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THE UPC'S NEW SURVIVORSHIP AND ANTILAPSE PROVISIONS

*Edward C. Halbach, Jr.**
*Lawrence W. Waggoner***

INTRODUCTION

Law governing transfers of family property has long struggled with questions of survivorship in their many and varied forms. Important results can and regularly do turn on how such issues are resolved.

Consider *Janus v. Tarasewicz*.¹ The case arose out of a freakish series of events that began in the Chicago area in 1982. Adam Janus unluckily purchased a bottle of Tylenol capsules that had been laced with cyanide by an unknown perpetrator prior to its sale at retail.² On the evening of September 29, 1982, the day of Adam's death, his brother, Stanley Janus, and Stanley's wife, Theresa Janus, having just returned from their honeymoon, gathered in mourning at Adam's home with other family members. Not yet knowing how Adam died, Stanley and Theresa innocently compounded the tragedy by taking some of the contaminated capsules themselves. Upon their arrival at the intensive care unit of a hospital emergency room, neither showed visible vital signs.³ Hospital personnel never succeeded in establishing any spontaneous blood pressure, pulse, or signs of respiration in Stanley and pronounced him dead.⁴ Hospital personnel did succeed in establishing a measurable, though unsatisfactory, blood pressure in Theresa. Although she had very unstable vital signs, remained in a coma, and had fixed and dilated pupils, she was placed on a mechani-

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¹ 482 N.E.2d 418 (Ill. App. Ct. 1985).

² *Id.* at 419.

³ *Id.* at 419-21.

⁴ *Id.* at 420.

cal respirator and remained on the respirator for two days before she was pronounced dead on October 1, 1982.⁵

Stanley had a \$100,000 life-insurance policy that named Theresa as primary beneficiary and his mother, Alojza Janus, as contingent beneficiary.⁶ The 1953 version of the Uniform Simultaneous Death Act, in force in Illinois, provides that "if [there is no sufficient evidence that the insured and beneficiary have died otherwise than simultaneously], the proceeds of the policy shall be distributed as if the insured had survived the beneficiary."⁷ The court held the act to be inapplicable because a preponderance of the evidence established that Theresa survived Stanley, albeit by only a couple of days.⁸ The result: The proceeds of Stanley's \$100,000 policy did not go to his mother, Alojza, as contingent beneficiary, but to Theresa's father, Jan Tarasewicz, as administrator of her estate.

Another freakish series of events appeared in *Estate of Peters*.⁹ Although Marie and Conrad Peters, wife and husband respectively, were not involved in a common accident, Marie died at 3:50 p.m. on March 23, 1985, and Conrad died about 125 hours and 10 minutes later, at 9:00 p.m. on March 28, 1985.¹⁰ Marie and Conrad had no children by their marriage, but Marie had a son, Joseph Skrók, by a prior marriage.¹¹

⁵ *Id.* at 420-21. Adam, Stanley, and Theresa Janus were three of seven victims who died from taking poisoned Tylenol capsules on Sept. 29, 1982. The killings have never been solved. See Nancy Ryan & John O'Brien, *Tylenol Deaths Leave Legacy of Fear*, DETROIT FREE PRESS, Sept. 30, 1992, at 2A. Similar incidents have followed. One such incident occurred in Takoma, Washington, in 1991. Cyanide-laced Sudafed cold capsules killed two victims and left another in a coma, although she later recovered. Authorities believe that the husband of the woman left in a coma planted the cyanide-laced capsules in local stores in an effort to conceal his attempt to kill his wife. His motive, authorities believe, was to collect on a \$700,000 insurance policy on his wife's life. He had added a \$1.4 million double indemnity provision for accidental death to the policy ten days before she was poisoned. See *Suspect Is Held in Poisonings From Capsules*, N.Y. TIMES, Aug. 25, 1992, at A8.

⁶ *Janus*, 482 N.E.2d at 419.

⁷ ILL. REV. STAT. ch. 110 ½, para. 3-1 (1981).

⁸ *Janus v. Tarasewicz*, 482 N.E.2d 418, 424 (Ill. App. Ct. 1985).

⁹ 526 A.2d 1005 (N.J. 1987).

¹⁰ The times of death are given in an opinion in a lower court. *In re Estate of Peters*, 509 A.2d 797, 805 (N.J. Super. Ct. App. Div. 1986) (Simpson, J., dissenting), *rev'd*, 526 A.2d 1005 (N.J. 1987). The opinions inexplicably refer to the interval between Marie and Conrad's deaths as 126 hours, not as 125 hours and 10 minutes. *In re Estate of Peters*, 526 A.2d 1005, 1006 (N.J. 1987).

¹¹ *Peters*, 509 A.2d at 798.

Marie's will devised¹² her entire estate to Conrad if he survived her (which he did), but if not, to Joseph. Conrad's will devised his entire estate to Marie if she survived him (which she did not), but if not, to Joseph.¹³ The court held, however, that Conrad's will had been defectively executed and that he died intestate.¹⁴ The result: Not only Conrad's property, but Marie's as well (because Marie's will, devising all her property to Conrad if he survived her, was validly executed), escheated to the state of New Jersey; Marie's son, Joseph, whom both Conrad and Marie wished to benefit, took nothing.¹⁵

How would the *Janus* and *Peters* cases be handled under the 1990 version of the Uniform Probate Code ("UPC")? Do these peculiar cases provide a fair test by which to judge the UPC or any other statute? No statute, no matter how deliberative or skillful the drafting process, can be expected to give a satisfactory outcome to every conceivable set of facts that may arise or that can be imagined by fertile minds. Every statute will give a bad result from time to time. The only reasonable test of a new statute is whether it advances the law by giving a satisfactory result in a greater proportion of cases than the law it replaces and whether it does so with a minimum of litigation.

In this Article, we will subject the 1990 UPC's survivorship and antilapse provisions to this test. There are several sections to consider. In numerical order, they are: (1) section 2-104, Requirement that Heir Survive Decedent for 120 Hours; (2) section 2-603, Antilapse; Deceased Devisee; Class Gifts; (3) section 2-702, Requirement of Survival by 120 Hours; (4) section 2-706, Life Insurance; Retirement Plan; Account with POD Designation; Transfer-on-Death Registration; Deceased Beneficiary; and (5) section 2-707, Survivorship with Respect to Future Interests under Terms of a Trust; Substitute Takers.

¹² The word "devise" is used in this Article to refer to testamentary dispositions of personal as well as real property. This terminology is consistent with the definition of the word "devise" in the *Uniform Probate Code* § 1-201. UNIF. PROB. CODE ("U.P.C.") § 1-201 (1991).

¹³ *Peters*, 526 A.2d at 1007.

¹⁴ *Id.* at 1013.

¹⁵ Conrad's estate was valued at about \$60,000. *Peters*, 509 A.2d at 805 (Simpson, J., dissenting). Marie's estate was valued at about \$1,900. Contrary to law, the Surrogate on August 16, 1985, ordered distribution of Marie's estate to Joseph as an intestate estate. Apparently no appeal of the Surrogate's order was filed. *Peters*, 526 A.2d at 1006 n.1.

We propose to divide this Article into two primary segments, one considering sections 2-104 and 2-702,¹⁶ the other considering sections 2-603, 2-706, and 2-707.¹⁷

I. THE 120-HOUR REQUIREMENT OF SURVIVAL—SECTIONS 2-104 AND 2-702

Instances of near-simultaneous deaths, such as those which occurred in *Janus* and *Peters*, would be governed by UPC sections 2-104 and 2-702. These sections work together to change the age-old survivorship rules under which survival by only an instant entitles an heir, devisee, or other beneficiary to succeed to the decedent's property. To be treated as having survived under these sections, the heir, devisee, or beneficiary must be shown by clear and convincing evidence to have survived the decedent by 120 hours.¹⁸ Section 2-104, which applies to intestacy, is a rule of mandatory law, but section 2-702, which applies to wills and other dispositive documents such as life-insurance policies and joint-tenancy deeds, is a rule of construction, or default rule, that yields to a contrary intention.¹⁹

Administration of the old rule of survival by only an instant became troublesome in the earlier part of this century, as vehicular deaths of both driver and passenger started occurring more frequently. Too often, proof of survival, even survival by only an instant, became impossible in such cases. To meet this problem, the Uniform Law Commissioners promulgated the Uniform Simultaneous Death Act ("pre-1991 USDA") in 1940 and amended it in small detail in 1953.²⁰ When proof of this or that event is especially difficult, the law usually responds by establishing presumptions that seem to give sensible results. This approach was followed in the pre-1991 USDA. The pre-1991 USDA's solution to the near-simultaneous deaths problem was to provide that when there was no sufficient evidence that two individuals died otherwise than simultaneously, each individual's property was to be distributed as if he or she survived the other.²¹

¹⁶ See *infra* notes 18-36 and accompanying text.

¹⁷ See *infra* notes 37-205 and accompanying text.

¹⁸ U.P.C. §§ 2-104, 2-107 (1991).

¹⁹ See *infra* note 28 and accompanying text.

²⁰ UNIF. SIMULTANEOUS DEATH ACT ("pre-1991 USDA"), 8A U.L.A. 561 (1983). The USDA was revised again in 1991. UNIF. SIMULTANEOUS DEATH ACT, 8A U.L.A. 315 (Supp. 1992).

²¹ Pre-1991 USDA § 1, 8A U.L.A. 561 (1983). Like UPC § 2-702, the pre-1991 USDA propounded a rule of construction that did not apply if the governing instrument provided otherwise. See pre-1991 USDA § 6, 8A U.L.A. 586 (1983).

In addition to resolving an obvious dilemma, the advantages of this rule were that each individual's property would pass to his or her own relatives rather than to the other individual's relatives and that double administrative costs would be avoided because property would not pass from one estate to another estate. This solution proved very popular and the pre-1991 USDA was enacted in Illinois, the jurisdiction in which the *Janus* case arose, as well as in the District of Columbia and all but three of the other states.²²

By the time the Uniform Law Commissioners promulgated the original UPC in 1969 ("pre-1990 UPC"),²³ it had become clear that the restriction in the USDA to cases in which there was no sufficient evidence that two individuals died otherwise than simultaneously created a problem. Cases similar in principle to *Janus* had started to turn up in which the representative of one or the other of two individuals killed in a common tragedy attempted, sometimes through the use of gruesome medical evidence, to prove that the one he or she represented had in fact survived the other by an instant or two.²⁴ It also came to be recognized that the specific rule of the USDA produces undesirable results even in cases in which it is indisputable that one of the two survived the other, but by only an insubstantial period of time. Illustrative is a situation in which one of the individuals clearly dies at the scene of an accident and the other clearly dies in the ambulance on the way to the hospital, or even a case similar to *Peters* in which the deaths of the two individuals were not caused by a common accident. In these cases too much would turn on minor and fortuitous differences in timing, and the underlying policy of the USDA should be extended to apply to such near-simultaneous deaths as well.

The solution adopted in the pre-1990 UPC was to institute an admittedly but inescapably arbitrary survival requirement of 120 hours. The theory was, in part, that the decedent's intention is better served by limiting devolution to beneficiaries who can hope to derive a *personal* benefit from the property. Because no personal benefit is likely to be derived by a beneficiary who dies within the post-death 120-hour period, the affected property should go to the decedent's own

²² See 8A U.L.A. 316 (Supp. 1992).

²³ References to the "pre-1990 UPC" encompass all earlier versions of the UPC.

²⁴ *E.g.*, In re *Bucci*, 293 N.Y.S.2d 1001 (N.Y. Sur. Ct. 1968) (husband and wife found dead when removed from wreckage of their small airplane, which crashed and burned after having collided in air with large airplane; existence of carbon monoxide in wife's blood found sufficient evidence to establish wife's survival of husband, whose skull was fractured and in whose blood no carbon monoxide was found).

heirs or devisees rather than to the heirs or devisees of the deceased beneficiary. For beneficiaries who survive the 120-hour period, however, the decedent's intention may be served by allowing the property to pass to them, since even in cases of a common accident, a reasonable number of those who stay alive for 120 hours will sufficiently recover from their injuries to gain a personal benefit from the property. Furthermore, a modest period of survival offers at least some possibility that the survivor will have an opportunity to take action by will, codicil, or disclaimer, if desired, to avoid adverse tax consequences or unintended dispositions.²⁵

Neither the result in *Janus* nor that in *Peters* would have been improved under the pre-1990 UPC. Because the pre-1990 UPC as a whole applied mainly to probate transfers, the 120-hour rule was not extended to the full range of transfers covered by the USDA, such as life insurance and joint tenancies, but was limited to intestacy²⁶ and wills.²⁷

The 1990 amendments bring the coverage of the UPC's 120-hour rule into line with that of the USDA. Section 2-104, as before, covers intestacy and propounds a rule of mandatory law. Section 2-702 covers survivorship provisions in the other arrangements, including wills, life-insurance policies, and joint tenancies. This section replaces the former provision applicable only to wills and is, as was the prior section, a rule of construction, or default rule, that yields to a contrary intention.²⁸ Both sections raise the standard of proof.²⁹ They require

²⁵ In cases in which the decedent and survivor are not involved in a common accident, there is no reason in general to believe that the survivor will die before having the opportunity to take action or to benefit personally from the decedent's property. The 120-hour requirement still seemed appropriate, however, because less time might offer inadequate opportunity to take action or an insignificant degree of enjoyment, again recognizing that the time period for such a rule is necessarily an arbitrary one.

²⁶ U.P.C. § 2-104 (1969).

²⁷ *Id.* § 2-601.

²⁸ U.P.C. §§ 2-701, 2-702(d) (1991). With regard to what counts as a contrary intention, §§ 2-701 and 2-702(d) made several intent-effecting improvements over their counterpart in the pre-1990 UPC. Under the pre-1990 counterpart, the 120-hour rule did not apply if "the will of decedent contains some language dealing explicitly with simultaneous deaths or deaths in a common disaster, or requiring that the devisee survive the testator or survive the testator for a stated period in order to take under the will." U.P.C. § 2-601 (1969) (emphasis added).

Under UPC § 2-701, a contrary intention need not appear in the governing instrument, but can be established by a "finding of a contrary intention." U.P.C. § 2-701 (1991). A finding of contrary intention can be based on extrinsic evidence as well as on the terms of the governing instrument.

The pre-1990 UPC standard nullified the 120-hour rule by mere "language . . . requiring that the devisee survive the testator." U.P.C. § 2-601 (1969). This is no longer the case. See U.P.C. § 2-702(d) (1991). Because will forms commonly attach language of survivorship to devises, even though such language is unnecessary because the law of lapse already imposes a

survival by 120 hours to be established by clear and convincing evidence,³⁰ not merely by a preponderance of the evidence. The purpose is to reduce litigation and resolve doubtful cases against survival. Still another feature, added in 1991, was to include in section 1-107 a definition of death in terms of either an irreversible cessation of circulatory and respiratory functions or irreversible cessation of all function of the entire brain, including the brain stem.³¹ The final step in the progression of uniform legislation was taken in 1991, when the Uniform Law Commissioners promulgated a revised USDA that incorporates these features of the 1990 UPC.³²

Returning now to the *Janus* and *Peters* cases under the 1990 UPC, it is clear that the result in *Janus* would be cut-and-dried. At most,

requirement of survival, the result of the pre-1990 UPC was that the 120-hour rule seldom applied. The 1990 change would remove an obstacle to the application of the 120-hour rule in both *Janus* and *Peters* (language of survivorship was present in the governing instrument in each case) and would reverse the result in cases such as *In re Estate of Kerlee*, 557 P.2d 599 (Idaho 1976), where the court held under the pre-1990 UPC that the 120-hour rule was nullified by Ira Kerlee's will that devised property to his sister, Margaret Fogg, and provided that "if [she] does not survive me," the property was to go to the North Idaho Children's Home. *Id.* at 600. Although Margaret only survived Ira by 74 hours, the court held that her devise did not lapse. *Id.* at 601.

Also under UPC § 2-702(d), "language dealing explicitly with simultaneous deaths or deaths in a common disaster" no longer nullifies the 120-hour rule unless the language is "operable under the facts of the case." U.P.C. § 2-702(d) (1991). This would reverse the result in cases such as *Estate of Acord*, 946 F.2d 1473 (9th Cir. 1991), where the pre-1990 UPC's 120-hour rule was nullified by Claud Acord's will that devised property to his wife, Jean Acord, and provided that "[if she] dies before I do, at the same time that I do, or under such circumstances as to make it doubtful who died first," the property was to go to Claud's brother and his nephews and niece. *Id.* at 1474. The court held, under the pre-1990 UPC, that the quoted language nullified the 120-hour rule, even though the language was inoperable under the facts of the case because Jean survived Claud by 38 hours. *Id.* at 1475. The result was that the devise was included in Jean's estate, costing her estate an additional \$150,000 in federal estate taxes. The opinion does not make it clear whether the additional cost to Jean's estate was offset by the fact that the holding presumably qualified Claud's devise to Jean for the federal estate tax marital deduction in his estate.

In certain circumstances, the requirement that language dealing with simultaneous deaths or deaths in a common disaster must be "operable under the facts of the case" in order to nullify the 120-hour rule can save a drafting attorney from malpractice liability. U.P.C. § 2-702(d)(1) (1991). See Martin D. Begleiter, *Article II of the Uniform Probate Code and the Malpractice Revolution*, 59 TENN. L. REV. 101, 123-24 (1991).

²⁹ U.P.C. §§ 2-104, 2-702 (1991).

³⁰ Under UPC § 1-107, as amended in 1991, "[i]n the absence of evidence disputing the time of death stated on a [death certificate], a [death certificate] that states a time of death 120 hours or more after the time of death of another individual, however the time of death of the other individual is determined, establishes by clear and convincing evidence that the individual survived the other individual by 120 hours." U.P.C. § 1-107 (1991) (emphasis added).

³¹ This is the definition of death contained in the Uniform Determination of Death Act. UNIF. DETERMINATION OF DEATH ACT § 1, 12 U.L.A. 340 (Supp. 1992).

³² See UNIF. SIMULTANEOUS DEATH ACT ("USDA"), 8A U.L.A. 315 (Supp. 1992).

Theresa only survived Stanley by around 48 hours, far short of the required 120 hours. Section 2-702 would therefore treat Theresa as having predeceased Stanley, and the proceeds of Stanley's life-insurance policy would go to Stanley's mother as contingent beneficiary. The result is more sensible than the result in *Janus* itself, which was decided under the pre-1991 USDA, and the result would be reached without litigation.

For the *Peters* case, the story is different. In *Peters*, Conrad survived Marie by slightly more than 120 hours. Conrad would therefore succeed to Marie's property as primary devisee under her will, as he did in the case itself. Section 2-702 would not change that part of the result. Such cases are inevitable, however, whenever a statute selects an arbitrary period of survival. If the statute required survival by 30 days, cases could show up or be hypothesized in which remarkably different results would follow from survival for slightly more or slightly less than the 30-day period. The statutory survival period of 120 hours was chosen because that is the period that must elapse after the decedent's death in order to begin an informal probate³³ and because the period seems sufficient to clear away most cases of near-simultaneous deaths but not so long as to interfere with the ability to distribute property and to clear titles under the survivorship provisions of joint tenancies and so on. The risk of cases involving slightly more or slightly less than that period is a tolerable price to pay for the improved result in a great number of near-simultaneous death cases like *Janus*.

