleen and Russell. They each would have gotten two-ninths of the estate.

The UPC approach may be confusing and has only been adopted by a few states. The thing to remember is that it is similar to the Modern per stirpes approach with regards to the first generation of descendants. Another example may be helpful.

Example:

Dennis, a widower, had four children, Thelma, Louis, Molly and Curt. Thelma had one child, Bradford. Louis had two children, Regina and Alberta. Molly had one child, Melody. Curt had three children, Curtis, Carla and Candice. Alberta had one child, Melissa. Dennis was survived by Bradford, Regina, Melody, Curtis, Carla, Candice and Melissa.

Explanation:

Under the UPC system, Dennis's estate is divided into seven parts because that is the number of descendants in the generation where there is at least one survivor. The estate would be divided as follows: Bradford (1/7), Regina (1/7), Melody (1/7), Curtis (1/7), Carla (1/7) and Candice (1/7). The 1/7 share Alberta would have received is treated as one pot and dropped down to the next generation. Since she is the only survivor at that generation, Melissa takes a 1/7 share, the entire pot. If other great grandchildren had existed, Melissa would have to had split the 1/7 share with them.

2.4.5 Comparison

Let's illustrate the different between the three systems.

To illustrate the variances between the three systems of representation, let's consider the Anderson family. Stephen Anderson had three children, Leonard, Brittany and Katherine. Leonard had three children, Patrick, Brenda and Deborah. Brittany had one child, Huey. Katherine had two children, Walter and Clifford. Let's consider four different scenarios.

Scenario One: Stephen dies intestate survived by Leonard, Brittany and Katherine.

Result: Under all three systems, Leonard, Brittany and Katherine receive one-third of Stephen's estate.

Scenario Two: Stephen dies intestate survived by Brittany and Katherine.

Result: Under all three systems, the following distribution occurs: Brittany (1/3), Katherine (1/3), Patrick (1/9), Brenda (1/9), and Deborah (1/9). Patrick, Brenda and Deborah split Leonard's 1/3.

Scenario Three: Stephen dies intestate. All three of Stephen's children predeceased him.

Result: Under the English and Modern per stirpes systems, the following distribution occurs: Patrick (1/9), Brenda (1/9), Deborah (1/9), Huey (1/3), Walter (1/6) and Clifford (1/6). Application of the UPC system results in each of the grandchildren receiving one-sixth share of the estate.

Scenario Four: Stephen dies intestate. Leonard and Brittany predecease Stephen. Stephen is survived by Katherine and his grandchildren.

Result: Under the English and Modern per stirpes systems, the following distribution occurs: Katherine (1/3), Huey (1/3), Patrick (1/9), Brenda (1/9) and Deborah (1/9). Huey, a grandchild, receives the same portion of the estate as Katherine, a child. He receives a larger portion than the other grandchildren. Under the UPC, the following distribution occurs: Kathrine takes 1/3 and the other two 1/3 shares are combined into a single 2/3 share and distributed as if Katherine, Walter and Clifford had predeceased Stephen. As a result, Patrick, Brenda, Deborah and Huey each receive 1/6 of the estate.

Problems

Please divide the property using the English per stirpes, Modern per stirpes and UPC approaches.

1. Hank, a widower, had three children, Keith, Patti, and Rosa. Keith had one child, Edward. Patti had two children, Rochelle and Pamela. Rosa had three children, David, Carlton and Vince. Hank died intestate. Hank was survived by Keith, Patti, Rosa, Edward, Rochelle, Pamela, David, Carlton and Vince.

2. Theresa, a widow, had five children, Donald, Sharon, Cara, Anthony, and Pearl. Donald had one child, Aaron. Sharon had three children, Rene, Tina and Victor. Anthony and Cara did not have any children. Pearl had two children, Francine and Howie. All of Theresa's children predeceased her. She died intestate survived by her six grandchildren.

3. Raven, a widow, had three children, Darrell, Andrew, and Madison. Darrell had four children, Gino, Edwardo, Lucy, and Tonya. Andrew did not have any children. Madison had two children, Nancy and Ruth. Madison also had two grandchildren, Barry and Martin by her daughter Nancy and her husband Bryan. Raven died intestate survived by Darrell, Gino, Edwardo, Lucy, Tonya, Ruth, Barry and Martin. Andrew and Madison predeceased Raven. Nancy predeceased Raven, leaving a will devising all of her property to Bryan.

4. Devon, a widower, had two children, Alice and Clint, both of whom predeceased him. Alice had one child, Charles. Clint had three children, Edwin, Kenny, and Eric. Edwin had one child, Gus.

Eric had three children, Harriet, Ivan, and Justin. Devon died intestate. He was survived by Charles, Gus, Harriet, Ivan and Justin.

5. Anna, a widow, had three children, Toni, Maddy, and Nelson. Toni had one child, Christina. Christina had two children, Eugenia and Catherine. Nelson had two children Lawrence and Thomas. Toni had three children, Darlene, Sarah, and Tiffany. Darlene had three children, Lisa, Minnie, and Noah. Anna died intestate. Toni, Maddy, Nelson, Christian and Lawrence predeceased Anna. She was survived by Eugenia, Catherine, Thomas, Darlene, Sarah, and Tiffany.

2.5 Ancestors, Collaterals and Others.

2.5.1 Parents

In some cases, the intestacy system places parents second in line to children. The law assumes that a decedent only wants his or her parents to inherit if he or she is not survived by children. Is it possible that a decedent would prefer that an elderly parent inherit instead of an adult child?

In about half of the states, parents take if the decedent is not survived by children. However, in the other states, the surviving spouse of a decedent with no surviving children takes the intestate decedent's entire estate. Even in jurisdictions that favor parents, parents may be prevented from inheriting.

Uniform Probate Code § 2-114. Parent and Child Relationship.

(c) Inheritance from or through a child by either natural parent or his [or her] kindred is precluded unless that natural parent has openly treated the child as his [or hers], and has not refused to support the child.

Section 2-114 was originally designed to punish "dead beat dads". When the Code was revised in 1990, the section was amended to apply to mothers. As the next two cases illustrate, mothers can be just as neglectful as fathers.

In re Estate of Fleming, 991 P.2d 128 (Wash. Ct. App. 2000) (Voluntary Termination of Parental Rights)

BAKER, J.

Margaret Fleming voluntarily surrendered her infant son Thomas Fleming to a charitable organization for adoption. At that time, she agreed to a court order that permanently relinquished all maternal rights to him. However, Thomas was never adopted. He died intestate fifty years later with no spouse or issue. Margaret Fleming and her later-born son Antonio Marzan now assert that they are intestate heirs of Thomas. Because we hold that the termination order permanently divested Fleming and her kin of intestate inheritance rights, Thomas's estate escheats to the State of Washington.

Thomas A. Fleming was born out of wedlock to Margaret Fleming in 1946. Paternity was never established. Ms. Fleming decided to give up her son for adoption. The King County Juvenile Court entered a parental termination order in 1947 stating that Margaret Mary Fleming was "hereby permanently deprived of any and all maternal rights and interests in and to the said Baby Boy Fleming," committing him into the permanent custody of Catholic Charity of the Diocese of Seattle, and authorizing that organization to consent to his adoption. Thomas was never adopted. He lived in foster care until the age of majority.

Thomas died intestate in 1996. He was not married and he had no children or stepchildren. Thomas was survived by two biological relatives: his mother Margaret Fleming and his half-brother Antonio Marzan, who was born to Ms. Fleming after she terminated her parental rights to Thomas.

In 1998, Judith Kovacs, the personal administrator of Thomas's estate, filed a petition for determination of heirship. She asked the court to find that Margaret Fleming and her kin were not entitled to inherit in intestacy from Thomas because Ms. Fleming had terminated all maternal rights to Thomas at his birth. She argued that Thomas's estate should therefore escheat to the State of Washington because he died intestate without any legal heirs. In the alternative, she asked the court to instruct what action she should take if it determined that there are potential heirs to the estate. Ms. Fleming and Mr. Marzan then filed a response and objections to the petition.

The commissioner agreed with Kovacs and ruled that the estate escheated because Thomas died without legal heirs. He found that the 1947 order terminating Margaret Fleming's maternal rights to Thomas also extinguished her right to intestate inheritance, and that Marzan could not inherit from Thomas because his right to intestate inheritance derived from Margaret Fleming's extinguished maternal rights. Margaret Fleming died soon after, and her son Marzan was appointed personal representative of her estate. Marzan then filed a motion to revise the ruling of the commissioner. The superior court upheld the commissioner's order. Marzan now appeals that ruling.

II

As a preliminary matter, Marzan contends that Kovacs, as the personal representative of the estate, lacked standing to argue in favor of escheat because the State waived its right to serve as personal administrator under RCW 11.08.160 and because there were potential intestate heirs. We disagree. There is nothing in the probate statutes or case law that constrains the personal representative's authority to present evidence of escheat to the court when the State declines the right to serve as personal administrator. A personal representative has a duty to exercise the utmost good faith and to utilize the skill, judgment and diligence which would be employed by an ordinarily cautious and prudent person in the management of her own business affairs. While we need not hold that Kovacs had a duty to argue in favor of escheat, it is clear that she had standing to do so when a good faith argument under the facts and law appeared to merit such a conclusion.

The primary issue in this case is whether the 1947 termination order permanently deprived Margaret Fleming of the right to inherit in intestacy from Thomas. This is an issue of first impression in Washington. There are numerous cases addressing the intestate inheritance rights of adopted children and their kin. Thomas was never adopted, however, so those cases are not dispositive. Therefore, we must rely on statutory interpretation to determine the legal effect of the parental termination order on Fleming's intestate inheritance rights. Issues of statutory construction are

questions of law, reviewed de novo on appeal.

We first determine which statutes govern the legal effect of the termination proceeding. Kovacs and the State urge us to apply current dependency and adoption statutes because the probate statutes that apply are those in effect at the time of the decedent's death, and the intestacy statutes vest heirs with legal interests only upon the death of their intestate ancestor. Marzan agrees that modern probate statutes apply, but argues that the termination proceeding is a separate matter that must be considered under the 1947 statutes. We hold that the legal effect of the 1947 termination order must be analyzed under the statutes in force at the time of the termination proceeding, not under those in effect at the time of Thomas's death in 1996. The 1947 parental termination order was issued under Rem.Rev.Stat. § 1700, which governed surrender of a child to a charitable society for the purposes of receiving, caring for, or placing the child out for adoption. Therefore, we consider the termination order in light of that statute, and we need not address the arguments advanced by Kovacs and the State regarding the application of modern adoption and termination statutes to this case.

We next determine whether the 1947 statute and termination order operated to permanently divest Margaret Fleming of her right to intestate inheritance from her biological son Thomas.

Under Rem. Rev. Stat. § 1700, when a child is surrendered to the care and custody of a benevolent or charitable incorporated society for the purpose of receiving, caring for, or placing the child out for adoption, then, (but not otherwise), the rights of its natural parents or of the guardian of its person (if any) shall cease and such corporation shall become entitled to the custody of such child, and shall have authority to care for and educate such child or place it either temporarily or permanently in a suitable private home in such manner as shall best secure its welfare.

The 1947 order approved Margaret Fleming's voluntary relinquishment "of all of her maternal rights and interests in and to the said child," ordered that Margaret Fleming "is hereby permanently deprived of any and all maternal rights and interests in and to the said Baby Boy Fleming," and committed Thomas to the permanent custody of the Catholic Charities of the Diocese of Seattle.

Margaret Fleming chose to surrender Thomas to a charitable society under Rem. Rev. Stat. § 1700. By the express language of that statute and the termination order, Margaret Fleming was permanently deprived of all maternal rights and interests in Thomas. The statute and order need not expressly provide that termination of parental rights terminates intestate succession, because "all maternal rights and interests" clearly includes intestate inheritance rights.

According to Marzan, Fleming's intestate inheritance rights were not extinguished because a series of early Washington Supreme Court cases hold that the rights of any kin to inherit in intestacy from each other cannot be extinguished absent express legislative declaration. Because the Legislature has never expressly stated that termination of parental rights simultaneously cuts off intestate inheritance rights, Marzan argues that only a decree of adoption can have this effect. Marzan's overly broad reading of these cases is incorrect. The statutes addressed in those cases were silent as to the right of adopted children to inherit in intestacy from their biological parents. However, as noted, the statute and the order issued pursuant to it in this case deprived the natural parent of all rights regarding the child. The cases relied on by Marzan tracked the statutes then in effect when they held that the Legislature had not expressly terminated the intestate inheritance rights of a child from its biological parents. But the cases did not address the reverse issue presented here.

In our view, the 1947 statutes could and did give effect to the differing circumstances of a natural parent and a child in termination and adoption proceedings. Children who were permanently surrendered to foster care but never adopted had no opportunity for intestate inheritance other than from their biological parents. On the other hand, parents who chose to relieve themselves of the obligations of child rearing by relinquishing their children to an adoption agency nevertheless retained their legal relationship with other blood kin. There is little reason for them to reap the benefits of intestate inheritance if a child should happen to die intestate without having been adopted.

Finally, because we hold that the 1947 order terminated Margaret Fleming's intestate inheritance rights, we must decide whether it also permanently severed the right of any later born siblings to inherit in intestacy from Thomas. Marzan contends that even if the termination of parental rights effectively removed Margaret Fleming from Thomas's family, he is a direct collateral heir of Thomas and can inherit in his own right. Kovacs contends that Marzan's right to inherit in intestacy must descend through his mother, and if her right to inherit was terminated then the line has been severed and Marzan's right terminates as well.

To determine intestate succession, we apply the probate statutes in effect at the time of the decedent's death, in this case 1996. Intestacy statutes establish a system of intestate succession whereby the line of descent and distribution flows through a decedent's parents to reach the issue of parents. The line must flow through a common ancestor. Margaret Fleming, as the parent of Marzan and Thomas, was the only direct connection between them. When Margaret Fleming's parental rights were terminated, the effect was to permanently sever Thomas from her family line, leaving him without a legal parent. Therefore, the line of intestate succession between Marzan and Thomas was severed as well.

Our result is in accord with *In re Estates of Donnelly,* in which the Washington Supreme Court held that an adopted child could not inherit in intestacy from her biological paternal grandfather because she had been legally removed from her natural bloodline for inheritance purposes. The Court stated that because "the adopted child cannot take from her natural father, she should not represent him and take from his father." Similarly, because Margaret Fleming cannot take from Thomas, Marzan should not be able to step in and represent her.

We hold that Margaret Fleming and her son Antonio Marzan are not intestate heirs of Thomas Fleming's estate. Therefore, there are no legal heirs, and the estate must escheat to the State of Washington.

AFFIRMED.

New Jersey Div. of Youth and Family Services v. M.W., 942 A.2d 1 (N.J. App. Div. 2007) (Involuntary Termination of Parental Rights)

COLLESTER, J.A.D.

This is an appeal from a judgment retroactively terminating the parental rights of the natural mother

to her deceased child, and alternatively, holding that the mother's right of inheritance by intestacy is extinguished on equitable grounds. This novel issue was precipitated by a complaint for guardianship brought by the Division of Youth and Family Services (the Division) to terminate M.W.'s parental rights to three of her sons: T.H., Jr., born August 28, 1998; R.W. born on June 13, 1995; and his identical twin, F.W., who died on January 5, 2003. In an earlier opinion we affirmed that portion of the judgment terminating M.W.'s parental rights to R.W. and T.H., Jr. We now review the determination of the trial judge as to the deceased F.W. In doing so it is necessary to repeat some of the facts set forth in our prior opinion.

The facts of this case would shock the cynical and wound the most hardened of heart. When the circumstances were reported by the media, the case outraged the citizenry and shook the foundations of the State's child support system. It began on the morning of January 4, 2003, when the Newark Police Department received an anonymous 9–1–1 call reporting that two beaten and starving children were found locked in the basement of an apartment building at 188 Parker Street. When police arrived, they were met by Shawn Slappy who said he made the 9–1–1 call. Slappy told them he was the boyfriend of Sherry Murphy, who was a tenant in the building, and that he moved in with her about two weeks earlier. He said he was unaware of the existence of these children until that morning when he used a screwdriver to pry open the locked basement door to search for a pair of his boots he believed Murphy put in the basement. When he saw "something moving," he investigated and was shocked to find two young boys locked in a dark and fetid room with only a bed, no sink, no toilet, and no food. Slappy brought the frightened children upstairs to Sherry Murphy's apartment and made the 9–1–1 call.

The condition of the two boys was deplorable. They were emaciated with burn marks and new and old bruises all over their bodies, evidencing severe physical abuse. Their hair was matted. They smelled rank because their clothing was filthy with urine and feces. Seven-year-old R.W. told police "Sherry" put them in the basement. The police asked Slappy where Sherry Murphy was, and he said she left early that morning. He had no idea where she was or when she would return.

The boys were taken by EMT to University Hospital in Newark for examination and treatment, and the Division of Youth and Family Services ("the Division") was notified. Division worker Sandra Osborne responded to the hospital at about 11:30 a.m. She reported as follows:

> [T.H., Jr.], age 4, appeared to be extremely weak and needed assistance standing. He was not able to verbalize at all. However he understands what is being said to him. [He] has multiple bruises over his entire body and appears to have been burned over the buttocks, arms, legs, face and stomach. He is very thin and frail for his age. [R.W.], age 7, was able to provide his name and also his brother's name. [R.W.] was also filthy with old burns and marks on back and neck. His skin is dry and scaly, clothes were wet with the smell of urine. He was very weak and hungry. [R.W.] gave his age as 6 years old, but did not know his brother[']s age. Both boys appear to be underdeveloped for [their] ages. It is not known how long the children were in the basement, however, it appears that they have been locked up for 3 to 4 weeks.
>
> [R.W.] was able to tell me that Sherry put him and his brother in the basement. He stated that she only fed them sometime[s] not all the time. I asked [R.W.] how did he get the bump on his eye. He stated "Sherry punched me in my face for peeing on the floor." He also said that she put [T.H., Jr.] in hot water because he did "do" on the floor. I then asked [R.W.] did he know where his mother was and he responded, "Yes." I said where is she? He responded, "She's locked up." I

> asked [R.W.] how long has he and his brother been in the basement? He responded, "A long time." ... [R.W.] did not want to answer any more questions at that time because he wanted to eat.

Hospital records and medical reports confirm the pitiful condition of the two boys. Four-year-old T.H., Jr. had hypopigmented patches on his skin resembling burns, scaling skin, osteopenia (generalized reduction of bone mass), significant dental decay, and a distended abdomen. Circumferential scarring around the ankles, wrists, and neck indicated he was bound with some type of restraints. He weighed only twenty-nine pounds and measured three feet tall, both under the third percentile for a four-year-old. Burn scars on his chest, neck, feet and buttocks were consistent with second degree burns. As a result of the burn scarring, T.H., Jr. had to wear a compression garment suit over his entire body for twenty-three to twenty-four hours a day for almost a year. Seven-year-old R.W., twin of the deceased F.W., was emaciated. He weighed thirty-seven pounds and was three and one-half feet tall, a height and weight below the third percentile for a child of his age. Physical examination disclosed multiple scars, old burns, lesions, scabbing, dried skin, a distended stomach, and severe dental decay. He suffered from chronic protein calorie malnutrition and micronutrient deficiency.

A hospital registration clerk searched the computer for past admittances and discovered M.W. was the mother of the two boys. A contact number was listed for her in New York City. When Osborne called the number, R.G. answered the phone and said she was M.W.'s sister and the children's aunt. She related that every time she asked M.W. about the children, M.W. was "vague," saying only that they were temporarily staying with her cousin, Sherry Murphy, in Irvington until M.W. could find her own apartment. R.G. told Osborne that the children had lived with Murphy from March 2001 to July 2001 while M.W. served a jail sentence and that when she was released, M.W. moved into Murphy's apartment. R.G. said Murphy threw M.W. out after an argument a month later, and M.W. left her children. M.W.'s oldest son, ten-year-old F.D.W., left Murphy's home to live with R.G. and her son in New York. The three younger boys remained with Murphy. When Osborne told her that only R.W. and T.H., Jr. were found in the basement, R.G. became concerned because she knew F.W. was also living with Murphy. R.G. told Osborne that she believed M.W. was living in Newark with P.W., another sister, and she supplied the telephone number.

Osborne checked Division records and found that M.W. did have another son named F.W. who was R.W.'s twin brother. She then spoke to P.W. who told her that M.W. had been living with her since leaving Murphy's apartment in August 2001. P.W. said that when she asked about the boys, M.W. told her that F.D.W. was living in New York with R.G.'s son and the other three were living with relatives in North Carolina. P.W. said that M.W. was not at her home and had left that morning to go to New York. When Osborne told P.W. about the discovery that morning of the two boys in the basement, P.W. became very disturbed and went to University Hospital to see them. At the hospital P.W. told Osborne that she was very upset that F.W. was missing because she had no idea where the child might be. When asked about Sherry Murphy, P.W. said she was M.W.'s cousin and worked nights in various bars as a go-go dancer.

Caseworker Osborne then spoke to eight-year-old R.W. and asked him about his twin brother. R.W. said that the last time he saw F.W. was "a long time ago" when "Joe" took him and "Sherry put [him] in hot water and he was screaming." "Joe" was later identified as Joseph Reese, Sherry Murphy's former boyfriend. R.W. later reported that he had been sexually abused by Reese.

That night the Newark Police Department issued a missing persons bulletin for F.W. and then

continued the search for M.W. and Sherry Murphy. Later the police received information that M.W. was admitted to Lincoln Hospital in the Bronx after being struck by an automobile. The night ended with no information on either Sherry Murphy or the missing F.W.

At about 3 p.m. the following afternoon, Newark police officers returned to the basement at 188 Parker Street with a trained cadaver-sniffing dog. They found what they feared most—the decaying body of seven-year-old F.W. in a Rubbermaid storage bin located about fifteen feet from where his brothers were found the day before. The desiccated corpse was so badly decomposed that only DNA could verify identity. No remaining facial features remained—no eyes, no nose, and no lips. F.W. was pronounced dead at 3:35 p.m. that day, January 5, 2003, but it was the opinion of the medical examiner that the child had been dead for several weeks. The death certificate listed F.W.'s death as a homicide and noted blunt trauma to the head and abdomen.

The gruesome discoveries in the Newark basement of two starving and abused young boys and the mummified remains of a third spurred extensive media coverage throughout New Jersey and the metropolitan area. At F.W.'s funeral the boy who had been abused, abandoned, and forgotten and known to few, was mourned by over 400 people including the Governor of New Jersey, a United States Senator and the Mayor of Newark. Richard Lezin Jones,

The police and FBI hunt for Sherry Murphy ended after four days. On January 9, 2003, she was found hiding in the Newark apartment of a man she met on the street three days earlier. She was arrested, remanded to jail on charges of child endangerment, and subsequently indicted on seven counts of attempted murder, kidnapping, and child endangerment. Avoiding trial, she pleaded guilty to two counts of aggravated assault, two counts of criminal restraint, and two counts of endangering the welfare of a child. At her plea hearing Murphy said that F.W. died while she was living in Irvington. She hid the body and took it with her when she moved to Newark in December 2002, where she placed it in the basement. She further admitted to confining R.W. and T.H., Jr. in the unlit basement without food, water or a toilet and causing their severe malnutrition. She also admitted to burning the buttocks of four-year-old T.H., Jr. by placing him in scalding bath water and then failing to obtain medical treatment for the injury.

Sherry Murphy was sentenced on November 2, 2005, to an aggregate term of twenty-five years with sixteen years parole ineligibility under the No Early Release Act. Her sentence was affirmed on appeal. Her projected parole eligibility date is August 13, 2016. Murphy's seventeen-year-old son Wesley entered a guilty plea to reckless manslaughter causing the death of F.W. He was paroled on September 2, 2005. Murphy's boyfriend, Joseph Reese, pleaded guilty to sexual assault on R.W. and was sentenced to a five-year term in State prison. He was released on May 31, 2007.

After the discovery of R.W. and T.H., Jr. on January 4, 2003, the Division sought and received an emergency order of temporary custody and supervision of the children pending a fact finding hearing scheduled for February 24, 2003. M.W. was served with the order and a complaint and order to show cause for continued care of R.W. and T.H., Jr. by a Division caseworker while M.W. was in Lincoln Hospital in the Bronx recovering from her injuries in the January 4, 2003 accident. The caseworker reported that M.W. was neither remorseful nor sad. She said that she had not seen her children since August 2001 when she left Sherry Murphy's apartment. She claimed that she made several failed attempts to get R.W., F.W., and T.H., Jr. back, but she did not seek the aid of the police or the Division. She blamed Sherry Murphy for any harm done to her children, but she did not express any anger toward Murphy, referring to her as her favorite cousin.

Following the fact finding hearing on February 24, 2003, Judge Glenn A. Grant found the Division had proven by clear and convincing evidence that M.W. had abused and neglected R.W. and T.H., Jr. by placing them in the care of Sherry Murphy. He directed that the two boys remain in foster care and ordered legal custody was to remain with the Division while alternative placement was explored.

While the Division was pursuing placement, M.W. was discharged from the hospital. She was then arrested in New Jersey on charges she violated the conditions of her probation imposed as a result of a 1996 conviction of child endangerment of children left in her care by a friend serving a prison sentence. M.W. was found guilty of violating probation, and she was sentenced to four years in prison.

R.W. and T.H., Jr. were reluctant to talk to Division caseworkers and others about the abuse they suffered at the hands of Sherry Murphy and their mother. In bits and pieces they disclosed the evil they endured in the Newark basement. R.W. said they had no food and were forced to eat their vomit and drink urine. He added they were tied or shackled by their ankles and wrists. They were burned in hot water and as a consequence were frightened at the sight of a bathtub. R.W. said Murphy burned them with lit cigarettes just like their mother and that Sherry Murphy learned from their mother to burn them as punishment.

It soon came to light that the Division had a long history with M.W. and her family. In 1989 when she was sixteen, M.W. gave birth to her first child, a daughter named K.W. M.W.'s parental rights to K.W. were terminated six years later. In the interim, her first son, F.D.W., was born on May 6, 1991, and the twin boys, R.W. and F.W., were born on June 13, 1995.

The Division's involvement with M.W. and her sons began in 1992 when an anonymous caller reported that the children had no food and that the house was filthy and roach infested. In July 1996 it was reported that five-year-old F.D.W. and the eleven-month-old twins, R.W. and F.W., were left alone in their apartment without food for several hours and that the mother often left the children alone. When confronted, M.W. admitted to leaving the children by themselves. She signed her first of many case plans with the Division. She failed to complete or cooperate with the Division on any of them.

The Division received another anonymous call on December 4, 1996, this one reporting that drug trafficking was going on in M.W.'s apartment and that her children were left unattended and without proper clothing. The allegations were deemed unsubstantiated. In February 1997, M.W. failed to maintain contact with the Division as required by her case plan. After attempts to locate her were unsuccessful, a request was made by the Division for a hold on her welfare benefits until she contacted the Division. On March 4, 1997, the Division received another referral stating that M.W.'s apartment was filthy with garbage all over the floor, that F.D.W. was begging for food, and all the children were regularly left unattended. A field visit to the home convinced the caseworker that the family was "stable," although the apartment was crowded and unclean.

M.W. signed another case plan on April 2, 1997, agreeing to cooperate with the Division's services. However, five days later on April 7, 1997, the Division sent M.W. a letter stating that after review by the caseworker and her supervisor, it was determined that M.W.'s family no longer required supervision and the Division was closing its case. This decision was both puzzling and disturbing since the Division was well aware that M.W. was indicted three months earlier for child

endangerment based on her physical abuse of a friend's children who were left in her care while the mother served a jail sentence. The report made to the Division and the prosecutor was that those children, ages seven, five, and three and a half, were beaten with a belt, a belt buckle, and a coat hanger and burned with lit cigarettes. For some unexplained reason the case was delayed almost five years. On April 2, 2002, M.W. pleaded guilty to second-degree child endangerment, and pursuant to a plea agreement, was sentenced to a five year term of probation.

After closing its case on M.W. and her children in April 1997, the Division was forced to re-open the case on M.W. and her four sons in October 1997, amid further reports of neglect and abuse of the children. M.W.'s resistance to Division supervision continued. She signed five more case plans to cooperate with the Division and its services, but she did the opposite. From October 1997 to December 2001 she moved ten times with her children without notifying the Division. Once again "holds" were requested on her welfare benefits until she and the children were finally located.

Medical neglect was substantiated in 1990 when caseworkers saw that F.D.W. had an untreated laceration on his palm. He was taken to the emergency room where the wound was cleaned and treated, but it was too old to be sutured. Later that year M.W. was referred to the Ad House Newark New Start Project for a psychological evaluation, a drug screening, and pre-natal care since she was four months pregnant with T.H., Jr. But within a month, M.W. again moved without informing the Division. During this time, she gave birth to T.H., Jr. on August 20, 1998.

After several more requests for holds on her welfare benefits, M.W. finally contacted the Division on October 1, 1998 to advise that she was living in East Orange. M.W. was required to sign another case plan on October 7, 1998. She agreed to enroll F.D.W. in school and agreed to attend the Apostles' House Family Preservation Program to learn housekeeping and hygiene skills. But within a month, M.W. told her caseworker that she did not want parent aid services and would not attend. She then disappeared until February 2, 1999, when a Division caseworker saw her on Broad Street in Newark and spoke with her. M.W. said she had moved back to Newark and gave the Division worker the address. But when the caseworker visited the address on February 22, 1999, she was told that M.W. and her children had left and were living with relatives of T.H. On March 8, 1999, T.H.'s relatives informed the Division that M.W. left their apartment on March 1, 1999, with her children and they did not know their whereabouts.

M.W. and the children were located in East Orange on April 27, 1999, after a referral from F.D.W.'s school reporting he had an inch long cut on his thumb and he told the nurse that his mother had cut him with a knife while she was trying to attack her boyfriend and that there was a gun under his bed at home. A worker visited the family that afternoon and decided that the allegations were unsubstantiated. But M.W. was requested to sign another case plan because the school reported that F.D.W. was classified as a non-reader.

On July 28, 1999, the Division was contacted by H.H., the paternal grandmother of T.H., Jr., who said that three weeks earlier M.W. asked her to watch the child one afternoon. M.W. never came back and left no food or clothing for the child. The following day, the Division placed F.D.W., R.W., and F.W. in the care of their maternal aunt, R.G., while T.H., Jr. remained with H.H. During a visit by the caseworker to H.H.'s home on August 19, 1999, H.H. said she still had not seen or heard from M.W. in two months.

Sometime between the end of November 1999 and June 2000, F.D.W., F.W., and R.W. were

returned to M.W. She agreed to a psychological evaluation on July 11, 2000. The examining psychologist reported M.W. posed a risk to her children without Division services and parental training. However, M.W. did not complete the recommended parenting skills courses or cooperate with other Division services.

The Division was next notified in August 2000 by R.G., M.W.'s sister in New York, that F.D.W., R.W., and F.W. were living with her. But by late October they were again living with M.W. in New Jersey. Then on January 17, 2001, the Division received an anonymous referral that M.W. and her children were living in an apartment with broken windows and no heat. A caseworker visited the apartment building that day, saw M.W. and the children, and reported the referral as unsubstantiated. This was the last time that anyone from the Division saw any of M.W.'s sons until January 4, 2003, at University Hospital.

After January 17, 2001, the Division again lost contact with M.W. On July 13, 2001, P.W. called the Division to report that F.D.W. was with her in New York and that R.W., F.W. and T.H., Jr. were living with Sherry Murphy while M.W. was serving a county jail sentence. On October 3, 2001, P.W. advised the Division that F.D.W. was now living with her son in New York. She also said that M.W. had been released from jail and was living with her other three sons with Sherry Murphy in Irvington. P.W. informed the caseworker that F.D.W. told her M.W. physically abused her children and burned them with lit cigarettes. On the same day, the caseworker went to Sherry Murphy's home but was told that M.W. and her children did not live there. Three weeks later the caseworker returned to Murphy's home and was told M.W. and the three children were out.

The caseworker then spoke to R.G. in New York who said that M.W. did not properly feed or clothe the children and failed to enroll them in school. She added that M.W. and Sherry Murphy were abusive individuals and that F.D.W. told her both women beat and burned all the children and that Murphy's son tried to sexually abuse him.

Finally, after ten months, the Division successfully made contact with M.W., and a field visit at the Murphy home was scheduled for November 13, 2001. But M.W. called at the last minute to say that she was too busy until after Thanksgiving. The caseworker made an unannounced field visit the following day. Murphy answered the door and said that M.W. and the children were not home and that all of them were doing well. During another unfruitful visit on November 26, 2001, the caseworkers were told by Murphy's brother that M.W. and her children were away for a week. Division caseworkers tried once again on December 10, 2001. As they were walking up the steps, they met a young man who told them that M.W. and her children were inside. But as they approached the front door another man said the caseworkers had "just missed her."

Incredibly, the Division gave up. The following day, December 11, 2001, the decision was made to close the case even though there were reports emanating from F.D.W. that Sherry Murphy and M.W. had physically abused all the boys and the children had not been seen by a caseworker in a year. The final "In–Home Safety Assessment" prepared by the Division caseworker stated that Sherry Murphy said M.W. and the children were living with her, that they were "fine," and the children were at "very low risk." The assessment concluded that the children were unlikely to be in danger of immediate or serious harm. The Division "Case Summary for Closing" submitted by the case manager and supervisor based the decision on the non-compliance of M.W. with Division supervision, noting "many attempts to make contact with the children but to no avail." The case was closed.

So the three young boys who were abused by their mother and abandoned by her in the summer of 2001 were again abandoned six months later, this time by the State agency that was supposed to protect them. The Division's next contact was January 4, 2003, following the 9–1–1 call reporting two starving and abused boys of three and seven in a cold, dark basement near the yet to be discovered body of their seven-year-old brother rotting in a plastic bin.

Following the fact finding determination on February 24, 2003, the Division explored relatives of the children for possible placement. When it was reported that no such placement was in the children's best interests, Judge Grant directed the Division to pursue formal guardianship of the children and termination of M.W.'s parental rights. The Division filed its complaint on August 12, 2005.

Meanwhile, while still serving her jail sentence on the probation violation, M.W. filed a civil complaint as guardian ad litem for R.W. and T.H., Jr. against the Division, alleging that the Division had negligently failed to protect her children from abuse while they were in the care of Sherry Murphy. As administrix ad prosequendum she asserted claims for F.W.'s estate under the Wrongful Death Act, N.J.S.A. 2A:31-1, the Survivor's Act, N.J.S.A. 2A:15-3, and for loss of consortium. The State answered denying liability and filed a counterclaim against M.W. seeking expenses incurred in the guardianship action commenced by the Division.

The civil supervising judge recognized a conflict of interest between M.W. and her sons, and appointed a substitute administrix ad prosequendum for the estate of F.W. and separate guardians ad litem for R.W. and T.H., Jr. They participated in mediation with a retired Superior Court judge, and a settlement was reached between the State and on behalf of the children for payment of $3.75 million on behalf of T.H., Jr., $2.75 million on behalf of R.W. and $1 million to the estate of F.W. The settlement contained no condition or provision that would exclude M.W. from inheriting under the intestacy statute. M.W. did not participate in the negotiations, and her claim of loss of consortium was not included in the settlement. The judge dismissed the count of M.W.'s complaint seeking relief on her own behalf without prejudice, and he specifically stated that M.W. could re-file her claim or claims against the Division in a subsequent action.

A month after the civil settlement was filed, the Division moved in the guardianship action to amend its complaint to include a demand for retroactive termination of M.W.'s parental rights to F.W. including any right of inheritance. The avowed purpose was to prevent M.W. from receiving any portion of the $1 million settlement payable to F.W.'s estate. M.W. opposed the amendment, arguing: (1) the claim asserted in the proposed amendment lacked merit because there is no authority permitting termination of parental rights for a deceased child; (2) any application with respect to M.W.'s interest in F.W.'s estate was a matter for the Probate Division rather than the Family Division; and (3) the Division was vindictively attempting to shift the blame for the death of F.W. to M.W. rather than acknowledging its failures in this case. Following oral argument on April 17, 2006, Judge Grant ruled in favor of the Division, and the amended complaint seeking termination of M.W.'s rights to F.W. was filed the same day.

The guardianship trial began on May 22, 2006, and lasted three days. Psychologist Frank J. Dyer, Division caseworker, Sabrina McNeil, and behavioral therapist, Charles C. Cooper testified for the Division. M.W. did not testify and called no witnesses.

Dr. Dyer testified that in his opinion M.W.'s "contact with reality is rather tenuous [she] has a rather plastic concept of reality." M.W. categorically denied to Dr. Dyer any abusive behavior by her toward any child at any time, even though she pleaded guilty and was sentenced for child endangerment relating to her physical abuse of children placed in her care. She also took no responsibility for the Division's involvement in her life and the life of her children. Dr. Dyer concluded that M.W. suffers from schizophrenia, dysthymic disorder and personality disorders with prominent antisocial features. He said that "[M.W.] is far too unstable emotionally and behaviorally to be even remotely capable of providing the kind of consistent nurturance, structure, guidance and stimulation, and physical protection that a child requires."

Mr. Cooper was qualified as an expert in therapy and behavioral assistance. He testified he saw both R.W. and T.H., Jr. in therapy on a regular basis over an extended period of time. He was adamant that the boys should not have any contact with their mother because they connect the abuse they suffered to their mother. He stated that they had a profound fear of M.W. and regressed emotionally and psychologically when a photograph of her was shown to them. Cooper explained that both children had issues with fear and safety, suffered from night tremors, and were terrified even at the sight of a bathtub. He testified that a close relationship with foster parents was critical in order for the boys to have any chance of developing a sense of normalcy. He said that any relationship between the boys and M.W. would be emotionally traumatic and psychologically disruptive to them.

On June 8, 2006, Judge Grant gave an oral decision terminating the parental rights of M.W. to R.W., T.H., Jr., and the deceased F.W.

We next address the larger issue of M.W.'s right to receive F.W.'s settlement recovery and whether any legal or equitable ground precludes her from inheriting F.W.'s estate by intestacy. The civil action resulting in the $1 million settlement was based on this State's Wrongful Death Act, N.J.S.A. 2A:31-1 to 31–6, and Survivor's Act, N.J.S.A. 2A: 15-3. Actions to recover damages for the wrongful killing of a child are wholly statutory since no right existed at common law prior to the passage of Lord Campbell's Act. *Johnson v. Dobrosky*, 187 N.J. 594, 605, 902 A. 2d 238 (2006); *Negron v. Llarena*, 156 N.J. 296, 308, 716 A.2d 1158 (1998). Under this State's Wrongful Death Act, recovery is limited to pecuniary losses, which in the case of a child, is limited to loss of future financial contributions and loss of companionship and care. *Green v. Bittner*, 85 N.J. 1, 14-15, 424 A.2d 210 (1980). Proceeds of a recovery under the Wrongful Death Act are not part of the decedent's estate. The recovery is for the exclusive benefit of those entitled to take the decedent's personal property by intestacy. *Miller v. Estate of Sperling*, 166 N.J. 370, 383-84, 766 A.2d 738 (2001); *Gershon v.* Regency *Diving Ctr.,* 368 N.J. Super. 237, 246, 845 A.2d 720 (App. Div. 2004). N.J.S.A. 2A:31-4. In contrast, an action under the Survivor's Act permits recovery of pecuniary and non-pecuniary damages prior to death, but, as with the Wrongful Death Act, recovery belongs to the decedent's estate, which, in the case of a person without a will or a child, passes to those entitled to inherit by intestacy. N.J.S.A. 2A:15-3.

Most state statutes prohibit recovery for wrongful death of a child to a parent who abandons or fails to support the child by denying the parent the right to bring a wrongful death action or share in damages recovered in such an action. *See* Emile F. Short, *Parent's Desertion, Abandonment, or Failure to Support Minor Child as Affecting Right or Measure of Recovery for Wrongful Death of Child*, 53 A.L.R.3d 566, 568-69 (1973); *see also* Allison M. Stemler, Note, *Parents Who Abandon or Fail to Support Their Children and Apportionment of Wrongful Death Damages*, 27 *Brandeis . Fam. L.* 871 (1989. However, neither the New Jersey Wrongful Death Act nor the Survivor's Act contain an exception to the distribution

mandated by the intestacy act. Evidence of mistreatment or abandonment by a parent of a child may bear on future financial contributions to the parent or the loss of companionship and advice to the parent and thereby affect the damage recovery. N.J.S.A. 2A:31-5. However, actions by a parent contrary to the welfare of the child such as desertion, abandonment, or failure to support do not preclude recovery of damages for wrongful death of the child. *See In re Rogiers,* 396 N.J. Super. 317, 325, 933 A.2s 971 (App. Div. 2007); *In re Estate of Rozet*, 207 N.J. Super. 321, 326, 504 A.2d 145 (LawDiv. 1985). *Compare Johnson, supra* 187 N.J. at 610-11, 902 A.2d 238 with Green, supra, 85 N.J. at 12-17, 424 A.2d 210.

In the absence of a surviving spouse, domestic partner, or surviving descendents, parents are next in line to receive the estate of an intestate child, N.J.S.A. 3B:5-4(b), and siblings inherit only if there are no surviving descendents or parents, N.J.S.A. 3B:5—4(c). Accordingly, absent any exception or exclusion, the intestacy law of this State provides that M.W. is entitled to the entire estate of F.W. to the exclusion of R.W. and T.H., Jr.

Intestacy statutes provide a will for those who have neglected to make their own or, as in this case, are adjudged incompetent. *See generally,* Ronald J. Scalise, Jr., *Honor Thy Father and Mother?: How Intestacy Law Goes Too Far in Protecting Parents,* 37 Seton Hall L. Rev. 171 (2006). They are a necessary response to the fact that most Americans die without wills. *Id.* at 174. The intestacy laws are thought to fulfill the presumed intent of decedent and, alternatively, to embody society's judgment as to how the decedent's property should devolve. *Id.* at 173. *See also Unif. Probate Code,* art. II, pt. 1, gen. smt. (1969) (intestate succession "should in the main express what the typical intestate would have wished had he expressed his desires in the form of a will or otherwise"). However, case law has held that where there is no will, the distribution of a decedent's estate must be in accord with the order specified in the intestacy statute even when the decedent expresses a contrary intent. *Rozet, supra,* 207 N.J.Super. at 326, 504 A.2d 145; *Maxwell v. Maxwell*, 122 N.J. Eq. 247, 193 A. 719 (Ch. 1937) next of kin take by intestacy is not in pursuance of the testator's intention, but by force of law, regardless of what his intentions were).

For those dissatisfied with distribution by intestacy, the simple answer is to execute a will. But that option is not available to a seven-year-old child. A child is forced to leave property to his or her parents even if the parents are unworthy. If we could consider F.W.'s presumed intent to distribute his $1 million estate, he would in all likelihood mirror the fear and anger that his brothers displayed toward M.W. and elect to exclude her from any inheritance in favor of his brothers. However, our case law interprets the language of N.J.S.A. 3B:5--4 to rule out any judicially created exception to intestacy distribution based on the wishes of the child, even though the child cannot opt out of the default distribution of the intestacy statute. *Rogiers, supra*, 396 N.J.Super. at 325-26, 933 A.2d 971. Therefore, the intestacy statute does not preclude M.W. from receiving F.W.'s entire estate in spite of any presumed intent of F.W. to the contrary or M.W.'s unworthiness.

The exception to the mandated distribution of the intestacy statute is the "slayer rule," codified in N.J.S.A. 3:B7-1.1, which states that an intentional killer forfeits all benefits from the decedent's estate, whether inherited by will or intestacy. If the victim dies intestate, the estate passes through as if the killer disclaimed his share. The statute codified the common law of this State and the equitable principle that wrongdoers should not be allowed to profit from wrongdoing. *See, e.g., Neiman v. Hurff,* 11 N.J. 55, 93 A.2d 345 (1952*); Wasserman v. Schwartz,* 364 N.J. Super. 399, 836 A. 2d 828 (Law *Div. 2001); Estate of Wolyniec v. Moe, 94 N.J.Super.* 43, 226 A.2d 743 (Ch. Div. 1967); *cf. D'Arc v. D'Arc, 175 N.J.Super.* 598, 421 A.2d 602 (App. Div.1980), *certif. denied,* 85 N.J. 487, 427 A.2d 579, *cert. denied,* 451

U.S. 971, 101 S.Ct. 2049, 68 L.Ed. 2d 350 (1981)(husband who tried to have wife murdered held not entitled to equitable distribution in divorce action). In this case, however, the slayer rule is inapplicable since both the statute and prior case law require an intentional killing, *Estate of Artz v. Artz,* 198 N.J.Super. 585, 487 A.2d 1294 (App. Div. 1985, and M.W. did not kill her son, although her cruelty and abandonment ultimately led to his death in Sherry Murphy's apartment.

A majority of other states have adopted a statutory exception to the mandatory succession by intestacy statutes applicable to children to extinguish the inheritance rights of "bad parents." Scalise, *supra,* at 193; *see, e.g.* N.Y. Est. Powers & Trusts, § 5-1.2(a); Conn. Gen. Stat. Ann. § 45(a)–436(g); N.C. Gen. Stat. § 31A-2 (1984); and 20 Pa. Cons. Stat. § 2106(a). Most of these statutes are directed to parental abandonment and non-support, although several preclude inheritance by a parent who has been convicted of crimes against the child including physical abuse, sexual abuse, and endangering the child's welfare. *See, e.g.,* 20 Pa. Const. Stat. §2106(a); *see also* Or. Rev. Stat. § 112.465 (2005); Scalise, *supra,* at 102. Furthermore, both the Restatement of Property and the Uniform Probate Code bar inheritance by a parent who has abandoned and refused to support the child. Restatement (Third) of Property: Wills & Other Donative Transfers, § 2.5(5); *Unif. Probate Code,* § 2.114(c), 8 *U.L.A.* 91 (1998). But New Jersey has no bad parent statute to preclude parental inheritance by intestacy, and it has not adopted the applicable sections of the Restatement of Property or the Uniform Probate Code.

In *Rozet, supra*, 207 N.J. Super. At 323, 504 A.2d 145, a Law Division decision, the father, who abandoned his daughter six months after her birth and failed to pay any child support, was held entitled to collect his intestate share of her estate. *Rozet* was recently cited with approval by another panel in *Rogiers, supra*, 396 N.J.Super. at 324-25, 933 A.2d 971. In that case the child was severely handicapped from birth as a result of medical malpractice. Her mother pursued the malpractice claim and obtained a substantial recovery that was placed in trust for the daughter. When the child died, her father sought half of the trust balance of over $1 million as his intestate share. The mother argued that he did not contribute to the child's support and therefore did not qualify as her parent and should not receive any part of the child's estate. The court rejected the argument, holding the father was qualified as a parent under the Parentage Act, N.J.S.A. 3B:5-10, and the requisite legal relationship qualified him to inherit as a parent through intestacy. The court further rejected the claim that the New Jersey Probate Code should be read to include the portion of the Uniform Probate Code section that prohibits inheritance when the parent supports the child. But the court found the argument was without substance, noting that the Legislature had amended the Probate Code twice since *Rozet* and had not adopted the provision.

We must conclude that with the exception of the slayer rule, the intestacy law of this State is blind to the worthiness of a parent inheriting from a deceased child. Accordingly, M.W. has an enforceable legal right to inherit the entire $1 million in F.W.'s estate despite factual findings of cruel and abusive conduct toward her son unless her parental rights are terminated in a Title 30 action or there are other lawful grounds to interdict her from receiving the inheritance.

M.W. argues that her parental relationship terminated on the death of F.W. and that therefore no cause of action could lawfully exist under Title 30. However, under the decisional law of this State, a court may exercise equitable powers in unusual circumstances to grant posthumous relief in order to prevent an inequity.

In re Estate of Santolino, 384 N.J.Super. 567, 895 A.2d 506 (Ch Div. 2005), the issue was whether the

court could annul a marriage after the death of one of the parties to the marriage. There, the eighty-one year old decedent suffering from terminal lung cancer married a forty-six year old woman one month before he died intestate. The decedent's sister filed a caveat against granting letters of administration, contending that the marriage was a nullity. The widow argued that the validity of the marriage could not be challenged because the decedent's death terminated the marriage. The court held that under its equitable powers the validity of the marriage could be addressed after the decedent's death because "[a] court of equity is empowered to prevent one party from acquiring the benefits of marriage when the marriage itself was somehow illicit." *Id.* at 584, 895 A.2d 506. *See also Carrv. Carr,* 120 N.J. 336, 576A.2d 872 (1990) (holding that when the husband died during the pendency of a divorce action, the wife may pursue a claim for equitable distribution); *Fulton v. Fulton*, 204 N.J.Super 544, 499 A.2d 542 (Ch Div. 1985) (holding that final judgment of divorce could be adjudicated after husband's death based on prior testimony in order to prevent inequity to decedent's children); *Jacobson v. Jacobson*, 146 N.J.Super. 491, 370 A.2d 65 (Ch Div. 1976) (after husband charged with wife's murder, court declined to abate divorce action and substituted wife's estate as a party for purposes of equitable distribution). These cases stand for the proposition that in exceptional circumstances a court may apply principles of equity to posthumously grant relief from the plain reading of a statute based on the equitable principle that no one should be allowed to profit directly or indirectly from his own wrongdoing, a principle described by our Supreme Court as "so essential to the observance of morality and justice [that it] has been universally recognized in the basis of civilized communities for centuries and is as old as equity. Its sentiment is ageless." *Neiman, supra*, 11 N.J. at 60-61, 93 A.2d 345.

While the guardianship statute contemplates a surviving child, N.J.S.A. 30:4C-15(a), there is no limitation on a court's posthumous application of the statute. *See Santolino, supra,* 384 N.J.Super. at583, 895 A.2d 506(noting that the annulment statute did not express limitation upon its posthumous application). We agree with Judge Grant that the unique and extraordinary circumstances of this case are such that the Family Court in the exercise of its equitable powers may terminate M.W.'s rights to inherit from F.W. nunc pro tunc. The clear public policy of this State is to protect and preserve the welfare of its children, and, to this end, there is reposed in the Family Court inherent equitable authority to fashion appropriate remedies to protect the welfare of children and advance their best interests. *In re Adoption of a Child by W.P.,* 163 N.J. 158, 195, 748 A.2d 515 (2000); *In re Guardianship of J.C.*, 129 N.K. 1, 10, 608 A.2d 1312 (1992).

How cruel, ironic, and inequitable it would be to hold that M.W. retained the right to inherit $1 million from the child she burned, abused, neglected, and abandoned. Equity, morality, and common sense dictate that physically or sexually abusive parents have no right of inheritance by intestacy. The contrary result would bespeak a thoughtless jurisprudence warranting public disrespect. The applicable principle of equity is that "equity will not suffer a wrong without a remedy." *Crane v. Bielski*, 15 N.J. 342, 349, 104 A.2d 651 (1954). In these extraordinary circumstances, the inherent equitable powers of the Family Part prevents the unjust enrichment of M.W. which would result from the mechanical application of the intestacy statute.

We therefore affirm the judgment by Judge Grant and hold that in these extraordinary circumstances the parental rights of M.W., including any residual right of inheritance, were terminated pursuant to N.J.S.A. 30:4C-15.1. Concurrently, we hold that equitable principles inherent in the Family Court proscribe the recovery or receipt of any portion of F.W.'s estate by M.W., thereby causing her disinheritance, and we impose a constructive trust on F.W.'s estate with the direction that the funds are to be conveyed to F.W.'s brothers as proper recipients under the

intestacy succession rules.

Affirmed.

Notes, Problems, and Questions

1. In *Fleming*, the Court ruled that because Thomas died intestate without any legal heirs his estate should escheat to the State of Washington. Why was Thomas' half-brother prevented from inheriting? Did the Court correctly decide that issue?

2. In *Fleming*, Thomas was never adopted. He remained in the permanent custody of the Catholic Charities of the Diocese of Seattle. Should an exception have been made to permit his mother to inherit? Should the estate have been given to the charity instead of the state?

3. In *New Jersey Div.*, why was the decedent's mother prevented from inheriting his estate?

4. In the above-cases, the biological mothers were not permitted to take under the intestacy system. The legal definition of parent varies. Some states have started recognizing an expansive definition of "parent" for purposes pertaining to custody and child support. These theories of parenthood focus upon the benefit that broadly defining "parenthood" provides for children. Nevertheless, if courts rely upon factors other than biology and adoption to establish the legal parent-child relationship, that may impact the ability of adults to inherit from children. A few of those theories are set-forth below.

(1) *Psychological Parent*- Professor Katharine T. Bartlett is one of the main proponents of the recognition of a psychological parent. According to Professor Bartlett, a psychological parent is an adult who assists in the provision of necessities that would typically be supplied by a child's nuclear family. These needs may be physical, emotional and/or social. Professor Bartlett has suggested the use of a three-part test to identify a potential psychological parent. In order to be recognized as a psychological parent, the adult must satisfy three conditions. First, the adult must be in physical possession of the child for at least six months prior to seeking parental status. Second, when seeking parental status, the adult must be motivated by a desire to take care of the child and the child must consider the adult to be his or her parent. Finally, the adult seeking parental status must prove that his or her relationship with the child was the result of the legal parent's consent or a court order.

(2) *Functional Parent*- The functional parent is similar to the psychological or social parent. The focus is on the actions the person takes after the birth of the child. This theory of parentage has been put forth by Professor Nancy Polikoff. According to Professor Polikoff, in order for a person to be classified as a functional parent, the child's legally recognized parent must create a relationship between the child and that person. In addition, the legal parent must intend for that relationship to be parental in nature. Finally, the person must maintain a functional relationship with the child.

(3) *Intentional Parent*-The focus is upon the person's behavior prior to the birth of the child. Courts have taken this approach when determining maternity in surrogate cases. The inquiry is whether the person acted in such a way to indicate that he or she intended to parent the

child. Professor Marjorie Maguire Shultz states that legal parenthood should be determined by evaluating the intentions of the parties. Specifically, Professor Shultz opines "intentions that are voluntarily chosen, deliberate, express and bargained for ought to determine legal parenthood."

(4) *De Facto Parent*- Professor Charles P. Kindregan, Jr. advocates legally recognizing a de facto parent. This approach has been championed by the drafters of the ALI Principles of the Law of Family Dissolution. Pursuant to that document, a de facto parent must satisfy the following conditions: (1) live with the child for two years or more; (2) have non-financial motives; (3) present evidence of an agreement by a legal parent or evidence of a complete lack of caretaking function by the legal parent; and (4) perform caretaking duties on a regular basis at least on par with the duties performed by the parent serving as the child's primary caretaker.

5. What impact could the recognition of several classes of parents have on the intestacy system?

6. In deciding whether or not to recognize a parent-child relationship based upon something other than biology, what factors should the courts consider?

7. Should the parental theories discussed above be implemented into the current intestacy statutory regime or should courts be given the flexibility to apply the doctrines on a case by case basis? What are the pros and cons of each approach?

8. The purpose of the intestacy system is to carry out the presumed intent of the testator. Will that purpose be better carried out if the courts recognize different types of legal parent-child relationships?

2.5.2 Other Ancestors and Collaterals

If an intestate decedent is not survived by children or parents, it is logical that the estate would go to the decedent's grandparents. However, the intestacy system does not operate in that manner. In cases where there are no surviving descendants or parents, the decedent's estate goes to his or her collateral kindred. There are two set of collaterals—first line and second line. First line collaterals include the decedent's siblings[4] who take if he or she is not survived by children or parents. The decedent's nieces and nephews step into the shoes of any siblings who predecease the decedent. The decedent's aunts and uncles are referred to as second line collaterals. The second line collaterals may take if the decedent is not survived by first line collaterals.

Example:

Willis never married or fathered children. His parents predeceased him. Willis had three sisters, Beverly, Cissy, and Whitney and one brother, Theo. Cissy predeceased Willis leaving behind two sons, Vance and Donovan. Willis died intestate survived by Beverly, Whitney, Theo, Vance and Donovan.

[4] Most jurisdictions have followed the UPC's approach and treat half-siblings the same as whole sibling. (UPC § 2-107 "Relatives of the half-blood inherit the same share they would inherit if they were of the whole blood."

Explanation:

Willis estate will be divided into four parts. The intestate distribution of the estate will be as follows: Beverly (1/4), Whitney (1/4) and Theo (1/4). Cissy's one-fourth will be divided between her two sons, Vance and Donovan who will each get 1/8 of Willis' estate.

If the decedent dies intestate without leaving children, parents, or first-line collaterals, the court must determine who should take. The court's decision will depend on the approach that has been adopted by the legislature. Courts typically have two options to apply—the parentelic system or the degree-of-relationship system. The parentelic scheme authorizes the probate court to start at the decedent's grandparents and go down the line to find an heir. Under that system the options are grandparents and their descendants, great-grandparents and their descendants, great-great grandparents and their descendant's etc. The degree-of-relationship approach requires the court to distribute the decedent's estate to the surviving relative that is the closest kin. For example, a first cousin would take before a fifth cousin. Finding the next of kin who is not a first line collateral can be complicated.

In re Wolbert's Estate, 135 A.2d 533 (N.J. Super. Ct. App. Div. 1957)

CLAPP, S.J.A.D.

The question brought before the court by this appeal is whether under the descent and distribution statute a first cousin of Josephine Wolbert, the intestate, and issue of deceased first cousins, all descendants of Miss Wolbert's grandparents, take her intestate property to the exclusion of Mrs. Marie E. W. Spratt, a second cousin who is a descendant, not of Miss Wolbert's grandparents, but of her great grandparents. The Atlantic County Court, Probate Division, Judge Naame sitting, held they take to the exclusion of Mrs. Spratt, and the latter appeals. The question was raised in a proceeding brought by Mrs. Spratt in the County Court to set aside letters of administration granted by the surrogate as to the estate of Miss Wolbert.

Josephine Wolbert died intestate on November 3, 1956, a resident of Atlantic City, leaving neither spouse, nor issue, nor parent, nor any brother or sister or issue of brother or sister. Her closest next of kin was a first cousin, J. Walter Steel, related to her in the fourth degree. She also left surviving three children of a deceased first cousin, Francis P. Steel, Amanda Fell Steel and Alfred Steel. These four persons are issue of an uncle, a brother of the intestate's mother. Furthermore, Miss Wolbert was survived by Gretchen Wolbert and Priscilla Alden Riesenberg, issue of deceased first cousins who were themselves children of another uncle of Miss Wolbert, a brother of her father.

The Atlantic County Surrogate's Court issued letters of administration to Alfred Steel, upon the presentation to the court of renunciations from J. Walter Steel, Francis P. Steel and Amanda Fell Steel, containing a request that letters be issued to him. Mrs. Spratt then brought a proceeding in the County Court, Probate Division, N.J.S. 3A:2-3, N.J.S.A., R.R. 5:3-4(a), to set aside these letters on the ground that she is one of the next of kin and had never been given notice of Alfred Steel's application for administration. The right to administration belongs to the spouse and next of kin if they or any of them will accept the same. N.J.S. 3A: 6-4, N.J.S.A. Further, see R.R. 4:99-3, made applicable to the Surrogate's Court by R.R. 5:4-1. In the course of the proceeding before the County Court, Gretchen Wolbert and Priscilla Alden Riesenberg approved the issuance of the letters to

Alfred Steel.

There is no merit whatever in Mrs. Spratt's claim that she is one of the next of kin. The point is disposed of by that sentence of N.J.S. 3A:4-5, N.J.S.A., which we have italicized below:

> 'If there be no husband or widow, child or any legal representative of a child, nor a parent, brother or sister, nor a legal representative of any brother or sister, then the intestate's property, real and personal, shall descend and be distributed equally to the next of kindred, in equal degree, of or unto the intestate and their legal representatives. *Representatives of ancestors nearest in degree to the decedent shall take to the exclusion of representatives of ancestors more remote in degree.*'

The italicized clause in the statute provides in effect that where neither spouse, issue, parent, brother or sister or issue of brother or sister survive, then descendants of a grandfather-in this case a first cousin and, Per stirpes, issue of deceased first cousins, paternal and maternal, *In re Allen's Estate*, 23 N.J. Super. 229, 92 A.2d 857 (Ch Div. 1952), *In re Miller's Estate*, 103 N.J. Eq. 86, 141 A. 676 (Prerog. 1928), *affirmed* 104 N.J.Eq. 491, 146 A. 915 (E. & A. 1929) take to the exclusion of other descendants of a great grandfather, such as Mrs. Spratt. As stated in the Foreword to Title 3A, p. xi, 'this seems just. A person is more apt to know and therefore to want to provide for the lines of descent closer to him.'

The aim of this clause may be made more apparent if we observe the state of the law as to the distribution of personal property, as it stood before this statute. Under the rule obtaining then, if an intestate should leave him surviving a great uncle as his next of kin nearest in degree, call him A, and if he also leaves cousins who are issue of deceased great uncles (they would be descendants of the intestate's great grandparents) and furthermore leaves cousins who are issue of deceased first cousins (they would be descendants of the intestate's grandparents), all the descendants of the great grandparents would take per stirpes to the exclusion of all the descendants of the grandparents. *See Smith v. McDonald*, 71 N.J.Eq. 261, 266, 65 A. 840 (E. & A. 1907) (7 N.J.Prac. 290, 291), *cf. In re Fisher's Estate*, 17 N.J.Super. 207, 85 A.2d 562 (Cty. Ct. 1952), holding that distribution is made to the living kinsman nearest in degree, viz. A, a great uncle of the fourth degree, and 'the representatives of those dead, who, if living, would answer the same description,' that is (in the supposititious case) the representatives of deceased Great uncles. The cited statute rejected this admittedly 'fortuitous' (74 N.J.Eq., at page 268, 65 A. at page 842) rule. It adopted instead what has been called the parentelic system, a system that obtained under the English law of descent. Bordwell, 'Law of Succession,' 8 Rutgers L. Rev. 164 (1953); 2 Pollock and Maitland, History of English Law (2d ed. 1923), 295-297; 3 Holdsworth, History of English Law, (2d ed.) 143-145; *Smith v. Gaines*, 36 N.J.Eq. 297, 299 (E. & A. 1882); *Smith v. McDonald*, 71 N.J.Eq. 261, 267, 65 A. 840 (E. & A. 1907). Contrast the parentelic system obtaining under 6 Mass. Laws Annot., c. 190, s 3(6) (1955) (citations omitted).

Mrs. Spratt was therefore not one of the next of kin of Miss Wolbert. That being so, she did not even have the standing to institute the proceeding in the County Court. For, under R.R. 5:3-4(a), only a 'person aggrieved' may review a judgment of the Surrogate's Court. A person is not aggrieved by a judgment unless his personal or pecuniary interests or property rights have been injuriously affected thereby. *In re Lent*, 142 N.J.Eq. 21, 22, 59 A.2d 7 (E. & A. 1948). It follows that Mrs. Spratt was not aggrieved by the Surrogate's Court judgment here.

Appeal dismissed, with costs to respondents.

2.5.3 Laughing Heirs

Laughing heirs are relatives that are so remote from the decedent that they may laugh if they discovered that he or she died. These persons take if the decedent dies without surviving spouse, children, parents, siblings, nieces, nephews, aunts, uncles, grandparents etc. The problem with remote heirs is that it takes a lot of time and resources to discover and locate them. As I have previously stated, the primary objective of the intestacy system is to carry out the decedent's presumed intent. Because that is the goal it probably does not make sense for the court to track down distant relatives with whom the decedent did not have any type of relationship. Section 2-103(4) of the Uniform Probate Code sought to eliminate the remote heir problem by limiting inheritance to descendants of the decedent, parents and their descendants, and grandparents and collateral relatives descended from grandparents. The majority of jurisdictions have adopted this approach.

2.5.4 Escheat

Uniform Probate Code § 2-105 No Taker.

If there is no taker under the provisions of this Article, the intestate estate passes to the [state].

Once the decedent's blood line runs out, his or her estate goes to the state if he or she dies intestate. Very few estates escheat to the state because people tend to keep an eye on relatives who have money and/or property. Another reason why the state seldom gets the estate is that the Internet is full of companies that specialize in locating missing heirs. The companies will locate missing heirs in exchange for a percentage of the estate.

2.5.6 Advancements

The intestacy system is meant to distribute property that the decedent did not dispense in a validly executed will. The advancement doctrine comes into play when the decedent gives an heir property prior to his or her death. The advancements doctrine is based on the theory that a parent intends to treat all of his or children in the same way. Thus, if a parent gave a child a significant lifetime gift of real or personal property, the common law imposed a presumption that the parent intended an advancement. The child who received the gift had the burden of overcoming the presumption in order to avoid having the gift counted against his or her share of the estate. The common law doctrine of advancements still exists, but it has been codified. Under most of the current statutes, the court presumes that the lifetime gift was not mean to be an advancement. Some states have followed the Uniform Probate approach requiring some type of writing indicating that an advancement was intended.

Tankesley v. Thompson, 469 S.E.2d 853 (Ga. App. Ct. 1996)

POPE, Presiding Judge.

Richard Tankesley, Robert Tankesley, William Tankesley and John Tankesley are the adult sons of Stella Lee Kays, who died intestate on July 24, 1992. During the administration of Kays' estate, Richard and the court-appointed administrator, Mary Thompson, asserted that Kays had advanced approximately $70,000 to Robert during the last two years of her life. Robert denied this assertion. After extensive discovery and several hearings on the matter, the probate court ruled that the $70,000 disbursed to Robert was not an advancement, but rather constituted loans or investments made to Robert and/or businesses he had started-primarily Southern Broasted Foods, Inc. (SBF). Concluding that the probate court did not err in reaching its determination, we affirm.

"An advancement is any provision made by a parent out of his estate, for and accepted by a child, either in money or property, during the parent's lifetime, over and above the obligation of the parent for maintenance and education." OCGA § 53-4-50(a). In this state, when a parent dies intestate, a substantial gift of money or property from the parent to his or her child during the parent's lifetime is ordinarily presumed to be an advancement. *See Bowen v. Holland*, 184 Ga. 718, 720(1), 193 S.E. 233 (1937); *Neal v. Neal*, 153 Ga. 44, 45(3), 111 S.E. 387 (1922). This presumption, however, is rebuttable *Id.* The relevant inquiry in cases such as this is the decedent's intent at the time of the transactions in question. *Berry v. Berry*, 208 Ga. 285, 289(2), 290, 66 S.E.2d 336 (1951). The determination as to the decedent's intent is to be made by the finder of fact-either the jury, or a judge in a case tried without a jury. *See Smith v. Varner*, 130 Ga. App. 484, 203 S.E.2d 717 (1973).

In the instant case, all of the money in question was disbursed in the form of numerous checks written by Kays. All of the checks except one were either payable to SBF or named SBF or another business entity in the memo portion thereof. Many of the checks also included the notation "investment" or "loan." Robert testified by affidavit that at the time Kays wrote each check, she indicated that the money was an investment. Robert further testified that at various times during her life, Kays expressed her intent that at the time of her death her estate should be divided equally between her four children, regardless of any gifts she previously may have given to any particular child. The affidavits of William and John corroborate that this was Kays' intent, as do the various wills, though not valid, that Kays executed during her life. Additionally, Kays' attorney testified by affidavit that as far as he was aware, "at the time of her death, [Kays] contemplated that her estate, as it existed at the time of her death, would be divided equally between her four sons, notwithstanding any gifts she may have made to them during her lifetime." The record also shows that Kays was a shrewd business woman who often invested in other businesses, and there is some evidence that she expected a return on her investment in SBF.

Based on the above evidence, we hold that the probate court, as the sole factfinder and judge of witness credibility in this case, did not err in concluding that Robert had met his burden of rebutting the presumption that the disbursements constituted advancements. The probate court was authorized to conclude that Robert had demonstrated with clear and satisfactory evidence that Kays' intent when she made the disbursements was that they be treated as loans or investments rather than advancements. Accordingly, we affirm the probate court's ruling.

Judgment affirmed.

Uniform Probate Code § 2-109

(a) If an individual dies intestate as to all or a portion of his [or her] estate, property the decedent gave during the decedent's lifetime to an individual who, at the decedent's death, is an heir is treated as an advancement against the heir's intestate share only if (i) the decedent declared in a contemporaneous writing or the heir acknowledged in writing that the gift is an advancement or (ii) the decedent's contemporaneous writing or the heir's written acknowledgment otherwise indicates that the gift is to be taken into account in computing the division and distribution of the decedent's intestate estate.

(b) For purpose of subsection (a), property advanced is valued as of the time the heir came into possession or enjoyment of the property or as of the time of the decedent's death, whichever first occurs.

(c) If the recipient of the property fails to survive the decedent, the property is not taken into account in computing the division and distribution of the decedent's intestate estate, unless the decedent's contemporaneous writing provides otherwise.

If the court concludes that an advancement was intended, it relies upon the hotchpot method in order to determine the amount of the estate to distribute to the child who received the prepayment. The hotchpot method comes from the common law, but it has been codified.

Va. Code Ann. § 64.206. Advancements brought into hotchpot

When the descendant of a decedent receives any property as an advancement from the decedent during the decedent's lifetime or under the decedent's will, and the descendant, or any descendant of his, is also to receive a distribution of any portion of the decedent's intestate estate, real or personal, the advancement shall be brought into hotchpot with the intestate estate and the descendant is entitled to his proper portion of the entire intestate estate, including such advancement.

2.5.7 Computation of Shares-Hotchpot Method.

Example:

Zeda died intestate, survived by her four children, Denise, Jana, Melanie and Robert. Zeda's probate estate was worth $200,000. While she was living, Zeda gave $50,000 to Denise and $10,000 to Melanie. Zeda left a written instrument declaring that she intended the gifts to Denise and Melanie to be treated as advancements.

Explanation:

The first step in the hotchpot method is to add the value of the advancements to the value of Zeda's probate estate. This combined figure is called the hotchpot estate.

In this case, Zeda's hotchpot estate preliminarily comes to $260,000 ($200,000 + $50,000 + $10,000). The $260,000 is divided equally among Denise, Jana, Melanie and Robert, so they are each entitled to $65,000. Jana and Robert each get $65,000 from the probate estate. $70,000 remains in the probate estate to be divided between Denise and Melanie. Denise has already received $50,000, so she receives $15,000 from the probate estate. The remaining $55,000 in the probate estate goes to Melanie who had already received $10,000.

Problems and Questions

1. Would the outcome of the *Tankesley* case have been the same in a UPC jurisdiction?

2. During his lifetime, Barry advanced $20,000 to his son, Alex. Barry died intestate, leaving a probate estate of $100,000. Barry was survived by his daughter, Kellie, and by Alex's child, Judy. How should Barry's estate be distributed in a UPC jurisdiction?

3. Jean had five children, Phillip, Mona, Tommy, Suzanna, and Rita. During her lifetime, Jean did the following: (1) paid $120,000 for Mona to attend graduate school; (2) gave Suzanna $50,000 to pay medical bills; (3) loaned Rita $27,000 to make a down payment on a condo; and (4) gave Tommy $10,000 to take a trip to Europe. While she was sick, Phillip stole $30,000 from Jean's bank account. Jean died intestate survived by her five children. Jean's estate was worth $500,000. Jean left a note stating that she loved all of her children equally. She told her friend that she was not executing a will because the lawyer told her that her children would split her estate. Which, if any, lifetime gift should be considered to be an advancement? How should Jean's estate be distributed if no advancements exists? If advancements exist?

Chapter Three: Intestacy System (Surviving Spouse)

3.1 Introduction

When a person dies intestate, the surviving spouse is entitled to a share of the community property[5] belonging to the decedent and a share of the decedent's separate property.[6] The law of intestacy varies from state to state. Therefore the portion of the decedent's estate that goes to the surviving spouse may be different.[7] For the sake of uniformity, I have included the Uniform Probate Section that deals with the inheritance of the surviving spouse. The UPC increases the share that the surviving spouse takes. Instead of including the spouse in Chapter Two, I chose to discuss the rights of the surviving spouse in a separate chapter. I selected that approach because I wanted to emphasize that the spouse is not like other heirs of the decedent. For example, a decedent can easily disinherit his or her child, but it may be difficult for that person to prevent his or her spouse from taking a portion of the estate.[8] It is also important to note that the spouse gets the first opportunity to take from the estate.[9] The spouse has several options. If the decedent leaves a validly executed will, the spouse can choose to receive his or her portion under the will. However, if the spouse is not satisfied with the terms of the will or if the spouse is intentionally omitted from the will, the spouse can renounce the will and take his or her elective share.[10] Some jurisdictions still recognize dower[11] and cutesy,[12] so the surviving spouse can decide to exercise those rights.

---

[5] States that have a community property system include Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin. Community property refers to money that is earned and property that is bought during the marriage. In Idaho, Louisiana and Texas, income from separate property is community property. The spouses own community property in undivided, equal shares. Either spouse may dispose of his or her half of the community property at death; the other half belonging to the surviving spouse.

[6] Separate property refers to property that belongs exclusively to one spouse or the other.

[7] Mongold v. Mayle, 452 S.E.2d 444, 447 (W. Va. 1994)("[t]he purpose behind the elective-share provision ……is to prevent spousal disinheritance in order to ensure that the surviving spouse's contribution to the acquisition of property during the marriage is recognized and in order to ensure that the surviving spouse has continuing financial support after the death of his or her spouse.")

[8] This can be changed by the execution of a valid pre-nuptial agreement. Those types of arrangements are discussed in family law and property law courses. Thus, the information in this chapter assumes that a relevant pre-nuptial agreement does not exist.

[9] Estate usually refers to a person's probate estate. However, some jurisdictions have permitted the surviving spouse's elective share to apply to the testator's nonprobate property. *See Newman v. Dore*, 9 N.E.2d 966 (N.Y. 1937); *Dreher v. Dreher*, 634 S.E.2d 646 (S.C. 2006).

[10] In the majority of jurisdictions, elective share has replaced dower and curtesy rights. *See, e.g.,* 20 Pa. C.S.A. § 2105 (West 2016). UPC § 2-213 permits a surviving spouse to waive his or her elective share in writing.

[11] Dower was a common law doctrine that granted a widow a life estate in one-third of all land in which her deceased husband had been seised during their marriage and that was inheritable by the descendants of husband and wife. The right of dower attaches the moment the man obtains title to land or upon marriage, whichever is later. Dower stays inchoate until the man dies. After his death, the woman's dower becomes possessory. During the man's lifetime, once dower attaches, he cannot sell the land free and clear of the wife's dower interest. Even a bona fide purchaser cannot cut off the wife's dower without her consent. *See* R.C. § 21.03.02 (West 2016)(Ohio); M.C.L.A. § 558.1 (West 2016).

[12] At common law, a man was given a support interest in his wife's land referred to as curtesy. Curtesy was similar to dower, but it contained the following differences: (1) the man did not obtain curtesy if no children were born during the marriage, and (2) the man's interest in his deceased wife's property was a life estate in the land instead of the one-third interest reserved for surviving wives. In a few states curtesy still exists, but it is pretty much gender-neutral as is dower. *See* A.C.A. § 28-11-301(b)(West 2016)(Arkansas); K.R.S § 392.02 (West 2016)(Kentucky).

Uniform Probate Code § 2-102. Share of Spouse.

The intestate share of a decedent's surviving spouse is:

(1) the entire intestate estate if:

(i) no descendant or parent of the decedent survives the decedent; or

(ii) all of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent;

(2) the first [$200,000], plus three-fourths of any balance of the intestate estate, if no descendant of the decedent survives the decedent, but a parent of the decedent survives the decedent;

(3) the first [$150,000], plus one-half of any balance of the intestate estate, if all of the decedent's surviving descendants are also descendants of the surviving spouse and the surviving spouse has one or more surviving descendants who are not descendants of the decedent;

(4) the first [$100,000], plus one-half of any balance of the intestate estate if one or more of the decedent's surviving descendants are not descendants of the surviving spouse.

Problems

1. Loretta was married for twelve years to Milton. Loretta and Milton had two children together, Maggie and Rod. After Loretta divorced Milton, she married Frank. Loretta and Frank had three children together, Tabitha, Jennifer and Reba. Frank also had a child, Casper, from his prior marriage. Loretta died survived by Frank, Loretta, Milton, Tabitha, Jennifer and Reba. Loretta left an estate worth $650,000. Under the UPC, what portion of Loretta's estate does Frank get?

2. Woodrow was married to Paige. Woodrow and Paige did not have any children together. Paige had one child, Bessie from a previous relationship. Woodrow had five children, George, Andrew, John, Quincy, and Franklin, from his prior marriage. All five of Woodrow's children and his parents predeceased him. Woodrow died intestate survived by two grandchildren, Ronald and Bryon, Bessie and Paige. Woodrow's probate estate was worth $950,000. Under the UPC, what portion of Woodrow's estate does Paige get?

3. Bennett was married to Pauline. Bennett and Pauline had six children, Clara, Bella, Steve, London, Michael, and Cody. All six of Bennett's children predeceased him. Bennett died intestate survived by Pauline and his mother, Elizabeth. Bennett's probate estate was worth $500,000. Under the UPC, what portion of Bennett's estate does Pauline get?

4. Sandra was married to Rosie. Sandra and Rosie adopted two children, Oliver and Grey. Sandra had two children, Nina and Simon, from a prior relationship. Rosie had two children, Bruce and Shelia, from her previous marriage. Sandra died intestate survived by Rosie, Oliver, Grey, Nina, and Simon's daughter, April. She was also survived by Rosie's two children Bruce and Shelia. Sandra's probate estate was worth $435,000. Under the UPC, what portion of Sandra's estate goes to Rosie?

5. In America, there are variations of two marital property systems, separate property and community property. The primary difference between the schemes is that, in a separate property jurisdiction, the spouses own separately all property each obtains; in a community property state, the spouses own all property acquired from earnings after marriage in equal, undivided shares. *See In re Marriage of Brandes*, 192 Cal. Rptr. 3d 1, 9 (Cal. App. 4th 2015).

The two main legal issues that impact the surviving spouse's ability to inherit are (1) whether or not the person is a spouse and (2) whether or not the person survived the intestate decedent.

3.2 Definition of Spouse

Traditionally, "spouse" referred to a person who is married to a member of the opposite sex. In cases where a man who is legally married to a woman or a woman who is legally married to a man dies intestate, it is easy to determine the person that has the right to take a spouse's share. Nonetheless, the definition of spouse has evolved. Consequently, legislatures and courts have interpreted the term broadly. In this section, I examine factors that may influence a person's ability to be legally identified as a spouse.

3.2.1 Putative Spouse

The putative spouse doctrine was designed to protect a person who may have been tricked into a marriage. For example, a woman may marry a man without knowing that he is already legally married to someone else. If that woman enters the marriage in good faith and functions as a wife, is it fair for the law to deny her the advantages of marriage? The woman is given the benefit of the doubt because the law presumes that she would not have married the man had she known that he already had a wife. Thus, if the woman learns of the other wife and remains in the marriage, she loses her status as a putative spouse. The loss of that identity deprives the woman of the ability to receive any type of spousal support, including an intestate portion of the man's estate.

M.S.A. § 518.055 Putative Spouse (Minnesota)

Any person who has cohabited with another to whom the person is not legally married in the good faith belief that the person was married to the other is a putative spouse until knowledge of the fact that the person is not legally married terminates the status and prevents acquisition of further rights. A putative spouse acquires the rights conferred upon a legal spouse, including the right to maintenance following termination of the status, whether or not the marriage is prohibited or declared a nullity. If there is a legal spouse or other putative spouses, rights acquired by a putative spouse do not supersede the rights of the legal spouse or those acquired by other putative spouses, but the court shall apportion property, maintenance, and support rights among the claimants as appropriate in the circumstances and in the interests of justice.

Estate of Leslie, 689 P.2d 133 (Cal. 1984)

BIRD, Chief Justice.

Is a surviving putative spouse entitled to succeed to a share of his or her decedent's separate property under the Probate Code?

I.

On April 22, 1972, William Garvin and Fay Reah Leslie were married in Tijuana, Mexico. The marriage was invalid because it was never recorded as required by Mexican law. However, Garvin believed that he and Leslie were validly married. The couple lived together as husband and wife for almost nine years, until Leslie's death in 1981. Throughout this period, they resided in a house in Mira Loma. The house had been purchased by Leslie, Mike Bosnich, her former husband, and respondent Alton B. Smith, a son from a prior marriage who lived next door. This case concerns the administration and distribution of Leslie's estate.

During Leslie's and Garvin's marriage, restaurant property, which had been acquired by Leslie prior to the marriage, was remodeled. As a result, it increased in value. There is conflicting testimony concerning the source of funds and labor used for this remodeling. Garvin testified that the improvements were paid for with "community funds" and that he and Leslie did most of the remodeling. Smith testified that (1) the money used to remodel the restaurant came from his mother's separate funds, (2) he and his brother performed most of the work, and (3) Garvin's work on the remodeling was minimal. After the improvements were made, Leslie sold the restaurant and received a promissory note secured by a deed of trust in her name.

During the marriage, Leslie and Garvin acquired three parcels of real property in the Desert Hot Springs area. The manner in which title was taken varied for each parcel. The first two parcels were purchased in 1977. Title to Parcel 1 was taken in joint tenancy by "Fay Bosnich, an unmarried woman, and William A. Garvin, an unmarried man." Title to Parcel 2 was taken in the name of "Fay Bosnich, an unmarried woman." Parcel 3 was purchased approximately 16 months later, and title to it was taken as a tenancy in common by "Fay Bosnich, an unmarried woman, and William Garvin, a widower."

Garvin and Leslie also purchased furniture during their marriage. There is conflicting testimony regarding which pieces of furniture they acquired together. Smith testified that with the exception of two end tables purchased by his mother and Garvin, the furniture in the Mira Loma residence had been acquired either during the 15 years that Smith and his mother lived together or during his mother's former marriage. Garvin testified that he and Leslie together purchased 50 percent of the furniture in the residence.

During the marriage, a trustee bank account was established for Leslie's granddaughter, Deborah E. Hoskins, with Leslie named as trustee. Leslie deposited the payments she received from the sale of her restaurant property into this account. Garvin testified that $1,000 of "community funds" were also deposited into this account. He also testified that Leslie withdrew money from the account and placed that money into the couple's common funds.

On February 6, 1981, Leslie died intestate. She was survived by Garvin, her son Smith, and three other adult children from a prior marriage.

Smith filed a petition for letters of administration in the estate of his deceased mother. Garvin objected to Smith's petition, filed his own petition for letters of administration, and sought a determination as to who was entitled to distribution of the estate.

Smith requested to be appointed special administrator to take possession of the estate and to preserve it until an administrator could be appointed. (See Prob. Code § 460). The superior court granted that request.

In January 1982, a court trial was held to determine the appointment of the administrator and the distribution of the property in the estate. The trial court found that a putative marriage had existed between Garvin and Leslie, denied Garvin's petition for letters of administration, and determined that he was not entitled to any of decedent's separate property. The court also found that some of the property was quasi-marital and some was separate.

Specifically, the trial court found that three bank accounts, the two end tables, and approximately $2,400 in cash were quasi-marital property. The remaining property was found to be Leslie's separate property, consisting of: (1) Parcel 2, which was in decedent's name alone, (2) an undivided one-half interest in Parcel 3, which was in decedent's and Garvin's names and held as a tenancy in common, (3) the remaining furniture in the Mira Loma residence, (4) a two-thirds interest in the Mira Loma residence, (5) the trustee bank account, and (6) the promissory note from the sale of the restaurant property. Finally, the trial court found that the funds used to improve the restaurant had come from decedent's separate property and the improvements had been made by decedent's sons.

Garvin makes several contentions on appeal. First, he argues that he is entitled to an intestate share of the decedent's separate property. Second, he contends that he should have been appointed administrator of the estate. Lastly, he challenges several of the trial court's separate property findings.

II.

The principal issue presented by this case is whether a putative spouse is entitled to succeed to a share of his or her decedent's separate property. Although this court has not directly confronted this question, the conclusions of other courts on this and analogous questions are instructive.

Some guidance can be gleaned from decisions which have held that a putative spouse is entitled to succeed to *quasi-marital* property. (See *ante,* fn. 5.) One such decision is *Feig v. Bank of America etc. Assn.* (1936) 5 Cal.2d 266, 54 P.2d 3. The Feigs were married in 1889. A year later, Mrs. Feig obtained a divorce without Mr. Feig's knowledge. The couple continued living together as husband and wife. In 1921, Mrs. Feig suggested that she and Mr. Feig remarry. It was only then that Mr. Feig discovered that he and Mrs. Feig were divorced. They remarried that year. In 1929, Mrs. Feig died intestate. *(Id.*, 2 Cal. 2d at 270, 54 P.2d 3).

At issue in *Feig* was the property acquired after the 1890 divorce and before the 1921 remarriage. The trial court awarded all the property to Mr. Feig. This court, affirming the judgment, noted that the property acquired by the Feigs during the period they were divorced, "although not community

by reason of the fact that there was in truth no marriage, should be marked by all the incidents of community property." (5 Cal.2d at p. 273, 54 P.2d 3). Thus, Mr. Feig was entitled to all of the "community" property (*Id.*, 5 Cal.2d at pp. 273-274, 54 P.2d 3).

Although the surviving husband in *Feig* was the legal spouse at the time of his wife's death, he was also the putative spouse for the period during which the couple were divorced. Thus, *Feig* essentially holds that a surviving putative spouse *is* entitled to all the property acquired during the putative marriage.

This holding was made explicit several years later in *Estate of Krone* (1948) 83 Cal. App. 2d 766, 189 P.2d 741. There, the decedent was survived by his putative wife and three children from a previous marriage. The trial court determined that the putative wife was entitled to only one-half of the "community" estate (*Id.*, 83 Cal. App 2d at pp. 766-767, 189 P.2d 741). The Court of Appeal modified the judgment to award all of the "community" estate to the putative wife. (*Id.,* 83 Cal. App. 2d at p. 770, 189 P.2d 741). The court held that when a putative spouse dies, the surviving spouse takes "the same share to which she would have been entitled as a legal spouse." (*Id.*, 83 Cal. App. 2d at p. 769, 189 P.2d 741).

The *Krone* court reasoned that "the logic appears irrefutable that if according to statute [§ 201] the survivor of a valid, ceremonial marriage shall be entitled to take all of the community estate upon its dissolution, then by parity of reasoning why should not the [putative] wife inherit the entire estate of a putative union upon the death of her husband intestate? Clearly, she does inherit all." (83 Cal. App. 2d at pp. 769-770, 189 P.2d 741; accord *Union Bank & Trust Co. v. Gordon* (1953) 116 Cal. App. 2d 681-690, 254 P.2d 644; *Mazzenga v. Rosso* (1948) 87 Cal. App. 2d 790, 793-794, 197 P.2d 770). It would be contrary to established law to deny a putative spouse "her rights as a surviving spouse to inherit the total of the gains of the putative marriage." (83 Cal. App.2d at p. 770, 189 P.2d 741).

Krone has been read "to recognize a putative [spouse] as a legal spouse for the purpose of succession." (*Kunakoff v. Woods* (1958) 166 Cal. App. 2d 59, 65-66, 332 P.2d 773). That reading is clearly applicable to the determination of the separate property rights of a putative spouse.

A number of Court of Appeal decisions support the conclusion that a putative spouse is entitled to succeed to a share of the decedent's separate property. *Estate of Goldberg* (1962) 203 Cal.App.2d 402, 21 Cal.App.2d 402, 21 Cal. Rptr. 626, is one such case. Sam Goldberg died intestate, survived by Edith, his putative spouse, and three children from a prior marriage. The trial court found that Edith was both Sam's actual and putative spouse. She was awarded all of the community property as well as one-third of Sam's separate property. The other two-thirds of the separate property was awarded to Sam's children. (*Id.*, 203 Cal.App.2e at p. 404, 21 Cal. Rptr. 626; *see* § 221, *ante,* fn. 6.) The children appealed.

The Court of Appeal agreed with the trial court's finding that there was insufficient evidence that Edith was Sam's actual wife, but sufficient evidence that she was Sam's putative wife. (203 Cal.App.2d at pp. 411-412, 21 Cal. Rptr. 626). As a putative spouse, Edith was entitled "to the same share of the 'community' property as she would receive as an actual wife." (*Id.,* 203 Cal. App.2d at p. 412, 21 Cal. Rptr. 626).

Although the *Goldberg* court was silent on the question of Edith's right as a putative spouse to succeed to Sam's *separate* property, the court did affirm the trial court's award of one-third of that

property to Edith. By such action, the Court of Appeal implicitly recognized the right of a surviving putative spouse to an intestate share of the decedent's separate property.

Similarly in *Garrado v. Collins* (1955) 136 Cal. App.2d 323, 288 P.2d 620, the trial court awarded the putative husband one-third of the decedent's separate property. The decedent's two children from a previous marriage appealed, arguing that the putative husband was not entitled to any of the separate property. (*Id.*, 136 Cal. App. 21 at pp. 324-325, 288 P.2d 620).

The Court of Appeal did not reach the merits of the trial court's award. Instead, it held that the children lacked standing as aggrieved parties and dismissed the appeal. (136 Cal. App. 2d at pp. 325-326, 288 P.2d 620). In dictum, the court noted that the children could not inherit the separate property at issue because that property would descend either to the legal husband, who was still living, or to the surviving putative husband. (*Ibid.*) That observation is significant, since the court recognized the possibility that the putative husband may have been awarded the "surviving spouse's" share of the separate property even as against the legal husband.

Finally, there is *Estate of Shank* (1957) 154 Cal.App.2d 808, 316 P.2d 710. Claire Shank married her legal husband in 1944, then obtained a Mexican divorce, and subsequently married her putative husband. In 1953, she died intestate, leaving an estate consisting entirely of separate property. She was survived by a putative husband, a legal husband, and three adult siblings. (*Id.*, 154 Cal. App. 2d at pp. 809-810, 316 P.2d 710).

The trial court found that the Mexican divorce was invalid and awarded all the separate property to the siblings. The court also found that the legal husband had acquiesced in and relied upon the Mexican divorce and had conducted himself as if that decree were valid. He was, therefore, estopped from asserting that he was the surviving spouse for the purpose of inheriting the decedent's separate property. In addition, the trial court found that the decedent's marriage to her putative husband was invalid because she was still married to her legal husband at the time of the second "marriage." (154 Cal.App.2d at pp. 810-811, 316 P.2d 710) Both the legal and putative husbands appealed. (*Id.*, 154 Cal.App.2d at p. 811, 316 P.2d 710).

The Court of Appeal affirmed the award as to the legal husband, concluding that as against the putative husband, the former was estopped from contending that the divorce was invalid. (154 Cal. App. 2d at pp. 811-812, 316 P.2d 710). However, the court concluded that the putative husband was entitled to one-half of the separate property. Since the decedent was estopped from denying the validity of the Mexican divorce during her life as against the putative husband, her heirs, in privity with her, were also estopped. The court noted that a second marriage is presumed to be valid. *(Id.*, 154 Cal.App.2d at pp. 812, 316 P.2d 710). Although the result in *Shank* rests on estoppel principles, it provides yet another example of a putative spouse who was permitted to succeed to a share of the decedent's separate property.

In many analogous contexts, California courts, as well as federal courts applying California law, have accorded surviving putative spouses the same rights as surviving legal spouses. Examples abound.

In *Kunakoff v. Woods, supra*, 166 Cal.App.2d at p.59, 67-68, 332 P.2d 773, a surviving putative spouse was held to be an heir for the purposes of Code of Civil Procedure section 377. As such, she was entitled to bring an action for the wrongful death of her deceased partner. The Court of Appeal noted that the term "spouse" may include a putative spouse. (*Kunakoff v. Woods, supra*, 166

Cal.App.2d at p. 63, 332 P.2d 773). The court reasoned that since a putative spouse is an heir for purposes of succession, she is an heir for purposes of maintaining an action for wrongful death. *(Id.*, 166 Cal.App.2d at pp. 67-68, 332 P.2d 773).

A surviving putative spouse has also been held to be a surviving spouse within the meaning of Government Code section 21364. (*Addudell v. Board of Administration, supra*, 8 Cal. App.3d 243, 87 Cal. Rptr. 268). That statute entitles a surviving spouse to special death benefits under the Public Employees' Retirement Law. In *Addudell,* the court indicated that it would be "illogical and inconsistent" for the Legislature to intend that a putative spouse is a surviving spouse under section 201, but not a surviving spouse under Government Code section 21364. (8 Cal.App.3d at pp. 249-250, 87 Cal. Rptr. 268).

A surviving putative spouse has also been held to be a "surviving widow" within the meaning of a former version of Labor Code section 4702 (Stats.1969, ch. 65, § 1, p. 187), and thus entitled to recovery of workers' compensation death benefits. (*Brennfleck v. Workmen's Comp. App. Bd., supra*, 3 Cal. App.3d 666, 84 Cal.Rptr. 50; see also *Neureither v. Workmen's Comp. App. Bd.* (1971) 15 Cal.App. 3d 429, 433, 93 Cal. Rptr. 162).

Finally, it is noteworthy that putative spouses have been awarded spousal benefits under the civil service retirement statute (5 U.S.C. § 8341, *Brown v. Devine* (N.D. Cal. 1983) 574 F. Supp. 790, 792), (under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 901 et.seq., *Powell v. Rogers* (9th Cir. 1974) 496 F.2d 1248, 1250, cert. den., 419 U.S. 1032, 95 S.Ct. 514, 42 L.Ed. 2d 307; *Holland American Insurance Company v. Rogers* (N.D. Cal. 1970) 313 F. Supp. 314, 317-318, and under the Social Security Act (42 U.S.C. § 416, *Aubrey v. Folsom* (N.D. Cal. 1957) 151 F.Supp. 836, 840; *Speedling v. Hobby* (N.D. Cal. 1955) 132 F.Supp. 833, 836).

The foregoing authority compels but one conclusion: a surviving putative spouse is entitled to succeed to a share of his or her decedent's separate property. This result is inherently fair. By definition, a putative marriage is a union in which at least one partner believes in good faith that a valid marriage exists. As in this case, the couple conducts themselves as husband and wife throughout the period of their union. Why should the right to separate property accorded to legal spouses be denied to putative spouses?

Further, to deny a putative spouse the status of surviving spouse for the purposes of succeeding to a share of the decedent's separate property would lead to anomalous and unjust results. For example, where the decedent is survived by a putative spouse and children of the putative marriage, such a rule would deny the spouse succession rights to separate property even though the children are accorded such rights. Such a rule would also deny succession rights to a putative spouse who lived with the decedent for many years, while according these rights to the legal spouse, even if that spouse's partner died the day the couple were married. (Laughran & Laughran, *Property and Inheritance Rights of Putative Spouses in California: Selected Problems and Suggested Solutions* (1977) 11 Loyola L.A.L.Rev. 45, 68.) Surely, the Legislature never intended such results.

There is one Court of Appeal decision which has reached a conclusion contrary to that reached by this court today. That decision must therefore be addressed. *In Estate of Levie* (1975) 50 Cal. App.3d 572, 123 Cal. Rptr. 445, the trial court awarded the putative spouse all of the quasi-marital property as well as an intestate share of the decedent's separate property. (*Id.,* 50 Cal. App.3d at p. 574, 123 Cal. Rptr. 445). One of the decedent's children from a prior marriage appealed. The Court of Appeal

reversed the separate property determination, rejecting the argument that a putative spouse is entitled to a surviving spouse's share of the decedent's separate property. (*Id.,* 50 Cal.App.3d at pp. 576-577, 123 Cal. Rptr. 445).

The *Levie* court articulated three reasons in support of its holding. First, it noted that there appeared to be no California decision suggesting that a putative spouse is entitled to succeed to an interest in the decedent's separate property. Second, it declared that the equities connected with quasi-marital property do not apply to a decedent's separate property because the joint efforts of the putative spouses did not contribute to the acquisition of that property. Lastly, the court observed that to give the putative spouse an interest in a decedent's separate property would "unjustifiably disregard the statutory scheme governing intestate succession of separate property." (50 Cal. App. 3d at 576-577, 123 Cal. Rptr. 445).

Levie has been severely criticized by the commentators and for good reasons. (*See, e.g.*, Laughran & Laughran, *op. cit. supra,* 11 Loyola L.A.L.Rev. at pp. 64, 66–68, 78, 85; Bruch, *The Definition and Division of Marital Property in California: Towards Parity and Simplicity* (1982) 33 Hastings L.J. 771, 825, fn. 224; Reppy, *Debt Collection from Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage* (1981) 18 San Diego L. Rev. 143, 218, fn. 283.) Not only are the *Levie* court's reasons unpersuasive, but its conclusion leads to anomalous, absurd and unjust results.

Levie's first reason is plainly in error. Numerous California decisions *have* suggested that a putative spouse is entitled to succeed to a share of a decedent's separate property. (See *ante,* at pp. 566–567 of 207 Cal.Rptr., pp. 138–139 of 689 P.2d.) For example, the result in *Estate of Krone*, *supra,* 83 Cal. App. 766, 189 P.2d 741 (*ante,* at pp. 565–566 of 207 Cal.Rptr., pp. 137–138 of 689 P.2d) suggests that a putative spouse should also be considered a surviving spouse for purposes of other sections in the same division of the Probate Code. Moreover, a surviving putative spouse has been accorded the same rights as a surviving legal spouse in many analogous contexts. (*See ante,* at pp. 567–568, of 207 Cal.Rptr., pp. 139–140 of 689 P.2d.) Clearly, *Levie*'s first reason is without basis in fact.

Equally unpersuasive are the other two reasons given in *Levie.* Two commentators have aptly addressed these reasons in their article concerning the rights of putative spouses. (See Laughran & Laughran, *op. cit. supra,* 11 Loyola L.A.L.Rev. at pp. 66–68.) As the Laughrans observe, "[w]hile it is true that the joint efforts of putative spouses do not contribute to the acquisition of separate property, it is equally true that the efforts of a legally married person do not contribute to the acquisition of separate property of the other spouse. It therefore begs the question to state that the 'equities' of a putative spouse differ depending upon whether rights of succession to quasi-marital or separate property are at issue, since the same distinction applies to the 'equities' of a legally married person with respect to rights of succession to community and separate property. Thus, as to rights of intestate succession to separate property of the decedent, the 'equitable' position of a surviving legal spouse and a surviving putative spouse is the same." (*Id.,* at p. 67.)

Further, language within the *Levie* opinion contradicts its ultimate conclusion. *Levie* stated that a putative spouse's right to succeed to quasi-marital property is derived from " '[e]quitable considerations arising from the reasonable expectation of the continuation of benefits attending the status of marriage entered into in good faith ....' [Citations.]" (50 Cal. App.3d at p. 576, 123 Cal. Rptr. 445). As the Laughrans convincingly assert, "[t]hat very language dictates a decision in favor of the surviving putative spouse in cases involving succession to *separate* property, since the rights of a 'surviving spouse' [to succeed to separate property under the Probate Code] are 'benefits attending

the status of marriage.' " (Laughran & Laughran, *op. cit. supra,* 11 Loyola L.A.L.Rev. at p. 67, italics added.)

To accord a surviving putative spouse rights to the decedent's separate property honors rather than disregards the statutory scheme governing intestate succession. (Laughran & Laughran, *op. cit. supra,* 11 Loyola L.A.L.Rev. at p. 67; *but see Levie, supra*, 50 Cal.App.3d at p. 577, 123 Cal.Rptr. 445). Since the right to succession is not an inherent or natural right, but purely a creature of statute (Estate of Simmons (1996) 64 Cal. 2d 217, 221, 49 (*Estate of Simmons* (1966) 64 Cal. 2d 217, 221, 49 Cal. Rptr. 369, 411 P.2d 97), a surviving legal spouse inherits a decedent's separate property "only because the statutes provide that a person having the status of 'surviving spouse' takes a certain share." (Laughran & Laughran, *op. cit. supra,* 11 Loyola L.A.L. Rev. at p. 67.) To accord a surviving putative spouse the status of "surviving spouse" simply recognizes that a good faith belief in the marriage should put the putative spouse in the same position as a survivor of a legal marriage. (*Id.,* at p. 68.) Thus, contrary to *Levie,* to permit a surviving putative spouse to succeed to a share of the decedent's separate property in no way upsets the statutory scheme of intestate succession.

Levie is "wrong in its analysis of the 'equities,' wrong as a matter of statutory construction, and ... ignores compelling analogous precedents." (Laughran & Laughran, *op. cit. supra,* 11 Loyola L.A.L.Rev. at p. 78.) Therefore, to the extent that it is inconsistent with this opinion, *Levie* is disapproved.

Here, the trial court determined that Garvin was not decedent's "surviving spouse" under section 221. As a result, the court determined that he had no legal interest in any of her separate property. That determination was in error.

III.

Garvin next argues that under section 422 he should have been appointed the administrator of decedent's estate. This argument has merit.

Section 422 lists in order of priority the persons who are entitled to letters of administration. That section provides: "(a) Administration of the estate of a person dying intestate *must* be granted to one or more of the following persons, who are entitled to letters *in the following order:* (1) The surviving spouse, or some competent person whom he or she may request to have appointed. (2) The children.... (b) A relative of the decedent who is entitled to priority under subdivision (a) is entitled to priority only if either of the following facts exist: (1) The relative is entitled to succeed to all or part of the estate...." (Italics added.)

The meaning of the statute is clear. "The surviving spouse, when entitled to succeed to the estate or some portion thereof, is given first preference. This right is absolute and the court has no right to refuse to appoint the survivor or to appoint another in a lower class." (*Estate of Hirschberg* (1964) 224 Cal.App.2d 449, 461, 36 Cal. Rptr. 661; see also Estate of Johnson (1920) 182 Cal. 642, 643, 189 P. 280; *Estate of Cummings* (1972) 23 Cal.App.3d 617, 622, 100 Cal. Rptr. 809; *Estate of Locke* (1968) 258 Cal. App.2d 617, 622, 65 Cal.Rptr. 884).

In addition, the reasoning in section II (*ante,* at pp. 564–570 of 207 Cal.Rptr., pp. 136–142 of 689 P.2d) compels the conclusion that a putative spouse is a surviving spouse within the meaning of section 422. Without reiterating those reasons here, suffice it to say that in the absence of clear

legislative direction to the contrary, neither logic nor justice supports the conclusion that a putative spouse may inherit an intestate share of the decedent's separate property but may not administer the estate.

Here, the trial court denied Garvin's petition for letters of administration. As a putative husband, Garvin is a surviving spouse under section 422. Therefore, he is entitled to letters of administration and has preference over anyone else. The trial court's ruling was in error.

IV.

Next, Garvin contends that the trial court erred in finding that certain of the Desert Hot Springs property, the Mira Loma furniture, and the trustee bank account were decedent's separate property. He also contends that the trial court erred in failing to find a community interest in the improvements made to decedent's restaurant property. His argument is essentially that the trial court's determinations are unsupported by substantial evidence.

In reviewing the sufficiency of the evidence, this court is guided by well-settled principles. "[T]he power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted," to support the trial court's findings. (*Crawford v. Southern Pacific Co.* (1935) 3 Cal. 2d 427, 429, 45 P.2d 183; *Jessup Farms v. Baldwin* (1983) 33 Cal. 3d 639, 660, 190 Cal. Rptr. 355, 660 P.2d 813). "We must therefore view the evidence in the light most favorable to the prevailing party, giving [him] the benefit of every reasonable inference and resolving all conflicts in [his] favor ...." (*Ibid.*) " 'The finding of a trial court that property is either separate or community in character is binding and conclusive on the appellate court if it is supported by sufficient evidence, or if it is based on conflicting evidence or upon evidence that is subject to different inferences ....' " (*Beam v. Bank of America* (1971) 6 Cal.3d 12, 25, 98 Cal. Rptr. 137, 490 P.2d 257). With these familiar principles in mind, this court examines each of the challenged findings.

Three parcels of real property were purchased during the putative marriage. Although two parcels were purchased at the same time, title to each was taken in a different manner. Title to Parcel 1 was taken in Leslie's and Garvin's names as joint tenants, while title to Parcel 2 was taken in Leslie's name alone. Sixteen months later, Garvin and Leslie purchased Parcel 3. Title to it was taken in both their names as tenants in common.

Garvin contests the trial court's findings that Parcel 2 and Leslie's one-half interest in Parcel 3 were her separate property. However, the record amply supports those findings.

The fact that title to each of the three parcels was taken in a different manner, particularly where all were purchased within a 16-month period, supports the inference that the parties deliberately intended to differentiate the ownership interests in each. Garvin's own testimony supports this inference. As he testified, a married couple "could put land or buy land in one name or another, whatever they wanted to. I mean, that was up to their own particular rights. Each of us knew how [title] got there and why. Of course, we never anticipated all these other problems at this point in time." Garvin was obviously sophisticated enough to understand the reasons for taking title to the properties in different ways. Thus, the trial court's findings that Parcel 2 and one-half of Parcel 3 were decedent's separate property were amply justified.

Garvin's contention that the trial court erred in finding that the bulk of Leslie's furniture was her

separate property is also without merit.

Smith testified that with the exception of two end tables, all of the furniture in his mother's residence had been acquired prior to her marriage with Garvin. Although Garvin contradicted this testimony, the trial court resolved the conflict in Smith's favor. This court is bound by the trial court's finding, since it is based on substantial evidence. (*Jessup Farms v. Baldwin, supra*, 33 Cal.3d at p. 660, 190 Cal.Rptr. 355, 660 P.2d 813).

Alternatively, Garvin relies on the proposition that he should be awarded all the furniture as exempt property. (§ 660). Since Garvin failed to make this argument below, he is precluded from raising it for the first time on appeal. *Estate of Westerman* (1968) 68 Cal.2d 267, 66 Cal. Rptr. 29, 437 P.2d 517). In any event, it is well established that a trial court has discretion to deny a surviving spouse's request to set exempt property apart once an inventory has been filed. (§ 660; *Estate of Hawkins* (1956) 141 Cal.App. 2d 391, 397-398, 296 P.2d 873). There is no evidence that the trial court abused its discretion.

Accordingly, the trial court's finding as to the furniture is affirmed.

Garvin also contends that the trial court erred in finding that the trustee bank account consisted entirely of Leslie's separate property. Once again, Garvin's contention lacks merit.

Garvin offered the only evidence regarding the trustee account. He testified that when the account was originally established, $1,000 of "community funds" were placed in it. He also testified that payments from the sale of Leslie's restaurant property were deposited into the account and that Leslie withdrew money and placed it into the couple's common funds. Moreover, Leslie was the sole trustee named on the account for her granddaughter. At the time of Leslie's death, there were $1,719 in the account.

In ruling on this matter, the trial court found that Garvin had no interest in the account. The trial court specifically indicated that it had taken the witnesses' credibility into consideration. Since that court was in a better position to weigh Garvin's credibility against evidence that the account appeared to be Leslie's separate property, this court discerns no error in the trial court's ruling.

Lastly, Garvin asserts that funds and labor from the "community" were used to improve decedent's restaurant property and that the "community" is therefore entitled to a pro rata share of the increased value of that property. This assertion, too, fails.

It is undisputed that decedent acquired the restaurant prior to her marriage with Garvin. It is also uncontested that improvements were made to the restaurant that increased its value.

However, the testimony was in conflict regarding the source of funds and labor used for the improvements. Garvin testified that community funds were used and that he and Leslie did most of the work themselves. Smith testified that his mother's separate funds were used, that he and his brother did most of the work, and that any labor by Garvin was minimal.

The trial court resolved the conflict in Smith's favor. The finding that the restaurant property was decedent's separate property is thus binding on this court for it is supported by substantial evidence. (*Jessup Farms v. Baldwin* supra, 33 Cal.3d at p. 660, 190 Cal. Rptr. 355, 660 P.2d 813).

V.

Virtually every court which has considered the issue has accorded a surviving putative spouse the same rights as a surviving legal spouse. The one court which has decided against such benefits did so in a poorly reasoned and unsound decision. Moreover, as in most putative spouse cases, the couple involved here lived together for a substantial period of time, conducting themselves as husband and wife throughout their union. To deny one of their members an intestate share of the decedent's separate property while permitting him to succeed to the quasi-marital property defies logic and leads to unjust results. Therefore, this court holds that a surviving putative spouse is entitled to succeed to a share of the decedent's separate property. Similar reasoning supports the conclusion that a surviving putative spouse is entitled to first preference for letters of administration.

Accordingly, the portion of the trial court's judgment denying Garvin an interest in decedent's separate property and letters of administration in decedent's estate is reversed. In all other respects, the judgment is affirmed.

Notes, Problems, and Questions

1. If Garvin is recognized as a legal spouse and the jurisdiction has adopted the UPC, what portion of Leslie's estate would Gavin take?

2. What were the reasons the court gave for giving Garvin, the putative spouse in this case, the status of surviving spouse?

3. What three reasons did the *Levie* court give for denying the putative surviving spouse status?

4. How did the *Leslie* court justify not following the holding of the *Levie* case?

5. The surviving spouse receives a share of an intestate decedent's estate because the law presumes that a decedent wants to provide for the spouse that he or she leaves behind. Should that presumption be rebuttal? What if one spouse finds that the other spouse is cheating and dies intestate before he or she can obtain a divorce? Would the decedent really want his or her cheating spouse to inherit his or her separate property?

6. Consider the following example. Griffin had no intention of marrying Cindy, but he wanted to have intimate relations with her. Cindy had taken a purity pledge to avoid sex before marriage, so she refused Griffin's advances. Griffin often told his friends that he would not get married unless the woman signed a prenuptial agreement. Griffin got Stanley, one of his friends, to pretend to be a licensed minister. Stanley performed the ceremony and declared that Griffin and Cindy were legally married. Two days later, Griffin died intestate in a car accident. He was survived by his parents, Joe and Betty; his brothers, Henry and Paul; and Cindy. Griffin left an estate of $930,000. Is Cindy a putative spouse? Should she be entitled to an elective share of Griffin's estate after just two days of marriage? If she is entitled to take, how much would Cindy get in a UPC jurisdiction?

The scenario of a person remarrying without divorcing the first spouse is common especially in small southern towns. Problems starts when the person dies and two grieving spouses show up at the funeral.

Estate of Hafner, 184 Cal. App. 3d 1371 (Cal. App. Ct. 1986)

DANIELSON, J.

The principle issue presented by this case is: as between the surviving, innocent, wife and children of a bigamous husband, and his surviving, innocent, putative spouse and their child, who is entitled to succeed to the husband's intestate estate when that estate is, as to his surviving wife and children, the husband's separate property and is, as to the putative spouse, quasi-marital property?

We hold that, as separate property, one-half of the estate goes to the surviving wife and four children of the decedent for distribution pursuant to former section 221 of the Probate Code (hereafter section 221) and the other one-half goes to the surviving putative spouse as quasi-marital property pursuant to Civil Code section 4452 and former section 201 of the Probate Code (hereafter section 201).

Factual Background and Proceedings Below

Joan Hafner (Joan) and the decedent Charles J. Hafner (Charles) were married on June 12, 1954, in the State of New York; it was the first marriage for each of them. Following their marriage they took up residence in College Point, New York. Joan has continued to live in or near College Point ever since. The marriage between Joan and Charles produced three daughters, all of whom are now living: Catherine Kotsay, born December 25, 1955; Lillian Mayorga, born November 18, 1956; and Dorothy Hafner, born November 16, 1957.

In February or March of 1956 Joan learned that she was pregnant with her second child and told Charles. In April or May of 1956 Charles left Joan, without prior notice and without letting her know where he would be. At that time their first child, Catherine, was sick and Joan moved back to her parents, who supported her; she received no support from Charles.

Joan and Charles were reunited briefly in early 1957. Charles left Joan for the last time in February 1957. Joan, then pregnant with their third child, encountered Charles on the street in New York in May 1957. He told her, "I hear you are going to have another baby," and asked her whether she would like to go to California. Joan replied, "What guarantees would I have that you won't leave me pregnant again?" Charles replied, "There's no guarantees."

In 1956 and 1958, Joan filed support proceedings against Charles in the New York family court. In 1956, she obtained a $12 per week child support order and in 1958 she obtained a similar order for $20 per week. Charles made four support payments in 1958 but never made any other payments. In 1958, Joan consulted an attorney in New York on the support matters, but, because of the expense required to locate Charles in California, she did not pursue the matter. In 1961, Joan abandoned any further efforts to obtain support warrants in the New York family court because such efforts caused her to lose time on her job.

Joan last saw Charles in the New York family court in 1958 when he was brought before the court on a support warrant. Shortly after that appearance, an acquaintance told Joan that Charles had gone to California. From 1958 until his death in 1982, Joan and Charles never saw or communicated with each other again. Joan knew that Charles was in California but did not know where in California.

Beginning in 1961, and continuously thereafter, Joan considered her marriage to Charles for all practicable purposes to have ended and that they would never reconcile or even see each other again.

Except for short intervals to have their babies, Joan was employed at all times following her marriage to Charles, and was so employed at the time of the trial below. She reared the three daughters of herself and decedent.

In August, 1953, shortly after graduating from high school, Joan commenced working at a magazine company and continued until August, 1955, when she left because she was pregnant with her first daughter. In April, 1957, she went to work on the assembly line of a rubber company, on a machine putting snaps on baby pants. Except for a three-month lay-off to have her third baby she stayed on that machine for about twelve years, when the company moved away. She started at the minimum wage and later became a piece worker. After two weeks of unemployment she went to work for a glove manufacturing company, starting as an order picker, filling orders, and later as a stock supervisor, making sure that the orders were picked and sent out. She was still so employed at the time of the trial of the within action and had then been working at the glove factory for 14 1/2 years.

Joan never sought a divorce from Charles; it is unclear whether she did not seek a divorce because of religious convictions, the lack of financial resources, or a lack of interest. At no time from their marriage in 1954 until his death on December 25, 1982, did Charles ever file proceedings to dissolve his marriage to Joan. Their marriage was still in full force and effect at the time of Charles' death.

Respondent Helen L. Hafner (Helen) met Charles in 1962 when he was a patron at a beer bar where she was working as a barmaid. Helen had separated from her second husband, Eldon Pomeroy, in November, 1961.

Charles told Helen that he had divorced his wife, Joan, in New York on charges of adultery, that he had three children of that marriage with Joan, and that he had given up an interest in a house in lieu of child support. Charles further stated that the divorce records had been destroyed in a fire in New York. Helen, in good faith, relied on these representations and believed them to be true continuously thereafter; she had no actual knowledge or reasonable grounds to believe otherwise.

In July 1962, Helen and Charles went to Tijuana, Mexico, to enable Helen to obtain a divorce from Pomeroy and to participate in a marriage ceremony with Charles. Both of those objectives were accomplished. Helen, in good faith, believed that both the divorce and marriage were valid. Following their return from Tijuana in 1962, Helen and Charles lived as husband and wife.

Helen's second husband, Pomeroy, was killed in an accident on June 21, 1963. In June 1963, Helen consulted an attorney and was advised that her Mexican divorce from Pomeroy was invalid in California. Following Pomeroy's death Helen and Charles went to Las Vegas, Nevada, and participated in a marriage ceremony. After that marriage ceremony, on October 14, 1963, Helen and

Charles returned to the Los Angeles area where they lived and held themselves out as husband and wife until Charles' death. They had one child, Kimberly Hafner, born December 10, 1964.

On September 27, 1973, Charles was seriously injured in an automobile accident which left him with permanent physical disabilities and brain damage that rendered him incapable of employment. During the nine months in the hospital and his subsequent recovery period, Helen faithfully attended to his needs as his wife and continued to do so for some nine years until his death.

Charles and Helen accumulated approximately $69,000 in hospital and doctor bills as a result of the accident. Those bills were not paid until Charles's personal injury action was settled for $900,000, in 1975, which netted decedent $600,000 after attorney's fees. Helen and her attorney, Charles Weldon, were appointed as Charles's co-conservators in 1975. The personal injury settlement was placed in conservatorship accounts and administered under court supervision. The conservatorship assets were subsequently transferred to Charles' probate administrator following Charles's death.

Charles Hafner died intestate on December 25, 1982, leaving an estate appraised at $416,472.40; his entire probate estate consists of the remainder of the proceeds of his personal injury settlement.

Joan apparently learned of Charles's personal injury in 1974; she was not able financially to visit him following his accident. Joan learned of Charles's death a few days after Christmas, 1982; she did not attend his funeral and did not know where it was.

Petitions for letters of administration were filed by Helen and by Joan on January 21 and February 14, 1983, respectively. By stipulation the competing petitions were taken off calendar and a bank was appointed administrator. The bank administrator is not a party to this appeal.

Helen filed a petition for determination of entitlement to estate (former § 1080), claiming to be the surviving wife of Charles and seeking to have the probate court determine the persons entitled to share in the distribution of Charles's estate.

Appellants (Joan and the three daughters) filed a response to the petition and a statement of interest, asserting their respective claims to a share of Charles' estate, as his surviving spouse and children, pursuant to section 221. Kimberly Hafner, a child of Charles, also filed a statement of interest in the state.

Appellants claimed that they, together with Kimberly, should succeed to Charles' entire estate under section 221, and that even if Helen were found to be a good faith putative spouse the court should, under equitable principles, divide the estate among them.

Pursuant to stipulations without prejudice by Joan and Helen, acting through their attorneys and filed in the cause, Helen was awarded a family allowance of $1,800 per month from and after the date of Charles's death. Later, and commencing November 1, 1983, a family allowance of $1,800 per month was ordered payable to Helen and a family allowance of $400 per month was ordered payable to Joan, both until trial of the petition for determination of heirship. Such stipulations were expressly without prejudice to either Joan or Helen in their respective positions in the controversy and with the provision that all such allowances should be charged in full against such person's distributive share of the estate, and would not otherwise be reimbursed.

Helen's petition came on for a nonjury trial on January 12, 1984. Following the conclusion of the trial, the court rendered its statement of decision, on February 1, 1984, in which it concluded that Helen had a legal right to succeed to Charles's entire estate as his surviving spouse under Probate Code section 201. The court also concluded that Helen was Charles' good faith putative spouse and that it would be inequitable to deny her Charles' entire estate.

On February 27, 1984, the court made and entered its judgment determining entitlement to estate distribution and order for family allowance, in accordance with its statement of decision. Appellants and Kimberly Hafner filed timely notices of appeal from that judgment.

Contentions

Appellants contend that (1) the trial court erred in awarding the entire estate to the putative spouse, Helen, in the absence of an estoppel against the wife, Joan, and Charles' children; (2) the trial court improperly applied equities so as to disinherit the wife and children of the decedent in favor of his putative spouse; and (3) the trial court's decision as to the family allowance was erroneous as a matter of law, and was not supported by the evidence.

Discussion

The Findings

The trial court's statement of decision set forth certain findings upon which its decision and the judgment were based. Among these findings are:

1. Joan and Charles were legally married on June 12, 1954; neither Joan nor Charles ever obtained divorce, annulment, or other dissolution of their marriage; Joan never knew of Charles' marriage to Helen until his death; and three daughters were born of their marriage.

2. Helen and Charles participated in a marriage ceremony in Tijuana, Mexico, in 1962, and another marriage ceremony in Las Vegas, Nevada, on October 14, 1963; at all times to and including Charles' death Helen believed in good faith that her marriage with Charles was valid and that Charles had previously obtained a valid divorce from his wife; at all times on and after October 14, 1963, Helen was a good faith putative spouse of Charles; the marriage of Helen and Charles was invalid [void] in that the prior marriage of Joan and Charles was an existing marriage; Charles and Helen had one child.

3. The entire estate of Charles consists of the remainder of the proceeds of Charles' personal injury settlement.

4. Joan is not estopped by any act or omission on *her* part to assert the invalidity of the [void] marriage of Charles and Helen. (Italics in statement of decision.)

5. Joan, by reason of privity with Charles, would be estopped to challenge the validity of Charles's marriage to Helen because of Charles's misrepresentation to Helen regarding his divorce from Joan. The three daughters of Joan and Charles, Catherine, Lillian, and Dorothy would be estopped for the same reason.

The Status of the Parties

Joan Hafner was, at all times from June 12, 1954, until the death of Charles, the wife (spouse) of the decedent, Charles Hafner. The trial court properly found that Joan and Charles were married, each for the first time, on June 12, 1954, and that neither had ever taken any steps to dissolve their marriage.

Charles Hafner was, at all times from June 12, 1954, until his death, the husband (spouse) of Joan Hafner. We note that Charles was not the putative spouse of Helen. That status belongs only to the party or parties to a void marriage who the trial court finds to have believed in good faith in the validity of the void marriage. (Civ. Code § 4452). The trial court did not so find in this case.

Helen was the putative spouse (Civ. Code § 4452) of Charles from October 14, 1963, until his death. Catherine Kotsay, Lillian Mayorga and Dorothy Hafner, the three daughters of Joan and Charles, and Kimberly Hafner, the daughter of Helen and Charles, were all children of decedent Charles Hafner.

The Character of the Property

We must view the character of the property in Charles's intestate estate from the perspectives of the surviving wife and the surviving putative spouse.

(a) From the Perspective of Joan

As to Joan, the entire probate estate was the separate property of Charles, the decedent.

Charles was a married person, married to Joan, and was living separate from her at the time the money was received by him in 1975, pursuant to the settlement of his claim for damages for personal injury.

At the time Charles's personal injury settlement money was received, in 1975, Civil Code section 5126 provided, in pertinent part: "(a) All money ... received by a married person ... for damages for personal injuries ... pursuant to an agreement for the settlement or compromise of a claim for such damages is the separate property of the injured person if such money ... is received ...:... (2) While either spouse, if he or she is the injured person, is living separate from the other spouse."

Civil Code section 5126 is consonant with Civil Code section 5118 which provides, in pertinent part: "The earnings and accumulations of a spouse ... while separate and apart from the other spouse, are the separate property of the spouse."

(b) From the Perspective of Helen

As to Helen, the entire probate estate is quasi-marital property.

The trial court found that Helen was the putative spouse of Charles. At the time of the events of this case, former section 4452 of the Civil Code, a part of The Family Law Act enacted in 1969, provided, in pertinent part: "Whenever a determination is made that a marriage is void or voidable and the court finds that either party or both parties believed in good faith that the marriage was

valid, the court shall declare such party or parties to have the status of a putative spouse, and, if the division of property is in issue, shall divide, in accordance with Section 4800, that property acquired during the union which would have been community property or quasi-community property if the union had not been void or voidable. Such property shall be termed 'quasi-marital property.'"

Principles Applicable to Intestate Succession to Quasi-Marital Property of a Void Marriage

It is settled that in the case of a void or voidable marriage, as between a putative spouse and the other spouse, or as between the surviving putative spouse and the heirs of his or her decedent other than the decedent's surviving legal spouse, the putative spouse is entitled to share in the property accumulated by the partners during their void or voidable marriage. It is also settled that the share to which the putative spouse is entitled is the same share of the quasi-marital property as the spouse would receive as an actual and legal spouse if there had been a valid marriage, i.e., it shall be divided equally between the parties. (*Estate of Leslie, supra*., 37 Cal.3d 186, 194 [207 Cal. Rptr. 561, 689 P.2d 133]; Civ. Code §§ 4452, 4800 subd. (a)).

The proportionate contribution of each of the parties to the property acquired during the void or voidable union is immaterial in this state because it is divided as community property would be divided upon the dissolution of a valid marriage. (*Vallera v. Vallera* (1943) 21 Cal.2d 681, 683-684 [134 P.2d 761]).

These principles were established by numerous judicial decisions, and were made a part of our positive law by the enactment, in 1969, of Civil Code section 4452, a part of the Family Law Act, effective January 1, 1970. There is no reason to believe that the Legislature, by that enactment, intended to change those principles. (Cf. *Marvin v. Marvin* (1976) 18 Cal. 3d 660, 681 [134 Cal. Rptr. 815, 557 P.2d 106]).

The Trial Court Erred in Awarding the Entire Intestate Estate to the Putative Spouse

We have examined the cases cited by the trial court as authorities for its decision and find them wanting. None of the cited cases is authority for a decision on the facts and issues which were before the trial court in the case at bench.

The language used in an opinion is to be understood in the light of the facts and the issues then before the court, and cases are not authority for propositions not considered therein and actually adjudicated. (Code Civ. Proc., § 1911; *People v. Ceballos* (1974) 12 Cal.3d 470, 484 [116 Cal. Rptr. 233, 526 P.2d 241]; *McDowell & Craig v. City of Santa Fe Springs* (1960) 54 Cal. 2d 33, 38 [4 Cal. Rptr. 176, 351 P.2d 344; *Coats v. Coats* (1911) 160 Cal. 671, 679 [118 P. 441]; *Karlin v. Zalta* (1984) 154 Cal. App. 3d 953, 976 [201 Cal. Rptr. 379]; (and see authorities collected at 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 783, pp. 753-755.)

The principle issue before the court in this case is, as between the surviving wife and children of the decedent, on the one hand, and the decedent's good faith putative spouse under his bigamous marriage, on the other, who is entitled to succeed to his intestate estate?

The trial court found and concluded that under the circumstances of this case, Helen had a legal right to succeed to the entire estate under Probate Code section 201 as a surviving spouse. In

support of that conclusion, the court cited *Estate of Krone* (1948) 83 Cal. App.2d 766 at page 770 [189 P.2d 741], *Estate of Foy* (19520 109 Cal.App.2d 329 [240 P.2d 685], *Speedling v. Hobby* (D.C. Cal. 1955) 132 F. Supp. 833, and *Kunakoff v. Woods* (1958) 166 Cal.App.2d 59, 67 [332 P.2d 773]; and then sought to buttress its decision by also citing *Union Bank & Trust Co. v. Gordon* 91953) 116 Cal.app.2d 681, 689 [254 P.2d 644]; *Estate of McAfee* (1960) 182 Cal.App.2d 553, 556-557 [6 Cal. Rptr. 79]; *Estate of Long* (1961) 198 Cal. App. 2d 732, 738 [18 Cal. Rptr. 105]; *Estate of Goldberg* (1962) 203 Cal. App.2d 402 [21 Cal. Rptr. 626].

With one exception, none of the cases relied upon by the trial court presented a fact situation similar to the facts of the case at bench, and the facts of that one exception (*Union Bank & Trust Co. v. Gordon*), *supra.*, are so clearly and fairly distinguishable from the facts of this case that it is not precedent or authority supporting the trial court's decision.

Union Bank & Trust Co. v. Gordon, *supra.*, 116 Cal. App.2d 681, was in fact a contest between Sara, the first wife of Leo, the decedent, and Elsie, Leo's putative wife. The bank was special administrator of Leo's estate which consisted entirely of property which Leo and Elsie had accumulated during their 21-year putative marriage and was in the nature of community property. Sara and Leo had married in New York in 1921, and Sara obtained a decree of separate maintenance in 1927. In 1928 Leo moved to California, and in 1929 he sued Sara for divorce in Nevada and obtained a decree of divorce; Sara was served in that action. In 1929, Leo married Elsie and lived with her as husband and wife until he died in 1950. In 1936, Sara married Milton, and in 1949 she obtained an annulment of that 13-year marriage on the ground of fraud. In an action to quiet title to the property in Leo's estate, the court held that Sara was estopped "by every principle of law and equity from attacking the Nevada decree or asserting its invalidity" (*id.*, at p. 689) because she had acquiesced in and relied upon it when she married Milton. The court also found that Leo and Elsie had a good faith putative marriage, and that the property was acquired during that union. Leo had disposed of his interest in it by will.

In its decision in the case at bench, the trial court relied principally upon *Estate of Krone*, *supra,* 83 Cal. App.2d 755.

In *Estate of Krone*, *supra,* 83 Cal. App.2d 766, three adult children of decedent by a previous marriage filed a claim of interest in their father's estate declaring that the property of the estate was the separate property of the decedent in that his surviving wife was not his lawful wife because at the time of their marriage her divorce from her former husband had not become final, though a final decree was entered 10 months later. The surviving wife also filed a statement of claim of interest alleging that she and decedent had been married in April 1934, and lived together as husband and wife until his death in 1946, and alleging other facts which were set forth in the findings of the trial court.

"The court found that [decedent and his wife had] lived and cohabited as man and wife from the date of their attempted marriage until decedent's death; that at the time of such marriage neither had any property; that as a result of their joint efforts the parties accumulated personal property of the value of $16,412.51; that at the time of her marriage appellant believed in good faith and that she was the lawfully wedded wife of decedent, due to her ignorance of the law which required the lapse of one year after the entry of an interlocutory decree; that she had obtained an interlocutory decree from her former husband February 13, 1934, and that the final judgment therein was not entered until February 19, 1935, or 10 months after her purported marriage to decedent; that she had no information of any claim of illegality of her marriage to decedent until the filing by respondents of

their claim to an interest in the estate;...." (*Id.*, at p. 767.)

On appeal, the reviewing court implicitly found that the decedent and his surviving wife were partners to a putative marriage. The court stated that "[t]he term ['putative marriage'] is applied to a matrimonial union which has been solemnized in due form and celebrated in good faith by both parties but which by reason of some legal infirmity is either void or voidable. The essential basis of such marriage is the belief that the marriage is valid. (*Vallera v. Vallera* (1943) 21 Cal.2d 681, 684)" (*Estate of Krone*, *supra,* 83 Cal. App.2d at p. 768). The court then reviewed several cases dealing with the division of property acquired due to the joint efforts of the partners during a void or voidable marriage entered into in good faith, and concluded "that upon the dissolution of a putative marriage by decree of annulment or by death the [surviving spouse] is to take the same share to which [he or she] would have been entitled as a legal spouse." (*Id.*, at p. 769.)

In *Estate of Foy, supra*, 109 Cal. App.2d 329, the contesting parties were the putative spouse (wife) of the decedent and the decedent's son by a prior marriage. Decedent's marriage to his putative wife had been celebrated in the interlocutory period following his divorce from his prior wife. Decedent died intestate; his estate consisted entirely of property in the nature of community property. The court held that the putative wife/widow was entitled to take the entire estate under former Probate Code section 201. (*Id.*, at pp. 331-332.)

Speedling v. Hobby, supra., 132 F.Supp. 833, was a controversy between a surviving putative spouse (wife) and the Secretary of Health, Education and Welfare as to whether the putative wife/widow had the same status in taking intestate property as a widow would have and would therefore be eligible to receive "mother's insurance benefits" under the social security act. Citing *Krone*, *supra,* 83 Cal. App.2d at 766, the United States District Court held that a putative spouse was entitled to succeed to "community property" in California and therefore entitled to the social security benefit. The putative spouse and decedent had married during the interlocutory period following a divorce, and had lived together for 18 years until decedent's death.

Kunakoff v. Woods, *supra.,* 116 Cal. App.2d 59, was an action for wrongful death and the question was whether a putative spouse (wife) was an "heir" within the meaning of the statutory wrongful death law. (Code Civ. Proc., § 377). Citing *Krone*, *supra*., the court held that, in the case of intestacy, the putative spouse could succeed to her "husband's" estate under former Probate Code section 201, and that, therefore, she was an "heir" and as such was entitled to bring an action for wrongful death under Code of Civil Procedure section 377. *Estate of McAfee, supra*., 182 Cal. App.2d 553, is not authority for anything relating to this case. *McAfee* was an appeal from an order appointing an administrator of an estate. The reviewing court reversed the order, pointing out that the trial court had failed to make findings, or had made conflicting findings, on material issues. The court mentioned *Estate of Krone*, *supra,* 83 Cal. App.2d 766, in commenting that the trial court would have to find whether the decedent was legally married and, if not, whether there was a putative marriage. (*Id.*, at pp. 556-557.)

Estate of Long, supra., 198 Cal. App.2d 732, was an appeal from an order decreeing final distribution of an estate. It presented a contest between the half-siblings of the decedent and the decedent's surviving wife, Emma. The half-siblings questioned whether Emma was legally divorced from her former husband at the time of her marriage to decedent. Ruling that the presumption of validity of the second marriage had not been overcome, the court held that Emma and decedent were validly married, that except for a few items their property had been acquired through their joint efforts, and

that all of the property should be distributed to Emma except for decedent's separate property and that one-half of the separate property be distributed to her. In dictum, the court cited *Krone*, *supra.*, and stated that if there had been a putative marriage between Emma and decedent, *Krone* would have applied. (*Id.*, at p. 738.) The Court of Appeal affirmed.

Estate of Goldberg, supra., 203 Cal. App. 2d 402, was a contest between Edith, the second wife of Sam, and three of Sam's children by his first marriage, for succession to Sam's intestate estate. The reviewing court affirmed the trial court's ruling that Edith was Sam's good-faith putative spouse and, citing *Krone*, *supra.*, ruled that Edith was entitled to the same share of the "community property" as she would have received had she been his actual wife.

In sum, except for *Union Bank & Trust Co. v. Gordon*, *supra.,* 116 Cal.2d 681, which is clearly distinguishable from this case because of its facts compelling an estoppel, none of the cases relied upon by the trial court present the facts and issues with which we are concerned, i.e., the competing interests of a legal wife and a putative spouse. In *Krone, Foy*, and *Goldberg*, the controversy was between a putative spouse and the decedent's children by a prior marriage. In *Long*, the competing interests were a legal wife and the decedent's half siblings. *Speedling* stands only for the proposition that a putative wife may be eligible for certain social security benefits based upon her decedent "spouse's" earnings, and *Kunakoff* establishes only that a putative spouse can be a plaintiff in a wrongful death action. *McAfee* stands for nothing relevant to the case at bench.

Five additional cases cited by the trial court are of even lesser relevance to the case at bench than the cases reviewed above, and do not require discussion in this opinion. Thus, we find that the cases relied upon by the trial court do not support its decision and the judgment appealed from.

As Between the Surviving Spouse and Children of a Decedent and the Decedent's Putative Spouse, the Surviving Spouse and Children Are Entitled to Succeed to the Separate Property in an Intestate Decedent's Estate

We bear in mind that the issue presented in the case at bench is the proper resolution of the competing interests of the legal wife of a decedent, and his putative wife, for succession to his intestate estate.

In *Estate of Leslie, supra.*, 37 Cal.3d 186, our Supreme Court, in deciding a contest between the surviving putative spouse of an intestate decedent and the children of that decedent by a prior marriage, observed that "[t]here may be cases in which two or more surviving spouses each claim an intestate share of the decedent's separate property. However, that scenario is not before this court and need not be resolved at this time." (Id., at p. 197, fn. 11.) The case at bench is such a case, and we find substantial public policy and precedent to establish and protect the rights of the legal spouse, and the children of the legal community, in the estate of their spouse and parent.

We first note that marriage and the family are highly favored by the public policy of the State of California, as evidenced by statute and by countless decisions of our courts.

In decisions resolving competing claims of legal spouses of decedents and the decedents' putative spouses, as to the right to succeed to the decedent's estate, our courts have awarded one-half of the quasi-marital property to the putative spouse and the rest of the property to the decedent's legal heirs or as disposed of by decedent's will.

In *Estate of Ricci* (1962) 201 Cal.App.2d 146 [19 Cal. Rptr. 739], the contest was between Viola, the first and legal wife of Henry, and his putative spouse, Antoinetta. At issue was heirship to the property of decedent which had been acquired as the result of the joint efforts of decedent and Antoinetta during the years of their void marriage. Viola and Henry were married in Italy in 1907; that marriage was never terminated and remained in force until Henry's death in 1956. Meanwhile, Henry came to California. Antoinetta, in good faith, participated in a ceremonial marriage with Henry in 1919. Henry and Antoinetta lived together as husband and wife continuously thereafter until Henry died, intestate, in 1956. The trial court found, inter alia, that Antoinetta was the surviving putative wife of Henry, that the presumption of the validity of the second marriage had been overcome, and that there was no basis in the evidence for an estoppel against Viola. The trial court decreed that one-half of the property should be awarded to Viola and the other half to Antoinetta. The Court of Appeal concluded that the decision of the trial court was supported by the evidence and the law and affirmed the decree.

In its opinion, the reviewing court quoted extensively from Burby, Family Law for California Lawyers, at pages 359-360, setting forth his comments on the problems arising in the distribution of property accumulated in a void or voidable marriage. Professor Burby had written: '"Some difficulty is presented if conflicting claims are asserted by a legally recognized spouse and a putative spouse. Of course the claim of a putative spouse must be limited to property acquired during the continuance of that relationship. It seems obvious that one-half of the property in question belongs to the putative spouse. The other half belongs to the legal community (husband and legally recognized spouse) and should be distributed as any other community property under the same circumstances.

"A putative marriage was involved in *Estate of Krone*. The property in question was acquired during the continuance of this relationship and was claimed by the putative wife after the death of the husband. Her claim was resisted by issue of a former marriage. The court held that all of the property in question passed to the putative spouse by force of Probate Code section 201, which provides: "Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse ...." The conclusion reached by the court seems to be a proper one. The claimants (husband's issue by a former marriage) would be entitled to recover only on the theory that the property in question constituted a part of the husband's separate estate. But the property in question was not of that type."

"A much more difficult problem would be raised if a claim were asserted by a legally recognized spouse. That was the situation involved in *Union Bank & Trust Co. v. Gordon [supra.]* 116 Cal.App.2d 681. The deceased husband devised and bequeathed one-half of the property acquired during the putative marriage to his putative wife, Elsie, and one-half to his children. The legally recognized wife claimed a right to share in his estate. This claim was denied. [The trial court held, inter alia, that the legal wife] was estopped to deny the validity of the putative marriage because after her purported divorce (it was void because secured by the husband in Nevada and without having established a sufficient domicile) she purported to enter into another marriage. In the absence of the argument that she was estopped to deny the validity of the husband's putative marriage, there is no sound reason for excluding the legally recognized spouse from her share in acquisitions made by her husband during a putative marriage. It is true that one-half of the property belongs to the putative spouse but the other half belongs to the legally recognized community and there is no basis upon

which the legally recognized spouse can be excluded from a proper share therein." (Estate of Ricci, supra., 201 Cal. App. 2d at pp. 148-150). (*Estate of Ricci*, *supra*, 201 Cal. App.2d at pp. 148-150).

The *Ricci* court went on to say: "The case of *Union Bank & Trust Co. v. Gordon*, *supra.*, in which it was held that the legal wife was not entitled to share in the estate of her deceased husband was correctly decided on the basis of estoppel, but, as we analyze the authorities, the legal wife could not have been excluded without the estoppel. To do so could penalize an innocent wife who had been deserted by her husband, and would be contrary to section 201 of the Probate Code which states that 'Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; ...' Here there are no facts in the record justifying the application of the doctrine of estoppel." (*Id.*, at p. 150.)

"In conclusion we agree with the following statement of the learned trial judge in his memorandum opinion: 'Yet under the case law of this state it seems clear that each of the two widows absent of the other is entitled to the whole estate. Thus, in a contest between them it would seem both logical and equitable to divide the property equally, awarding the putative wife the half to which she [presumably] contributed and giving to the legal but deserted wife the half over which the husband normally has testamentary control.'" (*Id.*, at pp. 151-152.)

Sousa v. Freitas (1970) 10 Cal. App.3d 660 [89 Cal. Rptr. 485], was a contest between Maria, the legal wife of Manuel, and Catherine, his putative spouse, as to the property of Manuel's estate, all of which had been acquired by the joint efforts of Manuel and Catherine during their void marriage. Maria and Manuel Sousa were married in Portugal in 1905; they had one son. Manuel emigrated to California in 1908, changed his name to Freitas in 1915, and participated in a marriage ceremony with Catherine in 1919. Catherine believed in good faith that she was lawfully married to Manuel and lived with him as wife and husband until Manuel died in 1962. Manuel left a will devising and bequeathing all of his property to Catherine. The trial court awarded the estate one-half to Maria and one-half to Catherine. The Court of Appeal modified the judgment holding that Catherine was entitled to one-half, being her share as a good-faith putative spouse, and the other half belonged to the legal community of Manuel and Maria. Manuel had a right to dispose of one-half of that half by his will, but the other half, one-fourth of the gross estate, belonged to Maria. As authority, the Court of Appeal cited *Estate of Ricci* and quoted from Professor Burby's comments as set forth in *Ricci*, above.

Estate of Atherley (1975) 44 Cal.App.3d 758 [119 Cal. Rptr. 41, 81 A.L.R.3d 97], was a contest between Ruth, the legal wife of Harold, and his putative wife, Annette, for determination of heirship to Harold's intestate estate. Ruth and Harold were married in 1933 and had two children. Harold left Ruth in 1947 and joined Annette. Harold and Annette lived together from 1947 until Harold's death in 1969; they had no children. In 1961 Harold obtained an invalid divorce from Ruth in Mexico, and in 1962 Harold married Annette in Nevada. Ruth, Harold, and Annette were in touch with each other from time to time; they shared in common the knowledge of Harold's marriage with Ruth, his cohabitation with Annette, his invalid divorce from Ruth and his void marriage with Annette. Most of Harold's estate had been accumulated during the period of his cohabitation with Annette, both before and after the void Mexican divorce and Nevada marriage. The trial court held that Ruth was the surviving spouse and implicitly held that Annette was Harold's putative spouse. The estate was comprised of a mixture of real and personal property, including separate property and joint tenancy property. The Court of Appeal, applying the rule of *Sousa v. Freitas*, supra., 10 Cal. App.3d 660, held that Annette, the putative spouse, was entitled to one half of the total estate as well as those assets

which were hers by separate ownership or joint tenancy survivorship, and that the rest of the estate was property of the legal marriage and passed by intestate succession; that Ruth had an interest in that property as the surviving spouse but, since Ruth and Harold had two children, the extent of her interest depended on whether it was community or separate property. The judgment was reversed in part with directions.

3.2.2 Common Law Spouse

Unlike the putative spouse, persons in common law relationships know that they are not in traditional legal marriages. Nonetheless, if one of the persons in the relationship dies, the person who survives may expect to be considered a surviving spouse for intestacy purposes.

In re Estate of Duval, 777 N.W.2d 380 (S.D. 2010)

MEIERHENRY, Justice.

Nathalie Duval-Couetil and Orielle Duval-Georgiades (Daughters) appeal the circuit court's judgment that Karen Hargrave (Hargrave) was the common-law wife of their father, Paul A. Duval (Duval). Daughters contend the circuit court erred when it held that Duval and Hargrave entered into a common-law marriage under the laws of Mexico and Oklahoma. We agree and reverse the circuit court.

FACTS AND BACKGROUND

Duval and Hargrave began living together in Massachusetts in 1994. In 1995, Duval acquired a home in Custer, South Dakota. Hargrave moved from Massachusetts to Duval's home in South Dakota in 1996. In 1997, Duval and Hargrave began a yearly routine of spending the summer months in Custer and the winter months in Mexico. In 1998, Duval and Hargrave bought a home together in Nuevo Leon, Mexico, as husband and wife.

In 2005, Duval was assaulted while in Mexico and placed in an intensive care unit for his injuries. Hargrave lived with Duval at the hospital while he was being treated. She later took Duval to Oklahoma for rehabilitation at a hospital in the Tulsa area and eventually to Rochester, Minnesota, for medical treatment at Mayo Clinic. Duval and Hargrave subsequently returned to Oklahoma for a period of time; and then, resumed their annual routine of spending winters in Mexico and summers in Custer. Duval was killed as a result of a rock climbing accident on June 24, 2008, in Custer County, South Dakota.

Duval and Hargrave never formally married. Hargrave testified that she and Duval had discussed a formal wedding ceremony, but mutually decided against it. She said they did not think they needed to marry because they held themselves out as husband and wife and felt like they were married. The circuit court specifically found that over the course of Duval and Hargrave's relationship, Duval referred to Hargrave as his wife on an income tax return form, designated her as the beneficiary on his VA health benefits application, and executed a general power of attorney in her favor.

The circuit court ultimately concluded that Hargrave had established that she and Duval met the requirements for a common-law marriage under the laws of both Mexico and Oklahoma. As such, Hargrave was treated as Duval's surviving spouse for inheritance purposes in South Dakota. Daughters appeal. Daughters' main issue on appeal is whether the circuit court erroneously recognized Hargrave as Duval's surviving spouse entitling her to inherit from his estate. They claim (1) that the South Dakota domicile of Duval and Hargrave precluded them from entering into a common-law marriage in either Mexico or Oklahoma, (2) that South Dakota law does not recognize a Mexican concubinage as a marriage, and (3) that Hargrave and Duval had not entered into a common-law marriage under Oklahoma law.

ANALYSIS

The relevant facts are not in dispute. Because the issues involve questions of law, our review is de novo. *Sanford v. Sanford*, 2005 SD 34, 12, 694 N.W.2d 283, 287. The first issue centers on whether South Dakota will give effect to a common-law marriage established by South Dakota domiciliaries while living in a jurisdiction that recognizes common-law marriage.

Common-Law Marriage

Common-law marriages were statutorily abrogated in South Dakota in 1959 by an amendment to SDCL 25-1-29. Notwithstanding, Hargrave contends that South Dakota continues to recognize valid common-law marriages entered into in other jurisdictions. Hargrave relies on SDCL 19-8-1, which provides that "[e]very court of this state shall take judicial notice of the common law and statutes of every state, territory, and other jurisdiction of the United States." *Id.* In addition to taking judicial notice of the common-law of other states, the South Dakota Legislature specifically addressed the validity of marriages entered into in other jurisdictions in SDCL 25-1-38. This statute provides that "[a]ny marriage contracted outside the jurisdiction of this state ... which is valid by the laws of the jurisdiction in which such marriage was contracted, is valid in this state." *Id.* In view of these statutes, we conclude that a common-law marriage validly entered into in another jurisdiction will be recognized in South Dakota.

Daughters argue that the domicile of the couple controls their ability to enter into a common-law marriage. Daughters urge this Court to adopt a rule requiring parties to a common-law marriage to be domiciled in the state in which the marriage occurred. Thus, a couple domiciled in South Dakota could not be considered married merely by traveling to another state that recognizes common-law marriage and meeting that state's common-law marriage requirements. Daughters further allege that at all relevant times, Duval and Hargrave were domiciled in South Dakota, thereby precluding them from entering into a common-law marriage in either Mexico or Oklahoma. Daughters cite *Garcia v. Garcia* as authority for the domicile requirement. 25 S.D. 645, 127 N.W. 586 (1910). In *Garcia*, we said that a marriage "valid in the state where it was contracted, is to be regarded as valid in [South Dakota]." *Id.* at 589. We do not interpret *Garcia* as requiring domicile in the state in which the marriage occurred.

This is consistent with other jurisdictions that do not require parties to establish domicile in the state where the common-law marriage occurred. Minnesota courts have recognized common-law marriages entered into in other jurisdictions. In *Pesina v. Anderson*, the court held it would "recognize a common-law marriage if the couple takes up residence (but not necessarily domicile) in another state that allows common-law marriages." 1995 WL 387752 *2 (Minn. Ct. App. 1995) (quoting

Laikola v. Engineered Concrete, 277 N.W.2d 653, 658 (Minn. 1979)) (citations omitted). Similarly, in *Vandever v. Indus. Comm'n of Ariz.,* the court stated that it "disagree[d] with the legal reasoning of cases which hold that the policy of the domicile disfavoring common-law marriages should govern unless the couple has subsequently established residence in a state recognizing such marriages." 148 Ariz. 373, 714 P.2d 866, 870 (1985). The *Vandever* court went on to state, "[t]hese cases effectively read a requirement of residency into the law of all common-law marriage states which may or may not exist." *Id. See Grant v. Superior Court* in and for County of Pima, 27 Ariz. App. 427, 555 P.2d 895, 897 (1976) ("Although Arizona does not authorize common law marriage, it will accord to such a marriage entered into in another state the same legal significances as if the marriage were effectively contracted in Arizona."). Mississippi has also recognized that "[t]he [domicile requirement] argument ignores the basic right of all persons to choose their place of marriage. As long as they follow the requirements of the law of the state of celebration, the marriage is valid in most jurisdictions." *George v. George*, 389 So.2d 1389, 1390 (Miss. 1980). Likewise, Maryland "has continuously held that a common-law marriage, valid where contracted, is recognized in [Maryland]." *Goldin v. Goldin*, 48 Md.App. 154, 426 A.2d 410, 412 (Md. Ct. Spec. App. 1981).

In addition to *Garcia*, the plain meaning of SDCL 25-1-38 does not require domicile in the foreign jurisdiction in order for the marriage to be considered valid in South Dakota. Consequently, we hold that South Dakota does not require domicile in the foreign jurisdiction before recognizing that jurisdiction's common-law marriage scheme. All that is necessary for a marriage from another jurisdiction to be recognized in South Dakota is for the marriage to be valid under the law of that jurisdiction. *See* SDCL 25-1-38. Thus, the question in this case is whether Duval and Hargrave would be considered validly married under the laws of either Nuevo Leon, Mexico, or Oklahoma.

Concubinage in Mexico

The parties agree that Nuevo Leon, Mexico, has no common-law on which a common-law marriage could be established. *See In the Common Law of Mexican Law in Texas Courts,* 26 Hous. J. Int'l. L. 119, 151-56 (2003)(citing *Nevarez v. Bailon*, 287 S.W.2d 521, 523 (Tex. Civ. App. 1956)). Nuevo Leon does, however, have a law that gives certain rights to persons who have entered into a concubinage. Hargrave provided the state law of Nuevo Leon, which defines a concubinage as:

> [T]he union of a man and woman, free from formal matrimony, who for more than five years make a marital life without being united in a formal matrimony unto the other as long as there is no legal impediment to their contracting it. The concubine's gender union can have rights and obligations in reciprocal form, of support and inheritance, independently of all others recognized by this code or other laws.

Compilacion Legislativa del Estado de Nuevo Leon, p 50, Book I of Persons, Title V of Matrimony, Ch 11 of Concubinage, Art 291. The circuit court concluded that concubinages were to be given the same legal effect as common-law marriages validly entered into in the United States. Daughters argue, however, that a concubinage is not the legal equivalent of a common-law marriage.

Other courts that have addressed this issue have declined to equate a concubinage with a common-law marriage. In *Nevarez,* the court held a woman who cohabited with a man within the definition of a concubinage was not entitled to claim any of the man's property after his death as his common-law wife because common-law marriage was not recognized in that Mexican state. 287 S.W.2d at 523.

The court noted that under Mexican law a concubinage was a " 'legal union' but not a legal marriage." *Id.* Because the woman met the definition of a concubine, she was entitled to certain rights, but was not a common-law wife under the laws of Mexico. *Id.* Consequently, she was not entitled to the benefits given to a common-law wife in Texas "for such a relationship [was] non-existent in [Mexico]," and she would not "qualify in her home jurisdiction as a surviving wife." *Id.* at 525.

A California court similarly addressed the issue of whether "concubinage is equivalent to a Mexican common law marriage[.]" *Rosales,* 113 Cal.App. 4th at 1183, 7 Cal. Rptr.3d 13. In *Rosales*, a Mexican citizen claimed she was the surviving spouse, for purposes of a wrongful death claim, of a deceased American who was the father of her children. *Id.* The *Rosales* court, citing *Nevarez,* determined "that although concubinage is a legal relationship in Mexico, it is not a legal marriage." *Id.* at 1184, 7 Cal.Rptr. 3d 13. The *Rosales* court affirmed the trial court on this basis recognizing that "concubinage is not equivalent to a common law marriage because it does not confer on the parties all of the rights and duties of marriage." *Id.*

We are persuaded by the reasoning of *Nevarez* and *Rosales* and also conclude that a Mexican concubinage is not the legal equivalent of a common-law marriage in the United States. Consequently, the circuit court erred in concluding the concubinage between Duval and Hargrave, if one existed, had the same legal effect as a common-law marriage. Therefore, we reverse on this issue.

Common-Law Marriage in Oklahoma

The circuit court concluded that Duval and Hargrave entered into a valid common-law marriage while they lived in Oklahoma. The Oklahoma Court of Civil Appeals recently reaffirmed its recognition of common-law marriages and its requirements. The court stated:

> [T]his Court recognizes in accordance with established Oklahoma case law that, absent a marital impediment suffered by one of the parties to the common-law marriage, a common-law marriage occurs upon the happening of three events: a declaration by the parties of an intent to marry, cohabitation, and a holding out of themselves to the community of being husband and wife.

Brooks v. Sanders, 190 P.3d 357, 362 (Okla. Civ. App. 2008). In *Brooks*, the court referenced an earlier Oklahoma case that explained the requirements of Oklahoma's common-law marriage as follows:

> " 'To constitute a valid "common-law marriage," it is necessary that there should be an actual and mutual agreement to enter into a matrimonial relation, permanent and exclusive of all others, between parties capable in law of making such contract, consummated by their cohabitation as man and wife, or their mutual assumption openly of marital duties and obligations. A mere promise of future marriage, followed by illicit relations, is not, in itself, sufficient to constitute such marriage.' "

Id. at 358n. 2 (quoting *D.P. Greenwood Trucking Co. v. State Indus. Comm'n*, 271 P.2d 339, 342 (quoting *Cavanaugh v. Cavanaugh*, 275 P. 315)). Based on the language of these two cases, it appears that Oklahoma requires (1) a mutual agreement or declaration of intent to marry, (2) consummation by cohabitation, and (3) publicly holding themselves out as husband and wife. Oklahoma law requires

the party alleging a common-law marriage satisfy these elements by clear and convincing evidence. *Standefer v. Standefer*, 26 P.3d 104, 107 (citing *Maxfield v. Maxfield*, 258 P.2d 915, 921).

Thus, the first requirement Hargrave had to satisfy by clear and convincing evidence was that she and Duval had mutually agreed and/or declared their intent to marry while in Oklahoma. *Brooks*, 190 P.3d at 362. "Some evidence of consent to enter into a common-law marriage are cohabitation, actions consistent with the relationship of spouses, recognition by the community of the marital relationship, and declarations of the parties." *Standefer*, 26 P.3d at 107 (citing *Reaves v. Reaves*, 82 P. 490). The circuit court made no finding on mutual agreement or declaration of intent to marry, yet concluded that Duval and Hargrave entered into a common-law marriage. We have said a circuit court "is not required to 'enter a finding of fact on every fact represented, but only those findings of fact essential to support its conclusions.' " *In re S.K.*, 587 N.W.2d 740, 742 (quoting *Hanks v. Hanks*, 334 N.W.2d 856, 858-59 (S.D. 1983)) A finding on whether the couple mutually agreed or declared their intent to marry while in Oklahoma was essential to support the circuit court's conclusion that they entered into a common-law marriage. A review of the testimony may explain why the circuit court was unable to enter a finding of a mutual agreement or declaration of intent to enter into a marital relationship.

Hargrave testified that she and Duval entered into an "implicit agreement" to be married while they were in Oklahoma. She also testified that "nobody said, okay, so we should agree to be married and write it down and put the date on it." When asked on cross-examination if there was ever a point when she and Duval made an agreement to be married, Hargrave stated in the negative, and said the couple just decided "well, I guess we are [married]."

The Oklahoma Supreme Court addressed this issue under a similar situation and recognized the importance of establishing a clear intent to marry. *Standefer*, 26 P.3d at 107-08. In *Standefer*, the court stated the "evidence [wa]s clear and convincing that both parties assented to a marriage on Thanksgiving Day of 1988." Both the husband and wife in *Standefer* agreed that they were common-law spouses as a result of their mutual assent to marry on that day. Significantly, the couple was able to identify an instance where they mutually assented to a marriage. This fact stands in contrast to the present case where Hargrave's testimony established that no specific time existed when the couple mutually agreed or declared their intent to be married. To meet Oklahoma's requirements, their mutual agreement or declaration to marry would have to be more than an implicit agreement. This consent requirement is consistent with SDCL 25-1-38, which sets forth the requirement that a marriage must be "contracted" in the other jurisdiction before South Dakota will recognize the marriage as valid. SDCL 25-1-38 provides "[a]ny marriage *contracted* outside the jurisdiction of this state ... which is valid by the laws of the jurisdiction in which such marriage was *contracted,* is valid in this state." *Id.* (emphasis added). Failing to establish that mutual assent or a declaration to marry took place, Hargrave could not meet the first requirement for entering into a common-law marriage in Oklahoma as outlined by *Brooks* 190 P.3d at 362.

The absence of a finding of fact on this issue, coupled with Hargrave's testimony, leads to a conclusion that as a matter of law Hargrave could not prove by clear and convincing evidence that the couple entered into a valid common-law marriage while in Oklahoma. Thus, no legal basis existed to support the circuit court's conclusion that the parties entered into a common-law marriage in Oklahoma.

CONCLUSION

Based on the foregoing, we conclude that Duval and Hargrave were not validly married under either Mexico or Oklahoma law. Consequently, Hargrave cannot be considered a surviving spouse for purposes of inheriting from Duval's estate.

We reverse and remand to the circuit court for proceedings consistent with this opinion.

Notes, Problems, and Questions

1. Common law marriages are recognized in several states, including Colorado, Iowa, Kansas, Montana, New Hampshire, South Carolina, Texas, Utah, Alabama and Rhode Island. A few states like Ohio, Illinois, New Jersey and Florida have statutes specifically stating that common law marriages are not legally recognized. A person who meets the common law marriage requirements of State A and moves to State B, a state that does not recognize common law marriage, may still be considered to be a legal spouse by State B. *See Grant v. Superior Court In and For Pima County*, 555 P.2d 895 (Ariz. App. 1976); *Vaughn v. Hufnagel*, 473 S.W.2d 124 (Ky. 1971); *Estate of Booth v. Director, Division of Taxation*, 27 N.J. Tax. 600 (2014).

2. What are the pros and cons of permitting persons in common law marriages to inherit on par with surviving spouses of legal marriages? What factors should be used to decide whether or not a person is a common law spouse? Should the same standards apply to establish a common law marriage for spousal support and for the intestate spousal elective share? *See* Jennifer Thomas, *Common Law Marriage*, 22 J. Am. Acad. Matrim. Law 151 (2009); Sarah Primrose, *The Decline of Common Law Marriage and the Unrecognized Cultural Effect*, 34 Whittier L. Rev. 787 (Winter 2003).

3. If the common law marriage in *Duval* was legally recognized, how much of the estate would the surviving spouse take in a UPC jurisdiction? In your state if it has not adopted the UPC?

4. On October 8, 2015, Travis County Probate Judge Guy Herman recognized a common-law same sex marriage in Texas. The judge signed an order declaring that the eight year relationship between Stella Poswell and Sonemaly Phrasawath met the legal requirements of marriage without a license. Thus, Phrasawath was entitled to inherit Powell's intestate estate as a surviving spouse. The case arose when Powell died intestate and left no surviving children or parents. Powell's siblings argued that she died without a surviving spouse because, at the time of her death, she could not legally marry another woman under Texas law. Therefore, they claimed they were the next in line to inherit Powell's estate. The judge reasoned that Phrasawath was entitled to Powell's estate because Texas' same-sex marriage ban was in violation of the couple's constitutional rights. In essence, the judge applied the United States Supreme Court's decision invalidating bans on same-sex marriages retroactively. As of the writing of the book, the Texas Attorney General had vowed to appeal this decision. The main concern is that the decision may result in the opening of probate estates in Texas and the redistribution of intestate estates.

3.2.3 Same-Sex Spouse

Under the intestacy system, the word "spouse" referred to a person involved in a marital relationship with a person of the opposite sex. Consequently, persons in committed long-term relationships with persons of the same-sex could not inherit as surviving spouses. A recap of the history of same-sex marriages in the United States is unnecessary and beyond the scope of this section. Therefore, I will include only a brief history. The first major victory for advocates of same-sex marriage occurred in Hawaii. In 1983, the Hawaii Supreme Court in *Baehr v. Lewin,* 852 P.2d 44 (Haw. 1993) ruled that the state had to show a compelling reason for denying marriage licenses to same-sex couples. The state legislature reacted to the *Baer* decision by enacting a reciprocal beneficiary statute that gave some of the benefits of marriage to couples who were not legally permitted to marry. A defeat for those same-sex marriage advocates happened when President William J. Clinton signed the Defense of Marriage Act (DOMA) into law. According to the provisions of DOMA, the federal definition of marriage was limited to the union of one man and one woman. DOMA also stated that a state was not required to recognize any other sort of marriage even if that marriage was valid in another state. As a result of DOMA, same-sex couples could not take advantage of federal benefits like Social Security Survivors' benefits. A few years after the passage of DOMA the tide turned when the Vermont Supreme Court heard *Baker v. State*, 744 A.2d 864 (Vt. 1999) and held that the denial of a marriage license to a same-sex couple violated the "common benefits" clause of the state constitution. The Court ordered the state to extend the benefits of marriage to same-sex couples or issue marriage licenses to those couples. In response, the Vermont legislature enacted a civil union statute that gave same-sex couples the option to enter into civil unions that gave them all of the rights and responsibilities of marriage. In 2003, in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003) the Massachusetts Supreme Judicial Court held that because the state did not have a rational basis for refusing to grant a marriage license to a same-sex couple that denial violated the equal protection guarantee of the state's constitution. A divided United States Supreme Court struck down section three of DOMA in *U.S. v. Windsor*, 133 S. Ct. 2675 (2013). On June 26, 2015, the United States Supreme Court ruled in *Obergfell v. Hodges*, 135 S. Ct. 2584 (2015) that state bans on same-sex marriages were unconstitutional. The Court held that the refusal to grant marriage licenses to same-sex couples and the failure to recognize those marriages performed in other states violates the Due Process and the Equal Protection clauses of the Fourteenth Amendment of the United States Constitution. Consequently, the laws governing opposite sex spouses now apply to persons in same-sex marriages.

3.2.4 Other Issues Impacting the Status of Surviving Spouse

In the previous sections, we discussed cases involving persons who could have been denied the right to inherit as a surviving spouse because of the nature of their marital relationships. Those persons acted in the capacity of spouses and did not take any steps to indicate that they did not want to be a part of their marital relationships. The persons' ability to inherit as surviving spouses was based upon the fact that they functioned as spouses. Those "functional spouses" were treated like legal spouses, so that they could receive a portion of the intestate estates. The facts of the cases discussed in this section are totally different. The persons seeking to inherit engaged in activities that adversely impact their marital relationships. The plaintiff in the first case went to court to be legally separated from her husband. The second case deals with the issue of spousal abandonment. Let look at the tales of two ladies named Frances.

3.2.4.1 Legal Separation

Estate of Lahey, 76 Cal App. 4th 1056, 91 Cal. Rptr. 30 (Ct. App. Cal. 1st Dist. Div. 5, 1999)

JONES, P.J.

The question presented in this proceeding is whether a spouse who obtained a judgment of legal separation qualifies as a surviving spouse for purposes of intestate succession. We agree with the trial court that the decedent's widow here does not qualify as a surviving spouse. We affirm the judgment.

Factual and Procedural History

Frances Lahey and decedent Clarence G. Lahey were married in 1984; they separated in March 1995. In April 1995 Frances, acting in propria persona, petitioned for legal separation. She alleged that there were no known community debts or assets. She requested termination of the court's jurisdiction to award spousal support to Clarence, and she gave up her own right to receive spousal support. Clarence's default was eventually entered, and in July 1995 a judgment for legal separation was filed, declaring as follows: "There are no children or items of community property subject to the disposition by this Court. Spousal support for Respondent is terminated by default. The Court's jurisdiction to award spousal support to either party is terminated."

In December 1996 Clarence died intestate survived by Frances and by his daughter from a prior marriage, Dorothy Bianchi, who was appointed administrator of his estate. Apparently the main estate asset consists of decedent's separate property residence at 237 Glenwood Avenue in Daly City. Frances filed a creditor's claim seeking her intestate share of the estate as the surviving spouse, but the claim was rejected by the administrator. She then filed the instant action alleging entitlement to one-half of the decedent's estate as the surviving spouse.

After a court trial, the trial court concluded that Frances did not qualify by statute as the surviving spouse inasmuch as she had obtained a judgment resolving her marital property rights. Frances appeals.

Discussion

I. Judgment of Legal Separation

When a decedent dies intestate, the surviving spouse is entitled to a share of the community property belonging to the decedent and a share of the decedent's separate property. (Prob. Code, § 6401). "Surviving spouse" is defined by statute to exclude a person whose marriage to the decedent was dissolved or annulled and also to exclude "[a] person who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights." (Prob. Code, § 78, subd. (d).)

There is no question that Frances's marriage to the decedent had not been dissolved or annulled. A judgment of legal separation leaves the marriage bonds intact. (See Fam. Code § 2347; *Faught v. Faugh* (1973) 30 Cal. App.3d 875, 878 [106 Cal. Rptr. 751]; *Elam v. Elam* (1969) 2 Cal. App.3d 1013, 1019-1020 [83 Cal. Rptr. 275].) However, it is obvious that a surviving spouse for purposes of intestate succession is distinct from the legal wife or husband of the decedent. Probate Code section 78 excludes not only a spouse whose marital status has been terminated but also a spouse whose marital property rights have been terminated. The issue before us, then, is whether the judgment of legal separation constitutes an "order purporting to terminate all marital property rights" so as to disqualify Frances as the surviving spouse.

The concept of divisible divorce permits issues of marital status and financial responsibility to be litigated at separate times and in different forums. (*Faught v. Faught, supra,* 30 Cal. App.3d at p. 878). As Frances acknowledges, a judgment of legal separation (formerly a decree of separate maintenance) is designed to resolve the financial issues between the parties, including division of community assets and liabilities and determination of support obligations. (*See Krier v. Krier* (946) 28 Cal.2d 841 [172 P.2d 681]; *Faught v. Faught, supra,* 30 Cal. App.3d at p. 878). A judgment for legal separation, however, is not an interim order. It serves as a final adjudication of the parties' property rights and is conclusive and res judicata even in a subsequent proceeding to dissolve the marriage. (*Krier v. Krier, supra,* 28 Cal. 2d 841; *Faught v. Faught, supra,* 30 Cal. App.3d at p. 878).

Frances argues that her petition for legal separation sought only limited relief, and the judgment of legal separation cannot be read to exceed the relief prayed for. The Judicial Council form petition for legal separation includes several boxes to be checked to indicate, e.g., a request for confirmation of separate property assets and obligations, a request for spousal support, a request for termination of jurisdiction to award spousal support, and a request that property rights be determined. Frances did *not* check the box seeking a determination of property rights, nor did she check the box requesting confirmation of separate property. She checked only the box declaring that there were no community assets or liabilities and the box requesting termination of jurisdiction to award spousal support. Frances argues because she made no request in her petition that *all* property rights be determined, the judgment was not a determination of *all* her marital property rights.

We reject the argument. Under the statutory scheme, the court in a legal separation proceeding must divide the known community assets and must characterize the parties' liabilities as community or separate. (Fam. Code §§ 2550, 2551). The court may also make orders for spousal support. (Fam. Code §§ 4330). Here, Frances's petition declared that there was no community property to divide, and the judgment for legal separation said the same. The judgment also terminated the rights of both parties to spousal support. That determination of the marital property rights was final and conclusive and served to terminate Frances's community property rights. There were no other property rights that could have been determined.

Frances contends that nothing in the judgment for legal separation adjudicated the parties' separate property and therefore she retained her rights to succeed to the decedent's separate property residence. This contention, however, ignores the import of Probate Code section 78. That statute excludes from the definition of surviving spouse one whose *marital property* rights have been terminated. Nothing in the language or meaning of the statute requires in addition an express

termination of *inheritance* rights, for the obvious effect of the statute itself is to terminate the inheritance rights of such a spouse.

The judgment is affirmed.

Notes, Problems, and Questions

1. Why did Frances argue that she should have been permitted to inherit from Clarence's estate?

2. The Court admitted that Frances was still legally married to Clarence. Why did the Court refuse to recognize Frances as a surviving spouse?

3. Consider the following example. Floyd and Glenda were married for 25 years. After Floyd was diagnosed with cancer, the couple spent a lot of money on medical bills. Floyd and Glenda went to a local charity for assistance. The charity agreed to pay a portion of Floyd's medical expenses if his income fell below a certain amount. The woman who helped Glenda fill out the paperwork told Glenda that Floyd would qualify for assistance if he and Glenda were legally separated. Thus, Glenda filed for a legal separation. Two months after Glenda was granted a legal separation, Floyd died intestate. Floyd was survived by Glenda and two children from his previous marriage, Vivian and Leigh. Floyd's probate estate which consisted of real estate he purchased prior to his marriage to Glenda was worth $72,000. In a jurisdiction that follows the reasoning of the *Lahey* case would Glenda be eligible to inherit from Floyd's estate? If she is permitted to inherit, what portion of the estate would Glenda receive in a UPC jurisdiction? In the jurisdiction where you live if it has not adopted the UPC?

3.2.4.2 Abandonment

Estate of Joyner v. Joyner, 753 S.E.2d 192 (Ct. App. N.C. 2014) (Constructive Abandonment)

Opinion

HUNTER, Judge.

Plaintiffs appeal from an order entered 17 October 2012 in Lenoir County Superior Court by Judge Phyllis M. Gorham granting defendants' motion for summary judgment. On appeal, plaintiffs argue there was a genuine issue of material fact with respect to whether Warren Joyner ("Warren") constructively abandoned his wife, Frances Joyner ("Frances"). After careful review, we affirm the trial court's order granting summary judgment.

Background

All plaintiffs in this case are surviving siblings of Frances. Frances died intestate on 17 January 2011 without children and with her husband, Warren, as her only potential heir. Warren died intestate on 6 February 2011, survived only by his mother. Plaintiffs brought this action against the co-administrators of Warren's estate, Jessie Mae Britt and Linwood Joyner, and Warren's mother, Jessie

Bell Joyner (collectively "defendants"), seeking a declaratory judgment to bar Warren and his heirs from inheriting from Frances on the ground that Warren actually or constructively abandoned Frances.

Warren and Frances were married for twenty-six years and lived in the same home until Frances's death. They were both disabled; Warren had kidney failure, and Frances was a double amputee with heart failure. Warren was unemployed for the last twenty years of the marriage.

The parties contest the level of care Warren provided for Frances. Plaintiffs claimed in depositions that: (1) Warren would not take Frances to doctors' visits without compensation for his time and gas; (2) the couple ceased conjugal contact and Warren openly engaged in homosexual relationships; (3) Warren moved into a separate bedroom in the home he shared with Frances; and (4) Warren refused to provide food or financial support for Frances for at least the last six years of their marriage. Defendants testified at the summary judgment hearing that Warren was the primary caretaker of Frances and was a loving, caring husband, and that Warren helped Frances around the house, cooked meals for her, checked her blood sugar, and provided her medication.

At the conclusion of deposition presentation and testimony at the hearing on defendants' motion for summary judgment, the trial court granted summary judgment for defendants. Plaintiffs timely appealed.

Discussion

I. Whether Summary Judgment was Proper

Plaintiffs' sole argument on appeal is that the trial court erred in granting defendants' motion for summary judgment. After careful review, we affirm.

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)). When reviewing a grant of summary judgment "evidence presented by the parties must be viewed in the light most favorable to the non-movant." *Brue—Terminix Co., v. Zurich Ins. Co*., 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). "Summary judgment is appropriate where the movant proves that an essential element of the claim is nonexistent or that the opposing party cannot produce evidence to support an essential element of his claim." *Holloway v. Wachovia Bank & Trust Co*., N.A., 339 N.C. 338, 351, 452 S.E.2d 233, 240 (1994) (citation omitted).

N.C. Gen. Stat. § 31A—1(a)(3) (2011) states that "[a] spouse who willfully and without just cause abandons and refuses to live with the other spouse *and is not living with the other spouse at the time of such spouse's death* " loses intestate succession rights in the other spouse. N.C. Gen. Stat. § 31A—1(a)(3), (b)(1)(2011) (emphasis added). Plaintiffs cite *Powell v. Powell*, 25 N.C. App. 695, 699, 214 S.E.2d 808, 811 (1975), and *Meares v. Jernigan*, 138 N.C. App. 318, 321, 530 S.E.2d 883, 885-86 (2000), for the proposition that a husband or wife could constructively abandon his or her spouse under section 31A-1 without leaving the marital home. They argue that Warren's failure to provide monetary and emotional support amounted to constructive abandonment and that he should be divested of his right to intestate succession as a result. However, plaintiffs overlook the fact that *Powell* analyzes

abandonment under N.C. Gen. Stat. § 50-16.2(4), which was repealed in 1995, and therefore is no longer controlling. Act of Oct. 1, 1995, ch. 319, sec. 1, 1995 N.C. Sess. 641. *Meares* analyzes section 31A1(a)(3) and quotes language from *Powell* to support the proposition that a husband or wife could constructively abandon his or her spouse without leaving the marital home, but the decision stops short of reaching all elements in section 31A-1. *Meares*, 138 N.C. App. At 321-22, 530 S.E.2d at 886. Our Supreme Court has made clear that abandonment alone is insufficient to deprive a spouse of intestate succession rights under section 31A-1. In *Locust v. Pitt Cnty. Mem'l Hosp., Inc.,* 358 N.C. 113, 118, 591 S.E.2d 543, 546 (2004), the Supreme Court held that "not living with the other spouse at the time of such spouse's death" is a necessary element of section 31A-1.

> Notably, under the wording of the statute, intent to abandon and abandonment even when combined, are insufficient to preclude an abandoning spouse from intestate succession. The abandoning spouse must also "not [be] living with the other spouse at the time of such spouse's death." N.C.G.S. § 31A-1. This Court has held that a spouse may abandon the other spouse without physically leaving the home, thus likely prompting the legislature to include the *additional requirement* in N.C.G.S. § 31A-1. Because *absence from the marital home is an element under the statute,* a determination of spousal preclusion from intestate succession cannot be made until the death of the other spouse.

Id. (emphasis added) (citations omitted). Because it is undisputed that Warren was not "absen[t] from the marital home" at the time of Frances's death, but was merely sleeping in a separate bedroom, plaintiffs failed to meet this required element of section N.C.G.S. § 31A-1. *See id.* Accordingly, we affirm the trial court's entry of summary judgment in defendants' favor. *See Holloway,* 339 N.C. at 351, 452 S.E.2d at 240 ("Summary judgment is appropriate where the movant proves that an essential element of the claim is nonexistent or that the opposing party cannot produce evidence to support an essential element of his claim.").

As plaintiffs failed to cite *Locust* in their brief, we remind counsel of the duty of candor toward the tribunal, which requires disclosure of known, controlling, and directly adverse authority. *See* N.C. Rev. R. Prof. Conduct 3.3(a), (a)(2) (2012) ("A lawyer shall not knowingly: ... fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel[.]"). While the duty to disclose *Locust* rests upon plaintiffs, defendants also failed to cite the case. We remind counsel of the need to be diligent in finding controlling authority.

Conclusion

Because plaintiffs failed to establish an element of their claim, we affirm the trial court's order granting defendants' motion for summary judgment.

AFFIRMED.

Notes, Problems, and Questions

1. If the facts in the *Joyner* case are true as set forth by the plaintiffs, should Warren be permitted to inherit from Frances' estate? If we punish a person for being a bad spouse, where do we draw the line?

2. What was the constructive abandonment argument made in the *Joyner* case?

3. What is required to prove abandonment? Is abandonment enough to keep Warren from inheriting from Frances' estate?

4. Consider the following case. In 2010, Will and Delores were married in Maine. The couple did not have any children. In 2013, Will and Delores had a terrible argument when she discovered that he had quit his job to become an artist. Delores moved out of the house. She left a note stating, "When you come to your senses, I'll come back home." After Delores left, Will could not afford the mortgage payments, so he lost the house to foreclosure. Will moved to Alaska to live with his brother. Five years later, Will sold his first painting for two million dollars. When Delores found out about Will's success, she contacted him and told him that she wanted to again be a couple. Will was so happy that he booked a flight back to Maine. Unfortunately, Will's plane hit a mountain and he was one of the fatalities. Will died intestate survived by Delores, his sister, Grace, and his sister Marla. Will's grandmother, Sharon, also survived him. At the time of his death, Will's estate was worth 1.2 million dollars. What portion, if any, of Will's intestate estate should Delores receive?

3.3 What does it mean to survive?

In order for a person to be considered to be a surviving spouse, he or she must survive the decedent. The easy cases are the ones that involve situations where a person dies before his or her spouse. The surviving spouse has the legal right to a share of the decedent's estate. Nonetheless, there are times when it is difficult to determine the identity of the surviving spouse. For example, if the spouses died in a common accident, it may be impossible to definitively declare one as the surviving spouse. This sad state of affairs has started to happen with some regularity. A high profile case involved John F. Kennedy, Jr. and his wife Carolyn. The couple was killed when their plane crashed into the ocean. Kennedy and his wife stayed in the oceans for several days. When their bodies were found the medical examiner concluded that they died instantly. However, he could not say who died first. The simultaneous death problem impacts the distribution of both intestate and testate estates.

Legislatures and courts made several attempts to solve the simultaneous death problem. For instance, the provisions of the original Uniform Simultaneous Death Act (USDA) of 1940 state that if "there is no sufficient evidence" of the order of deaths, each person is considered to have died before the other person, so neither inherits from the other. The legislatures adopting the USDA did not give clear guidance on what was necessary to fulfill the sufficient evidence requirement. Thus, courts were forced to evaluate the evidence on a case-by-case basis. That approach led to inconsistent results.

There are some clear rules governing non-probate property where simultaneous death cannot be definitely proven. Consider the following two examples. Ernie and Bert who owned a house as joint tenants or community property owners died at the same time. Ernie was survived by his mother, Peggy, and Bert was survived by his sister, Bernice. The court distributes Ernie's one-half interest in the house to Peggy and the Bert's one half interest in the house to Bernice. One-half of the property is distributed as if Ernie survived and one half is distributed as if Bert survived. When an insured and the third-party beneficiary of a life insurance policy die simultaneously, the proceeds are distributed as if the insured survived the beneficiary.

3.3.1 Common Law

Under common law, the general rule was that, if several persons died in a common disaster, there was no presumption as to survivorship. The person asserting survivorship had the burden of proving that fact. The burden of proof was a preponderance of the evidence. It was not presumed at common law that one person survived another, or that the persons died simultaneously, even in the absence of proof that one survived the other. Therefore, the common law rule governing the devolution of property of persons who perish in common disasters when there was no evidence as to which died first was that the courts disposed of their property rights as though death had occurred to all the persons at the same time. These common law rules were supplanted by the Uniform Simultaneous Death Act.

3.3.2 Original Uniform Simultaneous Death Act

Matter of Bausch's Estate, 100 Misc.2d 817 (N.Y. 1979)

F. WARREN TRAVERS, Surrogate.

The above named decedents were husband and wife and both died, apparently almost simultaneously, as the result of injuries sustained in an automobile accident on March 5, 1979. It is now necessary to establish the order of their deaths, in order that distribution of the assets of the estates can be made.

In view of the circumstances of decedents' deaths, it is necessary to consider whether the New York State Uniform Simultaneous Death Act (EPTL 2-1.6 governs the distribution of the estates' assets. The statute provides that "where the title to property or the devolution thereof depends upon priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously, the property of each person shall be disposed of as if he had survived . . ." EPTL 2-1.6(a).

Where two persons die in a common disaster, there is no presumption as to which person survived, and there is no presumption that the deaths were simultaneous. The burden of proof is on the party claiming survivorship to establish it as a fact or by evidence, which fairly warrants an inference of survivorship. (*Matter of Spatafora*, 35 Misc.2d 128, 229 N.Y.S.2d 601).

Petitioner claims that Paula E. Bausch survived her husband and that his estate should be distributed accordingly. Petitioner has submitted the decedents' death certificates which have been certified by the County Coroner. The certificates recite that Paula E. Bausch died at 8:00 a. m., and her husband died at 7:55 a. m. The certificates made by the County Coroner state in part: "On the basis of examination and/or investigation, in my opinion death occurred at the time . . . stated."

Public Health Law, Section 4103(3), provides in part that "a . . . death certificate . . . shall be prima facie evidence in all courts and places of the facts therein stated." There has been some question as to whether a death certificate is admissible to prove any facts other than the fact of death. (*See* Fisch

on New York Evidence, Section 956, and *Matter of Esther T.,* 86 Misc.2d 452, 382 N.Y.S.2d 916, , and cases cited therein.)

This court is persuaded by the reasoning of Surrogate Bennet as expressed In *Matter of Esther T.*, (*supra*) and holds that the death certificates offered by petitioner are admissible in evidence together with the collateral facts stated therein and not solely for the proof of death.

The court is satisfied that EPTL 2-1.6 does not apply in the case now before the court.

The death certificates are sufficient proof of the fact that John A. Bausch predeceased his wife by approximately five minutes.

The estate of John A. Bausch shall be distributed as though his wife survived, and Paul E. Bausch's estate shall be distributed as though her husband predeceased her.

Problems

1. Based upon the reasoning in the *Bausch* case, is it clear how much evidence is necessary to reach the "sufficient evidence" requirement? Does this case provide guidance for attorneys in the jurisdiction? The sufficient evidence only has to prove that one person survived for an instant. In the *Bausch* case, the wife only survived her husband for five minutes. That small amount of time changed the distribution of the estates and potentially disadvantaged the husband's heirs.

2. If order of death can be determined, the USDA is not applicable. The statute also does not apply if the decedent leaves a will containing survival language. In cases where the statute is applied, the statute results in an even distribution of the parties' estate. Thus, if H and W die in a common disaster and it is not possible to prove who died first, half of the estate goes through H and half goes through W.

3. Collin and Raven, husband and wife, were killed when their boat exploded. Their bodies were not found until ten days later. Doctors concluded that they died from hypothermia when they were thrown from the boat into the frigid lake. A Coast Guard officer testified that, when they were discovered, Collin was wearing a t-shirt and a pair of biker shorts and Raven was wearing a long-sleeved shirt and a pair of jeans. Is that sufficient evidence to conclude that Raven survived Collin for an instant of time?

4. On April 12, 2000, Parker and Anita, husband and wife, were hiking. Parker tripped and fell down a small hill. While trying to save Parker, Anita slipped and hit her head. Two hikers found the couple and they were rushed to a nearby hospital. When Parker and Anita arrived at the emergency room, they were both in serious condition. At the hospital, Anita's brain started swelling and she was rushed to the operating room. Due to an existing condition, Parker started having heart problems and he was also taken to the operating room. Following the operations, Parker and Anita were both placed on life support. A review of his medical records revealed that Parker had a living will stating that he did not want to remain on life support for more than two days. Anita's medical records showed that she had an advanced health care directive that gave her sister, Trina, the right to make her medical decisions. Thus, the hospital decided to keep Anita on life support until Trina could arrive. Trina was out of the country, so she did not get to the hospital until April 16, 2000. Parker

was taken off of life support on April 14, 2000 and pronounced dead. Trina gave the hospital permission to remove Anita from last support on April 17, 2000. Was there sufficient evidence that Anita survived Parker?

3.3.3 UPC and Modern USDA (120 Hour Rule)

It was basically impossible to determine if one person survived another person by an instant. In addition, as the situation in problem 3 indicates, the order of death may sometimes be controlled by doctors or other circumstances. In the interests of judicial economy and judicial consistency, states legislatures adopted a bright line survival rule as a default approach. That approach was codified in both the UPC and the USDA. It should be noted that the 120 hour rule does not really solve the life support situation discussed in problem 3. In acknowledgment of that fact, most probate attorneys include survival clauses in wills that mandate that the person survives the decedent by 30 or 60 days.

Uniform Probate Act § 2-104. Requirement that Heir Survive Decedent for 120 Hours.

An individual who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent for purposes of homestead allowance, exempt property, and intestate succession, and the decedent's heirs are determined accordingly. If it is not established by clear and convincing evidence that an individual who would otherwise be an heir survived the decedent by 120 hours, it is deemed that the individual failed to survive for the required period. This section is not to be applied if its application would result in a taking of intestate estate by the state under Section 2-105.

Stephens v. Beard, 428 S.W.3d 385 (Ct. App. Tex. 2014)

HOYLE, Justice.

Elaine Stephens, independent executrix of the estate of Vencie Beard and of the estate of Melba Beard, appeals from declaratory judgments construing Vencie Beard's will and Melba Beard's will. In two issues, Stephens asserts that the trial court erred in determining that Vencie and his wife, Melba, died in a common disaster and that the Simultaneous Death Act applies to this case. We affirm.

BACKGROUND

Vencie Beard shot and killed his wife, Melba, on April 16, 2011. The death certificate states that the time of her death was 8:59 p.m. Vencie died that same night at 10:55 p.m. from a self-inflicted gunshot wound.

Paragraph 2.02 of each of the decedents' wills provided for specific cash bequests to nine named individuals if both Vencie and Melba died in a common disaster or under circumstances making it impossible to determine which died first. Paragraph 2.03 of each will provided that if the spouse did not survive the testator by ninety days, Janet Lea Hopkins would receive a portion of a tract of land. Paragraph 2.04 of each will provided that if the spouse did not survive the testator by ninety days, Matthew C. Hopkins would receive the remaining portion of that tract of land. In paragraph 2.05 of

each will, Vencie and Melba gave "the rest and residue" of their estates to their respective spouses. That paragraph further provided that if the spouse did not survive the testator by ninety days, Beverly Kaye Gilmore and Janet Lea Hopkins would receive the residuary estate.

Stephens sought a declaration as to whether Vencie and Melba died in a common disaster or under circumstances making it impossible to determine which of them died first. She also wanted a determination of the amounts of the cash bequests the nine individuals were to receive under the wills. She named as defendants the beneficiaries under the wills, Brandon Scott Beard, Brian Jake Gilmore, Philip Chase Johnson, Megan Johnson, Jeremy Hopkins, Lindsey Beard, Pamela Johnson, Roland Scott Beard, Janet Lea Hopkins, individually and as trustee for Matthew C. Hopkins, and Beverly Kaye Gilmore.

The court determined that Vencie and Melba died in a common disaster and that, based on the language in their wills, they intended to incorporate the statutory presumption of the Simultaneous Death Act. Therefore, the court determined that paragraph 2.02 should apply to the distribution of each estate. Further, the court declared that "the beneficiaries are to be awarded the amount provided from each estate, to the extent the resources of the estate permit."

COMMON DISASTER

In her first issue, Stephens argues that, because there is evidence of who died first, Melba and Vencie did not die in a common disaster or under circumstances making it impossible to determine who died first. Therefore, she argues, the trial court erred in concluding that they died in a common disaster and the cash bequests provided for in paragraph 2.02 of each will were not effective.

Applicable Law

An executrix of a decedent's estate may have a declaration of rights in respect to the estate to determine questions of construction of the will. TEX. CIV. PRAC. & REM. CODE ANN. § 37.005(3)(West 2008). When reviewing the trial court's legal conclusions, we evaluate them independently and thus review the legal conclusions drawn from the facts solely to determine their correctness. *Ashcraft v. Lookadoo*, 952 S.W.2d 907, 910 (Tex. App.-Dallas 1997, pet. denied) (en banc).

Analysis

Paragraph 2.02 provided for cash bequests to certain defendants if both Vencie and Melba died in a common disaster or under circumstances making it impossible to determine which died first. The evidence shows that Vencie and Melba did not die at the same time and it is possible to determine that Melba died first. Stephens asserts the trial court's conclusion of law that the Beards died in a common disaster was erroneous.

The term "common disaster" has been defined to mean "[a]n event that causes two or more persons with related property interests ... to die at very nearly the same time, with no way of determining who died first." BLACK'S LAW DICTIONARY 292 (8th ed. 2007). Ordinarily, cases discussing common disasters involve accidents or natural disasters. *See White v. Taylor,* 155 Tex. 392, 386 S.W.2d 925, 925 (1956) (automobile accident); *Sherman v. Roe*, 153 Tex. 1, 262 S.W.2d 393, 395 (1953) (airplane accident); *Males v. Sovereing Camp Woodmen of the World*, Tex. Civ. App. 184, 70 S.W. 108, 108 (Fort Worth 1902, no writ) (storm). The word "common" can mean shared by two or more.

MERRIAM–WEBSTER'S COLLEGIATE DICTIONARY 250 (11th ed. 2011). A disaster has been defined as a calamitous event or great misfortune. *Id.* at 355. Generally, it can be said that a common disaster is any situation where the death of two or more people arose out of the same set of circumstances.

The record shows that Melba was found dead at her home. She died of a gunshot wound inflicted by Vencie who then shot himself. He did not die immediately and was transported to a hospital where he died about two hours later. The shots were fired in one episode, which is a common disaster in spite of the fact that Vencie did not successfully kill himself immediately. Accordingly, the trial court's conclusion of law that Vencie and Melba died in a common disaster is not erroneous. *See Ashcraft*, 952 S.W.2d at 910. We overrule Stephens's first issue.

CONSTRUCTION OF THE WILLS

In her second issue, Stephens asserts that the Simultaneous Death Act does not apply in this case. She further contends that even if it applied, the statute would not govern due to the exception in the statute, which states that if a will provides for a disposition of property that is different from the provisions of the statute, the statute will not apply. She asserts that the wills' language providing for a disposition of property in the event the couple died in a common disaster or under circumstances making it impossible to determine who died first satisfies the exception. She further argues that paragraphs 2.03, 2.04, and 2.05 provided for a different disposition of the property than the one set forth in the statute. Therefore, she asserts, the wills did not incorporate the Simultaneous Death Act.

Applicable Law

The cardinal rule for construing a will requires that the testator's intent be ascertained by looking to the provisions of the instrument as a whole, as set forth within the four corners of the instrument. *Perfect Union Lodge No. 10 v. Interfirst Bank of San Antonio, N.A.,* 748 S.W.2d 218, 220 (Tex. 1988). The will should be construed so as to give effect to every part of it, if the language is reasonably susceptible of that construction. *Id.* Terms are to be given their plain, ordinary, and generally accepted meanings unless the instrument itself shows them to have been used in a technical or different sense. *Steger v. Muenster Drilling Co.*, 134 S.W.3d 359, 372 (Tex. App.-Fort Worth 200, pet. denied). If possible, all parts of the will must be harmonized, and every sentence, clause, and word must be considered in ascertaining the testator's intent. *Id.*

The Simultaneous Death Act provides that a person who dies less than 120 hours after the time the decedent dies is deemed to have predeceased him and therefore cannot be a beneficiary. *See generally* Act of May 17, 1979, 66th Leg., ch. 713, § 6, 1979 Tex. Gen. Laws 1740, 1743–44 (amended 1993) (current version at TEX. EST. CODE §§ 121.001–.153 (West Pamph. 2013)). However, a decedent's will can provide for a disposition of property that is different from the provisions of the Simultaneous Death Act and the statute will not apply. Act of May 17, 1979, 66th Leg., ch. 713, § 6, 1979 Tex. Gen. Laws 1740, 1744 (current version at TEX. EST. CODEE § 121.001 (West Pamph. 2013)).

ANALYSIS

In paragraphs 2.03, 2.04, and 2.05 of each will, the testators specified that the beneficiaries' receipt of property was contingent upon the decedent's spouse failing to survive the decedent by ninety

days. These provisions constitute a disposition of property that is different from the statutory requirement of survival for only 120 hours after the testator dies. Thus, the statute does not apply to those provisions. *Id.* However, paragraph 2.02 in each will provides for certain bequests if both Vencie and Melba "die in a common disaster or under circumstances making it impossible to determine which of [them] died first." This language indicates that their intent was to avoid the bequest going to one of them if they died simultaneously or almost simultaneously. This is also the intent of the statute, which prevents property from passing into the estate of a second person who is already deceased only to be distributed immediately from that estate. *See Glover v. Davis,* 366 S.W.2d 227, 231 (Tex.1963).The Beards articulated their intent to provide for a disposition of some of their property that was different from provisions of the statute but worded paragraph 2.02 in a manner that is consistent with the Simultaneous Death Act. They could have used the same language in paragraph 2.02 as they did in the other paragraphs if they wanted the same result. The trial court did not err in its construction of the wills. We overrule Stephens's second issue.

DISPOSITION

The trial court properly concluded that the Beards died in a common disaster and the Simultaneous Death Act applies to paragraph 2.02 of each will.

We affirm the trial court's judgment in each case.

3.3.4 Brain Death vs. Hearth Death

It is difficult to determine survival without a clear meaning of death. As the next case indicates, the law often grapples with the concept of legal death.

In re Haymer, 450 N.E.2d 940 (Ill. App. 3d 1983)

RIZZI, Justice:

On October 28, 1982, Loyola University of Chicago, which owns and operates Foster G. McGaw Hospital in Cook County, Illinois, sought a declaratory judgment that its patient, 7-month-old Alex B. Haymer, was legally dead, thereby permitting the hospital to remove Alex B. Haymer from a mechanical ventilation system. The child's parents opposed the removal of the mechanical device, as did the child's guardian ad litem. Following an expedited hearing, the trial court entered an order on November 4, 1982, which provided that the legal death of Alex B. Haymer occurred on October 23, 1982, the date when doctors determined that the child had suffered the total and irreversible cessation of all functions of the entire brain. The order also authorized Foster G. McGaw Hospital, Loyola University Medical Center, to discontinue the mechanical ventilation system connected to the body of Alex B. Haymer. The trial court stayed the force and effect of its order for seven days to give the parties an opportunity to have appellate review of the order before the mechanical ventilation system was removed. The State of Illinois was permitted to intervene on the ground that it had an interest in the investigation and prosecution of any deaths which may have been caused by any criminal action in Cook County. The State objected to the stay on the basis that the circumstances surrounding the alleged legal death of Alex B. Haymer were suspicious, and that the

Medical Examiner of Cook County must perform an autopsy as soon as possible because, according to the affidavit of the Medical Examiner of Cook County, "where brain death has occurred and the subject is maintained on artificial breathing and circulatory apparatus, tissue deterioration and destabilization occurs which may render it impossible to determine the cause of death * * *." The guardian ad litem appealed the order of the trial court and moved for an emergency stay. We stayed the force and effect of the trial court's order and set the case for oral argument on December 6, 1982. In the meantime, on November 28, 1982, Alex B. Haymer's heart stopped functioning and the mechanical ventilation system was disconnected. Oral argument on the merits of the case was heard on February 16, 1983.

On appeal the parties contest whether Alex B. Haymer was legally dead on October 23, 1982, when it was medically determined that he had sustained total brain death, or on November 28, 1982, when his heart stopped functioning. We affirm the trial court's order that Alex B. Haymer was legally dead on October 23, 1982.

This case presents the issue of determining when death legally occurs in Illinois. Plainly, with the scientific and medical advances of recent years, the general and traditional definition of death, cessation of heartbeat, is no longer meaningful or factually accurate. In our present-day society, many people continue to live after experiencing cardiac arrest, and cardiopulmonary by-pass machines permit a patient's heartbeat to cease for several hours with full clinical recovery after resuscitation. *See* F. Plum & J. Posner, The Diagnosis of Stupor and Coma 313, 331 (3d ed. 1980); Jacobson, Anderson & Speigel, *Towards a Statutory Definition of Death in Illinois,* 14 J. Mar. L. Rev. 701, 709 (1981). There has also been at least one instance where a permanent artificial heart has sustained a human's life for a relatively extended period of time. *See* Time, April 4, 1983, at 62.

In addition, the general common law definition of death, cessation of respiration and circulation, is no longer acceptable by today's standards. *See Towards a Statutory Definition of Death in Illinois,* 14 J. Mar. L. Rev. at 701-13. To illustrate, in Sweet, *Brain Death,* 299 New Eng. J. of Med. 410-11 (1978), the author, a neurosurgeon, states: "Indeed, it is clear that a person is not dead *unless* his brain is dead. The time-honored criteria of stoppage of the heartbeat and circulation are indicative of death only when they persist long enough for the brain to die." *See generally* A. Guyton, Textbook of Medical Physiology 342 (6th ed. 1981). Moreover, Illinois has enacted the Uniform Anatomical Gift Act which states: " 'Death' means for the purposes of the Act, the irreversible cessation of total brain function, according to usual and customary standards of medical practice." Ill.Rev.Stat.1981, ch. 110 ½, par. 302(b). This definition of death, which is limited to the particular statute, is significantly different from the general common law definition of death.

In order to bridge the gap between the past and present-day meanings of death, 29 states have enacted statutes which have a definition of death for general application in their respective states. These statutes fall into three categories: (1) total brain death; (2) total brain death or cardiopulmonary death; and (3) total brain death only if artificial means of support prevent determination of death by traditional means. What all these statutes have in common is their recognition that total brain death is the death of the person.

Other states have judicially recognized that a person found to have total brain death is legally dead. Thus, at least 34 states have now either legislatively or judicially recognized this precept. Moreover, no case has been found in which total brain death has been rejected as being the death of the person where the issue has been specifically raised. On this point, in A. Moraczewski & J. Showalter,

Determination of Death 30 (1982), the authors state: "That courts might not accept [total] brain death [as the death of the person] is of course theoretically possible. But the fact is that *no court has ever rejected it,* and given its overwhelming acceptance, none is likely to do so." Also, it has been stated: "Legally, medically and morally, this country now generally accepts the concept of brain death (although state laws defining death are still not completely uniform). Life support systems are routinely turned off when brain activity has irreparably ceased, even though heartbeat and breathing can be sustained artificially." *Who Lives, Who Dies? Making life's final decision,* Chicago Tribune, May 24, 1983, § 1, at 18, col. 1.

In the present case, the guardian ad litem contends that if total brain death is to be considered the death of the person in Illinois, the change in the law should be made by the legislature. This contention was addressed in *In re Welfare of Bowman*, 94 Wash.2d 407, 617 P.2d 731 (Wash.1980), one of the leading cases in which total brain death was judicially recognized as the death of the person. There, the court stated:

> As was the case in Colorado and Massachusetts [where brain death was judicially recognized], no statute in this state has been enacted to define what constitutes death as posed by the facts now before us. It is both appropriate and proper, therefore, that this court decide that question. 617 P.2d at 738.

Moreover, as the court stated in *Lovato v. District Court*, 198 Cole. 419, 601 P.2d 1072 (Colo. 1979) in holding that a person is legally dead if he has sustained irreversible cessation of all functioning of the total brain:

> We recognize the authority of, and indeed encourage, the General Assembly to pronounce statutorily the standards by which death is to be determined in Colorado. We do not, however, believe that in the absence of legislative action we are precluded from facing and resolving the legal issue of whether irretrievable loss of brain function can be used as a means of detecting the condition of death. Under the circumstances of this case we are not only entitled to resolve the question, but have a duty to do so. To act otherwise would be to close our eyes to the scientific and medical advances made worldwide in the past two or three decades. 601 P.2d at 1081.

As in *Bowman* and *Lovato,* no statute in our state defines what constitutes death as posed by the facts now before us. Our supreme court has held that the proper relationship between the legislature and the judiciary is one of cooperation and assistance in examining and changing the common law to conform with the ever-changing demands of the community. *Alvis v. Ribar*, 85 Ill.2d 1, 23, 52 Ill. Dec. 23, 33, 421 N.E.2d 886, 896 (1981). When there is a gap in the common law that manifestly should be bridged and the legislature has failed to take remedial action, it is the imperative duty of the judiciary to reform the law to be responsive to the demands of society. *Alvis*, 85 Ill.2d at 23-24, 52 Ill.Dec. at 33, 421 N.E.2d at 896. For these reasons, we believe that it is both appropriate and proper that we decide the issue that is presented in this case. *See Bowman,* 617 P.2d at 738*; Lovato,* 601 P.2d 1081*; State v. Fierro,* 124 Ariz. 182, 603 P.2d 74, 77 (Ariz. 1979).

In resolving the issue, we recognize the nearly unanimous consensus of the medical community that when the whole brain no longer functions, the person is dead. *See* Determination of Death 23. In addition, we take into account that the prevailing practice of the medical community nationwide is

to regard total brain death as the death of the person. *See Bowman,* 617 P.2d at 733. We also recognize and take into account that the Illinois General Assembly has stated, for purposes of the Uniform Anatomical Gift Act, that death means the irreversible cessation of total brain function, according to usual and customary standards of medical practice. Ill.Rev.Stat.1981, ch. 110 ½, par. 302(b). In this regard, we find it significant that the legislature's definition of death under the Uniform Anatomical Gift Act conforms to the consensus of the medical community that total brain death is the death of the person, and that adoption of that definition of death in the present case will conform the legal definition of death in Illinois to current medical standards.

Accordingly, we conclude that a person who has sustained irreversible cessation of total brain function, according to usual and customary standards of medical practice, is legally dead. However, we recognize that in most instances when a person has sustained irreversible cessation of circulatory and respiratory functions according to usual and customary standards of medical practice, both the medical profession and our society accept that the person is dead without the need to assess brain functions directly. We see no need to change or interfere with this practice judicially. We therefore hold that a person is legally dead if he or she has sustained either (1) irreversible cessation of total brain function, according to usual and customary standards of medical practice, or (2) irreversible cessation of circulatory and respiratory functions, according to usual and customary standards of medical practice.

In the present case, Alex B. Haymer was 7 months old when he was at McGaw Hospital. He was attached to a mechanical ventilation system which ventilated his lungs, caused his heart to continue pumping and sustained some of his other purely biological functions.

Dr. Timothy B. Scarff, a neurosurgeon specializing in pediatric neurosurgery, testified during the trial court hearing that he had examined Alex B. Haymer in the pediatric intensive care unit at the hospital. His objective finding was that clinically, the child had suffered total, complete and irreversible brain death. Subjectively, he found that the child did not respond to any kind of stimuli and had no brain stem reflexes. Also, the child had no pupillary or other eye movement, and he was not breathing by himself.

Scarff also testified that he ordered an EEG, or brain wave test, and a radioactive isotope blood flow test. These tests showed that, in fact, there was no electrical activity in the brain and that there was no flow of blood to any part of the brain. After 24 hours, Scarff repeated the EEG examination and ordered an evoked response test of the brain stem. This second EEG test confirmed that there was no electrical activity in the brain. The evoked response test confirmed that there was no activity in the brain stem.

Scarff further testified that as of October 23, 1982, Alex B. Haymer had total and irreversible brain death and that this diagnosis was confirmed by two other consultants. The diagnosis of brain death applied to the entire brain. Also, Scarff testified that there are no recorded incidents of any person meeting these criteria ever regaining any function whatsoever. Scarff testified that his diagnosis and conclusions were made according to the usual and customary standards of medical practice. Scarff's testimony was uncontradicted.

Under the circumstances, we believe the record clearly establishes that on October 23, 1982, Alex B. Haymer sustained an irreversible cessation of total brain function, according to usual and customary standards of medical practice, and was legally dead as of that date.

We next address the question of whether this case should be dismissed on the basis that it became moot when Alex B. Haymer's heart stopped functioning on November 28, 1982. If the case were to be dismissed due to mootness, the date of death would remain in dispute. The trial court's order provides that the date of legal death was October 23, 1982, but circulation and respiration did not cease until November 28, 1982, which is the same day that the heart stopped functioning. Thus, the date of death to be recorded on the death certificate, a public record, is uncertain. Moreover, since it is readily apparent that the general issue involved in the case is likely to recur, and the issue plainly involves matters of public concern, we are not required to dismiss the case even though the issue may be technically moot. *See Johnny Bruce Co. v. City of Champaign,* 24 Ill.App.3d 900, 905, 321 N.E.2d 469, 473 (1974); *Lurie v. Village of Skokie*, 64 Ill.App.3d 217, 226, 20 Ill.Dec. 911, 919, 380 N.E.2d 1120, 1128 (1978).

In addition, the case should not be dismissed as moot because the very urgency which moved those in the medical profession, the county medical examiner and the state to press for prompt action here is likely to recur, making it probable that similar cases arising in the future will likewise appear to be or become technically moot by ordinary standards before they can be decided by a reviewing court. *See Wallace v. Labrenz,* 411 Ill. 618, 623, 104 N.E.2d 769, 772 (1952). Evidence gained from thousands of patients studied in many centers around the world indicates that a person attached to a mechanical ventilation system who has met the brain death criteria would not be expected to maintain a heartbeat for the period of time it would take for appellate review no matter how expeditiously the appellate process proceeds. *See* The Diagnosis of Stupor and Coma 315; *Roe v. Wade*, 410 U.S. 113, 125, 93 S.Ct. 705, 713, 35 L.Ed.2d 147, 161 (1973). Thus, the situation before us is clearly a situation which is "capable of repetition, yet evading review." *Roe*, 410 U.S. at 125, 93 S.Ct. at 713, 35 L.Ed.2d at 161. We therefore decide that this case should not be dismissed because of mootness.

Accordingly, we conclude that on October 23, 1982, Alex B. Haymer sustained irreversible cessation of total brain function, according to usual and customary standards of medical practice, and that he was legally dead as of that date. The order of the circuit court is affirmed.

AFFIRMED.

3.4 Other Surviving Spousal Resources

The main purpose of this chapter has been to examine the steps the law takes to prevent spousal disinheritance. In this section, I would like to briefly discuss two other approaches states have taken to achieve that goal. The earliest forms of protection from spousal disinheritance adopted in the United States were the common law doctrines of dower and curtesy. Dower gave a surviving widow a lifetime interest in one-third of the property her husband acquired during their marriage. Curtesy afforded a surviving widower slightly more protection because he was entitled to a lifetime interest in all of the property his wife obtained while they were married. The intestacy statutes of the majority of states and the Uniform Probate Code have abolished dower and curtesy. However, a few states still retain the law of dower. In those states, dower applies to protect both men and women. A few state legislatures have adopted the Uniform Probate Code recommendation and modified their elective share statutes to consider the marital contributions of the parties involved. Those legislatures have rejected the "one size fits all" approach in favor of permitting the

probate code to evaluate each estate based upon the unique circumstances of the parties involved. This section also examines the other resources that may be available to the surviving spouse.

3.4.1. Social Security and Retirement Benefits

A surviving spouse is eligible to receive Social Security benefits if the decedent worked long enough to qualify for benefits. Social Security usually pays a one-time death benefit of $255 to the surviving spouse. The earliest a surviving spouse can receive benefits based upon age is 60. The amount of benefits the surviving spouse is able to receive depends on the amount of taxed earnings, the retirement age, and the number of work quarters. The surviving spouse may also have the right to receive some of the deceased spouse's retirement benefits. The federal Employment Retirement Income Security Act of 1974 (ERISA) and the Retirement Equity Act of 1984 mandates that the surviving spouse has an interest in the private pension plan if an employee dies before his or her spouse.[13]

3.4.2. Homestead, Personal Property Set-Aside, and Family Allowance

When a person dies, the decedent's surviving spouse and minor children have an interest in remaining in the family home. The home usually has sentimental and/or economic value to the surviving family members. Funeral costs and other debts may put the family home at risk. As a result, most state legislatures have enacted statutes to enable the surviving spouse to retain the family home free of the claims of the deceased spouse's creditors.[14] The provisions of state homestead laws vary significantly.[15]

The surviving spouse may also have the right to receive a certain amount of the decedent's tangible personal property. That property typically includes household furniture, clothing, cars etc. The surviving spouse has to satisfy specific conditions to obtain the right to receive this property.[16] UPC § 2-403 (1990, rev. 2008) limits the personal property set-aside to $15,000. That amount is subject to the cost of living adjustment formula in § 1-109.

All of the states have statutes that permit the probate court to grant the surviving spouse an allowance for maintenance and support. The surviving spouse may receive the maintenance allowance for a specific period of time or until the probate case is closed. The provisions of UPC § 2-04 permits the surviving spouse to receive a reasonable allowance. If the estate does not have enough resources to pay all of the decedent's creditors, the surviving spouse can only receive the allowance for one year. Once the estate is closed, maintenance payments to the surviving spouse will cease. UPC § 2-405 gives the personal representative the authority to decide the amount of the family allowance up to a specified limit without a court order; however, that decision is subject to judicial review.

---

[13] John H. Langbein, Susan J. Stabile, and Bruce A. Wolk, Pension and Employee Benefit Law 280-302 (5th ed. 2010).
[14] *See, e.g.*, 58 Okl. St. Ann. § 311 and § 313 (West 2016); 18 A.M.R.S.A. § 2-401 (West 2016); O. R.S. § 2-422 (West 2016).
[15] *See* Mark E. Osborne, Asset Protection Trust Planning, SW037 ALI-CLE 97 (June 21-26, 2015)(discussing probate homestead laws in various states).
[16] *In re Estate of Rhea*, 257 S.W.3d 787 (TX 2008)(court set aside decedent's wedding ring for his surviving spouse).

3.4.3 Dower

Ohio Revised Code Ann. 2103.02

A spouse who has not relinquished or been barred from it shall be endowed of an estate for life in one third of the real property of which the consort was seized as an estate of inheritance at any time during the marriage. Such dower interest shall terminate upon the death of the consort except:

(A) To the extent that any such real property was conveyed by the deceased consort during the marriage, the surviving spouse not having relinquished or been barred from dower therein;

(B) To the extent that any such real property during the marriage was encumbered by the deceased consort by mortgage, judgment, lien except tax lien, or otherwise, or aliened by involuntary sale, the surviving spouse not having relinquished or been barred from dower therein. If such real property was encumbered or aliened prior to decease, the dower interest of the surviving spouse therein shall be computed on the basis of the amount of the encumbrance at the time of the death of such consort or at the time of such alienation, but not upon an amount exceeding the sale price of such property.

In lieu of such dower interest which terminates pursuant to this section, a surviving spouse shall be entitled to the distributive share provided by section 2105.06 of the Revised Code.

Dower interest shall terminate upon the granting of an absolute divorce in favor of or against such spouse by a court of competent jurisdiction within or without this state.

Wherever dower is referred to in Chapters 2101 to 2131, inclusive, of the Revised Code, it means the dower to which a spouse is entitled by this section.

Armstrong v. Armstrong, 715 N.E.2d 207 (Ohio App. Ct. 1998)

DICKINSON, J.

Plaintiff Irene Armstrong has appealed from a judgment of the Wayne County Probate Court by which it determined that she was entitled to either a statutory distributive share of her late husband's estate or her dower interest in certain real property, but not both. She has argued that the trial court incorrectly held that she must elect between the two. This court reverses the judgment of the trial court. Because, prior to his death, Irene Armstrong's late husband conveyed his one-half interest in the marital residence without her consent, her dower interest in that property was not extinguished by his death and she was entitled to both that dower interest and a statutory distributive share of the rest of his estate.

I

Irene Armstrong was married to Norman Armstrong at the time of his death on September 1, 1995. Less than a month before his death, apparently because the Armstrongs were in the process of a divorce, Mr. Armstrong quitclaimed his one-half interest in the marital residence to his four adult

children from a previous marriage. Irene Armstrong did not consent to the transfer, nor did she waive her dower interest in the property.

On October 2, 1995, Mr. Armstrong's executor, defendant Patricia Armstrong, filed an application to probate Mr. Armstrong's will. Because Mr. Armstrong's last will, executed on July 31, 1995, made no provision for Irene Armstrong, she elected to take against the will. The trial court held that because Irene Armstrong elected to take her statutory distributive share of Mr. Armstrong's estate, she waived her dower interest in any of Mr. Armstrong's real property. The trial court held that she could elect to take either her dower interest or her statutory distributive share of the estate, but not both. Ms. Armstrong timely appealed to this court.

II

Ms. Armstrong has asserted that the trial court misconstrued R.C. 21203.02, which provides:

"In lieu of such dower interest which terminates pursuant to this section, a surviving spouse shall be entitled to the distributive share provided by section 2105.06 of the Revised Code."

The trial court found that Irene Armstrong, as surviving spouse, was entitled to her statutory distributive share of Mr. Armstrong's estate "in lieu of" her dower interest in his real property. As R.C. 21203.02 explicitly provides, however, the statutory distribution is in lieu of only that dower interest "which terminates pursuant to this section."

"[P]ursuant to this section" is explained by the paragraphs immediately preceding it, which provide:

"A spouse who has not relinquished or been barred from it shall be endowed of an estate for life in one third of the real property of which the consort was seized as an estate of inheritance at any time during the marriage. Such dower interest shall terminate upon the death of the consort except:

"(A) To the extent that any such real property was conveyed by the deceased consort during the marriage, the surviving spouse not having relinquished or been barred from dower therein."

Although dower rights normally terminate "upon the death of the consort," an exception is made for situations, such as here, in which the decedent, prior to his death, conveyed real property in which the surviving spouse had not waived her dower interest. Because the trial court incorrectly held that Irene Armstrong was required to elect between her dower interest in the real property conveyed without her having relinquished her dower interest and her statutory distributive share of the estate, the judgment of the trial court is reversed. She is entitled to a statutory distributive share of Mr. Armstrong's estate and her dower interest in his share of the marital residence. According to R.C. 2103.03, Irene Armstrong's dower interest is a life estate in one third of Mr. Armstrong's one-half interest in the marital residence. To this extent, Irene Armstrong's assignment of error is sustained.

III

Irene Armstrong's assignment of error is sustained. The judgment of the trial court is reversed.

Judgment reversed and cause remanded.

3.4.4 Fractionalize Forced Share

In re Estate of Soard, 173 S.W.3d 22 (Tenn. App. Ct. 2005)

CHARLES D. SUSANO, JR.,

This case involves a dispute between a widow and the personal representative of her husband's estate. The parties differ as to the correct interpretation of Tenn. Code Ann. § 31-4-101 (2001), the statute setting forth the criteria pursuant to which a surviving spouse's elective share is computed. The trial court adopted the estate's construction of the statute and subtracted the widow's exempt property, homestead allowance, and year's support allowance from the value of her percentage share of the net estate in arriving at the elective-share amount to which she is entitled. We disagree with the trial court's interpretation of the statute. Accordingly, we reverse the judgment of that court.

I.

The parties filed a stipulation of material facts in the trial court. The stipulation provides, in pertinent part, as follows:

> Frank Soard died on the 14th day of July, 2003.
>
> Frank Soard was survived by his wife, Sarah Soard, whom he had married on the 24th day of June, 1995.
>
> The Parties agreed that pursuant to [Tenn. Code Ann.] § 30-2-209, Sarah Soard is entitled to payment of $5,000.00 for Homestead.
>
> The Parties agreed that pursuant to [Tenn. Code Ann.] § 30-2-102, Sarah Soard is entitled to [a] Year's Support in the amount of $13,656.00.
>
> The Parties agreed that pursuant to [Tenn. Code Ann.] § 30-2-101, Sarah Soard is entitled to $37,848.92 in Exempt Property.

Inasmuch as Frank and Sarah Soard had been married more than six years but less than nine years, the Parties agreed that Sarah Soard was entitled to an Elective Share of Thirty Percent (30%) of the net estate as set out in [Tenn. Code Ann.] § 31-4-101 (a).

Pursuant to [Tenn. Code Ann.] § 31-4-101(b), the Parties agreed to the following determination of the net estate as of November 11, 2003, the Parties acknowledging, however, that the administrative expenses are subject to increase based on attorneys fees and expenses incurred in this Elective Share litigation:

	Gross Estate		$872,253.32
	Less:		
	ORNL Mortgage	$29,408.23	
	Funeral and Admin. Exp.	78,795.27	
	Exempt Property	37,848.92	
	Homestead	5,000.00	
	Year's Support	13,656.00	164,708.42
	Net Estate		$707,544.90
	30% of Net Estate		$212,263.47

After determining Thirty Percent (30%) of the net estate as set out in [Tenn. Code Ann.] § 31-4-101(a) and (b), the Parties agreed that said maximum Elective Share amount is $212,263.47, but the Parties disagreed as to how that amount is to be reduced pursuant to [Tenn. Code Ann.] § 31-4-101(c). (Paragraph numbering in original omitted). Although not a part of the parties' written stipulation, it is abundantly clear from the record that Ms. Soard filed a petition for an elective share.

II.

Tenn. Code Ann. § 31-4-101, as it existed at the time of Mr. Soard's death, *i.e.,* July 14, 2003, provides as follows:

> (a)(1) The surviving spouse of an intestate decedent, or a surviving spouse who elects against a decedent's will, has a right of election, unless limited by subsection (c), to take an elective-share amount equal to the value of the decedent's net estate as defined in subsection (b), determined by the length of time the surviving spouse and the decedent were married to each other, in accordance with the following schedule:

	If the decedent and the surviving spouse were married to each other:	The elective-share percentage is:
	less than 3 years	10% of the net estate
	3 years but less than 6 years	20% of the net estate
	6 years but less than 9 years	30% of the net estate
	9 years or more	40% of the net estate

(2) For purposes of determining the total number of years to be applied to the computation provided in this subsection, the number of years persons are married to the same person shall be combined. The years do not have to be consecutive, but may be separated by divorce. All years married shall be counted toward the total number of years for purposes of this section.

(b) The value of the net estate includes all of the decedent's real and personal property subject to disposition under the provisions of the decedent's will or the laws of intestate succession, reduced by the following: secured debts to the extent that secured creditors are entitled to realize on the applicable collateral, funeral and administration expenses, and award of exempt property, homestead allowance and year's support allowance.

(c) After the elective-share amount has been determined in accordance with the foregoing subsections (a) and (b), *the amount payable to the surviving spouse by the estate shall be reduced by the value of all assets includable in the decedent's gross estate which were transferred, or deemed transferred, to the surviving spouse or which were for the benefit of the surviving spouse.* For purposes hereof, the decedent's gross estate shall be determined by the court in the same manner as for inheritance tax purposes pursuant to [Tenn. Code Ann.] §§ 67-8-301 et. seq., except that the value of any life estate or trust for the lifetime benefit of the surviving spouse shall be actuarially determined.

(d) The elective-share amount payable to the surviving spouse is exempt from the claims of the unsecured creditors of the decedent's estate.

(Emphasis added). For ease of reference, we will hereinafter sometimes refer to this statute as "the elective-share statute" or "the current elective-share statute."

III.

The issue before us can be simply stated as follows:

Does the "reduction" language set forth in subsection (c) of Tenn. Code Ann. § 31-4-101—"the amount payable to the surviving spouse by the estate shall be reduced by the value of all assets includable in the decedent's gross estate which were transferred, or deemed transferred, to the surviving spouse or which were for the benefit of the surviving spouse"—contemplate the deduction, from a surviving spouse's percentage share of the net estate, of the value of the surviving spouse's exempt property, homestead allowance, and year's support allowance?

The trial court held that "subsection (c) precisely states that all assets includable in the decedent's gross estate which are payable to the surviving spouse must be credited against the maximum [e]lective [s]hare to determine the actual amount of the [e]lective [s[hare payable to the surviving spouse." In its order, the trial court concluded that

> based [up]on the clear language of [Tenn. Code Ann.] § 31-4-101(c), the amounts paid to the surviving spouse for [h]omestead, [y]ear's [s]upport and [e]xempt [p]roperty, as assets included in the decedent's gross estate, are sums which must be credited against the maximum amount available as an [e]lective [s]hare to determine the amount "payable" to the surviving spouse.

As far as we can determine, this case presents a question of first impression.

Since the material facts are not in dispute, our *de novo* review is one of law and, hence, unburdened by a presumption of correctness as to the trial court's judgment. *Southern Constructors, Inc. v. London Co. Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn.2001).

IV.

In the instant case, the parties stipulate that the gross estate is valued at $872,253.32. However, they do not identify the component parts of the "gross estate." Furthermore, there is nothing in the other parts of the record which sets forth with specificity the items included within this concept. However, since the "gross estate" stipulation reflects that it is made "[p]ursuant to [Tenn. Code Ann.] § 31-4-101 (b)," we assume that this starting-point number of $872,253.32 comprises, in the words of the aforesaid statutory provision, the value of "all of the decedent's real and personal property subject to disposition under the provisions of the decedent's will or the laws of intestate succession."[2] It is clear that this language contemplates assets that pass in probate and not those that pass outside of probate.

The parties further stipulate—again pursuant to Tenn. Code Ann. § 31-4-101 (b)—that the value of the "net estate" is $707,544.90. They also agree that the maximum elective-share amount, determined in accordance with subsections (a) and (b) of the elective-share statute, is $212,263.47. Finally, they stipulate that subsection (c) of the elective-share statute requires that Ms. Soard's elective- share amount be reduced by the following items:

We now reach the point of the parties' very sharp disagreement. The estate argues that, even though Ms. Soard's award of exempt property, homestead allowance, and year's support allowance have already been subtracted from the value of "the decedent's real and personal property subject to disposition under the provisions of the decedent's will or the laws of intestate succession" as a part of the computation of the net estate under subsection (b) of the elective-share statute, these three items must be subtracted *again,* this time from the value of the widow's percentage share of the net estate, in order to arrive at the elective-share amount payable to the surviving spouse. The estate maintains that the further deduction of these three statutory entitlements is mandated by subsection (c) of the elective-share statute.

V.

The effect of the parties' disagreement in monetary terms is illustrated thusly:

		Widow's Computation	Estate's Computation	
	Elective-share amount per subsections (a) & (b)	$212,263.47	$212,263.47	
	Less: Agreed-upon deductions	21,741.82	21,741.82	
		$190,521.65	$190,521.65	
	Less: Widow's Exempt Property, Homestead, and Year's Support	N/A	56,504.92	
	Elective- Share Amount due Widow	$190,521.65	$134,016.73	

VI.

Ms. Soard argues that the critical language in subsection (c) of the elective-share statute pertains to assets that are transferred to a surviving spouse *outside* the estate. She points to language in our case of *In re Estate of Morris*, 104 S.W.2d 855 (Tenn.Ct.App.2002), which she claims is supportive of her position. She also relies upon an illustration of how the elective-share statute is applied as found in 18 Albert W. Secor, *Tennessee Practice: Tennessee Probate* § 10.5 (2d ed.2002). She notes that in neither authority is mention made of subtracting exempt property, homestead or the year's support allowance from the surviving spouse's percentage share of the net estate.

The widow further argues that the estate's interpretation of the statute runs afoul of well-established rules of statutory construction. She contends that to construe the statute as requiring the deduction *twice* of the aforesaid three items "would frustrate the purpose of the legislation." She argues that the interpretation placed on the statute by the estate renders this legislative enactment "absurd, unjust or futile." Finally, the widow argues that the double deduction of these three items "would not be sensible, would work a manifest inconvenience, would produce an absurd result and would be unjust."

VII.

The estate counters by pointing out that the "reduction" concept embodied in subsection (c) of the elective-share statute was not in the elective-share statute in effect prior to the amendments effective January 1, 1998. Those amendments deleted the earlier version of the elective-share statute in its entirety. The estate reads the language of subsection (c) broadly to mean, in the language of the estate's brief, that there is a credit against the surviving spouse's percentage share of the net estate

for "all items in the gross estate that the spouse otherwise receives." The estate notes that subsection (c) of the elective-share statute expressly provides that the "gross estate," as that concept is used in that subsection, "shall be determined by the court in the same manner as for inheritance tax purposes." Tenn. Code Ann. § 31-4-101(c). The estate contends that exempt property, homestead and a year's support are *not* excluded from the gross estate for inheritance tax purposes. In support of this argument, the estate relies upon the provisions of Tenn. Code Ann.] § 67-8-303 (2003), a section of the inheritance tax statutory scheme describing the types of property subject to that tax. As can be seen, the property which is subject to the tax is broadly stated and does not contain an express exclusion for exempt property, homestead and a year's support. The estate argues that subsection (c) is unambiguous, and that our obligation is to enforce its provisions regardless of how we feel about the justice of its application to the facts of the case at bar.

VIII.

In this case, we are called upon to interpret and apply the provisions of the elective-share statute. In *Eastman Chem. Co. v. Johnson,* 151 S.W.3d 503 (Tenn.2004), the Supreme Court recited many of the general principles pertaining to statutory construction:

Issues of statutory construction are questions of law that this Court reviews de novo without any presumption of correctness.

Our duty in construing statutes is to ascertain and give effect to the intention and purpose of the legislature. "'Legislative intent is to be ascertained whenever possible from the natural and ordinary meaning of the language used, without forced or subtle construction that would limit or extend the meaning of the language.' "

When the statutory language is clear and unambiguous, we must apply its plain meaning in its normal and accepted use, without a forced interpretation that would limit or expand the statute's application. Where an ambiguity exists, we must look to the entire statutory scheme and elsewhere to ascertain the legislative intent and purpose. The statute must be construed in its entirety, and it should be assumed that the legislature used each word purposely and that those words convey some intent and have a meaning and a purpose. The background, purpose, and general circumstances under which words are used in a statute must be considered, and it is improper to take a word or a few words from its context and, with them isolated, attempt to determine their meaning.

Id. at 506-07 (citations omitted). In construing legislation, courts must harmonize, if possible, all parts of the legislature's enactment. *See Marsh v. Henderson,* 221 Tenn. 42, 424 S.W.2d 193, 196 (1968) ("A statute should be construed, if practicable, so that its component parts are consistent and reasonable.... Inconsistent phrases are to be harmonized, if possible, so as to reach the legislative intent."). *See also State v. Netto,* 486 S.W.2d 725, 729 (Tenn.1972).

"A construction will be avoided, if possible, that would render one section of the act repugnant to another. Or one that would produce an absurd result." *Tenn. Elec. Power Co. v. City of Chattanooga,* 172 Tenn. 505, 114 S.W.2d 441, 444 (1937) (citations omitted). *See also Turner v. Eslick,* 146 Tenn. 236, 240 S.W. 786, 789 (1922).

"When the legislature enacts provisions of a uniform or model act without significant alteration, it may be generally presumed to have adopted the expressed intention of the drafters of that uniform

or model act. However, when the legislature makes significant departures from the text of that uniform act, we must likewise presume that its departure was meant to express an intention different from that manifested in the uniform act itself." *Heirs of Ellis v. Estate of Ellis*, 71 S.W.3d 705, 713-14 (Tenn.2002)(citations omitted).

IX.

Our interpretation of the current version of the elective-share statute begins with a look back at the prior version of that statute. Before January 1, 1998, the elective-share statute in Tennessee provided as follows:

> (a) A decedent's surviving spouse has the right to elect to take an elective share. The elective share is one third (1/3) of the decedent's net estate as defined in subsection (b). The right to elect an elective share is available to the surviving spouse of an intestate decedent and a testate decedent if the surviving spouse elects against the decedent's will. When the elective share is determined, it is exempt from the unsecured debts of the decedent incurred after April 1, 1977. In determining the elective share, it is not reduced by any estate or inheritance taxes.
>
> (b) The net estate includes all of the decedent's real and personal property subject to disposition under the terms of the decedent's will or the laws of intestate succession reduced by funeral and administration expenses, homestead, exemptions and year's support.

[Tenn. Code Ann.] § 31-4-101 (repealed effective January 1, 1998, by 1997 Tenn. Pub. Acts 426, § 17).

Under the earlier version of the statute, the method of calculating the surviving spouse's elective share was clear and relatively simple to apply. A surviving spouse had an absolute right "to elect to take an elective share." Once the election was made, the surviving spouse, regardless of the length of his or her marriage to the decedent, was entitled to one-third of a relatively well-defined concept, *i.e.,* the value of the real and personal property that passes under the decedent's will or the laws of intestate succession reduced by funeral and administration expenses, homestead, exempt property, and a year's support allowance. There were no further reductions.

In 1995, the 99th Tennessee General Assembly adopted House Joint Resolution No. 223 appointing a Special Joint Commission whose charge was to "[s]tudy all aspects of the probate law in Tennessee with a view towards adopting the Uniform Probate Code by revising, updating, and clarifying the law so that it may give clear and consistent guidance to those using it and those affected by the law in order to ensure, to the extent possible, the uniformity of probate law from any legal uncertainties related to this important process; and [r]ecommend legislation to effect the above goals." (Numbering in original omitted). The commission was directed to file "the report of its findings and any recommendations concerning legislation, with the 99th General Assembly no later than December 15, 1995."

As directed by the General Assembly, the commission filed a report setting forth its fact-finding process, its decision-making process, and its recommendations. The report notes that the commission found "little or no public support for the adoption of the Uniform Probate Code in its entirety." At another point in the report, the commission noted that it "decided that a wholesale revision of the probate law at this time is unnecessary and that the Uniform Probate Code, which

also covers fields other than those typically considered to be of a probate nature, should not be adopted as a whole for various reasons."

The commission made 15 numbered recommendations, one of which is the following:

> To modernize the elective share for surviving spouses to take into account the length of the marriage and to redefine how the amount is ascertained.

Its recommendations were, in the language of the report, "incorporated into a draft of a legislative bill which accompanie[d][the] report."

By Chapter 426, Public Acts of 1997, the General Assembly, without discussion, adopted verbatim that portion of the proposed legislation dealing with a surviving spouse's elective share by deleting the prior elective-share statute in its entirety and by substituting the current version of the elective-share statute. As previously noted, the new version became effective January 1, 1998, and applies to all estates of decedents dying on or after that date.
The current version of the elective-share statute retains a few of the features of the old statute, *i.e.,* the *right* to elect is still unconditional; the starting point of the calculation, once the percentage of entitlement is established, is still "the decedent's real and personal property subject to disposition under the provisions of the decedent's will or the laws of intestate succession"; the value of the aforesaid concept is still reduced by funeral and administration expenses, homestead, exempt property, and the year's support, before the percentage of entitlement is applied to the balance; and the surviving spouse's entitlement under the statute is still not subject to the claims of the decedent's unsecured creditors.

While there are similarities between the two versions, there are striking differences, both in concept and language.

The current version of the elective-share statute replaces the "one size fits all" approach of the old statute—that all surviving spouses were previously entitled to a one-third elective share—with the phased-in *approach* of the Uniform Probate Code ("the UPC") under which the percentage amount of a surviving spouse's elective share increases as the length of the parties' marriage increases. While adopting the UPC's approach, the current statute utilizes only four levels of percentage entitlement compared to the 16 levels of the UPC. The current statute does adopt the UPC provision that all years of marriage between the parties are counted even if those periods "may be separated by divorce."

While the current version of the elective-share statute retains the starting point of "the decedent's real and personal property subject to disposition under the provisions of the decedent's will or the laws of intestate succession," the new version, in subsection (b), introduces a new deduction from the concept: "secured debts to the extent that secured creditors are entitled to realize on the applicable collateral." Tenn. Code Ann.] § 31-4-101 (b).

As can be seen, the new version of the elective-share statute has significantly changed the method of determining the surviving spouse's elective-share percentage. Under the new approach, some surviving spouses will receive more than the previous one-third share while others will receive less. While this was a major change introduced by the amendments effective January 1, 1998, it is not the one at issue in the case at bar. That "distinction" belongs to the commission's recommendation as to

"how the [elective-share] amount is ascertained."

X.

In adopting House Joint Resolution No. 223, the General Assembly was influenced by the 1990 adoption of a new version of the UPC by the National Conference of Commissioners on Uniform State Laws. The underlying theory behind the significant revisions to the elective share sections of the UPC has been described thusly:

In constructing a new elective share, the drafters of the UPC applied two theories, both described in the General Comment to the elective share section of the 1990 UPC. Unif. Prob. Code art. II, pt. 2, gen. cmt. (1993). One theory, the marital partnership theory, views marriage as an economic partnership to which both spouses contribute productive effort. This theory holds that each spouse is entitled to one-half of the economic gains of the marriage. The other theory, the need-based theory, holds that a decedent spouse should provide for the surviving spouse. A married couple's moral duties to one another, the expectations of the surviving spouse and public concern that the surviving spouse not be left to depend on the state for support form the basis of this theory. Taken together, the two theories establish a duty of spousal support that arises in marriage and continues to some degree after death. Therefore, each spouse has a right to a share of the economic gains of both spouses during the marriage.

To implement the need-based theory, the 1990 UPC creates a supplemental elective share of $50,000. To the extent the elective share, calculated as a percentage of the augmented estate, is less than $50,000, the surviving spouse is entitled to a supplemental elective share equal to the difference. Stated another way, the minimum amount of a spouse's elective share is $50,000. Because the augmented estate includes the surviving spouse's assets, the spouse will receive a supplemental elective share only if his or her own assets are less than $50,000.

To implement the partnership theory, the 1990 UPC creates an augmented estate that includes property owned and controlled by both spouses—probate property and property passing under will substitutes. The guiding principle of giving each spouse one-half of the marital property made it necessary to look at the assets owned by both spouses and not just property controlled by the decedent. In contrast to the prior UPC, the 1990 UPC makes no exceptions for insurance [,] annuities and pensions.

A difficulty faced by the drafters of the 1990 UPC is that not all property owned by spouses is marital property. A spouse may have inherited property or acquired property before marriage. To avoid a post-death determination of marital and separate property, the drafters devised a phased-in elective share based on the length of the marriage. The goal of this provision was to approximate increased marital sharing and the increased contribution to the acquisition of marital assets as a marriage endures. The drafters concluded that "[b]ecause ease of administration and predictability of result are prized features of the probate system," a "mechanically determined approximation system" makes sense. Unif. Prob. Code art. II, pt. 2, gen. cmt. (1993). Susan N. Gary, *Share and Share Alike? The UPC's Elective Share*, 12 Prob. & Prop. 18, 20 (1998). The author opined as follows regarding the amendments to the Tennessee elective share statute effective January 1, 1998:

> *A law adopted in Tennessee in 1997 borrows concepts from the UPC and uses them to modify what is still essentially a traditional elective share statute.* The new Tennessee statute phases in the elective share

> percentage from 10% for less than three years of marriage to 40% for marriages lasting nine years or more. The percentage is applied to the "net estate," which the law defines as the probate estate less certain secured debts, funeral and administration expenses and family allowances. *Property that the surviving spouse receives, whether probate or nonprobate property,* reduces the elective share. It appears that the law will charge disclaimed interests against the surviving spouse because the statute refers to assets "which were transferred, or deemed transferred ... or which were for the benefit of the surviving spouse." Tenn. Code Ann.] § 31-4-101(c)(1997).
>
> *The Tennessee statute considers the augmented estate, determined by reference to the Tennessee inheritance tax statute, only to reduce the surviving spouse's share.* If the decedent dies holding only nonprobate assets, the value of the net estate, and thus the elective share, will be zero....

Id. at 22 (emphasis added).

It is clear to us that the changes to the Tennessee elective-share statute effective January 1, 1998, while adopting some of the thrust of the 1990 changes to the UPC elective share provisions, depart from the model act in significant and substantial ways. First, the 1997 amendments did not adopt the UPC's concept of a minimum elective share stated in monetary terms. It is clear that there is no such monetary minimum share under the current version of our statute. Second, as pointed out in the article just quoted, the current elective-share statute considers the concept of an "augmented estate" to reduce the surviving spouse's elective share, but continues to use the "net estate" concept in defining the amount to which the surviving spouse's percentage is applied.

The differences between the current version of the elective-share statute and the provisions of the UPC relating to a surviving spouse's elective share are so significant as to lead us to conclude that the legislature's departure "was meant to express an intention different from that manifested in the uniform act itself." *Heirs of Ellis*, 71 S.W.3d at 713-14. Therefore, even though it is clear that the Special Joint Commission was directed by the General Assembly to study the probate laws of Tennessee "with a view towards adopting the [UPC]," the commission and later the legislature itself chose not to adopt the expansive and far-reaching language of the UPC as it pertains to the methodology of computing the surviving spouse's elective share, other than the adoption of the theory of the UPC that the percentage share should be tied to the length of the parties' marriage. We conclude from this that the intention behind the UPC is of no particular help in determining whether the language of subsection (c) of the elective share statute contemplates the reduction of homestead, exempt property, and year's support from the surviving spouse's percentage share of the net estate.

We have discussed the UPC extensively simply because of the General Assembly's charge to the commission. In view of this charge, we felt it essential to expressly point out that the legislature's 1997 amendments evidence a general intention to go in a direction other than the one charted by the UPC. For the purposes of illustration and comparison, we have attached a copy of the UPC provisions addressing the surviving spouse's elective share, as last amended in 1993, as an appendix to this opinion. In the interest of brevity, we have omitted the official comments and illustrations.

XI.

The estate urges us to hold, as did the trial court, that the elective-share statute requires that the surviving spouse's statutory entitlements to homestead, exempt property, and a year's support

allowance be deducted *twice* as a part of the computation outlined in the elective share statute, *i.e.,* first, in reducing the gross estate passing in probate to arrive at the net estate subject to the surviving spouse's percentage share, and, second, from the product of the multiplication of the net estate by the surviving spouse's percentage share. We agree with the widow in this case that such an interpretation leads to an absurd result.

We find ambiguity in the wording of the statute. We note that while the legislature referred to the three statutory entitlements by name in subsection (b), there is no such explicit reference in subsection (c). The fact that the legislature referred to these statutory entitlements by name in subsection (b) clearly shows that they were on the mind of that body when it adopted the 1997 amendments. Query: If the legislature had intended, in subsection (c), to mandate the deduction of these same three items a *second* time in this continuing statutory computation, why did it not expressly refer to them as it did in subsection (b)? In other words, if the legislature had intended to include these items in the general language of subsection (c), why did it not refer to the decedent's "gross estate" as "the gross estate, *including the surviving spouse's homestead, exempt property, and a year's support* " or by the use of similar language?

The current version of the elective-share statute is hardly a model of clarity as far as the interplay between subsections (b) and (c) is concerned. While the author quoted earlier in this opinion may be right when she opines that our legislature "borrow[ed] concepts from the UPC and use[d] them to modify what is still essentially a traditional elective[-]share statute," it is clear to us that the legislature rejected the comprehensive statutory scheme thought to be necessary by the Commissioners on Uniform State Law to effectuate their desire to adopt a "marital partnership theory" and a "need-based theory" in the elective-share concept. By adopting bits and pieces from the earlier version of the elective-share statute as well as concepts from the UPC and then "cutting and pasting" them with some new language into a much shorter version of an elective-share statute, the legislature has created more questions than answers. If the legislature has rejected the UPC's dual theories mentioned above, either in whole or in part, and we believe it has, what is the theory behind the current version of the elective-share statute? What is the purpose or theory underlying the deduction set forth in subsection (c)? We are left to ponder these and related questions. Assuming that the estate is correct in its interpretation of subsection (c), what is the rationale behind the deduction of the surviving spouse's statutory entitlements from the maximum elective share after these very same items have already been "cleared out" of the gross estate as a part of the computation leading to the calculation of that same maximum elective-share amount?

