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Contracts of the Dead and Boilerplate

William A. Drennan

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CONTRACTS OF THE DEAD AND BOILERPLATE

William A. Drennan[†]

ABSTRACT

Black’s Law Dictionary defined “boilerplate” as language with “a definite meaning in the same context without variation.”¹ If the goal of using boilerplate is uniform application,² it fails spectacularly in the murky land of contracts of the dead. Some courts have treated boilerplate clauses as reflecting the intent of the parties and decided whether contractual obligations survived the death of a party based on the boilerplate. Other courts have ignored or otherwise dismissed the exact same boilerplate. This Article argues that the latter approach is usually preferable. Death talk is a social taboo, so parties rarely address it directly in written contracts. When they employ standard boilerplate clauses, it seems doubtful that they intend it to address death before performance of the contract.

CONTENTS

INTRODUCTION	604
I. INEVITABLE DISPUTES, JUDICIAL PRESUMPTIONS, AND THE PRIMACY OF INTENT	606
II. FINDING A CLEAR EXPRESSION OF INTENT IN THE CONTRACT.....	611
III. ASCRIBED-INTENT APPROACH.....	612
IV. REPORTED CASES INTERPRETING BOILERPLATE AT DEATH	615
<i>A. Cases Interpreting Boilerplate About Successors and Assigns</i>	615
<i>B. Cases Interpreting Boilerplate About Binding Legal Representatives, Heirs, or Executors</i>	618

[†] Professor, Southern Illinois University School of Law. Member, American Law Institute. Partner and Associate, Husch Blackwell Sanders LLP (1985–2005). New York University School of Law, LL.M. (Executive) (2013); Washington University School of Law, LL.M. in Intellectual Property (2003); Washington University School of Law, LL.M. in Taxation (1997); St. Louis University School of Law, J.D. (1985). Professor Drennan practiced law full-time for twenty years in the areas of tax, estate planning, and business law. Special thanks to Jennifer Davies, Class of 2018, Ashley Moya, Class of 2018, Cody Walls, Class of 2019, and Amanda Reiter, J.D., for their excellent editorial and research assistance.

1. *Boilerplate*, BLACK’S LAW DICTIONARY (5th ed. 1979).
2. Jeremiah T. Reynolds, Barristers Tips, *Defending Boilerplate in Contracts*, 31 L.A. LAW. 8, 10 (2008) (praising boilerplate because it provides uniformity).

V. OPTIONS AVAILABLE WHEN INTERPRETING BOILERPLATE AT DEATH	625
A. Plain or Prevailing Meaning of Some Boilerplate Terms	627
B. Questioning the Policies Behind the General Rule of Contract Survival	631
C. Doctrines for Avoiding Economic Senselessness	634
CONCLUSION	635

“[I]t may be doubtful if the parties [to this contract] ever put their minds to the question of ‘suppose [you] die.’”³

INTRODUCTION

An ad man’s contract said it was binding on his successors and his assigns.⁴ But upon his death, a court said his estate could not perform the balance of the advertising contract either as a successor or as an assign,⁵ and the surviving party did not have to accept performance from the estate.

A sharecropper’s contract included a no-assignment clause.⁶ Nevertheless, upon the sharecropper’s death, a court concluded his estate must farm the land and complete the contract.⁷

A music director’s one-year employment contract with a singing icon provided for a \$25,000 “guaranteed” salary.⁸ When the singing icon died mid-year, a court concluded, despite the “unqualified character of the promissory words,”⁹ the music director was not entitled to the \$13,100 unpaid balance.¹⁰

In several cases, the contract provided it would bind the parties, their heirs, executors, and administrators. Sometimes the courts said the deceased party’s estate or other successor must perform the

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3. *Ulmann v. Sunset-McKee Co.*, 221 F.2d 128, 133 (9th Cir. 1955).
 4. *Smith v. Zuckman*, 282 N.W. 269, 270 (Minn. 1938).
 5. *Id.* at 271 (“Nor do we think [the estate’s] argument that the contract . . . bears upon its face an intent to bind the ‘successors and assigns’ of the parties is of any moment.”).
 6. *In re Estate of Sauder*, 156 P.3d 1204, 1215 (Kan. 2007) (“Paragraph 4(d) of the agreement provided that the tenant would ‘not assign this lease or sublet the premises.’”).
 7. *Id.* at 1214.
 8. *Farnon v. Cole*, 259 Cal. App. 2d 855, 856–57, 860 n.1 (Cal. Ct. App. 1968) (involving Nat King Cole and “any corporation or company for whom [Cole] may render services”); *see infra* notes 52–58 and accompanying text (providing additional information about the *Farnon* case).
 9. *Farnon*, 259 Cal. App. 2d at 858.
 10. *Id.* at 857–59.

remaining contract obligations,¹¹ and sometimes the courts reached the opposite result.¹²

Why the inconsistencies? Courts generally seek to enforce the intent of the parties.¹³ Contracts of the dead frequently present a challenging question—did the parties intend to specify the consequences of death when employing certain standard boilerplate clauses?¹⁴

This Article suggests guidelines and considerations for unearthing intent post-mortem and marshals the existing authorities that support, or dispute, these positions. Part I briefly discusses the taboo of death talk, the need to determine intent in these cases, and the presumptions courts sometimes fall back on in the absence of intent evidence.

Part II discusses contracts that clearly reveal an intent about death and suggests that courts should give great weight to any written contract language which specifically addresses post-death performance. Because parties seldom negotiate, draft, and include such direct clauses,¹⁵ probably due to social taboos about death talk, courts should

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11. *See, e.g.*, Warner v. Kaplan, 892 N.Y.S.2d 311, 313 (N.Y. App. 2009); Ames v. Saylor, 642 N.E.2d 1340 (Ill. App. Ct. 1994); *see also infra* notes 129–153 and accompanying text (discussing these and similar cases in more detail).
 12. *See, e.g.*, Browne v. Fairhall, 100 N.E. 556 (Mass. 1913); Marvel v. Phillips, 38 N.E. 1117, 1118 (Mass. 1894); *see also infra* notes 99–128 and accompanying text (discussing these and similar cases in more detail).
 13. CHARLES L. KNAPP ET AL., PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 384 (8th ed. 2016) (asserting that when interpreting a contract “the mutual understanding of the parties controls”); Warnecke v. Rabenau’s Estate, 367 S.W.2d 15, 18 (Mo. Ct. App. 1963) (“The cardinal rule of construction of contracts and conveyances, of course, [is] that the intention of the parties must be ascertained and given effect.”); Ress v. Barent, 548 A.2d 1259, 1262 (Pa. Super. Ct. 1988) (“It is a cardinal rule of contract interpretation that the intention of the parties at the time the contract is entered into governs.”).
 14. In dealing with a contract of the dead, one court stated: “[T]he intention and understanding of the parties are not subject to any fixed standard of ‘weights and measures.’ They are invisible and intangible things variable with time and place, and undeterminable by any constant or set formula.” Burch v. J. D. Bush & Co., 106 S.E. 489, 490 (N.C. 1921); *see also* JEFFREY A. SCHOENBLUM, PAGE ON THE LAW OF WILLS § 1.1, at 1 (2003) (“One cannot read a dead man’s mind.”). Even when both parties are alive, courts are not always sure how to determine intent. *See* KNAPP ET AL., *supra* note 13, at 1059 (citing Melvin Aron Eisenberg, *Third-Party Beneficiaries*, 92 COLUM. L. REV. 1358, 1378–84 (1992)).
 15. Ulmann v. Sunset-McKee Co., 221 F.2d 128, 133 (9th Cir. 1955) (“The use of words of survivorship generally has gone out of fashion in ordinary contracts.”).

carefully analyze a written contract for clues that the parties implied that the arrangement should die (or survive) upon a party's death.¹⁶

Part III recommends that courts consider an ascribed-intent approach reflected in a handful of reported cases. This approach allows a court to analyze all relevant facts and circumstances and decide the case based on what reasonable parties would have intended in the situation.

Part IV considers common boilerplate clauses with language that arguably addresses death when there is no additional evidence about intent. Although explicit clauses addressing death are rare, boilerplate provisions that arguably address death abound. In some reported cases, courts interpret and rely upon the boilerplate to conclude whether the contractual obligations survive death. In other reported cases, courts are skeptical that standard boilerplate reflects the parties' intent about death and decide whether any remaining contractual obligations vanish at death without regard for the boilerplate language.

Part V surveys the meaning of certain common boilerplate clauses in isolation. Part V also considers policy concerns surrounding contracts of the dead and discusses options for interpreting boilerplate clauses that can allow courts to reach reasonable results.

The taboo of death talk justifies skepticism toward boilerplate in the murky land of contracts of the dead. In the absence of direct evidence of negotiations and agreements about death, courts should be inclined to terminate many contracts at death.

I. INEVITABLE DISPUTES, JUDICIAL PRESUMPTIONS, AND THE PRIMACY OF INTENT

Whenever a *mortal* makes an executory contract, death could precede performance.¹⁷ “[C]ontracts must be read in the light of the knowledge of all mankind, that death may come tomorrow.”¹⁸ Although

16. See, e.g., *Buccini v. Paterno Constr. Co.*, 170 N.E. 910, 911 (N.Y. App. 1930). For a discussion of the case, see *infra* notes 48–51 and accompanying text.

17. “[T]he only things of which we can be certain are death and taxes.” *Lehigh Cement Co. v. Quinn*, 173 A.3d 1272, 1273 (R.I. 2017); see also Chris Guthrie, *Prospect Theory, Risk Preference, and the Law*, 97 NW. U. L. REV. 1115, 1115 (2003) (“The corollary . . . is that life is rife with uncertainty.”). Justice Holmes wrote: “One who makes a contract never can be absolutely certain that he will be able to perform it when the time comes.” *Day v. United States*, 245 U.S. 159, 161 (1917), *quoted in* *Burka v. Patrick*, 366 A.2d 1070, 1073 (Md. Ct. Spec. App. 1976); see also *Cent. Contra Costa Sanitary Dist. v. Nat’l Sur. Corp.*, 246 P.2d 150, 152 (Cal. Dist. Ct. App. 1952) (“The execution of the . . . contract . . . was prevented by an irresistible, superhuman cause, namely . . . death.”).

