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# Property: Creating a Slayer Statute Oklahomans Can Live With

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# COMMENTS

# Property: Creating a Slayer Statute Oklahomans Can Live With

## *I. Introduction*

"It is almost as important that property law be predictable as that it be right."[1] Although not everyone fully agrees with this statement, when the law is both *unpredictable* and *wrong*, change often comes more swiftly. Not so, however, with Oklahoma's slayer statute.[2] A slayer statute is a law that prevents a murderer, or sometimes less-culpable killer, from taking property as a beneficiary of his victim through testate or intestate succession.[3] Not all jurisdictions have such laws; some states apply common law maxims to achieve the same result, and a very small number of states have yet to apply the rule at all.[4]

Oklahoma passed its slayer statute in 1915,[5] two years after the Oklahoma Supreme Court allowed a man who murdered his wife to take half of her estate under Oklahoma's intestacy scheme.[6] The legislature has amended the law three times since, most recently in 1994.[7] The result is a hodgepodge of laws

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1. Estate of Propst, 788 P.2d 628, 639 (Cal. 1990) (Broussard, J., concurring and dissenting).

2. 84 OKLA. STAT. § 231 (2001).

3. Curiously, the term "slayer statute," although in wide use by commentators, *see, e.g.*, Brian W. Underdahl, *Creating a New Public Policy in Estate of O'Keefe: Judicial Legislation Using a Slayer Statute in a Novel Way*, 44 S.D. L. REV. 828 (1999), has not found its way into our dictionaries. The closest entry in *Black's Law Dictionary* is "slayer's rule," which is essentially the common law doctrine that a person who kills another person could not in any way share in the distribution of the slain person's estate. BLACK'S LAW DICTIONARY 1393 (7th ed. 1999). A statute is, of course, "[a] law passed by a legislative body." *Id.* at 1420. Thus, we can infer that a "slayer statute" is the formal written enactment of the slayer rule.

4. Five states are without any form of slayer statute: Maryland, Massachusetts, Missouri, New Hampshire, and New York. Three of those states apply the rule by common law: Maryland, Prince v. Hitaffer, 165 A. 470, 474 (Md. 1933) (applying to testate succession); Missouri, Perry v. Strawbridge, 108 S.W. 641, 648 (Mo. 1908) (applying to intestate succession); and New York, Riggs v. Palmer, 22 N.E. 188, 190 (N.Y. App. Div. 1889) (applying to intestate succession). In the other two states, Massachusetts and New Hampshire, the courts have never squarely faced the question. *See* Jeffrey G. Sherman, *Mercy Killing and the Right to Inherit*, 61 U. CINN. L. REV. 803, 805-06 n.12 (1993).

5. Act Relating to Heirs or Beneficiary Causing Death or Disability, ch. 136, § 1, 1915 Okla. Sess. Laws 185.

6. Holloway v. McCormick, 1913 OK 692, 136 P. 1111.

7. This comment provides, for the convenience of the reader, the full text of the original



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1910 statute, additions and deletions from each of three amendments passed.

*1) The full text of the original enactment:*

Guilty Party May Not Benefit by Action.

> Section 1. No person who is convicted of having taken, or causes or procures another so to take, the life of another, shall inherit from such person, or receive any interest in the estate of the decedent, or take by devise or legacy, or descent or distribution, from him, or her, any portion of his, or her, estate; and no beneficiary of any policy of insurance or certificate of membership issued by any benevolent association or organization, payable upon the death or disability of any person, who in like manner takes or cause or procures to be taken, the life upon which such policy or certificate is issued, or who causes or procures a disability of such person, shall take the proceeds of such policy or certificate; but in every instance mentioned in this section all benefits that would accrue to any such person upon the death or disability of the person whose life is thus taken, or who is thus disabled, shall become subject to distribution among the other heirs of such deceased person according to the laws of descent and distribution, in case of death, and in case of disability, the benefits thereunder shall be paid to the disabled person; provided, however, that an insurance company shall be discharged of all liability under a policy issued by it upon payment of the proceeds in accordance with the terms thereof, unless before such payment the company shall have written notice by or in behalf of some claimant other then the beneficiary named in the policy that a claim to the proceeds of such policy will be made by heirs of such deceased under the provisions of this Act.
>
> Approved March 13, 1915.

Act Relating to Heirs or Beneficiary Causing Death or Disability, ch. 136, § 1, 1915 Okla. Sess. Laws. 185.

2) The 1963 amendment:

> Amending the title to read, "§ 231. Person causing death not to inherit nor benefit by insurance of decedent".

Act Relating to Wills and Succession, ch. 309, § 1, 1963 Okla. Sess. Laws 447 (codified as amended at 84 OKLA. STAT. § 231 (2001)).

> Amending first sentence to read, "No person who is convicted of *murder or manslaughter in the first degree under the laws of this State, or the laws of any other state or Foreign Country,* of having taken, caused or procured another so to take, the life of another . . . ."

*Id.* (emphasis added).

3) The 1975 amendment:

> Amending first sentence to read, "No person who is convicted of murder in the first degree, *as defined in 21 O.S.1971, Section 701.1,* or murder in the second degree, *as defined in 21 O.S.1971 701.2, subparagraph 1 or 2,* or manslaughter in the first degree, *as defined in 21 O.S.1971, Section 711, subparagraph* 2, under the laws of this state . . . shall . . . take . . *as a surviving joint tenant . . . .*"

Act Relating to Wills and Succession, ch. 356, § 1, 1975 Okla. Sess. Laws 672 (codified as amended at 84 OKLA. STAT. § 231 (2001)).

4) The 1994 amendment:

The 1994 amendment is the most recent. Most notably the 1994 amendment deleted the title

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that are ambiguous, too narrow in some instances, too broad in others, and at times contradictory. Such a state of affairs has forced the Oklahoma Supreme Court to employ, at best, creative methods to circumvent the statute's absurdities and, at worst, to ignore the statute completely. Ultimately, this has created a "system" of law and court-made rules that is difficult to understand — i.e., unpredictable — and based on poor policy choices — i.e., wrong. Although the current framework is probably better than no legislation at all, it is time that Oklahoma lawmakers consider enacting a new slayer statute.

This comment's primary purpose is to aid legislators in defining problems inherent in the current law and to suggest possible changes. To the extent that such changes do not materialize, this comment works to aid practitioners who are attempting to wade through Oklahoma's slayer laws in applying the current law to their own factual situations.

To that end, Part II presents the historical background of the common law slayer rule, from feudal England to Oklahoma's enactment of its statutory version. In an attempt to discern the current state of the law concerning slayers in Oklahoma, Part III examines Oklahoma's original slayer Act, its various amendments, and various cases interpreting its language. Part IV suggests answers to the difficult policy choices that lawmakers face when drafting a comprehensive slayer statute and examines how other jurisdictions have approached the issue. Part V explores and recommends the adoption of the Uniform Probate Code's (UPC) model slayer statute.

## *II. Of Killers and Kings: A Historical Overview*

The problem of what to do with a slayer and his bounty is, of course, not new.[8] The history of homicide is not brief, and a killer's motivation is often greed. The law has rarely been complacent, however, in allowing the slayer to collect on his crime. This section briefly reviews the legal devices that courts and legislatures have used to prevent a slayer from economically benefiting from his wrong.

The early English system had no need for legislation on the matter because it used the traditional doctrines of attainder, corruption and forfeiture of blood,

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and the 1975 additions of the specific location of each numerated offense. It also added POD and TOD accounts as items from which a slayer may not benefit. Act Relating to Designations of Beneficiaries, ch. 313, § 9, 1994 Okla. Sess. Laws 1406 (codified at 84 OKLA. STAT. § 231 (2001)).

8. *See generally* Alison Reppy, *The Slayer's Bounty — History of Problem in Anglo-American Law*, 19 N.Y.U. L.Q. REV. 229 (1942) (furnishing a concise history of the historical problems and solutions concerning a killer benefiting economically from his victim).

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and escheat to keep the slayer from his bounty.[9] The ancient doctrine of attainder "was a state in which a person was placed, by operation of law, upon sentence for a capital offense, such as treason or some other felony."[10] Unfortunately for the attainted person's family, the doctrine brought with it some negative consequences for third parties, known as incidents of attainder.[11] The incident of forfeiture of chattels insisted that the attainted felon, immediately upon conviction, forfeit his personal property to the king.[12] The incident of forfeiture of estate demanded that the attainted felon forfeit all his land "during the life of the offender, on the pronouncement of sentence."[13] Corruption of blood, another incident of attainder, provided that the attainted felon "could not convey his estate to his heirs, nor could they take by descent from him. . . . [T]he felon's heirs unto the remotest generation were barred from inheritance."[14]

Parliament began abolishing these archaic doctrines in 1814 and completed the task fifty-six years later with the Forfeiture Act of 1870.[15] That Act forced English courts to make a decision: either seek innovative remedies or allow slayers to recover.[16] Choosing the former, courts "discovered and promulgated the 'so-called rule of public policy,' which forbade a criminal from profiting from his own wrong."[17]

The ancient doctrines did become a part of American colonial law; however, "[f]or the most part, [the states] have been saved from this complication by constitutional and statutory abolishment of the[] undemocratic and archaic features of the common law."[18] Oklahoma is no exception in this regard, as it abolished the incidents of corruption of blood and forfeiture of estate in its constitution.[19] Oklahoma, along with the rest of the country, was then forced to create a way, if it so desired, to keep killers from benefiting from their wrongs.

The first American case of import concerning a slayer's bounty was *New York Mutual Life Insurance Co. v. Armstrong*,[20] in which a man took out a life

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9. *Id.* at 230.
10. *Id.* at 231.
11. *See id.*
12. *Id.* at 232-33.
13. *Id.* at 233.
14. *Id.*
15. *Id.* at 234-38.
16. *See id.* at 241.
17. *Id.* at 242 (quoting Cleaver v. Mutual Reserve Fund L. Ass'n, 1 Q.B. 147 (C.A. 1892)).
18. *Id.* at 244.
19. OKLA. CONST. art. 2, § 15.
20. 117 U.S. 591 (1886).