Although *Peters* is a case of survival by slightly over the 120-hour period, an increase in the required period of survival would still not resolve the case satisfactorily. To be sure, such an extension of the statutory period would allow Marie's son, Joseph, not Conrad, to have succeeded to Marie's property. But Joseph still would not have succeeded to Conrad's property; it was not the survivorship rule that prevented Joseph from succeeding to Conrad's property, but the rule of strict compliance with the execution formalities for a valid will.³⁴ Although the two intended witnesses witnessed Conrad acknowledge his signature, neither was asked to sign the will as a witness and—contrary to the will execution statute—neither did.³⁵ The failure of the witnesses to sign was not discovered until after Conrad's death, fifteen months later. After Conrad signed and the witnesses

³³ See U.P.C. §§ 3-302, 3-307 (1991).

³⁴ *In re Estate of Peters*, 526 A.2d 1005, 1013 (N.J. 1987).

³⁵ Two other persons witnessed Conrad sign his will, but neither of them signed as witnesses. *Id.* at 1007.

witnessed, the will was folded up and handed to Marie, who apparently put it someplace for safekeeping thinking that all necessary steps had been taken. The solution in *Peters*, then, lies in section 2-503, the dispensing-power section added to the UPC in 1990. That is the section that authorizes defects in compliance with will formalities to be excused if the proponent of the will can establish by clear and convincing evidence that the decedent intended the document to constitute his or her will.³⁶ Under that section, Conrad's will most likely would have been upheld and both Marie and Conrad's property would have gone to Joseph, as intended.

II. ANTILAPSE AND RELATED PROVISIONS—SECTIONS 2-603, 2-706, AND 2-707

In the *Janus* and *Peters* cases, the governing instruments expressly provided for an alternative taker. Had Theresa Janus's failure to survive her husband by 120 hours led to her being deemed to have predeceased him,³⁷ the alternative beneficiary designation in Stanley's \$100,000 life-insurance policy in favor of his mother would have taken effect. Had Conrad Peters failed to survive his wife by 120 hours and had this led to his being deemed to have predeceased her,³⁸ the alternative devise in Marie's will in favor of her son would have taken effect.

What happens if no alternative taker is named or if the alternative taker also predeceases the transferor? Resolution of these issues is partly the function of the antilapse statute. Antilapse statutes serve an extremely important function in the law, for they give effect to strong human impulses in some cases and, in others, to what are perceived as highly probable intentions. They prevent unintended disinheritance of one or more lines of descent, by presumptively creating an alternative or substitute gift in favor of the descendants of certain of the decedent's predeceased relatives.³⁹

³⁶ U.P.C. § 2-503 (1991).

³⁷ Under the pre-1990 UPC, the language in Stanley's life-insurance policy that required the beneficiary, Theresa Janus, to survive him would have nullified the 120-hour rule even if that rule had been extended to life insurance. Under the 1990 UPC, however, mere language of survivorship no longer nullifies the 120-hour rule. *See supra* note 28.

³⁸ Because Conrad's will contained language requiring the devisee, Marie Peters, to survive him, the 120-hour rule would have been nullified under the pre-1990 UPC but not under the 1990 UPC. *See supra* note 28.

³⁹ Under the 1990 UPC, the protected relatives are the decedent's grandparents, descendants of the decedent's grandparents, and stepchildren of the decedent. *See* U.P.C. §§ 2-603(b), 2-706(b) (1991). The protected relatives under the pre-1990 UPC were the decedent's grandparents and descendants of the decedent's grandparents. *See* U.P.C. § 2-605 (1969).

Although antilapse statutes traditionally apply only to wills, the 1990 UPC extends the antilapse idea to will substitutes, such as life-insurance policies, and to future interests under a trust. We start, however, with the UPC's antilapse statute applicable only to wills—section 2-603.

A. Antilapse—Section 2-603

The rule of lapse is a common-law rule that automatically conditions all devises on survival of the testator. The lapse rule is based on the dual notions that a will transfers property at the testator's death, not when the will was executed, and that property cannot be transferred to a deceased person. A purported devise to a devisee who predeceases the testator fails (lapses); the devised property does not pass to the devisee's estate, to be distributed according to the devisee's will or to pass by intestate succession from the devisee. Also, as we have seen, 1990 UPC section 2-702 modifies the rule of lapse by presumptively conditioning devises on a 120-hour period of survival.⁴⁰

If a devise lapses, what happens to it? As noted above, the governing instruments in the *Janus* and *Peters* cases expressly designated an alternative taker, each of whom survived the decedent. If no alternative taker is named or survives the decedent, the devolution of a lapsed devise (in the absence of an antilapse statute) depends on whether the lapse occurred in the residuary clause or in a nonresiduary clause and on whether the clause created or did not create a class gift. If a class member predeceases the decedent, the share that he or she would have taken goes to the class members who survive the decedent.⁴¹ If a devisee of a non-class gift or if all the class members of a class gift predecease the decedent, the lapsed devise passes under the residuary clause or if the lapse occurred in the residuary it passes to the decedent's heirs by intestacy.⁴²

⁴⁰ In effect, the requirement of survival of the testator's death means survival of the 120-hour period following the testator's death. This is because, under § 2-702(a), "an individual who is not established to have survived an event . . . by 120 hours is deemed to have predeceased the event." U.P.C. § 2-702(a) (1991). As made clear by § 2-603(a)(6), for the purposes of § 2-603, the "event" to which § 2-702(a) relates is the testator's death.

⁴¹ See generally LAWRENCE W. WAGGONER, ET AL., FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 343-45 (1991) [hereinafter FAMILY PROPERTY LAW] (charting antilapse statutes by state).

⁴² *Id.* at 334-35. Under UPC § 2-604, the share of a predeceased residuary devisee does not pass by intestacy if there are other residuary devisees who survive the testator by 120 hours, even if the residuary clause does not create a class gift. U.P.C. § 2-604 (1991); FAMILY PROPERTY LAW, *supra* note 41, at 335.

Although statutes such as section 2-603 are commonly called "antilapse" statutes, the label is somewhat misleading. Contrary to what the label implies, antilapse statutes do not reverse the common-law rule of lapse because they do not abrogate the law-imposed condition of survivorship. Antilapse statutes do not direct the devised property to the estates of predeceasing devisees. What the statutes actually do is modify the devolution of lapsed devises by providing a statutory substitute gift in the case of specified relatives. Section 2-603 follows the norm⁴³ by creating the statutory substitute gift in the deceased devisee's descendants,⁴⁴ modified by the 120-hour rule.⁴⁵ Under section 2-603, the devisee's descendants who survive the testator by 120 hours take the property to which the devisee would have been entitled had the devisee survived the testator by 120 hours. If the devisee leaves no descendants who survive the testator by 120 hours, the antilapse statute does not operate and the lapsed devise passes under the ordinary devolution rules described above.

1. Overall Rationale of Section 2-603

The dominant force driving the 1990 revisions of the UPC's antilapse statute is the rationale, alluded to above, that common dispositive preferences instinctively favor representation among different lines of descent. When a deceased child leaves children or more remote descendants, most parents would not want to disinherit that child's line of descent. From the earliest of times, this human instinct has been embedded in the patterns of distribution in intestacy, under which descendants take by representation.⁴⁶ The same instinct explains the parallel and prevalent use of multiple-generation class gifts (class gifts to "issue" or "descendants") in private documents such as

⁴³ See FAMILY PROPERTY LAW, *supra* note 41, at 348-49.

⁴⁴ The devisee's descendants include adopted persons and children of unmarried parents to the extent they would inherit from the devisee. See U.P.C. §§ 1-201 and 2-114 (1991).

The statutory substitute gift is divided among the devisee's descendants "by representation," a term defined in § 2-709(b). *Id.* § 2-709(b).

⁴⁵ The 120-hour survival requirement stated in § 2-702 does not require descendants who would be substituted for their parent by § 2-603 to survive *their parent* by any set period. *Id.* § 2-702 (1991).

⁴⁶ The idea of descendants taking by representation is traceable to the common-law canons of descent, under which the child of an eldest son who predeceased his father took in preference to the father's second child, and to the English Statute of Distribution, 1670, 22 & 23 Car. 2, ch. 10, § V (Eng.), which provided: "[A]nd all the residue by equal portions, to and amongst the children of such persons dying intestate, and such persons as legally represent such children, in case any of the said children be then dead . . ." *Id.*

wills and trusts,⁴⁷ and supplies the rationale for the antilapse statutes such as section 2-603.⁴⁸

(a) *Clearly Expressing a Contrary Intention*

For those testators who do not wish the descendants of a deceased devisee to be substituted for the devisee, clear avenues for avoiding

⁴⁷ Because multiple-generation class gifts contain within themselves the idea of representation, under which a deceased class member's descendants are substituted for him or her, § 2-603 is inapplicable to these types of class gifts. See U.P.C. § 2-603(b)(2) (1991).

⁴⁸ The instinctive preference for representation among descendants is also recognized in other corners of trusts and estates law. An example comes from the important recent case of *Dewire v. Haveles*, 534 N.E.2d 782 (Mass. 1989). Thomas A. Dewire died in 1941, leaving a will that placed substantially all of his estate into a residuary trust. *Id.* at 783. The income from the trust was first payable to his widow for life, then to his son, Thomas, Jr., and Thomas, Jr.'s widow and children. *Id.* at 783-84. Thomas, Jr. died in 1978, a widower, survived by his six children (Thomas's grandchildren). *Id.* at 784. The specific terms of the trust regarding the payment of income to Thomas's grandchildren provided at one point that "my grandchildren . . . shall share equally in the net income of my estate" and at another point that the income shall be "divided equally amongst my grandchildren." *Id.*

When one of the grandchildren, Thomas III, died in 1987, a question arose regarding the future distribution of the one-sixth share of income that he had been receiving. Thomas III was not only survived by his five brothers and sisters (the other five grandchildren), but also by his widow and child, Jennifer.

As the court acknowledged, the traditional rule of construction in the case of a gift of income for life to the members of a class, when the corpus of the trust is payable upon the death of the last living class member, is that the class members take as joint tenants with rights of survivorship. *Id.* That is to say, that there is a cross remainder over to the surviving class members of the share of income of a deceased class member. Applied to the *Dewire* case, the traditional rule of construction would give Thomas III's one-sixth share of income to his five brothers and sisters.

The court, however, awarded Thomas III's one-sixth share of the income to his child, Jennifer. *Id.* at 785. The court's theory was that the traditional rule of construction was rebutted by particular features of the will itself. However, the court also signalled that it would be sympathetic in a future case to replacing the traditional rule of construction with "a rule based on principles similar to those expressed in the antilapse statute." *Id.* (footnote omitted). In a footnote, the court amplified the point:

The policy underlying [the antilapse statute] might fairly be seen as supporting, as a rule of construction (absent a contrary intent), the substitution of a class member's surviving issue for a deceased class member if the class is made up of children or other relations of the testator. It has been suggested that "[t]he policy of [antilapse] statutes [dealing with the death of a class member after the testator's death] commends itself to decisional law." If the antilapse statute protects the interests of the issue of a relation who predeceases a testator, there is good reason why we should adopt, as a rule of construction, the same principle as to a relation of a testator who survives the testator but dies before an interest comes into possession. In the case of a class gift of income from a trust, the interest could be viewed as coming into possession on each income distribution date.

Id. at 785 n.5 (quoting RESTATEMENT (SECOND) OF PROPERTY (Donative Transfers) § 27.3 cmt. i (Tentative Draft No. 9 (1986))).

the statute are suggested in the official comments to section 2-603.⁴⁹ One method cited is to add to a devise the phrase "and not to [the devisee's] descendants."⁵⁰ Another, for nonresiduary devises, is to add to the residuary clause the phrase "including all lapsed or failed devises."⁵¹ Still another is to add a separate sentence or clause stating that all lapsed or failed nonresiduary devises are to pass under the residuary clause.⁵² And, finally, although not mentioned in the comments, a simple provision stating directly that the antilapse statute is not to be applicable to a particular devise or group of devises, or to any devise in the will, would constitute a clear statement of contrary intention. In addition, as we shall see,⁵³ the statute provides that, when a devise fails, an alternative disposition expressed in the will is entitled to priority over the statute's substitute gift to the original devisee's descendants.

Conversations between attorneys and their clients should routinely include discussion of survivorship and antilapse issues. The client should be told that a state statute provides that, should a protected relative (in a UPC state, the client's stepchildren, grandparents, and descendants of a grandparent) fail to survive the client (by 120 hours, in a UPC state or revised USDA state), the devisee's descendants will be substituted for the devisee. Discussing the antilapse statute not only informs the client about the statute's existence but also forces the client as well as the lawyer to consider seriously the possibility that a devisee might die first. Especially in the case of devisees in a

⁴⁹ Official comments to uniform acts are generally seen as reflecting the legislative intent of enacting states, unless the language in the enacting state deviates from the statutory text of the uniform act or the enacting state gives some contrary expression of legislative intent. *See, e.g., Estate of Acord v. Commissioner*, 946 F.2d 1473, 1474 (9th Cir. 1991) ("Because there is no other expression of the intent of the Arizona legislation, we assume, as the parties do, that the [Arizona enactment of the pre-1990 UPC] was meant to serve [the purposes stated in the official comments]."); *Tompkins State Bank v. Niles*, 537 N.E.2d 274, 283 (Ill. 1989) ("The official comments to the Uniform Act do not, of course, have the force of statutory language, but are a permissible and typically persuasive aid in determining legislative intent. Courts may assume that the legislature adopted the legislation with the same intent evidenced by the official comments unless the language in the adopting statute unambiguously indicates the contrary.") (citation omitted).

⁵⁰ U.P.C. § 2-603 cmt. (1991) (Contrary Intention—the Rationale of Subsection (b)(3)). The rebuttal phrase could be made even more specific by stating "and not to [the devisee's] descendants if the devisee fails to survive me by 120 hours."

In the case of a power of appointment, the phrase "and not to an appointee's descendants," (perhaps also adding "if the appointee fails to survive the donee by 120 hours,") can be inserted by the donor of the power into the document creating the power of appointment, if the donor does not want the antilapse statute to apply to an appointment under a power. *Id.*

⁵¹ *See id.* § 2-603(a)(1), (b)(4) & cmt., ex. 3 (1991).

⁵² *See id.* § 2-603(a)(1), (b)(4) (1991).

⁵³ *See infra* II.A.1(d).

younger generation who might be twenty-five or so years the client's junior (in the case of children or nieces or nephews), or even fifty or more years younger (in the case of grandchildren, for example), this is a possibility that lay testators might not otherwise seriously consider.

The attorney's practice in drafting should be to avoid application of the statute, whether or not the statutory result is desired, and to avoid controversy in the process. Thus, the client interview should lead to insertion of an appropriate substitute devise in the will, even when the client wants a substitution of descendants. For clients who do not want substitution of descendants, attorneys should use specific rebuttal language, such as one of the phrases described above⁶⁴ or in the UPC comments,⁶⁵ at least for devises to the close relatives covered by the statute. Even if the statute is not initially discussed with the client, some reference in the will to "lapsed devises" or to the "antilapse statute" would tend to prompt the client to inquire about what that language means, or the use of "and not to the devisee's descendants" would tend to induce the client to consider more carefully the possibility that the devisee will predecease leaving surviving descendants and to decide whether those descendants should or should not be substituted.

Thus, considerable benefit accrues from the use of specific rebuttal language when that is the intention. Its use provides objective evidence to assure that a conversation of the above nature took place, with the client deciding against substitution of descendants, or at least assuring that the client had been put on notice either that the will expressly excludes devisees' descendants or that he or she should inquire about the references to "lapsed devises" or the "antilapse statute."

(b) Words of Survivorship as Contrary Intention?

What about words of survivorship, such as in a devise "to my daughter, A, if she survives me" or "to my surviving children"? Do or should they, by themselves, automatically defeat the antilapse statute? This is perhaps the most-litigated question, and almost certainly the most troubling issue, under antilapse statutes.

Many lawyers seem to believe that attaching words of survivorship to a devise is a foolproof method of defeating an antilapse statute.

⁶⁴ See *supra* notes 50-52 and accompanying text.

⁶⁵ U.P.C. § 2-603 cmt. (1991).

But the insertion of words of survivorship provides neither objective evidence that a conversation about the antilapse statute took place nor even objective evidence that the client was put on notice to think seriously about the possibility of nonsurvival or to inquire about the meaning of expressions such as "lapsed devisees" or "antilapse statute."⁵⁶ Moreover, the belief that words of survivorship automatically defeat antilapse statutes is mistaken. The very fact that the question is litigated so frequently is itself evidence (and warning to the alert estate planner) that the use of mere words of survivorship is far from foolproof, regardless of the outcome of the cases.⁵⁷ In addition, the results of the litigated cases are divided on the question. To be sure, most cases hold that mere words of survivorship do automatically or presumptively defeat the antilapse statute.⁵⁸ Some cases, however, reach an opposite conclusion, seemingly motivated by the understandable goal of avoiding the omission of family lines, especially when the survivorship language is associated with a set of alternative devisees or when the decision can be attributed to alleged peculiarities of the case.⁵⁹

⁵⁶ Under UPC § 2-603, a finding of contrary intention can be based on extrinsic evidence as well as on provisions of the will. *Id.* § 2-603 (1991). Thus, an attorney who used words of survivorship to express a client's decision against substitution of descendants can testify and introduce documentary evidence to that effect. *See id.* § 2-603 cmt., ex. 1 (1991) (for a full examination of this example, see *infra* note 61). Opening rebuttal of the antilapse statute to extrinsic evidence will not necessarily increase litigation. More likely, it will replace existing litigation with a more intent-effectuating inquiry.

⁵⁷ To one degree or another, all the cases cited *infra* notes 58-92 and accompanying text involved the question of whether or to what extent words of survivorship defeat the antilapse statute in question.

It may also be noted that not all lawyers think that words of survivorship automatically bar antilapse statutes. At a recent meeting of a subcommittee of the Michigan State Bar Association's Probate and Estate Planning Section charged with studying UPC Article II, Professor Waggoner went out of his way to make sure that the other members of the subcommittee understood that mere words of survivorship did not bar UPC § 2-603. No one blinked an eye, and those who spoke said that they already understood that language of survivorship is unreliable as a means of barring the current Michigan antilapse statute.

⁵⁸ *E.g.*, *In re Estate of Stroble*, 636 P.2d 236 (Kan. Ct. App. 1981). Other cases are collected in C.C. Marvel, Annotation, *Testator's Intention as Defeating Operation of Antilapse Statute*, 63 A.L.R.2d 1172, 1186-87 (1959); P.M. Dwyer, Annotation, *Intention of Testator as Defeating Operation of Statute to Prevent Lapses*, 92 A.L.R. 846, 857 (1934).