18. *Burka*, 366 A.2d at 1073 (quoting *Rishel v. Pacific Mut.*, 78 F.2d 881, 883 (10th Cir. 1935)).

death is always foreseeable,¹⁹ the Ninth Circuit has observed that, at the time of contracting, parties seldom directly address the impact death should have on contract performance.²⁰ This reflects society's aversion to talking about death. There may be no more disfavored conversation topic than your own death,²¹ and some believe discussing death will hasten it.²² Form books do not routinely provide sample boilerplate provisions directly addressing death.²³

As a practical matter, except when a party is known to be seriously ill, or particularly old, raising the topic in contract negotiations seems almost unthinkable.²⁴ If you propose contingencies based on the other party's death, are you hinting that their time is short? Or to use a euphemism, perhaps you are advising your fellow contract party: "Don't buy green bananas."²⁵ Also, what signals are you sending to the other side if you start speculating about your own death? Will the other

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19. *Hollis v. Gallagher*, 2012 WL 3793288 (Tex. App. 2012) (acknowledging that a party was aware of his own mortality); *Shutt v. Butner*, 303 S.E.2d 399, 401 (N.C. Ct. App. 1983) ("[A]ll know that unexpected and untimely death is a constant possibility and are deemed to make their contracts in light thereof.").
 20. *Ulmann v. Sunset-McKee Co.*, 221 F.2d 128, 133 (9th Cir. 1955).
 21. See Christie M. Charles, *Book Note*, 8 B.U. PUB. INT. L. J. 585, 588 (1998) (reviewing LOUISE HARMON, *FRAGMENTS ON THE DEATHWATCH* (1998)) ("[T]he predominant attitude toward death is one of fear; people rarely talk about death even in the abstract, and almost never talk about their own death. Death therefore evolved into a taboo."); Walter Wadlington, *Breaking the Silence of Doctor and Patient*, 93 YALE L. J. 1640, 1650 (1984) (reviewing JAY KATZ, *THE SILENT WORLD OF DOCTOR AND PATIENT* (1984)) ("[D]eath seems to be the most taboo of subjects.").
 22. GERRY W. BEYER, *TEACHING MATERIALS ON ESTATE PLANNING* 7 (4th ed. 2012); Rikk Larsen & Crystal Thorpe, *Elder Mediation: Optimizing Major Family Transitions*, 7 MARQ. ELDER'S ADVISOR 293, 299 (2006) ("Typical family dynamics in the elder law area could consist of: . . . **Superstitions.** 'Writing a will could hasten my death.'").
 23. See, e.g., TINA L. STARK, *NEGOTIATING AND DRAFTING CONTRACT BOILERPLATE* 90 (2003) ("Drafters should anticipate and directly address any issues that could arise upon a party's death or other life event."). But see TINA L. STARK, *DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO* 215 (2d ed. 2013) (including a standard termination provision upon the death of an employee in an employment agreement).
 24. See Akhil Reid Amar, *Presidents, Vice-Presidents, and Death: Closing the Constitution's Succession Gap*, 48 ARK. L. REV. 215, 215 (1994) ("[T]alk about death is bad form.").
 25. *Don't Buy Green Bananas*, WIKTIONARY (Sept. 1, 2017), https://en.wiktionary.org/wiki/don%27t_buy_green_bananas [<https://perma.cc/9MAB-GDV3>] ("[D]on't make long-term plans as you may not live/survive long enough to accomplish them.").

side want to contract with you if you demonstrate a lack of confidence about surviving to fulfill your contractual duties?

Standard boilerplate clauses have not prevented disputes in this area. As demonstrated in Part IV, the law is inconsistent when faced with general language about successors and assigns. In addition, some courts have even concluded that clauses stating that the contract is binding on heirs and executors do not resolve this issue.²⁶ As a result, executors and the surviving parties often call upon the courts to decide contract survival.

In the absence of evidence of intent, courts have developed presumptions. A presumption is available to allow a court to declare that the contract survives death, and this is treated as the general rule. Courts applying this presumption have stated: “[D]eath does not absolve . . . [contractual] engagements,”²⁷ and “It is a presumption of law that the parties to a contract bind not only themselves but their personal representatives.”²⁸ On the other hand, a presumption is also available to allow a court to declare that contract obligations terminated at death, and this is treated as the exception. Courts applying this presumption have used the phrase “personal services contracts” and have referred to “contracts to whose performance the continued existence of a particular person . . . is necessary.”²⁹ Courts have stated where the exception applies that “a condition is always implied that the death . . . of that person . . . shall excuse performance,”³⁰ and that “[n]either party contemplates substitution by

26. *See infra* notes 99–153, and accompanying text.

27. *Burch v. J. D. Bush & Co.*, 106 S.E. 489, 490 (N.C. 1921).

28. *United States ex rel. Wilhelm v. Chain*, 300 U.S. 31, 35 (1937) (citing *Estate of Rapp v. Phx. Ins. Co.*, 113 Ill. 390, 395 (1885)) (including an exception for “contracts in which personal skill or taste is required”); *see First Nat. Bank of Danville v. Taylor*, 67 N.E.2d 306, 310 (Ill. App. Ct. 1946) (“[G]enerally, at common law, all actions based on contracts survive the death of either party.”).

29. *Taylor*, 67 N.E.2d at 310.

30. *See, e.g., id.* In a bilateral contract, the death of one party who must provide personal services may terminate the contract, but the death of a party providing non-personal services may not end the contract. *See Stark v. McCaw*, 506 P.2d 863, 866 (Wash. Ct. App. 1973) (“The contract extends beyond the death of McCaw . . . because . . . his performance was to be the payment of money.”); *Kelley v. Thompson Land Co.*, 164 S.E. 667, 668 (W. Va. 1932) (“[T]he promise of a painter to paint a landscape is discharged by his physical inability, but the death or illness of one who has contracted to buy the painting will not free his estate from liability.”); 30 RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 77:75, at 503 (4th ed. 2004) [hereinafter *WILLISTON ON CONTRACTS*] (“[I]t is only the death of the party whose pledge is personal that ends the contractual arrangement.”) (citations omitted).

another.”³¹ In certain extreme cases, it seems likely that the nature of the services signals the parties’ intent. Courts have characterized obligations such as agreements “to marry, to draw a picture, write a book, perform on the stage, be one’s companion, *etc.*” as “personal services contracts,” which terminate upon the obligor’s death.³² Other courts have stated: “All painters do not paint portraits like Sir Joshua Reynolds, nor landscapes like Claude Lorraine, nor do all writers write dramas like Shakespeare or fiction like Dickens. Rare genius and extraordinary skill are not transferable, and contracts for their employment are therefore personal, and cannot be assigned.”³³

These presumptions, which date back to Shakespearean England,³⁴ could be summarized as simply—all contracts survive death except personal services contracts.³⁵ Part V asserts that these presumptions are outdated. A couple cases, however, suggest that these presumptions are paramount in deciding contract survival. For example, a Pennsylvania court declared, “[a]ll contracts must be construed with reference to their subject matter.”³⁶ A Missouri court asserted that

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31. *In re Estate of Sheppard*, 789 N.W.2d 616, 619 (Wis. Ct. App. 2010); *see also id.* at 618 (quoting *Personal Service*, BLACK’S LAW DICTIONARY (8th ed. 2004)) (“Personal services are defined as ‘economic service[s] involving either the intellectual or manual personal effort of an individual.’”). In personal services contracts, “distinctly personal considerations are at the foundation of the contract.” *Id.* (quoting *Volk v. Stowell*, 74 N.W. 118, 120 (Wis. 1898)).
 32. *Shutt v. Butner*, 303 S.E.2d 399, 402 (N.C. Ct. App. 1983). Other contracts for purely personal acts include the “agreement of an author to write a particular book . . . [or] a sculptor to produce a designated statue.” *Mackay v. Clark Rig Bldg. Co.*, 42 P.2d 341, 348 (Cal. Ct. App. 1935); *Cox v. Martin*, 21 So. 611, 612 (Miss. 1897) (including teachers who instruct pupils and “masters [who] teach apprentices a trade or calling”).
 33. *DuPont v. Yellow Cab Co. of Birmingham, Inc.*, 565 So.2d 190, 193 (Ala. 1990) (quoting *Taylor v. Cyrus Palmer*, 31 Cal. 240, 247 (Cal. 1866)); *see Macke Co. v. Pizza of Gathersburg, Inc.*, 270 A.2d 645, 648 (Md. 1970). In contrast, “rare genius and extraordinary skill are not indispensable to the workmanlike digging down of a sand hill or the filling up [of] a depression to a given level, or the construction of brick sewers with manholes and covers, and contracts for such work are not personal, and may be assigned.” *Cyrus Palmer*, 31 Cal. at 247–48.
 34. *See Hyde v. Windsor*, 78 Eng. Rep. 798, 798 (Q.B. 1597); *see also* JOHN EDWARD MURRAY, MURRAY ON CONTRACTS § 113, at 707 (5th ed. 2011); E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS § 9.5, at 626–27 (3d ed. 2004).
 35. *See* 14 JAMES P. NEHF, CORBIN ON CONTRACTS § 75.2, at 127–28 (2001) [hereinafter CORBIN ON CONTRACTS]; WILLISTON ON CONTRACTS, *supra* note 30, § 77.75, at 501–02.
 36. *Blakely v. Sousa*, 47 A. 286, 286 (Pa. 1900).

sometimes obligations are “so purely personal in their nature as to leave no room for doubt but that the contract” died with the party’s death.³⁷

Nevertheless, the majority of cases recognize the primacy of the parties’ intent when deciding contract survival.³⁸ For example, in *Warnecke v. Rabenau’s Estate*,³⁹ a tenant entered into a two-year lease for office space with the property owner, but the tenant died five months into the lease.⁴⁰ The building owner sued to compel the tenant’s estate to pay rent for the balance of the lease term. The court asserted the presumption that “a lease for a term of years is not terminated by the death of the lessor, or the lessee.”⁴¹ Nevertheless, the court stated, “if the terms of the lease and the surrounding facts and circumstances show that the lease was *intended* to be only a personal obligation of the lessee, then there is necessarily an implied condition that . . . death will terminate the lease.”⁴² The court focused on language in the lease that the tenant could only use the space as an office for a certified public accountant (CPA),⁴³ and the fact that the decedent’s surviving spouse

37. *McDaniel v. Rose*, 153 S.W.2d 828, 830 (Mo. Ct. App. 1941).

38. *See, e.g., Ulmann v. Sunset-McKee Co.*, 221 F.2d 128, 133 (9th Cir. 1955) (“[A]lways a court must seek to divine the intent of the parties.”); *Schultz & Co. v. Johnson’s Admin.*, 5 B. Mon. 497, 501 (Ky. 1845) (“[E]very case, must turn at last upon the intention of the parties.”); *Warnecke v. Rabenau’s Estate*, 367 S.W.2d 15, 18 (Mo. Ct. App. 1963) (“The cardinal rule[] of construction of contracts and conveyances, of course, [is] that the intention of the parties must be ascertained and given effect.”); *Burch v. J. D. Bush & Co.*, 106 S.E. 489, 490 (N.C. 1921) (“[W]hether a given case falls under the general rule, or the exception, must depend upon the intention of the parties.”); *Unit Vending Corp. v. Lacas*, 190 A.2d 298, 300 (Pa. 1963) (“The intention of the parties is paramount.”); *Kelley v. Thompson Land Co.*, 164 S.E. 667, 669 (W. Va. 1932); *see also In re Estate of Sauder*, 156 P.3d 1204, 1214 (Kan. 2007) (imploring contract drafters to clearly state the parties’ intent about contract survival so the courts will not have to work through this legal thicket). The Restatement of Contracts suggests an interesting mix of a common law presumption with the primacy of intent principle—if the arrangement is a personal services contract, then an intent that the contract will survive death will only prevail if it is “clearly manifested.” RESTATEMENT (SECOND) OF CONTRACTS § 262 cmt. a (AM. LAW INST. 1981); *see also WILLISTON ON CONTRACTS*, *supra* note 30, § 77:70, at 484–85. This approach is consistent *Marvel v. Phillips*, 38 N.E. 1117 (Mass. 1894). *See infra* notes 99–106 and accompanying text (discussing *Marvel*).