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insurance policy on his own life, payable to himself or his assigns.[21] The man then assigned the policy to a third party, who was later convicted of killing the man.[22] When the insurance company refused to pay the proceeds to the administrator of the man's estate, the administrator sued.[23] Upon losing, the administrator appealed to the U.S. Supreme Court.[24] Justice Field declared for the Court:

> [I]ndependently of any proof of the motives of [the slayer] in obtaining the policy, and even assuming that they were just and proper, [the slayer] forfeited all rights under it when, to secure its immediate payment, he murdered the assured. It would be a reproach to the jurisprudence of the country, if one could recover insurance money payable on the death of a party whose life he had feloniously taken.[25]

Three years after *Armstrong*, the New York Court of Appeals decided *Riggs v. Palmer*.[26] The case quickly became a bastion for the slayer rule in America, especially as it relates to noninsurance cases.[27] In that case a grandson, who was a beneficiary under his grandfather's will, killed his grandfather.[28] The court addressed whether the state Statute of Wills permitted the grandson to take under his grandfather's will.[29] Although a majority of the court refused to allow the grandson to take, the dissent vigorously argued that the grandson should take under a strict reading of the state statute.[30] That is, the grandfather had complied with the execution formalities of the Statute of Wills, and the grandson was not within any of the legislatively created exceptions as to who could be a beneficiary.[31] Therefore, the argument went, the legislature must have intended for the murderer to take under the will.[32] The dissent insisted that it was the job of the legislature, not

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21. *Id.* at 592-93.
22. *Id.*
23. *Id.*
24. *Id.* The defendant-insurance company removed the case to the federal courts as a diversity case. *Id.*
25. *Id.* at 600.
26. 22 N.E. 188 (N.Y. 1889).
27. *See* Daniel A. Farber, *Courts, Statutes, and Public Policy: The Case of the Murderous Heir*, 53 S.M.U. L. REV. 31 (2000).
28. *Riggs*, 22 N.E. at 189.
29. *Id.*
30. *Id.* at 191-93 (Gray, J., dissenting).
31. *Id.* at 189.
32. *Id.*

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the courts, to modify the existing rule.[33] Nevertheless, the famous majority opinion by Judge Earl relied on the public policy rule that a wrongdoer should not benefit from his wrong, a rule first constructed by common law English courts after Parliament had abolished the incidents to attainder.[34] Judge Earl insisted that the statute must be read with that maxim in mind because the legislature must have had it in mind as well.[35] Therefore, the court held that the grandson was barred from taking under the will.[36]

Although *Riggs* and *Armstrong* deal with dramatically different areas of the law — *Riggs* with the traditionally legislative field of wills and *Armstrong* with the traditionally judicial field of contracts — together they pose a fundamental jurisprudential question: What is the extent of the courts' rulemaking authority? Should courts be relegated to the role of robotic interpreters, capable of adding nothing of substance to the law, as the *Riggs* dissent might maintain? Or do courts serve some greater role?

It is surprising that the questions addressed in *Riggs* and *Armstrong* took so long to surface in America. Whether this was a result of the lengthened time between a death sentence and the execution of that sentence, because the young nation had other concerns, or for other reasons, is not fully evident. In any event, *Riggs* triggered the question of what to do with a slayer and his bounty, regardless of whether that bounty came by will, statute, or contract. In the myriad of slayer cases that followed *Riggs*, only a few jurisdictions followed New York's lead.[37]

## *III. The State of Oklahoma Law Concerning Slayers*

### *A. The Law Before Legislation: Simpler Times*

The *Riggs* question arose in Oklahoma less than five months after statehood,[38] and involved a homicide in Indian country.[39] In *De Graffenreid v. Iowa Land & Trust Co.*, a husband murdered his wife and then attempted to collect from her estate under the Creek laws of descent and distribution.[40]

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33. *Id.* at 191-92 (Gray, J., dissenting).

34. *Id.* at 190.

35. *Id.*

36. *Id.* at 191.

37. New York is one of only five states with no slayer statute. *See supra* note 4.

38. Oklahoma gained statehood November 16, 1907. COLUMBIA ENCYCLOPEDIA 45 (Paul Lagasse ed., 6th ed. 2000). It was the 46th state to enter the union. *Id.* The first case regarding the slayer rule was decided April 13, 1908. De Graffenreid v. Iowa Land & Trust Co., 1908 OK 49, 95 P. 624.

39. *De Graffenreid*, ¶ 77, 95 P. at 640.

40. *Id.* ¶ 78, 95 P. at 640.

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Although the Oklahoma Supreme Court interpreted Creek law in *De Graffenreid*, and the case ultimately turned on complicated issues of jurisdiction in Indian country,[41] the court stated a general rule:

> 'By the weight of authority, in the absence of express provisions excluding from inheritance an heir murdering the intestate, the operation of the statute of descent is not affected by the fact that the ancestor was murdered by the heir apparent in order to obtain the inheritance at once, and therefore an heir who murders his ancestor in order that he may inherit the estate at once is not disqualified from taking . . . .'[42]

Although the *De Graffenreid* court stated the rule as applying to inheriting descendants only, given that the holding of the case pertained to spouses,[43] the rule clearly applied to inheritances in general, and likely to bequests and devises as well. Indeed, the next Oklahoma case concerning a slayer and his bounty, *Holloway v. McCormick*,[44] relied on *De Graffenreid* for that general holding.[45]

The facts of *Holloway* are similar to those of *De Graffenreid*, except for the absence of Indian country jurisdictional issues. In *Holloway*, a husband killed his wife and then himself.[46] The wife died intestate with two possible heirs — her husband and her brother.[47] The husband also died intestate with two possible heirs — his father and his son from a prior relationship.[48] Initially, the probate court found that when the wife died, her estate passed in equal parts to the husband and her brother.[49] When the husband died, his estate, which now included half of the wife's estate, went solely to his father because the probate court was never aware of the existence of the father's nonmarital son.[50] The father brought a partition action against the wife's brother.[51] The wife's brother counterclaimed, contending that he should have taken the whole estate, and inviting the court to adopt a common law slayer

41. *Id.* ¶ 77, 95 P. at 640.
42. *Id.*
43. *Id.*
44. 1913 OK 692, 136 P. 1111.
45. *Id.* ¶ 6, 136 P. at 1113 (quoting *De Graffenreid*, ¶ 77, 95 P. at 640).
46. *Id.* ¶ 1, 136 P. at 1112.
47. *Id.*
48. *Id.*
49. *Id.* ¶ 2, 136 P. at 1112.
50. *Id.*
51. *Id.*

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rule as in *Riggs*.[52] The trial court declined the invitation and held that upon the wife's death, half of the wife's estate passed to the husband-slayer.[53]

The relevant issue on appeal was whether the trial court erred by not applying a common law slayer rule.[54] Although it found the argument "ingenious," the Oklahoma Supreme Court held that there was no room for the court to intrude into the legislatively controlled area of intestacy.[55] Despite the fact that the court cited neither *Armstrong* nor *Riggs*, it did note that none of the insurance or will cases were "exactly in point with the case at bar."[56]

The *Holloway* court noted several reasons for its holding. First, the court was clearly aware of the spirit versus the letter-of-the-law conundrum the slayer question poses.[57] Determined to follow the letter of the law, the court stated that the equitable arguments favoring the spirit approach "'would have great weight *if* there were ambiguity in the statute, or *if* it were the province of the court to settle the policy of the state with respect to the descent of property.'"[58] The court also worried about stepping on legislative toes by determining for itself "'the character and extent of punishment which should be inflicted for the commission of crime.'"[59] Second, the court reasoned that adopting a slayer rule would violate the Oklahoma constitutional provision forbidding the use of the feudal doctrines of forfeiture of estate and corruption of blood.[60] Finally, the court felt compelled to follow the precedent established by *De Graffenreid*.[61]

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52. *Id.*

53. *Id.* Even though the trial court essentially affirmed what happened at the probate level, it did significantly alter the holdings of the litigants. Because the husband's nonmarital son was added as an indispensable party, the son, in lieu of the father, took the husband's whole estate (which included half of the wife's estate). *Id.* ¶ 2, 136 P. at 1112. It is for this reason that the father appealed as well, claiming that the method by which the husband recognized the son was legally insufficient. *Id.* ¶ 9, 136 P. at 1114. The supreme court agreed and declared that the writing was insufficient as a matter of law and remanded the case to the district court to reinstate the father's inheritance potion. *Id.* ¶ 14, 136 P. at 1115.

54. *See id.* ¶ 2, 136 P. at 1112.

55. *Id.* ¶ 2, 136 P. at 1113.

56. *Id.* ¶ 2, 136 P. at 1112.

57. *See id.* ¶¶ 4-5, 136 P. at 1113.

58. *Id.* ¶ 5, 136 P. at 1113 (quoting McAllister v. Fair, 84 P. 112, 113 (Kan. 1906)) (emphasis added).

59. *Id.* ¶ 6, 136 P. at 1113 (quoting *McAllister*, 84 P. at 113).

60. *Id.*

61. *Id.*

Although the Oklahoma legislature passed a slayer statute in 1915,[62] two years after *Holloway*, the legislature did not make the law retroactive; therefore, the court ignored the statute in *Equitable Life Insurance Co. of America v. Weightman*,[63] its next case concerning a slayer and his bounty. In *Weightman*, a wife and husband each owned a joint life insurance policy.[64] The wife assigned her rights under the policy to a third party assignee, who later killed the husband.[65] The assignee sued the insurance company, claiming that the insurance company must honor the policy — again inviting the court to adopt the common law slayer rule, but this time regarding insurance benefits.[66] The husband's estate intervened as a defendant, claiming that although the slayer rule should bar the assignee from taking under the policy, the insurance company should pay the proceeds into the estate of the husband.[67]

Citing *Armstrong*, the Oklahoma Supreme Court held that Oklahoma would follow the common law slayer rule as to insurance cases, despite the lack of legislative guidance.[68] This fact, coupled with the rule that forbids an assignee from taking more rights than the assignor, effectively barred the assignee from taking under the policy.[69] In reaching this conclusion, the court relied on the common law rule that one should not benefit from a criminal act.[70] However, the court held that the liability of the insurance company should not come to an end simply because it was impossible to pay the technical beneficiary of the contract.[71] Rather, the court held that the husband — who was wholly faultless in his own death — should not lose the benefit of his bargain regarding the contract.[72] Indeed, the court declared that neither "the law of contracts, public policy, [n]or equity" required such a holding.[73] Therefore, the court ordered the insurance company to pay the proceeds of the policy to the husband's estate and not to the slayer.[74]

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62. Act Relating to Heirs or Beneficiary Causing Death or Disability, ch. 136, § 1, 1915 Okla. Sess. Laws 185.
63. 1916 OK 879, 160 P. 629.
64. *Id.* ¶ 2, 160 P. at 630.
65. *Id.* ¶ 6, 160 P. at 630.
66. *See id.* ¶ 1, 160 P. at 629-30.
67. *Id.* ¶ 1, 160 P. at 630.
68. *Id.* ¶ 15, 160 P. at 631-32.
69. *Id.* ¶ 18, 160 P. at 632.
70. *Id.* ¶ 14, 160 P. at 631.
71. *Id.* ¶ 26, 160 P. at 633.
72. *Id.*
73. *Id.*
74. *Id.* ¶ 36, 160 P. at 635.

