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# The 1990 Uniform Probate Code: Older and Better, or More like the Internal Revenue Code?

Mark L. Ascher\*

For more than a decade, I have taught Estates & Trusts in Arizona, one of the relatively few states to have adopted the Uniform Probate Code (UPC).<sup>1</sup> During that time, I have grown quite fond of the pre-1990 version of the UPC.<sup>2</sup> It is a model of clear and concise drafting.<sup>3</sup> Its distaste for estate planning esoterica<sup>4</sup> marks it as distinctly "consumer friendly." Its sure and sensible handling of issues that otherwise would have generated litigation<sup>5</sup> evidences thorough common sense. As one who also teaches Tax, I have jealously guarded the opportunity to continue teaching my UPC course, for the welcome relief it has provided from the Internal Revenue Code's statutory pollution, esoteric vocabulary, and litigation incentives.

I expected the 1990 revisions to make the UPC even better. I am not sure they have. The 1990 version lacks several of the

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1. ARIZ. REV. STAT. ANN. §§ 14-1101 to 14-7307 (1975). Only 15 states have adopted the UPC. UNIF. PROBATE CODE, 8 U.L.A. 1 (Supp. 1992).

2. The "pre-1990 version" of UPC Article II was originally promulgated in 1969, and last amended in 1987. The "1990 version" of Article II represented a significant revision of the old article, and was itself amended in 1991. For clarity, this article will cite to the old Article II as "PRE-1990 UNIF. PROBATE CODE" and the new Article II as "1990 UNIF. PROBATE CODE," omitting information about the provisions' subsequent revision or amendment.

3. See, e.g., PRE-1990 UNIF. PROBATE CODE §§ 2-605 (the antilapse statute), 2-608 (providing for exceptions to ademption).

4. See, e.g., *id.* §§ 2-302 (minimizing claims of pretermitted children), 2-502 (liberalizing presence requirements for will execution), 2-503 (liberalizing holograph requirements), 2-505 (liberalizing witness requirements), 4-201 to 4-207 (minimizing need for ancillary probate).

5. See, e.g., *id.* §§ 2-110 (minimizing advancements), 2-504 (providing for self-proved wills), 2-612 (minimizing satisfactions).

pre-1990 version's most endearing characteristics. The 1990 version is much less clear and much wordier. Several of the new statutory contortions are distinctly more complex than anything in the old version.<sup>6</sup> To be blunt, the 1990 version is also quite pretentious. In contrast to the pre-1990 version, which was content to provide practical and workable solutions to most of the biggest problems most of the time, the 1990 version apparently believes that it can and must solve all probate (and related) problems, however small, all the time. This compulsion to deal individually with every conceivable variation<sup>7</sup> serves not just to explain why the 1990 version is so complex and wordy. It also helps to explain the 1990 version's willingness to resort to litigation to resolve issues the pre-1990 version was willing to resolve in more summary fashion.

In addition, the 1990 version of the UPC seems to have a different ideology from that of the old statute. The notes accompanying the 1990 revision identify, as a central "theme," the need better to effectuate a decedent's intent.<sup>8</sup> Accordingly, the 1990 version frequently specifies outcomes that depend explicitly upon the decedent's intention (as opposed to what the controlling document says), which, in turn, is ascertainable (if at all) only upon analysis of all the facts and circumstances.<sup>9</sup>

Effectuation of a decedent's intent seems to have served as the revisers' primary compass. I have argued elsewhere, and in a different context, that society ought to care less about how

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6. The antilapse statute in the 1990 version of the UPC takes up 99 lines of text; that in the pre-1990 version took up only 11. In addition, the 1990 version consumes 259 more lines to project the antilapse statute into new areas. Compare 1990 UNIF. PROBATE CODE §§ 2-603, 2-706, 2-707 with PRE-1990 UNIF. PROBATE CODE § 2-605. The new provisions relating to the surviving spouse's elective share are even more breathtakingly resplendent in statutory verbiage. They occupy 467 lines; those in the pre-1990 version occupied only 176. Compare 1990 UNIF. PROBATE CODE §§ 2-201 to 2-207 with PRE-1990 UNIF. PROBATE CODE §§ 2-201 to 2-207. There ought to be a law against this type of statutory pollution.

7. See, e.g., 1990 UNIF. PROBATE CODE §§ 2-102 (spousal intestate succession scheme taking more variables into account), 2-106 (redefining and complicating representation).

8. See *id.* art. II, pref. note (recognizing "the decline of formalism in favor of intent-serving policies").

9. See, e.g., *id.* §§ 2-601 (rules of construction apply in absence of a "finding of a contrary intention"), 2-603(b)(3) (words requiring survival do not render antilapse statute inapplicable unless there is "additional evidence" of "an intent contrary to the application of this section"), 2-606(a)(6) ("unless the facts and circumstances indicate that ademption of the devise was intended by the testator or ademption of the devise is consistent with the testator's manifested plan of distribution," ademption cannot occur).

the dead want their wealth used than how the living want to use it.<sup>10</sup> Consistent with that belief, I would prefer to see the UPC pay more attention to “living” values, such as simplicity and certainty, than to “dead” values, such as incremental improvements in effectuating a decedent’s intent. I am less interested in a system that seeks to carry out a decedent’s intent (particularly where the decedent has never bothered to express that intent) than in a system that simply and without litigation disposes of a decedent’s assets. Moreover, I am convinced that in many instances, triers of fact have nothing of value to say about an intention the decedent has never expressed and probably never even had. It is ironic, in a field of law so riddled with rules whose primary effect has always been the frustration of decedents’ *expressed* intentions,<sup>11</sup> that the 1990 version of the UPC would strain so hard to effectuate intentions that decedents have left *unexpressed*—and in particular, that it would strain to do so with respect to comparatively trivial matters.<sup>12</sup> In seeking to implement the often unexpressed intent of decedents, the 1990 version invites litigation concerning many more issues than the pre-1990 version did.