39. *Warnecke*, 367 S.W.2d at 17.

40. *Id.* at 16.

41. *Id.* at 17 (citations omitted).

42. *Id.* (emphasis added).

43. *Id.* at 16.

was not a CPA,⁴⁴ to conclude that the lease “was one of a personal nature which terminated with [the tenant’s] death.”⁴⁵

II. FINDING A CLEAR EXPRESSION OF INTENT IN THE CONTRACT

Courts often say the best evidence of the parties’ intent is the written language in the contract.⁴⁶ Although contracts seldom address death directly,⁴⁷ sometimes the contract language will imply the parties’ intent that an individual’s survival is a condition precedent to the continuing obligation to perform. For example, in *Buccini v. Paterno Construction Co.*,⁴⁸ Paterno hired Albert Buccini to “decorate the ballroom, banquet hall, and swimming pool in a dwelling described as ‘Paterno’s Castle.’”⁴⁹ The contract specifically stated that “all the decorative figured work shall be done by [Albert] Buccini personally and that only the plain work may be delegated to mechanics.”⁵⁰ Justice Cardozo, writing for the majority, concluded that the contract called for the artistic skill of Albert Buccini personally on the decorative work, and upon Albert’s death, the obligation to perform the decorative work terminated.⁵¹

Similarly, in *Farnon v. Cole*,⁵² renowned singer Nat King Cole hired Brian Farnon as his music director for one year beginning August 31,

44. *Id.*

45. *Id.* at 18.

46. *See, e.g.,* Southgate Recreation & Park Dist. v. Cal. Ass’n for Park & Recreation Ins., 130 Cal. Rptr. 2d 728, 730 (Cal. Ct. App. 2003) (“The basic rule of contract interpretation is to effectuate the parties’ intent as expressed in the contract’s terms.”); *see supra* note 13 and accompanying text.

47. *See, e.g.,* Stark v. McCaw, 506 P.2d 863, 864–65 (Wash. Ct. App. 1973) (demonstrating potential problems if one party tries to deal with death in the contract—the other party delayed the negotiation of the death terms, the parties agreed to a deal on the other terms, and one party died before they negotiated the death terms).

48. 170 N.E. 910 (N.Y. 1930).

49. *Id.* at 911.

50. *Id.*

51. *Id.*; *see also* Ctr. Contra Costa Sanitary Dist. v. Nat’l Sur. Corp., 246 P.2d 150, 154 (Cal. Dist. Ct. App. 1952) (citing *In re Estate of Burke*, 244 P. 340, 342 (Cal. 1926)) (explaining that ordinarily a building contract is not a personal services contract, but “[i]t is otherwise . . . as remarked by Lord Denman [when] the ‘character, credit and substance of the party contracted with was an inducement to the contract’”).

52. 259 Cal. App. 2d 855 (Cal. Ct. App. 1968).

1964, at a “guaranteed” salary of \$25,000.⁵³ Cole paid Farnon \$11,900 under the contract for the first five months. Cole entered a hospital on December 8, 1964, could not publicly perform again, and died of cancer on February 15, 1965. Farnon sued Cole’s estate for the balance of \$13,100 under the “guaranteed” contract.

The court framed the question as looking at “the intention of the parties”⁵⁴ and found, “[t]he wording of the contract explicitly conveys an *intent* of the parties that the contract be conditioned upon [Nat King] Cole’s continued existence and personal participation.”⁵⁵ Some of the contract passages indicating that Farnon would provide services to Nat King Cole personally and to no one else included: “I agree to employ you, and you agree to render services to me,” “[y]our services shall be exclusive to me,” and “[you will serve] as musical director in connection with my personal appearances.”⁵⁶ In addressing the contract language that Farnon was “guaranteed”⁵⁷ \$25,000, the court merely stated, “it is apparent the parties contracted upon the basis of the continued existence of [Nat King Cole].”⁵⁸

III. ASCRIBED-INTENT APPROACH

In the absence of clear evidence of intent, a handful of cases suggest that a court may determine what reasonable, hypothetical parties would have intended and may attribute that intent to the actual

53. *Id.* at 856 n.1; *see supra* notes 8–10 and accompanying text (discussing the *Farnon* case).

54. *Farnon*, 259 Cal. App. at 858.

55. *Id.* at 859 (emphasis added).

56. *Id.* at 856 n.1.

57. *Id.* at 857.

58. *Id.* at 858 (quoting *Smith v. Preston*, 48 N.E. 688, 690 (Ill. 1897)); *see also* *Blakely v. Sousa*, 47 A. 286, 287 (Pa. 1900) (involving a contract between a music director with special business abilities and famous band conductor John Philip Sousa; the contract language demonstrated that each party entered into the contract because of the special talents of the other party).

parties.⁵⁹ For example, in *Unit Vending Corp. v. Lacas*,⁶⁰ a cigarette vending machine company contracted with the owner of a Philadelphia diner “to sell cigarettes . . . in the diner for a continuous period of five years.”⁶¹ The owner of the diner died just six months into the contract, and his family promptly sold the diner. In the sale, the family failed to secure a promise from the new owner to honor the cigarette contract.⁶² The cigarette vending machine company sued the estate for lost profits. The court found nothing in the contract indicating it should end on the original owner’s death.⁶³ Also, the court acknowledged this was not a personal services contract, so under the common law presumptions the contract should have survived the death of the original owner of the diner.⁶⁴ Nevertheless, the court concluded the contract ended on the original owner’s death stating that “the court will adopt the interpretation which . . . ascribes the most reasonable, probable and natural conduct of the parties.”⁶⁵

Also, in extreme cases, courts may ascribe intent based on the type of services provided. Classic examples of personal services contracts that terminate with the obligor’s death include “an agreement of an author to write a particular book, an artist to paint a certain painting, [or] a

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59. *See, e.g.*, *Smith v. Zuckman*, 282 N.W. 269, 271 (Minn. 1938) (“[I]t must have been intended that the rights should be exercised and the obligations performed by him alone.”); *Warnecke v. Estate of Rabenau*, 367 S.W.2d 15, 18 (Mo. Ct. App. 1963) (concluding that the parties must have contemplated that the lease of the office space to the CPA would die with the CPA-tenant because “his personal representative could not carry on his profession”); *Ress v. Barent*, 548 A.2d 1259, 1262 (Pa. Super. Ct. 1988) (“[T]he court will adopt the interpretation, which under all the circumstances of the case, ascribes the most reasonable, probable, and natural conduct of the parties, bearing in mind the objects to be accomplished.”).
60. 190 A.2d 298 (Pa. 1963).
61. *Id.* at 299.
62. *Id.* at 299–300. The new owner was “agreeable to permit Unit [Vending] to continue selling cigarettes through its machines in the diner.” *Id.* at 299. But the new owner demanded that he receive all commissions directly rather than allowing the commissions to offset a loan to the original owner. Unit Vending treated this as a breach of the contract. *Id.* at 299–300.
63. *Id.* at 300 (“There is nothing in the contract involved saying what should happen in the event of the death of Soter. . . . It is significant that it failed to provide for performance by the heirs and representatives of his estate.”).
64. *Id.*; *see supra* notes 27–33 and accompanying text (discussing the common law presumptions).
65. *Lacas*, 190 A.2d at 300 (“[A] reasonable interpretation absent specific language to the contrary, leads us to the conclusion that it was not intended that the contract extend beyond . . . death.”).

sculptor to produce a designated statue.”⁶⁶ At the other extreme, courts tend to conclude that the parties intended that the decedent’s estate would be obligated to perform when the contract merely requires the use of the decedent’s property, such as paying money,⁶⁷ selling property,⁶⁸ or renting property.⁶⁹ Between these extremes, however, line drawing becomes difficult. The Seventh Circuit stated, “[i]t must be admitted that the line of demarcation between the two kinds of contracts under consideration [personal services contracts and impersonal ones] is not very clearly marked.”⁷⁰ Courts attempting to use the personal services contract presumption cannot even agree on whether the issue is a question of fact or law.⁷¹

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66. *Carlock v. La Salle Extension Univ.*, 185 F.2d 594, 595 (7th Cir. 1950).
67. CORBIN ON CONTRACTS, *supra* note 35, § 75.1, at 122 (“[A]s a general matter, a promise to pay money is not made impossible by the death of either the debtor or the creditor.”); *Brearton v. DeWitt*, 170 N.E. 119, 119–20 (N.Y. 1930) (concerning a health care provider’s agreement to pay \$1,000 a month for the life of a patient injured by his negligent or reckless act); *Hutchings v. Bates*, 393 S.W.2d 338, 343 (Tex. Civ. App. 1965) (concluding that a contractual obligation to pay money does not become impossible because of the death of the original debtor). *But see* *Hasemann v. Hasemann*, 203 N.W.2d 100, 102 (Neb. 1972) (debtor-son’s obligation to pay ended upon creditor-father’s death because that is what the parties intended).
68. *Shutt v. Butner*, 303 S.E.2d 399, 401 (N.C. Ct. App. 1983) (holding that an agreement to sell a home when a child attained age eighteen, which was incorporated into a divorce settlement and decree, survived the wife’s death); *Davis v. Davis*, 266 S.W. 797, 799 (Tex. Civ. App. 1924).
69. *Wilson v. Fieldgrove*, 787 N.W.2d 707, 712 (Neb. 2010) (“[T]he death of the landlord or tenant in a year-to-year lease does not terminate the lease.”); *Estate of Duncan v. Kinsolving*, 70 P.3d 1260, 1263 (N.M. 2003) (“[Landlords] may enter into leases that extend beyond their death.”); *Volk v. Stowell*, 74 N.W. 118, 118 (Wis. 1898) (involving a five-year contract with a farmer to manage and cultivate the farm; upon the death of the property owner, the heir could not obtain possession of the farm because “[a]n ordinary contract of lease is not such a personal contract as is extinguished by the death of the lessor or lessee”). *But see* *Warnecke v. Estate of Rabenau*, 367 S.W.2d 15, 16–18 (Mo. Ct. App. 1963) (observing that “[g]enerally . . . a lease for a term of years is not terminated by the death of the lessee” but concluding that a two-year lease of office space terminated on the death of the tenant when the premises could be used only as an “office for certified public accountants and for no other purpose,” and decedent’s widow was not an accountant).
70. *Carlock v. La Salle Extension Univ.*, 185 F.2d 594, 595 (7th Cir. 1950); *Burch v. J. D. Bush & Co.*, 106 S.E. 489, 490 (N.C. 1921).
71. *Compare Carlock*, 185 F.2d at 595 (“[The contract’s] classification must be determined, not as a matter of law, but upon a consideration of all the facts and circumstances of the case.”), *with In re Estate of Sauder*, 156 P.3d 1204, 1210 (Kan. 2007) (“[W]hether a contract is a personal services contract that terminates on the death of a lessee [is a] question[] of law.”), *and Estate of Duncan*, 70 P.3d 1260, 1262 (N.M. 2003) (“[W]hether a

IV. REPORTED CASES INTERPRETING BOILERPLATE AT DEATH

There are two types of boilerplate clauses customarily included in contracts that arguably address contract survival after the death of a party. First, parties often contract in the name of themselves and their “successor and assigns” or provide that the contract will bind their “successors and assigns.” Second, parties often include a clause that the agreement will be binding on heirs, executors, and administrators. Several courts have considered whether a contract should survive death because the parties included these miscellaneous clauses.

