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These Are a Few of My Least Favorite Things

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I. Introduction

The Uniform Probate Code ("UPC") can trace its origins back to a Model Probate Code promulgated by the American Bar Association ("ABA")'s section on Real Property, Probate, and Trust Law in 1946.[1] In 1962, the Section on Real Property, Probate, and Trust Law, along with National Conference of Commissioners on Uniform State Laws began work on what was to become the original UPC.[2] The National Conference and the ABA's House of Delegates approved the UPC in 1969.[3]

The 1969 UPC was an attempt to modernize some of the traditional rules and provide a degree of uniformity for the American law of wills and intestacy.[4] In general, the original UPC did a good job of achieving these goals. The 1990 revised UPC was somewhat more ambitious. It introduced entirely new concepts such as "harmless error" and substantially changed longstanding rules

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[1] Robert Whitman, *Revocation and Revival: An Analysis of the 1990 Revision of the Uniform Probate Code and Suggestions for the Future*, 55 ALB. L. REV. 1035, 1041 (1992).

[2] *Id.* at 1042.

[3] *Id.*

[4] *See id.* at 1041 (providing that the purpose of the ABA was to promote uniformity in laws).

on descent and distribution and elective share rights for surviving spouses.[5] Unfortunately, some of the 1990 UPC's sections are unnecessarily confusing and complex, while others seem excessively vague and open-ended. This Article will identify some of the worst offenders and suggest ways to improve them.

Part II discusses the doctrine of representation and advocates replacing the Code's per capita at each generation rule with the more traditional per capita with representation approach.[6] Part III examines the harmless error rule, or dispensing power, which allows a court to probate a will even though it has not been properly executed.[7] Part IV is concerned with the treatment of revival in the 1990 UPC. This section further explores why only a few jurisdictions have adopted said revival as most courts are turned off by the provision's complex arrangement of presumptions going every which way. Part IV suggests a return to the 1969 UPC's treatment of revival.[8] Part V provides a critique of the revised UPC's anti-lapse provision.[9] Not only is this provision much too long and complicated, but it makes it unnecessarily difficult for a testator to allow a gift to lapse. Finally, Part VI analyzes the concept of ademption by extinction and recommends that the 1990 UPC's provision on ademption be jettisoned and replaced by the 1969 UPC's more workable version.[10]

II. Intestate Succession.

Sections 2-101 through 2-114 of the 1990 UPC are concerned with intestate succession. Although some of these provisions are beneficial, others, such as sections 2-106(b) and (c) are more problematic. Section 2-106 modifies the traditional law of representation by introducing the concept of per capita at each generation.[11]

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[5] *Id.*

[6] *See* UNIF. PROB. Code § 2-106 (1990) (stating that "[e]ach surviving descendant in the nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if the surviving descendants who were allocated a share and their surviving descendants had predeceased the decedent.").

[7] *See* UNIF. PROB. CODE § 2-503 (1969).

[8] *See* UNIF. PROB. CODE § 2-509 (1990).

[9] *See* UNIF. PROB. CODE§ 2-603 (1990).

[10] *See* UNIF. PROB. CODE § 2-606 (1990).

[11] *See* Unif. Prob. Code § 2-106 (1990).

A. The Traditional Law of Descent and Distribution.

Until recently, English law distinguished between real property and personal property as far as descent and distribution were concerned.[12] Freehold estates in land descended under the rule of primogeniture and could not be devised by will until 1540.[13] Under this principle, when the owner died, his real property descended to the eldest son to the exclusion of daughters and younger sons.[14] The decedent's widow received a life interest in a third of the property under the concept of dower.[15] Any litigation over the devise of real property took place in one of the royal courts.[16]

In England, the distribution of personal property was the domain of the ecclesiastical courts.[17] In 1670, Parliament codified the law of descent and distribution for personal property in the Statute of Distribution.[18] This statute provided that when a decedent died intestate, one-third of his "surplus" estate[19] would be distributed to his widow.[20] The remainder of the estate would be distributed to the decedent's children or their representatives in equal shares.[21] If there were no children (or descendants of children), the remaining property would be distributed to the decedent's next of kin in equal degree.[22] Finally, the statute provided that the issues of deceased children would take the share of the estate that their ancestor would have been entitled to.[23] In 1857, Parliament removed probate testamentary matters from the ecclesiastical courts and transferred it to the Court of Probate.[24] This new court exercised probate jurisdiction over both real and personal property.[25]

Most American intestacy statues, which now apply to both real and personal property, are loosely modeled after the English Statute of Distribution. In contrast to the so-called civil law approach under which those of equal degree of kinship take an equal share, these statutes incorporate a parentelic system of

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[12] Thomas E. Atkinson, *Brief History of English Testamentary Jurisdiction*, 8 MO. L. REV. 107, 124 (1943).
[13] 32 Hen. 8, c. 1 (1540). However, primogeniture continued to control the descent of intestate real property until 1925. Administration of Estates Act, 15 & 16 Geo. 5, c. 23 (1925).
[14] Anne-Marie Rhodes, *Blood and Behavior*, 36 ACTEC J. 143, 151-52 (2010).
[15] Cornelius J. Moynihan, *Introduction to the Law of Real Property* § 11D at 55 (2d ed. 1962).
[16] Anne-Marie Rhodes *supra* note 14, at 158-59.
[17] *Id.*
[18] 22 & 23 Car. 2, c. 10 (1670).
[19] That is, the remainder of the decedent's estate after the payment of debts. *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] Court of Probate Act, 20 & 21 Vict., c. 77(iii)-(iv) (1857).
[25] Thomas E. Atkinson, *supra* note 12, at 124.

descent and distribution under which the issue of the nearest ancestor take before the issue of a more remote ancestor.[26] For example, descendants of the decedent take ahead of all other relatives.[27] If there are none, the decedent's parents or descendants of the decedent's parents (other than those of the decedent) take next.[28] This would include ancestors and collateral relatives such as siblings, nieces, nephews and descendants of nieces, and nephews.[29] Descendants of the decedent's grandparents would take next if there were no surviving first line collaterals.[30] These would include aunts and uncles, first cousins, and their descendants.[31] For the most part, the UPC also follows this approach,[32] although it allows descendants of a deceased spouse to take if there are no surviving first or second line collaterals.[33] Furthermore, while many state statutes allow more remote collaterals (so called "laughing heirs")[34] to inherit,[35] the UPC does not.[36]

Virtually all states allow an heir to take a deceased parent's share by representation.[37] The 1969 UPC provided that in cases of intestacy a decedent's estate would be divided into as many shares as there were surviving heirs in the nearest degree of kinship.[38] If a decedent's heir predeceased the decedent but left a surviving issue, the surviving issue would take the heir's share.[39] For example, if the decedent who died intestate had four children and one of them predeceased the decedent but left two surviving children (and no predeceased children), the heir's one-quarter share would be divided among the two children. Although the surviving children in the above example inherited from the decedent, they took their deceased parent's share by representation.

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[26] *Id.*
[27] UNIF. PROB. CODE § 2-103.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *See Id.*
[32] UNIF. PROB. CODE § 2-103(a) (1990).
[33] *Id.* at § 2-103(b).
[34] David V. DeRosa, *Intestate Succession and the Laughing Heir: Who Do We Want to Get the Last Laugh?*, 12 QUINNIPIAC PROB. L.J. 153, 158 (1997).
[35] *Id.* at 164.
[36] UNIF. PROB. CODE § 2-103(a) (1990).
[37] *See generally* C. R. McCorkle, *Descent and distribution to and among cousins,* 54 A.L.R.2d 1009 (1957) (stating that "provisions entitling the issue, children, or representatives of deceased members of a class of relatives constituting the intestate's heirs or next of kin, to take by representation, or permitting representation among collaterals generally....").
[38] UNIF. PROB. CODE § 2-106 (1969).
[39] *Id.*

B. The Uniform Probate Code.

According to the drafters of the 1990 UPC, taking by representation under the traditional rule could result in an unequal allocation if two groups of relatives took a share of the decedent's estate by representation.[40] For example, assume that two of the decedent's three children predeceased him. The first predeceased child had two children and the second predeceased child had three children. Had they all survived, each of the decedent's children would have received one-third of the decedent's net probate estate. However, under the principle of representation, the two children of the first predeceased child would each take one half of their parent's share of one-sixth of the estate, while the three children of the second predeceased child would each take one-ninth of the estate. The drafters of the UPC believed that the decedent would want each grandchild to take an equal share.[41] Their solution to this problem was to adopt the principle of per capita at each generation.[42]

