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Wills and Survival

Richard Storrow
CUNY School of Law

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Articles

WILLS AND SURVIVAL

*Richard F. Storrow**

I.	INTRODUCTION	448
II.	THE REQUIREMENT OF SURVIVORSHIP IN SUCCESSION LAW.....	450
A.	<i>Failure to Survive under the Common Law</i>	453
1.	Lapse.....	453
2.	Voidness	455
B.	<i>The Policy Behind the Lapse Doctrine</i>	456
C.	<i>Statutory Alterations of the Common Law Survivorship Doctrine</i>	459
1.	Anti-Lapse	459
a.	<i>The Mechanics of Anti-Lapse</i>	461
b.	<i>Anti-Lapse and Words of Survivorship and Substitution</i>	465
c.	<i>Anti-Lapse and Disinheritance</i>	468
d.	<i>Anti-Lapse and Will Substitutes</i>	469
2.	Simultaneous Death.....	471
3.	Survival by 120 Hours.....	473
III.	LAPSE AND INTENTION	476
IV.	DOCTRINAL SUPPORT FOR A REVISED APPROACH TO ANTI-LAPSE	485
A.	<i>Acts of Independent Significance and Extrinsic Evidence</i>	485
B.	<i>Powers of Appointment</i>	489
V.	CONCLUSION	492

* Professor, City University of New York School of Law; B.A., Miami University; M.A., Columbia University; J.D. Columbia Law School.

I. INTRODUCTION

Lisa Gersten would have been a much wealthier woman if only her uncle Seymour had lived another month. It was not that Seymour himself was wealthy. Indeed, he owned no real estate and had never had much of an income. He had, though, been left a small inheritance by his parents. Named Seymour's executor and primary beneficiary, Gersten discovered numerous storage lockers where Seymour had stashed the products of what can only be explained as a retail shopping mania: mountains of XXL and XXXL clothing, purchased with his inheritance. It took Gersten over a year to settle Seymour's estate.

Although Seymour was not a wealthy man, he had a lifelong friend, Alan, who was. Seymour became Alan's caregiver after Alan had a stroke. Eventually, Seymour could no longer care for Alan, and Alan moved into a nursing home. Alan had named Seymour the beneficiary of his house in the Hamptons, a manse worth several million dollars. But Seymour died three weeks before Alan. The common law doctrine of lapse states that the beneficiary of a testamentary gift receives nothing if he predeceases the testator.¹ The property does not go to the predeceasing beneficiary's estate unless the testator so intends.² Even if Seymour had outlived Alan, in some states he would have had to survive him by at least five days to avoid lapse, in accordance with a trend in the law toward requiring survival by 120 hours.³

Lapse is a venerable doctrine and a cornerstone of wills law. Its rationale, though, remains murky. As Leonard Levin has observed, "[L]apse has been largely accepted with little analysis of why the death of a beneficiary before the testator should produce such an outcome."⁴ The doctrine's blunt, unforgiving application has troubled courts and policy makers and has given rise to anti-lapse legislation—supposedly geared toward better carrying out a testator's probable intent.⁵ There is reason to believe, though, that the typical testator does not fully appreciate the lapse doctrine or its various statutory exceptions. Back in 1823,

¹ 80 AM. JUR. 2D *Wills* § 1408 (2015).

² *Id.*

³ See Edward C. Halbach, Jr., & Lawrence W. Waggoner, *The UPC's New Survivorship and Antilapse Provisions*, 55 ALB. L. REV. 1091, 1094 (1992).

⁴ Leonard Levin, *Lapse and Vesting of Interest Revisited*, 3 HOFSTRA PROP. L.J. 155, 156–57 (1990).

⁵ See Susan F. French, *Antilapse Statutes Are Blunt Instruments: A Blueprint for Reform*, 37 HASTINGS L.J. 335, 339 (1985); Mark Reutlinger, *Washington's Other Anti-Lapse Statute*, 39 WASH. ST. B. NEWS, no. 8, Aug. 1985, at 25, 25–26.

the Pennsylvania Supreme Court remarked, “That a legacy lapses by the death of a legatee in the lifetime of the testator is a consequence known to few testators”⁶ Although it is not known how many testators seek legal counsel when they finally get around to executing a will, it is doubtful that in the intervening 175 years testators have become more aware of how the rule of lapse will affect the distribution of their estates. It is, furthermore, not clear that the doctrine contributes in any meaningful way to the task of carrying out the testator’s intention, the paramount objective of wills law.⁷

This Article examines the rule of lapse, discusses how efforts to reform the damage it does has led to the doctrine of anti-lapse, and advocates an alternative approach. I argue that allowing the provisions of a beneficiary’s probated will to take the gift where the beneficiary has predeceased the testator by one year or less would be preferable to the predominant anti-lapse approach that essentially benefits a narrow set of the testator’s heirs. The argument herein rests solidly on the conviction that testators do not have in mind survival when their wills make no such indication. Thus, bequeathing property without using survivorship language to express the preference that the beneficiary possess and control it and without providing for a substitutionary gift in the event that the beneficiary predeceases the testator evinces an intention that the legatee decide who will take the property if that legatee, in turn, has exercised her intentionality by executing a valid will of her own. This alternative approach to what we currently define as lapse would unsettle certain basic tenets of wills law, namely that a testator’s will controls only the property he owns at his death.⁸ The rationale behind this approach, however, is to fashion lapse and anti-lapse rules that are less about creating efficiency in the administration of estates and more about the paramount goal of carrying out a testator’s intentions.

My proposal does not chart entirely unfamiliar territory. Indeed, in a narrower form it was a feature of the English Wills Act of 1837,⁹ and it is today found in the law of Maryland, whose statutory alteration of

⁶ *Craighead v. Given*, 10 Serg. & Rawle 351, 353 (Pa. 1823). Of course, the legal presumption is that testators are aware of the rule of lapse. *See Aldred v. Sylvester*, 111 N.E. 914, 915–16 (Ind. 1916); *Detzel v. Nieberding*, 219 N.E.2d 327, 331 (Ohio Prob. Ct. 1966).

⁷ *In re Janney’s Estate*, 446 A.2d 1265, 1266 (Pa. 1982) (“[T]he intention of the testator is of primary importance, the lodestar, cornerstone, cardinal rule.”).

⁸ In actuality a will may govern the distribution of property an estate acquires after the testator’s death. *See, e.g.*, MICH. COMP. LAWS ANN. § 700.2602(2) (West 2015).

⁹ Wills Act 1837, 7 Will. 4 & 1 Vict. c. 26 § 33 (Eng.). For further discussion, see John B. Rees, Jr., *American Wills Statutes: II*, 46 VA. L. REV. 856, 899 & n.764 (1960).

lapse dates back to 1810 in what can best be described as its complete abrogation.¹⁰ While support for my proposal could be sought in the doctrine of independent significance or the use of powers of appointment to complete one's estate plan—theories I explore below—it is most appropriately grounded in a straightforward use of extrinsic evidence to construe wills, as well as the philosophy of intention. I am, of course, not arguing that those who are ultimately entitled to a decedent's property need not survive the testator, but simply that rules used to identify those who should succeed to lapsed property have outlived their usefulness.

The remainder of this Article consists of three parts. Part II examines the common law requirement of survival in succession law as a mechanism for determining entitlement to inherit or to take as a beneficiary under a will. It examines statutory approaches to survival, including the requirement's role in intestacy law and the most common effort to circumvent its ill effects in the law of wills, the anti-lapse statute. This part also focuses on the problem of simultaneous death and examines its treatment in statutes and uniform laws. Part III probes the interrelationship between efforts to address lapse and efforts to carry out the intention of the testator. This Part urges consideration of a rule that would allow, within certain bounds, a gift to a predeceasing beneficiary to be distributed to those named in that beneficiary's will. Part IV considers whether powers of appointment or the doctrine of acts of independent significance provide doctrinal support for the proposed rule. In what follows, although I acknowledge that the common law treated lapsed legacies and lapsed devises differently,¹¹ this Article uses the terms legacy, devise, bequest and gift interchangeably.

II. THE REQUIREMENT OF SURVIVORSHIP IN SUCCESSION LAW

Survivorship is a central feature of succession law. In intestacy, heirs must survive the decedent to take a portion of the estate.¹² If they

¹⁰ MD. CODE ANN., EST. & TRUSTS § 4-403 (West 2015) (“[A] legacy may not lapse or fail because of the death of a legatee after the execution of the will but prior to the death of the testator”); Lawrence W. Waggoner, *Future Interests Legislation: Implied Conditions of Survivorship and Substitutionary Gifts under the New Illinois “Anti-Lapse” Provision*, 1969 U. ILL. L.F. 423, 424 (1969).

¹¹ *Van Kleeck v. Reformed Dutch Protestant Church of N.Y.*, 20 Wend. 457, 457–58 (N.Y. 1838); Verner F. Chaffin, *The Time Gap in Wills: Problems Under Georgia's Lapse Statutes*, 6 GA. L. REV. 268, 298–99, 303 (1972). Some courts have expressly disapproved of the distinction. *See, e.g., Caldwell v. Caldwell*, 85 So. 493, 494 (Ala. 1920).

¹² JESSE DUKEMINIER ET AL., *WILLS, TRUSTS & ESTATES* 80 (8th ed. 2009).

do not, their surviving descendants “represent” them and take in their stead.¹³ If there are no surviving descendants of a predeceasing heir, the property goes to the next heir in line, according to a hierarchy established in the applicable intestacy statute.¹⁴ If the intestate decedent dies with no heirs at all, the property belongs to the state.¹⁵ With some variation at the margins, intestacy laws are quite similar across the fifty states.¹⁶ They embody the presumed intent of most people who die without making a will to benefit those with whom one has the closest kinship relationships.¹⁷ Such statutes presume, “with little or no discussion,”¹⁸ that the decedent would not have wanted his property to go to the estate of a predeceasing heir.

Survivorship is also an important feature of the common law of wills. With almost no exception,¹⁹ an individual named in a decedent’s will must survive the testator in order to benefit from it. If that individual fails to survive, the property that would have devolved to him will be distributed under the residuary clause of the testator’s will or according to the rules of intestacy.²⁰ If he does survive, his death before the distribution of the estate’s assets is of no consequence.²¹ To avoid the disenfranchising effect of lapse in its common law form, the named individual must survive the testator, if only by the briefest conceivable interval of time.²²

In contrast to wills and intestacy, survivorship is not a common feature of the law of future interests.²³ The recipient of a gift of a future interest need not even be alive at the time the gift is made, but must have

¹³ *Id.* at 87.

¹⁴ *See id.* at 88–89.

¹⁵ WILLIAM M. MCGOVERN ET AL., *WILLS, TRUSTS & ESTATES INCLUDING TAXATION & FUTURE INTERESTS* 8 (4th ed. 2001) (defining “escheat”).

¹⁶ Brian Peters & Michael Boehlje, *A Summary of State Laws of Intestate Property Distribution and Succession* 2 (Iowa State Univ. Staff Paper No. 120, 1981).

¹⁷ 26B C.J.S. *Descent and Distribution* § 6 n.1 (2015).

¹⁸ MCGOVERN ET AL., *supra* note 15, at 420.

¹⁹ Two important exceptions are where the beneficiary is a debtor of the testator or vice versa. 96 C.J.S. *Wills* § 2079 (2015) (citing *In re Tuck*, 11 N.Y.S.2d 790, 793 (Sur. Ct. 1939)). *See, e.g., In re Pierce’s Will*, 276 N.Y.S. 433, 435 (Sur. Ct. 1934) (providing an exception for funeral expenses).

²⁰ *See generally* 97 C.J.S. *Wills* § 2109 (2015) (stating that the lapse of a residuary bequest will be distributed to the remaining residuary legatees or to the testator’s heirs or next of kin).

²¹ *In re Hall’s Estate*, 71 N.Y.S.2d 825, 829 (App. Div. 1947).

²² Richard W. Effland, *Will Construction Under the Uniform Probate Code*, 63 OR. L. REV. 337, 339 (1984).

²³ DUKEMINIER ET AL., *supra* note 12, at 853.

the potential of coming into existence. For example, the future interest in an *inter vivos* gift of a life estate to X with a remainder to X's children, where X has previously died childless, would fail for lack of potential beneficiaries. If X is alive, however, and has one child, A, then A need not survive X's death to be entitled to the property. In the absence of a condition in the original gift, if A dies before the distribution date—the death of X—his will or the law of intestacy will direct who will be given possession.²⁴ Although a frequently litigated question, the law does not require that someone in A's position survive to the time of distribution.²⁵ As will be discussed in more detail below, some states have begun to enact statutes that do away with the vested remainder approach and apply anti-lapse principles to *inter vivos* trusts.²⁶

It is easy to assume, mistakenly, that the law of future interests is a contradiction of the law of wills. But a testamentary devise does not constitute a gift until the testator dies,²⁷ whereas the conveyance of a future interest is a completed gift.²⁸ The law of wills and the law of gifts are consistent in that they both require recipients of gifts of present possession to be living at the time the gifts take effect. Gifts of future interests, though, postpone possession.²⁹ Since possession is postponed, the recipients of gifts of future interests need only to have a potential existence when the gift is made.³⁰ If the hypothetical gift described in the previous paragraph were made under a will, and the gift of the remainder interest were to Y's children rather than X's, X having predeceased the testator and Y having survived him,³¹ it is easy to see that the gift to Y's

²⁴ See, e.g., *First Galesburg Nat'l Bank & Tr. Co., v. Robinson*, 500 N.E.2d 995, 996 (Ill. App. Ct. 1986); *In re Estate of Capocy*, 430 N.E.2d 1131, 1134 (Ill. App. Ct. 1981); *Lyons v. Lyons*, 48 N.E.2d 18, 19 (Mass. 1943); *Williams v. Williams*, 115 N.W. 342, 345 (Wis. 1908).

²⁵ EUGENE F. SCOLES ET AL., *PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS* 404 n.1, 417 (7th ed. 2006).

²⁶ See, e.g., 755 ILL. COMP. STAT. 5/4-11 (West 2015).

²⁷ See *S.L. v. R.L.*, 774 N.E.2d 1179, 1181 n.9 (Mass. App. Ct. 2002) (“[A]n anticipated inheritance under the will of a living person is considered a ‘mere expectancy[.]’” (quoting *Lauricella v. Lauricella* 565 N.E.2d 436, 439 (Mass. 1991))).

²⁸ *DUKEMINIER ET AL.*, *supra* note 12, at 851.

²⁹ See, e.g., 14C MASS. PRAC. SERIES § 15.13 (4th ed. 2014).

