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Anti-Lapse Statute Must Apply to a Lapsed Residuary Bequest in the Absence of Reasonably Certain Intent of the Testator: *In re Estate of Burger*

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Anti-Lapse Statute Must Apply to a Lapsed Residuary Bequest in the Absence of Reasonably Certain Intent of the Testator: *In re Estate of Burger*

PENNSYLVANIA STATUTORY INTERPRETATION — ANTI-LAPSE STATUTE — FAILED RESIDUARY BEQUEST — The Pennsylvania Supreme Court held that an intestate heir lacked standing to challenge a residuary bequest in a will contest because, in the absence of the testator's contrary intent, the anti-lapse statute applied to direct the failed bequest to the other residuary legatees.

In re Estate of Burger, 898 A.2d 547 (Pa. 2006).

Dr. Regis F. Burger died in November 2002, leaving an estate valued at over $2.5 million.[1] Burger's final will, which was drafted in March 2000, named the five heirs of his deceased sister as beneficiaries.[2] Each beneficiary was designated a portion of the residue of Burger's estate, Linda Nash being allotted the largest share.[3] The residuary clause[4] in the final will was similar to clauses contained in Burger's prior two wills, except that those wills granted Nash a smaller percentage of the residuary estate.[5]

Janice B. Leckey, Burger's niece, petitioned to have the will set aside in part, averring that the 25% increase in Nash's bequest was procured through undue influence.[6] Consequently, Leckey

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1. *In re* Estate of Burger, 898 A.2d 547, 548 (Pa. 2006).
2. *Burger*, 898 A.2d at 548.
3. *Id.* The seventh paragraph of the will provided as follows:

> I give 50% of my residuary estate to LINDA NASH, 120 Bingay Drive, Pittsburgh, Pennsylvania 15237. If LINDA NASH does not survive me, the assets which would have been distributed to her had she survived me shall be distributed proportionally to the other persons entitled to distribution pursuant to this paragraph SEVENTH.

Id.

4. A *residuary clause* is defined as "a testamentary clause that disposes of any estate property remaining after the satisfaction of all other gifts." BLACK'S LAW DICTIONARY 1336 (8th ed. 2004).
5. *Burger*, 898 A.2d at 548. Burger had increased Nash's share of the residuary estate from 25% in his 1998 will, to 34% in his 1999 will and finally to 50% in his 2000 will. *Id.* Another significant change made to the final will was the appointment of Nash as executrix. *Id.*
6. *Id.* Along with the increased bequest, Leckey also cited, as further evidence of undue influence, the fact that, at the end of 1999 when Burger's physical and mental health

argued that the 25% increase in the residuary bequest was void, resulting in partial intestacy[7] from which Leckey would benefit as the person in the nearest degree of consanguinity[8] to Burger.[9]

Nash objected to Leckey's petition by way of demurrer,[10] asserting that Leckey lacked standing to pursue the will contest because she was not a beneficiary of Burger's will, which disposed of his entire estate.[11] Further adducing Leckey's lack of standing, Nash argued that, even if the will was found to be invalid in part, Leckey would not benefit as an intestate heir because the will provided for a substitutional gift (also referred to hereinafter as a "substitute disposition")[12] of Nash's residuary bequest.[13] Although the substitute disposition of the bequest was predicated upon a beneficiary predeceasing Burger, Nash asserted that Burger's intent was that the same substitute disposition should take effect if the gift failed for any other reason.[14]

Nash further supported her argument with a rule of interpretation established by section 2514 of the Pennsylvania Probate, Estates and Fiduciaries Code (hereinafter "Code"),[15] which supplied the default provision stating that the will should control the disposition of his property in the absence of the testator's contrary intent.[16] Title 20, section 2514(11)[17] of the Code (hereinafter "clause (11)"), the purpose of which is to avoid partial intestacy,[18] reads as follows:

> Lapsed and void devises and legacies; shares in residue.--When a devise or bequest *as described in clause (10) hereof* shall be included in a residuary clause of the will and shall

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had declined, Nash had been granted a broad power of attorney, took control of Burger's finances and fired his full-time caregiver. *Id.*

7. *Intestacy* is "the state or condition of a person's having died without a valid will." BLACK'S LAW DICTIONARY 840 (8th ed. 2004).

8. *Consanguinity* is defined as "the relationship of persons of the same blood or origin." BLACK'S LAW DICTIONARY 322 (8th ed. 2004).

9. *Burger*, 898 A.2d at 548-49.

10. A *demurrer* is "a pleading stating that although the facts alleged in a complaint may be true, they are insufficient for the plaintiff to state a claim for relief and for the defendant to frame an answer." BLACK'S LAW DICTIONARY 465 (8th ed. 2004).

11. *Burger*, 898 A.2d at 549.

12. A *substitutional gift* is defined as "a testamentary gift to one person in place of another who is unable to take under the will for some reason." BLACK'S LAW DICTIONARY 710 (8th ed. 2004).

13. *Burger*, 898 A.2d at 549.

14. *Id.*

15. 20 PA. CONS. STAT. § 2514 (2005).

16. *Burger*, 898 A.2d at 549.

17. 20 PA. CONS. STAT. § 2514(11).

18. *Burger*, 898 A.2d at 549.

