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Slaying Contingent Beneficiaries

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Slaying Contingent Beneficiaries

Kevin Bennardo*

This Article analyzes what impact, if any, the slaying of one beneficiary by another should have on distribution of a decedent's property. This issue could arise in a variety of conveyances, such as intestate succession, wills, pay-on-death bank accounts, transfer-on-death securities, or life insurance proceeds. Based on equity, the Restatement (Third) of Restitution takes the position that a beneficiary may never move forward in the line of succession as the result of a slaying. This result is thought to be an extension of the traditional "slayer rule," which disallows a slayer from inheriting from her victim.

The Article argues for the opposite conclusion: the slaying of a higher-priority beneficiary by a contingent beneficiary does not result in unjust enrichment because it does not result in a transfer of a property interest to the slayer. Although the slayer advances in the line of succession as a result of the slaying, the slayer still only possesses a defeasible expectancy, not a property interest. Because an expectancy is the legal equivalent of nothing, the slayer has not profited as a result of the killing.

Thus, the property distribution should be governed by the likely intent of the owner of the estate rather than by the Restatement's misguided notion of equity. When there is no governing instrument, the best approach is to presume that the owner of the estate would neither wish to totally disinherit the slayer nor permit the slayer's share to increase as a result of the slaying. Thus, the slayer's distribution should be calculated as if the victim of the slaying did not predecease the owner of the estate. But when there is a governing instrument that was either

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republished after the slaying or went unchanged for a reasonable time after the slaying, the law should simply carry out the property distribution as directed in the instrument even if it results in a larger share for the slayer than the slayer would have received if the slayer's victim was still alive. This result is most likely in keeping with the intent of the estate's owner.

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INTRODUCTION

A slaying contingent beneficiary is a person who kills a high-priority beneficiary and, as a result, moves forward in the line of succession. This situation could arise in intestacy, where a lower-priority would-be heir kills an heir apparent, or in succession through a will, where a contingent devisee kills the primary devisee.¹ It could also arise in non-probate transfers, such as a slaying among the beneficiaries of a life

¹ These are but two of the many possible iterations of this fact pattern. It could also arise, for example, when a substitute taker under an antilapse statute slays a beneficiary who was named in a will and, as a result, succeeds to the named beneficiary's devise. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & DONATIVE TRANSFERS § 5.5 (1999). Although not technically appropriate for every scenario, this Article will generally use the term "beneficiary" to encompass all potential takers for ease of reference.

insurance contract, pay-on-death bank account, or transfer-on-death security. In each of these cases, the modern slayer rule,² as set forth in the Restatement (Third) of Restitution, would intervene to bar the slaying contingent beneficiary from receiving the targeted estate.³

This result is not universally appropriate. Slaying among beneficiaries does not transform an expectancy in an inheritance into a legal interest. That transformative threshold is not crossed until the death of the owner of the targeted estate. Thus, the slayer has not profited by her wrongdoing; she has simply exchanged one worthless expectancy for another, still worthless, expectancy. Because any enrichment that occurs is not the unjust product of the slaying, the analysis here should be driven by the intent of the deceased owner of the targeted estate. After all, it is the decedent's estate and the decedent has every right to leave it to a killer.

Because decedents who die without a will—dying intestate—have demonstrated little interest in estate planning, it is necessary for the law to intervene by setting up a default system of distribution based on the law's understanding of the desires of the typical intestate decedent. In the scenario of a slaying contingent beneficiary, we lack data on what the typical intestate decedent would desire. However, it is no great leap from the textbook application of the slayer rule (in which the victim of an intentional killing is presumed to wish to disinherit her slayer) to surmise that the typical intestate decedent would not want to increase an heir's portion of the estate as the result of the heir killing the decedent's previous heir-apparent, to whom the decedent was more closely related.

Decedents who die with a will—dying testate—have displayed important characteristics: attention, willingness, and ability to estate plan. Subject to certain exceptions, the law generally carries out the manifested dispositive intent of testators.⁴ Such should also be the case here. By leaving her will unchanged after the slaying of one beneficiary by another, a testator signals that she wishes the will to be carried out as written even if that means granting the slayer a larger share of the estate than she would have received but for the slaying. The law should not presume from the testator's inaction that she has suddenly grown inattentive to her estate plan. Rather, consistent with the organizing principle of the law of succession, the law should give effect to the testator's manifested intent.

² In brief, the slayer rule prevents a killer from transforming an expected inheritance into a legal interest through slaying. For a more detailed explanation, see *infra* Part I.

³ See *infra* Part III.A.

⁴ See *infra* Part II.B.

This Article first explains the slayer rule in greater depth in Part I. In Part II, it then outlines situations in which a decedent's estate plan may be altered by changes in circumstances. In Part III, the Article applies the slayer rule to the situation of a slaying among beneficiaries, with a particular focus on the rule's justifications. In light of these purposes, the proper result, summarized in the preceding two paragraphs above, is contrary to the Restatement's treatment of the same situation.⁵

I. THE SLAYER RULE, GENERALLY

The usual application of the slayer rule bars a slayer from inheriting from her victim.⁶ Under the Uniform Probate Code, “[a]n individual who feloniously and intentionally kills the decedent forfeits all benefits under this [article] with respect to the decedent’s estate.”⁷ In short, a slayer is absolutely cut off from inheriting from her victim.⁸ A slaying may have other consequences as well, such as severing a joint tenancy with right of survivorship and converting the interests into equal tenancies in common.⁹ Some jurisdictions go even further, and void the slayer’s interest in a joint tenancy with the victim;¹⁰ however, this approach has drawn criticism as potentially unconstitutional.¹¹

⁵ See *infra* Part III.

⁶ See, e.g., JESSE DUKEMINIER & ROBERT H. SITKOFF, *WILLS, TRUSTS, AND ESTATES* 132 (9th ed. 2013). The textbook slayer rule cases involve a contest over the victim’s estate in which the slayer is barred from inheriting.

⁷ UNIF. PROBATE CODE § 2-803(b) (amended 2010).

⁸ *Id.* This disinheritance includes any shares claimed as a pretermitted heir or an elective share claimed by a surviving spouse. *Id.*

⁹ *Id.* § 2-803(c)(2) (amended 2010); see also John V. Orth, *Second Thoughts in the Law of Property*, 10 GREEN BAG 2D 65, 75-76 (2006) (noting that “[p]articular problems” arise when the slayer rule is applied to a joint tenancy with right of survivorship and resulting legislation).

¹⁰ See, e.g., N.D. CENT. CODE § 30.1-10.03(3)(b) (2013); MASS. GEN. LAWS ch. 265, § 46 (2003); *Lakatos v. Estate of Billotti*, 509 S.E.2d 594, 598 (W. Va. 1998) (interpreting state statute to find that “upon the death of the victim, the total estate held in a joint tenancy passes in its entirety to the person or persons who would have taken the same if the slayer had predeceased the victim.”).

¹¹ See Bradley Myers, *The New North Dakota Slayer Statute: Does it Cause a Criminal Forfeiture?*, 83 N.D. L. REV. 997, 1024-27 (2007) (arguing that voiding a slayer’s joint tenancy is a criminal forfeiture, and therefore, triggers constitutional protections); Robert F. Hennessy, Note, *Property—The Limits of Equity: Forfeiture, Double Jeopardy, and the Massachusetts “Slayer Statute”*, 31 W. N. ENG. L. REV. 159, 202 (2009) (opining that the Massachusetts slayer statute violates the double jeopardy clause of the Fifth Amendment); see also John W. Wade, *Acquisition of Property by Wilfully Killing Another—A Statutory Solution*, 49 HARV. L. REV. 715, 728, 736 (1936) (noting that it would be unconstitutional to deprive the slayer of a vested property interest as a result of the slaying).

A key component of the slayer rule is the definition of a “slayer.”¹² Defining “slayer” too broadly would disinherit some who do not deserve to be disinherited. Defining the term too narrowly, however, would allow some killers to wrongfully profit. In the end, it has been observed that logic alone is insufficient to mete out the boundaries of slayerdom,¹³ but nevertheless, “a line must be drawn at some place.”¹⁴ The Uniform Probate Code sets the boundaries of its slayer rule at “felonious and intentional killing[s].”¹⁵ A criminal conviction is conclusive evidence of a slayer’s guilt, but is not necessary to trigger the slayer rule.¹⁶ Likewise, an acquittal does not conclusively establish that an individual was not the slayer for purposes of the rule.¹⁷ In the absence of a conviction, the probate court determines by a preponderance of the evidence whether the alleged slayer would be found criminally accountable for slaying the decedent.¹⁸

¹² See Wade, *supra* note 11, at 722 (“The definition of the term ‘slayer’ is particularly important, since it signifies what kind of killing disqualifies a man from acquiring property.”).

¹³ E.M. Grossman, *Liability and Rights of the Insurer When the Death of the Insured is Caused by the Beneficiary or Assignee*, 10 B.U. L. REV. 281, 290 (1930) (“It is futile to attempt to arrive at a ‘true rule’ by pure logic.”).