³⁰ *Id.*

³¹ I have deliberately fashioned a hypothetical that does not trigger the rule of convenience, which dictates that “a class will close whenever any member of the class is entitled to possession and enjoyment of his or her share.” *DUKEMINIER ET AL.*, *supra* note 12, at 877 (emphasis in original). Instead, since “no members of the class have been born before the testator’s death,” this hypothetical falls within the exception to the rule that holds the class open “until the death of the designated ancestor of the class,” here Y. *Id.* at 878.

children is valid even if Y has no children.³² As long as Y is alive, her children have a potential existence and can for this reason be thought of as having “survived” the testator.³³

A. *Failure to Survive under the Common Law*

1. Lapse

In law, “lapse” means the failure of a right or privilege because of a contingency that has not been satisfied or a purpose that has failed or become impossible.³⁴ The term is used in various legal contexts, including the failure of insurance coverage when premiums remain unpaid,³⁵ the expiration of offers and options,³⁶ and whether the lapse of time renders evidence inadmissible.³⁷ But the most common use of the term relates to the requirement that a beneficiary named in a will survive the testator in order to take the testamentary gift.³⁸ In other words, a testamentary beneficiary’s gift is conditioned on his survival,³⁹ and if he does not survive the testator, his gift is said to lapse.⁴⁰ Under the common law, the effect of the failure to survive makes it as if the name of the legatee is missing from the will.⁴¹ Absent a gift in substitution, whether by statutory dictate or other provision of the will, the gift will lapse and be distributed according to specific rules.⁴² Neither the testator’s knowledge of the beneficiary’s death, either before or after the execution of the will, nor the

³² This assumes that the doctrine of destructibility of contingent remainders has been abolished in the jurisdiction in question. The Restatement indicates that nearly all states have abolished it. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 25.5 (AM. LAW INST. 2011).

³³ For a similar problem, see JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS & ESTATES 645 (4th ed. 1990). *See also* DUKEMINIER ET AL., PROPERTY 305–06 (8th ed. 2014) (providing analysis for a similar problem).

³⁴ 97 C.J.S. *Wills* § 2072 (2015).

³⁵ THE GUIDE TO AMERICAN LAW: EVERYONE’S LEGAL ENCYCLOPEDIA 71 (7th ed. 1984).

³⁶ C.J.S. *Vendor* § 16 (2016) (offer to sell or purchase realty); *Id.* § 159 (options).

³⁷ *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 908 (Tex. 2004) (distinguishing between excited utterances and deliberative statements).

³⁸ *See, e.g.*, CAL. PROB. CODE § 21109(a) (West 2015). There are other circumstances under which lapse occurs listed at 96 C.J.S. *Wills* §§ 1208–13, 2075–2081 (2015).

³⁹ UNIF. PROB. CODE § 2-603 cmt. (amended 2010) (UNIF. LAW COMM’N 1969) (“Under the rule of lapse, all devises are automatically and by law conditioned on survivorship of the testator.”).

⁴⁰ *See In re Estate of McFarland*, 167 S.W.3d 299, 303 (Tenn. 2005).

⁴¹ *See Robinson v. McIver*, 63 N.C. 645, 651 (N.C. 1869).

⁴² 96 C.J.S. *Wills* §§ 2084, 2086 (2015).

devisee's death testate will change this result.⁴³

A lapsed gift does not pass to the beneficiary or his estate, but is disposed of in another manner. Generations of law students have had to master these dispositional rules. The first rule in the cluster relates to the event that constitutes a lapse. When a beneficiary is alive at the time the will is executed but predeceases the testator, if the will provides no gift in substitution, the gift lapses.⁴⁴ The remaining rules dictate with specificity the disposition of devises in the event of lapse. If the gift is to a class, the gift is shared by the surviving members of that class,⁴⁵ the reasoning being that membership in the class is to be ascertained at the time of the testator's death, not at the time of the execution of the will.⁴⁶ It is not, therefore, possible for the gift to a member of a class to lapse.⁴⁷ If the gift is not to a class and is specific or demonstrative, the lapsed portion will be distributed according to the terms of the residuary clause.⁴⁸ If the bequest to the predeceased individual consists of the residue of the estate, the bequest will be distributed to the testator's heirs at law under the terms of the applicable intestacy statute.⁴⁹ Thus, the strong presumption in wills law against partial intestacy has an important exception in the doctrine of lapse. Partial intestacy may result, of course, in some beneficiaries receiving property under the terms of the will and via intestacy,⁵⁰ a "mixing" of regimes that was disliked by the common law but tolerated under the tenet that there is no residue of a residue.⁵¹

In sum, lapse is an event and its effects. It is common, though, to define lapse as constituting either the event or its effects, but not both.

⁴³ See 96 C.J.S. *Wills* § 2066 (2015). Some courts have, though, entertained assumptions that by including a named individual in the will, the testator must have believed the individual to be alive. See Thomas M. Cooley II, "Lapse Statutes" and Their Effect on Gifts to Classes, 22 VA. L. REV. 373, 403 n.90 (1936).

⁴⁴ See, e.g., OKLA. STAT. tit. 84, § 177 (2015); see also THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS 777 (2d ed. 1953).

⁴⁵ DUKEMINIER ET AL., *supra* note 12, at 358.

⁴⁶ THOMAS L. SHAFFER & CAROL ANN MOONEY, THE PLANNING AND DRAFTING OF WILLS AND TRUSTS 93 (3d. ed. 1991).

⁴⁷ Cooley, *supra* note 43, at 398.

⁴⁸ See, e.g., IND. CODE ANN. § 29-1-6-1(g) (West 2015); KY. REV. STAT. ANN. § 394.500 (West 2015); *In re Estate of Stroble*, 636 P.2d 236, 241 (Kan. Ct. App. 1981); *Shroeder v. Bohlsen*, 83 S.W. 627, 628 (Ky. 1904); *In re McFarland*, 167 S.W.3d 299, 304 (Tenn. 2005).

⁴⁹ See, e.g., *Quattlebaum v. Simmons Nat'l Bank of Pine Bluff*, 184 S.W.2d 911, 913 (Ark. 1945); *In re Estate of Russell*, 444 P.2d 353, 363-64 (Cal. 1968); *McFarland*, 167 S.W.3d at 304. This is known as the no-residue-of-the-residue rule. See DUKEMINIER ET AL., *supra* note 12, at 363.

⁵⁰ *Quattlebaum*, 184 S.W.2d at 913.

⁵¹ *In re Estate of Melton*, 272 P.3d 668, 675, 680 (Nev. 2012) (applying a will's disinheritance provision to block intestate distribution).

For example, some define lapse merely as the passing of the bequest or devise into the residue of the estate or by intestacy.⁵² Others define a lapsed gift as “one which fails to vest when the time for vesting arrives by reason of the incapacity or unwillingness of the beneficiary to receive it.”⁵³ Thus, lapse alternatively refers to the failure of a testamentary gift due to events occurring after the execution of the will or to the effect of those events on the ultimate disposition of the subject of the gift. Until a more rarefied definition or new terminology appears, it is important to conceive of lapse as encompassing both of these meanings.

The lapse doctrine is a default rule that can be altered by the use of specific terms in a will that sets up its own rules regarding survivorship. Bequeathing the property to a secondary beneficiary in the event that the primary beneficiary does not survive the testator is one such lapse-avoidance mechanism. If the primary beneficiary predeceases the testator, then the gift does not lapse but simply becomes the subject of the provision for substitution of the secondary beneficiary and is carried out according to its terms, assuming of course that the secondary beneficiary has not also predeceased.⁵⁴ Another lapse-avoidance mechanism is for a will to direct that the property be given to the estate of a beneficiary who has predeceased him.⁵⁵ As Patricia Roberts has noted, “Although such gifts are not recommended, there appears to be no policy reason to prohibit them.”⁵⁶

2. Voidness

The law distinguishes voidness from lapse. A bequest is void when one who would otherwise be a beneficiary predeceases the execution of the will, regardless of whether the testator was aware that the beneficiary had already died.⁵⁷ There are other, less common, reasons for declaring a

⁵² *Lapse*, BLACK'S LAW DICTIONARY (9th ed. 2009); see also *Simpson v. Piscano*, 419 A.2d 1059, 1064 (Md. 1980) (Cole, J., dissenting). Professor Gardner notes that before the enactment of statutes allowing wills to control property acquired after the execution of the will, see, for example, UNIF. PROBATE CODE § 2-602 (amended 2010) (UNIF. LAW COMM'N 1969), lapsed devises of after-acquired property passed by intestacy. GEORGE E. GARDNER, HANDBOOK OF THE LAW OF WILLS 575–79 (1903).

⁵³ GARDNER, *supra* note 52, at 575; see also Chaffin, *supra* note 11, at 269–70.

⁵⁴ 97 C.J.S. *Wills* § 2082 (2015).

⁵⁵ James Morfit Mullen, *The Maryland Statute Relating to Lapsing of Testamentary Gifts*, 7 MD. L. REV. 101, 102 (1943).

⁵⁶ Patricia J. Roberts, *Lapse Statutes: Recurring Construction Problems*, 37 EMORY L.J. 323, 361 (1988).

⁵⁷ 97 C.J.S. *Wills* § 2075 (2015) (citing *In re Doyle's Estate*, 80 P.2d 374, 375 (Mont.

bequest void, such as the incapacity of a beneficiary, whether for reasons of alienage, having served as a subscribing witness, or status as *domitae naturae*.⁵⁸ One court has even deemed a gift to an estate void because “an estate is not a person or legal entity.”⁵⁹ Void bequests are “incapable of taking effect from the time of making the will.”⁶⁰ Under the common law, a void bequest was thus not considered lapsed, since the beneficiary did not survive the will’s execution.⁶¹ The disposition of the subject of a void bequest was also distinct: it passed as intestate property.⁶² Today, the dispositional rules relating to void gifts are similar to those relating to lapsed gifts.⁶³

B. *The Policy Behind the Lapse Doctrine*

Although the rules governing the disposition of lapsed devises are clear, the rationale behind the lapse doctrine is not. Wills scholars have advanced a number of explanations for the persistence of the doctrine. Jesse Dukeminier and Robert Sitkoff theorize that the lapse rule embodies the fundamental principle that “[a]ll gifts made by will are subject to a requirement that the devisee survive the testator, unless the testator specifies otherwise.”⁶⁴ Thomas Jarman reasons that since wills do not take effect until the death of the testator, they cannot benefit those who

1938)).

⁵⁸ See, e.g., *In re Estate of Russell*, 444 P.2d 353, 363 (Cal. 1968) (bequest to a dog); *Pavlick v. Meriden Tr. & Safe Deposit Co.*, 107 A.2d 262, 267 (Conn. 1954) (alienage); *In re Hohn’s Estate*, N.Y.S.2d 237, 242 (Sur. Ct. 1943) (beneficiary-witness).

⁵⁹ See 80 AM. JUR. 2D *Wills* § 1082 (2016) (citing *Martin v. Hale*, 71 S.W.2d 211, 213 (Tenn. Ct. App. 1954)); *In re Glass’ Estate*, 130 P. 868, 869 (Cal. 1913). But see *Rogers v. Walton*, 39 A.2d 409, 411 (Me. 1943) (recognizing a valid transfer to the estate of a deceased person); *accord Cumming v. Cumming*, 135 S.E.2d 402 (Ga. 1964). It is perfectly acceptable for a testator to bequeath property to another’s estate. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 1.2 cmt. g (AM. LAW INST. 1999); L.S. Tellier, *Devise or Bequest to Designated Individual “or His Estate,” “or His Children,” “or His Representatives,” or the Like (Other Than “or His Heirs”), As Subject to Lapse in Event of Individual’s Death Before That of Testator*, 11 A.L.R.2D 1387 § 3 (1950).

⁶⁰ GARDNER, *supra* note 52, at 579.

⁶¹ *Drafts v. Drafts*, 114 So.2d 473, 475 (Fla. Dist. Ct. App. 1959) (“[N]o question of lapse arises.”).

⁶² SHAFER & MOONEY, *supra* note 46, at 93.

⁶³ DUKEMINIER ET AL., *supra* note 12, at 359; GARDNER, *supra* note 52, at 579. See, e.g., *Martineau v. Simonson*, 69 N.Y.S. 185, 186 (App. Div. 1901) (holding that void gifts to certain members of class passed to other members of that class).

⁶⁴ DUKEMINIER ET AL., *supra* note 12, at 358. We could just as easily say there is an implied revocation, but that speaks to the operation of lapse and not the policy behind it.

have predeceased him.⁶⁵ Mary Louise Fellows believes the rule is justified because “good estate planning would leave the final disposition of the property in the testator’s control if a beneficiary predeceases a testator.”⁶⁶ Courts, too, have attempted to explain the policy behind the rule. The Supreme Court of Tennessee has deemed aspects of the lapse doctrine “just, natural, and reasonable,” largely on the basis of *stare decisis*.⁶⁷ The court may have had in mind a case from 1568 that justifies the doctrine on the basis that the rule simply “ought to be” thus.⁶⁸ These scholarly and judicial explanations tell us a great deal about what the law is and what it values, but they tell us little about the role that lapse doctrine is meant to play in forwarding the paramount concern of wills law—to carry out the intention of the testator. The explanations likewise present us with no more than conclusory justifications for the tenacity of the lapse rule. While no one would dispute that a dead person cannot own property,⁶⁹ which itself might explain why we have wills in the first place, commentators and courts make no attempt to explain why, in the absence of a condition expressed in the decedent’s will, the estate plan of the predeceased individual may not control the disposition of a lapsed devise.⁷⁰ Relinquishing control of property to another is, after all, precisely what a will is meant to do.

A few commentators do discern a connection between lapse rules and testamentary intentions. One author suggests that doing away with all lapses would be “too broad to accord with the testator’s probable intention.”⁷¹ Adam Hirsch has opined that lapse rules reflect the intent of the reasonable testator, who knows that “dead persons have no use for property” and “would prefer to bequeath [it] to someone who is living.”⁷² Hirsch is undoubtedly correct that the reasonable testator understands that she herself will not own anything after she dies. His theory

⁶⁵ See Philip Mechem, *Some Problems Arising under Anti-Lapse Statutes*, 19 IOWA L. REV. 1, 1 (1933) (citing JARMAN ON WILLS 398 (7th ed. 1930)).

⁶⁶ Mary Louise Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611, 637 (1988).

⁶⁷ *In re Estate of McFarland*, 167 S.W.3d 299, 305 (Tenn. 2005).

⁶⁸ See Mechem, *supra* note 65, at 1 n.2 (quoting *Brett v. Rigdon*, 1 Plowd. 340 (1568)).

⁶⁹ LAWRENCE W. WAGGONER ET AL., *FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS* 374, 1066 (3d ed. 2002); UNIF. PROBATE CODE § 2-603 cmt. (amended 2010) (UNIF. LAW COMM’N 1969).

⁷⁰ See, e.g., *Carpenter v. Miller*, 26 S.W.3d 135, 138 (Ark. Ct. App. 2000).

⁷¹ Note, *Legacies and Devises—Statute Preventing Lapse Held Applicable When Legatee and Testator Die in Common Disaster*, 55 HARV. L. REV. 691, 692 (1942) [hereinafter *Legacies and Devises*].

