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Erich Tucker Kimbrough

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LAPSING OF TESTAMENTARY GIFTS, ANTILAPSE STATUTES, AND THE EXPANSION OF UNIFORM PROBATE CODE ANTILAPSE PROTECTION*

An implied assumption of the law of wills is that in order for an intended beneficiary to take under a will, that beneficiary must survive the testator.¹ When a testator makes a devise² to a devisee who has predeceased the testator, and the testator has not provided for a substitute taker, the devise lapses.³ At common law, a lapsed devise was distributed among the residuary legatees or became intestate property.⁴ If the residuary devise lapsed or there was no residuary clause, the property would be distributed through intestacy.⁵ Beginning in the late eighteenth century, legislatures in the United States and in Great Britain began to counter this harsh result by crafting statutes that would protect certain devises from lapsing.⁶ These statutes, commonly referred to as "antilapse" statutes, provide that when

* Professor John E. Donaldson provided invaluable and greatly appreciated assistance in the preparation of this Note.

1. RESTATEMENT (SECOND) OF PROPERTY § 34.6 (1985).

2. For the purposes of this Note, the term "devise" refers to testamentary gifts of real property as well as personal property, and "devisee" refers to the intended taker of a testamentary gift. The distinction between devises (testamentary gifts of realty) on the one hand and bequests and legacies (testamentary gifts of personalty) on the other does not generally influence the application of antilapse statutes.

3. See generally THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 140 (2d ed. 1953).

4. *Id.* at 777. Before the English Statute of Wills of 1837 (and similar statutes in the United States) testamentary gifts of real property were not ambulatory: a testator could only devise land that he owned at the time of the execution of the will. *Id.* § 4, at 21-22. Any land that the testator acquired after the execution of the will would be distributed via intestacy unless the testator executed a new will or codicil to the original will. *Id.* § 91, at 470. The residuary clause of the will applied only to personalty. Accordingly, if the testator made a devise of real property to a devisee who predeceased him, the residuary clause of the will could not be used to distribute the devise and the testator was deemed intestate as to that real property. *Id.* § 140, at 785.

5. *Id.* § 140, at 784. The reason for this result is a consequence of the theory of the law of wills. See also *infra* notes 82-86 and accompanying text.

6. See *infra* notes 33-38 and accompanying text.

a devisee within a particular class predeceases the testator, the devise does not fall into the residue or pass to the testator's heirs by intestacy but descends to the issue of the predeceased devisee.⁷

Both the common law rule of lapse and modern antilapse statutes are methods of disposing of a testator's property at the happening of an event that the testator failed to consider.⁸ For example, assuming that testators generally believe that their children will survive them, many testators will not provide for the possibility that a devisee-child will not survive. When a court confronts a situation in which a devisee has predeceased the testator, it must determine who should receive the gift. The common law rule, which gives lapsed testamentary gifts to the residuary or intestate takers, results from the evidentiary requirements of the law of wills⁹ and is completely neutral on the issue of actual or presumed testamentary intent. In contrast, antilapse statutes represent a legislative effort to implement the presumed intent of the testator when the testamentary directions are frustrated by conditions that the testator did not consider—namely, the death of a devisee.

Aside from Louisiana, which follows the civil law, all states in the United States now have some form of antilapse provision.¹⁰ These legislative efforts seek to effect presumed testamentary intent by implementing what a "typical" testator is believed to have desired. For example, suppose that *T* (testator) devises "Blackacre to my child Ann—residuary to my friend Bill," and Ann predeceases the testator leaving her surviving son, Xavier. Under the common law, the devise to the predeceased child Ann would lapse, and Bill would receive Blackacre. The common law result would leave *T*'s grandchild Xavier with nothing. Under the theory of antilapse legislation, *T* (being a typical testator) would have desired to avoid this result and provide for Xavier. In practice, almost all current antilapse statutes provide that the devise to Ann would descend directly to Xavier.¹¹

7. ATKINSON, *supra* note 3, § 140.

8. Patricia J. Roberts, *Lapse Statutes: Recurring Construction Problems*, 37 EMORY L.J. 323, 347 (1988).

9. See *infra* notes 82-86 and accompanying text.

10. See *infra* app. A.

11. See *infra* app. A. This result would not obtain, however, if *T* manifested an

In cases that are similar to the above example, the antilapse result probably effects testamentary intent more frequently than does the common law rule. The argument in favor of antilapse provisions is even stronger when a testator has devised the residuary to charity, assuming that the typical testator would probably desire that his family members be provided for before the charity. Statutory will construction methods that tend to implement actual testamentary intent correctly are, of course, laudable. Individual antilapse statutes, however, are commonly the target of criticism because many testamentary schemes are much more complex than the above example, and antilapse statutes frequently result in testamentary distributions which are contrary to obvious testamentary intent.¹²

Antilapse statutes also have been criticized for being too rigid and simplistic, and commentators suggest a variety of ways that these statutes should be modified.¹³ Additionally, the antilapse statutes in effect across the United States vary significantly. In fact, there is so much variation that no typical or "majority" antilapse statute exists. The differences among antilapse statutes reflect the difficulty that legislatures encounter in defining presumed testamentary intent across a broad spectrum of testators. This difficulty is exacerbated further by the complexity of probate law generally.¹⁴

When the Uniform Probate Code (UPC) first was drafted in 1969, it included an antilapse statute that has features similar to those of many of the antilapse provisions in force today.¹⁵ Article II of the UPC was revised in 1990, and with that revision, the drafters made significant changes to the antilapse statute. The revised statute was designed partly to correct some of the problems identified with antilapse statutes¹⁶ and partly to extend antilapse protection to areas which no antilapse stat-

intention that the antilapse statute should not operate. See *infra* notes 97-100 and accompanying text.

12. See cases cited *infra* notes 56, 62-63, 66, 69-70.

13. See generally Susan F. French, *Antilapse Statutes Are Blunt Instruments: A Blueprint for Reform*, 37 HASTINGS L.J. 335 (1985).

14. See *infra* notes 91-96 and accompanying text.

15. See *infra* notes 157-60 and accompanying text.

16. See *infra* notes 161-62 and accompanying text.

ute now covers.¹⁷ Thus far, there has been little scholarly commentary concerning the new statute beyond that regarding the statute's treatment of survivorship language.¹⁸

The purpose of this Note is to explore the theory of antilapse, explain the application of the antilapse statutes that are currently in effect, and discuss the problems that some of these antilapse statutes present. This Note will then discuss the 1990 UPC's revised antilapse statute and the goals of the drafters of that revision. Finally, this Note will examine how well the 1990 UPC antilapse statute deals with the problems that current antilapse statutes present.

The latest UPC revisions include some ill-advised changes to the antilapse statute. The UPC antilapse statute now treats a number of testamentary gifts in a questionable manner. Additionally, the UPC antilapse statute is unnecessarily confusing and invites increased litigation.

OPERATION OF THE DOCTRINE OF ANTILAPSE

History and Development

Lapse, according to the technical definition of the term, occurs only when the intended beneficiary of a devise is competent to take under the terms of the will at execution but dies or otherwise loses the capacity to take the property before the death of the testator.¹⁹ Technically, failed class gifts, void testamentary gifts,²⁰ and gifts that are renounced by the intended beneficiary have not lapsed.²¹ The distinction between lapsed devises, renounced devises, and devises that are void has been blurred

17. See *infra* notes 163-64 and accompanying text.

18. See, e.g., Mark L. Ascher, *The 1990 Uniform Probate Code: Older and Better, or More Like the Internal Revenue Code?*, 77 MINN. L. REV. 639 (1993); Martin D. Begleiter, *Article II of the Uniform Probate Code and the Malpractice Revolution*, 59 TENN. L. REV. 101 (1991). "Survivorship language" refers to the language in a devise, such as "to X, if he survives me," intended to prevent application of an antilapse statute.

19. ATKINSON, *supra* note 3, § 140.

20. A void gift arises when the testator devises property to one who is dead or otherwise lacks the capacity to take under the will at the time of the execution of the will. *Id.*

21. *Id.*

somewhat by courts and legislatures.²² Under most antilapse statutes, whether a devise has truly lapsed, become void, or been renounced is not considered a factor in the operation of the statute.²³ However, there are some statutes that, either expressly or through judicial interpretation, do not cover some void gifts.²⁴ For the purposes of this discussion, these distinctions generally will be ignored, but it is important to recognize that in some jurisdictions and under certain circumstances the various types of failed devises will be treated differently.²⁵

The term "antilapse" is a misnomer because antilapse statutes do not prevent lapse, they simply redirect a lapsed testamentary gift by providing substitute takers.²⁶ Generally, certain lapsed gifts, which at common law would fall into the residue or pass by intestacy, are given instead to the issue of the predeceased devisee.²⁷ Not all lapsed devises, however, are covered by antilapse statutes; many lapsed gifts still are subject to the common law rule.²⁸ Furthermore, antilapse statutes are rules of construction that do not operate if the testator manifests an intention within the will that the statute not apply.²⁹

Because there are significant variations among the antilapse statutes in effect in the United States,³⁰ it is difficult to explain adequately the application of antilapse statutes without first exploring their development.

The common law rule, under which all lapsed devises fell into the residue or passed by intestacy, engendered dissatisfaction because it often seemed to defeat the probable intent of testators who had failed to adequately provide for the possibility that a devisee would predecease the source.³¹ Accordingly, legislatures

22. WILLIAM J. BOWE & DOUGLAS H. PARKER, 6 PAGE ON THE LAW OF WILLS § 50.1. (W.H. Anderson, 1962 & Supp. 1994) [hereinafter PAGE ON WILLS]; see also UNIF. PROB. CODE § 2-801(d)(1) (1990) (treating one who has renounced a devise as having predeceased the testator).

23. ATKINSON, *supra* note 3, § 140.

24. See *infra* notes 142-51 and accompanying text.

25. See *infra* notes 148-54 and accompanying text.

26. UNIF. PROB. CODE § 2-603 cmt.

27. PAGE ON WILLS, *supra* note 22, § 50.10.

28. ATKINSON, *supra* note 3, § 140.

29. *Id.*

30. See *infra* notes 40-72 and accompanying text.

31. See French, *supra* note 13, at 337 nn. 11, 13 (quoting extensively from ENG-

began enacting statutes that modified or abrogated the common law rule.³²

The first antilapse statute was enacted in Massachusetts in 1783.³³ This statute applied to devises to relatives of the testator and provided that if the devisee-relative predeceased the testator, the devise would pass to the surviving issue of that relative.³⁴

In 1810, Maryland adopted an antilapse statute³⁵ that differed from the Massachusetts provision in two ways. First, Maryland's statute applied to all devises regardless of whether the devisee was related to the testator.³⁶ Second, under this statute, if a devisee predeceased the testator, the devise would not pass to the devisee's issue but would be distributed as though the devisee had died owning the property.³⁷ In other

LISH COMMISSIONERS ON THE REVISION OF THE LAW OF REAL PROPERTY, FOURTH REPORT 73 (Gr. Br. 1833)).

32. PAGE ON WILLS, *supra* note 22, § 50.10.

33. See MASS. GEN. LAWS ANN. ch. 191, § 22 (West 1990) (Historical and Statutory Notes). The 1783 statute, originally codified at St. 1783, c. 24, § 8, provided:

If a devise or legacy is made to a child or other relation of the testator, who dies before the testator, but leaves issue surviving the testator, such issue shall, unless a different disposition is made or required by the will, take the same estate which the person whose issue they are would have taken if he had survived the testator.

Id.

This statute has since been amended and now includes adoptive children under the definitions of the terms "child or other relation" and "issue"; the statute also now includes devises under a class gift "whether the death occurred before or after the execution of the will." *Id.*

34. *Id.*

35. *Simpson v. Piscano*, 419 A.2d 1059, 1065 (Md. 1980) (Cole, J., dissenting) (citing Chapter 34, § 4, Laws of Maryland of 1810). The Maryland statute provided:

That from and after the passage of this act, no devise, legacy or bequest, shall lapse or fail of taking effect by reason of the death of any devisee or legatee named in any last will or testament, or any codicil thereto, in the life-time of the testator, but every such devise, legacy or bequest, shall have the same effect and operation in law to transfer the right, estate and interest, in the property mentioned in such devise or bequest as if such devisee or legatee had survived the testator.

Id. at n.4 (quoting Chapter 34, § 4, Laws of Maryland of 1810).

This statute has been updated, but the meaning of the statute has remained relatively constant. See MD. CODE ANN. EST. & TRUSTS § 4-403 (1991).

36. MD. EST. & TRUSTS § 4-403.

37. *Id.*

words, if the devisee died testate, the lapsed devise would be distributed under the terms of the deceased devisee's will. If the devisee died intestate, the property would descend to the devisee's surviving heirs who may or may not be issue.

The English Statute of Wills of 1837 contained an antilapse provision that limited its coverage to devises to children or other issue of the testator and, like the Maryland statute, distributed the lapsed devise as though the devisee had died owning the property.³⁸

These antilapse statutes from the late eighteenth and early nineteenth centuries serve as the model for all antilapse statutes in effect today.³⁹ For example, nine states and the District of Columbia follow the Maryland example of applying antilapse to all devises.⁴⁰ Conversely, four states limit the application of their antilapse statutes to devises to the issue of the testator in the same manner as the English Statute of Wills.⁴¹ The remainder of the states' antilapse statutes cover devises to devisees who are, to a defined degree, related to the testator.⁴²

38. Wills Act 7 WM. IV & 1 VICT. CAP. 26, § 33 (1837), *reprinted in* ALISON REPPY & LESLIE J. TOMPKINS, *HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS: DESCENT AND DISTRIBUTION, PROBATE AND ADMINISTRATION* 220 (1928). The Wills Act provided:

That where any Person being a Child or other Issue of the Testator to whom any Real or Personal Estate shall be devised or bequeathed for any Estate or Interest not determinable at or before the Death of such Person shall die in the Lifetime of the Testator leaving Issue, and any such Issue of such Person shall be living at the Time of the Death of the Testator, such Devise or Bequest shall not lapse, but shall take effect as if the Death of such Person had happened immediately after the Death of the Testator, unless a contrary Intention shall appear by the Will.

Id.

39. French, *supra* note 13, at 339.

40. D.C. CODE ANN. § 18-308 (1981); GA. CODE ANN. § 53-2-103 (1982); IOWA CODE ANN. § 633.273 (West 1992); KY. REV. STAT. ANN. § 394.400 (Michie/Bobbs-Merrill 1984); MD. CODE ANN. EST. & TRUSTS § 4-403 (1991); N.H. REV. STAT. ANN. § 551:12 (1974); N.C. GEN. STAT. § 31-42 (1993); R.I. GEN. LAWS § 33-6-19 (1984); TENN. CODE ANN. § 32-3-105 (1984); W. VA. CODE § 41-3-3 (Michie 1982).

41. ARK. CODE ANN. § 28-26-104 (1987); ILL. ANN. STAT. ch. 755, para. 5/4-11 (Smith-Hurd 1993); IND. CODE ANN. § 29-1-6-1 (Burns 1981) (including parents of the testator); MISS. CODE ANN. § 91-5-7 (1972).

42. Several states' antilapse statutes apply to devises to a descendant of the testator's parents. See CONN. GEN. STAT. ANN. § 45a-411 (West 1993) (Connecticut excludes devises to the issue of the testator's siblings); N.Y. EST. POWERS & TRUSTS

The statutes that limit the application of antilapse to devises to relatives or kin of the testator almost universally exclude devises to the testator's spouse under the rationale that the typical testator would favor the residuary takers over the spouse's children from a former marriage.⁴³

Current antilapse statutes also vary in other ways. Thirty-four states expressly include devises that are drafted in the form of a class gift,⁴⁴ and fifteen states and the District of Columbia

LAW § 3-3.3 (Consol. 1979); 20 PA. CONS. STAT. ANN. § 2514(9) (1975); TEX. PROB. CODE ANN. § 68 (West 1980). Michigan extends antilapse coverage to descendants of the testator's grandparents. MICH. COMP. LAWS ANN. § 700.134 (West 1980). Many states further broaden the coverage to apply to the testator's grandparents as well as their descendants. See ALA. CODE § 43-8-224 (1975); ALASKA STAT. § 13.11.240 (1985); ARIZ. REV. STAT. ANN. § 14-2605 (1975); COLO. REV. STAT. ANN. § 15-11-605 (West 1987); DEL. CODE ANN. tit. 12, § 2313 (1974); FLA. STAT. ANN. § 732.603 (West 1976); HAW. REV. STAT. § 560:2-605 (1985); IDAHO CODE § 15-2-605 (1979); ME. REV. STAT. ANN. tit. 18-A, § 2-605 (1964); MINN. STAT. ANN. § 524.2-605 (West 1975); MONT. CODE ANN. § 72-2-613 (1993); N.J. STAT. ANN. § 3B:3-35 (West 1983); N.M. STAT. ANN. § 45-2-603 (Michie 1978) (including devises to step-children); N.D. CENT. CODE § 30.1-09-05 (2-605) (1976); VA. CODE ANN. § 64.1-64.1 (Michie 1991); WYO. STAT. § 2-6-106 (1977). Other states extend antilapse application to still further removed relatives. See S.C. CODE ANN. § 62-2-603 (Law. Co-op. 1987) (covering the testator's great-grandparents and descendants of the great-grandparents); KAN. PROB. CODE ANN. § 59-602 (Vernon 1983) (covering the testator's spouse or any relatives within the sixth degree); UTAH CODE ANN. § 75-2-605 (1993) (covering all possible heirs of the testator).