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### *B. The Legislature Intervenes*

Perhaps recognizing the disparity of results between contract, inheritance, and insurance cases, or perhaps just finally getting around to it, the Oklahoma legislature passed a slayer statute in 1915.[75] Since then, the statute has undergone three amendments and various court interpretations.[76]

This section attempts to clarify how current Oklahoma law deals with a slayer and his bounty. Although the legislature has never sectionalized the statute, it can be broken into four parts for convenience. The first defines "slayer" for purposes of the statute. The second identifies what a slayer forfeits once a court determines his status. The third determines who takes the bounty in lieu of the slayer. The fourth provides protection for insurance companies who hold policies with slayers as beneficiaries. The following sections: (1) provide the full text of the portion of the statute examined; (2) comment upon any ambiguities that require interpretation; and (3) examine Oklahoma cases that address the ambiguities.

#### *1. Who Is a Slayer?*

##### *a) The Text*

The current portions of Oklahoma's slayer statute that define "slayer" are found in two different places within the statute. The first clause of the statute defines "slayer" for death-time property transfers.[77] Later, the statute defines the term for the purposes of insurance.[78] Thus, Oklahoma law currently defines a "slayer" as any

> person who is convicted *of murder in the first degree, murder in the second degree, or manslaughter in the first degree, as defined by the laws of this state, or the laws of any other state or foreign country,* of having taken, caused, or procured another to take, the life of an individual . . . and [any] beneficiary of any policy of insurance or certificate of membership issued by any benevolent

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75. Act Relating to Heirs or Beneficiary Causing Death or Disability, ch. 136, § 1, 1915 Okla. Sess. Laws 185.

76. Act Relating to Wills and Succession, ch. 309, § 1, 1963 Okla. Sess. Laws 447 (codified as amended at 84 OKLA. STAT. § 231 (2001)); Act Relating to Wills and Succession, ch. 356, § 1, 1975 Okla. Sess. Laws 672 (codified as amended at 84 OKLA. STAT. § 231 (2001)); Act Relating to Designations of Beneficiaries, ch. 313, § 9, 1994 Okla. Sess. Laws 1399 (codified at 84 OKLA. STAT. § 231 (2001)); *see supra* note 7.

77. 84 OKLA. STAT. § 231 (2001).

78. *Id.*

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> association or organization, payable upon the death or disability of any person, who in like manner takes, causes, or procures to be taken, the life upon which such policy or certificate is issued, or who causes or procures a disability of such person . . . .[79]

The law as originally written and as subsequently amended suffers from several ambiguities that make it inefficient and difficult to apply.

*b) Ambiguities*

One of the most important questions confronting a legislature when writing a slayer statute is how to define "slayer." Although that question might seem elementary, it is a profound task that invokes important jurisprudential questions about the nature and security of property rights. Questions such as what proof should be required and what presumptions should be made involve difficult policy choices. Oklahoma's law leaves many of these questions unanswered.

Ostensibly, when crafting the original statute, the Oklahoma legislature intended to require a criminal conviction to confer slayer status. Although legislative history is completely lacking,[80] both the title and language of the

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79. *Id.* The italicized language was added by a 1994 amendment. § 9, 1994 Okla. Sess. Laws 1399.

80. Oklahoma, then and now, has no official system for determining substantive legislative history. Procedural histories are available for both the House and the Senate through the House and Senate reports, though these generally give no information as to legislative intent.

Whether or not legislative history is useful in statutory interpretation has been, and continues to be, a topic of great debate. One commentator has summarized the debate well:

> Many commentators take the view that legislative intent has no proper role in statutory construction. For them, legislative intent is indeterminate, and, therefore, useless at best, and possibly even mischievous. *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION 17 (Textualists "do not really look for subjective legislative intent."); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 62 (1988) (The use of legislative intent as a tool of statutory construction "increases the discretion, and therefore the power, of the court."); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 872 (1930) ("A legislative intent, undiscoverable in fact, irrelevant if it were discovered, is the last residuum of our 'golden rule.' It is a queerly amorphous piece of slag. Are we really reduced to such shifts that we must fashion monsters and endow them with imaginations in order to understand statutes?"). According to the traditional view, legislative intent is a meaningful tool of statutory construction. *See, e.g.*, Carol Chomsky, *Unlocking the Mysteries of* Holy Trinity*: Spirit, Letter, and History in Statutory Interpretation*, 100 COLUM. L. REV. 901, 952 (2000) ("The legislative history at least may alert the interpreter to the possible complexities of the language used in the statute."); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L.

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statute seem to suggest the legislative intent. The statute's subtitle originally read, "*Guilty Party* May Not Benefit By Action."[81] Further, although the legislature used the broad language "taken, or causes or procures another so to take, the life of another" to define the necessary acts, it insisted that a court *convict* the slayer of those acts.[82] However, although in modern parlance lawmakers generally reserve the words "guilty parties" and "convicted" for the criminal context, those words were formally used to describe a wrongdoer in general.[83] For these reasons, it is unclear whether the 1915 Oklahoma legislature intended a criminal conviction as *necessary* to label a person a slayer within the meaning of the statute — at least as far as death-time testate and intestate transfers were concerned. It is even more difficult to decipher the intent of the Oklahoma legislature when defining "slayer" for purposes of insurance transfers. The legislature used the same "taken, or causes or procures another so to take" language, even adding "in like manner" — suggesting that the tests were the same for insurance as for other property transfers.[84]

Subsequent amendments to this portion of the statute fail to illuminate whether the legislature intended a criminal conviction to be sufficient to assign slayer status. Although simple logic might suggest that the legislature, by inserting the names of specific crimes, was attempting to make the conviction requirement clearer, the amendment itself does not necessarily

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> REV. 1, 32-33 (1985) (Separation of powers under the Constitution requires that statutes be construed in light of legislative intent); Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 280-81 (1990) ("Although early American courts used legislative history somewhat sparingly, the increasingly liberal use of these extra-textual materials in determining what a law means can be traced back at least a century.").

David F. Shores, *Antitrust Decisions and Legislative Intent*, 66 MO. L. REV. 725, 727-28 n.9 (2001).

For a general discussion of what state legislative history materials *are* available and where to find them, see generally MORRIS L. COHEN ET AL., HOW TO FIND THE LAW 257-60 (9th ed. 1989).

81. Act Relating to Heirs or Beneficiary Causing Death or Disability, ch. 136, § 1, 1915 Okla. Sess. Laws 185 (emphasis added).

82. *Id.*

83. The 1910 edition of *Black's Law Dictionary* defines "guilty" as "[h]aving committed a crime *or tort.*" BLACK'S LAW DICTIONARY 863 (3d ed. 1910). Although that same edition defines "conviction" as "the result of a criminal trial which ends in a judgment or sentence that the prisoner is guilty as charged," it goes on to note that "in legal parlance, [the word conviction] often denotes the final judgment of the court." *Id.* at 432. Presumably, "the court," in that case, could be either a criminal or a civil court.

84. *See* § 1, 1915 Okla. Sess. Laws 185.

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reveal its cause. Indeed, the opposite argument — that the amending legislature was attempting to impose a conviction requirement that the original drafters omitted — seems just as plausible.

In any event, determining whether the statute requires a criminal conviction is only the beginning of this definitional dilemma. If the language requires a criminal conviction, the question remains whether that conviction is *sufficient* to confer slayer status. Such a holding may implicate due process concerns and raise issues of offensive collateral estoppel, which effective legislation should address. On the other hand, if a criminal conviction is *not* required, the daunting task of determining exactly what *is* sufficient remains. The statute does not address these issues, and Oklahoma courts have adjudicated but a few.

Another problem posed by this definitional portion of the Oklahoma slayer statute is the effect of a conviction, or other adjudication, if deemed adequate, in a foreign jurisdiction. The original statute did not address this question; however, as amended, the answer seems clear — the statute allows a conviction for one of the three listed crimes in other jurisdictions to create slayer status.[85] However, the issues of jurisdiction and conviction, when combined, may result in questions that neither amendments nor case law have resolved. For example, what is the result when the laws of another state or foreign jurisdiction define the itemized crimes in a different fashion than Oklahoma's criminal code?

*c) Case Law*

The first case requiring judicial interpretation of the slayer statute, *Harrison v. Moncravie*,[86] asked whether the statute required that the killing take place in Oklahoma. In *Harrison*, a wife killed her husband in Kansas.[87] The wife-slayer sued the couple's daughter in an Oklahoma federal court seeking half of the Oklahoma real estate in the husband-victim's estate.[88] The circuit court agreed with the trial court that the statute's penal nature required strict construction.[89] The circuit court determined that because terms of the statute did not, on their face, apply to such a situation, the wife must take despite her Kansas conviction.[90]

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85. 84 OKLA. STAT. § 231 (2001); *see supra* note 7.
86. 264 F. 776 (8th Cir. 1920).
87. *Id.* at 778.
88. *Id.*
89. *Id.* at 784.
90. *Id.* at 784-85.

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This result is surprising given that, at that time, section 231 enumerated no Oklahoma crimes, but required only a "conviction."[91] However, if the *Harrison* court's interpretation concerned the Oklahoma legislature, it failed to express its concern, at least for forty-three years. It was not until 1963 that the legislature amended the statute to include anyone convicted "under . . . the laws of any other state or Foreign Country."[92]

In 1985, the Oklahoma Supreme Court revisited the issue of whether the statute required a criminal conviction. In *State Mutual Life Assurance Co. v. Hampton*,[93] a wife was charged with killing her husband.[94] The insurance company, holding a policy on the life of the husband with the wife as the primary beneficiary, initiated an interpleader action to determine to whom, if anyone, it should pay the proceeds of the policy.[95] When the trial court found the wife not guilty by reason of insanity, she filed a motion for summary judgment in the interpleader action.[96] The trial court denied the motion, and the wife appealed.[97] The Oklahoma Supreme Court, in affirming the ruling of the trial court, held that (1) a conviction is not a necessary prerequisite for the invocation of the slayer statute,[98] and (2) an acquittal is not a bar to invoking the statute.[99]

Regarding its first holding, the court reasoned that the statutory language that applied to insurance cases, unlike that for inheritance cases, did not require any specific crime.[100] Rather, that part of the statute required only that a person take, cause, or procure another to take the policyholder's life to invoke the statute.[101] Because one can take, cause, or procure to take another's life without a criminal conviction, the court reasoned that a conviction was not a necessary element under the statute.[102] The court also distinguished earlier insurance cases involving convictions, saying that "the

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91. Act Relating to Heirs or Beneficiary Causing Death or Disability, ch. 136, § 1, 1915 Okla. Sess. Laws 185.