⁷² Adam J. Hirsch, *Inheritance and Bankruptcy: the Meaning of the “Fresh Start,”* 45 HASTINGS L.J. 175, 238 (1994).

does not tell us, though, why she necessarily has survival of her beneficiary in mind when her will states no such preference and it cannot be otherwise established that she wished the beneficiary actually to possess the property.⁷³ It fails as well to say who a testator desires to possess the property in lieu of the predeceased beneficiary. The testator, in considering that a beneficiary may predecease her, may just as likely expect that the property will find its way into the hands of a living person “through the probate estate of the named beneficiary.”⁷⁴ As Philip Mechem sees it, “It is apparent . . . that in many instances [a] testator, if sufficiently informed, would have preferred some representative of the original donee to take [the property], rather than that the property should pass to his own heir or residuary legatee.”⁷⁵

Although Mechem is discussing the narrow anti-lapse statutes we know today, his insight comports with the theory that a testator may believe that the intended beneficiary’s will is just as suitable a channel for the distribution of a lapsed bequest as is the residuary of the testator’s estate or a statute dictating to whom the lapsed legacy will pass. Good estate planning or not, a testator has no expectation of retaining control of her property merely because a beneficiary has predeceased her. In the absence of good counsel, and sometimes even with it, she likely has no knowledge whatsoever of the rule of lapse. In a world where few testators seek the advice of well-trained lawyers, her true intentions on the matter will seldom be established.⁷⁶ What she does understand, however, is that her own estate plan will control any property to which her estate becomes entitled after she dies, and she understands this to be true of other testators’ wills.⁷⁷ In this sense, she is what I call “wills-minded.” The wills-mindedness of testators is what makes a rule that takes account of a predeceased beneficiary’s will in carrying out a testator’s estate plan more in keeping with the average testator’s intent in cases of lapse. We can be even more certain of this intention when “there is little doubt of the predeceasing legatee’s desire to dispose of his estate in a

⁷³ See, e.g., *White v. Brown*, 559 S.W.2d 938, 938 (Tenn. 1977) (bequeathing a house “to live in and not to be sold”).

⁷⁴ Hirsch, *supra* note 72, at 238.

⁷⁵ Mechem, *supra* note 65, at 1.

⁷⁶ See ATKINSON, *supra* note 44, at 778.

⁷⁷ A testator’s will controls the disposition of property that vests in her estate after she dies. See, e.g., *Leary v. Liberty Tr. Co.*, 171 N.E. 828, 828–29 (Mass. 1930); *Bottomley v. Bottomley*, 35 A.2d 475, 484 (N.J. Ch. 1944); *Hudson v. Hopkins*, 799 S.W.2d 783, 787 (Tex. App. 1990).

method counter to the statutory manner of distribution.”⁷⁸

C. *Statutory Alterations of the Common Law Survivorship Doctrine*

The remorseless workings of the lapse doctrine have spawned an immense amount of litigation. Attempts to stem the tide have led to statutory exceptions to lapse. The most well-known of these reforms is anti-lapse legislation, aimed at better carrying out a testator’s probable intent when a gift to a relative lapses.⁷⁹ A reform that also applies to intestate succession is simultaneous death legislation, designed to eliminate excruciating questions about survival where deaths occur in close temporal proximity.⁸⁰ The most recent reforms require heirs or beneficiaries to survive the testator by 120 hours in order to spare the estate the costs of being administered twice in a short period of time.⁸¹ Despite their salutary aims, these statutory reforms have created new problems that should motivate us to scrutinize their role in carrying out the intention of testators.

1. Anti-Lapse

Described as “barbarous to the ear” by one commentator,⁸² the curiously named anti-lapse statutes⁸³ found in most jurisdictions do not so much overturn the lapse rule as they, in a few specific instances, direct the disposition of a lapsed devise in a manner divergent from the common law.⁸⁴ Thus, even statutes that declare that a devise covered by the anti-lapse statute “shall not lapse”⁸⁵ mean merely that the distribution of the property will be different from what the common law dictates. In most cases, contemporary American statutes direct that a gift that would otherwise lapse be taken by the surviving issue of the predeceased bene-

⁷⁸ Note, *Anti-Lapse Statutes and the Conflict of Laws*, 47 YALE L.J. 1216, 1221 (1938) [hereinafter *Anti-Lapse Statutes*].

⁷⁹ B.E. WITKIN ET AL., SUMMARY OF CALIFORNIA LAW § 262 (10th ed. 2005).

⁸⁰ DUKEMINIER ET AL., *supra* note 12, at 80.

⁸¹ *Id.*

⁸² Mechem, *supra* note 65, at 1 n.*.

⁸³ Anti-lapse statutes are alternatively referred to as lapse statutes. SHAFFER & MOONEY, *supra* note 46, at 92; Cooley, *supra* note 43, at 374. One commentator has suggested “statutory gift-over provision” as a more apt moniker. Suzana Popovic-Montag, *Revisiting Section 31 of the Succession Law Reform Act – The “Anti-Lapse Provision,”* 23 EST. TR. & PENSIONS J. 266, 267 (2004).

⁸⁴ UNIF. PROBATE CODE § 2-603 cmt. (amended 2010) (UNIF. LAW COMM’N 1969).

⁸⁵ *See, e.g.*, 20 PA. CONS. STAT. ANN. § 2514(9) (West 2015).

ficiary using a representational scheme similar to that used for intestate distribution.⁸⁶ In this regard, they differ from the original English anti-lapse law, which actually prevented lapse by declaring that the property “shall not lapse, but shall take effect as if the Death of such Person had happened immediately after the Death of the Testator.”⁸⁷ The “fictitious survivorship” theory that undergirded the English law required distribution of the property as if the legatee had survived the testator,⁸⁸ that is, through the estate plan of the predeceased beneficiary. The evident purpose of this approach to lapse is to bestow the property on “those persons ‘who would presumably have enjoyed the benefits of such devise, had the devisee survived the death of the testator and died immediately afterwards.’”⁸⁹ England has since discarded the fictitious survivorship theory.⁹⁰ In the United States, fictitious survivorship is embodied only in the law of Maryland, where the law directs property bequeathed to predeceased beneficiaries to that person’s devisees or heirs.⁹¹

The consensus appears to be that “fixing” lapse law in the way anti-lapse statutes do is a “benevolent design”⁹² promoting the reasonable testator’s unarticulated wish that when she bequeaths property to her close relatives, she intends it to benefit their progeny as well.⁹³ Roger Andersen reveals himself to be of this view in stating that anti-lapse statutes reflect the legislative belief “that in some cases [lapse] would be contrary to a common testator’s intention.”⁹⁴ Thomas Atkinson describes anti-lapse provisions as carrying out “the probable intention of the average testator, if he had thought of the possibility of his surviving the lega-

⁸⁶ See, e.g., GA. CODE ANN. § 53-4-64(a) (West 2015); IOWA CODE ANN. § 633.273 (West 2015); N.C. GEN. STAT. ANN § 31-42(a) (West 2015); R.I. GEN. LAWS ANN. § 33-6-19 (West 2015).

⁸⁷ Wills Act 1837, 7 Will. 4 & 1 Vict. c. 26, § 32 (Eng.); *Anti-Lapse Statutes*, *supra* note 78, at 1217–18 (“The words [of the statute] . . . creat[ed] a fictitious survivorship which carries with it all the incidents of an actual survivorship. The gift is pictured as vesting in the legatee, and is disposable by his will.”).

⁸⁸ *Anti-Lapse Statutes*, *supra* note 78, at 1217.

⁸⁹ *McAllister v. McAllister*, 167 N.W. 78, 79 (Iowa 1918) (quoting *In re Hullett’s Estate*, 96 N.W. 952, 953 (Iowa 1903)). Until 1995, Iowa’s anti-lapse statute bestowed lapsed devises on the devisee’s heirs. *In re Estate of Michael*, 577 N.W.2d 407, 409 (Iowa 1998). Iowa subsequently amended its anti-lapse statute. The current formulation bestows lapsed devises on the issue of predeceased beneficiaries. IOWA CODE ANN. § 633.273.

⁹⁰ See IOWA CODE ANN. § 633.273; see also MCGOVERN ET AL., *supra* note 15, at 420 n.2. (citing Administration of Justice Act 1982, § 19 (Eng.)).

⁹¹ MD. CODE ANN., EST. & TRUSTS § 4-403 (West 2015).

⁹² *McAllister*, 167 N.W. at 79.

⁹³ Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057, 1129 (1996).

⁹⁴ ROGER W. ANDERSEN, UNDERSTANDING TRUSTS AND ESTATES 251 (5th ed. 2013).

tee or devisee.”⁹⁵ Dukeminier and Sitkoff elaborate: “The idea is that, for certain predeceasing devisees, the testator would prefer a substitute gift to the devisee’s descendants rather than for the gift to pass in accordance with the common law of lapse.”⁹⁶ The generality of such statements is probably due to the fact that it is likely not possible to determine whether anti-lapse statutes promote testamentary intent.⁹⁷ Nonetheless, legislatures have indeed “indulge[d] in generalizations as to the presumed intent of an average reasonable testator” in enacting anti-lapse laws in nearly every state.⁹⁸

a. *The Mechanics of Anti-Lapse*

Anti-lapse statutes are best described as narrow departures from lapse law because they apply, almost without exception, only to testamentary gifts to certain consanguineous or adopted relatives.⁹⁹ The relatives covered by anti-lapse provisions vary significantly across states. Many apply to gifts to the testator’s issue¹⁰⁰ or issue and siblings¹⁰¹ (including adopted children, although this was not always so).¹⁰² Some variations include gifts to children and grandchildren,¹⁰³ gifts to any descendant,¹⁰⁴ or gifts to the children of siblings.¹⁰⁵ Some are more expansive, extending to the testator’s parents and their descendants,¹⁰⁶ grandparents and their descendants,¹⁰⁷ great-grandparents and their descendants,¹⁰⁸ the testator’s kindred,¹⁰⁹ his heirs,¹¹⁰ or even to *any* benefi-

⁹⁵ ATKINSON, *supra* note 44, at 779; *accord* Chaffin, *supra* note 11, at 272.

⁹⁶ DUKEMINIER ET AL., *supra* note 12, at 364.

⁹⁷ Erich Tucker Kimbrough, *Lapsing of Testamentary Gifts, Antilapse Statutes, and the Expansion of Uniform Probate Code Antilapse Protection*, 36 WM. & MARY L. REV. 269, 279 (1994).

⁹⁸ Mechem, *supra* note 65, at 2.

⁹⁹ *See, e.g.*, TEX. EST. CODE ANN. § 255.153(a) (West 2015) (including “a descendant of the testator or a descendant of a testator’s parent”).

¹⁰⁰ *See, e.g.*, 755 ILL. COMP. STAT. ANN. 5/4-11(a) (West 2015).

¹⁰¹ *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 3-3.3 (McKinney 2015).

¹⁰² *See, e.g.*, *In re Phillips’ Estate*, 17 Pa. Super. 103, 109 (1901) (“One adopted has the rights of a child without being a child.” (quoting *Schafer v. Eneu*, 54 Pa. 304, 306 (1867))).

¹⁰³ *See, e.g.*, CONN. GEN. STAT. ANN. § 45a-441 (West 2015).

¹⁰⁴ *See, e.g.*, IND. CODE ANN. § 29-1-6-1(g) (West 2015).

¹⁰⁵ *See, e.g.*, 20 PA. CONS. STAT. ANN. § 2514(9) (West 2015).

¹⁰⁶ *See, e.g.*, TEX. EST. CODE ANN. § 255.153(a) (West 2015).

¹⁰⁷ *See, e.g.*, ALA. CODE § 43-8-224 (West 2015); N.C. GEN. STAT. ANN. § 31-42 (West 2015).

¹⁰⁸ *See, e.g.*, S.C. CODE ANN. § 62-2-603(A) (West 2015).

¹⁰⁹ *See, e.g.*, CAL. PROB. CODE § 21110(c) (West 2015); VT. STAT. ANN. tit. 14, § 335 (West 2015).

ciary.¹¹¹ Some statutes explicitly include predeceasing spouses;¹¹² others have been construed as excluding spouses.¹¹³ Washington has two anti-lapse statutes, one that applies to gifts to the issue of grandparents¹¹⁴ and another that applies to gifts to any beneficiary who cannot be located at the time of distribution but who has “clearly . . . died prior to the decedent.”¹¹⁵ Both statutes benefit the lineal descendants of the predeceasing beneficiary. The Uniform Probate Code (“UPC”), more expansive than most anti-lapse provisions, includes grandparents, the issue of grandparents, and stepchildren.¹¹⁶ Some statutes alter the basic anti-lapse scheme in certain cases. Pennsylvania, for example, protects the testator’s closest family members. The issue of the predeceasing beneficiary do not take if, in lapsing, the legacy would otherwise go to the testator’s children or spouse under the residuary clause or in intestacy.¹¹⁷

What is not so varied is the application of anti-lapse statutes to class gifts. As mentioned above, under the common law, class members who failed to survive the testator were simply not members of the class; their portion of the gift did not lapse.¹¹⁸ In bequeathing property to a class, the testator was presumed to intend a gift only to those members of the class who survived his death.¹¹⁹ Based on this reasoning, an anti-lapse provision would not apply to a class gift.¹²⁰ Today, even though some statutes

¹¹⁰ KAN. STAT. ANN. § 59-615(a) (West 2015). The statute reads “relative by lineal descent or within the sixth degree” and is thus congruent with the definition of heirs in intestate succession. *See Id.* § 59-509.

¹¹¹ *See* D.C. CODE ANN. § 18-308 (West 2015); GA. CODE ANN. § 53-4-64(a) (West 2015); IOWA CODE ANN. § 633.273(1) (West 2015) (excepting spouses, IOWA CODE ANN. § 633.274); KY. REV. STAT. ANN. § 394.400 (West 2015); MD. CODE ANN., EST. & TRUSTS § 4-401 (West 2015) (excepting spouses); R.I. GEN. LAWS ANN. § 33-6-19 (West 2015); TENN. CODE ANN. § 32-3-105 (West 2015); W. VA. CODE ANN. § 41-3-3 (West 2015).

¹¹² *See, e.g.*, KAN. STAT. ANN. § 59-615(a).

¹¹³ *See, e.g.*, Estate of Dye, 112 Cal. Rptr. 2d 362, 374-77 (Dist. Ct. App. 2001); Blackman v. Wadsworth, 21 N.W. 190, 192-93 (Iowa 1884).

¹¹⁴ WASH. REV. CODE ANN. § 11.12.110 (West 2015).

¹¹⁵ *Id.* § 11.76.240; Reutlinger, *supra* note 5, at 25.

¹¹⁶ UNIF. PROBATE CODE § 2-603(b) (amended 2010) (UNIF. LAW COMM’N 1969). *See also* MICH. COMP. LAWS ANN. § 700.2709 (West 2015); N.J. STAT. ANN. § 3B:3-35 (West 2015).

¹¹⁷ 20 PA. CONS. STAT. ANN. § 2514(9) (West 2015).

¹¹⁸ SHAFER & MOONEY, *supra* note 46, at 93; Drafts v. Drafts, 114 So. 2d 473, 475 (Fla. Dist. Ct. App. 1959) (“[A] gift to members of a class cannot lapse so long as any member of the class survives the testator.”); A. James Casner, *Class Gifts—Effect of Failure of Class Member to Survive the Testator*, 60 HARV. L. REV. 751, 761 (1947); Cooley, *supra* note 43, at 398.

¹¹⁹ Cooley, *supra* note 43, at 379.

¹²⁰ *See, e.g.*, Lacy v. Murdock, 22 N.W.2d 713, 718 (Neb. 1946); *In re Prejato’s Will*, 155 N.Y.S.2d 569, 571 (Sur. Ct. 1956); Cooley, *supra* note 43, at 377.

do not explicitly include class gifts,¹²¹ there are no anti-lapse statutes that explicitly *exclude* them. Courts have been willing to interpret such statutes as inclusive of class gifts in part on the rationale that “such statutes are remedial and should receive a liberal construction”¹²² Another rationale is the testator’s probable intent, a presumed intent supplied by the law.¹²³ The modern trend is decidedly in favor of applying anti-lapse provisions to class gifts.¹²⁴ Under such statutes, it can be said with accuracy that the anti-lapse statute trumps the class gift rule.