We have concluded, and so hold, that the language of subsection (c) of the elective-share statute cannot, consistent with the clear meaning of subsection (b), be read to include homestead, exempt property, and a year's support.

We believe the reason behind the deduction of the surviving spouse's statutory entitlements from the gross probate estate under subsection (b) is clear: it is to remove these items from the assets passing in probate *before* the surviving spouse's percentage is applied. The deduction at this point in the computation ensures that the surviving spouse does not get these three statutory entitlements *plus* a percentage of the same items. We believe the deduction at this stage of the statutory computation was intended to avoid "double-dipping." Thus, the deduction from the probatable assets is reasonable and logical.

We cannot say the same for a subsequent deduction of the same items as a part of what is essentially

a continuing statutory computation. Such a deduction, in the overall scheme of things, is illogical and defies explanation. We recognize that it is the prerogative of the legislature to adopt such legislation as it deems appropriate so long as it does not offend a provision of the United States Constitution or the Tennessee Constitution. Certainly, it has the authority to enact legislation which appears on its face to be illogical should it choose to do so. However, we believe that, had the legislature intended to deduct these three items a second time in the same statutory computation, it would have referred to them by name in subsection (c) just as it did in subsection (b).

If one of the purposes behind the current version of the elective-share statute is to reduce the surviving spouse's elective share to compensate for the surviving spouse's receipt of homestead, exempt property, and a year's support, we believe the legislature could have accomplished this objective in one of at least two ways. First, it could have—and we believe it did—construct a computation that removes these items from the gross probatable estate before the surviving spouse's percentage share is applied. Second, had it chosen not to pursue the foregoing approach in carrying out this presumed objective, it could have structured a computation providing that (a) the percentage share is applied to the gross probatable estate *without prior deduction for the statutory entitlements* and (b) the result of that computation would then be reduced by the statutory entitlements. It does not make any sense, however, to do the first *and* then apply a significant variation of the second, resulting in a deduction of these entitlements at the beginning of the computation and then again after the maximum elective share has been determined.

We believe the estate's interpretation is suspect for another reason. As can be seen from the illustration on page six of this opinion, the widow, having chosen to pursue her right to homestead, exempt property, and a year's support, would receive, under the approach of the estate and the trial court, an elective share of $134,016.73 plus her three statutory entitlements of $56,504.92 or a total of $190,521.65. If she had chosen not to receive her statutory entitlements, her elective share would have been calculated as follows:

	Gross Estate		$872,253.32
	Less:		
	ORNL Mortgage	$29,408.23	
	Funeral and Admin. Exp.	78,795.27	108,203.50
	Net Estate		$764,049.82
	30% of Net Estate		$229,214.94

Thus, as the estate and the trial court interpreted the statute, the widow would receive *more, i.e.,* $229,214.94, if she foregoes her three statutory entitlements than she would receive, *i.e.,* $190,521.65, if she claimed them. We refuse to read the statute in a way that attributes to the General Assembly an intention to discourage a surviving spouse from pursuing homestead, exempt property, and a year's support, all entitlements granted by that same legislative body.

We have attempted to construe subsections (b) and (c) of the elective-share statute in a way that will harmonize these two provisions. *See Marsh,* 424 S.W.2d at 196. We believe the only way they can be harmonized is if subsection (c) is read so as not to include the surviving spouse's homestead, exempt property, and year's support among the items to be deducted from the surviving spouse's percentage share of the net estate.

In reaching our decision, we expressly do not rely upon two of the authorities cited by the widow, *i.e., In re Estate of Morris,* 104 S.W.3d 855 (Tenn.Ct.App.2002), and 18 Albert W. Secor, *Tennessee Practice: Tennessee Probate* § 10.5 (2d ed.2002). We do not believe that either of these authorities is implicated by the facts and issue now before us.

We recognize that the "reduction" concept embodied in subsection (c) was not in the elective-share statute prior to January 1, 1998. We also recognize that the concept of the "value of all assets" as found in subsection (c) of the elective-share statute is different from, and more expansive than, the concept of the assets passing through probate as addressed in subsection (b). However, we are not persuaded that the concept in subsection (c) is broad enough to compel, for a second time, the deduction of the surviving spouse's three statutory entitlements as a part of the statutory computation of the amount of the surviving spouse's elective share. We specifically hold that the language of subsection (c) was not intended to include, and does not include, the statutory entitlements set forth in Tenn. Code Ann. §§ 30-2-101 (2001), 30-2-102 (2001), and 30-2-209 (2001). We believe a contrary holding with respect to the statutory entitlements would lead to an absurd result. We decline to go there.

XII.

The judgment of the trial court is reversed. This case is remanded to the court below for further proceedings. Costs on appeal are taxed to the Estate of Frank Soard.

Chapter Four: The Intestacy System (Marital and Adopted Children)

4.1 Introduction

This chapter examines the inheritance rights of what I refer to as first tier children, marital children and adopted children. Under the intestacy system, children born during the marriage are heirs of their mothers and their fathers. These children receive preference over other classes of children and they do not have to take additional steps to acquire the right to inherit. One argument in favor of this preference for marital children is that they are third party beneficiaries of the marital contract between their parents. In addition, it is reasonable that a man would want his marital children to inherit his estate because those are the children with whom he usually has a relationship. Under the marital presumption of paternity doctrine, children born during the marriage are the children of a woman's husband even if the child is a result of an extra-marital affair. The presumption can be rebutted by DNA testing showing that the man and the child are not genetically-related. However, some jurisdictions have adopted the best interests of the child marital presumption. That system only permits the paternity of the child to be rebutted if it is in the child's best interests to do so. It is seldom in the child's best interests to be declared a nonmarital child. Adopted children are treated the same as marital children.

4.2 Marital Children

The only legal issue that may come up with regards to marital children pertain to children born after the death of their mother's husband.

4.2.1 Posthumously Born Children

It is well settled, that posthumously born children are treated the same as children that are alive at the time that the testator dies. In older cases, courts allowed an unborn child to inherit if the child was born within the gestation period without requiring the child to be born within a specific time. Modern courts have recognized a rebuttable presumption that the generally accepted gestation period is 280 days. Thus, if the child is born after the 280 days, the child or the child's parent or guardian has the burden of rebutting the presumption. Failure to rebut the presumption results in an inability to inherit from the deceased man. However, according to the Uniform Parentage Act, the court should recognize a rebuttable presumption that a child born to a woman within 300 days after the death of her husband is a child of the deceased husband. Currently, most jurisdictions have followed the UPC approach and conditioned the ability to inherit upon the child surviving his or her father by a certain period of time. Therefore, a key issue with regards to the inheritance rights of the posthumously born child is whether or not the child was born within the statutorily defined time period.

Morrow v. Scott, 7 Ga. 535 (Ga. 1849)

MERRIWETHER, J.

Ewing T. Morrow died intestate, leaving a large estate. His next of kin, and distributees at law, were his first cousins, of whom several were in life. Within the period of gestation after his death, Mary

M. Morrow, another first cousin, was born, and filed a bill by her guardian, claiming a distributive share. On demurrer, the Court dismissed the bill, and that decision is brought up for review.

WARNER, J.

The only question made by the record in this case for our judgment is, whether the first cousin of the intestate, in *ventre sa mere*, at the time of his death, but born within the usual period of gestation thereafter, is entitled to a distributive share of such intestate's estate.

We are of the opinion, both upon principle and authority, that a child in *ventre sa mere*, at the time of the death of the intestate's ancestor, who is born within the usual period of gestation thereafter, is entitled to a distributive share of such deceased intestate's estate. *Blackstone* states the rule to be that, "An infant in *ventre sa mere*, or in the mother's womb, is supposed in law to be born, for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards, by such limitation, as if it were then actually born; and in this point, the Civil Law agrees *with ours.*" 1 *Bl. Com.* 130. 1 *Roper on Legacies*, 53.

Posthumous children, says Chancellor *Kent*, inherit, in all cases, in like manner as if they were born in the lifetime of the intestate, and had survived him. This is the universal rule in this country. *It is equally the acknowledged principle in the English Law; and for all the beneficial purposes of heirship, a child in ventre sa mere, is considered as absolutely born.* 4 *Kent's Com.* 412. In *Wallis vs. Hodson*, Lord *Hardwicke* held that, both by the rules of the *Common Law*, as well as by the Civil Law, a child in *ventre sa mere*, is in *rerum natura*, and is as much one, as if born in the father's lifetime. 2 *Atkyns*, 116. In *Doe vs. Clark*, it was held, that an infant in *ventre sa mere* is considered as born for all purposes which are for his benefit. 2 *H. Blackstone*, 399. In *Hall vs. Hancock*, the Court ruled, that in general, a child is to be considered as *in being*, from the time of its conception, where it will be for the benefit of such child to be so considered. 15 *Pickering's Rep.* 255. This rule is in accordance with the principles of justice, and we have no disposition to innovate upon it, or create exceptions to it.

Let the judgment of the Court below be reversed.

Uniform Probate Code § 2-108 Afterborn Heirs

An individual in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more after birth.

Class Discussion Tool One

Christine and Eric were married with two children, Polly and Diane. Diane was developmentally disabled. Eric was diagnosed with brain cancer. Christine wanted to attempt to have a son in memory of Eric. Eric stated that he did not want any more children because he had only made financial preparations for two children. Eric's cancer temporarily went into remission. Christine and Eric resumed their sexual relationship. As a result, Christine became pregnant. Before Christine could tell Eric about her condition, his cancer reoccurred. Eric died intestate two months later. Should the unborn child be able to inherit from Eric's estate?

4.3 Adopted Children

Much of American inheritance law is based upon English common law. The English placed a substantial value on blood relations. As a consequence, the common law of England did not give legal recognition to the adoption by one person of the child of another person. Thus, that child did not acquire the status of a child and heir of the person attempting to adopt him or her. In England, the persons having the right to inherit were limited to legitimate children who were heirs by blood. However, adoption existed as a part of the civil law of Rome and other European countries. Adoption law, based upon the laws of France and Spain, was initially introduced into American jurisprudence by the states of Texas and Louisiana. Eventually, several New England states enacted adoption statutes. One of the first states to include adoption as a part of its common law was Massachusetts. The requirements of Massachusetts adoption procedures were codified in the Mass. Stat. of 1851.[17] The push to recognize adoptions in America stemmed from the need to protect neglected and abused children. Therefore, the concept of the "best interests of the child" was developed as a part of American adoption law.[18] Consequently, all of the states in the United States and the District of Columbia currently have adoption statutes in place.

In the majority of jurisdictions, the adopted child is treated as the legal child of the adopting parents once the court has entered the final adoption decree. As a result, the adopted child obtains the right to inherit from the adoptive parents and from the adoptive parents' relatives. Generally, the court decree that finalizes the adoption ends the legal relationship between the birth parents and the adopted child. Therefore, the adopted child does not retain the right to inherit from or through the birth parents.[19] However, the adoption by the spouse of a birth parent generally has no effect on the right of a child to inherit from or through either birth parent.

Since adoption law is statutory and highly localized, adoption laws varies from state to state. With regards to this legal issue, the states have taken several different approaches. Some states like Alaska[20], Idaho[21], Illinois[22] and Maine[23] have enacted statutes that permit the adopted child to inherit from his or her birth parents as long as that right is reserved in the adoption decree. Texas[24]and a

---

[17] *See Ross v. Ross*, 129 Mass. 262-263 (1978).

[18] *Matter of Jarrett*, 230 A.D. 2d 513 (N.Y.S. 2d 1997).

[19] *See e.g.,* Tenn. Ann. Code § 36-1-121.

[20] Alaska Stat. §§ 25.23.130 ("A final decree of adoption relieves the birth parents of the adopted persons of all parental rights and responsibilities, and, except as provided below, terminates all legal relationships between the adopted person and the birth parents and other relatives of the adopted person, so that the adopted person thereafter is a stranger to the former relatives for all purposes including inheritance, unless the decree of adoption specifically provided for continuation of inheritance rights.").

[21] Idaho Code § 16-1509 ("Unless the decree of adoption otherwise provides, the natural parents of an adopted person are relieved of all parental duties toward the adopted person, including the right of inheritance unless specifically provided by will.")

[22] Ill. Cons. Stat. Tit. 755, § 5/2-4(b), (d) ("***"For purposes of inheritance from or through a natural parent, an adopted child is not a child of a natural parent, nor is the child a descendant of a natural parent or of any lineal or collateral kindred of a natural parent, unless ***The contrary intent is demonstrated by the terms of the instrument by clear and convincing evidence.").

[23] Maine Ann. Stat. Tit. 18-A, §§ 9-105; 2-109 ("An adopted person retains the right to inherit from the adopted person's birth parents if the adoption decree so provides, as specified in § 2-109. If a natural parent wishes an adopted child to inherit from the natural parents and their respective kin, the adoption decree must provide for that status.").

[24] Texas Prob. Code § 40; Fam. Code § 162.507 ("The natural parents of an adopted child shall not inherit form or through said child, but said child shall inherit from and through its natural parents.") Texas Prob. Code § 40 ("An

few other states allow the adopted child to inherit from and through both his or her adoptive and birth parents. In Colorado, if there are no other heirs, the adopted child may file a claim against the estate of the birth parent within 90 days of the parent's death.[25] Pennsylvania permits an adopted child to inherit from the estate of a birth relative, other than a birth parent, who has maintained a family relationship with the adopted child.[26]

With regards to inheritance issues, two questions must be answered—Which adopted children should have the opportunity to inherit? From whom should the adopted child be permitted to inherit?. The litigation surrounding the answers to those questions involved the following issues: (1) Whether the legally adopted child has the right to inherit from and through his or her birth parents; (2) Whether the legally adopted child has the right to inherit from and through his or her adoptive parents; (3) Whether the courts should use its equitable powers to permit a child who has not been legally adopted to inherit from and through the intended adoptive parents; and (4) Whether a child who was adopted as an adult should be permitted to inherit from and through his adoptive parents.

4.3.1 Legal Adoption

McKinney's D.R.L. § 117(b) Right to inherit from and through the biological parents eliminated after adoption

> (b) The rights of an adoptive child to inheritance and succession from and through his birth parents shall terminate upon the making of the order of adoption except as hereinafter provided.

The language contained in the above-cited statute is representative of the language found in a majority of state adoption statutes. Once a competent court declares that a child has been legally adopted, the legal relationship between that child and his or her birth parent(s) is severed. The basis of having the ability to inherit from a parent who dies intestate is dependent upon the existence of a parent-child relationship. As a result, once a child is adopted, he or she is not considered to be an heir of his or her biological parent(s). As the next case illustrates, the child may lose the opportunity to inherit from a parent even if that parent does not consent to the legal adoption.

Aldridge v. MIMS, 884 P.2d 817 (N.M. 1994)

BLACK, J.

Born out of wedlock, Steven Aldridge (Child) was adopted in 1978 by his maternal grandparents, but consent to the adoption was not obtained from his natural father. The maternal grandmother attested that the adoption petition did not contain any reference to the alleged natural father because

---

adopted child may, under the laws of descent and distribution, inherit from and through the adopting parents and their relative, and the adopting parents and their family may inherit from and through such adopted child.").

[25] Colo. Rev. Stat. §§ 15-11-103(6)-(7); 15-11-114.

[26] Pa. Cons. Stat. Tit. 20, § 2108 ("An adoption person shall not be considered as continuing to be the child of his or her natural parents except in distributing the estate of a natural kin, other than the natural parent, who has maintained a family relationship with the adopted person.").

he was very violent, and consequently the family was afraid to approach him either for consent to adopt or to ask him to provide support for his child. When Child's alleged natural father died intestate in 1992, Child filed a claim of heirship and a separate suit to establish paternity. The Estate moved to dismiss Child's claim of heirship and paternity suit, and the district court granted the motions to dismiss in both actions. Child appeals both dismissals, and we consolidated the cases on appeal. We affirm.

I. Heirship

In dismissing the claim of heirship, the district court held, inter alia:

1. Steven Ray Aldridge is precluded from making this claim by reason of his adoption by Ray D. Aldridge and Doris Marie Aldridge under the final decree of adoption entered in cause number SA-77-00007 of the Seventh Judicial District of New Mexico on March 3, 1978, said adoption having been sufficient and complete in all respects under the law of New Mexico at such time; and

2. An adoptive child in New Mexico is precluded from inheriting from the estate of a natural father even if paternity of the father is established after the adoption[.]

We conclude that both of these district court holdings correctly state the law.

Child's argument is that he should be able to prove Decedent's paternity so that he can inherit from both his natural parents as well as his adoptive parents. Child argues that when the New Mexico Legislature adopted the Uniform Probate Code (UPC) in 1975 it was "presumed to be aware of all existing case law interpreting [NMSA 1978, Section 45-2-109 (Repl.Pamp.1989)] and have intended the same result." Citing *Stark v. Watson,* 359 P.2d 191 (Okla.1961), Child concludes, "[a]ll cases at that time held that Section 2-109 of the 'UPC did not reveal a legislative intent to destroy the rights of an adopted child to inherit from its natural parents.' "

The flaw in this argument is that under the UPC it is the law at the date of parent's death, not that in effect at the time of adoption, which controls. *See In re Estate of Holt,* 95 N.M. 412, 413, 622 P.2d 1032, 1033 (1981); *In re Estate of Mooney,* 395 So.2d 608, 609 (Fla.Dist.Ct.App.1981). At the time of the alleged father's death in 1992, the New Mexico courts had already established that, under the UPC, an adopted child inherits through the adoptive, not the natural, parents.

The New Mexico Supreme Court interpreted Section 45-2-109 in *In re Estate of Holt.* In rejecting the attempt of a child, who had been adopted by her stepfather, to inherit from her paternal grandmother, who died intestate, our Supreme Court stated:

> The clear meaning of Section 45-2-109 is that an adoption severs the legal rights and privileges between the adopted child and the natural parents. From the point of adoption on, the adopted child belongs to the adoptive parents as if he or she had been their natural child, with the same rights of a natural child, *all to the exclusion of the natural parents.*

Child next urges us to, in essence, overrule *Holt.* Not only are we not at liberty to overrule recent Supreme Court precedent, *State v. Wilson,* 867 P.2d 1175, 1177-78 (N.M. 1994), but additionally we believe the *Holt* Court followed the accepted interpretation of UPC Section 2-109.

II. Constitutionality

Child next argues that if the intestate succession statute can be read to divest children who are adopted by their grandparents from the right to inherit from both natural parents, and not so for children adopted by their stepparents, then the statute is unconstitutional as applied. However, Child provides only policy reasons and no legal precedent to support this contention. Issues raised in briefs that are unsupported by legal authority need not be considered. Moreover, this issue has also been raised under the UPC and has been resolved adversely to Child's position. The Florida Court of Appeals rejected a very similar equal protection challenge to the UPC plan of substituting the adoptive parents for the natural parents, saying:

> Appellant has furnished us with an abundance of statistical information regarding the increase of illegitimacy and the social reasons why § 732.108 [Florida's equivalent of § 45-2-109] should be declared unconstitutional. This argument can best be made before the Legislature which has the obligation to decide the social consequences of legislation. However, the statistics do nothing to convince us that there has been a denial of equal protection. The section simply provides that an adopted person is not a lineal descendant of his natural parent. Other provisions in the section provide that he is a lineal descendant of his adopting parents, the consequence of which afford him full and equal protection to inherit from his adoptive parents.

As in the Florida case, Child's arguments may be appropriate for a debate on public policy in the legislature, but they are an inadequate foundation for a constitutional challenge to the intestacy provisions of the UPC.

III. Adoption

Child argues that the 1978 adoption is void because the 1979 United States Supreme Court decision in *Caban v. Mohammed,* 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979), "declared all state statutes which required an illegitimate child's mother, but not his father, to consent to his adoption, to be unconstitutional as violative of the equal protection clause." This is a misreading of *Caban. Caban* recognized a natural father's interest in the adoption of his children only where he has acknowledged his paternity and developed a relationship with the child. Moreover, Child's adoption decree was entered in March 1978; *Caban* was not filed until more than a year later in April 1979. Even if Child's alleged father had acknowledged and established a relationship with Child, *Caban* has not been applied retroactively.

The New Mexico adoption statutes in effect at the time of Child's 1978 adoption may be found at NMSA 1953, Sections 22-2-20 to -46 (Supp.1975). Section 22-2-33(C) read:

> Subject to the disposition of an appeal, after one [1] year from the date of entry of a judgment of adoption, the judgment of adoption *cannot be questioned by any person,* including the petitioner, *in any manner, upon any ground,* including fraud, misrepresentation or failure to give any required notice. (Emphasis added.)

The statute was emphatic and inclusive in limiting both the persons and grounds on which an adoption could be set aside. Thus, it may be reasonably assumed that the legislature chose a policy that would impose permanence on the adoptive relationship. We conclude that Child's adoption was

final and its validity cannot now be attacked.

IV. Paternity

Finally, Child argues that even as a lawfully adopted child he may proceed with a paternity suit against his natural father's estate. Paternity suits are not recognized as a common-law cause of action in New Mexico. *See State ex rel. Human Servs. v. Aguirre,* 797 P.2d 317, 319 (N.M., Ct.App.1990). Moreover, the primary purpose of paternity suits is to insure the putative father meets his obligation to help support the child. *Id.* As previously noted, the legal effect of an order of adoption is to cause the adopted child to be treated as if it were the natural child of the adoptive parents and thus terminate the natural parent's duty to support such child. *See In re Estate of Holt,* 622 P.2d at 1034. It therefore follows that if the adoption of a child is approved prior to the commencement of a paternity suit, the paternity suit will not lie.

V. Conclusion

The district court properly considered the adoption decree and correctly concluded Child is legally precluded from challenging his adoption at this late date. Since a lawfully adopted child does not inherit from its natural parents, the district court's order dismissing the claim of heirship is affirmed, and since a lawfully adopted child does not have a right to support from his natural parents, the district court's order dismissing the paternity suit is affirmed.

Ellis v. West, 971 So. 2d 20 (Ala. 2007)

WOODALL, Justice.

Betty Ellis, as personal representative of the estate of her sister, Annie Laurie Pace, deceased, appeals from a judgment for Joshua Adam Falls West and Jacob Wayne Falls West ("the children"), by and through their adoptive mother and next friend, Agnes West, on the children's petition asserting a claim in Pace's estate. We reverse and remand with directions.

The facts are undisputed. The decedent, Annie Laurie Pace, was the *maternal great-grandmother* of the children, being the mother of Robert Pace, deceased, who was the father of Kelly Pace, who married Ricky Falls in 1990. In April 1993, Kelly Pace Falls died, survived by her husband and the children. On November 16, 1995, the children were *adopted* by their *paternal grandmother,* Agnes West, and her husband, Albert West, the children's step grandfather.

Annie Laurie Pace died intestate on July 25, 2005, and letters of administration were issued to her sister, Betty Ellis. Subsequently, the children, by and through Agnes West, filed in the probate court a "petition for determination of heirship," alleging that they are the "only surviving lineal descendants of Annie Laurie Pace." The petition sought an "order determining that [the children] are the heirs and next-of-kin of [Annie Pace], and are entitled to inherit the estate of [Annie Pace]." The proceeding was removed to the Jefferson Circuit Court.

On July 5, 2006, Ellis moved for a summary judgment, arguing that the children's petition had no merit, based on Ala. Code 1975, § 43-8-48(1), which provides:

"If, for purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through, or from a person:

"(1) An adopted person is the child of an adopting parent and *not of the natural parents* except that adoption of a child by the spouse of a natural parent has no effect on the right of the child to inherit from or through either natural parent...."

(Emphasis added.)

On August 30, 2006, the trial court entered an order granting the children's petition. The order stated, in pertinent part:

> "The court hereby finds that the undisputed facts show that Kelly Pace Falls, the biological mother of [the children], died prior to the adoption of the children; therefore, there was no termination of parental rights nor relinquishment of parental rights by Kelly Pace Falls. The minor children were adopted by their paternal grandmother, Agnes West and paternal step-grandfather, Albert West, following the death of Kelly Pace Falls. The biological father of the children consented to the adoption of the children by his mother and stepfather.
>
> "The court finds further that § 43-8-48, Code of Alabama, is not to be so strictly construed as to disinherit these minor children from the biological mother's grandmother. *There are no reported Alabama cases applying strict construction of this statute such that these children would not inherit under the law of intestate succession under the facts of this case.* Their deceased biological mother, the granddaughter of the decedent, Annie Laurie Pace, did not consent to the adoption of her children, nor were her parental rights terminated. Neither does this court provide for such a result."

(Emphasis added.)

Subsequently, Ellis appealed. On appeal, Ellis contends that the trial court failed to apply § 43-8-48 according to its *plain meaning,* and that it erred in failing to do so.

Our resolution of this dispute is governed by well-established principles of statutory construction and separation of powers. It is axiomatic that " '[w]ords used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean *exactly what it says.*' " *University of South Alabama v. Progressive Ins. Co.,* 904 So.2d 1242, 1246 (Ala.2004) (quoting *IMED Corp. v. Systems Eng'g Assocs. Corp.,* 602 So.2d 344, 346 (Ala.1992)) (emphasis added). Moreover, " '[i]f the language of the statute is unambiguous, then *there is no room for judicial construction* and the clearly expressed intent of the legislature must be given effect.' " *Id.* (emphasis added).

We see no ambiguity in § 43-8-48(1). It clearly states that an adopted child is *not* the child of its natural parents "for purposes of intestate succession." The *single exception* is where the adoptive parent is "spouse of a natural parent." It is undisputed that the exception does not apply in this case.

The children urge this Court to disregard the clear statutory directive and engage in a labored public-policy discussion, with a view to integrating the probate code with the adoption code, and to affirm the judgment on that basis. Children's brief, at 10-17. This, we may not do.

"'[Section] 43 of the Constitution of Alabama of 1901 mandates the separation of judicial power from legislative power and condemns the usurpation of the power of one branch of government by the other.' " *Sears Termite & Pest Control, Inc. v. Robinson,* 883 So.2d 153, 157 (Ala.2003) (quoting *Ex parte Thicklin,* 824 So.2d 723, 732 (Ala.2002)). " 'The *authority to declare public policy is reserved to the Legislature,* subject to limits imposed by the Constitution.' " *Id.* (emphasis added). *See Rogers v. City of Mobile,* 277 Ala. 261, 281, 169 So.2d 282, 302 (1964); *Almon v. Morgan County,* 245 Ala. 241, 245, 16 So.2d 511, 514 (1944) ("[T]he Legislature prescribes the State's policy; the courts do not.").

"Our laws of descent and distributions are of *statutory creation,* and ... the status of parent and child has always influenced legislative action in determining what shall become of the property of those who die intestate...." *Prince v. Prince,* 188 Ala. 559, 560, 66 So. 27, 28 (1914) (emphasis added). *See also Woodliff v. Dunlap,* 187 Ala. 255, 259, 65 So. 936, 938 (1914) ("[T]he subjects of descent and distribution are of statutory control....").

The legislature has unambiguously declared it to be the policy of this State that, except in one instance immaterial to this case, an adoption severs a child from its natural lineage for purposes of intestate succession. The wisdom or folly of that declaration is of no legitimate concern to the judiciary. *Alabama State Fed'n of Labor v. McAdory,* 246 Ala. 1, 9, 18 So.2d 810, 815 (1944). The judiciary's duty is merely to enforce the policy as declared in § 43-8-48(1).

For these reasons, the judgment of the trial court is reversed, and this cause is remanded with directions to enter a judgment in favor of Ellis.

Right to inherit from biological parent retained after adoption

In some jurisdictions, the adopted child may retain the right to inherit from his or her biological parents. However, as the next case indicates, that right may be impacted by subsequent adoptions.

In re Estate of Moore, 25 P3d 305 (Oklahoma 2001)

BUETTNER, J.

Two children were adopted by George and Sylvia Moore. The couple divorced. After Sylvia Moore's marriage to Ronald Fore, George Moore relinquished his parental rights over the two children, paving the way for Fore's adoption of them. George Moore later died, leaving his estate to his mother, Francis Eugenia Moore. Francis Eugenia Moore subsequently died intestate. The trial court awarded her estate to the two children who had been adopted by George Moore and later adopted by Fore. We hold that children may inherit through intestate succession through their natural parents and their adoptive parents, but that when there are successive adoptions, the last adoption precludes rights of inheritance through intestate succession through previous adoptive parents.

The facts in this case were stipulated:

1. Sylvia R. Fore is the adoptive mother of Wesley Jerome Fore, born January 26, 1965, and Christopher Merrell Fore, born September 23, 1965.

2. Sylvia R. Fore married George Clifford Moore June 16, 1962.

3. George Clifford Moore is the son of the Decedent, Francis Eugenia Moore and Clifford W. Moore, also deceased.

4. George Clifford Moore and Sylvia R. Fore adopted Christopher Fore and Wesley Fore shortly after the births of said children in adoption proceedings in Orleans Parish, Louisiana.

5. Sylvia R. Fore and George Clifford Moore were divorced by Decree of Divorce entered on January 31, 1967 by the District Court of Carter County, Oklahoma, in Case No. D-4344.

6. Sylvia R. Fore, subsequent to her divorce from George Clifford Moore, married Ronald Wilson Fore on or about December 31, 1969.

7. On May 7, 1970, by Decree of Adoption entered by the District Court of Carter County, Oklahoma, Ronald Wilson Fore, husband of Sylvia R. Fore, adopted Christopher Fore and Wesley Fore, in Case No. A-70-18.

8. The estate of George Clifford Moore was probated in the District Court of Kay County, Oklahoma, Case No. P-91-141. By Decree of Distribution dated October 13, 1992, the District Court of Kay County, Oklahoma distributed to Francis Eugenia Moore the entire estate of George Clifford Moore.

9. Francis Eugenia Moore died intestate on September 8, 1999 a resident of Stillwater, Payne County, Oklahoma.

The issue for the trial court, and for the appellate court, was whether "an adopted child may inherit from an adoptive parent whose parental rights are relinquished and terminated when said child has been subsequently adopted by a third party." The trial court relied on 10 O.S. Supp.1995 § 7006-1.3(A), which states that termination of parental rights does not affect the right of the child to inherit from the parent; 10 O.S. Supp.1998 § 7505-6.5, which abolished differences between natural and adopted children; and finally relied on *Matter of the Estate of Flowers,* 1993 OK 19, 848 P.2d 1146, which held that pursuant to the plain language of the statute, that termination of parental rights does not affect the right of the child to inherit from the parent.

"Issues of law are reviewable by a *de novo* standard and an appellate court claims for itself plenary independent and non-deferential authority to reexamine a trial court's legal rulings." *Kluver v. Weatherford Hospital Authority,* 1993 OK 85, 859 P.2d 1081, 1084.

We note first that the "right of an adopted child to inherit is decided by the law in force at the death of the testatrix/testator not the date of adoption." *Flowers, Id.* at 1151. In this case, the law in effect September 8, 1999, is the law to apply.

Despite subsequent amendments, 10 O.S. Supp.1995 § 7006-1.3 has consistently stated that termination of parental rights does not "in any way affect the right of the child to inherit from the parent." *Matter of the Estate of Flowers,* 1993 OK 19, 848 P.2d 1146, 1151. This statement is consistent with the laws of descent and distribution, as well as those concerning adoption.

With respect to intestate succession, "[i]f the decedent leave no surviving husband or wife, but leaves issue, the whole estate goes to such issue,...." A child adopted away from his natural parents remains "issue." Citing 1 Am.Jur. 656, § 57, the court in *Stark v. Watson,* 1961 OK 17, 359 P.2d 191, 193 stated:

> Consanguinity is so fundamental in Statutes of Descent and Distribution that it may only be ignored by construction when courts are forced so to do, either by the express terms of the statute or by inexorable implication. An adopted child is, in a legal sense the child both of its natural and of its adopting parents, and is not, because of the adoption, deprived of its rights of inheritance from its natural parents, unless the statute expressly so provides.

The *Starks* court then held that Oklahoma has "no statutory provisions limiting an adopted child's statutory rights to inherit from its natural parent." *Id.* The effect of a final decree of adoption gives the adopted child and adoptive parents rights to inherit through each other in accordance with the laws of descent and distribution, but there is no excluding of the child's right to inherit from his natural parent. 10 O.S. Supp.1998 § 7505-6.5.

However, a subsequent adoption will terminate any inheritance rights a child might have had from a previous adoption. In *In re Talley's Estate,* 1941 OK 1, 109 P.2d 495, a teen-age boy was adopted by the Talleys. When the boy was nineteen, he was adopted by his natural father. In holding that the boy could not inherit from the Talleys' estate (the first adoptive family), the court stated:

> neither in theory, practice nor common sense was petitioner the adopted son of his first adoptive parents after his second adoption. Having lost that relationship (a thing which by parallel he could not entirely do, at least as to blood, as to his natural parent) there was no longer any predicate upon which to base the conclusion that he would thereafter inherit from his first adoptive parents the same as if he had been their natural son. *Id.* at 498.

We hold that a child may inherit through his natural parents, even after he is adopted away from his natural family. And although an adopted child and adoptive parents enjoy all the rights of descent and distribution as if they were biological parents and child, a subsequent adoption will cut off any right the previous adoption might have conferred on either. If the rule in *Talley's* case is to be changed, it will be up to the Oklahoma Supreme Court.

For these reasons, we reverse the order of the trial court and remand the matter with directions to proceed in a manner consistent with this opinion.

In re Estate of Wulf, 167 N.W.2d 181 (Neb. 1969)

NEWTON, J.

This is an appeal from an order determining heirship in an intestate estate. The question presented is whether or not an adopted child remains an heir of a natural parent who died subsequent to the adoption proceeding. The trial court adjudged that an adopted child may inherit from her natural parents notwithstanding the adoption. We affirm the judgment of the trial court.

Fred Wulf died intestate April 30, 1967, a resident of Washington County, Nebraska. He was the father of four children. Two of his children, Freddie Wulf and Anna Marie Wulf, were the issue of his first marriage. The remaining children, Eggert Wulf and Earl Wulf, were the issue of his second marriage. As an infant, Anna Marie Wulf, during the last illness of her mother, was placed in the care of Mr. and Mrs. Carl Reeh, Mrs. Reeh being a sister of Fred Wulf. She was ultimately adopted by Mr. and Mrs. Reeh and subsequently married, her present name being Anna Marie Ibsen. Throughout his lifetime, her father, Fred Wulf, maintained close contact with his daughter. Her adoptive father, Carl Reeh, died testate and she shared in his estate. Subsequently the adoptive mother, Mrs. Carl Reeh, died intestate and Anna Marie Ibsen inherited the remaining estate of her parents by adoption.

Adoption was unknown to the common law, is a creature of statute, and rights accruing or sacrificed by reason of adoption are to be determined by reference to the statutes of the state having jurisdiction. There are certain general rules on the subject which are almost uniformly recognized. 'Consanguinity is fundamental in statutes of descent and distribution, and the right of a child to inherit from his natural parents or to share in the intestate personalty of their estates is affected by the legal adoption of the child by another only to the extent that such rights are taken away or limited by the terms of the applicable statutes of adoption and descent and distribution, or by necessary implication therefrom. To state the rule another way, an adopted child is, in a legal sense, the child both of its natural and of its adopting parents, and is not, because of the adoption, deprived of its right of inheritance from its natural parents, unless the statute expressly so provides.'

The statutes of the various states pertaining to adoption and the position in which the parties are left subsequent to adoption vary greatly. In some, the right of the adopted child to inherit from its natural parents is specifically preserved. In others, this right is specifically barred. In many others, the statutes do not pass upon the subject by specific language and such statutes remain subject to interpretation. This appears to be true with reference to the Uniform Adoption Code which has been adopted by the State of Oklahoma. In *Stark v. Watson* (Okl.), 359 P.2d 191, it was held that the Uniform Adoption Code did not reveal a legislative intent to destroy the rights of an adopted child to inherit from its natural parents. Ordinarily, 'A statute which includes as a principal or dominant feature the establishing of the child as an heir of the adopting parent, without making reference to the inheritance from natural parents, is not likely to be construed as depriving the child of that inheritance.'

The statutes of Nebraska do not specifically refer to this question of inheritance by an adopted child from its natural parents. Nevertheless, it would appear that the legislative intent is reasonably clear. The Nebraska statutes provide: 'After a decree of adoption is entered, the usual relation of parent and child and all the rights, duties and other legal consequences of the natural relation of child and parent shall thereafter exist between such adopted child and the person or persons adopting such child and his, her or their kindred.' Section 43-110, R.R.S.1943. 'Except as provided in section 43-106.01, after a decree of adoption has been entered, the natural parents of the adopted child shall be relieved of all parental duties toward and all responsibilities for such child and have no rights over such adopted child or to his or her property by descent and distribution.' Section 43-111, R.R.S.1943. 'When a child shall have been relinquished by written instrument, as provided by sections 43-104 and 43-106, to the Department of Public Welfare or to a licensed child placement agency and the agency has, in writing, accepted full responsibility for the child, the person so relinquishing shall be relieved of all parental duties toward and all responsibilities for such child and have no rights over such child. Nothing contained in this section shall impair the right of such child

to inherit.' (Emphasis supplied.) Section 43-106.01, R.R.S.1943.

It will be noted that although all rights of the natural parent over his or her adopted child, including the right to inherit from such child, are clearly barred by the statute, the statute does not likewise bar the right of the adopted child to inherit from its natural parents. Since the Legislature here dealt in part with the inheritable rights of the parties concerned and specifically outlined them in part, the failure to restrict the right of the child to inherit from its natural parents cannot be deemed an oversight but rather an act evidencing the legislative intent to preserve this right in the child. This legislative intent is even more clearly evidenced by the language contained in section 43-106.01, R.R.S.1943, which provides in substance that a child who has been relinquished for adoption to the Department of Public Welfare or to a licensed child placement agency shall not thereby have its right to inherit impaired. To assume that this preservation of the right of the adopted child to inherit from its natural parents was to be limited only to those cases involving relinquishments of the type referred to in the statute would be to strain the credulity of any reasonable person.

It may be of interest to consider the construction placed upon the Utah statute on adoption which is to all intents and purposes identical with section 43-111, R.R.S.1943. The court stated in *In re Benner's Estate,* 109 Utah 172, 166 P.2d 257: 'The statute does not in express terms say that an adopted child may not inherit from its natural parents, nor do we think that it is a necessary implication from the fact that the legislature has said that natural parents lose all rights over its child when it is adopted, nor from the fact that the child becomes the legal child of its adopting parent and sustains all the rights and is subject to all of the duties of that relationship. The more reasonable import of these statutes is that they were enacted for the benefit of the adopted child and to define the relationship between it and its adopting and natural parents insofar as the custody and control of the child is concerned. We cannot say it is a necessary implication from the language used by the legislature that it intended the adopted child to lose certain rights which it otherwise would have. By being born to its natural parents its status was established under our succession statutes and it became entitled to inherit from them.' Other somewhat similar statutes have been likewise construed. *See*, *In re Roderick's Estate*, 291 P. 325; *In re Ballantine's Estate* (N.D.), 81 N.W.2d 259.

This is a case of first impression in Nebraska. We are convinced that it was the legislative intent to permit an adoptive child to inherit from its natural parents and that the judgment of the district court is correct. The judgment of the district court is affirmed.

Affirmed.

The right to inherit from two lines

Uniform Probate Code § 2-113

An individual who is related to the decedent through two lines of relationship is entitled to only a single share based on the relationship that would entitle the individual to the larger share.

Jenkins v. Jenkins, 990 So. 2d 807 (Miss. App. Ct. 2008)

BARNES, J.

Willena Jenkins, administratrix of the estate of her daughter, Janice Jenkins, appeals the judgment of the Chancery Court of Pike County, which determined that one of Janice's heirs at law, DeMarcus Deante Jenkins, would inherit two shares of the estate. The chancellor found DeMarcus entitled to inherit as both an adopted sibling of the decedent, Janice, and as the surviving child of Janice's predeceased sister. We find no error and affirm.

Summary of Facts and Procedural History

On January 20, 2007, Janice died intestate in Pike County without a spouse, surviving children, or more remote lineal descendants. Janice had been disabled since March 1999 due to an alleged medical malpractice incident. Since that time, she had been in a persistent vegetative state. A lawsuit over the matter was settled, resulting in a large part of the estate at issue.

At the time of her death, Janice was a ward under a pending conservatorship proceeding in the Chancery Court of Pike County. A decree was entered converting the conservatorship to an administration of Janice's estate and appointing Willena as the administratrix. During the course of the administration of the estate, Willena filed a petition for adjudication of heirship to determine Janice's heirs at law. Proper notice was given to all of Janice's possible heirs. On May 29, 2007, a hearing was held on the petition. The chancery court adjudicated the following individuals to be Janice's heirs-at-law: (1) Willena Jenkins, living mother; (2) Edward Jenkins, Jr., living father; (3) Glenn Edward Jenkins, living brother; (4) Linda Faye Jenkins Adams, living sister; (5) Lisa Michelle Jenkins, living sister; (6) John Ellis Jenkins, living brother; (7) Shirley Rosetta Jenkins, living sister by adoption; and (8) DeMarcus Deante Jenkins, living minor brother by adoption. However, one of Janice's sisters, Stephanie Ann Jenkins, had predeceased her. Stephanie left one living descendant, her minor son and natural child, DeMarcus. However, subsequent to his mother's death, on April 18, 1997, DeMarcus was lawfully adopted by his grandparents, Willena and Edward. According to the parties' stipulation of facts, the adoption decree did not preclude or limit the right of DeMarcus to inherit from the estate of his mother, Stephanie.

Also on May 29, 2007, Willena filed a petition for allowance of certain claims and other relief. Within the petition, Willena requested the chancery court adjudicate the apportionment of the estate as it pertains to DeMarcus because of the unusual situation that had arisen. On the one hand, under the applicable statute regarding intestate succession, each of the enumerated heirs would receive a one-eighth share of Janice's estate. Therefore, DeMarcus would be entitled to inherit the share of his deceased mother, Stephanie. On the other hand, as a result of his adoption by Willena and Edward, DeMarcus would also be entitled to inherit as Janice's adopted brother. Thus, Willena specifically requested the chancellor to determine if DeMarcus would inherit one one-eighth share of the estate or if DeMarcus would inherit two one-ninth shares of the estate.

On June 21, 2007, a hearing was held on the petition, and a final judgment was entered regarding DeMarcus's shares. The chancellor found that Janice's heirs at law would each receive a one-ninth share of her estate, with the exception of DeMarcus, who would receive two one-ninth shares. The

chancellor duly noted "the apparent inequity that is resulting" from her judgment but she stated the matter warranted strict statutory construction. Willena subsequently appealed this determination.

Standard of Review

Whether DeMarcus should receive one or two shares of Janice's estate is a question of law. This Court reviews questions of law de novo. *Estate of Yount v. McKnight,* 845 So.2d 724, 726 (Miss.Ct.App.2003) (citing *Estate of Jones v. Howell,* 687 So.2d 1171, 1174 (Miss.1996)).

Discussion

Whether The Chancery Court Erred In Determining That DeMarcus Was Entitled To Two Shares of Janice's Net Estate

This case requires that we analyze the statutory framework surrounding the unique factual circumstances, which are undisputed. Both parties agree that the two determinative statutes are Mississippi Code Annotated section 91-1-3 (Rev.2004), which deals with intestate succession of real property, and Mississippi Code Annotated section 93-17-13 (Supp.2007), which relates the effect of adoption on inheritance. However, the parties disagree on the interpretation and outcome of these two statutes when read together.

Section 91-1-3 provides in relevant part that when an individual dies intestate, the following occurs:

> When there shall not be a child or children of the intestate nor descendants of such children, then to the brothers and sisters and father and mother of the intestate and the descendants of such brothers and sisters in equal parts, the descendants of a sister or brother of the intestate to have in equal parts among them their deceased parent's share.

Miss. Code Ann. § 91-1-3. DeMarcus's mother, Stephanie, was the decedent Janice's sister. This statute preserves the right of DeMarcus to inherit his deceased mother's portion of Janice's estate, as his mother's sole descendant. Thus, under this statute, DeMarcus would receive an equal share of Janice's net estate, also divided among Janice's other heirs at law.

The other applicable statute, section 93-17-13 states in part that:

> The final decree [of adoption] shall adjudicate, in addition to such other provisions as may be found by the court to be proper for the protection of the interests of the child; and its effect, unless otherwise specifically provided, shall be that (a) *the child shall inherit from and through the adopting parents and shall likewise inherit from the other children of the adopting parents to the same extent and under the same conditions as provided for the inheritance between brothers and sisters of the full blood by the laws of descent and distribution of the State of Mississippi....*

Miss. Code Ann. § 93-17-13 (emphasis added). This section clearly provides that DeMarcus, as the adopted son of Janice's mother and father (his natural grandparents), would be treated as Janice's adopted brother for inheritance purposes. Because the adoption at issue occurred between related family members, an unusual situation arises, as DeMarcus occupies two positions for inheritance purposes: as the sole heir to his mother's share of Janice's estate through the statutory right of representation, and as Janice's adopted sibling.

Case law in Mississippi is also clear that, in the absence of a statute or decree to the contrary, an adoptive child inherits from both natural and adoptive parents. *Sledge v. Floyd,* 139 Miss. 398, 407-08, 104 So. 163, 165 (1925) (adoption statute not "intended to deprive children of their rights to inherit from their natural parents and blood relatives"; adopted child held entitled to portion of natural grandfather's estate). In the more recent authority, *Alack v. Phelps,* 230 So.2d 789, 793 (Miss.1970), the Mississippi Supreme Court has continued to hold that Mississippi's adoption statutes do not terminate the right of the child to inherit from his natural parents. *See also Warren v. Foster,* 450 So.2d 786, 787 (Miss.1984) (holding that the right of an adoptive child to inherit from both natural and adoptive parents remains pursuant to section 93-17-13). The *Alack* court notes this holding is in accordance with the clear intent of the Legislature, stating:

> While the effect of a final decree of adoption is that the natural parent or parents will not inherit by or through the child, and all parental rights are terminated, *Mississippi's adoption law does not state in any shape, form or fashion that the right of the child to inherit from its natural parents is terminated.* We think the intent of the legislature is clear; they intended for the child to continue to inherit from his or her natural parents.

Alack, 230 So.2d at 792-93 (emphasis added) (citing *Sledge,* 139 Miss. at 408, 104 So. at 165; 2 C.J.S. *Adoption of Children* § 63(c) (1936) (in absence of statute to the contrary, adopted child "still inherits from or through his blood relatives, or his natural parents")); *see also* Robert A. Weems, Wills and Administration of Estates in Mississippi, § 1:9 (3rd ed.2003) (as statute is silent regarding child's right to inherit from "natural family and their kindred[,] ... the right to inherit that the child had prior to the adoption remains intact"). The public policy behind continuing to allow adoptive children to inherit from their natural parents is "to protect minor children from losing their birthright without consent or knowledge. The tendency of the courts is to construe adoption statutes so as to benefit the child." *Estate of Yount*, 845 So. 2d at 727.

Additionally, *Alack* pronounces that since adoption statutes are in derogation of the common law, they are to be strictly construed. *Alack,* 230 So.2d at 793.

Willena bases her argument on rules of statutory construction. She cites the axiom that when two statutes encompass the same subject matter, they must be read together, along with the legislative intent. *Wilbourn v. Hobson,* 608 So.2d 1187, 1191 (Miss.1992). The majority of Willena's argument, however, relies on the doctrine *in pari materia.* This doctrine of statutory construction states that if a statute is ambiguous, the court must resolve the ambiguity by interpreting the statute consistently with other statutes on the same or similar subject matter. *State ex rel. Hood v. Madison County,* 873 So.2d 85, 90 (Miss.2004). Accordingly, Willena claims that Mississippi's intestate succession statute, section 91-1-3, should be construed *in pari materia* with the adoption statute, section 93-17-13. To utilize this doctrine, the legislative intent as a whole must be derived from the statutes at issue, as the inconsistencies of one statute may be resolved by looking at another statute on the same subject. *Wilbourn,* 608 So.2d at 1191. Willena concludes that legislation on the same subject matter must be harmonized to fit into the dominate policy of their subject matter, citing *Andrews v. Waste Control, Inc.,* 409 So.2d 707, 713 (Miss.1982).

Willena contends that the legislative intent of section 93-17-13 is to elevate the adopted child to the same level as the natural child, but not to raise the adoptive child higher than the natural child. The ultimate effect of the chancellor's ruling, Willena claims, goes further than the Legislature intended

and has the effect of penalizing the other heirs at law. Willena argues that the better analysis is to have DeMarcus inherit, under the laws of descent and distribution, from Janice solely as the adopted brother of Janice. Willena explains this will protect the right of DeMarcus as an adoptive child toward his adoptive family. Further, she claims that the rights of DeMarcus as an adopted brother have superseded his rights as a descendant of his deceased mother-Janice's natural sister.

We are not persuaded by Willena's arguments. We agree with the chancellor that strict statutory construction-giving full effect to both statutes-is necessary in this situation, even though it results in DeMarcus's receiving a greater share than the other heirs of Janice. It is clear that DeMarcus has the right to inherit pursuant to both section 91-1-3 and section 93-17-13. It is the norm that every adoptee may inherit under both of these statutes, and in fact, it is statutorily required. This case has an unusual outcome only because the adoptive parents and the natural parent are related. We find no instance where Mississippi's inheritance statutes force the heir to choose under which statute he will inherit, as Willena advocates. In the absence of a legislative enactment which states otherwise, DeMarcus may inherit as both an adopted sibling of Janice and as the son of Janice's natural sister, Stephanie.

In response to Willena's arguments on statutory construction, we find that it is the unusual factual circumstance of the case which leads to the unusual legal result, not inconsistencies between the statutes themselves. The two statutes are not in conflict or ambiguous, as required in order to apply the doctrine of *in pari materia*. Therefore, "harmonizing" the statutes to produce a more logical outcome is improper. Even if we were to interpret the statutes *in pari materia,* when we examine the legislative intent of similar statutes, we find the chancellor's ruling proper. As *Alack* states regarding Mississippi's adoption statutes, "the legislative intent is clear; they intended for the child to continue to inherit from his or her natural parents." *Alack,* 230 So.2d at 793. This clearly expressed legislative intent is in direct conflict with Willena's proposed solution, which is to ignore DeMarcus's birthright position as the heir to his mother's share of the estate and allow him to inherit only as the decedent's adopted brother. The adoption statute clearly does not terminate the right of the adopted child to inherit from his or her natural parent or blood relative. Alternatively, ignoring DeMarcus's adoptive status flies in the face of the legislative intent as well, because the adoption statutes were created to protect the child. Even though, in this unique instance, because the adopted parents are related to the natural parent, the "protection" places the "adopted," but also related, child in a higher position than the other related heirs at law, it is well established in Mississippi that adoption statutes must be strictly construed, as they are in derogation of the common law. *Alack,* 230 So.2d at 793.

As for Willena's claims that DeMarcus's inheriting two shares of the estate is inequitable, we find that any other result would contradict the legislative policy established through the adoption statute to protect the inheritance rights of adopted children. In this special circumstance, where the adoptive parents are related to the adopted child and to one of the child's natural parents, any perceived inequity of a dual inheritance could be eliminated by limiting the adopted child's right to inherit from the adoptive kindred in the final adoption decree. *See* Miss. Code Ann. § 93-17-13 (providing that the final decree of adoption shall adjudicate that the child shall inherit from and through the adopting kindred "unless otherwise specifically provided").

Finally, we find it unnecessary to distinguish the case law from other jurisdictions that Willena cites that have allowed or disallowed dual inheritances in a variety of situations. The determinative law of this case is statutory and specific to Mississippi.

Conclusion

Based on the foregoing reasons, we find the chancellor did not err in ruling that DeMarcus is entitled to two one-ninth shares of Janice's estate. Accordingly, we affirm the judgment of the Chancery Court of Pike County.

The Judgment of the Chancery Court of Pike County is Affirmed.

Notes and Questions

1. In the majority jurisdictions, after a child is adopted, the court severs the relationship between that child and the child's birth parents. Since a parent-child relationship no longer exists, the child does not have the right to inherit from the birth parents. *See Matter of Estate of Jank*, 521 N.W.2d 162 (Wis. App. 1994).

2. Eventually, in stranger adoption cases, the identity of the birth parents was withheld from the adopted child. The purpose of that was to protect the privacy of the adopted parents and the birth parents. That also enables the child to be part of the new family unit. *See* Elizabeth J. Samuels, *The Idea of Adoption: An Inquiry Into the History of Adult Adoptee Access to Birth Records*, 53 Rutgers L. Rev. 367 (Winter 2001).

3. From a public policy perspective, what are the reasons to prevent the adopted child from inheriting from the biological parents? A child's biological grandparents are not a part of the adoption process. Why does it make sense to prevent the child from inheriting from his or her biological grandparents?

4. What would be the outcome of the *Jenkins* case in a UPC jurisdiction? Is the approach set forth in UPC § 2-113 better than the one utilized by the court in the *Jenkins* case?

4.3.2 Equitable Adoption

Right to inherit from the intended adoptive parents

It is clear that a child who is legally adopted has a right to inherit from his or her adopted parents. In order for the adoption to be legal, the parties must comply with the mandates of the adoption statute. Nonetheless, courts have exercised their equitable powers to recognize informal arrangements that have the attributes of adoptions. These situations are referred to as virtual or equitable adoptions. An equitably adopted child acquires the right to inherit from the person who informally adopts him or her.

In order to establish the existence of an equitable adoption, the child must prove the following elements: (1) an agreement to adopt between the birth parents and alleged adoptive parents; (2) performance by the birth parents of the child in giving custody; (3) performance by the child by living in the home of the alleged adoptive parents; (4) partial performance by the alleged adoptive parents in taking the child into their home and treating the child as their own child; and (5) intestacy of the alleged adoptive parents. Once a competent court decides that a child has been equitably adopted, that child has the right to inherit from the intended adoptive parents.

O'Neal vs. Wilkes, 439 S.E.2d 490 (Ga. 1994)

FLETCHER, J.

In this virtual adoption action, a jury found that appellant Hattie O'Neal had been virtually adopted by the decedent, Roswell Cook. On post-trial motions, the court granted a judgment notwithstanding the verdict to appellee Firmon Wilkes, as administrator of Cook's estate, on the ground that the paternal aunt who allegedly entered into the adoption contract with Cook had no legal authority to do so. We have reviewed the record and conclude that the court correctly determined that there was no valid contract to adopt.

O'Neal was born out of wedlock in 1949 and raised by her mother, Bessie Broughton, until her mother's death in 1957. At no time did O'Neal's biological father recognize O'Neal as his daughter, take any action to legitimize her, or provide support to her or her mother. O'Neal testified that she first met her biological father in 1970.

For four years after her mother's death, O'Neal lived in New York City with her maternal aunt, Ethel Campbell. In 1961, Ms. Campbell brought O'Neal to Savannah, Georgia, and surrendered physical custody of O'Neal to a woman identified only as Louise who was known to want a daughter. Shortly thereafter, Louise determined she could not care for O'Neal and took her to the Savannah home of Estelle Page, the sister of O'Neal's biological father. After a short time with Page, Roswell Cook and his wife came to Savannah from their Riceboro, Georgia home to pick up O'Neal. Page testified that she had heard that the Cooks wanted a daughter and after telling them about O'Neal, they came for her.

Although O'Neal was never statutorily adopted by Cook, he raised her and provided for her education and she resided with him until her marriage in 1975. While she never took the last name of Cook, he referred to her as his daughter and, later, identified her children as his grandchildren.

In November 1991, Cook died intestate. The appellee, Firmon Wilkes, was appointed as administrator of Cook's estate and refused to recognize O'Neal's asserted interest in the estate. In December 1991, O'Neal filed a petition in equity asking the court to declare a virtual adoption, thereby entitling her to the estate property she would have inherited if she were Cook's statutorily adopted child.

1. The first essential of a contract for adoption is that it be made between persons competent to contract for the disposition of the child. *Winder v. Winder,* 218 Ga. 409, 128 S.E.2d 56 (1962); *Rucker v. Moore,* 186 Ga. 747, 748, 199 S.E. 106 (1938). A successful plaintiff must also prove:

> Some showing of an agreement between the natural and adoptive parents, performance by the natural parents of the child in giving up custody, performance by the child by living in the home of the adoptive parents, partial performance by the foster parents in taking the child into the home and treating [it] as their child, and ... the intestacy of the foster parent.

Williams v. Murray, 239 Ga. 276, 236 S.E.2d 624 (1977), quoting *Habecker v. Young,* 474 F.2d 1229, 1230 (5th Cir.1973). The only issue on this appeal is whether the court correctly determined that

Page was without authority to contract for O'Neal's adoption.

2. O'Neal argues that Page, a paternal aunt with physical custody of her, had authority to contract for her adoption and, even if she was without such authority, any person with the legal right to contract for the adoption, be they O'Neal's biological father or maternal aunts or uncles, ratified the adoption contract by failing to object.

As a preliminary matter, we agree with O'Neal that although her biological father was living at the time the adoption contract was allegedly entered into, his consent to the contract was not necessary as he never recognized or legitimized her or provided for her support in any manner. *See Williams,* 239 Ga. 276, 236 S.E.2d 624 (mother alone may contract for adoption where the father has lost parental control or abandoned the child); OCGA § 19-7-25, Code 1933, § 74-203 (only mother of child born out of wedlock may exercise parental power over the child unless legitimized by the father); *see also* OCGA § 19-8-10 (parent not entitled to notice of petition of adoption where parent has abandoned the child). What is less clear are the rights and obligations acquired by Page by virtue of her physical custody of O'Neal after her mother's death.

3. The Georgia Code defines a "legal custodian" as a person to whom legal custody has been given by court order and who has the right to physical custody of the child and to determine the nature of the care and treatment of the child and the duty to provide for the care, protection, training, and education and the physical, mental, and moral welfare of the child. OCGA § 15-11-43, Code 1933, § 24A-2901. A legal custodian does not have the right to consent to the adoption of a child, as this right is specifically retained by one with greater rights over the child, a child's parent or guardian. OCGA § 15-11-43, Code 1933, § 24A-2901 (rights of a legal custodian are subject to the remaining rights and duties of the child's parents or guardian); *Skipper v. Smith,* 239 Ga. 854, 238 S.E.2d 917 (1977) (right to consent to adoption is a residual right retained by a parent notwithstanding the transfer of legal custody of the child to another person); *Jackson v. Anglin,* 193 Ga. 737, 738, 19 S.E.2d 914 (1942)(parent retains exclusive authority to consent to adoption although child is placed in temporary custody of another); *Carey v. Phillips,* 137 Ga. App. 619, 624, 224 S.E.2d 870 (1976) (parent's consent is required for adoption of child although child is in physical custody of another).

O'Neal concedes that, after her mother's death, no guardianship petition was filed by her relatives. Nor is there any evidence that any person petitioned to be appointed as her legal custodian. Accordingly, the obligation to care and provide for O'Neal, undertaken first by Campbell, and later by Page, was not a legal obligation but a familial obligation resulting in a custodial relationship properly characterized as something less than that of a legal custodian. Such a relationship carried with it no authority to contract for O'Neal's adoption. *See Skipper,* 239 Ga. at 856, 238 S.E.2d 917. While we sympathize with O'Neal's plight, we conclude that Page had no authority to enter into the adoption contract with Cook and the contract, therefore, was invalid.

4. Because O'Neal's relatives did not have the legal authority to enter into a contract for her adoption, their alleged ratification of the adoption contract was of no legal effect and the court did not err in granting a judgment notwithstanding the verdict in favor of the appellee. *See Foster v. Cheek,* 212 Ga. 821, 96 S.E.2d 545 (1957) (adoption contract made between persons not competent to contract for child's adoption specifically enforceable where the parent with parental power over the child acquiesced in and ratified the adoption contract).

Judgment affirmed.

SEARS-COLLINS, J., dissenting.

I disagree with the majority's holding that O'Neal's claim for equitable adoption is defeated by the fact that her paternal aunt was not a person designated by law as one having the authority to consent to O'Neal's adoption.

1. In *Crawford v. Wilson,* 139 Ga. 654, 658, 78 S.E. 30 (1913), the doctrine of equitable or virtual adoption was recognized for the first time in Georgia. Relying on the equitable principle that "equity considers that done which ought to have been done," *id.* at 659, 78 S.E. 30; see OCGA § 23-1-8, we held that "an agreement to adopt a child, so as to constitute the child an heir at law on the death of the person adopting, performed on the part of the child, is enforceable upon the death of the person adopting the child as to property which is undisposed of by will," * *id.* We held that although the death of the adopting parents precluded a literal enforcement of the contract, equity would "enforce the contract by decreeing that the child is entitled to the fruits of a legal adoption." *Id.* In *Crawford,* we noted that the full performance of the agreement by the child was sufficient to overcome an objection that the agreement was unenforceable because it violated the statute of frauds. *Id.* 139 Ga. at 658, 78 S.E. 30. We further held that

> [w]here one takes an infant into his home upon a promise to adopt such as his own child, and the child performs all the duties growing out of the substituted relationship of parent and child, rendering years of service, companionship, and obedience to the foster parent, upon the faith that such foster parent stands in loco parentis, and that upon his death the child will sustain the legal relationship to his estate of a natural child, there is equitable reason that the child may appeal to a court of equity to consummate, so far as it may be possible, the foster parent's omission of duty in the matter of formal adoption. [*Id.* at 660, 78 S.E. 30.]

Although the majority correctly states the current rule in Georgia that a contract to adopt may not be specifically enforced unless the contract was entered by a person with the legal authority to consent to the adoption of the child, *Crawford* did not expressly establish such a requirement, and I think the cases cited by the majority that have established this requirement are in error.

Instead, I would hold that where a child has fully performed the alleged contract over the course of many years or a lifetime and can sufficiently establish the existence of the contract to adopt, equity should enforce the contract over the objection of the adopting parents' heirs that the contract is unenforceable because the person who consented to the adoption did not have the legal authority to do so. Several reasons support this conclusion.

First, in such cases, the adopting parents and probably their heirs know of the defect in the contract and yet voice no objection to the contract while the child fully performs the contract and the adopting parents reap the benefits thereof. Under these circumstances, to hold that the contract is unenforceable after the child has performed is to permit a virtual fraud upon the child and should not be countenanced in equity. Equity does not permit such action with regard to contracts that are initially unenforceable because they violate the statute of frauds, but instead recognizes that the full performance of the contract negates its initial unenforceability and renders it enforceable in equity. *Harp v. Bacon,* 222 Ga. 478, 482-83 (1), 150 S.E.2d 655 (1966).

Moreover, the purpose of requiring consent by a person with the legal authority to consent to an adoption, where such a person exists, is to protect that person, the child, and the adopting parents. However, as equitable adoption cases do not arise until the death of the adopting parents, the interests of the person with the consent to adopt and of the adopting parents are not in jeopardy. On the other hand, the interests of the child are unfairly and inequitably harmed by insisting upon the requirement that a person with the consent to adopt had to have been a party to the contract. That this legal requirement is held against the child is particularly inequitable because the child, the course of whose life is forever changed by such contracts, was unable to act to insure the validity of the contract when the contract was made.

Furthermore, where there is no person with the legal authority to consent to the adoption, such as in the present case, the only reason to insist that a person be appointed the child's legal guardian before agreeing to the contract to adopt would be for the protection of the child. Yet, by insisting upon this requirement after the adopting parents' deaths, this Court is harming the very person that the requirement would protect.

For all the foregoing reasons, equity ought to intervene on the child's behalf in these types of cases, and require the performance of the contract if it is sufficiently proven. *See* OCGA § 23-1-8. In this case, I would thus not rule against O'Neal's claim for specific performance solely on the ground that her paternal aunt did not have the authority to consent to the adoption.

2. Moreover, basing the doctrine of equitable adoption in contract theory has come under heavy criticism, for numerous reasons. For instance, as we acknowledged in *Wilson, supra,* 139 Ga. at 659, 78 S.E. 30, the contract to adopt is not being specifically enforced as the adopting parents are dead; for equitable reasons we are merely placing the child in a position that he or she would have been in if he or she had been adopted. Moreover, it is problematic whether these contracts are capable of being enforced in all respects during the child's infancy. Furthermore, because part of the consideration for these contracts is the child's performance thereunder, the child is not merely a third-party beneficiary of a contract between the adults involved but is a party thereto. Yet, a child is usually too young to know of or understand the contract, and it is thus difficult to find a meeting of the minds between the child and the adopting parents and the child's acceptance of the contract. I agree with these criticisms and would abandon the contract basis for equitable adoption in favor of the more flexible and equitable theory advanced by the foregoing authorities. That theory focuses not on the fiction of whether there has been a contract to adopt but on the relationship between the adopting parents and the child and in particular whether the adopting parents have led the child to believe that he or she is a legally adopted member of their family.

3. Because the majority fails to honor the maxim that "[e]quity considers that done which ought to be done,"§ 23-1-8, and follows a rule that fails to protect a person with superior equities, I dissent.

Welch vs. Wilson, 516 S.E.2d 35 (W. Va. 1999)

Per Curiam:

This is an appeal by Glenell Welch (hereinafter "Appellant") from a December 31, 1997, order of the Circuit Court of Wood County, ruling that John Maxwell Wilson, II, (hereinafter "Appellee") was the sole heir of John Maxwell Wilson (hereinafter "decedent"). The Appellant contends that the

lower court erred in ruling that she was not equitably adopted by the decedent and in improperly relying upon certain probate records of Mrs. Margaret Wilson, the decedent's wife and the Appellant's grandmother. We reverse the decision of the lower court and remand for entry of an order declaring that the Appellant had been equitably adopted by the decedent.

I. Facts

The Appellant was born on August 31, 1971, to Glen and Kathy Welch. Within six months of her birth, physical custody of the Appellant was voluntarily transferred to the Appellant's maternal grandmother, Mrs. Margaret Wilson, and her husband, decedent John Maxwell Wilson. Mr. Wilson was the step-grandfather of the Appellant, and Mr. Wilson had one natural child from a previous marriage, Appellee John Maxwell Wilson, II.

Mr. and Mrs. Wilson provided all financial support for the Appellant, and she maintained little contact with her natural parents. Her parents eventually divorced, her father remarried, and her mother moved out of state without further visitation or contact. While the Wilsons did not seek formal adoption, school records indicated that John and Margaret Wilson were the Appellant's parents. The evidence indicated that the Wilsons functioned as the parental authorities for the Appellant for a period of fifteen years, from the time the Appellant was six months of age until the death of Mrs. Wilson in 1986. Mrs. Sandra Welch, Glen Welch's third wife, testified that upon Glen Welch's instruction, she visited the Wilson home to offer to take Glenell from Mr. Wilson's care after the death of Mrs. Wilson. Mr. Wilson allegedly informed Mrs. Welch that he wished to retain custody of Glenell; consequently, the Appellant continued to reside with Mr. Wilson after Mrs. Wilson's death.

In 1988, the Appellant gave birth to a child out of wedlock. Although she lived briefly with her boyfriend and in her own trailer with the child, she continued to reside primarily with Mr. Wilson until she was nineteen years of age, in 1990. When Mr. Wilson was diagnosed with cancer in 1993, Glenell and other family members cared for him in his home. On June 14, 1996, Mr. Wilson died intestate.

Pursuant to West Virginia Code § 42-1-9 (1998), entitled "Establishment and Recordation of Descent," the Appellant filed a Petition for Determination of Heirship in the lower court, alleging that she had been equitably adopted by the decedent. Subsequent to a bench trial, the lower court denied the petition and ruled that the Appellant had failed to establish sufficient facts to prove that she had been equitably adopted by the decedent. The Appellant appeals that ruling to this Court.

II. Standard of Review

We expressed the following standard of review in syllabus point four of *Burgess v. Porterfield,* 469 S.E.2d 114 (Va., 1996): "This Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed de novo."

III. Discussion

The Appellant asserts that the lower court erred in failing to find that she had been equitably adopted by the decedent, and further asserts that the lower court improperly relied upon certain

probate records of Mrs. Margaret Wilson. Our seminal case on the issue of equitable adoption is *Wheeling Dollar Savings & Trust Co. v. Singer,* 250 S.E.2d 369 (W. Va., 1978). Syllabus point two of *Singer* explained as follows:

> The doctrine of equitable adoption is hereby incorporated into the law of West Virginia, but a litigant seeking to avail himself of the doctrine in a dispute among private parties concerning trusts or the descent of property at death must prove by clear, cogent, and convincing evidence that he has stood from an age of tender years in a position exactly equivalent to that of a formally adopted or natural child; provided, however, that the same strict standard of proof does not apply to the determination of dependency under any State remedial statute conferring State government benefits which must be liberally construed to effect its purpose.

250 S.E.2d at 370 (footnote added).

In addressing the competing concerns of an equitable adoption allegation, we reasoned in *Singer* that "[w]hile formal adoption is the only safe route, in many instances a child will be raised by persons not his parents from an age of tender years, treated as a natural child, and represented to others as a natural or adopted child." 250 S.E.2d at 373.

Our family centered society presumes that bonds of love and loyalty will prevail in the distribution of family wealth along family lines, and only by affirmative action, i.e., writing a will, may this presumption be overcome. An equitably adopted child in practical terms is as much a family member as a formally adopted child and should not be the subject of discrimination. He will be as loyal to his adoptive parents, take as faithful care of them in their old age, and provide them with as much financial and emotional support in their vicissitudes, as any natural or formally adopted child.

Id.

In discussing the proof necessary to establish equitable adoption, we noted as follows in *Singer:*

> Circumstances which tend to show the existence of an equitable adoption include: the benefits of love and affection accruing to the adopting party, *Foster v. Cheek,* 96 S.E.2d 545 (Ga. 1957); the performances of services by the child, *Lynn v. Hockaday,* 61 S.W. 885 (Mo. 1901); the surrender of ties by the natural parent, *Chehak v. Battles,* 110 N.W. 330 (Iowa 1907); the society, companionship and filial obedience of the child, *Oles v. Wilson,* 141 P. 489 (Colo.1914); an invalid or ineffectual adoption proceeding, *Benefield v. Faulkner,* 29 So.2d 1 (Ala. 1947); reliance by the adopted person upon the existence of his adoptive status, *Adler v. Moran,* 549 S.W.2d 760 (Tex.Civ.App.1977); the representation to all the world that the child is a natural or adopted child, *In re Lamfrom's Estate,* 368 P.2d 318 (Ariz. 1962); and the rearing of the child from an age of tender years by the adopting parents. *Lamfrom's Estate, supra.* Of course, evidence can be presented which tends to negate an equitable adoption such as failure of the child to perform the duties of an adopted child, *Fisher v. Davidson,* 195 S.W. 1024 (Mo. 1917), or misconduct of the child or abandonment of the adoptive parents, *Winne v. Winne,* 59 N.E. 832 (N.Y.1901); however, mere mischievous behavior usually associated with being a child is not sufficient to disprove an equitable adoption. *Tuttle v. Winchell,* 178 N.W. 755 (Neb. 1920).

Id. at 508-09, 250 S.E.2d at 373-74. *See also Kisamore v. Coakley,* 437 S.E.2d 585 (W. Va.1993).

In the case sub judice, the facts are virtually undisputed. Our review of the lower court's conclusion of law is de novo. We find that the Appellant has proven by clear, cogent, and convincing evidence, that she enjoyed a status within the decedent's home and family identical to that of a formally adopted child. Reviewing all facts available, we find that the decedent treated the Appellant with the degree of care, nurturing, and shelter enjoyed by a natural child. Ties were severed with her natural parents, and the decedent specifically declined the opportunity to release himself of the responsibility for the care of the Appellant subsequent to Mrs. Wilson's death. The evidence of the decedent's devotion to the Appellant and her reciprocation of such devotion is uncontradicted, and the record is replete with examples of the loving relationship between the two.

Consequently, we reverse the decision of the lower court and remand for entry of an order declaring that the Appellant had been equitably adopted by the decedent.

Notes and Questions

1. Informal arrangements are common in many communities, especially in communities of color. When something happens to a parent, the grandparent or other close relatives usually step forward and care for the minor children. These people may not have the time or money to execute a legal adoption. In some cases, even persons with the resources do not think that an adoption is necessary. Should the child be penalized because the adults failed to take the steps necessary to legally adopt him or her? Michael J. Higdon, *When Informal Adoption Meets Intestate Succession: The Cultural Myopia of the Equitable Adoption Doctrine*, 43 Wake Forest L. Rev. 223, 230-250 (Spring 2008).

2. From a public policy perspective, what are the pros and cons of recognizing equitable adoptions? Jan Elle Rein, *Relatives By Blood, Adoption, and Association: Who Should Get What and Why?,* 37 Vand. L. Rev. 711 (1984).

3. The main issue addressed by the *O'Neal* court was whether the person who gave O'Neal to the Cooks had the legal authority to consent to her adoption. The purpose of the equitable adoption doctrine is to enable the court to deem done what the parties intended to be done. This is usually the case when the courts exercise their equitable powers. In the *O'Neal* case, since no one with the authority attempted to have the child legally adopted, the child could not be considered equitably adopted. The court's job is to effectuate the parties' intent not to create it.

4. What factual differences justify the different outcomes of the *O'Neal* and *Welch* cases?

5. Is the *O'Neal* case correctly decided if the purpose of the intestacy system is to carry out the presumed intent of the decedent?

6. Would O'Neal's case have been stronger if she had introduced evidence that she took care of the Cooks when they were elderly?

Right to inherit from biological parents

Gardner v. Hancock, 924 S.W.2d 857 (Mo. 1996)

MONTGOMERY, Presiding Judge.

Ruth Elizabeth Gardner (Respondent), James Gardner's niece, brought a quiet title action with an alternative count for partition against Josephine Gardner Broyles (Appellant). After a bench trial, the trial court determined that Appellant is the equitably adopted daughter of Stanford R. Chapman and Josie E. Chapman and is "judicially estopped" from asserting she is an heir of James Gardner, her natural father. The trial court adjudged that Appellant had no right, title or interest in the real estate in question, and consequently the Hancocks took nothing by Appellant's deed to them. *See supra* note 1. We reverse and remand.

The dispositive question on appeal is whether an equitably adopted child may inherit from the child's natural parent under § 474.010 Appellant correctly claims the trial court erroneously applied the law in holding that the theory of equitable adoption can be used by a third party (Respondent) to bar a child (Appellant) from inheritance rights in her natural parents' property.

Our review of this action for equitable relief is governed by Rule 73.01(c) and *Murphy v. Carron,* 536 S.W.2d 30 (Mo. banc 1976). "[T]he decree or judgment of the trial court will be sustained by the appellate court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." *Id.* at 32.

In this case no one disputes that Appellant is the natural child of James Gardner, deceased. The controversy only centers on Appellant's right to inherit from her father under § 474.010 after she was equitably adopted by the Chapmans. Because Appellant apparently "inherited" an interest in Oklahoma real estate from Mrs. Chapman, Respondent claims Appellant "now wants a second bite of the apple-to receive from the estate of the Chapmans, her adoptive parents, and again from the estate of James Gardner, her natural parent." However, Respondent cites no authority supporting her "second bite" theory.

We need not recite the facts the trial court found to support its determination that the Chapmans equitably adopted Appellant. We can resolve the issue on this appeal by assuming, without deciding, the trial court's determination was correct.

This is a case of first impression in Missouri. The parties cite no cases, and we have located none in which a person in Respondent's position has been allowed to establish an equitable adoption to deny an equitable adoptee's inheritance rights from a natural parent. To reach the correct result, we must examine the theory behind equitable adoption.

Generally speaking, the theory of recovery in an equitable adoption case is founded upon either equitable principles or upon the theory of estoppel. In the former it is a judicial remedy for an unperformed contract of legal adoption or, in the alternative, the ordering of specific performance of an implied contract to adopt. The estoppel theory operates to preclude a party from asserting the invalidity of a status of an "adopted" child for inheritance purposes. It has been said that a so-called

"equitable adoption" is no more than a legal fiction permitting specific performance of a contract to adopt. Furthermore, the descriptive phrase "adoption by estoppel" has been described as a shorthand method of saying that because of the promises, acts and conduct of an intestate deceased, those claiming under and through him are estopped to assert that a child was not legally adopted or did not occupy the status of an adopted child.

An adoption by estoppel is an equitable remedy to protect the interests of a person who was supposed to have been adopted as a child but whose adoptive parents failed to undertake the legal steps necessary to formally accomplish the adoption; the doctrine is applied in an intestate estate to give effect to the intent of the decedent to adopt and provide for the child.

The doctrine is predicated on principles of contract law and equitable enforcement of the agreement to adopt for the purpose of securing the benefits of adoption that would otherwise flow from the adoptive parent under the laws of intestacy had the agreement to adopt been carried out; as such it is essentially a matter of equitable relief. Being only an equitable remedy to enforce a contract right, it is not intended or applied to create the legal relationship of parent and child, with all the legal consequences of such relationship, nor is it meant to create a legal adoption. (Footnotes omitted.)

Our courts embrace the general principles set forth above. (citations omitted).

A case factually similar to the instant matter is *Kupec v. Cooper,* 593 So.2d 1176 (Fla. Dist. Ct. App. 1992), where an alleged adopted child sought to inherit from his natural father's estate. The appellate court determined the trial court incorrectly found the child was legally adopted by his stepfather, thereby barring inheritance from the child's natural father. On appeal the child also advanced an argument that the trial court erroneously applied the theory of equitable adoption to change his status to that of a legally adopted child which precluded inheritance from his natural father. Although apparently dicta, the court responded by stating:

[Equitable adoption] is applied in an intestate estate to give effect to the intent of the decedent to adopt and provide for the child. If no legal adoption occurred and [stepfather] were to die intestate, [child] could use the theory of equitable adoption to inherit a share of his estate. However, application of this doctrine does not change his status to that of a legally adopted child. Equitable adoption could only affect his rights against the intestate estate of [stepfather]. It does not affect his rights against the intestate estate of his natural father....

Id. at 1178 (citation omitted).

The Florida court had no difficulty announcing that an equitably adopted child could inherit from both the adoptive parents and from the natural parents because the doctrine of equitable adoption does not change the child's status to that of a legally adopted person. We see no reason for a different result in Missouri.

Although not factually like the instant case, *Halterman* contains a similar issue to that raised here. The natural father in *Halterman* claimed the alleged adoptive mother was not entitled to establish that she was the deceased child's mother through equitable adoption because the doctrine is solely for the benefit of the child. Here, for the same reason, Appellant claims that Respondent cannot rely on the doctrine to deny Appellant's inheritance rights.

After the natural father in *Halterman* filed a wrongful death action for the death of his daughter, the alleged adoptive mother filed a motion to intervene on the basis that she was the child's mother by an equitable adoption. Relying on *Drake v. Drake,* 328 Mo. 966, 43 S.W.2d 556 (banc 1931), the appellate court upheld denial of the motion to intervene and said, "It is clear from *Drake* that equitable adoption was developed solely to benefit the child." 867 S.W.2d at 560. According to *Halterman* the primary purpose of equitable adoption is illustrated by *Rumans v. Lighthizer, supra,* which held that equitable adoption could not be used to establish heirship for the purpose of inheriting from the alleged equitably adopted child. *Id.*

The result in *Halterman* reinforces our view that the doctrine of equitable adoption does not bar Appellant's inheritance rights in her natural father's estate. Application of the doctrine in this case benefits only Respondent which is contrary to the purpose of the doctrine as reasoned in *Halterman.*

Therefore, we hold that the doctrine of equitable adoption does not apply in this case to bar Appellant's inheritance rights in her natural father's estate. If we held otherwise, the primary purpose of the doctrine would be ignored.

The judgment is reversed, and the cause is remanded for further proceedings.

Notes and Questions

1. The Court in the *Gardner* case discusses the difference between the legal doctrines of equitable adoption and adoption by estoppel. The Court classifies equitable adoption as a judicial remedy used to enforce a contract to adopt. The Court refers to the adoption by estoppel doctrine as a judicial remedy utilized to prevent someone from denying the existence of the adoption. *But see Luna v. Estate of Rodriguez,* 906 S.W.2d 576 (Tex. App. 1995)(Court merges the doctrines and analyzes the case under a theory of equitable adoption by estoppel.).

2. Equitable adoption may be applicable in the following situations.

Situation One: Josephine decided that she did not want to raise her daughter, Bonnie, as a single parent. Thus, she asked her friends, Bertha and Elmer, to adopt the child. Bertha and Elmer were already the parents of one birth child and one legally adopted child. The parties signed the adoption papers, but the petition was never filed. Nonetheless, Bonnie lived with Bertha and Elmer until she reached the age of majority. She had minimal contact with Josephine. Josephine told everyone that Bertha and Elmer were Bonnie's adoptive parents. Bertha and Elmer held Bonnie out as their daughter. Since the adoption papers were never filed, the jurisdiction did not legally recognize the adoption. However, the court could use its equitable powers to perform the adoption by operation of law. The result would be that Bonnie, as an equitably adopted child, would be able to inherit from Bertha and Elmer on par with their birth and legally adopted children. *See Cubley v. Barbee*, 735 S.W.2d 72 (Tex. 1934); *Lankford v. Wright*, 489 S.E.2d 604 (N.C. 1997).

Situation Two: After his wife died, Craig told his deceased wife's parents he did not feel qualified to raise his two small children. Craig's in-laws decided to take the children into their home in order to give Craig time to grieve. Once the children moved in with his deceased wife's parents, Craig had no further contact with the children. He said that it was too painful for him to see the children because they looked like their mother. The children lived with their maternal grandparents until they reached

the age of majority. Since the grandparents never attempted to adopt the children, the jurisdiction did not recognize the children as being legally adopted. Nevertheless, the court could use its equitable powers to imply a contract to adopt. Then, the court would use its equitable powers to enforce the implied contact to adopt. Consequently, Craig's children would be able to inherit from their maternal grandparents on par with their mother's siblings. Because of the lack of parental consent to the adoption a child presenting this type of fact pattern to a court may have a more difficult time proving an equitable adoption. *See Wheeling Dollar Sav. & Trust Co. v. Singer*, 250 S.E.2d 369 (W. Va. 1978); *DeHart v. DeHart*, 986 N.E.2d 85 (Ill. 2013).

3. Adoption by estoppel is meant to prevent someone from objecting to the classification of a child as adopted in some circumstances. The doctrine comes into play when there has been a reasonable, detrimental reliance on a promise (explicit or implied) to adopt. As the *Gardner* court states: "'Adoption by estoppel' has been described as a shorthand method of saying that because of the promises, acts and conduct of an intestate deceased, those claiming under and through him are estopped to assert that a child was not legally adopted or did not occupy the status of an adopted child."

The right to inherit through the intended adoptive parents

Bd. of Education of Montgomery County v. Browning, 635 A.2d 373 (Md. 1994)

MURPHY, Chief Judge.

This case involves the concept of equitable adoption, and in particular, whether a person, if equitably adopted, may inherit by intestate succession from the sister of an equitably adoptive parent.

Eleanor G. Hamilton, a resident of Montgomery County, died intestate in August, 1990, leaving an estate valued at $394,405.57. At the time of her death, Hamilton had no known living blood relatives. Appellee Paula M. Browning was appointed Personal Representative of the Estate of Eleanor G. Hamilton on May 21, 1991.

Paula was born out of wedlock on October 4, 1919. Her natural father, Lawrence E. Hutchison, legally adopted Paula on October 10, 1921. In March of 1922, Hutchison married Marian Estelle Gibson. Paula grew up in the Hutchison's household in the District of Columbia; Marian, however, never formally adopted Paula. Marian, who died in 1986, was the sister of the decedent Eleanor Hamilton.

Because Eleanor apparently died without any heirs, the Board of Education of Montgomery County claimed that it was entitled to Eleanor's estate pursuant to the Maryland escheat laws Believing that she was a legal heir of Eleanor, Paula filed a complaint for declaratory judgment and a motion for summary judgment in the Circuit Court for Montgomery County. In her complaint, Paula named the Board of Education as defendant because the Board had a potential claim to the proceeds of Eleanor's estate through the escheat laws. Paula sought a declaration that she was the equitably adopted child of Marian; and as such was entitled to inherit the Estate of Eleanor G. Hamilton, Marian's sister.

In support of her motion for summary judgment, Paula submitted an affidavit in which she stated that she maintained a normal child-parent relationship with Lawrence and Marian Hutchison throughout her life. She also stated that Lawrence and Marian told her when she was a child, and later when she was an adult, that she had been adopted by them; moreover, Paula stated that Marian specifically told her in 1984 that Marian had adopted her. In 1992, when she was asked to produce proof of adoption for the instant litigation, Paula discovered that she had not been legally adopted by Marian. In her affidavit, Paula also stated that no other heirs had presented or filed claims regarding Eleanor's estate.

The Board of Education of Montgomery County, pursuant to Maryland Rule 2-322(b), filed a motion to dismiss for failure to state a claim upon which relief can be granted. The Board maintained that Paula's complaint failed to allege facts which would enable a court to declare that she was the equitably adopted child of Marian. The Board further averred that, even if Paula were adjudged to be the equitably adopted daughter of Marian, she could not, as a matter of law, inherit from the estate of her equitably adoptive mother's sister. The Board therefore argued that because Eleanor Hamilton died without a will and without any legal heirs, it was entitled to her estate under the Maryland law of escheat, as set forth in Maryland Code (1991 Repl. Vol., 1993 Cum. Supp.) § 3-105(a) of the Estates and Trusts Article. Specifically, the Board asked the circuit court to grant its motion to dismiss and declare that: (1) Paula is not entitled to inherit from Eleanor's estate; and (2) the estate escheats to the Board of Education of Montgomery County.

After a December, 1992 hearing, the court concluded that the Board of Education had conceded that Paula was the equitably adopted child of Marian. The court therefore framed the sole remaining issue as follows: "whether Paula Browning, as the equitably adopted daughter of Marian Hutchison, may inherit as a collateral heir to the estate of Marian Hutchison's sister, Eleanor G. Hamilton."

Relying on *First Nat. Bank in Fairmont v. Phillips,* 176 W.Va. 395, 344 S.E.2d 201 (1985), upon the fact that the Board of Education was the only other party interested in the Hamilton estate, and on the close relationship between Paula and her equitably adoptive mother, the court determined that Paula could inherit from the estate of her equitably adoptive mother's sister. Thus, the court denied the Board's motion to dismiss and granted Paula's motion for summary judgment. The Board appealed to the Court of Special Appeals. We granted certiorari prior to consideration of the appeal by the intermediate appellate court to decide the significant issue presented in this case 331 Md. 178, 626 A.2d 967.

II

Before us, the Board reasserts its view that an equitably adopted child may not inherit from her equitably adoptive parent's sibling. On the other hand, Paula argues that the lower court correctly ruled, as a matter of law, that a child may inherit by intestate succession from the sister of an equitably adoptive parent thereby defeating an escheat to the State.

The Board also contends that the lower court improperly granted Paula's motion for summary judgment because the court failed to consider the elements of equitable adoption and the evidence fell far short of the clear and convincing proof necessary to establish an equitable adoption. We need not address this argument, however, because even assuming *arguendo* that Paula was equitably adopted by Marian, we conclude that Paula may not inherit from her equitably adoptive parent's sister. Therefore, the trial court should have granted the Board's motion to dismiss and declared that

the Estate of Eleanor G. Hamilton escheats to the Board of Education of Montgomery County.

When analyzing a motion to dismiss pursuant to Maryland Rule 2-322(b), we must accept as true all well-pleaded facts and allegations in the complaint. *Faya v. Almaraz,* 329 Md. 435, 443, 620 A.2d 327 (1993). Dismissal is only proper if the facts and allegations viewed in the light most favorable to the plaintiff fail to afford the plaintiff relief if proven. *Id.; Berman v. Karvounis,* 308 Md. 259, 264-65, 518 A.2d 726 (1987); *Sharrow v. State Farm Mutual,* 306 Md. 754, 768, 511 A.2d 492 (1986). Moreover, "any ambiguity or uncertainty in the allegations bearing on whether the complaint states a cause of action must be construed against the pleader." *Figueiredo-Torres v. Nickel,* 321 Md. 642, 647, 584 A.2d 69 (1991) (quoting *Sharrow, supra,* 306 Md. at 768, 511 A.2d 492).

For purposes of our analysis, we accept as true the factual allegations of Paula's complaint for declaratory judgment and motion for summary judgment. Thus, we will assume that Paula is the equitably adopted daughter of Marian Hutchison, Eleanor Hamilton's sister.

III

A. Equitable Adoption

In Maryland, the general rule is that there can be no adoption except under and in accordance with a statute. *See In re Adoption No. 9979,* 323 Md. 39, 43, 591 A.2d 468 (1991); *In re Lynn M.,* 312 Md. 461, 463, 540 A.2d 799 (1988); *McGarvey v. State,* 311 Md. 233, 236, 533 A.2d 690 (1987). There is a narrow exception to this rule, however; equitable adoption, sometimes referred to as "adoption by estoppel," "virtual adoption," or "de facto adoption," permits individuals to circumvent the statutory adoption procedures for certain limited purposes. *See McGarvey, supra; Besche v. Murphy,* 190 Md. 539, 59 A.2d 499 (1948). Under the doctrine of equitable adoption, however, no relationship of parent and child is created and consequently, an equitably adopted child does not attain the status of a statutorily adopted child. *McGarvey,* 311 Md. at 239-40, 533 A.2d 690.

The doctrine of equitable adoption "involves the notion that if an individual who is legally competent to adopt a child enters into a contract to do so, and if the contract is supported by consideration in the form of part performance that falls short of completion of statutory adoption, then a court, applying equitable principles, may accord to the child the status of a formally adopted child for limited purposes." *McGarvey,* 311 Md. at 234, 533 A.2d 690. We have explained that when there is a valid contract for adoption, although not consummated and given legal effect by adoption proceedings during the lifetime of the adopting parent, the contract may, upon the parent's death, be enforced to the extent of decreeing that the child occupy the status of an adopted child in equity, entitled to rights of inheritance from the adoptive parent where circumstances require such relief as a matter of justice. *See Besche, supra,* 190 Md. at 547, 59 A.2d 499.

In *McGarvey, supra,* we stated that "Maryland would likely look with favor upon the doctrine [of equitable adoption] to the extent of permitting an equitably adopted child to take property from an equitably adoptive parent by intestate succession." 311 Md. at 238. The basis of this doctrine, which permits a child to share in the estate of the deceased parent who had agreed to adopt the child, is that it is inequitable and unjust to allow the parent to escape the obligations of an adoptive parent by failing to comply with the agreement. *See Thompson v. Moseley,* 344 Mo. 240, 125 S.W.2d 860, 862 (1939).

This equitable principle of law has been explained under two different theories. The first theory is specific performance of the contract to adopt. Applying this theory, courts enforce the promise of the adoptive parent provided that sufficient consideration is given in return for the promise of adoption. However, "[c]ourts grant this remedy only against the estate of a deceased promisor." *See* Note, *Equitable Adoption: They took him into their home and called him Fred,* 58 Va.L.Rev. 727, 730 (1972). The second theory is estoppel under which the personal representative of the estate of the adoptive parent is estopped from asserting that the child was not an adopted child. Specifically:

> "[estoppel operates] to preclude adoptive parents and their privies [*i.e.,* the estate] from asserting the invalidity of adoption proceedings, or, at least, the status of the adopted child, when, by performance upon the part of the child, the adoptive parents have received all the benefits and privileges accruing from such performance, and they by their representations induced such performance under the belief of the existence of the status of adopted child."

Jones v. Guy, 135 Tex. 398, 143 S.W.2d 906, 908 (1940). It is not important which theory is employed because the application of the doctrine of equitable adoption is the same. *See* Note, *supra,* 58 Va.L.Rev. at 736-38. The courts under either theory focus upon the equities involved and require "clear and convincing evidence" of the adoption contract. *See McGarvey, supra,* 311 Md. at 238, 533 A.2d 690.

In formally recognizing the doctrine of equitable adoption in Maryland, *McGarvey* relied on *Besche, supra,* where we said:

> " 'the authorities very generally establish the proposition, that a parol obligation by a person to adopt the child of another as his own, accompanied by the virtual though not statutory adoption, and acted upon by both parties during the obligor's life, may be enforced upon the death of the obligor, who dies without disposing of the property by his will;' ... [this proposition] seems to be supported by the weight of authority in this country to the extent that the courts decree that a child so treated will be entitled to a right of inheritance from the estate of the foster parent such as a natural child would enjoy, where the child in question has faithfully and fully performed the duties of a natural child to the foster parents."

190 Md. at 546, 59 A.2d 499 (quoting in part *Clayton v. Supreme Conclave, Improved O. of H.,* 130 Md. 31, 36-37, 99 A. 949 (1917)). *Besche* further stated:

> "[B]ased upon the maxim that equity considers that done which ought to be done, ...'[i]t is now firmly established that an oral agreement to adopt, where there has been a full and faithful performance on the part of the adoptive child, but which was never consummated by formal adoption proceedings during the life of the adoptive parent, will, upon the death of the latter, and when equity and justice so requires, be enforced to the extent of decreeing that such child occupies in equity the status of an adopted child, entitled to the same right of inheritance from so much of his foster parent's estate that remains undisposed of by will or otherwise, as he would have been had he been a natural born child.' "

190 Md. at 547, 59 A.2d 499 (quoting in part *Burdick v. Grimshaw,* 113 N.J.Eq. 591, 168 A. 186, 188 (1933)).

Maryland therefore recognizes the doctrine of equitable adoption as it applies to an equitably adopted child who seeks to inherit by intestate succession from the estate of an equitably adoptive

parent. *McGarvey,* 311 Md. at 238-39, 533 A.2d 690. A majority of other jurisdictions also recognize the doctrine to the extent of permitting an adoptee to inherit from an equitably adoptive parent's estate. *See* George A. Locke, Annotation, *Modern Status as to Equitable Adoption or Adoption by Estoppel,* 97 A.L.R.3d 347 (1980 & Supp.1993). However, few courts apply the doctrine "as we move beyond the subject of inheritance by an equitably adopted child from an equitably adoptive parent." *McGarvey,* 311 Md. at 239, 533 A.2d 690.

B. *The Scope of the Doctrine of Equitable Adoption*

As we earlier discussed, the doctrine of equitable adoption does not affect the status of the child; it merely entitles the adopted child to inheritance rights from the adoptive parent. *See McGarvey,* 311 Md. at 239-40, 533 A.2d 690. In the instant case, Paula asks us to extend the doctrine of equitable adoption so that an equitably adopted child may inherit from her equitably adoptive parent's sibling, thereby defeating an escheat to the Board of Education. In other words, Paula argues that an equitably adopted child may inherit *through,* as opposed to from, her equitably adoptive parent.

Although Maryland has never considered this issue, a few jurisdictions have addressed it. In *Menees v. Cowgill,* 359 Mo. 697, 223 S.W.2d 412 (1949), *cert. denied,* 338 U.S. 949, 70 S.Ct. 488, 94 L.Ed. 585 (1950), the Supreme Court of Missouri faced the question of whether a "daughter" could inherit from her equitably adoptive "father's" sister. There, the court stated:

> "While it is in effect admitted that the ["daughter"] would have been entitled to a decree of equitable adoption against [her putative father] during his lifetime, or against his heirs at law or his personal representatives after his death, entitling her to inherit from him as an adopted daughter, she is not entitled to such a decree as against the collateral kin of his sister, who were not parties to the adoption contract and who are not bound thereby. No equities exist in her favor as against them authorizing a decree of equitable adoption by him as against them.... A decree for equitable adoption of [the "daughter"] by [her putative father] in this proceeding against the collateral heirs of [the putative father's] sister would be wholly unauthorized.

Id. 223 S.W.2d at 418. The Supreme Court of Missouri continued:

> If [the putative father] had legally adopted [the "daughter"] in compliance with statutory requirements, the adoption would have been binding on all persons, ... but in an equitable proceeding based upon contract, only the parties thereto, or those in privity with them are bound. Equity acts only against specific individuals and, in such case, one person may be bound and not another. A decree of equitable adoption merely forecloses 'the parties to the suit against a denial of the status that the court declares' and the status decreed exists only in equity and against the judgment defendants. As between [the parties in the instant case], [the "daughter"] was not, in either law or equity, the adopted child of [the putative father] by reason of his contract to adopt her."

Id. The court therefore determined that the "daughter" could not inherit *through* her equitably adoptive "father;" *i.e.,* from her "adoptive aunt's" estate.

Similarly, in *In re Estate of Olson,* 244 Minn. 449, 70 N.W.2d 107 (1955), the Supreme Court of Minnesota addressed the question of whether an equitably adopted child could inherit from his

equitably adoptive parent's brother. In that case, Johnny O. Olson, the equitably adoptive son of Gilbert K. Olson's brother, sought to inherit from the estate of Gilbert K. Olson as an adoptive nephew. The court summarized its position as follows:

> "We believe that an equity court, weighing the equities involved, may ... treat the situation as though the relationship of parent and child had been established and *may allow the child to inherit from the estate of the one promising to adopt.* However, in our opinion, the relationship thus enforced does not create a legal adoption as provided in our statutes. When the words 'equitable adoption' are used, it is our opinion that the court, under its general equity powers, merely is treating the situation as though the relationship had been created between the one promising to adopt and the beneficiary of that promise."

Id. 70 N.W.2d at 110. (emphasis added) The court then explained that the doctrine does not permit equitably adopted children to inherit *through* their equitably adoptive parents. Thus, the court stated "no equities have been shown in favor of Johnny O. Olson and against the heirs of Gilbert K. Olson; therefore, in our opinion, he has no rights in the estate of [his equitably adoptive parent's brother,] Gilbert K. Olson." *Id.*

In *Pouncy v. Garner,* 626 S.W.2d 337 (Tex.Ct.App.1981), appellant Pouncy sought to recover a share of the estate of his equitably adoptive parents' natural daughter. In other words, Pouncy sought to inherit as the decedent's adopted brother. Appellees argued that, even if Pouncy was equitably adopted by the decedent's parents, Pouncy was not entitled, as a matter of law, to inherit from the decedent as her adopted brother. Agreeing with the appellees, the court stated:

> "Appellant Pouncy is *not* seeking to recover a share of the estate of [his equitably adoptive parents]; instead, he is seeking to inherit the estate of Lula D. Dailey as her equitably adopted brother on the grounds that her parents were estopped to deny such adoption.

Under adoption by estoppel, only the adoptive parents and their privies are estopped to deny the adoption. The estoppel to deny the adopted status does not operate or work against collateral kindred not in privity with the adoptive parents. A child adopted by estoppel does not inherit from collateral kindred, as there is no privity of estate between such kindred and the adoptive parents."

Id. at 341-42. (emphasis in original). The court concluded: "Thus, even if Pouncy had established that he was adopted under the estoppel doctrine ..., he would not inherit from Lula as her equitably adopted brother." *Id.* at 342.

The West Virginia Supreme Court of Appeals, however, has permitted an equitably adopted child to inherit *through* an equitably adoptive parent under limited circumstances. *See First Nat. Bank in Fairmont v. Phillips,* 176 W.Va. 395, 344 S.E.2d 201 (1985). In that case, the court phrased the issue as follows: "may an equitably adopted child inherit as a brother or sister from another child of the equitably adoptive parent?" *Id.* 344 S.E.2d at 204. The court answered this question in the affirmative: an "equitably adopted child [may] inherit from another child of the adoptive parent." *Id.* at 205. The court, however, limited its holding to the facts of the case. Specifically, it stated that "[w]e leave to another day the more troublesome question of whether the equitably adopted child would inherit from collateral kindred of the adoptive parent(s)." *Id.* at 205 n. 6.

It is therefore clear that a majority of jurisdictions do not permit equitably adopted children to

inherit from the kindred of their adoptive parents. Even the one jurisdiction that permitted an equitably adopted child to inherit *through* her adoptive parents, namely West Virginia, specifically limited the breadth of its holding. Moreover, in the area of equitable adoption, we have said that Maryland is "surely not prepared to go as far as West Virginia has gone." *McGarvey, supra,* 311 Md. at 240, 533 A.2d 690.

In the instant case, Paula seeks to inherit not from her putative mother, Marian Hutchison, but rather from Marian's sister. We agree with those cases that stand for the proposition that an equitably adopted child may not inherit *through* an equitably adoptive parent. Under both contractual and estoppel notions, the equities that clearly exist in favor of permitting an equitably adopted child to inherit from an equitably adoptive parent do not exist when that child seeks to inherit from a sibling of the child's adoptive parents.

Paula suggests that those cases which hold that an equitable adoptee may not inherit *through* an equitably adoptive parent are inapposite to the case at bar because in each of those cases, a legal heir of the decedent, as well as the equitably adopted child, claimed an interest in the estate, whereas in the instant case, only the Board of Education has filed a claim against the Estate of Eleanor Hamilton. Paula maintains that a party, who is not an heir, such as the Board of Education, cannot defeat her claim to the Hamilton estate.

Paula's counsel conceded during oral argument before us that if an heir existed, Paula would have no interest in Eleanor's estate. Consequently, the crux of Paula's argument is that the doctrine of equitable adoption permits an equitably adopted child to inherit from the adoptive parent's sibling when the only other party seeking to inherit is the local Board of Education through the escheat laws.

This rationale was rejected by a federal district court in *In re Estate of McConnell,* 268 F. Supp. 346 (D.D.C. 1967), *aff'd,* 393 F.2d 665 (D.C.Cir.1968). There, the federal district court, applying Florida law, was faced with the question of whether the natural children of the equitably adoptive parents could inherit from the equitable adoptee as "half-sisters" thereby defeating an escheat to the District of Columbia. The court held that no Florida or District of Columbia case "touching on equitable adoption is a precedent for a decree by this Court approving distribution of the estate of a deceased adoptee to the heirs of an adoptive parent who did not legally consummate the adoption." *Id.* at 349. Accordingly, the court found that the "half-sisters" had no interest in the estate and the estate escheated to the District of Columbia.

Although Paula correctly points out that escheats are not favored by law, Maryland law is crystal clear that if no legal heir exists, the decedent's property escheats to the local Board of Education. *See* Maryland Code (1991 Repl. Vol., 1993 Cum. Supp.) § 3-105 of the Estates and Trust Article. In the instant case, therefore, because Paula may not inherit from her equitably adoptive mother's sister, and Eleanor Hamilton died without heirs, her estate escheats to the Board of Education.

We therefore conclude that an equitably adopted child may not inherit from her adoptive parent's sibling. Consequently, the entry of summary judgment in favor of Paula was inappropriate in this case. Furthermore, the circuit court erred in denying the Board's motion to dismiss. Because Paula may not inherit from Eleanor's estate, it escheats to the Board of Education of Montgomery County.

Judgment of the Circuit Court for Montgomery County Reversed. Case remanded to that Court with directions to enter a declaratory judgment not inconsistent with this opinion.

ELDRIDGE, J., dissenting:

The Court decides today that when the "aunt" of an equitably adopted child dies intestate, when the deceased had no "heirs" as defined by statute, and when the contest over the estate is between the equitably adopted child claiming through her parent and the State claiming by escheat, the State should prevail. Neither the cases nor reason support this result.

"Equitable adoption" is a principle of equity law. The doctrine is typically applied when a "parent" has entered an arrangement to adopt a child that is not carried out according to the statutory requirements but when both have acted as if there were a parent-child relationship. *See McGarvey v. State,* 311 Md. 233, 236-238, 533 A.2d 690, 691-692 (1987). As the majority points out, the doctrine is rooted in the notion that it would be "inequitable and unjust to allow the parent to escape the obligations of an adoptive parent by failing to comply with the agreement." Consequently, for purposes of inheriting from the parent, courts will place the child "in the position he would have been in, had he been adopted." *McGarvey v. State, supra,* 311 Md. at 238, 533 A.2d at 692; *Besche v. Murphy,* 190 Md. 539, 549-550, 59 A.2d 499, 505 (1947). Maryland recognizes the doctrine of equitable adoption. *McGarvey v. State, supra,* 311 Md. at 238, 533 A.2d at 692.

Although this Court has not defined the contours of the doctrine, some other jurisdictions have refused to allow the equitably adopted child to inherit *through* the equitably adopting parents in a contest between the equitably adopted child and a legal heir of the decedent.

In general, I agree that an equitably adopted child should not share in the intestate estate of a collateral "relative" at the expense of the legal heirs of that relative. The statutory laws of descent and distribution are a legislative attempt to divine how the decedent would have disposed of his or her property had there been a will. *Barron v. Janney,* 225 Md. 228, 234-235, 170 A.2d 176, 180 (1961). It is not unreasonable, absent a will, to speculate that a deceased would have preferred that his or her property devolve upon a legal heir rather than a person with whom the deceased had no adoption arrangement.

Not one case cited by the majority, however, involves a contest between the State and an equitably adopted child. The Court merely assumes that the same considerations which have defeated the claim of an equitably adopted child, in a contest with a legal heir, also apply in this case. This assumption, however, overlooks the State's unfavorable position in the intestate succession scheme. Because "society prefers to keep ... property within the family *as most broadly defined,* or within the hands of those whom the deceased has designated," escheat is disfavored and is enforced only as a last resort. *United States v. 198.73 Acres of Land, More or Less,* 800 F.2d 434, 435 (4th Cir.1986) (emphasis added). Since the law disfavors escheat, the equitably adopted child who has served as a dutiful family member should be entitled to the estate of her aunt. Furthermore, the factors that weighed against the equitably adopted child in a contest with an heir have no relevance here, for unlike those who would be entitled to take as heirs, the State has no "family" connection to the intestate decedent. It functions solely as a repository of last resort for the decedent's estate should there be no family members.

In deciding that Paula Browning is not entitled to the estate of Eleanor Hamilton, her "aunt," the

majority relies on reasoning that is either inconsistent or circular. The majority asserts that "[a]lthough Paula correctly points out that escheats are not favored by law, ... Maryland law is crystal clear that if no *legal heirs* exist, the decedent's property escheats to the local board of education" (citations omitted) (emphasis added). If, by "legal heirs," the majority means the legal heirs as defined by statute, then the statement is inconsistent with the Court's view that one who is equitably adopted, even though not included among the statutory heirs, is permitted to inherit from an intestate equitably adopting parent. If, on the other hand, the majority means, by using the term "legal heir," simply a person who is entitled to inherit, then it has begged the question. The reason the parties are before this Court is for a determination of who is legally entitled to inherit. Equitable adoption is one of the reasons which entitles a person to inherit. The result is that the Court has decided today, based on the most intellectually unsatisfying "reasons," to deprive Paula Browning of an inheritance.

The majority also ignores the fact that this is not simply a case where the relationship between Paula and Marian Hutchinson, the deceased's sister, is based entirely upon equitable adoption. In this case, Hutchinson had married Paula's biological father and, as a result, became her stepmother. According to Maryland Code (1991 Repl. Vol., 1993 Cum. Supp.), § 3-104(e) of the Estates and Trusts Article, based on this relationship, Paula would be a legal heir of Marian Hutchinson. To assume, in light of this, that the deceased, leaving no will, would have preferred her property to go to the State by escheat rather than to the legal heir of her sister compounds the inequity.

In effect, the Court has said today that when Eleanor Hamilton died intestate, she would have preferred to leave her estate to the government rather than to Paula Browning who, although never formally adopted, presumably because of oversight, was a member of the family for over seventy years. I do not believe that such a result would have been intended by the deceased.

Notes and Problems

1. There are three theories under which a person who had not been legally adopted may obtain the status of adopted child. In the one situation, the person parenting the child makes no attempt to formally adopt the child even after they have received implicit or explicit consent to do so. A child involved in that type of case may rely upon the doctrine of equitable adoption to achieve the right to inherit from the potential adoptive parent. In another case, the person does not fulfill the promise he or she makes to adopt the child or the person's attempt to adopt the child is unsuccessful. The court may resolve the case using the theory of equitable estoppel or a breach of contract theory. The doctrine of equitable estoppel permits the court to prevent persons from objecting to the classification of the relationship between the person and the child as an adoption after the child has relied upon the belief that he or she is an adopted child. Under a breach of contract theory, the court specifically enforces the promise to adopt the child. The court uses its equitable powers to deemed the child to be adopted.

2. The equitably adopted child is usually not permitted to inherit through his or her adoptive parent. *Board of Educ. v. Browning*, 635 A.2d 373 (Md. 1994). In addition, the adoptive parent and his or her relatives are not eligible to inherit from the equitably adopted child. *Estate of Riggs*, 440 N.Y.S.2d 450 (Sur. 1980). The equitably adopted child can inherit from his or her adoptive parent and his or her biological parent. *See Gardner v. Hancock*, 924 S.W.2d 857 (Mo. App. 1996). Some states have refused to adopt the doctrine of equitable adoption. *See Ladd v. Estate of Kellenberger*, 307 S.E. 850 (N.C.

1983); *Wilks v. Langley Adm'r*, 451 S.W.2d 209 (Ark. 1970); *In re Estate of Fox*, 328 N.E.2d 224 (Ind. App. 1975); *Clarkson v. Bliley*, 38 S.E.2d (Va. 1946).

3. In which of the following situations might the court find an equitable adoption to enable the child to inherit from the alleged adoptive parents?

(a). Pete, a widower, was struggling to raise his three year old daughter, Dominic. While he worked, Pete left Dominic with Jennifer, his neighbor. Pete was killed when he was struck by lightning. Pete was not survived by any close relatives, so Jennifer made funeral arrangements for Pete. Dominic lived with Jennifer until she reached the age of majority and went to college. When Dominic was twenty-five years old, Jennifer died intestate. Dominic sought to inherit a portion of Jennifer's estate.

(b). When she was sixteen years old, Keisha gave birth to a baby boy who she named Travon. Keisha and Travon lived with her parents, Emily and Lionel. Two years later, Keisha was injured in a car accident and had to undergo emergency surgery. At the hospital, Keisha told Lionel, "If I don't make it, take care of Travon." Keisha died during surgery. Emily and Lionel reared Travon until he reached the age of majority. Lionel died intestate as the result of a heart attack. After Emily received her elective share, Travon sought to inherit a portion of Lionel's estate.

(c). Karen and Roberto were the parents of twin daughters, Juanita and Maria. Karen and Roberto became addicted to drugs. Family and Children Services removed Juanita and Maria from the custody of their parents and took them to the police station. A social worker contacted Roberto's mother, Luisa, and told her to come pick up the children. Luisa took the children to her home and they remained there until they reached the age of majority. Karen and Roberto Selena never stayed sober long enough to regain custody of Juanita and Maria. When Luisa died intestate, Juanita and Maria sought to inherit a portion of Luisa's estate.

(d). Pinky became pregnant as the result of an affair with a married man. When she was five months pregnant, Pinky met Douglas. A few weeks later, Pinky and Douglas moved in together. Pinky gave birth to a son she named Avery. Douglas had his named placed on Avery's birth certificate. Two years later, Pinky gave birth to Douglas' son, Raymond. Pinky and Douglas never married each other, and Douglas never formally adopted Avery. Nonetheless, Pinky, Douglas, Avery and Raymond lived as a family. When Douglas died intestate, Avery sought to inherit a portion of Douglas' estate.

(e). Amanda was a single mother of a son named Steven. When Steven was only two years old, Amanda was diagnosed with stomach cancer and given only a few months to live. Amanda's best friend, Diane, agreed to care for the baby if Amanda did not survive the cancer. While Amanda was in hospice care, Diane was transferred to a job in Italy and she took Steven with her. After Diane left, Amanda discovered that she had been misdiagnosed. Amanda tried unsuccessfully to find Diane, so she could get Steven back. Amanda was never able to locate Diane. Diane held Steven out as her son and reared him until he reached the age of majority. When Diane died intestate, Steven sought to inherit a portion of Diane's estate.

4.3.2 Adult Adoption

Adoption is based in contract law. Thus, not surprising, in order to have the right to adopt, a person must be legally capable of executing a contract. Hence, a person must be over the age of majority in order to legally adopt a child. Most adoption statutes do not place specific age limits on the persons adopted. Typically, when a person decides to adopt a child, that person intends to adopt someone under the age of majority. However, some state adoption laws permit adults to be adopted. Prior to the legalization of same-sex marriages, in order to be able to make medical decisions for their partners, some gays and lesbians adopted their partners. This often became a problem when the adopted partner tried to inherit from the deceased partner's estate. There are several reasons why someone might want to adopt another adult.[27] The cases in this section illustrate some of those reasons. Even a person who is adopted as an adult loses connections to his or her biological family.[28]

The right to inherit through the adoptive parents

Some courts strictly apply the adoption statute without considering the legislative intent or the motives of the parties. Thus, if the statute permits the adoption of an adult, the court recognizes the adoption regardless of the reason for the adoption. On the other hand, some courts evaluate the motive behind the adult adoption to ascertain if that motive violates public policy. In those cases, the courts exercise their discretion to decide whether or not to recognize the adoption and permit the adopted child to inherit from the adoptive parent.

In the Matter of the Petition of P.A.L., 5 P.3d 390 (Colo. 2000)

KAPELKE, J.

P.A.L. von R. appeals from the judgment of the trial court dismissing the petition to adopt his adult sister, K.M.F. We reverse and remand for entry of an adoption decree.

Petitioner filed his petition pursuant to § 14-1-101, C.R.S. 1999, together with a consent to the adoption and a waiver and acceptance of service signed by his sister. Following an evidentiary hearing, the trial court denied the petition. No party opposed the requested adoption.

The court found that petitioner, age 60, was seeking the adoption to allow his sister, a German citizen, age 55, to change her name to the original family name. Petitioner stated that his sister had been unable to effect the name change by any court proceeding in Germany, but that an adoption decree would be recognized.

The court also found that there was nothing in the statute that expressly prevented an adult from adopting another adult of any age. However, the court indicated that it would exercise its discretion and decline to decree the adoption because it appeared to the court to violate the public policy. The

[27] Brynne E. McCabe, *Adult Adoption: The Varying Motives, Potential Consequences, and Ethical Considerations*, 22 Quinnipiac Prob. L.J. 300 (2009).

[28] *See Kummer v. Donak*, 715 S.E. 2d 7 (Va. 2011)(Adult adoption of a woman prevented her children from inheriting from her biological sister).

transcript shows that the court was concerned with the lack of age differential between the petitioner and his sister and with the fact that they were siblings.

Petitioner contends that § 14-1-101 contains no exception based upon age differential or blood relationship. Therefore, he argues that the trial court erred in denying the petition for adoption. We agree.

Section 14-1-101, the adult adoption statute, provides in pertinent part:

> (1) Any person desiring to adopt an adult as heir at law shall file his petition in the juvenile court of the county and thereupon summons shall issue … and be served on the person sought to be adopted. Said person shall file in the court a written answer to the petition… and shall either consent to such adoption or deny or disclaim all desire to be adopted by such person.
>
> (2) Upon the filing, by the person sought to be adopted, of a disclaimer of all desire to become the heir at law of the petitioner, the petition shall be dismissed by the court, but *upon the filing of a consent to such adoption,…the prayer of the petition shall be granted, and a decree of adoption shall be rendered and entered by the court declaring such person the heir at law of the petitioner* and entitled to inherit from the petitioner any property in all respects as if such adopted person had been the petitioner's child born in lawful wedlock, and such decree may or may not change the name of such adopted person, as the court rendering the decree may deem advisable;

(emphasis added).

The statute authorizes the adoption of adults for the purpose of giving the adoptee the status of an heir of law. *In re Trust Created by Belgard*, 829 P.2d 457 (Colo. App. 1991).

An adult adoption has been described as "merely a means of giving effect to a personal transaction mutually agreeable between two adults." *Herrera v. Glau*, 772 P.2d 682 (Colo. App. 1989) (*quoting Martinv. Cuellar*, 131 Colo. 117, 279 P.2d 843 (1955)).

If we can give effect to the ordinary words used by the General Assembly, we must apply the statute as written. Use of the word "shall" implies a mandatory meaning. *In re Adoption of T.K.L.*, 931 P.2d 488 (Colo. App. 1996).

The plain language of § 14-1-101 requires the trial court to grant an adult adoption when there is valid service and the adoptee consents to such adoption. Both requirements were met here. There is no additional requirement that there be a minimum age differential between the adoptor and the adoptee. *See In re Adoption of Elizabeth P.S.*, 134 Misc. 2d 144, 509 N.Y.S. 2d 746 (1986) (lack of disparity in age not fatal to adoption proceeding). Nor is adoption precluded based upon the prior relationship of the parties. *See In re Trust Created by Belgard, supra; see also Berston v. Minnesota Department of Public Welfare,* 296 Minn. 24, 206 N.W. 2d 28 (1973) (under statute allowing adoption of an adult by "any person," son's petition to adopt mother granted even though admitted motive was to bring her within terms of trust established by father who had divorced mother).

Finally, we are not aware of any public policy in Colorado that would be violated by permitting a person to adopt his or her own adult sibling.

Accordingly, we conclude that pursuant to the mandatory language of § 14-1-101, the court was required to grant the petition and enter a decree of adoption.

The judgment is therefore reversed, and the cause is remanded for entry of a decree of adoption.

Tinney v. Tinney, 799 A.2d 235 (R.I. 2002)

BOURCIER, J.

In this case, the latest chapter in the bizarre saga of Belcourt Castle, a once majestic Newport mansion, we are called upon to determine whether Kevin Tinney, a/k/a Kevin Jacob Koellisch, is entitled pursuant to G.L.1956 § 33-1-10 to share in the intestate distribution of his adoptive and now deceased mother's personal estate. The case comes to us on an appeal from a Superior Court final judgment declaring that he is entitled to do so.

Facts and Travel

The facts in this matter are undisputed and aptly summarized in our opinion in *Tinney v. Tinney,* 770 A.2d 420 (R.I.2001). For purposes of this appeal, on October 11, 1990, Ruth E. Tinney, who was then eighty-four years old, adopted the defendant Kevin, who was thirty-eight years old, in an adult adoption proceeding in Newport Probate Court. On December 18, 1995, Ruth died intestate. On July 6, 1999, Kevin filed a petition to probate Ruth's personal estate in the Newport Probate Court. In his petition, he listed two heirs at law as sons of the decedent, himself and Ruth's biological son, Donald Tinney. Kevin claimed a one-half ownership interest in Ruth's personal estate pursuant to § 33-1-10. B. Mitchell Simpson was duly appointed and qualified as the administrator of Ruth's estate. Thereafter, on May 1, 2000, the plaintiff Donald filed this action seeking a declaratory judgment that Kevin, as an adopted adult, was not entitled to intestate inheritance. Kevin and the administrator of Ruth's estate were named as party defendants.

On September 27, 2000, Donald filed a motion for summary judgment, and on October 20, 2000, Kevin filed a cross-motion seeking summary judgment. The motions were heard on November 6, 2000. Donald contended that G.L.1956 § 15-7-16(a) gives only a minor child, not an adopted adult, the right of intestate inheritance. He argued that it was significant that the Legislature used the term "child" in enacting § 15-7-16(a) as opposed to using the word "persons" in describing potential adoptees as provided by § 15-7-4(d). Donald claimed it was natural that the Legislature used the word "child" instead of "persons" because the primary purpose of the adoption statute was intended to "promote the welfare of children, not adults, by securing to them the benefits of a home and parental care."

Kevin, on the other hand, contended that the Legislature, in enacting our adoption statute, never intended to distinguish between children adopted during their minority and those adopted as adults.

On December 4, 2000, the Superior Court hearing justice denied Donald's motion for summary judgment and granted Kevin's cross-motion for summary judgment. The hearing justice concluded that the Legislature's use of the word "child" in § 15-7-16 was not intended to restrict its meaning only to a child under the age of majority, but "in fact means the son or daughter of a parent,

regardless of age." An order and judgment granting summary judgment in favor of Kevin was entered on December 14, 2000, and Donald timely appealed.

Analysis

Whether an adopted adult has the right to inherit under the laws of intestate succession from a deceased adoptive parent is an issue of first impression in Rhode Island and requires an examination of the relevant statutes.

Section 15-7-16(a) provides for inheritance by adopted children and states in relevant part:

> "A child lawfully adopted shall be deemed, for the purpose of inheritance by the child and his or her descendants from the parents by adoption * * * the child of the parents by adoption the same as if he or she had been born to them in lawful wedlock."

Donald argues that § 15-7-16(a) does not include adult adoptees because it specifically refers only to a "child." By contrast, § 15-7-4(d), which permits the adoption of adults, provides that "[p]etitions for adoptions of persons eighteen (18) years or older shall be heard by the probate court of the city or town in which the petitioners live." He maintains that had the Legislature intended to include adult adoptees as eligible for inheritance pursuant to § 15-7-16(a), it would have described adoptees as "persons" as it did in § 15-7-4(d). Donald asserts that the Legislature, by not amending the statute, did not intend to give an adopted adult the same rights as an adopted "child."

Kevin argues that an adopted adult has the same rights as an adopted minor child, and accordingly maintains that the hearing justice correctly granted summary judgment.

"In construing a statute, this Court's primary 'task is to establish and effectuate the intent of the Legislature.'" *R & R Associates v. City of Providence Water Supply Board,* 765 A.2d 432, 436 (R.I.2001) (quoting *Cardarelli v. DET Board of Review,* 674 A.2d 398, 400 (R.I.1996)). "This intent is gleaned from a careful examination of the 'language, nature and object of the statute.'" *Id.* at 436 (quoting *Brouillette v. DET Board of Review,* 677 A.2d 1344, 1346 (R.I.1996)). This Court repeatedly has stated that "when the language of a statute is clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." *Mottola v. Cirello,* 789 A.2d 421, 423 (R.I. 2002) (quoting *Accent Store Design, Inc. v. Marathon House, Inc.,* 674 A.2d 1223, 1226 (R.I.1996)).

Adoption was not recognized at common law, and our statutes permitting adoption "create[ ] a status and relationship unknown to the common law." *Batcheller-Durkee v. Batcheller,* 39 R.I. 45, 49, 97 A. 378, 379 (1916). This Court has held that adopted children "are deemed to be heirs of their adoptive parents, as if they were their natural children." *In re Lisa Diane G.,* 537 A.2d 131, 132 (R.I.1988) (citing *In re Adoption of a Minor Child,* 109 R.I. 443, 450, 287 A.2d 115, 118-19 (1972)). This Court has also held that "such * * * statutes as are intended to integrate adopted children into family units and thus promote the public interest in the preservation of the family are to be liberally construed in favor of the adopted child." *Prince v. Nugent,* 93 R.I. 149, 168, 172 A.2d 743, 754 (1961).

Upon reviewing the statutory history of adoption in Rhode Island, it is clear that "child" means the son or daughter of a parent, regardless of age. For example, the adoption statute of 1923 provided that "[a]ny person may petition the municipal court or probate court for leave to adopt as his child

any person younger than himself" and allowed the same rights of inheritance for that "child so adopted." G.L.1923, ch. 288, §§ 1, 6. More than twenty years later, in 1944, the Legislature established the Juvenile Court with jurisdiction "[c]oncerning adoption of children." P.L.1944, ch. 1441, § 14. In doing so, the Legislature amended G.L. 1938, ch. 420 by stating: "1. In all cases involving persons under eighteen years of age, such term shall mean the juvenile court. 2. In all cases involving persons eighteen years of age or older, such term shall mean the probate court of the city or town in which the petitioner resides." P.L.1944, ch. 1441, § 36B. Thus, jurisdiction over the adoption of those under eighteen years of age was vested in the Juvenile Court, and the adoption of those over eighteen years old was vested in the Probate Court. Significantly, the Legislature made no distinction between the rights of those adopted as minors and those adopted over the age of eighteen.

When the Juvenile Court was abolished and replaced by the creation of our present Family Court, P.L.1961, ch. 73, § 14, exclusive jurisdiction over adoption of children under the age of eighteen was vested in that Court, and the adoption of persons over eighteen remained in the exclusive jurisdiction of the Probate Court. Throughout the years and various statutory changes since then, the Legislature has never enacted any provision noting any distinction between the inheritance rights granted to an adopted person, whether child or adult.

We conclude that the language of § 15-7-16(a) is clear and unambiguous, and therefore we must give the words of the statute their plain and ordinary meaning. It is clear that the Legislature intended the term "child" to mean son or daughter of a parent, regardless of age, and that there was no distinction intended between the inheritance rights of a "child" adopted as a minor and "persons" adopted as adults.

Conclusion

For the reasons above stated, the plaintiff's appeal is denied and dismissed. The order granting summary judgment in favor of the defendant is affirmed. The papers of this case are to be returned to the Superior Court.

Notes and Questions

1. From a public policy perspective, what are the pros and cons of permitting one adult to adopt another adult? *See* Jackie Messier, *The Inconsistent Inheritance Rights of Adult Adoptees and A Proposal For Uniformity*, 95 Marq. L. Rev. 1043 (Spring 2012).

2. Why do you think that the legislature would permit adult adoptions?

3. What may be some legitimate reasons why a person would want to adopt an adult? *See Berston v. Minnesota Dept. of Public Welfare*, 206 N.W.2d 28 (Minn. 1973).

4. Which, if any, restrictions should be placed on a person seeking to adopt an adult?

5. Some jurisdictions that permit adult adoptions have concluded that a person may not adopt his or her adult lover. Those jurisdictions fail to sanction those adult adoptions because of the sexual nature of the relationship. Courts often find that it is against public policy to permit the creation of a

parent-child relationship between persons who are engaged in a sexual relationship. *See Matter of Adoption of Robert Paul P.,* 471 N.E.2d 424 (N.Y.2d 1984)(court held that a 57-year-old man could not adopt a 50-year-old man with whom he shared a homosexual relationship).

Right to inherit through adoptive parents

In re Estate of Brittin, 664 N.E.2d 687 (Ill. 1996)

GOLDENHERSH, J.

Respondent, Mary Ann Buckman, natural daughter of decedent, Stephen Glenn Brittin, and administrator of his estate, appeals from an order of the circuit court finding petitioners, Deborah J. Roeder, Linda Brittin, Denise Brittin, Stacie Brittin, and Laura Moore, the natural children of decedent's adopted son, William Eugene, to be decedent's legal heirs and reopening decedent's estate.

On appeal, respondent contends the trial court erred in finding petitioners, for purposes of intestate succession, to be the legal heirs of decedent and in reopening decedent's estate. We affirm.

The facts are undisputed. The record reveals that when William Eugene was about three years of age, his mother, Estelle Willet, married the decedent, Stephen Glenn Brittin. From age three, Stephen and Estelle raised William as their son. The couple had one natural child, Mary Ann Buckman, respondent herein. Estelle Willet Brittin died on July 28, 1975. Shortly thereafter, on October 20, 1976, Stephen adopted William in an adult adoption proceeding in St. Clair County. William was 46 years old at the time of the adoption and had five children, petitioners herein. The adoption decree specifically provides that William was the child of Stephen Glenn Brittin "and for the purposes of inheritance and all other legal incidents and consequences, shall be the same as if said respondent had been born to Stephen Glenn Brittin and Estelle Willet Brittin (now deceased) in lawful wedlock." William died on May 17, 1979, predeceasing his adoptive father and leaving his five children as his descendants and heirs.

On February 8, 1993, Stephen died intestate leaving Mary, his natural daughter, and petitioners, descendants of his adopted son, William, as his heirs. Decedent's intestate estate was opened on March 10, 1993. The court found respondent to be the sole heir and appointed her administrator of the estate. The estate was closed on October 4, 1993, with the proceeds going to respondent. Petitioners were unaware that the administration of decedent's estate was underway without their participation until December 1993, when they learned that the estate had been closed.

On February 9, 1994, petitioners filed a petition to vacate the order of discharge and order finding heirship and to reopen the estate. Petitioners alleged in the petition that they are heirs of the decedent and are entitled to share in decedent's estate as the children of decedent's adopted son. After a hearing, the trial court entered its order finding petitioners legal heirs of decedent and reopening the estate. Respondent filed a motion to reconsider, which was denied on January 30, 1995. Respondent appeals.

I

Respondent contends that petitioners are not descendants of the decedent and may not take, by representation, their deceased father's share of the decedent's estate. Respondent acknowledges that pursuant to section 2-4(a) of the Probate Act (755 ILCS 5/2-4(a) (West 1992)), petitioners' father, as the adopted child of the decedent, is a descendant of his adoptive parent, and had he not predeceased decedent, he would be entitled to half of decedent's estate. However, defendant argues that the legislature, in using the term "adopted child" in section 2-4(a) of the Probate Act, intended to limit intestate succession to the descendants of a child adopted as a minor. Respondent further asserts that the legislature did not intend to include as descendants of an "adopted child" children born to the adopted adult prior to that adult's adoption. According to respondent, because petitioners were already born at the time of decedent's adoption of their father, they are not the descendants of an "adopted child" and therefore cannot take by representation their deceased father's share of decedent's estate. We disagree.

The case before us is one of first impression and requires our consideration of the issue of whether the natural children of an adult adoptee are descendants of the adopting parent for purposes of inheritance. In considering this issue, we must consider whether the legislature, in enacting the statute granting an adopted child the status of a descendant of the adopting parent, intended to limit succession rights of the adoptee's children to the natural children of a child adopted as a minor and to exclude the natural children born to the adult adoptee prior to his adoption by the adopting parent.

The distribution of an intestate real and personal estate of a decedent whose spouse is predeceased but who is survived by his descendants is governed by section 2-1(b) of the Probate Act, which provides:

> "§ 2-1. Rules of descent and distribution. The intestate real and personal estate of a resident decedent and the intestate real estate in this State of a nonresident decedent, after all just claims against his estate are fully paid, descends and shall be distributed as follows:
>
> * * * * * *
>
> (b) If there is no surviving spouse but a descendant of the decedent: the entire estate to the decedent's descendants per stirpes." 755 ILCS 5/2-1(b) (West 1992).

Where the decedent is survived by an adopted child, the adopted child may take a share of the intestate estate as a legal heir of the decedent pursuant to section 2-4(a) of the Probate Act, which provides:

> "§ 2-4. Adopted child and adopting parent. (a) An adopted child is a descendant of the adopting parent for purposes of inheritance from the adopting parent and from the lineal and collateral kindred of the adopting parent. For such purposes, an adopted child also is a descendant of both natural parents when the adopting parent is the spouse of a natural parent." 755 ILCS 5/2-4(a) (West 1992).

A cardinal rule of statutory construction "is to ascertain and give effect to the true intent and meaning of the legislature." *Solich v. George & Anna Portes Cancer Prevention Center of Chicago, Inc.,* 630

N.E.2d 820, 822 (Ill. 1994). To determine the intent of the legislature, a court should first consider the statutory language, for its language best indicates the legislature's intent. *Solich,* 196 Ill.Dec. at 657, 630 N.E.2d at 822. When the language of the statute is clear, the court must give it effect "without resorting to other aids for construction." *Solich,* 630 N.E.2d at 822. "In applying plain and unambiguous language, it is not necessary for a court to search for any subtle or not readily apparent intention of the legislature." *Di Foggio v. Retirement Board of the County Employees Annuity & Benefit Fund of Cook County,* 620 N.E.2d 1070, 1073 (1993).

The Adoption Act (750 ILCS 50/1*et seq.* (West 1992)) provides for the adoption of an adult as well as the adoption of minor children. Section 3 of the Adoption Act sets forth the conditions under which an adult may be adopted, stating:

> "§ 3. Who may be adopted. A male or female * * * adult[ ] may be adopted * * * provided * * * that such adult has resided in the home of the persons intending to adopt him at any time for more than 2 years continuously preceding the commencement of an adoption proceeding, or in the alternative that such persons are related to him within a degree set forth in the definition of a related child in Section 1 of this Act." 750 ILCS 50/3 (West 1992).

A careful review of the Adoption Act reveals no statutory distinction between an adopted adult and an adopted minor with respect to the nature of the legal relationship created between the adoptee and the adopting parent, namely, a parent-child relationship. The adoptee, regardless of his age upon adoption, attains the status of a natural child of the adopting parents. *In re M.M.,* 619 N.E.2d 702, 708 (Ill. 1993). Likewise, the Adoption Act makes no reference to the rights of an adopted child with regard to his ability to inherit from his adopting parents. Therefore, for the proper resolution of the issue before us, we must examine section 2-4(a) of the Probate Act.

Respondent maintains that section 2-4(a) of the Probate Act does not include adult adoptees because, had the legislature intended to include adopted adult children, it would have changed the word "child" to "person" so as to include all adopted persons. Respondent argues that the legislature has amended section 2-4(a) several times and has not made this change and, therefore, the legislature intended to limit inheritance to minor adopted children. We do not agree with this contention.

"Where the terms of a statute are not defined by the legislature, courts will assume that they were intended to have their ordinary and popularly understood meanings, unless doing so would defeat the perceived legislative intent." *People v. Hicks,* 462 N.E.2d 473, 476 (Ill. 1984). Further, in determining the legislature's intent in using a particular term, "a reference to the subject matter and the context will ordinarily disclose the sense in which the word is used." *Bartholow v. Davies,* 276 Ill. 505, 511, 114 N.E. 1017 (1916).

"There are * * * two meanings which may be given to the word 'child:' one an offspring or a descendant, when a person is spoken of in relation to his parents; another, a person of immature years. * * * The word 'child,' when used with reference to the parents, ordinarily has no reference to age, but to the relation. When used without reference to the parents, as indicating a particular individual, it usually bears the meaning of a young person of immature years." *Bartholow,* 276 Ill. at 511, 114 N.E. at 1019. (NOTE: *Bartholow* was decided prior to statutory changes allowing the adoption of adults.)

Considering the subject matter and context in which the word "child" is used in section 2-4(a), the plain language of the statute indicates that the legislature intended to use the word "child" in its relational sense; referring to the parent-child relationship between the adoptee and the adopting parent. The word "child," as used here, cannot be interpreted fairly as meaning a minor, in light of section 3 of the Adoption Act which permits adult adoptions. Moreover, there is nothing in section 2-4(a) indicating a distinction between the adoptee's status as an adult or a minor at the time of adoption with regard to the adoptee's classification as a descendant of the adopting parent. The only qualification set forth in the statute is that the adoptee be legally adopted. Nothing more is required. Accordingly, petitioner's deceased father is an adopted child of the decedent and, as such, obtained the right of succession as decedent's legal heir.

III

Respondent next asserts that the children of an adopted adult who were born before the adult's adoption are not the legal heirs of the decedent because they are not the children of an adopted adult. Respondent argues, therefore, that petitioners, as already-born children at the time of their father's adoption, cannot take by representation their predeceased father's share of decedent's estate. This contention is not persuasive.

As discussed above, section 2-4(a) deems all adopted children to be descendants of the adopting parent. This provision places the adopted child and the natural child in equivalent positions with respect to the child's capacity to inherit from an intestate parent. Similarly, the act of adoption itself accords the adoptee the status of a natural child of the adopting parent. *In re M.M.,* 156 Ill.2d at 62, 189 Ill.Dec. at 7, 619 N.E.2d at 708. As with natural children, the children of the adoptee, by virtue of the adoption, become the grandchildren of the adopting parent, thereby creating a grandparent-grandchild relationship.

Because section 2-4(a) deems an adopted child the descendant of the adopting parent, it logically follows that, for purposes of inheritance, the children of the adopted adult are also descendants and can take as grandchildren of the decedent. Accordingly, if the adopted child predeceases the adopting parent, leaving children, as is the case here, those children, as grandchildren of the adopting parent, are entitled to represent their deceased parent and to receive from the adopting parent's estate the share to which the adopted adult child would have been entitled to receive had he survived the adopting parent.

We believe this to be the correct reading of section 2-4(a) since section 2-4(a) does not impose any restrictions or conditions on the ability of the natural children of a predeceased adopted child to inherit from the estate of the adopting parent. Nor does the provision either expressly or impliedly state that the adopted child's children must be born *subsequent to* the adoption in order to be legal heirs of the adopting parent. Because "the plain meaning of the language used by the legislature is the safest guide in constructing any [statute]," the court cannot inject provisions not expressly included or fairly implied by the statute. *Munroe v. Brower Realty & Management Co.,* 565 N.E.2d 32, 38 (Ill. 1990). Further, "the words of a statute must be read in light of the purposes to be served, and those words must be read to reach a common-sense result." *Munroe,* 565 N.E.2d at 38. Our reading of section 2-4(a) gives effect to the legislative policy of according adopted children a status of inheritance equivalent to that of natural children. With this legislative purpose in mind, we can read section 2-4(a) in no other way but as including, as descendants of the decedent, the natural children

of an adopted adult. Accordingly, we find that the trial court did not err in finding petitioners to be the legal heirs of the decedent. As such, petitioners are entitled to represent their deceased parent, the adopted child of the decedent, and to receive the adopted child's *per stirpes* share of decedent's estate.

For the foregoing reasons, the judgment of the circuit court of Madison County is affirmed.

Affirmed.

In re Ellison Grandchildren Trust, 261 S.W.3d 111 (Tex. 2008)

ANGELINI, J.

At issue in this appeal is whether, in creating an inter vivos, irrevocable trust for the "descendants" of his children, Ray Ellison Sr. intended to include, as beneficiaries, his son's adopted children, who were not adopted until they were adults. Because we conclude that Ray Ellison Sr. did not intend to include persons adopted as adults by his son, we affirm the summary judgment granted by the trial court.

Background

On March 9, 1982, Ray Ellison Sr. created an inter vivos, irrevocable trust called "the Ray Ellison Grandchildren Trust." At the time the Trust was created, Ray Ellison Sr. had two adult children: Bonnie Ellison (then age 36) and Ray Ellison Jr. (then age 40). Bonnie Ellison had one daughter, Tracy Egan (now Tracy Egan Calloway) (then age 11). Ray Ellison Jr. had two daughters: Arleene Ellison (then age 18) and Darleene Ellison (then age 20).

The pertinent language of the Trust provides the following:

> At the time of executing this trust instrument, the beneficiaries are well provided for by their parents. It is the desire of the Grantor that the income of this trust be accumulated and that the properties from time to time put into the trust shall be invested… Any distributions for beneficiaries of this trust prior to the termination of the trust shall be solely in the discretion of the Trustees. However, the Grantor realizes that there may be circumstances arising in the future which would make it desirable or advisable on the part of the Trustees to make distributions from this trust prior to the time it terminates. Therefore, the Trustees are authorized *to pay to or for the benefit of the descendants of* BONNIE JEAN EGAN and the descendants of RAY ELLISON JR. (the descendants living at this time are TRACY EGAN, DARLENE ELLISON AND ARLENE ELLISON) out of income, and if income is insufficient, out of the principal of this trust, from time to time such sums as are reasonably needed for their health, including medical, dental, hospital and nursing expenses and expenses of invalidism, and such sums as are reasonably needed for their maintenance and support. There shall be no requirement that the same amount be paid for each of such persons. In determining the amount to be paid to or for the benefit of each of such persons, the Trustees shall take into consideration such other income or means of support known to the Trustees that each of them is entitled to receive…

> This trust shall terminate upon the 31st day of December, in the year 2020, and upon termination, the funds and properties remaining in the trust after paying the expenses of the trust shall be distributed as follows:
>
> > A. FIFTY PERCENT (50%) to the descendants of BONNIE JEAN EGAN, per stirpes, and if there be none, to the descendants of RAY ELLISON, JR., per stirpes.
> >
> > B. FIFTY PERCENT (50%) to the descendants of RAY ELLISON, JR., per stirpes, and if there be none, to the descendants of BONNIE JEAN EGAN, per stirpes.
>
> In the event the above named persons are all deceased and none of them have left living descendants, the funds and properties remaining in the trust shall be distributed to one or more charitable organizations in which contributions are then deductible under section 642(c) and 2055(e) of the Internal Revenue Code of 1954 in such shares as the Trustees may designate. (emphasis added).

In 1989, Ray Ellison Jr. divorced his first wife, to whom he had been married for thirty-two years. In 1995, he remarried.

In 1998, sixteen years after the Trust was created, Ray Ellison Jr.'s father, Ray Ellison Sr., was found to be incapacitated by a probate court in Bexar County. He died on October 16, 2005. Ray Ellison Jr.'s sister, Bonnie Ellison, was designated by the probate court as Guardian of Ray Ellison Sr.'s Person, and Frost National Bank was appointed Guardian of his Estate.

In 2003, twenty-one years after the Trust was created, Ray Ellison Jr. adopted the adult children of his second wife: Aaron Lindner (then age 39), Jeffrey Lindner (then age 37), and Marc Lindner (then age 36) ("the Lindners"). Immediately after their adoption, the Lindners moved for an accounting of the Trust. The Trustees, however, refused to provide an accounting and filed a declaratory judgment action requesting that the probate court "determine whether the Lindners are beneficiaries of the Trust and therefore entitled to an accounting." In response, the Lindners filed an answer and counterclaim for declaratory judgment, requesting that the court declare them beneficiaries of the Trust.

Darleene and Arleene Ellison then joined the lawsuit and filed an answer to the Trustee's original petition for declaratory judgment and an answer to the Lindners' counterclaim for declaratory judgment. They also filed their own original counterclaim for declaratory judgment. They alleged that their father's adoption of the Lindners was a "sham designed by" their father and the Lindners in an attempt to give the Lindners standing to make claims against the Trust, based on their contention that they are now "descendants" of their father. They also alleged that their grandfather did not intend for the term "descendants" to include any person adopted as an adult when he executed the Trust on March 9, 1982. Therefore, they requested the trial court declare that the term "descendant" as used in the Trust does not include those persons adopted as an adult and, specifically, does not include the Lindners. In their second amended answer, Arleen and Darleene Ellison also pled affirmative defenses. They alleged that the Lindners are "equitably estopped from claiming to be beneficiaries of the Trust as a result of their participation in and/or attempt to benefit from the wrongful use of the adult adoption statute to divert Trust assets to individuals who would otherwise have no colorable claim or right to those assets." They alleged that the Lindners did not come to the court with "clean hands" and that their "claims to be beneficiaries of the Trust are

barred because it is contrary to public policy of Texas for persons to use the adult adoption statutes to divert Trust assets to individuals who would otherwise have no colorable claim or right to those assets."

Tracy Egan Calloway also joined the litigation and filed an answer to the original petition for declaratory judgment and answer to the Lindners' counterclaim for declaratory judgment, bringing the affirmative defenses of fraud, constructive fraud, illegality, and estoppel as well as the equitable defense of unclean hands.

The Lindners then moved for partial summary judgment, arguing that they are beneficiaries of the Trust as a matter of law, Arleene and Darleene Ellison responded by filing a cross-motion for partial summary judgment, arguing that the Lindners are not beneficiaries of the Trust as a matter of law.

The trial court denied the Lindners' motion and granted Arleene and Darleene Ellisons' motion. In its order, the trial court determined as a matter of law the following:

> (1) the particular language in the March 9, 1982, Ray Ellison Grandchildren Trust [that] identifies or refers to the Trust beneficiaries as "descendants of BONNIE JEAN EGAN" and "the descendants of RAY ELLISON JR." does not include any person whom Bonnie Jean Egan or Ray Ellison Jr. has adopted, or may in the future adopt, if such adopted person was or is an adult, over the age of majority under Texas law, at the time of said adoption;
>
> (2) such trust language specifically does not include Aaron Lee Lindner, Jeffrey Scott Lindner, and Marc Tecelle Lindner ("the Lindners"); and
>
> (3) the Lindners are not Trust beneficiaries and are not entitled to an accounting pursuant to TEXAS TRUST CODE §§ 113.151, 113.152.

Although the trial court denied the Lindners' motion for partial summary judgment, it did grant their motion to exclude certain summary judgment evidence submitted by Darleene and Arleene Ellison. Specifically, the trial court excluded Ronald Habitzreiter's affidavit and any extrinsic evidence of the intent of Ray Ellison Sr. when executing the Trust.

Also in its order, the trial court noted that the only remaining issues were those related to attorneys' fees, expenses, and costs. The Trustees, Darleene and Arleene Ellison, Tracy Egan Calloway, and the Lindners all moved for attorneys' fees, expenses, and costs. In its final judgment, the trial court granted all these motions and ordered the parties' attorneys' fees to be paid from the Trust.

The Lindners have appealed the trial court's determination that they are not beneficiaries of the Trust. The Trustees have appealed the trial court's award of attorneys' fees, costs, and expenses to the Lindners. And, Tracy Egan Calloway brings a cross-issue, arguing that in the event we reverse the trial court's order, we should not reverse and render judgment in favor of the Lindners because they did not negate her affirmative defenses of fraud, constructive fraud, illegality, and estoppel as well as the equitable defense of unclean hands.

Declaratory Judgment/Summary Judgment

Rules of Construction

The same rules of construction apply to both wills and trusts. *See Eckels,* 111 S.W. 3d at 694; *Hurley*, 98 S.W. 3d at 310. In interpreting a will or a trust, we ascertain the intent of the testator or grantor. *See Eckels*, 111 S.W. 3d at 694; *Hurley*, 98 S.W. 3d at 310. We do so from the language used within the four corners of the instrument. *Eckels,* 111 S.W.3d at 694; *see Shriner's Hosp. v. Stahl,* 610 S.W.2d 147, 151 (Tex.1980) (applying four-corners rule to construe a will). If this language is unambiguous and expresses the intent of the grantor, we need not construe the trust instrument because "it speaks for itself." *Eckels,* 111 S.W.3d at 694; *Hurley,* 98 S.W.3d at 310; *see Frost Nat'l Bank v. Newton,* 554 S.W.2d 149, 153 (Tex.1977) (" 'No speculation or conjecture regarding the intent of the testatrix is permissible where, as here, the will is unambiguous, and we must construe the will based on the express language used therein.' "). Thus, we do not focus on what the grantor intended to write but the meaning of the words he actually used. *San Antonio Area Found. v. Lang,* 35 S.W.3d 636, 639 (Tex.2000). That is, we must not redraft a trust instrument to vary or add provisions "under the guise of construction of the language" of the trust to reach a presumed intent. *Id.*

In determining the grantor's intent from the four corners of the trust instrument, we carefully examine the words used and, if unambiguous, do not go beyond specific terms in search of the grantor's intent. *Id.* Thus, when the language of a trust instrument is unambiguous, extrinsic evidence may not be introduced to show that the grantor intended something outside of the words used. *Id.* And, when the intent of the grantor is unambiguous, his intent controls even if it conflicts with applicable statutes. *See Vaughn v. Vaughn,* 161 Tex. 104, 337 S.W.2d 793, 796 (1960) (explaining that statutes "may be considered as an aid to the construction of a will" but "cannot control or defeat a will's true construction").

If, on the other hand, the meaning of the instrument is uncertain or "reasonably susceptible to more than one meaning," the instrument is ambiguous. *Eckels,* 111 S.W.3d at 694 (quoting *Myrick v. Moody,* 802 S.W.2d 735, 738 (Tex.App.-Houston [14th Dist.] 1990, writ denied)). Ambiguity can be either patent or latent. *Eckels,* 111 S.W.3d at 695; *see In re Estate of Brown,* 922 S.W.2d 605, 608-09 (Tex.App.-Texarkana 1996, no writ). A patent ambiguity arises on the reading of the trust from the words themselves. *Eckels,* 111 S.W.3d at 695; *In re Brown,* 922 S.W.2d at 608. A latent ambiguity exists when the trust appears to convey a sensible meaning on its face but cannot be carried out without further clarification. *Eckels,* 111 S.W.3d at 695; *see Nat'l Union Fire Ins. Co. v. CBI Indus., Inc.,* 907 S.W.2d 517, 520 n. 4 (Tex.1995) (explaining latent ambiguity would exist if a contract called for goods to be delivered to "the green house on Pecan Street," but there were in fact two green houses on Pecan Street).

Where there is latent or patent ambiguity, a court may admit extrinsic evidence to show the grantor's intent. *Eckels,* 111 S.W.3d at 696; *In re Estate of Cohorn,* 622 S.W.2d 486, 487-88 (Tex.App.-Eastland 1981, writ ref'd n.r.e.); *see Stewart v. Selder,* 473 S.W.2d 3, 7 (Tex.1971) ("[W]e have stated on several occasions that where the intention of the testator is not clearly expressed by the language of the will, it may be found by looking to the provisions of the instrument as a whole and to the circumstances surrounding its execution."). Although the Texas Supreme Court has, in the past, stated that a "court may *always* receive and consider evidence concerning the situation of the [grantor], the circumstances existing when the [trust] was executed, and other material facts that will enable the court to place itself in the [grantor]'s position at the time," *Lang,* 35 S.W.3d at 640 (quoting *Stewart v. Selder,* 473 S.W.2d 3, 7 (Tex.1971)), the supreme court explained in 2000 that "this broad approach to the admissibility of extrinsic evidence applies only when a term is open to more than one

construction." *Lang,* 35 S.W.3d at 639 (citing *Lehman v. Corpus Christi Nat'l Bank,* 668 S.W.2d 687, 689 (Tex.1984)). Thus, extrinsic evidence may only be considered when the terms of the instrument are ambiguous.

Finally, in interpreting the provisions of a trust instrument, if possible, we must construe the instrument to give effect to all provisions so that no provision is rendered meaningless. *Eckels,* 111 S.W.3d at 694. And, in interpreting the trust, we look to the law as it existed at the time the trust was executed. *Hagaman v. Morgan,* 886 S.W.2d 398, 400 (Tex.App.-Dallas 1994, writ denied).

Determining the Grantor's Intent

Using the above rules of construction, we must determine what Ray Ellison Sr. meant in 1982 when he stated that he wanted the Trust to benefit the *descendants* of his son, Ray Ellison Jr., and his daughter, Bonnie Egan.

In the Trust, Ray Ellison Sr. identified the descendants of his son and daughter parenthetically: "the descendants living at this time are TRACY EGAN, DARLENE ELLISON AND ARLENE ELLISON." Further, Ray Ellison Sr. stated in the Trust that at the time the Trust was executed "the beneficiaries are well provided for by their parents." Arleene and Darleene Ellison, and Frost Bank, point to these two phrases used by Ellison Sr. in the Trust and argue that we can determine Ray Ellison Sr.'s intent from the four corners of the trust instrument because these phrases show Ray Ellison Sr.'s unambiguous intent.

Although the Lindners disagree that the above two phrases indicate Ray Ellison Sr.'s unambiguous intent, they also argue that the words used in the Trust are unambiguous. According to the Lindners, "descendants" is an unambiguous term with a specific legal meaning that we can determine by using family law statutes in existence at the time the Trust was created as a constructive aid.

In contrast, Tracy Egan Calloway argues that "descendants" is an ambiguous term and that the trial court erred in not allowing her to admit extrinsic evidence of Ray Ellison Sr.'s intent.

As explained below, we believe that "descendants" is not an ambiguous term and that the family statutes in existence in 1982 should be used as a constructive aid of Ray Ellison Sr.'s intent.

1. Does Ray Ellison Sr.'s use of the phrase "descendants living at this time" indicate his clear intent to exclude adult adoptees?

Arleene and Darleene Ellison argue that Ellison Sr.'s intent is clear from the four corners of the trust instrument. According to Arleene and Darleene, by parenthetically identifying Tracy Egan, Darleene Ellison, and Arleene Ellison as *descendants living at this time,* Ellison Sr. indicated that at the time of the creation of the Trust, the *only descendants living* were Tracy Egan, Darleene Ellison, and Arleene Ellison. Thus, they argue that because the Lindners were *living* at the time the Trust was created, Ellison Sr. could not possibly have intended to include them. If Ellison Sr. had wanted the Trust to benefit a class of persons like the Lindners (those being adopted as adults), he would not have specified that the only beneficiaries living were Tracy, Darleene, and Arleene.

Frost National Bank, Independent Executor of the Estate of Ray Ellison Sr., agrees with Arleene and Darleene's argument. Frost Bank also emphasizes that Ellison Sr. specifically named the persons

whom he considered to be "descendants" and who were living at the time the Trust was executed in 1982. Frost Bank points out that Ellison did not use language like "the descendants identifiable at this time" or "the descendants ascertainable at this time." Instead, he specifically stated "the descendants *living* at this time." According to Frost Bank, this "language demonstrates that Mr. Ellison contemplated that the only possible additional descendants would be persons born after 1982. This, in itself, excludes the Lindners, each of whom was born well before 1982."

The Lindners respond by arguing that they are not excluded by the language "descendants living at this time" because although they were living at the time, they were not *descendants* at the time.

We believe that Ray Ellison Sr.'s parenthetical identification of Tracy, Darleene, and Arleene as the only descendants living at this time was for identification purposes and does not indicate his clear intent to exclude adult adoptees.

2. Does Ray Ellison Sr.'s use of the phrase "[a]t the time of executing this trust instrument, the beneficiaries are well provided for by their parents," indicate his intent to exclude adult adoptees?

Arleene and Darleene Ellison also argue that by stating that "[a]t the time of executing this trust instrument, *the beneficiaries are well provided for by their parents,*" Ellison Sr. indicated his intent to benefit his grandchildren, not other persons who had been raised as someone else's grandchildren for decades after the Trust was created. They emphasize that the language "the beneficiaries are well provided for by their parents," indicates Ellison Sr.'s intent to benefit only those persons then in a parent-child relationship with, and entitled to receive parental support from, Bonnie Egan and Ray Ellison Jr. They argue that the Lindners were not such people.

Frost Bank also emphasizes that the statement regarding the beneficiaries, at the time of the Trust's execution, being "well provided for by their parents" demonstrates Ellison's intent that the trust beneficiaries be only the named biological grandchildren and later-born biological grandchildren. According to Frost Bank, had Ellison "intended to include persons born before 1982 but not adopted until afterward, he [would] not have opined on whether those persons were, on March 9, 1982, 'well provided for by their parents.' "

We disagree. At the time the Trust was created, Tracy, Arleene, and Darleene were the only beneficiaries to the Trust. Thus, the sentence, "[a]t the time of executing this trust instrument, *the beneficiaries are well provided for by their parents,*" refers only to Tracy, Arleene, and Darleene.

3. Is the term "descendants" ambiguous so that extrinsic evidence should have been admitted?

Tracy Egan Calloway argues that "descendants" is not an unambiguous term that the trial court could construe from the instrument itself and the law but instead is ambiguous. According to Calloway, "descendants" as used by Ellison Sr. could have had "at least four possible meanings":

1. Ellison Sr. could have intended the term "descendants" to include only his children's and grandchildren's biological offspring;

2. Ellison Sr. could have intended "descendants" to have a more expansive meaning so as to include, in addition to his biological offspring, individuals who were adopted as minors by his biological children or grandchildren, while excluding individuals who were adopted as adults;

3. Ellison Sr. could have intended "descendants" to have an even more expansive meaning so as to include not only individuals who were adopted as minors but also individuals who were adopted as adults as long as they enjoyed an *in loco parentis* relationship with his biological children and grandchildren while the adoptees were minors-that is, he could have intended that adult adoptees who actually lived in the homes of his biological children or grandchildren for a period of time while they were minors and who later were adopted as adults be considered beneficiaries, but not adult adoptees who never enjoyed an *in loco parentis* relationship; and

4. Ellison Sr. could have intended "descendants" to include in addition to biological offspring any adoptee, minor or adult, regardless whether the adoptee ever actually enjoyed an *in loco parentis* relationship with his biological children or grandchildren.

Thus, because the term "descendants" is ambiguous, Calloway argues that the trial court should have considered extrinsic evidence of what Ellison Sr. intended by his use of "descendants."

In *San Antonio Area Found. v. Lang,* 35 S.W.3d 636, 640 (Tex.2000), the supreme court considered when extrinsic evidence may be admitted to explain a term. First, the court emphasized that when a testatrix's intent is apparent on the face of the will, extrinsic evidence is not admissible to show a contrary meaning. *Id.* It explained that extrinsic evidence is admissible only when the testatrix's will uses a word that is susceptible to more than one construction. *Id.* at 641. Thus, the court explained that in *Stewart v. Selder,* 473 S.W.2d 3, 7 (Tex.1971), extrinsic evidence was admissible to explain the testatrix's intent in using the term "cash," because "cash" "could refer to either dollar bills or other forms of currency, like checks or securities." *Lang,* 35 S.W.3d at 641. However, the testatrix in the case before it had used the term "real property." *Id.* The court explained that extrinsic evidence was not admissible to explain the testatrix's intent in using the term "real property" because real property has a settled legal meaning. *Id.* That is, "real property" is "a term with a specific meaning ascribed to it in law." *Id.* Thus, the testatrix's use of the term in her will was unambiguous and the trial court did not err in excluding "any sort of background, historical extrinsic evidence to explain" the testatrix's intent in using the term. *Id.*

Like "real property," we believe that "descendants" is a term with a specific meaning ascribed to it in law: "one who follows in lineage, in direct (not collateral) descent from a person." BLACK'S LAW DICTIONARY 476 (8th ed. 2004). Examples of descendants are "children and grandchildren." *Id.* Thus, the term "descendants" is not ambiguous. A descendant of Ray Ellison Jr. would be any person who follows in lineage, in direct descent from him. An example of such a "descendant" would be his "child." Thus, the issue becomes whether one adopted as an adult is considered a "child" of his adopted father with respect to third persons as the law existed in 1982 when the Trust was created.

4. Should 1982 Family Law statutes be used as a constructive aid of Ray Ellison Sr.'s intent?

In support of their argument that they are included within Ellison Sr.'s use of the term "descendants," the Lindners emphasize that as the law existed in 1982, when the Trust was created, descendants included those adopted as adults. According to the Lindners, pursuant to 1982 Texas Family Law statutes, a person adopted as an adult is a "child" and thus a descendant of his adopted father. In response to the Lindners' argument, Arleene and Darleene Ellison argue that we should not consider 1982 Family Law statutes because a statute cannot contradict Ellison Sr.'s unambiguous intent.

It is true that the grantor's intent controls and that a statute cannot control or defeat a trust's "true construction." *Vaughn,* 337 S.W.2d at 796. Thus, the question is not whether persons adopted as adults should be beneficiaries of the Trust pursuant to a statute, but whom Ellison Sr. intended to designate as beneficiaries when he created the Trust. However, while a statute cannot defeat the clear intent of the grantor, a statute "may be considered as an aid to the construction" of a trust. *Id.* By interpreting the state of law with regard to "descendants" in 1982, we would not be stating that the law required persons adopted as adults to be beneficiaries of the Trust. Instead, we would be recognizing that Ellison Sr. decided to use the specific word "descendants" to define his beneficiaries and that he did not define "descendants" in the trust instrument itself. Thus, we presume that Ellison Sr., by using the word "descendants," knew what the law in 1982 considered "descendants" to encompass. *See San Antonio Area Found.,* 35 S.W.3d at 640.

5. With respect to adopted children, what did "descendants" mean in 1982?

a. Progression of Adoption Laws-1931 Statute

Before 1931, adopted persons had no right of inheritance except from the estate of the party adopting him. *Armstrong v. Hixon,* 206 S.W.3d 175, 180 (Tex.App.-Corpus Christi 2006, pet. denied); *Fletcher v. Persall,* 75 S.W.2d 170, 170 (Tex.Civ.App.-Austin 1934, writ ref'd). In 1931, the Legislature enacted the following statute (formerly Article 46a of the Revised Civil Statutes), entitled "Adoption of Minor Children," providing for the adoption of minor children:

When a child is adopted in accordance with the provisions of this Article, all legal relationships and all rights and duties between such child and its natural parents shall cease and terminate, provided however, that nothing herein shall prevent such adopted child from inheriting from its natural parent; all adopted children shall inherit from the adopted as well as its natural parents. Said child shall thereafter be deemed and held to be, *for every purpose, the child of its parent or parents by adoption as fully as though born of them in lawful wedlock.* Said child shall be entitled to proper education, support, maintenance, nurture and care from said parent or parents by adoption, and shall inherit from said parent or parents by adoption, and as the child of said parents or parents by adoption, as fully as though born to them in lawful wedlock; subject, however, to the provisions of this Act. Said parent or parents by adoption shall be entitled to the services, wages, control, custody and company of said adopted child, and shall, as such adopting parent or parents, inherit from and as the parent or parents of said adopted child as fully as though the child had been born to them in lawful wedlock; provided, however, that upon the death of such adopted child, while unmarried and without issue of its body, all its property, of whatsoever kind and nature, shall pass and descend to the adopting parent or parents, if living, but if such adopting parent or parents be not living, then all such property shall pass and descend to the next of kin of said adopting parent or parents according to the then law of descent and distribution, and not to the next of kin of such adopted child; and provided that.... Acts of 1931, 42nd Leg., p. 300, ch. 177, § 9 (emphasis added).

This 1931 statute "did not have the sweeping effect suggested by the language quoted above." *Cutrer v. Cutrer,* 162 Tex. 166, 345 S.W.2d 513, 516 (1961). "[T]he legal relationship established by the 1931 Act was effective only 'as between the adopting parent and the adopted child.' " *Id.* Thus, "[w]here the adopting parent or his estate was concerned, a child adopted under the provisions of the statute had all of the rights of a natural child." *Id.* However, "as to all persons other than the adoptive parents, an adopted child's status was the same as it would have been if no act of adoption had

occurred." *Id.* Therefore, "[t]here is no basis then for saying that the status conferred by the 1931 Act requires that an adopted child be regarded as a natural child of the adopter for the purpose of construing instruments executed by third persons." *Id.* at 516-17. This rule is called the "stranger to the adoption rule." According to the rule, adopted persons could inherit from their adoptive parents *but not through them;* that is, they could not inherit from one who was a "stranger to the adoption." *See id.*

b. 1947 Statute

In 1947, the Legislature enacted a statute providing for the adoption of adults in the same manner as was then provided for adopting minors. *See* Act of 1947, 50th Leg., R.S., ch. 428, 1947 Tex. Gen. Laws 1009. Thus, the statute tracked the above language providing for the adoption of minor children. However, as noted, the supreme court applied the "stranger to the adoption rule" to that statute. *See Cutrer,* 345 S.W.2d at 516. Therefore, the stranger to the adoption rule applied to this 1947 statute providing that those adopted as adults will "be deemed and held to be, *for every purpose, the child of [his] parent or parents by adoption as fully as though born of them in lawful wedlock.*" *See* Act of 1947, 50th Leg., R.S., ch. 428, 1947 Tex. Gen. Laws 1009.

c. 1951 Statute

In 1951, the Legislature amended the adoption statute relating to minors:

> When a minor child is adopted in accordance with the provisions of this Article, all legal relationship and all rights and duties between such child and its natural parents shall cease and terminate, and such child shall thereafter be deemed and held to be for every purpose the child of its parent or parents by adoption as fully as though naturally born to them in lawful wedlock. Said child shall be entitled to proper education, support, maintenance, nurture and care from said parent or parents by adoption, and said parent or parents by adoption shall be entitled to the services, wages, control, custody and company of said adopted child, all as if said child were their own natural child. For purposes of inheritance under the laws of descent and distribution such adopted child shall be regarded as the child of the parent or parents by adoption, such adopted child and its descendants inheriting from and through the parent or parents by adoption and their kin the same as if such child were the natural legitimate child of such parent or parents by adoption, and such parent or parents by adoption and their kin inheriting from and through such adopted child the same as if such child were the natural legitimate child of such parent or parents by adoption. The natural parent or parents of such child and their kin shall not inherit from or through said child, but said child shall inherit from and through its natural parent or parents. Nothing herein shall prevent anyone from disposing of his property by will according to law. *Such adopted child shall be regarded as a child of the parent or parents by adoption for all other purposes as well, except that where a deed, will, or other instrument uses words clearly intended to exclude children by adoption, such adopted child shall not be included in such class....*

Acts of 1951, 52nd Leg., ch. 249, § 3, 1951 Tex. Gen. Laws 388, 390 (emphasis added).

This is the statute that abrogated the stranger to the adoption rule with respect to those *adopted as minors. See Ortega v. First Republic Bank Fort Worth, N.A.,* 792 S.W.2d 452, 454 (Tex.1990) ("Before 1951, the general rule in Texas was that an adopted child was not entitled to property conveyed or

devised to the natural children of the adoptive parent unless the intent to include was indicated by additional language or circumstances. This presumption of exclusion was changed by the passage of a 1951 amendment to the adoption statutes."). However, the Legislature did not amend the adult adoption statute. Thus, the 1951 amendment, with respect to adult adoptees, did not abrogate the stranger to the adoption rule.

d. 1973 Statute

In 1973, the Legislature adopted the Texas Family Code and codified the following child adoption statute:

Subchapter A. Adoption of Children

Sec. 16.09. Effect of Adoption Decree

(a) On entry of a decree of adoption, the parent-child relationship exists between the adopted child and the adoptive parents as if the child were born to the adoptive parents during marriage.

(b) An adopted child is entitled to inherit from and through his adoptive parents as though he were the natural child of the parents.

(c) The terms "child," "descendant," "issue," and other terms indicating the relationship of parent and child include an adopted child unless the context or express language clearly indicates otherwise.

It also codified a statute relating to the adoption of adults:

Subchapter B. Adoption of Adults

Sec. 16.55. Effect of Adoption Decree

On entry of the decree of adoption, the adopted adult is the son or daughter of the adoptive parents and of the natural parents, for inheritance purposes. However, the natural parents may not inherit from the adopted adult.

Act of 1973, 63d Leg., R.S., ch. 543, § 16.55, 1973 Tex. Gen. Laws 1411.

e. 1975 Statute

In 1975, the Legislature amended the statute relating to adoption of adults (it did not amend the statute relating to the adoption of minor children):

Sec. 16.55. Effect of Adoption Decree

On entry of the decree of adoption, the adopted adult is the son or daughter of the adoptive parents *for all purposes,* and of the natural parents for inheritance purposes only. However, the natural parents may not inherit from or through the adopted adult.

Acts of 1975, 64th Leg., R.S., ch. 475, § 43, 1975 Tex. Gen. Laws 1253, 1270 (emphasis added). This 1975 statute is the law that was in effect at the time the Trust was created. This is also the amendment that the Lindners claim abrogated the stranger to the adoption rule with respect to adults. They argue that the phrase "for all purposes" means that the adopted adult can inherit *through* his adoptive parents.

Arleene and Darleene Ellison, in contrast, argue that this amendment did not abrogate the stranger to the adoption rule and point to the differences between the child and adult statutes. They emphasize that the minor adoption statute, in subsection (c), contained an "inclusionary presumption," which expressly abrogated the stranger to the adoption rule. However, the adult version contained no such inclusionary presumption. Thus, according to Arleene and Darleene, the Legislature must have intentionally not included such an "inclusionary presumption" in the adult statute. And, by not including such a presumption, the common-law exclusionary presumption known as the stranger to the adoption rule remained in effect for adult adoptees. We agree with Arleene and Darleene Ellison.

We find it significant that the Legislature failed to include an inclusionary presumption in the 1975 statute. And, we find the Lindners' argument that the language "for all purposes" abrogated the stranger to the adoption rule unpersuasive. When it enacted this statute, the Legislature knew that the Texas Supreme Court had interpreted statutory language like "for all purposes" as not abrogating the stranger to the adoption rule. *See Cutrer,* 345 S.W.2d at 516 (interpreting statutory language that included the phrase "for every purpose" to apply only to the adoptive parent and child and to not allow an adoptive child to inherit "through" the adoptive parent). Thus, had it wanted to abrogate the stranger to the adoption rule with respect to adults, the Legislature would have explicitly included an inclusionary presumption. *See Foster v. Foster,* 641 S.W.2d 693, 695 (Tex.App.-Fort Worth 1982, no writ) ("Even now [in 1982], it is not the law of this State that one who was an adult when adopted has entitlement under the laws of descent and distribution to recover as a child from anyone other than his adoptive parents."). We believe the Legislature did so in 1995 when it amended the statute to state that an adopted adult "is entitled to inherit *from and through* the adopted adult's adoptive parents as though the adopted adult were the biological child of the adoptive parents." Act of April 6, 1995, 74th Leg., R.S., ch. 20, § 1, sec. 162.507(b), 1995 Tex. Gen. Laws 113, 238 (current version at TEX. FAM. CODE ANN. 162.507 (Vernon Supp.2005)) (emphasis added); *see Armstrong v. Hixon,* 206 S.W.3d 175, 180-81 (Tex.App.-Corpus Christi 2006, pet. denied) ("Not until 1995 did the Legislature modify the adult adoption statute to specifically provide that an adopted adult might inherit 'from and through' the adopted adult's adoptive parents.").

The Lindners, however, point to a 1984 Texas Supreme Court case, decided two years after Ray Ellison Sr. created the Trust: *Lehman v. Corpus Christi National Bank,* 668 S.W.2d 687 (Tex.1984). They argue that the following language in *Lehman* supports their assertion that the 1975 statute abrogated the stranger to the adoption rule with respect to adults:

> Keith Lehman would have us announce a presumption that adopted adults are not included within the beneficiaries of a class gift in a testamentary instrument of someone other than the adoptive parents. We decline to do so. This presumption would be a form of the "stranger to the adoption" rule, which has now been rejected in Texas, *see Vaughn v. Gunter,* 458 S.W.2d 523 (Tex.Civ.App.-Dallas), *writ ref'd n.r.e.,*461 S.W.2d 599 (Tex.1970), as well as in a majority of American jurisdictions considering the question. *See Elliott v. Hiddleson,* 303

N.W.2d 140, 144 (Iowa 1981).

Id. at 688. We, however, find *Lehman* distinguishable.

The will at issue in *Lehman* specifically included adoptees as descendants, with no age distinction between children and adults. *Id.* at 688. Thus, the language from *Lehman* upon which the Lindners rely to support their claim is mere *dicta.* Further, in making its assertion that the stranger to the adoption rule had already been eliminated by the 1951 amendment to the statute, the *Lehman* court relied upon a court of appeals decision. *See id.* That case, *Vaughn v. Gunter,* 458 S.W.2d at 524-25, dealt with the issue of whether an individual who had been adopted as a *minor* was included in the class defined as "children" of his adopted father. In holding that the minor adoptee was a child of his adopted father, the *Vaughn* court relied on *the 1951 statute relating to minors* that clearly abrogated the stranger to the adoption rule *with respect to minor.* The *Vaughn* court did not address the 1951 statute concerning the adoption of adults. Therefore, we find *Lehman* and its reliance on *Vaughn* distinguishable from this case.

Thus, by using the 1975 statute as a constructive aid, we conclude that when Ray Ellison Sr. created the Trust in 1982, he did not intend the term "descendants" to include those persons adopted as adults.

Conclusion

Because the trial court did not err in concluding that Ray Ellison Sr. intended the term "descendants" to not include those persons adopted as adults and because it did not abuse its discretion in awarding attorneys' fees, we affirm, as modified, the judgment of the trial court.

SIMMONS, J., dissenting.

In this case, the old adage "bad facts make bad law" is particularly true. The record paints an unattractive picture of Ray Ellison, Jr. ("Ray Jr.") and the Lindner boys and the motive surrounding their adoption. The record before the trial court was replete with evidence that the adoption of the adult Lindner boys by Ray Jr. was merely a way in which Ray Jr. could attempt to exercise control over his father's trust. There was evidence that Ray Jr. was not only estranged from his father when the trust was created, but estranged from his daughters and niece, the beneficiaries of the trust. The issue in this appeal is whether we (1) apply the law and reward what could be characterized as unworthy beneficiaries or (2) neglect established precedent and impose our own intent on the inter vivos, irrevocable trust to exclude the unworthy contenders to the Ray Ellison, Sr. fortune. I choose the former and thus, must respectfully dissent.

I agree with much of the majority opinion; we part ways, however, over the status of adopted adults in 1982 and whether the "stranger to the adoption" rule was in effect in 1982, when the Trust was created. I believe that in 1982, adopted adults were the sons or daughters of their adoptive parents "for all purposes," including inheriting from and through the adoptive parents.

The controlling law in effect in 1982, when the Trust was created, provided:

> On entry of the decree of adoption, the adopted adult is the son or daughter of the adoptive parents for all purposes, and of the natural parents for inheritance purposes only. However,

the natural parents may not inherit from or through the adopted adult.

Acts of 1975, 64th Leg., R.S., ch. 475, § 43, 1975 Tex. Gen. Laws 1253, 1270.

The meaning of the statute is clear-that adopted adults are the sons or daughters of their adoptive parents "for all purposes." Although Arleene and Darleene Ellison argue that this 1975 amendment did not abrogate the stranger to the adoption rule, the Texas Supreme Court determined otherwise in *Lehman v. Corpus Christi Nat'l Bank,* 668 S.W.2d 687 (Tex.1984). In *Lehman,* the question before the court was whether an adopted adult qualified as a "descendant" of his adoptive father within the terms of his grandfather's will. *Id.* at 688. The will expressly defined "descendants" as including "the children of the person designated, and the issue of such children, and such children and issue shall always include those who are adopted." *Id.* (emphasis added). Thus, those adopted as children were unambiguously defined as descendants, but the issue was whether "children ... who are adopted" included those adopted as adults. The supreme court reasoned that adopted adults were included because the will's definition of "descendants" drew no distinction between natural and adopted children, "if adopted adults are incapable of taking, adult natural children would likewise be excluded from the class of beneficiaries." *Id.*

While I agree that the language in *Lehman* is dicta and that it was decided two years after the Trust was created, I cannot ignore that the supreme court in *Lehman* interpreted the 1975 statute at issue as having abrogated the stranger to the adoption rule. The supreme court goes on to point out that the stranger to the adoption rule had likewise been rejected in a majority of American jurisdictions and was "contrary to the public policy of this state." *Id.* Although the application of *Lehman* to this case may seem to cause an inequitable result, the failure to recognize that the stranger to the adoption rule was abrogated in 1975 may have serious unintended consequences. Any practitioner reading *Lehman* prior to this decision would have concluded that the stranger to the adoption rule was abrogated by the 1975 statute and advise her clients accordingly. Yet, under the reasoning of the majority opinion, the stranger to the adoption rule, referred to as bad public policy under *Lehman,* was not abrogated until some twenty years later, in a recodification of the statute in 1995. *Lehman* has been the law in this area for the past twenty-five years and I would apply it to this case.

Thus, by using the 1975 statute as a constructive aid, I cannot conclude that Ray Ellison, Sr. intended to preclude adult adoptees as "descendants" of his son, Ray Ellison, Jr. Therefore, I cannot agree to affirm the trial court's summary judgment. This case presents a very unfortunate family dispute. The record reflects that the Lindner boys were adopted by Ray Jr., in part, to allow Ray Jr. to exercise control over his father's trust. Although the Lindner boys do not look like worthy beneficiaries, I would not change twenty-five years of law to refute their claims.

4.3.3 Stepparent Adoption

Uniform Probate Code § 2-114 Parent and Child Relationship

(b) An adopted individual is the child of his [or her] adopting parent or parents and not of his [or her] natural parents, but adoption of a child by the spouse of either natural parent has no effect on (i) the relationship between the child and that natural parent or (ii) the right of the child or a descendant of the child to inherit from or through the other natural parent.

Uniform Adoption Act § 4-103 (1994)

(b) An adoption by a stepparent does not affect:

(3) the right of the adoptee or a descendant of the adoptee to inheritance or intestate succession through or from the adoptee's former parent.

It is usually in the child's best interests to be in a two parent family. Thus, legislatures and the courts seek to preserve the family unit. If the parents, divorce, legislatures and courts ensure that the noncustodial parent maintains contact with the child by giving that person liberal visitation rights. Therefore, divorce does not sever the parent-child relationship. On the other hand, if the custodial parent remarries, it is in the child's best interests to blend into that family unit. Normally, the birth parent-child relationship takes precedent over the stepparent-stepchild relationship. Consequently, as will be discussed in a later chapter, stepchildren are not typically considered to be the heirs of their stepparents. To encourage harmony in blended families, legislatures and courts do not permit the relationship that the child has with his or her stepparent to interfere with the relationship that the child has with his or her birth parents. In jurisdictions that have adopted the UPC, the stepparent's adoption of the child does not impact the relationship between the child and the birth parents. This approach permits the courts to respect the relationships that children have with their stepparents and their birth parents. In light of the high divorce rate and the increasing number of blended families, the UPC's approach is consistent with public policy.

Impact on the right to inherit from biological parent(s)

Estate of Jacobs, 719 A.2d 523 (Me. 1998)

SAUFLEY, J.

Gloria B. Norcott appeals from an order of the Oxford County Probate Court (Hanley, J.), finding that Jameson Boucher is the "child" of her son Derek Jacobs, now deceased for purposes of intestacy under the Maine Probate Code. Because we agree with the Probate Code that Boucher's adoption by his mother's husband did not change his relationship with Jacobs, his natural father, for purposes of intestacy pursuant to 18-A M.R.S.A. § 2-109, we affirm.

Jameson Boucher (named Jameson LaCroix at birth) was born in 1970 in New Hampshire to Suzanne LaCroix. LaCroix, unmarried at that time, later married Peter Boucher, who adopted Jameson just before his second birthday. The child's last name was accordingly changed from LaCroix to Boucher under the adoption decree. The decree was silent as to the child's relationship to his natural father. Indeed, it is not clear from the record that the identity of Jasmeson Boucher's father was known at the time of adoption. It is undisputed, however, that when Boucher became an adult he established a relationship with Derek Jacobs before Jacob's death and that Jacobs is, in fact, Boucher's natural father.

Derek Jacobs died intestate in Maine in early December 1995, at the age of forty-three. Norcott, his mother, filed a petition for her informal appointment as personal representative of Jacobs's estate, and listed herself and Robert Jacobs, Derek's father, as the decedent's only heirs. Jameson Boucher filed a competing petition for formal adjudication of intestacy, identifying himself as Jacobs's son,

and seeking his own appointment as personal representative of the decedent's estate. The Probate Court held that, pursuant to section 2-109 of the Probate Code, Jameson Boucher was the "child" of the decedent, Derek Jacobs, for purposes of intestacy, and therefore that he had priority of appointment as personal representative of the decedent's estate, Gloria Norcott appealed from this order.

The sole question before the Court is whether, pursuant to 18-A M.R.S.A. § 2-109(1), Jameson Boucher is the "child" of Derek Jacobs for purposes of intestate inheritance, despite the absence of a provision in his adoption decree providing for that status. Statutory interpretation is a matter of law, and we review the trial court's decision de novo. *See Guardianship of Zachary Z.,* 677 A.2d 550, 552 (Me. 1996). When interpreting a statute, we look first to its plain meaning and seek to give effect to the intent of the Legislature, construing the statutory language to avoid absurd, illogical, or inconsistent results. *See Nasberg v. City of Augusta*, 662 A.2d 227, 229 (Me. 1995). In doing so, we consider "the whole statutory scheme of which the section at issue forms a part so that a harmonious result, presumably the intent of the Legislature, may be achieved." *Davis v. Scott Paper Co.*, 507 A.2d 581, 583 (Me. 1986).

Section 2-109(1) of the Maine Probate Code provides:

> An adopted person is the child of an adopting parent and not of the natural parents except that an adopted child inherits from the natural parents and their respective kin if the adoption decree so provides, and *except that adoption of a child by the spouse of a natural parent has no effect on the relationship between the child and either natural parent.* If a natural parent wishes an adopted child to inherit from the natural parents and their respective kin, the adoption decree must provide for that status. 18-A M.R.S.A. § 2-109 (1998) (emphasis added).

The unambiguous language at the end of the first sentence stating that the adoption of a child by the spouse of a natural parent has no *effect* on the relationship between the child and *either* parent, results in that child being the "child" of and inheriting from *both* natural parents. The adoption by a stepparent, in other words, does not affect the relationship between the adopted person and either of his natural parents for purposes of intestacy under the Probate Code.

Norcott argues, however, that the second sentence, added by the Legislature in 1993, modifies the first sentence so that a child adopted by a stepparent may inherit through both natural parents only if the adoption decree explicitly so provides. If the second sentence is read to have the effect urged by Norcott, much of the first sentence becomes meaningless because its exception to the rule for adoptions by stepparents would be swallowed by the requirement that the adoption decree explicitly address the continued inheritance rights. Such an interpretation would run directly counter to our mandate to give effect to all portions of a statute where that goal can be accomplished in a logical fashion. If, in contrast, the second sentence is read to provide simply that natural parents have the affirmative right to assure that their child will inherit from them when that child is adopted by someone other than a spouse of a natural parent, both sentences are given meaning, and the result is neither illogical nor inconsistent.

Moreover, to the extent that the second sentence of section 2-109 is inconsistent with the first, any ambiguity is resolved by the legislative history of the statute. Before the 1993 amendment, it was clear that "a child adopted by the new spouse of a natural parent…inherit[ed] from both his natural parents and from his adoptive parent." Maine Probate Law 41 (1978). When the second sentence

was added in 1993, the statement of fact accompanying a Senate Amendment to the bill provided: "This amendment *retains current inheritance rights of adopted children* but clarifies that the adoptive parents may not bar the wishes of the birth parents." Comm. Amend. A to L.D. 942, No. S-495 (116th Legis. 1993) (emphasis added). Thus, it is clear that the Legislature did not intend the amendment to change the meaning of the existing provision, under which the adoption of a child by the spouse of a natural parent did not affect the child's relationship with either of his natural parents.

Accordingly, the Probate Court correctly concluded that Jameson Boucher is the "child" of his natural father, Derek Jacobs, pursuant to section 2-109 of the Maine Probate Code.

Judgment affirmed.

Impact on the right to inherit through biological parent(s)

In re Estate of McQuesten, 578 A.2d 335 (N.H. 1990)

BROCK, Chief Justice.

The petitioners were adopted by their stepfather following the divorce of their natural parents and the remarriage of their mother. They now claim a right to inherit, through their deceased natural father, from the estate of their natural paternal grandmother. The Hillsborough County Probate Court (*Cloutier,* J.) denied the petitioners' claim, ruling that the right to take by representation was terminated by the adoption. For the reasons that follow, we affirm.

Sheree L. Faucher and Cathy L. Faucher, the petitioners, were born during the marriage of their natural parents, Robert A. McQuesten and Sandra A. Faucher (formerly Sandra A. McQuesten). When the marriage ended in divorce in 1963, custody of the petitioners was given to their mother, who later that same year married Bertrand Faucher. In 1968, when Sheree and Cathy were nine and seven years old, respectively, they were adopted by their stepfather with the consent of their natural father.

In 1971, Robert A. McQuesten died intestate and, in 1979, his mother, Ena M. McQuesten also died intestate. In December 1988, the petitioners filed notices of claim with the probate court, each seeking an amount equivalent to one-fourteenth (1/14) of the value of certain real estate owned by their natural paternal grandmother at the time of her death. The court denied the petitioners' claims, ruling "that the right to take by representation through their biological parent [was] terminated by the adoption...." The petitioners also filed a motion, which was not granted by the probate court, requesting access to their sealed adoption records.

On appeal, the petitioners argue that the probate court erred in denying their claims against their grandmother's estate. They contend that RSA 170-B:20 creates a special exception, applicable to stepparent adoptions, which permits them to inherit through their natural father. They further contend that the termination of the right to inherit through their natural father, who openly consented to the adoption of his children by their stepfather, was not in their "best interests" and violated principles of equity. In addition, the petitioners argue that a guardian ad litem should have been appointed by the probate court at the time of adoption to protect their financial interests. Finally, they claim that "good cause" exists to unseal their adoption records because their adoption

was open and uncontested and because no living party to the adoption has expressed any objection.

We first address the petitioners' claim that the adoption statute creates an exception for stepparent adoptions, allowing the adopted child to inherit from the natural parent who has been otherwise dispossessed of any parental rights, privileges, duties or obligations. The petitioners argue that the exception can be found in the wording of RSA 170-B:20, V: "When the adopting parent is a stepparent, married to a natural parent, nothing contained in this section shall affect the rights of inheritance between the child and *his natural parent* or their collateral or lineal relatives." (Emphasis added.) The petitioners assert that because the legislature did not employ the phrase "his natural parent who is married to the stepparent," as it did in RSA 170-B:20, II, it was referring to the natural parent who was not part of the adoptive marriage. We disagree.

"Adoption was unknown at common law and is wholly statutory." *Durivage v. Vincent,* 102 N.H. 481, 483, 161 A.2d 175, 177 (1960). Therefore, our review of this claim is limited to an interpretation of what the legislature has enacted. *Young v. Bridges,* 86 N.H. 135, 138, 165 A. 272, 274 (1933). In interpreting the intent of the legislature, we look at words in the context of the statute as a whole. *State Employees Ass'n v. Cheney,* 119 N.H. 822, 826, 409 A.2d 775, 777 (1979).

RSA 170-B:20 contains five paragraphs. Paragraph I confers upon the adopted child and the adoptive parent or parents the same rights, privileges, duties and obligations, with respect to one another, as if the adopted child were born in wedlock to the adoptive parent or parents. RSA 170-B:20, I. Paragraph II, which complements paragraph I, removes from the natural parent or parents any of the rights, privileges, duties or obligations with respect to the adopted child. RSA 170-B:20, II. Paragraph II contains an exception, exempting from its provisions natural parents who are married to adoptive stepparents. RSA 170-B:20, II. Paragraphs III and IV specifically address inheritance rights. Paragraph III severs existing rights of inheritance between the adopted child and the natural parent or parents. RSA 170-B:20, III. Paragraph IV, complementing paragraph III, establishes rights of inheritance between the adopted child and the adoptive parent or parents. RSA 170-B:20, IV. Paragraph V is composed of several sentences, each dealing further with the effect of adoption upon testate or intestate property distribution. *See* RSA 170-B:20, V.

It is one of the sentences of paragraph V which provides the fuel for the petitioners' argument. The sentence calls for the continuation of inheritance rights, which would otherwise be severed by the provisions of paragraph III, between an adopted child and "his natural parent" in situations involving stepparent adoption. RSA 170-B:20, V. The question is whether "his natural parent" refers to the natural parent married to the stepparent, to the natural parent whose parental relationship with the adopted child has been legally terminated, or to both.

The provision clearly does not apply to both natural parents. The wording, "his natural parent," is in the singular. The adoption statute consistently makes reference to "natural parent or parents" where inclusion of both the natural father and the natural mother is intended. *See* RSA 170-B:20, I-V. If the legislature had sought to continue the inheritance rights between the adopted child and both natural parents, it undoubtedly would have employed similar language.

In determining which natural parent is referred to as "his natural parent," it is logical that the legislature would intend to preserve inheritance rights between an adopted child and the natural parent with whom he or she continues to have a familial relationship. This would be consistent with the exception contained in paragraph II. *See* RSA 170-B:20, II. Furthermore, it would be illogical to

conclude that the legislature intended to continue inheritance rights between an adopted child and a natural parent who has had all other parental rights, privileges, duties and obligations legally terminated. *See* RSA 170-B:20, II, III.

In interpreting the adoption statute as a whole, we conclude that RSA 170-B:20, V allows the inheritance rights of the natural parent married to an adopting stepparent to remain unaffected by the adoption. It does not create an exception whereby inheritance rights may be preserved between an adoptive child and a natural parent who has been legally dispossessed of any continuing parental rights or duties.

Next, we consider the petitioners' claim that, despite the intent of the legislature, as expressed in the adoption statute, this court should promote their "best interests" and permit them to inherit from the estate of their natural paternal grandmother. The basis for making such a ruling, as argued by the petitioners, is that theirs was an "open" adoption, entered into with the knowledge and consent of their now deceased natural father. They argue that they should be permitted to inherit from their natural parents as well as their adoptive parents, which would be the result if this court applied principles of fairness and equity. We disagree.

We begin our review of this claim by noting that RSA 170-B:20, III-V, the provisions which address rights of inheritance after adoption, do not differentiate between cases based upon whether an adoption is "open" or whether parental consent was obtained. We further note that the only interest which the petitioners have asked us to promote is their claim to a portion of their late grandmother's estate.

We have previously addressed the petitioners' argument regarding the fairness and equity of permitting adopted children to inherit from both adoptive and natural parents and have held "that for the purpose of inheritance of property by heirship the adopted child becomes the child of the adopting parents and ceases to be the child of the natural parents, the reason being to avoid the *unfair* result of giving a dual right of inheritance to an adopted child as against the single right of a child not adopted to inherit from his blood kin only." *Amoskeag Trust Co. v. Haskell,* 96 N.H. 89, 98, 70 A.2d 210, 217 (1950) (citing *Young v. Bridges,* 86 N.H. at 138, 165 A. at 275) (emphasis added). This reasoning remains sound today. While an adopted child may lose rights of inheritance from natural parents, he or she gains rights of inheritance from adoptive parents. RSA 170-B:20, I. At the same time, natural parents are not prevented from making testamentary provision for their children who are adopted, should they desire. RSA 170-B:20, V.

The right of inheritance is also controlled by statute. *See* RSA ch. 561. The right is of no immediate value until a relative dies and the deceased relative's assets, by operation of the descent and distribution statutes, become vested in the heir. A relative can disappoint a potential heir by conveying his or her life's bounty through testamentary disposition or *inter vivos* transfer to other parties, or by simply expending his or her resources during his or her lifetime. While the right of inheritance provides the opportunity for an heir to be enriched by the demise of a relative, we cannot adjudge one right of inheritance to be more valuable than another.

We see no unfairness or inequity in terminating the right of inheritance through a natural parent in substitution for granting a new right of inheritance through an adoptive parent. In the petitioners' situation, it may be in their best *financial* interest to inherit from their natural grandmother. But it is not the purpose of the adoption statute to create financial advantages for the adopted child. *See* RSA

170-B:1. The statute already considers the respective interests of the adopted child, adoptive parents and natural parents in the adoption process. *See id.* Because the statute provides a clear solution in the interest of all parties, we need not apply equitable principles to reach a contrary result. *Smith v. Consul General Of Spain,* 110 N.H. 62, 64, 260 A.2d 95, 97 (1969).

Next, the petitioners claim that the failure of the probate court to appoint guardians ad litem to represent their financial interests during the adoption proceeding amounted to a denial of due process and the unprivileged taking of their property in violation of the New Hampshire Constitution, part I, article 15. We find no merit in this claim.

The petitioners were not dispossessed of the right to inherit. For purposes of inheritance, the adoption changed only their familial association, exchanging their inheritance right through their natural father for the right to inherit through their adoptive father. Their natural father and his relatives retained the right to make testamentary dispositions to the petitioners. As stated earlier, the right to inherit has no immediate value, providing opportunity for gain only under fortuitous, and often bittersweet, circumstances. The petitioners had no property taken from them at the time of their adoption, and the State Constitution was not violated. The probate court did not err in failing to appoint guardians ad litem to represent the petitioners' financial interests.

Affirmed.

Chapter Five: Intestacy (Non-Marital Children, Stepchildren and Foster Children)

5.1 Introduction

This chapter examines the rights of three categories of children who are treated like outsiders. These children are punished because of the actions of their parents. The deterioration of the institution of marriage created two new classes of children—non-marital children and step children. For inheritance purposes, non-marital children are treated like second tiered children. A child who is not genetically related to a woman's husband has the opportunity to inherit from that man because of the marriage. However, a child born outside of the marriage may not be able to inherit from his biological father unless his mother jumps through some extra hoops.

When the intestacy system was created, non-marital children were called bastards and had basically no legal rights. The man did not have to provide any type of support for the children he conceived with a woman who was not his wife. Those children were considered to be the children of no one. Therefore, they were not legally entitled to child support or legally able to be heirs.[29] If an unmarried woman died giving birth to a child, that child was forced to reside in an orphanage home or to live on the streets. The child suffered that fate even if the child's father was a wealthy man. There was a no great outrage or objection to that practice because children born out of wedlock were considered to be the products of sin. As more and more people chose to openly have children without the benefit of marriage, the plight of non-marital children could not be ignored. Society recognized the need to ensure that those children were not disadvantaged because of the circumstances of their births. It took years of litigation, but the stigma of illegitimacy was eventually removed from the non-marital child. Currently, all fifty states and the District of Columbia have intestacy statutes giving non-marital children the opportunity to inherit from their parents. Thus, the nature of the litigation has changed. Recent cases address the ability of non-marital children to take the steps necessary to have the chance to inherit from their fathers.

My father was my mother's third husband. When my parents married, my mother had three small children. As a result of their marriage, my parents conceived nine children. We all grew up together as a family. I did not make any distinction between my half-siblings and my whole siblings. Nonetheless, when my father died, his estate was divided into nine parts instead of twelve parts. The courts did not take into consideration that my half-siblings were really young when my parents married or the fact that my father had a close relationship with my half-siblings. The courts were bound by the law that stated that stepchildren were not heirs of their stepparents. In this context, the legal parent-child relationship necessary for my half-siblings to inherit from my father did not exist even though a parent-child relationship did exist. Studies show that a majority of children in the United States will live in blended families. Thus, there is a push to put stepchildren on par with biological children for intestacy purposes. I have included a discussion of the inheritance rights of foster children in this chapter because the foster care system is changing. Children are staying longer in the same foster homes and becoming part of their foster families. Therefore, the foster parent-foster child relationship resembles a parent-child relationship.

[29] 1 William Blackstone, Commentaries on the Laws of England 447 (William S. Hein & Co., Inc. 1992).

5.2 Non-Marital Children

Most of the current litigation in this area involves the non-marital child's right to inherit from his or her father. In order for the non-marital child to be considered an heir under the intestacy system, a father-child relationship must exist. The legal issues relevant to the discussion are: (1) Whether the intestate statute at issue satisfies the mandates established by the United States Supreme Court cases; (2) Whether the non-marital child has sufficiently complied with the intestate statute to have earned the opportunity to inherit from his or her parent; and (3) Whether the non-marital child should be given the chance to inherit through his or her parent.

Every time the state expands the definition of "child" for inheritance purposes, it decreases the inheritance rights of marital children. Accordingly, the state legislature must balance the inheritance rights of various groups of children while promoting the state's interest in an orderly probate process. When reading the materials in this section, you should think about the interests that have to be balanced. In deciding how to distribute the property of a man who dies intestate, the state must consider three important interests: (1) the state's interests in the orderly disposition of after death property; (2) the non-marital child's interest in acquiring the chance to inherit from his or her father; and (3) the marital children's interest in reducing the number of persons claiming an interest in the man's estate.

Starting in the late 1960's, the United States Supreme Court considered several cases involving the legal rights of non-marital children attempting to receive financial benefits based upon their connections to their biological fathers and their mothers. The holdings in those cases paved the way for the Supreme Court to conclude that non-marital children must be given the opportunity to inherit from their mothers and fathers. In response, the state enacted statutes setting out the conditions that have to be met in order for non-marital children to inherit from their mothers and fathers. The state legislatures either concluded that the mother-child relationship was established by the process of birth or explicitly granted the non-marital child the right to inherit from his or her mother. The non-marital child's right to inherit from his or her father was not so easily resolved. The states enacted statutes enumerating the conditions the non-marital child has to meet in order to establish the father-child relationship for inheritance purposes. The following cases set out the parameters state intestacy statutes have to meet in order to survive constitutional challenges by and on behalf of non-martial children.

5.2.1 The Right to Inherit From Mothers

In light of the old adage, "mama's baby, papa's maybe," it would appear that the non-marital child's ability to inherit from his or her mother would be a foregone conclusion. Nonetheless, non-martial children had to fight to be recognized as the heirs of their mothers. In fact, the early cases dealing with the rights of non-marital children focused upon the legal rights attached to the mother-child relationship. Getting courts to recognize that relationship was crucial to non-martial children who wanted the opportunity to inherit from and through their mothers. Those initial cases involved tort law. The principles established in those cases paved the way for legislatures to acknowledge that non-marital children have a right to be financially supported by their mothers. That right to support has extended to a right to be considered an heir under the intestacy system. An example of such a case follows.

Levy v. Louisiana, 391 U.S. 68 (1968)

Mr. Justice DOUGLAS delivered the opinion of the Court.

Appellant sued on behalf of five illegitimate children to recover, under a Louisiana statute[30] for two kinds of damages as a result of the wrongful death of their mother: (1) the damages to them for the loss of their mother; and (2) those based on the survival of a cause of action which the mother had at the time of her death for pain and suffering. Appellees[31] are the doctor who treated her and the insurance company.

We assume in the present state of the pleadings that the mother, Louise Levy, gave birth to these five illegitimate children and that they lived with her; that she treated them as a parent would treat any other child; that she worked as a domestic servant to support them, taking them to church every Sunday and enrolling them, at her own expense, in a parochial school. The Louisiana District Court dismissed the suit. The Court of Appeal affirmed, holding that 'child' in Article 21315 means 'legitimate child,' the denial to illegitimate children of 'the right to recover' being based on morals and general welfare because it discourages bringing children into the world out of wedlock.' 192 So. 2d 193, 195. The Supreme Court of Louisiana denied certiorari. 250 La. 25, 193 So. 2d 530.

The case is here on appeal (28 U.S.C. s 1257(2)); and we noted probable jurisdiction, 389 U.S. 925, 88 S.Ct. 290, 19 L.Ed. 2d 276, the statute as construed having been sustained against challenge under both the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

We start from the premise that illegitimate children are not 'nonpersons.' They are humans, live and have their being.[32] They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment.

While a State has broad power when it comes to making classifications (*Ferguson v. Skrupa*, 372 U.S. 726, 732, 83 S.Ct. 1028, 1032, 10 L.Ed. 2d 93), it may not draw a line which constitutes an invidious discrimination against a particular class. *See Skinner v. State of Oklahoma,* 316 U.S. 535, 541-542, 62 S.Ct. 1110, 1113-1114, 86 L. Ed. 1655. Though the test has been variously stated, the end result is whether the line drawn is a rational one. *See Morey v. Doud*, 354 U.S. 457, 465-466, 77 S.Ct. 1344, 1349-1351, 1 L.Ed. 2d 1485.

---

[30] La. Civ. Code Ann. Art. 2315 (Supp. 1967) (Every act whatever of man that causes damages to another obliges him by whose fault it happened to repair it. 'The right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the oblige, is inherited by his legal, instituted, or irregular heirs, subject to the community rights of the surviving spouse.' The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children; (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or surviving child; and (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving. The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased. A right to recover damages under the provisions of this paragraph is a property right which, on the death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted, or irregular heirs, whether suit has been instituted thereon by the survivor or not. 'As used in this article, the words 'child,' 'sister,' 'father,' and 'mother' include a child, brother, sister, father, and mother, by adoption, respectively.'

[31] The State of Louisiana was dismissed from the action and exceptions relating to the Charity Hospital, at which the mother was treated, were continued indefinitely. No appeal was taken with respect to either of those defendants.

[32] *See* Note, *The Rights of Illegitimates Under Federal Statutes*, 76 Harv. L. Rev. 337 (1962).

In applying the Equal Protection Clause to social and economic legislation, we give great latitude to the legislature in making classifications. *Williamson v. Lee Optical*, 348 U.S. 483, 489, 75 S. Ct. 461, 465, 99 L. Ed. 563; *Morey v. Doud, supra*. 354 U.S., at 465-466, 77 S.Ct. at 1349-1351. Even so, would a corporation, which is a 'person,' for certain purposes, within the meaning of the Equal Protection Clause (*Pembina Consol, Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 188, 8 S.Ct. 737, 740, 31 L.Ed. 650) be required to forgo recovery for wrongs done its interests because its incorporators were all bastards? However that might be, we have been extremely sensitive when it comes to basic civil rights (*Skinner v. State of Oklahoma, supra,* 316 U.S. at 541, 62 S. Ct., at 1113; *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 669-670, 86 S.Ct. 1079, 1082-1083, 16 L.Ed. 2d 169) and have not hesitated to strike down an invidious classifications even though it had history and tradition on its side. (citations omitted). The rights asserted here involve the intimate familial relationship between a child and his own mother. When the child's claim of damage for loss of his mother is in issue, why, in terms of 'equal protection,' should the tortfeasors go free merely because the child is illegitimate? Why should the illegitimate child be denied rights merely because of his birth out of wedlock? He certainly is subject to all the responsibilities of a citizen, including the payment of taxes and conscription under the Selective Service Act. How under our constitutional regime can he be denied correlative rights which other citizens enjoy?

Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother. These children, though illegitimate, were dependent on he; she cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense; in her death they suffered wrong in the sense that any dependent would.[33]

We conclude that it is invidious to discriminate against them when no action, conduct, or demeanor of theirs[34] is possibly relevant to the harm that was done the mother.[35]

Reversed.

Notes and Questions

1. Once courts recognized and validated the parent-child relationship between mothers and their non-marital children, it was not a stretch for non-marital children to be acknowledged as heirs of their mothers. As a result, several state legislatures made it clear that non-marital children have the right to inherit from their mothers. A sample statute follows:

---

[33] Under Louisiana law both parents are under a duty to support their illegitimate children. La. Civ. Code Ann. Arts. 239, 240 (1952).

[34] We can say with Shakespeare: 'Why bastard, wherefore base? When my dimensions are as well compact, My mind as generous, and my shape as true, As honest madam's issue? Why brand they us With base? with baseness? bastardy? base, base?' King Lear, Act I, Scene 2.

[35] Under Louisiana's Workmen's Compensation Act (La. Rev. Stat. Ann. 23:1231, 23:1252, 23:1253 (1964) and illegitimate child, who is a dependent member of the deceased parent's family, may recover compensation for his death. *See Thompson v. Vestal Lumber & Mfg. Co*., 208 La. 83, 22 So. 2d 842 (1945). Employers are entitled to recover from a wrongdoer workmen's compensation payments they make to the deceased's dependent illegitimate children. *See Board of Commissioners, etc. v. City of New Orleans*, 223 La. 199, 65 So. 2d 313 (1953); *Thomas v. Matthews Lumber Co*., 201 So. 2d 357 (Ct. App. La. 1967).

Ohio Revised Code Annotated

> **2105.17 Capability of children born out of wedlock as to inheritance**
> Children born out of wedlock shall be capable of inheriting or transmitting inheritance from and to their mother, and from and to those from whom she may inherit, or to whom she may transmit inheritance, as if born in lawful wedlock.

2. Are there any legitimate reasons why non-marital children should not be given the opportunity to inherit from their mothers? What factors should go into making that determination? Are there any limitations that should be placed on the ability of non-marital children to inherit from their mothers? *See Byrd N. Trennor*, 811 N.E.2d 549 (Ohio App. 2 Dist. 2004)(justifying the different in treatment, for inheritance purposes, of non-marital children of intestate fathers and non-martial children of intestate mothers).

3. The *Levy* court emphasized the need to prevent tortfeasors from injuring or killing parents of non-marital children without liability. In light of that concern, is the decision helpful to a non-marital child attempting to inherit from his or her mother? What reasoning in the case supports a non-marital child's right to inherit under the intestacy system?

5.2.2 The Right to Inherit From Fathers

A child does not have the right to inherit from a parent. However, if the intestacy system permits one class of children to inherit, that right must be provided to all classes of children. Thus, it is clear that a state statute that prohibits the non-marital child from inheriting from his or her father will not pass constitutional muster. Hence, the question becomes: How much can a state limit a non-marital child's right to inherit from his or her father. As the following cases indicate, the state has to give the non-marital child a plausible opportunity to inherit from his or her parent.

Lalli v. Lalli, 439 U.S. 259 (1978)

Mr. Justice POWELL announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE and Mr. Justice STEWART join.

This case presents a challenge to the constitutionality of § 4-1.2 of New York's Estates, Powers, and Trusts Law, which requires illegitimate children who would inherit from their fathers by intestate succession to provide a particular form of proof of paternity. Legitimate children are not subject to the same requirement.

Appellant Robert Lalli claims to be the illegitimate son of Mario Lalli who died intestate on January 7, 1973, in the State of New York, Appellant's mother who died in 1968, never was married to Mario. After Mario's widow, Rosamond Lalli, was appointed administratrix of her husband's estate, appellant petitioned the Surrogate's Court for Westchester County for a compulsory accounting, claiming that he and his sister Maureen Lalli were entitled to inherit from Mario as his children. Rosamond Lalli opposed the petition. She argued that even if Robert and Maureen were Mario's children, they were not lawful distributes of the estate because they had failed to comply with § 4-1.2, which provides in part:

> "An illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years form the birth of the child."

Appellant conceded that he had not obtained an order of filiation during the putative father's lifetime. He contended, however, that § 4-1.2, by imposing this requirement, discriminated against him on the basis of his illegitimate birth in violation of the Equal Protection Clause of the Fourteenth Amendment. Appellant tendered certain evidence of his relationship with Mario Lalli, including a notarized document in which Lalli, in consenting appellant's marriage, referred to him as "my son," and several affidavits by persons who stated that Lalli had acknowledged and often that Robert and Maureen were his children.

The Surrogate's Court noted that § 4-1.2 had previously, and unsuccessfully, been attacked under the Equal Protection Clause. After reviewing recent decisions of this Court concerning discrimination against illegitimate children, particularly *Labine v. Vincent,* 401 U.S. 532, 91 S. Ct. 1017 (1971), and three New York decisions affirming the constitutionality of the statute, the court ruled that appellant was properly excluded as a distribute of Lalli's estate and therefore lacked status to petition for a compulsory accounting (citations omitted).

On direct appeal the New York Court of Appeals affirmed. *In re Lalli,* 340 N.E. 2d 721 (1975). It understood *Labine* to require the State to show no more than that "there is a rational basis for the means chosen by the Legislature for the accomplishment of a permissible State objective." 340 N.E.2d, at 723. After discussing the problems of proof peculiar to establishing paternity, as opposed to maternity, the court concluded that the State was constitutionally entitled to require a judicial decree during the father's lifetime as the exclusive form of proof of paternity.

On remand, the New York Court of Appeals, with two judges dissenting, adhered to is former disposition. *In re Lalli*, 371 N.E.2d 481 (1977). It acknowledged that *Trimble* contemplated a standard of judicial review demanding more than "a mere finding of some remote rational relationship between the statute and a legitimate State purpose," though less than strictest scrutiny. (citations omitted) Finding § 4-1.2 to be "significantly and determinatively different" from the statute overturned in *Trimble*, the court ruled that the New York law was sufficiently related the State's interest in "'the orderly settlement of estates and the dependability of titles to property passing under intestacy laws,'" to meet the requirements of equal protection. *Quoting Trimble, supra,* 430 U.S., at 771, 97 S. Ct., at 1465, protection. (citation omitted).

Appellant appealed the Court of Appeals' decision to this Court. While that case was pending here, we decided *Trimble v. Gordon,* 430 U.S. 762, 97 S.Ct. 1459 (1977). Because the issues in these two cases were similar in some respects, we vacated and remanded to permit further consideration in light of *Trimble. Lalli v. Lalli,* 431 U.S. 911, 97 S.Ct. 2164 (1977).

Appealing again sought review here, and we noted probably jurisdiction. 435 U.S. 921, 98 S.Ct. 1482 (1978). We now affirm.

II

We begin our analysis with *Trimble.* At issue in that case was the constitutionality of an Illinois statute providing that a child born out of wedlock could inherit from his interstate father only if the father had "acknowledged" the child and the child had been legitimated by the intermarriage of the parents. The appellant in *Trimble* was a child born out of wedlock whose father had neither acknowledged her nor married her mother. He had, however, been found to be her father in a judicial decree ordering him to contribute to her support. When the father died intestate, the child was excluded as a distributee because the statutory requirements for inheritance had not been met.

We concluded that the Illinois statute discriminated against illegitimate children in a manner prohibited by the Equal Protection Clause. Although, as decided in *Mathews v. Lucas*, 427 U.S. 495, 506, 96 S.Ct. 2755, 2762 (1976), and reaffirmed in *Trimble, supra,* 430 U.S., at 767, 97 S.Ct., at 1464, classifications based on illegitimacy are not subject to "strict scrutiny," they nevertheless are invalid under the Fourteenth Amendment if they are not substantially related to permissible state interests. Upon examination, we found that the Illinois law failed that test.

Two state interests were proposed which the statute was said to foster: the encouragement of legitimate family relationships and the maintenance of an accurate and efficient method of disposing of an intestate decedent's property. Granting that the State was appropriately concerned with the integrity of the family unite, we viewed the statute as bearing "only the most attenuated relationship to the asserted goal." *Trimble, supra*, at 768, 97 S.Ct., at 1464. We again rejected the argument that "persons will shun illicit relations because the offspring may not one day reap the benefits" that would accrue to them were they legitimate. *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164, 173, 92 S.Ct. 1400, 1405 (1972). The statute therefore was not defensible as an incentive to enter legitimate family relationships.

Illinois' interest in safeguarding the orderly disposition of property at death was more relevant to the statutory classification. We recognized that devising "an appropriate legal framework" in the furtherance of that interest "is a matter particularly within the competence of the individual States." *Trimble, supra,* 430 U.S., at 771, 97 S.Ct., at 1465. An important aspect of that framework is a response to the often difficult problem of providing the paternity of illegitimate children and the related danger of spurious claims against intestate estates. These difficulties, we said, "might justify a more demanding standard for illegitimate children claiming under their fathers' estates than that required either for illegitimate children claiming under their mothers' estates or for legitimate children generally." *Trimble, supra,* at 770, 97 S.Ct., at 1465.

The Illinois statute, however, was constitutionally flawed because, by insisting upon not only an acknowledgment by the father, but also the marriage of the parents, it excluded "at least some significant categories of illegitimate children of intestate men [whose] inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestacy laws." *Id.*, at 771, 97 S.Ct. at 1465. We concluded that the Equal Protection Clause required that a statute placing exceptional burdens on illegitimate children in the furtherance of proper sate objectives must be more "'carefully tuned to alternative considerations'" than was true of the broad disqualification in the Illinois law (citations omitted).

III

The New York statute, enacted in 1865, was intended to soften the rigors of previous law which permitted illegitimate children to inherit only from their mothers. *See infra,* at 525. By lifting the absolute bar to paternal inheritance, § 4-1.2 tended to achieve its desired effect. As in *Trimble,* however, the question before us is whether the remaining statutory obstacles to inheritance by illegitimate children can be squared with the Equal Protection Clause.

A.

At the outset we observed that § 4-1.2 is different in importance respects from the statutory provision overturned in *Trimble.* The Illinois statute required, in addition to the father's acknowledgment of paternity, the legitimation of the child through the intermarriage of the parents as an absolute precondition to inheritance. This combination of requirements eliminated "the possibility of middle ground between the extremes of complete exclusion and case-by-case determination of paternity." *Trimble*, 430 U.S., at 770-771, 97 S.Ct., at 1465. As illustrated by the facts in *Trimble*, even a judicial declaration of paternity was insufficient to permit inheritance.

Under § 4-1.2, by contrast, the marital status of the parents is irrelevant. The single requirement at issue here is an evidentiary one-that the paternity of the father be declared in a judicial proceeding sometime before his death. The child need not have been legitimated in order to inherit from his father. Had the appellant in *Trimble* been governed by § 4-1.2. The Court of Appeals disclaimed that the purpose of the statute, "even in small part, was to discourage illegitimacy, to mold human conduct or to set societal norms." *In re Lalli, supra,* 371 N.E.2d, at 483. The absence in § 4-1.2 of any requirement that the parents intermarry or otherwise legitimate a child born out of wedlock and our review of the legislative history of the statute confirm this view.

Our inquiry, therefore, is focused narrowly. We are asked to decide whether the discrete procedural demands that § 4-1.2 places on illegitimate children bear an evident and substantial relation to the particular state interests this statute is designed to serve.

B.

The primary state goal underlying the challenged aspects of § 4-1.2 is to provide for the just and orderly disposition of property of death. We long have recognized that this is an area with which the States have an interest of considerable magnitude. *Trimble, supra* 430 U.S., at 771, 97 S.Ct., at 1466.

This interest is directly implicated in paternal inheritance by illegitimate children because of the peculiar problems of proof that are involved. Establishing maternity is seldom difficult. As one New York Surrogate's Court has observed: "[T]he birth of the child is a recorded or registered event usually taking place in the presence of others. In most cases the child remains with the mother and for a time is necessarily reared by her. That the child is the child of a particular woman is rarely difficult to prove." *In re Ortiz,* 60 Misc.2d 756, 761,303 N.Y.S.2d 806, 812 (1969). Proof of paternity, by contrast, frequently is difficult when the father is not part of formal family unit. "The putative father often goes his way unconscious of the birth of a child. Even if conscious, he is very often totally unconcerned because of the absence of any ties to the mother. Indeed the mother may not know who is responsible for her pregnancy." (citations omitted)

Thus, a number of problems arise that counsel against treating illegitimate children identically to all others heirs of an intestate father. These were the subject of a comprehensive study by the Temporary State Commission on the Modernization, Revision and Simplification of the Law of Estates. This group, known as the Bennett Commission, consisted of individuals experienced in the practical problems of estate administration. (citations omitted). The commission issued its report and recommendations to the legislature in 1965. *See* Fourth Report of the Temporary State Commission on the Modernization, Revision and Simplification of the Law of Estates. This group, known as the Bennett Commission, consisted on individuals experienced in the practical problems of estate administration. (citations omitted). The Commission issued its report and recommendations to the legislature in 1965. *See* Fourth Report of the Temporary State Commission on the Modernization, Revision and Simplification of the Law of Estates, Legis.Doc. No. 19(1965) (hereinafter Commission Report). The statute now codified as § 4-1.2 was included.

Although the overarching purpose of the proposed statute was "to alleviate the plight of the illegitimate child," the Bennett Commission considered it necessary to impose the strictures of § 4-1.2 in order to mitigate serious difficulties in the administration of the estates of both testate and intestate decedents. Commission Report 37.
Even where an individual claiming to be the illegitimate child of a deceased man makes himself known, the difficulties facing an estate are likely to persist. Because of the particular problems of proof, spurious claims may be difficult to expose. The Bennett Commission therefore sought to protect "innocent adults and those rightfully interested in their estates from fraudulent claims of heirship and harassing litigation instituted by those seeking to establish themselves as illegitimated heirs." Commission Report 265.

C.

As the State's interests are substantial, we now consider the means adopted by New York to further these interests. In order to avoid the problems described above, the Commission recommended a requirement designed to ensure the accurate resolution of claims of paternity and to minimize the potential for disruption of estate administration. Accuracy is enhanced by placing paternity disputes in a judicial forum during the lifetime of the father. As the New York Court of Appeals observed in its first opinion in this case, the "availability [of the putative father] should be a substantial factor contributing to the reliability of the fact-finding process." *In re Lalli*, 340 N.E. 2d, at 724. In addition, requiring that the order be issued during the father's lifetime permits a man to defend his reputation against "unjust accusations in paternity claims," which was a secondary purpose of § 4-1.2. Commission Report 266.

The administration of an estate will be facilitated, and the possibility of delay and uncertainty minimized, where the entitlement of an illegitimate child to notice and participation is a matter of judicial record before the administration commences. Fraudulent assertions of paternity will be much less likely to succeed, or even to arise, where the proof is put before a court of law at a time when the putative father is available to respond, rather than first brought to light when the distribution of the assets of an estate is in the offing.

Appellant contends that § 4-1.2, like the statute at issue in *Trimble,* excludes "significant categories of illegitimate children" who could be allowed to inherit "without jeopardizing the orderly settlement" of their intestate fathers' estates. *Trimble,* 430 U.S., at 771, 97 S.Ct., at 1465. He urges that those in his position-"known" illegitimate children who, despite the absence of an order of filiation obtained

during their fathers' lifetimes, can present convincing proof of paternity-cannot rationally be denied inheritance as they pose none of the risks § 4-1.2 was to minimize.

We do not question that there will be some illegitimate children who would be able to establish their relationship to their deceased fathers without serious disruption of the administration of estates and that, as applied to such individuals, § 4-1.2 appears to operate unfairly. But few statutory classifications are entirely free from the criticism that they sometimes produce inequitable results. Our inquiry under the Equal Protection Clause does not focus on the abstract "fairness" of a state law, but on whether the statute's rationality contemplated by the Fourteenth Amendment.

The Illinois statute in *Trimble* was constitutionally unacceptable because it effected a total statutory disinheritance of children born out of wedlock who were not legitimated by the subsequent marriage of their parents. The reach of the statute was far in excess of its justifiable purposes. Section 4-1.2 does not share this defect. Inheritance is barred only where there has been a failure to secure evidence of paternity during the father's lifetime in the manner prescribed by the State. This is not a requirement that inevitably disqualifies an unnecessarily large number of children born out of wedlock.

The New York courts have interpreted § 4-1.2 liberally and in such a way as to enhance its utility to both father and child without sacrificing its strength as a procedural prophylactic. For example, a father of illegitimate children who is willing to acknowledge paternity can waive his defenses in a paternity proceeding or even institute such a proceeding himself. (citations omitted). In addition, the courts have excused "technical" failures by illegitimate children to comply with the statute in order to prevent unnecessary injustice. e.g., *In re Niles*, 53 A.D.2d 983, 385 N.Y.S.2d 876 (1976), *appeal denied*, 360 N.E.2d 1109 (1977) filiation order may be signed nunc pro tunc to relate back to period prior to father's death when court's factual finding of paternity had been made); *In re Kennedy,* 392 N.Y. S.2d 365, 367 (Surr.Ct.1977) (judicial support order treated as "tantamount to an order of filiation," even though paternity was not specifically declared therein).

As the history of § 4-1.2 clearly illustrates, the New York Legislature desired to "grant to illegitimates in so far as practicable rights of inheritance on a par with those enjoyed by legitimate children," while protecting the important state interests we have described. Commission Report 265. Section 4-1.2 represents a carefully considered legislative judgment as to how this balance best could be achieved.

Even if, as Mr. Justice BRENNAN believes, § 4-1.2 could have been written somewhat more equitably, it is not the function of a court "to hypothesize independently on the desirability or feasibility of any possible alternative[s]" to the statutory scheme formulated by New York. *Mathews v. Lucas*, 427 U.S., at 515, 96 S.Ct., at 2767. "These matters of practical judgment and empirical calculation are for the [the State]…In the end, the precise accuracy of [the State's] calculations is not a matter of specialized judicial competence; and we have no basis to question their detail beyond the evident consistency and substantiality." *Id.*, at 515-516, 96 S.C. at 2767.

The "formal acknowledgement" contemplated by *Trimble* is such as would minimize post-death litigation, i.e., a regularly prescribed, legally recognized method of acknowledging paternity. It is thus plain that footnote 14 in *Trimble* does not sustain the dissenting opinion. Indeed, the document relied upon by the dissent is not an acknowledgment of paternity at all. It is a simple "Certificate of

consent" that apparently was required at the time by New York for the marriage of minor. It consists of one sentence:

> "THIS IS TO CERTIFY that I, who have hereto subscribed my name, do hereby consent that Robert Lalli who is my son and who is under the age of 21 years, shall be united in marriage to Janice Bivins by any minister of the gospel or other person authorized by law to solemnize marriages." App. A14.

Mario Lalli's signature to this document was acknowledge by a notary public, but the certificate contains no oath or affirmation as to the truth of its contents. The notary did no more than confirm the identity of Lalli. Because the certificate was executed for the purpose of giving consent to marry, not of proving biological paternity, the meaning of the words "my son" is ambiguous. One can readily imagine that had Robert Lalli's half-brother, who was not Mario's son but who took the surname Lalli and lived as a member of his household, sought permission to marry, Mario might also have referred to him as "my son" on a consent certificate.

The important state interests of safeguarding the accurate and orderly disposition of property at death, emphasized in *Trimble* and reiterated in our opinion today, could be frustrated easily if there were a constitutional rule that any notarized but unsworn statement identifying an individual as a "child" must be accepted as adequate proof of paternity regardless of the context in which the statement was made.

We concluded that the requirement imposed by § 4-1.2 on illegitimate children who would inherit from their fathers is substantially related to the important state interests the statute is intended to promote. We therefore find no violation of the Equal Protection Clause.

The judgment of the New York Court of Appeals is affirmed.

Notes and Questions

1. How did the Court distinguish the statute in *Lalli* from the statute in *Trimble*? Does the distinction justify the different outcomes of the cases?

2. Was there another way for the state to carry out its interest without placing a burden on the mother of the non-marital child(ren)?

3. From a public policy perspective, what are the pros and cons of permitting non-marital children to inherit equally with martial children?

4. For a complete analysis of the United States Supreme Court cases dealing with the rights of non-marital children *See* Lilli Mostofi, *Legitimizing The Bastard*: *The Supreme Court's Treatment of the Illegitimate Child*, 14 L.J. Contemp. Legal Issues 453 (2004); Laurence C. Nolan, "*Unwed Children and Their Parents Before the United States Supreme Court from Levy to Michael H: Unlikely Participants in Constitutional Jurisprudence,* 28 Cap. U.L. Rev.1 (1999).

Even after the United States Supreme Court clearly mandated that non-marital children be given a chance to inherit from their fathers, as the next cases demonstrates, the litigation continues.

Phillips v. Ledford, 590 S.E.2d 280 (N.C. App. 2004)

TIMMONS-GOODSON, J.

Gwendolyn W. Phillips ("plaintiff") appeals from a trial court dismissal granted pursuant to N.C. Gen. Stat. § 1A-1 Rule 12(b)(6). For the reasons stated herein, we affirm the trial court's decision.

The facts of the case are as follows. Benjamin Jay Owenby ("decedent") died intestate in Buncombe County, North Carolina on 29 January 2002. At the time of his death, decedent was not married, not survived by parents and had no children other than plaintiff. Plaintiff is the natural and biological daughter of decedent and Nancy Wilson Waldron. Decedent and Waldron were never married.

On 11 March 2002, the Buncombe County Estate Division opened decedent's estate. Marilyn Owenby Ledford and George Richard Owenby ("defendants"), were appointed co-administrators for the estate. Defendants are decedent's siblings.

Decedent had seven siblings, three of whom predeceased him. Two of the deceased siblings had children and the third deceased sibling had no children. The four surviving siblings and the children of the deceased siblings were named in the Application of Letters of Administration as the decedent's heirs and those persons entitled to share in the decedent's estate, and are also defendants in this action.

Born on 19 April 1972, plaintiff was not told that she was decedent's daughter until several years prior to decedent's death. After decedent was told that he was plaintiff's biological father, plaintiff and decedent were tested by a DNA genetic paternity testing laboratory which determined to a greater than 99% level of certainty that decedent could not be excluded as the father of the plaintiff. After the DNA testing, plaintiff and decedent developed a parent-child relationship. Decedent acknowledged to his family, friends, and the general public that he was plaintiff's father. Furthermore, decedent's siblings and their families were aware that plaintiff was decedent's daughter. However, decedent never legitimated plaintiff, and decedent was never adjudicated to be plaintiff's father during his lifetime.

On 17 June 2002, plaintiff filed this action pursuant to N.C. Gen. Stat. § 1-253, seeking a declaratory judgment that she is the sole heir of the decedent. Defendants filed a motion to dismiss which was granted, and an order of dismissal was entered on 17 September 2002. It is from this order that plaintiff now appeals.

Plaintiff's sole assignment of error is that the trial court improvidently granted defendants' motion to dismiss because the statute which stood as grounds for dismissal, N.C. Gen. Stat. § 29-19, as applied violates plaintiff's right to due process and equal protection under the North Carolina and United States Constitutions. Plaintiff believes that the statute lacks a substantial and legitimate relationship to the particular state interest that it purports to protect, and therefore is unconstitutional.

The first step in this Court's analysis is to consider the trial court's treatment of the motion to dismiss. On a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the standard of review is "'whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory.' (citations omitted). "The complaint must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief." (citations omitted). In the present case, this Court must consider whether plaintiff's complaint, treated as if all the allegations therein are true, would meet the statutory requirements for an illegitimate child to inherit from her father through this state's intestacy laws. We hold that plaintiff's complaint does not meet this requirement.

The statute governing succession by, through and from illegitimate children states in pertinent part:

> For purposes of intestate succession, an illegitimate child shall be entitled to take by, through and from: (1) any person who has been finally adjudged to be the father of such child…; (2) any person who has acknowledged himself during his own lifetime and the child's lifetime to be the father of such child in a written instrument executed or acknowledged before a certifying officer…and filed during his own lifetime and the child's lifetime in the office of the clerk of superior court of the county where either he or the child resides.

N.C. Gen. Stat. § 29-19(b)(1) and (2) (2001). "Absent the statute, an illegitimate child has no right to inherit from his or her putative father." *Hayes v. Dixon*, 83 N.C. App. 52, 54, 348 S.E. 2d 609, 610 (1986) citing *Herndon v. Robinson*, 57 N.C. App. 318, 291 S.E. 2d 305 (1982).

In her complaint, plaintiff asserts the following pertinent allegations:

17. Several years prior to the death of the Decedent, Benjamin Owenby:

a. Plaintiff learned that the Decedent was her father;

b. Plaintiff and the Decedent developed a close and loving relationship;

c. Decedent acknowledged and held to his family, his friends and the general public that he was the father of the Plaintiff;

d. Decedent's siblings and their families were aware that the Plaintiff was the daughter of the Decedent.

18. Several years prior to the death of the decedent, the Plaintiff and the [D]ecedent were tested by a genetic paternity testing laboratory and it was determined to a greater than 99% level of certainty that the [D]ecedent could not be excluded as the father of the child.

Plaintiff's complaint did not include any claim that decedent was adjudged to be her father, or that decedent acknowledged himself to be plaintiff's father in a written instrument which was duly executed and filed. Although the North Carolina Supreme Court has recognized DNA profile testing to be generally admissible evidence as a reliable technique within the scientific community,

(citations omitted) a positive DNA test is not enumerated in the statute as a method of meeting the requirements to legitimate a child.

"The statute mandates what at times may create a harsh result. It is not, however, for the courts but rather the legislature to effect any change." *Hayes*, 83 N.C. App. at 54, 348 S.E. 2d at 610. The allegations set forth in plaintiff's complaint do not satisfy the statutory requirement for an illegitimate child to inherit through the state's intestacy laws. Therefore, these allegations, even when treated as true, are not sufficient to state a claim upon which relief may be granted. For this reason, we conclude that the trial court properly granted defendants' motion to dismiss.

Plaintiff bases her appeal of the Rule 12(b)(6) dismissal on an argument that N.C. Gen. Stat. § 29-19 violates her equal protection and due process rights as afforded her by the North Carolina and United States Constitutions. Because we have determined that plaintiff's complaint does not state a claim upon which relief can be granted, we need not address whether the statute violates plaintiff's rights under the North Carolina and United States Constitutions. (citations omitted). "[T]he courts of this State will avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds"). The trial court properly granted defendants' motion to dismiss and therefore we decline to address the constitutional issues presented in this appeal.

No error.

Notes and Questions

1. Would the North Carolina statute have survived a challenged based upon the United States Constitution?

2. Is the result in this case against public policy? How should the statute be amended to serve the best interests of the state and the non-marital child?

Class Discussion Tool

Ten years ago, only 11% of the children born in the State of Morality were born to persons who were unmarried. Thus, non-marital children are not included in the definition of children under the State's intestacy statute. In fact, the inheritance rights of non-marital children are not addressed anywhere in the State's intestacy statute. Today, in the State, 32% of the children born are the products of non-marital relationships. Several non-martial children recently filed actions in the probate court to have the right to inherit under the State's intestacy laws. Consequently, the State would like to amend its current intestacy statute to address the needs of non-marital children. However, many of the current legislators are up for re-election, and the majority of the voters polled think that it is immoral to have a child without the benefit of marriage. The State Senate has retained your firm for assistance in drafting an appropriate statute. What components should the statute include? What are concerns that must be considered prior to drafting the statute?

The Need For Information

The Plaintiff in the *Ledford* case appeared to make every effort to be recognized as the decedent's child prior to his death. However, since she did not strictly comply with the mandates of

the statute, she was not given the opportunity to inherit from her biological father. The intestacy system is set up to give preference to the decedent's children. Nonetheless, the Plaintiff in the *Ledford* case lost her inheritance to her father's siblings and his nieces and nephews. It is unlikely that the decedent would have wanted his estate distributed in that manner. The facts of this case illustrate the problem faced by numerous non-marital children. It is not enough to give non-marital children the opportunity to inherit from their fathers if they do not understand the steps necessary to take advantage of that opportunity.

In order to make informed decisions, parents of non-marital children should know all of the facts and rules. State intestacy laws can be confusing. For instance, many low-income women may believe that if the father's name is on the birth certificate, the non-marital child has the right to inherit from his or her father. As a result, such women do not bother to file paternity actions as required by most state statutes. In reality, only two states, Arkansas and Georgia, deem the father's name on the birth certificate as sufficient proof of paternity to permit a non-marital child to inherit from his or her father. In both states, the father's name cannot be placed on the birth certificate without his knowledge and consent.

Women who live in common law marriage jurisdictions are also disadvantaged by lack of access to information. Many women living in those states believe that if they live with a man for a long period of time, they are automatically deemed to be married. Those women do not realize that, if they do not take the steps necessary to have their relationships legally recognized as common law marriage, their children are considered non-marital children. Consequently, the women do not take the actions necessary to ensure that their children will have the legal right to inherit from their fathers.

Non-marital children often lose the right to inherit from their fathers because of the ignorance of their parents. In the probate arena, knowledge is power; therefore, states should take steps to make sure that parents understand the steps they need to take in order to enable non-marital children to inherit from their fathers. There are actions states can take to get the necessary information to the public. For instance, states could run public service announcements on local television and radio stations. Public service announcements could inform women about the legal consequences of having a child out of wedlock and educate parents about the steps they must take under the state's intestacy statute to make the non-marital child eligible to inherit from his or her father. States could also require organizations that provide services to low-income women to distribute pamphlets containing information about the state's intestacy laws. The pamphlets could include a checklist of the requirements for a non-marital child to earn the right to inherit from his or her father. In order to guarantee fairness, states should arm parents of non-marital children with the information necessary to protect the inheritance rights of those children.

Notes and Questions

1. What steps can state legislatures take to ensure that the families of non-martial children are informed about their rights and responsibilities?

2. Should mothers have the right to waive the non-marital child's right to inherit?

Class Discussion Tool

LaMeesha had an affair with Melvin, a prominent member of the community. As a result of that liaison, LaMeesha conceived a child. Prior to the birth of the child, LaMeesha and Melvin signed a contract. LaMeesha agreed not to file a claim for child support. In exchange for that promise, Melvin promised to pay LaMeesha $700 per month to provide for the child's financial needs. After the child, Cameron, was born Melvin made the promised payments. When Cameron was fourteen years old, Melvin died intestate, survived by his wife, Linda and distant cousins. The state had the following statute: "A child born out of wedlock may not inherit from or through the child's father, the other children of the father, or any parental kinship, unless: A court of competent jurisdiction has entered an order declaring the child to be legitimate; a court of competent jurisdiction has otherwise entered a court order establishing paternity; the father has signed the birth certificate of the child; the father has executed a sworn statement signed by him attesting to the parent-child relationship; or there is other clear and convincing evidence that the child is the child of the father." Does the contract satisfy the statutory requirements? Is the contract enforceable against the estate?

5.2.3 Right to Inherit Through Fathers

Children have no control over the actions of their parents. Consequently, they should not be penalized because their parents chose to have them without the benefit of marriage. Therefore, the Supreme Court has taken steps to ensure that non-marital children have the opportunity to inherit from their fathers. From a public policy perspective, this makes sense because a man has a legal duty to provide financial support for his child(ren). That obligation should not end with death of the man. Courts have been less inclined to require that the non-marital child be given the right to inherit through his or her father. This is especially true if that mandate would frustrate the intent of a testator. That issue is taken up in the next case.

In re Dumaine, 600 A.2d 127 (N.H. 1991)

BATCHELEDER, J.

Elizabeth Ann Charney appeals the ruling of the Superior Court (Pappagianis, J.) that she is not a member of the class of "legitimate" beneficiaries of the Dumaines and Dumaines New Fund trusts. She raises five issues on appeal. First, she argues that the trial court erred in its construction of the term "legitimate" as "lawfully begotten, born in wedlock." Second, she asserts that the trial court improperly relied on depositions containing inadmissible hearsay in determining the settler's intent. Third, she maintains that, even though she was adopted, the subsequent marriage of her natural parents and their recognition of her as their child qualifies her as a beneficiary under the language of the trusts. Fourth, she argues that the trial court's determination of the settlors' intent was impermissible State action, violative of her rights under the equal protection and due process clauses of the United States and New Hampshire Constitutions. Finally, she contends that the trial court erred when it denied her request for attorney's fees. For the reasons that followed, we affirm.

The patriarch of the Dumaine family business complex was Frederic C. Dumaine, Sr., who founded the Amoskeag Company and amassed the wealth that formed the res of the trusts involved in this litigation. Dumaines, a New Hampshire trust, was created by Frederic, Sr. in 1920. The Dumaines

declaration of trust provides for income to be distributed "to legitimate children of Frederic C. Dumaine or to their legitimate surviving children," and provides for the distribution of the trust principal "to and among the legitimate issue or lineal descendants of the children of Frederic C. Dumaine living at that time."

Dumaines New Fund, also a New Hampshire trust, was created in 1955. The Dumaines New Fund declaration of trust provides for income to be distributed to " legitimate children…of Frederic C. Dumaine, Sr….and…to the legitimate issue…of any such children deceased," and provides for the distribution of the trust principal "to the legitimate issue of Frederic C. Dumaine, Sr."

On January 19, 1956, Elizabeth Ann Charney was born to Evelyn Lafferty Richardson Humphreys, who was unmarried at the time. Pierre Dumaine, a son of Frederic C. Dumaine, Sr., was the father. At the time of the birth, however, Pierre Dumaine was married to Margaret Lael Edwards Dumaine, by whom he had two children, Peter Thomas Dumaine and Lael Elizabeth Dumaine Fuhs.

Evelyn Humphreys placed the baby for adoption immediately after she was born, and the child was adopted by John and Nelda Scudder of Brooklyn, New York, in 1957. Pierre and Margaret Edwards Dumaine were divorced in 1961. Pierre and Evelyn Humphreys were married six days later. In 1978, John Scudder contacted the attorney who had facilitated the adoption and stated that his daughter, seeking to determine her roots, wanted to locate her biological parents. She was then twenty-two years old, married, and the mother of one son. She was subsequently reunited with her biological parents and, during the next nine years, visited with them on three other occasions and attended their funerals.

The trustees of the Dumaines and Dumaines New Fund trusts sought a determination by the superior court of the class of beneficiaries entitled to distributions of income and principal under the trusts, and specifically of the rights of Elizabeth Ann Charney under those trusts. The superior court ruled that Charney was not a beneficiary of the trusts because she was not "lawfully begotten, born in wedlock." This appeal followed.

At the outset, we must determine which jurisdiction's law controls the interpretation of the terms of the trusts. Charney argues that New York law should be applied, because it is the State where the birth, adoption, and initial acts of recognition occurred and, therefore, has significant relevant policy considerations to be preserved and protected. In this case, both trusts specifically state that they are executed "in the State of New Hampshire and with reference to the laws thereof; and the rights of all parties and the construction and effect of each and every provision shall be subject to and construed according to the laws of said State." We will respect the settlor's intent that New Hampshire law should govern the trust instruments. *See, e.g., In re Lykes Estate,* 113 N.H. 282, 284, 305 A.2d 684, 685 (1973) (New Hampshire testamentary trust interpreted under Texas law, according to direction of testator); Restatement (second) of Conflict of Laws §§ 268, 277 (1977). Moreover, this court has previously applied New Hampshire law in interpreting one of the trusts involved here. *See Bartlett v. Dumaine* 128 N.H. 497, 523 A.2d 1 (1986). Consequently, we hold that New Hampshire law applies.

Charney first argues that the term "legitimate" is unambiguous and, as such, should be given its legal definition, which she contends is "to make lawful." We agree that the term is unambiguous, but reject Charney's proposed definition.

The definition of "legitimate" proffered by Charney, i.e., "to make lawful," applies only when the term is used as a verb. Indeed, the example employed in the definition of the verb "to legitimate" in Black's Law Dictionary 901 (6th ed.1990). "to place a child born before marriage on the legal footing of those born in lawful wedlock," is exactly what Charney is striving to do in this case. Because of the use of the term as an adjective in the trust documents, however, her efforts "to legitimate" her status must fail.

"In searching for the proper interpretation of words used in a written instrument, we require that the words and phrases be given their common meaning." *In re Trust u/w/o Smith*, 131 N.H. 396, 398, 553 A.2d 323, 324 (1988). The classes of beneficiaries entitled to distributions under these trusts are described alternatively as "legitimate children," "legitimate surviving children," "legitimate" is used as an adjective; nowhere in the trust instruments is it employed as a verb. The term's common meaning as an adjective is found in Webster's Third New Dictionary 1291 (3rd ed. 1961): "lawfully begotten: born in wedlock: having full filial rights and obligations by birth." Thus, a child whose parents were unwed at the time of his or her birth, regardless of the child's subsequent adoption or the intermarriage of his or her parents, is not "legitimate" under the term's common meaning and as the term is used I the trust documents.

Focusing on the phrase "legitimate issue or lineal descendants," which describes the ultimate takers of the trust assets upon termination of the Dumaines trust, Charney contends that, even if this court excludes her from the class of "legitimate issue," she is nevertheless entitled to take as a "lineal descendant." We agree with the trial court, however, that "legitimate" modifies both "issue" and "lineal descendants." A review of the trust instruments indicates that each references to the beneficiaries includes the term "legitimate" as a modifier. This manifests the settlor's purpose to benefit only those of his descendants who are "legitimate." See Bartlett, 128 N.H. at 504, 523 A.2d at 6 (settlor's intend to be determined by the terms of the trust). Moreover, in the analogous principal distribution provision of the Dumaines New Fund trust, the distribution of assets on the trust's termination is directed to "legitimate issue;" the phrase "or lineal descendants" does not appear.

Charney also maintains that the trial court erred when it ruled that "legitimate" was ambiguous because it went outside the four corners of the document to determine the settlor's intent. She contends that, in doing so, the trial court erroneously considered inadmissible hearsay and improperly denied her a full evidentiary hearing. Because we hold that the term "legitimate" as employed in the trust documents is unambiguous and, as such, requires no parole evidence, we need not address this argument.

In addition, Charney contends that RSA 457:42 entitles her to take under the trusts. That statute provides:

> "Marriage of Parents. Where the parents of children born before marriage afterwards intermarry, and recognize such children as their own, such children shall be legitimate and shall inherit equally with their other children under the statute of distribution."