¹⁴ Wade, *supra* note 11, at 722.

¹⁵ UNIF. PROBATE CODE § 2-803(c) (amended 2010). This standard includes both accomplice and co-conspirator liability, but excludes slaying by accidental manslaughter. *Id.* § 2-803 cmt. (amended 2010). The Restatement defines a slayer as one “who kills another, or who participates in killing another, by an act that is felonious, intentional, and without legal excuse or justification.” RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 45(1) (2011). Some states are more restrictive, and apply the slayer rule only to killings that would constitute murder. See Mary Louise Fellows, *The Slayer Rule: Not Solely a Matter of Equity*, 71 IOWA L. REV. 489, 498 (1986).

¹⁶ See UNIF. PROBATE CODE § 2-803(g) (amended 2010). The Commentary points out that “in many of the cases arising under this section there may be no criminal prosecution because the killer has committed suicide.” *Id.* § 2-803 cmt.; see also Wade, *supra* note 11, at 723 (noting that “in a surprisingly large percentage of cases the slayer immediately commits suicide”). Moreover, the slayer may accept a plea bargain to a lesser offense. See Fellows, *supra* note 15, at 500. The modern statutory approach is a break from the common law, where the majority rule was to *disallow* admission of a criminal conviction in a civil action when used to show guilt or innocence. See Wade, *supra* note 11, at 750; Grossman, *supra* note 13, at 298-300.

¹⁷ UNIF. PROBATE CODE § 2-803 cmt.; see also Fellows, *supra* note 15, at 504. But see generally Stephanie J. Willbanks, *Does It Pay to Kill Your Mother? The Effect of a Criminal Acquittal in a Subsequent Civil Proceeding to Disqualify the Slayer*, 16 CONN. L. REV. 29 (1983) (arguing that a criminal acquittal should conclusively bar a subsequent proceeding to disqualify an individual under the slayer rule).

¹⁸ UNIF. PROBATE CODE § 2-803(g). The Restatement sets forth a lower standard of proof that does not inquire whether the individual was or would be convicted for the slaying, but rather “the identification of a person as a slayer is established by a preponderance of the evidence.” RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 45(1).

Under the traditional application of the common law slayer rule, the slayer still took under the will or through intestacy, but held the property in constructive trust in favor of another with a superior equitable claim to the property.¹⁹ Statutory reform has eliminated the middleman and generally disposes of the property as if the slayer predeceased the decedent. Under the Uniform Probate Code, if the decedent died without a will, the “estate passes as if the killer disclaimed [her] intestate share,”²⁰ which results in the killer being treated as if she had died immediately before the time of distribution.²¹ If the decedent had a will, the same result obtains.²² In operation, the distribution of the estate simply skips over the slayer.

The slayer rule represents a compromise of justifications; it cannot be wholly explained by any single rationale.²³ The crux of the slayer rule is twofold: (1) the killing robs the victim of a fair opportunity to update her estate plan to disinherit the slayer, and (2) the slaying converts a mere expectancy in an inheritance into an actual property interest.²⁴

¹⁹ See, e.g., *Kelly v. State*, 196 A.2d 68, 69-70 (N.H. 1963) (“[A] court applying common law techniques can reach a sensible solution by charging the [slaying] spouse, heir or legatee as a constructive trustee of the property where equity and justice demand it.”); RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 45 cmt. c (2011); Kent S. Berk, Comment, *Mercy Killing and the Slayer Rule: Should the Legislature Change Something?*, 67 TUL. L. REV. 485, 492 (1992).

²⁰ UNIF. PROBATE CODE § 2-803(c)(2).

²¹ *Id.* § 2-1106(b)(3)(B) (amended 2010).

²² *Id.* § 2-803(e) (amended 2010).

²³ See Karen J. Sneddon, *Should Cain’s Children Inherit Abel’s Property?: Wading into the Extended Slayer Rule Quagmire*, 76 UMKC L. REV. 101, 102 (2007) (referring to the slayer rule as “driven by a jumble of moral, equitable, and legal principles”).

²⁴ Professor Mary Louise Fellows identified a potential additional justification for the slayer rule:

In addition to the moral justification for denying succession rights, a rational property transfer law system demands that slayers motivated by greed be denied the right to succeed to their victims’ property. These types of killings potentially interrupt the normal disposition of property in three ways: the killings cause the victims to lose personal enjoyment in their property; the killings may deny the victims the opportunity to change their existing estate plans; and the killings interfere with the order of death of the victims and the slayers, placing property transfers conditioned on survivorship in jeopardy of being controlled by surviving slayers.

Fellows, *supra* note 15, at 493. To this author, the demands of a rational property transfer law system do not constitute an independent justification for the slayer rule. First, some of Fellows’ considerations are incorporated into the primary justifications of effectuating the decedent’s likely intent and preventing unjust enrichment. (For example, the victim’s inability to update her estate plan is already addressed by the goal of effectuating the likely intent of the victim.) Second, the Fellows’ other considerations seem to presuppose some sort of predetermined natural order that this author questions. What is meant by the “normal disposition of property” or “interfere[nce] with the order of death of the victims

Thus, barring the slayer from inheriting from her victim carries out the victim's likely desire to disinherit the slayer and fulfills the equitable maxim that a wrongdoer should not benefit from her misdeeds. The slayer rule also deters slaying, although this consequence is so weak that it is rightly viewed as a collateral benefit of the rule rather than a justification for it.

It is fairly safe to presume that most victims of intentional homicides would not want their property to pass to their slayers.²⁵ Such a victim usually will lack an opportunity to update her estate plan, and therefore the law intervenes to carry out the victim's likely wishes.²⁶ However, only one state explicitly permits a testator to opt out of the slayer rule by stating a contrary intention in a will.²⁷ If the testator's intent was the only basis for the rule, all jurisdictions would (or at least should) permit the testator to opt out of it through a will provision stating that the testator wished the beneficiary to inherit regardless of the whether the beneficiary caused the testator's death. Because the vast majority of jurisdictions impose the slayer rule as a mandatory rule rather than a

and the slayers"? Any cause of death, particularly a non-natural cause of death, would seem to fit the bill as something that intervenes into the natural order of death. Yet, the distribution of property through the law of succession is not otherwise altered by unnatural deaths; it is not clear why this justification should operate in the slayer scenario and not elsewhere. To the extent that the answer stems from placing control over the transfer in the hands of the slayer, this justification dovetails back into the moral justification of disallowing a wrongdoer from profiting from her misdeeds.

²⁵ See Nili Cohen, *The Slayer Rule*, 92 B.U. L. REV. 793, 799 (2012) ("It is highly conceivable that if the testator had been asked, she would have expressed an absolute objection to being succeeded by her murderer and would have disinherited him."); Sneddon, *supra* note 23, at 103; Orth, *supra* note 9, at 75 (noting that "[i]t is difficult to imagine a testator intending the gift under such circumstances"). *But see* Carla Spivack, *Killers Shouldn't Inherit from Their Victims—or Should They?*, 48 GA. L. REV. 145, 160-61 (2013) (questioning whether most individuals would truly wish to disinherit a slaying family member, especially when a parent is killed by a child who suffers from a mental illness). A situation in which the probable desire of the decedent would likely be to *not* disinherit the slayer arises in cases of mercy killings. *See generally* Jeffrey G. Sherman, *Mercy Killing and the Right to Inherit*, 61 U. CIN. L. REV. 803 (1993) (arguing that the slayer rule should not apply in cases of mercy killings or assisted suicides, regardless of the criminal law consequences of the killing).

²⁶ See Adam J. Hirsch, *Text and Time: A Theory of Testamentary Obsolescence*, 86 WASH. U. L. REV. 609, 620 (2009) ("Pointing a sharp metal object at the testator's throat and thrusting it forward is the sort of act likely to snap the sociological bonds that previously tied the testator to his or her assailant. But the testator lacks time to communicate the change of intent following from the act: in this instance, the sword is mightier than the pen.").

²⁷ WIS. STAT. ANN. § 854.14(6)(b) (West 2015). In Wisconsin, the court may also set aside the slayer rule if it finds that "the decedent's wishes would best be carried out by means of another disposition of the property." *Id.* Thus, in Wisconsin, the decedent's freedom of disposition trumps all other considerations.

default one, the law of succession's overarching desire to carry out the testator's intent is compromised by another consideration: the desire to prevent enrichment that the law deems to be unjust.²⁸

The second rationale for the slayer rule springs from the equitable principle that "a wrongdoer may not profit by his or her own wrong" and thus "the killer should not gain from killing."²⁹ Put bluntly, "the transparent purpose of the slayer rule is to prevent unjust enrichment by homicide."³⁰ The unjust enrichment contemplated by the slayer rule is the transformation of an expected inheritance into a legal interest in the property.³¹

However, this equitable principle alone does not justify the entire slayer rule. In the United States, the slayer rule is triggered only by a killing that is both intentional and felonious.³² It is not triggered by a killing, like an involuntary manslaughter or a criminally negligent homicide, that is wrongful but not intentional.³³ If the equitable principle

²⁸ See generally Andrew Simester, *Unworthy but Forgiven Heirs*, 10 EST. & TR. J. 217, 225 (1990-1991) (arguing that equity mandates disinheriting slayers even if the victim would intend otherwise: "To allow an exception based upon testamentary intention is to contradict the very basis of the rule in common law."); see also Adam J. Hirsch, *Freedom of Testation / Freedom of Contract*, 95 MINN. L. REV. 2180, 2214 (2011).