⁵⁹ *E.g.*, *Schneller v. Schneller*, 190 N.E. 121 (Ill. 1934); *In re Estate of Bulger*, 586 N.E.2d 673 (Ill. App. Ct. 1991); *Detzel v. Nieberding*, 219 N.E.2d 327 (Ohio P. Ct. 1966); *Estate of Kehler*, 411 A.2d 748 (Pa. 1980); *Henderson v. Parker*, 728 S.W.2d 768 (Tex. 1987). *See also* Susan F. French, *Antilapse Statutes are Blunt Instruments: A Blueprint for Reform*, 37 HASTINGS L.J. 335, 347-49 (1985) (examining history and problems with antilapse statutes and proposing a new statute).

Compare *Galloupe v. Blake*, 142 N.E. 818 (Mass. 1924); *In re Estate of Ulrikson*, 290 N.W.2d 757 (Minn. 1980); *In re Estate of Burns*, 100 N.W.2d 399 (S.D. 1960); *In re Estate of Allmond*, 520 P.2d 1388 (Wash. Ct. App. 1974). These cases involve multiple devisees with alternative

In reshaping UPC section 2-603, the decision was made to legislate a preferred answer to the question, thus imposing the burden of case-

gifts to the survivors, none of whom outlived their respective testators with the result that antilapse act substitute gifts were given effect. See *infra* notes 75-92 and accompanying text.

In the *Kehler* case in which the devise was to the testator's four named siblings or the survivor(s), the descendants of a deceased sibling were allowed to take under the antilapse statute along with the three surviving siblings, emphasizing that "a 'contrary intent' must appear with reasonable certainty." *Kehler*, 411 A.2d at 750.

In the *Detzel* case the devise was to the testator's sister "provided she be living at the time of my death," with no alternative devise. *Detzel*, 219 N.E.2d at 329. The sister predeceased the testator, leaving a daughter who survived him and who was allowed to take under the statute. The court reasoned that "antilapse statutes are remedial" and entitled to "liberal construction." *Id.* at 332. "To prevent operation of the Ohio antilapse statute," the opinion continued, "it is necessary that the testator, in apt language, make an alternative provision" giving a substitute devise to "named or identifiable devisee or devisees." *Id.* at 336. Several subsequent lower-court cases in Ohio have distinguished, disagreed with, or not followed *Detzel*. See *Cowgill v. Faulconer*, 385 N.E.2d 327, 330 (Ohio C.P. P. Div. 1978) (holding, without discussing *Detzel*, that the statute did not apply to a class gift because "the testatrix has expressly denied its application by" limiting the class "to those 'who survive me'"); *Shalkhauser v. Beach*, 233 N.E.2d 527, 529-30 (Ohio P. Ct. 1968) (stating "words of survivorship are usually sufficient to indicate an intent that the statute not apply" and that *Detzel* is "clearly and completely erroneous") (emphasis added); *Day v. Brooks*, 224 N.E.2d 557 (Ohio P. Ct. 1967) (distinguishing *Detzel* on ground it involved a single devisee). Although antilapse statutes certainly do yield to "sufficient expression of [contrary] intention," *Tootle v. Tootle*, 490 N.E.2d 878, 882 (Ohio 1986), the Ohio Supreme Court in *Dollar Sav. & Trust Co. v. Turner*, 529 N.E.2d 1261 (Ohio 1988), recently (in dealing with a quite different issue) reiterated that the statute is "remedial in nature and [is] to be liberally construed." *Id.* at 1264. One commentator has described *Detzel* as a "decision [that] seems correct." See French, *supra*, at 349.

Judicial support for the remedial objectives of antilapse statutes, and the extent to which courts may go to avoid finding intention contrary to these statutes is further illustrated in the *Schneller* and *Henderson* cases each relating language of survivorship ("survivors or survivor" and "surviving children" respectively) to the date of the will's execution rather than to the time of the testator's death in order to allow descendants of deceased devisees to share with surviving devisees through the substitute gifts supplied by antilapse legislation. *Schneller*, 190 N.E. 121; *Henderson*, 728 S.W.2d 768.

The contention that estate planners have justifiably relied on words of survivorship to express intent contrary to an antilapse statute is further undermined by the ability of "protectively" motivated courts to find some unique language or circumstances to suggest that words of survivorship in the particular case do not sufficiently evidence the alleged contrary intent. This was a factor, for example, in *Henderson*. *Henderson*, 728 S.W.2d 768. Also, for an illustration of the close calls and litigation costs that may occur on this basis even in a jurisdiction in which words of survivorship usually bar application of an antilapse statute, see the three-judge dissent in *In re Estate of Price*, 454 P.2d 411, 416 (Wash. 1969) (en banc) (Finley, J., dissenting) ("where there is room for construction, 'that meaning will be adopted which favors those who would inherit under the intestate laws'") (citing *In re Estate of Levas*, 206 P.2d 482, 486 (Wash. 1949) (en banc)). The *Second Restatement of Property* also adopts this approach. Although § 25.1 cmt. d, illus. 8 accepts the idea that language of survival such as "to the children of [the testator's] daughter who survive [the testator]" bars application of the antilapse statute, § 27.2 cmt. f, illus. 5 states: "In the absence of additional facts or circumstances that indicate otherwise, the word 'surviving' in [the case of a class gift 'to my surviving children in equal shares'] should mean surviving on the date [the testator's] will is executed so as to leave as much room as possible for the operation of the antilapse statute." RESTATEMENT (SECOND) OF

by-case adjudication on those who would seek to deny the statutory protection rather than on those who would assert it. Accordingly, the position adopted was that mere words of survivorship, by themselves, do not defeat the substitute gift created for protected descendants by the antilapse statute.⁶⁰ To render the statute inapplicable to a devise that would otherwise be covered, there must be additional evidence within or outside the will that the testator intended the words of survivorship to do so.⁶¹

In the case of a lawyer-drawn will, for example, extrinsic evidence could establish that the lawyer discussed the question with the client and that it was decided that; if a child should die before the client, the descendants of the deceased child should not take the devise in his or her place. If this were to be established, then the combination of the words of survivorship and the extrinsic evidence of the client's intention would support a finding of a contrary intent under section

PROPERTY (Donative Transfers) §§ 25.1 cmt. d, illus. 8, 27.2 cmt. f, illus. 5 (1987), *but cf. id.* § 27.1 cmt. e, illus. 6. (insertion of the word "survival" overcomes use of antilapse statute).

Also compare the situations examined and the cases cited, as well as the questionable significance of words of survivorship, in the discussion of future interests. *See* discussion *infra* part II.C.2.

⁶⁰ U.P.C. § 2-603(b)(3) (1991). As noted in French, *supra* note 59, at 369: "Courts have tended to accord too much significance to survival requirements when deciding whether to apply antilapse statutes." (footnote omitted).

⁶¹ The comment to § 2-603 illustrates this point in the following example:

Example 1. G's will devised "\$10,000 to my surviving children." G had two children, A and B. A predeceased G, leaving a child, X, who survived G by 120 hours. B also survived G by 120 hours.

Solution: Under subsection (b)(2), X takes \$5,000 and B takes \$5,000. The substitute gift to A's descendant, X, is not defeated by the fact that the devise is a class gift nor, under subsection (b)(3), is it automatically defeated by the fact that the word "surviving" is used.

Note that subsection (b)(3) provides that words of survivorship are not by themselves to be taken as expressing a contrary intention for purposes of Section 2-601. Under Section 2-601, a finding of a contrary intention could appropriately be based on affirmative evidence that G deliberately used the words of survivorship to defeat the antilapse statute. In the case of such a finding, B would take the full \$10,000 devise. Relevant evidence tending to support such a finding might be a pre-execution letter or memorandum to G from G's attorney stating that G's attorney used the word "surviving" for the purpose of assuring that if one of G's children were to predecease G, that child's descendants would not take the predeceased child's share under any statute or rule of law.

U.P.C. § 2-603 cmt., ex. 1 (1991).

Assuming that A was living when G's will was executed, § 2-603's solution to example one is supported by the *Restatement*. RESTATEMENT (SECOND) OF PROPERTY (Donative Transfers) § 27.2 cmt. f, illus. 5 (1987), *but cf. id.* § 27.1, cmt. e, illus. 6. ("surviving" overcomes antilapse statute unless additional language or circumstances indicate that "surviving" refers to some date prior to the date the dispositive instrument is executed). Example one is also supported to some extent by *Henderson v. Parker*, 728 S.W.2d 768 (Tex. 1987). There are cases to the contrary. *See, e.g., Price*, 454 P.2d 411 (6-to-3 decision).

2-601. For this reason, sections 2-601 and 2-603 work together to safeguard lawyers from malpractice liability. The success of a malpractice claim depends upon sufficient evidence of a client's intention and the lawyer's failure to carry out that intention. In a case in which there is evidence that the client did not want the antilapse statute to apply, that evidence would support a finding of a contrary intention under section 2-601. This prevents the client's intention from being defeated by section 2-603 and thereby protects the lawyer from liability for the amount that, in the absence of a finding of contrary intention, would have passed under the antilapse statute to a deceased devisee's descendants.⁹²

⁹² U.P.C. § 2-603 cmt. (1991). In a recent article, Professor Begleiter has questioned the conclusion stated in this comment. See Begleiter, *supra* note 28, at 126-30. Professor Begleiter served as the ABA Advisor to the Drafting Committee to Revise Article II of the Uniform Probate Code and attended the Drafting Committee meetings. In his Article, Professor Begleiter argues that the UPC's antilapse statute will cause an increase in malpractice litigation and probably in liability as well. *Id.*

We believe there are several responses to Professor Begleiter's contention. Professor Begleiter first argues that many lawyers, relying on the belief that survival language is a foolproof means of barring the antilapse statute, use that type of language in their forms for that purpose. *Id.* at 127. We have already responded to that point. See *supra* notes 56-59 and accompanying text.

Professor Begleiter's second point is that courts are unlikely to follow the official comments to UPC § 2-601 and allow extrinsic evidence to show that the client intended survival language to bar the antilapse statute, and even more unlikely to allow evidence of the client's direct declarations of intention on that point, whereas that type of evidence is admissible in malpractice actions. Begleiter, *supra* note 28, at 129. His argument is based on the fact that UPC § 2-601 itself does not state that extrinsic evidence is admissible to establish a finding of a contrary intention; only the comment to § 2-601 states that. *Id.* In point of fact, the comments to both UPC §§ 2-601 and 2-603 state that extrinsic evidence is admissible on the question of whether the client intended survival language to bar the antilapse statute. We doubt that courts will disregard the statements in the official comments to both UPC §§ 2-601 and 2-603. This is especially so in the light of the authorities cited. See *supra* note 49 (discussing cases holding that official comments to uniform acts are generally seen as reflecting the legislative intent of the enacting state).

Regarding the admissibility of the client's direct declarations of intention, Professor Begleiter relies on the view that, in resolving ambiguities in a will, direct declarations of intention are not admissible unless the ambiguity constitutes an equivocation. Begleiter, *supra* note 28, at 129. Although this rule generally prevails in cases of ambiguity, there is authority that even if the client's direct declarations of intention to the drafting attorney are inadmissible, evidence of the other side of the conversation—what the drafting attorney advised and told the client—is admissible. See, e.g., *Virginia Nat'l Bank v. United States*, 443 F.2d 1030, 1034 (4th Cir. 1971).

In an antilapse case, the key testimony is likely to come from the drafting attorney's side of the conversation, for it would be the drafting attorney who would have told the client that the survival language was placed in the will to make sure that there would be no substitution of descendants if the devisee dies before the client. If the drafting attorney so testifies, and the will contains the survival language, it would be reasonable to infer that the client acquiesced even if the attorney's testimony that the client did acquiesce is not admissible. Moreover, it is not clear that evidence of the client's side of the conversation is inadmissible. See, e.g., *In re Estate of Smith*, 580 P.2d 754 (Ariz. Ct. App. 1978) (holding that drafting attorney's affidavit as

(c) *Words of Survivorship: Rationale for UPC Position*

Being remedial in nature and intended to preserve the probable wishes of testators to allow representation among descendants or other closely related lines of succession, the antilapse statute should be given the widest reasonable chance to operate. It should therefore be defeated only by a reliable finding that the decedent actually intended a result inconsistent with the statutory substitute gift to the descendants of an eligible, deceased devisee. Accordingly, the framers of the 1990 UPC decided that mere words of survivorship should not, by themselves, be treated as sufficient evidence to contradict the testamentary objectives attributed to decedents by the substitute gift supplied in the statute. Because of the inherent difficulty of this issue, the decision was a controversial one among the framers and was reached only after extensive deliberation. The reasoning is thus worth reviewing at this point.

Words in a will requiring survivorship might very well be no more than a casual duplication of the survivorship requirement imposed by the rule of lapse, with no independent purpose. Thus, they are not

to both sides of his conversations with the client regarding the client's intention was admissible).

In any event, these authorities deal with the admissibility of direct declarations of intention in ambiguity cases, not in cases in which rebuttal of a rule of construction is at issue or in which the purpose for which particular language was inserted is at issue. On these points, see RESTATEMENT (SECOND) OF PROPERTY (Donative Transfers) reporter's note at 4-5 (1987) (stating and citing authority that the donor's direct declarations of intention are admissible in determining whether a rule of construction is rebutted); *Motes/Henes Trust v. Motes*, 761 S.W.2d 938 (Ark. 1988) (considering testimony of drafting attorney regarding client's statements that bore on the purpose of inserting clause in client's will making a blanket exercise of all powers of appointment held at death); *First Nat'l Bank v. Walker*, 607 S.W.2d 469 (Tenn. 1980) (considering testimony of drafting attorneys regarding clients' statements that bore on the purpose of inserting clause in one client's will requiring a specific reference to power of appointment in order to exercise power and on the purpose of inserting clause in other client's will making a blanket exercise of all powers held at death).

Finally, any enacting state concerned about the efficacy of the comments can easily add statutory language that clearly makes extrinsic evidence, including the testator's direct declarations of intention, admissible under UPC § 2-601. Had the point been raised at any drafting session, we might have elevated both propositions to the statutory text of the UPC itself.

Professor Begleiter's third point is that devisees disappointed by the application of the antilapse statute are more likely to press the issue in a malpractice action against the drafting attorney than in the probate proceeding, and that malpractice suits injure lawyers even if the suit is unsuccessful. Begleiter, *supra* note 28, at 129. We would not disagree with the point that malpractice suits injure lawyers even if the suit is unsuccessful. We doubt, however, that such suits will be shifted from probate to tort. If anyone is in possession of evidence that the client understood and approved of the use of the survival language to bar the antilapse statute, that person is likely to be the drafting attorney. The drafting attorney is also likely to be centrally involved in the probate proceeding and will bring the evidence forward there.

necessarily included in the will with the intention of contradicting the objectives of the antilapse statute.⁶³ Such a modest "redundancy" is not at all unusual or inappropriate in the drafting of either administrative or distributive provisions of wills. This fact is aptly illustrated for present purposes by the routine use of language expressly requiring unrelated devisees to survive the testator, even though their gifts are already so conditioned by law and not covered by the antilapse statute, and also by the frequent inclusion of expressed substitute gifts to the descendants of deceased devisees who would have been covered by the statute even without a substitute gift in the will. In fact, the considerable and diverse experience of the members of the Joint Editorial Board for the UPC provided credible support for concerns that language of survivorship in documents does not supply trustworthy indication of an intention contrary to the antilapse statute and also for the belief that, for situations involving those family relationships encompassed by these statutes, careful drafting usually would provide other indications of that contradictory intent when it exists.

For example, when actually intended to call for a result contrary to the statute, words of survivorship are likely to be accompanied by additional language,⁶⁴ such as the expression discussed in section b, above,⁶⁵ or at least by some expressed provision for the devisee-relative's descendants at some point in the disposition, thereby revealing that they were not to take the statutory gift in the manner prescribed in the statute. Illustratively, when the terms of a disposition are actually intended to favor surviving children over the descendants of deceased children, the devise might well begin by leaving property "equally to my children who survive me" but go on to provide that "if none do, then [the property shall pass] to my issue who survive me."

With these considerations in mind, and recognizing a need expressly to clarify the significance of words of survivorship, the Joint Editorial Board decided that section 2-603 should do so in a manner that would rather strongly protect the general statutory objectives, even if this afforded greater protection than that often recognized by judicial construction of antilapse statutes that are silent on this much-litigated question.

⁶³ Nor are they likely to have been included for the purpose of rebutting the 120-hour rule. For that reason, as explained *supra* note 28, UPC § 2-702(d) no longer treats mere language of survival as rebutting that rule. U.P.C. § 2-702(d) (1991).

⁶⁴ See *supra* part II.A.1(b).

⁶⁵ See *supra* part II.A.1(b).

As noted above, a substantial, though by no means unanimous, body of case law treats words of survivorship, standing alone, as sufficient to defeat an antilapse statute, at least in typical circumstances. What are the arguments of those cases and why did the framers of the new UPC statute find those arguments unconvincing? Usually, when a reason is given at all, the cases rely principally on a "disappearing-devise" theory, reasoning that a devise expressly conditioned on surviving the testator vanishes if the devisee dies first, rendering the antilapse statute inapplicable because there is no devise to which the predeceased devisee's descendants can succeed under the statute. The catch-phrase is that "there is nothing upon which the statute can operate."⁶⁶ This theory is fundamentally flawed because it overlooks the fact that the law of lapse automatically conditions all devises on survival of the testator, whether the will expresses the condition or not. Thus, with the law factored in, the logical conclusion of the disappearing-devise theory is that the antilapse statute *never* has any devise upon which to operate. The common law of lapse is simply ignored, however, and adherents to the theory reason from a mistaken assumption that it is the words of survivorship that cause the lapse—as if devised property would otherwise pass to the estates of predeceased devisees. Although this last element of reasoning is usually implicit,⁶⁷ at least one case went so far as to make it explicit, stating:

⁶⁶ See, e.g., *In re Estate of Burns*, 100 N.W.2d 399, 402 (S.D. 1960) ("It is equally obvious that if the testator uses words indicating an intention that the named beneficiary shall take the gift only if he outlives the testator, there is nothing upon which the statute can operate."); Dwyer, *supra* note 58, at 857 ("Where the testator uses words of survivorship, . . . the condition attached to the gift fails immediately upon the death of the legatee, and there is nothing upon which the statute can operate."). See also Marvel, *supra* note 58, at 1186 ("When the testator uses words of survivorship, indicating an intention that the legatee shall take the gift only if he outlives the testator, it is clear that the statute against lapses has no application.").

Note that almost no one today is persuaded by similarly formalistic reasoning as it might be applied to class gifts, in which there is no "lapse" for the antilapse statute to cure on the question-begging theory that the deceased class member's share is absorbed by the surviving members. See *infra*, part II.A.4.