This approach calls for the remaining share of the decedent's estate to be calculated at each generation, thereby equalizing the amount each heir in that generation receives.[43] In the example discussed above, the decedent had three children, one of whom survived. Applying per capita at each generation, the decedent's surviving child would receive one-third of the net probate estate. The remaining two-thirds would be divided equally among the five grandchildren. In other words, each grandchild would receive two-fifteenths of the decedent's net probate estate. The comment to § 2-106(b) claims that a survey of client preferences conducted by the Fellows of the American College of Trust and Estate Counsel ("ACTEC"), clients preferred per capita at each generation to the traditional approach embodied in the 1969 UPC.[44]

C. Critique

Although this approach has the virtue of equalizing the shares of those who are in an equal degree of kinship with each other, it seems overly complex for those who are mathematically challenged. Even more complex is the UPC's application of per capita at each generation to inheritance by collaterals.[45] Although a case can be made that a decedent would want his grandchildren to

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[40] *See* UNIF. PROB. CODE § 2-106, cmt. 6.
[41] *Id.*
[42] Per capita at each generation was first proposed by Professor Lawrence Waggoner in the 1970s. *See* Lawrence W. Waggoner, *A Proposed Alternative to the Uniform Probate Code's System for Intestate Distribution among Descendants*, 66 NW. U. L. REV. 626 (1971-1972).
[43] UNIF. PROB. CODE § 2-106(b).
[44] UNIF. PROB. CODE § 2-106, cmt. (citing Raymond H. Young, *Meaning of "Issue" and "Descendants,"* 13 ACTEC PROB. NOTES 225 (1988)).
[45] *See* UNIF. PROB. CODE § 2-106(c).

receive an equal share of his estate, it is more difficult to argue that a decedent would care if more remote heirs, such as nieces and nephews, received equal shares or not.

The difficulty of applying per capita at each generation outweighs whatever benefit the present UPC rule provides. Therefore, it would be better to return to the per capita with representation approach which most states continue to follow.

III. The "Harmless Error" Rule.

The 1969 UPC broke new ground by departing from the English Wills Act model and adopting a simpler approach based on the Statute of Frauds.[46] The 1990 version, as revised slightly in 2008, largely retained the structure of the 1969 provision.[47] However, the 1990 UPC introduced considerable uncertainty into the execution process by adopting a so-called harmless error rule.[48]

A. Strict Compliance with Will Formalities.

The requirements for a valid will have undergone considerable changes over the centuries. Prior to the Statute of Frauds, few formalities were required for either wills or testaments.[49] However, in 1677, the English Parliament enacted the Statute of Frauds, which specified certain formalities for wills involving real property.[50] Specifically, it required that a valid will be in writing, signed by the testator, or by another at the testator's direction and in his presence, and attested by three or four credible witnesses.[51]

In 1837, Parliament passed the English Wills Act that applied to both real and personal property.[52] This statute required that a will be in writing, signed at the foot or end thereof by the testator or by some person in his presence and by his direction.[53] In addition, the Wills Act required that the signature be made or acknowledged by the testator in the presence of two or more witnesses present at the same time who attested and subscribed the will in the presence of

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[46] *See generally* UNIF. PROB. CODE §§ 2-502, 2-503 (1969) (outlining the requirements for a valid will).
[47] *C.f.*, UNIF. PROB. CODE § 2-502 (1990) with UNIF. PROB. CODE § 2-502 (1969).
[48] *See* UNIF. PROB. CODE § 2-503.
[49] *See* 32 Hen. 8, c. 1 (1540) (allowing land to be devised by will with little formalities).
[50] 29 Car. 2, c. 3, xii (1677).
[51] Thomas E. Atkinson, *Handbook on the Law of Wills*, § 3 at 19-21 (2d ed. 1953); UNIF. PROB. CODE §§ 2-502, 2-503 (1969).
[52] 7 Wm. & 1 Vict. Ch. 26, § 3 (1837).
[53] *Id.* at § 9.

the testator.[54] Many American jurisdictions modeled their own wills acts after this legislation.[55]

As *Stevens v. Casdorph* illustrates, failure to strictly comply with these additional requirements caused many wills to be invalid.[56] There, Patricia and Paul Casdorph took the testator, Homer Miller, to a local bank to execute his will.[57] Homer signed his will in the presence of Debra Pauley, a bank employee, who apparently did not sign the attestation clause.[58] Debra then took the will to two other bank employees, located in different parts of the bank, for the purpose of having them sign as witnesses.[59] Homer did not accompany her to either of their work areas.[60] Nor did he see either of the bank employees sign or acknowledge the will.[61] On appeal, the West Virginia Supreme Court of Appeals observed that the state's Wills Act required the testator to sign or acknowledge his or her will in the presence of two witnesses at the same time.[62] However, neither witness signed the will in the presence of the testator or in the presence of each other as required by the Wills Act.[63] Because none of these formalities were satisfied, the Court concluded that the will had not been properly executed.[64]

To prevent issues like this from happening in the future, the drafters of the 1969 UPC rejected the Wills Act approach and simply required that the will be in writing, signed by the testator or someone in his presence and at his direction, and it be signed by at least two persons who had witnessed the testator's signing or acknowledgement of the document.[65] In addition, section 2-502 recognized holographic wills which had to be written and signed by the testator, but which did not have to be witnessed.[66]

The 1990 and 2008 revisions of the UPC closely tracked the 1969 version except that they consolidated the provisions for standard wills and holographic wills into one section and the 2008 revision allowed testators to acknowledge

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[54] *Id.*
[55] Anne-Marie Rhodes, *supra* note 14, at 419-20.
[56] *Stevens v. Casdorph*, 508 S.E.2d 610, 613 (W. Va. 1998); *see also In re Estate of Hennegahn*, 45 A.3d 684, 688 (D.C. 2012) (requiring strict compliance with wills act formalities); *In re Estate of Chastain*, 401 S.W.3d 612, 620 (Tenn. 2012).
[57] *Casdorph*, 508 S.E.2d at 611.
[58] *Id.*
[59] *Id.*
[60] *Id.* at 612.
[61] *Id.* at 611-12.
[62] *Casdorph*, 508 S.E.2d at 612.
[63] *Cadsdorph*, 508 S.E. 2d, 610, 612.
[64] *Id.* at 613.
[65] UNIF. PROB. CODE § 2-502 (1969).
[66] *Id.* § 2-502.

their wills before a notary public as an alternative to having it attested by witnesses in the traditional manner.[67]

B. Substantial Compliance and the Harmless Error Rule.

In an abundance of caution, the drafters of the 1990 revision also adopted a provision, known as the harmless error rule, that provided relief to testators who were even unable to comply with the minimal formalities of the UPC's execution statute.[68] The concept of harmless error originated in the research that Professor Langbein conducted on its use in the state of South Australia.[69]

Professor Langbein had previously proposed that a will should be admitted to probate if it "substantially complied" with the applicable formalities.[70] Under this substantial compliance doctrine, a will that failed to fully comply with the requirements of the Wills Act would not be automatically invalidated.[71] Instead, the court could probate the noncomplying instrument after considering (1) whether it accurately expressed the decedent's testamentary intent and (2) whether it sufficiently approximated the required formalities to enable the court to conclude that it served the evidentiary and protective purposes of the wills act.[72] Although the Australian state of Queensland adopted the substantial compliance doctrine statutorily in 1981, only a few American jurisdictions embraced it.[73] Reviewing the experience in Queensland, Professor Langbein concluded that the Australian courts interpreted their substantial compliance doctrine as a near-miss standard, ignoring the question of whether the testator's conduct evidenced testamentary intent or not.[74]

In light of the disappointing experience with the substantial compliance doctrine in Queensland, Professor Langbein proposed a new approach based on a statute enacted in the state of South Australia in 1975.[75] Although the Australian name for this concept, the dispensing power, is a more accurate description of the principle, the drafters of the 1990 UPC chose to call it the harmless error rule after including it the revised UPC.[76] In its present form,