The remaining states' antilapse statutes apply to devises to either blood relatives or kindred of the testator. See CAL. PROB. CODE § 6147 (West 1991) (including devises to kindred of the testator's spouse); MASS. GEN. LAWS ANN. ch. 191, § 22 (1990); MO. ANN. STAT. § 474.460 (Vernon 1992); NEB. REV. STAT. § 30-2343 (1989); NEV. REV. STAT. § 133.200 (1986); OHIO REV. CODE ANN. § 2107.52 (Baldwin 1992); OKLA. STAT. ANN. tit. 84, § 142 (West 1990); OR. REV. STAT. § 112.395 (1990); S.D. CODIFIED LAWS ANN. § 29-6-8 (1984); VT. STAT. ANN. tit. 14, § 558 (1989); WASH. REV. CODE ANN. § 11.12.110 (West 1987); WIS. STAT. ANN. § 853.27 (West 1991).

43. French, *supra* note 13, at 357-58.

44. ALA. CODE § 43-8-224 (1975); ALASKA STAT. § 13.11.240 (1985); ARIZ. REV. STAT. ANN. § 14-2605 (1975); ARK. CODE ANN. § 28-26-104 (1987); CAL. PROB. CODE § 6147 (West 1991); COLO. REV. STAT. ANN. § 15-11-605 (West 1987); DEL. CODE ANN. tit. 12, § 2313 (1974); FLA. STAT. ANN. § 732.603 (West 1976); HAW. REV. STAT. § 560:2-605 (1985); IDAHO CODE § 15-2-605 (1979); ILL. ANN. STAT. ch. 755, ¶ 5/4-11 (Smith-Hurd 1993); IOWA CODE ANN. § 633.273 (West 1992); KY. REV. STAT. ANN. § 394.400 (Michie/Bobbs-Merrill 1984); ME. REV. STAT. ANN. tit. 18-A, § 2-605 (1964); MD. CODE ANN. EST. & TRUSTS § 4-403 (1991); MASS. GEN. LAWS ANN. ch. 191, § 22 (1990); MICH. COMP. LAWS ANN. § 700.134 (West 1980); MINN. STAT. ANN. § 524.2-605 (West 1975); MONT. CODE ANN. § 72-2-613 (1993); NEB. REV. STAT. § 30-2343 (1989); N.J. STAT. ANN. § 3B:3-35 (West 1983); N.M. STAT. ANN. § 45-2-603

do not mention whether class gifts are covered by the statute.⁴⁵ The antilapse statutes that expressly include class gifts also differ. Four states' statutes save lapsed devises to deceased class members only if the class member died after execution of the will and do not apply antilapse to void class gifts.⁴⁶ In states where the antilapse statute fails to mention class gifts, courts generally hold that class gifts are included under the antilapse statute⁴⁷ but differ as to whether the statutes cover void class gifts.⁴⁸

Almost all antilapse statutes provide that if the deceased devisee has surviving issue and is within the class of devisees covered by the statute, then the devise will pass to such issue.⁴⁹ Only Maryland retains its rule of distributing lapsed devises to "those persons who would have taken the property if the legatee had died, testate or intestate, owning the property."⁵⁰

(Michie 1978); N.Y. EST. POWERS & TRUSTS LAW § 3-3.3 (Consol. 1979); N.C. GEN. STAT. § 31-42 (1993); N.D. CENT. CODE § 30.1-09-05 (2-605) (1976); OR. REV. STAT. § 112.395 (1990); 20 PA. CONS. STAT. ANN. § 2514(9) (1975); S.C. CODE ANN. § 62-2-603 (Law. Co-op. 1987); TENN. CODE ANN. § 32-3-105 (1984); UTAH CODE ANN. § 75-2-605 (1993); VA. CODE ANN. § 64.1-64.1 (Michie 1991); W. VA. CODE § 41-3-3 (Michie 1982); WIS. STAT. ANN. § 853.27 (West 1991); WYO. STAT. § 2-6-106 (1977).

45. CONN. GEN. STAT. ANN. § 45a-411 (West 1993); D.C. CODE ANN. § 18-308 (1981); GA. CODE ANN. § 53-2-103 (1982); IND. CODE ANN. § 29-1-6-1 (Burns 1981); KAN. PROB. CODE ANN. § 59-602 (Vernon 1983); MISS. CODE ANN. § 91-5-7 (1972); MO. ANN. STAT. § 474.460 (Vernon 1992); NEV. REV. STAT. § 133.200 (1986); N.H. REV. STAT. ANN. § 551:12 (1974); OHIO REV. CODE ANN. § 2107.52 (Baldwin 1992); OKLA. STAT. ANN. tit. 84, § 142 (West 1990); R.I. GEN. LAWS § 33-6-19 (1984); S.D. CODIFIED LAWS ANN. § 29-6-8 (1984); TEX. PROB. CODE ANN. § 68 (West 1980); VT. STAT. ANN. tit. 14, § 558 (1989); WASH. REV. CODE ANN. § 11.12.110 (1987).

46. See CAL. PROB. CODE § 6147 (West 1991); N.Y. EST. POWERS & TRUSTS LAW § 3-3.3 (Consol. 1979); OR. REV. STAT. § 112.395 (1990); WIS. STAT. ANN. § 853.27 (West 1991). A void class gift arises when the testator creates a class gift (e.g., "to my children") and one of the class members has died prior to the execution of the will. See *infra* notes 142-47 and accompanying text.

47. See, e.g., *In re Steidl's Estate*, 201 P.2d 58 (Cal. Dist. Ct. App. 1948) (case decided before California added express language to antilapse statute covering class gifts); *Everhard v. Brown*, 62 N.E.2d 901 (Ohio Ct. App. 1945); *Hoverstad v. First Nat'l Bank & Trust Co.*, 74 N.W.2d 48 (S.D. 1955); *Burch v. McMillin*, 15 S.W.2d 86 (Tex. Civ. App. 1929). But see *In re Estate of Kalouse*, 282 N.W.2d 98 (Iowa 1979) (holding that antilapse statute does not cover class gifts); *In re Estate of Zagar*, 491 N.W.2d 915 (Minn. Ct. App. 1992) (holding that antilapse statute should only apply to class gifts if all of the class members predecease the testator).

48. Roberts, *supra* note 8, at 344-46.

49. *Id.* at 336-37; see also *infra* app. A.

50. MD. CODE ANN. EST. & TRUSTS, § 4-403 (1991). Out of necessity, this provi-

Two states have adopted certain aspects of the Maryland method for determining takers of a lapsed devise. Georgia's statute distributes lapsed devises to the predeceased devisee's issue, but in the same proportions as if the property were inherited directly from their deceased testate or intestate ancestor.⁵¹ One apparent rationale underlying this rule is that a child of the deceased devisee who has been disinherited by the devisee should not be allowed to take property by virtue of an antilapse statute. In contrast, Iowa distributes lapsed devises to the heirs of the predeceased devisee.⁵²

Two states provide that lapsed devises pass to the issue of the predeceased devisee only under certain circumstances. Pennsylvania's statute substitutes the deceased devisee's issue only if the testator's spouse or children would not take by virtue of the residuary clause or by intestacy.⁵³ North Carolina takes a similar approach, allowing a lapsed devise to pass to the issue of the predeceased devisee only if such issue would have been an heir of the testator if the testator had died intestate.⁵⁴

Coverage of Current Antilapse Statutes

The most important feature of any antilapse statute is the class of devises covered by the statute.⁵⁵ This feature not only determines how frequently an antilapse statute will apply, but it also influences the level of impact that an antilapse statute will have on the distribution of an estate. In other words, an antilapse statute that applies only to devises to the testator's issue (1) will not affect as many devises and (2) will not change the

sion of the Maryland statute has been limited somewhat by the courts. For example, if *T* devised property to predeceased devisee *A*, and *A*'s will devised "everything I own to *B*," and *B* predeceased *A*, the lapsed devise would not be distributed by the terms of *B*'s will but would pass under the common law rule to the residuary takers in *T*'s will. See *Simpson v. Piscano*, 419 A.2d 1059 (Md. 1980) and cases cited therein.

51. GA. CODE ANN. § 53-2-103 (1982).

52. IOWA CODE ANN. § 633.273 (West 1992). An advantage of Iowa's method over that of Georgia is that the deceased devisee's will, which may contain lapsed devises of its own, need not be reinterpreted.

53. 20 PA. CONS. STAT. ANN. § 2514(9) (1975).

54. N.C. GEN. STAT. § 31-42 (1993).

55. French, *supra* note 13, at 344.

common law result in a significant manner because the testator's remote issue probably would have taken at least some of the lapsed devise through intestacy. An antilapse statute that applies to all devises without regard to the devisee's relationship to the testator would be applied more frequently and would tend to impact the scheme of testamentary distribution more significantly.

Whether limiting the coverage of antilapse statutes to devises to issue of the testator is necessarily better than either extending antilapse protection to all devises or to devises to all relatives is impossible to determine. Most testators probably would prefer to provide for their own children over the children of a deceased friend. It is possible, however, that the majority of testators that devise only nominal amounts to their friends would prefer that their friends' children benefit from such a small gift. When testators make large devises to their friends, they may either prefer that their own children take small amounts or intend to disinherit their children altogether.

No matter which devises an antilapse statute covers, the statute sometimes will lead to results that are contrary to probable testamentary intent. Where antilapse protection is limited to devises to the testator's children, cases arise where disinherited children take property devised to a predeceased sibling. For example, in a Texas case, *Najvar v. Vasek*,⁵⁶ the testator devised all of his real estate to his brother, Bohumil, and "his heirs and assigns in fee simple forever."⁵⁷ The will went on to state, "[i]t being my wish however for my beloved brother to keep the property for his son [A]lvin."⁵⁸ Bohumil predeceased the testator.⁵⁹ The record at trial established that (1) the testator was survived by three children whom he had not seen for approximately 40 years; (2) the testator had left each of his three children one dollar in his will; (3) the children were unable to recognize the testator; and (4) the testator had an extremely close relationship with his nephew Alvin.⁶⁰ The court, reversing a finding in favor

56. 564 S.W.2d 202 (Tex. Civ. App. 1978).

57. *Id.* at 205.

58. *Id.*

59. *Id.*

60. *Id.* at 207.

of Alvin's children,⁶¹ held that the Texas antilapse statute, which at that time only covered devises to children or other descendants of the testator, did not apply to the devise to the testator's brother.⁶²

At the other extreme are the antilapse statutes that cover all devises. These statutes are just as likely to lead to results that are contrary to testamentary intent. For example, in *Persson v. Dukes*,⁶³ a married couple executed "sweetheart" wills leaving everything to each other.⁶⁴ The husband predeceased his wife by less than two hours.⁶⁵ Because the husband died first, his property became vested in his wife, and when the wife died, all of her property, which she had devised to her predeceased husband, was distributed to her husband's heirs under the antilapse statute; her family took nothing.⁶⁶ In this case, the order of deaths determined the distributions, and actual intent was seemingly defeated.

The compromise between limiting the coverage of an antilapse statute to devises to the testator's issue or extending coverage to all devises is to extend coverage of the statute to some class of relatives of the testator.⁶⁷ Under this type of antilapse provision, both *Najvar* and *Persson* would have resulted in distributions that were consistent with testamentary intent. Most states favor this approach,⁶⁸ and it probably effects testamentary intent more frequently than the other two methods. However,

61. Alvin died after the testator but before final resolution of the case. *Id.* at 205.

62. *Id.* at 208. This decision, in part, motivated the Texas legislature to change its antilapse statute in 1991 to include devises to any descendant of the testator's parents. See Annotations, TEX. PROB. CODE ANN. § 68 (West Supp. 1991); see also *In re Estate of Connolly*, 222 N.W.2d 885 (Wis. 1974) (upholding application of antilapse statute that frustrated testator's probable intent).

63. 372 A.2d 240 (Md. 1977).

64. *Id.* at 241 n.1.

65. *Id.* at 241.

66. *Id.* at 243; cf. *Robinson v. Ray*, 327 S.E.2d 721 (Ga. 1985) (holding that where testator devises estate to predeceased wife, estate passes to wife's son from a prior marriage and testator's relatives take nothing); *Stewart v. Whitehurst*, 303 A.2d 393 (Md. 1973) (holding that where testator devises estate to predeceased wife, estate passes to wife's parents and testator's father takes nothing).

67. For example, a statute could limit antilapse protection to devises to the testator's grandparents and the descendants of those grandparents. See *supra* note 42 (identifying those states that have adopted this type of compromise).

68. See *supra* note 42.

there are examples where such statutes have caused results that the testator clearly would not have endorsed because the coverage is either too narrow⁶⁹ or too broad.⁷⁰

One may conclude from this discussion that, even though the coverage of an antilapse statute is its most distinguishing characteristic, the problems with antilapse statutes are not a result of the class of devises they cover. Rather, the problems generated by antilapse statutes are a consequence of the nature of antilapse theory and the law of wills generally.

THE NATURE OF THE LAW OF WILLS: ANTILAPSE THEORY AND CONSTRUCTION PROBLEMS

The Varying Methods of Antilapse

All of the different types of antilapse statutes reflect attempts on the part of legislatures to effect presumed testamentary intent more precisely. Given the contradictory assumptions underlying antilapse statutes, no consensus exists regarding what the typical testator would want to happen with a particular lapsed devise. Each method of antilapse has advantages and disadvantages, and for every antilapse statute, one could pose hypothetical situations that advance or thwart presumed testamentary intent. In drafting an antilapse statute, legislatures must predict which hypothetical situation more likely will occur.

For example, suppose that a testator devises property to a devoted employee, and the employee predeceases the testator. Would that testator prefer to provide for that employee's children? The answer depends upon a variety of factors, including

69. See *Estate of Connolly*, 222 N.W.2d 885 (Wis. 1974) (refusing to save lapsed gift to testator's predeceased friend for friend's daughter who was also a beneficiary under the will and allowing testator's various collateral relatives to take property in spite of the fact that testator had not seen the relatives for at least fourteen years and had stated her intention not to leave anything to her relatives); French, *supra* note 13, at 359-60 & n.122 (citing *Connolly*, *In re Estate of Hittel*, 75 P. 53 (Cal. 1903), and *In re Estate of Sessions*, 153 P. 231 (Cal. 1915)).

70. See *In re Estate of Ulrikson*, 290 N.W.2d 757 (Minn. 1980) (applying antilapse statute to save lapsed devise to testator's predeceased brother for the brother's children and excluding testator's other nieces and nephews in spite of testamentary scheme which arguably indicated that testator would have preferred that all nieces and nephews be treated equally).

the size of the devise, the testator's reason for making the devise, and the provisions that the testator has made for his own family. The testator may have intended the gift to enable the employee to finance a child's education. Conversely, the gift simply may have been a reward for past performance, and the testator intended the gift to lapse if the employee is not around to enjoy it. As a practical matter, it would be impossible to draft a statute that takes all of these considerations into account. As a result, legislatures try to determine which devises to employees (or friends, distant relatives, etc.) are of the sort that the typical testator would intend to pass on to the devisee's children.

Recent empirical studies have attempted to determine what testators would prefer under given situations.⁷¹ However, in light of the fact that most antilapse statutes do not correspond to the results of these studies, legislatures probably rely more on personal experience in crafting their antilapse statutes.⁷² Legislative reliance on this subjective judgment results in a range of statutes, each purporting to effect testamentary intent but in different ways.