²⁹ UNIF. PROBATE CODE § 2-803 cmt.; see also DEL. CODE ANN. tit. 12, § 2322(k) (the slayer rule "shall be construed broadly in order to effect the policy of this State that a person shall not be permitted to profit by that person's own wrong"); Prudential Ins. Co. of Am. v. Athmer, 178 F.3d 473, 475-76 (7th Cir. 1999); Slocum v. Metro. Life Ins. Co., 139 N.E. 816, 817 (Mass. 1923); Riggs v. Palmer, 22 N.E. 188, 190 (N.Y. 1889); Sneddon, *supra* note 23, at 102; Orth, *supra* note 9, at 75; Wade, *supra* note 11, at 715; Grossman, *supra* note 13, at 283 (discussing the slayer rule's application to life insurance proceeds); Sara M. Gregory, Note, *Paved with Good 'Intentions': The Latent Ambiguities in New Jersey's Slayer Statute*, 62 RUTGERS L. REV. 821, 823 (2010). But see Sneddon, *supra* note 23, at 110 (noting that the slayer rule does not prohibit the slayer from receiving "indirect" benefits, such as when a close relative of the slayer receives property as a result of the victim's death and later passes it on to the slayer).

³⁰ RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 45 cmt. c; see also *id.* § 45(2) (2011) ("A slayer's acquisition, enlargement, or accelerated possession of an interest in property as a result of the victim's death constitutes unjust enrichment that the slayer will not be allowed to retain."). But see Spivack, *supra* note 25, at 162 (arguing that certain killings resulting from domestic abuse and mental illness do not constitute moral wrongs, and therefore do not fall within the concerns implicated by the slayer rule).

³¹ See, e.g., Caterpillar Inc. v. Estate of Lacefield-Cole, 520 F. Supp. 2d 989, 996 (N.D. Ill. 2007) ("The slayer's rule is intended to prevent a party from acquiring a property interest through wrongful conduct.").

³² See *supra* note 15 & accompanying text; see also Grossman, *supra* note 13, at 289-90 (contrasting the American slayer rule with Canadian and English cases in which an unintentional killing triggers the slayer rule).

³³ See, e.g., Henry v. Toney, 50 So. 2d 921, 923-24 (Miss. 1951) (finding that conviction for manslaughter was admissible but not conclusive evidence of whether individual committed a willful killing necessary to trigger slayer rule); see also Franklin Life Ins. Co. v. Strickland, 376 F. Supp. 280, 283 (N.D. Miss. 1974).

was the sole principle at play, killers would be barred from the victims of all *wrongful* killings, not solely *intentional* ones.³⁴ The first justification discussed above—the decedent’s likely intent to disinherit the killer—helps to explain the requirement that the killing be intentional: a decedent is much more likely to wish to disinherit her killer when the killing was intentional than when it was unintentional.

The slayer rule produces some measure of deterrence, albeit likely a small one. “[D]enying succession rights to slayers [when the slaying is motivated by greed] reinforces criminal punishments for a felonious killing because the denial deters a person from killing to succeed to another person’s property.”³⁵ Accelerating inheritance is certainly a motive for some killings.³⁶ The slayer rule erodes that motive, and thereby has a deterrent effect on greed-motivated slayers to the extent that such slayers know about the rule.³⁷ Deterrence, however, fits better as a collateral benefit of the slayer rule than a justification for it.³⁸ In order for the rule to deter, the would-be slayer would have to know about the slayer rule and its effect. Moreover, many slayers do not have inheritance on the mind; the slayer rule would not act as a strong deterrent on those killers.³⁹ The criminal law establishes harsh penalties to deter intentional killings, and these punishments likely already have a strong deterrent effect on would-be killers.⁴⁰ Killers who deliberately carry out a greed-motivated homicide likely expect to get away with the crime;⁴¹ thus, the slayer rule likely has only a marginal deterrent effect

³⁴ See Grossman, *supra* note 13, at 290 (“If the rule is grounded simply on the maxim that no one may profit by his own wrong, it ought logically to embrace any wrongful act, whether wilful or not, and of however slight a degree of culpability . . .”).

³⁵ Fellows, *supra* note 15, at 493; see also Hirsch, *supra* note 28, at 2214 (noting the deterrent effect of the slayer rule).

³⁶ See Fellows, *supra* note 15, at 492-93 (surveying cases involving greed-motivated slayings).

³⁷ Cf. Sneddon, *supra* note 23, at 135 (opining that “the possible application of the slayer rule is not likely to be reviewed by potential slayers”).

³⁸ See Sneddon, *supra* note 23, at 103 (listing deterrence as a side effect of the slayer rule rather than a policy goal).

³⁹ See *id.*; Fellows, *supra* note 15, at 494 (surveying cases involving non-greed-motivated slayings); see also Grossman, *supra* note 13, at 286 (finding that the case law does not require an intent or motivation to profit in order to trigger the slayer rule in cases involving life insurance proceeds). Note, however, that the slayer rule could still have some deterrent effect in cases of non-greed killings, just as any negative consequence carries some measure of deterrence regardless of whether it is related to the motive for the crime.

⁴⁰ The punishment is likely to be ever stiffer if the slayer was motivated by greed. See Carissa Byrne Hessick, *Motive’s Role in Criminal Punishment*, 80 S. CAL. L. REV. 89, 102 (2006) (“Pecuniary gain may be the most prevalent aggravating motive.”).

⁴¹ See Michael J. Zydney Mannheim, *Not the Crime but the Cover-Up: A Deterrence-Based Rationale for the Premeditation-Deliberation Formula*, 86 IND. L.J.

because it cannot be invoked unless the killer is caught. None of this is to say that the slayer rule never deters; it is simply to point out that the deterrent effect of the rule is so weak that it cannot and should not be the primary justification for the rule.

II. ALTERING ESTATE PLANS BASED ON CHANGES IN CIRCUMSTANCES

Known as dead hand control, the organizing principle of the law of succession is to give effect to the decedent's intent.⁴² When a decedent leaves a will, we have strong evidence of the decedent's preferred distribution (or at least the preferred distribution at the time the will was drafted) and the law of wills operates to generally distribute the decedent's estate in accordance with those wishes.⁴³ When a decedent dies without a will, an intestacy statute operates to distribute the decedent's estate in accordance with the most likely wishes of the majority of decedents.⁴⁴ The intestacy statute creates "an estate plan by default."⁴⁵ The law does not inquire into the most likely wishes of the individual decedent who died without a will; rather, the intestacy statute seeks to create a majoritarian rule that effectuates the estate plan of the typical intestate decedent.⁴⁶

Certain lifetime events have consequences that trigger changes in the way a decedent's estate is distributed. The slaying of the decedent by a

879, 919 (2011) (noting that, for premeditated and deliberate killings, "any rational prospective offender who truly plans out his crime will also plan out a way to avoid detection, apprehension, and punishment").

⁴² See LAWRENCE M. FRIEDMAN, *DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW* 19, 46 (2009). This organizing principle is not without its limits: although freedom of disposition looms large in the law of successions, it is not the only principle at play. For example, the law disallows certain dispositions as violative of public policy. See Ronald J. Scalise Jr., *Public Policy and Antisocial Testators*, 32 *CARDOZO L. REV.* 1315, 1326-32 (2011) (overviewing kinds of conditions placed on devises that have been held to be contrary to public policy, such as conditions encouraging illegal behavior and restrictions on marital freedom).

⁴³ See Orth, *supra* note 9, at 73 ("[I]n some cases the testator's actual intention is known, not merely presumed, but crossed nonetheless.").

⁴⁴ See Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 *IOWA L. REV.* 223, 231 (1991) ("Various considerations drive the formulation of intestate-succession laws. The most obvious and perhaps predominant consideration is the decedent's intention. Of course, the law gives effect to intention by imputation.").

⁴⁵ DUKEMINIER & SITKOFF, *supra* note 6, at 63.

⁴⁶ *Id.*; see Sneddon, *supra* note 23, at 129 ("Intestacy statutes represent legislative approximation of an individual's wishes for the disposition of his or her property after death.").

primary beneficiary or heir apparent is but one of these events. Others include births, deaths, marriages, and divorces. These events shape the distribution of an intestate decedent's estate by defining who the decedent's heirs are. But even when the decedent dies with a will, changes in circumstances that occur after the execution of the will may intervene to alter the distribution of the estate. These "changed circumstances" are chronicled below in both intestate and testate succession to provide better context for examining the limits of the slayer rule's ability to revoke an inheritance by operation of law.