(Emphasis added.) On its face, the statute's purpose is to define the inheritance rights of children born out of wedlock whose natural parents had later intermarried, recognized them, and died intestate. It does not govern the distribution of funds under private trust document. We therefore dismiss Charney's argument to the contrary.

Charney further argues that her intervening adoption did not negate her legitimization, which was accomplished by her parents' intermarriage and recognition of her s their child. Because we have held that her parents' marital status at the time of her birth controls her ability to take under the trusts, any event subsequent to her birth, such as her adoption, are of no consequence to her beneficiary status.

In support of the arguments presented above, Charney offers several unique theories as to why she should be included in the class of beneficiaries under the trusts. We find none of them to be compelling. First, she argues that Pierre Dumaine expressed in his will that it was his desire that she should be a beneficiary. However, absent a power of appointment over his share of the trust distributions, which he did not have, Pierre was powerless to direct where those funds would go upon his death. Second, she maintains that she was placed for adoption because of "fear of economic reprisals from the trustees" and that the fact of adoption, therefore, should not exclude her from the class of beneficiaries. Even if her allegation is true, many parents are forced to place a child for adoption because of economic factors. Further, we have already held that her adoption had no bearing on her ability to take under the trust instruments. Finally, Charney contends that equity requires that an adopted child not be denied his or her "right to take" under the trust document. This argument is equally unpersuasive, because no "right to take" ever existed.

Again focusing on her adopted status, Charney further argues that the trial court's ruling that a child born out of wedlock and subsequently given up for adoption will permanently retain the status of being illegitimate, despite the subsequent intermarriage of the child's natural parents and their recognition of the child as their own, violated her equal protection and due process rights under the State and Federal Constitutions. N.H. CONST. pt I, arts. 2, 12, 14; U.S. CONST. amend XIV, § 1. We disagree.

As a preliminary matter, we will analyze the respondent's argument under the protections afforded by part I, articles 2, 12 and 14 of the New Hampshire Constitution. *See Sate v. Ball*, 124 N.H. 226, 231, 471 A.2d 347, 350 (1983). To that extent, we look to federal cases merely for guidance. *See In re Certain Scholarship Funds,* 133 N.H. 227, 229-30, 575 A.2d 1325, 1326-27 (1990).

We first address Charney's argument that the trial court's ruling resulted in a denial of her right to equal protection as a member of a class of children born out of wedlock. In order to implicate the provisions of the equal protection clause, however, the requisite "state action" must be demonstrated. *In re Certain Scholarship Funds, supra* at 230, 575 A.2d at 1327. Absent some action that may fairly be attributed to the State and Federal Constitutions "'erect[ ] no shield against merely private conduct, however discriminating or wrongful.'" *In re Certain Scholarship Funds supra (quoting Shelley v. Kraemer,* 334 U.S. 1, 13, 68 S.Ct. 836, 842, 92 L.Ed. 1161 (1948)).

The trial court rejected Charney's constitutional claim, ruling:

> "[A]ny adverse consequences from the fact she was not born in wedlock are not the result of state statutes or state provisions on descent and distribution, illegitimacy, adoption, or intermarriage of biological parents, but are the sole result of the intention of Frederic C. Dumaine, Sr., and of the other settlors that a beneficiary under Dumaines and Dumaines New Fund can be only a person 'lawfully begotten, born in wedlock.'"

We fail to find the necessary State action in the trial court's interpretation of the trust documents. *See Evans v. Abney,* 396 U.S. 435, 444, 90 S.Ct. 628, 633 (1970) (action of Georgia Supreme Court declaring trust terminated did not constitute State action): *see also In re Certain Scholarship Funds, supra* at 234, 575 A. 2d at 1329. To hold otherwise would subject all judicial interpretations of private agreements to equal protection challenges.

The contention that Charney was divested of property rights in violation of the guarantees of due process is equally unfounded. "[I]t is the alteration or extinguishing of a right or status previously recognized by state law that invokes the procedural guarantees contained in the due process clause." *Medina v. Rudman*, 545 F.2d 244, 250 (1st Cir. 1976), *cert. denied,* 434 U.S. 891, 98 S.Ct. 266, 54 L.Ed.2d 177 (1977). We have already determined, however, that no "right to take" under the trusts ever existed. Consequently, we reject Charney's due process claim.

Finally, Charney argues that the trial court erred as a matter of law when it denied her request for attorney's fees. "[T]he allowance of attorneys' fees is not a matter of right but rests in the cautiously exercised discretion of the court. Attorneys' fees should be allowed only in those cases where the litigation is conducted in good faith for the primary benefit of the trust as a whole in relation to substantial and material issues essential to the proper administration of the trust." *Concord Nat. Bank v. Haverhill*, 101 N.H. 416, 419, 145 A.2d 61, 63 (1958). The trial court found that "Elizabeth Ann Charney participated in this litigation primarily for her personal benefit and not for the primary benefit of the trust as a whole." Although Charney argues that, by participating in these proceedings, she "aided the trial court with key and relevant legal sources, authorities, and legal analysis, and has corrected misleading and erroneous assertions made by [the petitioners]," her evaluation of the benefit to the trial court from her participation in this litigation is not the determinative factor. The inquiry is whether her primary motive was the benefit of the trusts as a whole or her own benefit. On the facts of this case, the trial court did not abuse its discretion in determining that any purported aid it received from Charney was not "for the primary benefit of the trust as a whole." *Id.*

Affirmed.

Notes and Questions

1. Why do you think that the settlor of the trust insisted upon only legitimate heirs benefiting from the trust?

2. If Charney's father had been the settler of the trust and the trust contained the same language, would Charney have had the right to take under the trust?

3. From a public policy perspective, should non-martial children be permitted to inherit through their fathers?

Uniform Parentage Act § 202. No Discrimination Based on Marital Status.[36]

[36] Adopted by the following states: Alaska, Arizona, California, Colorado, Connecticut, Hawaii, Kansas, Michigan, Minnesota, Montana, Nevada, New Jersey, New Mexico, North Dakota, Rhode Island, South Dakota, Washington, Washington D.C. and Utah.

> A child born to parents who are not married to each other has the same rights under the law as a child born to parents who are married to each other.

Under the UPA, the right of children to inherit from their fathers' estates does not depend upon the marital status of the parents at the time they were born. Under this approach, non-marital children are given an equal opportunity to inherit from their fathers' estates. Approximately twenty states have included language modeled after the language in the UPA in their intestacy statutes.

According to the scheme set forth by the UPA, when the father and mother do not marry or attempt to marry, the law presumes the existence of a father-child relationship between the father and child if one of the following conditions exists: (1) before the child reaches the age of two, the father and child live in the same household and the father (openly) holds the child out as his natural child; or (2) the fathers files a written acknowledgment of paternity with an appropriate court of administrative agency. If the presumption is not rebutted, the child has a right to inherit on equal par with the man's marital children. If neither one of the stated requirements is met, the non-marital child has the burden of proving a claim of paternity in order to be able to inherit from his or her father.

The UPA provides equal opportunity, but not true equality, for the non-marital child. The marital child does not have to take any action for the presumption of a parent-child relationship to arise. To the contrary, for the non-marital child, the presumption of paternity arises only if his or her father takes some type of affirmative action.

Notes and Questions

1. What are the pros and cons of the UPA approach?

2. Does the UPA approach balance the interests of the state, the non-marital children and the marital children?

3. Intestacy is the domain of the individual states. In enacting intestacy statutes, state legislatures attempt to create systems that serve the interests of their citizens. With regards to the inheritance rights of non-marital children, is there a need for the states to take a uniform approach? Why? Why not?

4. For a discussion of the history of the UPA's treatment of non-marital children, *See* Olga V. Kotlyarevskaya & Sara B. Poster, *Separation Anxiety Among California's Courts: Addressing the Confusion over Same-Sex Partners' Parentage Claims*, 10 U.C. Davis J. Juv. L. & Pol'y 153, 157-58 (2006).

Sample State Statutes

West's Annotated Indiana Code

29-1-2-7 Illegitimate children; inheritance

Sec. 7.
(a) For the purpose of inheritance (on the maternal side) to, through, and from a child born out of wedlock, the child shall be treated as if the child's mother were married to the child's father at the time of the child's birth, so that the child and the child's issue shall inherit from the child's mother and from the child's maternal kindred, both descendants and collaterals, in all degrees, and they may inherit from the child. The child shall also be treated as if the child's mother were married to the child's father at the time of the child's birth, for the purpose of determining homestead rights and the making of family allowances.

(b) For the purpose of inheritance (on the paternal side) to, through, and from a child born out of wedlock, the child shall be treated as if the child's father were married to the child's mother at the time of the child's birth, if one (1) of the following requirements is met:

> (1) The paternity of a child who was at least twenty (20) years of age when the father died has been established by law in a cause of action that is filed during the father's lifetime.
>
> (2) The paternity of a child who was less than twenty (20) years of age when the father died has been established by law in a cause of action that is filed:
>
> > (A) during the father's lifetime; or
> > (B) within five (5) months after the father's death.
>
> (3) The paternity of a child born after the father died has been established by law in a cause of action that is filed within eleven (11) months after the father's death.
>
> (4) The putative father marries the mother of the child and acknowledges the child to be his own.
>
> (5) The putative father executes a paternity affidavit as set forth in IC 16-37-2-2.1.

(c) The testimony of the mother may be received in evidence to establish such paternity and acknowledgment, but no judgment shall be made upon the evidence of the mother alone. The evidence of the mother must be supported by corroborative evidence or circumstances.

(d) If paternity is established as described in this section, the child shall be treated as if the child's father were married to the child's mother at the time of the child's birth, so that the child and the child's issue shall inherit from the child's father and from the child's paternal kindred, both descendants and collateral, in all degrees, and they may inherit from the child. The child shall also be treated as if the child's father were married to the child's mother at the time of the child's birth, for the purpose of determining homestead rights and the making of family allowances.

Code of Georgia Annotated

§ 53-2-3. Rights of inheritance of child born out of wedlock

The rights of inheritance of a child born out of wedlock shall be as follows:

(1) A child born out of wedlock may inherit in the same manner as though legitimate from or through the child's mother, the other children of the mother, and any other maternal kin;

(2)

(A) A child born out of wedlock may not inherit from or through the child's father, the other children of the father, or any paternal kin by reason of the paternal kinship, unless:

(i) A court of competent jurisdiction has entered an order declaring the child to be legitimate, under the authority of Code Section 19-7-22 or such other authority as may be provided by law;

(ii) A court of competent jurisdiction has otherwise entered a court order establishing paternity;

(iii) The father has executed a sworn statement signed by him attesting to the parent-child relationship;

(iv) The father has signed the birth certificate of the child; or

(v) There is other clear and convincing evidence that the child is the child of the father.

(B)(i) Subparagraph (A) of this paragraph notwithstanding, a child born out of wedlock may inherit from or through the father, other children of the father, or any paternal kin by reason of the paternal kinship if evidence of the rebuttable presumption of paternity described in this subparagraph is filed with the court before which proceedings on the estate are pending and the presumption is not overcome to the satisfaction of the trier of fact by clear and convincing evidence.

(ii) There shall exist a rebuttable presumption of paternity of a child born out of wedlock if parentage-determination genetic testing establishes at least a 97 percent probability of paternity. Parentage-determination genetic testing shall include, but not be limited to, red cell antigen, human leucocyte antigen (HLA), red cell enzyme, and serum protein electrophoresis tests or testing by deoxyribonucleic acid (DNA) probes.

(C) If any one of the requirements of divisions (i) through (v) of subparagraph (A) of this paragraph is fulfilled, or if the presumption of paternity set forth in subparagraph (B) of this paragraph shall have been established and shall not have been rebutted by clear and convincing evidence, a child born out of wedlock may inherit in the same manner as though

legitimate from and through the child's father, the other children of his or her father, and any other paternal kin;

(3) In distributions under this Code section, the children of a deceased child born out of wedlock shall represent that deceased child.

South Carolina Probate Code
§ 62-2-109. Meaning of child and related terms.

If, for purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through, or from a person:

(1) from the date the final decree of adoption is entered, and except as otherwise provided in § 20-7-1825, an adopted person is the child of an adopting parent and not of the natural parents except that adoption of a child by the spouse of a natural parent has no effect on the relationship between the child and that natural parent.

(2) In cases not covered by (1), a person born out of wedlock is a child of the mother. That person is also a child of the father if:

(i) the natural parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void; or

(ii) the paternity is established by an adjudication commenced before the death of the father or within the later of eight months after the death of the father or six months after the initial appointment of a personal representative of his estate and, if after his death, by clear and convincing proof, except that the paternity established under this subitem (ii) is ineffective to qualify the father or his kindred to inherit from or through the child unless the father has openly treated the child as his and has not refused to support the child.

(3) A person is not the child of a parent whose parental rights have been terminated under §20-7-1574 of the 1976 Code, except that the termination of parental rights is ineffective to disqualify the child or its kindred to inherit from or through the parent.

McKinney's Consolidated Laws of New York Annotated
§ 4-1.2 Inheritance by non-marital children

(a) For the purposes of this article:

(1) A non-marital child is the legitimate child of his mother so that he and his Issue inherit from his mother and from his maternal kindred.

(2) A non-marital child is the legitimate child of his father so that he and his issue inherit from his father and his paternal kindred if:

(A) a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity or the mother and father of the child have executed an acknowledgment of paternity pursuant to section four thousand one

hundred thirty-five-b of the public health law, which has been filed with the registrar of the district in which the birth certificate has been filed or;

(B) the father of the child has signed an instrument acknowledging paternity, provided that

(i) such instrument is acknowledged or executed or proved in the form required to entitle a deed to be recorded in the presence of one or more witnesses and acknowledged by such witness or witnesses, in either case, before a notary public or other officer authorized to take proof of deeds and

(ii) such instrument is filed within sixty days from the making thereof with the putative father registry established by the state department of social services pursuant to section three hundred seventy-two-c of the social services law, as added by chapter six hundred sixty-five of the laws of nineteen hundred seventy-six and

(iii) the department of social services shall, within seven days of the filing of the instrument, send written notice by registered mail to the mother and other legal guardian of such child, notifying them that an acknowledgment of paternity instrument acknowledged or executed by such father has been duly filed or;

(C) paternity has been established by clear and convincing evidence and the father of the child has openly and notoriously acknowledged the child as his own; or

(D) a blood genetic marker test had been administered to the father which together with other evidence establishes paternity by clear and convincing evidence.

(3) The existence of an agreement obligating the father to support the non-marital child does not qualify such child or his issue to inherit from the father in the absence of an order of filiation made or acknowledgement of paternity as prescribed by subparagraph (2).

(4) A motion for relief from an order of filiation may be made only by the father and a motion for relief from and acknowledgment of paternity may be made by the father, mother or other legal guardian of such child, or the child, provided however, such motion must be made within one year from the entry of such order or from the date of written notice as provided for in subparagraph (2).

(b) If a non-marital child dies, his surviving spouse, issue, mother, maternal kindred, father and paternal kindred inherit and are entitled to letters of administration as if the decedent were legitimate, provided that the father and paternal kindred may inherit or obtain such letters only if the paternity of the non-marital child has been established pursuant to provisions of clause (A) of subparagraph (2) of paragraph (a) or the father has signed an instrument acknowledging paternity and filed the same in accordance with the provisions of clause (B) of subparagraph (2) of paragraph (a) or paternity has been established by clear and convincing evidence and the father of the child has openly and notoriously acknowledged the child as his own.

Notes and Questions

1. Evaluate the above statutes in light of the legislative mandate to balance the interests of the state, the non-marital child and the marital child.

2. Are there any legitimate reasons to treat paternal inheritance different from maternal inheritance?

3. What public policy or state interest is promoted by each of the above statutes?

4. A key purpose of the intestacy system is to carry out the presumed intent of the decedent. Is that purpose promoted by the mandates of the above statutes?

5. What factors should the probate court be permitted to consider in deciding how to distribute a man's estate under the intestacy system?

6. In the majority of jurisdictions, in order for the non-martial child to inherit from his or her father, he or she must prove paternity. What methods of proof should be acceptable? *See Malone vs. Thomas*, 24 S.W.3d 412 (Tex. App-Houston (1 Dist.) 2000).

7. Illegitimacy is a suspect classification entitled to strict scrutiny. *See Taylor v. Hoffman*, 544 S.E.2d 387 (W. Va. 2001). Should the status of illegitimacy be on par with race or other protected classes?

6. In some jurisdictions, the non-marital child must be legitimized in order to have the right to inherit from his or her father. Should the doctrine of equitable legitimacy be recognized to satisfy the statutory requirement? Consider the following example. Emma and Jarvis lived together, without the benefit of marriage, for almost twenty-six years. They were the parents of two adult children and five grandchildren. The couple and their children have always functioned as a family. Jarvis died intestate. He was survived by Emma, their two children, their five grandchildren. Jarvis was also survived by his two sisters. In order to inherit from Jarvis, the children had to be legitimized prior to his death. The statute sets out the steps the children needed to take to be considered legitimate. In order to be fair to the non-marital children and to carry out the presumed intent of Jarvis, should the court be able to use its equitable powers to declare them to be legitimate?

5.3 Stepchildren and Foster Children

In the majority of jurisdictions, stepchildren and foster children are not entitled to inherit from stepparents and foster parents. Nonetheless, if the decedent is not survived by any other heirs related to the decedent by blood or adoption, the stepchildren and/or foster children may be allowed to inherit from the decedent's estate. In those jurisdictions, the only time that stepchildren or foster children can inherit is if it is necessary to avoid having the property escheat to the state.

5.3.1 Stepchildren/Foster Children are not entitled to inherit

When people hear the word "stepparent", the images of Cinderella's cruel stepmother and stepsisters come to mind. The Cinderella story focuses upon the discord that can exist in a blended family. Cinderella and her stepmother did not have a loving parent-child relationship. This vision of blended families may contribute to the treatment of stepchildren with regards to inheritance. The

purpose of the intestacy system is to carry out the presumed intent of the decedent. The exclusion of stepchildren from the list of possible heirs may be a product of the belief that the stepparent-stepchild relationship is usually a contentious one. Historically, foster children did not stay in the same home for very long. Thus, the foster parent and the foster child did not have time to develop a relationship. Given the nature of the foster care system, it was impossible to envision a foster parent-foster child relationship that would justify treating foster children on par with biological and adopted children for inheritance purposes.

Wyo. Stat. Ann. § 2-4-104 (1977)

Persons of the half-blood inherit the same share they would inherit if they were of the whole blood, but stepchildren and foster children and their descendants do not inherit.

Currently, people are creating families in non-traditional ways. Stepchildren are becoming totally integrated into families and foster children are remaining in the same home during most of their time in the system. These changes have enabled stepparents/foster parents to bond with stepchildren/foster children. As a result, the law has begun to recognize and respect those relationships. The consequence is that, in some jurisdictions, stepchildren and foster children are given the opportunity to inherit from their stepparents and foster parents.[37]

5.3.2 Stepchildren/Foster Children may inherit if the necessary relationship exists

West's Ann. Cal. Prob. Code § 6454

For the purpose of determining intestate succession by a person or the person's issue from or through a foster parent or stepparent, the relationship of parent and child exists between that person and the person's foster parent or stepparent of both of the following requirements are satisfied:

(a) The relationship began during the person's minority and continued throughout the joint lifetimes of the person and the person's foster parent or stepparent.

(b) It is established by clear and convincing evidence that the foster parent or stepparent would have adopted the person but for a legal barrier.

Estate of Claffey, 257 Cal. Rptr. 197 (Cal. App. 3d 1989)

SONESHINE, Associate Justice.

Monroe Thomas McKenzie and Janet Turner appeal a judgment denying them, as stepchildren of Bessie Claffey, any entitlement to Claffey's estate. They contend the trial court prejudicially erred in instructing the jury to find a "family relationship," rather than a mere stepchild/stepparent relationship, as a prerequisite to their intestate succession.

[37] *See* Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 Law & Ineq. 1 (Winter 2000); Terin Barbas Cremer, *Reforming Intestate Inheritance For Stepchildren and Stepparents*, 18 Cardozo L.J. & Gender 89 (2011).

I

Thomas and Janet are the children of John and Edythe McKenzie. The McKenzies were divorced in March 1934. Custody of Thomas and Janet, ten and seven years of age respectively at the time of divorce, was granted to the mother pursuant to stipulation of the parties. Thereafter John married Bessie Stokes in April 1935. After John's death in 1948, Bessie married Edward Claffey from whom she obtained a divorce in 1953. Bessie died intestate in April 1985.

On August 30, 1985, Thomas and Janet filed Statements of Claim of Interest in the Estate. (Prob. Code, § 1080.) The statements contain no allegation they lived with their father and Bessie. Nonetheless, they claimed as stepchildren they were Bessie's "closest heirs at law," because a "parent/child relationship" arose upon her marriage to John. They attribute Bessie's failure to adopt them to the John/Edythe divorce which was "so bitter that [Edythe] refused the request of Bessie Claffey to adopt [them]."

On September 19, Dorothy Creeks filed a statement of interest as a first cousin of Bessie, attaching a list of other known heirs. She stated the property "consists of cash in the approximate amount of $322,000.00 and other property with an approximate value of $20,000.00, all the separate property of the deceased."

The opposing statements placed the matter of inheritance at issue; Thomas and Janet requested a jury, and trial began in June 1986. By special verdict, the jury found against Thomas and Janet.

II

Prior to January 1, 1985, a stepchild had no right to inherit from a stepparent. On that date, a general revision of a large portion of the Probate Code took effect. One such provision was the addition of section 6408, setting forth the requirements for establishing a parent and child relationship "for the purpose of determining intestate succession...." The relationship exists between a child and his or her natural parent "regardless of the marital status of the natural parents" (§ 6408, subd. (a)(1)) and "between an adopted person and his or her adopting parent or parents." (§ 6408, subd. (a)(2).)

The innovative portion, adapted from the Uniform Probate Code, provided: "The relationship between a person and his or her foster parent or stepparent has the same effect as if it were an adoptive relationship if (A) the relationship began during the person's minority and continued throughout the parties' joint lifetimes and (B) it is established by clear and convincing evidence that the foster parent or stepparent would have adopted the person but for a legal barrier." (§ 6408, former subd. (a)(3).)

Here, the trial court determined the "relationship" referenced above contemplated one "like that of" a natural parent and child in the sense of a "family" relationship. Consequently, the instructions and the special verdict forms contained that language. The jurors were told Thomas and Janet had the burden of establishing, by a preponderance of the evidence, "a relationship like that of parent and child between themselves and Bessie...." The facts necessary to establish the relationship were (1) Thomas' and Janet's father married Bessie while they were minors, (2) they had a "family relationship" during their minority, and (3) "a parent and child family relationship existed between Bessie and [the children] which began while [they were minors] and continued throughout their joint

lifetimes."

By special verdict, the jury found no "parent/child-like family relationship between BESSIE CLAFFEY and [the stepchildren] [to] exist during [the stepchildren's] minority and continue throughout their joint lifetimes." They further found Edythe and Bessie discussed only "temporary possession" of the children for medical reasons; and although there was a legal barrier to adoption, there was no clear and convincing evidence Bessie would have adopted the stepchildren but for that barrier.

III

Thomas objects to the trial court's insertion of the term "family" in the instructions and verdict forms presented to the jury. He claims the court "instilled a certain vision of the type of relationship necessary for § 6408 to apply which is not required by the literal meaning of § 6408." In particular, he and Janet insist the "relationship" in question is merely "a relationship between a person and his or her stepparent or a 'stepchild/stepparent' relationship." We disagree.

The meaning of section 6408, subdivision (a)(3) is not so abundantly clear as Thomas contends. The term "relationship" in subdivision (a)(3)(A) cannot refer solely to the dictionary meaning, i.e., the stepchild/stepparent relationship that arises upon the natural parent's remarriage. If that were true, every remarriage, standing alone, would satisfy part (A) whether the new partner even knew the children or was ever allowed to see them. Consequently, the necessary "relationship," existing during minority and continuing throughout the parties' lifetime, must encompass something more than an exchange of wedding vows between the natural father and a stranger.

 """The most fundamental rule of statutory construction is that 'the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law.' [Citations.]"" (*Jutzi v. County of Los Angeles* (1987) 196 Cal.App.3d 637, 650, 242 Cal.Rptr. 74.) Section 6408, a part of the revision of the statutes relating to wills and intestate succession, was drafted by and proposed to the Legislature by the California Law Revision Commission. The initial presentation contained no reference to stepchildren except as they were officially adopted by the stepparent. Comment to the section stated, "A person who is only a stepchild ... is not a child." A later recommendation by the commission's probate consultant suggested the addition of what would become subdivision (a)(3). The consultant noted, under the proposed addition, provision would be made "for step- and foster children *in very limited situations,* with the necessary safeguards incorporated by treating the case like an adoption...." (Emphasis added.) The proposal was accepted at the next revision committee meeting.

As reworked and amended, the comprehensive redrafting of the Probate Code was known as Bill No. AB 25 and contained subdivision (a)(3) above. The commission's "Explanation of Assembly Bill No. 25" specifically refers to establishment of a stepchild's right to inherit as based on a "family relationship." In its report to the Assembly, the Committee on the Judiciary digested the relevant section as follows: "Gives a foster child and a stepchild the same status as an adopted child if the *family relationship* began during the child's minority...." (Emphasis added.) Similarly, the Senate Committee on Judiciary reported to its session that "[t]his bill would also create in a foster child and a stepchild the same inheritance rights as in an adopted child if the *family relationship* began during the child's minority...." (Emphasis added.)

By analogy, we note the provisions of section 6408.5, which further define the parent and child

relationship of an adopted child and its natural and adoptive parents. In delineating those situations where the child may inherit from both the natural and the adoptive parents, the operative issue is whether the "natural parent and the adopted person *lived together* at any time as parent and child...." (§ 6408.5, subd. (a)(1), emphasis added.)

Most important, the categories of foster children and stepchildren are dealt with in the same section and receive identical treatment. In both instances, the "relationship" must originate during the child's minority and continue throughout the parties' lifetimes. It would be anomalous to find less of a "family relationship" required for inheritance by a stepchild than by a foster child. Yet "[a] foster parent has been defined as 'one who, although not legally related to the child by direct parental blood ties, nor decreed a parent in formal adoption proceedings, assumes the role of parent.' [Citations.]" (*In re Lynna B.* (1979) 92 Cal.App.3d 682, 696, 155 Cal.Rptr. 256.) They are essentially "de facto" parents. (*In re B.G.* (1974) 11 Cal.3d 679, 693, 114 Cal.Rptr. 444, 523 P.2d 244.) We do not perceive the Legislature as requiring less familial or parental involvement by a stepparent where the stepchild seeks to inherit after the death of the stepparent.

We are convinced the relationship envisioned by the Law Revision Commission, as framers of the revised code, and the Legislature, which enacted the proposals as amended, embraced the terms pronounced by the trial court. Distribution of the estate of one dying without a will to his or her unadopted stepchild rather than to heirs claiming by blood relationship is not automatic and must be based on a review of each situation. Where the child has lived with one natural parent rather than the other natural parent and the stepparent, any alleged relationship is necessarily more difficult to establish.

Here, the jury found there existed no family relationship like that of a parent and child between Bessie and either Thomas or Janet. The sufficiency of the evidence to support this finding is not contested. And because we find no reason to disagree with the court's instructions to the jury, we find no error.

Judgment affirmed.

5.3.3 Stepchildren/Foster Children may inherit if there are no other heirs available

MD Code, Estates and Trusts, § 3-104

(e) If there is no surviving blood relative entitled to inherit under this section, it shall be divided into as many equal shares as there are stepchildren of the decedent who survive the decedent and stepchildren of the decedent who did not survive the decedent but of whom issue did survive the decedent. Each stepchild of the decedent who did survive the decedent shall receive one share and the issue of each stepchild of the decedent who did not survive the decedent but of whom issue did survive the decedent shall receive one share apportioned by applying the pattern of representation set forth in § 1-210. As used in this subsection, "stepchild" shall mean the child of any spouse of the decedent if such spouse was not divorced from the decedent.

Estate of Smith, 299 P.2d 550 (Wash. 1956)

SCHWELLENBACH, J.

Ernest E. Smith died testate. His will provided:

'*Article First:* I give and bequeath unto each of my children, namely, Marion Gildberg, residing at Seattle, Washington, Adelle Benson, residing at Portland, Oregon, Virginia McAllister, residing at Cottage Grove, Oregon; Georgia Dolphus, residing at Long Beach, California, and Ernest E. Smith, Jr., residing at Monroe, Washington, the sum of one dollar.

'*Article Second:* I hereby give, devise and bequeath all of the rest, residue and remainder of my estate, real, personal and mixed, of whatsoever character, and wheresoever situated, unto my beloved wife, Jessie M. Smith.'

Of the 'children' mentioned in the will, only Ernest E. Smith, Jr., was a child of the decedent. He was born of the marriage between decedent and Jessie M. Smith. The others were the issue of a previous marriage between Jessie M. Smith and Jorgen P. Gildberg.

Marion Gildberg, Georgia Dolphus, Ernest E. Smith, Jr., and Jessie M. Smith, predeceased Ernest E. Smith. Ernest E. Smith, Jr., left as his issue one child, Virginia H. Nicholson.

The will was admitted to probate and in his final report the administrator with will annexed petitioned that the estate be distributed equally to Adele Benson, Virginia McAllister Smith, and Virginia H. Nicholson, the granddaughter. The latter, claiming to be the sole heir, filed objections and the trial court ruled that Adele Benson and Virginia McAllister Smith, as stepchildren of the decedent, had no right of inheritance from him. One dollar was ordered to be distributed to each of the surviving stepchildren in accordance with the terms of the will and the residue of the estate distributed to Virginia Nicholson. Adele Benson and Virginia McAllister Smith appeal.

Jessie M. Smith having predeceased her husband, the clause in his will leaving her the residue of his estate, lapsed. There being no further residuary provision, that portion of his property passes by the law of descent to his heirs-at-law. *In re Sims' Estate*, 39 Wash.2d 288, 235 P.2d 204.

The question presented in this appeal is whether a stepchild may inherit from his stepparent as an heir-at-law. At common law the relationship of stepparent and stepchild conferred no rights and imposed no duties. The question of whether appellants may inherit in this instance depends wholly upon the statutes of descent and distribution. The property before the court was Ernest E. Smith's separate property, having been acquired by him from the community estate of himself and Jessie M. Smith under probate procedure.

RCW 11.04.020 provides in part:

> 'When any person dies seized of any lands, tenements or hereditaments, or any right thereto, or entitled to any interest therein, in fee simple, or for the life of another, as his separate estate, not having devised the same, they shall descend subject to the debts as follows:

> 'Fifth. If the decedent leaves no husband or wife the estate goes in equal shares to his children, and to the issue of any deceased child, by right of representation.
>
> 'The words 'issue,' 'child' and 'children' wherever used in this section shall be construed to include lawfully adopted children.' RCW 11.04.030(3) provides:
>
> 'The residue, if any, of the personal estate shall be distributed among the same persons as would be entitled to the real estate by RCW 11.04.020, and in the same proportion as provided, excepting as herein further provided; * * *.'

A child is the son or daughter, in relation to the father or mother. A stepchild is the son or daughter of one's wife by a former husband, or of one's husband by a former wife.

The court found that there was no evidence of the decedent having lawfully adopted Adele Benson or Virginia McAllister Smith.

Stepchildren are not included in the terms of the last paragraph of RCW 11.04.020 by implication. The status of stepchildren was considered by the legislature in a separate section. RCW 11.08.010 provides for inheritance from a stepparent in order to avoid escheat of the property to the state. The right of a stepchild to inherit from a stepparent is limited to the circumstances outlined therein.

Appellants contend that the legislature eliminated any distinction between kindred of the half blood and of the whole blood when it enacted RCW 11.04.100.

> 'The degree of kindred shall be computed according to the rules of the civil law, and the kindred of the half blood shall inherit equally with those of the whole blood in the same degree, unless the inheritance comes to the intestate by descent, devise, or gift from one of his ancestors, or kindred of such ancestor's blood, in which case all those who are not of the blood of such ancestors shall be excluded from such inheritance. The words 'kindred of such ancestor's blood' and 'blood of such ancestors' shall be construed to include any child lawfully adopted by one who is in fact of the blood of such ancestor.'

In *State v. Bielman*, 86 Wash. 460, 150 P. 1194, 1195, the defendant was charged with the crime of incest with his stepdaughter, in violation of § 2455, Rem. & Bal. Code, which provided:

> 'Whenever any male and female persons, nearer of kin to each other than second cousins, computing by the rules of the civil law, whether of the half or the whole blood, shall have sexual intercourse together, both shall be guilty of incest * * *."

We said:

> 'It is contended by the appellant that this statute refers only to persons who are blood relations nearer of kin to each other than second cousins, computing by the rule of the civil law. We think this contention must be sustained. The ordinary meaning of the word 'kin' is 'a blood relation.' See 'Kin,' 2 Words & Phrases, Second Series, p. 1306 [23 Words & Phrases, Perm. Ed., p. 546]. Warvelle, Real Property (3d ed.), § 168. The phrase 'whether of the half or the whole blood,' used in section 2455, indicates quite clearly that the section

> refers only to kindred of the blood, and not kindred by affinity. We are of the opinion, therefore, that this section does not apply.'

In *In re Field*, 182 App.Div. 266, 169 N.Y.S. 677, 681, the question was whether four stepchildren were entitled to share in their deceased stepmother's estate under the laws of descent and distribution. The court excluded the stepchildren, saying:

> 'There is no question presented in this case, therefore, of the half blood, because the four children of her husband, John Stilwell, by his first wife, had none of her blood in their veins, and she was the stock. If one of her children had died intestate, then his share would have descended to each of his four half brothers and sisters and his two whole sisters, because, as to them, he would have been the ancestor, and all would have been of the blood of their common father, John Stilwell. But that situation is not presented.'

In re Estate of Paus, 324 Ill.App. 58, 57 N.E.2d 212, 213, involved a petition by the children of a sister of decedent's predeceased stepfather that they be declared heirs and next of kin of decedent. Their claim was based on a statute which provided:

> 'In no case is there any distinction between the kindred of the whole and the half blood." S.H.A.Ill. ch. 3, § 162.

The court said:

> 'We find nothing in the statute to justify the construction contended for. Five paragraphs of the statute designate persons who shall take by descent from a deceased person. The provision that distinction 'in no case' shall be made between the whole and half blood does not create another class of persons who will take but *forbids distinction between the whole and half blood in the case of the persons named who are to take*. The rule of the feudal law excluded from the inheritance descendants who were of the half blood. The rule never found favor in this country. The statute therefore expressly repeals that rule. This comes far short of creating another class of persons who are to take and who are not of the blood of the deceased at all. Petitioners' contention is without merit. They have no standing to make their claim. There is a fundamental distinction between persons who are of the half blood and those without inheritable blood at all.'(Italics ours.)

The 'kindred' mentioned in RCW 11.04.100, whether of the half blood or of the whole blood, are kindred of the intestate. The meaning of the word 'kin' is a blood relation. As between a stepchild and a stepparent there is no blood relationship, but only that designated as affinity, the relationship which one spouse, because of marriage, has to blood relatives of the other. Here there was no blood relationship at all between Ernest E. Smith and his two stepdaughters.

RCW 11.04.100 is not applicable to the facts in the case at bar. It prohibits distinction between kindred of the whole blood and of the half blood who are entitled to inherit under the statutes of descent and distribution. The only applicable statutes are RCW 11.04.020 (Fifth), and RCW 11.04.030(3). The stepdaughters were not decedent's children. He left no children. His only heir-at-law is the respondent, the issue of his deceased child.

In re Sheard's Estate, 181 Wash. 62, 42 P.2d 34, and *In re Bordeaux' Estate,* 37 Wash.2d 561, 225 P.2d

433, 26 A.L.R.2d 249,*cited by* appellants, dealt with the tie of affinity in connection with statutory classification for inheritance tax purposes, and have no bearing on the disposition of this case.

Appellants contend that they should be treated as decedent's natural children because they were raised by him and were designated as his 'children' in his will. No proof was offered that they were lawfully adopted by him. The adoption of an heir is purely statutory, and can be accomplished only by strict compliance with the statute. *In re Renton's Estate*, 10 Wash. 533, 39 P. 145.

The order settling final account and decree of distribution is affirmed.

Estate of Joseph, 949 P.2d 472 (Cal. 1998)

MOSK, J.

Pursuant to section 6400 et seq. of the Probate Code, the estate of a deceased parent may pass by intestate succession to his child as heir. For these purposes, the code defines the relationship of parent and child to exist in three situations. First, section 6450, subdivision (a), provides that the "relationship of parent and child exists between a person and the person's natural parents, regardless of the marital status of the natural parents." Second, section 6450, subdivision (b), provides that the "relationship of parent and child exists between an adopted person and the person's adopting parent or parents." Third, section 6454-with which we are here concerned-provides that the "relationship of parent and child exists between [a] person and the person's foster parent or stepparent if"'(a) [t]he relationship began during the person's minority and continued throughout the joint lifetimes of the person and the person's foster parent or stepparent," and "(b) [i]t is established by clear and convincing evidence that the foster parent or stepparent would have adopted the person but for a legal barrier." Thus, this provision contains what may be called a "continuing relationship" requirement: the relationship must have continued from minority until death. It also contains what may be called a "legal barrier" requirement: A legal barrier must have been the necessary cause of the failure to adopt.

We granted review in this proceeding in order to resolve a conflict in the Courts of Appeal respecting the meaning of Probate Code section 6454. In *Estate of Stevenson* (1992) 11 Cal.App.4th 852, 14 Cal.Rptr.2d 250 (hereafter sometimes *Stevenson*), the Sixth Appellate District held, in substance, that what would become section 6454 allows the legal barrier or barriers to adoption of the foster child or stepchild by the foster parent or stepparent to have existed only at a time at which adoption was contemplated or attempted. In *Estate of Cleveland* (1993) 17 Cal.App.4th 1700, 22 Cal.Rptr.2d 590 (hereafter sometimes *Cleveland*), Division Five of the Second Appellate District, declining to follow *Stevenson,* held, in substance, that what would become the provision requires that the legal barrier or barriers to adoption must have continued until death. As we shall explain, we conclude that the *Cleveland* court was right and the *Stevenson* court was wrong.

I

Petitioner, Kim Barnum-Smith, asked the Probate Department of the Superior Court of Alameda County for letters of administration of the estate of decedent, Louis Joseph, who died intestate, and was subsequently issued such letters of administration.

Thereupon, petitioner asked the probate court for a determination that she was decedent's daughter pursuant to Probate Code section 6454 and his sole heir, and that, as such, she was entitled to distribution of his estate in its entirety. Objector, James C. Joseph, who was decedent's brother, opposed.

After trial, the probate court determined that petitioner was not decedent's daughter or heir and, hence, was not entitled to distribution of his estate in any part. It also revoked her letters of administration of decedent's estate and removed her from office, concluding that, because she was not an heir, she did not have a priority to serve over others, including objector.

In issuing orders to this effect, the probate court rendered a statement of decision, which included the following:

> Petitioner "was taken in by" decedent and his wife, who predeceased him, "and [was] raised by them during the vast period of her minority, from age three on. [They] assisted her after her minority by financing her efforts at San Jose State University and a local junior college. [Decedent] 'gave' [her] away at her wedding. Certainly, the relationship between [decedent and his wife and petitioner] satisfied the common law definition of 'foster child,' at least during the minority and early adulthood of [petitioner], which to simplistically recite [its] shorthand definition means one whose wellbeing is fostered by another person. For a period, at the beginning of the relationship, and during her minority both [decedent and his wife] would from time to time ask [petitioner's] natural parents if they ... could adopt [her]. Each such request was refused. After a while, but still during [her] minority [they] discontinued asking.
>
> "The real problem presented by this case is concluding the legislative meaning of, and the purpose for, the requirement of Probate Code [section] 6454 when it requires that there be '... clear and convincing evidence that the foster parent ...*would have adopted the [foster child] but for a legal barrier*.' ([E]mphasis added[.]) Only two cases have surfaced which address themselves to Probate Code [section] 6454 and they specifically address themselves to the above mentioned ['legal barrier'] requirement. They are: *Estate of Stevenson* (1991 [1992]) 11 Cal.App.4th [852, 14 Cal.Rptr.2d 250,] and *Estate of Cleveland* (1993) 17 Cal.App.4th [1700, 22 Cal.Rptr.2d 590]. These decisions are diametrically opposite one to the other.
>
> "This court is impressed with the logic, analysis and scholarship of *Cleveland* .... The *Cleveland* Court carefully analyzed the legislative history of this novel reform to the law of intestate succession and concluded that [section] 6454's ['legal barrier'] requirement means what it says and says what it means. The public policy reasons for the enactment of [section] 6454 are satisfied by the *Cleveland* Court's decision and it appears to this court that *Stevenson*... goes well beyond the intent of the legislation in [its] conclusion.
>
> "Factually, in this case [decedent], the last to die of the [spouses], could have pursued an adult adoption had he really wanted to establish a parent/child relationship with [petitioner]. Additionally, he could have written a will leaving his property to [her] had he intended for her to succeed to his property. (He clearly was aware of the benefits of the use of a will, as he used the services of the [l]awyer who now represents [petitioner] to write a will many years before his death.) We cannot know what [decedent's] intentions were regarding the devolution of his estate, except as he expressed them as to his predeceased spouse when he

> wrote his will. Although it is not an insignificant fact that he did not express any testamentary intent toward [petitioner] as a successor beneficiary should, as actually happened, his wife have predeceased him. *Cleveland*... envisioned just such a case as this when it recognized that any number of reasons could exist for not wanting a 'foster child' to succeed to one's property including loss of affection, disappointment, favoring relatives, dissatisfaction with the choice of the 'foster child's' spouse, to name but a few. In this case [petitioner] obtained her majority age on October 15, 1974, some twenty one years before [decedent's] death. Surely, that passage of time cannot be ignored.... [Decedent and his wife] during their life had ample opportunity to control the outcome and *for whatever* [*sic*] *reason* chose not to. To conclude that [decedent] wanted [petitioner] to inherit his property is presumptuous and not consistent with the Legislature's reasons for enactment of § 6454.
>
> "Therefore, it is the ruling of this court that the provisions of Probate Code [section] 6454 have not been satisfied by the relationship between [petitioner] and [decedent, and] that she has [not] shown by clear and convincing evidence that [he] would have adopted [her] but for a legal barrier." (original italics.)

From the probate court's orders, petitioner appealed to the First Appellate District of the Court of Appeal. She proceeded without a reporter's or clerk's transcript, electing to prepare an appendix in lieu of the latter. She did so, as she would later explain, "[b]ecause the material facts," as disclosed in the probate court's statement of decision, "are undisputed."

In an opinion certified for publication, Division Three of the First Appellate District, to which the cause was assigned, unanimously affirmed the probate court's orders. All but expressly applying the standard of independent review, and following *Cleveland* instead of *Stevenson,* it agreed with the implied conclusion that Probate Code section 6454 requires that the legal barrier or barriers to adoption of the foster child or stepchild by the foster parent or stepparent must have begun during the foster child or stepchild's minority, and must have continued throughout the joint lifetimes of the foster child or stepchild and the foster parent or stepparent. Impliedly using what appears to be the substantial evidence test, it sustained the express finding that petitioner failed to establish by clear and convincing evidence that decedent would have adopted her but for a legal barrier: Under the provision, a legal barrier to adoption had to have continued until death; she admitted, however, that such a barrier did not perdure.

At petitioner's request, we granted review. We now affirm.

II

In 1931, the Legislature enacted the original Probate Code. (Stats.1931, ch. 281.) It incorporated therein the substance of provisions from the Civil Code, the Code of Civil Procedure, and two uncodified statutes, and then repealed the provisions in question. (*Evans v. Superior Court* (1932) 215 Cal. 58, 61, 8 P.2d 467.)

In 1980, the Legislature directed the California Law Revision Commission (hereafter the Law Revision Commission or simply the commission) to study, among other topics, "[w]hether the California Probate Code should be revised, including but not limited to whether California should adopt, in whole or in part, the Uniform Probate Code...." (Assem. Conc. Res. No. 107, Stats. 1980 (1979-1980 Reg. Sess.) res. ch. 37, p. 5086.)

In the course of its study over the years that followed, the Law Revision Commission submitted various recommendations to the Legislature to revise the original Probate Code in various ways, some in line with the Uniform Probate Code, some not.

So far as the law of intestate succession was concerned, the Law Revision Commission had as its purpose to "provide" new "rules," framed in light of "changes in the American family and in public attitudes," "that are more likely" than the old ones "to carry out ... the intent a decedent without a will is most likely to have had," evidently at the time of death, and to do so in a "more efficient and expeditious" manner. (Tent. Recommendation Relating to Wills and Intestate Succession (Nov.1982) 16 Cal. Law Revision Com. Rep. (1982) pp. 2318, 2319.) From all that appears, the Legislature had the same purpose. (*Estate of Cleveland, supra,* 17 Cal.App.4th at p. 1706, 22 Cal.Rptr.2d 590.)

In 1983, the Legislature added section 6408 to the Probate Code. (Stats.1983, ch. 842, § 55, pp. 3083-3084.)

Probate Code section 6408, subdivision (a)(2), provided: "The relationship of parent and child exists between an adopted person and his or her adopting parent or parents. The relationship between a person and his or her foster parent, and between a person and his or her stepparent, has the same effect as if it were an adoptive relationship if (i) the relationship began during the person's minority and continued throughout the parties' joint lifetimes and (ii) it is established by clear and convincing evidence that the foster parent or stepparent would have adopted the person but for a legal barrier." (Stats.1983, ch. 842, § 55, p. 3083.) One such legal barrier exists "where ... a parent of the" "foster child or stepchild" "refuses to consent to the adoption." (Sen. Com. on Judiciary, Rep. on Assem. Bills No. 25 & 68 (1983-1984 Reg. Sess.) 3 Sen. J. (1983-1984 Reg. Sess.) p. 4882 [hereafter Senate Committee on Judiciary Report].)

Probate Code section 6408, subdivision (a)(2), was new to California law. (Senate Committee on Judiciary Report, *supra,* 3 Sen. J. (1983-1984 Reg. Sess.) p. 4882; *see Estate of Cleveland, supra,* 17 Cal.App.4th at p. 1704, 22 Cal.Rptr.2d 590; *Estate of Claffey* (1989) 209 Cal.App.3d 254, 256, 257 Cal.Rptr. 197.) Moreover, it appears to have been, and to have remained, unique to this state among American jurisdictions. (Meadow &Loeb, *Heirs Unapparent* (June 1994) L.A.Law. 34, 38; Note, *Intestate Succession for Stepchildren: California Leads the Way, but Has It Gone Far Enough?* (1995) 47 Hastings L.J. 257, 260 [speaking only of stepparents and stepchildren]; Mahoney, *Stepfamilies in the Law of Intestate Succession and Wills* (1989) 22 U.C. Davis L.Rev. 917, 929 [same]; *see Estate of Cleveland, supra,* 17 Cal.App.4th at pp. 1704-1705, fn. 6, 22 Cal.Rptr.2d 590; see also 8 West's U. Laws Ann. (1983) U. Prob.Code (1969) § 2-109, pp. 66-67 [making no provision for foster parents and foster children or stepparents and stepchildren]; *cf. id.,* § 1-201(3), p. 30 [excluding from the definition of a "child," in pertinent part, "any person who is only a stepchild ... [or] a foster child"]; *id.* (1997 supp.) § 1-201(5), p. 12 (1990 rev.) [same]; former Prob.Code, § 26, added by Stats.1983, ch. 842, § 21, p. 3026 [same]; *id.,* as amended by Stats.1984, ch. 892, § 4, p. 2988 [deleting the exclusion]; *but see Estate of Claffey, supra,* 209 Cal.App.3d at p. 256, 257 Cal.Rptr. 197 [stating, incorrectly, that this "innovative portion" was "adapted from the Uniform Probate Code"].)

Probate Code section 6408, subdivision (a)(2), was proposed to the Legislature by the Law Revision Commission. It was not submitted as a recommendation originally. (Tent. Recommendation Relating to Wills and Intestate Succession, *supra,* 16 Cal. Law Revision Com. Rep. *(1982)* at pp. 2459-

2460; *see id.* at p. 2460 [Cal. Law Revision Com. com. on Prob.Code, § 6408: "[a] person who is only a stepchild [or a] foster child ... is not a 'child[,]' " and "[a] person who is only a stepparent [or a] foster parent ... is not a 'parent[ ]' "]; see generally *Estate of Claffey, supra,* 209 Cal.App.3d at p. 258, 257 Cal.Rptr. 197; *Estate of Cleveland, supra,* 17 Cal.App.4th at p. 1705, 22 Cal.Rptr.2d 590 [following *Claffey*].) It came later. (*Estate of Claffey, supra,* 209 Cal.App.3d at p. 258, 257 Cal.Rptr. 197; *Estate of Cleveland, supra,* 17 Cal.App.4th at p. 1705, 22 Cal.Rptr.2d 590 [following *Claffey*].) It evidently found its source in the notes of one of the commission's expert consultants, who drafted language that was virtually identical to what would subsequently be enacted, in order "to provide for step- and foster children in very limited situations, with the necessary safeguards incorporated by treating the case like an adoption, for which qualifications, exceptions, etc. are elsewhere worked out."

In 1984, the Legislature redesignated the pertinent part of Probate Code section 6408, subdivision (a)(2), quoted above, as subdivision (a)(3), with virtually no change in language and absolutely no change in substance. (Stats.1984, ch. 892, § 41.5, p. 3000.)

In 1985, the Legislature redesignated Probate Code section 6408, subdivision (a)(3), as subdivision (b), with some change in language, to cause the provision to stand alone without reference to the one dealing with the adoptive relationship, but with no change in substance. (Stats.1985, ch. 982, § 21, p. 3118.)

In 1990, the Legislature repealed the original Probate Code, as amended (Stats.1990, ch. 79, § 13, p. 463), and enacted a new one (Stats.1990, ch. 79, § 14, p. 463 et seq.), which remains in effect today. In so doing, it repealed former Probate Code section 6408, subdivision (b) (Stats.1990, ch. 79, § 13, p. 463), and enacted a new Probate Code section 6408, subdivision (e), which was identical thereto (Stats.1990, ch. 79, § 14, p. 722). (See Recommendation Proposing New Probate Code (Dec.1989) 20 Cal. Law Revision Com. Rep. (1990) pp. 1468-1471.)

In 1993, the Legislature repealed Probate Code section 6408, including subdivision (e) (Stats.1993, ch. 529, § 4), and added section 6454 (Stats.1993, ch. 529, § 5), which continues its substance in its present form (Annual Rep. for 1993 (1993) 23 Cal. Law Revision Com. Rep. (1993) p. 1006): "[T]he relationship of parent and child exists between [a] person and the person's foster parent or stepparent if"'(a) [t]he relationship began during the person's minority and continued throughout the joint lifetimes of the person and the person's foster parent or stepparent," and "(b) [i]t is established by clear and convincing evidence that the foster parent or stepparent would have adopted the person but for a legal barrier." (Stats.1993, ch. 529, § 5.)

After review, we believe-like the *Cleveland* court and unlike the *Stevenson* court-that Probate Code section 6454 should be read to require that the legal barrier or barriers to adoption of the foster child or stepchild by the foster parent or stepparent must have begun during the foster child or stepchild's minority, and must have continued throughout the joint lifetimes of the foster child or stepchild and the foster parent or stepparent, and that the provision should not be read to allow such barrier or barriers to have existed only at a time at which adoption was contemplated or attempted.

Our reading of Probate Code section 6454 is consistent with the words that it uses. It is easy to conclude that the provision's "legal barrier" requirement mandates that a legal barrier to adoption must have continued until death and also mandates, by implication, that an intent to adopt must have continued as well. If a legal barrier to adoption did not continue, it *could not* continue to be the

necessary cause of the failure to adopt: It could not operate when it was not effective. If a legal barrier to adoption did not continue *together with an intent to adopt,* it *did not* continue to be the necessary cause of the failure to adopt: It may not be said to have prevented what was not even undertaken. By contrast, it is hard to conclude that the provision's "legal barrier" requirement allows a legal barrier to adoption to have existed only at a time at which adoption was contemplated or attempted. If a barrier of this sort existed only at some such moment, perhaps ephemerally in the far distant past, it was not a necessary cause of the failure to adopt at any of the others. The "legal barrier" requirement is, "but for a legal barrier" to adoption, "the foster parent or stepparent would have adopted" the foster child or stepchild. (Prob.Code, § 6454, subd. (b).) It is *not,* "but for a legal barrier" to adoption *at a time at which adoption was contemplated or attempted,* "the foster parent or stepparent would have adopted" the foster child or stepchild *at that time.*

Our reading of Probate Code section 6454 also suits the purpose that underlies the code generally, that is, to pass the estate of an intestate decedent in accordance with the "intent" that he "is most likely to have had" at the time of death, and to do so in an "efficient and expeditious" manner. (Tent. Recommendation Relating to Wills and Intestate Succession, *supra,* 16 Cal. Law Revision Com. Rep. (1982) at p. 2319.)

Specifically, our reading of Probate Code section 6454 serves the passing of the estate of an intestate foster parent or stepparent in accordance with his likely intent at the time of death. It is easy to conclude that, had he made a will, the foster parent or stepparent would have desired to dispose of at least some of his property to his foster child or stepchild if a legal barrier to adoption had continued until death together with an intent to adopt. In such a case, the failure to adopt would not imply the nonexistence of a parent-child relationship: It would be coterminous with the inability to adopt because of law. There would then be a kind of parent-child relationship that would be tantamount to that of adoption: Not only would a legal barrier to adoption have continued until death, an intent to adopt would have continued as well. By contrast, it is hard to conclude that, had he made a will, the foster parent or stepparent would have desired to dispose of any of his property to his foster child or stepchild if a legal barrier to adoption had existed only at a time at which adoption was contemplated or attempted. In such a case, the failure to adopt at some such moment would not imply the existence of a parent-child relationship at any of the others: It would not be preceded or succeeded by the inability to adopt because of law. When that moment was years or even decades before death, it would signify that what might once have approached a parent-child relationship, to quote the *Cleveland* court, might well have suffered a "change in [its] nature or quality" in the interim. (*Estate of Cleveland, supra,* 17 Cal.App.4th at p. 1710, 22 Cal.Rptr.2d 590.) True, at death, the foster child or stepchild might been have a friend to the foster parent or stepparent. But a friend, as such, is not an heir. The result of all this may indeed be that a parent-child relationship will be deemed to exist only in exceptional circumstances. That, however, does not seem to be against the provision's design, but rather in conformity therewith.

Our reading of Probate Code section 6454 also serves the passing of the estate of an intestate foster parent or stepparent efficiently and expeditiously. To quote the *Cleveland* court again, it "injects a strong dose of certainty into" such matters. (*Estate of Cleveland, supra,* 17 Cal.App.4th at p. 1712, 22 Cal.Rptr.2d 590.) The provision's mandate that a legal barrier to adoption must have continued until death, together with an intent to adopt, eliminates, or at least reduces, marginal claims, whether genuine or sham, based on little more than an assertion that such a barrier existed only at a time at which adoption was contemplated or attempted. Otherwise, as the *Cleveland* court explained, there might be "claims by a stepchild or foster child if at any time during his minority the stepparent [or

foster parent] expressed a desire to adopt but was denied the consent of the natural parent. Any such child could claim an intestate share of the decedent's estate at his death-no matter how many years elapsed after the removal of the legal impediment. Operating from the stalest sort of evidence, the probate court must then determine whether, 'but for' that legal impediment the decedent would have adopted the [child] during his minority and must negate the existence of other reasons for decedent's abandonment of the adoption. In such cases, of course, the decedent is unavailable to rebut these claims asserted by persons with a direct financial interest. Often, the only corroborating testimony is from the nonconsenting [natural] parent who may also be financially interested in the outcome. Typically, there will be no other disinterested third parties to verify the decedent's intent, since the subject matter is commonly considered to be of a highly personal and private nature." (*Id.* at pp. 1710-1711, 22 Cal.Rptr.2d 590, fn. omitted.)

In adopting a reading of what would become Probate Code section 6454 that is different from ours, the *Stevenson* court gave three reasons. Let us consider each in turn.

The *Stevenson* court's first reason against a reading of Probate Code section 6454 like ours is that the foster parent and foster child or the stepparent and stepchild "may decide that" adoption "is not so important" "once" the foster child or stepchild "reaches adulthood." (*Estate of Stevenson, supra,* 11 Cal.App.4th at p. 866, 14 Cal.Rptr.2d 250.) Whether or not adoption is "important" simply has no bearing on what the provision itself requires. In any event, that adoption may not be "*so* important," as the *Cleveland* court explained, does not mean that it is not important at all: "Adoption implicates estate tax planning (e.g., credits or exemptions for property passed to 'family member'); construction of insurance policies (e.g., 'family member' exclusion); right to recover for wrongful death; right to sue or be sued for negligence; dependency matters ...; and custody/visitation issues (as with 'grandchildren' of the stepparent or foster parent)." (*Estate of Cleveland, supra,* 17 Cal.App.4th at p. 1712, 22 Cal.Rptr.2d 590.) Moreover, that adoption may not be "*so* important," as the *Cleveland* court also explained, "would weigh against the conclusion that" the foster parent or stepparent "considered" the foster child or stepchild "to be one of his ... 'children.' " (*Id.* at p. 1710, 22 Cal.Rptr.2d 590.)

The *Stevenson* court's second reason against a reading of Probate Code section 6454 like ours is that it would cut off "adult" foster children or stepchildren. (*Estate of Stevenson, supra,* 11 Cal.App.4th at p. 866, 14 Cal.Rptr.2d 250.) Its premises are that the provision's benefits are not limited to minors, and that legal barriers to the adoption of adults do not exist. That is not the case. Like the *Cleveland* court, we accept the former premise. There is no indication that the provision's benefits are limited to minors. (*See Estate of Cleveland, supra,* 17 Cal.App.4th at p. 1711, 22 Cal.Rptr.2d 590.) But also like the *Cleveland* court, we reject the latter premise. Legal barriers to the adoption of adults do indeed exist (see Fam.Code, §§ 9301, 9302, 9303, 9328)-and have existed since before the time of the original enactment of what would become the provision (*see* Civ.Code, former § 227p, as amended by Stats.1981, ch. 734, § 1, pp. 2888-2889). They include "failure to consent by the adopting person's spouse, the adoptee's spouse, or the adoptee," the limitation of "only one adult adoption of unrelated persons per year," and the requirement that an "adult adoption [ ] must be '[in] the best interests of the [persons seeking the adoption] and in the public interest....' " (*Estate of Cleveland, supra,* 17 Cal.App.4th at p. 1708, fn. 10, 22 Cal.Rptr.2d 590.)

The *Stevenson* court's third reason against a reading of Probate Code section 6454 like ours is that the provision's "continuing relationship" requirement "suggests" that the provision "was meant to apply even after" the foster child or stepchild "reached adulthood." (*Estate of Stevenson, supra,* 11

Cal.App.4th at p. 866, 14 Cal.Rptr.2d 250.) Any such suggestion, however, does not itself suggest that the provision was *not* meant to apply thereafter insofar as its "legal barrier" requirement is concerned.

In reading Probate Code section 6454 as we do, we do not overlook a recommendation by the Law Revision Commission, dated October 1997, relating to the provision.

In order to resolve the conflict between *Stevenson* and *Cleveland* in favor of *Stevenson,* the Law Revision Commission has proposed to the Legislature to amend Probate Code section 6454 to provide, in substance, that the legal barrier to adoption need only exist at a time at which adoption was contemplated or attempted. (Recommendation: Inheritance by Foster Child or Stepchild (Oct.1997) 27 Cal. Law Revision Com. Rep. (1997) p. x6 [preprint copy].) The commission asserts that such an amendment "should not lead to an increase of manufactured claims because of the requirements that the parent-child relationship must continue throughout their joint lifetimes, and that evidence of intent to adopt must be clear and convincing." (*Id.* at p. x7 [same].) With this point, for argument's sake only, we shall agree. The commission also asserts that a reading of the provision like ours would assertedly "preclude inheritance by virtually all adults from ... a foster parent or stepparent," and would thereby "frustrate the underlying purpose of the" provision "to carry out the likely intent of the intestate decedent." (*Id.* at p. x6 [same].) With this point, we cannot agree. To be sure, we give "substantial weight" to the commission's understanding of a provision it proposed, like the present one. (*Van Arsdale v. Hollinger* (1968) 68 Cal.2d 245, 249, 66 Cal.Rptr. 20, 437 P.2d 508.) But, as we have explained, the provision seems to have been designed to apply only in exceptional circumstances. Moreover, it is hard to conclude that, had he made a will, a foster parent or stepparent would have desired to dispose of any of his property to his foster child or stepchild if a legal barrier to adoption had existed only at a time, perhaps years or even decades before his death, at which adoption was contemplated or attempted, inasmuch as what might then have approached a parent-child relationship could well have suffered a "change in [its] nature or quality" in the interim. (*Estate of Cleveland, supra,* 17 Cal.App.4th at p. 1710, 22 Cal.Rptr.2d 590.)

Whether the Legislature chooses to amend Probate Code section 6454 along the lines of the Law Revision Commission's recommendation is, without question, a matter that belongs solely to that body. We do not pass on the wisdom of the provision as it may exist sometime in the future. We simply read it as it stands now.

III

Turning now to the case at bar-in which, as petitioner represents, the "material facts," as disclosed in the probate court's statement of decision, "are undisputed"-we believe that the Court of Appeal was sound in its reasoning and correct in its result when it affirmed the probate court's orders that determined that petitioner was not decedent's daughter or heir and, hence, was not entitled to distribution of his estate in any part, and that revoked her letters of administration of decedent's estate and removed her from office.

The Court of Appeal was right as to the probate court's implied conclusion that Probate Code section 6454 requires that the legal barrier or barriers to adoption of the foster child or stepchild by the foster parent or stepparent must have begun during the foster child or stepchild's minority, and must have continued throughout the joint lifetimes of the foster child or stepchild and the foster parent or stepparent. Such a conclusion is reviewed independently: It resolves a pure question of

law, viz., the meaning of the provision in question. (E.g., *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 271, 32 Cal.Rptr.2d 807, 878 P.2d 566.) It survives scrutiny. The analysis set out above establishes the point. Petitioner argues to the contrary. At bottom, she relies on *Stevenson.* But *Stevenson* has been found wanting. She also relies on the comment, quoted above, that one of the legal barriers to adoption exists "where ... a parent of the" "foster child or stepchild" "refuses to consent to the adoption." (Senate Committee on Judiciary Report, *supra,* Sen. J. (1983-1984 Reg. Sess.) p. 4882.) But that comment deals only with what such a barrier is, and not when it has to exist or how long it has to continue. In addition, she asserts that, in order to give the provision's "continuing relationship" and "legal barrier" requirements independent meaning, we should understand the former to be temporal but not causal and the latter to be causal but not temporal. We cannot do so. What is temporal need not be causal. But what is causal must be temporal: A cause exists only when it operates; it operates only when it is effective; it is effective only when it fills at least one moment in time. Even though we cannot understand the provision's requirements as urged, we can nevertheless give them independent meaning: The former assures that a relationship between the foster parent or stepparent and the foster child or stepchild lasted until death, and the latter assures that that relationship was tantamount to that of adoption.

The Court of Appeal was also right as to the probate court's express finding that petitioner failed to establish by clear and convincing evidence that decedent would have adopted her but for a legal barrier. Such a finding is reviewed for substantial evidence: It resolves a mixed question of law and fact that is nonetheless predominantly one of fact, inasmuch as it "requires application of experience with human affairs...." (*Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888, 264 Cal.Rptr. 139, 782 P.2d 278.) It survives scrutiny. Petitioner does not argue to the contrary. Under Probate Code section 6454, a legal barrier to adoption must have continued until death. But she admitted below that such a barrier did not perdure. She makes the same admission here.

Lastly, we observe that, to the extent that the purpose of Probate Code section 6454 is to pass the estate of an intestate decedent in accordance with the "intent" that he "is most likely to have had" at the time of death, and to do so in an "efficient and expeditious" manner (Tent. Recommendation Relating to Wills and Intestate Succession, *supra,* 16 Cal. Law Revision Com. Rep., *supra,* at p. 2319), it appears to be satisfied in this case. As the probate court stated, "it is not an insignificant fact that," in his old will, decedent "did not express any testamentary intent toward" petitioner "as a successor beneficiary should, as actually happened, his wife have predeceased him." This fact, of course, is not proof. But it is all there is. And it is not challenged.

IV

For the reasons stated above, we conclude that we must affirm the judgment of the Court of Appeal.

It is so ordered.

CHIN, Associate Justice, dissenting.

In this case, we must apply Probate Code section 6454, which provides in relevant part: "For the purpose of determining intestate succession by a person ... from or through a foster parent or stepparent, the relationship of parent and child exists between that person and the person's foster parent or stepparent if both of the following requirements are satisfied: (a) The relationship began

during the person's minority and continued throughout the joint lifetimes of the person and the person's foster parent or stepparent. (b) It is established by clear and convincing evidence that the foster parent or stepparent would have adopted the person but for a legal barrier."

The Courts of Appeal have disagreed as to the necessary duration of the "legal barrier" that the statute references. (§ 6454, subd. (b).) Construing section 6454's predecessor, the Sixth District held that the legal barrier had to exist only when adoption was attempted or contemplated. (*Estate of Stevenson* (1992) 11 Cal.App.4th 852, 865-866, 14 Cal.Rptr.2d 250 (*Stevenson*).) Construing the same statute, Division Five of the Second District expressly rejected *Stevenson* and held that the legal barrier must have existed throughout the lives of the child and the foster parent or stepparent. (*Estate of Cleveland* (1993) 17 Cal.App.4th 1700, 1709-1713, 22 Cal.Rptr.2d 590 (*Cleveland*).)

Essentially agreeing with *Cleveland,* the majority rewrites the statute so as to render it virtually inapplicable to adult foster children or stepchildren, who seldom (if ever) could demonstrate a lifetime legal barrier to adoption. This narrow construction is neither compelled by the words of the statute nor necessary to effectuate the Legislature's intent. On the contrary, *Stevenson*'s interpretation, which has the express endorsement of the commission that drafted the statute for the Legislature, is both more logical and more consistent with the available indicia of legislative intent. Moreover, the advantages that the majority claims for its construction are largely illusory. Accordingly, I cannot join in the majority's restrictive revision of section 6454.

Notes and Questions

1. What are the pros and cons of permitting stepchildren and foster children to inherit from stepparents and foster parents?

2. Should the Probate Court consider the relationship between the stepparent/foster parent and the stepchild/foster child? Should these children have to be adopted in order to obtain the right to inherit?

3. What, if any, restrictions should be place on the right of stepchildren/foster children to inherit under the intestacy system?

Chapter Six: Intestacy (Children of Assisted Reproductive Technology)

6.1 Introduction

The availability of assisted reproductive technology has changed the way families are being formed. It is now possible for a child to have at least six legal parents. Consider the following scenario. A and B would like to have a child, but they are both infertile. A and B purchase eggs from C and sperm from D. Then, they hire a surrogate E, a married woman, to gestate their embryos. A and B are the intended parents, so they are the legal parents. C and D are the biological parents. In some jurisdictions, as a gestational surrogate, E, is the legal parent. Since the child is conceived during the course of the marriage, E's husband may be presumed to be the legal father. The law has not kept paced with the changes that assisted reproductive technology has made to the determination of paternity and maternity.

In this chapter, we look at the inheritance rights of three classes of children that have resulted from the use of assisted reproductive technology. The first section examines the rights of child conceived using the sperm of dead men. These children are referred to as posthumously conceived children. In this section, we will focus upon the child's ability to inherit from his dead father because that has been the subject of most of the litigation. Since it is more difficult to retrieve eggs from a dead woman, there are no reported cases involving children conceived using the eggs of a dead women.[38] In addition, cases involving the eggs of a dead woman would implicate surrogacy laws, so the maternity issues that arise are discussed in the section of this chapter that deals with surrogacy.

The second section of this chapter looks at the ability of children conceived using artificial insemination to inherit from their fathers. Numerous types of reproductive technology are available to help infertile couples achieve their dreams of having children. One of the oldest and most common forms of assisted reproduction is artificial insemination. Couples widely use artificial insemination because it is the simplest form of assisted reproduction. The popularity of artificial insemination may also be attributed to the fact that it is affordable and can be safely done without the benefit of medical personnel. Artificial insemination involves sperm being placed into a woman's cervix without sexual intercourse. Thus, the procedure can be done at home using a turkey baster. The widespread use of artificial insemination may be the reason why most state legislatures that have enacted statutes dealing with assisted reproduction have focused exclusively on artificial insemination.

The final section of this chapter explores the inheritance rights of children who are born as the result of surrogacy agreements. There are two types of surrogacy—traditional and gestational. In a traditional surrogacy arrangement, in essence, the person is purchasing both the eggs and the services of the surrogate. The person who wishes to become a parent supplies the sperm and the surrogate does the rest. After the *Baby M* case, traditional surrogacy fell into disfavor.[39] The

[38] In 2012, an Israeli court gave the parents of a seventeen year old girl who was killed in a car accident the right to harvest her eggs. The parent planned to donate the eggs to the girl's infertile aunt.

[39] In *Baby M*, the court held that surrogacy was against public policy. When the surrogate refused to surrender the child, the court treated the matter like a custody dispute instead of a breach of contract case. The intended mother was not

jurisdictions that permit and regulate surrogacy have limited it to gestational surrogacy. Under a gestational surrogacy arrangement, the surrogate provides only the womb. The maternity dispute in those cases is between the intended mother and the surrogate.

6.2 Posthumously Conceived Children

Heirship is determined at the person's death. The person's death is when intestate property passes by intestacy to the deceased's heirs. Before the person dies, a potential heir has no property interest but merely an "expectancy" in the dead person's intestate estate. The cases discussed in this section involve the right of posthumously conceived children to inherit from their fathers. The resolution of this issue is important because the existence of posthumously conceived children has the potential to impact the distribution of a man's estate. If the man dies with a validly executed will leaving his estate to his children, the question becomes whether or not posthumously conceived children should be included in the definition of "children". In the event that a man dies without a will, the question to be resolved is whether or not posthumously conceived children should be considered heirs under the intestacy system. The legal issues relevant to the discussion are: (1) Whether the posthumously conceived child should be recognized as a survivor of his or her father under the state's intestacy system and (2) Whether the posthumously conceived child should be given the right to inherit through his or her father.

The issue of posthumous reproduction inheritance rights usually arises in two contexts. Context One: Facing a life threatening illness or situation, a man has his sperm stored for future use. After the man becomes sterile, dies or is killed, the woman uses his sperm to conceive his child. Context Two: A man dies or is killed without storing his sperm. Then, the woman has his sperm harvested from his body and uses it to conceive his child.[40] The result of either context is a child born years after the death of his or her father. Both scenarios mentioned above lead to the following two questions: (1) Whether the resulting child should have the opportunity to inherit from his or her father, and (2) Whether any conditions should be placed on the child's right to inherit from his or her father.

When reading the materials in this chapter, you should think about the interests to be protected. In deciding whether or not to give posthumously conceived children the right to inherit, the state must strive to protect: (1) the reproductive right of the deceased man; (2) the financial interests of the posthumously conceived child; (3) the financial interests of the deceased man's existing heirs; and (4) the integrity of the probate system.

---

given standing in the case. The court awarded custody of the case to the man who supplied the sperm after deciding that he would make the better parent.

[40] In 1997, Art Caplan, the Director for Bioethics at the University of Pennsylvania, and several colleagues conducted a study of fertility clinics to find out the number of clinics that had extracted sperm from a deceased man. The results of the study indicated that the practice of taking sperm from dead men has become more common. Gina Kolata, Uncertain Area for Doctors: Saving Sperm of Dead Men, The New York Times, www. nytimes.com (May 30, 1997). Media coverage like this one led to attempts by the government to regulate the process. For example, Roy Goodman, a Republican New York state senator, introduced a bill that would have regulated the extraction and preservation of the sperm of dead men. Under the bill's mandates, doctors could only remove sperm from dead men who had given written permission for the extraction prior to death. The bill was never enacted into law. *See* Ian Fisher, Bill Would Govern Use of Dead Men's Sperm, nytimes.com (March 7, 1998).

6.2.1 The Right to Inherit From Fathers

Persons involved in these cases usually have modest means and are not interested in inheriting from the dead men's estates. Litigation occurs when the women apply for and are denied Social Security Survivors' benefits. The Social Security Act does not include provisions dealing with posthumously conceived children, so, when determining a child's eligibility for benefits, the Agency relies upon the intestacy laws of the state where the man dies. If the child is not considered to be the man's heir under the intestacy system, he or she is not eligible for benefits under the Social Security Act.

Astrue v. Capato ex. Rel. B.N.C., 132 S. Ct. 2021 (2012)

GINSBURG, J., delivered the opinion for a unanimous Court.

Eighteen months after her husband, Robert Capato, died of cancer, respondent Karen Capato gave birth to twins conceived through in vitro fertilization using her husband's frozen sperm. Karen applied for Social Security Survivors benefits for the twins. The Social Security Administration (SSA) denied her application, and the District Court affirmed. In accord with the SSA's construction of the Social Security Act (Act), the court determined that the twins would qualify for benefits only if, as 42 U.S.C. §416(h)(2)(A) specifies, they could inherit from the deceased wage earner under state intestacy law. The court then found that Robert was domiciled in Florida at his death, and that under Florida law, posthumously conceived children do not qualify for inheritance through intestate succession. The Third Circuit reversed. It concluded that, under. §416(e), which defines child to mean, *inter alia,* "the child or legally adopted child of an [insured] individual," the undisputed biological children of an insured and his widow qualify for survivors benefits without regard to state intestacy law.

Held: The SSA's reading is better attuned to the statute's text and its design to benefit primarily those supported by the deceased wage earner in his or her lifetime. Moreover, even if the SSA's longstanding interpretation is not the only reasonable one, it is at least a permissible construction entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694. Pp. 2027 – 2034.

(a) Congress amended the Act in 1939 to provide that, as relevant here, "[e]very child (as defined in section 416(e) of this title)" of a deceased insured individual "shall be entitled to a child's insurance benefit." §412(d). Section 416(e), in turn, defines "child" to mean: "(1) the child or legally adopted child of an individual, (2) a stepchild [under certain circumstances], and (3) ... the grandchild or step grandchild of an individual or his spouse [under certain conditions]." Unlike § 416(e)(2) and (3), § 416(e)(1) lacks any elaboration of the conditions under which a child qualifies for benefits. Section 416(h)(2)(A), however, further addresses the term "child," providing: "In determining whether an applicant is the child or parent of [an] insured individual for purposes of this subchapter, the Commissioner of Social Security shall apply [the intestacy law of the insured individual's domiciliary State]." An applicant who does not meet § 416(h)(2)(A)'s intestacy-law criterion may nonetheless qualify for benefits under other criteria set forth in §416(h)(2)(B) and (h)(3), but respondent does not claim eligibility under those other criteria. Regulations promulgated by the SSA closely track. § 416(h)(2) and (3) in defining "[w]ho is the insured's natural child," 20 CFR § 404.355. 42 U.S.C. § 416(e) As the SSA reads the statute, 42 U.S.C. § 416(h) governs the meaning of "child" in § 416(e)(1)

and serves as a gateway through which all applicants for insurance benefits as a "child" must pass. Pp. 2027 – 2029. 841757941

(b) While the SSA regards §416(h) as completing §416(e)'s sparse definition of "child," the Third Circuit held, and respondent contends, that §416(e) alone governs whenever the claimant is a married couple's biological child. There are conspicuous flaws in the Third Circuit's and respondent's reading; the SSA offers the more persuasive interpretation. Pp. 2028 – 2033.

(1) Nothing in §416(e)'s tautological definition suggests that Congress understood the word "child" to refer only to the children of married parents. The dictionary definitions offered by respondent are not so confined. Moreover, elsewhere in the Act, Congress expressly limited the category of children covered to offspring of a marital union, see §402 (d)(3)(A), and contemporaneous statutes similarly distinguish child of a marriage from the unmodified term "child." Nor does §416(e) indicate that Congress intended "biological" parentage to be prerequisite to "child" status. A biological parent is not always a child's parent under law. Furthermore, marriage does not necessarily make a child's parentage certain, nor does the absence of marriage necessarily make a child's parentage uncertain. Finally, it is far from obvious that respondent's proposed definition would cover her posthumously conceived twins, for under Florida law a marriage ends upon the death of a spouse. Pp. 2029 – 2031.

(2) The SSA finds a key textual cue in § 416(h)(2)(A)'s opening instruction: "In determining whether an applicant is the child ... of [an] insured individual for purposes of this subchapter," the Commissioner shall apply state intestacy law. Respondent notes the absence of any cross-reference in § 416(e) to § 416(h), but she overlooks that § 416(h) provides the crucial link: It requires reference to state intestacy law to determine child status not just for § 416(h) purposes, but "for purposes of this subchapter," which includes both §§ 402(d) and 416(e). Having explicitly complemented § 416(e) by the definitional provisions contained in § 416(h), Congress had no need to place a redundant cross-reference in § 416(e).

The Act commonly refers to state law on matters of family status, including an applicant's status as a wife, widow, husband, or widower. *See*, *e.g.,* § 416(h)(1)(A). The Act also sets duration-of-relationship limitations, *see Weinberger v. Salfi*, 422 U.S. 749, 777-782, 95 S.Ct. 2457, 45 L.Ed.2d 522, and time limits qualify the statutes of several States that accord inheritance rights to posthumously conceived children. In contrast, no time constraint attends the Third Circuit's ruling in this case, under which the biological child of married parents is eligible for survivors benefits, no matter the length of time between the father's death and the child's conception and birth.

Because a child who may take from a father's estate is more likely to "be dependent during the parent's life and at his death," *Matthews v. Lucas*, 427 I.S. 495, 514 96 S.Ct. 2755, 49 L.Ed.2d 651, reliance on state intestacy law to determine who is a "child" serves the Act's driving objective, which is to "provide ... dependent members of [a wage earner's] family with protection against the hardship occasioned by [the] loss of [the insured's] earnings," *Califano v. Jobst*, 434 U.S. 47, 52, 98 S.Ct. 95, 54 L.Ed.2d 228. Although the Act and regulations set different eligibility requirements for adopted children, stepchildren, grandchildren, and step grandchildren, it hardly follows, as respondent argues, that applicants in those categories are treated more advantageously than are children who must meet a §416(h) criterion. Respondent charges that the SSA's construction of the Act raises serious constitutional concerns under the equal protection component of the Due Process Clause. But under rational-basis review, the appropriate standard here, the regime passed by Congress easily passes inspection. Pp. 2030 – 2033.

(c) Because the SSA's interpretation of the relevant provisions, is at least reasonable, the agency's reading is entitled to this Court's deference under *Chevron*, 467 U.S. 837, 104 104 S.Ct. 2778, 81 L.Ed.2d 694. *Chevron* deference is appropriate "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-227, 121 S.Ct. 2164, 150 L.Ed.2d 292. Here, the SSA's longstanding interpretation, set forth in regulations published after notice-and-comment rulemaking, is neither "arbitrary or capricious in substance, [n]or manifestly contrary to the statute." *Mayo Foundation for Medical Ed. and Research v. United States*, 562 U.S.-----, ------, 131 S.Ct. 704, 711, 178 L.Ed.2d 588. It therefore warrants the Court's approbation. Pp. 2033 – 2034.

631 F.2d 626, reversed and remanded.

Woodward*[41] *v. Commissioner of Social Sec., 760 N.E.2d 257 (Mass. 2002)

MARSHALL, C.J.

The United States District Court for the District of Massachusetts has certified the following question to this court. *See* S.J.C. Rule 1:03, *as appearing in* 382 Mass. 700 (1981).

"If a married man and woman arrange for sperm to be withdrawn from the husband for the purpose of artificially impregnating the wife, and the woman is impregnated with that sperm after the man, her husband, has died, will children resulting from such pregnancy enjoy the inheritance rights of natural children under Massachusetts' law of intestate succession?"

We answer the certified question as follows: In certain limited circumstances, a child[42] resulting from posthumous reproduction may enjoy the inheritance rights of "issue" under the Massachusetts intestacy statute. These limited circumstances exist where, as a threshold matter, the surviving parent or the child's other legal representative demonstrates a genetic relationship between the child and the decedent. The survivor or representative must then establish both that the decedent affirmatively consented to posthumous conception and to the support of any resulting child. Even where such circumstances exist, time limitations may preclude commencing a claim for succession rights on behalf of a posthumously conceived child. Because the government has conceded that the timeliness of the wife's paternity action under our intestacy law is irrelevant to her Federal appeal, we do not address that question today.

The United States District Court judge has not asked us to determine whether the circumstances giving rise to succession rights for posthumously conceived children apply here. In addition, she has

[41] Lauren Woodward (wife), on her own behalf as parent and guardian and on behalf of her minor children, and as administratrix of the estate of Warren Woodward (husband).

[42] The term "natural child" (or "natural children") does not occur in any applicable Massachusetts statute. It is a term drawn from Federal legislation. *See, e.g.*, 42 U.S.C. § 416(e) (1994) and 20 C.F.R. § 404.355 (2001) (defining the term "natural child"). Our inquiry is directed solely to the language of the applicable Massachusetts statutes.

removed from our consideration the question whether the paternity judgment obtained by the wife in this case was valid. *See* note 6, *infra.* We answer only the certified question. *See Canal Elec. Co. v. Westinghouse Elec. Corp.*, 406 Mass. 369, 370 n. 1, 548 N.E.2d 182 (1990); *Cabot Corp. v. Baddour*, 394 Mass. 720, 721, 477 N.E.2d 399 (1985).

I

The undisputed facts and relevant procedural history are as follows. In January, 1993, about three and one-half years after they were married, Lauren Woodward and Warren Woodward were informed that the husband had leukemia. At the time, the couple was childless. Advised that the husband's leukemia treatment might leave him sterile, the Woodwards arranged for a quantity of the husband's semen to be medically withdrawn and preserved, in a process commonly known as "sperm banking." The husband then underwent a bone marrow transplant. The treatment was not successful. The husband died in October, 1993, and the wife was appointed administratrix of his estate.

In October, 1995, the wife gave birth to twin girls. The children were conceived through artificial insemination using the husband's preserved semen. In January, 1996, the wife applied for two forms of Social Security survivor benefits: "child's" benefits under 42 U.S.C. § 402(d)(1) (1994 & Supp. V 1999), and "mother's" benefits under 42 U.S.C. § 402(g)(1) (1994).[43]

The Social Security Administration (SSA) rejected the wife's claims on the ground that she had not established that the twins were the husband's "children" within the meaning of the Act.[44] In February, 1996, as she pursued a series of appeals from the SSA decision, the wife filed a "complaint for correction of birth record" in the Probate and Family Court against the clerk of the city of Beverly, seeking to add her deceased husband as the "father" on the twins' birth certificates. In October, 1996, a judge in the Probate and Family Court entered a judgment of paternity and an order to amend both birth certificates declaring the deceased husband to be the children's father. In his judgment of paternity, the Probate Court judge did not make findings of fact, other than to state that he "accepts the [s]tipulations of [v]oluntary [a]cknowledgment of [p]arentage of [the children] ... executed by [the wife] as [m]other, and [the wife], [a]dministratrix of the [e]state of [the husband], for father." *See* G.L. c. 209C, § 11.[45]

---

[43] At the time of his death, the husband was a fully insured individual under the United States Social Security Act (Act). Section 402(d)(1) of 42 U.S.C. provides "child's" benefits to dependent children of deceased parents who die fully insured under the Act. *See* 42 U.S.C. § 402(d)(1); 20 C.F.R. § 404.350. Section 402(g)(1) of 42 U.S.C. provides "mother's" benefits to the widow of an individual who died fully insured under the Act, if, inter alia, she has care of a child or children entitled to child's benefits. *See* 42 U.S.C. § 402(g)(1); 20 C.F.R. § 404.339 (2001). Thus, the wife's eligibility for Social Security survivor benefits hinges on her children's eligibility for such benefits.

[44] The Act defines children, in pertinent part, as the "child or legally adopted child of an individual." *See* 42 U.S.C. § 416(e). The term "child" includes "natural child." *See* 20 C.F.R. § 404.355. The Act also establishes presumptions of dependency for certain classes of children, as well as other mechanisms for establishing dependency. As stated in the certification order, the wife's "appeal centers on only one possible basis for eligibility, which is that under SSA regulations the children are eligible if they would be treated as [the husband's] natural children for the disposition of his personal property under the Massachusetts law of intestate succession. *See* 42 U.S.C. §§ 402(d)(3) and 416(h)(2)(A); 20 C.F.R. § 404.355(a)(1); 20 C.F.R. § 404.361(a)."

[45] The voluntary acknowledgments of parentage are not part of the certification record before us.

The wife presented the judgment of paternity and the amended birth certificates to the SSA, but the agency remained unpersuaded. A United States administrative law judge, hearing the wife's claims de novo, concluded, among other things, that the children did not qualify for benefits because they "are not entitled to inherit from [the husband] under the Massachusetts intestacy and paternity laws."[46] The appeals council of the SSA affirmed the administrative law judge's decision, which thus became the commissioner's final decision for purposes of judicial review. The wife appealed to the United States District Court for the District of Massachusetts, seeking a declaratory judgment to reverse the commissioner's ruling.

The United States District Court judge certified the above question to this court because "[t]he parties agree that a determination of these children's rights under the law of Massachusetts is dispositive of the case and ... no directly applicable Massachusetts precedent exists."

II

A

We have been asked to determine the inheritance rights under Massachusetts law of children conceived from the gametes[47] of a deceased individual and his or her surviving spouse.[48] We have not previously been asked to consider whether our intestacy statute accords inheritance rights to posthumously conceived genetic children. Nor has any American court of last resort considered, in a published opinion, the question of posthumously conceived genetic children's inheritance rights

[46] The administrative law judge reasoned that the children were not "ascertainable heirs as defined by the intestacy laws of Massachusetts," because they were neither born nor in utero at the date of the husband's death and "the statutes and cases contemplated an ascertainable child, one who had been conceived prior to the father's death." He also found that the children could not inherit as the husband's children under Massachusetts intestacy law because the evidence failed to establish that the husband, before his death, either acknowledged the children as his own or intended to contribute to their support. *See* G.L. c. 190, § 7. Further, the administrative law judge held that the SSA was not bound by the judgment of paternity because that judgment "is not only inconsistent with Massachusetts paternity laws but also constitutes a proceeding to which the [SSA] was not a party." *See* Soc. Sec. Rul. 83-37c; *Gray v. Richardson,* 474 F.2d 1370 (6th Cir.1973). In her certification order, the United State District Court judge affirmed that, as a matter of Federal law, the administrative law judge "was not compelled to give dispositive weight to the Probate Court judgment." She did not ask us to determine whether the paternity judgment is "inconsistent with Massachusetts paternity laws," as the administrative law judge concluded.

[47] We use the term "gamete" here to denote "[a]ny germ cell, whether ovum or spermatozoon." Stedman's Medical Dictionary 701 (26th ed.1995).

[48] Although the certified question asks us to consider an unsettled question of law concerning the paternity of children conceived from a deceased male's gametes, we see no principled reason that our conclusions should not apply equally to children posthumously conceived from a deceased female's gametes.

under other States' intestacy laws.[49]

This case presents a narrow set of circumstances, yet the issues it raises are far reaching. Because the law regarding the rights of posthumously conceived children is unsettled, the certified question is understandably broad. Moreover, the parties have articulated extreme positions. The wife's principal argument is that, by virtue of their genetic connection with the decedent, posthumously conceived children must always be permitted to enjoy the inheritance rights of the deceased parent's children under our law of intestate succession. The government's principal argument is that, because posthumously conceived children are not "in being" as of the date of the parent's death, they are always barred from enjoying such inheritance rights.

Neither party's position is tenable. In this developing and relatively uncharted area of human relations, bright-line rules are not favored unless the applicable statute requires them. The Massachusetts intestacy statute does not. Neither the statute's "posthumous children" provision, see G.L. c. 190, § 8, nor any other provision of our intestacy law limits the class of posthumous children to those in utero at the time of the decedent's death. Cf. La. Civ. Code Ann. art. 939 (West 2000) ("A successor must exist at the death of the decedent").[50] On the other hand, with the act of procreation now separated from coitus, posthumous reproduction can occur under a variety of conditions that may conflict with the purposes of the intestacy law and implicate other firmly established State and individual interests. We look to our intestacy law to resolve these tensions.

B

We begin our analysis with an overview of Massachusetts intestacy law. In our Commonwealth, the devolution of real and personal property in intestacy is neither a natural nor a constitutional right. It is a privilege conferred by statute. *Merchants Nat'l Bank v. Merchants Nat'l Bank*, 318 Mass. 563, 573, 62 N.E.2d 831 (1945). Our intestacy statute "excludes all rules of law which might otherwise be operative. It impliedly repealed all preexisting statutes and supersedes the common law." *Cassidy v. Truscott,* 287 Mass. 515, 521, 192 N.E. 164 (1934).

---

[49] We are aware of only two cases that have addressed, in varying degrees, the question before us. In *Hecht v. Superior Court*, 16 Cal.App.4th 836, 20 Cal.Rptr.2d 275 (1993), the California Court of Appeal considered, among other things, whether a decedent's sperm was "property" that could be bequeathed to his girlfriend. *Id.* at 847, 20 Cal.Rptr.2d 275. In answering in the affirmative, the court noted, in dicta and without elaboration, that, under the provisions of California's Probate Code, "it is unlikely that the estate would be subject to claims with respect to any such children" resulting from insemination of the girl friend with the decedent's sperm. *Id.* at 859, 20 Cal.Rptr.2d 275. *In Matter of Estate of Kolacy,* 332 N.J.Super. 593, 753 A.2d 1257 (2000), the plaintiff brought a declaratory judgment action to have her children, who were conceived after the death of her husband, declared the intestate heirs of her deceased husband in order to pursue the children's claims for survivor benefits with the Social Security Administration. A New Jersey Superior Court judge held that, in circumstances where the decedent left no estate and an adjudication of parentage did not unfairly intrude on the rights of others or cause "serious problems" with the orderly administration of estates, the children would be entitled to inherit under the State's intestacy law. *Id.* at 602, 753 A.2d 1257.

[50] The cases relied on by the administrative law judge do no more than affirm the general common-law rule that heirs are fixed as of the date of death, see National Shawmut Bank v. Joy, 315 Mass. 457, 467, 53 N.E.2d 113 (1944); *Gorey v. Guarente*, 303 Mass. 569, 576-577, 22 N.E.2d 99 (1939), and that children born after death within the probable period of gestation may inherit as issue of the deceased parent in exception to the general rule. *See Bowen v. Hoxie,* 137 Mass. 527, 528-529, 1884 WL 10644 (1884). *See also Waverley Trust Co.*, petitioner, 268 Mass. 181, 183, 167 N.E. 274 (1929). Our intestacy statute supersedes any Massachusetts common law in this area. See note 16, and accompanying text, *infra.*

Section 1 of the intestacy statute directs that, if a decedent "leaves issue," such "issue" will inherit a fixed portion of his real and personal property, subject to debts and expenses, the rights of the surviving spouse, and other statutory payments not relevant here. *See* G.L. c. 190, §1[51] To answer the certified question, then, we must first determine whether the twins are the "issue" of the husband.

The intestacy statute does not define "issue." However, in the context of intestacy the term "issue" means all lineal (genetic) descendants, and now includes both marital and nonmarital[52] descendants. *See generally* S.M. Dunphy, Probate Law and Practice § 8.5, at 123 (2d ed. 1997 & Supp.2001), and cases cited.[53] *See also* G.L. c. 4, § 7, Sixteenth ("Issue, as applied to the descent of estates, shall include all the lawful lineal descendants of the ancestor"); *Powers v. Wilkinson*, 399 Mass. 650, 662, 506 N.E.2d 842 (1987) The term " '[d]escendants' ... has long been held to mean persons 'who by consanguinity trace their lineage to the designated ancestor.' " *Lockwood v. Adamson*, 409 Mass. 325, 329, 566 N.E.2d 96 (1991), *quoting Evarts v. Davis,* 348 Mass. 487, 489, 204 N.E.2d 454 (1965).

The Massachusetts intestacy statute thus does not contain an express, affirmative requirement that posthumous children must "be in existence" as of the date of the decedent's death. The Legislature could surely have enacted such a provision had it desired to do so. *Cf.* La. Civ.Code Ann. art. 939 (effective July 1, 1999) (West 2000) ("A successor must exist at the death of the decedent"). *See also* N.D. Cent.Code Ann. 14-18-04 (Michie 1997) ("A person who dies before a conception using that person's sperm or egg is not a parent of any resulting child born of the conception"). We must therefore determine whether, under our intestacy law, there is any reason that children conceived after the decedent's death who are the decedent's direct genetic descendants-that is, children who "by consanguinity trace their lineage to the designated ancestor"-may not enjoy the same succession rights as children conceived before the decedent's death who are the decedent's direct genetic descendants. *Lockwood v. Adamson, supra.*

To answer that question we consider whether and to what extent such children may take as intestate heirs of the deceased genetic parent consistent with the purposes of the intestacy law, and not by any assumptions of the common law. *See Cassidy v. Truscott, supra* at 520-521, 192 N.E. 164. In the absence of express legislative directives, we construe the Legislature's purposes from statutory indicia and judicial decisions in a manner that advances the purposes of the intestacy law. *Houghton v. Dickinson*, 196 Mass. 389, 391, 82 N.E. 481 (1907).

---

[51] General Laws c. 190, § 2, provides that the intestate personal property of the deceased shall be divided "among the persons and in the proportions ... prescribed for the descent of real property," subject to the limitations discussed above. General Laws c. 190, § 3, governs the distribution of real property to the decedent's "children" and their "issue," who are preferred takers over other nonspousal heirs.

[52] When not quoting directly from other sources employing different terminology, we shall use the term "nonmarital child" throughout this opinion to describe a child born to parents who are not legally married to each other. The term "nonmarital child" is less fraught with negative implications than is the traditional language of "illegitimacy" or "bastardy." As such, the term "nonmarital child" is more closely aligned with the Legislature's commitment to eradicate distinctions between the rights of children based on the circumstances of birth.

[53] Although by statute and case law adopted children are also included in the term "issue," our discussion is limited to consanguineous descendants. In certain express and very limited circumstances, the Legislature has cut off inheritance rights of biological children, but only for the purpose of grafting the children into a new family with parents from whom they can inherit in intestacy or by will. *See* G.L. c. 46, § 4B (child born as result of artificial insemination of wife with husband's consent is legitimate child of marriage); G.L. c. 210, § 7 (inheritance rights of adopted child).

The question whether posthumously conceived genetic children may enjoy inheritance rights under the intestacy statute implicates three powerful State interests: the best interests of children, the State's interest in the orderly administration of estates, and the reproductive rights of the genetic parent. Our task is to balance and harmonize these interests to effect the Legislature's over-all purposes.

1. First and foremost we consider the overriding legislative concern to promote the best interests of children. "The protection of minor children, most especially those who may be stigmatized by their 'illegitimate' status ... has been a hallmark of legislative action and of the jurisprudence of this court." *L.W.K. v. E.R.C.*, 432 Mass. 438, 447-448, 735 N.E.2d 359 (2000). Repeatedly, forcefully, and unequivocally, the Legislature has expressed its will that all children be "entitled to the same rights and protections of the law" regardless of the accidents of their birth. G.L. c. 209C, § 1. *See* G.L. c. 119, § 1 ("It is hereby declared to be the policy of the commonwealth to direct its efforts, first, to the strengthening and encouragement of family life for the protection and care of children ..."). Among the many rights and protections vouchsafed to all children are rights to financial support from their parents and their parents' estates. *See* G.L. c. 119A, § 1 ("It is the public policy of this commonwealth that dependent children shall be maintained, as completely as possible, from the resources of their parents, thereby relieving or avoiding, at least in part, the burden borne by the citizens of the commonwealth"); G.L. c. 191, § 20 (establishing inheritance rights for pretermitted children); G.L. c. 196, §§ 1-3 (permitting allowances from estate to widows and minor children); G.L. c. 209C, § 14 (permitting paternity claims to be commenced prior to birth). *See also* G.L. c. 190, §§ 1-3, 5, 7-8 (intestacy rights).[54]

We also consider that some of the assistive reproductive technologies that make posthumous reproduction possible have been widely known and practiced for several decades. *See generally* Banks, *Traditional Concepts and Nontraditional Conceptions: Social Security Survivor's Benefits for Posthumously Conceived Children*, 32 Loy. L.A. L.Rev. 251, 267-273 (1999). In that time, the Legislature has not acted to narrow the broad statutory class of posthumous children to restrict posthumously conceived children from taking in intestacy. Moreover, the Legislature has in great measure affirmatively supported the assistive reproductive technologies that are the only means by which these children can come into being. *See* G.L. c. 46, § 4B (artificial insemination of married woman). *See also* G.L. c. 175, § 47H; G.L. c. 176A, § 8K; G.L. c. 176B, § 4J; G.L. c. 176G, § 4 (insurance coverage for infertility treatments). We do not impute to the Legislature the inherently irrational conclusion that assistive reproductive technologies are to be encouraged while a class of children who are the fruit of that technology are to have fewer rights and protections than other children.

In short, we cannot, absent express legislative directive, accept the commissioner's position that the historical context of G.L. c. 190, § 8, dictates as a matter of law that all posthumously conceived children are automatically barred from taking under their deceased donor parent's intestate estate. We have consistently construed statutes to effectuate the Legislature's overriding purpose to promote the welfare of all children, notwithstanding restrictive common-law rules to the contrary.

---

[54] The provisions of the intestacy statute regarding paternity have been regularly amended to broaden the class of nonmarital children eligible to succeed from their father's intestate estate. *See Houghton v. Dickinson*, 196 Mass. 389, 390-391, 82 N.E. 481 (1907). *See also* St.1943, c. 72, § 1 (establishing succession rights for nonmarital child whose father's paternity has been successfully adjudicated); St.1980, c. 396 (establishing succession rights for nonmarital child whose father has acknowledged paternity).

See, e.g., L.W.K. v. E.R.C., supra at 447, 735 N.E.2d 359; *Adoption of Tammy*, 416 Mass. 205, 210, 619 N.E.2d 315 (1993); *Powers v. Wilkinson*, 399 Mass. 650, 661-662, 506 N.E.2d 842 (1987); *Powers v. Steele*, 394 Mass. 306, 310, 475 N.E.2d 395 (1985); *Hall v. Hancock*, 32 Mass. 255, 15 Pick. 255 (1834).[55] Posthumously conceived children may not come into the world the way the majority of children do. But they are children nonetheless. We may assume that the Legislature intended that such children be "entitled," in so far as possible, "to the same rights and protections of the law" as children conceived before death. *See* G.L. c. 209C, § 1.

2. However, in the context of our intestacy laws, the best interests of the posthumously conceived child, while of great importance, are not in themselves conclusive. They must be balanced against other important State interests, not the least of which is the protection of children who are alive or conceived before the intestate parent's death. In an era in which serial marriages, serial families, and blended families are not uncommon, according succession rights under our intestacy laws to posthumously conceived children may, in a given case, have the potential to pit child against child and family against family. Any inheritance rights of posthumously conceived children will reduce the intestate share available to children born prior to the decedent's death. *See* G.L. c. 190, § 3(1). Such considerations, among others, lead us to examine a second important legislative purpose: to provide certainty to heirs and creditors by effecting the orderly, prompt, and accurate administration of intestate estates. *See generally* S.M. Dunphy, Probate Law and Practice § 8.1, at 115 (2d ed.1997).

The intestacy statute furthers the Legislature's administrative goals in two principal ways: (1) by requiring certainty of filiation between the decedent and his issue, and (2) by establishing limitations periods for the commencement of claims against the intestate estate. In answering the certified question, we must consider each of these requirements of the intestacy statute in turn.

First, as we have discussed, our intestacy law mandates that, absent the father's acknowledgment of paternity or marriage to the mother, a nonmarital child must obtain a judicial determination of paternity as a prerequisite to succeeding to a portion of the father's intestate estate. Both the United States Supreme Court and this court have long recognized that the State's strong interest in preventing fraudulent claims justifies certain disparate classifications among nonmarital children based on the relative difficulty of accurately determining a child's direct lineal ancestor. *See Lowell v. Kowalski,* 380 Mass. 663, 668-669, 405 N.E.2d 135 (1980). *See also Trimble v. Gordon,* 430 U.S. 762, 771, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977).

Because death ends a marriage, *see Callow v. Thomas,* 322 Mass. 550, 555, 78 N.E.2d 637 (1948); *Rawson v. Rawson*, 156 Mass. 578, 580, 31 N.E. 653 (1892), posthumously conceived children are always nonmarital children. And because the parentage of such children can be neither acknowledged nor adjudicated prior to the decedent's death, it follows that, under the intestacy statute, posthumously conceived children must obtain a judgment of paternity as a necessary prerequisite to enjoying inheritance rights in the estate of the deceased genetic father.[56] Although

[55] The common-law rule that heirs are ascertained at the time of the decedent's death has been superseded and, in any event, has never been applied with rigid inflexibility, even outside of the context of posthumously born children. *See, e.g., Waverley Trust Co.*, petitioner, 268 Mass. 181, 183-184, 167 N.E. 274 (1929) ("It is not an inflexible rule that under no circumstances can the heirs of a person be ascertained as of a date later than that of death").

[56] It is equally clear that the intestacy statute requires an adjudication of parentage regardless of whether the deceased genetic parent was male or female. The presumption of consanguinity between the nonmarital child and his or her mother expressed in G.L. c. 190, § 5, is plainly inapplicable to the circumstances of posthumous reproduction. *Cf.* G.L.

modern reproductive technologies will increase the possibility of disputed paternity claims,[57] sophisticated modern testing techniques now make the determination of genetic paternity accurate and reliable. *See generally* Note, *Implications of DNA Technology on Posthumous Paternity Determination: Deciding the Facts When Daddy Can't Give His Opinion*, 35 B.C. L.Rev. 747 (1994). See also G.L. c. 209C, § 17.

We now turn to the second way in which the Legislature has met its administrative goals: the establishment of a limitations period for bringing paternity claims against the intestate estate. Our discussion of this important goal, however, is necessarily circumscribed by the procedural posture of this case and by the terms of the certified question. The commissioner concedes that the timeliness of the wife's Massachusetts paternity actions is not relevant to the Federal law question whether the wife's children will be considered the husband's "natural children" for Social Security benefits purposes, and that therefore whatever we say on this issue has no bearing on the wife's Federal action. We also note that the certified question does not specifically address the limitations matter and that, in their briefs to this court, the parties referred to the limitations question only peripherally. *See also* note 6, *supra.*

Nevertheless, the limitations question is inextricably tied to consideration of the intestacy statute's administrative goals. In the case of posthumously conceived children, the application of the one-year limitations period of G.L. c. 190, § 7 is not clear; it may pose significant burdens on the surviving parent, and consequently on the child.[58] [59] It requires, in effect, that the survivor make a decision to bear children while in the freshness of grieving. It also requires that attempts at conception succeed quickly. *Cf. Commentary*, *Modern Reproductive Technologies: Legal Issues Concerning Cryopreservation and Posthumous Conception*, 17 J. Legal Med. 547, 549 (1996) ("It takes an average of seven insemination attempts over 4.4 menstrual cycles to establish pregnancy"). Because the resolution of the time constraints question is not required here, it must await the appropriate case, should one arise.

3. Finally, the question certified to us implicates a third important State interest: to honor the reproductive choices of individuals. We need not address the wife's argument that her reproductive rights would be infringed by denying succession rights to her children under our intestacy law. Nothing in the record even remotely suggests that she was prevented by the State from choosing to conceive children using her deceased husband's semen. The husband's reproductive rights are a

---

c. 209C, § 21 (applying provisions of paternity statute "[i]nsofar as practicable" to disputes regarding maternity). *See also* G.L. c. 190, § 7 (referring to c. 209C).

[57] It is now possible for a child to be born by means of reproductive technologies in circumstances in which several people could claim or be claimed to be the child's legal parents: an egg donor, a sperm donor, a gestational carrier, and one or two people who are not biologically related to the child but who have arranged for the contributions of the others and who intend to raise the child. *See Shapo, Matters of Life and Death: Inheritance Consequences of Reproductive Technologies,* 25 Hofstra L.Rev. 1091, 1102 (1997)

[58] The paternity statute permits paternity actions to be commenced prior to a child's birth, *see* G.L. c. 209C, § 14. Thus, a Probate Court judge, in the exercise of general equity jurisdiction under G.L. c. 215, § 6, may consider a claim to establish paternity of a posthumously conceived child where such action is commenced during a pregnancy resulting from the joining of the gametes of the surviving spouse and the deceased spouse within the time period prescribed by G.L. c. 190, § 7.

[59] We reject the wife's argument that a posthumously conceived child may be considered a "creditor" whose claim has not yet "accrued" within the meaning of G.L. c. 197, § 13, until after the child's birth. Section 13 permits a creditor "whose right of action shall not accrue within one year after the date of death of the deceased" to present his or her claims "at any time before the estate is fully administered." *See Flannery v. Flannery*, 429 Mass. 55, 705 N.E.2d 1140 (1999). Those who take by intestate succession are not "creditors." Rather, they are the heirs who receive what remains of the estate after all creditors have been paid.

more complicated matter.

In *A.Z. v. B.Z.*, 431 Mass. 150, 725 N.E.2d 1051 (2000), we considered certain issues surrounding the disposition of frozen preembryos. A woman sought to enforce written agreements between herself and her former husband. The wife argued that these agreements permitted her to implant frozen preembryos created with the couple's gametes during the marriage, even in the event of their divorce. We declined to enforce the agreements. Persuasive to us, among other factors, was the lack of credible evidence of the husband's "true intention" regarding the disposition of the frozen preembryos, and the changed family circumstance resulting from the couple's divorce. *See id.* at 158-159, 725 N.E.2d 1051. Recognizing that our laws strongly affirm the value of bodily and reproductive integrity, we held that "forced procreation is not an area amenable to judicial enforcement." *Id.* at 160, 725 N.E.2d 1051. In short, *A.Z. v. B.Z., supra*, recognized that individuals have a protected right to control the use of their gametes.

Consonant with the principles identified in *A.Z. v. B.Z., supra*, a decedent's silence, or his equivocal indications of a desire to parent posthumously, "ought not to be construed as consent." *See* Schiff, *Arising from the Dead: Challenges of Posthumous Procreation,* 75 N.C. L.Rev. 901, 951 (1997).[60] The prospective donor parent must clearly and unequivocally consent not only to posthumous reproduction but also to the support of any resulting child. *Cf. Paternity of Cheryl,* 434 Mass. 23, 37, 746 N.E.2d 488 (2001) ("The law places on men the burden to consider carefully the permanent consequences that flow from an acknowledgment of paternity"). After the donor-parent's death, the burden rests with the surviving parent, or the posthumously conceived child's other legal representative, to prove the deceased genetic parent's affirmative consent to both requirements for posthumous parentage: posthumous reproduction and the support of any resulting child.

This two-fold consent requirement arises from the nature of alternative reproduction itself. It will not always be the case that a person elects to have his or her gametes medically preserved to create "issue" posthumously. A man, for example, may preserve his semen for myriad reasons, including, among others: to reproduce after recovery from medical treatment, to reproduce after an event that leaves him sterile, or to reproduce when his spouse has a genetic disorder or otherwise cannot have or safely bear children. That a man has medically preserved his gametes for use by his spouse thus may indicate only that he wished to reproduce after some contingency while he was alive, and not that he consented to the different circumstance of creating a child after his death. Uncertainty as to consent may be compounded by the fact that medically preserved semen can remain viable for up to ten years after it was first extracted, long after the original decision to preserve the semen has passed and when such changed circumstances as divorce, remarriage, and a second family may have intervened. *See* Banks, T*raditional Concepts and Nontraditional Conceptions: Social Security Survivor's Benefits for Posthumously Conceived Children,* 32 Loy. L.A. L.Rev. 251, 270 (1999).[61]

---

[60] No question has arisen in this case concerning the right of the surviving wife to use the decedent husband's gametes. *Cf. Hecht v. Superior Court,* 16 Cal.App.4th 836, 20 Cal.Rptr.2d 275 (1993).

[61] Of course, a man will not always medically deposit his semen in a sperm bank for the use by a spouse or other designated person. He may also deposit his semen in a sperm bank, usually in return for compensation, for use by an anonymous third party or third parties. *See* Chester, *Freezing the Heir Apparent: A Dialogue on Postmortem Conception, Parental Responsibility, and Inheritance*, 33 Hous. L.Rev. 967, 977 & n.41 (1996). The sperm donor generally signs a contract relinquishing all parental rights and responsibilities, "and the majority of states seem to protect anonymous donors at least from unwanted responsibility for their offspring." *Id. See* G.L. c. 46, § 4B. *See also R.R. v. M.H.*, 426 Mass. 501, 509, 689 N.E.2d 790 (1998) ("Section 4B does not comment on the rights and obligations, if any, of the biological father, although inferentially he has none"). Such protections may reflect widespread consensus that shielding donors from the

Such circumstances demonstrate the inadequacy of a rule that would make the mere genetic tie of the decedent to any posthumously conceived child, or the decedent's mere election to preserve gametes, sufficient to bind his intestate estate for the benefit of any posthumously conceived child. Without evidence that the deceased intestate parent affirmatively consented (1) to the posthumous reproduction and (2) to support any resulting child, a court cannot be assured that the intestacy statute's goal of fraud prevention is satisfied.

C

The certified question does not require us to specify what proof would be sufficient to establish a successful claim under our intestacy law on behalf of a posthumously conceived child. Nor have we been asked to determine whether the wife has met her burden of proof.

It is undisputed in this case that the husband is the genetic father of the wife's children. However, for the reasons stated above, that fact, in itself, cannot be sufficient to establish that the husband is the children's legal father for purposes of the devolution and distribution of his intestate property. In the United States District Court, the wife may come forward with other evidence as to her husband's consent to posthumously conceive children. She may come forward with evidence of his consent to support such children. We do not speculate as to the sufficiency of evidence she may submit at trial.

III

For the second time this term, we have been confronted with novel questions involving the rights of children born from assistive reproductive technologies. *See Culliton v. Beth Israel Deaconess Med. Ctr.,* 435 Mass. 285, 756 N.E.2d 1133 (2001). As these technologies advance, the number of children they produce will continue to multiply. So, too, will the complex moral, legal, social, and ethical questions that surround their birth. The questions present in this case cry out for lengthy, careful examination outside the adversary process, which can only address the specific circumstances of each controversy that presents itself. They demand a comprehensive response reflecting the considered will of the people.

In the absence of statutory directives, we have answered the certified question by identifying and harmonizing the important State interests implicated therein in a manner that advances the Legislature's over-all purposes. In so doing, we conclude that limited circumstances may exist, consistent with the mandates of our Legislature, in which posthumously conceived children may enjoy the inheritance rights of "issue" under our intestacy law. These limited circumstances exist where, as a threshold matter, the surviving parent or the child's other legal representative demonstrates a genetic relationship between the child and the decedent. The survivor or representative must then establish both that the decedent affirmatively consented to posthumous conception and to the support of any resulting child. Even where such circumstances exist, time limitations may preclude commencing a claim for succession rights on behalf of a

---

responsibilities of legal parentage is necessary to encourage the socially beneficial practice of sperm donation. It may also reflect an intention to avoid the myriad complications of probate, title to property, and fragmentation of the donor's estate that might result from contrary rules. *See generally* Shapo, *Matters of Life and Death: Inheritance Consequences of Reproductive Technologies,* 25 Hofstra L.Rev. 1091, 1218 (1997).

posthumously conceived child. In any action brought to establish such inheritance rights, notice must be given to all interested parties.

The Reporter of Decisions is to furnish attested copies of this opinion to the clerk of this court. The clerk in turn will transmit one copy, under the seal of this court, to the clerk of the United States District Court for the District of Massachusetts, as the answer to the question certified, and will also transmit a copy to each party.

Notes and Questions

1. *Woodward* was a Social Security case. However, the Court based its decision on an analysis of the state's intestacy system. Was that the right analysis? Should the same standard be applied to cases involving posthumously conceived children seeking to receive Social Security benefits and to cases involving posthumously conceived children seeking to inherit under the intestacy system?

2. What is the rule established by the *Woodward* case? Design a statute based upon the criterion set out by the court. Would such a statute survive a constitutional challenge?

3. The court in *Woodward* required that the woman present "evidence that the deceased intestate parent affirmatively consented to (1) the posthumous reproduction and (2) to support any resulting child." What proof would be sufficient to establish a successful claim applying that standard? What are the pros and cons of that two-fold consent requirement?

4. The *Woodward* court did not address the time constraints question. Should a time limit be placed on when the posthumously conceived child must be produced or born? What factors should be considered when establishing that time period? What are the pros and cons of establishing a specific time period?

5. What are the pros and cons of treating posthumously conceived children as just another class of posthumously born children?

6. What are the state interests that are implicated by giving posthumously conceived children the right to inherit from their fathers?

7. The Restatement (Third) of Property: Wills and Other Donative Transfers § 2.5, cmt. 1 (1999) provides "[T]o inherit from the decedent, a child produced from genetic material of the decedent by assisted reproductive technology must be born within a reasonable time after the decedent's death in circumstances indicating that the decedent would have approved of the child's right to inherit. A clear case would be that of a child produced by artificial insemination of the decedent's widow with his frozen sperm." What are the pros and cons of this rule? Would the outcome of *Woodward* have been different if the Restatement rule had applied?

8. In a California case, the court upheld an agreement signed by a man requesting that, instead of being released to his wife, his frozen sperm be discarded in the event of his death. The man's widow claimed that she had a right to use his sperm to attempt to conceive a child. The court stated that the man's intent should control because it was his sperm. *Estate of Kievernagel vs. Patsy Kievernage*l, __ Cal. Rptr. 3d __, 2008 WL 4183504 (Cal. App. 3 Dist.) (Sept. 11, 2008). Should the reproductive

rights of the live person be given preference over the reproductive rights of the deceased person? In order words, is the right to not procreate a fundamental right?

Probate law is really localized. Thus, the outcome of the case usually turns upon whether or not the court is willing to give the intestacy statute a broad reading. As the next cases illustrate, sometimes a court is willing to strictly construe the words of the statute even when the construction goes against the best interests of the child and the wishes of the deceased man. On other occasions, a court will permit the child to inherit in order to carry out the dead man's intent.

Khabbaz v. Commissioner of Social Security Administration, 930 A.2d 1180 (N.H. 2007)

DUGGAN, J.

Pursuant to Supreme Court Rule 34, the United States District Court for the District of New Hampshire (*Barbadoro,* J.) certified the following question for our consideration:

> Is a child conceived after her father's death via artificial insemination eligible to inherit from her father as his surviving issue under New Hampshire intestacy law?

We respond in the negative.

The district court's order provides the following facts. Donna M. Eng and Rumzi Brian Khabbaz were married in September 1989 and, six years later, had a son together. In April 1997, Mr. Khabbaz was diagnosed with a terminal illness. Subsequently, he began to bank his sperm so that his wife could conceive a child through artificial insemination. He also executed a consent form indicating that the sperm could be used by his wife "to achieve a pregnancy" and that it was his "desire and intent to be legally recognized as the father of the child to the fullest extent allowable by law." Mr. Khabbaz died on May 23, 1998.

Christine C. Eng Khabbaz was conceived by artificial insemination after Mr. Khabbaz's death, using his banked sperm, and was born in the summer of 2000. At some point thereafter, she sought social security survivor's benefits. Under federal law, her eligibility for the benefits depends upon whether she can inherit from her father under state intestacy law. As the federal district court explained:

[U]nder the Social Security Act (the "Act"), an individual who is the "child" of an insured wage earner and is dependent on the insured at the time of his death is entitled to child's insurance benefits. 42 U.S.C. §402(d)(1). In determining "child" status, the Act instructs the Commissioner [to] ... apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual was domiciled at the time of his death. Applicants who according to such law would have the same status relative to taking intestate personal property as a child of parent shall be deemed such. Thus, if Christine may inherit from Mr. Khabbaz as his surviving issue under New Hampshire intestacy law, she is considered to be the "child" of Mr. Khabbaz under the Act and is therefore entitled to child's insurance benefits. (Quotation, citation, brackets and ellipses omitted.)

The Commissioner of the Social Security Administration (commissioner) denied Christine's application for survivor's benefits based upon an interpretation of RSA 561:1, our state's intestacy

distribution statute. After a hearing, an administrative law judge upheld the commissioner's decision, and the Appeals Council of the Social Security Administration subsequently affirmed. Christine then appealed the commissioner's decision to the federal district court. Recognizing that this case raises an unresolved question of New Hampshire law, the district court certified the question to us.

Responding to the certified question requires us to interpret our state intestacy statutes. In matters of statutory interpretation, we are the final arbiters of the legislature's intent as expressed in the words of the statute considered as a whole. *Chase v. Ameriquest Mortgage Co.,* 155 N.H. 19, 22, 921 A.2d 369, 372 (2007). When examining the language of the statute, we ascribe the plain and ordinary meaning to the words used. *Id.* at 22, 921 A.2d at 372. We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. *Id.* at 22, 921 A.2d at 373.

RSA chapter 561 (2007) sets forth a comprehensive scheme for estate distribution. RSA 561:1, in particular, governs the devolution of the real and personal estate upon intestacy. RSA 561:1, I, prescribes the circumstances under which a surviving spouse may take from the estate. RSA 561:1, II, in turn, describes the procedure for distributing that portion of the intestate estate not passing to the surviving spouse.

Eng argues that her daughter is a "surviving issue" within the meaning of the statute. However, the plain meaning of the word "surviving" is "remaining alive or in existence." *Webster's Third New International Dictionary* 2303 (unabridged ed.2002). In order to *remain* alive or in existence after her father passed away, Eng would necessarily have to have been "alive" or "in existence" at the time of his death. She was not. She was conceived more than a year after his death. It follows, therefore, that neither she nor any posthumously conceived child is a "surviving issue" within the plain meaning of the statute.

Alternatively, Eng contends that even if her daughter is not a "surviving issue," RSA 561:1, II(a) does not include the word "surviving," and therefore it applies to any "issue"-including posthumously conceived children. She argues that her position is buttressed by RSA 21:20 (2000), which defines "issue" as "includ[ing] all the lawful lineal descendants of the ancestor."

In isolation, the provisions cited by Eng might support her position. However, we do not construe statutes in isolation; instead, we attempt to do so in harmony with the overall statutory scheme. *Chase*, 155 N.H. at 22, 921 A.2d at 373. Parts (b) through (e) of RSA 561:1, II all expressly reference "surviving issue" in describing the order of distribution. Thus, when viewed as a whole, RSA 561:1, II evinces a clear legislative intent to create an overall statutory scheme under which those who "survive" a decedent-that is, those who remain alive at the time of the decedent's death-may inherit in a timely and orderly fashion contingent upon who is alive. To hold that part (a) does not require the decedent's issue to "survive" would undermine the orderly distribution process clearly contemplated by the legislature. *See id.* at 22, 921 A.2s at 373 (when interpreting two or more statutes that deal with a similar subject matter, we construe them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statutes). Accordingly, when part (a) is interpreted in light of parts (b) through (e) and viewed within its larger statutory context, the absence of the word "surviving" in part (a) makes no difference in determining how the decedent's property is distributed.

RSA 21:20 does not compel a contrary result. RSA chapter 21 (2000 & Supp.2006) sets forth general rules of statutory construction, including the definition of "issue" found at RSA 21:20. RSA 21:1 provides, however, that the definitions in RSA chapter 21 shall be observed in construing statutes "unless such construction would be inconsistent with the manifest intent of the legislature or repugnant to the context of the same statute." To conclude that RSA 21:20 broadens RSA 561:1, , II(a) to include all issue-whether surviving or not-would undermine the finality and orderly distribution that the legislature clearly contemplated. After all, on a practical level, children may be conceived posthumously several years after an individual's death, and waiting for the potential birth of a posthumously conceived child could tie up estate distributions indefinitely. Moreover, in terms of how the statutory scheme operates, requiring estates to wait for the potential birth of a posthumously conceived child would render meaningless the contingency scheme created by RSA 561:1, II(b)-II(e) because application of those parts is dependent upon a determination of the existence of "surviving issue," a determination that cannot be made if using a male's banked sperm any time after his death could create "issue" entitled to inherit under the statute. Accordingly, because application of the definition of "issue" in RSA 21:20 would be inconsistent with the manifest intent of the legislature and repugnant to the context of RSA 561:1, II, we do not apply it. RSA 21:1.

We also reject Eng's further argument that another statute, RSA 561:4, renders her daughter eligible to inherit under New Hampshire intestacy law. RSA 561:4 describes the inheritance rights of children born to unwed parents.

Eng contends that Mr. Khabbaz's death ended the marriage, leaving Christine born to unwed parents and eligible to inherit from her father as long as she satisfied any of the conditions listed in RSA 561:4, II(a)-(e). We disagree. Viewed as a whole, RSA 561:4 evinces a clear legislative intent to establish a scheme of inheritance rights, upon intestacy, for illegitimate children. *See N.H.S. Jour.* 899 (1983) ("This [bill] would provide for an illegitimate child whose mother and father dies intestate, to be able to inherit from both the mother and the father."). If a man who was both a husband and a father died during the last few months of his wife's pregnancy, the parents would no longer be married; however, he and his wife would not be deemed "unwed" and no one would question the legitimacy of the child. The same must be true in the instant case. Although Christine's father died, her parents are not "unwed" for purposes of the statute, and she does not argue that she is illegitimate. To the contrary, she refers to herself as her father's "legitimate child." *See* RSA 168-B:7 (2002) (child created through artificial insemination is deemed legitimate). Accordingly, we reject Eng's contentions based upon RSA 561:4.

Eng also argues that RSA chapter 168-B (2002), a framework governing artificial insemination, in vitro fertilization, preembryo transfer and surrogacy, renders her daughter eligible to inherit from Mr. Khabbaz if he died intestate.

RSA 168-B:9, entitled "Intestate and Testate Succession," provides:

I. Subject to the provisions of paragraph II, a child shall be considered a child only of his or her parent or parents, and the parent or parents shall be considered the parent or parents of the child, as determined under RSA 168-B:2-5, for purposes of:

(a) Intestate succession.

(b) Taking against the will of any person.

(c) Taking under the will of any person, unless such will otherwise provides.

(d) Being entitled to any support or similar allowance during the administration of a parent's estate.

II. For purposes of paragraph I, a child born of a surrogate is:

(a) The child of the intended parents from the moment of the child's birth unless the surrogate gives notice of her intent to keep the child pursuant to RSA 168-B:25, IV.

(b) The child of the surrogate and her husband, if any, or if none, the person presumed to be the father under RSA 168-B:3, I(d), from the moment of the child's birth, if the surrogate gives notice of her intent to keep the child pursuant to RSA 168-B:25, IV.

These provisions establish certain rights for children born by alternative means. However, nothing in the plain language of RSA 168-B:9 either affirmatively or implicitly modifies the requirement of RSA 561:1 that the issue who inherit upon intestacy must be "surviving." Moreover, to hold that RSA 168-B:9 creates a distribution scheme different from that created by RSA 561:1 would be inconsistent with our practice of construing statutes that deal with a similar subject matter so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose. *Chase*, 155 N.H. at 22, 921 A.2d at 373.

Eng also argues that the Uniform Simultaneous Death Act (USDA), RSA chapter 563 (2007), supports her position because "[t]here is no requirement under the USDA that the surviving individual be in existence, in gestation or *in utero* at the time of the death of the individual upon whose death the survivorship is based, only that they survive the decedent more than one hundred and twenty hours." In light of our discussion of "surviving issue" above, we reject this argument.

Finally, based essentially upon public policy considerations, Eng argues that we should adopt the reasoning of the Massachusetts Supreme Judicial Court in *Woodward v. Commissioner of Social* Security, 435 Mass. 536, 760 N.E2d 257 (2002). *Woodward,* however, is distinguishable because it is based upon Massachusetts statutes that differ from our own. Furthermore, to the extent Eng argues that public policy requires us to read RSA 561:1, II as allowing children who are posthumously conceived within a reasonable time after a parent's death to inherit, we agree with the special concurrence that "the intestacy statute ... essentially leaves an entire class of posthumous[ly conceived] children unprotected." However, the present statute requires that result. To reach the opposite result and adopt the reasoning of *Woodward* would require us to add words to a statute, *Chase*, 155 N.H. at 22, 921 A.2d at 373. We reserve such matters of public policy for the legislature. *State v. Kidder*, 150 N.H. 600, 604, 843 A.2d 312 (2004). Other state legislatures have grappled with these issues, and we leave it to ours, if it chooses, to do the same. (citations omitted).

Accordingly, for the foregoing reasons, we answer the certified question in the negative.

Remanded.

In Re Estate of Kolacy, 753 A.2d 1257 (N.J. 2000)

STANTON, .J.S.C.

On March 31, 2000, I delivered an oral opinion declaring that Amanda Kolacy and Elyse Kolacy, three year old girls who are residents of New Jersey, are the heirs of their father William Kolacy, even though they were born eighteen months after his death. This opinion supersedes my earlier oral opinion.

The plaintiff in this action is Mariantonia Kolacy. She has brought this action to obtain a declaration that her two children, Amanda and Elyse, have the status of intestate heirs of her late husband, William J. Kolacy. Because this action involves a claim that one or more statutes of the State of New Jersey are unconstitutional, the Attorney General of New Jersey was notified of the action and has appeared through a Deputy Attorney General to defend the constitutionality of the state statutes involved.

On February 7, 1994, William J. Kolacy and Mariantonia Kolacy were a young married couple living in Rockaway, New Jersey. On that date, William Kolacy was diagnosed as having leukemia and he was advised to start chemotherapy as quickly as possible. He feared that he would be rendered infertile by the disease or by the treatment for the disease, so he decided to place his sperm in the Sperm and Embryo Bank of NJ. On the morning of February 8, 1994, William Kolacy and Mariantonia Kolacy harvested his sperm and Mariantonia Kolacy delivered it to the sperm bank. Later that day, the chemotherapy began. After the chemotherapy had been in progress for one month, a second harvesting of sperm occurred and was placed in the sperm bank.

Unfortunately, William Kolacy's leukemia led to his death at the age of 26 on April 15, 1995. He died domiciled in New Jersey. On April 3, 1996, almost a year after the death of William Kolacy, plaintiff Mariantonia Kolacy authorized the release of his sperm from the Sperm and Embryo Bank of NJ to the Center for Reproductive Medicine and Infertility at Cornell University Medical College in New York City. An IVF fertilization procedure uniting the sperm of William Kolacy and eggs taken from Mariantonia Kolacy was performed at the Center. The procedure was successful and the embryos which resulted were transferred into the womb of Mariantonia Kolacy. Twin girls, Amanda and Elyse, were born to Mariantonia Kolacy on November 3, 1996. The births occurred slightly more than eighteen months after the death of William Kolacy.

I find that the certifications submitted by Mariantonia Kolacy and Dr. Isaac Kligman of the Center for Reproductive Medicine and Infertility are fully credible and that they firmly establish the facts set forth above. Accordingly, it is clear that Amanda and Elyse Kolacy are genetically and biologically the children of William Kolacy.

Plaintiff is currently pursuing her claims and those of the children through appellate process within the Social Security Administration, and, if necessary, will eventually litigate them in the federal courts. In bringing this action in the Superior Court, the plaintiff is attempting to obtain a state court ruling which will be helpful to her in pursuing her federal claims before a federal administrative agency and before the federal courts.

The State of New Jersey, speaking through the Deputy Attorney General appearing in this action,

has urged me not to adjudicate this case. The State argues that the plaintiff's claim really is not justiciable in this court. The argument is that plaintiff is basically seeking to assert federal rights before federal tribunals and that she should be restricted to presenting her case before federal tribunals. Those tribunals, of course, are capable of looking at New Jersey law and of making perfectly intelligent judgments with respect to it. The State, in effect, argues that it would be an inappropriate intrusion on federal adjudicatory processes for me to become involved in determining the status of Amanda and Elyse Kolacy.

The ultimate question of whether Amanda and Elyse Kolacy are entitled to Social Security benefits is something which is exclusively a matter for federal tribunals. Even if I were to determine that the children are the heirs of William Kolacy under New Jersey law, it does not necessarily follow that they would be entitled to benefits under the Social Security Act, because there are important federal policy considerations which are applicable and which do not involve merely the status of the children as heirs under New Jersey law. However, the interpretation of New Jersey statutes and the determination of what New Jersey law is are primarily the responsibility of New Jersey courts. Federal courts routinely look to state courts for authoritative rulings with respect to state law. *See generally*, *Elkins v. Moreno*, 435 U.S. 647, 98 S.Ct. 1338, 55 L.Ed.2d 614 (1978); *Cotton States Mutual Ins. Co. v. Anderson*, 749 F.2d 663 (11th Cir. 1984). In the case before me, a proper determination of what New Jersey law is will not necessarily be dispositive of the rights of plaintiff and the children under federal law, and it would not be appropriate for a state court to intrude into federal adjudicatory processes. On the other hand, it would clearly be unfortunate for those federal adjudicatory processes to reach a result based in part upon an incorrect determination by federal tribunals of New Jersey law. Accordingly, even if this action is viewed primarily as an adjunct to claims asserted in federal proceedings, it is appropriate for me to interpret New Jersey statutory law as it applies to Amanda and Elyse Kolacy.

I also note that, entirely aside from claims being asserted with respect to Social Security benefits, Amanda and Elyse are entitled to have their status as heirs of their father determined for a variety of state law purposes. The State argues that, because William Kolacy left no assets and thus had no estate at the time of his death, there is really no point in determining who are his heirs under New Jersey law. William Kolacy died without a will, but he did not leave any assets which would pass under the intestate laws of New Jersey. His assets were modest because of his young age and because of the difficult economic stresses that were placed upon him and his wife by his illness. Such assets as he had passed to his wife because of the joint ownership of property. Therefore, a determination that Amanda and Elyse were his heirs would not presently entitle them to any property under intestate law.

However, a present determination of their status as heirs is appropriate because of the effect it has on their general legal and social status and because of the impact which it may have upon property rights as they evolve over a period of time. For one thing, it is conceivable, though not very likely, that William Kolacy might have an estate because of assets passing to him at a future date. More realistically, a determination that the children are the heirs of William Kolacy could be significant in terms of their rights to take from his parents or from his collateral relatives in the event that one or more of those persons were to die intestate. Their status as his heirs could also be significant in determining their rights under the wills of their father's relatives. Thus, for a variety of estate law purposes, there is a present real utility to a declaration of the inheritance status of Amanda and Elyse. I will therefore entertain this action and I will make a ruling with respect to whether Amanda and Elyse legally qualify as the heirs of William Kolacy. *See New Jersey Citizen Action v. Riviera Motel*

Corp., 296 N.J.Super. 402, 686 A.2d 1265 (App.Div.1997); *New Jersey Home Builders Association v. Division of Civil Rights*, 81 N.J.Super. 243, 195 A.2d 318 (Ch.Div. 1963).

There are no New Jersey decisions dealing with the central issue presented in this case—whether Amanda and Elyse Kolacy, conceived after the death of their biological father and born more than eighteen months after his death, qualify as his heirs under state intestate law. I have not been able to find any American appellate court decisions dealing with that central issue.

Counsel have discussed at some length N.J.S.A. 3B:5-8, which is the New Jersey statute dealing with after born heirs. That statute provides as follows: "Relatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent." Counsel for plaintiff argues that this statute, as applied to children such as Amanda and Elyse Kolacy, is unconstitutional because "the effect of the statute as to posthumously conceived children is to both invidiously and irrationally discriminate against them." My view is that the constitutional argument against this statute is fundamentally misplaced and that it really is not necessary to reach the issue of whether this statute is constitutional.

A brief discussion of elementary estate law concepts is appropriate at this point. When a person dies, whether he dies leaving a will or whether he dies intestate, there is a real life need and a legal need to determine which persons are entitled to take his estate, and when that determination is made the general policy is to deliver to those persons rather promptly the property to which they are entitled. Thus, the identity of people who will take property from a decedent has traditionally been determined as of the date of the decedent's death.

However, there have long been exceptions to the rule that the identity of takers from a decedent's estate is determined as of the date of death. Those exceptions are based on human experience going back to time immemorial. We have always been aware that men sometimes cause a woman to become pregnant and then die before the pregnancy comes to term and a child is born. It has always been routine human experience that men sometimes have children after they die. To deal fairly with this reality, decisional law and statutory law have long recognized that it is appropriate to hold the process of identifying takers from a decedent's estate open long enough to allow after born children to receive property from and through their father. *See Byerly v. Tolbert*, 250 N.C. 27, 108 S.E.2d 29 (1959); *Baugh v. Baugh,* 25 Kan.App.2d 871, 973 P.2d 202 (1999).

Aside from the fact that a man sometimes dies before his child is born, there is the fact that when any person dies, a woman related to that decedent may be pregnant with a child who upon birth will qualify as a member of a class of persons entitled to take property from the decedent. The law has traditionally held the class of persons entitled to take from the decedent open long enough to allow a child who was being carried in his or her mother's womb at the time of the decedent's death to receive a share of the property. *See Estate of Wolyniec v. Moe*, 94 N.J.Super. 43, 226 A.2d 743 (Ch.Div. 1967); *Chemical Bank & Trust Company v. Godfrey*, 29 N.J.Super. 226, 102 A.2d 108 (Ch.Div.1953).

N.J.S.A. 3B:5-8 is part of that traditional recognition of exceptions to the rule that takers from a decedent's estate should be determined as of the date of the decedent's death. N.J.S.A. 3B:5-8 was enacted in 1981 as part of a fairly broad reorganization of statutory law dealing with decedents' estates. In 1981, reproductive technology had advanced to the point that it is conceivable that the legislature might have been aware of the kind of problem posed by our present case. However, the relevant legislative history indicates that the current statute was simply a carryover of earlier statutes

going back to at least 1877. The simple fact is that when the legislature adopted N.J.S.A. 3B:5-8 it was not giving any thought whatever to the kind of problem we have in this case. To the extent that there was a conscious legislative intent about reproductive processes involved, the intent was undoubtedly to deal fairly and sensibly with children resulting from traditional sexual activity in which a man directly deposits sperm into the body of a woman. With one exception mentioned hereafter, the New Jersey Legislature has never addressed the problems posed in estate law by current human reproductive technology.

The ability to remove sperm and eggs from human beings and to preserve their viability by storing them for long periods of time at low temperatures makes it possible for children to come into existence as the genetic and biological offspring of a father or of a mother who has long since been dead. My impression is that it is now possible to preserve the viability of human genetic material for as long as ten years. It is likely that the time will be extended in the future. The evolving human productive technology opens up some wonderful possibilities, but it also creates difficult issues and potential problems in many areas. It would undoubtedly be useful for the Legislature to deal consciously and in a well informed way with at least some of the issues presented by reproductive technology.

The State has urged that courts should not entertain actions such as the present one, but should wait until the Legislature has dealt with the kinds of issues presented by this case. As indicated above, I think it would be helpful for the Legislature to deal with these kinds of issues. In the meanwhile, life goes on, and people come into the courts seeking redress for present problems. We judges cannot simply put those problems on hold in the hope that some day (which may never come) the Legislature will deal with the problem in question. Simple justice requires us to do the best we can with the statutory law which is presently available. As I look at N.J.S.A. 3B:5-8 and other statutory provisions dealing with intestate succession, I discern a basic legislative intent to enable children to take property from their parents and through their parents from parental relatives. Although the Legislature has not dealt with the kind of issue presented by children such as Amanda and Elyse, it has manifested a general intent that the children of a decedent should be amply provided for with respect to property passing from him or through him as the result of a death. It is my view that the general intent should prevail over a restrictive, literal reading of statutes which did not consciously purport to deal with the kind of problem before us.

Given that general legislative intent, it seems to me that once we establish, as we have in this case, that a child is indeed the offspring of a decedent, we should routinely grant that child the legal status of being an heir of the decedent, unless doing so would unfairly intrude on the rights of other persons or would cause serious problems in terms of the orderly administration of estates.

I note that after born children who come into existence because of modern reproductive techniques pose special challenges to society and to our legal system. Historically, after born children were conceived and in their mother's womb at the time of a decedent's death and they could be counted on to appear no later than approximately nine months after that death. Now they can appear after the death of either a mother or a father and they can appear a number of years after that death. Estates cannot be held open for years simply to allow for the possibility that after born children may come into existence. People alive at the time of a decedent's death who are entitled to receive property from the decedent's estate are entitled to receive it reasonably promptly. It would undoubtedly be both fair and constitutional for a Legislature to impose time limits and other situationally described limits on the ability of after born children to take from or through a parent.

In the absence of legislative provision in that regard, it would undoubtedly be fair and constitutional for courts to impose limits on the ability of after born children to take in particular cases.

In our present case, there are no estate administration problems involved and there are no competing interests of other persons who were alive at the time of William Kolacy's death which would be unfairly frustrated by recognizing Amanda and Elyse as his heirs. Even in situations where competing interests such as other children born during the lifetime of the decedent are in existence at the time of his death, it might be possible to accommodate those interests with the interests of after born children. For example, by statutory provision or decisional rule, payments made in the course of routine estate administration before the advent of after born children could be treated as vested and left undisturbed, while distributions made following the birth of after born children could be made to both categories of children.

There has been some discussion in this case of the possible impact of the New Jersey Parentage Act, N.J.S.A. 9:17-38 to –59. That act is very important in dealing with problems posed by fathers seeking to avoid their responsibility for the support of children, and it also deals with a number of other parentage issues. But most of its provisions are not even remotely relevant to the kind of issues posed by our present case.

One provision of the Parentage Act which is facially somewhat relevant to our case is *N.J.S.A.* 9:17–43a(1) which reads: "A man is presumed to be the biological father of a child if: He and the child's biological mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment or divorce." This provision might arguably be interpreted as creating the reverse presumption that a child born more than 300 days after the death of a man shall be presumed not to be the biological child of the deceased man. I think that treating the cited provision as creating such a reverse presumption of non-parentage would be somewhat strained because it is counterproductive to the purposes of the act, but even if such a reverse presumption is read into the act, it is subject to being rebutted by clear and convincing factual evidence. In our present case, there is clear and convincing evidence that Amanda and Elyse are the biological children of William Kolacy.

This legislative treatment of certain issues arising out of reproductive technology is interesting and sensible. But it does not deal expressly with posthumous conception, and, more importantly, it does not deal with sperm contributed by the husband of the woman giving birth to a child. It is not relevant to the facts of our present case.

The ability to cause children to come into existence long after the death of a parent is a recently acquired ability for human society. There are probably wise and wonderful ways in which that ability can be used. There are also undoubtedly some special problems that the exercise of that ability might pose. There are, I think, ethical problems, social policy problems and legal problems which are presented when a child is brought into existence under circumstances where a traditionally normal parenting situation is not available. One would hope that a prospective parent thinking about causing a child to come into existence after the death of a genetic and biological parent would think very carefully about the potential consequences of doing that. The law should certainly be cautious about encouraging parents to move precipitously in this area.

I accept as true Mariantonia Kolacy's statement that her husband unequivocally expressed his desire that she use his stored sperm after his death to bear his children. She did, in fact, use his sperm to

bear his children. Some may question the wisdom of such a course of action, but one can certainly understand why a loving and caring couple in the Kolacys' position might choose it. Be all that as it may, once a child has come into existence, she is a full-fledged human being and is entitled to all of the love, respect, dignity and legal protection which that status requires. It seems to me that a fundamental policy of the law should be to enhance and enlarge the rights of each human being to the maximum extent possible, consistent with the duty not to intrude unfairly upon the interests of other persons. Given that viewpoint, and given the facts of this case, including particularly the fact that William Kolacy by his intentional conduct created the possibility of having long-delayed after born children, I believe it is entirely fitting to recognize that Amanda and Elyse Kolacy are the legal heirs of William Kolacy under the intestate laws of New Jersey.

Questions

1. Since death ends the marriage, a posthumously conceived child is technically a non-martial child. As mentioned in the previous chapter, every jurisdiction has a statute that addresses the inheritance rights of non-marital children. Should those statutes be applied to determine the inheritance rights of posthumously conceived children? Why? Why not? Do you agree with the *Khabbaz* court's reasoning on the issue?

2. What are the pros and cons of amending the Social Security Act to make posthumously conceived children eligible for benefits?

3. If the reasoning of the *Woodward* case was applied, what would be the outcome of the case?

4. In the *Khabbaz* case, the Court stated that "In order to remain alive or in existence after her father passed away, Eng would necessarily have to have been 'alive' or 'in existence' at the time of his death." Is there a way to define survivor that would permit Eng to satisfy the definition? Is a being in existence if the component parts leading to its creation already exist? Would Eng have a stronger argument for existence if she was a pre-embryo at the time her father died?

5. Khabbaz clearly wanted to be the parent to his posthumously conceived children. Are his reproductive rights violated by the court not fulfilling his desire to be legally recognized as the parent of any children produced using his stored sperm?

As previously mentioned, most cases addressing posthumous reproduction involve children conceived using artificial insemination. Moreover, all of the statutes regulating the inheritance rights of posthumously conceived children are limited to children created utilizing artificial insemination. The next case deals with the rights of a child conceived through the use of in vitro fertilization.

Finley v. Astrue, 270 S.W.3d 849 (Ark. 2008)

DANIELSON, J.

This case involves a question of law certified to this court by the United States District Court for the Eastern District of Arkansas in accordance with Ark. Sup.Ct. R. 68 and accepted by this court on June 28, 2007. *See Finley v. Astrue,* 370 Ark. 429, ----S.W.3d----(2007) (*per curiam*). The question certified is the following:

Does a child, who was created as an embryo through in vitro fertilization during his parents' marriage, but implanted into his mother's womb after the death of his father, inherit from the father under Arkansas intestacy law as a surviving child?

We conclude that the answer to this question is no.

According to the District Court's order, the certified question arises from an appeal by Amy Finley, from the final decision of the Commissioner of the Social Security Administration, Michael Astrue (the Commissioner), which denied her claim for "child's insurance benefits" under 42 U.S.C. 42 U.S.C. § 402(d). U.S.C.[62]

The District Court's order reflects the following facts. On October 6, 1990, Ms. Finley and Wade W. Finley, Jr., were married. During the course of the marriage, the Finleys pursued fertility treatments at the University of Arkansas for Medical Sciences (UAMS), and, ultimately, participated in UAMS's In Vitro Fertilization and Embryo Transfer (IVF/ET) Program.[63] In June of 2001, doctors produced ten embryos using Ms. Finley's eggs and Mr. Finley's sperm. Two of the embryos were implanted into Ms. Finley's uterus and four embryos were frozen for preservation.[64] Ms. Finely later suffered a miscarriage of both of the implanted embryos.

On July 19, 2001, Mr. Finely died intestate while domiciled here in Arkansas. A little less than one year later, on June 26, 2002, Ms. Finley had two of the previously frozen embryos thawed and transferred into her uterus, resulting in a single pregnancy. On February 14, 2003, prior to the child's birth, the Lonoke County Circuit Court entered an order providing that upon the baby's delivery, the State Registrar of the Arkansas Department of Health, Division of Vital Records, shall enter and state upon the certificate of birth that Wade W. Finley, Jr., now deceased, is the father of [W.F.]; [a]nd that, thereafter, all State and Federal Agencies, of the United States of America, shall uphold the findings of this Court's conclusion of paternity-in[Plaintiff] the mother and Wade W. Finley, Jr. the father-for any and all lawful purposes; and, that [W.F.] is the legitimate child of [Plaintiff] and Wade W. Finely, Jr. for any and all lawful purposes.

The child was born on March 4, 2003, and on April 11, 2003, Ms. Finley filed a claim for mother's insurance benefits and the child's claim for child's insurance benefits, based on the earnings record

---

[62] The Commissioner's order also denied Ms. Finley's claim for "mother's insurance benefits" under 42 U.S.C. § 402(g).

[63] In vitro fertilization is described as follows: After the woman has taken injectable ovulation-inducing medications ..., multiple oocytes are retrieved from the woman's ovaries by a minor surgical procedure. The oocytes are placed in a petri dish with her male partner's sperm (in vitro) and placed in an incubator for fertilization to occur. The embryos are allowed to grow for a period of three to five days before they are placed back into the woman's uterus. 7-289 *Attorneys' Textbook of Medicine* P.289.65 (3d ed.2007). It differs entirely from artificial insemination: Intrauterine insemination, also known as artificial insemination, refers to the placement of sperm into the uterine cavity. Intrauterine insemination may be performed at the time of ovulation in the woman's normal menstrual cycle, or with the use of medications that induce ovulation. In most cases, the female partner takes fertility medications in advance of the procedure. The man must produce sperm at the time the woman is ovulating; the sperm (after undergoing certain "washing" procedures) are then inserted into the woman's uterine cavity through a long, thin catheter.17-289 *Attorney's Textbook of Medicine* P.289.81 (3d ed.2007).The District Court's order further observes that in participating in the IVF/ET program at UAMS, the Finleys executed a consent form. That form is not before us; however, we note that the Worker's Compensation Commission awarded benefits to the child based, at least in part, on the consent form's language. *See Finley v. Farm Cat, Inc.,* WCC No. F108515 (Dec. 27, 2006).

[64] The District Court's order notes that the remaining four embryos were not preserved.

of Mr. Finley. The claims were denied at the initial and reconsideration levels; however, an Administrative Law Judge (ALJ) issued a decision on June 16, 2006, awarding both mother's and child's insurance benefits.

On December 14, 2006, the Appeals Council reversed the ALJ's decision, finding that Ms. Finley's claims were without merit. Ms. Finley then filed her complaint with the District Court on October 13, 2006, appealing the final decision of the Commissioner. The parties filed a joint motion to certify the instant question of law to this court and to stay briefing before the District Court. The District Court granted the motion, certified the instant question to this court, and we accepted certification, as already stated.

In the briefs before us, Ms. Finley argues that her child was "conceived" at the time her egg was fertilized by the father's sperm. She contends that there is no statutory prohibition in Arkansas preventing a natural child who was conceived by in vitro fertilization from inheriting from his father. She avers that the General Assembly was aware of in vitro fertilization procedures in light of the fact that it mandated all accident and health insurance companies include in vitro fertilization as a covered expense in Ark. Code Ann. § 23-85-137(a) (Repl. 2004) and was aware of assisted reproductive technologies by its reference to artificial insemination in Ark. Code Ann. § 28-9-209(c) (Repl.2004). She urges that based upon the medical definitions of "conception," the child born of the Finleys' union was not posthumously conceived and that as a matter of public policy, all children's rights should be protected, including their rights to property and inheritance.

The Commissioner responds that Arkansas intestacy law does not provide inheritance rights from a biological father to a child who was created as an embryo through in vitro fertilization during his parents' marriage, but implanted into his mother's womb after the death of the father. He argues that the Finleys' child was neither born nor conceived during the Finleys' marriage, which ended upon Mr. Finley's death. The Commissioner maintains that the logical interpretation of the term "conception" or "conceived," as used in Arkansas's intestacy provisions, is to mean the onset of pregnancy, or the successful implantation of an embryo in the womb. He asserts that the General Assembly has not amended the intestate succession statutes to expand the definition of conception to include the creation of embryos during the in vitro fertilization process and that absent a statutory amendment to encompass an IVF-created embryo, this court should conclude that the General Assembly did not intend for such embryos to be considered "conceived" within the terms of the intestacy statutes. He further points out that the General Assembly, and not the courts, determines public policy. Finally, the Commissioner submits, given the fact that inheritance laws require finality, it is unlikely that the legislature defined the term "conception" to include a medical procedure that could result in a biological birth many years after the father's death. Ms. Finley replies that the General Assembly has been well aware of assisted reproduction for a number of years and, had it chosen to do so, it could have enacted legislation to prevent such an inheritance.

A review of the benefits being sought and the orders leading to the certification of the instant question was set forth in the District Court's certification order. It provides that [u]nder the Social Security Act, a child is entitled to child's insurance benefits if he is the child of an individual who dies while insured, if the child was dependent upon the insured at the time of the insured's death. *See* 42 U.S.C. § 402(d). "Child" means "the child or legally adopted child of an individual[.]"42 U.S.C. § 402(c). In determining whether a claimant is the "child" of a deceased insured, the Commissioner is instructed to "apply such law as would be applied in determining the devolution of intestate personal property ... by the courts of the State in which [the insured] was domiciled at the time of his

death[.]"42 U.S.C. § 416 (h)(2)(A). Social Security regulations provide further guidance on determining "child" status, including that a claimant be the insured's "natural child," meaning that the claimant "could inherit the insured's personal property as his or her natural child under State inheritance law[s]." *See* 20 C.F.R. §§ 404.354 and 404.355(a)(1). In deciding whether the claimant has "inheritance rights as the natural child of the insured[,]" the Commissioner uses "the law on inheritance rights that the State courts would use to decide whether you could inherit a child's share of the insured's personal property if the insured were to die without leaving a will." *See* 20 C.F.R. § 404.355(b)(1).

During the administrative proceedings in this case, Plaintiff claimed that there were no Arkansas statutes specifically addressing the inheritance rights of a child conceived through in vitro fertilization, but that, pursuant to Ark. Code Ann. § 28-9-209(c), W .F. was "conceived" as a "zygote" prior to his father's death, while his parents were married. Thus, she argued that W.F. had inheritance rights under that statute. The Commissioner acknowledged the lack of a "clear definition" of "conception" under Arkansas state law, but looked to "the generally accepted definition of the term in the medical community" and concluded that "conception" occurred when "the embryo was implanted in [Plaintiff's] uterus after the wage earner died." The Commissioner also rejected Plaintiff's reliance on both Ark. Code Ann. § 11-9-507, a worker's compensation statute which does not "govern inheritance issues," and the Lonoke Circuit Court Order, which was "not consistent with the law as enunciated by the highest court in the State of Arkansas."

According to the Commissioner's findings: (1) W.F. was the biological child of Wade W. Finley, Jr. who was not married to Plaintiff at the time that W.F. was conceived or born; and (2) W.F. did not have "inheritance rights in [Wade W. Finley, Jr.'s] estate" and thus did "not have status as the child of the wage earner pursuant to [42 U.S.C. § 416(h)(2)(A)]." Because Plaintiff's claim for "mother's insurance benefits" was contingent on having "an entitled child of the wage earner in her care," the Commissioner found that this claim also lacked merit. (Internal footnotes and citations to transcript omitted.)

Having been presented with the instant question, we turn to our statutes on intestate succession. Title 28, Chapter 9 of the Arkansas Code Annotated sets forth Arkansas's law on intestate succession, entitled the "Arkansas Inheritance Code of 1969." Arkansas Code Annotated § 28-9-203(a)(Repl. 2004) provides that "[a]ny part of the estate of a decedent not effectively disposed of by his or her will shall pass to his or her heirs as prescribed in the following sections." Ark. Code Ann. § 28-9-203(a) (Repl. 2004).

The instant certified question presents a posthumous child.[65] In order to inherit as a posthumous heir under Arkansas law, the child must not only have been born after the decedent's death, but must also have been conceived before the decedent's death.

The basic rule of statutory construction is to give effect to the intent of the legislature. *See McMickle v. Griffin,* 369 Ark. 318, ---S.W.3d---(2007).Where the language of a statute is plain and unambiguous, we determine legislative intent from the ordinary meaning of the language used. *See id.* In considering the meaning of a statute, we construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *See id.* We construe the statute so that no word

[65] While our statutory code does not define this term, *Black's Law Dictionary* defines the term "posthumous child" as: "A child born after a parent's death." *Black's Law Dictionary* 255 (8th ed.2004).

is left void, superfluous or insignificant, and we give meaning and effect to every word in the statute, if possible. *See id.* Furthermore, we are very hesitant to interpret a legislative act in a manner contrary to its express language, unless it is clear that a drafting error or omission has circumvented legislative intent. *See Arkansas Beverage Retailers Ass'n, Inc. v. Moore,* 369 Ark. 498, ---S.W.3d---(2007).

It is clear from the statute that in order to inherit through intestate succession as a posthumous descendant, the child must have been conceived before the decedent's death. However, the statutory scheme fails to define the term "conceived." While we could define that term, we find there is no need to do so, as we can definitively say that the General Assembly, in enacting Act 303 of 1969, § 12, now codified at Ark. Code Ann. § 28-9-210, did not intend for the statute to permit a child, created through in vitro fertilization and implanted after the father's death, to inherit under intestate succession. Not only does the instant statute fail to specifically address such a scenario, but it was enacted in 1969, which was well before the technology of in vitro fertilization was developed. *See* Janet L. Dolgin, *Surrounding Embryos: Biology, Ideology, & Politics,* 16 Health Matrix: J.L. & Med. 27 (2006) (observing that the first birth resulting from in vitro fertilization was in 1978).

Both parties discuss Ark. Code Ann. § 28-9-209 (c)(Repl. 2004), which provides: (c) Any child conceived following artificial insemination of a married woman with the consent of her husband shall be treated as their child for all purposes of intestate succession. Consent of the husband is presumed unless the contrary is shown by clear and convincing evidence. Ark. Code Ann. § 28-9-209(c). That statute is inapposite for two reasons. First and foremost, the statute goes to the legitimacy of a child, and, second, it specifically references artificial insemination, not in vitro fertilization are two completely different procedures.

While the parties would have us define the term "conceive," we decline to do so in the instant case. Our role is not to create the law, but to interpret the law and to give effect to the legislature's intent. *See, e.g., Miller v. Tatum,* 170 Ark. 152, 279 S.W. 1002 (1926); *Williams v. Buchanan*, 86 Ark. 259, 110 S.W. 1024 (1908).In vitro fertilization and other methods of assisted reproduction are new technologies that have created new legal issues not addressed by already-existing law. *See, e.g., Gillett-Netting v. Barnhart, supra* (observing that "[d]eveloping reproductive technology has outpaced federal and state laws, which currently do not address directly the legal issues created by posthumous conception"); *Woodward v. Commissioner of Social Security, supra* (observing that "with the act of procreation now separated from coitus, posthumous reproduction can occur under a variety of conditions that may conflict with the purposes of the intestacy law and implicate other firmly established State and individual interests"). Were we to define the term "conceive," we would be making a determination that would implicate many public policy concerns, including, but certainly not limited to, the finality of estates. That is not our role. The determination of public policy lies almost exclusively with the legislature, and we will not interfere with that determination in the absence of palpable errors. *See Jordan v. Atlantic Cas. Ins. Co.,* 344 Ark. 81, 40 S.W.3d 254 (2001).With this is mind, we strongly encourage the General Assembly to revisit the intestacy succession statutes to address the issues involved in the instant case and those that have not but will likely evolve.

For the foregoing reasons, we answer the certified question in the negative.

Questions

1. Given the reasoning in the *Finley* case, the court seemed unconcerned that the assisted reproductive technology used was in vitro fertilization. Should children conceived using frozen embryos be treated different from the ones using the dead man's sperm? The court in the *Kievernagel* case indicated that the outcome of the case might have been different had it involved embryos instead of sperm.

2. If the posthumously conceived child is allowed to inherit what steps should be taken to protect the deceased man's existing heirs?

6.2.2 The Right to Inheritance Through Fathers

In re Martin, 841 N.Y.S.2d 207 (N.Y. Sur. Ct. 2007)

ROTH, J.

This uncontested application for advice and direction in connection with seven trust agreements executed on December 31, 1969, by Martin B. (the Grantor) illustrates one of the new challenges that the law of trusts must address as a result of advances in biotechnology. Specifically, the novel question posed is whether, for these instruments, the terms "issue" and "descendants" include children conceived by means of in vitro fertilization with the cryopreserved semen of the Grantor's son who had died several years prior to such conception.

The relevant facts are briefly stated. Grantor (who was a life income beneficiary of the trusts) died on July 9, 2001, survived by his wife Abigail and their son Lindsay (who has two adult children), but predeceased by his son James, who died of Hodgkins Lymphoma on January 13, 2001. James, however, after learning of his illness, deposited a sample of his semen at a laboratory with instructions that it be cryopreserved and that, in the event of his death, it be held subject to the directions of his wife Nancy. Although at his death James had no children, three years later Nancy underwent in vitro fertilization with his cryopreserved semen and gave birth on October 15, 2004, to a boy (James Mitchell). Almost two years later, on August 14, 2006, after using the same procedure, she gave birth to another boy (Warren). It is undisputed that these infants, although conceived after the death of James, are the products of his semen.

Although the trust instruments addressed in this proceeding are not entirely identical, for present purposes the differences among them are in all but one respect immaterial. The only relevant difference is that one is expressly governed by the law of New York while the others are governed by the law of the District of Columbia. As a practical matter, however, such difference is not material since neither jurisdiction provides any statutory authority or judicial comment on the question before the court.

All seven instruments give the trustees discretion to sprinkle principal to, and among, Grantor's "issue" during Abigail's life. The instruments also provide that at Abigail's death the principal is to be distributed as she directs under her special testamentary power to appoint to Grantor's "issue" or "descendants" (or to certain other "eligible" appointees). In the absence of such exercise, the principal is to be distributed to or for the benefit of "issue" surviving at the time of such disposition

(James's issue, in the case of certain trusts, and Grantor's issue, in the case of certain other trusts). The trustees have brought this proceeding because under such instruments they are authorized to sprinkle principal to decedent's "issue" and "descendants" and thus need to know whether James's children qualify as members of such classes.

The question thus raised is whether the two infant boys are "descendants" and "issue" for purposes of such provisions although they were conceived several years after the death of James.

Although the particular question presented here arises from recent scientific advances in biotechnology, this is not the first time that the Surrogate's Court has been called upon to consider an issue involving a child conceived through artificial means.

Over three decades ago, Surrogate Nathan R. Sobel addressed one of the earliest legal problems created by the use of artificial insemination as a technique for human reproduction (*Matter of Anonymous*, 74 Misc.2d 99, 345 N.Y.S.2d 430). In that case, the petitioner sought to adopt a child that his wife had conceived, during her prior marriage, through artificial insemination with the sperm of a third-party donor (heterologous insemination). The question before Surrogate Sobel was whether the former husband had standing to object to the adoption. In the course of his analysis, the learned Surrogate predicted that artificial insemination would become increasingly common and would inevitably also complicate the legal landscape in areas other than adoption. Indeed, he specifically forecast that, as a result of such technological advances, "[legal] issues ... will multiply [in relation to matters such as] intestate succession and will construction" (*id.*, at 100, 345 N.Y.S.2d 430). Surrogate Sobel noted, however, that there was at that point a dearth of statutory or decisional guidance on questions such as the one before him.

The following year New York enacted Domestic Relations Law 73, which recognized the status of a child born to a married couple as a result of heterologous artificial insemination provided that both spouses consented in writing to the procedure, to be performed by a physician. Such statute reflected the evolution of the State's public policy toward eliminating the distinction between marital and non-marital children in determining family rights. Thus, where a husband executes a written consent (or even in some instances where he has expressed oral consent) to artificial insemination the child is treated as his natural child for all purposes despite the absence of a biological connection between the two (*see e.g.* Scheinkman, Practice Commentaries, McKinney's Con. Laws of N.Y., Book 14, Domestic Relations Law 73, at 309-10).

Surrogate Sobel's predictions in *Anonymous* proved to be prophetic. Some thirty years later, the novel issues generated by scientific developments in the area of assisted human reproduction are perplexing legislators and legal scholars (citations omitted).

Compounding the problem, as the authors of the foregoing studies have observed, decisions and enactments from earlier times-when human reproduction was in all cases a natural and uniform process-do not fit the needs of this more complex era. These new issues, however, are being discussed and in some jurisdictions have been the subject of legislation or judicial decisions. But, as will be discussed below, neither New York nor the District of Columbia, the governing jurisdictions, has a statute directly considering the rights of post-conceived children. In this case legislative action has not kept pace with the progress of science. In the absence of binding authority, courts must turn to less immediate sources for a reflection of the public's evolving attitude toward assisted

reproduction-including statutes in other jurisdictions, model codes, scholarly discussions and Restatements of the law.

We turn first to the laws of the governing jurisdictions. At present, the right of a posthumous child to inherit (EPTL 4-1.1[c] [in intestacy]) or as an after-born child under a will (EPTL 5-3.2 [under a will]) is limited to a child conceived during the decedent's lifetime. Indeed, a recent amendment to section 5-3.2 (effective July 26, 2006) was specifically intended to make it clear that a post-conceived child is excluded from sharing in the parent's estate as an "after-born" (absent some provision in the will to the contrary, EPTL 5-3.2 [b]). Such limitation was intended to ensure certainty in identifying persons interested in an estate and finality in its distribution (*see* Sponsor's Mem., Bill Jacket L. 2006, ch. 249). It, however, is by its terms applicable only to wills and to "after-borns" who are children of the testators themselves and not children of third parties (see Turano, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 17B, EPTL 5-3.2, at 275). Moreover, the concerns related to winding up a decedent's estate differ from those related to identifying whether a class disposition to a grantor's issue includes a child conceived after the father's death but before the disposition became effective.

With respect to future interests, both the District of Columbia and New York have statutes which ostensibly bear upon the status of a post-conceived child. In the D.C. Code, the one statutory reference to posthumous children appears in section 704 of title 42 which in relevant part provides that, "[w]here a future estate shall be limited to heirs, or issue, or children, posthumous children shall be entitled to take in the same manner as if living at the death of their parent...." New York has a very similar statute, which provides in relevant part that, "[w]here a future estate is limited to children, distributees, heirs or issue, posthumous children are entitled to take in the same manner as if living at the death of their ancestors" (EPTL 6-5.7). In addition, EPTL 2-1.3(2) provides that a posthumous child may share as a member of a class if such child was conceived before the disposition became effective.

Each of the above statutes read literally would allow post-conceived children-who are indisputably "posthumous"-to claim benefits as biological offspring. But such statutes were enacted long before anyone anticipated that children could be conceived after the death of the biological parent. In other words, the respective legislatures presumably contemplated that such provisions would apply only to children *en ventre sa mere* (*see e.g.* Turano, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 17B, EPTL 6-5.7, at 176).

We turn now to the jurisdictions in which the inheritance rights of a post-conceived child have been directly addressed by the legislatures, namely, Louisiana, California and Florida and to the seven States that have adopted, in part, the Uniform Parentage Act (2000, as amended in 2002)(UPA, discussed below), namely, Delaware, North Dakota, Oklahoma, Texas, Utah, Washington and Wyoming. Although we are concerned here with a male donor, the legislation also covers the use of a woman's eggs (UPA 707).

In Louisiana, a post-conceived child may inherit from his or her father if the father consented in writing to his wife's use of his semen and the child was born within three years of the father's death. But it is noted parenthetically that the statute also allows a person adversely affected to challenge paternity within one year of such child's birth (LA Civil Code 9:391.1).

In order for a post-conceived child to inherit in the State of California, the parent must have consented in writing to the posthumous use of genetic material and designated a person to control its use. Such designee must be given written notice of the designation and the child must have been conceived within two years of decedent's death (CA Probate Code 249.5).

Florida, by contrast, requires a written agreement by the couple and the treating physician for the disposition of their eggs or semen in the event of divorce or death. A post-conceived child may inherit only if the parent explicitly provided for such child under his or her will (FL Stat. Ann. 742.17)

Under the UPA, a man who provides semen, or consents to assisted reproduction by a woman as provided under section 704, with the intent to become a father is the parent of the child who is born as a result (UPA § 703). Under section 704 of the UPA, both the man and the woman must consent in writing to the recognition of the man as the father. The UPA has also addressed the situation where the potential parent dies before the act of assisted reproduction has been performed. In such situation, decedent is the parent of the child if decedent agreed to the use of assisted reproduction after his death (UPA 707).

On a related question, the courts of three States have held that a post-conceived child is entitled to benefits under the Social Security Act: Massachusetts (*Woodward v. Commissioner of Soc. Sec.,* 435 Mas. 536, 760 N.E.2d 257 [2002]). New Jersey (*Matter of Kolacy*, 332 N.J.Super. 593, 753 A.2d 1257 (2000)) (which had enacted an earlier version of the UPA), and Arizona (*Gillett-Netting v. Barnhart*, 371 F.3d 593). All three courts concluded that post-conceived children qualified for such benefits.

As can clearly be seen from all the above, the legislatures and the courts have tried to balance competing interests. On the one hand, certainty and finality are critical to the public interests in the orderly administration of estates. On the other hand, the human desire to have children, albeit by biotechnology, deserves respect, as do the rights of the children born as a result of such scientific advances. To achieve such balance, the statutes, for example, require written consent to the use of genetic material after death and establish a cut-off date by which the child must be conceived. It is noted parenthetically that in this regard an affidavit has been submitted here stating that all of James's cryopreserved sperm has been destroyed, thereby closing the class of his children.

[1]Finally, we turn to the instruments presently before the court. Although it cannot be said that in 1969 the Grantor contemplated that his "issue" or "descendants" would include children who were conceived after his son's death, the absence of specific intent should not necessarily preclude a determination that such children are members of the class of issue. Indeed, it is noted that the Restatement of Property suggests that "[u]nless the language or circumstances indicate that the transferor had a different intention, a child of assisted reproduction [be] treated for class-gift purposes as a child of a person who consented to function as a parent to the child and who functioned in that capacity or was prevented from doing so by an event such as death or incapacity" (Restatement [Third] of Property [Wills and Other Donative Transfers] 14.8 [Tentative Draft No. 4 204]).

The rationale of the Restatement, *Matter of Anonymous* and section 73 of the Domestic Relations Law should be applied here, namely, if an individual considers a child to be his or her own, society through its laws should do so as well. It is noted that a similar rationale was endorsed by our State's highest court with respect to the beneficial interests of adopted children (*Matter of Park*, 15 N.Y.2d

413, 260 N.Y.S.2d 169, 207 N.E.2d 859). Accordingly, in the instant case, these post-conceived infants should be treated as part of their father's family for all purposes. Simply put, where a governing instrument is silent, children born of this new biotechnology with the consent of their parent are entitled to the same rights "for all purposes as those of a natural child" (*id.*, at 418, 260 N.Y.S.2d 169, 207 N.E.2d 859).

Although James probably assumed that any children born as a result of the use of his preserved semen would share in his family's trusts, his intention is not controlling here. For purposes of determining the beneficiaries of these trusts, the controlling factor is the Grantor's intent as gleaned from a reading of the trust agreements (citations omitted). Such instruments provide that, upon the death of the Grantor's wife, the trust fund would benefit his sons and their families equally. In view of such overall dispositive scheme, a sympathetic reading of these instruments warrants the conclusion that the Grantor intended all members of his bloodline to receive their share.

Based upon all of the foregoing, it is concluded that James Mitchell and Warren are "issue" and "descendants" for all purposes of these trusts.

As can be seen from all of the above, there is a need for comprehensive legislation to resolve the issues raised by advances in biotechnology. Accordingly, copies of this decision are being sent to the respective Chairs of the Judiciary Committees of the New York State Senate and Assembly.

Decree signed.

Notes and Questions

1. Do you think that the decision in *Martin* carried out the intent of the settlor of the trust? Should it be more difficult for posthumously conceived children to inherit through their fathers?

2. The court ended the decision acknowledging the need for comprehensive legislation to resolve issues raised by the use of new biotechnology. There is nothing to indicate that the New York legislature has heeded the call with regards to posthumously conceived children. The states that have attempted to address the issue are set forth below.

Statutes Addressing the Inheritance Rights of Posthumously Conceived Children

Uniform Status of Children of Assisted Conception Act § 4 (b)

An individual who dies before implantation of an embryo, or before a child is conceived other than through sexual intercourse, using the individual's egg or sperm, is not a parent of the resulting child.[66]

Uniform Parentage Act § 707

If an individual who consented in a record to be a parent by assisted reproduction dies before placement of eggs, sperm, or embryos, the deceased individual is not a parent of the resulting child

[66] In 2000, the language of this act was integrated into the UPA.

unless the deceased individual consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.[67]

Questions

1. UPA § 707 requires the individual to consent to the posthumous use of his or her gametes by submitting a written record. The statute does not define "record". What type of writing should be necessary to satisfy the writing requirement? In light of the purpose of the writing requirement, what components should the writing contain?

2. What are the advantages and disadvantages of the UPA's approach?

3. If the UPA had been applied in the *Woodward* case would the outcome of the case have been different?

Baldwin's Ohio Revised Code Annotated
§ 2105.14 Posthumous child to inherit

Descendants of an intestate begotten before his death, but born thereafter, in all cases will inherit as if born in the lifetime of the intestate and surviving him; but in no other case can a person inherit unless living at the time of the death of the intestate.[68]

West's Louisiana Statutes Annotated
§ 391.1. Child conceived after death of parent

A. Notwithstanding the provisions of any law to the contrary, any child conceived after the death of a decedent, who specifically authorized in writing his surviving spouse to use his gametes, shall be deemed the child of such decedent with all rights, including the capacity to inherit from the decedent, as the child would have had if the child had been in existence at the time of the death of the deceased parent, provided the child was born to the surviving spouse, using the gametes of the decedent, within three years of the death of the decedent.

West's Annotated California Code
§ 249.5. Posthumous conception; child of decedent deemed born in decedent's lifetime; conditions

For purposes of determining rights to property to be distributed upon the death of a decedent, a child of the decedent conceived and born after the death of the decedent shall be deemed to have been born in the lifetime of the decedent, and after the execution of all of the decedent's testamentary instruments, if the child or his or her representative proves by clear and convincing evidence that all of the following conditions are satisfied:

---

[67] Some version of the UPA has been adopted by the following states: Delaware, North Dakota, Texas, Utah, Washington and Wyoming.

[68] Susan N. Gary, *Posthumously Conceived Heirs: Where the Law Stands and What to Do About It Now*, 19 Apr. Prob. & Prop. 32, 34-35 (March/April 2005)(stating "But, Ohio enacted this statute in 1953, so it is unlikely that the legislature considered the issue of children conceived after the decedent's death.").

(a) The decedent, in writing, specifies that his or her genetic material shall be used for the posthumous conception of a child of the decedent, subject to the following:

(1) The specification shall be signed by the decedent and dated.

(2) The specification may be revoked or amended only by a writing, signed by the decedent and dated.

(3) A person is designated by the decedent to control the use of the genetic material.

(b) The person designated by the decedent to control the use of the genetic material has given written notice by certified mail, return receipt requested, that the decedent's genetic material was available for the purpose of posthumous conception. The notice shall have been given to a person who has the power to control the distribution of either the decedent's property or death benefits payable by reason of the decedent's death, within four months of the date of issuance of a certificate of the decedent's death or entry of a judgment determining the fact of the decedent's death, whichever event occurs first.

(c) The child was in utero using the decedent's genetic material and was in utero within two years of the date of issuance of a certificate of the decedent's death or entry of a judgment determining the fact of the decedent's death, whichever event occurs first. This subdivision does not apply to a child who shares all of his or her nuclear genes with the person donating the implanted nucleus as a result of the application of somatic nuclear transfer technology commonly known as human cloning.

West's Florida Statutes Annotated
§ 742.17. Disposition of eggs, sperm, or preembryos; rights of inheritance

A commissioning couple and the treating physician shall enter into a written agreement that provides for the disposition of the commissioning couple's eggs, sperm, and preembryos in the event of a divorce, the death of a spouse, or any other unforeseen circumstance.

(4) A child conceived from the eggs or sperm of a person or persons who died before the transfer of their eggs, sperm, or preembryos to a woman's body shall not be eligible for a claim against the decedent's estate unless the child has been provided for by the decedent's will.

West's Annotated Code of Virginia
§ 20-158. Parentage of child resulting from assisted conception

B. Death of spouse.--Any child resulting from the insemination of a wife's ovum using her husband's sperm, with his consent, is the child of the husband and wife notwithstanding that, during the ten-month period immediately preceding the birth, either party died.

However, any person who dies before in utero implantation of an embryo resulting from the union of his sperm or her ovum with another gamete, whether or not the other gamete is that of the person's spouse, is not the parent of any resulting child unless (i) implantation occurs before notice of the death can reasonably be communicated to the physician performing the procedure or (ii) the person consents to be a parent in writing executed before the implantation.

Questions

1. Which one of the above approaches to the issue of posthumous reproduction does the most to protect the interests of the children, the decedent and the state?

2. Is the three-year time limitation included in the Louisiana statute reasonable?

3. The Louisiana statute only applies to married couples. What are the pros and cons of restricting posthumous reproduction to married persons? Is this restriction going to disadvantage the children conceived in long-term relationships? ill this statute survive a constitutional challenge? Should it be void because of public policy considerations?

4. Is the four-month notice requirement included in the California statute necessary? Is it reasonable?

5. The California statute contains an anti-cloning provision. What are the pros and cons of prohibiting cloning? How is cloning related to artificial insemination in a legal context?

6. Under the Florida statute, the posthumously conceived child is only protected if his father provides for the child in his will. Thus, if a man dies intestate, his posthumously conceived child does not have the right to inherit. In every state and the District of Columbia, if a man dies intestate, preference is given to his children. As a result, children who exist at the time of the man's death automatically get the right to inherit. Consequently, in Florida, posthumously conceived children are treated differently from other classes of children. This seems to go against the legislative and judicial efforts to treat all children equally. What are the pros and cons of Florida's approach? Would the statute survive a constitutional challenge?

7. Explain the Virginia statute's approach.

8. The use of assisted reproductive technology to create children posthumously has become a global practice. As a consequence, the French Parliament prohibited posthumous reproduction.[69] Western Australia adopted The Human Reproductive Technology Act of 1991 to deal with the issue of posthumous reproduction.[70] Postmortem sperm retrieval and posthumous reproduction is statutorily prohibited in Germany, Sweden, and the Australian states of Victoria and Western Australia.[71] Hungarian law also does not permit the use of the gametes of dead persons for posthumous reproduction.[72] In order for posthumous reproduction to take place in the United Kingdom, the gamete donor must give written consent.[73] Likewise, legal regulations enacted by the Canadian government ban posthumous reproduction without the written informed consent of the sperm

[69] *See* Art. L. 152.2 of the Code de la Sante' Publique, *cited in* Nicole Zwart-Hendrix, *Chilling Aspects of Procreation*, 21 Med. & L. 567, 569 (2002).

[70] *See* Reproductive Technology Council, The Human Reproductive Technology Act of 1991.

[71] A provision of Victoria's Infertility Treatment Act of 1995 makes it a criminal offense to use the gametes or embryos of dead people. §43 Infertility Treatment Act of 1995.

[72] Law No. 154, 1997, § 166, article No. 3.

[73] Human Fertilization and Embryology Act 2008 §39, Schedule 3 (the consent provisions); *See also The Queen (on the application of IM, MM) v. Human Fertilisation and Embryology Authority*, 2015 WL 3630368 (June 15, 2015).

donor.[74] Posthumous reproduction has conditional acceptance in the Netherlands and Greece as long as written consent is acquired before the sperm donor dies.[75]

Problems

1. Juan and Isabella were married for ten years. Juan was diagnosed with stomach cancer and had to undergo chemotherapy. Dr. Chin informed the couple that the chemotherapy might render Juan infertile. Juan and Isabella really wanted to have children. Therefore, Juan had his sperm frozen prior to submitting to treatment. As a part of that process, Juan signed a form stating that, in the event of his death, he wanted Isabella to use his frozen sperm to conceive his child. In addition, Juan told his friends that Isabella was the love of his life, and so it was important for a little piece of them both to exist on the earth. Unfortunately, Juan passed away in January of 2011. In June of 2012, Isabella decided to have a child conceived using Juan's sperm. Isabella was insecure about her looks. She told her best friend, Debbie, "There is no way I'm passing on this face." Debbie agreed to donate some of her eggs to Isabella, so Isabella could have the beautiful child that she wanted. After the hospital released Juan's sperm to Isabella, Isabella used the sperm to fertilize Debbie's egg. Isabella did not want to mess up her figure, so she hired a surrogate, Hillary, to carry the child for her. On February 18, 2013, Hillary gave birth to a little boy named Juan, Jr. Will Juan, Jr. be legally recognized as Juan's child? What ethical issues may arise out of these facts?

2. Patrick signed a document giving his wife, Bonnie, permission to conceive a child using his sperm in the event that he died. Patrick wanted to make sure that Bonnie had something by which to remember him. Patrick was in a car accident. As a result, Patrick suffered brain damage and is in a vegetative state. Patrick is breathing on his own, but has very little brain activity. Doctors informed Bonnie that Patrick would never recover from his condition. However, doctors confirmed that Patrick could remain in a vegetative state for years. Bonnie presented the written form Patrick signed and requested that the doctors extract Patrick's sperm, so that she could use it to conceive his child. Bonnie does not want to wait until Patrick dies to get the sperm because her biological clock is ticking. The head of the clinic has consulted you for advice. In light of the above-listed statutes, how would you respond?

3. Mitch told his wife Lisa that, if they did not conceive a child prior to his death, she could have his sperm extracted and use it to conceive a child posthumously. Without Mitch's knowledge, Lisa recorded the conversation. A few months later, Lisa and Mitch had a fight over money. Mitch refused to destroy the pre-nuptial agreement that limited Lisa's interest in his assets to 5% upon his death or if they got a divorce. According to the pre-nuptial agreement, any children of the marriage would receive 25% of Mitch's assets. On June 10, 2014, Mitch filed for a divorce. Two days later, Mitch was killed in a car accident. Lisa played the tape recorded conversation for the doctor and demanded the removal of Mitch's sperm. The doctor complied with Lisa's request and she used

[74] Assisted Human Reproduction (Section 8 Consent) Regulations SOR/2007-137,

[75] Usha Ahluwalia and Maia Arora, *Posthumous Reproduction and Its Legal Perspective*, 2 International Journal of Fertility and Fetal Medicine, 9, 12 (January 2011) (citing Art. 7 Embryos Bill); Mavroforou, A., Koumantakis, E., Mavrophoros, D., and Michalodimitrakis, E., *Medically assisted human reproduction: the Greek view*, 26 Med. Law 339, 341 (2007)(*citing* Medically Assisted Human Reproduction Act 3089/02 which states "Artificial insemination carried out after the death of the husband or the woman's partner, is allowed only by judicial permission and only under the following circumstances: a. The husband or the permanent partner of the woman suffers from a disease, which endangers his life or fertility b. The husband or the woman's partner has already given his consent before a notary for posthumous artificial insemination.").

Mitch's sperm to become pregnant. After Mitch's daughter, Michelle, was born, Lisa petitioned the estate for her 5% and for Michelle's 25%. The estate refused to honor Lisa's request, so she filed a court action. What probable result?

4. Larry was rushed to the hospital after he suffered a massive heart attack. Larry did not survive the ordeal. Larry's girlfriend, Tessa, showed the doctors at the hospital a letter Larry had written stating his intent to divorce his wife and to marry Tessa. The letter also stated that Larry wanted to conceive a child with Tessa. The hospital extracted Larry's sperm and released it to Tessa. Tessa conceived a child using Larry's sperm. Larry died intestate. According to the intestacy statute, if Larry died with no surviving children, his surviving spouse is legally entitled to his entire estate. If Larry died with surviving children, his surviving spouse is only entitled to receive one-third of the estate. In light of the above statutes, how much of Larry's estate is his wife entitled to receive?

6.3 Children Conceived Using Artificial Insemination

When the statutory system allocating paternal responsibility was established a family consisted of a man, a woman and children. The primary methods used to create a family were sexual intercourse and adoption. The availability of assisted reproductive technology permits persons to form families in various ways. The majority of states have statutes addressing the legal status of children conceived with the use of assisted reproductive technology. Most of the state legislatures that have enacted statutes dealing with assisted reproduction have focused exclusively on artificial insemination. Thus, most of the cases discussed in this section will involve the use of artificial insemination. The statutes that exist establish the parental rights of the inseminated woman's husband and the sperm donor.

In order for a child to inherit under the intestacy system, there must be a legally recognized parent-child relationship. This section examines the circumstances under which a man has a duty to financially support a child conceived using artificial insemination. Once the law recognizes the existence of a father-child relationship for child support purposes, the child is given the opportunity to inherit from his or her father. If a man is financially responsible for a child during his lifetime, that child is usually classified as his heir if he dies intestate. Once an artificially conceived child is permitted to inherit from his or her father, the issue that must be resolved is: from which "father" does the child have the legal right to inherit. There are two possible answers to this question. The child may have the right to inherit from the husband of his or her mother or from the man who donated the sperm that resulted in his or her conception.

6.4 The Paternity of the Inseminated Woman's Husband

The legal issue becomes: Is the child the legitimate heir of the inseminated woman's husband? If the child is classified as legitimate, the child has the right to inherit from the man who was married to the child's mother at the time of the artificial insemination. Under the common law, the child would be in the class of heirs if the child was conceived during marriage. The states that have enacted statutes addressing the status of children conceived by artificial insemination have taken different routes to arrive at the same answer—the child is the legitimate child of the woman's husband. Thus, the child has the right to inherit from and through the man.

6.4.1 Consenting Husband is the Legal Father

In the majority of jurisdictions, if the husband does not consent in writing to the artificial insemination of his wife, he is not responsible for providing financial support to the resulting child. Hence, it follows that the child would not be eligible to inherit from the non-consenting husband. A few states require that the husband's consent to the artificial insemination be in writing. Nonetheless, some courts have stated that consent is not limited to written consent. Therefore, a man may become responsible for the artificially conceived child as a result of his actions. Some state statutes require that the husband consent to the artificial insemination without specifically stating that the consent has to be in writing.

6.4.1.1 Written Consent

When evaluating the consent of the woman's husband for purposes of establishing the father-child relationship, the first thing the courts attempt to determine is whether or not the husband gave written consent. Resolving that inquiry requires the court to answer two questions: (1) whether there was a writing and (2) whether the writing satisfies the statutory mandate. This is not a straight forward analysis because most of the state statutes do not identify the type of document that is necessary to satisfy the written consent requirement. In addition, the statutes do not specify the necessary content of the writing and the time at which the writing must be signed. The court in the following case gave the written consent requirement a flexible meaning and used the doctrine of substantial compliance to recognize the woman's husband as the legal father of the artificially conceived child.

Lane v. Lane, 912 P.2d. 290 (N.M. 1996)

HARTZ, J.

Twentieth-century science has complicated the law of paternity. Advances in biology make it possible both to determine and to create biological parents in ways not contemplated a few decades ago. On the one hand, laboratory technicians can now rebut the presumption that the husband of the mother at the time of conception is the biological father. On the other, physicians can now enable infertile couples to have children who do not share both parents' genes. Legislatures have been attempting to design paternity statutes that properly balance the important interests at stake. This appeal requires us to interpret one such attempt, the Uniform Parentage Act (the Uniform Act), approved by the National Conference of Commissioners on Uniform State Laws in 1973 and enacted, with some modifications, in New Mexico in 1986, NMSA 1978, §§ 40-11-1 to -23 (Repl.Pamp.1994) (the New Mexico Act).

The dispute before us arises out of the dissolution of the marriage of Arlene Daniels Lane (Wife) and Terrence M. Lane (Husband). Wife appeals the district court's order granting Husband joint custody of Colleen Lane, who was conceived during the marriage by artificial insemination from an anonymous donor. Husband is neither the biological nor adoptive parent of Colleen. The issue on appeal is whether Husband should nevertheless be treated as Colleen's "natural" father. We hold that he acquired that status through substantial compliance with the New Mexico Act. We therefore affirm the judgment of the district court.

Background

Husband and Wife were married on December 4, 1984. With three children from two previous marriages, Husband had undergone a vasectomy in 1980. Shortly after the marriage, however, Wife expressed a desire to have children. Husband was hesitant and refused to have his vasectomy reversed. But after Wife stated that she would leave Husband if she could not have children, Husband and Wife explored various options. They chose artificial insemination from an anonymous donor, obtaining help first from a personal physician and then from the University of New Mexico Hospital. Husband participated in the process, driving Wife for some medical visits, attending birthing classes, and being present in the delivery room for the birth of Colleen. Husband testified that Wife assured him that he would be treated in all respects as the father of the child. He also testified that to ensure that Colleen would think he was her natural father, Wife made him swear not to reveal that she had undergone artificial insemination but, rather, to represent the child as having been conceived naturally by the couple.

The customary practice of the University of New Mexico Hospital was not to undertake artificial insemination without the signed consent of both the husband and the wife. A hospital representative testified that the consent's purpose was to make the couple aware of the risks involved, to establish that they both wished to participate in the program, and to obtain a release from liability. Yet, the only signed consent form relating to Wife is a document signed just by Wife and apparently brought to the hospital by Wife from her previous physician. Neither Husband nor Wife recalled signing any form of consent relating to the insemination that led to the conception of Colleen. Neither the hospital files nor the records of the New Mexico Bureau of Vital Records and Health Statistics contain any additional consent form, although medical notes for a later unsuccessful attempt to conceive another child in 1990 contain the notation: "patient [Wife] and spouse signed consent."

After Colleen was born, both Husband and Wife told friends and relatives that Husband was Colleen's natural father. Husband appears as Colleen's father on her birth certificate, although the circumstances under which his name was entered are unclear. *See* NMSA 1978, § 24-14-13(D) (Repl.1986) (birth certificate should name husband of mother as father unless paternity established in court or by agreement of both spouses and putative husband). Wife encouraged Husband to be an active parent, and he was.

On May 10, 1991 Husband filed a petition to dissolve the marriage. The petition, which Husband verified, alleges that Colleen is a child of the marriage. The response to the petition, which Wife verified, requests that she be awarded sole legal and physical custody of the child but admits that Colleen was a child of the marriage and does not challenge Husband's paternity. On March 26, 1992 the attorneys for Husband and Wife approved a stipulated order stating that the parties "agree and stipulate" that Husband and Wife "are the parents of Colleen Dawn Lane, born August 26, 1988."

7. On February 16, 1993 a new attorney entered an appearance for Wife. Two weeks later that attorney moved for leave to file an amended response and counterpetition, stating that "[t]he facts leading to the proposed Amended Response and Counterpetition have recently come to light." The new pleadings for the first time alleged that Colleen was conceived through artificial insemination and that Husband was neither her natural nor legal father.

After trial on the issues of paternity and custody, the district court awarded joint custody in July 1993. The court concluded that "[i]t is inequitable to strictly apply [the New Mexico Act] to this

case, because this Court finds that both parties manifested through their actions and words that they both consented to the artificial insemination." A final order setting forth the terms of joint custody was entered by the district court on February 7, 1995.

Discussion

Although a stepparent may be entitled to visitation rights after dissolution of a marriage, *see* NMSA 1978, § 40-4-9.1(L)(4) and (8) (Repl.Pamp.1994); *Rhinehart v. Nowlin,* 111 N.M. 319, 323-25, 805 P.2d 88, 92-94 (Ct.App.1990); *id.* at 330-32, 805 P.2d at 99-101 (Hartz, J., concurring), Husband has a right to custody only if he is Colleen's "natural" father. According to the statutory provision governing joint custody of children after dissolution of marriage, "[w]hen any person other than a natural or adoptive parent seeks custody of a child, no such person shall be awarded custody absent a showing of unfitness of the natural or adoptive parent." Section 40-4-9.1(K).

Under what circumstances may someone who is not the biological father be the "natural" father? New Mexico law provides that "[t]he parent and child relationship between a child and ... the natural father may be established as provided in the [New Mexico] Act." Section 40-11-4(B). The New Mexico Act recognizes a presumption of paternity in several circumstances, such as when the child is born during the marriage, § 40-11-5(A)(1), or when the man during the child's minority "openly holds out the child as his natural child and has established a personal, financial or custodial relationship with the child," Section 40-11-5(A)(4). Husband here could rely on one or more of these presumptions, except that the presumptions can be rebutted by clear and convincing evidence. Section 40-11-5(C). Any presumption in this case was indisputably rebutted by evidence of Husband's sterility and the artificial insemination.

Consequently, Husband's claim to be Colleen's natural father must rest on Section 40-11-6, which addresses artificial insemination. It reads:

> A. If, under the supervision of a licensed physician and with the consent of her husband, a woman is inseminated artificially with semen donated by a man not her husband, the husband is treated as if he were the natural father of the child thereby conceived so long as the husband's consent is in writing, signed by him and his wife. The physician shall certify their signatures and the date of the insemination and file the husband's consent with the vital statistics bureau of the health services division of the health and environment department [department of health], where it shall be kept confidential and in a sealed file; provided, however, that the physician's failure to either certify or file the consent shall not affect the father and child relationship.
>
> B. Any donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife may be treated as if he were the natural father of the child thereby conceived if he so consents in writing signed by him and the woman. The physician shall certify their signatures and the date of the insemination and file the donor's consent with the vital statistics bureau of the health services division of the health and environment department [department of health] where it shall be kept confidential and in a sealed file; provided, however, that the physician's failure to either certify or file the consent shall not affect the father and child relationship.
>
> C. All papers and records pertaining to the insemination, whether part of a court, medical or

any other file, are subject to inspection only upon an order of the court for good cause shown.

Wife argues that written consent is essential if the husband is to be treated as the natural father. She points out that the statute not only requires the husband's consent but also specifically provides that the husband is treated as the natural father only "so long as the husband's consent is in writing, signed by him and his wife." Comparison of the language of the New Mexico Act with the language of the Uniform Act reinforces the argument that the existence of a writing is an absolute requirement for the husband to be treated as the natural father. The first sentence of the New Mexico Act differs in a suggestive way from the first two sentences of the Uniform Act. Section 5 of the Uniform Act states:

If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife.

The New Mexico Act's version of this language-combining the two sentences by inserting the conditional phrase "so long as"-serves little purpose but to emphasize the dependence of the husband's status on the execution of a written consent.

Moreover, the New Mexico Act (just as the Uniform Act) explicitly states that the failure of the physician to certify the signatures and file the consent shall "not affect the father and child relationship." By stating that the failure to comply with certain requirements does not affect the husband's status as the natural father, the statute implies that failure to comply with other requirements *does* affect that status.

Wife further argues that strict compliance with the statutory requirements is called for because of the precious maternal rights that are at stake. Although the district court did not annul Wife's right to her child, the reduction in those rights resulting from her having to share joint custody with Husband is a matter of profound significance. Indeed, there is some authority that even granting just visitation rights to a third party can violate the constitutional rights of a parent. *See Brooks v. Parkerson,* 265 Ga. 189, 454 S.E.2d 769 (holding grandparent visitation statute to be unconstitutional), *cert. denied,* 516 U.S. 942, 116 S.Ct. 377, 133 L.Ed.2d 301 (1995); *but see Campbell v. Campbell,* 896 P.2d 635 (Utah Ct.App.1995) (refusing to follow *Brooks*).

The final step in Wife's argument is simply to point out that there was not strict compliance with the New Mexico Act in this case. The record contains no written consent signed by both Husband and Wife. Although there was sufficient evidence at trial for the district court to make a finding that such a document had once been in existence, the district court made no such finding.

Wife's syllogism is not without persuasive force. But we do not adopt it. In our view, the absence of strict compliance does not end the inquiry. To begin with, despite the constitutional protection given to parenthood, we view the matter before us as a matter of statutory construction. We are aware of no constitutional doctrine that insists on a genetic basis for parenthood. Wife does not suggest that Section 40-11-6, which permits a husband who is not the biological father to be treated as the natural father, is unconstitutional. Nor does she suggest that the statute would be unconstitutional if the requirement of a writing were eliminated. Although the importance of the interests involved

cautions us to be circumspect, traditional precepts of statutory interpretation should apply.

Those precepts tell us that even though a statute constitutes a command to the courts regarding what law to apply, the command must be read with intelligence. The legislature, as with anyone who issues an order, cannot anticipate every contingency. The legislature can, however, expect that when one of its orders (*i.e.,* a law) is to be carried out, those who have that duty (*i.e.,* the courts) will discern its purpose and act in accordance with its essence if not necessarily its letter. The doctrine of statutory interpretation that captures this proposition is the doctrine of substantial compliance. Under that doctrine, "a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which the statute was adopted and accomplishes the reasonable objectives of the statute." *Vaughn v. United Nuclear Corp.,* 98 N.M. 481, 485, 650 P.2d 3, 7 (Ct. App.), *cert. quashed,* 98 N.M. 478, 649 P.2d 1391 (1982).

Application of the substantial-compliance doctrine is a risky venture. The danger, of course, is that the court will choose its personal view of what is just or fair, rather than complying with the mandate of the statute. Departure from the strict letter of a statute should therefore be undertaken with great caution. In particular, one must be careful not to underestimate the purposes served by strict compliance with the letter of the statute.

Keeping these concerns in mind, we nevertheless find that this case presents an example of exceptional circumstances in which the doctrine of substantial compliance must be employed. The purposes of Section 40-11-6(A) are best effectuated by treating Husband as Colleen's natural father.

The essential policy of the section is that when a husband and wife both approve of her conceiving a child through artificial insemination and both wish the husband to be treated as the natural father, then the State should honor that wish. As for the requirement that the consent be in writing, we have searched in vain for commentary on the Uniform Act that addresses the matter. *See, e.g.,* Harry D. Krause, *Bringing the Bastard Into the Great Society-A Proposed Uniform Act on Legitimacy,* 44 Tex. L. Rev. 829 (1966) (described in the prefatory note to the Uniform Act as providing the genesis for the Act). Nevertheless, it appears clear to us that the requirement of a writing serves two functions. First, the writing serves an evidentiary function. The existence of a document signed by the husband and the wife avoids disputes regarding whether consent was actually given. Second, the requirement serves a cautionary purpose. One who pauses to sign a document can be expected to give more thought to the consequences of consent than one who gives consent in a less formal setting. An additional purpose that may be served by the requirement of written consent is to protect from liability the medical personnel who conduct the procedure, but failure to advance that purpose could hardly be a ground for denying the husband's status as a natural parent.

It is important to note that while the New Mexico Act requires a writing to achieve these two purposes, it is not rigid about the nature of the writing. The statute does not require any particular form of words for the consent. Given the purposes of the statute, a writing should be satisfactory if it conveys in some manner that (1) the husband knows of the conception by artificial insemination, (2) the husband agrees to be treated as the lawful father of the child so conceived, and (3) the wife agrees that the husband will be treated as the lawful father of the child.

We also note that the New Mexico Act does not prescribe when the written consent must be executed. Although the mother may wish to be assured of the husband's responsibility toward the child before undergoing the procedure, and the medical personnel may wish to be assured that the

husband will not hold them responsible before they initiate the procedure, the evidentiary and cautionary purposes of the writing requirement can be fully served by a writing executed after the artificial insemination, or even after the birth of the child. We fail to see how the date of the writing affects the probative value of the writing as evidence of the consent. The date certainly has less effect on the probative value than does the presence or absence of certification by the physician, which is a statutory requirement that by the express terms of the statute "shall not affect the father and child relationship." Section 40-11-6(A). As for the cautionary purpose of the writing requirement, a consent to parenthood after successful insemination, and especially after the birth of the child, would probably reflect more solemn consideration than such a consent before the insemination procedure. After all, the full consequences of consent become strikingly evident once the child is born.

The above analysis of the purposes and terms of Section 40-11-6(A) convinces us that there was substantial compliance with the New Mexico Act in this case. Of particular interest are the pleadings filed in district court. Husband verified his petition claiming Colleen as a "minor child[ ] of the marriage." Wife likewise verified the response, which admitted that "there is one minor child of the marriage, Colleen Dawn Lane," and did not challenge Husband's paternity in any manner. Later in the litigation the attorneys for Husband and Wife each signed a stipulated order which stated: "The parties agree and stipulate as follows: 1. The parties are the parents of Colleen Dawn Lane, born August 26, 1988." Although no document was signed by both Husband and Wife, and one of the pleadings was signed only by their attorneys, these pleadings unequivocally demonstrate that more than two and one-half years after the birth of Colleen, and even after the marriage had failed, both Husband and Wife were acknowledging Husband's status as Colleen's natural father. *Cf.* NMSA 1978, § 55-2-201(3)(b) (Repl.Pamp.1993) (Uniform Commercial Code statute of frauds can be satisfied by a pleading). To be sure, missing from these documents is any reference to the artificial insemination by which Colleen was conceived. But there is absolutely no dispute in this case that Husband was fully aware of the artificial insemination and that Wife knew that he was fully aware. There is not even a whisper of a possibility that Husband was deceived regarding the circumstances of Colleen's conception. Consequently, the pleadings referred to represent a knowing consent by both Husband and Wife to treating Husband as the natural father of the child born to Wife as a result of artificial conception. The purposes of the statute are served.

We recognize that pleadings can be amended and a party is not necessarily bound by the first pleading filed in court. Indeed, the district court in this case permitted Wife to file an amended response to Husband's petition and a counterpetition challenging Husband's paternity. Nevertheless, we fail to see why the fact that a pleading can be amended to expand the issues to be decided at trial should necessarily impact upon the effect of statements in those pleadings with respect to Section 40-11-6(A). Nothing in the New Mexico Act permits withdrawal of consent. Wife has not suggested any equitable grounds for setting aside her sworn allegation or the stipulation of her counsel. At most, she could argue that the statements were made without knowledge of (1) the requirements of Section 40-11-6(A) or (2) the absence of a written consent to the artificial insemination. In the circumstances of this case, we see no reason why Wife's ignorance of the law and of that particular fact warrants setting aside the clear import of the assertions made in the pleadings-that both Husband and Wife considered Husband to be Colleen's father.

Conclusion

We affirm the judgment of the district court. The parties shall bear their own costs and attorney's

fees on appeal.

Notes and Questions

1. If the husband in *Lane* sought to be relieved of all legal responsibility for the child, would the result of the case have been the same?

2. In *Lane*, the husband refused to reverse his vasectomy. In addition, the husband never gave written consent to have his wife artificially inseminated. In light of those facts, did the court correctly conclude that the husband had substantially complied with the statutory written consent requirement?

3. What are the disadvantages of the court giving "written consent" such a broad meaning?

4. Does the court's analysis conflict with the plain language of the statute? Do you think that it carries out the legislature's intent?

5. Based upon the three-part test established in the case, in which of the following situations would the written consent requirement be satisfied?

(a) The husband posted a message on his social media page stating that he and his wife were going to be parents.

(b) Husband and Wife sign and send out the following baby shower announcement: "Please join us to celebrate the impending birth of our child."

(c) Prior to the birth of the child, Husband and Wife fill out an adoption petition requesting that Husband be allowed to adopt the child.

(d) Husband and Wife execute a contract in which they agree that the Husband will be the father of any child born during their marriage.

6.4.1.2 Verbal Consent

The key purpose of the written consent requirement is to make sure that the husband is not forced to parent a child without his consent. Consequently, if the husband acknowledges that he consented to the artificial insemination, the court will recognize him as the legal father even in the absence of written consent. As the next case indicates, once the court determines that the man has given some type of consent, written or verbal, that consent cannot be easily revoked. The majority of states do not permit a man to withdraw his initial consent to the artificial insemination. Thus, a man who changes his mind after initially consenting to the artificial insemination of his wife may still be recognized as the legal father of the resulting child.

K.S. v. G.S., 440 A.2d 64 (N.J. Super. Ct. App. Div. 1981)

MILLER, J. S. C.

This matter comes before the court on plaintiff wife's motion for pendente lite support and custody of the infant child, J. S., who was born during the course of plaintiff's marriage to defendant but was conceived by a technique of artificial insemination known as "artificial insemination by donor" (AID). Since a full exposition of the factual background is necessary for a proper understanding of the case, the following findings of fact are made.

The parties were married on December 6, 1977. Defendant had been previously married and divorced. After a third child was born of the prior marriage and before the marriage to present plaintiff, defendant voluntarily underwent a vasectomy operation which sterilized him. Plaintiff was aware of defendant's infertility prior to their marriage.

Several months after marriage plaintiff learned of the AID procedure. The parties were referred by their family physician to Lewis Ladocsi, an obstetrician and gynecologist, who specialized in the field of fertility. Ladocsi first saw the couple on July 8, 1978, at which time he intensively interrogated the couple, took a joint history and explained the AID process to them. He also noted physical characteristics of defendant for the purpose of obtaining a "matching" donor and directed that blood tests be taken for the purpose of aiding in the screening of donor applicants. Ladocsi questioned defendant closely in order to determine whether he understood and consented to AID. Defendant stipulates he gave his verbal consent to the procedure at that time.

Ladocsi did not, however obtain any written consent from defendant. He indicated that at the time it was not his practice to obtain written consents from AID patients. His present practice, however, is to obtain written consent before commencing the AID process. New Jersey statutory law does not require written consent be obtained by a physician before the commencement of AID procedures, and did not in 1978.

A suitable donor was selected and a series of three artificial insemination procedures took place in July 1978. The initial insemination process was successful and plaintiff was tested positive for pregnancy on August 19, 1978. That pregnancy did not result in a live birth because a spontaneous miscarriage took place in early September 1978.

Defendant, after the miscarriage, expressed feelings of sympathy and urged plaintiff to continue the procedures when she was able to do so. Although defendant testified to the contrary, he court finds that he expressed no reservations to continuing the AID procedures for any reason at that time.

During 1978 the parties had several discussions concerning the continuing cost of the AID procedures, which placed a strain on the family budget and resulted in several overdrafts on the joint checking account. Defendant contends he told plaintiff to stop the AID treatments because of the cost. This testimony is not credible and is inconsistent with plaintiff's convincing testimony that defendant accompanied plaintiff to Ladocsi's office for the insemination procedure on several occasions in 1979, including at least one occasion in October 1979. Defendant also admitted he never advised Ladocsi at any time that he had any reservations concerning continuing the AID procedure.

Commencing in November 1978 plaintiff continued with the AID procedures at the rate of approximately three inseminations during her fertile cycles. Various medications were prescribed and various examinations were employed to confirm her continuing ability to conceive, since she failed to become pregnant for many months. Finally, in October 1979 she became pregnant with J. S.

After plaintiff's pregnancy was confirmed defendant became distant and uncommunicative. On December 30, 1979 he left the marital premises "to think things out." In a telephone conversation between the parties shortly after that date defendant advised plaintiff he objected to her pregnancy.

The parties continued to live separately until the child was born on July 28, 1980. Plaintiff filed a complaint for divorce on October 7, 1980, seeking support for the child. Defendant has never seen the infant or contributed to its support.

It is clear that in the absence of a husband's consent to artificial insemination, support obligations may not be imposed on him. *People v. Sorenson,* 68 Cal.2d 280, 66 Cal.Rptr. 7, 437 P.2d 495 (Sup.1968*)*; *Adoption of Anonymous*, 74 Misc.2d 99, 345 N.Y.S.2d 430 (Surr.Ct.1973). Legislation addressing the problem of the paternal duties created by artificial insemination has likewise uniformly conditioned imposition of all such obligations in a marital context upon a husband's valid consent to use of the procedure.

In the case at bar, the initial consent of the husband is clearly established. Defendant contends he withdrew his consent to the AID procedure prior to conception by informing plaintiff of his opposition to continuing the inseminations. He further contends that plaintiff then went ahead with AID procedures surreptitiously and without his knowledge or approval in the face of his opposition.

In the present case the initial AID sequence was followed first by a miscarriage, then by resumption of artificial insemination procedures. As the procedures continued and pregnancy did not result, alternative courses of treatment for infertility were attempted, each followed by another series of AID procedures. When plaintiff finally conceived, it was approximately 15 months after defendant's initial consent.

Two questions are therefore presented. First, does consent to AID, once given, continue until pregnancy is accomplished? Second, if consent be deemed to continue, what burden of proof must be met to establish withdrawal of consent?

Legislation which has considered artificial insemination has favored continuation of consent. Such a result is achieved by presuming the husband's initial and continuing consent to artificial insemination procedures and placing the burden on him to establish otherwise.

Although no cases are reported in that jurisdiction dealing with legitimacy in the context of artificial insemination, it has been held that the presumption of legitimacy may be rebutted by "contrary evidence ... of greater persuasion than that having given rise to the presumption...." *Zamaludin v. Ishoff*, 44 Md. App. 538, 409 A.2d 1118, 1121 (Ct.Spec.App.1980), interpreting Md. Code Ann. s 1-105(b).

In legitimacy or paternity cases where pregnancy has been naturally induced, the central issue is often an evidentiary question of access or nonaccess of the putative father at the time of conception.

In New Jersey, in order to sufficiently rebut the presumption of legitimacy of a child born or conceived prior to the dissolution of marriage in such cases, proof of illegitimacy must be such that "there is no possible escape" from that conclusion. *In re Rogers' Estate*, 30 N.J.Super. 479, 105 A.2d 28 (App.Div.1954); *Egnozzi v. Egnozzi*, 17 N.J.Super. 433, 86 A.2d 272 (App.Div.1952). If proof of illegitimacy is by nonaccess of the husband, evidence of nonaccess must be clear and convincing, strong and irresistible, or something just shy of absolute certainty. *Jackson v. Prudential Ins. Co. of America*, 106 N.J.Super. 61, 77, 254 A.2d 141 (Law Div.1969).

The court recognizes that, from the point of view of the partners involved in artificial insemination, there is a physical and psychological difference in the manner the pregnancy will be perceived.

From the point of view of the female partner, although the child is conceived artificially, from all other aspects it is a natural child, carried to term exactly as if conception had taken place by natural means. While there may be a lingering question in her mind during the pregnancy as to what the child's physical characteristics may be, after undergoing the painful and emotional experience of childbirth, that uncertainty will be resolved.

For the male partner, on the other hand, it is quite possible that his perception of the pregnancy will be substantially different. He is not the natural father, as the mother is the natural parent, and must be well aware of that fact. He may experience feelings of inadequacy, resentment or other negative attitudes toward the pregnancy, as illustrated by the case at bar. Thus, from the male point of view the pregnancy and resulting issue is, in many ways, akin to an adoption of the resulting child. However, whereas society has seen fit to regulate the artificial status of parent and child resulting from the adoption process, to insure as much as possible the stability of the relationship being created, no such protections exist at this time with regard to the field of artificial insemination. N.J.S.A. 9:3-17 et seq. Until such safeguards are supplied by legislative enactment, they must be supplied on a case-by-case basis.

In artificially induced pregnancy cases, nonaccess, of course, becomes irrelevant but is replaced by the issue of consent in order to establish legitimacy. Since consent, once it is disputed, is often far more difficult to prove to the same degree of certainty as physical access, it is only practical and reasonable to apply a rebuttable presumption criterion in determining threshold evidentiary questions as to the existence of consent at a certain point in time. This is particularly true when the question becomes one of withdrawal of an initial consent to the procedure.

Many states have resolved this problem by enacting statutes requiring that consent be provided in writing, although none specifically requires revocation of consent to be of the same formality. (citations omitted). Such legislative mandate achieves certainty and also diminishes problems of legal proof.

Public policy considerations seeking to prevent children born as a result of AID procedures from becoming public charges or being bastardized require that a presumption of consent exist and that a strong burden be placed on one seeking to rebut the presumption. *C. M. v. C. C.*, 152 N.J.Super. 160, 166, 377 A.2d 821 (Cty.Ct.1977). The same policy considerations are present whether the question presented is one of initial or continued consent. The absence of any authority limiting the continuing effectiveness of consent also leads to the conclusion that consent of the husband (in the case of married partners), once given, is presumed to be effective at the time when pregnancy occurs, unless the husband establishes by clear and convincing evidence that such consent has been

revoked or rescinded. Defendant has not met that burden.

Insofar as this is the case, the best interests of the child, the mother, the family unit and society are served by recognizing that the law surrounding AID insemination deals with the creation of a family unit and more particularly with the creation of parent-child relationships. Thus viewed, the public policy objectives served by legitimacy laws should similarly and consistently be applied in dealing with closely related problems presented by the use of AID techniques.

Accordingly, defendant is declared to be the lawful father of J. S. and as such bears at least partial responsibility for the child's support. The amount thereof is deferred pending submission by the parties of updated financial data to the court within 20 days of the date hereof.

The issue of custody is not disputed at all by defendant. Therefore, custody of J. S. is granted to plaintiff. Defendant is granted reasonable and liberal visitation with the child, should he choose to exercise it, subject to the requirement that he advise the plaintiff by telephone at least 24 hours in advance of each visit of his intention to exercise visitation.

Motion granted.

6.4.1.3 Presumed Consent

W.W. v. W.W., 51 A.D.3d 211 (N.Y. App. Div. 2008)

SPAIN, J.

At issue is the novel question of whether a husband can be deemed the legal parent of a child born to his wife, where the child was conceived as a result of artificial insemination by donor (hereinafter AID) during the marriage, but where the husband's consent to the AID was not obtained in writing.

The parties to this divorce action were married in 1995. After two children were born to the marriage, defendant (hereinafter the husband) had a vasectomy. In 2004, plaintiff (hereinafter the wife) became pregnant again, as a result of AID, with a third child (hereinafter the child). A few months into the wife's pregnancy, the parties separated pursuant to an agreement which provided, among other things, that the husband would not be financially responsible for the child. However, in her subsequent complaint for divorce, the wife alleged that the child was born to the marriage. The parties then entered a settlement agreement which reaffirmed the terms of the separation agreement and calculated the husband's support obligation based on two children. Thereafter, Supreme Court found that the provision in the separation agreement absolving the husband of his support obligation for the child was void as against public policy. Following a hearing on the issue of paternity, Supreme Court held that the husband was the child's legal father and modified the parties' stipulation by increasing the husband's child support obligation based upon three children, instead of two. Thereafter, the court entered judgment granting the divorce. The husband appeals and we now affirm.

Initially, we agree with Supreme Court that the provision of the settlement agreement absolving the husband of any support obligation with respect to the child is unenforceable. Despite the fact that the parties stipulated to the terms of the divorce, the court correctly recognized its obligation to

protect the best interests of the child, and appointed a Law Guardian. Indeed, the agreement left the child fatherless without any hearing or analysis of the child's rights and interests. Given that "the needs of a child must take precedence over the terms of the agreement when it appears that the best interests of the child are not being met," we agree that the parties' agreement-which preceded any determination of legal paternity-to leave the child without the husband's support cannot stand (*Matter of Gravlin v. Ruppert*, 98 NY2d 1, 5 [2002]; *see Harriman v Harriman*, 227 AD2d 839, 841 [1996]).

Next, we turn to the application of Domestic Relations Law § 73 to the facts of this case. That section provides a mechanism for married couples who utilize AID to have a child with assurances that the child will be, for all purposes, considered the legitimate child of both the woman and her husband (*see* Domestic Relations Law § 73[1]). Specifically, Domestic Relations Law § 73, which creates an irrebuttable presumption of paternity when certain conditions are met, states:

> "Any child born to a married woman by means of artificial insemination performed by persons duly authorized to practice medicine and with the consent in writing of the woman and her husband, shall be deemed the legitimate, natural child of the husband and his wife for all purposes. . . .
>
> "The aforesaid written consent shall be executed and acknowledged by both the husband and wife and the physician who performs the technique shall certify that he [or she] had rendered the service."

Given the clear and specific language making written consent a prerequisite to invoking the statute's protections, we cannot find that the statute applies where, as here, it is conceded that the husband did not consent in writing to the procedure. Indeed, the wife's physician testified that he rarely performed AID and conceded that he did not have any office protocol or standard form for obtaining the consent of the woman's husband. Under these circumstances, we conclude that Domestic Relations Law § 73 does not establish the husband's relationship to the child.

The fact that paternity cannot be established by statute, however, does not end our inquiry (*cf. In re Parentage of M.J.*, 203 Ill 2d 526, 535-537, 787 NE2d 144, 149-150 [2003] [holding written consent to AID essential to finding paternity]). Neither the language nor legislative history of Domestic Relations Law § 73 suggests that it was intended to be the exclusive means to establish paternity of a child born through the AID procedure. Indeed, the statute, by its terms, covers one specific situation where it operates to create an irrebuttable presumption of paternity; it applies only where the parties are married, the procedure is performed by a person "duly authorized to practice medicine" and the consent is appropriately written, executed, acknowledged and certified (*see* Attorney General's Mem in Support, Bill Jacket, L 1974, ch 303, at 3 [noting statute does not address the legitimacy of children born without husband's written consent or those conceived by AID prior to the enactment of the statute]; *see also Matter of Thomas S. v Robin Y.*, 209 AD2d 298, 299 [1994], *lv dismissed* 86 NY2d 779 [1995] [insemination performed by the woman at home]).

Certainly, situations will arise where not all of these statutory conditions are present, yet equity and reason require a finding that an individual who participated in and consented to a procedure intentionally designed to bring a child into the world can be deemed the legal parent of the resulting child (*see* Letter from Div of Human Rights, Bill Jacket, L 1974, ch 303, at 9 [noting the statute does not provide a result where AID is performed by someone other than a " 'duly authorized'

physician," but that status of the medical professional should not impact legitimacy of child]). Indeed, "if an unmarried man who biologically causes conception through sexual relations without the premeditated intent of birth is legally obligated to support a child, then the equivalent resulting birth of a child caused by the deliberate conduct of artificial insemination should receive the same treatment in the eyes of the law" (*In re Parentage of M.J.*, 203 Ill 2d at 541, 787 NE2d at 152; *see In re Baby Doe*, 291 SC 389, 392-393, 353 SE2d 877, 878-879 [Sup Ct 1987] ["even where husband's written consent is statutorily required, the failure to obtain written consent does not relieve (the) husband of the responsibilities of parentage"]; *see also R.S. v R.S.*, 9 Kan App 2d 39, 44, 670 P2d 923, 928 [1983]).

We thus reject the husband's attempt to invoke noncompliance with Domestic Relations Law § 73 as a bar to a finding that he is, legally, the child's father. It is clear that the overriding purpose of the statute is to give certainty to the legitimacy of those children conceived via AID whose parents complied with all of the statutory prerequisites, rather than to create a means of absolving individuals of any responsibility toward a child, even if the proof could otherwise establish that the individual participated in and consented to the decision to create the child (*see* Attorney General's Mem in Support, Bill Jacket, L 1974, ch 303, at 3; Mem of Dept of Social Servs, Bill Jacket, L 1974, ch 303, at 7; Letter from Dept of Health, Bill Jacket, L 1974, ch 303, at 8; *see also In re Parentage of M.J.*, 203 Ill 2d at 534, 787 NE2d at 148).

Accordingly, as the statute is neither applicable to nor determinative of the issue of paternity presented, we turn to the common law for an answer. To begin, "New York has a strong policy in favor of legitimacy" (*Matter of Anonymous*, 74 Misc 2d 99, 104 [1973]). Indeed, the presumption that a child born to a marriage is the legitimate child of both parents " 'is one of the strongest and most persuasive known to the law' " (*State of New York ex rel. H. v P.*, 90 AD2d 434, 437 [1982], quoting *Matter of Findlay*, 253 NY 1, 7 [1930]). Hence, our analysis begins with the rebuttable presumption that the child, a child born to a married woman, is the legitimate child of both parties.

Prior to the enactment of Domestic Relations Law § 73, a Surrogate's Court held "that a child born of consensual AID during a valid marriage is a legitimate child entitled to the rights and privileges of a naturally conceived child of the same marriage" (*Matter of Anonymous*, 74 Misc 2d at 105). This common-law rule is shared by numerous jurisdictions which have held, even in the absence of statutorily required written consent, that "the best interests of children and society are served by recognizing that parental responsibility may be imposed based on conduct evincing actual consent to the artificial insemination procedure" (citations omitted).

Consistent with our State's strong presumption of legitimacy, as well as the compelling public policy of protecting children conceived via AID, we follow the lead of other jurisdictions that impose a rebuttable presumption of consent by the husband of a woman who conceives by AID, shifting the burden to the husband to rebut the presumption by clear and convincing evidence (*see e.g. In re Baby Doe*, 291 SC at 391, 353 SE2d at 878; *K. S. v G. S.*, 182 NJ Super 102, 109, 440 A2d 64, 68 [1981]; *People v. Sorensen*, 68 Cal 2d 280, 283, 437 P2d 495, 497 [1968]; *but see Jackson v. Jackson*, 137 Ohio App 3d 782, 795, 739 NE2d 1203, 1213 [2000] [burden on wife to prove consent by a preponderance of the evidence]). Although our Legislature has provided an avenue to avoid factual disputes essentially by creating an irrebuttable presumption of legitimacy where the prerequisites of the statute are met (*see* Domestic Relations Law § 73), the need for a rebuttable presumption also clearly exists, especially so in light of the evidence that medical personnel who conduct AID procedures are not always aware of statutory consent requirements (citations omitted).

Turning to the specific issue before us, our review of the record reveals that the facts necessary to resolve the matter were either undisputed, or have been fully litigated before Supreme Court, rendering it appropriate to apply the rule of law announced herein without a remittal for further hearings. It is not disputed that the husband was fully aware that his wife was utilizing AID to get pregnant. Although he testified that he did not want a third child and that he had repeatedly told his wife that he did not think AID was "a good idea," at least until the couple had completed some counseling, he did not testify that he ever informed his wife that, should a child be born as a result of AID, he would not accept the child as his own. Indeed, he proffered no evidence that he took any steps before the AID was performed to demonstrate that he was not willing to be the child's father. Under these circumstances, we find that the husband failed to rebut the presumption that he consented to bringing a third child into the marriage through AID.

Even if we did not apply the rebuttable presumption, and instead placed the burden on the wife and Law Guardian to prove the husband's consent, we would find, as Supreme Court did, that the evidence demonstrates that the husband consented to the child's creation. The husband knew that his wife planned to undergo the AID procedure and observed her picking out a donor based on characteristics which matched his own; he signed a "Frozen Donor Semen Specimen Agreement" which set forth the terms of purchase and delivery of the semen specimen; he faxed the donor agreement to the California-based sperm bank and paid for the specimen with a credit card; he stayed home to care for the other children to enable his wife to go to the doctor's office for insemination; and, significantly, he acknowledged in his testimony that had the couple stayed together, he would have accepted the child as his own.

The husband's assertion that his wife forced him to sign the donor agreement by threatening to leave him is of no consequence. Just as an individual who agrees and proceeds to create a child by conventional methods in an attempt to salvage a troubled marriage is held responsible for the care of the resulting child, so too should an individual who acquiesces to his spouse's demands that a child be conceived through AID be held responsible. Importantly, the separation agreement executed by both parties specifically states that "the unborn child is not the biological child of the husband, but was conceived through a *mutually agreed upon* course of artificial insemination" (emphasis added).

This evidence fully supports Supreme Court's conclusion that the husband consented to his wife's decision to create the child and that he is, therefore, the child's legal father. Indeed, pursuing an alternative avenue, we reach the same result, finding that the foregoing facts of this case also warrant application of the doctrine of equitable estoppel to preclude the husband from "seeking to disclaim paternity of the parties' child, whose best interest is paramount" (citations omitted).

Finally, we reject the husband's assertion that Supreme Court erred in granting a judgment of divorce despite altering the terms of the parties' separation agreement. The separation agreement contains a severability clause which specifically provides for the present situation, stating that if any of its provisions "should be held to be contrary to or invalid under the law . . . such invalidity shall not affect in any way any other provision hereof." Inasmuch as the agreed upon support obligation for the two children included in the separation agreement is the amount reached by direct application of the Child Support Standards Act (*see* Domestic Relations Law § 240 [1-b]), altering the percentage to reflect the parties' third child does not require a new hearing or undermine the other provisions of the agreement. Under these circumstances, the divorce was properly granted (citations

omitted).

Ordered that the judgment is affirmed, without costs.

Notes and Questions

1. Some jurisdictions presumed that the man consented to the artificial insemination of his wife. As a result of that presumption, the man is recognized as the legal father of the child. In a presumption jurisdiction, which of the following situations should be enough to rebut the presumption?

(a) The man tells his mistress that he does not want to have a child with his wife because he plans to divorce her.

(b) The man's religious beliefs prohibit him from participating in artificial insemination.

(c) The man is biologically and physiologically capable of having children.

(d) The man has lost his job and is suffering financially.

(e) The man supplied sperm so his brother's wife could be artificially inseminated.

6.4.1.4 Implied Consent

In re Baby Doe, 353 S.E.2d 877 (S.C. 1987)

NESS, Chief Justice

This is an appeal from an order of the family court which held appellant husband responsible for the support of a child born to his wife as a result of artificial insemination. We affirm.

Husband has four grown children from a prior marriage. He married his present wife in the early 1970s and they attempted for several years to have a child. While living overseas, husband sought medical advice and learned that he was no longer able to father children, apparently due to physical trauma. Upon the parties' return to this country, the diagnosis was confirmed. The parties visited a gynecologist in Myrtle Beach and discussed artificial insemination. With husband's knowledge, wife began undergoing artificial insemination in Myrtle Beach and Charleston. Husband assisted wife with daily temperature readings to determine dates of fertility.

Wife conceived in February, 1983, and the parties separated shortly thereafter. The child was born in November, 1983, and husband was listed as father on the birth certificate.

Husband brought this action in family court seeking a declaration that he was not the father of the child. Wife counterclaimed seeking child support. The trial judge held there was a rebuttable presumption that any child conceived by artificial insemination during the course of the marriage has been conceived with the consent of the husband. The judge also held husband had expressly and impliedly consented to the artificial insemination, and awarded child support to wife.

Husband argues implied consent to artificial insemination should not be sufficient to establish legal parentage of a child. He argues that in the absence of written consent, he cannot be declared the legal father of a child conceived by artificial insemination during the marriage.

Artificial insemination is the introduction of semen into the reproductive tract of a female by artificial means. There are two types of artificial insemination in common use: (1) artificial insemination with the husband's sperm (homologous insemination), commonly referred to as A.I.H.; and (2) artificial insemination with the sperm of an anonymous third-party donor (heterologous insemination), commonly referred to as A.I.D. (citations omitted). The legal entanglements of determining parental responsibility have arisen almost exclusively from the latter (citations omitted).

This new reproductive technology has created the potential for conflicting decisions regarding the status of the parties involved. With the exception of the earliest decisions on this issue, however, American courts have been fairly uniform in their holdings. Almost exclusively, courts which have addressed this issue have assigned paternal responsibility to the husband based on conduct evidencing his consent to the artificial insemination. *Cf., Byers v. Byers*, 618 P.2d 930 (Okla.1980) [distinguishing birth by artificial insemination from husband's acceptance of child born from wife's affair with her paramour].

We hold that a husband who consents for his wife to conceive a child through artificial insemination, with the understanding that the child will be treated as their own, is the legal father of the child born as a result of the artificial insemination and will be charged with all the legal responsibilities of paternity, including support (citations omitted).

We do not agree that husband's consent is effective only if obtained in writing. A number of jurisdictions have adopted statutes regulating the use of artificial insemination and requiring written consent of the parties or of the husband.[76] However, even where husband's written consent is statutorily required, the failure to obtain written consent does not relieve husband of the responsibilities of parentage (citation omitted). Husband's consent to his wife's impregnation by artificial insemination may be express, or it may be implied from conduct which evidences knowledge of the procedure and failure to object.

We agree with the trial judge that husband's knowledge of and assistance in his wife's efforts to conceive through artificial insemination constitutes his consent to the procedure. The trial judge's decision to declare husband the legal father of Baby Doe is affirmed.

---

[76] *See* Uniform Parentage Act, Section 5: (a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination, and file the husband's consent with the [State Department of Health], where it shall be kept confidential and in a sealed file. However, the physician's failure to do so does not affect the father and child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, are subject to inspection only upon order of the court for good cause shown. (b) The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.

Husband's remaining exceptions are without merit and the trial judge's rulings on these issues are affirmed pursuant to Supreme Court Rule 23.

Affirmed.

Notes and Questions

1. The UPA permits the husband to withdraw his consent to the artificial insemination of his wife. Should the man be permitted to withdraw his consent? At what stage of the process should the man's withdrawal of consent be effective to relieve him of his obligation to any resulting child?

2. Should the withdrawal of consent have to be in writing?

3. What are the pros and cons of permitting a man to withdraw his consent?

4. Should the husband have the burden of proving that he withdrew his consent prior to the child's conception?

5. Which of the following evidence should be sufficient to show withdrawal of consent?

(a) Husband writes a letter to his wife stating that he is having second thoughts about raising a child conceived by artificial insemination using another man's sperm.

(b) Husband joins an organization that is lobbying to have the use of assisted reproductive technology declared to be illegal.

(c) During a heated argument, husband tells his wife that he does not want to have a child with her.

(d) Husband refuses to pay for his wife to continue receiving artificial insemination, so she borrows money to continue with the process.

6.4.2 Nonconsenting Husband is not the Legal Father

Marriage of Witbeck-Wildhagen, 667 N.E.2d 122 (Ill. App. Ct. 1996)

KNECHT, Justice.

Petitioner, Marcia Witbeck-Wildhagen, filed a petition for dissolution of marriage on January 26, 1994. One issue raised during the dissolution action was whether respondent, Eric Wildhagen, was the legal father of a child conceived by artificial insemination and born during the marriage. The trial court determined respondent is not the legal father of the child because he did not consent to the artificial insemination of petitioner, as required by section 3 of the Illinois Parentage Act (Act) (750 ILCS 40/3 (West 1994)). Petitioner appeals and we affirm.

Petitioner and respondent were married in November 1990. In April 1992, petitioner and respondent consulted with a nurse clinician at Christie Clinic regarding the procedure of artificial insemination. At the consultation, respondent made it clear to petitioner and the nurse he did not

want to participate in, nor did he consent to, petitioner's attempts to become pregnant. Petitioner acknowledges at the consultation respondent expressed his desire not to participate in her attempt to have a baby, but alleges respondent said it would be all right if she pursued the pregnancy alone. Whenever respondent had sexual relations with petitioner, he used a condom to prevent pregnancy. Following the initial consultation at Christie Clinic, petitioner underwent seven artificial insemination procedures. Respondent was not informed of this by Christie Clinic or by petitioner.

In approximately October 1993, petitioner became pregnant. In January 1994, she filed a petition for dissolution of marriage. The petition stated no children were born during the marriage but petitioner was pregnant. The complaint alleged petitioner did not have sufficient property and income to provide for her reasonable needs or those of her unborn child. Petitioner sought custody of the unborn child and asked the court to order respondent to pay reasonable sums for her maintenance, support of the unborn child, and prenatal and delivery expenses.

On July 2, 1994, petitioner gave birth to a son, M.W. In September 1994, respondent filed a motion for blood testing, which was allowed. Petitioner's attorney then notified respondent, in a letter dated September 14, 1994, of the seven artificial insemination procedures, the last of which, the letter stated, may have resulted in the conception of M.W. The parties and M.W. underwent blood testing in November 1994. Respondent was conclusively excluded as M.W.'s biological father.

In February 1995, petitioner filed a motion for summary determination of a major issue (motion for summary determination) under section 2-1005(d) of the Illinois Code of Civil Procedure (735 ILCS 5/2-1005(d) (West 1994)). In the motion, petitioner acknowledged respondent was not M.W.'s biological father and had not given his written consent to her artificial insemination. Nonetheless, petitioner asked the court to find respondent to be the legal father of M.W. within the meaning of the Act (750 ILCS 40/3 (West 1994)). The court heard arguments on the motion for summary determination and determined, under its interpretation of section 3 of the Act, respondent is not the legal father of M.W.

Following this ruling, the parties executed a marital settlement agreement which reflected the court's earlier decision and in which they set forth their agreements on the remaining issues. On August 4, 1995, the trial court entered a judgment of dissolution of marriage which incorporated the marital settlement agreement, and entered a final order stating respondent is not the legal father of M.W. Petitioner filed a timely notice of appeal and asks this court to reverse the trial court's determination respondent is not the legal father of M.W.

The issue presented is whether, under section 3 of the Act, the lack of written consent by respondent to petitioner's artificial insemination precludes the establishment of a father-child relationship and the imposition of a support obligation.

Section 3(a) of the Act provides:

> "(a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband shall be treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing executed and acknowledged by both the husband and wife. The physician who is to perform the technique shall certify their signatures and the date of the insemination, and file the husband's consent in the medical record where it shall

> be kept confidential and held by the patient's physician. However, the physician's failure to do so shall not affect the legal relationship between father and child. All papers and records pertaining to the insemination, whether part of the permanent medical record held by the physician or not, are subject to inspection only upon an order of the court for good cause shown." (Emphasis added.) 750 ILCS 40/3(a) (West 1994).

Only one Illinois case has analyzed this provision of the Act. In *In re Marriage of Adams*, 174 Ill.App.3d 595, 610-11, 124 Ill.Dec. 184, 193, 528 N.E.2d 1075, 1084 (1988), rev'd on other grounds, 133 Ill.2d 437, 141 Ill. Dec. 448, 551 N.E.2d 635 (1990), the Second District Appellate Court decided the failure to obtain the husband's written consent does not bar further inquiry into the circumstances surrounding the decision to use the artificial insemination procedure. The court examined the surrounding circumstances in the case and, although the husband had not executed a written consent to his wife's artificial insemination, agreed with the trial court's finding he had manifested his consent by his conduct before, during, and after the pregnancy. *Adams*, 174 Ill.App.3d at 615, 124 Ill. Dec. at 196, 528 N.E.2d at 1087. The court concluded nothing in section 3 bars the imposition of a support obligation on an estoppel or waiver theory where written consent is not obtained. Thus, the court imposed a support obligation on the husband, who had manifested actual consent to the procedure by his conduct. In *Adams* the court found the husband consented to the procedure. In this case respondent did not consent to the artificial insemination procedure, either in writing or in any other manner.

After the appellate court decision in *Adams*, the Supreme Court of Illinois reviewed the case but, because it determined Florida law was controlling and remanded the case, the court did not render a conclusive interpretation of section 3 of the Act. *In re Marriage of Adams*, 133 Ill.2d 437, 141 Ill. Dec. 448, 551 N.E.2d 635 (1990). In a cursory discussion of both section 3 of the Act and the applicable Florida statute, the court stated, "we note that the provision in the Illinois statute that the husband's consent * * * 'must be in writing' could be considered a mandatory requirement for establishing a parent-child relationship pursuant to the statute." (Emphasis added.) *Adams*, 133 Ill.2d at 444, 141 Ill. Dec. at 451, 551 N.E.2d at 638. The court went on to note:

> "[I]t is not clear whether under either statute the failure to provide written consent will preclude both the establishment of a parent-child relationship and the imposition of a support obligation. It may be the case that a support obligation will be found even in the absence of a parent-child relationship." (Emphasis added.) *Adams*, 133 Ill.2d at 445, 141 Ill. Dec. at 451, 551 N.E.2d at 638.

The court in *Adams* was considering only the possible effects of the failure to obtain written consent. It did not indicate the consent requirement could be waived entirely. *Adams*, 133 Ill.2d at 444, 141 Ill. Dec. at 451, 551 N.E.2d at 638.

Petitioner argues the language of the statute indicates respondent's written consent is not a prerequisite to the establishment of a father-child relationship. Her argument focuses on the following language: "the physician's failure to do so shall not affect the legal relationship between father and child." 750 ILCS 40/3(a) (West 1994). This language appears immediately after the description of the physician's duties of certifying the signatures of the husband and wife and the date of insemination and filing the husband's consent in the medical record. Petitioner contends, however, the quoted language means "the physician's failure to obtain the consent shall not affect the legal relationship between father and child." (Emphasis added.) The plain language and

structure of the statute does not lend itself to such a reading, nor do we believe this interpretation is what the legislature intended.

The first sentence of section 3 of the Act provides, "[i]f, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband shall be treated in law as if he were the natural father." (Emphasis added.) 750 ILCS 40/3(a) (West 1994). The Act then states, "[t]he husband's consent must be in writing." 750 ILCS 40/3(a) (West 1994). Following these statements is the explanation of what the duties of the physician performing the procedure are in terms of documenting the husband's consent, and the statement which provides, "the physician's failure to do so shall not affect the legal relationship between father and child." (Emphasis added.) 750 ILCS 40/3(a) (West 1994). This language refers to the physician's failure to certify and document the consent in accordance with the statute and cannot be interpreted as obviating the consent requirement.

We conclude the legislature intended a husband's written consent to be a prerequisite to the establishment of the legal father-child relationship and the imposition of a support obligation. The several provisions in section 3 of the Act which address the consent requirement would be superfluous if the failure to obtain the husband's written consent would not affect the legal status of the individuals involved.

In addition, because the statute requires the physician to certify the date of insemination, we conclude the husband's written consent is required each time his wife is to undergo the procedure. 750 ILCS 40/3(a) (West 1994). Such a requirement is not burdensome and it leaves no room for confusion on the part of the married couple or the physician regarding whether a consent previously given by the husband is still viable.

On the facts of this case, we need not decide whether the failure to obtain written consent would be an absolute bar to the establishment of a father-child relationship where the conduct of the father otherwise demonstrated his consent to the artificial insemination procedure. Such a situation was present in Adams and has also been addressed by commentators and the courts of other states. (citations omitted).

Here, there is no evidence of consent by respondent to the artificial insemination procedure, written or otherwise. Petitioner filed for a dissolution of marriage within two or three months of becoming pregnant. She was impregnated by the sperm of a man other than respondent, without respondent's knowledge or consent, and apparently without any intention of raising the child with respondent. In her brief, petitioner admits she underwent the procedure relying on her doctor's written assurance respondent would be legally responsible for her child, even though it was not his wish she have a child. There is no evidence in the record of any contact or interaction between respondent and M.W., and petitioner had M.W.'s last name legally changed to her maiden name. Under the facts of this case, there is no statutory or equitable basis for concluding a father-child relationship exists between respondent and M.W.

Petitioner urges this court to impose a support obligation on respondent, even absent the existence of a father-child relationship, contending any other result would be contrary to public policy. The two primary policy considerations here are (1) M.W.'s right to support, and (2) respondent's right to choose not to be a parent.

Just as a woman has a constitutionally protected right not to bear a child (see *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973)), a man has the right not to be deemed the parent of a child that he played no part in conceiving. Respondent made a choice not to parent a child. This choice was evidenced by not giving his consent to petitioner or any support to her choice to undergo artificial insemination. Petitioner underwent the procedure unbeknownst to respondent. Respondent was only informed of the manner in which M.W. was conceived after M.W. was born, by his attorney. This is not a case where respondent has changed his mind or is attempting to evade responsibility for his own actions in helping to conceive or encouraging the conception of a child. The facts of this case illustrate, and the trial court correctly determined, it would be inconsistent with public policy to force upon respondent parental obligations which he declined to undertake.

The second policy consideration here is M.W.'s right to support. The main purpose of the policy recognizing a child's right to support is to prevent minors from becoming dependent on the State. *Fink v. Roller*, 113 Ill.App.3d 1084, 1089, 69 Ill. Dec. 744, 747, 448 N.E.2d 204, 207 (1983). The trial court's order demonstrates it considered M.W.'s need for support and found that support would be forthcoming from his mother. The child's right to support cannot be met by requiring a nonparent to fulfill the obligation of a parent. Respondent has no financial obligation to this child.

It is the duty of the court to ensure the rights of the child are adequately protected. In this case, the trial court did so, and the balance it struck between the attendant interests of the parties was appropriate. It would be unjust to impose a support obligation on respondent where no father-child relationship exists between him and M.W. and he did not consent to the artificial insemination procedure. Accordingly, we affirm.

Affirmed.

Notes and Questions

1. Should the best interests of the child outweigh the man's decision not to be a parent?

2. If the child had been conceived by sexual intercourse, the outcome of the case may have been different. The man had sexual relations with his wife and the child was conceived during the marriage. Based upon the marital presumption, he would have been presumed to be the father of the child. In some jurisdictions, the man would not have been permitted to rebut the presumption unless it was in the child's best interests to do so. It would not be in the child's best interests unless another man was willing and able to parent the child. Is it fair that a child conceived by artificial insemination is given less protection than a child conceived by natural insemination?

3. In deciding whether to require the man to pay child support, should the court give more consideration to the financial needs of the child?

4. From a public policy perspective, is the *Witbeck* case wrongly decided? If the woman cannot financially support the child, the child will have to be taken care of by the government. Is that fair to the tax payers if the man has the financial resources to provide for a child conceived during his marriage?

6.5 The Paternity of the Sperm Donor

6.5.1 The Sperm Donor is not the Legal Father

Lamaritata v. Lucas, 823 So. 2d 316 (Fla. Dist. Ct. App. 2002)

BLUE, Chief Judge.

Although the parties raise numerous issues on appeal and cross-appeal, this is a simple case that can be resolved in a one-sentence opinion, to wit: Danny A. Lucas is a sperm donor, not a parent, and has no parental rights; thus the court erred in establishing a visitation schedule. Unfortunately for the parties, it does not appear that the attorneys ever seemed to understand this principle and thus assisted the trial court to the ruling we reverse. There has been protracted, unnecessary litigation in this case, including a prior visit to this court which should have ended the controversy.

In 1998, on certiorari review of an order for paternity tests in a paternity action brought by Danny A. Lucas against Lori A. Lamaritata, this court issued a clear mandate for the trial court to determine the applicability of the sperm donor statute and the validity of the parties' contract before proceeding on any issues regarding the rights of Mr. Lucas vis-a-vis the children of Ms. Lamaritata. Mr. Lucas had convinced the trial court to order paternity tests so that he might avoid the cost of litigation if he was not actually the biological father of Ms. Lamaritata's children. Despite the dictates of this court's opinion, the parties returned to the trial court, stipulated to paternity testing, then litigated issues regarding visitation, child support, and the best interests of the children. Because the parties and the trial court failed to heed this court's decision, they have suffered the exact harm they feared by unnecessarily litigating issues that are not relevant to the core issue in this case.