A. Cases Interpreting Boilerplate About Successors and Assigns

In *Smith v. Zuckman*,⁷² the Minnesota Supreme Court considered a contract between a sole proprietor and his “successors and assigns” on one side and a theater owner and his “successors and assigns” on the other side.⁷³ The sole proprietor, Al Smith, agreed to use his best efforts to obtain advertising to display on the theater screens, and the theater owner, Sam Zuckman, agreed to pay compensation and display the advertising at the theater.⁷⁴ Smith died during the two-year term of the contract, and his executor and heirs wished to continue providing the advertising services and receive compensation under the contract as a successor or assign. Zuckman argued that the contract terminated at Smith’s death.⁷⁵ The court applied the rule that the contract “involve[d] such a relation of personal confidence that it must have been intended that the . . . obligations [be] performed by [Smith] alone . . . [and the contract] cannot be assigned without the consent of the other party to the original contract.”⁷⁶ Although acknowledging that the contract “bears upon its face an intent to bind the ‘successors and assigns’ of the parties,” the court concluded that any argument based on that language was not “of any moment.”⁷⁷ The Minnesota Supreme Court relied heavily on two prior Massachusetts cases ignoring boilerplate.⁷⁸ The court did not discuss the definition of either “successors” or “assigns.”

lease . . . will continue to be enforceable after the death of the lessor . . . is a question of law, which we review de novo.”).

72. 282 N.W. 269 (Minn. 1938).

73. *Id.* at 270.

74. *Id.*

75. *Id.* at 270–71.

76. *Id.* at 271 (quoting *Bd. of Comm’rs v. Diebold Safe & Lock Co.*, 133 U.S. 473, 488 (1890)).

77. *Id.* at 271.

78. *Id.* at 271–72 (first citing *Browne v. Fairhall*, 100 N.E. 556, 557 (Mass. 1913); then citing *Marvel v. Phillips*, 38 N.E. 1117, 1118 (Mass. 1894)).

Some contracts specifically prohibit assignment. A no-assignment clause, in isolation, could suggest that the contract will die with the original obligor, and the estate, heirs, and executors will have no duty under the contract. In the reported cases, courts reach various results.

Frederick Stormer entered into a contract with a municipality to construct a sewage system.⁷⁹ Approximately a year-and-a-half later, Stormer died when the sewage system was sixty percent complete.⁸⁰ Stormer's executors continued the work, but quit before completion, and the municipality sued the estate for breach of contract.⁸¹ The executors argued that the contract terminated at Fred Stormer's death because it was based on Fred Stormer's "personal responsibility and competency,"⁸² and also because the contract contained a no-assignment clause.⁸³

The Pennsylvania Supreme Court rejected both arguments. First, the court asserted, "[b]uilding contracts generally do not involve a peculiar skill or ability on the part of the person who is to perform them, and hence do not terminate on the death of the contractor."⁸⁴ Second, in regards to the boilerplate no-assignment clause, the court simply stated the clause "ha[d] no effect on [the] decision," because "[i]ts presence in the contract does not mean that the contract must be performed by the decedent and none other."⁸⁵ The court did not discuss the definition of the word "assignability" but stated the clause "was patently inserted to protect the Authority by preventing performance by other than qualified contractors."⁸⁶ Thus, apparently, the no-assignment clause prohibited a voluntary assignment to a nonqualified contractor but did not prohibit an involuntary transfer to an estate. Although there was no discussion of evidence about the intent of the particular parties, perhaps this was an equitable result. The decedent's son had been the superintendent on the job during Fred Stormer's life, the decedent's son initially undertook to complete the contract upon Fred Stormer's death, and later quit,⁸⁷ perhaps when it became uneconomical.

79. *In re Estate of Stormer*, 123 A.2d 627, 628 (Pa. 1956).

80. *Id.*

81. *Id.* The executor was Fred Stormer's son, "who had been superintendent of the work during his father's lifetime." *Id.* Fred Stormer died on August 12, 1953; the son continued the work until October 3, 1953, and other executors continued the work until January 21, 1954. *Id.*

82. *Id.* at 629.

83. *Id.*

84. *Id.*

85. *Id.* at 630.

86. *Id.*

87. *Id.* at 628.

In *California Packing Corp. v. Lopez*,⁸⁸ a farm owner was party to an “asparagus cropping contract” with a sharecropper which contained a no-assignment clause.⁸⁹ When the sharecropper died, his brother, who was the executor of the estate, moved onto the property and began farming the land. The land owner sued to evict the brother arguing the contract involved personal services and terminated upon the sharecropper’s death, and the no-assignment clause prohibited the transfer of contract rights to the estate.⁹⁰ The court disagreed, stating: “Contracts for cultivation of the soil are not generally held to be contracts terminable upon death,”⁹¹ and the no-assignment clause “forbids only voluntary assignment . . . [and] is not violated by an involuntary assignment by operation of law.”⁹² On a practical level, the court’s choice allowed the family to continue to farm the one hundred acres, which may have been a minor inconvenience for the owner that had recently purchased five thousand acres.⁹³

In the complicated case of *In re Estate of Sauder*,⁹⁴ the Kansas Supreme Court decided a no-assignment clause should be disregarded when the same contract stated the agreement will “be binding on heirs, successors, executors and administrators.”⁹⁵ The Kansas district court apparently gave effect to the no-assignment clause and found that it

88. 279 P. 664 (Cal. 1929).

89. *Id.* at 664–65. The contract provided: “The second party shall have no right to assign this agreement or sublet the above described land or any part thereof, without the written consent of the [farm owner].” *Id.* at 665.

90. *Id.* at 665.

91. *Id.* *But see In re Estate of Sauder*, 156 P.2d 1204, 1213 (Kan. 2007) (asserting that sharecropping arrangements usually are personal services contracts and terminate upon the farmer’s death) (citing *Read v. Estate of Mincks*, 176 N.W.2d 192, 193 (Iowa 1970)).

92. *Cal. Packing Corp.*, 279 P. at 665.

93. *Id.*

94. 156 P.3d 1204 (Kan. 2007).

95. *Id.* at 1215. The *Sauder* case is complicated for several reasons. In concluding that the contract survived the sharecropper’s death, the Kansas Supreme Court relied first upon a Kansas statute providing: “Executors and administrators shall have the same remedies to recover rents, and be subject to the same liabilities to pay them, as their testators and intestates.” *Id.* at 1213–14 (citing KAN. STAT. ANN. § 58-2519 (2017)). The Kansas Supreme Court stated the statute was “simply a codification of the common law.” *Id.* at 1214 (quoting H.W. Hannah, *The Legal Status of Tenant Farmers in Kansas*, 7 KAN. L. REV. 295, 301 (1959)). *But see In re Estate of Sauder*, 156 P.3d at 1213 (asserting that “the majority of jurisdictions have noted that considerable skill and judgment are required in farming and a landlord’s confidence in the lessee is personal and not assignable, transferable, or inheritable”). The court then analyzed the language of the contract and concluded that at least part of the language “had the same effect as K.S.A. 58-2519.” *Id.* at 1215.

reflected the parties' intent that the contract terminated upon the sharecropper or tenant's death.⁹⁶ The Kansas appeals courts disagreed, stating that "circumstances surrounding an administrator assuming the duties and obligations of a decedent under a contract is not an assignment or sublease."⁹⁷ The Kansas Supreme Court, rather than focusing on the no-assignment clause, cited dictum from an Illinois case, stating that language in a contract that the agreement would be binding on heirs and executors would cause a contract to survive.⁹⁸

B. Cases Interpreting Boilerplate About Binding Legal Representatives, Heirs, or Executors

Several cases conclude that a contract terminates on the death of a party notwithstanding a boilerplate clause stating the contract binds legal representatives, heirs, executors, and administrators. In *Marvel v. Phillips*,⁹⁹ Theodore Marvel created patentable improvements to elevators and conveyors.¹⁰⁰ Marvel contracted with Fanny Phillips who agreed to perform a number of tasks from advancing all funds for promoting the inventions to "do[ing] all things which a wise and energetic owner of said patents with ample financial ability ought to do."¹⁰¹ Fanny Phillips died within seven months of the second patent's issuance. The contract provided, "I [Fanny Phillips] agree and bind myself and my *legal representatives* as above, with and to Marvel and his legal representatives."¹⁰² Marvel requested that Phillips' executors continue to perform the contract, specifically to advance money to promote the inventions. The executors refused to take any actions other than tendering the patents to Marvel, and Marvel sued. The court found that the contract involved Phillips' personal skill, attention, and ability, and therefore the contract became impossible to perform upon Phillips' death.¹⁰³

Discussing the boilerplate language binding Phillips' legal representatives, the court concluded that because Phillips was discharged from his obligations at death, his executors could not be

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96. *In re Estate of Sauder*, 156 P.3d at 1213; *see also In re Estate of Sauder*, No. 93,556, 2005 WL 2715678, at *2 (Kan. Ct. App. Oct. 21, 2005) (discussing reliance on the no-assignment clause).
97. *In re Estate of Sauder*, 156 P.3d at 1215; *see also In re Estate of Sauder*, 2005 WL 2715678, at *2.
98. *In re Estate of Sauder*, 156 P.3d at 1215 (citing *Ames v. Sayler*, 642 N.E.2d 1340 (Ill. App. Ct. 1994)).
99. 38 N.E. 1117 (Mass. 1894).
100. *Id.* at 1117–18.
101. *Id.* at 1118.
102. *Id.* (emphasis added).
103. *Id.* (finding that Phillips' duties were subject to an implied condition that he "be alive and well enough in health to perform [the duties]").