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[67] *Id.* § 2-502 (1990, 2008).
[68] UNIF. PROB. CODE § 2-503 (1969).
[69] John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1 (1987).
[70] John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489 (1975).
[71] *Id.*
[72] *Id.* at 514-26.
[73] *See generally In re Will of Ranney*, 589 A.2d 1339 (N.J. 1991).
[74] Langbein, *supra* note 69, at 53.
[75] Langbein, *supra* note 70, at 514.
[76] *Id.*

section 2-503 allows a document that fails to comply with the requirements of section 2-502 to be given effect if the proponent of the document establishes by clear and convincing evidence that the decedent intended the writing to constitute (1) the decedent's will; (2) a partial or complete revocation of the will, (3) an addition to or alteration of the will, or (4) a partial or complete revival of a formerly revoked will or of a formerly revoked portion of a will.[77]

The comment to section 2-503 claims that this provision unifies the law of probate and non-probate transfers by extending to wills the harmless error principle that has long been applied to non-probate transfers.[78] Furthermore, the comment declares that by placing the burden of proof upon the proponent of the defective instrument and by imposing a clear and convincing evidence standard, section 2-503 imposes procedural standards that are commensurate with the seriousness of the issue.[79] Finally, the comment citing favorable experiences in Australia and Israel declares that the harmless error rule will not increase litigation and might even discourage it.[80]

C. Critique.

Section 2-503 is well-intentioned, but it is still problematic. One concern is that section 2-503 undermines section 2-502's modest but sensible requirements for execution to protect a group of people who are unable to follow even the simplest directions for executing a will.[81] Secondly, the scope of section 2-503's harmless error rule seems unnecessarily broad. For example, rather than extending section 2-503 to revocation and revival, perhaps if it is retained at all, its scope should be limited to wills and codicils.[82] Furthermore, assuming that it is retained, section 2-503 should be restricted to attestation problems and not be applied to failure to comply with signature requirements or the requirement that a will be in writing.[83]

Finally, notwithstanding the assurances of the drafters, the harmless error rule is almost certain to encourage litigation. After all, disappointed beneficiaries under a defectively executed will have little to lose (except litigation costs) by asking a sympathetic court to use its dispensing power to correct a testator's failure to execute his will properly.

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[77] UNIF. PROB. CODE § 2-503 (1990).
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] UNIF. PROB. CODE §§ 2-502, 2-503.
[82] *Id.*
[83] *Id.*

IV. Revival

A. An Overview of the Doctrine of Revival.

The doctrine of revival provides that the revocation of a subsequent will can reactivate or "revive" a will that has previously been revoked.[84] For example, a testator executes a valid will (Will 1). The testator subsequently executes a new will (Will 2), also valid, which purports to revoke Will 1. Later, the testator revokes Will 2 by physically destroying it. In former times, the revocation of Will 2 would automatically revive Will 1 and at the testator's death, his or her property would be distributed according to the terms of Will 1.[85]

Thus, revival requires two revocatory acts. First, the will to be revived (Will 1) must have been revoked by a subsequent testamentary instrument. Then, a second will (Will 2) must be executed and subsequently revoked in order to revive Will 1.[86] The Wyoming Supreme Court in *In re Estate of Stringer* identified five possible outcomes when a will was revoked by a subsequent will which was also revoked by the testator.[87] One result would be that the earlier will would be revived as a matter of law.[88] That was the approach of the English common law courts. The common law courts ruled that the original will was automatically revived, as long as it had not been destroyed, and no proof of an intent to revive the will was required.[89] The common law rule was based on the notion that wills were ambulatory in nature, that is, that they would not have any legal effect until the testator's death.[90] Thus, the revocation of the first will would not become so effective until the testator's death, but if the testator had revoked the second will, that revocation would also become effective at the testator's death, leaving the first will intact.[91]

A second approach provides that the question of revival is one of intention with no presumption either for or against revival.[92] This was the rule

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[84] Samuel A. Persky, Comment, *Effect Upon a Prior and Existing Will of the Revocation of a Subsequent Will Containing an Express Revocation Clause*, 32 YALE L. J. 70, 71 (1922).
[85] *Id.*
[86] *Id.*
[87] *In re Stringer's Estate*, 343 P.2d 508 (Wyo. 1959), *modified*, 345 P.2d 786 (Wyo. 1959).
[88] *Id.* at 515.
[89] Whitman, *supra* note 1, at 1054.
[90] *Goodright v. Glazier*, 4 Burr. 2512, 2514 (1770); *Hyatt v. Hyatt*, 120 S.E. 830, 833 (1924).
[91] *Stetson v. Stetson*, 66 N.E. 262, 614-15 (Ill. 1903); *Marsh v. Marsh*, 48 N.C. 77, 79, 64 Am. Dec. 598 (1855); *Bates v. Hacking*, 68 A. 623, 625 (R.I. 1907).
[92] Alvin E. Evans, *Testamentary Revival*, 16 KY. L.J. 47 (1927). (However, as a practical matter, the proponent of the former will would have to show that the testator intended to revive it). *Id.* at 47-48.

followed by the English ecclesiastical courts, which oversaw the probate of personal property, regarded the revoking instrument as effective at the time of its execution. [93] Therefore, when a revoking will itself was revoked, these courts would allow the first will to be revived if there was sufficient evidence that the testator revoked the second will in order to revive the first.[94] Oral testimony was admissible to prove the presence or absence of an intent to revive a revoked will.[95] A number of American courts also followed this approach.[96]

The third approach emphasizes that the earlier will would be revived unless there was evidence of a contrary intent.[97] This approach is also based on the notion that wills were ambulatory in nature. Thus, if the subsequent will is revoked, it leaves the prior will as if the latter will never existed unless it can be proved that the testator revoked the second will with the intention of dying intestate.[98]

According to the fourth approach, the earlier will is not revived unless an intent to revive can be shown.[99] This is the mirror image of the third approach which applies a presumption in favor of revival. In contrast, the fourth approach applies a presumption against revival.[100]

Lastly, some courts have held that the earlier will shall not be revived except by re-publication.[101] This was the approach taken by the English Will Act of 1837, which provided that a revoked will could only be revived if the testator re-executed the first will or executed a codicil demonstrating an intent to thereby revive the first will.[102] This approach was adopted by some American courts in the nineteenth century.[103] The rationale for this rule is that neither will necessarily reflected the intent of the testator.[104] Nowadays, many states have enacted anti-revival statutes that follow this approach.[105]

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[93] *Id.*
[94] Whitman, *supra* note 1, at 1054-55.
[95] *Bates v. Hacking*, 68 A. 622, 625 (R.I. 1907).
[96] *See generally Blackett v. Ziegler*, 133 N.W. 901 (Iowa 1913); *Williams v. Miles*, 94 N.W. 705, 708-09 (Neb. 1903); *In re Davis' Estate*, 35 A.2d 880, 888 (N.J. 1944); *In re Gould's Will*, 47 A. 1082, 1083-84 (Vt.1900); *see also* Joseph Warren, *Dependent Relative Revocation*, 33 HARV. L. REV. 337, 341 (1920).
[97] *Stringer*, 343 P.2d at 515.
[98] *Colvin v. Warford*, 20 Md. 357, 393 (1863); *Williams* 94 N.W.at 709.
[99] *Bailey v. Kennedy*, 425 P.2d 304, 306-07 (Colo. 1967); *Williams* 94 N.W.at 709; *In re Moore's Will*, 65 A. 447, 449 (N.J. Perog. Ct.1907).
[100] *In re Bassett's Estate*, 238 P.2d 666, 669 (Cal. 1925).
[101] *Driver v. Sheffield*, 85 S.E.2d 766, 767 (Ga. 1955).
[102] 7 Wm. 4 & 1 Vict., ch. 26, § 22 (1837).
[103] *Lively v. Harwell*, 29, 20 Ga. 509, 516 (Ga. 1859).
[104] *Id.*
[105] Thomas E. Atkinson, *Law of Wills* § 92 at 477-78 (2d ed. 1953).

