
WILLS, TRUSTS, AND
ESTATES

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WILLS, TRUSTS, AND
ESTATES

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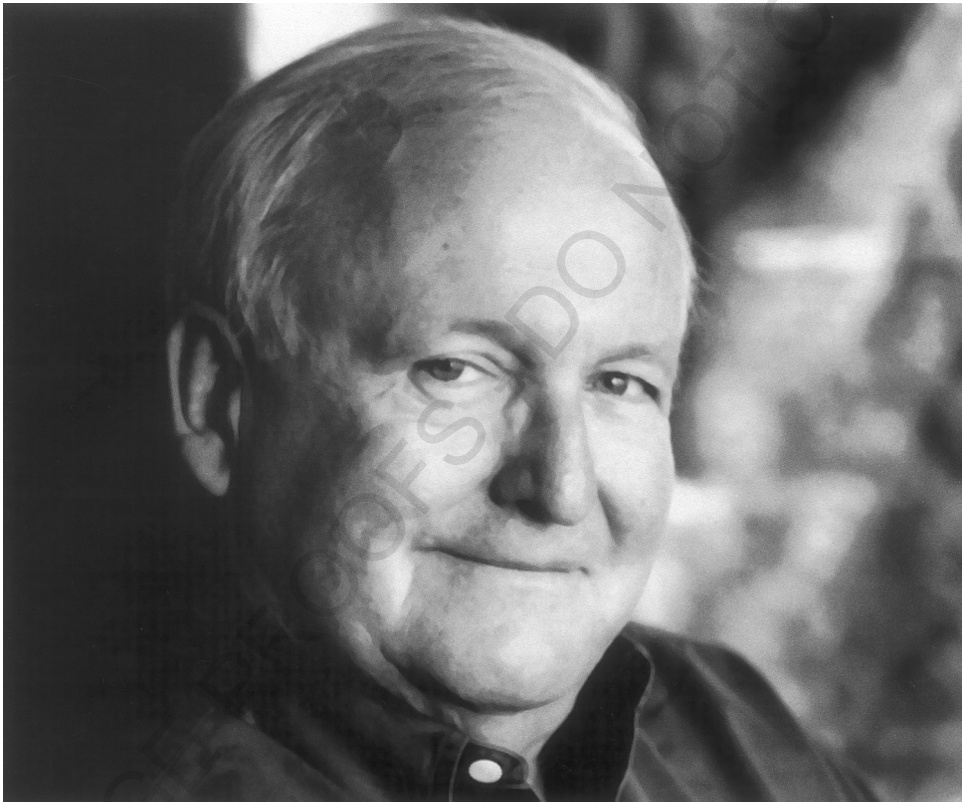
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For David Sanders,
who inspired Jesse Dukeminier,
who inspired the rest of us.



Jesse Dukeminier, 1925-2003

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PREFACE

As trusts and estates lawyers, we are in the business of succession. This simple truth was brought home to us in a deeply personal way with the unexpected passing of Jesse Dukeminier in April 2003, necessitating the succession of authorship for this book. With this eighth edition, that process of succession continues. Stanley M. Johanson, who has been serving in an emeritus capacity, now formally retires from authorship. Robert H. Sitkoff and James Lindgren, new coauthors in the seventh edition, assume full responsibility for this revision. Jesse remains the first author, however, and with good reason. Much of the wit, erudition, and playfulness of the book belongs to Jesse, whose importance to us and to the field cannot be overstated.

Wills, Trusts, and Estates is designed for use in a course on trusts and decedents' estates and as an introduction to estate planning. Our basic aim in this eighth edition remains as before: to produce not merely competent practitioners in trusts and estates, but lawyers who think critically about problems in family wealth transmission and are able to compare alternative solutions.

Since the 1960s, the law of wills has undergone a thorough renovation. Initially, the change was brought on by a swelling public demand for cheaper and simpler ways of transferring property at death, avoiding expensive probate. Imaginative scholars then began to ventilate this ancient law of the dead hand, challenging assumptions and suggesting judicial and legislative innovation to simplify and rationalize it. Medical science complicated matters by creating varieties of parentage unheard of a generation earlier. Legal malpractice in drawing wills and trusts arrived with a bang. The nonprobate revolution, with its multitude of will substitutes, provided a system of private succession that began to compete with the court-supervised probate system. Scholars, science, malpractice liability, and market competition have been a potent combination for driving law reform, of which there has been much in the last generation.

The use of trusts to transmit family wealth has become commonplace, not only for rich clients, but also for those of modest wealth. In expanding, trust law has annexed future interests and powers of appointment, reducing these two subjects largely to problems in drafting and construing trust instruments. The teachings of modern finance theory and the shifting locus of wealth from land to financial assets has put pressure on the law of

trust investment and administration, which evolved in simpler times. As a result, the fiduciary obligation has replaced limitations on the trustee's powers as the principal mechanism for safeguarding the beneficiary from mismanagement or abuse by the trustee. Meanwhile, the burgeoning tort liability of modern times has spawned an asset protection industry and with it radical change in the rights of creditors to trust assets.

Taxation of donative transfers has changed dramatically. The unlimited marital deduction — which permits spouses to make unlimited tax-free gifts and bequests to each other — is now a central feature of estate planning. In 1986, Congress enacted the generation-skipping transfer tax, implementing a policy of wealth transfer taxation at each generation. This tax, like an invisible boomerang, has delivered a potentially lethal blow to the Rule Against Perpetuities. In 2001, Congress enacted legislation that phases out the federal wealth transfer taxes by 2010, but then in 2011 these taxes will revert to their pre-2001 form. Further legislation, striking a new compromise, seems likely in the near future.

Throughout the book we emphasize the basic theoretical structure and the general philosophy and purposes that unify the field of donative transfers. We focus on function and purpose, not form. To this end, we have pruned away mechanical matters (such as a step-by-step discussion of how to probate a will and settle an estate, which is essentially local law, easily learned from a local practice book). At the same time, we have sought the historical roots of modern law. Understanding how the law became the way it is illuminates its continuing evolution and the sometimes exasperating peculiarities inherited from the past.

Although we organize the material in topical compartments, we have also sought a more penetrating view of the subject as a tapestry of humanity. Every illustration included, every behind-the-scenes peek, every quirk of the parties' behavior has its place as a piece of ornament fitting into the larger whole. Understanding the ambivalences of the human heart and the richness of human frailty, and realizing that even the best-constructed estate plans may, with the ever-whirling wheels of change, turn into sand castles, are essential to being a *counselor* at law, as opposed to being a mere attorney.

As Jesse and Stan said in the first edition of this book, in 1972:

In this book we deal with people, the quick as well as the dead. There is nothing like the death of a moneyed member of the family to show persons as they really are, virtuous or conniving, generous or grasping. Many a family has been torn apart by a botched-up will. Each case is a drama in human relationships — and the lawyer, as counselor, draftsman, or advocate, is an important figure in the *dramatis personae*. This is one reason the estates practitioner enjoys his work, and why we enjoy ours.

This observation remains true today. In a changing reality the human drama abides. Trusts and estates is a field concerned fundamentally with people and their relationships.

For their sage advice on this revision, we thank Jane Baron, Jerry Borison, Karen Boxx, Evelyn Brody, Eric Chason, Ronald Chester, Jeff Cooper, Bridget Crawford, Judith Daar, Alyssa DiRusso, Tom Eisele, Miranda Fleischer, Bradley Fogel, Frances Foster, Susan French, Martin Fried, Gail Frommer, Susan Gary, Wayne Gazur, Randy Gingiss, Howard Helsing, Adam Hirsch, David Horton, Richard Hyman, Bruce Johnson, Kenneth Kettering, Diane Klein, Kris Knapp, John Langbein, William LaPiana, Michael Lewyn, Ray Madoff, Bruce Mann, Nancy McLaughlin, Fran Miller, Alan Newman, Craig Oren, Eric Rakowski, Laura Rosenbury, Ron Scalise, Max Schanzenbach, Kent Schenkel, Jeffrey Schoenblum, Frederic Schwartz, Helene Shapo, Gary Spitko, Jeffrey Stake, Joshua

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Jesse Dukeminier, 1925-2003

Robert H. Sitkoff

James Lindgren

April 2009

Editors' note: All citations to state statutes and the United States Code are to such statutes as they appeared on Lexis or Westlaw at year-end 2008 unless stated otherwise. Footnotes are numbered consecutively from the beginning of each chapter. Most footnotes in quoted materials are omitted. Citations in quoted materials are regularly omitted or edited for readability. Editors' footnotes added to quoted materials are indicated by the abbreviation: — Eds.

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WILLS, TRUSTS, AND
ESTATES

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INTRODUCTION

SECTION A. THE POWER TO TRANSMIT PROPERTY AT DEATH: JUSTIFICATIONS AND LIMITATIONS

1. The Right to Inherit and the Right to Convey

THOMAS JEFFERSON, 7 JEFFERSON'S WORKS 454 (Monticello ed. 1904):
"The earth belongs in usufruct to the living; the dead have neither powers nor rights over it. The portion occupied by any individual ceases to be his when he himself ceases to be, and reverts to society." (Letter to James Madison, dated Sept. 6, 1789.)

2 William Blackstone, Commentaries
*10-13

The right of inheritance, or descent to the children and relations of the deceased, seems to have been allowed much earlier than the right of devising by testament. We are apt to conceive, at first view, that it has nature on its side; yet we often mistake for nature what we find established by long and inveterate custom. It is certainly a wise and effectual, but clearly a political, establishment; since the permanent right of property, vested in the ancestor himself, was no *natural*, but merely a *civil* right. . . . It is probable that [the right of inheritance arose] . . . from a plainer and more simple principle. A man's children or nearest relations are usually about him on his death-bed, and are the earliest witnesses of his decease. They become, therefore, generally the next immediate occupants, till at length, in process of time, this frequent usage ripened into general law. And therefore, also, in the earliest ages, on failure of children, a man's servants,

born under his roof, were allowed to be his heirs; being immediately on the spot when he died. For we find the old patriarch Abraham expressly declaring that “since God had given him no seed, his steward Eliezer, one born in his house, was his heir.”¹

While property continued only for life, testaments were useless and unknown: and, when it became inheritable, the inheritance was long indefeasible, and the children or heirs at law were incapable of exclusion by will; till at length it was found, that so strict a rule of inheritance made heirs disobedient and headstrong, defrauded creditors of their just debts, and prevented many provident fathers from dividing or charging their estates as the exigencies of their families required. This introduced pretty generally the right of disposing of one’s property, or a part of it, by *testament*; that is, by written or oral instructions properly *witnessed* and authenticated, according to the *pleasure* of the deceased, which we, therefore, emphatically style his *will*. This was established in some countries much later than in others. With us in England, till modern times, a man could only dispose of one-third of his movables from his wife and children; and in general, no will was permitted of lands till the reign of Henry VIII; and then only of a certain portion: for it was not till after the Restoration that the power of devising real property became so universal as at present.

Wills, therefore, and testaments, rights of inheritance and successions, are all of them creatures of the civil or municipal laws, and accordingly are in all respects regulated by them; every distinct country having different ceremonies and requisites to make a testament completely valid; neither does anything vary more than the right of inheritance under different national establishments.

John Locke, Two Treatises of Government
Book I, Ch. 9, §88 (Peter Laslett ed., 1988)

It might reasonably be asked here, how come Children by this right of possessing, before any other, the properties of their Parents upon their Decease. For it being Personally the Parents, when they dye, without actually Transferring their Right to another, why does it not return again to the common stock of Mankind? ’Twill perhaps be answered, that common consent hath disposed of it, to the Children. Common Practice, we see indeed does so dispose of it but we cannot say, that it is the common consent of Mankind; for that hath never been asked, nor actually given: and if common tacit Consent hath establish’d it, it would make but a positive and not Natural Right of Children to Inherit the Goods of their Parents: But where the Practice is Universal, ’tis reasonable to think the Cause is Natural. The ground then, I think, to be this. The first and strongest desire God

1. Genesis 15:3. [The words put in quotation marks are Blackstone’s paraphrase of two verses of the Bible, which no one has yet translated from the original Hebrew to everyone’s satisfaction. Blackstone’s statement that servants took as heirs in the absence of children has been disputed by many scholars. “Israel does not know a general rule like this for regulating the inheritance.” Gerhard Von Rad, Genesis 178 (John H. Marks trans., 1961). Abraham’s declaration was never put to the test for thereafter, when Abraham was 100 years old and his wife, Sarah, was 90, Sarah gave birth to a son, Isaac. Genesis 17:15. — Eds.]

Planted in Men, and wrought into the very Principles of their Nature being that of Self-preservation, that is the Foundation of a right to the Creatures, for the particular support and use of each individual Person himself. But next to this, God Planted in Men a strong desire also of propagating their Kind, and continuing themselves in their Posterity, and this gives Children a Title, to share in the *Property* of their Parents, and a Right to Inherit their Possessions. Men are not Proprietors of what they have merely for themselves, their Children have a Title to part of it, and have their Kind of Right joyn'd with their Parents, in the Possession which comes to be wholly theirs, when death having put an end to their Parents use of it, hath taken them from their Possessions, and this we call Inheritance.

Until the 1980s, the views of Jefferson and Blackstone prevailed over those of Locke. It was generally accepted that the right to transmit or inherit property at death was neither a natural right nor was it constitutionally protected. Thus in *Irving Trust Co. v. Day*, 314 U.S. 556, 562 (1942), the Supreme Court said:

Rights of succession to property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction.

But *Hodel v. Irving*, decided in the 1980s when the Court revived its interest in protecting private property through the Just Compensation Clause, changed all that.

Hodel v. Irving

Supreme Court of the United States, 1987
481 U.S. 704

O'CONNOR, J. 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.* . . . [In 1889, by an Act of Congress] each male Sioux head of household took 320 acres of land and

most other individuals 160 acres. 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. 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, and after 1910, allottees were permitted to dispose of their interests by will in accordance with regulations promulgated by the Secretary of the Interior. Those regulations generally served to protect Indian ownership of the allotted lands.



Justice Sandra Day O'Connor

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 farm the land themselves, evolved into petty landlords, leasing their allotted lands to white ranchers and farmers and living off the meager rentals. . . . 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. . . . 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) (remarks of Rep. Howard).

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, 48 Stat. 984.

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. . . . [N]ot 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 a tribe's reservation or otherwise subjected to a tribe's jurisdiction shall descend [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. 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. . . .

II

[The Court held that the plaintiffs had standing under Article III of the Constitution.]

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. . . .

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. 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. . . .

The extent to which any of appellees' decedents had "investment-backed expectations" in passing on the property is dubious. Though it is conceivable that some of these interests were purchased with the expectation that the owners might pass on the remainder to their heirs at death, the property has been held in trust for the Indians for 100 years and is overwhelmingly acquired by gift, descent, or devise. Because of the highly fractionated ownership, the property is

generally held for lease rather than improved and used by the owners. None of the appellees here can point to any specific investment-backed expectations beyond the fact that their ancestors agreed to accept allotment only after ceding to the United States large parts of the original Great Sioux Reservation.

Also weighing weakly in favor of the statute is the fact that there is something of an “average reciprocity of advantage,” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), to the extent that owners of escheatable interests maintain a nexus to the Tribe. Consolidation of Indian lands in the Tribe benefits the members of the Tribe. All members do not own escheatable interests, nor do all owners belong to the Tribe. Nevertheless, there is substantial overlap between the two groups. The owners of escheatable interests often benefit from the escheat of others’ fractional interests. Moreover, the whole benefit gained is greater than the sum of the burdens imposed since consolidated lands are more productive than fractionated lands.

If we were to stop our analysis at this point, we might well find §207 constitutional. But the character of the Government regulation here is extraordinary. In *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979), we emphasized that the regulation destroyed “one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others.” Similarly, the regulation here amounts to virtually the abrogation of the right to pass on a certain type of property—the small undivided interest—to one’s heirs. In one form or another, the right to pass on property—to one’s family in particular—has been part of the Anglo-American legal system since feudal times. See *United States v. Perkins*, 163 U.S. 625, 627-628 (1896). The fact that it may be possible for the owners of these interests to effectively control disposition upon death through complex inter vivos transactions such as revocable trusts, is simply not an adequate substitute for the rights taken, given the nature of the property. Even the United States concedes that total abrogation of the right to pass property is unprecedented and likely unconstitutional. Moreover, this statute effectively abolishes both descent and devise of these property interests even when the passing of the property to the heir might result in consolidation of property—as for instance when the heir already owns another undivided interest in the property. Cf. 25 U.S.C. §2206(b) (1982 ed., Supp. III). Since the escheatable interests are not, as the United States argues, necessarily *de minimis*, nor, as it also argues, does the availability of inter vivos transfer obviate the need for descent and devise, a *total* abrogation of these rights cannot be upheld. . . .

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 (1942). 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. 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. The judgment of the Court of Appeals is

Affirmed.

QUESTIONS AND NOTES

1. Most of the controlling cases cited by Justice O'Connor involve governmental regulation of land use. Why should tests that were designed to determine when compensation must be given for land use regulation be used when inheritance is at issue? A fundamental issue in the former area is whether the government is “forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Is this relevant to regulation of inheritance?

2. In *Hodel v. Irving*, the Court’s opinion appears to rest on the assumption that the right to transmit property at death is a separate, identifiable stick in the bundle of rights called property, and, if this right is taken away, compensation must be paid. The Court did not look at the impact of the statute upon the value of the whole bundle of property rights, including lifetime use, but only at the impact of the statute upon the right to transmit the property at death. If the issue is the economic loss suffered by the property owner as a consequence of the statute, as it is in regulatory taking cases, should not the court have considered the impact of the statute upon the whole bundle of rights rather than on one stick?

For an interesting comment on *Hodel v. Irving*, see Ronald Chester, *Inheritance in American Legal Thought*, in *Inheritance and Wealth in America* 23 (Robert K. Miller, Jr. and Stephen J. McNamee eds., 1998).

3. In many societies wills are not permitted. With respect to Native American tribal lands, wills were unknown until Congress forced individual allotments on the tribes. Even then, before 1910 Native American allottees were not permitted to devise their lands.

In some countries (on the continent of Europe, for example), children cannot be disinherited. They are forced heirs. In Anglo-American history, the right to

devise property has always been in uneasy tension with forced succession. In early feudal times, forced succession had the upper hand. Prior to 1540, when the Statute of Wills was enacted, a will of land was not permitted at law in England. The legal title to land owned at death passed to the eldest son, subject to the surviving spouse's dower or curtesy. In the United States, married women could not devise land without the consent of their husbands until the enactment of Married Women's Property Acts in the late nineteenth century. By the twentieth century, forced succession reappeared when statutes were enacted giving the surviving spouse a forced share, typically one-third, of the decedent spouse's estate. See *In re Estate of Magee*, 988 So. 2d 1 (Fla. App. 2007) (upholding spousal forced share against constitutional challenge). In Louisiana, where the civil law of France was introduced, minor and disabled children may not be disinherited. (On the protection of a spouse and children, see Chapter 7.)

Although §207 of the Indian Land Consolidation Act spoke of "escheat" to the tribe, in effect, the section made the tribe the successor to, or heir of, the Native American owner of the affected fractioned land. Why is forced succession by a tribe not constitutionally permissible when forced succession by family members is? If the Native Americans wanted tribal ownership restored, is there any way to change back to tribal ownership without paying individuals for their allotted lands? Is there any way to get the genie back in the bottle?

4. While *Hodel v. Irving* was being argued in the Court of Appeals, Congress amended §207 of the Indian Land Consolidation Act to provide: "Nothing in this section shall prohibit the devise of such an escheatable fractional interest to any other owner of an undivided fractional interest in such parcel or tract of trust or restricted land." 25 U.S.C. §2206(b) (1994). The amendment was not retroactive and hence did not affect the operation of §207 on the property involved in the case. The amended statute was held unconstitutional in *Babbitt v. Youpee*, 519 U.S. 234 (1997), on the grounds that it permitted devise only among a very limited group (other owners of the parcel), which is not likely to include a lineal descendant of the decedent, often the primary object of the decedent's bounty.

In 2004, Congress passed the American Indian Probate Reform Act, effective June 2006, which takes a new approach to resolving the problem of fractionation. See 25 U.S.C. §2206 (2008). The new Act supplants state probate law with a federal probate code for most Native American reservations, though tribes are permitted to enact their own probate codes if they wish. Under the new law, trust land may be conveyed by will to other Native Americans or to the tribe. Without a will, the decedent's spouse generally receives only a life estate in one-third, with the rest going to the decedent's descendants. If an intestate decedent owns less than a 5 percent interest in a parcel, then the interest is not divided further, but rather the oldest child or grandchild takes all of it, limited only by the right of a surviving spouse to remain on the land. The tribe or the other co-owners may buy the decedent's interest during probate with the consent of the heirs, unless the decedent owns less than a 5 percent interest, in which event consent is not required so long as the heirs do not live on the land.

For further discussion, see Douglas R. Nash and Cecelia E. Burke, *The Changing Landscape of Indian Estate Planning and Probate: The American Indian Probate Reform Act*, 5 Seattle J. Soc. Just. 121 (2006); David M. English, *A Uniform Probate Code for Indian Country at Last*, Prob. & Prop., Mar./Apr. 2006, at 20. Meanwhile, litigation continues over individual Indian money trust accounts held by the federal government. See *Cobell v. Kempthorne*, 569 F. Supp. 2d 223 (D.D.C. 2008).

5. For further reading on the changing institution of inheritance in this country, from its earliest days to the present, see Carole Shammas, Marylynn Salmon, and Michel Dahlin, *Inheritance in America: From Colonial Times to the Present* (1997); Kristine S. Knaplund, *The Evolution of Women's Rights in Inheritance*, 19 Hastings Women's L.J. 3 (2008).

For a fascinating study of the legal minefield of devising property to slaves in the antebellum South, see Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 Stan. L. Rev. 221 (1999). The fundamental challenge was how to uphold testamentary freedom without disrupting racial hierarchies. Slaves were regarded as property, and the idea of property owning property was baffling. Professor Davis examines the wills of white men who devised property to their children borne by slave women, or to the slave women themselves, and the tensions and contradictions in legal doctrine these devises caused.

In *Hodel v. Irving*, the Supreme Court held that the Fifth Amendment curtailed the power of the government to *limit* the right to convey property at death. In the next case, the court grapples with the opposite question, namely, whether after the decedent's death the government can *increase* the property rights that pass as part of the decedent's estate.

Shaw Family Archives v. CMG Worldwide

United States District Court, Southern District of New York, 2007
486 F. Supp. 2d 309

McMAHON, J. . . . Marilyn Monroe, perhaps the most famous American sex symbol of the twentieth century, died testate on August 5, 1962. Her will, which did not expressly bequeath a right of publicity, contained the following residuary clause:

SIXTH: All the rest, residue and remainder of my estate, both real and personal of whatsoever nature and whatsoever situate, of which I shall die seized or possessed or to which I shall be in any way entitled, or over which I shall possess any power of appointment by Will at the time of my death, including any lapsed legacies, I give, devise and bequeath as follows:

- (a) To MAY REIS the sum of \$ 40,000 or 25% of the total remainder of my estate, whichever shall be the lesser.
- (b) To DR. MARIANNE KRIS 25% of the balance thereof, to be used by her [for the furtherance of the work of such psychiatric institutions or groups as she shall elect]. . . .
- (c) To LEE STRASBERG the entire remaining balance.

The will also named Aaron Frosch, Ms. Monroe's New York-based attorney, as the executor. It was subject to primary probate in New York County Surrogate's Court.

In 1968, six years after probate of the Monroe Estate had commenced, Lee Strasberg² married Anna Strasberg. Lee Strasberg died in 1982, leaving his wife Anna Strasberg as the sole beneficiary under his will. Upon the death of Mr. Frosch in 1989, the New York Surrogate's Court appointed Anna Strasberg as Administratrix . . . of the Monroe Estate. The Monroe Estate remained open until June 19, 2001, on which date the Surrogate's Court authorized the Administratrix to close the estate and transfer the residuary assets to MMLLC [Marilyn Monroe, LLC], a Delaware company formed by Ms. Strasberg to hold and manage the intellectual property assets of the residuary beneficiaries of Marilyn Monroe's will.

SFA [Shaw Family Archives, LLC] is a limited liability company organized under New York law with its primary place of business in New York. Its principals are the three children of the late photographer Sam Shaw. Among the photographs owned by SFA and comprising the Shaw Collection is a series of photographs of Marilyn Monroe, including many "canonical" Marilyn images. The copyrights to the Marilyn photographs are purportedly owned by Sam Shaw's daughters, Edith Marcus and Meta Stevens.

This dispute arises out of (1) the alleged sale of a T-shirt at a Target retail store in Indianapolis, Indiana on September 6, 2006, which bore a picture of Marilyn Monroe and the inscription of the "Shaw Family Archives" on the inside neck label and tag, and (2) the alleged maintenance of a website by SFA and Bradford [Licensing] through which customers could purchase licenses for the use of Ms. Monroe's picture, image and likeness on various commercial products. MMLLC asserts that it is the successor-in-interest to the postmortem right of publicity that was devised through the residuary clause of Ms. Monroe's will, and that the commercial use of Ms. Monroe's picture, image, and likeness by SFA and Bradford without MMLLC's consent violates its rights under Indiana's 1994 Right of Publicity Act. This statute, passed over three decades after Ms. Monroe's death, by a state with which she had (as far as the court is aware) absolutely no contact during her life, creates a descendible and freely transferable right of publicity that survives for 100 years after a personality's death. The statute purports to apply to an act or event that occurs within Indiana, regardless of a personality's domicile, residence, or citizenship. See Ind. Code §§32-36-1-1 to -20 (2007). . . .

DISCUSSION

In their cross-motion for summary judgment, the SFA parties [SFA and Bradford] argue, *inter alia*, that even if a postmortem right of publicity in Marilyn Monroe's

2. For more on Lee Strasberg, see footnote 16 at page 582. — Eds.



Marilyn Monroe

rights through her will, and MMLLC cannot be a successor-in-interest to them. Moreover, the SFA parties contend, neither the California nor the Indiana right of publicity statutes allow for the transfer of the publicity rights they recognize through the wills of personalities who were already deceased at the time of their enactment. The court agrees.

1. *Ms. Monroe did not have the testamentary capacity to devise property rights she did not own at the time of her death.*

MMLLC argues that its ownership interest in Ms. Monroe's postmortem right of publicity—assuming *arguendo* that such a right exists—stems from Ms. Monroe's valid devise of this right to Lee Strasberg through the residuary clause in her will. The court concludes—regardless of Ms. Monroe's domicile at the time of her death, and regardless of any rights purportedly conferred after her death by the Indiana Right of Publicity Act or by Cal. Civil Code §3344.1 (2007)—Ms. Monroe could not devise by will a property right she did not own at the time of her death in 1962.

Descendible postmortem publicity rights were not recognized, in New York, California, or Indiana at the time of Ms. Monroe's death in 1962. To this day, New York law does not recognize any common law right of publicity and limits its statutory publicity rights to living persons. California recognized descendible publicity rights when it passed its postmortem right of publicity statute in 1984, 22 years after Ms. Monroe's death. Prior to that time, a common law right of publicity existed, but it was not freely transferable or descendible. Indiana first recognized a descendible, postmortem right of publicity in 1994, when it passed the Indiana Right of Publicity Act. See Ind. Code §§32-36-1-1 to -20. Prior to that time, rights of publicity were inalienable in Indiana, since they could only be vindicated through a personal tort action for invasion of privacy.

Thus, at the time of her death in 1962 Ms. Monroe did not have any postmortem right of publicity under the law of any relevant state. As a result, any publicity rights she enjoyed during her lifetime were extinguished at her death by operation of law.

name, likeness and persona exists, MMLLC and CMG [Worldwide, Inc.] cannot demonstrate that they are the owners of that right because only property actually owned by a testator at the time of her death can be devised by will. Since neither New York nor California (the only possible domiciles of Ms. Monroe at the time of her death)—nor for that matter, Indiana—recognized descendible postmortem publicity rights at the time of Ms. Monroe's death in 1962, she could not transfer any such

Nevertheless, MMLLC argues that her will should be construed as devising postmortem publicity rights that were later conferred on Ms. Monroe by statute. Such a construction is untenable.

Indiana follows the majority rule that the law of the domicile of the testator at his or her death applies to all questions of a will's construction. There are disputed issues of fact concerning whether Ms. Monroe was domiciled in New York or California at the time of her death. (There is absolutely no doubt that she was not domiciled in Indiana.) However, it is not necessary to resolve the question of domicile because neither New York nor California—the only two states in which Ms. Monroe could conceivably have been domiciled—permitted a testator to dispose by will of property she does not own at the time of her death.

It is well-settled that, under New York law, “A disposition by the testator of all his property passes all of the property he was entitled to dispose of *at the time of his death*.” N.Y. Est. Powers & Trusts Law §3-3.1 (2007) (emphasis added). The corollary principle recognized by the courts is that property not owned by the testator at the time of his death is not subject to disposition by will. . . .

California law does not differ from New York's. Section 21105 of the California Probate Code provides that, with inapplicable exceptions, “A will passes all property *the testator owns at death*, including property acquired after execution of the will.” (emphasis added). . . .

Nor does §2-602 of the Uniform Probate Code, which states that a will may pass “property acquired by the estate after the testator's death,” have anything to do with the present case, because neither New York nor California is among the 18 states that have adopted the Uniform Probate Code in whole or even in part.³ This court has not found, nor has MMLLC cited, any provision in either the New York or the California probate laws that codifies §2-602. . . .

Even if, as MMLLC implies, there has been some recent shift away from the unequivocal rule that only property owned by the testator at the time of death can be passed by will (as evidenced by §2-602 of the Uniform Probate Code), it does not help MMLLC's cause. “Testamentary disposition . . . is controlled by the law in effect *as of the date of death*.” *Dep't of Health Services v. Fontes*, 215 Cal. Rptr. 14, 15 (App. 1985) (emphasis added). There is no question—based on the case law recited above—that at the time of Ms. Monroe's death in 1962, neither New York nor California permitted a testator to dispose by will of property she did not own at the time of her death. Any argument that the residuary clause of Ms. Monroe's will could devise a postmortem right of publicity is thus doubly doomed because the law in effect at the time of Ms. Monroe's death did not recognize descendible postmortem publicity rights and did not allow for distribution under a will of property not owned by the testator at the time of her death.

3. The official comment to UPC §2-602 (1990) explains: “This section is revised to assure that . . . a residuary clause in a will . . . passes property acquired by a testator's estate after his or her death.” — Eds.

2. *Ms. Monroe did not “intend” to devise any rights she may have acquired under the Indiana or California right of publicity statute through the residuary clause of her will.*

MMLLC argues that Marilyn Monroe intended to bequeath a postmortem right of publicity to her testamentary legatees. The argument is unpersuasive. . . . MMLLC makes much of Ms. Monroe’s purported intent to include in her residuary estate all property “to which [she] shall be in any way entitled.” In the absence of any other evidence concerning Ms. Monroe’s intent, this boilerplate language is much too slender a reed on which to hang a devise of postmortem publicity rights that did not come into being until 22 years after her death. . . .

Even if the language Ms. Monroe employed clearly demonstrated her intent to devise property she had no capacity to devise, the effect would be to render the disposition invalid, because she had no legal right to dispose of property that did not exist at the time of her death. . . .

3. *Neither the California nor the Indiana postmortem right of publicity statutes allows for testamentary disposition of the rights it recognizes by celebrities already deceased at the time of its enactment. . . .*

MMLLC’s case is doomed because both the California and Indiana postmortem right of publicity statutes recognize that an individual cannot pass by will a statutory property right that she did not possess at the time of her death. California’s Civ. Code §3344.1(b)-(d) provides that, if no transfer of a personality’s postmortem right of publicity has occurred before the personality’s death, either “by contract or by means of a trust or testamentary documents,” then the rights vest in certain statutorily specified heirs. Since a testamentary transfer has no effect until the testator’s death, such a transfer could not be effectuated “before death” for purposes of the California statute. Thus, any rights bestowed by §3344.1 on a personality already deceased at the time of its enactment could not be transferred by will (which is how the purported property right came to MMLLC from the Administratrix at the time the Monroe Estate wound up). It would vest instead in the persons provided for by statute.

The Indiana statute likewise provides that if a personality has not transferred her right of publicity by “contract,” license,” “gift,” “trust,” or “testamentary document,” the right will “vest” in those individuals entitled to her property through the “[o]peration of the laws of intestate succession applicable to the state administering the estate and property of the intestate deceased personality, regardless of whether the state recognizes the property rights set forth under this chapter.” See Ind. Code §§32-36-1-16 to -18. Ms. Monroe’s legatees under her will are not her statutory heirs for intestacy purposes.

Thus, even if a postmortem right of publicity in Marilyn Monroe’s persona could have been created after her death, neither of the statutes that arguably bestowed that right allows for it to be transferred through the will of a “personality” who, like Ms. Monroe, was already deceased at the time of the statute’s enactment. To the extent that other courts, including *Joplin Enterprises v.*

Allen, 795 F. Supp. 349 (W.D. Wash. 1992) and *Miller v. Glenn Miller Productions*, 318 F. Supp. 2d 923 (C.D. Cal. 2004), assumed without explicitly deciding that California's right of publicity statute allows for the disposition of the rights it recognizes through wills of personalities already deceased at the time of its enactment, and that such disposition is permissible under the applicable probate principles, this court respectfully disagrees.

CONCLUSION

MMLLC's motion for summary judgment . . . is denied, and SFA's cross-motion for summary judgment . . . is granted.

NOTES AND QUESTIONS

1. *Epilogue*. The decision in *Shaw* excerpted above was rendered in May 2007. Five months later, California Governor Arnold Schwarzenegger signed an amendment to Cal. Civ. Code §3344.1 that added the following language:

(b) . . . The rights recognized under this section shall be deemed to have existed at the time of death of any deceased personality who died prior to January 1, 1985, and . . . shall vest in the persons entitled to these property rights under the testamentary instrument of the deceased personality effective as of the date of his or her death. In the absence of an express transfer in a testamentary instrument of the deceased personality's rights . . . , a provision in the testamentary instrument that provides for the disposition of the residue of the deceased personality's assets shall be effective to transfer the rights recognized under this section in accordance with the terms of that provision. The rights established by this section shall also be freely transferable or descendible by contract, trust, or any other testamentary instrument by any subsequent owner of the deceased personality's rights as recognized by this section. . . .

(p) The rights recognized by this section are expressly made retroactive, including to those deceased personalities who died before January 1, 1985. [Cal. Civ. Code §3344.1 (2008).]

Thus, under California law, publicity rights are devisable at death, even by general residuary clauses in wills made before 1984, when California first recognized such rights. The session law as enacted by the legislature makes the purpose of the amendment plain: "It is the intent of the Legislature to abrogate the summary judgment order[] entered in . . . *Shaw Family Archives Ltd. v. CMG Worldwide*." 2007 Cal. Legis. Serv. Ch. 439 §2 (S.B. 771). In 2008, however, federal district courts in both New York and California held that Monroe was a domiciliary of New York at her death, rendering the California statute inapplicable. *Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc.*, 568 F. Supp. 3d 1152 (C.D. Cal. 2008); *Shaw Family Archives Ltd. v. CMG Worldwide, Inc.*, 2008 WL 4127830 (S.D.N.Y. 2008).

2. *Literature.* For an analysis of dead-hand control over the right of publicity, see William A. Drennan, Wills, Trusts, Schadenfreude, and the Wild, Wacky Right of Publicity: Exploring the Enforceability of Dead-Hand Restrictions, 58 Ark. L. Rev. 43 (2005). See also Mark G. Tratos and Stephen Weizenecker, Dead Celebrity Wars, 25 Ent. & Sports L. 1 (2007) (surveying deceased celebrity rights across the states); Stacey L. Dogan and Mark A. Lemley, What the Right of Publicity Can Learn From Trademark Law, 58 Stan. L. Rev. 1161 (2006).

For a discussion of the inheritance of copyrights, which is governed by federal law and not variable by will (what the author calls “estate-bumping”), see Lee-Ford Tritt, Liberating Estates Law from the Constraints of Copyright, 38 Rutgers L.J. 109 (2006).

3. *Tax implications?* Suppose *T* lives in a jurisdiction that recognizes a descendible right of publicity. How should that right be reckoned in computing the estate taxes due on *T*’s death? For an insightful analysis, see Ray D. Madoff, Taxing Personhood: Estate Taxes and the Compelled Commodification of Identity, 17 Va. Tax Rev. 759 (1998). What are the tax ramifications if the jurisdiction in which *T* lived did not recognize a descendible right of publicity at *T*’s death but thereafter recognizes such a right retroactively? Compare Joshua C. Tate, Marilyn Monroe’s Legacy: Taxation of Postmortem Publicity Rights, 118 Yale L.J. Pocket Part 38 (2008), with Mitchell M. Gans, Bridget J. Crawford, and Jonathan G. Blattmachr, Postmortem Rights of Publicity: The Federal Estate Tax Consequences of New State-Law Property Rights, 117 Yale L.J. Pocket Part 203 (2008), and Mitchell M. Gans, Bridget J. Crawford, and Jonathan G. Blattmachr, The Estate Tax Fundamentals of Celebrity and Control, 118 Yale L.J. Pocket Part 50 (2008).

2. *The Policy of Passing Wealth at Death*

JOHN A. BRITAIN, INHERITANCE AND THE INEQUALITY OF MATERIAL WEALTH 13 (1978): “The less the rewards of wealth are associated with one’s own contribution, the better the case for taxing them. . . . Inheritance remains one of the purest forms of ‘getting something for nothing.’”

*Edward C. Halbach, Jr., An Introduction to Death,
Taxes and Family Property
in Death, Taxes and Family Property 3 (Edward C. Halbach, Jr., ed., 1977)⁴*

What justifications are there for the private transmission of wealth from generation to generation? And how do we rationalize allowing only some

4. Reprinted from *Death, Taxes and Family Property* (Edward C. Halbach, Jr., ed., 1977) with permission of the West Publishing Company. Copyright © 1977 by West Publishing Co.

individuals, selected by accident of birth, to enjoy significant comforts and power they have not earned?

Many arguments are offered in support of the institution of inheritance. One is simply that, in a society based on private property, it may be the least objectionable arrangement for dealing with property on the owner's death. Another is that inheritance is natural and proper as both an expression and a reinforcement of family ties, which in turn are important to a healthy society and a good life. After all, a society should be concerned with the total amount of happiness it can offer, and to many of its members it is a great comfort and satisfaction to know during life that, even after death, those whom one cares about can be provided for and may be able to enjoy better lives because of the inheritance that can be left to them. Furthermore, it is argued, giving and bequeathing not only express but beget affection, or at least responsibility. Thus, society is seen as offering a better and happier life by responding to the understandable desire of an individual to provide for his or her family after death.

Just as individuals may be rewarded through this desire, it can also be used by society, via inheritance rights, to serve as an incentive to bring forth creativity, hard work, initiative and ultimately productivity that benefits others, as well as encouraging individual responsibility — encouraging those who can to make provision that society would otherwise have to make for those who are or may be dependents. Of course, some doubt the need for such incentives, at least beyond modest levels of achievement and wealth accumulation, relying on the quest for power (or for recognition) and other motivations — not to mention habit. Long after these forces have taken over to stimulate the industry of such individuals, however, society may continue to find it important to offer property inducements to the irrepressibly productive to save rather than to consume, and to go on saving long after their own lifelong future needs are provided for. And what harm is there if individuals, through socially approved channels, pursue immortality and psychological satisfactions? The direct and indirect (e.g., through life insurance and through corporate accumulations) savings of individuals are vital to the economy's capital base and thus to its level of employment and to the productivity of other individuals.

Consequently, it is concluded, inheritance may grant wealth to *donees* without regard to their competence and performance, but the economic reasons for allowing inheritance are viewed in terms of proper rewards and socially valuable incentives to the *donor*. In fact, some philosophers would insist, these rewards are required by ideals of social justice as the fruits of one's labors.

JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 184 (C.K. Ogden ed., 1950): "[W]hen we recollect the infirmities of old age, we must be satisfied that it is necessary not to deprive it of this counterpoise of factitious attractions [prospects of inheritance by the younger giving care to the older]. In the rapid descent of life, every support on which man can lean should be left untouched, and it is well that interest serve as a monitor to duty."

Melvin L. Oliver, Thomas M. Shapiro, and Julie E. Press, *"Them That's Got Shall Get": Inheritance and Achievement in Wealth Accumulation* in 5 *Research in Politics and Society: The Politics of Wealth and Inequality* 69 (Richard E. Ratcliff, Melvin L. Oliver, and Thomas M. Shapiro eds., 1995)

The role and extent of inherited wealth is an important issue that occupies considerable attention among economists. However, their theoretically driven models of the importance of inherited wealth support a wide and quite contradictory range of findings. One end estimates that 80 percent of great wealth is inherited. The other end estimates that inherited wealth comprises only 20 percent of the wealthy's stockpile and 80 percent is earned the old fashioned way. In any event the amount and meaning of inherited wealth is considerable. For example, the wealthiest generation of elderly people in America's history is in the process of passing along its wealth.

Between 1987 and 2011, the baby boom generation stands to inherit an estimated 6.8 trillion dollars.⁵ Much of this wealth was built by their parents between the late 1940s and the late 1960s when real wages and savings rates were higher and housing costs were considerably lower. For the elderly middle class, the escalation of real estate prices over the last 20 years has meant a significant boon to their assets. Of course not all will benefit equally, or at all. The richest one percent will divide one-third of the worth of estates, each inheritance per estate receiving an average inheritance of \$6 million; the next richest nine percent will divide another third for an average inheritance of about \$396,000. Much of this wealth will be property. Philosopher Robert Nozick says that this "sticks out as a special kind of unearned benefit that produces unequal opportunities."