Construction Problems Caused by the Simplicity of Antilapse Statutes

The antilapse provisions in effect today tend to be simple statutes that are designed to correct only the most harsh lapse results under the common law. For example, all antilapse statutes will save a devise to a testator's predeceased child with surviving issue from falling into a residuary gift to a charity.⁷³ These statutes do not, however, make value judgements determining that the testator's grandchildren are more worthy than the charity; they simply apply rigid rules that ignore the individual testator's true intent and presume that the testator would prefer that his grandchildren take over the charity.

71. French, *supra* note 13, at 340 n.20 (citing a study which found that majority of people would prefer to leave their estates to surviving children rather than the issue of deceased children).

72. Most antilapse statutes would treat the issue of deceased children the same as surviving children. *See infra* app. A.

73. *See infra* app. A.

The testator can avoid application of the antilapse statute only by clearly manifesting an intent within the will that the statute not operate.⁷⁴ If a predeceased devisee is within the protected class, neither extrinsic evidence nor a testamentary scheme that clearly shows that the testator intended for a devise to lapse can be used to forestall an antilapse statute from passing the devise to the devisee's issue.⁷⁵ For example, several cases, such as *Estate of Carroll*,⁷⁶ have held that a testator's attempt to disinherit a relative did not adequately establish the testator's intent that the antilapse statute not operate even when the statute would pass a lapsed devise to the disinherited relative.⁷⁷

In *Carroll*, the testator left a holographic will by which she devised her entire estate to her sister, Margaret, and one dollar each to the testator's brother and to Margaret's son.⁷⁸ The testator further stated that the one dollar gifts were "each Any will make before is null & void [sic]."⁷⁹ Although the language used is less than straightforward, clearly the testator did not intend for her brother or Margaret's son to take anything more than the one dollar she devised. Nonetheless, the court held that because Margaret had predeceased the testator, the antilapse statute must operate, and it passed the gift to Margaret's son.⁸⁰ The court also refused to admit extrinsic evidence to show that the testator fully intended to disinherit Margaret's son.⁸¹

Antilapse statutes operate in this manner because legislatures and courts, deferring to the policies of the wills act, disregard extrinsic evidence of actual testamentary intent. In order for a

74. ATKINSON, *supra* note 3, § 140.

75. PAGE ON WILLS, *supra* note 22, § 50.11.

76. 291 P.2d 976 (Cal. Dist. Ct. App. 1956).

77. *In re Estate of Roberts*, 88 Cal. Rptr. 396, (Ct. App. 1970); *In re Murphy's Estate*, 50 P.2d 828 (Cal. Dist. Ct. App. 1935); *see also* *Larrabee v. Tracy*, 134 P.2d 265 (Cal. 1943) (applying antilapse statute to pass lapsed devise to persons not named in will despite clause expressly disinheriting those not named therein); *Sleeper v. Larrabee*, 165 N.E. 121 (Mass. 1929) (same). *But see In re McKeon's Estate*, 46 N.Y.S.2d 349 (Sup. Ct. 1944) (holding that disinherited niece could not take by virtue of the antilapse statute).

78. *Carroll*, 291 P.2d at 977.

79. *Id.*

80. *Id.*

81. *Id.* at 979.

will to be admitted to probate it must be a properly attested and signed writing.⁸² This standard normally requires at least the signature of two witnesses in addition to the signature of the testator.⁸³ The rationale behind requiring this high evidentiary standard is that "the best evidence of the testator's intent, the testator, is always dead."⁸⁴ Furthermore, when a court interprets a will, information beyond the document will not satisfy this evidentiary standard and cannot be considered by the court unless an ambiguity is evident in the writing itself.⁸⁵ Absent such an ambiguity, extrinsic evidence, which may establish that the testator intended something other than the legal effect of his words, will not be admitted.⁸⁶

As rules of construction, antilapse statutes become a part of the will.⁸⁷ In other words, when the testator devises "Blackacre to A," an antilapse statute adds the words "or to A's issue if A does not survive me" unless the testator clearly indicates the intent that the antilapse statute not apply. In *Carroll*, discussed above, the antilapse statute added "or to Margaret's issue" to the devise to Margaret, and the extrinsic evidence that application of the antilapse statute violated the testator's testamentary scheme could not overcome the "appearance" of these words in the testator's will.⁸⁸

Accordingly, in order for antilapse statutes to better apply testamentary intent they need to be more flexible. Legislatures should contemplate who would take under the application of the statute and who would take under the common law rule and make value judgments as to which outcome would better effect the intent of the typical testator. Only a few antilapse statutes force courts to apply this type of value judgment. The Pennsylvania statute, for example, passes lapsed devises to the issue of

82. See generally MELVILLE M. BIGELOW, *THE LAW OF WILLS* 42-62 (1898) (explaining the necessary requirements for the execution of a valid will).

83. *Id.* at 50.

84. WILLIAM M. MCGOVERN, JR., ET AL., *WILLS, TRUSTS AND ESTATES* § 6.1 (1988).

85. *Id.*

86. *Id.*; cf. *Royston v. Watts*, 842 S.W.2d 876, 880 (Mo. Ct. App. 1992) (explaining that when the words of the testator's will do not express an intent to override the statute, then the matter is not open to extrinsic evidence to show contrary intent).

87. *In re Estate of Burns*, 100 N.W.2d 399, 402 (S.D. 1960).

88. See *supra* notes 78-81 and accompanying text.

the devisee only if the wife or children of the testator would not take under the common law rule.⁸⁹ This statute acts as a rule of construction, but its application is limited by a presumption in favor of the testator's immediate family. This statute does not go far enough, however, because it operates to give property to children of the testator whom the testator expressly has disinherited.

There are also examples when courts go beyond the rigid bounds of the law of wills in order to formulate outcomes that are more likely to effect the typical testator's true intent. These courts interpret the antilapse statutes more flexibly. For example, some courts have held that when the testator has made specific devises to the issue of the predeceased devisee, the testator has sufficiently manifested his intent that the statute not operate.⁹⁰ These cases, however, represent the minority, and the vast majority of states apply antilapse statutes in the more traditional and inflexible manner.

The simplicity of antilapse statutes also causes a related problem in that it ignores the complexity of probate law and the many different types of testamentary transfers that testators often employ.⁹¹ For example, few statutes mention whether they apply to powers of appointment,⁹² options,⁹³ or trusts.⁹⁴

89. 20 PA. CONS. STAT. ANN. § 2514(9) (1975).

90. See *Williams v. Williams*, 9 So. 2d 798 (Fla. 1942); *Jensen v. Nelson*, 19 N.W.2d 596 (Iowa 1945). But see *Anderson v. Anderson*, 126 N.E.2d 726 (Ill. App. Ct. 1955).

91. For a thorough discussion of construction problems regarding lapse statutes, see *Roberts*, *supra* note 8.

92. See generally *Dow v. Atwood*, 260 A.2d 437, 441 (Me. 1969) (explaining that general powers of appointment are covered by antilapse statute but special powers of appointment are not).

93. An example of an option is when the testator devises "Blackacre to A if he gives the estate \$10,000, and if he does not give the estate \$10,000, then Blackacre to B." Options are useful in situations where the testator's primary asset is a house or farm. If the testator does not want to force his children to sell off the house in order to split the proceeds, he may devise the option to purchase the home to one of the children and then provide the other children with the proceeds from the sale. The problem arises where the intended beneficiary of the option predeceases the testator. Should the option be preserved for the children of the beneficiary? Two cases have said it should. See *In re Estate of Niehenke*, 818 P.2d 1324 (Wash. 1991); *In re Estate of Passanisi*, 476 N.Y.S.2d 456 (Sup. Ct. 1984).

The problem with preserving these options for the issue of the intended benefi-

Antilapse statutes are often the subject of litigation because the statutes generally fail to deal completely with commonly utilized testamentary gifts such as class gifts. The rudimentary nature of these statutes forces courts to wrestle with inadequate language to answer the construction problems that cases present.⁹⁵ Consequently, courts attach different meaning to identical language.⁹⁶ Much of the confusion and litigation concerning these issues easily could be avoided if statutes expressly dealt with them.

Manifesting an Intent That the Statute Not Apply

The most heavily litigated area in antilapse involves the requirement that a testator must clearly indicate an intent that the antilapse statute not apply in order to prevent its operation.⁹⁷ This requirement attaches to all antilapse statutes⁹⁸ to varying degrees because courts disagree over what language is adequate to stop the operation of the statute.⁹⁹ All courts agree that the testator's intent to defeat the statute must be shown clearly,¹⁰⁰ but exactly what the term "clearly" means is not itself particularly clear.

Courts generally accept that a devise that states that the antilapse statute should not be applied (or a clause that states that the antilapse statute should not apply to any devise) suffices to defeat the operation of the statute.¹⁰¹ Similarly, a clause that

ciary is that in a strict sense, the testator has provided for an alternative devise that many courts hold clearly manifests an intent that the statute not apply. See *infra* note 124 and accompanying text.

94. See generally *Portales Nat'l Bank v. Bellin*, 645 P.2d 986, 991 (N.M. Ct. App. 1982) (holding that in the case of a devise to a trust, the trustee is a devisee for purposes of applying the antilapse statute); *Keller v. Keller*, 287 S.E.2d 508 (W. Va. 1982) (holding that antilapse statute did not cause share of predeceased devisee to pass to children where that share was held in trust).

95. See generally *Roberts*, *supra* note 8.

96. See *infra* note 130 (citing two cases in the same jurisdiction that reach opposite conclusions on the effect of survivorship language).

97. *Roberts*, *supra* note 8, at 346-47.

98. PAGE ON WILLS, *supra* note 22, § 50.11.

99. See *infra* text accompanying notes 103-30.

100. PAGE ON WILLS, *supra* note 22, § 50.11.

101. Edward C. Halbach, Jr. & Lawrence W. Waggoner, *The UPC's New Survivorship and Antilapse Provisions*, 55 ALB. L. REV. 1091, 1103 (1992).

states that if any devisee predeceases the testator the devise should either lapse, revert to the estate, or fall into the residue should suffice to defeat the operation of the antilapse statute.¹⁰² Beyond these obvious manifestations of intent, jurisdictions disagree as to what is necessary to state contrary intent "clearly."

Disinheritance as Contrary Intent

No consensus exists regarding whether the express disinheritance of an individual suffices to prevent that individual from taking by virtue of an antilapse statute.¹⁰³ If the testator states that a specific person should not take any part of the estate, apparently the testator has indicated clearly that the antilapse statute should not operate to pass a lapsed devise to that person. In many jurisdictions, however, courts hold that an express disinheritance will not stop that person from taking a part of the estate by virtue of the antilapse statute.¹⁰⁴

As a general rule, disinheritance by negative implication¹⁰⁵ does not prevent persons so disinherited from taking by virtue of an antilapse statute.¹⁰⁶ Most courts also hold that when a testator devises a nominal gift, such as one dollar, to an individual,

102. *Id.* See generally *In re Estate of Evans*, 227 N.W.2d 603 (Neb. 1975) (holding that clause in will that stated that deceased child's share of residuary should go to the surviving children was sufficient to defeat antilapse statute); *In re McFerrer's Estate*, 76 A.2d 759 (Pa. 1959) (statement that devises should lapse held to defeat the antilapse statute).

103. Commentators even disagree as to what the general rule among courts is regarding disinherited persons and their ability to take an interest in an estate by virtue of an antilapse statute. Compare Roberts, *supra* note 8, at 354 ("Generally, courts . . . apply the lapse statute despite the express disinheritance.") with C.C. Marvel, Annotation, *Testator's Intention as Defeating Operation of Antilapse Statute*, 63 A.L.R.2d 1172, § 8 at 1184 (1959) ("Various results, seemingly difficult or impossible to reconcile in some instances, have been reached in cases in which those entitled to take under the operation of the antilapse statute were apparently expressly disinherited or bequeathed a nominal amount only.").

104. Roberts, *supra* note 8, at 354 n.124 (citing *In re Pfadenhauer's Estate*, 324 P.2d 693 (Cal. Ct. App. 1963); *In re Sullivan's Estate* 88 P.2d 225 (Cal. Ct. App. 1939); *Murray v. Murray*, 564 S.W.2d 5 (Ky. 1978); *Estate of Sellers*, 496 A.2d 1237 (Pa. Super. Ct. 1985)).

105. *E.g.*, a statement in the will that those not mentioned in the will are not to share in the estate.

106. Marvel, *supra* note 103, § 7 at 1184.

the testator has not clearly stated his intent that the statute not apply.¹⁰⁷

According to Professor Roberts, part of the rationale of this outcome is that words of disinheritance are generally form-book expressions made in order to toll the application of a pretermitted heir statute.¹⁰⁸ Some courts also point out that the disinheritance is made when the testator believes that the disinherited individual's ancestor would take the devise.¹⁰⁹ Accordingly, the disinheritance does not mean that the testator intends that the disinherited individual not take if the ancestor has died. Furthermore, applying an antilapse statute to allow a disinherited heir to take a lapsed devise makes sense when viewed in light of the rule that disinherited heirs cannot be prevented from taking by intestacy.¹¹⁰ As Professor Roberts observes, however, this argument fails because intestate distributions are made as a rule of law, and antilapse statutes are rules of construction "that should not apply when there is contrary intent."¹¹¹

In a few jurisdictions, words of express disinheritance have been held to keep the disinherited individual from taking under the will.¹¹² The arguments in favor of applying an antilapse statute to pass property to persons expressly disinherited are weak. Express disinheritance is not done lightly. A clause in a will stating that an individual is to take nothing is an unequivocal expression of a testator's true intent. Vague possibilities that the testator made the disinheritance under the belief that the disinherited individual's ancestor would take the property do not change the attested words of the will.¹¹³ Antilapse statutes dis-

107. See, e.g., *In re Estate of Roberts*, 88 Cal. Rptr. 396 (Ct. App. 1970); *In re Carroll's Estate*, 291 P.2d 976 (Cal. Ct. App. 1956).

108. Roberts, *supra* note 8, at 354.

109. See, e.g., *In re Carroll's Estate*, 291 P.2d 976 (Cal. Ct. App. 1956); *Bruner v. First Nat'l Bank*, 443 P.2d 645 (Or. 1968).

110. Roberts, *supra* note 8, at 356.

111. *Id.* at 357.

112. E.g., *Fischer v. Mills*, 85 N.W.2d 533 (Iowa 1957); *In re McKeon's Estate* 46 N.Y.S.2d 349 (Sup. Ct. 1944).

113. Furthermore, when courts apply antilapse statutes, they should attempt to effect the probable intent of the typical testator. Clearly, the typical testator would not intend for an expressly disinherited individual to take simply because an unfore-

tribute property when the testamentary directions are made impossible by an unforeseen event.¹¹⁴ The death of a devisee does not render a disinheritance impossible.

Words of Survivorship

The inclusion of words of survivorship with a devise is often thought to be an effective method of preventing an antilapse statute from being applied to that devise. For example, many commentators believe that by devising Blackacre "to A if she survives me," the testator has clearly indicated an intent contrary to the antilapse statute by conditioning the devise on survival of the devisee.¹¹⁵ The weight of authority in this area is that attaching a survivorship requirement to a devise sufficiently evidences an intent opposed to the application of the statute.¹¹⁶

A significant and perhaps growing number of jurisdictions ignore this authority and hold that words of survivorship, by themselves, do not defeat the operation of the statute.¹¹⁷ One court provided the rationale of this holding by stating that by making "a conditional devise to [the devisee], 'provided she be living at the time of my death,' [the testator] was, in fact, expressing the same intention which the statute provides," namely that for an individual to take a devise, he must survive the testator.¹¹⁸ The argument made by this court makes sense. Attaching words of survivorship to a devise does not really change

seen event has arisen.

114. See *supra* note 8 and accompanying text.

115. *In re Will of Hanf*, 471 N.Y.S.2d 919 (N.Y. App. Div. 1984).

116. See, e.g., *Slattery v. Kelsch*, 734 S.W.2d 813, 814 (Ky. Ct. App. 1987); *Halbach & Waggoner*, *supra* note 101, at 1105. See generally *In re Estate of Stroble*, 636 P.2d 236 (Kan. Ct. App. 1981); *In re Will of Robinson*, 236 N.Y.S.2d 293 (Sup. Ct. 1963); *Day v. Brooks*, 224 N.E.2d 557 (Ohio Prob. Ct. 1967); *White v. Moore*, 760 S.W.2d 242 (Tex. 1988).