Ms. Lamaritata appeals a supplemental final judgment that grants to Mr. Lucas (1) unsupervised, overnight visitation on alternating weekends and visitation on the day after Christmas and on Father's Day; (2) telephone calls from the children when they are with their mother; and (3) the right to confer with the children's teachers and attend school events and activities. At the same time, the supplemental final judgment held that Mr. Lucas was foreclosed from all parental rights except those set forth above and foreclosed from bringing the paternity action. The trial court also denied Ms. Lamaritata's motion to escrow child support, which she sought to protect the children's right to support in the unlikely event Mr. Lucas was given parental rights. A brief statement of the pertinent facts was set forth in this court's prior opinion.

D.A.L. (donor) and L.A.L. (recipient) entered into a contract whereby the donor would provide sperm to recipient with the expectation that she would become pregnant through artificial insemination and deliver offspring. The agreement provided that if childbirth resulted, the donor would have no parental rights and obligations associated with the delivery, and both parties would be foreclosed from establishing those rights and obligations by the institution of an action to determine the paternity of any such child or children. Notwithstanding the clear language of the contract, after the recipient gave birth to twin boys the donor filed an action in circuit court seeking to establish paternity and an award of those rights associated with it. In defense of the action, the recipient alleged that the contract barred such an action, that section 742.14, Florida Statutes (1997), disallowed sperm donors any parental rights, and that the donor was not in fact the biological father of the children.

L.A.L. v. D.A.L., 714 So.2d 595, 596 (Fla. 2d DCA 1998). This court quashed the order for paternity testing and directed the circuit court to proceed in a manner consistent with this court's opinion.

In the opinion, after considering the express language of section 742.14, Florida Statutes (1997),[77] this court held: "Should the trial court decide that this statute is constitutionally applicable to the facts in the underlying litigation, the donor, whether or not he is scientifically determined to be the biological parent of these boys, will be foreclosed from all parental rights, including his access to the children." 714 So.2d at 596 (emphasis added). Likewise, after considering the express language of the parties' contract, this court held that "if the clear intent of the parties to this agreement is enforced by the trial court," Mr. Lucas waived his right to institute a paternity proceeding. 714 So.2d at 597.

In an attempt to avoid application of the statute, Mr. Lucas now argues that he is not a sperm donor. Sperm donor is not defined in the statute. The contract, however, calls Mr. Lucas "donor" and indicates that sperm is the only donation required of him. Thus we easily conclude that Mr. Lucas qualifies as a sperm donor.

We just as easily reject Mr. Lucas's argument that he and Ms. Lamaritata constitute a "commissioning couple." Commissioning couple is defined in the statute as "the intended mother and father of a child who will be conceived by means of assisted reproductive technology using the eggs or sperm of at least one of the intended parents."§ 742.13(2). There are no facts to show that Mr. Lucas and Ms. Lamaritata have any type of relationship that would fall under the rubric of "couple." Further, they did not commission or contract to jointly raise the children as mother and father. Rather, they joined forces solely for the purpose of artificially inseminating Ms. Lamaritata, an intent clearly set forth in the parties' contract.

A person who provides sperm for a woman to conceive a child by artificial insemination is not a parent. Both the contract between the parties and the Florida statute controlling these arrangements provide that there are no parental rights or responsibilities resulting to the donor of sperm. See § 742.14. If the sperm donor has no parental rights, the sperm donor is a nonparent, a statutory stranger to the children.

Even though the parties entered into subsequent stipulations, purportedly to give visitation rights to this nonparent, we conclude that agreement is not enforceable. There are numerous Florida cases holding that nonparents are not entitled to visitation rights. *See, e.g.*, *O'Dell v. O'Dell*, 629 So.2d 891, 891 (Fla. 2d DCA 1993) (reversing visitation for a divorced man and his stepson, noting that "[t]his court has repeatedly reversed orders giving visitation rights to nonparents"); *Kazmierazak v. Query*, 736 So.2d 106, 106 (Fla. 4th DCA 1999) (holding that "psychological parent" was not entitled to custody or visitation); *Meeks v. Garner*, 598 So.2d 261 (Fla. 1st DCA 1992); *cf. Lonon v. Ferrell*, 739 So.2d 650, 652 (Fla. 2d DCA 1999) (holding that biological grandparents were "statutory strangers" to children following their adoption by stepfather; statute authorizing grandparent visitation violated

[77] Section 742.14 provides in pertinent part: "The donor of any egg, sperm, or preembryo, other than the commissioning couple or a father who has executed a preplanned adoption agreement under s. 63.212, shall relinquish all maternal or paternal rights and obligations with respect to the donation or the resulting children."

parent's constitutional right to privacy). Contracts purporting to grant visitation rights to nonparents are unenforceable. *Taylor v. Kennedy*, 649 So.2d 270, 271-72 (Fla. 5th DCA 1994) ("Florida courts do not recognize a claim for specific performance of a contract for visitation in favor of a non-parent."). Therefore, pursuant to the contract's severability clause, we sever the unenforceable portion of the contract purporting to give visitation rights to Mr. Lucas.

The sperm donor here has no legal parental rights, and this case should have been dismissed after our prior opinion. Accordingly, we reverse the supplemental final judgment and remand to the trial court for the entry of a final judgment declaring that Mr. Lucas has no enforceable parental rights.

Reversed and remanded with directions.

Questions

1. Should known sperm donors be treated differently from anonymous sperm donors? Why? Why not?

2. Should the sperm donor be treated as if he has no parental rights? Should the court recognize the sperm donor's parental rights and force him to waive them?

3. If a single woman is inseminated with donor sperm, should the donor have a duty to support the child if something happens to the woman when the child is under the age of majority? In order to prevent the child from becoming an orphan, should a single woman be required to appoint a guardian for the child prior to being artificially inseminated?

6.5.2 The Sperm Donor May Be the Legal Father

Shultz v. Shultz, 923 A.2d 473 (Pa. Super Ct. 2007)

KELLY, J.

These unconsolidated appeals lie from two orders, denying respectively Appellant's complaint, lodged in York County, for sole legal and primary physical custody of the parties' four children, and her motion to join the biological father of two of the children in Dauphin County proceedings to resolve Appellee's complaint for child support. We affirm in part and vacate and remand in part, and hold that, in the circumstances of this case, the doctrine of equitable estoppel governs the financial obligation of a sperm donor to support children in whose lives he is involved.

Beginning in 1996, the parties lived together in York County for approximately nine years, during which period they underwent a commitment ceremony in Pittsburgh, and entered into a civil union in Vermont. Of the children who are the subjects of these actions, two, A.J. and L.J., are nephews of Appellee's whom she has adopted. The remaining two, Co.J. and Ca.J., are Appellee's biological children by Appellee Carl Frampton, a long-time friend of Appellant's. At her instigation he agreed to act as sperm donor, and has been involved in the children's lives since their birth.

In February of 2006, after several months during which the parties continued to reside together despite separation as a couple, Appellee relocated with the children from York County to Dauphin

County. Shortly after Appellee's departure, Appellant, naming both Appellee and Appellee Carl Frampton as defendants, sought full legal and physical custody of all four children in the York County Court. At the conclusion of a conciliation conference on March 20, legal and primary physical custody of all the children were temporarily awarded to Appellee with partial physical custody in Appellant. Although Appellant was awarded no legal custody rights, Appellee Frampton received shared legal and physical custody of Ca.J. and Co.J. Appellant's subsequent petition for special relief was denied on March 23. However, at some point soon thereafter, Appellee voluntarily relinquished L.J. to Appellant's care, and began providing a stipend for his support.

On April 3, Appellee filed a complaint in Dauphin County seeking child support from Appellant for Ca.J. and Co.J., and was awarded approximately $983 per month. Appellant appealed seeking de novo review on the basis that Appellee Frampton was essentially a third parent to Co.J. and Ca.J., and as such was obligated to contribute to their financial support. Although Appellant had failed to file a formal joinder request prior to the support hearing, she was permitted to do so afterwards. Following the court's receipt of the formal request and Appellee's response, joinder was denied on July 31.

The custody litigation was resolved on the second day of a two day trial held on August 1 and 2, when the trial court, ruling from the bench, awarded shared legal custody of all four children to the parties. Appellant received primary physical custody of L.J. only, with partial physical custody as to him in Appellee, who was awarded primary physical custody of the other three children, with partial custody in Appellant. Appellee Frampton was awarded partial physical custody, one weekend a month, of Co.J. and Ca.J.

Appellant has filed appeals from both the custody and support orders. Although presenting separate issues, the anomalous circumstances of these actions present basic and interrelated questions concerning the parental rights and responsibilities both of Appellant and of Appellee Frampton given the parties' recognition of her in loco parentis status, as well as his standing as a biological parent.

In her appeal from the support order, Appellant has ostensibly raised three claims concerning the court's denial of her joinder motion. Two of these are, in fact, aspects of the same contention, that Appellee Carl Frampton, having, as the biological father of Co.J. and Ca.J. a prima facie right to custody, for the same reason also has the obligation to contribute to their support. That being so, the trial court erred in denying the motion to join him as an indispensable party. As a coda to her primary contention, Appellant argues that the biological mother's failure/unwillingness to pursue support claims against the biological father is irrelevant, and since all of the three persons involved in these matters have been awarded formal rights of custody, all three are obligated to provide support.

Our standard and scope of review in child support cases is narrow. We will not disturb a child support order absent an abuse of discretion. An abuse of discretion occurs if insufficient evidence exists to sustain a support award, if the trial court overrides or misapplies existing law, or if the judgment exercised by the trial court is manifestly unreasonable. *L.S.K. v. H.A.N.*, 813 A.2d 872, 876 (Pa.Super.2002) (citations and quotation marks omitted).

"An indispensable party is one whose rights or interests are so pervasively connected with the claims of the litigants that no relief can be granted without infringing on those rights or interests." *Hubert v.*

Greenwald, 743 A.2d 977, 979 (Pa.Super.1999), appeal denied, 563 Pa. 688, 760 A.2d 854 (Pa.2000). The basic inquiry in determining indispensability concerns whether, in the absence of the person sought to be joined, justice can be done. *Id.* at 980. Analysis of this claim requires reference to both the nature of the claim and the requested remedy. *Id.*

In finding that because Appellee Frampton is not obligated to provide child support he is thus not indispensable, the trial court relies on two case authorities. The first, *L.S.K., supra,* explores the financial responsibility of a lesbian partner in a long term relationship where a sperm donor, in that case anonymous, fathered a child to the other partner. Support was not sought from the biological father, who had relinquished all parental rights.

The Court found that the biological mother was owed support by her partner, who had exercised custodial rights on the basis of her in loco parentis status. The duty, however, was not to be derived from the Domestic Relations Code, 23 Pa. C.S.A. § 4321(2), governing liability for support of minor children. Rather, the obligation stemmed from principles of equitable estoppel, which "applies to prevent a party from assuming a position or asserting a right to another's disadvantage inconsistent with a position previously taken." *L.S.K., supra* at 877 (citations and quotation marks omitted). Reduced to its essence, the doctrine is one of "fundamental fairness, designed to preclude a party from depriving another of a reasonable expectation when the party inducing the expectation albeit gratuitously knew or should have known that the other would rely on that conduct to his detriment." *Id.* Thus the trial court in this case held that Appellant, having "asserted custodial rights in relation to [the children], is [ ] obligated under an equitable theory to provide for their support."(Trial Ct. Op., 11/21/06, at 6).

In two basic respects, this case differs from *L.S.K.*: first, Appellant does not deny her own responsibility to support the children; rather, her focus is on the omission of any similar obligation assigned to Appellee Frampton, who, if he has not "asserted custodial rights" by petitioning for them, has sought them informally, and has in no way declined the award of custody. However, *L.S.K.* provides a matrix in which the critical question in this case arises: if fundamental fairness prevents Appellant, identified by law as a third party, from avoiding a support obligation arising from her status as a de facto parent, and she does not, in any event, attempt such an avoidance, does not the same principle operate similarly to estop Appellee Frampton, automatically recognized as the possessor of parental rights based on his biological parenthood, from disclaiming financial responsibility? We find that it does. His obligation is, in fact, statutorily imposed as "[p]arents are liable for the support of their children who are unemancipated and 18 years of age or younger." 23 Pa. C.S.A. § 4321(2). As the Court in *L.S.K.*, *supra* at 877, has opined, stepparents who have held a child out as their own are liable for support; biological parents who have exercised the rights appurtenant to that status can be no less bound. Thus the trial court's conclusion that Appellant's obligation is established by *L.S.K.* is not incorrect, only incomplete.

Further, Appellee Frampton has himself anticipated his obligation by providing support to Co.J. and Ca.J. since their births, having contributed "in excess of $13,000" in the last four years, (N.T., 8/2/06, at 217), $3,000 of it during the six months preceding the custody trial (*Id.* at 222); and having borrowed money to provide the parties with a vehicle suited to transporting the children. (*Id.*). While these contributions have been voluntary, they evidence a settled intention to demonstrate parental involvement far beyond the merely biological. Further, in addition to having been awarded partial custody, Appellee was present at the birth of Co.J. (*id.* at 20); has expressed an interest in relocating closer to the children's home to facilitate both his court ordered monthly partial

custody and further contact, which, in fact, already occurs (*id.* at 235, 216); and has encouraged the children to call him "Papa." (*Id.* at 216). If Appellee expresses a need for funds or household items, he supplies them (*id.* at 222), as well as clothing and toys for the children. (*Id.* at 223). Such constant and attentive solicitude seems widely at variance with the support court's characterization of Appellee Frampton's having "played a minimal role in raising and supporting" the children. (Trial Ct. Op., 11/21/06, at 2). We find that under such circumstances, the principle which serves to confirm Appellant's obligation operates in the same manner as to Appellee Frampton's.

To address the latter, the trial court finds relevant this Court's decision in *Ferguson v. McKiernan*, 855 A.2d 121 (Pa.Super.2004). There the biological mother sought child support from the biological father, her co-worker and former lover, despite having assured him on several occasions that he would have no parental status or obligation. Although recognizing the mother's reprehensible conduct toward the biological father, as well as toward her husband, who filed for divorce on the same day artificial insemination was performed, the Court found a duty of support to be owed by the biological father on grounds that the parties could not bargain away the right of support which accrued not to them but to the children.

The trial court here, which seems erroneously to regard Appellant's desire to join Appellee Frampton as an attempt to escape financial liability altogether, found that appearances notwithstanding, Ferguson does not support Appellant's position, as she was already liable for support under the ruling in *L.S.K.* The court also attempted to distinguish Ferguson on several bases: specifically, the biological mother there was in the process of divorce and had once been romantically attached to the sperm donor, while the children here were born into an intact family to persons who intended to cooperate in rearing them.

The distinctions drawn by the trial court to support its theory of inapplicability seem less persuasive than distinctions which tend in the opposite direction. Contrary to the trial court's assertion that Appellee Frampton, "like the sperm donor in Ferguson who also did not assert or seek parental rights," (Trial Ct. Op., 11/21/06, at 6) (emphasis added), rather than remaining detached from the children, he became, voluntarily, indeed, enthusiastically, an integral part of their lives. Most pertinently, the court found that Appellee Frampton made no agreement as to the children's support as there was no need for him to do so-two parents were already available to provide the support. This last point is in fact the crux of the court's rationale: "to hold [Appellee] Frampton liable for support would create a situation in which three parties/parents would be liable for support." (Trial Ct. Op. at 7). In the trial court's view the interjection of a third person in the traditional support scenario would create an untenable situation, never having been anticipated by Pennsylvania law. We are not convinced that the calculus of support arrangements cannot be reformulated, for instance, applying to the guidelines amount set for Appellant fractional shares to incorporate the contribution of anther obligee. As the Court in *L.S.K., supra*, has held, in another anomalous situation:

We recognize this is a matter which is better addressed by the legislature rather than the courts. However, in the absence of legislative mandates, the courts must construct a fair, workable and responsible basis for the protection of children, aside from whatever rights the adults may have vis a vis each other. *Id.* at 878.

Accordingly, we affirm the award of custody, vacate the award of support, and remand to the trial court with directions that Appellee Frampton be joined as an indispensable party for a hearing at which the support obligation of each litigant is to be recalculated.

Custody order affirmed. Support order vacated and case remanded with instructions. Jurisdiction is relinquished.

Sample Statutes

Ga. Code Ann., § 53-2-5 Rights of inheritance of and from individual conceived by artificial insemination

An individual conceived by artificial insemination and presumed legitimate in accordance with Code Section 19-7-21 shall be considered a child of the parents and entitled to inherit under the laws of intestacy from the parents and from relatives of the parents, and the parents and relatives of the parents shall likewise be entitled to inherit as heirs from and through such individual.

C.G.S.A. § 45a-777 (Connecticut)Inheritance by child conceived as a result of A.I.D

(a) A child born as a result of A.I.D. may inherit the estate of his mother and her consenting spouse or their relatives as though he were the natural child of the mother and consenting spouse and he shall not inherit the estate from his natural father or his relatives.

(b) The mother and her consenting husband or their relatives may inherit the estate of a child born as a result of A.I.D., if the child dies intestate, and the natural father or his relatives shall not inherit from him.

C.G.S.A. § 45a-778 (Connecticut)Words of inheritance to apply to child conceived through A.I.D

(a) The words "child", "children", "issue", "descendant", "descendants", "heir", "heirs", "unlawful heirs", "grandchild" and "grandchildren", when used in any will or trust instrument, shall, unless the document clearly indicates a contrary intention, include children born as a result of A.I.D.

A.C.A. § 28-9-209 (Arkansas) Children as legitimate

(c) Any child conceived following artificial insemination of a married woman with the consent of her husband shall be treated as their child for all purposes of intestate succession. Consent of the husband is presumed unless the contrary is shown by clear and convincing evidence.

Class Discussion Tools

1. Pedro and Sandra got married. Afterwards Pedro decided that he did not want to have children, so he had a vasectomy performed on him. Sandra threatened to file for divorce if Pedro did not agree to help her have a child. Pedro admitted to Sandra that he did not want children because he was afraid that any child he conceived would inherit his genetic disorder. To keep the peace, Pedro accompanied Sandra to the fertility clinic. Pedro helped select a sperm donor that had features similar to his. In preparation for the pregnancy, Sandra quit her job. Pedro drove Sandra to all of her medical appointments before and after the conception of the child. After the child was born, Pedro realized that he did not want to raise another man's child. He shared his concerns with

Sandra. As a consequence, Sandra filed for divorce. While the divorce was pending, Pedro was killed in a car accident. If Pedro died intestate in the state of Connecticut, would the child be eligible to inherit from his estate? What would be the result if Pedro died in the state of Arkansas?

2. Paul and his wife Maggie decided that they wanted to conceive a child using artificial insemination. Paul's sperm count was low, so they had to use donor sperm. They went to the New Love Fertility Clinic. Paul wrote a $5,000 check to the fertility clinic from his checking account. In the memorandum section of the check, Paul wrote, "to finance the creation of a child I will raise with my wife, Maggie." Maggie started receiving treatment a few days after the clinic cashed Paul's check. Prior to the conception of a child, Paul and Maggie had a fight. In response, Paul sent Maggie a text message stating that he no longer wanted to raise a child with her. It is unclear whether or not Maggie received the message. Nonetheless, Maggie continued treatments and conceived a child through the use of artificial insemination. Paul does not want to take any responsibility for the child. If the jurisdiction has the following statute, is Paul the legal father of the child? "A man who provides sperm for, or consents to, assisted reproduction by a woman with the intent to be the parent of her child, is a parent of the resulting child."

6.6 Children Conceived Through Surrogacy Arrangements

In the previous two sections of this chapter, the focus has been on paternity. This section is unique in that it tackles the issue of the legal status of the women involved in a surrogacy arrangement. The cases presented in this section deal with the right of a child created as the result of a surrogacy arrangement to inherit from his or her mother. As previously indicated, the child's right to inherit is determined by the existence of a parent-child relationship. In the case of children conceived as a result of surrogate agreements, the inheritance rights of those children is based upon the recognition of the mother-child relationship. The main issue becomes: Who is the legal mother of a child resulting from a surrogacy arrangement—the surrogate or the contracting woman.

6.6.1 The Possibility of Inheriting From the Woman

In order for a child created as the result of a surrogacy arrangement to have the opportunity to inherit from a woman, that woman must be deemed to be the child's legal mother. In some cases, that woman may be the woman acting as the surrogate. In other cases, that woman may be the woman who contracted to have the child created. Courts have adopted several different tests to determine the identity of the legal mother of a child conceived as the result of a surrogacy arrangement. These tests are illustrated in the next few cases.

6.6.1.1 The Genetics/Blood Test

Belsito v. Clark, et al., 644 N.E. 2d 760 (C.P. Ct. Oh. 1994)

SPICER, Judge.

Findings of Fact

Plaintiffs, Anthony and Shelly Belsito, were married September 26, 1992. They decided they wanted

a large family. Unfortunately, approximately one month prior to their marriage, Shelly had to undergo a hysterectomy as a result of recently discovered cervical cancer. Her physician had to remove her uterus, but was able to save her ovaries so that she could continue to produce eggs.

Carol S. Clark is Shelly's younger sister. Around the same time as Shelly's hysterectomy, Carol gave birth to her third child. Carol knew how much having a family meant to Shelly and Tony so, at that time, Carol told Shelly that, if she could, she would carry Shelly and Tony's baby for them.

In October 1993, Shelly and Tony were accepted into the University Hospitals' program for in vitro fertilization, Shelly and Tony as the genetic parents and Carol as the surrogate host. Carol was to receive no compensation for her role as a surrogate for Shelly and Tony's baby. Carol testified that she planned to be no more than an aunt to the child.

Dr. Leon Sheean is the Director of the Laboratories for In Vitro Fertilization and Andrology at University Hospitals of Cleveland, MacDonald Hospital for Women ("MacDonald Hospital"). Since he became the director in January 1990, Dr. Sheean has overseen all in vitro fertilization and andrology procedures in the laboratory, has established the policies in place at the hospital, and has been responsible for maintaining records of the events and patients that are treated within the program.

Dr. Sheean testified as to the policies, procedures, and routines followed at MacDonald Hospital in reference to the in vitro fertilization program. Dr. Sheean testified in great detail as to the procedures involved, and the methods of quality control used to ensure that the fetus is the result of the genetic parents and that it is placed in the proper surrogate, resulting in "one-hundred percent certainty" that the child is the biological and genetic child of the infertile couple.

Pursuant to the policies of the in vitro fertilization program, there are several checks and balances to ensure the propriety of the eggs and the sperm. First, the frequent visits to the hospital during the evaluation and the treatment stages allow the staff at the lab to establish a conversive relationship with the parties, and to identify them by sight. Second, all the containers used in the process are clearly labeled prior to the cells' being placed into the container. The petri dishes are labeled and color-coded with a color that is unique to that patient.

All the foregoing procedures were followed in the Belsito case. In addition, Shelly, Tony, and Carol signed separate consent forms to participate in the program. Within these documents, the parties consented to their status within the program. The consent form signed by Carol Clark described her as a "carrier." The consent form signed by Shelly and Tony designated them as the "mother" and "father" of the child.

In approximately January 1994, Shelly and Carol began the process of preparing for the procedure. Prior to the planned embryo transfer, Shelly and Carol began taking various medications to align their fertility cycles and prepare their bodies for the procedure. In addition, Carol testified that she abstained from sexual intercourse for at least two months prior to the procedure and at least two weeks after the procedure.

On February 10, 1994, Shelly Belsito was admitted to MacDonald Hospital for the retrieval of the eggs from her ovaries. A total of ten eggs was recovered from Shelly. Tony's sperm was collected in a labeled container, washed, and added to the eggs. On February 12, 1994, Carol Clark was admitted

to MacDonald Hospital for transfer of the embryos into her uterus. The two fertilized eggs were transferred into Carol's uterus by her physician. Shelly was also present at the transfer. Approximately two weeks after the transfer, the parties went to the hospital for a pregnancy test. At that time, it was confirmed that one of the two embryos did attach. Carol was carrying Shelly and Tony's child.

According to expert testimony of Dr. Sheean, the fetus placed in the carrier sets up an entirely separate system from the carrier. The uterus provides only a means of nourishment to and a means of carrying waste away from the baby's system. The uterus provides a "filtering system" for the child. Blood between the carrier and the fetus is not exchanged during the pregnancy, absent some complication. According to the opinion of Dr. Sheean, there would be no genetic or blood tie to the surrogate host.

Dr. Sheean expressed his opinion that the unborn child carried by Carol Clark was genetically the child of Anthony and Shelly Belsito, and that Carol Clark as a surrogate would contribute none of the DNA that would ultimately make up the genetics of the unborn child.

The parties knew that the baby was a boy, and planned on naming him Nicholas Anthony Belsito. The original due date for the child was calculated to be November 14, 1994. However, Carol was scheduled to undergo a Caesarean section on October 12, 1994, at Akron City Hospital. Shelly and Tony planned on being at Nicholas's birth. Shelly was also planning to nurse Nicholas.

In preparing for Nicholas's birth, Shelly spoke with Akron City Hospital regarding the birth certificate. She was told that, according to Ohio law, the woman who gave birth to the child will be listed on the birth certificate as the child's mother. Further, she was told that because Carol, the surrogate, and Tony, the genetic and biological father, are not married, the child will be considered illegitimate, and will be listed on his birth records as "Baby Boy Clark" and not as "Baby Boy Belsito."

As a result of that information, Anthony and Shelly Belsito filed a complaint for declaratory judgment with the court on September 14, 1994. A hearing was held on September 27, 1994. From that declaratory judgment and the hearing, the Belsitos have requested this court to declare that it is unnecessary for them to adopt the child now carried by Carol Clark. They contend that they are the genetic and natural parents of that child and are therefore entitled to be recognized as having the legal status of parents. In addition, they have requested that the court order the preparer of the birth certificate to reflect the legitimate status of the child and the Belsitos' status as the legal and natural parents of the child.

Conclusions of Law

The central question of the declaratory judgment action before the court is, who is to assume the legal status of natural parents of the unborn child carried by Carol S. Clark?

Under the foregoing findings of fact, the court must conclude that Carol S. Clark is the gestational surrogate, and the genetic makeup of the child she carries has been determined by the egg and the sperm of Shelly Belsito and Anthony Belsito. The court is of the opinion that the law requires that, because Shelly Belsito and Anthony Belsito provided the child with its genetics, they must be designated as the legal and natural parents.

The analysis and law in support of that conclusion begin with the proposition that the law will impose the duties of a child-parent relationship and legal status of natural parents only upon those individuals who can be found to be a natural or adoptive parent. *State v. Barger* (1920), 14 Ohio App. 127, 129; *Angel v. Angel* (C.P.1956), 74 Ohio Law Abs. 531, 533-534, 2 O.O.2d 136, 137, 140 N.E.2d 86, 87. *See, also, Burlington Cty. Welfare v. McClain* (1983), 189 N.J.Super. 152, 458 A.2d 1348; *Brummitt v. Kentucky* (Ky.App.1962), 357 S.W.2d 37.

Since plaintiffs, Anthony Belsito and Shelly Belsito, have alleged that they are the natural parents and not subject to the adoption laws of this state, the analysis of the law must be confined to the question of what constitutes or identifies a "natural parent."

While various terms are used to identify a natural parent, a review of case law leads to the conclusion that "natural parent" refers to the child and parent being of the same blood or related by blood. *Owens v. Bell* (1983), 6 Ohio St.3d 46, 48, 6 OBR 65, 67-68, 451 N.E.2d 241, 243; R.C. 2317.47; R.C. 3111.09. *Black's Law Dictionary* defines "blood relations" as: "Kindred; consanguinity; family relationship; relation by descent from a common blood ancestor. A person may be said to be 'of the blood' of another who has any, however small a portion, of the blood derived from a common ancestor * * *." *Black's Law Dictionary* (6 Ed.Rev.1990) 172.

In modern terminology, blood relationship would be described as shared DNA or genetics. Support for the contention that genetic relationship is the modern equivalent of the term "blood relationship" can be found in the evidentiary practice in disputed parentage cases of comparing common biological characteristics. The practice involves the trier of fact's comparing genetic traits of the child and the alleged parent, such as facial features, build, and color of hair and eyes, to confirm or rebut a blood relationship. *Domigan v. Gillette* (1984), 17 Ohio App.3d 228, 17 OBR 494, 479 N.E.2d 291, paragraph two of the syllabus. Further support may be found in the fact that comparison of the blood of both parent and child for a genetic or DNA resemblance has become a recognized means of establishing parentage. *See* R.C. 3111.09.

Historically and at common law, blood relation was the primary means of establishing the legal status of a natural parent. 1 Blackstone, Commentaries on the Laws of England (7 Ed.1775), Chapter XVI, Of Parent and Child. Under today's laws of parentage, a genetic relationship and blood relationship of the correct degree describe and result in the same legal status or relationship, and proof of either is still the primary means of establishing parentage.

However, in cases involving a maternity dispute, the female who gave birth to a child is considered the natural parent. *See Burlington Cty. Welfare v. McClain* (1983), 189 N.J.Super. 152, 458 A.2d 1348. The rationale behind that rule of substantive law is that for millennia, giving birth was synonymous with providing the genetic makeup of the child that was born. Birth and blood/genetics were one.

Blood/genetics and birth, the two ways that the law has historically used to identify the natural parent, are recognized and codified in R.C. Chapter 3111, Ohio's adoption of the Uniform Parentage Act. Under that Act, maternity can be established by identifying the natural mother through the birth process or by other means, including DNA blood tests. R.C. 3111.02.

In most disputed cases, those two ways of identifying natural parents are still valid and reliable. In a

small but growing number of cases, however, they can result in confusing and questionable determinations of parentage. The reason for that confusion is modern science and medicine's ability to manipulate the conception and delivery process of a child. By successfully implanting an embryo into the uterus of a female who has become known as the "gestational surrogate" or "surrogate host," modern medicine has devised a way of separating birth from genetics. The introduction of in vitro fertilization means that the female who bears the child may not be the person who provides the genetic imprint for the child's development.

That is the fact pattern of this case. Shelly Belsito has provided the genetics, that is, the egg, which will determine the child's genetics. Shelly's sister, Carol, is the person who will carry and give birth to the child. Under R.C. Chapter 3111, and the cases upon which it is based, both would be considered the mother of the delivered child: Carol, because she gave birth, and Shelly, because she provided the genetic makeup or imprint.

Surrogacy technology did not exist and a separate birth and genetic mother were factually impossible when the statute, case law, and common law were formulated. It must therefore be assumed that the framers of those laws did not intend for the law to result in two mothers. *In re Marriage of Moschetta* (1994), 25 Cal.App.4th 1218, 30 Cal.Rptr.2d 893. This conclusion is buttressed by the fact that the Uniform Parentage Act was intended to address solely the question of legitimacy of a child and not surrogacy. Notes, Uniform Parentage Act. In addition, society and the law recognize only one natural mother and father. *Michael H. v. Gerald D.* (1989), 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91.

It is apparent that the law must adapt and change to end the confusion caused by surrogacy. The question is, how will it adapt? Will the genetic test, or the birth test, or some other means be used to identify those individuals who will be classified as having the legal status of natural mother in cases such as this one in which the surrogate has not provided the genetic imprint for the child?

The fact pattern of this case is one of first impression for Ohio courts, and would be for most jurisdictions in the United States. However, several courts have addressed questions involving surrogacy. *In the Matter of Baby M.* (1988), 109 N.J. 396, 537 A.2d 1227; *In re Marriage of Moschetta, supra*; Seymour *v. Stotski* (1992), 82 Ohio App.3d 87, 611 N.E.2d 454; *Yates v. Keane* (1990), 184 Mich.App. 80, 457 N.W.2d 693, appeal denied (1991), 437 Mich. 986, 470 N.W.2d 372. Two courts have decided cases similar to the case before this court. *Johnson v. Calvert* (1993), 5 Cal.4th 84, 19 Cal.Rptr.2d 494, 851 P.2d 776, certiorari denied (1993), 510 U.S. 874, 114 S.Ct. 206, 126 L.Ed.2d 163; *McDonald v. McDonald* (1994), 196 A.D.2d 7, 608 N.Y.S.2d 477.

In *Johnson v. Calvert*, the facts are very similar to this case, with a married couple supplying the egg and sperm and a surrogate agreeing to carry and deliver the child. The difference is that the surrogate in *Johnson* was not related to the genetic providers, and was to be compensated for the surrogacy. A dispute arose over the compensation, and the surrogate claimed to be the parent. The California Supreme Court recognized the genetic providers as the natural parents. That ruling appears to be based on intent of the parties:

"We conclude that although the Act [the Uniform Parentage Act] recognizes both genetic consanguinity and giving birth as a means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child-that is, she who intended to bring about the birth of a child that she intended to raise as her own-is the natural

mother under California law." *Johnson*, 5 Cal.4th at 94, 19 Cal.Rptr.2d at 500, 851 P.2d at 782.

The court in *Johnson* looked for the intent to procreate and to raise the child, in order to identify the natural mother. Since the genetic mother in *Johnson* intended to procreate, she was the natural parent. The *Johnson* court discarded both genetics and birth as the primary means of identifying the natural maternal parent, and replaced both with a test that involves intent of the parties.

In a somewhat similar case, a New York court of appeals determined the gestational surrogate to be the natural mother based on the *Johnson* precedent of intent to procreate. *McDonald v. McDonald* (1994), 196 A.D.2d 7, 608 N.Y.S.2d 477. (In *McDonald*, the gestational surrogate received the egg from an anonymous donor; her husband provided the sperm.) Under the *Johnson* test, either the gestational surrogate or the genetic parents could be recognized as the natural and legal parents, depending on which party intended to procreate and raise the child.

Since both cases emanate from outside the appellate jurisdiction that binds this court, they can only be considered as persuasive and not binding. In light of Ohio law, this court finds neither case to be persuasive, for the following three important reasons: (1) the difficulty in applying the *Johnson* intent test; (2) public policy; and (3) Johnson's failure to recognize and emphasize the genetic provider's right to consent to procreation and to surrender potential parental rights.

Intent can be difficult to prove. Even when the parties have a written agreement, disagreements as to intent can arise. In addition, in certain fact patterns when intent is clear, the *Johnson* test of intent to procreate and raise the child may bring about unacceptable results. As an example, who is the natural parent if both a nongenetic-providing surrogate and the female genetic provider agree that they both intend to procreate and raise the child? It is apparent that the Johnson test presents problems when applied.

Nonetheless, ease of application should not be the central focus in structuring the law of surrogacy. The focus of parentage determination should be based on public policy. *Davis v. Davis* (Tenn.1992), 842 S.W.2d 588, 591. Surrogacy questions, such as this court has before it, involve questions of procreation and parentage. Those two subjects involve values that are basic to our society. Therefore, any new configuration of the law in those areas must be reconcilable with the values as are expressed in enunciated public policy of present law. The *Johnson* intent test fails to support, or is in conflict with, two areas of enunciated public policy.

The first area of conflict is surrender of parental rights by agreement. It has long been recognized that, as a matter of public policy, the state will not enforce or encourage private agreements or contracts to give up parental rights. (citations omitted). Through the intent to procreate, the *Johnson* case allows the nongenetic carrier/surrogate to be designated as the natural mother. The possibility of recognition as a parent means that a potential right is implicit in any agreement or contract to act as gestational surrogate. A surrogate who chooses not to be the natural parent forfeits her right to be considered the natural and legal parent. Because a fee is often involved in a surrogacy service, that assent amounts to selling a parental right, and is in contradiction to the public policy against private contracts to surrender parental rights.

The second area of conflict involves several aspects of the underlying public policy of adoption law. Adoption laws of Ohio have long required that a relinquishing natural mother be given an unpressured opportunity before a disinterested magistrate to surrender her parental rights. R.C.

3107.08. Considering the substantial rights involved, the possible financial pressures, and the value our society places on procreation, the need for such procedures is evident.

In addition to protecting the interest of the mother, adoption law has attempted to protect the interest of the child. By agreement or otherwise, the natural mother is not free to surrender her child to whomever she wishes. Through the use of its parens patriae powers, the state closely supervises the process, and ultimately selects or approves of the new parents. See R.C. Chapter 3107; *State ex rel. Portage Cty. Welfare Dept. v. Summers* (974), 38 Ohio St.2d 144, 67 O.O.2d 151, 311 N.E.2d 6. The underlying public policy is to provide for the best interest of the child: to ensure that the abandoned child is not given to persons who will abuse or neglect the child, but will be placed in a home with caring and competent parents.

Last, the adoption process promotes stability in the child-parent relationship. A court adjudication of adoption clearly ends the rights and responsibilities of the biological parents, and establishes those of the adopting parents. Such a process prevents a challenge to the rights and interests of the child and the parents at some later time. An underlying public policy of adoption law is to provide an adopted child with an unquestionable and certain status as to its relationship with those who are designated as the child's legal parents. R.C. 3107.15.

Due to the surrogate's similarity to an adopting parent, the same concerns that brought about the foregoing adoption procedure and public policy exist in surrogacy births in which the surrogate retains the child. The *Johnson* court's formulation of the intent-to-procreate test does not address those underlying concerns. It does not allow for unpressured surrender of potential parental rights, nor does it provide a means to review and ensure the suitability of the gestational surrogate or her spouse as parents. In addition, because it is based on private agreement or intent that has not been sanctioned by a court proceeding, it raises the question of future legal challenges, and thus undermines the stability of the child-parent relationship. The *Johnson* intent formulation ignores those concerns and relies on the whims of private intent and agreement. It is, in effect, a private adoption process that is readily subject to all the defects and pressures of such a process.

The final objection this court has to the *Johnson* intent-to-procreate test is its failure to fully recognize the genetic provider as having the right to choose or to consent. By subordinating the consent of the genetic-providing individual to the intent to procreate of the surrogate who intends to keep and raise the child, the *Johnson* court has deemphasized what should be considered a basic right. The procreation of a child, that is, the replication of the unique genes of an individual, should occur only with the consent of that individual. *See Davis v. Davis, supra*, 842 S.W.2d 588. The decision to allow implantation of another's egg and sperm with the understanding that the surrogate will raise the resulting child also involves the surrendering of parental rights. The consent to procreation and the surrender of the right to raise a child of one's own genes must be considered the surrender of basic rights. *Id.* at 600. *See, also, Skinner v. Oklahoma* (1942), 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655.

The exercise of fundamental rights should not be taken lightly, and when the choice is made to exercise or not to exercise those rights, the law must protect that process of choice. (citations omitted). A minimal protection for the basic rights of procreation, and the raising of a child of that procreation, should be to require consent to the surrender of those rights. At the very inception of the process of fertilization, the infertile couple who intends to raise the child and those who would procure the genetics and facilitate implantation should be put on notice that they must have the consent of the genetic provider. Such a clearly stated rule would prevent the involuntary use of an

individual's genes. If we are to respect the right of procreation and parentage when a gestational surrogate is used, one of the first questions asked must concern consent of the genetic parents. The *Johnson* test fails to give that priority, and thus fails to provide adequate protection of basic rights.

Other than *Johnson v. Calvert* and *McDonald v. McDonald*, this court can find no precedent or basis in the law, by analogy or otherwise, for establishing a natural parent by intent to procreate. The use of the intent test is truly a new and questionable framework upon which to base the determination of parentage. If a break with traditional law and public policy, as represented by the Johnson test, is to be made part of the law of this state, it must be argued that the legislature, through the scrutiny of public hearings and debate, is better situated than a judicial proceeding to test the effectiveness and appropriateness of such a change.

Having rejected the *Johnson* test, this court must still provide a framework in which to decide this case. This court believes it to be more prudent to travel a known path and use existing law as a legal pattern to fashion new law.

As has been stated, there is abundant precedent for using the genetics test for identifying a natural parent. For the best interest of the child and society, there are strong arguments to recognize the genetic parent as the natural parent. The genetic parent can guide the child from experience through the strengths and weaknesses of a common ancestry of genetic traits. Because that test has served so well, it should remain the primary test for determining the natural parent, or parents, in nongenetic-providing surrogacy cases.

The test to identify the natural parents should be, "Who are the genetic parents?" When dealing with a nongenetic-providing surrogate, such a rule minimizes or avoids the question of the surrogate selling her right to be determined the natural parent. Since she has not contributed to the genetics of the child, and the genetic parent or parents have not waived their rights, she cannot be determined the natural parent. She cannot sell a right she does not have. In addition, given the relative certainty of DNA blood testing, such a foundation or test for parental identity would be simpler to apply and more certain in results than a *Johnson*-type intent test.

However, a genetic test cannot be the only basis for determining who will assume the status of legal parent. The law must recognize the reality that the surrogate who did not provide the genetics of a child may wish to be the legal parent. There is precedent for recognition of her interest in becoming the legal parent. Because the surrogate, Carol S. Clark, has failed to assert parental rights, and no evidence exists of a consent or waiver, the legal status of a nongenetic-providing surrogate who claims parental rights is not at issue. Therefore, this court cannot properly rule upon the issues involved in determining that status.

Returning to the original query of this case, what identifies a natural parent when a child is conceived by the use of in vitro fertilization and the surrogate who delivers the child provides none of the genetics of that child? The answer of this court is that the individuals who provide the genes of that child are the natural parents. However, this court further recognizes that a second query must be made to determine the legal parents, the individual or individuals who will raise the child. That question must be determined by the consent of the genetic parents. If the genetic providers have not waived their rights and have decided to raise the child, then they must be recognized as the natural and legal parents. By formulating the law in this manner, both tests, genetics and birth, are used in determining parentage. However, they are no longer equal. The birth test becomes subordinate and

secondary to genetics.

In conclusion, under Ohio law, when a child is delivered by a gestational surrogate who has been impregnated through the process of in vitro fertilization, the natural parents of the child shall be identified by a determination as to which individuals have provided the genetic imprint for that child. If the individuals who have been identified as the genetic parents have not relinquished or waived their rights to assume the legal status of natural parents, they shall be considered the natural and legal parents of that child.

Applying the foregoing law to the case at bar, this court has found that Anthony Belsito and Shelly Belsito are the genetic parents of the unborn child carried by Carol S. Clark, a gestational surrogate who was impregnated by in vitro fertilization. This court further finds that Anthony Belsito and Shelly Belsito have not waived their rights to be the natural and legal parents of that child. Therefore, this court must find, as a matter of law, that Anthony Belsito and Shelly Belsito are the natural and legal parents of the unborn child now carried by Carol S. Clark.

Judgment Order

IT IS THEREFORE THE ORDER OF THIS COURT, and this court does declare:

1. That Anthony Belsito and Shelly Belsito are the natural and legal parents of the child now carried by Carol S. Clark.

2. That the child is a legitimate child of Anthony Belsito and Shelly Belsito, and that, under the law of inheritance of this state, they may inherit through the child and the child may inherit through them.

3. That they have, in relationship to that child, all other rights and responsibilities that are entailed in a parent-child relationship.

4. That, based on the foregoing, an adoption proceeding under R.C. Chapter 3107 is unnecessary.

5. That upon the birth of the child, pursuant to this court's authority under R.C. 3705.09 and R.C. Chapter 2721, the birth certificate of the child shall list Anthony Belsito as father and Shelly Belsito as mother.

So ordered.

Notes and Questions

1. The Court stated "By formulating the law in this manner, both tests, genetics and birth, are used in determining parentage. However, they are no longer equal. The birth test becomes subordinate and secondary to genetics." Do you agree with the Court's reasoning? Should the birth test be subordinate to genetics? Why? Why not?

2. Is the application of the genetics test always in the best interests of the child?

3. Should genetics be the sole indicator of maternity? Why? Why not?

4. Should the outcome of the case be different if it involved a traditional surrogate?

5. Perry and his partner Daniel wanted to have a child to rear. Perry's sister, Emily, agreed to be artificially inseminated with Daniel's sperm and to serve as a surrogate for the men. After the birth of the child, Perry and Daniel separated. Who are the legal parents of the child applying the reasoning of the above case? Does this outcome make sense?

6.6.1.2 The Gestational Test

When establishing the mother-child relationship, some courts elevate giving birth above all other factors. In those jurisdictions, the courts give the maternal rights to the person who gives birth. Thus, a traditional surrogate is the legal mother of the child created as the result of a surrogacy arrangement. Moreover, since she gives birth to the child, the courts recognize the maternal rights of the gestational surrogate.

J.F. v. D.B., 2004 WL 1570142, 66 Pa. D. & C. 4th 1 (2004)

CONNELLY, J.

A man and his girlfriend signed a surrogacy contract with a woman who agreed to act as their surrogate. The surrogate became pregnant with triplets. The children were created using the contracting man's sperm and donor eggs. Therefore, the contracting woman was not biologically related to the children. During the pregnancy, the contracting couple paid the surrogate's expenses and her medical bills. The babies were born slightly premature at 35 weeks old and had some minor medical problems. Thus, they were placed in the neonatal intensive care unit (NICU). After the birth of the children, the relationship between the surrogate and the contracting couple deteriorated. The surrogate did not approve of the limited contact the contracting couple chose to spend with the triplets while they were hospitalized. Consequently, the gestational surrogate sought to gain custody of the triplets.

The Court had to decide the following issue: whether a gestation surrogate has standing to file a custody action against the man who provided the sperm used to create the children. The Pennsylvania Legislature had not enacted a surrogacy statute. Thus, the Court reviewed the statutes in other states. In reaching its decision, the Court also relied upon the state tradition and public policy. The Court acknowledged the egg donor as the biological mother. However, the Court concluded that the egg donor could not be the legal mother because she was not a party to the action. In addition, the Court opined that the contracting man's girlfriend was not the legal mother because she was not genetically-related to the children. Although the gestational surrogate was not genetically-related to the children, the Court held that surrogate was the legal mother of the triplets.

The Court based its decision on the fact that the gestational surrogate carried and bore the children and took care of them as a natural parent would. The Court emphasized the important role the birth process plays in the recognition of the mother-child relationship.

> [The surrogate's] every decision prior to their birth has affected [the triplets]- health, nutrition, prenatal care, etc. In addition, she has not terminated any parental rights she may have to the triplets. She has instead taken the triplets into her home and cared for them along with her three other children. She ismore a mother and a parent by her actions than by genetics."

A.H.W. and P.W. v. G.H.B., 772 A.2d 948 (N.J. 2000)

KOBLITZ, P.J.F.P.

The novel issue presented in this surrogacy matter is whether or not a court may issue a pre-birth order directing a delivering physician to list the man and woman who provided the embryo carried by a third party as legal parents on a child's birth certificate. Both the petitioning biological parents and the defendant surrogate who carried the baby agree that petitioners should be listed as the legal parents on the baby certificate. However, the Attorney General's Office opposes the request of the biological parents for a pre-birth order claiming the relief is contrary to the law prohibiting surrender of a birth mother's rights until seventy-two hours after birth, and the public policy of the State of New Jersey as expressed by the New Jersey Supreme Court in *In re Baby M,* 109 N.J. 396, 537 A.2d. 1227 (1988). After considering case law and statutes in other states as well as New Jersey, this Court denies plaintiffs and the defendant surrogate's request for a pre-birth order, but will issue an order which allows the petitioning biological parents' names to be placed on the birth certificate after the seventy-two hour statutory waiting period has expired but before the birth certificate must be filed. To understand this unusual relief, the facts of this case must be explored, then a review of other states' law in this area, followed by a consideration of New Jersey case law, public policy implications and statutes.

G.H.B., hereinafter "Gina," is the unmarried sister of plaintiff A.H.W., "Andrea," and the sister-in-law of P.W., "Peter." The biological parents, Andrea and Peter, entered into a gestational surrogacy contract with Gina. Gina, without financial compensation, agreed to have embryos implanted into her uterus that were created from the sperm of her brother-in-law, Peter, and the ova of her sister, Andrea. This medical procedure is commonly referred to as "ovum implantation," and permits a woman who is incapable of carrying a baby to term to have a child who is genetically related to her. The child is due to be born in about two weeks at a Bergen Country hospital.

Plaintiffs filed a complaint to declare the maternity and paternity of unborn Baby A. Plaintiffs seek a pre-birth order establishing them as the legal mother and father of unborn Baby A, and placing their names on the child's birth certificate. They argue that a pre-birth order is appropriate with a gestational surrogacy.

The biological parents, Andrea and Peter, and the gestational surrogate, Gina, argue that Gina has no biological ties to the unborn child and liken the gestational carrier's role to that of an incubator. They argue that Baby M is distinguishable because the surrogate mother in that case was also the biological mother. While Andrea, Peter and Gina are correct that Gina will have no biological ties to the baby, their simplistic comparison to an incubator disregards the fact that there are human emotions and biological changes involved in pregnancy.

A bond is created between a gestational mother and the baby she carries in her womb for nine months. During the pregnancy, the fetus relies on the gestational mother for a myriad of contributions. A gestational mother's endocrine system determines the timing, amount and components of hormones that affect the fetus. The absence of any component at its appropriate time will irreversibly alter the life, mental capacity, appearance, susceptibility to disease and structure of the fetus forever. The gestational mother contributes an endocrine case that determines how the child will grow, when its cells will divide and differentiate in the womb, and how the child will appear and function for the rest of its life. (citations omitted)

In this case, Gina has previously had one child and therefore had an understanding of what is involved in carrying a pregnancy to term at the time she signed the contract. The problem case will present itself when a gestational mother changes her mind and wishes to keep the newborn. This may be more likely where a gestational mother has never had a child and is unfamiliar with the emotions and biological changes involved in a pregnancy. She will not be able to predict what her feelings will be towards the child she bears. Her body will undergo significant changes and she will continue to react biologically as any other birth mother. In this case it seems likely that the transfer of the child will occur without incident due to the close family ties of the parties and Gina's previous experience with childbirth. However, although Gina is extremely likely to surrender her rights as planned, she must not be completed to do so in a pre-birth order.

New Jersey regulations governing the creation of birth records state that the woman who gives birth must be recorded as a parent on the birth certificate. NJAC 8:2-1.4(a). This regulation would normally necessitate that Gina's name be placed on the birth certificate along with her brother-in-law, Peter, as the father. However, all parties have agreed by written contract that Andrea and Peter's names should be placed on the birth certificate.

In New Jersey, as required by NJSA 26:8-28(a), a birth certificate must be issued and filed within five days of birth with the local registrar of the district in which the birth occurred. Pursuant to NJSA 26:8-30, "the attending physician, midwife or person acting as the agent of the physician or midwife, who was in attendance upon the birth shall be responsible for the proper execution and return of a certificate of birth."

In recognition of the emotional and physical changes in the mother which occur at birth, voluntary surrenders are not valid if taken within seventy-two hours after the birth of the child. NJSA 9:3-41(e). Thus after the seventy-two hours have elapsed, Gina will be able to lawfully surrender her parental rights. She will have the responsibility of making decisions for the child during this seventy-hour period, even if her ultimate decision is to surrender her parental rights.

It is not necessary to now determine what parental rights, if any, the gestational mother may have vis-a-vis the newborn infant. That decision will have to be made if and when a gestational mother attempts to keep the infant after birth in violation of the prior agreement. Here, Gina, Peter and Andrea are closely related. The parties' detailed fifteen page agreement clearly reflects their shared intent and desired outcome for this case. Further, Gina, as Andrea's sister and Peter's sister-in-law knows the biological parents intimately and is in an excellent position to know the type of home they will provide for the child. Thus almost certainly Gina will honor the contract and surrender her rights.

Conclusion

The Legislature may well choose to clarify the rights and responsibilities of parties in a gestational surrogacy. The most prudent course, prior to legislative action, is to follow the current statutes as closely as possible while allowing the parties, to the maximum extent possible, the relief requested. A court order for the pre-birth termination of the pregnant defendant's parental rights is the equivalent of making her subject to a binding agreement to surrender the child and is contrary to New Jersey statutes and Baby M. Therefore, the gestational mother may surrender the child seventy-two hours after giving birth, which is forty-eight hours before the birth certificate must be prepared. If Gina does choose to surrender the infant, and she certifies that she wishes to relinquish all rights, then the original birth certificate will list the two biological parents, Andrea and Peter, as the baby's parents. If Gina changes her mind once the baby is born, she will have a chance to litigate for parental rights to the child.

The attending physician who delivers Baby A should prepare a Certificate of Parentage four days after the birth of the child. This waiting period will allow Gina to surrender her parental right after seventy-two hours and also allow a birth certificate to be issued within five days of birth. After Gina surrenders any parental rights she might have, the Certificate of Parentage shall be completed with Peter as the legal father and Andrea the legal mother. This solution represents a modification of the agreement between the parties to the least extent necessary to comply with current New Jersey statutes and the public policy concerns expressed by the Supreme Court in *Baby M*.

Note and Questions

1. If Gina dies before surrendering her parental rights, would the child be eligible to inherit from her estate?

2. The Court claims that it is not deciding the issue of the parental rights of a gestational mother. Is that true? By deciding that the gestational surrogate has a choice whether or not to surrender her parental rights, isn't the Court establishing a parent-child relationship between her and the child?

3. The Court refers to Gina as a gestational mother instead of a gestational surrogate. Doesn't that fact indicate that the Court is favoring gestation over genetics?

4. Since Gina is not genetically related to the child, should she be able to litigate to have parental rights over the child?

5. If a client comes to you seeking advice about using a gestational surrogate in this jurisdiction, what would you recommend?

6. What are the advantages and disadvantages of using the birth test to determine maternity?

7. The Court seems reluctant to force the gestational mother to surrender her parental rights. However, in New Jersey, the parental rights of sperm donors are automatically waived at the time they donate sperm. Does it make sense to be more protective of the parental rights of a woman with no genetic connection to the child than of the parental rights of the man who contributes the genetic material used to create the child?

8. Should there be a presumption that the gestational surrogate is not the legal mother of the child?

9. In light of the precedent established by this case, Andrea could be severely disadvantaged. Consider the following scenario. Gina dies in child birth. Since he is the biological father, Peter's name is placed upon the birth certificate and he is give custody of the child. When the baby is only a few months old, Peter and Andrea divorced. Given her lack of biological connection to the child, it is possible that Andrea would not have the legal right to custody or visitation. Would that outcome be fair? Gina only agreed to the process because she wanted to help her sister, Andrea, become a mother. What can Andrea do to protect her rights?

10. In most surrogacy situations, the woman who gives birth to the child will not be married to the man who provides the genetic material. As a consequence, if the surrogate is considered to be the child's mother, the child may be labeled as a nonmarital child. Should the child have to satisfy the requirements of the state's non-marital statute in order to have the right to inherit from his or her father?

6.6.1.3 The Intent Test

Johnson v. Calvert, 851 P.2d. 776 (Cal. 1993)

PANELLI, Justice.

In this case we address several of the legal questions raised by recent advances in reproductive technology. When, pursuant to a surrogacy agreement, a zygote formed of the gamete of a husband and wife is implanted in the uterus of another woman, who carries the resulting fetus to term and gives birth to a child not genetically related to her, who is the child's "natural mother" under California law? Does a determination that the wife is the child's natural mother work a deprivation of the gestating woman's constitutional rights? And is such an agreement barred by any public policy of this state?

We conclude that the husband and wife are the child's natural parents, and that this result does not offend the state or federal Constitution or public policy.

Facts

Mark and Crispina Calvert are a married couple who desired to have a child. Crispina was forced to undergo a hysterectomy in 1984. Her ovaries remained capable of producing eggs, however, and the couple eventually considered surrogacy. In 1989 Anna Johnson heard about Crispina's plight from a coworker and offered to serve as a surrogate for the Calverts.

On January 15, 1990, Mark, Crispina, and Anna signed a contract providing that an embryo created by the sperm of Mark and the egg of Crispina would be implanted in Anna and the child born would be taken into Mark and Crispina's home "as their child." Anna agreed she would relinquish "all parental rights" to the child in favor of Mark and Crispina. In return, Mark and Crispina would pay Anna $10,000 in a series of installments, the last to be paid six weeks after the child's birth. Mark and Crispina were also to pay for a $200,000 life insurance policy on Anna's life.

The zygote was implanted on January 19, 1990. Less than a month later, an ultrasound test confirmed Anna was pregnant.

Unfortunately, relations deteriorated between the two sides. Mark learned that Anna had not disclosed she had suffered several stillbirths and miscarriages. Anna felt Mark and Crispina did not do enough to obtain the required insurance policy. She also felt abandoned during an onset of premature labor in June.

In July 1990, Anna sent Mark and Crispina a letter demanding the balance of the payments due her or else she would refuse to give up the child. The following month, Mark and Crispina responded with a lawsuit, seeking a declaration they were the legal parents of the unborn child. Anna filed her own action to be declared the mother of the child, and the two cases were eventually consolidated. The parties agreed to an independent guardian ad litem for the purposes of the suit.

The child was born on September 19, 1990, and blood samples were obtained from both Anna and the child for analysis. The blood test results excluded Anna as the genetic mother. The parties agreed to a court order providing that the child would remain with Mark and Crispina on a temporary basis with visits by Anna.

At trial in October 1990, the parties stipulated that Mark and Crispina were the child's genetic parents. After hearing evidence and arguments, the trial court ruled that Mark and Crispina were the child's "genetic, biological and natural" father and mother, that Anna had no "parental" rights to the child, and that the surrogacy contract was legal and enforceable against Anna's claims. The court also terminated the order allowing visitation. Anna appealed from the trial court's judgment. The Court of Appeal for the Fourth District, Division Three, affirmed. We granted review.

The Uniform Parentage Act (the Act) was part of a package of legislation introduced in 1975 as Senate Bill No. 347. The legislation's purpose was to eliminate the legal distinction between legitimate and illegitimate children. The Act followed in the wake of certain United States Supreme Court decisions mandating equal treatment of legitimate and illegitimate children. (citations omitted).

The pertinent portion of Senate Bill No. 347, which passed with negligible opposition, became Part 7 of Division 4 of the California Civil Code, sections 7000-7021.[78]

Civil Code sections 7001 and 7002 replace the distinction between legitimate and illegitimate children with the concept of the "parent and child relationship." The "parent and child relationship" means "the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. It includes the mother and child relationship and the father and child relationship." (Civ.Code, § 7001.) "The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents." (Civ.Code, § 7002.) The "parent and child relationship" is thus a legal relationship encompassing two kinds of parents, "natural" and "adoptive."

---

[78] Effective January Code sections-7021 have been repealed and replaced with equivalent provisions in the Family Code. (Stats.1992, ch. 162, § 4; see Fam.Code, §§ 7600-7650 [eff. Jan. 1, 1994].)

Passage of the Act clearly was not motivated by the need to resolve surrogacy disputes, which were virtually unknown in 1975. Yet it facially applies to any parentage determination, including the rare case in which a child's maternity is in issue. We are invited to disregard the Act and decide this case according to other criteria, including constitutional precepts and our sense of the demands of public policy. We feel constrained, however, to decline the invitation. Not uncommonly, courts must construe statutes in factual settings not contemplated by the enacting legislature.

These contentions are readily summarized. Anna, of course, predicates her claim of maternity on the fact that she gave birth to the child. The Calverts contend that Crispina's genetic relationship to the child establishes that she is his mother. Counsel for the minor joins in that contention and argues, in addition, that several of the presumptions created by the Act dictate the same result. As will appear, we conclude that presentation of blood test evidence is one means of establishing maternity, as is proof of having given birth, but that the presumptions cited by minor's counsel do not apply to this case.

We turn to those few provisions of the Act directly addressing the determination of maternity. "Any interested party," presumably including a genetic mother, "may bring an action to determine the existence ... of a mother and child relationship." (Civ.Code, § 7015.) Civil Code section 7003 provides, in relevant part, that between a child and the natural mother a parent and child relationship "may be established by proof of her having given birth to the child, or under [the Act]." (Civ.Code, § 7003, subd. (1), emphasis added.) Apart from Civil Code section 7003, the Act sets forth no specific means by which a natural mother can establish a parent and child relationship. However, it declares that, insofar as practicable, provisions applicable to the father and child relationship apply in an action to determine the existence or nonexistence of a mother and child relationship. (Civ.Code, § 7015.) Thus, it is appropriate to examine those provisions as well.

A man can establish a father and child relationship by the means set forth in Civil Code section 7004. (Civ.Code, §§ 7006, 7004.) Paternity is presumed under that section if the man meets the conditions set forth in section 621 of the Evidence Code. (Civ.Code, § 7004, subd. (a).) The latter statute applies, by its terms, when determining the questioned paternity of a child born to a married woman, and contemplates reliance on evidence derived from blood testing. (Evid.Code, § 621, subds. (a), (b); see Evid.Code, §§ 890-897 [Uniform Act on Blood Tests to Determine Paternity].) Alternatively, Civil Code section 7004 creates a presumption of paternity based on the man's conduct toward the child (e.g., receiving the child into his home and openly holding the child out as his natural child) or his marriage or attempted marriage to the child's natural mother under specified conditions (citations omitted).

In our view, the presumptions contained in Civil Code section 7004 do not apply here. They describe situations in which substantial evidence points to a particular man as the natural father of the child. (9B West's U.Laws Ann. (1987) Unif. Parentage Act, com. foll. § 4, p. 299.) In this case, there is no question as to who is claiming the mother and child relationship, and the factual basis of each woman's claim is obvious. Thus, there is no need to resort to an evidentiary presumption to ascertain the identity of the natural mother. Instead, we must make the purely legal determination as between the two claimants.

Significantly for this case, Evidence Code section 892 provides that blood testing may be ordered in an action when paternity is a relevant fact. When maternity is disputed, genetic evidence derived

from blood testing is likewise admissible. (Evid.Code, § 892; *see* Civ.Code, § 7015.) The Evidence Code further provides that if the court finds the conclusions of all the experts, as disclosed by the evidence based on the blood tests, are that the alleged father is not the father of the child, the question of paternity is resolved accordingly. (Evid.Code, § 895.) By parity of reasoning, blood testing may also be dispositive of the question of maternity. Further, there is a rebuttable presumption of paternity (hence, maternity as well) on the finding of a certain number of genetic markers. (Evid.Code, § 895.5.)

Disregarding the presumptions of paternity that have no application to this case, then, we are left with the undisputed evidence that Anna, not Crispina, gave birth to the child and that Crispina, not Anna, is genetically related to him. Both women thus have adduced evidence of a mother and child relationship as contemplated by the Act. (Civ.Code, §§ 7003, subd. (1), 7004, subd. (a), 7015; Evid.Code, §§ 621, 892.) Yet for any child California law recognizes only one natural mother, despite advances in reproductive technology rendering a different outcome biologically possible.

We see no clear legislative preference in Civil Code section 7003 as between blood testing evidence and proof of having given birth. The word "may" in the Act indicates that proof of having given birth is a permitted method of establishing a mother and child relationship, although perhaps not the exclusive one. The disjunctive "or" indicates that blood test evidence, as prescribed in the Act, constitutes an alternative to proof of having given birth. It may be that the language of the Act merely reflects "the ancient dictum mater est quam [gestation] demonstrat (by gestation the mother is demonstrated). This phrase, by its use of the word 'demonstrated,' has always reflected an ambiguity in the meaning of the presumption. It is arguable that, while gestation may demonstrate maternal status, it is not the sine qua non of motherhood. Rather, it is possible that the common law viewed genetic consanguinity as the basis for maternal rights. Under this latter interpretation, gestation simply would be irrefutable evidence of the more fundamental genetic relationship." (Hill, *What Does It Mean to Be a "Parent"? The Claims of Biology As the Basis for Parental Rights* (1991) 66 N.Y.U.L.Rev. 353, 370, fns. omitted.) This ambiguity, highlighted by the problems arising from the use of artificial reproductive techniques, is nowhere explicitly resolved in the Act.

Because two women each have presented acceptable proof of maternity, we do not believe this case can be decided without enquiring into the parties' intentions as manifested in the surrogacy agreement. Mark and Crispina are a couple who desired to have a child of their own genetic stock but are physically unable to do so without the help of reproductive technology. They affirmatively intended the birth of the child, and took the steps necessary to effect in vitro fertilization. But for their acted-on intention, the child would not exist. Anna agreed to facilitate the procreation of Mark's and Crispina's child. The parties' aim was to bring Mark's and Crispina's child into the world, not for Mark and Crispina to donate a zygote to Anna. Crispina from the outset intended to be the child's mother. Although the gestative function Anna performed was necessary to bring about the child's birth, it is safe to say that Anna would not have been given the opportunity to gestate or deliver the child had she, prior to implantation of the zygote, manifested her own intent to be the child's mother. No reason appears why Anna's later change of heart should vitiate the determination that Crispina is the child's natural mother.

We conclude that although the Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child-that is, she who intended to bring about the birth of a child that she intended to raise as her own-is the natural mother under California law.

In deciding the issue of maternity under the Act we have felt free to take into account the parties' intentions, as expressed in the surrogacy contract, because in our view the agreement is not, on its face, inconsistent with public policy.

Preliminarily, Mark and Crispina urge us to interpret the Legislature's 1992 passage of a bill that would have regulated surrogacy as an expression of this state's public policy despite the fact that Governor Wilson's veto prevented the bill from becoming law. Senate Bill No. 937 contained a finding that surrogate contracts are not against sound public and social policy. (Sen. Bill No. 937 (1991-1992 Reg.Sess.).) Had Senate Bill No. 937 become law, there would be no room for argument to the contrary. The veto, however, raises a question whether the legislative declaration truly expresses California's public policy.

In the Governor's veto message we find, not unequivocal agreement with the Legislature's public policy assessment, but rather reservations about the practice of surrogate parenting. "Surrogacy is a relatively recent phenomenon. The full moral and psychological dimensions of this practice are not yet clear. In fact, they are just beginning to emerge. Only two published court opinions in California have treated this nettlesome subject.... Comprehensive regulation of this difficult moral issue is premature.... To the extent surrogacy continues to be practical, it can be governed by the legal framework already established in the family law area." (Governor's veto message to Sen. on Sen. Bill No. 937 (Sept. 26, 1992) Sen. Daily File (1991-1992 Reg.Sess.) p. 68.) Given this less than ringing endorsement of surrogate parenting, we conclude that the passage of Senate Bill No. 937, in and of itself, does not establish that surrogacy contracts are consistent with public policy. (Of course, neither do we draw the opposite conclusion from the fact of the Governor's veto.)

Anna urges that surrogacy contracts violate several social policies. Relying on her contention that she is the child's legal, natural mother, she cites the public policy embodied in Penal Code section 273, prohibiting***** the payment for consent to adoption of a child. She argues further that the policies underlying the adoption laws of this state are violated by the surrogacy contract because it in effect constitutes a prebirth waiver of her parental rights.

We disagree. Gestational surrogacy differs in crucial respects from adoption and so is not subject to the adoption statutes. The parties voluntarily agreed to participate in in vitro fertilization and related medical procedures before the child was conceived; at the time when Anna entered into the contract, therefore, she was not vulnerable to financial inducements to part with her own expected offspring. As discussed above, Anna was not the genetic mother of the child. The payments to Anna under the contract were meant to compensate her for her services in gestating the fetus and undergoing labor, rather than for giving up "parental" rights to the child. Payments were due both during the pregnancy and after the child's birth. We are, accordingly, unpersuaded that the contract used in this case violates the public policies embodied in Penal Code section 273 and the adoption statutes. For the same reasons, we conclude these contracts do not implicate the policies underlying the statutes governing termination of parental rights. (See Welf. & Inst.Code, § 202.)

It has been suggested that gestational surrogacy may run afoul of prohibitions on involuntary servitude. (*See* U.S. Const., Amend. XIII; Cal. Const., art. I, § 6; Pen.Code, § 181.) Involuntary servitude has been recognized in cases of criminal punishment for refusal to work. (*Pollock v. Williams* (1944) 322 U.S. 4, 18, 64 S.Ct. 792, 799, 88 L.Ed. 1095, 1104; *see, generally*, 7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, §§ 411-414, pp. 591-596.) We see no

potential for that evil in the contract at issue here, and extrinsic evidence of coercion or duress is utterly lacking. We note that although at one point the contract purports to give Mark and Crispina the sole right to determine whether to abort the pregnancy, at another point it acknowledges: "All parties understand that a pregnant woman has the absolute right to abort or not abort any fetus she is carrying. Any promise to the contrary is unenforceable." We therefore need not determine the validity of a surrogacy contract purporting to deprive the gestator of her freedom to terminate the pregnancy.

Finally, Anna and some commentators have expressed concern that surrogacy contracts tend to exploit or dehumanize women, especially women of lower economic status. Anna's objections center around the psychological harm she asserts may result from the gestator's relinquishing the child to whom she has given birth. Some have also cautioned that the practice of surrogacy may encourage society to view children as commodities, subject to trade at their parents' will.

We are all too aware that the proper forum for resolution of this issue is the Legislature, where empirical data, largely lacking from this record, can be studied and rules of general applicability developed.***** However, in light of our responsibility to decide this case, we have considered as best we can its possible consequences.

We are unpersuaded that gestational surrogacy arrangements are so likely to cause the untoward results Anna cites as to demand their invalidation on public policy grounds. Although common sense suggests that women of lesser means serve as surrogate mothers more often than do wealthy women, there has been no proof that surrogacy contracts exploit poor women to any greater degree than economic necessity in general exploits them by inducing them to accept lower-paid or otherwise undesirable employment. We are likewise unpersuaded by the claim that surrogacy will foster the attitude that children are mere commodities; no evidence is offered to support it. The limited data available seem to reflect an absence of significant adverse effects of surrogacy on all participants.

The argument that a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents carries overtones of the reasoning that for centuries prevented women from attaining equal economic rights and professional status under the law. To resurrect this view is both to foreclose a personal and economic choice on the part of the surrogate mother, and to deny intending parents what may be their only means of procreating a child of their own genetic stock. Certainly in the present case it cannot seriously be argued that Anna, a licensed vocational nurse who had done well in school and who had previously borne a child, lacked the intellectual wherewithal or life experience necessary to make an informed decision to enter into the surrogacy contract.

The judgment of the Court of Appeal is affirmed.

6.6.1.4 The Best Interests of the Child Test

Johnson v. Calvert, 851 P.2d. 776 (Cal. 1993)

KENNARD, Justice, dissenting.

When a woman who wants to have a child provides her fertilized ovum to another woman who carries it through pregnancy and gives birth to a child, who is the child's legal mother? Unlike the majority, I do not agree that the determinative consideration should be the intent to have the child that originated with the woman who contributed the ovum. In my view, the woman who provided the fertilized ovum and the woman who gave birth to the child both have substantial claims to legal motherhood. Pregnancy entails a unique commitment, both psychological and emotional, to an unborn child. No less substantial, however, is the contribution of the woman from whose egg the child developed and without whose desire the child would not exist.

For each child, California law accords the legal rights and responsibilities of parenthood to only one "natural mother." When, as here, the female reproductive role is divided between two women, California law requires courts to make a decision as to which woman is the child's natural mother, but provides no standards by which to make that decision. The majority's resort to "intent" to break the "tie" between the genetic and gestational mothers is unsupported by statute, and, in the absence of appropriate protections in the law to guard against abuse of surrogacy arrangements, it is ill-advised. To determine who is the legal mother of a child born of a gestational surrogacy arrangement, I would apply the standard most protective of child welfare-the best interests of the child.

To summarize, the woman who carried the fetus to term and brought a child into the world has, like the genetic mother, a substantial claim to be the natural mother of the child. The gestational mother has made an indispensable and unique biological contribution, and has also gone beyond biology in an intangible respect that, though difficult to label, cannot be denied. Accordingly, I cannot agree with the majority's devaluation of the role of the gestational mother.

I agree with the majority that the best interests of the child is an important goal; indeed, as I shall explain, the best interests of the child, rather than the intent of the genetic mother, is the proper standard to apply in the absence of legislation. The problem with the majority's rule of intent is that application of this inflexible rule will not serve the child's best interests in every case.

Factors that are pertinent to good parenting, and thus that are in a child's best interests, include the ability to nurture the child physically and psychologically (Cahill, *The Ethics of Surrogate Motherhood: Biology, Freedom, and Moral Obligation, in Surrogate Motherhood*, *supra*, at p. 160), and to provide ethical and intellectual guidance (*see In re Marriage of Carney* (1979) 24 Cal.3d 725, 739, 157 Cal.Rptr. 383, 598 P.2d 36). Also crucial to a child's best interests is the "well recognized right" of every child "to stability and continuity." (*Burchard v. Garay*, supra, 42 Cal.3d at p. 546, 229 Cal.Rptr. 800, 724 P.2d 486 (conc. opn. of Mosk, J.).) The intent of the genetic mother to procreate a child is certainly relevant to the question of the child's best interests; alone, however, it should not be dispositive.

Here, the child born of the gestational surrogacy arrangement between Anna Johnson and Mark and Crispina Calvert has lived continuously with Mark and Crispina since his birth in September 1990.

The trial court awarded parental rights to Mark and Crispina, concluding that as a matter of law they were the child's "genetic, biological and natural" parents. In reaching that conclusion, the trial court did not treat Anna's statutory claim to be the child's legal mother as equal to Crispina's, nor did the trial court consider the child's best interests in deciding between those two equal statutory claims. Accordingly, I would remand the matter to the trial court to undertake that evaluation.

I would reverse the judgment of the Court of Appeal, and remand the case to the trial court for a determination of disputed parentage on the basis of the best interests of the child.

Notes and Questions

1. What are the pros and cons of the intent test? How should the intent of the parties be determined?

2. Is the best interests test really a separate test? Should not the best interests of the child always be the primary factor in determining the mother of the child?

3. Since the surrogate had no genetic connection to the child, would not it have been simpler for the court to just apply the birth test?

4. Would the court's reasoning justify the outcome if the case involved a gestational surrogate?

5. Would application of the dissent's best interests test change the outcome of the case? Is it a better test?

6. Should the child be able to inherit from both women involved in the process?

6.6.1.5 The Totality of the Circumstances

In re C.K.G., 173 S.W. 3d 714 (Tenn. 2005)

DROWOTA, C.J.

This controversy involves a maternity dispute. An unmarried, heterosexual couple had three children by obtaining eggs donated from an anonymous third-party female, fertilizing the eggs in vitro with the man's sperm, and implanting the fertilized eggs in the woman's uterus. The couple intended to rear the children together as father and mother. When the couple's relationship deteriorated, the woman filed a parentage action seeking custody and child support. In response, the man claimed that the woman had no standing as a parent because, lacking genetic connection to the children, she failed to qualify as a parent under Tennessee's parentage statutes. On this basis, the man sought sole and exclusive custody.

Employing a broadly-framed test that looks to the parties' pre-conception intent to determine maternity, both the juvenile court and the Court of Appeals held that the woman was the children's legal mother. Alternatively, the Court of Appeals held that the man, based on his representations and conduct which induced detrimental reliance by the woman, is estopped to deny the woman's status as mother. We vacate the adoption of the intent test by the court below and also vacate the

holding of the Court of Appeals that the man is estopped to deny the woman's maternal status. However, we affirm on separate grounds the holding of the courts below that the woman is the children's legal mother with all the rights and responsibilities of parenthood. Our holding in this regard is based on the following factors: (1) prior to the children's birth, both the woman as gestator and the man as the genetic father voluntarily demonstrated the bona fide intent that the woman would be the children's legal mother and agreed that she would accept the legal responsibility as well as the legal rights of parenthood; (2) the woman became pregnant, carried to term, and gave birth to the children as her own; and (3) this case does not involve a controversy between a gestator and a female genetic progenitor where the genetic and gestative roles have been separated and distributed among two women, nor does this case involve a controversy between a traditional or gestational surrogate and a genetically-unrelated intended mother.

Our holding today is tailored narrowly to the specific controversy now before us. Having concluded that the woman is the children's legal mother, we also affirm in full the judgments of the juvenile court and Court of Appeals concerning comparative fitness, custody, child support, and visitation.

I. Factual and Procedural Background

Dr. Charles K.G. and Ms. Cindy C. first met in 1993 while working at Vanderbilt University Medical Center in Nashville. Cindy was a nurse practitioner who managed a department through which Charles, then a medical resident, rotated. Charles and Cindy began dating in 1994. After an initial period of closeness, they maintained for several years an unsteady dating relationship which included an extended period of estrangement.

In 1999, Charles and Cindy not only reunited as an unmarried couple but also soon thereafter began discussing having a child together. By this time Cindy was forty-five years old and Charles was also in his mid-forties. Charles had never had children. He had not grown up in Tennessee, and a December 1999 visit to his birthplace influenced him; he wanted to be a father. Even though Cindy had at least two adult children from prior marriages as well as grandchildren, she was amenable to starting a family with Charles. However, given her age, Cindy was concerned about the viability of her ova, or eggs.

Having decided to have a child, Charles and Cindy pursued in vitro fertilization through the Nashville Fertility Center. On May 2, 2000, they jointly executed several agreements with the Fertility Center. Although Charles and Cindy were unmarried, they did not alter the boilerplate language that the Center frequently used in its agreements describing them as "husband" and "wife." Included among these agreements was a "RECIPIENT CONSENT FOR DONATION OF OOCYTES BY ANONYMOUS DONOR" ("Recipient Consent") which describes the fertilization procedure and its risks, waives the right of Charles and Cindy to know the egg donor's identity, and outlines the responsibilities of the parties to the agreement. The Recipient Consent further provides as follows:

> I, Cindy (wife), understand that the child(ren) conceived by this method will not have my genetic material, but will have that of the oocyte [egg] donor and my husband [sic]. However, regardless of the outcome, I will be the mother of any child(ren) born to me as a result of egg donation and hereby accept all the legal responsibilities required of such a parent.

This document was signed by Cindy as "wife" and by Charles as "husband" and was witnessed and signed by a physician who represented that he had fully explained the procedure to Charles and Cindy and had answered all their questions. However, Charles and Cindy executed no other agreements concerning their intentions as to parentage or surrogacy.

Shortly thereafter, Charles paid the Fertility Center $10,000 for the procedure of having two anonymously donated eggs fertilized with Charles's sperm and inserted in Cindy's uterus. Charles intended for them to conceive only one child (presumably two eggs were used to increase the procedure's odds of success). After fertilization, one of the eggs divided, resulting in the development of three embryos. All three embryos flourished; Cindy had become pregnant with triplets.

During Cindy's pregnancy, Charles began residing consistently at Cindy's home. Due to complications with the pregnancy, Cindy took an early leave from her job. When she was placed on bed rest, Charles maintained the household and cooked for her. On February 21, 2001, Cindy gave birth via caesarian section to three children: C.K.G., C.A.G., and C.L.G. Tennessee Department of Health birth certificates for the children identify Charles as the father and Cindy as the mother.

Although Charles had never promised to marry Cindy, he represented that he desired permanence and stability with her. Further, Cindy understood and expected that they would raise the children together as mother and father. In fact, Cindy even sought assurance from Charles that she would not have to rear them by herself. Cindy stayed home with the triplets on maternity leave until June 2001 when she returned to work four days per week. Having set aside money in anticipation of having a child, Charles took a one-year leave of absence (February 2001 to January 2002) from his position as an emergency room physician. For the first several months after the triplets' birth, Charles and Cindy lived together and shared parenting responsibilities. They each provided financially for the children's needs. Further, for some time they had discussed the need for a larger home, and they purchased a house in Brentwood together as tenants in common with the understanding that they would bear the cost equally. Cindy sold her prior residence, and she, Charles, and the triplets moved into the new house in August 2001.

After hiring a nanny, Charles and Cindy's relationship soon deteriorated. Cindy alleged that Charles began cultivating or renewing relationships with several other women; Charles admitted to having sex with another woman during a December 2001 trip to London, England. Cindy further alleged that once their relationship had begun to deteriorate, Charles not only became dramatically less involved with the children, but also began withholding financial support from them. In April 2002, after utility service to their home had been cut off, Cindy filed a petition in the juvenile court of Williamson County to establish parentage and to obtain custody and child support.

In response, Charles argued that because Cindy lacks genetic connection to the children, she fails to qualify as the children's "mother" under Tennessee's domestic relations statutes. Contending that Cindy thus lacks standing as a parent, Charles sought sole and exclusive custody of the triplets. Charles further denied that he had failed to support the children financially and also alleged that Cindy was often absent from home on account of her part-time pursuit of a master's degree in business administration. Cindy conceded that Charles increased his involvement with the children after she filed suit. A pendente lite order required Charles to pay Cindy $3,000 per month for child support. Charles and Cindy continued to live together pending trial.

In anticipation of trial, Charles and Cindy stipulated that: (1) eggs donated by an anonymous third-party female were fertilized with Charles's sperm and implanted in Cindy's uterus; (2) Cindy carried the resulting embryos to term and gave birth to triplets; (3) based on genetic testing, Charles is the biological father of all three children; (4) based on genetic testing, none of the children obtained genetic material from Cindy; and (5) the genetic testing was valid.

After a bench trial, the juvenile court ruled that Cindy had standing to bring a parentage action "as legal mother of these three (3) minor children with all the rights, privileges, and obligations as if she were their biological mother." The juvenile court reasoned that Cindy "is the birth mother and always had the intent to birth these children for herself and [Charles]." Having so decided, the juvenile court addressed the question of custody and support. The court concluded that in light of all the circumstances, Charles and Cindy were both good and caring parents. Based upon their "comparative fitness ... as that affects the best interests of the minor children," the court awarded joint custody with Cindy designated as the primary custodial parent. The court further ordered certain visitation rights in favor of Charles and required him to continue to pay Cindy child support in the amount of $3,000 per month. Charles appealed as of right.

The Court of Appeals affirmed the judgments of the juvenile court. Concerning the question of Cindy's parental status, the Court of Appeals held not only that Tennessee's paternity and adoption statutes do not control this case, but also that Tennessee case law provides no directly controlling precedent. Consequently, the intermediate court looked to case law from other jurisdictions for guidance. To determine as a matter of law whether Cindy is the "mother" of the triplets, the Court of Appeals adopted the intent test of *Johnson v. Calvert,* 5 Cal.4th 84, 19 Cal.Rptr.2d 494, 851 P.2d 776 (1993), holding that "this issue should be resolved by looking to the intent of the parties" and not merely to genetics. The intermediate court determined that such an approach is consistent with this Court's decision in *Davis v. Davis*, 842 S.W.2d 588 (Tenn.1992), where we emphasized the importance of agreements between parties who choose to take advantage of modern techniques for assisted reproduction. Finding that Cindy was the intended mother and that no other party claimed maternal status, the Court of Appeals held that Cindy is legally the children's mother. Alternatively, based on principles of equity, the Court of Appeals held that Charles is estopped from challenging Cindy's parental status. Having affirmed that Cindy enjoys parental status, the Court of Appeals also affirmed in all respects the juvenile court's judgments concerning comparative fitness, custody, visitation, and child support.

We granted Charles's application for permission to appeal.

II. Analysis

In this case, an unmarried, heterosexual couple-Charles and Cindy-had children by obtaining eggs donated from an anonymous third-party female, fertilizing the eggs in vitro with Charles's sperm, and implanting the fertilized eggs in Cindy's uterus. Even though Cindy had no genetic connection to the three children to whom she eventually gave birth, she and Charles intended to rear the children together as mother and father. When the couple's relationship deteriorated, Cindy filed a parentage action seeking custody and child support from Charles. In response, Charles claimed that Cindy had no standing as a parent because, lacking genetic connection to the children, she failed to qualify as a parent under Tennessee parentage statutes. On this basis, Charles sought sole and exclusive custody. The facts of this case thus present us with a question of first impression in Tennessee: under such circumstances, who as a matter of law is the children's mother?

It is helpful to explain further how the primary issue which we must decide is distinct from other kinds of maternity disputes. This case is distinguishable from maternity disputes within the context of "traditional surrogacy," such as the situation involved in *In re Baby M*, 109 N.J. 396, 537 A.2d 1227 (1988), superseded by statute as recognized in *In re Adoption of Children by G.P.B.*, 161 N.J. 396, 736 A.2d 1277 (1999). In a traditional surrogacy arrangement, a surrogate "mother" gives birth to a child by allowing her own eggs to be inseminated. A traditional surrogate mother thus has a genetic connection to the child whom she nonetheless bears on behalf of others. In contrast, "gestational surrogacy" involves in vitro fertilization of an intended "mother's" egg which is then implanted for gestation purposes in a genetically-unrelated surrogate "mother." (citations omitted).

Our case is closer in kind to "gestational surrogacy with egg donation" where a woman carries and gives birth to a child as a result of fertilization and implantation of a third-party donor's egg. (citation omitted). Under such circumstances, both the egg donor and the gestational carrier, or gestator, may perform the role of surrogate. A "surrogate" is generally defined as "a person appointed to act in place of another...." Webster's Third New Int'l Dictionary of the English Language Unabridged 2302 (Philip Babcock Gove ed.1971). The egg donor is a surrogate insofar as she provides eggs in place of and on behalf of another woman who cannot produce viable eggs. The gestator may also play the role of surrogate by carrying the child to term in place of and on behalf of another.

In this case, however, an anonymous, surrogate egg donor provided eggs to a gestator (Cindy) who gave birth ostensibly for her own benefit. Whether Cindy may be classified as a gestational "surrogate" is thus problematic, for the question is unavoidably tied up with disputed legal questions. Cindy would argue that she is not a gestational "surrogate" because she gestated and gave birth to the children on behalf of both Charles as father and herself as mother. However, Charles contends that Cindy was merely a gestational "surrogate" on behalf of Charles as the sole legal parent.

A. The Question of Maternity

In addressing the question of maternity, we review findings of fact by the trial court de novo upon the record, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. *See* Tenn. R.App. P. 13(d); *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn.1993). Our standard of appellate review for questions of law is de novo with no presumption of correctness. *Presley v. Bennett*, 860 S.W.2d 857, 859-60 (Tenn.1993).

1. The Impact of Modern Reproductive Technology on the Legal Definition of Parenthood

"Historically, gestation proved genetic parentage beyond doubt, so it was unnecessary to distinguish between gestational and genetic mothers." (citation omitted). However, recent developments in reproductive technology have caused a tectonic shift in the realities which underlie our legal conceptions of parenthood.

This technological fragmentation of the procreative process, insofar as it includes techniques for egg and sperm donation and preservation, has engendered a bewildering variety of possibilities which are not easily reconciled with our traditional definitions of "mother," "father," and "parent." The degree to which current statutory law governs or fails to govern these realities provides the initial

framework for our analysis.

2. The Limited Scope of Tennessee's Parentage Statutes

Parentage is an area of law governed primarily by statute. Unfortunately, Tennessee's parentage and related statutes do not contemplate many of the scenarios now made possible by recent developments in reproductive technology. We now review Tennessee's statutory scheme. When construing statutes, we must "ascertain and carry out the legislature's intent without unduly restricting or expanding a statute's coverage beyond its intended scope." *Premium Fin. Corp. of Am. v. Crump Ins. Servs. of Memphis, Inc.*, 978 S.W.2d 91, 93 (Tenn.1998). "In ascertaining the intent of the legislature, this Court may look to 'the language of the statute, its subject matter, the object and reach of the statute, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment.' " *State v. Gilliland*, 22 S.W.3d 266, 275 (Tenn.2000) (quoting *State v. Lewis*, 958 S.W.2d 736, 739 (Tenn.1997)).

The Tennessee Code provides a single cause of action for establishing parentage. Tenn. Code Ann. § 36-2-301 (2001). A court "may enter an order of parentage upon the agreement of the mother and father unless the court on its own motion orders genetic testing." Tenn. Code Ann. § 36-2-305(a) (2001). Alternatively, a complaint to establish parentage of a child may be brought by the child, the "child's mother," a "man claiming to be the child's father," or the Tennessee Department of Human Services. Tenn. Code Ann. § 36-2-305(b)(1).

The parentage statutes define "mother" as "the biological mother of a child born out of wedlock." Tenn. Code Ann. § 36-2-302(4) (2001) (emphasis added). Similarly, "parent" is defined as "the biological mother or biological father of a child, regardless of the marital status of the mother and father." Tenn. Code Ann. § 36-2-302(5) (emphasis added). The parentage statutes do not define "biological mother." Consequently, we adduce definitions provided by Tennessee's adoption statutes. Statutes in pari materia-that is, statutes relating to the same subject or having a common purpose-are to be construed together. *Lyons v. Rasar*, 872 S.W.2d 895, 897 (Tenn.1994).

The adoption statutes define "biological parents" as "the woman and man who physically or genetically conceived the child." Tenn. Code Ann. § 36-1-102(10) (2001) (emphasis added). Code section 36-1-102(10) focuses solely on conception, making no reference to giving birth. The verb "conceived" is modified by two disjunctively related adverbs. On the one hand, "physically" is an adverb meaning "in a physical manner" and "in respect to the body," Webster's Third New Int'l Dictionary of the English Language Unabridged 1707, and which thus means in a manner which relates to or stands "in accordance with the laws of nature, "id. at 1706 (defining "physical"). As used in the statute, "physically ... conceived" therefore means having caused conception through natural means (coitus) as opposed to artificial means.

On the other hand, "genetically conceived" means having caused conception in a manner pertaining to "genetic makeup and phenomena." *Id.* at 946 (defining "genetics"). Genetic conception thus entails the contribution of one's genes to a child. By providing for genetic conception in addition to physical or natural conception, Code section 36-1-102(10) implicitly accounts for genetic procreation via technological assistance. If practicable, a statute is to be construed so that its component parts are reasonably consistent. *Marsh v. Henderson*, 221 Tenn. 42, 424 S.W.2d 193, 196 (1968). "Every word used is presumed to have meaning and purpose, and should be given full effect if so doing does not violate the obvious intention of the Legislature." *Id.*

We agree with the Court of Appeals that Cindy falls outside the statutory scope of the parentage and adoption statutes, which do not expressly control the circumstances of this case. It is appropriate to construe the parentage and adoption statutes narrowly insofar as this case involves such fundamental constitutional rights as parenthood and the right to procreate. *See Hawk v. Hawk*, 855 S.W.2d 573, 578-79 (Tenn.1993); *Davis v. Davis*, 842 S.W.2d 588, 600-01 (Tenn.1992). Further, we refrain from "speculating about the significance of provisions which are not included in [a] statute," finding it more effective to "consider the words actually used." *Fletcher v. State*, 951 S.W.2d 378, 382 (Tenn.1997).

First, although the definition of "biological parents" in Tennessee Code Annotated section 36-1-102(10) implicitly accounts for assisted conception by distinguishing between physical (natural) and genetic conception, see supra, the adoption and parentage statutes do not further elaborate upon this distinction.

Second, even the definition of "surrogate birth" in Tennessee Code Annotated section 36-1-102(48)(A) (2001) assumes the existence of a marital relationship between the intended parents on whose behalf the surrogate carries a child. *See* Tenn. Code Ann. § 36-1-102(48)(A)(i) ("The union of the wife's egg and the husband's sperm which are then placed in another woman who carries the fetus to term and who, pursuant to a contract, then relinquishes all parental rights....") (emphasis added); § 36-1-102(48)(A)(ii) (The gestational surrogate "shall relinquish the child to the biological father and the biological father's wife.") (emphasis added). As the Court of Appeals correctly pointed out, this definition of surrogate birth is "expressly based on the predicate that the surrogate entered into a contract by which she relinquished all parental rights." Moreover, this statutory definition assumes that the intended mother is a woman other than the gestator. However, in this case not only was there no marriage or surrogacy contract, there is also no evidence in the record to suggest that Cindy gave birth on behalf of anyone but Charles and herself.[79]

Third, the parentage statutes generally fail to contemplate dispute over maternity. For example, the rebuttable presumptions of parentage provided in Tennessee Code Annotated section 36-2-304 (2001) focus exclusively on establishing paternity. *See* Tenn. Code Ann. § 36-2-304(a) ("A man is rebuttably presumed to be the father of a child if ....") (emphasis added). The statutes also employ the term "mother" in a way that assumes we already know who the "mother" is, see, e.g. Tenn. Code Ann. §§ 36-2-303, 36-2-305(b)(1)(B) (2001), whereas references to "father" include such phrases as "a man claiming to be the child's father," Tenn. Code Ann. § 36-2-305(b)(1)(C), "alleged father," Tenn. Code Ann. § 36-2-305(b)(4), and "putative father," Tenn. Code Ann. § 36-2-318 (2001). Similarly, the statute providing for an order of parentage is concerned solely with the establishment of paternity. *See* Tenn. Code Ann. § 36-2-311(a) (2001) ("Upon establishing parentage, the court shall make an order declaring the father of the child.") (emphasis added). The statutes lack corresponding language concerning the establishment of maternity.

The legislative history of the parentage statutes reinforces our conclusion that they fail to

[79] We note that the surrogate birth statute itself reflects a neutral legislative stance as to the validity and enforceability of surrogacy arrangements. See Tenn. Code Ann. § 36-1-102(48)(C) ("Nothing herein shall be construed to expressly authorize the surrogate birth process in Tennessee unless otherwise approved by the courts or the general assembly."). We express no opinion here on that issue.

contemplate or to control the circumstances of this case. Where the plain language of a statute does not clearly resolve an issue, it is appropriate to consider the history and purpose of legislation in order to ascertain legislative intent. *See Lavin v. Jordon*, 16 S.W.3d 362, 365-66 (Tenn.2000).

In 1997, the Tennessee General Assembly completely overhauled the statutes concerning paternity and legitimation. *See* 1997 Tenn. Pub. Acts ch. 477. The primary purpose of this change was to streamline and to simplify the formerly separate causes of action for paternity and legitimation by combining them into a single parentage action. *See* Tenn. Code Ann. §§ 36-2-101 to -115 (1996) (paternity) and §§ 36-2-201 to -210 (1996) (legitimation), repealed by 1997 Tenn. Pub. Acts ch. 477 (codified at Tenn. Code Ann. §§ 36-2-301 to -322 (2001)); Tape H-C & FA # 1 (Tennessee House of Representatives Children and Family Affairs Committee Mar. 26, 1997) ("This bill is an effort to try to revise our statutes and bring us into the twentieth century and develop one system for determining and establishing the parentage of children born out of wedlock.") (statement of Rep. Kim McMillan). The 1997 legislation was also designed to correct a particular constitutional infirmity of the prior statutes.

Significantly, the legislative history shows that the current parentage statutes were not designed to control questions of parentage where sperm or egg donation is involved. In response to the observation that the new parentage statutes could potentially allow a sperm donor to file a parentage claim, Mr. Steve Cobb stated as follows:

> I can tell you that the clear intention, discussed intention, of this [bill] was not to deal with sperm donors at all.... [W]e wanted to put that off for another day.... The intent, and it should be stated by the sponsor in a colloquy on the floor if necessary, is not to affect that issue at all.

Tape S-Jud. # 4 (Tennessee Senate Judiciary Committee May 13, 1997). Concerning the question of maternity where egg donation is involved, the legislative history contains no indication that this matter was ever contemplated as a potential issue.

In sum, we conclude that Tennessee's parentage and related statutes do not provide for or control the circumstances of this case. Contrary to the position taken by the dissent which would restrict the basis for legal maternity to genetic consanguinity alone, we determine that these statutes simply do not apply to all conceivable parentage determinations. In this regard, we agree with the Court of Appeals.

3. Tests for Legal Maternity in Other Jurisdictions

In the absence of express guidance from the legislature, the Court of Appeals looked to case law from other jurisdictions to resolve the dispute of maternity in this case. Among the few jurisdictions which have addressed cases like this one, where a gestational carrier implanted with donated eggs seeks parental status of the resulting children and where legislation does not clearly resolve the matter, two tests for maternity have arisen. Some courts have focused on intent, holding that under such circumstances the intended "mother" is to be deemed the legal mother. *See*, *e.g.*, *Johnson v. Calvert*, 5 Cal.4th 84, 19 Cal.Rptr.2d 494, 851 P.2d 776 (1993); *In re Marriage of Buzzanca*, 61 Cal.App.4th 1410, 72 Cal.Rptr.2d 280 (1998); *McDonald v. McDonald*, 196 A.D.2d 7, 608 N.Y.S.2d 477 (N.Y.App.Div.1994). Other courts have instead focused on genetics and gestation, holding that genetic connection to the children is of paramount importance in determining legal maternity. *See,*

e.g., *Culliton v. Beth Israel Deaconess Med. Ctr.,* 435 Mass. 285, 756 N.E.2d 1133 (2001); *Belsito v. Clark*, 67 Ohio Misc.2d 54, 644 N.E.2d 760 (1994).

The intent test has developed primarily in California. In *Johnson*, a married couple was unable to have children naturally because the wife had undergone a hysterectomy, yet the wife could still produce eggs. 851 P.2d at 778. The couple entered into a surrogacy agreement with a third-party female who agreed to give birth to a child on their behalf in exchange for $10,000 and other consideration. One of the wife's eggs was fertilized with her husband's sperm and was successfully implanted in the surrogate's uterus. However, when the relationship between the couple and the surrogate deteriorated, litigation over maternity and custody ensued. *Id.* Under California's version of the Uniform Parentage Act, both genetic consanguinity and giving birth were equally cognizable bases for establishing maternity. *Id.* at 780-81. The Court declined to recognize two legal mothers. *Id.* at 781 n. 8. In order to break the tie, the California Supreme Court held that when gestation and genetic consanguinity "do not coincide in one woman, she who intended to procreate the child-that is, she who intended to bring about the birth of the child that she intended to raise as her own-is the natural mother under California law." *Id.* at 782.

The genetic test has been set forth most thoroughly by the Ohio Court of Common Pleas in Belsito. In *Belsito*, a married couple wanted children, and the wife could produce eggs but could not sustain a pregnancy. 644 N.E.2d at 760-61. By agreement, one of the wife's eggs was fertilized with the husband's sperm and then implanted in the uterus of a gestational surrogate (the wife's sister). Without objection from the surrogate, the couple sought a declaratory judgment of maternity and paternity. *Id.* at 761-62. Like California, Ohio had adopted a version of the Uniform Parentage Act which provided that "maternity can be established by identifying the natural mother through the birth process or by other means, including DNA blood tests," as provided by statute. *Id.* at 763 (citing Ohio Rev.Code Ann. ch. 3111). Also declining to recognize two legal mothers, id., the court applied a two-stage analysis for establishing maternity. First, if the male and female genetic providers have not waived parental rights, they must be declared the legal parents. Second, if the female genetic provider has waived her parental rights, then the gestator is the legal mother. *See id.* at 767. On this basis, the court held that the married couple, as the child's genetic progenitors, were the legal parents. Id. at 767.

Significantly, Tennessee's statutory framework for establishing maternity differs markedly from the California and Ohio statutes under consideration in *Johnson* and *Belsito*. Compare Tenn. Code Ann. § 36-2-302(4) (defining "mother" as "the biological mother of a child born out of wedlock") and Tenn. Code Ann. § 36-1-102(10) (defining "biological parents" as "the woman and man who physically or genetically conceived the child") with Cal. Civ.Code § 7003(1) (West 1983) ("The parent and child relationship may be established ... [b]etween a child and the natural mother ... by proof of her having given birth to the child, or under this part."), repealed by 1992 Cal. Stat. c. 162 (A.B.2650), § 4 and Ohio Rev.Code Ann. § 3111.02 (West 1992) ("The parent and child relationship between a child and the child's natural mother may be established by proof of her having given birth to the child or pursuant to [other sections of the Ohio Revised Code]."). Consequently, neither California's intent test nor Ohio's genetic test is strictly apposite to our statutory scheme.

Further, both the intent test and the genetic test suffer from inadequacies. For example, in *Johnson* the California Supreme Court crafted an unnecessarily broad rule which could afford maternal status even to a woman who failed to qualify under either of California's two statutory bases for maternity. *See Johnson*, 19 Cal.Rptr.2d 494, 851 P.2d at 783. According to *Belsito*, the intent formulation of

Johnson has "discarded both genetics and birth as the primary means of identifying the natural maternal parent," *Belsito*, 644 N.E.2d at 764, and provides for, "in effect, a private adoption process that is readily subject to all the defects and pressures of such a process," *id.* at 766. In Tennessee, unlicensed and unregulated adoption is statutorily prohibited and subject to criminal penalties. *See* Tenn. Code Ann. §§ 36-1-108 to -109 (2001).

However, the genetic test of *Belsito* also has significantly broad implications. In the event that a dispute were to arise between an intended mother who had obtained eggs from a third-party donor and a gestational surrogate in whom the eggs had been implanted, the genetic test would implicitly invalidate any surrogacy agreement. The genetic test could also have practical effects similar to the "adoption-default model" criticized by *In re Marriage of Buzzanca*, *see* 72 Cal.Rptr.2d at 289, in that an intended "mother" who employs techniques for assisted reproduction including egg donation would by default have to submit to government-controlled adoption procedures to attain a secure legal status as "mother." Policy-wise, the requirement of such regulation may or may not be sound.

Consequently, we decline to adopt either the intent test or the genetic test as a general rule for resolving this case. We thus vacate the adoption of the intent test of Johnson by the courts below.

4. Factors for Establishing Legal Maternity

In light of the foregoing analysis, we deem it appropriate to decide this case on particularly narrow grounds.

Therefore, in resolving this case we focus closely on its particular facts. Charles and Cindy, an unmarried couple, wanted to start a family and agreed to rear a child together permanently as father and mother, not suspecting that their own relationship would eventually fall apart. Given Cindy's age, they agreed to fertilize anonymously donated eggs with Charles's sperm and to implant the fertilized eggs in Cindy's uterus. Before the procedure, Charles and Cindy executed the Recipient Consent in which Charles acknowledged Cindy's status as "mother" and in which Cindy agreed to accept all the responsibilities of parenthood:

> I, Cindy (wife), understand that the child(ren) conceived by this method will not have my genetic material, but will have that of the oocyte [egg] donor and my husband [sic]. However, regardless of the outcome, I will be the mother of any child(ren) born to me as a result of egg donation and hereby accept all the legal responsibilities required of such a parent.

Cindy was impregnated and carried not just one but three fetuses to term. After a complicated pregnancy, she gave birth via caesarian section to triplets. Charles allowed Cindy to be named the "mother" on the children's birth certificates. After the children were born, Charles and Cindy lived together in an arrangement where both Charles and Cindy performed the role of parent.

Having recounted these events, we now discuss the relevant factors which we consider to be significant for deciding this case.

i. Genetics

Both statute and sound policy support genetics as an important factor in establishing legal maternity. Human reproduction as we now know it cannot take place without the involvement of genetic

material. As analyzed above, Tennessee's domestic relations statutes provide for the establishment of legal maternity based on genetic consanguinity. *See* §§ 36-2-302(4) (defining "mother" as "the biological mother of a child born out of wedlock"), 36-1-102(10) (defining "biological parents" as "the woman and man who physically or genetically conceived the child"). In emphasizing genetics, *Belsito* recognizes and honors an individual's decision to procreate or to refrain from procreating. 644 N.E.2d at 766 ("The procreation of a child, that is, the replication of the unique genes of an individual, should occur only with the consent of that individual."(citing *Davis*, 842 S.W.2d at 588)). As we held in *Davis*, such decisions enjoy constitutional protection. 842 S.W.2d at 600-01.

However, our recognition in *Davis* of the constitutional right to control the disposition of one's genetic material does not mean that *Davis* stands for the proposition that genetics must be paramount in all parentage determinations. In cases such as this one, where a woman has become intimately involved in the procreation process even though she has not contributed genetic material, factors other than genetics take on special significance.

ii. Intent

Before the children's birth, both Cindy and the genetic father, Charles, voluntarily demonstrated the bona fide intent that Cindy would be the children's legal mother, and they agreed that Cindy would accept all the legal responsibility as well as the legal rights of parenthood. We consider the intent to take on both parental rights and responsibilities as one important factor among others for resolving this controversy.

Although our decision in *Davis* does not control this case, we agree with the Court of Appeals that it is nonetheless instructive. In *Davis*, this Court had to decide whether a man could prevent donation and implantation against his will of a preembryo (an early-stage fertilized egg) containing his genes. 842 S.W.2d at 589-90. We held that just as an individual enjoys a constitutionally-protected right to procreate, an individual also has a similar right to avoid procreation. *Id.* at 600-01. We concluded that disputes over the control of preembryos are to be resolved first by looking to the agreement of the progenitors and second, in the absence of agreement, by weighing the relative interests of the male and female providers of reproductive cells. *Id.* at 604. *Davis* thus underscored the importance of intent and agreement with respect to the disposition of an individual's reproductive and genetic material.

Although Tennessee's parentage statutes recognize maternity on the basis of genetics, see Tenn.Code Ann. §§ 36-1-102(10), 36-2-302(4), as we have seen that the parentage statutes do not expressly control this case and thus do not necessarily confine the establishment of legal maternity to genetics alone. To the contrary, we determine that taking intent into consideration as a factor is consistent with policy implicit in Tennessee's domestic relations statutes.

Significantly, the artificial insemination statute of Tennessee Code Annotated section 68-3-306 (2001) supports the consideration of intent as a factor for establishing legal maternity. This section is entitled "Birth from artificial insemination" and is contained in the part of the Tennessee Code which addresses vital records. It provides as follows: "A child born to a married woman as a result of artificial insemination, with consent of such married woman's husband, is deemed to be the legitimate child of the husband and wife." Tenn. Code Ann. § 68-3-306. Like the parentage statutes, Code section 68-3-306 does not expressly govern this case because the statute contemplates and provides for an agreement within the context of marriage; Charles and Cindy were not married, and

in any event there is now a lack of consent. Notwithstanding, it is significant that Code section 68-3-306 confers parental status on a husband even though the child conceived in his wife via artificial insemination is not necessarily genetically related to him. The artificial insemination statute thus reflects a policy which favors taking into account intent in establishing parentage when technological assistance is involved.

iii. Gestation

Cindy became pregnant and gave birth to the children with the intent of raising them as her own. As mentioned above, historically gestation "proved genetic parentage beyond doubt" and thus was conclusive of maternity. The common law thus has presumed that the birth mother is the legal mother of the child. It is only quite recently that modern technology has made it possible to separate and to distribute among multiple persons or environments the genetic and gestational roles. We consider gestation as another important factor in determining legal maternity in this case.

To be sure, as discussed above, genetics remains an irreplaceable component of human reproduction, and as such genetic consanguinity is and should be particularly important to parentage determinations. And as our analysis above has shown, Tennessee's domestic relations statutes expressly account for genetics in parentage determinations. *See* Tenn. Code Ann. §§ 36-1-102(10), § 36-2-302(4).

However, as our analysis above has also shown, Tennessee's parentage and related statutes were simply not designed to control the circumstances of this case. To restrict legal maternity to genetic consanguinity alone where, as in this case, the genetic "mother" is an egg donor who has waived her parental rights and who has been and remains permanently anonymous would result in the absurdity of children having, for all practical purposes, no legal mother. A child's knowledge that he or she has an anonymous and inaccessible mother somewhere in the world would provide only cold comfort, and demanding such a result in cases like this one could hardly promote the best interests of children. "Courts must presume that the Legislature did not intend an absurdity and adopt, if possible, a reasonable construction which provides for a harmonious operation of the laws." *Fletcher*, 951 S.W.2d at 382 (citing *Cronin v. Howe*, 906 S.W.2d 910, 912 (Tenn.1995) and *Epstein v. State*, 211 Tenn. 633, 366 S.W.2d 914 (1963)).

We further observe that in this case the genetic "mother" has donated her eggs to another and has correspondingly waived her parental rights, thereby relinquishing her status as legal mother. As *Belsito* correctly concludes, "a genetic test cannot be the only basis for determining who will assume the status of legal parent." 644 N.E.2d at 767.

Although giving birth is conspicuously absent from Tennessee's parentage statutes, as discussed above, there is no indication that the General Assembly sought to exclude it as a basis for legal maternity or even sought to decide questions of maternity at all. In this regard, the artificial insemination statute is once again significant. In addition to recognizing paternity where artificial insemination is involved, Tennessee Code Annotated section 68-3-306 confers parental status on a wife when she gives birth to a child as the result of artificial insemination. This statute displays a policy which favors recognizing gestation and giving birth as a basis for legal maternity.

Accordingly, we conclude that sound policy and common sense favor recognizing gestation as an important factor for establishing legal maternity. "Although current technology allows the separation

between gestation and genetic contribution, it does not follow that gestation is now a less important part of parenthood." (citation omitted). In our view, the dissent accords too little significance to gestation as a factor for deciding this controversy.

iv. The Absence of Controversy Between the Gestator and the Genetic "Mother"

Another factor to consider in resolving this case is the nature of the controversy. Here we are not faced with a controversy between a birth "mother" and a genetic "mother" where the genetic and gestational roles have been separated and distributed among two women. In this case, the genetic "mother" has fully waived her parental rights and remains anonymous. Nor is this a case involving a dispute between a traditional or gestational surrogate and a genetically-unrelated intended "mother" who wishes to raise the child as her own. Rather, Cindy became pregnant and gave birth to triplets on her own behalf, and the sole dispute is between her and the genetic father, Charles. The other kinds of conflicts present different questions and ones which would be inappropriate for us to decide here. Instead, we limit our holding today to cases where there is no controversy between the gestator and the genetic "mother."

5. Establishing Legal Maternity in This Case

Deciding this case narrowly based on its particular facts, we affirm on separate grounds the holding of the courts below that Cindy is the legal mother. Our holding that Cindy is the legal mother of C.K.G., C.A.G., and C.L.G. with all the legal rights and responsibilities of parenthood is based on the following factors. First, prior to the children's birth, both Cindy, the gestator, and Charles, the genetic father, voluntarily demonstrated the bona fide intent that Cindy would be the children's legal mother and agreed that Cindy would accept the legal responsibility as well as the legal rights of parenthood. Second, Cindy then became pregnant, carried to term, and gave birth to the three children as her own. Third, this case does not involve a controversy between a gestator and a female genetic progenitor where the genetic and gestative roles have been separated and distributed among two women, nor does this case involve a controversy between a traditional or gestational surrogate and a genetically-unrelated intended mother; our holding today is not designed to control such controversies. Even though Cindy lacks genetic connection to the triplets, in light of all the factors considered we determine that Cindy is the children's legal mother. We further conclude that in light of the factors considered, Charles's genetic paternity does not give him a parental status superior to that of Cindy.

Having thus concluded that Cindy is the children's legal mother, the question of estoppel is moot, and we vacate the holding of the Court of Appeals that Charles is estopped to deny Cindy's maternal status.

III. Conclusion

We conclude that Tennessee's parentage statutes neither provide for nor contemplate the circumstances of this case, where an unmarried couple has employed techniques for assisted reproduction involving third-party egg donation to produce children for their own benefit and where dispute has arisen over the genetically unrelated gestator's legal status as mother. Although in some jurisdictions courts have fashioned widely applicable tests for maternity where techniques for assisted reproduction are involved, we decline to adopt as a general rule either the intent test or the genetic test. Consequently, we vacate the adoption of the intent test by the courts below.

Instead we affirm on separate and narrower grounds the holding of the courts below that Cindy is the legal mother of the children C.K.G., C.A.G., and C.L.G. with all the rights and responsibilities of parenthood. Our holding in this regard depends on the following factors: (1) prior to the children's birth, both Cindy as gestator and Charles as the genetic father voluntarily demonstrated the bona fide intent that Cindy would be the children's legal mother and agreed that she would accept the legal responsibility as well as the legal rights of parenthood; (2) Cindy became pregnant, carried to term, and gave birth to the children as her own; and (3) this case does not involve a controversy between a gestator and a female genetic progenitor where the genetic and gestative roles have been separated and distributed among two women, nor does this case involve a controversy between a traditional or gestational surrogate and a genetically-unrelated intended mother. In our view, given the far-reaching, profoundly complex, and competing public policy considerations necessarily implicated by the present controversy, crafting a broadly applicable rule for the establishment of maternity where techniques for assisted human reproduction are involved is more appropriately addressed by the Tennessee General Assembly.

Having concluded that Cindy is the children's legal mother, the question of estoppel is moot, and we vacate the holding of the Court of Appeals that Charles is estopped to deny Cindy's maternal status. However, we affirm in full the judgments of the juvenile court and Court of Appeals concerning comparative fitness, custody, child support, and visitation. Costs of this appeal are taxed to the appellant, Charles, for which execution may issue if necessary.

6.6.2 The Possibility of Inheriting Through The Woman

Matter of Petition Of Successor Trustees for the Construction of three inter vivos trusts created in 1959 f/b to the Issue of K. Doe, C. Doe, and M. , 793 N.Y.S. 2d 878 (2005).

PREMINGER, J.

In creating trusts for the benefit of the issue of his eight children, the settlor required that "adoptions shall not be recognized." One of the settlor's daughters ("K. Doe") and her husband became the parents of fraternal twins by virtue of a surrogacy arrangement, using an anonymous donor egg, fertilized in vitro with the sperm of K. Doe's husband, and carried to term by an unrelated surrogate mother. Petitioners, successors trustees, bring this construction proceeding to determine whether the settlor's exclusion of "adoptions "excludes these children as beneficiaries.

The eight identical inter vivos trust instruments, created by the settlor, an attorney, in 1959, required that the net income of each trust be paid to such charitable organizations as appointed by each child until September 1, 1979, after which date the net income of each trust was to be paid to the "issue" or "descendants" of each child. As of December 31, 2001, the issue of five of the settlor's eight children were receiving income from the trusts. The income from the remaining three trusts was being distributed in equal shares per capita to the fourteen then-living grandchildren of the settlor as specified by the trust instruments.

As to the twins' birth, K. Doe and her husband arranged for a genetically unrelated surrogate mother in the state of California to be impregnated with the eggs of an anonymous donor fertilized in vitro by K. Doe's husband's sperm. After the twins' birth, with consent of the surrogate mother, K. Doe

and her husband obtained a Judgment of Parental Relationship from the Superior Court of California to establish them as the twins' sole legal parents.

If the twins are not excluded by the terms of the trust prohibiting recognition of adopted children, they are: 1) income beneficiaries and presumptive remaindermen of the trust created for benefit of the issue of their mother, K. Doe; 2) eligible to receive their per capita share of the income of trusts for two of the settlor's issue who currently have no issue; 3) permissible beneficiaries of the exercise of the lifetime power of appointment reserved to the trustees to make discretionary principal distributions to the settlor's grandchildren; and 4) permissible beneficiaries of the testamentary powers of appointment given to K. Doe and her seven siblings over their respective remainders.

The Court has appointed a guardian at litem for the twins, who argues they should be included, as well as one for the infant grandchildren of the settlor whose interests in the trusts will be affected by this decision, who argues that they should not.

In a construction proceeding, the intent of the settlor controls. (*In re Balsam's Trust*, 58 Misc.2d 672, 677, 296 N.Y.S.2d 969; *see Matter of Buechner*, 226 N.Y. 440, 443, 123 N.E. 741). The reproductive technologies involved in this case in vitro fertilization and gestational surrogacy were established in the 1970s, well after these trusts were settled. It is unlikely that the settlor's views of these methods of reproduction can be discovered. Even if the court were to consider the trusts ambiguous and allow extrinsic evidence on this question, the petitioning trustees candidly state that they know of none. This construction question is thus confined to the language employed in the trusts.

Looking at that language, one interpretation of the settlor's exclusion of "adoptions" is that he intended to exclude all non-blood relations. However, in examining, as the court must, the document as a whole (*see Matter of Fabbri*, 2 N.Y.2d 236, 240, 159 N.Y.S.2d 184, 140 N.E.2d 269), it is clear that was not his intent. The settlor provided a means for spouses, non-blood relatives, to take under the trusts. Upon the death of a child, the trustees are directed to distribute any remaining trust principal to the settlor's then-living issue, other than the estate of the child, and the spouse of such issue in such proportions as the child may designate by will. In default of the child's exercise of the testamentary power of appointment, the remainder is to be distributed to the issue of the child, or in default of such issue, to the settlor's issue per stirpes. Although the possibility of a non-blood relative's taking a portion of the remainder depends on an affirmative exercise of the power of appointment by a child, the settlor contemplated that his non-blood relatives might take a portion of the trust remainder. Similarly, certain trustees are permitted in their discretion to appoint principal to "grandchildren and more remote issue of the Settlor and spouses of such grandchildren and more remote issue." Thus, under the trusts, there is the possibility of a non-blood relation being a beneficiary.

This is the main language in the trusts that bears on this question, and nothing else suggests that the court should extend "adoptions" to include the reproductive technologies at issue in this case. When the settlor excluded "adoptions," it cannot be said that he intended to exclude all means of assisted reproduction; such means of assisted reproduction were not then in existence, and no language in the trusts anticipates technologies relating to birth that may be developed in the future.

With some evidence in the trust documents that the settlor did not intend to exclude all non-blood relations, the court turns to the question of whether the California judgment should be considered an adoption, and if not, whether New York should afford it full faith and credit.

Under California law, a judgment of parental relationship is entirely distinct from an adoption proceeding, and the two are governed by different divisions of the California Family Code. The Judgment of Parental Relationship obtained by K. Doe and her spouse was entered in a proceeding brought under sections 7630 and 7650 of Division 12 of the California Family Code, which govern the establishment of parental relationships, not adoptions. The judgment declared K. Doe and her husband to be "the sole and legal parents" of the twins and the surrogate mother and her husband to be "strangers in blood" to the twins. The judgment ordered amendment of the twins' birth certificates to list K. Doe as mother and her husband as father. In contrast, California adoptions are governed by division 13 of the California Family Code. California treats these two methods of establishing parental rights as distinct in nature. A California gestational surrogacy arrangement, where, as here, the surrogate mother is implanted with an egg fertilized in vitro, is not subject to the adoption statutes (*Johnson v. Calvert*, 5 Cal.4th 84, 96, 19 Cal.Rptr.2d 494, 851 P.2d 776, 783-784 [Cal.1993]).

It is clear that in California the twins were not adopted, and recognizing this result in New York is appropriate. Surrogacy is not the functional equivalent of adoption. For example, in gestational surrogacies, as here where the birth mother is implanted with a fertilized ovum genetically unrelated to her the basic question of who should be considered the natural mother must be answered in light of the advanced technologies that permit such a procedure. In Johnson, California developed an analysis that has become known as the intent test: those who intended to be parents, absent other compelling circumstances, should be considered the parents. Applying that test, the Johnson court declared the genetic mother, who intended from the beginning to be the mother, instead of the gestational surrogate mother, to be the natural mother (*Johnson*, 5 Cal.4th at 93-94, 19 Cal.Rptr.2d 494, 851 P.2d at 781-782).

New York also has a separate article, article 8 (§§ 120-124) of the Domestic Relations Law, dealing with surrogate parenting. Unlike California, it forbids recognition of surrogate parenting contracts, and considers them void and unenforceable (Domestic Relations Law § 122). Nonetheless, New York courts entertain petitions for declarations of maternity, and do not require parents to go through an adoption proceeding in cases of in vitro fertilization and gestational surrogacy arrangements (*see e.g. Arredondo v. Nodelman*, 163 Misc.2d 757, 622 N.Y.S.2d 181 [decided before enactment of article 8]; *see Matter of Andres A.*, 156 Misc.2d 65, 591 N.Y.S.2d 946 [related proceeding]), and apply the intent test to determine who the "natural mother" is in such an arrangement in the context of a divorce and custody dispute (*McDonald v. McDonald*, 196 A.D.2d 7, 608 N.Y.S.2d 477 [decided after enactment of article 8]; *see also Kass v. Kass*, 91 N.Y.2d 554, 673 N.Y.S.2d 350, 696 N.E.2d 174). While the practice commentaries to Domestic Relations Law § 122 state that surrogacy arrangements are "specialized adoption agreements," (Scheinkman, McKinney's Unconsol. L. of N.Y., Book 14, Domestic Relations Law § 122, at 321 [1999]), adoption need not follow a surrogate parenting arrangement, as it does not in California (*Johnson*, 5 Cal.4th at 96, 19 Cal.Rptr.2d 494, 851 P.2d at 783-784) and did not in this case.

Finally, no reasoning justifies a denial of full faith and credit to the California judgment. Where a judgment of a sister state is issued with jurisdiction of all parties, New York must afford it full faith and credit (U.S. Const., art. IV, § 1; 28 USCA §§ 1738, 1738A, 1738B; *see e.g. In re Michael H.*, 198 A.D.2d 414, 415, 604 N.Y.S.2d 573 [1993] [full faith given to California judgment regarding paternity and visitation rights]; *Estate of D'Angelo*, 139 Misc.2d 5, 10, 526 N.Y.S.2d 729 [full faith given to California adoption decree] *see also Hampton v. M'Connel,* 16 U.S. 234, 235, 3 Wheat. 234, 4

L.Ed. 378; Domestic Relations Law § 77-b). Although New York forbids enforcement of surrogacy contracts, the enforcement of the contract is not at issue here. More importantly, the legislature did not punish or prejudice the rights of children born from such arrangements. Instead, the statutory scheme explicitly contemplates full and fair proceedings to determine "parental rights, status and obligations" (Domestic Relations Law § 124), notwithstanding the surrogate parenting contract. Although for different reasons, a New York court could have reached the same conclusions as to who the twins' parents are as the California court did, and full faith and credit cannot be denied the California judgment on grounds of some countervailing New York public policy (*see Baker v. General Motors Corp.,* 522 U.S. 222, 233, 118 S.Ct. 657, 139 L.Ed.2d 580 [1998]; *cf. Matter of May*, 305 N.Y. 486, 114 N.E.2d 4).

Accordingly, the Court holds that the twins are not excluded from the benefits of the John Doe trusts by virtue of the adoption exclusion.

Settle decree.

Part II —The Testacy System

Chapter Seven: Testamentary Freedom

7.1 Introduction

A person spends a lifetime accumulating property. Some people acquire more resources than others. Nonetheless, regardless of the size of the estate, the one who accrues the property wants to control what happens to it after he or she dies. The majority of people transfer their property using non-probate instruments like trusts, joint bank accounts and life insurance. In legal terms, property consists of a bundle of sticks or rights, including the right to include, the right to exclude, and the right to dispose. It is clear that, during life, a person has a right to dispose of his or her property by gift or sale. Should the right to dispose of property survive the death of the owner of that property? The right to dispose of property at death is a separate property right that belongs to the owner of the property. Therefore, as long as the person complies with the law, he or she has the right to control the distribution of his or her property. However, testamentary freedom is not absolute because preexisting obligations may have priority over testamentary dispositions. Since the right to dispose of property belongs to the testator, he or she may put reasonable restrictions on a person's right to inherit his or her estate. In this chapter, we will examine the testator's right to dispose and to place restrictions on the receipt of his or her property.

7.1.1. The Decedent's Right to Control the Distribution of Property

The next case involves the law of takings. According to the Fifth Amendment, private property cannot be taken for public use unless the government pays the private property owner just compensation. In takings jurisprudence, property is broadly defined to include all of the rights in the bundle of sticks of property ownership. Therefore, if the government, through eminent domain or regulation, takes any one of those rights, the private property owner is entitled to just compensation. Although the case discussed below deals with the issue of takings, the case is included because it stands for the proposition that "the right to pass on valuable property to one's heirs" is included in the bundle of sticks that make up property ownership. Consequently, if the government regulation takes away that right, the private property owner must be compensated.

Hodel v. Irving, 481 U.S. 704 (1987)

O'CONNOR, Justice.

The question presented is whether the original version of the "escheat" provision of the Indian Land Consolidation Act of 1983, Pub.L. 97-459, Tit. II, 96 Stat. 2519, effected a "taking" of appellees' decedents' property without just compensation.

I

Towards the end of the 19th century, Congress enacted a series of land Acts which divided the communal reservations of Indian tribes into individual allotments for Indians and unallotted lands

for non-Indian settlement. This legislation seems to have been in part animated by a desire to force Indians to abandon their nomadic ways in order to "speed the Indians' assimilation into American society," *Solem v. Bartlett,* 465 U.S. 463, 466 (1984), and in part a result of pressure to free new lands for further white settlement. *Ibid.* Two years after the enactment of the General Allotment Act of 1887, ch. 119, 24 Stat. 388, Congress adopted a specific statute authorizing the division of the Great Reservation of the Sioux Nation into separate reservations and the allotment of specific tracts of reservation land to individual Indians, conditioned on the consent of three-fourths of the adult male Sioux. Act of Mar. 2, 1889, ch. 405, 25 Stat. 888. Under the Act, each male Sioux head of household took 320 acres of land and most other individuals 160 acres. 25 Stat. 890. In order to protect the allottees from the improvident disposition of their lands to white settlers, the Sioux allotment statute provided that the allotted lands were to be held in trust by the United States. *Id.,* at 891. Until 1910, the lands of deceased allottees passed to their heirs "according to the laws of the State or Territory" where the land was located, *ibid.,* and after 1910, allottees were permitted to dispose of their interests by will in accordance with regulations promulgated by the Secretary of the Interior. 36 Stat. 856, 25 U.S.C. § 373. Those regulations generally served to protect Indian ownership of the allotted lands.

The policy of allotment of Indian lands quickly proved disastrous for the Indians. Cash generated by land sales to whites was quickly dissipated, and the Indians, rather than farming the land themselves, evolved into petty landlords, leasing their allotted lands to white ranchers and farmers and living off the meager rentals. Lawson, *Heirship: The Indian Amoeba, reprinted in* Hearing on S. 2480 and S. 2663 before the Senate Select Committee on Indian Affairs, 98th Cong., 2d Sess., 82-83 (1984). The failure of the allotment program became even clearer as successive generations came to hold the allotted lands. Thus 40-, 80-, and 160-acre parcels became splintered into multiple undivided interests in land, with some parcels having hundreds, and many parcels having dozens, of owners. Because the land was held in trust and often could not be alienated or partitioned, the fractionation problem grew and grew over time.

A 1928 report commissioned by the Congress found the situation administratively unworkable and economically wasteful. L. Meriam, Institute for Government Research, The Problem of Indian Administration 40-41. Good, potentially productive, land was allowed to lie fallow, amidst great poverty, because of the difficulties of managing property held in this manner. Hearings on H.R. 11113 before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 89th Cong., 2d Sess., 10 (1966) (remarks of Rep. Aspinall). In discussing the Indian Reorganization Act of 1934, Representative Howard said:

> "It is in the case of the inherited allotments, however, that the administrative costs become incredible.... On allotted reservations, numerous cases exist where the shares of each individual heir from lease money may be 1 cent a month. Or one heir may own minute fractional shares in 30 or 40 different allotments. The cost of leasing, bookkeeping, and distributing the proceeds in many cases far exceeds the total income. The Indians and the Indian Service personnel are thus trapped in a meaningless system of minute partition in which all thought of the possible use of land to satisfy human needs is lost in a mathematical haze of bookkeeping." 78 Cong.Rec. 11728 (1934).

In 1934, in response to arguments such as these, the Congress acknowledged the failure of its policy and ended further allotment of Indian lands. Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, 25 U.S.C. § 461 *et seq.*

But the end of future allotment by itself could not prevent the further compounding of the existing problem caused by the passage of time. Ownership continued to fragment as succeeding generations came to hold the property, since, in the order of things, each property owner was apt to have more than one heir. In 1960, both the House and the Senate undertook comprehensive studies of the problem. *See* House Committee on Interior and Insular Affairs, Indian Heirship Land Study, 86th Cong., 2d Sess. (Comm. Print 1961); Senate Committee on Interior and Insular Affairs, Indian Heirship Land Survey, 86th Cong., 2d Sess. (Comm. Print 1960-1961). These studies indicated that one-half of the approximately 12 million acres of allotted trust lands were held in fractionated ownership, with over 3 million acres held by more than six heirs to a parcel. *Id.,* at pt. 2, p. X. Further hearings were held in 1966, Hearings on H.R. 11113, *supra,* but not until the Indian Land Consolidation Act of 1983 did the Congress take action to ameliorate the problem of fractionated ownership of Indian lands.

Section 207 of the Indian Land Consolidation Act-the escheat provision at issue in this case-provided:

> "No undivided fractional interest in any tract of trust or restricted land within tribe's reservation or otherwise subjected to a tribe's jurisdiction shall descedent *[sic]* by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than $100 in the preceding year before it is due to escheat." 96 Stat. 2519.

Congress made no provision for the payment of compensation to the owners of the interests covered by § 207. The statute was signed into law on January 12, 1983, and became effective immediately.

The three appellees-Mary Irving, Patrick Pumpkin Seed, and Eileen Bissonette-are enrolled members of the Oglala Sioux Tribe. They are, or represent, heirs or devisees of members of the Tribe who died in March, April, and June 1983. Eileen Bissonette's decedent, Mary Poor Bear-Little Hoop Cross, purported to will all her property, including property subject to § 207, to her five minor children in whose name Bissonette claims the property. Chester Irving, Charles Leroy Pumpkin Seed, and Edgar Pumpkin Seed all died intestate. At the time of their deaths, the four decedents owned 41 fractional interests subject to the provisions of § 207. App. 20, 22-28, 32-33, 37-39. The Irving estate lost two interests whose value together was approximately $100; the Bureau of Indian Affairs placed total values of approximately $2,700 on the 26 escheatable interests in the Cross estate and $1,816 on the 13 escheatable interests in the Pumpkin Seed estates. But for § 207, this property would have passed, in the ordinary course, to appellees or those they represent.

Appellees filed suit in the United States District Court for the District of South Dakota, claiming that § 207 resulted in a taking of property without just compensation in violation of the Fifth Amendment. The District Court concluded that the statute was constitutional. It held that appellees had no vested interest in the property of the decedents prior to their deaths and that Congress had plenary authority to abolish the power of testamentary disposition of Indian property and to alter the rules of intestate succession.

The Court of Appeals for the Eighth Circuit reversed. *Irving v. Clark,* 758 F.2d 1260 (1985). Although it agreed that appellees had no vested rights in the decedents' property, it concluded that their decedents had a right, derived from the original Sioux allotment statute, to control disposition

of their property at death. The Court of Appeals held that appellees had standing to invoke that right and that the taking of that right without compensation to decedents' estates violated the Fifth Amendment.

II

The Court of Appeals concluded that appellees have standing to challenge § 207. 758 F.2d, at 1267-1268. The Government does not contest this ruling. As the Court of Appeals recognized, however, the existence of a case or controversy is a jurisdictional prerequisite to a federal court's deliberations. *Id.,* at 1267, n. 12. We are satisfied that the necessary case or controversy exists in this case. Section 207 has deprived appellees of the fractional interests they otherwise would have inherited. This is sufficient injury-in-fact to satisfy Article III of the Constitution. See *Singleton v. Wulff,* 428 U.S. 106, 112, 96 S.Ct. 2868, 2873, 49 L.Ed.2d 826 (1976).

In addition to the constitutional standing requirements, we have recognized prudential standing limitations. As the court below recognized, one of these prudential principles is that the plaintiff generally must assert his own legal rights and interests. 758 F.2d, at 1267-1268. That general principle, however, is subject to exceptions. Appellees here do not assert that their own property rights have been taken unconstitutionally, but rather that their decedents' right to pass the property at death has been taken. Nevertheless, we have no difficulty in finding the concerns of the prudential standing doctrine met here.

For obvious reasons, it has long been recognized that the surviving claims of a decedent must be pursued by a third party. At common law, a decedent's surviving claims were prosecuted by the executor or administrator of the estate. For Indians with trust property, statutes require the Secretary of the Interior to assume that general role. 25 U.S.C. §§ 371-380. The Secretary's responsibilities in that capacity, however, include the administration of the statute that the appellees claim is unconstitutional, see 25 U.S.C. §§ 2202, 2209, so that he can hardly be expected to assert appellees' decedents' rights to the extent that they turn on that point. Under these circumstances, appellees can appropriately serve as their decedents' representatives for purposes of asserting the latters' Fifth Amendment rights. They are situated to pursue the claims vigorously, since their interest in receiving the property is indissolubly linked to the decedents' right to dispose of it by will or intestacy. A vindication of decedents' rights would ensure that the fractional interests pass to appellees; pressing these rights unsuccessfully would equally guarantee that appellees take nothing. In short, permitting appellees to raise their decedents' claims is merely an extension of the common law's provision for appointment of a decedent's representative. It is therefore a "settled practice of the courts" not open to objection on the ground that it permits a litigant to raise third parties' rights. *Tyler v. Judges of Court of Registration,* 179 U.S. 405, 406, 21 S.Ct. 206, 207, 45 L.Ed. 252 (1900).

III

The Congress, acting pursuant to its broad authority to regulate the descent and devise of Indian trust lands, *Jefferson v. Fink,* 247 U.S. 288, 294 (1918), enacted § 207 as a means of ameliorating, over time, the problem of extreme fractionation of certain Indian lands. By forbidding the passing on at death of small, undivided interests in Indian lands, Congress hoped that future generations of Indians would be able to make more productive use of the Indians' ancestral lands. We agree with the Government that encouraging the consolidation of Indian lands is a public purpose of high order. The fractionation problem on Indian reservations is extraordinary and may call for dramatic

action to encourage consolidation. The Sisseton-Wahpeton Sioux Tribe, appearing as *amicus curiae* in support of the Secretary of the Interior, is a quintessential victim of fractionation. Forty-acre tracts on the Sisseton-Wahpeton Lake Traverse Reservation, leasing for about $1,000 annually, are commonly subdivided into hundreds of undivided interests, many of which generate only pennies a year in rent. The average tract has 196 owners and the average owner undivided interests in 14 tracts. The administrative headache this represents can be fathomed by examining Tract 1305, dubbed "one of the most fractionated parcels of land in the world." Lawson, Heirship: The Indian Amoeba, reprinted in Hearing on S. 2480 and S. 2663 before the Senate Select Committee on Indian Affairs, 98th Cong., 2d Sess., 85 (1984). Tract 1305 is 40 acres and produces $1,080 in income annually. It is valued at $8,000. It has 439 owners, one-third of whom receive less than $.05 in annual rent and two-thirds of whom receive less than $1. The largest interest holder receives $82.85 annually. The common denominator used to compute fractional interests in the property is 3,394,923,840,000. The smallest heir receives $.01 every 177 years. If the tract were sold (assuming the 439 owners could agree) for its estimated $8,000 value, he would be entitled to $.000418. The administrative costs of handling this tract are estimated by the Bureau of Indian Affairs at $17,560 annually. *Id.,* at 86, 87. See also Comment, Too Little Land, Too Many Heirs-The Indian Heirship Land Problem, 46 Wash.L.Rev. 709, 711-713 (1971).

This Court has held that the Government has considerable latitude in regulating property rights in ways that may adversely affect the owners. (Citations omitted.) The framework for examining the question whether a regulation of property amounts to a taking requiring just compensation is firmly established and has been regularly and recently reaffirmed. (citations omitted).

There is no question that the relative economic impact of § 207 upon the owners of these property rights can be substantial. Section 207 provides for the escheat of small undivided property interests that are unproductive during the year preceding the owner's death. Even if we accept the Government's assertion that the income generated by such parcels may be properly thought of as *de minimis,* their value may not be. While the Irving estate lost two interests whose value together was only approximately $100, the Bureau of Indian Affairs placed total values of approximately $2,700 and $1,816 on the escheatable interests in the Cross and Pumpkin Seed estates. (citations omitted). These are not trivial sums. Of course, the whole of appellees' decedents' property interests were not taken by § 207. Appellees' decedents retained full beneficial use of the property during their lifetimes as well as the right to convey it *inter vivos.* There is no question, however, that the right to pass on valuable property to one's heirs is itself a valuable right. Depending on the age of the owner, much or most of the value of the parcel may inhere in this "remainder" interest. See 26 CFR § 20.2031-7(f) (Table A) (1986) (value of remainder interest when life tenant is age 65 is approximately 32% of the whole).

In holding that complete abolition of both the descent and devise of a particular class of property may be a taking, we reaffirm the continuing vitality of the long line of cases recognizing the States', and where appropriate, the United States', broad authority to adjust the rules governing the descent and devise of property without implicating the guarantees of the Just Compensation Clause. See, *e.g., Irving Trust Co. v. Day,* 314 U.S. 556, 562, 62 S.Ct. 398, 401, 86 L.Ed. 452 (1942); *Jefferson v. Fink,* 247 U.S., at 294, 38 S.Ct., at 518. The difference in this case is the fact that both descent and devise are completely abolished; indeed they are abolished even in circumstances when the governmental purpose sought to be advanced, consolidation of ownership of Indian lands, does not conflict with the further descent of the property.

There is little doubt that the extreme fractionation of Indian lands is a serious public problem. It may well be appropriate for the United States to ameliorate fractionation by means of regulating the descent and devise of Indian lands. Surely it is permissible for the United States to prevent the owners of such interests from further subdividing them among future heirs on pain of escheat. See *Texaco, Inc. v. Short,* 454 U.S. 516, 542, 102 S.Ct. 781, 799, 70 L.Ed.2d 738 (1982) (Brennan, J., dissenting). It may be appropriate to minimize further compounding of the problem by abolishing the descent of such interests by rules of intestacy, thereby forcing the owners to formally designate an heir to prevent escheat to the Tribe. What is certainly not appropriate is to take the extraordinary step of abolishing both descent and devise of these property interests even when the passing of the property to the heir might result in consolidation of property. Accordingly, we find that this regulation, in the words of Justice Holmes, "goes too far." *Pennsylvania Coal Co. v. Mahon,* 260 U.S., at 415, 43 S.Ct., at 160. The judgment of the Court of Appeals is

Affirmed.

Notes and Questions

1. According to the *Hodel* court, the right to dispose of property is included in the bundle of rights of property ownership. Therefore, the owner of the property has a right to dispose of that property, but the heirs of that property owner do not have a right to inherit. Since the statute deprived the decedent of the right to pass on property to their heirs, the Court found that private property had been taken. How could the statute be amended to change the outcome of the case?

2. Section 207, the provision of the Indian Land Consolidation Act at issue in the *Hodel* case, abolished the power of testamentary disposition of Indian property and altered the rules of intestate succession. The purpose of the provision was to ameliorate the problem of fractionated ownership of Indian lands[80] by encouraging consolidation. The government hoped to accomplish that goal by prohibiting the passing on at death of small, undivided interests in Indian lands. Thus, if a person owned the land impacted by the Act, he or she could not devise it in his will and it could not be inherited by his or her intestate heirs.

3. Why did the Court conclude that the "complete abolition of both descent and devise of a particular class of property" was a taking?

Ostrander v. Preece, 196 N.E. 670 (Ohio 1935)

Error to Court of Appeals, Lucas County.

Action by one Preece, administrator with the will annexed of the estate of Joseph M. Stoddard, deceased, and others against one Ostrander, administrator of the estate of Clara H. Stoddard,

[80] The Court used Tract 1305 to show the impact of the problem. The language from the case states "Tract 1305 is 40 acres and produces $1,080 in income annually. It is valued at $8,000. It has 439 owners, one-third of whom receive less than $.05 in annual rent and two-thirds of whom receive less than $1. The largest interest holder receives $82.85 annually. The common denominator used to compute fractional interests in the property is 3,394,923,840,000. The smallest heir receives $.01 every 177 years. If the tract were sold (assuming the 439 owners could agree) for its estimated $8,000 value, he would be entitled to $.000418. The administrative costs of handling this tract are estimated by the Bureau of Indian Affairs at $17,560 annually."

deceased, and others. To review a judgment of the Court of Appeals which affirmed a judgment of the court of common pleas, defendants bring error.

Affirmed.

This is an action involving the constitutionality of section 10503-18, General Code, governing the right to transmit and inherit property 'when the surviving spouse or other heir at law or legatee dies within three days after the date of death of the decedent, or within thirty days after the date of death of such decedent if such death resulted from a common accident. * * *'

The controlling facts are these: Joseph M. Stoddard died testate on October 24, 1932, from natural causes. His wife, Clara H., died intestate on October 27, 1932, likewise from natural causes. Each decedent left brothers, sisters, nieces, and nephews. The will of Joseph M. Stoddard left all his property, valued at $25,000, to his wife and 'to her heirs and assigns forever,' and named her as executrix. The wife had assisted her husband in the accumulation and saving of his property and estate. Inasmuch as the wife died within three days from the date of death of her husband, the heirs at law of the husband claim his entire estate by virtue of section 10503-18, General Code. The heirs of the wife contend, however, that they are entitled to his estate under the will; that that section of the Code is unconstitutional; and that the claims of the heirs of Joseph M. Stoddard based thereon are invalid.

The administrator with the will annexed of the estate of Joseph M. Stoddard filed suit in the court of common pleas of Lucas county, alleging that he was in doubt as to the persons entitled to the estate and that he was unable, by reason thereof, to make proper application for the determination of inheritance tax, and praying direction and judgment of the court respecting the rights of the heirs of each decedent in and to said estate.

The heirs of Clara H. Stoddard, all of whom were named as parties defendant in the action, filed an answer asserting their claims substantially as mentioned above after admitting the facts alleged in the plaintiff's petition, which covered the time of death of each decedent, the relationship of the parties to the decedent, the execution and probate of the will.

On the trial of the case judgment was rendered in favor of the heirs of Joseph M. Stoddard, deceased, which was affirmed by the Court of Appeals of Lucas county. Error proceedings were filed in this court as of right on the ground that the questions herein arise out of the Constitution of the state of Ohio.

DAY, Judge.

Is section 10503-18, General Code, constitutional? Does it deprive the heirs of Clara H. Stoddard of their vested or property rights without due process of law? Does it establish a presumption of the order of death contrary to the facts? These are the major questions raised by plaintiffs in error and we shall consider them in their order.

A careful reading of the statute will disclose that, in fact, it establishes no presumption of the order of death. It provides that 'no one of such persons shall be presumed to have died first'; that the estate of such first decedent shall pass and descend as though he had survived such heir at law or legatee. The right to indulge in a presumption of the order of death is expressly prohibited therein. It

does, however, direct the course of descent and distribution of property of those who have died within the time and in the manner therein described. This is clearly within the constitutional powers of the General Assembly and does not constitute deprivation of property without due process of law.

The right to transmit or inherit property is not an inherent or natural right but is purely a statutory right and subject to legislative control and restriction. (Citations omitted).

A person cannot, of course, be divested of his vested rights without due process of law, and a present vested right 'can in no wise be affected by the laws of descent and distribution. *Oleff, Adm'r, v. Hodapp*, 129 Ohio St. 432, 195 N. E. 838.

There are no heirs, but only heirs apparent, to the living, persons with mere expectancies or possibilities of inheritance which may be fulfilled or defeated, defending upon various contingencies and situations. An heir apparent, therefore, has no vested right in the estate of his ancestor prior to the latter's death, and consequently no vested property rights therein. Legislation dealing with estates of persons who die after its effective date does not deal with vested rights. Plaintiffs in error, having had no present vested rights in the estate of Joseph M. Stoddard at the time the statute in question went into effect, could not have been deprived thereof.

A legislative enactment, repealing, modifying, or changing the course of descent and distribution of property and the right to inherit or transmit property is not an unlawful interference with or deprivation of vested rights, and, unless expressly inhibited by constitutional provision, is to be deemed valid.

We find nothing constitutionally objectionable in section 10503-18, General Code.

Judgment affirmed.

Notes, Problems, and Questions

1. If the *Ostrander* case was litigated after the *Hodel* opinion was issued, what would be the possible outcome of the case?

2. In order to prepare a will disposing of property, the testator must be mentally competent. If a person has the right to dispose of his or her property as he or she wishes, why should the person have to pass a mental competency test? Should a person who is physically incapacitated be able to prepare a valid will?

3. Even if the person is found to have been in sound mind at the time of the execution of the will, the court may refuse to probate the will if it concludes that the will was a result of undue influence, insane delusion or duress. Does the application of these doctrines infringe on the person's right to transmit property at death?

4. Should the inheritance be abolished? Should we have a system where the portion of land allotted to the individual ceases to belong to him or her upon death and reverts to society?

5. Suppose that Congress required registration of handguns and assault weapons, prohibited sale and provided that at the death of the owner the weapons became the property of the government to redistribute. Would that be constitutional?

Class Discussion Tool

Janet executed a will leaving her house to her son, Terrance. The jurisdiction had a statute that prohibited convicted felons from inheriting property if they still owed restitution for their crimes. Terrance was convicted of armed robbery and sentenced to seven years in prison. He was also ordered to pay $50,000 in restitution. When Janet died, Terrance had three years left on his sentence and he had not paid any money towards the restitution. The state's attorney filed a motion seeking to have Janet's house sold to pay the $50,000 in restitution. In the alternative, the state's attorney asked the court to attach a $50,000 lien on the house. Evaluate the constitutionality of the statute and the potential court action.

7.2 The Decedent's Right to Place Restrictions on the Right to Inherit

Since children do not have the right to inherit from their parents, they can be totally disinherited. Nonetheless, the majority of persons who prepare wills tend not to disinherit their children. Based on the particular circumstances, the testator may decide to place some type of condition or restriction on the child's right to inherit. Courts usually uphold those conditions unless they require the heir to engage in an activity that is illegal, unconstitutional or against public policy. Also, Courts will not enforce conditions that infringe on fundamental or constitutional rights. As the next two cases indicate, factually similar cases can have different judicial outcomes

7.2.1 Some Restrictions are Unreasonable

Maddox & al. v. Maddox's adm'r & als., 11 Grat., Va. 804 (Va. 1854)

1. A member of the Society of Friends, by his will, gives a legacy of a remainder after a life interest, to his niece M, "during her single life, and forever, if her conduct should be orderly, and she remain a member of the Society of Friends." When M arrived at a marriageable age, there were but five or six unmarried men of the society in the neighborhood in which she lived: And during the life estate she married a man not a member of the Society of Friends, and by that act she ceased to be a member of the society.

Held:

1. The condition is an unreasonable restraint upon marriage, and is void.

2. There being no bequest over, and no specific direction that upon breach of the condition the legacy shall fall into the residuum of the estate, the condition is therefore *in terrorem* merely, and does not avoid the bequest.

2. On a bequest of a legacy upon a condition requiring any religious qualification, the condition is against the policy of the law of Virginia, and therefore void.

3. If the condition be a condition precedent, the legatee can take the legacy free from the condition, or if the legacy lapses: And it seems that the legatee will take a legacy of personal property; though a devise of land would fail.

This was a suit in equity in the Circuit court of Hanover county, by Wilson Maddox and Martha Jane Maddox against William G. Maddox, as administrator *de bonis non* with the will annexed of John Maddox, and others, claiming as residuary legatees of John Maddox deceased. The plaintiffs claimed that the defendants, who were also legatees of John Maddox, had forfeited their interest in his estate by violating the condition upon which the legacies were given. The facts are stated by Judge LEE in his opinion. The decree below was in favor of the defendants. Whereupon the plaintiffs applied to this court for an appeal, which was allowed.

LEE, J.

The testator, who was a member of the Society of Friends, departed this life in the year 1834. By a codicil to his will, dated on the 7th of June 1834, after certain specific bequests, he directs the proceeds of his estate, which was to be converted into money, to be divided into three equal parts, and to be disposed of as follows: One-third for the benefit of his father during his natural life; one other third to be applied to the payment of a bond due his brother Thomas Maddox, or whatever sum might be due upon such bond; and the interest of the remaining third to go to his brother William G. Maddox during his natural life. At the death of his father, the third set apart for him to be returned to his estate, and disposed of according to his will. At the death of his brother William, the third "loaned" to him to be given to his daughter Ann Maria Maddox, "during her single life, and forever, if her conduct should be orderly, and she remain a member of Friends Society." The codicil concluded with the following clause: "Furthermore, at the closing of all the above things, I wish to give and bequeath all the remaining part of my estate to my nearest relations that may be then living, and that shall be at that time members of the Society of Friends."

After the death of the testator, and during the life time of her father, Ann Maria Maddox married the appellee Thomas Tiller, who was not a member of the Society of Friends, and thereby, according to the rules and discipline of the society, forfeited her right to membership. The appellee William Garland Maddox also left the society, but the time at which he did so is nowhere disclosed by the record.

As Mrs. Tiller is claiming the benefit of the bequest in remainder to her after the death of her father, and as both she and Garland Maddox are claiming as two of the next of kin of the testator to participate in the residuum, we are called upon in this state of the case, to pass on the validity and effect of the two bequests in this codicil.

As by the rules of the Society of Friends, a member who married out of the society thereby forfeited his membership, the effect of the bequest of the third in remainder to Ann Maria Maddox, was to restrict her to marriage with a member of the society. Upon her marriage, the estate given to her "during her single life," would, according to the terms of the codicil, be determined; and if she married a person who was not a member of the society, she herself ceased to be a member, and was thus excluded from further enjoyment of the estate. The question then, as it respects the bequest of the third in remainder to Ann Maria Maddox, is as to the validity of such a restraint upon marriage under the circumstances disclosed in this case.

It will not be questioned that marriages of a suitable and proper character, founded on the mutual affection of the parties, and made upon free choice, are of the greatest importance to the best interests of society, and should be by all proper means promoted and encouraged. The purity of the marriage relation and the happiness of the parties will, to a great extent, depend upon their suitableness the one for the other, and the entire freedom of choice which has led to their union; and upon these, in their turn, in a great degree must depend the successful rearing of their children, and the proper formation and development of their character and principles. Hence not only should all positive prohibitions of marriage be rendered nugatory, but all unjust and improper restrictions upon it should be removed, and all undue influences in determining the choice of the parties should be carefully suppressed. Accordingly, in the civil law all conditions annexed to gifts and legacies which went to restrain marriages generally, were deemed inconsistent with public policy, and held void. Poth. Pand. lib. 35, title 1, n. 35; Dig. xxxv, tit. 1, l. 22, 64, 72.

This doctrine has been introduced into the English law with certain modifications, suggested by a disposition to preserve to parents a just control and influence with their children, and the means of protecting youthful persons against the sad consequences of hasty, unsuitable or ill-assorted marriages. Conditions, therefore, in restraint of marriage, annexed to gifts and legacies, are allowed when they are reasonable in themselves, and do not unduly restrict a just and proper freedom of choice. But where a condition is in restraint of marriage generally, it is deemed to be contrary to public policy, at war with sound morality, and directly violative of the true economy of social and domestic life. Hence, such a condition will be held utterly void. (citations omitted).

In *Elizabeth Castle's Case,* Law Jurist, December 1846, the vice chancellor declared, in general terms, that "limitations in restriction of marriage, were objectionable:" and in *Long v. Dennis,* 4 Burr. R. 2052, Lord Mansfield said, "Conditions in restraint of marriage are odious, and are therefore held to the utmost rigor and strictness. They are contrary to sound policy. "And accordingly, even in those cases in which restraints of a partial character may be imposed on marriage, as in respect of time, place or person, they must be such only as are just, fair and reasonable. Where they are of so rigid a character, or made so dependent on peculiar circumstances, as to operate a virtual though not a positive restraint on marriage, or unreasonably restrict the party in the choice of marriage, they will be ineffectual and utterly disregarded. Thus, a condition in restraint of marriage excluding men of a particular profession, has been held void. 1 Equ. Ca. Ab. 100. So a contract not to marry within six years is void because it tends to discourage marriage. *Hartley v. Rice,* 10 East's R. 22. So a covenant with a woman not to marry any other person, has been held not to be binding. *Lowe v. Peers,* 4 Burr. R. 2225. So a condition annexed to a legacy to a daughter, forbidding her to marry any man who had not a clear unencumbered estate in fee or freehold perpetual, of the yearly value of five hundred pounds, was declared by the lord chancellor to be worthy of condemnation in every court of justice: and it was held void as leading to a probable prohibition of marriage. And Judge Story lays it down, that restraints in respect of time, place or person, may be so framed as to operate a virtual prohibition upon marriage, or at least upon its most important and valuable objects; and he illustrates by a condition that a child should not marry till fifty years of age; or should not marry any person inhabiting in the same town, county or state; or should not marry any person that was a clergyman, a physician, or a lawyer, or any person except of a particular trade or employment; all of which, he tells us, would be deemed mere evasions of the law. 1 Story's Eq. Jur. § 283. In these he seems to be borne out by the opinion of Lord Chancellor Clare, in *Keily v. Monck, ubi supra.*

Following these principles and the cases I have cited for my guide, and looking to the facts in proof in the cause, I cannot avoid coming to the conclusion, that the condition imposed by the bequest of

the third in remainder to Ann Maria Maddox, which in effect forbade her to marry any other than a member of the Society of Friends, was an undue and unreasonable restraint upon the choice of marriage, and ought to be disregarded. It is in proof, that when she became marriageable, the number of Quakers in the county of Hanover, in which she resided, and the vicinity, was small, and that it had been since diminishing. There were not within the circle of her association, more than five or six marriageable male members of the society, according to one of the witnesses, or three or four, according to another; and the probability is, as stated by one of the witnesses, the restriction imposed by the condition would have operated a virtual prohibition of her marrying. To say there were members of the society residing in other counties, is no answer to the objection. She certainly could not be expected, if she had the means, which it seems she had not, to go abroad in search of a helpmate; and to subject her to the doubtful chance of being sought in marriage by a stranger, would operate a restraint upon it far more stringent than those which are repudiated in the cases and illustrations which I have already cited.

The case of *Haughton v. Haughton,* 1 Molloy 612, 12 Cond. Eng. Ch. R. 295, has been cited in support of the restriction in this case. But that case and the case of *Perrin v. Lyon,* 9 East's R. 170, where the condition was not to marry a Scotchman, which is relied on by the lord chancellor as decisive, were cases of devises of realty; and there is a well settled distinction between them and bequests of personalty, such as is the present case. The former are governed by the rules of the common law, and the rules of the ecclesiastical courts which control bequests of personalty, are regarded as inapplicable. 2 Pow. on Dev. 282; 1 Jarm. on Wills 836; *Harvey v. Aston,* 1 Atk. R. 361; *Reynish v. Martin,* 3 Atk. R. 330; *Stackpole v. Beaumont,* 3 Ves. R. 89; 1 Fonbl. Eq. ch. iv, § 10, n. q, p. 258. Moreover, it may well be questioned how far a decision upon such a question in a country already overstocked with inhabitants, is applicable to a country like ours, with an unbounded extent of territory, a large portion of which is yet unsettled, and in which increase of population is one of the main elements of national prosperity. Nowhere can the policy of repudiating all unnecessary restraints upon freedom of choice in marriage apply with more force than among a free people, with institutions like ours, and in the circumstances by which we are surrounded. For this reason, and for another that will be presently adverted to, I should not feel disposed to follow the decision referred to, if it were even more strictly applicable to this case.

But treating the condition annexed to the bequest in remainder to Ann Maria Maddox, as a partial restraint upon marriage, by requiring her to marry (if she married at all) a member of the society, on pain of forfeiting her membership and the benefit of the bequest, if she married one who was not, there is another and distinct ground upon which it will be disregarded. There is no bequest over of the third thus given to her in case of her breach of the condition; and the condition therefore will be treated as *in terrorem* merely, and the legacy becomes pure and absolute. 1 Roper Leg. ch. 13, § 1, p. 654; *Garret v. Pritty,* 2 Vern. R. 293; *Wheeler v. Bingham,* 3 Atk. R. 364; *Lloyd v. Branton,* 3 Meriv. R. 108, 117. Nor will the residuary clause be regarded as equivalent to a bequest over. To render the condition effectual, there must be an express bequest over on breach of the condition, or a special direction that the forfeited legacy shall fall into the residuum (citations omitted).

There is yet another view, which is also equally applicable to the bequest of the residuum, in which the restriction imposed on the bequest of the third in remainder to Ann Maria Maddox, should be held to be void and ineffectual. And the case must be considered in this aspect, because upon the results to which we are brought upon such consideration, must depend the claim both of Mrs. Tiller and Garland Maddox to participate in the residuum. It is insisted by the counsel, it is true, that there is no proof of disorderly conduct on the part of Mrs. Tiller, nor that she has ever been actually

disowned as a member; or if she have been, that she might still be reinstated; and as she has applied for and done all in her power to gain such readmission, but has been refused by the society whose action she could not control, she should be regarded as having complied with the condition prescribed, *cy pres,* and should now be exempt from the disability which it creates. And as to Garland Maddox, it is urged that there is no proof he is not a member, and as he once was a member, it should be presumed that he still remains such until proof be given to the contrary. But the pretensions of these parties cannot be sustained on these grounds.

Mrs. Tiller's conduct was disorderly in the sense intended by the testator, in marrying one who was not a member of the society, contrary to its rules and discipline. In their answer, she and her husband say distinctly that she had left the society; and the fact of her applying for reinstatement sufficiently implies that she had been disowned and excluded. Her application for readmission, however, was not successful, but was rejected because the ""Monthly Meeting" distrusted the motives by which it was prompted. She is not, therefore, and has not been a member of the society since she was disowned upon her marriage, which took place some time, probably several years, before the death of her father. And as to Garland Maddox, the bill charges that he was not a member of the society, and on that account was not entitled to participate in the residuum under the clause of the codicil by which it is disposed of. Garland Maddox in his answer does not pretend that he is a member, nor does he make any claim to participate as such. He rests his claim upon the ground that he is one of the next of kin, and that the restriction of the benefits of the bequest to such of them only as should be members of the "Society of Friends," a body unknown to the law, is illegal and void. And he *swears* to his answer in the usual mode, instead of making a solemn affirmation, which it is understood is the universal usage with the members of the Society of Friends.

It will not be denied that one of the most marked and distinctive features of our civil institutions, is the perfect, absolute and unqualified freedom of opinion in matters of religion which they secure to all who dwell under them. Unjust encroachment upon the rights of conscience, in no inconsiderable degree, gave impulse to the early immigration from the European continent to this, in the hope that upon this new and virgin soil might be enjoyed that full and unquestioned freedom of opinion in matters of religion which was deemed a part of the natural rights of man, but which was denied to him in the old world. It was the spirit of resistance to such encroachment which filled the sails of the *May Flower,* and wafted her, with the Pilgrim Fathers upon her decks, to their landing on Plymouth rock. It was the same spirit which brought Huguenots to Virginia and to South Carolina, Catholics to Maryland, Quakers to Pennsylvania, and Presbyterians to several of the colonies. Hence, nothing was more natural or more certain than that when the separation took place from the British crown, and the state of colonial dependence was replaced by a separate and independent government, the rights of conscience and freedom of opinion in matters of religion, should have a prominent and well assured place in the new institutions.

I take it, then, that upon no subject is the policy of our law more firmly settled, or more plain, clear and unmistakable than upon this, and that all contracts and all conditions to the same or to gifts or legacies the effect of which is to thwart and violate this policy, should be held to be utterly void and ineffectual. And I regard a restriction imposed by the terms of a bequest, requiring as the condition of its enjoyment, that the legatee should be a member of any religious sect or denomination, as directly violative of this policy, and pregnant with evil consequences. It holds out a premium to fraud, meanness and hypocrisy; it tends to corrupt the pure principles of religion, by holding out a bribe for external profession and conformity to a particular sect; and however pure and honest the

motives of the beneficiary may be, he is yet rendered an object of distrust and suspicion; and we see in this case that although no other "disorderly" conduct than marrying out of the society was imputed to Mrs. Tiller, yet her application to be reinstated was rejected, because, in consequence of the condition annexed to the bequest in her favor, the meeting took up the impression that it was prompted by unworthy and mercenary motives; it hampers the conscience, holds out inducements to stifle its voice and to resist the force of reason and honest conviction; it tends to destroy true religion, and to replace it with what is false and counterfeit; and, in short, it tends to promote all or most of the evils so forcibly denounced in the preamble to the act already cited.

There are other difficulties attending the restriction annexed to this residuary clause, which render it questionable, if it do not involve so much of ambiguity and uncertainty as to the subject and the time of distribution, and the objects of the gift, as may render it void for that cause. If indeed we may discard the idea of time in construing the expressions, "at the closing of all the above things," "that may be then living, and that shall be at that time members of the Society of Friends," and yielding to the disposition in favor of vesting estates, can refer the time at which the gift is to take effect to the death of the testator, then no difficulty could occur: for at that time Mrs. Tiller was still a member of the Friends Society; and in the absence of proof we might also infer, that Garland Maddox was also still a member: and so no question could arise. But I think this cannot be done, because the testator seems plainly to have contemplated some period after his death at which the bequest was to take effect. What, then, was the period intended by him? The balance of the third not needed to pay the debt to Thomas Maddox, might be ready for distribution many years before the third given to the father for life would fall in upon his death. Would the former be distributed when it was ready, or would it be held up till the death of the father, and one distribution be made of the whole at that time? If the former, and the third given to the father for life, were to be the subject of a separate division upon his death, then a different class might come in at the first division from those who would be entitled at the second, because some of those embraced by the bounty, who were members of the society when the first division should take place, might cease to be so before the period arrived for the second. If one distribution of the whole is to be made, then the part remaining of the third, after paying the debt to Thomas Maddox, must be held up till the death of the father, that it may be ascertained which of the next of kin were members of the society at that time.

And how is the court to determine the question of membership? Religious societies, we know, are subject to schisms leading to a complete separation, and the formation of new and distinct societies. They have occurred in the Society of Friends. A schism in the society in England in 1801, which led to the formation of a new society called New Lights by the old society. In this country a separation took place some years since, between those who were called Hicksites, after the mover of the secession, Elias Hicks, and those who called themselves the Orthodox Quakers. Both societies claimed to be the true orthodox sect, and each repudiated the claims of the other. If the court were called on in case of such a division to say which was the true orthodox society, how would it determine between the conflicting claimants?

I shall not enter upon these enquiries, because, for the reasons I have already given, I think the Circuit court did right in treating the restrictions in the codicil as inoperative and void: and I am therefore of opinion to affirm the decree.

Decree Affirmed.

7.2.2 Some Restrictions are Reasonable

Shapira v. Union National Bank et. al., 315 N.E.2d 825 (Ohio 1974)

HENDERSON, Judge.

This is an action for a declaratory judgment and the construction of the will of David Shapira, M.D., who died April 13, 1973, a resident of this county. By agreement of the parties, the case has been submitted upon the pleadings and the exhibit.

The portions of the will in controversy are as follows:

> 'Item VIII. All the rest, residue and remainder of my estate, real and personal, of every kind and description and wheresoever situated, which I may own or have the right to dispose of at the time of my decease, I give, devise and bequeath to my three (3) beloved children, to wit: Ruth Shapira Aharoni, of Tel Aviv, Israel, or wherever she may reside at the time of my death; to my son Daniel Jacob Shapira, and to my son Mark Benjamin Simon Shapira in equal shares, with the following qualifications:
>
> > '(b) My son Daniel Jacob Shapira should receive his share of the bequest only, if he is married at the time of my death to a Jewish girl whose both parents were Jewish. In the event that at the time of my death he is not married to a Jewish girl whose both parents were Jewish, then his share of this bequest should be kept by my executor for a period of not longer than seven (7) years and if my said son Daniel Jacob gets married within the seven year period to a Jewish girl whose both parents were Jewish, my executor is hereby instructed to turn over his share of my bequest to him. In the event, however, that my said son Daniel Jacob is unmarried within the seven (7) years after my death to a Jewish girl whose both parents were Jewish, or if he is married to a non Jewish girl, then his share of my estate, as provided in item 8 above should go to The State of Israel, absolutely.'

The provision for the testator's other son Mark, is conditioned substantially similarly. Daniel Jacob Shapira, the plaintiff, alleges that the condition upon his inheritance is unconstitutional, contrary to public policy and unenforceable because of its unreasonableness, and that he should be given his bequest free of the restriction. Daniel is 21 years of age, unmarried and a student at Youngstown State University.

The provision in controversy is an executory devise or legacy, under which vesting of the estate of Daniel Jacob Shapira or the State of Israel is not intended to take place necessarily at the death of the testator, but rather conditionally, at a time not later than seven years after the testator's death. The executory aspect of the provision, though rather unusual, does not render it invalid. *Heath v. City of Cleveland* (1926), 114 Ohio St. 535, 151 N.E. 649.

Constitutionality

Plaintiff's argument that the condition in question violates constitutional safeguards is based upon the premise that the right to marry is protected by the Fourteenth Amendment to the Constitution

of the United States. Meyer v. Nebraska (1923), 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042; *Skinner v. Oklahoma* (1942), 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655; *Loving v. Virginia* (1967), 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010. In *Loving v. Virginia*, the court held unconstitutional as violative of the Equal Protection and Due Process Clauses of the Fourteenth Amendment an antimiscegenation statute under which a black person and a white person were convicted for marrying. In its opinion the United States Supreme Court made the following statements:

> 'There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.
>
> 'The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.
>
> 'Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.'

From the foregoing, it appears clear, as plaintiff contends, that the right to marry is constitutionally protected from restrictive state legislative action. Plaintiff submits, then, that under the doctrine of *Shelley v. Kraemer* (1948), 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161, the constitutional protection of the Fourteenth Amendment is extended from direct state legislative action to the enforcement by state judicial proceedings of private provisions restricting the right to marry. Plaintiff contends that a judgment of this court upholding the condition restricting marriage would, under *Shelley v. Kraemer*, constitute state action prohibited by the Fourteenth Amendment as much as a state statute.

In the case at bar, this court is not being asked to enforce any restriction upon Daniel Jacob Shapira's constitutional right to marry. Rather, this court is being asked to enforce the testator's restriction upon his son's inheritance. If the facts and circumstances of this case were such that the aid of this court were sought to enjoin Daniel's marrying a non-Jewish girl, then the doctrine of *Shelley v. Kraemer* would be applicable, but not, it is believed, upon the facts as they are.

Basically, the right to receive property by will is a creature of the law, and is not a natural right or one guaranteed or protected by either the Ohio or the United States constitution. (citations omitted). It is a fundamental rule of law in Ohio that a testator may legally entirely disinherit his children. (citations omitted). This would seem to demonstrate that, from a constitutional standpoint, a testator may restrict a child's inheritance. The court concludes, therefore, that the upholding and enforcement of the provisions of Dr. Shapira's will conditioning the bequests to his sons upon their marrying Jewish girls does not offend the Constitution of Ohio or of the United States. (citations omitted).

Public Policy

The condition that Daniel's share should be 'turned over to him if he should marry a Jewish girl whose both parents were Jewish' constitutes a partial restraint upon marriage. If the condition were that the beneficiary not marry anyone, the restraint would be general or total, and, at least in the case of a first marriage, would be held to be contrary to public policy and void. A partial restraint of

marriage which imposes only reasonable restrictions is valid, and not contrary to public policy. (citations omitted). The great weight of authority in the United States is that gifts conditioned upon the beneficiary's marrying within a particular religious class or faith are reasonable. (citations omitted).

Plaintiff contends, however, that in Ohio a condition such as the one in this case is void as against the public policy of this state. In Ohio, as elsewhere, a testator may not attach a condition to a gift which is in violation of public policy. 56 Ohio Jurisprudence 2d 238, Wills, Section 722; *Neidler v. Donaldson* (P.C. Seneca 1966), 9 Ohio Misc. 208, 224 N.E.2d 404, 38 O.O.2d 360. There can be no question about the soundness of plaintiff's position that the public policy of Ohio favors freedom of religion and that it is guaranteed by Section 7, Article I of the Ohio Constitution, providing that 'all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. Plaintiff's position that the free choice of religious practice cannot be circumscribed or controlled by contract is substantiated by *Hackett v. Hackett* (C.A. Lucas 1958), 78 Ohio Law Abs. 485, 150 N.E.2d 431.This case held that a covenant in a separation agreement, incorporated in a divorce decree, that the mother would rear a daughter in the Roman Catholic faith was unenforceable. However, the controversial condition in the case at bar is a partial restraint upon marriage and not a covenant to restrain the freedom of religious practice; and, of course, this court is not being asked to hold the plaintiff in contempt for failing to marry a Jewish girl of Jewish parentage.

Counsel contends that if 'Dr. David Shapira, during his life, had tried to impose upon his son those restrictions set out in his Will he would have violated the public policy of Ohio as shown in *Hackett v. Hackett*. The public policy is equally violated by the restrictions Dr. Shapira has placed on his son by his Will. 'This would be true, by analogy, if Dr. Shapira, in his lifetime, had tried to force his son to marry a Jewish girl as the condition of a completed gift. But it is not true that if Dr. Shapira had agreed to make his son an inter-vivos gift if he married a Jewish girl within seven years, that his son could have forced him to make the gift free of the condition.

It is noted, furthermore, in this connection, that the courts of Pennsylvania distinguish between testamentary gifts conditioned upon the religious faith of the beneficiary and those conditioned upon marriage to persons of a particular religious faith. In *In re Clayton's Estate, supra* (13 Pa.D. & C. 413), the court upheld a gift of a life estate conditioned upon the beneficiary's not marrying a woman of the Catholic faith. In its opinion the court distinguishes the earlier case of *Drace v. Klinedinst* (1922), 275 Pa. 266, 118 A. 907, in which a life estate willed to grandchildren, provided they remained faithful to a particular religion, was held to violate the public policy of Pennsylvania. In *Clayton's Estate*, the court said that the condition concerning marriage did not affect the faith of the beneficiary, and that the condition, operating only on the choice of a wife, was too remote to be regarded as coercive of religious faith.

But counsel relies upon an Ohio case much more nearly in point, that of *Moses v. Zook* (C.A. Wayne 1934), 18 Ohio Law Abs. 373. This case involves a will in which the testatrix gave the income of her residual estate in trust to her niece and nephews for two years and then the remainder to them. Item twelve provides as follows: 'If any of my nieces or nephews should marry outside of the Protestant Faith, then they shall not receive any part of my estate devised or bequeathed to them.' The will contained no gift over upon violation of the marriage condition. The holding of the trial court was that item twelve was null and void as being against public policy and the seven other items of the will should be administered as specified in detail by the court. There is nothing in the reported

opinion to show to what extent, if at all, the question of public policy was in issue or contested in the trial court; only one of the several other unrelated holdings of the trial court (not including the public policy holding) was assigned as error; and although the Court of Appeals adopted the unexcepted-to holdings of the trial court, there is no citation of authorities or discussion concerning the public policy question itself. The case was apparently not appealed to the Supreme Court, and no other cases in Ohio have been cited or found. *Moses v. Zook* differs in its facts in not containing a gift over upon breach of the condition, and appears not to have been a sufficiently litigated or reasoned establishment of the public policy of Ohio which this court should be obliged to follow.

The only cases cited by plaintiff's counsel in accord with the holding in *Moses v. Zook* are some English cases and one American decision. In England the courts have held that partial restrictions upon marriage to persons not of the Jewish faith, or of Jewish parentage, were not contrary to public policy or invalid. *Hodgson v. Halford* (1879 Eng.) L.R. 11 Ch.Div. 959, 50 A.L.R.2d 742. Other cases in England, however, have invalidated forfeitures of similarly conditioned provisions for children upon the basis of uncertainty or indefiniteness. (citations omitted). Since the foregoing decisions, a later English case has upheld a condition precedent that a granddaughter-beneficiary marry a person of Jewish faith and the child of Jewish parents. The court distinguished the cases cited above as not applicable to a condition precedent under which the legatee must qualify for the gift by marrying as specified, and there was found to be no difficulty with indefiniteness where the legatee married unquestionably outside the Jewish faith. (citations omitted).

The American case cited by plaintiff is that of *Maddox v. Maddox* (1854), 52 Va. (11 Grattain's) 804. The testator in this case willed a remainder to his niece if she remained a member of the Society of Friends. When the niece arrived at a marriageable age there were but five or six unmarried men of the society in the neighborhood in which she lived. She married a non-member and thus lost her own membership. The court held the condition to be an unreasonable restraint upon marriage and void, and that there being no gift over upon breach of the condition, the condition was *in terrorem*, and did not avoid the bequest. It can be seen that while the court considered the testamentary condition to be a restraint upon marriage, it was primarily one in restraint of religious faith. The court said that with the small number of eligible bachelors in the area the condition would have operated as a virtual prohibition of the niece's marrying, and that she could not be expected to 'go abroad' in search of a helpmate or to be subjected to the chance of being sought after by a stranger.

In arguing for the applicability of the *Maddox v. Maddox* test of reasonableness to the case at bar, counsel for the plaintiff asserts that the number of eligible Jewish females in this county would be an extremely small minority of the total population especially as compared with the comparatively much greater number in New York, whence have come many of the cases comprising the weight of authority upholding the validity of such clauses. There are no census figures in evidence. While this court could probably take judicial notice of the fact that the Jewish community is a minor, though important segment of our total local population, nevertheless the court is by no means justified in judicial knowledge that there is an insufficient number of eligible young ladies of Jewish parentage in this area from which Daniel would have a reasonable latitude of choice. And of course, Daniel is not at all confined in his choice to residents of this county, which is a very different circumstance in this day of travel by plane and freeway and communication by telephone, from the horse and buggy days of the 1854 *Maddox v. Maddox* decision. Consequently, the decision does not appear to be an appropriate yardstick of reasonableness under modern living conditions.

Plaintiff's counsel contends that the Shapira will falls within the principle of *Fineman v. Central*

National Bank (1961), 87 Ohio Law Abs. 236, 175 N.E.2d 837, 18 O.O.2d 33, holding that the public policy of Ohio does not countenance a bequest or device conditioned on the beneficiary's obtaining a separation or divorce from his wife. Counsel argues that the Shapira condition would encourage the beneficiary to marry a qualified girl just to receive the bequest, and then to divorce her afterward. This possibility seems too remote to be a pertinent application of the policy against bequests conditioned upon divorce. Most other authorities agree with *Fineman v. Bank* that as a general proposition, a testamentary gift effective only on condition that the recipient divorce or separate from his or her spouse is against public policy and invalid. 14 A.L.R.3d 1222. But no authorities have been found extending the principle to support plaintiff's position. Indeed, in measuring the reasonableness of the condition in question, both the father and the court should be able to assume that the son's motive would be proper. And surely the son should not gain the advantage of the avoidance of the condition by the possibility of his own impropriety.

Finally, counsel urges that the Shapira condition tends to pressure Daniel, by the reward of money, to marry within seven years without opportunity for mature reflection, and jeopardizes his college education. It seems to the court, on the contrary, that the seven year time limit would be a most reasonable grace period, and one which would give the son ample opportunity for exhaustive reflection and fulfillment of the condition without constraint or oppression. Daniel is no more being 'blackmailed into a marriage by immediate financial gain,' as suggested by counsel, than would be the beneficiary of a living gift or conveyance upon consideration of a future marriage-an arrangement which has long been sanctioned by the courts of this state. *Thompson v. Thompson* (1867), 17 Ohio St. 649.

In the opinion of this court, the provision made by the testator for the benefit of the State of Israel upon breach or failure of the condition is most significant for two reasons. First, it distinguishes this case from the bare forfeitures in *Moses v. Zook*, and in *Maddox v. Maddox* (including the technical *in terrorem* objection), and, in a way, from the vagueness and indefiniteness doctrine of some of the English cases. Second, and of greater importance, it demonstrates the depth of the testator's conviction. His purpose was not merely a negative one designed to punish his son for not carrying out his wishes. His unmistakable testamentary plan was that his possessions be used to encourage the preservation of the Jewish faith and blood, hopefully through his sons, but, if not, then through the State of Israel. Whether this judgment was wise is not for this court to determine. But it is the duty of this court to honor the testator's intention within the limitations of law and of public policy. The prerogative granted to a testator by the laws of this state to dispose of his estate according to his conscience is entitled to as much judicial protection and enforcement as the prerogative of a beneficiary to receive an inheritance.

It is the conclusion of this court that public policy should not, and does not preclude the fulfillment of Dr. Shapira's purpose, and that in accordance with the weight of authority in this country, the conditions contained in his will are reasonable restrictions upon marriage, and valid.

In re Estate of Feinberg, 919 N.E.2d 888 (Ill. 2009)

Justice GARMAN delivered the judgment of the court, with opinion.

This case involves a dispute among the surviving children and grandchildren of Max and Erla Feinberg regarding the validity of a trust provision. The circuit court of Cook County found the

trust provision unenforceable on the basis that it is contrary to the public policy of the state of Illinois. The appellate court affirmed. 383 Ill.App.3d 992, 322 Ill. Dec. 534, 891 N.E.2d 549. Michael Feinberg, the Feinbergs' son and coexecutor of their estates, filed a petition for leave to appeal pursuant to Supreme Court Rule 315 (210 Ill.2d R. 315), which we allowed. We also allowed Agudath Israel of America, the National Council of Young Israel, and the Union of Orthodox Jewish Congregations of America to file a brief *amici curiae* pursuant to Supreme Court Rule 345 (210 Ill.2d R. 345)

For the reasons that follow, we reverse.

BACKGROUND

Max Feinberg died in 1986. He was survived by his wife, Erla, their adult children, Michael and Leila, and five grandchildren.

Prior to his death, Max executed a will and created a trust. Max's will provided that upon his death, all of his assets were to "pour over" into the trust, which was to be further divided for tax reasons into two trusts, "Trust A" and "Trust B." If she survived him, Erla was to be the lifetime beneficiary of both trusts, first receiving income from Trust A, with a limited right to withdraw principal. If Trust A were exhausted, Erla would then receive income from Trust B, again with a limited right to withdraw principal.

Upon Erla's death, any assets remaining in Trust A after the payment of estate taxes were to be combined with the assets of Trust B. The assets of Trust B were then to be distributed to Max's descendants in accordance with a provision we shall call the "beneficiary restriction clause." This clause directed that 50% of the assets be held in trust for the benefit of the then-living descendants of Michael and Leila during their lifetimes. The division was to be on a *per stirpes* basis, with Michael's two children as lifetime beneficiaries of one quarter of the trust and Leila's three children as lifetime beneficiaries of the other one quarter of the trust. However, any such descendant who married outside the Jewish faith or whose non-Jewish spouse did not convert to Judaism within one year of marriage would be "deemed deceased for all purposes of this instrument as of the date of such marriage" and that descendant's share of the trust would revert to Michael or Leila.

In addition, the trust instrument gave Erla a limited testamentary power of appointment over the distribution of the assets of both trusts and a limited lifetime power of appointment over the assets of Trust B. Under the limiting provision, Erla was allowed to exercise her power of appointment only in favor of Max's descendants. Thus, she could not name as remaindermen individuals who were not Max's descendants or appoint to a charity. The parties dispute whether Erla's power of appointment was limited to those descendants not deemed deceased under the beneficiary restriction clause. The trial court did not make a finding on this question and the appellate court did not discuss it.

Erla exercised her lifetime power of appointment over Trust B in 1997, directing that, upon her death, each of her two children and any of her grandchildren who were not deemed deceased under Max's beneficiary restriction clause receive $250,000. In keeping with Max's original plan, if any grandchild was deemed deceased under the beneficiary restriction clause, Erla directed that his or her share be paid to Michael or Leila.

By exercising her power of appointment in this manner, Erla revoked the original distribution provision and replaced it with a plan that differs from Max's plan in two significant respects. First, Erla altered the distribution scheme from *per stirpes* to *per capita,* permitting each of the grandchildren to take an equal share, rather than favoring Michael's two children over Leila's three children. Second, Erla designated a fixed sum to be distributed to each eligible descendant at the time of her death, replacing Max's plan for a lifetime trust for such descendants. The record suggests that Erla's gifts will deplete the corpus of the trust, leaving no trust assets subject to distribution under Max's original plan. Thus, while Erla retained Max's beneficiary restriction clause, his distribution provision never became operative.

All five grandchildren married between 1990 and 2001. By the time of Erla's death in 2003, all five grandchildren had been married for more than one year. Only Leila's son, Jon, met the conditions of the beneficiary restriction clause and was entitled to receive $250,000 of the trust assets as directed by Erla.

This litigation followed, pitting Michael's daughter, Michele, against Michael, coexecutor of the estates of both Max and Erla.

The trial court invalidated the beneficiary restriction clause on public policy grounds. A divided appellate court affirmed, holding that "under Illinois law and under the Restatement (Third) of Trusts, the provision in the case before us is invalid because it seriously interferes with and limits the right of individuals to marry a person of their own choosing." 383 Ill.App.3d at 997, 322 Ill. Dec. 534, 891 N.E.2d 549. In reaching this conclusion, the appellate court relied on decisions of this court dating back as far as 1898 and, as noted, on the Restatement (Third) of Trusts.

ISSUE PRESENTED

As a threshold matter, we must clarify the issue presented. We need not consider whether Max's original testamentary scheme is void as a matter of public policy because Erla altered his scheme in 1997. Indeed, she could have done so again at any time before her death in 2003, exercising her lifetime or testamentary powers of appointment in any number of ways. For example, she could have named her grandson, Jon, as the sole beneficiary of the entire trust, or excluded the grandchildren entirely, appointing the entire corpus of the trust to Michael and Leila.

Indeed, counsel for Michele acknowledged at oral argument that Max and Erla could have accomplished the goal of benefitting only those grandchildren who married within their religious tradition by individually naming those grandchildren as beneficiaries of the will or the trust, without implicating public policy. Counsel argued that the violation of public policy occurred when Max used a religious description to define a class or category of descendants he wished to benefit, rather than mention them by name.

Of course, at the time Max prepared his estate plan, his grandchildren were too young to marry and it was possible that more grandchildren might have been born before the trust provisions took effect. As a result, Max could not have accomplished his purpose in the manner suggested by Michele. Even by the time Erla exercised her power of appointment, not all of the grandchildren had married.

Thus, the question we must answer is whether the holder of a power of appointment over the assets

of a trust may, without violating the public policy of the state of Illinois, direct that the assets be distributed at the time of her death to then-living descendants of the settlor, deeming deceased any descendant who has married outside the settlor's religious tradition. In effect, we are not called upon to consider the validity of Max's estate plan as a whole, which would have continued to hold the assets in trust for the benefit of the grandchildren only so long as they complied with the restriction. Rather, we must assess Max's beneficiary restriction clause in conjunction with Erla's directions for distribution.

When the issue is clarified in this way, it becomes apparent that many of the arguments raised by Michele are not relevant. For example, under Max's plan, an unmarried grandson would have begun to receive distributions from Trust B upon Erla's death, only to forfeit further such payments if he were to marry a non-Jewish woman who did not convert to Judaism within one year. We need not decide if such a provision would violate public policy because no such provision is implicated in the present case.

Michele also suggests that a granddaughter who was married to a non-Jewish man at the time of Erla's death might subsequently divorce and remarry, this time to a Jewish spouse, and make a claim upon the trust. This circumstance would raise the issue of whether such a descendant, previously deemed deceased, would be "resurrected." Such an occurrence would require construction of the language of the trust document. Under Erla's plan, however, this circumstance cannot arise because a fixed amount became distributable upon her death only to those grandchildren who then met the requirements previously set by Max.

Similarly, Michele's argument that the beneficiary restriction clause is invalid because a court might be called upon to determine whether the spouse of a particular descendant is or is not Jewish is not well taken. It is undisputed in the present case that only one of the five grandchildren meets the requirements established by Max.

STANDARD OF REVIEW

This court has not had occasion to identify the applicable standard of review on the question of whether a provision in a trust document or will is void as a matter of public policy. It is clear, however, that such findings are subject to *de novo* review, because public policy is necessarily a question of law. *Holstein v. Grossman*, 246 Ill.App.3d 719, 726, 186 Ill. Dec. 592, 616 N.E.2d 1224 (1993), citing *Zeigler v. Illinois Trust & Savings Bank*, 245 Ill. 180, 91 N.E. 1041 (1910). This conclusion is consistent with the well-established principle that whether a provision in a contract, insurance policy, or other agreement is invalid because it violates public policy is a question of law, which we review *de novo. O'Hara v. Ahlgren, Blumenfeld & Kempster,* 127 Ill.2d 333, 130 Ill. Dec. 401, 537 N.E.2d 720 (1989)(affirming grant of summary judgment on basis that fee-sharing agreement offended public policy).

ANALYSIS

Michael argues before this court that the beneficiary restriction clause in his father's trust was intended "to encourage and support Judaism and preservation of Jewish culture in his own family," and that it was not binding upon Erla, who exercised her power of appointment consistently with the provision because it expressed her intent as well as Max's. Michael argues, further, that even if

Max's beneficiary restriction was not revocable by Erla, the provision does not violate the public policy of this state when it is given effect via his mother's distribution scheme. He asserts that the distribution scheme is a valid partial restraint on marriage of a type that has long been enforced in Illinois and elsewhere. According to Michael, the beneficiary restriction clause has no prospective effect that might subsequently influence a descendant's decisions regarding marriage or divorce because, upon Erla's death, no contingencies remained. He distinguishes the cases relied upon by the appellate court and urges this court to reject the cited Restatement provision as not accurately stating Illinois law.

Michele defends the Restatement provision and argues that this case comes within a line of cases dating back to 1898 in which this court invalidated testamentary provisions that operated to discourage the subsequent lawful marriage by a legatee or to encourage a legatee to obtain a divorce. Specifically, she argues that under *Ransdell v. Boston*, 172 Ill. 439, 50 N.E. 111 (1898), testamentary restrictions on marriage are valid only if they operate to benefit the intended beneficiary. Further, she argues that enforcement of the clause would violate both state and federal constitutions and that it violates public policy by offering a financial inducement to embrace a particular religion.

We note that this case involves more than a grandfather's desire that his descendants continue to follow his religious tradition after he is gone. This case reveals a broader tension between the competing values of freedom of testation on one hand and resistance to "dead hand" control on the other. This tension is clearly demonstrated by the three opinions of the appellate court. The authoring justice rejected the argument that the distribution scheme is enforceable because it operated at the time of Erla's death and could not affect future behavior, stating that its "clear intent was to influence the marriage decisions of Max's grandchildren based on a religions criterion." 383 Ill.App.3d at 997, 322 Ill. Dec. 534, 891 N.E.2d 549. The concurring justice opined that while such restrictions might once have been considered reasonable, they are no longer reasonable. 383 Ill.App.3d at 1000, 322 Ill. Dec. 534, 891 N.E.2d 549 (Quinn, P.J., specially concurring). The dissenting justice noted that under the facts of this case, grandchildren who had complied with the restrictions would "immediately receive their legacy" upon Erla's death (383 Ill.App.3d at 1000, 322 Ill. Dec. 534, 891 N.E.2d 549) (Greiman, J., dissenting)), and that the weight of authority is that a testator has a right to make the distribution of his bounty conditional on the beneficiary's adherence to a particular religious faith (383 Ill.App.3d at 1002, 322 Ill. Dec. 534, 891 N.E.2d 549).

We, therefore, begin our analysis with the public policy surrounding testamentary freedom and then consider public policy pertaining to testamentary or trust provisions concerning marriage.

When we determine that our answer to a question of law must be based on public policy, it is not our role to make such policy. Rather, we must discern the public policy of the state of Illinois as expressed in the constitution, statutes, and long-standing case law. *O'Hara,* 127 Ill.2d at 341, 130 Ill. Dec. 401, 537 N.E.2d 730.We will find a contract provision against public policy only " ' "if it is injurious to the interests of the public, contravenes some established interest of society, violates some public statute, is against good morals, tends to interfere with the public welfare or safety, or is at war with the interests of society or is in conflict with the morals of the time." ' " *Vine Street Clinic v. Health Link, Inc.,* 222 Ill.2d 276, 296, 305 Ill. Dec. 617, 856 N.E.2d 422 (2006), quoting *E & B Marketing Enterprises, Inc. v. Ryan*, 209 Ill. App.3d 626, 630, 154 Ill. Sec. 339, 568 N.E.2d 339 (1991), quoting *Marvin N. Benn & Associates, Ltd. V. Nelsen Steel & Wire, Inc.,* 107 Ill.App.3d 442, 446, 63 Ill. Dec. 251, 437 N.E.2d 900 (1982). Thus,

> "In deciding whether an agreement violates public policy, courts determine whether the agreement is so capable of producing harm that its enforcement would be contrary to the public interest. [Citation.] The courts apply a strict test in determining when an agreement violates public policy. [Citation.] The power to invalidate part or all of an agreement on the basis of public policy is used sparingly because private parties should not be needlessly hampered in their freedom to contract between themselves. [Citation.] Whether an agreement is contrary to public policy depends on the particular facts and circumstances of the case." *Kleinwort Benson North America, Inc. v. Quantum Financial Services, Inv.*, 181 Ill.2d 214, 226, 229 Ill. Dec. 496, 692 N.E.2d 269 (1998).

Because, as will be discussed below, the public policy of this state values freedom of testation as well as freedom of contract, these same principles guide our analysis in the present case.

Public Policy Regarding Freedom of Testation

Neither the Constitution of the United States nor the Constitution of the State of Illinois speaks to the question of testamentary freedom. However, our statutes clearly reveal a public policy in support of testamentary freedom.

The Probate Act places only two limits on the ability of a testator to choose the objects of his bounty. First, the Act permits a spouse to renounce a testator's will, "whether or not the will contains any provision for the benefit of the surviving spouse." 755 ILCS 5/2-8 (West 2008). Thus, absent a valid prenuptial or postnuptial agreement (*see*, *e.g., Golden v. Golden,* 393 Ill. 536, 66 N.E.2d 662 (1946)(wife can effectively bind herself to accept provisions of husband's will, thereby estopping her from renouncing the will after his death)), the wishes of a surviving spouse can trump a testator's intentions. Second, a child born to a testator after the making of a will is "entitled to receive the portion of the estate to which he would be entitled if the testator died intestate," unless provision is made in the will for the child or the will reveals the testator's intent to disinherit the child. 755 ILCS 5/4-10 (West 2008).

The public policy of the state of Illinois as expressed in the Probate Act is, thus, one of broad testamentary freedom, constrained only by the rights granted to a surviving spouse and the need to expressly disinherit a child born after execution of the will if that is the testator's desire.

Under the Probate Act, Max and Erla had no obligation to make any provision at all for their grandchildren. Indeed, if Max had died intestate, Erla, Michael, and Leila would have shared his estate (755 ILCS 5/2-1 (a) (West 2008)), and if Erla had died intestate, only Michael and Leila would have taken (755 ILCS 5/2-1 (b) (West 2008)). Surely, the grandchildren have no greater claim on their grandparents' testate estates than they would have had on intestate estates.

Similarly, under the Trusts and Trustees Act, "[a] person establishing a trust may specify in the instrument the rights, powers, duties, limitations and immunities applicable to the trustee, beneficiary and others and those provisions where not otherwise contrary to law shall control, notwithstanding this Act." 760 ILCS 5/3 (West 2008). Thus, the legislature intended that the settlor of a trust have the freedom to direct his bounty as he sees fit, even to the point of giving effect to a provision regarding the rights of beneficiaries that might depart from the standard provisions of the Act, unless "otherwise contrary to law."

Another legislative enactment that reveals a strong public policy of freedom of testation was the

adoption, in 1969, of the Statute Concerning Perpetuities (765 ILCS 305/1 *et. seq.* (West 2008)), for the purpose of modifying the common law rule that a will or trust provision that violated the rule against perpetuities was void *ab initio.* 765 ILCS 305/2 (West 2008). The statute permits the settlor of a trust to create a "qualified perpetual trust" by including in the instrument a provision that the rule against perpetuities does not apply and by granting certain specified powers to the trustee. 765 ILCS 305/3 (a–5), 4(a)(8) (West 2008). The statute also specifies other circumstances under which the rule shall not apply. 765 ILCS 305/4 (a)(1) through (a)(7) (West 2008). In addition, the statute adopts a set of rules to be applied when determining whether an interest violates the rule against perpetuities. 765 ILCS 305/4 (c)(1) through (c)(3) (West 2008). With regard to trusts, the statute provides that a trust containing a provision that would violate the rule against perpetuities, as modified by the statute, shall terminate 21 years after the death of the last surviving beneficiary who was living at the beginning of the perpetuities period (765 ILCS 305/5 (a)(A) (West 2008)) or else at the end of the 21–year perpetuities period if no beneficiary was living when the period began to run (765 ILCS 305/5 (a)(B) (West 2008)). Thus, the trust is not rendered void *ab initio,* but is merely terminated by operation of law at the conclusion of the perpetuities period.

Also, in 1953, the legislature adopted the Rule in Shelley's Case Abolishment Act (765 ILCS 345/1 *et. seq.* (West 2008)), to abolish the common law rule that a life estate to A, with a remainder to A's heirs, shall pass to A in fee simple.

As demonstrated by the Probate Act, the Trusts Act, the Statute Concerning Perpetuities, and the Rule in Shelley's Case Abolishment Act, the public policy of the state of Illinois protects the ability of an individual to distribute his property, even after his death, as he chooses, with minimal restrictions under state law.

Our case law also demonstrates the existence of a public policy favoring testamentary freedom, reflected in the many cases in which a court strives to discover and to give effect to the intent of a deceased testator or settlor of a trust. See, *e.g., Harris Trust & Savings Bank v. Donovan,* 145 Ill.2d 166, 172, 163 Ill. Dec. 854, 582 N.E.2d 120 (1991)("The first purpose in construing a trust is to discover the settlor's intent from the trust as a whole, which the court will effectuate if it is not contrary to public policy"); *Harris Trust & Savings Bank v. Beach,* 118 Ill.2d 1, 3, 112 Ill. Dec. 224, 513 N.E.2d 833 (1987) ("In construing either a trust or a will the challenge is to find the settlor's or testator's intent and, provided that the intention is not against public policy, to give it effect").

The record, via the testimony of Michael and Leila, reveals that Max's intent in restricting the distribution of his estate was to benefit those descendants who opted to honor and further his commitment to Judaism by marrying within the faith. Max had expressed his concern about the potential extinction of the Jewish people, not only by holocaust, but by gradual dilution as a result of intermarriage with non-Jews. While he was willing to share his bounty with a grandchild whose spouse converted to Judaism, this was apparently as far as he was willing to go.

There is no question that a grandparent in Max's situation is entirely free during his lifetime to attempt to influence his grandchildren to marry within his family's religious tradition, even by offering financial incentives to do so. The question is, given our public policy of testamentary freedom, did Max's beneficiary restriction clause as given effect by Erla's appointment violate any other public policy of the state of Illinois, thus rendering it void?

Public Policy Regarding Terms Affecting Marriage or Divorce

The contrary law relied upon by the appellate court to invalidate Max's beneficiary restriction clause is found in three decisions of this court: *Ransdell*, 172 Ill. 439, 50 N.E. 111, *Winterland v. Winterland*, 389 Ill. 384, 59 N.E.2d 661 (1945), and *Estate of Gerbing*, 61 Ill.2d 503, 337 N.E.2d 29 (1975) (which overruled *Winterland* in part). The appellate court concluded that the "language and circumstances" of the testamentary provisions in these cases, "which Illinois courts have found to be against public policy, are strikingly similar to the instant case." 383 Ill.App.3d at 996, 322 Ill. Dec. 534, 891 N.E.2d 549. Specifically, the appellate court invoked the "principle that testamentary provisions are invalid if they discourage marriage or encourage divorce." 383 Ill.App.3d at 996, 322 Ill. Dec. 534, 891 N.E.2d 549.

In *Ransdell*, the testator's will included provisions for his wife, his son, and his daughter. At the time the will was executed, the son and his wife were separated and cross-suits for divorce were pending. The father's bequest to the son provided that the property be held in trust, giving him use and income of the land for life, or "until such time as he * * * shall become sole and unmarried," at which time the trustee was to convey title to the land to him in fee simple. *Ransdell*, 172 Ill. at 440, 50 N.E. 111. If the son died childless while still married to the wife, the land was to go to other devisees. Several years after the father's death, the son, who was still married but living apart from his wife, challenged the provision on public policy grounds. The circuit court granted judgment for the defendants and this court affirmed.

This court acknowledged the long-standing rule that conditions annexed to a gift that have the tendency to induce spouses to divorce or to live separately are void on grounds of public policy. *Ransdell*, 172 Ill. at 440, 50 N.E. 111. However, the testator's purpose in this case "was simply to secure the gift to his son in the manner which, in his judgment, would render it of the greatest benefit to him in view of the relations then existing between him and his wife" (*Ransdell*, 172 Ill. at 440, 50 N.E. 111), which were strained, to say the least. "Certainly," this court noted, "it cannot be said that the condition tended to encourage either the separation or the bringing of a divorce suit, both having taken place long prior to the execution of the will." *Ransdell*, 172 Ill. at 440, 50 N.E. 111.

This court weighed two potentially competing public policies, stating that it was "of the first importance to society that contract and testamentary gifts which are calculated to prevent lawful marriages or to bring about the separation or divorcement of husbands and wives should not be upheld." *Ransdell*, 172 Ill. at 446, 50 N.E. 111. On the other hand, "it is no less important that persons of sound mind and memory, free from restraint and undue influence, should be allowed to dispose of their property by will, with such limitations and conditions as they believe for the best interest of their donees." *Ransdell*, 172 Ill. at 446, 50 N.E. 111. Because the testator had not disinherited his son if he remained married, but made one provision for him in case he remained married (a life estate) and a different provision if he divorced (taking title in fee simple), the condition was not contrary to public policy.

Finally, this court distinguished between a condition subsequent (for example, if the will devised property to the beneficiary in trust for life, subject to divestment if he married), and a condition precedent, which directs that upon the fulfillment of the condition, ownership of the property is to vest in the beneficiary. *Ransdell*, 172 Ill. at 447, 50 N.E. 111. The condition subsequent, such as one that would prohibit marriage generally, would be void and the donee would retain the property,

unaffected by the violation of the condition. A condition precedent would be given effect, because until the condition was met, the beneficiary's interest was a mere expectancy. *Ransdell*, 172 Ill. at 447-48, 50 N.E. 111.

The appellate court cited *Ransdell* for the " general rule that testamentary provisions which act as a restraint upon marriage or which encourage divorce are void as against public policy" and distinguished *Ransdell* from the present case on the basis that the Ransdells' marriage was "already in disrepair" at the time the will was executed. 383 Ill.App.3d at 994, 322 Ill. Dec. 534, 891 N.E.2d 549. The appellate court noted that subsequent Illinois cases, however, have "reaffirmed the underlying principle." 383 Ill.App.3d at 995, 322 Ill. Dec. 534, 891 N.E.2d 549.

One such case was *Winterland*, in which the testator created a trust for his wife that, upon her death, was to be distributed equally to their 11 children. However, in a later codicil, the testator directed that the share intended for their son, George, was to be held in trust for him "'so long as he may live or until his present wife shall have died or been separated from him by absolute divorce.' " *Winterland,* 389 Ill. at 385, 59 N.E.2d 661. George predeceased his wife and she and their son challenged the codicil as promoting divorce, contrary to good morals, and against public policy. *Winterland,* 389 Ill. at 386, 59 N.E.2d 661. This court distinguished *Ransdell* on the basis that the couple's separation was "already an accomplished fact and a divorce suit was then pending" at the time the testator made his will. *Winterland,* 389 Ill. at 387, 59 N.E.2d 661. But where no separation was contemplated, the "natural tendency of the provision" was "to encourage divorce." For that reason, the provision was void. *Winterland,* 389 Ill. at 387-88, 59 N.E.2d 661. This court announced that it is "the public policy of this state to safeguard and protect the marriage relation, and this court will hold as contrary to that policy and void any testamentary provision tending to disturb or destroy an existing marriage." *Winterland,* 389 Ill. at 387, 59 N.E.2d 661.

This court further found that the codicil established two separate and divisible conditions upon which the trust would be distributed to George. First, George's life estate was to continue until the death of his wife; second, his life estate would terminate upon their absolute divorce. This court rejected the argument that the life estate itself failed and that title to the property vested in George upon his father's death. Rather, while the second condition was void, the first condition was not and, thus, could be given effect. *Winterland,* 389 Ill. at 388, 59 N.E.2d 661.

In *Gerbing*, this court considered the validity of a provision in a testamentary trust that would have terminated the trust and distributed the corpus to the testator's son in the event that his wife predeceased him or the couple divorced and remained divorced for two years. *Gerbing,* 61 Ill.2d at 505, 337 N.E.2d 29. This court restated the general principle that "a devise or bequest, the tendency of which is to encourage divorce or bring about a separation of husband and wife is against public policy." *Gerbing,* 61 Ill.2d at 507, 337 N.E.2d 29. However, if the "dominant motive of the testator is to provide support in the event of such separation or divorce the condition is valid." *Gerbing,* 61 Ill.2d at 507, 337 N.E.2d 29. Further, unless the couple was separated or a divorce was pending at the time the will was executed, the "exception to the general rule announced in *Ransdell*" was not applicable. *Gerbing,* 61 Ill.2d at 508, 337 N.E.2d 29. This court found the provision void, but declined to sever the two conditions, as it had done in *Winterland.* Finding that it was the testator's general intent to benefit her son and that she would have preferred that he take the corpus of the trust, even if he remained married, rather than have him take nothing, this court found the entire provision void, overruling *Winterland* to the extent it held otherwise. *Gerbing,* 61 Ill.2d at 512, 337 N.E.2d 29.

In the present case, the appellate court found the "language and circumstances" of these three cases "strikingly similar" to the present case and saw "no reason to depart from this well-established principle" of these cases. 383 Ill.App.3d at 996, 322 Ill. Dec. 534, 891 N.E.2d 549. We disagree with the appellate court's conclusion regarding the similarity of the present case to the cited cases. The beneficiary restriction clause as given effect by Erla's distribution scheme does not implicate the principle that trust provisions that encourage divorce violate public policy. That is, the present case does not involve a testamentary or trust provision that is "capable of exerting * * * a disruptive influence upon an otherwise normally harmonious marriage" by causing the beneficiary to choose between his or her spouse and the distribution. *Gerbing,* 61 Ill.2d at 508, 337 N.E.2d 29. The challenged provision in the present case involves the decision to marry, not an incentive to divorce. This court has considered the validity of restrictions affecting marriage in cases going back as far as 1857.

In *Shackelford v. Hall*, 19 Ill. 212 (1857), the testator, Hall, left his estate to his wife for life or until she remarried, with the remainder to his four children, subject to the condition that they not marry before the age of 21. Any child who married before his or her twenty-first birthday was to receive one dollar only. The only daughter, Eliza, married four months before her twenty-first birthday, with the approval of her eldest brother, the executor of their father's estate. This court described the provision as a "devise with a condition subsequent," because the remainder interest vested in the four children immediately upon the death of the testator, "subject to be defeated by their marriage before they should attain that age." *Shackelford v. Hall*, 19 Ill. at 213. This court noted that:

> "whoever will take the trouble to examine this branch of the law attentively, will find that the testator may impose reasonable and prudent restraints upon the marriage of the objects of his bounty, by means of conditions precedent, or subsequent, or by limitations, while he may not, with one single exception, impose perpetual celibacy upon the objects of his bounty, by means of conditions subsequent or limitations. That exception is in the case of a husband in making bequests or legacies to his own wife. He may rightfully impose the condition of forfeiture upon her subsequent marriage." *Shackelford v. Hall*, 19 Ill. at 214-15.

As for other conditions affecting marriage that might be imposed by a testator, this court said that:

> "[a]n examination of the subject, will show that the courts have very rarely held such condition void, although it might appear harsh, arbitrary and unreasonable, so as it did not absolutely prohibit the marriage of the party, within the period wherein issue of the marriage might be expected. It is enough for our present purpose, and we will go no further now, for it is not necessary, that it has been nowhere held, or pretended, that an absolute prohibition of marriage till twenty-one years of age is not reasonable and lawful, and must not be upheld, as a good condition, the violation of which may defeat a vested estate. The condition, then, annexed to this devise, was proper, reasonable and lawful, and its violation must be held to have forfeited the estate devised, unless it can be saved by some other equally well settled principle of law." *Shackelford v. Hall*, 19 Ill. 215.

Further:

> "The facts of the case show, that all of the devisees of the estate in remainder, now in controversy, were the children and heirs at law of the testator, *and as such heirs at law, had expectations*

> *of this estate.* In the absence of the will, each would have been entitled to his or her respective proportions of it, according to our statute of descent. *when such is the case,* the condition subsequent, the breach of which shall divest the estate which *has become vested in the devisee by the will,* must be shown to have been brought home to the knowledge of the devisee, before the breach, in order to mark the forfeiture." (Emphases added.) *Shackelford v. Hall*, 19 Ill. at 215-16.

In the end, this court found that the marriage of Hall's daughter prior to her twenty-first birthday did not divest her of the remainder interest conveyed to her upon her father's death. The basis for this decision was not that her father's partial restraint upon marriage was invalid, but that her remainder interest vested upon his death and could not be divested by a subsequent act on her part, absent a showing that she had notice of the condition subsequent. Other factors supporting this result were that she would have been one of her father's heirs at law should he have died intestate and that her brother, the executor, had unclean hands:

> "And this rule is in harmony with the general principles of law, which always lean hard against a forfeiture of estates once vested, and that it will not allow such forfeiture, where there has been no laches or misconduct. In the case before us, we must assume that the *defendant did not know of the existence of the will, and much less of the condition which it contained, that she should not marry till she was twenty-one years of age, under the penalty of forfeiting her interest in her father's estate.* In ignorance of the will, she supposed she was entitled to take as heir without any condition. When we look at this case as it is presented by the record, we see it would be a monstrous piece of injustice to enforce this forfeiture against her. Here was her elder brother, who was an executor named in the will, knowing of the condition of forfeiture, had an interest in keeping it from her, that she might, by doing the prohibited act, incur the forfeiture, that her portion might go to himself and the other heirs of the testator. Under the influence of this direct interest, he suffers her to go on in ignorance of the will, and marry only four months before she attained the age of twenty-one years, and now he comes forward and claims the benefit of the forfeiture, and insists upon depriving her of the portion devised to her by the will. To sustain this claim, would be to offer a premium for the commission of the most heartless frauds. * * * We have not the least doubt that, upon the soundest principles of law and morality, she must take the estate devised, discharged of the condition." (Emphasis added.) *Shackelford v. Hall*, 19 Ill. 217-18.

In the present case, Michael argues that the beneficiary restriction clause is a similar "reasonable and prudent restraint" that does not operate as a complete restraint upon marriage. Rather, the clause disqualifies from receipt of a share of the trust assets any grandchild who has chosen to marry outside the religious tradition their grandparents valued so highly.

More importantly, we note that, unlike Eliza Hall, the grandchildren did not receive a vested interest in the trust upon Max's death. By creating a power of appointment in Erla, Max created a situation in which the interests of the grandchildren were contingent on whether and in what manner she would exercise her lifetime and testamentary powers of appointment. Thus, the grandchildren had a mere expectancy that they might receive some portion of the remainder at the conclusion of Erla's life estate. No one had a vested interest in the remainder of the trust assets until Erla's death resolved all contingencies. Further, unlike Hall's daughter, the grandchildren in the present case were not Max's or Erla's heirs at law. Finally, while the record is unclear whether any or all of the grandchildren were aware of the existence of the beneficiary restriction clause, because they had no vested interest to protect, they were not entitled to notice of the condition.

More recently, the appellate court upheld the validity of a testamentary provision regarding the marriage of the intended legatee. In *In re Estate of Gehrt*, 134 Ill.App.3d 308, 89 Ill. Dec. 265, 480 N.E.2d 151 (1985), the testator, Forrest Gehrt, originally left a portion of his estate to six named individuals who were the children of Edna Bocock, apparently his deceased sister. Upon the death of one of these individuals, Harold Bocock, he executed a codicil leaving the portion originally intended for Harold to his widow, Betty, provided that at the time of Forrest's death, she remained unmarried. If, at the time of Forrest's death, it was determined that Betty had remarried, the share was to go to Harold's five siblings. *Estate of Gehrt*, 134 Ill.App.3d at 309, 89 Ill. Dec. 265, 480 N.E.2d 151.

Betty remarried and, upon Forrest's death, sought Harold's share of the estate. The parties agreed that the condition operated as a condition precedent. Betty argued that it constituted an invalid restraint on marriage and asked that it be declared void as against public policy. The executor argued that the condition did not operate as a restraint because the interest "either vests or not at the date of the death of the testator depending on [Betty's] marital status at the time, not at some later time." *Estate of Gehrt*, 134 Ill.App.3d at 310, 89 Ill. Dec. 265, 480 N.E.2d 151.

The appellate court invoked a rule of reasonableness, quoting a case from the state of Louisiana in support of such a rule:

> " '[C]onceding, without deciding, that a legacy conditioned upon the legatee remaining unmarried is against the public policy of this State, it is apt to observe here that the provision under consideration is not one forbidding the donee to marry during her lifetime or even for a fixed period of time, nor one that directs the legacy shall lapse in case the legatee should marry in the future, but rather one that is conditioned upon her status at the time of the testator's death. Certainly, such a provision is not against good morals, and we know of no law prohibiting the same.' " *Estate of Gehrt*, 134 Ill.App.3d at 311, 89 Ill. Dec. 265, 480 N.E.2d 151, quoting *Succession of Ruxton,* 226 La. 1088, 1091, 78 So.2d 183, 184 (1955).

Applying this principle to the *Gehrt* estate, the appellate court noted the well-established principle that a will speaks as of the date of death of the testator. *Estate of Gehrt*, 134 Ill.App.3d at 311, 89 Ill. Dec. 265, 480 N.E.2d 151. Thus, the court observed:

> "[T]he testator, Forrest L. Gehrt, could have, for any reason, changed his codicil at any time prior to his death. He could have, at the time of plaintiff's remarriage, immediately executed another codicil cancelling the gift to the plaintiff, and could have given that portion of property to others. He can validly accomplish the same result by using the language that he did in the codicil in this case." *Estate of Gehrt*, 134 Ill.App.3d at 311, 89 Ill. Dec. 265, 480 N.E.2d 151.

The appellate court then quoted this court's opinion in *Ransdell:*

> "While it is of the first importance to society that contract and testamentary gifts which are calculated to prevent lawful marriages or to bring about the separation or divorcement of husbands and wives should not be upheld, it is no less important that persons of sound mind and memory, free from restraint and undue influence, should be allowed to dispose of their property by will, with such limitations and conditions as they believe for the best interest of their donees." *Ransdell*, 172 Ill. at 446, 50 N.E. 111.

We conclude, reading *Ransdell, Shackelford, Gerbing,* and *Gehrt* together, that no interest vested in the Feinbergs' grandchildren at the time of Max's death because the terms of his testamentary trust were subject to change until Erla's death. Because they had no vested interest that could be divested by their noncompliance with the condition precedent, they were not entitled to notice of the existence of the beneficiary restriction clause. Further, because they were not the Feinbergs' heirs at law, the grandchildren had, at most, a mere expectancy that failed to materialize for four of them when, at the time of Erla's death, they did not meet the condition established by Max.

Applicability of Restatement (Third) of Trusts

In reaching its decision, the appellate court also relied on section 29 of the Restatement (Third) of Trusts, and the explanatory notes and comments thereto. 383 Ill.App.3d at 997, 322 Ill. Dec. 534, 891 N.E.2d 549.

Since the Restatement (Second) of Trusts was adopted in 1959, this court has, on several occasions, cited various sections with approval. See, *e.g., Eychaner v. Gross,* 202 Ill.2d 228, 25, 269 Ill. Dec. 80, 779 N.E.2d 1115 (2002)(requirements for creation of a trust). We have not yet had reason to consider whether any section of the Restatement (Third) of Trusts, which was adopted in 2003, is an accurate expression of Illinois law and we need not do so in this case.

The validity of a trust provision is not at issue, as the distribution provision of Max's trust was revoked when Erla exercised her power of appointment. Her distribution scheme was in the nature of a testamentary provision, which operated at the time of her death to determine who would be entitled to a $250,000 distribution.

The appellate court mistakenly compared the present case to an illustration accompanying Comment *j* to section 29 of the Restatement (Third) of Trusts. 383 Ill.App.3d at 997, 322 Ill. Dec. 534, 891 N.E.2d 549. The illustration concerns a trust created by an aunt to benefit her nephew, who was to receive discretionary payments until age 18, and all income and discretionary payments until age 30, at which time he would receive an outright distribution of all trust property. However, all of his rights under the trust would end if, before the trust terminated on his thirtieth birthday, he married "a person who is not of R Religion." If he violated this condition, the remainder of the trust would be given to a college. The drafters of the Restatement called this an "invalid restraint on marriage," and stated that the invalid condition and the gift over to the college should not be given effect. Restatement (Third) of Trusts § 29, Explanatory Notes, Comment *j,* Illustration 3, at 62–64 (2003).

This illustration is similar to Max's original trust provision. Under his plan, the grandchildren who were not "deemed deceased" at the time of Erla's death would receive distributions from the trust for life, subject to termination if they should violate the marriage restriction. Erla's scheme, however, does not operate prospectively to encourage the grandchildren to make certain choices regarding marriage. It operated on the date of her death to determine which, if any, of the grandchildren qualified for distribution on that date. The condition was either met or it was not met. There was nothing any of the grandchildren could have done at that time to make themselves eligible or ineligible for the distribution.

As this court noted in *Ransdell,* a condition precedent, even if a "complete restraint" on marriage, "will, if broken, be operative and prevent the devise from taking effect." However, "[w]hen the condition is subsequent and void it is entirely inoperative, and the donee retains the property

unaffected by its breach." *Ransdell*, 172 Ill. at 447, 50 N.E. 111, quoting 2 Pomeroy, Equity Jurisprudence § 933B (1881).

Max's will and trust created no vested interests in the children or grandchildren because Erla retained a power of appointment until her death. No vested interests were created in 1997 by Erla's exercise of her power of appointment. Her actions created a mere expectancy, contingent on her dying without further amending the distribution scheme. Because no interest vested in any of the grandchildren until Erla's death, her appointment created a condition precedent. As we noted in *Ransdell,* under these circumstances, even a complete restraint on marriage (*i.e.,* distribution only to unmarried grandchildren) would be operative.

Thus, this is not a case in which a donee, like the nephew in the illustration, will retain benefits under a trust only so long as he continues to comply with the wishes of a deceased donor. As such, there is no "dead hand" control or attempt to control the future conduct of the potential beneficiaries. Whatever the effect of Max's original trust provision might have been, Erla did not impose a condition intended to control future decisions of their grandchildren regarding marriage or the practice of Judaism; rather, she made a bequest to reward, at the time of her death, those grandchildren whose lives most closely embraced the values she and Max cherished.

The trial court and the appellate court erred by finding a violation of public policy in this case. While the beneficiary restriction clause, when given effect via Erla's distribution provision, has resulted in family strife, it is not "so capable of producing harm that its enforcement would be contrary to the public interest." *Kleimwort Benson*, 181 Ill.2d at 226, 229 Ill. Dec. 496, 492 N.E.2d 269.

Notes, Problems, and Questions

1. How far should we go to respect the wishes of the dead over the wishes of the living? What are the relevant factors to consider?

2. The Courts in *Maddox* and *Shapira* relied on the reasonableness test to evaluate the validity of the conditions in the respective cases. What facts justify the different outcome of the cases?

3. In light of the availability of Internet dating sites like Match.com and the current modes of transportation, would the outcome of the *Maddox* be different if the case was before the court today?

4. If there were only 700 Jewish women between the ages of 18 and 25, would it be reasonable to expect Daniel to find a Jewish wife? Would you say that the condition was satisfied if Daniel's intended wife and both her parents converted to Judaism?

5. If Daniel Shapira married his male partner, who was the product of two Jewish parents, would he have a right to inherit from his father's estate?

6. Suppose Daniel Shapira was only attracted to non-Jewish women. Is it reasonable to require him to fulfill the condition or lose his inheritance?

7. Suppose Dr. Shapira's will conditioned his gift to Daniel on his marrying a non-African American woman. How would that condition fare in light of the reasoning in *Shapira*?

8. In *Feinberg*, what did the court determine the testator's motivation to be with regards to the inclusion of the beneficiary restriction clause in his will? Should motive matter?

9. In *Feinberg,* what were the competing public policies that the court discussed? Which one should be given the greater weight?

10. In *Feinberg,* what did the court state was the appropriate test to decide whether or not the beneficiary restriction clause violated public policy? Why did the court conclude that no such violation had occurred?

11. Do any of the following restrictions violate public policy? Why? Why not?

(a) Emma's daughter, Carrie, is involved in an abusive relationship. Instead of leaving George, the abuser, Carrie gets engaged to him. Emma revises her will to include the following clause: "Emma will not inherit any portion of the trust I created on her behalf unless she ends her relationship with George. Emma must end the relationship within 6 months of my death. If at the time of my death, Emma has married George, she will not receive any portion of my estate."

(b) Carson's only son, Gary, has a gambling problem. He has lost thousands of dollars and been beaten up by loan sharks when he could not pay his gambling debts. Carson includes the following clause in his will: "My son Gary will not receive any portion of my estate unless he enters and completes rehab for his gambling addiction prior to my death or within one month of my death. In order to inherit, Gary must not enter a casino for at least 6 months after he finishes rehab."

(c) Fred is a devout Catholic who does not believe in divorce for any reason. Fred's daughter, Jill found out that her husband, Bryan, has been having an affair. Thus, Jill files for divorce. A few months later, Fred revises his will to include the following clause: "Jill will not inherit any portion of my estate unless she dismisses her divorce complaint against Bryan and agrees to marriage counseling. If at the time of my death, Jill has divorced Bryan, she will not be entitled to inherit any part of my estate."

Class Discussion Tool

Wilma and John started dating in college. On their third date, John shoved Wilma's head into the toilet and knocked out two of her teeth. Wilma's mother, Thelma, tried for years to get Wilma to end the abusive relationship. Wilma loves John and hopes that things will get better. Wilma is Thelma's only child. Thelma died leaving an estate worth several million dollars. In her will, Thelma left her entire estate to John on the condition that he end his relationship with Wilma. John is happy to choose the money over Wilma, but Wilma is desperate to hold on to the relationship. Wilma was able to talk John into challenging the condition placed on his inheritance. What is the possible outcome of the case?

Chapter Eight: Disinheritance

8.1 Introduction

The purpose of this chapter is to explore ways in which a person, including a child, can be disinherited. Should persons be allowed to disinherit their children? Should the government be forced to provide financial support for the dependent minor or disabled child of a millionaire? The legislators in the majority of states in America have answered these questions in the affirmative by permitting a testator to completely disinherit his or her child. Louisiana is the only states that protects a minor or disabled child from being disinherited.

8.2 Exceptions

8.2.1 Forced Heirs

The state of Louisiana makes special exceptions for children under the age of twenty-three and permanently disabled children. Those classes of children are designated as forced heirs because the decedent is forced to name them as heirs in his or her will and the probate court is forced to consider them as heirs under the intestacy system.

LSA. C.C. Art. 1493. Forced heirs

> Forced heirs are descendants of the first degree who, at the time of the death of the decedent, are twenty-three years of age or younger or descendants of the first degree of any age who, because of mental incapacity or physical infirmity, are permanently incapable of taking care of their persons or administering their estates at the time of the death of the decedent.

8.3 Negative Disinheritance

Parents have the right to disinherit their children. Parents may accomplish this by expressly stating in writing that they intend to disinherit their children and leave their property to charity or other persons.[81] Probate courts will usually comply with the parents' request that their children not receive any part of their estate. Under the common law negative disinheritance rule, in order to disinherit a child the parent has to do more than just state that the child is intentionally disinherited. In some cases, a disinherited child may inherit from the estate if all or a part of the estate is distributed under the intestacy system. For example, all of the estate would be disposed of in accordance with the intestate succession laws if the will was invalidated for any reason, including undue influence, insane delusion and/or duress. In addition, a partial intestacy may result if the testator failed to devise any part of his or her estate by will. In any of those cases, being disinherited would not prevent a child from taking an intestate share. See the following example and case.

[81] Bill Gates, Warren Buffet, and other billionaires, have indicated their plans to leave most of their money to charity. They plan to leave their children nominal amounts or, in some cases, nothing in their wills.

8.3.1 Example

Ross had three children, Olivia, Dennis and Susie. Ross disapproved of the man Susie married, so he decided to disinherit her. In his will, Ross stated, "My house, my money and all of my personal property is to be divided between Olivia and Dennis. Susie is not to inherit any of my property." Ross did not include anything in his will with regards to the distribution of his 500 acre farm. Under the negative disinheritance rule, although Susie was specifically disinherited by Ross' will, Susie may be entitled to a share of the farm because it was not devised to other persons. She was entitled to receive an interest in the farm and any other property not disposed of by the will. Susie's share of the estate depended upon the intestacy system.

Most jurisdictions no longer apply the negative disinheritance rule. The rule has been changed by application of UPC § 2-101(b)(1990). That section permits the testator to execute a will that disinherits a child. The disinherited child is treated as if he or she disclaimed his or her intestate share. As a result, the child is treated as if he or she had died before the testating parent. Some states have abolished the negative inheritance rule by statute.

8.3.2 UPC § 2-101 Intestate Estate

> (b) A decedent by will may expressly exclude or limit the right of an individual or class to succeed to property of the decedent passing by intestate succession. If that individual or a member of that class survives the decedent, the share of the decedent's intestate estate to which that individual or class would have succeeded passes as if that individual or each member of that class had disclaimed his [or her] intestate share.

In re Estate of Melton, 272 P.3d 668 (2012)

PER CURIAM:

This is a dispute between the State and a testator's daughter and half-sisters over his $3 million estate. At issue is the proper distribution of the estate of the testator, who, by way of a handwritten will, attempted to disinherit all of his heirs but was unsuccessful in otherwise affirmatively devising his estate. Under the common law, a disinheritance clause was unenforceable in these circumstances. In the proceedings below, after determining that the testator's handwritten will was a valid testamentary instrument that revoked his earlier will, the district court applied the prevailing common law rule, and thereby deemed the testator's disinheritance clause unenforceable. The court therefore distributed the testator's entire estate to his disinherited daughter, pursuant to the law of intestate succession, and rejected the claim that because he disinherited all of his heirs, his estate must escheat to the State to be used for educational purposes.

Crucially, however, the Nevada Legislature has enacted a statute providing, in pertinent part, that a will includes "a testamentary instrument that merely ... excludes or limits the right of an individual or class to succeed to property of the decedent passing by intestate succession." NRS 132.370. We conclude that by its plain and unambiguous language, NRS 132.370 abolishes the common law rules that would otherwise render a testator's disinheritance clause unenforceable when the testator is unsuccessful at affirmatively devising his or her estate. Here, although the district court correctly

determined that the testator executed a valid handwritten will that revoked his earlier will, the court erred in deeming the disinheritance clause contained therein unenforceable.

Finally, we consider whether an escheat is triggered when, as here, a testator disinherits all of his or her heirs. We conclude that an escheat is triggered in such a circumstance because, when all heirs have been disinherited, the testator "leaves no surviving spouse or kindred" under NRS 134.120 pursuant to the plain and commonly understood meaning of that phrase. Accordingly, the district court erred in determining that the testator's estate does not escheat.

Because the disinheritance clause contained in the testator's will is enforceable, we reverse the judgment of the district court. As the testator disinherited all of his heirs, his estate must escheat.

FACTS AND PROCEDURAL HISTORY

The 1975 will

In 1975, William Melton executed a formal will. The will was comprised of two forms, which Melton and three witnesses signed. Melton devised most of his estate to his parents and devised small portions to his brother and two of his cousins, Terry Melton and Jerry Melton. He also indicated that his daughter was to receive nothing. In 1979, Melton executed a handwritten codicil on the back of one of the 1975 will forms that provided his friend, Alberta (Susie) Kelleher, should receive a small portion of his estate (both will forms and the codicil are hereinafter referred to as "the 1975 will").

The 1995 letter

In 1995, Melton sent a handwritten letter to Kelleher. It reads:

> 5–15–95
> 5:00 AM
>
> Dear Susie
>
> I am on the way home from Mom's funeral. Mom died from an auto accident so I thought I had better leave something in writing so that you Alberta Kelleher will receive my entire estate. I *do not* want my brother Larry J. Melton or Vicki Palm or any of my other relatives to have *one penny* of my estate. I plan on making a revocable trust at a later date. I think it is the 15 of [M]ay, no calendar, I think it[']s 5:00 AM could be 7:AM in the City of Clinton Oklahoma
>
> Lots of Love
>
> Bill
> /s/ William E. Melton
> AKA Bill Melton
> [Social security number]

Discovery of the 1975 will and the 1995 letter

Kelleher died in 2002, thus predeceasing Melton, who died in 2008. Shortly after Melton's death, respondent John Cahill, Clark County Public Administrator, initiated a special administration of Melton's estate. During this administration, it was discovered that Melton had a daughter, respondent Vicki Palm. The 1995 letter was also discovered. Initially, Palm and respondent Elizabeth Stessel were appointed co-administrators of Melton's estate. But the district court suspended their powers after determining that a disinterested party should administer the estate because a dispute over the proper distribution of the estate had arisen between Melton's half-sisters, appellants Linda Melton Orte and Sherry L. Melton Briner, appellant State of Nevada, respondents Bryan Melton and Robert Melton and Palm. The district court therefore appointed Cahill to be the special administrator of Melton's estate. Thereafter, Cahill obtained access to Melton's safe deposit box and discovered the 1975 will. The appraised net value of Melton's estate is approximately $3 million.

The parties and their respective positions

Melton's daughter

Palm, Melton's only known child, initially argued that the 1995 letter is not a valid will, and that Melton's estate therefore should pass to her under the statutes governing intestate succession. Following the discovery of the 1975 will, however, she argued that the 1995 letter is a valid will and that it revoked the 1975 will. Palm argued that although the 1995 letter is a valid will, it is ineffective because the only named devisee, Kelleher, predeceased Melton. Thus, she maintained that Melton's estate should pass through intestacy, under which she has priority pursuant to NRS 134.100.

Melton's half-sisters

In the proceedings below, Melton's half-sisters contended that the 1995 letter is not a valid will, and therefore, the 1975 will is still effective. In addition, they argued that if the 1995 letter is a valid will, it does not effectively revoke the 1975 will. They further argued that, even assuming that the 1995 letter is a valid will that revoked the 1975 will, the revocation should be disregarded under the doctrine of dependent relative revocation. Although Melton's half-sisters were not named as devisees in the 1975 will, they asserted that under Nevada's antilapse statute, NRS 133.200. They could take their parent's share of Melton's estate.

The State

The State asserted that the 1995 letter is a valid will that revoked the 1975 will. It argued that the Legislature's revisions to the Nevada Probate Code in 1999 provide for the enforcement of disinheritance clauses, even when an estate passes by intestate succession. Thus, the State contended that because Melton expressly disinherited all of his relatives in the 1995 letter, his estate must escheat.

The district court order

After extensive briefing by the parties, the district court determined as follows: (1) the 1995 letter is a valid will; (2) although the 1995 letter is a valid will, the disinheritance clause contained therein is

unenforceable; (3) the 1995 letter revoked the 1975 will; (4) the revocation of the 1975 will cannot be disregarded under the doctrine of dependent relative revocation because NRS 133.130. Precludes the doctrine in Nevada; and (5) even if the doctrine of dependent relative revocation applies in Nevada, the doctrine is not applicable under the particular facts presented in this case. Accordingly, the district court distributed Melton's estate to Palm pursuant to the intestate succession scheme. Melton's half-sisters and the State each appealed.

DISCUSSION

On appeal, the parties largely maintain the positions that they asserted during the proceedings below. Thus, in their appeal, Melton's half-sisters' primary contention is that the district court erred in determining that the 1975 will does not control the distribution of Melton's estate. In its appeal, the State's main contention is that the district court erred in deeming Melton's disinheritance clause unenforceable and in determining that his estate does not escheat.

The parties' positions compel us to resolve a sequence of issues. First, we must consider whether the 1995 letter is a valid will, and if so, whether the disinheritance clause contained therein is enforceable. We conclude that the 1995 letter is a valid will and that the disinheritance clause contained therein is enforceable under NRS 132.370. Next, we address whether the 1995 letter revoked the 1975 will. Answering this question in the affirmative, we next consider whether to adopt the doctrine of dependent relative revocation in Nevada and whether the doctrine can be applied to render the revocation of the 1975 will ineffective. Because the doctrine of dependent relative revocation promotes the sound policy of effectuating a testator's intent as closely as possible, we take this opportunity to expressly adopt the doctrine. We conclude, however, that the doctrine cannot be applied under the particular facts of this case. Finally, we turn to the proper distribution of Melton's estate under the terms of the 1995 letter. We conclude that because Melton disinherited all of his heirs, his estate must escheat to the State pursuant to NRS 134.120. Accordingly, we reverse the judgment of the district court.

Standard of review

Whether a handwritten document is a valid will is a question of law reviewed de novo. *Randall v. Salvation Army*, 100 Nev. 466, 470, 686 P.2d 241, 243 (1984). Similarly, "questions of statutory construction, including the meaning and scope of a statute, are questions of law, which [we] review [ ] de novo." *City of Reno v. Reno Gazette-Journal*, 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003). Further, the interpretation of a will is typically subject to our plenary review. *Matter of Estate of Meredith*, 105 Nev. 689, 691, 782 P.2d 1313, 1315 (1989). Lastly, whether a will has been revoked is also generally a question of law reviewed de novo. *Estate of Anderson*, 56 Cal.App.4th 235, 65 Cal. Rptr.2d 307, 311 (1997).

"When a statute is clear and unambiguous, we give effect to the plain and ordinary meaning of the words and do not resort to the rules of construction." *Cromer v. Wilson*, 126 Nev. ___, ___, 225 P.3d 788, 790 (2010). As we have explained, we "must give [a statute's] terms their plain meaning, considering its provisions as a whole so as to read them in a way that would not render words or phrases superfluous or make a provision nugatory." *Southern Nev. Homebuilders v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (internal quotation omitted). We also have explained that a statute's express definitions are controlling because "[t]o read [them] otherwise would lead to the absurd result of rendering [such provisions] ... mere surplusage." *Boulder Oaks Cmty. Ass'n v. B & J*

Andrews, 125 Nev. 397, 406, 215 P.3d 27, 32-33 (2009).

The 1995 letter is a valid will

Melton's half-sisters assert that the 1995 letter is simply a letter and nothing more. They emphasize that the 1995 letter was discovered amongst miscellaneous papers in Melton's home, in contrast to the 1975 will, which was found carefully placed in a safe. Thus, Melton's half-sisters argue that if Melton intended for the 1995 letter to be his will, he would have treated it as carefully as the 1975 will. Therefore, they contend that because the 1995 letter is not a valid will, the 1975 will still controls the distribution of Melton's estate.

Nevada law gives holographic wills the same effect as formally executed wills. NRS 133.090(3). "A holographic will is a will in which the signature, date and material provisions are written by the hand of the testator, whether or not it is witnessed or notarized." NRS 133.090(1).

[7] The 1995 letter was written, signed, and dated by Melton. It contains the material provisions of a will because it provided that Kelleher should receive Melton's estate and that his relatives should receive nothing. Although Melton did not store the 1995 letter in the same manner that he stored the 1975 will, its validity as a holographic will does not depend upon him doing so. Melton's testamentary intent is evinced by his references to his mother's funeral, her untimely death, and his statement that he "had better leave something in writing." Accordingly, we conclude that the 1995 letter is a valid holographic will.

The disinheritance clause contained in the 1995 letter is enforceable

Having concluded that the 1995 letter is a valid holographic will, we now consider the State's contention that the district court erred in applying the prevailing common law rule regarding disinheritance clauses and thereby deeming the disinheritance clause unenforceable. We begin our analysis of this contention by providing a background on the common law disinheritance rules, the criticisms thereof, and the modern treatment of disinheritance provisions. Next, we consider the parties' specific arguments regarding whether NRS 132.370 reverses the common law disinheritance rules in Nevada.

Background on disinheritance clauses

Under the common law, two general rules, known as the "English rule" and the "American rule," have been developed by courts considering whether to enforce disinheritance provisions as to property passing by intestate succession. Under the English rule, a disinheritance provision, or a so-called "negative will" was enforceable only if "the testator clearly expressed an intent to limit an heir to the devise (if any) contained in the will, and at least one other heir remained eligible to receive the intestate property." Under the American rule, a testator could "prevent an heir from receiving his share of any property that passes by intestacy only by affirmatively disposing of the entire estate through a will."

As its name suggests, the majority of jurisdictions subscribe to the American rule. *See, e.g., In re Barnes' Estate,* 63 Cal.2d 580, 47 Cal.Rptr. 480, 407 P.2d 656, 659 (1965) ("It is settled that a disinheritance clause, no matter how broadly or strongly phrased, operates only to prevent a claimant from taking under the will itself, or to obviate a claim of pretermission. Such a clause does

not and cannot operate to prevent the heirs at law from taking under the statutory rules of inheritance when the decedent has died intestate as to any or all of his property."); 4 William J. Bowe and Douglas H. Parker, *Page on the Law of Wills* § 30.17, at 148 (rev. ed. 2004) ("If testator does not dispose of the whole of his estate by his last will and testament, and such will contains negative words of exclusion, the great majority of states hold that such negative words cannot prevent property from passing under the statutes of descent and distribution.").

Courts following the American rule have espoused three rationales for doing so: (1) enforcing disinheritance provisions as to intestate property "would create an undesirable 'mixing' of the probate and intestacy systems by requiring courts to alter the distribution scheme provided in the intestacy statute"; (2) because disinheritance clauses do not expressly name devisees, "their enforcement would in effect require courts to draft new wills for testators"; and (3) disinheritance clauses are simply "inconsistent with the law of succession." Heaton, *supra,* at 186.

The common law disinheritance rules, and the rationales underpinning them, have been the subjects of intense criticism. *See, e.g.,* Frederic S. Schwartz, *Models of the Will and Negative Disinheritance*, 48 Mercer L.Rev. 1137, 1140, 1167 (1997) (stating that the justifications given for the common law rules are "obviously circular" and unsatisfactory, and urging courts "to give straightforward effect" to disinheritance provisions); Heaton, *supra,* at 184, 186 (noting that none of the rationales for the American rule "withstand [ ] analysis," and concluding that it defeats testators' intentions).

Not surprisingly, because the common law disinheritance rules distort testamentary intent and conflict with testamentary freedom, the modern trend is to reject the traditional rules. The Uniform Probate Code (UPC) reflects this trend, providing that "[a] decedent by will may expressly exclude or limit the right of an individual or class to succeed to property of the decedent passing by intestate succession." Unif. Probate Code § 2-101(b), 8/I U.L.A. 79 (1998). The drafters of the UPC stated that in enacting this provision, they abrogated "the usually accepted common-law rule, which defeats a testator's intent for no sufficient reason," *Id.* § 2-101 cmt. The Restatement (Third) of Property also rejects the common law disinheritance rules, providing that "[a] decedent's will may expressly exclude or limit the right of an individual or class to succeed to property of the decedent passing by intestate succession." Restatement (Third) of Prop.: Wills and Other Donative Transfers § 2.7 (1999). As with the UPC, the Restatement explains that this provision "reverses the common-law rule, which defeats a testator's intent for no sufficient reason." *Id.* § 2.7 cmt. a. With the foregoing in mind, we turn to whether the Legislature intended for NRS 132.370 to abolish the common law disinheritance rules.

NRS 132.370 *abolishes the common law disinheritance rules*

The State asserts that by revising the Nevada Probate Code in 1999 to provide that a "will" includes a "testamentary instrument that merely .... excludes or limits the right of an individual or class to succeed to property of the decedent passing by intestate succession," the Legislature has rejected both the English and American rules. Thus, the State argues that disinheritance provisions are now enforceable as to property passing by intestate succession. The State acknowledges that Nevada has not adopted the UPC, but it points out the similarity in the language of NRS 132.370 and UPC section 2-101.

Palm contends that the "definition sections of Nevada's Probate Code should not be given substantive effect"[7] and claims that giving effect to disinheritance provisions would make estate

planning unpredictable. In essence, she believes that the language that the Legislature used in NRS 132.370 was imprecise and unwise. Thus, Palm asserts that we should apply the common law disinheritance rules, which would render Melton's disinheritance clause unenforceable. Palm argues that because Melton's disinheritance clause is unenforceable, the district court correctly determined that she should receive Melton's estate, as she has priority under the intestate succession scheme.

NRS 132.370defines "will" as follows:

> "Will" means a formal document that provides for the distribution of the property of a decedent upon the death of the decedent. The term includes a codicil and a testamentary instrument that *merely* appoints an executor, revokes or revises another will, nominates a guardian, *or expressly excludes or limits the right of an individual or class to succeed to property of the decedent passing by intestate succession.*

(Emphases added.)

The interpretation of NRS 132.370 is a matter of first impression for this court. NRS 132.370 defines a "will" broadly. In stark contrast to the common law disinheritance rules, NRS 132.370imposes no requirement that an instrument affirmatively devise property in order to be enforceable. Rather, a will includes an instrument that "merely" limits an individual or class from inheriting. The plain language of NRS 132.370 thus demonstrates that the Legislature envisioned a probate system in which disinheritance provisions can be enforced as to intestate property. Though Palm considers NRS 132.370 unwise, under well-established canons of statutory interpretation, we must not render it nugatory or a mere surplusage. *See Boulder Oaks Cmty. Ass'n v. B & J Andrews,* 125 Nev. 397, 406, 215 P.2d 27, 32-33 (2009); *Southern Nev. Homebuilders v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005).

The significance of NRS 132.370 cannot be overstated. While the Legislature's amendments to the probate code in 1999 are not a wholesale adoption of the UPC, the language of NRS 132.370 mirrors that of UPC section 2-101, which, as previously noted, was designed to abrogate the common law disinheritance rules. Giving effect to disinheritance provisions, however, is not so radical that it creates the estate planning upheaval that Palm claims it would. As UPC states such as Arizona, Colorado, and North Dakota demonstrate, such provisions can be seamlessly incorporated into the existing probate system. *See, e.g., Matter of Estate of Krokowsky,* 182 Ariz. 277, 896 P.2d 247, 249 n. 2 (1995); *In re Estate of Walter,* 97 P.3d 188, 192 (Colo.Ct.App.2003); *In re Estate of Samuelson*, 757 N.W. 2d 44, 47 (N.D. 2008).

In addition, we find the approach taken by New York courts instructive. New York, like Nevada, has not adopted the UPC, but it has enacted a statute defining a "will," in relevant part, as "an oral declaration or written instrument ... whereby a person disposes of property or directs how it shall not be disposed of...." N.Y. Est. Powers & Trusts Law § 1-2.19(a) (McKinney 1998). New York courts have interpreted this definition to be a reversal of the common law disinheritance rules:

> Prior to September 1, 1967, the effective date of [the statute defining "will"], the cases held that: "The legal rights of the heir or distributee to the property of deceased persons, cannot be defeated except by a valid devise or bequest of such property to other persons"....
>
> However, in this Court's opinion the new statute is unmistakable in providing that a testator now

may disinherit an heir from all his property, both testamentary and intestate assets.