De Tocqueville warned the first new nation about the social and political dangers of inherited wealth becoming the basis of enduring privilege. He wrote: "What is the most important for democracy is not that great fortunes should not exist, but that great fortunes should not remain in the same hands. In that way there are rich men, but they do not form a class."

The minimum wealth necessary to qualify in 2008 for the Forbes Magazine list of the 400 Richest Americans was \$1.3 billion. The top two slots went to Bill Gates and Warren Buffett, with \$57 and \$50 billion, respectively. In total, the combined net worth of the 400 Richest Americans was \$1.56 trillion. Forbes does not include inheritance as a category for source of wealth, but manifestly inheritance played an important role in the wealth of many on the list. Four of the top 10 slots, for example, are held by kin of Sam Walton, founder of Wal-Mart, and 3 of the top 20 slots are held by kin of Forrest Mars, inventor of M&M's chocolate candy.

A sense of the magnitude of gratuitous wealth transfer may be obtained from a review of federal estate and gift tax returns. The Statistics of Income Division

5. A more recent study estimates that between 1998 and 2052 at least \$41 trillion will pass from one generation to the next. John J. Havens and Paul G. Schervish, *Why the \$41 Trillion Wealth Transfer Estimate is Still Valid: A Review of Challenges and Comments*, 7 J. Gift Plan. 11 (Jan. 2003). — Eds.

(SOI) of the IRS estimates that in 2007 the IRS received nearly 40,000 estate tax returns reporting combined gross estates of just over \$200 billion. Nearly \$60 billion, more than one-quarter, is traceable to estates with a value of \$20 million or more. Over \$120 billion, more than half, is traceable to estates with a value of more than \$5 million. The SOI also estimates that in 2007 the IRS received nearly 250,000 gift tax returns showing aggregate gifts in the amount of almost \$40 billion, of which nearly \$26 billion came from gifts of over \$100,000. These estimates necessarily understate the total volume of gratuitous wealth transfer because they do not include many nontaxable transfers.

Most scholars have concluded that the concentration of wealth in the United States fell sharply from 1929 through the 1940s, reaching a plateau that held from the 1950s through the 1970s. In the 1980s, however, there was a sharp increase in the share of wealth held by the richest Americans, followed by a leveling off after 1989. Professor Repetti concludes: “The result was that at the end of the twentieth century, wealth was more concentrated in the United States than in the United Kingdom. This was a reversal from the early years of the twentieth century when the U.S. tradition of ‘economic democracy’ had resulted in a much lower concentration than the ‘royalist legacy’ of Britain.” James R. Repetti, *Democracy, Taxes and Wealth*, 76 N.Y.U. L. Rev. 825, 825-826 (2001). In 2004, the richest 1 percent of Americans owned 34.3 percent of family wealth and the top 10 percent owned a staggering 71.2 percent of family wealth. Lawrence Mishel, Jared Bernstein, and Sylvia Alegretto, *The State of Working America* at Table 5.1 (2006/2007).

Wealth is usually defined by economists as a discounted future income stream, but in measuring this economists often ignore some important forms of wealth. Professor Langbein explains:

These calculations presuppose that financial instruments, business interests, and real property are the only important components of wealth. Because this way of measuring wealth excludes the capitalized value of the income streams generated by human capital, and because it excludes the capitalized value of the private-pension and Social Security income streams, it materially overstates the disparity between the top wealth holders and the rest of the populace. These calculations also overlook what economists call the life-cycle effect: University of Michigan law students who will have six-figure incomes within a decade are currently reckoned as paupers. Nevertheless, the underlying point is undeniable. The top sliver of wealth holders is indeed very affluent. [John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 Mich. L. Rev. 722, 746 (1988).]

The most powerful argument against permitting transmission of wealth is that it perpetuates wide disparities in the distribution of wealth, concentrates inherited economic power in the hands of a few, and denies equality of opportunity to the poor. For insightful discussions of these issues, see Anne L. Alstott, *Equal Opportunity and Inheritance Taxation*, 121 Harv. L. Rev. 469 (2007); Ronald Chester, *Inheritance, Wealth and Society* (1982); Remi Clignet, *Death, Deeds and Descendants: Inheritance in Modern America* (1992); *Inheritance and Wealth in America* (Robert K. Miller, Jr. and Stephen J. McNamee eds., 1998). See also Jens Beckert, *Inherited Wealth* (Thomas Dunlap trans., 2008).

In the United States, this argument once found a receptive ear in Congress, which for most of the last century imposed substantial estate and gift taxes on the rich. In 2001, however, Congress passed legislation that would phase out the estate tax via gradual increases in the taxable threshold and decreases in the tax rate. Under the 2001 law, still in force as this book went to press, in 2009 the estate tax will be levied on estates in excess of \$3.5 million at a rate of 45 percent. In 2010, the tax is slated to disappear entirely, but then in 2011 the estate tax will be restored at its 2001 levels. With the election of President Barack Obama in 2008, however, many commentators predicted that the estate tax will be reinstated for 2010, and that Congress would settle on an exemption amount around \$3.5 to \$5 million and a maximum rate around 45 percent. Federal estate, gift, and generation-skipping taxes are discussed in Chapter 15.

Why do we allow the passing of property at death? After a person dies, there are several things that could happen to the person's property. Suppose that when Diana, Princess of Wales, died she left a valuable necklace. What are the options regarding Diana's necklace? Among the possibilities are:

- (1) destroying it;
- (2) burying it along with the Princess, as was often done with valuable jewelry in ancient Egypt;
- (3) treating it as unowned and allowing a free-for-all in which the first person to grab it is the new owner;
- (4) having the government confiscate it; or
- (5) honoring Diana's wishes.

Since mandatory destruction is wasteful and a free-for-all would encourage people to hover around a dying person like vultures, the alternatives worth serious consideration are the last two: some form of confiscation and the current system of private succession (limited somewhat by estate taxes and, as we shall see, perhaps a mandatory share for one's surviving family). This debate raises questions about the inequality of wealth in American society and the desirability — and feasibility — of a more confiscatory approach.

Mark L. Ascher, Curtailing Inherited Wealth
89 Mich. L. Rev. 69 (1990)

About \$150 billion pass at death each year. Yet in 1988 the federal wealth transfer taxes raised less than \$8 billion. Obviously, these taxes could raise much more. If, to take the extreme example, we allowed the government to confiscate all property at death, we could almost eliminate the deficit with one stroke of a Presidential pen. This nation, however, rarely has used taxes on the transfer of wealth to raise significant revenue. Our historical hesitancy in this regard strongly

suggests that we as a nation are unwilling to abolish inheritance in order to raise revenue. Nonetheless, thinking about using the federal wealth transfer taxes to abolish inheritance may not be entirely futile. It may permit an entirely new type of analysis. Conventional attempts to reform the federal wealth transfer taxes inevitably bog down in the Anglo-American tradition of freedom of testation. As begrudged intruders upon a general rule, these taxes necessarily end up playing an inconsequential role. One willing, for purposes of analysis, to discard freedom of testation could start from the proposition that property rights should end at death. Inheritance then would be tolerated only as an exception to that general rule. This article does just that. I invite the reader to join me in speculating whether it might not make sense to use the federal wealth transfer taxes to curtail inheritance, thereby increasing equality of opportunity while raising revenue.

My proposal views inheritance as something we should tolerate only when necessary — not something we should always protect. My major premise is that all property owned at death, after payment of debts and administration expenses, should be sold and the proceeds paid to the United States government. There would be six exceptions. A marital exemption, potentially unlimited, would accrue over the life of a marriage. Thus, spouses could continue to provide for each other after death. Decedents would also be allowed to provide for dependent lineal descendants. The amount available to any given descendant would, however, depend on the descendant's age and would drop to zero at an age of presumed independence. A separate exemption would allow generous provision for disabled lineal descendants of any age. Inheritance by lineal ascendants (parents, grandparents, etc.) would be unlimited. A universal exemption would allow a moderate amount of property either to pass outside the exemptions or to augment amounts passing under them. Thus, every decedent would be able to leave something to persons of his or her choice, regardless whether another exemption was available. Up to a fixed fraction of an estate could pass to charity. In addition, to prevent circumvention by lifetime giving, the gift tax would increase substantially.

My proposal strikes directly at inheritance by healthy, adult children. And for good reason. We cannot control differences in native ability. Even worse, so long as we believe in the family, we can achieve only the most rudimentary successes in evening out many types of opportunities. And we certainly cannot control many types of luck. But we can — and ought to — curb one form of luck. Children lucky enough to have been raised, acculturated, and educated by wealthy parents need not be allowed the additional good fortune of inheriting their parents' property. In this respect, we can do much better than we ever have before at equalizing opportunity. This proposal would leave "widows and orphans" essentially untouched. The disabled, grandparents, and charity would probably fare better than ever before. But inheritance by healthy, adult children would cease immediately, except to the extent of the universal exemption.

This proposal sounds radical, perhaps even communistic. Inheritance does seem to occupy a special place in the hearts of many Americans, even those who cannot realistically expect to inherit anything of significance. . . . My proposal

... reaches the conclusion that substantial limitations on inheritance would contribute meaningfully to the equality of opportunity we offer our children. It also concludes that such limitations are fully consistent with our notions of private property. Neither conclusion is new. What is new is a \$200 billion deficit.⁶ ... If we cannot, or will not, control the deficit, this generation's primary bequest to its children will be the obligation to pay their parents' debts. ...

My proposal starts from the proposition that inheritance should be permitted only where public policy clearly justifies it. I find that justification in six different contexts. Spousal inheritance would always be allowed, but the amount would depend upon the length of the marriage. Inheritance by dependent lineal descendants would be permitted, subject to limitations based on the beneficiary's age [under 25 years]. Large trusts for disabled lineal descendants would be encouraged. Inheritance by lineal ascendants would be unlimited. Charity could take up to 20%. And, in any event, \$250,000 would be exempt [and could be spread among anyone]. Thus, many types of inheritance would continue. In fact, my proposal leaves untouched estates of \$250,000 or less.

Irving Kristol, Taxes, Poverty, and Equality
Pub. Int. 26-28 (No. 37, Fall 1974)

Large disparities of income, leading in turn to large concentrations of wealth, and these leading in turn to large *inherited* concentrations of wealth — such, it has long been recognized, can pose a very special problem for democracy. The primal nightmare of a democracy is the emergence of an oligarchy that would, through the power associated with wealth, perpetuate itself, and eventually constitute a kind of aristocracy. So the question of the distribution of wealth is a proper concern for any democratic society. Whether, in the United States today, this question is acute is a matter of opinion and controversy. Since our economic historians tell us that, over the past 150 years, the distribution of wealth has probably become less unequal, it is not obvious that the subject should exercise us unduly. But let us assume, for the moment, that we decided it *was* acute enough (or was widely perceived to be acute enough) for us to do something about it. What might we do?

The question, oddly enough, is quite easy to answer: We should discourage the inheritance of large fortunes. This is a quite traditional liberal idea — Montesquieu and Jefferson would both have approved of it — nor is it such a difficult task. All we have to do is decide — and legislate — that no large fortune should outlast the lifetime of the man who made it, but rather that such a large fortune should dissolve into much smaller fortunes upon his death. Thus, we could make it a matter of public policy and law that no individual could inherit, in a lifetime, more than one million dollars — and any possessor of a large fortune must distribute it, prior to death or by testament, to his children, his

6. In early 2009 the Congressional Budget Office projected that the 2009 budget deficit would reach \$1.845 trillion. — Eds.

relatives, his friends, anyone, but no one receiving more than that maximum legacy, which would be tax-free. (Institutional donations, of course, could be of any size.) Should he fail to do so, the government would levy a 100 per cent tax on the undistributed portion of his estate.

There would seem to be many advantages to such a policy. It does not discourage the incentive to invest and make money — anyone can still become enormously rich in his lifetime. Moreover, the foreknowledge that he would have to distribute his riches means that the wealthy man would, in his lifetime, be the recipient of much flattering attention and of many honors. He would, in addition, have the pleasure associated with the plenary power disposing of his wealth as he saw fit — rewarding some, failing to reward others. No large fortune would outlast a generation; but there would still be enough wealthy people around to support charities, private educational institutions, unpopular political causes, and minority cultural tastes — in other words, to act as a useful counterbalance to the ever-increasing weight of government and the public sector. Even the children of the rich would benefit, since it has long been recognized that the inheritance of large sums of money tends to distort the motivations and corrupt the characters of young people.

It can be predicted that any such proposal would provoke the hostility of the wealthy, who really do — it is perfectly natural — have dreams of their families moving through oligarchy to eventual aristocracy. But it can also be predicted that any such proposal would be contemptuously dismissed by great many liberal reformers. Why? The explanation is simple: When modern liberals talk about “the redistribution of income,” they rarely mean a simple redistribution among individuals — more often they mean a redistribution *to the state*, which will then take the proper egalitarian measures. No proposal for the redistribution of large fortunes will get liberal support unless that money goes into the public treasury, where liberals will have much to say as to how it should be spent. That is the “dirty little secret” — the hidden agenda — behind the current chatter about the need for redistribution. The talk is about equality, the substance is about power.

QUESTIONS

In 1990, Professor Ascher proposed limiting to \$250,000 (nearly \$450,000 in 2009 dollars) the amount of property that could be passed to others, with partial or complete exceptions for property passing to spouses, parents, children under the age of 25, disabled persons, and charities. In 1974, Irving Kristol explored the possibility of limiting to \$1 million (nearly \$4.5 million in 2009 dollars) the amount that any one individual could inherit. Kristol says that it would be easy to implement his system, and though Ascher recognizes some obvious problems with his proposal, such as corresponding restrictions on gifts, he, too, presents his system as feasible. What would be the likely effects of an attempt to implement either approach? How would family and business relations change? What sorts of legal and illegal avoidance mechanisms would arise? In the long run, what might be the general economic effects of such reforms?

NOTE: INHERITANCE IN THE ERSTWHILE SOVIET UNION

In 1918, the Soviet Bolsheviks, carrying out the teaching of Marx and Engels, abolished inheritance. The 1918 law, translated into English, read: "Inheritance, testate and intestate, is abolished. Upon the death of the owner his property (movable and immovable) becomes the property of the R.S.F.S.R." [1918] 1 Sob. Uzak., RSFSR, No. 34, item 456, Apr. 26, 1918. Within four years, however, inheritance was re-established. The abolition of inheritance proved unpopular, and the Soviet rulers, on second thought, decided it was an institution encouraging savings and an incentive to work. Inheritance was also viewed as a method of providing for dependents of the deceased, relieving the state of this burden, and of furthering family unity and stability. Before the dissolution of the Soviet Union, the Soviet law of inheritance did not substantially differ from the civil law of inheritance found in Western Europe. See Frances Foster, *The Development of Inheritance Law in the Soviet Union and the People's Republic of China*, 33 Am. J. Comp. L. 33 (1985); Comment, *Soviet Inheritance Law: Ideological Consistency or a Retreat to the West?*, 23 Gonz. L. Rev. 593 (1988).

Inequality may result not only from inherited wealth, but also from uneven investment in the human capital of children across families. The following excerpts make this point brilliantly and raise the following question: If economic inheritance were abolished, would it be even more difficult to break up an upper class?

*Walter J. Blum and Harry Kalven, Jr., The Uneasy Case
for Progressive Taxation*
19 U. Chi. L. Rev. 417 (1952)

There is still another road leading to the problem of equality. Almost everybody professes to be in favor of one kind of equality — equality of opportunity. What remains to be investigated is the relationship between this kind of equality and economic equality. . . . In terms of the justice of rewards, the point is that no race can be fair unless the contestants start from the same mark. . . .

It might simplify matters somewhat to go directly to the heart of the problem — the children. . . . The important inequalities of opportunity are inequalities of environment, in its broadest sense, for the children. It is the inequalities in the worlds which the children inherit which count, and this inheritance is both economic and cultural. . . .

The critical economic inheritance consists of the day to day expenditures on the children; it is these expenditures which add up to money investments in the children's health, education and welfare which in the aggregate are, at least in our society, gravely disparate. No progressive inheritance tax, or combination of gift and inheritance taxes, can touch this source of economic inequalities among children. On the other hand a progressive income tax can, as one of its effects,

help to minimize this form of unequal inheritance. It is income, not wealth, which is the important operative factor here, and by bringing incomes closer together the tax tends to bring money investments in children closer together.

But the gravest source of inequality of opportunity in our society is not economic but rather what is called cultural inheritance for lack of a better term. Under modern conditions the opportunities for formal education, healthful diet and medical attention to some extent can be equalized by economic means without too greatly disrupting the family. However, it still remains true that even today much of the transmission of culture, in the narrow sense, occurs through the family, and no system of public education and training can completely neutralize this form of inheritance. Here it is the economic investment in the parents and the grandparents, irrevocably in the past, which produces differential opportunities for the children. Nor is this the end of the matter. It has long been recognized that the parents make the children in their own image, and modern psychology has served to underscore how early this process begins to operate and how decisive it may be. The more subtle and profound influences upon the child resulting from love, integrity and family morale form a kind of inheritance which cannot, at least for those above the minimum subsistence level, be significantly affected by economic measures, or possibly by any others. If these influences on the members of the next generation are to be equalized, nothing short of major changes in the institution of the family can possibly suffice. At a minimum such changes would include socializing decisions not only about how children are to be raised but who is to raise them. And this in turn would call into question the very having of children.



"Having a fine old name really has been enough for me."

Drawing by Wm. Hamilton.

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*John H. Langbein, The Twentieth-Century Revolution
in Family Wealth Transmission*
86 Mich. L. Rev. 722 (1988)

The main purpose of this article is to [call attention to] the ways in which . . . changes in the nature of wealth have become associated with changes of perhaps comparable magnitude in the timing and in the character of family wealth transmission. My first theme . . . concerns human capital. Whereas of old, wealth transmission from parents to children tended to center upon major items of patrimony such as the family farm or the family firm, today for the broad middle classes, wealth transmission centers on a radically different kind of asset: the investment in skills. In consequence, intergenerational wealth transmission no longer occurs primarily upon the death of the parents, but rather, when the children are growing up, hence, during the parents' lifetimes. . . .

My thesis is quite simple, and, I hope, quite intuitive. I believe that, in striking contrast to the patterns of last century and before, in modern times the business of educating children has become the main occasion for intergenerational wealth transfer. Of old, parents were mainly concerned to transmit the patrimony — prototypically the farm or the firm, but more generally, that “provision in life” that rescued children from the harsh fate of being a mere laborer. In today's economic order, it is education more than property, the new human capital rather than the old physical capital, that similarly advantages a child. . . .

From the proposition that the main parental wealth transfer to children now takes place *inter vivos*, there follows a corollary: Children of propertied parents are much less likely to expect an inheritance. Whereas of old, children did expect the transfer of the farm or firm, today's children expect help with educational expenses, but they do not depend upon parental wealth transfer at death. Lengthened life expectancies mean that the life-spans of the parents overlap the life-spans of their adult children for much longer than used to be. Parents now live to see their children reaching peak earnings potential, and those earnings often exceed what the parents were able to earn. Today, children are typically middle-aged when the survivor of their two parents dies, and middle-aged children are far less likely to be financially needy. It is still the common practice within middle- and upper-middle-class families for parents to leave to their children (or grandchildren) most or all of any property that happens to remain when the parents die, but there is no longer a widespread sense of parental responsibility to abstain from consumption in order to transmit an inheritance.

For further discussion of investment in cultural and human capital within families, see Samuel Bowles, Herbert Gintis, and Melissa Osborne Groves, eds., *Unequal Chances: Family Background and Economic Success* (2005). For stimulating further discussion of arguments for and against inheritance and the reach of the dead hand, see Ronald Chester, *From Here to Eternity? Property and the Dead Hand* (2007); Adam J. Hirsch and William K.S. Wang, *A Qualitative*

Theory of the Dead Hand, 68 Ind. L.J. 1, 6-14 (1992); Stephen R. Munzer, A Theory of Property 380-418 (1990).

3. *The Problem of the Dead Hand*

During life, a person can use her wealth to influence the conduct of her friends and family. To what extent should a person be able to use wealth to influence behavior after death? Arthur Hobhouse, more than 100 years ago, wrote a condemnation of the “cold and numbing influence of the Dead Hand”:

A clear, obvious, natural line is drawn for us between those persons and events which the Settlor knows and sees, and those which he cannot know and see. Within the former province we may push his natural affections and his capacity of judgment to make better dispositions than any external Law is likely to make for him. Within the latter, natural affection does not extend, and the wisest judgment is constantly baffled by the course of events. . . . What I consider to be not conjectural, but proved by experience in all human affairs, is, that people are the best judges of their own concerns; or if they are not, that it is better for them, on moral grounds, that they should manage their own concerns for themselves, and that it cannot be wrong continually to claim this liberty for every Generation of mortal men. [Arthur Hobhouse, *The Dead Hand* 188, 183-185 (1880).]

Restatement (Third) of Property: Wills and Other Donative Transfers (2003)

§10.1 DONOR’S INTENTION DETERMINES THE MEANING OF A DONATIVE DOCUMENT AND IS GIVEN EFFECT TO THE MAXIMUM EXTENT ALLOWED BY LAW

The controlling consideration in determining the meaning of a donative document is the donor’s intention. The donor’s intention is given effect to the maximum extent allowed by law.

COMMENT:

a. Rationale. The organizing principle of the American law of donative transfers is freedom of disposition. Property owners have the nearly unrestricted right to dispose of their property as they please. . . .

c. Effect of a donative document. Unless disallowed by law, the donor’s intention not only determines the meaning but also the effect of a donative document.

American law does not grant courts any general authority to question the wisdom, fairness, or reasonableness of the donor’s decisions about how to allocate his or her property. The main function of the law in this field is to facilitate rather than regulate. The law serves this function by establishing rules under which sufficiently reliable determinations can be made regarding the content of the donor’s intention.

American law curtails freedom of disposition only to the extent that the donor attempts to make a disposition or achieve a purpose that is prohibited or restricted by an overriding rule of law. . . .

Among the rules of law that prohibit or restrict freedom of disposition in certain instances are those relating to spousal rights; creditors' rights; unreasonable restraints on alienation or marriage; provisions promoting separation or divorce; impermissible racial or other categoric restrictions; provisions encouraging illegal activity; and the rules against perpetuities and accumulations.

Shapira v. Union National Bank

Ohio Court of Common Pleas, Mahoning County, 1974
315 N.E.2d 825

HENDERSON, J. 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. . . .

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. . . . In *Loving v. Virginia*, 388 U.S. 1 (1967), the court held unconstitutional as violative of the

Equal Protection and Due Process Clauses of the Fourteenth Amendment an anti-miscegenation 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, 388 U.S. at 12:

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*, 334 U.S. 1 (1948), 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 *Shelley v. Kraemer* the United States Supreme Court held that the action of the states to which the Fourteenth Amendment has reference includes action of state courts and state judicial officials. Prior to this decision the court had invalidated city ordinances which denied blacks the right to live in white neighborhoods. In *Shelley v. Kraemer* owners of neighboring properties sought to enjoin blacks from occupying properties which they had bought, but which were subjected to privately executed restrictions against use or occupation by any persons except those of the Caucasian race. Chief Justice Vinson noted, in the course of his opinion at page 13: “These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements.”

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. . . .

[T]he 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. . . . It is a fundamental rule of law in Ohio that a testator may legally entirely disinherit his children. . . . 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.

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: . . . 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. . . .

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. . . . Plaintiff's position that the free choice of religious practice cannot be circumscribed or controlled by contract is substantiated by *Hackett v. Hackett*, 150 N.E.2d 431 (Ohio App. 1958). 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. . . .

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 *Clayton's Estate*, 13 Pa. D. & C. 413 (Pa. Orphan's Ct. 1930), 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*, 118 A. 907 (Pa. 1922), 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.⁷ 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. . . .

The only cases cited by plaintiff's counsel in accord with [plaintiff's contention] are some English cases and one American decision. In England the courts have

7. In *Estate of Laning*, 339 A.2d 520 (Pa. 1975), the court stated that the *Drace* case was correctly decided on the grounds that the testator sought to require his grandchildren to "remain true" to the Catholic religion, and that the enforcement of a condition that they remain faithful Catholics would require the court to determine the doctrines of the Catholic church. "Such questions are clearly improper for a civil court to determine." The court went on to uphold a provision in Laning's will that the gift be distributed to certain relatives who held "membership in good standing" in the Presbyterian church. The court construed the provision to mean only a formal affiliation with the specified church, thus avoiding improper inquiry into church doctrine. — Eds.

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. Other cases in England, however, have invalidated forfeitures of similarly conditioned provisions for children upon the basis of uncertainty or indefiniteness. . . . 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 . . . found . . . no difficulty with indefiniteness where the legatee married unquestionably outside the Jewish faith. *Re Wolffe*, [1953] 2 All Eng. 697.⁸

The American case cited by plaintiff is that of *Maddox v. Maddox*, 52 Va. (11 Grattan's) 804 (1854). The testator in this case willed a remainder to his niece if she remain 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. . . . The other ground upon which the Virginia court rested its decision, that the condition was in *terrorem* because of the absence of a gift over, is clearly not applicable to the case at bar, even if it were in accord with Ohio law, because of the gift over to the State of Israel contained in the Shapira will.

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

8. In *re Tuck's Settlement Trusts*, [1977] 2 W.L.R. 411, a trust was set up by the first Baron Tuck, a Jew, for the benefit of his successors in the baronetcy. Anxious to ensure that his successors be Jewish, he provided for payment of income to the baronet for the time being if and when and as long as he should be of the Jewish faith and married to a wife of Jewish blood and of the Jewish faith. The trust also provided that in case of any dispute the decision of the Chief Rabbi of London would be conclusive. The court held that the conditions were not void for uncertainty. Lord Denning was of the view that if there was any uncertainty, it was cured by the Chief Rabbi clause. The other two judges declined to reach that issue.

The question — who is a Jew — is not easy to answer, not even in Israel where it has provoked continuing controversy. See Mark J. Altschul, *Israel's Law of Return and the Debate of Altering, Repealing, or Maintaining Its Present Language*, 2002 U. Ill. L. Rev. 1345; Meryl Hyman, *Who Is a Jew?* (1998). — Eds.

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.⁹ 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*, 175 N.E.2d 837 (1961 Ohio Com. Pleas), 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. . . . 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*, 17 Ohio St. 649 (1867).

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 . . . *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

9. The American Jewish Yearbook of 1976 estimates the Jewish population of Youngstown, Ohio, to be 5,400 in 1974. Taking into consideration other U.S. census data about the male-to-female ratio and the ages of the population in Youngstown, we estimate that about 500 Jewish females were in the 15-24 age group. If this estimate is correct, do you think this gives Daniel "a reasonable latitude of choice"? — Eds.

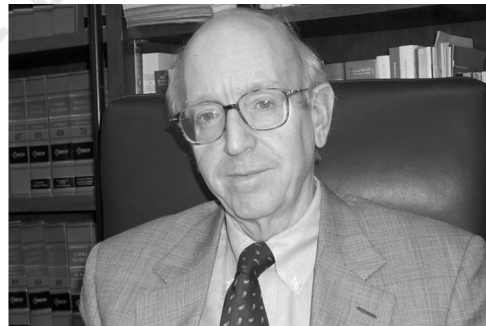
faith and blood, hopefully through his sons, but, if not, then through the State of Israel. Whether this judgment was wise is not for this court to determine. But it is the duty of this court to honor the testator's intention within the limitations of law and of public policy. The prerogative granted 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.

NOTES AND QUESTIONS

1. In 1994, the editors asked the attorney who represented Daniel Shapira for information about the aftermath of the case. The attorney contacted Mr. Shapira, who declined to give any information. It was a bitter experience, he said, that he wanted to forget.

2. What social objectives are accomplished by honoring control of a beneficiary's behavior by the dead hand, a hand that does not have a live mind controlling it and making a continuously informed judgment as circumstances change, that can no longer be affected by the opinions of others, and that does not suffer the consequences? Judge Posner suggests that perhaps the courts should have the power to modify conditions on testamentary gifts:



Judge Richard A. Posner

Suppose a man leaves money to his son in trust, the trust to fail however if the son does not marry a woman of the Jewish faith by the time he is 25 years old. The judicial approach in such cases is to refuse to enforce the condition if it is "unreasonable." In the case just put it might make a difference whether the son was 18 or 24 at the time of the bequest and how large the Jewish population was in the place where he lived.

This approach may seem wholly devoid of an economic foundation, and admittedly the criterion of reasonableness is here an unilluminating one. Consider, however, the possibilities for modification that would exist if the gift were inter vivos rather than testamentary. As the deadline approached, the son might come to his father and persuade him that a diligent search had revealed no marriageable Jewish girl who would accept him. The father might be persuaded to grant an extension or otherwise relax the condition. If the father is dead, this kind of "recontracting" is impossible, and the presumption that the condition is a reasonable one fails. This argues for applying the *cy pres* approach in private as well as charitable trust cases unless, perhaps, the testator expressly rejects a power of judicial modification. [Richard A. Posner, *Economic Analysis of Law* §18.7 (7th ed. 2007).]

You are Judge Posner. Daniel Shapira appears before you six-and-a-half years after his father's death and alleges that he has found no Jewish girl whom he desires who will accept him. What do you do?

Senator Joseph Lieberman, the Democratic nominee for vice president in 2000, was charged with enforcing a religious restriction while serving as the executor of his uncle's estate. Rather than enforce the terms of the will, which would have disinherited two of his cousins for marrying persons who were not born Jewish, he brokered a deal whereby the spouses of the disinherited cousins converted to Judaism and the cousins' shares were restored. Lieberman said that his uncle "knew who he was making the executor. He knew that these were my cousins and that I love them, and that by my nature I'm not as hard as the will was. He knew what I would do." Phil Kuntz and Bob Davis, *A Beloved Uncle's Will Tests Diplomatic Skills of Joseph Lieberman — Document Disinherits Children Who Failed Religious Test*, Wall St. J., Aug. 25, 2000, at A1. Did Lieberman betray his uncle's trust, or did he do the right thing?

3. Restatement (Second) of Property: Donative Transfers §6.2, cmt. a (1983) provides that a "restraint unreasonably limits the transferee's opportunity to marry if a marriage permitted by the restraint is not likely to occur. The likelihood of marriage is a factual question, to be answered from the circumstances of the particular case." Suppose that Daniel Shapira were gay. Would the get-married provision in Dr. Shapira's will be enforceable?

4. In *Shapira*, the court distinguished the *Maddox* case of 1854 on the grounds that "in this day of travel by plane and freeway and communication by telephone," precedents on reasonableness from the "horse and buggy days" have lost their vitality. The question thus arises, is satisfying the reasonableness test even easier today thanks to the availability of popular Jewish internet dating services such as JDate.com? In Tony Dokoupil, *Sex and the Synagogue*, Newsweek, Jan. 21, 2008, at 16, the author reports:

The rise of interfaith marriage is a sensitive issue among American Jews, and now two powerful forces in the religion are teaming up to do something about it: rabbis and J Date, the top matchmaking Web site for Jewish singles. For the first time in its 10-year history, the site is offering a bulk rate to rabbis who want to buy membership accounts for their congregants.

Not all courts, however, apply a reasonableness test. In *Estate of Feinberg*, 891 N.E.2d 549 (Ill. App. 2008), the court held 2 to 1 that a trust provision providing that a descendant "who marries outside the Jewish faith (unless the spouse of such descendant has converted or converts within one year of the marriage to the Jewish faith) and his or her descendants shall be deemed to be deceased" was invalid without consideration whether the clause was reasonable. An appeal to the Illinois Supreme Court was pending as this book went to press.

5. A will or trust provision is ordinarily invalid if it is intended or tends to encourage disruption of a family relationship. Thus, a bequest to the surviving spouse conditioned on the survivor not remarrying is invalid unless the purpose

is to provide support.¹⁰ For example, in *Estate of Robertson*, 859 N.E.2d 772 (Ind. App. 2007), the court differentiated a gift in trust to the testator's wife "so long as she remains my widow," a valid limitation, from a trust that provides income to the spouse for life but terminates if the spouse remarries, an invalid condition. Should this difference in form determine whether the condition violates public policy?

Provisions encouraging separation or divorce are likewise usually held invalid, unless the dominant motive of the testator is to provide support in the event of separation or divorce. See *In re Estate of Owen*, 855 N.E.2d 603 (Ind. App. 2006) (voiding condition prohibiting daughter from renting residence while married to an identified person because it tended to promote divorce).

Restatement (Third) of Trusts §29(c) (2003) invalidates trusts that are "contrary to public policy." In general, the Restatement (Third) of Trusts frowns on restraints on beneficiary behavior, including restraints on marriage or religious freedom, and those that disrupt family relationships and choice of careers, but calls for balancing of conflicting social values.¹¹

For a penetrating analysis of testamentary gifts conditioned on specified conduct by the beneficiary, see Jeffrey G. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 1999 U. Ill. L. Rev. 1273. Professor Sherman rejects the balancing test of "contrary to public policy" and makes a principled analysis of why testation should be permitted and under what limitations. He concludes that testamentary conditions calculated to restrain legatees' personal conduct should not be enforced. The article is especially readable because it is laced with Sherman's delicious wit.

NOTE: INCENTIVE TRUSTS AND THE DEAD HAND

In modern practice conditional gifts such as in *Shapira* tend to be made in trust, known in the practitioner literature as an *incentive trust*, and are as likely to be

10. What about the reverse? The German poet Heinrich Heine is reported to have said that he wanted to make his wife's share of his estate conditional on her remarrying. The reason: "I want at least one person to truly bereave my death." In the end, none of Heine's wills ever contained such a condition, which undoubtedly he suggested as a joke. The editors gratefully acknowledge the assistance of Mike Widener of the Tarlton Law Library at the University of Texas for sorting out these details.

11. The reporter's notes to §29 include this account of an incentive for unhealthy behavior from a 1993 Associated Press story from Romania:

A man who was nagged by his wife to stop smoking has left her everything — but only if she takes up his habit as punishment for 40 years of "hell," newspapers reported Saturday.

Marin Cemenescu, who died last week in his hometown of Timisoara at age 76, stipulated in his will that to inherit his house and \$30,000 estate, his 63-year-old wife Aneta must smoke five cigarets a day for the rest of her life, the Romania Libera daily reported.

"She could not stand to see me with a cigaret in my mouth, (and) I ended up smoking in the bathroom like a schoolboy," Cemenescu reportedly wrote in his will.

"My life was hell," he wrote.

The report said that Mrs. Cemenescu plans a legal challenge to the conditions of the will. "I'd rather lose everything than touch a cigaret," she told the newspaper.

The report did not specify the cause of Cemenescu's death or say whether it was related to his smoking.

focused on ensuring that the beneficiary does not adopt a slothful or wasteful existence as on religion or marriage.¹² The underlying worry has perhaps been most aptly put by the investment guru and billionaire Warren Buffett: “[T]he perfect amount to leave to children is ‘enough money so that they would feel they could do anything, but not so much that they could do nothing.’” Richard I. Kirkland, Jr., *Should You Leave It All to the Children?*, *Fortune*, Sept. 29, 1986, at 18. And indeed, there is some evidence that the receipt of a large inheritance is associated with reduced workforce participation. See Douglas Holtz-Eakin, David Joulfaian, and Harvey S. Rosen, *The Carnegie Conjecture: Some Empirical Evidence*, 108 Q.J. Econ. 413 (1993).

Enter the incentive trust. Professor Tate explains:

The conditions that incentive trusts might impose can be divided into three broad categories. First are conditions that encourage the beneficiaries to pursue an education. Second are conditions that provide what might be termed moral incentives: incentives that reflect the settlor’s moral or religious outlook or promote a particular way of living. Some of these conditions try to encourage the beneficiaries to contribute to charitable causes, while others discourage substance abuse or promote a traditional family lifestyle. Finally, there are conditions designed to encourage the beneficiaries to have a productive career. . . . Provided that these incentives do not violate public policy, courts generally will enforce them. [Joshua C. Tate, *Conditional Love: Incentive Trusts and the Inflexibility Problem*, 41 *Real Prop., Prob. & Tr. J.* 445, 453 (2006).]

Judging by the anecdotal evidence, the use of incentive trusts is increasing. A recent survey of wealthy Americans revealed that 57 percent of those with \$10 million or more in assets included an incentive trust in their estate plan. PNC Wealth Management, *Wealth and Values Survey — Inheritance* (2007). Although the survey methodology may be questioned, it seems clear that popular awareness and practitioner discussion of the incentive trust concept is on the rise. See David Handler and Alison E. Lothes, *The Case for Principle Trusts and Against Incentive Trusts*, *Tr. & Est.*, Oct. 2008, at 30; Marjorie J. Stephens, *Incentive Trusts: Considerations, Uses and Alternatives*, 29 *ACTEC J.* 5 (2003); Catherine M. Allchin, *In Some Trusts, the Heirs Must Work for the Money*, *N.Y. Times*, Jan. 29, 2006, §3, at 36.

If drafted poorly, however, an incentive trust can backfire, producing perverse incentives never intended by the settlor.

[T]he living can usually concoct schemes to outsmart the dead. Mr. Train recalled the saga of Tommy Manville, playboy heir to the Johns-Manville fortune. To prod him to settle down, according to Mr. Train, Mr. Manville’s trust guaranteed him \$250,000 when he married. “So he married 13 times,” Mr. Train says. “He’d pay the woman \$50,000, pocket \$200,000, get a quickie divorce and then, when he needed more money, he’d get married again.” [J. Peder Zane, *The Rise of Incentive Trusts: Six Feet Under and Overbearing*, *N.Y. Times*, Mar. 12, 1995, §4, at 5.]

12. Paris Hilton’s octogenarian grandfather, the hotel magnate Barron Hilton, has adopted a more traditional strategy. He has pledged to leave nearly all of his \$2.3 billion fortune to charity. See Susannah Rosenblatt, *Barron Hilton to Leave Most of Fortune to Charity*, *L.A. Times*, Dec. 27, 2007, at B3.

Changed circumstances can also frustrate the settlor's purpose if the trust is drafted to be inflexible. According to Professor Tate, practitioners sometimes recommend "provisions that pay out a certain amount of money from the trust for every dollar that the beneficiary earns on her own. This is sometimes described as the 'earn a dollar, get a dollar' arrangement." Tate, *supra*, at 460. But as Tate asks (*id.* at 464-466), what if the beneficiary is injured in an accident or suffers a debilitating illness? What if the beneficiary opts to stay at home with young children, or to care for a seriously ill child? Should the law of trust modification be refined to address problems that might arise in the use of incentive trusts?

NOTE: DESTRUCTION OF PROPERTY AT DEATH

A fundamental justification of private property is that society's total wealth usually is maximized by permitting individuals to decide what is the best use of their property. Each person, we ordinarily assume, makes rational choices to maximize her wealth; that the person will suffer economic loss from foolish or wrong decisions tends to deter irrational decisions. Hence a person can, if she wishes, destroy her property during life (subject to historic preservation or similar laws). For if she does, she bears most of the economic consequences of her decision, plus or minus. The question thus arises: Should a testator be permitted to order the destruction of property at death? Is not the main economic loss of posthumous destruction visited upon others rather than the testator? On the other hand, if the testator expects that her wishes for post-death destruction of her property will not be followed, will she suffer a loss (in money or pleasure) during life from knowing that her destructive wishes will not be honored after her death? Consider the following examples:

(a) The testator's will directs his executor to tear down the testator's house because the testator does not want anyone else to live in it. Can the executor tear down the house? Should a court order the house destroyed? See *Eyerman v. Mercantile Trust Co.*, 524 S.W.2d 210 (Mo. App. 1975) ("a well-ordered society cannot tolerate" waste). If the testator had anticipated this result, might she have destroyed her house during life, earlier than would have given her the most pleasure?

(b) Justice Hugo L. Black of the U.S. Supreme Court was of the view that private notes of the justices relating to Court conferences should not be published posthumously. Justice Black feared publication might inhibit free and vigorous discussion among the justices. Black was struck ill, destroyed his conference notes, resigned from the Court, and died a few weeks later. Suppose that Justice Black had died suddenly while on the bench and that his will had directed his executor to destroy his conference notes. Could the executor do this without a court order? Should a court order destruction of the notes, which might have enormous value to a Court historian? Who would have standing to object?

(c) Franz Kafka bequeathed his diaries, manuscripts, and letters to his friend Max Brod, directing him to burn everything. Brod declined to do so on the grounds that Kafka's unpublished works were of great literary value. Should Brod have ordered a bonfire? See Max Brod, *Postscript*, in *Franz Kafka, The Trial* 326 (1925, Mod. Lib. ed. 1956), discussed in William R. Bishin and Christopher D. Stone, *Law, Language, and Ethics* 1-9 (1972). See also Joseph L. Sax, *Playing Darts with a Rembrandt: Public and Private Rights in Cultural Treasures* (1999).

(d) In a 2008 replay of Kafka and Brod, after many years of publicly wrestling with the question, the son of the Russian writer Vladimir Nabokov (author of *Lolita*, among other novels), announced that he will publish the manuscript of his father's final, unfinished novel in spite of his father's instruction to destroy it. Previously his mother, Vladimir's wife, had likewise refused to destroy it, though she didn't publish it either, leaving it to Vladimir when she died. Suppose that Franz Schubert and Giacomo Puccini had ordered their unfinished works destroyed at death, thus depriving the world of Schubert's unfinished Symphony in B Minor and Puccini's unfinished opera *Turandot*. Should a court order destruction?