92. Act Relating to Wills and Succession, ch. 309, § 1, 1963 Okla. Sess. Laws 447 (codified as amended at 84 OKLA. STAT. § 231 (2001)).

93. 1985 OK 19, 696 P.2d 1027.

94. *Id.* ¶ 5, 696 P.2d at 1029.

95. *Id.* ¶ 6, 696 P.2d at 1030.

96. *Id.* ¶ 7, 696 P.2d at 1030.

97. *Id.*

98. *Id.* ¶ 23, 696 P.2d at 1032.

99. *Id.* ¶ 30, 696 P.2d at 1033.

100. *Id.* ¶ 16, 696 P.2d at 1031.

101. *See id.* ¶ 10, 696 P.2d at 1030.

102. *Id.* ¶ 21, 696 P.2d at 1032 ("Section 231 does not provide that a conviction of the statutorily designated degrees of homicide is the only ground for a beneficiary's disqualification, and we do not choose to construe it so narrowly.").

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holdings in these cases indicate that it was the beneficiary's *felonious act* rather than the fact of the beneficiary's *conviction* that this Court found to be determinative."[103] The *Hampton* court also relied on similar statutes of other states and judicial readings that had removed the requirement of a conviction.[104] Ultimately, the court concluded that "automatic disqualification of a convicted beneficiary is merely an extension of the common law rule that no person should benefit from his own wrongful conduct, and not a limitation or abrogation of that rule."[105]

As for its second holding, the *Hampton* court held that "in light of the disparate consequences of a criminal adjudication and a civil proceeding, we find it unlikely that the legislature intended that an acquittal have any effect on the question of a beneficiary's right to insurance proceeds under [section] 231."[106] Indeed, an acquittal, based solely on the state's inability to prove a crime beyond a reasonable doubt, will not normally bar a litigant from proving a crime in a civil action by a preponderance of the evidence.[107] The court found no reason to modify this general rule for slayer cases.[108] Further, the court reasoned that because neither the estate nor the other children — "who [would be] entitled to take under [section] 231 if [the] wife is barred" — were allowed to participate in the criminal prosecution, it would violate due process standards to allow their rights to be adjudicated in that action.[109]

*Hampton* proposed several equitable solutions to difficult slayer problems — solutions with which most people would probably agree. There is no doubt, however, that *Hampton* represented a shift in the way the Oklahoma Supreme Court evaluated the slayer problem — a shift from deciding cases based on the letter of the law to deciding cases based on the spirit of the law.

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103. *Id.* ¶ 15, 696 P.2d at 1031 (emphasis added).

104. *Id.* ¶ 17, 696 P.2d at 1031. The court cites the Kansas, North Carolina, Ohio, South Carolina, Virginia, West Virginia, and Utah statutes, along with corresponding cases from each jurisdiction. *Id.* ¶ 15 nn.3-4, 696 P.2d at 1031 nn.3-4.

105. *Id.* ¶ 17, 696 P.2d at 1031.

106. *Id.* ¶ 27, 696 P.2d at 1033.

107. Price v. Reed, 1986 OK 43, ¶ 7, 725 P.2d 1254, 1257-58 ("[A]n acquittal is never a bar to a *civil action* that arises out of the same facts as those which formed the basis of the criminal offense. No acquittal proves that the defendant is innocent; it merely reflects that there was a reasonable doubt in the jury's mind as to his guilt.") (footnote omitted).

108. *See Hampton*, ¶¶ 24-30, 696 P.2d at 1032-33.

109. *Id.* ¶ 29, 696 P.2d at 1033 (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.7 (1979), and *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329 (1971), for examples of possible due process problems).

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Justice Doolin's dissent in *Hampton* highlights this shift. Justice Doolin insists that the majority opinion "ignores the plain language of this statute in deference to decisions rendered by this Court in 1916 [*Weightman*] and 1935 [*Goodwin*]; the former having been issued prior to the effective date of the statute and the latter prior to two, important amendments."[110] The amendments to which Justice Doolin referred inserted more exacting definitions of the statutory crimes required to invoke the statute.[111] The legislature added the specific crimes of murder in the first degree, murder in the second degree, and manslaughter in the first degree to the definitional portion of the statute.[112] Justice Doolin ascribed to these additions an intent to modify the term "conviction" within the meaning of the statute.[113] He stated, "It is unsound reasoning to suppose the Legislature would twice make additions which more precisely define the term 'conviction,' without some intent to alter its traditional meaning."[114] Justice Doolin was unwilling to "conclude the Legislature has done a vain thing" in enacting the amendments.[115] Indeed, a narrowing of the definition of "conviction" within the meaning of the statute was the only purpose he could divine for the amendments.[116] That definition, Justice Doolin concluded, which originally required a conviction of a general sort, now required a conviction of one of the three specific crimes mentioned.[117]

*Hampton's* equitable reading of the slayer statute, which virtually ignored the plain language of that Act, was not too surprising given that *Hampton* was an insurance case. However, the case of *In re Estates of Young*,[118] which extends the reasoning of *Hampton* to inheritance cases, is more surprising. In *Young*, a son killed both his parents, but the trial court found the son not guilty

110. *Id.* ¶ 2, 696 P.2d at 1037 (Doolin, J. dissenting).

111. Act Relating to Wills and Succession, ch. 309, § 1, 1963 Okla. Sess. Laws 447 (codified as amended at 84 OKLA. STAT. § 231 (2001)); Act Relating to Wills and Succession, ch. 356, § 1, 1975 Okla. Sess. Laws 672 (codified as amended at 84 OKLA. STAT. § 231 (2001)); *see supra* note 7.

112. § 1, 1963 Okla. Sess. Laws 447. A later legislature added the specific section numbers where those three crimes in Oklahoma could be found. § 1, 1975 Okla. Sess. Laws 672. A later amendment, after *Hampton*, took the section numbers back out, thus reverting to the 1963 language. Act Relating to Designations of Beneficiaries, ch. 313, § 9, 1994 Okla. Sess. Laws 1399 (codified at 84 OKLA. STAT. § 231 (2001)); *see supra* note 7.

113. *Hampton*, ¶ 4, 696 P.2d at 1037 (Doolin, J., dissenting).

114. *Id.* (Doolin, J., dissenting).

115. *Id.* ¶ 5, 696 P.2d at 1037 (Doolin, J., dissenting).

116. *Id.* ¶ 6, 696 P.2d at 1037 (Doolin, J., dissenting).

117. *Id.* (Doolin, J., dissenting).

118. 1992 OK CIV APP 63, 831 P.2d 1014 (mem.).

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by reason of insanity.[119] The son's siblings sued to keep him from taking either the life insurance proceeds or taking as an heir to their parents' estates.[120] The son filed, and the trial court granted, a motion for summary judgment regarding the slayer question.[121] The siblings appealed, arguing, as in *Hampton*, that the civil court should allow them to relitigate the slayer question despite the language of the statute.[122]

The Oklahoma Court of Civil Appeals, in a memorandum opinion, reversed the ruling of the trial judge, saying, "By virtue of Section 231, [the rule of *Hampton*] is equally applicable to cases involving a decedent's estate and is not limited only to questions regarding a slayer's right to the decedent's life insurance proceeds."[123] The court, however, did not offer any substantial reasoning as to why it thought the reasoning of *Hampton* applied to inheritance cases as well as insurance cases.

Because *Young* was a memorandum opinion by the court of civil appeals, whether the slayer statute requires a criminal conviction in inheritance cases remains open. Although there is room for the Oklahoma Supreme Court to disagree with the court of appeals' extension of *Hampton*, that avenue appears unlikely given the supreme court's recent trend towards invoking the spirit, rather than the letter, of the slayer statute in solving these difficult cases.[124]

*2. What Is Forfeited?*

*a) The Text*

After determining who qualifies as a slayer, a statute should clearly delineate what rights a slayer loses. Oklahoma's statute includes the following items:

> No [slayer] shall inherit from the victim, or receive any interest in the estate of the victim, or take by devise or legacy, *or as a designated beneficiary of an account or security which is a POD or TOD designation, or as a surviving joint tenant,* or by descent or distribution, from the victim, any portion of the victim's

119. *Id.* ¶ 1, 831 P.2d at 1015.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *See, e.g.*, *Hampton*, discussed *supra* notes 93-109 and accompanying text; Duncan v. Vassaur, 1976 OK 65, 550 P.2d 929, discussed *infra* notes 127-38 and accompanying text.

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> estate . . . [or] take the proceeds of [a life or disability insurance] policy . . . .[125]

*b) Ambiguities*

Oklahoma law has always been broad enough to include testate succession, life and disability insurance proceeds, and intestate succession; however, ambiguities arise because the legislature failed to note whether that list was exhaustive.[126] The legislature amended the statute to include joint tenancies and POD and TOD accounts, but, as it stands, certain interests remain in question. Currently, the list does not cover vested remainder interests in a life tenancy, pension accounts, or other will substitutes. Oklahoma case law has answered some, but not all, of these questions.

*c) Case Law*

In 1976, the Oklahoma Supreme Court decided *Duncan v. Vassaur.*[127] In that case, a wife killed her husband.[128] While charges were pending, but prior to conviction, the wife transferred real property previously owned by the couple as joint tenants with rights of survivorship to her father.[129] The father then filed suit against the husband's estate to quiet title to the property.[130] The husband's estate counterclaimed, asserting title to the real property in question.[131] The father demurred as to the counterclaims, and the trial court dismissed them as a matter of law.[132] The husband's estate appealed.[133] The issue was whether either law or equity prevented a slayer's right of survivorship from ripening into a present interest because the slayer's felonious killing of the other tenant accelerated the ripening.[134]

The *Duncan* case nicely highlights the tension between the courts and the legislature that permeates the slayer issue. At the time the cause of action arose in *Duncan* — the time of the killing — the forfeiture section of the

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125. 84 OKLA. STAT. § 231 (2001). The italicized language was added by 1994 amendment. Act Relating to Designations of Beneficiaries, ch. 313, § 9, 1994 Okla. Sess. Laws 1399.

126. *See* Act Relating to Heirs or Beneficiary Causing Death or Disability, ch. 136, § 1, 1915 Okla. Sess. Laws 185.

127. 1976 OK 65, 550 P.2d 929.

128. *Id.* ¶ 1, 550 P.2d at 930.

129. *Id.* ¶ 2, 550 P.2d at 930.

130. *Id.* ¶ 3, 550 P.2d at 930.

131. *Id.*

132. *Id.*

133. *See id.*

134. *See id.* ¶¶ 4-6, 550 P.2d at 930.

slayer statute did not mention rights of survivorship.[135] The Oklahoma legislature added the language by emergency amendment and stripped the right of survivorship from the slayer, even though the amendment became effective almost a year before the supreme court decided the case.[136] However, because the court did not apply the statute retroactively,[137] if it was to find against the slayer, the court would have to invoke its equitable powers.