bound. The court asserted this was an appropriate manipulation of the contract language for three reasons. First, it would prevent the estate from being “exposed to hazards for an indefinite time.”¹⁰⁴ Second, it would allow Phillips to appoint an executor of his choosing without considering the executor’s ability to perform the remaining contract duties. Third, it would protect Marvel from the risks that Phillips would appoint “an unsuitable executor.”¹⁰⁵ Perhaps anticipating arguments that the court’s approach would prevent parties from making contracts binding on a decedent’s estate, the court stated that “[i]t would require *explicit* words to show that parties entering into a contract like this intended that executors should perform the duties undertaken by Phillips.”¹⁰⁶

In *Browne v. Fairhall*,¹⁰⁷ the Massachusetts Supreme Court extended this approach to a fact pattern involving negligible skill, talent, or effort. John B. Browne contracted to purchase the stocks and bonds of a particular corporation from Fairhall for \$1,375,000 in cash and \$200,000 in unsecured promissory notes.¹⁰⁸ Browne was to deliver the cash and promissory notes to an escrow agent within ninety days. The contract provided that it shall be “binding upon and inure to the benefit of the respective heirs, executors, and administrators.”¹⁰⁹ Under the agreement, Browne had discretion to designate when, within a three-year period, the \$200,000 promissory note would be payable.¹¹⁰ Browne died approximately fifty days after making the contract. At the time of his death, Browne had not delivered the promissory notes or otherwise designated when the \$200,000 would be payable.¹¹¹

The court said the agreement was a personal services contract because only Browne could set the maturity date (within the three-year period) for the \$200,000 promissory note.¹¹² Death made performance impossible, so the contract terminated and Browne’s estate was not obligated to purchase the stocks or bonds.¹¹³ In contrast, many subsequent authorities conclude that paying money from the decedent’s

104. *Id.*

105. *Id.*

106. *Id.* (emphasis added) (noting that “[e]ven in the case of a partnership, a provision for continuing a partner’s interest after his death must be clear and unambiguous”).

107. 100 N.E. 556 (Mass. 1913).

108. *Id.* at 556. Browne also agreed to transfer certain Chicago real estate. *Id.*

109. *Id.*

110. *Id.* Any unpaid balance would bear interest at six percent per annum. *Id.*

111. *Id.* at 557.

112. *Id.*

113. *Id.*

estate is not a personal service.¹¹⁴ In response to the argument that the court's interpretation made the contract language about binding heirs, executors, and administrators meaningless, the court proclaimed that if Browne specified the maturity date (or dates) and delivered the promissory note before his death, the contract would no longer have been a personal services contract. In that case, if Browne had subsequently died before paying the \$200,000, his estate would have been obligated.¹¹⁵ A leading contracts commentator endorses the approach in *Browne* based on intent: "Even if a contract binds not only the promisor but all legal representatives, successors, and assigns, those successors will not be required to specifically perform the promise unless that is the parties' *clear* intention."¹¹⁶

Marvel and *Browne* appear to create a doctrinal path both for sidestepping any boilerplate about successors or assigns and for the contract being binding on legal representatives, heirs, or executors. If the contract terminates with the party's death so that there is nothing to succeed to, to be the assignee of, or to be bound by, then the boilerplate simply does not apply to death.¹¹⁷

114. *See supra* note 67 and accompanying text.

115. *Browne*, 100 N.E. at 557–58.

116. WILLISTON ON CONTRACTS, *supra* note 30, § 77:75, at 504 (emphasis added).

117. Arguably, both cases also are unusual in that the court refused to bifurcate the transactions. *See Marvel v. Phillips*, 38 N.E. 1117, 1118 (Mass. 1894). ("The different parts of the agreement are not separable."); *Browne*, 100 N.E. at 557 ("Performance of the *whole* agreement became impossible because it had become impossible to carry out one of its essential terms by giving the promissory notes of the testator such as had been contracted for.") (emphasis added). For example, in *Marvel*, the court could have found that the duty to pay or advance money was not a personal service and survived death, but the obligations to promote and manage the inventions were personal services and terminated at Phillips' death. *Marvel*, 38 N.E. at 1118 ("[Phillips'] chief undertakings were personal in their character. He was to endeavor to create a profitable business under the patents, and to manage it . . ."). Similarly, the court in *Browne* could have held that the obligation to set the maturity date for the \$200,000 promissory note was personal, but the obligation to transfer the remaining \$1,375,000 in cash within ninety days was not. Other courts have been willing to bifurcate. *See, e.g., Mullen v. Wafer*, 480 S.W.2d 332, 334 (Ark. 1972) (concluding that the obligation to sell the assets of an accounting practice survived the seller's death, but the seller's obligation to assist with the transition of the practice to the buyer terminated with the seller's death, and stating that "the contract is severable and can be apportioned"); *Brearton v. DeWitt*, 170 N.E. 119 (N.Y. 1930) (holding that an obligation to pay money survived, but the medical practitioner's obligation to provide or supervise medical care terminated with his death).

The Illinois Supreme Court discussed binding-type boilerplate at length in *Vogel v. Melish* and chose not to apply it at death.¹¹⁸ Vogel and Koster were the two equal dominant shareholders of a corporation,¹¹⁹ and they entered into a shareholders agreement creating a “right of first refusal”¹²⁰ in the event “either party desired to sell, transfer, assign, convey or otherwise dispose of all or part of his shares.”¹²¹ Koster died, and Vogel asked the court whether he had an option to buy the decedent’s shares in connection with the “testamentary transfer”¹²² and when the agreement would terminate. First, the court concluded that “[t]he occurrences giving rise to the option to purchase are *inter vivos* transfers” and “there is no express restriction on intestate or testamentary disposition.”¹²³ Perhaps this conclusion was appropriate because the agreement described the right of first refusal triggering event as when a party “*desired* to . . . dispose of all or part of his shares”¹²⁴—presumably Koster did not *desire* to die and thereby dispose of his shares.

Second, in regards to the timing of the agreement’s termination, the court quoted the concluding paragraph of the shareholders agreement, which stated: “[T]he provisions of this agreement shall be binding upon and inuring to the benefit of the parties hereto and their respective administrators, executors, heirs and personal representatives.”¹²⁵ The appellate court affirmed the trial court on the grounds that “the stockholder’s agreement was personal to the parties and terminated with the death of Koster,” and the boilerplate provision about the agreement being binding on heirs and executors applied “only if either of the parties during the lifetimes of both contracted to purchase shares pursuant to the stockholder’s agreement.”¹²⁶ The appellate court emphasized that “neither party was required to accept performance by strangers to the agreement.”¹²⁷ The Illinois Supreme Court also affirmed stating: “In view of the detail of the stockholder’s

118. *Vogel v. Melish*, 203 N.E.2d 411 (Ill. 1965). Vogel was a patent attorney, and Koster was an inventor. They each owned 40 percent of the stock of Vogel Tool & Die Company.

119. *Id.* at 412. Vogel was a patent attorney and drafted the shareholders agreement. *Id.*

120. *Id.* at 413.

121. *Id.* at 412.

122. *Id.* Koster’s widow “subsequently sought to have some of the shares transferred to her in satisfaction of her widow’s award.” *Id.*

123. *Id.* at 413.

124. *Id.* at 412 (emphasis added).

125. *Id.*

126. *Id.* at 413.

127. *Id.*

agreement, it is unreasonable to assume that the parties intended it to survive the death of either of them . . . when no provision for that contingency is made . . . other than the vague and general terms” of the boilerplate provision binding the administrators, executors, heirs, and personal representatives.¹²⁸

In sharp contrast, some courts have applied binding-type boilerplate to conclude the contract survived death. In *United States ex rel. Wilhelm v. Chain*,¹²⁹ the U.S. Supreme Court considered whether obligations to guarantee the debt of a bank survived the death of the guarantor. James W. Flynn and other individuals guaranteed the debt of a bank that became insolvent, closed its doors, and refused to pay depositors. Upon Flynn’s death, Nellie Flynn Chain became the executrix of his estate.¹³⁰ Flynn had never revoked or terminated his suretyship during his lifetime. The issue was brought to the courts when a trustee, Wilhelm, brought an action against the bank for \$3,190.72 that was deposited in the bank when it closed.¹³¹

The Fourth Circuit Court of Appeals concluded the guarantee was merely an offer which terminated with Flynn’s death.¹³² But on appeal, the U.S. Supreme Court concluded the guarantee was a contract supported by consideration¹³³ and reversed on two grounds. First, the court relied on the presumption that contracts survive unless personal skill is required.¹³⁴ Second, the Court enforced the contract boilerplate that the obligors “bind not only themselves, but also their executors, administrators, and successors” because the clause was “in full accord with the presumption.”¹³⁵

In *Warner v. Kaplan*, New York courts not only applied and enforced a boilerplate clause but indicated that it represented the parties’ intent without any evidence other than the written contract.¹³⁶ Glen Altman agreed to purchase a cooperative apartment on Park Avenue in Manhattan from the Kaplans for \$2.3 million in cash, and she paid \$230,000 as a deposit in escrow when signing the contract. Before closing on the apartment or moving in with her two dogs, Ms. Altman died unexpectedly from a stroke.¹³⁷ Her estate notified the

128. *Id.*

129. 300 U.S. 31 (1937).

130. *Id.* at 32.

131. *Id.* at 32–33.

132. *Chain v. Wilhelm*, 84 F.2d 138, 140 (4th Cir. 1936).

133. *Wilhelm*, 300 U.S. at 34.

134. *Id.* at 35.

135. *Id.*

136. *Warner v. Kaplan*, 892 N.Y.S.2d 311 (N.Y. App. Div. 2009), *aff’g* 867 N.Y.S.2d 660 (N.Y. Sup. Ct. 2008).

137. *Warner*, 867 N.Y.S.2d at 661, 665.