117. *Halbach & Waggoner*, *supra* note 101, at 1105 n.59 (citing *Schneller v. Schneller*, 190 N.E. 121 (Ill. 1934); *In re Estate of Bulger*, 586 N.E.2d 673 (Ill. App. Ct. 1991); *Detzel v. Nieberding*, 219 N.E.2d 327 (Ohio Prob. Ct. 1966); *Estate of Kehler*, 411 A.2d 748 (Pa. 1980); *Henderson v. Parker*, 728 S.W.2d 768 (Tex. 1987)).

118. *Detzel*, 219 N.E.2d at 336. *Detzel* has never been reversed but was characterized as "clearly and completely erroneous" in another Ohio case two years later. *Shalkhauser v. Beach*, 233 N.E.2d 527, 530 (Ohio Prob. Ct. 1968).

the nature of the devise—the devisee has to survive in order to take the gift whether or not the words of survivorship are attached. The survivorship language does not clearly indicate that the issue of the predeceased devisee should be prevented from taking the gift.

Conversely, courts and commentators argue that words of survivorship should prevent the antilapse statute from applying to the devise.¹¹⁹ Antilapse statutes are crafted to effect the testator's presumed intent in situations that the testator has failed to consider. By attaching words of survivorship to a devise, the testator demonstrates consideration of the possibility that a devisee might die and has done nothing about it—perhaps intending that the devise fall into the residue if the devisee dies.

Moreover, even though the plain meaning of words of survivorship is not indicative of contrary intent, the legal effect of the words has been long recognized by courts as manifesting the testator's intent that the statute not operate.¹²⁰ Consequently, many scribes have relied on these words to prevent the issue of deceased devisees from taking by virtue of the statute.¹²¹ Changing this rule would result in testamentary distributions that are clearly contrary to the wishes of many testators.¹²²

Alternative Devises as Contrary Intent

An oft-repeated rule states that the provision of alternative takers of a devise in the event that the primary taker dies before the testator is the surest way of preventing the operation of an antilapse statute.¹²³ Sometimes, however, this rule is not applied.

119. See *Shalkhauser*, 233 N.E.2d at 527; *Ascher*, *supra* note 18, at 651-58; *Begleiter*, *supra* note 18, at 126-27.

120. *Ascher*, *supra* note 18, at 651; *Begleiter*, *supra* note 18, at 126-27.

121. *Begleiter*, *supra* note 18, at 126-27; see also *Ascher*, *supra* note 18, at 651; *Halbach & Waggoner*, *supra* note 101, at 1104-05.

122. *Ascher*, *supra* note 18, at 651-58.

123. *Roberts*, *supra* note 8, at 348-49 ("The clearest way to indicate contrary intent is to expressly require that the devisee survive *T* and provide for alternative takers in the event that the devisee should predecease *T*."). Actually, the clearest way to indicate contrary intent is to state expressly that no antilapse statute is to be applied to the devise. See P.M. Dwyer, Annotation, *Intention of Testator as Defeating Operation of Statute to Prevent Lapses*, 92 A.L.R. 846, 851 (1934).

When a testator devises Blackacre "to A and if A does not survive me, then to B," it would seem that the testator has indicated clearly that the antilapse statute should not apply. The testator, however, has not provided expressly for the distribution of the devise if both A and B predecease the testator. Many courts, particularly those that hold that words of survivorship alone are sufficient to prevent the application of the statutes, state that when both the primary and alternative devisees have predeceased the testator, the antilapse statute should not apply and the devise should fall into the residue.¹²⁴ By using words of survivorship and an alternative taker, the testator has clearly indicated contrary intent.¹²⁵

A growing number of jurisdictions hold that words of survivorship, when attached to alternative devises, are effective only when there are actually survivors among the primary and alternative takers.¹²⁶ These courts hold that if both the primary and alternative devisees predecease the testator, then the antilapse statute is revived and the devise passes to the issue of the primary devisee by virtue of the antilapse statute.¹²⁷

Other Methods of Manifesting Contrary Intent

Some courts recognize other methods of manifesting contrary intent. For example, in some jurisdictions, a residuary gift that states "the remainder of my estate, including any lapsed devises, I give to A" indicates the testator's intent that the statute not

124. *E.g.*, *In re Estate of Wagner*, 423 So. 2d 400, 403-04 (Fla. Dist. Ct. App. 1982); *In re Estate of Hanf*, 99 A.2d 673, 673-74 (N.Y. App. Div. 1984); *In re Estate of Hillman*, 363 N.W.2d 588, 591 (Wis. Ct. App. 1985).

125. *Roberts*, *supra* note 8, at 348-49.

126. *See, e.g.*, *In re Estate of Ulrikson*, 290 N.W.2d 757, 759 (Minn. 1980).

127. *Id.*; *In re Estate of Allmond*, 520 P.2d 1388, 1390-91 (Wash. Ct. App. 1974); *Estate of Kehler*, 411 A.2d 748, 750 (Pa. 1980); *see also* *Estate of Braun*, 126 N.W.2d 318, 321 (Iowa 1964) (holding that devise to husband and wife and, if husband and wife predecease testator, then to another individual, did not manifest an intent contrary to antilapse statute; thus, when only husband died before testator, his half interest passed to his children).

If the primary and alternative devisees have predeceased the testator, and only the alternative devisee has surviving issue, then presumably the devise passes to the issue of the alternative devisee. For the UPC's rather complicated solution to this problem, see *infra* text accompanying notes 229-49.

operate.¹²⁸ This type of residuary clause presents confusion because a court may view a devise that can be saved by an antilapse statute as not having lapsed; consequently, such a court may not accept the language in the residuary clause as evidence of an intent that the statute not apply.

A minority of jurisdictions regard the testator's scheme of distribution, such as devises to the issue of the predeceased devisee, as a clear manifestation of a desire that the statute not apply.¹²⁹

As this discussion demonstrates, the "clear intent" standard by which courts determine whether the testator would want an antilapse statute to apply to a particular devise is ill-defined. As a consequence, testators and scriveners do not know the legal effect of their words. They may make a devise in a manner that they believe adequately expresses their subjective intent when, in fact, the courts will attach an entirely different meaning to their language. In one state, separate courts in the same jurisdiction construed virtually identical language differently, and neither was overturned.¹³⁰

An antilapse statute that expressly detailed how to avoid its operation would eliminate a significant amount of litigation by providing courts with a reliable and consistent standard to apply.

*Construction of Class Gifts*¹³¹

At common law, a devise to a class of persons operates differently from a specific devise. For example, when the testator devises "\$10,000 to my children, share and share alike" the common law treats this language as creating a class gift and impos-

128. Estate of Salisbury, 143 Cal. Rptr. 81, 83 (Ct. App. 1978).

129. Roberts, *supra* note 8, at 362-64. Iowa recognizes an entirely unique method of manifesting contrary intent. See *In re Everett's Estate*, 28 N.W.2d 21, 22 (Iowa 1947) (providing that the doctrine of worthier title manifests an intent on the part of the testator that the statute not apply).

130. Compare *Detzel v. Nieberding*, 219 N.E.2d 327, 336 (Ohio Prob. Ct. 1966) with *Shalkhauser v. Beach*, 233 N.E.2d 527, 530 (Ohio Prob. Ct. 1968).

131. For a thorough discussion of antilapse statutes and class gifts, see W.E. Shipley, Annotation, *Applicability of Antilapse Statutes to Class Gifts*, 56 A.L.R.2d 948 (1957).

es a requirement of survivorship on the gift.¹³² Class gifts, however, do not lapse unless all class members predecease the testator.¹³³ If only one of the testator's children predeceased the testator, that child's share of the \$10,000 would be divided among the remaining class members.¹³⁴ Many antilapse statutes expressly change this result, providing that when a class member predeceases a testator, the class member's share passes to that class member's issue.¹³⁵

Not all antilapse statutes expressly provide for class gifts.¹³⁶ This silence presents courts with a problem of interpretation of the statute rather than of testamentary intent. If an interest in a class gift fails because a class member has predeceased the testator, technically, the gift interest does not lapse if there are surviving members of the class. If a court applies antilapse statutes only to lapsed gifts, then, in theory, the statute should not act to save class gifts that have not lapsed because a potential class member has not survived the testator. Conversely, if a court views antilapse statutes as a means to reverse the harsh common law rule of disinheriting the children of a predeceased devisee, it should not matter whether the devise was fashioned in the form of a class gift; the statute will be held to apply to class gifts.¹³⁷ Most courts include class gifts in the purview of the statute.¹³⁸ However a minority of courts refuse to apply an antilapse statute to a class gift where the statute fails to mention class gifts.¹³⁹

The confusion over whether antilapse statutes, absent express

132. In other words, the class of takers ("to my children") does not open until the testator dies. The class consists of those persons who are alive at the death of the testator. PAGE ON WILLS, *supra* note 22, § 50.9.

133. *See id.*

134. *Id.*

135. *See supra* note 44 and accompanying text.

136. Fifteen states and the District of Columbia have antilapse statutes that do not mention class gifts. *See supra* note 45.

137. *See ATKINSON, supra* note 3, § 140.

138. *Id.*

139. *E.g., In re Estate of Kalouse*, 282 N.W.2d 98, 106 (Iowa 1979) (holding that antilapse statute does not cover class gifts); *cf. In re Estate of Zagar*, 491 N.W.2d 915, 917 (Minn. Ct. App. 1992) (holding that antilapse statute should only apply to class gifts if all of the class members predecease the testator). For additional examples, see cases cited in ATKINSON, *supra* note 3, § 140 n.30.

language, should cover class gifts arises out of the conflict between the law of wills that treats class gifts differently from specific devises and the policy underlying antilapse statutes. Most states have effectively eliminated this confusion by passing statutes that expressly apply to class gifts.¹⁴⁰ No state has a statute that expressly excludes class gifts from antilapse protection, and the better course appears to be to extend the coverage to include class gifts. The policy of antilapse statutes is to provide for the children of predeceased devisees where the testator has been silent on the matter, and whether the statute applies should not depend on ancillary issues such as the technical definition of the term "lapse." Furthermore, if a testator is presumed to prefer that a specific gift to a predeceased child be saved for that child's issue, it should not matter that the testator made the gift in the form of a class gift or a devise to a specific person.¹⁴¹ In either event, the antilapse statute should expressly deal with class gifts.

Void Class Gifts

A much greater dispute concerns void class gifts. A void gift occurs when a testator devises property to one who has died before the execution of the will.¹⁴² In a class gift context, a void gift occurs when the testator devises property "to my children" and one of the children had died prior to the execution of the will.¹⁴³ The debate over whether antilapse statutes should cover void class gifts centers around the fact that the situation, from the testator's perspective, has not changed.¹⁴⁴ When a devisee dies after the execution of the will but before the testator, the circumstances under which the testator drafted the will have changed, and if the testator did not provide in the will for this changed situation, the antilapse statute will operate.¹⁴⁵ In the case of a void class gift, no new circumstances exist that the tes-

140. See *supra* note 44 and accompanying text.

141. ATKINSON, *supra* note 3, § 140.

142. PAGE ON WILLS, *supra* note 22, § 50.21.

143. See *supra* note 20 and accompanying text.

144. PAGE ON WILLS, *supra* note 22, § 50.22

145. See *supra* notes 8-9 and accompanying text.

tator failed to consider. If the testator had intended to provide for the child of the class member who was dead at the time of the making of the will he easily could have done so.

The inequity of extending antilapse protection to class gifts but excluding void class gifts becomes apparent in situations in which some of the members of the class die prior to the execution of the will and others die after the execution of the will but prior to the testator.¹⁴⁶ For example, assume the testator has three children, A, B, and C. A dies, survived by children, before the testator executes a will that contains a class gift leaving "everything to my children." If both B and C die after the execution of the will, B's children and C's children will take not only their parent's share of the class gift, but would also split the share that would have gone to A if A had survived. A's children are left completely out of the will.¹⁴⁷

A majority of the legislatures that have considered the question have expressly included void class gifts. Of the thirty-five statutes that mention class gifts, twenty-three expressly provide antilapse protection to void class gifts.¹⁴⁸ Four states expressly exclude void class gifts from the operation of their antilapse statute.¹⁴⁹ In the group of seven states whose statutes cover class gifts but do not mention void class gifts¹⁵⁰ and the fifteen states (and the District of Columbia) whose statutes make no

146. Roberts, *supra* note 8, at 344-45.

147. See, e.g., *Howland v. Slade*, 29 N.E. 631 (Mass. 1892).

148. ALA. CODE § 43-8-224 (1975); ALASKA STAT. § 13.11.240 (1985); ARIZ. REV. STAT. ANN. § 14-2605 (1975); COLO. REV. STAT. ANN. § 15-11-605 (West 1987); DEL. CODE ANN. tit. 12, § 2313 (1974); FLA. STAT. ANN. § 732.603 (West 1976); HAW. REV. STAT. § 560:2-605 (1985); IDAHO CODE § 15-2-605 (1979); ME. REV. STAT. ANN. tit. 18-A, § 2-605 (1964); MASS. GEN. LAWS ANN. ch. 191, § 22 (1990); MICH. COMP. LAWS ANN. § 700.134 (West 1980); MINN. STAT. ANN. § 524.2-605 (West 1975); MONT. CODE ANN. § 72-2-613 (1993); NEB. REV. STAT. § 30-2343 (1989); N.J. STAT. ANN. § 3B:3-35 (West 1983); N.M. STAT. ANN. § 45-2-603 (Michie 1978); N.C. GEN. STAT. § 31-42 (1993); N.D. CENT. CODE § 30.1-09-05 (2-605) (1976); S.C. CODE ANN. § 62-2-603 (Law. Co-op. 1987); TENN. CODE ANN. § 32-3-105 (1984); UTAH CODE ANN. § 75-2-605 (1993); W. VA. CODE § 41-3-3 (Michie 1982); WYO. STAT. § 2-6-106 (1977).

149. See *supra* note 46.

150. ARK. CODE ANN. § 28-26-104 (1987); ILL. ANN. STAT. ch. 755, para. 5/4-11 (Smith-Hurd 1993); IOWA CODE ANN. § 633.273 (West 1992); KY. REV. STAT. ANN. § 394.400 (Michie/Bobbs-Merrill 1984); MD. CODE ANN. EST. & TRUSTS § 4-403 (1991); 20 PA. CONS. STAT. ANN. § 2514(9) (1975); VA. CODE ANN. § 64.1-64.1 (Michie 1991).

mention of class gifts¹⁵¹ but whose courts hold that their statutes cover class gifts,¹⁵² there is a roughly even split of authority. Some of these states apply their statutes to void class gifts,¹⁵³ while others do not.¹⁵⁴

The argument in favor of excluding void class gifts from coverage of antilapse statutes is much stronger when one considers the statute's effect on such a devise. The testator, when he makes a devise "to my children" certainly will consider only the children alive at the time of the execution of the will. Furthermore, the testator probably will consider his grandchildren by the deceased child. By providing antilapse protection to void class gifts, the statute effectively adds words to the will that the testator has likely considered and rejected. When antilapse protection extends to void class gifts, the policy underlying the antilapse statute becomes much more similar to that of pretermitted heir provisions, which provide intestate shares for specified heirs not mentioned in a will. The policies underlying pretermitted heir statutes should be promoted through pretermitted heir statutes and not antilapse statutes. In any event, as is the case with class gifts generally, void class gifts should be addressed expressly in the antilapse statute in order to avoid confusion and litigation.

A Closing Word on Construction Problems

In construing antilapse statutes, some courts assert that uncertainty should be resolved in favor of application of the statutes.¹⁵⁵ These courts believe that this notion is implicit in the language of the statutes.¹⁵⁶ Disregarding whether this interpretation is correct, it will lead to the steady expansion of anti-

151. See *supra* note 45.

152. See *supra* note 47 and accompanying text.

153. See, e.g., *Gianoli v. Gabaccia*, 412 P.2d 439, 441 (Nev. 1966).

154. See, e.g., *Slattery v. Kelsch*, 734 S.W.2d 813, 815 (Ky. Ct. App. 1987).

155. See, e.g., *Tuecke v. Tuecke*, 131 N.W.2d 794, 798 (Iowa 1964); *Royston v. Watts*, 842 S.W.2d 876, 879-80 (Mo. Ct. App. 1992); *Henney v. Ertl*, 71 A.2d 546, 548 (N.J. Super. 1950); *Detzel v. Nieberding*, 219 N.E.2d 327, 331 (Ohio Prob. Ct. 1966); *Estate of Burns*, 100 N.W.2d 399, 402 (S.D. 1960); *Estate of Niehenke*, 818 P.2d 1324, 1329 (Wash. 1991); *Estate of Stewart*, 72 N.W.2d 334, 335-36 (Wis. 1955).