> not be available to the issue of the devisee or legatee under the provision of clause (9) hereof, and if the disposition shall not be otherwise expressly provided for by law, *it shall pass to the other residuary devisees or legatees*, if any there be, in proportion to their respective shares or interests in the residue.[19]

Nash proposed that clause (11) directed any failed bequest, including a residuary share, to be distributed to the remaining residuary legatees.[20]

In opposition, Leckey argued that clause (11)'s reference to title 20, section 2514(10)[21] (hereinafter "clause (10)") precludes clause (11) from applying to Nash's residuary bequest.[22] Clause (10) prescribes as follows:

> Lapsed and void devises and legacies; shares *not* in residue.--A devise or bequest *not being part of the residuary estate* which shall *fail or be void because the beneficiary fails to survive the testator or because it is contrary to law or otherwise incapable of taking effect or which has been revoked by the testator or is undisposed of or is released or disclaimed by the beneficiary*, if it shall not pass to the issue of the beneficiary under the provisions of clause (9) hereof, and if the disposition thereof shall not be otherwise expressly provided for by law, shall be included in the residuary devise or bequest, if any, contained in the will.[23]

Leckey asserted that clause (11) specifically states that it is only applicable to those bequests described in clause (10).[24] She concluded that, since clause (10) only refers to void specific bequests and devises,[25] clause (11) necessarily could not apply to a void residuary bequest.[26]

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19. 20 PA. CONS. STAT. § 2514(11) (emphasis added).
20. *Burger*, 898 A.2d at 549.
21. 20 PA. CONS. STAT. § 2514(10).
22. *Burger*, 898 A.2d at 549-50.
23. 20 PA. CONS. STAT. § 2514(10) (emphasis added).
24. *Burger*, 898 A.2d at 549-50.
25. A *specific devise* is defined as "a devise that passes a particular piece of property." BLACK'S LAW DICTIONARY 484 (8th ed. 2004).
26. *Burger*, 898 A.2d at 550. Leckey's argument, as noted in her Brief in Opposition to Preliminary Objections, was that "the Rule in clause (11) of the section, by its terms, applies to bequests which were originally not part of the Residuary, but, by the provisions of clause (10), are made part of the Residuary." *Id.*

In an unpublished opinion, the Pennsylvania Court of Common Pleas, Orphans' Division, agreed that Leckey lacked standing to pursue the will contest.[27] Judge Kelly noted that Leckey's interpretation of the Code ignored the plain meaning of the headings of clause (10)[28] and clause (11).[29] The court interpreted clause (11)'s reference to clause (10) as merely setting forth the reasons why a bequest may fail to residuary devises, not, as Leckey argued, requiring a specific devise in order to activate clause (11).[30]

However, the court's interpretation of clause (10) and clause (11) was not dispositive, because the majority found Burger's alternative disposition of the residuary bequest in the event of Nash's death to be sufficient evidence of the intent to have the same distribution if the gift failed for any other reason.[31] Thus, the court concluded that even if undue influence was proven, Leckey still lacked standing because the language of the will was evidence of Burger's intent to avoid intestacy.[32]

The Pennsylvania Superior Court affirmed the trial court's decision that Leckey lacked standing.[33] Judge Johnson noted the general presumption in Pennsylvania against intestacy,[34] mentioning that title 20, section 2514 of the Code, particularly the anti-lapse and void legacy provisions, operates consistently with this presumption.[35] Central to the superior court's reasoning was the notion that a testator's intent to have his will dispose of his property did not have to be express,[36] but need only appear with "reasonable certainty."[37]

The court found Burger's inclusion of substitute provisions for the distribution of the residuary bequests evinced the requisite

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27. *Id.*

28. *Id.* The heading of clause (10) is "lapsed and void devises and legacies; shares *not* in residue." *Id.* (emphasis added).

29. *Id.* The heading of clause (11) is "lapsed and void devises and legacies; shares in residue." *Id.*

30. *Id.*

31. *Burger*, 898 A.2d at 550.

32. *Id.*

33. *Id.*

34. *See In re* Estate of Hill, 247 A.2d 606, 609 (Pa. 1968), stating:

> "[W]hen a decedent drafts a last will and testament, he is presumed, in the absence of an indication to the contrary, to have intended to dispose of his entire estate and not to die intestate as to any part of it" and a construction should be adopted that would avoid an intestacy unless such construction would do violence to the language of the will . . . .

Id. (quoting *In re* Estate of Farrington, 220 A.2d 790, 793 (Pa. 1966)).

35. *Burger*, 898 A.2d at 550-51.

36. *Id.* at 551 (citing *In re* Estate of Corbett, 241 A.2d 524, 527 (Pa. 1968)).