The English Wills Act of 1837 provided that a revoked will could only be revived if the testator re-executed it or executed a codicil which showed an intention to revive the first will.[106] In the United States, many anti-revival statutes allow a testator to revive a will in this manner.[107] When a will has been revoked by a subsequent will, a codicil to the revoked will not only revives it, but also revokes the intervening will.[108] This doctrine of republication by codicil is illustrated by *Kimbark v. Satas*.[109] In that case, Walter Savickas executed a valid will in 1961 which bequeathed sums of money to various relatives and charities.[110] Later, in 1964, Walter executed a second will on a one-page printed form.[111] This document revoked the 1961 will and left Walter's property to two persons who were not related to him.[112] Finally, in 1965, Walter executed a document which purported to be a codicil to the 1961 will.[113] Although the beneficiaries of the 1964 will claimed that the codicil did not revive the 1961 will because Walter did not express any clear intent to do so, the Court concluded that there was sufficient evidence that he intended to distribute his estate according to the provisions of the 1961 will.[114]

B. The Uniform Probate Code.

Section 2-509(a) of the 1969 Code declared that:

> [i]f a second will which, had it remained effective at death, would have revoked the first will in whole or in part, is thereafter revoked by acts under Section 2-507, the first will is revoked in whole or in part unless it is evident from the circumstances of the revocation of the second will or from testator's contemporary or subsequent declarations that he intended the first will to take effect as executed.[115]

This provision was similar to the English Wills Act as far as revival is concerned because both statutes create a presumption against revival.[116]

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[106] Whitman, *supra* note 1, at 1055.
[107] See, e.g., *In re Estate of Stormont*, 517 N.E.2d 259, 251 (Ohio Ct. App. 1986); *In re Estate of Wilson*, 397 P.2d 805, 808 (Wyo. 1964).
[108] Atkinson, *supra* note 105, at 469.
[109] *Kimbark v. Satas*, 231 N.E.2d 699 (Ill. App. Ct. 1967).
[110] *Id.* at 699-700.
[111] *Id.* at 700.
[112] *Id.*
[113] *Id.*
[114] *See Kimbark*, 231 N.E.2d at 701.
[115] UNIF. PROB. CODE § 2-509(a) (1969).
[116] Whitman, *supra* note 1, at 1055.

However, unlike the English statute, the UPC allows a court to find that a revival has occurred if it concludes that adequate evidence of an intent to revive exists.[117] In addition, neither statute distinguishes between completely and partially revoked wills.[118]

White v. Wilbanks provides an example of the effect of the UPC's presumption against revival.[119] The testator in that case, Samuel Chapman, executed a will in 1980 and executed another will in 1982.[120] After his death in 1985, the 1980 will and a copy of the 1982 will were both offered for probate.[121] According to the Probate Court, because the original 1982 will could not be found, it was presumed that the testator destroyed it *animo revocandi*.[122] Since there was no evidence that Samuel intended to revive the 1980 will, the Probate Court concluded that he died intestate.[123] The Intermediate Appellate Court reversed, finding that since the testator died prior to the adoption of the UPC, the common law rule of automatic revival should have been applied.[124] However, upon further appeal, the state Supreme Court held that the recently adopted UPC presumption against revival was applicable.[125] Since the lower court had found no evidence of an intent to revive, the state Supreme Court upheld the decision of the Probate Court.[126]

The 1990 UPC's revision of section 2-509 is considerably more complicated than its predecessor. It features three subsections, each of which is subject to a presumption with respect to revival. Subsections 2-509 (a) and 2-509 (b) are concerned with wills that are wholly or partially revoked by physical act under section 2-507 (a) (2). Subsection (a) declares that:

> If a subsequent will that *wholly revoked* a previous will is thereafter revoked by a revocatory act under section 2-507 (a) (2), the previous will remains revoked unless it is revived. The previous will is revived if it is evident from the circumstances of the revocation of the subsequent will or from the testator's contemporary or subsequent declarations

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[117] *Id.*
[118] *Id.* at 1056.
[119] *White v. Wilbanks*, 393 S.E.2d 182 (S.C. 1990).
[120] *Id.*
[121] *Id.* at 183.
[122] *Id.*
[123] *Id.*
[124] *White*, 393 S.E.2d at 183.
[125] *Id.*
[126] *Id.*

> that the testator intended the previous will to take effect as executed.[127]

The comment to section 2-509 explains that the "burden of persuasion" is on the proponent of the first will to show that the testator intended to revive it by destroying the second will.[128] The comment also declares that "[t]he presumption against revival imposed by subsection (a) is justified because where Will # 2 wholly revoked Will # 1, the testator understood or should have understood that Will # 1 had no continuing effect."[129]

Unlike the original version of section 2-509, the new version distinguishes between complete revocation, covered in subsection (a), and partial revocation, covered in subsection (b). Subsection (b) provides that:

> If a subsequent will that *partly revoked* a previous will is thereafter revoked by a revocatory act under section 2-507 (a) (2), a revoked part of the previous will is revived unless it is evident form the circumstances of the revocation of the subsequent will or from the testator's contemporary or subsequent declarations that the testator did not intend the revoked part to take effect as executed. [130]

Thus, under the UPC's scheme, there is a presumption of revival when the second will wholly revokes the first will and is then revoked by physical act; but when a second will (or codicil) only partially revokes the first will and is then revoked by physical act, there is a presumption against revival.[131] The comment to of section 2-509 justifies this by claiming that where the second will is only a codicil to the first will, the testator would know, or should know, that the first will has a continuing effect.[132] Therefore, it is appropriate to assume in the absence of evidence to the contrary, that the testator would expect the material partially revoked by the second will to be reinstated when the second will was revoked by physical act.[133]

Finally, subsection (c) addresses the case where the subsequent will is revoked not by physical act, but by yet another will. This provision states that:

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[127] UNIF. PROB. CODE § 2-509(a) (1990) (emphasis added).
[128] UNIF. PROB. CODE § 2-509 cmt.
[129] *Id.* (emphasis omitted).
[130] UNIF. PROB. CODE § 2-509(b) (emphasis added).
[131] *See* UNIF. PROB. CODE § 2-509 cmt.
[132] *Id.*
[133] *See id.*

> If a subsequent will that revoked a previous will *in whole or in part* is thereafter revoked by another, later will, the previous will remains revoked in whole or in part, unless it or its revoked part is revived. The previous will or its revoked part is revived to the extent it appears from the terms of the later will that the testator intended the previous will to take effect.[134]

In other words, there is a presumption against revival of an earlier will if a will that partially or wholly revokes it is itself subsequently revoked by a third will. The comment to section 2-509 does not offer any explanation or justification for this result.[135]

C. Critique.

Both versions of section 2-509 are intended to repudiate the common law rule of automatic revival upon revocation of the "covering" will. However, compared with the simple elegance of the 1969 version, the 1990 UPC seems busy and cluttered. It evokes the image of an intersection where presumptions instead of cars are rushing around at breakneck speed. While there may be some merit to distinguishing between partial and complete revocation, the game is simply not worth the candle. A better approach is exemplified by the earlier version of section 2-509 which creates a weak presumption against revival in all circumstances but allows the proponent of the prior will considerable leeway to rebut it by offering various types of extrinsic evidence. If the proponent of the prior will can persuade a jury that the testator wanted to revive the will, he or she prevails. Otherwise, the prior will is neither seen nor heard from again.

V. Anti-Lapse Provisions.

A. An Overview of Anti-Lapse Statutes.

A lapse occurs when the beneficiary under a will predeceases the testator.[136] Under these circumstances, the bequest lapses because the will does not transfer the property to the intended beneficiary until the testator's death.[137]

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[134] UNIF. PROB. CODE § 2-509(c) (emphasis added).

[135] *See* UNIF. PROB. CODE § 2-509 cmt.

[136] Aron Leslie Suna, *Disinheritance and the Anti-Lapse Statute*, 29 WASH. & LEE L. REV. 105, 105 (1969).

[137] Eloisa C. Rodriguez-Dod, *"I'm Not Quite Dead Yet!": Rethinking the Anti-Lapse Redistribution of a Dead Beneficiary's Gift*, 61 CLEV. ST. L. REV. 1017, 1020 (2013). Strictly speaking, a void gift does not lapse because it was incapable of taking effect at the time the will was executed. *See*, Richard F.