In re Will of Beu, 70 Misc.2d 396, 333 N.Y.S.2d 858, 859 (Sur.Ct.1972)(citation omitted) (*quoting In re Hefner's Will* 122 N.Y.S.2d 252, 254 (Sur.Ct. 1953)), *affd,* 44 A.D.2d 774, 354 N.Y.S.2d 600 (1974); *see also Matter of Will of Stoffel,* 104 Misc.2d 154, 427 N.Y.S.2d 720, 721 (Surr.Ct. 1980) ("The definition of 'will' changed the rule previously existing which made directions to disinherit someone ineffective unless all of the Decedent's assets were effectively disposed to others."), *aff'd,* 79 A.D.2d 658, 437 N.Y.S.2d 922 (1980). In short, we conclude that in enacting NRS 132.370, the Nevada Legislature, like the New York Legislature, abolished the common law disinheritance rules.

Here, Melton drafted a will in which he expressly excluded all of his heirs: "I *do not* want my brother Larry J. Melton or Vicki Palm or any of my other relatives to have *one penny* of my estate." Melton's intent to disinherit his heirs could not have been clearer. *See Matter of Estate of Meredith,* 105 Nev. 689, 691, 782 P.2d 1313, 1315 (1989) ("[T]he surest way ... to carry out a testator's intent is to construe a will according to the plain meaning of the terms used in the will."). Although Palm speculates that Melton only intended to exclude her if his estate passed through his will, he placed no qualifications on his disinheritance clause. Without such direction from Melton, it cannot be said that he meant to disinherit Palm if his estate passed through his will but that he would have been content to have her receive his estate if it passed through intestate succession. *See Estate of Samuelson,* 757 N.W.2d at 48 ("[W]hen a testator expressly excludes an individual in his will, the individual is excluded from taking under both testate and intestate succession, unless the testator expressly specifies a contrary intention."). Pursuant to NRS 132.370, simply because Kelleher predeceased Melton, thereby causing his devise to her to lapse, does not render the remainder of the will, including its disinheritance clause, unenforceable. Accordingly, we conclude that the disinheritance clause contained in the 1995 letter is enforceable.

The proper distribution of Melton's estate under the 1995 letter is an escheat

We now turn to the proper distribution of Melton's estate under the terms of the 1995 letter. The State argues that because Melton disinherited all of his heirs in the 1995 letter, an escheat is triggered.

Palm asserts that the requisites of an escheat have not been met because, under NRS 134.120, an intestate estate can escheat only when "the decedent leaves no surviving spouse or kindred." Thus, she contends that because she survived Melton in the literal sense, his estate cannot escheat. Palm also argues that the law abhors escheats, and therefore, as a matter of public policy, an escheat should not be permitted.

Although the 1995 letter contains a disinheritance clause, and is therefore an enforceable testamentary instrument under NRS 132.370, Melton's estate nonetheless must descend through intestacy because he was unsuccessful at affirmatively distributing his estate. *See* NRS 132.195 (an " '[i]ntestate estate' includes an estate where no will has been offered or admitted to probate as the last will and testament and an estate where the will does not distribute the entire estate"). While this causes a "mixing" of the testate and intestate systems that was discouraged under the common law, the Legislature expressly contemplated this result. *See* NRS 132.370 (a "'will' " includes an instrument that excludes an heir from receiving property "passing by intestate succession").

Next, NRS 134.120, the provision that sets forth the requisites for the escheat of an intestate estate,

provides: "If the decedent leaves no surviving spouse or kindred, the estate escheats to the State for educational purposes." We reject Palm's cramped interpretation of this provision because it is commonly understood that when a disinheritance clause is enforceable as to intestate property, a disinherited heir is treated, as a matter of law, to have predeceased the testator. *See In re Will of Beu,* 70 Misc.2d 396, 333 N.Y.S.2d 858, 861 (Sur.Ct. 1972) (a disinherited heir is "considered to have predeceased the testator" under the New York statute providing for the enforcement of disinheritance clauses as to intestate property); Frederic S. Schwartz, *Models of the Will and Negative Disinheritance*, 48 Mercer L.Rev. 1137, 1145 (1997) ("A provision disinheriting [an heir] should result in an application of the intestacy statute as if [that heir] predeceased the testator."); J. Andrew Heaton, Comment, *The Intestate Claims of Heirs Excluded by Will: Should "Negative Wills" Be Enforced?,* 52 U. Chi. L. Rev. 177, 192 (1985) (when a disinheritance clause is enforced as to intestate property "the excluded heir is treated as having predeceased the testator").

Thus, because we presume that the Legislature was aware of the commonly understood effect of the language of NRS 134.120 when it drafted the statute, this is how it must be construed. *See Beazer Homes Nevada, Inc. v. Dist. Ct.,* 120 Nev. 575, 580-81, 97 P.3d 1132, 1135-36 (2004) ("When a legislature adopts language that has a particular meaning or history, rules of statutory construction ... indicate that a court may presume that the legislature intended the language to have meaning consistent with previous interpretations of the language."). Accordingly, we conclude that when a testator disinherits all heirs, he or she "leaves no surviving spouse or kindred" for the purposes of NRS 134.120 and, as a consequence, an escheat is triggered.

The law disfavors escheats. *In re Estate of Cruz,* 215 Cal. App.3d 1416, 264 Cal. Rptr. 492, 493 (1989). The commonly cited reason for this principle is that "society prefers to keep real property within the family as most broadly defined, or within the hands of those whom the deceased has designated." *United States v. 1978.73 Acres of Land, More or Less*, 800 F.2d 434, 435 (4th Cir. 1986). But the law also strives to effectuate the intentions of testators. *Zirovic v. Kordic*, 101 Nev. 740, 741, 709 P.2d 1022, 1023 (1985). It is unmistakable that in enacting NRS 132.370, the Legislature weighed these competing considerations and determined that testamentary freedom has primacy over the policy disfavoring escheats. Thus, when, as here, a testator disinherits all of his or her heirs, the law's disfavor of escheats does not prevent an estate from passing to the State. Accordingly, we conclude that Melton's estate must escheat to the State.

CONCLUSION

Because the disinheritance clause contained in Melton's will is enforceable, we reverse the judgment of the district court. As Melton disinherited all of his heirs, his estate escheats.

8.4 Expressed Disinheritance by the Testator

When parents place restrictions on their children's right to inherit, those restrictions must be reasonable or the court will not enforce them. Nonetheless, a parent can disinherit a child for no particular reason. Courts typically do not analyze the motives of the testator. However, in some cases, even if the child is disinherited, he or she may still be allowed to inherit from his or her parent. Those cases usually involve children who are legally recognized as creditors or other persons who have a right to receive property from the decedent that is independent of their relation to the testator.

Estate of D.M.R., 735 N.E.2d 359 (Mass. 2000)

MARSHALL, C.J.

Pursuant to G.L. c. 215, § 13, and Mass. R. Dom. Rel. P. 64, a judge in the Probate and Family Court reserved and reported four questions concerning the financial obligations of a deceased father's estate to his minor child: "1. whether a testator, survived by a minor child to whom he owed . . . support pursuant to a court order, may disinherit that child pursuant to the [omitted child statute,] G.L. c. 191, § 20; "2. whether the child's claim for support is in the nature of a preferred creditor's claim; "3. whether a posthumous support obligation includes assets of an inter vivos trust; and "4. whether an order to secure postmajority educational support may be made in the circumstances of posthumous support."

We discuss the background facts and applicable law before answering the questions.

Background

The father died on November 20, 1994, at the age of fifty-five. He was divorced at the time of his death. He was survived by two children, an adult daughter from his only marriage, and a minor child (child) born on September 10, 1990, to the mother, L.W.K. (mother), to whom he was not married. The mother was forty-two years old at the time of the child's birth. Prior to the father's death, the mother brought a paternity action to establish him as her child's father. On June 11, 1992, after a hearing, a judge in the Probate and Family Court so determined, and ordered the father to pay child support of $100 a week to the mother, the order to remain in effect "until further order of the Court." The father paid the required child support until his death.

On June 3, 1994, the father executed a will that disinherited his minor child, leaving to her the amount of one dollar. He further directed that she "shall not be considered an heir-at-law of mine" nor "a child of mine or issue of mine for any purpose under this will." The will provided that, after the payment of specific monetary bequests and disposition of certain tangible property, the remainder of the estate be devised and bequeathed to a trust (trust) that the father had previously established on February 3, 1977. On the same day the father also signed a final amendment to the trust that restated all of the trust terms. The trust instrument authorized the trustees, on the father's death, to collect various life insurance policies and any devises and bequests made by the father to the trust. The trust named the father's sister (sister) and his adult daughter (the only child from his quondam marriage) as the sole beneficiaries.

After the father's death, the sister was appointed executrix of his estate. She filed a Federal estate tax return that listed the father's total gross estate as $800,398, and a taxable estate of $648,722. On the death of the father, the mother filed a claim for Social Security benefits on her child's behalf based on the father's participation in the Social Security system. It was determined that the child, as a qualified minor, was entitled to receive at that time $849 a month in Social Security benefits. The child is entitled to receive these benefits until she turns eighteen or until her nineteenth birthday if she has not finished high school. The child is now ten years old. Her mother has the sole responsibility for her care and upbringing. The child's only source of income is the Social Security benefits, in addition to support from her mother. A guardian ad litem, appointed to represent the

child's interests in the father's estate, filed a complaint for modification of the child support order entered in 1992, and a notice of claim against the estate seeking further support payments for the child. Sometime later, a petition for authority to compromise was filed in the estate probate proceeding in which the mother and the sister (executrix of the father's estate) agreed to a settlement of all claims of the child in the amount of $10,000. A second guardian ad litem, appointed to represent the child's interests, filed an opposition to the compromise.

After a hearing, the compromise was dismissed and an attorney was appointed to represent the child in the modification action. The judge allowed a joint motion filed by the mother and the executrix to amend the complaint for modification to add the trustees as defendants. The parties submitted a statement of agreed facts and made a joint request for rulings. The judge ruled preliminarily that (1) the father could not disinherit his minor child to defeat his support obligations; (2) the assets of the inter vivos trust and the estate are subject to the child's support claim; (3) she had the authority to enter an order against the father's estate for future educational support of the child; and (4) the child's receipt of Social Security benefits did not bar further claims for support. Because the judge determined that the case presented questions of first impression, and that answers to the questions materially affected the merits of the claim for modification, she reserved and reported four questions and stayed the proceedings pending an appellate ruling. We granted the defendants' application for direct appellate review.

Questions One and Two.

For ease of discussion we address in tandem the first two questions. Testamentary freedom is not absolute, and certain preexisting obligations have priority over all testamentary dispositions. *See, e.g.*, *Harrison v. Stevens,* 305 Mass. 532, 535, 26 N.E.2d 351 (1940) (testamentary dispositions subject to the "claims of creditors and to administration expenses"); G.L. c. 191, § 15, 16 (spousal elective share takes priority over testamentary dispositions). *See also* H.J. Alperin & L.D. Shubow, Summary of Basic Law § 22.113, at 565 (3d ed.1996). A legally enforceable obligation to pay child support, like other financial obligations of the testator, takes precedence over testamentary dispositions and must be satisfied prior to any distribution of assets under the will. (citations omitted). A parent charged with an obligation to support his child cannot nullify that legal obligation by disinheriting his child pursuant to G.L. c. 191, § 20. Beyond satisfaction of his support obligation, however, a parent is free to exercise his testamentary discretion with respect to a minor child, as all others, and may disinherit her.

In order to answer questions one and two, therefore, we must resolve whether the order to the father to support his minor child survived his death. Specifically we must decide whether a child support order, made pursuant to G.L. c. 209C, §9, during the father's life, creates an obligation on his estate to continue support until his child reaches majority, or whether any obligations for her future support were extinguished by his death. The duty of a parent to support a minor child is statutory. *See, e.g.*, G.L. c. 208, § 28; G.L. c. 209, § 37; G.L. c. 209C, § 9. The question, therefore, is one of statutory interpretation. We conclude that the death of the father does not extinguish his duty to support his minor child. We do so for several reasons. First, contrary to the dissent, we are not legislating but applying unequivocal policy mandates of the Legislature to the specific facts of this case. For decades extending back into the Nineteenth Century, the Legislature has mandated and this court has recognized that parents have an obligation to support their minor children. The Legislature has expressed that duty in unmistakable terms: "It is the public policy of the commonwealth that dependent children shall be maintained, as completely as possible, from the

resources of their parents thereby relieving or avoiding, at least in part, the burden borne by the citizens of the commonwealth." G.L. c. 199A, §1, as amended through St.1998, c. 463, § 101 (approved with emergency preamble, Jan. 14, 1999). The Legislature has also decreed that the statutes concerning child support enforcement "shall be liberally construed to effectuate" that public policy. *Id.*

Second, in this Commonwealth there have been recent and profound legislative changes that have increased significantly the obligation of parents to support their children. Federal law has also increased significantly the obligations of parents for child support. Thus, both State and Federal law are explicit in providing for the broadest possible support of minor children by their parents. Moreover, under the Child Support Enforcement Act an "[o]bligor" is defined as "an individual, or *the estate of a decedent,* who owes *or may owe* a duty of support, or who is liable under a child support obligation," plainly suggesting that the Legislature intended liability for child support obligations to survive the death of a parent (emphasis supplied). G.L. c. 119A, § 1A. That the child support order was entered in a paternity proceeding other than a divorce proceeding is of no significance, for the Legislature has mandated that children born out of wedlock are entitled to the same rights and protections of the law as all other children. (citations omitted).

Third, the Legislature has imposed an explicit duty on parents who divorce and those who give birth to children out of wedlock to support their minor child until they attain their majority. General Laws c. 209C, § 1, imposes child support responsibility on a parent from the child's birth to the age of eighteen, and beyond that period if certain statutory and readily discernible circumstances exist. *See Doe v. Roe,* 23 Mass.App.Ct. 590, 594–595, 504 N.E.2d 659 (1987). *See also* G.L. c. 209, § 37 (imposing support obligations on separated parents of minor children). Where its terms are unambiguous, a statute must be held to mean what it plainly expresses. (citations omitted). In this case, the child support order is in force until the child is emancipated or "until further order of the Court." Neither of these contingencies has occurred. We are not free to add a further requirement, beyond what the Legislature has declared, that the father is responsible for the support of his child born out of wedlock "from [her] birth up to the age of eighteen," G.L. c. 209C, § 1, but only until his death.

Our ruling is also consistent with the declared public policy of this Commonwealth that dependent children shall be maintained "as completely as possible" from the resources of their parents. G.L. c. 119A, §1. See G.L. c. 209C, § 20. It would be inconsistent with that and other mandates of the Legislature to conclude that a father's court-ordered support obligation abated on his death, depriving his young daughter of the resources necessary for her maintenance. In an intact family, minor children have security against the loss of support when one parent dies, even in the case of testamentary disinheritance, because of the spousal elective share. G.L. c. 191, §§ 15, 16. *See also* G.L. c. 190, § 1 (spouse's right to share of property not disposed of by will); G.L. c. 193, §1 (surviving spouse listed first in schedule of persons entitled to appointment to administer intestate's estate); G.L. c. 229, § 1 (right of surviving spouse to bring wrongful death action). Children of divorced parents and children born out of wedlock do not have the same protection. For this reason, we are unpersuaded by the defendants' argument that our holding would unfairly discriminate against children from intact families.

Fourth, a conclusion that child support obligations survive the death of a parent is consistent with prevailing contemporary legal authority. *See, e.g.*, *Knowles v. Thompson,* 166 Vt. 414, 418, 697 A.2d 335 (1997), citing *Morris v. Henry,* 193 Va. 631, 636, 70 S.E.2d 417 (1952) ("text writers and a decided

majority of cases hold that under modern conditions liability of the father is not necessarily terminated by his death, and that there is no sound reason, unless prohibited by statute, why his estate should not be charged with his obligation to support his minor children"). *See also Edelman v. Edelman,* 65 Wyo. 271, 291–292, 199 P.2d 840 (1948), in which the Wyoming Supreme Court reached the same conclusion fifty years ago. The Uniform Marriage and Divorce Act § 316(c), 9A U.L.A. 102 (Master ed.1998), reflects this prevailing view: "Unless otherwise agreed in writing or expressly provided in the decree, provisions for the support of a child are terminated by emancipation of the child but *not by the death of a parent obligated to support the child* " (emphasis added). The comment to that section explains: "[T]his section terminates the obligation of a parent to support a child, only upon the child's emancipation. The *parent's death does not terminate the child's right to support,* and the court may make an appropriate order establishing the obligation of the deceased parent's estate to the child" (emphasis added). *Id.* at 103.

Finally, there is nothing in G.L. c. 191, § 20, that prohibits such a construction. That statute "forbids nothing and compels nothing; it merely provides a framework within which private testamentary decisions may be freely made." *Hanson v. Markham,* 371 Mass. 262, 265, 356 N.E.2d 702 (1976). Our conclusion interpreting the legislative mandate that child support obligations do not abate at death will not create any uncertainty for estate planning purposes. *See Hornung v. Estate of Lagerquist,* 155 Mont. 412, 419, 473 P.2d 541 (1970) ("the enforcement of an obligation for future support presents no greater problems than any other unliquidated claim against an estate"). Unlike alimony, an order to provide for the support of a minor child terminates at a specific age. Accordingly, the total amount of child support that a parent is obliged to pay may be readily determined—in contrast to an order to provide alimony that in many circumstances terminates only when a spouse remarries (a date uncertain in the future) or on the recipient's death (similarly uncertain). The protection of minor children, most especially those who may be stigmatized by their "illegitimate" status or who are not supported by divorced parents fully capable of doing so, has been a hallmark of legislative action and of the jurisprudence of this court. Consistent with the public policy so clearly articulated by the Legislature, the estate of the father in this case is charged with his court-imposed obligations to support his minor child.

Question Three

We consider whether the father's support obligation can be satisfied from the assets of his inter vivos trust. We conclude that all the assets of the inter vivos trust established by the father, under which he was the sole beneficiary entitled to funds at his request, and which he solely retained the power to modify, alter or revoke, must be included in the estate and, as such, must be made available to satisfy his child support obligations. Such a ruling is consistent with our law in closely related areas.

We have held that, for the purpose of determining a surviving spouse's elective share, G.L. c. 191, § 15, assets in an inter vivos trust over which the decedent had a general power of appointment, exercisable by deed or by will, constitute the estate of the deceased spouse. *See Sullivan v. Burkin,* 390 Mass. 864, 867, 460 N.E.2d 572 (1984). The Appeals Court has similarly recognized that creditors can reach the assets of an inter vivos trust to "the maximum amount which the trustee . . . could pay to [the trustee] or apply for his benefit," in order to satisfy the trustee's debts to them. *State St. Bank & Trust Co.* v. *Reiser,* 7 Mass.App.Ct. 633, 636, 389 N.E.2d 768 (1979). *See Nile v. Nile,* 432 Mass. 390, 734 N.E.2d 1153 (2000). *See also* Restatement (Second) of Trusts § 156(2) (1959); Restatement (Second) of Property § 34.3(3) comments h, j (1990). Our earlier decisions reason that, as to

property that a settlor may appoint to himself or his executors, the property could have been devoted to fulfilling debts or a widow's "special interests which should be recognized." *Sullivan v. Burkin, supra* at 869, 460 N.E.2d 572. We see no reason not to adopt the same reasoning for purposes of payment of a child obligation debt, and the defendants offer none.

Question Four (Discussion Omitted)

So ordered.

Notes and Questions

1. Parents are legally obligated to provide financial support for their children. Therefore, noncustodial parents must pay child support. Nonetheless, that duty ends when the parent dies. Since children do not have a right to inherit from their parents, their parents can disinherit them. However, should parents be permitted to disinherit minor and disabled children? What are the pros and cons of the majority approach which allows parents to disinherit their children regardless of their youth or disability?

2. What are the pros and cons of the Uniform Probate Code's approach to the omitted child problem?

3. Should parents be required to state reasons why they are disinheriting their children?

4. In light of the *Hodel* decision discussed in Chapter Seven, is Louisiana's forced heir statute unconstitutional? Is there a difference between prohibiting a person's property from being disposed of under the intestacy system and requiring that a portion of the person's property be disposed of under the intestacy system?

5. In all jurisdictions the spouse is entitled to a share of the decedent's estate whether he or she leaves a will or dies intestate. Therefore, a person cannot disinherit his or her spouse. In light of that fact, should a person be able to disinherit his or her minor and disabled children?

8.5 Disinheritance by Operation of Law (Slayer Rule)

On August 26, 1989, Erik and Lyle Menendez gunned down their parents in the den of their mansion in Beverly Hills. Their father, Jose, was shot in the head from point-blank range and their mother, Kitty, was shot multiple times while she attempted to escape. The prosecutor claimed that the young men committed the murders in order to inherit their parents' 14 million dollar estate. The brothers admitted to killing their parents, but maintained that their actions were the result of years of abuse. Eventually, the brothers were convicted of two counts each of first-degree murder and conspiracy to commit murder and sentenced to life in prison without parole. Because they were convicted of killing their parents the brothers will not be able to inherit their parents' estate. The law provides barriers to the child being able to inherit from his or her parent. In essence, the child is disinherited by the operation of law. A main barrier to inheritance is a slayer statute. The typical slayer statute provides that a person, including a child, who intentionally kills another person cannot inherit from that person's estate. The purpose of the slayer statute is to prevent a person from benefitting from his or her criminal act. The following is an example of a typical slayer statute.

West's Alaska Statutes Annotated § 13.12.803. Effect of homicide on intestate succession, wills, trusts, joint assets, life insurance, and beneficiary designations

(a) An individual who feloniously kills the decedent forfeits all benefits under this chapter with respect to the decedent's estate, including an intestate share, an elective share, an omitted spouse's or child's share, a homestead allowance, exempt property, and a family allowance. If the decedent died intestate, the decedent's intestate estate passes as if the killer disclaimed the killer's intestate share.

8.5.1 Application of the Slayer Statute

A person is classified as a slayer if the person participates in the willful and unlawful killing of another person. The person's participation can consist of his or her actually killing the person or acting as an accessory before or after the fact. In most jurisdictions, the killing must be intentional or reckless. However, the Alaska legislature decided to make its slayer statute applicable to intentional and unintentional killings.

8.5.1.1 Slayer Is Legally Disinherited

In the Matter of the Estate of Blodgett, 147 P.3d 702 (Alaska 2006)

CARPENETI, Justice.

Introduction

After being convicted of the criminally negligent homicide of his father, Robert Blodgett attempted to obtain the benefits devised to him under his father's will. Pursuant to Alaska's "slayer statute," the superior court found that Blodgett was not entitled to inherit under the will as a result of his conviction, and that no manifest injustice resulted from this forfeiture. Blodgett attacks this decision on statutory and constitutional grounds. Because we agree with the superior court that Blodgett failed to prove that excluding him from the benefits of his father's will would result in manifest injustice, we affirm that court's rejection of Blodgett's claims.

Facts and Proceedings

On September 14, 2003 Robert Blodgett caused the death of his father, Richard Blodgett. Blodgett was indicted for murder in the second degree and in January 2004 he entered a plea of no contest to criminally negligent homicide. His conviction led to a three-and-one-half-year term of imprisonment. Blodgett was named in the final will of his father, which left "all properties, bank accounts, stocks and insurance policies" to his children. In April 2004 Blodgett petitioned the superior court for a hearing to determine his rights to participate in the probate proceedings under the Alaska probate code and AS 13.12.803. The other will beneficiaries consented to the hearing, but, contending that the killing of Richard Blodgett was not "unintentional," argued that AS 13.12.803 precluded Blodgett from receiving any property under the will.

After additional briefing and a one-day evidentiary hearing, Superior Court Judge Ben Esch issued a Memorandum and Order denying Blodgett's petition and preventing him from obtaining any benefits under the will. The court explained that under AS 13.12.803 forfeiture was mandatory unless the slayer proved by a preponderance of the evidence that this would result in manifest injustice. The court concluded that Blodgett failed to make such a showing. The court considered, and rejected, possible factors it thought might colorably result in manifest injustice, including past family relationships and Blodgett's monetary needs. It found the "great deal of testimony about the nature of the past relationship" between Blodgett and his father "unhelpful" and irrelevant in determining "the justice of denying or allowing recovery." It also concluded that Blodgett retained sufficient income earning capacity and property holdings that he "would not be beggared if he did not receive these funds." While the court made no specific findings as to Blodgett's culpability in his father's death, Blodgett was sentenced to three and one-half years in prison after he pled guilty to criminally negligent homicide. Blodgett appeals.

Discussion

A. The Superior Court Did Not Abuse Its Discretion In Concluding That Forfeiture of the Inheritance Would Not Result in Manifest Injustice.

The common law has long followed the policy that "no one should be allowed to profit from his own wrong." Accordingly, many state courts exercised their equitable powers and followed this maxim in construing probate statutes to prevent inheritance by an heir who murdered the decedent. Over the years most states codified this rule into what became known as the "slayer statutes." The original Alaska slayer statute, passed in 1972, applied when the offender "feloniously *and intentionally* kills" the decedent. The requirement that the homicide be intentional was taken from the common law rule and the Uniform Probate Code's articulation, both of which endorse the policy that a wrongdoer should not profit from his own wrong.

In 1988 the legislature passed an amendment removing the words "and intentionally" from the statute. The amended statute on its face applied to homicides covered in AS 11.41.100 to140 that is, including criminally negligent homicide. The initial intent of the 1988 amendment was to prevent parents who caused the death of their child— even if unintentionally—from recovering damages through the child's estate. This concern followed a case in which a parent failed to act to bring a child to the hospital (an act of criminal negligence) resulting in the child's death. During debate on the bill, one representative suggested that the rule apply to all homicides, not just to those perpetrated against children. The final draft of the amendment incorporated this suggestion by simply removing the requirement of intent.

Shortly after this amendment, Alaska Governor Steve Cowper expressed concern that under unusual circumstances, it might be unjust to prohibit a killer from taking the property of the victim, such as in the case of an unintentional felonious killing. Accordingly, another amendment was adopted in 1989, creating the manifest injustice exception for unintentional homicides now found in subsection (k):

In the case of an unintentional felonious killing, a court may set aside the application of [the slayer statute] if the court makes special findings of fact and conclusions of law that the application of the subsection would result in a manifest injustice and that the subsection should not be applied.

The statute also instructs that acquisitions of property not covered by the section "shall be treated in accordance with the principle that a killer may not profit from the killer's wrong." This has remained the law in Alaska. Thus, the legislature broadened the application of the slayer statute— by extending it to unintentional killings— and created an escape clause— by enacting the manifest injustice exception.

Under the current Alaska criminal code, all unjustified forms of killing are deemed felonies. This includes murder in the first degree, murder in the second degree, manslaughter, and criminally negligent homicide. Thus, Alaska's slayer statute encompasses intentional as well as unintentional homicides.

When compared with the slayer statutes of other jurisdictions, Alaska's slayer statute emerges as unique. No other state has a manifest injustice provision for unintentional homicides. But in the great majority of other states, such a provision would be unnecessary—in these states only intentional homicides are within the statutes' reach. Many of these statutes are modeled after the Uniform Probate Code. Following the common-law slayer rule, the current Uniform Probate Code slayer statute applies to an "individual who feloniously and intentionally kills the decedent." The comments clarify that "this section . . . excludes the accidental manslaughter killing." The Restatement (Third) of Property takes a similar position, and its formulation of the law "does not apply if the killing was reckless, accidental, or negligent."

As noted, the great majority of state slayer statutes require that the homicide be intentional. A minority of jurisdictions resemble Alaska in merely requiring the killing to be unlawful, rather than intentional. But even among this minority of jurisdictions, some would only cover homicides with culpable mental states as low as "recklessness," and at least one has followed a judicial opinion reading an intent requirement into its slayer statute. Thus, when compared to the practices of most other jurisdictions, Alaska's slayer statute has a much broader reach that would preclude inheritance for unintentional killers where other jurisdictions would not.

The legislature tempered the broad reach of AS 13.12.803 by investing trial courts with discretion to stay its application in those cases where manifest injustice would result. Should inheritance be denied to the unskilled teenager who drives his car in a criminally negligent manner and accidentally causes the death of a sole remaining parent? The legislature clearly decided that in such a case there should be discretion in the court to consider the specific facts of the homicide and, if denial of inheritance would be manifestly unjust, to permit it. Nor does this power to avoid the rule conflict with the policy underlying the slayer rule: that a killer should not profit from the killer's own wrong. Where the killer's act was not intentional, and especially where the act was not even reckless, and where other circumstances mitigate the crime, the application of this principle may lead to unduly harsh results. Indeed, the unintended killing of a loved one, as in the example above, would likely cause the inadvertent killer far greater personal ruin than monetary gain. In this case, Blodgett was convicted of criminally negligent homicide after a plea of no contest. This conviction conclusively established a felonious killing under the slayer statute. Because a criminally negligent homicide is an unintentional homicide, under subsection (k) Blodgett is entitled to avoid the effects of the slayer statute if he proves by a preponderance of the evidence that applying the statute to him will result in manifest injustice.

We have not had occasion to define the phrase "manifest injustice" as used in the slayer statute, or to set out the relevant factors that a trial judge should consider when ruling on this question.

Similarly, because no other state slayer statute contains a provision similar to subsection (k), out-of-jurisdiction case law provides no ready assistance. However, the Alaska Court of Appeals has interpreted this phrase in another, similar context. In criminal presumptive sentencing, the legislature enacted a "safety valve" provision that permits review of a sentence by a special three-judge panel upon a showing of manifest injustice. In *Smith v. State,* the court of appeals equated manifest injustice with that which is "plainly unfair." Later, in *Beltz v. State* the court of appeals held that a presumptive term cannot be manifestly unjust "in general" but only "as applied to a particular defendant." Before finding manifest injustice, the court held that the "judge must articulate specific circumstances that make the defendant significantly different from a typical offender within that category or that make the defendant's conduct significantly different from a typical offense." We adopt *Beltz's* approach for the purpose of applying subsection (k) of Alaska's slayer statute.

Thus, the relevant comparison here is between Blodgett's conduct and that of a typical offender convicted of negligent homicide. In the criminal proceedings, Blodgett was sentenced to three and one-half years in prison. This sentence approaches the presumptive term for second felony offenses, suggesting that the superior court did not believe Blodgett's acts fell at the lowest level of culpability for a negligent homicide. Given the length of the sentence, we are reassured that the court below considered Blodgett's conduct in relation to other similarly situated defendants when it rejected Blodgett's claim of manifest injustice.

Blodgett attempted to prove that enforcement of the slayer statute would result in manifest injustice by introducing evidence regarding (1) past family relationships, and (2) possible impecunity if denied the benefits of inheritance. The court found that Blodgett failed to meet his burden of proving, by a preponderance of the evidence, extraordinary circumstances that would have made it manifestly unjust to exclude him from his father's will. We agree.

The court described the evidence regarding family relationships as "unhelpful." While the court's statement that the "nature and quality of the relationship between these parties during life seem unrelated to the fairness of allowing the killer to benefit after the decedent's death" may be a narrow interpretation of the relevance of past relationships generally, we do not believe it was an abuse of discretion under the circumstances of this case. Witnesses testified that Blodgett and his father shared a relationship of "tough love," a "good relationship" marked with occasional "squabblings" typical of father-son relationships. Such testimony neither proves nor refutes the fairness of forfeiting Blodgett's inheritance. The court did not abuse its discretion in deciding that Blodgett failed to prove manifest injustice on this ground.

The court also examined Blodgett's argument that "it would be unjust to deny benefits under the will to someone who is physically disabled, who faces unknowable future medical expenses, who has a compromised earning capacity and has ongoing psychological needs." The superior court noted that, although Blodgett suffered some medical disabilities, Blodgett's own witness testified that he "is adept at the operation of heavy equipment and has skills as a mechanic." The court found that these skills could lead to employment with yearly compensation ranging between $40,000 and $50,000 per year. It also found that Blodgett owns other property and that future medical expenses will likely be met through the Alaska Native Health Service. In light of this testimony, the court concluded that Blodgett "would not be beggared if he did not receive these funds." Consequently, the court found that Blodgett failed to prove manifest injustice based on monetary need.

While we believe the court did not abuse its discretion in making this determination, we are concerned that the court's analysis could lead to the conclusion that a showing of manifest injustice may turn on predictions concerning the future financial health of the petitioner. Such an approach would allow slayers of their decedents to inherit if they are poor, but not if they are financially solvent. We doubt that this distinction— between different slayers based on their personal wealth— reflects the legislature's purpose in enacting the manifest injustice provision.
Despite these concerns, we conclude that the superior court did not abuse its discretion in finding that Blodgett failed to prove manifest injustice by a preponderance of the evidence.

Conclusion

Because the superior court did not abuse its discretion in concluding that manifest injustice would not result from application of the slayer statute, we affirm the decision of the superior court.

8.5.1.2 Slayer's Descendant May Not Be Legally Disinherited

In the Matter of the Estate of Van Der Veen, 935 P.2d 1042 (Kan. 1997)

ALLEGRUCCI, Justice:

This is an appeal from the decision of the district court denying one-half of the estate of Morris and Deanne Van Der Veen to their biological grandchild, D.B.B. Decedents' son, Kent Van Der Veen, was disqualified under K.S.A.1996 Supp. 59-513 (slayer statute) from inheriting any portion of their estate. The case was transferred from the Court of Appeals to this court pursuant to K.S.A. 20-3018(c).

The facts are not in dispute. The matter was decided by the district court on the following stipulated facts: The decedents, Morris and Deanne Van Der Veen, were the parents of Kent. On or about April 30, 1993, Kent murdered his parents. Kent was 19 years old at the time. Two years earlier, Kent fathered a child, who had been legally adopted by unknown persons prior to April 30, 1993. The decedents never were aware of the existence of the minor child.

Laura Ann Van Der Veen is the decedents' daughter. Decedents had no other heirs, devisees, or legatees. At the time Kent killed his parents, he had no testamentary instrument of his own.

The 1989 joint will of Morris and Deanne Van Der Veen provides for the following distribution of assets that remain after their debts and obligations are satisfied:

> "Upon the death of the survivor of us, each of us hereby gives, devises, and bequeaths all of the rest, residue, and remainder of our property of every kind, character, and description, and wherever located, unto our children, Laura Ann Van Der Veen and Kent Phillip Van Der Veen, equally and per stirpes."

In their will, the Van Der Veens bequeathed one-half of their estate to each of their children, Laura and Kent. It is agreed that Kent is statutorily disqualified from inheriting property from his parents. At all pertinent times, it has been provided by statute:

> "No person convicted of feloniously killing, or procuring the killing of, another person shall inherit or take by will[,] by intestate succession, as a surviving joint tenant, as a beneficiary under a trust or otherwise from such other person any portion of the estate or property in which the decedent had an interest." K.S.A. 1996 Supp. 59-513.

This appeal challenges the district court's determination that the statute prevails over the express terms of the Van Der Veens' will, resulting in D.B.B.'s being disinherited. The argument made on behalf of D.B.B. by her guardian ad litem is that the language of her grandparents' bequest to their children, "equally and per stirpes," must be construed to give what would have been Kent's share, if he had not been disqualified, to his heir, D.B.B. D.B.B.'s guardian ad litem further argues that D.B.B.'s adoptive status is irrelevant because K.S.A. 59-2118(b) provides that "[a]n adoption shall not terminate the right of the child to inherit . . . through the birth parent."

Appellee Laura Van Der Veen counters that the language of 59-2118(b), on which D.B.B. relies, was added in 1993 and became effective after the Van Der Veens' deaths. If the effective date of the amendment does not prevent it from applying in the present case, appellee further argues, the statute should be construed to restrict inheritance "through the birth parent" to instances where the birth parent has died. In other words, it should be interpreted so as to exclude inheritance through a birth parent who is alive but disqualified. In appellee's words, the statute should be interpreted so that the disqualified killer is treated as if he never existed rather than as if he had died.

We consider whether Kent's being barred from inheriting from his parents prevents the inheritance from passing through him to his child. This was the basis for the trial court's decision and has not been decided by the appellate courts of this state. The question has arisen in other jurisdictions, however, and has been pondered by commentators, scholars, and the National Conference of Commissioners on Uniform State Laws.

In *In re Estate of Benson,* 548 So.2d 775 (Fla.App.1989), a murderer's minor children were allowed to inherit his share of intestate and testate estates. Margaret Benson, the deceased testator, was the mother of Carol Benson Kendall, Steven Benson, and Scott Benson. Steven had minor children; Scott had no heirs. Steven killed Margaret and Scott. Margaret's will devised her property to her three children in equal shares and per stirpes. Scott died intestate. An intestacy section of Florida's probate code provides that the property of a decedent such as Scott, without parents or lineal descendants, passes to the decedent's siblings and the descendants of deceased siblings. Florida's "slayer statute" provides that "the estate of the decedent passes as if the killer had predeceased the decedent." 548 So.2d at 777. The trial judge applied Florida's anti-lapse statute in concluding that Steven's minor children inherited through him. The District Court of Appeals reached the same conclusion for somewhat different reasons:

> "It would have been the correct result in any event, i.e., whether the express provisions of the will were utilized or whether the Anti-Lapse Statute was used. Margaret Benson's will devised her property to her children 'per stirpes.'
>
> Even though the drafter of the will testified in the murder trial that she intended a class gift to her children, since a class gift is not expressly provided by the terms of the will even if the term 'per stirpes' had been omitted from the will, section 732.611, Florida Statutes (1985), would have applied to make the devises and bequests 'per

> stirpes.' Further, even if Margaret Benson's will had provided for a class gift to her three children, the Anti-Lapse Statute would have substituted Steven Benson's minor children in his place as a devisee under the will in the absence of a contrary intent expressed in the will." 548 So.2d at 778.

At the time *Benson* was being considered by the Florida District Court of Appeals, the pertinent section of the Uniform Probate Code (UPC) was worded like the Florida statute. Unif. Probate Code 2-803(a), 8 U.L.A. 172 (1983) provided that a surviving heir or devisee who intentionally and feloniously killed the decedent "is not entitled to any benefits under the will or under this Article, and the estate of decedent passes as if the killer had predeceased the decedent." Although the section was "substantially revised" in 1993, "the main thrust of the pre-1990 version" was not altered. Unif. Probate Code 2-803, Comment, 8 U.L.A. 200 (1996 Supp.). Subsections (b), (c), and (e) of the current version of 2-803 provide that a decedent's estate, intestate or under a will, passes as if the killer disclaimed his or her share. The effect of disclaimer, as established in Unif. Probate Code 2-801(d), 8 U.L.A. 196 (1996 Supp.) is as follows:

> "If property or an interest therein devolves to a disclaimant under a testamentary instrument . . . or under the laws of intestacy . . . the disclaimed interest devolves as if the disclaimant had predeceased the decedent, but if by law or under the testamentary instrument the descendants of the disclaimant would share in the disclaimed interest by representation or otherwise were the disclaimant to predecease the decedent, then the disclaimed interest passes by representation, or passes as directed by the governing instrument, to the descendants of the disclaimant who survive[s] the decedent."

The Kansas statute that sets out the effect of disclaimer is K.S.A. 59-2293(a). It provides generally that disclaimed property shall descend or be distributed as if the disclaimant had predeceased the decedent.

With regard to the UPC, the Tennessee Court of Appeals, in *Carter v. Hutchison,* 707 S.W.2d 533, 537 n. 10 (Tenn.App.1985), noted:

> "A vast majority of states enacting the forfeiture statutes have patterned them after the model statute proposed by Dean Wade in 1936, see J. Wade, [*Acquisition of Property by Willfully Killing Another—A Statutory Solution,* 49 Harv. L.Rev. 715, 753–55 (1936)], or the Uniform Probate Code. Thus, in twenty-nine states there is a statutory presumption that the victim's property passes to his estate as if the slayer had predeceased the decedent. *See* Uniform Probate Code §2-803 (1983) and J. Wade, *supra* n. 5 at 753 Section 4. Four states provide for forfeiture but are silent as to distribution. Tennessee is among ten states that provide for forfeiture and for distribution to the decedent's heirs through the laws of intestate succession. The eight remaining states without statutes have forfeiture provisions by court decision. See generally Maki & Kaplan, [*Elmer's Case Revisited: The Problem of the Murdering Heir,* 41 Ohio St. L.J. 905, 957 (1980)."

See W. McGovern, *Homicide and Succession to Property,* 68 Mich. L.Rev. 65, 66–67 (1969). It appears that Kansas is one of the few states that does not expressly provide for distribution of the forfeited share.

Turning to the present case, it is clear that under either version of the UPC, appellee would take one-half of the estate of her parents. The other half would be taken by her disqualified brother's minor child.

The Van Der Veens intended for their daughter to take one-half of their estate. Their knowledge of Kent's troubled nature is reflected in a provision of the Van Der Veens' will that nominates Laura to serve as Kent's guardian and conservator. Nonetheless, they bequeathed one-half of their estate to him. There is nothing in the instrument from which the court could conclude that the Van Der Veens intended for Laura to receive the entire estate in the event of Kent's incapacity or disqualification. By extension, it may reasonably be inferred that they would not have intended for Kent's innocent child to be disqualified in order for Laura to receive the entire estate.

Appellee invites the court to speculate that the Van Der Veens would not have intended for their unknown, illegitimate grandchild to share in their estate. We decline the invitation and note there is no factual support in the record for such a speculation.

The judgment of the district court is reversed.

8.5.2 Exceptions

Some acts that result in the death of a person may be exempt from the application of the slayer statute.

8.5.2.1 Assisted Suicide[82]

In re the Estate of Schunk, 760 N.W.2d 446 (Wis. 2008)

VERGERONT, J.

The issue on appeal in this probate action is the proper construction of WIS. STAT. § 854.14 (2003–04), which prevents a person who "unlawful[ly] and intentional[ly] kill[s]" another from benefiting under the decedent's will and other instruments. We agree with the circuit court that "unlawful and intentional killing" within the meaning of this statute does not include assisting another to commit suicide. We therefore affirm.

Background

Edward Schunk died from a self-inflicted shotgun wound. At the time of his death he was terminally ill with non-Hodgkin's lymphoma. He lived with his wife, Linda, and their daughter, Megan. Edward had six older children who are not Linda's children. Edward left a will that is the subject of dispute in another action, but for purposes of this action the important point is that Linda and Megan, along with others, are beneficiaries under Edward's will.

[82] Jeffrey G. Sherman, *Mercy Killing and the Right to Inherit*, 61 U. Cin. L. Rev. 803 (1993).

This action began with a petition for informal administration of Edward's estate. One of Edward's older daughters filed a demand for formal proceedings on the issue of whether Linda and Megan had unlawfully and intentionally killed Edward and were thus barred from inheriting under his will pursuant to WIS. STAT. § 854.14. Her position and that of four of her siblings, who joined with her in the proceeding (the objectors), is that Linda and Megan assisted Edward in committing suicide.

Linda and Megan filed a motion for summary judgment on this issue. They denied that they assisted Edward in committing suicide but contended that, even if that were true, WIS. STAT. § 854.14 does not bar them from inheriting under Edward's will. The objectors opposed the motion because in their view the statute applies to assisted suicide, and they contended they were entitled to a trial to establish that Linda and Megan did assist in Edward's suicide.

The factual submissions show that Edward was hospitalized several days before his death. According to the medical records, on the day of his death his doctor allowed him to leave on a one-day pass to see his home and his dogs "one more time." Linda and Megan brought him home. There are factual disputes over Edward's mental and physical condition on that day and what occurred after he arrived home. Viewed most favorably to the objectors, the evidence shows that Linda and Megan knew that Edward wanted to commit suicide and brought him home so that he could do so. They drove him to a cabin on their property, helped him inside, gave him a loaded shotgun, and left. Viewed most favorably to Linda and Megan, the evidence shows that Edward drove himself to the cabin, taking his gun and hunting bag, and they did not know that he intended to commit suicide. It is undisputed that Edward's son and grandson found him later that day in the cabin, dead from a single gunshot wound to the chest.

The circuit court concluded that, assuming the objectors' view of the evidence was correct for purposes of the motion, Linda's and Megan's conduct in assisting Edward in committing suicide did not come within the statutory language of "unlawful and intentional killing." WIS. STAT. §854.14. The court therefore granted summary judgment in favor of Linda and Megan.

Discussion

On appeal the objectors contend the circuit court erred in its construction of WIS. STAT. § 854.14 and therefore erred in granting summary judgment.

When we review summary judgment we employ the same methodology as the circuit court and our review is de novo. *Green Spring Farms v. Kersten,* 136 Wis.2d 304, 314–16, 401 N.W.2d 816 (1987). A party is entitled to summary judgment if there are no genuine issues of material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). In assessing the factual submissions, we view them most favorably to the opposing party and draw all reasonable inferences in favor of that party. *Burbank Grease Servs. v. Sokolowski,* 2006 WI 103, 294 Wis.2d 274, 717N.W.2d 781.

The parties here agree that, for purposes of our review, we, like the circuit court, are to accept the view of the evidence advanced by the objectors— that Linda and Megan assisted Edward in committing suicide. The issue is whether, given these facts, WIS. STAT. §854.14 bars Linda and Megan from inheriting under Edward's will.

When we construe a statute we begin with the language of the statute and give it its common, ordinary, and accepted meaning, except that technical or specially defined words are given their technical or special definitions. *State ex rel. Kalal v. Circuit Court,* 2004 WI 58, 271 Wis.2d 633, 681 N.W.2d 110. We may use a dictionary to establish the common meaning of a word. *Swatek v. County of Dane,* 192 Wis.2d 47, 61, 531 N.W.2d 45 (1995). We interpret statutory language in the context in which it is used, not in isolation but as part of a whole, in relation to the language of surrounding or closely related statutes, and we interpret it reasonably to avoid absurd or unreasonable results. *Kalal,* 271 Wis.2d 633, 681 N.W.2d 110. We also consider the scope, context, and purpose of the statute insofar as they are ascertainable from the text and structure of the statute itself. *Id.* If, employing these principles, we conclude the statutory language has a plain meaning, then we apply the statute according to that plain meaning. *Id.*

WISCONSIN STAT. § 854.14 (2003–04) provides in relevant part:

> (2) Revocation of benefits. Except as provided in sub. (6), the unlawful and intentional killing of the decedent does all of the following:
> (a) Revokes a provision in a governing instrument that, by reason of the decedent's death, does any of the following:
> 1. Transfers or appoints property to the killer
> . . . . .
>
> (3) Effect of revocation. Except as provided in sub. (6), provisions of a governing instrument that are revoked by this section are given effect as if the killer disclaimed all revoked provisions. . . .
> . . . .
>
> (6) Exceptions. This section does not apply if any of the following applies:
>
> > (a) The court finds that, under the factual situation created by the killing, the decedent's wishes would best be carried out by means of another disposition of the property.
> >
> > (b) The decedent provided in his or her will, by specific reference to this section, that this section does not apply.

The key phrase for purposes of this appeal is "unlawful and intentional killing of the decedent." WIS. STAT. § 854.14(2). The objectors contend that this plainly includes assisting the decedent to commit suicide. We disagree and conclude the phrase plainly does not include this conduct.

In the dictionary the objectors refer us to, the first definition of the verb "kill" is "to deprive of life." Webster's Ninth New Collegiate Dictionary 661 (1989). "To commit suicide" is defined as "to put (oneself) to death: kill." *Id.* at 1180. A person who assists another in voluntarily and intentionally taking his or her own life is plainly not depriving the other of life. As the assumed facts in this case illustrate, providing Edward with a loaded shotgun did not deprive him of his life: he deprived himself of life by shooting himself with the shotgun. "Killing" is not commonly used to describe assisting another to commit suicide, just as "killer" is not commonly used to describe the person who assists another to kill himself or herself.

The objectors argue that because Linda and Megan provided the means with which Edward killed himself, they were the agents of his death and thus "killers" within the meaning of the statute. We do not agree that "killer" is commonly understood to mean the person who provides the means that enable another to kill himself or herself.

The objectors point out that WIS. STAT. § 940.12 makes it a felony to "with intent that another take his or her own life assist[ ] such person to commit suicide. . . ." Thus, they assert, Linda and Megan acted unlawfully and the facts show they intended to help Edward commit suicide. However, "unlawful" and "intentional" modify "killing" by limiting its meaning. If, as we have concluded, assisting another to commit suicide is not "killing" another, it does not become so because the conduct is unlawful and intentional.

The objectors also argue that the exception in WIS. STAT. § 854.14(6)(b) shows that the legislature intended "unlawful and intentional killing" to include assisting another to commit suicide. This paragraph provides that § 854.14 does not apply if "[t]he decedent provided in his or her will, by specific reference to this section, that this section does not apply." According to the objectors, the only reasonable meaning of this exception is that it refers to assisted suicide, because the legislature could not logically have intended to permit a testator to expressly allow another to inherit under the will if that person committed "intentional homicide."

We conclude WIS. STAT. § 854.14(6)(b) does not alter the plain meaning of "unlawful and intentional killing." This paragraph plainly expresses the legislature's intent to allow a testator to dispose of his or her property as the testator wishes notwithstanding the fact that an intended beneficiary has unlawfully and intentionally deprived the testator of his or her life. It may be unlikely a testator would choose to do so, but we cannot say it is illogical or absurd to think a testator would ever do so. A testator might, for example, contemplate that an intended beneficiary might kill the testator in an act of euthanasia— "the act . . . of killing . . . hopelessly sick . . . individuals . . . for reasons of mercy," Webster's Ninth New Collegiate Dictionary 429 (1989); and the testator might want this to happen. There may be other circumstances that would reasonably come within the exception in para. (6)(b), but we need not define its parameters to resolve this appeal. The point here is simply that there are ways to reasonably construe the exception that are consistent with the common meaning of the verb "kill."

Conclusion

We conclude the circuit court properly construed "unlawful and intentional killing" in WIS. STAT. § 854.14 not to include assisting another to commit suicide. We therefore affirm.

Judgment affirmed.

8.5.2.2 Mentally Incompetent Slayer[83]

Estate of Armstrong v. Armstrong, 170 So.3d 510 (Miss. 2015)

RANDOLPH, Presiding Justice, for the Court:

This is a case of first impression regarding the interpretation of Mississippi Code Section 91-5-33, known as the "Slayer Statute," which states that anyone who "wilfully cause[s] or procure[s]" the death of another shall not inherit from his or her victim. John R. Armstrong, a severely mentally ill man, killed Joan Armstrong, his eighty-year-old mother. This fact is not disputed by any party. The Circuit Court of Jackson County determined that John was not competent to stand trial for the murder of Joan, and John was committed to the state hospital at Whitfield, where he resides today. Based on the Slayer Statute, John's four siblings requested that the devise to John in their mother's will be declared void. The chancellor granted their motion, and John, through his court-appointed guardian *ad litem,* appeals the ruling. Finding that a hearing to determine John's mental status at the time of the murder is necessary prior to granting the motion, we reverse and remand for a hearing consistent with this opinion.

STATEMENT OF FACTS AND PROCEEDINGS BELOW

On August 7, 2010, Joan Armstrong was contacted by several of her son's neighbors, who were worried about their children's safety, after they noticed John acting erratically. John had a long history of serious mental illness, having been treated since 1989. Joan picked up John at his apartment and brought him back to her condominium. Joan had invited some of her friends to come over to the condominium swimming pool. Worried that his mother was leaving him, John went upstairs and retrieved a crochet-covered brick, which he used to hit Joan repeatedly over the head. He then moved her body to the bathroom and repeatedly stabbed her. He informed law enforcement officers from the Ocean Springs Police Department (OSPD) that he was preparing her body to be buried by bleeding her.

Joan's death certificate listed her cause of death as "contusion of brain with subdural and subarachnoid hemorrhage [due to] multiple blunt force injuries of head." Joan also sustained multiple stab wounds and rib fractures. Joan's death was listed as a homicide due to the multiple strikes to her head.

John admitted to the OSPD that he had killed Joan. His confession was overheard by his sister-in-law, Lee. John was arrested and subsequently indicted for Joan's murder.

The circuit court ordered that John receive a mental evaluation and treatment from the state hospital at Whitfield, to determine if he was competent to stand trial. Dr. Reb McMichael, Chief of Forensic Services at the Mississippi State Hospital, opined that John was not competent to stand trial. The circuit court then committed John to Whitfield, ordering that he remain at that facility until he was declared competent to stand trial. John continues to undergo treatment at Whitfield.

[83]Laurel Sevier, Kooky Collects: *How the Conflict Between Law and Psychiatry Grants Inheritance Rights to California's Mentally Ill Slayers*, 47 Santa Clara L. Rev. 379 (2007).

Terry L. Armstrong, John's brother, filed a petition in the Chancery Court of Jackson County, Mississippi, to probate Joan's will. The will appointed Terry as executor. Joan left her estate equally to her five children. The petition listed the following children as Joan's sole heirs-at-law: Terry L. Armstrong, David Armstrong, Jill Seiler, Gail Jones, and John Armstrong. Joan's will was admitted to probate, and letters testamentary were granted to Terry, as executor. The chancellor also entered an order establishing Joan's heirs-at-law as Terry Armstrong, David Armstrong, Jill Seiler, Gail Jones, and John Armstrong.

Once the heirs-at-law were determined, Terry filed a Motion to Declare Devise Void as to John, based on the Slayer Statute. Terry requested that this motion not be heard until the pending criminal charges against John were finally resolved. Due to John's mental illness, Terry requested that a guardian *ad litem* be appointed. Terry also filed a Motion for Partial Distribution, acknowledging that significant time might pass before John's guilt was determined. Therefore, the assets of Joan's estate, exclusive of the portion assigned to John, should be distributed to the other four children. The chancellor entered an order distributing eighty percent of Joan's residuary estate equally to four of Joan's children and placing John's twenty percent in a supplemental needs trust.

Stacie E. Zorn was appointed to represent John as his guardian *ad litem*. In response to the motion to declare the devise to John void, John argued that Terry had failed to prove he willfully or feloniously caused the death of Joan; the matter was not ripe for hearing because there had been no adjudication of his guilt in the criminal matter; and that, due to his mental incapacity, he lacked the requisite intent to commit a willful act; therefore, the Slayer Statute was not applicable.

After the chancellor heard arguments on the motion, she entered an order declaring the devise to John void. The chancellor recognized that this was a case of first impression, as there had been no decision addressing whether a person determined to be mentally incompetent to stand trial could be considered to have "wilfully" caused the death of another. The chancellor determined that the meaning of "wilfully" should be interpreted within the civil context, and not the criminal context. The chancellor found the following evidence to be proof of John's willfulness in Joan's killing:

1. John was discovered at Joan's home with Joan's body by law enforcement. John was covered in Joan's blood.

2. In the immediate aftermath of the homicide, John confessed to law enforcement. This confession was witnessed by John's sister-in-law who offered testimony at this motion hearing.

3. OSPD, at the conclusion of their investigation, issued a Complaint alleging John, "feloniously, willfully and unlawfully with deliberate design" caused the death of Joan.

4. A Jackson County Grand Jury returned an indictment against John for the willful and felonious murder of Joan.

Based on the above evidence, the chancellor held that John willfully caused the death of his mother and could not benefit from her estate pursuant to the Slayer Statute. The chancellor stated that:

> [t]his is the type of behavior our Slayer Statute contemplates. Further, while it is acceptable under our justice system to allow a killer to escape criminal liability due to his mental illness, it would be a perversion of justice to allow him to

benefit from it in this instance, especially in a court of equity.

John timely filed notice of his appeal. The chancellor ordered that the portion of the estate set aside for John would remain in the registry of the court or other trust account pending the outcome of this appeal.

STATEMENT OF THE ISSUES

John presents the following three issues:

> I. Whether the Chancery Court was precluded from ruling upon the Executor's Motion to Declare Devise Void under the Mississippi slayer statute, Mississippi Code Annotated § 91-5-33, when there has been no outcome in John's criminal proceedings due to his mental incapacity to stand trial at this time.
>
> II. Whether an individual charged with murder but not tried due to mental incapacity may be precluded from inheriting under the Mississippi slayer statutes, Mississippi Code Annotated §§ 91-1-25 and 91-5-33.
>
> III. Whether the Executor presented sufficient evidence to prove that the killing of Joan Armstrong was intentional on the part of John Armstrong.

ANALYSIS

Findings of a chancellor will not be disturbed on review unless the chancellor was "manifestly wrong, clearly erroneous, or applied the wrong legal standard." *Bluewater Logistics, LLC v. Williford*, 55 So. 3d 148, 166 (Miss. 2011)(quoting *Powell v. Campbell*, 912 So. 2d 978, 981 (Miss. 2005)). The Court will review a chancellor's judgment for abuse of discretion. *Hotboxxx, LLC v. City of Gulfport*, 154 So. 3d 21, 24 (Miss. 2015)(citing *Mississippi Power Co. v. Hanson*, 905 So. 2d 547, 549 (Miss. 2005); *McNeil v. Hester*, 753 So.2d 1057, 1063 (Miss. 2000). For questions of law, the Court will apply the *de novo* standard of review. *Hotboxxx*, 154 So.3d at 24.

When called upon to examine a statute, "the Court first looks to the language of the statute." *Lawson v. Honeywell Intern, Inc.*, 75 So. 3d 1024, 1027 (Miss. 2011) (citing *Pinkton v. State*, 481 So.2d 306, 309 (Miss. 1985)). "If the words of a statute are clear and unambiguous, the Court applies the plain meaning of the statute and refrains from using principles of statutory construction." *Id.* (citing *Clark v. State ex rel. Miss. State Med. Ass'n* 381 So.2d 1046, 1048 (Miss. 1980)). Section 91-5-33 of the Mississippi Code reads in pertinent part:

> If any person shall *wilfully* cause or procure the death of another in any manner, he shall not take the property, or any part thereof, real or personal, of such other under any will, testament, or codicil. Any devise to such person shall be void and, as to the property so devised, the decedent shall be deemed to have died intestate.

Miss. Code Ann. § 91-5-33 (Rev.2013) (emphasis added).

The key word in this statute is "wilfully." In the criminal context, this Court has addressed the

meaning of "wilfully," finding that it is synonymous with "knowingly" and "intentionally."

The Court has held that terms "willfully" and "knowingly" have substantially the same meaning in criminal statutes. *Ousley* [*v. State*], [154 Miss. 451,] 122 So. [731,] 732 (1929)] (indictment was sufficient even though it used the words "willfully, unlawfully[,] and feloniously" rather than "knowingly" as used in the statute). *See also Boyd v. State,* 977 So.2d 329, 335 (§ 22) (Miss. 2008)*(*"An act 'willfully' done is an act 'knowingly' and 'intentionally' done."); *Moore v. State*, 676 So. 2d 244, 246 (Miss. 1996) ("willfully" has the same meaning as "knowingly"). Relying on *Ousley,* the Court of Appeals held that the terms "wilfully and feloniously" had substantially the same meaning as "purposely or knowingly" when ruling on the sufficiency of a jury instruction for aggravated assault *Davis v. State*, 909 So.2d 749, 752-53 (§ 13) (Miss. Ct. App. 2005). *State v. Hawkins*, 145 So. 3d 636, 641 (Miss. 2014). In *Ousley,* this Court held that "[a] willful act is one that is done knowingly and purposely with the direct object in view of injuring another." *Ousley*, 122 So. At 732 (quoting Hazle v. So. Pac. Co., 173 F. 431 (C.C.D. Or. 1909)).

Additionally, the Model Penal Code reads that "[a] requirement that an offense be committed wilfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears." Model Penal Code § 2.02(8) (1962). A person acts "knowingly" with respect to a material element of an offense "if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist" and "if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result." Model Penal Code § 2.02(2)(b)(i)-(ii) (1962).

However, Section 91-5-33 is a civil statute. The usual meaning of "willful" in tort law is that an "actor has intentionally done an act of an unreasonable character in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow." W. Prosser, *Handbook of the Law of Torts* § 34 (1971).

This Court has held that a person who willfully causes the death of another is barred from participating in the victim's estate. *Genna v. Harrington*, 254 So.2d 525, 527 (Miss. 1971). "Mississippi's Slayer Statute is strictly construed and narrow in purpose." *In re Estate of Miller*, 849 So. 2d 703, 706 (Miss. 2003). "The sole purpose of a 'slayer statute' is to prevent the slayer from benefitting from the death of the victim or profiting from the wrongdoing." *Id.* (quoting 26B C.J.S. *Descent and Distribution* § 57, at 362-63 (2001)).

Mississippi courts have not addressed whether the Slayer Statute precludes insane persons from inheriting from their victims. Some cases have discussed manslaughter pleas, which are beneficial to this analysis. In *Henry v. Toney*, 211 Miss. 93, 50 So.2d 921 (951), the Court was presented with the issue of whether John Henry willfully caused the death of his wife, such that he could not inherit her land. Henry was charged with second-degree murder but pleaded guilty to manslaughter. *Id.* at 922. The Court noted that, under Mississippi statutes, manslaughter is not necessarily a willful killing. *Id.* at 923. "For that reason, it is obvious that such plea cannot be conclusive evidence of guilt of such a killing. On the contrary, it can amount to only slight evidence, or evidence merely that the killing has occurred." *Id.* The Court reversed the finding of the trial court that Henry could not inherit his wife's property and remanded the case for a new trial, instructing the trial court that "all evidence which will throw any light on the issue of whether or not this killing was willful is competent and admissible." *Id.*

In *Hood v. Van Devender*, 661 So. 2d 198 (Miss. 1995), Linda Van Devender killed her husband. Linda was charged with murder, pleaded guilty to manslaughter, and received a twenty-year-suspended sentence. *Id.* at 201. No further evidence of culpability was offered by her husband's estate. *Id.* The chancellor determined that the estate had failed to show that Linda willfully killed her husband. *Id.* at 200.

On appeal, the Court considered "whether evidence of a guilty plea to the charge of manslaughter is sufficient, standing alone, to enable a fact finder to conclude that one is prohibited from inheriting under our statutes which precluding one who willfully kills another from inheriting from that person." *Id.* at 201. Relying on *Franklin Life Insurance Company v. Strickland*, 376 F.Supp 280, 283 (N.D. Miss. 1974) ("Although a plea of guilty in a criminal proceeding and conviction thereon are clearly admissible in evidence, they are ordinarily not conclusive on the pleader and may be explained or rebutted in a subsequent civil case."), *Henry*, 50 So. 2d at 923 (Pleading guilty to manslaughter is only "slight evidence, or evidence merely that the killing has occurred."), and Mississippi manslaughter statutes which do not require willfulness, the Court ruled that Linda was not prohibited from inheriting from her deceased husband's estate. *Hood*, 661 So.2d at 201.

Numerous courts have held that an insane person would not be precluded by a slayer statute from inheriting from his or her victim, due to their mental condition at the time of the killing. *See Estates of Ladd,* 91Cal. App.3d 219, 226, 153 Cal. Rptr. 888 (Ct. App. 1979)(Court held that a mother, who was insane at the time she murdered her two sons, was not barred from inheriting her two sons' estates by statute, which provides that no person who has unlawfully and intentionally caused the death of a decedent shall be entitled to succeed to any portion of estate or to take under any will of decedent, because insane persons are not capable of acting "intentionally."); *Hill v. Morris*, 85 So.2d 847, 851 (Fla. Sup. Ct. 1956)("The effect of the judgment of acquittal by reason of insanity was to establish conclusively that petitioner was not guilty of the public offense with which she was charged, because as a matter of criminal law she lacked the capacity to commit the crime." Therefore, the court held the insane widow was permitted to inherit from her deceased husband.); *Turner v. Estate of Turner*, 454 N.E. 2d 1247, 1252 (Ind.Ct. App. 1983)(The court ruled that the equitable doctrine which sought to bar a person from profiting from his wrongful conduct had no application where an insane person shot and killed his parents.); *Ford v. Ford*, 307 Md. 105, 122, 512 A.2d 389, 398 (1986) (The court held that the slayer's rule was not applicable when the killer was not criminally responsible at the time he committed the homicide.); *In re Vadlamudi Estate*, 183 N.J. Super. 342, 443 A.2d 1113 (1982) (An insane slayer was allowed to inherit from her husband's estate.); *In re Wirth's Estate*, 59 Misc.2d 300, 302-03, 298 N.Y.S.2d 565, 567-68 (Sur. 1969) (Court determined it was not against the state's public policy to permit someone who has killed "while insane subsequently to take a share of the estate of the deceased or the proceeds of a policy of life insurance on the life of the deceased of which the insane killer is beneficiary."); *In re Lupka's Estate*, 56 Misc.2d 677, 289 N.Y.S.2d 705 (Sue. 1968) (New York court held that a husband could take under his wife's will although the wife died from effects of assault by husband, where husband was mentally ill at time of assault.); *Quick v. United Benefit Life Ins. Co.*, 287 N.C. 47, 213 S.E.2d 563, 566 (1975) (Court prevented slayer statute's application in cases of involuntary manslaughter, justifiable or excusable homicide, accidental killing or where the slayer was insane.); *Hoffman's Estate*, 39 Pa. D & C. 208, 209-10 (1940)(Wife who killed her husband but found to be insane was entitled to share in her husband's estate.); *De Zotell v. Mutual Life Ins. Co.*, 60 S.D. 532, 245 N.W. 58, 65 (1932) (South Dakota's slayer's rule requires that the killer be "sane" for it to apply.); *Simon v. Dibble*, 380 S.W.2d 898, 899 (Tex. Civ. App. 1964) (A Texas court determined the husband could inherit from the wife

he killed because an insane person was not capable of willfully taking the life of another.); *In re Estate of Mahoney*, 126 Vt. 31, 220 A.2d 475 (1966)(Court determined slayer statute would not be applicable if the slayer was insane.).

Other courts have held that the slayer rule is applicable, even if the killer was insane at the time of the murder. *See Dougherty v. Cole,* 401 Ill. App.3d 341, 348, 343 Ill. Dec. 16, 934 N.E. 2d 16, 22 (Ill. App. Ct. 2010) (The court determined that, although an individual was insane for criminal purposes, he was nevertheless cognizant that he was killing a person; therefore, the Slayer Statute prevented the killer from benefitting from his actions.); *Osman v. Osman*, 285 Va. 384, 73 S.E. 2d 876, 879 (2013) (Virginia's slayer statute provides that in the absence of a conviction for murder or voluntary manslaughter, "a slayer shall mean any person 'who is determined, whether before or after his death, by a court of appropriate jurisdiction by a preponderance of the evidence to have committed [murder or voluntary manslaughter].' " The court determined that the stipulated evidence "clearly demonstrated that Osman intended to kill his mother; therefore, he should not be allowed to profit from his wrongdoing."); *In re Estate of Kissinger*, 166 Wash. 2d 120, 122, 132, 206 P.3d 665, 666, 671 (2009)(The court held that a not-guilty-by-reason-of-insanity verdict is not a complete defense to the slayer statute. "An action under the slayer statute is civil, and the determination of whether a slaying was willful and unlawful must be made in civil court notwithstanding the result of any criminal case. A finding of not guilty by reason of insanity does not make an otherwise unlawful act lawful." The court determined that Hoge's actions were willful and unlawful when he killed his mother, and Hoge was barred from recovering from his mother's estate.).

It is clear from well-established precedent that willful is synonymous with intentionally, knowingly, deliberately, and purposely. In order for the Slayer Statute to apply to this case, John must have acted willfully in killing his mother. The record reveals that John has suffered from hallucinations and delusions for more than two decades. He has been diagnosed as a paranoid schizophrenic. John's thoughts are disorganized and very difficult to understand, and he often speaks in "word salad," which means that he uses words that are unrelated and disconnected. However, the record is silent as to John's mental state at the time of the killing.

In this matter of first impression, this Court concludes that Mississippi should follow the majority of states and holds that the Slayer Statute requires a finding of *willful* conduct to preclude a person from inheriting from his or her victim. Because an insane person lacks the requisite ability willfully to kill another person, the Slayer Statute is not applicable in cases where the killer is determined to be insane at the time of the killing.

> [T]he words used by Mr. Justice Nelson, when Chief Justice of New York, said that "self-destruction by a fellow being bereft of reason can with no more propriety be ascribed to the act of his own hand than to the deadly instrument that may have been used by him for the purpose," and "was no more his act, in the sense of the law, than if he had been impelled by irresistible physical force."

Great S. Life Ins. Co. v. Campbell, 148 Miss. 173, 114 So. 262, 263-64 (1927) (quoting *Manhattan Life Ins. Co. v. Broughton*, 109 U.S. 121, 132, 3 S.Ct. 99, 105, 27 L.Ed. 878 (1883)).

While this result is grounded in legal precedent, it may prove to be unsettling to some. However, it is not the duty of this Court to determine public policy. If the law as it now exists is in need of change, that task is for the Legislature.

CONCLUSION

Based upon this Court's holding that the Slayer Statute requires a finding of *willful* conduct in order to preclude a person from inheriting from his or her victim, this judgment is reversed and the case is remanded for a hearing to determine John's mental status at the time of the murder and whether he wilfully caused Joan's death. The Slayer Statute will be applicable only if it is proven that, at the time of the murder, John's actions were willful. The chancellor is instructed that "all evidence which will throw any light on the issue of whether or not this killing was willful is competent and admissible." *Henry,* 50 So. 2d at 923.

Reversed and remanded.

Notes and Questions

1. If a child kills his or her parent, that child cannot inherit from the deceased parent's estate. Should this barrier to inheritance be limited to murder? What if a child commits another crime against the parent like assault or financial exploitation? *See* Frances H. Foster, *Towards a Behavior-Based Model of Inheritance?: The Chinese Experiment,* 32 U.C. Davis L. Rev. 77 (Fall 1998).

2. Should the ability to inherit be linked to the relationship between the parent and the child? If a child mistreats or neglects a parent, should that child be permitted to inherit from that parent's estate?

3. In deciding whether or not a person should be prohibited from inheriting from the person he or she kills, the court must answer two main questions. First, the court must decide whether the slayer statute applies to the situation. The slayer statute usually does not apply unless the case involves an intentional or reckless killing. In some jurisdictions, crimes like assisted suicide are exempted from the slayer statute. Second, the court must decide whether the child has violated the statute. The statute has been violated if the child has been convicted of an intentional or reckless killing. Nonetheless, the child's acquittal does not preclude the probate court from concluding that the child has violated the slayer statute. The probate court is not bound by the decision reached in the criminal court and has the authority to conduct its own hearing to determine whether or not the persons has violated the statute. In the probate hearing, the standard of proof is preponderance of the evidence as opposed to the beyond a reasonable doubt standard applied in criminal court. For instance, O.J. Simpson was acquitted in a criminal court of killing his wife. However, the jury in the civil court found him liable for the murder. In the slayer context, the child may be acquitted in criminal court and found liable for the murder in the probate court. A finding of civil liability for the murder may be sufficient for the probate court to find that the child has violated the slayer statute. *See* Mary Louise Fellows, *The Slayer Rule: Not Soley A Matter of Equity*, 71 Iowa L. Rev. 489 (January 1986); Tara L. Pehush, *Maryland is Dying For a Slayer Statute: The Ineffectiveness of the Common Law Slayer Rule in Maryland,* 35 U. Balt. L. Rev. 271 (Winter 2005).

4. What are the arguments for and against slayer statutes? What components should be included in a slayer statute?

5. From a public policy perspective, is the *Van Der Veen* case wrongfully decided? Consider the following scenario. Madge is a wealthy woman who has one child, Samuel. Samuel and Madge do not have good relationship. Samuel has one child, Brenda. Brenda is sick and having trouble paying her medical bills and other living expenses. Samuel asks Madge for money to help Brenda, and Madge refuses. Samuel kills Madge. As a slayer, Samuel is not permitted to inherit. However, as Madge's sole legal heir, Brenda gets to inherit the entire estate. Samuel does not care that he cannot inherit because his main concern is insuring that Brenda gets the money that she needs. Is there any way for the legislature to modify the slayer statute to discourage this type of behavior? *See* Karen J. Sneddon, *Should Cain's Children Inherit Abel's Property?: Wading into the Extended Slayer Rule Quagmire*, 76 UMKC L. Rev. 101 (Fall, 2007).

Problems

(a) William had a difficult time dealing with his son's death. William started drinking regularly. He was arrested for DUI several times, and had the reputation of being the town drunk. On numerous occasions, William threatened to kill himself.

One night, Fred and his wife, Dana, had dinner with Fred's parents, Jennifer and William. William had spent most of the day drinking. William and Jennifer got into a heated argument and William threatened to kill himself. Fred, a police officer, went to his car and retrieved his service revolver. When he got back to the house, Fred handed the gun to William and said, "Don't just talk about it. Man up and do it."

Fred and Dana watched in horror as William shot Jennifer in the head. Before, they could stop him William shot himself in the stomach. William and Jennifer were rushed to the hospital. Jennifer was pronounced dead on her arrival at the hospital. William died two days later. In their joint will, William and Jennifer left all of their property to their children, Fred and Betty. The jurisdiction has a slayer statute. Should Fred be permitted to inherit from his parents? *See* Anne-Marie Rhodes, *Consequences of Heirs Misconduct: Moving From Rules to Discretion*, 33 Ohio N.U. L. Rev. 975 (2007).

(b) Ninety-five year old Anita was suffering from high blood pressure and dementia. Gus, Anita's only child, placed Anita in a long-term care facility. Since Anita was independently wealthy, she did not qualify for government assistance. Therefore, Anita's monthly long-term care facility fee was $6,000. Gus was Anita's sole heir. He was afraid that her stay in the long-term care facility would deplete all of her resources and prevent him from inheriting any money. Consequently, Gus removed Anita from the long-term care facility and hired a nurse to care for her at his house. Anita's doctors objected to the removal because they felt it was detrimental to Anita's health. Two months after she was removed from the long-term care facility, Anita wandered off, fell into a brook and drowned. The jurisdiction has a slayer statue. Should Gus be permitted to inherit from Anita?

(c) Sixteen-year old Angelina started dating twenty-one year old Todd. Angelina's parents objected to the relationship and prohibited Angelina from seeing Todd. One night, Angelina waited in the car while Todd entered her house and killed both of her parents. Angelina claimed she did not know that Todd planned to kill her parents. Todd was sentenced to life in prison. In exchange for her testimony against Todd, Angelina was tried in juvenile court and detained in a juvenile facility until she turned eighteen. The jurisdiction has a slayer statute. Should Angelina be permitted to inherit

from her parents? Mark Adam Silver, *Vesting Title in a Murderer: Where is the Equity in the Georgia Supreme Court's Interpretation of the Slayer Statute in Levenson?,* 45 Ga. L. Rev. 877 (Spring, 2011).

(d) George's wife died leaving him to raise his ten-year-old son, Pedro. George's son acted out as a teenager. George blamed himself for not being around when the boy was young. When Pedro was fifteen years old, George executed a will leaving his entire estate to Pedro. George included the following statement in his will. "I only want Pedro to inherit my property. I want him to have it no matter what. Pedro is my only child. If the state got my property, I would be heart broken." When he turned sixteen, Pedro started smoking marijuana and hearing voices telling him that George was the devil. One night, while George was sleeping, Pedro stabbed him to death. Pedro was George's sole living heir. If he does not inherit, the property will escheat to the state. The jurisdiction has a slayer statute. Should Pedro be permitted to inherit from George?

(e) Leonard hired April to kill his mother. Leonard was convicted of conspiracy to commit murder and sentenced to twenty-five years in prison. The jurisdiction has a slayer statute that prevents Leonard from inheriting from his mother. Leonard was required to pay restitution to his siblings. After Leonard serves his time in prison, is it fair that he should be prohibited from inheriting from his mother? Why? Why not?

Chapter Nine: Testamentary Capacity (Mental Competency and Insane Delusion)

9.1. Introduction

A probate attorney has two key roles: (1) to execute a will that carries out the testator's intent and (2) to create a will that is challenge-proof. Persons seeking to contest the probate of a will usually take two avenues—they challenge the testator's capacity to execute the will and/or they challenge the validity of the execution process. This chapter and Chapter 10 examine the ways in which the testator's ability to execute a legally enforceable will may be called into question. The cases in this chapter deal with the manner in which some defect in the testator may prevent him or her from being capable of executing a valid will. The cases in chapter 10 focus upon the way that the actions of other people may interfere with the testator's ability to execute a valid will. Chapter 11 and Chapter 12 discuss will contests based upon the testator's failure to follow the execution process.

According to the law in all states, in order to execute a will, a person must be at least 18 years old and of sound mind. The statutes do not include a definition of what it means for a person to be "of sound mind." When evaluating the soundness of a person's mind, lay persons think in psychological terms. For example, if a person has been diagnosed with some type of mental illness, the average person would say that person is not "of sound mind." However, a mentally ill person may be legally competent to execute a will.[84] The level of mental competence necessary to execute a will is very low compared to what is required to undertake other legal actions like executing a contract, obtaining a marriage license or executing a deed to transfer title to a piece of property.[85]

The attorney who prepares the will and assists in the execution process has a duty to determine whether or not his or her client is legally "of sound mind." Most attorneys have not been trained to make psychological evaluations. Thus, in order to determine if a client has testamentary capacity, an attorney must rely on the guidelines provided by the courts. In order to be deemed to have testamentary capacity, at the time that the will is executed, the testator must know the following: (1) the nature and extent of his or her property; (2) the persons who are the natural objects of his or her body; (3) the disposition he or she is making; and (4) the manner in which these facts related so far as to form an orderly plan for the disposition of his or her property. The attorney should take steps during the initial client interview to determine if his or her client can satisfy the testamentary capacity test.

Once an attorney concludes that his or her client can satisfy the mental capacity test, that may not be the end of the story. The client may do or say something to lead the attorney to believe that the client is suffering from a misconception that could hamper his or her ability to create a will. The insane delusion test is a two part test. The court first has to decide whether or not the testator was suffering from an insane delusion when the will was executed. Then, the court has to determine whether the dispositions the person made were a result of that delusion.[86] A delusion is insane even

---

[84] *Matter of Gentry's Estate*, 573 P.2d 322 (Or. App. 1978); *Briggs v. Kreutztrager*, 433 S.W.3d 355 (Ky. App. 2014).
[85] *Denson v. Moses,* 2 So. 3d 847 (Ala. App. 2008).
[86] *Breeden v. Stone*, 992 P.2d 1167, 1171 (Colo. 2000).

if there is some factual basis for the belief if a reasonable person in the testator's situation would not have drawn the conclusion reached by the testator. An insane delusion is different from a mistaken belief. An insane delusion is a belief not susceptible to correction by presenting the testator with evidence indicating the falsity of the belief. In this situation, a testator will refuse to believe the evidence that shows that he or she is wrong.[87] Consider this example. T believes that all cats are black. T's daughter shows him a white cat. T responds by telling his daughter that the animal she showed him could not be a cat because it is not black. On the other hand, a belief is a mistake if it is susceptible to correction if the testator is told the truth. Thus, if the testator's had responded to his daughter's actions by saying something like, "I never knew that white cats existed. Now I do."

As the next few cases illustrate, contestants seldom rely on testamentary capacity alone when seeking to have a will invalidated. This is the case because it is almost impossible to prove that a testator failed to meet the minimum capacity requirement. Thus, the argument is usually that the person's testamentary capacity was adversely impacted by other factors including insane delusion, fraud and undue influence.

9.2 Testamentary Capacity

In re Estate of Romero, 126 P.3d 228 (Colo. App. 2005)

HAWTHORNE, J.

In this formal testacy proceeding as to the estate of Robert Ramon Romero (decedent), decedent's children, Barbara A. Romero and Robert Ross Romero (contestants), appeal the probate court's judgment denying their petition for adjudication of intestacy. Decedent's sister, Dolores G. Vasquez, as devisee, opposed the petition. We affirm.

This case involves a contested probate of a formal will executed by decedent. The will named decedent's mother as personal representative and his sister as the successor personal representative. Decedent devised a gift of $500 to each of his children and left the remainder of his estate to his mother and sister in equal shares, with a provision that if either his mother or sister predeceased him, the remaining beneficiary would take the entire remainder. Because decedent's mother predeceased him, his sister was left as the sole beneficiary of the residuary estate.

Contestants filed objections, claiming that decedent did not have the testamentary capacity to execute a will. In support of their assertions, they relied primarily on the uncontested facts that decedent suffered from mental illness and that he had been a protected person under a Veterans Administration (VA) guardianship over his financial affairs.

A hearing was held on the petition for formal probate. Contestants presented, inter alia, expert witness testimony from the physician who treated decedent for schizophrenia. While this physician testified that decedent suffered from auditory hallucinations, the physician was unable to connect them with execution of decedent's will and, moreover, saw decedent for only a few minutes on three occasions during the eighteen months prior to the signing of the will. The probate court accordingly

[87] *In re Millar's Estate*, 207 P.2d 483, 487 (Kan. 1949).

discounted his testimony.

Instead, the probate court credited the testimony of the attorney who prepared the will, because it found him to be the only individual with personal knowledge of decedent's testamentary capacity when the will was executed. The attorney testified that he met with decedent on four separate occasions, including one visit to decedent's home. He testified that although decedent's mother transported decedent to and from the attorney's office, she was present neither during his conversations with decedent nor during the actual execution of the will, but remained in the office waiting area. He further testified that decedent expressed his desire to leave his entire estate to his mother and his sister because of his minimal contact with his children and in return for all the love and support he had received from his mother and sister over the years. The attorney also testified that it was only upon his suggestion that decedent made a small bequest to his children to demonstrate that his exclusion of them as primary beneficiaries was intentional. He further testified that he had "no doubt in his mind" when the will was executed that decedent fully understood the consequences of his action.

After considering all the evidence, the probate court found that contestants did not prove by a preponderance of the evidence that decedent was not of sound mind when he executed his will. The court held that neither the evidence of mental illness nor the mere existence of a VA guardianship was sufficient, in and of itself, to prove lack of testamentary capacity. It further found that decedent's sister had provided ample evidence that the will was a voluntary act and was not the product of undue influence. Accordingly, it granted the petition to admit the will to formal probate and to appoint decedent's sister as the personal representative of the estate in unsupervised administration.

I.

Contestants first contend that the probate court erred in failing to conclude that the will was invalid because decedent lacked testamentary capacity. We disagree.

A person has testamentary capacity if he or she is an "individual eighteen or more years of age who is of sound mind." Section 15-11-501, C.R.S. 2004. A testator's soundness of mind may be evaluated under either the test set forth in *Cunningham v. Stender*, 127 Colo. 293, 255 P.2d 977 (1953), or the insane delusion test. *See Breeden v. Stone,* 992 P.2d 1167 (Colo.2000).

Under the *Cunningham* test, a person has testamentary capacity when the person (1) understands the nature of the act, (2) knows the extent of his or her property, (3) understands the proposed testamentary disposition, and (4) knows the natural objects of his or her bounty, and (5) the will represents the person's wishes. *Cunningham v. Stender, supra.* An individual lacks testamentary capacity under the insane delusion test when he or she suffers from an insane delusion that materially affects the disposition of the will. *Breeden v. Stone, supra.*

Once a proponent of a will has offered prima facie proof that the will was duly executed, any contestant has the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation by a preponderance of the evidence. Section 15-12-407, C.R.S. 2004; *Breeden, supra*, 992 P.2d 1170.

A.

Contestants maintain that the facts demonstrated that decedent did not know the extent of his property and therefore lacked testamentary capacity testamentary capacity under that prong of the *Cunningham* test. We are not persuaded.

A finding of fact will not be set aside on appeal unless it is clearly erroneous. C.R.C.P. 52; In re *Estate of Gallavan*, 89 P.3d 521, 523 (Colo.App.2004) (probate court's findings under *Cunningham* and the insane delusion test will not be set aside if there is evidence in the record to support them). Evaluation of the credibility of witnesses, including expert witnesses, is a matter solely within the fact finding province of the trial court, and we will not reweigh testimony or reevaluate evidence on appeal. *See CF & I Steel, L.P. v. Air Pollution Control Div.,* 77 P.3d 933, 937 (Colo.App.2003).

The appointment of a conservator or guardian is not a determination of testamentary incapacity of the protected person. Section 15-14-409(4), C.R.S.2004.

There is scant Colorado case law detailing what specific knowledge is required for a testator to be deemed to know the extent of his or her property. However, the cases which touch upon this issue, including *Cunningham* itself, indicate that it is sufficient that a testator comprehend the "kind and character of his [or her] property" or understand, generally, the nature and extent of the property to be bequeathed. *Cunningham, supra*, 127 Colo. at 300, 255 P.2d at 981 (other citations omitted).

In other words, "A perfect memory is not an element of testamentary capacity. A testator may forget the existence of part of his estate ... and yet make a valid will." 1 *Page on Wills* § 12.22 (rev.2003).

1 *Page on Wills, supra,* § 12.22. Therefore, "[t]he fact that [the] testator believes that the residue of his estate is of little value, when it is, in fact, more than two-thirds of his estate," does not show lack of capacity. 1 *Page on Wills, supra,* § 12.22.

An ability to index the major categories of property constituting an individual's estate was found sufficient to establish testamentary capacity in *Breeden, supra*, 992 P.2d at 1173. This holding is consistent with the approach taken by courts in other jurisdictions with similar tests for testamentary capacity. *See Rich v. Rich,* 615 S.W.2d 795, 797 (Tex.Civ.App.1980)(holding that a finding of testamentary capacity does not require proof that "the testator knew the 'true value of his property" '); *Prichard v. Prichard*, 135 W.Va. 767, 772, 65 S.E.2d 65, 68 (1951)(holding that to have the capacity to make a will, the testator must know his property, but "it is not necessary that he know every item of his property or the value of his estate," and "[i]t is sufficient if he knows of what his property consists").

Here, the probate court found that decedent understood that his assets comprised the accumulation of whatever amounts were left over from his VA and social security benefits after his living expenses had been deducted. The probate court concluded that decedent's failure to know the actual amount of money in his VA account was not surprising or fatal, given that the VA's routine practice was not to inform its wards how much money they had in their VA accounts, to protect the wards from exploitation. Further, the court found that the relative size of the estate was not a motivating factor in decedent's decision to leave his estate to his mother and sister, as decedent's attorney testified that decedent's original intent was to preclude his children from taking any of his estate at all.

Under these circumstances, we agree with the probate court that decedent's lack of knowledge of the actual value of his estate did not affect his testamentary capacity.

B.

Contestants next contend that the probate court erred in concluding that decedent did not have an insane delusion regarding the amount of his estate. Specifically, they argue that decedent had an insane delusion that his estate would be minimal or nominal and that if he had realized the actual value, he would have left a larger bequest to them. We conclude there was no error.

An insane delusion is a persistent belief in something that has no existence in fact, which belief is adhered to in spite of all evidence to the contrary. *Breeden v. Stone, supra*, 992 P.2d at 1171. The contestant bears the burden of proving that the testator suffered from an insane delusion, that he was under such a delusion at the time of making his will, that the insane delusion materially affected the disposition made in the will, and that the will was the product of the insane delusion. *Breeden*, supra, 992 P.2d at 1171.

The evidence before the probate court was that decedent's estate was valued at approximately $90,000 when the will was executed and approximately $450,000 at decedent's death. His attorney testified that while decedent could not articulate the value of his assets, he expressed an understanding that his assets came from his VA benefits, that his VA guardian allocated him enough money to meet his personal needs and to pay for his living expenses, and that his estate would consist of the money left over in his accounts under VA supervision after his expenses were met. Moreover, his attorney testified that because he was familiar with the management of VA guardianship accounts, he did not press decedent about the value of the estate. While the attorney described decedent's account as nominal, this was his own assessment rather than a quote from decedent.

A field examiner for the VA testified that although a VA guardian is required to file an annual accounting with the court and with the VA, veterans would not usually be in a position to know the exact value of their estates because they were not furnished copies of their annual accounts. If veterans inquired, they were told they could get a copy of their accountings at the court where the documentation was filed.

The probate court concluded that it was not surprising that decedent did not know the value of his estate, given his apparent satisfaction with the money-handling arrangement and the lack of documentation as to the dollar amount of his VA account. Moreover, the probate court specifically credited the attorney's testimony that decedent was not motivated by the comparative size of the amounts passing to his children and to his mother and sister.

The probate court's findings are supported by the record, and under these circumstances, we conclude there was no error.

C.

Contestants maintain that the probate court erred in finding decedent had testamentary capacity in light of the VA guardianship. Specifically, they assert that because of his VA guardianship, decedent was found unable to enter into any contracts and that as such, he had no testamentary capacity. We

disagree.

In support of their argument, contestants point to a VA regulation that defines a mentally incompetent individual subject to guardianship as one who "lacks the mental testamentary capacity to contract or to manage his or her own affairs, including disbursement of funds without limitation." 38 C.F.R. § 3.353(a).

The VA regulations, however, specifically provide that "[l]ack of testamentary capacity should not be confused with ... mental incompetence." 38 C.F.R. § 3.353(c). The regulations provide that there is a general but rebuttable presumption that every testator possessed testamentary capacity and reasonable doubts should be resolved in favor of testamentary capacity. The regulations also provide a test for testamentary capacity similar to the test utilized in Colorado, including a requirement "that the testator reasonably comprehend the nature and significance of his act, that is, the subject and extent of his disposition, recognition of the object of his bounty, and appreciation of the consequence of his act, uninfluenced by any material delusion as to the property or person involved." 38 C.F.R. § 3.353(a).

Here, a VA field administrator testified that the VA rating of incompetency meant that decedent was incompetent only as to the handling of his VA disability funds and did not mean he was incapacitated as to other matters. The field administrator further testified that a veteran, even if incompetent to handle VA funds, could still enter into contracts similar to wills by naming insurance beneficiaries and that, in fact, the VA had accepted such a designation from decedent. Accordingly, the VA had found decedent to have testamentary capacity, despite his VA guardianship, under a test similar to the test established in Colorado.

We also note that the supreme court has held "that contractual capacity and testamentary capacity are the same." *Breeden v. Stone, supra*, 992 P.2d at 1170 (citing *Hanks v. McNeil Coal Corp.*, 114 Colo. 578, 168 P.2d 256 (1946)).

Section 15-14-409(4), C.R.S. 2004, specifically provides that the appointment of a conservator or the entry of another protective order is not a determination of the testamentary capacity of the protected person. Moreover, § 28-5-219, C.R.S. 2004, 2004, provides that neither the fact that a person has been rated incompetent by the VA nor the fact that a guardian has been appointed for the person shall be construed as a legal adjudication of insanity or mental incompetency. Thus, Colorado statutes explicitly state that the findings that warrant appointment of a guardian or conservator do not equate to a determination of testamentary incapacity. *In re Estate of Gallavan*, supra, 89 P.3d at 523.

Given the statutory framework and the record in this matter, we conclude that the probate court did not err in finding that decedent had testamentary capacity in spite of his VA guardianship.

The judgment is affirmed.

Notes, Problems, and Questions

1. A person is presumed to possess testamentary capacity. This presumption stems from the fact that courts disfavor intestacy. Since a person is presumed competent to execute a will, the one who

contests the will has the burden of showing that the testator was incompetent when he or she executed the will. The existence of a conservatorship or a guardianship does not create the presumption that the protected person lacks testamentary capacity.

2. Sophia hired a lawyer to execute her will. When she filled out the will questionnaire, Sophia included the Golden Gate Bridge as one of her assets. Does this indicate that she lacks testamentary capacity?

3. Madge told the lawyer drafting her will that she had three children, five grandchildren and one great-grandchild. In fact, Madge has only two grandchildren and no great-grandchildren. Does this indicate that she lacks testamentary capacity?

4. In the *Romero* case, what evidence did the contestants present to support their claimed that the testator lacked testamentary capacity? Why did the court hold that Romero had the necessary capacity? Why did they argue that Romero was suffering from an insane delusion?

5. In the *Romero* case, what was the test for testamentary capacity under the VA regulations? Would the outcome of the case have been the same if the court had applied that test?

6. Why did the *Romero* court determine that the fact that a guardian had been appointed for Romero did not impact his testamentary capacity? Do you agree with that determination?

Matter of Estate of Oliver, 934 P.2d 144 (Kan. App. 1997)

GERNON, Presiding Judge:

This is a will contest case. The contestants, Lenard and Charlene Miller, appeal the trial court's decision to admit the will of Alta E. Oliver into probate.

Oliver died in 1993 at the age of 93, leaving an estate of approximately $400,000. She was survived by a sister and several nieces and nephews.

The Millers were friends with Oliver. From 1978 until her death, Oliver wrote several different wills, leaving the Millers as beneficiaries in each, but in varying degrees.

In 1985, the Millers took Oliver to her attorney, Raymond Stein, and she executed a will which made the Millers the principal beneficiaries.

In 1988, a guardian and a conservator were appointed for Oliver. She also entered a nursing home that fall.

In November 1988, several of Oliver's relatives, including her sister, visited her and tape recorded their conversation with her. The substance of the conversation was to advise Oliver that she had given Lenard Miller control of her estate and to urge her to see her lawyer to check her estate plan.

One nephew, Charles Albert, subsequently asked Guy Steier, Oliver's guardian ad litem, to meet

with Oliver because he felt she wanted more input into her personal affairs. Steier met with Oliver in January 1989. Steier testified that Oliver seemed surprised she had so much money in various accounts. He testified that at that time, she expressed reservations about the amounts the Millers would receive under the will. She stated, according to Steier, that she wanted more input as to how her affairs were being handled.

Steier contacted the local mental health center and requested an evaluation of Oliver. A hearing on a petition for restoration of capacity was held, at which time the results of the evaluation were presented. The magistrate judge found that Oliver was a disabled person and ordered the guardianship and conservatorship to continue. The magistrate made no ruling as to her testamentary capacity. Oliver's niece, Charlene Rupe, was appointed guardian, and a bank was appointed as conservator.

In June 1989, Rupe and two other nieces took Oliver to the bank where her certificates of deposit naming the Millers as the payable on death recipients were located. A bank teller, Peg Kenningsman, testified that Oliver informed her she wanted to change the beneficiaries on her certificates of deposit. Kenningsman testified that Oliver did not talk with her nieces while at the bank and never wavered in her request. Kenningsman testified that Oliver appeared to know what she was doing.

That same day, the nieces took Oliver to see Steier. Steier met with Oliver in private. The 1985 will was reviewed in detail, and Oliver, according to Steier, made very specific and knowledgeable changes to the will.

Two days later, Steier again met with Oliver. They reviewed the will, and Oliver made a change in one of the clauses.

On June 30, 1989, Steier and two of his employees, Janet Holway and Marilyn Huffman, went to see Oliver at the nursing home with the final draft of the will. When they arrived, Oliver was playing cards and Steier noted that her cards were properly organized and she was playing the correct meld. After she finished playing the hand, they went to her room and reviewed the 1985 will and the new one. Steier stated that Oliver knew her family, her land, and where her bank certificates and accounts were generally located, but she was not sure how much money was in the accounts. When Steier suggested $190,000, Oliver was still not sure about the amount but stated that she trusted him. Oliver executed the will in the presence of Steier, Holway, and Huffman. Steier and Holway signed as witnesses, and Huffman notarized the document.

Steier testified that in his opinion, Oliver possessed testamentary capacity at that time and was not under undue influence. Holway also testified that in her opinion, Oliver knew who her relatives were, what her assets were, and why they were present in her room on June 30, 1989.

The 1989 will was submitted for probate. The Millers contested the validity of the 1989 will, claiming that Oliver lacked testamentary capacity at the time the will was executed.

Can a conservatee make testamentary decisions?

The Millers first argue that since Oliver was a disabled person under K.S.A. 59-3002(a) and had a guardian and conservator involuntarily appointed for her, she lacked the required capacity to execute the 1989 will and to change the beneficiaries on her payable on death certificates of deposit. They

maintain the trial court erred in finding that Oliver was competent to execute her 1989 will and make the changes to her certificates of deposit because an involuntary conservatee cannot make testamentary dispositions.

The Millers' contention raises a question of law over which this court has unlimited review. *See Hillman v. Colonial Penn. Ins. Co.*, 19 Kan.App.2d 375, 376, 869 P.2d 248, rev. denied 255 Kan. 1001 (1994).

While it is true that most of our decisions on this issue have arisen in the context of a voluntary conservatorship, *see*, *e.g., Campbell v. Black,* 17 Kan.App.2d 799, 844 P.2d 759 (1993), our courts continue to adhere to the principle that being under a guardianship or conservatorship does not prevent one from making testamentary dispositions. As noted in *Citizens State Bank & Trust Co. v. Nolte*, 226 Kan. 443, 449, 601 P.2d 1110 (1979), the conservator's purpose "is to manage the estate during the conservatee's lifetime. It is not his function, nor that of the probate court supervising the conservatorship, to control disposition of the conservatee's property after death."

In *In re Estate of Raney*, 247 Kan. 359, 799 P.2d 986 (1990), the decedent's children sought and obtained a conservatorship for him against his wishes. The decedent believed his children imposed the conservatorship in order to preserve his estate for themselves and subsequently executed a will while under the conservatorship. The trial court refused to admit the will to probate, finding that the decedent lacked testamentary capacity to make the will because he suffered from insane delusions. The Supreme Court reversed on the basis that the trial court's finding was not supported by the evidence. 247 Kan. At 375, 799 P2d 986. In reaching its holding, the court noted:

> "The trial court recognized that being under a guardianship and conservatorship does not necessarily deprive one of the power to make a will. Incompetency to transact business is not the equivalent of insanity and does not mean that the testator lacks testamentary capacity. Previously, this court concluded that an aged person who was ' "feeble-minded and incapable of managing his affairs" ' and who needed a guardian could, three weeks later, be competent to make a will. *In re Estate of Hall*, 165 Kan. 465, 469, 195 P.2d 612 (1948) (quoting *Mingle v, Hubbard*, 131 Kan. 844, 293 Pac. 513 [1930]). In *Hall,* the court stated: 'It is practically a universal rule that the mere fact that one is under guardianship does not deprive him of the power to make a will.' 165 Kan. 465 at 469, 195 P.2d 612 (citing Annot., 8 A.L.R. 1375)." 247 Kan. at 367-68, 799 P.2d 986.

We conclude that a conservatee, whether voluntary or involuntary, clearly retains the right to decide how his or her property is to be distributed upon death. See In re Estate of Perkins, 210 Kan. 619, 626-27, 504 P.2d 564 (1972); *In re Estate of Briley*, 16 Kan.App.2d 546, 549, 825 P.2d 1181 (1992). This right includes the power to change beneficiaries on payable on death accounts as well as make wills. *See In re Estate of Raney*, 247 Kan. at 367-68, 799 P.2d 986; *Campbell v. Black*, 17 Kan.App.2d at 802-03, 844 P.2d 759. "As long as the requisite mental capacity exists, a person has the power to dispose of the property as he wishes, and this power should not be interfered with by the court." *In re Estate of Raney*, 247 Kan. at 367, 799 P.2d 986. Consequently, if, as in this case, Oliver possessed testamentary capacity testamentary capacity at the time she executed her will and made the changes to her payable on death certificates of deposit, the distributions are valid.

Burden of Proof

The Millers next assert that there is a presumption of testamentary incapacity for any ward or

conservatee. We disagree.

It is well established in Kansas that once it has been shown that "a will has been executed in accordance with the formalities required by law, the burden is upon the will contestant and he must produce evidence to support his position." *In re Estate of Perkins*, 210 Kan. at 626, 504 P.2d 564.

The cases cited by the Millers involve individuals who have been adjudicated mentally incompetent or insane. Here, the record does not support an assertion that Oliver's mental condition was so diminished as to render her insane or mentally incompetent.

Other jurisdictions hold the fact that an individual has been adjudicated incompetent at a guardian proceeding does not mean he or she cannot execute a will. These courts note that this fact is merely evidence to be considered when determining testamentary capacity and the proponent does not carry a higher burden of proof on this issue. *See*, *e.g., Paskvan v. Mesich,* 455 P.2d 229, 238-39 (Alaska 1969); *In re Estate of Basich*, 79 Ill.App.3d 997, 1001, 35 Ill. Dec. 232, 398 N.E.2d 1182 (1979); see also Annot., 89 A.L.R.2d 1120.Other courts point out that a guardianship and conservatorship can be based on a variety of reasons other than for complete mental incompetency, such as age, which do not necessarily affect an individual's testamentary capacity. *See*, *e.g., Estate of Dopkins,* 34 Cal.2d 568, 578, 212 P.2d 886)1049); *In re Bottger's Estate*, 14 Wash.2d 676, 697, 129 P.2d 518 (1943); *see also* Annot., 89 A.L.R.2d 1120, 1130.

Based on the above reasoning, we conclude the burden of proof on the issue of testamentary capacity does not change in those instances where a testator is involuntarily appointed a conservator or guardian.

Testamentary Capacity

The Millers contend the trial court's findings that Oliver possessed testamentary capacity when she changed her payable on death certificates and when she executed her will are not supported by the evidence.

When reviewing the trial court's findings, this court must determine whether substantial competent evidence exists to support the court's findings and will not reweigh conflicting evidence. *In re Estate of Bolinder*, 19 Kan.App.2d 72, 74, 864 P.2d 228, *rev. denied* 254 Kan. 1007 (1994).

A testator must have testamentary capacity to make a will. In Kansas, the requirements for determining testamentary capacity are well settled:

> "It is the established rule in Kansas, the deceased possesses testamentary capacity if, on the date he executes the instrument which determines the manner in which the property will be disposed after death, he knows and understands the nature and extent of that property, has an intelligent understanding concerning the disposition he desires to make of it, realizes who his relatives are and the natural objects of his bounty, and comprehends the nature of the claims of those whom he desires to include and exclude in and from participation in his worldly effects after he has no further need for them." *In re Estate of Ziegelmeier*, 224 Kan. 617, 621, 585 P.2d 974 (1978).

See *In re Estate of Raney*, 247 Kan. at 367, 799 P.2d 986; *In re Estate of Bolinder*, 19 Kan.App.2d at 75, 864 P.2d 228. The critical time in determining testamentary capacity is when the will is made and

executed. All other evidence concerning the testator's mental capacity before or after the time of execution is only an aid in deciding the issue. *In re Estates of Barnes*, 218 Kan. 275, 281, 543 P.2d 1004 (1975).

> "The test of a testamentary capacity is not whether a person has capacity to enter into a complex contract or to engage in intricate business transactions nor is absolute soundness of mind the real test of such capacity. The established rule is that one who is able to understand what property he has, how he wants it to go at his death and who are the natural objects of his bounty is competent to make a will even though he may be feeble in mind and decrepit in body." *In re Estate of Perkins*, 210 Kan. at 626, 504 P.2d 564.

The Millers refer to various instances before and after the dates in question as support for their contention that Oliver lacked testamentary capacity. They further point out that Oliver suffered from degenerative dementia and did not know the exact amount of money in her bank accounts at the time she executed her will.

The mere fact that a person suffers from senile dementia does not mean that person lacks testamentary capacity. *In re Estate of Brown*, 230 Kan. 726, 730, 640 P.2d 1250 (1982). Here, Steier, the attorney who drafted the will, and two of his employees were present when Oliver executed the will. Steier testified that Oliver reviewed the will before signing it and knew to whom she wanted her property to go at her death. While Oliver was not positive of the exact amount of her cash assets, she listed her relatives and extensively discussed her personal and real property with Steier. It is apparent from Steier's and Holway's testimony that Oliver knew the general nature of her property and how she wanted it distributed when she signed the will.

Under the circumstances in this case, the trial court's findings that Oliver had testamentary capacity to make the will and to make changes to her certificates of deposit are supported by substantial competent evidence.

Our examination of the specific claims made by the Millers leads us to the same conclusion as that of the trial judge.

Affirmed.

Notes, Problems, and Questions

1. The only testamentary capacity that is relevant is the capacity that the testator has at the time the will is executed. Therefore, someone with a condition that permits them to have lucid periods may be legally competent to execute a will.

2. Consider the following problem. Tony takes medicine for a chronic illness. One side effect of the medicine is that Tony has hallucinations. The side effects last for about two hours after Tony takes the medicine. Tony takes the medicine every morning at about nine. One of the main hallucinations that Tony has is that his daughter, Barbara, is really his mother, Claire. Tony's mother has been dead for about twenty-years and they had a strained relationship. One morning, Tony contacted his lawyer and stated that he wanted to change his will so that his mother would not inherit any of his

estate. In response, Tony's lawyer came to his house at about two o'clock in the afternoon. At that time, Tony amended his will and left all of his property to his wife, Jean, and his son, Amos. The prior will had split the estate between Jean, Amos and Barbara. When Tony died, Barbara filed an action contesting the will. What is Barbara's strongest argument? What are her chances of getting the will set aside?

3. In the *Oliver* case, why did the contestants claim that the testator lacked testamentary capacity? What evidence did the lawyer who drafted the will put forth present to rebut their contention?

Paine v. Sullivan, 950 N.E.2d 874 (Mass. App. 2011)

HANLON, J.

Valerie E. Sullivan (Valerie) appeals from the decision of a Probate and Family Court judge concluding that the testator, John L. Sullivan (John), possessed testamentary capacity when he executed his last will and testament on June 26, 2004 (will), and also that the will was not the product of undue influence. We agree that the will was not the product of undue influence, but we hold that the petitioner, Susan W. Paine, did not meet her burden of proving the testator had testamentary capacity.

In reviewing issues of testamentary capacity and undue influence, "[i]t is our obligation to review the evidence and reach a decision in accordance with our own reasoning and understanding, giving due weight to the findings of the trial judge, which we will not reverse unless they are plainly wrong, and finding for ourselves any additional facts we believe to be justified by the evidence." *Palmer v. Palmer*, 23 Mass.App.Ct. 245, 249-250, 500 N.E.2d 1354 (1986), quoting from *Olsson v. Waite*, 373 Mass. 517, 520, 368 N.E.2d 1194 (1977). The question, however, "is not what finding we ourselves would have made on the same evidence," but whether we can say the finding of "competence was plainly wrong." *Goddard v. Dupree,* 322 Mass. 247, 248, 76 N.E.2d 643 (1948). A finding is not "plainly wrong" unless "the evidence, with every reasonable inference which can be drawn from it, is insufficient to warrant the findings." *Erb v. Lee*, 13 Mass.App.Ct. 120, 124, 430 N.E.2d 869 (1982).

With these standards in mind, we set forth the facts in some detail. *Maimonides Sch. v. Coles*, 71 Mass.App.Ct. 240, 242, 881 N.E.2d 778 (2008). John was born in May, 1912, and met his wife, Odette, in France when he was stationed there. They married in 1956 and enjoyed a forty-seven-year marriage before Odette died on July 23, 2004, of melanoma. John died in 2006. The couple had no children of their own; they adopted Odette's sister's daughters, Annabelle and Valerie. Annabelle had a falling-out with Odette and John in 1995; she left the home in 1995 and never reconciled with her adoptive parents.

In 1995, John executed a will eliminating Annabelle as a beneficiary and leaving the residuary of his estate to Valerie should Odette predecease him. Valerie remained with John and Odette until 2000 when Valerie was about thirty years old; at that time, Valerie and Odette had a falling-out. The judge found that John allowed Odette to banish Valerie from their home but noted that he continued to sneak telephone calls to her. The judge credited testimony that John was disappointed in Valerie because she had deeply wounded Odette, and that John never forgave Valerie for that even though

he continued to love Valerie and miss her. We defer to the judge's findings, based in part on credibility determinations, in this regard.

Odette owned and operated her own beauty salon in Brookline. The overall evidence supported the judge's findings that, at home, Odette was the "boss" and John happily acceded to her wishes in most areas throughout their marriage. In particular, Odette always took the lead on the couple's estate planning.

Odette was diagnosed with melanoma in late 2001. In 2002, she asked the same attorney (attorney) who had drafted the couple's 1995 wills to draft new reciprocal wills for her and John, leaving their estates to one another but, in the event that one predeceased the other, leaving Valerie one dollar and the residuary of their estates to friends of Odette. John executed a will on January 14, 2002, consistent with this request. Paine was named executor of the will if Odette did not survive him. Paula Miller, Odette's assistant for over twenty years and a personal friend of Odette and John, was named as one of the residuary beneficiaries of the will. New wills were executed on February 1, 2003, February 3, 2004, and June 26, 2004, in which minor changes to the residuary beneficiaries were made, but Paine remained the alternate executor. The judge allowed the June 26, 2004, will.

The medical records contained in the record appendix leave little doubt that John suffered from some degree of dementia during the time period that the 2002–2004 wills were executed. A June 25, 2001, neurology note concludes that John had "significant frontal dysfunction with poor insight and judgment, difficulty changing set and mild recent memory difficulties." The neurologist indicated that he discussed with John and Odette that John's insight and judgment difficulties made it difficult for him to appreciate his "gait instability." While there was some suspicion that a vitamin B12 deficiency was the cause of some of his symptoms, a full neuropsychological evaluation was recommended, which John underwent on October 15, 2001. The judge acknowledged the report of the October 15, 2001, evaluation, noting only that it revealed "mild cognitive slowing."

In fact, the history portion of the report of the October 15, 2001, evaluation reflects that Odette had observed some memory impairment over the past three years and more recent word-finding difficulty. The report reflects that before January of 2001, John had managed their financial affairs, but that he had become "confused" about the taxes and thereafter Odette took over the finances. In addition, John was receiving personal care assistance when his wife was at work. The report further reveals "evidence of significant cognitive impairment. Specifically, testing revealed mild disorientation (time), mild cognitive slowing, moderate anomia, moderate amnesia, and less pervasive frontal lobe deficits." Although it was felt that incompletely treated vitamin B12 deficiency could contribute to some of John's symptoms, the report concluded that a vitamin B12 deficiency did not explain all of them and that the "anomia and amnesia combined with less pronounced deficits in frontal lobe functioning [were] highly suggestive of a diagnosis of Senile Dementia of the Alzheimer's Type (SDAT)." The neuropsychologist concluded that "[u]nless his mental status improves appreciably, [John] will continue to need close supervision. Driving is contraindicated." The medical records do not reflect that John's mental status improved appreciably thereafter.

In July of 2002, John was seen by his primary care physician, and with regard to dementia, he was "strongly encouraged to follow up with the neurologist for additional evaluation." There is no evidence that John followed this advice; the next neurology note is in 2004, after his wife died and Valerie was caring for him. When John was seen in the emergency room on June 7, 2003, a week or two after a motor vehicle accident, he was described in a neurosurgery consult as "bright and

oriented x 4," and the judge relied on this portion of the note in support of her finding that he had testamentary capacity when the 2004 will was executed. The next sentence of the note stated, however, that "[t]here are obvious gaps in his short-term memory but this is of a chronic nature, as his wife was present during the interview." In addition, the emergency room physician noted that John was able to tell him he was in the hospital, but not which one, and that John was able to identify the month and day of the week, but could not tell him the date or the year. It was further noted that Odette reported "more of a significant problem with some baseline confusion and this was confirmed by ... his primary care physician."

The medical records reflect that by July 3, 2003, John had a personal care attendant twenty-four hours per day. Notwithstanding his need for twenty-four-hour care, the judge credited a September, 2004, note of his primary care physician that refers to John's dementia as "mild." The complete statement is that "[t]he patient also has ongoing progressive mild dementia and this has been an ongoing symptom that was first noted in 2001. The patient also had neuropsychological exam and testing in 2001 as well. Progressively, this has been monitored and certainly has noticed ... increasing forgetfulness." In the assessment and plan section of the note, the doctor states, "Regarding his dementia, the patient will be scheduled to follow up with the neurologist for additional follow up evaluations. He will continue with his Zyprexa and continue to have supervision at all times with monitoring of his medications and activities." On August 3, 2004, his primary care physician signed a document saying that John suffered from senile dementia and was unable to live alone. A November 2, 2004, neurology note reflects poor orientation, "poor recall memory, poor working memory and poor visual spatial construction."

The judge essentially adopted the opinion of the proponent's expert, Dr. Barry Roth, who identified medical records that described John's dementia as mild, and noted that medical providers continued to direct their reports to John and explained test results to John, and that John continued to be involved in making treatment decisions for himself. From this evidence, Dr. Roth concluded that "[a]s a physician, the preponderance of evidence indicates that [John] had capacity to know his property, who were the natural heirs to his bounty, that he was in the process of making a will to make distribution with respect to those elements, and that he was in fact making such a plan."

The attorney who drafted all the wills testified that he routinely spoke with Odette about estate planning for her and John. For the wills dated after 2000, he spoke with John only by telephone, and John simply confirmed that he was in accord with the instructions as given by Odette. The attorney did not have any private conversations with John. He did not visit with John. The judge credited the attorney's testimony that he drafted the wills in accordance with John's instructions. The attorney testified, however, that he did not read the wills to John after they were drafted. He mailed the documents to John and Odette, and they took the documents to a local bank for execution. The attorney did not supervise the execution. He could provide no evidence as to John's capacity on the dates the wills were executed.

At trial, the attorney was given a copy of the October, 2001, report of the neuropsychological testing of John. He testified that he had been unaware of that report and the diagnosis of dementia, and that, had he been aware of them, he would have investigated the issue of capacity further and would have requested a medical consultation on testamentary capacity. He would not have drafted the wills without a medical evaluation. He testified he could see from the report that John was impaired and that the report called into question John's independent judgment. Even though the attorney was aware that John had always followed Odette's lead with their estate planning, had he been aware of

the 2001 report, he would have consulted a physician. Nonetheless, the judge credited the attorney "with the requisite degree of attention to capacity and free will ... expected of an attorney drafting a Will for a client." She further credited the attorney's testimony that "he would have never drafted a Will for a client he believed to be mentally incapacitated."

Odette brought John to their local bank to execute the various wills. The bank employees who witnessed the 2002–2004 wills testified that they did not recall the specifics of the executions, but they never saw John appear confused, nor did they think that he was forced to execute the wills. During the executions, they had no discussions with John aside from social niceties.

THE SECTION ON UNDUE INFLUENCE IS OMITTED.

Testamentary capacity. "Where there is some evidence of lack of testamentary capacity, the presumption of sanity loses effect and 'the burden [is] on the proponent of the will to satisfy the tribunal of fact by a fair preponderance of the evidence that the deceased was of sound mind and testamentary capacity when the instrument was executed.'" *Palmer v. Palmer*, 23 Mass.App.Ct. at 250, 500 N.E.2d 1354, quoting from *Santry v. France*, 327 Mass. 174, 176, 97 N.E.2d 533 (1951). "That burden is met by a showing that it is more probable than not that, at the time of execution of the will, ... 'the testator [was able] to understand and carry in mind, in a general way, the nature and situation of his property and his relations to those persons who would naturally have some claim to his remembrance. It requires freedom from delusion which is the effect of disease or weakness and which might influence the disposition of his property. And it requires ability at the time of execution of the alleged will to comprehend the nature of the act of making a will.'" *Ibid*., quoting from *Goddard v. Dupree*, 322 Mass. 247, 250, 76 N.E.2d 643 (1948), "It is also well settled that in addition to possessing the requisite testamentary capacity and complying with the statutory formalities regarding execution, it must also be shown that the testator knew the contents of the instrument which he signed and executed it with the intention that it operate as his will. The burden of proof on these matters is on the proponent. Here again, he is aided by a presumption that a person signing a written instrument knows its contents." *Duchesnean v. Jaskoviak*, 360 Mass. 730, 733, 277 N.E.2d 507 (1972) (citations omitted).

The evidence presented by Valerie adequately rebuts the presumption of capacity. John exhibited symptoms consistent with the diagnosis of "Senile Dementia of Alzheimer's Type" at least as early as October of 2001. We are well aware that a diagnosis of Alzheimer's disease in and of itself does not compel a conclusion that a testator lacks capacity to execute a will. The diagnosis carries more weight, however, when the cognitive deficits associated with Alzheimer's disease manifest themselves in the loss of abilities that bear on testamentary capacity. Here, by June of 2001, John's cognitive deficits were such that his poor judgment caused him to be unaware that his gait was unsteady. By October of 2001, driving was deemed contraindicated. He required supervision when his wife was not at home. And, perhaps most importantly, he had lost the ability to handle the family's finances, a task he had always performed. His inability to handle the finances was due to "confusion," not physical weakness. In addition, Valerie offered an expert opinion that John lacked testamentary capacity to execute the 2002–2004 wills. We think this evidence taken together was sufficient to rebut the presumption of testamentary capacity. Compare *O'Rourke v. Hunter*, 446 Mass. 814, 827, 848 N.E.2d 382 (2006) (history of delusions that had resolved and ongoing frailty and depression did not rebut the presumption of capacity where testator met with attorney on four occasions and clearly articulated her desires, instructing the attorney how to modify two draft wills before executing the third version).

Paine, the proponent of the will, bore the burden of proving John had testamentary capacity when he executed his 2004 will, unaided by a presumption of testamentary capacity. She failed to meet her burden. Paine offered the testimony of Dr. Roth, who relied on medical notes that referred to John's dementia as "mild" and indicated that physicians continued to direct their reports to him and continued to include him in medical decisions through 2005. Dr. Roth explained that "the reports of the physicians over a long period of time [indicated] that they understood that he was able to take in what they were telling him [and] manipulate it to arrive at a treatment plan in collaboration with them where there was informed consent. Meaning, he could take in the information, he could process it, he could work with his health care providers to arrive at a decision in cooperation with them." In addition, Dr. Roth indicated that the records reflect a "fairly mild degree of dementia." From this evidence, Dr. Roth concluded that John possessed testamentary capacity. The judge accepted and adopted Dr. Roth's opinion.

First, it is not at all clear that Dr. Roth's conclusions are supported by careful review of the medical records. In large part, he "cherry picked" portions of the medical records that could suggest John's dementia was mild and ignored contrary medical records. For example, he points to a June 27, 2002, handwritten note by John's primary care physician indicating that John had declined to have further work-up of a suspicious finding on a neck X-ray, "given his advanced age and lack of symptoms," even though he understood it "could indicate both benign and malignant process." This, Dr. Roth concluded, indicates John had a sophisticated, high-level ability to take in information, process it, understand it, and arrive at a reasonable plan. Dr. Roth ignores that, in follow-up two weeks later, further testing *was* performed, calling into question John's original decision. But, even accepting Dr. Roth's interpretation of the physicians' reports as accurate, all that can be said is that with careful explanation by physicians, John retained some ability to process information and assist in reaching a treatment decision. When John executed the 2002–2004 wills, however, there is no evidence that anyone explained his estate planning options to him. There is no evidence that the 2004 will was read to him, or that anyone reviewed his finances with him, or that anyone asked him to identify or reviewed with him the natural objects of his bounty. In these circumstances, his ability to participate in medical decisions, where treatment options were clearly explained, simply does not support the inference that he possessed testamentary capacity in a situation where his options appear not to have been explained to him, and where he was never asked to articulate the choices he was said to be making.

In determining that John had testamentary capacity, the judge credited the attorney with the degree of care and attention appropriate to the issue of testamentary capacity. See *O'Rourke v. Hunter*, 446 Mass. at 827, 848 N.E.2d 382. This was plain error. It is true that in circumstances when medical and other evidence call into question a testator's capacity, we have relied on the testimony of the drafting attorney in resolving the testamentary capacity issue. *See Palmer v. Palmer*, 23 Mass.App.Ct. at 251-252 & n. 5, 500 N.E.2d 1354 (attorney who prepared simple, one-page instrument met with testator prior to execution and just prior to execution, summarized each article and put the practical effect in simple layman's language); *Rempelakis v. Russell*, 65 Mass.App.Ct. 557, 561-562, 842 N.E.2d 970 (2006) (attorney met with testator in hospital, hand-wrote will according to testator's instructions, and read the will to her in front of witnesses; testator agreed it reflected her wishes before executing it; attorney followed up with formal will and trust and repeated reading and execution formalities); *Maimonides Sch. v. Coles*, 71 Mass.App.Ct. at 245-247, 881 N.E.2d 778 (attorney spoke with testator in rehabilitation hospital by telephone and took him through the changes of his second trust amendment, which testator confirmed; testator made additional changes later that day; attorney met

with testator at rehabilitation hospital and went through amendment again; testator made additional change and initialed change in the margin and at all times demonstrated to attorney that he knew what he was doing and did not show any confusion).

Here, however, the attorney was unable to provide any relevant evidence as to John's testamentary capacity on the date the will was signed. The attorney had not seen John in a number of years and only spoke with him by telephone; John simply verified he wanted what Odette wanted. The attorney was unaware that John had been diagnosed with dementia in 2001. While we agree with the judge that it is very likely that the attorney would not have drafted a will for a client he believed to lack testamentary capacity, the attorney admittedly did nothing to determine whether John understood the will as drafted, knew the natural objects of his bounty, had a general understanding of his finances, or was suffering from any ailment that might influence his dispositions.

It is John's capacity at the time he executed the will that is at issue. The record is virtually barren of any evidence of his testamentary capacity when the will was executed except from the witnesses to the will. The most that can be said of the testimony of the bank employees who witnessed the will is that John did not display any outward evidence of confusion and did not appear forced to execute the will. None of the witnesses recalled the specifics of the execution, however, and none recall inquiring whether John knew he was signing a will, knew his financial holdings, knew the natural objects of his bounty, or otherwise met the testamentary capacity standard. As to the elements of testamentary capacity, the witnesses provided little relevant evidence.

Finally, we are aware that the judge credited testimony that through 2004, John "appeared sharp" to Rex Olson, a friend of John. Olson's conversations with John, however, were limited to small talk, Odette, and their military careers. He described them as "nothing in depth" and did not provide any description of John on or near the date the will was executed.

We are compelled to conclude, therefore, that Paine, as the proponent, failed to meet her burden of proving that John possessed testamentary capacity when he executed the June 26, 2004, will, and reverse the judgment allowing that will for probate. The judge made no findings as to the February 3, 2004, will, also offered by Paine, or the 1995 will, offered by Valerie. Therefore, the matter is remanded to the Probate and Family Court for further proceedings consistent with this opinion.

So ordered.

Notes, Problems, and Questions

1. In *Paine*, what evidence did Valerie rely on to rebut the presumption that John had testamentary capacity? Why did the court hold that she had successfully rebutted the presumption?

2. In *Paine*, what evidence did the proponent of the will put forth? What did the court say about that evidence?

3. In *Paine*, why did the probate court decide that John had testamentary capacity?

4. In *Paine*, why did the appellate court hold that John did not have testamentary capacity?

5. Why was the case sent back to the Probate and Family Court?

6. Problems-In which of the following cases would the testator lack capacity?

   (a) T forgot that her oldest son had been killed in a car accident and insisted that he be included in her will.

   (b) T's family home was seized by the government for back taxes. After the seizure, T continued to maintain the yard. T included the property in her will because she plans to win the lottery and buy the property back from the government.

   (c) T stated that his estate was worth 982,000 dollars. The estate was worth only 90,000 dollars.

   (d) T was diagnosed with bipolar disorder two years before she executed her will. In order to stop her from depleting her trust fund, T's parents went to court and successfully got appointed as her guardian. After that time, without her parents' knowledge, T amended her will and left her entire estate to charity.

9.3 Insane Delusion

Matter of Estate of Killen, 937 P.2d 1368 (Ariz. App. 1996)

GRANT, Presiding Judge.

In this appeal, we consider whether a testator who knew the natural objects of her bounty but had insane delusions about some of them that affected the terms of her will had the testamentary capacity to execute a will. We hold that she did not have such capacity and that the evidence supports the trial court's conclusion that the testator's will is invalid due to lack of testamentary capacity.

FACTS AND PROCEDURAL HISTORY

On February 13, 1988, appellant Marion McCannon ("Marion") and his wife, Virgie, arrived in Phoenix from Missouri to visit his aunt, Dorothy I. Killen, the decedent ("Killen"). Four days later, Killen told the McCannons that she wanted to find an attorney to draft a will for her. After driving around, they found two law offices, but the attorneys in those offices were unavailable. At the third office they tried, attorney Frank Collins agreed to draft a will for Killen. Collins did not know the McCannons or Killen.

At Killen's request, the McCannons left the office, and she conferred with Collins for an hour or two. The McCannons took her back to Collins' office the next day, February 18, 1988, for execution of the will. Collins and a couple who operated a shop next to Collins' office witnessed Killen's execution of her will.

In the will, Killen bequeathed only one dollar each to her nephews Russell Edward McCannon and R.C. McCannon and her niece Carolyn Dixon. She bequeathed to Marion McCannon $75,000, a rug,

half of $75,000 upon the death of her sister (who was to receive the interest on the $75,000 during her lifetime), all of her personal property, and a pro rata share of her residuary estate. Bequests were also made to other family members and friends. She named Marion as the personal representative.

Killen's husband, Dylton, had died in 1985. They had no children. For many years prior to Dylton's death, Killen believed that he was trying to kill her, was putting poison in her food, and was in "the mob." However, by all accounts, Dylton was a fine man and a loving husband who cared for his wife despite her delusions about him.

Shortly before Dylton's death, Killen began having delusions about Russell, R.C., and Carolyn. Even though these nephews and niece took care of her when her husband was ill and after his death and treated her well, she believed they lived in her attic, or caused others to live in the attic, and sprinkled chemicals and parasites down on her, put her to sleep and then pulled a tooth out and cut her arms and hands with glass, were in the Mafia, and were trying to kill her so they could take her property. Although other relatives tried to dissuade Killen from these bizarre beliefs, she would insist that Russell, R.C., and Carolyn were out to get her.

On February 10, 1988, eight days before she executed her will, Killen was evaluated by Dr. Vinod Patel, a psychiatrist. He diagnosed her as having a delusional paranoid disorder. He noted that Killen's judgment was compromised by paranoid ideas and that her delusional beliefs "can interfere in certain decision making."

Killen was admitted to Boswell Memorial Hospital on March 9, 1988, due to difficulty in breathing and weakness. Because of her delusional and paranoid behavior, Killen was transferred later that day to the psychiatric unit at the Maricopa County Hospital. The psychiatrist who examined her concluded that she was having persecutory delusions, her insight was poor and her judgment was impaired, and she was incapacitated by mental illness. He recommended that a guardian and conservator be appointed for her.

Killen died in March, 1993. Marion applied for informal probate of her February 18, 1988 will. The will was admitted to informal probate, and Marion was appointed personal representative.

Russell, R.C., and Carolyn petitioned the probate court for determination of testacy, removal of Marion as personal representative, and appointment of M & I Marshall & Ilsley Trust Company of Arizona as personal representative of Killen's estate. They alleged that at the time Killen executed the will she was operating under a mental derangement and did not have the capacity to make a valid will.

The matter was tried to the court in September, 1993. Dr. Patel testified that Killen could not have had lucid intervals because a delusion is permanent and lucid intervals are not possible with that condition. According to Dr. Patel, Killen's delusional disorder affected her ability to perceive her family members and friends. In his opinion, a person with delusional paranoia, when family and friends are involved in the delusions, would be unable to make a valid will.

Dr. Alexander Don, a psychiatrist, also testified. He had examined Mrs. Killen on November 27, 1989, and had reviewed her hospital records, records of other psychiatric evaluations, and documents prepared by some of her family members. In his opinion, on February 18, 1988, Killen was suffering with a psychotic illness termed delusional disorder. He explained that a delusion is a

fixed false belief that cannot be disabused by rational argument and that because of her delusional disorder she believed her husband and Russell and R.C. intended to harm her.

Dr. Don further testified that Killen's delusions would have influenced the writing of a will because her belief that individuals close to her were trying to destroy her would have been uppermost in her mind when she contemplated her actions toward them. Thus, he said, her perception of various beneficiaries was not rational or lucid. In Dr. Don's opinion, Killen knew who the natural objects of her bounty were, but she had a misperception of them because of her mental illness.

As contradictory evidence, Marion offered the testimony of Dr. Otto Bendheim, a psychiatrist. Dr. Bendheim never examined Killen, he did not review her hospital records, and he acknowledged that he did not perform a complete psychiatric autopsy but only reviewed the items relevant to the question of her capacity to make a will. He testified that there was no question that the diagnosis of Killen as psychotic, paranoid, and suffering from paranoid delusion disorder was correct. However, he believed that she had testamentary capacity because she knew she was executing a will, she knew the natural objects of her bounty, and she was aware of the nature and extent of her estate.

The probate court found that despite the good care Killen received from Russell, R.C., and Carolyn, she believed they were trying to injure her and take her property. These delusions, said the court, were false and were fixed and unshakable in her mind when she signed the February 18, 1988 will. The probate court found that Killen did not have the capacity to know the natural objects of her bounty and to appreciate her relationships with them. Therefore, it concluded that on February 18, 1988, Killen lacked testamentary capacity as a result of a delusional paranoid disorder that influenced the creation and terms of the will she signed that day and thus the will was invalid. The court entered an order withdrawing the will from probate, declaring that Killen died intestate, removing Marion as personal representative, and appointing M & I Marshall & Ilsley Trust Company of Arizona as successor personal representative. The court noted that each of Killen's nieces and nephews was entitled to one-eighth of her estate.

The court denied Marion's motion for new trial. Marion, as personal representative and in his personal capacity, appealed from the order and the denial of his motion for new trial.

DISCUSSION

Marion poses the issue on appeal as whether a testator's will is valid if she understands the nature of a will, knows the nature and extent of her property and knows the natural objects of her bounty but has a misperception of some of her family members due to insane delusions. He argues that a testator need only have the ability to know the natural objects of her bounty; it is not necessary that she possess an accurate perception of her relationships or have plausible, justifiable reasons for her opinions about her family members.

Marion maintains that, in any event, there was no proof that Killen's paranoid state and nothing else, such as a rational dislike and distrust of Russell, R.C., and Carolyn, produced her hostility toward them. Marion argues that in reaching the conclusion it did, the probate court disregarded Arizona law and substituted a rule that even when a testator is found to have known the natural objects of her bounty, a will may be rejected on a showing that the testator's subjective perceptions of one of those persons has been affected by a paranoid delusion concerning that individual.

The policy of the law favors testacy. *In re Walters' Estate*, 77 Ariz. 122, 125, 267 P.2d 896, 898 (1954). Thus, the law presumes that a testator had the requisite mental capacity to execute a will. *In re Vermeersch's Estate*, 109 Ariz. 125, 128, 506 P.2d 256, 259 (1973); *Matter of Estate of Thorpe*, 152 Ariz. 341, 732 P.2d 571, 573 (App.1986). The contestant of a will has the burden of showing by a preponderance of the evidence that the testator lacked testamentary capacity at the time the will was executed. *Walters' Estate*, 77 Ariz. at 125, 267 P.2d 898. The contestant must produce evidence sufficient to rebut the presumption of testamentary capacity. *Id.* It is our duty to carefully scrutinize a probate court ruling that a will is invalid and to set aside the ruling if the evidence is not sufficient to support it. *Id.*

The court considers the testator's capacity as it existed at the time the will was executed. *In re Teel's Estate*, 14 Ariz.App. 371, 373, 483 P.2d 603, 605 (1971). To invalidate a will for lack of testamentary capacity, the contestant must show that the testator lacked at least one of the following elements: (1) the ability to know the nature and extent of his property; (2) the ability to know his relation to the persons who are the natural objects of his bounty and whose interests are affected by the terms of the instrument; or (3) the ability to understand the nature of the testamentary act. *In re O'Connor's Estate*, 74 Ariz. 248, 257, 246 P.2d 1063, 1070 (1952); *Evans v. Liston*, 116 Ariz. 218, 219, 568 P.2d 1116, 1117 (App.1977).

In addition, Arizona law recognizes that mental illness can render a person incapable of making a valid will if the insanity is so broad as to produce general mental incompetence or a form of insanity that causes hallucinations or delusions. *In re Stitt's Estate*, 93 Ariz. 302, 305, 380 P.2d 601, 603 (1963); *Evans*, 116 Ariz. at 220, 568 P.2d at 1118. To invalidate a will, however, the will must be a product of the hallucinations or delusions; in other words, the hallucinations or delusions must have influenced the creation and terms of the will such that the testator devised his property in a way that he would not have done except for the delusions. *O'Connor's Estate*, 74 Ariz. at 258, 246 P.2d at 1069-70 (quoting *In re Greene's Estate*, 40 Ariz. 274, 11 P.2d 947 (1932)); *Evans,* 116 Ariz. at 220, 568 P.2d at 1118. Furthermore, a generally deteriorating mental condition, eccentricities, idiosyncracies, or mental slowness and poor memory associated with old age do not necessarily destroy testamentary capacity. *Stitt's*, 93 Ariz. at 306, 380 P.2d at 603 (quoting *In re Wright's Estate*, 7 Cal.2d 348, 60 P.2d 434, 438 (1936)); *Thorpe*, 152 Ariz. at 348, 732 P.2d at 578; *Evans*, 116 Ariz. at 219-20, 568 P.2d at 1118.

Arizona does not have a reported case in which a court has found that the testator's insane delusions at the time of execution of the will rendered it invalid. However, application of Arizona law leads to the conclusion that even if the testator has apparent testamentary capacity under the three-prong test, the will is nonetheless invalid if an insane delusion affects the terms of the will related to one of the requirements. The court in *Matter of Will of Maynard*, 64 N.C.App. 211, 307 S.E.2d 416, 430 (1983) (quoting Wiggins, *Wills and Administration of Estates in North Carolina,* § 47, pp. 65–66 (2d ed. 1983)), explained this rule as follows:

> "If a person has sufficient mental ability to make a will but is subject to an insane delusion, i.e., monomania, as to one of the essential requirements of testamentary capacity, the will would not be valid. For example, if the testator has an insane delusion as to the objects of his bounty, it would invalidate his will.
>
> * * * * * *
>
> An insane delusion must be distinguished from prejudice, hate, bad judgment, ill will, and any

number of other conditions which might be associated with sanity. To be sufficient to invalidate the will, the delusion must have no foundation in fact and must be the product of the testator's diseased or deranged mind."

The court in *Kirkpatrick v. United Bank of Benton*, 269 Ark. 970, 601 S.E.2d 607, 609 (1980), noted that the settled law is that "while an individual may possess the requisite testamentary capacity, he may, at the same time, be laboring under one or more insane delusions which may have the effect of making his purported will a nullity." *See also In re Dovci's Estate,* 174 Pa Super. 266, 101 A.2d 449, 451 (1953)(if testator is of sound mind regarding general dealings but is under insane delusion that affects terms of his will, will is invalid); *Matter of Estate of Kesler*, 702 P.2d 86, 88 (Utah 1985) (insane delusion that affects one's understanding of the natural objects of one's bounty and materially affects disposition of one's property may invalidate a will).

Accordingly, if the testator is eccentric or mean-spirited and dislikes family members for no good reason, but otherwise meets the three-prong capacity test, leaving the family members out of the will would not be due to lack of testamentary capacity. *See Stitt's.* However, when mental illness that produces insane delusions renders the testator unable to evaluate or understand his relationships with the natural objects of his bounty and this inability affects the terms of his will, the testator lacks the mental capacity to make a valid will. Thus, we examine the evidence produced in the probate court to determine whether it is sufficient to support the conclusion that Killen suffered from a delusionary condition that affected the provisions of her will. *See Thorpe*, 152 Ariz. at 343, 732 P.2d at 573 (in will contest, appellate court may properly examine evidence to determine whether it is legally sufficient.)

Two of the psychiatrists who examined Killen, one eight days before she executed the will and the other twenty-one months later, testified that at the time she executed her February 18, 1988 will she was suffering from a delusional paranoid disorder. Dr. Patel testified that her delusional condition was permanent and that she could not have had a lucid interval. Dr. Don testified that it would be highly unusual for Killen to have a lucid day or moment and that delusions never go into remission, even with treatment.

The records of the psychiatrist who examined Killen a few weeks after she made her will show that he found her to have persecutory delusions and to be mentally incapacitated. Although no psychiatrist examined Killen on the day she executed her will, the court may consider evidence of her mental capacity before or after her execution of the will to show her state of mind at the time she executed the will. *See O'Connor's Estate,* 74 Ariz. at 257, 246 P.2d at 1070; Thorpe, 152 Ariz. at 344, 732 P.2d at 574. 0Thus, the evidence clearly supports the trial court's finding that Killen was suffering from a psychotic mental illness diagnosed as delusional paranoid disorder on the day she executed her will.

Likewise, the evidence supports the conclusion that when she signed her will, Killen was operating under insane delusions about Russell, R.C., and Carolyn, and her delusions controlled her perception of those persons and her treatment of them in her will. Dr. Patel testified that Killen's delusional disorder affected her ability to perceive her family members and friends. According to Dr. Don, Killen's animosity toward Russell, R.C., and Carolyn was completely based on her delusional belief system, and it was this delusion-based animosity that caused her to leave them only one dollar each in her will. He testified that although Killen knew who the natural objects of her bounty were, due to her illness she had a skewed perception of the roles of those people in her life. Thus, the expert

testimony supported the conclusion that Killen's delusions controlled her disposition of her property.

Furthermore, the evidence clearly supports the finding that Killen's delusions about Russell, R.C., and Carolyn were without foundation or basis in fact.[2] She believed that they stayed in her attic, sprayed chemicals and parasites from the attic, were trying to poison her, were trying to take her property, and were in the Mafia. Some of her beliefs were too bizarre to be real. As to those that might be theoretically plausible, there was no evidence that Killen's nephews and niece had ever tried to harm her in any way or to take anything from her. Therefore, the court's finding that Killen's delusional beliefs about her nephews and niece were without foundation or basis in fact is supported by the evidence.

The only evidence contrary to the court's finding was the opinion of Dr. Bendheim that although Killen suffered from paranoid delusion disorder, she had testamentary capacity because she satisfied the three-prong test. However, in light of the law that an insane delusion may render a will invalid despite apparent capacity under the test, the probate court did not err in rejecting Dr. Bendheim's opinion.

As noted above, Marion argues that there is no proof that it was solely Killen's delusions that produced her hostility toward Russell, R.C., and Carolyn. If Killen had not suffered from insane delusions, she might have disliked them for a rational reason. However, Marion's position is rebutted by Dr. Don's testimony. There is no way of knowing what Killen might have felt without the delusions. The evidence shows that Killen's feelings toward Russell, R.C., and Carolyn were controlled by her delusions. Therefore, because this mental impairment did not allow her a rational and lucid view of her relationships, in a legal sense, she did not have the mental capacity required to make a will.

What might have been if she did not suffer from delusions cannot control in such a situation as it would be mere speculation; what does control is the fact that her paranoid delusions prevented her from appreciating her relationships with the natural objects of her bounty. This rule makes it unnecessary to try to determine what was in Killen's mind regarding her family members when she made her will. If the evidence shows that the testator had unfounded insane delusions that affected the terms of the will, the testator lacked the capacity to make a will; no inquiry into the testator's feelings or motivation is necessary.

Marion also argues that the evidence does not explain why Killen's delusions focused on Russell and, to a lesser extent, R.C. and Carolyn. He proposes that it may be because she rationally had come to dislike and distrust them. However, there is no evidence that, at least since the last few years of her husband's life, Killen was able to rationally evaluate her relationships without delusional interference. In addition, although none of the expert witnesses specifically testified as to why Killen's delusions focused on her husband and then on Russell, R.C., and Carolyn, the evidence indicates that her delusions focused on the persons who were closest to her and who took care of her. For example, Dr. Don reported that when he examined her in 1989, she believed that staff members of the care center at which she was then living had rummaged through her possessions, introduced noxious chemical substances into her room, poisoned her food, and bugged her room.

Most significantly for purposes of the will contest, her delusions focused on natural objects of her bounty. If, for example, when she executed her will she had been living at the care center and her

delusions had involved only staff at the care center, her delusionary condition would have not impacted her testamentary capacity, and the will might have been valid. However, because her insane delusions focused on natural objects of her bounty and thus materially affected her disposition of her property, the court correctly found the will to be invalid.

In summary, we hold that if at the time of execution of a will the testator knew the natural objects of her bounty but suffered from insane delusions that affected her perception of those persons and the terms of the will, the testator did not have the requisite testamentary capacity and the will is invalid. The evidence before the probate court supported its conclusion that Killen was suffering from such a paranoid delusion when she executed her will and that the February 18, 1988 will is invalid. Accordingly, we affirm the probate court's order declaring the will to be invalid and withdrawing it from probate.

Matter of Estate of Watlack, 945 P.2d 1154 (Wash. App. 1997)

KURTZ, Judge.

Between March 26, 1988, and June 22, 1988, Stephen Watlack executed two wills. The first will named his children as beneficiaries and the second will disinherited them in favor of the children of his favorite brother. The trial court set aside the second will as the product of an insane delusion and admitted the first will to probate. The personal representative and beneficiaries of the second will appeal. We hold that the facts support the trial court's conclusion that Mr. Watlack was suffering from an insane delusion at the time he executed the second will.

FACTS

Stephen Watlack was born on August 3, 1902. He was divorced in 1963, and thereafter maintained only sporadic contact with his two children David Watlack and Dawn Freeman. In March 1988, Dawn Freeman went to California to assist her father in a dispute he was involved in with his long-time companion, Dorothy Gregory. This dispute arose over the disappearance of approximately $100,000 of cash, which Mr. Watlack believed Ms. Gregory's nephew, Gordon Scott, had taken. At the same time, Mr. Watlack had a delusion that Mr. Scott had hit him over the head. Mr. Watlack made an attempt to attack Mr. Scott with an ax as a result of this delusion.

This dispute led to litigation between Mr. Watlack and Ms. Gregory and Mr. Scott. The parties negotiated a settlement wherein Mr. Watlack received his home in Falbrook, California, and a 1983 Lincoln automobile. As part of the settlement, he agreed to release all of his claims against Ms. Gregory and Mr. Scott and to drop criminal charges. At this time, it was also determined that Mr. Watlack would sell his home and return to Starbuck, Washington, to live with his daughter.

On March 26, 1988, Mr. Watlack executed a will while still a resident of California, designating his two children as the sole beneficiaries. A prior will designated Ms. Gregory as the beneficiary.

In April 1988, prior to returning to Starbuck, Washington, Mr. Watlack transferred ownership of his 1983 Lincoln to Dawn Freeman and placed his home in California for sale. He opened a joint checking account in Dayton, Washington, with Ms. Freeman. In May 1988, he gave Ms. Freeman

$200 to purchase clothes for herself and her children. He subsequently accused her of stealing the $200.

At this time, he was constantly talking about what he would do with the proceeds from the sale of his house. His house sold and a check for $98,000 was issued on May 31, 1988. When Mr. Watlack inquired about this money, Ms. Freeman told him she had not yet received it. Ms. Freeman had in fact arranged for the check to be held in California. She did not intend to permanently deprive or misappropriate Mr. Watlack's funds, but was fearful that if the check came in the mail, he would cash it, leave, and dissipate the funds. At no point, did Mr. Watlack authorize Ms. Freeman to take control of the proceeds of his house sale.

Mr. Watlack moved from the Freeman home in the latter part of May 1988. At that time, he was angry with Ms. Freeman. He accused her of being a thief, and stated he wanted to return to the sea. Thereafter, he lived in a motel for a few days, and then lived in a foster home run by Mr. and Mrs. Sanford until he was placed in a nursing home in Walla Walla in September 1989. Ms. Freeman and her husband attempted to visit Mr. Watlack at the foster home on May 29, 1988, but he became extremely angry and accused them of stealing his money. The Sanfords requested that they not return as it was too upsetting.

Ms. Freeman returned from a trip to California on June 17, 1988, and promptly turned the sale proceeds check over to Dayton attorney Terry Nealey. Initially, she had contacted Mr. Nealey on May 5 about a real estate matter concerning Mr. Watlack and thereafter on May 25, to inquire about a guardianship for him. She was concerned about his desire to take his money and return to the sea, and his desire to obtain revenge against Mr. Scott. She was also concerned that someone would take his money. At that time, Mr. Nealey agreed to represent her with respect to the guardianship for her father.

In the meantime, on June 15, 1988, Mr. Watlack asked Mrs. Sanford to make an appointment for him with an attorney. He wanted to change his will. Acquainted with Mr. Nealey, she scheduled an appointment for June 17. During this meeting, Mr. Watlack identified his family members, including his children and niece and nephews, and named the niece and nephews as the sole beneficiaries because they were the children of his favorite brother. None of these relatives visited him in Washington or came to his funeral. One of them, Audrey Watlack, visited him in California in April 1988, when he had his dispute with Ms. Gregory. At the time of his meeting with Mr. Nealey, Mr. Watlack stated that he did not want to leave his son and daughter anything. He expressed his anger with Ms. Freeman and again accused her of stealing money from him. The provision in the will disinheriting Mr. Watlack's children stated that they were to receive nothing because he had spent very little time with them and had previously given Ms. Freeman his 1983 Lincoln.

On June 21, 1988, Ms. Freeman and her husband met with Mr. Nealey to discuss Mr. Watlack's guardianship. At this time, Ms. Freeman turned over the check for $98,000 and the bank account cashier's check for $1,500. Later that day, Mr. Watlack returned to Mr. Nealey's office to sign his will. Mr. Nealey then disclosed to Mr. Watlack that Ms. Freeman had delivered to him the $98,000 check, and a cashier's check for $1,500 from his bank account. He also advised Mr. Watlack of the guardianship petition. Mr. Watlack agreed to the guardianship so long as Mrs. Sanford was appointed as his guardian. Mr. Watlack requested that the check for $98,000 be placed into an interest bearing account.

The next day Mr. Watlack returned to Mr. Nealey's office to sign his new will. Angry and pounding the desk, Mr. Watlack again accused his children of stealing the money now in Mr. Nealey's possession. Concerned about his capacity to make a will, Mr. Nealey tried to calm his client. Although agitated, Mr. Watlack had testamentary capacity at the time of the signing of the June 22, 1988, will. Nonetheless, on that date he still held the false belief that Ms. Freeman had stolen money from him and continued to accuse her of taking the money. From at least March 1988 through the date of his eventual death, Mr. Watlack suffered from this and other insane delusions.

The guardianship was commenced in superior court on June 22, 1988. The guardian permitted Mr. Watlack to maintain a checking account until September 1989, to which his pension was deposited and personal expenses, including foster home charges, were deducted. Mr. Watlack had a habit of stashing cash and this behavior continued while he lived in Washington. Out of money from his checking account, he accumulated more than $2,000 hidden under his mattress that was discovered when he went to a nursing home in Walla Walla in September 1989.

Mr. Watlack died on December 16, 1993, in Walla Walla. Ms. Freeman petitioned the court to admit his will dated March 26, 1988, and Audrey Watlack, Mr. Watlack's niece, filed an objection and petitioned the court to admit his will dated June 22, 1988. After a trial, the court made all of the findings recited in this summary of the facts. Based on these findings, the court determined Mr. Watlack had suffered from an insane delusion at the time he executed the June 22, 1988, will.

The court admitted to probate the March 26, 1988, will designating Mr. Watlack's children as the sole beneficiaries. Dorothy Sanford, as the personal representative of the will dated June 22, 1988, and Mr. Watlack's niece and nephews appealed.

ANALYSIS

Mr. Watlack's children contend this appeal should be dismissed because the appellants did not file a report of proceedings, citing *Heilman v. Wentworth*, 18 Wash.App. 751, 571 P.2d 963 (1977), *review denied,* 90 Wash.2d 1004 (1978) and *City of Seattle v. Torkar*, 25 Wash.App. 476, 610 P.2d 379, *review denied,* 94 Wash.2d 1001 (1980). These cases are distinguishable because they involved incomplete records that were insufficient for adequate review by the appellate court. Here, appellants are not asserting any factual challenges, but are challenging whether the conclusions are supported by the court's findings. RAP 9.1(a) provides that the record on review may consist of a report of proceedings but does not make the filing of such a report mandatory. Because the clerk's papers and findings of fact and conclusions of law provide a sufficient record for review here, the filing of a report of proceedings was not necessary. These unchallenged findings of fact are verities on appeal. Our review is limited to determining whether the conclusions of law are supported by findings of fact. *Holland v. Boeing Co.*, 90 Wash.2d 384, 390, 583 P.2d 621 (1978).

As will contestants, Mr. Watlack's children have the burden of establishing the will's invalidity by clear, cogent, and convincing evidence. *In re Estate of Meagher*, 60 Wash.2d 691, 692, 375 P.2d 148 (1962), A person may be insane regarding a certain subject and have one or more delusions, but despite such deficiencies that person may have testamentary capacity. *In re Estate of O'Neil*, 35 Wash.2d 325, 334, 212 P.2d 823 (1949). A will may be invalidated if it is shown by clear, cogent, and convincing evidence that at the time the will was executed, the testator was laboring under insane delusions that materially affected the disposition of the will. *Meagher*, 60 Wash.2d at 692, 375 P.2d 148. Clear, cogent, and convincing evidence exists when the ultimate fact in issue is shown by the

evidence to be highly probable. *In re Dependency of K.R.,* 128 Wash.2d 129, 141, 904 P.2d 1132 (1995).

An "insane delusion" is not well defined by case law. It has been defined as a false belief, which would be incredible in the same circumstances to the victim if he was of sound mind, and from which he cannot be dissuaded by any evidence or argument. *In re Estate of Klein*, 28 Wash.2d 456, 472, 183 P.2d 518 (1947). It was later described as a condition of such "aberration as indicates an unsound or deranged condition of the mental faculties...." *Meagher*, 60 Wash.2d at 693, 375 P.2d 148 (quoting *Owen v. Crumbaugh*, 228 Ill. 380, 81 N.E. 1044, 1051 (1907)). A belief resulting from a process of reasoning from existing facts will not be an insane delusion, regardless of whether the reasoning is imperfect or the conclusion illogical. *Meagher*, 60 Wash.2d at 693, 375 P.2d 148.

Mrs. Sanford first challenges conclusions of law 4 and 6, wherein the court determined Mr. Watlack had no rational basis to believe Ms. Freeman had stolen the house proceeds or other monies from him as of the afternoon of June 21, 1988. These conclusions are supported by the court's findings that Mr. Nealey disclosed to Mr. Watlack the day before the execution of his will, the fact that Ms. Freeman had obtained and delivered to his office the $98,000 house proceeds check and a $1,500 check from Mr. Watlack's bank account; Mr. Watlack specifically requested the check be placed in an interest bearing account later that day; at the time of the will signing, he continued to accuse her of stealing the money even though he was aware the check was in his attorney's possession; and Mr. Watlack had given Ms. Freeman $200 for clothing in May 1988 and later accused her of stealing the money.

She also challenges conclusion of law 5, wherein the court determined Mr. Watlack was suffering from an insane delusion at the time he executed the June 22, 1988, will. The court found Mr. Watlack was very agitated and angry at the time he signed his will on June 22, 1988, because he falsely believed Ms. Freeman had stolen money from him even though he knew the proceeds check was in the possession of his attorney. Likewise, the court found Mr. Nealey had informed Mr. Watlack that Ms. Freeman had delivered the proceeds check to his office on June 21, 1988, yet Mr. Watlack continued to believe Ms. Freeman had stolen the money. Mr. Watlack's continued adherence to this false belief despite all evidence to the contrary which was presented to him constituted an insane delusion. The court's conclusion that he was suffering from this insane delusion during the execution of the will is supported by the findings.

Mrs. Sanford next challenges conclusion of law 7, wherein the court determined Mr. Watlack had not put aside his insane delusions when he made the will on June 22, 1988. This conclusion is directly supported by the court's findings that Mr. Watlack suffered from insane delusions from at least March 1988 through the date of his death, became angry at the will signing because he falsely believed Ms. Freeman had stolen his money and continued to accuse her of such on that date, and continued to make accusations of her stealing the money long after his guardianship was established in June 1988.

Finally, Mrs. Sanford challenges conclusion of law 8, wherein the court determined Ms. Freeman and her brother David Watlack were disinherited based upon Mr. Watlack's extreme anger caused by an insane delusion and not on the basis that he had little contact with them or that he had previously given Ms. Freeman his car. Mrs. Sanford contends these reasons supply other motives for the disposition made, and Ms. Freeman did not establish the insane delusion was the controlling factor in the disposition.

This contention, however, is not supported by the court's findings that Mr. Watlack made arrangements to see an attorney about a new will shortly after an outburst with the Freemans wherein he accused them of stealing his money; while meeting with Mr. Nealey about the will, he stated he did not want to leave his children anything and again accused his daughter of stealing his money; and at the will signing again became agitated and angry with his daughter, pounding his fist on the desk and accusing her of stealing his money. Instead, the facts here indicate Mr. Watlack's insane delusion was the controlling reason for the new disposition in his June 22, 1988, will. In summary, the findings of fact support the conclusion that the June 22, 1988, will is a product of an insane delusion.

HOLDING

The judgment of the trial court is affirmed.

Notes, Problems, and Questions

1. Any person can be delusional and still be capable of executing a will. The problem occurs when the delusion is insane and the manner in which the testator distributes her property is influenced by that delusion. Hence, when evaluating the cases, you need to engage in a three step analysis. First, you must identify the delusion. Second, you must decide whether or not that delusion is insane. Insanity is not a psychological term; it is a legal term.[88] A delusion is insane if the person holds on to the belief despite facts to the contrary. Third, you must determine whether or not the insane delusion was the motivating factor behind the testator's decision to dispose of his or her property in a certain way. Review the facts of the two cases in this section and do the three step analysis. Did you come out with the same result as the courts?

Class Discussion Tools

(a) 75 year old Jillian met with a lawyer to have him draft her will. During the initial interview, Jillian told the lawyer that she wanted to leave her house to Mr. Giggles. When the lawyer asked for Mr. Giggles' address, Jillian opened up a box and produced a small monkey dressed in a black and red leather suit. Jillian said, "Say hello to the man Mr. Giggles." Jillian stated that she wanted to leave the house to Mr. Giggles so that he could have some place to live after she died. She also said that she was disinheriting her only daughter, Anne, because Anne was trying to kill Mr. Giggles. What should the lawyer do? If he executes the will, what are the chances that Anne will be able to successfully challenge Jillian's capacity? What additional information do you need to answer this question?

(b) Roger, a 77 year old widow, suffered from anxiety disorder. In addition to therapy, Roger's doctor gave him a prescription for medical marijuana and told him to smoke two joints a day. Roger had three children, Lester, Nathan and Charmaine. Every morning Charmaine made Roger a green smoothie. She put powered wheatgrass in the smoothie to give Roger an energy boost. Diane, Roger's neighbor, told him that she heard Dr. Oz say that wheatgrass caused cancer. Diane wore a hearing aid, so she missed the fact that Dr. Oz actually said that wheatgrass helped prevent cancer. Roger refused to drink the smoothie if Charmaine put the wheatgrass in it, so Charmaine started

[88] *Doughtery v. Rubenstein*, 914 A.2d 184, 193-94 (Md. 2007).

slipping the wheatgrass on his salads. One day, Roger saw Charmaine sprinkle something on his salad. He told Lester that Charmaine was trying to kill him. Lester confronted Charmaine and she told him that she put wheatgrass on Roger's salad to give him energy. In order to convince Roger that she was not trying to kill him. Charmaine sprinkled the wheatgrass on the salad and ate half of it. In response, Roger said, "You took the anecdote to the poison, so you won't die. The moment I eat it I'm a goner." Lester had the powder analyzed at a private lab and showed Roger the results. In response, Roger said, "You're in it with her. You are both dead to me." The next day, Roger changed his will, and left his entire estate to Nathan. After Roger died, Lester and Charmaine filed an action to set aside the will because it was a product of an insane delusion. What are the strongest arguments on each side? How might the court decide the case?

(c) Paige was a ninety-two year old widow who still maintained her own home. She had two sons Clyde and Beau, and a daughter Jeannette. Paige's son, Jackson, predeceased her; Jackson was survived by a wife, Marie, and two children, Bernard and Lillie. Because of her poor eyesight and a degenerative muscle disease that caused her hands to shake, Paige relied solely on her unmarried son, Beau, to pay her bills, to take her grocery shopping and to take her to doctor appointments. Paige's daughter, Jeannette lived in Spain. Paige refused to accept any assistance from Clyde because he did not "do as he was told and divorce his wife, Janet." Paige thought Clyde was weak, unduly protective of Janet, and inattentive to Paige's needs. Paige's dislike of Janet stemmed from an overheard telephone conversation between Janet and a man, which had taken place five years earlier. Upon overhearing the conversation, Paige assumed Janet was having an affair with another man. Paige confronted Clyde with the information. Clyde explained to Paige that the overheard telephone conversation was between Janet and her brother, Alan, who was planning to visit them. He explained that Janet was only arranging a time to pick Alan up from the airport. Clyde also tried to explain to Paige that it was natural for Janet to tell her brother that she loved him. Although Clyde's version of the story was the truth, Paige refused to believe it. She insisted that Clyde divorce Janet. Clyde refused to get a divorce, so Paige stopped speaking to him. On a trip to her doctor's office, accompanied by Beau, Paige indicated that, when she died, she wanted to leave all of her 1.2 million dollar estate to Beau. Beau thanked Paige and told her that, unlike his brother Clyde who would probably spend all of his mother's money buying luxuries for Janet, he would truly appreciate the property. At that time, Beau neglected to tell Paige that he was having an affair with Janet. Paige changed her will and left her entire estate to Beau. She told her lawyer she was making the change because Janet was an adulteress. After Paige died, Clyde and Jeannette filed an action to set aside the will because it was a product of an insane delusion. What are the strongest arguments on each side? How might the court decide the case?

(d) Amanda Nelson, a 52 year old single woman, was a member of a religious sect called Keepers of the Light. Amanda and other members of the religion worshiped Yaka, a firefly, and his children. The group believed that one day they would be rewarded by being physically transformed into his image. Phillip, the head of the sect, told the members that in order to receive their reward, they had to leave all of their worldly goods to Keepers of the Light. Thus, Amanda executed a will leaving her entire 20 million dollar estate to Phillip. After Amanda died, her sisters, Tina and Carmen, filed an action challenging the validity of her will. What is the possible outcome?

Chapter Ten: Testamentary Capacity (Undue Influence, Duress and Fraud)

10.1 Introduction

A testator's ability to execute a will may be negatively impacted by the actions of third parties. The cases in this chapter involve situations where third parties attempt to manipulate the testator in some way. The level of influence that the third party exerts on the testator varies. Nonetheless, the third party's motivation is to get the testator to execute a will that reflects his or her desires instead of the testator's wishes. The three most common types of manipulations include undue influence, duress and fraud. Since duress is a form of undue influence, the concepts will be discussed in the same section. Following the discussion of undue influence and duress, the chapter includes an examination of fraud. The chapter ends with a discussion of a relatively new tort, intentional interference with an inheritance expectancy.

10.2 Undue Influence/Duress

The law does not expect a testator to make estate planning decisions in isolation. Given family dynamics, it is understandable that the testator may discuss his or her estate planning ideas with family members. In addition, it is not uncommon for a testator to have a closer relationship with some family members than he or she has with others. Thus, the testator is bound to be influenced by the opinions of some members of his or her family. Under the law, some influence is acceptable; problems occur when the testator is unduly influenced. The legislatures and the courts have not provided a bright line rule for determining how much influence is too much. The test is whether such control was exercised over the mind of the testator as to overcome his or her free agency and to substitute the will of another person so as to cause the testator to do what he or she would not have done had the influence not existed.

10.2.1 Presumption of Undue Influence

Normally, the person who is challenging the will has the burden of proving that the will was a product of undue influence. This changes if a presumption of undue influence arises. The person contesting the will can establish a presumption of undue influence if he or she is able to show (1) the existence of a confidential relationship; (2) the persons with the confidential relationship received the bulk of the estate; and (3) the testator had a weakened intellect. All three of these elements are subjective and evaluated on a case-by-case basis. If the court finds a presumption of undue influence, the burden shifts to the proponent of the will. That person has to overcome the presumption by providing clear and convincing evidence that he or she acted in good faith. A presumption of undue influence may also arise when an attorney receives a bequest under the terms of a will that he drafts unless he or she is closely related to the testator.

Noblin v. Burgess, 54 So.3d 282 (Miss. 2010)

MAXWELL, J., for the Court:

Robert H. "Bob" Noblin executed his last will and testament only hours before his death. The proponents of the will and the sole beneficiaries under it, Sammy Burgess and Sheila McDill, initiated probate proceedings in Smith County. Noblin's numerous heirs at law contested the will, asserting it was the product of undue influence. The trial court granted the contestants' request for a jury trial, and the jury returned a verdict in favor of the proponents.

On appeal, the contestants contend that a confidential relationship existed between the testator and the proponents, raising a presumption of undue influence. They argue the proponents failed as a matter of law to overcome this presumption by clear and convincing evidence. In the alternative, the contestants claim the trial court erred in peremptorily instructing the jury that the testator possessed testamentary capacity. They also argue the trial court erred in failing to grant their proposed peremptory instruction, which would have directed the jury to find the existence of a confidential relationship.

We find no reversible error and affirm.

FACTS

Noblin died in the early morning hours of October 3, 2003. He left behind no close "blood" relatives. Noblin's closest relatives by consanguinity appear to be an aunt and an uncle. His uncle is one of the contestants along with multiple first cousins. The proponents, Burgess and McDill, are Noblin's stepchildren. Noblin's only wife, who passed away in 1994, was the natural mother of Burgess and McDill. But because Noblin never adopted Burgess or McDill, they bear no relationship to him under Mississippi's law of intestate succession.

Although Noblin did not make a will until the final hours of his life, he had named Burgess and McDill as contingent beneficiaries (entitled to payment if his spouse predeceased him) on his individual retirement accounts (IRAs) and certificates of deposit. In 1989, Noblin listed Burgess and McDill as his "son" and "daughter" on his IRA applications.

On September 23, 2003, Burgess took Noblin to see a doctor because Noblin had been having physical problems. Burgess later took Noblin to Lackey Memorial Hospital in Forest, Mississippi. While there, Noblin's doctors determined he had widespread liver and pancreatic cancer. Shortly after this diagnosis, Burgess drove Noblin to Baptist Hospital in Jackson, Mississippi. Soon after Noblin's arrival, his physicians determined he had no treatment options other than taking medication to control his pain. Noblin remained at Baptist Hospital from September 29 until he died on October 3. Burgess and McDill attended to Noblin during these five days and took turns spending the night with him.

On October 1, 2003, Burgess called Todd Sorey, an attorney back home in Smith County. The call was placed from Noblin's hospital room, where only Noblin and Burgess were present. According to Burgess, he contacted Sorey at Noblin's request. Burgess asked Sorey to draft Noblin's will, and Sorey agreed to do so. Both McDill and Burgess testified that it was Noblin's idea, and not their

own, to make the will. Noblin never spoke with Sorey directly over the phone. Instead, Burgess talked to Sorey on the phone and relayed information back and forth between Sorey and Noblin. According to Burgess, McDill, and Sorey, Noblin had a severe hearing problem and was unable to personally speak to Sorey over the telephone.

Sorey testified he could hear Noblin responding to his questions. He also heard Noblin speaking about the information he wanted in his will. According to Sorey, he had known Noblin most of his life and was familiar with his voice. Sorey claimed that he could hear Noblin's voice over the phone. He recognized the tone, vernacular, and accent as Noblin's. Sorey maintained he had no doubt that he was speaking to Noblin, albeit with Burgess as an intermediary. Sorey testified that he heard Noblin express his desire to leave all his property to Burgess and McDill.

After this phone conversation, Sorey drafted a will leaving Noblin's entire estate to Burgess and McDill. McDill picked up the will at Sorey's office on October 2 and brought it back to the hospital in Jackson. Burgess then asked Noblin's nurse, Lynn Thornton, to find hospital employees to witness the will. Thornton herself agreed to witness the will. She recruited Corley Callum, also a registered nurse, to fill the role of the other attesting witness.

Of the two attesting witnesses, only Callum testified at trial. According to Callum, immediately before witnessing the will, she had a conversation with Noblin. Though she could not remember the exact exchange, she satisfied herself that Noblin's will reflected his intent. Callum testified that through her conversations with Noblin at the time the will was executed, she was able to verify that "what was taking place was what he wanted to do."

Noblin executed his will on the afternoon of October 2 sometime between 12:00 p.m. and 3:00 p.m. He died at 12:10 a.m. on October 3.

PROCEEDINGS AND DISPOSITION IN THE TRIAL COURT

Following Noblin's death, Burgess and McDill initiated probate proceedings in the Smith County Chancery Court. The contestants filed a will contest and requested a jury trial. The chancellor then transferred the case to Smith County Circuit Court, where a jury trial was held.

The trial judge granted a directed verdict in favor of the proponents on the issue of testamentary capacity. The trial court later gave a peremptory instruction for the jury to find the testator possessed the requisite capacity to make a will. The court, however, submitted to the jury the issues of (1) whether a presumption of undue influence arose by virtue of a confidential relationship between the testator and the proponents, and (2) whether clear and convincing evidence existed to overcome the presumption of undue influence. The trial court denied the contestants' request for a peremptory instruction on issue (1).

Following a three-day trial, the jury found in favor of the proponents, and the trial court entered a judgment reflecting the jury's decision.

STANDARD OF REVIEW

In reviewing a jury verdict, we apply the following standard:

> [An appellate court] resolves all conflicts of evidence in the appellee's favor and determines all reasonable inferences from testimony given towards the appellee's position. Reversal occurs only where the facts presented are so overwhelming in the appellant's position that reasonable jurors could not have found for the appellee. When an appellant challenges the sufficiency of evidence to support a jury's verdict, the appellate court's scope of review is limited. All evidence must be reviewed in the light most favorable to the appellee. An appellate court may only reverse a jury verdict when the facts considered in that light point so overwhelmingly to the appellant's position that reasonable men could not have arrived at a contrary verdict. In the event that evidence is conflicting, a jury is the sole judge of the credibility of witnesses and the weight of their testimony.

In re Estate of Dabney v. Hataway, 740 So.2d 915, 919 (Miss. 1999) (internal citations and quotation marks omitted).

DISCUSSION

I. Undue Influence

The contestants' first and main contention is that the proponents presented insufficient evidence to overcome the presumption of undue influence, which they allege arose by virtue of a confidential relationship. On this ground, they ask this Court to reverse and render the judgment of the trial court.

A. Presumption of Undue Influence

In *Croft v. Alder*, 237 Miss. 713, 115 So.2d 683 (1959), our supreme court crafted the confidential relationship doctrine applicable to wills contested on the basis of undue influence. Robert A. Weems, *Wills and Administration of Estates in Mississippi* § 8: 18 (3rd ed. 2003). The *Croft* court held a presumption of undue influence arises where: (1) a confidential relationship existed between the testator and a beneficiary, and (2) the beneficiary in the confidential relationship was actively involved in some way with preparing or executing the will. *Croft*, 237 Miss. at 722-23, 115 So.2d at 686. A confidential relationship is present where "one person is in a position to exercise dominant influence upon the other because of the latter's dependency on the former arising either from weakness of mind or body, or through trust." *In re Estate of Laughter v. Williams*, 23 So.3d 1055, 1063 (Miss. 2009). (citation omitted).

B. Overcoming the Presumption of Undue Influence

Croft also established that once the required showing is made to raise the presumption of undue influence, the burden shifts to the proponents to rebut the presumption by clear and convincing evidence. *Croft*, 237 Miss. at 723, 115 So.2d at 686.

In order to overcome the presumption of undue influence, the proponents must show by clear and convincing evidence: (1) the beneficiary acted in good faith; (2) the testator had "full knowledge and

deliberation" in executing the will; and (3) the testator exhibited "independent consent and action." *In re Last Will and Testament and Estate of Smith v. Averill*, 722 So.2d 606, 612 (Miss. 1998). Factors to be considered in assessing the beneficiary's good faith include:

(1) who initiated the procurement of the will;
(2) where the testator executed the will and who was present at the execution;
(3) what consideration was paid and who paid it; and
(4) whether the execution was done in secrecy or openly.

See id. Factors to be assessed in determining the testator's knowledge and deliberation in executing the will include:

(1) whether the testator was aware of his total assets and their worth;
(2) whether the testator understood who his "natural inheritors" were;
(3) whether the testator understood how his action would legally affect prior wills;
(4) whether the testator knew non-relative beneficiaries would be included; and
(5) whether the testator knew who controlled his finances and the method used:
  (a) how dependent the testator is on persons handling his finances; and
  (b) how susceptible the testator is to be influenced by any such persons.

See id.

Regarding the testator's "independent consent and action," unlike the other two prongs, there is no express list of factors. The supreme court has in the past required a showing that the testator acted on "[a]dvice of ... [a] competent person, ... disconnected from the [beneficiary] and ... devoted wholly to the ... testator's interest." *Murray v. Laird*, 446 So.2d 575, 578 (Miss. 1984). Though still a relevant consideration, this requirement has been absolved by more recent precedent, which has instead required "a showing of the grantor's 'independent consent and action' based on all of the surrounding facts and circumstances." *Vega v. Estate of Mullen*, 583 So.2d 1259, 1264 (Miss. 1991).

1. Good Faith

Other than inferences that might be drawn from circumstances surrounding the will's procurement, the contestants produced no evidence that Burgess or McDill influenced Noblin's decision to make a will or suggested the terms of the will. In fact, the evidence points to the contrary. Burgess and McDill both testified that the idea of making a will originated with Noblin. Burgess testified Noblin wanted him to contact Sorey to draft a will. Sorey testified he could clearly identify Noblin's voice over the phone, and Noblin expressed his desire to leave all of his property to Burgess and McDill. Sorey explained he was satisfied the will embodied Noblin's wishes. And just prior to the will's execution, Callum had a conversation directly with Noblin. Through this conversation, she ascertained the will's provisions reflected his intent.

While we recognize much of this testimony is self-serving, our law is clear that witness credibility determinations are for the jury. *See, e.g., Solanki v. Ervin,* 21 So.3d 552, 568 (Miss. 2009). Burgess, McDill, and Sorey, in particular, were all vigorously cross-examined about the circumstances surrounding the making of the will.

It is not disputed that Noblin executed his will in a hospital room. Noblin signed the will in the

presence of Burgess and McDill, as well as the two subscribing witnesses, Callum and Thornton. Gail Young, a hospital employee, was present to notarize documents. As to the consideration paid, Sorey testified he would have sent the bill for Noblin to pay but was unable to do so. According to Sorey, no one ever told him they would pay his fee for drafting the will, and no one ever paid it. Finally, there is no indication the execution was done in secrecy. The issue here is not whether the heirs had knowledge of the will's execution, but whether the "the physical place the will was executed was in plain view of the witnesses." *Estate of Smith*, 722 So.2d at 613. Here, Callum testified she saw Noblin sign the will. The contestants offered no contrary evidence to show the execution was in any way concealed from the view of the attesting witnesses or done in a secretive manner.

2. Knowledge and Deliberation

Under this prong, the proponents offered a great deal of evidence that Noblin managed and controlled his own personal affairs and finances. At least eight witnesses testified in support of the fact that Noblin was an extraordinarily independent person. Several of the contestants even testified to this fact. For example, contestant Henry Clay Noblin described Noblin as an "independent[ ] loaner [sic], off to his self [sic] fellow, [who] did his own work." According to contestant Diane Boykin, Noblin "made up his own mind about things," and "[i]t was his way or no way. So, if you asked him something and he answered, that was ... law." Finally, contestant Ronnie Noblin described Noblin as "strong-willed."

Two non-relative acquaintances of Noblin's also echoed these sentiments. According to David Gainey, who had known Noblin since childhood, Noblin "pretty much stuck to himself as far as his business was concerned" and "made up his own mind." Joe Rigby, a friend of Burgess's, testified that Noblin "was [the] kind of person that stayed to himself and took care of Bob." As contestant Boykin put it, Noblin had garnered the nickname—"one way Bob."

According to McDill and Burgess, this independence extended to financial matters as well. Although we find no specific proof of what Noblin knew of his total assets, the testimony of Burgess and McDill supports that Noblin took care of his own finances. Both Burgess and McDill asserted they did not own a joint account with Noblin or assist Noblin in writing checks.

There is little or no proof to show Noblin either did or did not understand who his intestate heirs were. Also, no prior wills existed for the subject will to effect.

3. Independent Consent and Action

Again, other than inferences that might be drawn from the procurement of the will, especially from Burgess's telephone call to Sorey, the evidence points to the fact that Noblin exercised his own independent consent and action with regard to the making of the will and its terms. Callum's testimony, as a disinterested person, is of course very significant on this factor. Callum testified to the following:

> Q: Okay. Once you walked into the room, did you have any conversations with Mr. Noblin?
> A: I don't remember the exact words or exact conversation that I had with Mr. Noblin, but I did have a conversation with him, yes.
> Q: Okay, what were your conversations about?
> A: I'm sure the usual exchanges of, you know, hey, Mr. Noblin, how are you doing, that kind of

thing took place originally; and then, you know, verifying that what was taking place was what he wanted to do.
Q: Okay. And did you satisfy yourself that that's what he wanted to do?
A: I did, through the questions that I asked him, yes.

Callum remained in the room for approximately thirty minutes during the execution of the will. During cross-examination, Callum added, "I'm not going to sign my name to any document that I feel is deceitful. I read the will [,] and I made my own judgment based on the questions that I asked Mr. Noblin." After reading the will, remaining in the room for half an hour, and having a conversation with Noblin, Callum "satisfied [herself] knowing that [she] was doing what Mr. Noblin wanted done." She then observed Noblin sign his will.

Under these circumstances, we find a factual question on which reasonable minds could differ. The trial court did not err in refusing to hold the presumption of undue influence could not be overcome as a matter of law. The trial court properly submitted this issue to the jury.

In re Estate of Saucier, 908 So. 2d 883 (Miss. Ct. App. 2005)

ISHEE, J., for the Court.

This will contest was brought before the chancery court of Forrest County on August, 14, 2003, when the Appellant, James Saucier ("Saucier"), the father of Jerry Saucier, deceased, filed his petition to probate the will in common form. Appellee Susan W. Tatum ("Tatum"), filed her petition to probate a will and letters testamentary of another will purported to be the last will and testament of Jerry Saucier on August 18, 2003. On March 3, 2004, final judgment was entered in favor of Tatum and the will she supported was entered into probate. Aggrieved by this judgment, Saucier appealed. Finding no error, we affirm.

FACTS

The testator, Jerry Saucier ("Jerry"), was thirty-seven years of age at the time of his death on August 9, 2003. His death was the result of congestive heart failure due to alcoholic cardiomyopathy. During his life, Jerry executed two documents which were later produced and submitted to probate. The first will, later propounded by the Appellant, was a holographic document dated January 27, 2002. The second will was a typewritten will dated January 27, 2003, leaving all of Jerry's property, both real and personal, to Tatum. There is no dispute as to the authenticity of the two wills presented for probate.

Under the holographic will the balance of Jerry's estate would have passed to his son, from whom Jerry was estranged at the time of his death. At trial, Saucier challenged the second will put forth by Tatum on the grounds that the will was the product of Tatum's undue influence over Jerry at the time it was executed. The facts presented at trial regarding the close relationship between Tatum and the decedent established that Tatum provided care and assistance to Jerry as his health declined by, for example, cleaning his house and by taking him to detoxification programs and psychiatric appointments. Tatum and Jerry also dated at least one year prior to his death. Testimony at trial illustrated that the pair saw each other every day of the year prior to his death, that they were

physically intimate, and that at some point the pair had made plans to marry. Tatum was heavily involved in preparing his will. Tatum located and provided the form used for the second will, and accompanied Jerry to the bank where the instrument was executed. Upon learning that the will had not been properly executed, Tatum brought Jerry to the bank a second time in order to affect a valid execution.

After hearing all testimony in the matter, the trial court found that Tatum "played an instrumental part in seeing that the will was created...." While Jerry admitted to his father that he consumed approximately one-fifth of whisky a day, there was no testimony that Jerry was intoxicated at the time of the preparation and execution of his will. Witnesses from the bank where the instrument was executed provided that they thought Jerry was competent at the time of the execution, and that while present, Tatum did not appear to be an active or interfering force in the execution of the will. The judgment entered by the chancery court found that the will propounded by Tatum was not the result of undue influence, and allowed the document to be entered into probate. Aggrieved by this decision, Saucier asserts the following errors on appeal: (1) whether the chancery court erred in failing to find that the second will was the product of undue influence by Tatum; and (2) whether Tatum failed to rebut the presumption of undue influence by clear and convincing evidence.

ISSUES AND ANALYSIS

I. Whether the chancery court erred in failing to find that the second will was the product of undue influence by Tatum.

Saucier asserts that the trial court erred in failing to find that second will was the product of undue influence. Saucier asserts specifically that the relationship between Tatum and Jerry was confidential and that Tatum was instrumental in the formation of the second will, thereby creating a presumption of undue influence. We begin our analysis of this issue by noting the standard of review. "When reviewing a chancellor's legal findings, particularly involving the interpretation or construction of a will, this Court will apply a de novo standard of review." *In re Last Will and Testament of Carney*, 758 So.2d 1017, 1019 (Miss.2000). With respect to a chancellor's findings of fact in a will contest, this Court has held that it "will not disturb the findings of a chancellor unless he is manifestly wrong, clearly erroneous, or applied an erroneous legal standard." *Goode v. Village of Woodgreen Homeowners Ass'n,* 662 So.2d 1064, 1070 (Miss. 1995).

"In an action contesting a will, a presumption of undue influence arises where there is a confidential or fiduciary relationship." *In re Fankboner v. Pallatin*, 638 So.2d 493, 495 (Miss. 1994) (citing *Mullins v. Ratcliff*, 515 So.2d 1183, 1192 (Miss. 1987 "Suspicious circumstances, along with the confidential relationship, also give rise to a presumption of undue influence." *Id.* (Citing *Estate of Lawler v. Weston,* 451 So.2d 739, 741 (Miss. 1984)).

Saucier argues on appeal that a confidential relationship, as well as suspicious circumstances, created such a presumption of undue influence in this case, and that as such, Tatum should have been forced to rebut that presumption by clear and convincing evidence.

The factors utilized by this court to determine whether a confidential relationship existed are as follows:

> (1) whether one person has been taken care of by others, (2) whether one person maintains a close relationship with another, (3) whether one person is provided transportation and has their medical care provided for by another, (4) whether one person maintains joint accounts with another, (5) whether one is physically or mentally weak, (6) whether one is of advanced age or poor health, and (7) whether there exists a power of attorney between one and another.

In re Estate of Dabney, 740 So.2d 915, 919 (Miss.1999). In examining factor one, Tatum's own testimony established that she provided assistance and care to Jerry. However, in many instances, despite his alcoholism, Jerry was capable of caring for himself in a manner common to functional alcoholics. Because the parties saw each other on a daily basis, were physically intimate, and had made some generalized plans to marry, these facts clearly indicate that a close relationship was maintained between Jerry and Tatum in regards to factor two. While Tatum did provide transportation for Jerry, most notably during the formation of the will, this was mostly due to the fact that Jerry's license had been suspended. There is some evidence to suggest that Tatum transported Jerry to a handful of psychiatric appointments, and provided other more generalized assistance as considered by factor three. As to factor four, there is no evidence to suggest that Jerry and Tatum held joint accounts, although we note that Jerry entrusted Tatum with the keys to his safety deposit box. As to factor five, Jerry was physically ravaged by his alcoholism. However, whether Jerry was mentally weak presents a closer question. Saucier asserts on appeal that Jerry's liquor consumption, and a past incident where police were called to his home after a bout of hallucinations evidences Jerry's weakened mental state. Saucier also claims that Jerry "badly mismanaged" some apartments owned by his father. Finally, Saucier cites the statement of Jerry's psychiatrist who observed that he was "shaky, tremulous," and that Jerry "just seemed uncomfortable."

Tatum has put forth ample evidence to indicate that Jerry was fully capable of conducting his own affairs, was able to manage his own business and employees, and for the most part was competent to handle his own affairs. In fact, his own psychiatrist, Shannon Johnson, stated that Jerry was "in his right mind." Although Jerry evidenced specific instances of mental weakness, the weight of the evidence mitigates against finding that he functioned within a continually weakened mental state. As to factors six and seven, we note that Jerry was in a weakened physical state, and that no power of attorney was granted to Tatum by Jerry.

Taking all of the *Dabney* factors as a whole, it is clear that the relationship between Jerry and Tatum was confidential in nature. Furthermore, the chancellor found that Tatum was "a moving force" in the creation of the second will. The confidential relationship of the parties and Tatum's role in the creation of the will suffice to create a presumption of undue influence. Furthermore, according to *Croft,* Tatum's status as a beneficiary under the will further bolsters this presumption. Croft, 115 So.2d at 686. Saucier is correct in stating that the chancellor failed to make any mention of this presumption within his judgment. However, this failure to state this presumption within the judgment or elsewhere in the record may not, in and of itself, compel us to hold that the chancellor committed reversible error. "Even where the specific basis of a decision is not stated in the chancellor's opinion, the decision will not be disturbed if substantial evidence can be found in the record." *M.C.M.J. v. C.E.J.,* 715 So.2d 774, 777 (Miss.1998). It is apparent from the chancellor's opinion that all of the requisite *Dabney* factors were considered within his deliberative process. Although the chancellor did not specifically state that a presumption of undue influence arose, substantial evidence of such can be found to support, at the very least, his consideration of the

matter. We cannot say that the chancellor committed manifest error in his factual findings, and further hold that any legal error by the chancellor in this regard constitutes harmless error. We therefore must affirm the chancellor as to this issue.

II. Whether Tatum failed to rebut the presumption of undue influence by clear and convincing evidence.

Saucier asserts in his second assignment of error that Tatum failed to rebut the presumption of undue influence. In the case *sub judice,* due to the fact that the circumstances give rise to a presumption of undue influence, the burden off going forward with the proof shifted to Tatum to prove by clear and convincing evidence that (1) Tatum acted in good faith in the confidential relationship with Jerry;

(2) Jerry acted with full knowledge and deliberation of his actions and their consequences when he executed the second will; and (3) that Jerry exhibited independent consent and action. *Murray v. Laird,* 446 So.2d 575, 578 (Miss. 1984) as modified by *Mullins v. Ratcliff*, 515 So.2d 1183, 1193 (Miss. 1987).

To determine whether Tatum acted in good faith, we must examine the facts surrounding the procurement of the second will. It is undisputed that Tatum was instrumental in the drafting of the will. However, she and Jerry worked together in this regard, and her role in drafting the will is not alone determinative of bad faith. Numerous disinterested persons witnessed the signing of the will. The first subscribing witness to the will, Teressa Rogers, an assistant manager at the bank, testified that she questioned Jerry regarding whether the will represented his wishes, and whether he wanted to sign the document. She further testified that Jerry answered both questions in the affirmative, and that Jerry appeared to be in his right mind and was not intoxicated. The testimony of the second subscribing witness, Jacque Forrester, was not heard as the parties stipulated that his testimony was merely corroborative of the testimony of Rogers. "Secondly, the place of the execution of the will and the persons in whose presence the will was executed are significant." *In re Will of Fankboner*, 638 So.2d at 496. The second will of Jerry Saucier was executed in the open at a branch of the Union Planters Bank before two disinterested subscribing witnesses and a notary public. "The third and fourth factors are the consideration/fee that was paid and the identity of the person who paid the fee." *Id.* In this case, no consideration or fee was paid in the drafting of the will. The fifth and final factor that should be considered to determine the "good faith" of Tatum is the secrecy and openness given the execution of the will. *Id.* The evidence before us is clear that the execution of the will was open and well observed. We therefore find substantial evidence that supports a finding that Tatum acted in good faith.

We now turn to the question of whether Jerry acted with full knowledge and deliberation of his actions and their consequences when he signed the will. The testimony of the subscribing witnesses is again pertinent in this regard. All of the testimony provided regarding the signing of the will at the bank indicated that Jerry was acting in accordance with his own wishes and of his own volition. There is simply scant evidence to conclude that Tatum abused her relationship with Jerry either by asserting dominance over him or by substituting her intent for his. *See In re Estate of Sandlin v. Sandlin,* 790 So.2d 850, 854 (Miss.Ct.App.2001) (discussing the level of influence that must be exerted over a testator in order for the court to find undue influence). As to the third factor established in *Murray,* we must determine whether Jerry exhibited independent consent and action. The evidence in this case is legion toward establishing that Jerry exhibited independent consent and action, and that the

second will represents his final wishes independent and free from of any undue influence by Tatum. The evidence *sub judice* is clear and convincing in establishing that Tatum did not substitute her will for Jerry's, and any presumption to the contrary is clearly rebutted in accordance with the requirements of *Murray*. This assignment of error is without merit.

The judgment of the Chancery Court of Forrest County is affirmed.

Problems

1. In 1998, Jill, a 76 year old widow, was diagnosed with chronic pain syndrome. As a consequence, she received a special permit to smoke medical marijuana. She smoked a couple of joints three times a day. Jill had two children, Bailey and Scott. In 1999, Jill met Lydia, the founder and president of the Institute for Chronic Pain. The women became friends and Lydia did volunteer work for the Institute. Lydia, Jill and Marcia, the secretary at the Institute, often had lunch together. According to Marcia, during lunch one day in 2000, Lydia told Jill that if the Institute did not get more private donations she would have to close it. In March of 2003, Jill mentioned to Lydia that she intended to make a will. Lydia suggested that Jill contact Paul, Lydia's husband who was a private probate attorney. On March 23, 2003, Paul prepared Jill's will, leaving her entire estate to the Institute for Chronic Pain. On April 10, 2003, Jill was killed in a car accident. Bailey and Scott filed an action to challenge the validity of the will. What is the possible outcome?

2. Before Samuel Mack, a rapper, released a new album he always consulted Madame Z, his psychic. In 2007, Samuel was diagnosed with brain cancer. Madame Z gave Samuel several different types of herbs to counteract the nausea he experienced because of his chemotherapy treatment. As Samuel's disease progressed, he became severely depressed and stopped associating with most of his friends and family. Susan, Samuel's wife, tried to get him to see a psychologist, but Samuel told her that he could get all of the help that he needed from Madame Z. Madame Z gave Samuel herbs to ease his depression. One day, Madame Z told Samuel that he had brain cancer because the universe was not pleased with him. Madame Z predicted that Samuel would be cured if he started donating money to charity. Samuel took Madame Z's advice and gave 2 million dollars to an organization that provided services to the poor. Two months later, Samuel's doctors declared him to be cancer-free. After that, Samuel would not make any decisions without consulting Madame Z. In 2010, Samuel was excited when Susan gave birth to twin boys, Luke and Luther. In 2014, Samuel decided to execute a will. He consulted Madame Z and asked her if she could recommend a good attorney. Madame Z pulled up the yellow pages on the Internet, closed her eyes and touched the screen. Madame Z's finger landed on the name, Sigmund Taylor, a sole practitioner who prepared wills. Susan objected to the selection of Sigmund because he had only been out of law school for two years. Madame Z insisted that Sigmund was the one who should prepare Samuel's will, so Samuel contacted him. Susan refused to accompany Samuel to Sigmund's office, so he took Madame Z with him. Madame Z stayed in the waiting room while Samuel and Sigmund discussed the terms of the will. In 2015, Samuel was killed when his private plane hit a mountain. At that time, Susan discovered that Samuel had left half of his 100 million dollar estate to Madame Z. Susan filed an action challenging the validity of the will. What might be the possible outcome of the case?

10.2.2 Undue Influence

If the presumption of undue influence does not arise or the proponent of the will is able to overcome the presumption of undue influence, the contestant has the burden of proving all of the elements of undue influence. To state a claim of undue influence the contestant must prove the existence of the following: (1) the testator was susceptible to undue influence or domination by another; (2) the person alleged to have committed the undue influence had the opportunity to exercise it; (3) the person alleged to have committed the undue influence had a disposition to influence for the purpose of personal benefit; and (4) the provisions of the will appear to be unnatural and the result of such influence.

In re Estate of Schoppe, 710 N.W.2d 258 (Iowa Ct. App. 2005)

MILLER, J.

Brenda Edmunds and Bryan Schoppe appeal from a district court order, following a jury verdict, that set aside the will of their father, Clair Schoppe. They contend the jury's verdict, which found the will was the result of undue influence, is not supported by substantial evidence. We affirm.

I. Background Facts and Proceedings.

Clair and Kay Schoppe were the parents of three children: Bryan Schoppe, Brenda Edmunds, and Berwin Schoppe. In 1997 Clair and Kay executed "mirror wills." Each will named the other spouse as the primary beneficiary and, in the event the beneficiary spouse predeceased the testator, the property left to the beneficiary spouse was to be divided equally between Brenda and Berwin, after a specific bequest of $1,000 to Bryan. Kay was nominated as executor, and Brenda and Berwin were nominated as contingent co-executors.

At or about the time the wills were executed, both Bryan and Brenda had moved out of the family home. Berwin continued to live with his parents until his mother's death in 2000. After Kay's death Berwin continued to live in the family home, taking care of the home and assisting Clair. Clair had various health problems, and had always been disinclined to take care of his own health and hygiene needs. Following his wife's death Clair became even more reluctant to address these issues.

Clair's mental acuity also appeared to decline after Kay's death. Once highly adept at math, Clair now had problems performing mental calculations. In addition, he occasionally seemed confused and unfocused, and repeated statements and questions multiple times. However, he was still able to conduct his own financial affairs, drive, and work as a dirt excavator.

In 2001 Clair Schoppe executed a new will. In it he made a specific bequest to Bryan of $10,000, and provided Berwin a first option to purchase the acreage upon which they were living, including the house and outbuildings, for $100,000. The remainder of Clair's estate was to be divided equally between Brenda and Berwin. Brenda was nominated as executor, and a bank as contingent executor.

In March 2002 Clair suffered a stroke. Following the stroke Clair appeared to suffer an even greater decline in his mental acuity. He also became even less attentive to his hygiene. As his health

concerns increased, so too did his dependence on family members.

In the months following the stroke Berwin and Clair's relationship became increasingly strained. Berwin found it more and more difficult to get his father to address his health and hygiene needs. In addition, in August 2002 Brenda accused Berwin of abusing Clair. Berwin denied the abuse, but Clair remained silent. This disturbed Berwin, and he began to make plans to move from the home. According to Berwin, Clair indicated he did not want Berwin to move. Berwin suggested that Clair sell him the acreage. The men reached a tentative agreement, but Clair backed away from the deal after Brenda expressed a concern to her father that if Clair sold Berwin the acreage Berwin might force Clair to leave the house.

On October 4 Berwin was in the process of removing his property from the family home when he was served with a temporary protective order that restrained him from contacting his father or entering the family home. The order was entered pursuant to a petition for relief from domestic abuse that Clair had filed on October 3.

According to Brenda, Clair arrived at her home the evening of October 2, upset and crying. The following day Brenda took Clair to see attorney Chris Clausen, and then to the courthouse, where Brenda filled out the petition on Clair's behalf. The petition alleged Berwin had yelled at his father, grabbed him by the front of the shirt, pushed him up against the counter, then let him go. It further alleged Clair had locked himself in the bathroom because Berwin was yelling at him, and that Berwin had picked the lock on the door, entered the bathroom, continued to yell at Clair, and said he was going to continue harassing Clair and "make it a living hell for" him. Clair initialed the acknowledgment section and signed the petition.

Berwin denied the allegations in the petition, but agreed to the entry of a protective order that did not contain a finding of domestic abuse. According to Berwin, he agreed to entry of the order because he felt he could no longer live with his father in any event, and he hoped that after the order expired he and Clair would be able to work out their differences.

On December 27, 2002, Clair executed his final will. Brenda drove Clair to the office of his attorney, Gail Boliver. Brenda waited in the reception area while Clair met privately with Boliver. Clair had provided Boliver with a hand-altered version of the 2001 will. Boliver made the noted changes, and the will was duly executed. The 2002 will now made a specific bequest to Berwin of $10.00, provided Bryan the opportunity to purchase the acreage for one-half of its appraised value, and divided the remainder of Clair's estate equally between Bryan and Brenda. Brenda continued to be nominated as executor, with the bank as contingent executor.

Clair died less than two months later, on February 12, 2003. After the 2002 will was admitted to probate, Berwin filed a petition to set the will aside. Berwin asserted Clair lacked the testamentary capacity to make the will, and that the will was the result of undue influence. The matter proceeded to trial in December 2004. The jury returned a verdict finding that Clair had the mental ability to make a will on December 27, 2002, but that the 2002 will was the result of undue influence. Brenda and Bryan filed a motion for a judgment notwithstanding the verdict, which was denied by the district court.

Brenda and Bryan appeal. They contend the record does not contain sufficient evidence to support a finding of undue influence.

II. Scope and Standards of Review.

A will contest is an ordinary action, tried at law. Iowa Code § 633.33 (2003). Accordingly, our review is for the correction of errors at law. Iowa R.App. P. 6.4. We will uphold the district court's denial of the motion for a judgment notwithstanding the verdict if the record contains substantial evidence to support the jury's verdict. *See In re Estate of Bayer,* 574 N.W.2d 667, 670 (Iowa 1998). We view the evidence in the light most favorable to upholding the verdict. *Id.*

Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion. *Falczynski v. Amoco Oil Co.*, 533 N.W.2d 226, 230 (Iowa 1995). Evidence is not insubstantial simply because it supports different inferences, and a court cannot set aside a verdict merely because it would have reached a different result. *Bayer,* 574 N.W.2d at 670. Weighing the evidence and assessing credibility are matters left to the jury. *Id.*

III. Discussion.

Undue Influence is that which

> substitute[s] the will of the person exercising the influence for that of the testator, thereby making the writing express, not the purpose and intent of the testator, but that of the person exercising the influence. It must operate at the very time the will is executed and must be the dominating factor.

In re Estate of Davenport, 346 N.W.2d 530, 531-32 (Iowa 1984) (citation omitted). The four essential elements of such a claim are

> (1) the testator susceptibility to undue influence; (2) opportunity to exercise such influence and effect the wrongful purpose; (3) disposition to influence unduly for the purpose of procuring an improper favor; and (4) a result clearly the effect of undue influence.

In re Estate of Todd, 585 N.W.2d 273, 277 n. 4 (Iowa 1998).

Berwin bore the burden of proving undue influence by a preponderance of the evidence. *Id.* at 277. While his claim can rest on circumstantial evidence alone, more than a "scintilla" of evidence is required. *Bayer*, 574 N.W.2d at 671. "Mere suspicion, surmise, conjecture, or speculation is not enough to warrant a finding of undue influence, but there must be a solid foundation of established facts upon which to rest an inference of its existence." *In re Will of Pritchard*, 443 N.W.2d 95, 98 (Iowa Ct.App. 1989).

Brenda and Bryan assert that none of the four elements of undue influence are supported by substantial evidence. Upon a review of the record we conclude, as did the district court, that the jury's verdict is sufficiently supported.

A. Clair's Susceptibility to Undue Influence.

During trial the parties vigorously disputed Clair's mental state. Berwin points to evidence that Clair's physical health and mental acuity gradually declined and his dependence on others gradually

increased, beginning with Kay's death in 2000, and accelerating following Clair's stroke in 2002. Brenda and Bryan assert that this evidence demonstrates no more than the natural processes of aging and grieving. They point to evidence that Clair was always a stubborn man who knew his own mind, and testimony from attorneys Clausen and Boliver that the petition for relief from domestic abuse and the 2002 will appeared to be products of Clair's own wishes.

As previously noted, the weight and credibility to be assigned to the various items of evidence is a matter for the jury. *Bayer*, 574 N.W.2d at 670. If the jury found Berwin's evidence on the question to be more credible, and placed greater weight on that evidence than it did on the evidence presented by Brenda and Bryan, there is sufficient evidence in the record to demonstrate a physical and mental vulnerability that could render Clair susceptible to undue influence. *See Davenport,* 346 N.W.2d at 532 (noting that both physical and mental weaknesses are relevant to show a tendency towards susceptibility).

B. Brenda's and Bryan's Opportunity to Exercise Undue Influence.

It is undisputed that Brenda and Bryan had significant contact with Clair in the weeks and months leading up to the execution of the 2002 will. This contact only increased following the petition for relief from domestic abuse and resulting consent order, as Brenda supplanted Berwin as Clair's primary caretaker. Brenda took Clair to nearly all of his doctor's appointments, Clair spent holidays at Bryan's home, and both Brenda and Bryan regularly spent additional time with their father. Brenda and Bryan contend, however, that these occasions were no more than the performance of "familial duties," and do not rise to an opportunity to exercise undue influence. They cite to the case of *In re Estate of Davenport*, 346 N.W.2d 530, 532 (Iowa 1984), in support of their position.

However, the language they rely on in *Davenport* relates only to the level of influence inherently exerted in the performance of "friendship or familial duties," and explains that such influence is not in and of itself the type of undue, "tainted," or dominating influence necessary to set aside a will. *Davenport*, 346 N.W.2d at 532. The time Brenda and Bryan spent with their father was sufficient to create an opportunity to exert undue influence over Clair. *See Id.* at 531(concluding a four day visit, occurring a few weeks prior to will execution, was sufficient to establish an opportunity to exercise undue influence).

C. Brenda's and Bryan's Disposition to Unduly Influence Clair.

Brenda and Bryan point out there is no direct evidence they unduly influenced Clair's testamentary dispositions, and they both denied even attempting to do so. However, Brenda's and Bryan's denials need not be believed by the jury. Moreover, as we have previously noted, the elements of undue influence may be proved through circumstantial evidence, *Bayer*, 574 N.W.2d at 671, so long as that evidence creates "a solid foundation of established facts upon which to rest an inference of its existence," *Pritchard,* 443 N.W.2d at 98.

Viewing the record in the light most favorable to upholding the verdict, it contains substantial circumstantial evidence that, if believed, indicates Brenda had a strong dislike for Berwin and attempted to undermine his relationship with their father. In light of the fact that no evidence of abuse was ever produced, the record also substantially supports a determination that Brenda went so far as to prompt Clair to falsely accuse Berwin of abuse in an effort to eject Berwin from Clair's life. In light of the foregoing, it was reasonable for the jury to infer that Brenda was disposed to assert a

dominating influence over Clair in order to all but eliminate Berwin from Clair's will. The record contains substantial evidence to support a finding that Brenda was disposed to unduly influence Clair in order to procure an improper favor.

D. Dispositions in 2002 Will Resulted from Undue Influence.

Clearly, the disposition in the 2002 will was a marked change from both the 1997 and 2001 wills, and also provided for a patently unequal distribution of Clair's estate. Brenda and Bryan point out that while inequality in distribution is evidence of undue influence, generally such a distribution is not in and of itself sufficient to establish undue influence. *See Davenport*, 346 N.W.2d at 532. They contend the record is bereft of any additional evidence to support a finding of undue influence, and that in fact the 2002 will simply reflects the natural decline in Berwin and Clair's relationship. While the record is susceptible to the interpretation Brenda and Bryan suggest, it is also susceptible to a contrary interpretation. *See Bayer,* 574 N.W.2d at 670 (noting evidence is not insubstantial simply because it supports different inferences).

Once again, if the jury found Berwin's evidence more credible, and placed greater weight on it than the evidence offered by Brenda and Bryan, the jury could conclude Berwin was a loving and dutiful son who spent years caring for his father, that Clair did not in fact want Berwin to move from the family home, that even though Berwin never abused his father Brenda was able to convince Clair to file the petition for relief from domestic abuse, and that she did so in order to sever Berwin's ties with their father. Moreover, the 2002 will was not executed until after entry of the no contact order, an order that prevented Berwin from contacting his father and resulted in Brenda becoming the central caretaking figure in Clair's life. Under those circumstances it was reasonable for the jury to infer that the inequality in distribution was a product, not of Clair's intent, but of Brenda's undue influence.

IV. Conclusion.

The parties have presented differing versions of events. Which of these versions is more credible, and entitled to more weight, is a matter for the jury. Viewing the evidence in the light most favorable to upholding the jury's verdict, we conclude the record contains evidence that would allow a reasonable fact finder to determine Clair's 2002 will was the product of undue influence. We accordingly uphold the district court order setting aside the 2002 will.

Affirmed.

Notes, Problems, and Questions

1. Should there have been a presumption of undue influence in the *Schoppe* case?

2. It is unclear what makes a person susceptible to undue influence. However, courts seem to focus on the person's age, personality, physical and mental health and ability to handle business affairs. *See In re Kamesar*, 259 N.W.2d 733, 738 (Wis. 1977). The level of dependency that the person has on other people also seems to be relevant. In the following situations, which of the testators should be deemed to be susceptible to undue influence?

(a) Prior to executing her will, Karen was diagnosed with bipolar disorder.
(b) Prior to executing his will, Bryon was blind in one eye and suffering from end-stage renal failure.
(c) The court appointed a guardian to handle Daniel's personal and business affairs prior to the execution of his will.
(d) Prior to executing her will, Wanda had a stroke.

3. In order to determine if the alleged influencer had the opportunity to influence the testator, courts look at the amount of time that the person spent with the testator, the person's proximity to the testator, and the nature of the relationship between the person and the testator. The opportunity element is difficult to evaluate. In order to have the opportunity to influence, the person is usually spending a lot of time with the elderly person providing physical and emotional care. On the other hand, the person who is contesting the will is typically the person who has spent the least amount of time with the testator. From a public policy perspective, we should want to encourage the former and not the later behavior.

4. In order to satisfy the disposition element, the contestant has to show something more than the fact that the alleged influencer had a desire to obtain a share of the testator's estate. The disposition necessary for a finding of undue influence implies that the alleged influencer was willing to do something wrong or unfair to insure that he or she receive a bigger share of the estate.

5. Aileen and Lee were married and had two children, Colin and Frances. After Lee died, Colin moved in with Aileen to help her put his father's affairs in order. Frances was estranged from her parents, so she did not attend Lee's funeral. Colin took Aileen to see an attorney who had done work for him in order to have a will prepared for her. At that time, Aileen exhibited signs of dementia. She had begun to forget and exaggerate. The attorney thought that Aileen was paranoid and somewhat delusional, but concluded that she had testamentary capacity because she knew the objects of her bounty and was oriented as to time and place. Aileen told the attorney that Frances had stolen horses from her and had driven away her hired hand. She stated that she did not want Frances to receive any of her property. Aileen also told the attorney that the local sheriff and everyone in her county were on drugs. The attorney prepared a will leaving Aileen's entire estate to Colin. When Aileen died, Frances filed an action contesting the will. What is the possible outcome of the case?

10.2.3 Duress

Duress is aggressive undue influence. In these cases, the wrongdoer threatens to perform or performs a wrongful act that forces the donor to make a donative transfer that the donor does not want to make. These types of cases are relatively rare. The coercive action may be physical or mental. For example, a child may threaten to place an elderly parent in a nursing home if the parent does not include certain provisions in his or her will. In extreme cases, the person seeking to inherit may physically assault the testator to force the testator to comply with his or her demands.

In re Estate of Rosasco, 31 Misc. 3d 1214(A), 927 N.Y.S.2d 819 (N.Y. Sur. Ct. 2011)

KRISTIN BOOTH GLEN, J.

This is a motion for summary judgment brought by John Cella, preliminary executor of the estate of his great-aunt, Mildred Rosasco, and proponent in a proceeding to probate her will. Objectants (four of decedent's nieces and nephews, including proponent's mother) oppose the motion. The facts of this case and the objections asserted present an opportunity to reexamine the tangled relationship in New York law between undue influence and duress as grounds for invalidating a will.

Procedural Posture:

Decedent died on June 18, 2006, at age 93, survived by five nieces and nephews as her distributees, leaving a $2.8 million estate. The propounded instrument, executed on September 16, 1997, nominated as co-executors Loretta, a predeceased sister, and proponent and left the entire probate estate to Loretta and Lillian, another predeceased sister, but, in the event neither survived decedent, to proponent. Accordingly, proponent is the only person with an interest under the propounded instrument.

Distributees Elissa Cella, Robert Rosasco, Arthur Rosasco and Ellin Learned objected to probate of the propounded instrument, alleging that the instrument: (1) is not genuine; (2) was not duly executed; (3) was executed by mistake; (4) was executed without testamentary capacity; (5) is the product of proponent's undue influence; (6) is the product of duress exercised by proponent on decedent; and (7) was procured by proponent's fraud.

Summary Judgment:

On a summary judgment motion, the court must examine the evidence in a light most favorable to the party opposing summary judgment (*see Council of City of New York v. Bloomberg,* 6 NY3d 380, 401[2006]). That party "must assemble and lay bare its affirmative proof to demonstrate the existence of genuine, triable issues. Reliance upon mere conclusions, expressions of hope or unsubstantiated allegations is insufficient for that purpose [citations omitted]" (*Corcoran Group v.* Guy *Morris et al.,* 107b A.D.2d 622, 624 [1st Dept 1985], *affd.*, 64 N.Y.2d 1034).

Objectants have articulated a basis for their allegations of undue influence and duress, but adduced no evidence to support any other ground. Therefore, with respect to issues for which objectants bear the burden of proof—allegations that the propounded instrument is the product of fraud (*see Matter of Evanchcuk,* 145 A.D.2d 559, 560 [1st Dept 1988]) and was executed by mistake—but have furnished none, the motion for summary judgment is granted. With respect to objections for which proponent bears the burden of proof—the genuineness of the instrument (*see Matter of Creekmore,* 1 N.Y.2d 284, 292 [1956]); *see also* SCPA 1408 [1]), the due execution of the instrument and the capacity of the testator (*see Matter of Kumstar,* 66 N.Y.2d 691, 692 [1985])—and has borne his burden (by means of an affidavit of the attesting witnesses, the attestation clause of the will, and proof that an attorney supervised the execution of the will [*Matter of Schlaeger*, 74 AD3d 405 (1st Dept. 2010)]), the motion for summary judgment also is granted. The only remaining issue, therefore, is whether objectants' allegations of undue influence and duress warrant a trial.

Facts Relevant to Claims of Undue Influence and Duress:

Decedent, her sisters Lillian and Loretta, and proponent and his family all lived in various apartments in 45 Morton Street, a building owned by LoRoss Realty Corp., a closely-held corporation controlled by members of the Rosasco family. When proponent's parents threw him out of their home, proponent, according to his deposition testimony, simply moved from his parents' units, Apartments 7 and 8, into Apartment 2, which belonged to Lillian. Lillian resided with decedent in Apartment 5. Loretta lived in Apartment 4. In 1989, decedent gave proponent a key to Apartment 5.

In August 1997, proponent (along with Lillian and Loretta) attended a meeting between decedent and Joseph J. Cella, Esq., (no relation to proponent), the attorney who drafted the September 16, 1997 instrument, at which the terms of the proposed instrument were discussed. "In essence," proponent testified at his deposition, "she said she'd like to leave all her possessions to her sisters first and then to me."

In 1997, that same year, proponent's relationship with his sister Kate, according to his own deposition testimony, was "hostile." Proponent knew that decedent and her sisters provided Kate (who no longer was residing at 45 Morton Street) with financial support. It was "common knowledge"; besides, at the time, according to his deposition testimony, proponent had unfettered access to decedent's checkbook and monitored checks payable to Kate. Decedent's financial support of Kate infuriated proponent. He berated decedent and her sisters loudly and often. His anger incited him to violence. He testified at his deposition that, in 1997, on one of Kate's weekly visits to Apartment 5 to ask decedent and her sisters for money, he struck Kate and "pushed" her to the floor.

Kate also testified at her deposition about the 1997 incident:

"A. There was one time I believe in—I believe it was 97 when John hit me in the back while I was—while I was leaving the apartment and he was coming in. He just swung around and hit me. And it was in front of all three of my aunts. And that was one of the—

Q. As you were coming the [*sic*] apartment?

A. As I was going out.

Q. As you were going out the door?

A. Yes. And that was the one time that—well, not the one time; but it was, like, a major time when all three aunts got up and went after him. They were yelling at him to leave me alone. They were very agitated and they were very upset. They called the police."

The court notes that decedent was crippled from polio. In 1997, according to proponent's deposition testimony, decedent was 5'7" and "skinny," weighing approximately 100 pounds, while proponent was 5'11" tall, weighing 190 pounds.

According to Kate, the 1997 incident was not proponent's first act of violence against her in decedent's presence. As she testified at her deposition:

A. There were plenty of instances where he tried to intimidate me physically. But as for hitting me, it was confined to 97 and one in 94–95.

Q. Did you—

A. And that was in front of the aunts too.

Q. What happened then?

A. He started an argument with Mildred about giving me money and about me being around them, which is what he usually complains about. And when she told him to get out, he said, I'm not going anywhere. Then he promptly punched me in the stomach in front of them and I went down like a ton of bricks.

He's a martial—he knew martial arts at this time. So he was pretty strong at that time...."

Proponent's violence and other intimidating behavior had a keen effect on decedent. Kate testified at her deposition:

"... I remember the conversation happening at the end of August, beginning of September of 97 where she said one day—I came in one day to talk to her.

"She said—and I quote—I did a really stupid thing. I made your brother the executor of my estate and I should have made you that, meaning me. And I said, Well, easy thing to do. Call your lawyer and have it changed if that's what you want to do.

"Oh, no. If I do that, he'll hurt me. And I was, like, Um, it's your estate. You shouldn't have to be intimidated by him. If you're afraid of calling the lawyer, I'll call the lawyer. No. If you do that, he's just going to end up making things a lot worse and he's going to hurt you and I don't want that on my conscience.

* * * * *

"And I talked to her about it and I said, Well, it's your money. It's your estate. If you don't want John to be the executor, you have the right to call your lawyer and have it changed.

"She kept saying that if she did that, John would hurt her. Which I could believe, because he intimidated her a lot over the years."

There is also evidence decedent believed that, even if she were to make a new will—and expose herself and Kate to the risk of proponent's violence—proponent, nevertheless, would thwart her intent. Kate testified at her deposition that, in 2002, when Loretta complained that proponent had taken $10,000 from her:

> "Mildred said, Well, he did the same thing to me. I mean, he's the executor of my estate and I really don't want him to be.... And then she said, Well, he's probably going to find a way to steal my money anyway...."

Decedent's declarations to Kate that: (1) if she were to contact her lawyer about making a new will, proponent would "hurt me," (2) if Kate were to contact the lawyer on decedent's behalf, proponent's "going to hurt you," and (3) regardless of the terms of her will, proponent would "find a way to steal" the assets of her estate, are not considered for their truth or falsity. Rather, these statements fall within the state of mind exception to the hearsay rule (*see* Prince on Evidence § 8–106). As the Court of Appeals explained:

> "No testimonial effect need be given to the declaration, but the fact that such a declaration was made by the decedent, whether true of false, is compelling evidence of her feelings toward, and relations to, [in the instant case, proponent]. As such it is not excluded under the hearsay rule but is admissible as a verbal act."

Loetsch v. New York City Omnibus Corp., 291 N.Y. 308, 311 (1943).

The credibility of Kate's testimony, as to "the fact that such a declaration was made by the decedent," and, if credible, the significance of such declarations, would be for a trier of fact to decide.

Undue Influence:

Courts have long wrestled with the concept of undue influence. In the nineteenth century, the Court of Appeals noted:

> "It is impossible to define or describe with precision and exactness what is undue influence; what the quality and the extent of the power of one mind over another must be to make it *undue,* in the sense of the law, when exerted in making a will. Like the question of insanity, it is to some degree open and vague, and must be decided by the application of sound principles and good sense to the facts of each given case. [Citation omitted.] But the influence exercised over a testator which the law regards as undue or illegal, must be such as to destroy his free agency; but no matter how little the influence, if the free agency is destroyed it vitiates the act which is the result of it. In 1 Jarman on Wills, 36, it is said: That the amount of undue influences which will be sufficient to invalidate a will must of course vary with the strength or weakness of the mind of the testator; and the influence which would subdue and control a mind naturally weak, or one which had become impaired by age, sickness, disease, intemperance, or any other cause, might have no effect to overcome or mislead a mind naturally strong and unimpaired.' "The undue influence is not often the subject of direct proof. It can be shown by all the facts and circumstances surrounding the testator, the nature of the will, his family relations, the condition of his health and mind, his dependency upon and subjection to the control of the person supposed to have wielded the influences, the opportunity and disposition of the person to wield it, and the acts and declarations of such person. [Citations omitted.]"

Rollwagen v. Rollwagen, 63 N.Y. 504, 519 (1876).

A year later, the Court of Appeals amplified its definition, explaining that influence is undue if it:

> "amounted to a moral coercion, which restrained independent action and

> destroyed free agency, or which, by importunity which could not be resisted, constrained the testator to do that which was against his free will and desire, but which he was unable to refuse or too weak to resist. It must not be the promptings of affection; the desire of gratifying the wishes of another; the ties of attachment arising from consanguinity, or the memory of kind acts and friendly offices, but a coercion produced by importunity, or by a silent, resistless power which the strong will often exercises over the weak and infirm, and which could not be resisted, so that the motive was tantamount to force or fear. [Citations omitted.]"

Children's Aid Soc'y v. Loveridge, 70 N.Y. 387, 394 (1877).

Some 82 years later, the Court of Appeals, in *Matter of Walther* (6 N.Y.2d 49 [1959]), articulated the elements of a *prima facie* case: (1) undue influence may be proven by circumstantial evidence, provided such evidence is substantial (*id.* at 54); (2) there must be a showing, not only of opportunity and motive to exercise undue influence, but also, of the actual exercise of undue influence (*id.* at 55); and (3) evidence that equally gives rise to an inference of undue influence or an inference that no undue influence was practiced, does not establish undue influence (*id.* at 54).

The New York State Pattern Jury Instructions provide:

"A will must be a true expression of the testator's wishes. If, instead, it reflects the desires of some person who controlled the testator's thoughts or actions, the will is invalid because of undue influence. To be undue', the influence exerted must amount to mental coercion that led the testator to carry out the wishes of another, instead of (his, her) own wishes, because the testator was unable to refuse or too weak to resist. The undue pressure brought to bear may consist of a play on the testator's emotions, passions, fears, weaknesses or hopes. It may consist of an appeal to (his, her) prejudices or a continual course of flattery. The exercise of undue influence may be slow and gradual, progressively gaining control over the testator.

* * * * *

"Direct evidence of undue influence is seldom available. Accordingly, the law permits undue influence to be shown by facts and circumstances leading up to and surrounding execution of a will. However, it is not enough that you find that motive and opportunity to exercise undue influence existed. You must also find additional facts that satisfy you that such influence was actually exercised. Further, the facts upon which a claim of undue influence is based must be proved. In other words, you may not guess or speculate. It must appear that the inference of undue influence is the only one that can fairly and reasonably be drawn from the facts proved, and that any other explanation is fairly and reasonably excluded. If the facts proved would reasonably support an inference that undue influence was exercised, as well as the contrary inference that it was not exercised, then undue influence has not been proved.

"You just answer the following question: Was the execution of the will... by the testator, AB, the result of undue influence by CD?' To answer that question, you must determine what were the facts and circumstances leading up to and surrounding execution of this will, taking into consideration such testimony as you deem true concerning ... AB's physical and mental condition; AB's contact with, or isolation from, (his, her) family and friends....

"The burden is on the contestant to establish by a fair preponderance of the evidence that the will in question was the result of undue
influence...."

(PJI2d 7:55 at 1429–1430 [2011]).

This "classic" type of undue influence is difficult to prove. It tends to be practiced in secret (a "silent resistless power") on an individual who is enfeebled, isolated and moribund, someone susceptible to the effects of subtle importuning who, after executing her will, either loses capacity or dies while subject to the undue influence. On its face, it would not appear applicable to the instant case. Decedent here, at the time she executed her will, suffered no mental infirmity, lived communally with her sisters and survived an additional eight-and-three-quarter years. During that period, she was connected to, and received assistance from, many people other than proponent.

The burden of proving this "classic" form of undue influence is eased if objectants can establish that the testator was in a relationship of trust and dependence with a person who exploited that relationship (*see* PJI2d 7:56.1 at 1442–1444 [2011]). Such facts permit an inference of undue influence that obligates the person charged with undue influence to explain the bequest (*Matter of Katz,* 15 Misc.3d 1104[A][Sur Ct, New York County, 2007]).

Unsurprisingly, objectants claim that decedent was in a relationship of trust and dependence with proponent; however, their non-specific and conclusory allegations fail to establish the existence of such relationship. Objectants claim that proponent was "a regular presence at [decedent's] apartment, a participant in her daily life," that he "assist[ed] her and [made] arrangements for her daily life" and that he "supervised her care." These allegations, inadequate in themselves to describe a confidential relationship, are based on the affidavits of Zoe Maher and Mayra Rajeh which, along with proponent's own deposition testimony, undercut any claim of isolation or exclusive dependence. At most, proponent was part of decedent's support system.

In the absence of evidence of actual exercise of undue influence on a weakened mind or abuse of a confidential relationship, proponent, under the "classic" definition of undue influence, would be entitled to summary judgment. Yet, "classic" undue influence is not the only ground on which to determine whether a propounded instrument expresses testator's unconstrained choice. Although it is seldom discussed in New York cases, the First Department has noted:

> "There are two principal categories of undue influence in the law of wills, the forms of which are circumscribed only by the ingenuity and resourcefulness of man. One class is the gross, obvious and palpable type of undue influence which does not destroy the intent or will of the testator but prevents it from being exercised by force and threats of harm to the testator or those close to him. The other class is the insidious, subtle and impalpable kind which subverts the intent or will of the testator, internalizes within the mind of the testator the desire to do that which is not his intent but the intent and end of another. [Citations omitted.]"

Matter of Kaufmann, 20 A.D.2d 464, 482-483 (1st Dept 1964), affd 15 N.Y.2d 825 (1965)
The former category is also known as "duress."

Duress:

In the context of contested probate proceedings, New York State courts tend to blur the distinction between duress and undue influence. Indeed, the New York State Pattern Jury Instructions do not even mention duress as a ground, separate from undue influence, for contesting a will. Such indiscriminate approach toward the law of duress is not unique to the courts of this State. A legal scholar has observed:

> "In fact, in the American law of wills, the concepts of duress and undue influence are so intertwined that several major Trusts and Estates textbooks omit discussion of duress altogether or explain the idea only in connection with undue influence. Leading treatises explain that duress is often classed under undue influence.' And, in the context of wills, it may be defined as the use of coercion or force to such a degree that it destroys the free agency and willpower of the testator. The Restatement is perhaps most helpful in distinguishing between duress and undue influence. [Footnotes omitted.]"
> Scalise, *supra,* at 68.

The Restatement (Third) of Property distinguishes a bequest procured by undue influence from one procured by duress. As to the former:

> "A donative transfer is procured by undue influence if the wrongdoer exerted such influence over the donor that it overcame the donor's free will and caused the donor to make a donative transfer that the donor would not otherwise have made."

Id. § 8.3(b).

The latter is explained as follows:

> "A donative transfer is procured by duress if the wrongdoer threatened to perform or did perform a wrongful act that coerced the donor into making a donative transfer that the donor would not otherwise have made."

Id. § 8.3(c).

The Comment on Subsection (c) explains:

> "An act is wrongful if it is criminal or one that the wrongdoer had no right to do. See Restatement Second, Contracts §§ 174-176. Although an act or a threat to do an act that the wrongdoer had a right to do does not constitute duress, such a threat or act can constitute undue influence, for example, a threat to abandon an ill testator."

The Restatement of Contracts fleshes out the elements of duress. First, "the doing of an act often involves, without more, a threat that the act will be repeated" (Restatement [First] of Contracts § 492 Comment *d*). As stated in the Restatement (Second) of Contracts: "Past events often import a threat" (*id.* § 175 Comment *b*).

Second, the standard for evaluating whether an "act or threat produces the required degree of fear is

not objective," but subjective, that is, the issue is whether the threat of a wrongful act induced such fear in the testator "as to preclude the exercise by [her] of free will and judgment" (Restatement [First] of Contracts § 492 Comment *a*]). As explained in the Restatement (Second) of Contracts: "The test is subjective and the question is, did the threat actually induce assent on the part of the person claiming to be the victim of duress" (*id.* § 175 Comment *c*).

Finally, the motivation or intent of the person charged with duress is irrelevant: "duress does not depend on the intent of the person exercising it" (Restatement [First] of Contracts § 492 Comment *a*]).

Objectants here have established a *prima facie* case for duress. The evidence adduced by objectants, if believed by the trier of fact, could establish that: (1) To decedent, proponent's wrongful act—his violence toward Kate—posed a threat of repeated violence. (2) That threat induced fear in decedent. (3) Decedent feared that, if she were to make a new will that favored Kate, not only would proponent harm decedent, if he were to learn of the new will during decedent's lifetime, but also, more significantly, upon decedent's death, proponent would physically harm Kate (and convert for himself any assets intended for Kate). And (4) Such fear precluded decedent from exercising her free will and judgment and naming Kate, a natural object of her bounty, a legatee.

Proponent's Contentions:

Proponent makes two arguments which may be disposed of easily. First, he contends that it was natural for decedent to disinherit her nieces and nephews because her relationship with them was "distant at best." Indeed, objectants Elissa Cella and Ellin Learned, along with another of decedent's nieces (the one who did not object in the instant probate proceeding), commenced an action in 1988 against decedent, her sisters Lillian and Loretta and their brother Walter (who died in 1997), accusing them of mismanaging LoRoss Realty Corp. However, the rationale for decedent's decision to disfavor her nieces and nephews has no bearing on her decision to favor proponent to the exclusion of others. Rather, the issue is, as discussed above, whether her decision was the product of duress.

Second, proponent, invoking the doctrine of laches, contends that objectants are precluded from objecting to probate of the propounded instrument because they did not: (1) object to the appointment of proponent and Joseph J. Cella, Esq., as co-executors of Lillian's will, or (2) object to the appointment of proponent (after decedent had renounced her nomination as executor) as administrator c.t.a. of Loretta's estate, or (3) object, during decedent's lifetime, to the 2002 agreement, whereby decedent and her sisters, Lillian and Loretta, transferred to proponent their 60% interest in premises known as 51 East 10th Street for less than fair market value, or (4) seek the appointment of an Article 81 guardian for decedent, all of which deprived proponent of the benefit of decedent's testimony. Proponent's invocation of the doctrine of laches is entirely inapposite.

The questions presented in the instant proceeding concern only the validity of the instrument executed on September 16, 1997. Such questions could not have been raised during decedent's lifetime. Furthermore, objectants had no standing, during decedent's lifetime, to challenge the 2002 transfer; indeed, objectants will remain without standing unless they establish an interest in decedent's estate.

Conclusion:

The motion for summary judgment with respect to duress is denied. In all other respects, themotion is granted.

The court will contact the parties to schedule a conference before a trial on the issue of duress.

This decision constitutes the order of the court.

10.3 Fraud

According to § 8.3(d) of the Restatement (Third) of Property: Wills and Other Donative Transfers, "A donative transfer is procured by fraud if the wrongdoer knowingly or recklessly made a false representation to the donor about a material fact that was intended to and did lead the donor to make a donative transfer that the donor would not otherwise have made." If the fraudulent actions of another person impacts the contents of the testator's will, the will is not valid because it does not reflect the testator's true intent. The misrepresentation must be made with both the intent to deceive the testator and the purpose of influencing the testamentary disposition. Let's look at an example.

Example 1: Betty planned to leave half of her estate to her friend, Elaine. One day, Betty shared that fact with her neighbor, Louise. Louise told Betty, "I saw Elaine's daughter about a month ago and she told me that Elaine had been diagnosed with breast cancer. Last week, I ran into Elaine's cousin at the supermarket and she told me that Elaine did not make it." In fact, the cousin told Louise that the doctors did not think that Elaine was going to make it. After Betty tried unsuccessfully to contact Elaine and her family, she executed a will leaving all of her estate to charity. At the time that Betty executed her will, Elaine was very much alive.

Explanation 1: Betty's will was not a product of fraud. Louise's purpose was to influence the testamentary disposition because she did not want Betty leaving half of her estate to a dead woman. However, Louise did not tell her Elaine was dead to deceive her. At the time she shared the information, Louise thought that it was true. Fraud would have occurred if Louise knew Elaine was alive, but she did not want Elaine to get half of the estate.

There are two types of fraud relevant to estate planning—fraud in the inducement and fraud in the execution. Fraud in the inducement occurs when a person misrepresents facts, thereby causing the testator to execute a will, to include particular provisions in the wrongdoer's favor, to refrain from revoking a will or not to execute a will. Fraud in the execution occurs when a person misrepresents the character or contents of the instrument signed by the testator, which does not in fact carry out the testator's intent

10.3.1 Fraud in the inducement

Fraud in the inducement happens at the beginning of the estate planning process. It usually involves a situation where someone seeks to entice the testator into making a testamentary disposition that benefits him or her. The person makes a misrepresentation for the sole purpose of achieving that goal.

Example:

Helen, a 78 year old widow, had three children, Clarence, Cody and Cathy. Cathy took Helen to a lawyer, so that Helen could prepare her will. On the way to the lawyer's office, the following conversation occurred:

Helen: "I plan to leave my estate to you and your brothers equally."
Cathy: "You have to be careful because leaving Cody money will just hurt him."
Helen: "What are you talking about?"
Cathy: "Cody has been taking drugs for years. The only reason he is sober sometimes is because he doesn't have money to buy all of the drugs that he wants."
Helen: "Are you sure? This is my first time hearing that."
Cathy: "That's because everyone is afraid of hurting your feelings."
Helen: "Thanks for letting me know."

As a result of the conversation, Helen left the majority of her estate to Clarence and Cathy. She placed a small amount in trust for Cody. Cathy intentionally lied about Cody having a drug problem. This is a classic example of fraud in the inducement.

10.3.2 Fraud in the Execution

Fraud in the execution occurs after the contents of the will have already been put in place and prior to the actual execution of the will. It encompasses cases where the testator is tricked into executing a document that is not his or her will or one that does not contain his or her expressed wishes.

Example:

Joseph, an 82 year old widower, had two children, Janice and Benjamin, and two grandchildren by his daughter Janice, Wayne and Garrett. Joseph had his attorney prepare a will in which he left 25% of his estate to Janice and 25% to Benjamin. The remaining 50% of the estate was placed in trust for Wayne and Garrett. Benjamin found a copy of the will on Joseph's desk. Benjamin felt that, since Janice's children were benefitting from the trust, she was entitled to a smaller percentage of the estate. Joseph had three of his friends come to his house to witness the signing of the will. Benjamin was present at the ceremony. He gave the will to Joseph for his signature. Joseph and the witnesses only looked at the signature page of the will. Joseph did not know that Benjamin had retyped the will, so that he received 50% of the estate, Janice received 25%, and the amount in the trust for Wayne and Garrett was reduced to 25%. This is a case of fraud in the execution because Joseph was tricked into signing a will with different terms than the ones he approved.

10.4 Intentional Interference With An Inheritance Expectancy (IIE)

No one has a right to inherit property. The right to dispose of property belongs to the testator. Thus, a person can legally disinherit any of his or her relatives. Nonetheless, when a person is prevented from inheriting property because of the actions of a third party, that person may have a

cause of action against the third party. The tort of IIE was derived from Restatement (Second) of Torts § 774B(1979). Courts have been reluctant to recognize the tort of IIE because the person bringing the cause of action typically has access to an adequate remedy in probate court. In fact, most probate codes explicitly state that the exclusive means of challenging the validity of a will is a will contest action filed in the probate court. IIE resembles a will contest because the plaintiff claims that he or she did not receive the inheritance that he or she expected because of the fraud, duress and/or undue influence perpetrated by the third party. Therefore, some courts reason that recognition of IIE, a separate cause of action, is unnecessary because the plaintiff can achieve the same outcome by filing a will contest action.

In order to successfully bring a cause of action for IIE, the plaintiff has to prove four things. First, the plaintiff must show the existence of an expectancy. The plaintiff can accomplish this by demonstrating that he or she was the beneficiary of a testator's prior will or the heir at law of an intestate decedent. Second, the plaintiff must establish the intentional interference with his or her expectancy through tortious conduct. In order to satisfy this requirement, the plaintiff must present evidence that the third party committed a tort that deprived the plaintiff of his or her inheritance. The tortious conduct that the plaintiff usually alleges includes fraud, duress and/or undue influence. Third, the plaintiff must prove that the third party's actions caused him or her to lose the expected inheritance. Fourth, the plaintiff must prove damages.

§ 774B Intentional Interference with Inheritance or Gift

> One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift.

Schilling v. Herrera, 952 So. 2d 1231 (Fla. App. 2007)

ROTHENBERG, Judge.

The plaintiff, Edward A. Schilling ("Mr. Schilling"), appeals from an order granting the defendant Maria Herrera's ("Ms. Herrera") motion to dismiss the amended complaint with prejudice based on the trial court's finding that the amended complaint fails to state a cause of action and that Mr. Schilling is barred from filing to action because he failed to exhaust his probate, remedies. We disagree as to both findings and, therefore, reverse and remand for further proceedings.

PROCEDURAL HISTORY

Mr. Schilling, the decedent's brother, sued Ms. Herrera, the decedent's caretaker, for intentional interference with an expectancy of inheritance. Ms. Herrera moved to dismiss the complaint, arguing that Mr. Schilling failed to state a cause of action and that he was barred from filing his claim because he failed to exhaust his probate remedies. The trial court granted the motion to dismiss without prejudice.

Thereafter, Mr. Schilling filed an amended complaint asserting the same cause of action against Ms. Herrera. The amended complaint alleges that in December 1996, Mignonne Helen Schilling (the decedent) executed her Last Will and Testament, naming her brother and only heir-at-law, Mr. Schilling, as her personal representative and sole beneficiary, and in May 1997, she executed a Durable Power of Attorney, naming Mr. Schilling as her attorney-in-fact.

In December 1999, the decedent was diagnosed with renal disease, resulting in several hospitalizations. During this period, Mr. Schilling, who resides in New Jersey, traveled to Florida to assist the decedent. In January 2000, the decedent executed a Power of Attorney for Health Care, naming Mr. Schilling as her attorney-in-fact for health care decisions.

On January 12, 2001, when the decedent was once again hospitalized, Mr. Schilling traveled to Florida to make arrangements for the decedent's care. After being released from the hospital, the decedent was admitted to a rehabilitation hospital, then to a health care center, and then to the Clairidge House for rehabilitation. While at the Clairidge House, Ms. Herrera became involved in the decedent's care, and when the decedent was discharged from the Clairidge House on December 16, 2001, Ms. Herrera notified Mr. Schilling.

After being discharged from the Clairidge House, the decedent returned to her apartment, and Ms. Herrera began to care for her on an "occasional, as needed basis." In 2003, when the decedent's condition worsened and she was in need of additional care, Ms. Herrera converted her garage into a bedroom, and the decedent moved in. The decedent paid Ms. Herrera rent and for her services as caregiver.

When Mr. Schilling spoke to Ms. Herrera over the phone, Ms. Herrera complained that she was not getting paid enough to take care of the decedent, and on April 10, 2003, Mr. Schilling sent Ms. Herrera money. While living in the converted garage, the decedent became completely dependent on Ms. Herrera. In September 2003, without Mr. Schilling's knowledge, Ms. Herrera convinced the decedent to prepare and execute a new Power of Attorney, naming Ms. Herrera as attorney-in-fact, and to execute a new Last Will and Testament naming Ms. Herrera as personal representative and sole beneficiary of the decedent's estate.

Mr. Schilling visited the decedent in March of 2004. On August 6, 2004, the decedent died at Ms. Herrera's home.

On August 24, 2004, Ms. Herrera filed her Petition for Administration. On December 2, 2004, following the expiration of the creditor's period, Ms. Herrera petitioned for discharge of probate. On December 6, 2004, after the expiration of the creditor's period and after Ms. Herrera had petitioned the probate court for discharge of probate, Ms. Herrera notified Mr. Schilling for the first time that the decedent, his sister, had passed away on August 6, 2004. Shortly thereafter, in late December 2004, the Final Order of Discharge was entered by the probate court. Mr. Schilling alleges that prior to being notified of his sister's death on December 6, 2004, he attempted to contact the decedent through Ms. Herrera, but Ms. Herrera did not return his calls until the conclusion of probate proceedings and did not inform him of his sister's death, thereby depriving him of both the knowledge of the decedent's death and the opportunity of contesting the probate proceedings. Mr. Schilling further alleges that prior to the decedent's death, Ms. Herrera regularly did not immediately return his phone calls, and that Ms. Herrera's "intentional silence was part of a calculated scheme to prevent [Mr.] Schilling from contesting the Estate of Decedent, and was

intended to induce [Mr.] Schilling to refrain from acting in his interests to contest the probate proceedings in a timely fashion, as [Mr.] Schilling was used to long delays in contact with [Ms.] Herrera, and did not suspect that the delay was intended to fraudulently induce [Mr.] Schilling to refrain from acting on his own behalf." Finally, Mr. Schilling alleges that he expected to inherit the decedent's estate because he was the decedent's only heir-at-law and because he was named as the sole beneficiary in the 1996 will; Ms. Herrera's fraudulent actions prevented him from receiving the decedent's estate, which he was entitled to; and but for Ms. Herrera's action of procuring the will naming her as sole beneficiary, he would have received the benefit of the estate.

After Mr. Schilling filed his amended complaint, Ms. Herrera filed a renewed motion to dismiss, arguing the same issues that she had raised in her previous motion to dismiss. The trial court granted the motion to dismiss with prejudice, finding that Ms. Herrera had no duty to notify Mr. Schilling of the decedent's death as Mr. Schilling did not hire Ms. Herrera to care for the decedent, and therefore, there was "no special relationship giving rise to a proactive responsibility to provide information...." The trial court also found that Mr. Schilling was barred from filing a claim for intentional interference with an expectancy of inheritance because he failed to exhaust his probate remedies.

LEGAL ANALYSIS

A trial court's ruling on a motion to dismiss for failure to state a cause of action is an issue of law, and therefore, our standard of review is *de novo. Roos v. Morrison,* 913 So.2d 59, 63 (Fla. 1st DCA 2005); *Susan Fixel, Inc. v. Rosenthal & Rosenthal, Inc.* 842 So.2d 204, 206 (Fla. 2d DCA 2003).This court "must accept the facts alleged in a complaint as true when reviewing an order that determines the sufficiency of the complaint." *Warren ex rel. Brassell v. K-Mart Corp*., 765 So.2d 235, 236 (Fla. 1st DCA 2000); *see also Marshall v. Amerisys, Inc.,* 943 So.2d 276, 278 (Fla.3d DCA 2006)("In determining the merits of a motion to dismiss, the court is confined to the four corners of the complaint, including the attachments thereto, the allegations of which must be accepted as true and considered in the light most favorable to the nonmoving party.").

To state a cause of action for intentional interference with an expectancy of inheritance, the complaint must allege the following elements: (1) the existence of an expectancy; (2) intentional interference with the expectancy through tortious conduct; (3) causation; and (4) damages. *Claveloux v. Bacotti*, 778 So.2d 399, 400 (Fla. DCA 2001)(citing *Whalen v. Prosser*, 719 So.2d 2, 5 (Fla. 2d DCA 1998)). The court in *Whalen* clearly explained that the purpose behind this tort is to protect the testator, not the beneficiary:

> Interference with an expectancy is an unusual tort because the beneficiary is authorized to sue to recover damages primarily to protect the testator's interest rather than the disappointed beneficiary's expectations. The fraud, duress, undue influence, or other independent tortious conduct required for this tort is directed at the testator. The beneficiary is not directly defrauded or unduly influenced; the testator is. Thus, the common law court has created this cause of action not primarily to protect the beneficiary's inchoate rights, but to protect the deceased testator's former right to dispose of property freely and without improper interference. In a sense, the beneficiary's action is derivative of the testator's rights.

Whalen, 719 So.2d at 6.

In the instant case, the trial court's ruling was based on the fact that the amended complaint fails to allege that Ms. Herrera breached a legal duty owed to Mr. Schilling. However, as the *Claveloux* court noted, there are four elements for a cause of action for intentional interference with an expectancy of inheritance, and breach of a legal duty is not one of the elements. This is consistent with the *Whalen* court's explanation that the "fraud, duress, undue influence, or other independent tortious conduct required for this tort is directed at the testator. The beneficiary is not directly defrauded or unduly influenced; the testator is." *Id.* (emphasis added). We, therefore, review the amended complaint to determine if it sufficiently pleads a cause of action for intentional interference with an expectancy of inheritance.

In essence, the amended complaint alleges that Mr. Schilling was named as the sole beneficiary in the decedent's last will and testament; that based on this last will and testament, he expected to inherit the decedent's estate upon her death; that Ms. Herrera intentionally interfered with his expectancy of inheritance by "convincing" the decedent, while she was ill and completely dependent on Ms. Herrera, to execute a new last will and testament naming Ms. Herrera as the sole beneficiary; and that Ms. Herrera's "fraudulent actions" and "undue influence" prevented Mr. Schilling from inheriting the decedent's estate. Based on these well-pled allegations, we conclude that the amended complaint states a cause of action for intentional interference with an expectancy of inheritance. Therefore, the trial court erred, as a matter of law, in dismissing the amended complaint on that basis.

Mr. Schilling also contends that the trial court erred in finding that he was barred from filing a claim for intentional interference with an expectancy of inheritance as he failed to exhaust his probate remedies. We agree.

In finding that Mr. Schilling was barred from filing his action for intentional interference with an expectancy of inheritance, the trial court relied on *DeWitt v. Duce*, 408 So.2d 216 (Fla. 1981). In *DeWitt,* the testator's will was admitted to probate after his death. Thereafter, the plaintiffs filed a petition for revocation of probate of the testator's will, but voluntarily dismissed the petition, choosing to take under the will instead of challenging the will in probate court. More than two years later, the plaintiffs filed their claim for intentional interference with an inheritance, arguing that the defendants exercised undue influence over the testator at a time when he lacked testamentary capacity, causing the testator to execute the probated will, which was less favorable to the plaintiffs and more favorable to the defendants than the testator's previous will. The trial court dismissed the action, finding that pursuant to section 733.103(2), Florida Statutes (1977), the plaintiffs were foreclosed from proving the facts necessary to establish a cause of action for intentional interference with an expectancy of inheritance. 733.103(2), Florida Statutes (1977), provides as follows:

> In any collateral action or proceeding relating to devised property, the probate of a will in Florida shall be conclusive of its due execution; that it was executed by a competent testator, free of fraud, duress, mistake, and undue influence; and of the fact that the will was unrevoked on the testator's death.