Even though there is near uniformity in including class gifts within the ambit of anti-lapse provisions, there is variation among the states on the question of whether anti-lapse statutes apply to class members who predecease the execution of the will. According to the traditional understanding of class gifts, they are not members of the class¹²⁵ unless the testator expressly defines the class to include them.¹²⁶ Another reason for excluding them parrots the common-law logic regarding void gifts: anti-lapse statutes do not apply to *void* portions of class gifts because voidness is distinct from lapse.¹²⁷ This highly unsatisfying semantic rationale is contradicted by the UPC,¹²⁸ whose drafters thought it likely that the testator would want all predeceasing members of a class treated similarly,¹²⁹ and by many contemporary anti-lapse statutes that bring class gifts within their ambit and act equally upon either lapsed or void portions of such gifts.¹³⁰ Despite the trend in the direction of including the void portions of class gifts within the ambit of anti-lapse statutes, some states nonetheless explicitly exclude void portions of class gifts, leaving them

¹²¹ See, e.g., OKLA. STAT. ANN. tit. 84, § 142 (West 2015); D.C. CODE ANN. § 18-308 (West 2015).

¹²² JOHN E. ALEXANDER, 2 COMMENTARIES ON THE LAW OF WILLS § 874 (1917), quoted in *Clifford v. Cronin*, 117 A. 489, 490 (Conn. 1922); see also GARDNER, *supra* note 52, at 446 (stating that anti-lapse statutes “are commonly construed as applying to gifts to a class”).

¹²³ Cooley, *supra* note 43, at 375, 379.

¹²⁴ See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 3-3.3(a)(3) (McKinney 2015).

¹²⁵ See, e.g., *In re Harrison’s Estate*, 51 A. 976 (Pa. 1902).

¹²⁶ See, e.g., *In re Estate of Shappell*, 227 A.2d 651, 652 (Pa. 1967) (will included bequest to children who “shall predecease me in death”).

¹²⁷ *Drafts v. Drafts*, 114 So. 2d 473, 475 (Fla. Dist. Ct. App. 1959) (“[A] beneficiary who is dead at the time the will is executed is void, and no question of lapse arises.”); MD. CODE ANN., EST. & TRUSTS § 4-404 (West 2015); Succession Law Reform Act § 23, R.S.O. 1990, c. S.23 (Can.).

¹²⁸ UNIF. PROBATE CODE § 2-603(a)(6) (amended 2010) (UNIF. LAW COMM’N 1969).

¹²⁹ *Id.* § 2-603 cmt.

¹³⁰ See, e.g., DEL. CODE ANN. tit. 12, § 2313(a)(2) (West 2015); IDAHO CODE ANN. § 15-2-605 (West 2015); MINN. STAT. ANN. § 524.2-603 (West 2015); N.J. STAT. ANN. § 3B:3-35 (West 2015); S.C. CODE ANN. § 62-2-603(B) (2015).

subject to the common law.¹³¹

One common anti-lapse provision that includes any beneficiary is the statutory abrogation of the rule that a lapsed residuary devise is distributed through intestate succession. This no-residue-of-a-residue rule has been severely criticized as an override of a testator's intent *not* to benefit his heirs and as a concession to the antiquated English common law that favored intestacy.¹³² Some courts have simply ruled that the lapsed portion of a residuary devise to individuals is shared by the surviving residuary takers.¹³³ Today, statutes in many states embody this rule.¹³⁴ The rule prevents the distribution in intestacy of certain lapsed residuary devises. Like the class-gift rule it resembles, the abrogation of the no-residue-of-a-residue rule is itself trumped by the anti-lapse statute in instances where the predeceased residuary beneficiary falls within its ambit.¹³⁵

In some cases, an anti-lapse statute will operate in a manner similar to what the outcome would have been under lapse law, as when the gift of the entire residue is to a predeceased child whose surviving issue are the testator's only intestate heirs. Anti-lapse rules are unnecessary in such cases, as Dukeminier and Sitkoff explain, "because a multigenerational class absorbs the concept of representation familiar from inheritance law."¹³⁶ Perhaps for this reason, New York recently amended its anti-lapse statute to exclude gifts to "issue" and "descendants," preferring to let the definition of those terms found in the intestacy law determine the distribution of such gifts.¹³⁷

¹³¹ See, e.g., CAL. PROB. CODE § 21110(a) (West 2015) (if known to testator); IOWA CODE ANN. § 633.273(2) (West 2015); N.Y. EST. POWERS & TRUSTS LAW § 3-3.3(a)(3) (McKinney 2015).

¹³² See, e.g., *In re Gray's Estate*, 23 A. 205, 206 (Pa. 1892); *In re Slack Tr.*, 220 A.2d 472, 472-73 (Vt. 1966); Chaffin, *supra* note 11, at 306-08.

¹³³ See *Hedges v. Payne*, 154 N.E. 293, 294-95 (Ind. Ct. App. 1926) (noting the conflict with the weight of authority); *In re Frolich Estate*, 295 A.2d 448, 451 (N.H. 1972) (noting the judicial trend toward discarding traditional rule) (citing *In re Estate of Jackson*, 471 P.2d 278, 281 (Ariz. 1970) and *Slack*, 220 A.2d at 474); *Indus. Nat'l Bank of R.I. v. Gloucester Manton Free Pub. Library of Gloucester*, 265 A.2d 724, 729 (R.I. 1970) (noting the widespread criticism of the common law rule).

¹³⁴ See, e.g., CAL. PROB. CODE § 21111(b); GA. CODE ANN. § 53-4-65(b) (West 2015); 755 ILL. COMP. STAT. ANN. 5/4-11(c) (West 2015); N.J. STAT. ANN. § 3B:3-37; N.Y. EST. POWERS & TRUSTS LAW § 3-3.4; N.C. GEN. STAT. ANN. § 31-42(b) (West 2015); 20 PA. CONS. STAT. ANN. § 2514(11) (West 2015); OHIO REV. CODE ANN. § 2107.52(D)(2) (West 2015); R.I. GEN. LAWS ANN. § 33-6-20 (West 2015); UNIF. PROBATE CODE § 2-604(b) (amended 2010) (UNIF. LAW COMM'N 1969).

¹³⁵ See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 3-3.3(a)(3).

¹³⁶ DUKEMINIER ET AL., *supra* note 12, at 379 n.19.

¹³⁷ N.Y. EST. POWERS & TRUSTS LAW § 3-3.3 cmt. The definition of issue can be found

b. *Anti-Lapse and Words of Survivorship and Substitution*

In Patricia Roberts's estimation, "[t]he most frequently litigated issue in the lapse statute cases is whether the testator has indicated a contrary intent."¹³⁸ Courts and policy makers have been unable to reach a consensus on this question, with some taking the position that words of survivorship merely speak in favor of the statute and that a substitutional gift would be required to circumvent it. The majority of jurisdictions, however, take the position that a testator's deliberate choice of words of survivorship should defeat the application of the default rule, whether or not she specifies a taker in substitution. There is good reason to adhere to the majority rule.

The anti-lapse statute is a default rule based on the notion that in making a gift to a parent the testator contemplated the benefit of such parent's children, in the absence of a contrary intention being expressed in the will. Therefore, if the testator qualifies a bequest with a specific requirement that the beneficiary survive him, a majority of courts and some legislatures will not apply the anti-lapse statute to the testator's will.¹³⁹ Avoiding the operation of the statute in these jurisdictions is a simple matter of making it clear that survivorship of the legatee is essential. In contrast, a minority of courts have ruled that mere words requiring survival are not enough to defeat the anti-lapse statute.¹⁴⁰ The drafters of the UPC concur, reasoning that "mere words of survivorship merely *duplicate* the law-imposed survivorship requirement deriving from the rule of lapse."¹⁴¹ In other words testators who use survivorship language are simply choosing to articulate the default rule of law requir-

in § 1-2.10.

¹³⁸ Roberts, *supra* note 56, at 346-47.

¹³⁹ See, e.g., *In re Estate of Stroble*, 636 P.2d 236, 241 (Kan. 1981) (claiming this approach is "almost universally applied by the courts in this country"); *Polen v. Baker*, 752 N.E.2d 258, 262 (Ohio Ct. App. 2000); *Erlbach v. Estate of Thompson*, 954 P.2d 350 (Wash. Ct. App. 1998); see also MINN. STAT. ANN. § 524.2-603 (West 2015); S.C. CODE ANN. § 62-2-603(C) (West 2015) (An anti-lapse provision does not control where the testator has explicitly made survival a requirement, using phraseology such as "if he survives me" or to "my surviving children."); Jeffrey A. Cooper, *A Lapse in Judgment: Ruotolo v. Tietjen and the Interpretation of Connecticut's Anti-Lapse Statute*, 20 QUINNIAC PROB. L.J. 204, 210, 213 (2007).

¹⁴⁰ See, e.g., *Ruotolo v. Tietjen*, 916 A.2d 1 (Conn. 2007); see also Halbach & Waggoner, *supra* note 3, at 1110 (claiming that "language of survivorship in documents does not supply trustworthy indication of intention contrary to the anti-lapse statute").

¹⁴¹ UNIF. PROBATE CODE § 2-603 cmt. (amended 2010) (UNIF. LAW COMM'N 1969) (emphasis in original).

ing beneficiaries to survive the testator.¹⁴² Under this reasoning, when a testator includes words of survivorship but does *not* include a substitute devise, his intent regarding what should become of the property in the event of lapse is incomplete, and the anti-lapse statute should apply.¹⁴³

A couple of cases involving what I will call provisions requiring dual or alternative survivorship suffice to illustrate the difficulty courts have in evaluating the interplay between words of survivorship and anti-lapse statutes. The will in *In re Estate of Ulrikson* contained a provision bequeathing the residue to the testatrix's brother and sister in equal shares.¹⁴⁴ The will specifically dictated that if one of the siblings predeceased the testatrix, the surviving sibling would take the entire residue.¹⁴⁵ But in this case, *both* siblings predeceased the testatrix, and only the brother left issue. A lawsuit between the testatrix's heirs at law and the brother's issue ensued. The heirs argued that the provision in the will placed an absolute condition of survival on the gifts to both siblings, and therefore, since both siblings predeceased the testatrix, neither had an entitlement to the property that could be preserved by the anti-lapse statute.¹⁴⁶

The Minnesota Supreme Court was unconvinced. Referring to the wills law presumption against intestacy, it reasoned that the testatrix intended for the requirement of survivorship to apply only in the event there *were* survivors. The testatrix simply had not contemplated that there might not be a survivor, and for this reason her expressed intention was incomplete.¹⁴⁷ The anti-lapse statute thus operated to complete the expression of her intent by preserving the residue for the two children of the testatrix's brother, to the exclusion of the seven other heirs at law who otherwise would have shared the residue equally with them.¹⁴⁸ Although the *Ulrikson* decision is obviously limited to will provisions requiring dual or alternative survivorship, the comments to the UPC cite it for the extravagant proposition that in Minnesota words of survivorship do not override the anti-lapse statute.¹⁴⁹

In a similar case, a different court also used the presumption against

¹⁴² See, e.g., *Kubiczky v. Wesbanco Bank Wheeling*, 541 S.E.2d 334 (W. Va. 2000).

¹⁴³ See Mary Louise Fellows, *Traveling the Road of Probate Reform: Finding a Way to Your Will (A Response to Professor Ascher)*, 77 MINN. L. REV. 659, 678 (1993).

¹⁴⁴ 290 N.W.2d 757, 758 (Minn. 1980).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 759.

¹⁴⁷ *Id.*

¹⁴⁸ *Ulrikson*, 290 N.W.2d at 759.

¹⁴⁹ UNIF. PROBATE CODE § 2-603 cmt. (amended 2010) (UNIF. LAW COMM'N 1969).

intestacy to rule in favor of applying the anti-lapse statute despite the testator's gift in substitution to the survivor of his two brothers.¹⁵⁰ The North Carolina appeals court also gave intent-based reasons for its ruling. In bequeathing his property to his two brothers "or to the survivor," the testator failed to contemplate that both of his brothers might predecease him.¹⁵¹ This court went further than the *Ulrikson* court, though, in remarking that there was "no clear intent on Testator's part that either brother outlive him in order for his gift to be effective."¹⁵² In other words, the court believed that a stronger expression of survivorship would be necessary for the anti-lapse statute to be overridden. Since the testator had not specified what should happen to his estate if both of his siblings predeceased him, his brothers' issue took the property to the exclusion of the heirs at law.¹⁵³

Ulrikson and *Early* do not establish that words of survivorship, standing alone, are insufficient to trump the anti-lapse statute. They are cases of dual or alternative survivorship and are based wholly on the fact that neither testator expressed what to do with the estate should both siblings die first. Since the testators' intentions regarding the events that actually occurred remained unknown, the anti-lapse statute applied. These cases establish that anti-lapse statutes work best when they fill in gaps in wills in which testators have not expressed their intentions regarding survivorship. This is the fashion in which rules of construction generally function. This position has the virtue of respecting the oft-cited principle that a court should strive to give effect to every word of a last will and testament.¹⁵⁴ The opposite position, by contrast, assumes that in some instances the testator's words are simply a mouthpiece for the wisdom of the common law.

The problem with the theory that survivorship language by itself expresses an incomplete intention is that it does not allow the words employed by the testator to convey any meaning. It instead assumes that the testator has used them to parrot the lapse doctrine. The words of survivorship are thus emptied of their particular meaning for the testator because, where the same testator does not use survivorship language in the will, the lapse rule will apply in the same fashion. This feeble method of

¹⁵⁰ *Early v. Bowen*, 447 S.E.2d 167, 172 (N.C. Ct. App. 1994).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 172–73.

¹⁵⁴ *See, e.g., Carlson v. Sweeney*, 895 N.E.2d 1191, 1197 (Ind. 2008); *Lemmon v. Wilson*, 28 S.E.2d 792, 800 (S.C. 1944).

interpretation effaces the possibility that the testator intended for the words to negate the anti-lapse statute. By requiring survivorship, the reasonable testator likely intends for the beneficiary to possess and control the property and to make conscious decisions about its disposition. A predeceased beneficiary cannot make such decisions. By requiring the beneficiary to survive her death, a testator is not even remotely expressing an intention that the beneficiary's descendants should take in his stead.

Those who hold that words of survivorship express no more than the rule of lapse have argued that words of survivorship might be deemed ambiguous and need to be construed. The comments to the UPC, for example, stress that a judge is always at liberty to call for extrinsic evidence to interpret the will as circumventing the anti-lapse statute.¹⁵⁵ Of course, there is usually nothing particularly ambiguous about an express survivorship requirement. Thus, advocates would have a difficult time arguing that a will is ambiguous when the words used are so plain on their face. Most courts would be justified and would prefer to employ a plain-language interpretation of words of survivorship and would use the rules of lapse and anti-lapse to fill in the testator's unspoken intentions regarding the disposition of his property.¹⁵⁶

c. *Anti-Lapse and Disinheritance*

Yet another constructional problem on which the courts disagree is the effect of disinheritance on the application of an anti-lapse statute. This problem arises when the will disinherits the person who would otherwise take the property by operation of an anti-lapse provision. For example, in *In re McKeon's Estate*, the testator bequeathed property to her sister but specifically disinherited her niece.¹⁵⁷ The court ruled that the anti-lapse provision was not triggered by these facts because "the testatrix clearly expressed in her will her intent that the child of the legatee was to take no part of her estate."¹⁵⁸ The court reasoned that the anti-lapse statute "was not intended to nullify the right of the testator to select the objects of his bounty and to specify the conditions and limitations

¹⁵⁵ UNIF. PROBATE CODE § 2-601 cmt. (amended 2010) (UNIF. LAW COMM'N 1969); *id.* § 2-603 cmt.