37. *Id.* (citing Estate of Kehler, 411 A.2d 748, 750 (Pa. 1980)).

reasonably certain intent to dispose of his property by will, not through the application of the anti-lapse statute.[38] Consequently, the majority found no reason to support Leckey's argument that if the bequest failed due to undue influence then the alternate disposition would not apply.[39] In holding that Burger's intent to dispose of his entire estate through his will was reasonably certain, the court declined to address the interpretation of section 2514(11).[40]

The Pennsylvania Supreme Court granted allocatur[41] upon Leckey's appeal of the superior court's decision.[42] Justice Saylor delivered the majority opinion for the court.[43] After summarizing the parties' arguments, the court addressed the superior court's reasons for denying Leckey standing to contest the will.[44]

Justice Saylor stated that the superior court's reliance on Burger's specification for an alternate disposition of the residuary estate was in tension with previous Pennsylvania Supreme Court decisions.[45] When compared with this authority, it was clear that the superior court could not have been justified when it divined Burger's intent based upon the language of the will coupled with surrounding circumstances.[46] The majority asserted that the superior court must have relied upon a judicial presumption in order to have arrived at its result.[47]

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38. *Id.*

39. *Id.* The majority reasoned that:

> Whether a testator's bequest "lapses" because the beneficiary has predeceased him, or has failed for some other reason, the testator's expression of intent for the disposition of the affected property remains to be honored to the extent possible. Thus, if a bequest fails, (albeit under a scenario less common than the beneficiary's death) and an alternative disposition is specified, we cannot presume that had the bequest failed for a different reason the testator's intent for the descent of the property to someone else would change.

Id. (quoting *In re* Estate of Burger, 852 A.2d 385, 390 (Pa. Super. Ct. 2004), *aff'd*, 898 A.2d 547 (Pa. 2005)).

40. *Burger*, 898 A.2d at 552.

41. *Allocatur* is the Latin phrase for "it is allowed . . . [and] is still used in Pennsylvania to denote permission to appeal." BLACK'S LAW DICTIONARY 83 (8th ed. 2004).

42. *In re* Estate of Burger, 872 A.2d 1197 (Pa. 2005).

43. *Burger*, 898 A.2d at 548 (Chief Justice Cappy and Justices Castille and Baer joined in the majority opinion. Justice Eakin filed a concurring opinion in which Justice Newman joined).

44. *Id.* at 553.

45. *Id.* The court disagreed with the superior court's reasoning because "a circumstance-specific, alternative bequest is not, in and of itself, sufficient to support a substitute gift occasioned by a different circumstance, at least in the absence of some additional presumption." *Id.*

46. *Id.* at 554.

47. *Id.* Justice Saylor noted that the court does not:

Justice Saylor noted that the need for judicial presumptions when interpreting wills containing ambiguities was precisely the reason the Pennsylvania Legislature enacted section 2514.[48] Because of the extensive disagreement regarding which presumptions were appropriate, the court found it most reasonable to follow the direction of the Legislature by applying the current statutory presumptions.[49] For these reasons, the majority held that the superior court erred in precluding the application of section 2514 when it found that Burger's intent was reasonably certain based exclusively on the will's provision for a substitute gift should Nash predecease him.[50]

Having concluded that the superior court's dismissal of a statutory interpretation of section 2514 was improper, Justice Saylor discussed the proper interpretation of the statute.[51] Justice Saylor stated that, since clause (11) purported to pertain only to the lapsed and void special devises addressed in clause (10), Leckey's argument appears to be valid on its face.[52] However, as the court noted, clause (11)'s cross-reference was meant to apply to clause (10) in its entirety, not just an isolated portion thereof.[53] If Leckey's interpretation of section 2514 was given effect, clause (11) would be rendered superfluous, as both clauses (10) and (11)

> [R]egard this presumption as necessarily unreasonable; indeed, the result of its application (a substitute gift to the other residuary beneficiaries) is precisely the same result obtaining upon applying the presumption of clause (11) of Section 2514 as its language has been interpreted in prior decisions of this court, by the orphan's court, and by Appellee herein.

Id. (citation omitted).

48. *Burger*, 898 A.2d at 555.

49. *Id.* The majority believed that "the interests of justice would be better served" by implementing the "legislatively prescribed rules of interpretation that were available to the testator for consideration at the time that the will was drafted, as opposed to crafting subsequent, judicial presumptions that are independent of the statute." *Id.*

50. *Id.*

51. *Id.*

52. *Id.* However, the court noted that Leckey's interpretation cannot survive application to the remainder of the statute. *Id.* The court stated:

> [Leckey's view] appears to be that the requirement for the gifts covered by clause (11) to be included within the residuary clause of the will merely reflects a legislative conception that lapsed or void particular devises or legacies would fall within the residuary by operation of clause (10) upon lapse or invalidation of the gift.

Id. at 555 n.11. The court disagreed with this interpretation because clause (11) "speaks directly to the subject matter of the actual 'residuary clause,' [Leckey's] view does not reflect the same literal approach to the statute that she seeks to have applied to another of its parts." *Id.* (internal citations omitted).

53. *Burger*, 898 A.2d at 556.

would apply to non-residuary gifts and section 2514 would be left without a provision for the disposition of residuary gifts.[54]

Due to the apparent inconsistencies presented by the interpretation of clause (11), the court found it necessary to apply principles of statutory construction to resolve the ambiguity of the statute.[55] In doing so, the court noted that the creation of section 2514, the language of which was modeled after the Uniform Probate Code,[56] was the result of the General Assembly wishing to move away from the common law doctrines favoring intestacy.[57] Consistent with this notion was the court's interpretation that clause (11), when read in its entirety,[58] directs courts to apply a presumption avoiding lapsed gifts that result in intestacy.[59]

The majority understood this interpretation of the statute to be in line with previous decisions involving the interpretation of clause (10) of section 14 of the Wills Act of 1947 (hereinafter "1947 Act"),[60] the language of which is nearly identical to clause (11).[61] In the case of *In re Estate of McLaughlin*,[62] an equally divided supreme court reasoned that clause (10) of the 1947 Act worked to enlarge the shares of residuary beneficiaries when a testator failed to provide for a complete distribution of his estate.[63] The supreme court remained consistent in deciding *In re Estate of Corbett*[64] and *In re Slater's Estate*,[65] where it held that the same re-