The decision was appealed to a federal district court, and the federal court determined it would be better for the Florida Supreme Court to decide the issue, certifying the following question to the Florida Supreme Court:

> Does Florida law, statutory or otherwise, preclude plaintiffs from proving the essential elements of their claim for tortious interference with an inheritance where the alleged wrongfully procured will has been probated in a Florida court and plaintiffs had notice of the probate proceeding and an opportunity to contest the validity of the will therein but chose not to do so?

DeWitt, 408 So.2d at 216-17.

In answering the certified question in the affirmative, the Florida Supreme Court stated that "[t]he rule is that if adequate relief is available in a probate proceeding, then that remedy must be exhausted before a tortious interference claim may be pursued." *Id.* at 218. The Court, however, stated that an exception to this general rule is that "[i]f the defendant's fraud is not discovered until after probate, plaintiff is allowed to bring a later action for damages since relief in probate was impossible." *Id.* at 219. The Court also noted that "[c]ases which allow the action for tortious interference with a testamentary expectancy are predicated on the inadequacy of probate remedies...." *Id.* In conclusion, the Florida Supreme Court held:

> In sum, we find that [plaintiffs] had an adequate remedy in probate with a fair opportunity to pursue it. Because they lacked assiduity in failing to avail themselves of this remedy, we interpret section 733.103(2) as barring [plaintiffs] from a subsequent action in tort for wrongful interference with a testamentary expectancy, and accordingly answer the certified question in the affirmative.

Id. at 222. Therefore, the Court's holding that the plaintiffs were barred from pursuing their claim for intentional interference with an expectancy of inheritance, was based on the fact that the plaintiffs had an adequate remedy in probate; the plaintiffs had a fair opportunity to pursue their remedy; and the plaintiffs' failure to pursue their remedy was due to their lack of diligence.

We find that *DeWitt* is factually distinguishable, and therefore inapplicable. A review of the amended complaint reflects that Mr. Schilling has alleged two separate frauds. The first alleged fraud stems from Ms. Herrera's undue influence over the deceased in procuring the will, whereas the second alleged fraud stems from Ms. Herrera's actions in preventing Mr. Schilling from contesting the will in probate court. We acknowledge that pursuant to *DeWitt* if only the first type of fraud was involved, Mr. Schilling's collateral attack of the will would be barred. However, language contained in *DeWitt* clearly indicates that a subsequent action for intentional interference with an expectancy of inheritance may be permitted where "the circumstances surrounding the tortious conduct effectively preclude adequate relief in the probate court." *Id.* at 219.

This issue was later addressed by the Fourth District in *Ebeling v. Voltz*, 545 So.2d 783 (Fla. 4th DCA 1984). In *Ebeling*, the plaintiffs filed an action against the defendant for intentional interference with an expectancy of inheritance, alleging that, although they knew of the probate proceeding, they did not contest the will in probate court because the defendant made fraudulent statements inducing them not to contest the will. The trial court granted the defendant's motion to dismiss, finding that pursuant to Section 733.103, Florida Statutes (1983), the plaintiffs were barred from attacking the will. The Fourth District reversed, finding that "[e]xtrinsic fraud, or in other words, fraud alleged in the prevention of the will contest, as opposed to in the making of the will, would appear to be the type of circumstance that would preclude relief in the probate court." *Id.* The court noted that the

fraud alleged in the complaint prevented the plaintiffs from pursuing the incapacity claim in the probate court, and therefore, the action "falls into the category of cases that *DeWitt* considers outside the purview of Section 733.103(2), Florida Statutes." *Id.*

In the instant case, we must accept the facts alleged by Mr. Schilling as true. He alleges in the amended complaint that when the decedent began to live in Ms. Herrera's home, pursuant to powers of attorney executed by the decedent, Mr. Schilling was the decedent's attorney-in-fact; throughout the decedent's numerous illnesses, Mr. Schilling made decisions regarding the decedent's care; Mr. Schilling traveled to Miami on numerous occasions to visit the decedent, whose condition progressively worsened; Mr. Schilling stayed in contact with Ms. Herrera while the decedent was living in her home; Mr. Schilling relied on Ms. Herrera to obtain information regarding the decedent; Mr. Schilling sent money to Ms. Herrera to pay for the decedent's care; after the decedent passed away, Mr. Schilling called Ms. Herrera numerous times, but she would not return his calls; and Ms. Herrera did not inform Mr. Schilling of his sister's death until after she petitioned for discharge of probate. As the facts in the amended complaint sufficiently allege that Mr. Schilling was prevented from contesting the will in the probate court due to Ms. Herrera's fraudulent conduct, we find that the trial court erred in finding that Mr. Schilling's claim for intentional interference with an expectancy of inheritance was barred.

Accordingly, we reverse the order dismissing Mr. Schilling's amended complaint, and remand for further proceedings.

Notes, Problems, and Questions

1. The purpose of IIE is to protect the testator's right to dispose of his or her property without a third party improperly interfering. The person who sues is trying to receive the inheritance that the testator wanted him or her to have. Prior to filing an IIE claim, the person must exhaust all of his probate remedies. Why did the *Schilling* court find an exception to this rule?

2. James G. Sawyer divorced Pumpkin Sawyer after twenty years of marriage. The couple had one child, Moon Sawyer. Shortly after the divorce, James married Iris Sawyer. Moon accused Iris of breaking up her parents' marriage. She also claimed that Iris attempted to exclude her from her father's life. According to Moon, her father resorted to secret meetings with her because Iris disapproved of their meetings. At some point, Moon lost contact with her father. James executed a will in July 1999. In the will, he provided that his entire estate was to go to Iris. In the event that Iris preceded him in death, James bequeathed household items to Iris's daughters Pam and Joan, $10,000 each to Iris's two nieces, $1 to Moon, and the rest of the estate to Hastie. Hastie was designated as trustee, and Wade, Hastie's ex-husband, was designated trustee in the event that Hastie could not serve. Wade also drafted the will and signed it as a witness. James died on November 25, 2000. Moon claimed that she did not learn of her father's death until April 3, 2007, when she called his house to wish him a happy birthday. According to Moon, Iris informed her that her father had died years ago. The obituary announcing his death did not list Moon as James's daughter. Moon filed a cause of action for IIE. What is the likely outcome of that case?

3. The tort cannot be invoked if the challenge is based on the testator's lack of mental capacity or an insane delusion.

Class Discussion Tool
(Answer this hypothetic relying on the information contain in Chapters Nine and Ten)

Anna was diagnosed with breast cancer. Her doctor treated the cancer with radiation and chemotherapy. In order to combat the side effects of the treatment, Anna got a prescription for medical marijuana. Anna smoked three joints a day to alleviate her pain and nausea. Anna moved in with her only child, Jean, so she could take care of her. Jean believed in natural healing, so she put Anna on a regiment of organic food, herbal supplements and yoga. Maggie, Anna's best friend, told Anna that Dr. Oz said that some herbal supplements increased the growth of cancer cells. In fact, Dr. Oz stated that some herbal supplements might decrease the growth of cancer cells. On the day she watched the show, Maggie was having trouble with her hearing aide. Anna refused to take the herbal supplements. Jean got tired of fighting with Anna over the supplements, so she started slipping them into Anna's food.

One day, Anna saw Jean open up a capsule and sprinkle it over her pasta. After that, Anna became convinced that Jean was poisoning her. Anna shared her concerns with Maggie. Maggie told her pastor, Donald, that Anna was in danger. Maggie took Anna to the church to meet with Donald. After the meeting, Anna was so grateful that she gave the church a $500 donation.

When he discovered that she had money, Donald convinced Anna to move into an apartment complex owned by his church. Donald and the other members of the church prevented Jean from visiting Anna. Eventually, Donald took Anna to the church's attorney and had her execute a will leaving all of her money in trust for the benefit of the church.

A few months later, Anna read in a magazine that Dr. Oz stated that some herbal supplements might decrease the growth of cancer cells. Consequently, Anna told Donald that she was wrong about Jean. Anna told him that she planned to return home to Jean and to modify her will to leave her entire estate to Jean. In response, David placed guards, so that Anna could not leave the apartment.

One night, Maggie helped Anna escape from the apartment and reunite with Jean. Anna died a few days later before she could amend her will.

Jean plans to challenge the validity of the will. What are her strongest arguments and the church's possible responses?

Chapter Eleven: Attested Wills

11.1 Introduction

Most jurisdictions that have will statutes that are pretty similar. The only differences lie in the number of attesting witnesses that are required. The will execution process is a solemn ceremony that must be taken seriously. The legislatures want the testator to go through a ritual, so that it is clear that the testator is making a thoughtful disposition of his or her property. The testator usually has to sign or acknowledge his or her will in the presence of two or more disinterested witnesses.[89] The main components of a valid will execution are (1) a writing, (2) signature by the testator and, (3) attestation by witnesses. Most of the litigation challenging the validity of the will execution process involves one or all of these elements. Therefore, the three parts of this chapter include cases analyzing those issues. Some states require the testator's signature to be at the end of the will. This is referred to as a subscription. In a few states, the testator is required to publish his or her will by telling the witnesses that the written instrument is his or her will.

Va. Code Ann. 64.2-403. Execution of wills; requirements

A. No will shall be valid unless it is in writing and signed by the testator, or by some other person in the testator's presence and by his direction, in such a manner as to make it manifest that the name is intended as a signature.

****

C. A will not wholly in the testator's handwriting is not valid unless the signature of the testator is made, or the will is acknowledged by the testator, in the presence of at least two competent witnesses who are present at the same time and who subscribe the will in the presence of the testator. No form of attestation of the witnesses shall be necessary.

11.2 Writing

The writing requirement comes from the Statute of Frauds and the Wills Act. The purpose of the writing mandate is evidentiary. At the time the will is submitted for probate, the testator is no longer available to be questioned by the court. The best evidence of the testator's intentions is the written instrument. What constitutes a writing? When the original Wills Act was enacted, the answer to that question was relatively easy. Nonetheless, times have changed and the manner in which people communicate is evolving. This may complicate the wills writing requirement. Is a text message a writing? What about an email? At least one state legislature permits electronic wills.

N.R.S. 133.085. Electronic will (Nevada)

1. An electronic will is a will of a testator that:

[89] La. Civ. Code Ann. art. 1577 (2016)(requires two witnesses and a notary.)

(a) Is written, created and stored in an electronic record;
(b) Contains the date and the electronic signature of the testator and which includes, without limitation, at least one authentication characteristic of the testator; and
(c) Is created and stored in such a manner that:
(1) Only one authoritative copy exists;
(2) The authoritative copy is maintained and controlled by the testator or a custodian designated by the testator in the electronic will;
(3) Any attempted alteration of the authoritative copy is readily identifiable; and
(4) Each copy of the authoritative copy is readily identifiable as a copy that is not the authoritative copy.

2. Every person of sound mind over the age of 18 years may, by last electronic will, dispose of all of his or her estate, real and personal, but the estate is chargeable with the payment of the testator's debts.

3. An electronic will that meets the requirements of this section is subject to no other form, and may be made in or out of this State. An electronic will is valid and has the same force and effect as if formally executed.

4. An electronic will shall be deemed to be executed in this State if the authoritative copy of the electronic will is:

(a) Transmitted to and maintained by a custodian designated in the electronic will at the custodian's place of business in this State or at the custodian's residence in this State; or
(b) Maintained by the testator at the testator's place of business in this State or at the testator's residence in this State.

5. The provisions of this section do not apply to a trust other than a trust contained in an electronic will.

6. As used in this section:

(a) "Authentication characteristic" means a characteristic of a certain person that is unique to that person and that is capable of measurement and recognition in an electronic record as a biological aspect of or physical act performed by that person. Such a characteristic may consist of a fingerprint, a retinal scan, voice recognition, facial recognition, a digitized signature or other authentication using a unique characteristic of the person.
(b) "Authoritative copy" means the original, unique, identifiable and unalterable electronic record of an electronic will.
(c) "Digitized signature" means a graphical image of a handwritten signature that is created, generated or stored by electronic means.

Problems

1. Anthony sent his lawyer the following email message "I leave my house to Cory Baker; I leave my season football tickets to Benny; I leave the rest of my estate to my son, Dennis." The following

information was included at the end of the email *Anthony Turner* (Testator, 11-23-10); *Betty Green* (Witness 1, 11-23-10); *Sally Matthews* (Witness 2, 11-23-10). Does this satisfy the writing requirement under the common law and/or under the Nevada statute?

2. Gordon Beckerson recorded the following on his IPhone: "My name is Gordon Beckerson. I am of sound mind and body. Today is August 12, 2011. I am here with three people who are willing to witness my will. Say hello Janet Watson. Smile for the camera Terrie Baker. You're up next Charlie Davis. I would like to have my estate split evenly between State Law School and State Medical School. I am intentionally disinheriting my children, Skip and Muffie." Gordon took the sim card out of the telephone and placed it in an envelope. Then, he signed the seal of the envelope and mailed it to his lawyer. Later, he called the lawyer and said, "Don't watch the video I'm sending you until after I'm dead and buried. A month later, Gordon committed suicide. Does this satisfy the writing requirement under the common law and/or under the Nevada statute?

11.3 Signed by the Testator

The testator can sign the will or have someone else sign on his or her behalf. The will must be signed in the presence of the required number of witnesses. The purpose of that requirement is to protect the testator from fraud, duress and undue influence. In some jurisdictions, the testator has the option of signing the will in the presence of the witnesses or acknowledging to the witnesses that the signature on the will belongs to him or her.

11.3.1 Signature Problems

The preference is for the testator to sign his or her full legal name at the end of the will. However, courts have found marks, crosses, abbreviations, or nicknames to be sufficient to satisfy the signature requirement. A testator can legally authorize a person to sign on the testator's behalf. The testator can also have someone assist him or her in signing the will.

Taylor v. Holt, 134 S.W.3d 830 (Tenn. Ct. App. 2003)

SWINEY, J.

Steve Godfrey prepared his last will and testament on his computer and affixed his computer generated signature at the end. He had two neighbors witness the will. Mr. Godfrey died approximately one week later. Doris Holt ("Defendant"), Mr. Godfrey's girlfriend, submitted the will for probate. Donna Godfrey Taylor ("Plaintiff"), Mr. Godfrey's sister, filed a complaint alleging, in part, that the will was not signed and claiming that Mr. Godfrey had died intestate. The Trial Court granted Defendant summary judgment holding there were no undisputed material facts and that all legal requirements concerning the execution and witnessing of a will had been met. Plaintiff appeals. We affirm.

Background

Steve Godfrey ("Deceased") prepared a document in January of 2002, purporting to be his last will and testament. The one page document was prepared by Deceased on his computer. Deceased asked two neighbors, Hershell Williams and Teresa Williams to act as witnesses to the will. Deceased affixed a computer generated version of his signature at the end of the document in the presence of both Hershell and Teresa Williams. Hershell and Teresa Williams then each signed their name below Deceased's and dated the document next to their respective signatures. In the document, Deceased devised everything he owned to a person identified only as Doris. Deceased died approximately one week after the will was witnessed.

Defendant, Deceased's girlfriend, who lived with Deceased at the time of his death, filed an Order of Probate attempting to admit the will to probate and requesting to be appointed the personal representative of the estate. Defendant also filed affidavits of both Hershell and Teresa Williams attesting to the execution of the will. The affidavits each state that the affiant was a witness to Deceased's last will and testament and that each had signed at Deceased's request in the presence of both Deceased and the other witness. The affidavits both also state: "That the Testator, Steve Godfrey personally prepared the Last Will and Testament on his computer, and using the computer affixed his stylized cursive signature in my sight and presence and in the sight and presence of the other attesting witness...." Further, each affidavit states that the affiant "was of the opinion that the Testator, Steve Godfrey, was of sound mind" at the time the will was witnessed.

Plaintiff, Deceased's sister, filed a complaint alleging, *inter alia,* that she is the only surviving heir of Deceased, that Deceased died intestate, that the document produced for probate was void because it did not contain Deceased's signature, and that Doris Holt has no blood relation or legal relation to the Deceased and should not have been appointed administratrix of Deceased's estate. Defendant filed a motion to dismiss or in the alternative for summary judgment claiming that all of the legal requirements concerning the execution and witnessing of a will under Tennessee law had been met and filed the supporting affidavits of Hershell and Teresa Williams.

The Trial Court entered an order on December 23, 2002, granting Defendant summary judgment. The December order held that all of the legal requirements concerning the execution and witnessing of a will under Tennessee law had been met and held that Defendant was entitled to summary judgment as a matter of law. Plaintiff appeals.

Discussion

Although not stated exactly as such, Plaintiff raises two issues on appeal: 1) whether the Trial Court erred in finding that the computer generated signature on the will complied with the legal requirements for the execution of a will, and, thus, erred in granting Defendant summary judgment; and, 2) whether an alleged beneficiary under a will should be allowed to receive benefits from the estate even though the will refers to the beneficiary only by her first name. We will address each issue in turn.

Tenn. Code Ann. § 32-1-104 addresses the requisite formalities for the execution and witnessing of a will in Tennessee and states:

> The execution of a will, other than a holographic or nuncupative will, must be by the signature of the testator and of at least two (2) witnesses as follows:

(1) The testator shall signify to the attesting witnesses that the instrument is his will and either:
(A) Himself sign;
(B) Acknowledge his signature already made; or
(C) At his direction and in his presence have someone else sign his name for him; and
(D) In any of the above cases the act must be done in the presence of two (2) or more attesting witnesses.

(2) The attesting witnesses must sign:
(A) In the presence of the testator; and
(B) In the presence of each other.

Tenn. Code Ann. § 32-1-104 (1984) The definition of "signature" as used in the statute is provided by Tenn. Code Ann. § 1-3-105, which states: "As used in this code, unless the context otherwise requires: ... 'Signature' or 'signed' includes a mark, the name being written near the mark and witnessed, or any other symbol or methodology executed or adopted by a party with intention to authenticate a writing or record, regardless of being witnessed." Tenn. Code Ann. § 1-3-105(27) (1999).

We begin by considering whether the Trial Court erred in finding that the computer generated signature on the will complied with the legal requirements for the execution of a will, and, thus, erred in granting Defendant summary judgment.

Plaintiff claims that the will was not signed. Plaintiff's brief argues "there is no indication of any type or nature that there was a mark of any type made by the testator." Plaintiff cites to *Sunderland v. Bailey (In Re. Estate of Wait*), a 1957 case in which this Court found that "the testatrix may have made a mark of some sort, either an initial or one or more letters of her signature, on the will but she clearly indicated that she did not consider such mark or marks to constitute her signature." *Sunderland v. Bailey (In Re. Estate of Wait*), 43 Tenn. App. 217, 306 S.W.2d 345, 348 (1957). The witnesses in *Estate of Wait* testified that the testatrix had stated to them when the will was witnessed that she could not sign the will at that time, but would sign it later. *Id.* at 347. The *Wait* testatrix actually signed the will a day or two after it was witnessed. *Id.*

The *Wait* testatrix stated to the witnesses that she did not consider any mark to be her signature and this is borne out by the fact that she later signed the will. The *Wait* Court did not "find it necessary or proper ... to rule whether or not a testator may legally sign a will by mark." *Id.* at 348. Rather, the Court upheld the determination that the will was not entitled to probate based upon the fact that the will was not executed and witnessed in conformity with the statute. *Id.* at 349.

The situation in *Estate of Wait* is dissimilar to the instant case. In the case at hand, Deceased did make a mark that was intended to operate as his signature. Deceased made a mark by using his computer to affix his computer generated signature, and, as indicated by the affidavits of both witnesses, this was done in the presence of the witnesses. The computer generated signature made by Deceased falls into the category of "any other symbol or methodology executed or adopted by a party with intention to authenticate a writing or record," and, if made in the presence of two attesting witnesses, as it was in this case, is sufficient to constitute proper execution of a will. Further, we note that Deceased simply used a computer rather than an ink pen as the tool to make his signature, and, therefore, complied with Tenn. Code Ann. § 32-1-104 by signing the will himself.

Defendant made a properly supported motion for summary judgment claiming there were no disputed issues of material fact and that Defendant was entitled to judgment as a matter of law. Defendant supported this assertion with the affidavits of Hershell and Teresa Williams, the witnesses to the will, attesting to the circumstances surrounding the execution of the will. As Defendant made a properly supported motion, the burden shifted to Plaintiff to set forth specific facts establishing the existence of disputed, material facts which must be resolved by the trier of fact. Plaintiff failed to do this. Plaintiff produced a letter that Plaintiff's appellate brief claims "set out a very different picture of [Deceased's] feelings towards [Defendant]." However, this letter has absolutely no relevance as to whether the will was properly executed and witnessed. Plaintiff failed to set forth specific facts establishing the existence of disputed, material facts regarding the execution of the will which must be resolved by the trier of fact.

There are no disputed material facts and, as discussed above, Defendant is entitled to judgment as a matter of law because the will was executed and witnessed in conformity with the statute. Thus, we hold that the Trial Court did not err in holding that the legal requirements for the execution and witnessing of a will had been met.

The other issue Plaintiff raises concerns whether an alleged beneficiary under a will should be allowed to receive benefits from the estate even though the will refers to the beneficiary by first name, but fails to state the beneficiary's last name. The will devises everything Deceased owned to someone named Doris, but fails to give a last name for Doris. Plaintiff apparently raises an issue regarding whether the Doris named in the will is the Defendant.

The Trial Court based its decision to grant summary judgment upon whether the will in question met the statutorily prescribed elements to be a valid last will and testament. The Trial Court did not consider or decide whether the Doris named in the will is the Defendant as this issue is not germane to whether the will was properly executed and witnessed in conformity with Tennessee law. We agree. Defendant was entitled to summary judgment because the will was properly executed and witnessed in conformity with Tennessee law. The identification of the beneficiary has no bearing on the dispositive issue before the Trial Court of whether this was Deceased's validly executed and witnessed last will and testament. We affirm the grant of summary judgment.

Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for such further proceedings as may be required, if any, consistent with this Opinion and for collection of the costs below. The costs on appeal are assessed against the Appellant, Donna Godfrey Taylor, and her surety.

Matter of Will of Bernatowicz, 233 A.D.2d 838 (N.Y. App. Div. 1996)

MEMORANDUM:

We conclude that Surrogate's Court erred in refusing to admit the will of decedent on the ground that proponent failed to demonstrate due execution of the will. The record shows that decedent, who was very ill, attempted to sign his name to his will, but had difficulty doing so. When, after

several attempts, decedent continued to experience difficulty, decedent's counsel advised proponent that she could aid decedent by steadying his hand. Counsel further advised proponent that she could not sign the document for decedent or move his hand. The Surrogate concluded that proponent controlled rather than assisted decedent in signing the document and that its execution was therefore invalid. We disagree.

The question whether a signature is assisted or controlled does not turn on the extent of the aid, but rather whether the act of "signing was in any degree an act of the testator, acquiesced in and adopted by him" (*Matter of Kearney*, 69 App. Div. 481, 483, 74 N.Y.S. 1045). Here, the record establishes that the act of signing was the act of decedent, acquiesced in and adopted by him and, therefore, the signature was assisted rather than controlled. We conclude that the fact that decedent did not request assistance but, rather, that his counsel suggested that he be assisted does not render the signature invalid. We further conclude that the testimony of the witnesses regarding the circumstances surrounding the witnessing of the will demonstrates compliance with the other requirements of EPTL 3-2.1. That testimony sufficiently establishes that decedent signed the document purported to be his will and requested the witnesses to sign the document (*see generally, Matter of Dujenski,* 147 A.D.2d 958, 537 N.Y.S.2d 402). We reject the contention of respondents that the execution of the will was invalid because decedent declared the document to be his will before, rather than after, he signed it (*see, Matter of Haber,* 118 Misc. 179, 182, 192 N.Y.S. 616; EPTL 3-2.1[a][1][B]).Consequently, we reverse the order, reinstate the petition and remit the matter to Orleans County Surrogate's Court for further proceedings on the petition.

Order reversed on the law without costs, petition reinstated and matter remitted to Orleans County Surrogate's Court for further proceedings on petition.

BALIO, Justice, dissenting.

I respectfully dissent. The Surrogate found that the testator did not ask for assistance in signing his purported last will and testament and that, based upon the substantial difference in the manner and quality of the testator's handwriting after Sherry Callara physically assisted in the signing, she did more than steady his hand, and that she controlled the movement of his hand. Thus, the court concluded that the proposed last will and testament had not been duly executed.

EPTL 3-2.1(a)(1) requires that the testator execute a will by signing it or by having another person sign it in his name "and by his direction". Where, as here, the testator is physically infirm, a third person may assist the testator by holding and guiding his hand or arm (*see, Matter of Morris,* 208 A.D.2d 733, 734, 617 N.Y.S.2d 513; *Matter of Kearney*, 69 App. Div. 481, 483, 74 N.Y.S. 1045).Although the testator must request the assistance (*see, Matter of Morris, supra; Matter of Kearney, supra),*the fact that the testator desired such assistance may be inferred from the circumstances (*see, Matter of Lewis,* 193 Misc. 183, 80 N.Y.S.2d 757; *Matter of Knight*, 87 Misc. 577, 150 N.Y.S. 137).The hearing testimony establishes that the testator was on his deathbed. In fact, he died a few hours after attempting to sign the will. Two persons had to prop the testator up to a sitting position so that he could attempt to sign the will. One of those persons is a legatee under the proposed will and the other, Sherry Callara, is the mother of the other legatee and is named the executrix under the will. When the testator appeared to be having difficulty signing his name, his attorney suggested that Callara assist by holding his hand steady. The Surrogate determined, based upon the testimony and the appearance of the signature, that the testator did not request Callara's assistance and that Callara actually controlled the testator's conduct in signing the will. That determination, made by the Judge

who presided at the hearing and heard the testimony, "is entitled to great weight in this case, which hinged on the credibility of the witnesses" (*Matter of Margolis*, 218 A.D.2d 738, 739, 630 N.Y.S.2d 574,*see also, Matter of Morris, supra; Hanley v. Williamson,* 186 A.D.2d 1010, 590 N.Y.S.2d 821). I perceive no basis in this record to disturb the Surrogate's findings.

Notes, Problems, and Questions

1. A testator does not have to sign his written name. A mark qualifies as a signature for purposes of executing a will. *Ferguson v. Ferguson*, 47 S.E.2d 346 (Vir. 1948).

2. Electronic signatures are becoming more common and more legally acceptable. Courts have upheld electronic signatures in real estate transactions (Electronic Transactions Act) and commercial transactions (Uniform Electronic Signature Act). Some courts permit litigants to file courts documents electronically (Electronic Signatures and Records Act-the use of an electronic signature shall have the same validity and effect as the use of a signature offered by hand). This trend has not taken hold in probate law. Why do you think that is the case?

3. The testator's signature and the signature of the witnesses do not have to appear on the same page as long as all of the signature pages are physically connected as part of the will. *In re Estate of Brannon*, 441 S.E.2d 248 (Ga. Ct. App. 1994).

4. The testator must sign or acknowledge the will prior to having the witnesses sign it. The witnesses' role is to attest that the testator has signed or acknowledged the will. Thus, it makes sense that the witnesses should not sign first. Nonetheless, if the testator and the witnesses are deemed to have signed as a part of a single event, the order of the signing is not important. Restatement (Third) of Property: Wills and Other Donative Transfers 3.1, cmt. M (1999).

5. **Subscription Requirement**: Some states require the testator's signature to be at the end of the will. See 84 Okl.St. Ann. § 854(B)(West 2016).

6. T suffered from Parkinson disease. T attempted to sign his will several times, but the tremors made it difficult. Finally, A, who was witnessing the signing of the will, grabbed T's hand and held it steady, so that he could sign the will. T's son, B, challenged the validity of the will. What is the possible outcome of the case? *See Matter of Will of Bennatovicz*, 233 A.D.2d 838 (N.Y. App. Div. 1996); *Patrick v. Rankin*, 506 S.W.2d 853 (Ark. 1976); *Matter of Weaver's Estate*, 365 N.E.2d 1038 (Ill. App. 1977); *Vandruff v. Rinehart*, 29 Pa. 232 (1857).

7. T was in the hospital when he executed his will. While in the process of signing the will, T had a stroke. T only managed to sign his first name. T died without ever regaining consciousness. Was T's will validly executed?

11.4 In the Presence

The testator must sign or acknowledge the will in the presence of the witnesses. The witnesses are required to sign the will in the presence of the testator and each other. The law does not provide a specific definition for presence. However, courts have applied two tests when

determining whether or not the testator met the presence requirement---line of sight and conscious presence.

11.4.1 Line of Sight

Under the line-of-sight test, the testator is deemed to be in the presence of the witnesses if they are capable of seeing one another in the act of signing the will. The proponent of the will does not have to prove that the witnesses actually saw the testator sign the will. He or she just has to show that the witnesses had the opportunity to see the signing.

Walker v. Walker, 174 N.E. 541 (Ill. 1930)

FARMER, J.

Fred Walker, a son of Alice Ann Walker, deceased, filed in the probate court of Cook county a petition for the probate of a written instrument alleged to be the last will and testament of his mother and in which the petitioner was designated as the chief beneficiary and executor. On a hearing of the petition on July 14, 1927, the will was admitted to probate. John Walker, another son of the deceased, and two of his sisters, prosecuted an appeal to the circuit court of Cook county. The testimony of the three subscribing witnesses to the will was presented, and the court found the instrument to be the last will and testament of Alice Ann Walker and an order was entered that the will be admitted to probate. An appeal was prosecuted by John Walker to this court (336 Ill. 191, 168 N.E. 299), and the cause was transferred to the Appellate Court for the First District, where the judgment of the circuit court was affirmed (256 Ill. App. 218). A petition for writ of certiorari has been allowed by this court to review the judgment of the Appellate Court.

It is contended by plaintiff in error that the instrument was not signed or acknowledged in the presence of two credible witnesses, and was not attested by two such witnesses in the presence of the testatrix, as provided by section 2 of the Wills Act (Cahill's Rev. St. 1927, c. 148, par. 2).

The record as presented discloses the following facts concerning the testatrix and the execution, acknowledgment, and attestation of her alleged will: The instrument consisted of three typewritten pages, and on the margin of each page the signature of the testatrix appears. The last page contains the further signature of the testatrix, and the instrument is dated March 27, 1926. Immediately following her signature is a formal attestation clause containing the language frequently used in such clauses. Subscribed to this clause are the names and addresses of Robert Whitelaw, Lucy M. Whitelaw, and David H. Frost. These witnesses testified upon the hearing that they believed the testatrix at the time she executed the instrument was of sound mind and memory and that there was no fraud, duress, or undue influence. On Saturday afternoon, March 27, 1926, Fred Walker, a son of the testatrix, talked with the Whitelaws at their residence in Park Ridge over the telephone and asked if they and Frost, a brother of Mrs. Whitelaw, would witness his mother's will. Whitelaw said they would do so, and Fred told him he would bring his mother to Whitelaw's home. One of the Whitelaws either telephoned Frost, who lived next door, or went to his home and spoke to him about it, and he agreed to act as a witness.

Later in the afternoon Fred and his mother arrived at the Whitelaw residence in a Hupmobile sedan. The son parked the car facing east and immediately in front of the Whitelaw residence, which faced south on this street. The testatrix remained seated in the rear seat of the automobile and on the side nearest the house. Her location was about thirty-five feet from the south windows of the Whitelaw living room. The Whitelaw bungalow is located on the north side of the street, which runs east and west in front of the house. On the front of the house was a porch about six or eight feet wide. It was roofed and was about four feet above the walk which led to the house. There were six or seven steps leading to the porch from the sidewalk, but no steps from the porch to the inside of the house. There was a little railing, about two feet high on the outside of the porch, which enclosed it. Three windows on the south side of the living room faced on this porch. Inside of the living room was a library table about two feet wide and about forty-five inches long which stood lengthwise in front of two of the living room windows and about three inches from them.

The son went into the house where Mr. and Mrs. Whitelaw and Frost were, produced the instrument, and requested the three persons to sign it as witnesses. Whitelaw said he wanted to make sure it was the will and signature of the testatrix, and he took the will and went out to the car in which the testatrix was sitting. The other parties remained in the house. They saw Whitelaw go to the car and hand the instrument to the testatrix, but did not hear anything that was said. Whitelaw stated on the hearing that he asked the testatrix if it was her will and signature, and she said that it was. He then returned to the house with the will and told the other witnesses that he was satisfied it was her will and signature and it was all right for them to sign it as witnesses. The writing was placed upon the table in the living room and signed by the three subscribing witnesses. Whitelaw signed his name first, standing at the north side of the table. He could not say that the testatrix was looking at the house when he signed, but when he looked out he saw her and it is his recollection she was looking at him, but he could not say for sure. Mrs. Whitelaw signed second, and she stood at the side of the table, facing east. As she signed she looked out of the window and saw the testatrix, and the testatrix was facing east, but Mrs. Whitelaw said she saw the testatrix's eyes looking at witness in the house. Frost signed last, and was standing in the same position that Whitelaw was when the latter executed the instrument. Frost stated when he signed he looked out and saw the testatrix looking toward the house, but later stated that whether it was at the time he was signing or not he did not know, but he did know that she was looking at the window when he looked out.

After the witnesses signed their names, Fred took possession of the will. Mrs. Whitelaw walked out to the automobile where the testatrix was and inquired about her health. Shortly afterward Whitelaw, Frost, and Fred came out of the house and walked toward the car. When about ten feet from the car, Frost spoke to the testatrix, though he testified he was not acquainted with her, and went to his home. Fred had the folded instrument in his hand and handed it to the testatrix. The Whitelaws were standing by the side of the car, or nearby, and Fred thanked them for signing the will. The testatrix nodded her head in assent and said she was glad it was done. This was the only reference made to the will by the testatrix in the presence of Mrs. Whitelaw, and at that time Frost had gone to his home.

Section 2 of the Statute of Wills (Cahill's Rev. St. 1927, p. 2503) provides that all wills shall be reduced to writing and signed by the testatrix, or by some person in her presence and by her direction, and attested in the presence of the testatrix by two or more credible witnesses, two of whom shall declare on oath before the county court of the proper county that they were present and saw the testatrix sign the will in their presence or acknowledge the same to be her act and deed, and that they believed the testatrix to be of sound mind and memory at the time of signing or

acknowledging the will. It is indispensable that the statutory requirements be complied with to make a valid will. *Harris v. Etienne*, 315 Ill. 540, 146 N.E. 547.It is not necessary that the attesting witnesses see the signature of the testatrix upon the face of the will, or that an acknowledgment of the signature be made to them by the testatrix, or that they know that the instrument is a will, but the statutory requirements are satisfied if the testatrix acknowledges the execution of the will. *Thornton v. Herndon*, 314 Ill. 360, 145 N.E. 603; *In re Will of Barry*, 219 Ill. 391, 76 N.E. 577; *Hoover v. Keller*, 339 Ill. 126, 171 N.E. 163.

In the instant case the instrument was signed before the three witnesses saw it; hence it was necessary for the testatrix to acknowledge execution thereof to at least two of the witnesses. Testatrix asked none of the witnesses to subscribe their names to the instrument, but she did acknowledge to Whitelaw, one of the subscribing witnesses, before any of the three witnesses affixed their signatures, that the instrument was her will and that her signature thereon was genuine. Frost had no information relative to an acknowledgment by the testatrix except as told to him by Whitelaw. Mrs. Whitelaw received like information from her husband, and, after signing as a witness, she was present at the car when the son presented the folded instrument to his mother and thanked the Whitelaws for their services. The mother nodded assent and said she was glad it was done. This act on the part of the testatrix, who was somewhat lame, but who, so far as this record shows, had no other physical or mental infirmity, cannot be construed as an acknowledgment of her execution of the will. She merely joined in the expression of her son in thanking the Whitelaws for their trouble or inconvenience. The statute does not permit or contemplate that witnesses are to be secured for a testatrix, that they shall subscribe their names to a writing which only one of the witnesses knows and states to be the will of the testatrix, and thereafter have their action, as well as the instrument, approved or ratified by the testatrix.

The further question to be considered is whether the instrument was attested in the presence of the testatrix. She was about 75 years of age at the time here in question, and remained seated in the rear seat of the sedan automobile which her son had parked in front of the Whitelaw residence. She sat facing east, and was about thirty-five feet distant from the table situated in the living room and in front of the porch windows of the Whitelaw house, and upon which table the alleged will was placed when the three witnesses signed their names thereto. Fred Walker, a son of testatrix, went into the Whitelaw house, where he produced the will and asked the three witnesses to sign it. One of them, Whitelaw, took the will and went out to the car where the testatrix was and asked her about the instrument and her signature. He returned into the living room of the house with the will and reported his interview with her before the witnesses signed their names. The will was thereafter given to the son, who remained in the room while the attesting witnesses subscribed their names. He folded up the instrument and delivered it to the testatrix. There is nothing in the record showing that she saw the will from the time it was in Whitelaw's possession at the car until given to her by her son Fred. Neither is there any proof that she ever saw the signatures of the subscribing witnesses after they were affixed. What constitutes attestation in the presence of a testator has frequently been explained, and a general statement of the rule is that the testator must be so situated, both as to the will and the witnesses, that he may, if he chooses, see both in the act of attestation. The plain meaning of the law is that both the will and witnesses must be in the presence of the testator, so that he may without any effort or change of his position see both and see the act of attestation. It is not an attestation in his presence if he cannot see the act, but merely concludes from the surrounding circumstances and what he understands is going on that an attestation is taking place. It is immaterial whether the attestion is in the same room or an adjoining one, but the essential thing is that the testator must have an opportunity of personal knowledge, by his own vision and in his actual

position, that the witnesses are signing their names to the instrument which he has signed as his will in accordance with his request. *Quirk v. Pierson*, 287 Ill. 176, 122 N.E. 518. It is not enough for the testator to be able to judge from such act as he may see that the witnesses were signing his will. It is essential to the attestation which the law requires that the testator have the opportunity of seeing the very act of attestation, the will, the witnesses and their act. *Snyder v. Steele*, 287 Ill. 159, 122 N.E. 520. All the authorities declare that the object of the law is to prevent fraud and imposition upon the testator or the substitution of a surreptitious will, and to effect that object it is necessary that the testator shall be able to see and know that the witnesses have affixed their names to the paper which he has signed and acknowledged as his will. As we view the facts presented by this record, there was no way testatrix could have known of her own knowledge that her will was being signed by the three subscribing witnesses and that she had not been imposed upon.

Counsel for defendant in error asserts that the attestation clause recites all the necessary facts, under the statute, for admitting the will to probate, and was entitled to weight on the hearing in the circuit court. An attestation clause in proper from is entitled to due weight in determining whether a will was legally executed, but such a clause is not conclusive. *Harris v. Etienne, supra.*

In our opinion the requirements of the statute have not been complied with, and the judgment of the Appellate Court and the order of the circuit court of Cook County are reversed.

Judgments reversed.

11.4.2 Conscious Presence

> In order to satisfy the conscious presence test, the witness is in the presence of the testator if the testator, through sight, hearing, or general consciousness of events, comprehends that the witness is in the act of signing.

Whitacre v. Crowe, 972 N.E.2d 659 (Ohio Ct. App. 2012)

CARR, Judge.

Appellant, Victoria Hobson, appeals the judgment of the Medina County Court of Common Pleas, Probate Division. This Court affirms.

I.

Kay Whitacre had five adult children at the time of her death. Her will was admitted to probate. Her daughter Victoria was named as the sole beneficiary, while her son Michael was named as executor. Kay's three remaining children, Shawn, Angie, and Nick, were not mentioned in the will. Subsequently, Shawn, Angie, and Nick filed a complaint to contest the will. They later moved for summary judgment. Victoria and Michael responded in opposition. The trial court granted the plaintiffs' motion for summary judgment, concluded that Kay's will was not executed pursuant to the formalities required in R.C. 2107.03, and revoked an earlier order admitting the will to probate. Victoria appealed, raising three interrelated assignments of error for review.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED IN FINDING THAT THE EXECUTION OF THE WILL DID NOT MEET THE FORMALITIES REQUIRED UNDER [] R.C. 2107.03.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED IN GRANTING PLAINTIFF/APPELLEE'S MOTION FOR SUMMARY JUDGMENT FINDING THAT THE WITNESSES WERE NOT IN THE CONSCIOUS PRESENCE OF KAY WHITACRE, THE TESTATOR.

ASSIGNMENT OF ERROR III

THE TRIAL COURT ERRED IN REVOKING ITS PRIOR ORDER ADMITTING THE PROPERLY EXECUTED WILL TO PROBATE.

Victoria challenges the trial court's granting of summary judgment in favor of the plaintiffs which resulted in the court's revocation of its prior order admitting Kay's will to probate. Her arguments are not persuasive.

This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). This Court applies the same standard as the trial court, viewing the facts in the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.*, 13 Ohio App.3d 7, 12, 467 N.E.2d 137 (6th Dist. 1983).
To prevail on a motion for summary judgment, the party moving for summary judgment must be able to point to evidentiary materials that show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). Once a moving party satisfies its burden of supporting its motion for summary judgment with sufficient and acceptable evidence pursuant to Civ. R. 56(C), Civ. R. 56(E) provides that the non-moving party may not rest upon the mere allegations or denials of the moving party's pleadings. Rather, the non-moving party has a reciprocal burden of responding by setting forth specific facts, demonstrating that a "genuine triable issue" exists to be litigated for trial. *State ex. Rel. Zimmerman v. Tompkins*. 75 Ohio St.3d 447, 449, 663 N.E.2d 639 (1996).

The non-moving party's reciprocal burden does not arise until after the moving party has met its initial evidentiary burden. To do so, the moving party must set forth evidence of the limited types enumerated in Civ.R. 56(C), specifically, "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact[.]" Civ.R. 56(C) further provides that "[n]o evidence or stipulation may be considered except as stated in this rule."

R.C. 2107.18 provides that "[t]he probate court shall admit a will to probate if * * * the execution of the will complies with the law in force at the time of the execution of the will in the jurisdiction in which it was executed, with the law in force in this state at the time of the death of the testator, or with the law in force in the jurisdiction in which the testator was domiciled at the time of the

testator's death."

Kay purported to execute her will in Ohio on May 14, 2010. The applicable version of R.C. 2107.03, in effect at both the time of the execution of the will and at the time of Kay's death, states:

> Except oral wills, every last will and testament shall be in writing, but may be handwritten or typewritten. The will shall be signed at the end by the testator making it or by some other person in the testator's conscious presence and at the testator's express direction, and be attested and subscribed in the conscious presence of the testator, by two or more competent witnesses, who saw the testator subscribe, or heard the testator acknowledge the testator's signature.
>
> For purposes of this section, "conscious presence" means within the range of any of the testator's senses, excluding the sense of sight or sound that is sensed by telephonic, electronic, or other distant communication.

In their motion for summary judgment, the plaintiffs challenged the valid execution of Kay's will on two grounds, specifically, (1) that Kay did not sign her will in the conscious presence of the witnesses because the witnesses viewed the signing from another room by way of a video monitor, and (2) that the witnesses did not attest and subscribe the will in the conscious presence of the testator. In its order granting summary judgment to the plaintiffs, the trial court found that the witnesses "technically" never saw Kay sign her will because they viewed the event on a monitor, and that the witnesses were not in the conscious presence of Kay when she signed her will. The trial court concluded that the execution of the will did not meet the formal requirements of R.C. 2107.03 and it, therefore, revoked its prior order admitting the will to probate. Although the trial court's findings are inartfully crafted, this Court concludes that the trial court properly granted summary judgment in favor of Shawn, Angie, and Nick, and therefore properly revoked its prior order admitting Kay's will to probate.

No party argues that the indecipherable scribble on the will does not constitute Kay's signature, and we do not address that matter further.

Victoria argues that the trial court erred because genuine issues of material fact existed regarding whether the two witnesses attested and subscribed the will in the conscious presence of the testator. Because that issue is dispositive of the appeal, we confine our analysis to that issue.

Subscription is "the physical act of affixing a signature for purposes of identification." *Jackson v. Estate of Henderson*, 8th Dist. No. 93231, 2010-Ohio-3084, 2010 WL 2636725. Attestation, a separate and distinct act from subscription, "is the act by which the subscribing witnesses hear the testator acknowledge his signature or see him sign the document in their presence." *Id.*, *see also Timberlake v. Sayre,* 4th Dist. No. 09CA3269, 2009-Ohio-6005, 2009 WL 3790495.

By the plain language of R.C. 2107.03, the witnesses attesting and subscribing the will must do so "within the range of any of the testator's senses," which expressly excludes sights and sounds relayed through electronic means. The evidence appended to both the motion for summary judgment and response in opposition clearly establishes that the monitor involved in this situation worked one way in that it only allowed the witnesses to see and hear Kay, while Kay could not see and hear the witnesses via any electronic means. To the extent, then, that any party has argued that the use of the audio/video monitor precluded the witnesses from being in Kay's "conscious presence," such an

argument is a red herring.

Ohio. Historically, however, other jurisdictions which required witnesses to attest and subscribe the will in the presence of the testator interpreted "presence" to mean "conscious presence." *See, e.g., In re Estate of Holden,* 261 Minn. 527, 113 N.W.2d 87 (1962); *In re Demaris' Estate*, 166 Or. 36, 110 P.2d 571, 581 (1941); *Calkins v. Calkins*, 216 Ill. 458, 75 N.E. 182, 183-184 (1905); *Watson v. Pipes*, 32 Miss. 451 (1856); *Nock v. Nock's Exrs.,* 51 Va. 106 (1853); Nichols v. Rowan, 422 S.W.2d 21, 24 (Tex. Civ. App. 1967). The test has been referred to as a "mental apprehension test" and is stated as follows:

> "When a testator is not prevented by physical infirmities from seeing and hearing what goes on around him, it is the general, if not universal, rule that his will is attested in his presence if he understands and is conscious of what the witnesses are doing when they write their names, and can, if he is so disposed, readily change his position so that he can see and hear what they do and say. * * * In other words, if he has knowledge of their presence, and can, if he is so disposed, readily see them write their names, the will is attested in his presence, even if he does not see them do it, and could not without some slight physical exertion. It is not necessary that he should actually see the witnesses, for them to be in his presence. They are in his presence whenever they are so near him that he is conscious of where they are and of what they are doing, through any of his senses, and are where he can readily see them if he is so disposed. The test, therefore, to determine whether the will of a person who has the use of all his faculties is attested in his presence, is to inquire whether he understood what the witnesses were doing when they affixed their names to his will, and could, if he had been so disposed, readily have seen them do it."

Demaris at 582, quoting Healey v. Bartlett, 73 N.H. 110, 59 A. 617, 618 (1904).

In *In re Estate of Holden*, 113 N.W.2d at 92-93, the Supreme Court of Minnesota concluded that witnesses signing the will while standing eight feet away in the doorway to the testator's room were in the testator's "range of vision" and, therefore, within his conscious presence. In *Nock*, 51 Va. at 126, the Supreme Court of Appeals of Virginia concluded that the witnesses who attested the will did so in the conscious presence of the testator even though they were in another room, 16–17 feet away, and the testator could not from his position see the witnesses' forearms, writing hands, or the will itself without changing position. The court concluded that the conscious presence test was met, however, because the testator could have seen the witnesses attesting the will merely by changing his position. *Id.*

California has also construed the presence requirement by applying the "conscious presence" test. *In re Tracy's Estate*, 80 Cal.App.2d 782, 182 P.2d 336, 337 (1947). The *Tracy* court, citing a long history of cases from various states, set out the following elements to establish conscious presence, where the testator cannot actually view the witnesses' signing: "(1) the witnesses must sign within the testator's hearing, (2) the testator must know what is being done, and (3) the signing by the witnesses and the testator must constitute one continuous transaction." *Id.* In *Tracy*, the witnesses signed the will in another room 25 feet away and, although the testator could not see them, she could hear the witnesses' conversation evidencing their contemporaneous signing. Given the timing of the witnesses' signatures immediately after the testator's and the testator's ability to hear the witnesses and understand by their conversation that they were attesting her will, the court concluded that the

will was properly executed. *Id.*

The Supreme Court of Mississippi explained the rationale behind the conscious presence test. *In re Estate of Jefferson,* 349 So.2d 1032 (Miss. 1977). The *Jefferson* court wrote that "the purpose of signing by the attesting witnesses in the presence of the testator is that the testator will know that the witnesses are attesting the testator's will and not another document; that the witnesses will know the same; these reasons being to avoid imposition or fraud on either the testator or the witnesses by substitution of another will in place of that signed by the testator; and that the witnesses will be reasonably satisfied that the testator is of sound and disposing mind and capable of making a will." *Id.* at 1036. In that case, the high court concluded that a witness who telephoned the testator and informed him that he was then signing and attesting the testator's will was not in the conscious presence of the testator.

More recently, the Supreme Court of New Hampshire relied on the conscious presence test as enunciated in *Healey, supra*, and concluded that the witnesses had not attested the will in the testator's presence. *In re Estate of Fischer*, 152 N.H. 669, 886 A.2d 996 (2005). In *Fischer,* the testatrix was bedridden with cancer. After signing her will in her bed in front of the witnesses, the witnesses signed the will on the porch. The court concluded that there was no evidence in the record that the testatrix could have readily seen or heard what the witnesses were doing but for her infirmities or that they were so near the testatrix that she was conscious of their actions when they signed the will. *Id.* at 999. Moreover, the high court concluded that the witnesses' signing in the presence of the testatrix' attorney was not adequate to meet the statutory requirement. *Id.* at 1000.

Based on our review of the considerations long recognized throughout the country, we adopt a "conscious presence" test in line with historical precedent which requires that the subscribing and attesting witnesses be in the testator's range of vision or that the testator hear and understand that the witnesses are subscribing and attesting the will at the time they are doing so.

Sara White and Joseph Reich were asked to witness the execution of Kay's will. In this case, both Ms. White and Mr. Reich testified during their depositions that Kay, who was on another floor of the home when she signed her will, could not see them from either bedroom. In fact, Ms. White understood that Kay did not want the witnesses in the same room with her because she did not want any strangers to see her in her state of illness. Ms. White testified that she had no knowledge about whether Kay could hear the witnesses on the floor below her. Both witnesses testified that they signed the will within mere feet of one another but that Kay did not see the witnesses sign from upstairs. Mr. Reich further testified that no one asked him to communicate in any way with Kay that day regarding her understanding of the will.

Based on our review of the evidence submitted by Shawn, Angie, and Nick in support of their motion for summary judgment, this Court concludes that they met their initial burden of presenting evidence to demonstrate that there was no genuine issue of material fact and that they were entitled to judgment as a matter of law. The plaintiffs presented evidence that the witnesses were not in Kay's range of vision when they subscribed and attested the will and further that she could not hear what they were doing and, therefore, had no understanding that the witnesses were signing the will.

In support of her reciprocal burden, Victoria appended her affidavit in which she averred that "the voices of the witnesses and sounds they were making moving around in the living room were clearly audible and within the sound of my mother's ears, being only several yards away and directly below

her in the living room[.]" She further averred that Michael took the will from Kay downstairs to the witnesses and that "they had a discussion that could be heard in my mother's upstairs bedroom while they were signing as witnesses [.]" Victoria also appended the affidavit of Ms. White who averred that "[d]ue to our close proximity, Kay Whitacre could hear me talking with her son and daughter, as well as the other witness, Joseph Reich, and I believe she could hear our movements about the living room, so she was fully aware of our presence[.]"

Based on our review of the evidence, we conclude that Victoria did not meet her reciprocal burden of responding by setting forth specific facts, demonstrating that a "genuine triable issue" exists to be litigated for trial. *Tompkins*, 75 Ohio St.3d 447 at 449, 663 N.E.2d 639. Although she presented evidence that Kay could hear conversations and movements in the downstairs living room, she presented no evidence regarding the substance of any of those conversations or that Kay was aware that the witnesses were subscribing and attesting her will at the time they were doing so. Accordingly, the trial court did not err when it found that the will was not executed in compliance with the requirements of R.C. 2107.03, and when it therefore revoked its prior order admitting the will to probate. Victoria's assignments of error are overruled.

III.

Victoria's assignments of error are overruled. The judgment of the Medina County Court of Common Pleas, Probate Division, is affirmed.

BELFANCE, P.J., Dissenting.

I respectfully dissent from the judgment of the majority, as I would conclude there is a genuine dispute of material fact precluding summary judgment.

R.C. 2107.03 states in part that the will shall "be attested and subscribed in the conscious presence of the testator, by two or more competent witnesses, who saw the testator subscribe, or heard the testator acknowledge the testator's signature." The statute goes on to define the phrase conscious presence as "within the range of any of the testator's senses, excluding the sense of sight or sound that is sensed by telephonic, electronic, or other distant communication." R.C. 2107.03. Because that phrase has been defined by the legislature, I would rely first and primarily on that definition in determining whether there was a genuine dispute of material fact with respect to whether the will was attested and subscribed in Kay's conscious presence.

Viewing the evidence in a light most favorable to Victoria, I would conclude that she met her reciprocal burden and demonstrated that a genuine dispute of material fact exists with respect to whether the will was attested and subscribed in Kay's conscious presence. While I do not dispute that Victoria's affidavit is somewhat ambiguous, this Court is required to resolve that ambiguity in favor of Victoria. *See Garner v. Robart,* 9th Dist. No. 25427, 2011-Ohio-1519, 2011 WL 1138702. Victoria's affidavit states, inter alia, that "the voices of the witnesses and sounds they were making moving around in the living room were clearly audible and within the sound of [her] mother's ears * * *[,]" that the fan was turned off "so the sounds of the witnesses on the first floor were clearly heard by her," and, that, at the time the witnesses were going to sign the will the discussion the witnesses were having "could be heard in [Kay's] bedroom while [the witnesses] were signing * * *." In addition, Victoria's affidavit indicates that the doors to the upstairs rooms where Kay was at were kept open and that Kay was "not more than 12–15 feet[ ]" from where the witnesses were located.

Viewing this evidence in a light most favorable to Victoria, it could be said that the witnesses attested and subscribed to the will in the conscious presence of Kay, as the witnesses were within range of her hearing. *See* R.C. 2107.03. Accordingly, I would conclude that the movant was not entitled to summary judgment.

12.5 Witnesses

The testator must sign the will before the number of competent witness specified in the statute. A witness is competent if he or she is over the age of majority and of sound mind. The witnesses must be disinterested. A disinterested witness is one who does not benefit directly or indirectly from the will. A will signed by an interested witness is not invalid as long as there are enough disinterested witnesses who sign the will. Consequently, lawyers should always have more than the required number of witnesses sign the will. Consider the following example.

Example:

Kate lives in a jurisdiction that requires a will to be witnessed by two disinterested witnesses. Kate executed a will leaving half of her estate to Della and half to Betsy. The will was signed and witnessed by Della, Tony and Wayne.

Explanation:

The will was validly executed because it was signed in the presence of Tony and Wayne who are both disinterested witnesses. Thus, Della gets to take half of the estate even though she witnessed the will. The outcome would have been different if the will had only been signed by Della and Tony.

A.C.A. § 28-25-102. Competency, etc., of witnesses

(a) Any person, eighteen (18) years of age or older, competent to be witness generally in this state may act as attesting witness to a will.

(b) No will is invalidated because attested by an interested witness, but an interested witness, unless the will is also attested by two (2) qualified disinterested witnesses, shall forfeit so much of the provision therein made for him or her as in the aggregate exceeds in value, as of the date of the testator's death, what he or she would have received had the testator died intestate.

(c) No attesting witness is interested unless the will gives to him or her some beneficial interest by way of devise.

(d) An attesting witness, even though interested, may be compelled to testify with respect to the will.

When evaluating the validity of a will, courts make a two-fold inquiry. They must first determine whether or not the testator's will was witnessed by the mandated number of witnesses. In order for the witnesses to count, they must be competent. Thus, the second thing the court must decide is whether or not the witnesses were competent to witness and sign the will. In addition to evaluating the witnesses' age and mental competency, the court must decide if the witnesses were

disinterested. The court must also decide what to do with a devise that was made to an interested witness. The options are for the court to purge the entire devise or to purge the amount of the devise exceeding what the interested witness would have received under the intestacy system. Once the devise to an interested witness is purged, that person becomes disinterested, so the will is validated. In order to save the will, a majority of courts will take the devise away from the interested witness to make that person a disinterested witness, so he or she can be deemed competent to sign the will.

Scandurro v. Beto, 234 S.W.2d 695 (Tex. Civ. App. 1950)

LESTER, Chief Justice.

On a former date we handed down an opinion in this cause, in which the judgment of the trial court was reversed and rendered. Proponent has filed a motion for rehearing, insisting that the judgment of the trial court should in all things be affirmed, and in the alternative, that the cause be reversed and remanded to insure a more complete development of the facts in order to prevent a gross injustice. Upon reconsideration we have decided to withdraw our former opinion of date July 3, 1950, and substitute therefor the following:

On July 25, 1949, Mrs. Mary Eugenia Robertson executed her will, which was not wholly written in the hand of the testatrix, and on August 26, 1949, she departed this life, leaving an estate of considerable value. Under the terms of said will her brother and two sisters were the only beneficiaries. The will was attested by Mrs. Ursula Gandy and Mrs. Billie E. Beto, and none other. Mrs. Beto, a sister of the deceased, was one of the principal devisees under the terms of said will and was also appointed independent executrix therein. Mrs. Beto filed an application in the County Court of McLennan County to have the will admitted to probate. The children of a deceased sister of the testatrix filed a contest, based upon the ground that the will was not attested by two competent witnesses, as required by law.

An order was entered in said court admitting the will to probate as to all of its provisions, without revoking the bequest to Mrs. Beto. An appeal was taken to the District Court where a like order was entered; hence this appeal.

The contestants contend here that the instrument is void for the lack of the necessary number of competent attesting witnesses, and if not void, the court below erred in not revoking the bequest to Mrs. Beto. They cite in support thereof: Articles 8283, 8296 and 8297, Vernon's Ann.Civ.Stats.; also the following cases: *Nixon v. Armstrong*, 38 Tex. 296; *Fowler v. Stagner*, 55 Tex. 393; *Brown v. Pridgen*, 56 Tex. 124; *Kennedy v. Upshaw*, 66 Tex 442, 1 S.W. 308; and *Gamble v. Butchee*, 87 Tex. 643, 30 S.W. 861.

Article 8283, Vernon's Ann.Civ.Stats., provides: 'Every last will and testament except where otherwise provided by law, shall be in writing and signed by the testator or by some other person by his direction and in his presence, and shall, if not wholly in the handwriting of the testator, be attested by two or more credible witnesses.'

Now, the question is: was Mrs. Billie Beto a credible witness at the time she attested said instrument as a witness. The statute does not define what constitutes credible witnesses, but this question has been before the appellate courts of this state several times. In the case of *Nixon v. Armstrong*, 38 Tex.

296, 297, which was a proceeding to contest a will and to have set aside an order admitting it to probate, all three of the attesting witnesses were named as beneficiaries therein. One of said witnesses relinquished his interest given to him under its provisions and testified, in order to prove said will. The court held that a credible witness, as used in the statute, is a competent witness, and none other, upon the theory that a pecuniary interest disqualifies a witness, and said that it has been almost universally held that a devisee or legatee is incompetent as a witness to attest or prove up a will under which he receives a bequest. Speaking of Article 5370 of Paschal's Digest, which is in effect Article 8296 of Vernon's Ann.Civ.Stats. and which reads as follows: 'Should any person be a subscribing witness to a will, and be also a legatee or devisee therein, if the will cannot be otherwise established, such bequest shall be void, and such witness shall be allowed and compelled to appear and give his testimony in like manner as if no such bequest had been made. But, if in such case the witness would have been entitled to a share of the estate of the testator had there been no will, he shall be entitled to so much of such share as shall not exceed the value of the bequest to him in the will,' the court said: 'We think the only proper and reasonable construction of said article is that all bequests made to attesting witnesses shall be absolutely void, unless there are the required number of witnesses attesting and to prove the will, who have received no bequests.' and further held that none of the attesting witnesses were competent witnesses at the time they attested the same and declared the bequests to all three to be void. The court further said: 'Again, the statute says that if the will cannot be otherwise proven, the bequests to the attesting witnesses shall be void; and if void, then its nullity must relate back to the time when the pretended bequest was made, and not to the relinquishment by the witness. If that be so, then every bequest to attesting witnesses became null on their signing the will; for without that effect the will could not have been proven, as it had no competent attesting witnesses.'

The case of *Fowler v. Stagner*, 55 Tex. 393, in which the opinion was rendered in 1881, is identical with the facts of this case. The will was attested by one Laney and J. T. Powers. Powers was a beneficiary under the terms of said will and named executor therein, and the court, in passing upon the question, said:

'The statute of wills declares it in effect essential to the validity of a will, that, if it be not wholly in the handwriting of the testator, it shall be attested by two or more credible witnesses, above the age of fourteen years, subscribing their names in his or her presence. A credible witness is a competent witness', and cites Redfield on Wills; *Lewis v. Aylott('s Heirs),* 45 Tex. 190; and *Nixon v. Armstrong, supra.*

The court further said:

'One who is interested as taking under the will is incompetent to testify to establish it. And this is true notwithstanding any general law removing the disability of witnesses on the ground of interest. The law at the time of the execution of this will, and the law now, provides how, and in what case, and with what effect, a will which is attested by a witness who is named a beneficiary therein, may be proved by such witness. Such a provision would be useless were it not that competency and credibility in the meaning of the statute are the same thing, and that without this provision such witness could not in any case testify.

'The tenth section of the statute reads: 'If any person shall subscribe his name as a witness to a will in which any bequest is given to him, if the will cannot be otherwise proved, the bequest shall be void, and such witness shall be allowed and compelled to appear and give testimony on the residue

of the will, in like manner as if no such bequest had been made, etc.'

'This section did not repeal or qualify the first section of the act. A will is still invalid unless attested by two disinterested witnesses who take nothing under it. Nor is the will void because attested by one to whom a bequest is made. The policy of the statute is to prevent frauds, imposition or deceit, by providing that these dispositions of property, usually made in ill health or at the near approach of death, and under circumstances peculiarly liable to imposition, shall be fairly made in the presence of at least two wholly disinterested persons; and also it is its policy to uphold the right of a testator to make such dispositions and prevent their failing because of the incompetency of the witnesses, by reason of any bequest left them by the will; and this it effects by declaring such bequest void.

'Now here the will of Mrs. Larremore cannot be established should the attesting witness Powers take anything under it, because it would lack the necessary legal number of competent witnesses. The execution of it may indeed by proved by the oath of one witness, the witness Laney, who is wholly disinterested, but that proof would simply show the will invalid, when it appeared Powers was both witness and legatee under it, unless we hold that by the very fact of Powers subscribing this will, there being but two attesting witnesses, the bequest to him in the will was avoided, and that he was therefore competent. It was not necessary that Powers should be called or compelled to testify, or that he should execute a release, but it was essential that he should take no interest under the will, and that is effected by operation of the law.

'We believe this the fair construction of the statute. The language of the section quoted, 'If the will cannot otherwise be proved' must be understood as meaning if the will cannot otherwise be established as a valid will; not that proof of its execution by one witness would dispense with proof of its attestation by two competent witnesses, or that a will is a well-executed one if attested by one disinterested witness though all the other subscribing witnesses are parties in its maintenance and beneficiaries under it, who cannot be called to testify with respect to its execution, so long as the one witness can be produced, but will continue to claim and hold under it.'

The case of *Brown v. Pridgen*, 56 Tex. 124, also held that the term 'credible witnesses' meant 'competent witnesses', and cited the case of *Fowler v. Stagner*, and further said:

'This court has uniformly held to that construction * * * Even if that construction admitted of doubt, it has been too long acquiesced in and acted on to be overruled. It has now become a rule of property, and valuable rights depend upon an adherence to it.'

The proponents rely upon Article 8297, Vernon's Ann.Civ.Stats., which reads: 'In the case provided for in the preceding article, such will may be proved by the evidence of the subscribing witnesses, corroborated by the testimony of one or more other disinterested and credible persons, to the effect that the testimony of such subscribing witnesses necessary to sustain the will is substantially true; in which event the bequest to such subscribing witnesses shall not be void.'

This article was enacted into law in 1875 and the opinion in *Fowler v. Stagner* was written in 1881 and in the *Brown v. Pridgen* case the opinion was written in 1882, some six and seven years after the enactment of said article, yet the Supreme Court held that in order to sustain a valid will the same should be attested by at least two competent witnesses, two that received no pecuniary benefit under its terms, and held that a will attested by only one competent witness together with another who was rendered incompetent by reason of being a devisee or legatee, the bequest to the latter should be

void. In *Fowler v. Stagner*, supra, the court, some six years after Article 8297 became a law, referring to the will then under consideration, said:

'The law at the time of the execution of this will, and the law now, provides how, and in what case, and with what effect, a will which is attested by a witness who is named a beneficiary therein, may be proved by such witness. Such a provision would be useless were it not that competency and credibility in the meaning of the statute are the same thing, and that without this provision such witness could not in any case testify.'

We can reasonably assume that the court had in mind Article 8297 as well as all the laws relating to the execution and establishment of wills when such statements were made. *See also*: *Gamble v. Butcheee*, 87 Tex. 643, 30 S.W. 861. The legislature, in the enactment of the above article, did not modify, amend or repeal Article 8283, which requires that a will not wholly in the hand-writing of the testator shall be attested by two credible witnesses, but only amended Section 10 of the probate laws then existing, which was in effect the same as Article 8296.

We are of the opinion that this state is committed to the rule that a credible witness to a will must be a competent witness, that is, one who receives no pecuniary benefits under its terms. It is true Mrs. Beto was not called upon to testify in the proceedings below. The will was proven solely upon the testimony of Mrs. Gandy, the only competent attesting witness. This procedure would have been in compliance with the law had there been another competent attesting witness, and under such circumstances the bequest to Mrs. Beto would not have been void. A will can be proven by one competent attesting witness, but it takes two competent attesting witnesses to sustain a valid will. Mrs. Beto being a subscribing witness to the will and a devisee thereunder, therefore, is not a competent witness unless she relinquishes or the court revokes her pecuniary interest under its provisions. The policy of the law is to uphold a will when it can be done. Under the above cited authorities, this will is not void but to sustain it and prevent it from failing in its entirety for the lack of the required number of competent attesting witnesses, Mrs. Beto must become a competent witness, and to make her such a witness it is necessary that she receive no pecuniary benefits under its terms.

In *Brown v. Pridgen*, 56 Tex. 124, *Fowler v. Stagner*, 55 Tex. 393, and *Nixon v. Armstrong*, 38 Tex. 296, in which the exact or similar questions were before the court, and which are cited and strongly relied upon by the contestants, in each instance the case was reversed and remanded to the lower court. After reconsideration of the case, we have decided to reverse and remand the case in order to prevent any possible injustice. Therefore, the cause is reversed and remanded.

Problems

1. Maxine executed a will leaving her entire estate to the Church of the Blessed. The applicable statute required the will to be witnessed by two competent witnesses. The will was witnessed by Richard, Maxine's neighbor, and Curtis, Pastor of the Church of the Blessed. Was the will validly executed? In a jurisdiction that has adopted A.C.A. § 28-25-102, what happens to the devise to Curtis?

2. David executed a will leaving his farm to Robert; $5.00 to Jeremy; and the rest of his estate to Major. The applicable statute required the will to be witnessed by two competent witnesses. The will was witnessed by Jeremy and Bruce. When the will was probated, Jeremy disclaimed his interest in the estate. Was the will validly executed?

3. Cynthia executed a will leaving half of her estate to her son, Garrison, and half to her best friend, Olivia. The applicable statute required the will to be witnessed by two competent witnesses. The will was witnessed by Garrison and Tiffany. Was the will validly executed? Will Garrison be permitted to take under the will?

11.6 Revocation

Because the will does not become effective until the testator's death, it is a constantly evolving document. Thus, the testator may change or revoke the will during his or her lifetime. All or part of a testator's will may be revoked in one of the following ways: (1) by a subsequent writing executed with testamentary formalities; (2) by a physical act such as destroying, obliterating, or burning the will; (3) or by change in family circumstances (divorce or birth of a child). In order for a change or revocation to be effective, the testator must manifest the intent to change or revoke the will. For example, T drinks too much one night and accidentally shreds his will. This could be considered to be a revocation by physical act; however, the revocation would not be effective because T lacked the necessary testamentary intent.

M.G.L.A. 190B § 2-507 Revocation by writing or by act (Mass.)

(a) A will or any part thereof is revoked:
(1) by executing a subsequent will that revokes the previous will or part expressly or by inconsistency; or
(2) by performing a revocatory act on the will, if the testator performed the act with the intent and for the purpose of revoking the will or part or if another individual performed the act in the testator's conscious presence and by the testator's direction. For purposes of this paragraph, "revocatory act on the will" includes burning, tearing, canceling, obliterating, or destroying the will or any part of it.

(b) If a subsequent will does not expressly revoke a previous will, the execution of the subsequent will wholly revokes the previous will by inconsistency if the testator intended the subsequent will to replace rather than supplement the previous will.

(c) The testator is presumed to have intended a subsequent will to replace rather than supplement a previous will if the subsequent will makes a complete disposition of the testator's estate. If this presumption arises and is not rebutted, the previous will is revoked; only the subsequent will is operative on the testator's death.

(d) The testator is presumed to have intended a subsequent will to supplement rather than replace a previous will if the subsequent will does not make a complete disposition of the testator's estate. If this presumption arises and is not rebutted, the subsequent will revokes the previous will only to the

extent the subsequent will is inconsistent with the previous will; each will is fully operative on the testator's death to the extent they are not inconsistent.

11.6.1 By Later Writing

A subsequent writing can explicitly or implicitly revoke a will. An expressed revocation occurs when the later testamentary writing expressly states that intent. For instance, the later document states, "I revoke all prior wills." Courts treat a later writing that makes a complete disposition of the testator's estate as presumptively replacing the previous will and revoking it by inconsistency. If the subsequent writing does not completely dispose of the testator's estate, courts do not presume it to revoke the prior will but view it as a codicil. As a result, the property that is not disposed of by the codicil is distributed based on the terms of the previous will.

Example:

In 2000, Carmen executes a will stating, "I leave my entire estate to my cousin, Paige." In 2013, Carmen executes a will stating, "I leave my entire estate to my brother, Simon."

Explanation:

The 2013 will revokes the 2000 will by inconsistency. Therefore, Simon takes the entire estate.

Example:

In 2000, Carmen executes a will stating, "I leave my entire estate to my cousin, Paige." In 2013, Carmen executes a will stating, "I leave my house to my brother, Simon."

Explanation:

Courts will consider the 2000 will to be a codicil because it only deals with a portion of Carmen's estate. Therefore, Simon takes the house and Paige gets the rest of Carmen's estate.

Problems

1. In 2012, Ellen executes a will stating, "I leave all of my property to James." In 2013, Ellen executes a will stating, "I leave my car to Dana and my boat to Maggie." In 2014, Ellen and Dana have a disagreement. As a result, Ellen burns the 2013 will with the intent of revoking it. In 2015, Ellen dies. How will her estate be distributed? *In re Griffis' Estate*, 330 So.2d 797 (Fla. 1976).

2. In 2009, Dewey executes a will stating, "I leave my entire estate to Donald and Daisy." In 2011, Dewey executes a will stating, "I leave my house to Alice." In 2013, Dewey shreds the 2009 will with the intent of revoking it. In 2015, Dewey dies. How will his estate be distributed? *In re Schild's Will*, 72 Misc. 2d 225 (N.Y. Sur. 1972).

11.6.2 By Physical Act

The Wills Act allows testators to revoke their wills by physical act. In order to have the revocation recognized, the testator must comply with the statutory requirements. In some cases, courts will presume revocation with the intent to revoke if the testator destroys the will in a state that allows revocation of a will by physical act. The court assumes that the testator destroyed the will if it was last seen in his or her possession and it is not found after he or she dies. The problem with this presumption of destruction is that the person who usually searches for the will expects to take under the will. If that expectation does not come to fruition, the person may be motivated to claim that the will could not be found. This presumption is rebuttable.

11.6.2.1 Attempted Destruction

Thompson v. Royall, 175 S.E. 748 (Va. 1934)

HUDGINS, J., delivered the opinion of the court.

The only question presented by this record, is whether the will of Mrs. M. Lou Bowen Kroll had been revoked shortly before her death.

The uncontroverted facts are as follows: On the 4th day of September, 1932, Mrs. Kroll signed a will, typewritten on five sheets of legal cap paper; the signature appeared on the last page duly attested by three subscribing witnesses. H. P. Brittain, the executor named in the will, was given possession of the instrument for safe-keeping. A codicil typed on the top third of one sheet of paper dated September 15, 1932, was signed by the testatrix in the presence of two subscribing witnesses. Possession of this instrument was given to Judge S. M. B. Coulling, the attorney who prepared both documents.

On September 19, 1932, at the request of Mrs. Kroll, Judge Coulling, and Mr. Brittain took the will and the codicil to her home where she told her attorney, in the presence of Mr. Brittain and another, to destroy both. But instead of destroying the papers, at the suggestion of Judge Coulling, she decided to retain them as memoranda, to be used as such in the event she decided to execute a new will. Upon the back of the manuscript cover, which was fastened to the five sheets by metal clasps, in the handwriting of Judge Coulling, signed by Mrs. Kroll, there is the following notation: 'This will null and void and to be only held by H. P. Brittain, instead of being destroyed, as a memorandum for another will if I desire to make same. This 19 Sept 1932 'M. LOU BOWEN KROLL.'

The same notation was made upon the back of the sheet on which the codicil was written, except that the name, S. M. B. Coulling, was substituted for H. P. Brittain; this was likewise signed by Mrs. Kroll.

Mrs. Kroll died October 2, 1932, leaving numerous nephews and nieces, some of whom were not mentioned in her will, and an estate valued at approximately $200,000. On motion of some of the beneficiaries, the will and codicil were offered for probate. All the interested parties including the heirs at law were convened, and on the issue, *devisavit vel non,* the jury found that the instruments dated September 4th and 15, 1932, were the last will and testament of Mrs. M. Lou Bowen Kroll. From an order sustaining the verdict and probating the will this writ of error was allowed.

For more than one hundred years, the means by which a duly executed will may be revoked, have been prescribed by statute. These requirements are found in section 5233 of the 1919 Code, the pertinent parts of which read thus: 'No will or codicil, or any part thereof, shall be revoked, unless * * * by a subsequent will or codicil, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is required to be executed, or by the testator, or some person in his presence and by his direction, cutting, tearing, burning, obliterating, canceling, or destroying the same, or the signature thereto, with the intent to revoke.'

The notations, dated September 19, 1932, are not wholly in the handwriting of the testatrix, nor are her signatures thereto attached attested by subscribing witnesses; hence under the statute they are ineffectual as 'some writing declaring an intention to revoke.' The faces of the two instruments bear no physical evidence of any cutting, tearing, burning, obliterating, canceling, or destroying. The only contention made by appellants is, that the notation written in the presence, and with the approval, of Mrs. Kroll, on the back of the manuscript cover in the one instance, and on the back of the sheet containing the codicil in the other, constitute 'canceling' within the meaning of the statute.

Both parties concede that to effect revocation of a duly executed will, in any of the methods prescribed by statute, two things are necessary: (1) The doing of one of the acts specified, (2) accompanied by the intent to revoke — the *animo revocandi.* Proof of either, without proof of the other, is insufficient. *Malone v. Hobbs*, 1 Rob. (40 Va.) 346, 39 Am. Dec. 263:2 Minor Ins. 925.

The proof established the intention to revoke. The entire controversy is confined to the acts used in carrying out that purpose. The testatrix adopted the suggestion of her attorney to revoke her will by written memoranda, admittedly ineffectual as revocations by subsequent writings, but appellants contend the memoranda, in the handwriting of another, and testatrix's signatures, are sufficient to effect revocation by cancellation. To support this contention appellants cite a number of authorities which hold that the modern definition of cancellation includes, 'any act which would destroy, revoke, recall, do away with, overrule, render null and void, the instrument.'

Most of the authorities cited, that approve the above, or a similar meaning of the word, were dealing with the cancellation of simple contracts, or other instruments that require little or no formality in execution. However there is one line of cases which apply this extended meaning of 'canceling' to the revocation of wills. The leading case so holding is *Warner v. Warner's Estate*, 37 Vt. 356. In this case proof of the intent and the act were a notation on the same page with, and below the signature of the testator, reading: 'This will is hereby cancelled and annulled. In full this the 15th day of March in the year 1859,' and written lengthwise on the back of the fourth page of the foolscap paper, upon which no part of the written will appeared, were these words, 'Cancelled and is null and void. (Signed) I. Warner.' It was held this was sufficient to revoke the will under a statute similar to the one here under consideration.

In *Evans' Appeal,* 58 Pa.St. 238, the Pennsylvania court approved the reasoning of the Vermont court in *Warner v. Warner's Estate, supra,* but the force of the opinion is weakened when the facts are considered. It seems that there were lines drawn through two of the three signatures of the testator appearing in the Evans will, and the paper on which material parts of the will were written was torn in four places. It therefore appeared on the face of the instrument, when offered for probate, that there was a sufficient defacement to bring it within the meaning of both obliteration and cancellation.

The construction of the statute in *Warner v. Warner's Estate, supra,* has been criticized by eminent text writers on wills, and the courts in the majority of the states in construing similar statutes have refused to follow the reasoning in that case. (citations omitted).

The above, and other authorities that might be cited, hold that revocation of a will by cancellation within the meaning of the statute, contemplates marks or lines across the written parts of the instrument, or a physical defacement, or some mutilation of the writing itself, with the intent to revoke. If written words are used for the purpose, they must be so placed as to physically affect the written portion of the will, not merely on blank parts of the paper on which the will is written. If the writing intended to be the act of cancelling, does not mutilate, or erase, or deface, or otherwise physically come in contact with any part of written words of the will, it cannot be given any greater weight than a similar writing on a separate sheet of paper, which identifies the will referred to, just as definitely, as does the writing on the back. If a will may be revoked by writing on the back, separable from the will, it may be done by a writing not on the will. This the statute forbids.

The attempted revocation is ineffectual, because testatrix intended to revoke her will by subsequent writings not executed as required by statute, and because it does not in any wise physically obliterate, mutilate, deface, or cancel any written parts of the will.

For the reasons stated, the judgment of the trial court is affirmed.

Affirmed.

11.6.2.2 Presumption of Destruction

Edmonds v. Edmonds, 772 S.E.2d 898 (Va. 2015)

Opinion by Chief Justice DONALD W. LEMONS.

In this appeal, we consider whether the trial court erred when it ordered a photocopy of a will to be probated. We must determine whether the trial court applied the correct legal standard in reaching its decision, and whether the evidence was sufficient to support the trial court's determination.

I. Facts and Proceedings

James A. Edmonds, Jr. ("Edmonds") died on April 30, 2013. Edmonds was survived by his wife, Elizabeth Cashman Edmonds ("Elizabeth"), his daughter from that marriage, Kelly Elizabeth Edmonds ("Kelly"), and a son from a previous marriage, James Christopher Edmonds ("Christopher").

It is undisputed that on November 8, 2002, Edmonds executed a will ("2002 Will") which left all of his personal property to his wife, Elizabeth, and the remainder of his property to a revocable living trust ("Trust"). The 2002 Will stated that in the event Elizabeth pre-deceased Edmonds all of Edmonds' personal property would go to his daughter Kelly. The 2002 Will intentionally omitted Christopher as a beneficiary. The documents creating the Trust were also executed on November 8,

2002. Elizabeth and Kelly are the beneficiaries of the Trust. The Trust documents state that Christopher was intentionally omitted as a beneficiary.

At the same time Edmonds executed his 2002 Will and Trust documents, Elizabeth also executed her will and trust documents. Her estate planning documents were a mirror image of Edmonds' documents, leaving all of her estate to Edmonds, and if Edmonds predeceased her, leaving everything to Kelly.

After Edmonds died, his original 2002 Will could not be located. However, photocopies of the 2002 Will and Trust documents were found in a green binder in Edmonds' filing cabinet in his office. Thereafter, Elizabeth filed a "Complaint to Establish Copies of the Will and Trust Where Originals Cannot Be Located," in the Circuit Court of Arlington County ("trial court") and named Kelly and Christopher as defendants. The complaint acknowledged that Kelly and Christopher would both be heirs at law if Edmonds was deemed to have died intestate, but asked the trial court to establish and direct probate of the photocopy of the 2002 Will and the Trust.

Christopher filed an answer, counterclaim, and cross-claim. He sought to establish that Edmonds died intestate, and that Christopher was an heir at law. Christopher asserted that because the 2002 Will was in Edmonds' possession when he died, and Elizabeth had been unable to locate it, the presumption that Edmonds had destroyed it with the intent to revoke it applied.

Kelly filed answers to the complaint and the cross-claim. She admitted that she would be an heir at law if Edmonds died intestate, but she asked the trial court to find that the 2002 Will was valid and to probate the photocopy. She asserted there was no evidence that Edmonds destroyed the 2002 Will with the intent to revoke it.

A two-day trial was held on March 25–26, 2014. Elizabeth presented numerous witnesses who described conversations they had with Edmonds regarding his testamentary intentions. Patrick J. Vaughn, an attorney who prepared wills and trust documents for Edmonds and Elizabeth in 1973, and again in 1989, testified that in the 1973 will, Edmonds left his estate to Elizabeth, and expressly excluded any child of his born from a previous marriage. In the 1989 will, Edmonds again left everything to Elizabeth. In the event Elizabeth predeceased him, he left everything to his daughter, Kelly.

Marc E. Bettius ("Bettius") testified that he had been friends with Edmonds and Elizabeth for more than 30 years. Bettius stated that in the fall of 2012, he had gone by Edmonds' auto business to have his car serviced, and he and Edmonds had a conversation. During that conversation, Bettius asked Edmonds what plans he had made for the future of his business, and Edmonds indicated that everything was taken care of in his estate and it would all go to Elizabeth. Edmonds also stated that he made the appropriate decisions to maximize estate tax benefits. Bettius knew Edmonds had a son from a previous marriage and asked Edmonds if he'd ever thought about having a relationship with his son. Edmonds responded in the negative and said that, "the boy had never been a part of his life and never would be a part of his life."

Paul C. Kincheloe ("Kincheloe"), an attorney who had been friends with Edmonds since the 1970s, testified that he was not professionally engaged to do any estate planning for Edmonds, but they did discuss the subject on several occasions. At one point, Edmonds asked Kincheloe to serve as substitute trustee, and Kincheloe agreed. Edmonds told Kincheloe he was leaving everything to his

wife and daughter, and nothing to his son.

John A. Bell, Jr. ("Bell") testified that he had been friends with Edmonds and Elizabeth since the 1980s. The last time he was with Edmonds was during the first week of March 2013, when Edmonds invited him to Florida for a four-day golf tournament. Bell testified that he brought up the subject of estate planning because he was deciding what do with his own estate. During that conversation, Edmonds said, "As soon as I go, everything goes to Liz. And as soon as she goes, everything goes to Kelly." When asked if Edmonds ever said anything negative about Christopher, Bell responded that Edmonds had never mentioned his son. Bell testified that about three or four years before this March 2013 conversation, he and Edmonds had another discussion about their estates. During that discussion, Edmonds said he was trying to set up his estate so that Kelly would receive her inheritance in increments. Bell testified that Edmonds was concerned that Kelly would spend the money all at once. Edmonds was also concerned that he had paid for Kelly to have a great education, and he was not sure she was using it wisely.

Raymond Knight, one of Edmonds' employees in his auto business, testified that approximately six years before Edmonds died, they had a conversation about the future of the business if anything happened to Edmonds. Edmonds told him that "Liz would carry on the business."

Donald Manning ("Manning") was the attorney who prepared the 2002 Will. Manning testified that when he met with Edmonds and Elizabeth to prepare their wills in 2002, Edmonds made it clear that he did not want Christopher to be a beneficiary. Manning testified that after Edmonds and Elizabeth executed their wills and trust documents, he made photocopies of the originals. Several weeks later, Edmonds picked up both the originals and the photocopies. Manning testified that the photocopies were placed in a green binder before Edmonds picked them up. Manning also testified that Edmonds never completed several of the items related to the estate plan, such as funding a family trust or retitling stock, but Manning agreed that those items did not affect the 2002 Will.

Meta Jane Mortensen ("Mortensen"), who prepared Edmonds' taxes each year, testified that she had a discussion with Edmonds wherein she told him she was concerned about the tax implications of his estate plan and wanted to see the documents governing it. Edmonds finally brought her his estate documents in 2011. The documents Edmonds showed her in 2011 were the 2002 Will and Trust.

Dina Knight, the bookkeeper for Edmonds' auto business, testified that although Edmonds did not discuss his estate plan in specific terms with her, he told her that one day the business would belong to his wife and daughter. Knight also testified that Edmonds kept all of his important papers in the filing cabinet in his office. After Edmonds died, Knight looked through the cabinet for important papers Elizabeth would need, and that is where she found life insurance papers, lease agreements, and the green binder with the copies of the 2002 Will and Trust documents. Knight did not know the documents in the green binder were photocopies when she found them. Upon learning that those documents were not originals, Knight assisted Elizabeth in looking through all the cabinets and drawers in the auto business, but they never found the original 2002 Will.

Elizabeth testified that she and Edmonds were married in 1972. She explained that Edmonds had three serious surgeries during their marriage, one in 1992, another in 1998, and the last one in 2003. Prior to each of these surgeries, he always told her that all the important papers she would need, including his will, were in the top drawer of his filing cabinet in his office. Elizabeth testified that

when they prepared their wills in 2002, Edmonds was clear that he wanted to exclude Christopher as a beneficiary. Elizabeth also testified that in late March or early April of 2013, while they were still in Florida, Edmonds stated that when they got back to Virginia they should make an appointment with their estate attorney to starting putting into place several of the estate planning items, including funding the family trust and retitling some of their stock.

Christopher testified that he had never met or spoken to Edmonds, although he did make two attempts to contact him.

After hearing the evidence and considering the argument of counsel, the trial court stated that "in my mind it's a very close ... case." The trial court held that the execution and content of the 2002 Will was not contested. The trial court also held that the evidence proved that the documents were traceable to Edmond's possession but were not found at his death. The trial court stated that it had to determine whether the evidence was sufficient to overcome the presumption that the testator had destroyed the will with the intention to revoke it.

After a thorough review of the evidence in the case, the trial court held that the plaintiff had proven "by clear and convincing evidence" that the 2002 Will was not revoked. The trial court stated that it was relying on this Court's opinion in *Bowery v. Webber*, 181 Va. 34, 23 S.E.2d 766 (1943), which it found to be controlling. The trial court noted that here, as in *Bowery,* there was compelling evidence of the decedent's deep affection for the proponent of the will, and that the decedent had made a number of statements to various disinterested parties related to the disposition of his estate. The trial court further noted that it found those witnesses to be "highly credible." Finally, the trial court held that there was no evidence of any credible reason or cause for the decedent to have made any change in the testamentary disposition of his estate. The trial court ordered that the photocopy of Edmonds 2002 Will be probated.

The trial court entered a final order on May 9, 2014, and Christopher appealed to this Court. We granted Christopher's appeal on the following assignments of error:

> 1. The trial court erred when it ordered a photocopy of the will to be probated, because it applied the wrong legal standard in allowing a decedent's general statements of intent and affection to overcome the presumption of revocation of the missing original will, thus failing to follow this Court's numerous decisions requiring clear and convincing evidence of some other cause for the original will's disappearance.
>
> 2. The trial court erred when it ordered a photocopy of the will to be probated, because it allowed less than clear and convincing evidence to overcome the presumption of revocation, contrary to this Court's decisions.

II. Analysis

A. Standard of Review

Whether the trial court applied the correct legal standard in this case is a question of law. We review questions of law de novo. *See Lamar Co. v. City of Richmond,* 287 Va. 322, 325, 757 S.E.2d 15, 16 (2014).The issue whether Elizabeth, the proponent of the will, proved by clear and convincing evidence that Edmonds did not revoke his will is a question of sufficiency of the evidence. A

judgment should be reversed for insufficient evidence only if it is "plainly wrong or without evidence to support it." *Atrium Unit Owners Ass'n v. King*, 266 Va. 288, 293, 585 S.E.2d 545, 548 (2003) (internal quotation marks omitted).

B. Virginia's Legal Standard for Missing Wills

Over the past century, this Court has decided numerous cases involving missing wills, and the law controlling this case is well-established. The most recent case this Court decided involving this issue was *Brown v. Hardin,* 225 Va. 624, 304 S.E.2d 291 (1983), where we stated:

> Where an executed will in the testator's custody cannot be found after his death there is a presumption that it was destroyed by the testator *animo revocandi.* This presumption, however, is only *prima facie* and may be rebutted, but the burden is upon those who seek to establish such an instrument to assign and prove some other cause for its disappearance, by clear and convincing evidence, leading to the conclusion that the will was not revoked.

Id. at 626, 304 S.E.2d at 292 (citations omitted).

Neither party in this appeal disagrees that, where an executed will in the testator's custody cannot be found after his death, there is a presumption that it was destroyed by the testator with the intent of revoking it. In this case, the 2002 Will was traced to Edmonds' custody, but could not be found at his death. Accordingly, the trial court properly applied the presumption in this case that the 2002 Will was destroyed by Edmonds.

The parties also do not appear to disagree that the presumption of revocation can be overcome by the proponent of the will upon presentation of clear and convincing evidence, leading to the conclusion that the will was not revoked by the testator. Instead, the dispute in this case involves what the proponent of the will must prove to meet her burden of proof, and whether she met her burden of proof in this particular case.

Christopher argues that to meet her burden of proof, Elizabeth was required to prove "some other cause" for the disappearance of the will, and that evidence of general intent and affection alone is not clear and convincing evidence, sufficient to overcome the presumption of revocation. Christopher contends that the only case that supports Elizabeth's position, *Bowery,* is an "outlier" and should not have been relied on by the trial court.

A review of our decisions over the past century on the issue of missing wills is informative. In 1913, we provided a synthesis of the operation of the lost will presumption and the evidence sufficient to rebut it, in deciding the case of *Jackson v. Hewlett*, 114 Va. 573, 77 S.E. 518 (1913). In *Jackson,* the evidence proved that the decedent had made a will in which he devised the bulk of his estate to his illegitimate daughter, and left only a few minor devises to others, including his legitimate daughter. *Id.* at 575, 77 S.E. at 519. The will was kept in an unlocked drawer, but after decedent's death the will could not be located. *Id.* at 576, 77 S.E. at 519. The proponent of the will introduced numerous declarations by the testator regarding his intentions to leave the bulk of his estate to her, and not to his other relatives. *Id.* at 576–77, 77 S.E. at 519.

We explained that these declarations were not introduced for the purpose of proving the will, its due

execution, or its contents. Rather,

> [t]hey were introduced as evidence showing a strong and unvarying adherence by the testator to his purposes with respect to the disposition of his estate, which had obtained for years prior to his death, both as to the beneficiaries thereunder and as to those omitted therefrom; and for the purpose of rebutting the presumption that this testator deliberately destroyed, with intent to revoke, a will he had so carefully prepared, and to which he had so firmly adhered.

Id. at 578, 77 S.E. at 520.

We held that, in a case like *Jackson,* the presumption could only be overcome by this type of evidence, since "[i]t is impossible for the beneficiaries under the will to say what became of it; they can only assert that, whatever may have happened to it, the testator did not revoke it." *Id.* at 580, 77 S.E. at 521. We concluded that:

> It must be generally the case, in such a status, that the best evidence, if not the only evidence, that can be adduced to rebut the presumption of revocation is that the testator's mind for many years contemplated a certain disposition of his property; that when he disposed of that property by will his mental attitude was precisely the same that it had been during the previous years, and that after he made such disposition his mind remained in the same state practically until his death, supplemented by the consistency of his mental attitude towards his various relatives.

Id. at 581, 77 S.E. at 521. Our decision in *Jackson* recognizes that it may very well be impossible for the proponent of a missing will to explain what happened to the will, and therefore the statements of the testator regarding his testamentary intentions may be the best evidence to rebut the presumption of revocation.

The next case we decided involving a missing will was *Bowery,* handed down in 1943—the decision that appellant contends is an "outlier," but which in fact gave another concrete illustration of the nature of the evidence required to rebut the presumption of revocation for a lost will. In *Bowery,* the decedent had prepared a will which left her estate to her step-granddaughter, whom she had raised as her daughter, but excluded other relatives. 181 Va. at 35, 23 S.E.2d at 766. At the time of the testator's death, the will could not be found, and the proponent of the will filed a bill to establish the will, alleging that the will had become lost or misplaced, but that it had not been revoked. *Id.* The proponent of the will put on evidence that the decedent repeatedly stated to her intimate associates that she desired and intended to leave all of her property to her adopted daughter. *Id.* at 37, 23 S.E.2d at 767. In contrast, there was no evidence of any such affection or intention toward her other relatives. *Id.* There was also no evidence of any incidents occurring which would have induced the decedent to revoke or change her will. *Id.* We held that this evidence was sufficient to support the conclusion that the testator did not destroy her will with the intent to revoke it. *Id.* at 39, 23 S.E.2d at 768.

Three years after *Bowery,* we decided *Tate v. Wren*, 185 Va. 773, 40 S.E.2d 188 (1946), holding that the evidence presented in that case was not sufficient to overcome the presumption of revocation. We explained that, unlike the record before the trial court in *Bowery,* there was no evidence in *Tate* of

declarations by the testator that his 1933 will was still in effect. *Id.* at 785–86, 40 S.E.2d at 194. To the contrary, there was evidence that the testator had made numerous statements that he intended to change his 1933 will, and that he had actually prepared a new holographic will. *Id.* at 786, 40 S.E.2d at 194. It is important to note, however, that in distinguishing the facts in *Tate* from the facts in *Bowery,* we never indicated that *Bowery* was an "outlier" or no longer correct.

Later cases have confirmed the continued application of *Jackson* and *Bowery* in lost will cases. For example, in *Sutherland v. Sutherland*, 192 Va. 764, 66 S.E.2d 537 (1951), we referenced our decisions in *Bowery* and *Jackson,* and stated that, in our opinion, the facts in those two cases "were clear and convincing." *Id.* at 774, 66 S.E.2d at 543. We determined that the facts in *Sutherland* did not "measure up" to the facts present in *Bowery* and *Jackson,* and therefore we held that the proponent of the missing will had failed to meet his burden of proof to overcome the presumption of revocation. *Id.* at 774–75, 66 S.E.2d at 543–44. Our opinion in *Sutherland* makes clear that we viewed *Jackson* and *Bowery* to be correct, and to be examples of factual scenarios where the proponent of the missing will had met the necessary burden of proof to overcome the presumption of revocation.

Where the will-proponent's proof fails to clearly and convincingly rebut the presumption of revocation, the burden is not met and the will cannot be probated. In *Harris v. Harris*, 216 Va. 716, 222 S.E.2d 543 (1976), for example, the proponents of the missing will argued that the will was not actually in the decedent's possession at the time of his death, and for that reason the presumption of revocation should not apply. *Id.* at 719, 222 S.E.2d at 545. However, we disagreed and held that the evidence proved that the will remained in the decedent's house, and therefore the presumption of revocation applied. *Id.* at 719–20, 222 S.E.2d at 545. Further, we determined that the proponents had not met their burden of overcoming the presumption, because the only evidence presented was that other relatives were frequently in the house and could have had access to the will. *Id.* at 720, 222 S.E.2d at 546. We held that this evidence left the competing inferences "equally probable," and was not enough to constitute clear and convincing evidence that the will was not revoked by the testator. *Id.*

The most recent decision by this Court on the issue of a missing will was the *Brown* case. In *Brown,* there was no dispute that the decedent had made a will in which he left the majority of his estate to a family friend instead of his sister. There was evidence presented that the decedent had told numerous witnesses that he intended to leave everything to the friend, and that he was not leaving anything to his sister because she was already well off and did not need the money. 225 Va. at 636-37, 304 S.E.2d at 298. We emphasized that:

> The declarations of a testator, after he has made his will, as to its continued existence, its contents, or its revocation, where the will cannot be found after his death, [are] recognized under certain circumstances as entitled to great weight.

Id. at 636, 304 S.E.2d at 298 (quoting *Shacklett v. Roller*, 97 Va. 639, 644, 34 S.E. 492, 494 (1899)). Evidence was also presented that the sister had access to the decedent's personal papers within 36 hours of his death, which might have explained the disappearance of the will. *Id.* The Court stated that to overcome the presumption that the will was destroyed by the testator with the intention of revoking it,

> the burden was on [the proponent of the will] to prove by clear and convincing evidence that the will was not destroyed by [the testator] but was destroyed or

> secreted by some other person with intent to prevent its probate or recordation, or was lost or misplaced; *that it was not incumbent upon [the proponent] to prove that the [will] was destroyed or suppressed by any certain person nor specifically what became of said will*; and that [the proponent] only had to prove by clear and convincing evidence that [the testator] did not destroy the will with the intention of revoking it.

Id. at 637, 304 S.E.2d at 299 (emphasis added).

It is clear from a review of our extensive case law on this topic that a proponent of a missing will is not required to specifically prove what became of the missing will. The language cited above from *Brown* demonstrates that we rejected the appellant's interpretation of our cases that a proponent is required to prove what happened to the will. Instead, the proponent is required to prove, by clear and convincing evidence, that the testator did not destroy the will with the intention of revoking it.

The evidence presented by a proponent of a missing instrument will take different forms depending on the facts and context of each individual case. In some cases, the proponent may present evidence regarding what could have happened to the will; and in other cases, there may be no evidence to explain why the will is lost or missing. The facts of each case are different, and the evidence in each case will therefore also be different. What remains the same is that each proponent of a missing will must prove, by clear and convincing evidence, that the testator did not destroy the will with the intention of revoking it. That is the standard that we have articulated in all our cases over the past century, and it remains the law of the Commonwealth today.

It is clear from the transcript of the trial and the final order that in the present case the trial court applied the proper legal standard. The trial court recognized that, because the will was traced to Edmonds' possession but was not located at his death, the presumption of revocation applied. The trial court then stated that the presumption could be overcome by clear and convincing evidence that the will was not revoked by the defendant. Accordingly, with respect to assignment of error one, we hold that the trial court did not err, and that it applied the proper legal standard.

C. Overcoming the Presumption of Revocation

In assignment of error two, Appellant asserts that the trial court erred because it allowed less than clear and convincing evidence to overcome the presumption of revocation. We have defined clear and convincing evidence as:

> [t]hat measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and *unequivocal*.

Brown, 225 Va. at 637, 304 S.E.2d at 299 (quoting *Walker Agcy. & Aetna Cas. Co. v. Lucas*, 215 Va. 535, 540-41, 211 S.E.2d 88, 92 (1975)).

The remaining question is whether the proof in this case was sufficient to produce in the mind of the trier of fact a firm belief or conviction that Edmonds did not destroy the original copy of the 2002 Will with the intention of revoking it. The trial court found that Elizabeth had proven that fact

by clear and convincing evidence. Elizabeth is entitled to have this Court review the evidence and all reasonable inferences therefrom in the light most favorable to her, the prevailing party at trial. *See Exxon Mobil Corp. v. Minton,* 285 Va. 115, 121, 737 S.E.2d 16, 22 (2013).Viewing the evidence in the light most favorable to Elizabeth, the evidence is sufficient to support the trial court's finding that she had rebutted the presumption that the original 2002 Will was missing because Edmonds had purposefully destroyed it with the intention of revoking it, by offering clear and convincing evidence to the contrary.

Edmonds and Elizabeth had been married for more than 40 years and had complementary estate plans in place to provide for each other and then to pass their estate to their daughter Kelly after they both died. On numerous occasions, Edmonds stated his intent that his estate be handled in such a manner, declarations that are both admissible and entitled to great weight. *See Brown,* 225 Va. at 636, 304 S.E.2d at 298; *Shacklett*, 97 Va. at 644, 34 S.E. at 494.

Christopher testified that he had never spoken with or met Edmonds. Edmonds stated to his friend Bettius that he had no interest in having a relationship with Christopher. Edmonds had at least three wills, and each time he changed his will, he had a new one prepared. Christopher was never listed as a beneficiary in any of Edmonds' wills. During the preparation of his 2002 Will, Edmonds was clear that he did not want Christopher to be a beneficiary. Because Edmonds did not want Christopher to be a beneficiary, he would know that he needed to have a will to exclude Christopher from inheriting part of his estate. Therefore, even if he lost confidence in his daughter, there is no indication that he would want his property to pass through intestate succession under any circumstances.

It is important to note in this instance that a neatly bound photocopy of Edmonds' 2002 Will and Trust was found in a drawer in the filing cabinet in Edmonds' office, exactly where Edmonds had stated he kept his important papers. The photocopy was fully executed. However, the original of the document could not be found. The fully executed photocopy was found where Edmonds stated he would keep his important papers. If he had intended to revoke the 2002 Will by destroying the original, it would have been logical that he would have removed the photocopy from his file of important papers.

Edmonds never indicated to his wife, or anyone else, that he had destroyed the couple's 2002 estate planning documents. He also made a number of statements in the last two years of his life that reflected his intention that, when he died, his estate would be governed by the 2002 Will and Trust. In the fall of 2011, he gave a copy of the 2002 Will and Trust to his long-term tax advisor for her review. In the fall of 2012, he told his close friend, Bettius, that he had no interest in developing a relationship with Christopher, that he had made appropriate decisions to maximize his estate tax benefits, and that after he died all the decisions regarding the management of his business would be in Elizabeth's hands. This is inconsistent with Edmonds having revoked the will, leaving no estate plan in place.

In March 2013, Edmonds told his close friend Bell that, "as soon as I go, everything goes to Liz. As soon as she goes, everything goes to Kelly." In late March or early April, just weeks before his death, Edmonds told Elizabeth that they should meet with their attorney when they returned to Arlington from Florida to begin funding their trust and taking the other steps their attorney had recommended as part of the 2002 estate plan.

As in *Jackson* and *Bowery,* it is demonstrated on the present record with clear and convincing evidentiary support that in all of his statements Edmonds confirmed the intention that his wife and daughter were to be the objects of his bounty, and that he specifically did not intend to leave anything to his son. There is also no evidence in the record of anything that might have happened to change Edmonds' mind in the period prior to his death. Accordingly, we hold that these facts are sufficient to support the trial court's finding of clear and convincing evidence that Edmonds did not destroy the original 2002 Will with the intention of revoking it.

III. Conclusion

For the reasons stated, we will affirm the judgment of the trial court.

Affirmed.

Harrison v. Bird, 621 So.2d 972 (Ala. 1993)

HOUSTON, Justice.

The proponent of a will appeals from a judgment of the Circuit Court of Montgomery County holding that the estate of Daisy Virginia Speer, deceased, should be administered as an intestate estate and confirming the letters of administration granted by the probate court to Mae S. Bird.

The following pertinent facts are undisputed:

Daisy Virginia Speer executed a will in November 1989, in which she named Katherine Crapps Harrison as the main beneficiary of her estate. The original of the will was retained by Ms. Speer's attorney and a duplicate original was given to Ms. Harrison. On March 4, 1991, Ms. Speer telephoned her attorney and advised him that she wanted to revoke her will. Thereafter, Ms. Speer's attorney or his secretary, in the presence of each other, tore the will into four pieces. The attorney then wrote Ms. Speer a letter, informing her that he had "revoked" her will as she had instructed and that he was enclosing the pieces of the will so that she could verify that he had torn up the original. In the letter, the attorney specifically stated, "As it now stands, you are without a will."

Ms. Speer died on September 3, 1991. Upon her death, the postmarked letter from her attorney was found among her personal effects, but the four pieces of the will were not found. Thereafter, on September 17, 1991, the Probate Court of Montgomery County granted letters of administration on the estate of Ms. Speer, to Mae S. Bird, a cousin of Ms. Speer. On October 11, 1991, Ms. Harrison filed for probate a document purporting to be the last will and testament of Ms. Speer and naming Ms. Harrison as executrix. On Ms. Bird's petition, the case was removed to the Circuit Court of Montgomery County. Thereafter, Ms. Bird filed an "Answer to Petition to Probate Will and Answer to Petition to Have Administratrix Removed," contesting the will on the grounds that Ms. Speer had revoked her will.

Thereafter, Ms. Bird and Ms. Harrison moved for summary judgments, which the circuit court denied. Upon denying their motions, the circuit court ruled in part (1) that Ms. Speer's will was not lawfully revoked when it was destroyed by her attorney at her direction and with her consent, but not in her presence, see Ala. Code 1975 § 43-8-136(b); (2) that there could be no ratification of the

destruction of Ms. Speer's will, which was not accomplished pursuant to the strict requirements of § 43-8-136(b); and (3) that, based on the fact that the pieces of the destroyed will were delivered to Ms. Speer's home but were not found after her death, there arose a presumption that Ms. Speer thereafter revoked the will herself. However, because the trial court found that a genuine issue of material fact existed as to whether Ms. Harrison had rebutted the presumption that Ms. Speer intended to revoke her will even though the duplicate was not destroyed, it held that "this issue must be submitted for trial."

Subsequently, however, based upon the affidavits submitted in support of the motions for summary judgment, the oral testimony, and a finding that the presumption in favor of revocation of Ms. Speer's will had not been rebutted and therefore that the duplicate original will offered for probate by Ms. Harrison was not the last will and testament of Daisy Virginia Speer, the circuit court held that the estate should be administered as an intestate estate and confirmed the letters of administration issued by the probate court to Ms. Bird.

If the evidence establishes that Ms. Speer had possession of the will before her death, but the will is not found among her personal effects after her death, a presumption arises that she destroyed the will. See Barksdale v. Pendergrass, 294 Ala. 526, 319 So.2d 267 (1975). Furthermore, if she destroys the copy of the will in her possession, a presumption arises that she has revoked her will and all duplicates, even though a duplicate exists that is not in her possession. *See Stiles v. Brown*, 380 So.2d 792 (Ala. 1980); *see, also*, *Snider v. Burks*, 84 Ala. 53, 4 So. 225 (1887). However, this presumption of revocation is rebuttable and the burden of rebutting the presumption is on the proponent of the will. *See Barksdale, supra.*

Based on the foregoing, we conclude that under the facts of this case there existed a presumption that Ms. Speer destroyed her will and thus revoked it. Therefore, the burden shifted to Ms. Harrison to present sufficient evidence to rebut that presumption—to present sufficient evidence to convince the trier of fact that the absence of the will from Ms. Speer's personal effects after her death was not due to Ms. Speer's destroying and thus revoking the will. See *Stiles v. Brown,* supra.

From a careful review of the record, we conclude, as did the trial court, that the evidence presented by Ms. Harrison was not sufficient to rebut the presumption that Ms. Speer destroyed her will with the intent to revoke it. We, therefore, affirm the trial court's judgment.

We note Ms. Harrison's argument that under the particular facts of this case, because Ms. Speer's attorney destroyed the will outside of Ms. Speer's presence, "[t]he fact that Ms. Speer may have had possession of the pieces of her will and that such pieces were not found upon her death is not sufficient to invoke the presumption [of revocation] imposed by the trial court." We find that argument to be without merit.

AFFIRMED.

Notes, Problems, and Questions

1. Unless there is a statute mandating a contrary result, a will that is (1) lost, (2) destroyed without the testator's consent, or (3) destroyed with the testator's consent but not in compliance with the revocation statute may be admitted into probate if its contents can be proven. For example, during

Hurricane Katrina, a large number of wills were probably destroyed as a result of the floods. Those wills were destroyed without the testators' consent, so they can be probated if their terms can be proved from copies or otherwise.

2. The terms of the lost will must be proven. For example, K.S.A. 59-2228 provides "A lost or destroyed will may be established if its provisions are clearly and distinctly proved. When such will is established the provisions thereof shall be distinctly stated, certified by the court, and filed and recorded. Letters shall issue thereon as in the case of other wills."

3. A few states limit the probate of lost wills. For instance, N.R.S. 136.240(3) states "*** no will may be proved as a lost or destroyed will unless it is proved to have been in existence at the death of the person whose will it is claimed to be, or is shown to have been fraudulently destroyed in the lifetime of that person, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses."

4. In 1990, Pauline executed a will stating, "I leave my estate in equal parts to my nieces, Betty, Jean and Clara." In 2007, Pauline called her attorney and said, "I need you to tear up my will because I don't want my niece to get any of my things. I plan to leave it all to charity." The attorney torn up the will in front of his secretary and placed it in Pauline's file. In 2014, Pauline was killed in a train accident. Pauline's nieces submitted the 1990 will for probate. Henry, Pauline's sole intestate heir filed an action contesting the probate of the will. What is the likely outcome of the case?

5. In 2000, Georgia executed a will stating, "I leave half of my estate to Dennis and half of my estate to Wilma." Georgia died in 2011. At that time, her will was found stuck inside of her shredder. The will was intact and only had slight tears on the edge of the pages. Dennis and Wilma submitted Georgia's will for probate. What is the possible result?

11.6.3 Dependent Relative Revocation and Revival (DRRR)

Courts will honor the testator's intent to revoke his or her will, but what if that intent is based on misinformation. According to the DRRR, if the testator decides to revoke her will because of a mistaken assumption of law or fact, the court will not give the revocation effect if evidence is introduced showing that the testator would not have revoked the will if her or she had known the truth. The doctrine is one of presumptive intent, not actual intent. It only applies where there is an alternative plan disposition that fails or where the mistake is recited in the terms of the revoking instrument or established by clear and convincing evidence. It is not enough just to revoke the will. Consider the following examples.

Example:

T revokes her 2000 will because she thinks the jurisdiction will allow her to write a letter to dispose of her property. The state does not recognize holographic wills, so the revocation is based upon a mistaken assumption of law. The court will ignore the revocation and probate the 2000 will because it presumes that T would not want to die intestate. The purpose is to carry out T's intent.

Example:

T revokes her 2000 will leaving all of her property to her friend, Bob, because she thinks that Bob is dead. Bob is alive, so the revocation is based upon a mistaken assumption of fact. The court will ignore the revocation and probate the 2000 will.

11.6.3.1DRRR

Kroll v. Nehmer, 705 A.2d 716 (Md. 1998).

WILNER, Judge.

Margaret Binco died on December 19, 1994, leaving four wills-one dated July 24, 1980, a second dated April 12, 1985, a third dated June 28, 1990, and a fourth dated October 27, 1994. We are concerned here only with the second will-the 1985 will.

The 1980 will, it appears, had been altered, and, although it was at one time offered for probate, no one now contends that it has any validity. When Ms. Binco drew the 1990 will, she wrote on the back of her 1985 will "VOID-NEW WILL DRAWN UP 6-28-90." The 1990 and 1994 wills, all parties agree, are ineffective because they lack the signatures of attesting witnesses, as required by Maryland Code, Estates and Trusts Article, § 4-102. Accordingly, if the 1985 will was effectively revoked by Ms. Binco, she would have died intestate, in which event appellant, her brother and closest surviving relative, who was not named as a beneficiary under the 1985, 1990, or 1994 wills, would inherit. The dispute now before us is therefore between appellant, urging that the 1985 will had been revoked, and appellee, the person who offered that will for probate and who was appointed as personal representative to administer the estate under the will, who contends that the 1985 will had not been effectively revoked.

Over appellant's objection, the Orphans' Court for Baltimore County, apparently applying the doctrine of dependent relative revocation, admitted the 1985 will to probate, notwithstanding its apparent revocation by Ms. Binco. The Circuit Court for Baltimore County affirmed that decision. We granted *certiorari* on our own initiative before any proceedings in the Court of Special Appeals to consider whether the lower courts erred in applying the doctrine and finding the 1985 will to be valid. We believe that they did err and shall therefore reverse.

Dependent Relative Revocation

Section 4-105 of the Estates and Trusts Article permits a will to be revoked by "cancelling ... the same, by the testator himself...." It is clear, and neither party now suggests otherwise, that, by writing on the 1985 will "VOID-NEW WILL DRAWN UP 6-28-90" and retaining the will, so marked, among her papers, Ms. Binco intended to revoke that will and that, unless saved by the doctrine of dependent relative revocation, that will was effectively revoked.

As we indicated in *Arrowsmith v. Mercantile-Safe Deposit*, 313 Md. 334, 343, 545 A.2d 674, 679 (1988), , no reported Maryland appellate decision has ever applied that doctrine. The doctrine, in its most general form, is described in 2 WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON THE

LAW OF WILLS § 21.57 at 446 (rev. ed.1960):

> "In general the doctrine of dependent relative revocation applies to invalidate the revocation of a will where it is shown that the revocation was conditioned on the occurrence of certain facts which never came to pass or upon the existence or nonexistence of circumstances which were either absent or present contrary to the condition."

As most commentators, including the revisors of Page's opus, point out, in applying the doctrine, courts often speak in terms of a *conditional* revocation, regarding the revocation as conditioned on the existence of a set of facts or circumstances that the testator assumes to exist, when, in reality, the revocation is itself unconditional but is rather based on a mistaken frame of mind-a mistake of either fact or law. They give as an example of a mistake of fact the circumstance in which a testator physically destroys his will believing that the document he is destroying is not his will but some other instrument. In that circumstance, they suggest, the necessary intention to revoke the will is clearly lacking, and a "mistake of this sort prevents revocation, although all the other elements are present." *Id.* at 448. There is no need in that situation to construe the revocation as a "conditional" one-the presumed condition being that the document being destroyed is not the testator's will-for a mistake of that kind suffices on its own to justify granting relief.

The more troublesome branch of the doctrine is where the mistake is not in the act of revocation itself but in the inducement for the act, arising from facts or circumstances extrinsic to the instrument revoked. This often takes the form of a mistake of law or of legal consequences. The most common instance of this form is "where a testator revokes a later will in the belief that he can thus put a prior will into effect, or where he revokes a prior instrument thinking that a later instrument has been executed in due form and that no other facts exist which will prevent such instrument from operating as a later will." *Id.* at 448. *See also* Joseph Warren, *Dependent Relative Revocation*, 33 Harv. L. Rev. 337, 342 (1920).

It is possible, of course, for a testator to make clear that his revocation of an existing will is conditioned on the legal validity or effectiveness of some other instrument, but, as the Page authors note, in most instances the testator has simply assumed that state of affairs and has articulated no such condition. In such cases, the revocation is really less of a conditional one than one based on a mistake of law which, if regarded in that manner, would not normally suffice to avoid an otherwise deliberate act. Some courts, in an effort to effectuate what they presume would have been the testator's intent had he known the true circumstances, have thus constructed the fiction of a conditional, or dependent relative, revocation, as a more plausible theory upon which to provide relief. *See* George E. Palmer, *Dependent Relative Revocation and its Relation to Relief for Mistake,* 69 Mich. L.Rev. 989-90 (1970-71):

> "The one part of the law of wills in which courts often do give relief for mistake is in connection with revocation by holding that an apparent revocation was ineffective because of mistake in underlying assumptions. Rarely, if ever, however, does a modern court rest its decision squarely on its power to relieve for mistake. Instead, the testator's intent to revoke is regarded as conditioned upon the truth of the matter in question; since the condition has not been met the conclusion is reached that there was no revocation for lack of the requisite intent. This is the doctrine of dependent relative revocation. *It rests upon an*

analysis that, with few exceptions, is found nowhere else in the law relating to mistake in underlying assumptions."

(Emphasis added.)

This theory, almost peculiar to revocations of wills, gained initial currency in English decisions. Joseph Warren, *Dependent Relative Revocation, supra*, 33 Harv. L. Rev. at 337. As Page, and increasingly many courts, have warned, however, the testator's true intentions in a mistake of law-implied condition context are often ambiguous-harder to discern with real clarity and authority-and, before applying legal fictions based on undocumented presumptions to accept as valid a will that has otherwise been facially revoked in accordance with all legal prerequisites, courts need to examine the circumstances with great care and caution.[2] We shall turn now to those circumstances, as they appear in this case.

The Four Wills and the Proceedings Below

When Ms. Binco died, her only heir was her brother, Henry J. Kroll, the appellant. Mr. Kroll was not mentioned as a beneficiary in any of the three later wills; the 1980 will is not in the record before us, but, from a comment made during the hearing in the circuit court, it appears that he was left a car in that will. The 1985 will was drawn by an attorney and made a complete disposition of Ms. Binco's estate. She left her jewelry, furs, and furniture to five individuals-Charmaine Kilmartin, Esther Strebech, Betty Ball, Joan Romanowski, and Phyllis Butler; a credit union account was left to a sixth individual; AT & T stock was bequeathed equally to two charities-First Church of God and Lutheran Social Services of Maryland; and Standard Oil Company stock was left to Spay and Neuter All Pets, Inc. St. John's Lutheran Church, the First Church of God, and Spay and Neuter All Pets, Inc. shared equally in the residuary bequest. Ms. Romanowski was named as personal representative.

The 1990 will, which was handwritten and contained a number of margin notes and interlineations, had no residuary clause, so it is not clear whether that will made a complete disposition of Ms. Binco's estate. None of the individuals mentioned in the 1985 will were included in the 1990 will. Some of the beneficiaries are referred to only by their first names-Ms. Binco's house and certain stock, for example, is left to "Richard and Sharyn"; clothing is left to "Chris"; mink stoles are left to "Bea" and "Pat." Other bequests suggest that "Richard" is Richard Kroll, appellant's son and Ms. Binco's nephew. In a Notice of Hearing sent later by the Register of Wills, "Sharyn" is identified as Sharyn L. Trent, but it is not clear from the record what, if any, relationship she has with Richard Kroll or with Ms. Binco. Pat Sonneborn, Bea Reynolds-possibly the "Pat" and "Bea" named as legatees-along with a "Hank," who might be appellant, are listed as executors. The First Church of God is mentioned in the will, but it is not at all clear what, if any, bequest is made to that charity. One or more of the interlineations appear to have been made after the initial will was written. A provision stating "Pay Norman Lauenstein-Atty," for example, is crossed out, and, in the margin is written "Paid Him."

The 1994 will is also a handwritten document, containing no residuary clause. At the top, Ms. Binco declares it as her Last Will and Testament and states that she "would like to designate the following items to those mentioned below." Her car, which in the 1990 will went to Richard Kroll, was given to Pat Sonneborn. Her house, which was formerly to go to Sharyn and Richard, was left to Beate Reynolds. With the exception of a bedroom set and table that were left to Pat Sonneborn, the

furniture in the house was left to Ms. Reynolds as well. A credit union account was left to Ms. Sonneborn and a Rosedale Federal account was left to Ms. Reynolds. Certain stock was bequeathed 50% to Richard Kroll, 25% to Ms. Sonneborn, and 25% to Ms. Reynolds. One thousand dollars of insurance was left to the First Church of God, and another $1,000 was left to Friends of Animals. Ms. Sonneborn and Richard Kroll were designated as executors.

Neither the 1990 will nor the 1994 will make any reference to any earlier will, and, as noted, neither contains the signatures of any attesting witnesses, although the 1990 will has a place designated for witnesses.

Unfortunately, the record of proceedings in the orphans' court transmitted to this Court does not constitute the complete file and is somewhat difficult to follow, although we can piece together essentially what occurred from what we have and from what the parties assert in their briefs. At some point after Ms. Binco's death, Richard Kroll presented the 1990 will for judicial probate. Subsequently, appellee presented the 1980 will for judicial probate. At a hearing held on March 14, 1995, appellant produced the 1985 will which, over his objection, was admitted to probate. Appellee, identified as the Pastor of St. Johns's Lutheran Church, was appointed as personal representative. Appellant then filed a caveat to the will contending, among other things, that Ms. Binco did not have sufficient mental capacity to make that will, that the contents of the will had not been read or explained to her, that the will was procured by fraud and undue influence, and that it had, in any event, been subsequently revoked. In an amended petition and caveat, he asked that those issues be tried in the circuit court. On August 9, 1995, the orphans' court dismissed appellant's amended petition and caveat, without assigning any reasons. In that same order, the court formally rejected the 1990 will on the ground that "it does not satisfy the statutory requirement of a valid will and is not in good form."

Appellant noted an appeal to the circuit court but in that court effectively abandoned any complaint with respect to Ms. Binco's testamentary capacity or to any fraud or undue influence. The sole question presented to the circuit court was whether the orphans' court erred in applying the doctrine of dependent relative revocation and admitting the 1985 will to probate, notwithstanding its apparent revocation. After a brief evidentiary hearing, the court entered an order affirming the admission of the 1985 will to probate. The basis of its ruling was that "the revocation of the April 12, 1985 Will was so related to the making of the June 28, 1990 Will as to be dependent on it. Therefore, since the June 28, 1990 Will was invalid, the April 12, 1985 Will, whose contents can be ascertained, should be given effect."

Application of Dependent Relative Revocation

At issue here is the branch of the dependent relative revocation doctrine that, in effect, disregards conduct otherwise qualifying as a revocation of a will when that conduct, in the court's view, was based on an assumption by the testator that the will being revoked would be immediately replaced by a valid new will. It is the "mistake of law" branch of the doctrine. Two overlapping and confluent assumptions underlie the theory. One was expressed in a 1929 Annotation, A.G.S., *Effect of Testator's Attempted Physical Alteration of Will After Execution,* 62 A.L.R. 1367, 1401 (1929):

> "It is based upon the presumption that the testator performed the act of revocation with a view and for the purpose of making some other disposition of his property in place of that which was canceled, and that there is, therefore, no

> reason to suppose that he would have made the change if he had been aware that it would have been wholly futile, but that his wishes with regard to his property, as expressed in his original will, would have remained unchanged, in the absence of any known and sufficient reason for changing them."

See also the 1952 update of that Annotation, L.S. Tellier, *Effect of Testator's Attempted Physical Alteration of Will After Execution*, 24 A.L.R.2d 514, 554 (1952).

A second, or perhaps simply a different articulation of the same, theory offered in support of the doctrine comes into play when, as is often the case, the effect of not disregarding the revocation is for the decedent's estate, or some part of it, to pass intestate. *See In re Macomber's Wills,* 274 A.D. 724, 87 N.Y.S.2d 308, 313 (1949): "The rule seeks to avoid intestacy where a will has once been duly executed and the acts of the testator in relation to its revocation seem conditional or equivocal." *See also Goriczynski v. Poston,* 248 Va. 271, 448 S.E.2d 423, 425 (1994). The law disfavors intestacies and requires that, whenever reasonably possible, wills be construed to avoid that result. *Crawford v. Crawford*, 266 Md. 711, 719, 296 A.2d 388, 392 (1972). Courts have made it clear, however, that the law's preference for a testate disposition is always subordinate to the intention of the testator, whether ascertained or presumed. *See Charleston Library Soc. v. Citizens & Southern Nat. B.,* 200 S.C. 96, 20 S.E.2d 623, 632 (1942).

Although, as noted, this Court has never applied the doctrine, we have discussed aspects of it in three cases. In *Semmes v. Semmes*, 7 H. & J. 388 (Ms. 1826), the testator had a will leaving his entire estate to his wife, in trust for herself and his infant son until the child reached 21, at which point one-half of the personal property was to go to her absolutely. When his wife predeceased him, the testator used a pen to obliterate his signature and those of the attesting witnesses and to write on the bottom of the will, "In consequence of the death of my wife, it is become necessary to make another will." *Id.* at 389. Unfortunately, he died before making another will. The orphans' court refused to probate the existing will, and this Court affirmed that judgment. Our predecessors discussed the doctrine of dependent relative revocation as it had been applied in some English cases, notably *Onions v. Tyrer,* 1 P. Williams, 343 (1717), characterizing the doctrine as based on a mistake principle:

> "The cancelling of a will is said to be an equivocal act, and not to effect a revocation, unless it is done *animo revocandi.* And where it is a dependent relative act, done with reference to another, which is meant and supposed to be good and effectual, it may be a revocation or not, as to that to which it relates is efficacious or not. As where a man having duly executed one will, afterwards causes another to be prepared, and supposing the second to be duly executed, under that impression alone cancels the first. In such case it has been held, that on the second turning out not to have been duly executed, the cancelling the first, being done by mistake and misapprehension, would not operate as a revocation."

7 H. & J. at 390-91.

Having so characterized the doctrine, the Court made clear that the doctrine would never apply "where a man has deliberately and intentionally cancelled his will, as in this case, in the entire absence of all accident or mistake, notwithstanding he may, at the time, have intended to make another will." *Id.* at 391. We accepted, from the evidence, that the testator did not intend to die

intestate but held that "however that may be, we cannot make a will for him." *Id.* On its facts, *Semmes* was similar to the situation in *In re Emernecker's Estate, supra* 218 Pa. 369, 67 A. 701, where the revocation also was not actually accompanied by the preparation of a new, albeit ineffective will.

Our second brush with the doctrine was in *Safe Dep. & Trust Co. v. Thom*, 117 Md. 154, 83 A. 45 (1912), which presented somewhat the same situation as *Semmes,* although with different facts. The testatrix, who had five children, had signed a valid will in March, 1907. Item I of that will left $10,000 in cash to four of the children; Item II left $10,000 in trust for the fifth child, who apparently was mentally disabled. After providing for some additional small bequests, the testatrix left the residue of her estate in trust, with one-fifth of the income to be paid quarterly to each of the five children during their lives (the disabled son's share to be paid to his trustee), and a one-fifth share of the corpus to be paid to the children of any deceased child. In April, 1910, the testatrix informed her attorney that she wanted to change her will to leave the one-fifth shares to the four competent children outright and not in trust and to make a number of other minor bequests. She said that she would prepare and send to the lawyer a list of those bequests. In June, 1910, she informed him that she had rubbed out the first provision in her will, leaving the competent children $10,000 each, since they would be getting their full one-fifth share absolutely. The lawyer stated that he told the testatrix not to attempt to change the will in that manner.

The testatrix died without ever making a new will or sending the lawyer the list of new bequests. Among her papers was the 1907 will on which the names of the four children in Item I had been rubbed but the letters then relined or retraced in pencil. Accompanying the will, in a sealed envelope, was a letter to the lawyer containing the list of bequests. With the agreement of all parties, the trustee named in the will offered the will for probate, following which two of the competent children petitioned the orphans' court to declare the will cancelled and revoked by reason of the erasure. The court, over objection, granted the petition and denied probate. We reversed.

Although, as in *Semmes,* we discussed the doctrine of dependent relative revocation, that was not the basis for our decision. Rather, we concluded from the evidence that there was no revocation of the will in the first instance. The act that might be regarded as a revocation-the attempt to obliterate a provision-was incomplete, "not in the sense that the clause was not entirely rubbed out or obliterated, but in the sense that that which was begun was not finished and was abandoned." *Id.* at 163, 83 A. 45. Before completing any obliteration, we noted, the testatrix changed her mind and retraced the letters rubbed, thereby indicating an intent not to revoke the instrument.

Our most recent consideration of the doctrine came in *Arrowsmith v. Mercantile-Safe Deposit, supra*, 313 Md. 334, 545 A.2d 674. The testator there left three relevant wills, drawn, respectively in 1966, 1976, and 1982, the earlier wills each being expressly revoked by a provision in the next succeeding will. All three wills purported to exercise a power of appointment given to the testator through a 1953 deed of trust from his mother. When the testator died in 1983, a question was raised whether the appointment in the 1982 will violated the rule against perpetuities. Indeed, the circuit court held that there was such a violation, a conclusion that we affirmed. The power as exercised in the 1966 will did not present a perpetuities problem, and, in an effort to save the testamentary disposition and not have the property distributed under the 1953 deed of trust in default of an appointment, the parties who would be benefitted by that approach asked the court to sustain the 1966 provision under a theory of dependent relative revocation. The theory seemed to be that, had the testator been aware that his exercise of the power in the 1976 and 1982 wills would be ineffective, he would not have revoked the 1966 provision.

As was the case in *Semmes* and *Safe Dep. & Trust Co.,* it was not necessary for us in *Arrowsmith* to determine whether we would accept the doctrine in any of its manifestations, for even if accepted into Maryland law, it could not be applied as urged. At 345, 545 A.2d 674, we noted that "[p]lucking the perpetuities saving clause from the 1966 will and inserting it in the 1982 will is inconsistent with the theoretical justification for the doctrine." Harking back to what the Court said in *Semmes,* Judge Rodowsky pointed out that "this Court is neither empowered to write a will for [the testator] nor structure a will that differs from any will which [the testator] ever executed." *Id.* at 350, 545 A.2d 674.

This case presents for the first time a situation in which the doctrine *might* be applied and in which other courts have applied it. It is not a situation, however, in which we believe it appropriate to apply the doctrine.

It is important to keep in mind that, in the context now before us, the doctrine rests on a fiction that is, in turn, supported only by an assumption as to what Ms. Binco would have done had she known that her 1990 will was invalid. As Professor Warren observed in his law review article, "[t]he inquiry should always be: What would the testator have desired had he been informed of the true situation?" Joseph Warren, *Dependent Relative Revocation, supra*, 33 Harv. L.Rev. at 345. The most rational and obvious answer to that question, of course, is that the testator would have desired to make the new instrument effective, and, if presumed intent were to control, the court would simply overlook the statutory deficiency and probate the new will, rather than overlook the legal effect of an otherwise deliberate revocation and probate the old one. That is an option the law does not permit, however. We thus must look for secondary, fictional intentions never actually possessed by Ms. Binco. The real question is what Ms. Binco would have wanted to do if she had been told that she was unable to make a new will: would she have preferred her estate to pass under the existing (1985) will to persons she had decided to remove as beneficiaries, or would she have preferred that her estate pass intestate to her brother?

In attempting to arrive at a reasonable answer to that kind of question, courts have considered all of the relevant circumstances surrounding the revocation-the manner in which the existing will was revoked, whether a new will was actually made and, if so, how contemporaneous the revocation and the making of the new will were, parol evidence regarding the testator's intentions, and the differences and similarities between the old and new wills. The courts recognize that the question is always one of presumed intent. In many cases, because the other evidence is either inconclusive or nonexistent, the principal focus is on the differences and similarities between the two instruments. In that regard, the courts have generally refused to apply the doctrine unless the two instruments reflect a common dispositive scheme. (citations omitted).

Conversely, courts that have applied the doctrine have looked to the similarity of the new and old dispositive schemes as a basis for concluding that the testator indeed intended the revocation to be conditional and that he would have preferred to have his estate pass under the old will rather than through an intestacy. (citations omitted).

In the case before us, Ms. Binco indicated a clear intent to revoke her 1985 will by writing VOID on the back of it. Unlike the situation in *Safe Dep. & Trust Co., supra*, 117 Md. 154, 83 A. 45, there is nothing ambiguous about her intent to revoke that will. Also unlike that case and *Semmes,* however, she did contemporaneously handwrite a new will, thereby indicating with some clarity that her act of

revocation was based on her mistaken belief that the new will was valid and would replace the old one. The confluent inference, that she intended to revoke the 1985 will based on her belief that it would be superseded by the 1990 will, does not alone justify application of the doctrine of dependent relative revocation. We must still search for that fictional presumed intent of what she would have done had she been informed that she could not make a new will. There was some evidence that Ms. Binco did not have a good relationship with her brother and would not have desired that he take any part of her estate. That evidence was contradicted, however, by testimony that appellant and his sister did have a cordial relationship.

We turn, then, to a comparison of the 1985 and 1990 wills and, as noted, we find two very different dispositive schemes. Apart from the fact that the 1990 will did not contain a residuary clause and may not have effected an entirely testate disposition, the fact is that, with the possible exception of the First Church of God, whose status under the 1990 will is, at best, unclear, none of the beneficiaries under the 1985 will were named in the 1990 will. The 1990 will replaced them all, indicating that Ms. Binco did not wish any of them (again with the possible exception of the First Church of God) to be benefitted. The effect of applying the doctrine and disregarding her revocation, however, is precisely to do what she clearly did not want done-to leave her estate to people she had intended to disinherit. We cannot fairly presume such an intent on her part; nor should the lower courts have done so.
We need not decide in this case whether the doctrine of dependent relative revocation, as articulated above, is part of Maryland law and, if it is, the circumstances under which it may properly be applied. It cannot be applied under the circumstances of this case.

Judgment Reversed; Case Remanded to Circuit Court For Baltimore County With Instructions to Reverse Order of Orphans' Court Admitting 1985 Will to Probate; Appellee to Pay the Costs.

Notes, Problems, and Questions

1. If a testator cancels or destroys a will with the present intention of making a new one immediately and as a substitute and the new will is not made or, if made, fails of effect for any reason, it will be presumed that the testator preferred the old will to intestacy, and the old one will be admitted to probate in the absence of evidence overcoming the presumption. *La Croix v. Seneca*, 99 A.2d 115 (1953).

2. In 2008, Frannie executed a will stating, "I leave my entire estate to Theresa and Donald." In 2009, Donald told Frannie that Theresa had been killed in a car accident. In 2010, Frannie revoked her will because she wanted to include a devise to her grandson, Willis. The new will stated, "I leave my entire estate to Willis and Donald." The will was witnessed by Willis and Beth. The jurisdiction requires the will to be witnessed by two competent witnesses. In a jurisdiction that recognizes DRRR, how will Frannie's estate be distributed?

11.6.3.2 Revival

In most states the rule of revival is now statutory in nature. Consider the following example. T executed a will in 2005. T executed a will in 2006. The 2006 will specifically revoked the 2005 will. In 2009, T revoked the 2006 will. The issue is whether or not the 2005 will is revived. If not, T would have died intestate. The answer to the question depends on the approach taken in the jurisdiction. In the majority of jurisdictions, a will is revived if the testator so intends. The testator's intent may be shown from the circumstances surrounding revocation of the second will or from the

testator's contemporaneous or subsequent oral declarations that the original will is to be probated. A minority of state statutes mandate that a revoked will cannot be revived unless it is re-executed with testamentary formalities or republished by being referred to in a later duly executed testamentary writing. *See Stetson v. Stetson*, 61 L.R.A. 258 (1903)(common law rule of revival).

N.C.G.S.A. § 31-5.8.Revival of revoked will

No will or any part thereof that has been in any manner revoked can, ****be revived otherwise than by a reexecution thereof, or by the execution of another will in which the revoked will or part thereof is incorporated by reference.

VA Code Ann. § 64.2-411. Revival of wills after revocation

Any will or codicil, or any part thereof that has been revoked pursuant to *** shall not be revived unless such will or codicil is reexecuted in the manner required by law. Such revival operates only to the extent that the testator's intent to revive the will or codicil is shown.

20 Pa.C.S.A. § 2506. Revival of revoked or invalid will

If, after the making of any will, the testator shall execute a later will which expressly or by necessary implication revokes the earlier will, the revocation of the later will shall not revive the earlier will, unless the revocation is in writing and declares the intention of the testator to revive the earlier will, or unless, after such revocation, the earlier will shall be reexecuted. Oral republication of itself shall be ineffective to revive a will.

MCA 72-2-529. Revival of revoked will (Montana)

(1) If a subsequent will that wholly revoked a previous will is thereafter revoked by a revocatory act***, the previous will remains revoked unless it is revived. The previous will is revived if it is evident from the circumstances of the revocation of the subsequent will or from the testator's contemporary or subsequent declarations that the testator intended the previous will to take effect as executed.

Problems

(Answer the following questions relying on the above statutes)

1. In 2000, Janet executed a will stating, "I leave my house to Barry and the rest of my estate to Polly." In 2002, Janet burned her 2000 will. In 2004, Janet executed a will stating, "I leave my entire estate to Barry." In 2005, Janet told her lawyer, "I have had a change of heart and I want to make sure that Polly gets something. I don't want my son, Patrick to get anything." In 2006, Janet burned her 2004 will. At that time, she told her neighbor, "I have fixed it where Polly will be taken care of." In 2011, Janet died survived by Patrick, her sole intestate heir. How will Janet's estate be distributed?

2. In 2001, Madison executed a will stating, "I leave my estate to Connie, Mitchell and Allison." In 2003, Madison executed a will that expressly revoked her 2001 will. The 2003 will stated, "I leave my estate to Allison and Thelma. In 2013, Madison wrote a letter to her attorney stating, "I want to revoke the will I wrote in 2003. I like the terms of my 2001 will better. When I die, please let the 2001 will stand. Madison died in 2015. Which will should control the distribution of her property?

3. In 2007, Matthew executed a will stating, "I leave my estate to the Local University." In 2008, Local University merged with City University to form City-Local University. Matthew was upset about the merger. In 2009, Matthew executed a will stating, "I revoked all prior wills. I leave my entire estate to Local Public Library." In 2010, City-Local University gave Matthew an honorary degree. On May 17, 2011, Matthew executed a will stating, "I revoke all prior wills. I want my estate to be distributed in the manner specified in the May 10, 2011 letter that I wrote to my sister, Shirley." The May 10, 2011 letter contained the following sentence: "I made a mistake when I went back on my word to give everything to Local University. Even though, I still don't like the merger, I want to go back to my 2007 will, so I can keep my promises." Which will should control the disposition of Matthew's estate?

11.6.4 Revocation by Changed Circumstances

Events that happen in the life of a testator may impact his or her will. Thus, a testator's will may be revoked by operation of law due to changes in his or her family circumstances. In the majority of jurisdictions, statutes provide that a divorce revokes any provision in the decedent's will for the divorced spouse. If the testator executes a will and later marries, statutes in most states gives the new spouse what he or she would receive under the intestacy system. However, the new spouse does not take an intestate share if the will indicates that the testator intentionally omitted the new spouse or the spouse is provided for in the will or by a will substitute with the intent that the transfer be in lieu of a testamentary provision. In a few states, a premarital will is revoked entirely upon marriage. Almost all of the states have pretermitted child statutes that give a child born after the execution of the will who is not mentioned in the will a share of the estate.

11.6.4.1 Spouses

11.6.4.1.1 Divorce

Davis v. Aringe, 731 S.W.2d 210 (Ark. 1987)

GLAZE, Justice.

This case is a will contest and involves whether the will of the decedent, Carlton Taylor, was revoked by operation of law, pursuant to Ark.Stat.Ann. § 60–407 (Supp.1985). The chancellor admitted the will to probate, holding § 60–407 was inapplicable to the situation posed here, and the will provision favoring Ima M. Darby, as residual legatee and devisee, was valid.

The parties have no dispute as to the facts. Taylor had executed a will nominating Darby (now

Aringe) as executrix and leaving his entire estate to her, with the exception of a one-dollar bequest to his brother. Thirteen months later, Taylor married Darby, but after two years of marriage, the parties were divorced. Taylor died nineteen months after he obtained the divorce, without having changed his will. Darby petitioned to probate Taylor's will, and Shelton Davis, Taylor's cousin and sole heir, contested the will, claiming it had been revoked under § 60–407 because Taylor had married and divorced Darby since the will had been executed. The chancellor upheld the Taylor will, reasoning that Taylor had named Darby in his will when they were friends, not spouses, and that Taylor had never changed it, even though a significant amount of time had passed (nineteen months) between the parties' divorce and Taylor's death.

Section 60–407 provides:

> If after making a will the testator is divorced or the marriage of the testator is annulled, all provisions in the will in favor of the testator's spouse are thereby revoked. With these exceptions, no will or any part thereof shall be revoked by any change in the circumstances, condition or marital status of the testator; subject, however, to the provisions of § 60–501.

In determining whether § 60–407 applies to the Taylor will, we believe a brief recount and understanding of the history relevant to the doctrine of implied revocation is important. At common law, a woman's will was revoked by her subsequent marriage, but a man's will was not, at least, unless there was both a marriage and birth of issue. Besides having been altered by the Wills Act, 1837, these two rules have been treated differently in American jurisdictions. T. Atkinson, *Law of Wills* § 85 (2d ed. 1953); *see also* 2 W. Bowe & D. Parker, *Page on Wills* §§ 21.89—21.91 (3rd ed. 1960). Professor Atkinson, in his treatise on wills, notes a legislative tendency to depart from the old rules. He further observes that a considerable number of jurisdictions, by statute, have provided a man's marriage revokes his will, absolutely, or as to the spouse, unless the will in some way provides to the contrary. Atkinson, *supra.*

Similarly, the law pertaining to divorce and how it impliedly affects a testator's will has experienced change by our state courts and legislatures. In the absence of statute, it is generally agreed in this country that a divorce, unaccompanied by a property settlement, does not revoke the testator's will nor the legacy in the divorced spouse's favor. However, when such a settlement exists and the jurisdiction recognizes generally the doctrine of revocation by operation of law, it is usually held that there is a revocation in favor of the divorced spouse. Atkinson, *supra; accord Mosely v. Mosely,* 217 Ark. 536, 231 S.W.2d 99 (1950)(discussed statutory treatment and applied rule there was no revocation by operation of law after determining § 60–407 had not yet taken effect and was, therefore, inapplicable to the situation then before the court). Here, again, legislative change has occurred in recent years. Professor Atkinson recognized in his work that, in an increasing number of states, there is legislation providing that subsequent divorce revokes provisions in favor of the spouse. *Atkinson, supra,* citing *Mosely, supra.* One authority explains this new perspective or trend as follows:

> Divorce was so rare before modern legislation that it may well be treated as a new case, fairly involving the question of the application of the existing principles of common law and ecclesiastical law to a situation which could rarely, if ever, be presented under the old law for specific adjudication. It seems likely that the courts would treat divorce as a revocation if they felt that it fairly represented the intention of the average testator. The unwillingness of the courts

> to treat this as a revocation is due in a large part to the fact that [a] testator frequently intends his will to remain in effect in spite of the divorce. The dangers of relying on oral evidence are such that it would be unsafe to adopt a rule making the validity of the will depend upon the actual intention of the testator. The courts are thus driven to a rule which represents the probable intention of the average testator. *It seems very doubtful whether the probable intention of the average testator that a prior will should not remain in force under such circumstances is so clear as to justify the courts in adding this as a new class of revocation by operation of law.*

W. Bowe & D. Parker, *Page on Wills* § 21–101 at 523 (3rd ed. 1960) (emphasis supplied).

In 1949, our General Assembly enacted § 60–407 in order to avoid some of the legal uncertainties in probate law that had arisen in past years when dealing with marriage and divorce issues and the doctrine of implied revocation. *See* Note, *Wills—Revocation Implied from Divorce of Testator,* 9 Ark.L.Rev. 182 (1955). When applying the plain language of § 60–407 to the instant case, we can only conclude that after Taylor executed his will, that will was not revoked by his marriage to Darby, but his divorce from her did revoke the will provisions made in her favor.

Darby's view or argument in this case is inconsistent in its interpretation and application of § 60–407. She argues that the first sentence of that statute, pertaining to a testator's divorce, applies *only* in instances when the testator made the will *during* his marriage but not before. On the other hand, Darby would apply the second sentence of § 60–407, because that provision upholds the validity and continued effectiveness of a testator's will even though he marries after it was executed. *Cf. Sughrue v. Barlow,* 233 Mass. 468, 124 N.E. 285 (1919)(wherein the court revoked the will provision even though testator left everything to the woman he later married because the will did not show on its face the contemplated marriage). While Darby's interpretation of § 60–407 sustains the validity of Taylor's will and its provisions favoring her, that construction is a tortured and inconsistent application of its plain language.

In sum, to adopt Darby's argument would require us to read language into § 60–407 that simply is not there. Clearly, § 60–407 does not provide that its provision revoking a former spouse's bequest or devise upon divorce is dependent upon the testator having made his will during a marriage. To supply such language, we believe, would lend uncertainty and confusion to the law, which runs contrary to the very reason the General Assembly enacted this statute in the first place.

In re the Estate of Epperson, 284 Ark. 35, 40, 679 S.W.2d 792, 794 (1984) we examined §§ 60–407 and –501 (Supp.1985), and in doing so, made it clear that neither of these statutes makes a distinction concerning wills that predate a marriage and those made after a marriage. If such a distinction should exist, it is the General Assembly's province to make it, not this court's. Accordingly, we hold that § 60–407 applies *in toto* and that the chancellor was in error in holding otherwise.

11.6.4.1.2 Marriage

Estate of Murrary, 193 Cal. Rptr. 355 (1983)

WALLIN, Associate Justice.

The probate court awarded Paul Murray one-third of his deceased wife's estate under the provisions of Probate Code section 70. The decedent's sons appeal.

STATEMENT OF FACTS

Paul Murray and Bonnie I. Murray were married on August 29, 1972. Their marriage produced no children. By an earlier marriage Bonnie had three sons, Robert, Gary and Russell Blackney.

On July 31, 1978, Bonnie signed a petition to dissolve her marriage to Paul. On the same day, she executed her last will and testament naming her three sons as sole beneficiaries of her estate.[90] On October 23, 1979, the judgment of dissolution was entered.

Bonnie and Paul lived separately for a short period. However, within a year of the dissolution, they reconciled their differences and remarried on September 3, 1980. Three days later Bonnie died of a brain tumor. Her will of July 31, 1978, was never revoked or changed.

On October 14, 1980 the will was admitted to probate. Paul promptly filed a petition to revoke, claiming the will executed before the remarriage failed to provide for him and was, therefore, revoked as to him under Probate Code section 70. He claimed one-third of Bonnie's estate under the laws of intestate succession. (Prob. Code, § 201 et seq., 221.) Relying principally on *Estate of Poisl* (1955) 44 Cal.2d 147, 280 P.2d 789, the trial court granted judgment for Paul.

DISCUSSION

Probate Code section 70 reflects a strong public policy against disinheritance of a surviving spouse, who is not provided for in the premarital will of the testator. (*Estate of Green* (1981) 120 Cal.App.3d 589, 592, 174 Cal. Rptr. 654.)

---

[90] The pertinent paragraphs provide as follows:

"SECOND: I declare I am married to Paul Murray and there is no issue of this marriage. I declare I have three children the issue of a former marriage: Robert Hugh Blackney, Gary Douglas Blackney and David Russell Blackney.

THIRD: Subject to the operation and effect of the conditions hereinafter noted:

A. I hereby give, bequeath and devise all of my estate, over which I have testamentary ownership and disposition, at the time of my death, either real, personal, or mixed, of whatsoever kind of character and wheresoever situate, of which I may die possessed, or to which I may in any manner be entitled, or over which I may at the time of my death, have the power of appointment, to my said children, ROBERT HUGH BLACKNEY, GARY DOUGLAS BLACKNEY, and DAVID RUSSELL BLACKNEY, share and share alike, provided they survive me by 120 days.

EIGHTH: Except as otherwise provided in this Will, I have intentionally and with full knowledge, omitted to provide for my heirs and I hereby generally and specifically disinherit each, any and all persons who shall contest or attack this will or any portion of its provisions, and expressly revoke any share or interest heretofore given in this Will to such contestants, and I further declare that if any person other than mentioned in this Will shall establish himself or herself to be my heir, then I give and bequeath to such person the sum of ONE DOLLAR ($1.00)."

Section 70 states: "If a person marries after making a will, and the spouse survives the maker, the will is revoked as to the spouse, unless provision has been made for the spouse by marriage contract, or unless the spouse is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation can be received." In this case, there is no evidence of a marriage contract and the will contains no provision for Paul; the sole issue is the third exception's application.

The crucial inquiry in determining whether the spouse is mentioned is whether the language of the will expresses an intention to specifically disinherit the surviving spouse. (*Estate of Green, supra*, 120 Cal. App.3d 589, 592, 174 Cal.Rptr. 654.) Bonnie's will left her estate to her sons and stated: "Except as otherwise provided in this will, I have intentionally and with full knowledge, omitted to provide for my heirs and I hereby generally and specifically disinherit each."

General exclusionary clauses have been held insufficient to overcome statutory revocation. "[U]nder such language the testator contemplated only persons who *at the time of execution of the will* stood in such relationship to the decedent that they would *then* conceptually fall within the designated disinherited class." (*Estate of Green, supra*, 120 Cal.App.3d 589, 592-593, 174 Cal.Rptr. 654, citing *Estate of Axcelrod* (1944) 23 Cal.2d 761, 767, 147 P.2d 1, emphasis added.) We find this rule applicable to the present case.

The exclusionary clause in Bonnie's will did not intentionally omit a future heir who becomes so by marriage. (*Estate of Duke* (1953) 41 Cal.2d 509, 261 P.2d 235.) Thus, as in *Green,* there is no explicit intention to omit Paul as a member of a designated disinherited class.

Bonnie's sons next contend Paul is sufficiently mentioned in the will in paragraph SECOND to show her intent not to provide for him. The Supreme Court in *Estate of Poisl, supra*, 44 Cal.2d 147, 280 P.2d 789 noted that a will must show a contemplation of a future marriage whether providing for or disinheriting an after-acquired spouse. (*See also Estate of Paul* (1972) 29 Cal.App.3d 690, 695, 105 Cal.Rptr. 742.) Thus, merely *naming* Paul with no indication he might become a future spouse is not enough to prevent revocation. "That indication must appear on the face of the will, and extrinsic evidence is not admissible to show the testator's intention, at least unless there is some ambiguity." (*Estate of Poisl, supra*, 44 Cal.2d 147, 150, 280 P.2d 789.) Bonnie's mention of Paul in the clause denoting her issue and marital status is not ambiguous with regard to any indication of whether Paul is a prospective spouse. "[I]t is merely 'noncommittal' as were the words 'heirs at law' in the Duke case." (*Ibid.*)

Estate of Paul supra, 29 Cal.App.3d 690, 695, 105 Cal.Rptr. 742 concerned a will naming P. as testator's wife and leaving one-half his estate to his son and daughter by a previous marriage. P. was not then his wife though they married a mere seven days later. In revoking the will under the third exception to section 70, the court stated: "To be applicable, i.e. to prevent revocation as to the spouse, the spouse must not only be mentioned in the will, but the 'mentioning' must be with a specific intent, the intention not to provide for her. It is clear that the first of these elements is present—the spouse was 'mentioned.' Our decision therefore must rest on the question of the testator's intent, the second element; it must be ascertained from the will itself." (*Id.*, at p. 695, 105 Cal.Rptr. 742.)

The will in *Paul* was ordered revoked even though P. was mentioned as a wife and there was a

reasonable inference the will was executed in contemplation of marriage. Further, she was named elsewhere as an alternate executor which the court also found insufficient to prevent revocation.

Although we have not been cited, nor can we find, a California case dealing specifically with the fact situation before us, a distillation of the authorities provides (1) a strong public policy underlying section 70 that looks with "disfavor toward a testator's failure to provide for a surviving spouse." (*Estate of Duke, supra*, 41 Cal.2d 509, 512, 261 P.2d 235; and, (2) revocation by marriage is a presumption which can be rebutted only by a *clear manifestation of intent on the face of the will.* (*Estate of Paul, supra*, 29 Cal.App.3d 690, 696-697, 105 Cal.Rptr. 742; *Estate of Poisl, supra*, 44 Cal.2d 147, 150 280 P.2d 7898; *Estate of Green, supra*, 120 Cal.App.3d 589, 593, 174 Cal.Rptr. 654.)

Bonnie, in executing her will on the same day she filed for dissolution, may well have intended not to provide for Paul, *as the situation then presented itself.* However, she did not specifically disinherit *any future* marriage partner. We find it difficult to believe that a future partner, *other than Paul,* could revoke the will as to himself, merely as an after-acquired spouse, yet that option is not available to Paul when he remarries the same spouse.

Remarriage to a former spouse may occur rarely. However the purpose of the statute (to prevent unintentional disinheritance of a surviving spouse) should apply equally to wills executed prior to a remarriage.

Probate Code section 70 legislates the natural assumption that a decedent does not intend to disinherit an after-acquired spouse. We perceive no reason for a different rule merely because the after-acquired is also a former spouse. Remarriage resumed a relationship interrupted by a brief period of unhappiness leading to dissolution of the first marriage. The pretermitted heir statute applies to all marriages unless one of its specific exceptions is fully satisfied.

The judgment is affirmed.

11.6.4.2 Children

11.6.4.2.1 Omitted Children

In the case of a child born after the execution of the will, the testator must make it clear that he or she intended to disinherit the child. If the omitted child is not disinherited, the statutes in the majority of jurisdictions follow the Uniform Probate Code (UPC) approach and provide for the child to receive a portion of the testator's estate. This is similar to the negative disinheritance rule. Under that rule, the disinherited child can take his or her intestate share of the estate unless the testator makes affirmative dispositions of all of his or her property. This rule has been modified by the UPC.

UPC § 2-302. Omitted Children

> (a) Except as provided in subsection (b), if a testator fails to provide in his [or her] will for any of his [or her] children born or adopted after the execution of the will, the omitted after-born of after-adopted child receives a share in the estate as follows:

(1) If the testator had no child living when he [or she] executed the will, an omitted after-born or after adopted child receives a share in the estate equal in value to that which the child would have received had the testator died intestate, unless the will devised all or substantially all of the estate to the other parent of the omitted child and that other parent survives the testator and is entitled to take under the will.

(2) If the testator had one or more children living when he [or she] executed the will, and the will devised property or an interest in property to one or more of the then living children, an omitted after-born or after-adopted child is entitled to share in the testator's estate as follows:

(i) The portion of the testator's estate in which the omitted after-born or after adopted child is entitled to share is limited to devises made to the testator's then living children under the will.

(ii) The omitted after-born or after-adopted child is entitled to receive the share of the testator's estate, as limited in subparagraph (i), that the child would have received had the testator included all omitted after-born and after-adopted children with the children to whom devises were made under the will and had given an equal share of the estate to each child.

(iii)To the extent feasible, the interest granted an omitted after-born or after adopted child under this section must be of the same character, whether equitable or legal, present or future, as that devised to the testator's then-living children under the will.

(iv) In satisfying a share provided by this paragraph, devises to the testator's children who were living when the will was executed abate ratably. In abating the devises of the then-living children, the court shall preserve to the maximum extent possible the character of the testamentary plan adopted by the testator.

(b) Neither subsection (a)(1) nor subsection (a)(2) applies if:

(1) it appears from the will that the omission was intentional; or

(2) the testator provided for the omitted after-born or after-adopted child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence.

(c) If at the time of execution of the will, the testator fails to provide in his [or her] will for a living child solely because he [or she] believes the child to be dead, the child is entitled to share in the estate as if the child were an omitted after-born or after-adopted child.

Problems

1. In 1990, Gloria married Michael. Gloria gave birth to the couple's first child, Patrick, in 1991. The couple's second child, Tresmal, was born in 1993. In 1997, Gloria executed a will leaving her

estate to her two children, Patrick and Tresmal. The estate was to be split evenly between the two boys. Gloria and Michael divorced in 2000. In 2001, Gloria married Alvin. Gloria gave birth to Alonzo in 2002. In 2003, Gloria was killed in an automobile accident. Gloria's will was probated in 1994. In a UPC jurisdiction, what, if anything, is Alonzo entitled to inherit from Gloria's estate?

2. In 2003, Sandra married Henry. In 2010, Henry executed a will leaving his estate to Sandra. Two years later, Sandra and Henry adopted twins, Cody and Catherine. Henry died of lung cancer in 2013. In a UPC jurisdiction, what, if anything, will Cody and Catherine inherit from Henry's estate?

3. Geneva was a divorced woman who had one biological child, Elliot, and one adopted child, Robert. Geneva wanted her oldest son, Robert, to marry Kendra, her best friend's daughter. Robert refused, so Geneva told him that he would not receive any of her multi-million dollar estate. Geneva executed a will stating, "I want my son, Elliot, to receive 100% of my estate. No one else, including Robert, is entitled to any of my estate." After she executed the will, Geneva had an affair with Jeremy. As a result of the affair, Geneva gave birth to Joneka. A few months after Joneka's birth, Geneva was diagnosed with breast cancer. Geneva's lawyer asked her if she wanted to modify her will to provide for Joneka. In response, Geneva stated, "Joneka's father has enough money to take care of her. Elliot needs all of the help he can get." Geneva died without changing her will. In a UPC jurisdiction, what, if anything, will Joneka inherit from Geneva's estate?

4. Claudia was the mother of five children, Rebecca, Keisha, Rashad, Ozark and Benjamin. Four of Claudia's children went to college and became productive members of society. However, Benjamin was a permanent student. He never worked. He just kept acquiring college degrees. Claudia won fifty million dollars in the lottery. Claudia opened up a joint bank account with Benjamin. She placed five hundred thousand dollars in the bank account. Claudia sent Benjamin a letter informing him of the bank account. The letter contained the following statement: "You need to grow up and get a job. The money in this bank account is all I ever plan to give you. When it runs out, you should get a job or go hungry." Later, Claudia executed a will leaving her estate in equal shares to Rebecca, Keisha, Rashad and Ozark. What, if anything, will Benjamin inherit from Claudia's estate?

5. Fatima executed a will leaving her entire estate to charity. After the execution of the will, Fatima married Ali and gave birth to Urooj. Fatima and Ali established a trust for the benefit of Urooj. Fatima and Ali died in a house fire. What, if anything, will Urooj inherit from Fatima's estate?

11.6.4.2.2 After Born Children

Hedlund et al. v. Miner et. al., 69 N.E.2d 862 (Ill. 1946)

THOMPSON, Justice.

This case comes to us on direct appeal from a partition decree entered in the circuit court of Ford county. The complaint for partition was filed by Carl A. Hedlund and Allen G. Miner, each of whom is the owner of an undivided one-third of the premises sought to be partitioned. The other one-third interest was owned by Leslie E. Miner, who died seized thereof on February 22, 1943, leaving a widow, Lois Sweet Miner, and one child, Sandra Louise Miner, aged 1 year, 3 months and 19 days, at the time of her father's death.

It appears from the record that on October 11, 1941, Leslie E. Miner, who then had no children, but was shortly expecting the birth of a child, made and executed a last will and testament, which, omitting the formal parts, is as follows: 'I devise and bequeath all the estate and effects whatsoever and wheresoever, both real and personal, to which I may be entitled, or which I may have power to dispose of at my decease, unto my dear wife, Lois Sweet Miner, absolutely; and I appoint her sole executrix of this my will, and I direct that she be exempt from giving any surety or sureties on her official bond as executrix.' Afterward, on November 3, 1941, the appellee, Sandra Louise, was born, and approximately two weeks later Miner delivered the executed will to his wife. Thereafter he died testate, leaving his will as originally made, and leaving his said widow and child as his only heirs-at-law.

The will was admitted to probate and letters testamentary were issued to the widow, as executrix, by the probate court of Cook county, on April 22, 1943. At the hearing on the petition to probate the will, the child was represented by a guardian ad litem, appointed by the court. The estate of the testator, in addition to his interest in the real estate here sought to be partitioned, consisted of approximately $18,000 in cash and other personal property of considerable value. The widow filed her final account and report as executrix in the probate court of Cook county on February 3, 1944, showing payment in full of all claims and costs of administration and distribution of all the remainder of the property to herself, individually, as sole beneficiary and legatee, and an order was entered by the probate court on the same day approving the final report of distribution, declaring the estate settled and discharging the executrix. This order was entered without notice to the child, Sandra Louise, and she was not represented by guardian ad litem nor in any other manner at the hearing on the final report. No appeal or other proceedings for review were taken concerning the action of the probate court.

The complaint for partition, to which both the mother, Lois, and the child, Sandra Louise, were made parties defendant, set forth the death and heirship of Leslie E. Miner. It also set forth the execution by him of his last will and testament, the subsequent birth of his daughter, Sandra Louise, twenty-two days later, the admission of the will to probate in Cook county, the issuing of letters testamentary to the widow, as executrix, and the final settlement of the estate in that court on a report of distribution of all the property of the estate to the widow as sole legatee and beneficiary. The complaint then alleged that because of the birth of the daughter after the execution of the will, a construction of the will was necessary to determine whether said child possessed any rights in the realty under section 48 of the Probate Act. The complaint concluded with a prayer that the court construe the will of Leslie E. Miner, deceased, determine the rights of the parties in the real estate, and enter a decree for partition of said lands based on such determination. Appellant answered, denying that the daughter, Sandra Louise Miner, was entitled to any interest in the real estate, and claiming that the said Sandra Louise Miner was disinherited by the will of her father, Leslie E. Miner.

The guardian ad litem appointed for Sandra Louise filed an answer and counterclaim by which it was alleged that Sandra Louise, because of her birth after the execution of the will of Leslie E. Miner, and because it did not appear by said will that it was the intention of the testator to disinherit her, was entitled to receive two-thirds of the interest which her father had in the real estate at the time of his death. The counterclaim further alleged that the child was entitled to a two-thirds interest in the net personal estate of Leslie E. Miner; that Lois Sweet Miner was wrongfully withholding the said two-thirds share, and that the said Lois Sweet Miner holds, on a constructive trust for the benefit of the minor, two thirds of the net personal estate.

The matter was referred to a master in chancery, who, after hearings, reported that the plaintiffs were entitled to a partition; that the child, Sandra Louise, was entitled to a two ninths interest in the real estate and a two-thirds interest in the net personal estate of Leslie E. Miner; that Lois Sweet Miner, the mother, holds in constructive trust, for the benefit of Sandra Louise Miner, the portion of the real estate involved and also two thirds of the personal property of Leslie E. Miner; that a decree of partition should be entered in accordance with the interests of the parties therein and that appellant should be directed to pay and deliver to Sandra Louise Miner two thirds of the money and personal property distributed under the order of the probate court. In arriving at this conclusion, the master held that there was no intention expressed in the will to disinherit Sandra Louise and that the provisions of section 48 of the Probate Act apply to give to the child that portion to which she would be entitled had there been no will. Objections were filed by the widow to the master's report, which were overruled by the master. The circuit court, after a hearing on the master's report and the objections thereto, which were ordered to stand as exceptions, approved the report and entered a decree in accordance with its conclusions.

To obtain a reversal of the decree, appellant makes the contention, among others, that the child, Sandra Louise Miner, (hereinafter referred to as the appellee,) was intentionally disinherited by the will of her father and therefore section 48 of the Probate Act has no application and does not operate to entitle the child to any portion of the father's estate.

Section 48 of the Probate Act reads as follows: 'Unless provision is made in the will for a child of the testator born after the will is made or unless it appears by the will that it was the intention of the testator to disinherit the child, the child is entitled to receive the portion of the estate to which he would be entitled if the testator had died intestate, and all devises and legacies shall be abated proportionately therefor.' Ill.Rev.Stat.1945, chap. 3, par. 199. This section, which was enacted as a part of the Probate Act of 1939, is a restatement, with verbal changes only, of that part of section 10 of the Descent Act concerning the effect upon a parent's will of the subsequent birth of a child, which, prior to its repeal by said Probate Act, had been in effect for many years.

This provision of section 10 of the former statute was as follows: 'If, after making a last will and testament, a child shall be born to any testator, and no provision be made in such will for such child, the will shall not on that account be revoked; but unless it shall appear by such will that it was the intention of the testator to disinherit such child, the devises and legacies by such will granted and given, shall be abated in equal proportions to raise a portion for such child equal to that which such child would have been entitled to receive out of the estate of such testator if he had died intestate.' Ill.Rev.Stat.1937, chap.39, par. 10.

Under the express provisions of both section 48 of the present Probate Act and section 10 of the former Descent Act, a will, making no provision for an after-born child, is not effective as regards such child unless it appears by the will that it was the intention of the testator to disinherit the child. It is evident, from the wording of the statute in both instances, that the controlling factor in determining its applicability is the testamentary intent of the parent, and that in order to remove the will from the operation of the statute, the intention to disinherit must appear by the will. The requirement that the testator's intention to disinherit any after-born child or children must appear by the will is no different, however, from the requirement necessary to render effective any other intention of the testator, since it is well established that in all cases the intention of the testator which the courts will carry into effect is that expressed by the language of the will when interpreted in view of the facts and circumstances surrounding the testator at the time of its execution.

The object of the statute is not to control the intention of the parent or to restrict his absolute power to disinherit any child, whether living or subsequently born, but only to provide for such after-born children as were neither provided for nor disinherited in the will. The rule laid down in the cases involving the application of the statute is, that although the testator's intention to disinherit after-born children must be drawn from the will itself, it is not essential that such intention be declared in express terms, but the same may be drawn from the language of the will when construed in connection with the proved facts and circumstances surrounding the testator when the will was made, evidence of which may be received, not for the purpose of changing the language of the will, but to explain its meaning when there is an ambiguity in the will with reference to disinheriting after-born children. *Hawkins v. McKee*, 321 Ill. 198, 151 N.E. 577.

The question then to be considered in this case is whether it appears by the will of Leslie E. Miner that it was his intention to disinherit his daughter, Sandra Louise Miner, whose birth was expected to and did occur within a short time after the execution of the will. Ordinarily, a will purporting to devise and bequeath all the property of a testator to a beneficiary therein named is equivalent to the expression of an intention to disinherit all other persons, and it is unnecessary to construe the will to ascertain the testator's intentions. When, however, such will is taken in connection with the provisions of section 48 of the Probate Act, a latent ambiguity is raised and it becomes necessary to construe the will in order to ascertain if it was the intention of the testator to therein disinherit his after-born child or children.

This court, in a number of cases involving the application of the statute, has had occasion to construe wills, including those where a devise simpliciter appears in the will as well as other forms of wills, for the purpose of ascertaining from such wills the intention of the testator as to disinheriting after-born children. Upon an examination of these cases we find that where a testator, having a living child or children and another child soon to be born, executed a will, giving to each of his living children a share in his estate, but making no provision for, or mention of any unborn child or children and using no express words of disinheritance therein, this court has construed the will in such instances as not disclosing an intention of the testator to disinherit the after-born child. *Lurie v. Radnitzer*, 166 Ill. 609, 46 N.E. 1116, *Ward v. Ward,* 12.0 Ill. 111, 11 N.E. 336.

The same construction was also adopted where a will making provision for the testator's living children neither provided for nor expressly disinherited after-born children, and another child of the testator was born more than a year and a half subsequent to the execution of the will. *Salem National Bank v. White,* 159 Ill. 136, 42 N.E. 312. In another instance, where a testator, having two children, aged respectively four and two years, executed his will, giving all his property to his wife and making no reference or provision concerning children, present or after-born, the will was construed as disinheriting a son born two months after its execution. *Hawke v. Chicago & Western Indiana Railroad Co.*, 165 Ill. 561, 46 N.E. 240. In that case this court stated that it was not reasonable to believe that the testator intended to exclude his two infant children, who were living with him when the will was executed, and not at the same time exclude another child to be born within the next two months thereafter. The same construction was adopted and the same reasoning applied in *Froehlich v. Minwegen,* 304 Ill. 462, 136 N.E. 669, and *Peet v. Peet,* 229 Ill. 341, 82 N.E. 376.

In each of these cases it was held that a will made by a testator having at the time of its execution a living child or children, which gave all of his property to his wife and made no reference or provision concerning children, either present or after-born, sufficiently manifested the testator's

intention to disinherit after-born children, when considered in connection with the circumstances surrounding the testator when the will was made. In the *Froelich* case the testator had two children born prior to the making of his will and six born thereafter, but there is nothing showing the ages of the living children at the time the will was executed or showing how long it was thereafter before another child was born. In the *Peet* case the testator, at the time of executing his will, had one child aged three years, and another child was born about two and a half years subsequent to the making of the will.

It can be seen, therefore, that the decisions in this State are to the effect that where a testator having living children, disinherits them, little short of an express provision in the will for after-born children will be construed as sufficient to raise a portion for any after-born child; whereas, if the testator provides in his will for his living children, little short of an express disinheritance of after-born children will be construed as precluding the after-born child from sharing in the estate.

The latest case in which the applicability of the statute in question was considered by this court, and, so far as we are able to discover, the only case where the testator had no children at the time of executing the will and made no provision of any kind therein concerning children, is that of *Hawkins v. McKee*, 321 Ill. 198, 151 N.E. 577. In the *Hawkins* case the testator, William T. Hawkins, had no children living at the time he executed his will on January 9, 1908. On November 27, 1908, a child was born to the testator and his wife, and on September 9, 1910, the birth of their second child occurred. The testator died on May 9, 1913, leaving a widow, the beneficiary in his will, and the two minor children. The will in that case was in simple language, giving and devising to his wife all his estate, real and personal, and appointing her sole executrix; and this court held that it did not, in view of the circumstances surrounding its execution, disinherit the after-born children. We there pointed out, after a review of our former decisions construing wills for the purpose of ascertaining whether or not after-born children had been disinherited, that in no case in this State had a will ever been construed as showing an intention to disinherit after-born children where the testator had no children at the time of making the will and after-born children were not referred to in the will, and also stated that these distinguishing facts were of such importance in considering the application of the statute, that the cases previously considered by this court could not be held controlling.

Both appellant and appellee cite and rely upon the *Hawkins* case in support of their respective contentions. Appellant argues that the language in the opinion that 'since the testator had no children and no reason to know that he would have, there is nothing to indicate that he had any intention whatever respecting after-born children' shows plainly that had the birth of a child to the testator and his wife been imminent, and the testator, in making his will, had in mind such unborn child, then the will would have been construed as disinheriting the child. The conclusion reached does not seem to follow from the language quoted. The most that can be said of this language is that it implies that, under such circumstances, the will would have been construed as indicating that the testator did have an intention respecting unborn children, but does not imply, in the least, what such intention might be construed to be.

Appellant contends that the will of Leslie E. Miner and the facts and circumstances existing at the time of the execution of the will manifest his intention to disinherit his child about to be born and exclude it from receiving any portion of his estate. The record discloses that Miner and the appellant, at the time the will was executed, were happily married and anticipating with joy the coming of the baby, and that he was solicitous of her welfare during the pregnancy. These facts and circumstances cannot justly be said to indicate that the testator intended to disinherit the child. Nor

does the will contain anything indicating that he intended the statute should not have its full operation. The presumption must be indulged that he knew the law and had the provisions of this statute in mind when making his will. *Lurie v. Radnitzer*, 166 Ill. 609, 46 N.E. 1116, 1118. The following language of this court in the case last cited might also be aptly applied to the present case: 'It may be observed, also, that the testator could not know that the child would be born alive. He did know, however, as it must be held, that if he made no provision for the child, and did not by the will show an intention to disinherit it, it would, if born alive, receive its due share, under the statute making provision in such cases.' Viewed in this light, the testator, Leslie E. Miner, by his will provided for his wife under any and all circumstances and also for his unborn child in the event such child should be born alive and survive the testator.

We are of the opinion that it does not appear by the will in this case, when properly construed, that it was the intention of the testator to disinherit the child, Sandra Louise Miner, born subsequent to the time the will was made. There is nothing in the case of *Hawkins v. McKee* contrary to the conclusion we have reached in this case.

Decree affirmed.

Notes and Questions

1. Parents are legally obligated to provide financial support for their children. Therefore, noncustodial parents must pay child support. Nonetheless, that duty ends when the parent dies. Since children do not have a right to inherit from their parents, their parents can disinherit them. However, should parents be permitted to disinherit minor and disabled children? What are the pros and cons of the majority approach which allows parents to disinherit their children regardless of their youth or disability?

2. What are the pros and cons of the Uniform Probate Code's approach to the omitted child problem?

3. Should parents be required to state reasons why they are disinheriting their children?

4. In light of the *Hodel* decision discussed in Chapter Seven, is Louisiana's forced heir statute unconstitutional? Is there a difference between prohibiting a person's property from being disposed of under the intestacy system and requiring that a portion of the person's property be disposed of under the intestacy system?

5. In all jurisdictions the spouse is entitled to a share of the decedent's estate whether he or she leaves a will or dies intestate. Therefore, a person cannot disinherit his or her spouse. In light of that fact, should a person be able to disinherit his or her minor and disabled children?

6. The *Hedlund* court found that the father did not intend to disinherit the child born after the execution of the will. At the time the will was executed the testator's wife was pregnant, so he knew about the child's impending birth. However, he failed to make provision for the child in the will. What are arguments in favor of finding that the testator intended to disinherit the afterborn child? What are arguments in favor of finding that the testator did not intend to disinherit the afterborn child? The court made a distinction between cases involving a testator who had living children at the

time of the execution of the will and a testator who did not have children at the time of the execution of the will. What was that distinction? Should that distinction matter in deciding whether or not the testator intended to disinherit his afterborn child?

Chapter Twelve: Non-Attested Wills

12.1 Introduction

A large number of people die intestate because they do not take the time to execute a will. In Chapter Eleven, we discussed the requirements necessary to execute a validly attested will. It is thought that the required formalities deter persons from executing wills. Some jurisdictions permit people to have less formal wills. These wills do not have to be witnessed and provide more convenient options for persons who may be intimidated by the traditional wills process. The majority of this chapter consists of an examination of the legal issues that occur when a person seeks to dispose of his or her property by using a holographic will. This chapter also includes a brief discussion of nuncupative (oral) wills.

12.2 Holographic Will

Uniform Probate Code § 2-502. Execution; Witnessed or Notarized Wills; Holographic Wills.

(b) [Holographic Wills.] A will that does not comply with subsection (a) is valid as a holographic will, whether or not witnessed, if the signature and material portions of the document are in the testator's handwriting.

(c) [Extrinsic Evidence.] Intent that a document constitute the testator's will can be established by extrinsic evidence, including, for holographic wills, portions of the document that are not in the testator's handwriting.

A holographic will is a will that is handwritten. In order to be valid, the will must be written in the testator's handwriting and it must contain the testator's signature. The entire will does not have to be in the testator's handwriting; however, the material portions, including those parts showing testamentary intent, must be in the testator's handwriting. About half of the states recognize holographic wills. The challenges to these types of wills usually focus upon the validity of the testator's signature and the inclusion of information in the will that is not in the testator's handwriting. Internet sites like LegalZoom have pre-printed will forms that testator's can fill out. If these wills are not properly witnessed, they may be submitted to probate as holographic wills. Therefore, courts have to determine whether or not those types of wills satisfy the requirements necessary to be valid holographic wills.

12.2.1 Testamentary Intent

A will speaks at death, so the testator must intend for the gift to only take effect after he or

she dies. However, the testator must have a present intent to make the transfer even though the transfer will not be completed until after death. When evaluating the validity of a holographic will, it is critical that the court determine whether or not the person meant for the instrument to be testamentary in nature. The execution of an attested will includes a formal process. The lawyer, the testator, and the witnesses gather for the signing ceremony. Thus, there is no doubt that the purpose of the document that is signed by the testator and the witnesses is to govern the distribution of the testator's property after he or she dies. Since a holographic will may be written on a wall, a napkin, an envelope or any other surface, the testamentary nature of the writing may not be so evident.

In re Kimmel's Estate, 278 Pa. 435 (Pa. 1924)

SIMPSON, J.

One of decedent's heirs at law appeals from a decree of the orphans' court, directing the register of wills to probate the following letter:

'Johnstown, Dec. 12.

'The Kimmel Bro. and Famly We are all well as you can espec fore the time of the Year. I received you kind & welcome letter from Geo & Irvin all OK glad you poot your Pork down in Pickle it is the true way to keep meet every piece gets the same, now always poot it down that way & you will not miss it & you will have good pork fore smoking you can keep it from butchern to butchern the hole year round. Boys, I wont agree with you about the open winter I think we are gone to have one of the hardest. Plenty of snow & Verry cold verry cold! I dont want to see it this way but it will come see to the old sow & take her away when the time comes well I cant say if I will come over yet. I will wright in my next letter it may be to ruff we will see in the next letter if I come I have some very valuable papers I want you to keep fore me so if enny thing hapens all the scock money in the 3 Bank liberty lones Post office stamps and my home on Horner St goes to George Darl & Irvin Kepp this letter lock it up it may help you out. Earl sent after his Christmas Tree & Trimmings I sent them he is in the Post office in Phila working.

'Will clost your Truly,

Father.'

This letter was mailed by decedent at Johnstown, Pa., on the morning of its date-Monday, December 12, 1921-to two of his children, George and Irvin, who were named in it as beneficiaries; the envelope being addressed to them at their residence in Glencoe, Pa. He died suddenly on the afternoon of the same day.

Two questions are raised: First. Is the paper testamentary in character? Second. Is the signature to it a sufficient compliance with our Wills Act? Before answering them directly, there are a few principles, now well settled, which, perhaps, should be preliminarily stated.

While the informal character of a paper is an element in determining whether or not it was intended to be testamentary (*Kisecker's Estate*, 190 Pa. 476, 42 Atl. 886), this becomes a matter of no moment

when it appears thereby that the decedent's purpose was to make a posthumous gift. On this point the court below well said:

'Deeds, mortgages, letters, powers of attorney, agreements, checks, notes, etc., have all been held to be, in legal effect, wills. Hence, an assignment (*Coulter v. Shelmadine*, 204 Pa. 120, 53 Atl. 638), *** a deed (Turner v. Scott, 51 Pa. 126), a letter of instructions (*Scott's Estate*, 147 Pa. 89, 23 Atl. 212, 30 Am. St. Rep. 713), a power of attorney (*Rose v. Quick*, 30 Pa. 225), and an informal letter of requests (*Knox's Estate*, 131 Pa. 220, 18 Atl. 1021, 6 L.R.A. 353, 17 Am. St. Rep. 798), were all held as wills.'

It is equally clear that where, as here, the words 'if enny thing hapens,' condition the gift, they strongly support the idea of a testamentary intent; indeed they exactly state what is expressed in or must be implied from every will. True, if the particular contingency stated in a paper, as the condition upon which it shall become effective, has never in fact occurred, it will not be admitted to probate. *Morrow's Appeal*, 116 Pa. 440, 9 Atl. 660, 2 Am. St. Rep. 616; *Forquer's Estate*, 216 Pa. 331, 66 Atl. 92, 8 Ann. Cas. 1146. In the present case, however, it is clear the contingency, 'if enny thing hapens,' was still existing when testator died suddenly on the same day he wrote and mailed the letter; hence, the facts not being disputed, the question of testamentary intent was one of law for the court. *Davis' Estate*, 275 Pa. 126, 118 Atl. 645.

As is often the case in holographic wills of an informal character, much of that which is written is not dispositive; and the difficulty, in ascertaining the writer's intent, arises largely from the fact that he had little, if any, knowledge of either law, punctuation, or grammar. In the present case this is apparent from the paper itself; and in this light the language now quoted must be construed:

'I think we are gone to have one of the hardest [winters]. Plenty of snow & Verry cold Verry cold! I dont want to see it this way but it will come * * * well I cant say if I will come over yet. I will wright in my next letter it may be to ruff we will see in the next letter if I come I have some very valuable papers I want you to keep fore me so if enny thing hapens all * * * [the real and personal property specified] goes to George Darl and Irvin Kepp this letter lock it up it may help you out.'

When resolved into plainer English, it is clear to us that all of the quotation, preceding the words 'I have some very valuable papers,' relate to the predicted bad weather, a doubt as to whether decedent will be able to go to Glencoe because of it, and a possible resolution of it in his next letter; the present one stating 'we will see in the next letter if I come.' This being so, the clause relating to the valuable papers begins a new subject of thought, and since the clearly dispositive gifts which follow are made dependent on no other contingency than 'if enny thing happens,' and death did happen suddenly on the same day, the paper, so far as respects those gifts, must be treated as testamentary.
It is difficult to understand how the decedent, probably expecting an early demise-as appears by the letter itself, and the fact of his sickness and inability to work, during the last three days of the first or second week preceding-could have possibly meant anything else than a testamentary gift, when he said 'so if enny thing hapens [the property specified] goes to George Darl and Irvin'; and why, if this was not intended to be effective in and of itself, he should have sent it to two of the distributees named in it, telling them to 'Kepp this letter lock it up it may help you out.'

The second question to be determined depends on the proper construction of section 2 of the Wills Act of June 7, 1917 (P. L. 403, 405; Pa. St. 1920, § 8308), which is a re-enactment of section 6 of the Wills Act of April 8, 1833 (P. L. 249), reading as follows:

'Every will shall be in writing, and, unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof, or by some person in his presence and by his express direction.'

The letter now being considered was all in the handwriting of decedent, including the word 'Father,' at the end of it; and hence the point to be decided would appear to resolve itself into this: Does the word 'Father,' when taken in connection with the contents of the paper, show that it was 'signed by him?' When stated thus bluntly-in the very language of the statute-the answer seems free from doubt; but since we said in *Brenna's Estate*, 244 Pa. 574, 581, 91 Atl. 220, 222, that 'signing in the usual acceptation of the word and in the sense in which, presumably, it is used in the act is the writing of a name or the affixing of what is meant as a signature,' we must go further and determine whether or not the word 'Father' was 'meant as a signature.'

In *Vernon v. Kirk*, 30 Pa. 218, 223, it is said:

'The purpose of the Legislature seems rather to have been to designate the place where the signature should be, to wit, at the end of the will, than to prescribe the manner in which it should be made. * * * It was not, as was supposed in the earlier cases, to furnish, in the handwriting, evidence of identity, and protection against fraud; for the name might be signed by the testator or by another at his request, in which last case no such proof is deducible from the handwriting. The authentication of the instrument was left to the witnesses. * * * While the place of the signature is rigidly defined, its made is left unfetered.'

In *Knox's Estate*, 131 Pa. 220, 229, 18 Atl. 1021, 1022 (6 L.R.A. 353, 17 Amm. St. Rep. 798), this subject was fully considered, and we there said:

'The purposes of the act of 1833 were accuracy in the transmission of the testator's wishes, the authentication of the instrument transmitting them, the identification of the testator, and certainty as to his completed testamentary purpose. The first was attained by requiring writing instead of mere memory of witnesses, the second and third by the signature of testator, and the last by placing the signature at the end of the instrument. The first two requirements were derived from the English statute; the third was new (since followed by the act of 1 Vict. c. 26), and was the result of experience of the dangers of having mere memoranda or incomplete directions taken for the expression of final intention. *Baker's Appeal*, 107 Pa. 381; *Vernon v. Kirk*, 30 Pa. 223. These being the purposes of the act, and the Legislature not having concerned itself with what should be deemed a signing, we must look dehors the statute for a definition. As already said, the act is founded on the statute of frauds, 29 Car. 2. Under that act it has been held that the signing may be by a mark, or by initials only, or by a fictitious or assumed name, or by a name different from that by which the testator is designated in the body of the will. 1 Jarman on Wills, 78; 1 Redf. of Wills, c. 6, § 18, and cases there cited.'

This has been approved and followed in *Plate's Estate*, 148 Pa. 55, 23 Atl. 1038, 22 Am. St. Rep. 805; Swire's Estate, 223 Pa. 188, 192, 73 Atl. 1110; and *Churchill's Estate*, 260 Pa. 94, 100, 103 Atl. 533, and has never been doubted. If, then, the word 'Father,' was intended as a completed signature to this particular character of paper, it answers all the purposes of the Wills Act. That it was so intended we have no doubt. It was the method employed by decedent in signing all such letters, and was mailed by him as a finished document. In these respects it varies from *Brennan's Estate, supra*, so much relied on by appellant, where the writing of 'your misserable father,' was construed to be not a

signature, but part of an unfinished paper, which decedent retained, and to which his signature was not subsequently attached.

It is of course true-and upon this point *Plate's Estate, supra*, and *Brennan's Estate, supra*, were decided-that while 'exactly what constitutes a signing has never been reduced to a judicial formula,' if that which is written at the end of the paper is not 'a full and complete signature according to the intention and understanding of the testator,' it is not a compliance with the statute. The same cases decide, however, it will be held to be so, 'if the intent to execute is apparent.' In the present case, as already pointed out, testator used the word 'Father,' as a complete signature, and mailed the paper as a finished document. True, a formal will would not be so executed; but this is not a formal will. It is a letter, signed by him in the way he executed all such letters, and, from this circumstance, his 'intent to execute is apparent' beyond all question.

Decree affirmed and appeal dismissed, the costs in this court to be paid by the estate of Harry A. Kimmel, deceased.

Estate of Southworth, 51 Cal. App. 4th 564 (Cal. Ct. App. 1996)

GILBERT, J.

A charitable donor card contains printed language showing an intent to make a future gift to the charity. In the blank space following the printed words a testator writes that her entire estate is to be left to the charity. She signs and dates the donor card. Does her handwriting on the donor card constitute a holographic will? No.

The trial court admitted a donor card into probate as a holographic will. Half siblings, Jeanette Southworth, Jack Southworth, and an heir finder, Francis V. See, appeal from the judgment of the trial court in favor of respondent, North Shore Animal League (NSAL).

According to Probate Code section 6111, the material provisions of a holographic will must be in the handwriting of the testator, and the required testamentary intent may be set forth either in a holographic will or as part of a commercially printed form will. Because the handwriting here incorporates printed material on a donor card stating the future intention of Dorothy Southworth, the deceased, we reverse the judgment.

Facts

Decedent never married and had no children. On March 4, 1986, in response to decedent's request for information, NSAL sent a letter to her describing its lifetime pet care program and explaining how to register for it. NSAL asked that she return its enclosed pet care registration card, contact her attorney to include her bequest to NSAL in her estate and send a copy of the bequest to NSAL. NSAL informed her that "[e]ven if you don't currently have a will, we'll accept your Registration on good faith and maintain an Active file on your pet while you're arranging the Bequest." Decedent never returned the registration card to NSAL.

On September 4, 1987, decedent requested registration with The Neptune Society for cremation of her body upon her death. On the registration form, she stated that she never married and that

Neptune should contact the Ventura County Coroner to make arrangements. On the same date, decedent sent a letter to NSAL asking whether or not it destroys animals.

Her letter to NSAL states:

"I have been terribly upset since I heard [that NSAL destroys animals] because I have always truly believed that you did not destroy animals and this was the determining factor in my selection of you as the beneficiary of my entire estate as I have no relatives and do not want the State of California, courts, or attorneys to benefit from my hard earned labor. I should appreciate greatly if you would clarify this point about the destruction of animals at your shelter and tell me honestly and truly what your policy is [and] not hedge because I have mentioned leaving my estate to your organization."

On September 9, 1987, NSAL wrote to assure her that it would not destroy any pet. NSAL included a brochure regarding estate planning. The brochure explained that a letter or a verbal promise will not effectuate a testamentary gift; that a proper written will is required. The mailing urged members to consult an estate planning attorney to avoid the possibility that the estate might end up with "distant relatives whom you didn't even know." Decedent never prepared a formal will.

NSAL sent a donor card to the decedent. It stated: "Your newest gift to the North Shore Animal League will help get more homeless dogs and cats out of cages and into new homes." The donor card thanked her "for your interest in making a bequest to the League." It explained that she could change her life insurance policy or provide for animals in her will by calling her attorney. It sought gifts and legacies and asked her to complete and return the donor card.

On April 19, 1989, she returned the donor card to NSAL. The card provided three options: a. naming NSAL as a beneficiary of a life insurance policy, b. changing one's will to leave securities or cash to NSAL, or c. not taking immediate action, but stating her intentions.

On the card, the decedent circled printed option c. which states: "I am not taking action now, but my intention is [in the blank space provided she wrote] My entire estate is to be left to North Shore Animal League."

The donor card also included a printed statement which reads, "The total amount that the animal shelter will someday receive is [she wrote in the blank space] $500,000." The card then stated, "I would like the money used for:

"Food and shelter for the animals

"Adoption Fund to advertise for new owners

"Spaying and Neutering Program

"Unrestricted use[.]"

Decedent placed an "x" next to the food and spaying options listed. She signed and dated the donor card.

On May 10, 1989, NSAL sent a thank you letter to decedent for "letting us know that you will

remember the North Shore Animal League in your will." The letter requested that decedent "have your attorney send us a copy of your will[.]"

The Neptune Society asked for additional information to complete the death certificate, pursuant to amendments to the Probate Code. Decedent returned Neptune's supplemental form and stated that there are "[n]o living relatives" and to "[p]lease notify North Shore Animal League." She included NSAL's address, telephone numbers and the name of the executive director of NSAL. She signed the supplemental form and dated it October 20, 1989.

On September 2, 1992, NSAL sent a letter to decedent acknowledging that in March 1989 she wrote NSAL to state that she intended to take action leading to its becoming one of the beneficiaries of her estate. NSAL requested a meeting with decedent, thanking her for her "kind thoughts and generous support." She never responded to this request.

On January 14, 1994, Dorothy Southworth died. The Ventura County Public Administrator was appointed special administrator of her estate. The public administrator filed notice of its petition to administer her estate. NSAL filed its objection to the petition on the grounds that the donor card constitutes a holographic will of the decedent. Francis V. See contested the admission of the alleged holographic will on behalf of Jeanette and Jack Southworth, Michael and Arthur Hulse and himself.

Jeanette Southworth, Jack Southworth, Michael Hulse and Arthur Hulse assigned part of their alleged interests in the estate to See. Jeanette and Jack are the surviving half siblings of decedent. Michael and Arthur Hulse are the children of another half-sister of decedent who predeceased her.

The See contestants argued that the donor card should be denied admission into probate as a holographic will because not all of its material provisions are in the handwriting of the decedent and there is no showing of testamentary intent at the time she signed the card. NSAL argued that the donor card reflected decedent's testamentary intent and satisfied the statutory requirements for a holographic will.

The trial court concluded that decedent's handwritten statement on the donor card that "[m]y entire estate is to be left to North Shore Animal League" substantially complies with all the Probate Code requirements for a holographic will. The court viewed the preprinted parts of the donor card and the $500,000 sum written in to be immaterial. The court interpreted the preprinted words stating that "I am not taking action now, but my intention is ..." to mean that she did not want to immediately transfer her funds to NSAL, but intended to bequeath them upon her death. The trial court admitted the donor card to probate as the last will of the decedent. Jeanette and Jack Southworth, and Francis V. See, appeal from the judgment.

Discussion

The facts are stipulated. "Where, as here, there is no conflict in the evidence, '"the validity of the holographic instrument must be determined entirely by reference to the applicable statutes and principles of law. " [Citations.]' [Citation.]" (*Estate of Black* (1982) 30 Cal.3d 880, 883 [181 Cal.Rptr. 222, 641 P.2d 754].) Interpretation of statutes is a question of law and our fundamental task is to ascertain the intent of the Legislature. (*Walnut Creek Manor v. Fair Employment and Housing Com.* (1991) 54 Cal.3d 245, 268 [284 Cal.Rptr. 718, 814 P.2d 704]).

Former Civil Code section 1277 stated that "[a] [h]olographic will is one that is entirely written, dated and signed by the hand of the testator himself. *It is subject to no other form*, ... and need not be witnessed." (Italics added.) Section 1277 was strictly construed. (See *Estate of Thorn* (1920) 183 Cal. 512 [912 P. 19] [despite obvious testamentary intent, document denied probate because rubber stamp was used to print name of parcel of real property within body of otherwise holographic will].)

In *Estate of De Caccia* (1928) 205 Cal. 719 [273 P. 552, 61 A.L.R. 393], our Supreme Court reversed the order of a trial court which had denied probate to an otherwise handwritten will simply because it was written under a printed letterhead stating, "Oakland, California."

In 1931, the Legislature reenacted former Civil Code section 1277 as section 53 of the Probate Code and added a third sentence to codify the rule announced in the *De Caccia* case. (See *Estate of Towle* (1939) 14 Cal.2d 261, 269 [93 P.2d 555, 124 A.L.R. 624]). The sentence stated, "No address, date or other matter written, printed or stamped upon the document, which is not incorporated in the provisions which are in the handwriting of the decedent, shall be considered as any part of the will."

In *Estate of Black, supra*, 30 Cal.3d at pages 882-883, the decedent wrote out her will on three identical, commercially printed one-page will forms. In the blanks provided, she wrote her signature and place of domicile, and on the third page she inserted the name and gender of her executor, the date of the instrument and the city and state where she executed it. She either struck out or ignored other printed language regarding residuary gifts, the appointment of an executor, attesting witnesses and a testimonium clause.

"Using virtually all of the remaining space on each of the three pages, testatrix expressed in her own handwriting a detailed testamentary disposition of her estate, including specific devises and legacies to individuals and a charitable institution and a bequest of her residuary estate." (*Estate of Black*, *supra*, 30 Cal.3d at p. 883).

The trial court denied probate because the testator incorporated some of the printed language, even though it concerned perfunctory procedural matters in the form will. Our Supreme Court reversed because "none of the incorporated material is either material to the substance of the will or essential to its validity as a testamentary disposition ...." (*Estate of Black*, supra, 30 Cal.3d at p. 882).

The *Black* court explained that " '[t]he policy of the law is toward "a construction favoring validity, in determining whether a will has been executed in conformity with statutory requirements" [citations].' " (*Estate of Black*, *supra*, 30 Cal.3d at p. 883). Moreover, we affirmed (*Estate of Baker* (1963) 59 Cal.2d 680, 685 [31 Cal.Rptr. 33, 381 P.2d 913]) " ' "the tendency of both the courts and the Legislature ... toward greater liberality in accepting a writing as an holographic will ...." ' (*Ibid.*) ' "*Substantial compliance with the statute, and not absolute precision is all that is required*.... " ' [Citation.]" (*Black*, *supra* at p. 883, italics in text.) Courts are to use common sense in evaluating whether a document constitutes a holographic will. (*Id.*, at pp. 885-886.)

The *Black* court recognized that " '[i]f testators are to be encouraged by a statute like ours to draw their own wills, the courts should not adopt, upon purely technical reasoning, a construction which would result in invalidating such wills in half the cases.' That sensible admonition is no less appropriate today. [Citations.]" (*Estate of Black*, *supra*, 30 Cal.3d at p. 884). The law recognizes that such wills are generally made by people without legal training. (*Ibid.*) The primary purpose of the statutory holographic will provisions is to prevent fraud. Because counterfeiting another's

handwriting " 'is exceedingly difficult,' " these statutes require the material provisions of holographic wills to be in the testator's handwriting. (*Ibid.*)

It was apparent to the *Black* court that the testator mistakenly believed she needed to use the printed language on the commercially printed will form regarding procedural matters. Our Supreme Court noted that "identification of the document as a will and herself as its maker ... are accomplished in the clearly expressed words of the document written by her own hand." (*Estate of Black*, *supra*, 30 Cal.3d at p. 885).

The court determined that the printed clause of the commercial will form referring to a personal representative was "patently irrelevant" to the substance-the dispositive provisions of her will. (*Estate of Black*, *supra*, 30 Cal.3d at p. 885). The court explained that the issue is not whether one mechanically intends to include printed material, but whether one intends to include printed material " '*because of its importance or materiality to the testamentary message*.' " (*Id.*, at pp. 885-886, italics added.) The inclusion of such printed procedural details does not invalidate an otherwise valid will. (*Id.*, at pp. 886-887.)

Whether a document should be admitted to probate as a holographic will depends on proof of its authorship and authenticity, and whether the words establish that it was intended to be the author's last will and testament at the time she wrote it. (*Estate of Black*, *supra*, 30 Cal.3d at p. 888).

Our high court explained that four questions are pertinent in evaluating whether a document should be invalidated as a holographic will due to printed language in the document: "Was the particular provision relevant to the substance of the will? Was it essential to the will's validity? Did the testator intend to incorporate the provision? Would invalidation of the holograph defeat the testator's intent?" (*Estate of Black*, *supra*, 30 Cal.3d at p. 885).

Accordingly, in 1983, the year after our Supreme Court decided *Black*, our Legislature replaced Probate Code section 53 with Probate Code section 6111. Section 6111 provides, in pertinent part, that "(a) A will ... is valid as a holographic will, whether or not witnessed, if the signature and the material provisions are in the handwriting of the testator." In 1990, the Legislature added subdivision (c) which provides that "Any statement of testamentary intent contained in a holographic will may be set forth either in the testator's own handwriting or as part of a commercially printed form will."

Probate Code section 6111.5 states that "[e]xtrinsic evidence is admissible to determine whether a document constitutes a will pursuant to Section 6110 [concerning formal wills] or 6111, or to determine the meaning of a will or a portion of a will if the meaning is unclear."

There is no question that the handwriting on the document at issue is that of Dorothy Southworth, and that she signed and dated it. Unlike *Black*, however, the document is not a commercially printed will form. It is a donor card for a charity. It was not drafted to serve as a will. The card provides the option of informing NSAL that the donor has or intends to instruct one's attorney to change his or her will.

Furthermore, the printed language Southworth incorporated from the donor card does not evince her present testamentary intent. Instead of striking the material printed words which state "I am not taking action now, but my intention is," she chose to incorporate those words with her handwritten

statement, "My entire estate is to be left to North Shore Animal League." The material printed language together with her handwriting evince a future intent; not present testamentary intent.

Although other extrinsic evidence, such as her letter to NSAL of September 4, 1987, and the supplemental Neptune form she signed on October 20, 1989, shows that Southworth desired to leave her estate to NSAL, neither the donor card at issue nor the handwriting on it substantially complies with Probate Code requirements for holographic wills. Although courts may consider statements made before and after a holographic will is made and the surrounding circumstances, *evidence of present testamentary intent provided by the instrument at issue is paramount*. (*Estate of Wong* (1995) 40 Cal.App.4th 1198, 1204-1205 [47 Cal.Rptr.2d 707]; *Estate of Archer* (1987) 193 Cal.App.3d 238, 244 [239 Cal.Rptr. 137]; *Estate of French* (1964) 225 Cal.App.2d 9, 15-16 [36 Cal.Rptr. 908]; Prob. Code. §§ 6111, subd. (c), 6111.5.)

Here, Southworth incorporated printed language stating that she was not taking any action when she executed it. It does not establish her testamentary intent at the time she executed it. It only states her intention to make a will in the future.

The judgment is reversed. The parties are to bear their own costs.

Problems

1. David wrote the following letter to his girlfriend: "The last three months with you have been the best of my life. If I died today, I would want you to have everything that I own. I love you." David signed the letter "Your Heart." After he finished the letter, David committed suicide. Is this a valid holographic will?

2. Vera sent a letter to her granddaughter Phyllis. The letter stated: "Dear Phyllis, Granny loves you very much. The doctor says that this leukemia will probably kill me. I know that you need help to finish college. I plan to go to the attorney next week to draft a will, so I can leave you $100,000. I will see you at Christmas." Vera signed the letter, "Love Granny." Vera died the day after she mailed the letter. Is this a valid holographic will?

3. Alma wrote the following on a note pad: "To Whom It May Concern, I am feeling really sad. I just celebrated my 70th birthday and it is time to put my affairs in order. I do not have time or money to get a lawyer to make a will for me. Darlene told me that I could write a will myself. My estate consists of about $12,000 in cash and a mortgage-free house that is worth $230, 000. I would like to leave the house to my only child, Darrell. The $12,000 should be given to my church, Friendship Fellowship Church." Alma signed the note. Is this a valid holographic will?

4. Paula was found dead in her bed. The following note was found on her night stand. "Peaches, ground beef, rice, apples, and light bulbs. Life is too short. When I go, I want my daughter Maxine to have my house. She has been such a good daughter. My daughter, Liza, should only get $1.00. All she wants to do is drink and gamble. Not with my money. The rest of my property and money should be split between my mother, Rosa and my sister, Clara. They need the money more than my children. Something to think about." Paula signed the note. Is this a valid holographic will?

12.2.2 In the Testator's Handwriting

Matter of Estate of Hand, 684 A.2d 521 (N.J. 1996)

GOTTLIEB, P.J.Ch.

This case involves a challenge to a purported holographic will. It is before me upon the return of an order to show cause seeking the will's admission to probate. The primary issue is whether a holograph can be hand printed or must be in cursive to be in the author's handwriting.

Jeffrey A. Hand died on December 25, 1995. Decedent's brother Norman, the plaintiff, claims that decedent wrote out a holographic will on September 17, 1995. The will is actually dated September 17, 1996, an obvious error. The lined but otherwise originally blank sheet of paper tendered as that holographic will contains the following:

9/17/96

> I JEFFREY HAND LEAVE TO MY SISTERS SHARON & SUE MY house & BANK ACC. NORMAN & ADAM MY GUNS & TOOL ADAM GETS MY BOAT NORMAN GETS MY TRUCK

Decedent executed no formal will. When he died, he was survived by his sisters Sharon and Susan, his brothers Norman and Adam and his widow Marie, the defendant.

For several years before his death, decedent had been ill with kidney disease, diabetes and other medical problems. On September 11, 1995, Norman and Adam visited decedent. They discussed distribution of decedent's assets to his family. Norman and Adam maintain that decedent began writing on a sheet of paper and declared to his brothers that he was writing his will. Adam and Susan claim that on September 17, 1995, decedent handed the sheet of paper to Susan, told her it was his will and directed her to retain it. Susan contends that she noted the mistake in the year of the document's date and that she and decedent "joked about this obvious mistake."

Norman offers the writing for probate as a holographic will. He also contends that decedent and Marie had been separated when decedent died. Norman seeks to be appointed as administrator *cum testamento annexo*. Marie opposes the probate of the alleged holographic will. In the alternative, if the will is admitted into probate, Marie requests recognition of her rights to an elective share of the estate pursuant to N.J.S.A. 3B:8-1 to -19 since she denies any marital separation.

Marie asserts that (a) the writing is not a holograph since it is hand printed and not in cursive; (b) the paper does not contain decedent's signature; and (c) the markings on the sheet of paper were not placed there by decedent.

Norman and Adam, on the one hand, and Marie, on the other, have submitted conflicting affidavits as to whether decedent and Marie were separated when decedent died.
N.J.S.A. 3B:3-3 provides:

> A will which does not comply with N.J.S.A. 3B:302 is valid as a holographic will, whether or not witnessed, if the signature and material provisions are in the handwriting of the testator.

What is one's handwriting? Must it be in cursive or may it be hand printed?

At a minimum "handwriting" encompasses a person placing markings on paper or other writing surface using an implement which inscribes those markings in a manner unique to or characteristic of the writer. Other writing surfaces include cardboard, chalkboard and other objects capable of retaining markings for an extended period of time. The implement may be a pencil, *In re Craddock's Estate,* 179 Mont. 74, 586 P.2d 292 (1978); *Appeal of Knox*, 131 Pa. 220, 18 A. 1021 (1890), a felt-tip pen or an ink pen. Indeed, it may be any object that causes a lasting inscription, such as charcoal, a crayon or a lipstick. Different portions may be in different ink. *In re Moody's Estate*, 118 Cal.App.2d 300, 257 P.2d 709, 716 (1953). However, it cannot be a typewriter or other mechanism incapable of unique and individual inscription. *Dean v. Dickey*, 225 S.W.2d 999 (Tex.Civ.App. 1949); *Scott v. Gastright, 305 Ky.* 340, 204 S.W. 2d 367, 173 A.L.R. 565, 567 (1947); *In re Bauer's Estate*, 5 Wash.2d 165, 105 P.2d 11 (1940); *Wolf v. Gall*, 176 Cal. 787, 169 P.1017, 1019 (1917), as to a typewriter; *In re Thorn's Estate*, 183 Cal. 512, 192 P. 19 (1920), as to a rubber stamp; *In re Johnson's Estate,* 129 *Ariz.* 307, 630 *P.*2d 1039 Ct.App.1981); *In re Wolcott's Estate*, 54 Utah 165, 180 P.169, 4 A.L.R. 727 (1919), as to the filling in of blank spaces in preexisting printed matter.

Handwriting is required under the statute for three reasons. The first is to decrease the opportunity for fraud. Presumably, there will be sufficient other samples of a decedent's handwriting that a forged holographic will can be identified and rejected. Block printing is as amenable to that detection and analysis process as cursive writing. *United States v. Mangan*, 575 F.2d 32, 41-42 (2d Cir. 1978, *cert. denied,* 439 U.S. 931, 99 S.Ct. 320, 58 L.Ed.2s 324 (1978); James V.P. Conway, *The Identification of Handprinting,* 45 *Journal of Criminal Law, Criminology and Police Science* 605 (1955).

The second reason is to ensure that a testator was aware that he or she was making, and intended to make, testamentary dispositions. *In re Smith's Will*, 108 N.J. 257, 262, 528 A.2d 918 (1987). Inherently the process of creating and executing a holographic will lacks the ceremony and third-party inquiry attendant to a formal will execution format. That format is designed to impress on a testator the momentous consequences he or she is generating. By actually having to write out the specifics of what is wanted, as opposed to the less arduous process of merely filling in some blank spaces on a preprinted form, we believe that the significance of what the testator is doing permeates his or her understanding.

The third reason why handwriting-as opposed to filling in blanks or checking off provisions on a preprinted form-is required by N.J.S.A. 3B:3-3 is to make more certain that the testator expressed only and exactly what he or she intended. We trust that the bother of having to write out the will's directives shall result in a reflection on and verbalization precisely reciting what the testator meant to occur.

None of these reasons for requiring handwriting is adversely implicated by the use of hand printing as distinguished from cursive. The authenticity of printing can be tested as can cursive writing. It is evident that the use of printing or cursive equally address the goals of reassuring that the testator's state of mind was one of knowing what he or she was doing and of guaranteeing that the testator was expressing what he or she intended.

In *Alexander's Estate v. Hatcher*, 193 Miss. 369, 9 So.2d 791, 792 (1942), a hand printed holographic will was challenged. It was printed with a lead pencil. The claimed testator was able to write in cursive. The question was whether the decedent had written the proposed will. The decision was that he had not. That the will was printed, as opposed to cursively written, was not a *prima facie* basis for its rejection.

Accordingly, I conclude that the use of hand printing or block lettering not only satisfies the definition of handwriting but also is consistent with the goals of N.J.S.A. 3B:3-3 in requiring handwriting.

Must a signature be in cursive or may it also be printed? N.J.S.A. 3B:3-3 requires the signature on a holographic will to be in the testator's handwriting. As defined in *Webster's New World Collegiate Dictionary* 1079 (1973), a "signature" is the name of a person written with that person's own hand. *Cf., Matthews v. Deane,* 201 N.J.Super. 583, 584, 493 A.2d 632 (Ch.Div.1984)(which approved printed signatures on a recall petition, but defined "signature" as "that which an individual *intends* to be his signature.") *But see, In re Waldick Aero-Space Devices, Inc.,* 71 B.R. 932, 936 (D.N.J. 1987), which permitted a typewritten signature on a security agreement since it was consistent with existing commercial practices.

By definition a signature is not necessarily inscribed in cursive. It only must be the writer's name in the writer's handwriting. It need have no particular "cast or form." *In re Hyland's Will*, 27 N.Y.S. 961, 963 (Surrog.Ct.1892). For the purpose of N.J.S.A. 3B:3-3 a signature may be in cursive or in block lettering, as long as it is the writer's name and in the writer's hand.

Marie asserts that, since the claimed will does not contain the testator's signature at the end of the writing, it is invalid. However, if decedent printed his name at the beginning of the document and intended it to be his signature, it will suffice. *In re Siegel's Estate*, 214 N.J.Super. 586, 592, 520 A.2d 798 (App. Div.1987). This, of course, assumes that the purported holographic will was written by decedent. This assumption is at issue because of the third of the widow's challenges to admitting the holographic will to probate.

Marie posits the unlikelihood that decedent wrote the claimed will. Her stance is based on more than mere conjecture. She claims that decedent always wrote in cursive when he wrote out something or signed his name. She has provided copies of numerous documents in support of this claim. Additionally, when signing his name, decedent invariably included his middle initial. The signature on the holographic will lacks any middle initial. The genuineness of the handwriting constituting a holographic will is a *sine qua non* for its admissibility into probate. A bona fide factual dispute exists as to that genuineness. I cannot now rule on the will's admission into probate. A resolution of that factual dispute and whether decedent and Marie were living separately from one another will be determined at a trial to be scheduled in the near future.

Finally, it is not fatal to the will's acceptance that the date on it is obviously incorrect. The general rule is that an error in the dating will not vitiate a holographic will. (citations omitted) Here, the misstatement of the year will not nullify the will.

12.2.3 Material Portions

Matter of Estate of Krueger, 529 N.W.2d 151 (N.D. 1995)

LEVINE, Justice.

Fred Bieber appeals from a county court judgment, entered in a formal testacy proceeding, denying probate of the purported holographic will of Diana C. Krueger. We affirm.

Diana C. Krueger died on May 3, 1992. Her heirs are four nephews, Fred Bieber, William Bieber, Rhinhold Bieber, and Daniel Bieber. During her lifetime, Krueger executed two wills: a holographic will, executed on January 8, 1979, and a formally attested will, drafted by an attorney, and executed on March 9, 1990. The second will ("1990 will") contained a clause expressly revoking all previous wills, including the holographic will. The 1990 will was not located after Krueger's death.

Following Krueger's death, Fred Bieber petitioned the county court for formal probate of the holographic will and for appointment as personal representative of Krueger's estate. His brothers, William, Rhinhold, and Daniel Bieber [collectively "William"] objected to the probate of the will. They contended, inter alia, that a material provision of the will had been altered by someone other than the testator, invalidating the will under NDCC § 30.1-08-03. William also argued that Krueger did not reexecute the altered will and, once altered, it could not be revived.

The original holographic will contained a specific bequest of Krueger's "Books and Diploma" to her niece, Doris. However, at the time of probate, Doris's name had been crossed out and the phrase, "Fred Bieber daughters," inserted in its place. At the probate hearing, Fred testified that on March 14th or 15th of 1990, shortly after the execution of the 1990 will, he and his wife accompanied Krueger home from the hospital to Krueger's farm in Regent, North Dakota. After supper, Krueger asked him to retrieve a box from a dining room closet. As he and Krueger sat in her bedroom, Krueger took an envelope, containing the holographic will, out of the box and said, "Look, we still have our will." Then, Krueger read the contents of the two-page document to him "word for word." Fred testified that he could see cross-outs on the first page of the document. After she finished reading the will, Fred said that "Diane crossed [Doris's] name out" and, at Krueger's request, he wrote in its place, "Fred Bieber daughters," while Krueger held the document.

The county court found that "[e]ven if Fred Bieber's testimony is true, the holographic will as altered no longer complies with NDCC § 30.1-08-03. A material provision of the holographic will is not in the handwriting of the testator after the alteration." The county court also found that Krueger did not reexecute the altered holographic will and absent reexecution, the altered will could not be reviewed under NDCC § 30.1-08-09. On appeal, Fred contends that the trial court erred in concluding that the bequest of Krueger's books and diploma to a specific legatee is a material provision of the holographic will and that the trial court's finding that Krueger did not reexecute her holographic will is clearly erroneous.

I. Material Provision

The right to make a will disposing of one's property is statutory and unless a testator complies with the prescribed statutory formalities, the will is invalid. *In re Lyon's Estate*, 79 N.D. 595, 58 N.w.2d 845 (1953); *Montague v. Street*, 59 N.D. 618, 231 N.W. 728 (1930). Probate proceedings in North Dakota are governed by the Uniform Probate Code (UPC), codified at Title 30.1, NDCC. *See, e.g., Matter of Estate of Ketterling,* 515 N.W.2d 158 (N.D. 1994).

A holographic will is valid if "the signature and the material provisions of the will are in the handwriting of the testator." NDCC § 30.1-08-03. Fred contends that his handwritten insertion, "Fred Bieber daughters," is not a material provision because of the insignificant value of the books and diploma in light of the total value of the estate. We cannot agree.

The interpretation and application of a statute is a question of law fully reviewable on appeal. *Olson v. N.D. Dept. of Transp. Director*, 523 N.W.2d 258 (N.D. 1994). Neither the UPC, nor the general provisions of the North Dakota Century Code, define the term "material provisions." We construe words undefined in the Code by attributing to them their "plain, ordinary, and commonly understood meaning." *Stewart v. Ryan*, 520 N.W.2d 39, 45 (N.D. 1994). We construe uniform laws and model acts in the same manner as other jurisdictions to provide consistency and uniformity in the law. *Zuger v. N.D. Ins. Guaranty Ass'n*, 494 N.W.2d 135 (N.D. 1992). Our consideration of other states' similar statutes and court decisions interpreting those statutes is relevant and appropriate. J.*P. Furlong Enterprises, Inc. v. Sun Exploration and Production Co.,* 423 N.W. 2d 130 (N.D. 1988).

Generally, "material" means "relevant," "consequential," or "having a certain or probable bearing ... on the effect of an instrument." *Webster's Third New Int'l Dictionary,* 1392 (1971). "Material provisions" are those portions of a holographic will which express the testamentary and donative intent of the testator. *Matter of Estate of Muder*, 156 Ariz. 326, 751 P.2d 986 (Ariz.App. 1987). Specific bequests to particular legatees indicate testamentary intent and are uniformly held to be material provisions of holographic wills which must be in the handwriting of the testator. *Estate of Johnson*, 129 Ariz. 307, 630 P.2d 1039 (App.1981) [words are material if essential to the testamentary disposition]; *In Re Estate of Cunningham*, 198 N.J.Super. 484, 487 A.2d 777, 778-779 (L.1984) [describing the material provisions of the will as "instructions concerning the donation of [the testator's] bodily remains, specific bequests and the devise and bequest of the remainder of [the] estate"]; *Matter of Estate of Fitzgerald*, 738 P.2d 236 (Utah App. 1987) [admitting holographic will to probate because material provisions were in handwriting of testator]. The Drafters' Comments to UPC § 2-503, from which our holographic wills statute is derived, supports this interpretation:

> "By requiring only the 'material provisions' to be in the testator's handwriting ..., a holographic will may be valid, even though immaterial parts such as date or introductory wording be printed or stamped. A valid holograph might even be executed on some printed will forms if the printed portion could be eliminated and the handwritten portion could evidence the testator's will." Comment UPC § 2-503.. Uniform Probate Code Practice Manual 2d, v. 1 (1977).

We construe the material provisions requirement of NDCC § 30.1-08-03 to mean that those provisions which express donative and testamentary intent must be in the handwriting of the testator.

The bequest of Krueger's books and diploma to Doris reflects Krueger's donative intent. Therefore, the alteration made by Fred resulted in a material provision of Krueger's will being in *his* handwriting and not in Krueger's. Insertion of the designation, "Fred Bieber daughters," as legatees is relevant

and consequential, and it changes the effect of the instrument by altering the disposition of assets under the will. *Compare Bell v. Timmins,* 190 Va. 648, 58 S.E.2d 55 (1950)[deleting confusing language or inserting corrections in punctuation and spelling, although not done by the testator, did not alter the testamentary dispositions and hence were not material].

Fred cautions that a "strict construction" of NDCC § 30.1-08-03 would elevate form over substance and defeat Krueger's testamentary intent. He urges us to liberally construe the provisions of the UPC to effectuate that intent. While we adhere to the credo of liberal construction of a will, once it is admitted to probate, in order to effectuate the intent of the testator, *see Matter of Klein,* 434 N.W.2d 560 (N.D. 1989),this case involves the threshold question of the validity of the will under an unambiguous statute.

The requirement under NDCC § 30.1-08-03, that the material provisions of a holographic will be in the testator's handwriting, is designed to ensure the authenticity of holographs, while still permitting lay persons to prepare their own wills without the expense and formality associated with attested wills. *See Matter of Estate of Erickson,* 806 P.2d 1186 (Utah 1991); *Estate of Black,* 30 Cal.3d 880, 181 Cal.Rptr. 222, 641 P.2d 754 (1982). Section 30.1-08-03, NDCC, provides a straightforward means of ensuring that a will is truly the testator's, recognizing the difficulty of forging an entire handwritten document. *Black*, 181 Cal.Rptr. 222, 641 P.2d 754. We share the county court's apprehension that:

> "[i]f the holographic will in this case was admitted to probate with all of the cross-outs and writing on it, a precedent would be set which could open the door to forged and fraudulent documents being admitted as a decedent's will."

We conclude that a material provision of the will was not in Krueger's handwriting, and the trial court did not err in denying probate of the invalid will.

12.2.4 Preprinted Forms

Wills should carry out the testator's intent. The attestation process exists to ensure that the will is executed in accordance with the wishes of the testator. States that recognize holographic wills attempt to ensure that the testator is the maker of the will by requiring that the material portions of the will and the signature be in the testator's handwriting. Courts have addressed the preprinted form problem by ignoring the printed portions of the document and only reading the parts that are in the testator's handwriting. If the handwritten portions standing alone do not clearly show the testator's intentions, courts usually refuse to allow the will to be probated.

In re Will of Ferree, 848 A.2d 81 (N.J. 2003)

FISHER, P.J.Ch.

This case raises an issue of first impression in this State: may the filling in of blanks in a pre-printed form result in the creation of a valid holographic will? Because accepted legal principles compel the ignoring of all pre-printed language in an alleged holograph, because vast portions of the material provisions are not handwritten, and because the document is unintelligible without resort to the pre-printed words, the proffered document may not be admitted to probate.

I

The facts—all of which are undisputed—may be simply and briefly stated. Ronald Ferree ("decedent") died, apparently by his own hand, on July 13, 2002. Near his body was a document purporting to be his Last Will and Testament. The parties acknowledge that decedent executed this document, the handwritten portions were written by decedent, and decedent's signature was witnessed by only one person. The parties also agree that there is no later or prior will and, if the document in question is not admitted to probate, decedent's estate will pass pursuant to the laws of intestacy.

Plaintiff Charles Creel ("plaintiff") is a named beneficiary in the document in question, but not an heir at law. Accordingly, plaintiff will not be entitled to share in decedent's estate if the document is not admitted to probate.

II

In the United States, the right to make a will is not viewed as a "natural right" and no constitutional protection attaches. *Girard Trust Co. v. Schmitz*, 129 N.J.Eq. 444, 453, 20 A.2d 21 (Ch.Ct.1941); *Renwick v. Martin*, 126 N.J.Eq. 564, 568, 10 A.2d 293, 297 (Prerog.Ct. 1939); 1 *Page on Wills* (Bowe–Parker revision, 1960) § 3.1. As a result, the right to transfer property upon death, and the manner for effectively making such a transfer, is subject to legislative control, as our Supreme Court has recognized:

> The right of a citizen to dispose of his property by will has always been deemed a legislative creation. The state may regulate the manner and terms upon which his property, both real and personal, within its jurisdiction may be transmitted by will or by inheritance. It may prescribe who shall take, and who shall not be capable of taking, the property. And the privilege of transmission of property by will or by intestacy may be made subject to such terms as in the judgment of the state will serve the public good.

[*United States v. Kingsley*, 41 N.J. 75, 79, 194 A.2d 735, 737 (1963).

Accordingly, in determining what should be admitted to probate, the court is bound to consider the Legislature's carefully-crafted parameters.

In regulating the manner in which citizens may dispose of property upon death, the Legislature has concluded that "every will shall be in writing, signed by the testator or in his name by some other person in his presence and at his direction, and shall be signed by at least two persons each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will." N.J.S.A. 3B:3-2. The parties agree that the document offered for probate fails to comply with the formalities required by N.J.S.A. 3B:3-2 because only one person executed the document as a witness.

The Legislature has recognized and provided for one exception to the requirements of N.J.S.A. 3B:3-2. That is, a holographic will may be admitted to probate. N.J.S.A. 3B:3-3. Accordingly, it must be determined whether this document is a valid holographic will; if not, then the complaint should be dismissed and decedent's property distributed by way of the laws of intestacy.

III

The Statute of Wills exists, in the words of the late Judge Clapp, one of this State's leading authorities in the field, "to forestall frauds by the living upon the dead." *In re Taylor's Estate*, 28 N.J.Super. 220, 226, 100 A.2d 346, 349 (App.Div.1953). The terms of the statute permitting holographic wills endeavor to be consistent with that approach. While the apparent purpose in allowing holographic wills was to provide lay persons with the ability to make their own wills without the expense of legal assistance, *see Matter of Estate of Krueger,* 529 N.W.2d 151, 154 (N.D.1995); *Matter of Estate of Erickson*, 806 P.2d 1186, 1188 (Utah 1991), the requirement that the material provisions be in the testator's handwriting assumes that such action not only brings into contemplation the seriousness of the undertaking but also renders more difficult and unlikely the possibility of forgery. *See In re Towle's Estate,* 14 Cal.2d 261, 93 P.2d 555, 561 (1939)(The handwriting requirement is an "adequate guaranty of its genuineness."); 1 *Page on Wills, supra,* § 1.3 (Some states permit holographic wills to be probated "[b]ecause of the additional guaranty of trustworthiness that is thought to exist in the complete use of handwriting."). Holographs become sufficient substitutes for more formally-witnessed wills in that there is the equal assurance, in both instances, that such instruments are not fraudulent, constitute solemn undertakings, and employ the words actually intended by their authors.

Our Legislature, in apparent contemplation that individuals might seek to avoid the cost of legal counsel, has permitted a less costly device to be utilized by allowing holographic wills to be probated. There are no other options; indeed, the idea that a will may be created in some other or less reliable way than required by the statute constitutes a prodigious leap from the considered influence of many centuries of Anglo–American law. Since the document in question is not sufficiently witnessed pursuant to N.J.S.A. 3B:3-2, it must either be found to be a holographic will or decedent must be deemed to have died intestate; there are no other alternatives.

IV

N.J.S.A. 3B:3-3 provides that a will which fails to comply with N.J.S.A. 3B:3-2 "is valid as a holographic will, whether or not witnessed, if the signature and material provisions are in the handwriting of the testator." Since the signature affixed on the document is concededly decedent's, it remains to be decided whether "the material provisions are in the handwriting of the testator."

It is readily apparent, and not disputed, that the paragraphs of this document are either entirely pre-printed or a mixture of both pre-printed material and decedent's handwriting. The pre-printed material, in fact, so predominates that no single paragraph is entirely handwritten. Accordingly, it must be determined whether, as a matter of law, N.J.S.A. 3B:3-3 may be loosely applied to encompass a document containing material provisions which are both handwritten and pre-printed.

Courts have dealt with this question in the same or similar settings, with mixed results. For example, various decisions have been rendered concerning the significance of both handwriting and the making of obliterations on a photocopy of an earlier will, printing rather than cursive writing, the use of a typewriter or other similar device, the use of ink or pencil, and, as here, filling in the blanks of a pre-printed will form. (citations omitted). Other interesting problems have arisen over the years. Some of these situations have proven particularly nettlesome in those jurisdictions where the statute permitting holographic wills requires that the *entire* document be in the handwriting of the decedent.

For example, in *Estate of Baker*, 59 Cal.2d 688, 31 Cal.Rptr. 33, 381 P.2d 913 (1963), the testator wrote his will on paper embossed at the top with "AAA, Approved, Hotel Covell" (which testator drew lines through) and "Modesto, California" (which was not stricken). The court rejected the argument that the document could not be admitted to probate, concluding that the printed information was not material to the testamentary provisions of the document. *Accord In re Schuh's Estate,* 17 Ariz.App. 172, 496 P.2d 598 (1972)(handwritten material on stationery containing the following pre-printed material: "Bring's Funeral Home" and "My last will and testament"); *In re Parson's Will,* 207 N.C. 584, 178 S.E. 78 (1935) (handwritten material on paper with the words "In the name of God, Amen" pre-printed at the top). The same result was reached in cases where testators wrote their wills on stationery bearing their own or their business's names and addresses. *See Succession of Heinemann,* 172 La. 1057, 136 So. 51 (1931); *In re Lowrance's Will*, 199 N.C. 782, 155 D.E. 876 (1930); In re Bennett's Estate, 324 P.2d 862 (Okla. 1958).

Additional difficulties have been encountered where the testator did not fully date the document in his own handwriting but, rather, incorporated a pre-printed portion of a date. For example, in one case a testator used stationery with its location and a partial date already embossed ("Stockton, Calif. _____ 19___"). The testator, in his own hand, wrote "May 3" and "38" before and after the pre-printed "19." Notwithstanding California's statutory requirement that the document be dated in the testator's own handwriting, the court observed a growing tendency toward a liberal approach and admitted the writing to probate. (citations omitted); *but see, In re Noyes' Estate,* 40 Mont. 190, 105 P. 1017 (1909), and earlier California cases which took a more literal approach toward the governing statute than *Durlewanger*.

These cases, and others, reveal that where a statute requires the *entire* document, including its date, to be in the handwriting of the testator, courts have, at times, managed to permit the probating of documents that literally do not conform to that direction. In short, these other jurisdictions appear to have adopted a standard which permits probate so long as those provisions which are material are in the handwriting of the testator. Thus, through this case-by-case process, most of the jurisdictions governed by statutes requiring that the *entire* document be in the testator's handwriting have gradually moved toward applying the "material provisions" standard expressly adopted by legislatures in jurisdictions such as our own.

V

The cases discussed above, which dealt with "letterhead wills" or the partial use of a pre-printed date, appear to have followed two different philosophical approaches. The first suggests some consideration of the testator's probable intent with regard to the non-holographic material; the other approach—the surplusage theory—has been described by the leading treatise as follows:

> the surplusage test [requires that] the non-holographic material [be] stricken and the remainder of the instrument admitted to probate if the remaining provisions made sense standing alone. This is done even though the stricken non-holographic material was clearly intended to have been made part of the will as is the case where the will is made by filling in the blanks of a printed will form. [2 *Page on Wills, supra,* § 20.5.]

The surplusage theory, however, has proven easier to describe than to consistently apply. That is, with regard to the "letterhead" and "date" cases briefly reviewed above, the disregarding of non-holographic material has had less impact upon the gist or substance of the instrument than on the

respect due the applicable statute (which required the *entire* document and its date to be in the handwriting of the decedent).

Here, the question does not concern extraneous material found on hotel stationery or the use of a pre-printed "19" which the testator incorporated to form the year of the making of his holographic will. The more difficult problem, encountered here and by courts in other cases with mixed results, is how to deal with a document containing substantive provisions which are partially pre-printed and partially handwritten.

In approaching this vexing problem, it is initially observed that our Legislature's adoption of N.J.S.A. 3B:3-3 undoubtedly suggests the employment of this surplusage standard. N.J.S.A. 3B:3-3 was based upon the then-existing version of Uniform Probate Code § 2-503. The comment to this section of the Uniform Probate Code (UPC), in fact, describes the present situation and the application of the surplusage theory:

> This section enables a testator to write his own will in his handwriting. There need be no witnesses. The only requirement is that the signature and the material provisions of the will be in the testator's handwriting, (rather than requiring, as some existing statutes do, that the will be "entirely" in the testator's handwriting) a holograph may be valid even though immaterial parts such as date or introductory words be printed or stamped. *A valid holograph might even be executed on some printed will forms if the printed portion could be eliminated and the handwriting portion could evidence the testator's will.*
> [emphasis added.]

Since our Legislature adopted the holographic will standard contained in the UPC, it must be assumed that it intended to have N.J.S.A. 3B:3-3 applied as the UPC's drafters intended. Accordingly, it logically follows that the surplusage theory should be applied.

That is, while our statute does not disqualify a holograph simply because portions are not in the testator's handwriting, it does require that only the testator's handwritten words be considered and that those words must be intelligible without resort to words not in the testator's handwriting. All other provisions, whether pre-printed, typed or written by others, are deemed surplusage and must be ignored.

In this case, an elimination of the pre-printed words renders the offered document meaningless. If all pre-printed material is removed, the document only states:

> Ronald D. Ferree Ronald D. Ferree 40 Waterman Ave, Rumson N.J. 07760 There are no other rf rf rf Micheal Ferree (Brother) 2981 Heather Court, Jensen Beach, Fla 34957 Barbra Ferree 2981 Heather Ct Court, Jensen Beach, Fla 34957 Charles Creel (my IRA at Smith Barney) 49 Parker Ave, Fair Haven NJ Micheal Ferree Barbra Ferree 21st October 99 Ronald D. Ferree Ronald D. Ferree

As can readily be seen, the handwritten portions of this document—standing alone—mean nothing. The pre-printed verbs, the pre-printed punctuation, the pre-printed directions and the pre-printed testamentary language are essential if this document is to have any meaning. Material language, necessary to provide meaning and necessary to reveal the writer's testamentary intent, is not in decedent's handwriting. As such, this document cannot be considered a holographic will. This court

can come to no other conclusion without doing great violence to the meaning of N.J.S.A. 3B:3-3. While courts of other jurisdictions have found meaning despite the ignoring of pre-printed language in other documents, the document at hand simply does not permit any rationale interpretation when its pre-printed portions are disregarded. Any attempt to wring meaning inevitably requires resort to the pre-printed portions—a wholly impermissible approach.

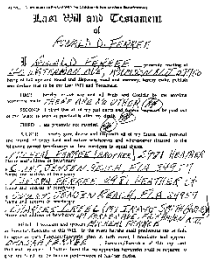
Our Legislature has adopted procedures governing the manner in which its citizens may distribute property upon death. This court is bound to enforce those laws. If the material provisions of the document are in the handwriting of the testator than the document may be admitted to probate as a holographic will; if not, then there must be two witnesses to the testator's execution of the document. Here, neither of these choices has been presented. If it makes sense for a document such as that in question to be admitted to probate, it is up to the Legislature to say so.

DISCUSSION ON SUBSTANTIAL COMPLIANCE IN VI IS OMITTED

VII

For these reasons, the document which plaintiff would have admitted to probate does not qualify as a holographic will. The complaint will be dismissed.

APPENDIX


Last Will and Testament

12.3 Nuncupative Wills

A few states permit the probate of oral wills referred to as nuncupative wills. These wills are only valid for the disposition of personal property that is worth less than a specified amount. Nuncupative wills function as temporary wills for emergency situations. The circumstances must prevent the testator from being able to execute a traditional will. In order to be probated, the wills have to be reduced to writing.

T. C. A. § 32-1-106. Nuncupative wills (Tenn.)

(a) A nuncupative will may be made only by a person in imminent peril of death, whether from illness or otherwise, and shall be valid only if the testator died as a result of the impending peril, and must be:

(1) Declared to be the testator's will by the testator before two (2) disinterested witnesses;

(2) Reduced to writing by or under the direction of one (1) of the witnesses within thirty (30) days after such declaration; and

(3) Submitted for probate within six (6) months after the death of the testator.

(b) The nuncupative will may dispose of personal property only and to an aggregate value not exceeding one thousand dollars ($1,000), except that in the case of persons in active military, air or naval service in time of war the aggregate amount may be ten thousand dollars ($10,000).

(c) A nuncupative will neither revokes nor changes an existing written will.

Problems

(Answer the following questions relying on the above statute)

1. Jacob was admitted to the hospital for open heart surgery. Jacob was afraid that he would not survive the surgery. Jacob's three friends, Carl, Lawrence and Maurice, sat with him while he was waiting to go into surgery. Jacob said, "I want to leave $20,000 to my sister, Ellen, so that she can finish nursing school. I want my brother, Keith to get the rest of my property. I don't want my other sisters, Lisa and Mona to get anything from me." Carl, Lawrence and Maurice agreed to make sure that, if Jacob died, his wishes would be carried out. While Jacob was in surgery, Carl type up the conversation that he, Lawrence and Maurice had with Jacob. Lawrence and Maurice signed the typed statement and agreed that it accurately reflected Jacob's wishes. During surgery, Jacob had a heart attack and died. Carl submitted the typed statement to be probate as Jacob's will. Lisa and Mona challenged the validity of the will. Is this a valid nuncupative will?

2. One of the tires blew out on Sharon's tractor. When she tried to repair the tire, the tractor rolled over and she got trap under it. After Sharon had been trapped for about two hours, her friends, Evans and Jane discovered her. They tried unsuccessfully to get Sharon from under the track. Sharon said, "I'm not gonna make it. I need to get my affairs in order." Evans and Jane tried to convince Sharon not to give up. But, Sharon said, "I want to leave my house to my cousin Joe and everything else to my Aunt Tabby." Sharon died a few hours later. Evans wrote out Sharon's will and submitted it for probate. Is this a valid nuncupative will?

3. Norman was a private in the United States army stationed in Iraq. One day Norman was shot in the chest by a sniper while he and five other men were on patrol. As he lay on the ground bleeding, Norman told his friend Mitchell, "I want my friend, Nina, to have the $8,000 in my savings account. My parents can have everything else." Norman died a few moments after making his statement. Two days later, Mitchell wrote out Norman's wishes and submitted the document for probate. Is this a valid nuncupative will?

4. Molly and four of her friends were riding their bikes. Molly fell off her bike and hit her head. Molly's friend, Dena called 911 and waited with her for the ambulance to arrive. Molly started crying and said, "If I die, I want my sister, Sammy, to have everything I own. It is probably only worth about $500, but it's better than nothing." Dena took out a napkin and wrote down what Molly told her. Molly died on the way to the hospital. The next day, Dena submitted the napkin to be probated as Molly's will. Is this a valid nuncupative will?

5. Nellie and her sisters, Connie and Starr, were hiking in the woods. Nellie got bitten by a poisonous snake. Nellie said, "If I don't make it, I want the two of you to split the thousand bucks I have in the bank." Nellie was rushed to the hospital. She died the next morning. Connie wrote down what Nellie had said and submitted it to be probated as Nellie's will. Is this a valid nuncupative will?

6. Barry was scheduled to have surgery to remove a cancerous tumor from his stomach. The doctors told Barry that he had a 35% chance of survival. The morning of surgery, Barry told his wife, Jessica, that he wanted to execute a will. Jessica went to call the family lawyer. While Jessica was gone, Barry began to feel sick. Barry told his nurses, Lucy and Tim, "My wife is taking too long to get that lawyer. She may not be back before I have to go under the knife." Tim offered to write down Barry's will and to give the note to Jessica when she came back. Barry said, "I want to leave everything to Jessica. But, I want to leave $1000 to the church." Barry's operation was successful. Two days later, when Barry and Jessica were driving from the hospital, their car was hit by a drunk driver. Barry was killed instantly. A week after Barry's funeral, Jessica submitted the note Tim had given her to be probated as Barry's will. Is this a valid nuncupative will?

Chapter Thirteen: Additional Doctrines Impacting Wills

13.1 Introduction

In Chapter Eleven, we examined the things that are necessary to validly execute a will. The purpose of this chapter is to discuss doctrines that are relevant to the execution of wills. The first two principles, integration and incorporation by reference, apply when someone wants the probate court to treat an independent document as part of the will. The doctrine of republication by codicil relates to the impact that a codicil can have on a will. The main way to dispose of property after death is through the execution of a will. Courts tend to invalidate other methods persons attempt to use to control the distribution of their probate property after they die. The doctrine of acts of independent significant is used to show that the person had a nontestamentary motive, so his or her wishes should be enforced.

13.2 Incorporation by Reference

The testator may want another document to be considered as a part of his or her will. Courts can use the doctrine of incorporation by reference to carry out the testator's intent. In order for a doctrine to be incorporated into a will, the following three factors must be present: (1) the writing must be in existence at the time the will is executed; (2) the will must describe the specific writing and (3) the testator must manifest an intent that the writing be incorporated into the will.

§ 2-510. Incorporation by Reference

A writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification.

13.2.1 In Existence

Cyfers v. Cyfers, 759 S.E.2d 475 (W. Va. 2014)

WORKMAN, Justice:

The Petitioners, Cathy Cyfers, Joseph Cyfers, and Megan Cyfers, APPEAL FROM A November 28, 2012, order entered by the circuit court of Kanawha County, West Virginia, granting summary judgment in favor of the Respondents, Jack Cyfers, Helen Cyfers, Roger Cyfers, Dottie Cyfers and Wayne Cyfers, who are beneficiaries under a Will.

I. Facts and Procedural History

This case arises from the Last Will and Testament ("the Will") of Lois Jayne Cyfers Miller ("the Decedent"), who died on January 7, 2009. The Will was executed by the Decedent on August 15, 2006, and was witnessed by Stacy Clark and Boyce Griffith, Esq. Mr. Griffith also prepared the Will for the Decedent. The Will had an "Exhibit A" attached to it when it was submitted to probate by Philip Vallandingham and Cathy Cyfers, the co-executors (referred to collectively as "the co-executors") named in the Will.

Article IV of the Will referenced Exhibit A and provided that other devises could be made through Exhibit A, "which exhibit [wa]s of even date" with the Will. Exhibit A also contained handwritten notations throughout the five-page document using different colors of ink and included a post-execution date in the Decedent's handwriting. The exhibit set forth bequests made by the Decedent to various relatives as referenced in Article IV of the Will. The exhibit, standing alone, was not signed by the Decedent or witnessed. Included among the handwritten bequests was the following: "Roger & Dottie [;] Nephew & Wife [;] Coin Collection in Strong Box at Home." There was another handwritten bequest to "Debbie Cyfers[;] (Niece in Utah)." That bequest provided: "3/4 coat Mink & Leather, Many family Albums (20 some) and Loose Pictures, Keep in Family always!!!, Many good coats, suits, purses, fur pieces, Various Jewelry, 1 diamond engagement ring, 1 Anniversary ring (8 small diamonds), Mixture too various to list, Mantle clock, 'Howard Miller' Anniversary Clock." There were other varied bequests of personal property, bank accounts and real estate contained within Exhibit A. On the last page of the exhibit was the following handwritten language:

> I love all my relatives and I have no children. My sisters & brothers have left their children their estates; therefore, some do not need as others. Am taking this all into consideration, am trying to do what, I think, is best. *Gertrude* was so good to Mom, Dad and Uncle Elmer!!! Since Joe Miller, my love, help[ed] [to] make a lot of this money I want his only live sibling to have *equal monies*. I love you Delores. (11/29/06[)].

The date of November 29, 2006, was nearly four months after the Will was executed.

A dispute arose between the co-executors of the Will and some of the beneficiaries of the Will concerning the administration of the Decedent's estate. On October 7, 2010, Jack Cyfers, Helen Cyfers and Rogers Cyfers petitioned the County Commission to remove the co-executors stating that "the Executors of Lois Jayne Cyfers Miller's estate have continually refused to administer the estate, pursuant to the Decedent's last wishes, as set out in her Last Will and Testament. They refuse to distribute the assets as directed by the Will."

A few days later, on October 13, 2010, the co-executors filed a petition for declaratory relief in the circuit court, asking for

> (a) An order determining whether the handwritten notations on the face of the will alter the will or have no effect on the will; (b) An Order determining whether the handwritten attachment, Exhibit A, is validly incorporated by reference; [and] (c) For such other relief and direction in the administration of said estate as the Court deems proper.