156. See, e.g., *Royston*, 842 S.W.2d at 879-80.

lapse doctrine. The instances in which antilapse statutes cause distributions contrary to testamentary intent will multiply. Testators and drafters will find it increasingly difficult to insure that the statute will not apply to a devise.

The antilapse statutes in effect today do not compensate adequately for the many situations like those presented in the cases cited above. Consequently, different jurisdictions apply different rules to antilapse doctrine and the result is confusion.

There is a trade-off involved in rectifying these problems. An antilapse statute would have to be long and complicated to deal effectively with all of the construction issues and would probably create its own confusion. On the other hand, it would be fairly simple to enact language that dealt conclusively with the most frequent of these questions without making the statute overly complex.

THE UPC ANTILAPSE STATUTE

The original draft of the UPC, completed in 1969, contained an antilapse statute¹⁵⁷ that is currently in force in sixteen states.¹⁵⁸ This antilapse provision represents a compromise

157. The antilapse statute in the original UPC stated:

If a devisee who is a grandparent or a lineal descendant of a grandparent of the testator is dead at the time of execution of the will, fails to survive the testator, or is treated as if he predeceased the testator, the issue of the deceased devisee who survive the testator by 120 hours take in place of the deceased devisee and if they are all of the same degree of kinship to the devisee they take equally, but if of unequal degree then those of more remote degree take by representation. One who would have been a devisee under a class gift if he had survived the testator is treated as a devisee for the purposes of this section whether his death occurred before or after the execution of the will.

UNIF. PROB. CODE § 2-605 (1969).

158. See ALA. CODE § 43-8-224 (1975); ALASKA STAT. § 13.11.240 (1985), ALIZ. REV. STAT. ANN. § 14-2605 (1975); COLO. REV. STAT. ANN. § 15-11-605 (West 1987); DEL. CODE ANN. tit. 12, § 2313 (1974) (modified by changing "by representation" distribution of lapsed devise to "per stirpes" distribution); FLA. STAT. ANN. § 732.603 (West 1976) (modified by changing "by representation" distribution of lapsed devise to "per stirpes" distribution); HAW. REV. STAT. § 560:2-605 (1985); IDAHO CODE § 15-2-605 (1979); ME. REV. STAT. ANN. tit. 18-A, § 2-605 (1964) (modified by changing "by representation" distribution of lapsed devise to "per stirpes" distribution); MINN. STAT. ANN. § 524.2-605 (West 1975); MONT. CODE ANN. § 72-2-613 (1993); N.J. REV. STAT. § 3B:3-35 (1983); N.D. CENT. CODE § 30.1-09-05 (2-605) (1976); S.C. CODE

among the various forms of antilapse statutes. It covers devises to grandparents of the testator or the grandparents' lineal descendants and passes the lapsed devise to the issue of the predeceased devisee by representation.¹⁵⁹ The original UPC antilapse statute also expressly covers class gifts, even where the class member died before the execution of the will.¹⁶⁰

Because the original UPC antilapse statute is similar to so many of the statutes in force, it is subject to many of the same criticisms as the antilapse statutes discussed above. With an eye toward resolving some of these criticisms,¹⁶¹ the UPC drafters, as part of their revision of Article II, promulgated section 2-603, a new and substantially changed antilapse statute.¹⁶² The UPC's revised antilapse provision is immediately striking because of its length. Whereas antilapse statutes are typically no longer than a short paragraph, the updated UPC dedicates over two pages to its antilapse statute. Furthermore, two additional sections of the UPC, sections 2-706 and 2-707, extend antilapse protection to other forms of testamentary and nontestamentary transfers.¹⁶³ This liberal verbiage carries out the drafters' obvious intention of extending the application of antilapse protection

ANN. § 62-2-603 (Law. Co-op. 1987) (modified by including great-grandparents and their lineal descendants in the class of devisees protected by the statute); UTAH CODE ANN. § 75-2-605 (1993) (modified by including all heirs of the testator in the class of devises protected by the statute); WYO. STAT. § 2-6-106 (1977) (modified by changing "by representation" distribution of lapsed devise to "per stirpes" distribution).

159. UNIF. PROB. CODE § 2-605 (1969). Some of the states that have adopted this provision have changed "by representation" to "per stirpes." See *supra* note 159. Utah has changed the coverage of the statute to include devises to all heirs of the testator in the class of devises protected by the statute. See UTAH CODE ANN. § 75-2-605 (1993). South Carolina has changed the coverage of the statute to include devises to the testator's great-grandparents and the great-grandparents' lineal heirs in the class of devisees protected by the statute. See S.C. CODE ANN. § 62-2-603 (Law. Co-op. 1987).

160. UNIF. PROB. CODE § 2-605 (1969).

161. The UPC drafters call these criticisms "interpretive questions." *Id.* § 2-603 cmt. (1990).

162. For the full text of the 1990 UPC § 2-603, see *infra* app. B.

163. UNIF. PROB. CODE § 2-706 ("Life Insurance; Retirement Plan; Account With POD Designation; Transfer-on-Death Registration; Deceased Beneficiary."); *id.* § 2-707 ("Survivorship with Respect to Future Interests under Terms of Trust; Substitute Takers.").

to areas where it has never been applied before.¹⁶⁴

The UPC's antilapse statute still covers devises to the testator's grandparents or the grandparents' descendants, but adds devises to stepchildren¹⁶⁵ to this class.¹⁶⁶ The UPC also extends antilapse protection to powers of appointment, life insurance beneficiaries, retirement plan beneficiaries, pay-on-death (POD) account beneficiaries, and the beneficiaries of future interests under the terms of a trust.¹⁶⁷ If the beneficiary of any of these testamentary and nontestamentary gifts predeceases the testator/grantor, then a substitute gift is created in the issue of the beneficiary.¹⁶⁸

The current UPC also makes it much more difficult for a testator¹⁶⁹ to defeat the operation of its antilapse statute. Under this provision, words of survivorship, by themselves, expressly do *not* prevent the application of the statute.¹⁷⁰ For example, the devise, "to A if she survives me" is not sufficient, by itself, to defeat the operation of the statute.¹⁷¹ Rather, in order to defeat it a testator must use language such as "to A if she survives me, but not to her descendants if she does not."¹⁷² The statute does allow for the introduction of extrinsic evidence to show that the

164. See *infra* notes 178-80 and accompanying text.

165. The inclusion of stepchildren in the class of devisees is not entirely new. See, e.g., CAL. PROB. CODE § 6147 (West 1991); CONN. GEN. STAT. ANN. § 45a-411 (West 1993).

166. UNIF. PROB. CODE § 2-603. Under UPC § 2-603, devises to the stepchild's descendants are not covered. *Id.* at cmt. Whereas the inclusion of stepchildren seems strange when devises to the spouse are not included in the coverage, the official comments to the UPC § 2-603 provide a convincing argument for the inclusion of stepchildren. *Id.*

It is, at first glance, confusing to exclude the testator's wife but include stepchildren. The apparent rationale is that the testator who devises property to his stepchild would probably want to benefit that stepchild's issue; whereas a devise to the wife does not carry the implicit intent on the part of the testator to benefit the wife's children from a prior marriage.

167. *Id.* §§ 2-706, 2-707.

168. *Id.* Section 2-104 imposes the additional requirement that the devisee survive the testator by 120 hours in order to be able to take the devise. *Id.* § 2-104.

169. Unless otherwise noted, when discussing the revised UPC the term "testator" includes the grantor of a nontestamentary gift.

170. UNIF. PROB. CODE § 2-603(b)(3).

171. *Id.* at cmt.

172. *Id.*

testator intended the words of survivorship to foreclose the application of the antilapse statute.¹⁷³

The 1990 UPC antilapse statute also reverses the generally accepted rule that the provision of an alternative devise is sufficient to stop the operation of the antilapse statute. In other words, if a testator devises "\$10,000 to A if she survives me and if not then to B," and both A and B predecease the testator, most courts would not apply the antilapse statute.¹⁷⁴ These courts reason that the provision of an alternative devise reflects the testator's intent that the statute not apply.¹⁷⁵ Under the UPC, however, if both A and B predecease the testator and both leave surviving issue, the antilapse statute saves the lapsed devise for the surviving issue.

The Drafters' Rationales for the Revisions

In updating the UPC's antilapse statute, the revised UPC's drafters had several goals in mind.¹⁷⁶ The drafters' stated reason for the revision was to resolve "a variety of interpretive questions that have arisen under standard antilapse statutes, including the antilapse statute of the pre-1990 Code."¹⁷⁷ The drafters also wanted to expand significantly the operation of antilapse doctrine and institute pioneering methods of extending antilapse protection.¹⁷⁸ The drafters claimed that this expansion of antilapse protection was necessary because "an antilapse statute is remedial in nature, tending to preserve equality of treatment among different lines of succession."¹⁷⁹ Therefore, "the remedial character of the statute means that it should be given the widest possible latitude to operate in considering whether in an individual case there is an indication of a contrary intent sufficiently convincing to defeat the statute."¹⁸⁰ In other words, because antilapse statutes are "remedial," any

173. *Id.* § 2-603(b)(3).

174. *See supra* notes 115-22 and accompanying text.

175. *See supra* notes 119-21 and accompanying text.

176. *See* Halbach & Waggoner, *supra* note 101, at 1101-02.

177. UNIF. PROB. CODE § 2-603 cmt.

178. Ascher, *supra* note 18, at 650.

179. UNIF. PROB. CODE § 2-603 cmt.

180. *Id.*

uncertainty as to whether the testator has manifested an intent that the statute should not apply should be resolved in favor of applying the statute. The drafters never fully explained why the "remedial nature" is good (or exactly what it is) and the result of their extension of antilapse doctrine is certain to result in applications of the antilapse statute that are clearly contrary to testamentary intent.

In determining whether the 1990 revisions have improved the UPC antilapse statute, this Note will evaluate it based on three criteria: (1) whether the revisions have adequately addressed the problems identified with existing antilapse statutes, (2) whether the solutions that the UPC drafters have presented to address these problems are likely to create other problems, and (3) the merits of the revisions that are directed toward expansion of antilapse doctrine.

The Antilapse Problems and UPC Solutions

In the discussion of antilapse statutes above, this Note identified two general areas with regard to antilapse statutes that often cause either distributions contrary to the intent of the testator or confusion on the part of the courts as to the proper application of the statutes. The first of these problem areas is the inflexibility with which antilapse statutes are applied.¹⁸¹ For example, few antilapse statutes force the court to consider who would take by virtue of the statute and who would take by virtue of the common law rule in determining an outcome that the typical testator would presumably prefer.¹⁸²

The UPC solution to this problem is likely to increase the frequency of litigation. If, for example, a testator uses language that could be interpreted to manifest an intention that the antilapse statute not apply, the UPC allows the court to consider extrinsic evidence in determining the testator's true intent.¹⁸³ When a testator disinherits a devisee's son, and the devisee predeceases the testator, the residuary takers are invited, by the language of the statute, to institute court action to stop the son

181. See *supra* notes 73-96 and accompanying text.

182. See *supra* notes 89-90 and accompanying text.

183. UNIF. PROB. CODE § 2-603(b)(3) cmt.

from taking the devise by virtue of the statute. Encouraging litigation, however, may not be the most efficient method of uncovering testamentary intent. Statutes should not be vehicles for expanding the burden on the judiciary. The drafters would better serve the interests of justice by simply applying a hard rule that express disinheritance is (or is not) sufficient to defeat the operation of the statute.¹⁸⁴

Construction Problems and the UPC

The general simplicity of current antilapse statutes and their failure to compensate expressly for the numerous construction problems that cases repeatedly present is another general problem area raised in the above discussion.¹⁸⁵ The revisions of the UPC's antilapse statute have dealt with many of these difficulties. The drafters' solution in almost¹⁸⁶ every one of these areas has been to expand the operation of the antilapse statute. Consequently, there is less confusion over whether the statute should apply, but in some areas, the UPC's extension of antilapse protection applies in ways that are of dubious value.

Class Gifts

The failure of many antilapse statutes to deal expressly with class gifts and void class gifts has caused conflicting results among the states.¹⁸⁷ The original UPC antilapse statute expressly covered both of these testamentary gifts and the newer version has not changed this coverage.¹⁸⁸ In the case of class gifts, the UPC has done nothing different from the majority of

184. Not allowing an expressly disinherited individual to take by virtue of the statute would be the preferred method. See *supra* notes 112-14 and accompanying text.

185. See *supra* notes 91-96 and accompanying text.

186. Oddly, the official comments to 2-603 include a statement that a "method of expressing a contrary intention as to nonresiduary devises is to add to the residuary clause the phrase 'including all lapsed or failed devises.'" UNIF. PROB. CODE § 2-603 cmt. See generally Halbach & Waggoner, *supra* note 101 (explaining the rationale of many of the changes in the UPC's antilapse statute). This comment is noteworthy because it is the single feature of the UPC antilapse statute that actually reduces the frequency with which the statute will apply.

187. See *supra* notes 131-54 and accompanying text.

188. UNIF. PROB. CODE § 2-603.

other states.¹⁸⁹ Additionally, it makes sense to expand antilapse doctrine to cover class gifts.¹⁹⁰

Similarly, many of the states whose antilapse statutes expressly cover class gifts expressly include void class gifts;¹⁹¹ the drafters of the UPC have done nothing radical by including void class gifts in the coverage of the antilapse statute. However, extending antilapse coverage to void class gifts probably decreases the likelihood that the statute will apply testamentary intent.¹⁹² Nonetheless, by expressly dealing with the issue of void gifts, the UPC has effectively reduced the amount of litigation concerning this issue.

Testamentary Transfers Other Than Devises

As discussed above,¹⁹³ the UPC antilapse statute now covers almost the full range of alternatives to testamentary gifts, including beneficial interests in insurance policies, POD accounts, retirement accounts, powers of appointment, and future interests in trusts. Only one state antilapse statute expressly covers any of these types of transfers.¹⁹⁴ Occasionally, courts have interpreted state antilapse statutes to cover one or more of these transfers.¹⁹⁵ With most of these transfers (specifically insurance policies, POD accounts, retirement accounts, and powers of appointment) applying antilapse protection is merely a question of whether the typical testator would intend the descendants of the deceased beneficiary to take the gift. Because receipt of these testamentary gifts requires survivorship on the part of the

189. See *supra* note 45 and accompanying text.

190. See *supra* text accompanying notes 140-44.

191. See *supra* note 148 and accompanying text.

192. See *supra* text following note 154.

193. See *supra* notes 168-69 and accompanying text.

194. N.M. STAT. ANN. § 45-2-603 (Michie 1978). New Mexico is the only state that has adopted §§ 2-706 and 2-707 of the revised UPC.

195. See, e.g., *Estate of Eddy*, 176 Cal. Rptr. 598, 611 (Ct. App. 1981) (noting that California antilapse statute applies to powers of appointment); *Dewire v. Haveles*, 534 N.E.2d 782, 784 (Mass. 1989) (noting that Massachusetts antilapse statute applies to gifts in trust); *Dollar Savings & Trust Co. of Youngstown v. Turner*, 529 N.E.2d 1261, 1262 (Ohio 1988) (holding that antilapse statute applies to trusts); *Estate of Neihenke*, 818 P.2d 1324, 1327 (Wash. 1991) (holding that antilapse statute applies to options).

beneficiary, in exactly the same manner as the receipt of a devise in a will, the argument for their inclusion under the umbrella of antilapse protection is at least as convincing as that for including a devise.¹⁹⁶ Accordingly, the UPC's express inclusion of these gifts is laudable because it creates a hard rule that will reduce litigation and confusion.

On the other hand, the drafters' inclusion of future interests in *inter vivos* and testamentary trusts in section 2-707 may add confusion. The common law imposes a constructional preference for vested future interests in trusts.¹⁹⁷ Under this preference, if a beneficiary of a trust predeceases the distribution date¹⁹⁸ the beneficiary's interest is considered vested, and the trust assets go to the beneficiary's successors.¹⁹⁹ Generally, the beneficiary can also assign or devise the interest in the trust. However, the UPC imposes the opposite constructional preference such that "[a] future interest under the terms of a trust is contingent on the beneficiary's surviving the distribution date."²⁰⁰ The UPC, under the guise of creating an antilapse statute, has reversed a fairly well established common law doctrine and decreed that all future interests under a trust are contingent and not vested.