(e) Professor John Orth calls to our attention to Virgil, who left instructions to destroy the *Aeneid* ("Of arms and the man I sing"), an unfinished work. The Emperor Augustus ordered the executors to disregard the order. See Moses Hadas, *A History of Latin Literature* 142 (1952). Orth asks: "The course of Western literature would be unimaginable without 'arms and the man'! Who would have guided Dante in Hell?"

Building on the insight of Professor Shavell and others that, before death, the living do internalize some of the future costs of seemingly wasteful dead-hand control (see Steven Shavell, *Foundations of Economic Analysis of Law* 67-72 (2004)), Professor Strahilevitz argues for a conditional right to destroy property after death. Under Strahilevitz's proposal, if during life the testator put a future interest in the property up for sale and (1) the government declined to condemn the future interest and (2) the owner turned down the highest bid for the future interest, then a testamentary direction to destroy the property would be followed. Lior Jacob Strahilevitz, *The Right to Destroy*, 114 *Yale L.J.* 781, 848-852 (2005). In Strahilevitz's view, this safe harbor mechanism would provide evidence of testamentary capacity, would ensure resolution of purpose by exposing the testator during life to reputational sanction and persuasion, and would ensure that the testator internalizes the relevant costs by requiring the testator to forego during life the price that others are willing to pay to preserve the property. But what of the possibility that society in the aggregate might want to preserve the property without any single person feeling so strongly that she would offer enough to induce the testator to sell? See *id.* at 850, n.264.

SECTION B. TRANSFER OF THE DECEDENT'S ESTATE

1. *Probate and Nonprobate Property*

All the decedent's assets at death can be divided into probate and nonprobate property. *Probate property* is property that passes through probate under the decedent's will or by intestacy. *Nonprobate property* is property that passes outside of probate under an instrument other than a will. People often have the idea that probate under a will or intestacy is the usual mode of passing property at death, but this is false. Most property transferred at death passes outside of probate through a nonprobate mode of transfer. Consider the following list, which is not exhaustive, of common modes of nonprobate transfer.

(a) *Joint tenancy property, both real and personal.* Under the theory of joint tenancy, the decedent's interest vanishes at death. The survivor has the whole property relieved of the decedent's participation. No interest passes to the survivor at the decedent's death. In order for the survivor to perfect title to real estate, all the survivor need do is file a death certificate of the decedent. Bank accounts, brokerage and mutual fund accounts, and real estate are often held in joint tenancy, particularly between married couples.

(b) *Life insurance.* Life insurance proceeds of a policy on the decedent's life are paid by the insurance company to the beneficiary named in the insurance contract. The company will pay upon receipt of a death certificate of the insured.

(c) *Contracts with payable-on-death (POD) provisions.* A decedent may have a contract with a bank, an employer, or some other person or corporation to distribute property at the decedent's death to a named beneficiary. Pension plans often provide survivor benefits. Tax-deferred investment plans (IRAs, 401(k)s, and the like) often name a death beneficiary. In nearly all states, it is possible to put a death beneficiary on a brokerage account. To collect property held under a POD contract, all the beneficiary need do is file a death certificate with the custodian holding the property.

(d) *Interests in trust.* When property is put in trust, the trustee holds the property for the benefit of one or more named beneficiaries, who may have life estates or remainders or other types of interests. The trust property is distributed to the beneficiaries by the trustee in accordance with the terms of the trust instrument. Property held in a *testamentary trust* created under the decedent's will passes through probate, but property put in an *inter vivos* trust during the decedent's life does not. In most states, the inter vivos trust has displaced the testamentary trust as the preferred type of trust in sophisticated estate planning.

Distribution of nonprobate property does not involve a court proceeding, but is made in accordance with the terms of the controlling contract or trust or deed (nonprobate transfers are dealt with in Chapter 6). By contrast, as outlined below, distribution of probate property under a will or to intestate successors may require a court proceeding involving probate of a will or a finding of intestacy followed by appointment of a personal representative to settle the probate estate.

2. Administration of Probate Estates

a. The Functions of Probate

Probate performs three core functions: (1) it provides *evidence of transfer of title* to the new owners (i.e., it clears title and makes property marketable again); (2) it *protects creditors* by providing a procedure for payment of debts; and (3) it *distributes the decedent's property* to those intended after the decedent's creditors are paid. In considering the brief sketch of probate procedures that follows, think about how well those procedures serve the three core functions of probate and whether any alternative procedures would better serve those functions with greater speed

and at lower cost. The latter question is brought into sharp relief by the modern reality that more property passes outside of the probate system than through it.

b. Probate Terminology and History

We begin with a summary of terminology and history. When a person dies and probate is necessary, the first step is the appointment of a *personal representative* to oversee the winding up of the decedent's affairs. The personal representative is a *fiduciary* who inventories and collects the property of the decedent; manages and protects the property during the administration of the decedent's estate; processes the claims of creditors and tax collectors; and distributes the property to those entitled. The court that supervises the administration of the probate estate is usually referred to as a *probate court*.

If the decedent dies testate and in the will names the person who is to execute (i.e., to carry out the terms of) the will and administer the probate estate, such personal representative is usually called an *executor*.¹³ When the will does not name an executor, the named executor is unable or unwilling to serve, or the decedent dies intestate, the court will name a personal representative, who is generally called an *administrator*. The administrator is usually selected from a statutory list of persons who are to be given preference, typically in the following order: surviving spouse, children, parents, siblings, creditors. A person appointed as administrator must give bond. In most states, if the will names an individual rather than a corporate fiduciary as executor, the executor also must give bond unless the will waives the bond requirement, which is common.

One court in each county has jurisdiction over administration of decedents' estates. The name of the court varies from state to state. It may be called the surrogate's court, the orphan's court, the probate division of the district court or chancery court, or something else. But all of these differently named courts are referred to collectively as probate courts. And "to go through probate" means to have an estate administered in one of these courts.

A needlessly complicating factor in this field is that we have two legal vocabularies—one applicable to real property and the other to personal property. It is often suggested that these parallel vocabularies are traceable to the historic fact that the English common law courts had jurisdiction over succession to real property, whereas, until the nineteenth century, ecclesiastical courts controlled succession to personal property in England. But in most instances this is not provable. Take the phrase *last will and testament*. A common belief is that this phrase arose because a *will* disposed of real property and a *testament* disposed of personal property; therefore, one instrument disposing of both was a will and testament. The belief that *testament* referred to personal property is based on its

13. In some states, a nonresident corporate fiduciary cannot be appointed as executor, and many states have at least some restrictions on the appointment of a nonresident individual, such as requiring that the nonresident be a close relative or requiring that a local co-executor or agent serve along with the nonresident. See Jeffrey A. Schoenblum, 2008 Multistate Guide to Estate Planning at Tables 3.01 and 3.03.

Latin origin (*testamentum*). It is assumed that the Latin-trained ecclesiastical courts introduced the word *testament* into the language to refer to an instrument disposing of property over which they had jurisdiction. It is then assumed that the Old English word *will* was used by the common law courts and, by a process of association, came to relate to land—the type of property over which these courts had jurisdiction.

The evidence does not support these assumptions. As far back as the records go, the words have sometimes been used interchangeably. To speak of a testament disposing of land or of a will disposing of a cow would not have sounded strange to the medieval ear. Professor Mellinkoff believes the phrase *last will and testament* is traceable to the law's habit of doubling Old English words with synonyms of Old French or Latin origin (e.g., *had and received*, *mind and memory*, *free and clear*), "helped along by a distinctive rhythm." David Mellinkoff, *The Language of the Law* 331 (1963). In any case, the myth that a will disposes of land and a testament disposes of chattels dies terribly, terribly slowly. Today, it is perfectly proper to use the single word *will* to refer to an instrument disposing of both real and personal property.

A person dying testate *devise*s real property to *devisees* and *bequeath*s personal property to *legatees*. Using *devise* to refer to land and *bequest* to refer to personalty became a lawyerly custom little more than a hundred years ago,¹⁴ though the distinction, like that between *will* and *testament*, is sometimes erroneously thought to have had more ancient roots in the different courts handling the decedent's property. Although these linguistic distinctions still have currency, there are signs that synonymous usage is returning in respectable circles. The Restatement of Property applies *devise* to both realty and personalty. In drafting wills, "I give" is an excellent substitute for "I devise," "I bequeath," or "I give, devise, and bequeath." "I give" effectively transfers any kind of property, and no fly-specking lawyer can ever fault you for using this verb.

When intestacy occurs we use different words to describe what happens to the intestate's real property and what happens to his personal property. We say real property *descends to heirs*; personal property is *distributed to next-of-kin*. At common law, *heirs* and *next-of-kin* were not necessarily the same. For example, when primogeniture, which applied only to land, was in effect, real property descended to the eldest son, but personal property was distributed equally among all the children. Today, in almost all states, a single *statute of descent and distribution* governs intestacy. The same persons are named as intestate successors to both real and personal property. Thus, today the word *heirs* usually means those persons designated by the applicable statute to take a decedent's intestate property, both real and personal. *Next-of-kin* usually means exactly the same thing.

At common law, a surviving spouse was not an heir; he or she had only what were called *curtesy* or *dower* rights (rights to take a share of some of the decedent spouse's property). Today, in all states the statutes of descent and distribution

14. Cf. William Shakespeare, *King John*, act I, scene 1, line 109: "Upon his death-bed he by will bequeath'd/ His lands to me."

name the spouse as an intestate successor whose share depends upon who else survives; the spouse is thus an heir.

In this book, we do not use the Latin suffix indicating feminine gender for women playing important roles in our cast: testator, executor, and administrator. Although *testatrix*, *executrix*, and *administratrix* are still in current fashion, other *-trix* forms either have disappeared from use (e.g., *donatrix*, *creditrix*) or would sound odd to the contemporary ear (e.g., *public administratrix*).¹⁵ And, of course, it does not matter whether the person in the given role is a man or a woman.¹⁶

We have tried to avoid words that assign a role to one sex, but we dare not hope that we have succeeded in a field so long dominated by assumptions of male superiority in property management. We believe it was Bentham who observed, “Error is never so difficult to be destroyed as when it has its root in language.”

c. A Summary of Probate Procedure

(1) *Opening probate*

Though the general pattern of administering probate estates is quite similar in all jurisdictions, there are widespread variations in the procedural details. In each state, the procedure is governed by a collection of statutes and court rules giving meticulous instructions for each step in the process. Happily, this precludes our being concerned with specific rules and procedures and enables us to advise that you can safely postpone any concern about the particular mechanics of probating a will and administering an estate until you can “learn by doing” when that first estate file comes across your desk. When that day comes, you will find that there are available in most jurisdictions excellent probate practice books. The purpose of the following description is to provide a generalized summary.

The will should first be probated, or letters of administration should first be sought, in the jurisdiction where the decedent was domiciled at death. This is known as the *primary* or *domiciliary* jurisdiction. If real property is located in another jurisdiction, *ancillary administration* in the jurisdiction is required. The purpose of requiring ancillary administration is to prove title to real property in the situs state’s recording system and to subject those assets to probate for the protection of local creditors. Ancillary administration may be costly because the state may require that a resident be appointed personal representative, with a local attorney. Executor’s commissions and attorney’s fees will be paid to them for handling the ancillary assets.

Each state has a detailed statutory procedure for issuance of *letters testamentary* to an executor or *letters of administration* to an administrator authorizing the person to act on behalf of the estate. Several states, mainly east of the Mississippi, follow the procedure formerly used by the English ecclesiastical courts in

15. See *-trix* in Oxford English Dictionary (1989).

16. The Supreme Court has held unconstitutional a statute giving preference to a male to serve as executor or administrator. *Reed v. Reed*, 404 U.S. 71 (1971).

distinguishing between contentious and noncontentious probate proceedings. Under the English system, the executor had a choice of probating a will *in common form* or *in solemn form*. Common form probate was an ex parte proceeding in which no notice or process was issued to any person. Due execution of the will was proved by the oath of the executor or such other witnesses as might be required. The will was admitted to probate at once, letters testamentary were granted, and the executor began administration of the estate. If no one raised any questions or objections, this procedure sufficed. However, within a period of years thereafter an interested party could file a *caveat*, compelling probate of the will in solemn form. Under probate in solemn form, notice to interested parties was given by citation, due execution of the will was proved by the testimony of the attesting witnesses, and administration of the estate involved greater court participation. Ex parte or common form procedure is recognized in many states, sometimes preserving the common form/solemn form terminology, but more often not.

(2) *Formal versus informal probate*

The Uniform Probate Code (UPC), originally promulgated in 1969 and substantially revised in 1990, is representative of statutes regulating probate procedures. It provides for both notice probate and ex parte probate. The former is called *formal probate* (rather than solemn form probate), the latter *informal probate* (rather than common form probate). The person asking for letters can choose.¹⁷

Formal probate. Formal probate under the UPC is a litigated judicial determination after notice to interested parties. UPC §3-401. A formal proceeding may be used to probate a will, to block an informal proceeding, or to secure a declaratory judgment of intestacy. Formal proceedings become final judgments if not appealed.

In a formal probate, the court supervises the actions of the personal representative in administering the estate. This supervision can be time consuming and costly. The court must approve the inventory and appraisal of the estate; payment of debts; family allowance; granting options on real estate; sale of real estate; borrowing of funds and mortgaging of property; leasing of property; proration of federal estate tax; personal representative's commissions; attorney's fees; preliminary and final distributions; and discharge of the personal representative. The sale of real estate may require several trips to the courthouse to get an order to sell, to file notice of all offers received, to give notice that a previous low bidder

17. No proceeding, formal or informal, may be initiated more than three years from the date of death. UPC §3-108 (1990). If no will is probated within three years after death, the presumption of intestacy is conclusive. The three-year statute of limitations of the UPC changes the common law, which permits a will to be probated at any time, perhaps many years after the testator's death. See Annot., 2 A.L.R.4th 1315 (1980, rev. 2008).

The time for contesting probate of a will is governed by statute. The period of limitations for filing a will contest is ordinarily jurisdictional and is not tolled by any fact not provided by statute. If the constitutional and statutory requirements for notice are satisfied, when the period of limitation passes, the probate court no longer has jurisdiction to revoke probate. Probate of a will thereby becomes final. The rules on will contests under the UPC are in §§3-401 to 3-414.

has overbid the previous high bid, and, finally, to get approval of the terms of the sale to the highest bidder.

Informal probate. In informal probate, after appointment, the personal representative administers the estate without going back into court. The representative has the broad powers of a trustee in dealing with the estate property and may collect assets, clear titles, sell property, invest in other assets, pay creditors, continue any business of the decedent, and distribute the estate — all without court approval. UPC §3-715. The estate may be closed by the personal representative by filing a sworn statement that he has published notice to creditors, administered the estate, paid all claims, and sent a statement and accounting to all known distributees. UPC §3-1003.

The key assumptions that underpin the informal probate statutes are that the typical executor or administrator is a trusted family member, and that the typical beneficiary is also a family member. In such circumstances, unless there is a dispute over the will or the administration of the estate, the intensive judicial supervision that is typical of formal probate imposes needless costs on the estate and drains the judiciary's budget without an offsetting benefit. Under the UPC, informal probate is the norm, but an interested party may file a petition for formal probate at any time during the administration of the estate. UPC §3-502. In this way, the drafters of the UPC managed to have their cake and eat it too. The safeguards of formal probate are preserved for any case in which an interested party asks for them, but otherwise the personal representative may make use of the faster and cheaper informal probate alternative.

UPC §3-301 sets forth the requirements for informal probate. Without giving notice to anyone, the representative petitions for appointment; the petition contains pertinent information about the decedent and the names and addresses of the spouse, the children or other heirs, and, if a will is involved, the devisees. If the petition is for probate of a will, the original will must accompany the petition. The executor swears that, to the best of her knowledge, the will was validly executed; proof by the witnesses is not required. A will that appears to have the required signatures and that contains an attestation clause showing that requirements of execution have been met is probated by the registrar without further proof. UPC §3-303. Within 30 days after appointment, the personal representative has the duty of mailing notice to every interested person, including heirs apparently disinherited by a will. UPC §3-705.

(3) *Barring creditors of the decedent*

Every state has a statute requiring creditors to file claims within a specified time period; claims filed thereafter are barred. These are known as *nonclaim statutes*. They come in two basic forms: Either (1) they bar claims not filed within a relatively short period after probate proceedings are begun, generally two to six months (four months under the UPC); or (2), whether or not probate proceedings are commenced, they bar claims not filed within a longer period after the

decedent's death, generally one to five years (one year under the UPC). UPC §3-803. Under short-term statutes, creditors are usually notified of the requirement to file claims only by publication in a newspaper after probate proceedings are opened. The Supreme Court has held, however, that the Due Process Clause requires that known or reasonably ascertainable creditors receive actual notice before they are barred by a short-term statute running from the commencement of probate proceedings. *Tulsa Prof. Collection Servs. v. Pope*, 485 U.S. 478 (1988) (statute barring known creditors two months after newspaper publication objectionable). A one-year statute of limitations running from the decedent's death, barring creditors filing claims thereafter, is believed to be constitutional even without notice to creditors. Most states have such a statute. See Elaine H. Gagliardi, *Remembering the Creditor at Death: Aligning Probate and Nonprobate Transfers*, 41 *Real Prop., Prob. & Tr. J.* 819, 840-848 (2007).

(4) Closing the estate

The personal representative of an estate is expected to complete the administration and distribute the assets as promptly as possible. Even if all the beneficiaries are amicable, several things that must be done may prolong administration. Creditors must be paid. Titles must be cleared. Taxes must be paid and tax returns audited and accepted by the tax authorities. Real estate or a sole proprietorship may have to be sold.

Judicial approval of the personal representative's action is required to relieve the representative from liability, unless some statute of limitations runs upon a cause of action against the representative. The representative is not discharged from fiduciary responsibility until the court grants discharge.

d. The Costs of Probate

Much is heard about the excessive cost of probate — or, as some have put it, the high cost of dying.¹⁸ The administrative costs of probate are mainly probate court fees, the commission of the personal representative, the attorney's fee, and,

18. Complaints about the delay and costs of probate are hardly new. Perhaps the most searing was by Charles Dickens. Speaking of *Jarndyce v. Jarndyce*, a chancery proceeding involving an estate that is at the center of his novel *Bleak House*, he wrote:

Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated, that no man alive knows what it means. The parties to it understand it least; but it has been observed that no two Chancery lawyers can talk about it for five minutes, without coming to a total disagreement as to all the premises. . . . Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce, without knowing how or why; whole families have inherited legendary hatreds with the suit. The little plaintiff or defendant, who was promised a new rocking-horse when Jarndyce and Jarndyce should be settled, has grown up, possessed himself of a real horse, and trotted away into the other world. [Id. ch. I.]

In the end, after the discovery and admission to probate of Jarndyce's true last will, "the whole estate is found to have been absorbed in costs." Id. ch. LXV.

sometimes, appraiser's and guardian ad litem's fees. In some states, the personal representative's commission is set by statute at a fixed percentage of the probate estate. In most states, the commission must be reasonable under the circumstances. See Robert A. Stein and Ian G. Fierstein, *The Role of the Attorney in Estate Administration*, 68 Minn. L. Rev. 1107 (1984). In some circumstances a lawyer who serves as executor may be entitled to fees for serving in both offices. See Cal. Prob. Code §10804 (2008); William M. McGovern, Jr. and Sheldon F. Kurtz, *Wills, Trusts and Estates* §12.5, at 535-536 (3d ed. 2004). On the other hand, if the personal representative is a family member, as is typical, she will usually serve without taking a commission.

A 1988 study examined fees for estate attorneys in ten large states. For an ordinary \$100,000 estate, fees ranged from \$2,000 in Florida to \$5,000 in New York and Pennsylvania. For an ordinary \$600,000 estate, the fees ranged from \$9,000 in Texas and Virginia to \$22,000 in New York and Pennsylvania. Fees in California, Georgia, Illinois, Michigan, and Ohio were somewhere in between these extremes. These numbers do not include the executor's commission, if any, and they assume probate of a relatively simple estate with a house and no major valuation issues or disputes. Cal. L. Revision Commn. Rep. No. L-1036/1055, at 7, Oct. 26, 1988.

A more recent snapshot of fees is provided by the Statistics of Income Division (SOI) of the IRS. According to estimates by the SOI, in 2007 the IRS received nearly 40,000 estate tax returns reporting aggregate deductions for personal representatives' fees of nearly \$1.3 billion and attorneys' fees of \$915 million. These deductions were taken against the just over \$200 billion in aggregate reported gross estate values, and thus represent 0.65 percent and 0.46 percent respectively.

e. Is Probate Necessary?

In view of the costs of probate and the attendant delays, the question is often asked: *Can probate be avoided?* The answer is Yes, provided the property owner during life transfers all his property into a joint tenancy or an inter vivos trust, or makes arrangement for other forms of nonprobate transfer. In such circumstances, the will serves a backup function to catch overlooked property or property acquired after inter vivos changes in ownership have been made.

Even for property transferred by will or intestacy, probate is not always necessary. As a practical matter, establishment of the transferee's title is not necessary for many items of personal property, such as furniture or personal effects. A purchaser will assume that the possessor has title. Moreover, even for items of personal property for which ownership is evidenced by a document — such as an automobile certificate — summary procedures now exist to clear title and give the transferee official recognition of his rights. See, e.g., Cal. Vehicle Code §5910 (2008) (vehicle transfer without probate).

Statutes in almost every state permit heirs to avoid probate where the amount of property involved is small, often by requiring nothing more than an affidavit of the decedent's successor. See UPC §§3-1201 to 3-1204. Indeed, the chief

area of divergence across the states is not whether to offer a *summary administration for small estates* (even the probate-preferring states that do not offer informal probate do offer a summary procedure for small estates), but rather how much and what kind of property can be transferred by summary administration. The figure defining a small estate, which can be collected upon affidavit, ranges from \$5,000 (as in UPC §3-1201) to \$100,000 (as in 755 Ill. Comp. Stat. Ann. 5/25-1 (2008)) or more. For a survey of small estate procedures across the states, see Jeffrey A. Schoenblum, 2008 Multistate Guide to Estate Planning at Table 4.

Also common are statutory provisions permitting collection of small bank accounts or wage claims, or transfer of an automobile certificate of title to the decedent's heirs, upon affidavit by the heirs. By filling out the appropriate forms and presenting them to the bank, the employer, or the department of motor vehicles, the heir is able to collect the decedent's property or acquire a new certificate of title. Statutes in some states permit filing a will for probate solely as a title document, with no formal administration to follow.

With the rising popularity of nonprobate modes of transfer, the ready availability of summary or affidavit administration for small estates, and special provisions for transfer of automobiles and other items with formal title registration, *increasingly probate is necessary only for very large estates or to clear title to real property*. A 1985 study of five states found that the percentage of decedents' estates that underwent probate administration ranged from 20 percent in California to 34 percent in Massachusetts. Robert A. Stein and Ian G. Fierstein, *The Demography of Probate Administration*, 15 U. Balt. L. Rev. 54 (1985). Thus, one way or another, the large majority of decedents manage to avoid probate.

PROBLEMS

1. Aaron Green died three weeks ago. His wife has come to your law firm with Green's will in hand. The will devises Green's entire estate "to my wife, Martha, if she survives me; otherwise to my children in equal shares." The will names Martha Green as executor. An interview with Mrs. Green reveals that the Green family consists of two adult sons and several grandchildren and that Green owned the following property: car (\$15,000), furniture (\$20,000), mutual fund (\$10,000), joint checking account (\$3,000), and life insurance policy naming Martha Green as beneficiary (\$50,000). Mr. Green also had a pension plan naming Martha Green for survivor's benefits. Green owned no real property; he and his wife lived in a rented apartment. Green's debts consisted of last month's utility bills (\$80) plus the usual consumer charge accounts: Visa card (\$600 balance) and a local department store (\$250). There is also a funeral bill (\$8,000) and the cost of a cemetery lot (\$600). Mrs. Green wants your advice: What should she do with the will? Must it be offered for probate? Must there be an administration of her husband's estate?

2. Same facts as in Problem 1 except that Green died intestate, and the state's statute of descent and distribution provides that where a decedent is survived by

a spouse and children, one-half of his real and personal property shall descend to the spouse and the remaining one-half shall descend to the children.

3. Same facts as in Problem 1 except that Green also owned a house and lot worth \$170,000 and another lot worth \$16,000. The deeds to both tracts name Aaron Green as grantee. The residential property is subject to a mortgage with a current balance of \$85,000; title to the other lot is free of encumbrances. Must (should?) Green's will be probated and his estate formally administered?

4. Let us look at Aaron Green's problem from another perspective. Suppose Green comes to you and tells you that he does not have a will. He describes his family situation and the property owned by him: the property listed in Problem 1 but not the real estate described in Problem 3. His question: In view of his family situation and his modest estate, does he really need a will?

f. Universal Succession

The English system of court-supervised administration of estates, which we inherited, was designed to protect creditors and to protect beneficiaries from an untrustworthy executor or heir. On the continent of Europe and in Louisiana, an entirely different system exists that rarely involves a court at all. It is known as *universal succession*. The heirs or the residuary devisees step into the shoes of the decedent at the decedent's death, taking the decedent's title and assuming all the decedent's liabilities and the obligation of paying legacies according to the decedent's will. If, for example, *O* dies intestate, leaving *H* as *O*'s heir, *H* succeeds to ownership of *O*'s property and must pay all of *O*'s creditors and any taxes resulting from *O*'s death. If *O* has three heirs, they take *O*'s property as tenants in common at *O*'s death, with the ordinary rights of tenants in common. The payment of a commission to a fiduciary is not necessary, and a lawyer need not be employed unless the heirs decide they need legal advice. A system of universal succession can have enormous advantages where the heirs or the residuary devisees are all adults. See *European Succession Laws* (David Hayton ed., 2d ed. 2002).

The UPC authorizes universal succession as an alternative to probate administration. Under UPC §§3-312 to 3-322, the heirs or the residuary devisees may petition the court for universal succession. If the court ascertains that the necessary parties are included and that the estate is not subject to any current contest or difficulty, it issues a written statement of universal succession. The universal successors then have full power of ownership to deal with the assets of the estate. They assume the liabilities of the decedent to creditors, including tax liability. The successors are personally liable to other heirs omitted from the petition or, in the case of residuary devisees, to other devisees for the amount of property due them. No state has yet adopted these provisions of the UPC.

Universal succession is, however, already available to a limited extent in the United States. Under California law, property that passes to the surviving spouse by intestacy or by will is not subject to administration unless the surviving spouse

elects to have it administered. If the surviving spouse chooses not to have the property administered, the surviving spouse takes title to the property and assumes personal liability for the decedent's debts chargeable against the property. Cal. Prob. Code §§13500-13650 (2008). If probate is not necessary for property passing to a surviving spouse, why is it necessary for property passing to adult children?

SECTION C. AN ESTATE PLANNING PROBLEM

1. The Client's Letter and Its Enclosures

January 15, 20__

Dear _____:

For some time now, Wendy and I have been considering the rewriting of our wills since we now have very simple wills giving our property to each other in case of death and then to our children when the survivor of us dies. However, in this day of air crashes where Wendy and I might die simultaneously, the problems of settling our estate might be complicated.

These, in general, are the assets with which we are concerned:

Residence	cost \$125,000	(\$100,000 mtge.)
Lot, cabin, Lake Murray, ME	cost 40,000	worth more
Chevrolet SUV	10,000	
Honda	12,000	
Household furniture, etc.	???	
Checking account	2,000 to 4,000	
Money market account at bank	7,000	
Certificate of deposit	20,000	
My IRA	30,000	
Stocks	130,000	
Mutual funds	110,000	
My life insurance	200,000	
Wendy's life insurance	240,000	
Mother's house at death	???	
Pension	???	

Wendy and I think our main objectives should be to avoid probate and to eliminate as many inheritance taxes as possible. I am enclosing copies of our present wills. These are some of the questions we would like your help on:

1. It may be that we do not need wills at all. Can we let our property pass by inheritance or by joint and survivor arrangements? Our bank accounts and some of our stocks are set up to pass by a joint and survivor arrangement.

2. As a sort of corollary to that first question, we have read in various places that it would be a good idea to set up a living trust to pass our house, cars, etc. With the use of a trust plus the joint and survivor arrangements, could we avoid the need for wills and probate entirely?

3. If you think we should have wills, are our present ones all right? If not, how should they be changed?

Please let us hear from you at your earliest convenience.

Sincerely yours,

/s/ Howard Brown

Howard Brown

Last Will and Testament of Howard Brown

I, Howard Brown, of the city of Springfield, County of _____, and State of _____, do hereby make, publish, and declare this to be my Last Will and Testament, hereby revoking any and all other wills and codicils thereto, which I have heretofore made.

FIRST: I hereby direct that all of my just debts, funeral expenses, and expenses of administration of my estate be paid out of my estate as soon as may be practicable after my death.

SECOND: I name and appoint my wife, Wendy Brown, to be the executor of this my Last Will and Testament, and I direct that she not be required to give bond or other security.

THIRD: I give my remainder interest in my mother's house at 423 Elm St., Concord, Delaware, to my sister, Carol Gould.

FOURTH: I give, devise, and bequeath all the rest of my property, both real and personal, of whatever kind and nature and description, and wherever located, which I now own or may own at the time of my death, to my wife, Wendy Brown, should she survive me. Should she not survive me, I then give, devise, and bequeath all of my property to my children.

FIFTH: I authorize and empower my Executor, or anyone appointed to administer this, my Last Will and Testament, to sell and convert into cash any and all of my personal property without a court order and to convey any such real estate by deed without the necessity of a court order authorizing such conveyance or approving such deed.

SIXTH: In the event that my wife, Wendy Brown, predeceases me, I name and appoint my wife's sister, Lucy Preston Lipman, of San Francisco, California, as legal guardian of my children during their respective minorities.

IN TESTIMONY WHEREOF I have hereunto set my hand and seal this 27th day of November, 2008.

/s/ Howard Brown

Howard Brown

The above instrument, consisting of two typewritten pages, of which this is the second, with paragraphs FIRST through SIXTH, inclusive, was on the 27th day

of November, 2008, signed by Howard Brown, in our presence, and he did then declare this to be his Last Will and Testament, and we at his request and in his presence and in the presence of each other, did sign this instrument as witnesses thereunto and as witnesses to his signature thereto.

WITNESSES:

/s/ Michael Wong

/s/ Patricia Muñoz Garcia

[Wendy Brown's will contains reciprocal provisions, with the exception of the remainder interest in Howard's mother's house. Wendy leaves everything of hers to Howard if he survives, and if he does not survive her, to her children.]

2. Some Preliminary Questions Raised by Brown's Letter

From time to time, we shall refer back to the Brown estate planning situation in the context of the substantive areas being considered. But before we embark on our studies, it may be profitable to reflect on some of the questions raised in, and by, Brown's letter.

QUESTIONS AND PROBLEMS

1. Examine Howard Brown's present will in the context of the property and family situation described in his letter. Can you detect any problems that may be raised or any contingencies that are not provided for by the will provisions? Here are a few:

(a) *Article FIRST*: Does the "just debts" clause require the executor to pay off the mortgage on the Browns' home? Would this be desirable? See *In re Estate of Miller*, 127 F. Supp. 23 (D.D.C. 1955); *In re Estate of Keil*, 145 A.2d 563 (Del. 1958). See also the discussion of exoneration of liens, page 391.

(b) Would death taxes incurred at Howard Brown's death be "just debts," making this a tax apportionment clause requiring payment of all taxes, including those on the remainder interest in his mother's house, out of Howard's residuary estate? See *Estate of Kyreazis*, 701 P.2d 1022 (N.M. App. 1985); Internal Revenue Code of 1986, §§2206, 2207.

(c) Does the "just debts" clause require the executor to pay off debts barred by limitations or other such defenses?

(d) *Articles SECOND and FIFTH*: Has suitable provision been made for appointment of an executor in case Wendy Brown dies before Howard? Does the executor have sufficiently broad powers to enable her to administer the estate effectively?

(e) *Article FOURTH*: Is the dispositive plan provided by Howard's will sound? Should he make an outright distribution of his entire estate to Wendy, or should he consider making some other distribution?

(f) Which of the items of property listed in Howard Brown's letter will be governed by his will, and which will pass as nonprobate property unaffected by the will?

(g) *Article SIXTH*: If both Howard and Wendy Brown die before all their children attain majority, a guardianship administration will be required. Is this desirable? See pages 136-140.

2. In view of the Browns' property and family situation, do they need wills at all? Should the Browns consider alternatives to a will or intestacy, such as joint and survivor arrangements and inter vivos trusts, as means of transferring their property at death?

Perhaps it has occurred to you by now that we don't really know very much about the Brown family or the property they own. Without further information, we cannot answer these questions. What further information should we obtain from the clients before we can proceed further?

3. *Additional Data on the Browns' Family and Property*

Following receipt of the letter from Howard Brown asking for a review of the present wills of Howard and Wendy Brown, a conference was held with the clients, and the following additional information was obtained.

a. **Family Data**

<i>Members of Immediate Family</i>		<i>Age</i>	<i>Birth Date</i>	<i>Health</i>
Husband	Howard Brown	43	7/12/—	good
Wife	Wendy Brown	41	6/1/—	"
Child of Wendy	Michael Walker	20	9/25/—	"
Child of both	Sarah Brown	14	11/19/—	"
Child of both	Stephanie Brown	11	8/22/—	"

Howard Brown is an industrial design engineer and manager of a department at Tresco Machine Tool Company in Springfield. He has been with this firm for the past eight years and feels that he has a secure and responsible position with the firm. His annual salary is \$90,000.

Wendy Brown has a degree in modern languages and during the early years of their marriage taught German and French at a secondary school in Springfield. She then worked for several years only in the home. Four years ago Wendy decided to go to law school. Last year she finished law school and received a J.D. degree. (She did *not* take a course in wills and trusts.) Wendy has just accepted a

position as an associate of Hanlon & Yutz, a medium-size law firm. Her annual salary is \$100,000.

Michael is Wendy's son by her first husband, Brian Walker, whom Wendy divorced when Michael was three years old. A year later, Wendy and Howard married, and Howard has raised Michael as a member of his family, though never formally adopting him. Brian stopped making child support payments a couple of years after the divorce and moved out of state. He has not been heard from in many years. Michael has left home and is living with (but not married to) an older woman, Candace Robinson, age 33. They have a child, Andy, age 1.

Residence

Home address: 2220 Casino Lane, Springfield. 555-477-5882

Period of residence in this state: All of life since college.

Note: No problems regarding domicile. Also, note that none of present assets acquired while residing in another state. Howard owns out-of-state property — a lot in Maine and a remainder interest in his mother's house in Delaware.

Parents; collateral relatives

Howard's parents. Howard Brown's father, Frank, died of a heart attack at age 60. His mother, Margaret Brown, a widow, is 63 years old, is in good health, and lives in Concord, Delaware. Howard stated that his mother has a modest but comfortable income from property left by her husband and from social security. Howard says his father devised his home to his wife, Margaret, for life, and on her death to Howard and his sister, Carol Gould.

Howard estimated that his mother owns property worth about \$300,000, of which \$150,000 is represented by her residence. Howard is familiar with the terms of his mother's will; it provides for an equal distribution between Howard and Carol Gould. Howard is named as executor under the will.

Howard's collateral relatives. Howard has a younger sister, Carol Gould, who is a police officer with the Concord police department. Carol is divorced and lives with her mother; Carol has no children.

Wendy's parents. Wendy Brown's parents (Robert Preston, age 65, and Zoë Preston, age 62) are both living. Wendy stated that her father is a well-known doctor in Boston and is quite well off. When asked how well off, Wendy said he is "worth" at least \$1 million (probably a very conservative estimate). Wendy may acquire a substantial inheritance upon the death of her parents.

Wendy's collateral relatives. Wendy Brown's siblings: one sister, Lucy Preston Lipman, a writer, lives in San Francisco with her husband, Jonathan Lipman. They have two children. Her brother, Simon Preston, is married to Antonia Preston, has no children, and is a salesman. Her other sister, Ruth Preston, unmarried, is a professor of archeology at Swarthmore.

Wendy Brown also has a maternal aunt, Fanny Fox of Lexington, Kentucky. Aunt Fanny is a rich widow without children and has a large house full of antiques, paintings, silver — things she and her husband collected during their marriage. Wendy will likely inherit some of Aunt Fanny's things and possibly a substantial sum of money.

Special family problems

Michael is a stepchild of Howard. Michael has an out-of-wedlock child, Andy.

b. Assets

The Browns have lived in Springfield since they were married 16 years ago. Since neither brought into the marriage any property of substantial value, there appears to be no problem in establishing their marital rights in the property they now own. All life insurance policies were taken out after the Browns married.

Tangible personal property

Tangible personalty consists of the usual furnishings in a family residence, two automobiles, outboard motor boat, personal effects such as clothing and jewelry, computers, plasma TV, and other miscellaneous items. No items of unusual value. Estimated value:

\$50,000

Real estate

(1) Family residence. The Browns purchased their home at 2220 Casino Lane, Springfield, 15 years ago. Although the purchase price for the property was \$125,000, Howard believes that it is now worth around \$300,000, but this is a guesstimate. Present balance on mortgage loan (note held by Springfield Federal Savings & Loan Assn.) is \$100,000. The deed shows that title to the property was taken by "Howard Brown and Wendy Brown, as joint tenants with right of survivorship and not as tenants in common."

\$300,000

(2) Lot and cabin, Lake Murray, Maine. Twelve years ago the Browns purchased a lot and cabin on Lake Murray for \$40,000. Title to the land was taken in Howard Brown's name alone. Based on current values, the Browns believe they could sell the property for at least \$120,000. No mortgage indebtedness.

120,000

(3) Mother's house. Howard has a remainder interest in 423 Elm St., Concord, Delaware, with his sister. House worth about \$150,000. Howard's (discounted) remainder roughly valued at \$40,000.

40,000

Bank accounts

(1) Checking account, Springfield National Bank. The account balance fluctuates from around \$2,000 to \$4,000 each month. Howard and Wendy Brown are both authorized to draw checks on the account; the balance is payable to the survivor.

\$ 3,000

(2) Money market account, Springfield Federal Savings & Loan Assn. The account is in the name of Wendy Brown.

7,000

(3) Certificate of deposit, Springfield Federal Savings & Loan Assn., at 6 percent for four years. CD was issued in the name of "Howard Brown and Wendy Brown, as joint tenants with right of survivorship."

20,000

(4) IRA (Individual Retirement Account), Springfield Federal Savings & Loan Assn. Established by Howard Brown 15 years ago. Income taxes on contributions are deferred until the money is withdrawn or Howard reaches 70½ or sooner dies. Current balance is \$30,000. If Howard dies before withdrawal, balance is payable to Wendy Brown.

30,000

Securities

(1) 800 shares, General Corporation common stock. Given to Howard under his aunt's will six years ago. Current value: \$50 per share. Registered in the name of Howard Brown as owner.

\$40,000

(2) 1,000 shares, Varoom Mutual Fund. When Howard's father died five years ago, his mother gave each of her children \$7,500. Howard used all of this money to purchase 400 shares of the Varoom Fund, which has appreciated in value since his purchase. Howard has reinvested the ordinary income and capital gains dividends paid by the fund and now owns an additional 600 shares. Present value is \$30 per share. Registered in the name of Howard Brown as owner.

30,000

(3) 2,000 shares, American Growth Mutual Fund. Over the years the Browns have invested in the American Growth Fund under some form of monthly investment plan. Their objective was to establish an educational fund for their children. The purchase price has fluctuated over the years from \$28 to \$42 a share. Present price is \$40 a share. Howard says that he has kept

records on the price of the shares as purchased. Registered in the name of “Howard Brown and Wendy Brown, as joint tenants with right of survivorship and not as tenants in common.”	80,000
(4) 1,500 shares, Union National Bank common stock. Was given to Wendy Brown by her parents. Present value is \$60 per share. Registered in the name of Wendy Brown as owner.	90,000

Life insurance

(1) Mutual of New York policy #624-05-91, ordinary life, participating, acquired 14 years ago. Annual premium \$2,050. Cash surrender value this year \$20,500; CSV is increasing at about \$1,600/year.	\$100,000
(2) Aetna Life Group policy, group term. Premiums are paid by Howard Brown’s employer.	100,000
(3) Prudential Life policy, group term. Premiums are paid by Wendy Brown’s employers.	240,000

Policies (1) and (2) name Howard Brown as “insured” and “owner.” The policies name Wendy Brown as primary beneficiary and the estate of Howard Brown as contingent beneficiary. Policy (3) names Wendy Brown as “insured” and “owner.” The policy names Howard Brown as beneficiary. It names Wendy’s children as secondary beneficiaries.

Employee benefits of Howard Brown

In addition to the group insurance mentioned above, Howard Brown’s employer provides medical insurance, disability insurance, and a qualified pension plan. The plan will provide substantial retirement benefits to Howard, under a formula based on his years of service and his average annual salary. The present projection is that Howard would be able to retire at age 65 with an annuity of about \$65,000 in today’s dollars.

The pension plan provides survivor benefits for the surviving spouse. If Howard survives to retirement age, the pension is payable as a joint and survivor annuity to Howard and his surviving spouse.