In short, as a result of the 1990 revisions, the UPC has come to resemble the Internal Revenue Code. Part of me therefore wants to write a stinging indictment of the 1990 revisions. This short essay is not that indictment. And I may never get around to writing one, for I genuinely like the effect of many of the 1990 revisions.<sup>13</sup> Many, indeed most, of the 1990

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10. Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69 (1990) (arguing generally that property rights should end at death).

11. Examples of such rules include the Statute of Wills, the allowance in lieu of homestead, provisions dealing with exempt property, the family allowance, the surviving spouse’s elective share, provisions for omitted spouses and pretermitted children, the rules relating to testamentary capacity and undue influence, and continue on and on.

12. For example, while reversing the traditional rule relating to ademption, apparently in an effort better to effectuate the unexpressed intent of the “average” testator, see 1990 UNIF. PROBATE CODE § 2-606(a)(5)-(6), the 1990 version of the UPC continues utterly to disregard the intent of those who die intestate, except, occasionally, with respect to advancements. See *id.* § 2-109(a). Yet intestates, just as those who have the inclination, leisure, and financial means to leave a will, may have formulated, and even expressed to others, clear and provable ideas about how their assets should pass after death.

13. For example, the effect of the 1990 revisions dealing with the surviving spouse’s elective share is distinctly superior to that of the pre-1990 version. Compare *id.* §§ 2-201 to 2-207 with PRE-1990 UNIF. PROBATE CODE §§ 2-201 to 2-207. I have advocated a somewhat similar approach in a different context. See Ascher, *supra* note 10, at 123-26 (discussing marital exceptions to a proposed abolition of inheritance). Likewise, it probably is time to start moving

revisions are worthy of enactment. They address widely recognized problems and dispose of them sensibly. There are, however, other portions of the 1990 version with which I take strong exception.

This essay discusses two particularly troublesome provisions of the 1990 version of the UPC. One is the reversal of the general rule relating to ademption. The other is the determination that words requiring survival are insufficient to render the antilapse statute inapplicable. Both revisions reveal an excessive concern for the decedent's unexpressed intent. Worse, both involve areas in which there is likely to be no real evidence, from any source, regarding the decedent's intent. Moreover, both issues are of trivial significance on any comparative basis. On each of these grounds, both revisions are vulnerable. So, however, are many other of the 1990 revisions. What distinguishes these two changes is that both require that competent and conscientious estate planners advise many of their clients to rewrite their wills, purely to settle statutory ambiguities. That is a terribly expensive price for a tiny increase in faithfulness to what the revisers imagine is the "average" testator's unexpressed intent. It is a price the revisers should not impose on this nation's testators.

As a general rule, any time a statute dealing with something as mundane as probate becomes more difficult to understand, the improvement is dubious. Whenever legislation makes it harder for a lay person to understand the words an estate planner has chosen on his or her behalf, we all should ask whether meaningful reform has occurred. Everyone in the estate planning community has reason to be disheartened by estate litigation, for, with few exceptions, behind every litigating estate is an estate planner or a probate rule that has failed to do its job properly. Legislation that forces large numbers of clients to redo their estate plans is, at least to that extent, manifestly inefficient and unfair. These are all truisms the revisers of the UPC should have constantly in mind. Instead, the UPC seems to have become a laboratory for academicians bent on reaching, at any cost, what they imagine to be the "correct" result. Those who revise the UPC should never forget that estate planners and lay people must live under, and pay the costs of implementing, their work product.

The thoughtful reader at this point may be tempted to ac-

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this country away from a highly formalistic Statute of Wills. If so, 1990 UNIF. PROBATE CODE § 2-503 is certainly appropriate.

cuse me of growling menacingly only to slink silently into the shadows. I hope to do more than pick nits, however. The two examples I discuss here exemplify all that is bad in the 1990 version of the UPC. Both revisions result in increased statutory complexity. Both place a premium on estate planning esoterica. Both openly encourage litigation. Thus, both revisions illustrate the general drift of the 1990 version away from the virtues of the pre-1990 version and toward the vices of the Internal Revenue Code. In addition, both changes require estate planners to review almost all currently existing wills. To that extent, the revisers have exhibited the same callous indifference Congress all too often displays in amending the Internal Revenue Code. In criticizing these two revisions, I may be picking nits. But I am picking nits that illustrate a significant change in the UPC's ideological direction. In criticizing these two revisions I am, therefore, arguing against that ideological change as well.

## I. ADEMPMENTION

Under traditional notions of ademption, if at death a testator no longer owns property that is the subject of a specific bequest, the beneficiary of that bequest takes nothing.<sup>14</sup> It requires no particular acumen to see that this rule has the potential to frustrate a testator's intent.<sup>15</sup> Not every testator who sells specifically bequeathed property immediately recognizes that the sale may have affected his or her will. Therefore, ademption may occur without the testator ever having considered the matter. Even if a testator does make the mental connection, there may not be the time, inclination, or wherewithal to consult a lawyer before death. And even with fair access to a lawyer, the testator may assume that the sales proceeds somehow pass to the specific beneficiary in lieu of the item in question. In any of these eventualities, ademption may frustrate the testator's intent.

Or it may not. Ademption is not a doctrine developed by a devious demon purely to frustrate testators' intent. It reflects the assumption, which the revisers apparently reject, that elimination of a specific bequest when the underlying asset disap-

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14. See generally THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 134 (2d ed. 1953).

15. See, e.g., *In re Estate of Nakoneczny*, 319 A.2d 893, 895-96 (Pa. 1974) (noting that ademption is "an inflexible rule of law . . . not founded on any presumed intention of the testator").

pears is what most testators want. Most specific bequests are not efforts to divide wealth quantitatively among competing beneficiaries, each of whom is similarly situated in the testator's affection and concern. In fact, competent estate planners generally try to avoid using specific bequests when the testator's real desire is simply to allocate quantities of wealth among a group of individuals. General bequests and fractional shares of the residuary estate are much more apt for implementing such dispositive goals. Instead, a well-conceived specific bequest generally reflects a testator's wish that a particular item pass to a particular individual. Thus, the "average" well-counseled testator almost certainly prefers that each specific bequest disappear with the asset bequeathed.