Prior to enactment of anti-lapse statutes, a lapsed specific or general bequest went to the residuary legatees, while a lapsed residuary bequest went to the intestate takers.[138] However, the common law rule only applied when the will did not specify how the testator wanted the property to be distributed if the beneficiary predeceased him.[139]

Class gifts were treated differently at common law.[140] Under this approach, a class gift was divided among those class members who survived the testator.[141] The rationale for this result was that class members who failed to survive the testator were not regarded as members of the class insofar as their share or the class gift was concerned.[142] Thus, a class gift did not lapse unless all members of the class predeceased the testator.[143]

When applicable, an anti-lapse statute does not actually prevent a gift from lapsing, but rather "redirects" the gift to a substitute taker.[144] The first anti-lapse statute was enacted in Massachusetts in 1783 and since then every state but Louisiana has adopted one.[145] Although these statutes vary from state to state,[146] most of them share some common features. For example, most statutes only apply to relatives who are fairly closely related to the testator.[147] In addition, they limit substitute takers to the issue of the predeceased beneficiary.[148] The gift is generally not saved if the beneficiary dies without issue since there is no qualifying substitute takers.[149] Furthermore, anti-lapse statutes usually do not apply to non-relatives of the testator, such as spouses and stepchildren.[150] Modern anti-lapse statutes also apply to void gifts.[151]

Storrow, *Wills and Survival*, 34 QUINNIPIAC L. REV. 447, 456 (2016). The same is true of bequests that are made to a beneficiary who is dead at the time the will was executed. *See also*, Raymond C. O'Brien, *Analytical Principle: A Guide for Lapse, Survivorship, Death without Issue, and the Rule*, 10 GEO. MASON L. REV. 383, 388 n. 17 (1988).

[138] Erich Tucker Kimbrough, *Lapsing of Testamentary Gifts, Anti-lapse Statutes, and the Expansion of Uniform Probate Code's Anti-lapse Protection*, 36 WM. & MARY L. REV. 269, 269 (1994).

[139] Rodriguez-Dod, *supra* note 137, at 1021.

[140] Kimbrough, *supra* note 138, at 292.

[141] Rodriguez-Dod, *supra* note 137, at 1023.

[142] Storrow, *supra* note 137, at 462.

[143] Kimbrough, *supra* note 138, at 293.

[144] Mark L. Ascher, *The 1990 Uniform Probate Code: Older and Better, or More Like the Internal Revenue Code*, 77 MINN. L. REV. 639, 650 (1993).

[145] Jeffrey A. Cooper, *A Lapse in Judgment: Ruotolo v. Tietjen and Interpretation of Connecticut's Anti-Lapse Statute*, 20 QUINNIPIAC PROB. L.J. 204, 208 (2007).

[146] Kimbrough, *supra* note 138, at 271.

[147] Rodriguez-Dod, *supra* note 137, at 1023.

[148] Patricia J. Roberts, *Lapse Statutes: Recurring Construction Problems*, 37 EMORY L.J. 323, 336 (1988).

[149] *Id.* at 338.

[150] *Id.* at 331.

[151] Kimbrough, *supra* note 138, at 295-296.

Although some anti-lapse statutes do not expressly apply to class gifts, most courts apply anti-lapse provisions to them anyway.[152] Thus, if a class member predeceases the testator, that person's share goes to his issue. If the class member dies without issue, the anti-lapse statute does not apply and the common law rule prevails, under which the class gift is split among the surviving class members.[153]

There are several issues that sometimes arise in connection with anti-lapse statutes, most of which involve overriding the statutory scheme. The first issue is whether the statute can be displaced by words of survivorship. A second issue is whether the testator can override the anti-lapse statute by making an alternative gift. A third issue is whether a person who has been expressly disinherited in the will can qualify as a substitute taker under the provisions of the anti-lapse statute. Finally, there is the question of whether anti-lapse statutes are limited to wills or whether they may also apply to will substitutes as well.

Because an anti-lapse statute is considered to be a rule of construction rather than a substantive legislative mandate, it does not apply if the testator manifests a contrary intent.[154] Therefore, according to the majority rule, express language of survivorship is sufficient evidence by itself of the testator's intent to overcome the anti-lapse statute.[155] Thus, if the testator devises property "to *A* if he survives me," the gift will lapse if *A* predeceases the testator.

Polen v. Baker illustrates this approach.[156] In *Polen*, the testator's will directed the executor to distribute the residuary estate to five named beneficiaries "or to the survivors thereof."[157]The children of one of the beneficiaries, George Baker, who had predeceased the testator, sought to take his share under the state anti-lapse statute.[158] The executor asked the Probate Court to construe the residuary clause and the Court ruled that that the survivorship requirement precluded operation of the anti-lapse statute.[159] This was affirmed by the Intermediate Appellate Court.[160]

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[152] *Id.* at 293.
[153] *Id.*
[154] Roberts, *supra* note 148, at 326.
[155] *Id.* at 349.
[156] *See Polen v. Baker*, 752 N.E.2d 258 (Ohio 2001) (holding that the use of the phrase "or to the survivors thereof" was evidence of testator's intent to avoid antilapse statute); *See also Erlenbach v. Estate of Thompson*, 954 P.2d 350, 352 (Wash. Ct. App. 1998) ("Where the testator uses words of survivorship indicating intention that the devisee shall take the gift only if he survives the testator, the [antilapse] statute does not apply.")
[157] *Polen*, 752 N.E.2d at 259.
[158] *Id.*
[159] *Id.*
[160] *Id.*

On appeal, the Ohio Supreme Court observed that express terms of the state's anti-lapse statute would operate "[u]nless a contrary intention is manifested in the will."[161] Relying on an earlier case,[162] the Court declared that the term "survivors" referred to the survivors named as beneficiaries in the will and not to the children of predeceased beneficiaries.[163] Thus, the Court held that George Baker's children were not entitled to a share of the residuary estate.[164]

However, some courts require something more than words of survivorship to displace an anti-lapse statute.[165] For example, in *Ruotolo v. Tietjen*, the Connecticut Supreme Court held that the state's anti-lapse statute was applicable notwithstanding the presence of survivorship language in the will.[166] In that case, the testator, John Swanson, executed a will whose residuary clause provided that his stepdaughter, Hazel Brennan, would receive one-half of his residuary estate "if she survives me...."[167] Hazel died seventeen days before the testator survived by her daughter, Kathleen Smaldone.[168] Both the Probate Court and Superior Court ruled that the survivorship language precluded the anti-lapse statute from preventing Hazel's bequest from lapsing.[169] However, this decision was reversed by an intermediate appellate Court, which held that the statute was applicable despite the presence of express survivorship language.[170]

On further appeal, the Connecticut Supreme Court affirmed the decision of the intermediate appellate Court. [171] The Court declared that the purpose of the anti-lapse statute was to prevent unintended disinheritance and, therefore, it should be interpreted liberally to achieve that objective.[172] In addition, the Court concluded that there was a presumption that the testator intended for his

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[161] *Id.* (citing OHIO REV. CODE 2107.52(B)).
[162] *See Hamilton v. Pettifor*, 135 N.E.2d 264, 265 (1956) (concluding the term "survivors" referred to the survivors among those named in a residuary clause).
[163] *Polen*, 752 N.E.2d at 260-261.
[164] *Id.* at 263-264.
[165] Edward C. Halbach Jr. & Lawrence W. Wagner, The UPC's *New Survivorship and Antilapse Provisions*, 55 ALB. L. REV. 1091, 1105 (1992).
[166] *See Ruotolo v. Tietjen*, 281 Conn. 483, 486 (2007) (holding the language "if she survives me" alone was insufficient to avoid anti-lapse statute).
[167] *Id.* at 485.
[168] *Id.*
[169] *Id.* at 2.
[170] *See Ruotolo v. Tietjen*, 93 Conn. App. 432, 450 (2006). ("[W]ords of survivorship, such as "if she survives me," alone do not constitute a "provision" in the will for the contingency of the death of a beneficiary....").
[171] *Ruotolo,* 281 Conn. at 486.
[172] *Id.* at 485 (citing *Ruotolo*, 93 Conn. App. 432 at 439).