54. Brief of Appellee at 14, *Burger*, 898 A.2d 547 (No. 62 WAP 2005).

55. *Burger*, 898 A.2d at 556. In interpreting the statute, the majority relied upon the "principle of liberal construction to promote the remedial statute's objects." *Id.* *See* 1 PA. CONS. STAT. § 1928(c) (2006). The court also relied on "the authorization to consider the occasion and necessity for the statute, the mischief to be remedied, the consequences of a particular interpretation, and former laws." *Burger*, 898 A.2d at 556. *See* 1 PA. CONS. STAT. § 1921 (2006). Finally, the majority found it necessary to "consider the headings included by the General Assembly as an aid." *Burger*, 898 A.2d at 556. *See* 1 PA. CONS. STAT. § 1924 (2006).

56. *Burger*, 898 A.2d at 556-57. The court compared section 2514(11) to section 2-606 of the Uniform Probate Code, which states that when a residuary gift fails, the "share passes to the other residuary devisee, or to other residuary devisees in proportion to their interests in the residue." *Id.* (citing UNIF. PROBATE CODE § 2-606 (1969)).

57. *Id.* (citing 80 AM. JUR. 2d *Wills* § 1445 (2005)).

58. *Id.* The court considered the "heading, the bulk of its body, and the policy" that section 2514 was meant to serve in its interpretation of the statute. *Id.*

59. *Id.* The majority noted that most jurisdictions follow the Uniform Probate Code's recommendation of adopting presumptions that disfavor intestacy. *Id.* These judicial presumptions have been "particularly strong where the subject of the gift is the residuary estate." *Id.* (citing 80 AM. JUR. 2d *Wills* § 1037 (2005)).

60. 1947 Pa. Laws 89 (amended 1970).

61. *Burger*, 898 A.2d at 557.

62. 273 A.2d 742 (Pa. 1971).

63. *Burger*, 898 A.2d at 552 (citing *McLaughlin*, 273 A.2d at 744-45).

64. 241 A.2d 524 (Pa. 1968).

65. 105 A.2d 59 (Pa. 1954).

sult should occur when the statute is applied to a lapsed bequest.[66]

In accordance with these prior decisions and the leading presumptions in favor of avoiding intestacy, the court stated that the General Assembly intended clause (11) to provide the presumption for lapsed and failed residuary bequests in the absence of the testator's reasonably certain intent.[67] Consequently, because the majority did not find Burger's intent to be reasonably certain, if the will was invalidated due to undue influence, clause (11)'s presumption would direct the substitute gift to the other residuary beneficiaries, not to Leckey, the intestate heir.[68] Since Leckey would not benefit from a finding that Burger was unduly influenced, the court held that she lacked standing to contest the will.[69]

Justice Eakin concurred with the majority, denying Leckey standing to challenge the will.[70] However, he agreed with the superior court's finding that Burger's intent was reasonably certain, making the interpretation of clause (11) unnecessary.[71] Justice Eakin argued that there was enough evidence from the prior wills and surrounding circumstances to discern Burger's intent with reasonable certainty.[72] The fact that Burger did not provide for a substitute gift in the event of undue influence, Justice Eakin argued, is not surprising in light of the fact that most people do not believe they are being unduly influenced during the drafting of their will.[73]

Moreover, Justice Eakin noted that a provision of the will provided that beneficiaries could forfeit their share by failing to attend Burger's funeral.[74] Justice Eakin argued that, since Burger

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66. *Burger*, 898 A.2d at 552 n.5 (citing *Corbett*, 241 A.2d at 527; *Slater*, 105 A.2d at 61).

67. *Id.* at 557.

68. *Id.*

69. *Id.*

70. *Id.* (Eakin, J., concurring). Justice Newman joined Justice Eakin's concurring opinion. *Id.*

71. *Burger*, 898 A.2d at 558 (Eakin, J. concurring).

72. *Id.* Justice Eakin believed that Burger's intent can be derived from the fact that Leckey:

> does not challenge her inclusion as a residuary beneficiary, nor Dr. Burger's capacity to provide for her in that way. Looking at the prior wills, where no undue influence was claimed, we see consistent inclusion of [Nash], who was involved with decedent's care in his waning years. He consistently provided for [Nash], and he consistently chose not to provide for [Leckey] or other intestate heirs.

Id.

73. *Id.*

74. *Id.* at 559.

directed these forfeited shares into the residuary estate, it is not unlikely that he intended the same result in the event that a beneficiary's share failed for any other reason.[75] For these reasons, the concurrence found that it was reasonably certain that Burger intended failed bequests to pass to the other residuary legatees, not to have clause (11) control the distribution of his estate.[76]

At common law, a legacy or devise was considered to have lapsed if the beneficiary died before the testator.[77] A gift was also considered to have lapsed when circumstances other than death of the beneficiary caused the devise or legacy to fail.[78] Traditionally, a lapsed *specific* devise fell into the residuary estate, but if there was no residuary estate, the devise passed by intestacy.[79] However, this was not true of lapsed *residuary*[80] bequests, which immediately passed to the intestate heirs.[81]

In *Reed's Estate*,[82] the Pennsylvania Supreme Court examined a will in which General Reed divided his residuary estate as follows: one-third to his wife, one-third to his two sons, one-sixth to his daughter and the final one-sixth to his two grandchildren.[83] Reed's daughter predeceased him, causing her residuary bequest to lapse.[84] Applying the common law rule, the court ordered that this lapsed bequest pass by intestacy.[85] Consequently, Reed's widow was entitled to the lapsed residuary share as his spouse and closest kin.[86]

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75. *Id.*

76. *Burger*, 898 A.2d at 559 (Eakin, J., concurring).