The Oklahoma Supreme Court had little trouble once again conjuring up those powers. It held that the act of killing a co-tenant was "inconsistent with the continued existence of the joint tenancy and that at the time the murder was committed, the joint tenancy was terminated and separated."[138] This meant that by the act of killing, the wife lost her right of survivorship, but kept a one-half interest, which transformed into a tenancy in common. Thus, equity saved the day for this case, but legislation would save it in the future.

*Duncan* is the only Oklahoma case to interpret the forfeiture portion of the slayer statute. Although the legislature has made other amendments, there are no cases on point. Because there are several items not covered and because the drafting has been less than desirable, the forfeiture portion of the slayer statute is in dire need of amendment. Also, the section fails to address possible federal preemption issues under ERISA and pension accounts. A discussion of what policy choices should control the amendment is found in Part IV below.

*3. If Not the Slayer, Then Who?*

*a) The Text*

After a lawmaker determines that a person is not entitled to property because he is a slayer, the lawmaker must decide who will receive the slayer's forfeited property. The Oklahoma legislature attempted to decide that issue in 1915. The legislature has never amended this portion of the slayer statute:

> [I]n every instance mentioned in this section all benefits that would accrue to any such person upon the death or disability of the person whose life is thus taken, or who is thus disabled, shall become subject to distribution among the other heirs of such deceased person according to the laws of descent and distribution, in the

135. Act Relating to Wills and Succession, ch. 356, § 1, 1975 Okla. Sess. Laws 672 (codified as amended at 84 OKLA. STAT. § 231 (2001)).

136. *Id.*

137. *Duncan*, ¶ 12, 550 P.2d at 931 ("In adopting the above theory, we are guided by [the recent amendment to the slayer statute].").

138. *Id.* ¶ 8, 550 P.2d at 930.

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> case of death, and in case of disability, the benefits thereunder shall be paid to the disabled person . . . .[139]

*b) Ambiguities*

From its inception, this section of Oklahoma's slayer statute has suffered from inartful drafting. It states that the benefits that would have gone to the slayer now go to the victim's "other heirs."[140] This ignores the fact that the slayer, by the very definition set forth in the same legislation, might not be an *heir* at all, but could be a beneficiary, devisee, legatee, or heir. Even if the word "heir" is read to include any word from the above list — the only way this portion of the statute makes sense — several problems remain.

First, should the statute be interpreted literally? If so, the statute could severely frustrate, and in some cases reverse, the probable intent of the victim. To the extent property transfer laws rely on the principle of donative freedom, this interpretation is troublesome. Although it is almost always the case that a victim would, if given the chance, avoid benefiting his killer, whether by inheritance under a will, or otherwise, other scenarios are not so simple. For example, what of the case where a nonrelative beneficiary with minor children kills his benefactor? There, the law should not be so quick to assume that the testator did not intend the killer's minor children to benefit. This is especially true if the victim's "other heirs" were specifically disinherited.

A second problem is discerning exactly what the drafters meant by "accrue . . . upon the death . . . of the person whose life is thus taken."[141] What about, for example, a testamentary trust that might have *vested* in the slayer immediately? Did the legislature use "accrue" in the sense of "vest" or in some other sense? Finally, the language of the statute would leave out descendants of the victim who are not technically heirs because the slayer is still alive. Is this what the legislature intended? Although the cases give guidance on some issues, many remain unresolved.

*c) Case Law*

In *National Home Life Assurance Co. v. Patterson*,[142] a husband was the primary beneficiary of two life insurance policies owned by his wife and the sole beneficiary under her will.[143] Both policies controlled who would receive

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139. 84 OKLA. STAT. § 231 (2001).
140. *Id.*
141. *Id.*
142. 1987 OK CIV APP 65, 746 P.2d 696.
143. *Id.* ¶¶ 1-2, 746 P.2d at 697.

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the proceeds if the primary beneficiary was unavailable.[144] The first policy listed the alternate beneficiaries as the issue of the insured and the insured's estate, in that order.[145] The second policy listed the alternative beneficiaries as the owner of the policy (i.e., the living spouse) and the insured's estate, also in that order.[146] When the husband murdered his wife on Christmas day and was subsequently convicted of the murder, both insurance companies filed an interpleader action against all parties involved — the husband-slayer, the joint child of the husband and wife, stepchildren on each side, and the wife's estate.[147] The parties stipulated that section 231 prevented the husband from taking; however, the question remained: Where should the proceeds go?[148] Under the strict terms of section 231, the proceeds would go to the wife's "other heirs," *i.e., her children only.* Under the express terms of the wife's policy however, the proceeds would go to the *alternative insurance beneficiaries*, i.e., in one case to the wife's issue only — the same as under the statute; but in the other case to the wife's estate, thereby to *all* the children, *wife's step-child included*, by way of the wife's will, which included wife's step-child as a beneficiary. The trial court, not following either path, held that the proceeds of *both* policies should pass to the estate of the wife and be distributed according to her will.[149]

Apparently not very fond of the husband's child, the wife's issue and the wife's estate both appealed, pleading that *both* policies should pass according to their express terms.[150] The Oklahoma Court of Civil Appeals agreed, holding,

> [W]e have considered [the slayer statute], which we believe does not apply under the facts of this case, as we believe the clear provisions of [the wife's] Will take precedence over the "descent and distribution" language of the slayer statute. The competing interests of the insurance contracts, [the wife's] Will, and our slayer statute . . . compel [this] construction . . . .[151]

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144. *Id.* ¶ 2, 746 P.2d at 697.
145. *Id.*
146. *Id.*
147. *Id.* ¶¶ 2-3, 746 P.2d at 697.
148. *Id.* ¶ 4, 746 P.2d at 697.
149. *Id.* ¶ 3, 746 P.2d at 697.
150. *See id.*
151. *Id.* ¶ 7, 746 P.2d at 698.

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In a case similar to *Patterson*, *United Presidential Life Insurance Co. v. Moss*,[152] a wife allegedly murdered her husband.[153] The insurance company initiated an interpleader action regarding the life insurance policy on the life of the husband with the wife as the primary beneficiary.[154] The trial court dismissed the insurance company after it placed the policy *res* into the court fund.[155] The only possible beneficiaries were the wife-slayer, the son of the wife and husband, and the mother of the husband-victim.[156] The mother counterclaimed, pleading that as alternative beneficiary under the terms of the policy, she should take.[157] The son claimed that he should take under a strict reading of the slayer statute.[158] The express terms of the policy required the primary beneficiary to predecease the alternative beneficiary in order for the alternative beneficiary to take the proceeds.[159] Everyone agreed that although the slayer statute effectively denied the wife from taking, the wife did not actually *predecease* the mother, for both were still alive.[160]

Nevertheless, both the trial court and the court of civil appeals agreed that the money should be awarded to the mother as alternative beneficiary.[161] The appellate court separated the child's argument into two propositions.[162] The child's primary argument was that a facial reading of the statute required that he take the proceeds.[163] In the alternative, the child argued that because express requirements of the policy were not fulfilled — that is, the primary beneficiary predecease the secondary beneficiary — the policy prevented the mother from taking.[164] Although the court called the propositions "arguable," it ultimately found them "unpersuasive" and "misplaced."[165] The court found two issues dispositive. First, the lower court's outcome troubled the court of appeals because, by allowing the son to inherit, the slayer indirectly controlled

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152. 1992 OK CIV APP 19, 838 P.2d 1011 (mem.).
153. *Id.* ¶ 4, 838 P.2d at 1012. The wife was later convicted of the murder. *Id.* ¶ 5 n.2, 838 P.2d at 1013 n.2.
154. *Id.* ¶ 2, 838 P.2d at 1012.
155. *Id.* ¶ 3, 838 P.2d at 1012.
156. *Id.* ¶ 2, 838 P.2d at 1012.
157. *Id.* ¶ 6, 838 P.2d at 1013.
158. *Id.*
159. *Id.* ¶ 5, 838 P.2d at 1013.
160. *Id.*
161. *Id.* ¶¶ 19-20, 838 P.2d at 1014.
162. *Id.* ¶ 7, 838 P.2d at 1013.
163. *Id.*
164. *Id.*
165. *Id.* ¶¶ 7-8, 14, 838 P.2d at 1013-14.

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the disposition of the victim's property.[166] Second, the court wished to give effect to the probable intent of the victim — namely, that the proceeds go the alternative beneficiary.[167] The court, satisfied with neither outcome, found for the mother and awarded her the proceeds.[168]

Although it is clear that the court came to what it believed to be the most equitable decision in both *Moss* and *Patterson*, it is equally clear that its holdings required ignoring the distribution portion of the slayer statute. But if that portion of the slayer statute does not apply under the facts of *Patterson* or *Moss*, under what facts *does* it apply? The statute clearly states that the distribution portion applies "in *every instance* mentioned in this section."[169] By stipulation, and by the facts, each of these cases involved an "instance mentioned."

*Patterson* and *Moss* are still good — and relatively recent, by slayer statute standards — law in Oklahoma. However, both seem especially vulnerable to attack. Even if their equitable solutions find favor with the current Oklahoma Supreme Court, any change in the balance of the court could change the outcome in a case on similar facts. For that reason, the Oklahoma legislature should either codify those cases in a new slayer statute or assert its own unambiguous will.

A different ambiguity arose under the disposition portion of section 231 in *Hulett v. First National Bank & Trust Co. in Clinton*,[170] Oklahoma's most recent slayer case. In *Hulert*, a son was convicted of murdering his mother.[171] In her will, the mother bequeathed specific personalty to her daughter, other specific personalty to her son, and the residue of the estate to a testamentary trust for both children to split when the daughter reached age thirty-five.[172] A probate court found that the son-slayer was unable to take because of section 231 and thus awarded *all* personalty and *all* proceeds from the testamentary trust to the daughter.[173] More than six years later, a previously unknown son of the slayer, who had not received proper notice of the probate proceedings, collaterally attacked the probate ruling, claiming that he should have taken the son-slayer's share *through* the son-slayer, by right of representation.[174]

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166. *Id.* ¶ 13, 838 P.2d at 1014.
167. *Id.* ¶ 11, 838 P.2d at 1013.
168. *Id.* ¶¶ 19-20, 838 P.2d at 1014.
169. 84 OKLA. STAT. § 231 (2001) (emphasis added).
170. 1998 OK 21, 956 P.2d 879.
171. *Id.* ¶ 4, 956 P.2d at 881.
172. *Id.* ¶ 5, 956 P.2d at 882.
173. *Id.* ¶ 6, 956 P.2d at 882-83.
174. *Id.* ¶ 7, 956 P.2d at 883.