On November 24, 2010, following a hearing regarding the petition to remove the co-executors, the

County Commission entered an order ruling that according to the Decedent's Will, she left "all her tangible personal property to Cathy Cyfers and all of the remainder of her personal property, including the proceeds from the sale of her home ... to those people listed in Exhibit 'A' attached to the Will." The County Commission further determined that the co-executors had failed to administer the Decedent's estate as set out in her Will and that the co-executors had contested the validity of the Will, which placed them in conflict with the heirs to the Decedent's estate and with the Decedent's wishes. Consequently, the County Commission revoked the appointment of Mr. Vallandingham and Mrs. Cyfers as co-executors of the Decedent's estate and appointed the Sheriff of Cabell County to serve as executor.

The declaratory judgment action proceeded in circuit court. The parties submitted cross-motions for summary judgment. By letter dated September 26, 2011, the circuit court initially granted the co-executors' motion, concluding that Exhibit A was not validly incorporated by reference into the Will under West Virginia law and directed the co-executors to prepare an order reflecting that ruling.

On January 12, 2012, the co-executors submitted an order as directed by the circuit court. On January 17, 2012, the respondent beneficiaries filed an objection to the proposed order and filed a motion for reconsideration. By order entered September 18, 2012, the circuit court granted the respondents motion for reconsideration and set the matter for trial on October 9, 2012.

On October 9, 2012, the parties appeared for trial. At that time the circuit court inquired of the parties if they wished to have the circuit court rule on renewed motions for summary judgment. The parties agreed that the issues could be resolved by the pending summary judgment motions, thereby waiving their right to a jury trial in favor of a ruling by the circuit court as a matter of law.

By order entered November 28, 2012, the circuit court granted summary judgment in favor of the Respondent beneficiaries under the Decedent's Will. The circuit court concluded that Exhibit A was properly incorporated by reference into the Decedent's Will. More precisely, the circuit court, in relevant part, determined that "'Exhibit A' (a) is repeatedly referenced in the Will; (b) is attached to the Will; [and] (c) is written in the Testator's handwriting [ ]...." Regarding only the handwritten notations found on the Will and Exhibit A that were clearly made after the date the Will was executed, the circuit court determined that "all of the disputed notations with dates after the Will was executed are surplusage and can be disregarded as the remainder of the Will is more than adequate to express ... [the Decedent's] intent and to dispose of her property." Finally, after concluding that the handwritten notations on the Will itself and the single handwritten notation containing a post-execution date on Exhibit A were surplusage and were to be disregarded, the trial court found that "there is nothing to indicate that the Will together with Exhibit A do not adequately and accurately reflect how ... [the Decedent] intended her Estate to be divided upon her death."

On appeal, the Petitioners argue that the circuit court erred: 1) in concluding that Exhibit A to the Will was properly incorporated by reference into the Will; 2) in concluding that the handwritten notations contained within Exhibit A clearly made after the date that the Will was executed are surplusage and were to be disregarded; and 3) by considering the Decedent's intent with respect to whether Exhibit A was properly incorporated by reference into the Will. Based upon a review of the parties' briefs and oral arguments, the appendix record, and both parties' agreement that the issues were susceptible to resolution by summary judgment, we conclude there was no other material evidence available and therefore insufficient evidence to allow Exhibit A to be incorporated by

reference into the Will. We reverse the circuit court and remand for entry of an order consistent with this opinion.

II. Standard of Review

"A circuit court's entry of summary judgment is reviewed *de novo*." Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994); *accord* Syl. Pt. 2, *Estate of Robinson v. Randolph Cnty*. Comm'n, 209 W.Va. 505, 509-10, 549 S.E.2d 699, 703-04 (2001). Further, "[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 3, *Aetna Cas. & Sur. Co. v. Fed. Ins. Co. of N.Y.*, 148 W.Va. 160, 133 S.E.2d 770 (1963). We will reverse a circuit court's grant of summary judgment if, as a matter of law, the moving party is not entitled to judgment. *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 59, 459 S.E.2d 329, 336 (1995). With the standards of review in mind, we review the issues raised.

III. Discussion

The determinative issue is whether the circuit court erred in concluding that Exhibit A to the Will was in existence at the time of execution of the Will and was properly incorporated by reference into the Will. The circuit court ruled that "[i]n this case, 'Exhibit A' (a) is repeatedly referenced in the Will; (b) is attached to the Will; (c) is written in the Testator's handwriting; and (d) Ms. Miller's prior Will, executed in 1999, also had an 'Exhibit A' attached indicating her wishes." (Footnote added). The Petitioners argue that the Exhibit A that was found with the Will and presented for probate was not the same Exhibit A that existed at the time the Will was executed. It is apparent from the single handwritten date that is found in Exhibit A that at a least portion of Exhibit A was added after the Will was executed. Conversely, the Respondent beneficiaries argue that the circuit court did not err in incorporating Exhibit A by reference into the Will.

The controlling case on this issue in West Virginia is *Wible v. Ashcraft,* 116 W.Va. 54, 178 S.E. 516 (1935). One of the issues presented to the Court in *Wible* was whether the reference to the deeds in the will was sufficient to incorporate the deeds by reference into the will. *Id.* In deciding the incorporation by reference argument, the Court stated:

> "An unattested or imperfectly attested paper may be incorporated in a will by reference, if the terms of the will, assisted (if necessary) by the surrounding circumstances, are sufficient to identify the paper, and to show the intention of giving effect to it." *Allen v. Maddock,* 11 Moore P.C. 427, 14 Reprint 757, 26 Eng. Rul. Cas. 439. The foregoing rule, followed by the English courts, has been frequently cited and followed in this country. *Newton v. Seaman's Friend Society*, 130 Mass. 91, 39 Am. Rep. 433. In the latter case Chief Justice Gray said: "If a will, executed and witnessed as required by statute, incorporates in itself by reference any document or paper not so executed and witnessed, whether the paper referred to be in the form of a will or codicil, or of a deed or indenture, or of a mere list or memorandum the paper so referred to, *if it was in existence at the time of the execution of the will,* and is identified by clear and satisfactory proof as the paper referred to therein, takes effect as part of the will, and should be admitted to probate as such." The same rule was invoked by the Supreme Court of Virginia in the case of *Pollock v. Glassell*, [43 Va. 439] 2 Grat. (Va.) 439 [(1846)].

116 W.Va. at 57-58, 178 S.E. at 517 (emphasis added). Following other jurisdictions, including

Virginia, the Court adopted the doctrine of incorporation, holding in the first syllabus point of *Wible* that

> [w]here it appears from the language of a will that deeds bearing a certain date were included in the testator's plan for the disposition of his property and prompted the provision for the one bequest made therein, and the reference to the deeds is sufficient to reasonably identify them, such deeds become part and parcel of the will as completely as if copied therein for the purpose of ascertaining the testator's intention regarding the said bequest.

Id. at 54, 178 S.E. at 516, Syl. Pt. 1.

Applying this law to the facts of *Wible,* the Court concluded that:

> Have the deeds been incorporated into the will in the present case? A reference is made to the transfer to "my beneficiaries" by deeds "dated the 11th day of February, 1928"; the deeds were in existence at the time of the execution of the will; and the intent to incorporate them for purpose of explanation is sufficiently shown by the words "and now desiring to give to my granddaughter, Mary Wible, such further amounts out of my estate, in addition to the property already deeded to her, as I feel she is entitled to receive in order that she may have an equal share of my estate." True, the will does not set out in detail the property conveyed by the deeds, or the names of the several grantees; but this is not necessary where the deeds can be identified with sufficient certainty to warrant their incorporation. The appellant does not deny the existence of the deeds, or that the four in question are the ones referred to in the will.

Id. at 58, 178 S.E. at 517-518.

Even though the *Wible* case dealt with incorporating a deed by reference, the law relied upon by the Court concerning the doctrine of incorporation by reference expressly provided that any document or paper could be incorporated by reference into a will. Extracting the salient requirements for incorporation by reference from the *Wible* decision, we now hold that there are three elements that must exist in order to incorporate a document by reference into a will. First, the extrinsic document sought to be incorporated must be in existence at the time the will is executed. Second, the intention of the testator to incorporate the extrinsic document into the will must appear clearly from the will. Third, the reference in the will must identify the extrinsic document with sufficient certainty that the written document referenced in the will is the written document proffered. *See id* at 54 and 58, 178 S.E. at 516 and 517-18.

Having set forth the necessary requisites that must be established in order for a document to be incorporated by reference into a Will, the focus of this appeal is whether Exhibit A, the extrinsic document sought to be incorporated into the Decedent's Will, was in existence at the time the Will was executed. *Id.*

In discerning the answer to the question before us, there is no dispute that there was an Exhibit A attached to the Will at the time the Will was submitted to probate. There is, however, no evidence regarding what bequests were contained within Exhibit A at the time the Will was executed. Rather, the evidence submitted before the circuit court was that the Decedent's attorney, Mr. Boyce A. Griffith, gave the Decedent a blank form to fill out regarding certain bequests of tangible personal property and real estate to beneficiaries that the Decedent would identify in the exhibit. The practice in Mr. Griffith's office was that after completing the blank document, the Decedent would return

the completed form to his office prior to the will being executed. All that Mr. Griffith had in his file regarding the Decedent's Will was a copy of the Will before it was executed without any exhibit attached thereto. Even though Mr. Griffith testified that Exhibit A was in existence on the date the Decedent's Will was executed, he could not state what language or bequests were contained within Exhibit A when the will was executed. Mr. Griffith further stated that even though he did not have any documentation to show any of the language contained in Exhibit A on the date the Will was executed, he testified that the Decedent had "already written" out what she wanted included in Exhibit A at the time the Will was executed. However, Mr. Griffith testified that at least some of the notations contained within Exhibit A were made after the Will was executed on August 15, 2006. No additional evidence was offered by the parties to show what language was contained within Exhibit A on the date the Will was executed.

Given the uncertainty as to what bequests were contained in Exhibit A at the date of execution of the Decedent's Will, we are compelled to conclude that there was insufficient evidence to allow the incorporation of Exhibit A by reference into the Will. Unfortunately, the undisputed evidence shows that at least one of the bequests contained within Exhibit A was made after the date the Will was executed. Further, the Decedent's attorney was unable to state what bequests or language was contained within Exhibit A at the time the Will was executed. These facts together with the Respondents' inability to present any additional evidence on this issue must necessarily result in the conclusion that it is simply impossible to prove that the Exhibit A that was submitted affixed to the Decedent's Will for probate was the same Exhibit A that existed at the date the Will was executed. As the Court stated in *Wible,* the existence of the extrinsic document, Exhibit A, sought to be incorporated *must have been in existence at the time the will was made.* 116 W.Va. at 54 and 58, 178 S.E. at 516 and 517-18 (emphasis added).

Our ruling today is supported by a similar determination made by the Supreme Court of Virginia in the *Triplett* case. *See* 172 S.E. at 167. In *Triplett,* the court considered whether an exhibit had been incorporated by reference into a holographic will. *Id.* A memorandum in the decedent's handwriting referred to as exhibit Y, provided that the decedent was in the process of rewriting his will; however, he did not wish his original will to be affected by his undertaking if he failed to complete it. *Id.* The decedent then stated in exhibit Y that there was a change to his third request made in his will as follows: "The change made in my third request I prefer being substituted for the original." *Id.* Exhibit Y was dated December 11, 1929, and was witnessed and signed by the decedent. *Id.* In the same envelope as exhibit Y, was exhibit X. *Id.* Exhibit X was an unfinished will that the decedent was engaged in rewriting. It contained four enumerated clauses including a third bequest which left $15,000 to the decedent's nephew. *Id.*

The argument before the court in *Triplett* was that exhibit Y incorporated by reference exhibit X, because exhibit Y met the statutory requirements for a holographic will as it was in the decedent's handwriting, witnessed and signed by the decedent. *Id.* at 167. The problem the Virginia court had with this argument was that the decedent had indicated that he was in the process of rewriting his will at the time he indicated in exhibit Y that he desired to change the third bequest. *Id.* at 168. Exhibit Y was dated December 11, 1929, but the decedent did not die until March 6, 1930. So the factual query posed to the *Triplett* court was: "How much of the paper sought to be incorporated by reference was written after Exhibit Y was written; or how much had been written at the date of that exhibit? We do not know. How, then, is it proven that the paper was in existence at the time it was claimed to have been incorporated by reference?" *Id.* The court concluded that there simply were insufficient facts to prove the requisite existence of exhibit X at the date of execution of exhibit Y.

Id.

Based upon the foregoing discussion, the requisites for incorporating a document into a will by reference cannot be established. This legal doctrine exists in order to prevent a third party from interfering with the intent of a testator by altering a document to be incorporated by reference by fraud or undue influence once the will is executed. Although there is no allegation of wrongdoing or fraud in the instant case, and although the testator may have intended her estate to be distributed in accordance with the bequests identified in Exhibit A, that intent was frustrated by the failure to follow these legal principles which have been developed to protect the sanctity and integrity of the testamentary process. Therefore, the circuit court erred, as a matter of law, in allowing Exhibit A to be incorporated by reference into the Decedent's Will.

IV. Conclusion

Based upon the foregoing, we reverse the decision of the circuit court and remand this case for entry of an order consistent with this opinion.

Reverse and remanded.

Clark v. Citizens Nat. Bank of Collingswood, 118 A.2d 108 (N.J. Super. Ct. App. Div 1955)

HANEMAN, J.S.C.

Plaintiff herein filed a suit seeking the construction of the will of Ernest W. Clark, deceased. In answer thereto, the Attorney General of the State of New Jersey filed an answer in which it was stated that it had no knowledge or information sufficient to form a belief as to the allegations of the complaint. The defendant Citizens National Bank of Collingswood, New Jersey, filed an answer and stated, among other things, that it was presently in the process of liquidation and therefore powerless to act in a banking or trust capacity except for the purpose of liquidation. Thereupon the plaintiff moved for a summary judgment upon affidavits filed and testimony taken in open court. In the light of the consent of the defendants to proceed in this matter, it will be considered as if the same were submitted on final hearing. The facts in connection herewith are as follows:

On Saturday, March 1, 1952, Ernest W. Clark, then being ill and confined to his home, executed two instruments, (1) an Inter vivos trust agreement, and (2) a last will and testament. The order in which reference to these instruments is made is not to be deemed a conclusion as to the sequence of their execution. The Inter vivos trust agreement, which was not executed as required for the execution of a will, created a charitable trust, giving broad powers to the named trustee in the management and conduct of the investments in said trust, and provided in addition, in part, as follows:

'Witnesseth that: Whereas the Donor has this day deposited with the Trustee certain monies, property, securities, investments and/or other assets, as set forth and enumerated in Schedule 'A' annexed hereto and hereby made a part hereof, in trust nevertheless for the uses and purposes, and under and subject to the terms and provisions hereinafter set forth; which trust the Trustee is willing to accept and assume; and the said parties desire to herein and hereby express and set forth and define the nature and terms of said trust:

(a) The Trustee shall pay the entire net income derived from the trust estate during the Donor's lifetime to the Donor, or in accordance with such written instructions or directions as may be given by the Donor to the Trustee, from time to time, with respect thereto; and the Trustee shall further pay and/or deliver to the Donor, from time to time, in addition to the said payments of income, such monies or other assets from the principal of the trust estate as the Donor may request, or as the Trustee may deem necessary for the support, maintenance, comfort or welfare of the Donor.

(b) From and after the Donor's death the Trustee shall pay the entire net income derived from the trust estate unto the wife of the Donor, Dorothea J. Clark, if she shall survive him, in convenient installments, for and during the term of her natural life, or until her remarriage; and her receipt for any sum or sums so paid to her shall be a complete and sufficient discharge of the Trustee in such regard.

(c) Upon the death or remarriage of the Donor's said wife, or if she should predecease the Donor then upon the Donor's death, the trust estate, or so much thereof as remains, whether principal or accumulated income, shall be held and retained, in trust, by the Trustee, in perpetuity, and shall be known and designated as the Clark Memorial Fund in memory and honor of the father and mother of the Donor, Ernest W. Clark and Lula B. Clark, his wife, both late of Belhaven, North Carolina, and the net income therefrom shall be paid and/or applied to further the education of such worthy and needy graduates of the Belhaven High School, of Belhaven, North Carolina, as may be selected in the manner hereinafter set forth.'

'Schedule 'A'. Securities deposited by Donor with the Trustee under the foregoing agreement: 100 shares, Camden Fire Insurance Association.'

The said last will and testament provided, as far as here pertinent, as follows:

> '* * * all of my residuary estate, I give, devise and bequeath unto the Citizens National Bank of Collingswood, New Jersey, and to its successor or successors, In Trust Nevertheless for the uses and purposes, and under and subject to the terms and provisions of a certain agreement of trust entered into between the said Citizens National Bank and myself, and bearing even date herewith, including such amendments to and modifications of the same, if any, as may hereafter and during my lifetime be made and agreed upon between the parties to said agreement, the property passing under this paragraph to be added to and to become and be a part of the corpus of the trust estate established by said agreement.'

There is great uncertainty as to whether the trust agreement or the last will and testament was first signed on March 1, 1952. The state of the proof is such that there is no positive evidence of the order in which said instruments were signed. However, it was proven that the trust agreement and the 100 shares of Camden Fire Insurance Association stock therein referred to were not delivered to the Citizens National Bank of Collingswood, New Jersey before Monday, March 3, 1952, and that the said Citizens National Bank did not execute the said trust agreement or accept the said trust before Monday, March 3, 1952. The certificate of stock of the Camden Fire Insurance Association remained in the safe deposit box of the said Ernest W. Clark, and under his sole and exclusive control, until shortly before delivery to the Citizens National Bank, coincidental with the delivery of the trust agreement.

Ernest W. Clerk died on April 24, 1953, and his above referred to will was admitted to probate by the Camden County Surrogate on June 29, 1953.

The question which the plaintiff now seeks to have determined is whether the residue passed at the death of the testator to the Citizens National Bank, or whether the testator died intestate as to such residue. Plaintiff argues that the said Ernest W. Clark died intestate as to said residue.

Basically, the question with which the court is confronted is whether the trust agreement and its terms were incorporated in the last will and testament of the deceased by reference, or whether under the facts here present it could be concluded that the terms of said trust agreement had such independent significance that the residue must pass to and be distributed by the trustee named in said trust agreement in accordance with the terms thereof.

The expression 'incorporation by reference' to which allusion is here made, signifies that a will duly executed and witnessed may incorporate into itself by appropriate reference, intent and identification, an existing written paper or document, whether or not executed as a will or signed by the testator or any other person, and whether or not it has any validity in itself, to the end and with the effect of making it a part of such will. It is unsettled whether this doctrine has been accepted in New Jersey, although the court, in *Murray v. Lewis*, 94 N.J.Eq. 681, 121 A.525 (Ch.1923), rejected the recognition of this doctrine.

The following cases have sustained the validity, however, of a testamentary gift to individuals or trustees named in a separate instrument existing at the time of the execution of the will there involved: *Swetland v. Swetland*, 100 N.J.Eq. 196, 134 A. 822 (Ch.1926), affirmed 102 N.J.Eq. 294, 140 A. 279 (E. & A. 1928); *First-Mechanics National Bank of Trenton v. Norris*, 134 N.J.Eq. 229, 34 A.2d 746 (Ch.1943); *Bottomley v. Bottomley*, 134 N.J.Eq. 279, 35 A.2d 475 (Ch.1944). *See also Noice v. Schnell*, 101 N.J.Eq. 252, 137 A. 582, 52 A.L.R. 965 (E. & A. 1927).

The following cases have held that a testamentary gift was invalid where reference was made to a written instrument insufficiently identified, or where the instructions were not contained in a writing executed with the formalities required of a will, or in existence at the time of the execution of said will: *Magnus v. Magnus*, 80 N.J.Eq. 346, 84 A. 705 (Ch.1912); *Condit v. Reynolds*, 66 N.J.L. 242, 49 A. 540 (E. & A. 1901); *Hackensack Trust Co. v. Hackensack Hospital Association,* 120 N.J.Eq. 14, 183 A. 723 (Ch. 1936); *Smith v. Smith*, 54 N.J.Eq. 1, 32 A. 1069 (Ch. 1895), affirmed 55 N.J.Eq. 821, 41 A. 1116 (E. & A. 1896); *Hartwell v. Martin,* 71 N.J.Eq. 157, 63 A. 754 (Ch. 1906).

There is a division between the acceptance and rejection of this doctrine in the other States of the Union. The theory upon which such incorporation is not permitted is that the instrument itself, which purports to make a testamentary disposition of the estate of the deceased, was not executed with the formality required for the execution of a will and that it is, therefore, subject to as much possible fraud as would be a will not so executed in accordance with the statutory requirements. There is a distinction between a gift to an existing trust and a provision incorporating the terms of a trust into a will. There is more than a technical difference between these two situations. In the former instance, the acts giving rise to such a gift are performed for some non-testamentary reason, prior to and frequently unconnected with the will, and so satisfy the underlying principle of the Wills Act. In the latter, they would seem to be an attempt to avoid the formalities required under the Wills Act, and hence subject to fraud and fraudulent imposition.

Even in those states in which such incorporation is permitted, it is a necessary ingredient, Inter alia, that the instrument should be in existence at the time of the execution of the will and that the will should refer to it as an existing instrument. If this were not the rule, a testator could, by executing a will and incorporating therein a document to be executed in the future, create for himself a power to dispose of his property by an instrument not executed in accordance with the statute of wills, and open the door to fraudulent imposition. The will itself must refer to such paper to be incorporated, as being in existence at the time of the execution of the will, in such a way as reasonably to identify such paper, and in such a way as to show testator's intention to incorporate such instrument in his will and make it a part thereof. 1 Scott on Trusts (1939), sec. 54.1, p. 290 (1939); 1 Page on Wills (1941), sec. 250, p. 498 (1941).

It is argued by the plaintiff that the theory of incorporation by reference is here inapplicable in the light of the fact that (1) the proof does not demonstrate that the trust indenture was executed by the creator prior to the execution of the will; (2) the trustee of the Inter vivos trust did not accept as such until at least two days after the execution of the will, and the trust did not, therefore, exist on the date that the will was signed; (3) no part of the Corpus of the trust was delivered to the trustee until at least two days after the execution of the will, and the trust did not, therefore, exist on the date that the will was signed; and (4) in any event, if a valid trust could be deemed to have existed at the time of the execution of the will, it was revoked by the withdrawal by the creator of the Corpus thereof prior to his death.

Insofar as plaintiff's first argument is concerned, I cannot, from the proofs, conclusively determine which of the two instruments here involved was first signed on March 1, 1952. It was the burden of the plaintiff to prove that the will was first signed, in view of her contention to that effect. As a general rule, the law does not take cognizance of fractions of a day, but this fiction will be ignored, and the law will take cognizance of the actual hour or time of the occurrence of an event or the performance of an act where the exact hour of such occurrence or performance is important in the fixing of relative rights and in the interest of doing justice. Where such occurrence or performance is required to be done in a certain order, it is presumed that the prescribed order has been followed, and the burden of proving otherwise is cast upon the person asserting the contrary. This the plaintiff has failed to do. *Hoppock's Executors v. Ramsey*, 28 N.J.Eq. 413 (Ch. 1877); *Gallagher v. True American Pub. Co.,* 75 N.J.Eq. 171, 71 A, 741 (Ch. 1909); *Ambrose v. Metropolitan Life Insurance Co.,* 10 A.2d 479, 18 N.J.Misc. 42 (Sup.Ct.1939); 86 C.J.S., Time, s 16, p. 900.

Insofar as plaintiff's second argument is concerned, it is recognized that generally a trust, and especially a charitable trust, may be created without notice to or acceptance by the trustee, since equity will not allow a trust to fail for want of a trustee. Where a settlor has made a sufficient delivery of the subject matter of the trust or of a deed of transfer, the trust is validly created at the time of the conveyance, even though the person named as trustee has no notice thereof, or after notice, disclaim. In either such a contingency the trust does not fail, nor is it destroyed, but the title to the property reverts in the settlor, subject to the terms of the trust. 1 Scott on Trusts (1939), sec. 35, p. 212; Restatement of the Law, Trusts, sec. 35, p. 113; 89 C.J.S., Trusts, s 60, p. 831; *Hooton v. Needl*, 12 N.J. 396, 97 A.2d 153 (1953).

Standing alone, the failure of the trustee to accept on March 1, 1952 was insufficient to cause a failure of the trust.

It is to be noted, however, that the creator did not deliver the subject matter of the trust prior to March 3, 1952. This failure to deliver is adverted to in plaintiff's third argument. Normally, a trust does not come into existence until the subject matter thereof, if capable of delivery, is delivered to a trustee. There must be an unequivocal act clearly showing that a trust was intended.

'It is of the essence of an express trust that the settlor make a present and unequivocal disposition of the subject property and divest himself of his interest therein.' *Bendix v. Hudson County National Bank*, 142 N.J.Eq. 487, 59 A.2d 253, 256 (E. & A. 1948).

Where the owner of property manifests an intention to transfer it in the future to another person in trust, no trust arises until he subsequently makes the transfer. See also 1 Scott on Trusts (1939), sec. 32, p. 198 et seq.; 89 C.J.S., Trusts, s 63, p. 837; *In re Farrell's Estate*, 110 N.J.Eq. 260, 159 A. 617 (Prerog. 1932); *DeMott v. National Bank of New Jersey*, 118 N.J.Eq. 396, 179 A. 470 (Ch. 1935); *Howard Savings Institution v. Baronych,* 8 N.J.Super. 599, 73 A.2d 853 (Ch.1950)
.
In the present case, it is patent that at any time prior to March 3, 1952 the creator could have destroyed the trust document and refused to deliver the stock certificate, and that no trust would have arisen. Since the trustee did not accept the trust until March 3, 1952 and the subject matter thereof was not delivered to him until that date, it is here held that no trust was in existence at the time of the execution of the will.

It is unnecessary to here conclude whether the doctrine of incorporation by reference has been adopted or rejected in New Jersey, since in any event one of the essential elements is lacking, i.e., the existence of a valid trust on the date of the execution of the will.

In the light of the foregoing, it is unnecessary to determine plaintiff's fourth contention, i.e., whether the trust was revoked during testator's lifetime.

It therefore becomes necessary to determine whether the Inter vivos trust agreement may be resorted to upon the theory of 'independent significance.' Unfortunately, the doctrines of incorporation by reference and independent significance are not too clearly distinguished in many cases, and are frequently confused. Such consequence is perhaps a reasonably anticipated result of their very nature since, as stated in *In re Fowles' Will*, 222 N.Y. 222, 118 N.E. 611, 613 (Ct. App. 1918), they 'run into each other by almost imperceptible gradations.' Basically, this doctrine of independent significance concerns itself with whether one may look to a non-testamentary instrument in order to add significance to the terms of a will, and not whether such instrument constitutes the will of the testator. Under this theory the testator may make some extraneous act instrumental in determining the recipients or subjects of the disposition. The sole and primary purpose of such an act is other than the control of the disposition under the will, though that may be an effect resulting from the act. The test is whether the facts have a primary significance apart from the disposition of the property bequeathed. In *In re Rausch's Will*, 258 N.Y. 327, 179 N.E. 755, 757, 80 A.L.R. 98 (Ct.App. 1932), Justice Cardozo stated:

> 'We exclude the will that remits us to other words of promise, the expression of a plan or purpose inchoate and imperfect.'

The distinction drawn between these two doctrines has been stated to be 'documents expressing the terms of the bequest and documents identifying the thing intended to be bequeathed.' Thus, a

bequest to 'heirs' or 'children' of a named person, or to 'persons who are in my employ,' or of property as 'money in banks,' require a resort to extrinsic evidence for the ascertainment of the identity of the person or property to which reference is made and are valid.

On the other hand, the disposition is invalid where the facts from which it is to be ascertained have no independent significance; thus a disposition in favor of such persons as may be named in an unattested memorandum, or such property as may be designated in such a memorandum, is invalid, since the designation in the memorandum has no significance apart from the disposition of the property by the will. 1 Scott on Trusts (1939), sec. 54.2, p. 292; *In re Fowles' Will*, 222 N.Y. 222, 118 N.E. 611 (Ct.App. 1918); *In re Rausch's Will*, 258 N.Y. 327, 179 N.E. 755, 757, 80 A.L.R. 98 (Ct.App. 1932); Clapp, Wills and Administration (in 5 N.H. Practice (1950)), sec. 48, p. 121.

In the matter Sub judice resort is sought to the Inter vivos trust in order to ascertain the disposition of the property, the terms of the bequest. The testator attempted to dispose of his residue by a non-testamentary instrument. Such a gift is invalid, as the trust agreement has no independent significance, as above defined.

It follows that since the gift of the residue is invalid, it passes as if the testator had died intestate. *Smith v. Smith*, 54 N.J.Eq. 1, 32 A. 1069 (Ch. 1895), affirmed 55 N.J.Eq. 821, 41 A. 1116 (E. & A. 1896); *Hyde's Executors v. Hyde*, 64 N.J.Eq. 6, 53 A. 593 (Ch. 1902); *Mills v. Montclair Trust Co.*, 139 N.J.Eq. 56, 49 A.2d 889 (Ch. 1946).

Judgment will be entered in accordance with the foregoing.

13.2.2 Description and Intent

Clark v. Greenhalge, 582 N.E.2d 949 (Mass. 1991)

NOLAN, Justice.

We consider in this case whether a probate judge correctly concluded that specific, written bequests of personal property contained in a notebook maintained by a testatrix were incorporated by reference into the terms of the testatrix's will.

We set forth the relevant facts as found by the probate judge. The testatrix, Helen Nesmith, duly executed a will in 1977, which named her cousin, Frederic T. Greenhalge, II, as executor of her estate. The will further identified Greenhalge as the principal beneficiary of the estate, entitling him to receive all of Helen Nesmith's tangible personal property upon her death except those items which she "designate[d] by a memorandum left by [her] and known to [Greenhalge], or in accordance with [her] known wishes," to be given to others living at the time of her death. Among Helen Nesmith's possessions was a large oil painting of a farm scene signed by T.H. Muckley and dated 1833. The value of the painting, as assessed for estate tax purposes, was $1,800.00.

In 1972, Greenhalge assisted Helen Nesmith in drafting a document entitled "MEMORANDUM" and identified as "a list of items of personal property prepared with Miss Helen Nesmith upon

September 5, 1972, for the guidance of myself in the distribution of personal tangible property." This list consisted of forty-nine specific bequests of Ms. Nesmith's tangible personal property. In 1976, Helen Nesmith modified the 1972 list by interlineations, additions and deletions. Neither edition of the list involved a bequest of the farm scene painting.

Ms. Nesmith kept a plastic-covered notebook in the drawer of a desk in her study. She periodically made entries in this notebook, which bore the title "List to be given Helen Nesmith 1979." One such entry read: "Ginny Clark farm picture hanging over fireplace. Ma's room." Imogene Conway and Joan Dragoumanos, Ms. Nesmith's private home care nurses, knew of the existence of the notebook and had observed Helen Nesmith write in it. On several occasions, Helen Nesmith orally expressed to these nurses her intentions regarding the disposition of particular pieces of her property upon her death, including the farm scene painting. Helen Nesmith told Conway and Dragoumanos that the farm scene painting was to be given to Virginia Clark, upon Helen Nesmith's death.

Virginia Clark and Helen Nesmith first became acquainted in or about 1940. The women lived next door to each other for approximately ten years (1945 through 1955), during which time they enjoyed a close friendship. The Nesmith-Clark friendship remained constant through the years. In more recent years, Ms. Clark frequently spent time at Ms. Nesmith's home, often visiting Helen Nesmith while she rested in the room which originally was her mother's bedroom. The farm scene painting hung in this room above the fireplace. Virginia Clark openly admired the picture.

According to Ms. Clark, sometime during either January or February of 1980, Helen Nesmith told Ms. Clark that the farm scene painting would belong to Ms. Clark after Helen Nesmith's death. Helen Nesmith then mentioned to Virginia Clark that she would record this gift in a book she kept for the purpose of memorializing her wishes with respect to the disposition of certain of her belongings.[91] After that conversation, Helen Nesmith often alluded to the fact that Ms. Clark someday would own the farm scene painting.

Ms. Nesmith executed two codicils to her 1977 will: one on May 30, 1980, and a second on October 23, 1980. The codicils amended certain bequests and deleted others, while ratifying the will in all other respects.

Greenhalge received Helen Nesmith's notebook on or shortly after January 28, 1986, the date of Ms. Nesmith's death. Thereafter, Greenhalge, as executor, distributed Ms. Nesmith's property in accordance with the will as amended, the 1972 memorandum as amended in 1976, and certain of the provisions contained in the notebook.[92] Greenhalge refused, however, to deliver the farm scene painting to Virginia Clark because the painting interested him and he wanted to keep it. Mr. Greenhalge claimed that he was not bound to give effect to the expressions of Helen Nesmith's

[91]According to Margaret Young, another nurse employed by Ms. Nesmith, Ms. Nesmith asked Ms. Young to "print[ ] in [the] notebook, beneath [her] own handwriting, 'Ginny Clark painting over fireplace in mother's bedroom.' " Ms. Young complied with this request. Ms. Young stated that Ms. Nesmith's express purpose in having Ms. Young record this statement in the notebook was "to insure that [Greenhalge] would know that she wanted Ginny Clark to have that particular painting."

[92]Helen Nesmith's will provided that Virginia Clark and her husband, Peter Hayden Clark, receive $20,000.00 upon Helen Nesmith's death. Under the terms of the 1972 memorandum, as amended in 1976, Helen Nesmith also bequeathed to Virginia Clark a portrait of Isabel Nesmith, Helen Nesmith's sister with whom Virginia Clark had been acquainted. Greenhalge honored these bequests and delivered the money and painting to Virginia Clark.

wishes and intentions stated in the notebook, particularly as to the disposition of the farm scene painting. Notwithstanding this opinion, Greenhalge distributed to himself all of the property bequeathed to him in the notebook. Ms. Clark thereafter commenced an action against Mr. Greenhalge seeking to compel him to deliver the farm scene painting to her.

The probate judge found that Helen Nesmith wanted Ms. Clark to have the farm scene painting. The judge concluded that Helen Nesmith's notebook qualified as a "memorandum" of her known wishes with respect to the distribution of her tangible personal property, within the meaning of Article Fifth of Helen Nesmith's will.[93] The judge further found that the notebook was in existence at the time of the execution of the 1980 codicils, which ratified the language of Article Fifth in its entirety. Based on these findings, the judge ruled that the notebook was incorporated by reference into the terms of the will. *Newton v. Seaman's Friend Soc'y*, 130 Mass. 91, 93 (1881). The judge awarded the painting to Ms. Clark.

The Appeals Court affirmed the probate judge's decision in an unpublished memorandum and order, 30 Mass. App. Ct. 1109, 570 N.E.2d 184 (1991). We allowed the appellee's petition for further appellate review and now hold that the probate judge correctly awarded the painting to Ms. Clark.

A properly executed will may incorporate by reference into its provisions any "document or paper not so executed and witnessed, whether the paper referred to be in the form of ... a mere list or memorandum, ... if it was in existence at the time of the execution of the will, and is identified by clear and satisfactory proof as the paper referred to therein." *Newton v. Seaman's Friend Soc'y, supra* at 93. The parties agree that the document entitled "memorandum," dated 1972 and amended in 1976, was in existence as of the date of the execution of Helen Nesmith's will. The parties further agree that this document is a memorandum regarding the distribution of certain items of Helen Nesmith's tangible personal property upon her death, as identified in Article Fifth of her will. There is no dispute, therefore, that the 1972 memorandum was incorporated by reference into the terms of the will. *Newton, supra.*

The parties do not agree, however, as to whether the documentation contained in the notebook, dated 1979, similarly was incorporated into the will through the language of Article Fifth. Greenhalge advances several arguments to support his contention that the purported bequest of the farm scene painting written in the notebook was not incorporated into the will and thus fails as a testamentary devise. The points raised by Greenhalge in this regard are not persuasive. First, Greenhalge contends that the judge wrongly concluded that the notebook could be considered a "memorandum" within the meaning of Article Fifth, because it is not specifically identified as a "memorandum." Such a literal interpretation of the language and meaning of Article Fifth is not appropriate.

"The 'cardinal rule in the interpretation of wills, to which all other rules must bend, is that the intention of the testator shall prevail, provided it is consistent with the rules of law.' " *Boston Safe Deposit & Trust Co. v. Park*, 307 Mass. 255, 259, 29 N.E.2d 977 (1940), quoting *McCurdy v. McCallum,* 186 Mass. 464, 469, 72 N.E. 75 (1904). The intent of the testator is ascertained through

[93]Article Fifth of Helen Nesmith's will reads, in pertinent part, as follows: "that [Greenhalge] distribute such of the tangible property to and among such persons *as I may designate by a memorandum left by me and known to him, or in accordance with my known wishes,* provided that said persons are living at the time of my decease" (emphasis added).

consideration of "the language which [the testatrix] has used to express [her] testamentary designs," *Taft v. Stearns*, 234 Mass. 273, 277, 125 N.E. 570 (1920), as well as the circumstances existing at the time of the execution of the will. *Boston Safe Deposit & Trust Co., supra* 307 Mass. At 259, 29 N.E.2d 977, and cases cited. The circumstances existing at the time of the execution of a codicil to a will are equally relevant, because the codicil serves to ratify the language in the will which has not been altered or affected by the terms of the codicil. *See Taft supra* 234 Mass. at 275-277, 125 N.E. 570.

Applying these principles in the present case, it appears clear that Helen Nesmith intended by the language used in Article Fifth of her will to retain the right to alter and amend the bequests of tangible personal property in her will, without having to amend formally the will. The text of Article Fifth provides a mechanism by which Helen Nesmith could accomplish the result she desired; i.e., by expressing her wishes "in a memorandum." The statements in the notebook unquestionably reflect Helen Nesmith's exercise of her retained right to restructure the distribution of her tangible personal property upon her death. That the notebook is not entitled "memorandum" is of no consequence, since its apparent purpose is consistent with that of a memorandum under Article Fifth: It is a written instrument which is intended to guide Greenhalge in "distribut[ing] such of [Helen Nesmith's] tangible personal property to and among ... persons [who] are living at the time of her decease." In this connection, the distinction between the notebook and "a memorandum" is illusory.

The appellant acknowledges that the subject documentation in the notebook establishes that Helen Nesmith wanted Virginia Clark to receive the farm scene painting upon Ms. Nesmith's death. The appellant argues, however, that the notebook cannot take effect as a testamentary instrument under Article Fifth, because the language of Article Fifth limits its application to "a" memorandum, or the 1972 memorandum. We reject this strict construction of Article Fifth. The language of Article Fifth does not preclude the existence of more than one memorandum which serves the intended purpose of that article. As previously suggested, the phrase "a memorandum" in Article Fifth appears as an expression of the manner in which Helen Nesmith could exercise her right to alter her will after its execution, but it does not denote a requirement that she do so within a particular format. To construe narrowly Article Fifth and to exclude the possibility that Helen Nesmith drafted the notebook contents as "a memorandum" under that Article, would undermine our long-standing policy of interpreting wills in a manner which best carries out the known wishes of the testatrix. *See Boston Safe Deposit & Trust Co., supra.* The evidence supports the conclusion that Helen Nesmith intended that the bequests in her notebook be accorded the same power and effect as those contained in the 1972 memorandum under Article Fifth. We conclude, therefore, that the judge properly accepted the notebook as a memorandum of Helen Nesmith's known wishes as referenced in Article Fifth of her will.

The appellant also contends that the judge erred in finding that Helen Nesmith intended to incorporate the notebook into her will, since the evidence established, at most, that she intended to bequeath the painting to Clark, and not that she intended to incorporate the notebook into her will. Our review of the judge's findings on this point, which is limited to a consideration of whether such findings are "clearly erroneous," proves the appellant argument to be without merit. *First Pa. Mortgage Trust v. Dorchester Sav. Bank*, 395 Mass. 614, 621, 481 N.E.2d 1132 (1985). The judge found that Helen Nesmith drafted the notebook contents with the expectation that Greenhalge would distribute the property accordingly. The judge further found that the notebook was in existence on the dates Helen Nesmith executed the codicils to her will, which affirmed the language of Article Fifth, and that it thereby was incorporated into the will pursuant to the language and spirit of Article

Fifth. It is clear that the judge fairly construed the evidence in reaching the determination that Helen Nesmith intended the notebook to serve as a memorandum of her wishes as contemplated under Article Fifth of her will.

Lastly, the appellant complains that the notebook fails to meet the specific requirements of a memorandum under Article Fifth of the will, because it was not "known to him" until after Helen Nesmith's death. For this reason, Greenhalge states that the judge improperly ruled that the notebook was incorporated into the will. One of Helen Nesmith's nurses testified, however, that Greenhalge was aware of the notebook and its contents, and that he at no time made an effort to determine the validity of the bequest of the farm scene painting to Virginia Clark as stated therein. There is ample support in the record, therefore, to support the judge's conclusion that the notebook met the criteria set forth in Article Fifth regarding memoranda.

We note, as did the Appeals Court, that "one who seeks equity must do equity and that a court will not permit its equitable powers to be employed to accomplish an injustice." *Pitts v. Halifax Country Club, Inc.,* 19 Mass.App.Ct. 525, 533, 476 N.E.2d 222 (1985). To this point, we remark that Greenhalge's conduct in handling this controversy fell short of the standard imposed by common social norms, not to mention the standard of conduct attending his fiduciary responsibility as executor, particularly with respect to his selective distribution of Helen Nesmith's assets. We can discern no reason in the record as to why this matter had to proceed along the protracted and costly route that it did.

Judgment affirmed.

Problems

1. On March 13, 2015, Harriet executed a will containing the following bequests: "$100,000 to Louise; house to Donna; residue to persons named in the list I left taped to my refrigerator." After Harriet's death, her executor found five sheets of paper attached to the refrigerator. Each sheet contained the name of several persons. One sheet included the name of Polly Davis. Polly wants to share in the residue. Can Polly successfully use the doctrine of incorporation by reference to get her wish? If Polly can prove that Harriet promised her a portion of her estate will she be able to inherit?

2. On January 15, 2012, Thomas included a clause in his will stating that he wanted the items listed in his red notebook to be incorporated into his will. The notebook contained the following items: "Jan. 14, 2010-car to Jean; March 26, 2011-lake cabin to Greg; Dec. 25, 2012-mink coat to Martha; Feb. 17, 2013-painting with the purple doves to Gayle." Will the bequests in the notebook be incorporated into Thomas' will?

3. On May 10, 2011, Warren mailed a letter to David stating, "There are some items I want to leave you when I die. In particular, I want you to have my baseball season tickets, my time share in Miami, and my car collection." On May 12, 2011, Warren executed his will. Will the contents of the letter be incorporated into Warren's will.

4. On March 3, 2013, Simon told his niece, Nicole, "If you finish college, I will leave you a few things in my will. I have written a list of the things I want you to have in my Bible." On June 13, 2013, Simon executed his will. On October 30, 2014, Simon died. After his death, Simon's executor

found the following list in his Bible: "Nikki, you deserve to have my red Mustang convertible, my Apple shares, $50,000 and my condo in New York." Will the information contained in the Bible be incorporated into Simon's will?

13.3 Integration

The average will consists of more than one page. A prudent attorney usually has the client place his or her initials on all the pages of the will. In the alternative, the attorney may clip or staple the pages of the will together. One or both of these actions ensures that the probate court knows the complete contents of the testator's will. Nonetheless, in some cases, courts have to rely on the doctrine of integration to carry out the testator's intent. Under the doctrine of integration, in order for a paper to be considered as part of the will (1) it must be present at the time of execution and (2) it must be intended to be a part of the will.

In re Morrison's Estate, 220 P.2d 413 (Cal. Ct. App. 1950)

MUSSELL, Justice.

Appellants Ruth Rogers, Marjorie W. Phipps, Gladys Morrison, Lloyd Hanck and Mrs. J. Breckenridge are legatees and devisees named in a codicil to the will of Wilton M. Morrison and appeal from the order of the trial court denying its admission to probate.

From the settled statement, in lieu of a reporter's transcript and clerk's transcript, it appears that Wilton M. Morrison died in the city of San Diego on April 10, 1949. The Security Trust and Savings Bank of that city duly filed a petition for probate of will and codicil and deposited with the county clerk a formal typewritten and witnessed will bearing date December 6, 1948; also three documents in the handwriting of the decedent. The petition of the bank asked that the formal will be admitted to probate and that an adjudication be made by the court whether the three documents in the handwriting of the decedent constituted a valid holographic codicil to the last will and testament of the decedent. The trial court, after hearing, admitted the formal will to probate and found and decreed that the said three documents did not constitute a valid holographic codicil to the last will and testament of the decedent and said writings were denied admission to probate. The sole question presented is whether the three documents constitute a valid codicil to the formal will of decedent.

It further appears from the settled statement that the decedent, for several months prior to his death on April 10, 1949, was suffering from cancer. On April 9, 1949, he was aware of his condition and in the afternoon of that day requested his friend and companion, Lloyd Hanck, to communicate with his lawyer, who had prepared the will of December 6, 1948. The attorney could not be reached. Between 2:00 and 3:00 o'clock in the afternoon of April 9th decedent had friends visit him at his apartment, listened to a broadcast of a baseball game and discussed the game with his friend, Lloyd Hanck. At about 3:00 o'clock Mr. Morrison complained, stating that he was not feeling well, and in the evening of that day, in the presence of his wife, Hazel Morrison, and Lloyd Hanck, decedent requested his wife to get him a pencil and a pad of paper. She handed these to him and he started writing on the top sheet, using a cushion in his lap for support. He requested Lloyd Hanck to move his seat as he wanted him to act as a witness. Decedent completed the writing in the course of

twenty to thirty minutes, during which he paused frequently. He produced either from his pocket or from the writing pad a second sheet of paper. When the decedent finished writing, he affixed his signature to the top sheet and Mrs. Morrison and Mr. Hanck signed it as witnesses. While decedent was writing on the top sheet, Mr. Hanck observed that he 'consulted with' some other paper while he was writing on the top sheet on the tablet and that the other sheet was underneath it; that decedent 'had something under the top piece of paper on the tablet but it was not apparent whether he was writing on it or studying it'. The decedent held two pieces of paper when he folded them and put them in an envelope, sealed it and gave it to Mr. Hanck. He then said to Mr. Hanck: 'Take it down to the bank and give it to Mr. Sutherland the first thing Monday morning. I might not be here. I might be dead'. He said 'It was something for Hanck and the nurse and he hoped he would get it'.

Subsequent to decedent's death on April 10, 1949, there was delivered to the bank a sealed envelope upon which there was written in the handwriting of decedent:

'April 9 1949
Security Trust & Sav Bank
From W. M. Morrison'.

It is conceded that the envelope and the writing thereon is not a part of the codicil. The envelope, when opened, contained two unnumbered sheets of paper, each in the handwriting of the decedent. The larger sheet of paper, dated, written and signed in the handwriting of decedent, and also bearing the signatures of Hazel M. Morrison and Lloyd A. Hanck, is as follows:

'To Whom It May Concern In San Diego April the 9th 1949

'I mean for all of this to be in my 'Will' that is now in keeping at the Security Trust and Savings Bank. Well realizing that this is written under poor conditions it is only to help these people

'Wilton M. Morrison
Signed

'Witness
Hazel M. Morrison

Witness
Lloyd A. Hanck'

The second sheet contained the names of appellants and others with certain monetary sums set opposite their respective names. This document is also in the handwriting of the decedent and reads as follows:

”Mrs. Merchant	2000.00
Ed & Ova	500.00
Sister	500.00
Sister	500.00
Ruth	1000.00
Marj	.....
Gladys	5000.00
Lloyd Hanck	1000.00
Nurse Mrs. Ellis	300.00
Mrs. J. Breckenridge	500.00
Mr. & Mrs. Green	1000.00
Farm all to 3 Sis	.....
All personal to Judy	.....

Mr. Sutherland was and is president of the Security Trust and Savings Bank of San Diego, executor named in the will of December 6, 1948, which was in the possession of Mr. Morrison's attorney. Decedent died Sunday morning, April 10, 1949, and the envelope, still sealed, was delivered to decedent's attorney.

Mrs. Morrison testified that the first time she saw the second sheet containing the list of names was when it was shown to her at the bank after her husband had passed away. She stated that in the evening of April 9, 1949, she did not see any piece of paper with any writing of the decedent upon it prior to the death of her husband except the one which she signed as a witness; that she did see the decedent put the paper which he had signed in an envelope; that he also took a folded paper out of his pocket and put it in the envelope at the same time.

Appellants contend that the principle of integration applies to the questioned documents and that the decision of the trial court is contrary to the law as stated in In *re Estate of Dumas*, 34 Cal.2d 406, 210 P.2d 697. We conclude that appellants' contention is correct.

As was said in *In re Estate of Wunderle*, 30 Cal. 2d 274, 281, 181 P.2d 874, 878: 'In the law of wills, integration, as distinguished from incorporation by reference, occurs when there is no reference to a

distinctly extraneous document, but it is clear that two or more separate writings are intended by the testator to be his will. (citations omitted). Thus several writings, connected by sequence of thought (*In re Estate of Swendsen, supra*; *In re Estate of Johnston*, 64 Cal.App. 197, 221 P. 382), folded together (*In re Estate of Merryfield*, 167 Cal. 729, 141 P. 259), or physically forming one document (*In re Estate of Clisby, supra;* see, *In re Estate of Skerrett*, 67 Cal. 585, 8 P. 181), have been admitted to probate as constituting an holographic will.'

This rule is quoted in *In re Estate of Dumas, supra*, 34 Cal.2d at page 406, 210 P.2d 697. In the *Dumas* case, the instruments admitted to probate consisted of three papers, all in the handwriting of the testatrix. The first page was written on January 20, 1935, in a 'greenish-blue' colored ink. It was dated at the top and headed 'The Last Will and Testament of Nellie Dumas.' Following customary recitals of soundness of mind, etc., it read 'The following bequests are to be given my friends herein named.' The executors were named and the document stated 'In testimony I set my name this 20th day of January, 1935' and was signed Nellie Dumas and her address. A blank space of several inches followed thereafter. The second and third pages were written nine years after the first page and were in black ink. Minute spots of greenish-blue ink appeared on the reverse side of the third page. The second page was completely filled with bequests of mentioned property to various named persons and there was an interlineation on one item that was made by the testatrix sometime after the second and third sheets were written. The second page was neither dated nor signed and the third concluded with the bequests, covering about three-fourths of the paper, at which place it was 'Signed Nellie Dumas' and her address. No date appeared thereon. All papers remained in the possession of the testatrix at all times until April 3, 1947. On that date the decedent placed the envelope containing the papers in a white envelope, sealed the latter and handed it to a roomer in her home, with instructions to deliver it in decedent's safety deposit box, where it remained until after her death. The three sheets in the envelope were not mechanically fastened together but were folded in a unit in order.

The contestants urged that the first page was a complete will in itself and that the second and third sheets were, in effect, codicils or new wills, but ineffective as such because the second sheet was neither dated nor signed and the third was not dated, both requirements of an holographic will.
The court held that the rule of integration was applicable rather than the principle of incorporation by reference and the order of the trial court admitting the papers to probate as the holographic will of the decedent was affirmed.

In the instant case, it is quite clear that the two writings were intended by the testator to be his will. The testator stated in the first sheet of the codicil that he meant 'all of this' to be in his will. These words are meaningless unless considered in connection with the second sheet containing the names of the intended beneficiaries. The statement that the document was written under poor conditions and 'only to help these people' is likewise meaningless without reference to the names of the people he wished to help, which are set forth on the second sheet. It is quite evident that the second sheet was in its present form and was in the testator's hands when the accompanying sheet was signed and witnesses. It is also quite evident that both documents were complete in their present form and were in decedent's custody at the time the signatures were affixed and that no change was made in them thereafter. Both the subscribing witnesses saw the decedent put both pieces of paper in the envelope, seal and deliver it for transmittal to the bank.

While the witnesses did not see decedent write on the second sheet, that circumstance may well have been occasioned by decedent's desire that the exact amounts thereon stated he kept from his wife

and his friend. Decedent did state, however, that there was something for Hanck and the nurse, which statement can only be explained by the fact that Hanck and the nurse were both named in the second sheet.

Both sheets of paper are admittedly in the handwriting of decedent. They were written with a pencil. The appearance of the writing on the second sheet indicates that it was written 'under poor conditions' as was the witnesses writing. This and other circumstances indicate that both writings were completed at or about the same time. The two writings are connected by sequence of thought and plainly indicate that they were both intended by the testator to constitute a codicil to his will.

The respondent's contention that the decision in this matter involves the principle of incorporation by reference and not integration is without merit.

Order reversed.

Problems

1. On November 2, 2015, John executed a three-page will. On November 10, 2015, John's attorney discovered a typo on the second page of the will. The attorney had his wife re-type the second page and substituted it for the one that was originally attached. Is the re-typed page a part of John's will?

2. On April 14, 2014, Karen executed a one page will. After the will was signed and witnessed, Karen stapled a second sheet to it, folded the two pages and put them in an envelope. Then, she had her sister mail the envelope to her attorney. Is the second sheet a part of Karen's will?

3. On October 18, 2015, Malcolm executed a will consisting of ten pages. Malcolm gave the will to his attorney for safe keeping. On November 2, 2015, Malcolm mailed his attorney two pages with a note saying, "please add these pages to my will." Are the two pages a part of Malcolm's will?

13.4 Republication by Codicil

Restatement (Third) of Property (Wills & Don. Trans.) § 3.4 (1999)

A will is treated as if it were executed when its most recent codicil was executed, whether or not the codicil expressly republishes the prior will, unless the effect of so treating it would be inconsistent with the testator's intent.

Most jurisdictions have adopted some version of the above-stated rule. A codicil is a supplement or an addition to a will. Even if the testator refers to the instrument as a will, courts will treat it as a codicil if it does not make a complete disposition of the testator's property. The revocation of a codicil does not revoke a will. However, the revocation of a will revokes all of its codicils.

Example:

On March 4, 2014, T executed a will stating, "I leave my entire estate to A".
On December 10, 2015, T executed a writing stating, "I leave my house to B."

Explanation:

The second instrument T executed was a codicil. As a result, B gets the house and A takes the rest of the estate. If T revokes the second instrument, A gets the entire estate and B gets nothing. If T revokes the will, neither A nor B get any part of the estate.

When the testator indicates to the witnesses that the document he or she is signing or has signed is meant to be the testator's will, the testator publishes the will. The publication takes place on the date that the will is executed. In the example above, the testator's will was published on March 4, 2014. Under the doctrine of republication by codicil, the law treats a validly executed will as republished as the date of the codicil. Thus, in the example set out above, the testator's will was republished on December 10, 2015. The doctrine of republication by codicil interacts with the doctrine of incorporation by reference. Consider the next examples.

Example:

On July 8, 2015, T executed a will that included a clause stating, "I would like the items listed in my journal to be incorporated by reference into my will." The date on the journal is August 10, 2015.

Explanation:

Because the journal was not in existence at the time that the will was executed, it cannot be incorporated into the will by reference.

Example:

On July 8, 2014, T executed a will that included a clause stating, "I would like the items listed in my journal to be incorporated by reference into my will." The date on the journal is August 10, 2014. On September 15, 2014, T executed the following codicil to the will, "I would like to leave $50,000 in trust for my granddaughter, Brittany."

Explanation:

The will is republished on September 15, 2014 when the codicil was executed. Hence, the will is treated as if it was executed on September 15, 2014. As a result, the journal was in existence at the time the will was executed, so it can be incorporated by reference into the will.

A codicil cannot republish a will that has not been validly executed.

Example:

On November 23, 2014, Devon signed his will in front of one witness. Because the jurisdiction required two witnesses and did not recognize holographic wills Devon's will was not validly

executed. On November 30, 2014, Devon executed a codicil to his will leaving his farm to his son James.

Explanation:

Since the will was not validly executed, it could not be republished by the codicil, so Devon died intestate. If the will was validly executed but invalidated because Devon was unduly influenced, it could be republished by codicil.

13.5 Acts of Independent Significance

§ 4-512. Events of Independent Significance.

A will may dispose of property by reference to acts and events that have significance apart from their effect upon the dispositions made by the will, whether they occur before or after the execution of the will or before or after the testator's death. The execution or revocation of another individual's will is such an event.

Courts may rely on the doctrine of acts of independent significance to consider outside evidence to determine the disposition of property under a will. This extrinsic evidence is used to show that the changes to the testator's will were the result of nontestamentary acts. The testator's beneficiary or property designations must be identified by reference to acts or events that have a lifetime motive and significance apart from their effect on the will.

Example:

T executed a will stating, "I leave the house that I am living in at my death to my friend, Maxine." At the time the will is executed, T is living in a house worth $200,000. Thus, the value of her bequest to Maxine is $200,000. If T wants to improve the value of her gift to Maxine, she has to modify her will. However, T does not want to go to the trouble of amending her will, so she purchases a new house that is worth $400,000.

Explanation:

Because Maxine is to take the house that T is living in at the time of her death T's actions increase Maxine's bequest by $200,000. The court will not permit T to get around the formalities of the Wills Act. Because of T's testamentary motive the court will not recognize the new bequest.

Example:

T executed a will stating, "I leave the house that I am living in at my death to my friend, Maxine." At the time the will is executed, T is living in a house worth $200,000. Thus, the value of her bequest to Maxine is $200,000. T's daughter and her grandchildren move in with T, so T needs a bigger house. T purchases a new house that is worth $400,000.

Explanation:

T's motivation for buying the new house was not to increase the value of her gift to Maxine. She purchased the house for a nontestamentary reason---she needed more room. Therefore, the court will uphold the gift to Maxine.

Problems

1. Gloria executed a will stating "I leave all of the items in the trunk of my car to my sister, Emily." The following items were found in the trunk of Gloria's car when she died: a diamond ring, a tool set, a set of gold rims. Which items will Emily take?

2. Olivia executed a will stating "I leave the contents of my jewelry box to my secretary, Barbara." The box contained the following items: a diamond necklace, a gold bracelet, a Rolex watch, and $40,000. Which items will Barbara take?

3. Brenda executed a will stating, "I leave $100,000 each to the persons who are working for my company at the time of my death." At the time of the execution of her will, Brenda had five employees, Galvin, Scott, Michelle, Crystal and Dale. Prior to her death, Brenda fired Scott and Dale and hired Tina. At the time of her death, Brenda's employees were Galvin, Michelle, Crystal and Tina. Who takes $100,000?

4. Sally executed a will stating, "I leave $10,000 each to my maid, my cook and my butler." At the time of the execution of the will, the maid was Callie, the cook was Lillie and the butler was Gerald. Sally and Lillie had a big falling out, so Sally fired her. In order for Callie to get a bigger portion of the estate, Sally gave her the jobs of cook and maid. Who takes $10,000?

13.6 Interaction Between the Doctrines

It is easy to confuse the doctrines discussed in this chapter. For example, integration and incorporation by reference are similar enough to cause some confusion. It is key to know that the main different is the testator's intent. In cases involving integration, the testator wants a testamentary document that is present at the execution ceremony to be a part of the will. Incorporation by reference may apply when you are dealing with a document that is not testamentary in nature. The document is an independent document that has not been included in the execution process.

Walsh v. St. Joseph's Home For Aged, 303 A.2d 691 (Del.Ch. 1973)

SHORT, Vice Chancellor:

Plaintiffs, the administrators of the estate of James G. Dugan, seek instructions regarding distribution under the decedent's will, which has been duly probated. The defendants are religious

charities and individuals engaged in charitable work to whom the decedent attempted to transfer certain bonds.

The plaintiffs' uncertainty concerns the effect which should be given to the following clause of the decedent's will:

> 'All United States Savings Bonds in safety deposit box #559 (sic) Farmers Bank 10th (sic) and Market Sts. Wilmington Del. to be given to the people and places as marked.'

The decedent's will was found after his death in the safety deposit box mentioned in that clause.* There were also found in the box a number of envelopes containing United States Savings Bonds, and a handwritten list of the names of various individuals and organizations, each of which name is followed by serial numbers, dates and face amounts corresponding to specific bonds. The list was addressed to three persons designated 'executors,' although none are named in the will itself. There were on each of the envelopes handwritten notations obviously designating the intended recipients of the bonds contained in the envelope. Small slips of paper on which were written further specific notations were secured by rubber bands around each bond or group of bonds intended for a given recipient. All of the individuals and organizations designated are engaged in religious, educational, community or charitable work.

It is not contested that the handwriting on the list, envelopes and small slips of paper was the decedent's, nor can it be seriously disputed that the decedent's intent was that the named charities should receive the designated bonds upon his death. The issue is simply whether the decedent succeeded in translating that intent into a legally effective disposition, by way of either an inter vivos or testamentary transfer. I find that he did not.

If the decedent intended to make his gift under his will, as it is clear that he did, then his writings must satisfy the statutory requirement of 12 Del.C. s 102, which provides that:

> 'Every will, whether of personal or real estate, must be in writing and signed by the testator, or by some person subscribing the testator's name in his presence and by his express direction, and attested and subscribed in his presence by two or more credible witnesses, or it shall be void.'

Either the writings by which the testator attempted to effect these gifts satisfy the statute, or they do not, and the court cannot ease the requirements of the statute in deference to the testator's intent. 'The question . . . is not what did the decedent intend to do, but what has he done in the light of the statute. *In re Panousseris' Will*, 2 Storey 21, 151 A.2d 518.

It is obvious that neither the list, the envelopes nor the small slips of paper, whether taken singly or together, satisfy the statute. They are not signed by the decedent and they are not witnessed. But the defendant charities argue that these writings might yet be effective to invoke the testator's intent under either the doctrine of integration or the doctrine of incorporation by reference.

The doctrines are so closely related as to be frequently confused, but it is clear that they are distinct. Under the doctrine of integration a separate writing is concluded to be an actual part of the testator's will; that is, the will is found to consist of several writings, one of which is the particular paper then

at issue. 2 Page The Law of Wills s 19.9; Atkinson on Wills s 79. See *In re Panousseris' Will, supra*, at 523, n. 3. On the other hand, in corporation by reference concerns those situations where the contents of the separate writing are given effect as terms of the will, even though the separate writing itself is not considered a part of the papers constituting the will. 2 Page, *supra*, s 19.17; Atkinson, *supra,* s 80; 57 Am.Jur., Wills, s. 233; see *In re Panousseris' Will, supra*, at 523, n. 3. A common requirement of both of these doctrines is that the separate writing in issue must have been in existence at the time the will was executed. 2 Page, Supra, ss 19.15, 19.24; Atkinson Supra, ss 79, 80; 57 Am.Jur., Wills, s. 233. Otherwise, the separate writing would merely represent an attempt to make a testamentary disposition without conforming to the plain and firm requirements of the statute.

None of the dispositive writings at issue here can be shown to have been in existence at the time the will was executed. It is plain that the list of instructions was not, because it refers to bonds issued long after the will was executed. The writing on the envelopes is either undated or dated well after the date of execution. The small slips of paper bear no dates, and even though they are in some cases affixed to bonds which were clearly in existence as of the date the will was executed, there is simply no evidence of when the slips might have been written and placed on the bonds.

The defendants argue that at least those bonds which were in existence as of the date of the will ought to effectively pass. But the bonds on their face and alone do not constitute any sort of dispositive writing. The writings containing the instructions are the crucial papers, and they cannot be shown to have been in existence at the time the will was executed.

Neither can defendants rely upon the doctrine of facts of independent significance. That doctrine permits reference to some act, fact or writing outside of the will when the testator's intent cannot otherwise the decedent here; on the contrary, the evidence requirement of the doctrine that the facts or writing referred to must have some independent, nontestamentary significance. Page, *supra*, s 19.9. 'If the act referred to is palpably specified for the purpose of allowing subsequent control through unattested act and has no other real significance, the gift is invalid.' Atkinson, *supra,* s 81. The designation of recipients by means of the writings involved here has no significance other than as a means of making an unattested testamentary gift. There is thus no independent, nontestamentary significance to those writings and the doctrine therefore cannot apply.

The separate writings do not conform to the statute, and cannot be given effect under the doctrines of integration, incorporation by reference, or facts having independent significance. Therefore, the testator's attempt to dispose of these bonds by way of a testamentary gift failed.

13.7 Contracts Relating to Wills

People make promises for all kinds of reasons. An elderly person may seek to control his or her family members by promises of bequests. A person may enter into a contract to make a will or to not revoke a will. Those types of arrangements are governed by contract law. Thus, the person seeking to enforce the contract must prove the existence of a valid contract. Even if the person is able to show that the testator breached the contract, the court will probate the will in accordance with the Wills Act. The contract beneficiary is entitled to an award of damages or the imposition of a constructive trust over the relevant portion of the testator's estate.

13.7.1 Contract to Make a Will

Uniform Probate Code § 2-514. Contracts Concerning Succession

A contract to make will or devise, or not to revoke a will or devise, or to dies intestate, if executed after the effective date of this [article], may be established only by (i) provisions of a will stating material provisions of the contract, (ii) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract, or (iii) a writing signed by the decedent evidencing the contract. The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.

Newton v. Lawson, 720 S.E.2d 353 (Ga. Ct. App. 2011)

ADAMS, Judge.

Jason and John B. Lawson III (collectively the "Lawsons") intervened in an existing lawsuit filed by appellant Danny Doy Newton for specific performance of a contract to make a will. The complaint asserted that Syble Lawson promised to leave Newton a life interest in her estate, with the remainder interest to her grandson Jason Lawson, in return for services provided by Newton, giving rise to an enforceable contract to make a will (the "Will Contract"). In these companion appeals, the Lawsons and Newton appeal the trial court's final judgment, following a bench trial, in favor of Christy B. Lawson, as the executor of Syble Lawson's estate.

The Lawsons filed a recent, related appeal in the Supreme Court of Georgia, in which they contested Syble Lawson's 2004 will (the "2004 Will"). The Supreme Court explained the underlying factual basis of that appeal, as follows:

> Appellants John and Jason Lawson are the son and grandson of Syble Lawson, who died in December 2005 at age 73. Her June 2004 will left her entire estate to her other son, appellee Christy "Chris" Lawson; he was also named her executor. Appellants filed a caveat to the probate of this will as did Danny Newton (not a party to this appeal), who lived with testator for the last ten years of her life. Appellants asserted, inter alia, that the 2004 will was the product of undue influence, and Newton petitioned the probate court to probate a document purporting to be testator's 2000 will, under which Newton was left a life estate in testator's realty and the remainder interest went to appellant Jason Lawson, along with certain other bequests. After a hearing, the probate court established the 2004 will as testator's last will and testament and held the 2000 will to be revoked.

Lawson v. Lawson, 288 Ga. 37, 701 S.E.2d 180 (2010). The Supreme Court affirmed the probate court's judgment validating the 2004 Will after finding no evidence in the record that Christy

Lawson exerted undue influence on Syble Lawson. *Id.* at 38(1), 701 S.E.2d 180. In this case, Newton and the Lawsons rely upon Syble Lawson's 2000 Will, a health care Durable Power of Attorney executed the same day, and a handwritten memorandum (the "Notes") discovered after her death to support their claim of a will contract.

The evidence showed that Newton met Syble Lawson in either 1995 or 1996 and subsequently moved into her home. Their relationship lasted until her death in 2005. Newton testified that in 1998 or thereafter Syble Lawson began indicating that she would leave him a life interest in her house (provided he did not remarry); income from her pine straw business; income from a rental trailer; the right to harvest timber, which he would share with Jason Lawson; and the right to receive certain personalty. In consideration for these promises, Newton agreed to care for Syble, to care for her dog and to perform upkeep and maintenance of the house and farm. Newton testified that in 2002 he gave up his job as a maintenance foreman at an apartment complex with a salary of $500 per week to care for Syble Lawson after she was diagnosed with breast cancer. Newton stated that he cared for Syble Lawson until her death and continued to care for her dog following her death. He also remodeled Syble Lawson's rental trailer, added a room onto the house and cleaned and maintained the property. He contends that these actions were undertaken pursuant to the Will Contract.

Newton asserts that the 2000 Will "essentially tracks" his agreement with Syble Lawson. That will left Newton a life estate in the house and the land "provided he lives alone," with a remainder interest in Jason Lawson. Newton also received income from the trailer and pine straw, and he shared the proceeds from any harvested timber with Jason Lawson. The Durable Power of Attorney for health care appointed Jason Lawson, Syble Lawson's neighbor, Corinne McMillian and Newton as her agents for making decisions about her health care. The Notes upon which Newton and the Lawsons rely are undated and unsigned but appear to be in Syble Lawson's handwriting. The Notes largely correspond with the terms of her 2000 Will with regard to the property left to Newton and Jason Lawson, but are not entirely consistent. For example, the Notes indicate that he should share the income from the pine straw with Jason Lawson, while the Will gives him all the income. The Notes also list various bequests of personal property that are not a part of the Will Contract and that differ somewhat from the 2000 Will. Although both the 2000 Will and the Notes indicate that Newton would care for the dog after her death, they do not address any obligations he had prior to her death. Newton did not see either the 2000 Will or the Notes until after Syble Lawson died.

Significantly, although Newton was not named in Syble Lawson's 2004 Will, the evidence at trial demonstrated that he received a $50,000 certificate of deposit ("CD") made payable to him on her death independent of any will. This CD is not mentioned in the Notes, nor is it a part of the Will Contract. Moreover, Newton acknowledged that Syble Lawson paid his living expenses until her death and paid him $100 per month out of the rental income from the trailer.
Christy Lawson testified at trial that on several occasions Syble Lawson stated, in Newton's presence and hearing, that Christy Lawson would inherit the farm. On those occasions, Christy Lawson says that Newton never protested based upon the Will Contract.

"A contract to make a will, supported by valuable consideration, is valid. An oral contract to make a will also may be valid and enforceable if entered into before January 1, 1998.... However, such a contract must be definite, certain, and precise in its terms and its existence must be established beyond a reasonable doubt." (Citations and punctuation omitted.) *Rushin v. Ussery*, 298 Ga.App. 830, 832(1), 681 S.E.2d 263 (2009). Any will contracts entered into on or after January 1, 1998, must be

in writing, signed by the one who undertakes to make a will or testamentary disposition. OCGA § 53-4-30.

1. Because Newton stated that his discussions with Syble Lawson about her estate occurred in 1998 and thereafter, he was required under OCGA § 53-4-30 to prove a written will contract signed by Syble Lawson. Based upon the evidence at trial, the judge concluded, in a well-reasoned opinion, that Newton failed to prove the existence of a written contract to make a will and entered judgment in Christy Lawson's favor. Newton and the Lawsons argue on appeal, however, that the requirements of OCGA § 53-4-30 are met by Syble Lawson's execution of the 2000 Will and her handwritten Notes.

Newton admitted at trial that Syble Lawson and he never signed a written contract memorializing the Will Contract. Nevertheless, Newton and the Lawsons argue that the 2000 Will should be admissible as evidence of that contract, citing Martin v. Turner, 235 Ga. 35, 37(3), 218 S.E.2d 789 (1975). The *Martin* case, decided prior to the enactment of OCGA § 53-4-30, held that "a will, or codicil, written pursuant to an alleged oral contract to make a will, although revoked, is admissible in a suit upon such contract as a writing to help prove the *oral* contract." (Emphasis supplied.) *Id.*

Here, however, Newton and the Lawsons argue that the 2000 Will meets the writing and signature requirements of OCGA § 53-4-30, and thus proffer it as a written contract. Even assuming, without deciding, that the 2000 Will could be considered admissible in this case, it is not a written contract promising to make a will for valuable consideration. Although the 2000 Will was signed by Syble Lawson, nothing in its terms reflects a promise to leave her estate in the manner described in exchange for valuable consideration, and nothing in the language of the will irrevocably binds her to its terms. To the contrary, this Court is bound by the Supreme Court's conclusion that the 2000 Will was revoked upon Syble Lawson's execution of the 2004 Will. *Lawson v. Lawson*, 288 Ga. At 38(1), 701 S.E.2d 180. Moreover, the 2000 Will does not address the obligations Newton says he undertook prior to Syble Lawson's death as consideration for her bequests. We conclude, therefore, that the document is simply what it purports to be: a revocable will reflecting Syble Lawson's testamentary intent at the time she executed it. The Supreme Court determined that Syble Lawson changed her testamentary intent when she executed the 2004 Will. Thus, the 2000 Will cannot be relied upon to fulfill the requirements of OCGA § 53-4-30.

Newton and the Lawsons also argue that the Notes, although unsigned, meet the statutory requirements. Contrary to their argument, however, the requirement that Syble Lawson sign a will contract is not a "useless formality" simply because the Notes are handwritten. The signature is, in fact, a mandatory statutory requirement. "It is axiomatic that when the language of a statute is plain and susceptible of but one construction, the courts have no authority to place a different construction on the statute, but must apply it according to its own terms. *Thompson v. Ga. Power*, 72 Ga.App. 587, 37 S.E.2d 622 (1946)." *Kirk v. Lithonia Mobile Homes*, 181 Ga.App. 533, 536(2), 352 S.E.2d 788 (1987).

In any event, the Notes suffer from the same contractual inadequacies as the 2000 Will because they do not reflect the consideration Newton described as part of the Will Contract, nor do the Notes embody any promise on Syble Lawson's part. Rather, the Notes simply state her wishes as to the disposal of her property and the handling of her estate and contain no language binding her to distribute her property in the manner listed. Moreover, the Notes include distributions to individuals other than Newton and Jason Lawson. Thus, the Notes cannot reasonably be considered the written

embodiment of the Will Contract Newton described.

Accordingly, we agree with the trial court that Newton and the Lawsons did not prove a written will contract meeting the statutory requirements.

2. Newton and the Lawsons also argue that the trial court erred in finding that the equitable exceptions codified at OCGA §§ 23-2-131 and 23-2-132 are not applicable to OCGA § 53-4-30. OCGA § 23-2-131(a) allows for the specific performance of a parole contract as to land "if the defendant admits the contract or if the contract has been so far executed by the party seeking relief and at the instance or by the inducements of the other party that if the contract were abandoned he could not be restored to his former position." OCGA § 23-2-132 provides that "[s]pecific performance will not be decreed of a voluntary agreement or merely gratuitous promise. If, however, possession of lands has been given under such an agreement, upon a meritorious consideration, and valuable improvements have been made upon the faith thereof, equity will decree the performance of the agreement." Newton contends that we should apply these provisions to order the specific performance of the Will Contract based upon his care for Syble Lawson and her dog, as well as his maintenance and upkeep of her property.

"But it is axiomatic that the terms of a specific statute govern over those of a more general statute," and thus the more specific provisions of OCGA § 53-4-30 addressing contracts to make a will control over the more general provisions of OCGA §§ 23-2-131 and 23-2-132 addressing any parole contract as to land and any voluntary agreement or merely gratuitous contract to land, respectively. Thus, even assuming, without deciding, that Newton had been able to prove an oral will contract beyond a reasonable doubt, we conclude that the equitable relief of specific performance is not available as a means of enforcing such a contract.

In any event, as the trial court correctly found, Newton could not meet the requirements of these statutes. "[W]here possession and valuable improvements are relied upon, they must have been by virtue of and on the faith of the oral contract or promise, so as to take the case out of the statute of frauds and constitute the equivalent of a writing by showing acts unequivocally referring to the alleged contract or promise." *Taylor v. Cureton*, 196 Ga. 28, 30)1), 25 S.E.2d 815 (1943). *See also* OCGA § 23-3-131(b) (allowing specific performance based upon "possession alone with valuable improvements, if clearly proved in each case to have been done with reference to the parole contract"). As the trial court noted, Newton

> failed to show that he had possession of [Syble Lawson's] home or pine straw or timber sales and that he made valuable improvements thereto *simply by virtue of [Syble Lawson's] promise* that she would use her will to leave him a life estate in these things. To the contrary, [Newton] testified that [Syble Lawson] paid [him] for the work he performed on the home.... [Newton] further testified that he and [Syble Lawson] were a "loving couple" [who] lived their daily lives together, shared the same bed, vacationed together, and took care of one another and the home they shared. In short, his care was not compelled or contingent upon any promises of [Syble Lawson].

(Emphasis in original.) Therefore, Newton and the Lawsons are not entitled to specific performance of the Will Contract.

Judgments affirmed.

Problems

1. Claudia, a 75 year old widow, was afraid to live in her house by herself. She claimed that the house was haunted and that the noise of the ghosts kept her up at night. Claudia asked her twenty-seven year old neighbor, Tessie, to move in with her. Claudia promised Tessie if she lived with her until she died that she would leave her half of her estate. Tessie sent Claudia the following text message: "I want it to be known that you promised to leave me half of everything you own when you die if I agree to live with you. I will live with you until you die and I expect to receive what you promised." Claudia's response to the text message was "Okay." When Claudia died, she left the following will, "I leave my entire estate to my son, Luke." Claudia's estate was worth $20 million dollars. Tessie filed suit to receive $10 million dollars from Claudia's estate. What is the possible outcome of her case?

2. William, an 87 year old widower, was suffering from numerous ailments. His insurance paid for him to have a home health aide for eight hours two days a week. William wanted more help. Therefore, he told the home health aide, Violet, that if she worked for him for eight hours five days a week, he would leave her $25,000 in his will. On September 7, 2013, Violet agreed to the arrangement and William executed a will leaving her $25,000. After the will was executed, Violet started working for William for eight hours five days a week; the agency only paid her to work two days a week. On February 14, 2014, Violet got married and left the state. William rescinded his contract with Violet. William was assigned Lisa, a new home health aide, who only worked eight hours two days a week. On May 10, 2014, William offered Lisa the same arrangement that he had with Violet. Lisa agreed to the arrangement and started taking care of William for eight hours five days a week. On November 1, 2014, William died without changing the terms of his will. Who is entitled to the $25,000?

13.7.2 Contract Not to Revoke a Will

Married people often execute joint wills or mutual wills. A joint will is one document executed by two people as both their wills. When the first person dies, the will is probate as that person's will. Then, when the second person passes away, the document is probated as that person's will. It is more common for couples to execute mutual wills. Mutual wills are the separate wills of two individuals that contain reciprocal or mirror-image provisions. The making of a joint or mutual will does not give rise to a presumption against revocation. Problems often arise when the surviving person has a change of heart, and revokes the prior will. Consider the following example. A and B are happily married, so they execute a joint will. According to the terms of the will, when A dies, everything goes to B; when B dies, everything goes to C, the child of A and B. A dies and the will is probated, so B gets A's entire estate. A few years after A's death, B marries D. As a result, B revokes his prior will and executes a new one leaving his entire estate to D. C may be angry, but she has no recourse because B did not promise not to revoke the joint will.

A promise not to revoke a will is enforceable if the person seeking to enforce the contract can prove the existence of the contract by clear and convincing evidence. The contract must be valid under contract law to be enforceable.

Problems

1. Jason, a seventy year old widower, wanted to have a sexual relationship with Ellen, his thirty year old secretary. Jason told Ellen that, if she had sex with him, he would leave her one million dollars in his will. Ellen and Jason went to his lawyer and added a codicil to his will leaving Ellen one million dollars. After Ellen made sure that the codicil was valid, she had a sexual relationship with Jason that lasted for about six months. Beverly, Jason's wife, found out about the affair and threatened to divorce him. Jason did not want to divorce his wife because he did not have a prenuptial agreement, so he broke up with Ellen. The next day, he revoked the codicil leaving Ellen one million dollars. When Jason died, Ellen filed suit to get the million dollars. What is the possible outcome of the case?

2. Ted and his wife Marlene executed mutual wills. Marlene wanted to make sure that Jamie, her physically disabled daughter from a previous marriage was taken care of, so she had Ted sign a note promising to always take care of Jamie. Ted's will stated, "I leave all of my property to Marlene." Marlene's will stated, "I leave all of my property to Ted." Without Marlene's knowledge, Ted revoked his will. Ted's new will stated, "I leave half of my property to Marlene and half of my property to my brother, Tim." Ted left the money to Tim, so that he could give it to Millie, Ted's mistress. After Ted died, Marlene filed suit claiming that Ted had violated their contract not to revoke their mutual wills. What is the possible outcome of the case?

Chapter Fourteen: Mistakes and Curative Doctrines

14.1 Introduction

Wills prepared by lawyers are just as susceptible to mistakes as holographic wills. This chapter examines two different types of mistakes---mistakes in drafting and errors in execution. Sometimes there are mistakes in the content of the will that cause the testator's property to be distributed in a way that is inconsistent with what the testator would have wanted. In those types of cases, courts have to decide whether to fix the mistake or to enforce the plain language of the will. As a part of the decision-making process, courts have to determine if it is appropriate to consider extrinsic evidence. Traditionally, in order for a will to be valid, the testator had to strictly comply with the applicable wills statute, and almost any mistake in the execution process invalidated the will. For example, if a testator's will had to be signed by two or more disinterested witnesses, a court would not probate a will that was signed by only one witness. This strict adherence to the requirements of the wills statute often resulted in an outcome that was clearly contrary to the testator's intent. Consequently, some courts have applied curative doctrines to ensure that they carry out the testator's intent. This chapter discusses the two main curative doctrines—substantial compliance and harmless error.

14.2 Drafting Errors

Persons seeking to have wills reformed have faced a heavy burden. Courts are reluctant to rewrite the contents of wills because the testators are not present to state their intentions. One court stated:

> "Courts have no power to reform wills. Hypothetical or imaginary mistakes of testators cannot be corrected. Omissions cannot be supplied. Language cannot be modified to meet unforeseen changes in conditions. The only means for ascertaining the intent of the testator are the words written and the acts done by him." *Sanderson v. Norcross*, 242 Mass. 43, 46, 136 N.E. 170 (1922)

In re Gibb's Estate, 111 N.W.2d 413 (Wis. 1961)

FAIRCHILD, Justice.

1. *The intention of the testators as determined from all the evidence*. The evidence leads irresistibly to the conclusion that Mr. and Mrs. Gibbs intended legacies to respondent, and that the use of the middle initial 'J.' and the address of North 46th street resulted from some sort of mistake.

Respondent testified that he met Mr. Gibbs about 1928. From 1930 to 1949 he was employed as superintendent of a steel warehouse where Mr. Gibbs was his superior. They worked in close contact. Until 1945 the business belonged to the Gibbs Steel Company. In that year the business was sold, but Mr. Gibbs stayed on for four years in a supervisory capacity. Respondent remained with the new company until 1960. After 1949 Mr. Gibbs occasionally visited the plant and saw the respondent when there. From 1935 to 1955 respondent took men occasionally to the Gibbs home

to do necessary work about the place. He also visited there socially several times a year and saw both Mr. and Mrs. Gibbs. Mrs. Gibbs had made a few visits at the plant before 1949 and respondent had seen her there. Mr. Gibbs did not visit respondent's home, although on a few occasions had telephoned him at home. Mr. Gibbs always called respondent 'Bob.'

Miss Krueger, who had been the Gibbs' housekeeper for 24 years up to 1958 and was a legatee under both wills, corroborated much of respondent's testimony. She also testified that Mr. Gibbs had told her he made a will remembering various people including 'the boys at the shop,' referring to them as 'Mike, Ed and Bob.'

Miss Pacius, a legatee under both wills, who had been Mr. Gibbs' private secretary for many years while he was in business, testified to Mr. Gibbs' expressions of high regard for respondent. Another former employee also testified to a similar effect.

Of the individuals named in the wills as legatees, all except two were shown to be relatives of Mr. or Mrs. Gibbs, former employees, neighbors, friends, or children of friends. The two exceptions were named near the end of the will and proof as to them may have been inadvertently omitted. 'Mike,' named in the will, was a warehouse employee under the supervision of respondent.

The attorney who drew several wills for Mr. and Mrs. Gibbs produced copies of most of them. They were similar in outline to the wills admitted to probate except that Mr. Gibbs' wills executed before Mrs. Gibb's death bequeathed his property to her, if she survived. The first ones were drawn in 1953 and each contained a bequest to 'Robert Krause, of Milwaukee, Wisconsin, if he survives me, one per cent (1%).' There was testimony that Mrs. Gibbs' will, executed in August, 1955, contained the same language. In the 1957 wills the same bequest was made to 'Robert Krause, now of 4708 North 46th Street, Milwaukee, Wisconsin.' In several other instances street addresses of legatees were given for the first time in 1957. In the 1958 wills the same bequest was made to 'Robert J. Krause, now of 4708 North 46thStreet, Milwaukee, Wisconsin.' The scrivener also produced a hand-written memorandum given to him by Mr. Gibbs for the purpose of preparing Mr. Gibbs' 1958 will, and the reference on that memorandum corresponding to the Krause bequest is 'Bob, 1%.' Four bequests (to Gruener, Krause, Preuschl and Owen) appear in the same order in each of the wills and are reflected in the memorandum referred to as 'Fred Gruener, Bob, Mike, and Ed.' Gruener, Preuschl and Owen were former employees of Gibbs Steel Company, as was respondent. Owen's residence is given as Jefferson, Wisconsin, in all the wills. In the 1953 wills, the residence of Gruener, Krause and Preuschl was given only as Milwaukee, Wisconsin. At street address was inserted for the first time in each case in the 1957 wills, and repeated in the later ones.

Prior to 1950 respondent had lived at several different locations. From 1950 until April, 1960, he lived at 2325 North Sherman boulevard. We take judicial notice that this address and 4708 North 46thStreet are in the same general section of the city of Milwaukee, and that both are a number of miles distant from the Gibbs' home. We also take judicial notice that the telephone directory for Milwaukee and vicinity listed 14 subscribers by the name of Robert Krause with varying initials in October, 1958, and 15 in October of 1959. The listing for appellant gives his middle initial *J.* as well as his street address.

The only evidence which suggests even a possibility that Mr. or Mrs. Gibbs may have known of appellant may be summarized as follows:

For a time, appellant had a second job as a part time taxi driver, and he recalled an elderly lady who was his passenger on a lengthy taxi trip in June, 1955. He did not recall where he picked her up. He had driven her across the city, waiting for her while she visited in a hospital, and then driven her back across the city. The place where he let her out, however, was not her home. He did not recall that she had given him her name, but she had inquired as to his. They had conversed about the illness of appellant's wife and his working at an extra job in order to make ends meet. She had expressed sympathy and approval of his efforts. Presumably when he was notified that his name appeared in the Gibbs' wills as legatee, he endeavored to find an explanation of his good fortune and concluded that the lady in question must have been Mrs. Gibbs. The 1955 taxi ride, however, could not explain the gift to Robert Krause in the 1953 wills, and it is clear that the same legatee was intended in the Krause bequests in all the wills. Moreover, appellant's description of his taxi passenger differed in several particulars from the description of Mrs. Gibbs given by other witnesses.

2. *Propriety of considering extrinsic evidence*. As stated above, the county court could reach no other conclusion upon consideration of the extrinsic evidence than that Mr. and Mrs. Gibbs intended to designate respondent as their legatee. The difficult question is whether the court could properly consider such evidence in determining testamentary intent.

Under rules as to construction of a will, unless there is ambiguity in the text of the will read in the light of surrounding circumstances, extrinsic evidence is inadmissible for the purpose of determining intent.

A latent ambiguity exists where the language of the will, though clear on its face, is susceptible of more than one meaning, when applied to the extrinsic facts to which it refers.

There are two classes of latent ambiguity. One, where there are two or more persons or things exactly measuring up to the description in the will; the other where no person or thing exactly answers the declarations and descriptions of the will, but two or more persons or things answer the description imperfectly. Extrinsic evidence must be resorted to under these circumstances to identify which of the parties, unspecified with particularity in the will, was intended by the testator.

Had the probated wills used the language of the 1953 wills 'To Robert Krause of Milwaukee,' such terms would have described both appellant and respondent, as well as a number of other people. Upon such ambiguity of the first type above mentioned becoming apparent, extrinsic evidence would be admissible in order to determine which Robert Krause Mr. and Mrs. Gibbs had in mind as their legatee.

Had the will said 'To my former employee, Robert J. Krause of 4708 North 46thStreet,' neither appellant nor respondent would have exactly fulfilled the terms. Latent ambiguity of the second type would thus have appeared, and again extrinsic evidence would be admissible to determine what individual testators had in mind.

The wills containing, as they do, similar bequests to a long list of individuals, each bearing some relationship of blood, friendship, or former employment to Mr. or Mrs. Gibbs, come close to implying that every legatee named has some such relationship. Nevertheless the wills do not refer to Krause as standing in any particular relationship.

The terms of the bequest exactly fit appellant and no one else. There is no ambiguity.

'An ambiguity is not that which may be made doubtful by extrinsic proof tending to show an intention different from that manifested in the will, but it must grow out of the difficulty of identifying the person whose name and description correspond with the terms of the will.'

Under the circumstances before us, can a court properly consider evidence showing that some of the words were used by mistake and should be stricken or disregarded? It is traditional doctrine that wills must not be reformed even in the case of demonstrable mistake. This doctrine doubtless rests upon policy reasons. The courts deem it wise to avoid entertaining claims of disappointed persons who may be able to make very plausible claims of mistake after the testator is no longer able to refute them.

Although the courts subscribe to an inflexible rule against reformation of a will, it seems that they have often strained a point in matters of identification of property or beneficiaries in order to reach a desired result by way of construction. In *Will of Stack*, where the will devised 'Block 64,' the court included part of block 175 in the provision to conform to the unexpressed intent of the testator. In *Will of Boeck*, where the will devised the 'northeast quarter of the northwest quarter' of a section, which was not owned by the testator, the court held such provision passed the southeast quarter of the northwest quarter, to conform to the misexpressed intent of the testator. In *Moseley v. Goodman*, where testator bequeathed property to 'Mrs. Moseley,' the court denied the claim of Mrs. Lenoir Moseley to the gift and held that Mrs. Trimble had been intended by the testator. Mrs. Trimble was known to the testator by the nickname 'Mrs. Moseley.'

In *Miller's Estate*, testator left property to 'William Wilson's children.' Relying on evidence that testator frequently confused William Wilson with his brother Seth, the court held the gift should go to the children of Seth Wilson, who had been intended by the testator. In *Groves v. Culph,* testator devised a remainder interest in part of lot 15 to his daughter. The court, to conform to testator's true intent, included part of lot 16 in this devise. In *Castell v. Togg* and *Geer v. Winds*, the testator omitted a child from his will by mistake. The court inserted in the will the gift which had been intended for the child by the parent. In *Beaumont v. Feld*, a bequest to 'Catharine Earnley' was proven to have been intended for Gertrude Yardley, and was given to the latter, and in *Masters v. Masters*, a gift to 'Mrs. Sawyer' was given to Mrs. Swopper, because testator knew no one by the former name. In the two cases last mentioned, no one with the name given in the will claimed the gift.

We are also aware of the rule which allows a court in probating a will to deny probate to a provision in the document which was included by mistake. British courts will deny probate to a single word, or part of a sentence, thereby completely altering the provided dispositions.

We conclude that details of identification, particularly such matters as middle initials, street addresses, and the like, which are highly susceptible to mistake, particularly in metropolitan areas, should not be accorded such sanctity as to frustrate an otherwise clearly demonstrable intent. Where such details of identification are involved, courts should receive evidence tending to show that a mistake has been made and should disregard the details when the proof establishes to the highest degree of certainty that a mistake was, in fact, made.

We therefore consider that the county court properly disregarded the middle initial and street address, and determined that respondent was the Robert Krause whom testators had in mind.

Orders affirmed.

14.3 Execution Errors

Even if the attorney does a flawless job of drafting a will, problems may occur in the execution process. Courts have to decide whether or not to excuse or correct an obvious execution defect. Some courts take a hard stance and invalidate wills if the testators have not strictly conformed to the will statutes. Other courts are motivated by a desire to carry out the testators' intent, so they read the statutes more liberally. Those courts have relied upon two doctrines to allowed defective wills to be probate.

14.3.1 Strict Compliance

Some courts have refused to give relief to devisees who are negatively impacted by the testator's failure to strictly comply with the requirements set forth in the applicable Wills Act. A court may take that stance even when it is clear that the will is consistent with the testator's wishes. Under this strict compliance approach, a will that does not strictly comply with the formal statutory requirements is invalid. This rule creates a conclusive presumption of invalidity for an imperfectly executed will. As a result, if the instrument is not executed in compliance with every statutory formality, the court will not permit the document to be probated even if there is compelling evidence that the testator intended the document to be his or her will.

In re Pavlinko's Estate, 148 A.2d 528 (Pa. 1959)

BELL, Justice.

Vasil Pavlinko died February 8, 1957; his wife, Hellen, died October 15, 1951. A testamentary writing dated March 9, 1949, which purported to be the will of Hellen Pavlinko, was signed by Vasil Pavlinko, her husband. The residuary legatee named therein, a brother of Hellen, offered the writing for probate as the will of Vasil Pavlinko, but probate was refused. The Orphans' Court, after hearing and argument, affirmed the decision of the Register of Wills.

The facts are unusual and the result very unfortunate. Vasil Pavlinko and Hellen, his wife, retained a lawyer to draw their wills and wished to leave their property to each other. By mistake Hellen signed the will which was prepared for her husband, and Vasil signed the will which was prepared for his wife, each instrument being signed at the end thereof. The lawyer who drew the will and his secretary, Dorothy Zinkham, both signed as witnesses. Miss Zinkham admitted that she was unable to speak the language of Vasil and Hellen, and that no conversation took place between them. The wills were kept by Vasil and Hellen. For some undisclosed reason, Hellen's will was never offered for probate at her death; in this case it was offered merely as an exhibit.

The instrument which was offered for probate was short. It stated:

'I, Hellen Pavlinko, of * * *, do hereby make, publish and declare this to be my Last Will and Testament, * * *.'

In the first paragraph she directed her executor to pay her debts and funeral expenses. In the second paragraph she gave her entire residuary estate to 'my husband, Vasil Pavlinko * * * absolutely'. She then provided:

'Third: If my aforesaid husband, Vasil Pavlinko, should predecease me, then and in that event, I give and bequeath:

'(a) To my brother-in-law, Mike Pavlinko, of McKees Rocks, Pennsylvania, the sum of Two hundred ($200) Dollars.

'(b) To my sister-in-law, Maria Gerber, (nee Pavlinko), of Pittsburgh, Pennsylvania, the sum of Two Hundred ($200) Dollars.

'(c) The rest, residue and remainder of my estate, of whatsoever kind and nature and wheresoever situate, I give, devise and bequeath, absolutely, to my brother, Elias Martin, now residing at 520 Aidyl Avenue, Pittsburgh, Pennsylvania.

'I do hereby nominate, constitute and appoint my husband, Vasil Pavlinko, as Executor of this my Last Will and Testament.' It was then mistakenly signed: 'Vasil Pavlinko [Seal]'.

While no attempt was made to probate, as Vasil's will, the writing which purported to be his will but was signed by Hellen, it could not have been probated as Vasil's will, because it was not signed by him at the end thereof.

The Wills Act of 1947 provides in clear, plain and unmistakable language in § 2: 'Every will, * * * shall be in writing and shall be signed by the testator at the end thereof', 20 P.S. § 180.2, with certain exceptions not here relevant. The Court below correctly held that the paper which recited that it was the will of Hellen Pavlinko and intended and purported to give Hellen's estate to her husband, could not be probated as the will of Vasil and was a nullity.

In order to decide in favor of the residuary legatee, almost the entire will would have to be rewritten. The Court would have to substitute the words 'Vasil Pavlinko' for 'Hellen Pavlinko' and the words 'my wife' wherever the words 'my husband' appear in the will, and the relationship of the contingent residuary legatees would likewise have to be changed. To consider this paper-as written-as Vasil's will, it would give his entire residuary estate to 'my husband, Vasil Pavlinko, absolutely' and 'Third: If my husband, Vasil Pavlinko, should predecease me, then * * * I give and bequeath my residuary estate to my brother, Elias Martin.' The language of this writing, which is signed at the end thereof by Vasil Pavlinko, is unambiguous, clear and unmistakable, and it is obvious that it is a meaningless nullity.

While no authority is needed to demonstrate what is so obvious, there is a case which is directly in point and holds that such a writing cannot be probated as the will of Vasil Pavlinko. This exact situation arose in Alter's Appeal, 67 Pa. 341. The facts are recited in the unanimous opinion of the Court, speaking through Mr. Justice Agnew (at page 344):

'This is a hard case, but it seems to be without a remedy. An aged couple, husband and wife, having no lineal descendants, and each owning property, determined to make their wills in favor of each other, so that the survivor should have all they possessed. Their wills were drawn precisely alike,

mutatis mutandis, and laid down on a table for execution. Each signed a paper, which was duly witnessed by three subscribing witnesses, and the papers were enclosed in separate envelopes, endorsed and sealed up. After the death of George A. Alter, the envelopes were opened and it was found that each had by mistake signed the will of the other. To remedy this error the legislature, by an Act approved the 23rd day of February 1870, conferred authority upon the Register's Court of this county to take proof of the mistake, and proceed as a court of chancery, to reform the will of George A. Alter and decree accordingly. * * * Was the paper signed by George A. Alter his will? Was it capable of being reformed by the Register's Court? The paper drawn up for his will was not a will in law, for it was not 'signed by him at the end thereof,' as the Wills Act requires. The paper he signed was not his will, for it was drawn up for the will of his wife and gave the property to himself. It was insensible and absurd. It is clear, therefore, that he had executed no will, and there was nothing to be reformed. There was a mistake, it is true, but that mistake was the same as if he had signed a blank sheet of paper. He had written his name, but not to his will. He had never signed his will, and the signature where it was, was the same as if he had not written it at all. He therefore died intestate, and his property descended as at law.' The Court further decided that the Legislative Act was void because it had no power to divest estates which were already vested at law on the death of George A. Alter without a will.

How firmly and without exception the Courts have carried out the provisions of the Wills Act, when the language thereof is clear and unmistakable, is further evident from the following authorities: *In re Bryen's Estate*, 328 Pa. 122, 195 A. 17; *In re Churchill's Estate*, 260 Pa. 94, 103 A. 533; *In re Gray's Wills*, 365 Pa. 411, 76 A.2d 169 (1959).

In re Bryen's Estate, 329 Pa. 122, 195 A. 17, a testator received from his lawyer a three page will. He wished to add an additional clause providing for a grandchild. The lawyer thereupon rewrote the last page 'backed and bound together with brass eyelets the first, second and new third page, unnumbered, and inserted the original third page loosely between the last of the fastened pages and the backer.' Bryen executed the loose sheet at the end thereof in the presence of two subscribing witnesses. He then placed the enclosure in his safe deposit box where it was found after his death. The Court held that the instrument could not be probated as Bryen's last will because it was not signed at the end thereof in conformity with the statute, nor could any part or pages thereof be probated as his last will. This Court, speaking through Mr. Justice, later Chief Justice, Stern, said (328 Pa. at page 128, 195 A. at page 20):

'The obvious truth of the matter is that the loose sheet was signed by mistake, * * *. While decedent's mistake is regrettable, it cannot be judicially corrected; the situation thus created must be accepted as it exists. Alter's Appeal, 67 Pa. 341. The question is not what a testator mistakenly thinks he is doing, but what he actually does. *In re Churchill's Estate*, 260 Pa. 94, 100, 103 A. 533; *In re Dietterich's Estate*, 127 Pa.Super. 315, 322, 323, 193 A. 158. It is of paramount importance to uphold the legal requirements as to the execution of wills, so that the possibility of fraud may be reduced to a minimum.'

In re Churchill's Estate, 260 Pa. 94, 103 A. 533, 535, the Court refused to probate Churchill's will, which was written by him. He failed to sign his name 'at what was so clearly the end of the paper as a will. What he did do was to write his name in three blank spaces in the paper, first at the top and then in the testimonium and attestation clauses * * * he said to one of the two attesting witnesses, 'This is my will, I have signed it,' and to the other, 'I wish you to witness my name to a paper,' and subsequently handed it to a physician, saying, 'This is my will, and I want you to keep it for me,' ***

'The decedent may have thought he had made a will, but the statute says he had not. The question is not one of his intention, but of what he actually did, or rather what he failed to do. He failed to sign the paper at the end thereof, and this essential requirement of the statute is not met by the insertion of his name in his own handwriting in three blank spaces in the printed form of the paper which he may have intended to use in executing his will. 'It may happen, even frequently, that genuine wills, namely, wills truly expressing the intentions of the testators, are made without observation of the required forms; and whenever that happens, the genuine intention if frustrated by the act of the Legislature, of which the general object is to give effect to the intention. The courts must consider that the Legislature, having regard to all probable circumstances, has thought it best, and has therefore determined, to run the risk of frustrating the intention sometimes, in preference to the risk of giving effect to or facilitating the formation of spurious wills, by the absence of forms. * * * 'Our Act of 1833 as well as the statute of Victoria, are in part borrowed from the British statute of frauds, two sections of which have been so evaded by judicial construction as to be practically repealed. We do not propose that the act of 1833 shall meet with the same fate. The Legislature have laid down a rule so plain that it cannot be evaded without a clear violation of its terms. No room is left for judicial construction or interpretation. It says a will must be signed at the end thereof, and that's the end of it. We are of opinion that this paper was not a will within the meaning of the act of 1833, and that it was error to admit it to probate."

In re Gray's Will, 365 Pa. 411, 76 A.2d 169, 170, testatrix signed her will 'Mrs. Ella X (her mark) Gray. Witness: Fannie Graff.' Mrs. Anderson was also present and saw Mrs. Gray make her mark, but did not sign her name on the paper as a subscribing witness. The Court said (365 Pa. at pages 414-415, 76 A.2d at page 170):

'The first question that arises is, was this writing of January 22, 1946, a will and if so, was it probatable as such? The learned trial judge found and we agree that this writing was testamentary in character. *In re Davis' Estate*, 275 Pa. 126, 118 A. 645; *Kimmel's Estate*, 278 Pa. 453, 123 A. 405, 31 A.L.R. 678; *In re Wenz's Estate*, 345 Pa. 393, 29 A.2d 13. It is however equally clear that even if it be a will, it is not a valid or probatable will. Section 2, subsection (2) of the Wills Act of April 24, 1947, P.L. 89 provides: 'If the testator is unable to sign his name for any reason, a will to which he makes his mark and to which his name is subscribed in his presence before or after he makes his mark, shall be as valid as though he had signed his name thereto: Provided, He makes his mark in the presence of two witnesses who sign their names to the will in his presence'.'

This Court held that the instrument did not comply with § 2 of the Wills Act of 1947 and could not be probated as Mrs. Gray's will.

Once a Court starts to ignore or alter or rewrite or make exceptions to clear, plain and unmistakable provisions of the Wills Act in order to accomplish equity and justice in that particular case, the Wills Act will become a meaningless, although well intentioned, scrap of paper, and the door will be opened wide to countless fraudulent claims which the Act successfully bars.
Decree affirmed. Each party shall pay their respective costs.

MUSMANNO, Justice (dissenting).

Vasil Pavlinko and his wife, Hellen Pavlinko, being unlettered in English and unlearned in the ways of the law, wisely decided to have an attorney draw up their wills, since they were both approaching the age when reflecting persons must give thought to that voyage from which there is no return.

They explained to the attorney, whose services they sought, that he should draw two wills which would state that when either of the partners had sailed away, the one remaining ashore would become the owner of the property of the departing voyager. Vasil Pavlinko knew but little English. However, his lawyer, fortunately, was well versed in his client's native language, known as Little Russian or Carpathian. The attorney thus discussed the whole matter with his two visitors in their language. He then dictated appropriate wills to his stenographer in English and then, after they had been transcribed, he translated the documents, paragraph by paragraph, to Mr. and Mrs. Pavlinko, who approved of all that he had written. The wills were laid before them and each signed the document purporting to be his or her will. The attorney gave Mrs. Pavlinko the paper she had signed and handed to her husband the paper he had signed. In accordance with customs they had brought with them from the old country, Mrs. Pavlinko turned her paper over to her husband. It did not matter, however, who held the papers since they were complementary of each other. Mrs. Pavlinko left her property to Mr. Pavlinko and Mr. Pavlinko left his property to Mrs. Pavlinko. They also agreed on a common residuary legatee, Elias Martin, the brother of Mrs. Pavlinko.

Mrs. Pavlinko died first, but for some reason her will was not probated. Then Mr. Pavlinko died and Elias Martin came forth to claim his inheritance. The Register of Wills of Allegheny County refused to accept the Vasil Pavlinko will for probate. It now developed for the first time that, despite every care used by her attorney, a strange thing had happened. Mr. Pavlinko had signed his wife's will and Mrs. Pavlinko had signed her husband's will.

At the hearing before the Register of Wills, the will signed by Vasil Pavlinko was introduced as Exhibit No. 1 and the will signed by Hellen Pavlinko was introduced as Exhibit No. 2. The attorney, who had drawn the wills and had witnessed the signatures of the testator and testatrix, testified to what had occurred in his office; his secretary who had typed the wills and had witnessed the signatures, also testified to the events which spelled out the little mishap of the unintentional exchange of the wills.

The Orphans' Court of Allegheny County sustained the action of the Register of Wills. Elias Martin appealed to this Court, which now affirms the lower court and, in doing so, I submit, creates another enigma for the layman to ponder over, regarding the mysterious manner in which the law operates, it wonders to perform. Everyone in this case admits that a mistake was made: an honest, innocent, unambiguous, simple mistake, the innocent, drowsy mistake of a man who sleeps all day and, on awakening, accepts the sunset for the dawn.

Nothing is more common to mankind than mistakes. Volumes, even libraries have been written on mistakes: Mistakes of law and mistakes of fact. In every phase of life, mistakes occur and there are but few people who will not attempt to lend a helping hand to the person who mistakes a step for a landing and falls, or the one who mistakes a nut for a grape and chokes, or the one who steps through a glass so clear that he does not see it. This Court, however, says that it can do nothing for the victim of the mistake in this case, a mistake which was caused through no fault of his own, nor of his intended benefactors.

Next to the love which the Pavlinkos bore to each other, they were devoted to Mrs. Pavlinko's brother, Elias Martin. They wholeheartedly agreed that after they had quitted the earth, this devoted kinsman of theirs should have all that they would leave behind them. No one disputes this brute fact, no one can dispute this granitic, unbudgeable truth. Cannot the law, therefore, dedicated as it is to the truth, and will all its wisdom and majestic power, correct this mistake which cries out for

correction? May the law not untie the loose knot of error which begs to be freed? I know that the law is founded on precedent and in many ways we are bound by the dead hand of the past. But even, with obeisance to precedent, I still do not believe that the medicine of the law is incapable of curing the simple ailment here which has not, because of any passage of time, become aggravated by complications.

We have said more times than there are tombstones in the cemetery where the Pavlinkos lie buried, that the primary rule to be followed in the interpretation of a will is to ascertain the intention of the testator. Can anyone go to the graves of the Pavlinkos and say that we do not know what they meant? They said in English and in Carpathian that they wanted their property to go to Elias Martin. We have also said time without number that the intent of the testator must be gathered from the four corners of his will. Whether it be from the four corners of the will signed by Vasil Pavlinko or whether from the eight corners of the wills signed by Vasil and Hellen Pavlinko, all set out before the court below, the net result is always the same, namely that the residue of the property of the last surviving member of the Pavlinko couple was to go to Elias Martin. In the face of all the pronouncements of the law as to the fidelity with which the intention of the testator must be followed, on what possible basis can we now ignore the intention expressed by the Pavlinkos so clearly, so conclusively, and so all-encompassingly?

The Majority says that there is nothing we can do to effectuate the expressed intention of Vasil Pavlinko. But, I respectfully submit, the Majority does not make a serious effort to effectuate that expressed intent. The Majority contents itself with saying that 'the facts are unusual and the result very unfortunate.' But the results do not need to be unfortunate. *In re King's Will*, 369 Pa. 523, 531, 87 A.2d 469, 474, we said that: 'What offends against an innate sense of justice, decency and fair play offends against good law.' Certainly the results being affirmed by this Court offend against an innate sense of justice. Elias Martin is being turned out of Court when there is no need for such a peremptory eviction. The Majority authorizes the eviction on the basis of a decision rendered by this Court in 1878 in the case of *Alter's Appeal*, 67 Pa. 341. There, wife and husband, also signed wrong papers and the Court in that post-Civil War period, held nothing could be done to correct the error. But even if we say that the Alter decision makes impossible the transferring of the signature of Vasil Pavlinko to the will written in his name, I still do not see how it prevents this Court from enforcing the provision in the will which was signed by Vasil Pavlinko. In the Alter case an attempt was made to reform the will 'by striking off the signature 'Catherine Alter,' and causing the name 'George A. Alter' to be signed thereto' so that the paper so signed could be 'admitted to probate as the will of George A. Alter.' But in our case here, no such substitution is being sought. What Elias Martin seeks is admission to probate of a testamentary writing actually signed by the testator Vasil Pavlinko.

Moreover, in the Alter case, as distinguished from the Pavlinko will, George A. Alter left everything to himself. Even if we accept the Majority's conclusion, based on the Alter case, that all provisions in the Pavlinko will, which refer to himself, must be regarded as nullities, not correctible by parol evidence because they evince no latent ambiguities, it does not follow that the residuary clause must perish. The fact that some of the provisions in the Pavlinko will cannot be executed does not strike down the residuary clause, which is meaningful and stands on its own two feet. We know that one of the very purposes of a residuary clause is to provide a catch-all for undisposed-of or ineffectually disposed-of property.

'A residuary gift carries with it, and is presumed to have been so intended, not only all the estate which remains not specifically disposed of at the time the will is executed, but all that, for any

reason, which is illy disposed of, or fails as to the legatees originally intended. *In re Wood's Estate*, 209 Pa. 16, (57 A. 1103).' (*In re Jull's Estate*, 370 Pa. 434, 442, 88 A.2d 753, 756). (Emphasis supplied.)

And the Wills Act itself specifically provides:

'A devise or bequest not being part of the residuary estate which shall fail or be void because the beneficiary fails to survive the testator or because it is contrary to law or otherwise incapable of taking effect or which has been revoked by the testator or is undisposed of or is released or disclaimed by the beneficiary, if it shall not pass to the issue of the beneficiary under the provisions *** provided for by law, shall be included in the residuary devise or bequest, if any, contained in the will.' (Emphasis supplied.) 20 P.S. § 180.14(9).

The Majority also relies on *In re Bryen's Estate*, 218 Pa. 122, 195 A. 17, 20, but in that case the testator failed to sign the prepared will at the end. He affixed his signature to a page which was 'in effect nothing more than a detached and independent paper not sequentially integrated with the others to form with them a testamentary instrument.' But here, I repeat, there was a complete testamentary instrument signed by Vasil Pavlinko at the end thereof and with testamentary intent.

The Majority calls upon *In re Churchill's Estate*, 260 Pa. 94, 103 A. 533, as further substantiation of its position, but the testator in that case failed to sign the testamentary writing at the end.

And, so far as *In re Gary's Will*, 365 Pa. 411, 76 A.2d 169, additionally cited by the Majority, is concerned, it clearly is not applicable to the facts in the case at bar because, there, the mark of the testator was not made in accordance with the provisions of the Wills Act.

I see no insuperable obstacle to probating the will signed by Vasil Pavlinko. Even though it was originally prepared as the will of his wife, Hellen, he did adopt its testamentary provisions as his own. Some of its provisions are not effective but their ineffectuality in no way bars the legality and validity of the residuary clause which is complete in itself. I would, therefore, probate the paper signed by Vasil Pavlinko. Here, indeed, is a situation where we could, if we wished, consistent with authority and precedent, and without endangering the integrity of the Wills Act, put in to effect the time-honored proverb that 'where there's a will, there's a way.'

In fact, we have here two wills, with signposts unerringly pointing to the just and proper destination, but the Court still cannot find the way.

14.3.2 Substantial Compliance

Relying on the substantial compliance doctrine, the court may treat a defectively executed will as being in conformity with the statutory formalities if the defective execution satisfies the purposes of those formalities. Therefore, if the proponent of the will can prove that the execution process substantially complied with the applicable statutory requirements, the court will permit the will to be probated. This doctrine comes into play when the testator tries to fulfill the mandates of the wills statute. Applying the doctrine involves the court to make a two part inquiry. The court has to ask the following questions: (1) Does the noncomplying document express the decedent's

testamentary intent?; and (2) Does the document sufficiently approximate the wills act formalities to enable the court to conclude that it serves the purposes of the wills act?

Matter of Will of Ranney, 589 A.2d 1339 (N.J. 1991)

POLLOCK, J.

The sole issue is whether an instrument purporting to be a last will and testament that includes the signature of two witnesses on an attached self-proving affidavit, but not on the will itself, should be admitted to probate. At issue is the will of Russell G. Ranney. The Monmouth County Surrogate ordered probate of the will, but the Superior Court, Law Division, Probate Part, reversed, ruling that the will did not contain the signatures of two witnesses as required by N.J.S.A. 3B:3-2. The Appellate Division found that the self-proving affidavit formed part of the will and, therefore, that the witnesses had signed the will as required by the statute. 240 N.J. Super. 337, 573 A.2d 467 (1990). It reversed the judgment of the Law Division and remanded the matter for a plenary hearing on the issue of execution. We granted the contestant's petition for certification, 122 N.J. 163, 584 A.2d 230 (1990), and now affirm the judgment of the Appellate Division.

I

The following facts emerge from the uncontested affidavits submitted in support of probate of the will. On October 26, 1982, Russell and his wife, Betty (now known as Betty McGregor), visited the law offices of Kantor, Mandia, and Schuster to execute their wills. Russell's will consisted of four pages and a fifth page containing a self-proving affidavit, entitled "ACKNOWLEDGMENT AND AFFIDAVIT RELATING TO EXECUTION OF WILL." The pages of Russell's will were neither numbered nor attached before execution. After Russell and Betty had reviewed their wills, they and their attorney, Robert Kantor, proceeded to a conference room, where they were joined by Kantor's partner John Schuster III and by two secretaries, Laura Stout and Carmella Mattox, who was also a notary.

Consistent with his usual practice, Kantor asked Russell if the instrument represented Russell's will and if Russell wanted Schuster and Stout to act as witnesses. Russell answered both questions affirmatively, and signed the will on the fourth page:

> IN WITNESS WHEREOF, I have hereunto set my hand and seal this 26th day of October, One Thousand Nine Hundred and Eighty Two.
> /s/ Russell G. Ranney
>
> Russell G. Ranney

No one else signed the fourth page of the will. Russell, followed by Schuster and Stout, then signed the self-proving affidavit on the fifth page. Both Schuster and Stout believed that they were signing and attesting the will when they signed the affidavit. Furthermore, both Kantor, who had supervised the similar execution of many wills, and Schuster believed that the witnesses' signatures on the "Acknowledgment and Affidavit" complied with the attestation requirements of N.J.S.A. 3B:3-2. Mattox, whose practice was to notarize a document only if she witnessed the signature, notarized all the signatures.

After execution of the will, Stout stapled its four pages to the self-proving affidavit. The fifth and critical page reads:

Acknowledgement and Affidavit Relating to Execution of

STATE OF NEW JERSEY
ss.
COUNTY OF MONMOUTH

RUSSELL G. RANNEY, JOHN SCHUSTER III, and LAURA J. STOUT, the Testator and the witnesses, respectively whose names are signed to the attached instrument, being first duly sworn, do hereby declare to the undersigned authority that the Testator signed and executed the instrument as his Last Will and Testament and that he signed willingly and that he executed it as his free and voluntary act for the purposes therein expressed; and that each witness states that he or she signed the Will as witnesses in the presence and hearing of the Testator and that to the best of his or her knowledge, the Testator was at the time 18 or more years of age, of sound mind and under no constraint or undue influence.

/s/ Russell G. Ranney

RUSSELL G. RANNEY

/s/ John Schuster III

/s/ Laura J. Stout

Subscribed, sworn to, and acknowledged before me, by Russell G. Ranney, the Testator, and subscribed and sworn to before me by JOHN SCHUSTER III and LAURA J. STOUT, witnesses, this 26 day of October 1982.

/s/ Carmella Mattox

Notary

The acknowledgment and affidavit is almost identical to the language suggested by N.J.S.A. 3B:3-5 for a self-proving affidavit signed subsequent to the time of execution. The form for making a will self-proved at the time of execution, as occurred here, is set forth in the preceding section, N.J.S.A. 3B:3-4. Although the subject affidavit was executed simultaneously with the execution of the will, the affidavit refers to the execution of the will in the past tense and incorrectly states that the witnesses had already signed the will.

Immediately after the execution of Russell's will, Betty executed her will in the presence of the same witnesses. As with Russell's will, Schuster and Stout signed the page containing the self-proving affidavit, but did not sign the will. Betty's will contained somewhat different dispositive provisions, and each page bore a legend identifying it as one page of "a three page will." The acknowledgment and affidavit, which appeared on the fourth page of the document, bore the legend "attached to a three page will."

Russell's will gives Betty a life estate in their apartment in a building at 111 Avenue of Two Rivers in Rumson, the rental income from other apartments in that building, and the tuition and rental income from the Rumson Reading Institute, which was merged into the Ranney School after the execution of Russell's will. The will further directs that on Betty's death, the Avenue of Two Rivers property and the proceeds of the Institute are to be turned over to the trustees of the Ranney School. Additionally, Betty receives all of Russell's personal property except that necessary for the operation of the Institute.

The residue of Russell's estate is to be paid in trust to Betty, Kantor, and Henry Bass, Russell's son-in-law, who were also appointed as executors. Betty and Harland Ranney and Suzanne Bass, Russell's two children, are to receive thirty-two percent each of the trust income, and are to share equally the net income from the operation of Ransco Corporation. Nancy Orlow, Betty's daughter and Russell's step-daughter, is to receive the remaining four percent of the trust income. Russell's will provides further that after Betty's death the income from Ransco Corporation is to be distributed equally between Harland Ranney and Suzanne Bass, and on their deaths is to be distributed to the Ranney School.

Russell died on April 4, 1987, and the Monmouth County Surrogate admitted the will to probate on April 21, 1987. Kantor represented Betty during the probate proceedings, but on March 8, 1988, he was disbarred for reasons unrelated to this case. *See In re Kantor,* 109 *N.J.* 647 (1988). Subsequently, Betty retained new counsel and contested the probate of Russell's will. She did not, however, assert that the will was the product of fraud or undue influence. Nor did she contend that it failed to express Russell's intent. Her sole challenge was that the will failed to comply literally with the formalities of N.J.S.A. 3B:3-2. Suzanne R. Bass, Harland Ranney, Henry Bass, and the Ranney School urged that the will be admitted to probate.

Without taking any testimony, the Law Division heard the matter on the return date of Betty's order to show cause. The court was satisfied that the will was Russell's last will and testament, but felt constrained to deny probate because the attesting witnesses had not strictly complied with the requirements of N.J.S.A. 3B:3-2.

Although the Appellate Division "decline[d] to hold that the placement of the witnesses' signatures is immaterial," 240 N.J.Super. at 344, 573 A.2d 467, it ruled that the self-proving affidavit was part of the will and that the witnesses' signatures on the affidavit constituted signatures on the will, *Id.* at 344-45, A.2d 467. Treating Russell's will as if it contained a defective attestation clause, the court remanded for a hearing to determine whether Russell had executed the document as his will, whether Schuster and Stout had signed the self-proving affidavit in response to Russell's request to witness the will, and whether they had witnessed either Russell's signature or his acknowledgment of that signature. *Id.* at 345, 573 A.2d 467.

We disagree with the Appellate Division that signatures on the subsequently-executed self-proving affidavit literally satisfied the requirements of N.J.S.A. 3B:3-2 as signatures on a will. We further hold, however, that the will may be admitted to probate if it substantially complies with these requirements.

II

The first question is whether Russell's will literally complies with the requirements of N.J.S.A. 3B:3-2, which provides:

> [E]very will shall be in writing, signed by the testator or in his name by some other person in his presence and at his direction, and shall be signed by at least two persons each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will.

In holding that signatures on the self-proving affidavit satisfy N.J.S.A. 3B:3-2, the Appellate Division relied on out-of-state decisions that permitted the probate of wills when the witnesses signed a self-proving affidavit, but not the will. 240 N.J.Super. at 344, 573 A.2d 467. The rationale of those cases is that a self-proving affidavit and an attestation clause are sufficiently similar to justify the conclusion that signatures on a self-proving affidavit, like signatures on the attestation clause, satisfy the requirement that the signatures be on the will. *See In re Estate of Charry*, 359 So.2d 544, 545 (Fla. Dist. Ct. App. 1978) (witnesses' signatures on self-proving affidavit on same page as testator's signature satisfied attestation requirements); *In re Estate of Petty*, 227 Kan. 697, 702-03, 608 P.2d 987, 992-93 (1980) (self-proving affidavit on same page as testator's signature substantially complies with attestation requirements); *In re Cutsinger,* 445 P.2d 778, 782 (Okla. 1968)(self-proving affidavit executed on same page as testator's signature is an attestation clause in substantial compliance with statutory requirement); *see also In re Will of Leitstein,* 46 Misc.2d 656, 657, 260 N.Y.S.2d 406, 407-08 (Sur. 1965)(probating will when witnesses signed affidavit purporting to be attestation clause). The Appellate Division found that the similarity between self-proving affidavits and attestation clauses warrants treating the affidavit attached to Russell's will as the equivalent of an attestation clause. 240 N.J.Super. at 345, 573 A.2d 467. Noting that the absence of an attestation clause does not void a will, but merely requires the proponents to prove due execution, the Appellate Division could find "no reason, either in logic or policy, to deny a similar opportunity to the proponents" of Russell's will. *Ibid.* That conclusion fails to consider, however, the fundamental differences between a subsequently-executed, self-proving affidavit and an attestation clause. We are unable to conclude that a will containing the signatures of witnesses only on such an affidavit literally complies with the attestation requirements of N.J.S.A. 3B:3-2.

Self-proving affidavits and attestation clauses, although substantially similar in content, serve different functions. Mann, *Self-Proving Affidavits and Formalism in Wills Adjudication,* 63 *Wash.U.L.Q.* 39, 41 (1985). Attestation clauses facilitate probate by providing "prima facie evidence" that the testator voluntarily signed the will in the presence of the witnesses. 5 A. Clapp, *N.J. Practice: Wills and Administration* § 133 at 335 (3d ed.1982). An attestation clause also permits probate of a will when a witness forgets the circumstances of the will's execution or dies before the testator. *Id.* at 337.

Self-proving affidavits, by comparison, are sworn statements by eyewitnesses that the will has been duly executed. Mann, *supra,* 63 *Wash.U.L.Q.* at 40. The affidavit performs virtually all the functions of an attestation clause, and has the further effect of permitting probate without requiring the appearance of either witness. *Id.* at 41; 8 A. Clapp, *supra,* § 2063 at 9, comment 1. Wills may be made self-proving simultaneously with or after execution. N.J.S.A. 3B:3-4,-5. One difference between an attestation clause and a subsequently-signed, self-proving affidavit is that in an attestation clause, the attestant expresses the present intent to act as a witness, but in the affidavit, the affiant swears that the will has already been witnessed. This difference is more apparent than real when, as here, the

affiants, with the intent to act as witnesses, sign the self-proving affidavit immediately after witnessing the testator's execution of the will.

The Legislature first authorized self-proving affidavits in the 1977 amendments to the Probate Code, specifically N.J.S.A. 3B:3-2A-6. Nothing in the statutory language or history intimates that the Legislature contemplated a subsequently-executed affidavit as a substitute for the attestation clause. Instead, the 1977 amendments indicate that the Legislature envisioned the will, including the attestation clause, as independent from such an affidavit. Hence, the form provided in N.J.S.A. 3B:3-5 for a subsequently-signed affidavit refers to the will as a separate instrument and states that the testator and witnesses have signed the will. Thus, the Legislature indicated its intention that subsequently-executed, self-proving affidavits be used solely in conjunction with duly-executed wills. Although the execution of Russell's will and of the self-proving affidavit apparently were contemporaneous, the affidavit follows the form provided in N.J.S.A. 3B:3-5. Consequently, the signatures of the witnesses on the subject self-proving affidavit do not literally comply with the statutory requirements.

That finding does not end the analysis. As we stated in *In re Estate of Peters*, 107 N.J. 263, 526 A.2d 1005 (1987), in limited circumstances a will may be probated if it substantially complies with those requirements. *Id.* at 281 n. 4, 526 A.2d 1005.

Other states have recognized that a will failing to satisfy the attestation requirements should not be denied probate when the witnesses have substantially complied with those requirements and the testator clearly intended to make a will. *See*, *e.g., In re LaMont's Estate,* 39 Cal.2d 566, 569-70, 248 P.2d 1, 2-3 (1952)(signature of witness substantially complied with execution requirements even if witness thought he was signing as executor); *In re Estate of Petty, supra*, 227 Kan. at 702-03, 608 P.2d at 992-93 (witnesses' signatures on self-proving affidavit substantially comply with attestation requirements); *Smith v. Neikirk*, 548 S.W.2d 156, 158 (Ky. Ct. App. 1977) (will substantially satisfies statutory requirements even though witness turned back on testator at moment of signing and another witness signed as notary); *In re Will of Kiefer*, 78 Misc. 2d 262, 264, 356 N.Y.S.2d 520, 522-23 (Sur. 1974) (will admitted to probate when only one of two witnesses signed); *see also* 2 Bowe & Parker, *Page on Wills* § 19.4 nn. 15-21 (1960) (collecting cases applying rule of substantial compliance).

Scholars also have supported the doctrine of substantial compliance. Langbein *Substantial Compliance with the Wills Act,* 88 Harv. L.Rev. 489 (1975); Nelson & Starck, *Formalities and Formalism: A Critical Look at the Execution of Wills,* 6 *Pepperdine L.Rev.* 331, 356 (1979). At the 1990 annual conference, the Commissioners on Uniform State Laws added a section to the Uniform Probate Code explicitly advocating the adoption of the doctrine. Uniform Probate Code § 2-503 (National Conference of Commissioners on Uniform State Laws 1990). That section, 2-503, provides:

> Although a document * * * was not executed in compliance with § 2-502 [enumerating the wills formalities], the document * * * is treated as if it had been executed in compliance with that section if the proponent of the document * * * establishes by clear and convincing evidence that the decedent intended the document to constitute (i) the decedent's will * * *.

In the 1990 edition of the *Restatement (Second) of Property* (Donative Transfers) (*Restatement*), moreover, the American Law Institute encourages courts to permit probate of wills that substantially comply with will formalities. § 33.1 comment g Tentative Draft No. 13) (approved by the American Law

Institute at 1990 annual meeting). The *Restatement* concludes that in the absence of legislative action, courts "should apply a rule of excused noncompliance, under which a will is found validly executed if the proponent establishes by clear and convincing evidence that the decedent intended the document to constitute his or her will." *Ibid.* Thus, courts and scholars have determined that substantial compliance better serves the goals of statutory formalities by permitting probate of formally-defective wills that nevertheless represent the intent of the testator.

III

Substantial compliance is a functional rule designed to cure the inequity caused by the "harsh and relentless formalism" of the law of wills. Langbein, *supra*, 88 Harv. L. Rev. at 489; *see also* L. Waggoner, R. Wellman, G. Alexander & M. Fellows, *Family Property Law: Wills, Trusts and Future Interests* 32-35 (Tentative Draft 1990) (discussing genesis of substantial compliance doctrine). The underlying rationale is that the finding of a formal defect should lead not to automatic invalidity, but to a further inquiry: does the noncomplying document express the decedent's testamentary intent, and does its form sufficiently approximate Wills Act formality to enable the court to conclude that it serves the purposes of the Wills Act?[Langbein, *supra*, 88 Harv. L. Rev. at 489.]

Scholars have identified various reasons for formalities in the execution of wills. The primary purpose of those formalities is to ensure that the document reflects the uncoerced intent of the testator. *Id.* at 492; Mann, *supra,* 63 *Wash.U.L.Q.* at 49. Requirements that the will be in writing and signed by the testator also serve an evidentiary function by providing courts with reliable evidence of the terms of the will and of the testamentary intent. Gulliver & Tilson, *Classification of Gratuitous Transfers*, 51 Yale L.J. 1, 6-7 (1941).Additionally, attestation requirements prevent fraud and undue influence. *Id.* at 9-10; *In re Estate of Peters, supra*, 107 N.J. at 276, 526 A.2d 1005. Further, the formalities perform a "channeling function" by requiring a certain degree of uniformity in the organization, language, and content of wills. Langbein, *supra,* 88 Harv. L. Rev. at 494. Finally, the ceremony serves as a ritual that impresses the testator with the seriousness of the occasion. Gulliver & Tilson, *supra*, 51 Yale L.J. at 5.

Rigid insistence on literal compliance often frustrates these purposes. *Restatement, supra,* § 33.1 comment g (strict compliance has in many cases led courts to results that defeated the intent of the testator). To avoid such frustration, some courts, although purporting to require literal compliance, have allowed probate of technically-defective wills. See In re Estate of Bochner; 119 Misc. 2d 937, 938, 464 N.Y.S.2d 958, 959 (Sur. 1983); *In re Will of Leitstein, supra*, 46 Misc.2d at 657, 260 N.Y.S.2d at 408. Other courts have refused to probate wills because of technical defects despite evidence that the testator meant the document to be a will. *See In re Estate of Sample*, 175 Mont. 93, 96-97, 572 P.2d 1232, 1234 (1977) (refusing to probate will signed only on attached self-proving affidavit); *Boren v. Boren*, 402 S.W.2d 728, 729 (Tex. 1966). Leading authorities have criticized the *Boren* rule, finding no basis in logic or policy for its blind insistence on voiding wills for "the most minute defect[s] in formal compliance * * * no matter how abundant the evidence that the defect [is] inconsequential." Langbein, *supra*, 88 Harv. L.Rev. at 489; accord *In re Estate of Charry, supra,* 359 So.2d at 545 (declining to follow *Boren* rule because it elevated form over substance); Mann, *supra,* 63 *Wash.U.L.Q.* at 39-40 (characterizing *Boren* line of cases as "odd and rather perverse"); Nelson & Starck, *supra,* 6 *Pepperdine L.Rev.* at 356-57.

We agree with those authorities. Compliance with statutory formalities is important not because of the inherent value that those formalities possess, but because of the purposes they serve. Mann,

supra, 63 *Wash.U.L.Q.* at 60; Nelson & Starck, *supra,* 6 *Pepperdine L.Rev.* at 355. It would be ironic to insist on literal compliance with statutory formalities when that insistence would invalidate a will that is the deliberate and voluntary act of the testator. Such a result would frustrate rather than further the purpose of the formalities. Nelson & Starck, *supra,* 6 *Pepperdine L.Rev.* at 353-55.

Concerned about inequities resulting from excessive adherence to formalism, the Commissioners on Uniform State Laws proposed the Uniform Probate Code. The goals of the Code were to simplify the execution of wills, *Uniform Probate Code,* art. 2, pt. 5, General Comment at 46 (1974), and to recognize the intent of the testator in the distribution of his property, *id.* at § 1-102(b)(2). Consequently, the Commissioners minimized the formalities of execution and diminished "the ceremonial value of attestation." Langbein, *supra*, 88 Harv. L. Rev. at 510-11. Responding to similar concerns in 1977, the New Jersey Legislature adopted a variation of the Uniform Probate Code that differed significantly from its pre-Code predecessor. 1977 *N.J. Laws,* ch. 412, § 1; *see In re Estate of Peters, supra,* 107 N.J. at 271, 526 A.2d 1005.Thus, N.J.S.A. 3B:3-2, like its identical 1977 counterpart, N.J.S.A. 3B:3-2A-4, does not require that witnesses sign in the presence of the testator and of each other. *In re Estate of Peters, supra*, 107 N.J. at 273, 526 A.2d 1005. The 1977 amendments also removed the interested-witness provisions, N.J.S.A. 3A:3-2A-7, with the result that a beneficiary who acts as a witness is no longer prevented from taking under a will, N.J.S.A. 3B:3-8. As a result of those amendments, moreover, unwitnessed holographic wills could be admitted to probate. N.J.S.A. 3A:2A-5. Under the current provision, N.J.S.A. 3B:3-3, a holographic will is valid whether or not witnessed, so long as the signature and material provisions of the will are in the handwriting of the testator. N.J.S.A. 3B:3-3. The approval of unwitnessed holographic wills, like the diminution of attestation requirements, reflects a more relaxed attitude toward the execution of wills.

Legislative history confirms that N.J.S.A. 3B:3-2 was enacted to free will execution from the ritualism of pre-Code law and to prevent technical defects from invalidating otherwise valid wills. Senate Judiciary Committee Public Hearing on Uniform Probate Code Bills at 20 (comments of Harrison Durand) (reduction of statutory formalities meant to prevent failure of testamentary plans); *see In re Estate of Peters, supra,* 107 N.J. at 272 n. 2, 526 A.2d 1005(noting that former statute often resulted in wills being refused probate because some formality not followed). Generally, when strict construction would frustrate the purposes of the statute, the spirit of the law should control over its letter. *New Jersey Builders, Owners & Manager Ass'n v. Blair,* 60 N.J. 330, 338, 288 A.2d 855 (1972). Accordingly, we believe that the Legislature did not intend that a will should be denied probate because the witnesses signed in the wrong place.

The execution of a last will and testament, however, remains a solemn event. A careful practitioner will still observe the formalities surrounding the execution of wills. When formal defects occur, proponents should prove by clear and convincing evidence that the will substantially complies with statutory requirements. *See Uniform Probate Code, supra,* § 2-503; *Restatement, supra,* § 33.1 comment g. Our adoption of the doctrine of substantial compliance should not be construed as an invitation either to carelessness or chicanery. The purpose of the doctrine is to remove procedural peccadillos as a bar to probate.

Furthermore, as previously described, *ante* at 1342-1343, a subsequently-signed self-proving affidavit serves a unique function in the probate of wills. We are reluctant to permit the signatures on such an affidavit both to validate the execution of the will and to render the will self-proving. Accordingly, if the witnesses, with the intent to attest, sign a self-proving affidavit, but do not sign the will or an attestation clause, clear and convincing evidence of their intent should be adduced to establish

substantial compliance with the statute. For that reason, probate in these circumstances should proceed in solemn form. *See* N.J.S.A. 3B:3-23; *R.* 4:84-1. Probate in solemn form, which is an added precaution to assure proof of valid execution, may be initiated on an order to show cause, *R.* 4:84-1(b), and need not unduly delay probate of a qualified will.

IV

The record suggests that the proffered instrument is the will of Russell Ranney, that he signed it voluntarily, that Schuster and Stout signed the self-proving affidavit at Russell's request, and that they witnessed his signature. Furthermore, Betty has certified that Russell executed the will and that she is unaware of the existence of any other will. Before us, however, her attorney questions whether Russell "actually signed" the will. If, after conducting a hearing in solemn form, the trial court is satisfied that the execution of the will substantially complies with the statutory requirements, it may reinstate the judgment of the Surrogate admitting the will to probate.

Following the judgment of the Appellate Division, this Court amended the Rules of Civil Procedure pertaining to probate practice. Those amendments resulted in the allocation of the probate jurisdiction of the Chancery Division to the Chancery Division, Probate Part. *See R.* 4:83.

The judgment of the Appellate Division is affirmed, and the matter is remanded to the Chancery Division, Probate Part.

14.3.3 Harmless Error/Dispensing Power

The harmless error rule applies to situations when the testator does not attempt to comply with the statutory requirements. This rule is also referred to as the dispensing power because it permits the courts to dispense with the statutory formalities. Under the rule, the court may excuse noncompliance with statutory formalities if the proponent of the will produces clear and convincing evidence that the decedent intended the document to be his or her will. For the rule to apply, the proponents must show that the decedent prepared the document or caused the document to be prepared and the decedent signed the document and intended the document to constitute the decedent's will.

In re Estate of Ehrlich, 47 A.3d 12 (N.J. Super. Ct. App. Div. 2012)

PARRILLO, P.J.A.D.

Appellants Todd Ehrlich and Pamela Venuto appeal from an April 20, 2011 order of the General Equity Part admitting into probate the proffered Will of Richard D. Ehrlich and from the June 20, 2011 order denying their motion for reconsideration. Respondent Jonathan Ehrlich cross-appeals from the July 6, 2011 order denying his motion for sanctions under the Frivolous Litigation statute, N.J.SA. 2A:15-59.1. We affirm.

The material facts are not genuinely in dispute. Richard Ehrlich, a trust and estates attorney who practiced in Burlington County for over fifty years, died on September 21, 2009. His only next of kin were his deceased brother's children—Todd and Jonathan Ehrlich and Pamela Venuto. The

decedent had not seen or had any contact with Todd or Pamela in over twenty years. He did, however, maintain a relationship with Jonathan, who, he had told his closest friends as late as 2008, was the person to contact if he became ill or died, and to whom he would leave his estate.

Jonathan learned of his uncle's death nearly two months after the passing. An extensive search for a Will followed. As a result, Jonathan located a copy of a purported Will in a drawer near the rear entrance of decedent's home, which, like his office, was full of clutter and a mess. Thereafter, on December 17, 2009, Jonathan filed a verified complaint seeking to have the document admitted to probate. His siblings, Todd and Pamela, filed an answer, objecting. The court appointed a temporary administrator, Dennis P. McInerney, Esquire, who had been previously named as Trustee of decedent's law practice, and by order of June 23, 2010, directed, among other things, an inspection of decedent's home. Pursuant to that order, on July 8, 2010, Jonathan, Todd and Pamela, along with counsel and McInerney, accessed and viewed the contents of decedent's home and law office. No other document purporting to be decedent's Will was ever located.

The document proffered by Jonathan is a copy of a detailed fourteen-page document entitled "Last Will and Testament." It was typed on traditional legal paper with Richard Ehrlich's name and law office address printed in the margin of each page. The document does not contain the signature of decedent or any witnesses. It does, however, include, in decedent's own handwriting, a notation at the right-hand corner of the cover page: "Original mailed to H.W. Van Sciver, 5/20/2000[.]" The document names Harry W. Van Sciver as Executor of the purported Will and Jonathan as contingent Executor. Van Sciver was also named Trustee, along with Jonathan and Michelle Tarter as contingent Trustees. Van Sciver predeceased the decedent and the original of the document was never returned.

In relevant part, the purported Will provides a specific bequest of $50,000 to Pamela and $75,000 to Todd. Twenty-five percent of the residuary estate is to pass to a trust for the benefit of a friend, Kathryn Harris, who is to receive periodic payments therefrom. Seventy-five percent of the residuary estate is to pass to Jonathan.

It is undisputed that the document was prepared by decedent and just before he was to undergo life-threatening surgery. On the same day this purported Will was drafted—May 20, 2000—decedent also executed a Power of Attorney and Living Will[1], both witnessed by the same individual, who was the Burlington County Surrogate. As with the purported Will, these other documents were typed on traditional legal paper with Richard Ehrlich's name and law office address printed in the margin of each page.

Years after drafting these documents, decedent acknowledged to others that he had a Will and wished to delete the bequest to his former friend, Kathryn Harris, with whom he apparently had a falling out. Despite his stated intention, decedent never effectuated any change or modification to his Will as no such document ever surfaced, even after the extensive search conducted of his home and law office after his death.

The contested probate matter proceeded on cross-motions for summary judgment following completion of discovery. After hearing argument, the General Equity Judge granted Jonathan's motion and admitted the copy entitled "Last Will and Testament" of Richard Ehrlich to probate. The court reasoned:

> First, since Mr. [Richard] Ehrlich prepared the document, there can be no doubt that he viewed it. Secondly, while he did not formally execute the copy, his hand written notations at the top of the first page, effectively demonstrating that the original was mailed to his executor on the same day that he executed his power of attorney and his health directive is clear and convincing evidence of his "final assent" that he intended the original document to constitute his last will and testament as required both by N.J.S.A. 3B:3-3 and [*In re Probate of Will and Codicil of Macool*, 416 N.J.Super. 298, 310, 3 A.3d 1258 (App. Div. 2010)].

The judge later denied Jonathan's motion for sanctions for frivolous litigation.

This appeal and cross-appeal follow.

I

At issue is whether the unexecuted copy of a purportedly executed original document sufficiently represents decedent's final testamentary intent to be admitted into probate under N.J.SA. 3B:3-3. Since, as the parties agree, there is no genuine issue of material fact, the matter was ripe for summary judgment as involving only a question of law, *Brill v. Guardian Life Ins. Co. of Am.,* 142 N.J. 520, 529, 666 A.2d 146 (1995); *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 N.J. 67, 75, 110 a.2d 24 (1954), to which we owe the motion court no special deference. *Manalapan Realty, L.P. v. Twp. Comm. Of Manlapan*, 140 N.J. 366, 378, 658 A.2d 1230 (1995).

N.J.S.A. 3B:3-2 contains the technical requirements for writings intended as wills:

> a. Except as provided in subsection b. and in N.J.S.A. 3B:3-3, a will shall be:
>
> (1) in writing;
> (2) signed by the testator or in the testator's name by some other individual in the testator's conscious presence and at the testator's direction; and
> (3) signed by at least two individuals, each of whom signed within a reasonable time after each witnessed either the signing of the will as described in paragraph (2) or the testator's acknowledgment of that signature or acknowledgment of the will.
>
> b. A will that does not comply with subsection a. is valid as a writing intended as a will, whether or not witnessed, if the signature and material portions of the document are in the testator's handwriting.
>
> c. Intent that the document constitutes the testator's will can be established by extrinsic evidence, including for writings intended as wills, portions of the document that are not in the testator's handwriting.

A document that does not comply with the requirements of *N.J.S.A.* 3B:3–2a or b is nevertheless valid as a document intended as a Will and may be admitted into probate upon satisfaction of N.J.S.A. 3B:3-3, which provides:

> Although a document or writing added upon a document was not executed in compliance with N.J.S.A. 3B:3-2, the document or writing is treated as if it had

> been executed in compliance with N.J.S.A. 3B:3-2if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute: (1) the decedent's will....

The Legislature enacted N.J.S.A. 3B:3-3 in 2004, as an amendment to the New Jersey Probate Code. *L.* 2004, *c.* 132, § 10, eff. Feb. 27, 2005. It is virtually identical to Section 2-503 of the Uniform Probate Code (UPC), upon which it was modeled. Senate Judiciary Committee, *Statement to Senate Bill No. 708,* enacted as *L.* 2004, *c.* 132 (reprinted after N.J.S.A. 3B:1-1). The comments to that Section by the National Conference of Commissioners on Uniform State Laws express its clear purpose: "[s]ection 2–503 means to retain the intent-serving benefits of Section 2–502 formality without inflicting intent-defeating outcomes in cases of harmless error." *Unif. Probate Code,* cmt. On § 2-503. Of particular note, the Commissioners' comments state that Section 2-503 "is supported by the Restatement (Third) of Property: Wills and Other Donative Transfers § 3.3 (1999)." Recognizing that strict compliance with the statutory formalities has led to harsh results in many cases, the comments to the Restatement explain,

> ... the purpose of the statutory formalities is to determine whether the decedent adopted the document as his or her will. Modern authority is moving away from insistence on strict compliance with statutory formalities, recognizing that the statutory formalities are not ends in themselves but rather the means of determining whether their underlying purpose has been met. A will that fails to comply with one or another of the statutory formalities, and hence would be invalid if held to a standard of strict compliance with the formalities, may constitute just as reliable an expression of intention as a will executed in strict compliance.
>
> ....
>
> The trend toward excusing harmless errors is based on a growing acceptance of the broader principle that mistake, whether in execution or in expression, should not be allowed to defeat intention nor to work unjust enrichment.

[*Restatement (Third) of Property,* § 3.3 cmt. b (1999).]

We recently had occasion to interpret N.J.S.A. 3B:3-3 in a case wherein we held that under New Jersey's codification of the "harmless error" doctrine, a writing need not be signed by the testator in order to be admitted to probate. *In re Probate of Will and Codicil of Macool,* 416 N.J.Super. 298, 311, 3 A.3d 1258 (App. Div. 2010).

> [T]hat for a writing to be admitted into probate as a will under N.J.S.A. 3B:3-3, the proponent of the writing intended to constitute such a will must prove, by clear and convincing evidence, that: (1) the decedent actually reviewed the document in question; and (2) thereafter gave his or her final assent to it. Absent either one of these two elements, a trier of fact can only speculate as to whether the proposed writing accurately reflects the decedent's final testamentary wishes. [Id. at 310, 3 A.3d 1258].

Thus, N.J.S.A. 3B:3-3, in addressing a form of testamentary document not executed in compliance with N.J.S.A. 3B:3-2, represents a relaxation of the rules regarding formal execution of Wills so as to effectuate the intent of the testator. This legislative leeway happens to be consonant with "a court's

duty in probate matters ... 'to ascertain and give effect to the probable intention of the testator.'" *Macool, sup*ra, 416 N.J.Super. at 307, 3 A.3d 1258 (quoting *Fidelity Union Trust v. Robert*, 36 N.J. 564, 178 A.2d 185 (1962)) (internal citations and quotation marks omitted in original). As such, Section 3 dispenses with the requirement that the proposed document be executed or otherwise signed in some fashion by the testator. *Macool, supra*, 416 N.J.Super. at 311, 3 A.3d 1258.

Our dissenting colleague, who participated in *Macool,* retreats from its holding and now discerns a specific requirement in Section 3 that the document be signed and acknowledged before a court may even move to the next step and decide whether there is clear and convincing evidence that the decedent intended the document to be his Will, and therefore excuse any deficiencies therein. We find no basis for such a constrictive construction in the plain language of the provision, which in clear contrast to Section 2, expressly contemplates an unexecuted Will within its scope. Otherwise what is the point of the exception?

Because N.J.S.A. 3B:3-3 is remedial in nature, it should be liberally construed. *See Singleton v. Consolidated Freightways Corp.,* 64 N.J. 357, 362, 316 A.2d 436 (1974). Indeed, if the Legislature intended a signed and acknowledged document as a condition precedent to its validation under Section 3, it would have, we submit, declared so expressly as did, for instance, the Colorado Legislature in enacting its version of UPC § 2-503 and N.J.S.A. 3B:3-3. The fact that the Legislature chose not to qualify its remedial measure as the dissent suggests is also consistent with the Commissioners' commentary expressly citing those foreign jurisdictions that excuse non-compliance with the signature requirement, although "reluctant [ly]" so. *Unif. Probate Code,* cmt. On § 2-503. And like the Commissioners' discussion, the comments to the Restatement also acknowledge that the absence of a signature is excusable, albeit the "hardest" deficiency to justify as it raises serious, *but not insuperable* doubt." *Restatement (Third) of Property,* § 3.3 cmt. b (1999) (emphasis added).

To be sure, as a general proposition, the greater the departure from Section 2's formal requirement, the more difficult it will be to satisfy Section 3's mandate that the instrument reflect the testator's final testamentary intent. And while the dissent's concern over the lack of a signature and attestation is obviously understandable, their absence in this instance, as recognized by both sets of commentators and the express wording of Section 3, does not present an insurmountable obstacle.

Instead, to overcome the deficiencies in formality, Section 3 places on the proponent of the defective instrument the burden of proving by clear and convincing evidence that the document was in fact reviewed by the testator, expresses his or her testamentary intent, and was thereafter assented to by the testator. In other words, in dispensing with technical conformity, Section 3 imposes evidential standards and safeguards appropriate to satisfy the fundamental mandate that the disputed instrument correctly expresses the testator's intent.

Here, as noted, decedent undeniably prepared and reviewed the challenged document. In disposing of his entire estate and making specific bequests, the purported Will both contains a level of formality and expresses sufficient testamentary intent. As the motion judge noted, in its form, the document "is clearly a professionally prepared Will and complete in every respect except for a date and its execution." Moreover, as the only living relative with whom decedent had any meaningful relationship, Jonathan, who is to receive the bulk of his uncle's estate under the purported Will, was the natural object of decedent's bounty.

The remaining question then is whether, under the undisputed facts of record, decedent gave his

final assent to the document. Clearly, decedent's handwritten notation on its cover page evidencing that the original was sent to the executor and trustee named in that very document demonstrates an intent that the document serve as its title indicates—the "Last Will and Testament" of Richard Ehrlich. In fact, the very same day he sent the original of his Will to his executor, decedent executed a power of attorney and health care directive, both witnessed by the same individual. As the General Equity judge noted, "[e]ven if the original for some reason was not signed by him, through some oversight or negligence his dated notation that he mailed the original to his executor is clearly his written assent of his intention that the document was his Last Will and Testament."

Lest there be any doubt, in the years following the drafting of this document, and as late as 2008, decedent repeatedly orally acknowledged and confirmed the dispositionary contents therein to those closest to him in life. The unrefuted proof is that decedent intended Jonathan to be the primary, if not exclusive, beneficiary of his estate, an objective the purported Will effectively accomplishes. Indeed, the evidence strongly suggests that this remained decedent's testamentary intent throughout the remainder of his life.

Moreover, decedent acknowledged the existence of the Will to others to whom he expressed an intention to change one or more of the testamentary dispositions therein. As the wife of decedent's closest friend recounted: "And [Richard] has to change [the Will] because there is another person that he gave, I don't know how you say it, annuities every month ... in case he passed away, and he wants to take her off the [W]ill. And by that time Richard could barely write or sign, so I'm not surprised he didn't sign his [W]ill." Although there is no evidence whatsoever that decedent ever pursued this intention, the very fact that he admitted to such a document is compelling proof not only of its existence but of decedent's belief that it was valid and of his intention that it serve as his final testamentary disposition.

Given these circumstances, we are satisfied there is clear and convincing evidence that the unexecuted document challenged by appellants was reviewed and assented to by decedent and accurately reflects his final testamentary wishes. As such, it was properly admitted to probate as his Last Will and Testament.

The fact that the document is only a copy of the original sent to decedent's executor is not fatal to its admissibility to probate. Although not lightly excused, there is no requirement in Section 3 that the document sought to be admitted to probate be an original. Moreover, there is no evidence or challenge presented that the copy of the Will has in any way been altered or forged.

As with the case of admitting a copy of a Last Will to probate where the proof is clear, satisfactory, and convincing to rebut the presumption of the original's revocation or destruction, *In re Davis,* 127 N.J.Eq. 55, 57, 11 A.2d 233 (E & A. 1940); *In re Bryan*, 125 N.J.Eq. 471, 473-74, 5 A.2d 774 (E & A. 1939); *In re Calef's Will*, 109 N.J.Eq. 181, 156 A. 475 (Prerog. Ct. 1931), *affirmed, on opinion below,* 111 N.J.Eq. 355, 162 A. 579 (E. & A. 1932), *cert. denied sub nom., Neely v. Stacy,* 288 U.S. 606, 53 S.Ct. 397, 77 L.Ed. 981 (1933), here, as noted, the evidence is compelling as to the testamentary sufficiency of the document, its preparation and reflection of decedent's intent. As has been stressed, a court's duty in probate matters is "to ascertain and give effect to the probable intent of the testator." *Fidelity Union Trust, supra*, 36 N.J. at 564, 178 A.2d 185 (internal citations and quotation marks omitted). In our view, the challenged document was properly admitted to probate because it meets all the intent-serving benefits of Section 2's formality and we discern no need to inflict the intent-defeating outcome requested by appellants and advocated by the dissent.

II

That said, we also find the court properly exercised its discretion in not imposing sanctions under the Frivolous Litigation statute, N.J.SA.A 2A:15-59.1(a)(1). *See United Hearts, L.L.C. v. Zahabian,* 407 N.J.Super. 379, 390, 971 A.2d 434 (App. Div.)(recognizing abuse of discretion as standard for review of an award of sanctions), *certif. denied,*200 N.J. 367, 982 A.2d 455 (2009). "An 'abuse of discretion is demonstrated if the discretionary act was not premised upon consideration of all relevant factors, was based upon consideration of irrelevant or inappropriate factors, or amounts to a clear error of judgment.'" *Ibid.* (quoting *Flagg v. Essex Cnty. Prosecutor*, 171 N.J. 561, 571, 796 A.2d 182 (2002).

The Frivolous Litigation statute provides:

> A party who prevails in a civil action, either as a plaintiff or defendant, against any other party may be awarded all reasonable litigation costs and reasonable attorney fees, if the judge finds at any time during the proceedings or upon judgment that a complaint, counterclaim, cross-claim or defense of the nonprevailing person was frivolous. [N.J.S.A. 2A:15-59.1(a)(1).]

To award costs to a prevailing party for a frivolous claim, the statute requires a showing that "the nonprevailing party either brought the claim in bad faith for harassment, delay, or malicious injury; or 'knew, or should have known that the complaint [or] counterclaim ... was without [any reasonable] basis in law or equity....'" *Bucinna v. Micheletti*, 311 N.J.Super. 557, 562-63, 710 A.2d 1019 (App.Div.1998) (quoting N.J.S.A. 2A:15-59.1(b)(2)).

Rule 1:4–8 also permits an attorney to be sanctioned for asserting frivolous claims on behalf of his or her client. *United Hearts, L.L.C., supra*, 407 N.J.Super. at 389, 971 A.2d 434. An assertion is deemed frivolous when " 'no rational argument can be advanced in its support, or it is not supported by any credible evidence, or it is completely untenable.'" *First Atl. Fed. Credit Union v. Perez,* 391 N.J. Super. 419, 432, 918 A.2d 666 (App. Div. 2007) (quoting *Fagas v. Scott*, 251 N.J.Super. 169, 190, 597 A.2d 571 (Law Div. 1991)). Where a party has a reasonable and good faith belief in the claims being asserted, reallocation of attorneys' fees and expenses will not be awarded. *Ibid.* Moreover, "a pleading will not be considered frivolous for purposes of imposing sanctions under *Rule* 1:4–8 unless the pleading as a whole is frivolous." *United Hearts, L.L.C., supra*, 407 N.J.Super. at 394, 971 A.2d 434. Thus, when some allegations are later proved unfounded, a complaint is not rendered frivolous if it also contains non-frivolous claims. *Id.* at 390, 971 A.2d 434.

Here, there was no showing that appellants' objection to probate was filed "in bad faith, solely for the purpose of harassment, delay or malicious injury" or had no "reasonable basis in law or equity." N.J.S.A. 2A:15-59.1(b)(2). Indeed, appellants' challenge was soundly based as the disputed document did not satisfy the formalities of N.J.S.A. 3B:3-2. The document was not witnessed, notarized or dated, and was only a copy of a purported original. Consequently, to be admitted to probate, the document had to satisfy N.J.S.A. 3B:3-3, which placed a heavy burden of proof upon the document's proponent. Given the nature of that document's departure from Section 2's technical requirements, it was neither unreasonable nor unfair for appellants to hold respondent to his rather exacting statutory burden. As properly noted by the motion judge, there was nothing in the record to suggest appellants' objection was filed to harass, delay or cause malicious injury. As there was a reasonable basis for appellants' claims in law and equity, the court properly denied respondent's motion for sanctions for frivolous litigation.

Affirmed.

In re Estate of Sky Dancer, 13 P.3d 1231 (Colo. App. 2000)

Opinion by Judge ROY.

In this probate proceeding, Lawrence Barnes (the legatee) appeals the trial court's order finding that Sky Dancer (the decedent) died intestate, and appointing the decedent's mother, Laura J. Fisher (the heir), as personal representative of the decedent's estate. We affirm.

The decedent died in December 1997 of gunshot wounds. The circumstances of her death prompted an investigation during which the investigating officers allegedly took into possession the original copy of a document which purported to be her last will and testament (the "Will").

Thereafter, an attorney retained to represent the estate commenced summary administration pursuant to § 15-12-1201, et. seq., C.R.S. 2000, which provides simplified procedures for the administration of small estates. At that time, the interested parties agreed that the decedent's testamentary intent was expressed in the "Will" which was considered to be a photocopy of the original document retained by the police. Based upon that agreement, partial distribution of the decedent's personal property was made in accordance with the terms of the "Will." However, after becoming aware of certain information developed by the police investigation suggesting that the legatee might have been involved in the decedent's death, the heir objected to any further distributions under the "Will," and none was made.

In October 1998, the heir filed a petition for adjudication of intestacy, determination of heirs, and formal appointment as personal representative of the decedent's estate. The legatee, who was living with the decedent at the time of her death and was a beneficiary under the "Will," filed an objection to the petition.

The "Will" consisted of the following photocopied documents: (1) four typewritten pages entitled "Last Will and Testament of Sky Dancer," dated September 10, 1997, to which were stapled two additional typewritten pages entitled "AFFIDAVIT," which takes the form of a notarized will attestation signed by the decedent and two witnesses and dated April 8, 1996; (2) a typewritten "Special Power of Attorney," dated April 8, 1996, and signed by the decedent and attested to by a notary public; (3) a signed typewritten statement dated August 11, 1997, in which the decedent stated that she had intentionally omitted her siblings; (4) an unsigned, typewritten document entitled "Estate Planning Worksheet" dated September 10, 1997; and (5) an unsigned, typewritten document entitled "Declaration Regarding Final Arrangements of Sky Dancer" dated September 10, 1997. In addition, the first document, which purported to be the testamentary instrument, contained incomplete portions, the end of the testamentary text was followed by a large segment of blank page, and the signatures and attestation clauses were on a page separate from any testamentary text.

The legatee argued in the trial court that the decedent died testate, conceding, however, that the "Will" was not executed pursuant to statute. The legatee maintained that the documents making up the "Will" constituted a holographic will and, in any event, when considered with certain supporting documents, were sufficient to make a determination of intestacy improper. The legatee further

argued that he and the decedent had contracted a common law marriage and he was, therefore, an heir.

Following an evidentiary hearing, the trial court found or concluded that the legatee had failed to prove: (1) that he and the decedent had contracted a common law marriage; (2) that the "Will" was a holographic will; or (3) that the decedent intended the "Will" to be her last will and testament. The trial court concluded that the decedent had died intestate and appointed the heir as personal representative of the estate.

I

At the outset, we address the legatee's first contention that the trial court erred in failing to make sufficient findings of fact, and erred in not admitting the "Will" into evidence. We disagree with the first and conclude that the "Will" was, in fact, admitted into evidence.

The trial court's order must contain findings of fact and conclusions of law sufficient to give an appellate court a clear understanding of the basis of its decision. *See In re Marriage of Van Inwegen,* 757 P.2d 1118 (Colo. App. 1988).Based on our review of the order we conclude that the trial court's order complies with this standard.

The legatee contends that the trial court, in not admitting the "Will" into evidence, failed properly to apply CRE 1003 and CRE 1004, which concern the admissibility of duplicates and other evidence of the contents of writings, recording, and photographs.

On the contrary, the record reflects that the trial court admitted the "Will" into evidence even though there was no testimony that the original documents were unavailable. The weight to be given such evidence, however, is a matter to be determined by the trial court. *See Jarnagin v. Busby, Inc.,* 867 P.2d 63 (Colo. App. 1993).

II

Relying upon §15-11-503, C.R.S. 2000, the legatee contends that the trial court erred in finding that the decedent died intestate. We disagree.

Traditionally, Colorado has recognized only wills that are signed and witnessed in accordance with the statute. While the statute has required more formality in the past, it currently requires that the instrument be: (1) in writing; (2) signed by the testator or in the testator's name by some other individual in the testator's conscious presence and at the testator's direction; and (3) signed by at least two witnesses before whom the testator either signed, acknowledged the signature, or acknowledged the will. Section 15-11-502(1), C.R.S. 2000. More recently, Colorado has recognized holographic wills if they are signed by the testator and material portions of the document are in the handwriting of the testator. Section 15-11-502(2), C.R.S. 2000.

In 1994, the General Assembly adopted comprehensive changes to the Colorado Probate Code which brought that code into conformity with the Uniform Probate Code Article II. *See* Colo. Sess. Laws 1994, ch. 178, § 15–10–107, et seq.; 8 Uniform L. Annot. 79–492 (1998). As pertinent here, the adopted revisions included a new provision, effective July 1, 1995, that is now § 15-11-503, C.R.S. 2000. This provision states:

> Although a will was not executed in compliance with section 15-11-502, the will is treated as if it had been executed in compliance with that section if the proponent of the will establishes by clear and convincing evidence that the decedent intended the will to constitute the decedent's will.

This added section gives Colorado courts, for the first time, authority to admit to probate wills that do not comply with the formal requirements of §15-11-502(1) and do not meet the holographic will requirements of §15-11-502(2). The construction and application of §15-11-503 has not previously been addressed by the appellate courts of this state and we have not located any published opinions of the appellate courts of another construing and applying that state's version of the statute.

By permitting the probate of wills which are flawed in execution, but nevertheless reflect the testator's intent, the statute comports with the underlying purposes and policies of the Colorado Probate Code to discover and make effective the intent of a decedent in the distribution of his or her property and to promote a speedy and efficient system for settling the estate. *See* §§ 15-10-102(2)(b) and 15-10-102(2)(c), C.R.S. 2000.

Similar legislation has been in effect in the Canadian province of Manitoba, as well as South Australia, and Israel, and is consistent with the general trend of the revisions of the Uniform Probate Code to unify the law of probate and nonprobate transfers, extending to will formalities the harmless error principle that has long been applied to defective compliance with the formal requirements of nonprobate transfers. *See, e.g.,* Annot., 19 A.L.R.2d 5 (1951) (life insurance beneficiary designations); Comment, Uniform Probate Code, § 2-503 (amended 1990), 8 Uniform L. Annot. 146–8 (1998).

The formalities associated with the execution of a will have historically served as proof of the testator's intent to dispose of property as set forth in the document, and the absence of undue influence, duress, or deceit. However, a technical failure in the execution of a will has also served to frustrate the testator's intent. In Israel and South Australia the adoption of a harmless error provision prevents unnecessary litigation by eliminating disputes about technical lapses and limits the actual dispute to the question of whether the instrument correctly expresses the testator's intent. *See* Law Reform Commission of British Columbia, *Report on the Making and Revocation of Wills* (1981); New South Wales Law Reform Commission, *Wills: Execution and Revocation* (1986); John H. Langbein, "Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law," 87 Colum. L. Rev. 1 (1987).

In application, the larger the departure from prescribed, formal execution, the greater the burden on the proponent to prove by clear and convincing evidence that the instrument reflects the testator's intent. For example, while the South Australian and Israeli courts routinely excuse breaches of the attestation requirements, they have insisted that the will be in writing, and have been extremely reluctant to excuse noncompliance with the signature requirement. *See* Langbein, *supra*, at 24-29, 49-50; *Estate of Hodge,* 40 S.A.St.R. 398 (1986) (the testator, who had written and signed his will, did not wish to be bothered with the requirement that the will be signed by two witnesses; despite the testator's willful noncompliance with the statutory requirement, the will was held to be valid); *Estate of Blakely,* 32 S.A.St.R. 473 (1983) (the testator and his wife signed "mirror wills," each mistakenly signing the will of the other; the court admitted the testator's will to probate, holding that there was no reasonable doubt that the husband intended the document signed by the wife to constitute his

will); *Baumanis v. Praulin,* 25 S.A.St.R. 423 (1980) (hospital patient asked a clergyman to draft his will and to have it typed, then asked that the clergyman have the will retyped with two minor changes; the testator died before signing the final draft; the court held that the unattested, unsigned will was not valid).

In this instance, we are not dealing with a minor deviation from the formal requisites of the preparation or execution of a will. Here, the "Will," or at least the dispositive portion of it, cannot be attributed to the decedent. It was not written by her in her own hand, it was not signed by her, and there is no evidence that she represented it to anyone, either orally or in writing, as her will. And, while there is no affirmative evidence to support the proposition here, the "Will" does not foreclose the possibility that some other person prepared or assembled the dispositive provisions of it.

There is nothing in the language of §15-11-503, nor is there any precedent in those jurisdictions which have adopted the same or similar statutes which would even contemplate the validation of the "Will" as the last will and testament of the decedent. The statute is limited in its application to those instruments which are not executed in strict compliance with the requisites of §15-11-502, not to those which are not executed at all.

The order is affirmed.

Chapter Fifteen: The Stale Will Problem

15.1 Introduction

After executing a will, a testator continues to live his or her life. A will does not become final until the testator dies. During the time between the execution of the will and the death of the testator, a will can become stale or outdated. A stale will problem exists when there are changes in the status of the beneficiaries and/or the property named in the will. This chapter is divided into two parts. Part one examines the legal consequences of a beneficiary of a will predeceasing the testator. It also deals with void will situations involving bequests to persons who are dead when the will is executed or gifts to animals. Part two includes a discussion of legal doctrines applicable to cases that arise when the property mentioned in a will does not exist when the testator dies.

15.2 Common law/Default Lapse Rules

Under the common law, the default rule is that a devisee must survive the testator to take under the testator's will. In essence, the law places a condition of survivorship on testamentary gifts. If the person who is named in the will does not survive the testator, the devise to that person lapses or fails. The two exceptions to this rule are the following: (1) the testator specifies what is to happen to the devise in the event that the beneficiary predeceases the testator and (2) the jurisdiction has an antilapse statute that substitutes another beneficiary for the deceased devisee. There are rules for specific or general gifts and for the residue of the estate. For clarity, consider the following basic example. Ramon, a widower, had two children, Madeline and Stanley. Stanley had two children, Brooke and Reginald. In 2000, Ramon executed a will stating, "I leave half of my estate to Madeline and half to Stanley. In 2012, Stanley died survived by his two children, Brooke and Reginald. Ramon dies in 2015. Under common law, the gift to Stanley would lapse, so Stanley's children would not inherit through him. What happens to the half of the estate that was left to Stanley? The answer to that question depends on several variables.

15.2.1 Specific and General Devises

A specific devise is one that is precisely described in the will. For example, the testator leaves a specific devise by stating, "I leave my car to Sam." A general devise is a gift of money. It occurs when the testator's will states, "I leave $100,000 to Gilbert." If a specific or general devise lapses, the devise falls into the residue.

Example:

In 1998, Claudia executed a will stating, "I leave my farm (specific devise) to Frank and $50,000 (general devise) to Clifford. The remainder of my estate (residuary devise) is to go Leonard." In 2012, Clifford died survived by one child, Bryan. In 2014, Frank died survived by three children, Lisa, Marie and Elvis. In 2015, Claudia died.

Explanation:

The farm and the $50,000 fall into the residue instead of going to the heirs of Frank and Clifford. Thus, Leonard takes the entire estate.

15.2.2 Residuary Devises

The residuary clause in a will is the catch-all provision. All property that is left over after the testator grants items to specific beneficiaries falls into the residue of the estate and goes to the person or persons who are the named takers. If the residuary devise lapses, the heirs of the testator take by intestacy even if they have not been listed in the will. If the testator leaves the residuary to two or more people and the gift of one of those beneficiaries lapses, that portion of the residuary passes by intestacy to the testator's heirs instead of going to the remaining residuary takers. Let's look at some examples.

Example 1:

In 2011, Ronald left a will stating, "I leave my house to Hillary and the rest of my estate to Bonita." In 2012, Bonita died survived by her son, Keith. In 2014, Ronald died. His sole intestate heir was his son Gibson.

Explanation 1:

Bonita's bequest falls out of the probate estate and Ronald dies intestate with regards to the residue of her estate. Thus, Hillary gets the house and Gibson gets the rest of the estate. It does not matter that Ronald chose not to include Gibson in his will.

Example 2:

In 1999, Sherrie left a will stating, "I leave my condo to Pamela. I leave the residue of my estate equally to Nancy and Gleason." In 2005, Nancy died survived by two children, Michael and Dale. In 2014, Sherrie died survived by her sole intestate heir, her son, Jenkins.

Explanation 2:

In the majority of jurisdictions, Nancy's portion of the residue would fall into the residue and go to Gleason. Thus, Pamela would get the condo and Gleason would take the rest of the estate.

15.2.3 No Residue-of-a Residue Rule

A few states continue to apply the "no residue-of-a residue rule. Under that rule, if one of the residue beneficiaries predeceases the testator, his or her portion cannot lapse into the residue. Instead, the dead beneficiary's share of the residue falls out of the probate estate into the intestacy estate.

Example 3:

In 2013, Freda left a will stating, "I leave my art collection to Vince. I leave the residue of my estate equally to Molly and Eddie." In 2011, Eddie died survived by one child, Cedrick. In 2015, Freda died survived by her sole intestate heirs, her sisters, Thomasina and Lucille.

Explanation 3:

Under the "no residue-of-a residue" rule, Eddie's portion of the residuary would fall out of the probate estate into the intestacy estate. Thus, Vince would get the art collection. The residue would be split between Molly, Thomasina and Lucille.

15.2.3 Class Devises

If the devise is to a class of persons and one member of the class predeceases the testator, the surviving members of the class divide the gift.

Example:

In 2009, Tony executed a will stating, "I leave $100,000 to my nephews and the rest of my estate to Monique." At the time the will was executed, Tony had four nephews, Jessie, Peter, Larry and Benjamin. Larry and Peter predeceased Tony. In 2014, Tony died survived by his nephews, Jessie and Benjamin. Tony was also survived by his sole intestate heir, his daughter Jenny.

Explanation:

Since this is a class gift, the portion of the estate meant to go to Larry and Peter remains in the class and goes to Jessie and Benjamin. Thus, Jessie gets $50,000; Benjamin gets $50,000; and the rest of the estate goes to Monique. Jenny does not receive any of the estate.

The main legal issue that arises when a testator leaves a devise to a group of people is whether or not that group constitutes a class. The test that is usually applied is if the testator was group minded. The testator is considered to be group minded if he or she uses a class label in describing the beneficiaries such as children, nieces and nieces. However, if the testator mentions the members of the group by name, the court may conclude that a class gift was not intended. In those cases, the courts reasons that the group classification is used for description and not designation.

Matter of Seaman, 196 Misc. 202 (N.Y. Sur. Ct. 1949)

FRANKENTHALER, S.

In this proceeding to settle the final account of an administratrix *c.t.a.*, a construction of the will is requested. Under paragraph sixth thereof the residuary estate was given 'to my step-mother, Alice B.

Seaman, of Ellenville, Ulster County, New York, and my namesake, Lyle Taylor McClure, of Colonia, New Jersey, equally, to have and to hold the same absolutely.' Alice B. Seaman, above-named, predeceased the testatrix. The question arises as to disposition of her share of the residuary estate.

The court holds that the legacy was not intended as a gift to a class but to the named beneficiaries separately and as individuals (*Matter of Kimberly*, 150 N.Y. 90; *Matter of Blumenthal*, 236 N. Y. 448; *Matter of Hartmannsgruber*, 146 Misc. 85; *Matter of Whelan*, 55 N.Y.S.2d 765). Accordingly, the gift to the legatee who predeceased the testatrix has lapsed.

Ordinarily a lapsed gift will pass under a general residuary clause (*Matter of Logasa*, 163 Misc. 628). However, where there is a failure of a gift of part of the residue itself, the lapsed portion will not be employed to augment the shares of the survivors, since admittedly the intention of the testator was to create a gift for each legatee of only a specified segment of the residue (*Beekman v. Bonsor*, 23 N.Y. 298; Matter of Hoffman, 201 N.Y. 247; *Wright v. Wright*, 225 N.Y. 329). Therefore, the gift having lapsed, the property must pass as upon intestacy.

Submit decree on notice construing the will and settling the account accordingly.

Matter of Kalouse's Estate, 282 N.W.2d 98 (Iowa 1979)

UHLENHOPP, Justice.

Decedent Louie Kalouse made the following bequests in his will executed on August 25, 1970, during a hospital stay:

ARTICLE II

I do hereby give and bequeath my organ to Louise Nespor of Oxford Junction, Iowa, to be hers absolutely.

ARTICLE III

I do hereby give and bequeath my old antique doll to Jessie Guthrie and Grace Houstman to be theirs absolutely.

ARTICLE IV

I do hereby give and bequeath all of my old albums, pictures, and photographs to my first cousins to be divided among them as equally as possible.

ARTICLE V

I do further hereby give, bequeath and devise all the rest, residue, and remainder of my property, real and personal, of every kind and character and wherever situated unto my first cousins on both my father's and mother's side of my family, and to Frank Nespor, in equal shares, share and share,

alike, with the share going to Frank Nespor to be equal with that of my other first cousins.

Kalouse died on November 26, 1976, at age 79, survived by 24 first cousins plus Frank Nespor. Thirteen other first cousins had died before the will was executed, and five first cousins died after the will was executed but before Kalouse died. In this will construction action the trial court held that Article V creates a class gift and that the antilapse statute therefore does not apply. On appeal several heirs of predeceased first cousins contest the trial court's holding.

I. Class gift. In construing a will we apply the following rules stated in *Elkader Production Credit Association v. Eulberg*, 251 N.W. 2d 234, 237 (Iowa 1977):

> (1) (T)estator's intent is the polestar and if expressed shall control; (2) it must be gleaned from a consideration of all language contained in the will, the scheme of distribution, and facts and circumstances surrounding the making of the will; and (3) technical rules of construction should be resorted to only if the will is clearly ambiguous, conflicting, or testator's intent is for any reason uncertain. *See e. g.*, *In re Estate of Spencer*, 232 N.W. 2d 491, 495 (Iowa 1975).

Article V left the residue of Kalouse's property to "first cousins on both my father's and mother's side of my family, and to Frank Nespor, in equal shares, share and share, alike . . .." Kalouse's first cousins were his closest living relatives. Frank Nespor was a half-brother of a first cousin but was not a blood relative of the decedent.

If Kalouse had excluded Frank Nespor and left his property to "my first cousins on both my father's and mother's side of my family," a class gift would have clearly resulted. *See Smith v. Harris*, 227 Iowa 127, 131, 287 N.W. 255, 257 (1939) ("surviving children"); *White v. Wachovia Bank & Trust Co.*, 251 F.Supp. 155, 159 (M.D.N.C. 1966) ("surviving brother and sisters or their legal representatives": "Ordinarily a gift to persons who are not named or numbered in the language of a gift but are designated therein only in general terms, as by relationship to the testator or another, is a gift to a class."); *Lacy v. Murdock*, 147 Neb. 242, 246, 22 N.W.2d 713, 716 (1946) ("children"); *In re Estate of Ransom*, 89 N.J. Super. 224, 230, 214 A.2d 521, 524 (1965) ("grandchildren"); *Green v. Green*, 9 Ohio Misc. 15, 18, 221 N.E.2d 388, 391 (1966) ("lineal descendants of my son, Richard C. Green, Per stirpes"); *Sanderson v. First National Bank*, 446 S.W.2d 720, 724, 726 (Tex. Civ. App. 1969)("sisters"); Annot., 61 A.L.R.2d 212, 237-40 (1958). A class gift "is a gift to two or more persons who are not named and who have one or more characteristics in common by which they are indicated or who answer to a general description." *In re Estate of Coryell*, 174 Neb. 603, 608, 118 N.W.2d 1002, 1005 (1963).

The trial court's comments on the class gift issue are pertinent:

> However, in the case involved the only naming was that of Frank Nespor. There is no evidence whether the testator was simply thinking of the particular persons who were alive on the date of the execution of the will, or if he was thinking of the future group who would survive him. It may well be that testator had not even gone through the mental processes to make that determination. However, it is plain from the wording of his will and the mentioning of his first cousins that these were the people he wished to inherit his property, along with Frank Nespor. This general theme of disposition would indicate that it would be thwarted by providing for specific bequests to

> individuals, rather than to the class first cousins. Except for the mention of Frank Nespor there is no working (Sic) in the will that indicates any specific individual or even a number of any individuals. Although Frank Nespor is named individually, the use of his name was to place him in the same classification with the other first cousins.
>
> It is noteworthy that decedent mentions "first cousins" three times in Articles IV and V. This is especially true when he does not mention heirs at law, second cousins, children or spouses of first cousins, relatives, deceased first cousins, or first cousins "alive at this time."
>
> It well may have been more equitable of the decedent to have named all of his heirs at law, or to have included the children of deceased first cousins. In this regard the Iowa Supreme Court, in *In re Estate of Fairley*, 159 N.W.2d 286, 288, stated: "Although our purpose is to arrive at the true intent of the testatrix, experience has demonstrated the advisability of adhering to established rules for the construction of wills rather than freeing judges to operate on broad principles of equity and justice."

The gift to "first cousins on both my father's and mother's side of my family" was a gift to several people, the beneficiaries were unnamed, they were all equally related to testator, their number was subject to change by decrease, and all except Nespor, to be considered later, answered to the general description of first cousins. The will itself refers to first cousins several times, and nothing in the will suggests that the issue of first cousins were to be included. *See* Note, Class Gifts in Iowa, 21 Drake L.Rev. 167, 169 (1971) ("The class of 'children' only includes issue of the first generation, and does not include grandchildren, unless a contrary intent is expressed in the will. Similarly, 'nieces and nephews' does not include grandnieces and grandnephews."). This court stated in *Parish v. Welton*, 194 Iowa 1274, 1277-78, 190 N.W. 947, 949 (1922):

> In the instant case, the Testator, at the time of drawing his will, Knew of the conditions with which he was dealing; that at said time three of his children were deceased; and that they had left children surviving them who were the grandchildren of the testator. Knowing this situation, he drew the will providing for his property to be divided equally among all of his children. He designated his "children" as the class which should be the beneficiaries of his will. He made no provision that the children of any of the deceased children should participate. He made no provision that any of his grandchildren should participate. The property was to be divided equally among all of his "children."
>
> We cannot extend the word "children" to include grandchildren, any more than in the Nicholson's Will, *In re case* (115 Iowa 493, 88 N.W. 1064 (1902)) could we extend the word "nephews" to include grandnephews. It is undoubtedly true that the word "children" may, in some instances, be construed to include grandchildren, where it is evident from the context of the will that such was the plain intent of the testator. *Bowker v. Bowker*, 148 Mass. 198, 19 N.E. 213. But such a situation does not confront us here, for there is nothing in the context of the will to indicate that the intent of the testator was to include grandchildren in the term "children." The general rule is that the word "children," when used in wills, is to be understood and construed in its primary sense, and always so where there are persons in existence answering such meaning of the word. Under such circumstances, the word "children" does not include grandchildren or any others than the immediate descendants of the ancestor of the first degree. (citations omitted)

As in *Parish*, the testator here was aware of the conditions with which he was dealing 13 of his first

cousins were dead when testator executed his will in 1970, including Vince Pegoriek (died 1917 or 1918), Albert Pegoriek (died 1928), Tillie Riches (died 1932), Tillie Koranda (died 1939), and Charles Riches (died 1943). We find the conclusion difficult to draw that Kalouse "intended" to include these people, some of whom had been dead for 30 to 50 years. Even though a number of the first cousins had descendants, Kalouse nevertheless designated "first cousins" as the class of beneficiaries. Thus the result here must be the same as in *Parish* only first cousins take and heirs of first cousins do not take.

The inclusion of Frank Nespor did not change the class gift to a gift to individuals. In the context of gifts to a group and a named individual the gift to the group is still a gift to a class; the addition of the named individual merely raises a question as to the status Of that individual. 3 Restatement of Property s 284& Comment A at 1492 (1940); Annot., 61 A.L.R. 2d at 292, 293. *Compare Spencer v. Adams*, 211 Mass. 291, 97 N.E. 743 (1912) (distributed as if single class), With *In re Pierce's Estate*, 177 Wis. 104, 188 N.W. 78 (1922) (held to be gift to class and gift to individual). Hence the gift to the group here is a class gift, and the only question is whether Frank Nespor is included in the class. But his gift is not questioned on appeal, and so no issue arises as to him. We note however that the will states, "with the share going to Frank Nespor to be equal with that of my Other first cousins," indicating a single class gift. (Emphasis added.)

The trial court was right that testator's first cousins on his father's and mother's sides and Nespor constitute a class.

II. Extrinsic evidence. The heirs of first cousins argue a contrary result is required because of extrinsic evidence in the form of the scrivener's deposition testimony. That testimony includes the following:

> A. Anyway, after that I wanted to find out what other person did you want your property to go to, and, well, he said he didn't really care what happened. He had no close relatives. And he thought that his first cousins ought to get the property and that was the best he could do. He said I asked him if do you want to name these people, and he said, no, he didn't want to name them, because he was afraid he might forget somebody and leave them out, because he wanted all of them to share pretty much equally. And then, kind of as an afterthought, he thought of Frank Nespor, and he thought that Frank should get the same share as any of these cousins should get. He wanted him to be treated the same, was my impression.
>
> Frank was not related, as I understood, so he wanted to name him specifically as being getting shares one of the cousins did.
>
> Q. Were you acquainted with Frank Nespor? A. Yes, I knew who he was through the office. I think we did his income tax, too.
>
> Q. Now, you say that Frank Nespor was more or less of an afterthought. Would you elaborate on that? A. Well, we were talking about relatives, and he couldn't remember all of his first cousins or didn't want to try to remember all their names, but he wanted them to share, and then and then he said that Frank should have a share, too. I can remember him saying that, that Frank Nespor was a friend of his and had done a lot of things for him, and he wanted to have him share like his relatives would. And I think he named Frank as an executor, too, as I recall.

Q. Was any consideration given, Mr. Story, to leaving anything to the first cousins who had predeceased Mr. Kalouse at the time he made the Will? A. Well, I have no specific recollection as to that. I know that I asked him specifically about naming people, and he told me he didn't want to name anybody, because he didn't want to leave anybody out. He wanted to be sure that all the first cousins were included. But I can't recall him or either of us talking about what would happen if one of them died before he did. (Emphasis added.)

Before considering the import of this evidence, we set forth some testimony of the scrivener relating to the time the will was executed, which is pertinent to an understanding of the case:

Q. And where was where did you find Mr. Kalouse? A. He was in a room in the hospital. It seemed to me like it was a private room. I don't recall anybody else being in there with him. But at the time that I came in he was he was not in the bed, but he was sitting on the edge of the bed. He was able to stand up and walk around. I recall he had some kind of a bandage or corset around his middle, because apparently he had broken ribs or gored by a bull or something.

Q. Now, did you learn from him or from any other source why he was in the hospital? A. He told me he had been gored by a bull. Maybe I'm not sure I learned it anywhere else either, but I know he did say that.

Q. Can you be a little more specific as to his condition of health at that particular time when you saw him at St. Luke's Hospital? A. Well, when I saw him, I mean, mentally, I mean, he appeared to be alert and knew what was going on. He had, I think, some pain probably from the ribs or whatever it was that was injured about his middle. But mentally he seemed to be same as I had seen him before.

Q. Did you visit with him about this Will that he wanted you to prepare? A. Yes. When I got there, I told him that they had called us to come down there to see him, because he wanted to make a Will, and he said that was true, that he felt he should have a Will, and so then we did visit somewhat as to what he wanted to do by way of a Will, and after I ascertained what he wanted, then I did sit down and write this out in my handwriting, and then I read that to him, also, and asked if that's what he wanted, and then we called in a nurse to be a witness, and he did sign it before myself and this other nurse.

Q. Now, why was it that you wanted to do it this way, which might be a little unusual, rather than to go back and prepare it and submit it to him later? A. Well, my understanding was when I went down there was that it was something urgent, needed to be done right away. Now, when I got there, I'm not sure if that was necessarily true. I mean, as far as looking at him, he appeared to be all right. But I didn't check with his doctor to find out what his condition was.

Q. Was this his wish, to have it done immediately? A. Yeah, he wanted it done right away.

Q. Did he give you any explanation as to why he wanted it done immediately? A. Well, apparently I took it his doctor had told him maybe that he ought to have one made. And if you knew Louie, why, he's not the kind of fella that wanted to make a Will before, when he's in the office, probably something he would put off a long time, but it was my impression somebody told him he ought to have one right away, so he called us to have it made.

At the outset, we are not persuaded that the deposition, taken at face value, shows Kalouse did not intend a class gift. Kalouse stated he did not want to leave out any first cousins, but that does not answer the question of whether he intended a class gift. The scrivener testified, "But I can't recall him or either of us talking about what would happen if one of them died before he did." When asked to name individuals, Kalouse refused; this is consistent with a class gift.

Assuming however that the scrivener's testimony shows gifts to individuals were intended, the heirs' problem is the principle against varying wills by extrinsic evidence. The general rule is that "extrinsic evidence is not admissible to vary, contradict or add to the terms of the will, or to show a different intention on the part of the testator from that disclosed by the language of the will." *See Wagg v. Mickelwait*, 165 N.W.2s 829, 831 (Iowa 1969); *In re Estate of Winslow*, 259 Iowa 1316, 1323, 147 N.W. 2d 814, 818 (1967) (scrivener's testimony excluded); *In re Estate of Hogan*, 259 Iowa 887, 890, 146 N.W. 2d 257, 258 (1966); *In re Estate of Stonebrook*, 258 Iowa 1062, 1073, 141 N.W. 2d 531, 537 (1966); *Bankers Trust Co. v. Allen*, 257 Iowa 938, 944, 945, 135 N.W. 2d 607, 611 (1965) ("Evidence of testator's intention as an independent fact, divorced from the words of the will, is clearly inadmissible. Courts will not, from oral testimony, make a will testator perhaps intended to, but in fact did not, make." Also, "(C)ourts cannot draw (testator's) will to carry out a possible intent not expressed in the will. A contrary holding would nullify the requirement that wills be in writing." (Emphasis added.)); *In re Estate of Miller*, 243 Iowa 920, 929, 54 N.W.2d 433, 438 (1952) (scrivener's testimony excluded). *Accord*, *Tamm, Inc. v. Pildis*, 249 N.W.2d 823, 831 (Iowa 1976) (contract); *Sanderson v. First National Bank*, 446 S.W. 2d at 723 (class gift). *See also In re Estate of Lepley*, 235 Iowas 664, 672, 17 N.W. 2d 526, 529-30 (1945) (" 'However clearly an intention not expressed in the will may be proved by extrinsic evidence, The rule of law requiring wills to be in writing stands as an insuperable barrier against carrying the intention thus proved into execution.' " (Emphasis added.)).

Extrinsic evidence used in this manner violates the parol evidence rule. Tamm, Inc., 249 N.W. 2d at 831, 834; *Egan v. Egan*, 212 N.W.2d 461, 464 (Iowa 1973); *Pappas v. Hauser*, 197 N.W. 2d 607, 611 (Iowa 1972). This holds true in the class gift context. As stated in 96 C.J.S. Wills s 693, at 22023 (1957):

> The only universal rule for determining whether testamentary gifts to several persons are gifts to them as a class or as individuals is to ascertain the intention of the testator as expressed in the instrument to be construed. . . .
>
> Primarily, the determination of the question depends on the language of the will, but it is not absolutely controlled and limited thereby; the substance and intent, rather than the words, are to control; as aids thereto, the general scope of the will, the general purpose of the testator, the particular language used, the relationship of the parties, and the surrounding circumstances may all be considered, Subject always to the limitation, prevailing generally as to the availability of extrinsic facts and circumstances as aids to construction, that such matters cannot be resorted to in order to defeat the plain and unambiguous language of the will. (Emphasis added.)

The editor states regarding decisions on "first" and "second cousins" in Annot., 94 A.L.R. 26, 111 (1935):

> Where there were persons in existence who fitted the description of "first cousins" and "second cousins," such description was held to be unambiguous, so that it could not be shown that the testator intended by the use of those terms to

> designate persons other than those included in the ordinary acceptation of the terms. (Citations omitted.)

Use of the extrinsic evidence involved here would violate the parol evidence rule. Where a will is involved the parole evidence rule applies with at least as much vigor as in contract cases, although authority exists for applying the rule more strictly in wills cases since wills must be in writing. As stated in Annot., 94 A.L.R. at 30:

> It is stated in some cases that the rules relating to the admissibility of parol evidence in connection with wills are the same as those relating to other written instruments. *Hanner v. Moulton,* (1885; C.C.) 23 F. 5 (affirmed in (1891) 138 U.S. 486, 11 S.Ct. 408), 34 L.Ed. 1032; *Tucker v. Seaman's Aid Soc.* (1843) 7 Met. (Mass.) 188; *Crosson v. Dwyer* (1895) 9 Tex. Civ. App. 482, 30 S.W. 929.
>
> However, it is stated in *Smith v. Holden* (1897) 58 Kan. 535, 50 P. 447, that More strictness is observed in the reception of parol evidence of expressions of a testator's intention than in cases of like evidence explanatory of contracts inter vivos. And in *Robinson v. Ramsey* (1925) 161 Ga. 1, 129 S.E. 837, The rule excluding parol evidence to contradict, add to, or vary the terms of a written instrument is said to be especially applicable in the construction of so solemn an instrument as a will.
>
> There would seem to be some reason for making the parol-evidence rule more stringent with regard to wills than with regard to other instruments, at least those not required by law to be in writing, for, In the case of wills, the person offering such evidence is confronted not only with the common-law rule against the admission of parol evidence to vary or add to a written instrument, but also with the Statute of Frauds and the Statute of Wills, both requiring testamentary instruments to be in writing and the latter setting up certain formalities to be observed in the execution of a will. (Emphasis added.)

See also 80 Am.Jur.2d Wills s 1279, at 388 (1975)("The rules for the admission and exclusion of parol evidence in regard to wills are essentially the same as those which prevail in regard to contracts in general.").

In this case the extrinsic evidence was admitted by stipulation. An evidentiary rule exists that evidence received without objection becomes part of the evidence in the case and is usable as proof to the extent of its rational persuasiveness. *Tamm, Inc.*, 249 N.W. 2d at 833 (citing McCormick's Handbook of the Law of Evidence s 54, at 125-26 (2d ed. E. Cleary 1972)). This rule, however, does not apply to evidence which is used in violation of the parol evidence rule, since that rule is a Substantive law rule. *Jarvis v. Cunliffe*, 140 Conn. 297, 299, 99 A.2d 126, 127 (1953) ("(A) written contract may not be varied by parol and this is a rule of substantive law. . . . even though evidence of an oral agreement is before a trier, it may not be given the effect of varying a written contract which was intended to incorporate all of the terms of the agreement."); 9 J. Wigmore, Evidence s 2400, at 3 (3d ed. 1940 & Supp.1979); Restatement (Second) of Contracts s 239, Comment A at 546 (Tent. Drafts Nos. 1-7, 1973). This court has specifically dealt with the application of the principle. The court has stated in *Randolph v. Fireman's Fund Insurance Co.*, 943, 949, 124 N.W. 2d 528, 531 (1963):

"The rule against varying, modifying or contradicting written instruments by parol evidence is one of substantive law rather than of evidence, and such evidence will be disregarded even though not objected to when offered."

The court has followed this rule in recent times. In 1976 we stated in *Tamm, Inc.*, 249 N.W.2d at 834-35.

> The McCuens' testimony concerned conversations they had with Mr. Hunt about termination of the driveway arrangement. For the same reasons asserted in the previous division we believe this testimony violates the parol evidence rule. The testimony was not offered to assist in the interpretation of words of termination because there were none. It was clearly an attempt to Add to contractual language words not previously there or referred to. It is true there were no objections to this testimony, but there is case law support for the proposition a court should sua sponte apply the parol evidence rule. In *Randolph v. Fireman's Fund Ins. Co.*, 255 Iowa 943, 949, 124 N.W.2d 528, 531, 8 A.L.R. 3d 907, 913-914, this court said:
>
> "Since we think the policy is clear in its intent that no farm employees are covered unless listed and a premium charged, We have no occasion to give any effect to the parol evidence introduced. It was conflicting; but Whether objected to or not, under the circumstances here it has no weight. The rule against varying, modifying or contradicting written instruments by parol evidence is one of substantive law rather than of evidence, and Such evidence will be disregarded even though not objected to when offered. . . . (citing authorities)." (Emphasis supplied.) *See also Williams v. Williams*, 251 Iowa 260, 264, 100 N.W. 2d 185, 188.

Therefore, their testimony is entitled to no consideration in arriving at our decision.

See also Annot., 81 A.L.R. 3d 249, 264-65 (1977).

The heirs apparently believe the rules stated in Tamm, Inc. and Randolph do not apply here since the evidence was admitted by stipulation. On the contrary, since the parol evidence rule is a Substantive law rule, the following statement is pertinent from 73 Am.Jur. 2d Stipulations s 5, at 539-40 (1974):

> While, ordinarily, courts are bound by stipulations of litigants, that rule cannot be invoked to bind or circumscribe a court in its determination of questions of law. It has generally been stated that the resolution of questions of law rests upon the court uninfluenced by stipulations of the parties, and accordingly, virtually all jurisdictions recognize that stipulations as to the law are invalid and ineffective. The same rule applies to legal conclusions arising from stipulated facts. It has thus been held that it is not competent for the parties or their attorneys to determine by stipulation questions as to the existence or proper construction or application of a statute; as to the validity of a legislative enactment; or as to the validity or effect of a written instrument.

See also Aubuchon v. Bender, 44 Mo. 560, 570 (1869) (deed; "No agreed statement of facts can fix a conclusion of law. The relationship and death are facts to be admitted, but who were his heirs is a question of law which the court is bound to declare.").

From the authorities we conclude that the extrinsic evidence of Kalouse's declarations to the scrivener may not be used to construe the will.

III. Antilapse statute. Then who takes at the death of Kalouse? The parties argue the question of the application of the antilapse statute to the Article V bequest. This statute provides in section 633.273, The Code 1977: "If a devisee die before the testator, his heirs shall inherit the property devised to him, unless from the terms of the will, the intent is clear and explicit to the contrary."

The application of the antilapse statute depends on whether the bequest was to a class or to individuals. "Generally if the gift is to a class the surviving members take the whole gift, if to named individuals there is no such right of survivorship to the other named beneficiaries but the heirs of the deceased beneficiary take his share under the antilapse statute . . . ." *Gunn v. Wagner*, 242 Iowa 1001, 1010, 48 N.W. 2d 292, 297 (1951); *In re Estate of Huston*, 224 Iowa 420, 425, 275 N.W. 149, 151 (1937) ("It is the well-known rule of law in this and most other jurisdictions that unless a contrary intent is indicated by a will, a devise to a class includes only such members as are living at the time of the testator's death, when the will takes effect."); 1A D. McCarty, Iowa Probate s 942, at 423 (2d ed. 1964). Since Kalouse left the residue of his property to a class, the antilapse statute does not apply as to predeceasing cousins. Thus, first cousins who died before the will was executed are not included, nor are their heirs. *Parish v. Welton*; Note, 21 Drake L.Rev. at 169-70. Likewise, first cousins who died after the will was executed and before testator died, and their heirs, are not included. *Redinbaugh v. Redinbaugh*, 199 Iowa 1053, 1054, 203 N.W. 246, 246-47 (1925); Note, 21 Drake L.Rev. at 170-71. We decline to change these rules.

The trial court correctly construed the Kalouse will. Each of the 24 first cousins alive on the date Kalouse died and Frank Nespor receive one twenty-fifth of the residue of the estate.

Affirmed.

Nolan v. Borger, 203 N.E.2d 274 (Ohio Prob. 1963)

ZIMMERS, Judge.

This cause is before the Court upon the Petition for construction of the Will of Henry E. Borger, deceased, by Nicholas F. Nolan, Executor of said decedent's estate; the Answer and Cross-Petition filed on behalf of the estate of George Reichert, deceased, and Lena Renner, defendants herein; the Answer and Cross-Petition filed by Essie Borger, defendant; the Briefs filed by counsel on behalf of the afore-mentioned parties and the evidence. Of the designated defendants the following are not before the Court by process or by virtue of an appearance and are, therefore, not bound by the judgment herein: Marie Reichert, Francis Adolph Reichert or Arthur E. Harter, Jr., Attorney in Fact for Francis Adolph Reichert, and Rev. Urban J. Stang.

The record shows that Henry E. Borger died on September 2, 1961, and that his Last Will and Testament was admitted to probate in this Court on September 11, 1961, at which time the petitioner was appointed executor of said estate. Clara Herman and Adolph Reichert, devisees named in said Will, predeceased the testator. George D. Reichert, who is named in the Will, died on June 2, 1962, therefore surviving the testator, and his estate is represented herein by Mary Katherine Kane and Margaret Cecelia Paszkiewicz, co-executrices thereof. Items IV, V, VI, VIII and IX of the Will of Henry E. Borger, deceased, are as follows:

'ITEM IV. My real estate located at South Illinois and Monroe Streets, in Carbondale, Illinois, being an undivided one-half interest therein; and my undivided one-third interest in my farm in Jackson County, Carbondale Township, Illinois, I give, devise and bequeath to my sister-in-law, Essie Borger, of Carbondale, Illinois, for and during her natural life, and upon her decease to the issue of her body, share and share alike. Said Essie Borger is to have the income from said property to pay all taxes, assessments and upkeep of said property.'

> 'ITEM V. The funds I have on deposit at the Gem City Building & Loan Association, Dayton, Ohio, being Account No. 22,474; and funds in the Citizens Federal Savings & Loan Association, Dayton, Ohio, being Account No. 0-22608; my Postal Savings funds; the United States bonds, Series E, in the approximate sum of $5,500.00, and which bonds I received from my wife, Katherine J. Borger; and my two-thirds interest in my farm in Marysville, Nodaway County, Missouri, I give, devise and bequeath to the brothers and sisters of may wife, namely; George Reichert, of St. Louis, Missouri; Clara Herman of Freeburg, Illinois; Adolph Reichert of St. Louis, Missouri; and Lena Renner of Belleville, Illinois, to be theirs absolutely, share and share alike.'
>
> 'ITEM VI. The household furniture in my residence at 19 Pelham Drive, Van Buren Township, Ohio, I give and bequeath to my sister-in-law, Essie Borger, and the brothers and sisters of my wife, namely: George Reichert of St. Louis, Missouri; Clara Herman of Freeburg, Illinois; Adolph Reichert of St. Louis, Missouri; and Lena Renner of Belleville, Illinois, to be theirs absolutely, share and share alike.'
>
> 'ITEM VIII. All the rest and residue of my estate of whatsoever nature and wheresoever situate, including my residence property in Dayton, Ohio, I request and direct that my Executor convert all the residuary of my estate into cash and after deducting the necessary expenses of sale, I give, devise and bequeath the same to my sister-in-law, Essie Borger, and the brothers and sisters of my wife, namely: George Reichert of St. Louis, Missouri, Clara Herman of Freeburg, Illinois; Adolph Reichert of St. Louis, Missouri; and Lena Renner of Belleville, Illinois, share and share alike.'

'ITEM IX. I hereby nominate and appoint Nicholas F. Nolan as Executor of this, my Last Will and Testament, and I direct that he be permitted to serve in such capacity without bond. I direct and request my said Executor in the administration of the estate to consult and advise with my sister-in-laws, Essie Borger of Carbondale, Illinois, and Lena Renner of Belleville, Illinois as to all sales of assets. I further empower my said Executor to sell, in whole or in part, any realty or personalty owned by me at the time of my death, at public or private sale, without order of Court and at such prices and upon such terms as in his judgment may seem wise and for the best interests of my estate, hereby empowering and authorizing my said Executor to execute and deliver any deeds, bills of sale or other necessary instruments to complete said transaction in the same manner as I could do, if living. I further authorize my said Executor to compound, compromise, settle and adjust any and all claims against my estate or due to my estate as he deems best.'

The evidence shows that the real estate mentioned in Item IV was sold by the decedent before his death and that the real estate mentioned in Item V came to the testator from his wife who predeceased him.

At bar the parties have stipulated that the reference to Series E bonds in Item V applies to bonds which were in the name of Katherine Borger alone on the date of her death. These had a total face value of $5,250.00, and the parties have further stipulated that certain bonds in Henry E. Borger's estate, having a total face value of $3,200,00, are re-issues of the former bonds and that the latter bonds, therefore, pass under Item V of his will. The balance are admittedly adeemed. It has been stipulated that all other government bonds in Henry E. Borger's estate pass under the residuary clause.

The basic question before the Court is the effect of the death of two of the named legatees and devisees in the will prior to the death of the testator herein upon the distribution of the testator's estate as required by his will. The real estate devised in Item IV of the testator's will was admittedly sold before the death of the testator, and there being no postal savings in his estate as described in Item V no issue of the ademption thereof is presented.

The respective parties have agreed that the gifts in Item V are class gifts. The Court agrees with the agreement of counsel on this issue but will establish its holding since the title to real estate is involved and it was asked to render judgment thereon in the pleadings.

The cardinal rule to follow in a will construction case is to ascertain the intention of the testator. This intention is determined from the words used in the will and construction from the four corners. There is no fixed rule applicable to the construction of wills. All rules of construction are useful or applicable only insofar as they aid in arriving at the correct construction as to the intention of the testator.

It has been written by outstanding jurists and other learned scholars of the law that a will has no brother. In following this truism this Court, in the construction of a particular will before it, has often pondered the paradox that a layman or testator is presumed to know the law, including statutes, judicial interpretations and the law's effect on the devolution of an estate- Flynn, *Administrator v. Bredbeck*, 147 Ohio St. 49, 68 N.E.2d 75, while in a will construction or other difficult question of law the Court and counsel representing the legatees and devisees or next of kin and heirs spend hours or days in research, following the doctrine of Stare Decisis to find a determination by the Court of last resort in a case in which the same or similar language was used. Yet the Court fully realizes that in nearly all cases the instrument that presents the problem is not a holographic will executed in accordance with the statutes of the state, but is one which we know was composed, framed, written and punctuated in the language of the scrivener and signed by the testator after reading the prepared instrument in counsel's office.

In Item V of the will at bar the testator has both designated the individual beneficiaries therein as a class, to-wit: 'to the brothers and sisters of my wife,' and he has named them as individuals. In *Jewett v. Jewett*, 21 Ohio Cir. Ct. R. 278, affirmed without opinion in 67 Ohio St. 541, 67 N.E. 1098, the rule in such case has been stated as follows:

'This clause, like many such testamentary provisions, described the residuary legatees in two ways, each of which, taken by itself, has a well settled legal effect quite different from the other. It describes them by name, which makes a bequest to them as individuals, so that if one dies without issue before the testator, the legacy to him fails. It also describes them as nephews, i. e., as a class, which makes a bequest to such of the class as are capable of receiving it when the bequest takes

effect, (sic) when both descriptions occur, *with nothing more to show the testator's intent*. (sic) The construction is that the gift by name constitutes a gift to individuals to which the class description is added by way of identification.' (Emphasis Added)

It is a well-established rule that when the Court construes a will from the four corners, it must insofar as possible place itself in the place of the testator and may take into consideration all of the facts and circumstances surrounding the testator at the time of execution of the will. See numerous cases cited in 56 O. Jur.2d, Section 522 on Wills and *Jewett v. Jewett*, *supra*, 21 Ohio Cir.Ct.R. at page 281.

This Court is of the opinion that, although the rule announced in *Jewett v. Jewett*, supra, is applicable in the case at bar, the result is different because the facts here clearly establish *something more* to show the testator's intent to create a class gift. The facts and circumstances surrounding the testator at the time of his death show that he intended to return at least part of a certain class of property, i. e. that which was received from his wife, to a class of individuals, i. e. the brothers and sisters of his wife. It must be admitted that there is no probative evidence in the record to establish the origin of the Savings and Loan accounts. Although testator received postal savings from his wife's estate, there are no postal savings in his estate. However, the government bonds and the real estate situated in Missouri have clearly been established to have come to the testator from his wife by his own declaration in his will and by evidence produced at the hearing herein. The Court, therefore, finds that the testator intended the gifts in Item V to be class gifts and the shares of the members of the class predeceasing the testator, therefore, pass to the members of the class surviving the testator. *See* 56 O.Jur.2d on Wills, Section 857, and the cases cited therein.

This Court has cited only Ohio authorities on this question and the further question might arise as to whether the construction by this Court applies to the Missouri real estate mentioned in Item V. This is a problem of choice of law within the rules of conflict of laws and the Court believes it necessary to comment thereon because the title to real estate is involved.

In the several states of the United States there appears to be conflicting authority as to which law governs in the construction of testamentary language purporting to devise real estate located in a sister state. Ohio has adopted the conflict of laws rule that the law of the situs applies. *See Jennings v. Jennings*, 21 Ohio St. 56, and *Ives v. McNicoll*, 59 Ohio St. 402, 53 N.E. 60, 43 L.R.A. 772, and Page on Wills, Boe-Parker Revision, Section 60.6, page 451. This would seem to require Missouri law to be examined with respect to the language necessary to create a class gift as to the parcel of realty mentioned in Item V. Missouri's conflict of laws rule, however, requires the law of domicile (in this case Ohio law) to be considered when construing language in a will in which Missouri real estate is devised. *See Jones v. Park*, 282 Mo. 610, 222 S.E. 1018; *Nombro v. Moffett*, 329 Mo. 137, 44 S.W.2d 149; *Bernheimer v. First National Bank*, 359 Mo. 1119, 225 S.W.2d 745 and 746 and Page on Wills, Boe-Parker Revision, Section 60.5, page 455.

In order to avoid the circular problem of 'Renvoi' the most accepted 'conflict of laws' rule is that the Court of the forum will only look to the internal law of the 'choice of law' state (or Missouri law). 9 Ohio Jur.2d on Conflict of Laws, Section 11, page 668. This rule would require this Court to examine only the internal law of Missouri and to ignore the reference back to Ohio law which is one of Missouri's 'conflict of laws' rule. One of the exceptions to the rule that only the internal law is to be considered is the case in which title to real estate is involved. *See* 9 O.Jur.2d on Conflict of Laws, section 11. In that event, which is our case at bar as to the Missouri real estate in Item V, the Court

of the forum looks to the whole law of Missouri and in order to avoid the circular problem, it decides the case as if it were sitting in the 'choice of law' state, namely Missouri. This Court is of the opinion that its construction of Item V herein must be based upon the Ohio rules of law in construing language to determine if a class gift exists because the Missouri court would have done so if it were deciding this case.

This Court wishes to add that the rule of the exception seems to be the better rule because the result is the same regardless of the forum. If the 'conflict of laws' rule *and* the 'internal law rule' on the issue being decided are conflicting in the two states involved, the result of the case can be controlled by filing the suit in the state which will apply the internal law to effect that result. The general rule, which requires only the internal law of the 'choice of law' state to be applied, would in that case result in different judgment, depending upon the forum of the law suit.

The principle issue in the case at bar and the one most extensively briefed by counsel is whether the gifts in Item VI and VIII are gifts to all of the individuals therein named or whether the brothers and sisters of the testator's predeceased wife were considered therein to be a class to receive one-half of the property disposed under said items and, Essie Borger, the widow of one of the testator's deceased brothers, is to receive the other half. The problem of construction, however, is the same, to-wit: what is the testator's intent in a case in which he both describes individuals who would constitute a class and also names them as individuals. The Court is of the opinion that the same rule above applied in Item V applies to the issue now under consideration. If this Court cannot find *something more* in the will or the surrounding circumstances to indicate that the testator intended the brothers and sisters of his predeceased wife to be treated as a class in Items VI and VIII, it must be found that he intended to make gifts to the individuals therein named, per capita, as held in Jewett v. Jewett, supra.

Counsel for Essie Borger contends in his brief that because the testator made specific gifts in Items IV and V he 'must have intended that the property he received from his wife would go to or be given to the brothers and sisters of his deceased wife, and the property received from his side of the family would go to his brother's widow and her children, *with the property acquired by him during his lifetime to be divided equally between the two sides of the family*.' (Emphasis added). With the statements in the first two clauses of the above quotation the Court agrees, but the Court cannot agree with the conclusion in the emphasized clause. It does not necessarily follow from the first two statements that the testator intended his uninherited property to be divided equally between the two sides of the family. Counsel for Essie Borger continually refers throughout his brief to the preference of Essie Borger manifested by the whole will of the testator. This Court is of the opinion that if the testator indicated any preference of Essie Borger, it was over the other relatives of the testator who were shown by the facts and circumstances admitted in evidence to have existed and to have been completely ignored in his will. From the wording of the whole will at bar and from the evidence submitted as to surrounding facts and circumstances this Court can find no indication that the testator intended to prefer Essie Borger as an individual over any one of the brothers and sisters of his predeceased wife with respect to the uninherited property acquired by him during his lifetime.
Counsel for Essie Borger contends that because the testator mentioned his client and one of the brothers and sisters of the testator's predeceased wife as consultants before the sale of any property could be made, it must be concluded that he intended a half and half distribution in Items VI and VIII. Examining the whole will the Court does find that there are in fact two classes or branches of beneficiaries as hereinbefore discussed. The Court is of the opinion that it does not necessarily follow, however, that because the testator designates one person from each branch as consultant, he

intended a half and half division of his property to the two branches.

Counsel for Essie Borger also contends that giving effect to the punctuation in the will, it is evident that the testator intended a half and half division. As counsel points out, the colon indicates a list and the Court is of the opinion that nothing further can be construed from the use of the colon in Items VI and VIII. There is no punctuation in said items which indicates that the testator intended two classes to be construed from a dispositive standpoint. The testator's scrivener has used language whereby all beneficiaries in the testator's will were both described in their relationship to him and as individuals. The colon was employed by virtue of the fact that one of the descriptions contained a list or was applicable to a number of individuals.

Counsel for Essie Borger also contends that a rule of the construction requires that where reoccurring phrases are used in a will, the testator must have intended to use the phrases with the same purpose, unless the context in which phrase is used makes it evident that a different meaning was intended. The statement of the rule is incomplete as this Court finds by investigating the authorities. The material portion of the rule omitted by counsel's reference thereto is that the reoccurring phrase must be used in conjunction with the *same subject matter*. *See Rugg v. Smith*, 40 Ohio App. 101, 177 N.E. 784; Walker v. Walker, 20 Ohio Cir.Ct.R. 409, at page 415 and O.Jur.2d on Wills, Section 574 at page 109. Since the testator was disposing of different property in Item V, it does not follow that the use of the same phrase in a later item or items in which different property was being disposed of must be similarly construed.

The portion of the rule omitted by counsel is a material portion as can be seen by examining its effect on the will at bar. If this Court would have construed the use of the phrase under discussion in Items VI and VIII first, and then applied its construction thereof to Item V, the Court would have to ignore the surrounding facts and circumstances which clearly indicate that the testator intended the property disposed of in Item V to go to the brothers and sisters of his predeceased wife as a class. In Items VI and VIII the testator is not returning to his wife's relatives property which he received from her and the same reasoning does not apply. To reiterate, this Court does not find 'something more' in the facts and circumstances surrounding the testator or in the language employed in Items VI and VIII of the will which would indicate intent to give a class gift. It would indeed be a weak rule of will construction if, depending upon which item of the will the Court construed first, the reoccurring phrase could be given two different constructions. The requirement that the rule apply only in the cases where the same subject matter is under consideration eliminates this weakness.

The precise question now being considered by this Court is discussed with citations in Page on Wills, Lifetime Edition, Section 1083. There are no reference to Ohio or Missouri cases therein and it must be concluded that there is no fixed rule established by the authorities throughout the United States. After the author cites a number of cases holding that in such event courts prefer a per capita distribution, he states: 'The rule that such a gift imports a per capita distribution is said to be a technical one, which is subject to many exceptions, and one which is disregarded more often than not,' and cites additional cases. He states at page 293 that a direction for equal distribution or a distribution share and share alike, as contained in the will at bar, is usually held to strengthen the inference that a per capita distribution was intended. This Court is of the opinion that the latter line of reasoning is begging the question to be decided, i. e. did the testator intend the individual and the group to share and share alike or did he intend all of the individuals named to share and share alike? Thus the authorities outside of Ohio have not been too helpful to this Court in the case at bar.

This Court finds from the foregoing that the testator intended the gifts in Items VI and VIII to be gifts to individuals and, therefore, those beneficiaries named in Item VI who predeceased the testator, not being relatives of the testator, lapse and pass into the residuary estate. Since these same beneficiaries are again named in the residuary clause, their residuary share must be divided among the surviving residuary beneficiaries per capita. *See Commerce National Bank of Toledo, Trustee v. Browning* (1952) 158 Ohio St. 54, 107 N.E.2d 120

An entry may be prepared accordingly, with costs to the estate.

15.2.4 Void Devises

If the devisee is already dead when the will is executed or is an ineligible taker, the devise is void and the lapse rules apply.

Example:

In 2000, Rudy executed a will stating, "I leave $40,000 to my brother, Rick and $75,000 to Spike. The rest of my estate is to be divided equally between my cousins, Lillian and Caine. Rick died in 1998 and Spike is a dog.

Explanation:

The devise to Rick is void because he was not alive at the time the will was executed. Spike's devise is void because, as a dog, he is an ineligible taker. Thus, the devises to Rick and Spike fall out of the probate estate and lapse into the residue. As a result, Lillian and Caine split the entire estate.

In re Estate of Russell, 444 P.2d 353 (Cal. 1968)

SULLIVAN, Associate Justice.

Georgia Nan Russell Hembree appeals from a judgment (Prob. Code, s 1240) entered in proceedings for the determination of heirship (ss 1080—1082) decreeing inter alia that under the terms of the will of Thelma L. Russell, deceased, all of the residue of her estate should be distributed to Chester H. Quinn.

Thelma L. Russell died testate on September 8, 1965, leaving a validly executed holographic will written on a small card. The front of the card reads:

'Turn the card

March 18—1957

I leave everything
I own Real &

Personal to Chester
H. Quinn & Roxy Russell
Thelma L. Russell'

The reverse side reads:

'My ($10.) Ten dollar gold
Piece & diamonds I leave to Georgia Nan Russell.
Alverata, Geogia (sic).'

Chester H. Quinn was a close friend and companion of testatrix, who for over 25 years prior to her death had resided in one of the living units on her property and had stood in a relation of personal trust and confidence toward here. Roxy Russell was testatrix' pet dog which was alive on the date of the execution of testatrix' will but predeceased her. Plaintiff is testatrix' niece and her only heir-at-law.

In her petition for determination of heirship plaintiff alleges, inter alia, that 'Roxy Russell is an Airedale dog'; that section 27 enumerates those entitled to take by will; that 'Dogs are not included among those listed in * * * Section 27. Not even Airedale dogs'; that the gift of one-half of the residue of testatrix' estate to Roxy Russell is invalid and void; and that plaintiff was entitled to such one-half as testatrix' sole heir-at-law.

At the hearing on the petition, plaintiff introduced without objection extrinsic evidence establishing that Roxy Russell was testatrix' Airedale dog which died on June 9, 1958. To this end plaintiff, in addition to an independent witness, called defendant pursuant to former Code of Civil Procedure section 2055 (now Evid. Code, s 776).Upon redirect examination, counsel for Quinn then sought to introduce evidence of the latter's relationship with testatrix 'in the event that your Honor feels that there is any necessity for further ascertainment of the intent above and beyond the document.' Plaintiff's objections on the ground that it was inadmissible under the statute of wills and the parol evidence rule 'because there is no ambiguity' and that it was inadmissible under section 105, were overruled. Over plaintiff's objection, counsel for Quinn also introduced certain documentary evidence consisting of testatrix' address book and a certain quitclaim deed 'for the purpose of demonstrating the intention on the part of the deceased that she not die intestate.'

Of all this extrinsic evidence only the following infinitesimal portion of Quinn's testimony relates to care of the dog: 'Q (Counsel for Quinn) Prior to the first Roxy's death did you ever discuss with Miss Russell taking care of Roxy if anything should ever happen to her? A Yes.' Plaintiff carefully preserved an objection running to all of the above line of testimony and at the conclusion of the hearing moved to strike such evidence. Her motion was denied.

The trial court found, so far as is here material, that it was the intention of testatrix 'that CHESTER H. QUINN was to receive her entire estate, excepting the gold coin and diamonds bequeathed to' plaintiff and that Quinn 'was to care for the dog, ROXY RUSSELL, in the event of Testatrix's death. The language contained in the Will concerning the dog, ROXY RUSSELL, was precatory in nature only, and merely indicative of the wish, desire and concern of Testatrix that CHESTER H. QUINN was to care for the dog, ROXY RUSSELL, subsequent to Testatrix's death.' The court concluded that testatrix intended to and did make an absolute and outright gift to Mr. Quinn of all the residue of her estate, adding: 'There occurred no lapse as to any portion of the residuary gift to

CHESTER H. QUINN by reason of the language contained in the Will concerning the dog, ROXY RUSSELL, such language not having the effect of being an attempted outright gift or gift in trust to the dog. The effect of such language is merely to indicate the intention of Testatrix that CHESTER H. QUINN was to take the entire residuary estate and to use whatever portion thereof as might be necessary to care for and maintain the dog, ROXY RUSSELL.' Judgment was entered accordingly. This appeal followed.

Plaintiff's position before us may be summarized thusly: That the gift of one-half of the residue of the estate to testatrix' dog was clear and unambiguous; that such gift was void and the property subject thereof passed to plaintiff under the laws of intestate succession; and that the court erred in admitting the extrinsic evidence offered by Quinn but that in any event the uncontradicted evidence in the record did not cure the invalidity of the gift. We proceed to set forth the rules here applicable which govern the interpretation of wills.

First, as we have said many times: 'The paramount rule in the construction of wills, to which all other rules must yield, is that a will is to be construed according to the intention of the testator as expressed therein, and this intention must be given effect as far as possible.' (*Estate of Wilson* (1920) 184 Cal. 63, 66-67, 193 P. 581, 582). The rule is imbedded in the Probate Code. (s 101). Its objective is to ascertain what the testator meant by the language he used.

When the language of a will is ambiguous or uncertain resort may be had to extrinsic evidence in order to ascertain the intention of the testator. We have said that extrinsic evidence is admissible 'to explain any ambiguity arising on the face of a will, or to resolve a latent ambiguity which does not so appear.' (*Estate of Torregano* (1960) 54 Cal.2d 234, 246, 5 Cal.Rptr. 137, 144, 352 P.2d 505, 512, 88 A.L.R.2d 597 citing s 105). A latent ambiguity is one which is not apparent on the face of the will but is disclosed by some fact collateral to it. (*See* 4 Page on Wills (Bowe-Parker Rev.) s 32.7, p. 255; Comment: Extrinsic Evidence and the Construction of Wills in California (1962) 50 Cal.L.Rev. 283, 284—291).

As to latent ambiguities, this court in the *Donnellan* case said: 'Broadly speaking, there are two classes of wills presenting latent ambiguities, for the removal of which ambiguities resort to extrinsic evidence is permissible. The one class is where there are two or more persons or things exactly measuring up to the description and conditions of the will, * * *. The other class is where no person or thing exactly answers the declarations and descriptions of the will, but where two or more persons or things in part though imperfectly do so answer.' (*Estate of Donnellan* (1912) 164 Cal. 14, 20, 127 P. 166, 168). Extrinsic evidence always may be introduced initially in order to show that under the circumstances of a particular case the seemingly clear language of a will describing either the subject of or the object of the gift actually embodies a latent ambiguity for it is only by the introduction of extrinsic evidence that the existence of such an ambiguity can be shown. Once shown, such ambiguity may be resolved by extrinsic evidence (citations omitted).

A patent ambiguity is an uncertainty which appears on the face of the will. (*Estate of Womersley* (1912) 164 Cal. 85, 87, 127 P. 645; *Estate of Willson* (1915) 171 Cal. 449, 456-457, 153 P. 627; *Estate of Salmonski* (1951) 38 Cal. 2d 199, 214, 238 P.2d 966; *see generally* 4 Page on Wills, op. cit. *supra*, s 32.7, p. 255; Comment: *supra*, 50 Cal.L.Rev. 283, 284—291.) 'When an uncertainty arises upon the face of a will as to the meaning of any of its provisions, the testator's intent is to be ascertained from the words of the will, but the circumstances of the execution thereof may be taken into consideration, excluding the oral declarations of the testator as to his intentions.' (*Estate of Salmonski*, *supra*, 38 Cal.

2d 199, 214, 238 P.2d 966, 975). This is but a corollary derived from an older formalism. Long before *Salmonski* it was said in *Estate of Willson*, *supra*, 171 Cal. 449, 456, 153 P. 927, 930: 'The rule is well established that where the meaning of the will, on its face, taking the words in the ordinary sense, is entirely clear, and where no latent ambiguity is made to appear by extrinsic evidence, there can be no evidence of extrinsic circumstances to show that the testatrix intended or desired to do something not expressed in the will.' However, this ancient touchstone has not necessarily uncovered judicial material of unquestioned purity.

In order to determine initially whether the terms of Any written instrument are clear, definite and free from ambiguity the court must examine the instrument in the light of the circumstances surrounding its execution so as to ascertain what the parties meant by the words used. Only then can it be determined whether the seemingly clear language of the instrument is in fact ambiguous. 'Words are used in an endless variety of contexts. Their meaning is not subsequently attached to them by the reader but is formulated by the writer and can only be found by interpretation in the light of all the circumstances that reveal the sense in which the writer used the words. The exclusion of parol evidence regarding such circumstances merely because the words do not appear ambiguous to the reader can easily lead to the attribution to a written instrument of a meaning that was never intended.' (*Universal Sales Corp. v. Cal.*, etc., Mfg. Co. (1942) 20 Cal. 2d 751, 776, 128 P.2d 665, 679 (Traynor, J., concurring).) 'The court must determine the true meaning of the instrument in the light of the evidence available. It can neither exclude evidence relevant to that determination nor invoke such evidence to write a new or different instrument.' (*Laux v. Free* (1960) 53 Cal. 2d 512, 527, 2 Cal. Rptr. 265, 273, 348 P.2d 873, 881 (Traynor, J., concurring); *see also Corbin*, The Interpretation of Words and the Parol Evidence Rule (1965) 50 Cornell L.Q. 161, 164: '(W)hen a judge refuses to consider relevant extrinsic evidence on the ground that the meaning of written words is to him plain and clear, his decision is formed by and wholly based upon the completely extrinsic evidence of his own personal education and experience'; (citations omitted).

The foregoing reflects the modern development of rules governing interpretation, for in the words of Wigmore 'The history of the law of Interpretation is the history of a progress from a stiff and superstitious formalism to a flexible rationalism.' (9 Wigmore, op. cit. *supra*, s 2461, p. 187.) While 'still surviving to us, in many Courts, from the old formalism * * * (is) the rule that you Cannot disturb a plain meaning' (9 Wigmore, op. cit. supra, p. 191, original emphasis) nevertheless decisions and authorities like those cited above bespeak the current tendency to abandon the 'stiff formalism of earlier interpretation' and to show the meaning of words even though no ambiguity appears on the face of the document.

There is nothing in these rules of interpretation which confines their application to contracts. Indeed quite the contrary. The rules are a response to 'problems which run through all the varieties of jural acts,' are therefore not necessarily solvable separately for deeds, contracts and wills, are not peculiar to any one kind of jural act, but involve a general principle applicable to all. (9 Wigmore, op. cit. supra, s 2401, pp. 6—7, s 2458, pp. 179—181, s 2463, s 2467.) Thus Wigmore says: 'In the field of Wills, where there is none but the individual standard of meaning to be considered, this principle is seen in unrestricted operation; * * *.' (s 2470, p. 228.)

Accordingly, we think it is self-evident that in the interpretation of a will, a court cannot determine whether the terms of the will are clear and definite in the first place until it considers the circumstances under which the will was made so that the judge may be placed in the position of the testator whose language he is interpreting. (Cf. Code Civ. Proc. S 1860). Failure to enter upon such

an inquiry is failure to recognize that the 'ordinary standard or 'plain meaning,' is simply the meaning of the people who did Not write the document.' (9 Wigmore, op. cit. supra, s 2462, p. 191.)

Thus we have declared in a slightly different context that extrinsic evidence as to the circumstances under which a written instrument was made is "admissible to interpret the instrument, but not to give it a meaning to which it is not reasonably susceptible' (*Coast Bank v. Miderhout*, 61 Cal.2d 311, 315, 38 Cal. Rptr. 505, 507, 392 P.2d 265, 297; and it is the instrument itself that must be given effect. (Civ. Code, ss 1638; Code Civ. Proc., s 1856)' (*Parsons v. Bristol Development Co.* (1965) 62 Cal. 2d 861, 865, 44 Cal. Rptr. 767, 770, 402 P.2d 839, 842). 'If the evidence offered would not persuade a reasonable man that the instrument meant anything other than the ordinary meaning of its words, it is useless.' (*Estate of Rule* (1944) 25 Cal. 2d 1, 22, 152 P.2d 1003, 1014 (Traynor, J., dissenting), disapproved on other grounds, *Parsons v. Bristol Development Co.*, *supra*, 62 Cal. 2d 861, 866, fn. 2, 44 Cal. Rptr. 767, 402 P.2d 839). On the other hand an ambiguity is said to exist when, in the light of the circumstances surrounding the execution of an instrument, 'the written language is fairly susceptible of two or more constructions.' (citations omitted).

As we have explained, what is here involved is a general principle of interpretation of written instruments, applicable to wills as well as to deeds and contracts. Even when the answer to the problem of interpretation is different for different kinds of written instruments, 'it appears in all cases as a variation from some general doctrine.' (9 Wigmore, op. cit. supra, s 2401, p. 7.) Under the application of this general principle in the field of wills, extrinsic evidence of the circumstances under which a will is made (except evidence expressly excluded by statute) may be considered by the court in ascertaining what the testator meant by the words used in the will. If in the light of such extrinsic evidence, the provisions of the will are reasonably susceptible of two or more meanings claimed to have been intended by the testator, 'an uncertainty arises upon the face of a will' (s 105) and extrinsic evidence relevant to prove any of such meanings is admissible (*see* s 106), subject to the restrictions imposed by statute (s 105). If, on the other hand, in the light of such extrinsic evidence, the provisions of the will are not reasonably susceptible of two or more meanings, there is no uncertainty arising upon the face of the will (s 105; *see Estate of Beldon* (1938) 11 Cal. 2d 108, 117, 77 P.2d 1052; *Estate of Pierce* (1948) 32 Cal. 2d 265, 272, 196 P.2d 1; *Estate of Carter*, *supra*, 47 Cal. 2d 200, 207, 302 P.2d 301) and any proffered evidence attempting to show an intention different from that expressed by the words therein, giving them the only meaning to which they are reasonably susceptible, is inadmissible. In the latter case the provisions of the will are to be interpreted according to such meaning. In short, we hold that while section 105 delineates the manner of ascertaining the testator's intention 'when an uncertainty arises upon the face of a will,' it cannot always be determined whether the will is ambiguous or not until the surrounding circumstances are first considered.

Finally, before taking up testatrix' will, we add a brief word concerning our proper function on this appeal. This function must subserve the paramount rule that the 'will is to be construed according to the intention of the testator.' (*See* fns. 5 and 6, ante, and accompanying text.) As we said in *Parsons v. Bristol Development Co.*, *supra*, 62 Cal. 2d 861, 865, 44 Cal. Rptr. 767, 402 P.2d 839, it is 'solely a judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence.' (See fn. 8, ante.) Accordingly, 'an appellate court is not bound by a construction of a document based solely upon the terms of the written instrument without the aid of extrinsic evidence, where there is no conflict in the evidence, or a determination has been made upon incompetent evidence. (Citations.)' (*Estate of Wunderle* (1947) 30 Cal. 2d 274, 280, 181 P.2d 874, 878; *see Estate of Donnellan*, *supra*, 164 Cal. 14, 19, 127 P. 166; Estate of Platt (1942) 21 Cal. 2d 343, 352,

131 P.2d 825; *Parsons v. Bristol Development Co.*, *supra*, 62 Cal. 2d 861, 865, 44 Cal. Rptr. 767, 402 P.2d 839).

We said in *Estate of Beldon*, *supra*, 11 Cal.2d 108, 111-112, 77 P.2d 1052, 1053-1054, "The making of a will raises a presumption that the testator intended to dispose of all his property. Residuary clauses are generally inserted for the purpose of making that disposition complete, and these clauses are always to receive a broad and liberal interpretation, with a view of preventing intestacy as to any portion of the estate of the testator, and this general rule is in harmony with the declaration of our code that the provisions of a will must be construed, if possible, so as to effect that purpose.' *O'Connor v. Murphy*, 147 Cal. 148, 153, 81 P. 406, 408. But there is no room for application of the rule if the testator's language, taken in the light of surrounding circumstances, will not reasonably admit of more than one construction. * * * If (testator) used language which results in intestacy, and there can be no doubt about the meaning of the language which was used, the court must hold that intestacy was intended.' Therefore, if having ascertained in the instant case that the provisions of the will are not reasonably susceptible of two or more meanings, we conclude that the only meaning to which the words expressed by testatrix are reasonably susceptible results in intestacy, we must give effect to her will accordingly. (*Estate of Beldon*, *supra* 11 Cal. 2d 108, 112, 77 P.2d 1052; *Estate of Akeley* (1950) 35 Cal.2d 26, 32, 215 P.2d 921 (Traynor, J., dissenting); *Estate of Barnes* (1965) 63 Cal.2d 580, 583-584, 47 Cal. Rptr. 480, 407 P.2d 656

Examining estatrix will in the light of the foregoing rules, we arrive at the following conclusions: Extrinsic evidence offered by plaintiff was admitted without objection and indeed would have been properly admitted over objection to raise and resolve the latent ambiguity as to Roxy Russell and ultimately to establish that Roxy Russell was a dog. Extrinsic evidence of the surrounding circumstances was properly considered in order to ascertain what testatrix meant by the words of the will, including the words: 'I leave everything I own Real & Personal to Chester H. Quinn & Roxy Russell' or as those words can now be read 'to Chester H. Quinn and my dog Roxy Russell.'

However, viewing the will in the light of the surrounding circumstances as are disclosed by the record, we conclude that the will cannot reasonably be construed as urged by Quinn and determined by the trial court as providing that testatrix intended to make an absolute and outright gift of the entire residue of her estate to Quinn who was 'to use whatever portion thereof as might be necessary to care for and maintain the dog.' No words of the will give the entire residuum to Quinn, much less indicate that the provisions for the dog is merely precatory in nature. Such an interpretation is not consistent with a disposition which by its language leaves the residuum in equal shares to Quinn and the dog. A disposition in equal shares to two beneficiaries cannot be equated with a disposition of the whole to one of them who may use 'whatever portion thereof as might be necessary' on behalf of the other. (*See* s 104; *cf. Estate of Kearns* (1950) 36 Cal.2d 531, 534-536, 225 P.2d 218). Neither can the bare language of a gift of one-half of the residue to the dog be so expanded as to mean a gift to Quinn in trust for the care of the dog, there being no words indicating an enforceable duty upon Quinn to do so or indicating to whom the trust property is to go upon termination of the trust. 'While no particular form of expression is necessary for the creation of a trust, nevertheless some expression of intent to that end is requisite.' (citations omitted).

Accordingly, since in the light of the extrinsic evidence introduced below, the terms of the will are not reasonably susceptible of the meaning claimed by Quinn to have been intended by testatrix, the extrinsic evidence offered to show such an intention should have been excluded by the trial court. Upon an independent examination of the will we conclude that the trial court's interpretation of the

terms thereof was erroneous. Interpreting the provisions relating to testatrix' residuary estate in accordance with the only meaning to which they are reasonably susceptible, we conclude that testatrix intended to make a disposition of all of the residue of the estate to Quinn and the dog in equal shares; therefore, as tenants in common. (s 29; *Estate of Hittell* (1903) 141 Cal. 432, 434-436, 75 P. 53; *Estate of Murphy* (1909) 157 Cal. 63, 66-72, 106 P. 230; *Estate of Kunkler* (1921) 163 Cal. 797, 8--, 127 P. 43; *Noble v. Beach* (1942) 21 Cal. 2d 91, 94, 130 P.2d 426). As a dog cannot be the beneficiary under a will (s 27; *see* 1 Page on Wills, op. cit. supra, s 17.21, p. 851) the attempted gift to Roxy Russell is void. (s 27; *Estate of Burnison* (1949) 33 Cal. 2d 638, 646, 204 P.2d 33o, affd. *United States v. Burnison*, 339 U.S. 87, 70 S.Ct. 503, 94 L.Ed. 675; *Estate of Doane*, *supra*, 190 Cal. 412, 213 P. 53).

There remains only the necessity of determining the effect of the void gift to the dog upon the disposition of the residuary estate. That portion of any residuary estate that is the subject of a lapsed gift to one of the residuary beneficiaries remains undisposed of by the will and passes to the heirs-at-law. (ss 92, 220; Estate of Hittell, supra, 141 Cal. 432, 437, 75 P. 53, Estate of Kunkler, supra, 163 Cal. 797, 800, 127 P. 43; Estate of Hall (1920) 13 Cal. 61, 63, 190 P. 634). The rule is equally applicable with respect to a void gift to one of the residuary beneficiaries. (s 220; see 96 C.J.S. Wills s 1226; 53 Cal.Jur.2d, Wills, s 271, p. 531.) Therefore, notwithstanding testatrix' expressed intention to limit the extent of her gift by will to plaintiff (see Estate of Barnes, supra, 63 Cal. 2d 580, 583, 47 Cal. Rptr. 480, 407 P.2d 656) one-half of the residuary estate passes to plaintiff as testatrix' only heir-at-law (s 225). We conclude that the residue of testatrix' estate should be distributed in equal shares to Chester H. Quinn and Georgia Nan Russell Hembree, testatrix' niece.

The judgment is reversed and the cause is remanded with directions to the trial court to set aside the findings of fact and conclusions of law; to make and file findings of fact and conclusions of law in conformity with the views herein expressed; and to enter judgment accordingly. Such findings of fact, conclusions of law and judgment shall be prepared, signed, filed and entered in the manner provided by law. Plaintiff shall recover costs on appeal.

Notes, Problems, and Questions

1. The plaintiff in the *Russell* case was not satisfied with her specific devise, so she sought to receive some of the residue. The testator's will indicated that the residue was to be split between H. Quinn and Roxy Russell. The testator's niece, who was her sole intestate heir, argued that, since Roxy was a dog, his devise was void. Because of the "no residue-of-a-residue rule" the dog's void devise would fall out of the probate estate into the intestacy estate. Consequently, the plaintiff would take half of the residue. The defendant argued that the testator's intent was to leave the entire estate to him in the hopes that he would take care of the dog. Therefore, according to the defendant, the dog was not given an interest in the estate, so there was nothing to lapse.

2. **Extrinsic Evidence**: The *Russell* court could not tell that Roxy was a dog just by reading the will. Therefore, the court had to decide whether to allow the introduction of extrinsic evidence to show that Roxy was a dog. The court stated that extrinsic evidence would be permitted to ascertain the testator's intent if the language in the will was susceptible to two or more meanings. This is referred to as a patent defect. The court will not allow in extrinsic evidence if there is no uncertainty on the face of the will.

3. **Patent vs. latent ambiguity**: According to the *Russell* court, it would admit extrinsic evidence to clear up a patent, but not a latent ambiguity. However, the court appeared to violate that rule. On the face of the will, the testator left her estate to Quin and Roxy. There was no confusion about her intent. The uncertainty arose when the niece was allowed to introduce evidence that Roxy was a dog. The court seemed to take a two-step approach. First, the court let the niece bring in outside information to show that Roxy was a dog. Then, the court permitted her to submit evidence to clear up the latent ambiguity caused by the introduction of evidence that Roxy was a dog. Consider the following examples. T executes a will stating, "I leave my estate to the president." There is only one president of the United States; however, the T did not specify to which president she was referring. She could have meant the president of her bank etc. In that case, the court would admit outside evidence to prove T's intent with regards to this patent ambiguity. T executes a will stating, "I leave my estate to President Bush." This is not a patent ambiguity because it is clear that the testator wanted to leave her property to President Bush. The uncertainty occurs when the court lets someone introduce evidence showing that there have been two presidents with the last name Bush. In order to clear up that latent ambiguity, the court will allow the introduction of outside evidence to show which President Bush the testator wanted to inherit her property.

4. **Problems**-In which of the following cases would the court allow extrinsic evidence to show the testator's intent? Why? Why not? Identify the ambiguity as latent or patent.

(a) Cindy left a will stating, "I leave my entire estate to my best friend."

(b) Meredith left a will stating, "I leave all of my property to the queen."

(c) Roger left a will stating, "I leave my estate to my church."

(d) Darwin left a will stating, "I leave all of my property to my neighbor."

(e) Steven left a will stating, "I leave my estate to Betty White."

14.3 Antilapse Statutes

The lapse rules some time requires courts to distribute a testator's property in a way that goes against his or her expressed preferences. For example, a disinherited child may be able to inherit if a portion of the testator's residuary estate lapses. Antilapse statutes were enacted to alleviate this problem. Antilapse statutes do not prevent lapses. Those statutes redirect a lapsed gift to the descendants of the predeceasing beneficiary. One purpose of antilapse statutes is to carry out the testator's presumed intent. The idea is that, for certain devisees, the testator would probably have preferred the devisee's descendants to take the gift to prevent it from lapsing. Another goal of antilapse statutes is to prevent the application of the intestacy system. If a person makes the effort to execute a will, the law presumes that he or she did not want to die intestate. An antilapse statute applies to a lapsed devised only if the devisee bears the particular relationship to the testator specified in the statute. Consider the following antilapse statute.

M.S.A. § 524.2-603. Antilapse; deceased devisee; class gifts; words of survivorship (Minn.)

Subdivision 1. Deceased devisee. If a devisee who is a grandparent or a lineal descendant of a grandparent of the testator is dead at the time of execution of the will, fails to survive the testator, or is treated as if the devisee predeceased the testator, the issue of the deceased devisee who survive the testator by 120 hours take in place of the deceased devisee. If they are all of the same degree of kinship to the devisee, they take equally. If they are of unequal degree, those of more remote degree take by representation. A person who would have been a devisee under a class gift if the person had survived the testator is treated as a devisee for purposes of this section, whether the death occurred before or after the execution of the will.

This is a typical antilapse statute. In order for the statute to apply, the case must involve the issue of the testator. For instance, T executes a will stating, "I leave my house to my son, Solomon. I leave the remainder of my estate to my friend, Jacob." Both Solomon and Jacob predecease T. Solomon is survived by his son Gino, and Jacob is survived by his daughter, Dottie. Since Gino is a lineal descendant of the T, the antilapse statute would apply to allow Gino to take the gift that was meant for his deceased father. However, the gift to Jacob would lapse because his daughter, Dottie is not related to T in the manner specified by the statute.