77. PAGE ON WILLS § 50.10 (William J. Bowe et al. eds., 2003).

78. 97 C.J.S. *Wills* § 1825 (2001). *See also* PAGE ON WILLS, *supra* note 77, § 50.1 ("By derivation 'lapse' means falling from the original condition because of subsequent events, by which that which was valid originally thereafter fails. With this underlying meaning, it might be used of devises and legacies to indicate any of the different ways, [other than death], in which they fail.").

79. 80 AM. JUR. 2d *Wills* § 1445 (2005).

80. A *residuary devise* is defined as "a devise of the remainder of the testator's property left after other specific devises are taken." BLACK'S LAW DICTIONARY 484 (8th ed. 2004).

81. 80 AM. JUR. 2d *Wills* § 1446.

82. 82 Pa. 428 (1876).

83. *Reed*, 82 Pa. at 428.

84. *Id.* at 429.

85. *Id.*

86. *Id.* at 431. The court reasoned that:

> The death of any one or more of the other residuary legatees did not lessen or deprive [Reed's widow] of her proportion of the residue under the will, but simply changed the distribution of the part left without an owner by reason of the death of the legatee of it in the lifetime of the testator. This lapsed legacy . . . became distributable under the intestate law, as part of the estate not disposed of by the will, when it took effect by and at the death of the testator. Of this he died intestate.

Id.

Almost two decades later, the common law doctrine employed by the court in *Reed's Estate* became the subject of repeated criticism due to the unsound reasoning behind its application.[87] In 1892, Justice Mitchell of the Pennsylvania Supreme Court stated:

> [T]he [intestate succession] rule thus established does not commend itself to sound reasoning, and is a sacrifice of the settled presumption that a testator does not mean to die intestate as to any portion of his estate, and also of his plain actual intent, shown in the appointment of general residuary legatees, that his next of kin shall not participate in the distribution at all. The rule is in fact a concession to the set policy of English law, nowhere more severely asserted than in chancery, to keep the devolution of property in the regular channels, to the heir, and the next of kin, whenever it can be done.[88]

In order to abrogate the harshness of the common law doctrine favoring intestacy, the Pennsylvania Legislature adopted an anti-lapse statute,[89] which currently applies to both specific and residuary devises.[90] Consequently, the anti-lapse statute will be rendered inoperative only when a decedent dies intestate, or when it appears from the language of a decedent's will that he wished for a gift to pass to his next of kin only under certain circumstances.[91] Nevertheless, even if a testator's will leaves "[d]irections for devolution in case of the failure of gifts for certain

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87. PAGE ON WILLS, *supra* note 77, § 50.18.

> In some cases the rule has been criticized quite sharply, on the ground, among others, that it defeats testator's intention in more cases than it gives effect thereto. In some states the courts have held the general rule to be unsound; and have taken the position that a lapsed residue becomes a part of the residue; and passes to the remaining residuary legatees.

Id.

88. *In re* Gray's Estate, 23 A. 205, 206 (Pa. 1892).

89. *In re* Estate of Burger, 898 A.2d 547, 556 (Pa. 2006) (citing 80 AM. JUR. 2d *Wills* § 1445 (2005)).

90. 20 PA. CONS. STAT. § 2514(10)-(11) (2005). *See also* 97 C.J.S. *Wills* section 1834 (2006), which states:

> In enacting a statute providing that any residuary bequest which fails, is void, or is revoked shall pass to and be divided among the other legatees in proportion to their respective interests, the intent of the legislature is to prevent void or lapsed legacies from passing to the next of kin or heirs and to carry out the testator's intent.

Id.

91. 97 C.J.S. *Wills* § 1825 (2006).

specified reasons . . . [this direction] will not apply where a gift fails for a reason not enumerated by the testator."[92]

However, Pennsylvania did not always have a provision specifically addressing the devolution of lapsed residuary bequests.[93] Anti-lapse provisions concerning the residuary estate were first enacted by the Wills Act of 1844, which included sections preventing the lapse of residuary bequests to siblings of the testator.[94] More than seven decades later, Pennsylvania enacted the Wills Act of 1917 (hereinafter "1917 Act"), which included a provision preventing the lapse of residuary devises to beneficiaries other than siblings of the testator.[95] Ever since the enactment of the 1917 Act, the Pennsylvania Supreme Court has consistently interpreted anti-lapse statutes as directing the devolution of such lapsed residuary bequests to the remaining residuary beneficiaries.[96]

In *Desh's Estate*,[97] the testatrix left the residue of her estate to her two brothers, Harvey and George Desh.[98] George Desh predeceased the testatrix and was survived by his two sons.[99] The auditing judge awarded one-half of the estate to Harvey Desh, the surviving brother, and the other one-half to the two sons of the

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92. *Id.*

93. Desh's Estate, 184 A. 111, 111-12 (Pa. 1936).

94. 1844 Pa. Laws 564 (repealed 1917).