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The trial court granted summary judgment to the daughter, presumably based upon the letter of the statute.[175] Because the statute dictates that the slayer's portion goes to the "other heirs,"[176] and because the son-slayer was still alive, the grandson was not an "heir" under Oklahoma's intestacy scheme, and he was unable to take.[177] The Oklahoma Court of Civil Appeals reversed in an unpublished opinion and the Oklahoma Supreme Court granted certiorari.[178]

The Oklahoma Supreme Court first noted that all parties correctly agreed that the slayer statute barred the slayer-son from taking under the will.[179] However, the court went on to reason that the distribution portion of section 231 did not apply to these facts because "[i]t does not apply where nothing would accrue to the slayer at the death of his victim, a situation unmistakably evident here in regard to the testamentary trust."[180] That is to say, because the son-slayer would have gained merely a *contingent* interest in the testamentary trust upon the death of his mother, subject to his sister reaching age thirty-five, nothing "accrued" to the slayer within the meaning of the statute.[181] Therefore, the statute's inapplicability compelled the court to turn elsewhere for guidance on how to distribute the trust.[182] The court first turned to a factually similar contemporaneous Kansas decision, *Estate of Van Der Veen*.[183] In that case, according to the *Hulett* court, the Kansas high court held that when the legislature was silent on the disposition of a slayer's share and the issue was "wholly innocent," the best rule was to dispose of the slayer's share as if the slayer predeceased the victim.[184] On this reasoning, the Oklahoma Supreme Court vacated the opinion of the court of civil appeals.[185] Although three justices dissented, either in whole or in part, none offered to share their reasoning.[186]

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175. *Id.* ¶ 11, 956 P.2d at 883.
176. *See* 84 OKLA. STAT. § 213B(2)(a) (2001).
177. *Hulett*, ¶ 8, 956 P.2d at 883.
178. *Id.* ¶ 11, 956 P.2d at 883.
179. *Id.* ¶ 13, 956 P.2d at 884.
180. *Id.* ¶ 16, 956 P.2d at 884.
181. *See id.*
182. *Id.* ¶ 19, 956 P.2d at 885.
183. 935 P.2d 1042 (Kan. 1997).
184. *Hulett*, ¶ 21, 956 P.2d at 885.
185. *Id.* ¶ 27, 956 P.2d at 887.
186. *Id.* ¶¶ 29-30, 956 P.2d at 887.

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#### 4. *Protection for Insurance Companies*

##### a) *The Text*

The last part of the slayer statute provides protection for insurance companies that pay the proceeds of policies to slayers in good faith. The legislature has not amended this portion of the section since its enactment in 1915.[187] It ensures that

> an insurance company shall be discharged of all liability under a policy issued by it upon payment of the proceeds in accordance with the terms thereof, unless before such payment the company shall have written notice by or in behalf of some claimant other than the beneficiary named in the policy that a claim to the proceeds of such policy will be made by heirs of such deceased under the provisions of this Act.[188]

##### b) *Ambiguities*

Although not directly related to this portion of the statute, insurance companies have faced problems regarding whether they should consider felonious, intentional, and unjustifiable homicide as "accidental."[189]

##### c) *Case Law*

Three cases occurring after *Weightman* both bolstered and refined its holding. The Oklahoma Supreme Court decided the first of the three in 1935. In *Goodwin v. Continental Casualty Co.*,[190] the court held that the term "accidental death" in an insurance policy included intentional killing.[191] The holding meant that those policy holders intentionally or feloniously killed would not lose the benefit of their bargain, but rather, the insurance companies must pay their estates or alternative beneficiaries the proceeds of the policy. Four years later, in *National Life & Accident Insurance Co. v. Reese*,[192] the court extended the *Goodwin* holding.[193] Finally, *National Aid Life Association*

187. *See supra* note 7.

188. Act Relating to Heirs or Beneficiary Causing Death or Disability, ch. 136, § 1, 1915 Okla. Sess. Laws 185.

189. *See generally* 11 AM. JUR. 2D *Proof of Facts* § 1 (2001) (annotating the problems and cases that have arisen regarding this question).

190. 1935 OK 1183, 53 P.2d 241.

191. *Id.* ¶ 13, 53 P.2d at 243.

192. 1939 OK 452, 96 P.2d 1058.

193. *Id.* ¶ 14, 96 P.2d at 1061 ("It is generally accepted in this and other jurisdictions that

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*v. May*[194] held that, although the term "accidental" does not prevent an insurance company from paying the victim's estate, the court could avoid that result given a *contract* with appropriately expressive language.[195] The court noted, however, that the legislature was free to change this rule at any time.[196]

### *IV. Policy Problems and Other Jurisdictions' Approaches*

This area of the law, being no exception to the law in general, is laden with difficult policy choices for both legislators and judges. This section discusses some of the most difficult issues facing lawmakers as they create and interpret a slayer statute and examines how other jurisdictions have addressed those problems. After briefly discussing some historical attempts at uniform slayer statutes throughout the states, this section will explore the problems posed in drafter slayer legislation and examine how different jurisdictions have approached the issue.

#### *A. Brief History of Uniform Acts Concerning Slayers and the State of the Current Law*

The problem of the slayer and his bounty, as pointed out in Section II above, is not new.[197] However, the drive to pass legislation concerning the matter is a relatively new phenomenon. It was only when courts began allowing killers to take as beneficiaries under a will or intestate scheme that legislatures addressed the problem — and not always with great success.[198] Since that time, forty-three states have passed purportedly comprehensive legislation.[199] Of the other seven, two have limited legislation,[200] and three

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the fact that one becomes involved in a difficulty and himself commits acts of violence does not deprive his own injury of its accidental character . . . .").

194. 1949 OK 129, 207 P.2d 292.

195. *Id.* ¶ 25, 207 P.2d at 297.

196. *See id.*

197. *See supra* Part II.

198. *See* Reppy, *supra* note 8, at 264 (stating, "[t]hus began a series of legislative efforts . . . many of which have been almost ludicrous," in referring to North Carolina's attempt at the first slayer statute).

199. For a list of the slayer statutes alphabetized by state, see Julie J. Olenn, Comment, *'Til Death Do Us Part: New York's Slayer Rule and* In re *Estates of Covert*, 49 BUFF. L. REV. 1341, 1341 n.3 (2001).

200. These are our neighbors Arkansas, ARK. CODE ANN. § 28-11-204 (Michie 1987) (covering dowry and curtesy only), and Texas, TEX. PROB. CODE ANN. § 41 (D) (Vernon 1980) (covering life insurance only).

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allow judicial rule to control the issue.[201] This leaves only two states with no legislation or case law on the matter.[202]

Most legislation concerning slayers, in accord with Oklahoma's own statute, seeks to answer the three key questions outlined in previous sections. First, they specify which acts are necessary and sufficient to confer slayer status and how a potential plaintiff must prove those acts. Second, they list what rights and property a slayer forfeits by virtue of his status. Third, they explain how to distribute a slayer's forfeited property. Although there are other issues that a comprehensive statute should address, these are the main three.

Professor John W. Wade, in his successful 1936 attempt at a uniform slayer statute, followed this pattern.[203] Professor Wade noted that, at the time, the majority view among legislatures was that they were unable to change the default rules of intestacy to disallow inheritance to a slayer.[204] Even in states without statutes, but where the courts had adopted a slayer rule, Wade noted that legislation was "eminently desirable" to ward off attacks by critics that the measures were "unwarranted judicial legislation," and to encourage uniformity in the law.[205] His article, with accompanying suggested legislation, became the standard for several state slayer statutes.[206]

Many states, including Oklahoma, passed statutes before Wade's 1936 article.[207] The most influential uniform legislation has been the UPC drafts of a uniform slayer statute. A significant number of states have now adopted either the pre-1990 or 1990 version of that statute.[208]

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201. They are: Maryland, Prince v. Hitaffer, 165 A. 470, 474 (Md. 1933) (applying to testate succession); Missouri, Perry v. Strawbridge, 108 S.W. 641, 648 (Mo. 1908) (applying to intestate succession); and New York, Riggs v. Palmer, 22 N.E. 188, 190 (N.Y. App. Div. 1889) (applying to intestate succession).

202. The question has never been squarely faced in either Massachusetts or New Hampshire. *See* Sherman, *supra* note 4, at 805-06 n.12.

203. John W. Wade, *Acquisition of Property by Wilfully Killing Another — A Statutory Solution*, 49 HARV. L. REV. 715, 723 (1936).

204. *Id.* at 717.

205. *Id.* at 718.

206. *See, e.g.*, DEL. CODE ANN. tit. 12 § 2322 (2001); IDAHO CODE § 15-2-803 (Michie 2000); N.C. GEN. STAT. §§ 31A-3 to -11 (1999); WASH. REV. CODE ANN. §§ 11.84.010-11.84.900 (West 1998).

207. Twenty-five states had legislation by that year. Wade, *supra* note 203, at 715 n.1 (citing then current statutes).

208. *See* Kent S. Berk, Comment, *Mercy Killing and the Slayer Rule: Should the Legislatures Change Something?*, 67 TUL. L. REV. 485, 493 (1992).

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*B. Who's a Slayer?*

The slayer rule codified by Professor Wade required that a killing be willful and unlawful.[209] However, as Professor Wade acknowledged "[t]he requirement that the killing be wilful and unlawful cannot be said to be the only possible rule; in fact, it 'is futile to attempt to arrive at a "true rule" by pure logic.' But a line must be drawn at some place."[210] The majority of states now define that line at "felonious and intentional" killing.[211] That phrase, employed by the UPC,[212] severely limits the breadth of a slayer statute to murder and voluntary manslaughter, a view in accordance with Professor Wade's beliefs.[213] Only a small minority of states, including Oklahoma, draws this line below voluntary manslaughter.[214]

If one argues that the main purpose of a slayer statute is to deter, a slayer statute should require premeditation and/or motivation of economic gain from the killing. In that case, the law should restrict only premeditated killers from taking from their victims, something which no slayer statute currently does.[215] For example, it does not necessarily follow that a person's realization that he will not inherit from his victim's estate will deter him from committing voluntary manslaughter, a crime which is currently covered by the Oklahoma statute.

To the extent that the slayer rule embraces other goals, most notably the moral proposition that a person should not benefit from his own wrongful act, then the rule should include crimes such as involuntary manslaughter. However, following this reasoning, it is not a long leap to conclude that other crimes, and even acts that are not crimes, should be worthy of conferring slayer status. For example, South Dakota courts recently used a slayer statute

209. Wade, *supra* note 203, at 721-22.

210. *Id.* at 722 (quoting E. M. Grossman, *Liability and Rights of the Insurer When the Death of the Insured is Caused by the Beneficiary or an Assignee*, 10 B.U. L. REV. 281, 290 (1930)).