A. The Effect of Changed Circumstances on Intestate Succession

Because intestate succession is a default estate plan for individuals who lack wills, it is a fluid one. As events occur over a person's lifetime, those events trigger changes in how the person's estate would be distributed if she were to die at various times. If an intestate decedent leaves a surviving spouse, the surviving spouse will always take a significant portion of the estate and sometimes the entirety of the estate.⁴⁷ Thus, marriage is a critical event in intestate succession. By extension, death of a spouse or divorce are equally meaningful because it extinguishes the surviving spouse's share.⁴⁸

The death of one's parents may also be a significant event in intestate succession because surviving parents will take the entire estate in the absence of a surviving spouse or descendant,⁴⁹ and parents still may take some of the estate even if the decedent was married at the time of death.⁵⁰ The birth, adoption, and, by extension, death of descendants may also work meaningful changes on how assets are distributed in the absence of a will.⁵¹ So too may the birth and death of siblings,⁵² the

⁴⁷ UNIF. PROBATE CODE § 2-102(1) (amended 2010) (in the absence of surviving parents, the decedent's surviving spouse inherits the entire estate when the decedent leaves no surviving descendants, or when all of the decedent's surviving descendants are also descendants of the surviving spouse and the surviving spouse has no other descendants).

⁴⁸ See Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227, 1261 (discussing intestate inheritances by surviving spouses, including the requirement that the individuals be legally married at the time of death to qualify as surviving spouses).

⁴⁹ UNIF. PROBATE CODE § 2-103(a)(2) (amended 2010).

⁵⁰ *Id.* §§ 2-102(2), 2-103(a)(2).

⁵¹ *Id.* § 2-103(a)(1) (in the absence of a surviving spouse, surviving descendants inherit the entire estate); *id.* § 2-102(3), (4) (in certain circumstances, surviving descendants inherit a portion of the estate even if the decedent leaves a surviving spouse).

⁵² See, e.g., *id.* § 2-103(a)(3) (siblings inherit the entire estate in the absence of a surviving spouse or descendants).

death of grandparents,⁵³ the birth and death of descendants of grandparents,⁵⁴ and the existence of stepchildren.⁵⁵ Each of these events may alter how the decedent's estate is distributed. If none of these relatives survive the decedent, the decedent's estate escheats to the state.⁵⁶ Thus, a birth, death, or marriage may be the difference between the decedent's estate passing to the government or not. Because, by definition, the decedent has not executed a will when an estate passes through intestacy, it is these extraneous events, rather than the expressed or otherwise proven desires of the decedent, that shape the distribution of an estate under an intestacy statute.⁵⁷

B. Revocation and Alteration of Wills by Operation of Law

Wills may be revoked or modified by the testator at any point prior to death.⁵⁸ Such revisions or revocations are accomplished by the execution of a subsequent writing or a physical act upon the will.⁵⁹ The law intervenes, however, in certain circumstances to revoke a will in whole or in part based on changed circumstances. These circumstances lead to what is known as a revocation by operation of law; such revocations are based on the assumption that the testator would have desired a different distribution than what was expressed in her will. In

⁵³ See, e.g., *id.* § 2-103(a)(4), (5).

⁵⁴ See, e.g., *id.*

⁵⁵ See, e.g., *id.* § 2-103(b).

⁵⁶ *Id.* § 2-105. Certain states extend inheritance rights to more distant relatives than grandparents and their descendants. See, e.g., S.C. CODE ANN. § 62-2-103(5) (2014) (permitting inheritance by great-grandparents or their issue); OHIO REV. CODE ANN. § 2105.06(I) (2015) (providing for potential inheritance to any next of kin). Other states provide for inheritance to certain classes of non-relatives. See HAW. REV. STAT. §§ 560:2-102, 572C-4 (2012) (providing intestate share to decedent's "reciprocal beneficiary"); see also Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. 1, 15-17 (1998).

⁵⁷ One caveat is that a decedent may execute a negative will to disinherit an individual or class who would have otherwise taken through intestacy. See UNIF. PROBATE CODE § 2-101(b) (amended 2010). A negative will does not affirmatively direct the distribution of the decedent's estate; it simply cuts would-be inheritors out of the line of succession. In the absence of a positive will, the estate will be distributed according to the intestacy statute as if the disinherited heir or heirs died before the time of distribution. See *id.*; *id.* § 2-1106(b)(3)(B).

⁵⁸ DUKEMINIER & SITKOFF, *supra* note 6, at 215.

⁵⁹ UNIF. PROBATE CODE § 2-507 (amended 2010). Under the doctrine of dependent relative revocation, a revocation based on a mistaken assumption of law or fact is ineffective if the testator would not have revoked the will but for the mistaken belief. See RESTATEMENT (THIRD) OF PROP.: WILLS & DONATIVE TRANSFERS § 4.3 (1999).

other words, because wills are “delayed-action documents,”⁶⁰ certain events cause a pre-existing will to turn stale.⁶¹

The concept of a “stale” will may be illustrated by considering a will written by a childless, unmarried eighteen year old woman. Imagine that, after the will, the woman marries, has children, divorces, remarries, grows old, and dies at the age of eighty after a life well-lived. Her will, written sixty-two years before, remains valid. However, much has occurred since its creation, and the will likely no longer reflects her actual intent regarding the disposition of her estate. New natural objects of her bounty have emerged since the will’s execution. The beneficiaries of the original will may have passed away. Thus, the law intervenes to update the devises, all the while balancing the testator’s expressed wishes for the disposition of her estate with timeworn presumptions regarding how the typical decedent in such a position would want her estate distributed.

At common law, marriage wholly revoked a woman’s premarital will.⁶² For men, it took marriage plus birth of issue to revoke a premarital will.⁶³ Under modern statutes, a premarital will remains effective post-marriage, but the surviving spouse is entitled to the spousal share available under the intestacy statute unless the will was made in contemplation of the marriage, the will expresses an intention to be effective despite any subsequent marriage, or the testator provided for the surviving spouse by other means and intended for that other transfer to be in lieu of a testamentary provision.⁶⁴ In other words, unless the testator expresses a contrary intent, the surviving spouse takes the share that she would have been entitled to if the decedent had died without a

⁶⁰ Orth, *supra* note 9, at 71.

⁶¹ See John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1135 (1984). This situation has also been called “testamentary obsolescence.” Hirsch, *supra* note 26, at 611.

⁶² See 1 THOMAS JARMAN, A TREATISE ON WILLS 142 n.1 (5th ed. 1893) (explaining that the revocation of a woman’s premarital will was “the necessary consequence of the husband’s common-law marital rights,” which denied women the capacity to execute or revoke wills).

⁶³ See *id.* at 142-43 (noting that a man’s marriage and birth of issue produced “such a total change in the testator’s situation, as to lead to a presumption, that he could not intend a disposition of property previously made to continue unchanged”); see also RESTATEMENT (THIRD) OF PROP.: WILLS & DONATIVE TRANSFERS § 4.1 cmt. q (1999).

⁶⁴ See UNIF. PROBATE CODE § 2-301(a) (amended 2010); see also Waggoner, *supra* note 44, at 253-55. These provisions may provide for omitted domestic partners as well. See, e.g., WASH. REV. CODE § 11.12.095 (2008). Under the UPC, however, any share that is devised under the will to a child of the testator who was born before the marriage and who is not a child of the surviving spouse or to a descendant of such a child takes precedence over the surviving spouse’s ability to take an intestate share. UNIF. PROBATE CODE § 2-301(a).

will. The purpose of these types of provisions, of course, is “to prevent the unintentional disinheritance of the surviving spouse of a testator who marries after making a will and then dies without ever changing it.”⁶⁵ When a pretermitted spouse takes an intestate share, the other devises are abated to the extent necessary to provide for the spouse’s share.⁶⁶

Even if the testator’s omission of her surviving spouse was purposeful, the law grants the surviving spouse the option to renounce the will and take an elective share of the decedent’s estate.⁶⁷ The purpose of the elective share is to guard against total disinheritance of a surviving spouse, thereby recognizing both a support obligation and a partnership between spouses.⁶⁸ Unlike the share available to unintentionally-omitted surviving spouses, the elective share is not meant to further the testator’s distributive intent. In this respect, the ideal of dead hand control does not extend so far as to permit a testator to disinherit a surviving spouse.

Similarly to the protection for pretermitted spouses, many states have pretermitted child statutes to cover the birth or adoption of a child after the execution of a will.⁶⁹ Even though the testator failed to update her will to account for the new child, the child is generally entitled to share in the decedent’s estate if it appears that the omission was unintentional.⁷⁰ Other devises made under the will abate to satisfy the child’s share.⁷¹ An after-born or after-adopted child cannot take if it appears from the will that the omission was intentional, or the testator provided for the child outside of the will and intended that transfer to take the place of a testamentary one.⁷²

⁶⁵ *Gier v. Deoneseus (In re Estate of Deoneseus)*, 906 P.2d 922, 923 (Wash. 1995); *see also Waggoner, supra note 44*, at 253.