A testator often leaves a specific bequest because he or she believes that a particular beneficiary has a particular desire for or familiarity with a particular asset. Such a testator makes the bequest not as an "equalizing devise,"<sup>16</sup> but because of a particular beneficiary's relationship to a particular asset. If the asset disappears, there is no reason to conclude that the testator would want the proceeds to pass to that beneficiary.

In other situations, the asset itself, rather than a specific beneficiary, is at the center of the testator's affections. The testator's real goal is to protect that asset by bequeathing it to someone the testator believes will care for it particularly well or cherish it especially highly. Perhaps the clearest example is a bequest of a pet. A testator may leave a favorite pet to someone he or she believes will provide the pet with affection and reliable care. Bequests of jewelry, antiques, paintings, old sports cars, guns, farms, and interests in closely-held businesses often arise out of similar motives. A testator who makes such a bequest may care less about who benefits from the asset than who is most likely to use the asset in the way the testator thinks appropriate. If the testator disposes of the asset in question, it is absurd to think that the testator would want the pro-

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16. These are words from the revisers' comment to 1990 UNIF. PROBATE CODE § 2-606. They, better than anything else in the revisers' notes, reveal what is apparently one of the revisers' primary assumptions. The revisers apparently view specific bequests as tools for shifting definable quantities of wealth among a cast of competing beneficiaries. Obviously, testators sometimes do so employ specific bequests. But there are other functions of specific bequests, in which the allocation of quantities of wealth plays little, if any, role. Instead, the relationship of an individual beneficiary to a particular piece of property, or the testator's desire to preserve a particular piece of property, may be the primary or even exclusive reason for the bequest.

ceeds to pass to an individual selected solely on the basis of fitness to care for a now-missing asset.

The pre-1990 version of the UPC followed the traditional ademption rule but carved out four very limited exceptions.<sup>17</sup> These exceptions recognized that ademption might or might not accord with a testator's intention, but their limited nature suggested a willingness to depart from the traditional rule only in the clearest circumstances. Unpaid sales proceeds, unpaid condemnation awards, and unpaid fire or casualty insurance passed to the specific beneficiary, as did property taken in (or in lieu of) foreclosure of the security for a specifically devised obligation.<sup>18</sup> The pre-1990 version of the UPC thus insisted on the clearest sort of tracing in its first baby steps away from the identity theory of ademption. It takes no hardcore advocate of effectuating a testator's unexpressed intent to suggest that the UPC could have taken more, bigger, and quicker steps away from the identity theory. But fashioning equally limited and thoughtful additional exceptions is not the route the revisers have chosen. Instead, the revisers have basically turned the rule on its head, though without the kind of forthright drafting one might have expected.<sup>19</sup>

The revisers have added a fifth "exception" that deals, broadly, with real or tangible personal property. If a decedent at death owns "real or tangible personal property" that he or she has "acquired as a replacement for specifically devised real or tangible personal property," the replacement property passes to the specific beneficiary.<sup>20</sup> The revisers encourage us to see in this fifth "exception" "a sensible 'mere change in form' principle."<sup>21</sup> They illustrate this "principle" with an example, which begins with a bequest of "my 1984 Ford." After execution of the will, the testator sells the Ford and buys a 1988 Buick. Later, she sells the Buick and buys a 1993 Chrysler. The

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17. PRE-1990 UNIF. PROBATE CODE § 2-608(a). In addition, there was an exception for assets disposed of by a conservator. *Id.* § 2-608(b).

18. *Id.* § 2-608(a).

19. The revisers' drafting reminds me of Congress' most recent major amendment of I.R.C. § 2035. I.R.C. § 2035 requires inclusion of certain gifts within three years of death in "gross estate" for purposes of the federal estate tax. I.R.C. § 2035(a) (1988). Instead of forthrightly reversing the old rule by repealing § 2035(a), Congress in 1981 added a new subsection, § 2035(d), which, in § 2035(d)(1), purported to repeal § 2035(a) but, in § 2035(d)(2), retained it for a few purposes. Economic Recovery Act of 1981, Pub. L. No. 97-34, § 424(a), 95 Stat. 172 (codified as amended at I.R.C. § 2035(d)(1)-(2)).

20. 1990 UNIF. PROBATE CODE § 2-606(a)(5) (emphasis added).

21. *Id.* § 2-606 cmt.



revisers opine that the 1993 Chrysler, as a replacement for the 1984 Ford, passes to the specific beneficiary.<sup>22</sup> I find this example troubling. Assume that the testator signed her will in 1988, when the Ford was well-used and badly-dented and its value was less than half its cost. In addition, assume that though the testator had fully paid for the Chrysler, and though the title had already been issued in her name, she died prior to picking up the car. Allowing the specific beneficiary to take a brand-new luxury car in lieu of a worn-out and beat-up economy car does not seem to me to be an intuitively obviously better result than ademption.

If I vary the fact pattern a little more, the fifth "exception" makes me even more uncomfortable. Assume that the third car is a 1926 Rolls Royce Phantom. The cost of the Rolls is approximately thirty times the value of the used Ford. Assume also that the testator bought the Rolls as her daily driver (and some people do buy expensive classics as daily drivers), in substitution for the Buick that replaced the Ford. Unless the revisers plan to slide off their slippery slope at this point by emphasizing the first word of their "sensible 'mere change in form' principle," the Rolls would apparently pass to the lucky beneficiary of the used Ford. Is this statutory improvement or an invitation to litigation that resembles legalized gambling?

One of the facts that these examples reflect is that "replacement" has no meaning well enough defined to merit its selection as the talisman of ademption.<sup>23</sup> In states that adopt the fifth "exception" to ademption, therefore, we can expect a flood of litigation over the meaning of "replacement." That is a high price to pay for a small improvement in faithfulness to the unexpressed intention of the testator.

I have even stronger reservations about the sixth "excep-

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22. *Id.*

23. If even the example involving the 1926 Rolls Royce fails to make the revisers squirm, surely there are other examples that will. Say that the testator from the previous examples, upon becoming unable to drive, replaces the Buick with an electric cart, with which she thereafter runs errands in her retirement community. Both the Buick and the electric cart were, while the testator owned them, her only form of transportation. Does the electric cart pass to the beneficiary of the Ford?