Kaplans that it would not be purchasing the co-op apartment, demanded the return of the \$230,000 deposit, and sued when the Kaplans directed the escrow agent to keep the \$230,000. The estate pointed out that the contract specified only Ms. Altman as the tenant, and the co-op board of directors had to approve any new tenant. As a result, the estate argued the contract became impossible to perform once Ms. Altman died.¹³⁸

The court rejected the estate's argument. According to the court, the "crux of this matter"¹³⁹ was Section 15.2 of the contract which stated that "[this contract] shall bind and inure to the benefit of the [p]arties hereto and their respective heirs, personal and legal representatives and successors in interest."¹⁴⁰ Although the court mentioned no evidence that Ms. Altman and the Kaplans read, discussed, or negotiated this provision or Ms. Altman's possible death before closing, the court stated: "[T]his provision indicates that [they] *explicitly contemplated* . . . the possibility of either party's death before closing, by specifying that the death would not terminate the contract, but that the contract would survive, to be performed by the successor or heirs of the deceased party."¹⁴¹ As justification, the court stated that the boilerplate "would be meaningless if it did not bind the purchaser's estate to her contractual obligation . . . and 'a contract should not be interpreted so as to render any clause meaningless.'"¹⁴² In addition, the court embraced the clause as boilerplate: "That this provision is a standard clause in a form contract renders it no less enforceable; the clause is clear and unambiguous, and if it inaccurately reflected the parties' intentions, it could have been rewritten."¹⁴³

In *Stein v. Bruce*,¹⁴⁴ a Missouri court stated that a boilerplate "binding-on-executors" clause "clearly" revealed the parties' intent.¹⁴⁵ Stein agreed to purchase real estate for \$19,000. A week before the closing, Stein died, and the administrator of his estate argued the contract terminated and sued to recover deposits of \$2,900.¹⁴⁶ The court concluded that the contract did not terminate and Stein's estate could not recover the deposits for three reasons. First, the contract did not

138. *Warner*, 892 N.Y.S.2d at 314. The estate also argued that her death made the contract unenforceable because of "frustration of contract purpose." *Id.* at 314-15.

139. *Id.* at 313.

140. *Warner*, 867 N.Y.S.2d at 665.

141. *Warner*, 892 N.Y.S.2d at 313 (emphasis added).

142. *Id.* at 314.

143. *Id.*

144. 366 S.W.2d 732 (Mo. Ct. App. 1963).

145. *Id.* at 734.

146. *Id.* at 733-34.

require Stein to perform any actions of a personal nature, and under the general presumption the contract survived.¹⁴⁷ Second, the court stated:

[T]he contract clause reading, “This [boilerplate clause] is to extend to and be binding upon the heirs, executors, administrators and assigns of the parties hereto,” *clearly reveals that the parties intended*, in the eventuality of either’s death, that the agreement would be performed . . . by one (or more) of the persons named.¹⁴⁸

Third, the liquidated damages clause providing that Stein would forfeit the deposits if he failed to close was not unenforceable as a penalty because the seller paid a substantial commission to a real estate agent in connection with arranging the sale to Stein.¹⁴⁹

Ames v. Saylor involved an oral sharecropping agreement.¹⁵⁰ After the farmer’s death, his family argued the contract survived, so they could continue to farm the land in exchange for the rent.¹⁵¹ The court rejected the family’s arguments but in dictum commented that the result would have been different if the sharecropper had used a standard form contract including a boilerplate clause that “the terms of the lease shall be binding on the heirs, executors, administrators and assigns of both lessee and lessor in like manner as upon the original parties.”¹⁵² The Kansas Supreme Court in *Sauder* cited *Ames* with approval in connection with concluding that “[w]hen parties to a sharecrop farm lease agree that the terms of the contract ‘shall apply to and be binding upon the heirs, successors, executors, and administrators of the parties,’ they express an intent that the contract is not a personal services contract [and survives death].”¹⁵³

147. *Id.* at 734; *see infra* notes 212–221 and accompanying text (regarding the general rule that a contract survives death).

148. *Stein*, 366 S.W.2d at 734–35 (emphasis added).

149. *Id.* at 736–37 (noting also that the sellers “were burdened by the contract for almost four months”). Presumably this demonstrated that the amount of the liquidated damages was reasonably related to the innocent party’s actual damages.

150. *Ames v. Saylor*, 642 N.E.2d 1340, 1341 (Ill. App. Ct. 1994).

151. *Id.* at 1341–42.

152. *Id.* at 1344 (discussing a University of Illinois College of Agriculture form).

153. *In re Estate of Sauder*, 156 P.3d 1204, 1215 (Kan. 2007); *see supra* notes 94–98 and accompanying text (discussing the *Sauder* case in more detail).

V. OPTIONS AVAILABLE WHEN INTERPRETING BOILERPLATE
AT DEATH

The process of interpreting words in a contract involves a fundamental tension at the core of contract law. On the one hand, a dominant goal of contract law is to carry out the intent of the parties.¹⁵⁴ On the other hand, many courts and commentators stress the “objective test of assent.”¹⁵⁵ Judge Learned Hand expressed an extreme objective view with his assertion that “[a] contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties.”¹⁵⁶ This tension between the subjective and the objective ripples through the cases, and courts and commentators sometimes emphasize one aspect of contract interpretation over another.¹⁵⁷

The Restatement of Contracts provides rules to accommodate both approaches. The Restatement begins its interpretation rules with a focus on the subjective intent of the parties.¹⁵⁸ If both parties attach the same subjective meaning to a word, it is interpreted according to that meaning even if it is nonsensical.¹⁵⁹ In explaining this rule, the Seventh Circuit stated: “Parties, like Humpty Dumpty, may use words as they please. If they wish the symbols ‘one Caterpillar D9G tractor’ to mean ‘500 railroad cars full of watermelons,’ that’s fine—provided the parties share this weird meaning.”¹⁶⁰ A related Restatement rule provides that if one party (the innocent party) attaches a particular meaning to a word and the other party knows or has reason to know the innocent party has attached that meaning, the word will have the meaning understood by the innocent party.¹⁶¹ Some leading commentators state that “modern contract law has . . . adopt[ed]” this approach,¹⁶² and this approach has “generally been approved by the courts.”¹⁶³ But another noted commentator says the courts merely pay “lip service”¹⁶⁴ to these Restatement subjective intent rules, we should not “be fooled by language in numerous judicial decisions that refers to

154. *See supra* note 13 and accompanying text.

155. *See, e.g.*, ROBERT A. HILLMAN, *PRINCIPLES OF CONTRACT LAW* 46 (3d ed. 2014).

156. *Hotchkiss v. Nat’l City Bank*, 200 F. 287, 293 (S.D.N.Y. 1911).

157. CORBIN ON CONTRACTS, *supra* note 35, § 24.6, at 25–28.

158. RESTATEMENT (SECOND) OF CONTRACTS § 200 (AM. LAW INST. 1981).

159. *See id.* § 201(1).

160. *TKO Equip. Co. v. C & G Coal Co.*, 863 F.2d 541, 545 (7th Cir. 1988).

161. RESTATEMENT (SECOND) OF CONTRACTS § 201(2)(b) (AM. LAW INST. 1981).

162. KNAPP ET AL., *supra* note 13, at 383.

163. *Id.* at 388.

164. HILLMAN, *supra* note 155, at 280.

the parties' intentions,"¹⁶⁵ and courts typically use an objective approach instead.

After the rules focused on intent, the Restatement follows with a series of general rules that can allow courts to interpret contract language more objectively. In particular, Restatement § 202(3) provides: "Unless a different intention is manifested, where language has a *generally prevailing meaning*, it is interpreted in accordance with that meaning."¹⁶⁶ A related comment states: "Words are read as having the meaning given them by general usage."¹⁶⁷ Under the objective approach, "[c]ourts generally determine the meaning of language by ascertaining what a reasonable person would believe the language means, not what either of the parties actually thought the language meant."¹⁶⁸ Courts often refer to this as the "plain meaning rule."¹⁶⁹

When the issue is post-death survival of a contract, admissible, outcome-determinative evidence of the parties' intent beyond the written terms of the contract likely will be nonexistent. An opposing party's attempt to introduce testimony about the decedent's oral statements indicating intent typically will need to qualify for an exception under a dead-man's statute of evidence.¹⁷⁰ Furthermore, any such testimony that would be admissible likely would be greeted with great skepticism consistent with the adage that such testimony should

165. *Id.*

166. RESTATEMENT (SECOND) OF CONTRACTS § 202(3)(a) (AM. LAW INST. 1981) (emphasis added).

167. *Id.* § 202 cmt. E. The comment includes some qualifications to the prevailing meaning rule: "This rule is a rule of interpretation in the absence of contrary evidence, not a rule excluding contrary evidence. It may also yield to internal indications such as inconsistency, absurdity, or departure from normal grammar, punctuation, or word order." *Id.*

168. HILLMAN, *supra* note 155, at 279; *see also* All-Ways Logistics, Inc. v. USA Truck, Inc., 583 F.3d 511, 516 (8th Cir. 2009) (quoting Coleman v. Regions Bank, 216 S.W.3d 569, 574 (2005)) ("[W]e give words their 'ordinary meaning' viewing the subject of the contract 'as the mass of mankind would view it.'").

169. *See, e.g.*, CORBIN ON CONTRACTS, *supra* note 35, § 24.7, at 34 ("[T]he 'plain meaning' rule is adhered to by a majority of the jurisdictions in the United States.").

170. *See* 81 AM. JUR. 2D *Witnesses* § 553, at 541 (2015) ("A dead-man's statute embraces verbal transactions and statements, and thus, testimony as to the existence of an oral agreement is inadmissible absent written evidence to substantiate the alleged agreement.") (citations omitted); *see also id.* § 616, at 590 (discussing an exception when the personal representative voluntarily testifies on an issue raised by a party adversely interested that concerns an oral communication of the decedent).

be given little weight.¹⁷¹ Thus, the written language of the contract may be the only evidence available to determine the parties' intent for contracts of the dead.

In addition to the plain (or prevailing) meaning rule, there are other general contract interpretation maxims that might be relevant in particular situations. For example, "an interpretation which gives [an] . . . effective meaning to all the terms is preferred to an interpretation which leaves a part . . . [having] no effect."¹⁷² Although a related comment stresses that to fit the context "words . . . may be disregarded."¹⁷³ Another potentially relevant maxim is—"If the principal purpose of the parties is ascertainable it is given great weight,"¹⁷⁴ although "if the purposes of the parties are obscure, the court may well fall back upon 'plain meaning.'"¹⁷⁵ The Restatement also stresses the importance of context: "A writing is interpreted as a whole."¹⁷⁶

A. Plain or Prevailing Meaning of Some Boilerplate Terms

Relevant boilerplate often includes the words "assigns," "successors," and "binding upon heirs and executors." In the absence of evidence about the parties' intent, a court may consider the plain (or prevailing) meaning of the written words. Without considering the parties' probable intent and the relevant policy considerations, it could be forcefully argued that the word "successor" and the phrase "binding on heirs and executors" indicate that a contract should survive death, and it is less clear with the word "assigns."

Successor. The word "successor" is flexible and its boundaries indefinite.¹⁷⁷ "[I]t is a word with many legal applications and . . . is

171. See, e.g., Marks v. St. Landy Parish, 308 So.2d 819, 824 (La. Ct. App. 1975) (treating oral statements of the dead as "the weakest kind of evidence . . . entitled to little weight").

172. RESTATEMENT (SECOND) OF CONTRACTS § 203(a) (AM. LAW INST. 1981).

173. *Id.* at § 202 cmt. d.