⁶⁷ The opinions typically state that the language of survivorship in the testator's will is what conditions the devise on survivorship. See for example, *Estate of Kerr*, 433 F.2d 479 (D.C. Cir. 1970), stating that:

[A contrary] intention is manifested, and plainly so, where the will articulates the gift in words effectively conditioning its efficacy upon the beneficiary's survival of the testator. If, in such a situation, the beneficiary predeceases the testator, the statutory bar to lapse and the concomitant substitution of issue in the beneficiary's stead are at war with the testator's purpose that the gift shall take only in the event that the beneficiary outlives the benefactor . . . [A] condition of survivorship of the testator made indispensably prerequisite to taking the gift is necessarily the expression of a purpose that the gift will take effect

[I]f the testator had desired to benefit the estate of any deceased child, he need only have provided that the residue of his estate should be divided equally among his four children, omitting the words "then surviving."⁶⁸

At bottom, then, the disappearing-devise theory is mechanical, formalistic, and nonpurposive. It has no bearing on the antilapse policy of protecting against serious oversight that might unintentionally omit a provision for a line of descent. Having found the theory unconvincing, the framers of the 1990 UPC decided expressly to nullify it. Section 2-603 does this by providing that the predeceased devisee's descendants take the property to which the devisee would have been entitled had the devisee survived the testator.⁶⁹

More difficult to dismiss is the view of some courts and others linking words of survivorship to an intention to defeat the statutory substitute gift, hence asserting that the language indicates a contrary intention. This conclusion, however, is simply assumed from an expression of the intent to condition the devise on survivorship and, as noted above, represents a dubious and hazardous extension of this limited intention. The reasoning is that "the statutory bar to lapse and the concomitant substitution of issue in the beneficiary's stead are at war with the testator's purpose that the gift shall take [effect] only in the event that the beneficiary outlives the benefactor."⁷⁰ At least this argument is tied to the testator's intention, and thus to the underlying policy of an antilapse statute. The argument can reasonably be extended to urge that the use of words of survivorship indicates that the testator considered the possibility of the devisee dying first and intentionally decided not to provide a substitute gift to the devisee's descendants.

The negative inference in this argument, however, is speculative. It may or may not accurately reflect reality and actual intention. It is equally plausible that the words of survivorship are in the testator's will merely because, with no such intention, the testator's lawyer used a will form containing words of survivorship. The testator who went to lawyer X and ended up with a will containing devises with a

only if the survival occurs. To award the gift to issue of the nonsurviving beneficiary is inevitably to frustrate that purpose.

Id. at 488 (footnote omitted); see also *In re Estate of Parker*, 181 N.Y.S.2d 711, 712-13 (Sur. Ct. 1958) ("The principle has been well established that [the antilapse statute] is not operative in a case where the will clearly and plainly expresses the intention that the bequest shall be effective only in the event that the legatee survived the testator.") (citation omitted).

⁶⁸ *Estate of Price*, 454 P.2d 411, 413 (Wash. 1969).

⁶⁹ U.P.C. § 2-603(b)(1), (b)(2) (1991).

⁷⁰ *Kerr*, 433 F.2d at 484.

survivorship requirement could by chance have gone to lawyer Y and ended up with a will containing devises with no survivorship requirement—with no different intention on the testator's part from one case to the other. The purpose of the survivorship language alone is simply too uncertain to justify giving the words so serious an effect as to bar the statute, as illustrated by the routine use of such forms for devises to which the statute would not apply in any event, such as devises to non-relatives.

Unless the lawyer discussed the matter with the client, any linkage between the lawyer's language and the client's intention, or even the lawyer's intention, is speculative. Indeed, an interesting and highly significant feature of the decided cases is the absence of testimony or offered testimony from drafting attorneys regarding their clients' knowledge and approval of using the survival language to bar the antilapse statute, even though such testimony would seem to be admissible under the ordinary principles of admission of extrinsic evidence.⁷¹ In addition, especially in the case of younger-generation devisees, such as the client's children or nieces and nephews, it should not be assumed in such an important matter that a particular client, at the time of making his or her will, anticipated the possibility of the devisee's death before the client's death and thought through the question of who should then take the devised property in question. If the discussion did occur, under UPC section 2-601 the lawyer's testimony or other evidence of the testator's intention can be used to avoid the statute and obtain the intended result.⁷²

Admittedly, this question of the appropriate effect to be given to words of survivorship is a difficult one. Yet it is one that needed to be answered. It is not unimportant that many lawyers who draft wills appear to believe that the insertion of an express requirement of survival will prevent application of the statute. Indeed, the framers found the issue most troublesome, struggling conscientiously with a

⁷¹ Unlike UPC §§ 2-601 and 2-603, the antilapse statutes involved in the decided cases typically state that the statute can only be rebutted by a contrary intention appearing in the will. Despite that, the *Restatement (Second) of Property* introductory note to part VI and reporter's note to the introductory note state and cite authority that the donor's direct declarations of intention are admissible in determining whether a rule of construction is rebutted. *RESTATEMENT (SECOND) OF PROPERTY (Donative Transfers)* pt. VI introductory note & reporter's note to introductory note at 4-5 (1987). Even if extrinsic evidence is not admissible to establish a contrary intention, however, the survival language is language that does appear in the will, and therefore, the testimony of the drafting attorney, regarding the purpose of including the survival language in the will, would seem to be admissible. See, e.g., *supra* note 62.

⁷² See *supra* note 71 and accompanying text for the proposition that such evidence would be admissible even without the imprimatur of admissibility conferred by UPC § 2-601.

variety of possibilities in several meetings before settling on the present solution. It might have been workable, for example, to provide a considerably more limited (but hardly trouble-free) protection against inadvertent omissions by extending the pretermitted heir statute to all descendants rather than merely protecting children. Or words of survivorship might have been treated as presumptively sufficient to overcome the antilapse statute, or as sufficient to overcome the statute except with respect to devises made to the surviving members of a class or group of devisees when none of the described or named devisees had descendants at the time the will was written. Following lengthy debate, however, including consideration of current drafting practices, examination of various alternative solutions, and review of drafts of possible statutory provisions, the provision now set out in section 2-603(b)(3) was supported by a consensus of the membership of the Joint Editorial Board.

One effect of this provision is to make clear the type of drafting now to be required under the new UPC in order to eliminate the statutory substitute gift to descendants of protected devisees. If, in a given jurisdiction, it is generally believed that the existing law has been reliably settled differently than in the 1990 UPC, or that the statute offers an inappropriate solution to the uncertainties of existing will provisions, consideration might be given to adopting the section with some form of prospective application, possibly even with a grace period allowing practitioners to adapt to the drafting significance of the statute. This would at least preserve the prophylactic effects sought in promulgating the new rule.

One further consideration is worth mentioning at this point. Any inference about actual intention to be drawn from mere words of survivorship is especially problematic in relation to will substitutes, such as life insurance, in which it is less likely that the insured had the assistance of a lawyer in drafting the beneficiary designation. Many life-insurance policies are taken out when the insured is young, often occasioned by marriage, birth of a child, or employment. In those circumstances and at that time of life, few insureds will think to provide for the possibility of a child dying before the insured, and leaving descendants. Although section 2-603 applies only to wills, a companion provision in section 2-706 applies to will substitutes, including life insurance.⁷³ Section 2-706 also contains language similar to that in subsection (b)(3), directing that words of survivorship, in the absence of additional evidence, not be treated as indicating an intent

⁷³ U.P.C. § 2-706 (1991).

contrary to the application of the section.⁷⁴ It seemed anomalous and, for general estate planning purposes, undesirably complicating to adopt different rules for will substitutes than for wills.

(d) Alternative Devise Takes Precedence Over Statutory Substitute Gift

Although mere words of survivorship do not contradict the statutory substitute gift provided by the antilapse statute, an expressly created alternative devise does.⁷⁵ By expressly creating one or more alternative devises, the testator's will gives that devise or those devises secondary priority, ahead of the statutory substitute. Section 2-603 recognizes this by providing, in subsection (b)(4), that any statutory substitution of the primary devisee's descendants is superseded if the testator's will expressly creates an alternative devise.

In expressly creating an alternative devise, however, the testator's will is treated as going no further than to provide secondary priority to the alternative devisee or devisees. The will does not expressly establish that the statutory substitute is not to take in the event neither the primary devisee nor an alternative devisee survives the testator by 120 hours.⁷⁶ Hence, the statutory substitution of the primary devisee's descendants is not contradicted by the alternative devise if the alternative devise does not take effect. Section 2-603 is structured so that the next priority in this case goes to the descendants of the primary devisee.⁷⁷ The section does this by providing, in

⁷⁴ *Id.*

⁷⁵ See, e.g., *Detzel v. Nieberding*, 219 N.E.2d 327 (Ohio P. Ct. 1966).

⁷⁶ See U.P.C. § 2-603 (1991).

⁷⁷ The comment illustrates this situation with the following example:

Example 4. G's will devised "\$10,000 to my two children, A and B, or to the survivor of them." A predeceased G, leaving a child, X, who survived G by 120 hours. B also survived G by 120 hours.

Solution: B takes the full \$10,000. Because the takers of the \$10,000 devise are both named and numbered ("my two children, A and B"), the devise is not in the form of a class gift. The substance of the devise is as if it read "half of \$10,000 to A, but if A predeceases me, that half to B if B survives me and the other half of \$10,000 to B, but if B predeceases me, that other half to A if A survives me." With respect to each half, A and B have alternative devises, one to the other. Subsection (b)(1) creates a substitute gift to A's descendant, X, with respect to A's alternative devise in each half. Under subsection (b)(4), however, that substitute gift to X with respect to each half is superseded by the alternative devise to B because the alternative devisee, B, survived G by 120 hours and is otherwise entitled to take under G's will.

Id. § 2-603 cmt., ex. 4.

Section 2-603's solution to Example 4 is supported by judicial interpretations of conventional antilapse statutes in *In re Estate of Burruss*, 394 N.W.2d 466 (Mich. Ct. App. 1986); *In re Estate of Evans*, 227 N.W.2d 603 (Neb. 1975); *Hummell v. Hummell*, 85 S.E.2d 144 (N.C. 1954);

subsection (b)(4), that the statutory substitute gift is superseded "only if an expressly designated devisee of the alternative devise is entitled to take under the will."⁷⁸

The disappearing-devise theory is inconsistent with giving third priority to the statutory substitute gift to the primary devisee's descendants. The logic of that theory is that the express condition of survivorship causes the primary devise to disappear, and hence causes there to be nothing upon which the antilapse statute can operate. Thus, the reasoning would seem to apply whether or not the will creates an alternative devise. The survival language does not impose the survival requirement only if the alternative devisee survives: It imposes it unconditionally. Moreover, the theory that the inclusion of survival language shows that the testator thought about the possibility of nonsurvival and intentionally did not provide for a substitute gift to the devisee's descendants arguably would be even more persuasive when the will specifically provides an alternative devise. Thus, to those who would readily find the antilapse statute displaced, it may be surprising that a number of courts have adopted the view that the survival language does not defeat the statute if the alternative devisee predeceases the testator.⁷⁹ To be sure, we agree with the results of these cases. We just note that it is difficult to square their results with the sometimes popular theories in question.

In re Miner's Estate, 282 A.2d 827 (Vt. 1971). There is also precedent for the application of the antilapse statute in such a case. See *Schneller v. Schneller*, 190 N.E. 121 (Ill. 1934); *In re Estate of Bulger*, 586 N.E.2d 673 (Ill. App. Ct. 1991); *Estate of Kehler*, 411 A.2d 748 (Pa. 1980). Cf. *White v. Moore*, 760 S.W.2d 242, 243 (Tex. 1988) (court remanded case for trial on the question of whether testator meant language in will "or to the survivor or survivors of [named devisees]" to mean that the heirs of predeceasing devisees should take).

⁷⁸ U.P.C. § 2-603(b)(4) (1991). The provision is drafted broadly rather than narrowly. That is, it is drafted in terms of the alternative devisee being entitled to take under the will rather than only in terms of the alternative devisee surviving the testator by 120 hours. The broader language is designed to cover not only the situation in which the alternative devisee fails to survive the testator by 120 hours but also the situation in which the will conditions the alternative devise on some event unrelated to the devisee's survival of the testator and that condition is not fulfilled. For an illustration of this point under § 2-707(b)(4), a companion provision to § 2-603(b)(4), see *infra* note 201.

⁷⁹ See, e.g., *Galloupe v. Blake*, 142 N.E. 818 (Mass. 1924); *Estate of Ulrikson*, 290 N.W.2d 757 (Minn. 1980); *Burns' Estate*, 100 N.W.2d 399 (S.D. 1960).

[I]t can be suggested that the survivorship requirement is applicable only in the case where one survives; that the testator did not contemplate or provide for the case where neither survives, and that accordingly the statute is left to operate. This has been held in several cases [O]n this view the provision about survivorship virtually becomes nugatory in the event that has happened

Philip Mechem, *Some Problems Arising Under Anti-Lapse Statutes*, 19 IOWA L. REV. 1, 10 (1933) (citation omitted).

Rationale aside, however, courts have occasionally reached the opposite result, holding the statute defeated even when the alternative devisee predeceases.⁸⁰ A case in point is *In re Estate of Parker*,⁸¹ decided by a New York surrogate under a conventional antilapse statute. Charles Parker's will divided his estate into four equal parts, one of which was devised "to my sister, Annie Hayes, if she survives me, absolutely and forever; if she does not survive me, I give, devise and bequeath said part or share to her husband, Luther, absolutely and forever."⁸² Both Annie and Luther predeceased the testator. Annie left two children, both of whom survived the testator. Because "the plain meaning of the words used by [the testator] import a condition [of survivorship] which the legatee failed to satisfy,"⁸³ the surrogate held that the antilapse statute was counteracted.⁸⁴ Had *Parker* been controlled by UPC section 2-603, we believe the outcome would have better reflected the testator's probable intention. Annie's children would have been substituted for her. First, the words of survivorship themselves would not have counteracted the statute. Second, the statutory substitute gift to Annie's children would not have been superseded by the alternative devise to Luther because he failed to survive the testator and was therefore not entitled to take under the will. Only if Luther had survived the testator by 120 hours would the statutory substitute gift to Annie's children have been superseded under section 2-603.

Section 2-603 is even more sophisticated than just described. Take, for example, a devise similar to the one in *Parker* but in which both devisees, A and B, are in the protected class, the class for which a statutory substitute gift is provided.⁸⁵ The devise we have in mind is "to A if A survives me; if not, to B."⁸⁶ If, as in *Parker*, neither A nor B survived the testator by 120 hours but A left descendants who did survive the testator by 120 hours, we have seen that section 2-603 would create a substitute gift in A's descendants, a gift that would

⁸⁰ See, e.g., *In re Estate of Kerr*, 433 F.2d 479 (D.C. Cir. 1970).

⁸¹ 181 N.Y.S.2d 711 (Sur. Ct. 1958).

⁸² *Id.* at 712.

⁸³ *Id.* at 713.

⁸⁴ *Id.* at 714.

⁸⁵ To be in the protected class under the UPC, the devisee must be "a grandparent, a descendant of a grandparent, or a stepchild" of the testator. U.P.C. § 2-603(b) (1991). Thus, in *Parker*, the testator's sister, Annie, was in the protected class, but her husband, Luther, was not.

⁸⁶ Alternative formulations of this provision include "to A if A survives me, if not to B if B survives me," or "to A, but if A predeceases me, to B." Because words of survivorship do not automatically defeat UPC § 2-603's statutory substitute gift, the statute would not draw a distinction among any of these formulations.

not be superseded. Assuming at least that B left no descendants who survived the testator by 120 hours, A's descendants would take.⁸⁷ Suppose, however, that the facts turned out oppositely, that is, suppose that B, not A, was the devisee who left descendants who survived the testator by 120 hours. Section 2-603 is also capable of handling this type of eventuality. The short answer is that B's descendants would take. The starting point is subsection (b)(1), which creates a substitute gift to the descendants of any protected devisee who fails to survive the testator by 120 hours.⁸⁸ Thus, the statute creates a substitute gift in B's descendants who survive the testator by 120 hours.⁸⁹ This substitute gift is, in turn, subject to possible supersession under subsection (b)(4) if the will creates an alternative devise and if that alternative devisee is entitled to take under the will. In this case, there is an alternative devise—the devise to A⁹⁰—but the alternative devisee, A, is not entitled to take under the will because A failed to survive the testator by 120 hours. Thus, the

⁸⁷ The comment illustrates this situation with the following example:

Example 5. G's will devised "\$10,000 to my two children, A and B, or to the survivor of them." A and B predeceased G. A left a child, X, who survived G by 120 hours; B died childless.

Solution: X takes the full \$10,000. Because the devise itself is in the same form as the one in Example 4, the substance of the devise is as if it read "half of \$10,000 to A, but if A predeceases me, that half to B if B survives me and the other half of \$10,000 to B, but if B predeceases me, that other half to A if A survives me." With respect to each half, A and B have alternative devises, one to the other. As in Example 4, subsection (b)(1) creates a substitute gift to A's descendant, X, with respect to A's alternative devise in each half. Unlike the situation in Example 4, however, neither substitute gift to X is superseded under subsection (b)(4) by the alternative devise to B because, in this case, the alternative devisee, B, failed to survive G by 120 hours and is therefore not entitled to take either half under G's will.

Note that the order of deaths as between A and B is irrelevant. The phrase "or to the survivor" does not mean the survivor as between them if they both predecease G; it refers to the one who survives G if one but not the other survives G.

U.P.C. § 2-603 cmt., ex. 5 (1991).

Section 2-603's solution to example 5 is supported by judicial interpretation of conventional antilapse statutes in *Galloupe v. Blake*, 142 N.E. 818 (Mass. 1924); *In re Estate of Ulrikson*, 290 N.W.2d 757 (Minn. 1980); *In re Estate of Burns*, 100 N.W.2d 399 (S.D. 1960). See also *Bear v. Bear*, 165 S.E.2d 518 (N.C. Ct. App. 1969) (holding that X takes A's but not B's \$5,000 devise). There are cases, however, holding that the antilapse statute is completely counteracted in such a case. See *In re Estate of Kerr*, 433 F.2d 479 (D.C. Cir. 1970); *Parker*, 181 N.Y.S.2d 711.

⁸⁸ U.P.C. § 2-603(b)(1) (1991). Under subsection (b)(1), every "devise" (which, under subsection (a)(3), includes an "alternative devise") to a person in the protected class, who leaves one or more descendants who survive the testator by 120 hours, triggers a substitute gift in the descendants. *Id.*

⁸⁹ *Id.*

⁹⁰ Under subsection (a)(1), the devise to B is an "alternative devise" with respect to A's devise and the devise to A is an "alternative devise" with respect to B's devise. *Id.* § 2-603(a)(1). Each is, in other words, an alternative devise with respect to the other.

substitute gift to B's descendants is not superseded, and B's descendants would take the devise.⁹¹

Section 2-603 is even more sophisticated. It is also capable of handling the situation in which both A and B leave descendants who survive the testator by 120 hours. That would be a situation covered by the subsection that breaks what might be viewed as "ties" between statutory substitute gifts.⁹² The tie-breaker subsection determines whether A's descendants or B's descendants would take.

(e) *The Tie-Breaker Provision*

Take again the devise "to A if A survives me; if not, to B." If neither A nor B survived the testator by 120 hours but both left descendants who did, the terms of section 2-603 would, literally, provide for a substitute gift in A's descendants and also a substitute gift in B's descendants. Neither substitute gift would be superseded under subsection (b)(4) because neither A nor B, the expressly designated alternative devisees, survived the testator by 120 hours, and therefore, neither would be entitled to take under the will.