¹⁵⁶ Aron Leslie Suna, *Disinheritance and the Anti-Lapse Statute*, 26 WASH. & LEE L. REV. 105, 111 (1969).

¹⁵⁷ 46 N.Y.S.2d 349, 351 (Sur. Ct. 1944).

¹⁵⁸ *Id.* at 350.

upon any legacy.”¹⁵⁹ Indeed, given that the statute is meant to carry out a probable intent, it should not be applied when the testator’s intent is so clearly contrary to it.¹⁶⁰

It is thus extraordinary to find other courts applying the anti-lapse statute in like circumstances. In *Bruner v. First National Bank*, the testatrix bequeathed the residue of her estate to her daughter Dressie and disinherited Dressie’s son Raymond.¹⁶¹ As in *McKeon*, the residuary beneficiary predeceased the testatrix. The Oregon Supreme Court ruled that the specific disinheritance of Raymond did not prevent him from taking the testatrix’s estate via the anti-lapse provision.¹⁶² The court believed that the language employed by the testatrix merely exhibited an intent to prevent her grandson from taking under the pretermitted heirs statute and that depriving him of the estate as a taker under the anti-lapse provision was beyond her purpose.¹⁶³ This limited-purpose theory was employed as well in *In re Carleton*.¹⁶⁴ There the testator had bequeathed \$1,000 to each of her grandchildren but in a codicil revoked this provision, stating “I feel that I should not remember [Horace M. Carleton] in any financial way in my Will.”¹⁶⁵ The testator’s will also contained a bequest to her son Alexander, Horace’s father.¹⁶⁶ Since Alexander had predeceased the testator, Horace claimed a share of the bequest to his father under the anti-lapse statute. The court construed the codicil as relating solely to the bequest of \$1,000 and not, as its language would suggest, to a broader disinheritance of Horace that would include any benefit from the bequest to Alexander.¹⁶⁷ As such, the testator was presumed to have intended for Horace to be included as a taker of the bequest to Alexander.¹⁶⁸

d. Anti-Lapse and Will Substitutes

Whether anti-lapse provisions apply to will substitutes such as life insurance policies, pension plans, and pay-on-death or transfer-on-death financial accounts remains an open question.¹⁶⁹ Very few legislatures

¹⁵⁹ *Id.* at 351.

¹⁶⁰ *Id.*

¹⁶¹ 443 P.2d 645, 645–46 (Or. 1968).

¹⁶² *Id.* at 646.

¹⁶³ *Id.* at 647.

¹⁶⁴ 151 N.Y.S.2d 338 (Sur. Ct. 1956).

¹⁶⁵ *Id.* at 340.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 341.

¹⁶⁸ *Bruner*, 151 N.Y.S.2d at 341.

¹⁶⁹ DUKEMINIER & JOHANSON, *supra* note 33, at 348.

have moved in this direction by enacting the 1989 revision of the UPC's article 6, requiring the beneficiaries of pay-on-death bank accounts and transfer-on-death security accounts to survive the owners of such accounts,¹⁷⁰ and by enacting the 1990 revision of the UPC's article 2, which includes an anti-lapse provision that covers non-probate transfers and applies to beneficiaries who are grandparents, descendants of a grandparent, or stepchildren of the decedent.¹⁷¹ As is true of the UPC's anti-lapse provision applicable to wills, the anti-lapse provision applicable to will substitutes is rendered inoperative by the inclusion of an "alternative beneficiary designation" but not by mere "words of survivorship."¹⁷² If the predeceased beneficiary is not among the group of beneficiaries for whom a descendant will be substituted, the property is retained by whichever beneficiary survives or in the estate of the last surviving party to the account.¹⁷³ This approach mirrors anti-lapse legislation on lapsed residuary devises.

The Uniform Probate Code's extension of anti-lapse principles to remainders in *inter vivos* trusts is controversial in that it overturns a familiar principle of the law of future interests—that a beneficiary need not survive to the time of possession. The attempted reform is meant to harmonize the law of wills and the law of future interests by moving the vesting of the remainder in the beneficiary from the time of the creation of the trust to the time of distribution. The assumption underlying the reform is that the donor of a future interest has in mind preserving the property for the issue of the beneficiary in the event the beneficiary does not survive the date of distribution. This assumption resembles what is assumed to be a testator's desire to preserve testamentary bequests for the issue of predeceased beneficiaries with whom he has a consanguineous or adoptive relationship.¹⁷⁴ Harmonizing the law of wills and trusts makes the most sense when a trust is revocable. As with wills, the settlor of a revocable *inter vivos* trust is free to make changes to his estate plan to respond to the deaths of beneficiaries. But irrevocable *inter vivos*

¹⁷⁰ UNIF. PROBATE CODE §§ 6-212(a)–(b), 6-307 (amended 2010) (UNIF. LAW COMM'N 1969).

¹⁷¹ *Id.* § 2-706(b).

¹⁷² *Id.* § 2-706(b)(3)–(4).

¹⁷³ *Id.* §§ 6-212(b)(2), 6-307.

¹⁷⁴ See, e.g., 760 ILL. COMP. STAT. ANN. 5/5.5 (West 2015). *In re Estate of Button*, 490 P.2d 731, 734 (Wash. 1971) (construing *inter vivos* trust and remarking, "A gift to be enjoyed only upon or after the death of the donor is in practical effect a legacy, whether it is created in an *inter vivos* instrument or in a will.").

trusts and other present transfers, such as those evidenced by deeds,¹⁷⁵ do not permit such changes. In drafting such a trust, a settlor would not only have to consider drafting around anti-lapse principles that have historically never applied to trusts but would also have to consider the possibility that the trust property will remain in his estate in the event a predeceased beneficiary has no issue surviving the settlor. Nonetheless, states that choose to enact an anti-lapse provision applicable to trusts are unlikely to distinguish between revocable and irrevocable trusts.¹⁷⁶ Like the UPC's insistence that words of survivorship are not enough to trump an anti-lapse provision, the extension of anti-lapse principles to remainders has not caught on, and many courts have rejected arguments urging such an extension.¹⁷⁷

Although the idea of treating revocable trusts like wills appeals to me given the similarities between these instruments, I wish to suggest a different direction that the law might take. My proposal is that we treat lapsed devises more like remainders. In short, instead of bringing anti-lapse concepts into trust law, I advocate bringing vesting concepts into wills law in the specific situation where the beneficiary predeceases the testator leaving a valid will of her own. I believe it is more in keeping with the average testator's intention that the estate of a predeceased beneficiary who has been as wills-minded as she assume control of the bequeathed property. To address at least one of the controversial aspects of my proposal, one that the courts of Maryland have had to contend with given the similarity of that state's law to my proposal, I would limit the applicability of the rule to beneficiaries who have predeceased the testator by a maximum of one year. This period of time would give the testator a reasonable time to learn of and respond to the beneficiary's death. The Maryland law and my proposal are explored in more detail in Part III, below.

2. Simultaneous Death

Problems posed by deaths occurring "simultaneously" have fascinated the probate bar and the wider public, and for good reason. The increasingly fast pace of living in the 20th century, made possible by new

¹⁷⁵ See, e.g., *Zweifel v. Dougherty*, 761 S.W.2d 215, 218 (Mo. Ct. App. 1988) (discussing a present interest conveyed by a deed).

¹⁷⁶ See, e.g., 760 ILL. COMP. STAT. ANN. 5/5.5.

¹⁷⁷ See, e.g., *Tait v. Cmty. First Tr. Co.*, 425 S.W.3d 684, 687–88 (Ark. 2012); *First Nat'l Bank of Bar Harbor v. Anthony*, 557 A.2d 957, 960 (Me. 1989).

forms of transportation, has made contemporaneous deaths a more prominent feature of the administration of estates.¹⁷⁸ A true simultaneous death would not satisfy the condition of surviving the testator imposed by the common law on will beneficiaries. But simultaneity of deaths is not itself the problem. Indeed, due to the infinite divisibility of time, there is surely never a truly simultaneous death.¹⁷⁹ The problem lies in the fact that the law is left to contend with our inability to calculate, especially in connection with deaths in a common disaster, the precise time of death of the testator and the legatee. For this reason, some deaths may appear to be simultaneous. The indeterminacy of the order of death places a heavy burden on those claiming entitlement to the estate by virtue of survivorship. Furthermore, the common law offers them no presumption of either simultaneous death or survivorship in such situations.¹⁸⁰ The problem relates to cases of lapse and to wills that expressly condition a bequest upon the survival of the recipient.

The solution to this problem devised by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) in 1940 was the Uniform Simultaneous Death Act (“USDA”). Although the USDA was meant to apply to cases where title to property “depends upon priority of death,” to joint tenancies, tenancies by the entirety, and insurance policies, the Act was limited to cases where no evidence showed that the parties had died other than simultaneously.¹⁸¹ The Act provided that, where “there is no sufficient evidence that the persons have died otherwise than simultaneously, the property of each person shall be disposed of as if he had survived.”¹⁸² The act propounded a useful presumption as an aid to distributing the estates of those who had died contemporaneously, but it did not diminish the amount of litigation aimed at establishing other than simultaneous death by adducing sufficient evidence that the beneficiary had survived the testator. Thus, gruesome details involving the rates and manner of decomposition of the corpses,¹⁸³ inhalation

¹⁷⁸ See UNIF. SIMULTANEOUS DEATH ACT pref. note (amended 1953), 8B U.L.A. 338 (2014).

¹⁷⁹ *Legacies and Devises*, *supra* note 71, at 692.

¹⁸⁰ See UNIF. SIMULTANEOUS DEATH ACT pref. note (amended 1953), 8B U.L.A. 338 (2014); *People v. Eulo*, 472 N.E.2d 286, 291 n.2 (N.Y. 1984); *Glover v. Davis*, 366 S.W.2d 227, 231 (Tex. 1963).

¹⁸¹ UNIF. SIMULTANEOUS DEATH ACT § 1 (amended 1953), 8B U.L.A. 342 (2014).

¹⁸² *Id.*

¹⁸³ See, e.g., *Specht v. Estate of Hartman*, 20 Pa. D. & C. 3d 735, 736 (Ct. Comm. Pl. 1981).

of noxious fumes during a catastrophe,¹⁸⁴ evidence of a violent struggle to survive,¹⁸⁵ response of the pupils to light,¹⁸⁶ the presence of brain waves,¹⁸⁷ the meaning of which required the testimony of expert witnesses, were the unsavory features of many cases in which survivorship was unclear. Litigating such cases in the past has not only been gruesome but administratively inefficient.¹⁸⁸

From the early 1940s until as late as 1972, the 1940 USDA was adopted in 47 states, the District of Columbia, and the United States Virgin Islands.¹⁸⁹ Twenty-two states, the District of Columbia, and the Virgin Islands later repealed the 1940 USDA in favor of the 1993 revised USDA,¹⁹⁰ discussed below. The 1940 version was also later repealed in both Michigan and Oregon, which had by that time enacted 120-hour survivorship requirements for both wills and intestacy.¹⁹¹ Ohio, which never had enacted the 1940 version of the USDA, enacted the 1993 version in 2002.¹⁹²

3. Survival by 120 Hours

The “complete inadequacy of the USDA to resolve many survivorship problems”¹⁹³ led NCCUSL to expand the amount of time required for survival under that provision beyond any amount of time to 120 hours, thus bringing the USDA into line with the UPC, which has required survival by 120 hours from its earliest iteration in 1969.¹⁹⁴ It had been common prior to that time for testators drafting their wills with the assistance of legal counsel to express “that a particular devisee or all devisees must survive the testator for a stated period.”¹⁹⁵ Estate planners

¹⁸⁴ See, e.g., *In re Bucci*, 293 N.Y.S.2d 994, 996 (Sur. Ct. 1968).

¹⁸⁵ See, e.g., *In re Campbell's Estate*, 641 P.2d 610, 613 (Or. Ct. App. 1982).

¹⁸⁶ See, e.g., *Janus v. Tarasewicz*, 482 N.E.2d 418, 420 (Ill. Ct. App. 1985).

¹⁸⁷ See, e.g., *id.* at 420–21.

¹⁸⁸ Halbach & Waggoner, *supra* note 3, at 1094.

¹⁸⁹ UNIF. SIMULTANEOUS DEATH ACT (amended 1953), 8B U.L.A. 337–41 (2014); UNIF. SIMULTANEOUS DEATH ACT (1993), 8B U.L.A. 317 (2014).

¹⁹⁰ UNIF. SIMULTANEOUS DEATH ACT (1993), 8B U.L.A. 317, 319–22 (2014).

¹⁹¹ See MICH. COMP. LAWS ANN. §§ 700.2104 (intestacy), 700.2702 (wills) (West 2015); OR. REV. STAT. ANN. §§ 112.572, 112.578 (West 2015).

¹⁹² See OHIO REV. CODE ANN. §§ 2105.31 *et seq.* (2015).

¹⁹³ J. Rodney Johnson, *The New Uniform Simultaneous Death Act*, 8 PROB. & PROP. May-June 1994, at 22, 23.

¹⁹⁴ UNIF. PROBATE CODE §§ 2-104(a), 2-702 (amended 2010) (UNIF. LAW COMM'N 1969).

¹⁹⁵ Effland, *supra* note 22, at 341. See also SCOLES ET AL., *supra* note 25, at 404 n.1. See, e.g., *In re Leete Estate*, 803 N.W.2d 889, 894 (Mich. Ct. App. 2010) (with respect to probate

recommend such provisions to avoid the difficulties and inefficiencies inherent in cases where deaths occur within a short period of time, not only in cases of common disasters. Courts, too, are sympathetic to the problem and have in the past devised ways of circumventing it. In one case, for example, the court construed the phrase “in a common disaster” to include a beneficiary who had been involved in the same automobile accident but who had actually survived the testator by a full two hours.¹⁹⁶ At the time of the accident, Florida did not require the survival of a will beneficiary by 120 hours.¹⁹⁷

Deaths that occur closely in time often affect the distribution of jointly held property. Under the USDA, failure to survive a co-owner by the requisite 120 hours would result in half of the property being distributed as if one of the co-owners had survived the other and the other half being distributed as if the other co-owner had survived. A Michigan case applying such a provision involved Frederick and Barbara Leete, an elderly couple who owned, as tenants by the entirety, a cottage that had been in Frederick’s family for about 100 years.¹⁹⁸ The husband had left the car running in the attached garage of their home, and the couple was asphyxiated by the noxious fumes. Barbara died that day, but Frederick lingered for four more days. Frederick’s share of the cottage went to his children in accordance with his will. But the wife’s daughter claimed a half interest in the cottage because Frederick had not survived Barbara by more than 120 hours.¹⁹⁹ Thus, even though Barbara predeceased Frederick, the cottage was not yet his sole property when he died. Frederick’s children vigorously opposed the claim, but Barbara’s daughter prevailed.²⁰⁰

The problems of “double administrative costs”²⁰¹ and “multiple administrations”²⁰² that result from property being probated in rapid succession through two different estates prompted NCCUSL, in the 1969 iteration of the UPC, to require that a devisee survive the testator by 120 hours.²⁰³ The UPC also applies the survival-by-120-hours requirement to

estate, husband’s will required wife to outlive him by 30 days; otherwise, property would go to children from a previous marriage).