14.3.1 Devisee Predeceases the Testator

An antilapse statute is only relevant if one or more of the devisees dies prior to the testator. Nonetheless, a physical death is not necessary. The statute may also come into play in situations where the court presumes that the devisee predeceased the testator. That presumption may arise because the devisee disclaims the bequest or is somehow considered unfit to inherit.

Gianoli v. Gabaccia, 412 P.2d 439 (Nev. 1966)

ZENOFF, District Judge.

This is a case of will interpretation in which the sole matter at issue is the pertinence and application of Nevada's 'antilapse statute,' NRS 133.200. The lower court ruled the statute inapplicable and ordered testate distribution accordingly. We reverse.

The testator John Data, executed a valid will on December 2, 1946, the material paragraphs of which follow: 'SECOND: I give and bequeath to each of my brothers and sisters, the sum of five thousand dollars ($5,000.00).

'THIRD: All the rest, residue and remainder of my estate, real, personal or mixed, wheresoever situate, of which I shall die seized or possessed, or to which I shall be entitled at the time of my decease, or to which my estate shall thereafter become entitled, I give, devise and bequeath to my nephews and nieces, share and share alike.'

Data, a bachelor, originally was from a family of seven. At the time of his will's execution, however,

a brother, Giuseppe, and a sister, Caterina Massa, already had died. Subsequent to execution, but prior to Data's own death on February 22, 1965, two other brothers and a second sister died. Thus only one sister, Francesca Gabaccia, survived Data.

In petitioning the court for distribution of Data's estate, the Administrator, applying the anti-lapse statute, allowed, under the will's second paragraph, $5,000 each to the two brothers and two sisters who survived the execution of Data's will, though only one sister survived Data. The residue, as per the third paragraph of the will then was divided equally among Data's nieces and nephews.
The attorney for absent heirs protested, alleging only the surviving sister should take a $5,000 share. The lower court agreed, finding the will was ambiguous and that NRS 133.200 did not apply. We disagree.

1. 'An ambiguous provision * * * means simply that there are two constructions or interpretations which may be given to a provision of a will and that it may be understood in more senses than one.' *In re Tonneson's Estate*, 136 N.W.2d 823 (N.D. 1965). There is nothing in either the second or third paragraph of Data's will which creates such an ambiguity. In the second paragraph he bequeathed $5,000 to each of his brothers and sisters; in the third, he left the residue to his nieces and nephews. Nor is there any 'latent' ambiguity. *Cf. Estate of Shields*, 84 Ariz. 330, 327 P.2d 1009 (1958). We therefore are restricted to the writing alone.

2. In the second paragraph, as noted, Data bequeathed $5,000 each to his brothers and sisters, five of whom predeceased him of the five predeceasing the execution of the will.

We first consider the two brothers and sister of Data who were alive at the time of the will's execution but predeceased Data. At common law, their bequests would be said to 'lapse,' and thereby fail. Presuming this result contrary to a testator's intent, Nevada, as almost all other states, enacted an 'anti-lapse statue,' NRS 133.200, expressly protecting devises and bequests to 'any child or other relation of the testator.' Data's brothers and sisters come within this protection 'in the absence of a provision in the will to the contrary.' NRS 133.200.

3. It is argued that the second paragraph refers to the brothers and sisters as a 'class' and our anti-lapse statute should not apply to 'class' gifts. We agree with the overwhelming weight of authority that an anti-lapse statute does apply to class gifts. *Hoverstad v. First Natl. Bank & T. Co.*, 76 S.D. 119, 74 N.W.2d 48, 56 A.L.R.2d 938 (1956); *In re Steidl's Estate*, 89 Cal.App.2d 488, 201 P.2d 58 (1948); Page on Wills, Lifetime Ed., s 1062; Restatement, Property, Parts 3 & 4, p. 1623, comment a, s 298.

4. Next, it is argued that Data intended for the anti-lapse statute not to apply. Such intent, of course, would control, 'but to render the statute inoperative a contrary intent on the part of the testator must be plainly indicated.' *In re Steidl's Estate*, *supra*. Nowhere is such a 'plain intent' expressed within Data's will; nor did he even state, 'I give * * * to each of my surviving brothers and sisters * * *.' The fact that in the third paragraph he bequeathed his residue to his nieces and nephews, 'share and share alike,' does not influence who takes 'through an entirely separate channel, * * * an entirely different right' under the second paragraph. *Everhand v. Brown*, 75 Ohio App. 451, 62 N.E.2d 901, 911 (1945).

5. Finally, we consider the status of the brother and sister who predeceased the execution of Data's will. At common law, their bequests would fail as 'void.' Our anti-lapse statute only speaks of a testamentary beneficiary who 'shall die before the testator;' there is no specification as to how long

'before,' nor is there any express reference within the statute to 'lapse' or 'void' bequests or their distinction. However '(i)t seems obvious that the (anti-lapse statute) was motivated by a purpose to protect the kindred of the testator and by a belief that a more fair and equitable result would be assured if a defeated legacy were disposed of by law to the lineal descendants of the legatees or devisees selected by the testator.' *Hoverstad v. First Natl. Bank supra*, 74 N.W.2d at 55. Accepting this rationale, as have the majority of courts, we see little reason to not equally apply it to void as well as lapsed bequests or devises. *Kehl v. Taylor*, 275 Ill. 346, 114 N.E. 125, 127 (1916).

We therefore hold NRS 133.200 is applicable to the instant will, and that its provisions extend to void as well as lapsed

In re Estate of Evans, 326 P.3d 755 (Wash. Ct. App. 2014)

APPELWICK, J.

1 Washington's antilapse statute, RCW 11.12.110, applies when a beneficiary under a will is deemed to have predeceased the testator, because he or she financially abused the testator under chapter 11.84 RCW. In this case, the testator's intent did not overcome the presumed application of the antilapse statute. We affirm.

FACTS

Calvin H. Evans, Sr. (Cal Sr.) was born on March 8, 1933. At the time of his death, Cal Sr. was no longer married and had four children: Kenneth Evans, Vicki Sansing, Sharon Eaden, and Calvin H. Evans, Jr. (Cal Jr.).

Cal Sr. suffered from a medical condition called polycythemia, which results in a thickening of the blood. He had his first stroke related to the condition in 2000.

In 2003, Cal Sr. purchased a 40 acre ranch in Sultan, Washington. Soon after he purchased another 70 acre parcel nearby. Cal Sr. requested that Cal Jr. and his family move to the ranch to help care for him. They did so in early 2005.

In March 2005, Cal Sr. was hospitalized for another stroke and was diagnosed with dementia secondary to the stroke. Cal Sr.'s health continued to decline over the course of the year. His teeth began falling out and he lost substantial weight. Cal Jr. observed forgetfulness and memory loss in his father.

While living on the Sultan ranch, Cal Jr. made several large purchases using his father's money. For instance, Cal Jr. used $20,000 of Cal Sr.'s money to purchase a dump truck. He borrowed another $75,000 from his father to make improvements to the ranch. He also spent $15,000 of his father's money to buy a park model mobile home.

On December 28, 2005, Sharon filed a guardianship petition in Snohomish County alleging that Cal Sr. was incapacitated and needed a guardian. An order appointing a guardian ad litem was entered the same day. Cal Sr. did not want to be subject to a guardianship and was upset with Sharon for filing the petition.

Early in 2006, Cal Jr. and his wife prepared a will for Cal Sr. The will left Cal Sr.'s Sultan ranch and his Cessna airplane to Cal Jr. The will divided Cal Sr.'s remaining real properties equally between Vicki and Kenneth, but not Sharon. It left only $25,000 to Sharon. The residue of Cal Sr.'s estate was to be placed in trust. Every year on the anniversary of his death, the trustee was to disburse $10,000 to Cal Sr.'s children, excluding Sharon, and $5,000 to each of his grandchildren.

The will was witnessed and executed on March 7, 2006. Cal Sr.'s attorney Charles Diesen and Diesen's law partner Carol Johnson questioned Cal Sr. privately and believed he had testamentary capacity. The will named Diesen as personal representative of the "Estate."

Cal Sr. died on April 5, 2011. By that time, the only real property he still owned was the Sultan ranch. The rest had been sold to pay for his care.

On April 29, 2011, Cal Sr.'s will was filed with the trial court, along with a petition to admit the will to probate and appoint Diesen as personal representative of Cal Sr.'s Estate. The court did so on the same day following an ex parte proceeding.

On July 14, 2011, three of Cal Sr.'s children—Sharon, Kenneth, and Vicki (collectively Eaden)—filed a petition under the Trust and Estate Dispute Resolution Act (TEDRA), chapter 11.96A RCW. Eaden's petition challenged the validity of Cal Sr.'s will and sought a declaration of rights pursuant to RCW 11.84.020. Eaden argued that Cal Sr. lacked testamentary capacity at the time he made the will and was acting under fraudulent representations and undue influence from Cal Jr. Eaden also asserted that Cal Jr. was a financial abuser, because he participated in the willful and unlawful financial exploitation of his father, a vulnerable adult under RCW 74.34.020. Therefore, Eaden argued, Cal Jr. should be treated as predeceased under RCW 11.84.020 and the Estate should pass to Cal Sr.'s three other children.

On May 31, 2012, the trial court upheld the will, denying Eaden's request to declare Cal Sr.'s will invalid due to lack of testamentary capacity and undue influence by Cal Jr. However, the trial court held Cal Jr. to be an abuser under RCW 11.84.010(1), finding that he financially exploited Cal Sr. Therefore, the trial court deemed Cal Jr. to have predeceased Cal Sr. Cal Jr. was accordingly disinherited and ordered to "take nothing from the Estate by devise or legacy, or by laws of descent and distribution." The trial court entered extensive findings of fact and conclusions of law on the same day. That decision was not appealed.

On September 12, 2012, Eaden filed a second TEDRA petition requesting that the trial court not apply Washington's antilapse statute, RCW 11.12.110, in favor of Cal Jr.'s children—Lindsey Evans, Cory Evans, Jesse Evans, and Calvin Evans III. Eaden acknowledged that the antilapse statute would ordinarily apply when a beneficiary predeceases the testator, but argued that applying it here would be contrary to Cal Sr.'s testamentary intent. Therefore, Eaden argued that any bequests made to Cal Jr. should pass to the residue of the Estate, rather than to Cal Jr.'s children.

On January 25, 2013, Cal Jr.'s children requested an award of attorney fees, against either Eaden or the Estate. On February 11, 2013, Eaden requested attorney fees under RCW 11.96A.150(1) for the second TEDRA petition. They asked that the fees be assessed against the Estate, because the litigation involved all beneficiaries to the Estate.

On March 12, 2013, the trial court denied Eaden's second TEDRA petition and held that the antilapse statute applied:

> 3. The slayer/abuser statute, RCW 11.84.020, is clear on its face and does not preclude the issue of the abuser inheriting under the anti-lapse statute;
>
> 4. The anti-lapse statute, RCW 11.12.110, is clear on its face and applies to circumstances of financial abuse in the same manner as it would in a case of a slayer;
>
> 5. The residuary trust created by Calvin Evan Sr.'s Will cannot be construed as an expression of the testator's intent sufficient to avoid the application of the anti-lapse statute;
>
> 6. The Petitioner's Petition for Declaration of Rights of Beneficiaries Re: Non–Application of Anti–Lapse Statute Under Chapter 11.94A RCW (TEDRA) is DENIED; and
>
> 7. The children of Calvin Evans, Jr., shall inherit his bequests of the ranch and the units of membership in the C & C Aviation LLC by reason of the application of the anti-lapse statute.

The trial court also held that Diesen, the Estate's personal representative, had standing to appear and urge the application of the antilapse statute to the bequests made to Cal Jr.

The trial court granted both parties' request for attorney fees and ordered the fees to be paid by the Estate.

The Estate appeals the trial court's award of fees to Eaden and the court's assessment of both fee awards against the Estate. Eaden cross appeals the denial of the second TEDRA petition, challenging the court's application of the antilapse statute to the abuser statute.

DISCUSSION

I. Application of the Antilapse Statute

Eaden argues that the trial court erred in holding, as a matter of law, that Washington's antilapse statute applies to bequests to persons deemed to have predeceased the testator because of financial abuse under chapter 11.84 RCW. Instead, Eaden advocates for an equitable exception to the antilapse statute in which courts consider whether applying the statute benefits the abuser; prevents disinheritance of an entire branch of the testator's family; offends the decedent's overall testamentary plan by exacerbating the effect of abuse on that plan; and results in the loss caused by the abuse to fall only or disproportionately on the beneficiaries other than the abuser's issue. Eaden also argues that it would be an abuse of discretion to apply the antilapse statute here, because all elements of this equitable exception are met.

Simply put, we must decide whether the antilapse statute is triggered when a beneficiary is found to be a financial abuser and deemed to predecease the testator under chapter 11.84 RCW. This is an issue of first impression in Washington. If yes, we must then determine whether Cal Sr.'s testamentary intent overcomes the rebuttable presumption that the antilapse statute applies.

Statutory interpretation is a question of law that we review de novo. *State v. Gray*, 174 Wash. 2d 920,

926, 280 P.3d 1110 (2012). Our primary duty in construing a statute is to ascertain and carry out the legislature's intent. *Lake v. Woodcreek Homeowners Ass'n*, 169 Wash. 2d 516, 526, 243 P.3d 1283 (2010). Statutory interpretation begins with the statute's plain meaning, which we discern from the ordinary meaning of the language used in the context of the entire statute, related statutory provisions, and the statutory scheme as a whole. *Id.* If the statute's meaning is unambiguous, our inquiry is at an end. *State v. Armendariz*. 160 Wash.2d 106, 110, 156 P.3d 201 (2007). Conversely, a statute is ambiguous when it is susceptible to two or more reasonable interpretations, but not merely because different interpretations are possible. *In re Det. Of Aston*, 161 Wash. App. 824, 842, 251 P.3d 917 (2011), *review denied*, 173 Wash. 2d 1031, 277 P.3d 668 (2012).

A. Antilapse Statute Triggered by Abuser Statute

Washington's antilapse statute provides for statutory succession when a named heir predeceases the testator of a will. RCW 11.12.110. The statute specifies, in relevant part:

> Unless otherwise provided, when any property shall be given under a will, or under a trust of which the decedent is a grantor and which by its terms becomes irrevocable upon or before the grantor's death, to any issue of a grandparent of the decedent and that issue dies before the decedent, or dies before that issue's interest is no longer subject to a contingency, leaving descendants who survive the decedent, *those descendants shall take that property as the predeceased issue would have done if the predeceased issue had survived the decedent.*

Id. (emphasis added).

The antilapse statute reflects a legislative determination that, as a matter of public policy, when the testator fails to provide for the possibility that his consanguineous beneficiary will predecease him, the lineal descendants of the beneficiary take his or her share. *In re Estate of Rehwinkel*, 71 Wash. App. 827, 829, 862 P.2d 639 (1993). At common law, testamentary gifts lapse if a beneficiary predeceased the testator. *In re Estate of Niehenke*, 117 Wash. 2d 631, 638, 818 P.2d 1324 (1991). The legislature enacted the antilapse statute to prevent this, in derogation of the common law. *Id.* "This is said to be a recognition of a natural and instinctive concern for the welfare of those in a testator's bloodline." *In re Estate of Allmond*, 10 Wash.App. 869, 871, 520 P.2d 1388 (1974).

Under chapter 11.84 RCW—the slayer statute—a slayer cannot benefit from the death of the decedent. RCW 11.84.020. The chapter is to "be construed broadly to effect the policy of this state that no person shall be allowed to profit by his or her own wrong, wherever committed." RCW 11.84.900. In July 2009, the legislature expanded the scope of the slayer statute to include financial abusers as well as slayers. Laws of 2009, ch. 525, §§ 1–17. "Abuser" is defined as "any person who participates, either as a principal or an accessory before the fact, in the willful and unlawful financial exploitation of a vulnerable adult." RCW 11.84.010(1).

The statute provides for the disposition of property if a beneficiary is found to be a slayer or abuser. RCW 11.84.020 specifies that "[n]o slayer or abuser shall in any way acquire any property or receive any benefit as the result of the death of the decedent, but *such property shall pass as provided in the sections following.*" (Emphasis added.) The following section in the statute provides that "[t]he slayer or *abuser shall be deemed to have predeceased the decedent* as to property which would have passed from the decedent or his or her estate to the slayer or abuser." RCW 11.84.030 (emphasis added). RCW 11.84.040 then

states that "[p]roperty which would have passed to or for the benefit of the slayer or abuser by devise or legacy from the decedent *shall be distributed as if he or she had predeceased the decedent.*" (Emphasis added.)

This statutory language is unambiguous and provides an express method for distributing an abuser's inheritance. If a beneficiary is found to be an abuser, he or she is deemed to predecease the testator. RCW 11.84.030. Any property or benefit to the abuser must then be distributed as if the abuser predeceased the decedent. RCW 11.84.040. The antilapse statute then provides for the division of property when a beneficiary predeceases the testator. RCW 11.12.110. Nothing in the abuser statute indicates that the term predecease means anything different than it does in the antilapse statute. Thus, the abuser statute's consistent use of the term "predecease" triggers the antilapse statute, even though the antilapse statute is not explicitly referenced.

Furthermore, the legislature is presumed to know the law in the area in which it is legislating. *Wynn v. Earin*, 163 Wash. 2d 361, 371, 181 P.3d 806 (2008). The legislature is likewise presumed to enact laws with full knowledge of existing laws. *Jametsky v. Olsen*, 179 Wash. 2d 756, 766, 317 P.3d 1003 (2014). We can presume that the legislature knew that treating an abuser as predeceased would trigger the antilapse statute. The legislature could have specified that the abuser's descendants were also disinherited. It did not do so.

Legislative history supports our conclusion that the legislature intended for the antilapse statute to apply. The slayer statute was adopted in 1955. LAWS OF 1955, ch. 141. The final bill signed into law was practically a verbatim copy of a model slayer statute proposed by John Wade in 1936. J. Gordon Gose & Joseph W. Hawley, *Probate Legislation Enacted by the 1955 Session of the Washington Legislature,* 31 WASH. L.REV. 22, 26 (1956). However, section 4 of Wade's model statute expressly provided that the antilapse statute did not apply, with the result that property did not pass to the slayer's issue. The Washington legislature did not include Wade's section 4 in the slayer statute. *Compare* LAWS OF 1955, ch. 141, §§ 2–3. By not specifically precluding application of the antilapse statute, the Washington legislature mandated that the slayer be treated as if he or she predeceased the decedent, allowing children of slayers to take the slayer's share by substitution.

The Washington Supreme Court in *Haviland* explained that the abuser statute regulates the receipt of benefits. *In re Estate of Haviland*, 177 Wash. 2d 68, 76, 301 P.2d 31 (2013). The statute is not intended to be penal. *See id.; see also Armstrong v. Bray,* 64 Wash. App. 736, 741, 826 P.2d 706 (1992).The *Haviland* court noted that the "financial abuse slayer statutes only affect those persons who both abuse a vulnerable adult *and* are beneficiaries of the abused person." 177 Wash. 2d at 76, 301 P.3d 31. The innocent descendants of the slayer or abuser do not meet this criteria.

In the context of slayers, the Washington Supreme Court recognized that most states have been "reluctant to extend the rule beyond the slayer and deny the slayer's heirs from taking directly from the victim's estate." *In re Estate of Kissinger*, 166 Wash. 2d 120, 126, 206 P.3d 665 (2009). This reluctance generally rests on the notion of fairness to innocent persons. Mary Louise Fellows, *The Slayer Rule: Not Solely a Matter of Equity*, 71 Iowa L.Rev. 489, 495 (1986). In her law review article, Fellows points out that the purpose of the antilapse statute is to imply a devise to further the testator's intent. *Id.* at 530. The antilapse statute "should not be viewed differently than a provision in the victim's will for an alternative taker to the slayer; therefore, extending the fiction of the slayer's death to the antilapse statute seems correct." *Id.* She likewise notes that "[w]hen the slayer does not have the right to control the disposition" of the testator's estate, "any indirect benefit that

results from allowing the natural objects of the slayer's bounty to take from the victim's estate does not warrant disqualifying these innocent persons." *Id.* at 495.

Despite Eaden's attempt to distinguish slayers and abusers, the legislature did not do so, and instead addressed them together in a single statutory scheme. Washington's abuser statute prevents the abuser from controlling disposition of the testator's estate. The abuser is cut off from any direct benefit or inheritance, except as provided in RWC 11.84.170(2). Therefore, as Fellows argues, any incidental benefit to the abuser does not warrant denying benefits to the abuser's innocent heirs.

We hold that Washington's antilapse statute, RWC 11.12.110, applies when a beneficiary under a will is deemed to have predeceased the testator, because he or she financially abused the testator under chapter 11.84 RCW.

B. Antilapse Application to the Facts of this Case

Once the antilapse statute is triggered, there is a presumption in favor of its application. However, its application is not absolute. It can be rebutted by the testator's clear intent to preclude operation of the antilapse statute.

In determining whether the antilapse statute applies, the paramount duty of the court is to give effect to the testator's intent. *Rehwinkel*, 71 Wash.App. at 830, 862 P.2d 639. Such intention must, if possible, be ascertained from the language of the will in its entirety. *Id.* The party opposing its operation bears the burden of showing that it does not apply. *Id.* All doubts are to be resolved in favor of the statute's operation, which is to be liberally construed. *Id.*

The intent on the part of the testator to preclude operation of the antilapse statute must be clearly shown. *Id.* Where the testator uses words of survivorship indicating an intention that the devisee shall take the gift only if he or she survives the testator, the antilapse statute does not apply. *Id.* at 831, 862 P.2d 639. The statute likewise does not apply if the testator provides for an alternative disposition. *Id.* at 830, 862 P.2d 639.

In *Kvande,* the testator bequeathed the balance and residue of his estate "'for the use and purpose to help maintain and care' " for his sister Olga, who predeceased him. *In re Estate of Kvande*, 74 Wash. App. 65, 66-67, 871 P.2d 669 (1994). The appellate court held that this indicated the testator's intent to condition Olga's gift on her survival, with no intent for the gift pass on to Olga's son. *Id.* at 69, 871 P.2d 669. This precluded operation of the antilapse statute. *Id.*

Similarly, the appellate court held in *Rehwinkel* that bequests in the testator's will " 'to those of the following who are living at the time of my death' " demonstrated a clear intent to preclude application of the antilapse statute. 71 Wash.App. at 831, 862 P.2d 639. Such survivorship language manifests a testator's intent that named beneficiaries take under the will only if they survive the testator. *Id.* at 833, 862 P.2d 639; *see also Niehenke,* 117 Wash. 2d at 641, 818 P.2d 1324(applying antilapse statute where there was no "clear manifestation of the testator's intention to condition the gift on [the beneficiary's] survival").

There is no clear intent in Cal Sr.'s will to preclude application of the antilapse statute or to disinherit Cal Jr.'s descendants. In fact, the opposite is true. Cal Sr.'s will included the following three provisions:

VI.

I give, devise and bequeath my interest in the Cessna 310 123DE airplane and six (6) parcels of real estate owned by me in Snohomish County, Washington to my son, Calvin H. Evans Jr....

VII.

I give, devise and bequeath all of the remaining real estate owned by me in two(2) equal portions to Vicki Ann Sansing and Kenneth Lee Evans.

VIII.

All of the rest, residue and remainder of my estate including bank accounts, securities or annuities, I give in trust with Frontier Bank with directions that on the first anniversary of my death and on each year after, the Trustee disburse $10,000 to each of three(3) of my children, Vicky Ann Sansing, Calvin H. Evans, Jr., and Kenneth Lee Evans and $5,000 to each of my grandchildren. If any beneficiary should die during the administration of the trust and before the trust is exhausted, their bequest shall be disbursed to their heirs.

Cal Sr. did not condition inheritance on the survival of Cal Jr. or the survival of any other beneficiaries. Rather, the final sentence of Section VIII suggests that Cal Sr. wanted the antilapse statute to apply. If any beneficiaries died before the trust was exhausted, he wanted their bequest to pass to their heirs. Given this language, applying the antilapse statute gives effect to Cal Sr.'s intent to provide for his heirs *and* their descendants. Eaden is correct that Cal Jr.'s children would not be completely disinherited if the antilapse statute did not apply. However, they have failed to show any intent by Cal Sr. to preclude operation of the antilapse statute. We therefore hold that the trial court properly applied the antilapse statute here.

****

We affirm.

15.3.2 Testator's Contrary Intent

An antilapse statute does not apply if the testator's will indicates a contrary intent. Therefore, the court has to determine whether or not the testator would have wanted the statute to apply. The court presumes that the testator knew about the existence and operation of the antilapse statute and drafted his or her will in accordance with that understanding. The testator can express a contrary intent in one of three ways: (1) specifically stating that the statute should not apply; (2) making an alternative disposition of the property left to the devisee who predeceases the testator; and/or (3) including language in his will indicating that the testator wants the devisee to survive in order to inherit. There is no bright line rule as to what constitutes a contrary intent on the part of the testator. Thus, courts explore this issue on a case by case basis. Courts often issue conflicting decisions.

15.3.2.1 Language of the Will

M.S.A. § 524.2-603. Antilapse; deceased devisee; class gifts; words of survivorship (Minn.)

Subd. 2. Definition. For the purposes of section 524.2-601, words of survivorship, such as, in a devise to an individual, "if he or she survives me," or, in a class gift, to "my surviving children," are a sufficient indication of an intent contrary to the application of this section.

Ruotolo v. Tietjen, 890 A.2d 166 (Conn. App. Ct. 2006)

LAVERY, C.J.

This appeal presents a question of statutory interpretation of General Statutes § 45a-441, our testamentary antilapse statute. The appellant, Kathleen Smaldone, appeals from the judgment of the Superior Court on appeal from the Probate Court, which found the statute inoperative in the present case. We disagree and, accordingly, reverse the judgment of the Superior Court.

The facts are undisputed. On March 1, 1990, John N. Swanson executed a will. The residuary clause contained therein bequeathed, inter alia, "one-half ... of [the residue] property to Hazel Brennan of Guilford, Connecticut, if she survives me ...." Brennan died on January 2, 2001, seventeen days prior to the testator's death. Brennan was the testator's stepdaughter, a relation encompassed by § 45a-441. The appellant is the child of the deceased legatee, Brennan, and is a residuary legatee in the will, and, thus, was an object of affection of the testator.

On February 9, 2001, the will was admitted to probate. In a memorandum of decision dated April 26, 2002, the Probate Court concluded that, as § 45a-441 "is not operative," the bequest to Brennan lapsed and passed to the intestate estate. The plaintiffs, Fred Ruotolo and Charlene Ruotolo, beneficiaries under the will, filed a motion for appeal to the Superior Court. The Probate Court issued a decree allowing the appeal. The appellant thereafter filed a cross appeal. Following a de novo hearing, the court issued a memorandum of decision affirming the judgment of the Probate Court, and this appeal followed.

The sole issue on appeal is whether the court properly concluded that the antilapse statute does not apply. Section 45a-441 has never been scrutinized by appellate eyes and, thus, presents a question of first impression. Accordingly, our review is plenary. *See Genesky v. East Lyme*, 275 Conn. 246, 252, 881 A.2d 114 (2005).

Pursuant to General Statutes § 1-2z, we consider first the text of § 45a-441 to determine whether it is ambiguous. The statute provides: "When a devisee or legatee, being a child, stepchild, grandchild, brother or sister of the testator, dies before him, and no provision has been made in the will for such contingency, the issue of such devisee or legatee shall take the estate so devised or bequeathed." General Statues § 45a-441. The bequest in the present case specified "one-half ... of [the residue] property to Hazel Brennan of Guilford, Connecticut, if she survives me ...." Because the bequest contained the condition, "if she survives me," both the Probate Court and the Superior Court concluded that a provision had been made in the will for such contingency. The appellant

disagrees, arguing that because the will contained no provision as to the fate of Brennan's share in the event that she predeceased the testator, a provision had not been made in the will for such contingency. Both readings present plausible interpretations of the salient statutory language. In light of that ambiguity, we turn our attention to extratextual evidence to determine its proper meaning. See General Statutes § 1-2z.

"According to our long-standing principles of statutory construction, our fundamental objective is to ascertain and give effect to the intent of the legislature.... In determining the intent of a statute, we look to the words of the statute itself, to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter.... In construing a statute, common sense must be used, and courts will assume that the legislature intended to accomplish a reasonable and rational result." (Citation omitted; internal quotation marks omitted.) *Regency Savings Bank v. Westmark Partners*, 70 Conn. App. 341, 345, 798 A.2d 476 (2002). "A legislative act must be read as a whole and construed to give effect and to harmonize all of its parts." (Internal quotation marks omitted.) *Hayes v. Smith*, 194 Conn. 52, 58, 480 A.2d 425 (1984). In addition, "[w]here the meaning of a statute is in doubt, reference to legislation in other states and jurisdictions which pertains to the same subject matter, persons, things, or relations may be a helpful source of interpretative guidance." (Internal quotation marks omitted.) *Johnson v. Manson*, 196 Conn. 309, 318-19, 493 A.2d 846 (1985), cert. denied, 474 U.S. 1063, 106 S.Ct. 813, 88 L.Ed.2d 787 (1986).

I

HISTORY

At common law, when a named beneficiary under a will predeceased the testator, the share of the deceased beneficiary passed not to his descendants, but rather "lapsed." See 4 W. Bowe & D. Parker, Page on the Law of Wills (Rev. Ed. 2005) § 35.15, p. 645; *see also Clifford v. Cronin*, 97 Conn. 434, 438, 117 A. 489 (1922). Thus, the rule of lapse automatically conditions all devises on the survival of the legatee. "At common law, all legacies, not affected by substitutionary disposition, became intestate estate whenever the legatee died before the testator." *Ackerman v. Hughes*, 11 Conn. Supp. 133, 135 (1942).

As Judge O'Sullivan explained in *Ackerman,* "[s]ome pretty oppressive results were occasioned by these principles which frequently blocked the way for carrying out the testator's expressed intention. These injustices were most significant in those instances where the will provided legacies for close relatives." *Id.* To prevent such a harsh and presumably unintended result, legislatures of the United States in the late eighteenth century began crafting statutes designed to protect certain devises from lapsing.

In 1783, the Massachusetts legislature enacted the first antilapse statute. It provided: "When a devise of real or personal estate is made to any child or other relation of the testator, and the devisee shall die before the testator, leaving issue who survive the testator, such issue shall take the estate so devised, in the same manner as the devisee would have done, if he had survived the testator; unless a different disposition thereof shall be made or required by the will." 1783 Mass. Acts, ch. 24, § 8, quoted in S. French, "Antilapse States Are Blunt Instruments: A Blueprint for Reform," 37 Hastings L.J. 335, 339 n. 16 (1985). "In 1810, Maryland went even further and adopted a statute that prevented lapse altogether.... These two statutes provided the basic models on which all subsequent

antilapse statutes have been constructed." S. French, 37 Hastings L.J., supra, 339. In England, the Wills Act of 1837 took antilapse statutes across the Atlantic Ocean, providing that "when there was a devise or bequest to a child or other issue of the testator, and the child or issue predeceased the testator, leaving issue who survived the testator, the devise or bequest should not lapse, 'but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.' " 6 W. Bowe & D. Parker, supra, § 50.10, p. 91. Today, antilapse statutes have been enacted in every state except Louisiana. "[T]he antilapse statutes in effect across the United States vary significantly [and] so much ... that no typical or 'majority' antilapse statute exists." E. Kimbrough, "Lapsing of Testamentary Gifts, Antilapse Statutes, and the Expansion of Uniform Probate Code Antilapse Protection," 26 Wm. & Mary L. Rev. 269, 271 (1994).

Although varying in scope, all antilapse statutes provide that when a particular devisee predeceases the testator, the devise does not fall into the residue or pass to the testator's heirs by intestacy, but rather descends to the issue of the predeceased devisee. "Although ... commonly called 'antilapse' statutes, the label is somewhat misleading. Contrary to what the label implies, antilapse statutes do not reverse the common-law rule of lapse because they do not abrogate the law-imposed condition of survivorship.... What the statutes actually do is modify the devolution of lapsed devises by providing a statutory substitute gift in the case of specified relatives." E. Halbach, Jr. & L. Waggoner, "The UPC's New Survivorship and Antilapse Provisions," 55 Alb. L. Rev. 1091, 1101 (1992). With that background in mind, we turn our attention to § 45a-441.

II

OUR ANTILAPSE STATUTE

Connecticut's antilapse statute was enacted in 1821 as part of "An Act for the settlement of Estates, testate, intestate, and insolvent." It provided: "Whenever a devisee or legatee in any last will and testament, being a child or grand-child of the testator, shall die before the testator, and no provision shall be made for such contingency, the issue, if any there be, of such devisee or legatee, shall take the estate devised or bequeathed, as the devisee or legatee would have done, had he or she survived the testator; and if there be no such issue, at the time of the testator's death, the estate disposed of by such devise or legacy, shall be considered and treated as intestate estate." General Statutes (1821 Rev.) tit. 32, ch. 1, § 4. The antilapse statute today provides that "[w]hen a devisee or legatee, being a child, stepchild, grandchild, brother or sister of the testator, dies before him, and no provision has been made in the will for such contingency, the issue of such devisee or legatee shall take the estate so devised or bequeathed." General Statutes § 45a-441. Other than adding siblings and stepchildren to the class of applicable devisees and legatees; *see* Public Acts 1987, No. 87–355, § 2; no substantive change has been made to our antilapse statute since 1821. Moreover, the pertinent language at issue in the present dispute, namely, "*and no provision shall be made for such contingency,*" was part of the original 1821 statute and remains unaltered today.

Plainly, the purpose underlying our antilapse statute is the prevention of unintended disinheritance. Its passage reflects a legislative determination that, as a matter of public policy, when a testator fails to provide for the possibility that a particular beneficiary might predecease him, the lineal descendants of that beneficiary take the applicable share.

In the years since its enactment, Connecticut courts have stated that the antilapse statute is remedial

and should receive a liberal construction. *See*, *e.g.*, *Clifford v. Cronin, supra*, 97 Conn. At 438, 117 a. 489; *Ackerman v. Hughes*, *supra*, 11 Conn. Sup. At 135-36. When a dispute arises regarding application of that statute, therefore, the burden rests on the party seeking to deny the statutory protection.

Under Connecticut law, the antilapse statute applies unless a "provision has been made in the will for such contingency ...." General Statutes § 45a-441. A review of the antilapse statutes presently in effect in forty-eight other jurisdictions reveals that this language is unique to our statute. It is not disputed that the "contingency" referenced in § 45a-441 is the death of a devisee or legatee prior to that of the testator. What is contested is the proper construction of the "provision has been made in the will" language.

The appellees contend that inclusion of words of survivorship in a will constitutes a provision for such contingency, thereby rendering the antilapse statute inapplicable. Because the bequest in the present case contains the condition "if she survives me," they claim § 45a-441 is inoperative. That simple and seemingly persuasive argument fails, however, on closer examination.

First, it is significant that the language at issue dates back to 1821, the inception of our antilapse statute. The first antilapse statute, enacted in Massachusetts in 1783, provided that it would apply "unless a different disposition thereof shall be made or required by the will." 1783 Mass. Acts, ch. 24, § 8, quoted in S. French, supra, 37 Hastings L.J. 339 n. 16. The Maryland statute enacted in 1810 contained no such condition. Like every other antilapse statute that followed, ours was modeled on those statutes. Today, a majority of jurisdictions contain some variation of the "unless a different disposition thereof" condition. See Ark. Code Ann. § 28-26-104 Lexis Nexis (2004) ("[u]nless a contrary intent is indicated by the terms of the will"); § 21110(b) (LexisNexis 2004) ("issue of a deceased transferee do not take in the transferee's place if the instrument expresses a contrary intention or a substitute disposition"); Del. Code Ann. Tit. 12, § 2313(b) (Michie 2001) (section shall not apply in case of wills wherein provisions have been made for distribution of property different from this section); Fla. Stat. Ann. § 732.603 (West 2005) ("[u]nless a contrary intention appears in the will"); 755 Ill. Comp. Stat. Ann. § 5/4-11 (West 1992) ("[u]nless the testator expressly provides otherwise in his will"); Iowa Code Ann. § 633.273(2) (West 1992) ("unless from the terms of the will, the intent is clear and explicit to the contrary"); Kan. Prob. Code Ann. § 59-615(a) (1994) ("unless a different disposition is made or required by the will"); Ky.Rev.Stat. Ann. § 394.400 (same) (Lexis 1999); Md. Code Ann. Est. & Trusts § 4-403(a) (Lexis 2001) ("[u]nless a contrary intent is expressly indicated in the will"); Mass. Gen. Laws Ann. Ch. 191, § 22 (Law. Co-op. 1994) (same); Nev. Rev. Stat. § 133.200 (2003) ("in the absence of a provision in the will to the contrary"); N.Y. Est. Powers & Trusts Law § 2-3.3(a) (West 1998) ("[u]nless the will whenever executed provides otherwise"); N.C. Gen. Stat. § 31-42(a) (LexisNexis 2005) ("[u]nless the will indicates a contrary intent"); Ohio Rev. Code An.. § 42107.52(B (West 2005) ("[u]nless a contrary intention is manifested in the will"); Or. Rev. Stat. Ann. § 112.395 (1990) ("[u]nless otherwise provided in the will of the testator"); R.I. Gen. Laws § 33-6-19 (Michie 1995) ("unless a contrary intention shall appear by the will"); Tenn. Code Ann. § 32-3-105(a) (Lexis Nexis 2001) ("unless a different disposition thereof is made or required by the will"); Tex. Prob. Code Ann. § 68(e) (West 2003) ("unless the testator's last will and testament provides otherwise"); Vt. Stat. Ann. Tit. 14, § 558 Lexis Nexis 2002) ("unless a different disposition is required by the will) "; Va. Code Ann. § 64.1-64.1 (Lexis Nexis 2002) ("[u]nless a contrary intention appears in the will"); Wash. Rev. Code Ann. § 11.12.110 (West 1998) ("[u]nless otherwise provided"); W. Va. Code § 41-3-3 (LexisNexis 2004) ("unless a different disposition thereof be made or required by the will"); Wis. Stat. Ann. § 854.06(4)(a) (West 2002) ("section does not apply if there is a finding of contrary intent of the

decedent"). Thus, although the precise wording of the condition in our antilapse statute is unique, its existence is not. Like other states, Connecticut enacted its statute to counteract the harsh results of the common-law rule of lapse. Like other states, Connecticut conditioned operation of the antilapse statute on the intent of the testator as expressed in the will. Accordingly, the critical inquiry is whether an intent contrary to § 45a-441 is so manifested.

Our inquiry into whether words of survivorship evince a contrary intent sufficient to defeat the antilapse statute is guided by the following principles. Antilapse statutes "will apply unless testator's intention to exclude its operation is shown with reasonable certainty." 6 W. Bowe & D. Parker, supra, § 50.11, p. 96. Section 5.5 of the Restatement (Third) of Property, Wills and Other Donative Transfers (1999), addresses antilapse statutes.[7] Comment (f) to that section provides in relevant part: "Antilapse statutes establish a strong rule of construction, designed to carry out presumed intention. They are based on the constructional preference against disinheriting a line of descent .... Consequently, these statutes should be given the widest possible sphere of operation and should be defeated only when the trier of fact determines that the testator wanted to disinherit the line of descent headed by the deceased devisee." 1 Restatement (Third), Property, Wills and Other Donative Transfers § 5.5, comment (f), p. 383 (1999). Hence, the burden is on those who seek to deny the statutory protection rather than on those who assert it.

Finally, we are mindful that our statute was enacted to *prevent* operation of the rule of lapse. Our statute is remedial in nature and must be liberally construed. *Clifford v. Cronin, supra*, 97 Conn. At 438, 117 A. 489; Ackerman v. Hughes, supra, 11 Conn. Supp. at 135-36. Accordingly, we resolve any doubt in favor of the operation of § 45a-441.

The bequest at issue states, "one-half ... of [the residue] property to Hazel Brennan of Guilford, Connecticut, *if she survives me* ...." (Emphasis added.) Our task is to determine the significance of those words of survivorship. While the present case is one of first impression in Connecticut, numerous other states have considered the question of whether words of survivorship, such as "if she survives me," demonstrate a contrary intent on the part of the testator sufficient to negate operation of the antilapse statute.

III

OTHER AUTHORITY

Whether words of survivorship alone constitute sufficient evidence of a contrary intent on the part of the testator so as to prevent application of the antilapse statute is a question on which sibling authority is split. Some courts have concluded that words of survivorship demonstrate sufficient contrary intent. Illustrative of that line of cases is *Bankers Trust Co. v. Allen*, 257 Iowa 938, 135 N.W.2d 607 (1965). In that case, the Supreme Court of Iowa stated: "The bequest to Mary in Item III is conditioned on her surviving the testator. We have held many times ... that our antilapse statute ... does not apply to a bequest so conditioned. ... This is on the theory that a bequest to one 'if she survives me' manifests an intent that the bequest would lapse if the named beneficiary dies before the testator." (Citations omitted.) *Id.*, at 945, 135 N.W.2d 607; *see also In re Estate of Todd,* 17 Cal. 2d 270, 109 P.2d 913 (1941); *In re Estate of Stroble*, 6 Kan.App.2d 955, 960, 636 P.2d 236 (1981) ("when the testator uses words of survivorship in the will expressing an intent that the legatee shall take the gift only if he outlives the testator, the statute against lapses has no application and the expressed intention of the testator is controlling");*Slattery v. Kelsch*, 734 S.W.2d 813 (Ky.App. 1987);

In re Holtforth's Estate, 298 Mich. 708, 299 N.W. 776 (1941); *In re Robinson's Will*, 37 Misc.2d 546, 236 N.Y.S.2d 293 (1963); *Hummell v. Hummell*, 241 N.C. 254, 85 S.E.2d 144 (1954); *In re Estate of Burns*, 78 S.D. 223, 228, 100 N.W.2d 399 (1960) ("if the testator uses words indicating an intention that the named beneficiary shall take the gift only if he outlives the testator, there is nothing upon which the statute can operate").

Underlying that view is the presumption that the testator knowingly and deliberately included the words of survivorship. As one New York court explained: "[T]hese words were used by the testator in a will drawn by an experienced attorney. Some meaning must be attributed to them—and the meaning is clear—that survivorship was a condition precedent to the receipt of the residuary estate. If words were held to be devoid of meaning, then this court would be rewriting the testator's will." *In re Robinson's Will, supra*, at 548, 236 N.Y.S.2d 293. That presumption has pitfalls of its own, however.

Inclusion of words of survivorship provides neither objective evidence that a conversation about § 45a-441 took place nor objective evidence that the testator considered seriously the possibility of nonsurvival or inquired about the meaning of expressions such as "lapsed bequest" and the protections of the antilapse statute. "Because such a survival provision is often boiler-plate form-book language, the testator may not understand that such language could disinherit the line of descent headed by the deceased devisee. When the testator is older than the devisee and hence does not expect the devisee to die first ... it seems especially unlikely that a provision requiring the devisee to survive the testator was intended to disinherit the devisee's descendants." 1 Restatement (Third), supra, § 5.5, comment (h), p. 385.

At oral argument, counsel for the appellees alleged that inclusion of the words "if she survives me" indicates that the testator intended for the bequest to Brennan to lapse. While plausible, it remains conjecture nonetheless. As one commentary aptly stated: "The argument can reasonably be extended to urge that the use of words of survivorship indicates that the testator considered the possibility of the devisee dying first and intentionally decided not to provide a substitute gift to the devisee's descendants. The negative inference in this argument, however, is speculative. It may or may not accurately reflect reality and actual intention. It is equally plausible that the words of survivorship are in the testator's will merely because, with no such intention, the testator's lawyer used a will form containing words of survivorship. 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 devises with no survivorship requirement—with no different intention on the testator's part from one case to the other." E. Halbach, Jr. & L. Waggoner, *supra*, 55 Alb. L.Rev. 1112–13. Furthermore, words of survivorship "might very well be no more than a casual duplication of the survivorship requirement imposed by the rule of lapse, with no independent purpose. Thus, they are not necessarily included in the will with the intention of contradicting the objectives of the antilapse statute." *Id.*, 1109–10. As this court recently observed, "[s]peculation and conjecture have no place in appellate review." *Narumanchi v. DeStefano*, 89 Conn. App. 807, 815, 875 A.2d 71 (2005). Put simply, the intent of the testator cannot definitely be discerned on the basis of words of survivorship alone.

If he intended the bequest to lapse, the testator could have explicitly so provided. The testator also could have made an alternative devise, which "indicates a contrary intent, and hence overrides an antilapse statute ...." 1 Restatement (Third), supra, § 5.5, comment (g), p. 384; *see also* E. Halbach, Jr. & L. Waggoner, supra, 55 Alb. L.Rev. 1110 (when actually intended to call for result contrary to

antilapse statute, words of survivorship likely to be accompanied by additional language). That the testator did neither in the present case informs our consideration of whether he intended disinheritance.

The argument is further weakened by the fact that, under the interpretation of § 45a-441 provided by the Probate Court and the Superior Court, the result is not merely that Brennan's share lapses; her share passes to the intestate estate. Thus, at its crux, the contention of the appellees asks us to presume that, although not explicitly provided for, the testator *intended* intestacy as to Brennan's share. That argument confounds Connecticut law, which presumes that a testator designed by his will to dispose of his entire estate and to avoid intestacy as to any part of it. (citations omitted). In addition, the bequest to Brennan was residuary in nature. "Residuary language expresses an intention to ... avoid intestacy." *Hechtman v. Savitsky*, 62 Conn.App. 654, 663, 772 A.2d 673 (2001); *see also Hartford Trust Co. v. Wolcott*, 85 Conn. 134, 139, 81 A. 1085 (1912)

Indulging in the presumption that the testator intended to avoid intestacy militates against a finding that he intended for Brennan's share to lapse.

Another presumption bears consideration. In *Clifford v. Cronin, supra*, 97 Conn. At 438, 117 A. 489our Supreme Court, quoting 2 J. Alexander, Commentaries on Wills, § 874, stated that "the testator is presumed to know the law and that his will is drawn accordingly." As one court has noted, however, "[w]ith respect to any individual, the argument of knowledge and approval of the state law is sheer fiction." *Trimble v. Gordon*, 430 U.S. 762, 775 n. 16, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977). Discounting that observation, the presumption is revealing nevertheless. If we must presume that the testator was aware of our antilapse statute, we must also equally presume that he was aware that it is remedial in nature and provided a liberal construction in Connecticut. In that event, the testator would have known that any ambiguity arising from the probate of his will, absent an express indication to the contrary, would be resolved in favor of operation of the statute.

Alternatively, another line of cases from various jurisdictions concludes that words of survivorship alone are insufficient to defeat an antilapse statute. As the Supreme Court of Appeals of West Virginia stated, "In order to prevent application of the [antilapse] statute ... a testator must clearly and unequivocally indicate his intent that the statute not apply." (citations omitted).

A similar case is *Detzel v. Nieberding*, 7 Ohio Misc. 262, 219 N.E.2d 327 (Prob.Ct. 1966). In *Detzel,* the will provided in relevant part, "To my beloved sister, Mary Detzel, provided she be living at the time of my death ...." (Internal quotation marks omitted.) Id., at 263, 219 N.E.2e 327. Mary Detzel predeceased the testator. Id. In considering the operation of Ohio's antilapse statute, the court noted that "[a]ntilapse statutes are remedial and should receive a liberal construction"; id., at 267, 219 N.E.2d 327; echoing a precept shared by Connecticut law. Accordingly, "[a]ll doubts are to be resolved in favor of the operation of the antilapse statute .... [T]o render [the] statute inoperative contrary intent of testator must be plainly indicated." (Citations omitted.) *Id*., at 266-67, 219 N.E.2e 327. The court continued: "To prevent operation of the Ohio antilapse statute when a devise is made to a relative conditioned upon the survival of the testator by the relative, and the relative predeceases the testator leaving issue who survive the testator, it is necessary that the testator, in apt language, make an alternative provision in his will providing that in the event such relative predeceases or fails to survive the testator such devise shall be given to another specifically named or identifiable devisee or devisees." *Id*., at 274, 219 N.E.2d 327. Although we do not agree that the only way to negate operation of an antilapse statute is by providing an alternate devise, *Detzel* is

persuasive nevertheless. *Detzel* has never been reversed, although another Ohio court characterized it as "clearly and completely erroneous." *Shalkhauser v. Beach,* 14 Ohio Misc. 1, 6, 233 N.E.2d 527 (Prob.Ct. 1968). The Uniform Probate Code, however, seems to agree with the logic of *Detzel.*

In 1990, a revised Uniform Probate Code was promulgated, which contained a substantially altered antilapse statute. Notably, § 2–603(b)(3) provides that "words of survivorship, such as in a devise to an individual 'if he survives me,' or in a devise to 'my surviving children,' are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section." Unif. Prob. Code § 2-603(b)(3). The comment to that section explains that this expansion of antilapse protection was necessary because "an antilapse statute is remedial in nature .... [T]he remedial character of the statute means that it should be given the widest possible latitude to operate" in considering whether in an individual case there is an indication of a contrary intent sufficiently convincing to defeat the statute. Id., comment. The Restatement Third of Property agrees; see 1 Restatement (Third), supra, § 5.5, comment (f), p. 383; and that proposition is consonant with Connecticut law. In sum, we agree with those jurisdictions that have held that mere words of survivorship do not defeat antilapse statutes.

IV

CONCLUSION

Our antilapse statute was enacted to prevent operation of the rule of lapse and unintended disinheritance. The statute is remedial and receives a liberal construction. Any doubts are resolved in favor of its operation. We therefore conclude that words of survivorship, such as "if she survives me," alone do not constitute a "provision" in the will for the contingency of the death of a beneficiary, as the statute requires, and thus are insufficient to negate operation of § 45a-441. Our conclusion today effectuates the intent of the General Assembly in enacting this remedial statute. Should a testator desire to avoid application of the antilapse statute, the testator must either unequivocally express that intent or simply provide for an alternate bequest. Because the testator in the present case did neither, the protections of the antilapse statute apply. Accordingly, the bequest to Brennan does not lapse, but rather descends to her issue.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

15.3.2.2 Alternative Disposition

Kubiczky v. Wesbanco Bank Wheeling, 541 S.E.2d 334 (W. Va. 2000)

SCOTT, Justice:

This is an appeal by Stephen Kubiczky (hereinafter "Appellant") from a November 12, 1999, decision of the Circuit Court of Ohio County in favor of the Appellees, Anna Harmath Kovacs and Helen Harmath Laitos (hereinafter "Appellees"). The Appellant maintains that the lower court erred by finding that the Appellees, great aunts of the Appellant, were entitled to the one-third share of the residuary estate of Mr. Dick Harmath which had been bequeathed to the Appellant's deceased grandmother, Mrs. Mary Harmath Kish. The Appellant contends that West Virginia Code 41-3-3

(1997), the antilapse statute, governs the resolution of this matter and compels the conclusion that the Appellant is entitled to the one-third share of the residuary estate which had been bequeathed to his deceased grandmother. We agree with the contentions of the Appellant, reverse the decision of the lower court, and remand this matter for the entry of an order providing that the one-third share of the residuary estate to which Mrs. Mary Harmath Kish would have been entitled shall pass to her issue pursuant to West Virginia § 41-3-2.

I. Facts

Mr. Dick Harmath, the Appellant's great uncle, executed a will on December 12, 1975. Unmarried and without issue, Mr. Harmath provided in his will that all his debts were to be paid, that he was to be buried in a crypt in Wheeling, West Virginia, and that $4,000.00 was to be given to St. Joseph's Cathedral for Masses. In apparent complete disposition of the estate, the will also provided as follows:

> All the rest, residue and remainder of my estate, of all kind and description and wheresoever situate, I give, devise, and bequeath to be divided equally among my three (3) sisters, Anna Harmath Kovacs [address omitted], Mary Harmath Kish [address omitted], and Helen Harmath Laitos [address omitted], share and share alike, to the express exclusion of any other person or persons.

Mrs. Mary Harmath Kish, grandmother of the Appellant, died on November 28, 1988, leaving the Appellant as her sole lineal descendant. The testator, Mr. Harmath, died on December 10, 1998. The will was admitted to probate, and Wesbanco Bank Wheeling (hereinafter "Wesbanco") was the Executor. Having been advised by counsel for Wesbanco that he was not entitled to his grandmother's share of the estate, the Appellant filed his proof of claim against the estate on March 1, 1999, seeking to receive the one-third share of the residuary estate devised and bequeathed to Mrs. Mary Harmath Kish, pursuant to the provisions of West Virginia's antilapse statute, West Virginia Code § 41-3-3. The Appellant contended that the testator's inclusion of the phrase "to the express exclusion of any other person or persons" was insufficient to defeat the operation of the antilapse statute.

The Fiduciary Commissioner determined that the Appellant should receive the share to which his grandmother was entitled, reasoning that the antilapse statute controlled the disposition of the estate. The Commissioner explained: "Looking at the Testator's Will as a whole, your Commissioner does not believe that the language 'to the express exclusion of all others' by the Testator is 'condition precedent' or a 'different disposition' to defeat the operation of the anti-lapse statute...."

The Appellant filed a declaratory judgment action in the lower court and moved for summary judgment. The lower court entered an order dated November 12, 1999, denying the Appellant's motion and concluding that the disputed share constituted a void gift under West Virginia Code § 41-3-4 (1997) and should be distributed to the Appellees rather than the Appellant. Specifically, the lower court stated:

> It is the opinion of the Court that testator's language at the residuary clause of his Will, that his residue go equally to his three sisters, "to the express exclusion of any other person or persons", is a clear and unambiguous expression of his intent which permits only his surviving sisters as his residuary beneficiaries, and constitutes a testamentary direction which controls the distribution of

the residue of his estate. Therefore, when his sister Mary Harmath Kish predeceased him, it caused the bequest of her residuary share to be incapable of taking effect.

These events fall within the provisions of West Virginia Code 41-3-4 which provides that when a residuary bequest is incapable of taking effect the bequest passes to the remaining residuary legatees, in terms of this case-Anna Harmath Kovacs and Helen Harmath Laitos.

The Appellant appealed the lower court's determination to this Court, contending that the phrase "to the express exclusion of any other person or persons" did not constitute a "different disposition" defeating the operation of the antilapse statute. Such reference, according to the Appellant, related to third parties living at the time the will was written, such as those claiming to be illegitimate children of the testator or claiming to have been equitably adopted by the testator, rather than to lineal descendants of a predeceased sister.

The Appellant also emphasizes the testator's failure to provide an alternate distribution should one or all of the sisters predecease him. The Appellant discusses the significance of the fact that the testator, assisted by legal counsel in drafting the will, did not include a clause stating that only the surviving sister or sisters would be entitled to the residuary. Absent some alternate disposition, the Appellant argues that the death of a beneficiary prior to the death of the testator triggers the application of the antilapse statute and that the void-gift statute is consequently not implicated.

The Appellees maintain that the testator evidenced his intention for an alternate distribution by excluding all other persons from his will. They argue that such an alternate distribution defeats the operation of the antilapse statute and renders the gift to the deceased Mrs. Kish void under West Virginia Code § 41-3-4. . We disagree.

II. Standard of Review

We review this matter *de novo,* pursuant to our typical standard of review for declaratory and summary judgment actions as enunciated in syllabus point three of *Cox v. Amuck*, 195 W.Va. 608, 466 S.E.2d 459 (1995), as follows: "A circuit court's entry of a declaratory judgment is reviewed *de novo.*" We explained in *Cox* that "because the purpose of a declaratory judgment action is to resolve legal questions, a circuit court's ultimate resolution in a declaratory judgment action is reviewed *de novo* ...." *Id.* at 612, 466 S.E2d at 463. In *Poole v. Berkeley County Planning Commission*, 200 W.Va. 74, 488 S.E.2d 349 (1997), this Court acknowledged that "both the entry of a summary judgment and the entry of a declaratory judgment are reviewed by this Court *de novo.*" *Id.* at 77, 488 S.E.2d at 352.

III. History of Antilapse Statutes

Where an intended devisee predeceases the testator of a will, the devise is considered lapsed, based upon the implied assumption that an intended beneficiary must survive the testator. At common law, such lapsed devise was either treated as intestate property or was distributed among the residuary legatees. *Simpson v. Pisano*, 288 Md. 560, 419 A.2d 1059 (1980) (citing 1 *Jarmon on Wills* 438 (8th ed. London 1951) (1st ed. London 1841-2-3); *Billingsley v. Tongue*, 9 Md. 575 (1856); 6 J. Bowe and Douglas H. Parker, *Page on Wills* s 50.10 (Rev. ed. 1962). To present such a harsh and presumably unintended result, legislatures of the United States and Great Britain in the nineteenth century crafted statutes designed to prevent such devises from lapsing. These "antilapse" statutes

generally provided that the property devised would descend to the issue of the predeceased devisee unless a contrary interest was expressed. *Helmsley v. McKeon*, 119 Md. 431, 87 A. 506 (1913). Such legislative construction achieved transfer of the legacy to the legatee's heirs rather than the testator's heirs and prevented intestacy or escheat to the state. *Mayor & City Council v. White*, 189 Md. 571, 56 A.2d 824, 826 (1948). Through such means, the statutes effected "'the probable intention of the average testator,' " *In re Estate of Christian*, 65 Haw. 394, 652 P.2d 1137 (1982) (citing T. Atkinson, *Law of Wills* § 140, at 779 (2d ed.1953)).

While all states, except Louisiana, have some version of an antilapse statute, the precise language and effect of the statutes vary greatly from state to state. A frequently litigated issue in the antilapse context focuses upon the manner in which a testator who desires to avoid application of the statute must express such intent. In order to prevent application of the statute, courts have uniformly held that a testator must clearly and unequivocally indicate his intent that the statute not apply. *In re Estate of McCarthy*, 256 Iowa 66, 126 N.W.2d 357, 361 (Iowa 1964). "To defeat the operation of the antilapse statute, the will must contain plain and clear language indicating that the testator intended a different disposition of his or her property should a named beneficiary die first." *Jacobsen v. Lathe*, 1997 WL 576339, at *3 (Tenn. Ct. App. 1997); *see In re Estate of Renner*, 895 S.W.2d 180, 182 (Mo.Ct.App. 1995); *Royston v. Watts*, 842 S.W.2d 876, 879 (Mo. Ct. App. 1992).

"Where a will does not clearly indicate that the person who made it intended to disinherit a predeceased legatee in favor of a surviving legatee, the antilapse statute works to save the deceased legatee's gift for his or her heirs." *Jacobsen*, 1997 WL 576339, at *3.

In *Early v. Bowen*, 116 N.C.App. 206, 447 S.E.2d 167 (1994) *review denied,* 339 N.C. 611, 454 S.E.2d 249 (1995), the North Carolina court succinctly stated: "A testator who desires to prevent lapse must express such intent or provide for substitution of another devisee in language sufficiently clear to indicate what person or persons testator intended to substitute for the legatee dying in his lifetime; otherwise the anti-lapse statute applies." *Id.* at 170.

Courts have disagreed, however, regarding precisely what language is sufficient to convey such contrary intent. If, for example, a testator directly references the antilapse statute and expressly states that the statute is not to be applied to the devises in his will, such expression of contrary intent is obviously sufficient to avoid operation of the statute. Other expressions of contrary intent, however, are presented with less clarity, and litigation is required to determine whether the specific language suffices to prevent operation of the statute. An express requirement of survivorship of the devisee or a designation of an alternative disposition if any devisee predeceases the testator have been deemed sufficient to defeat application of the statute. *See e.g. In re Estate of Burruss,* 152 Mich.App. 660, 394 N.W.2d 466, 468 (1986)(bequeathing estate to daughters "'or to the survivor or survivors of them' "); *In re Robinson's Will*, 37 Misc. 2d 546, 236 N.Y.S.2d 293, 295 (N.Y.Sur. Ct. 1963) (bequeathing estate to brothers and sisters "'or to the survivor or survivors of them' "); *In re Estate of Farris*, 865 P.2d 1275, 1278 (Okl. Ct.App. 1993) (bequeathing estate to brothers and sisters "'or to survivor[s] of them' ").

Throughout the development of standards surrounding the application of antilapse statutes, several consistent principles have emerged. Primary among these is the presumption of testator knowledge regarding the existence and operation of the antilapse statute. In analyzing the particular language utilized by the testator, courts have generally applied a presumption that the testator was aware of the existence and operation of the antilapse statute and that he drafted the will in accordance with

such understanding. *Martin v. Summers*, 101 Ohio App. 3d 269, 655 N.E.2d 424 (1995). In *In re Estate of Ricklefs*, 211 Kan. 713, 508 P.2d 866 (1973), the Kansas court reasoned:

> Lawyers and testators of the state 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 a will being made the instrument of introducing a vague discretionary law formed upon the occasion from the circumstances, to which no precedent can be applied, and from which no rule can be deduced.

Id. at 873.

Courts have also uniformly recognized the necessity of broad and liberal construction of the antilapse statutes. In *In re Estate of Braun*, 256 Iowa 55, 126 N.W. 2d 318 (1964), for instance, the Iowa court reasoned that the antilapse statute "was enacted to preserve the devise for those who would presumably have enjoyed its benefits had the deceased devisee survived the testator and died immediately thereafter." *Id.* at 320. To achieve that purpose, the Iowa court provided the statute a broad and liberal construction. *Id. See also Brundige v. Alexander,* 547 S.W.2d 232, 234 (Tenn. 1976). The compulsion toward broad and liberal construction was summarized as follows in *In re Estate of Kerrr,* 433 F.2d 470 (D.C. Cir. 1970):

> As an expedient to mitigate the rigors of common law doctrine, the antilapse statute is to be interpreted liberally with a view to attainment of its beneficent objective. To render the statute inoperative, a purpose inconsistent with that objective must fairly appear, and from the terms of the will itself.

Id. at 483 (footnotes omitted).

IV. Burden of Proof

In presenting arguments regarding whether the antilapse statute is applicable to a particular factual scenario, courts have also placed the burden of demonstrating that the antilapse statute should not operate upon the party contending that it is inapplicable. Doubts are resolved in favor of normal operation of the statute, as liberally construed. *In re Estate of Niehenke*, 58 Wash. App. 149, 791 P.2d 562, 564 (1990), *aff'd,* 117 Wash. 2d 631, 818 P.2d 1324 (1991). *See Nicholson v. Fritz,* 252 Iowa 892, 109 N.W.2d 226, 227 (Iowa 1961)("The burden was upon plaintiffs to show the 'contrary intent' claimed by them."); *Fischer v. Mills*, 248 Iowa 1319, 85 N.W.2d 533, 537 (Iowa 1957) (holding "when a litigant depends upon the contrary intention clause ... the burden of proof rests upon such party to the action."); *Benz v. Paulson*, 248 Iowa 1005, 70 N.W. 2d 570, 574 (Iowa 1955) ("The burden was upon the appellant to show from the terms of the will a 'contrary intent'; that is, that the anti-lapse statute did not apply." ').

V. West Virginia Antilapse Statute

The antilapse statute adopted by the legislature of this state, West Virginia Code § 41-3-3, was discussed by this Court in *Mrocko v. Wright*, 172 W.Va. 616, 309 S.E.2d 115 (1983). In *Mrocko,* the

testator left all her property to her husband, her sister Mrs. Tomich, and her sister Mrs. Wright. The testator provided that her two sisters, on a share and share alike basis, were to receive certain specified devises. *Id.* at 617, 309 S.E. 2d at 116. The particular provision of the will relevant to the operation of the antilapse statute and determined to constitute a contrary intention negating the effect of the antilapse statute provided as follows: "'This is providing that all named are living at my death.' " '*Id.* at 617, 309 S.E. 2d at 117. The testator's husband and her sister Mrs. Tomich predeceased her. *Id.*

The lower court held in *Mrocko* that Mrs. Wright, as the sole surviving sister, was the beneficiary under the will. The appellants contended on appeal that the antilapse statute entitled them to one-half of the residuary estate. *Id.* at 618, 309 S.E. 2d at 117. This Court affirmed the determination of the lower court, finding that the testator's provision, "'This is providing that all named are living at my death' " applied to all of the named beneficiaries in the will. *Id.* This was in essence a survivorship clause creating a "different disposition" negating the application of the antilapse statute. Because the bequest was not saved by the antilapse statute, the void gift statute was invoked, and the failed devise was added to the residuary estate which permitted Mrs. Wright to receive the entire estate under the residuary clause. *Id.* at 619, 309 S.E. 2d at 118.

The case *sub judice* differs markedly from *Mrocko*. The testator in *Mrocko* included an express survivorship requirement in the provision devising to the beneficiaries "providing that all named are living at my death." *Id.* at 617, 309 S.E. 2d at 117. The will under scrutiny in the present case contains no such provision; nor does it contain any alternate disposition of the portion of the estate which was to be given to Mrs. Mary Harmath Kish.

Keller v. Keller, 169 W.Va. 372, 287 S.E. 2d 508 (1982), is also illuminating as to the incorporation of an express alternate distribution provision in a trust. In *Keller*, this Court encountered a scenario in which a testator had willed his property in equal shares to his eight children. The testator had also provided a spendthrift trust for the share of one of the children and expressly provided that on the death of that child his share should go to the other surviving children, all named individually in the residuary clause. Specifically, the testator provided:

> I further direct that should George W. Keller die while the said trust fund is in existence that the said Trustee shall pay his funeral expenses from said fund and any balance remaining in said trust fund to pass outright to such of the brothers and sisters of said George W. Keller as are then living, share and share alike.

Id. at 374, 287 S.E. 2d at 508.

The child for whom the spendthrift trust had been created predeceased the testator. This Court, analyzing the antilapse statute, concluded that the deceased child's share should pass to the surviving children. While "[t]he trust provisions of the will had no specific application[,]" because the child for whom the trust had been created had predeceased the testator, this Court found that the

> trust provisions of the will expressed a general intent that the brothers and sisters surviving George W. Keller would take his share. It is clear that had the trust been in existence after the death of the testator, such brothers and sisters, rather than the appellants, would have taken George W. Keller's share.

169 W.Va. At 381, 287 S.E.2d at 513. Based upon the obviously intended alternate distribution, the antilapse statute did not apply to transfer the disputed share to George W. Keller's lineal descendants. *Id.*

We also adhere to the firmly established legal presumption against intestacy. We explained in *Cowherd v. Fleming*, 84 W.Va. 227, 100 S.E. 84 (1919) that "[t]he presumption is that when a testator makes a will he intends to dispose of his whole estate, and if possible the will should be so interpreted as to avoid total or partial intestacy." *Id.* at 231, 100 S.E. at 86. In syllabus point four of *Rastle v. Gamsjager*, 151 W.Va. 499, 153 S.E. 2d 403 (1967), this Court explained: "Where a will is made it is presumed that the testator intended to dispose of his whole estate, and such presumption should prevail unless the contrary shall plainly appear." In syllabus point eight of *In re Teubert's Estate*, 171 W.Va. 226, 298 S.E.2d 456 (1982), this Court succinctly stated the "[t]he law favors testacy over intestacy."

The presumption against intestacy is quite significant in the present case. If this Court were to adopt the reasoning of the Appellees and carry that argument to its logical conclusion, escheat to the state would have resulted if all three residuary beneficiaries had predeceased the testator. In other words, in such event, if the language utilized in the will, "to the express exclusion of any other person or persons," were interpreted to constitute sufficient intent of a "different disposition" and thereby deemed to negate the operation of the antilapse statute, escheat to the state would have been the result-a result which would violate all established principles of testamentary interpretation. *See* W. Va. Code § 41.3-3.

This Court summarized the effect of the antilapse statute in syllabus point one of *Mrocko*, as follows: "W.Va. Code 41-3-3 [1923] provides that the heirs at law of a devisee or legatee who dies before the testator take such property as the joint devisee or legatee would have taken if he had survived the testator, unless a different disposition thereof be made or required by the will." As established by the principal cases interpreting antilapse issues throughout the nation, the burden of proving that a "different disposition" was "made or required by the will" must be upon that party urging the inapplicability of the antilapse statute. Such intention for a different disposition must be expressed clearly and unequivocally by the testator, and the antilapse statute is to be granted broad and liberal construction.

If the intention of the testator in the present case had been to bequeath a share of his estate to only his sisters living at the time of his death, he should have expressed it. The will as drafted, however, did not require survivorship; nor did it include an alternate distribution which expressed any intent to exclude descendants of a predeceased beneficiary.

Premised upon the broad interpretation of the antilapse statute, the presumption that the testator was aware of the workings of the antilapse statute when the will was written, and the necessity for clear and unambiguous assertion of an alternate intent in order to defeat the antilapse statute, we find that the antilapse statute applies and that the one-third share to which Mrs. Mary Harmath Kish would have been entitled shall pass to her issue. In providing for distribution of an estate, utilization of the phrase "to the express exclusion of any other person or persons," in the absence of clear and unequivocal expression of intent for an alternate distribution, is insufficient to negate the operation of the antilapse statute, West Virginia Code § 41-3-3. We consequently reverse the determination of the lower court and remand this matter for the entry of an order in accord with this opinion.

Reversed and Remanded with Directions.

15.4 Ademption

The law considers a devise in a will to be an expectancy, so does the testator. If a person executes a will leaving his or her property to someone, that person does not expect the devisee to get any interest in that property until after he or she dies. After a person executes a will, he or she continues to act as the owner or the property. Consequently, due to life circumstances, the person may not own the devised property when the will becomes operational. For example, a person may lose a house to foreclosure, sell a car or have a piece of jewelry stolen. In addition a person may distributed some of the property mentioned in the will to the devisee. The doctrine of ademption applies to situations involving changes in property following the execution of a will. There are two types or ademption---extinction and satisfaction.

15.4.1 Ademption by Extinction

Specific devises of real and personal property are subject to the doctrine of ademption by extinction. This rule only applies to specific devises. A specific devise refers to a piece of property that is explicitly named like a house or a mink coat. Hence, if T leaves a will stating, "I leave my 1998 black mustang to Joe," Joe only gets the mustang if T dies owning the car. Under the doctrine of ademption by extinction, if T sells the mustang, Joe is not entitled to receive the value of the mustang or another car that T owns at the time of his or her death. General, demonstrative, and residuary devises are not impacted by the rule of ademption. If the testator intends to confer a general benefit on the devisee instead of leaving him or her a particular piece of property, the devise is classified as general. For example, T executes a will stating, "I leave $50,000 to Tina." If T does not have $50,000 in cash when he or she dies, the executor of the estate must sell other property to satisfy the legacy meant for Tina. A demonstrative devise refers to a general gift to be paid from a specific source. For instance, T executes a will stating, "I leave $50,000 to Troy to be paid from the sale of my Wells Fargo stock." If T dies without owning $50,000 worth of Wells Fargo stock, Troy does not lose his devise. The executor must sell other property to raise the $50,000 so Troy can be paid. The residuary devise is a grant of the remainder of the estate. This devise is not adeemed because the devisee takes whatever is left over after all of the other devises have been satisfied.

Stewart v. Sewell, 215 S.W.3d 815 (Tenn. 2007)

CORNELIA, J.

We granted this appeal to clarify the applicability of the rule of ademption by extinction and of Tennessee Code Annotated section 32-3-111 concerning the sale of specifically devised property. In August 1994, the decedent Clara Stewart executed her last will and testament in which she left a parcel of real estate to her stepson, the plaintiff in this matter. In November 1994, the decedent executed a durable power of attorney to her natural children, defendants Sewell and Judkins. In January 1997, the decedent's health had so far deteriorated that she required placement in a nursing home. In February 1997, Sewell and Judkins sold a portion of the devised real estate in order to fund the decedent's nursing home expenses. After their mother's death, Sewell and Judkins inherited the remaining proceeds of the sale; the plaintiff inherited that portion of the real estate which had not

been sold. Plaintiff sued Sewell and Judkins as well as the purchasers of the real estate, alleging fraud. After a trial, the trial court dismissed the plaintiff's complaint. On appeal, the Court of Appeals determined that Sewell and Judkins had acted improperly and granted the plaintiff relief. We granted the defendants' application for permission to appeal and hold that the specific devise of the real property was adeemed by extinction and that the Court of Appeals erred in applying retroactively Tennessee Code Annotated section 32-3-111 and in imposing a constructive trust in order to avoid that result. Accordingly, we reverse the judgment of the Court of Appeals and reinstate the trial court's judgment dismissing the plaintiff's case.

FACTUAL AND PROCEDURAL BACKGROUND

This case involves a dispute between the decedent Clara Stewart's natural children, defendants Demple Sewell and Bobby Judkins, and her stepson, plaintiff George Stewart, over the sale of a parcel of real estate originally owned by Stewart's father and devised to Stewart under Clara Stewart's will.

James Stewart and Clara Judkins, whose first spouses had died, married in 1974. They lived together in a house near Tim's Ford Lake that James had owned prior to this second marriage. They rented out the house in Winchester in which Clara had lived with her first husband. During their marriage, Clara and James each executed wills leaving all their property to the other spouse if he or she survived. If the spouse did not survive, then each left the property previously owned by the spouse to the spouse's adult child or children, and left all remaining property to their own child or children.

James Stewart died in 1981, and Clara inherited the Tim's Ford Lake property in fee simple. This property included the house and approximately seven acres. Clara continued to live there until 1992, when she moved back to her old home in Winchester. She thereafter leased the Tim's Ford Lake house to a tenant who paid several hundred dollars a month in rent. In August 1994, soon after the death of one of her three adult children, Clara executed a new last will and testament, in which she again devised to George Stewart the Tim's Ford Lake property. Clara's two living children, Sewell and Judkins, were the remainder beneficiaries under Clara's new will, with the only specific bequest being of the Tim's Ford Lake property.

On November 7, 1994, Clara executed a durable power of attorney ("the POA") in which she named Sewell and Judkins her attorneys-in-fact. The POA provides that it "shall not be affected by [Clara's] subsequent disability or incapacity and is made pursuant to the Uniform Power of Attorney Act as codified in Tennessee Code Annotated Section, 34-6-101, et. seq." The POA also specifically gave Sewell and Judkins "the right ... to buy and sell both real and personal property on [Clara's] behalf to the full extent as if [she] transacted the sale or purchase in person. This shall specifically include the right and power to execute deeds and other instruments conveying personal and real property."

In late December 1996, Sewell found her mother in a coma. Clara was taken to the hospital. In mid-January 1997, after she had come out of the coma, Clara was transferred to Mountain View Nursing Home. Clara remained at the nursing home until her death on May 9, 1998.

In January 1997, Sewell obtained an appraisal of the undeveloped acreage included in the Tim's Ford Lake property ("the Undeveloped Tract"). The appraisal describes the Undeveloped Tract as including approximately five acres and a small barn and indicates an estimated value of $110,000.

Sewell also obtained an appraisal of the house and one acre remaining in the Tim's Ford Lake property. The appraised value on that tract was $64,000.

After receiving the appraisals, Sewell contacted Stewart through attorney Clinton Swafford to inquire whether he would like to purchase the Undeveloped Tract for $110,000. Stewart declined because he believed he was entitled to receive the parcel by bequest. Sewell subsequently sold the Undeveloped Tract, which actually included approximately six acres, to her daughter and son-in-law and their friends Mr. and Mrs. Blocker for $80,000. Sewell testified that she negotiated the price for the Undeveloped Tract, taking into consideration the expenses required to develop an access road and to extend utilities. She stated that $80,000 was the best offer she got on the Undeveloped Tract after offering it to several members of her family, including Stewart. Sewell did not list the Undeveloped Tract with a broker or otherwise advertise it prior to selling it.

Sewell testified that she took the proceeds from the sale of the Undeveloped Tract and invested it in several certificates of deposit through the credit union. She explained that her mother had been diagnosed with Alzheimer's disease and she "tried to figure out by the length of time other Alzheimer's patients were being kept in the nursing home, how long [she] could stretch the money out." Sewell testified that her mother's monthly bills at the nursing home were "always at least $3,000 plus her supplies, plus her medicines." Sewell acknowledged that, after her mother died, the money remaining in these certificates was divided between her and Judkins, her brother. In other words, Sewell admitted that she and her brother eventually benefited personally from the sale of the Undeveloped Tract because they kept the proceeds remaining upon their mother's death. Sewell testified that she "did not think" about borrowing money against the Tim's Ford Lake property instead of selling a portion of it.

After Clara died, attorney Swafford advised Stewart that he had inherited the house and one remaining acre overlooking Tim's Ford Lake and mailed him the key to the house.

Stewart testified that he grew up on the Tim's Ford Lake property and that he knew Clara intended to leave him that property upon her death. He acknowledged that an attorney representing Sewell called him in late January or early February 1997 and asked him if he wanted to buy the Undeveloped Tract for the appraised price of $110,000. Stewart testified that he told the lawyer he did not want to buy the Undeveloped Tract because he "felt that [he] should have inherited that piece of property." He also stated that he never had any conversations with Sewell or Judkins about Clara's care or the need for money to pay for her care. Stewart acknowledged, however, receiving a telephone call from a lawyer regarding the need to raise money for Clara's nursing home care. He did not learn what had happened with the Undeveloped Tract until he received a letter from the attorney together with the key to the house in June 1998. His last visit with Clara was in 1992.

In addition to a transcript of the witnesses' testimony, the record includes extensive documentation concerning Clara's finances. Chronologically, the documentary record begins with a January 1994 bank statement on checking account number–7281. Both Clara and Sewell had signing authority on this account. The record includes statements on this account from January 1994 through September 1996. All of the checks included with these statements were signed by Sewell, who testified that even before Clara's decline in health, she preferred to have her daughter write checks and take care of business for her.

On June 26, 1996, a twelve-month certificate of deposit in the amount of $25,807.45 was obtained,

payable to "Clara B. Stewart or Demple Sewell." The documentary record does not disclose the source of the funds for this certificate. The record indicates that this certificate of deposit was later "closed" but does not indicate when.

In September 1996, checking account number –7281 was closed and checking account number—3496 was opened with an initial deposit of $1,063.70 (the closing balance of—7281 was $863.70). This account bore the names of "Clara B. Stewart or Demple L. Sewell or Bobby L. Judkins." The record includes copies of the statements on this account from October 1996 through April 1997. All but one of the checks included with the statements bear Sewell's signature (the other one bears Judkins' signature).

On November 21, 1996, a deposit in the amount of $26,130.15 was made into checking account number—3496. Although the record does not make clear the source of this deposit, a logical inference is that it resulted from redeeming the June 1996 certificate of deposit. On November 27, 1996, a check in the amount of $19,957.13 was made payable to the investment firm J.C. Bradford. Sewell testified that she invested this money in her and Judkins' names at her mother's direction. Sewell explained that her mother had been saving this money for her children for many years.

In February 1997, after Clara entered the nursing home, Sewell opened a new account at the credit union in the names of "Clara B. Stewart, Demple L. Sewell, Bobby L. Judkins." Sewell testified that she set the account up in all three names "so that if anything happened to us [Clara] wouldn't be ... [unable] to get it." Sewell subsequently deposited $75,000 from the sale of the Property into this account as well as approximately $6,500 after closing checking account number –3496. Clara's social security and rental income checks totaling approximately $1,100 per month were also deposited into this account. The March 31, 1997, balance in this account was approximately $82,500.

On May 30, 1997, Sewell issued a check to Mountain View Nursing Home in the amount of $5,766.74 from the credit union account. Additional checks from this account were paid to the nursing home on a monthly basis through June 1998. The checks from May 1997 through June 1998 total more than $40,000. Checks totaling approximately $2,200 were issued to a pharmacy from this account during the same period. At the time Clara died, the credit union account balance was approximately $51,500.

In October 1998, Stewart filed a complaint against Sewell, Judkins, and the four purchasers of the Undeveloped Tract. Stewart alleged, among other things, that Sewell and Judkins "fraudulently conveyed their mother's property to keep [Stewart] from inheriting said property." In his prayer for relief, Stewart requested that the court "find that a fraud has been committed on both the Estate of Clara B. Stewart and upon the Plaintiff, George Haskel Stewart," that the court void the deed by which Sewell and Judkins conveyed the Undeveloped Tract, and that the Undeveloped Tract be conveyed to him. In the alternative, Stewart requested damages "in a sum not to exceed $400,000." At the end of the trial, plaintiff's counsel moved the court to amend the complaint to conform with the evidence. After considering the evidence summarized above, the trial court entered an order dismissing the complaint on the basis that "the allegations and legal theories set forth in plaintiff's Complaint are not sustained by the proof." Unfortunately, the trial court made no specific findings of fact.

On appeal, the Court of Appeals reversed the trial court and awarded Stewart a judgment against Sewell and Judkins. The Court of Appeals determined that Sewell and Judkins "acted in

contravention of the power of attorney and the limitations imposed under Tenn. Code § 34-6-108(c)(1) and (6) and breached their fiduciary duties." The Court of Appeals determined that the rule of ademption by extinction did not apply in this case, applied the provisions of Tennessee Code Annotated section 32-3-111, and imposed a constructive trust on the proceeds resulting from the sale of the Undeveloped Tract in order to award Stewart a judgment "in the amount of the net proceeds resulting from the sale of the devised property plus pre-judgment interest computed from the date of sale of the devised property." Because the Court of Appeals based these determinations on erroneous findings of fact, and because the intermediate appellate court crafted its remedy in part upon the provisions of an inapplicable statute, we reverse.

STANDARD OF REVIEW

Tennessee Rule of Appellate Procedure 13(d) provides that, "[u]nless otherwise required by statute, review of findings of fact by the trial court in civil actions shall be de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding[s], unless the preponderance of the evidence is otherwise." When the trial court fails to make specific findings of fact, however, this Court reviews the record to determine the facts as established by the preponderance of the evidence. *Gauzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997). Our scope of review for questions of law is de novo upon the trial court's record with no presumption of correctness. *Id.*

ANALYSIS

I. Factual Findings

The Court of Appeals found several facts to be significantly different from those recited above, or drew different inferences therefrom. Our careful examination of the record belies those findings.

A. The "$19,500 Gift"

The Court of Appeals found that "[a]s the Fiduciaries [Sewell and Judkins] were preparing to move Mrs. Stewart into the nursing home in December of 1996 and January of 1997, the Fiduciaries received a $19,500 'gift' from Mrs. Stewart's bank account." This reference is to the $19,957.13 check written on account number–3496 and invested with J.C. Bradford in Sewell's and Judkins' names. Apparently, the intermediate appellate court was of the opinion that this money should have been available to pay for Clara's care. The Court of Appeals described this transfer as having been made as Sewell and Judkins "were preparing to move [their mother] into the nursing home." The record indicates, however, that the transfer of funds took place in November 1996, approximately a month before Sewell found her mother in a coma and before the need to pay for nursing home care existed. Sewell explained that her mother had requested this transfer of money to be made and that her mother had been saving this money for her children for many years. No proof in the record contradicts this testimony. Moreover, the documents before us compel the inference that the transfer was made from funds that had been held jointly by Sewell and Clara in a certificate of deposit.

B. The Credit Union Account

Sewell opened an account at the credit union in February 1997. The account was listed in the names

of Clara, Sewell, and Judkins. Seventy-five thousand dollars from the sale of the Undeveloped Tract was deposited into the account along with $6,517.47, the balance of the checking account previously held at a bank. Clara's social security and rental income checks totaling approximately $1,100 per month were also deposited into this account. The deposits into this account were, so far as the record indicates, the sole source of Clara's liquid assets to pay for her care.

The Court of Appeals emphasized the fact that Sewell and Judkins placed the proceeds from the sale of the Undeveloped Tract into an account bearing their names along with that of their mother:

> While [Sewell and Judkins] had the authority, assuming it was in Mrs. Stewart's best interest, to sell the property, they had a corresponding duty to invest the proceeds in assets or accounts solely in the name of Mrs. Stewart because the property was titled solely in her name when it was sold. Accordingly, [Sewell and Judkins] acted in direct contravention of the power of attorney and Tenn. Code Ann. § 34-6-108 (c)(1) and (6) by depositing the proceeds in a series of certificates of deposit with themselves identified as co-owners and with right of survivorship upon the death of Mrs. Stewart.

However, Sewell testified that she set the account up in all three names "so that if anything happened to us she wouldn't be ... [unable] to get it." Given that Clara's previous checking account was also in the names of all three people, Sewell's explanation for her handling of the proceeds is consistent with the way she had helped her mother handle her finances prior to her final illness. Given that there is no proof that any of the proceeds from the sale of the Undeveloped Tract was used for an improper purpose while Clara remained alive, we disagree with the Court of Appeals that Sewell and Judkins acted "in direct contravention" of their duties and obligations under the POA so as to be in breach of their fiduciary duties thereunder. Rather, upon our close review of all of the evidence, we are convinced that Sewell and Judkins would have continued to use the proceeds from the sale of the Undeveloped Tract for their mother's benefit for so long as she remained alive. The Court of Appeals' conclusion that Sewell and Judkins sold the Undeveloped Tract in order to benefit themselves is not supported by a preponderance of the evidence.

C. Payments for Clara's Care

The Court of Appeals also concluded that the proceeds from the sale of the Undeveloped Tract "were never used for [Clara] Stewart's benefit because other assets were sufficient to provide for her care and nursing home expenses." As set forth above, this conclusion is not supported by the record. By the time Clara died, over $42,000 had been paid from the credit union account to the nursing home and the pharmacy for her care: over half of the amounts initially deposited and available. The record contains no indication that any of the money in this account was used for inappropriate purposes. At the time Clara died in May 1998, the balance in the account was approximately $51,500. Obviously, a significant portion of the proceeds from the sale of the Undeveloped Tract was used for Clara's care and expenses.

D. Tenn Care Fraud

The Court of Appeals suggested that Sewell and Judkins sold the Undeveloped Tract to prevent the property from "going to the nursing home." In fact, the court went further, concluding that

> the Fiduciaries [Sewell and Judkins] intentionally used the power of attorney to benefit themselves by gifting the proceeds from the sale of the disputed property to themselves. Moreover, the Fiduciaries' actions exposed Mrs. Stewart to various liabilities for potential fraud upon the Medicaid and Tenn Care programs. Such actions constitute serious violations of the Fiduciaries' duties to exercise the utmost good faith, loyalty and honesty toward Mrs. Stewart. Thus, we hold that the Fiduciaries, Demple Sewell and Robert Judkins violated their confidential relationship and breached their fiduciary duties owing to Mrs. Stewart when they established the certificates of deposit.

We disagree with the Court of Appeals' conclusion that Sewell and Judkins exposed their mother to allegations of Medicaid and Tenn Care fraud. The Court of Appeals may have been influenced by Sewell's admission that, when asked by the nursing home for a list of Clara's assets other than her home, an automobile, and $2,000, Sewell and Judkins declined to provide the list because they "were trying to save some portion." However, the evidence in the record establishes that all of Clara's expenses during her sixteen months at the nursing home, and all of her pharmacy expenses, were paid for with her own assets, including the proceeds from the sale of the Undeveloped Tract. There is no evidence that Tenn Care/Medicaid was defrauded into providing for Clara's healthcare.

E. Purchase Price for Undeveloped Tract

The Court of Appeals found "questionable" and "suspicious" the fact that Sewell and Judkins, without the assistance of a real estate agent and without offering it for sale to the general public, sold the Undeveloped Tract to one of their children, her spouse, and friends, at a price 30% below the appraised value and at a time when there was no pressing need to liquidate Clara's assets because she had "ample cash assets" to pay for her needs, including nursing home expenses. As noted above, however, the assumptions made by the Court of Appeals are not supported by a preponderance of the evidence. The discrepancy between the appraisal and the actual purchase price was reasonably explained at trial. Stewart was offered the first right to purchase the property. He, too, presumably could have made a counter-offer if he believed the initial price suggested was too high.

F. Absence of Total Ademption

Although the Court of Appeals acknowledged that Sewell and Judkins did not sell the entire parcel of property on Tim's Ford Lake, the intermediate appellate court seems to have underestimated the significance of that fact. If Sewell and Judkins had had any improper motive in selling the property, or wanted to maximize the benefit to themselves, they simply could have sold the entire property, thereby preventing Stewart from inheriting any of it. Instead, they took steps to sell first only the undeveloped portion, thereby preserving the family house and approximately one acre of property which Stewart did ultimately receive by devise.

II. Legal Conclusions

A. Ademption by Extinction

In *In re Estate of Hume*, 984 S.W.2d 602 (Tenn. 1999), this Court reiterated Tennessee's longstanding rule that a devise of specific property is extinguished upon "'the doing of some act with regard to the subject-matter [of the devise] which interferes with the operation of the will.' " *Id.* at 604 (quoting *Am. Trust & Banking Co. v. Balfour,* 138 Tenn. 385, 198 S.W. 70, 71 (1917)). In these cases,

> [t]he rule [of ademption by extinction] prevails *without regard to the intention of the testator or the hardship of the case,* and is predicated upon the principle that the subject of the gift is annihilated or its condition so altered that nothing remains to which the terms of the bequest can apply.

Id. (quoting *Wiggins v. Cheatham*, 143 Tenn. 406, 225 S.W. 1040, 1041 (1920) (emphasis added) (citation omitted)). "In other words, it only matters that the subject of the specific bequest no longer exists because of 'the doing of some act;' it is irrelevant who or what initiates 'the doing.'" *Id.* (quoting *Balfour*, 198 S.W. at 71).

In *Hume*, the testator had specifically devised a parcel of real estate to his niece. Prior to the testator's death, the mortgagee sold the real estate in a foreclosure sale. The mortgagee paid the surplus proceeds to the estate, the testator having since died. The niece sought to recover the surplus. This Court held that the niece was not entitled to recover the surplus because "the specific bequest of the ... property was adeemed in its entirety by the foreclosure sale regardless of [the testator's] presumed intentions." *Id.* at 605. This Court emphasized that

> the proceeds cannot be substituted for the specific bequest of the house because 'a specific legacy is adeemed when there has been a material alteration or change in the subject-matter, and ... the property into which it was converted in such change cannot be substituted as or for the specific bequest.'

Id. (quoting *Balfour*, 198 S.W. at 71).

The rule that the intent of the testator is irrelevant in ademption by extinction cases is in harmony with modern holdings in the majority of states. *Id.* at 604-05. Among the advantages of this theory is ease of application, stability, uniformity, and predictability. *Id.* at 605.

In this case, the sale of the undeveloped portion of the Tim's Ford Lake property was clearly "the doing of some act with regard to the subject-matter which interfere[d] with the operation of the will." *Balfour*, 198 S.W. at 71. The Court of Appeals acknowledged that, under the doctrine of ademption by extinction, Clara's specific devise of the Tim's Ford Lake property to Stewart was extinguished upon the sale of the Undeveloped Tract. Under the *Balfour* doctrine, Stewart had no claim to the proceeds. Thus Stewart's claim was appropriately dismissed by the trial court.

The Court of Appeals sought to avoid this "harsh" result by attempting to distinguish *Hume* on the basis that Sewell and Judkins "acted in contravention of the power of attorney and the limitations imposed under Tenn. Code Ann. § 34-6-108 (c)(1) and (6) and breached their fiduciary duties,"

thereby allowing the imposition of a constructive trust on the sale proceeds.

In this case, the preponderance of the evidence establishes that Sewell and Judkins acted in accordance with the duties they owed their mother as her attorneys-in-fact. They sold the Undeveloped Tract in order to fund Clara's living and healthcare expenses after she had been placed in a nursing home. In so doing, they did not act in an "unfaithful," "ultra-vires," or a "self-serving" manner. Therefore, contrary to the Court of Appeals' analysis, this case does not present a set of facts requiring an exception to the rule of law recognized in *Hume*. Accordingly, Sewell and Judkins' sale of the Undeveloped Tract extinguished Clara's specific devise thereof. The land sale may not be voided, and the proceeds resulting from the sale cannot be substituted. We hold, therefore, that Stewart is not entitled to the Undeveloped Tract or the proceeds of its sale.

B. Tennessee Code Annotated section 32-3-111

After erroneously determining that the "no exceptions" rule of ademption by extinction did not apply in this case, the Court of Appeals embraced special rules adopted in other states to limit or eliminate the *Balfour/Hume* rule when applied to acts of a representative done after a testator's incapacity. The intermediate appellate court expressly endorsed Uniform Probate Code section 2-606, as adopted in Tennessee Code Annotated section 32-3-111. That statute provides that

> [i]f specifically devised or bequeathed property is sold or mortgaged by a conservator or by an agent acting within the authority of a durable power of attorney for an incapacitated principal,... the specific devisee has the right to a general pecuniary devise equal to the net sale price....

Tenn. Code Ann. § 32-3-111 (b) (Supp.2004). Using this statute, the Court of Appeals found Stewart had the right to recover from Sewell and Judkins "the general pecuniary devise equal to the net sale price [of the property]." This statute did not take effect, however, until June 8, 2004. *See* 2004 Tenn. Pub. Acts 1977–78. Clara died in 1998.

Tennessee's Constitution provides that "no retrospective law, or law impairing the obligations of contracts, shall be made." Tenn. Const. art. I, § 20. This Court has stated that "[s]tatutes are presumed to operate prospectively unless the legislature clearly indicates otherwise." *Nutt v. Champion Int'l Corp.,* 980 S.W. 2d 365, 368 (Tenn. 1998). Moreover, while statutes which are "remedial or procedural" can apply retrospectively, statutes cannot be applied to disturb vested rights. *See Kuykendall v. Wheeler,* 890 S.W.2d 785, 787 (Tenn. 1994).

"[T]he law in effect when the testator dies controls all substantive rights in the estate, whether vested or inchoate." *Fell v. Rambo*, 36 S.W.3d 837, 845 (Tenn. Ct. App. 2000) (citing *Marler v. Claunch,* 221 Tenn. 693, 430 S.W.2d 452, 454 (1968)). At the time Clara died, Tennessee Code Annotated section 32-3-111 was not in effect. Nothing in the language of the statute indicates that the legislature intended it to apply retroactively. Accordingly, under the rule of law we recognized in *Hume*, Clara's specific bequest of the Tim's Ford Lake property to Stewart was adeemed by extinction upon the sale of the Undeveloped Tract in 1997. Sewell's and Judkins' rights to inherit pursuant to Clara's will vested upon her death and entitled them to inherit what remained in Clara's credit union account. Those vested rights cannot be disturbed by the retroactive application of Tennessee Code Annotated section 32-3-111.

C. Constructive Trust

The Court of Appeals determined that, because Sewell and Judkins breached their fiduciary duties as attorneys-in-fact for their mother, a constructive trust should be imposed on the proceeds from the sale of the Undeveloped Tract for the benefit of Stewart. We disagree.

This Court has previously recognized that a constructive trust may be imposed where, for example, a person (1) obtains legal title to property in violation of some duty owed the owner of the property; (2) obtains title to property by fraud, duress, or other inequitable means; (3) makes use of a confidential relationship or undue influence to obtain title to property upon more advantageous terms than would otherwise have been obtained; or (4) obtains property with notice that someone else is entitled to the property's benefits. *See Tanner v. Tanner,* 698 S.W.2d 342, 345-46 (Tenn. 1985).In this case, the Court of Appeals imposed a constructive trust upon the proceeds from the sale of the Undeveloped Tract on the basis that Sewell and Judkins "unlawfully transferred the proceeds from the sale of the devised property to themselves." In so doing, the Court of Appeals held that self-serving ultra vires actions by an unfaithful fiduciary create an exception to the *Hume* "no exceptions" doctrine of ademption by extinction. However, as noted previously, the intermediate appellate court erred in its factual findings.

Sewell and Judkins sold the Undeveloped Tract, which was owned solely by Clara, and placed the proceeds from the sale into a credit union account bearing all three of their names. We agree that Sewell and Judkins did not have the authority under the POA to place the proceeds from the sale of the Undeveloped Tract into an account bearing their names. *See* Tenn. Code Ann. § 34-6-108 (c)(1), (c)(6) (2001). Sewell testified that this was done so that Clara would still have access to the proceeds in the event anything happened to Sewell and Judkins. No evidence in the record contradicts this testimony. Clara's previous checking account had been in all three names, so Sewell was familiar with this manner of handling her mother's finances. Furthermore, there is no evidence in the record that either Sewell or Judkins made any improper use of the proceeds. Rather, the evidence demonstrates that the proceeds were used to fund Clara's living and healthcare expenses, which exceeded $3,000 per month, from her move to the nursing home in January 1997 until her death in May 1998. Thus, while adding their names to the account was improper, no improper use of the proceeds occurred. And because the original bequest was partially adeemed by the sale of the Undeveloped Tract, Stewart had no interest in the proceeds.

Had Sewell and Judkins taken the proceeds from the sale of the Undeveloped Tract, placed them into a joint account, and then absconded with the proceeds, we might agree with the Court of Appeals that they had thereby breached the fiduciary duty they owed Clara. That is not what they did, however. Our close examination of the record reveals that the proceeds from the sale of the Undeveloped Tract funded the account from which Clara's healthcare expenses were paid. There is no indication that Sewell and Judkins used any of the proceeds for an improper purpose while their mother remained alive.

In short, the evidence does not establish that Sewell and Judkins "unlawfully transferred the proceeds from the sale of the devised property to themselves." Nor does the evidence support any of the grounds necessary for the imposition of a constructive trust. Finally, the duty owed by Sewell and Judkins was to Clara, not Stewart. Any constructive trust arising from a breach of that duty would therefore be for the benefit of Clara or her estate, not Stewart. The Court of Appeals' imposition of a constructive trust for the benefit of Stewart implicitly embraced the tort of

intentional interference with an inheritance or gift. Tennessee does not, however, recognize that tortious cause of action. *See Fell,* 36 S.W. 3d at 849-50.Accordingly, the Court of Appeals erred in imposing a constructive trust upon the proceeds from the sale of the Undeveloped Tract.

CONCLUSION

Upon our close and careful review of the record in this case, we have determined that the evidence preponderates in favor of the trial court's judgment that Stewart failed to establish any unlawful conduct on the part of the defendants Sewell and Judkins stemming from their sale of the Undeveloped Tract pursuant to the POA. The Court of Appeals erred in distinguishing this case from the rule of ademption by extinction set forth in *Hume*, in retroactively applying Tennessee Code Annotated section 32-3-111, and in imposing a constructive trust on the proceeds of the sale of the Undeveloped Tract. Accordingly, we reverse the judgment of the Court of Appeals as to Sewell and Judkins and reinstate the judgment of the trial court dismissing the action against all defendants. The costs of this cause are assessed against the plaintiff George Haskell Stewart and his sureties, for which execution may issue if necessary.

Notes, Problems, and Questions

1. The *Stewart* court relied on the traditional identity theory of ademption. Under that theory, if a gift that is specifically devised is not in the testator's estate, the devisee is not entitled to receive anything. The Court stated that the testator's intent was not relevant to the analysis. Some states have adopted the intent theory of ademption that permits a devisee to receive replacement property or cash value if he or she can show that the testator wanted that outcome. How would the *Stewart* case have been decided if the intent theory was applied?

2. From a public policy perspective, should courts adopt the identity or the intent approach?

3. Problems-Answer the following problems based upon UPC §2-606.

(a) In 2013, Fred executed a will leaving his house to his cousin, Mary. He left the rest of the estate to his son, Karl. A few months later, Fred's house burned to the ground. The insurance company gave Fred $230,000 to compensate for his lost. Fred used the money to take five of his friends on a cruise around the world. In 2015, Fred died. At the time of his death, Fred lived in an apartment he was renting. Fred left an estate consisting of $20,000, an art collection worth $100,000, an RV, a truck and other personal property. What, if anything, does Mary take?

(b) In 2009, Thomas executed a will stating, "I leave my Walmart stocks to my sister, Cassie; I leave $120,000 to my brother, Mark; and I leave the rest of my estate in trust for my grandchildren." In 2011, Thomas sold his Walmart stocks for $150,000. Thomas lent the $150,000 to his daughter, Betty, so that she could buy a house. In exchange, Betty gave Thomas a mortgage on the house. In 2015, Thomas died. At that time, Betty still owed him $100,000. What, if anything, does Cassie take?

(c) In 2004, Jean executed a will stating, "I leave my diamond ring to Sofia; I leave the rest of my estate to charity." In 2008, Jean was mugged and her diamond ring was stolen. As a result of her injuries, Jean was no longer able to wear a ring. When Jean received the insurance money, she purchased a diamond necklace. In 2012, Jean died. What, if anything, does Sofia take?

(d) In 2010, Douglas executed a will stating, "I leave my season tickets to Team A to my son, Larry." In 2012, Team A moved to another state." In 2015, Douglas died. What, if anything, does Larry take?

(e) In 2007, Alma executed a will leaving her airplane and her boat to her son, Matthew. In 2013, Alma appointed her daughter, Denise, as her durable power of attorney. In 2014, because of physical and mental health issues, Alma was forced to move in with Denise. Using her durable power of attorney, Denise sold the airplane and the boat. She used the money from the sales to add a room onto her house, so that Alma could have her own space. In 2016, Alma died. What, if anything, does Matthew take?

Uniform Probate Code § 2-606. Nonademption of specific devises: Unpaid proceeds of sale, Condemnation, or insurance; Sale by conservator or agent

(a) A specific devisee has a right to the specifically devised property in the testator's estate at death and:

(1) any balance of the purchase price, together with any security agreement, owing from a purchaser to the testator at death by reason of sale of the property;

(2) any amount of a condemnation award for the taking of the property unpaid at death;

(3) any proceeds unpaid at death on fire or casualty insurance on or other recovery for injury to the property;

(4) property owned by the testator at death and acquired as a result of foreclosure, or obtained in lieu of foreclosure, of the security interest for a specifically devised obligation;

(5) real or tangible personal property owned by the testator at death which the testator acquired as a replacement for specifically devised real or tangible personal property; and

(6) if not covered by paragraphs (1) through (5), a pecuniary devise equal to the value as of its date of disposition of other specifically devised property disposed of during the testator's lifetime but only to the extent it is established that ademption would be inconsistent with the testator's manifested plan of distribution or that at the time the will was made, the date of disposition or otherwise, the testator did not intend that the devise adeem.

(b) If specifically devised property is sold or mortgaged by a conservator or by an agent acting within the authority of a durable power of attorney for a principal who lacks capacity, or if a condemnation award, insurance proceeds, or recovery for injury to the property are paid to a conservator or to an agent acting within the authority of a durable power of attorney for a principal who lacks capacity, the specific devisee has the right to a general pecuniary devise equal to the net sale price, the amount of the unpaid loan, the condemnation award, the insurance proceeds, or the recovery.

(c) The right of a specific devisee under subsection (b) is reduced by any right the devisee has under subsection (a).

15.4.2 Ademption by Satisfaction

The doctrine of ademption by satisfaction comes into play when the testator gives property to a devisee after the will has been executed. This rule is similar to the doctrine of advancements that may apply when an intestate decedent gives property to his or her child prior to death. This doctrine only applies to general monetary gifts. If a specific devise is given to the beneficiary during

the testator's lifetime, that gift may be considered to be adeemed by extinction. If the testator gives his or her child property of a similar nature to that devised to the child in the will, the law presumes that the gift was in satisfaction of the gift devised in the will. This presumption is rebuttable. Consider the following example. T leaves a will stating, "I leave $100,000 to my son, Steve, and the rest of my estate to my daughter, Bernice. Afterwards, T gives Steve a gift of $80,000. Then, T dies. Since there is a presumption that the later gift was in partial satisfaction of the will devise, Steve only takes $20,000 of T's estate.

In re Estate of Condon, 715 N.W.2d 770 (Iowa Ct. App. 2006)

BEEGHLY, S.J.

I. Background Facts & Proceedings

Marguerite Condon executed a will in 1989 which made specific bequests to five charities. She also made a bequest of $10,000, to be divided by the five children of her deceased brother, Gregory Mowry. In addition, the will stated:

> I give and bequeath the sum of $10,000 to my niece and nephew, who are the children of my deceased sister, MARY ANN PARSONS, namely CHARLES PARSONS and VIRGINIA MALONEY, share and share alike; and in the event either of my niece or nephew predecease me, then the share of the one so dying shall go to the survivor.

Marguerite's son, Robert Condon, was made the residual beneficiary of the will.

Charles died in 1992. During the months of June and July 1996, Marguerite wrote checks to the specific beneficiaries under the will, except for Charles, for the amount specified in the will. In the memo portion of the checks, she wrote "will payment." One of the checks was written to Mary Virginia Maloney for $5,000. Robert testified Marguerite made these payments because "she wanted to have the satisfaction of knowing that she gave the money to the people she wanted to receive it."

Marguerite died on January 22, 2003. Robert was appointed as the executor of her estate. As the executor, Robert took the position that the specific beneficiaries had already been paid in 1996 the amount they would have received under the will, except that Mary was owed $5,000, which represented Charles's share. The charitable beneficiaries and Mary Caldron, one of the children of Gregory, signed receipts and waivers, agreeing they were owed no additional sums. The other children of Gregory neither signed the waivers nor objected. The executor filed a final probate report which provided, "it appears that the devisees and beneficiaries shown in the Last Will & Testament have received their share of the bequest that was provided in the Last Will & Testament when the decedent made an advance payment in 1996...."

Mary objected to the final report. She claimed that Marguerite's will did not provide for advancements, and that the 1996 payments should not be considered as the payments that were due under the will because the 1996 payments were in fact gifts. A hearing on the final report was held.

The district court did not approve the final report and ordered the executor to file a revised report. The court determined that although Marguerite may have intended the 1996 payments to be charged against the bequests in her will, the language of the will did not make any reference to advancements. The court concluded the $5,000 check to Mary must be considered a gift, and that she was entitled to $10,000 from the estate under the terms of the will. The court stated:

> To allow the check to be considered as an advancement without any reference in the Will to possible advancements would be tantamount to treating the check as a codicil to the Will without proper execution and attestation required by Iowa law.

The executor filed a motion to reconsider. The motion raises for the first time the doctrine of satisfaction. The district court discussed two cases, *Heileman v. Dakan*, 221 Iowa 344, 233 N.W. 542 (1930) and *Rodgers v. Reinking*, 205 Iowa 1311, 217 N.W. 441 (1928), and found they were distinguishable on the facts. The court denied the motion to reconsider. The executor now appeals.

II. Standard of Review

This case was tried in equity. *See* Iowa Code § 633.33 (2005). Our review is therefore de novo Iowa R.App. P. 6.4. In equity cases, especially when considering the credibility of witnesses, we give weight to the fact findings of the district court, but are not bound by them. Iowa R.App. P. 6.14(6)(g).

III. Advancements

Generally, the rules concerning advancements apply only when a person dies intestate. *See* Iowa Code § 633.224; *Harper v. Coad*, 191 N.W.2d 682, 687 (Iowa 1971). When a decedent has a will, the language of the will controls the disposition of the estate. *In re Estate of Francis*, 204 Iowa 1237, 1242, 212 N.W. 306, 308 (1927). Whether advancements will be charged against a beneficiary's share depends upon the language of the will. *In re Estate of Morgan*, 225 Iowa 746, 747, 281 N.W. 346, 347 (1938). Marguerite's will did not provide that advance payments would be charged against a beneficiary's share. Therefore, the doctrine of advancements does not apply.

IV. Ademption by Satisfaction

The executor raises the alternative theory of ademption by satisfaction. As noted above, the law regarding advancements generally only applies in cases of intestacy, "but the doctrine of ademption [by satisfaction], though strictly speaking applying only to personal property or to legacies, is resorted to carry out the apparent or presumed intention of a testator...." *In re Estate of Mikkelsen*, 202 Iowa 842, 846, 211 N.W. 254, 255 (1926). The term "ademption" generally applies to a specific legacy, while "satisfaction" is applied when the legacy is general. *In re Estate of Keeler*, 225 Iowa 1349, 1354, 282 N.W. 362, 365 (1938). A legacy is the testamentary disposition of personal property. Iowa Code § 633(25).

The doctrine of ademption by satisfaction is explained as follows:

> When a general legacy is given of a sum of money without regard to any particular fund, and thereafter testator pays this legacy to the legatee or advances

> him even a small sum with intent to discharge the legacy or to substitute the advancement for the bequest, the legacy is satisfied, or, as it is sometimes said, adeemed. When the amount of the advancement or gift is smaller than the legacy, the satisfaction is held complete, not for the reason that the smaller sum is regarded as payment of the larger, but by reason of the intent of the testator to substitute the smaller for the larger, and to reduce the amount of the general legacy. The doctrine of satisfaction depends very largely, if not altogether, upon the intent of the testator.

In re Estate of Brown, 139 Iowa 219, 225-26, 117 N.W. 260, 262-63 (1908).

"[A]pplication of the doctrine of satisfaction of legacies ultimately depends upon evidence of the decedent's intent at the time the lifetime gift is made." 1 Sheldon F. Kurtz, *Kurtz on Iowa Estates* § 15.26, at 615 (3d ed.1995). *See also* 13 Julie L. Pulkrabek & Gary J. Schmit, *Iowa Practice-Probate* § 11:115, at 422 (2005) ("Whether a payment made by testator to a legatee after the making of the will amounted to a satisfaction of the legacy depends upon the intent of the testator in making the payment ."). The doctrine of satisfaction depends upon the intention of the testator, as inferred from his or her acts. *Keeler*, 225 Iowa at 1354, 282 N.W. at 365.

It is not essential that the decedent's will specifically provides for satisfaction based on inter vivos gifts. *Rodgers*, 205 Iowa at 1317, 217 N.W. at 444. The court should consider all the facts and surrounding circumstances to determine the intent of the testator. *Id.* at 1317-18, 217 N.W. at 444. A party may show through extrinsic evidence that the testator intended a payment to be considered as satisfaction for a bequest. *In re Estate of Youngerman*, 136 Iowa 488, 492, 114 N.W. 7, 9 (1907).

"Since proof of a decedent's intent is frequently difficult, the Iowa courts have adhered to two presumptions in applying the doctrine." *Kurtz on Iowa Estates* § 15.26, at 615. In the first instance, when the testator is a parent or stands in loco parentis to the legatee, a subsequent gift to the legatee is presumed to be in satisfaction of the legacy. Heileman, 211 Iowa at 345, 233 N.W. at 543.

On the other hand, where the testator is a stranger to the legatee, such a presumption does not arise. *Youngerman*, 136 Iowa at 492-93, 114 N.W. at 9. A party may still show that satisfaction was intended, however, by clear proof that satisfaction was intended. *Id.* at 493, 114 N.W. at 9; 97 C.J.S. Wills, § 1767, at 470 (2001) (noting that where a presumption does not arise, "the burden is on the one claiming that the testator intended a satisfaction of the legacy to prove such intention, and the evidence must be clear and convincing"). The intention to satisfy a legacy may be shown if the benefit subsequently conveyed is the same or so far identical in character as to be ejusdem generis. *Youngerman*, 136 Iowa at 493, 114 N.W. at 9; *Iowa Practice-Probate,* § 11:115, at 423. The intention has also been shown where there was a receipt attached to the will showing satisfaction of the legacy. *See Heileman,* 211 Iowa at 347-48, 233 N.W. at 544.

Since Marguerite and Mary did not have a parent-child relationship, there is no presumption that Marguerite intended the 1996 payment to be a satisfaction of the legacy in her will. We consider all the facts and surrounding circumstances to determine Marguerite's intent. *See Rodgers,* 205 Iowa at 1317, 217 N.W. at 444.The executor may show, through extrinsic evidence, that Marguerite intended to satisfy the legacy. *See Youngerman,* 136 Iowa at 493, 114 N.W. at 9.On this issue we consider the notation of "will payment" on the checks and Robert's testimony as to Marguerite's intent. We also note that the payments made by Marguerite were for the precise amount of the specific bequests in

her will. On our de novo review, we find clear evidence that Marguerite intended the 1996 payments to be in satisfaction of the bequests she made in her will. We find the factual differences ascribed to the cases concerning the doctrine of satisfaction by the district court do not overcome the application of that doctrine to the facts in this case.

Based on the doctrine of satisfaction, we reverse that portion of the district court opinion which determined Mary was entitled to $10,000 from the estate. The bequest of $5,000 to Mary has been satisfied. Mary is still entitled to receive the $5,000 which represented the share of her brother, Charles, because this bequest has not been satisfied.

V. Final Report

The executor argues that the district court should have approved the final report. Based on our conclusions above, we determine the final report correctly provided, "it appears that the devisees and beneficiaries shown in the Last Will & Testament have received their share of the bequest that was provided in the Last Will & Testament when the decedent made an advance payment in 1996...." The final report notes that Mary is still entitled to $5,000, which represents the share of Charles. We conclude the final report should be approved.

VI. Other Issues

Mary has raised some procedural issues regarding this appeal. The supreme court considered these issues in considering Mary's motion to dismiss, and denied the motion. We conclude these issues have already been addressed and we do not consider them further.

We reverse the decision of the district court and remand for an order approving the final report.

Reversed and remanded.

In order to rebut the presumption of satisfaction, the devisee has to show that the testator did not intend for the lifetime gift to be a substitution for the devise in the will. It is usually difficult for the court to ascertain the testator's intent. Consequently some state legislators have enacted statutes requiring that the testator's intent to adeem a gift by satisfaction be in writing. These jurisdictions appear to have created a presumption that the gift has not be adeemed.

SDCL § 29A-2-609. Ademption by satisfaction (S.D.)

(a) Property a testator gave during lifetime to a person is treated as a satisfaction of a devise in whole or in part, only if (i) the will provides for deduction of the gift, (ii) the testator declared in a writing that the gift is in satisfaction of the devise or that its value is to be deducted from the value of the devise, or (iii) the devisee acknowledged in writing that the gift is in satisfaction of the devise or that its value is to be deducted from the value of the devise.
(b) For purposes of partial satisfaction, property given during lifetime is valued as of the time the devisee came into possession or enjoyment of the property or at the testator's death, whichever occurs first.

(c) If the devisee fails to survive the testator, the gift is treated as a full or partial satisfaction of the devise, as appropriate, in applying §§ 29A-2-603 and 29A-2-604, unless the testator's writing provides otherwise.

Problems

(Answer the follow questions, by first applying the common law and then applying the above statute.)

1. In 2010, Della executed a will stating, "I leave $65,000 to my sister, Peggy and the rest of my estate to my son, Clinton." In 2014, Della lent Peggy $23,000 to pay her medical bills. In 2016, Della died. What, if anything, will Peggy take from Della's estate?

2. In 2009, Shelia executed a will stating, "I leave $150,000 to the Local Animal Humane Society, and the rest of my estate to Local University." In 2011, the main building of the Local Animal Humane Society was destroyed by fire. Shelia sent the Local Animal Humane Society a check for $50,000. In the memo section of the check, Shelia wrote, "Make the best of this cause you're not getting anything else from me." In 2015, Shelia died. What, if anything, will the Local Animal Humane Society take from Shelia's estate?

3. In 2007, Jennifer executed a will stating, "I leave $200,000 to my son, Jeff, and the rest of my estate to my daughter, Eliza." In 2009, Jeff wrote Jennifer asking her to give him $85,000, so that he could complete his graduate program. In response, Jennifer mailed Jeff a check for $100,000. She included a note with the check stating, "This is half of what I planned to give you. You can spend it how you wish." In 2015, Jennifer died. What, if anything, will Jeff take from Jennifer's estate?

15.5 Other Doctrines Relevant to Will Property

15.5.1 Exoneration of Liens

Testators often divide the devises in their wills into real and tangible personal property. For instance, the house may go to A and the car may go to B. When a testator devises a piece of property that is encumbered by a mortgage, things may get complicated. Consider the following example. T executes a will leaving his house to A and the rest of the estate to B. At the time of T's death, the house has a mortgage of $40,000. The question is whether A takes the house subject to the mortgage or whether B must pay the mortgage out of the residuary estate. Under the common law doctrine of exoneration of liens, if a will makes a specific disposition of real or personal property that is subject to a mortgage to secure a note on which the testator is personally liable, it is presumed that the testator wanted the debt to be paid out of the residuary of the estate. Thus, in the above example, A would get the house and B would get the $40,000 debt. Is this fair? What if the residuary estate only contains $40,000? Some jurisdictions have enacted statutes reversing the common law rule. Which approach do you think is best?

VA Code Ann. § 64.2-531. Nonexoneration; payment of lien if granted by agent

A. Unless a contrary intent is clearly set out in the will or in a transfer on death deed, (i) real or personal property that is the subject of a specific devise or bequest in the will or (ii) real property subject to a transfer on death deed passes, subject to any mortgage, pledge, security interest, or other lien existing at the date of death of the testator, without the right of exoneration. A general directive in the will to pay debts shall not be evidence of a contrary intent that the mortgage, pledge, security interest, or other lien be exonerated prior to passing to the legatee.

Estate of Fussell v. Fortney, 730 S.E.2d 405 (W. Va. 2012)

KETCHUM, Chief Justice:

In this matter we consider whether a decedent's will that directs "all my just debts be paid as soon as conveniently possible after the date of my death" (hereinafter "just debts"), obligates the decedent's estate to pay the mortgage on two parcels of real property devised to the Respondents, Kristi Fortney and Chanda Collette (hereinafter "Respondents"). The Circuit Court of Randolph County determined that the "just debts" clause required the decedent's estate to pay the mortgage on these two properties and deliver an *unencumbered* interest in the two properties to the Respondents.

In this appeal, Petitioner Andrea Simmons, the executrix of the will (hereinafter "Ms. Simmons" or "executrix"), argues that the "just debts" clause is boilerplate language that should not obligate the estate to pay the mortgage on the two devised properties. Ms. Simmons states that the circuit court erred in its focus on the "just debts" clause and discounted other language in the will showing the decedent's intention to devise his *encumbered* interest in the two properties to the Respondents.

The Respondents argue that the circuit court's ruling should be affirmed because the will's direction to pay off all of the decedent's just debts is clear and unambiguous.

Upon careful review, and for the reasons set forth herein, we affirm the decision of the circuit court.

I. Facts & Procedural Background

Roger G. Fussell, a resident of Randolph County, West Virginia, died on December 21, 2009, leaving a last will and testament dated November 5, 2009 (hereinafter "will"). The first instruction in the will states, "FIRST: I desire that all my just debts be paid as soon as conveniently possible after the date of my death." Following this "just debts" instruction, Mr. Fussell's will devised two properties to his daughters, Kristi Fortney and Chanda Collette:

> I give ... my daughter, Kristi Fortney ... my right, title and interest in and to my lot and house at 414 6th Street, Glenmore Addition, near Elkins, Randolph County, West Virginia.
> I give ... my right, title and interest in and to my lot and house located adjacent to King's Run Road in Randolph County, West Virginia to my daughter, Chanda Collette of Elkins, West Virginia.

These two properties were encumbered by a single deed of trust with a face value of $223,000.00.

When this lawsuit was filed, approximately $120,000.00 was still owed on the mortgage.

The will directed that a third daughter, Andrea Simmons, and her husband, were to receive the "rest, residue and remainder of my property, whether the same be real, personal or mixed[.]"[1] Ms. Simmons was appointed as the executrix of the will.

Ms. Simmons, in her role as executrix, made the January and February 2010 mortgage payment on the two properties left to the Respondents. Ms. Simmons refused to make further mortgage payments after February 2010. The Respondents subsequently filed a complaint for declaratory judgment and injunctive relief in the Circuit Court of Randolph County, arguing that the "just debts" clause required the estate to continue making the mortgage payments. The circuit court held an initial hearing on September 14, 2010, and granted a preliminary injunction requiring the estate to make the monthly mortgage payments.

After finding that there were no factual issues for a jury to decide, the circuit court held a final hearing on December 1, 2010. At this hearing, both sides agreed that the issue—whether a "just debts" clause in a will obligates the estate to pay the remaining mortgage on devised real property—was a matter of first impression in West Virginia. The Respondents argued that the plain language of the will required the estate to pay all of the decedent's outstanding debts, including the mortgage on the two properties devised to the Respondents. The Respondents stated that the two properties were covered by a single deed of trust and that if the decedent intended the Respondents to receive his *encumbered* interest in these properties, the will would have set forth a formula apportioning the percentage of the mortgage that each daughter was responsible for paying. The Respondents also stated that the remaining mortgage on these two properties was relatively small in comparison to the overall value of the estate.

In response, Ms. Simmons argued that the "just debts" clause was boilerplate language that should not obligate the estate to pay the outstanding mortgage on the two devised properties. Ms. Simmons also argued that the decedent left the Respondents his "right, title, and interest" in the two properties and that this language shows the decedent's intention that the Respondents receive the properties subject to the remaining mortgage.

The circuit court ruled in favor of the Respondents and ordered the estate to deliver an *unencumbered* interest in the two properties to them. The circuit court determined that "[t]he will directed that *all* his just debts be paid after his death. This includes the debt on the property which Ms. Fortney and Ms. Collette inherited." (Emphasis added by the circuit court). The circuit court's February 10, 2011, judgment order explains:

> The testamentary language requiring the payment of all of Mr. Fussell's debts is inclusive of the debt which is secured by the real estate [that] was devised to the Plaintiffs.
> Since Mr. Fussell's will requires that all debts be paid by the Estate, the debt secured by the said Davis Trust Company deed of trust is to be paid by the Estate, resulting in the Plaintiffs' acquiring unencumbered title to the real estate which was devised to them.

Following the entry of this judgment order, Ms. Simmons filed the present appeal.

II. Standard of Review

This appeal follows a declaratory judgment action in the circuit court. Because the purpose of a declaratory judgment action is to resolve legal questions, "a circuit court's entry of a declaratory judgment is reviewed *de novo*." Syllabus Point 3, *Cox v. Amick*, 195 W.Va. 608, 466 S.E.2d 459 (1995). Further, "a circuit court's ultimate resolution in a declaratory judgment action is reviewed *de novo;* however, any determinations of fact made by the circuit court in reaching its ultimate resolution are reviewed pursuant to a clearly erroneous standard." *Id.* 195 W.Va. at 612, 466 S.E.2d at 463.

III. Analysis

Before addressing the specific question before us, we note that, "[t]he paramount principle in construing or giving effect to a will is that the intention of the testator prevails, unless it is contrary to some positive rule of law or principle of public policy." Syllabus Point 1, *Farmers and Merchants Bank v. Farmers and Merchants Bank*, 158 W.Va. 1012, 216 S.E.2d 769 (1975). "The intention of the testator is to be gathered from the whole instrument, not from one part alone." *Emmert v. Old Nat'l Bank*, 162 W.Va. 48, 554, 246 S.E.2d 236, 241 (1978). In *Hobbs v. Brenneman*, 94 W.Va. 320, 326, 118 S.E. 546, 549 (1923), we described the role of the judiciary in ascertaining a testator's intent:

> When the intention is ascertained from an examination of all its parts the problem is solved. The interpretation of a will is simply a judicial determination of what the testator intended; and the rules of interpretation and construction for that purpose formulated by the courts in the evolution of jurisprudence through the centuries are founded on reason and practical experience. It is wise to follow them, bearing in mind always that the intention is the guiding star, and when that is clear from a study of the will in its entirety, any arbitrary rule, however ancient and sacrosanct, applicable to any of its parts, must yield to the clear intention.

With this background in mind, we examine whether the "just debts" clause in the decedent's will obligates his estate to pay the mortgage on the two properties devised to the Respondents. There is an extensive body of law addressing whether a devisee of real property is entitled to have encumbrances upon the property paid by the personalty of a decedent's estate. This law is referred to as the doctrine of exoneration.

The common law doctrine of exoneration provides that unless a will specifically states otherwise, "an heir or devisee is generally entitled to have encumbrances upon real estate paid by the estate's personalty[.]" *In re Estate of Vincent*, 98 S.W.3d 146, 148 (Tenn.2003). This law was first recognized in England in the early eighteenth century.

> The doctrine of exoneration originated in English common law. English cases from the early eighteenth century demonstrate that an heir or devisee of real property could look to a decedent's personal estate to satisfy any mortgage debt remaining on a decedent's probate property. The doctrine of exoneration stems from the broad English common law rule that all debts of the deceased were to be paid from his personal estate.

Thomas E. Clary, III, "Property---In Re Estate of Vincent: The Tennessee Supreme Court Declines to Extend the Common Law Doctrine of Exoneration to Survivorship Property," 34 U. Mem. L. Rev. 695, 697 (2004).

The doctrine of exoneration has been recognized and applied by courts in the United States since the late eighteenth century. *See e.g., Ruston's Ex'rs v. Ruston,* 2 U.S. 243, 2 Dall. 243, 1 L.Ed. 356 (1796).This Court has not directly addressed the common law doctrine of exoneration. However, Syllabus Point 2 of *McComb v. McComb*, 121 W.Va. 53, 200 S.E. 49 (1939), indicates that West Virginia follows the doctrine of exoneration:

> When a will charges all of the testator's personal property with the payment of "all my just debts", the real estate of the testator subject to a lien indebtedness is to be exonerated by applying first, the income and thereafter, if necessary, the corpus of his personal estate.

McComb does not discuss the doctrine of exoneration or provide specific direction on how it should be applied. This Court has not had occasion to address the doctrine of exoneration since *McComb* was decided. We therefore deem it necessary to examine how courts in other jurisdictions have dealt with this issue.

A number of jurisdictions adhere to the common law doctrine of exoneration. For instance, in *Lemp v. Keto*, 678 A.2d 1010, 1015 (D.C. 1996), the court stated "it has been repeatedly recognized as 'well settled that the common law rule of exoneration is in effect in the District of Columbia.' " (citation omitted). The court in *Lemp* explained that "the rule of exoneration operates only in the absence of an expression of intent by the decedent. Indeed, where the decedent's intent is discernible—either through the content of the will or surrounding circumstances—the rule of exoneration has no application. "*Id.* Similarly, in *Manders v. King*, 284 Ga. 338, 339, 667 S.E.2d 59, 60 (2008the court stated, "Georgia is one of several states adhering to the common-law doctrine of exoneration, which provides that, unless a will specifically provides otherwise, an heir or devisee of real property may look to the decedent's personal property for satisfaction of liens on devised real property[.]" Tennessee also follows the doctrine of exoneration. *See Wilson v. Smith,* 50 Tenn. App. 188, 360 S.W.2d 78 (1962)(The court found that the debts of the estate, including debts secured by the real estate, must be paid out of the testator's personal estate.).

While the foregoing jurisdictions adhere to the common law doctrine of exoneration, a number of states have abrogated the common law doctrine through statutory enactment or through the adoption of the Uniform Probate Code. States that have enacted statutes abrogating the doctrine of exoneration require a testator's will to specifically direct that exoneration is intended for encumbered property. For example, Ohio abrogated the doctrine of exoneration through the following statute:

> If real property devised in a will is subject to a mortgage lien that exists on the date of the testator's death, the person taking the real property under the devise has no right of exoneration for the mortgage lien, regardless of a general direction in the will to pay the testator's debts, unless the will specifically provides a right of exoneration that extends to that lien.

Ohio Rev. Code Ann. § 2113.52 (B) [2011].

Other states have abrogated the doctrine of exoneration by enacting §2-607 of the Uniform Probate Code (hereinafter "UPC"). The UPC requires a devisee of real property to take the property subject to any encumbrance when a will is silent as to exoneration. The UPC also provides that generic

language in a will calling for the payment of debts is insufficient to invoke exoneration. Nebraska is one of several states that follows the UPC approach. It enacted Neb. Rev. St. § 30-2347 [1074] which states "[a] specific devise passes subject to any security interest existing at the date of death, without right of exoneration, regardless of a general directive in the will to pay debts."

When considering how other courts have dealt with the doctrine of exoneration, the prevailing trend is that the states that have abrogated the doctrine have done so through statutory enactment or through the adoption of UPC §2-607. Our Legislature has not enacted a statute abrogating the doctrine of exoneration, nor has it adopted §2-607 of the UPC. In the absence of this direction from our Legislature, and because of this Court's holding in syllabus point 2 of *McComb*, we will not depart from the long-standing common law doctrine of exoneration. We therefore hold that under the common law doctrine of exoneration, a devisee is generally entitled to have encumbrances upon real property paid by the estate's personalty, unless the will directs otherwise.

In the present case, the decedent's will directed that "all my just debts be paid as soon as conveniently possible after the date of my death." The executrix argues that, despite this general direction to pay all debts, the devise of "my right, title, and interest in the property" demonstrates the decedent's clear intention that the Respondents receive his *encumbered* interest in the two devised properties. We disagree.

The "right, title, and interest language" is capable of more than one interpretation. As one court dealing with this issue observed:

> [W]e do not believe the devise of "all right, title, and interest of whatever kind I may have at the time of my death" effectively negates exoneration by necessarily implying that the devisee takes subject to a mortgage. While one could read that language to suggest a mortgage limitation on the devise, that language is equally consistent with the idea that the testator intended to devise his or her full fee interest ... free and clear. *See Kent v. McCaslin,* 238 Miss. 129, 117 So.2d 804, 807 (1960) (testator's gift of "my interest" in cotton gin real property denoted "title," not merely "equity subject to any liens thereon," and thus absent "clearly implied" intention not to exonerate, specific devisee took property free of vendor's lien)[.]

Lemp, 678 A.2d at 1019. We agree with this reasoning and find that the "right, title, and interest" language, standing alone, is not sufficient to negate exoneration in this case.

The Respondents contend that had the decedent intended to deliver his *encumbered* interest in the two properties to them, his will would have stated the percentage of the mortgage that each was responsible for paying. We agree with the Respondents and find that the lack of such a direction apportioning the mortgage payments, combined with the general direction to pay all "just debts," weighs in favor of applying the doctrine of exoneration in this case.

Because the decedent's will contains a general direction to pay off all of his "just debts," and because the will does not specifically exempt the mortgage covering the two properties devised to the Respondents from this general direction, we find that the doctrine of exoneration is applicable to this case. Under the doctrine of exoneration, the Respondents are entitled to receive an *unencumbered* interest in the two devised properties.

We therefore agree with the circuit court's conclusion that "Mr. Fussell's will requires that all debts

be paid by the Estate, the debt secured by the ... deed of trust is to be paid by the Estate, resulting in the Plaintiffs' acquiring unencumbered title to the real estate which was devised to them."

IV. Conclusion

The circuit court's February 10, 2011, judgment order is affirmed.

Affirmed.

15.5.2 Abatement

The problem of abatement occurs when the testator dies without enough property to pay his or her debts and all of the devises. Thus, after it ensures that the creditors are paid, the probate court may have to abate or reduce some devises. Unless the testator indicates otherwise, the devises are abated in the following order: (1) residuary devises are reduced first; (2) general devises are reduced second on a pro rata basis; and (3) specific and demonstrative devises are the last to be abated.

Example:

In 2013, Trudy executed a will containing the follow devises: $100,000 to A; 300,000 to B; stamp collection to C; and the rest of the estate to D. At the time the will was executed, Trudy's estate was valued at $500,000. In 2014, Trudy was diagnosed with end stage renal failure. As a result of end-of-life expenses, when Trudy died in 2016, her estate was only worth $100,000.

Explanation:

The first devise to be reduced is the residuary, so D takes nothing. The second devise to be abated is the general devise, so the devises to A and B are reduced. Since Trudy wanted B to receive three times as much as A, B gets $75,000 and A gets $25,000. C gets her specific devise, the stamp collection.

Part III — Nonprobate Transfers

Chapter Sixteen: Will Substitutes

16.1 Introduction

In the first fifteen chapters of this book, we discuss two ways the property of a person may be disposed of after he or she dies. In the first section of the book, we examine the intestacy system, the default plan that legislators created to govern the distribution of the property of a person who dies without executing a valid will. The second part of the book contains a thorough exploration of the different types of wills persons can use to designate the future owners of their property. This chapter analysis a third option referred to as will substitutes or non-probate transfers. The items analyzed in this chapter are called non-probate transfers because people use them to allocate property without relying on the probate system. Using non-probate transfers, a person can give away an interest in property during his or her lifetime and postpone the vesting of that interest until after he or she dies. Unlike a will devisee, the beneficiary of a non-probate transfer receives his or her gift from a third party, and not the probate court. In some cases, the person may receive the decedent's property by operation of law. In those cases, the person does not have to do anything but wait for the owner of the property to die. This chapter will discuss the following will substitutes: (1) life insurance, (2) retirement accounts, (3) joint bank accounts, (4) concurrently owned property, and (5) inter vivos trusts.

16.2 Life Insurance

A life insurance policy can be used as a vehicle to get money to a third party after the death of the insured. For example, A takes out a $100,000 life insurance policy and names B as the beneficiary of the policy. When A dies, B receives $100,000 from the insurance company. The two most common types of life insurance are term and whole. A term life insurance policy protects the insured for a specified amount of time. Term periods usually range from one to 20 years. If the term expires before the insured dies, a new policy replaces the lapsed policy. The premiums of a term insurance increase annually because the odds of the insured person dying increase as the person ages. Some insurance companies offer a guaranteed level premium for the term policy (usually five, 10, 15, or 20 years); however, after, the term expires the premiums for future terms may increase dramatically, depending on the health of the person insured.

Whole life is permanent life insurance. A key feature of traditional whole life policies is a level premium which is sufficient to guarantee a stated death benefit for the rest of the insured's lifetime. In the beginning, the premium will be higher than the cost of the pure insurance protection afforded by the policy in order to generate a cash value reserve. The insurance company invests the cash value of the whole life insurance contract in its general investment account. As the insured gets older, the company uses the earnings on the cash value reserve to supplement the premiums paid by the insured in order to keep the premiums needed to support the policy's death benefit level. In some cases, the earnings on the cash value may reduce, and even eliminate, premiums in later years.

16.2.1 Changing the Beneficiary

A life insurance policy is similar to a will because it also speaks at death. Thus, the person who acquires the life insurance policy may constantly change the beneficiary. Moreover, the beneficiary of a life insurance policy only has an expectancy in the proceeds of the policy. That expectancy does not vest until the insured dies and the life insurance company has to pay the policy amount to the beneficiary. Life insurance is governed by contract law, so the insured can only change the beneficiary of the policy by following the terms included in the life insurance policy. However, the courts may rely on the equitable doctrines applied to wills to ensure that the decedent's property is distributed in the manner he or she so intended.

Carruthers v. $21,000 (Formerly New York Life Ins. Co.), 434 A.2d 125 (Pa. Super. 1981)

MONTGOMERY, J.

Lois Carruthers, appellee, and James W. Dolbow, appellant, are both claimants of the proceeds of a group life insurance policy in the sum of $21,000.00 written by the New York Life Insurance Company. New York Life was granted leave to pay the proceeds of the policy into court.

The policy was written on the life of Theodore Dolbow, Jr. who died February 13, 1976. Theodore Dolbow, Jr. was initially insured under the policy on January 6, 1966, while an employee of the Reading Company. At that time, he designated Theresa V. Dolbow, his wife, as the beneficiary. On December 13, 1974, he changed the beneficiary to his brother, James W. Dolbow, one of the present claimants. He again changed the named beneficiary one February 28, 1975, this time to Lois Carruthers, the other claimant herein. Both changes were executed in full compliance with the provisions of the policy.

The present dispute resulted from the contents of a holographic will which was admitted to probate. It was written by the decedent on the back of an envelope and read:

> "As my last will & testament all insurance and any and all articles that belong to me and willed to anyone other than my brother James W. Dolbow is hereby changed to read willed to James W. Dolbow.
> /s/ Theodore R. Dolbow, Jr.
>
> /s/ 10-26-75"

That part of the insurance policy applicable in the instant case reads:

> "The Group provides that ... the proceeds of your life insurance are payable to the beneficiary last designated by you before your death ... Any part of your insurance for which there is no beneficiary designated or surviving at your death will be payable to the executor or administrator of your estate ..."
> "A beneficiary can be designated, or ... changed, only by a written notice received by or on behalf of New York Life. No such designation or change will be effective until recorded by or on behalf of New York Life, but once it has been so recorded, it will take effect as of the date the notice was

signed, subject to any payment made or other action taken by or on behalf of New York Life before such recording."

The issue, therefore, is whether the will dated October 26, 1975, accomplished a change of beneficiary from Lois Carruthers, who had been properly named therein on February 28, 1975. The lower court held that the will did not work a change and we agree. There being no facts in dispute, the order was by way of a summary judgment based on the applicable principles of law.

Generally, in order to effect a change of beneficiary the mode prescribed by the policy must be followed. *Sproat v. Travelers Insurance Company*, 289 Pa. 351, 137 A. 621 (1927); *Riley v. Wirth*, 313 Pa. 362, 169 A. 139 (1933). As noted in the excerpt from the policy set forth above, notice of a change must be by a writing received by the insurer, or on its behalf, and recorded before a change becomes effective. Once recorded, the change becomes effective as of the date of the writing. The policy herein, however, does not prescribe the form of the written notice.

It is not disputed that notice of the will was not brought to the attention of the insurer until after the death of the insured. Although he lived approximately three and one-half months after executing the will, the insured made no effort to comply with the provisions of his policy. The intent of the insured will be given effect in our Commonwealth if he does all that he reasonably can under the circumstances to comply with the terms of the policy which permit a change of beneficiary. *Provident Mutual Life Insurance Company of Philadelphia v. Ehrlich*, 508 F.2d 129 (3rd Cir. 1975). The record herein reveals no extenuating circumstances which would allow us to find substantial compliance on the part of the deceased insured.

It is well settled that a change of beneficiary is valid even though notice is not received before the death of the insured if every reasonable effort is made to comply with the policy requirements. *Breckline v. Metropolitan Life Insurance Company*, 406 Pa. 573, 178 2 A.L.R.3d 1135 (1962). The appellant in the instant case relies on, as such notice, a letter sent by his attorney to the Reading Company which enclosed a copy of the will and demanded payment of the proceeds of the policy. The letter was not a notice to change the beneficiary, but assumed that the change had been accomplished by the will. In light of the precedent set forth above, such an assumption was erroneous. As the insured did not substantially comply with the policy provisions, neither the letter nor the will, nor both together, could act as notice of a change of beneficiary.

Appellant's claim is further abrogated by the fact that the insured complied with the policy provisions on two prior occasions. That fact clearly demonstrates the insured's knowledge of policy provisions regarding the mode required to change a beneficiary. An assumption that he intended to change the beneficiary by way of a holographic will is farfetched under those circumstances.

Lastly, the cases from foreign jurisdictions cited by appellant in his brief to buttress his claim that we should allow a will to work a change in beneficiary are distinguishable. In those jurisdictions which follow the principle of substantial compliance, as we do, the courts therein accepted the will as notice of a change of beneficiary in light of extenuating factual circumstances. As noted earlier, we find no such extenuating circumstances herein. Furthermore, those jurisdictions more often than not required specific language as to the policy in question in order to work a change of beneficiary. The language contained in the will here in question is general and ambiguous. We, therefore, find no support for appellant's arguments in any of those cases.

Accordingly, we affirm the order of the lower court.

Doss v. Kalas, 383 P.2d 169 (Ariz. 1963)

LOCKWOOD, Justice.

This is an appeal by Elsie May Doss, as executrix of the Estate of Richard H. Doss, deceased, from an order and decision of the superior court rejecting her contention that decedent's will have her the right to administer the proceeds from two life insurance policies for the benefit of the two surviving minor children.

Richard H. Doss died on the 14th day of September, 1959, a resident of Cochise County, Arizona. During his life he had been married to two different women and there was one child of each marriage. Elsie May Doss, to whom he was married at the time of his death, is the mother of Darryl Preston Doss, and appellant in this action. Margaret Kalas was formerly decedent's wife and is the mother of Shelley Jo Doss. She, as guardian of the estate of her daughter, Shelley, is appellee herein. At the time of his death decedent was insured by two Equitable Life Assurance Society of the United States Life insurance policies, numbers 4161 and 4161DA, in the amount of Six Thousand ($6,000.00) Dollars each. The beneficiaries of the two policies were the minor children of the decedent, Darryl Preston and Shelley Jo Doss, who were to share equally in the proceeds, according to the last records received by the insurance company. Both policies reserved to the insured the right to change the beneficiaries; policy No. 4161DA provided for a specific procedure to be followed to effect the change, but policy No. 4161 did not.

Richard H. Doss died leaving a will. A printed form with blanks for the testator to fill in was used. In the appropriate space is typed the name of 'my wife, Elsie May Doss' as executrix of the last will and testament, and immediately thereafter the typed wording 'and guardian of my insurance to be divided between my son, Preston and my daughter Shelley after all funeral bills have been paid from said insurance.'

Appellant was appointed executrix of the will by the superior court in its probate capacity. Later appellant petitioned for appointment of herself as trustee under the will to administer the insurance proceeds as a trust for the benefit of Preston Doss and Shelley Jo Doss. On August 26, 1960, the court ordered her appointment as trustee of the proceeds of the two insurance policies. However, upon motion for rehearing made by appellee, mother of Shelley Jo Doss, the court revoked the order of August 26, 1960, and ordered the petition of appellant for appointment as trustee denied. It further ordered that she, as guardian of the person and estate of Darryl Preston Doss, was entitled to one-half of the proceeds of the insurance policies; and that appellee, as guardian of the person and estate of Shelley Jo Doss, was entitled to the other one-half of the proceeds, and that appellant should deduct from the proceeds of the insurance policies then in her possession the amount of the funeral bill of the deceased 'prior to division of the proceeds as herein ordered.'

Appellant claims that the will was an effective method of changing the beneficiary as to policy No. 4161 and that it created a valid trust of the proceeds of both policies which appellant as trustee was entitled to administer.

To determine whether the will effected a change of beneficiaries we consider each insurance policy separately. Insurance policy No. 4161DA provides as follows:

'The employee [the insured] may from time to time during the continuance of the insurance change the beneficiary by a written request, upon the Society's blank, filed at its Home Office, but such change shall take effect only upon the receipt of the request for change at the Home Office of the Society.'

The law is not in agreement whether such a requirement must always be followed to effect a change of beneficiaries. 25 A.L.R.2d 999. In *McLennan v. McLennan*, 29 Ariz. 191, 240 P. 339 (1925) this court stated that if an insurance policy contract provides the method of changing the name of the beneficiary from one person to another, that particular method provided for in the policy contract is exclusive and must be followed strictly, or the attempted change if of no effect. *See Cook v. Cook*, 17 Cal.2d 639, 111 P.2d 322 (1941). The rationale generally used for such holding is amply illustrated in *Stone v. Stephens*, 155 Ohio St. 595, 99 N.E.2d 766, 25 A.L.R.2d 992, 996 (1951) quoting from *Wannamaker v. Stroman*, 167 S.C. 484, 166 S.E. 621, 623 (1932):

"To hold that a change in beneficiary may be made by testamentary disposition alone would open up a serious question as to payment of life insurance policies. It is in the public interest that an insurance company may pay a loss to the beneficiary designated in the policy as promptly after the death of insured as may reasonably be done. If there is uncertainty as to the beneficiary upon the death of insured, in all cases where the right to change the beneficiary had been reserved there would always be a question as to whom the proceeds of the insurance should be paid. If paid to the beneficiary, a will might later be probated designating a different disposition of the fund, and it would be a risk that few companies would be willing to take, * * *."

Other authorities, however hold that when the power to make a change of the beneficiary is reserved to the insured by the policy, and the insurer does not demand full compliance with the procedure to effect the change as set out in the policy, the insured may change his beneficiary by a valid will.

'We feel that the provisions of this policy setting up the method by which a beneficiary may be designated or changed are for the protection of the insurer, and we do not feel that the technical provisions are placed in the policy to protect the insured against hasty or impetuous action. In the case now before this court, the insurer is no longer a party, and the battle is between possible beneficiaries. Since this is the case, there is no reason to invoke technical provisions designed to protect an insurer against the possibility of double payment. We feel that the clearly manifested intent of the insured should control.' *Sears v. Austin*, 292 F.2d 690, 693 (9th Cir. 1961).

We believe that the latter rule is founded on the better reasoning. The provisions in a policy of insurance as to the procedure for making a change of beneficiary are for the benefit of the insurer. If the insurer does not choose to require enforcement thereof, and the rights of the respective claimants alone are before the court, the intent of the insured should govern. *Sears v. Austin*, *supra*; *Stone v. Stephens*, *supra* (dissenting opinion); *Pedron v. Olds*, 193 Ark. 1026, 105 S.W.2d 70 (1937); *Martinelli v. Cometti*, 133 Misc. 810, 243 N.Y.S. 389 (1929)

The beneficiary, during the life of the insured, has no vested right which the law protects and the insured, if the right to name the beneficiary is not irrevocable, may change the beneficiary without

his consent and without notice to him. *Stone v. Stephens*, *supra* (dissenting opinion); *Pedron v. Olds*, *supra*; 1 Underhill, Law of Wills, p. 71. The manner of procedure to effect such change being for the benefit of the insurer, may not be questioned by a beneficiary if the insurer does not demand compliance.

[4] It should be noted that although a will ordinarily speaks from the time of the death of the testator as to any bequests or legacies therein contained, a provision in a will changing the beneficiary in a life insurance policy operates as an expression of intent which occurred at the time of making the will, during the lifetime of the insured. Stone v. Stephens, supra (dissenting opinion).

In the earlier Arizona case, *McLennan v. McLennan*, *supra*, which followed the first line of reasoning as quoted above, the insurance company received a copy of an instrument which attempted a change of beneficiaries by the insured before the death of the insured. The insurance company however returned it to the insurer stating 'that the transfer was not lawful, and that the Grand Lodge would not accept it,' indicating that the insurer intended to inforce the required procedure. In the instant case appellant, the new beneficiary named under the will, who was to hold the proceeds for the benefit of both original beneficiaries (the children), received payments in full from the insurance company for the policy proceeds without objection to the change in beneficiary by will. The insurance company therefore in effect acquiesced in the change of beneficiaries by the insured in his will.

Since policy No. 4161 merely reserved the right to change the beneficiaries without specifying any particular method and the original beneficiary has no vested right in the policy it follows that a change was properly effected by will.

We find that the trial court erred in reversing its first order decreeing that the proceeds of the insurance policies passed to appellant as trustee, first for the payment of the funeral bills, and then in equal proportion to the minor children of the insured. The insured, by his will, nominated appellant as 'guardian of my insurance.' The language of a will must be liberally construed with a view to carrying into effect what the will as a whole shows was the real intent of the testator. *In re Conness' Estate*, 73 Ariz. 259, 212 P.2d 764 (1949). It is clear here that the insured testator intended that the insurance proceeds not go directly to the minor children, but rather that they should be distributed to the appellant to administer for the children, after having paid the funeral debts. All the essential elements of a valid trust are present in this case: (a) a competent settlor, and a trustee (the appellant); (b) a clear and unequivocal intent to create a trust (the word 'guardian' in its context clearly indicates a trustee relationship); and (c) an ascertainable trust res (the proceeds of the insurance policies); and (d) sufficiently certain beneficiaries (the two minor children). *Carrillo v. Taylor*, 81 Ariz. 14, 299 P.2d 188 (1956).

Reversed and remanded with instructions to proceed in accordance with this opinion.

Notes, Problems, and Questions

1. In order for life insurance proceeds to be a part of the probate estate, the insured must designate the estate as the beneficiary on the policy.

2. Life insurance is not subject to the creditors of the decedent. *See May v. Ellis*, 92 P.3d 859 (Ariz. 2004). A dies with $100,000 in unpaid debt. B receives $200,000 from A's life insurance policy. B does not have to pay any of A's debt. Is that fair?

3. Slayer statutes prevent a person who intentionally murders someone from inheriting from that person's estate. Likewise, a person who murders the insured forfeits the life insurance money. *See Estate of Stafford*, 244 S.W.3d 368 (Tex. App. 2007); *Francis v. Marshall*, 841 S.W.2d 51 (Tex. App. 1992).

4. Life insurance proceeds are usually not considered to be a marital asset. *See Thomas v. Thomas*, 54 So.3d 346 (Ala. Civ. App. 2009). A divorce decree does not impliedly revoke a former spouse as the beneficiary of a life insurance policy. The insured must remove the former spouse as the beneficiary on the policy. *In the Matter of the Declaration of Death of Santos*, 660 A.2d 1271 (N.J. Ch. 1994).

5. After the insurance company distributes the proceeds to the named beneficiary, the insurance company has met its obligations. There is no mechanism in place to ensure that the beneficiary uses the insurance money to pay for the insured's funeral arrangements.

6. A takes out a $250,000 life insurance policy and names B as the beneficiary. In exchange for being named as the beneficiary on the account, B promises to spend at least $40,000 on A's funeral. When A dies, B receives the money. B goes against A's wishes and only gives A's daughter, C, $1000 for the funeral. Thus C cremates A instead of giving A the lavish funeral that A expected. A's daughter, C, is outraged by B's actions. Does she have any legal recourse? Should she have any legal recourse?

16.3 Private Retirement Accounts

Because people are living longer it is important to plan for retirement. The main three devices people use to save for retirement are the following: (1) defined benefit plans, (2) defined contribution plans and (3) individual retirement accounts (IRAs). The first two are the only ones that are relevant to this discussion because IRAs are not employee benefit plans. A defined benefit plan is a pension plan under which an employee receives a set monthly amount upon retirement guaranteed for their life or the joint lives of the member and their spouse. This benefit may also include a cost-of-living increase each year during retirement. The monthly benefit amount is based upon the participant's wages and length of service. A defined contribution plan is a retirement savings program under which the employer promises certain contributions to a participant's account during employment, but with no guaranteed retirement benefit. The ultimate benefit is based exclusively upon the contribution to, and investment earnings of the plan. The benefit ceases when the account balance is depleted, regardless of the retiree's age or circumstances.

After the owner of a retirement account dies, the person listed as the beneficiary has the legal right to take control of the funds in the account. Like life insurance, the person who contributes to a retirement account can control the distribution of the money in the account by designating the beneficiary. However, in order to change the beneficiary of the account to someone other than his or her spouse, the owner of the retirement account must receive his or her spouse's consent. These accounts are controlled by two federal laws, the Retirement Equity Act (REA) and the Employee Retirement Income Security Act (ERISA), that limit the application of certain state laws to retirement accounts.

Egelhoff v. Egelhoff ex rel. Breiner, 532 U.S. 141 (2014)

Justice THOMAS delivered the opinion of the Court.

A Washington statute provides that the designation of a spouse as the beneficiary of a nonprobate asset is revoked automatically upon divorce. We are asked to decide whether the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 832, 29 U.S.C. § 1001 et. seq., pre-empts that statute to the extent it applies to ERISA plans. We hold that it does.

I

Petitioner Donna Rae Egelhoff was married to David A. Egelhoff. Mr. Egelhoff was employed by the Boeing Company, which provided him with a life insurance policy and a pension plan. Both plans were governed by ERISA, and Mr. Egelhoff designated his wife as the beneficiary under both. In April 1994, the Egelhoffs divorced. Just over two months later, Mr. Egelhoff died intestate following an automobile accident. At that time, Mrs. Egelhoff remained the listed beneficiary under both the life insurance policy and the pension plan. The life insurance proceeds, totaling $46,000, were paid to her.

Respondents Samantha and David Egelhoff, Mr. Egelhoff's children by a previous marriage, are his statutory heirs under state law. They sued petitioner in Washington state court to recover the life insurance proceeds. Respondents relied on a Washington statute that provides:

> "If a marriage is dissolved or invalidated, a provision made prior to that event that relates to the payment or transfer at death of the decedent's interest in a nonprobate asset in favor of or granting an interest or power to the decedent's former spouse is revoked. A provision affected by this section must be interpreted, and the nonprobate asset affected passes, as if the former spouse failed to survive the decedent, having died at the time of entry of the decree of dissolution or declaration of invalidity." Wash. Rev. Code § 11.07.010 (2)(a) (1994).

That statute applies to "all nonprobate assets, wherever situated, held at the time of entry by a superior court of this state of a decree of dissolution of marriage or a declaration of invalidity." § 11.07.010(1). It defines "nonprobate asset" to include "a life insurance policy, employee benefit plan, annuity or similar contract, or individual retirement account."§ 11.07.010(5)(a).

Respondents argued that they were entitled to the life insurance proceeds because the Washington statute disqualified Mrs. Egelhoff as a beneficiary, and in the absence of a qualified named beneficiary, the proceeds would pass to them as Mr. Egelhoff's heirs. In a separate action, respondents also sued to recover the pension plan benefits. Respondents again argued that the Washington statute disqualified Mrs. Egelhoff as a beneficiary and they were thus entitled to the benefits under the plan.

The trial courts, concluding that both the insurance policy and the pension plan "should be administered in accordance" with ERISA, granted summary judgment to petitioner in both cases. App. to Pet. for Cert. 46a, 48a. The Washington Court of Appeals consolidated the cases and reversed. *In re Estate of Egelhoff*, 93 Wash.App. 314, 968 P.2d 924 (1998). It concluded that the

Washington statute was not pre-empted by ERISA. *Id.*, at 317, 968 P.2d, at 925. Applying the statute, it held that respondents were entitled to the proceeds of both the insurance policy and the pension plan. *Ibid.*

The Supreme Court of Washington affirmed. 139 Wash.2d 557, 989 P.2d 80 (1999). It held that the state statute, although applicable to "employee benefit plan[s]," does not "refe[r] to" ERISA plans to an extent that would require pre-emption, because it "does not apply immediately and exclusively to an ERISA plan, nor is the existence of such a plan essential to operation of the statute." *Id.,* at 574, 989 P.2d, at 89. It also held that the statute lacks a "connection with" an ERISA plan that would compel pre-emption. *Id.*, at 576, 989 P.2d, at 90. It emphasized that the statute "does not alter the nature of the plan itself, the administrator's fiduciary duties, or the requirements for plan administration." *Id.*, at 575, 989 P.2d, at 90. Nor, the court concluded, does the statute conflict with any specific provision of ERISA, including the antialienation provision, 29 U.S.C. §1056(d)(1), because it "does not operate to divert benefit plan proceeds from distribution under terms of the plan documents," but merely alters "the underlying circumstances to which the distribution scheme of [the] plan must be applied." 139 Wash.2d, at 578, 989 P.2d, at 91.

Courts have disagreed about whether statutes like that of Washington are pre-empted by ERISA. Compare, *e.g., Manning v. Hayes,* 212 F.3d 866 (C.A.5 2000) (finding pre-emption), cert. pending, No. 00-265, and *Metropolitan Life Ins. Co. v. Hanslip*, 939 F.2d 904 (C.A.10 1991) (same), with, *e.g., Emard v. Hughes Aircraft Co.,* 153 F.3d 949 (C.A.9 1998) (finding no pre-emption), and 139 Wash.2d, at 557, 989 P.2d, at 80 (same). To resolve the conflict, we granted certiorari. 530 U.S. 1242, 120 S.Ct. 2687, 147 L.Ed.2d 960 (2000).

II

Petitioner argues that the Washington statute falls within the terms of ERISA's express pre-emption provision and that it is pre-empted by ERISA under traditional principles of conflict pre-emption. Because we conclude that the statute is expressly pre-empted by ERISA, we address only the first argument.

ERISA's pre-emption section, 29 U.S.C. § 1144(a), states that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. We have observed repeatedly that this broadly worded provision is "clearly expansive." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995); see, *e.g., Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 384, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992) (listing cases in which we have described ERISA pre-emption in broad terms). But at the same time, we have recognized that the term "relate to" cannot be taken "to extend to the furthest stretch of its indeterminacy," or else "for all practical purposes pre-emption would never run its course." *Travelers, supra*, at 655, 115 S.Ct. 1671.

We have held that a state law relates to an ERISA plan "if it has a connection with or reference to such a plan." *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 97, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983). Petitioner focuses on the "connection with" part of this inquiry. Acknowledging that "connection with" is scarcely more restrictive than "relate to," we have cautioned against an "uncritical literalism" that would make pre-emption turn on "infinite connections." *Travelers, supra*, at 656, 115 S.Ct. 1671. Instead, "to determine whether a state law has the forbidden connection, we look both to 'the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood

would survive,' as well as to the nature of the effect of the state law on ERISA plans." *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, quoting *Travelers, supra*, at 656, 115 S.Ct. 1671 (citation omitted).

Applying this framework, petitioner argues that the Washington statute has an impermissible connection with ERISA plans. We agree. The statute binds ERISA plan administrators to a particular choice of rules for determining beneficiary status. The administrators must pay benefits to the beneficiaries chosen by state law, rather than to those identified in the plan documents. The statute thus implicates an area of core ERISA concern. In particular, it runs counter to ERISA's commands that a plan shall "specify the basis on which payments are made to and from the plan," § 1102(b)(4), and that the fiduciary shall administer the plan "in accordance with the documents and instruments governing the plan," § 1104(a)(1)(D), making payments to a "beneficiary" who is "designated by a participant, or by the terms of [the] plan." § 1002(8). In other words, unlike generally applicable laws regulating "areas where ERISA has nothing to say," *Dillingham,* 519 U.S. 330, 117 S.Ct. 832, which we have upheld notwithstanding their incidental effect on ERISA plans, *see*, *e.g., ibid.,* this statute governs the payment of benefits, a central matter of plan administration.

The Washington statute also has a prohibited connection with ERISA plans because it interferes with nationally uniform plan administration. One of the principal goals of ERISA is to enable employers "to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9, 107 S.Ct. 2211, 96 L.Ed.2d 1 (1987). Uniformity is impossible, however, if plans are subject to different legal obligations in different States.

The Washington statute at issue here poses precisely that threat. Plan administrators cannot make payments simply by identifying the beneficiary specified by the plan documents. Instead they must familiarize themselves with state statutes so that they can determine whether the named beneficiary's status has been "revoked" by operation of law. And in this context the burden is exacerbated by the choice-of-law problems that may confront an administrator when the employer is located in one State, the plan participant lives in another, and the participant's former spouse lives in a third. In such a situation, administrators might find that plan payments are subject to conflicting legal obligations.

To be sure, the Washington statute protects administrators from liability for making payments to the named beneficiary unless they have "actual knowledge of the dissolution or other invalidation of marriage," Wash. Rev.Code § 11.07.010(3)(a) (1994), and it permits administrators to refuse to make payments until any dispute among putative beneficiaries is resolved, § 11.07.010(3)(b). But if administrators do pay benefits, they will face the risk that a court might later find that they had "actual knowledge" of a divorce. If they instead decide to await the results of litigation before paying benefits, they will simply transfer to the beneficiaries the costs of delay and uncertainty. Requiring ERISA administrators to master the relevant laws of 50 States and to contend with litigation would undermine the congressional goal of "minimiz[ing] the administrative and financial burden[s]" on plan administrators-burdens ultimately borne by the beneficiaries. *Ingersoll-Rand Co. v. McClendon,* 498 U.S. 133, 142, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990).

We recognize that all state laws create some potential for a lack of uniformity. But differing state regulations affecting an ERISA plan's "system for processing claims and paying benefits" impose "precisely the burden that ERISA pre-emption was intended to avoid." *Fort Halifax, supra*, at 10, 107

S.Ct. 2211. And as we have noted, the statute at issue here directly conflicts with ERISA's requirements that plans be administered, and benefits be paid, in accordance with plan documents. We conclude that the Washington statute has a "connection with" ERISA plans and is therefore pre-empted.

III

Respondents suggest several reasons why ordinary ERISA pre-emption analysis should not apply here. First, they observe that the Washington statute allows employers to opt out. According to respondents, the statute neither regulates plan administration nor impairs uniformity because it does not apply when "[t]he instrument governing disposition of the nonprobate asset expressly provides otherwise." Wash. Rev.Code § 11.07.010(2)(b)(i) (1994). We do not believe that the statute is saved from pre-emption simply because it is, at least in a broad sense, a default rule.

Even though the Washington statute's cancellation of private choice may itself be trumped by specific language in the plan documents, the statute does "dictate the choice[s] facing ERISA plans" with respect to matters of plan administration. *Dillingham, supra*, at 334, 117 S.Ct. 832. Plan administrators must either follow Washington's beneficiary designation scheme or alter the terms of their plan so as to indicate that they will not follow it. The statute is not any less of a regulation of the terms of ERISA plans simply because there are two ways of complying with it. Of course, simple noncompliance with the statute is not one of the options available to plan administrators. Their only choice is one of timing, *i.e.,* whether to bear the burden of compliance *ex post,* by paying benefits as the statute dictates (and in contravention of the plan documents), or *ex ante,* by amending the plan.

Respondents emphasize that the opt-out provision makes compliance with the statute less burdensome than if it were mandatory. That is true enough, but the burden that remains is hardly trivial. It is not enough for plan administrators to opt out of this particular statute. Instead, they must maintain a familiarity with the laws of all 50 States so that they can update their plans as necessary to satisfy the opt-out requirements of other, similar statutes. They also must be attentive to changes in the interpretations of those statutes by state courts. This "tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction" is exactly the burden ERISA seeks to eliminate. *Ingersoll-Rand, supra*, at 142, 111 S.Ct. 478.

Second, respondents emphasize that the Washington statute involves both family law and probate law, areas of traditional state regulation. There is indeed a presumption against pre-emption in areas of traditional state regulation such as family law. *See*, *e.g., Hisquierdo v. Hisquierdo,* 439 U.S. 572, 581, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979). But that presumption can be overcome where, as here, Congress has made clear its desire for pre-emption. Accordingly, we have not hesitated to find state family law pre-empted when it conflicts with ERISA or relates to ERISA plans. *See*, *e.g., Boggs v. Boggs,* 520 U.S. 833, 117 S.Ct. 1754, 138 L.Ed.2d 45 (1997)(holding that ERISA pre-empts a state community property law permitting the testamentary transfer of an interest in a spouse's pension plan benefits).

Finally, respondents argue that if ERISA pre-empts this statute, then it also must pre-empt the various state statutes providing that a murdering heir is not entitled to receive property as a result of the killing. See, *e.g.,* Cal. Prob.Code Ann. §§ 250-259 (West 1991 and Supp.2000); 755 Ill. Comp. Stat., ch. 755, § 5/2-6 (1999). In the ERISA context, these "slayer" statutes could revoke the beneficiary status of someone who murdered a plan participant. Those statutes are not before us, so we do not decide the issue. We note, however, that the principle underlying the statutes-which have

been adopted by nearly every State-is well established in the law and has a long historical pedigree predating ERISA. *See*, *e.g., Riggs v. Palmer,* 115 N.Y. 506, 22 N.E. 188 (1889). And because the statutes are more or less uniform nationwide, their interference with the aims of ERISA is at least debatable.

The judgment of the Supreme Court of Washington is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice BREYER, with whom Justice STEVENS joins, dissenting.

Like Justice SCALIA, I believe that we should apply normal conflict pre-emption and field pre-emption principles where, as here, a state statute covers ERISA and non-ERISA documents alike. *Ante,* at 1330 (concurring opinion). Our more recent ERISA cases are consistent with this approach. *See De Buono v. NYSA-ILA Medical and Clinical Services Fund*, 520 U.S. 806, 912-813, 117 S.Ct. 1747, 138 L.Ed.2d 21 (1997) (rejecting literal interpretation of ERISA's pre-emption clause); *California Div. of Labor Standards Enforcement v. Dillingham Constr.*, N.A., Inc., 519 U.S. 316, 334, 117 S.Ct. 832, 136 L.Ed.2d 791 (1997) (narrowly interpreting the clause); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,* 514 U.S. 645, 656. 115 S.Ct. 1671, 131 L.E.2d 695 (1995) ("go[ing] beyond the unhelpful text [of the clause] and the frustrating difficulty of defining its key term, and look[ing] instead to the objectives of the ERISA statute as a guide"). *See also Boggs v. Boggs*, 520 U.S. 833, 841, 117 S.Ct. 1754, 138 L.Ed.2d 45 (1997) (relying on conflict pre-emption principles instead of ERISA's pre-emption clause). And I fear that our failure to endorse this "new approach" explicitly, *Dillingham, supra,* at336, 117 S.Ct. 832 (SCALIA, J., concurring), will continue to produce an "avalanche of litigation," *De Buono, supra*, at 809, n. 1, 117 S.Ct. 1747, as courts struggle to interpret a clause that lacks any "discernible content," *ante,* at 1330 (SCALIA, J., concurring), threatening results that Congress could not have intended.

I do not agree with Justice SCALIA or with the majority, however, that there is any plausible pre-emption principle that leads to a conclusion that ERISA pre-empts the statute at issue here. No one could claim that ERISA pre-empts the entire *field* of state law governing inheritance-though such matters "relate to" ERISA broadly speaking. *See Travelers, supra*, at 655, 115 S.Ct. 1671. Neither is there any direct conflict between the Washington statute and ERISA, for the one nowhere directly contradicts the other. *Cf. ante,* at 1329 (claiming a "direc[t] conflic[t]" between ERISA and the Washington statute). But *cf. ante,* at 1327 (relying upon the "relate to" language in ERISA's pre-emption clause).

The Court correctly points out that ERISA requires a fiduciary to make payments to a beneficiary "in accordance with the documents and instruments governing the plan." 29 U.S.C. § 1104(a)(1)(D). But nothing in the Washington statute requires the contrary. Rather, the state statute simply sets forth a default rule for interpreting documentary silence. The statute specifies that a nonprobate asset will pass at A's death "as if" A's "former spouse" had died first-*unless the* "*instrument governing disposition of the nonprobate asset expressly provides otherwise.*" Wash. Rev.Code § 11.07.010 (2)(b)(i) (1994) (emphasis added). This state-law rule is a rule of interpretation, and it is designed to carry out, not to conflict with, the employee's likely intention as revealed in the plan documents.

There is no direct conflict or contradiction between the Washington statute and the terms of the

plan documents here at issue. David Egelhoff's investment plan provides that when a "beneficiary designation" is "invalid," the "benefits will be paid" to a "surviving spouse," or "[i]f there is no surviving spouse," to the "children in equal shares." App. 40. The life insurance plan is silent about what occurs when a beneficiary designation is invalid. The Washington statute fills in these gaps, *i.e.,* matters about which the documents themselves say nothing. Thus, the Washington statute specifies that a beneficiary designation-here "Donna R. Egelhoff wife" in the pension plan-is invalid where there is no longer any such person as Donna R. Egelhoff, wife. And the statute adds that in such instance the funds would be paid to the children, who themselves are potential pension plan beneficiaries.

The Court's "direct conflict" conclusion rests upon its claim that "administrators must pay benefits to the beneficiaries chosen by state law, rather than to those identified in the plan documents." *Ante,* at 1327. But the Court cannot mean "identified *anywhere* in the plan documents," for the Egelhoff children were "identified" as recipients in the pension plan documents should the initial designation to "Donna R. Egelhoff wife" become invalid. And whether that initial designation became invalid upon divorce is a matter about which the plan documents are silent.

To refer to state law to determine whether a given name makes a designation that is, or has become, invalid makes sense where background property or inheritance law is at issue, say, for example, where a written name is potentially ambiguous, where it is set forth near, but not in, the correct space, where it refers to a missing person perhaps presumed dead, where the name was written at a time the employee was incompetent, or where the name refers to an individual or entity disqualified by other law, say, the rule against perpetuities or rules prohibiting a murderer from benefiting from his crime. Why would Congress want the courts to create an ERISA-related federal property law to deal with such problems? Regardless, to refer to background state law in such circumstances does not *directly* conflict with any explicit ERISA provision, for no provision of ERISA forbids reading an instrument or document in light of state property law principles. In any event, in this case the plan documents *explicitly* foresee that a beneficiary designation may become "invalid," but they do not specify the invalidating circumstances. *supra,* at 1331-1332. To refer to state property law to fill in that blank cannot possibly create any direct conflict with the plan documents.

The majority simply denies that there is any blank to fill in and suggests that the plan documents require the plan to pay the designated beneficiary under all circumstances. *See ante,* at 1328, n. 1. But there is nonetheless an open question, namely, whether a designation that (here explicitly) refers to a wife remains valid after divorce. The question is genuine and important (unlike the imaginary example in the majority's footnote). The plan documents themselves do not answer the question any more than they describe what is to occur in a host of other special circumstances (*e.g.,* mental incompetence, intoxication, ambiguous names, etc.). To determine whether ERISA permits state law to answer such questions requires a careful examination of the particular state law in light of ERISA's basic policies. *See ante,* at 1327-1328; *infra* this page and 1333-1334. We should not short circuit that necessary inquiry simply by announcing a "direct conflict" where none exists.

The Court also complains that the Washington statute restricts the plan's choices to "two." *Ante,* at 1329. But it is difficult to take this complaint seriously. After all, the two choices that Washington gives the plan are (1) to comply with Washington's rule or (2) not to comply with Washington's rule. What other choices could there be? A state statute that asks a plan to choose whether it intends to comply is not a statute that directly conflicts with a plan. Quite obviously, it is possible, not " 'impossible,' " to comply with both the Washington statute and federal law. *Geier v. American Honda*

Motor Co., 529 U.S. 861, 873, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000).

The more serious pre-emption question is whether this state statute "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Ibid.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 D.Ct. 399, 85 L.Ed. 581 (1941)). In answering that question, we must remember that petitioner has to overcome a strong presumption *against* pre-emption. That is because the Washington statute governs family property law-a "fiel[d] of traditional state regulation," where courts will not find federal pre-emption unless such was the " 'clear and manifest purpose of Congress,'" *Travelers*, 514 U.S., at 655, 115 S.Ct. 1671 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)), or the state statute does " 'major damage' to 'clear and substantial' federal interests," *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979) (quoting *United States v. Yazell*, 382 U.S. 341, 352, 86 S.Ct. 500, 15 L.Ed.2d 404 (1966)). No one can seriously argue that Congress has *clearly* resolved the question before us. And the only damage to federal interests that the Court identifies consists of the added administrative burden the state statute imposes upon ERISA plan administrators.

The Court claims that the Washington statute "interferes with nationally uniform plan administration" by requiring administrators to "familiarize themselves with state statutes." *Ante,* at 1328. But administrators have to familiarize themselves with state law in any event when they answer such routine legal questions as whether amounts due are subject to garnishment, *Mackey v. Lanier Collection Agency & Service, Inc.,* 486 U.S. 825, 838, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988), who is a "spouse," who qualifies as a "child," or when an employee is legally dead. And were that "familiarizing burden" somehow overwhelming, the plan could easily avoid it by resolving the divorce revocation issue in the plan documents themselves, stating expressly that state law does not apply. The "burden" thus reduces to a one-time requirement that would fall primarily upon the few who draft model ERISA documents, not upon the many who administer them. So meager a burden cannot justify pre-empting a state law that enjoys a presumption against pre-emption.

The Court also fears that administrators would have to make difficult choice-of-law determinations when parties live in different States. *Ante,* at 1328. Whether this problem is or is not "major" in practice, the Washington statute resolves it by expressly setting forth procedures whereby the parties or the courts, *not* the plan administrator, are responsible for resolving it. *See* §§ 11.07.010 (3)(b)(i)-(ii) (stating that a plan may "without liability, refuse to pay or transfer a nonprobate asset" until "[a]ll beneficiaries and other interested persons claiming an interest have consented in writing to the payment or transfer" or "[t]he payment or transfer is authorized or directed by a court of proper jurisdiction"); § 11.07.010(3)(c) (plan may condition payment on provision of security by recipient to indemnify plan for costs); § 11.07.010(2)(b)(i) (plan may avoid default rule by expressing its intent in the plan documents).

The Court has previously made clear that the fact that state law "impose[s] some burde[n] on the administration of ERISA plans" does not necessarily require pre-emption. *DeBuono*, 520 U.S., at 815, 117 S.Ct. 1747; *Mackey, supra*, at 831, 108 S.Ct. 2182 (upholding state garnishment law notwithstanding claim that "benefit plans subjected to garnishment will incur substantial administrative burdens"). Precisely, what is it about this statute's requirement that distinguishes it from the "'myriad state laws' " that impose some kind of burden on ERISA plans? *DeBuono, supra*, at 815, 117 S.Ct. 147 (quoting *Travelers, supra*, at 668, 115 S.Ct. 1671).

Indeed, if one looks beyond administrative burden, one finds that Washington's statute poses no

obstacle, but furthers ERISA's ultimate objective-developing a fair system for protecting employee benefits. *Cf. Pension Benefit Guaranty Corporation v. R.A. Gray & Co.*, 467 U.S. 717, 720, 104 S.Ct. 2709, 81 L.Ed.2d 601 (1984). The Washington statute transfers an employee's pension assets at death to those individuals whom the worker would likely have wanted to receive them. As many jurisdictions have concluded, divorced workers more often prefer that a child, rather than a divorced spouse, receive those assets. Of course, an employee can secure this result by changing a beneficiary form; but doing so requires awareness, understanding, and time. That is why Washington and many other jurisdictions have created a statutory assumption that divorce works a revocation of a designation in favor of an ex-spouse. That assumption is embodied in the Uniform Probate Code; it is consistent with human experience; and those with expertise in the matter have concluded that it "more often" serves the cause of "[j]ustice." Langbein, The Nonprobate Revolution and the Future of the Law of Succession, 97 Harv. L.Rev. 1108, 1135 (1984).

In forbidding Washington to apply that assumption here, the Court permits a divorced wife, who *already* acquired, during the divorce proceeding, her fair share of the couple's community property, to receive in addition the benefits that the divorce court awarded to her former husband. To be more specific, Donna Egelhoff already received a business, an IRA account, and stock; David received, among other things, 100% of his pension benefits. App. 31-34. David did not change the beneficiary designation in the pension plan or life insurance plan during the 6-month period between his divorce and his death. As a result, Donna will now receive a windfall of approximately $80,000 at the expense of David's children. The State of Washington enacted a statute to prevent precisely this kind of unfair result. But the Court, relying on an inconsequential administrative burden, concludes that Congress required it.

Finally, the logic of the Court's decision does not stop at divorce revocation laws. The Washington statute is virtually indistinguishable from other traditional state-law rules, for example, rules using presumptions to transfer assets in the case of simultaneous deaths, and rules that prohibit a husband who kills a wife from receiving benefits as a result of the wrongful death. It is particularly difficult to believe that Congress wanted to pre-empt the latter kind of statute. But how do these statutes differ from the one before us? Slayer statutes-like this statute-"gover[n] the payment of benefits, a central matter of plan administration." *Ante,* at 1328. And contrary to the Court's suggestion, *ante,* at 1330, slayer statutes vary from State to State in their details just like divorce revocation statutes. Compare Ariz.Rev.Stat. Ann. § 14-2803(F) (1995) (requiring proof, in a civil proceeding, under preponderance of the evidence standard); Haw.Rev.Stat. § 560.2-803(g) (1999) (same), with Ga.Code Ann. § 53-1-5(d) (Supp.1996) (requiring proof under clear and convincing evidence standard); Me.Rev.Stat. Ann., Tit. 18-A, § 2-803(e) (1998) (same); and Ala.Code § 43-8-253(e) (1991) (treating judgment of conviction as conclusive when it becomes final); Me.Rev.Stat. Ann., Tit. 18-A, § 2-803(e) (1998) (same), with Ariz.Rev.Stat. Ann. § 14-2803 (F)(1995) (treating judgment of conviction as conclusive only after "all right to appeal has been exhausted"); Haw.Rev.Stat. § 560.2-803(g) (1999) (same). Indeed, the "slayer" conflict would seem more serious, not less serious, than the conflict before us, for few, if any, slayer statutes permit plans to opt out of the state property law rule.

"ERISA pre-emption analysis," the Court has said, must "respect" the "separate spher[e]" of state "authority." *Fort Halifax Packing Co. v. Coyne*, 482 U.S.1, 19, 107 S.Ct. 2211, 96 L.Ed.2d 1 (1987) (quoting *Alessi v. Raybestos-Manhattan, Inc.,* 451 U.S. 504, 522, 101 S.Ct. 1895, 68 L.Ed.2d 402 (1981) (internal quotation marks omitted). In so stating, the Court has recognized the practical importance of preserving local independence, at retail, *i.e.,* by applying pre-emption analysis with care, statute by statute, line by line, in order to determine how best to reconcile a federal statute's language and

purpose with federalism's need to preserve state autonomy. Indeed, in today's world, filled with legal complexity, the true test of federalist principle may lie, not in the occasional constitutional effort to trim Congress' commerce power at its edges, *United States v. Morrison*, 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000), or to protect a State's treasury from a private damages action, *Board of Trustees of Univ. of Ala. v. Garrett,* 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001), but rather in those many statutory cases where courts interpret the mass of technical detail that is the ordinary diet of the law, *AT & T Corp. v. Iowa Utilities Bd.,* 525 U.S. 366, 427 119 S.Ct. 721, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999) (BREYER, J., concurring in part and dissenting in part).

In this case, "field pre-emption" is not at issue. There is no "direct" conflict between state and federal statutes. The state statute poses no significant obstacle to the accomplishment of any federal objective. Any effort to squeeze some additional pre-emptive force from ERISA's words (*i.e.,* "relate to") is inconsistent with the Court's recent case law. And the state statute before us is one regarding family property-a "fiel[d] of traditional state regulation," where the interpretive presumption against pre-emption is particularly strong. *Travelers,* 514 U.S., at 655, 115 S.Ct. 1671. For these reasons, I disagree with the Court's conclusion. And, consequently, I dissent.

Questions

1. What reasons did the Respondents give to support their argument that ordinary ERISA pre-emption analysis should not apply here?

2. What was the basis of the Respondents' claim to the insurance proceeds?

3. When does ERISA apply to a retirement plan?

4. Why did the Court conclude that the Washington statute had a prohibited connection with ERISA plans?

16.4 Joint Bank Accounts

A joint bank account is a good way to transfer money to a person without executing a will. Banks usually give their customers joint tenancy bank accounts. Therefore, the surviving person listed on the account has the legal right to the funds that remain in the account. All of the parties listed on the account have the present right to withdraw funds from the account. However, the person who opens the bank account may want to prevent the third party from taking money from the account during his or her lifetime. One way to accomplish that objective is to open up a payable on death (POD) account. For example, A opens up a joint account with B and tells the bank that A only wants B to receive the balance upon A's death. Courts have also permitted money to be transferred using a POD saving account referred to as a Totten trust.

In re Estate of Platt, 772 N.E.2d 198 (Ohio Ct. App. 2002)

GRENDELL, J.

Gerald P. Platt ("appellant") appeals from the May 31, 2001 judgment entry by the Trumbull County Court of Common Pleas, Probate Division, finding that appellant forfeited his survivorship right in a certificate of deposit account. For the foregoing reasons, we reverse the judgment of the lower court.

Linnea B. Platt ("decedent") died testate on July 21, 1997. Appellant is decedent's son. Prior to her death, decedent gave appellant power of attorney over her affairs on September 7, 1995. The trial court appointed Jeffrey D. Adler, Esq. ("appellee"), special administrator of decedent's estate. Subsequently, decedent's will was filed for probate.

Appellee then filed an inventory of decedent's estate on October 13, 2000. On October 30, 2000, as heirs at law and beneficiaries of decedent's will, Sandra Cameron, decedent's daughter, and Kenneth Platt, decedent's son, filed exceptions to the inventory. Specifically, Sandra Cameron and Kenneth Platt argued that Bank One certificate of deposit ("CD") accounts 940017638151 ("51"), 9000017638150 ("50"), and 860017081949 ("49") were the property of the estate but were not included in the inventory. "Exceptions to inventory" hearings were held on January 22, 2001, and April 30, 2001. At the close of the April 30, 2001 hearing, the exceptions to CD accounts 51 and 50 were withdrawn. CD account 49 remained contested.

CD account 49 was issued on September 3, 1996, in the names of decedent and appellant with a right of survivorship. The initial deposit amount was $10,000. The type of deposit was an automatic renewal with the term of maturity at 10 months. CD account 49 matured on July 3, 1997. Appellant testified that the funds for the CDs came from the sale of decedent's house of which he had no claim of ownership in the house. Upon maturity, CD account 49 contained $10,454.10.

Prior to decedent's death, appellant, by telephone, authorized the issuance of CD account 08600198605463 ("63"). Appellant deposited all of the funds from CD account 49, $10,454.10, into CD account 63. CD account 63 was a "POD/ITF" account (a payable on death/in trust for account), which named decedent as the sole owner and appellant as the named beneficiary. The term of maturity for CD account 63 was 7 months. Bank One documentation submitted into evidence showed July 15, 1997, as the closing date of CD account 49. However, Bank One documents listed CD account 63 as being issued on July 9, 1997.

On May 18, 2001, appellant filed a brief, contending that Bank One renewed CD account 49 as CD account 63. Appellant argued that CD account 63 should not be included in the assets of the estate. Appellant claimed that there was no evidence that decedent attempted or intended the survivorship character of CD account 49 to be extinguished upon its renewal. Appellant averred that it was presumed that decedent intended the survivor to benefit at her death and that the character of the account should not change.

The trial court filed a judgment entry on May 31, 2001, finding that appellant forfeited his survivorship right in CD account 49 when he withdrew the funds and directed their transfer to a POD account. The trial court concluded that the funds in the POD account were assets of the estate

and were included in the inventory of the estate. In particular, the trial court stated that decedent deposited $10,000 into CD account 49, a joint and survivorship account in the names of decedent and appellant, which matured on July 3, 1997, having a 10-day grace period for renewal. The trial court indicated that, on July 9, 1997, appellant instructed Bank One, by telephone, to withdraw the account and deposit it into CD account 63, a POD account that was solely in the name of decedent, which named appellant the beneficiary. The trial court determined that decedent was the sole owner of the funds held in CD account 49 since she was the sole contributor to that account. The trial court found that decedent, who died on July 21, 1997, did not sign or authorize the creation of the POD account, and appellant's designation of himself as beneficiary was invalid.

On June 27, 2001, appellant filed a timely notice of appeal, asserting the following assignments of error:

"[1.] The trial court erred in ignoring the survivorship feature in favor of appellant of a renewed certificate of deposit, as no person had authority to eliminate the right of survivorship provisions[,] and[,] in fact [,] the renewed certificate likewise contained survivorship rights in favor of appellant.

"[2.] The trial court erred when it found that a certificate of deposit contract, which included a designation of survivorship, had been renewed but excluded from the terms of the renewed contract the designation of survivorship upon the renewal, and no person had been given authority to alter the contract terms that existed before the date of death, thereby the renewed contract is binding upon the estate and the bank."

Appellant's assignments of error will be reviewed collectively since they contain overlapping arguments. Appellant contends that, at the time CD account 49 was created, decedent intended to benefit appellant. Appellant argues that CD account 63 should not be included in the assets of the estate since the objectors to the exclusion of that account had not met their burden of proof. Appellant asserts that it is presumed that decedent intended the survivor to benefit at her death and that the character of the account should not change since evidence of intent to change was not produced. Appellant claims that the record contains sufficient material and trustworthy evidence to support the conclusion that decedent's intent for the right of survivorship did not change from July 3, 1997, to the time of her death on July 21, 1997. Appellant argues that those who opposed the right of survivorship failed to introduce any evidence of any change of decedent's intent.

Briefly, it is necessary to emphasize that no issue was raised below as to the validity of CD account 49, which was a joint and survivorship account held in the names of decedent and appellant. The signatures of both decedent and appellant were affixed to the CD receipt. There were no issues raised as to fraud, duress, undue influence, or lack of capacity on the part of decedent at the time that CD account 49 was created. Additionally, decedent took no affirmative action during the remainder of her life to impair, alter, or nullify CD account 49. Rather, the issues before us pertain to the subsequent action once CD account 49 matured on July 3, 1997.

A hearing of exceptions to an inventory, pursuant to R.C. 2115.15, is a summary proceeding conducted by the probate court to determine whether those charged with the responsibility of filing an inventory have included in the decedent's estate more or less than the decedent owned at the time of his or her death. *In re Estate of Etzensperger* (1984), 9 Ohio St.3d 19, 21, 9 OBR 112, 457 N.E.2d 1161, citing *In re Estate of Gottwald* (1956), 164 Ohio St. 405, 58 O.O. 235, 131 N.E.2d 586, paragraph one of the syllabus. Our standard of review of such a proceeding is one of abuse of

discretion. *In re Estate of Counts* (Sept. 18, 2000), 4th Dist. No. 99CA2507, 2000 WL 1572710, citing *In re Guardianship of Mauer* (1995), 108 Ohio App.3d 354, 359, 670 N.E.2d 1030.. Abuse of discretion connotes more than an error of law or judgment; rather, it implies that the trial court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 450 N.E.2d 1140.

In the case sub judice, it is necessary to note that the chronology of the closing of CD account 49 and the issuance of CD account 63 is inconsistent. Bank One documents that were submitted into evidence showed that CD account 63 was issued on July 9, 1997. However, the closing date for CD account 49 was listed as July 15, 1997. Bank One documents indicate that there was a difference between the processing dates and the effective dates. Specifically, the closing of CD account 49 was processed on July 17, 1997; however, the effective date was listed as July 15, 1997. Similarly, CD account 63 was processed on July 17, 1997; however, the effective date was listed as July 9, 1997. Nonetheless, all action took place *prior* to decedent's death. Also, it was undisputed that all funds from CD account 49 were deposited into CD account 63.

It is clear from the record that CD account 49 was a joint and survivorship account, with an automatic provision, naming decedent and appellant as joint owners. CD account 63 was a POD account, naming decedent as the sole owner and appellant as the named beneficiary. In a POD account, the owner retains sole ownership and only he may withdraw the proceeds or change the named beneficiary during his lifetime, *Trumbull Sav. & Loan Co. v. Vaccar,* 11th Dist. No. 2000–T–0101, 2001-Ohio-8810, 2001 WL 1497205, at * 2, citing *Giurbino v. Giurbino* (1993), 89 Ohio App.3d 646, 657, 626 N.E.2d 1017, whereas, a joint account with a right of survivorship belongs to all of the parties during their lifetimes. Id.

Appellant was authorized to close CD account 49, according to the terms of deposit. However, prior to her death, decedent was the sole owner of those funds because she was the sole contributor to that account. Appellant testified that the funds for the CDs came from the sale of decedent's house in which he had no claim of ownership in that house. "A joint and survivorship account belongs, *during the lifetime of all parties,* to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent." (Emphasis added.) *In re Estate of Thompson* (1981), 66 Ohio St.2d 433, 20 O.O.3d 371, 423 N.E.2d 90, paragraph one of the syllabus. *See, also, Bradford v. Heyder* (June 4, 1998), 10th Dist. No. 97APE10–1419, 1998 WL 292234.

A constructive trust can be imposed in an amount withdrawn by a co-owner of a joint and survivorship account that is in excess of his contributions. *Thompson* at 440, 20 O.O.3d 371, 423 N.E.2d 90. A co-owner of a joint and survivorship account forfeits any survivorship rights to any excess withdrawals and is liable to the decedent's estate for the amount of those withdrawals. *In re Estate of Mayer* (1995), 105 Ohio App.3d 483, 486, 664 N.E.2d 583; *see, also*, *Estate of Sammartino v. Bogard* (Sept. 16, 1999), 7th Dist. No. 97 C.A. 77, 1999 WL 771083.

In *Wright v. Bloom* (1994), 69 Ohio St.3d 596, 635 N.E.2d 31, the Supreme Court of Ohio held that, when there is a joint and survivorship account, there is a conclusive presumption that the depositor intended the balance of the account to belong to the surviving party and not the estate of the decedent. In *In re Stowers* (Nov. 9, 1995), 11th Dist. No. 95–A–0009, 1995 WL 803611, the decedent's daughter withdrew monies from joint and survivorship accounts during her mother's lifetime. There was evidence the funds were used for the benefit of the mother. The decedent was the only depositor for the accounts. This court noted that the monies in the accounts would have

been the property of the daughter upon the decedent's death. Even if the daughter returned the money to the estate, the estate would have to distribute the funds to the daughter as the survivor on the accounts. This court held that any challenge to an unauthorized withdrawal by the beneficiary on a joint and survivorship account must be made prior to the death of the depositor. After the depositor dies, all money allegedly misused by the beneficiary would be the property of the beneficiary anyway. Only challenges based upon fraud, duress, undue influence, or lack of capacity would be permitted after the death of the depositor.

Appellant testified that decedent was aware that he would become the beneficiary of the CD accounts when she died. The record demonstrates that the decedent intended to give appellant a survivorship interest in CD account 49. Appellant placed the funds into a POD account immediately prior to decedent's death. In this type of account, the depositor of the funds retains both the legal and equitable interest on the account. The beneficiary's interest does not vest until the death of the owner. *Friedrich v. Banc Ohio Natl. Bank* (1984), 14 Ohio App.3d 247, 14 OBR 276, 470 N.E.2d 467. By the terms of CD account 63, decedent remained the sole owner of the funds. Appellant conferred no benefit upon himself by depositing the funds from CD account 49 into the POD account. His mother remained in control of the funds with appellant's interest becoming vested only upon her death.

There is no evidence in the record of fraud, duress, undue influence, or lack of mental capacity on the part of the decedent. Based upon *In re Stowers,* the challenge to the unauthorized withdrawal had to be made prior to the decedent's death. No such challenge was made and is now waived. Further, because appellant did not benefit from the transfer of the funds from the CD to the POD account, the equitable result is that the intentions of the decedent were carried out and appellant retained his survivorship interest in the funds.

Appellant's two assignments of error are well taken. The judgment of the Trumbull County Court of Common Pleas, Probate Division, is reversed, and the cause is remanded for proceedings consistent with this opinion.

Judgment reversed and cause remanded.

Notes, Problems, and Questions

1. An agency or convenience account is one that is set up for a third party to have the power to draw on the account during the depositor's life only for the convenience of the depositor. The third party does not receive the balance at the depositor's death. The money left in the account is a part of the depositor's probate estate.

2. The court in *In re Totten*, 71 N.E. 748 (N.Y. 1904) permitted a person to deposit money in a savings account for the benefit of a third party. For instance, A opens up a savings account and holds the money in trust for B. A retains the right to revoke the trust by withdrawing the money at any time during his life. B is only entitled to the amount in the account when A dies. The court treated this as an inter vivos trust instead of a testamentary trust. This type of savings account is referred to as a "poor man's trust," and is recognized in almost all states.

3. After suffering a stroke, Harriet had a difficult time handling her affairs. On March 11, 2011, Harriet put her grandson, Anthony's name on her checking account at Local Bank, so that he could pay her bills. The account was funded with Harriet's Social Security checks. On November 15, 2014, Harriet executed a will stating, "I leave my house to my grandson, Anthony. The rest of my estate is to be divided between my two children, Lisa and Kim." Local Bank only had joint tenancy accounts available. On May 5, 2016, Harriet died. At the time of her death, Harriet had $71,000 in her Local Bank checking account. Who gets the $71,000?

16.5 Concurrently Owned Real Property

Persons can avoid probate by owning real property as joint tenants or tenants by the entirety. Under a joint tenancy arrangement, each owner has the right to possess the entire property. When one of the owners dies, the surviving owner becomes the sole owner of the property. The decedent's interest in the property disappears at death, so no probate is necessary because no interest passes to the survivor at death. A tenancy by the entirety is a joint tenancy arrangement that can only be entered into by persons in a marriage. A person who enters a joint tenancy arrangement cannot, during his or her lifetime, revoke the transfer and cancel the interest he or she gives to the other joint tenant. A joint tenant cannot devise his or her interest in the property by will. If a joint tenant wants someone other than the other joint tenant to receive his or her share at death, he or she must sever the joint tenancy during life. In order to sever a joint tenancy, the person must convert it to a tenancy in common. Consider the following example, A and B purchased a house as joint tenants. A would like to leave her interest in the property to C. In order to sever the joint tenancy, A transfers her interest in the property to D and has D transfer the property back to her. When D transfers the property back to A, A and B become tenants in common and A can leave the property to D in her will.

16.6 Inter Vivos Trusts

Unlike an outright bequest, a trust is a device that is used to hold property for the benefit of the settlor and/or a third party. When the settlor dies, the beneficiary still does not receive the property outright. The trust property is distributed according to the terms of the trust. The settlor is the person who establishes the trust. The person who is intended to benefit from the trust is referred to as the beneficiary of the trust. The trustee administers the trust. The settlor may serve as the trustee. If the settlor does not serve as the trustee, a trustee may be appointed by the trust instrument or by the court.

Trusts may be testamentary or inter vivos. An inter vivos trust is a trust established during the settlor's lifetime. A testamentary trust is one that is created as a part of a will. The testamentary trust is not a will substitute because it is administered by the probate court. The testamentary trust is discussed in this author's book on The Law of Trusts. An inter vivos trust may be created by a declaration of trust or a deed of trust. An inter vivos trust is created using a declaration of trust when the settlor declares that he or she holds certain property in trust. In this type of situation, the settlor is often one of the beneficiaries of the trust. For example, the settlor may create a trust by declaring, "I hold my farm in trust for the benefit of myself for life with the remainder to be held in trust for my son." When an inter vivos trust is established using a deed of trust, the settlor transfers the property to another person as trustee. For instance, the settlor states, "I leave my estate in trust to John for the benefit of myself for life with the remainder to be held in trust for my son."

Moreover, the settlor may use a deed of trust to set up a trust exclusively for the benefit of a third party. The moment the trust is created the beneficiary becomes the equitable owner of the trust property, and the trustee becomes the legal owner.

16.6.1 Creation of a Trust

In order to create a valid trust, the settlor must have the intention to do so. Courts may determine the settlor's intent by reviewing the language of the trust instrument or relevant extrinsic evidence. The second requirement the settlor must satisfy is the existence of trust property. According to courts, any item capable of ownership may serve as the corpus of a trust. For example, a trust may be named as the beneficiary of a life insurance policy. The proceeds from the policy are considered to be the corpus of the trust. A valid trust also requires beneficiaries who can keep the trustee accountable. Even though the inter vivos trust is created during the settlor's lifetime, the property is not distributed until after the settlor dies. Therefore, it may be difficult for the court to determine the testator's intent.

16.6.1.1. Intent

Frazier v. Hudson, 130 S.W.2d 809 (Ky. Ct. App. 1939)

THOMAS, Justice.

At the time of the transaction here in contest the appellee, A. M. Hudson, defendant below, resided in Henry County, Kentucky, and was then about 78 years of age. He had succeeded in accumulating considerable property, composed of both real estate and personalty. His wife had died, and he had executed deeds dividing his extensive farm among his children-who were married, and, as we gather, were living on the portions allotted to them, except his daughter, the appellant and plaintiff below, Mary Lee Frazier, nee Hudson, who was an infant 19 years of age and living with her father. In making the division of his land plaintiff was deeded 62 acres, but which did not embrace the residence, and defendant reserved a life interest in that tract for himself, plus a similar reservation in 34 acres of an adjoining allotment to another child, and upon which 34 acres was located the Hudson residence.

Some four years or more before the filing of this action, plaintiff married one Frazier, and she and her husband desired a separate residence. To accommodate them defendant purchased another 62 acres and deeded it outright to his daughter, but did not alter in any manner the disposition of his home place that he had reserved for himself during his life. So that, the total amount of land given to plaintiff by defendant was and is 62 acres unencumbered by any prior estate, and 62 acres encumbered by defendant's life estate-the land being worth, according to the undisputed testimony, at least $150 per acre-it being, in the language of defendant, "as good land as a crow ever flew over".

Among the personal property owned by defendant was a number of U. S. Liberty Bonds of $1000 each, and on March 13, 1926, he went to the bank in which the bonds were deposited in a safety box and after procuring them he, by writing on the back thereof, assigned one of them to each of his children. The assignment of the one here in contest says: "For value received I assign to Mary Lee

Hudson the within registered bond of the United States and hereby authorize the transfer thereof on the books of the United States Treasury Department." Defendant then signed it, as he did other bonds to his other children, and acknowledged it before the assistant cashier of the bank. He then put the bonds back in his box and never informed any one of what he had done, except the assistant cashier. The bonds were redeemable by the government after 1933, but were not due until 1938. A year or more following 1933 defendant received notice that the government desired to redeem his bonds and he, for the first time, notified his children of the endorsements that he had made thereon and requested a re-transfer of them to him so that they might be redeemed, and with the intention as he testified without objection, to re-invest the proceeds in similar bonds.

All of the children except plaintiff readily consented thereto, none of them, except her, asserting any interest in the particular bond that had been so transferred to them. She, however, declined, and later filed this action against her father in the Henry circuit court, seeking to recover possession of the bond that had been so transferred to her, with damages from the date of its transfer, which she fixed at the rate of 4½ per centum annually, which was the rate of interest that the bond drew, and which he collected after the endorsement. She did not ask for or obtain a writ of claim and delivery at the beginning of the action. In her petition she claimed the property as a gift inter vivos, but she appears to have later abandoned that and to base her claim of title under the doctrine of an express declaratory trust, emanating from the written declaration of her father as contained in the writing on the back of the bond. Evidencing such abandonment we insert some excerpts from brief of plaintiff's counsel, made by them in disposing of the argument of defendant's counsel that the transaction in controversy did not constitute an inter vivos gift. They say: "The obvious reasoning upon which those cases are to be distinguished from the case at bar is that in those cases there was no thought of anything other than an inter vivos gift. The supposed donors had obviously intended to make an inter vivos gift, and nothing more. Since the elements required to sustain a gift were lacking, the 'gifts' failed. In the instant case, however, there was no contention that this transaction involved an inter vivos gift, but on the contrary, that it does not."

Later in their brief they say this: "In the instant case, the evidence certainly does not tend to establish an inter vivos gift. There was no delivery; no passing of the dividends; no surrender of present custody. Yet, there was a formal written declaration, made by the appellee before an official, setting out that appellee transferred the bond to his then infant daughter."

Then follows an argument that, though the transaction was ineffective as an inter vivos gift, yet it was sufficient to create an enforceable declaration of trust, which, if true, has the same effect as if the original contention of an inter vivos gift had prevailed.

Defendant's answer to the petition denied all material averments contained therein, except the assignment, and he denied all intention of making thereby any sort of present transfer of title to the bond from himself to his daughter. On the contrary, he asserted that his only intention was to fix it so that his daughter and other children would receive the respective bonds so transferred at the time of his death *if* he still owned them at that time, and had not consumed them in his necessary living expenses, or otherwise. No objection was made to that testimony as given by him, and it corresponds with his conduct thereafter in retaining possession of the bonds and collecting the interest thereon for his own use, and in not informing the children of what he had done. However, it should be said that plaintiff testified that her father did inform her at or following the transfer made by him, but her testimony on that point is more or less unconvincing, and it was necessarily discarded by the court, who believed the testimony of the father rather than that of the daughter.

On final submission after evidence taken the court dismissed plaintiff's petition, to reverse which she prosecutes this appeal. In view of the express admissions of counsel supra, we will dismiss without comment the original claim of plaintiff that she obtained title to the bond in question through an inter vivos gift from her father, and will treat the case from now on as one based upon the claim of a valid and enforceable declaration of trust.

One of the chief elements essential to the creation of such a trust is the manifestation of an intent on the part of the alleged donor or trustee to create it in favor of the alleged beneficiary in and to the particular property involved. In the Restatement of the Law of Trusts, Volume I, page 73, section 23, it is said: "In order to create a trust the settlor must properly manifest an intention to create such a relationship as constitutes a trust as defined in section (2). *** On the other hand, no trust is created unless the settlor manifests an intention to impose enforceable duties (see section 25). So also, a manifestation if intention to create a trust inter vivos at some time subsequent to the time of the manifestation does not create a trust (see section 26). So also, a manifestation by the owner of property of an intention to transfer the property to another person as an outright gift to him is not a manifestation of an intention to create a trust (see section 31)."

Later on in the same volume, on page 100, section 31, in discussing the effect of the failure of an intention to make an inter vivos gift, the text says: "If the owner manifests an intention to give the beneficial interest in the property to another by employing one of these three methods, and the disposition is ineffective because of his failure to comply with the requirements for an effective disposition by that method, the disposition will not be upheld merely because it would have been effective if he had manifested an intention to employ one of the other methods. An ineffective gift, therefore, will not be upheld as a declaration of trust."

In 96 A.L.R. page 383, there is an annotation upon the subject of "May unconsummated intention to make a gift of personal property be made effective as a voluntary trust?" It begins with this statement by the learned annotator: "It has been said that the only important difference between a gift and a voluntary trust is that in the case of a gift the thing itself passes to the donee, while in the case of a trust the actual, beneficial, or equitable title passes to the cestui que trust, while the legal title is transferred to a third person, or is retained by the person creating it, to hold for the purpose of the trust. Possession and control in such a case remain with the trustee, but a gift of the equitable or beneficial title *must be as complete* and effectual in the case of a trust as is the gift of the thing itself in a gift inter vivos. *There must be an executed gift of the equitable title*, without any reference to its taking effect at some future time. *Norway Savings Bank v. Merriam* (1895) 88 Me. 146, 33 A. 840. 'A trust is created only if the settlor *manifests an intention* to create a trust'. Section 23, Tentative Draft of Restatement of the Law of Trusts. The rule is well established that equity will not give effect to an imperfect gift by enforcing it as a trust, *merely because of the imperfection*, since to do so would be to give effect to an intention never contemplated by the maker." (Our italics.)

In discussing the element of *intent* in the creation of the character of trust here sought to be enforced the writer of the notes to the case of *Marshall's Adm'r v. Marshall*, 156 Ky. 20, 160 S.W. 775, 51 L.R.A., N.S.-annotation on page 1212-says (quoting from the case of *Northrip v. Burge*, 255 Mo. 641, 164 S.W. 584): "The question in this case is not whether the preponderance of the competent evidence shows that the alleged trust was executed, but is whether that fact is established by evidence so clear, certain, complete, and convincing as to remove all reasonable doubt in our minds on the subject, for this is the rule when parol or verbal trusts are subjects of investigation."

There is nothing in the Marshall case, nor any other case rendered by this court, either preceding or following it, contrary to the requirement of necessary intention of the settlor in creating such a trust. As we have seen from the excerpt in the annotation taken from 96 A.L.R. 384, "a gift of the equitable or beneficial title must be as complete and effectual in the case of a trust as is the gift of the thing itself in a gift inter vivos. There must be an executed gift of the equitable title", etc. It is true that we said in the case of *Ginn's Adm'x v. Ginn's Adm'r*, 236 Ky. 217, 32 S.W.2d 971, 972, that "an imperfect gift may be enforced as a trust when it possesses all the elements thereof [trust] and the proof is clear and undoubted". But no case from this court has gone beyond that expression. They are too numerous to take up and consider seriatim, but they embrace those cited and relied on by counsel for plaintiff. Some domestic cases supporting (expressly or by necessary implication) the above quoted texts are *Schauberger v. Tafel*, Ex'r, 202 Ky. 9, 259 S.W. 953,; *Cincinnati Finance Co. v. Atkinson's Adm'r*, 235 Ky. 582, 31 S.W.2d 890; *Biehl v. Biehl's Adm'x*, 263 Ky. 710, 93 S.W.2d 836.

It being necessary, therefore, in order to create an enforceable declaration of trust that the *intent* of the donor to do so must clearly appear (the same as a similar intention to make an inter vivos gift of the legal title should likewise appear) our task is reduced to the inquiry, whether or not defendant-the father and donor in this case-intended to make a declaration of trust in favor of each of his children when he endorsed his bonds in the manner above described, followed by conduct totally inconsistent with such an intention? We are forced to the conclusion, in view of the authorities supra and in the light of fairness and justice, that it was not the intention of defendant in this case to transfer either the legal or the equitable title to his endorsed bonds to his children and to divest himself of all interest therein at the time he so endorsed them. All authorities hold that trusts created in the manner here contended for should be supported by clear and convincing proof, and which means that every element necessary to its creation should be so established. Otherwise the door would be widely opened whereby one without any intention to part with his property would lose it through an effort to prepare against future contingencies in his laudable desire to provide for those dependent upon him. Both the testimony of defendant (which was admitted without objection), as well as his conduct, refute any such intention on his part, and, following the law as it has been so declared, we must hold that the court committed no error in dismissing plaintiff's petition.

Wherefore, the judgment is affirmed.

Bothe v. Dennie, 324 A.2d 784 (Del. 1974)

TAYLOR, J.

Plaintiff seeks to recover certain bonds which were referred to in an instrument which was delivered to plaintiff on December 16, 1971 by D. Clinton D. Todd (deceased). D. Clinton D. Todd died on March 25, 1972 and his last will and testament dated November 12, 1971 was duly probated, pursuant to which Lois E. Dennie (defendant) was appointed executrix of his estate. Defendant is sued in her capacity as executrix and also as an individual, being the residuary legatee under the will of deceased. Since the distinction in capacity is not of significance to this Opinion, defendant will be treated as one person. Defendant has moved to dismiss the complaint on the basis that the transaction between plaintiff and deceased upon which plaintiff bases his claim was neither a valid gift made during the lifetime of deceased nor a valid testamentary disposition. Both sides have submitted evidentiary material. Pursuant to Civil Rule 12(b), the Court will treat this as a motion for summary judgment. Although the formalities of the Rules have not followed in authenticating the

evidentiary material which has been attached to the briefs, it has been accepted by both sides as being true, and hence, the parties are held to have waived formal authentication.

The facts pertinent to this case as asserted by plaintiff are as follows:

(1) On October 29, 1971, deceased changed the name of the registrants for his safe deposit box at the Delaware Trust Company branch to the name of deceased and of plaintiff. The safe deposit box agreement with the bank provided that each registrant shall have the same rights as a sole lessee. It further provided that in the event of death of one of the registrants his rights would succeed to his personal representative, but that the separate right of access of the other registrant would not be affected or impaired by death. Contemporaneously with the naming of plaintiff as a registrant on the safe deposit box, deceased gave plaintiff a key to the garage of his house, pointing out that the door between the garage and house was kept unlocked. Deceased further showed plaintiff where he kept the key to the safe deposit box in a drawer in his house.

(2) On November 12, 1971, deceased executed the last will and testament which was probated alter his death.

(3) On December 16, 1971, deceased delivered to plaintiff an envelope addressed to plaintiff with the statement 'to be opened immediately after my death' and signed by deceased. The envelope contained an instrument signed by deceased, but unwitnessed. The instrument stated that in the safe deposit box were certain bearer bonds in designated amounts totaling $120,000 in face value. After stating an intention not to have these bonds listed as assets of the estate, in order to avoid payment of Federal and State 'inheritance' taxes, the instrument directed: 'Since you are the only one who will have access to my sale deposit box, immediately after my death please remove all of these bonds and treasury notes and distribute them' in the manner designated in the instrument. The instrument concluded by saying 'in addition to the above I made out a will leaving various people the balance (sic) of my estate consisting of a house and content, stocks, bonds, savings certificates, and bank accounts'.

(4) On January 17, 1972, deceased suffered a heart attack.

(5) On January 18, 1972, deceased called plaintiff asking him to locate plaintiff's car and to bring to deceased certain papers which were at deceased's home. Plaintiff did this on January 19, 1972.

(6) On January 21, 1972 plaintiff entered the garage to correct on oil spill which had occurred in the garage, and attempted to enter the house. He found that the door had been secured with a chain.

(7) On March 22, 1972, deceased died.

(8) Shortly after deceased's death, defendant was appointed executrix of the estate of deceased, and on or about April 1, 1972, she obtained possession of all of the contents of the safe deposit box including the bonds referred to in the instrument dated December 16, 1971.

(9) After the death of deceased, plaintiff opened the envelope which deceased had given to him, and for the first time learned its contents. Plaintiff was unable to obtain access to the safe deposit box because he did not have the key. He subsequently demanded the bonds from defendant and was refused.

(10) The bonds still remain in the custody of defendant as executrix.

Defendant contends that the transaction between deceased and plaintiff was not a valid testamentary act because it does not satisfy the requirements of 12 Delaware Code s 102. Plaintiff does not contend otherwise.

Plaintiff supports the validity of the transaction on the ground that it was either an executed gift or an inter vivos trust. Assuming requisite mental capacity, the owner of property may dispose of it during his lifetime by gift or by inter vivos trust. *Hill v. Baker*, Del.Super., 9 Terry 305, 102 A.2d 923 (1953). Because of the possibility of abuse which can result from the transfer of assets without consideration, certain formal requirements have been developed in order to effect a valid transfer by gift. If the requirements are not met, the transaction is not a valid gift. In order for a gift to be effective, the owner must have intended to make a gift and he must have made actual or constructive delivery of the subject matter of the gift. *Ibid*; *Wilmington Trust Co. v. General Motors Corp.*, Del.Supr., 29 Del. 572, 51 A.2d 584 (1947).

The delivery of the subject matter of the gift need not be simultaneous with the words by which the donor expresses his intent to make the gift. 38 Am.Jur.2d 823, Gifts s 21; 38 C.J.S. Gifts s 27, p. 806. However, delivery must occur during the donor's lifetime. *Highfield v. Equitable Trust Co.*, Del.Super., 4 W.W.Harr. 500, 155 A. 724 (1931).

A donor may take irrevocable steps to transfer ownership to a donee even though he continues to hold the documentary proof of ownership. *Hill v. Baker*, *supra*. Thus, where the donor has a stock certificate issued in the name of the donee and takes no action inconsistent with donee's ownership of the stock, the gift will be considered effective even though the certificate is not delivered to the donee or is retained by the donor. *Wilmington Trust Co. v. General Motors Corporation*, *supra*.

It must appear that during his lifetime the donor relinquished in favor of the donee all present and future dominion and control over the gift property. 38 C.J.S. Gifts s 20, p. 799. Any further possession and control by the donor must be in recognition of the right of the donee, i.e., as agent or trustee or custodian for the donee. 38 C.J.S. Gifts s 26, p. 806. If the donor retains dominion and control of the property during his lifetime, so that the gift would take effect only upon the death of the donor, it must comply with the testamentary law if it is to be valid. 38 C.J.S. Gifts s 42, p. 821.

The evidence is that the deceased at no time considered that he was turning over the bonds to plaintiff. Although he made plaintiff a record co-owner of the safe deposit box, he retained the key to the box during his lifetime. The safe deposit box rental agreement did not provide for a joint tenancy or right of survivorship. With respect to the bonds, these were never physically delivered to plaintiff nor were they pointed out or set apart as belonging to plaintiff either in his individual or trust capacity. Deceased treated the bonds as being his own by clipping interest coupons from them. The instrument which deceased gave to plaintiff shows that deceased did not consider that he had turned over the bonds to plaintiff. The reference is to bonds 'in my safe deposit box'. The direction deals with actions to be taken after death of the deceased. Deceased merely directed that the bonds be removed 'immediately after my death', and recognized that since they were unregistered 'no one can claim ownership'. Because of this fact, the deceased directed that the bonds not be listed as assets of his estate 'in order to avoid a large payment of State and Federal inheritance taxes'. All of these declarations point to the deceased's intention that the bonds would remain his until death and

that immediately thereafter the trust would become applicable. Nothing points to a transfer of an interest in the bonds away from deceased or to plaintiff during deceased's lifetime or an intention to do so.

Plaintiff contends that if the actions of deceased fail to qualify as a gift, the transaction can be sustained as an inter vivos trust. It is true that a donor can during his lifetime create an inter vivos trust under which he can retain certain rights, such as income rights, during his lifetime. *Bodley v. Jones*, Del.Supr., 27 Del.Ch. 273, 32 A.2d 436 (1943); *Highfield v. Equitable Trust Co.*, *supra*; *Robson v. Robson's Adm.*, Del.Ch., 3 Del.Ch. 51, 62 (1866). However, in order to create such a trust, where the creation of the trust is without legal consideration, the formal requirements for a valid gift must be found. *Robson v. Robson's Adm., supra*. The donor must have divested himself of some interest which the formerly had in the property, and the divestiture must have been absolute at the time of creation of the trust. *Ibid.* Moreover, it must clearly appear that this result was intended by the donor. *Bodley v. Jones, supra*.

The facts in *Robson v. Robson's Adm., supra*, bear striking resemblance to the present case. There, the donor had delivered bonds to a third person for delivery to the donee after the donor's death as 'a free gift to him at my decease'. Donor collected the interest on the bonds throughout his lifetime. The Chancellor held that the actions of the donor did not create a valid inter vivos trust.

In *Bodley v. Jones, supra*, the donor had given to the donee an instrument which directed that his executor deliver to donee a certain bond and mortgage. The Delaware Supreme Court held that the instrument was not a present transfer of title to the bond and mortgage, and hence was not a valid gift or inter vivos trust.

The facts here also fail to qualify as an inter vivos trust.

A related type of transaction which deserves comment is joint tenancy.

In order to create a joint tenancy with survivorship, language specifically showing an intent to create such relationship must have been used. *In re Estate of McCracken*, Del.Ch., 219 A.2d 908 (1966); 25 Del.C. s 701. A transaction will not be given the effect of a joint tenancy with right of survivorship unless clear and definite language is used from which the conclusion is without reasonable dispute that such relationship was intended. *Short v. Wilby*, 31 DelCh. 49, 64 A.2d 36 (1949). Even the presence of appropriate language will not control if it appears that the donor did not intend such result. *Rauhut v. Reinhart*, Del. Orph., 22 Del.Ch. 431, 180 A. 913 (1935).

The Delaware Supreme Court has held that a gift may be effected by the creation of a joint tenancy with right of survivorship with respect to a bank account by having both parties execute the appropriate instrument which clearly provides for such relationship. *Walsh v. Bailey*, Del.Supr., 197 A.2d 331 (1964). In *Walsh*, the instrument specifically provided that a joint tenancy was created and that during the lifetime of the parties each party could draw upon the account, and it further provided that withdrawal of the funds by the survivor would be binding upon the heirs, next of kin, legatees, assigns and personal representatives of each party. Upon these facts, the Supreme Court concluded that upon execution of the instrument, the donor perfected a gift of a joint tenancy with survivorship.

In contrast to the above is the decision of the Chancellor in *Farmers Bank of State of Delaware v.*

Howard, Del.Ch., 258 A.2d 299 (1969), aff'd *Howard v. Farmers Bank*, Del.Supr., 268 A.2d 870 (1970). In *Howard*, the donor executed the contractual paper, but the donee did not. The donee was not given a right of withdrawal during the lifetime of the donor. The Chancellor held that in order to create a valid joint tenancy with right of survivorship there must be an equal right in all of the tenants to share in the enjoyment during their lives, that is, there must be a unity of possession, along with unity of interest, time and title, as essential elements of such ownership. Thus, the Chancellor held that the donee was not invested with such dominion and control of the subject matter as to be consistent with joint ownership because she had neither possession nor enjoyment thereof during the lifetime of the donor.

The actions of deceased did not by expressed intent or by formal word establish a joint tenancy with right of survivorship.

Plaintiff relies upon *Innes v. Potter*, 130 Minn. 320, 153 N.W. 604 (1915) in support of the validity of this transaction. In *Innes,* the donor endorsed stock certificates for transfer to his daughter's name, wrote his daughter that he had transferred the stock to her, and delivered an envelope containing the certificates to a third party for delivery to the daughter upon the death of the donor. The gift was upheld because the subject of the gift had been delivered to a third person for delivery to the donee after donor's death, the donor had parted with all control over it, he had not retained a right to recall it, and he intended that action to be a final disposition of the property. The test, according to Innes, is 'whether the maker intended the instrument to have no effect until after the maker's death, or whether he intended to transfer some present interest'.

The Court concludes that deceased did not make a valid gift or create a valid inter vivos trust or joint tenancy. This conclusion is based upon the legal requirements applicable to those concepts. The Court recognizes that the persons mentioned in the instrument which deceased delivered to plaintiff had such a relationship to deceased that they were not unlikely beneficiaries of deceased's bounty. Yet, deceased chose to exercise his beneficence in two different ways almost contemporaneously. In the case of the will, he satisfied the legal requirements. His actions here failed to meet the legal requirements. Each transaction involved different beneficiaries. Apparently, deceased was more concerned here with tax avoidance than with a valid distribution to the named beneficiaries. The method which deceased chose failed to achieve either objective.

Plaintiff contends that he should have an opportunity to go to trial. It appears that plaintiff could show no more at trial than the facts which I have stated above. These are insufficient to entitle plaintiff to recover the bonds. The Court finds no issue of material fact which would support plaintiff's position. *Cf. Standard Acc. Ins. Co. v. Ponsell's Drug Stores, Inc.* Del.Supr., 202 A.2d 271 (1964).

Accordingly, summary judgment is in favor of defendant.

It is so ordered.

Notes and Problems

1. Sabrina executed an instrument stating, "I leave $30,000 to my sister, Wilma, in hopes that she takes care of my nephew, Paul." Did Sabrina intend to create a trust?

2. Arthur placed $100,000 worth of savings bonds in a safe deposit box. A week later, he told his attorney, "I put some money in my safe deposit box at City Credit Union. I would like for you to manage the money for my grandson, Michael, after I die." Did Arthur intend to create a trust?

3. Liza executed an instrument stating, "I leave $75,000 to my friend, Lillie, in trust for my brother Wayne, as long as Wayne pays me the $10,000 that he owes me." Did Liza intend to create a trust?

4. Joshua executed an instrument stating, "I leave my business to National Bank, in trust for my daughter, Betty, as long as Berry pays Derrick the $4,000 that she borrowed from him last year." Did Joshua intend to create a trust?

5. Inter vivos trusts are not considered testamentary even though the settlor may reserve a beneficial life interest, the power to revoke or modify, and the power to control the trustee's administration of the trust.

16.6.1.2. Property

A trust is not valid unless it contains property. One exception to that rule is the pour-over will scenario. Consider the following explanation. The settlor establishes an inter vivos trust, and does not fund it. The settlor executes a will at the same time the trust is created or shortly thereafter. In the will, the testator who is also the settlor of the inter vivos trust, indicates that a certain portion or all of his or her estate is to pour over from the will into the trust. In essence, the trust is incorporated by reference into the will.

In re Estate of McDowell, 781 N.W.2d 568 (Iowa Ct.App. 2010)

DOYLE, J.

Evelyn Wanders, trustee of the Florence M. McDowell Trust (Trust), appeals from an order of the district court granting the co-executors of the Estate of Florence M. McDowell authority to sell an eighty-acre farm owned by decedent at the time of her death. We conclude the farm should be distributed to the Trust under the pour-over provision of decedent's will, and therefore reverse the ruling of the district court.

I. Background Facts and Proceedings.

The decedent, Florence M. McDowell, died a resident of Poweshiek County, Iowa, on June 1, 2006. She had been a resident of Cottage Grove, Oregon, prior to returning to Iowa in 2000. She was survived by three daughters: Evelyn Wanders of Montezuma, Iowa; Mary Lee Seals of Cottage Grove, Oregon; and Martha Ann Rourke of Vancouver, Washington. At the time of her death, Florence owned an eighty-acre Poweshiek County farm. The farm was not Florence's homestead.

A "Revocable Living Trust Agreement" was executed by Florence on May 22, 1990, establishing the Trust. Article II of the Trust agreement states, in part, "I have transferred and delivered to Trustee the property described on Schedule 'A.' " Schedule "A," attached to the Trust agreement, lists

certain property and includes a legal description of the farm. Assets were transferred to the Trust during Florence's life; inexplicably, however, the farm was not conveyed to the Trust, and title was held by Florence at the time of her death.

The Trust agreement was amended several times during Florence's lifetime. A 1999 amendment names "Florence ... Evelyn as Co-Trustees." The Trust provides that upon Florence's death certain trust assets be distributed to specific persons and that the remaining Trust estate be distributed in equal shares to Florence's daughters, Martha, Evelyn, and Mary. The Trust also directs the trustee to pay, upon Florence's death, certain obligations including expenses of last illness, funeral, and final interment, costs and expenses to administer and settle the estate, and death taxes.

On the same day the Trust was created, Florence executed a will with a pour-over provision that devised the residue of her estate to the trustees of the Trust. The will names Martha and Mary as personal representatives of the estate. The will also directs the personal representatives to pay from the estate all expenses of Florence's last illness, funerals, and final interment, and expenses for administration of the estate.

The will was admitted to probate in August 2007, and Martha and Mary were issued letters of appointment as co-executors of the estate. The farm was listed on probate inventory schedule A, "Real Estate." In February 2009, the co-executors filed a petition for authority to sell the farm pursuant to Iowa Code section 633.386 (2007). Evelyn, as trustee of the Trust, filed a resistance asserting it was not in the best interests of the estate to sell the farm. She requested that the court deny the co-executors' request to sell the farm and requested an order that the co-executors distribute all the assets of the estate pursuant to the will. In their brief and argument filed in the district court, the co-executors stated:

> In the present case, the three daughters of the decedent are all up in years and the two daughters who are Co-Executors of the estate live on the West coast. The fact this is an eighty-acre parcel of real estate, which, with each of them owning a one-third interest, will not produce sufficient income for any of them to make it worthwhile to retain same. It seems obvious that the practical thing to do is sell said real estate in the estate to make distribution and in the best interests of the estate.
>
> If this real estate is not sold and if it passes into the revocable trust of the decedent, it is important for the Court to know that Evelyn Wanders will be managing same as Trustee and it is also important for the Court to know that her son, Kenneth Wanders, desires to purchase the real estate, which would not be in the best interests of Mary Lee Seals and Martha Ann Rourke.

Evelyn does not take issue with the facts set forth in the co-executors' brief.

A hearing was held on the matter. In its March 2, 2009 ruling, the court found the co-executors met their burden of proof under Iowa Code section 633.386(1)(c) and concluded "that it would be in the best interests of the estate for the real estate in question to be sold." The court ordered the farm to be sold at public auction no later than sixty days from the date of the order. Evelyn, as trustee, filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2) requesting the court to reconsider its decision, or, in the alternative, enter findings of fact and conclusions of law that set forth more fully the rationale for the court's decision. On March 16, 2009, the court entered its ruling and order adding the following language to its previous ruling:

> The co-executors and the trustee do not and cannot get along with one another. One co-executor resides in the state of Washington and the other co-executor resides in the state of Oregon. It is impracticable to oversee an 80-acre farm in the state of Iowa. Accordingly, it is in the best interests of the estate for the property to be sold.

Evelyn, as trustee of the Trust, appeals.

II. Scope and Standards of Review.

The parties agree on our standard of review. Iowa Code section 633.33 provides, with certain exceptions, matters triable in probate shall be tried in equity. Consequently, our review is review de novo. Iowa R.App. P. 6.907. We give weight to the district court's findings of fact, but are not bound by them. Iowa R. App. P. 904(3)(*g*).

III. Discussion.

Florence's 1990 will, drafted and executed in the State of Oregon, contains a pour-over provision. A pour-over provision devises part of testator's estate to an already existing inter vivos trust without repeating the terms of the trust in the will. 79 Am. Jur. 2d *Wills* § 196, at 403 (2002). Such a provision is authorized under Iowa and Oregon statutes, both adapted from the Uniform Testamentary Additions to Trusts Act (1960) ("UTATA"). *See* UTATA, 8B U.L.A. 367 (2001).

The will devises "all the rest, residue and remainder" of Florence's estate to the Trust. The farm, not having been specifically bequeathed, is therefore a part of the "rest, residue and remainder" of Florence's estate. *See In re Estate of Wagner,* 507 N.W.2d 711, 714 (Iowa Ct.App. 1993).Evelyn argues the co-executors' "sole duty with respect to the farm ground is to turn it over to the trust." Under the circumstances, we agree.

To be sure, a decedent's property is subject to possession by the decedent's personal representative during probate proceedings for purposes of administration, sale, or other disposition under provisions of law. Iowa Code § 633.350; *DeLong v. Scott*, 217 N.W.2d 635, 637 (Iowa 1974). And as a part of the administration of the estate, a decedent's property may be sold for certain purposes. Iowa Code § 633.386. It is undisputed that sale of the farm was not necessary for the payment of debts and charges against the estate or for payment of costs of the administration of the estate. The parties agree that the only legal authority for selling the farm in question is found under section 633.386 (1)(c), which provides that any property belonging to the decedent, except exempt personal property and the homestead, may be sold by the personal representative of the estate for "[a]ny other purpose in the best interests of the estate." Although this section provides legal authority for a personal representative to sell estate property under certain circumstances, for the reasons set forth below, it is inapplicable to the case before us.

Before determining whether it is in the best interests of the estate to sell the farm under section 633.386, we must necessarily answer the antecedent question of whether the co-executors have a duty under the pour-over provision of the will to distribute the farm to the Trust. For if the co-executors have a duty to distribute the farm to the Trust, the question of whether it is "in the best interests of the estate" to sell the farm is moot.

Iowa Code section 633.275 states in part:

> Unless the testator's will provides otherwise, the property so devised or bequeathed [to the trust] shall not be deemed to be held under a testamentary trust for the testator, *but shall become a part of the trust to which it is given* and *shall be administered and disposed of in accordance with the instrument* or will *setting forth the terms of the trust....*

(Emphasis added.) The word "shall" imposes a duty. Iowa Code § 4.4 (30)(a). It therefore seems clear, under the statute, that the farm "shall" become a part of the Trust.

Comments from various treatises confirm this conclusion. Concerning a pour-over provision leaving the estate's residue to a living trust, "it is held that the residue is added to the property of the living trust." George Gleason Bogert & George Taylor Bogert, *Handbook of the Law of Trusts* § 22, at 60 (West 5th ed. 1973). Additionally:

> Under [the] UTATA, unless the will provides otherwise, the bequest does not constitute a testamentary trust but is instead part of the trust to which it passes, and the trustee is to administer and dispose of it in accordance with the provisions of the trust instrument....

1 Austin W. Scott et al., *Scott and Ascher on Trusts* § 7.1.3, at 352 (Aspen 5th ed. 2006). Further:

> Under the [UTATA,] the property is to be administered pursuant to the living trust ... unless the testator provides that it is to be administered under a separate testamentary trust in his will. For this reason there will be no supervision of the administration of the trust by the probate court supervising administration of the testator's estate.

George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees* § 107, at 302 (West 2d ed. rev. 1984). The Commissioners' Prefatory Note to the UTATA also provides some guidance, explaining, in part, "[t]he pour-over trust has the further advantage that a large part of the estate thus transferred to a trust *is not thereafter involved in the probate proceedings.*" UTATA, 8B U.L.A. at 368 (emphasis added). Some advantages to a pour-over provision include that it (1) permits unified administration of the trust and probate properties, (2) avoids the continued necessity for court supervision and for accounting required of a testamentary trustee, (3) allows a greater flexibility in the disposition of the property, and (4) takes the property thus transferred out of the probate proceedings. William A. Wells, Note, *Trusts-Pour-Over from a Will to a Inter Vivos Trust,* 8 Washburn L.J. 81, 81 (1968). Thus, a pour-over provision envisions the pouring over of the residuary to a trust, not its retention by the estate's personal representative with disposal at his or her discretion.

Additionally and more importantly, distribution of the farm to the Trust is consistent with the decedent's intent. Article IV of the will is clear and unequivocal. The residue of Florence's estate was devised to the Trust "to be added to and become a part and be administered and disposed of in accordance with the terms ... of [the] trust." Further, the article provides that if for any reason the distribution of the residue is ineffective, then the residue is to be given to the trustee to be held in a testamentary trust "in accordance with the terms ... of the trust described above." Although this is

not a will construction case, we are mindful of the well-settled law that the testator's intent is the polestar and if expressed must prevail. *In re Estate of Lamp*, 172 N.W.2d 254, 257 (Iowa 1969). The will is not ambiguous or conflicting, nor is the testator's intent uncertain. There can be no doubt that Florence's intent was to have the residue of her estate (including the farm) distributed to the Trust and administered and distributed according to the terms of the Trust.

So, barring any legal requirement mandating retention of the residuary in the estate, and none is presented here, the farm should be distributed to the Trust. Once the farm is distributed to the Trust, the co-executors lose the authority to sell or administer the asset.

There is a dearth of law on the issue presented, but the parties direct us to the case of *In re Scheib Trust*, 457 N.W.2d 4 (Iowa Ct.App. 1990). In *In re Scheib Trust*, Earl and Hattie Scheib created an inter vivos trust in 1975 giving the trustees the power to sell after the trustors' deaths the two tracts of farmland which formed the basis for the trust, but only if each of the Scheibs' surviving children consented. *Scheib Trust*, 457 N.W.2d at 5-6. Hattie died in 1981, and her will devised all her real estate, except her home, to two sons as trustees. *Id.* at 6.] Her will was silent as to any power to sell any of the farmland. *Id.* Earl died in 1986, and his will was almost identical to Hattie's in regard to the creation of a trust, but it did provide that the trustees could sell real estate if all his surviving children consented. *Id.* All but one of the Scheib children consented to sale of the farmland. *Id.* Since one child did not consent to the sale of the farmland, this court concluded the sales of the farm property in the Scheib Trust were invalid and must be considered invalid. *Id.* at 9.

Turning to the farmland that stemmed from Hattie's and Earl's estates, the court noted the applications to sell the real estate were made by the personal representatives as executors. *Id.* at 9. There was no indication that the trusts under the Scheib wills were ever activated. *Id.*

On this court's review, we concluded:

> The trial court, after considering the merits of the objectors' objection, concluded that it was in the best interest of the estate that the farm land in question be sold. Although our review is de novo, we see no reason to disturb the finding.

Id. at 10. Further, this court reviewed the proceedings concerning the sale of the land and saw no reason to set aside those sales. *Id.* Accordingly, the court affirmed the trial court on the issue and approved the sale of the farmland from the estates of Earl and Hattie. *Id.*

In re Scheib Trust is distinguishable from the case at hand. The farmland that stemmed from Hattie's and Earl's estates was subject to testamentary trusts under Hattie's and Earl's wills. Those trusts had never been "activated,". i.e., they had never been funded. *Id.* at 9. The farmland was not the subject of a pour-over provision devising the land to an inter vivos trust. Therefore, no question was raised or addressed as to an executor's duty to distribute residuary under a pour-over provision to an inter vivos trust. *In re Scheib* concerns the application of Iowa Code section 633.386 (1)(c) and provides no authority for the co-executors to sell the farm, as we have held this section is inapplicable to the circumstances presented here. In any case, the potential difficulties in administering the trust due to the beneficiaries' places of residence and personal conflict have little bearing in determining the best interests of the estate under section 633.386 (1)(c).

IV. Conclusion.

The residuary of Florence's estate should be distributed to the Trust. The district court erred in authorizing the co-executors to sell the farm. Accordingly, we reverse the district court's ruling, and we remand for further proceedings consistent with this opinion.

Reversed and Remanded.

16.6.2 Modification/Revocation of a Trust

An inter vivos trust can be revocable or irrevocable. A revocable trust is similar to a will because it does not become final until the settlor's death. Therefore, the settlor can modify or terminate the trust during his lifetime. Initially, courts presumed that a trust was revocable unless the settlor indicated to the contrary. Currently, there is a rebuttal presumption that the inter vivos trust is irrevocable; therefore, it cannot be changed by the settlor. In order to be able to revoke a revocable trust, the settlor must reserve the right to do so. All inter vivos trusts become irrevocable when the settlor's dies.

Chiles v. Chiles, 242 S.E.2d 426 (S.C. 1978)

RHODES, Justice:

This is an action instituted by the settlor of an irrevocable inter vivos trust to modify the trust instrument by extinguishing the interests of certain beneficiaries. The lower court granted the modification and only Walter Hale Chiles, III, a minor under the age of fourteen and a beneficiary under the trust, appeals contending the lower court erred in extinguishing his interest in the trust. We agree and reverse only that portion of the lower court's order which extinguishes his interest.

The trust instrument in question was executed by the respondent, grandfather of the appellant, as settlor with the Baptist Foundation of South Carolina, Incorporated, designated trustee. The trust was funded with securities which, at the time of the transfer in trust, had a value in excess of two million dollars. By the terms of the trust, the settlor is to receive distributions during his lifetime and, upon his death, distributions are to be made to specified beneficiaries during their lifetime. The appellant is one of these latter beneficiaries.

Upon termination of the intermediate beneficial interests, the trust provides that "all corpus shall be used as a permanent endowment and the income derived from this entire trust (after special benefits have been paid according to the terms of this trust) shall be, at least annually, distributed to and paid over to the Lottie Moon Christmas Offering of the Southern Baptist Convention."

The document specifically provides that the trust is irrevocable.

According to the respondent's petition filed in the lower court, his purpose in establishing the trust was to provide a charitable gift to the Lottie Moon Christmas Offering. To effectuate this purpose, the respondent seeks to extinguish the interests of the intermediate beneficiaries because, according to his allegations, he "has been advised by the Internal Revenue Service that the Trust Agreement as

presently constituted does not effect the purpose of Petitioner as far as being a charitable contribution in that there will be no recognizable gift to the Lottie Moon Christmas Offering of the Southern Baptist Convention upon the death of the last of the non-charitable contingent beneficiaries."

Service was had upon all of the numerous intermediate beneficiaries and the Attorney General of South Carolina. Only the Attorney General and the appellant, through his duly appointed Guardian Ad Litem, responded to the respondent's petition.

Based primarily on the testimony of the respondent as to his intentions, the lower court found his clear intent at the time of the creation of the trust was to create a charitable gift to the Lottie Moon Christmas Offering. The respondent's accountant testified that no corpus would remain for the benefit of the charity if the prior distributions to the settlor and intermediate beneficiaries should be made in accord with the trust provisions. Based on this showing, the lower court held that the settlor's intent could be achieved only by extinguishing the interests of the intermediate beneficiaries.

As the case stands before us on appeal, the only question presented and the only one we consider is whether it was error to extinguish the interest of Walter H. Chiles, III.

The respondent points out that a court of equity may modify a trust upon the occurrence of emergencies or unusual circumstances in order to carry out the settlor's intent. He contends that, in the present case, his intent can be effectuated only by excluding the intermediate beneficial interests and, thus, the lower court acted properly in extinguishing the interest of the appellant.

It is true that a court of equity has the power to alter or modify a trust to effectuate the intent of the settlor 89 C.J.S. Trusts 87(b) (1955). However, it is the duty of the courts to preserve, not destroy, trusts and to see to it that the rights of infants are not injuriously affected. Bettis v. Harrison, 186 S.C. 352, 195 S.E. 835 (1938); Dumas v. Carroll, 112 S.C. 284, 99 S.E. 801 (1919). Accordingly, the exercise of this power "can be justified only by some exigency or emergency which makes the action of the court in a sense indispensable to the preservation of the trust . . . ." 89 C.J.S., supra.

In order to determine whether the requested modification is justified in the present case, it is, first, necessary that we ascertain the intent of the settlor; otherwise, we could not give it effect.

The respondent has testified extensively in the court below as to his intent in creating this trust. However, the respondent has overlooked the cardinal rule of ascertaining intent. "(R)esort is first to be had to its (the instrument's) language, and if such is perfectly plain and capable of legal construction, such language determines the force and effect of the instrument. Extrinsic facts cannot, in such cases, give the instrument a different construction from that imported by its terms." *Superior Auto Ins. Co. v. Maners*, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973); Restatement (Second) of Trusts s 38 (1959) (see especially com. a); 89 C.J.S., *supra*. "(T)he possibility that the trustor may be alive should have no effect upon the interpretation to be given the trust instrument. Its construction depends upon the trustor's intent at the time of execution as shown by the face of the document and not on any secret wishes, desires or thoughts after the event." *Brock v. Hall*, 33 Cal.2d 885, 206 P.2d 360, 11 A.L.R. 2d 672, 675 (1949).

The logic of these principles of construction is evidenced by the present case. The trust instrument

expressly states that the trust is irrevocable. To allow subsequent declarations of intent to control construction when the language of the instrument itself is clear would render the irrevocability provision a nullity and allow the settlor to revoke or modify a trust at will in direct contravention of the recognized rule that a trust cannot be revoked unless such a power is expressly reserved in the instrument. *Ademan v. Ademan*, 178 S.C. 9, 181 S.E. 897 (1934).

Although the respondent testified that his intent was to benefit the Lottie Moon Christmas Offering, it is manifest from the language of the document that he also intended to provide for his grandson during his lifetime. Although it may be true, as the respondent contends, that no corpus will remain after the death of the appellant, there is nothing in the instrument to indicate this is to affect the benefits to be paid his grandson, much less warrant their being terminated. The charity was given only a remainder interest and the instrument specifically states that the charity is to receive the benefits of this interest only "after special benefits have been paid according to the terms of this trust." It is clear that the term "special benefits" includes those payable to the appellant and that they take precedence over those payable to the charity. Because of this, extinguishment of the appellant's interest would not only fail to effectuate the clear intent expressed by the settlor in the trust instrument, but would, in fact, defeat that intent.

As pointed out above, the respondent's petition in this action stated that he "has been advised by the Internal Revenue Service that the Trust Agreement as presently constituted does not effect the purpose of Petitioner as far as being a charitable contribution . . . ." Under the circumstances, we conclude that this litigation has been largely motivated by tax considerations. In view of this, we feel the following quotation from *Davidson v. Duke University*, 282 N.C. 676, 194 S.E.2d 761, 57 A.L.R.3d 1008 (1973), is pertinent and we quote with approval: "Absent circumstances allowing modification, however, we agree with this statement in the case of *In Re Estate of Benson*, 447 Pa. 62, 285 A.2d 101:

" 'As to the obviation of taxes, it is incontestable that almost every settlor and testator desires to minimize his tax burden to the greatest extent possible. However, courts cannot be placed in the position of estate planners, charged with the task of reinterpreting deeds of trust and testamentary dispositions so as to generate the most favorable possible tax consequences for the estate. Rather courts are obliged to construe the settlor's or testator's intent as evidenced by the language of the instrument itself, the overall scheme of distributions, and the surrounding circumstances.' "

282 N.C. at 716, 194 S.E. 2d at 786, 57 A.L.R. 3d at 1042.

To the extent that it extinguishes the interest of appellant, the order of the lower court is reversed.

REVERSED IN PART.

Notes, Problems, and Questions

1. A settlor retains a significant level of control over the assets in an inter vivos trust. That control is acceptable because the property remains the settlor's property until the trust becomes irrevocable. However, if the settlor maintains too much control over the trust property, the court may conclude that the trust is illusory and invalidate.

2. Should the settlor be permitted to revocable an irrevocable trust?

3. Should the presumption be that the trust is revocable or irrevocable?