will to dispose of his entire estate.[173] Consequently, to establish contrary intent, and thus avoid application of the anti-lapse statute, the Court declared that "the testator must either unequivocally express that intent or simply provide for an alternative bequest."[174] Therefore, the Court held that mere words of survivorship, without more, were not sufficient to override the anti-lapse statute.[175]

A more reliable way to defeat an anti-lapse statute is to make an alternative gift.[176] For example, a testator may leave property "to *A* if he survives me and if *A* does not survive me, then to *B*."[177] For most courts, this is sufficient evidence of a contrary intent.[178] However, there is a split of authority over what happens if both the primary beneficiary and the alternative taker both predecease the testator.[179]

Estate of Parker[180] reflects the view that the anti-lapse statute, at least in some cases, does not apply to alternative gifts when both the principal beneficiary and the alternative taker predecease the testator. In that case, Charles Parker left his residuary estate four separate shares to three sisters and a brother.[181] Each bequest provided for an alternative beneficiary if the primary beneficiary failed to survive the testator.[182] The will failed to mention another brother who was deceased at the time the will was executed.[183] One of the sisters, Annie, predeceased the testator as did her husband, Luther, the alternative taker under Charles' will.[184] Two of Annie and Luther's children argued that the anti-lapse statute should prevent their parents' bequest from lapsing.[185]

However, the Surrogate Court rejected this argument, declaring that "[t]he principle has been well established that section 29 [the anti-lapse statute] is not operative in a case where the will clearly and plainly expresses the intention that the bequest shall be effective only in the event that the legatee

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[173] *Id.* at 486 (citing *Ruotolo*, 93 Conn. App. 432 at 447).
[174] *Id.*
[175] *Id.*
[176] Roberts, *supra* note 115, at 357.
[177] Another option is to leave property to "A or A's estate." *Id.* at 359 (internal quotations added).
[178] Kimbrough, *supra* note 138, at 291.
[179] Halbach & Waggoner, *supra* note 165, at 116.
[180] *See generally In re Estate of Parker*, 181 N.Y.S.2d 711 (Sur. Ct. 1958).
[181] *Id.* at 712.
[182] *Id.*
[183] *Id.*
[184] *Id.*
[185] *In re Estate of Parker*, 181 N.Y.S.2d at 712.

survived the testator."[186] Although the Court acknowledged that survivorship clauses often reflected "the mannerisms of the draftsman" rather than the intent of the testator, it concluded that in this case, the testator meant what he said.[187] Consequently, the Court ruled that the property in question would pass as intestate property instead of going entirely to Annie and Luther's children.[188]

On the other hand, the Court in *Estate of Ulrikson*,[189] reached the opposite conclusion. In *Ulrikson*, the testator, Bellida Ulrikson, left her residuary estate to her brother, Melvin, and her sister, Rodine, and provided, "in the event that either one of them shall predecease me, then to the other surviving brother or sister."[190] Melvin was survived by two children, Annabelle and Mavis, while Rodine died without issue.[191] According to the Court, if the anti-lapse statute applied, the entire residuary estate would be divided between Anabelle and Mavis; however, if the residuary bequest lapsed, Belida's residuary estate would go by intestacy.[192] If this occurred, the estate would be distributed to the issue of Belida's other two siblings, Sena as well as to Annabelle and Mavis.[193]

After reviewing several statutes, the Minnesota Supreme Court concluded that they manifested a preference for testacy over intestacy and also dictated that the anti-lapse statute be applied unless a contrary intention appeared in the will.[194] The Court then rejected the argument that the alternative gift imposed an absolute condition of survivorship as far as the residuary bequest was concerned.[195] Instead, the Court reasoned that the testator simply failed to anticipate that both her siblings would predecease her.[196] In addition, according to the Court, "words of survivorship" could only be effective if "there [were] survivors."[197] Thus, in the absence of an effective survivorship clause, "the anti-lapse statute [was] free to operate."[198]

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[186] *Id.* at 712-13.
[187] *Id.* at 713.
[188] *Id.* at 714. This presumably meant that issue of the brother who was not mentioned in the will, if there were any, would take an intestate share.
[189] *See generally In re Estate of Ulrikson*, 290 N.W.2d 757 (Minn. 1980) (holding the anti-lapse statute was applicable absent clear intention to the contrary).
[190] *Id.* at 759.
[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] *In re Estate of Ulrikson*, 290 N.W.2d at 759.
[195] *Id.*
[196] *Id.*
[197] *Id.*
[198] *Id.*

Another interesting question arises when a beneficiary predeceases the testator survived by a person that the testator has expressly disinherited. The courts appear to be evenly split over whether express disinheritance is evidence of contrary intent.[199] For example, in *McKeon's Estate*,[200] the Court declined to apply the anti-lapse statute. In that case, the testator made a bequest to her sister, Annie, and in a subsequent codicil left her one-half of her residuary estate.[201] Annie predeceased the testator, "survived by a child, Catherine Doughtery Smith."[202] In a codicil executed prior to her death, the testator revoked an earlier bequest to Catherine stating that "I hereby declare and direct that my said niece [Catherine] shall receive no part of my estate."[203]

The executors contended that Annie's bequest lapsed at her death and passed as intestate property to the testator's distributees.[204] Conversely, Catherine argued that she should be substituted as a statutory beneficiary under the anti-lapse statute.[205] The Surrogate Court concluded that the anti-lapse should not be allowed to "nullify the right of the testator to select the objects of [her] bounty."[206] In the Court's view, the testator made it clear that Catherine should not be substituted as a beneficiary if her mother predeceased the testator.[207] Accordingly, the Court ruled that Annie's share would pass to the testator's distributees under the laws of intestacy.[208]

However, a California intermediate appellate Court took another view in *Estate of Roberts*.[209] In that case, the testator, Lila Roberts, executed a will that left various bequests to her son and grandchildren.[210] Two of her grandchildren, Turner and Lila Helen, were the children of the testator's deceased son, Archie. The other three grandchildren were the children of the testator's other son, Watkins.[211] Two of them, Gerald and David, received substantial gifts.[212] However, the remaining grandson, Richard, received only one dollar.[213]

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[199] Kimbrough, *supra* note 138, at 287.
[200] *In re Estate of McKeon*, 46 N.Y.S.2d 349 (Surr. Ct. 1944).
[201] *Id.* at 350-51.
[202] *Id.* at 351.
[203] *Id.*
[204] *Id.*
[205] *In re Estate of McKeon*, 46 N.Y.S.2d at 351.
[206] *Id.*
[207] *Id.*
[208] *Id.* (however, the court pointed out that Catherine could still take a share of the lapsed gift since she was a distributee). *Id.* at 352.
[209] *Estate of Roberts*, 9 Cal. App. 3d. 396 (1970).
[210] *Id.* at 397.
[211] *Id.*
[212] *Id.*
[213] *Id.*

Watkins, who was alive when the will was executed, was named as the residuary beneficiary.[214]

Watkins died before the testator.[215] However, prior to his death, the testator was declared incompetent and, therefore, was not able to name a new residuary legatee.[216] After the testator died, her executor petitioned the Court to order that the residuary estate be distributed to Watkin's lineal heirs, Gerald, Richard, and David.[217] However, Turner and Lila Helen argued that the anti-lapse statutes should not apply and that the residuary estate should be divided equally among all of the grandchildren.[218] They reasoned that the disinheritance of Richard indicated that the testator did not want her property to be distributed according to the provisions of the anti-lapse statute.[219] In response, the Court declared that that disinheritance was not sufficient evidence of an intent to displace the anti-lapse statute.[220] The Court speculated that the testator did not intend for nominal bequest to Richard to be a disinheritance, but felt at the time the will was executed that Richard was too young to manage his own property and that Watkins would see that Richard was properly provided for at a later time.[221] Consequently, the three grandchildren of Watkins took his share of the estate under the anti-lapse statute.[222]

B. The Uniform Probate Code.

The original Uniform Probate Code contained many of the features commonly found in American anti-lapse statutes.[223] It was well-received, eventually being adopted in sixteen states.[224] Like most of these statutes, the Code limited the scope of its anti-lapse provisions to beneficiaries who were either grandparents or lineal descendants of grandparents.[225] If the intended beneficiary predeceased the testator, the bequest would go instead to issue of the beneficiary who survived the testator by 120 hours.[226] The Code's anti-lapse provisions not only applied to beneficiaries who died after the execution of the will, but they also extended to beneficiaries who were dead at the time the will