95. 1917 Pa. Laws 403 (amended 1999). Section 15(c) of the Act stated:

> Unless a contrary intention shall appear by the will, such real or personal estate, or interests therein, as shall be comprised or intended to be comprised in any devise or bequest in such will contained, which shall fail or be void by reason of the death of the devisee or legatee in the lifetime of the testator, or by reason of such devise or bequest being contrary to law, or otherwise incapable of taking effect, or which shall be revoked by the testator, shall be included in the residuary devise or bequest, if any, contained in such will. In any case where such devise or bequest which shall fail or be void, or shall be revoked as aforesaid, shall be contained in the residuary clause of such will, it shall pass to and be divided among the other residuary devisees or legatees, if any there be, in proportion to their respective interests in such residue.

Id.

96. *See In re* Estate of Burger, 898 A.2d 547, 557 (Pa. 2006) (interpreting section 2514(11) of title 20 of the Code as applying to a lapsed residuary bequest in the absence of reasonable certainty concerning the intent of the testator); *In re* Estate of McLaughlin, 273 A.2d 742, 744-45 (Pa. 1971) (interpreting Section (10) of the Wills Act of 1947 as enhancing the shares of the residuary beneficiaries upon a failure of a complete disposition of the residuary estate); Armstrong Estate, 31 A.2d 528, 529 (Pa. 1943) (holding that section 15(c) of the Wills Act of 1917's "purpose was to abolish that common-law rule as to lapse . . . and thus prevent a lapse where it was apparent that the testatrix intended not to give the next of kin any interest in her estate").

97. *Desh*, 184 A. at 111.

98. *Id.*

99. *Id.*

deceased George Desh.[100] Harvey Desh appealed, claiming that he was entitled to the entire residue according to section 15(c) of the 1917 Act.[101]

The issue presented to the Pennsylvania Supreme Court was whether the residuary legacy, which failed due to the death of the testatrix's brother, should pass to the issue of the legatee under section 15(b) of the 1917 Act or to Harvey Desh, the surviving residuary legatee, under section 15(c) of the same act.[102] Chief Justice Kephart first described the existing interpretation of section 15(b).[103] Standing alone, 15(b) would control the disposition of the estate because "its purpose was to prevent intestacy or lapse and to give to lineal descendants of a brother or sister of a testator dying before him the property which he intended their ancestor to get, if living."[104]

The court then addressed the question of whether the Legislature's recent addition of subsection 15, subparagraph (c) had any effect on the application of 15(b).[105] Justice Kephart explained that the Legislature enacted section 15(c) to cover "entirely new subject-matter which could only operate if the devise or legacy did not come within section 15(a)[106] or (b)."[107] The Chief Justice explained that section 15(c) was enacted as a response to criticism of the common law rule, which directed the devolution of lapsed residuary bequests to intestate heirs.[108] However, the court reasoned that section 15(c) should not be construed to include a residuary gift to a brother or a sister, since such gifts were already addressed by section 15(b).[109] The court concluded that since the lapsed residuary bequest was given to the testatrix's brother, section 15(b) should apply because the purpose of 15(c) "was not to cover a situation of intestacy previously provided for, but to cover one formerly untouched by legislation."[110]

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100. *Id.*
101. *Id.*
102. *Desh*, 184 A. at 111.
103. *Id.* at 112.
104. *Id.*
105. *Id.*
106. 1917 Pa. Laws 403 (amended 1999). Section 15(a) of the Wills Act of 1917 is the provision preventing the lapse of devises or bequests given to the children and other lineal descendents of the testator. *Id.*
107. *Desh*, 184 A. at 112.
108. *Id.*
109. *Id.*
110. *Id.* at 113.

In re Slater's Estate also raised the question of the devolution of a lapsed residuary devise.[111] There, the testator left two-thirds of his residuary estate to his cousin, Mary Aber, and the remaining one-third to be divided between Ralph and Alice Canon, also his cousins.[112] Alice Canon predeceased the testator, causing her residuary bequest to lapse.[113] Writing for the majority, Justice Stearne stated that the Legislature had enacted various statutes to control the disposition of lapsed residuary bequests.[114] He noted that the culmination of these various statutes lies in the 1947 Act,[115] section 14(10),[116] which applied in *Slater*.[117]

Originally, Mary Aber was given two-thirds of the residuary estate and Ralph Canon was given one-sixth of the residuary estate, which proportionately equaled four-fifths and one-fifth, respectively, of the residuary estate.[118] Consequently, in applying section 14(10), the court held that Alice Canon's lapsed one-sixth share of the residuary was to be divided in accordance with these proportions between the two surviving residuary legatees.[119]

In re Estate of Corbett was another case in which the Pennsylvania Supreme Court interpreted section 14(10) of the 1947 Act to direct the devolution of a lapsed residuary bequest to the surviving residuary legatees.[120] This case involved a will contest between the surviving heir of a residuary legatee and two intestate heirs.[121] Dennis A. Corbett bequeathed his residuary estate equally to his brother and two sisters, "who [were] instructed as to [his] charitable wishes."[122] All three of the named beneficiaries predeceased the testator.[123] The two sisters were unmarried and died without issue, while the brother was survived by his adopted

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111. *In re* Slater's Estate, 105 A.2d 59 (Pa. 1954).
112. *Slater*, 105 A.2d at 60.
113. *Id.*
114. *Id.* at 61.
115. 1947 Pa. Laws 89 (amended 1970).
116. *Id.* Section 14(10) of the Wills Act of 1947 stated:
> Lapsed and void devises and legacies.--Shares in residue. When a devise or bequest . . . shall be included in a residuary clause of the will and shall not be available to the issue of the devisee or legatee under the provisions of clause (8) hereof, . . . it shall pass to the other residuary devisees or legatees, if any there be, in proportion to their respective shares or interests in the residue.