Employee benefits of Wendy Brown

In addition to the group insurance mentioned above, Wendy Brown’s law firm, Hanlon & Yutz, provides group medical coverage. There are no pension benefits for first-year associates. Wendy has been in practice for only a month, but she will join the plan after her first year at the firm. If she stays at the firm for 10 years, it is likely that her income — already slightly exceeding Howard’s — will grow substantially.

c. Liabilities

Real estate mortgages: \$100,000 mortgage loan, Springfield Federal Savings & Loan Assn.

Other notes to banks, etc.: None.

Loans on insurance policies: None.

Accounts to others: "Usual" store, etc. accounts.

Other: None.

d. Assets and Liabilities: Summary

(1) Estate of Howard and Wendy Brown	
Tangible personalty	\$ 50,000
Realty:	
Residence (joint tenancy)	300,000
Lake Murray property (in Howard's name)	120,000
Remainder interest in mother's home (Howard)	40,000*
Bank accounts:	
Checking (joint and survivor)	3,000
Money market (in Wendy's name)	7,000
Certificate of deposit (joint tenancy)	20,000
IRA (Howard's, payable on death to Wendy)	30,000
Securities:	
General Corp. common (in Howard's name)	40,000*
Varoom Mutual Fund (in Howard's name)	30,000*
American Growth Mutual Fund (joint tenancy)	80,000
Union Natl. Bank common (in Wendy's name)	90,000*
Life insurance on Howard	200,000
Life insurance on Wendy	240,000
TOTAL ASSETS	\$ 1,050,000 ¹⁹
(2) Liabilities	
Mortgage loan, Springfield Federal Savings & Loan Assn.	100,000
TOTAL LIABILITIES	\$ 100,000

19. Items marked by asterisk, which were acquired by gift or inheritance from Howard's and Wendy's respective relatives, are excluded from this total. All other assets are attributable to Howard Brown's earnings during their marriage. In a community property state, property acquired with a spouse's earnings is community property unless the spouses have changed it into another form of ownership.

(3) Other factors:

Probable inheritance by Howard Brown of about \$150,000 from his mother. Probability of substantial inheritance by Wendy Brown from her parents and her Aunt Fanny — but no knowledge of whether this would be outright or in some form of trust.

SECTION D. PROFESSIONAL RESPONSIBILITY

Trusts and estates practice is mined with conflicts of interest arising from duties to clients and their intended beneficiaries. Forewarned is forearmed.

1. *Duties to Intended Beneficiaries*

Simpson v. Calivas

Supreme Court of New Hampshire, 1994
650 A.2d 318

HORTON, J. The plaintiff, Robert H. Simpson, Jr., appeals from a directed verdict, grant of summary judgment, and dismissal of his claims against the lawyer who drafted his father's will. The plaintiff's action, sounding in both negligence and breach of contract, alleged that the defendant, Christopher Calivas, failed to draft a will which incorporated the actual intent of Robert H. Simpson, Sr. to leave all his land to the plaintiff in fee simple. Sitting with a jury, the Superior Court (Dickson, J.) directed a verdict for the defendant based on the plaintiff's failure to introduce any evidence on . . . breach of duty. The trial court also granted summary judgment on collateral estoppel grounds based on findings of the Strafford County Probate Court and dismissed the action, ruling that under New Hampshire law an attorney who drafts a will owes no duty to intended beneficiaries. We reverse and remand.

In March 1984, Robert H. Simpson, Sr. (Robert Sr.) executed a will that had been drafted by the defendant. The will left all real estate to the plaintiff except for a life estate in "our homestead located at Piscataqua Road, Dover, New Hampshire," which was left to Robert Sr.'s second wife, Roberta C. Simpson (stepmother). After Robert Sr.'s death in September 1985, the plaintiff and his stepmother filed a joint petition in the Strafford County Probate Court seeking a determination, essentially, of whether the term "homestead" referred to all the decedent's real property on Piscataqua Road (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). The probate court found the term

“homestead” ambiguous, and in order to aid construction, admitted some extrinsic evidence of the testator’s surrounding circumstances, including evidence showing a close relationship between Robert Sr. and plaintiff’s stepmother. The probate court, however, did not admit notes taken by the defendant during consultations with Robert Sr. that read: “House to wife as a life estate remainder to son, Robert H. Simpson, Jr. . . . Remaining land . . . to son Robert A. [sic] Simpson, Jr.” The probate court construed the will to provide Roberta with a life estate in all the real property. After losing the will construction action — then two years after his father’s death — the plaintiff negotiated with his stepmother to buy out her life estate in all the real property for \$400,000.

The plaintiff then brought this malpractice action, pleading a contract count, based on third-party beneficiary theory, and a negligence count. . . .

The plaintiff raises . . . [these] issues on appeal: (1) whether the trial court erred in ruling that under New Hampshire law a drafting attorney owes no duty to an intended beneficiary; (2) whether the trial court erred in ruling that the findings of the probate court on testator intent collaterally estopped the plaintiff from bringing a malpractice action

We reverse and remand.

I. DUTY TO INTENDED BENEFICIARIES . . .

The critical issue, for purposes of this appeal, is whether an attorney who drafts a testator’s will owes a duty of reasonable care to intended beneficiaries. We hold that there is such a duty.

As a general principle, “the concept of ‘duty’ . . . arises out of a relation between the parties and the protection against reasonably foreseeable harm.” *Morvay v. Hanover Insurance Co.*, 506 A.2d 333, 334 (N.H. 1986). The existence of a contract between parties may constitute a relation sufficient to impose a duty to exercise reasonable care, but in general, “the scope of such a duty is limited to those in privity of contract with each other.” *Robinson v. Colebrook Savings Bank*, 254 A.2d 837, 839 (N.H. 1969). The privity rule is not ironclad, though, and we have been willing to recognize exceptions particularly where, as here, the risk to persons not in privity is apparent. In *Morvay*, for example, we held that investigators hired by an insurance company to investigate the cause of a fire owed a duty to the insureds to perform their investigation with due care despite the absence of privity. Accordingly, the insureds stated a cause of action by alleging that the investigators negligently concluded that the fire was set, thereby prompting the insurance company to deny coverage. *Morvay*, 506 A.2d at 335.

Because this issue is one of first impression, we look for guidance to other jurisdictions. The overwhelming majority of courts that have considered this issue have found that a duty runs from an attorney to an intended beneficiary of a will. Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* 3d ed. §26.4, at 595 (1989 & Supp. 1992). A theme common to these cases, similar to a theme of cases in which we have recognized exceptions to the privity rule, is an emphasis on the foreseeability of injury to the intended beneficiary. As the California Supreme

Court explained in reaffirming the duty owed by an attorney to an intended beneficiary:

When an attorney undertakes to fulfill the testamentary instructions of his client, he realistically and in fact assumes a relationship not only with the client but also with the client's intended beneficiaries. The attorney's actions and omissions will affect the success of the client's testamentary scheme; and thus the possibility of thwarting the testator's wishes immediately becomes foreseeable. Equally foreseeable is the possibility of injury to an intended beneficiary. In some ways, the beneficiary's interests loom greater than those of the client. After the latter's death, a failure in his testamentary scheme works no practical effect except to deprive his intended beneficiaries of the intended bequests.

Heyer v. Flaig, 449 P.2d 161, 164-65 (Cal. 1969). We agree 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.

The defendant in his brief, however, urges that if we are to recognize an exception to the privity rule, we should limit it to those cases where the testator's intent as expressed in the will — not as shown by extrinsic evidence — was frustrated by attorney error. See *Kirgan v. Parks*, 478 A.2d 713, 719 (Md. App. 1984). Under such a limited exception to the privity rule, a beneficiary whose interest violated the rule against perpetuities would have a cause of action against the drafting attorney, but a beneficiary whose interest was omitted by a drafting error would not. Similarly, application of such a rule to the facts of this case would require dismissal even if the allegations — that the defendant botched Robert Sr.'s instructions to leave all his land to his son — were true. We refuse to adopt a rule that would produce such inconsistent results for equally foreseeable harms, and hold that an intended beneficiary states a cause of action simply by pleading sufficient facts to establish that an attorney has negligently failed to effectuate the testator's intent as expressed to the attorney.

We are not the only court to reject the distinction urged by the defendant. In *Ogle v. Fuiten*, 466 N.E.2d 224, 225 (Ill. 1984), for example, nephews of the testator sued the testator's attorney for failing to provide in the will for the possibility that the testator's wife might not die in a common disaster, but might nonetheless fail to survive him by thirty days. The testator's wife died in the period not dealt with in the will, and without a provision in the will providing for this situation, the estate devolved by intestacy. On appeal after the dismissal of the nephews' claims, the court flatly rejected the argument that intended beneficiaries do not state a cause of action where the testator's alleged intent does not appear in the will.

The plaintiff also argues that the trial court erred in failing to recognize that the writ stated a cause of action in contract. We agree.

The general rule that a nonparty to a contract has no remedy for breach of contract is subject to an exception for third-party beneficiaries. Third-party beneficiary status necessary to trigger this exception exists where "the contract is so expressed as to give the promisor reason to know that a benefit to a third party is

contemplated by the promisee as one of the motivating causes of his making the contract.” *Tamposi Associates, Inc. v. Star Market Co.*, 406 A.2d 132, 134 (N.H. 1979). We hold that where, as here, a client has contracted with an attorney to draft a will and the client has identified to whom he wishes his estate to pass, that identified beneficiary may enforce the terms of the contract as a third-party beneficiary.

Because we hold that a duty runs from a drafting attorney to an intended beneficiary, and that an identified beneficiary has third-party beneficiary status, the trial court erred by dismissing the plaintiff’s writ.

II. COLLATERAL ESTOPPEL

The defendant insists, however, that even if a duty runs from a testator’s attorney to an intended beneficiary, the superior court properly granted summary judgment on collateral estoppel grounds. We disagree. . . .

The primary question is whether the issues before the probate and superior courts were identical. We agree with defendant that comparison of the respective evidence which each court was competent to hear is one factor, but note that an identity of evidence is not dispositive of an identity of issues. Instead, determination of “identity” necessarily requires inquiry into each court’s role and the nature of the respective findings.

The principal task of the probate court is to determine the testator’s intent . . . limited by the requirement that it determine the “intention of the testator as shown by the language of the whole will.” *Dennett v. Osgood*, 229 A.2d 689, 690 (N.H. 1967). In this effort, the probate court is always permitted to consider the “surrounding circumstances” of the testator, *id.*, and where the terms of a will are ambiguous, as here, extrinsic evidence may be admitted to the extent that it does not contradict the express terms of the will. *In re Estate of Sayewich*, 413 A.2d 581, 584 (N.H. 1980). Direct declarations of a testator’s intent, however, are generally inadmissible in all probate proceedings. *Id.* The defendant argues that even though his notes of his meeting with the decedent recorded the decedent’s direct declarations of intent, they could have been admissible as an exception to the general rule had there been a proper proffer. We need not reach the issue of whether the defendant’s notes fall within an exception to the general rule because even assuming admissibility and therefore an identity of evidence, there remain distinct issues. Quite simply, the task of the probate court is a limited one: to determine the intent of the testator as expressed in the language of the will. Obviously, the hope is that the application of rules of construction and consideration of extrinsic evidence (where authorized) will produce a finding of expressed intent that corresponds to actual intent. Further, the likelihood of such convergence presumably increases as the probate court considers more extrinsic evidence; however, even with access to all extrinsic evidence, there is no requirement or guarantee that the testator’s intent as construed will match the testator’s actual intent.

The defendant, however, insists that whether or not required to do so, the probate court in this case did make an explicit finding of actual intent when it

concluded: “There is nothing to suggest that [the testator] intended to grant a life estate in anything less than the whole.” We need not reach the issue of whether this language constitutes a finding of actual intent because collateral estoppel will not lie anyway. Collateral estoppel is only applicable if the finding in the first proceeding was essential to the judgment of that court. Restatement (Second) of Judgments §27. Inasmuch as the mandate of the probate court is simply to determine and give effect to the intent of the testator as expressed in the language of the will, a finding of actual intent is not necessary to that judgment. Accordingly, even an explicit finding of actual intent by a probate court cannot be the basis for collateral estoppel. . . .

Reversed and remanded.

NOTES AND QUESTIONS

1. *The privity defense.* In rejecting the privity defense, Vice Chancellor Megarry of England stated the argument against it succinctly:

In broad terms, the question is whether solicitors who prepare a will are liable to a beneficiary under it if, through their negligence, the gift to the beneficiary is void. The solicitors are liable, of course, to the testator or his estate for a breach of the duty that they owed to him, though as he has suffered no financial loss it seems that his estate could recover no more than nominal damages. Yet it is said that however careless the solicitors were, they owed no duty to the beneficiary, and so they cannot be liable to her. If this is right, the result is striking. The only person who has a valid claim has suffered no loss, and the only person who has suffered a loss has no valid claim. [Ross v. Caunters, 3 All Eng. Rep. 580, 582 (Ch. 1980).]

At most ten states still follow the old rule that the lack of privity between the drafter and an intended beneficiary prevents a malpractice action by the beneficiary: Alabama, Arkansas, Maine, Maryland, Nebraska, New York, Ohio, Texas, Virginia, and, perhaps, Massachusetts. See Ronald E. Mallen and Jeffrey M. Smith, 4 Legal Malpractice §§34:4-34:7 (2008); Kevin S. Rosen and Pamela A. Bresnahan, Avoiding Malpractice in the Course of Estate Planning, 41 Heckerling Inst. on Est. Plan. ch. 8 (2007); Bradley E.S. Fogel, Attorney v. Client: Privity, Malpractice, and the Lack of Respect for the Primacy of the Attorney-Client Relationship in Estate Planning, 68 Tenn. L. Rev. 261 (2001).

2. *Malpractice and law reform.* If extrinsic evidence of the testator’s actual intent is reliable enough to hold the drafter liable for misrendering that intent, why not reform the will to correct the drafting error and avoid the malpractice litigation altogether?

Many years ago Professor Dukeminier predicted that legal malpractice liability would prove to be a strong force for reform of property law. Jesse Dukeminier, Cleansing the Stables of Property: A River Found at Last, 65 Iowa L. Rev. 151 (1979). And so it is turning out. Today there are movements to excuse errors in will execution (see pages 246-264); to correct mistakes by lawyers in drafting instruments to carry out the client’s intent (see pages 342-357); to cure or avoid

perpetuities violations by judicial reformation of the instrument, the adoption of the wait-and-see doctrine, or the abolition of the Rule Against Perpetuities altogether (see pages 905-917); and to reform wills and trusts after the decedent's death to obtain tax advantages lost by the lawyer's mistake (see page 651). Has the fall of the privity defense played a role in inducing lawyers to support these reforms?

3. *Probate court jurisdiction.* In *Simpson v. Calivas*, the validity and construction of the will were matters for the probate court to decide. The negligence of the lawyer was a matter for a court of general jurisdiction, which entertains tort and contract suits. This is true in most states.

Historically, probate courts were inferior courts, with jurisdiction limited to determining the will's validity and supervising administration of the decedent's estate. Because of the small amount of business, legislatures were often unwilling to provide suitable compensation and clerical assistance, particularly in rural areas. In some states, probate judges may be laypersons, without legal training. Anyone can run for the office. The *National Law Journal*, Dec. 24, 1984, at 39, reported the election of an 18-year-old man, just six months out of high school, as probate judge for Valencia County, New Mexico. Because of lack of confidence in probate judges, their powers were often curtailed.

Today, most probate courts are better staffed and they are authorized to pass on more questions regarding wills, including the construction of wills. Nonetheless, most courts, like the New Hampshire Supreme Court, reject the claim that conclusions reached by the probate court about testator's intent in a construction suit are determinative in a malpractice suit. The issues and the evidentiary rules for proving intent applied in the two proceedings are different.

State probate courts, meanwhile, continue to suffer from a poor reputation, in some cases well deserved. See John H. Langbein, *Don't Die in Connecticut*, *Hartford Courant*, Oct. 23, 2005, at C1 (detailing the low standards and culture of petty corruption of Connecticut's probate courts); *In re Feinberg*, 833 N.E.2d 1204 (N.Y. 2005) (upholding removal of a probate court judge for misconduct). See also Bill Braun, *Judge Facing Sex Charges Is Given New Assignment*, *Tulsa World*, Apr. 29, 2008, at A13 (reporting that an Oklahoma judge accused of exposing himself to two women in a parking lot had been reassigned to the probate division pending resolution of the charges).

4. Sometimes attorneys who make drafting errors in wills have more to fear from their incompetence than a mere suit for malpractice. Because a Tennessee lawyer (a former judge who specialized in probate) mistakenly used the phrase "all monies" when intending to refer to the residue of an estate, the testator's intended beneficiary was not awarded the testator's stock investments. The intended beneficiary, who lost out on \$100,000, became unhinged and shot and killed the lawyer—as well as a life insurance agent who, at the time of the murder, was trying to sell an insurance policy to the 81-year-old lawyer. See Angela K. Brown, *One Word Enraged Lawyer's Killer*, *Comm. App.*, Mar. 20, 1999, at B2.

2. *Conflicts of Interest*

A. v. B.

Supreme Court of New Jersey, 1999
726 A.2d 924

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. . . .

I.

In October 1997, the husband and wife retained Hill Wallack, a firm of approximately sixty lawyers, to assist them with planning their estates.²⁰ 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

20. In an omitted portion of the opinion, the court said: "Because the Family Part has sealed the record, we refer to the parties without identifying them by their proper names." — Eds.

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:1-2;3-48, 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. . . .

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*, 372 A.2d 297, 300 (N.J. 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.” 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. 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*, 493 A.2d 1239, 1245 (N.J. 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. . . .

The New Jersey RPCs 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. . . . 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 1.6.²¹ . . .

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. . . .

[A]n 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 context of estate planning, the [Restatement (Third) of the Law Governing Lawyers (Proposed Final Draft No. 1, 1996) ("the Restatement")] 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. *Id.* §112 comment 1, illustrations 2, 3. The Restatement provides two analogous illustrations in which a lawyer has been jointly retained by a husband and wife to prepare reciprocal wills. The first illustration states:

Lawyer has been retained by Husband and Wife to prepare wills pursuant to an arrangement under which each spouse agrees to leave most of their property to the other. Shortly after the wills are executed, Husband (unknown to Wife) asks Lawyer to prepare an inter vivos trust for an illegitimate child whose existence Husband has kept secret from Wife for many years and about whom Husband had not previously informed Lawyer. Husband states that Wife would be distraught at learning of Husband's infidelity and of Husband's years of silence and that disclosure of the information could destroy their marriage. Husband directs Lawyer not to

21. As amended in 2002, Model Rule 1.6(b) now does provide for permissive disclosure "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." — Eds.

inform Wife. The inter vivos trust that Husband proposes to create would not materially affect Wife's own estate plan or her expected receipt of property under Husband's will, because Husband proposes to use property designated in Husband's will for a personally favored charity. In view of the lack of material effect on Wife, Lawyer may assist Husband to establish and fund the inter vivos trust and refrain from disclosing Husband's information to Wife. [Id. §112, cmt. 1, illus. 2.]

In authorizing non-disclosure, the Restatement explains that an attorney should refrain from disclosing the existence of the illegitimate child to the wife because the trust "would not materially affect Wife's own estate plan or her expected receipt of property under Husband's will." *Ibid.*

The other illustration states:

Same facts as [the prior Illustration], except that Husband's proposed inter vivos trust would significantly deplete Husband's estate, to Wife's material detriment and in frustration of the Spouses' intended testamentary arrangements. If Husband will neither inform Wife nor permit Lawyer to do so, Lawyer must withdraw from representing both Husband and Wife. In the light of all relevant circumstances, Lawyer may exercise discretion whether to inform Wife either that circumstances, which Lawyer has been asked not to reveal, indicate that she should revoke her recent will or to inform Wife of some or all the details of the information that Husband has recently provided so that Wife may protect her interests. Alternatively, Lawyer may inform Wife only that Lawyer is withdrawing because Husband will not permit disclosure of information that Lawyer has learned from Husband. [Id. §112, cmt. 1, illus. 3.]

Because the money placed in the trust would be deducted from the portion of the husband's estate left to his wife, the Restatement concludes that the lawyer may exercise discretion to inform the wife of the husband's plans. *Ibid.* . . .

Similarly, the American College of Trust and Estate Counsel (ACTEC) also 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." American College of Trust and Estate Counsel, ACTEC Commentaries on the Model Rules of Professional Conduct 68 (2d ed. 1995). The ACTEC suggests that the lawyer first attempt to convince the client to inform the co-client. *Ibid.* . . .

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. *Id.* at 68-69. . . .

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. . . .

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 AND QUESTION

1. Estate planning lawyers commonly represent multiple members of the same family — such as a husband and wife — in drafting wills, trusts, and powers of attorney, and in the administration of wills and trusts. In such cases it is important to discuss with the affected parties at the outset the possible conflicts of interests and the ground rules for sharing information. A prudent practice, unfortunately infrequently used, is to speak with each client separately early in the representation to ferret out any hidden conflicts. Most estate planning lawyers at least discuss the potential for a conflict of interests with the clients, and then follow up on the discussion with an *engagement letter* or other form of waiver agreement. In some states an engagement letter is required. See Anne-Marie Rhodes, *Engagement Letters*, Tr. & Est., Apr. 2008, at 25.

The model engagement letter for the joint representation of spouses suggested in ACTEC *Engagement Letters: A Guide for Practitioners* (2d ed. 2007), provides as follows:

It is common for a husband and wife to employ the same lawyer to assist them in planning their estates. You have taken this approach by asking me to represent both of you in your planning. It is important that you understand that, because I will be representing both of you, you are considered my client, collectively. Ethical considerations prohibit me from agreeing with either of you to withhold information from the other. Accordingly, in agreeing to this form of representation, each of you is authorizing me to disclose to the other any matters related to the representation that one of you might discuss with me or that I might acquire from any other source. In this representation, I will not give legal advice to either of you or make any changes in any of your estate planning documents without your mutual knowledge and consent. [Id. at 11.]

What result in *A. v. B.* if the husband and wife had signed an engagement letter containing this clause?

2. For an excellent discussion of estate planning under the ABA Model Rules of Professional Conduct, see ACTEC *Commentaries on the Model Rules of Professional Conduct* (4th ed. 2006), particularly the treatment of Rules 1.2 (scope of representation), 1.6 (confidentiality), and 1.7 (conflicts of interest). As in *A. v. B.*, courts often treat the ACTEC *Commentaries* as authoritative. For an up-to-date treatment of multiple client representation in estate planning, see John R. Price, *The Fundamentals of Ethically Representing Multiple Clients in Estate*

Planning, 62 U. Miami L. Rev. 735 (2008). For a survey of common malpractice pitfalls in estate planning, see Gerry W. Beyer, Avoiding the Estate Planning “Blue Screen of Death” — Common Non-Tax Errors and How to Prevent Them, 1 Est. Plan. & Comm. Prop. L.J. 61 (2008).

3. Estate planning matters are a common source of ethics complaints against attorneys. For example, in Illinois probate was fifth among 19 fields in the frequency of disciplinary complaints filed in 2007. Annual Report of the Illinois Attorney Registration and Disciplinary Commission (2008).

For useful student texts covering the materials in this book, see Roger W. Andersen, *Understanding Trusts and Estates* (3d ed. 2003); Gerry W. Beyer, *Wills, Trusts, and Estates: Examples and Explanations* (4th ed. 2007); Melanie B. Leslie and Stewart E. Sterk, *Trusts and Estates: Concepts and Insights* (2006); Jeffrey N. Pennell and Alan Newman, *Estate and Trust Planning* (2005); William M. McGovern and Sheldon F. Kurtz, *Principles of Wills, Trusts & Estates* (2005).

INTESTACY: AN ESTATE PLAN BY DEFAULT

SECTION A. THE BASIC SCHEME

1. *Introduction*

Some people die leaving a will that provides for the disposition of their property at death. These people are said to die *testate*. Other people die without a will. These people are said to die *intestate*. The law of intestacy governs the distribution of an intestate decedent's probate property. Intestacy is therefore the background law that lawyers plan around—what in legal theory are called *default rules*.

Lawyers almost always advise their clients to avoid intestacy by executing a will (and often a trust as well). In addition to identifying who will take the decedent's probate property, wills can designate guardians for minor children, identify a trustworthy individual or trust company to administer the estate, reduce probate costs by waiving a required bond (or surety on a bond), and achieve tax savings. Surveys report that about half of all adults claim to have a will.¹ Those who say that they have a will tend to be older and wealthier, and most but not all had assistance of a lawyer in the will's preparation.

In spite of the many advantages of a will, roughly half the population dies intestate. Why? One reason is that the unpleasantness of confronting mortality invites procrastination. In a 2006 poll of older adults, 20 percent acknowledged that “[t]hinking about my own death . . . scares me.”² Insurers call death insurance

1. See Gallup Poll Social Series — Values and Beliefs (reporting 51%, May 2-5, 2005, survey of 1,005 adults); ABC News Poll: Planning Ahead (reporting 50%, Jul.-Aug. 2002, survey of 1,024 adults).

2. AARP Thoughts on the Afterlife Survey, Public Opinion Online database, Roper Center for Public Opinion Research, University of Connecticut (June 2006, survey of 1,011 adults 50 and older).

“life insurance,” and agents are careful to omit the word *death* from their discussions with clients (“If anything should happen to you . . .” *If*, indeed!). As Freud wrote, “Our own death is indeed unimaginable, and whenever we make the attempt to imagine it we can perceive that we really survive as spectators. Hence . . . at bottom no one believes in his own death, or to put the same thing in another way, in the unconscious every one of us is convinced of his own immortality.” Sigmund Freud, *Our Attitude Towards Death*, in 4 *Collected Papers* 304 (1925).

Another reason people do not make wills is the time and cost involved. It seems like a “big deal” to go to a lawyer, and lawyers tend not to market the advantages of wills relative to intestacy and nonprobate modes of transfer. See Michael R. McCunney and Alyssa A. DiRusso, *Marketing Wills*, 16 *Elder L.J.* 33 (2008). Today people commonly arrange to transfer their property at death by way of joint tenancy, payable-on-death designations on life insurance, pension plans, and the like, or revocable trusts created during life, avoiding probate and wills (indeed, more property is passed outside probate than through probate).

Whatever the reasons, people who do not make wills or otherwise dispose of their property by nonprobate transfers accept the intestacy law as their estate plans by default. The probate property of a person who dies without a will is governed by the state’s statute of descent and distribution. If a will disposes of only part of the probate estate, then the result is a *partial intestacy* in which the part of the probate estate not disposed of by the will passes by intestacy. Generally speaking, the law of the state where the decedent was domiciled at death governs the disposition of personal property, and the law of the state where the decedent’s real property is located governs the disposition of real property.

Because the law of intestacy is not exactly the same in all details in any two states, it is essential that lawyers become familiar with the intestacy statutes of the state in which they intend to practice. We reproduce here the intestacy provisions of the Uniform Probate Code (UPC) and in later chapters we excerpt the UPC or Uniform Trust Code (UTC, see pages 545-546) provisions relevant to the particular topic under discussion. The intestate succession scheme of each state is summarized in Table 8 of Jeffrey A. Schoenblum, 2008 *Multistate Guide to Estate Planning* (updated annually).

The UPC was originally promulgated in 1969. Subsequently, about one-third of the states adopted laws substantially conforming to major parts of the 1969 Code, and several other states enacted particular sections of the Code. Article VI of the Code, dealing with nonprobate transfers, was substantially revised in 1989. Article II of the Code, dealing with intestacy, wills, and donative transfers, was overhauled in 1990. See John H. Langbein and Lawrence W. Waggoner, *Reforming the Law of Gratuitous Transfers: The New Uniform Probate Code*, 55 *Alb. L. Rev.* 871 (1992). Some of the Code sections have since been revised further, most systematically in 2008. You should compare the probate code provisions of your own state with the UPC and consider whether the UPC approach is better than the one adopted in your state and any other alternatives.

Uniform Probate Code (1990, as amended 2008)

§2-101. INTESTATE ESTATE

(a) Any part of a decedent's estate not effectively disposed of by will passes by intestate succession to the decedent's heirs as prescribed in this Code, except as modified by the decedent's will.

(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.

§2-102. SHARE OF SPOUSE³

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

(1) the entire intestate estate if:

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

(B) 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 [\$300,000],⁴ 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 [\$225,000], 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 [\$150,000], 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.

§2-103. SHARE OF HEIRS OTHER THAN SURVIVING SPOUSE

(a) Any part of the intestate estate not passing to a 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 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 if only one survives;

3. The UPC's alternate section for community property states (§2-102A) provides for the same distribution of separate property as is provided in §2-102 and further provides that all community property passes to the surviving spouse whether or not the decedent is survived by descendants or parents. — Eds.

4. UPC §1-109, added to the Code in 2008, provides for an annual adjustment, based on the Consumer Price Index, of the dollar amounts stated in the Code. — Eds.

(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 on both the paternal and maternal sides by one or more grandparents or descendants of grandparents:

(A) half to the decedent's paternal grandparents equally if both survive, to the surviving paternal grandparent if only one survives, or to the descendants of the decedent's paternal grandparents or either of them if both are deceased, the descendants taking by representation; and

(B) half to the decedent's maternal grandparents equally if both survive, to the surviving maternal grandparent if only one survives, or to the descendants of the decedent's maternal grandparents or either of them if both are deceased, the descendants taking by representation;

(5) 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 on the paternal but not the maternal side, or on the maternal but not the paternal side, to the decedent's relatives on the side with one or more surviving members in the manner described in paragraph (4).

(b) If there is no taker under subsection (a), but the decedent has:

(1) one deceased spouse who has one or more descendants who survive the decedent, the estate or part thereof passes to that spouse's descendants by representation; or

(2) more than one deceased spouse who has one or more descendants who survive the decedent, an equal share of the estate or part thereof passes to each set of descendants by representation.

§2-105. NO TAKER

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

QUESTION

Under all intestate succession statutes, parents of the decedent are not heirs if the decedent leaves a child. Why should this be so (especially if the child is an adult)? Why isn't the decedent's property used to support aging parents rather than an able-bodied adult child?

NOTE: THE MEANING OF HEIRS AND THE TRANSFER OF AN EXPECTANCY

In the eyes of the law no living person has heirs; to use the Latin phrase: *nemo est haeres viventis*. The persons who would be the heirs of *A*, a living person, if *A* died within the next hour, are not the heirs of *A* but are the *heirs apparent*. They have a

mere *expectancy*. This expectancy can be destroyed by *A*'s deed or will. It is not a legal "interest" at all. *A*'s heirs can be identified only at *A*'s death, and only by reference to the applicable statute of descent and distribution. Being named in a will or will substitute makes the person a devisee or legatee or beneficiary, not an heir.

A mere expectancy cannot be transferred at law. However, a purported transfer of an expectancy, for an adequate consideration, may be enforceable in equity as a contract if the court views it as fair under all the circumstances. Equity scrutinizes such transactions to protect prospective heirs from unfair bargains.⁵ See *Hoffman v. Gregory*, 204 S.W.3d 541 (Ark. 2005).

Should a release of an expectancy to the donor be subjected to less judicial scrutiny than the transfer of an expectancy to a third party? See Katherine R. Guzman, *Releasing the Expectancy*, 34 Ariz. St. L.J. 775 (2002).

2. *Share of Surviving Spouse*

In designing an intestacy statute, the primary policy is to carry out the probable intent of the average intestate decedent. In the last 50 years, several empirical studies have been undertaken to determine popular preferences for intestate succession. Although these studies do not always agree, they unanimously support the conclusion that the spouse's share that had traditionally been given by most intestacy statutes was too small. The studies show that, when there are no children from a prior marriage, most persons want everything to go to the surviving spouse, thus excluding parents and siblings—and children. This preference is particularly strong among persons with moderate estates, who believe the surviving spouse will need the entire estate for support. The richer the person, the greater the desire that children or collaterals share with the spouse in the estate. See Mary L. Fellows, Rita J. Simon, and William Rau, *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 Am. B. Found. Res. J. 319, 348-364; Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. Chi. L. Rev. 241, 251-253 (1963); Comment, *A Comparison of Iowans' Dispositive Preferences with Selected Provisions of the Iowa and Uniform Probate Codes*, 63 Iowa L. Rev. 1041 (1978).

A study by John R. Price, *The Transmission of Wealth at Death in a Community Property Jurisdiction*, 50 Wash. L. Rev. 277, 311-313 (1975), supports giving the surviving spouse all of the decedent's interest in community property. See also Kristine S. Knaplund, *The Evolution of Women's Rights in Inheritance*, 19 Hastings Women's L.J. 3 (2008); Lawrence M. Friedman, Christopher J. Walker, and Ben Hernandez-Stern, *The Inheritance Process in San Bernardino County, California, 1964: A Research Note*, 43 Hous. L. Rev. 1445 (2007).

5. Undoubtedly, the most famous sale of an expectancy was the sale of Esau's birthright to Jacob for a bowl of pottage. Genesis 25:29-34. Whether this sale was enforceable under Hebrew law has been much debated by biblical scholars. See David Daube, *Studies in Biblical Law* 191-200 (1947); Reuben Ahroni, *Why Did Esau Spurn the Birthright?*, 29 Judaism 323 (1980). Under modern American law, was Esau's promise enforceable as a fair bargain?

Under current intestacy laws in most states, the surviving spouse usually receives at least a one-half share of the decedent's estate, an increase from the one-quarter or one-third of the estate that was typical a half century ago. There are many variations in the specifics, however, such as giving the surviving spouse a lump sum plus one-half of the remainder, or giving the surviving spouse a one-half share if only one child or descendants of one child survives, and a one-third share if more than one child or one child and descendants of a deceased child survive. For a critical survey, see Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 Utah L. Rev. 1227, 1261-1274.

The current UPC provision for the surviving spouse is relatively generous. Under UPC §2-102(1), if all the decedent's descendants are also descendants of the surviving spouse, and the surviving spouse has no other descendants, the surviving spouse takes the entire estate to the exclusion of the decedent's descendants. Giving everything to the spouse and nothing to the children under these circumstances was a novel statutory approach, but studies of estates with minor children show it to be the usual practice of those leaving wills. It also has the virtue of avoiding a guardianship for a minor child. Thanks in large part to the influence of the UPC, intestacy statutes that give the surviving spouse the entirety of the decedent's estate are no longer uncommon. The provisions in subsections (3) and (4), giving the surviving spouse less when either spouse has a child by someone other than the other spouse, were also unusual when originally proposed. The theory of §2-102 is discussed in Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 Iowa L. Rev. 223 (1991).

If there is no descendant, roughly half of the states provide, as does UPC §2-102(2), that the surviving spouse share the estate with the decedent's parents, if any. If no parent survives, the surviving spouse usually takes all to the exclusion of collateral kin, as the UPC provides, but in a few states the spouse shares with the decedent's brothers and sisters and their descendants. See 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).

A secondary policy of the intestacy laws is family protection — that is, preserving the economic health of the family after a death. With respect to spouses, a related consideration is the idea that marriage involves an economic partnership. The law of intestate succession therefore influences the discourse over the extent to which testators should be free to disinherit their spouses and other family members. In Chapter 7, when we examine the mandatory minimum share to which the law entitles a surviving spouse in spite of a contrary will by the decedent, the question arises, should the surviving spouse's *elective share* (or *forced share*) be the same as what the spouse would have taken in intestacy? For an interesting article documenting the reach of family policy in inheritance law and criticizing this focus on the family, see Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. Rev. 199 (2001).

In recent years some commentators have argued that advancing the public policy of the state and fostering positive social norms also should be relevant

considerations in designing intestate succession statutes. For a discussion and critique of these goals, see Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 *Fordham L. Rev.* 1031 (2004).

PROBLEMS AND QUESTION

1. Refer back to the estate planning problem of Howard and Wendy Brown on pages 49-50. Howard has two children by Wendy. Wendy has an additional child from a previous marriage. If Howard dies intestate, what will be Wendy's share under UPC §2-102? If it is Wendy who dies intestate, what will be Howard's share? What is the basis for the different amounts provided under §2-102(3) and (4)?

2. Suppose *H* and *W* have been married one year. *H* dies, survived by *W* and a brother, but no parent. What is *W*'s share? Notice that the amount would not change even if *H* and *W* had been married for many years. Compare UPC §2-203(b) (1990, rev. 2008), page 499, which takes into account the length of the marriage in determining the surviving spouse's forced share. Why is this relevant for the spouse's forced share but not the intestate share? In Arkansas, if the decedent has no descendants, a spouse of fewer than three years takes a one-half share, and a spouse of three or more years takes the entire estate. See Ark. Code Ann. §28-9-214 (2008).

3. Suppose Henry dies intestate. Anne, with whom he has been living, would like to claim a spouse's share. Is Anne entitled to such a share if she married Henry, but the marriage is bigamous? What if she did not marry Henry, but common law marriage is recognized? See William M. McGovern, Jr. and Sheldon F. Kurtz, *Wills, Trusts and Estates* §2.11 (3d ed. 2004). What if Anne and Henry did not marry because they perceived, as did the Princess of Cleves long ago, that there's nothing like marriage to spoil a perfect love, but Henry promised to take care of Anne? See pages 325-327, dealing with contracts to make wills. Suppose that Henry and Anne had married, but Henry had moved out and filed for divorce. What result?

NOTE: SAME-SEX MARRIAGE, DOMESTIC PARTNERS, AND INTESTATE SUCCESSION

The chief policies that underpin the spousal intestate share — giving effect to the probable intent of the decedent and protecting those whom the decedent treated as family — seem also to apply to domestic partners. In Mary L. Fellows, Monica K. Johnson, Amy Chiericozzi, Ann Hale, Christopher Lee, Robin Preble, and Michael Voran, *Committed Partners and Inheritance: An Empirical Study*, 16 *Law & Ineq. J.* 1 (1998), the authors found that a substantial majority of committed partners want the surviving partner to take a share of the decedent partner's estate, and this preference is even greater among same-sex partners. See

also Mary Louise Fellows, E. Gary Spitko, and Charles Q. Stroh, *An Empirical Assessment of the Potential for Will Substitutes to Improve State Intestacy Statutes*, 85 Ind. L.J. (forthcoming 2009) (finding a preference for treating a committed partner as the other's heir, based on beneficiary designations in the partners' will substitutes).

The law pertaining to the intestacy rights of domestic partners is in flux, as is the related question of same-sex marriage. The rapidly changing legal landscape in part reflects the shift in public opinion, which appears to be moving toward a consensus in favor of legal recognition for gay and lesbian couples, but with disagreement over the form that this recognition should take.

Although six in 10 Americans think some form of legal recognition is appropriate for same-sex couples, only a third [33%] of Americans think those couples should be allowed to marry. Another 27% of Americans support civil unions for same-sex couples, while 35% thinks there should be no legal recognition of same-sex relationships at all. . . . Support for legalizing same-sex marriage has remained about the same for the past two years, though it is up from 2004, when only 22% of Americans supported the idea. [CBS News Poll: The Debate Over Same-Sex Marriage (Mar. 12-16, 2009, survey of 1,142 adults).]

As this book went to press, same-sex marriage was recognized in Connecticut, Iowa, Maine, Massachusetts, New Hampshire, and Vermont, and civil unions with spousal-like intestacy rights were recognized in California⁶ and New Jersey. In addition, intestate succession rights for domestic partners were recognized in the District of Columbia, Hawaii (called reciprocal beneficiaries), Oregon, Nevada, and Washington. In Colorado, spousal-like intestacy rights may be granted by an unmarried person to another person by a "designated beneficiary agreement."

An important issue in the states that recognize intestacy rights for domestic partners is the criteria for qualifying as a domestic partner. The usual answer is to make use of a registry. Under this approach, couples wanting to be treated as domestic partners must register as such with the state, which has the virtue of being clear. But might it exclude committed partners who want domestic partner treatment but do not know to register? Would a standard, looking to the nature of the relationship, be better? See E. Gary Spitko, *An Accrual/Multi-Factor Approach to Intestate Inheritance Rights for Unmarried Committed Partners*, 81 Or. L. Rev. 255 (2002).

In 1995, Professor Lawrence W. Waggoner proposed an amendment to the UPC — to become UPC §2-102B — that would have provided an intestate share for "committed partners." A committed partner was defined as a person "sharing

6. For five months in 2008, same-sex marriage was recognized in California, following a ruling by the state supreme court that limiting marriage to opposite-sex couples violated the state constitution. But a slim majority of voters in the November 2008 election supported a ballot proposition, known as Proposition 8, to amend the state constitution to limit marriage to opposite-sex couples. The state supreme court upheld the validity of Proposition 8, but the court also held that Proposition 8 did not have retroactive effect, preserving the validity of the marriages of same-sex couples who wed during the five-month window.

a common household with the decedent in a marriage-like relationship.” Although Waggoner’s proposal was never adopted by the Uniform Law Commission, it was not rejected either. In 2002 the Joint Editorial Board (JEB) for Uniform Trusts and Estates Acts revisited Waggoner’s proposal, appointing Professor Thomas P. Gallanis as special reporter for the project and tasking him with the preparation of a model statute and an accompanying study on the inheritance rights of domestic partners. The JEB abandoned the project in 2004, but it consented to Gallanis’s publishing his study and model statute. Under the Gallanis proposal, domestic partnership, entitling the partners to spousal-like intestacy and elective share rights, could be established by registration or by proof of “sharing a common household.” T.P. Gallanis, *Inheritance Rights for Domestic Partners*, 79 Tul. L. Rev. 55 (2004). Although the UPC was extensively updated in 2008, none of the revisions addresses the rights of domestic partners, on which the UPC remains silent.