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[214] *Estate of Roberts*, 9 Cal. App. 3d. at 397.
[215] *Id.*
[216] *Id.*
[217] *Id.*
[218] *Id.*
[219] *Estate of Roberts*, 9 Cal. App. 3d. at 397.
[220] *Id.* at 398-99.
[221] *Id.* at 399.
[222] *Id.*
[223] Kimbrough, *supra* note 138, at 271.
[224] *Id.* at 297.
[225] UNIF. PROB. CODE § 2-605 (1969).
[226] *Id.*

was executed; and finally, the Code's anti-lapse provisions also applied to class gifts.[227] If a class member predeceased the testator, that person's share would go to his issue. However, if there was no issue, the deceased class member's share would go to the surviving class members.[228]

The 1990 UPC anti-lapse provision[229] made significant changes and additions to the 1969 version.[230] The 1969 anti-lapse provision was only seven lines long, whereas the 1990 version was eighty-one lines long, followed by eight pages of comments. The new version was an ambitious attempt to resolve some of the issues that had arisen in the past under simpler state anti-lapse statutes.[231]

Section 2-603(b) is concerned with substitute gifts. In its preamble, section 2-603(b) limits the anti-lapse provisions to the traditional parties, namely grandparents and descendants of grandparents, but adds stepchildren to the class of persons who are also included as beneficiaries whose bequests may be protected against lapse if they predecease the testator.[232] Section 2-603(b)(1) states that if a deceased individual beneficiary leaves descendants, a substitute gift will be created in these descendants who will take by representation.[233] In the case of a class gift the deceased class member's share goes to his descendants, if any, by representation. [234]

With the exception of the extension the Code's anti-lapse protection to stepchildren, most of the foregoing provisions are not particularly controversial. However, section 2-603(b)(3), which deals with survivorship language, is another matter entirely. This provision declares that "words of survivorship, such as in a devise to an individual 'if he survives me,' or in a devise to 'my surviving children," are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section."[235] In the comment to section 2-603, the drafters rebut the formalistic argument that survivorship language makes the gift conditional upon survivorship and when the beneficiary predeceases the testator the bequest fails

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[227] *Id.*
[228] UNIF. PROB. CODE § 2-605, comment.
[229] UNIF. PROB. CODE § 2-603.
[230] Kimbrough, *supra* note 138, at 271.
[231] *Id.* at 300.
[232] Halbach & Waggoner, *supra* note 148, at 1121 (the comment points out that this provision does not extend anti-lapse protection to descendants of the testator's stepchildren or to stepchildren of any of the testator's other relatives). UNIF. COMM. CODE § 2-603, cmt.
[233] UNIF. PROB. CODE § 2-603(b)(1).
[234] *Id.* at § 2-603(b)(2).
[235] UNIF. PROB. CODE § 2-603(b)(3). UNIF. PROB. CODE § 2-702(a) requires one to survive another by 120 hours in order to be considered a survivor. *See* UNIF. PROB. CODE § 2-603, cmt.

because the anti-lapse statute has nothing to preserve.[236] They point out that sections (b)(1) and (2) provide that the predeceased beneficiary's descendants take any property to which the beneficiary would have been entitled under the will had he survived the testator.[237] The drafters also express skepticism about whether boilerplate language of survivorship reflects the testator's actual intent.[238]

The comment also justifies the approach taken by section 2-603 by arguing that it is remedial in nature and should be allowed to operate unless there is clear evidence of contrary intent on the part of the testator:

In the absence of persuasive evidence of a contrary intent, however, the anti-lapse statute, being remedial in nature, and tending to preserve equality among different lines of succession, should be given the widest possible chance to operate and should be defeated only by a finding of intention that directly contradicts the substitute gift created by the statute. Mere words of survivorship—by themselves—do not directly contradict the statutory substitute gift to the descendants of a deceased devisee.[239]

Section 2-603(b)(4), as clarified by a technical amendment in 2008, declares that a statutory substitute gift will be superseded if the testator's will expressly provides for an alternative beneficiary under either of two circumstances. First, the anti-lapse provision will not apply if the alternative bequest is in the form of a class gift and one or more members of the class is entitled to take under the will.[240] For example, assume that the testator's will leaves "$10,000.00 to my son, *A*, if he is living at my death, and if he is not living at my death, to *A*'s children." Assume further that *A* and *A*'s child, *X*, predecease the testator, survived by *A*'s other child, *Y*, and *X*'s children, *M* and *N*. In that case, the anti-lapse provision would not apply, and *Y* would receive the entire bequest.[241]

Second, the anti-lapse provision will not apply if the alternative bequest is not in the form of a class gift and the expressly designated beneficiary of the alternative devise is entitled to take under the will.[242] For example, if the testator's will leaves property "to *A* if *A* survives me, but if *A* does not survive me, then to *B*," the property goes to *B*, rather than to *A*'s descendants.[243]

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[236] UNIF. PROB. CODE § 2-603 cmt.
[237] *Id.*
[238] *Id.*
[239] *Id.*
[240] UNIF. PROB. CODE § 2-603(b)(4)(A).
[241] UNIF. PROB. CODE § 2-603 cmt.
[242] UNIF. PROB. CODE § 2-603(b)(4)(B).
[243] UNIF. PROB. CODE § 2-603 cmt.

The comment also addresses the question of what happens when both the primary and the alternative taker predecease the testator. If, for example, the testator's will leaves property "to *A* if *A* survives me, but if *A* does not survive me, then to *B*," and both *A* and *B* fail to survive the testator, but both leave descendants, *A*'s descendants would take because *B*, the "expressly designated devisee of the alternative devise," would not be entitled to take under the will even if *B* was survived by descendants.[244]

Section 603(c)(2) sets forth an exception to this rule and provides that that a bequest will not pass under the primary substitute gift if there is a younger generation devise.[245] This is illustrated by the following example in the comment to section 2-603: The testator's will devises $5,000.00 to his son *A*, if he is living at his death; if not, to his daughter, *B*. The testator also devises $7,500.00 to his daughter, *B*, if she is living at his death, if not, to his son, *A*. *A* and *B* both predecease the testator, leaving descendants. Under section 2-603(c), *A*'s descendants take the $5,000.00 devise as substitute takers for *A* and *B*'s descendants take the $7,500.00 devise as substitute takers for *B*. Since each devise contains an alternative devise, one to the other, the question of which substitute gift takes effect is resolved by determining which of the devisees would have taken the property if each of them had survived the testator. Under these circumstances, *A* would have taken the $5,000.00 devise and *B* would have taken the $7,500.00 devise. Therefore, their respective descendants would take under the anti-lapse statute.

C. Critique.

The 1990 Code's anti-lapse provisions, particularly section 2-603(b)(3), are highly controversial and have not been widely adopted.[246] Indeed, there is a lot to dislike about many aspects of section 2-603. Compared with the simplicity and elegance of the 1969 version, section 2-603 is excessively complex and wordy. It is no wonder that state legislatures have given it a wide berth. Furthermore, estate planners in jurisdictions that have adopted section 2-603 have every reason to be concerned about increased malpractice exposure if they fail to master its convoluted provisions. In addition, if the provisions of section 2-603 are applied to older wills, the expectations of testators and their lawyers who relied on prior statutes and court decisions may be frustrated.[247]

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[244] *Id.*
[245] UNIF. PROB. CODE § 2-603(c)(2).
[246] Robert H. Sitkoff & Jesse Dukeminier, WILLS, TRUSTS AND ESTATES 361 (10th ed. 2017).
[247] Ascher, *supra* note 144, at 653-54.

Unfortunately, the provisions of section 2-603 seem less concerned with carrying out testators' intent than imposing the drafters' views on everyone. In the words of Professor Archer:

> Apparently, the revisers believe their own anti-lapse provisions are likely to reflect any particular testator's intent more faithfully than *the testator's own will.* This conclusion is not only pretentious, it disputes what should be obvious—that most testators expect *their wills* to dispose of their property *completely*—without interference from a statute of which they have never even heard.[248]

The best solution is to return to the 1969 UPC's anti-lapse provision Another solution would be to declare that words of survivorship would prevent the anti-lapse provisions from operating unless there was clear evidence in the will that the testator wished them to apply.[249] Another recommendation would be to provide that the anti-lapse provisions would not apply if the testator made an alternative gift of the property. This would also make section 2-603(c) unnecessary. If the problem of both alternative beneficiaries predeceasing the testator were to arise, it could be resolved by the courts.