Id.
117. *Slater*, 105 A.2d at 61.
118. *Id.*
119. *Id.* at 62.
120. *In re* Estate of Corbett, 241 A.2d 524 (Pa. 1968).
121. *Corbett*, 241 A.2d at 525.
122. *Id.*
123. *Id.*

son, James Corbett.[124] Dennis Corbett had another brother, not mentioned in the will, who died one year before the execution of the will and was survived by two daughters, Mae Corbett and Margaret Suria.[125]

The question presented to the court was whether the residuary estate should have passed in its entirety to James Corbett, as was held by the auditing judge, or if the estate should have passed through intestacy, with James Corbett, Mae Corbett and Margaret Suria taking equal shares.[126] The court noted that if the statute was to be applied, "since the lapsed bequests to testator's sisters were contained in a residuary clause, subsection (10) dictate[d] that [James Corbett], whose father's bequest did not lapse, [would be] entitled to the entire residue."[127] However, the two nieces argued that since the will contained the phrase "who are instructed as to my charitable wishes," the intent of the testator was that the named beneficiaries were only to take in the event that they survived the testator.[128] The court stated that this argument could be reduced to the proposition that this phrase demonstrated Dennis Corbett's implied intent that the anti-lapse statute should not apply.[129]

The majority disagreed that this language was sufficient to show that the testator's intent was to prevent the application of the anti-lapse statute.[130] Justice Roberts noted that Pennsylvania courts had consistently held that the statute may only be rendered inoperative when the testator specifically provided for an alternative disposition in the event of a contingency.[131] Because Dennis Corbett's will did not include language amounting to sufficient intent to render the statute inoperative, the court held that the entire residuary estate, in accordance with section 14(10), should pass to James Corbett, the surviving heir of a residuary legatee.[132]

Three years later, the court decided *In re Estate of McLaughlin* and faced an additional question requiring the interpretation of section 14(10) of the 1947 Act.[133] In *McLaughlin*, the fifth para-

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124. *Id.*
125. *Id.*
126. *Corbett*, 241 A.2d at 525.
127. *Id.* at 527.
128. *Id.* at 526.
129. *Id.* at 527.
130. *Id.*
131. *Corbett*, 241 A.2d at 527.
132. *Id.* at 528.
133. *In re* Estate of McLaughlin, 273 A.2d 742 (Pa. 1971).

graph of Viola S. McLaughlin's will provided that "all of the rest, residue and remainder of [her] estate" was to be distributed to five named beneficiaries.[134] The will then devised 10% of the residuary estate to each of four named beneficiaries and the "remaining" 50% to a fifth beneficiary, the First Presbyterian Church of Warren Pennsylvania (hereinafter "Church").[135] The orphans' court held that the fifth paragraph failed to dispose of the 10% of the residuary estate not specifically devised in the will and that the undisposed 10% was to be distributed pro-rata between the five residuary devisees.[136]

The Church appealed this decision, arguing that the word "remaining" in the devise granting it 50% of the residue evidenced the testatrix's intent for the Church to have whatever residue remained, including the putatively undisputed 10%.[137] The Church also asserted that the devise of 50% of the residuary estate was merely a typographical error and that the testatrix's true intention was to devise 60% of the estate.[138] In opposition, the other four residuary beneficiaries argued that a fifth 10% beneficiary was omitted from the will, resulting in that portion of the estate being undisposed of, in which case section 14(10) of the 1947 Act should apply.[139]

The majority stated that the language of McLaughlin's will did not clearly evince an intent for the Church to take a 60% share of the residuary estate.[140] As such, the court concluded that McLaughlin had not disposed of the disputed 10% of her residuary estate.[141] Section 14(10) of the 1947 Act states that "when a devise or bequest as described in clause (9) hereof shall be included in a residuary clause of the will . . . it shall pass to the other residuary devisees or legatees, if any there be, in proportion to their respective shares or interests in the residue."[142] The court held that section 14(10) was applicable to the unaccounted for 10% of the estate because of the cross reference to clause (9) of the 1947 Act, which specifically includes those devises or bequests which

134. *McLaughlin*, 273 A.2d at 742.
135. *Id.* at 743.
136. *Id.* at 744.
137. *Id.*
138. *Id.*
139. *McLaughlin*, 273 A.2d at 744.
140. *Id.*
141. *Id.*
142. *Id.* at 745 (citing 1947 Pa. Laws 89 (amended 1970)).

are "undisposed of."[143] Consequently, the court read sections 14(9) and (10) as distributing the undisposed portion of McLaughlin's estate "in proportion to their respective shares or interests in the residue."[144]

While the wording of the statutes controlling the disposition of lapsed and void residuary devises has changed throughout the past several decades, the Pennsylvania Supreme Court's construction of these statutes remains steadfast. Prior to the *Burger*[145] opinion, the court had yet to interpret title 20, sections 2514 (10) and (11) of the Code. The court took this opportunity to make the determination that the original purpose for creating the statute in 1917,[146] the abolition of the common law rule concerning lapsed and void devises, remains the contemporary objective underlying the current statute.