If the revisers still have not begun to squirm, here is yet another example. Say that the same testator, upon losing the ability to drive, replaces the Buick with a painting of a favorite vacation spot, to which she has frequently driven. She tells friends that looking at the painting allows her to "visit" that location despite her inability to drive there anymore. The painting is tangible personal property that has replaced the Buick. Does the painting pass to the beneficiary of the Ford?

tion," which in fact reverses the traditional notion of ademption. That "exception" basically converts all adeemed specific bequests into general bequests of the value of the missing property. Thus, it performs a function exactly opposite to that of ademption. But because this "exception" begins with "unless the facts and circumstances indicate that ademption of the devise was intended by the testator or ademption of the devise is consistent with the testator's manifested plan of distribution,"<sup>24</sup> the revisers nonchalantly claim that it "creates [only] a mild presumption against ademption."<sup>25</sup> What an understatement. What the sixth "exception" really does is to tear a longstanding rule out by the roots and then encourage private litigants to determine whether the old rule applies nonetheless.<sup>26</sup> It is conceivable (but I doubt)<sup>27</sup> that non-ademption is more in keeping with the "average" testator's unexpressed intent than ademption. If so, elimination of ademption might be appropriate. But sowing the seeds of litigation is not.

Until recently, estate planners have been entitled to draft wills that assumed ademption. In many jurisdictions there were exceptions,<sup>28</sup> and in a few jurisdictions judges had begun to flirt with the so-called "intent theory of ademption."<sup>29</sup> But,

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24. 1990 UNIF. PROBATE CODE § 2-606(a)(6).

25. *Id.* § 2-606 cmt.

26. What the revisers propose with respect to ademption thus parallels Judge Cardozo's demotion of the doctrine of worthier title from a rule of law to a rule of construction in *Doctor v. Hughes*, 122 N.E. 221 (N.Y. 1919). Unlike the revisers in dealing with ademption, Judge Cardozo did not also reverse the traditional rule; he merely treated it as an issue on which extraneous proof was relevant. Still, the result was a litigation quagmire. *See, e.g.*, *Hatch v. Riggs Nat'l Bank*, 361 F.2d 559 (D.C. Cir. 1966) (considering the continued viability of the doctrine of worthier title); Harold E. Verrall, *The Doctrine of Worthier Title: A Questionable Rule of Construction*, 6 UCLA L. REV. 371 (1959) (tracing the transformation of the doctrine in various jurisdictions). Eventually, reformers came to understand that outright elimination of the doctrine of worthier title was preferable to requiring private parties to litigate their own rule on a case-by-case basis. The trend, therefore, seems to be a rejection of the doctrine not only as a rule of law, but also as a rule of construction. *See, e.g.*, 1990 UNIF. PROBATE CODE § 2-710; *Hatch*, 361 F.2d at 564.

27. *See infra* pp. 648-49.

28. *See, e.g.*, PRE-1990 UNIF. PROBATE CODE § 2-608.

29. The comment to 1990 UNIF. PROBATE CODE § 2-606 cites only one such case, *Estate of Austin*, 169 Cal. Rptr. 648 (1980). In *Austin* the court did refuse rigidly to apply the identity theory of ademption, but nothing in the opinion supports the revisers' drastic changes in the rules relating to ademption. *Austin* involved a specific bequest of a promissory note secured by a deed of trust. Shortly after the promisor prepaid the note, the testator reinvested the proceeds in another promissory note secured by another deed of trust. Because a third party (rather than the testator) "initiate[d]" the action that caused the disappearance of the specifically bequeathed asset; because the proceeds of the

in general, ademption reigned supreme.<sup>30</sup> An estate planner could, therefore, confidently draft a specific bequest and be safe in the knowledge that if the asset disappeared, the bequest would, too. Under the 1990 version of the UPC, with its variable result, the competent estate planner who drafts a specific bequest must in every case add language disposing of the ademption issue one way or the other. Moreover, any estate planner who has ever drafted a specific bequest under the now obsolete assumption that ademption applied must give serious consideration to asking the client to amend the will to reflect the client's intention as to ademption. The revisers and I apparently disagree about whether ademption or non-ademption is the better default rule. Even if the revisers are correct, however, a slightly better rule relating to such a trivial aspect of the law is not worth reviewing all the wills in this country.

It is no answer to say, as the revisers do in their comments to their new antilapse statute, that, if a lawyer has relied on the old rule in response to actual client feedback, the lawyer will be permitted to testify as to that feedback, and the old result will prevail.<sup>31</sup> "The counselor's job is to prevent litigation."<sup>32</sup> Allowing a client to die with a will that depends on the scrivener's testimony for its effect is a sure-fire way to promote, not prevent, litigation.

I have yet another bone to pick with the fifth and sixth "exceptions." It is obvious that one of the revisers' goals throughout their work is to "idiot-proof" the UPC. They have constantly tried to change the UPC in ways that make estate planning expertise less compulsory for those who plan estates without regard to their own competence.<sup>33</sup> In the long run, however, bending over backwards to preserve specific bequests may not be "consumer friendly." The lay person trying to

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specifically bequeathed asset were "easily traceable" into the replacement asset; and because the replacement asset was "almost identical" to the specifically bequeathed asset, one cannot fairly say that *Austin* stands for either a replacement theory of ademption or conversion of all specific bequests of missing assets into general bequests of the value of those assets. See *id.* at 651.

30. Even the revisers' comment to 1990 UNIF. PROBATE CODE § 2-606 indicates that "most courts" continue to employ the traditional notion of ademption.

31. 1990 UNIF. PROBATE CODE § 2-603 cmt.