Subsection (c) provides the tie-breaking mechanism for such situations. The initial step is to determine which of the alternative devises in the will would take effect had all the devisees themselves survived the testator (by 120 hours). In subsection (c), this devise is called the "primary devise."⁹³ The primary devise in the above example would be the one to A, since if both A and B survived the testator by 120 hours, A would take rather than B. Unless the important exception of subsection (c)(2) applies, subsection (c)(1) provides that the devised property passes under the statutory substitute gift created with respect to the primary devise.⁹⁴ This substitute gift, the one in favor of A's descendants, is called the "primary substitute gift."⁹⁵ The rule favoring the primary substitute gift simply follows the priority set up

⁹¹ This outcome is supported by *Estate of Dittrich*, 395 A.2d 216 (N.J. Super. Ct. App. Div. 1978), decided under a conventional antilapse statute. In *Dittrich*, the testator's will devised his residuary estate to his sister, but further provided that if she failed to survive him, the residuary was to go to his brother. *Id.* at 216. The testator's sister and brother both predeceased him. The sister died without descendants, but the brother had two daughters who survived the testator. *Id.* The court held that the brother's daughters took the residue under the antilapse statute. *Id.* at 218.

⁹² U.P.C. § 2-603(c) (1991).

⁹³ *Id.* § 2-603(c)(3)(i).

⁹⁴ *Id.* § 2-603(c)(1).

⁹⁵ *Id.* § 2-603(c)(3)(ii).

by the testator—the testator favored A over B, hence this element of the statute favors A's descendants over B's.⁹⁶

Subsection (c)(2) provides a significant exception to the rule favoring the primary substitute gift. The exception is set up for situations in which the class of A's descendants includes B's descendants, that is, when B was descended from A.⁹⁷ Under subsection (c)(2), the devised property does not pass under the primary substitute gift if

⁹⁶ The commentary to § 2-603 contains the following examples illustrating this procedure: *Example 6.* G's will devised "\$5,000 to my son, A, if he is living at my death; if not, to my daughter, B" and devised "\$7,500 to my daughter, B, if she is living at my death; if not, to my son, A." A and B predeceased G, both leaving descendants who survived G by 120 hours.

Solution: A's descendants take the \$5,000 devise as substitute takers for A, and B's descendants take the \$7,500 devise as substitute takers for B. In the absence of a finding based on affirmative evidence such as described in the solution to Example 1, the mere words of survivorship do not by themselves indicate a contrary intent.

Both devises require application of subsection (c). In the case of both devises, the statute produces a substitute gift for the devise to A and for the devise to B, each devise being an alternative devise, one to the other. The question of which of the substitute gifts takes effect is resolved by determining which of the devisees themselves would take the devised property if both A and B had survived G by 120 hours.

With respect to the devise of \$5,000, the primary devise is to A because A would have taken the devised property had both A and B survived G by 120 hours. Consequently, the primary substitute gift is to A's descendants and that substitute gift prevails over the substitute gift to B's descendants.

With respect to the devise of \$7,500, the primary devise is to B because B would have taken the devised property had both A and B survived G by 120 hours, and so the substitute gift to B's descendants is the primary substitute gift and it prevails over the substitute gift to A's descendants.

Subsection (c)(2) is inapplicable because there is no younger-generation devise. Neither A nor B is a descendant of the other.

Example 8. [G's will devised "\$10,000 to my two children, A and B, or to the survivor of them."] [B]oth A and B predeceased the testator and both left descendants who survived the testator by 120 hours.

Solution: A's descendants take half (\$5,000) and B's descendants take half (\$5,000).

As to the half devised to A, subsection (b)(1) produces a substitute gift to A's descendants and a substitute gift to B's descendants (because the language "or to the survivor of them" created an alternative devise in B of A's half). As to the half devised to B, subsection (b)(1) produces a substitute gift to B's descendants and a substitute gift to A's descendants (because the language "or to the survivor of them" created an alternative devise in A of B's half). Thus, with respect to each half, resort must be had to subsection (c) to determine which substitute gift prevails.

Under subsection (c)(1), each half passes under the primary substitute gift. The primary devise as to A's half is to A and the primary devise as to B's half is to B because, if both A and B had survived G by 120 hours, A would have taken half (\$5,000) and B would have taken half (\$5,000). Neither A nor B is a descendant of the other, so subsection (c)(2) does not apply. Only if one were a descendant of the other would the other's descendants take it all, under the rule of subsection (c)(2).

Id. § 2-603 cmt., ex. 6 & ex. 8.

⁹⁷ *Id.* § 2-603(c)(2).

there is a "younger-generation devise"—defined as a devise that "(A) is to a descendant of a devisee of the primary devise, (B) is an alternative devise with respect to the primary devise, (C) is a devise for which a [statutory] substitute gift is created, and (D) would have taken effect had all the deceased devisees who left surviving descendants survived the testator except the deceased devisee or devisees of the primary devise."⁹⁸ If there is a younger-generation devise, the devised property passes under the "younger-generation substitute gift"—defined as the substitute gift created with respect to the younger-generation devise.

Applied to our example, the tie-breaker provision would mean that A's descendants would take if B were not a descendant of A, but that B's descendants (who would, of course, also be descendants of A) would take if B were a descendant of A. The wisdom of favoring B's descendants over A's descendants in the latter case is illustrated in example number seven from the commentary to section 2-603.⁹⁹

2. Protected Relatives

The specified relatives whose devises are protected by section 2-603 are the testator's grandparents and their descendants, plus the testator's stepchildren.¹⁰⁰ In the case of a testamentary exercise of a power of appointment, the statute applies to devises to both the testator's (donee's) and the donor's grandparents and their descendants and to stepchildren of either the testator or the donor.

Section 2-603 breaks new ground by extending the UPC's "antilapse" protection to devises to a testator's stepchildren.¹⁰¹ The bene-

⁹⁸ *Id.* § 2-603(c)(3)(iii).

⁹⁹ *Example 7.* G's will devised "\$10,000 to my son, A, if he is living at my death; if not, to A's children, X and Y." A and X predeceased G. A's child, Y, and X's children, M and N, survived G by 120 hours.

Solution: Half (\$5,000) of the devise goes to Y. The other half (\$5,000) goes to M and N. The disposition of the latter half requires application of subsection (c).

Subsection (b)(1) literally provides two substitute gifts as to that latter half, one for the initial devise of that half to A and another for the alternative devise of that half to X. The primary devise is to A. But there is also a younger-generation devise, the alternative devise to X. X is a descendant of A; X would take if X but not A survived G by 120 hours; and the devise to X is one for which a substitute gift is created by subsection (b)(1). So, the younger-generation substitute gift, which is to X's descendants (M and N), prevails over the primary substitute gift, which is to A's descendants (Y, M, and N).

Id. § 2-603 cmt., ex. 7.

¹⁰⁰ *Id.* § 2-603(b).

¹⁰¹ As defined in UPC § 2-603(a)(5), the term "stepchild" means "a child of the surviving, deceased, or former spouse of the testator or of the donor of a power of appointment, and not of the testator or donor." *Id.* § 2-603(a)(5). Antilapse protection is not extended to descendants

ficial effect of this extension can be seen in a case such as *In re Estate of Griffen*.¹⁰² Kizzie Belle Griffen, a childless widow, left a will that devised her entire estate to her stepdaughter, Willa Baughman, "to have to hold the same unto herself and her heirs forever."¹⁰³ Willa predeceased Kizzie, leaving an adopted daughter who survived Kizzie. Although the applicable antilapse statute did not cover devises to stepchildren, the court strained to reach a result similar to that of an antilapse statute. Conceding that "the general rule [is] that the words 'and his heirs' attached to a testamentary gift are words of limitation and not of purchase,"¹⁰⁴ the court nevertheless held:

It is obvious that [Kizzie's] affections were centered upon her stepdaughter, and that she desired her estate to go to the stepdaughter's heirs in the event she predeceased the testatrix, *just as it would have gone to her natural grandchildren [under the antilapse statute] had Willa Baughman been her natural daughter*.¹⁰⁵

Consequently, the court held that the language "and [Willa Baughman's] heirs forever" were words of purchase, not of limitation—that is, that they did not serve to define the nature and extent of the interest Willa was to take but created a substitutionary gift in Willa's heirs if she predeceased Kizzie. The result, therefore, was that the residue of Kizzie's estate passed under her will directly to Willa's adopted daughter.¹⁰⁶

of the testator's stepchildren or to stepchildren of any of the testator's relatives. Even as to the testator's own stepchildren, however, note that under UPC § 2-804 a devise to a stepchild might be revoked if the testator and the stepchild's adoptive or biological parent subsequently become divorced; the antilapse statute does not apply to a deceased stepchild's devise if it was revoked by UPC § 2-804. *Id.* § 2-804. UPC §§ 2-603(b)(1) and (b)(2) give this result by providing that the substituted descendants take the property to which the deceased devisee or deceased class member would have been entitled if he or she had survived the testator. If a deceased stepchild whose devise was revoked by UPC § 2-804 had survived the testator, that stepchild would not have been entitled to his or her devise, and so his or her descendants take nothing, either.

California's antilapse statute (as enacted in 1983) also applied to devises to stepchildren, while further extending its application to devisees who are "*kindred* of a surviving, deceased, or former spouse of the testator." CAL. PROB. CODE § 6147(a) (Deering 1991) (emphasis added).

¹⁰² 543 P.2d 245 (Wash. 1975) (en banc).

¹⁰³ *Id.* at 246.

¹⁰⁴ *Id.* at 247.

¹⁰⁵ *Id.* at 248 (emphasis added).

¹⁰⁶ Note that the court did not prevent lapse in any strict sense of the word. Preventing lapse would mean that the residue of Kizzie's estate would have passed first to Willa's estate and then by intestacy to her adopted daughter.

Were *Griffen* to have been governed by section 2-603, the outcome would have been the same, but without the expense of the litigation. Willa's adopted daughter would have taken directly under the antilapse statute from Kizzie.

3. Testamentary Exercise of a Power of Appointment Where Appointee Fails to Survive the Testator

One of the uncertainties in antilapse law has been the extent to which those statutes apply to the testamentary exercise of a power of appointment if the appointee predeceases the testator. Section 2-603 clears up this uncertainty by explicitly extending antilapse protection to appointees under a power of appointment exercised by the testator's will.¹⁰⁷ The extension of the antilapse statute to powers of appointment is a step long overdue. The extension brings the statute into line with the *Second Restatement of Property*.¹⁰⁸

4. Class Gifts

In line with modern policy, subsection (b)(2) continues the pre-1990 Code's approach of expressly extending the antilapse protection to class gifts.¹⁰⁹ Class gifts to "issue," "descendants," "heirs of the body," "heirs," "next of kin," "relatives," "family," or a class described by language of similar import are excluded, however, because antilapse protection is unnecessary in class gifts of these types. They already contain within themselves the idea of representation, under which a deceased class member's descendants are substituted for him or her.¹¹⁰

5. "Void" Gifts

By virtue of UPC section 2-603(a)(4), subsection (b) expressly applies to the so-called "void" gift, where the devisee is dead at the time of execution of the will. Though contrary to some decisions, it seems likely that the testator would want the descendants of a person who is included, for example, in a class term but who is dead when the will is made to be treated like the descendants of another mem-

¹⁰⁷ See U.P.C. § 2-603(a)(3), (4), (5), (7), & (b)(5) (1991).

¹⁰⁸ RESTATEMENT (SECOND) OF PROPERTY (Donative Transfers) § 18.6 (1984).

¹⁰⁹ U.P.C. § 2-603(b)(2) (1991).

¹¹⁰ See *id.* §§ 2-708, 2-709, 2-711.

ber of the class who was alive at the time the will was executed but who dies before the testator.

6. A Final Assessment

As revised in 1990, section 2-603 is a comprehensive antilapse statute that resolves a variety of interpretive questions that have arisen under conventional antilapse statutes, including the antilapse statute of the pre-1990 Code.¹¹¹

Some of the interpretive questions unresolved by the pre-1990 statute were whether it applies to the exercise of a power of appointment and what the priorities are if the testator's will creates alternative devisees, but one or both of the alternative devisees predeceases the testator. Of necessity, resolving these interpretive questions requires lengthier statutory text. The lengthier text, in turn, makes the statute appear complicated.

The terms of the statute are elaborate and intricate because they have to deal with a variety of potentially complicated factual situations. The test of a statute is not whether the statute is understandable upon a single reading of its text. The test of a statute is whether it produces a clear and appropriate result when applied to an actual case. Nothing concentrates the mind more acutely on the intricacies of statutory text than having a case whose outcome hinges on the statute. A statute should be read, in other words, from the standpoint of an actual case. If, by working with the statutory language and the official comments for an hour or two in his or her law office, a lawyer can resolve the case, the public is much better served by the statute than it would be by a simpler statute that leaves a number of issues unresolved and requires legal research and perhaps litigation and appeal in order to resolve the case.

Thus, we do not deny the intricacy of the statute but believe that its mystery largely disappears with a little study. In addition, section 2-603 has two related counterparts that are structurally and linguisti-

¹¹¹ The pre-1990 UPC antilapse statute, § 2-605, provided:

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

U.P.C. § 2-605 (1969).

cally very similar to the antilapse statute. These are sections 2-706 and 2-707, dealing respectively with life insurance and similar beneficiary designations and with future interests under the terms of a trust. The similarities are by design, so that learning under one statute is largely transferrable to the other two.

B. Antilapse for Life Insurance and Similar Beneficiary Designations—Section 2-706

1. Antilapse Protection for Predeceasing Beneficiaries of Life Insurance, Retirement-Plan Death Benefits, and POD Accounts

The trend toward the unification of the law of probate and nonprobate transfers has produced a number of cases seeking to extend antilapse statutes to revocable trusts in which no express condition of survival was imposed.¹¹² Although no cases have yet arisen seeking to extend antilapse statutes to other types of will substitutes, such as life-insurance beneficiary designations, retirement-plan death benefits, and POD accounts, the case for doing so is much stronger than it is regarding revocable trusts. The reason is that predeceasing beneficiaries of these types of contractual arrangements lose their interests. Like wills, these arrangements impose a survivorship requirement on the beneficiaries, whereas the common-law rule for revocable trusts is that, in the absence of an express condition of survival, predeceasing beneficiaries usually have a devisable interest.¹¹³

In direct response to this problem, the 1990 UPC contains a new provision, section 2-706, which applies language similar to that of section 2-603 to "beneficiary designations" in favor of the decedent's grandparents, descendants of the decedent's grandparents, and the decedent's stepchildren.¹¹⁴ As defined in section 1-201, the term "beneficiary designation" refers to provisions in "a governing instrument naming a beneficiary of an insurance or annuity policy, of an account with POD designation, of a security registered in beneficiary form ("TOD"), or of a pension, profit-sharing, retirement, or similar benefit plan."¹¹⁵

Unfortunately, life-insurance policies and copies of pension beneficiary designations are too often left in files or desk drawers for decades. A common beneficiary designation in these arrangements, ex-

¹¹² See cases cited *infra* notes 168 & 173.

¹¹³ See cases cited *infra* notes 168 & 173.

¹¹⁴ U.P.C. § 2-706 (1991).

¹¹⁵ *Id.* § 1-201(4).

cuted early in a marriage when the children are infants or pre-teens, is "to my spouse [naming him or her] if [he] [she] survives me; if not, to my surviving children." If the spouse dies first, and if one of the children also predeceases leaving children (the insured or employee's grandchildren) who survive the insured or employee by 120 hours, section 2-706 would give the predeceased child's share of the proceeds to that child's children. Most persons, we believe, would approve of that result.

2. ERISA Preemption of State Law?

A possible obstacle to the complete effectiveness of section 2-706 is the Employee Retirement Income Security Act of 1974 ("ERISA").¹¹⁶ In federalizing pension and employee benefit law, ERISA provides that the provisions of Titles I and IV of ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" governed by ERISA.¹¹⁷

ERISA's preemption clause is extraordinarily broad. ERISA does not merely preempt state laws that conflict with specific provisions in ERISA. ERISA preempts "any and all State laws" insofar as they "relate to" any ERISA-governed employee benefit plan.¹¹⁸

A complex body of case law has arisen concerning the question of whether to apply ERISA to preempt state law in circumstances in which ERISA supplies no substantive rule. For example, until 1984, ERISA contained no authorization for the enforcement of state domestic relations decrees against pension accounts, but the federal courts were virtually unanimous in refusing to apply ERISA preemption against such state decrees.¹¹⁹ The Retirement Equity Act of 1984 ("REACT")¹²⁰ amended ERISA to add provisions confirming the judicially created exception for state domestic relations decrees.¹²¹

The federal courts have been less certain about whether to defer to state probate law. In *Metropolitan Life Ins. Co. v. Hanslip*,¹²² the court held that ERISA preempted an Oklahoma statute¹²³ that re-

¹¹⁶ Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461 (1988).

¹¹⁷ ERISA § 514(a), 29 U.S.C. § 1144(a) (1988).

¹¹⁸ *Id.*

¹¹⁹ See, e.g., *American Tel. & Tel. Co. v. Merry*, 592 F.2d 118 (2d Cir. 1979).

¹²⁰ Retirement Equity Act of 1984 ("REACT"), Pub. L. No. 98-397, 98 Stat. 1426 (codified in scattered sections of 26 U.S.C. and 29 U.S.C.).

¹²¹ REACT §§ 206(d)(3), 514(b)(7), 29 U.S.C. §§ 1056(d), 1144(b) (1988).

¹²² 939 F.2d 904 (10th Cir. 1991).

¹²³ OKLA. STAT. ANN. tit. 15, § 178 (West Supp. 1992).

sembles UPC section 2-804.¹²⁴ Both statutes purport to extend the revocation-upon-divorce provision common in will statutes to ERISA-covered death benefits. On the other hand, in *Mendez-Bellido v. Board of Trustees*,¹²⁵ the court applied the New York "slayer-rule" despite an ERISA preemption claim, reasoning that "state laws prohibiting murderers from receiving death benefits are relatively uniform. [Therefore] there is little threat of creating a 'patchwork scheme of regulation'" which ERISA sought to avoid.¹²⁶

It is to be hoped that the federal courts will show sensitivity to the primary role of state law in the field of probate and nonprobate transfers. Otherwise, ERISA preemption will stifle long-overdue advancements in state probate and nonprobate law without providing any compensating federal rule. To the extent that the federal courts think themselves unable to craft exceptions to ERISA's preemption language, however, another avenue is open to them. This is to apply state law concepts as federal common law. Because the UPC contemplates multistate applicability, the UPC is well suited to be the model for federal common law absorption.