The disagreement underlying the holding in *Burger* concerned the question of statutory construction.[147] The Orphans' Court of Allegheny County, the Pennsylvania Superior Court and Justice Eakin's concurrence all agreed that Janice Leckey lacked standing, not because the application of the statute prevented her from taking under the will, but because it was reasonably certain that Burger intended the gift to be distributed amongst the remaining residuary beneficiaries in the event of failure due to undue influence.[148]

The supreme court's ultimate decision in *Burger*, that the application of the anti-lapse statute is the appropriate means to determine whether or not Leckey lacked standing, hinged upon the definition of "reasonably certain." If a court finds it reasonably certain that a testator's intent was for the will, and not the statute, to apply in the event of a contingency, then the will controls the disposition of the estate.[149] While the *Burger* court left unclear what the threshold for reasonably certain intent was, it concluded that Burger's intent fell short of such threshold.[150]

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143. *Id.*
144. *McLaughlin*, 273 A.2d at 745.
145. *In re* Estate of Burger, 898 A.2d 547 (Pa. 2006).
146. Armstrong Estate, 31 A.2d 528, 529 (Pa. 1943).
147. *Burger*, 898 A.2d at 558 (Eakin, J., concurring).
148. *See generally* Carothers's Estate, 150 A. 585, 586 (Pa. 1930) ("Where the contestant to a will that is void in part receives no benefit from the contest he is not entitled to sustain a caveat nor take an appeal from the action of the court below . . . .").
149. *In re* Estate of Corbett, 241 A.2d 524, 527 (Pa. 1968).
150. *Burger*, 898 A.2d at 553 (majority opinion).

Burger's will provided for an alternative disposition of his residuary estate only in the event of a beneficiary predeceasing him, not for the contingency of undue influence.[151] The majority disagreed with the lower court's decision that this disposition met the requisite reasonably certain intent standard.[152] Justice Saylor noted that the superior court's decision was "in substantial tension with the holdings of this Court to the effect that a circumstance-specific, alternative bequest is not, in and of itself, sufficient to support a substitute gift occasioned by a different circumstance, at least in the absence of some additional presumption."[153]

The majority's determination that "circumstance-specific, alternative bequest[s]" are insufficient evidence of "reasonably certain intent" makes the application of section 2514 quite extensive. This interpretation allows for the statute to apply to *any* contingency, such as undue influence not, contemplated by the testator during the creation of the will. Justice Eakin's concurrence pointedly noted that "no one writes [his] will believing [he] [is] under the undue influence of another; hence there is no reason to believe that [he] would specifically address a situation [he] could not have believed was of moment."[154] Consequently, his argument makes the application of section 2514 inappropriate in situations where the court determines that the testator would not have thought about the occurrence of a particular event for whatever reason.

While Justice Eakin's argument is not without merit, it is clear that the majority opinion was structured upon a theory of uniformity, which staunchly disapproves of judicial reformation of wills. The supreme court's finding that the will in *Burger* presented insufficient evidence of "reasonably certain intent" supports the effort toward uniformly distributing estates where contingencies would otherwise require courts to rewrite wills. There are a myriad of contingencies that a testator may fail to provide for during the creation of his will. "Significantly, in this arena, there is substantial room for disagreement as to what presumptions are most appropriate" when there is a failure to anticipate the happening of an event which in fact occurs.[155]

In order to provide a uniform and fair presumption in the event that the testator fails to provide for the happening of a certain

151. *Id.* at 550.
152. *Id.* at 553.
153. *Id.*
154. *Id.* at 558 (Eakin, J., concurring).
155. *Burger*, 898 A.2d at 554.

event, the court noted that the most appropriate way to approach the situation is to "assume that the testator simply did not anticipate this happening."[156] In making this assumption, the court finds it reasonable to implement the "pre-existing, legislatively prescribed rules of interpretation that were available to the testator for consideration at the time that the will was drafted, as opposed to crafting subsequent, judicial presumptions that are independent of the statute,"[157] as Justice Eakin would have it.

This sweeping exclusion from the phrase "reasonably certain" allowed the *Burger* court to reach its current interpretation of clauses (10) and (11) of title 20 section 2514.[158] In *Armstrong Estate*,[159] Justice Stearne noted "the court's tendency to interpret statutes liberally whenever the evil appears which it was obviously intended to prevent. The letter killeth, but the spirit giveth life."[160] In its holding in *Burger*, the majority of the Pennsylvania Supreme Court continued to be consistent with the Commonwealth's advancement of the policy against intestacy that evolved at common law. Future novel constructions of clause (11) will be futile now that the court has solidified a concrete interpretation of the statute in its contemporary form. It can now be said that the letter of the statute does not kill, but, along with the spirit, breathes life into its underlying purpose.

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156. *Id.* at 555.
157. *Id.*
158. 20 PA. CONS. STAT. § 2514(10), (11) (2005).
159. 31 A.2d 528, 529 (Pa. 1943).
160. *Id.*