32. John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 524 (1975).

33. See, e.g., 1990 UNIF. PROBATE CODE §§ 2-503 (writings intended as wills admissible to probate notwithstanding noncompliance with statutory formalities), 2-601 (rules of construction control in absence of "contrary intent," as opposed to "contrary intention indicated by the will").

write his or her own will, or the client trying to figure out the meaning of a lawyer-prepared will, ought to have a fighting chance of getting it right. The uninitiated are unlikely to conclude on their own that "I give my car to Bob" really means "I give my car to Bob if I still own it at my death or, if I do not still own my car at my death, I give Bob anything with which I have replaced my car, or, if I have disposed of my car but not replaced it, I give Bob cash in the amount of the fair market value of what was once my car, as of the moment of my death." These "exceptions" thus make a working knowledge of esoteric estate planning trivia more, rather than less, essential to understanding words that often appear in wills, no matter who drafts them. In short, because these "exceptions" veer sharply from what a lay person would expect a specific bequest to denote, they place an even higher premium on obtaining competent, expert assistance. This is not my notion of a "consumer-friendly" change.

One of the easiest errors for the inexperienced or thoughtless estate planner to make is to allow a client to leave so many preresiduary bequests that little or nothing remains for the residuary beneficiary, who is almost always the testator's overwhelmingly predominant beneficiary (generally a surviving spouse or issue). Traditional ademption, however unfriendly to testator intentions in the limited sense that seems to have motivated the revisers, is "consumer-friendly" in the sense that it serves to limit preresiduary bequests and may, therefore, help to effectuate the testator's ultimate dispositive goals. By attempting to make it harder to screw up a client's will on a small matter, the revisers have made it easier to screw up a client's will in a major way. The revisers probably should not hold their breaths for a congratulatory telegram from Ralph Nader.

## II. ANTILAPSE STATUTE

One of the most basic of all the rules relating to the testamentary disposition of wealth is *lapse*. As a general rule, a beneficiary who fails to survive the testator forfeits any bequest under the testator's will.<sup>34</sup> Lapse does, however, do more than state the obvious. It also denies the bequest to the dead beneficiary's estate. The consequence of lapse is, therefore, that someone else takes the property that was the subject of the be-

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34. See generally ATKINSON, *supra* note 14, § 140 (describing the effect of lapse on testamentary gifts).

quest. "Antilapse" statutes do not change this result and thus do not fully live up to their name. Instead, antilapse statutes, when they apply, merely identify the someone else who takes the bequest in lieu of the dead beneficiary's estate. Rather than relying on other parts of the will (or the law of intestate succession), antilapse statutes redirect lapsed bequests to one or more substitute takers, typically the dead beneficiary's surviving issue.<sup>35</sup> Thus, an antilapse statute can "save" a lapsed bequest for certain of a dead beneficiary's successors, rather than allow the property that is the subject of the bequest to pass, possibly to different beneficiaries, under different provisions of the testator's will (e.g., the residuary clause) or by intestate succession.

The 1990 version of the UPC places a very high value on antilapse statutes. Not only does the 1990 version extend antilapse rules to areas where their application has heretofore been uncertain,<sup>36</sup> it also seeks to give the antilapse statute "the widest possible latitude to operate in considering whether in an individual case there is an indication of a contrary intent sufficiently convincing to defeat the statute."<sup>37</sup> Accordingly, the 1990 version states that words requiring a beneficiary to survive the testator are insufficient to defeat the operation of the antilapse statute.<sup>38</sup> I have strong reservations about this aspect of the new antilapse provisions.<sup>39</sup>

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35. See Susan F. French, *Antilapse Statutes are Blunt Instruments: A Blueprint for Reform*, 37 HASTINGS L.J. 335, 345, 370 (1985).

36. See 1990 UNIF. PROBATE CODE §§ 2-603(a)(4)(iv) (appointments under testamentary powers), 2-706 (life insurance, retirement plans, POD accounts, etc.), 2-707 (future interests).

37. *Id.* § 2-603 cmt.

38. *Id.* § 2-603(b)(3).

39. The revisers' comment to the 1990 version of the UPC's antilapse statute quotes Professor French: "Courts have tended to accord too much significance to survival requirements when deciding whether to apply antilapse statutes." *Id.* § 2-603 cmt. (quoting French, *supra* note 35, at 369). But the comment offers as its sole reason for denying preclusive effect to words requiring survival that the statute is "remedial in nature, tending to preserve equality of treatment among different lines of succession." *Id.* One of the most important reasons for allowing decedents to dispose of their property by will is to free them from the unwanted obligation to leave their property equally among various lines of succession. Enforced equality of treatment may be an appropriate result under an intestate succession statute, but it is an appropriate result under a will only if the testator desires it. Professor French's article is, indeed, a virtuoso performance. But I disagree with several of her recommendations, particularly those relating to the effect of words requiring survival. Those recommendations often seem more effective in enforcing equality of distribution among family lines than in implementing a particular testator's intent. Even so, the 1990 version of the UPC goes well beyond Professor

Everyone recognizes that a testator should be able to formulate a dispositive scheme and implement it without interference from the antilapse statute. In other words, everyone agrees that a testator ought to be able to leave a bequest that does not pass to the substitute takers specified in the antilapse statute if the beneficiary does not survive the testator. Under most estate planners' understanding of current law, all it takes to "defeat" the antilapse statute is that the terms of a bequest require survival of the beneficiary.<sup>40</sup> (Throughout the rest of this essay, I shall refer to this understanding as "the rule.") Specifically, most estate planners believe that if a bequest contains language such as, "if he survives me," the antilapse statute cannot apply. Other portions of the will (or the law of intestate succession), rather than the antilapse statute, will determine what happens to the property that is the subject of a bequest if the beneficiary predeceases the testator. Thus, every day, good lawyers all around the country draft wills under the assumption that, so long as they condition each bequest on the beneficiary's survival of the testator, the antilapse statute is inapplicable.

The 1990 version of the UPC changes all this. The 1990 version, which requires more in the way of establishing that the testator intended for the statute not to apply, rejects the rule out of hand.<sup>41</sup> As in the case of ademption, therefore, the revis-

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French's recommendations. She recommends that words requiring survival continue to have nearly preclusive effect with respect to all bequests except bequests to issue. French, *supra* note 35, at 372-73. Even as to bequests to issue, words requiring survival would have nearly preclusive effect unless "the result of lapse would be to disinherit a branch of the testator's lineal descendants." *Id.* Professor French's recommendations are thus far more sophisticated than the revisers' new blunt instrument.