Another avenue of reconciliation between ERISA preemption and the primacy of state law in this field is envisioned in UPC section 2-706(e)(2). This subsection imposes a personal liability for pension payments (or their value) that pass to a person who, not for value, receives a payment to which the recipient is not entitled. Section 2-706(e)(2) operates in a manner similar to constructive trust by obligating the recipient to return the payment (or to pay the amount of the payment) to the person who would have been entitled to it were section 2-706 not preempted. This provision respects ERISA's concern that federal law govern the administration of the plan, while still preventing unjust enrichment that would result if an unintended beneficiary were to receive the pension benefits. In the absence of conflicting substantive policies or provisions, federal law properly has no interest in working a broader disruption of state probate and non-

¹²⁴ U.P.C. § 2-804 (1991). See *Metropolitan*, 939 F.2d at 907. See also *Board of Trustees v. H.F. Johnson, Inc.*, 830 F.2d 1009 (9th Cir. 1987) (ERISA preempted Montana nonclaim statute, which is U.P.C. § 3-803). Cf. *Albamis v. Roper*, 937 F.2d 1450 (9th Cir. 1991) (ERISA preempted any community property law right of a deceased wife to devise half of her surviving husband's pension benefits).

¹²⁵ 709 F. Supp. 329 (E.D.N.Y. 1989).

¹²⁶ *Id.* at 332 (footnote omitted) (quoting *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987)).

probate transfer law than is required in the interest of smooth administration of pension and employee benefit plans.¹²⁷

3. Constitutionality of Section 2-706 Under the Contracts Clause

Under UPC section 8-101(b)(5), the provisions of section 2-706 apply to "instruments executed . . . before the effective date [of the enactment] unless there is a clear indication of a contrary intent."¹²⁸

¹²⁷ There is no direct authority on the question of whether ERISA preempts a state statute such as 1990 UPC § 2-706(e)(2) that imposes a personal liability on a recipient to turn over a payment or pay its value to the person properly entitled to it under that statute. There is authority that the Federal Employees' Group Life Insurance Act ("FEGLIA"), Pub. L. No. 89-554, 80 Stat. 592 (1966) (codified as amended at 5 U.S.C. §§ 8701-8716 (1988)), does not preempt the imposition of a constructive trust on FEGLIA-governed life-insurance proceeds after they have been paid to a recipient. See *Rollins v. Metropolitan Life Ins. Co.*, 863 F.2d 1346, 1353 (7th Cir. 1988) (reasoning that the imposition of a constructive trust "would not do 'major damage' to any 'clear and substantial federal interests'"); *Kidd v. Pritzel*, 821 S.W.2d 566 (Mo. Ct. App. 1991) (reasoning that:

To accept the proposition that Congress intended the named beneficiary on the last filed designation of beneficiary form to be the person entitled to keep the proceeds of the policy, regardless of the surrounding circumstances, [would place] hundreds of years of well-developed law at the fatal mercy of a statutory provision intended solely to promote administrative convenience and the expeditious payment of claims.

Id. at 571.).

Both the *Rollins* and *Kidd* courts distinguished *Ridgway v. Ridgway*, 454 U.S. 46 (1981), which held that the Servicemen's Group Life Insurance Act ("SGLIA"), Pub. L. No. 89-214, 79 Stat. 880 (1965) (codified as amended at 38 U.S.C. §§ 1965-1976 (1988)), preempted the post-payment imposition of a constructive trust on SGLIA-governed life-insurance proceeds, on the ground that SGLIA contains an anti-attachment provision, while FEGLIA does not. SGLIA § 770(g) provides that "[p]ayments of benefits due . . . under [SGLIA] . . . shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." 38 U.S.C. § 1970(g) (1988) (emphasis added). The court in *Kidd* noted that "[i]f Congress desired to totally pre-empt all state law claims it would have included an anti-attachment provision to FEGLIA." *Kidd*, at 571.

ERISA, like FEGLIA, contains no anti-attachment provision. ERISA does contain an anti-alienation provision, ERISA § 206(d)(1), 29 U.S.C. § 1056(d)(1) (1988), but that provision only requires each ERISA-governed *pension* plan to prohibit the assignment or alienation of benefits *before* payment. See *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 836 (1988) (5-to-4 decision) ("Section 206(d)(1) bars the assignment or alienation of pension plan benefits, and thus prohibits the use of state enforcement mechanisms only insofar as they prevent those benefits from being *paid* to plan participants.") (second emphasis added).

Although, as noted *supra* notes 116-18 and accompanying text, ERISA's preemption provision, ERISA § 514(a), 29 U.S.C. § 1144(a) (1988), is one of unusual breadth, the Supreme Court in *Mackey, supra*, held that it does not preempt state-law pre-payment garnishment of individual participants' benefits under ERISA-governed employee *welfare benefit* plans in order to satisfy money judgments awarded against those participants in independent causes of action, despite the fact that forcing the plan to honor the garnishment orders caused the plan to incur significant administrative burdens and costs. ERISA's anti-alienation provision would block pre-payment garnishment proceedings under state law, but the provision only applies to pension plans, not to employee welfare benefit plans. See *Mackey*, at 837-38.

¹²⁸ U.P.C. § 8-101(b)(5) (1991).

A recent decision of the Eighth Circuit, *Whirlpool Corp. v. Ritter*,¹²⁹ raises a concern regarding the constitutionality of applying rules of construction such as section 2-706 to third-party contract beneficiary designations that were executed prior to the effective date of the statute. The court in *Ritter* held that the Contracts Clause of the federal constitution¹³⁰ prohibited the application of the same Oklahoma statute that was embroiled in the *Hanslip* litigation¹³¹ to pre-existing life-insurance beneficiary designations.¹³² As noted above, this is the Oklahoma statute that resembles UPC section 2-804 and extends the revocation-upon-divorce rule to will substitutes such as life insurance.¹³³ In *Ritter*, the decedent's revocable designation of his former spouse as his life-insurance beneficiary was executed before the enactment of the statute but the divorce that revoked it (and, of course, the decedent's death) occurred after enactment.¹³⁴

The Joint Editorial Board for the UPC has issued a statement expressing its disapproval of the *Ritter* decision.¹³⁵ The analysis in that statement appears equally applicable to the extension in section 2-706 of antilapse protection to predeceasing beneficiaries of life-insurance policies. The Joint Editorial Board's statement makes four points in arguing that *Ritter* is wrong and should not be followed elsewhere. In summary, those four points are, first, that the beneficiary-designation in a life-insurance policy is a donative transfer.¹³⁶ The statute did not impair the contractual component of the policy, the insurance company's obligation to pay the proceeds to any person the insured names as beneficiary. The statute only affected the identity of the donee. Thus, the statute did not properly raise any Contracts Clause issue. This same point applies to the extension of antilapse protection to predeceasing beneficiaries of life-insurance policies.

¹²⁹ 929 F.2d 1318 (8th Cir. 1991).

¹³⁰ U.S. CONST., art. I, § 10, cl. 1.

¹³¹ See *supra* note 122-24.

¹³² *Ritter*, 929 F.2d at 1324.

¹³³ See *supra* note 124 and accompanying text.

¹³⁴ *Ritter*, 929 F.2d at 1319-20.

¹³⁵ The full statement is published in the *American College of Trust and Estates Counsel Notes. Joint Editorial Board Statement Regarding the Constitutionality of Changes in Default Rules as Applied to Pre-Existing Documents*, 17 ACTEC NOTES 161, 184-85 (1991) [hereinafter *Joint Editorial Board Statement*]. It is also available from the headquarters office of the National Conference of Commissioners on Uniform State Laws.

¹³⁶ *Joint Editorial Board Statement*, *supra* note 135, at 184. See also S. Alan Medlin, *Joint Editorial Board Rebukes Eighth Circuit Decision*, 4 PROB. PRAC. REP. 1, 5 (1992).

Second, the statute merely established a rule of construction designed to implement intention.¹³⁷ It reflected a legislative judgment that when the insured leaves unaltered a will, trust, or insurance beneficiary designation in favor of an ex-spouse, the insured's "failure to designate substitute takers more likely than not represents inattention rather than intention."¹³⁸ Section 2-706 reflects a similarly-grounded legislative judgment that the failure to designate the beneficiary's descendants as substitute takers in case the beneficiary predeceases more likely than not represents inattention rather than intention. The legislative judgement in each instance yields to a contrary intention.

Third, the "Contracts Clause has never been read to pose any obstacle to the application of legislatively altered constructional rules to pre-existing donative documents such as revocable trusts that have no contractual component."¹³⁹ There is, therefore, no justification for extending Contracts Clause concerns to a statute that only affects the revocable, donative-transfer component of a life-insurance policy.

Fourth, the JEB found no Supreme Court authority for the Eighth Circuit's intrusion of the Contracts Clause into the area of legislative default rules.¹⁴⁰ In fact, the Eighth Circuit's approach is at variance with the Supreme Court's recent tolerance of retroactive federal legislation imposing liabilities under the Multiemployer Pension Plan Amendments Act of 1980 ("MEPPA").¹⁴¹ "When an employer withdraws from an underfunded pension plan, MEPPA allows the imposition of significant unforeseen liabilities."¹⁴² Yet, the Supreme Court has rejected both due process and uncompensated takings objections to these retroactively imposed MEPPA obligations.¹⁴³

¹³⁷ *Joint Editorial Board Statement*, *supra* note 135, at 184.

¹³⁸ *Id.*

¹³⁹ *Id.* at 185.

¹⁴⁰ *Id.* The principal Supreme Court precedent upon which the Eighth Circuit relied in *Ritter* was *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978). "*Spannaus* held unconstitutional a Minnesota statute that retroactively increased the pension obligations that a company would owe to its workers when the company ceased operations in Minnesota or terminated the plan." *Joint Editorial Board Statement*, *supra* note 135, at 185. "By contrast, in *Ritter*, [or under UPC § 2-706,] there is no increase, decrease or other interference with the obligation of the insurer to pay the contractual proceeds." *Id.*

¹⁴¹ *Id.* Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1381-1461 (1988).

¹⁴² *Joint Editorial Board Statement*, *supra* note 135, at 185.

¹⁴³ See *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986); *Pension Benefit Guaranty Corp. v. Gray & Co.*, 467 U.S. 717 (1984).

*C. Conditions of Survival in Trust Future Interests—
Section 2-707*

In structure and theory, section 2-707 of the UPC parallels the antilapse provisions of sections 2-603 and 2-706. Unlike traditional antilapse statutes, section 2-707 expressly applies to future interests under the terms of a trust.¹⁴⁴ Section 2-707 must be understood against the background of the common-law rules it replaces and the practices estate planners have adopted in drafting trusts in the light of those common-law rules. One of the recurring problems in future interests law concerns survivorship: Is a future interest extinguished (terminated) if its holder dies after the creation of the interest but before the time of possession or enjoyment?

Future interests are normally given to persons in one or more generations younger than that of the income beneficiary. If the income interest is granted to the grantor's surviving spouse, the remainder interest is likely to be granted to the couple's children or descendants; if the income interest is granted to a child of the grantor, the remainder interest is likely to be granted to the child's children or descendants. It is unusual, in other words, to grant an income interest to the grantor's grandchild and follow it with a remainder interest to the grantor's parents.

Consequently, when the beneficiary of a future interest predeceases the time of possession or enjoyment, the event is unexpected, typically caused by the remainder beneficiary's premature death or the life beneficiary's unusually long life span. When the unusual or unexpected happens, however, and a beneficiary dies before the time of possession or enjoyment, the first place to look to see if that event was anticipated and provided for is the governing instrument. If the governing instrument expressly imposes a condition of survival—as, for example, in the disposition “to A for life, remainder to B if B survives A”—then survival is required, of course. Conversely, if the governing instrument expressly states that no condition of survival is imposed—as, for example, in the disposition “to A for life, remainder to B whether or not B survives A”—then, of course, B need not survive A.

What happens if the governing instrument expresses neither intention—as, for example, in the disposition “to A for life, remainder to

¹⁴⁴ The term “future interest under the terms of a trust” is defined in UPC § 2-707(a)(6) as “a future interest that was created by a transfer creating a trust or to an existing trust or by an exercise of a power of appointment to an existing trust, . . . directing the continuance of an existing trust, or creating a trust.” U.P.C. § 2-707(a)(6) (1991).

B"? The basic rule of construction at common law is that a condition of survival is not implied, except in the case of flexible, multiple-generation classes such as "issue" or "descendants." Several rationales are offered in support of this rule. The rule, it is said, (i) furthers the constructional preference for complete dispositions of property; (ii) furthers the constructional preference for equality of distribution among the different lines of descent; (iii) is supported by the constructional preferences for vested over contingent interests, for vesting at the earliest possible time, and for indefeasible vesting at the earliest possible time;¹⁴⁵ and (iv) furthers the alienability of property.¹⁴⁶

Of these four, the first, second, and fourth rationales are the most convincing, and the second probably the most forceful. The constructional preference for vested interests is an inconsistently respected relic of the past, having to do with avoidance of once important but now widely abolished rules, such as the doctrine of destructibility of contingent remainders, and the once overly harsh but now widely liberalized rule against perpetuities.¹⁴⁷

The framers of the 1990 UPC concluded that the first and second rationales can be about as well or better served by a statute such as section 2-707 and that the fourth rationale can be served by limiting the statute to future interests created under the terms of a trust, where the trustee usually has the power to convey and mortgage the trust property.

How can the first and second rationales be similarly or better served by a statute such as section 2-707? The first rationale, the constructional preference for complete dispositions, is about equally served by traditional doctrine or by the substitutionary gifts created by the statute, so that the imposition of a condition of survival ordinarily does not cause the disposition to become incomplete.¹⁴⁸ The second rationale, however, the strong constructional preference against inadvertently cutting off a branch of the family as a result of the early death of its ancestor, is much better served by the substitu-

¹⁴⁵ See RESTATEMENT OF PROPERTY (Future Interests) § 243 & cmts. (1940).

¹⁴⁶ See William F. Fratcher, *Class Gifts to "Heirs," "Issue," and Like Groups*, 55 ALB. L. REV. 1205, 1206-07 (1992).

¹⁴⁷ The 1990 version of the UPC contains the Uniform Statutory Rule Against Perpetuities, which adopts the wait-and-see plus deferred-reformation method of perpetuity reform. U.P.C. §§ 2-901 to 2-906 (1991).

¹⁴⁸ When a predeceased beneficiary leaves no surviving descendants, and the instrument provides no other distributee, UPC § 2-707(d)(2) provides a taker of last resort—the transferor's nearest relatives determined under UPC § 2-711, that is, the persons who would be the transferor's heirs if he or she died when the disposition takes effect in possession or enjoyment.

tionary gifts created by the statute than it is by the rule of construction against implied conditions of survival. The reason is that the rule of construction applies whether or not the predeceased beneficiary leaves any descendants who survive the time of possession and enjoyment. Thus, in either event it produces a future interest that is transmissible at death and thereby permits the deceased beneficiary to divert the property to others (such as a spouse or charity) rather than having the property pass, as it appears most transferors would prefer, to the beneficiary's descendants or other descendants of the transferor, as the case may be. Section 2-707, on the other hand, provides for a substitutionary gift to descendants when there are descendants who survive the time of possession and enjoyment (by 120 hours), but allows the particular future interest to fail if the predeceased beneficiary leaves no surviving descendants.¹⁴⁹ Finally, section 2-707 avoids another set of disadvantages of the common-law rule, which is the need for reopening or tracing through the estates of predeceased beneficiaries when it is later discovered that the decedent had a transmissible future interest,¹⁵⁰ with the accompanying risk of unnecessary, fortuitous taxation. In short, the results better correspond to the beneficiary preferences,¹⁵¹ administrative efficiencies, and tax objectives that could be expected to follow from careful estate planning and drafting.¹⁵²

¹⁴⁹ The trust property then goes to the transferor's other beneficiaries under the instrument or to the takers of last resort. See *infra* note 150.

¹⁵⁰ See Susan F. French, *Imposing a General Survival Requirement on Beneficiaries of Future Interests: Solving the Problems Caused by the Death of a Beneficiary Before the Time Set for Distribution*, 27 ARIZ. L. REV. 801, 801-05 (1985). Substitute takers, and even the takers of last resort under UPC § 2-707, will be persons living at the date of distribution. Under UPC § 2-707, property will never cause the reopening of estates of predeceased beneficiaries.

A recent decision, invoking the old "divide and pay over rule," under which a condition of survivorship is implied if the language directs that the property be "divided and paid over" among a group of beneficiaries at the distribution date, may have been prompted by impatience with the necessity of reopening estates caused by the rule against implying a survival requirement. *Harris Trust & Sav. Bank v. Beach*, 513 N.E.2d 833, 841 (Ill. 1987). In *Harris Trust*, the Illinois court invoked this rule, saying that the "rule is one of construction to aid courts in determining whether a gift to a class is a vested or contingent remainder." *Id.* at 841 (citation omitted). The court took no note of the fact that the rule was rejected in the *Restatement of Property* and has in most states been overtly repudiated, fallen into disuse, or was never followed in the first place. RESTATEMENT OF PROPERTY (Future Interests) § 260 (1940). See *American Law of Property* § 21.21 (A. James Casner ed., 1952).

¹⁵¹ Note that the Supreme Judicial Court of Massachusetts, in the important case of *Dewire v. Haveles*, 534 N.E.2d 782 (Mass. 1989), endorsed the extension of the antilapse idea into the area of future interests.

¹⁵² See, e.g., Edward C. Halbach, Jr., *Issues About Issue: Some Recurrent Class Gift Problems*, 48 Mo. L. Rev. 333, 366-67 (1983).

1. Implied Conditions of Survival

(a) *Common-Law Background*

Informed estate planners routinely impose express conditions of survival on the beneficiaries of future interests in trusts they draft. Few trusts take the pristine form of "income to A for life" with "remainder to B" or "corpus thereafter to A's children." Litigation about whether there is an implied condition of survivorship mostly arises in connection with somewhat more complicated dispositions, such as those in which there is an express condition of survivorship imposed upon the beneficiary of the first future interest but not on an alternative or substitute future interest. Two such cases are *In re Bomberger's Estate*¹⁵³ and *Lawson v. Lawson*.¹⁵⁴

Both cases involved the same general pattern of disposition, an alternative future interest to a class that was expressly contingent on an event or events unrelated to survivorship. *Bomberger* adopted the majority view¹⁵⁵ that no condition of survivorship is implied.¹⁵⁶ *Lawson* adopted the minority view¹⁵⁷ that the attachment of a condition unrelated to survivorship implies a condition of survivorship.¹⁵⁸

The testator's will in *Bomberger* devised \$50,000 in trust, income to his niece, Lilly Aughinbaugh, for life, corpus on Lilly's death to her children.¹⁵⁹ The will continued:

Should [niece Lilly] . . . die without leaving a child or children, I order and direct that the bequest . . . shall be equally divided among my nephews and nieces . . . then living, the child or children of nieces who may be deceased to have the share their mother would have been entitled to if living . . .

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¹⁵³ 32 A.2d 729 (Pa. 1943).

¹⁵⁴ 148 S.E.2d 546 (N.C. 1966).

¹⁵⁵ See, e.g., *Rosenthal v. First Nat'l Bank*, 239 N.E.2d 826 (Ill. 1968); *In re Bogart's Will*, 308 N.Y.S.2d 594 (Sur. Ct. 1970); RESTATEMENT OF PROPERTY (Future Interests) § 261 (1940); American Law of Property, *supra* note 150, § 21.25; LEWIS M. SIMES & ALAN F. SMITH, THE LAW OF FUTURE INTERESTS § 594 (2d ed. 1956).

¹⁵⁶ *Bomberger*, 32 A.2d at 731.