QUESTIONS, NOTE, AND PROBLEM

1. The patchwork of state laws on same-sex marriage, civil unions, and domestic partnerships raises important questions of conflicts of law. Suppose that a same-sex couple marries in Massachusetts but then moves to another state that does not recognize same-sex marriage. On the death of the first spouse, is the survivor entitled to an intestate share under the new state’s intestacy law? Under Massachusetts law? See *Estate of Ranftle*, N.Y.L.J. 34 (Feb. 4, 2009) (N.Y. Surrogate’s Court decision); Andrew Koppelman, *Same Sex, Different States: When Same-Sex Marriages Cross State Lines* (2006); Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 Or. L. Rev. 433 (2005).

2. Should property passing in intestacy to a domestic partner be eligible for the favorable federal tax treatment afforded to transfers between spouses? For a discussion of the tax consequences of same-sex marriages, civil unions, and domestic partnerships, see Patricia A. Cain, *Taxing Families Fairly*, 48 Santa Clara L. Rev. 805 (2008).

In 1996, Congress enacted the Defense of Marriage Act, 1 U.S.C. §7 (2008). Section 2 of the act provides that no state shall be required under the Full Faith and Credit Clause of the Constitution to give effect to a same-sex marriage contracted in another state. Section 3 provides that for all purposes of federal law “the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.” The latter section thus deprives same-sex married couples of the Social Security, tax, and welfare benefits afforded by federal law to opposite-sex married couples.

3. Suppose *H* marries *W*, a transsexual who was born a man, but had her birth certificate legally changed after undergoing sex-change surgery. Is *W* entitled to an intestate share in *H*’s estate? See *Estate of Gardiner*, 42 P.3d 120 (Kan. 2002)

(no). See also A. Spencer Bergstedt, Estate Planning and the Transgender Client, 30 W. New Eng. L. Rev. 675 (2008).

Simultaneous death. A person succeeds to the property of a decedent only if the person survives the decedent for an instant of time. The advent of the automobile and the airplane brought an increase in deaths of closely related persons in common disasters, particularly husbands and wives. The question thus arose: When a person dies simultaneously with his heir or devisee, does the heir or devisee succeed to the person's property?

The original Uniform Simultaneous Death Act (USDA) (1940, rev. 1953), drafted to answer this question, provided that if "there is no sufficient evidence" of the order of deaths, the beneficiary is deemed to have predeceased the donor. Thus, neither inherits from the other. The act further provided that if two joint tenants, *A* and *B*, die simultaneously, one-half of the property is distributed as if *A* survived and one-half is distributed as if *B* survived. The same rule is applied to property held in tenancy by the entirety or community property. With respect to life insurance, when the insured and the beneficiary die simultaneously, the proceeds are distributed as if the insured survived the beneficiary. Although the USDA was at first thought to offer an elegant solution to the simultaneous death problem, the courts were soon faced with the ghastly interpretive question of what constitutes "sufficient evidence" of the order of deaths. The tragic case of *Janus v. Tarasewicz*, *infra*, is illustrative. Because of cases such as *Janus*, the act was revised in 1991, as we shall see (page 86).

Before turning to *Janus*, however, it bears emphasizing that the problem of simultaneous death arises not only in intestacy, but also under wills, trusts, and other instruments transferring property at death. We nevertheless locate our discussion of it here, in connection with spousal intestate succession rights, for two reasons. First, the simultaneous death problem arises more often in intestacy than elsewhere, because well-drafted instruments typically require a beneficiary to survive the donor by a stated period of time (often 30 or 60 days). Under such a provision, a beneficiary who dies in a common disaster with the donor does not qualify to take. Second, because husbands and wives often travel together and are commonly each other's primary beneficiary, the typical simultaneous death case involves spouses.

Janus v. Tarasewicz
Illinois Appellate Court, 1985
482 N.E.2d 418

O'CONNOR, J. This non-jury declaratory judgment action arose out of the death of a husband and wife, Stanley and Theresa Janus, who died after ingesting Tylenol capsules which had been laced with cyanide by an unknown perpetrator prior to its sale in stores. Stanley Janus was pronounced dead shortly after he was

admitted to the hospital. However, Theresa Janus was placed on life support systems for almost two days before being pronounced dead. Claiming that there was no sufficient evidence that Theresa Janus survived her husband, plaintiff Alojza Janus, Stanley's mother, brought this action for the proceeds of Stanley's \$100,000 life insurance policy which named Theresa as the primary beneficiary and plaintiff as the contingent beneficiary. Defendant Metropolitan Life Insurance Company paid the proceeds to defendant Jan Tarasewicz, Theresa's father and the administrator of her estate. The trial court found sufficient evidence that Theresa survived Stanley Janus. We affirm.

The facts of this case are particularly poignant and complex. Stanley and Theresa Janus had recently returned from their honeymoon when, on the evening of September 29, 1982, they gathered with other family members to mourn the death of Stanley's brother, Adam Janus, who had died earlier that day from what was later determined to be cyanide-laced Tylenol capsules.⁷ While the family was at Adam's home, Stanley and Theresa Janus unknowingly took some of the contaminated Tylenol. Soon afterwards, Stanley collapsed on the kitchen floor.

Theresa was still standing when Diane O'Sullivan, a registered nurse and a neighbor of Adam Janus, was called to the scene. Stanley's pulse was weak so she began cardiopulmonary resuscitation (CPR) on him. Within minutes, Theresa Janus began having seizures. After paramedic teams began arriving, Ms. O'Sullivan went into the living room to assist with Theresa. While she was working on Theresa, Ms. O'Sullivan could hear Stanley's "heavy and labored breathing." She believed that both Stanley and Theresa died before they were taken to the ambulance, but she could not tell who died first.

Ronald Mahon, a paramedic for the Arlington Heights Fire Department, arrived at approximately 5:45 P.M. He saw Theresa faint and go into a seizure. Her pupils did not respond to light but she was breathing on her own during the time that he worked on her. Mahon also assisted with Stanley, giving him drugs to

7. See Jonathan Saltzman, *Fatal Tampering Case is Renewed: FBI Searches a Condo in Cambridge*, Boston Globe, Feb. 5, 2009, at B1:

FBI agents and State Police investigators searched a Cambridge condominium yesterday that is the longtime home of a leading suspect in the 1982 deaths of seven people from cyanide-laced Tylenol capsules in the Chicago area, one of the most notorious unsolved crimes in the last generation.

The first-floor condominium belongs to James W. Lewis, 62, . . . who spent 12 years in federal prison for trying to extort \$1 million from the painkiller's manufacturers, but was never charged in the killings. . . .

The seven victims of cyanide-tainted Extra-Strength Tylenol — four women, two men, and a 12-year-old girl — died in 1982 after taking capsules that had been purchased from drugstores and groceries in the Chicago area. Someone had opened the capsules and replaced some of the acetaminophen with cyanide and returned them to the shelves.

The killer was never identified, but the deaths caused widespread panic and led to use of tamper-resistant wrappings on food and medical products. . . .

Lewis was sentenced to prison in June 1983 for demanding \$1 million from Johnson & Johnson, parent of Tylenol manufacturer McNeil Consumer Products Co., "to stop the killing." . . .

Walter Tarasewicz, . . . whose sister Theresa Janus was 19 when she, her newlywed husband, and a brother-in-law were killed in the poisonings in the only case that touched several family members, said yesterday that he hopes police have developed enough information to lead to an arrest. Especially for the sake of his father, he said, who is about to turn 80 and longs to see his daughter's killer found.

— Eds.

stimulate heart contractions. Mahon later prepared the paramedic's report on Stanley. One entry in the report shows that at 18:00 hours Stanley had "zero blood pressure, zero pulse, and zero respiration." However, Mahon stated that the times in the report were merely approximations. He was able to say that Stanley was in the ambulance en route to the hospital when his vital signs disappeared.

When paramedic Robert Lockhart arrived at 5:55 P.M., both victims were unconscious with non-reactive pupils. Theresa's seizures had ceased but she was in a decerebrate posture in which her arms and legs were rigidly extended and her arms were rotated inward toward her body, thus, indicating severe neurological dysfunction. At that time, she was breathing only four or five times a minute and, shortly thereafter, she stopped breathing on her own altogether. Lockhart intubated them both by placing tubes down their tracheae to keep their air passages open. Prior to being taken to the ambulance, they were put on "ambu-bags" which is a form of artificial respiration whereby the paramedic respirates the patient by squeezing a bag. Neither Stanley nor Theresa showed any signs of being able to breathe on their own while they were being transported to Northwest Community Hospital in Arlington Heights, Illinois. However, Lockhart stated that when Theresa was turned over to the hospital personnel, she had a palpable pulse and blood pressure.

The medical director of the intensive care unit at the hospital, Dr. Thomas Kim, examined them when they arrived in the emergency room at approximately 6:30 P.M. Stanley had no blood pressure or pulse. An electrocardiogram detected electrical activity in Stanley Janus' heart but there was no synchronization between his heart's electrical activity and its pumping activity. A temporary pacemaker was inserted in an unsuccessful attempt to resuscitate him. Because he never developed spontaneous blood pressure, pulse or signs of respiration, Stanley Janus was pronounced dead at 8:15 P.M. on September 29, 1982.

Like Stanley, Theresa Janus showed no visible vital signs when she was admitted to the emergency room. However, hospital personnel were able to get her heart beating on its own again, so they did not insert a pacemaker. They were also able to establish a measurable, though unsatisfactory, blood pressure. Theresa was taken off the "ambu-bag" and put on a mechanical respirator. In Dr. Kim's opinion, Theresa was in a deep coma with "very unstable vital signs" when she was moved to the intensive care unit at 9:30 P.M. on September 29, 1982.

While Theresa was in the intensive care unit, numerous entries in her hospital records indicated that she had fixed and dilated pupils. However, one entry made at 2:32 A.M. on September 30, 1982, indicated that a nurse apparently detected a minimal reaction to light in Theresa's right pupil but not in her left pupil.

On September 30, 1982, various tests were performed in order to assess Theresa's brain function. These tests included an electroencephalogram (EEG) to measure electrical activity in her brain and a cerebral blood flow test to determine whether there was any blood circulating in her brain. In addition, Theresa exhibited no gag or cord reflexes, no response to pain or other external stimuli. As a result of these tests, Theresa Janus was diagnosed as having sustained total brain

death, her life support systems then were terminated, and she was pronounced dead at 1:15 P.M. on October 1, 1982.

Death certificates were issued for Stanley and Theresa Janus more than three weeks later by a medical examiner's physician who never examined them. The certificates listed Stanley Janus' date of death as September 29, 1982, and Theresa Janus' date of death as October 1, 1982. Concluding that Theresa survived Stanley, the Metropolitan Life Insurance Company paid the proceeds of Stanley's life insurance policy to the administrator of Theresa's estate.

On January 6, 1983, plaintiff brought the instant declaratory judgment action against the insurance company and the administrators of Stanley and Theresa's estates, claiming the proceeds of the insurance policy as the contingent beneficiary of the policy. Also, the administrator of Stanley's estate filed a counterclaim against Theresa's estate seeking a declaration as to the disposition of the assets of Stanley's estate. . . .

Dr. Kenneth Vatz, a neurologist on the hospital staff, was called as an expert witness by plaintiff. Although he never actually examined Theresa, he had originally read her EEG as part of hospital routine. Without having seen her other hospital records, his initial evaluation of her EEG was that it showed some minimal electrical activity of living brain cells in the frontal portion of Theresa's brain. After reading her records and reviewing the EEG, however, he stated that the electrical activity measured by the EEG was "very likely" the result of interference from surrounding equipment in the intensive care unit. He concluded that Theresa was brain dead at the time of her admission to the hospital but he could not give an opinion as to who died first.

The trial court also heard an evidence deposition of Dr. Joseph George Hanley, a neurosurgeon who testified as an expert witness on behalf of the defendants. Based on his examination of their records, Dr. Hanley concluded that Stanley Janus died on September 29, 1982. He further concluded that Theresa Janus did not die until her vital signs disappeared on October 1, 1982. His conclusion that she did not die prior to that time was based on: (1) the observations by hospital personnel that Theresa Janus had spontaneous pulse and blood pressure which did not have to be artificially maintained; (2) the instance when Theresa Janus' right pupil allegedly reacted to light; and (3) Theresa's EEG which showed some brain function and which, in his opinion, could not have resulted from outside interference. At the conclusion of the trial, the court held that the evidence was sufficient to show that Theresa survived Stanley, but the court was not prepared to say by how long she survived him. Plaintiff and the administrator of Stanley's estate appeal. In essence, their main contention is that there is not sufficient evidence to prove that both victims did not suffer brain death prior to their arrival at the hospital on September 29, 1982.

Dual standards for determining when legal death occurs in Illinois were set forth in the case of *In re Haymer*, 450 N.E.2d 940 (Ill. App. 1983). There, the court determined that a comatose child attached to a mechanical life support system was legally dead on the date he was medically determined to have

sustained total brain death, rather than on the date that his heart stopped functioning. . . . In a footnote, the court stated that widely accepted characteristics of brain death include: (1) unreceptivity and unresponsivity to intensely painful stimuli; (2) no spontaneous movement or breathing for at least one hour; (3) no blinking, no swallowing, and fixed and dilated pupils; (4) flat EEGs taken twice with at least a 24-hour intervening period; and (5) absence of drug intoxication or hyperthermia.⁸ . . .

Regardless of which standard of death is applied, survivorship is a fact which must be proven by a preponderance of the evidence by the party whose claim depends on survivorship. In *re Estate of Moran*, 395 N.E.2d 579 (Ill. 1979). The operative provisions of the Illinois version of the Uniform Simultaneous Death Act provides in pertinent part:

If the title to property or its devolution depends upon the priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously and there is no other provision in the will, trust agreement, deed, contract of insurance or other governing instrument for distribution of the property different from the provisions of this Section:

- (a) The property of each person shall be disposed of as if he had survived. . . .
- (d) If the insured and the beneficiary of a policy of life or accident insurance have so died, the proceeds of the policy shall be distributed as if the insured had survived the beneficiary.

Ill. Rev. Stat. 1981, ch. 110 1/2, par. 3-1. . . .

Although the use of sophisticated medical technology can also make it difficult to determine when death occurs, the context of this case does not require a determination as to the exact moment at which the decedents died. Rather, the trial court's task was to determine whether or not there was sufficient evidence that Theresa Janus survived her husband. Our task on review of this factually disputed case is to determine whether the trial court's finding was against the manifest weight of the evidence. . . . We hold that it was not.

In the case at bar, both victims arrived at the hospital with artificial respirators and no obvious vital signs. There is no dispute among the treating physicians and expert witnesses that Stanley Janus died in both a cardiopulmonary sense and a brain death sense when his vital signs disappeared en route to the hospital and were never reestablished. He was pronounced dead at 8:15 P.M. on September 29, 1982, only after intensive procedures such as electro-shock, medication, and the insertion of a pacemaker failed to resuscitate him.

8. The court's rendition of the test from *Haymer* is incorrect; the correct term is hypothermia (see 450 N.E.2d at 945 n.9), a cooling that is so severe that it prevents the body from maintaining normal temperature and can suppress physiological responses. Dr. Michael S. Young, a neurologist who noticed the *Janus* court's error while in Professor Ronald Volkmer's Spring 2008 Trusts and Estates class at Creighton University School of Law, explains the difference between hypothermia and hyperthermia thus: "I have warmed a person up in order to declare the person dead. This person had hypothermia. I have never cooled a person down in order to declare the person dead. Those people had hyperthermia." — Eds.

In contrast, these intensive procedures were not necessary with Theresa Janus because hospital personnel were able to reestablish a spontaneous blood pressure and pulse which did not have to be artificially maintained by a pacemaker or medication. Once spontaneous circulation was restored in the emergency room, Theresa was put on a mechanical respirator and transferred to the intensive care unit. Clearly, efforts to preserve Theresa Janus' life continued after more intensive efforts on Stanley's behalf had failed.

It is argued that the significance of Theresa Janus' cardiopulmonary functions, as a sign of life, was rendered ambiguous by the use of artificial respiration. In particular, reliance is placed upon expert testimony that a person can be brain dead and still have a spontaneous pulse and blood pressure which is indirectly maintained by artificial respiration. The fact remains, however, that Dr. Kim, an intensive care specialist who treated Theresa, testified that her condition in the emergency room did not warrant a diagnosis of brain death. In his opinion, Theresa Janus did not suffer irreversible brain death until much later, when extensive treatment failed to preserve her brain function and vital signs. . . .

There was also other evidence presented at trial which indicated that Theresa Janus was not brain dead on September 29, 1982. Theresa's EEG, taken on September 30, 1982, was not flat but rather it showed some delta waves of extremely low amplitude. Dr. Hanley concluded that Theresa's EEG taken on September 30 exhibited brain activity. Dr. Vatz disagreed. Since the trier of fact determines the credibility of expert witnesses and the weight to be given to their testimony . . . , the trial court in this case could have reasonably given greater weight to Dr. Hanley's opinion than to Dr. Vatz'. . . .

In conclusion, we believe that the record clearly established that the treating physicians' diagnoses of death with respect to Stanley and Theresa Janus were made in accordance with "the usual and customary standards of medical practice." Stanley Janus was diagnosed as having sustained irreversible cessation of circulatory and respiratory functions on September 29, 1982. These same physicians concluded that Theresa Janus' condition on that date did not warrant a diagnosis of death and, therefore, they continued their efforts to preserve her life. Their conclusion that Theresa Janus did not die until October 1, 1982, was based on various factors including the restoration of certain of her vital signs as well as other neurological evidence. The trial court found that these facts and circumstances constituted sufficient evidence that Theresa Janus survived her husband. It was not necessary to determine the exact moment at which Theresa died or by how long she survived him, and the trial court properly declined to do so. Viewing the record in its entirety, we cannot say that the trial court's finding of sufficient evidence of Theresa's survivorship was against the manifest weight of the evidence. . . .

Accordingly, there being sufficient evidence that Theresa Janus survived Stanley Janus, the judgment of the circuit court of Cook County is affirmed.

Affirmed.

PROBLEMS, NOTES, AND QUESTIONS

1. Suppose that *H* and *W* both drown in a boating accident. The evidence shows that *W* was a better swimmer and in better health than *H*. In addition, the autopsy shows *W* drowned after a violent death struggle while *H* passively submitted to death. Is there sufficient evidence of *W*'s survival? See *In re Estate of Campbell*, 641 P.2d 610 (Or. App. 1982).

H and *W* are killed in the crash of a private airplane. An autopsy reveals *W*'s brain is intact and there is carbon monoxide in her bloodstream; *H*'s brain is crushed and there is no carbon monoxide in his bloodstream. Is there sufficient evidence of *W*'s survival? See *In re Bucci*, 293 N.Y.S.2d 994 (Sur. 1968).

2. *The 120-hour rule.* To remedy the “no sufficient evidence” problem, UPC §§2-104 and 2-702 (1990, rev. 2008) provide that an heir or devisee or life insurance beneficiary who fails to survive by 120 hours (5 days) is deemed to have predeceased the decedent. The USDA was amended in 1991 to require survivorship by 120 hours, conforming it with the UPC. Under the amended UPC and USDA, a claimant must establish survivorship by 120 hours by clear and convincing evidence. What result in *Janus* and the cases in Note 1 under this rule?

A further advantage of the 120-hour rule is that it addresses contemporaneous deaths even if they do not arise from a common disaster. Suppose *H* dies of a heart attack. The next day, while en route to the cemetery, *W* is killed by *H*'s coffin, which was propelled into her when the hearse carrying them was hit from behind by another vehicle. See *Evening Stand.* (London), Nov. 12, 2008, at 26. What result under the sufficient evidence test? What result under the 120-hour rule?

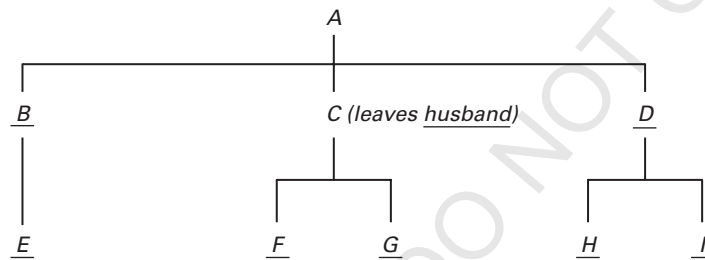
3. Is survivorship by 120 hours long enough? Suppose someone is lacking in higher brain function, but the family insists that the patient's heart and lungs be kept working on a ventilator for more than 120 hours, long enough to allow the patient to inherit from someone else who died in the same common disaster. Would the 30-, 60-, or 90-day survivorship clauses common in well-drafted instruments work better?

4. If you are interested in whether a severed head retains feeling and consciousness for a few moments after severance and therefore arguably remains alive for that period, the experiments carried out by French doctors after the invention of the guillotine are instructive. The doctors were trying to discover if death by guillotine was really instantaneous and painless, as Dr. Guillotin, the inventor, claimed. See Alister Kershaw, *A History of the Guillotine* 80-89 (1958) (severed heads had looks of indignation or astonishment or, as agreed in advance of decapitation, winked in response to questions); Antonia Fraser, *Mary Queen of Scots* 539 (1969) (reporting that Mary's lips moved for a quarter of an hour after she was beheaded). More recently, Reuters carried a report of a Venezuelan man, previously declared dead, who woke up in pain during his autopsy. See Reuters, “Dead” Man Wakes Up Under Autopsy Knife (Sept. 17, 2007).

3. Shares of Descendants

In all jurisdictions in this country, after the spouse's share (if any) is set aside, children and descendants of deceased children take the remainder of the decedent's property to the exclusion of everyone else. When one of several children has died before the decedent, leaving descendants, all states provide that the child's descendants shall *represent* the dead child and divide the child's share among themselves.

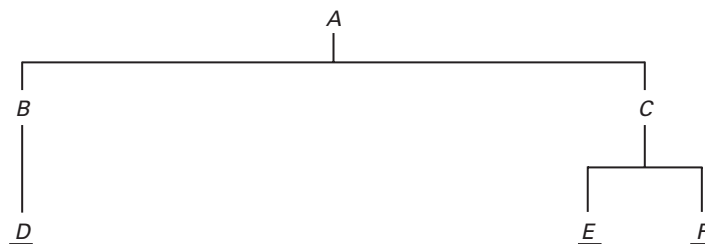
The following diagram illustrates how representation works. Assume that the intestate decedent, *A*, a widow, has three children. One of her three children, *C*, dies before *A*, survived by a husband and two children. *A* is survived by two children, *B* and *D*, and by five grandchildren, *E*, *F*, *G*, *H*, and *I*. Thus:



The survivors are underlined; all others are dead.

Because *C*'s children take *C*'s share by representation, *A*'s heirs are *B* (1/3), *D* (1/3), *F* (1/6), and *G* (1/6). Observe that *E*, *H*, and *I* take nothing because their parents are living. (Observe also that *C*'s spouse, the decedent's son-in-law, takes nothing. Sons-in-law and daughters-in-law are excluded as intestate successors in virtually all states.)

In more complicated contexts, there are different views about what taking by representation means. The fundamental issue is whether the division into shares should begin at the generational level immediately below the decedent or at the closest generational level with a descendant of the decedent alive. Take this case: *A* has two children, *B* and *C*. *B* predeceases *A*, leaving a child, *D*. *C* predeceases *A*, leaving two children, *E* and *F*. *A* dies intestate, leaving no surviving spouse, survived by *D*, *E*, and *F*. Thus:



The survivors are underlined; all others are dead.

How is *A*'s estate distributed? There are three basic systems, with a twist in some states that might be considered a fourth system. See Jeffrey A. Schoenblum, 2008 Multistate Guide to Estate Planning at Table 8 (categorizing each state).

1. *English per stirpes*. About one-third of the states follow the system of English distribution *per stirpes* ("by the stocks"). Sometimes called *strict per stirpes*, the English per stirpes system of representation treats each *line* of descendants equally. The property is divided into as many shares as there are living children of the designated person and deceased children who have descendants living. The children of each deceased descendant represent their deceased parent and are moved into their parent's position beginning at the first generation below the designated person. Under this system, *A*'s property is divided into two shares at the level of *A*'s children, *D* takes *B*'s one-half by representation, and *E* and *F* split *C*'s one-half by representation. The English per stirpes system of representation owes much to the English system of primogeniture, in which the son represented the deceased father, and the grandson represented the deceased son.

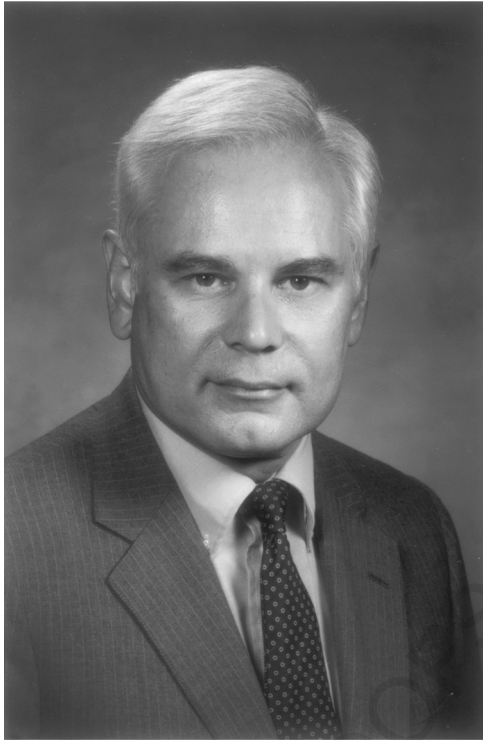
2. *Modern per stirpes*. Nearly half of the states follow a different system of representation called *modern per stirpes* or *per capita with representation*. Under this approach, one looks first to see whether any children survived the decedent. If so, the distribution is identical to that under English per stirpes. If not, as in the above example, the estate is divided equally (per capita) at the first generation in which there are living takers, which is usually the generation of the decedent's grandchildren. That is, under modern per stirpes the decedent's estate is divided into shares at the generational level nearest to the decedent in which one or more descendants of the decedent are alive. Any deceased descendant on that level is represented by her descendants using an English per stirpes distribution.⁹ This system treats equally each *line beginning at the closest living generation*.

In the above example, where *B* and *C* are dead, *D*, *E*, and *F* are all grandchildren of equal degree of kinship to *A*, *A*'s estate is divided equally among them in thirds. If *F* had predeceased *A*, leaving descendants, *F*'s descendants would represent *F* and take *F*'s one-third.

Two studies have indicated that an overwhelming majority of people prefer dividing the stocks at the level where someone is alive. See Mary L. Fellows, Rita J. Simon, Teal E. Snapp, and William D. Snapp, An Empirical Study of the Illinois Statutory Estate Plan, 1976 U. Ill. L.F. 717, 741 (95 percent of the persons interviewed); Comment, A Comparison of Iowans' Dispositive Preferences with Selected Provisions of the Iowa and Uniform Probate Codes, 63 Iowa L. Rev. 1041, 1111 (1978) (87 percent).

9. The twist that might be considered a fourth system, but that we treat as a variant on modern per stirpes, is in the representation of a deceased descendant below the closest generation with a living descendant. Modern per stirpes uses an English per stirpes distribution starting at the closest generation with a living descendant. Hence it could be called per capita with per stirpes representation. The 1969 UPC, by contrast, provided for representation as if the deceased descendant was the decedent — that is, it provided for distribution per capita with per capita representation. The distinction affects the actual distribution in only the rarest of cases. For an example and further discussion, see Restatement (Third) of Property: Wills and Other Donative Transfers §2.3, cmt. f (1999).

3. *Per capita at each generation (1990 UPC)*. The remaining states, about a dozen, follow a newer, more complicated system of distribution known as *per capita at each generation*, which has been advocated by Professor Waggoner since the early 1970s. See Lawrence W. Waggoner, A Proposed Alternative to the Uniform Probate Code's System for Intestate Distribution among Descendants, 66 Nw. U.L. Rev. 626 (1971).

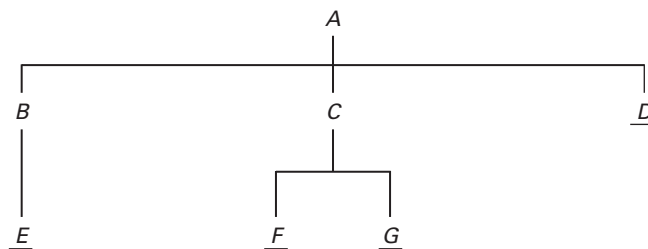


Professor Lawrence W. Waggoner

Section 2-106(b) of the 1990 UPC, for which Waggoner was the reporter, adopts this approach:

(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 UPC §2-106(b), the initial division of shares is made at the level where one or more descendants are alive (as under modern *per stirpes*), but the shares of deceased persons on that level are treated as one pot and are dropped down and divided equally among the representatives on the next generational level. Thus, in the situation pictured below, *D* takes a one-third share; the two-thirds that would have passed to *B* and *C* had they been living is divided equally among all the children of *B* and *C*. *E*, *F*, and *G* each take a two-ninths share.

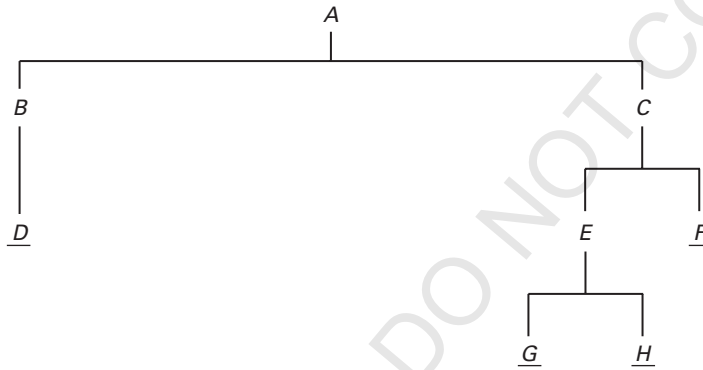


The survivors are underlined; all others are dead.

This system treats equally *each taker at each generation with the other takers at that generation*. The premise of this approach is that those equally related to the decedent should take equal shares: “Equally near, equally dear.”

PROBLEM AND QUESTIONS

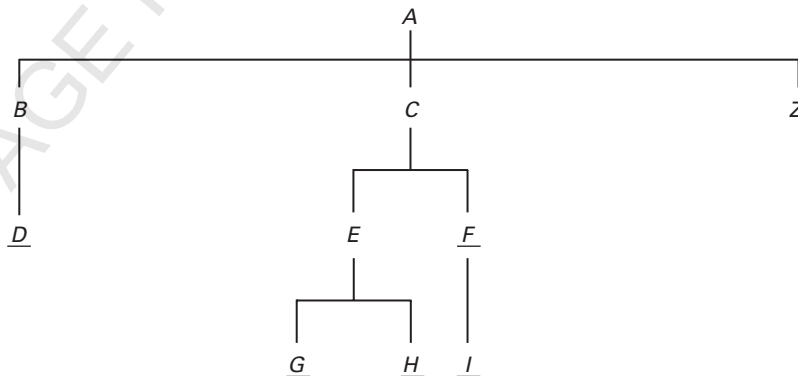
1. *A* has two children, *B* and *C*. *B* predeceases *A*, leaving a child, *D*. *C* predeceases *A*, leaving two children, *E* and *F*. *E* predeceases *A*, leaving two children, *G* and *H*. Thus:



The survivors are underlined; all others are dead.

A dies intestate leaving no surviving spouse. How is *A*'s estate distributed under the English per stirpes system? Under the modern per stirpes system? Under the 1990 UPC? Under the intestacy statute of your state?

2. Assume the same facts as in Problem 1 except that *A* has another child, *Z*, and *F* has a child, *I*. *Z* predeceases *A*, leaving no descendants. *F* survives *A*, as does *F*'s child *I*. Thus:



The survivors are underlined; all others are dead.

Does the presence in the family tree of the surviving *I* and the deceased *Z* change the result under any of the intestacy systems? The answer is No. *I* does not take because her parent, *F*, is alive, and because no one in *Z*'s line remains, it is ignored.

3. Which of the three systems do you prefer? Which would your parents prefer? Are you sure? More importantly, which would most decedents prefer? A questionnaire developed by one of the advisors to the UPC drafting committee, to which 75 responses from targeted lawyers and their clients were received, revealed that 85 percent of the lawyers responding, perhaps reflecting their law school training in English property law, believed their clients wanted the English per stirpes distribution, but that 71 percent of the clients themselves wanted distribution per capita at each generation. Raymond H. Young, Meaning of "Issue" and "Descendants," 13 ACTEC Notes 225 (1988). Although this sampling is small and the methodology problematic, the study provides evidence that some lawyers simply assume what their clients want without explaining the options. See Roger W. Andersen, Informed Decisionmaking in Office Practice, 28 B.C. L. Rev. 225 (1987), arguing that a lawyer has a duty to allow a client to make informed decisions on most estate planning issues rather than assuming that the lawyer knows best.

4. Suppose that a will devises property "to the descendants of *A* per stirpes." Which of the representation systems would a court apply in interpreting the will? The answer varies depending on the state. In some states, the courts read "per stirpes" to call for the same representational system as provided by the state's intestacy laws. In others, the courts read "per stirpes" to reference English per stirpes regardless of the form of representation provided for by the state's intestacy law. See pages 867-869.

NOTE: NEGATIVE DISINHERITANCE

An old rule of law holds that disinheritance is not possible by a declaration in a will that "my son John shall receive none of my property." To disinherit John—that is, to prevent John from taking an intestate share—John's father must devise his entire estate to other persons. If there is a partial intestacy, John will take an intestate share of the intestate property notwithstanding the provision in the will disinheriting him. See Frederic S. Schwartz, Models of the Will and Negative Disinheritance, 48 Mercer L. Rev. 1137 (1997).

UPC §2-101(b), page 73, changes this rule and authorizes a *negative will*. The barred heir is treated as if he disclaimed his intestate share, which means he is treated as having predeceased the intestate. See also Restatement (Third) of Property: Wills and Other Donative Transfers §2.7 (1999), to similar effect.

PROBLEM

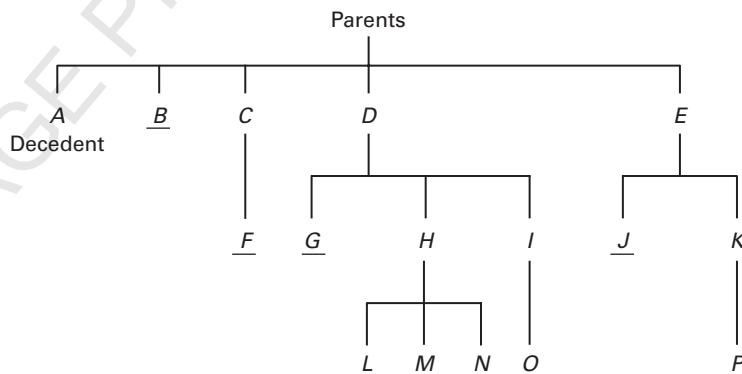
T dies testate, survived by two siblings, *A* and *B*, and two nephews, *B*'s children, *X* and *Y*. *T*'s will provides that "I hereby disinherit my brother, *B*," but makes no affirmative disposition. Who takes *T*'s probate property? See *Estate of Samuelson*, 757 N.W.2d 44 (N.D. 2008).

4. Shares of Ancestors and Collaterals

When the intestate decedent is survived by a descendant, the decedent's ancestors and collaterals do not take. In about half of the states, when there is no descendant, after deducting the spouse's share, the rest of the intestate's property is distributed to the decedent's parents, as under the UPC.

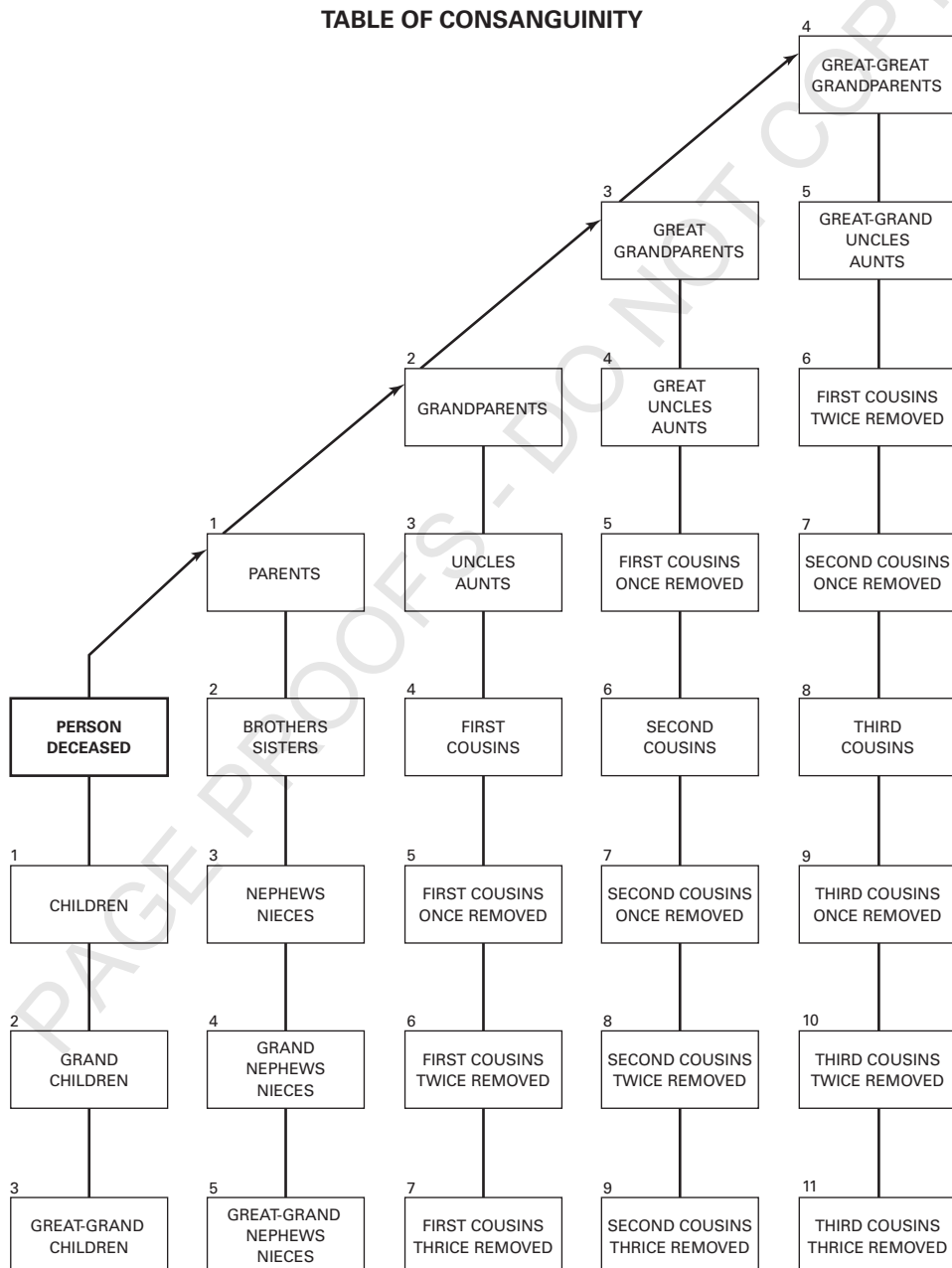
If there is no spouse or parent, the decedent's heirs will be more remote ancestors or collateral kindred. All persons who are related by blood to the decedent but who are not descendants or ancestors are called *collateral kindred*. Descendants of the decedent's parents, other than the decedent and the decedent's descendants, are called *first-line collaterals*. Descendants of the decedent's grandparents, other than the decedent's parents and their descendants, are called *second-line collaterals*. The reason for this terminology is seen by glancing at the Table of Consanguinity on the next page, which has lines descending from the decedent's ancestors.

If the decedent is not survived by a spouse, descendant, or parent, in all jurisdictions intestate property passes to brothers and sisters and their descendants. The descendants of any deceased brothers and sisters (nephews and nieces) take by representation, usually in the same manner as the decedent's descendants, as discussed at pages 88-89. See, e.g., UPC §2-106(c), which is substantially similar to §2-106(b), page 89, and calls for representation per capita at each generation. Hence:



The survivors are underlined; all others are dead.

Under the English per stirpes system, division into four shares is made at the level of *A*'s brothers and sisters. So, too, under the modern per stirpes system, because one sibling, *B*, is alive. Under both of these systems, *B* takes 1/4; *F* takes 1/4; *G* takes 1/12; *L*, *M*, and *N* take 1/36; *O* takes 1/12; *J* takes 1/8; and *P* takes 1/8. Under UPC §2-106(c), *B* takes 1/4. The remaining 3/4 is divided into six shares of 1/8 each. *F*, *G*, and *J* take 1/8 each. The remaining 3/8 is divided into five shares of 3/40. *L*, *M*, *N*, *O*, and *P* take 3/40 each.



If there are no first-line collaterals, the states differ on who is next in the line of succession. Two basic schemes are used: the parentelic system and the degree-of-relationship system. Under the *parentelic* system, the intestate estate passes to grandparents and their descendants, and if none to great-grandparents and their descendants, and if none to great-great-grandparents and their descendants, and so on down each line (*parentela*) descended from an ancestor until an heir is found.