40. The revisers dispute this assertion in part. They state that "lawyers who believe that . . . attachment of words of survivorship to a devise is a foolproof method of defeating an antilapse statute [sic] are mistaken." 1990 UNIF. PROBATE CODE § 2-603 cmt. But they cite only three cases, *see infra* note 44, two of which are readily distinguishable, *see* description of cases *infra* note 44, and one of which probably is not the law even in the state in which it was decided, *see infra* note 45.

41. 1990 UNIF. PROBATE CODE § 2-603(b)(3). The revisers offer three "foolproof means of expressing a contrary intention." *Id.* § 2-603 cmt. The first of these techniques, adding "and not to [the devisee's] descendants" to the words conferring the bequest, is hardly a standard drafting technique. *Cf.* THE NORTHERN TRUST COMPANY OF ARIZONA, WILL AND TRUST FORMS 110-0 (4th ed. 1984) ("I devise . . . \$5,000 to my sister, JANE DOE, of Phoenix, Arizona, if she survives me."). Another of these techniques, adding "including all lapsed or failed devises" to the residuary clause, does have some current acceptance. *Cf. id.* at 110-3. But that technique obviously works only with respect to lapsed preresiduary bequests. The third of the suggested techniques, adding "a

ers have chosen to stand on its head an established rule upon which those who draft wills must and should be able safely to rely. This situation is bad enough, for it forces reconsideration of almost all outstanding wills. But here, as in the case of ademption, the 1990 version of the UPC does not simply reverse the old rule; rather, it demands the introduction of "additional evidence" of the testator's intent before it will allow words of survivorship to defeat the antilapse statute.<sup>42</sup> Thus, here, too, the 1990 version does not just require the review of already completed documents; it also forces private parties to engage in litigation to determine whether the antilapse statute applies on a particular set of facts. In short, the revisers' handling of the rule is subject to many of the same criticisms I have already leveled against their handling of ademption.

The revisers' handling of the rule raises an additional, more troubling issue. It is difficult to avoid concluding that the revisers look down their noses at estate planners who rely on the rule. They seem to think that these estate planners simply do not know what they are doing.<sup>43</sup> The revisers cite three cases that, to one extent or another, adversely affect the rule.<sup>44</sup> To suggest, however, that reliance on a rule is unjustified unless every relevant case fully squares with it is to require more consistency than our legal system is capable of sustaining. Some cases are simply wrong, and we ought to be willing to label them as such.<sup>45</sup> Generally, antilapse statutes apply only if

separate clause stating that all lapsed or failed nonresiduary devises are to pass under the residuary clause," also seems not to be widely used and, in any event, works only with respect to lapsed preresiduary bequests.

42. 1990 UNIF. PROBATE CODE § 2-603(b)(3).

43. "Lawyers who believe that the attachment of words of survivorship to a devise is a foolproof method of defeating an antilapse statute [sic] are mistaken." *Id.* § 2-603 cmt.

44. *Henderson v. Parker*, 728 S.W.2d 768 (Tex. 1987) (court construed language in joint will disposing of property among "surviving children of this marriage" as "merely a general statement clarified by the more specific disposition which follow[ed] and did not require survival"); *Estate of Ulrikson*, 290 N.W.2d 757 (Minn. 1980) (en banc) (will contained language dealing with contingency that one beneficiary would predecease the other but said nothing about what was to happen if both predeceased the testator; thus, the court found that the will "contain[ed] no instructions for the circumstances which occurred"); *Detzel v. Nieberding*, 219 N.E.2d 327 (P. Ct. Hamilton County, Ohio 1966). French, *supra* note 35, at 347 n.67, cites a few more cases.

45. One Ohio judge has referred to *Detzel v. Nieberding* as "clearly and completely erroneous." *Shalkhauser v. Beach*, 233 N.E.2d 527, 530 (P. Ct. Cuyahoga County, Ohio 1968) (Decatur, Ref.). Another has expressly distinguished it. *Day v. Brooks*, 224 N.E.2d 557, 566 (P. Ct. Cuyahoga County, Ohio 1967) (Andrews, C.Ref.). Moreover, it is *Shalkhauser v. Beach*, rather than *Detzel v. Nieberding*, that appears to be the law in Ohio. See *Tootle v. Tootle*,

the testator's will fails to evidence a "contrary intention."<sup>46</sup> The cases on which the revisers rely are simply bad interpretations of statutes that incompletely answer the question, "What does it take to defeat the antilapse statute?" Thus, these cases do little more than illustrate the fact that antilapse statutes (including the antilapse statute under the pre-1990 version of the UPC) typically have not been crystal-clear in describing what it takes to render them inapplicable. I agree wholeheartedly that the UPC should be crystal-clear on this issue. But I part with the revisers in rejecting the rule. In doing so, they are throwing the baby out with the bath water. Even worse, after discarding the baby, they have failed to deliver a workable replacement.

It would have been a simple matter to make the UPC crystal-clear on what it takes to render the antilapse statute inapplicable. The revisers could have done so simply by stating that words of survivorship *are* sufficient to indicate an intent to render the antilapse statute inapplicable. They chose not to. Instead, they rejected the rule in general terms but left the issue open to proof in individual cases.<sup>47</sup> As a result, the actual effect of the 1990 revisions is that the rule no longer applies, unless litigation determines that it does.

Even one who views the stray cases upon which the revisers rely as more than just "wrong" must admit that the 1990 revisions offer testators and their lawyers and beneficiaries a much less clear environment in which to operate. The old rule worked, other than in the exceptional case when litigation occurred. Even in those cases, the result was usually enforcement of the rule.<sup>48</sup> Under the 1990 revisions, any bequest conditioned on survival is statutorily ambiguous until litigation determines its meaning (unless an effective alternate bequest immediately follows the bequest).<sup>49</sup> Thus, the new UPC makes

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490 N.E.2d 878 (Ohio 1986) (citing *Shalkhauser* favorably); *Cowgill v. Faulconer*, 385 N.E.2d 327 (C.P. Prob. Div. Highland County, Ohio 1978) (applying *Shalkhauser*). Similarly, Professor French has labelled the result in *Estate of Ulrikson* as "unjust." French, *supra* note 35, at 354. I would have expected that the revisers would have presented substantially stronger precedents to support a change in a rule upon which all estate planners must rely daily.