174. *Id.* at § 202(1).

175. KNAPP ET AL., *supra* note 13, at 391 (emphasis added) (quoting Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 853-55 (1964)).

176. RESTATEMENT (SECOND) OF CONTRACTS § 202(2) (AM. LAW INST. 1981). A related comment stresses the importance of context. *Id.* at § 202 cmt. b ("The meaning of words and other symbols commonly depends on their context.").

177. Dille v. Plainview Coal Co., 250 N.W. 607, 613 (Iowa 1933) (referring to "successor" as a "plastic word"); Proctor v. Foxmeyer Drug, Co., 884 S.W.2d 853, 861 (Tex. App. 1994) ("The exact meaning of the word 'successor' when used in a contract depends largely on the kind and character of the contract, its purpose and circumstances, and the context.").

therefore difficult to define precisely Mr. Justice Marshall once remarked, ‘There is, and can be no single definition of “successor” which is applicable in every legal context.’¹⁷⁸ Nevertheless, it appears to comfortably encompass the relationship between a decedent and his or her estate. One court has stated: “[I]n modern application the term has a broader significance than successor in respect of the estate of a deceased, yet it is an apt and appropriate term to designate one to whom property descends.”¹⁷⁹ Its dictionary definition includes “a person who succeeds to a throne, title or *estate*.”¹⁸⁰ Succession’s general legal definition includes, “the devolution of title to property under the law[s] of descent and distribution,”¹⁸¹ and it “frequently possesses the somewhat broader meaning of the acquisition of rights upon the death of another.”¹⁸²

The Uniform Probate Code employs the term “successors”¹⁸³ and defines it as any “persons, other than creditors, who are entitled to property of a decedent under his [or her] will or this [Code].”¹⁸⁴ A leading treatise on the law of estates, in beginning its discussion of the law of wills, uses the word “succession” four times in the first two pages.¹⁸⁵ In *Howell v. Murray Mortgage Co.*, Frederick Howell borrowed money from a mortgage company and purchased real estate.¹⁸⁶ Howell granted the lender a deed of trust, which included a due-on-sale clause. Howell died, and the administrator of his estate sought a declaratory judgment canceling the due-on-sale clause.¹⁸⁷ The deed of trust specifically stated

178. *Safer v. Perper*, 569 F.2d 87, 95 (D.C. Cir. 1977) (quoting *Howard Johnson Co. v. Hotel Emps.*, 417 U.S. 249, 263 (1974)).

179. *Dille*, 250 N.W. at 613.

180. *Successor*, WEBSTER’S THIRD INTERNATIONAL DICTIONARY 2282 (1981) (emphasis added).

181. *Succession*, BLACK’S LAW DICTIONARY (5th ed. 1979).

182. *Id.* (5th ed. 1979) (citing *In re Russell’s Estate*, 17 Cal. App. 3d 758, 769 (Cal App. 1971)).

183. UNIF. PROB. CODE § 1-201, 8 U.L.A. 49 (Supp. 2012); *see also id.* § 2-701 (describing “[c]ontracts [c]oncerning [s]uccession” as “contract[s] to make a will or devise, or not to revoke a will or devise, or to die intestate . . .”).

184. *Id.* § 1-201.

185. SCHOENBLUM, *supra* note 14, § 1.1, at 1–2.

186. *Howell v. Murray Mortg. Co.*, 890 S.W.2d 78, 80 (Tex. App. 1994).

187. The due-on-sale clause basically provided that if borrower sold or transferred any part of the property without the lender’s consent, the unpaid balance of the loan would be immediately due and payable. *Id.* at 80–81. For these purposes, a “transfer” did not include “a transfer by devise, descent, or by operation of law upon . . . death.” *Id.* at 81.

it “shall bind . . . the . . . successors and assigns of . . . [b]orrower.”¹⁸⁸
The court said:

Broadly speaking, when the term successor is used in common parlance it means anyone who follows. However, when used as a legal term applying to . . . natural persons, it is an apt and appropriate term to designate one to whom property descends or the estate of [a] decedent.¹⁸⁹

Thus, without considering the intentions of the parties and relevant policy considerations in connection with contracts of the dead, an estate generally could be described as a decedent’s “successor.”

Assigns. Thorough drafters likely use the familiar phrase “successors and assigns,”¹⁹⁰ but sometimes the word “assigns” stands alone and requires interpretation.¹⁹¹ When contract boilerplate states the contract is between the parties and their “assigns,” two significant interpretive problems arise with asserting that the estate (or heir) is an assign and therefore must perform the decedent’s remaining contractual obligations.

The first problem or issue is that an “assignment” typically refers to a transfer of a right or property interest¹⁹² rather than the assumption of a duty. The dictionary defines “assignee” as “one to whom a *right of property* is legally transferred.”¹⁹³ The general legal definition of an “assignment” is “[a] transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein. It includes transfers of all kinds of property.”¹⁹⁴ An assignment is frequently distinguished from the delegation of a duty. “Duties and liabilities under a contract . . . are not assigned, they are delegated, a concept distinct from assignment.”¹⁹⁵ Thus, an assignee generally could enforce rights under a contract, but in the absence of

188. *Id.* at 83–84 (quoting *Int’l Ass’n of Machinists v. Falstaff Brewing Co.*, 328 S.W.2d 778, 781 (Tex. Civ. App. 1959); and also quoting *Farm & Home Sav. Ass’n v. Strauss*, 671 S.W.2d 682, 685 (Tex. App. 1984)).

189. *Id.* at 84 (internal brackets omitted).

190. *See id.* (declining to interpret the word “assign” because the court’s analysis of the word “successor” resolved the issue).

191. *See, e.g.*, *Smith v. Zuckman*, 282 N.W. 269, 271 (1938).

192. *See Ex parte Cox*, 828 So.2d 295, 299 (Ala. 2002); TINA L. STARK, *NEGOTIATING AND DRAFTING CONTRACT BOILERPLATE* 81 (2003).

193. *Assignee*, WEBSTER’S THIRD NEW INT’L DICTIONARY (1981) (emphasis added).

194. *Assignment*, BLACK’S LAW DICTIONARY (5th ed. 1979).

195. *Midland Mut. Life Ins. v. Mercy Clinics*, 579 N.W.2d 823, 833 (Iowa 1998) (quoting E. ALLAN FARNSWORTH, *FARNSWORTH ON CONTRACTS* § 11.1, at 58–59) (“An obligor’s empowering of another to perform the obligor’s duty is known as a delegation of the performance of that duty.”).

other considerations, the other party could not be forced to accept performance from an assignee. One court has indicated there is no “assignment” when an estate assumes the decedent’s rights and obligations.¹⁹⁶

The second problem or issue is whether an estate is an “assignee” of the decedent. “In common acceptance the word [assignee] is limited to an ‘assignee in fact’” which is “one to whom an assignment has been made in fact by the party having the right.”¹⁹⁷ Unlike an “assignee in fact,” an executor or administrator is an “assignee at law”¹⁹⁸ and therefore generally would not be an “assign” or “assignee.” In a case involving the dead-man’s statute of evidence, a court concluded that a residuary legatee was not an assignee because neither a general nor a residuary legacy “direct[s] the delivery of any particular property.”¹⁹⁹

Nevertheless, various authorities suggest that, depending on the context and other considerations, courts could define “assigns” or “assignment” differently. The Restatement asserts that “an assignment of ‘the contract’ or of ‘all my rights under the contract’ or an assignment in similar general terms is an assignment of the assignor’s rights *and a delegation of his unperformed duties* under the contract.”²⁰⁰ Apparently, the theory is that “[o]ften parties do not ‘distinguish between these words of art.’”²⁰¹

Also, an assignee at law (such as an executor or administrator) could be considered an assignee under an expansive definition. A court has stated that if the context so requires, the word “assignee” can be considered in “its more comprehensive sense as including an assignee in law.”²⁰² Another court has stated that the word “assignee” can include

196. See *In re Estate of Sauder*, 156 P.3d 1204, 1215 (Kan. 2007) (describing the lower court’s conclusion as: “[T]he circumstances surrounding an administrator assuming the duties and obligations of a decedent under a contract is not as assignment”). The Kansas Court of Appeals in *Sauder* stated: “To direct that a written instrument becomes binding on a person’s heirs and administrators neither contemplates nor requires an assignment It is well established that upon death, the personal representative *assumes* the rights and obligations of the decedent by operation of law; no formal assignment is required.” *In re Estate of Sauder*, No. 93,556, 2005 WL 34455786, at *2 (Kan. Ct. App. Dec. 16, 2005).

197. *Mich. Tr. Co. v. Chaffee*, 44 F. Supp. 848, 850 (D.N.D. 1941).

198. *Id.* (including a trustee in bankruptcy and a guardian).

199. *Johnson v. Bogdis*, 67 S.E.2d 189, 191 (Ga. Ct. App. 1951) (concluding there was not a transfer, and therefore there was no assignment). The court also stated an heir is not an assignee. *Id.* at 192.

200. RESTATEMENT (SECOND) OF CONTRACTS § 328(1) (Am. Law Inst. 1981) (emphasis added).

201. *Midland Mut. Life Ins. v. Mercy Clinics*, 579 N.W.2d 823, 833 (Iowa 1998).

202. *Mich. Tr. Co.*, 44 F. Supp. at 848, 850.

those who acquire “whether by conveyance, devise, descent, or act of law.”²⁰³ Thus, while boilerplate referring to a contract party and his or her assigns, in isolation, generally should not delegate duties at death, context, policy considerations, and some authorities could support the contrary result.

Binding on Heirs and Executors. A standard boilerplate clause in contracts provides that “[t]his contract shall be binding on the parties and their heirs and executors.”²⁰⁴ The dictionary definition of “binding” is “imposing an obligation, duty or responsibility.”²⁰⁵ Thus, if the parties agree that “the contract” shall be binding upon each party’s heirs and executors, the plain meaning of the words suggests that the heirs and executors would be required to fulfill the decedent’s remaining duties. On the other hand, it could be argued that if the parties really intended to delegate post-death performance, presumably they would have used the words “delegate” and “estate.”

The primary definition of “heir” is a person entitled to receive a decedent’s property in intestacy,²⁰⁶ which would exclude a beneficiary who takes under a will or a probate-avoidance arrangement. A secondary definition of “heir,” however, can include both a person who takes by will and a person who takes by intestacy.²⁰⁷ In popular usage, the word “heir” can refer simply to issue, children, or descendants.²⁰⁸

An “executor” is a “person named by a testator to carry out the provisions in the testator’s will,”²⁰⁹ and the word “executor” technically does not include the administrator of an intestate estate.²¹⁰ If the contract parties wanted to address contract survival whether or not the decedent had a will, the preferred term would be “personal representative.”²¹¹ Thus, for parties who really wanted to delegate duties (and acquiesce to that delegation) at death, one might anticipate some modifications to the standard boilerplate.