196. See Halbach & Waggoner, *supra* note 101, at 1125-26.

197. LEWIS S. SIMES & ALLAN F. SMITH, *THE LAW OF FUTURE INTERESTS* § 585 (2d. ed. 1956); see also *In re Estate of Ferry*, 361 P.2d 900, 905 (Cal. 1961); *Mueller v. Forsyth*, 235 N.E.2d 645, 648-49 (Ill. App. 1968); UNIF. PROB. CODE § 2-707 cmt (1990). This preference is not absolute. *Fletcher v. Hurdle*, 536 S.W.2d 109, 112-13 (Ark. 1976); *Schau v. Cecil*, 136 N.W.2d 515, 519 (Iowa 1965); *Altman v. Rider*, 291 S.W.2d 577, 579 (Ky. 1956).

198. "Distribution date" refers to the time when the future interest is to take effect in possession or enjoyment. See UNIF. PROB. CODE § 2-707(a)(4).

199. The successors would be the beneficiary's heirs if the beneficiary dies intestate or the beneficiary's residuary legatees if the beneficiary dies testate.

200. UNIF. PROB. CODE § 2-707(b). Note that under § 2-701, a finding within the trust document of an intent contrary to the operation of the rules of construction (such as § 2-707) supersedes this constructional preference. *Id.* §§ 2-701, 2-707 cmt. The comments to § 2-701 do not expressly state that extrinsic evidence is allowed to show a contrary intent whereas, in contrast, the comments to § 2-601 (referring to rules of construction for wills) do expressly state that extrinsic evidence is allowed. *Id.* § 2-601 cmt. However, the wording of § 2-701 seems to indicate that any finding of contrary intent (not just a finding within the governing instrument) is sufficient to toll the operation of the statute. See *id.* § 2-701. Accordingly, under § 2-707, it is possible for a grantor to indicate in his will that he does not intend for § 2-707 to apply to a trust created by a separate instrument.

This change has many possible implications that are generally beyond the scope of this Note.²⁰¹ However, there are some significant aspects of the UPC treatment of future interests in trusts that deserve discussion.

When the beneficiary of a future interest in a trust predeceases the distribution date, there are three possible solutions: (1) the law could imply a condition of survivorship with a reversionary interest in the grantor or grantor's estate,²⁰² (2) the law could provide for alternative takers, or (3) the law could imply no condition of survivorship and allow the trust interest to pass to the deceased beneficiary's successors. UPC section 2-707 adopts part of the first solution and part of the second solution. The statute operates by requiring the beneficiary to survive the distribution date of the trust and creating a substitute gift in alternative takers. The alternative takers are (1) the beneficiary's issue,²⁰³ (2) the residuary takers under the terms of the grantor's will,²⁰³ and (3) the grantor's heirs, respectively.²⁰⁴ If the beneficiary of a future interest in a trust predeceases the distribution date, the trust proceeds immediately pass

201. For example, when future interests are vested, it is much easier to resolve disputes because those who may have a possible interest in the trust are much more easily identifiable. If the future interest in a trust is contingent, under the doctrine of virtual representation, everyone that possibly could have an interest in the trust must be represented in any dispute concerning the trust. Under some circumstances, these individuals might not be identifiable. For a thorough discussion of these issues, see Jesse Dukeminier, *A Modern Guide to Perpetuities*, 74 CAL. L. REV. 1867 (1986) (discussing the early vesting of contingent future interests in trusts and the implications of the Rule Against Perpetuities); Rochelle A. Smith, Note, *Why Limit a Good Thing? A Proposal to Apply the California Antilapse Statute to Revocable Living Trusts*, 43 HASTINGS L.J. 1391 (1992).

202. This solution would also include acceleration of the succeeding interest in the trust.

203. The residuary takers under the grantor's will receive a substitute future interest if the "trust was created in a nonresiduary devise in the [grantor's] will or in a codicil to the [grantor's] will . . ." UNIF. PROB. CODE § 2-707(d)(1).

204. In other words, if a grantor creates a trust that states, "\$10,000 in trust to Trustee to pay the income to Alan for life, remainder to Bob," § 2-707 adds the words "and if Bob fails to survive Alan, remainder to Bob's issue; and if Bob fails to survive Alan and dies without issue, remainder to the residuary takers under my will; and if Bob fails to survive Alan and dies without issue and the residuary takers under my will cannot take, remainder to my heirs." See *id.* § 2-707.

Also note that under § 2-701, § 2-707 yields to a contrary intent expressed in the trust document. *Id.* at cmt.

to the beneficiary's issue²⁰⁵ without passing through the beneficiary's estate, thus saving probate costs and taxes.²⁰⁶

According to the official comment, the objective of the drafters in developing this section is to "project the antilapse idea into the area of future interests."²⁰⁷ The statute does not cover all future interests, however, because by its terms, section 2-707 is limited to future interests under a trust.²⁰⁸

Unlike all other UPC antilapse provisions, section 2-707 applies to *all* future interests in trusts, not just those to the grantor's grandparents or the descendants of the grantor's grandparents. Moreover, section 2-707 differs from other antilapse statutes because the beneficiary must survive the "distribution date" of the trust.²⁰⁹ Normally, antilapse statutes operate under a system that requires the beneficiary to survive the testator. For example, if a grantor created a trust that stated "\$10,000 in trust to Trustee to pay the income to Alan for life, remainder to Bob," under section 2-707, Bob must survive Alan in order to take a vested interest in the \$10,000. Bob's failure to survive Alan could occur many years after the death of the grantor. If Bob had no issue and died prior to Alan but fifty years after the grantor, section 2-707(d)(1) states that after Alan's death, the \$10,000 should pass to the residuary takers under the terms of the testator's will.²¹⁰ However, the residuary takers must also survive Alan because they are treated as having "a future interest under the terms of the trust."²¹¹

205. If the beneficiary died without issue, the property passes to the residuary takers under the grantor's will or to the grantor's heirs. *Id.* § 2-707(d).

206. Although the rationale of implying survivorship is to avoid taxation of the trust assets as a part of the deceased beneficiary's estate, distribution to alternate takers (who are the issue of the beneficiary) may be subject to a generation skipping tax under the Internal Revenue Code. *See* 26 U.S.C. §§ 2611-12 (1986). This question deserves further attention but is, unfortunately, beyond the scope of this Note.

207. UNIF. PROB. CODE § 2-707 cmt.

208. The rationale of this distinction is that, as to legal interests, early vesting is favored because early vesting allows for the more efficient disposal of property. With trusts, the entire legal interest rests with the trustee who can normally dispose of the property if efficiency so demands. *See id.*

209. *Id.* § 2-707(b).

210. *Id.* § 2-707(d)(1).

211. Accordingly, any time that a grantor creates a trust with a future interest, the residuary takers under the grantor's will have a contingent interest in the trust.

Without a more in depth discussion into the various implications of section 2-707,²¹² it is difficult to categorically state whether the extension of antilapse doctrine to the area of future interests is praiseworthy. The drafters' claim that the statute would avoid the "cumbersome and costly distributions to and through the estates of deceased beneficiaries of future interests"²¹³ is debatable. The advantage of the statute is that trust assets would not have to pass through a deceased beneficiary's estate. However, the possible necessity of determining the grantor's surviving residuary takers or heirs, long after the death of the grantor, could be quite cumbersome.

Additionally, the doctrine of antilapse as it applies to wills operates only at the time that the testator dies. UPC section 2-707 can operate before or after the grantor dies. If a grantor creates an irrevocable *inter vivos* trust that includes a future interest in a beneficiary, under the common law, which treats the future interest as vested, the beneficiary has the opportunity to change the ultimate destination of the trust assets. For example, suppose a grantor creates a trust that states, "\$100,000 in trust to Trustee to pay the income to Wife for life, remainder to sons Alan and Bob share and share alike." Under the common law, if circumstances change such that Alan has no need for his portion of the trust assets, he can transfer his future interest to Bob. Under section 2-707, any transfer Alan makes would be contingent on his surviving the life beneficiary.²¹⁴ Section 2-707 does not allow the holders of a future interest in a trust to rearrange the distribution of the trust assets to compensate for the many potential changes that could occur in the potentially extended period between the creation of the trust and the distribution date.

If the residuary takers do not survive the distribution date, a substitute gift is also created in their issue such that the issue would take whatever their ancestors would have been entitled to take had they survived. *Id.*

212. See *supra* note 201 and accompanying text.

213. UNIF. PROB. CODE § 2-707 cmt.

214. Furthermore, assembling all of the possible contingent beneficiaries in order to allow such a change in the trust would be extremely difficult if not impossible. See *supra* note 198.

UPC Antilapse and a Contrary Intent

With regard to defeating the operation of the antilapse statute, the UPC has made expressing contrary intent much more difficult in two ways. First, the UPC expressly states that words of survivorship alone are not sufficient to defeat the operation of the statute.²¹⁵ Second, the UPC's antilapse statute operates even when the testator provides for alternate devisees.²¹⁶

As was discussed above, courts generally recognize that the inclusion of words of survivorship²¹⁷ clearly manifests the testator's intent that the statute not operate.²¹⁸ Accordingly, by expressly stating that words of survivorship are not sufficient to defeat the statute, the UPC has "chosen to stand on its head an established rule upon which those who draft wills must and should be able safely to rely."²¹⁹ The UPC drafters ignore the concept that the antilapse statute is to apply to situations that the testator has not considered.²²⁰

Several courts have held that mere words of survivorship are not sufficient to defeat the operation of the statute, but these courts are in the minority.²²¹ The UPC has chosen to follow the minority path much to the dismay of at least two commentators.²²² This action on the part of the UPC drafters is commendable to the extent that the statute provides a hard rule that would produce more consistent results. However, the drafters tempered their action by allowing for the introduction of extrinsic evidence to determine whether the testator intended for the words of survivorship to foreclose the operation of the statute, thereby undermining the beneficial effects of the rule.²²³ Under this statute, litigation is likely to increase because every time words of survivorship appear in a will, the residuary devisees may institute court action in an attempt to

215. UNIF. PROB. CODE § 2-603.

216. *Id.*

217. *E.g.*, when the testator devises "Blackacre to A if she survives me."

218. *See supra* note 116 and accompanying text.

219. Ascher, *supra* note 18, at 652.

220. *Id.*

221. *See supra* note 117 and accompanying text.

222. *See, e.g.*, Ascher, *supra* note 18; Begleiter, *supra* note 18.

223. UNIF. PROB. CODE § 2-603 cmt. (1990).

show that the testator voiced his desire that the antilapse statute not apply to any devise.²²⁴

This revision has also been criticized on the grounds that it will expose attorneys to increasing malpractice liability.²²⁵ Attorneys who rely on the generally accepted rule that words of survivorship adequately foreclose the operation of the statute will find themselves defending malpractice actions brought forth by angry residuary takers.²²⁶

In this case, the drafters missed an opportunity to create a better statute which expressly states that words of survivorship defeat the operation of the statute.²²⁷

Alternative Devises Under the UPC

With regard to alternative devises, the UPC's antilapse statute has also overturned an accepted rule. Most courts today hold that the provision of alternative devises has the effect of manifesting a clear intent contrary to the application of an antilapse statute.²²⁸ In these states, if a testator makes a devise to the effect of "to A if he survives me and if not, then to B" the antilapse statute will not apply even if both A and B predecease the testator. This rule has a much greater likelihood of applying testamentary intent because the testator who has provided for an alternative devise has obviously thought of the contingency that a beneficiary under the will may die. Therefore, it is much more likely that the same testator has also considered what would happen if the alternative devisee also dies. Following the general rule that an alternative devise is sufficient to defeat the operation of the statute, the testator presumes that the lapsed devise will fall into the residuary.

224. Ascher, *supra* note 18, at 653-54. For further discussion of the UPC treatment of extrinsic evidence with regard to antilapse statutes, see *infra* notes 258-63 and accompanying text.

225. Begleiter, *supra* note 18, at 127-30.

226. *Id.* But see UNIF. PROB. CODE § 2-603 cmt. (rebutting this argument by stating that, in combination, §§ 2-601 and 2-603 will not expose lawyers to malpractice liability; the finding that would be necessary to establish attorney malpractice would also establish that the antilapse statute should not apply).

227. Ascher, *supra* note 18, at 650-52.

228. See *supra* notes 123-25 and accompanying text.

Under the UPC, a testator who wants to stop the operation of the antilapse statute and who provides for alternative devisees must write the devise "to A if she survives me and if she does not then to B, and if B does not survive me then not to either A's or B's issue."²²⁹

An Interpretive Nightmare: Subsection (c)

When the drafters of the UPC changed the accepted rule and decreed that alternative devisees would not stop the operation of the antilapse statute, they apparently feared that this change might cause confusion.²³⁰ In a situation where a testator devises, "\$10,000 to A if she survives me, and if not, then to B," and both A and B predecease the testator and both leave surviving issue, the UPC directs the courts to apply the antilapse statute.²³¹ The drafters apparently were concerned that the courts applying the statute would not know how to apportion the \$10,000 among A's issue and B's issue. Accordingly, they created a complicated scheme to deal with this potential problem. Under this system, the provision of alternative devisees by the testator does not foreclose the operation of the statute even if the secondary devisee²³² survives the testator and takes the entire devise. Examples may help in explaining how and why the UPC handles alternative devisees in this manner, but a vivid imagination may help even more.

When a testator devises "\$10,000 to A if he survives me, and if not, then to B," where A does not survive the testator but does leave surviving issue and B does survive, the UPC nevertheless creates a substitute gift in A's surviving issue even though B, the secondary devisee, survives and takes the entire \$10,000. The secondary devise to B supersedes the substitute gift as long as B survives the testator and the substitute gift to A's issue amounts to nothing. If both A and B predecease the testator,

229. UNIF. PROB. CODE § 2-306 cmt.

230. *Id.*

231. *Id.* § 2-603 & cmt.

232. For the purposes of this discussion "secondary devisee" refers to the beneficiary of the devise that takes effect if the "primary devisee" dies. For example, if a testator devises, "\$10,000 to A if she survives me, and if she does not, then to B," A is the primary devisee and B is the secondary devisee.

then the substitute gift to A's issue takes effect.

To extend this example even further, if a testator makes the same devise: "\$10,000 to A if he survives me, and if not then to B," but both A and B predecease the testator and both leave surviving issue, then a primary substitute gift is created in A's issue and a secondary substitute gift²³³ is created in B's issue. In this case, A's issue would take the entire \$10,000 because the primary substitute gift to A's issue supersedes the secondary substitute gift to B's issue.²³⁴

The reason that the UPC creates substitute gifts that seemingly never have a possibility of taking effect is *not* so that the antilapse statute can be called into operation to create a nullity. This language presumably is employed so that subsection (c) of the antilapse statute is understandable.

Subsection (c) of the UPC's antilapse statute is titled: "More Than One Substitute Gift; Which One Takes."²³⁵ This subsection is designed to deal with two situations.

The first of these situations arises when the testator devises property to be shared by two or more named devisees (who are in the protected class) where the testator clearly intends the survivor(s) of the devisees to take over the issue of a predeceased devisee. An example of such a devise would be "\$5000 to A and B, share and share alike, or to the survivor." In this case, subsection (c) goes into effect when both A and B predecease the testator.

If, in the above example, A and B both predecease the testator and both leave surviving issue, then:

(1) a primary substitute gift of \$2500 is created in the issue of A under A's gift,

(2) a secondary substitute gift of \$2500 is created in the issue of A under B's gift,

(3) a primary substitute gift of \$2500 is created in the issue of B under B's gift, and

(4) a secondary substitute gift of \$2500 is created in the issue

233. U.P.C. § 2-603 never actually uses the term "secondary substitute gift." This term is purely a creation of the Author made in the interest of clarity.

234. UNIF. PROB. CODE § 2-603 & cmt.

235. *Id.* § 2-603(c).

of *B* under *A*'s gift.

Of the above substitute gifts, only the primary substitute gifts (1 and 3) take effect, and the secondary substitute gifts are superseded by the primary substitute gifts. *A*'s issue and *B*'s issue each take \$2500.