46. See, e.g., PRE-1990 UNIF. PROBATE CODE § 2-603.

47. 1990 UNIF. PROBATE CODE § 2-603(b)(3).

48. See French, *supra* note 35, at 347 n.67. Even the revisers' comment to 1990 UNIF. PROBATE CODE § 2-603, citing primarily A.L.R. annotations, admits that "many cases hold that mere words of survivorship do automatically defeat the antilapse statute."

49. See 1990 UNIF. PROBATE CODE § 2-603(b)(3)-(4).



litigation the rule, rather than the exception. The fact that the old rule has governed the drafting of the wills of several generations of testators who are still alive means, with certainty, that bequests conditioned on survival will continue to occur with great frequency for years to come. The fact that several generations of lawyers have learned to draft wills in reliance on the rule means, with almost equal certainty, that in the future there will be even more wills containing bequests conditioned on survival.

The revisers' rejection of the most obvious solution to the problem of a few stray cases—i.e., to state unequivocally that those cases are wrong—suggests that the revisers' real motive was not simply to restore order, but to reverse the rule itself. Apparently, the revisers believe their own antilapse provisions are likely to reflect any particular testator's intent more faithfully than *the testator's own will*. This conclusion is not only pretentious, it disputes what should be obvious—that most testators expect *their wills* to dispose of their property *completely*<sup>50</sup>—without interference from a statute of which they have never even heard.<sup>51</sup> Instead of allowing “if he survives me” to mean what almost everyone would expect it to mean, the revisers have translated it into, “if he survives me, and, if

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50. See PRE-1990 UNIF. PROBATE CODE § 2-604 (“A will is construed to pass all property which the testator owns at his death . . .”). It is interesting to note that the revisers' replacement for this provision neatly avoids conveying this message. See 1990 UNIF. PROBATE CODE § 2-602 (“A will may provide for the passage of all property the testator owns at death . . .”).

51. This is, of course, the effect every time the antilapse statute applies. But applying the statute to a bequest “to Bob” is much less pretentious than applying the statute to a bequest “to Bob if he survives me.” The first of these bequests provides no evidence that either the testator or the scrivener has contemplated the possibility that Bob might predecease the testator. In all likelihood, that thought never entered either's head. Thus, application of the statute is in no way *inconsistent* with the will and may, in fact, more accurately capture what the testator would have wanted had he or she considered the issue than to allow the property to pass under another part of the will or by intestate succession. The second of these bequests, however, provides unmistakable evidence that someone (either the testator, the scrivener, or the author of a form book) has considered the possibility that Bob might predecease the testator. Moreover, the second bequest expressly denies the bequest to Bob's estate. Since the takers of an estate, in many instances, consist primarily or even exclusively of the decedent's issue, allowing the antilapse statute to save the second bequest for Bob's issue is, at least to some extent, deliberately inconsistent with the terms of the will. Applying the statute to the second bequest in the name of more faithfully carrying out the testator's intention thus implies that the statute more accurately reflects the testator's intentions than the testator's own will, with respect to a highly analogous issue.

he does not survive me, to his issue who survive me." For those unfamiliar with estate planning esoterica, therefore, it has become yet more difficult to figure out what the words in a will actually mean. The uninitiated apparently have three options: hire a competent estate planner, go to law school, or curl up with *Alice in Wonderland*.

An even greater form of arrogance lies behind the notion that rote statutory takers are more in keeping with a testator's wishes than those the testator's own will specifies. The revisers apparently believe they can capture the testator's intention as to whether the antilapse statute should apply to a given lapsed bequest more accurately than the testator's own estate planner.<sup>52</sup> This is absurd. The competent estate planner generally attaches a condition of survival to each and every bequest. He or she also constantly takes into account what happens to each bequest if the conditions to which it is subject do not occur. If it is the client's wish that a particular preresiduary bequest pass to a specific alternate taker, there is nothing more natural than immediately to draft an alternate bequest. But if the client's desire to leave a specific or general bequest relates primarily to a particular beneficiary, it is equally natural for the lapsed bequest to "fall into the residuary." Based on my own experience as an estate planner, I can say with certainty that estate planners, in general, are not oblivious to their clients' wishes regarding the survival of preresiduary bequests. In any event, motivating estate planners to add more standardized gobbledegook to their residuary clauses,<sup>53</sup> or to standardize separate clauses containing that gobbledegook,<sup>54</sup> is extremely unlikely either to make estate planners more sensitive to their clients' wishes on these issues or to make it easier for clients to ascertain their documents' meaning under circumstances they generally do not even care to envision.

Is it different with respect to residuary bequests? Here,

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52. Professor French admits that, if a testator's spouse has children by another, the testator's estate planner may be in a better position than the antilapse statute to determine the testator's intention as to the disposition of a lapsed bequest to that spouse. French, *supra* note 35, at 359. The apparent implication is that in many other situations, the antilapse statute is a better judge of the testator's intent than the testator's own estate planner.

53. The revisers suggest that one "foolproof means of expressing a contrary intention" is to add to the residuary clause the phrase, "including all lapsed or failed devises." 1990 UNIF. PROBATE CODE § 2-603 cmt.