Under the *degree-of-relationship* system, the intestate estate passes to the closest of kin, counting degrees of kinship. To ascertain the degree of relationship of the decedent to the claimant you count the steps (counting one for each generation) up from the decedent to the nearest common ancestor of the decedent and the claimant, and then you count the steps down to the claimant from the common ancestor. The total number of steps is the degree of relationship. See the Table of Consanguinity on page 93, where the degree of relationship to the decedent is printed above the upper left-hand corner of the box designating the relationship of the claimant.

There are numerous variations and mixtures of the parentelic and degree-of-relationship systems in force in the various states. Massachusetts, for example, has long followed a degree-of-relationship system subject to a parentelic preference to break a tie between kin of equal degree.

The number of possible collateral kindred is immense. As Blackstone tells us:

[I]f we only suppose each couple of our ancestors to have left, one with another, two children; and each of those children on an average to have left two more, (and, without such a supposition, the human species must be daily diminishing;) we shall find that all of us have now subsisting near two hundred and seventy millions of kindred in the fifteenth degree; at the same distance from the several common ancestors as ourselves are; besides those that are one or two descents nearer to or farther from the common stock, who may amount to as many more. And if this calculation should appear incompatible with the number of inhabitants on the earth, it is because, by intermarriages among the several descendants from the same ancestor, a hundred or a thousand modes of consanguinity may be consolidated in one person, or he may be related to us a hundred or a thousand different ways. [William Blackstone, Commentaries *205. Blackstone also observes that if you go back 20 generations you have 1,048,576 ancestors (disregarding the possibility of intermarriage among relatives)!]

Should the law permit intestate succession by these remote collaterals, known to lawyers as *laughing heirs* (that is, persons so distantly related to the decedent as to suffer no sense of bereavement, laughing all the way to the bank)? This question was brought into sharp focus by three famous cases in the early part of the twentieth century, where hordes of fortune seekers appeared on death. These

were the cases of Ella Wendel, Ida Wood, and Henrietta Garrett, all of whom died during the Great Depression:

(1) Ella Wendel, a recluse, died in 1931, leaving a will devising most of her \$40 million estate to charity. The only persons who may contest a will are those who would take if the will is held invalid. Some 2,303 fortune hunters strove to establish they were her next of kin, so that they might contest her will as her intestate successors. Reams of evidence were fabricated, birth and death certificates altered, and tales spun of incest and children born out of wedlock. One man was sent to jail for fabricating evidence, and Surrogate Foley referred the activities of six lawyers to the Grievance Committee of the Bar. Ultimately nine persons were established to be her cousins, and they settled out of court with the charities. *In re Wendel*, 257 N.Y.S. 87 (Sur. 1932); 262 N.Y.S. 41 (Sur. 1933); 287 N.Y.S. 893 (Sur. 1936). The late Justice Harlan's participation in the *Wendel* litigation is traced in Cloyd Laporte, John M. Harlan Saves the Ella Wendel Estate, 59 A.B.A. J. 868 (1973).

(2) Ida Wood, the widow of a U.S. congressman from New York, died intestate in 1932. For more than 20 years, she and her two sisters (who predeceased her) had barricaded themselves in a New York hotel room, into which no one was permitted to enter. During her life Ida had spun a web of deceit to hide who she really was. The evidence finally accepted by the court showed she had been born Ellen Walsh in Ireland, had moved with her parents to Boston, and had been her husband's mistress for ten years before they married. Once married and propelled into high society, Ida drew a curtain across her past. She made up vague stories of having been born a Mayfield and brought up in New Orleans. Her mother, and some other members of her family, took the name Mayfield, and Ida carved "Mayfield" on their tombstones. Fearful of a depression, Ida kept \$500,000 in cash tied around her waist. When she died, some 1,100 persons claimed to be her next of kin — including a great many persons named Mayfield from Louisiana. Ultimately, the court established as Ida's next of kin some first cousins once removed (none of whom Ida had seen since her marriage to Wood 65 years before). *In re Wood*, 299 N.Y.S. 195 (Sur. 1937). The whole fascinating story is recounted in Joseph A. Cox, *The Recluse of Herald Square* (1964).

(3) Henrietta E. Garrett died intestate in Philadelphia in 1930, leaving an estate of over \$17 million. Nearly 26,000 claims were filed by persons claiming to be her heirs. The testimony covered 390 volumes and over 115,000 pages. Finally, three persons were found to be first cousins of Henrietta. In 1953, after 23 years of litigation, the Supreme Court of Pennsylvania finally ordered the Garrett estate closed. *Estate of Garrett*, 94 A.2d 357 (Pa. 1953).

With these cases in mind, Professor Cavers predicted that the rules of succession would be revised to abolish laughing heirs. David F. Cavers, *Change in the American Family and the "Laughing Heir,"* 20 Iowa L. Rev. 203 (1935). Roughly half the states have done so, typically by drawing the line at grandparents and their descendants. In these jurisdictions, there is no inheritance by relatives traced through great-grandparents and other more remote ancestors. In this, UPC §2-103(a) (1990, rev. 2008), pages 73-74, is typical.

A few states and the UPC as revised in 2008 have created a new class of heirs consisting of *stepchildren*, who take as a last resort if there are no surviving grandparents or descendants of grandparents or more closely related kin. See Ohio Rev. Code §2105.06(j) (2008); UPC §2-103(b). California goes even further. It extends intestate succession not only to stepchildren but also to mothers-in-law, fathers-in-law, brothers-in-law, and sisters-in-law — but not to sons-in-law or daughters-in-law! Cal. Prob. Code §6402(e) and (g) (2008).

If the intestate leaves no survivors entitled to take under the intestacy statute, the intestate's property *escheats* to the state. Escheats of substantial estates are rare. Relatives usually keep tabs on kinfolk of obvious wealth, and thus the larger the estate, the more likely it is that there will be heirs claiming it. Moreover, heir-hunting firms seek out unknown or uninformed heirs, offering to disclose the name of an estate to which the person may be an heir in exchange for a share of the inheritance. See Rachel Emma Silverman, *Heir-Search Firms Help to Keep It in the Family — Companies Track Down Lost Beneficiaries on Behalf of Estates*, Wall St. J., Feb. 21, 2007, at D2.

PROBLEMS AND NOTE

1. The decedent is survived by his mother, his sister, and two nephews (children of a deceased brother). How is the decedent's estate distributed under UPC §2-103 (1990, rev. 2008), pages 73-74? Under the intestacy statute of your state?

2. The decedent is survived by one first cousin on his mother's side and by two first cousins on his father's side. How is the decedent's estate distributed under UPC §2-103? Under the intestacy statute of your state? Recall that UPC §2-106, page 89, which defines representation, is based upon a goal of providing equal shares to those equally related. Is the UPC treatment of the three first cousins consistent with that goal? Why are three grandchildren or three grandnephews treated alike but not three first cousins?

3. The decedent is survived by *A*, the first cousin of the decedent's mother, and by *B*, the granddaughter of the decedent's first cousin. (You can locate these on the Table of Consanguinity, page 93.) How is the decedent's estate distributed under UPC §2-103? Under the intestacy statute of your state?

NOTE: HALF-BLOODS

In England, which put great weight on whole-blood relations, the common law courts wholly excluded relatives of the half-blood (e.g., a half-sister) from inheriting land through intestate succession. This rule has long been abolished in all American states. In a large majority of states, and under UPC §2-107 (1990), a relative of the half-blood is treated the same as a relative of the whole-blood. In a few states, including Florida and Texas, a half-blood is given a one-half share; this was the Scottish rule and was introduced in this country in Virginia. Va. Code Ann. §64.1-2 (2008). In a few other states, a half-blood takes only when there are no whole-blood relatives of the same degree. See Miss. Code Ann. §91-1-5 (2008). In Oklahoma, half-bloods are excluded when there are whole-blood kindred in the same degree and the inheritance came to the decedent by an ancestor and the half-blood is not a descendant of the ancestor. Okla. Stat. tit. 84, §222 (2008).

PROBLEM AND NOTE

1. *F* has one child, *A*, by his first marriage, and two children, *B* and *C*, by his second marriage. *F* is estranged from *A* and never tells his second wife or *B* and *C* of *A*'s existence. *F* and his second wife die. Then *C* dies intestate, married but without descendants. How should *C*'s property be distributed? See *In re Estate of Griswold*, 24 P.3d 1191 (Cal. 2001).

2. For further discussion and a proposal for reform, see Ralph C. Brashier, Half-Bloods, Inheritance, and Family, 37 U. Mem. L. Rev. 215 (2007); Ralph C. Brashier, Consanguinity, Sibling Relationships, and the Default Rules of Inheritance Law: Reshaping Half-Blood Statutes to Reflect the Surviving Family, 58 SMU L. Rev. 137 (2005).

SECTION B. TRANSFERS TO CHILDREN*1. Meaning of Children***a. Adopted Children****Hall v. Vallandingham**

Court of Special Appeals of Maryland, 1988
540 A.2d 1162

GILBERT, C.J. Adoption did not exist under the common law of England,¹⁰ although it was in use “[a]mong the ancient peoples of Greece, Rome, Egypt and Babylonia.” M. Leary and R. Weinberg, *Law of Adoption* (4th ed. 1979) 1; Lord Mackenzie, *Studies in Roman Law*, 130-34 (3rd ed. 1870). The primary purpose for adoption was, and still is, inheritance rights, particularly in “France, Greece, Spain and most of Latin America.” Leary and Weinberg, *Law of Adoption*, 1. Since adoption was not a part of the common law, it owes its existence in this State, and indeed in this nation, to statutory enactments.

The first two general adoption statutes were passed in Texas and Vermont in 1850. Leary and Weinberg, *Law of Adoption*, 1. Maryland first enacted an Adoption Statute in Laws 1892, Ch. 244, and that law has continued in existence, in various forms, until the present time. The current statute, Maryland Code, Family Law Article Ann. §5-308 provides, in pertinent part:

10. According to J.W. Madden, *Handbook of the Law of Persons and Domestic Relations* (Wash. 1931) §106, adoption in the sense of the term as used in this country was not a part of the English law until 1926.

- (b) [A]fter a decree of adoption is entered:
 - (1) the individual adopted:
 - (i) is the child of the petitioner for all intents and purposes;¹¹ and
 - (ii) is entitled to all the rights and privileges of and is subject to all the obligations of a child born to the petitioner in wedlock;
 - (2) each living natural parent of the individual adopted is:
 - (i) relieved of all parental duties and obligations to the individual adopted; and
 - (ii) divested of all parental rights as to the individual adopted; and
 - (3) *all rights of inheritance between the individual adopted and the natural relations shall be governed by the Estates and Trusts Article.* (Emphasis supplied.)

The applicable section of the Md. Estates and Trusts Code Ann. §1-207(a), provides:

An adopted child shall be treated as a natural child of his adopted parent or parents. On adoption, a child no longer shall be considered a child of either natural parent, except that upon adoption by the spouse of a natural parent, the child shall be considered the child of that natural parent.¹²

With that “thumbnail” history of adoption and the current statutes firmly in mind, we turn our attention to the matter sub judice.

Earl J. Vallandingham died in 1956, survived by his widow, Elizabeth, and their four children. Two years later, Elizabeth married Jim Walter Killgore, who adopted the children.

In 1983, twenty-five years after the adoption of Earl’s children by Killgore, Earl’s brother, William Jr., died childless, unmarried, and intestate. His sole heirs were his surviving brothers and sisters and the children of brothers and sisters who predeceased him.

Joseph W. Vallandingham, the decedent’s twin brother, was appointed Personal Representative of the estate. After the Inventory and First Accounting were filed, the four natural children of Earl J. Vallandingham noted exceptions, alleging that they were entitled to the distributive share of their natural uncle’s estate that their natural father would have received had he survived William. Est. & Trusts Art. §3-104(b).

The Orphan’s Court transmitted the issue to the Circuit Court for St. Mary’s County. That tribunal determined that the four natural children of Earl, because of their adoption by their adoptive father, Jim Walter Killgore, were not entitled to inherit from William M. Vallandingham Jr.

11. Notwithstanding Maryland law, a child who is eligible for social security survivor’s benefits through a deceased natural parent under Federal law does not lose eligibility for the continuation of those benefits because of a subsequent adoption. 42 U.S.C. §402(d).

12. Although the statute speaks in terms of the “adopted child,” the person who is adopted need not be a minor child. See Family Law Art. §5-307(a).

Patently unwilling to accept that judgment which effectively disinherited them, the children have journeyed here where they posit to us:

Did the trial court err in construing Maryland's current law regarding natural inheritance by adopted persons so as to deny the Appellants the right to inherit through their natural paternal uncle, when said Appellants were adopted as minors by their stepfather after the death of their natural father and the remarriage of their natural mother?

When the four natural children of Earl J. Vallandingham were adopted in 1958 by Jim Killgore, then Md. Ann. Code art. 16, §78(b) clearly provided that adopted children retained the right to inherit from their natural parents and relatives.¹³ That right of inheritance was removed by the Legislature in 1963 when it declared: "Upon entry of a decree of adoption, the adopted child shall lose all rights of inheritance from its parents and from their natural collateral or lineal relatives." Laws 1963, Ch. 174. Subsequently, the Legislature in 1969 enacted what is the current, above-quoted language of Est. & Trusts Art. §1-207(a). Laws 1969, Ch. 3, §4(c).

The appellants contend that since the explicit language of the 1963 Act proscribing dual inheritance by adoptees was not retained in the present law, Est. & Trusts Art. §1-207(a) implicitly permits adoptees to inherit from natural relatives, as well as the adoptive parents.

The right to receive property by devise or descent is not a natural right but a privilege granted by the State. . . . Every State possesses the power to regulate the manner or term by which property within its dominion may be transmitted by will or inheritance and to prescribe who shall or shall not be capable of receiving that property. A State may deny the privilege altogether or may impose whatever restrictions or conditions upon the grant it deems appropriate. *Mager v. Grima*, 49 U.S. 490 (1850).¹⁴

Family Law Art. §5-308(b)(1)(ii) entitles an adopted person to all the rights and privileges of a natural child insofar as the adoptive parents are concerned, but adoption does not confer upon the adopted child *more* rights and privileges than those possessed by a natural child. To construe Est. & Trusts Art. §1-207(a) so as to allow dual inheritance would bestow upon an adopted child a superior status. That status was removed in Laws 1963, Ch. 174 which, as we have said, expressly disallowed the dual inheritance capability of adopted children by providing that "the adopted child shall lose all rights of inheritance from its parents and from their natural collateral or lineal relatives." We think that the current statute, Est. & Trusts Art. §1-207(a), did not alter the substance of the 1963 act which eliminated dual inheritance. Rather, §1-207(a) merely "streamlined" the wording while retaining the meaning.

13. "[N]othing in this subtitle shall be construed to prevent the person adopted from inheriting from his natural parents and relatives. . . ."

14. Since the Legislature is elected by the people, it is answerable to the people, and that is the best safeguard against unreasonable laws concerning inheritance.

Family Law Art. §5-308 plainly mandates that adoption be considered a “rebirth” into a completely different relationship. Once a child is adopted, the rights of both the natural parents and relatives are terminated. *L.F.M. v. Department of Social Services*, 507 A.2d 1151 (Md. App. 1986). Est. & Trusts Art. §1-207(a) and Family Law Art. §5-308 emphasize the clean-cut severance from the natural bloodline. Because an adopted child has no right to inherit *from* the estate of a natural parent who dies intestate, it follows that the same child may not inherit *through* the natural parent by way of representation. What may not be done directly most assuredly may not be done indirectly. The elimination of dual inheritance in 1963 clearly established that policy, and the current language of §1-207(a) simply reflects the continuation of that policy.

We hold that because §1-207(a) eliminates the adopted child’s right to inherit from the natural parent it concomitantly abrogated the right to inherit through the natural parent by way of representation.

“The Legislature giveth, and the Legislature taketh away.”

Judgment affirmed.

Restatement (Third) of Property: Wills and Other Donative Transfers (1999)

§2.5 PARENT AND CHILD RELATIONSHIP

For purposes of intestate succession by, from, or through an individual:

(1) An individual is the child of his or her genetic parents, whether or not they are married to each other, except as otherwise provided in paragraph (2) or (5) or as other facts and circumstances warrant a different result.

(2) An adopted individual is a child of his or her adoptive parent or parents.

(A) If the adoption removes the child from the families of both of the genetic parents, the child is not a child of either genetic parent.

(B) If the adoption is by a relative of either genetic parent, or by the spouse or surviving spouse of such a relative, the individual remains a child of both genetic parents.

(C) If the adoption is by a stepparent, the adopted stepchild is not only a child of the adoptive stepparent but is also a child of the genetic parent who is married to the stepparent. Under several intestacy statutes, including . . . Uniform Probate Code [§2-114(b) (1990)], the adopted stepchild is also a child of the other genetic parent for purposes of inheritance from and through that parent, but not for purposes of inheritance from or through the child.

(3) A stepchild who is not adopted by his or her stepparent is not the stepparent’s child.

(4) A foster child is not a child of his or her foster parent or parents.

(5) A parent who has refused to acknowledge or has abandoned his or her child, or a person whose parental rights have been terminated, is barred from inheriting from or through the child.

NOTES AND QUESTIONS

1. Inheritance rights of an adopted child vary considerably from state to state. In some states, as in *Hall*, an adopted child inherits only from adoptive parents and their relatives; in others, an adopted child inherits from both adoptive parents and genetic parents and their relatives; in still others, as provided in UPC §2-114(b) (1990), an adopted child inherits from adoptive relatives and also from genetic relatives if the child is adopted by a stepparent. And there are many statutory variations on these three basic schemes. For a sweeping review of the development of adoption law, see Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 Duke L.J. 1077 (2003).

2. In view of the diversity and complexities of contemporary family relations created by adoptions, multiple marriages, and single parenthood, plus the increasing prevalence of unmarried domestic partners and new reproductive technologies, it is not easy to discern what the average person (the hypothetical intestate decedent) would want in many of these situations. For further discussion with reference to adoption, see E. Gary Spitko, *Open Adoption, Inheritance, and the “Uncleing” Principle*, 48 Santa Clara L. Rev. 765 (2008); Peter Wendel, *Inheritance Rights and the Step-Partner Adoption Paradigm: Shades of the Discrimination Against Illegitimate Children*, 34 Hofstra L. Rev. 351 (2005); Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 Law & Ineq. J. 1 (2000); Margaret M. Mahoney, *Stepfamilies in the Law of Intestate Succession and Wills*, 22 U.C. Davis L. Rev. 917 (1989); Jan E. Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why?*, 37 Vand. L. Rev. 711 (1984). For a more general treatment, see Ralph C. Brashier, *Inheritance Law and the Evolving Family* (2004).

3. *The 2008 amendments to the UPC.* In 2008 the UPC provisions on inheritance between parents and children were extensively revised. Under the UPC as revised the key determination is whether there is a *parent-child relationship*. If such a relationship exists, “the parent is a parent of the child and the child is a child of the parent for the purpose of intestate succession” by, from, or through the parent or the child (§2-116). Regarding adoption, a parent-child relationship exists between an adopted child and the adoptive parent (§2-118(a)), but not between an adopted child and the child’s genetic parents (§2-119(a)), the latter subject to several exceptions:

(b) [Stepchild Adopted by Stepparent.] A parent-child relationship exists between an individual who is adopted by the spouse of either genetic parent and:

(1) the genetic parent whose spouse adopted the individual; and

(2) the other genetic parent, but only for the purpose of the right of the adoptee or a descendant of the adoptee to inherit from or through the other genetic parent.

(c) [Individual Adopted by Relative of a Genetic Parent.] A parent-child relationship exists between both genetic parents and an individual who is adopted by a relative of a genetic parent, or by the spouse or surviving spouse of a relative of a genetic parent, but only for the purpose of the right of the adoptee or a descendant of the adoptee to inherit from or through either genetic parent.

(d) [Individual Adopted after Death of Both Genetic Parents.] A parent-child relationship exists between both genetic parents and an individual who is adopted after the death of both genetic parents, but only for the purpose of the right of the adoptee or a descendant of the adoptee to inherit through either genetic parent. [UPC §2-119 (2008).]

If UPC §2-119(b)(2) (2008) had been applicable in *Hall*, Earl's children, adopted by their stepfather, would have inherited from their genetic father's brother, William Jr. But William Jr. would not be able to inherit from Earl's children. In a stepparent adoption, the children can inherit from their genetic relatives, but the genetic relatives cannot inherit from the children. Is this fair?

For further discussion of the 2008 UPC provisions on parents and children, see Susan N. Gary, *We Are Family: The Definition of Parent and Child for Succession Purposes*, 34 ACTEC J. 171 (2008); Lee-ford Tritt, *Sperms and Estates: An Unadulterated Functionally Based Approach to Parent-Child Property Succession*, 62 SMU L. Rev. 367 (2009).

4. Should a person who is related to an intestate decedent through two lines, one genetic and one adoptive, be entitled to two intestate shares? Compare UPC §2-113 (1990) (larger share only), with *Jenkins v. Jenkins*, 990 So. 2d 807 (Miss. App. 2008) (both shares).

We now add two wrinkles: (1) adult adoption and (2) the effect of adoption on the interpretation of wills and trusts.

(1) *Adult adoption*. Most intestacy statutes draw no distinction between the adoption of a minor and the adoption of an adult. See *Tinney v. Tinney*, 799 A.2d 235 (R.I. 2002) (84-year-old Newport woman adopts 38-year-old man and he shares in her intestate estate, including "Belcourt Castle, a once majestic Newport mansion"). In some states (most prominently New York), however, the adoption of one's lover is not permitted. See *In re Robert Paul P.*, 471 N.E.2d 424 (N.Y. 1984), holding that a homosexual male, age 57, could not legally adopt his lover, age 50, although New York statutes permit the adoption of adults. The court ruled that a sexual relationship was incompatible with a parent-child relationship. For a case contrary to the New York view, see *In re Adoption of Swanson*, 623 A.2d 1095 (Del. 1993), holding that a 66-year-old man could adopt a 51-year-old man, his companion for 17 years, to prevent claims against their estates by collateral relatives. The Delaware court expressly rejected the New York holding. See also Terry L. Turnipseed, *Scalia's Ship of Revulsion Has Sailed: Will Lawrence Protect Adults Who Adopt Lovers to Help Ensure their Inheritance from Incest Prosecution?*, 32 Hamline L. Rev. (forthcoming 2009).

The adoption of an adult may be useful in preventing a will contest by denying standing to the potential contestants. The only persons who have standing to challenge the validity of a will are those who would take if the will were denied probate. To gain standing to challenge the will, the decedent's collateral relatives must first overturn the adoption. In *Greene v. Fitzpatrick*, 295 S.W. 896 (Ky. 1927), a wealthy bachelor adopted a married woman who had been his secretary

for many years and with whom, it was alleged, the bachelor had a sexual relationship. In *Collamore v. Learned*, 50 N.E. 518 (Mass. 1898), a 70-year-old man adopted three persons of ages 43, 39, and 25 respectively. In both cases it was held that the adoptions could not be set aside by the persons who would have been the heirs but for the adoptions. In the second case, Justice Holmes remarked that adoption for the purpose of preventing a will contest was “perfectly proper.”

(2) *Adoption and the interpretation of wills and trusts.* Is a child adopted by *A* entitled to share in a gift in a will or trust by *T* to the “children,” “issue,” “descendants,” or “heirs” of *A*? Because adoption was unknown to the common law, “children” and “issue” necessarily connoted a blood relationship. Thus, when adoption laws were enacted in the second half of the nineteenth century, the courts struggled with the question of whether an adopted child took under the will or trust of a person who was not the adoptive parent.

The early cases, influenced by the ancient reverence for blood relationships, held that an adopted child could not take. These cases gave rise to the *stranger-to-the-adoption* rule: The adopted child is presumptively barred, whatever generic word is used, except when the donor is the adoptive parent.

As adoption became more common and more socially acceptable, courts began to carve exceptions to the stranger-to-the-adoption rule. An adopted child might be permitted to take if adopted before, but not after, the testator’s death. Some courts also drew distinctions between a gift to “*A*’s children” and a gift to “*A*’s issue” or the “heirs of *A*’s body.” Unlike the latter terms, which were thought to have a biological connotation, a gift to “*A*’s children” presumptively included *A*’s adopted children. Where judicial decisions were found unsatisfactory, legislatures began to intervene in favor of the adopted child. But the legislation was seldom retroactive and was sometimes ambiguous.

In most states today, a minor adopted by *A* is presumptively included in a gift by *T* to the “children,” “issue,” “descendants,” or “heirs” of *A*. See Restatement (Third) of Property: Wills and Other Donative Transfers §14.5 (T.D. No. 4, 2004). The presumption yields to a contrary expression of intent by the donor. But the law of many states is likely to have been developed by changing judicial decisions and statutes over the twentieth century, and, since the change may not be retroactive, whether an adopted child is included may depend on what the law was at testator’s death in, say, 1936. See *Watson v. Baker*, 829 N.E.2d 648 (Mass. 2005).

The following case adds yet another twist. Is an adult adopted by *A* included in a gift by *T* to the “children,” “issue,” “descendants,” or “heirs” of *A*?

Minary v. Citizens Fidelity Bank & Trust Co.

Court of Appeals of Kentucky, 1967
419 S.W.2d 340

OSBORNE, J. [Amelia S. Minary died in 1932, leaving a will devising her residuary estate in trust, to pay the income to her husband and three sons, James, Thomas, and Alfred, for their respective lives. The trust was to terminate upon

the death of the last surviving beneficiary, at which time the corpus was to be distributed as follows:

After the Trust terminates, the remaining portion of the Trust Fund shall be distributed to my then surviving heirs, according to the laws of descent and distribution then in force in Kentucky, and, if no such heirs, then to the First Christian Church, Louisville, Kentucky.

The husband died, then James died without descendants, then Thomas died leaving two children: Thomas Jr. and Amelia Minary Gant. In 1934, Alfred married Myra, and in 1959 he adopted her as his child. The trust terminated upon Alfred's death without biological descendants in 1963.]

The question herein presented is, "Did Alfred's adoption of his wife Myra make her eligible to inherit under the provisions of his mother's will?" More specifically, the question is, "Is Myra included in the term 'my then surviving heirs according to the laws of descent and distribution in force in Kentucky'?"

This has revived a lively question in the jurisprudence of this state and presents two rather difficult legal problems. The first being under what conditions, if any, should an adopted child inherit from or through its adoptive parent? We have encountered little difficulty with the problem of inheriting from an adoptive parent but the question of when will an adoptive child inherit through an adoptive parent has given us considerable trouble. As late as 1945 in *Copeland v. State Bank and Trust Company*, 188 S.W.2d 1017 (Ky.), we held without hesitation or equivocation that the words "heirs" and "issue" as well as "children" and all other words of similar import as used in a will referred only to the natural blood relations and did not include an adopted child.

In 1950, in *Isaacs v. Manning*, 227 S.W.2d 418 (Ky.), we adopted the contrary position and held that an adopted child was included in the phrase "heirs at law" wherein a will devised property to designated children and then upon their death to their heirs at law. In the course of the opinion, we said, "where no language [shows] a contrary intent . . . an adopted daughter clearly falls within the class designated." In this case we distinguish the *Copeland* case, *supra*.

In 1953, in *Major v. Kammer*, 258 S.W.2d 506, we again held that an adopted child was included in the term "heirs at law," basing our decision upon the legislative changes made in the adoption laws and overruling *Copeland v. State Bank and Trust Company*, *supra*. In *Edmands v. Tice*, 324 S.W.2d 491, which was decided in 1959, we held that where testator used the word children, an adopted child could inherit through an adopted parent the same as if heirs at law or issue had been used. . . .

From the foregoing we conclude that when Amelia S. Minary used the phrase, "my then surviving heirs according to the laws of descent and distribution then in force in Kentucky," she included the adoptive children of her sons. This leaves us with the extremely bothersome question of: "Does the fact that Myra Minary was an adult and the wife of Alfred at the time she was adopted affect her status as an 'heir' under the will?" KRS 405.390 provides: "An adult person . . . may be adopted in the same manner as provided by law for the adoption of a child and with the same legal effect. . . ."

KRS 199.520 provides: "From and after the date of the judgment the child shall be deemed the child of petitioners and shall be considered for purposes of inheritance and succession and for all other legal considerations, the natural, legitimate child of the parents adopting it the same as if born of their bodies."

It would appear from examination of the authorities that the adoption of an adult for the purpose of making him an heir has been an accepted practice in our law for many years. However, here it should be pointed out that the practice in its ancient form made the person so adopted the legal heir of the adopting party only. This court has dealt with the problem of adopting adults for the purpose of making them heirs on several occasions. . . .

In 1957, in *Bedinger v. Graybill's Executors*, Ky., 302 S.W.2d 594, we had before us a case almost identical to the one here under consideration. In that case Mrs. Lulu Graybill, in 1914, set up a trust for her son Robert by will. She then provided after the death of the son that the trust "be paid over and distributed by the Trustee to the heirs at law of my said son according to the laws of descent and distribution in force in Kentucky at the time of his death." There was a devise over to others in the event that Robert died without heirs. Robert having no issue adopted his wife long after his mother's death. We held that the wife should inherit the same as an adopted child, there being no public policy against the adoption of a wife. However, it will be noted that in the course of the opinion it is carefully pointed out that the will directed the estate be paid to the "heirs at law of Robert" and did not provide that the estate should go to "my heirs," "his children" or to "his issue," indicating by this language that if the phrase had been one of the others set out the results might have been different. . . .

This case could properly be distinguished from *Bedinger v. Graybill's Executors*, supra, on the basis of the difference in language used in the two wills[;] however, no useful purpose could be served by so distinguishing them. The time has come to face again this problem which has persistently perplexed the court when an adult is adopted for the sole purpose of making him or her an heir and claimant to the estate of an ancestor under the terms of a testamentary instrument known and in existence at the time of the adoption. Even though the statute permits such adoption and even though it expressly provides that it shall be "with the same legal effect as the adoption of a child," we, nevertheless, are constrained to view this practice to be an act of subterfuge which in effect thwarts the intent of the ancestor whose property is being distributed and cheats the rightful heirs. We are faced with a situation wherein we must choose between carrying out the intent of deceased testators or giving a strict and rigid construction to a statute which thwarts that intent. In the *Bedinger* case there is no doubt but what the intent of the testatrix, as to the disposition of her property, was circumvented. It is our opinion that by giving a strict and literal construction to the adoption statutes, we thwarted the efforts of the deceased to dispose of her property as she saw fit.

When one rule of law does violence to another it becomes inevitable that one must then give way to the other. It is of paramount importance that a man be permitted to pass on his property at his death to those who represent the natural objects of his bounty. This is an ancient and precious right running from the dawn

of civilization in an unbroken line down to the present day. Our adoption statutes are humanitarian in nature and of great importance to the welfare of the public. However, these statutes should not be given a construction that does violence to the above rule and to the extent that they violate the rule and prevent one from passing on his property in accord with his wishes, they must give way. Adoption of an adult for the purpose of bringing that person under the provisions of a pre-existing testamentary instrument when he clearly was not intended to be so covered should not be permitted and we do not view this as doing any great violence to the intent and purpose of our adoption laws.

For the foregoing reasons the action of the trial court in declaring Myra Galvin Minary an heir of Amelia S. Minary is reversed.

The judgment is reversed.

QUESTIONS, NOTES, AND PROBLEMS

1. In *Minary*, the trust was to be distributed to the testator's "surviving heirs, according to the laws of descent and distribution *then* in force in Kentucky [emphasis added]." Why leave it to future legislatures to determine who will be the beneficiaries? Why not distribute according to the laws in force on the date the trust is created? See UPC §2-711 (1990, rev. 1993), page 874.

2. The use of an adoption procedure for the purpose of creating a child to come within a class gift is in effect using adoption as a *special power of appointment* (discussed in Chapter 12). If Amelia Minary had given her sons a power to appoint at least a life estate to their spouses, Alfred's desperate shenanigans would not have been necessary and his wife would not have ended up impoverished. It is unlikely that Alfred's mother would have wanted his widow to live in penury. Likely her lawyer did not suggest a special power of appointment. Is not the testator's intent, to which the court endeavored to adhere, something of a fiction if her lawyer never brought up the subject of her sons' widows?

3. *Adult adoption and class gifts*. The cases are split on the use of adult adoption to affect a class gift. Compare *Fleet National Bank v. Hunt*, 944 A.2d 846 (R.I. 2008) (attempt failed), with *In re Trust of Lane*, 660 N.W.2d 421 (Minn. 2003) (grandson adopted his nephew to allow the nephew to take from a mutual ancestor's trust for "issue").

UPC §2-705(f) (1990, rev. 2008) excludes a person adopted after reaching the age of 18 from a class gift to the adoptive parent's children, issue, descendants, or heirs by someone other than the adoptive parent unless the adoptive parent was the adoptee's stepparent or foster parent, or the adoptive parent "functioned as a parent of the adoptee before the adoptee" turned 18. See also Restatement (Third) of Property: Wills and Other Donative Transfers §14.5 (T.D. No. 4, 2004), to similar effect.

In a state in which an adult adoptee is included in a gift to the adoptive parent's children, issue, descendants, or heirs, is there any reason for excluding a

spouse who is adopted? What about an adopted lover? See Pam Belluck and Alison Leigh Cowan, *Partner Adopted by an Heiress Stakes Her Claim*, N.Y. Times, Mar. 19, 2007, at A1 (discussing a claim by the former lover and adopted child of the granddaughter of the founder of IBM to a share in family trusts created by him).

4. *Children “adopted out.”* So far we have considered the effect of adoption to bring the adopted person into a class gift. But what of the reverse? Does adoption remove the adoptee from a class gift to the adoptee’s genetic parent’s children, issue, descendants, or heirs? See *In re Accounting by Fleet Bank*, 884 N.E.2d 1040 (N.Y. 2008) (holding that adoptee is not included in a class gift to adoptee’s genetic parent’s descendants).

But suppose *T* bequeaths a fund in trust “for my wife for life, then to my descendants then living per stirpes.” After *T*’s death, his son, *A*, dies, leaving a wife and a minor child, *B*. *A*’s wife remarries, and her second husband adopts the minor child *B*. *T*’s wife then dies. Is *B* entitled to share in *T*’s trust fund? Compare *Newman v. Wells Fargo Bank*, 926 P.2d 969 (Cal. 1996) (looking at intestacy law as it existed at time of *T*’s death to determine *T*’s intent; *B* excluded), with *Lockwood v. Adamson*, 566 N.E.2d 96 (Mass. 1991) (*B* shares under *T*’s will even though *B* would not inherit from *T* under intestacy law). Under UPC §2-705(b) (1990, rev. 2008), *B* would share in *T*’s trust fund because the stepparent adoption rule of §2-119(b)(2), page 101, would apply.

NOTE: DORIS DUKE AND ADOPTIVE PARENT’S REMORSE

Adoption, unlike marriage, is not revocable if the relationship turns sour. In 1988 Doris Duke, 75, one of the world’s richest women, adopted Chandi Heffner, 35. Chandi had taken her name from the Hindu deity, Chandi, and was a Hare Krishna when Doris met her at a dance class. Doris Duke was the life beneficiary of two trusts created by her father, James Buchanan (“Buck”) Duke, in 1917 and 1924. After Doris’s death, the income from the trusts was to be payable to Doris’s children. Doris had no genetic children. Subsequent to the adoption, Doris Duke had a falling out with Chandi and tried to exclude Chandi from her father’s trust in her will.

Doris Duke died in 1993, a billionaire. She left her fortune to a charitable foundation, over which she put her barely-literate butler, Bernard Lafferty, in charge. After embarking on an extended spending spree, far exceeding the \$500,000 a year Doris left him, the butler dropped dead some three years after Doris died. Doris’s will provided:

TWENTY-ONE: As indicated in Article SEVEN, it is my intention that Chandi Heffner not be deemed to be my child for purposes of disposing of property under this my Will (or any Codicil thereto). Furthermore, it is not my intention, nor do I believe that it was ever my father’s intention, that Chandi Heffner be deemed to be a child or lineal descendant of mine for purposes of disposing of the trust estate of the May 2, 1917 trust which my father

established for my benefit or the Doris Duke Trust, dated December 11, 1924, which my father established for the benefit of me, certain other members of the Duke family and ultimately for charity.

I am extremely troubled by the realization that Chandi Heffner may use my 1988 adoption of her (when she was 35 years old) to attempt to benefit financially under the terms of either of the trusts created by my father. After giving the matter prolonged and serious consideration, I am convinced that I should not have adopted Chandi Heffner. I have come to the realization that her primary motive was financial gain. I firmly believe that, like me, my father would not have wanted her to have benefitted under the trusts which he created, and similarly, I do not wish her to benefit from my estate.



Her signature was shaky but bold:

Doris Duke in 1991, with her butler, Bernard Lafferty.

IN WITNESS WHEREOF, I have hereunto set my hand and affix my seal to this my Last Will and Testament on this ~~5th~~ day of April, 1993.

Upon Doris Duke's death, Chandi Heffner sued the trustees of the Doris Duke Trust created by her father, Buck Duke, demanding that they pay her income as the successive life beneficiary of the Doris Duke Trust, worth \$170 million at Doris's death. The trial court ruled against her, on the ground that an adult adoptee was not considered a child of the adopting parent when the trust is created by another. *In re Trust of Duke*, 702 A.2d 1008 (N.J. Super. 1995). Chandi Heffner also sued the trustees of the other trust created by Buck Duke and the executors of Doris Duke, claiming that Doris had promised to support her. While the litigation was proceeding, the parties settled. Chandi Heffner received \$60 million from the James Buchanan Duke trusts in settlement of her claim to be a child of Doris and \$5 million from the Doris Duke estate. One very expensive adoption!

For more on the Doris Duke litigation, see *In re Duke*, 663 N.E.2d 602 (N.Y. 1996); *N.Y. Times*, May 16, 1996, at B8; *N.Y. Times*, Nov. 5, 1996, at B8; *N.Y. Times*, Jan. 24, 1997, at B1 (reporting the feeding frenzy of lawyers); Susan Hansen, *The Butler's Lawyers*, *Am. Law.*, Apr. 1995, at 53 (reporting sensational but unproved charges against Duke's lawyers and butler).

Thus far we have explored explicit adoptions. But the recognition of a more informal *equitable adoption* (sometimes called *virtual adoption* or *adoption by estoppel*) can also affect the distribution of property at death.

O'Neal v. Wilkes

Supreme Court of Georgia, 1994
439 S.E.2d 490

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. [Mr. and Mrs. Cook were divorced in the 1970s.]

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*, 128 S.E.2d 56 (Ga. 1962); *Rucker v. Moore*, 199 S.E. 106 (Ga. 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, 236 S.E.2d 624 (Ga. 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 v. Murray*, 236 S.E.2d 624 (Ga. 1977) (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*, 238 S.E.2d 917 (Ga. 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*, 19 S.E.2d 914 (Ga. 1942) (parent retains exclusive authority to consent to adoption although child is placed in temporary custody of another); *Carey v. Phillips*, 224 S.E.2d 870 (Ga. App. 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*, 238 S.E.2d at 919. 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*, 96 S.E.2d 545 (Ga. 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, 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.



Justice Leah Sears
Appointed to the Georgia
Supreme Court in 1992,
at age 36.

1. In *Crawford v. Wilson*, 78 S.E. 30 (Ga. 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 32; 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.* 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 33.]

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. See 2 Corbin on Contracts, §429 (1950). 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. See 2 Corbin, *supra*, §§420, 421, 429, 432; *Harp v. Bacon*, 150 S.E.2d 655 (Ga. 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. See generally Clark, *The Law of Domestic Relations*, Vol. 2, Section 21.11 (2nd ed. 1987). However, as equitable adoption cases do not arise until the death of the adopting parents, the interests of the person with the [right to] 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. See Clark, *supra*, at 676-78; Jan Ellen Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why* (The Impact of Adoptions, Adult Adoptions, and Equitable Adoptions on Intestate Succession and Class Gifts), 37 Vand. L. Rev. 711, 770-75, 784-86 (1984). For instance, as we acknowledged in *Wilson*, *supra*, 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. See Rein at 774. Moreover, it is problematic whether these contracts are capable of being enforced in all respects during the child's infancy. See Rein at 773-74; Clark at 678. 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. Rein at 772-73, 775. 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. Rein at 785-87; Clark at 678, 682.

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. I am authorized to state that Justice Hunstein concurs in the result reached by this dissent.

NOTES AND QUESTION

1. Under the *equitable adoption* doctrine, recognized in a majority of states, an oral agreement to adopt *A*, between *H* and *W* and *A*'s genetic parents, is inferred if *H* and *W* take baby *A* into their home and raise *A* as their child. As against *H* and *W*, equity treats *A* as if the contract to adopt had been performed by *H* and *W*. They are estopped to deny a formal adoption took place.

Equitable adoption permits an equitably adopted child to inherit from the foster parents. *Lankford v. Wright*, 489 S.E.2d 604 (N.C. 1997). On the other hand, the foster parents (and their relatives) cannot inherit from the child. Having failed to perform by in fact adopting the child, they have no claim in equity. *Estate of Riggs*, 440 N.Y.S.2d 450 (Sur. 1981). In *Board of Educ. v. Browning*, 635 A.2d 373 (Md. 1994), the court held that an equitably adopted child could not inherit through her adoptive parent to take from her adoptive parent's sister even

though the sister's estate thus escheated. The court concluded that the effect of equitable adoption should be limited to inheritance from the parent who is estopped. Many courts, though not all, refuse to apply equitable adoption to testate estates. See *In re Estate of Seader*, 76 P.3d 1236 (Wyo. 2003).