¹⁹⁶ *Silver v. Schroeder*, 474 So. 2d 857, 860 (Fla. Dist. Ct. App. 1985).

¹⁹⁷ *Id.* at 861.

¹⁹⁸ *Leete*, 803 N.W.2d at 894.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 903.

²⁰¹ Halbach & Waggoner, *supra* note 3, at 1095.

²⁰² UNIF. PROBATE CODE § 2-104 cmt. (amended 2010) (UNIF. LAW COMM’N 1969).

²⁰³ *Id.* § 2-702.

intestate succession,²⁰⁴ but not if the result would be a taking of the property by the state in escheat.²⁰⁵ Many states now have 120-hour-survival requirements.²⁰⁶ They are not limited to wills and intestacy but can also be found in provisions designed for the protection of the testator's spouse and children, including the elective share,²⁰⁷ the homestead allowance,²⁰⁸ and provisions relating to will substitutes.²⁰⁹ Where the enactment of a 120-hour statute applicable to wills and intestacy does not explicitly repeal a simultaneous death provision modeled on the 1940 USDA, some courts have determined that the simultaneous death act has been implicitly repealed.²¹⁰

Double administration results in additional death taxes and the passing of the property directly to unintended beneficiaries.²¹¹ The Restatement suggests that the policy behind the rule is "to ensure that a decedent's property passes to a beneficiary who can personally benefit, as opposed to a beneficiary who became deceased a short time later, meaning that the property would ultimately pass to that beneficiary's heirs."²¹² The period of required survival, however, is only five days, so the personal benefit rationale seems a bit far-fetched. Some states, though, impose longer periods of required survival time,²¹³ and, of course, a testator is free to provide for an even longer time in her will. In one case, for example, the period of survival required by the will was thirty days. Because the beneficiary survived longer than thirty days, the testator's property was ultimately distributed to that beneficiary's heirs at law, rather than the alternate beneficiaries named in the will.²¹⁴

The legal effect of the failure of a beneficiary to survive for the required amount of time is that the beneficiary is deemed to have predeceased the testator.²¹⁵ As with anti-lapse provisions, if the will shows a

²⁰⁴ *Id.* § 2-104.

²⁰⁵ *See, e.g.*, 20 PA. CONS. STAT. ANN. § 2104(10) (West 2015) (intestacy statute).

²⁰⁶ *See, e.g.*, KY. REV. STAT. ANN. § 397.1002 (West 2015); MICH. COMP. LAWS ANN. § 700.2104 (West 2015); NEB. REV. STAT. ANN. § 30-2304 (West 2015); *id.* § 30-2339; N.J. REV. STAT. ANN. § 3B:3-32 (West 2015); 20 PA. CONS. STAT. ANN. § 2104(10).

²⁰⁷ N.Y. EST. TRUSTS & POWERS LAW § 2-1.6 (McKinney 2015).

²⁰⁸ *See In re Estate of Martelle*, 32 P.3d 758, 762 (Mont. 2001).

²⁰⁹ UNIF. PROBATE CODE § 2-702(b) (amended 2010) (UNIF. LAW COMM'N 1969).

²¹⁰ *See, e.g.*, UNUM Life Ins. Co. of Am. v. Craig, 26 P.3d 510, 516 (Ariz. 2001) (holding that 120-hour statute implicitly repealed earlier simultaneous death statute).

²¹¹ Effland, *supra* note 22, at 342.

²¹² *In re Leete Estate*, 803 N.W.2d 889, 901 (Mich. Ct. App. 2010) (citing RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 1.2 (AM. LAW INST. 1999)).

²¹³ *See, e.g.*, MD. CODE ANN., EST. & TRUSTS § 4-401 (West 2015).

²¹⁴ *In re Estate of Corrigan*, 358 N.W.2d 501, 505 (Neb. 1984).

²¹⁵ *See* UNIF. PROBATE CODE § 2-702 (amended 2010) (UNIF. LAW COMM'N 1969); MD.

contrary intention, the statute does not apply. In addition, as with anti-lapse statutes, the problems that stem from the application of this rule have largely to do with whether the testator has taken sufficient steps to indicate that he does not want the rule to apply to a particular devise. The testator's contrary intention²¹⁶ might take the form of requiring the beneficiary to survive a specific event. But finding a contrary intention can be particularly tricky if the will in question is not quite so specific, for example, if it contains an explicit survivorship provision but does not specify any specific duration of survivorship.

III. LAPSE AND INTENTION

The arbitrariness of the lapse doctrine has found it few defenders. Nonetheless, the doctrine has never received the thorough criticism it deserves. Commentators have chosen largely to deplore how it disadvantages the testator's close relations or to quibble about the details of the narrow statutory alterations to it that today we find embodied in anti-lapse legislation.²¹⁷ The main problem remains determining whether anti-lapse principles do an adequate job of tempering the perceived inadequacies of the lapse doctrine.

One way of addressing this question is to focus on the role of anti-lapse statutes in promoting testamentary intent. Carrying out the testator's actual intent is, after all, the "polestar" of wills law and the primary inspiration for the tenet that "no will has a brother."²¹⁸ Given the vagaries of testamentary preferences that stem from the relationships testators have actually experienced, the search for a testator's actual intent can feel like a "search after a phantom."²¹⁹ The reality is that, as Mechem has commented, "[p]robably no such thing exists."²²⁰ This may be why the primary tools for ascertaining a testator's actual intent, the plain meaning rule and the admission of extrinsic evidence, are frequently inadequate to the task at hand and why the law of wills as a result is so replete with presumptions of what a reasonable person would intend. We would do well to admit, as Fellows has, that the law does not do a par-

CODE ANN., EST. & TRUSTS § 4-401; *Jordan v. Anderson*, 421 N.W.2d 816, 819-20 (N.D. 1988).

²¹⁶ COLO. REV. STAT. ANN. § 15-11-601 (West 2015).

²¹⁷ Cooley, *supra* note 43, at 374.

²¹⁸ *Hammons v. Hammons*, 327 S.W.3d 444, 448 (Ky. 2010); *see also In re Corrigan*, 358 N.W.2d 501, 503 (Neb. 1984).

²¹⁹ *In re Chalmers' Will*, 190 N.E. 476, 478 (N.Y. 1934).

²²⁰ Mechem, *supra* note 65, at 2.

ticularly good job of discovering a deceased person's preferences where none have been expressed.²²¹ Left with doubts about a testator's actual intent, courts are left to conjure the "average actual intent" or probable intent of reasonable testators.²²² Legislators are left to speculate on what most people would want under the circumstances and to develop guideposts to help decision makers come as close to the intent of the testator as the evidence before them will allow.²²³ Anti-lapse statutes play a part in this interpretive alchemy through their supposed reasonable approximation of a testator's "probable wishes."²²⁴

Anti-lapse statutes are blunt, as Susan French has theorized, precisely because the intent-discerning enterprise is so prone to error.²²⁵ But in another sense, anti-lapse statutes are not blunt enough. They are so narrow as to seem tentative. And their relentless emphasis on consanguineous succession imports principles of intestate succession into the construction of a will in a manner that seems incongruous if not indeed intent-defeating.²²⁶ In Mark Ascher's estimation, "[M]ost testators expect *their wills* to dispose of their property *completely*—without interference from a statute of which they have never even heard."²²⁷ To borrow so heavily from intestacy to fill what we perceive to be gaps in wills seems short-sighted and imprecise. To be fair, as Verner Chaffin has put it, "No anti-lapse statute can ever be expected to reach desirable results in all cases, since legislation of necessity must pour everyone into the same mould and cannot hope to meet the varying needs and desires of different individuals under infinitely varying circumstances."²²⁸ There is no justification, however, for making intestate distribution the default setting in cases in which the testator's will is not incomplete; he has given no indication that he desires the beneficiary to have actual possession of the bequest, and he exhibits his understanding of the importance of wills by drafting one in the first place. Seen in this light, the traditional

²²¹ Fellows, *supra* note 66, at 637.

²²² Casner, *supra* note 118, at 751.

²²³ See Mechem, *supra* note 65, at 2 (noting that it is impossible to secure data as to average actual intent).

²²⁴ Cooley, *supra* note 43, at 374.

²²⁵ See French, *supra* note 5, at 348.

²²⁶ Cooley, *supra* note 43, at 394 ("A liberal admixture of public policy in favor of direct issue of testators must be read into this decision to obscure the fact that any such generality will manifestly interfere with the intent of many testators who were fully apprised of the state of their families when they made their wills.").

²²⁷ Mark L. Ascher, *The 1990 Uniform Probate Code: Older and Better, or More Like the Internal Revenue Code?*, 77 MINN. L. REV. 639, 654 (1993) (emphasis in original).

²²⁸ Chaffin, *supra* note 11, at 309–10.

approach to anti-lapse legislation seems less geared to ascertaining testators' reasonable intent than it does to resolving doubtful cases quickly and efficiently. An emphasis on efficiency would explain why anti-lapse statutes rely so heavily on the preference for consanguineous succession we find in intestacy law.

Fashioning an appropriate rule to address lapse will require us to define with more clarity what we mean when we speak of the intention of a testator. Given the insistence that finding and carrying out the intention of the testator are what wills law strives toward above all, it is no wonder that the dominant message about the importance of intention has obscured the primary drivers of testamentary transfers, the desires and expectations of the testator and the actions taken by both the testator and the executor or administrator of the estate. A will is essentially a set of declarations laying out what the testator desires to become of his property when he dies. A will can serve other purposes, too, of course, such as expressing the testator's values or giving voice to other matters.²²⁹ But when we speak of testamentary intentions, we mean primarily the testator's desired disposition of his property. In addition to expressing the testator's desires, a will also embodies a testator's expectation that the law will uphold his wishes through the probate process after he dies.²³⁰ Thus, the action of a testator in executing a will and the actions he expects his directions will bring about after his death are both essential to realizing a testator's individually crafted estate plan.²³¹

Intestacy, by contrast, since it is an estate plan by operation of law or by default, is premised not on the testator's action but her *inaction*. The agent appointed to distribute an intestate's property after his death carries out the estate plan the state has enacted to take effect in default of a valid will. Although "[a] person can intentionally refrain from action without trying to do so[.]"²³² it is generally believed that decedents die without wills because they fear death and the cost of executing wills, not

²²⁹ Karen J. Sneddon, *Speaking for the Dead: Voice in Last Wills and Testaments*, 85 ST. JOHN'S L. REV. 683, 729, 740–48 (2011) (describing ethical wills and explanations in wills).

²³⁰ Jane Baron, *Intention and Stories*, 42 DUKE L.J. 630, 633 (1992); *Anti-Lapse Statutes*, *supra* note 78, at 1219 (describing the coordination of "testamentary desire with legal effect"). Of course the law does refrain from carrying out provisions in wills that are against public policy. *See, e.g.*, Girard Tr. Co. v. Schmitz, 20 A.2d 21, 36 (N.J. Ch. 1941) (provision would sow discord in family).

²³¹ *See* JOHN R. SEARLE, INTENTIONALITY: AN ESSAY IN THE PHILOSOPHY OF MIND 80, 92 (1983).

²³² Peter Cane, *Mens Rea in Tort Law*, in INTENTION IN LAW AND PHILOSOPHY 129, 131 (Ngaire Naffine et al. eds., 2001).

because they prefer the default estate plan crafted by the state.²³³

What we have come to call intention in wills is a convenient but clumsy shorthand for a formalized expression of desire, a “faded form of intention,” as John Searle puts it, “with the Intentional causation bleached out.”²³⁴ Firm distinctions have been drawn between desire and intention in the criminal law,²³⁵ but in speaking of wills, by desire I do not mean to suggest that the testator must experience pleasure or satisfaction or harbor some benevolent motive in picturing the property in the hands of the beneficiary. I mean merely that she “aims at” the property being within the beneficiary’s control.²³⁶ When a testator devises Blackacre to X, for example, she may be motivated to benefit or burden X, but what is certain is that X’s control of Blackacre is her aim. It matters little whether the testator expresses her desire with “I desire that X have Blackacre” or “I want Blackacre to go to X” or “I direct my executor to convey Blackacre to X.” The testator wants X to have Blackacre and by embodying this expression of her desire in her will directs that that result be brought about upon her death. Thus, despite the theory that Blackacre will vest in X immediately upon death of the testator,²³⁷ the testator does not actually intend to give Blackacre to X but desires that Blackacre be given *to* her. The testator acts to make his wishes known in a correctly executed document, but the actions he envisions occurring with respect to his property are by definition ones that he will not be present to bring about. An agent, usually named in the will, will be responsible for putting its provisions into action. In essence, then, the will is a set of directions to an agent, perhaps the one the testator has named in the will but certainly the one a court will appoint. The law encourages the expectation a testator has that some agent will take control of carrying out her desires after he has passed away.²³⁸

Some will object to my definition of intention in terms of desire by pointing out that the testator’s declarations must be sufficiently directive so as to carry them beyond mere precatory language. The words must show testamentary intent, not merely a request or entreaty that stops

²³³ See *DUKEMINIER ET AL.*, *supra* note 12, at 71–72.

²³⁴ SEARLE, *supra* note 231, at 36.

²³⁵ Sir Anthony Mason, *Intention in the Law of Murder*, in *INTENTION IN LAW AND PHILOSOPHY* 107, 113–15 (Ngaire Naffine et al. eds., 2001).

²³⁶ G.E.M. ANSCOMBE, *INTENTION*, 18 (2d ed. 1985); Cane, *supra* note 232, at 131.

²³⁷ *In re Estate of Fitzsimmons*, 86 A.3d 1026, 1035 (Vt. 2013) (referring to “the rule of immediate passage”).

²³⁸ See 96 C.J.S. *Wills* § 902 (2016).

short of a command or direction.²³⁹ In practice, precatory language rarely gets in the way of discerning a testator's testamentary aims because it is invariably used in connection with a gift outright that is in no way ambiguous. In other words, when the words are meant to govern conduct they are an "expression of testamentary desire" but when they are a mere "expression of opinion or offering of advice" they can be construed as "nothing more."²⁴⁰ The statement "I desire A to have Blackacre" would be considered precatory if mentioned in conversation or scribbled on a to-do list.²⁴¹ It would be considered testamentary if embodied in a validly executed will.²⁴² The proper execution of the will is sufficient to carry what would otherwise be considered precatory language into the realm of testamentary intent.

The real question raised about the use of precatory language in wills is whether the testator intended to impose a condition on a beneficiary's use of the property.²⁴³ The classic example of precatory language is one where the testator bequeaths Blackacre outright "to [A] and it is my wish and desire that [B] should be able to live on the land during her life."²⁴⁴ The testator intends that A receive Blackacre but does not intend to make it compulsory for A to allow B to live there. She is merely making a request.²⁴⁵ In other words, X wants to leave it up to A to decide how to behave toward B but wants A to know her preferences in the matter.²⁴⁶ If T makes a monetary bequest "to C with the hope that C will care for D," she wants C to decide whether he will use the money to care for D and hopes he will. None of the precatory language in these examples makes the gifts to A and C conditional; it thus does not get in the way of A and C's obtaining control of the property. In both cases, the testator has stated what she wants carried out by her agent and what she

²³⁹ *Precatory*, 8 THE GUIDE TO AMERICAN LAW 252 (1984).