¹⁵⁷ Cases in support of *Lawson* include *Fletcher v. Hurdle*, 536 S.W.2d 109 (Ark. 1976) (4-to-3 decision); *Schau v. Cecil*, 136 N.W.2d 515 (Iowa 1965); *Jones v. Holland*, 77 S.E.2d 202 (S.C. 1953). *Lawson* is perceptively discussed in Patricia J. Roberts, *Class Gifts in North Carolina—When Do We "Call the Roll"?*, 21 WAKE FOREST L. REV. 1 (1985).

¹⁵⁸ *Lawson*, 148 S.E.2d at 548.

¹⁵⁹ *In re Bombergers Estate*, 32 A.2d 729, 729 (Pa. 1943).

¹⁶⁰ *Id.* at 730 (final language omitted in original).

The will, in effect, created a life estate in Lilly followed by three alternative contingent remainders: first, to Lilly's unborn children; second, to the testator's nieces and nephews, contingent on surviving Lilly and on Lilly leaving no surviving children; and third, to the children of any then deceased nieces, contingent on Lilly leaving no surviving children and on their respective mothers also predeceasing Lilly.

As the facts turned out, Lilly died childless, never having had any children, and all of the testator's nieces and nephews predeceased Lilly.¹⁶¹ Ada, one of the predeceased nieces, had eight children: seven of them survived Lilly, but one, John, predeceased Lilly. Annie, the other predeceased niece, had one child, Rachel, who predeceased Lilly.¹⁶² John and Rachel apparently died childless, although the court does not specifically so state.

The dispute arose between Ada's seven living children and the executors of John's and Rachel's estates. If the third remainder, the one to the children of nieces who predeceased Lilly, was contingent on survival of Lilly, Ada's seven children would split the corpus, a one-seventh share each. If the remainder was not contingent on surviving Lilly, Ada's seven living children and John's estate would split half of the corpus, one-sixteenth each, and Rachel's estate would take a full one-half share. The court held the latter, that the third remainder was not contingent on survival of Lilly, reasoning:

The language which testator used did not impose the same contingency of survivorship upon the substitutionary gift to child or children of deceased nieces that it did upon the nephews and nieces There is nothing in the substitutionary gift which expressly states that children of deceased nieces must survive [Lilly]. . . . The condition of survival to a fixed time is never implied. Such condition must appear plainly, manifestly and indisputably.¹⁶³

In *Lawson*, the testator's will devised land to his daughter Opal Lawson Long for her life, and at her death "to her children, if any, in fee simple; if none, to [Opal's] whole brothers and sisters."¹⁶⁴ The will, in effect, created a life estate in Opal, followed by two alternative contingent remainders: first, to Opal's children, if any; and second, to Opal's whole brothers and sisters, contingent on Opal not leaving any children.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 731 (citation omitted).

¹⁶⁴ *Lawson v. Lawson*, 148 S.E.2d 546, 547 (N.C. 1966).

As the facts turned out, Opal died childless, and four of her six whole brothers and sisters survived her. The other two brothers survived the testator but predeceased Opal. One of the predeceased brothers left a child, William, who survived Opal and claimed a one-sixth share through his father's estate.¹⁶⁶ The other predeceased brother left four children, Leo, Kenneth, Bonnie, and Barbara, who survived Opal and collectively claimed a one-sixth share through their father's estate. The court held that the second remainder was contingent on survival of Opal, and thus that the corpus went exclusively to the four surviving brothers.¹⁶⁶ The court reasoned:

Clearly the interests of the whole brothers and sisters was contingent and could not vest before the death of the life tenant, for not until then could it be determined that she would leave no issue surviving. "Where those who are to take in remainder cannot be determined until the happening of a stated event, the remainder is contingent. Only those who can answer the roll immediately upon the happening of the event acquire any estate in the properties granted." Respondents' parents, having predeceased the life tenant, could not answer the roll call at her death.¹⁶⁷

(b) *UPC Section 2-707*

How would *Bomberger* and *Lawson* have turned out under UPC section 2-707? In *Bomberger*, the property would go to Ada's seven children who survived Lilly. The solution is premised on neither John nor Rachel having left any descendants who survived Lilly by 120 hours. In such circumstances, is section 2-707's solution not more in tune with what the testator would have wanted, had he been given the chance to tell us? Did it really further the testator's intent to allow a full half share to go down a descending line (i.e., Annie's line) that had completely died out? (Section 2-707 would work out differently if John or Rachel had left descendants who survived Lilly by 120 hours; those descendants would have come in for a share.)

The imposition of an implied condition of survivorship probably defeated the testator's intent in *Lawson* because it cut out the descendants in two descending lines—the children of the predeceased whole brothers who survived the life tenant. The dubious result in

¹⁶⁶ *Id.*

¹⁶⁶ *Id.* at 548.

¹⁶⁷ *Id.* (citations omitted) (quoting *Strickland v. Jackson*, 130 S.E.2d 22, 25 (N.C. 1963)).

Lawson provides a telling contrast with the dubious result in *Bomberger*, where the failure to impose an implied condition of survivorship probably defeated overall intention because the predeceased children of the predeceased nieces left no descendants surviving the life tenant. Insofar as effectuation of intention is concerned, the question in these two cases is not whether one rule is better than the other, i.e., whether treating conditions unrelated to survivorship as not subjecting the future interest to an implied condition of survivorship carries out or defeats overall intent. *Bomberger* and *Lawson* show that the prevailing *Bomberger* view would have worked out better in a case like *Lawson* than in one like *Bomberger* itself, and that the minority *Lawson* view would have worked out better in a case like *Bomberger* than in one like *Lawson* itself.

UPC section 2-707 seems to work out better in both cases—just as thorough drafting would have, if we assume typical transferor objectives. Had *Lawson* involved a trust, the two descending lines that still had living members at the life tenant's death would not have been cut off. In *Bomberger*, the two descending lines that had died off before the life tenant's death would have been cut off and the property would have all gone down the lines that still had living descendants at the life tenant's death.

We note one final point about the many cases, both litigated and unlitigated, in which there are problems generally similar to those in *Bomberger* and *Lawson*. Would the drafting attorney not have avoided controversy and carried out the testator's intent better by so simple a technique as using an adaptable, multiple-generation class gift with an express condition of surviving the life tenant ("descendants" who survive Lilly; "issue" who survive Opal) rather than a single-generation class gift ("children" of nieces who predecease; "brothers and sisters")? This, in fact, is what UPC section 2-707 seeks to do in cases in which the drafting attorney did not do so. Here, we need not speculate about the quality of the drafting in order to inject a statutory solution; whatever the actual intention (if any existed—and we shall never know), we do know that the lawyer's work was deficient and in need of remedial treatment. It seems clear that a legislative remedy offers more flexibility to achieve, or at least to approximate, what the typical, informed transferor would want than can even enlightened but restricted judicial choice between a couple of unsatisfactory constructional alternatives (here, simply the choice of implying or not implying a condition of survivorship).

It is interesting to observe that there is already a fledgling movement to inject the antilapse concept into trusts, if the trust is revoca-

ble. Although the common-law rule against implying conditions of survivorship in future interests applies to revocable trusts (including for the period before the settlor's death),¹⁶⁸ recent years have seen litigation aimed at extending antilapse statutes to such interests. Just a few of these efforts have been successful; others have not.

A successful effort arose in *Dollar Sav. & Trust Co. v. Turner*,¹⁶⁹ a case involving a dispositive pattern similar to that of *Bomberger* and *Lawson*. Gus Detman created a revocable inter-vivos trust, reserving to himself the right to receive the income from the trust property for life and a power to withdraw corpus.¹⁷⁰ On his death, the remaining corpus was to be divided into four equal shares, one of which was payable "to my sister, Minnie Applegate, or if she predeceases me, then . . . to her son, Harry Applegate."¹⁷¹ Both Minnie and Harry predeceased Gus; Harry left descendants who survived Gus.

Rather than holding, as *Bomberger* did, that Harry's remainder interest was not contingent on surviving Gus, despite the fact that it was contingent on Minnie's failure to so survive, the court held that the Ohio antilapse statute applied to give a one-fourth share of the corpus to Harry's surviving descendants. "Considering its status as a remedial statute," the court reasoned, the antilapse statute

must "be liberally construed in favor of the persons to be benefited." With respect to [the antilapse statute], such persons include both the settlor and the issue of the beneficiary who predeceased him. Equally important is the admonition that a remedial statute should be extended "' . . . beyond its actual language to cases within its reason and general intent.'"

Thus, while [the antilapse statute], by its terms, applies only to wills, the intent of the legislature is furthered by its application to trust agreements.¹⁷²

¹⁶⁸ *E.g.*, *First Nat'l Bank v. Tenney*, 138 N.E.2d 15 (Ohio 1956); *Detroit Bank & Trust Co. v. Grout*, 289 N.W.2d 898 (Mich. Ct. App. 1980). Incidentally, *Tenney* was overlooked (or silently disregarded) by the Ohio Supreme Court in *Dollar Sav. & Trust Co. v. Turner*, 529 N.E.2d 1261 (Ohio 1988), discussed *infra* text accompanying notes 169-72.

¹⁶⁹ 529 N.E.2d 1261 (Ohio 1988).

¹⁷⁰ *Id.* at 1262.

¹⁷¹ *Id.*

¹⁷² *Id.* at 1264 (quoting *State ex rel. Maher v. Baker*, 102 N.E. 732, 734 (Ohio 1913) and *Rice v. Wheeling Dollar Sav. & Trust Co.*, 99 N.E.2d 301, 304 (Ohio 1951) (quoting Eugene Wambaugh, *Use of Decisions and Statutes*, in *BRIEF MAKING AND THE USE OF LAW BOOKS* 139 (Roger W. Cooley ed., 2d ed. 1909))) (citations omitted) (footnote omitted). As of this writing, a bill sponsored by the Ohio State Bar Association is pending in the Ohio legislature that would make it clear that the Ohio antilapse statute only applies to wills, and "not to inter vivos trust instruments or other instruments which are not admitted to probate." H.R. 427, 119th General Assembly (1992). See Richard V. Wellman, *Uniform Probate Code and Ohio in the 1990s*, 1

Although *Dollar Savings* still represents a small minority view,¹⁷³ the *Second Restatement of Property* sides with the *Dollar Savings* case:

For many purposes the revocable trust operates as a substitute for a will. The reasons that justify the applicability of an antilapse statute to wills are equally present when a revocable trust is involved. Consequently, the statutory language relating to the antilapse statute should be construed to apply to revocable trusts as well as to wills whenever that is possible.¹⁷⁴

The embryonic movement to extend antilapse statutes to revocable trusts provided at least partial encouragement to the framers of the 1990 UPC to include provisions such as those now set out in section 2-707, which, of course, go beyond the revocable trust situation. The feeling was that it would be better to have the same rule of construction apply to all future interests in trusts, whether the trust is revocable, irrevocable, or testamentary, rather than one rule of construction for revocable trusts and another for irrevocable and testamentary trusts. There was also a feeling that the fact that regular antilapse statutes only protect relatives in specified categories would raise special questions in this broadened context. Would the rule implying and responding to a condition of survivorship apply to all future interests in revocable trusts, or only when the beneficiary of the future interest is in one of the categories protected by the antilapse statute?¹⁷⁵ The position of the *Second Restatement of Property*, which simply calls for judicial extension of the typical antilapse statute to future interests, is that the future interest fails when the

Prob. L.J. of Ohio 55 (1991); Letter from Robert M. Brucken, Esq., of Baker & Hostetler, Cleveland, Ohio, to Lawrence W. Waggoner (Feb. 24, 1992) (on file with the *Albany Law Review*). The bill also includes a new section that extends antilapse protection to beneficiary designations such as in life-insurance policies and under employee death-benefit plans, in a fashion basically similar to UPC § 2-706.

¹⁷³ Recent cases rejecting the view of *Dollar Savings* include *In re Estate of Capocy*, 430 N.E.2d 1131 (Ill. App. Ct. 1981); *Hinds v. McNair*, 413 N.E.2d 586 (Ind. Ct. App. 1980); *Detroit Bank & Trust Co. v. Grout*, 289 N.W.2d 898 (Mich. Ct. App. 1980); *May v. Safer*, 208 N.W.2d 619 (Mich. Ct. App. 1973). Cases that have adopted a view like that of *Dollar Savings* include *In re Estate of Button*, 490 P.2d 731 (Wash. 1971) (en banc); *Hester v. Sammons*, 198 S.E. 466 (Va. 1938).

¹⁷⁴ RESTATEMENT (SECOND) OF PROPERTY (Donative Transfers) § 27.1 cmt. e (1987). See RESTATEMENT (SECOND) OF PROPERTY (Donative Transfers) §§ 27.2 cmt. f, 34.6(3)(b), 34.6 cmt. b (Tentative Draft No. 13, 1990).

¹⁷⁵ In the *Grout* case, for example, the person given the remainder interest was a friend but not a relative of the settlor's, and was not in the protected categories. *Grout*, 289 N.W.2d at 898.

beneficiary is outside the protected categories.¹⁷⁶ Section 2-707 provides a broader legislative solution to this problem by not restricting its application to any limited category of protected relatives. Section 2-707 applies to all future interests in trust.

A final consideration was that an extension of regular antilapse statutes to revocable trusts becomes awkward when the distribution of the trust's corpus takes place at the death of someone other than the settlor. Although many revocable trusts provide for distribution of the corpus upon the settlor's death, others continue on after the settlor's death to provide an income interest to the settlor's surviving spouse or the settlor's children. It seemed to make more sense, when faced with patently inadequate drafting, to require survival and to provide for substitution of descendants at the time of final distribution in all such cases rather than only at the earlier time of the settlor's death.

2. Express Conditions of Survival

As noted above, informed estate planners routinely impose express conditions of survival on the beneficiaries of future interests in trusts they draft. They do this for basically the same reasons that prompt proposals for a statute imposing a survival requirement when the governing instrument expressly fails to do so. A future interest that passes through a beneficiary's estate invites unintended disposition and is awkward, expensive, and subject to federal estate taxation under Internal Revenue Code section 2033.¹⁷⁷ In addition, the absence of an express requirement of survival may lead to litigation concerning whether one is to be implied. This litigation may occur decades after the beneficiary's death.

The major intent-effecting advantage of the rule against implying conditions of survival—preserving a share of the estate for descending lines in which an ancestor predeceases the time of distribution—is easily accomplished by attaching the express condition of survival to multiple-generation class gifts, that is, future interests to “issue” or “descendants” living at the time of the distribution.

Carelessly drafted, however, express conditions of survival can themselves be ambiguous and lead to unfortunate results or at least to litigation about their meaning.

¹⁷⁶ RESTATEMENT (SECOND) OF PROPERTY (Donative Transfers) § 34.6 cmt. b, illus. 3 (Tentative Draft No. 13, 1990).

¹⁷⁷ I.R.C. § 2033 (1988).

(a) *Common-Law Background*

(1) **Predominant Constructional Preference: "Surviving" Relates to Time of Distribution (Death of Income Beneficiary)**

Language of survival is ambiguous when it does not specify the time of survival. Important consequences can turn on the resolution of these inherently troublesome cases. The predominant constructional preference at common law is set forth in section 251 of the original *Restatement of Property*.¹⁷⁸ Section 251 provides that language of survival that does not specify the time to which the takers must survive "tends to establish the time of the termination of all preceding interests as the time to which survival is required."¹⁷⁹ The rationale, given in comment a, is that this constructional preference "'conforms more closely to the intent commonly prevalent among conveyors similarly situated.'"¹⁸⁰ Although comment e indicates that the preference for survival of the time of distribution is overcome if there is a "special context" indicating that only survival of the testator is required,¹⁸¹ the *Restatement* also states that the constructional preference is a strong one.¹⁸² Nowhere is the distinction noticed between multiple-generation class gifts (where its constructional preference makes sense) and single-generation class gifts (where application of its constructional preference tends to lead to disinheritance of a descending line).

A recent case, *In re Gustafson*,¹⁸³ shows how this rule of construction can work mischief when applied to a single-generation class gift. Carl Gustafson died leaving a will that basically devised about half of his estate in trust, the income to be paid to his wife Elsie Warren Gustafson for life. Regarding the distribution of the corpus upon Elsie's death, Paragraph Fifth of Carl's will provided:

- (a) One-half to my brother, E. Leonard Gustafson.
- (b) One-half to my brother, Roy L. Gustafson.
- (c) If a brother predeceases Elsie Warren Gustafson, then his share of this Trust shall be paid over to *his surviving child or children*, share and share alike.

¹⁷⁸ RESTATEMENT OF PROPERTY (Future Interests) § 251 (1940).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* (quoting RESTATEMENT OF PROPERTY (Future Interests) § 243 (1940)).

¹⁸¹ *Id.* § 251 cmt. e.

¹⁸² *Id.*

¹⁸³ 547 N.E.2d 1152 (N.Y. 1989).

(d) If one of my brothers shall predecease Elsie Warren Gustafson, without *issue* surviving, then his part of this Trust shall be paid over to his surviving brother.¹⁸⁴

Roy survived Elsie and took his half. Leonard predeceased Elsie, leaving a daughter Jacqueline and a son Daniel surviving him. Jacqueline survived Elsie as well, but Daniel predeceased Elsie, leaving a widow and children who survived Elsie.¹⁸⁵ Relying on the *Restatement of Property*,¹⁸⁶ the court held that the condition of survival on the interest of Leonard's children related to Elsie's death; consequently, Jacqueline took Leonard's half, and Daniel's widow and children took nothing.

Judge Hancock, dissenting, sought to construe the word "children" to mean "issue," in order to divide Leonard's half equally between Jacqueline and Daniel's children.¹⁸⁷ His argument was strengthened by the fact that Paragraph Fifth used "children" and "issue" interchangeably.¹⁸⁸

(2) Minority Rule: "Surviving" Relates to Time of Substitution (Death of Beneficiary's Ancestor)

Another approach to the *Gustafson* case would have been to relate the word "surviving" in Paragraph Fifth (c) to Leonard's death rather than to Elsie's death, thus dividing Leonard's portion between Jacqueline and Daniel's successors in interest. Among the precedents supporting this interpretation is the remarkably similar case of *In re Colman's Will*.¹⁸⁹ In that case, Lucius C. Colman's will created a

¹⁸⁴ *Id.* at 1153 (emphasis added).

¹⁸⁵ *Id.*

¹⁸⁶ RESTATEMENT OF PROPERTY (Future Interests) § 251 (1940).

¹⁸⁷ *Gustafson*, 547 N.E.2d at 1156 (Hancock, J., dissenting).

¹⁸⁸ *Id.* See RESTATEMENT (SECOND) OF PROPERTY (Donative Transfers) § 25.1 cmt. j & reporter's note 5c to § 25.1 at 23-24 (1987) (citing cases that indicate use of "children" and "issue" interchangeably can lead to construing "children" to mean "issue"); RESTATEMENT OF PROPERTY (Future Interests) § 285(2)(c) & cmt. j (1940). *But see* RESTATEMENT (SECOND) OF PROPERTY (Donative Transfers) § 25.9 cmt. d (1987) (use of "children" and "issue" interchangeably can lead to construing "issue" to mean "children").