B. Questioning the Policies Behind the General Rule of Contract Survival

In 1597, an English court established the method for deciding whether a contract survives the obligor’s death.²¹² Over 400 years later,

203. *Sylan Props Co. v. State Planning Office*, 711 A.2d 138, 140 (Me. 1998).

204. *See, e.g., Biagi v. Biagi*, 43 Cal. Rptr. 707, 711 (Cal. Ct. App. 1965).

205. *Binding*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1981).

206. *Heir*, BLACK’S LAW DICTIONARY (10th ed. 2014).

207. *Id.*

208. *See Cook v. Underwood*, 228 N.W. 629, 631 (Iowa 1930).

209. *Executor*, BLACK’S LAW DICTIONARY (10th ed. 2010).

210. *Id.*

211. *Personal Representative*, BLACK’S LAW DICTIONARY (10th ed. 2014).

212. *Hyde v. Dean and Canons of Windsor*, 78 Eng. Rep. 798 (Q.B. 1597).

a leading contracts commentator indicated this method can lead to “commercial senselessness.”²¹³ The foundational case from Shakespearean England provided in part: “[A] covenant lies against an executor in every case, although he be not named; unless it be such a covenant as is to be performed *by the person* of the testator, which they cannot perform.”²¹⁴

While greater embellishment might have helped comprehension, this pithy proclamation suggests the economic assumptions the court embraced in 1597. First, the general rule is contract survival, and contract termination at death is the exception. This reflects an assumption that collective welfare is enhanced when the decedent’s successor (estate, heir, or beneficiary) mimics the decedent and performs the remaining duties under the contract. In other words, if the parent “shuffle[s] off this mortal coil”²¹⁵ and leaves work undone, it is economically efficient for the children to stop their occupations and try to perform the occupation of their parent. Second, it assumes that it is not economically efficient for the surviving party to choose a replacement. Third, this framework assumes that the only time a contractual obligation should terminate at death is when “*the person* of the testator” would perform, and the successors cannot perform the duty. Thus, apparently it was only economically efficient for the contract to terminate if three conditions were present—first, performance depended on the personal effort of the decedent; second, materials, equipment, or other forms of capital were insignificant in performing the contract; and third, the successors could not perform.

As an example of how this approach has worked, in 1615, an English court concluded that when the decedent contracted to build a house and died before completion, the decedent’s family or other successors were obligated to become home builders and finish the job (or search for and hire a replacement).²¹⁶ More recently, courts have held that successors were obligated to finish constructing a YMCA building,²¹⁷ a sewer system,²¹⁸ and an oil rig.²¹⁹ A treatise states: “Promises to erect or renovate buildings are enforced after the promisor’s death, so long

213. JOSEPH M. PERILLO, *CONTRACTS* 496 (7th ed. 2014).

214. *Hyde*, 78 Eng. Rep. at 798 (emphasis added).

215. WILLIAM SHAKESPEARE, *HAMLET*, act 3, sc. 1.

216. *Quick v. Ludborrow*, 81 Eng. Rep. 25 (K.B. 1615); *see also* *Marshall v. Broadhurst*, 148 Eng. Rep. 1480 (C.E. 1831) (explaining that a contract survives if “a man builds half a house and dies”).

217. *Exchange Nat’l Bank of Atchison v. Betts’ Estate*, 176 P. 660, 662 (Kan. 1918).

218. *In re Stormer’s Estate*, 123 A.2d 627, 628 (Pa. 1956).

219. *Mackay v. Clark Rig Bldg. Co.*, 42 P.2d 341 (D. Cal. 1935).

as no one contemplated the decedent's personal work."²²⁰ As a summary, a court in 1983 stated: "Few contracts are terminated by death in the absence of explicit provisions [in the contract] to the contrary."²²¹

The economic assumptions used in England in 1597 to create these rules, however, seem out of date. Sixteenth and seventeenth century England primarily was an agrarian economy,²²² with other occupations using an apprentice system.²²³ People often inherited their occupation.²²⁴ Formal education, which can open doors to other careers, was not even compulsory for all children until 1880.²²⁵ For this sixteenth-century society with limited occupational and geographic mobility, perhaps a rule that successors must fulfill the decedent's unfinished business made economic sense. In addition, limited communication may have hindered a surviving contract party's ability to choose a competent replacement. Even if the decedent's family was not in the same business as the decedent, perhaps they were qualified to choose a replacement.

Times have changed. Children are more likely to choose where they want to live and how they want to make a living, rather than

220. WILLISTON ON CONTRACTS, *supra* note 30, § 77.72, at 496.

221. *Shutt v. Butner*, 303 S.E.2d 399, 401 (N.C. Ct. App. 1983); *see also Horning v. Ladd*, 321 P.2d 795, 798 (Cal. Ct. App. 1953) ("Contracts do not die with the contractor (with a few exceptions . . .) unless they contain [a] provision to that effect.").

222. KNAPP ET AL., *supra* note 13, at 351 ("[I]n England in the seventeenth century, land was the basis of the English economy."); Tim Lambert, *Life in 16th Century England*, www.localhistories.org/tudor.html [<https://perma.cc/6T3C-9YY5>] ("In 16th century England, most of the population lived in small villages and made their living from farming.") (last revised 2018).

223. *See, e.g., Walker v. Hull*, 83 Eng. Rep. 357 (K.B. 1664) (providing that a contractual obligation to train an individual as an apprentice survived the overseer's death even if no one in the overseer's surviving family performed the trade).

224. Jon D. Wisman & Nicholas Reksten, *Rising Job Complexity and the Need for Government Guaranteed Work and Training*, in *THE JOB GUARANTEE: TOWARD TRUE FULL EMPLOYMENT 4* (Michael J. Murray & Mathew Forstater eds., 2012), www.american.edu/cas/economics/pdg/upload/2012-2.pdf [<https://perma.cc/JW7W-2E44>] (explaining that in "pre-modern agricultural societies . . . [o]ccupations were usually inherited, and children began participating in agricultural work at a young age").

225. *How Did the Industrial Revolution Affect Education?*, QUORA, <https://www.quora.com/How-did-the-Industrial-Revolution-affect-education> [<https://perma.cc/Z29Y-TYAP>] ("In 1880, the Education Act made school attendance compulsory for children up to the age of 10.") (last visited Oct. 9, 2018).

automatically adopting their parents' choices.²²⁶ Even if the parent was a sharecropper or a home builder, today it seems dubious to presume with any confidence that the child or other successor will be a qualified sharecropper or home builder.²²⁷ Furthermore, in the information age, the surviving contract party likely can choose a qualified replacement. The surviving contract party probably understands its needs and the status of the project more thoroughly than the decedent's family. In this economic context, it often will be appropriate to terminate the contract and avoid "economic senselessness."²²⁸

C. Doctrines for Avoiding Economic Senselessness

The reported cases provide multiple paths to avoid boilerplate which could be interpreted to require that the decedent's family or other successor perform the decedent's remaining contractual obligations. This avoidance would be especially appropriate when the family or other successor has no experience in the field, and the surviving contract party wants to choose the replacement.

First, a court could adopt an ascribed-intent approach and conclude that the parties (or reasonable persons in the position of the parties) intended the contractual obligations to terminate at death. A court employed this technique in *Smith v. Zuckman* when the parties contracted in the names of themselves and their "successors and assigns."²²⁹ Upon Smith's death, the court stated that the contract "involve[d] such a relation of personal confidence that it must have been intended"²³⁰ that the arrangement would terminate upon Smith's death.

Second, if a contract provides that it is binding on "assigns," a court could conclude that there is no "assignment" at death as between a decedent and his or her estate or heirs, as in the *Sauder* case.²³¹ Third, regardless of any boilerplate about successors, assigns, heirs, executors, or administrators, a court simply could assert that the contract terminated at death. Under this approach, the contractual duties are discharged because there are no remaining contractual obligations to succeed to, assign, or to become binding upon anyone. This approach

226. See Ian D. Wyatt & Daniel E. Hecker, *Occupational Changes During the 20th Century*, MONTHLY LAB. REV. 35, 38 (2006) (noting occupational shifts during the 20th century).

227. *Id.* at 55 ("[Farmers and farm laborers] declined nearly ninety-six percent as a proportion of total employment between 1910 and 2000."); *id.* (reporting that from 1910 to 2000, the workforce engaged in farming dropped from 33 percent to 1.2 percent).

228. PERILLO, *supra* note 213, at 496.

229. *Smith v. Zuckman*, 282 N.W.2d 269, 270 (Minn. 1938).

230. *Id.* at 271.

231. *In re Estate of Sauder*, 156 P.3d 1204, 1215 (Kan. 2007).

was demonstrated in *Marvel v. Phillips*,²³² in which the decedent was obligated to exercise some skill and discretion performing the contract.²³³ And also in *Browne v. Fairhall*,²³⁴ in which the decedent's obligations were routine—just paying approximately eighty-seven percent of the purchase price in cash by a certain date and choosing a maturity date within a three-year period for a promissory note representing approximately 13 percent of the purchase price.²³⁵

Fourth, regardless of any general boilerplate, a court could assert that the failure to directly address the consequences of death in the contract demonstrates an intent to terminate the contract at death, as in *Vogel v. Melish*.²³⁶ In response to arguments that these methods render the boilerplate meaningless, the estate could assert that the boilerplate would have applied if, before death, the decedent either had taken certain actions or would have applied if a party breached the contract before death. The courts used the former approach in *Browne v. Fairhall*²³⁷ and *Vogel v. Melish*.²³⁸

CONCLUSION

Contracting parties seldom negotiate death, but the plain meaning of some extremely common boilerplate terms would indicate that a contract survives an obligor's death. This Article argues that in many situations, forcing the decedent's successors to perform the remaining contractual duties would be "economic senselessness."²³⁹ In contrast to the economic conditions in 1597 when the general rule of contract survival arose,²⁴⁰ today the majority of the workforce is not involved in agriculture²⁴¹ and occupations are seldom inherited. As a result of increased occupational and geographic mobility, requiring the decedent's family or other successor to try to mimic the decedent typically will not be economically efficient. Many cases have dealt with these boilerplate provisions, and this Article describes methods to terminate a contract at death despite boilerplate language indicating the contrary.

232. 38 N.E. 1117 (Mass. 1894).

233. *Id.* at 1118.

234. 100 N.E. 556 (Mass. 1913).

235. *See generally id.*

236. 203 N.E.2d 411, 414 (Ill. 1965).

237. *Browne*, 100 N.E. at 557–58.

238. *Vogel*, 203 N.E.2d at 413.

239. PERILLO, *supra* note 213, at 496.

240. *See supra* note 222 and accompanying text.

241. *See supra* notes 226–227 and accompanying text.