²⁴⁰ See GARDNER, *supra* note 122, at 33.

²⁴¹ See, e.g., *In re Henry's Estate*, 248 N.W. 853, 855 (Mich. 1933) (holding document was not a will but a letter requesting assistance with modifying a will).

²⁴² See *In re Collias' Estate*, 233 P.2d 554, 556 (Cal. 1951); *In re Bosworth*, 55 N.Y.S.2d 422, 425 (App. Div. 1945); *Langehennig v. Hohmann*, 163 S.W.2d 402, 406 (Tex. Comm'n App. 1942).

²⁴³ See, e.g., *Byars v. Byars*, 182 S.W.2d 363, 364-67 (Tex. 1944); *Singer v. Singer*, 196 S.W.2d 938, 939 (Tex. Civ. App. 1946) (using expression of desire that trustees "keep said estate together for ten years after my death").

²⁴⁴ DUKEMINIER & JOHANSON, *supra* note 33, at 456.

²⁴⁵ See, e.g., *Byars*, 182 S.W.2d at 364; *Banks v. Banks*, 262 S.W.2d 119, 121 (Tex. Civ. App. 1953).

²⁴⁶ See, e.g., *Lux v. Lux*, 288 A.2d 701, 703 (R.I. 1972) (expressing "desire" that real estate be sold to a member of her family in the event that such property is sold to pay estate's debts).

wants left to the discretion of A and C.²⁴⁷

These reflections on the meaning of testamentary intentions establish that they are desires formalized as directions to an agent. As mentioned above, testamentary intentions reflect the testator's wills-mindedness, a state of mind focused on providing a mechanism by which testamentary desires can be carried out. These understandings tell us little about what a testator wants to happen to his property if his chosen beneficiary predeceases him. Since wills law is committed above all to carrying out the testator's intent, it seems anomalous to revert so automatically to a regime resembling intestate distribution, the embodiment of the absence of testamentary intent. Such an approach completely eliminates the testator's wills-mindedness from the equation, substituting for it an outcome that seems above all aimed at easing the administration of estates. In this posture, the state is deciding what the testator's intentions should be rather than doing its utmost to honor his expectations. Since the usual testamentary bequest aims to place property within the control of the beneficiary, it would be more in keeping with the testator's wills-mindedness to allow the property to be controlled by the predeceased beneficiary's will. Where the beneficiary has a will of her own, she has demonstrated a wills-mindedness with which the testator can directly identify. The traditional defenses of the rule of lapse and the anti-lapse regimes that have arisen to temper its ills completely ignore the likelihood that in choosing a particular beneficiary a testator is not seeking to benefit his issue, whether or not the beneficiary is a close family member and whether or not the beneficiary dies first. Instead, unless the testator places specific conditions on the testamentary gift, he wishes the beneficiary to assume control of the property to the extent of allowing a predeceased beneficiary's own will to direct the disposition of it.

My proposal, then, is for amending the currently prevailing anti-lapse provisions that are reflections of intestate distribution norms. The new default rule should be that a bequest does not lapse when the predeceased beneficiary's estate is disposed of through a validly executed will and the beneficiary died within one year of the testator. The will of the beneficiary should be probated,²⁴⁸ in order to remove all doubt about the

²⁴⁷ See, e.g., *In re Oliver's Will*, 42 N.Y.S.2d 865, 870 (Sur. Ct. 1943).

²⁴⁸ By statute, wills are supposed to be presented and filed in the clerk's office. See, e.g., FLA. STAT. ANN. § 732.901(1) (West 2015); TEX. EST. CODE ANN. § 252.201 (West 2015). But not every will is probated, as in cases where a surviving spouse is already in possession of the property in the estate and simply continues in possession. See, e.g., *In re Estate of Zim-*

beneficiary's intentions and the enforceability of his will's provisions. The default rule favoring the beneficiary's will could be overridden where the will itself requires that the beneficiary survive the testator or provides that a gift lapses on the death of a beneficiary before distribution of the estate.²⁴⁹ Such provisions would indicate that the testator did *not* want a predeceased beneficiary's estate plan to control the disposition of the property, probably because she desired the beneficiary to have actual possession of the property. The rule would not apply where the predeceasing devisee died intestate. Intestacy may be an estate plan by operation of law, but it is unlikely that those who have died without a will have consciously elected the scheme designed for them by the state. To distribute the property to the predeceasing devisee's heirs at law in such cases would, in the words of the Supreme Court of Alabama, implicate the court in making a will for her.²⁵⁰ In such circumstances, "[t]he court cannot say what would have been the wish of the testatrix had she had a chance to express it."²⁵¹ If the beneficiary is one of the testator's heirs at law, however, the property should be distributed to the beneficiary's heirs.

This is not the first proposal for expanding anti-lapse, though prior ones have perhaps not been quite as far-reaching.²⁵² I believe, though, that there is good reason for broadening anti-lapse provisions. First, as we have seen above, the lapse doctrine is difficult to square with a testator's intention. Second, anti-lapse statutes are tepid attempts to address this problem and rely, in a wills context, on intestacy law's preference for consanguineous succession. NCCUSL's move to expand the class of legatees to which anti-lapse applies is a step in the right direction, but it does not go far enough. The real problem is that substituting issue does not appear to be in keeping with the policy for carving exceptions out of the lapse rule in the first place.

Currently, only one jurisdiction in the United States distributes lapsed property to the predeceased beneficiary's heirs or devisees. The

merman, 485 P.2d 215, 217 (Kan. 1971); *Wetzel v. Watson*, 328 S.E.2d 526, 528 (W. Va. 1985).

²⁴⁹ See, e.g., *Estate of Hampe*, 193 P.2d 133, 135 (Cal. 1948) (discussing a will requiring a beneficiary to survive the issuance of the decree of distribution); *In re Greacen*, 54 N.Y.S.2d 426, 427 (Sur. Ct. 1945).

²⁵⁰ *Morgan Cty. Nat'l Bank of Decatur v. Nelson*, 13 So. 2d 765, 768 (Ala. 1943).

²⁵¹ *Id.*

²⁵² See, e.g., Chaffin, *supra* note 11, at 287, 294 (advocating expansion of Georgia's anti-lapse statute to class gifts where one or all of the class die either before or after the execution of the will but before the testator).

Maryland statute substitutes the beneficiary's heirs if she died intestate and her legatees if she died testate.²⁵³ A more complete abrogation of the default lapse doctrine can scarcely be imagined. As Eugene Scoles put it, "How, if at all, is Maryland's lapse statute different from simply rejecting the basic lapse rule that requires the devisee to survive the testator?"²⁵⁴ As noted above, this approach is based on the legal theory of fictitious survivorship, a theory that the standard American anti-lapse statute rejects in favor of substituting the issue of the predeceased legatee.

Maryland's anti-lapse statute is not without its problems. *Simpson v. Piscano*,²⁵⁵ the first case in which Maryland's high court first construed the statute, involved the reciprocal wills of a husband and wife, wherein the estate of each was devised to the other. Bernard predeceased his wife Leona by a little over a year. Upon Leona's death, the quandary was that Bernard's will directed his lapsed legacy back to Leona.²⁵⁶ A court applying an anti-lapse provision that does not rely upon the principle of intestacy law that property is never distributed to or through the estate of a predeceasing heir²⁵⁷ will eventually confront a case where the beneficiary of the predeceased beneficiary's estate will also have predeceased the testator. This is not a problem *per se*, of course. In *Simpson*, the real problem was that the beneficiary's will directed the property back to its source, the testator herself.²⁵⁸ The superior court sensibly concluded that under those specific circumstances, the anti-lapse statute becomes inoperative.²⁵⁹ Since Bernard died testate, the statute directed the terms of his will to control the disposition.²⁶⁰ It was not until Bernard's will was found to bequeath the property to Leona, that the statute could no longer be applied.²⁶¹ Instead of having the property bounce

²⁵³ MD. CODE ANN., EST. & TRUSTS § 4-403(b) (West 2015).

²⁵⁴ SCOLES ET AL., *supra* note 25, at 405.

²⁵⁵ 419 A.2d 1059 (Md. 1980).

²⁵⁶ *Id.* at 1061–62.

²⁵⁷ Case law and commentary are clear that the issue or heirs entitled to take under an anti-lapse provision are those who survive the testator, not the legatee. *See, e.g.*, *McAllister v. McAllister*, 167 N.W. 78, 81 (Iowa 1918) (only heirs of predeceased legatee who survived testator were entitled to take); *Anti-Lapse Statutes*, *supra* note 78, at 1218 (“[I]f the legatee dies intestate, his heirs take not by substitution but by descent from the legatee, and are determined as of the date of the legatee’s notional death, immediately after that of the testator.”).

²⁵⁸ *Simpson*, 419 A.2d at 1061.

²⁵⁹ *Id.* (“[W]hen the property arrives back at the starting gate . . . the anti-lapse statute becomes ineffective . . .”).

²⁶⁰ *Id.* at 1061.

²⁶¹ *Id.*

back and forth between the two estates, the court's approach was to take the statute as far as it would go, and the result was as if Leona had died intestate.²⁶² The Maryland Court of Appeals affirmed this result.²⁶³

The question of the application of Maryland's statute to reciprocal wills is perhaps easier to resolve than is the hypothetical posed by the dissent in *Simpson*. If Leona's will had devised her estate to X who predeceased her, and X's will had bequeathed everything to Y, who also predeceased Leona, "[w]hen does the chain end?"²⁶⁴ The dissent found it "ludicrous" and "absurd" "to apply a fiction which would place beneficiaries in a chain composed of persons whom the testatrix would have no intention to benefit and who were strangers."²⁶⁵ In fairness, this is precisely what the statute appears to contemplate. What the dissent misconstrues is that the testamentary mindset of a testator may well be to benefit the strangers whom her named beneficiary wished to benefit. When a beneficiary does outlive the testator, the testator understands quite well that the beneficiary has the power to benefit strangers with gifts of the property and certainly intends "to pass the power of testamentary disposal along with her gift."²⁶⁶ That is why my proposal is limited to situations where the predeceased beneficiary also has a will. I would limit the breadth of anti-lapse reform to cases where the beneficiary has also acted with testamentary intentionality. I am not at all convinced, for the reasons given above, that the same rationale applies where the beneficiary has died intestate and would even be more opposed to the property's being distributed through successive intestate estates. I am also convinced that, in cases where a beneficiary has died more than one year before the testator, the testator's wills-mindedness should lead her to revisit her will and make clear that she wants the predeceased beneficiary's beneficiaries to receive the bequest if in fact she does.

In further defense of the Maryland statute, it bears repeating that the provision does not distribute the property to the predeceased beneficiary's estate but merely substitutes, in the *testator's* estate, the beneficiaries named in his will. Indeed, under a traditional anti-lapse statute, it has been emphasized many times that the property does not pass to the representative of the predeceasing legatee or under his will²⁶⁷ but under

²⁶² *Simpson*, 419 A.2d at 1061.

²⁶³ *Id.* at 1063.

²⁶⁴ *Id.* at 1066 (Cole, J., dissenting).

²⁶⁵ *Id.* at 1067.

²⁶⁶ See *Anti-Lapse Statutes*, *supra* note 78, at 1220.

²⁶⁷ Mechem, *supra* note 65, at 21 (citing cases).

the will of the testator such that they become devisees in that will by substitution.²⁶⁸ As was also mentioned previously, an anti-lapse statute based on the model we find in Maryland is not a statute that requires the reopening of probate of an estate that has already been closed. The statute merely tells us where to locate the evidence necessary to complete the disposition of the testator's estate. In this way, it allows us to move beyond old notions about expectancies²⁶⁹ and one's estate being capable of disposing only of property he possesses upon his death.²⁷⁰ Furthermore, referring to the terms of the legatee's will to make the distribution in no way runs the risk of engaging in a "double probate." Further support for this approach to lapse is documented in the section that follows.

IV. DOCTRINAL SUPPORT FOR A REVISED APPROACH TO ANTI-LAPSE

The analysis above establishes that when a testator bequeaths property to a beneficiary who predeceases the testator leaving a valid will, the more likely scenario is that the testator intends for the beneficiary's will to control the lapsed gift. In this section, I discuss two doctrines relating to the interpretation of wills and an estate planning device all of which offer some support for my analysis.

A. *Acts of Independent Significance and Extrinsic Evidence*

Wills act as a mean to combat fraud by requiring that testamentary transfers satisfy certain formal requirements. It is believed that formalities such as signing the will at the end and having witnesses attest have evidentiary and cautionary functions that counterbalance the ease with which potential heirs can make statements of self-interest that the testator cannot be present to contradict.²⁷¹ Although the primary purpose of such acts may be to combat the fraud of self-seeking heirs, they place a heavy burden on testators as well. Since their estate plans must be fully embodied in a properly executed writing, the law circumscribes the ability of testators to change their estate plans informally. It would not be

²⁶⁸ R.I. GEN. LAWS ANN. § 33-6-19 (West 2015) ("[S]uch devise or bequest shall not lapse, but shall take effect and operate as a devise or bequest from the testator to that issue . . ."); *In re Conner's Estate*, 36 N.W.2d 833, 841 (Iowa 1949); Chaffin, *supra* note 11, at 272, 276.

²⁶⁹ See, e.g., *McLaughlin v. McGee*, 101 A. 682, 686 (Md. 1917).

²⁷⁰ See, e.g., *Glenn v. Belt*, 7 G. & J. 362, 367-68 (Md. 1835).

²⁷¹ See MCGOVERN ET AL., *supra* note 15, at 157.

adequate, for example, for a will to direct that property be distributed according to a memorandum that was prepared *after* the execution of the will.²⁷² Once a testator has executed his will, he cannot make an enforceable testamentary decision that alters the disposition of his probatable estate beyond revoking it entirely or in part without formally executing a codicil or a new will.²⁷³

This is not to suggest that wills law is devoid of flexible rules of interpretation. The doctrine of independent significance or nontestamentary acts refers to beneficiary or property designations in wills that are determined by “acts or events that have a lifetime motive and significance apart from their effect on the will.”²⁷⁴ “Lifetime motive” refers to a motive of the testator,²⁷⁵ not someone else; otherwise, the doctrine would be swallowed by the necessity in almost every construction of a will to resort to extrinsic facts.²⁷⁶ Take class gifts, for example. In a gift to A’s children, the children of A living at the time of the testator’s decease will take the property. A may have predeceased the execution of the testator’s will, in which case there will be no additional children of A than exist at that time. If A outlives the execution, A may begin having children or have additional children before the testator’s death. Since A’s decision to have children or not to have them is not a “lifetime motive” of the testator, we would not say that A’s having children is an act of independent significance. Likewise, the direction to “give ten dollars to each of the members of my family whose name is recorded in the family Bible kept by my Uncle Ned” refers to the acts of Uncle Ned and not of the testator.²⁷⁷ The misnomer “facts of independent significance”²⁷⁸ leads us to believe that any fact that helps determine the identity of the takers or the property under the will is a fact of independent

²⁷² See, e.g., *Cyfers v. Cyfers*, 759 S.E.2d 475, 481–82 (W. Va. 2014).

²⁷³ This might not be completely accurate in the context of holographic wills. There are cases that allow the testator to change the will in his handwriting without signing it again. See, e.g., *Stanley v. Henderson*, 162 S.W.2d 95, 97 (Tex. Comm’n App. 1942).