54. Another of the revisers' "foolproof means of expressing a contrary intention" is to add a separate clause "stating that all lapsed or failed nonresiduary devises are to pass under the residuary clause." *Id.*

too, the competent estate planner almost always requires survival. But, in general, the manner in which the competent estate planner requires survival carries out, rather than frustrates, the client's wishes, even as handed down by the revisers. Typically, there are two types of residuary beneficiaries: spouses and issue. It is the truly exceptional testator who wants a bequest to a predeceased spouse to pass to *the spouse's* issue, rather than to *the testator's own*.<sup>55</sup> Even the 1990 revisions decline to extend the antilapse statute that far.<sup>56</sup> Bequests to issue, then, are at the heart of this debate. The revisers, however, have excluded from the operation of the 1990 antilapse statute most well-drafted bequests to issue as well.<sup>57</sup>

The competent estate planner's residuary clauses make generous use of "to my issue who survive me, per stirpes," or one of the currently more fashionable variants.<sup>58</sup> Though requiring survival, such a formulation does exactly what the antilapse statute would do—assure equality of treatment among the various lines of succession. Importantly, however, the competent estate planner, unlike the 1990 statute, limits this equality of treatment to those situations where the client *wants* it—typically, in the residuary bequest and in only certain of the pre-residuary bequests. The 1990 revisions have instead made equality of treatment the general rule. The 1990 revisions have therefore offered a solution to a problem that does not exist in competently drafted wills.<sup>59</sup>

For wills not written by competent estate planners, it may be (though I doubt)<sup>60</sup> that the revisers are correct in second-guessing automatic application of the rule. Even if the revisers have accurately divined the intent of testators whose wills are not drafted by competent estate planners, however, the revisers

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55. See French, *supra* note 35, at 357-59.

56. See 1990 UNIF. PROBATE CODE § 2-603(b) (gifts to spouse not included in statute).

57. *Id.* § 2-603(b)(2).

58. See Raymond H. Young, *Meaning of "Issue" and "Descendants,"* 13 ACPC PROB. NOTES 225 (1988); cf. 1990 UNIF. PROBATE CODE § 2-106 (per capita system of representation at each generation for purposes of intestate succession).

59. Professor French seems to admit all this. She writes, "Proper testamentary planning and drafting to provide alternative takers can avoid the problem, but not all lawyers are careful drafters and not all testators consult lawyers." French, *supra* note 35, at 337. She also identifies an antilapse statute's "true function" as "providing a supplemental disposition of property for the testator too careless or too ill-advised to have drawn a complete and unambiguous will." *Id.* at 374.

60. See *supra* pp. 651-52.

have gone much too far in trying to effectuate that intent. They propose to effectuate an unexpressed intent *at the expense* of those who have done everything possible to express their own intent clearly.

Those who hire competent estate planners to formulate wills ought not endlessly receive recall notices. Wills need revision often enough in response to changes in family life. The legislature ought not require revision for such a tiny improvement in faithfulness to the presumed intent of those who have hired no one or no one competent to write their wills. Our statutes should undoubtedly be more "consumer friendly." They should not, however, in the name of an infinitesimal improvement in "consumer friendliness," penalize those who have already paid a high price in time and money to make the current system work.

### CONCLUSION

Estate planners must constantly revise their clients' wills to take into account not only changes in family life but also Congress's most recent revisions to the Internal Revenue Code. Many of us see the latter as never-ending and often misguided. But the changes Congress makes can be extremely important.<sup>61</sup> In comparison, both of the UPC changes this essay discusses are trivial. Conceivably, in some circumstances, some of the revisers' assumptions may be better than those underlying the existing rules. But both changes reverse rules that have governed the drafting of almost every will currently in existence. The tiny improvement in faithfulness to the unexpressed testatorial intent of those who cannot or will not hire a competent estate planner is simply not worth reviewing all currently outstanding wills to determine whether revision is necessary.

In all likelihood, these new rules frustrate, rather than fur-

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61. For example, in 1981, when Congress bloated the unified credit, *see* Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 401(a)(2)(A), 95 Stat. 172, 299 (codified as amended at I.R.C. § 2010(b) (1988)) (amending § 2010 to increase the credit equivalent to \$225,000 in 1982 and providing for further annual increases through 1987, when the credit equivalent reached \$600,000), and removed all quantitative restrictions, *see* Economic Recovery Tax Act § 403(a)(1), 95 Stat. at 301 (codified as amended at I.R.C. § 2056 (a), (c) (1988)), as well as a crucial qualitative restriction on the marital deduction, *see* Economic Recovery Tax Act § 403(d)(1), 95 Stat. at 302-03 (current version at I.R.C. § 2056(b)(7), (8) (1988 & Supp. II 1990)), it was clear that Congress had intended to revolutionize estate planning. That the wills of virtually all married couples needed revision as a result seemed exactly what Congress had in mind.

ther, the unexpressed intent of the "average" testator. There seems to be general agreement with the proposition that, whenever possible, the law should give words the same meaning lay people attribute to them. These changes, however, give the UPC a language all its own. In rejecting ademption, the revisers are forcing estate planners to interpret "I give my car to Bob" as "I give my car to Bob if I still own it at my death or, if I do not still own my car at my death, I give Bob anything with which I have replaced my car, or, if I have disposed of my car but not replaced it, I give Bob cash in the amount of the fair market value of what was once my car, as of the moment of my death." Obviously, the words say nothing of the sort. So how can the revisers claim that their interpretation is more faithful to the unexpressed intent of the "average" testator? Similarly, by rejecting the understanding, commonly held among estate planners, that words of survival render the antilapse statute inapplicable, the revisers force estate planners to interpret "to Bob if he survives me" as "to Bob if he survives me or, if he does not, to his issue who survive me." Here again, the words themselves say very much less. Just how is the "average" testator supposed to figure out the revisers' intent? *Alice in Wonderland* is an amusing little tale, but I do not believe that the Red Queen's use of language is helpful in revising the UPC. Why can't words mean for estate planning purposes exactly what most people think they mean?

The 1990 version of the UPC seems to have a distinctly different agenda for reform than the pre-1990 version. The pre-1990 version was easy to understand and apply, minimized the importance of estate planning esoterica in understanding estate planning documents, and avoided litigation whenever possible. The 1990 version appears to have allowed another goal to dilute, if not supersede, these objectives. The 1990 goal of greater statutory faithfulness to what the revisers imagine is the "average" testator's unexpressed intent has swamped these pre-1990 objectives and led instead to wordiness, complexity, heightened significance for estate planning esoterica, and increased reliance on litigation. As a result of the 1990 revisions, the UPC has, therefore, come, in several distasteful respects, to resemble the Internal Revenue Code.