211. The phrase, or a similar one is used in twenty-five states. See Sherman, *supra* note 4, at 848 n.211, for a list of states and corresponding statutes.

212. UNIF. PROBATE CODE § 2-803(b) (amended 1997).

213. Wade, *supra* note 203, at 721-22 (defining slayer as "any person who wilfully and unlawfully takes or procures to be taken the life of another").

214. Sherman, *supra* note 4, at 848 n.213 ("The slayer statutes of Colorado, the District of Columbia, Indiana, and Oklahoma refer specifically to 'manslaughter,' and the criminal statutes of each of those jurisdictions characterize some unintentional homicides as manslaughter.").

215. States with stricter statutes may require a criminal conviction, but no state restricts the rule to premeditated or malicious murder. Arkansas' very limited statute, applying to only spousal dowry and curtesy, requires a spousal murder conviction. ARK. CODE ANN. § 28-11-204 (Michie 1987).

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"to prevent beneficiaries who perpetrated *fraud* against the testator's estate from collecting punitive damages which the estate received from them in a prior suit."[216] The court was unable to apply the slayer statute because no killing was involved.[217] Instead, it accomplished the task by resorting to the common law maxim that no person should be allowed to benefit from his *wrong*.[218] However, in the context of applying a slayer statute, the better formulation of that maxim is that no *killer* should be allowed to benefit from his wrongful *killing*.[219] This is the formulation used by the UPC slayer statute in codifying the common law maxim.[220]

However, that formulation does not dispose of the opposite proposition: that an act *less* than intentional and felonious homicide should confer slayer status when the result of the act is death. That is, why should a slayer statute not apply in situations such as negligent homicide, involuntary manslaughter, or even in cases of wrongful death liability? After all, in such cases, the killer has engaged in wrongful conduct that resulted in death. Then why should the killer benefit from his killing? The most logical answer exposes that the *purpose* of a slayer statute is not only to punish a wrongdoer for bad behavior, but also to *deter* killings motivated by potential economic benefit. However, such reasoning does not explain the case where a killer in fact benefited economically from the killing, but the benefit was not the motivating factor in bringing out the death. Nevertheless, from the beginning, courts have ignored the actual motivation of a killer when it was intentional.[221] Perhaps the reasoning is that requiring determination of actual motive would be too difficult and costly, and *not* requiring such a determination does not impede the deterrence purpose of the slayer rule. Thus, given these considerations, the best rule is to allow any intentional and felonious homicide, including any murder and voluntary manslaughter, to impart slayer status.[222]

216. Underdahl, *supra* note 3, at 828 (referring to Estate of O'Keefe, 583 N.W.2d 138 (S.D. 1998)) (emphasis added).

217. *Id.*

218. *Id.*

219. *See id.* at 853.

220. UNIF. PROBATE CODE § 2-803(f) (amended 1997) ("A wrongful acquisition of property or interest by a killer not covered by this section must be treated in accordance with the principle that a killer cannot profit from his [or her] wrong.").

221. *See* Riggs v. Palmer, 22 N.E. 188, 190 (N.Y. App. Div. 1889) (holding that "'[i]ndependently of any proof of the motives'" a slayer will be prevented from benefiting from the killing).

222. Underlying the above analysis lurks a more fundamental question: to what degree should behavior and the death-time property transfer system be linked? *See generally* Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199 (2001); Underdahl, *supra* note 3; Paula A. Monopoli, *"Deadbeat Dads": Should Support and Inheritance Be*

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### *C. The Requirement of a Conviction*[223]

#### *1. The Necessity of a Conviction*

Oklahoma courts are not alone in using their power of interpretation to remove the conviction requirement from the slayer statute. Most other jurisdictions have either removed or never had this requirement.[224] In balancing the respective positions, the majority's position is favorable. The main reason given by other courts for removing the requirement of conviction is the same as the reasoning of Oklahoma courts: the radical difference between the burden of proof in criminal and civil courts.[225] As a general proposition, it is well accepted that the requirement of proof beyond a reasonable doubt is bound to lead to more false acquittals than the requirement of proof by a preponderance of the evidence.[226] But, the argument goes, it is contrary to justice that a slayer should acquire property to which he would have no right but for the "technical" acquittal.[227]

Another problem faced by authors of slayer statutes concerns protecting the constitutional due process rights of potential plaintiffs.[228] For example, suppose that *X*, a beneficiary under *Y's* will, kills *Y*. A criminal court acquits *X* under an insanity theory. *Z*, the alternative beneficiary under *Y's* will, has sufficient evidence to prove the crime by a preponderance of the evidence. In a jurisdiction that views a criminal acquittal as a bar to further litigation, *Z* is out of luck, even though she had no opportunity to offer evidence in the criminal trial. The law has barred *Z's* rights in litigation in which she had no opportunity to participate. Furthermore, even if *Z* did have such an

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*Linked?*, 49 U. MIAMI L. REV. 257 (1994). To some extent the property transfer law seems to be moving in that direction. *See, e.g.*, UNIF. PROBATE CODE § 2-114(c) (1990). That provision insists that a parent, in order to be eligible to take from a deceased child, "openly treat[] the child as his . . . and . . . not refuse[] to support the child." *Id.*

223. *See generally* Sherman, *supra* note 4, at 848-56.

224. *Id.* at 855-56.

225. *Id.*

226. *See, e.g.*, *In re* Winship, 397 U.S. 358, 371 (1970) ("If, for example, the standard of proof for a criminal trial were a preponderance of the evidence rather than proof beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilty persons, but a far greater risk of factual errors that result in convicting the innocent.").

227. Sherman, *supra* note 4, at 855-56.

228. *See* Mary Loise Fellows, *The Slayer Rule: Not Solely a Matter of Equity*, 71 IOWA L. REV. 489, 545 (1986) ("The slayer rule's most serious flaws are that the rule in some states is overinclusive by denying the slayer the right to retain some property interests unrelated to the victim's death and is underinclusive in some states by permitting the slayer to retain some property interests related to the victim's death.").

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opportunity, her evidence would not necessarily be sufficient to prove the crime beyond a reasonable doubt — otherwise there would be no acquittal. By contrast, some commentators have asked whether *Z's* due process rights are truly violated, in that she had no greater interest in *Y's* property than *X*, that is, because no *property* was taken, but only an *expectancy*.[229]

Some commentators have strongly argued for removal of the conviction requirement because of the high percentage of slayer cases in which the slayer, soon after his crime, commits suicide.[230] In such a case, it is obviously impossible to gain a criminal conviction of the slayer.[231] Fundamental notions of fairness and logic suggest that courts treat the homicide-suicide situation identically to a case involving only homicide, at least in determining the status of the slayer.

*2. The Sufficiency of a Conviction*

But what about the converse question? Should a civil court allow a slayer who is *convicted* to relitigate his status in civil court? Traditionally, courts have answered "yes," for some of the same concerns listed above — that the party attempting to establish slayer status cannot invoke collateral estoppel for judgments to which he was not a party.[232] Some courts even ban the conviction from coming into evidence under the theory that it is simply the "opinion" of the jury.[233]

However, efficiency concerns weigh heavily in favor of allowing a conviction to create slayer status *per se*, if it can be done without unduly prejudicing the rights of any party involved.[234] This risk can be avoided if the statute creates a strong nexus between the elements of a particular crime and the elements necessary to gain the status of slayer. For this reason, the statute should clearly establish the elements necessary to create slayer status, or even list some crimes for which a conviction creates an irrebuttable presumption of slayer status.

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229. *Id.* at 500; Sherman, *supra* note 4, at 856; Wade, *supra* note 203, at 723.

230. Wade, *supra* note 203, at 723.

231. *Id.*

232. Sherman, *supra* note 4, at 855.

233. *Id.* at 855-56.

234. *See* Fellows, *supra* note 228, at 499-500 ("The conviction requirement is seemingly attractive because it eliminates the need for a court in a civil trial to inquire into the felonious nature of a person's conduct."); Sherman, *supra* note 4, at 856 ("[I]t is a great convenience to be spared the trouble and expense of relitigating the question of the alleged slayer's guilt in the civil proceeding . . . .").

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This solution, however, creates potential problems in the area of assisted suicide and similar cases.[235] In such cases, defenses may be available in a civil case that are not available in a criminal case.[236] Thus, the best position might be to compromise by allowing the evidence of a conviction to come in, but not creating an irrebuttable presumption in any case.

*D. What Does a Slayer Forfeit?*

One of the most difficult issues confronting the drafter of a slayer statute concerns exactly what the law should force a slayer to forfeit when a court labels him a "slayer." Currently, Oklahoma's list is an ad hoc compilation, created over many years without uniformity of drafting or thought. What is needed is a statute that is not so broad as to risk infringing upon the rights that a slayer retains, thereby risking constitutional violation, but not so narrow as to allow a slayer to maintain control over the distribution of the victim's estate.[237]

It is important to note that it is impossible to take away every benefit that a person might gain from a felonious homicide. A person might kill for emotional reasons, to silence another, or because he thinks it is the morally correct action. It is impossible for the law to deprive a person of these types of ephemeral gains from a wrongful act. The goal of slayer statutes, then, must be more practical: to keep a wrongdoer from benefiting *economically* from his wrongful act. This serves two broader purposes: (1) it lessens any economic motivation that a killer might have to kill; and (2) it codifies the moral proposition that no wrongdoer should benefit from his wrongful act.

These two propositions of keeping a slayer from economic benefit and yet staying within the bounds of accepted and constitutional notions of property rights should serve as guideposts to lawmakers, helping them determine which rights a slayer should forfeit and which he should maintain. The simplest way to serve both of these goals is to allow the statute to strip all *expectancies* from the slayer, while allowing the slayer to maintain all *actual* property rights he has already acquired. Note that the words *vested* and *contingent* are not used because, although traditionally some vested rights are tantamount to "mere expectancies," some contingent rights may be "actual" under this system.

There are some rights that are expectancies upon which everyone can agree. Rights gained under a will, through intestacy, and by contract all traditionally

235. Sherman, *supra* note 4, at 856.
236. *Id.*
237. Fellows, *supra* note 228, at 545.

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fall into this category. Some rights are more difficult to categorize, such as the right of survivorship in jointly owned personalty, powers of appointment, irrevocable trusts, other will substitutes, vested remaindermen, and cases where "a donor names the slayer as a default taker, subject to a power exercisable by the victim."[238] These are all examples of problem areas that a slayer statute should specifically address.