²⁷⁴ *DUKEMINIER ET AL.*, *supra* note 12, at 323.

²⁷⁵ *SCOLES ET AL.*, *supra* note 25, at 160 (referring to acts “peculiarly within the control of the testator”).

²⁷⁶ See *id.*; see also *WAGGONER ET AL.*, *supra* note 69, at 281 (citing *Stubbs v. Sargon*, 40 Eng. Rep. 1022, 1024 (Ch. 1838)).

²⁷⁷ This example is taken from *SHAFFER & MOONEY*, *supra* note 46, at 86.

²⁷⁸ See, e.g., *Tierce v. Macedonia United Methodist Church*, 519 So. 2d 451, 456 (Ala. 1987); *MCGOVERN ET AL.*, *supra* note 15, at 249; *SCOLES ET AL.*, *supra* note 25, at 160; *SHAFFER & MOONEY*, *supra* note 46, at 86. The term “acts of independent significance” may be confusing to some who are familiar with this term from insurance law. In that body of law, an act of independent significance is one that breaks the chain of causation. See, e.g., *Doe v. State Budget and Control Bd.*, 523 S.E.2d 457, 458 (S.C. 1999).

significance. This may be true as a matter of will construction, where courts use extrinsic evidence to identify the property and the takers of it,²⁷⁹ but referring to this process as involving facts of independent significance distracts us from the purpose of the doctrine which is to determine what *acts* of the testator beyond the execution of the will can be given effect in a distribution of the estate.

“Lifetime motive and significance” refers, in addition, to nontestamentary purposes and effects, that is, “not be[ing] solely for the purpose of supplementing the will.”²⁸⁰ The concern is that the testator may be altering his estate plan (beyond revocation) without the required formalities. Many of the testator’s decisions regarding his property will affect what the beneficiaries ultimately take but will have little or nothing to do with a desire to alter his estate plan. We should be satisfied that such actions need not be the subject of testamentary formalities as long as they “have a substantial significance apart from their impact on the will.”²⁸¹ What if, instead of a gift to A’s children, the testator’s will contains gifts of “the automobile that I own at my death” to “my children” and of \$1,000 “to each person who shall be in my employ at my death?”²⁸² As long as we are satisfied that the decisions regarding what automobile to own or whom to employ have to do with matters apart from modifying the estate plan, there should be no objection to allowing them to influence the final disposition of the property. For example, the identity of the employees, the children, and the car the testator drives likely lie in the testator’s desire to drive a particular car, his wanting a family of a certain size, and his convictions about how he should run his business rather than how he wants his estate distributed. They are “the kind of thing that would occur without regard to their effect on the will.”²⁸³ We have faith in the use of these events because they are performed “for some reason other than the effect it would have on the testamentary disposition, notwithstanding that it might occur or be done, or did occur or was done, for the purpose of affecting the testamentary disposition.”²⁸⁴ Even what the residue consists of may be influenced by many actions of

²⁷⁹ See *In re Tipler*, 10 S.W.3d 244, 246–47 (Tenn. Ct. App. 1998) (citing SCOTT ON TRUSTS § 54.2 (4th ed. 1987)).

²⁸⁰ *Tierce*, 519 So. 2d at 456.

²⁸¹ SCOLES ET AL., *supra* note 25, at 160 (emphasis omitted).

²⁸² This example is taken from DUKEMINIER ET AL., *supra* note 12, at 323–24, and is slightly altered from the original.

²⁸³ SCOLES ET AL., *supra* note 25, at 160.

²⁸⁴ RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.7 cmt. a (AM. LAW INST. 1999).

the testator after the will's execution.²⁸⁵ Bequests of "contents" are no different.²⁸⁶ The cases decided and the statutes passed to make clear that such bequests do not include cash or "titled property"—e.g., property evidenced by deeds or bank passbooks—arise less from a concern that the testator has engaged in a nonformalized testamentary act than from the conviction that his intent in describing the contents of a drawer or box in so pedestrian a way could not have encompassed such items.²⁸⁷

Cases involving wills that direct that the estate be distributed using someone else's estate plan bear some resemblance to my proposal that a predeceased beneficiary's will control the lapsed devise. Such a case was *In re Tipler*.²⁸⁸ In this case, Gladys Tipler's will directed that her estate be distributed to the beneficiaries named in her husband James's will if James predeceased her. He did, having executed a will several years after she did. Tipler's heirs challenged the provision because James's will was not yet in existence when she executed her will.²⁸⁹ The court upheld the devise as a proper exercise of the doctrine of independent significance.²⁹⁰ The *Tipler* decision cites a number of other cases where wills that direct the distribution of property in accordance with the will of another were upheld as legitimate exercises of the independent significance doctrine.

Despite the court's analysis in *Tipler*, it is important to recognize that it technically is not a case involving acts of independent significance. This is because James's will was his act, not Gladys's. The case is no different from one construing a will that gives property to "my surviving sisters" or "the current mayor of New York City." All that is required in such cases is extrinsic evidence to clarify the identity of the beneficiary. Indeed, the court in *Tipler* appears unsure whether the case presents a simple matter of identifying the beneficiaries through extrinsic evidence or whether it might be akin to a power of appointment or some looser form of incorporation by reference.²⁹¹ But this case has nothing to do with incorporating unattested material into the testator's will. Nor does it involve a testator's giving someone the right to "finish" his estate plan via a power of appointment. The testamentary significance of the beneficiary's will makes this a simple matter of extrinsic

²⁸⁵ SCOLES ET AL., *supra* note 25, at 160.

²⁸⁶ *See, e.g.*, *Old Colony Tr. Co. v. Hale*, 18 N.E.2d 432, 433 (Mass. 1939).

²⁸⁷ *See, e.g.*, *Creamer v. Harris*, 106 N.E. 967, 968 (Ohio 1914).

²⁸⁸ 10 S.W.3d 244 (Tenn. Ct. App. 1998).

²⁸⁹ *Id.* at 245–46.

²⁹⁰ *Id.* at 249.

²⁹¹ *See id.* at 247–48.

evidence. The use of the beneficiary's will would simply be to identify the beneficiaries named therein, and there would be no need to reopen the estate of the beneficiary.²⁹² For this reason, the creditors of the deceased beneficiary would have no interest in the property as they would if the gift were a gift to the beneficiary's estate.²⁹³

B. Powers of Appointment

Another legal theory that bears some resemblance to my proposal is the general testamentary power of appointment. A power is the grant of authority to dispose of the property of another. Although it is not itself a property right, in its broadest sense a power allows the donee of the power "to do any act which the donor himself or herself might lawfully perform."²⁹⁴ This would include the donee's appointment of the property to himself.²⁹⁵ But a power can also be narrower, crafted so that the donee of the power may appoint the property only to someone within a defined class of persons or may appoint the property only at a certain time, for example only during his lifetime or only at his death.²⁹⁶ In effect, a testator may appoint someone to "finish" his estate plan via provisions in the will of the donee of the power. The two wills are then construed together.

Does a testator, contemplating lapse, intend "to pass the power of testamentary disposal along with" whatever bequests he has made to predeceased legatees?²⁹⁷ Under current law, a legatee who survives the testator has precisely this power. But in most jurisdictions, the mere fact that the legatee has not outlived the testator is, under the dominant American approach to anti-lapse, a justification for depriving him of it. Nonetheless, there are at least two senses in which the power-of-appointment device reflects my proposal.

First, "[u]nder certain circumstances, the will of the testator and the will of another may be construed together."²⁹⁸ A will conferring a power

²⁹² RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 1.1 cmt. b, illus. 16 (AM. LAW INST. 1999); *Id.* § 1.2 cmt. g; *cf. Id.* § 16.1 cmt. c (class gift to "heirs").

²⁹³ See MD. CODE ANN., EST. & TRUSTS § 4-403(c) (West 2015); MCGOVERN ET AL., *supra* note 15, at 421 ("They would take directly from the testator, so the bequest would not be taxed in Alice's estate or subject to claims of her spouse or creditors.").

²⁹⁴ 72 C.J.S. *Powers* § 1 (2016).

²⁹⁵ *Id.* § 8.

²⁹⁶ *Id.*

²⁹⁷ *Anti-Lapse Statutes*, *supra* note 78, at 1220.

²⁹⁸ 96 C.J.S. *Wills* § 965 (2005).

of appointment by will and the will of the donee exercising such power is one such instance.²⁹⁹ The result is that “the interests or estates created by the exercise of a power of appointment take effect as if created by the instrument creating the power, and the appointee or beneficiary takes title under the donor of the power and not under the donee.”³⁰⁰ Under my proposal, as with powers of appointments, the provisions made by a predeceased beneficiary under a will would also be read into the will of the testator.³⁰¹ Reading the wills together in this way would allay the concern that distributing lapsed property to the beneficiaries named in the legatee’s will would necessitate two probates.

Second, if we analogize a predeceased beneficiary to the donee of a power and her will to the exercise of that power, then, as with powers of appointment, if the legatee fails to execute a will or it is invalid, the power would be deemed ineffectively exercised. In such a case, the property would be distributed as it would pursuant to the failure to exercise a power.³⁰² The “default takers” in a case of lapse would be the testator’s residuary legatees or his heirs at law or, if applicable, the substituted takers under the relevant anti-lapse provision. In short, if the predeceasing beneficiary had no valid will, then my proposed rule would not apply.

Although the power-of-appointment theory supports my proposal to change the contours of the typical anti-lapse statute, several characteristics of valid powers of appointment conspire to make this theory less supportive of my proposal than the principles of will interpretation discussed above. The primary problem with this theory is that a power of appointment cannot simply be read into a will that contains a lapsed legacy but must expressly be created by the donor of the power.³⁰³ Of course, the proposal I am making is one that has to do with wills that have no such language. I am certainly not proposing that, to avoid lapse, a testator would be required to direct that a gift to a predeceased beneficiary be distributed in accordance with that beneficiary’s will. On the

²⁹⁹ Republic Nat’l Bank of Dallas v. Fredericks, 274 S.W.2d 431, 440 (Tex. Civ. App. 1954), *rev’d on other grounds*, 283 S.W.2d 39 (Tex. 1955).

³⁰⁰ 72 C.J.S. Powers § 29 (2005).

³⁰¹ Second Nat’l Bank of New Haven v. Harris Tr. & Sav. Bank, 283 A.2d 226, 228 (Conn. Super. Ct. 1971); DUKEMINIER & JOHANSON, *supra* note 33 at 708; WAGGONER ET AL., *supra* note 69, at 989.

³⁰² See 72 C.J.S. Powers § 30 (2005).

³⁰³ *In re Estate of Krokowsky*, 896 P.2d 247, 250–51 (Ala. 1995); *McCuddy v. Citizens Fidelity Bank & Tr. Co.*, 505 S.W.2d 766, 767 (Ky. 1974); *In re Estate of Kohler*, 344 A.2d 469, 471 (Pa. 1975).

contrary, I am proposing a default measure that would apply in the absence of a specific intent to override it. The rule that a power must expressly be created to exist at all does not support this proposal.

Another difficulty is that, like the creation of powers, the exercise of a power of appointment must also be unequivocal.³⁰⁴ In other words, the instrument claimed as an exercise of the power must actually manifest an intention to exercise the power the donee has been given. Since the type of power that could serve as a model for my proposal is necessarily general, then a general residuary clause would have to be sufficient to exercise the power.³⁰⁵ But a general residuary clause is sufficient to exercise a power of appointment in only a minority of jurisdictions.³⁰⁶ The requirement that the exercise of the power by the beneficiary must be executed with specificity cannot be carried out by a beneficiary who is not aware that her will will serve to “appoint” lapsed property from the will of the testator. The rules governing the creation and exercise of powers of appointment, then, do not support my proposal to reform anti-lapse principles.

For the foregoing reasons, the power of appointment resembles my proposal only superficially. The donor and the donee of the power need to demonstrate too much intentionality to create and to exercise it. My proposal would operate by law and would not involve the affirmative acts of the testator in creating and exercising interests resembling a power of appointment or require the beneficiary to make affirmative statements in a will regarding devises to himself that lapse.

Given how embedded the principles of lapse and anti-lapse are in the law of wills, existing doctrine offers only limited support for my proposal to reform them. Although there are sound reasons for the reform I propose, as was true of the wave of anti-lapse legislation that currently holds sway within the American law of wills, such a reform will have to await the action of state legislatures.

³⁰⁴ See *Hartford-Conn. Tr. Co. v. Thayer*, 134 A. 155, 159 (Conn. 1926).

³⁰⁵ See *Beals v. State St. Bank & Tr. Co.*, 326 N.E.2d 896, 900 (Mass. 1975); *In re Smith's Will*, 108 N.Y.S.2d 290, 295 (App. Div. 1951); N.Y. EST. POWERS & TRUSTS LAW § 10-6.1(4) (McKinney 2015); 72 C.J.S. *Powers* § 27 (2005).

³⁰⁶ See, e.g., *Bank of N.Y. v. Black*, 139 A.2d 393, 396 (N.J. 1958); JOHN RITCHIE ET AL., *DECEDENTS' ESTATES AND TRUSTS* 929 (8th ed. 1993); WAGGONER ET AL., *supra* note 69, at 1000–01; MCGOVERN ET AL., *supra* note 15, at 488; 72 C.J.S. *Powers* § 27 (2005); see also Susan French, *Exercise of Powers of Appointment: Should Intent to Exercise Be Inferred from a General Disposition of Property?*, 1979 DUKE L.J. 747, 753.

V. CONCLUSION

Although the common law doctrine of lapse seems a harsh way to address cases in which a will beneficiary predeceases a testator, it remains a foundational principle of the law of wills. The policy rationale for the doctrine is a matter of some speculation, with some commentators suggesting it reflects the fact that the dead cannot own property and others suggesting that it reflects sensible estate planning. Rules that govern the disposition of property in cases of simultaneous death and that dictate that a beneficiary must survive the testator for a certain period of time help refine our understanding of how survival is established in the wills context, but they do not otherwise alter the common law of lapse.

The law of lapse appears to be a legal engine doing very little to advance wills law's primary goal—finding and carrying out the testator's intention. It acts as a default rule, operating in the absence of a stated intention to the contrary. The desirability of an alternative to the traditional disposition of property in lapse cases is firmly in evidence. Anti-lapse statutes exist in almost every state. They purport to remedy the remorselessness of the lapse doctrine by presuming that a testator would prefer his testamentary gift to a close family member to go to that relative's issue in the event of lapse. Anti-lapse rules operate in a manner familiar from intestacy law, favoring lines of consanguinity and descendants over ancestors.

We have little cause to believe that the reasonable testator, having taken the time to draft a will in the first place, would prefer lapsed devises to close relatives to be disposed of in a fashion so closely resembling what the state dictates should become of the property of those who die *without* wills. Instead, being wills-minded, a testator would likely prefer the valid testamentary plan of a predeceased beneficiary to control the disposition of the property if the beneficiary had predeceased her within a relatively short period of time. This new approach to lapse does not find support in the device it might at first blush resemble, the power of appointment, but it does find support in will interpretation principles and in the fact that an estate is just as valid a testamentary beneficiary as a living person. As an antidote not only to the law of lapse but to the narrow anti-lapse statutes that currently serve as exceptions to it, a wills-minded approach to lapse will prevent us from making the preferences of the state for efficiency and ease of administration serve as stand-ins for what the law of wills is supposed to promote above all else.