However, if in the same devise *A* and *B* predecease the testator but only *B* leaves surviving issue, then a primary substitute gift of \$2500 is created in *B*'s issue under the gift to *B* and a secondary substitute gift of \$2500 is created in *B*'s issue under the gift to *A*. In this case, both the primary and secondary gifts take effect because no other gifts supersede the secondary substitute gift. Accordingly, *B*'s issue take \$5000.

The second situation arises when the testator makes individual devises to two devisees (who are in the protected class) and for each of these devises the testator names the other devisee as the secondary devisee. An example of such a devise would be "\$5000 to *A* if she survives me and if not, then to *B*; \$10,000 to *B* if he survives me and if not then to *A*." If both *A* and *B* predecease the testator and both leave issue, then:

(1) a primary substitute gift of \$5000 is created in the issue of *A* under *A*'s gift,

(2) a secondary substitute gift of \$10,000 is created in the issue of *A* under *B*'s gift,

(3) a primary substitute gift of \$10,000 is created in the issue of *B* under *B*'s gift, and

(4) a secondary substitute gift of \$5000 is created in the issue of *B* under *A*'s gift.

Again, of the above substitute gifts, only the primary substitute gifts (1 and 3) take effect, and the secondary substitute gifts are superseded by the primary substitute gifts. *A*'s issue take \$5000 and *B*'s issue take \$10,000.

However, if in the same devise *A* and *B* predecease the testator but only *B* leaves surviving issue, then a primary substitute gift of \$10,000 is created in *B*'s issue under the gift to *B* and a secondary substitute gift of \$5000 is created in *B*'s issue under the gift to *A*. In this case, both the primary and secondary gifts take effect because no other gifts supersede the secondary substitute gift. Accordingly, *B*'s issue take \$15,000.

Younger-Generation Devises

The above examples do not adequately demonstrate the need for secondary substitute gifts that could never take effect. One must read paragraph (2) of subsection (c) in order to fully understand the need for secondary substitute gifts. That paragraph states, “[i]f there is a younger-generation devise, the devised property passes under the younger-generation substitute gift and not under the primary substitute gift.”²³⁶ In other words, the possibility exists for a secondary substitute gift to supersede a primary substitute gift if the devise is of a certain type.

By way of illustration, assume the testator devises “\$50,000 to my child A and if he does not survive me, then to A’s two children, X and Y.” If A and X both predecease the testator and X leaves child Z surviving, then:

- (1) a secondary devise of \$25,000 would be created in Y,
- (2) a primary substitute gift of \$25,000 would also be created in Y under the gift to A, and
- (3) a secondary substitute gift of \$25,000 would be created in Z under the gift to X.

Under these circumstances, the secondary devise of \$25,000 created in Y would take effect, superseding all substitute gifts. However, the secondary substitute gift to Z would supersede the primary substitute gift to Y because the alternative devise to “A’s two children, X and Y” is a “younger-generation devise,” and the devise must pass under the substitute gift created under that alternative devise. Both Y and Z would each take \$25,000.

This description of subsection (c) of the UPC antilapse statute demonstrates that the subsection is, at best, unnecessarily confusing. Apparently, the drafters wanted to insure that the antilapse statute would apply to as many different hypothetical devise/deceased devisee combinations as possible. By doing so, the drafters hoped to resolve the types of construction problems that may arise as a result of the complicated nature of some of these combinations. However, the drafters ignored the fact that common sense could resolve most of the hypothetical situations that subsection (c) is intended to address.

236. *Id.* § 2-603(c)(2).

For example, in the devise, "\$10,000 to A and B, share and share alike, or to the survivor," where A and B both predecease the testator and both leave surviving issue, subsection (c) provides the complicated scheme outlined above in order to resolve the question of how the \$10,000 gift should be apportioned among A's issue and B's issue. Under the original UPC antilapse statute, which did not have this scheme, the only construction problem a court faces is whether to apply the antilapse statute in light of the testator's use of survivorship language.²³⁷ No court would give the devise only to A's issue or only to B's issue if it determined that the antilapse statute applied. The court would give \$5000 to A's issue and \$5000 to B's issue without going to the trouble of creating the primary substitute devise and secondary substitute devise that the UPC antilapse statute contemplates.²³⁸

The only counterintuitive aspect to subsection (c) is the two paragraphs that deal with the "younger-generation devise."²³⁹ According to the drafters, this language is designed "to preserve equality of treatment among different lines of succession."²⁴⁰ The scheme that creates the younger-generation devise and the younger-generation substitute gift does meet the drafters' stated goal,²⁴¹ but not without unnecessary complexity. For example, if a court were confronted with a situation in which a testator made a devise of "\$10,000 to my son A, and if A does not survive me then to A's two children, B and C, equally," the alternative devisees to B and C are younger-generation devisees. In order to reach this conclusion the court would have to undertake the following analysis.

First the court would refer to subparagraph 2-603(c)(3)(i) which defines "primary devise" as "the devise that would have

237. See *supra* notes 115-22 and accompanying text.

238. See *supra* text accompanying notes 232-34.

239. See UNIF. PROB. CODE § 2-603(c)(2), (3) (1990); *supra* note 236 and accompanying text.

240. UNIF. PROB. CODE § 2-603 cmt.

241. If a testator devises "\$10,000 to my son A if he survives me and if not, then to A's children [testator's grandchildren] B and C" and A and B both predecease the testator and B leaves surviving child X, subsection (c) of the UPC antilapse statute splits the devise between C and X. Without subsection (c), C would get the entire devise and X would take nothing. See *id.* § 2-603(c).

taken effect had all the deceased devisees of the alternative devises who left surviving descendants survived the testator.”²⁴² In other words, “primary devise” refers to the devise to A. This definition is confusing because the primary devise is partially referred to as an alternative devise. Intuitively, the alternative devise is the secondary devise to B and C, but 2-603(a)(1) defines “alternative devise” as:

a devise that is expressly created by the will and, under the terms of the will, can take effect instead of another devise on the happening of one or more events, *including survival of the testator or failure to survive the testator*, whether an event is expressed in condition-precedent, condition-subsequent, or any other form.²⁴³

Normally, “survival of the testator”²⁴⁴ refers to the fact that the testator is alive, and “failure to survive the testator”²⁴⁵ refers to the fact that the devisee has predeceased the testator. In order to understand that “alternative devise” refers to all of the possible devises mentioned in the will (the devises to A, B, and C in the above example) the court must discern that where 2-603(a)(1) refers to “survival of the testator,” it means the survival of the devisee and not that the testator is still alive. The court must also understand that the statement, “failure to survive the testator” refers to the failure of someone other than the devisee to survive.

Once the court understands what the “primary” and “alternative” devises are, it then must proceed to the definition of “younger-generation devise” in subparagraph 2-603(c)(3)(iii):

a devise that (A) is to a descendant of a devisee of the primary devise, (B) is an alternative devise with respect to the primary devise, (C) is a devise for which a substitute gift is created, and (D) would have taken effect had all the deceased devisees who left surviving descendants survived the testator

242. *Id.* § 2-603(c)(3)(i).

243. *Id.* § 2-603(a)(1) (emphasis added).

244. *Id.*

245. *Id.*

except the deceased devisee or devisees of the primary devise.²⁴⁶

Again, the court must determine if the secondary devisees to *B* and *C* are alternative devisees "with respect to the primary devise"²⁴⁷ by referring to the definition of "alternative devise." Then the court must refer to 2-603(b)(1) to insure that the secondary devisees to *B* and *C* are devisees "for which a substitute gift is created."²⁴⁸ If the court refers to the official comment section on 2-603(c)(2) for a more intelligible explanation, it will find that the above definition of "younger-generation devise" is repeated verbatim.

The younger-generation devise is not a thoroughly rudimentary concept, but neither is it so obscure as to require the arcane treatment that the UPC provides. The drafters could have easily drafted a statute that reached the same result without the unnecessary confusion.²⁴⁹

Class Gifts and Contrary Intent

A testator who makes a class gift that states "to my children who survive me" clearly indicates that the gift is to be divided

246. *Id.* § 2-603(c)(3)(iii).

247. *Id.*

248. *Id.*

249. A proposal for meeting this goal in a less confusing manner would be:
(c) More than one substitute gift; which one takes.

...
(2) In a devise, if the testator provides for one or more secondary devisees who are to take the devise in case the primary devisee is treated as if he had failed to survive the testator, and the secondary devisees are descendants of the primary devisee, and the primary devisee does not survive the testator, then the following shall apply:

(i) If all secondary devisees survive, they shall take the portions of the devise as provided by the will.

(ii) If at least one but fewer than all of the secondary devisees predeceases the testator, and at least one of the deceased secondary devisees leaves surviving descendants, then such surviving descendants shall take the portion of the devise that their ancestor would have taken had that ancestor survived the testator.

Granted, this version of the statute may not explicitly cover every possible situation, but judicial interpretation would lead to the desired result in most, if not all, cases.

among the children who are alive at the death of the testator. The testator has shown that he has thought about the possibility that one or more of his children might predecease him, and he has provided for the alternate distribution of the devise should a child predecease him.²⁵⁰ Under the UPC's antilapse statute, however, class gifts are expressly covered,²⁵¹ and words of survivorship such as "to 'my surviving children,' . . . are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of [the antilapse statute]."²⁵²

Other Methods of Manifesting an Intent Contrary to the Antilapse Statute

The UPC fails to mention the other recognized methods of defeating the operation of the statute that were discussed above.²⁵³ Accordingly, when courts in UPC jurisdictions are confronted by language in a will that arguably manifests the testator's intent that the statute not apply, several interpretations of the antilapse statute are possible.

For example, suppose a court probates a will under which an expressly disinherited individual would take a devise by virtue of the UPC antilapse statute. Because the UPC statute does not expressly state whether words of disinheritance are sufficient to toll the operation of the statute, the court would have no explicit guidance as to whether to apply the statute. Consequently, the court could look to a number of possible sources to determine if the testator has clearly manifested his intent contrary to the statute. Because the statute expressly states that words of survivorship are not sufficient to toll the operation of the statute but says nothing about express disinheritance, the court might interpret the statute to include express disinheritance as a method of defeating the operation of the statute. The court could also reason that, because the statute in effect prior to the adoption of

250. See *Cowgill v. Faulconer*, 385 N.E.2d 327, 330 (Ohio Ct. App. 1978).

251. UNIF. PROB. CODE § 2-603(b)(2).

252. *Id.* § 2-603(b)(3).

253. These methods are testamentary scheme, express disinheritance, disinheritance by implication, and a devise to the descendant of the deceased devisee who would have taken the gift under the antilapse statute. See *supra* notes 103-12, 128-29 and accompanying text.

the UPC did not mention express disinheritance, the same rule that applied to the old statute should be applied to the UPC antilapse statute. Additionally, the court could read the comments of section 2-603 which state that

[i]n the absence of persuasive evidence of a contrary intent, however, the antilapse statute, being remedial in nature, and tending to preserve equality among different lines of succession, *should be given the widest possible chance to operate* and should be defeated only by a finding of intention that *directly contradicts* the substitute gift created by the statute.²⁵⁴

After reading this comment the court could hold that "the widest possible chance to operate"²⁵⁵ language means that doubt as to whether the statute applies should be resolved in favor of applying the statute. Conversely, the court could hold that the application of the statute "directly contradicts"²⁵⁶ the express language in the will that states that the individual is to take no part of the estate.

Hence, depending on the jurisdiction, it will either be extremely difficult to prevent an antilapse statute from applying, or significant confusion over defeating the operation of the UPC statute will continue to result. In either case, the appearance of an express disinheritance or any other recognized method of manifesting contrary intent in a will is certain to invite increased litigation because all of the methods of statutory interpretation mentioned above are regarded as reasonable approaches. Simply put, the UPC antilapse statute does not sufficiently indicate which of these methods of statutory interpretation should be applied.

The drafters, in carefully including language that stated that words of survivorship would not toll operation of the antilapse statute, should have taken the further step of expressly dealing with the other methods of manifesting intent contrary to the statute. Courts in several jurisdictions deem express disinheritance to be a clear manifestation of the testator's intent that the

254. UNIF. PROB. CODE § 2-603 cmt. (first emphasis added).

255. *Id.*

256. *Id.*

antilapse statute not apply.²⁵⁷ By not mentioning these methods, the antilapse statute invites increased litigation.

Extrinsic Evidence and Contrary Intent

As noted above, all current antilapse statutes are rules of construction that yield to a finding of contrary intent.²⁵⁸ In all but a few of the states, the contrary intent must be found in the language of the will itself—no evidence extrinsic to the will may be considered in determining whether the testator clearly manifested his intent that the statute not apply unless an ambiguity exists on the face of the will.²⁵⁹

In reversing this rule, UPC section 2-601 states “[i]n the absence of a finding of a contrary intention, the rules of construction in this Part control the construction of a will.”²⁶⁰ In the comment to section 2-601, the drafters state that “evidence extrinsic to the will as well as the content of the will itself is admissible for the purpose of rebutting the [antilapse statute].”²⁶¹ Accordingly, no limits are placed on the character and manner of the evidence presented. Under the UPC, any time a court confronts a situation calling for the application of the antilapse statute, extrinsic evidence is allowed in order to show that the testator would not have intended for the statute to operate—even if the content of the will raises no question or ambiguity as to whether the statute should be applied.²⁶² As a consequence, any time a devise lapses, the residuary devisees (or the testator’s heirs if there are no residuary devisees) would have standing to challenge the application of the antilapse statute regardless of the language in the will. They need only allege that they have evidence that the testator intended the devise to fall into the residuary. As written, the UPC antilapse statute, in effect, has created an entirely new litigation issue. Unquestionably, the UPC’s invitation to courts to allow extrinsic evidence

257. See *supra* notes 103-12 and accompanying text.

258. See *supra* notes 97-100 and accompanying text.

259. See *supra* notes 85-88 and accompanying text.

260. UNIF. PROB. CODE § 2-601.

261. *Id.* at cmt.

262. See *id.*

would have the effect of dramatically increasing litigation.

Furthermore, the rationale for excluding extrinsic evidence, that the best evidence of the testator's intent is the attested words of his will, still exists.²⁶³ The common law developed the high evidentiary standard of the law of wills in order to prevent fraud and provide for the orderly distribution of a testator's estate. The UPC antilapse statute will thwart both of these goals by allowing extrinsic evidence.

CONCLUSION

Some of the revisions to the UPC's antilapse statute are noteworthy in that they work to reduce the confusion surrounding the current law regarding antilapse statutes. For example, the UPC expressly extends antilapse protection to most types of donative transfers that are to take effect on death such as insurance policies. In laying down a "bright line rule" in this manner, the drafters have effectively eliminated the confusion that courts now face in interpreting current antilapse statutes.

The 1990 UPC antilapse statute also addresses other problems identified with current antilapse statutes, and in almost every instance, the UPC solution has been to expand the operation of the statute. In one sense, the operation of the statute is now much more difficult to defeat in that words of survivorship are expressly made insufficient to overcome the presumption in favor of the statute. The drafters apparently predicted the negative reaction that this change would provoke. Consequently, they tempered this action by allowing completely unfettered consideration of extrinsic evidence in determining whether to apply the statute. Moreover, the UPC antilapse statute does not mention whether it covers other traditional methods of defeating the statute such as disinheritance of the devisee's issue. The UPC statute's silence on these methods of manifesting contrary intent and the allowance of extrinsic evidence are certain to increase the amount of litigation regarding a lapsed devise.

In addition to reversing the well-established rule that words of survivorship are sufficient to defeat the statute, the UPC ab-

263. See *supra* notes 82-84 and accompanying text.

rogates the rule that the provision of alternative devises is sufficient to toll the operation of the antilapse statute. In making this change, the drafters created an unnecessarily complicated scheme for apportioning lapsed alternative devises. Finally, the UPC reverses the common law constructional preference for early vesting of future interests in a trust in order to extend the antilapse policies into the area of trusts.

The UPC drafters' stated goal is to extend antilapse protection. In meeting this goal, they have created an unwieldy statute that is confusing and certain to increase litigation.