Judge Hancock's argument that "children" meant issue would have been further strengthened had the language said "children, per stirpes" rather than "children, share and share alike." See *id.* § 25.1 cmt. i, illus. 14.

The dissenting opinion in the earlier case of *In re Welles*, 173 N.E.2d 876 (N.Y. 1961), had failed by one vote in its effort to avoid a result comparable to that of *Gustafson* by construing "then surviving grandchildren" as including great grandchildren. The dissenters expressed grave doubt that the testator wished two of his five branches of descendants to be excluded simply because of an unusual order of deaths. *Id.* at 880-81 (Burke, J., dissenting).

¹⁸⁹ 33 N.W.2d 237 (Wis. 1948).

trust that gave the income to his widow, Genevra Colman, for life, remainder in a portion of the corpus to Lucius's brother, Edward Colman; "[a]nd in case of the death of [Edward] before the death of my said wife, the share that he . . . would have taken shall be divided equally between his . . . *surviving* children."¹⁹⁰ Edward predeceased the life tenant, Genevra. His four children, Ruth Clark, Anna Colman, Joseph Colman, and Helen Murphy, survived him. At the time of the lawsuit, three of those children were still living, as was Genevra, but Anna had died. The court related the word "surviving" to the death of Edward, not to the death of the life tenant, Genevra. The court said:

The general rule is that when a vested interest is divested by a condition subsequent, such interest immediately vests in the substitutionary legatees unless the will expressly provides otherwise. Consequently then, as under the will involved herein, the substitutionary legatees are children not of the testator nor of the life tenant, but [of a third person], the class is determined and the bequest vests in such class on the death of their parent, or ancestor if taking per stirpes. When the interest of the parent vests in the children as a class the interest of any child then living is not divested by the death of such child prior to the termination of the life estate.

. . . .
The law favors a vested rather than a contingent estate; and an absolute rather than a defeasible estate; and a vesting at the earliest possible period.¹⁹¹

This position, if adopted in *Gustafson*, would have avoided benefitting one branch of the family to the exclusion of another branch. Only half of Leonard's portion would have gone to Jacqueline. The other half would have gone to Daniel's successors in interest. Although Daniel's successor in interest apparently was Daniel's widow under Daniel's will, the unconsumed portion of that property would likely end up in the hands of Daniel's children. In *Colman*, however, the court appears to have blindly relied on the preference for early indefeasibility, although it may have been motivated by the objective of establishing a rule of construction that would tend to produce results consistent with the intentions of most testators.

The intent-effecting rationale (of avoiding the exclusion of a branch of the family) would have been well served had the "time of

¹⁹⁰ *Id.* at 239 (emphasis added).

¹⁹¹ *Id.* at 241-42 (citations omitted).

substitution" construction been adopted in *Gustafson*, but it may have been disserved in the particular facts of *Colman*. It appears that Edward's daughter, Anna, in whom the "time of substitution" construction vested a one-fourth share of Edward's portion, left neither descendants nor spouse surviving at the time of distribution, the death of the life tenant, Geneva.¹⁹²

(3) Another Minority View: "Surviving" Relates to Death of Testator

Some other courts have sought to avoid excluding a family branch by relating the word "surviving" to the testator's death. Such a case is *In re Nass's Estate*.¹⁹³ George Nass, Sr.'s will devised his residuary estate in trust, income to his wife for life; upon her death, a portion of the corpus was given in further trust to pay the income equally to each of his daughters for life.¹⁹⁴ On the death of each daughter, the portion of corpus from which that daughter had been receiving income was to go to her child or children, with the further provision that if a daughter dies without leaving lawful issue, that daughter's share shall go "unto my *surviving* child or children absolutely and forever."¹⁹⁵ George had four children, a son George, Jr. and three daughters, Mary, Amanda, and Julia. George died first, then Mary, and then Amanda. George, Jr. and Mary left children who were still living at the time of the lawsuit. Because Amanda died without any children, Julia, as the testator's only living child, claimed Amanda's share. The court, however, decided that "surviving" did not relate to the death of the life tenant, Amanda, but to the death of the testator, George, Sr.¹⁹⁶ The court put the ground of its decision squarely on the desire to avoid benefitting Julia's branch to the exclusion of George, Jr. and Mary's branches:¹⁹⁷

¹⁹² We deduce this from the fact that the court lists her name as Anna Colman. *Id.* at 239. In the era in which this case arose, the fact that she retained her father's surname would seem to indicate that she was unmarried and childless.

¹⁹³ 182 A. 401 (Pa. 1936).

¹⁹⁴ *Id.* at 402.

¹⁹⁵ *Id.* (emphasis added).

¹⁹⁶ *Id.* at 403.

¹⁹⁷ This ground is often overlooked by authorities that prefer to relate the word "surviving" to the time of distribution. Those authorities often, wrongly, attribute the *Nass* view to nothing more substantial than the preference for early indefeasibility. See for example, *Hawke v. Lodge*, 77 A. 1090 (Del. Ch. 1910):

It is believed that the adoption of [the rule relating 'surviving' to the time of distribution] will more effectually carry out the intention of the testator in most cases than any other rule, for it seems to be the natural meaning of the words and one to be adopted by those

Our rule of construction applied to survivorship has been held to refer to the time of death of the testator unless a contrary intent appears in the will. The rule is not without sound reason, for its general effect is to distribute the property among all of testator's descendants rather than to shunt it off into one line where it may pass out of the family. It is apparent that in this case any other construction would work an inequality which would not carry out what was presumably testator's scheme If testator's intent be considered otherwise, it results in giving the entire fund to one child, Julia, whose life has been prolonged beyond the lives of the other children, and would tend to prefer her and her heirs over the heirs of other children. However, the interpretation placed on the will by the court below works an entire equality. Julia gets her share of the part of the estate now distributable, as do the issue and heirs of the other children of the testator who are now deceased The judgment of the court below is accordingly affirmed.¹⁹⁸

Gustafson, *Colman*, and *Nass* simply illustrate that there is common-law precedent for three different rules of construction, on ambiguous language of survivorship: that it relates to the time of distribution (*Gustafson* and the Restatement), that it relates to an intermediate time of substitution (*Colman*), and that it relates to the testator's death (*Nass*). Having three different rules of construction, none of which will consistently produce results consistent with probable intention, makes the common law very unsatisfactory.

(b) *UPC Section 2-707*

How would UPC section 2-707 handle these cases? Does it give a clear result? Does it give a satisfactory result? In *Gustafson*, the result would be straightforward and satisfactory. Daniel's children would take half of Leonard's portion, and Jacqueline would take the

not unduly influenced by the desire for a vesting of estates and interests at the earliest period.

Id. at 1091. See also RESTATEMENT OF PROPERTY (Future Interests) § 251 cmt. a (1940) ("[Relating 'surviving' to the death of the testator] would be in accord with the constructional preference . . . favoring early indefeasibility. . . . [But] [t]he preference for [relating that word to the time of distribution] 'conforms more closely to the intention commonly prevalent among conveyors similarly situated.'") (quoting *id.* § 243(a)).

¹⁹⁸ *Nass*, 182 A. at 403 (citations omitted). Presumably, since Amanda survived the testator, Amanda's own successors in interest would share in Amanda's portion equally with Julia and the successors in interest of George, Jr. and Mary.

other half, not all of it. Section 2-707(b) essentially adopts the position of the *Restatement of Property* for that situation, and the more generally sound planning principle, in providing that a future interest under a trust is conditioned on the beneficiary's surviving the "distribution date," a defined term meaning the time of possession or enjoyment.¹⁹⁹ Section 2-707(b)(3) provides that words of survivorship attached to a future interest, including words of survivorship such as those in *Gustafson* that relate to "an unspecified time,"²⁰⁰ are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of the substituted gift (to descendants) provision of section 2-707(b)(2). The ill effect of the *Restatement* position—the potential exclusion of one branch of the family—is thus avoided by, essentially, transforming single-generation class gifts into multiple-generation class gifts. In the *Gustafson* facts, section 2-707(b)(2) would give a substitute gift to Daniel's descendants who survived the income beneficiary, Elsie, by 120 hours.²⁰¹

¹⁹⁹ U.P.C. § 2-707(a)(4) (1991).

²⁰⁰ UPC § 2-707(b)(3) also applies to words of survivorship that relate to "an earlier" time than the distribution date. The application of this feature is illustrated by the case of *Weller v. Sokel*, 318 A.2d 193 (Md. 1974). Arthur Nattans's will devised certain property in trust. The remainder interest, which was to take effect upon the death of the last survivor of Arthur's eight children, was devised to the issue of the children who died "leaving lawful issue him or her surviving, per stirpes." *Id.* at 196.

Two of Arthur's grandchildren, Harold Herbert and Arthur Bachrach, predeceased the death of Arthur's last surviving child. These two grandchildren survived their parent (a child of Arthur's) but left no descendants surviving them. *Id.* The court held that the remainder interest to "issue per stirpes" imposed condition of survival, not only of their parent (Arthur's child) but of the time of possession and enjoyment (the death of Arthur's last surviving child). *Id.* at 202-03. This, despite the language "leaving lawful issue *him or her surviving*," which would seem to require only survival of the grandchildren's parent. *Id.* at 196 (emphasis added). *Weller* indicates the strength of the idea that a future interest to a multiple-generation class by representation implicitly requires survival of the time of possession and enjoyment.

Had UPC § 2-707 governed *Weller*, the outcome would have been the same, but without the necessity of litigation or appeal. Although UPC § 2-707(b)(2) is inapplicable to class gifts to "descendants" or "issue," because the statutory creation of a substitute gift is unnecessary regarding such class gifts, the first sentence of UPC § 2-707(b) applies to all future interests under a trust, including multiple-generation class gifts to issue, and provides that all such future interests are contingent on survivorship of the distribution date (the death of Arthur's last surviving child). UPC § 2-702(b)(3) says that words of survivorship that relate to a time earlier than the distribution date are not a sufficient expression of a contrary intention.

²⁰¹ Recall that the devise in *Gustafson* created a future interest in half of the corpus in the testator's brother, Leonard, an alternative future interest in Leonard's children should Leonard predecease the income beneficiary, Elsie, and another alternative future interest in the testator's other brother, Roy, should Leonard predecease Elsie "without issue surviving." *In re Gustafson*, 547 N.E.2d 1152, 1153 (N.Y. 1989). The first step in applying UPC § 2-707 to this devise is to note that subsection (b)(1) applies to future interests that are not in the form of a class gift and that subsection (b)(2) applies to future interests that are in the form of a class gift. U.P.C. § 2-707(b)(1), (b)(2) (1991). Thus, subsection (b)(1) applies to Leonard's future interest

In *Colman*,²⁰² the result is also straightforward and satisfactory. Edward's portion of the corpus would be divided among his three children, Ruth, Joseph, and Helen, assuming they survived the income beneficiary, Geneva, by 120 hours and assuming Anna left no descendants who survived Geneva by 120 hours. If Anna did leave descendants who survived Geneva by 120 hours, however, section 2-707(b)(2) would apply and provide that those descendants take the share Anna would have received.²⁰³

Applying section 2-707 to *Nass*,²⁰⁴ George's descendants who survived Amanda by 120 hours would divide, by representation, the one-third share that George would have taken had he survived Amanda by 120 hours; Mary's descendants who survived Amanda by 120 hours would divide, by representation, the one-third share that Mary would have taken had she survived Amanda by 120 hours; and Julia would take the final one-third share.²⁰⁵

CONCLUSION

As revised in 1990, the UPC's survivorship and antilapse provisions constitute comprehensive legislation that resolves a variety of inter-

and creates a substitute gift for that interest in Leonard's descendants who survive the distribution date (Elsie's death) by 120 hours. That substitute gift, however, is superseded under subsection (b)(4) by the alternative future interest in Leonard's children. *Id.* § 2-707(b)(4). Supersession of the substitute gift for Leonard occurs because one of the beneficiaries of the alternative future interest, Jacqueline, survived the distribution date by 120 hours and is entitled to take in possession or enjoyment. The next step is to apply subsection (b)(2)—the class gift subsection—to the alternative future interest in Leonard's children. That subsection provides that Jacqueline takes her half share and that Daniel's descendants who survive the distribution date by 120 hours divide, by representation, the other half share that Daniel would have taken had he survived the distribution date by 120 hours. *Id.* § 2-707(b)(2). In this case, of course, it would make no difference in result which substitute gift takes effect—the one for Leonard or the one for Leonard's children. Both substitute gifts would give half to Jacqueline and half to Daniel's children. Note that the substitute gift to Daniel's descendants under subsection (b)(2) is not superseded by the alternative future interest in Roy. In order for that substitute gift to be superseded, subsection (b)(4) requires that Roy be entitled to take in possession or enjoyment. Although Roy survived the distribution date by 120 hours, he is not entitled to take in possession or enjoyment because his interest was subject to an unsatisfied condition precedent. His interest was contingent on Leonard predeceasing Elsie "without issue surviving." Although Leonard predeceased Elsie, he did not die without issue surviving. Leonard's issue, Jacqueline and Daniel's children, survived Elsie by 120 hours.

²⁰² *In re Colman's Will*, 33 N.W.2d 237 (Wis. 1948).

²⁰³ Subsection (b)(2) states that "[e]ach deceased beneficiary's surviving descendants who are substituted for the deceased beneficiary take by representation the share to which the deceased beneficiary would have been entitled had the deceased beneficiary survived the distribution date." U.P.C. § 2-707(b)(2) (1991).

²⁰⁴ *In re Nass's Estate*, 187 A. 401 (Pa. 1936).

²⁰⁵ See U.P.C. § 2-707(b)(2) (1991).

pretive questions that have long troubled courts and litigants. In addition to the inevitable possibility of policy controversy over a few inherently difficult issues, the resolution of all of these interpretive questions necessarily requires lengthier statutory text. The lengthier text, in turn, makes the statutory scheme appear complicated and susceptible to the criticism of over-legislating.

The terms of the statutes are elaborate and intricate, however, because they have to deal with a variety of potentially complicated factual situations. We reiterate the point made earlier,²⁰⁶ that the test of a statute is not whether it is understandable upon a single reading of its text. The test is whether the statute produces a clear and appropriate result when applied to actual cases. A statute should be read, in other words, from the standpoint of an actual case. If, by working with the statutory language and the official comments for a few hours, a lawyer (or probate judge) can resolve the case, the public is much better served by the statute than it would be by a simpler statute that leaves a number of issues unresolved and that requires legal research and perhaps lengthy litigation and appeal in order to resolve the case.

Thus, we do not deny the intricacy of the statutory scheme, but believe that its mystery largely disappears with a little study. In addition, UPC sections 2-603, 2-706, and 2-707 are, by design, structurally and linguistically very similar, so that learning under one statute is largely transferrable to the other two.

We have tested these statutory provisions in far more cases than we were able to describe in this article, and found them to work well.²⁰⁷ As experienced legislative drafters, we can also say that these provisions, particularly sections 2-603, 2-706, and 2-707, posed

²⁰⁶ See *supra* part II.A.6.

²⁰⁷ Inevitably, cases will arise in which the application of the statute depends upon the resolution of an ambiguity in the disposition itself. A case in point is a slightly altered version of the testamentary trust in *Boone County Nat'l Bank v. Edson*, 760 S.W.2d 108 (Mo. 1988) (en banc). Assume that the trust, as in *Edson*, which would be governed by UPC § 2-707, provides:

[a] Income to my daughter A. for life, remainder in corpus in equal shares to her children who survive her, but if she dies without children surviving her, then in equal shares to my sisters B and C.

[b] If B fails to survive A, B's share to go to B's grandchildren, X, Y, and Z.

[c] If C fails to survive A, C's share to go to B.

A never had any children. Both B and C predecease A. B's grandchildren, X, Y, and Z, survive A. X, Y, and Z are children of B's child, M. After the testator's will was executed, but before the testator's death, M had a fourth child, V, who survives A. M predeceases A, but B's other child, N, survives A. C leaves no descendants who survive A.

Because A left no surviving children or other descendants, the analysis of this case under UPC § 2-707 starts with the point that paragraph [a] creates a remainder in one-half of the corpus in B and in the other half of the corpus in C. Paragraph [b] directs the disposition of B's

greater challenges to the drafting process than anything we have seen before. Undoubtedly, over time, we and others will find some cases or come up with hypotheticals in which the scheme does not work perfectly. If any genuine flaws in the legislation exist, we would not expect them to turn up in mainstream cases, but hope they will either involve deeply subordinate issues or justify the very types of continuing modification for which the Joint Editorial Board exists.

We began this Article by pointing out that no statute, no matter how deliberative or skillful the drafting process, can be expected to give a satisfactory outcome to every conceivable set of facts that may arise or that can be imagined by fertile minds. Every statute will give a bad result from time to time. The only reasonable test of a new statute is whether it advances the law by giving a satisfactory result in a greater proportion of cases than the law it replaces and whether it does so with a minimum of litigation. Obviously, the framers believe that the 1990 UPC survivorship and antilapse provisions meet this test and, once enacted, will serve the public well.

original half share in case B predeceases A. Paragraph [c] directs the disposition of C's original half share in case C predeceases A.

B's original half share clearly goes to X, Y, and Z under paragraph [b] rather than to B's descendants under UPC § 2-707. (The class of B's descendants, who would take under UPC § 2-707, includes N and V as well as X, Y, and Z and, under the system of representation, would give half of that share to N and divide the other half four ways among V, X, Y, and Z.) Although UPC § 2-707(b)(1) creates a statutory substitute gift in B's descendants, that substitute gift is superseded under UPC § 2-707(b)(4) by the alternative future interest in X, Y, and Z.

It is C's original half share that creates the problem. Because C failed to survive A, paragraph [c] says that it goes to B. Because B failed to survive A, UPC § 2-707(b)(1) creates a statutory substitute gift in B's descendants. The question becomes: Is that statutory substitute gift superseded under UPC § 2-707(b)(4) by the alternative future interest created by paragraph [b] in X, Y, and Z? Put differently, does the phrase "B's share" in paragraph [b] apply only to B's original half share or does it also include B's alternative future interest in C's original half share created by paragraph [c]? If it applies only to B's original half share, as a literal reading of the disposition and perhaps the *First Restatement* suggest, then the statutory substitute gift to B's descendants takes effect because it is not superseded by the alternative future interest in X, Y, and Z. See *RESTATEMENT OF PROPERTY (Future Interests)* § 271 (1940). If the phrase also includes B's alternative future interest in C's original half share, as the court in *Edson* seemed to assume without discussion, then the statutory substitute gift to B's descendants is superseded and the alternative future interest in X, Y, and Z takes effect. *Edson*, 760 S.W.2d at 110.

Although cases like this will inevitably arise under UPC § 2-707, that does not mean that UPC § 2-707 will increase litigation. The ambiguity in the disposition would have to be resolved anyway. In the absence of a statute such as UPC § 2-707, the same ambiguity would raise the question whether C's original half share would devolve under B's will or to B's heirs by intestacy or would pass under paragraph [b] to X, Y, and Z.

The important point is that, once the ambiguity in the disposition is resolved, the application of UPC § 2-707 is not difficult.