Finally, the statute should cover special scenarios, such as what to do if the slayer is pardoned or granted postconviction relief. These scenarios occur only where a court has used evidence of conviction to establish slayer status — for both problems could be avoided by insisting upon civil adjudication to establish slayer status in every instance. However, as suggested above, the best rule is to allow evidence of criminal guilt to establish slayer status in some situations.[239] Therefore, any statute should consider solutions to these unique situations. In the case of a pardon, the court should consider *why* the slayer was pardoned. If it is for a reason that in no way exonerates the slayer from his crime, there is no reason to disturb the civil judgment.

*E. If Not the Slayer, Then Who?*

Oklahoma courts have generally ignored the portion of the slayer statute demanding that the benefits not going to the slayer should pass to the "other heirs" of the victim.[240] Presumably, they have done so because the law on its face makes little sense and because a literal interpretation could seriously frustrate the likely intent of the victim. In determining who should take, legislatures are generally faced with the same types of policy goals that inform an intestacy scheme: (1) a desire to effectuate the likely intent of the decedent, and (2) a desire to mitigate the necessity of state intervention. However, these two goals will not always suggest the same conclusion.

If the main purpose of a slayer statute is to effectuate the likely intent of the decedent, the best approach may be to operate under the legal fiction that the slayer predeceased the victim. In doing so, potential beneficiaries that the decedent would most likely not have wanted to leave out (i.e., innocent issue of the slayer) are not left out simply because they do not fit the technical definition of "heir." This has been the almost-universal approach in America. The UPC reaches a substantially similar result by treating slayers as if they disclaimed their interest.[241]

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238. *Id.* at 510.

239. *See supra* Part IV.C.2.

240. See *supra* Part III.B.1.c.

241. UNIF. PROBATE CODE § 2-803(e) (amended 1997). The reason the result is substantially

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One major problem with this approach occurs when the slayer-beneficiary is not related to the victim-benefactor. In that case, or in states that do not have adequate antilapse statutes, innocent issue of the slayer will be left with nothing. However, there is a strong argument that if the victim had desired to take care of those innocent issue, he would have done so more directly. Thus, any effective slayer statute must work alongside a well-drafted antilapse statute and intestate representational scheme if it is to most closely mirror the probable intent of the victim.

*F. Problems of Jurisprudence*

Since the abolition of the feudal doctrines gave rise to the need for a slayer rule, the question has arisen as to whose role it is to create that rule. Is it solely within the province of the legislature, or is a judge free to adjust the rule when faced with new facts and difficulties? Many great jurists have posed and debated the question.[242] However, one novel solution avoids the debate altogether. Some jurisdictions have written the common law maxim — that a wrongdoer may not benefit from his wrong — into their codes.[243] This solution provides judicial maneuvering, which is often necessary to impose justice in these cases, and a firm statutory foundation.

One commentator argued that "the slayer rule is an essential element of the property transfer law system and does not rest solely on equity principals."[244] When the slayer rule is understood in this way, the controversy over the role of the court as lawmaker is diffused. A court can establish the slayer rule merely by performing its traditional function of statutory interpretation.[245] Such a concept is important to any effective slayer statute and should inform Oklahoma's legislation as well.

### *V. Suggested Legislation*

Because the UPC slayer statute solves most of the problems discussed in the previous section, and in the interest of uniformity, this comment suggests that Oklahoma adopt the UPC model slayer statute with some minor changes. The following is the UPC slayer statute in pertinent part, broken down into the

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similar is that a disclaimant under the UPC is generally treated as if he predeceased the decedent. *Id.* § 2-801(d).

242. *See generally* Farber, *supra* note 27. Professor Farber points out: "Among others, *Riggs* attracted the attention of Pound, Cardozo, Hart and Sacks, Dworkin, and Posner." *Id.* at 31 (footnotes omitted).

243. *See, e.g.*, UNIF. PROBATE CODE § 2-803(f) (amended 1997).

244. Fellows, *supra* note 228, at 490.

245. *Id.* at 491.

categories used throughout this comment: (1) how a court determines slayer status, (2) what rights a slayer forfeits, and (3) how a court should distribute the bounty. Other pertinent sections are also included.[246]

*A. Who Is a Slayer?*

> (g) *After all right to appeal has been exhausted, a judgment of conviction establishing criminal accountability for the felonious and intentional killing of the decedent conclusively establishes the convicted individual as the decedent's killer for purposes of this section. In the absence of a conviction, the court, upon the petition of an interested person, must determine whether, under* a clear and convincing evidence [*the preponderance of evidence*] *standard, the individual would be found criminally accountable for the felonious and intentional killing of the decedent. If the court determines that, under that standard, the individual would be found criminally accountable for the felonious and intentional killing of the decedent, the determination conclusively establishes that individual as the decedent's killer for purposes of this section.*[247]

The most significant suggested change to the UPC slayer statue in this section is that a court must find civil proof of a killing by a clear and convincing evidence standard, as opposed to a preponderance test, which is the rule in most jurisdictions.[248] The change accords with noted scholars who persuasively argue that "[t]he higher burden of proof seems appropriate given the stigma of a finding that a person feloniously and intentionally killed the decedent."[249] One state, Maine, enacted this change when adopting the UPC slayer statute,[250] and another, Wisconsin, has made the change judicially.[251]

This section also solves the problem of postconviction relief by not allowing a judgment of criminal conviction to establish status until *after* all rights of appeal are exhausted. Further, by allowing the matter to be litigated civilly, the issue of executive pardon is removed: once a civil court determines slayer status, a criminal pardon would be irrelevant.

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246. The following sections generally follow the UPC slayer statute. UNIF. PROBATE CODE § 2-803 (amended 1997). Unmodified text is in italics and includes section numbering; my changes are normal typeface, and my deletions are bracketed.

247. *See id.* § 2-803(g).

248. Fellows, *supra* note 228, at 502.

249. *Id.*

250. ME. REV. STAT. ANN. tit. 18-A, § 2-803 (West 1998).

251. *In re* Estate of Safran, 306 N.W.2d 27, 36 (Wis. 1981).

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*B. What Rights Does a Slayer Forfeit and Where Do They Go?*

> *(b) An individual who feloniously and intentionally kills the decedent forfeits all benefits under this Article with respect to the decedent's estate, including an intestate share, an elective share, an omitted spouse's or child's share, a homestead allowance, exempt property, and a family allowance. If the decedent died intestate, the decedent's intestate estate passes as if the killer disclaimed his [or her] intestate share.*
>
> *(c) The felonious and intentional killing of the decedent:*
>
> *(1) revokes any revocable (i) disposition or appointment of property made by the decedent to the killer in a governing instrument, (ii) provision in a governing instrument conferring a general or nongeneral power of appointment on the killer, and (iii) nomination of the killer in a governing instrument, nominating or appointing the killer to serve in any fiduciary or representative capacity, including a personal representative, executor, trustee, or agent; and*
>
> *(2) severs the interests of the decedent and killer in property held by them at the time of the killing as joint tenants with the right of survivorship [or as community property with the right of survivorship], transforming the interests of the decedent and killer into tenancies in common.*[252]

This provision is well-drafted because it includes all the possible expectancies that a slayer might hope to gain by committing homicide, and it addresses both testate and intestate succession.

The above sections, however, must be read with the following definitions in mind.

> *(a) In this section:*
>
> *(1) "Disposition or appointment of property" includes a transfer of an item of property or any other benefit to a beneficiary designated in a governing instrument.*
>
> *(2) "Governing instrument" means a governing instrument executed by the decedent.*
>
> *(3) "Revocable," with respect to a disposition, appointment, provision, or nomination, means one under which the decedent, at the time of or immediately before death, was alone empowered, by*

252. UNIF. PROBATE CODE § 2-803(b)-(c) (amended 1997).

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> *law or under the governing instrument, to cancel the designation, in favor of the killer, whether or not the decedent was then empowered to designate himself [or herself] in place of his [or her] killer and or the decedent then had capacity to exercise the power.*[253]

There is no need to change this definitional section.

*C. Other Issues*

The UPC also contains sections that thoroughly deal with the rights of innocent third parties, bona fide purchasers for value, and federal preemption:

> *(h) Protection of Payors and Other Third Parties.*
>
> *(1) A payor or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a beneficiary designated in a governing instrument affected by an intentional and felonious killing, or for having taken any other action in good faith reliance on the validity of the governing instrument, upon request and satisfactory proof of the decedent's death, before the payor or other third party received written notice of a claimed forfeiture or revocation under this section. A payor or other third party is liable for a payment made or other action taken after the payor or other third party received written notice of a claimed forfeiture or revocation under this section.*
>
> *(2) Written notice of a claimed forfeiture or revocation under paragraph (1) must be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. Upon receipt of written notice of a claimed forfeiture or revocation under this section, a payor or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate, or if no proceedings have been commenced, to or with the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. The court shall hold the funds or item of property and, upon its determination under this section, shall order disbursement in accordance with the determination.*

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253. *Id.* § 2-803(a).

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> *Payments, transfers, or deposits made to or with the court discharge the payor or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the court.*
>
> *(i) Protection of Bona Fide Purchasers; Personal Liability of Recipient.*
>
> *(1) A person who purchases property for value and without notice, or who receives a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this section to return the payment, item of property, or benefit nor is liable under this section for the amount of the payment or the value of the item of property or benefit. But a person who, not for value, receives a payment, item of property, or any other benefit to which the person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who is entitled to it under this section.*
>
> *(2) If this section or any part of this section is preempted by federal law with respect to a payment, an item of property, or any other benefit covered by this section, a person who, not for value, receives the payment, item of property, or any other benefit to which the person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were this section or part of this section not preempted.*[254]

Finally, the UPC includes a "catchall" provision, which would allow courts to solve any apparent injustices that might arise under new facts with a firm statutory basis. It provides:

> *(f) A wrongful acquisition of property or interest by a killer not covered by this section must be treated in accordance with the principle that a killer cannot profit from his [or her] wrong.*[255]

Although this type of caveat would certainly appeal to judges who are trying to decide real cases, critics might argue that it removes the incentive for legislatures to devise innovative and comprehensive legislation. As discussed

254. *Id.* § 2-803 (h-i).
255. *Id.* § 2-803(f).

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above, however, it is a preferred inclusion and should be enacted in Oklahoma.[256]

## *VI. Conclusion*

The Oklahoma statute concerning the slayer and his bounty is currently riddled with problems. Although creative judicial interpretation has ameliorated concern in some areas, in others, such interpretation has exacerbated the statute's ambiguities. The best solution is to repeal the old law and enact new legislation that covers as many situations as possible. In addition, such legislation should codify the principle that the law cannot allow a culpable killer to benefit from his killing. This would put future cases of necessary judicial stretching on firmer footing and foster the greatest possible balance of justice.

*Gregory C. Blackwell*

256. *See supra* Part IV.E.

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