2. Suppose in *O'Neal* that the Juvenile Court had placed Hattie in the custody of Mr. and Mrs. Cook, and that the Juvenile Court had power to consent to adoption of Hattie by the Cooks. Same result? See *Welch v. Welch*, 453 S.E.2d 445 (Ga. 1995) (holding no equitable adoption, by a 4 to 3 vote).

In re Estate of Ford, 82 P.3d 747 (Cal. 2004), involved a foster child who was raised from the age of two by the decedent. The court rejected the foster child's claim to an intestate share of the decedent's estate, giving the property instead to a nephew and niece who had not seen the decedent for 15 years. The court held that, under California law, equitable adoption was based on contract, and the promise or intention to adopt must be proved by clear and convincing evidence. See also *Walden v. Burke*, 637 S.E.2d 859 (Ga. 2006) (reaffirming the *O'Neal* requirement of contract).

Not all courts are as strict in requiring a contract. In *Welch v. Wilson*, 516 S.E.2d 35 (W. Va. 1999), a woman who was raised by her grandmother and step-grandfather was treated as having been equitably adopted by the step-grandfather, allowing her to inherit his entire estate. The court did not require a contract, nor did it mention estoppel, though it did note that the step-grandparent was listed as the woman's parent on school records. The court focused primarily on the ample evidence of a close, loving parent-child relationship. See also Kristine S. Knaplund, *Grandparents Raising Grandchildren and the Implications for Inheritance*, 48 Ariz. L. Rev. 1 (2006).

3. Hattie O'Neal was African American, and the country town of Riceboro, Georgia, where she went to live, had a population of 767, of whom 751 were African Americans. There was no lawyer in Riceboro, but there are several lawyers in the county seat, Hinesville, 17 miles away. Does this affect your view of the *O'Neal* case? See Lynda Richardson, *Adoptions that Lack Papers, Not Purpose*, N.Y. Times, Nov. 25, 1993, at C1, discussing the history and prevalence of informal adoptions in the African American community ("of the estimated one million black children in this country who do not live with a biological parent, nearly 800,000 have been informally adopted, usually by a grandparent"). See also Michael J. Higdon, *When Informal Adoption Meets Intestate Succession: The Cultural Myopia of the Equitable Adoption Doctrine*, 43 Wake Forest L. Rev. 223 (2008) (criticizing equitable adoption doctrine for insensitivity to racial and ethnic minority communities).

In *O'Neal*, the court was divided 5 to 2. Joining Justice Sears in her dissent was a white woman justice; the majority were all men, including one African American. Might women look at equitable adoption as less an application of abstract principles and more as a judgment about whether the responsibilities and care involved in a parent-child relationship had been satisfied in a particular case? See the views of Professor Rein, cited in Justice Sears's opinion, and Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (1982).

b. Posthumous Children

The typical posthumous child case involves a child who is conceived before, but born after, her father's death. Where, for purposes of inheritance or of determining property rights, it is to a child's advantage to be treated as in being from the time of conception rather than from the time of birth, the child will be so treated if born alive. The principle is an ancient one. See 1 William Blackstone, Commentaries *130. David Copperfield, the lead character in the eponymous book by Charles Dickens, reports at the outset that "I was a posthumous child. My father's eyes had closed upon the light of this world six months, when mine opened on it."

Courts have established a rebuttable presumption that the normal period of gestation is 280 days (10 lunar months). If the child claims that conception dated more than 280 days before birth, the burden of proof is usually upon the child. On supposed periods of gestation beyond 280 days, the modern record for a protracted pregnancy apparently belongs to a woman from North Carolina. In *Byerly v. Tolbert*, 108 S.E.2d 29 (N.C. 1959), a child was born to the decedent's widow 322 days after his death. The child (through a guardian ad litem, of course) claimed an intestate share. The trial court held as a matter of law that the infant was not a child of the decedent. On appeal, the case was reversed. Although there is a presumption that a child born more than 280 days after death is not the decedent's child, the presumption is not irrebuttable, and the child was entitled to have the issue submitted to a jury.

Uniform Parentage Act §204 (2000, rev. 2002) establishes a rebuttable presumption that a child born to a woman within 300 (rather than 280) days after the death of her husband is a child of that husband.

c. Nonmarital Children

Although innocent of any sin or crime, children of unmarried parents were given harsh, pitiless treatment by the common law.¹⁵ A child born out of wedlock was *filius nullius*, the child of no one, and could inherit from neither father nor mother. Only the child's spouse and descendants could inherit from the child. If the child died intestate and left neither spouse nor descendants, the child's property escheated to the king or other overlord.

All states have alleviated this unsympathetic treatment of nonmarital children and now permit inheritance from the mother. But the rules respecting inheritance from the father vary. In *Trimble v. Gordon*, 430 U.S. 762 (1977), the Supreme Court held unconstitutional, as a denial of equal protection, an Illinois statute denying a nonmarital child inheritance rights from the father. The Court held that state discrimination against nonmarital children, though not a suspect

15. For a description of the legal position at common law of what was called an illegitimate child, see 1 William Blackstone, Commentaries *454 ff.; 2 id. *247 ff. In the first book of Blackstone (1 id. *457) you may find out, if you care to, how a child could be "more than ordinarily legitimate."

classification subject to the strict scrutiny test, must have a substantial justification as serving an important state interest. The valid state interest recognized by the Court was obtaining reliable proof of paternity. The Court ruled that total statutory disinheritance from the father was not rationally related to this objective. See also *Lalli v. Lalli*, 439 U.S. 259 (1978), upholding a New York statute permitting inheritance by a nonmarital child from the father only if the father had married the mother or had been formally adjudicated the father by a court during the father's lifetime. But see Paula A. Monopoli, *Nonmarital Children and Post-Death Parentage: A Different Path for Inheritance Law?*, 38 Santa Clara L. Rev. 857 (2008) (arguing that the Court's analysis has been undermined by subsequent advances in the science of paternity testing).

In the wake of these and related cases, most states amended their intestacy statutes to liberalize inheritance by nonmarital children. Most permit paternity to be established by evidence of the subsequent marriage of the parents, by acknowledgment by the father, by an adjudication during the life of the father, or by clear and convincing proof after his death. For further discussion, see Browne Lewis, *Children of Men: Balancing the Inheritance Rights of Marital and Non-Marital Children*, 39 U. Tol. L. Rev. 1 (2007); Linda Kelly Hill, *Equal Protection Misapplied: The Politics of Gender and Legitimacy and the Denial of Inheritance*, 13 Wm. & Mary J. Women & L. 129 (2006).

QUESTIONS AND NOTE

1. In the usual case, the question is whether an out-of-wedlock child can inherit from the father. But what about the reverse? Can a father of a child born out of wedlock inherit from the child? The authorities are split. See Katherine Guzman, *What Price Paternity?*, 53 Okla. L. Rev. 77 (2000).

2. Should state courts develop an *equitable legitimation* doctrine (similar to equitable adoption) so that where a formal adjudication of paternity is required by statute for inheritance, a nonmarital child can inherit from the father if there is clear and convincing evidence of paternity and of the father's intent that the child be treated as an heir? See the Georgia case, *Prince v. Black*, 344 S.E.2d 411 (Ga. 1986) (announcing equitable legitimation doctrine) — *Georgia*, did you say? Compare *O'Neal v. Wilkes*, page 109. See also James R. Robinson, *Untangling the "Loose Threads": Equitable Adoption, Equitable Legitimation, and Inheritance in Extralegal Family Arrangements*, 48 Emory L.J. 943 (1999).

3. *DNA testing*. Should the remains of deceased persons be exhumed for DNA testing to establish paternity? In *Estate of Kingsbury*, 946 A.2d 389 (Me. 2008), the court ordered the deceased's body be disinterred so that a purported daughter's claim of paternity might be proven by DNA testing. In New York, on the other hand, while post-death DNA testing has been allowed on stored samples and the deceased's surviving kin, the courts have been reluctant to order exhumation. Compare *In re Estate of Poldrugovaz*, 851 N.Y.S.2d 254 (Sur. 2008) (allowing post-mortem DNA testing of tissue sample retained by the coroner),

and *In re Estate of Gaynor*, 818 N.Y.S.2d 747 (Sur. 2006) (ordering DNA testing of deceased's marital son to verify claim by purported out-of-wedlock son), with *In re Estate of Janis*, 600 N.Y.S.2d 416 (Sur. 1993) (refusing to order exhumation). As DNA analysis has made paternity testing both fairer and more accurate,¹⁶ the clear trend is toward allowing it, even if exhumation of the body is required. See Ilene Sherwyn Cooper, *Posthumous Paternity Testing: A Proposal to Amend EPTL 4-1.2(A)(2)(D)*, 69 Alb. L. Rev. 947 (2006).

Should a man who has acknowledged paternity and formed a relationship with the child later be allowed to repudiate the acknowledgement if subsequent DNA testing shows he is not the father? In *Shondel J. v. Mark D.* 853 N.E.2d 610 (N.Y. 2006), the court held in the negative. For further discussion, compare *Melanie B. Jacobs, My Two Dads: Disaggregating Biological and Social Paternity*, 38 Ariz. St. L.J. 809 (2006), with *Ronald K. Henry, The Innocent Third Party: Victims of Paternity Fraud*, 40 Fam. L.Q. 51 (2006).

d. Reproductive Technology and New Forms of Parentage

At issue in *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275 (App. 1993), was William Kane's devise to his girlfriend, Deborah Hecht, of 15 vials of his sperm that were on deposit in a sperm bank. Kane's two adult children contested the devise and sought an order that the sperm be destroyed. The court ruled in favor of Hecht, awarding her Kane's sperm.

Would a child conceived through the use of Kane's sperm after Kane's death qualify as Kane's heir? Recall that a posthumous child (a child *en ventre sa mere*) is treated as in being from the time of conception rather than from the time of birth if it is to the child's advantage to do so and the child is born alive (see page 115). The posthumously conceived child (a child *en ventre sa frigidaire*) differs from the posthumous child in that the former is both born *and conceived after* the death of one or both of the child's genetic parents. Hence a posthumously conceived child is, by definition, a nonmarital child even though the child's parents might have been married prior to the child's conception. The California courts were able to elide the question in the subsequent litigation over Hecht's sperm,¹⁷ but the issue has since been confronted squarely.

16. For a paternity case in which DNA testing was not enough, because the potential fathers were identical twin brothers, each of whom had slept with the mother, see *State ex rel. Dept. Social Serv. v. Miller*, 218 S.W.3d 2 (Mo. App. 2007). From the case report you may find out, if you care to, how the court resolved which of the twins was the father.

17. After the 1993 decision, the Kane children continued their litigation to deny Hecht the vials of sperm. Finally, in *Hecht v. Superior Court*, 59 Cal. Rptr. 2d 222 (App. 1996), the court, expressing exasperation at the children's effort to frustrate their father's will, dismissed the children's claims and ordered all the vials to be distributed to Deborah Hecht without further delay. Said the court: "We do not have before us the many legal questions raised by the possible birth of a child of Hecht through use of Kane's sperm. Thus, we do not decide, for instance, whether that child would be entitled to inherit any property as Kane's heir."

Woodward v. Commissioner of Social Security
Supreme Judicial Court of Massachusetts, 2002
760 N.E.2d 257

MARSHALL, C.J. The United States District Court for the District of Massachusetts has certified the following question to this court.

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 resulting from posthumous reproduction may enjoy the inheritance rights of "issue" under the Massachusetts intestacy statute. . . .

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 . . . and "mother's" benefits.

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 . . . [because] they "are not entitled to inherit from [the husband] under the Massachusetts intestacy and paternity laws." . . .

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 of a deceased individual and his or



Michayla and Mackenzie Woodward, conceived with their father's sperm after his death. Defending the court's decision, their mother, Lauren, said, "Look at them and tell me that's not right."

AP/Salem News/Amy Sweeney

her surviving spouse.¹⁸ 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 under other States' intestacy laws. . . .

[T]he 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.

18. 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.

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. . . . 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

. . . 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. 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 descendants. The term "[d]escendants" . . . has long been held to mean persons 'who by consanguinity trace their lineage to the designated ancestor.'" *Lockwood v. Adamson*, 566 N.E.2d 96 (Mass. 1991). . . .

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.

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. 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.

The question whether posthumously conceived genetic children may enjoy inheritance rights under the intestacy statute implicates three powerful State interests: [1] the best interests of children, [2] the State's interest in the orderly administration of estates, and [3] 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." 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. 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).

We also consider that some of the assistive reproductive technologies that make posthumous reproduction possible have been widely known and practiced for several decades. 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. 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. 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.

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, . . . 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. . . .

Because death ends a marriage, 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. Although modern reproductive technologies will increase the possibility of disputed paternity claims, sophisticated modern testing techniques now make the determination of genetic paternity accurate and reliable. . . .

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 parties stipulated that, in this dispute over Social Security benefits, timeliness was not at issue.] . . .

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. 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 more complicated matter.

In *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000), we . . . 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.*, a decedent's silence, or his equivocal indications of a desire to parent posthumously, "ought not to be construed as consent." See Anne Reichman Schiff, *Arising from the Dead: Challenges of Posthumous Procreation*, 75 N.C.L. Rev. 901, 951 (1997). The prospective donor parent must clearly and unequivocally consent not only to posthumous reproduction but also to the support of any resulting child. 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.

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

. . . 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 posthumously conceived child. In any action brought to establish such inheritance rights, notice must be given to all interested parties.

[The clerk of the court was ordered to transmit an attested copy of this opinion to the district court.]

PROBLEMS, QUESTIONS, AND NOTES

1. Suppose a man banks his sperm and records in writing his consent to posthumous conception with his widow, and the widow gives birth to the man's posthumously conceived daughter 21 years later. See Celia Hall, *Baby Boy Born from Sperm Frozen for 21 Years*, Daily Telegraph (London), May 25, 2004, at 01. Should the girl be entitled to inherit from her father? What result under *Woodward*? At what point does the need for finality in property succession trump the interests of a later-born, posthumously conceived child?

Suppose a man banks his sperm but, after he dies, there is a dispute whether he consented to posthumous conception. What proof would show that the man "affirmatively consented" under *Woodward*? What about the extraction of sperm from dead or comatose men who do not consent, and the use of such sperm by wives, girlfriends, and parents? Should a child conceived in this way be entitled to inherit from the father, who did not give his consent? In Lori B. Andrews, *The Sperminator*, N.Y. Times Mag., Mar. 28, 1999, at 62, the author reports that the practice of harvesting sperm from deceased men has become common (it has since been a plot device in the ABC television show *Ugly Betty*). See also

Katheryn D. Katz, *Parenthood from the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying*, 2006 U. Chi. Legal F. 289.

2. *Social Security and inheritance law.* In *Woodward*, the court was asked to determine the intestacy rights of the decedent's posthumously conceived children, not for the purpose of distributing the decedent's estate, but because under federal law a child of a deceased father is eligible for Social Security survivor's benefits only if the child would inherit from the father under state law. Nearly all the litigated cases over the inheritance rights of a posthumously conceived child involve eligibility for Social Security benefits. In spite of their common issue, the cases have reached divergent results. Compare *Gillett-Netting v. Barnhart*, 371 F.3d 593 (9th Cir. 2004) (Arizona law, yes), and *Estate of Kolacy*, 753 A.2d 1257 (N.J. Super. 2000) (yes), with *Finley v. Astrue*, 270 S.W.3d 849 (Ark. 2008) (no), *Khabbaz v. Commissioner of Social Security*, 930 A.2d 1180 (N.H. 2007) (no), and *Stephen v. Commissioner of Social Security*, 386 F. Supp. 2d 1257 (M.D. Fla. 2005) (Florida law, no). Should Congress amend the Social Security Act to provide a uniform national rule?

3. *Legislation and law reform.* Heeding the call in *Woodward* for legislative relief, several state legislatures have responded, with California leading the way. Under Cal. Prob. Code §249.5 (2008), "a child of the decedent conceived after the death of the decedent shall be deemed to have been born in the lifetime of the decedent" if (a) the decedent consented in a signed and dated writing; (b) within four months of the decedent's death, notice of the possibility of posthumous conception is served upon "a person who has the power to control the distribution" of the decedent's property; and (c) the child "was in utero within two years of the" decedent's death and the child is not a clone of the decedent. La. Rev. Stat. 9:391.1 (2008) grants posthumously conceived children inheritance rights if born to the surviving spouse within three years of the decedent's death. Uniform Parentage Act §707 (2000, rev. 2002), adopted in a handful of states, recognizes inheritance rights for a posthumously conceived child if the parent consented to posthumous conception in writing. Fla. Stat. Ann. §742.17 (2008) provides that a posthumously conceived child inherits only if provided for expressly in the decedent's will.

UPC §2-120, added to the Code in 2008, provides that a posthumously conceived child inherits from the deceased parent if (1) during life the parent consented to posthumous conception in a signed writing or consent is otherwise proved by clear and convincing evidence, and (2) the child is in utero not later than 36 months or is born not later than 45 months after the parent's death. See Susan N. Gary, *We Are Family: The Definition of Parent and Child for Succession Purposes*, 34 ACTEC J. 171 (2008).

Restatement (Third) of Property: Wills and Other Donative Transfers §2.5, cmt. 1 (1999), takes the position that "to 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."

4. *Literature.* For further discussion, see Ronald Chester, *Inheritance Rights of the Posthumously Conceived Child: What Exactly Does Lauren Woodward v. Commissioner of Social Security Decide?*, 87 Mass. L. Rev. 49 (2002); Michael K. Elliot, *Tales of Parenthood from the Crypt: The Predicament of the Posthumously Conceived Child*, 39 Real Prop., Prob. & Tr. J. 47 (2004); Kristine S. Knaplund, *Legal Issues of Maternity and Inheritance for the Biotech Child of the 21st Century*, 43 Real Prop., Prob. & Tr. J. 393 (2008); Kristine S. Knaplund, *Equal Protection, Postmortem Conception, and Intestacy*, 53 U. Kan. L. Rev. 627 (2005); Browne C. Lewis, *Dead Men Reproducing: Responding to the Existence of After-death Children*, 16 Geo. Mason L. Rev. 403 (2009); Kathryn Venturatos Lorio, *Conceiving the Inconceivable: Legal Recognition of the Posthumously Conceived Child*, 34 ACTEC J. 154 (2008); Laurence C. Nolan, *Critiquing Society's Response to the Needs of Posthumously Conceived Children*, 82 Or. L. Rev. 1067 (2003).

For a more general treatment of new reproductive technologies and the law, see Charles P. Kindregan and Maureen McBrien, *Assisted Reproductive Technology: A Lawyer's Guide to Emerging Law and Science* (2006 and Supp. 2009).

Posthumously conceived children raise problems of interpretation not only for intestate succession, but also for wills and trusts.

In re Martin B.

Surrogate's Court, New York County, 2008
841 N.Y.S.2d 207

ROTH, S. 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. . . .

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



Surrogate Renee R. Roth

finality in its distribution. 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. 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 statute or judicial decision, on which see Notes 2 and 3 following *Woodward* at page 125]. . . .

[T]he 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.

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, 2004]).

The rationale of the Restatement . . . 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, 207 N.E.2d 859 (N.Y. 1965)). 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.”

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. 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.

QUESTIONS AND NOTES

1. Suppose in *Martin B.* the remainder of James’s banked sperm had not been destroyed and ten years later another child was conceived with the sperm and then born alive. Would this child qualify as a beneficiary for future distributions from James’s father’s trusts? Should the trustee consider the possibility of future, posthumously conceived children in the administration and portfolio management of the trust? Should the courts consider the possibility of future, posthumously conceived children — the possibility of a *fertile decedent* — in applying the Rule Against Perpetuities?

2. *The 2008 amendments to the UPC.* As revised in 2008, the UPC states a similar rule for posthumous conception and class gifts as its rule for posthumous conception and intestate succession (see Note 3 at page 125). The key difference

is that the focus for class gifts is on the distribution date rather than the date of the parent's death. Thus, a posthumously conceived child of *A* is included in a class gift in a will or trust by *T* to the "children," "issue," "descendants," or "heirs" of *A* if (1) *A* consented to posthumous conception in a signed writing or *A*'s consent is otherwise proved by clear and convincing evidence (§§2-705(b) and 2-120(f)), and (2) the child is living on the distribution date or is in utero not later than 36 months after or is born not later than 45 months after the distribution date (§2-705(g)). If *Martin B.* arose under the UPC as revised in 2008, what result?

3. For further discussion of class closing rules and the new reproductive technologies, see Sheldon F. Kurz and Lawrence W. Waggoner, *The UPC Addresses the Class-Gift and Intestacy Rights of Children of Assisted Reproductive Technologies*, 35 ACTEC J. 30 (2009); Cameron Krier, *Heir on the Side of Exclusion? Addressing the Problems Created by Assisted Reproductive Technologies to the Inheritance Rights of a Class Named in a Funded Trust or Probated Will*, 20 Quinnipiac Prob. L.J. 47 (2006); Kristine S. Knaplund, *Postmortem Conception and a Father's Last Will*, 46 Ariz. L. Rev. 91 (2004).

NOTE: SURROGATE MOTHERHOOD AND MARRIED COUPLES

Who is the parent of a child born by surrogate motherhood? Surrogate motherhood can involve (1) an egg of the wife fertilized by the husband's sperm; (2) an egg of the wife fertilized by the sperm of a third party donor; (3) an egg of the surrogate mother fertilized by the husband's sperm; (4) an egg of a third party donor fertilized by the husband's sperm; or (5) an egg of a third party donor fertilized by the sperm of a third party donor. As you can see, there may be a genetic connection of both husband and wife to the child, or a genetic connection of only one of them to the child, or no genetic connection between the husband and wife and the child. The law is evolving on who is a parent, but courts are by no means in agreement, and many states have neither statutory nor case law on parentage in surrogacy matters. Article 8 of the Uniform Parentage Act (2000, rev. 2002) provides for comprehensive rules on the subject, but those rules have not been widely adopted.

In *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993), a husband and wife signed a contract with a woman surrogate providing that an egg of the wife fertilized by the husband's sperm would be implanted in the surrogate woman and, after the child was born, it would be taken into the home of the husband and wife as their child. The surrogate agreed to relinquish all parental rights to the child. The surrogate later changed her mind, claiming parental rights. The court held that parenthood in surrogate mother cases should not be determined by who gave birth or who contributed genetic material, but should turn on the intent of the parties as shown by the surrogacy contract. The court declared the husband and wife the sole parents. But in another jurisdiction the result might have been different. In

Michigan, for example, surrogacy for compensation is illegal, and in a custody dispute over a child born to a surrogate, the dispositive consideration is the best interests of the child. Mich. Comp. Laws §§722.859 and 722.861 (2008).

A more recent example of the difficulties in determining parentage in surrogacy cases is furnished by the so-called Erie Surrogate Triplets. The triplets, conceived from the sperm of the intended father and an unrelated egg donor, were born to a gestational surrogate in 2003. After the surrogate reneged on an agreement with the father and his fiancée to turn the triplets over to them, the surrogate, the father, and the father's fiancée — plus the egg donor, the surrogate's husband, and the company that brought them all together — became embroiled in litigation in various courts in Pennsylvania, Ohio, and Indiana. The result was that the triplets were moved, after two and half years in the surrogate's custody in Pennsylvania, to the custody of the father and his fiancée in Ohio, where the children have had no further contact with the surrogate. For a fuller rendition of the story, with policy analysis, see Robert E. Rains, What the Erie "Surrogate Triplets" Can Teach State Legislatures About the Need to Enact Article 8 of the Uniform Parentage Act (2000), 56 Clev. St. L. Rev. 1 (2008).

In some states, surrogacy agreements are prohibited or are enforceable only under certain specified conditions. This complicates matters. In *Hodas v. Morin*, 814 N.E.2d 320 (Mass. 2004), the court upheld the choice of Massachusetts law in a surrogacy agreement between a New York surrogate and Connecticut genetic parents, who were married, that called for the child to be born in Massachusetts. The court ruled that this provided a sufficient connection with Massachusetts to justify application of Massachusetts law, which is favorable to surrogacy and allows for a pre-birth declaratory judgment on parentage, in spite of the strong New York public policy against gestational surrogacy agreements.

Is a determination of who is a parent in custody cases and child support cases *res judicata* as to inheritance rights? Should the policies in the cases cited above, which are heavily influenced by the family law emphasis on the best interests of the child, also govern inheritance? See Lee-ford Tritt, *Sperms and Estates: An Unadulterated Functionally Based Approach to Parent-Child Property Succession*, 62 SMU L. Rev. 367 (2009).

Under the 2008 amendments to the UPC, inheritance rights turn on whether a parent-child relationship exists (see Note 3 at page 101). With respect to a child born to a surrogate (a "gestational carrier"), UPC §2-121 (2008) provides that in the absence of a court order to the contrary, the surrogate does not have a parent-child relationship with the child unless the surrogate is the child's genetic mother and no one else has a parent-child relationship with the child. An intended parent of the child, meaning a person who entered into an agreement with the surrogate stating that the person would be the parent of the child, has a parent-child relationship with the child if the person functioned as a parent of the child within two years of the child's birth.

For further discussion, see Charles P. Kindregan, *Collaborative Reproduction and Rethinking Parentage*, 21 J. Am. Acad. Matrimonial L. 43 (2008); Helene S. Shapo, *Assisted Reproduction and the Law: Disharmony on a Divisive Social*

Issue, 100 Nw. U. L. Rev. 465 (2006); Naomi R. Cahn, Parenthood, Genes, and Gametes: The Family Law and Trusts and Estates Perspectives, 32 U. Mem. L. Rev. 563 (2002); James E. Bailey, An Analytical Framework for Resolving the Issues Raised by the Interaction Between Reproductive Technology and the Law of Inheritance, 47 DePaul L. Rev. 743 (1998); Alexa E. King, Solomon Revisited: Assigning Parenthood in the Context of Collaborative Reproduction, 5 UCLA Women's L.J. 329 (1995).

NOTE: ASSISTED REPRODUCTION AND SAME-SEX COUPLES

In *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993), noted in 107 Harv. L. Rev. 751 (1994), the court approved the adoption of the child, conceived by artificial insemination, of Dr. Susan Love, the eminent breast cancer surgeon, by her lesbian partner, also a surgeon. The court held that both the genetic mother and the adoptive mother had post-adoptive rights and that the adopted child would inherit from and through both mothers as the child of each. But suppose the court did not settle the inheritance rights of the parties. If the genetic mother thereafter died, survived by the child and the adoptive mother, would the child be the genetic mother's heir? See Laura M. Padilla, *Flesh of My Flesh But Not My Heir: Unintended Disinheritance*, 36 J. Fam. L. 219 (1997). In *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005), the court held that a child can have only two parents, but both of those parents can be women. See also *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005) (holding that "a woman who has supplied her ova to impregnate her lesbian partner in order to produce children who would be raised in their joint home" is a mother of the resulting children).

Under the 2008 amendments to the UPC, a child conceived by assisted reproduction other than gestational surrogacy is in a parent-child relationship (and thus entitled to inherit by, from, or through) the child's birth mother (§2-120(c)). There can also be a parent-child relationship with another person if the other person either consented in writing to assisted reproduction by the birth mother with the intent to be the other parent of the child or functioned as a parent of the child within two years of the child's birth (§2-120(f)). See Sheldon F. Kurz and Lawrence W. Waggoner, *The UPC Addresses the Class-Gift and Intestacy Rights of Children of Assisted Reproductive Technologies*, 35 ACTEC J. 30 (2009).

For further discussion, see Kathy T. Graham, *Same-Sex Couples: Their Rights as Parents, and Their Children's Rights as Children*, 48 Santa Clara L. Rev. 999 (2008); Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. Rev. 227 (2006); Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 Hastings L.J. 597 (2002). See also John A. Robertson, *Gay and Lesbian Access to Assisted Reproductive Technology*, 55 Case W. Res. L. Rev. 323 (2004).



“You just wait until your other mother gets home, young man!”

Drawing by M. Stevens.

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2. Advancements

If a child wishes to share in the intestate distribution of a deceased parent's estate, the child must permit the administrator to include in the determination of the distributive shares the value of any property that the decedent, while living, gave the child by way of an *advancement*. At common law, any lifetime gift by the decedent to a child was presumed to be an advancement—in effect, a prepayment—of the child's intestate share. To avoid the application of the doctrine, the child had the burden of establishing that the transfer was intended as an absolute gift that was not to be counted against the child's share of the estate. The doctrine is based on the assumption that the parent would want an equal distribution of assets among the children and that true equality can be reached only if lifetime gifts by the parent are taken into account in determining the amount of the equal shares. When a parent makes an advancement to the child and the child predeceases the parent, the amount of the advancement is deducted from the shares of the child's descendants if other children of the parent survive.

If a gift is treated as an advancement, it is accounted for in distributing the decedent's estate by bringing it into *hotchpot*. Here is how hotchpot works: Assume the decedent leaves no spouse, three children, and an estate worth \$50,000. One daughter, *A*, received an advancement of \$10,000. To calculate the shares in the estate, the \$10,000 gift is added to the \$50,000, and the total of \$60,000 is divided by three. *A* has already received \$10,000 of her share; thus she receives only \$10,000 from the estate. Her siblings each take a \$20,000 share. If instead *A* had been given property worth \$40,000 as an advancement, *A* would not have to give back a portion of this amount (we know that the decedent wanted *A* to have at least \$40,000). *A* will stay out of hotchpot, and decedent's \$50,000 will be equally divided between the other two children.

QUESTIONS AND PROBLEMS

1. Suppose that *O* has two children, *A* and *B*. *A* owns a successful business. *B* is a single parent who struggles to make ends meet. *O* makes regular gifts to *B*, but not to *A*, because *B* is in greater need. If *O*'s lifetime transfers to *B* are deemed to be advancements, then *A* will inherit more than *B* on the death of *O*. Is this result consistent with *O*'s probable intent? Why does the law regard favorable lifetime treatment of a child as a reason to disfavor that child at the parent's death? Is not favorable lifetime treatment good evidence that the decedent would have wanted the favored child to receive at least the same share of her estate as her other children? The common law of advancements answers this question in the negative.

2. *O* has three children. One daughter, *A*, does not leave home but lives with *O* on *O*'s farm until *O* dies. A few years before death, *O* deeds the farm to *A*. *O* dies intestate. *A* claims the gift is not an advancement but an extra gift for extraordinary services rendered to *O*. What result? See *Thomas v. Thomas*, 398 S.W.2d 231 (Ky. 1965).

Suppose that *O* gives his son, *B*, \$20,000. *B* is ill and unable to work and support his family. Is this an advancement?

Suppose that *O*'s daughter, *C*, goes to Yale Medical School and earns a medical degree. *O* pays the tuition. Is this an advancement?

Largely because of problems of proof of the donor's intent, many states have reversed the common law presumption of advancement. In these states, a lifetime gift is presumed *not* to be an advancement unless it is shown to have been intended as such. Some states and UPC §2-109(a) (1990) go even further, requiring that the intention to make an advancement be declared in a writing signed by the grantor or grantee. See also Restatement (Third) of Property: Wills and Other Donative Transfers §2.6 (1999), to similar effect.

Uniform Probate Code (1990)

§2-109. ADVANCEMENTS

(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 heir¹⁹ 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 purposes 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.

UPC §2-109(c) changes the common law rule if the recipient does not survive the decedent. In that case, under the UPC the advancement is not taken into account in determining the share of the recipient's descendants.

Requiring a writing to evidence an advancement in effect all but eliminates the doctrine of advancements from the law of intestate succession. The upshot is that this avoids contentious litigation between family members about little-remembered lifetime gifts. The downside is that persons who do not write wills or consult lawyers and die intestate will rarely know that a lifetime gift must be stated in writing to be an advancement to be charged against the donee's intestate share. See Mary L. Fellows, *Concealing Legislative Reform in the Common-Law Tradition: The Advancements Doctrine and the Uniform Probate Code*, 37 Vand. L. Rev. 671 (1984), proposing a statute requiring *all* gifts be treated as advancements absent written evidence of a contrary intent (the opposite of the UPC).

QUESTION

Which of the following rules do you think is best?

1. Gifts to children are presumptively advancements.
2. Gifts to children are presumptively not advancements.

19. UPC §2-109 applies to advancements made to spouses and collaterals (such as nephews and nieces) as well as to lineal descendants. In most states, only gifts to lineal descendants are considered advancements. — Eds.

3. Gifts to children are not advancements unless stated in writing to be advancements.
4. Gifts to children are advancements unless stated in writing not to be advancements.

3. *Guardianship and Conservatorship of Minors*

A minor has neither the legal capacity to manage property nor the legal power to make most choices about how and where to live. Clients with young children should be advised to provide for the possibility that their children might be orphaned — a possibility that must be confronted by rich and poor clients alike. It is now time to speak of guardians, conservators, and how best to avoid them if possible.

a. Guardian of the Person

A guardian of the person has responsibility for the minor child's custody and care. As long as one parent of the child is living and competent, that parent is the natural guardian of the child's person. Hence, if only one of two parents dies, there is no need to appoint a guardian of the person (though there may be a need for a conservator or guardian of the property). If both parents die while a child is a minor and their wills do not designate a guardian, the court will appoint a guardian of the person, usually from among the nearest relatives. This person may not be whom the parents would want to have custody of the child.

Accordingly, for a parent with a minor child, one of the principal reasons for making a will is to designate a guardian of the person for the child. Most testators select a family member, often a sibling, or sometimes a friend. It is a good practice also to select an alternate. The guardian of the person for the minor decides where the minor lives, how the minor is raised and educated, and when the minor receives medical care. A guardianship of the person terminates when the minor reaches the age of majority, dies, or is adopted.

Guardianship of the person for a minor is covered by UPC §§5-201 through 5-210 (1998), which are based on the Uniform Guardianship and Protective Proceedings Act (1997).

b. Property Management Options

Another important reason that a parent with a minor child should have a will is to deal with the management of the child's property. A guardian of the person has no authority to deal with the child's property.

Several alternatives for property management are available: guardianship of the property, conservatorship, custodianship, and trusteeship. Trusts are available only to persons who create them during life or who die testate and create one by will. If a parent dies intestate, leaving property to a minor child, a guardian of the property or a conservator must be appointed by a court, unless state law allows payment instead to a custodian under the Uniform Transfers to Minors Act or to the person who has physical custody of the child. Let us examine these alternatives for managing a minor's property.

(1) Guardianship of the property

In feudal times the guardian of a minor ward (usually the overlord) took possession of the ward's lands. The guardian had the duty of supporting the ward, but all income from rents in excess of the amount necessary for support belonged to the guardian personally. Thus guardianships (then known as wardships) were very profitable for the guardian.

After the feudal incidents, including wardship, were abolished in 1660, a new kind of guardianship was recognized, giving the ward the rents from the property and the guardian only a management fee. Nonetheless, the historical odor remained. A guardian of property was looked upon with suspicion and was required to account annually to a court of chancery. To avoid a disagreeable contest later with the ward or chancellor, guardians sought approval for their actions in advance from the chancellor. The product of this history is a system wherein the guardian is straitjacketed and the process is expensive.

The guardian of property, who does not have title to the ward's property, usually cannot change investments without a court order. The guardian has the duty of preserving the specific property left to the minor and delivering it to the ward at age 18, unless the court approves a sale, lease, or mortgage. The guardian ordinarily can use only the income from the property to support the ward; the guardian needs court approval to go into principal to support the ward. Strict court supervision over many of the guardian's acts is burdensome and time-consuming. Each trip to court incurs attorney's fees and court costs. The ward may end up with less property at the end of a guardianship than at the beginning.

In sum, guardianship for a minor's property is somewhat like going through a continuous probate until the child reaches the age of majority. It should be avoided.

(2) Conservatorship

The expense and inflexibility of a guardianship for property has led to a major reform — its replacement with a *conservator* system. Following the lead of UPC Article V (1998) and the Uniform Guardianship and Protective Proceeding Act

(1997), in many states guardianship laws have been revised to allow a more trust-like arrangement. The guardian of the property has been renamed the *conservator* and given “title as trustee” to the protected person’s property, as well as investment powers similar to those of trustees. Appointment and supervision by a court is still required, but the conservator has far more flexible powers than a guardian, and only one trip to the courthouse annually for an accounting may be necessary.

The conservatorship system permits a more streamlined administration of the estate, allowing a higher net return on the assets, more flexibility in investments, and a greater chance of meeting the financial needs of the child, both while a minor and on termination of the conservatorship. The conservatorship terminates when the minor reaches the age of majority or dies before then. UPC §5-431 (1998).

In states without modern conservatorship laws, the only effective way to handle guardianship administrations is to avoid them. And, indeed, we suggest that even in states with modern conservatorship laws, the alternative arrangements of custodianship or trusteeship for a minor are preferable because the court does not become involved unless the minor contests the custodian’s or trustee’s actions.

(3) *Custodianship*

A *custodian* is a person who is given property to hold for the benefit of a minor under the Uniform Transfers to Minors Act (UTMA) (1983, rev. 1986) or its predecessor, the Uniform Gifts to Minors Act (UGMA) (1956, rev. 1966). Under these acts, some form of which has been enacted in every state, property may be transferred to a person (including the donor) as *custodian* for the benefit of the minor. A devise or gift may be made “to X as custodian for (name of minor) under the (name of state) Uniform Transfers to Minors Act,” thereby incorporating the provisions of the state’s uniform act and eliminating the necessity of drafting a trust instrument. Often the donor will choose herself as custodian for the minor, whether the donor is related to the minor or not. When setting up a custodianship, remember to use the minor’s Social Security number to identify the account, so that any interest or other income will not be reported to the IRS as if it were the custodian’s personal income.

The creation of a custodianship is thus quite simple. Most banks, brokers, and other financial institutions have standard forms that can be filled out by a donor making a gift to a minor or by a fiduciary making a distribution to a minor. Well-drafted wills and trusts often include a *facility of payment clause* under which assets to be distributed outright to a minor may be paid instead to a custodian or even to the parent or guardian of the minor. Even if there is no will or trust or the will or trust does not expressly authorize payment to the child’s parents, many states have laws permitting a fiduciary to pay small sums to the custodial parent or to an account in the child’s name alone without requiring the appointment of a guardian or conservator. See UPC §5-104 (1998) (sums not exceeding \$5,000 per year).

If no such power to transfer assets to a custodian is given in a will or trust, the UTMA, but not the earlier UGMA, allows the fiduciary to make payments to a custodian nonetheless. UTMA §6. Payments to custodians over \$10,000, however, require court approval.

Under UTMA §14(a), the custodian has discretionary power to expend

for the minor's benefit so much of the custodial property as the custodian considers advisable for the use and benefit of the minor, without court order and without regard to (i) the duty or ability of the custodian personally or any other person to support the minor, or (ii) any other income or property of the minor which may be applicable or available for that purpose.

To the extent that the custodial property is not so expended, the custodian is required to transfer the property to the minor on his attaining the age of 18 or 21, depending on the circumstances, or, if the minor dies before attaining the age of 18 or 21, to the estate of the minor.

The custodian has the right to manage the property and to reinvest it. However, the custodian is a fiduciary and is subject to "the standard of care that would be observed by a prudent person dealing with property of another." UTMA §12(b). The custodian is not under the supervision of a court — as is a guardian or conservator — and no accounting to the court annually or at the end of the custodianship is necessary, but an interested party may require one if he wishes. UTMA §§12(e) and 19. A custodianship is ideal for modest gifts to a minor and is helpful in other cases when used to avoid a conservatorship or guardianship, but when a large amount of property is involved, a trust is usually preferable.

For further discussion, see Stephanie E. Heilborn and Jonathan G. Blattmachr, *Planning with UTMA Accounts and Other Transfers to Minors: Part I*, 34 Est. Plan. 3 (Dec. 2007), *Part II*, 35 Est. Plan. 11 (Jan. 2008); Jani Maurer, *Uniform Transfers to Minors Act Accounts — Progress, Potential, and Pitfalls*, 28 Nova L. Rev. 745 (2004).

(4) Trusts

The fourth alternative for property management on behalf of a minor is to establish a trust. A trust is the most flexible of all property arrangements, and much of the latter part of this book (see Chapters 8-14) is devoted to the law of trusts. The donor can tailor the trust specifically to family circumstances and the donor's particular desires. Under a guardianship or conservatorship, the child must receive the property at 18 and, under a custodianship, at 18 or 21, but a trust can postpone possession until the donor thinks the child is competent to manage the property. For an examination of guardianship, custodianship, and trusts, concluding that the last is preferable in most situations, see William M. McGovern, Jr., *Trusts, Custodianships, and Durable Powers of Attorney*, 27 Real Prop., Prob. & Tr. J. 1 (1992).

Even when a person has no children or the person's children are fully grown, most well-designed estate plans provide for a contingent trust in the event that there is a minor beneficiary, perhaps because a named adult beneficiary predeceases the testator, leaving a minor child as a substitute taker. As a result, in many law firms there is no such thing as a simple will. A well-drafted will should account for the possibility of a minor beneficiary, and in almost all cases the best way to do so is with a trust.

PROBLEM

Refer back to the estate planning problem involving Howard and Wendy Brown (pages 49-58). Assume that Howard Brown dies intestate. After payment of debts, taxes, and expenses of administration, the assets of his estate include:

	<i>Property acquired from H's earnings during marriage²⁰</i>	<i>H's property acquired by gift²⁰</i>
Tangible personality:	\$ 20,000	
Real estate:		
Residence (title is in "Howard Brown and Wendy Brown, as joint tenants with right of survivorship and not as tenants in common"); subject to mortgage of \$70,000	160,000	
Lot and cabin, Lake Murray (title is in Howard alone)	75,000	
Remainder interest in mother's home		\$20,000
Bank accounts:		
Checking (joint and survivor account with wife)	3,000	
Certificate of deposit ("Howard Brown and Wendy Brown, as joint tenants with right of survivorship")	20,000	
IRA (Howard's, payable on death to Wendy)	30,000	

20. The source of the property is irrelevant for intestate distribution in common law property states; how title is held at death is controlling. In community property states, property acquired from a spouse's earnings during marriage is community property and at the spouse's death passes under a different intestate scheme from separate property.