⁶⁶ UNIF. PROBATE CODE § 2-301(b) (amended 2010). As a general matter, shares of distributees abate in the following order: (1) property not disposed of in the will, (2) residuary devises, (3) general devises, and (4) specific devises. *Id.* § 3-902(a) (amended 2010).

⁶⁷ *See id.* § 2-202 (amended 2010).

⁶⁸ *See id.* § 2-202 cmt. (amended 2010) (noting that the purpose of the revision was to implement “a partnership or marital-sharing theory of marriage, with a support theory back-up” by setting the elective share at fifty percent of the marital property with a floor of \$75,000).

⁶⁹ *See id.* § 2-302 (amended 2010); *see also Waggoner, supra note 44*, at 254 (“These statutes typically grant children born after the execution of the will a measure of protection from being unintentionally disinherited.”).

⁷⁰ UNIF. PROBATE CODE § 2-302(a) (amended 2010).

⁷¹ *Id.* § 2-302(c) (amended 2010).

⁷² *Id.* § 2-302(b) (amended 2010). Unlike a surviving spouse, a surviving child who falls within one of the exceptions generally has no avenue through which to take an elective share. Such a child simply would not share in her parent’s estate. In short, under the American tradition, a child may be disinherited but a spouse may not. *But see LA.*

Mirroring the elective share of a surviving spouse, divorce gives rise to a revocation by operation of law. Absent express terms to the contrary, divorce or annulment of marriage revokes any devise made under a will or non-probate transfer to the former spouse.⁷³ Even though the testator took no steps to update her will after divorce, the law presumes that she wished to disinherit her former spouse. Under the UPC, this revocation extends to relatives of the former spouse as well, on the theory that “the former spouse’s relatives are likely to side with the former spouse [in the aftermath of divorce], breaking down or weakening any former ties that may previously have developed between the transferor and the former spouse’s relatives.”⁷⁴ Former spouses and their relatives are treated as if they had executed a disclaimer, which has the same effect as dying before distribution of the decedent’s estate.⁷⁵

III. CONTINGENT BENEFICIARIES WHO SLAY

This section first overviews the treatment of slaying among beneficiaries by the Uniform Probate Code and the Restatement (Third) of Restitution. It then applies each of the slayer rule’s rationales—prevention of unjust enrichment and carrying out the decedent’s likely intent—to the same situation and arrives at a different conclusion. Permitting the slayer to inherit despite the slaying does not result in unjust enrichment because the inheritance is not the direct consequence of the slaying. Thus, the decedent’s intent should drive the analysis. An intestate decedent’s likely intent in this situation is difficult to gauge. As a result, the law should neither fully disinherit the slayer nor permit the slayer to expand her inheritance through the slaying. Rather, the slayer should receive the same share of the targeted estate that she would have received if her victim had been alive at the time of the death of the owner of the targeted estate. When the owner of the targeted estate has a will, however, and fails to update the will in a reasonable time after the slaying to disinherit the slayer, the law should presume that the testator intended for the slayer to continue to inherit. Thus, the terms of the will should be followed, even if it results in a greater inheritance for the slayer than the slayer would have received if the victim remained alive.

CIV. CODE ANN. art. 1621 (2015) (permitting disinheritance of a child only for just cause under the civil law tradition)

⁷³ UNIF. PROBATE CODE § 2-804(b)(1)(A) (amended 2010); *see also* Waggoner, *supra* note 44, at 226-29.

⁷⁴ UNIF. PROBATE CODE § 2-804 (1997 comment).

⁷⁵ *See id.* §§ 2-804(d), 2-1106(b)(3)(B) (amended 2010).

A. Treatment of Slaying Contingent Beneficiaries Under the Uniform Probate Code and Restatement (Third) of Restitution

As chronicled above, the slayer rule is fairly well supported when it comes to an individual slaying another to immediately take property.⁷⁶ Tracing the rule further out, however, gets muddier.

The Uniform Probate Code does not directly address a slaying of one beneficiary by another beneficiary during the lifetime of the owner of the estate. Under a catch-all provision, the UPC states that “[a] wrongful acquisition of property or interest by a killer not covered by this section must be treated in accordance with the principle that a killer cannot profit from [her] wrong.”⁷⁷ In other words, the UPC simply directs its users to apply unjust enrichment reasoning by analogy to other situations to ensure that the slayer does not benefit from the killing. This provision is overly narrow because it disregards the decedent’s intended distribution completely and could lead to application of the slayer rule to situations decidedly not contemplated by the UPC, such as a killing that was wrongful but unintentional.⁷⁸

When it comes to the slayer rule, the Restatement (Third) of Restitution paints a much more expansive picture than the UPC. However, the devil lies in the details, and it is in the details regarding slaying among beneficiaries that the Restatement is misguided. The Restatement makes clear that slaying can never lead to any “acquisition, enlargement, or accelerated possession of an interest in property” because such a result would constitute unjust enrichment.⁷⁹ In particular, a slayer may not “take property as to which the slayer’s interest was contingent on the slayer’s surviving the victim.”⁸⁰ This rule applies to transfers through intestacy, wills, and will substitutes like pay-on-death bank accounts and life insurance pay-outs.⁸¹

The Restatement contains an illustration in which a contingent beneficiary of a life insurance policy slays a primary beneficiary and, as a consequence, moves to the front of the line of priority.⁸² Upon the death of the insured, the slayer is not permitted to share in the life insurance benefit, but rather must convey the proceeds by way of a constructive trust.⁸³ According to the Commentary, permitting the

⁷⁶ See *supra* Part I.

⁷⁷ UNIF. PROBATE CODE § 2-803(f) (amended 2010).

⁷⁸ See *supra* Part I.

⁷⁹ RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 45(2) (2011).

⁸⁰ *Id.* § 45(2)(c) (2011).

⁸¹ *Id.* § 45 cmts. e, f (2011).

⁸² *Id.* § 45 illus. 11 (2011).

⁸³ *Id.* Under the facts of the illustration, the insured had no opportunity to amend the beneficiary designation after the slaying. *Id.* This lack of opportunity is not embodied in

slaying contingent beneficiary to succeed to the property would be “obviously impermissible.”⁸⁴ In such situations, the Restatement concludes that “it is plain that the slayer cannot succeed to an interest the victim might have taken.”⁸⁵ In other words, the Restatement flatly disallows a contingent beneficiary to improve her position as a result of slaying a higher-priority beneficiary.

But who should take the property in lieu of the slaying contingent beneficiary? The Restatement generally distributes a slayer’s unjust inheritance to “the person at whose expense the slayer has been unjustly enriched.”⁸⁶ Tellingly, the Restatement has difficulty determining that person’s identity when a slaying occurs between beneficiaries. Although the Restatement finds that unjust enrichment has clearly occurred, it states quite candidly that the identity of the party who has suffered as a result of the unjust enrichment is “less clear[] given the contingent nature of the victim’s interest.”⁸⁷ This lack of clarity regarding the identity of the rightful taker is a red flag: if it is unclear at whose expense the slayer has been unjustly enriched, then perhaps no unjust enrichment actually occurred. Indeed, neither the owner of the targeted estate nor the slayed primary beneficiary has lost an interest in property as a result of the

the words of the Restatement provision, and, therefore, does not appear to be mandatory in order for the contingent beneficiary to be unjustly enriched under the Restatement’s view. *See id.* § 45(2)(c).

The illustration in the Restatement Commentary is based on the case of *United States v. Kwasniewski*, 91 F. Supp. 847 (E.D. Mich. 1950). The case contains an important fact that is not reflected in the illustration: in the case, the insured had died months before the slaying, and monthly payments of the insurance proceeds were ongoing at the time the contingent beneficiary killed the primary beneficiary. *Id.* at 848-49. The insured, a serviceman in World War II, died in March 1944. *Id.* at 848. The life insurance policy designated his mother as the primary beneficiary and his step-father as the contingent beneficiary. *Id.* at 849. The insured’s mother started receiving monthly payment from the life insurance proceeds in March 1944. *Id.* In September 1944, the insured’s step-father intentionally killed the insured’s mother. *Id.* at 849-50. The question before the court was whether the step-father, as contingent beneficiary, could equitably take over the ongoing life insurance payments. The court properly found that the step-father could not. *Id.* at 851-53. That situation involved the potential transfer of a *legal interest* in receiving monthly life insurance payouts from a victim to her slayer. It was therefore a very different factual situation than a situation where a contingent beneficiary slays a primary beneficiary while the insured is still alive. When the insured is living, only expectancies, not legal interests, are transferred among beneficiaries. *See infra* Part III.B.

⁸⁴ RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 45 cmt. g (2011).

⁸⁵ *Id.*

⁸⁶ *Id.* § 45(3)(a) (2011).