Erich Tucker Kimbrough

APPENDIX A: STATE BY

STATE	DEVISEES COVERED BY STATUTE
Alabama ALA. CODE § 43-8-224 (1975).	Grandparent or lineal descendant of grandparent.
Alaska ALASKA STAT. § 13.11.240 (1985).	Grandparent or lineal descendant of grandparent.
Arizona ARIZ. REV. STAT. ANN. § 14-2605 (1975).	Grandparent or lineal descendant of grandparent.
Arkansas ARK. CODE ANN. § 28-26-104 (1987).	Child or other descendant.
California CAL. PROB. CODE § 6147 (West 1991).	Kindred to the testator or kindred to a surviving, deceased, or former spouse.
Colorado COLO. REV. STAT. ANN. § 15-11-605 (West 1987).	Grandparent or lineal descendant of grandparent.
Connecticut CONN. GEN. STAT. ANN. § 45a-411 (West 1993).	Child, stepchild, grandchild, brother, or sister.
Delaware DEL. CODE ANN. tit. 12, § 2313 (1974).	Grandparent or lineal descendant of grandparent.
District of Columbia D.C. CODE ANN. § 18-308 (1981).	All devisees.
Florida FLA. STAT. ANN. § 732.603 (West 1976).	Grandparent or lineal descendant of grandparent.
Georgia GA. CODE ANN. § 53-2-103 (1982).	All devisees.

STATE TREATMENT OF ANTILAPSE

TREATMENT OF CLASS GIFTS	WHO TAKES UNDER STATUTE
Includes class gifts even if deceased class member dies before the execution of the will.	Issue of deceased devisee by representation.
Includes class gifts even if deceased class member dies before the execution of the will.	Issue of deceased devisee by representation.
Includes class gifts even if deceased class member dies before the execution of the will.	Issue of deceased devisee by representation.
Includes class gifts.	Issue of deceased devisee as by intestacy.
Includes class gifts only if deceased class member dies after execution of the will.	Issue of deceased devisee by representation.
Includes class gifts even if deceased class member dies before the execution of the will.	Issue of deceased devisee by representation.
No mention of class gifts.	Issue of deceased devisee.
Includes class gifts even if deceased class member dies before the execution of the will.	Issue of deceased devisee per stirpes.
No mention of class gifts.	Issue of deceased devisee.
Includes class gifts even if deceased class member dies before the execution of the will.	Issue of deceased devisee per stirpes.
No mention of class gifts.	Issue of deceased devisee in same proportions as if it were inherited directly from their deceased ancestor.

APPENDIX A: STATE BY

STATE	DEWISEES COVERED BY STATUTE
Hawaii HAW. REV. STAT. § 560:2-605 (1985).	Grandparent or lineal descendant of grandparent.
Idaho IDAHO CODE § 15-2-605 (1979).	Grandparent or lineal descendant of grandparent.
Illinois ILL. ANN. STAT. ch. 755, para. 5/4-11 (Smith-Hurd 1993).	Descendants of the testator.
Indiana IND. CODE ANN. § 29-1-6-1 (Burns 1981).	Descendants (including parents of the testator).
Iowa IOWA CODE ANN. § 633.273 (West 1992).	All devisees.
Kansas KAN. PROB. CODE ANN. § 59-602 (Vernon 1983).	Spouse, any relative by lineal descent, or any relative within the sixth degree.
Kentucky KY. REV. STAT. ANN. § 394.400 (Michie/Bobbs-Merrill 1984).	All devisees.
Louisiana	No antilapse statute.
Maine ME. REV. STAT. ANN. tit. 18-A, § 2-605 (1964).	Grandparent or lineal descendant of grandparent.
Maryland MD. CODE ANN. EST. & TRUSTS § 4-403 (1991).	All devisees.
Massachusetts MASS. GEN. LAWS ANN. ch. 191, § 22 (1990).	Child or other relation of the testator.

STATE TREATMENT OF ANTILAPSE

TREATMENT OF CLASS GIFTS	WHO TAKES UNDER STATUTE
Includes class gifts even if deceased class member dies before the execution of the will.	Issue of deceased devisee by representation.
Includes class gifts even if deceased class member dies before the execution of the will.	Issue of deceased devisee by representation.
Includes class gifts.	Issue of deceased devisee per stirpes.
No mention of class gifts.	Issue of deceased devisee as if deceased devisee had died intestate.
Includes class gifts.	Heirs of deceased devisee.
No mention of class gifts.	Issue of deceased devisee.
Includes class gifts.	Issue of deceased devisee.
Includes class gifts even if deceased class member dies before the execution of the will.	Issue of deceased devisee per capita.
Includes class gifts.	"[T]hose persons who would have taken the property if the legatee had died, testate or intestate, owning the property."
Includes class gifts even if deceased class member dies before the execution of the will.	Issue of deceased devisee.

APPENDIX A: STATE BY

STATE	DEVISEES COVERED BY STATUTE
Michigan MICH. COMP. LAWS ANN. § 700.134 (West 1980).	Lineal descendant of grandparent.
Minnesota MINN. STAT. ANN. § 524.2-605 (West 1975).	Grandparent or lineal descendant of grandparent.
Mississippi MISS. CODE ANN. § 91-5-7 (1972).	Child or descendant.
Missouri MO. ANN. STAT. § 474.460 (Vernon 1992).	Child, grandchild, or other relative.
Montana MONT. CODE ANN. § 72-2-613 (1993).	Grandparent or lineal descendant of grandparent.
Nebraska NEB. REV. STAT. § 30-2343 (1989).	Related to testator in any degree.
Nevada NEV. REV. STAT. § 133.200 (1993).	Any child or other relation of the testator.
New Hampshire N.H. REV. STAT. ANN. § 551:12 (1974).	All devisees.
New Jersey N.J. ANN. STAT. § 3B:3-35 (West 1983).	Grandparent or lineal descendant of grandparent. ²⁶⁴

²⁶⁴ Residuary devises to more than one person where one of the devisees dies and which are not saved from lapse by the above statute go to the other takers of the residuary devise. N.J. STAT. ANN. § 3B:3-37 (West 1983).

STATE TREATMENT OF ANTILAPSE

TREATMENT OF CLASS GIFTS	WHO TAKES UNDER STATUTE
Includes class gifts even if deceased class member dies before the execution of the will.	Issue of deceased devisee by representation.
Includes class gifts even if deceased class member dies before the execution of the will.	Issue of deceased devisee by representation.
No mention of class gifts.	Issue deceased devisee as by intestacy.
No mention of class gifts.	Issue of deceased devisee.
Includes class gifts even if deceased class member dies before the execution of the will.	Issue of deceased devisee by representation.
Includes class gifts even if deceased class member dies before the execution of the will.	Issue of deceased devisee by representation.
No mention of class gifts.	Issue of deceased devisee.
No mention of class gifts.	Issue of deceased devisee.
Includes class gifts even if deceased class member dies before the execution of the will.	Issue of deceased devisee by representation.

APPENDIX A: STATE BY

STATE	DEVISEES COVERED BY STATUTE
New Mexico ²⁶⁵ N.M. STAT. ANN. § 45-2-603 (Michie 1978).	Grandparent, lineal descendant of grandparent, and stepchildren.
New York N.Y. EST. POWERS & TRUSTS LAW § 3-3.3 (Consol. 1979).	Issue or siblings of testator. ²⁶⁶
North Carolina N.C. GEN. STAT. § 31-42 (1993).	All devisees.
North Dakota N.D. CENT. CODE § 30.1-09-05 (2-605) (1976).	Grandparent or lineal descendant of grandparent.
Ohio OHIO REV. CODE ANN. § 2107.52 (Baldwin 1992).	Relative of the testator. ²⁶⁷
Oklahoma OKLA. STAT. ANN. tit. 84, § 142 (West 1990).	Any child or other relation of the testator.
Oregon OR. REV. STAT. § 112.395 (1990).	Related to testator by blood or adoption.
Pennsylvania 20 PA. CONS. STAT. ANN. § 2514(9) (1975).	Lineal descendants of parents of testator.

265 New Mexico is the only state to have adopted the 1990 UPC Antilapse statute.

266 Residuary devises to more than one person where one of the devisees dies and which are not saved from lapse by the above statute go to the other takers of the residuary devise. N.Y. EST. POWERS & TRUSTS LAW § 3-3.4 (Consol. 1979).

267 Relatives are persons related by consanguinity (blood) and not affinity (marriage). *Oliver v. Bank One*, 573 N.E.2d 55 (Ohio 1991).

STATE TREATMENT OF ANTILAPSE

TREATMENT OF CLASS GIFTS	WHO TAKES UNDER STATUTE
Includes class gifts even if class member dies before the execution of the will.	Issue of deceased devisee by representation.
Includes class gifts only if deceased class member dies after the execution of the will.	Wills executed prior to 9/1/92, issue of deceased devisee per stirpes; thereafter, issue by representation ²⁶⁸
Includes class gifts even if deceased class member dies before execution of the will. If deceased class member has no issue, remaining class members take.	"Qualified issue"—issue of deceased devisee that would take in intestacy.
Includes class gifts even if deceased class member dies before the execution of the will.	Issue of deceased devisee by representation.
No mention of class gifts.	Issue of deceased devisee.
No mention of class gifts.	Issue of deceased devisee.
Includes class gifts only if deceased class member was alive at the execution of the will.	Issue of deceased devisee by representation.
Includes class gifts.	Issue of deceased devisee. ²⁶⁹

268. Residuary devises to more than one person where one of the devisees dies and which are not saved from lapse by the above statute go to the other takers of the residuary devise.

269. The Pennsylvania antilapse statute operates only if testator's spouse or children would not take the property by virtue of the residue or intestacy. 20 PA. CONS. STAT. ANN. § 2514(9) (1975).

APPENDIX A: STATE BY

STATE	DEVISEES COVERED BY STATUTE
Rhode Island R.I. GEN. LAWS § 33-6-19 (1984).	All devisees.
South Carolina S.C. CODE ANN. § 62-2-603 (Law. Co-op. 1987).	Great-grandparent and lineal descendants of great-grandparent.
South Dakota S.D. CODIFIED LAWS ANN. § 29-6-8 (1984).	Any child or other relation—even if dead at execution of the will.
Tennessee TENN. CODE ANN. § 32-3-105 (1984).	All devisees.
Texas TEX. PROB. CODE ANN. § 68 (West 1980).	Descendant of testator's parents.
Utah UTAH CODE ANN. § 75-2-605 (1993).	Heirs of the testator.
Vermont VT. STAT. ANN. tit. 14, § 558 (1989).	Child or other kindred of testator.
Virginia VA. CODE ANN. § 64.1-64.1 (Michie 1991).	Grandparent or grandparent's descendant—even if dead at the execution of the will.
Washington WASH. REV. CODE ANN. § 11.12.110 (West 1987).	Child, grandchild or other relative (spouse is not a relative).
West Virginia W. VA. CODE § 41-3-3 (Michie 1992).	All devisees.

STATE TREATMENT OF ANTILAPSE

TREATMENT OF CLASS GIFTS	WHO TAKES UNDER STATUTE
No mention of class gifts.	Issue of deceased devisee as by intestacy.
Includes class gifts even if deceased class member dies before the execution of the will.	Issue of deceased devisee by representation.
No mention of class gifts.	Issue of deceased devisee.
Includes class gifts even if deceased class member dies before the execution of the will. ²⁷⁰	Issue of deceased devisee.
No mention of class gifts.	Issue of devisee per stirpes.
Includes class gifts even if deceased class member dies before the execution of the will.	Issue of deceased devisee by representation.
No mention of class gifts.	Issue of deceased devisee.
Includes class gifts.	Issue of deceased devisee by representation.
No mention of class gifts.	Issue of deceased devisee by representation.
Includes class gifts even if deceased class member dies before the execution of the will.	Issue of deceased devisee.

270. The Tennessee Code has a separate antilapse statute for class gifts. TENN. CODE ANN. § 32-3-104 (1984).

APPENDIX A: STATE BY

STATE	DEVISEES COVERED BY STATUTE
Wisconsin WIS. STAT. ANN. § 853.27 (West 1991).	Relatives of testator.
Wyoming WYO. STAT. § 2-6-106 (1977).	Grandparent or lineal descendant of grandparent.

STATE TREATMENT OF ANTILAPSE

TREATMENT OF CLASS GIFTS	WHO TAKES UNDER STATUTE
Includes class gifts only if deceased class member was alive at the execution of the will.	Issue of deceased devisee by representation.
Includes class gifts even if deceased class member dies before the execution of the will.	Issue of deceased devisee per stirpes.

APPENDIX B: 1990 UNIFORM PROBATE CODE § 2-603

(a) [Definitions.] In this section:

(1) "Alternative devise" means a devise that is expressly created by the will and, under the terms of the will, can take effect instead of another devise on the happening of one or more events, including survival of the testator or failure to survive the testator, whether an event is expressed in condition-precedent, condition-subsequent, or any other form. A residuary clause constitutes an alternative devise with respect to a non-residuary devise only if the will specifically provides that, upon lapse or failure, the non-residuary devise, or non-residuary devises in general, pass under the residuary clause.

(2) "Class member" includes an individual who fails to survive the testator but who would have taken under a devise in the form of a class gift had he [or she] survived the testator.

(3) "Devise" includes an alternative devise, a devise in the form of a class gift, and an exercise of a power of appointment.

(4) "Devisee" includes (i) a class member if the devise is in the form of a class gift, (ii) an individual or class member who was deceased at the time the testator executed his [or her] will as well as an individual or class member who was then living but who failed to survive the testator, and (iii) an appointee under a power of appointment exercised by the testator's will.

(5) "Stepchild" means a child of the surviving, deceased, or former spouse of the testator or of the donor of a power of appointment, and not of the testator or donor.

(6) "Surviving devisee" or "surviving descendant" means a devisee or a descendant who neither predeceased the testator nor is deemed to have predeceased the testator under Section 2-702.

(7) "Testator" includes the donee of a power of appointment if the power is exercised in the testator's will.

(b) [Substitute Gift.] If a devisee fails to survive the testator and is a grandparent, a descendant of a grandparent, or a stepchild of either the testator or the donor of a power of appointment exercised by the testator's will, the following apply:

(1) Except as provided in paragraph (4), if the devise is not in the form of a class gift and the deceased devisee leaves surviving

APPENDIX B: *CONTINUED*

descendants, a substitute gift is created in the devisee's surviving descendants. They take by representation the property to which the devisee would have been entitled had the devisee survived the testator.

(2) Except as provided in paragraph (4), if the devise is in the form of a class gift, other than a devise to "issue," "descendants," "heirs of the body," "heirs," "next of kin," "relatives," or "family," or a class described by language of similar import, a substitute gift is created in the deceased devisee or devisee's surviving descendants. The property to which the devisees would have been entitled had all of them survived the testator passes to the surviving devisees and the surviving descendants of the deceased devisees. Each surviving devisee takes the share to which he [or she] would have been entitled had the deceased devisees survived the testator. Each deceased devisee's surviving descendants who are substituted for the deceased devisee take by representation the share to which the deceased devisee would have been entitled had the deceased devisee survived the testator. For the purposes of this paragraph, "deceased devisee" means a class member who failed to survive the testator and left one or more surviving descendants.

(3) For the purposes of Section 2-601, words of survivorship, such as in a devise to an individual "if he survives me," or in a devise to "my surviving children," are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section.

(4) If the will creates an alternative devise with respect to a devise for which a substitute gift is created by paragraph (1) or (2), the substitute gift is superseded by the alternative devise only if an expressly designated devisee of the alternative devise is entitled to take under the will.

(5) Unless the language creating a power of appointment expressly excludes the substitution of the descendants of an appointee for the appointee, a surviving descendant of a deceased appointee of a power of appointment can be substituted for the appointee under this section, whether or not the descendant is an object of the power.

APPENDIX B: *CONTINUED*

(c) [More Than One Substitute Gift; Which One Takes.] If, under subsection (b), substitute gifts are created and not superseded with respect to more than one devise and the devises are alternative devises, one to the other, the determination of which of the substitute gifts takes effect is resolved as follows:

(1) Except as provided in paragraph (2), the devised property passes under the primary substitute gift.

(2) If there is a younger-generation devise, the devised property passes under the younger-generation substitute gift and not under the primary substitute gift.

(3) In this subsection:

(i) "Primary devise" means the devise that would have taken effect had all the deceased devisees of the alternative devises who left surviving descendants survived the testator.

(ii) "Primary substitute gift" means the substitute gift created with respect to the primary devise.

(iii) "Younger-generation devise" means a devise that (A) is to a descendant of a devisee of the primary devise, (B) is an alternative devise with respect to the primary devise, (C) is a devise for which a substitute gift is created, and (D) would have taken effect had all the deceased devisees who left surviving descendants survived the testator except the deceased devisee or devisees of the primary devise.

(iv) "Younger-generation substitute gift" means the substitute gift created with respect to the younger-generation devise.