Securities:

General Corp. stock (registered in Howard's name)	80,000
Varoom Mutual Fund (registered in Howard's name)	30,000
American Growth Mutual Fund ("Howard Brown and Wendy Brown, as joint tenants with right of survivorship and not as tenants in common")	40,000

Life insurance:

(Wendy is named primary beneficiary; Howard's estate is named contingent beneficiary)	125,000	
	<u>\$473,000</u>	<u>\$130,000</u>

Howard is survived by his wife and two minor children and a stepson. How is Howard's estate distributed under the UPC? Under the intestacy statute of your state? Should Howard have left a will?

AN EXERCISE IN LAWYERING

Wendy Brown writes you:

Dear _____:

We've had some changes in our family since we wrote our wills and our wills need changing.

Two months ago our son, Zachary, was born. A bundle of joy — and sleepless nights! As you know, Howard and I want our property to go to the survivor, and the main reason for having wills is to provide for the children in case we die in a common disaster or before the survivor can make a will for the children.

You drafted our wills to create a trust for our children if we die and a child is under 25. Do you think we should continue to have a single trust for all the children or should we have separate trusts for each child, permitting each child to receive the principal of the child's trust upon reaching 25? Is a "family trust" or separate trusts fairer to our newborn son? What are the pros and cons of these?

Another problem is that my sister Lucy has separated from her husband, Jonathan, and has taken up with a man we don't like at all, Bill Hyde. She says she intends to marry him. Bill is a slick operator with a mysterious source of income. We're sick over this, because we love Lucy and hate for her to get mixed up with this guy. But if she marries Bill, we wouldn't want our children to move into their home if we die in a common disaster. My brother Simon and his wife Antonia don't have children, they both work, and wouldn't want to be in charge of a baby. Ruth is always off on digs in Turkey. Do you have any advice about who should be guardian for our children?

I enclose a copy of Howard's will that you drafted. Mine is the same, with appropriate changes in names, and except for the gift of his mother's house. Please give us your advice about these two matters.

Sincerely,

/s/ Wendy Brown

Wendy Brown

[For more on Wendy and Howard Brown's family, see pages 49-50.]

Will of Howard Brown
(With Testamentary Trust)

ARTICLE 1

I, Howard Brown, hereby make my will, and I revoke all other wills and codicils that I have previously made.

ARTICLE 2

I give all my jewelry, clothing, household furniture and furnishings, personal automobiles, books, and other tangible articles of a household or personal nature, or my interest in any such property, not otherwise specifically disposed of by this or in any other manner, together with any insurance on the property, to my wife, Wendy Brown, if she survives me; but if my wife does not survive me, then to my children who survive me, in substantially equal shares as they may select on the basis of valuation. These gifts shall be free of all death taxes.

The executor shall represent any child under age 18 in matters relating to any distribution of tangible personal property, including selecting the assets that shall constitute that child's share. In the executor's absolute discretion, the executor may (1) sell all or part of such child's share which the executor deems unsuitable for the child's use, (2) distribute the proceeds to the Children's Trust or share of such trust for the child's benefit, or (3) deliver the unsold property without bond to the minor if sufficiently mature or to any suitable person with whom the child resides or who has control or care of the child.

ARTICLE 3

I give all my right, title, and interest in my mother's house at 423 Elm St., Concord, Delaware, to my sister Carol Gould.

ARTICLE 4

I give the residue of my estate to my wife, Wendy Brown, if she survives me. If my wife does not survive me and all my children are 25 years of age or older at my death, I give the residue of my estate to my children and to the descendants of any then-deceased child by right of representation. If my wife does not survive me and any of my children is under the age of 25 at my death, I give the residue of my estate to the trustee of the Children's Trust set forth in Article 5.

ARTICLE 5

The trustee of the Children's Trust shall hold, administer, and distribute all property allocated to the Children's Trust for the benefit of my children as follows: The trustee shall pay to

or for any child as much of the income as is necessary for the child's health, education, support, or maintenance to maintain the child's accustomed manner of living. The trustee shall add to principal any net income not so distributed.

If the trustee considers the income insufficient, the trustee shall pay to or for a child as much of the principal as the trustee considers reasonably necessary for the child's health, education, support, maintenance, comfort, welfare, or happiness to maintain, at a minimum, the child's accustomed manner of living.

In making distributions, the trustee (1) may consider any other income or resources of the child, including the child's ability to obtain gainful employment and the obligation of others to support the child, known to the trustee and reasonably available for the purposes stated here; (2) may pay more to or apply more for some children than others and may make payments to or applications of benefits for one or more children to the exclusion of others; (3) may consider the value of the trust assets, the relative needs, both present and future, of each child, and the tax consequences to the trust and to any child; and (4) shall charge distributions of income and principal against the entire trust estate and not against the share of the child to whom or for whom the distribution was made.

The trustee, in the trustee's reasonable discretion, may from time to time make preliminary distributions of principal to any of my children who have attained the age of 25, if the trustee finds valid and productive reasons for making the distribution, such as the purchase of a residence or establishment of a business, and if the remaining principal and income will be adequate for the health, support, maintenance, and education of my other children. The trustee shall deduct such preliminary distributions without interest from the share ultimately distributed to such child or to such child's descendants. In the aggregate, the value of any preliminary distributions shall not exceed 50 percent of that child's putative share. The term *putative share* shall mean that portion of the entire trust estate that would be distributable to a particular child, after considering all previous loans and advances, if the entire trust were divided into separate trusts on the date that the distribution to be measured against the putative share is made.

When every child of mine has reached the age of 25 or died before reaching that age, the trustee shall divide the trust into as many equal shares as there are children of mine then living and children of mine then deceased with descendants then living.

On the division of the Children's Trust into shares, the trustee shall distribute each living child's share outright to the child and each deceased child's share to the deceased child's then-living descendants by right of representation.

ARTICLE 6

I nominate as trustee of the Children's Trust Lucy Preston Lipman. If Lucy Preston Lipman fails to qualify or ceases to act, I nominate as successor trustee [the lawyer who drew this will].

The trustee may employ custodians, attorneys, accountants, investment advisers, corporate fiduciaries, or any other agents or advisers to assist the trustee in the administration of this trust, and the trustee may rely on the advice given by these agents. The trustee shall pay reasonable compensation for all services performed by these agents from the trust estate out of either income or principal as the trustee in the trustee's reasonable discretion shall determine. These payments shall not decrease the compensation of the trustee.

No trustee shall be liable to any person interested in this trust for any act or default unless it results from the trustee's bad faith, willful misconduct, or gross negligence.

The trustee shall have the power to continue to hold any property or to abandon any property that the trustee receives or acquires.

The trustee shall have the power to retain, purchase, or otherwise acquire unproductive property.

The trustee shall have the power to manage, control, grant options on, sell (for cash or on deferred payments with or without security), convey, exchange, partition, divide, improve, and repair trust property.

The trustee shall have the power to lease trust property for terms within or beyond the terms of the trust and for any purpose, including exploration for and removal of gas, oil, and other minerals, and to enter into oil leases, pooling, and utilization agreements.

The trustee shall have the power to invest and reinvest the trust estate in every kind of property, real, personal, or mixed, and every kind of investment, specifically including, but not by way of limitation, corporate obligations of every kind, preferred or common stocks, shares in investment trusts, investment companies, mutual funds, money market funds, index funds, and mortgage participations, which persons of prudence, discretion, and intelligence acquire for their own account, and any common trust fund administered by the trustee.

The trustee shall have all the rights, powers, and privileges of an owner of the securities held in trust, including, but not by way of limitation, the power to vote, give proxies, and pay assessments; the power to participate in voting trusts and pooling agreements (whether or not extending beyond the terms of the trust); the power to enter into shareholders' agreements; the power to consent to foreclosure, reorganizations, consolidations, merger liquidations, sales, and leases, and, incident to any such action, to deposit securities with and transfer title to any protective or other committee on such terms as the trustee may deem advisable; and the power to exercise or sell stock subscription or conversion rights.

The trustee shall have the power to hold securities or other property in the trustee's name as trustee under this trust, in the trustee's own name, in the name of a nominee, or in unregistered form so that ownership will pass by delivery.

The trustee shall have the power to carry, at the expense of the trust, insurance of such kinds and in such amounts as the trustee deems advisable to protect the trust estate against any damage or loss and to protect the trustee against liability with respect to third parties.

The trustee shall have the power to loan to any person, including a trust beneficiary or the estate of a trust beneficiary, at interest rates and with or without security as the trustee deems advisable.

Upon termination of the trust, the approval of the accounts of the trustee in an instrument signed by all the adult beneficiaries and guardians of any minor beneficiaries shall be a complete discharge and release of the trustee with respect to the administration of the trust property and shall be binding on all persons.

ARTICLE 7

If my wife, Wendy Brown, does not survive me and if at my death any of my children are minors, I nominate as guardian of the persons and the property of my minor children Lucy Preston Lipman.

ARTICLE 8

The terms *child* and *children* as used in this will refer to my stepson, Michael Walker, and to my children, Sarah Brown and Stephanie Brown, and also to any child or children hereafter born to me.

ARTICLE 9

I nominate as executor of this will my wife, Wendy Brown. If for any reason she fails to qualify or ceases to act I nominate Lucy Preston Lipman to serve as executor.

My executor shall have the same powers granted the trustee under Article 6 to be exercised without court order, as well as any other powers that may be granted by law. I direct that no bond or other security shall be required of any person, including nonresidents named in this will, acting as executor, trustee, or guardian.

I have signed this will, which is typewritten on _____ sheets of paper; on this _____ day of _____, 20 _____, and, for the purposes of identification, I have also written my name on the margin of all pages before this signature page.

Howard Brown

On the _____ day of _____, 20 _____, Howard Brown declared to us, the undersigned, that the foregoing instrument was his last will, and he requested us to act as witnesses to it and to his signature thereon. He then signed the will in our presence, we being present at the same time. We now, at his request, in his presence, and in the presence of each other, hereunto subscribe our names as witnesses, and each of us declares that in his or her opinion this testator is of sound and disposing mind and memory.

Name

Address

Name

Address

QUESTIONS

Note the contingent trust for children in Article 4 of Howard Brown's will. Why do you think 25 is the contingent age, rather than 18 or 21? Is the contingency, limited only to Howard's children under 25, broad enough? Suppose Howard's only surviving beneficiary is a minor grandchild. Would Howard's devise of his entire estate to that minor grandchild trigger a conservatorship? How might Article 4 be redrafted to deal with this problem?

SECTION C. BARS TO SUCCESSION

1. Homicide

In re Estate of Mahoney
Supreme Court of Vermont, 1966
220 A.2d 475

SMITH, J. The decedent, Howard Mahoney, died intestate on May 6, 1961, of gunshot wounds. His wife, Charlotte Mahoney, the appellant here, was tried for the murder of Howard Mahoney in the Addison County Court and was convicted by jury of the crime of manslaughter in March, 1962. She is presently serving a

sentence of not less than 12 nor more than 15 years at the Women's Reformatory in Rutland.

Howard Mahoney left no issue, and was survived by his wife and his father and mother. His father, Mark Mahoney, was appointed administrator of his estate which at the present time amounts to \$3,885.89. After due notice and hearing, the Probate Court for the District of Franklin entered a judgment order decreeing the residue of the Estate of Howard Mahoney, in equal shares, to the father and mother of the decedent. An appeal from the judgment order and decree has been taken here by the appellant widow. The question submitted is whether a widow convicted of manslaughter in connection with the death of her husband may inherit from his estate.

The general rules of descent provide that if a decedent is married and leaves no issue, his surviving spouse shall be entitled to the whole of decedent's estate if it does not exceed \$8,000. 14 Va. Stat. Ann. (V.S.A.) §551(2). Only if the decedent leaves no surviving spouse or issue does the estate descend in equal shares to the surviving father and mother. 14 V.S.A. §551(3). There is no statutory provision in Vermont regulating the descent and distribution of property from the decedent to the slayer. The question presented is one of first impression in this jurisdiction.

In a number of jurisdictions, statutes have been enacted which in certain instances, at least, prevent a person who has killed another from taking by descent or distribution from the person he has killed. . . .

Courts in those states that have no statute preventing a slayer from taking by descent or distribution from the estate of his victim, have followed three separate and different lines of decision.

(1) The legal title passed to the slayer and may be retained by him in spite of his crime. The reasoning for so deciding is that devolution of the property of a decedent is controlled entirely by the statutes of descent and distribution; further, that denial of the inheritance to the slayer because of his crime would be imposing an additional punishment for his crime not provided by statute, and would violate the constitutional provision against corruption of blood. *Carpenter's Estate*, 32 A. 637 (Pa. 1895); *Wall v. Pfanschmidt*, 106 N.E. 785 (Ill. 1914); *Bird v. Plunkett et al.*, 95 A.2d 71 (Conn. 1953).

(2) The legal title will not pass to the slayer because of the equitable principle that no one should be permitted to profit by his own fraud, or take advantage and profit as a result of his own wrong or crime. *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889); *Price v. Hitaffer*, 165 A. 470 (Md. 1933); *Slocum v. Metropolitan Life Ins.*, 139 N.E. 816 (Mass. 1923). Decisions so holding have been criticized as judicially engrafting an exception on the statute of descent and distribution and being "unwarranted judicial legislation." *Wall v. Pfanschmidt*, *supra*.

(3) The legal title passes to the slayer but equity holds him to be a constructive trustee for the heirs or next of kin of the decedent. This disposition of the question presented avoids a judicial engrafting on the statutory laws of descent and distribution, for title passes to the slayer. But because of the unconscionable mode by which the property is acquired by the slayer, equity treats him as a constructive trustee and compels him to convey the property to the heirs or next of kin of the deceased.

The reasoning behind the adoption of this doctrine was well expressed by Mr. Justice Cardozo in his lecture on “The Nature of the Judicial Process.” “Consistency was preserved, logic received its tribute, by holding that the legal title passed, but it was subject to a constructive trust. A constructive trust is nothing but ‘the formula through which the conscience of equity finds expression.’ Property is acquired in such circumstances that the holder of legal title may not in good conscience retain the beneficial interest. Equity, to express its disapproval of his conduct, converts him into a trustee.”

The New Hampshire court was confronted with the same problem of the rights to the benefits of an estate by one who had slain the decedent, in the absence of a statute on the subject. *Kelley v. State*, 196 A.2d 68 (N.H. 1963). Speaking for an unanimous court, Chief Justice Kenison said: “But, even in the absence of statute, a court applying common law techniques can reach a sensible solution by charging the spouse, heir or legatee as a constructive trustee of the property where equity and justice demand it.” *Kelley v. State*, *supra*, at 69-70. We approve of the doctrine so expressed.

However, the principle that one should not profit by his own wrong must not be extended to every case where a killer acquires property from his victim as a result of the killing. One who has killed while insane is not chargeable as a constructive trustee, or if the slayer had a vested interest in the property, it is property to which he would have been entitled if no slaying had occurred. The principle to be applied is that the slayer should not be permitted to improve his position by the killing, but should not be compelled to surrender property to which he would have been entitled if there had been no killing. The doctrine of constructive trust is involved to prevent the slayer from profiting from his crime, but not as an added criminal penalty. *Kelley v. State*, *supra*, at 70; Restatement of Restitution, §187(2), Comment a.

The appellant here was, as we have noted, convicted of manslaughter and not of murder. She calls to our attention that while the Restatement of Restitution approves the application of the constructive trust doctrine where a devisee or legatee murders the testator, that such rules are not applicable where the slayer was guilty of manslaughter. Restatement of Restitution, §187, Comment e.

The cases generally have not followed this limitation of the rule but hold that the line should not be drawn between murder and manslaughter, but between voluntary and involuntary manslaughter. *Kelley v. State*, *supra*; *Chase v. Jennifer*, 150 A.2d 251, 254 (Md. 1959).

We think that this is the proper rule to follow. Voluntary manslaughter is an intentional and unlawful killing, with a real design and purpose to kill, even if such killing be the result of sudden passion or great provocation. Involuntary manslaughter is caused by an unlawful act, but not accompanied with any intention to take life. *State v. McDonnell*, 32 Vt. 491, 545 (1860). It is the intent to kill, which when accomplished, leads to the profit of the slayer that brings into play the constructive trust to prevent the unjust enrichment of the slayer by reason of his intentional killing.

In Vermont, an indictment for murder can result in a jury conviction on either voluntary or involuntary manslaughter. *State v. Averill*, 81 A. 461 (Vt. 1911). The legislature has provided the sentences that may be passed upon a person convicted of manslaughter, but provides no definition of that offense, nor any statutory distinction between voluntary and involuntary manslaughter. 13 V.S.A. §2304.

The cause now before us is here on a direct appeal from the probate court. Findings of fact were made below from which it appears that the judgment of the probate court decreeing the estate of Howard Mahoney to his parents, rather than to his widow, was based upon a finding of the felonious killing of her husband by Mrs. Mahoney. However, the appellees here have asked us to affirm the decree below by imposing a constructive trust on the estate in the hands of the widow.

But the Probate Court did not decree the estate to the widow, and then make her a constructive trustee of such estate for the benefit of the parents. The judgment below decreed the estate directly to the parents, which was in direct contravention of the statutes of descent and distribution. The Probate Court was bound to follow the statutes of descent and distribution and its decree was in error and must be reversed.

The Probate Court was without jurisdiction to impose a constructive trust on the estate in the hands of the appellant, even if it had attempted to do so. Probate courts are courts of special and limited jurisdiction given by statute and do not [have powers to establish] . . . purely equitable rights and claims. . . .

However, the jurisdiction of the court of chancery may be invoked in probate matters in aid of the probate court when the powers of that court are inadequate, and it appears that the probate court cannot reasonably and adequately handle the question. The jurisdiction of the chancery court in so acting on probate matters is special and limited only to aiding the probate court. The Probate Court, in making its decree, used the record of the conviction of the appellant for manslaughter for its determination that the appellant had feloniously killed her husband. If the jurisdiction of the court of chancery is invoked by the appellees here it will be for the determination of that court, upon proof, to determine whether the appellant wilfully killed her late husband, as it will upon all other equitable considerations that may be offered in evidence, upon charging the appellant with a constructive trust. "The fact that he is convicted of murder in a criminal case does not dispense with the necessity of proof of the murder in a proceedings in equity to charge him as a constructive trustee." Restatement of Restitution, §187, Comment d.

The jurisdiction over charging the appellant with a constructive trust on the estate of Howard Mahoney lies in the court of chancery, and not in the probate court.

Decree reversed and cause remanded, with directions that the proceedings herein be stayed for sixty days to give the Administrator of the Estate of Howard Mahoney an opportunity to apply to the Franklin County Court of Chancery for relief. If application is so made, proceedings herein shall be stayed pending the final determination thereof. If application is not so made, the Probate Court for

the District of Franklin shall assign to Charlotte Mahoney, surviving wife, the right and interest in and to the estate of her deceased husband which the Vermont Statutes confer.²¹

PROBLEMS, QUESTIONS, AND NOTES

1. Can a donor opt out of the slayer rules? Suppose *H*, aware of his wife *W*'s psychological instability, provides in his will that *W* should receive his entire estate even if *W* kills him. *W* then kills *H*. Does *W* take? In Wisconsin — but only in Wisconsin — the answer appears to be Yes. See Wis. Stat. Ann. §854.14(6)(b) (2008); Anne-Marie Rhodes, Consequences of Heirs' Misconduct: Moving from Rules to Discretion, 33 Ohio N.U. L. Rev. 975, 980-982 (2007). See also Marie Louise Fellows, The Slayer Rule: Not Solely a Matter of Equity, 71 Iowa L. Rev. 489 (1986).

Suppose *H* suffers from a painful and terminal illness. At *H*'s request, *W* helps *H* commit suicide. Can *W* take from *H*'s estate? See *In re Estate of Schunk*, 760 N.W.2d 446 (Wis. App. 2008). See also Jeffrey G. Sherman, Mercy Killing and the Right to Inherit, 61 U. Cin. L. Rev. 803 (1993).

2. Nearly every state has enacted a statute dealing with the rights of a killer in the estate of the victim, but these statutes vary in the details and usually leave gaps to be resolved by the courts. Among the many issues arising under these statutes, the following appear to give rise to the most litigation:

(a) *Does the statute apply to nonprobate transfers (joint tenancy, life insurance, pensions, and so on) as well as to wills and intestacy?* If the statute applies only to the latter, will a court nonetheless apply to nonprobate transfers a common law slayer's rule or a constructive trust to prevent the beneficiary from profiting by killing? UPC §2-803 (1990, rev. 1997), a well-drafted slayer statute, bars the killer from succeeding to nonprobate as well as probate property. It also provides that a "wrongful acquisition" of property must be treated in accordance with the equitable principle that a killer cannot profit from his wrong.

(b) *If the killer is barred from taking, who takes?* The usual view is that the killer is treated as having predeceased the victim. UPC §2-803 provides that the killer is treated as having disclaimed the property, and under the UPC disclaimer statute, §2-1106 (2002, rev. 2006), the disclaimant is treated as having "died immediately before the time of distribution." The question thus arises: If the killer is treated as having predeceased the victim, should a court give effect to a substitute gift in the killer's descendants or other heirs?

In *Estate of Covert*, 761 N.E.2d 571 (N.Y. 2001), Edward fatally shot his wife, Kathleen, and then turned the gun on himself, completing the tragic murder-suicide. Applying the New York slayer rule of *Riggs v. Palmer*, 22

21. In 1972, a statute was enacted in Vermont providing that an heir, devisee, or legatee who "stands convicted in any court . . . of intentionally and unlawfully killing the decedent" shall forfeit any share in the decedent's estate. *Vt. Stat. Ann. tit. 14, §551(6)* (2008). — Eds.

N.E. 188 (N.Y. 1889), which was famously defended by Justice Cardozo in *The Nature of the Judicial Process* 40-43 (1921), the court held that Edward could not take from Kathleen's estate. However, because Edward's devisees were innocent of Edward's crime, the court allowed them to take from Kathleen's estate.

Some states take a different approach. California, Rhode Island, and Virginia extend the bar by statute to the killer's descendants. Other states limit the right of the killer's descendants to take by case law. In *Estate of Mueller*, 655 N.E.2d 1040 (Ill. App. 1995), the decedent by will left 60 percent of his estate to his second wife and, if she predeceased him, to her children by a prior marriage. The husband was killed by a man solicited by the wife to commit the murder. The wife was barred under Illinois's slayer statute, which provided that the killer should be treated as having predeceased the victim. The court refused to apply the statute literally on the ground that this might result in the killer profiting from her wrong (inheriting from her daughters). The court held the devised property passed to the decedent's heirs. In dicta, however, the court suggested that a gift over to the killer's heirs in a will would be given effect if the killer's heirs were also the victim's heirs. But see *Cook v. Grierson*, 845 A.2d 1231 (Md. 2004) (intestate decedent's grandchildren cannot inherit because their father, decedent's son, was alive even though father was barred from taking as slayer).

For further discussion, see Karen J. Sneddon, *Should Cain's Children Inherit Abel's Property?: Wading Into the Extended Slayer Rule* *Quagmire*, 76 *UMKC L. Rev.* 101 (2007).

(c) *Is a criminal conviction required?* UPC §2-803(g) provides that a final criminal conviction of a felonious and intentional killing is conclusive. Acquittal, however, is not dispositive of the acquitted individual's status as a slayer. In the absence of a conviction, upon application of an interested person, the court must determine whether, under the preponderance of evidence standard (not the criminal law standard of beyond a reasonable doubt), the individual would be found criminally accountable for the killing. If so found, the individual is barred. The reason for using a civil standard of evidence is that probate law is concerned about a killer not profiting from her wrong, whereas criminal law is concerned with protection of the accused. Where the killer commits suicide, the killer's estate may still be barred under this section.

The UPC section appears to follow the majority view. See *In re Estate of Cotton*, 662 N.E.2d 63 (Ohio App. 1995), where the husband pled guilty to involuntary manslaughter in killing his wife. The court barred the husband on the ground that even though he was not convicted of an intentional and felonious killing, the civil trial court concluded that he intentionally and feloniously killed his wife and therefore the common law barred him from profiting from his wrong. A plea of guilty to a lesser crime than specified in the slayer's statute did not prevent the killer from being barred in a civil proceeding. See also *In re Estate of Blodgett*, 147 P.3d 702 (Alaska 2006), where the applicable slayer statute gave the trial court discretion to allow the slayer to take in the case of a felonious but

unintentional killing. The court nonetheless upheld the barring of a son, who was initially charged with second degree murder for the killing of his father, but pled guilty to criminally negligent homicide.

Suppose the killer is convicted of a felonious and intentional killing but appeals the judgment. While the appeal is pending, what weight, if any, should the probate court give the fact of the conviction in applying the slayer rule? See *In re Peterson*, 67 Cal. Rptr. 3d 676 (App. 2007), involving the notorious Laci Peterson murder.²² The court held that the conviction, not being final, did not conclusively bar Laci's husband and convicted killer Scott from taking, but the conviction was sufficient to make out a *prima facie* case of a felonious and intentional killing, putting the burden on him to overcome it, which he did not. Thus, even though his conviction was not final, Scott was barred from receiving the proceeds of a \$250,000 insurance policy on Laci's life.

NOTE: THE CHINESE SYSTEM AND OTHER CONDUCT-BASED RESTRICTIONS ON INHERITANCE

In the United States, unworthy heirs — whose conduct bars inheritance — are usually limited to killers of the decedent. In nearly all other situations, inheritance is by a mechanical rule of status: kinship, marriage, or adoption. In some states, however, spouses who abandon the decedent are barred, and in a few more, parents are barred from taking from a child decedent if the parent refused to support the child. A handful of states—including California, Pennsylvania, Illinois, Oregon, and Maryland—have statutes that deny inheritance from children or elderly relatives who were abused by the heir. See Anne-Marie Rhodes, *Consequences of Heirs' Misconduct: Moving from Rules to Discretion*, 33 Ohio N.U. L. Rev. 975 (2007); Richard Lewis Brown, *Undeserving Heirs? — The Case of the "Terminated" Parent*, 40 U. Rich. L. Rev. 547 (2006); Linda Kelly Hill, *No-Fault Death: Wedding Inheritance Rights to Family Values*, 94 Ky. L.J. 319 (2005-2006). See also UPC §2-114 (2008), which prohibits inheritance by a parent from a child if the parental rights of the parent could have been terminated under state law for nonsupport, abandonment, abuse, or neglect.

22. When Laci Peterson disappeared on Christmas Eve, 2002, she was nearly eight months pregnant with her first child. Her husband, Scott Peterson, had started an affair with a massage therapist, Amber Frey, about a month earlier. Two weeks before Laci's disappearance, Scott told Amber that he was a widower and that the upcoming Christmas holiday would be his first without his wife. In April 2003, the badly decomposed bodies of Laci and the fetus washed up on the shore of San Francisco Bay. Convicted of Laci's murder, Scott is currently on death row at San Quentin Prison, awaiting the outcome of the appellate process.



Laci and Scott Peterson

The People's Republic of China has an entirely different scheme of inheritance, which punishes bad behavior and rewards good behavior. In an illuminating article, Frances H. Foster, *Towards a Behavior-Based Model of Inheritance? The Chinese Experiment*, 32 U.C. Davis L. Rev. 77 (1998), Professor Foster examines the Chinese system. The Chinese approach encompasses a broad range of misconduct, and it permits courts to reduce or eliminate a wrongdoer's share. It also rewards good behavior, even by worthy nonrelatives at the expense of the decedent's family members who do not support the decedent. It is "highly time-and-labor intensive, requiring courts to evaluate on a case-by-case basis the conduct of all potential claimants and the most appropriate division of each estate. The flexibility that is the hallmark of the behavior-based model today may prove to be its greatest drawback in the future . . . [when] increased social mobility, accumulation of private property, and a rise in the popular use of courts will bring about an increase in the number and complexity of inheritance disputes." *Id.* at 84-85.

Nonetheless, Foster concludes that the Chinese system has "significant advantages" over the American system, which does not penalize unworthy heirs. And it "recognizes the reality of support relationships today. It rewards contributions to the decedent's welfare by individuals outside the nuclear family, including blended and extended family members, nonmarital partners, and other unrelated parties." *Id.* at 125-126. Foster suggests the Chinese system may provide guidance for reforming the American inheritance system to deal with problems of parental and child neglect and rewarding exemplary conduct by, for instance, personally caring for a disabled person. See also Frances H. Foster, *Linking Support and Inheritance: A New Model from China*, 1999 Wis. L. Rev. 1199; Frances H. Foster, *American Trust Law in a Chinese Mirror*, 94 Minn. L. Rev. (forthcoming 2010).

2. *Disclaimer*

Sometimes an heir or a devisee will decline to take the property, a refusal that is called a *disclaimer*.²³ Disclaimers allow for post-mortem estate planning. The most common motivations for disclaimer are to reduce taxes or to keep property from creditors.

At common law, when a person died intestate, title to real and personal property passed to the decedent's heirs by operation of law. An intestate successor could not prevent title from passing to him. If the heir refused to accept (or, more precisely, to keep) the inheritance, the common law treated the heir's renunciation as if title had passed to the heir and then from the heir to the next intestate successor. The reason for this rule was that there must always be someone seised of the land who was liable for the feudal obligations — a reason once valid but of no importance today. On the other hand, if a person died testate, the devisee could refuse to accept the devise, thereby preventing title from passing to the devisee. A gift, whether inter vivos or by will, requires acceptance by the donee.

23. By traditional usage, an heir *renounces*; a beneficiary under a will *disclaims*. Today, the two words are used interchangeably as synonyms. The term *disclaimer* is the one more commonly used to describe the formal refusal to take by either an heir or a beneficiary.

These different conceptions of how title passes at death produced unexpectedly different tax results. If an heir renounced his inheritance and the common law rule applied, the situation was treated as though the heir had received the intestate share and then made a taxable gift to the persons who took by reason of the renunciation. *Hardenburgh v. Commissioner*, 198 F.2d 63 (8th Cir. 1952). By contrast, if a devisee disclaimed a testamentary gift, there were no gift tax consequences. *Brown v. Routzahn*, 63 F.2d 914 (6th Cir. 1933).

To eliminate the difference between disclaiming an intestate share and a devise, almost all states have enacted disclaimer legislation that provides that the disclaimant is treated as having died before the decedent or before the time of distribution. Thus the property does not pass to the disclaimant, and under state law the disclaimant makes no transfer of it (see UPC §§2-1105, 2-1106 (2002, rev. 2006)). This fiction allows the decedent's family to undertake post-mortem estate planning. Hence disclaimer must be kept in mind by the lawyer handling the estate. See *Sims v. Hall*, 592 S.E.2d 315 (S.C. App. 2003), upholding a malpractice judgment against a lawyer for failing to advise about the use of disclaimer to avoid a tax liability.

1. *Saving estate taxes.* Suppose that *O* dies intestate, survived by one sister, *A*. If *A* disclaims, *A* is treated as having predeceased *O*, and *O*'s estate will pass under the intestacy law to *A*'s child, *B*, who is *O*'s niece. Thus, to pass the property on to *A*'s child without a gift or estate tax being levied on it when it leaves *A*'s hands, *A* may decide to disclaim the inheritance. Moreover, if *B* is taxed at a lower income tax rate than *A*, then *A*'s disclaiming the inheritance will also save income taxes because any returns on the property will be taxable at *B*'s lower rate.

Most state disclaimer statutes require that a disclaimer be made within nine months of the creation of the interest being disclaimed. However, the Uniform Disclaimer of Property Interests Act (UDPIA) (1999, rev. 2006), which in 2002 was absorbed into the UPC as §§2-1101 through 2-1107 and has been adopted in about one-third of the states, does not contain a specified time limit.

The origin of the nine-month time limit was not an implementation of a considered state property law policy, but rather a reaction to the passage of Internal Revenue Code §2518 in 1976. Under §2518, only "qualified disclaimers" will avoid the gift tax liability that would have resulted if a disclaimant inherited property and then gave it away. Even if a person disclaims under applicable state law, if the disclaimer is not also "qualified" under the federal tax code, gift tax liability results. To qualify under the federal tax code, the disclaimer must be made within nine months after the interest is created or after the donee reaches 21, whichever is later. Hence, in the above example, if *A* disclaims a year after *O*'s death, *A* is treated under the tax laws as having accepted the property and having made a taxable gift to *B*. Given that disclaimers are often used for post-mortem tax planning, the decoupling of the time requirement under the UDPIA from IRC §2518 has become one of the main points of contention between the act's supporters and its critics.²⁴

24. For debate on the UDPIA's pros and cons, compare Adam J. Hirsch, Disclaimer Law and UDPIA's Unintended Consequences, 36 Est. Plan. 34 (Apr. 2009), Adam J. Hirsch, The Uniform Acts' Loophole in

2. *Avoiding creditors.* Most disclaimer statutes provide that a disclaimer relates back *for all purposes* to the date of the decedent's death. The UDPIA "continues the effect of the relation back doctrine, not by using the specific words, but by directly stating what the relation back doctrine has been interpreted to mean." UPC §2-1106, cmt. (2002, rev. 2006). Thus, in an intestate estate, the disclaimer "takes effect . . . as of the time of the intestate's death." UPC §2-1106(b)(1).

In the example above, if *A* disclaims her interest in *O*'s estate, most cases have held that *A*'s ordinary creditors cannot reach her share of *O*'s estate. The disclaimed property is treated as passing directly to others, bypassing the disclaimant. In a subsequent bankruptcy proceeding, so long as the disclaimer was made prior to the filing of the bankruptcy petition, the federal courts respect the relation back under state disclaimer law. In re Costas, 555 F.3d 790 (9th Cir. 2009).

When, however, a bankruptcy petition is filed before the debtor disclaims, the courts almost invariably hold that the disclaimer is ineffective under federal bankruptcy law. See David B. Young, The Intersection of Bankruptcy and Probate, 49 S. Tex. L. Rev. 351, 381-394 (2007). Moreover, in a minority of states, an insolvent debtor who is not already in bankruptcy may not use a disclaimer to avoid his creditors. See UPC §2-1113, cmt. (2002, rev. 2006) (collecting authority).

For further discussion, see Adam J. Hirsch, The Problem of the Insolvent Heir, 74 Cornell L. Rev. 587 (1989) (arguing that tort creditors and child support and alimony creditors should be permitted to veto the debtor's disclaimer).

PROBLEM

O has two children, *A* and *B*. *B* dies, survived by one child, *C*. Then *O*, a widow, dies intestate. *O*'s heirs are *A* and *C*. *A* has four children. *A* disclaims. What distribution is made of *O*'s estate? UPC §2-1106(b)(3)(C) (2002, rev. 2006) provides:

If by law or under the instrument, the descendants of the disclaimant would share in the disclaimed interest by any method of representation had the disclaimant died before the time of distribution, the *disclaimed interest* passes only to the descendants of the disclaimant who survive the time of distribution. [Emphasis added.]

While in most states individual creditors cannot reach assets disclaimed by a debtor not already in bankruptcy, the Internal Revenue Service as a creditor is treated differently.

Fraudulent Conveyance Law, 34 Est. Plan. 20 (Dec. 2007), and Adam J. Hirsch and Richard R. Gans, Disclaimer Reform and UDPIA: The Disappointing Amendments of 2006, 33 Est. Plan. 24 (Dec. 2006), with William P. LaPiana, Some Property Law Issues in the Law of Disclaimers, 38 Real Prop., Prob. & Tr. J. 207 (2003).

Drye v. United States, 528 U.S. 49 (1999): Irma Deliah Drye died intestate, leaving her son, Rohn F. Drye, Jr. (“Drye”), as the sole heir to her \$233,000 estate. Prior to his mother’s death, Drye ran up an unpaid \$325,000 tax bill, prompting the IRS to file tax liens against all of Drye’s “property and rights to property.” To keep his mother’s estate away from the IRS, Drye disclaimed his interest. This allowed the entire estate to pass to his daughter, Theresa, who was next in line under the applicable state intestacy statute.

Theresa Drye then used the estate’s proceeds to fund the Trust, of which she and, during their lifetimes, her parents are the beneficiaries. Under the Trust’s terms, distributions are at the discretion of the trustee, Drye’s counsel Daniel M. Traylor, and may be made only for the health, maintenance, and support of the beneficiaries. The Trust is spendthrift, and under state law, its assets are therefore shielded from creditors seeking to satisfy the debts of the Trust’s beneficiaries.²⁵

The question before the Court was whether Drye’s disclaimer was effective to pass the property to his daughter free from the federal tax lien. Under the applicable state disclaimer law, disclaimed property bypasses the disclaimant, who is treated as having predeceased the decedent. Thus Drye argued “that state law is the proper guide to the critical determination whether his interest in his mother’s estate constituted ‘property’ or ‘rights to property.’” If so, his disclaimed interest would pass to his daughter free of the tax liens.

Speaking for a unanimous Court, Justice Ruth Bader Ginsburg rejected Drye’s argument:

The disclaiming heir . . . inevitably exercises dominion over the property. He determines who will receive the property — himself if he does not disclaim, a known other if he does. See Adam J. Hirsch, *The Problem of the Insolvent Heir*, 74 *Cornell L. Rev.* 587, 607-608 (1989). This power to channel the estate’s assets warrants the conclusion that Drye held “property” or a “right to property” subject to the Government’s liens. . . .

Drye had the unqualified right to receive the entire value of his mother’s estate (less administrative expenses), or to channel that value to his daughter. The control rein he held under state law, we hold, rendered the inheritance “property” or “rights to property” belonging to him within the meaning of [the Internal Revenue Code], and hence subject to the federal tax liens that sparked this controversy.



Justice Ruth Bader Ginsburg

25. Spendthrift trusts are addressed in Chapter 9 at pages 614-624. — Eds.

QUESTIONS

Suppose that Irma Deliah Drye had executed a valid will that left her entire estate to her granddaughter, Theresa, thereby disinheriting her insolvent son, Rohn. Under these facts, would the IRS have had any recourse against the assets of Irma's estate? See Robert T. Danforth, *The Role of Federalism in Administering a National System of Taxation*, 57 *Tax Law.* 625, 641-642 (2004). Suppose that Theresa promised Irma to make use of the bequest to support her father. Would the IRS be entitled to a constructive trust over the bequest to Theresa? See *Cabral v. Soares*, 69 Cal. Rptr. 3d 242 (App. 2007).

NOTE: DISCLAIMERS TO QUALIFY FOR MEDICAID

Under the eighteenth and nineteenth century English Poor Laws, if a person could not pay for the person's care, the person's kin could be required to do so. Today, in the United States, a person has a legal obligation to provide for the person's spouse and minor children, if able to do so, but not the person's parents or siblings.

The federal and state governments offer a range of support programs for the poor and the elderly. Perhaps the most important, which provides medical assistance to needy people, is Medicaid, a cooperative state and federal program that pays for roughly one-fifth of all hospital patients and over one-half of all nursing home residents. An applicant for Medicaid assistance must meet strict income and resource requirements, which vary from state to state. In many cases, to qualify for Medicaid, the applicant must "spend down" his assets to a few thousand dollars. See Linda S. Ershow-Levenberg, *Court Approval of Medicaid Spend-Down Planning by Guardians*, 6 *Marq. Elder's Advisor* 197 (2005); John A. Miller, *Voluntary Impoverishment to Obtain Government Benefits*, 13 *Cornell J.L. & Pub. Poly.* 81 (2003). However, giving away property may result in the disqualification of the applicant from Medicaid assistance for a certain period of time depending on the nature of the transfer. Certain transfers are exempt, such as the transfer of a home to a spouse and a transfer in trust for certain disabled persons. For a discussion of the use of trusts in Medicaid planning, see pages 638-640.

In some states, the Medicaid applicant or recipient is required to try to get transferred property returned in order to be eligible for benefits. If a Medicaid recipient dies leaving a probate estate or nonprobate transfers, the state may look to those assets to recover benefits already paid to the Medicaid recipient. See Alison Barnes, *An Assessment of Medicaid Planning*, 3 *Hous. J. Health L. & Poly.* 265 (2003); Janel C. Frank, *How Far Is Too Far? Tracing Assets in Medicaid Estate Recovery*, 79 *N.D. L. Rev.* 111 (2003).

The question thus arises, can a person who qualifies for Medicaid benefits that would be lost if the person receives an inheritance preserve his eligibility by disclaiming that inheritance? In *Troy v. Hart*, 697 A.2d 113 (Md. App. 1997), Paul

Lettich, a Medicaid recipient, was entitled to a \$100,000 inheritance from his sister's estate. Rather than take the money, he disclaimed, making each of his other two sisters \$50,000 richer. After Lettich died, the administrator of his estate sought to rescind the disclaimer and reclaim the money. The court held that Lettich was required to report his inheritance to state Medicaid authorities, whether he disclaimed it or not. Although the court held the disclaimer valid, it suggested that the amounts passing to the sisters could be subject to a claim by the state for reimbursement of Lettich's Medicaid expenses.

The law in this area is complex and has been changing rapidly. Caution is advised.