⁸⁷ *Id.* § 45 cmt. g; *see also id.* § 45 illus. 11 (stating that, in the case of a contingent beneficiary slaying a primary beneficiary of a life insurance policy, the persons equitably entitled to the proceeds may either be the successors of the insured or the successors of the primary beneficiary).

slaying. Thus, as further explained below, the Restatement errs in finding unjust enrichment in the case of an inter-beneficiary slaying.⁸⁸

B. A Slayer's Advancement in the Line of Potential Succession is Not Unjust Enrichment

When a contingent beneficiary slays a higher-priority beneficiary, the slaying itself does not transform the slayer's hope to inherit into a property interest. After the slaying, the slayer is left with a mere expectancy. The slayer may have cause to be a little more expectant, because another potential inheritor has been removed from the picture, but the slayer, at best, still can only hope to inherit. Many events could occur to disrupt the slayer from actually inheriting: the slayer could herself predecease the owner of the targeted estate; a new higher-priority would-be heir could appear through marriage, birth, or adoption; or, perhaps more concerning to the slayer, the owner of the targeted estate could choose to disinherit the slayer. The slayer is simply not enriched—justly or unjustly—by the slaying itself; the stars still need to align in the slayer's favor for the slayer to actually reap a pecuniary benefit. If the stars do align and the slayer eventually inherits from the owner of the targeted estate, that enrichment is more of a product of the inaction of the owner of the targeted estate to revise her estate plan after the killing than it is a product of the killing itself.⁸⁹ Indeed, the primary beneficiary might not have inherited even if the slaying did not occur: she may have died from other causes or have been disinherited in the interim.

In the context of unjust enrichment, the key to the textbook slayer scenario is that the slaying of the victim transforms an expectancy to inherit into an actual interest in property. Before the slaying, the slayer had only an expectancy in inheriting property. That expectancy, “hovering somewhere between hope and high chance,” was defeasible at the whim of the owner of the estate and did not constitute a legal interest in property.⁹⁰ After the slaying, the slayer no longer possesses a mere expectancy, but rather an actual legal interest.⁹¹ The slayer is no longer subject to the whims of the owner of the estate. That is enrichment by

⁸⁸ See *infra* Part III.B.

⁸⁹ This reasoning is even more compelling when the owner of the targeted estate named the contingent beneficiary in a will or other governing instrument. In that scenario, the enrichment is both due to the owner of the estate executing the governing instrument and to the owner's subsequent inaction by not updating the instrument after the slaying.

⁹⁰ Kathleen R. Guzman, *Releasing the Expectancy*, 34 ARIZ. ST. L.J. 775, 775 n.1 (2002) (stating that this “proposition is almost so entrenched as to need no citation”).

⁹¹ E.g., DUKEMINIER & SITKOFF, *supra* note 6, at 70.

unjust means. Thus, when a beneficiary slays the owner of the estate, the law of equity intervenes to take away what the slayer gained through slaying. The unjust enrichment contemplated by the slayer rule is the transformation of an expected inheritance into a legal interest in the property.⁹² The same is true when a contingent beneficiary slays a higher-priority beneficiary after the vesting of the interest. In that situation, it would not be equitable to permit the contingent beneficiary to accelerate her attainment of the interest through slaying.⁹³

But in the context of a contingent beneficiary slaying a higher-priority beneficiary of an *unvested* interest, all that passes between beneficiaries are worthless expectancies, not actual property interests. What the primary beneficiary loses by being slayed—in terms of an interest in the targeted estate—is a worthless expectancy. All that the contingent beneficiary gains through the slaying is a “better” expectancy. Because an expectancy legally amounts to nothing, nothing—in terms of property rights—is lost or gained as a result of the slaying.⁹⁴ A higher-priority expectancy is still an expectancy, just as a better version of nothing is still nothing, and even the law of equity should not intervene to provide recompense for the loss of nothing.⁹⁵

⁹² See, e.g., *Caterpillar Inc. v. Estate of Lacefield Cole*, 520 F. Supp. 2d 989, 996 (N.D. Ill. 2007) (“The slayer’s rule is intended to prevent a party from acquiring a property interest through wrongful conduct.”).

⁹³ See *Burton v. Moses (In re Estate of Moses)*, 300 N.E.2d 473, 480 (Ill. App. Ct. 1973) (holding that “the public policy should be so extended to prevent such a murderer from gaining any benefit from his crime” where the murderer “accelerates his own life interest by murdering a predecessor life tenant”). In *Moses*, the testator devised all of his property to his wife, except that his son was to have one room in the house during the wife’s lifetime. *Id.* at 474. According to the testator’s will, after the death of the wife, the real property would vest in the son if the son had issue; otherwise, the son would have only a life estate in the property. The son slayed the wife two years after the death of the testator. At the time of the slaying the son had no issue. The court held that the wife’s estate should receive the value of her life estate based on mortality tables. *Id.* at 480. The court further held that the son would receive the value of one room in the house during the course of the wife’s life expectancy and the entire property would vest in the son if he had issue at the time of the expiration of the wife’s natural life expectancy. *Id.* at 480-81.

⁹⁴ The estate of a would-be beneficiary who suffers an untimely death before the death of the property owner has no claim to the property. See *Caterpillar Inc.*, 520 F. Supp. 2d at 996-98 (owner of retirement plan account killed his primary beneficiary/spouse and then himself; the court refused to reverse the order of deaths to permit the account to pass to the estate of the primary beneficiary/spouse); *Hughes v. Wheeler*, 364 F.3d 920, 924 (8th Cir. 2004) (finding that the contingent beneficiary of a slayer’s insurance policy was not unjustly enriched by the murder of the primary beneficiary by the insured); see also RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 45 illus. 8 (2011) (illustrating the same general result).

⁹⁵ This scenario would not fall within the tort of interference with an expected inheritance. Such a claim of interference is pursued by a disappointed would-be inheritor. RESTATEMENT (SECOND) OF TORTS § 774B (1979). The theory behind this tort is that the

C. *The Decedent's Likely Intent After an Inter-Beneficiary Slaying*

It is always dicey to presume the likely intent of a class of individuals without empirical evidence.⁹⁶ This section undertakes the enterprise of presuming the likely intent of two distinct classes of individuals: (1) decedents who died intestate after one relative slayed another; and (2) decedents who drafted a will before the slaying of one beneficiary by another and then neglected to update the will after the slaying. The intent of a third class of individuals—those who wrote or amended a will *after* the slaying—need not be presumed; we know how the slaying affected the preferred disposition of their estates and those stated preferences should be followed. But, for the two classes of decedents who took no testamentary action after the slaying, the following subsections contemplate their likely intent.

1. An Intestate Decedent's Likely Intent

The relevant class of individuals here are those who did not draft a will after the slaying of a close relative. Would that class of individuals desire that the slayer (who is also a close relative, although perhaps a little less close) inherit a portion of their estate? Likely yes, but it is equally likely that the decedent would not want the slaying to *increase* the slayer's share.

First, the fact that the individual elected not to execute a will after the slaying provides only very limited, if any, information regarding the decedent's wishes. A person in this class of individuals has shown herself to *not* be the sort of person with estate planning on her mind.⁹⁷ We simply do not know whether the individual knows about the order of intestate succession or has given any thought to the impact of the slaying on the distribution of her estate. We certainly cannot presume that the

testator was somehow defrauded or unduly influenced or tortiously interfered with in order to prevent the *testator* from carrying out her true intent. The disappointed would-be "beneficiary's action is derivative of the testator's rights." *Whalen v. Prosser*, 719 So. 2d 2, 6 (Fla. Dist. Ct. App. 1998). The textbook case of tortious interference is the use of fraud, duress, or coercion to cajole a testator into executing or revoking a will. RESTATEMENT (SECOND) OF TORTS § 774B cmt. b (1979). In the case of the slaying of a higher-priority beneficiary, the *testator's* ability to control the disposition of her estate remains unimpaired. Thus, although the beneficiary's ability to inherit is interfered with by the slaying, that interference does not fit the mold of tortious interference with an expected inheritance because the testator retains fully capable of disposing of her estate as she pleases.

⁹⁶ Cf. Hirsch, *supra* note 26, at 626-29 (calling for empirical research to better formulate default rules regarding decedents' likely intents).

⁹⁷ Or, if estate planning is on her mind, she has shown herself to be the sort of person who would rather spend her time and energy on some other higher-utility endeavor than on estate planning.

individual has implicitly adopted the outcome of intestate succession.⁹⁸ Consequently, the fact that the individual has failed to take the necessary steps to disinherit the slayer through a negative will also means little. All we know is that the decedent has not made a will; we do not know why.

Thus, we are left to guess at what the typical intestate decedent would want in the situation where one potential heir has slayed another. In situations where the slaying disrupts the intestate distribution, the victim of the slaying is quite likely the closest living relative of the owner of the targeted estate. Suffice to say, the owner of the targeted estate likely had more affinity for the victim than for the slayer (who is likely also a close relative, although a little less so than the victim). It is difficult to presume what the ordinary intestate decedent would desire in this situation. Presuming that the owner of the targeted estate would wish to totally disinherit the slayer seems too harsh; after all, the slayer is one of the closest remaining relatives, if not the closest remaining relative, of the owner of the targeted estate.⁹⁹ A better approach is to presume that the owner of the targeted estate would neither wish for the slayer's share to increase nor decrease as a result of the slaying. In effect, such a presumption would treat the slaying as a nullity in the distribution of the slayer's share.

Thus, the proper result in intestacy is for the slayer to take the same portion of the estate that the slayer would have taken if the victim was alive at the time of the death of the owner of the targeted estate. Total disinheritance of the slayer is not appropriate, but neither is an expansion of the slayer's intestate share as a result of the absence of the victim at the time of the owner of the targeted estate's death.¹⁰⁰ Because the

⁹⁸ Many people who lack a will either cannot identify their heirs-apparent or would desire a different distribution of their property than provided for in the intestacy statute. See Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 889-91 (2013); see also Hirsch, *supra* note 26, at 634 n.116 ("Empirical studies have found widespread ignorance of the rules of intestacy . . .").

⁹⁹ Other relatives may be equally close, such as when both the slayer and the victim are two of the decedent's many children.

¹⁰⁰ As a hypothetical, consider the situation of Father, Step-Mother, and Son. (Son is the child of Father and the step-child of Step-Mother; Father and Step-Mother are married.) Father does not have a will. During Father's lifetime, Son kills Step-Mother. Father later dies, still without a will. Under the proposed rule, Son is not totally barred from inheriting from Father. Rather, Son is limited to taking through intestate succession the same share that he would have inherited if Step-Mother had been alive at the time of Father's death. In other words, the slayed successor should be treated as if she were still alive for purposes of calculating the slayer's intestate share.

If Father's estate is worth \$300,000 and no slaying occurs, the intestacy provision of the Uniform Probate Code would distribute the first \$150,000 to Step-Mother and split the remaining \$150,000 between Step-Mother and Son. UNIF. PROBATE CODE §§ 2-102(4), 2-103(a)(1) (amended 2010). Thus, Step-Mother would take \$225,000 and Son

owner of the targeted estate's intent is so difficult to discern with any accuracy in this situation, the slayer's share should simply be determined as if the slaying had not occurred.¹⁰¹

2. A Testator's Likely Intent

An individual who passes property through a will or other governing instrument displays the presence of important traits: the interest, willingness, and ability to actively engage in estate planning. Preparing a first estate plan involves numerous costs: opportunity costs (spending time figuring out how to make an estate plan), decisional costs (figuring out how to divide estate), monetary costs (paying for the preparation of the estate plan), and emotional costs (facing end of life as a reality).¹⁰² Testation tells us that the testator found estate planning to be worth these costs.¹⁰³

Although it is not fair to presume that a person who dies intestate approves of the distribution of her estate according to the state's

would take \$75,000. If Step-Mother is out of the picture, then Son would take the whole \$300,000. *Id.* § 2-103(a)(1). Thus, Son's share would increase by \$225,000 as a result of Step-Mother's absence in Father's line of succession. Rather than totally disinheriting Son or permitting Son to retain the entire \$300,000, a fair compromise is to reduce Son's share to the amount it would have been had Step-Mother been alive at the time of the distribution of Father's estate. Thus, Son inherits \$75,000 under the proposed rule. The remaining \$225,000 would pass through intestacy to Father's more remote heirs.

¹⁰¹ That is not to say that the slayer's intestate share is frozen in place at the moment of the slaying. It may still be expanded or contracted based on events independent of the slaying. To alter the hypothetical in the immediately-preceding footnote, imagine that Father has a Daughter as well (Son and Daughter are full siblings). Step-Mother would take the same \$225,000 if she were alive at Father's death. Son and Daughter would split the \$75,000 between them. Thus, at the time Son slayed Step-Mother, Son would only be entitled to \$37,500 of Father's estate. However, if Daughter later died and left no descendants of her own, Son's share would grow to \$75,000 upon Father's death. The growth of Son's share after the slaying of Step-Mother should be permitted because it is unrelated to the slaying. Thus, the slaying would not affect Father's likely intent with regard to that portion of his estate. Son is only barred from inheriting any of the \$225,000 that would have gone to Step-Mother had Son not slayed her.

¹⁰² Stephen Clowney, *In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking*, 43 REAL PROP. TR. & EST. L.J. 27, 28-29 (2008) (surveying costs involved with preparing non-holographic wills); see also Thomas L. Shaffer, *The "Estate Planning" Counselor and Values Destroyed by Death*, 55 IOWA L. REV. 376, 377 (1969) ("[P]ersonal death is a thought modern man will do almost anything to avoid."). But see Weisbord, *supra* note 97, at 879 (finding the traditional explanation that intestacy is driven by individuals' fears of facing their own mortality to be implausible).

¹⁰³ Weisbord, *supra* note 97, at 879 (stating that "the complexity of the will-making process deters the exercise of testamentary freedom by imposing substantial transaction costs, including the cost of professional counsel or the investment of time necessary to prepare a proper will without a lawyer . . .").

intestacy statute,¹⁰⁴ it is fair to presume that a person who has executed a will approves of the distribution of her estate according to the will. Indeed, if freedom of disposition is the organizing principle of the law of successions, then the will is the embodiment of the decedent's intent to distribute.¹⁰⁵ A contrary presumption—that a person with a valid will does not know its content or that its content is not in accord with the person's testamentary intent—would turn the law of wills on its head.

This key distinction between the intestate decedents and testators informs the treatment of a contingent beneficiary who slays a higher-priority beneficiary. Because the testator should be presumed to know and approve of the content of her will, a testator who does not amend her will after a slaying should be presumed to have intended the slayer to inherit.

After the slaying of a primary beneficiary by a contingent beneficiary, little stands in the way of the testator from updating the will to disinherit the slayer. The costs—decisional, monetary, informational, emotional—associated with revising an existing will are significantly lower than the costs associated with creating a first will. A testator who leaves her will unchanged after a slaying sends a strong signal that she wishes the slayer to inherit under the terms of the will.

As explained above, the law presumes in certain circumstances that the testator's will reflects inattentiveness rather than the testator's current distributive intent.¹⁰⁶ Despite the timeworn nature of the revocation by operation of law doctrines, some commentators have criticized these doctrines as counter to the overriding purpose of testamentary freedom of disposition, or at least unsupported by sufficient data to infer an alternative disposition. Professor Adam Hirsch has developed a theoretical framework using the concept of “friction” to assess when the

¹⁰⁴ See *supra* note 98 & accompanying text. Moreover, intestacy is correlated to a relative lack of income and education; this correlation supports the notion that intestate decedents fail to arrange an affirmative estate plan because of the costs associated with testation rather than because of wholesale agreement with the distribution of their assets under the intestacy statute. See Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNIPIAC PROB. L.J. 36, 48-51 (2009) (finding a statistically significant difference in testation based on both education and income); see also Palma Joy Strand, *Inheriting Inequality: Wealth, Race, and the Law of Succession*, 89 OR. L. REV. 453, 492 (2010) (“[P]eople with fewer assets are substantially more likely to die intestate” than wealthier individuals).

¹⁰⁵ See FRIEDMAN, *supra* note 42, at 46 (“Freedom of testation is supposed to be the guiding principle of modern law. In essence, you can leave your money to anybody you choose to leave it to . . . This is a fundamental principle of law. It is also, apparently, a fundamental social norm.”); see also Mark Glover, *A Taxonomy of Testamentary Intent*, 23 GEO. MASON L. REV. (forthcoming 2016) (discussing courts' reluctance to look to other evidence of a decedent's intended estate plan in the face of an authentic will).

¹⁰⁶ See *supra* Part II.B.

law should intervene and alter a valid will in favor of the presumed intent of the testator given a change in circumstances.¹⁰⁷ Here, “friction” is the amount of difficulty a testator faces in revising her will after a certain event.¹⁰⁸ Hirsch identifies several circumstances in which the testator experiences significant, even paralyzing, friction that makes it challenging to update her will, such as dying nearly simultaneously in time to a beneficiary¹⁰⁹ and being slayed by a beneficiary.¹¹⁰ In these instances, the event that is likely to trigger a change in the testator’s desired estate plan—the terminal condition of the beneficiary or the beneficiary’s slaying of the testator—occurs nearly simultaneously with the death of the testator, and, therefore, the testator lacks an opportunity to update her estate plan to reflect the changed circumstance. In such instances of high friction, Hirsch finds intervention by operation of law useful, so long as we can actually deduce the testator’s preferred revision.¹¹¹

In Hirsch’s words, “[w]hen we turn to changes of circumstances that testators remain at liberty to answer by revising their wills, the case for legal activism to update text becomes uneasy.”¹¹² One approach would be the formalistic one, which would simply carry out the provisions of the will.¹¹³ Another, the antiformalistic approach, would permit courts to analyze each changed circumstances since the will’s execution in order to divine the testator’s revised wishes in light of all of those accumulated circumstances.¹¹⁴ Although courts have generally rejected the antiformalistic approach as speculative, they do not adhere strictly to the formalistic one either.¹¹⁵ Adherence to the formalistic approach would never permit a revocation by operation of law, and, as discussed above, these doctrines survive for the changed circumstances of marriage, divorce, and childbirth.¹¹⁶

¹⁰⁷ Hirsch, *supra* note 26, at 620.

¹⁰⁸ *Id.* at 609.

¹⁰⁹ *Id.* at 618 (“Even if the beneficiary survives the testator by a short while, we can predict that the testator would prefer to substitute a different taker. Now on death’s door, the beneficiary will have no occasion to enjoy the bequest, and it will pass in short order to others selected to inherit under the beneficiary’s, instead of the testator’s, estate plan.”); *see also* UNIF. PROBATE CODE § 2-702 (amended 2010); UNIF. SIMULTANEOUS DEATH ACT §§ 3, 6.

¹¹⁰ Hirsch, *supra* note 26, at 620.

¹¹¹ *Id.* at 618, 623-24.

¹¹² *Id.* at 624.

¹¹³ *Id.* at 630.

¹¹⁴ *Id.* at 631.

¹¹⁵ *Id.* at 631-32.

¹¹⁶ *See supra* Part II.B.

When it comes to identifying a testator's intent in light of such life events, Hirsch introduces the concept of looking at the lag time between the event and the testator's demise. On the one hand, "[t]estators do not revise their wills overnight," but, on the other hand, "with each passing day . . . the likelihood that [testators] left their wills unchanged on purpose creeps up commensurately."¹¹⁷ Thus, Hirsch posits that lawmakers could devise a scheme in which divorce, or another sufficiently significant change in circumstance, creates a temporary revocation by operation of law in light of changed circumstance, but then allows the presumption to dissipate over time as the testator's failure to update her will discloses a probable preference to let the will stand as written.¹¹⁸

The situation of a slaying contingent beneficiary fits well into Hirsch's proposal. Although the slaying of the *testator* is a high friction event, the slaying of one *beneficiary* by another is essentially frictionless: it does not disable the testator from revising her will. Nor does the slaying of the primary beneficiary redefine property rights between the testator and the slayer in a way that could justify a presumption that a pre-slaying testament has grown stale.¹¹⁹ Therefore, the law should be very wary of doing what the testator had every opportunity to do herself but declined to do. If years pass after the slaying and the testator declines to update her will to disadvantage the slayer, the law should not take the extraordinary step of intervening to do it for her.

Undoubtedly, some testators will never know that the contingent beneficiary was the slayer or perhaps even that the primary beneficiary's death was the result of a homicide. The owner of the targeted estate may go to her own grave believing that the slayed beneficiary's death was an accident rather than an intentional killing. But such ignorance is immaterial to the proper operation of the slayer rule, even if the testator would have revised her will to disinherit the slayer if she had known the full details regarding the slaying.

The law of succession is not concerned with what the decedent likely would have done if she had complete knowledge of the lifestyle and actions of every would-be beneficiary. If that were the rule, the law would not rely on wills because wills are the product of the testator's imperfect information. Rather, the probate system would be a forum to

¹¹⁷ Hirsch, *supra* note 26, at 639.

¹¹⁸ *Id.* at 640.

¹¹⁹ For example, a post-divorce division of marital property could justify a presumption that a pre-divorce will no longer reflects the testator's intent regarding the surviving spouse. See Alan S. Wilmit, Note, *Applying the Doctrine of Revocation by Divorce to Life Insurance Policies*, 73 CORNELL L. REV. 653, 655-59 (1988) (chronicling the doctrine's progression).

uncover all of the facts relevant to the testator's life and the lives of the testator's friends, relatives, and other potential beneficiaries. Once the deepest and darkest secrets of all of the relevant actors are uncovered, an algorithm could determine what the testator likely would have wanted had she known everything that was learned during this factfinding. Of course, that is not the law of wills. The law of wills effectuates the testator's manifested intent given the always limited and often flawed knowledge of the testator.¹²⁰ A secretive cheating spouse's inheritance is not diminished even though she would have likely fallen out of favor with the decedent spouse if the decedent had discovered the infidelity. An alcoholic, gambling-addicted child is not disinherited even though her parent may have been less willing to leave her an inheritance if the parent had known of the child's foibles. Likewise, the fact that the owner of the targeted estate did not know that one of her beneficiaries was a slayer should not disturb the distribution of the estate. The law should provide safe harbor to the decedent's manifested intent, even though that intent is the product of the testator's imperfect perception of reality.¹²¹ Reality is subjective; here, the subjective reality that matters belongs to the decedent.

¹²⁰ The outer bound is met only when a devise is the product of an insane delusion of the testator, defined as an erroneous belief to which the testator clings despite all factual evidence to the contrary. *See, e.g., Kottke v. Parker (In re Estate of Kottke)*, 6 P.3d 243, 246 (Alaska 2000). If a devise is the result of an insane delusion, the devise is invalid for lack of testamentary capacity. *See, e.g., id.* A testator's simple mistake or lack of knowledge regarding a beneficiary's identity as a slayer, however, would not rise to the level of an insane delusion because such a mistake would not demonstrate that the testator is unable to reason. *See, e.g., Nat'l Newark & Essex Bank v. Bollin (In re Estate of Coffin)*, 246 A.2d 489, 490 (N.J. Super. Ct. App. Div. 1968) ("A mere mistake of fact, or a belief based on false or insufficient evidence, is not an insane delusion . . . Rather, an insane delusion is a false and fixed belief not founded on reason and incapable of being removed by reason."); *see also* Jane B. Baron, *Empathy, Subjectivity, and Testamentary Capacity*, 24 SAN DIEGO L. REV. 1043, 1055 (1987) (reasoning that the test for insane delusions is "consistent with the more general position that testamentary capacity exists only when a testator is capable of reasoning.").

¹²¹ An excellent illustration of this concept involves a child who is born before a testator executes a will but was unknown to the testator at the time of the will's execution. Obviously, the testator could not include the child in the will because the testator did not know that the child existed. Nevertheless, the law treats the omission of the child as an intentional disinheritance rather than as an unintentional disinheritance. *See, e.g., In re Gilmore*, 925 N.Y.S.2d 567, 572-73 (N.Y. App. Div. 2011). If the disinheritance was treated as unintentional, then the child would potentially be able to claim of portion of the father's estate as a pretermitted heir; such would be the case if the child was born *after* the will was executed. Instead, the law carries out the testator's manifested intent that was based on the testator's subjective, albeit incomplete, view of reality.

Thus, after a reasonable lag time to permit the slayer to update her will after the slaying of a primary beneficiary, the testator's will should be probated as it is written. No presumption should arise that the testator intended to disinherit the slayer or limit the slayer's share from increasing as a result of the slaying. Unless empirical evidence shows otherwise, a lag time of one year seems reasonable.¹²² If the testator dies during this lag time, then the same rule should apply as applies in intestacy: because we do not know the testator's true intent, the slayer should inherit the same share she would have inherited if her victim was living at the time of the testator's death. The opposite presumption—that the testator intended to totally disinherit the slayer—is untenable based on the testator's own lack of action following the slaying. But if the testator lives for a year after the slaying and does not use that time to revise her will, the terms of the will should be followed even if it results in a greater share for the slayer.

CONCLUSION

Contrary to the Restatement (Third) of Restitution, it works no unjust enrichment for one beneficiary to advance in the line of succession as a result of slaying a higher-priority beneficiary during the life of the owner of the targeted estate. An expected inheritance is a mere expectancy, defeasible at the whim of the owner of the estate and dependent upon the expectancy's possessor outliving the owner of the estate. Because no legal interest passes as a result of the slaying, equity should not automatically bar the slayer from inheriting.

Rather, the outcome should be dictated by the decedent's intent. Unfortunately, carrying out an intestate decedent's intent is an exercise in guesswork. And, where the intestate decedent did not execute a will after the slaying, the intestate decedent's intent is relatively unclear. Because the victim of the slaying was a closer relative than the slayer, it is fair to presume that the decedent would not want the slayer's intestate share to be expanded as a result of the victim's absence.

But when a decedent's intent is manifested in a will that predates the slaying, the law need not engage in such speculation. Rather, the law should give effect to the will. It should emphatically not presume to know the decedent's intent better than the decedent's own will. By executing a will, testators have marked themselves as interested in the outcome of the distribution of their estates. The law should not presume

¹²² Cf. *Aetna Life Ins. Co. v. Wadsworth*, 689 P.2d 46, 52 (Wash. 1984) (holding one year to be the maximum reasonable time in which an insured should be expected to update her beneficiary designation following divorce).

them to be an inattentive bunch. Rather, when the testator lives for a reasonable time after the slaying and therefore had a fair opportunity to amend or revoke her will if that was her intent, a devise in the testator's will in favor of the slaying contingent beneficiary should be carried out, even if honoring the devise would lead to a larger inheritance for the slayer than she would have received had the testator been survived by the victim of the slaying. Such was the testator's manifested intent. Revising the devise by operation of law does nothing except needlessly frustrate the testator's manifested distribution of her estate.