VI. Ademption by Extinction.

A. Ademption by Extinction.

The term "ademption" means "a taking away."[250] There are two forms of ademption: ademption by extinction and ademption by satisfaction.[251] Ademption by extinction applies to specifically bequeathed property that is no longer in the estate at the testator's death because it has been sold, destroyed, given away, or sufficiently altered that it cannot be substituted for the original bequest.[252] When this occurs, the bequest is extinguished and the beneficiary takes nothing in lieu of the missing property.[253] If only a portion of the property is removed from the estate during the testator's lifetime, the bequest is adeemed *pro tanto*.[254] In contrast, ademption by satisfaction occurs when the testator

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[248] *Id.* at 654 (emphasis in original).
[249] Ascher, *supra* note 144, at 653.
[250] Joseph Warren, *The History of Ademption,* 25 IOWA L. REV. 290, 296 (1940).
[251] Joshua A. Mullen, *Property—Administration of Wills—Common Law Ademption by Extinction and the Applicability of Tennessee Code Annotated Section 32-3-111*, 75 TENN. L. REV. 577, 579 (2008).
[252] Nicole M. Paschoal, *The Problem of Replacement Property in the Law of Ademption*, 44 ACTEC L.J. 183, 186 (2019).
[253] Ascher, *supra* note 144, at 643.
[254] Thomas E. Atkinson, Handbook of the Law of Wills and Other Principles of Succession including Intestacy and Administration of the Decedents Estate §134 at 745 (2d ed. 1953).

makes an *inter vivos* gift of the property in question to the person named as the beneficiary in the will.[255] The amount of the *inter vivos* gift will be deducted from the bequest if the testator so intends.[256]

1. The Identity Theory.

There are two basic approaches to the treatment of beneficiaries whose legacies have been adeemed. One approach is the identity or *in specie* theory. A court which applies this rule must determine whether the devise is specific or not and if it is specific, whether the property in question is in the estate at the testator's death.[257] The identity theory is not concerned with the testator's intent. [258] For example, in *McGee v. McGee*,[259] the testator bequeathed money on deposit "in any bank" to her grandchildren.[260] However, a few weeks before the testator's death, her son, Richard, acting pursuant to a durable power of attorney, withdrew a considerable sum of money from the testator's savings account at the People's Savings Bank and used it to purchase United States treasury bonds.[261] On appeal, the Rhode Island Supreme Court held that the bequest to the grandchildren was specific and that conversion of the money deposited in the savings account to treasury bonds adeemed the grandchildren's legacy.[262]

Over the years, the courts have developed a number of questionable practices to defeat the identity theory when they feel that it would frustrate the testator's estate plan: (1) they may characterize the change in the nature of the property in question as a change in form rather than a change in substance; (2) they may construe the devise as general or demonstrative instead of specific; or (3) they may conclude that the will speaks at the time of death rather than at the time of execution.[263]

A great many courts hold that a specific devise is not adeemed if the property has changed only in form.[264] *Parker v. Bozian* illustrates how this rule

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[255] Mary Kay Lundwall, *The Case Against the Ademption by Extinction Rule: A Proposal for Reform*, 29 GONZ. L. REV. 105, 105 (1993).
[256] *Id.*
[257] Gregory S. Alexander, *Ademption and the Domain of Formality in Wills Law*, 55 ALB. L. REV. 1067, 1068 (1992).
[258] Paschoal, *supra* note 252, at 185.
[259] *McGee v. McGee*, 413 A.2d 72 (R.I. 1980).
[260] *Id.* at 73.
[261] *Id.*
[262] *Id.* at 78.
[263] Lundwall, *supra* note 255, at 110.
[264] Alexander, *supra* note 257, at 1074.

of construction works.[265] Effie Wilson executed a will in 1995 in which she bequeathed her "CD Account # XXX-XXX1274 with the First Bank of Dothan" to her niece, Marguerite Bozian.[266] She also left her residuary estate to another niece, Sara Parker.[267] Later, in 2000, the testator transferred the funds in the CD 1274 account into two new CD accounts, CD 2843 and CD 2844, which paid a higher rate of interest.[268] After the testator died in 2001, her niece, Sara Parker, acting as executor, refused to transfer the CDs to Marguerite, claiming that the original CD had been adeemed by extinction when the testator cashed it in and used the proceeds to purchase CD 2843 and 2844.[269] According to Sara, having been adeemed, the CDs would go to her as the residuary legatee.[270] However, the lower Court's ruling in favor of Marguerite was affirmed on appeal by the Alabama Supreme Court.[271] The Court concluded that the transfer of the money in CD 1274 into the new CDs was a change in form rather than a change in substance.[272]

Another dodge is to classify the property as general or demonstrative instead of specific.[273] For example, in *Estates of Doepke*,[274] when the decedent bequeathed her son the sum of $3,000.00, "being the amount of life insurance left by my husband to me," the Court concluded that the bequest was not adeemed even though the insurance fund no longer existed. The Washington Supreme Court held that the gift was demonstrative and not specific, concluding that the reference to the insurance policy was merely descriptive. Accordingly, the Court ordered the bequest to be paid out of the estate's general assets.

The third method of avoiding ademption is to treat the will as speaking at the time of death rather than at the time of execution.[275] For example, if the

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[265] *Parker v. Bozian*, 859 So. 2d 427 (Ala. 2003).
[266] *Id.* at 430.
[267] *Id.*
[268] *Id.*
[269] *Id.*
[270] *Parker v. Bozian*, 859 So. 2d. at 433.
[271] *Id.* at 439.
[272] *Id.* at 438.
[273] Alexander, *supra* note 257, at 1073-74. Property that is disposed of by will is classified as specific, general, demonstrative or residuary. As the term suggests, a specific devise involves a unique piece of tangible property such as real estate, art or jewelry, while a general bequest involves cash or other fungible goods. A demonstrative bequest is a gift of a specific sum of money from a named source instead of from the general assets of the estate. For example, a bequest of "$10,000 from the First National Bank of Cincinnati" would be demonstrative in nature. If there was not enough money in the account to pay the legacy, the deficit would be paid as a general bequest. A residuary bequest includes all property that is not otherwise disposed of. *See* William M. McGovern, Sheldon F. Kurtz & David M. English, Wills, Trusts and Estates § 8.1 (4th ed. 2001).
[274] In re Estates of Doepke, 47 P.2d 1009 (Wash. 1935).
[275] Alexander, *supra* note 257, at 1075.

testator in a will executed in 2010 leaves her 2009 Lexus LS 460 automobile to her son, Alfred, the bequest will probably be classified as specific and will be adeemed if it is not in the testator's estate at her death in 2020. On the other hand, if the testator simply leaves "my automobile" to Alfred, a court may treat this more generic description as referring to whatever automobile the testator owns at death, thereby avoiding ademption. Of course, this technique depends on what words and phrases the drafter of the will chooses to employ.[276]

2. The Intent Theory.

As the name implies, the identity theory focuses on whether the testator intended for the bequest to be adeemed.[277] This approach was apparently part of the Roman civil law and was also followed for a time by the English Chancery and ecclesiastical courts. [278] It continues to be followed in a minority of jurisdictions in the United States.[279] The Comment to section 2-606 cites *Estate of Austin* as an example of the intent theory.[280] In that case, the testator, Lucille Ann Austin, executed a will in 1977 which left an oil painting and a promissory note to her friend, Betty Guldberg.[281] The promissory note was paid off prior to Lucille's death.[282] After depositing the funds in a savings account, the testator withdrew money from the account in order to purchase another promissory note.[283] The testator died about ten months after the will was executed without having changed the bequest to Betty.[284] The residuary legatee, the Shrine Hospital for Crippled Children, contended that the bequest of the promissory note was adeemed when the debtor paid it off.[285] The trial court agreed and held that the bequest was specific and adeemed and, therefore, went to the Hospital as the residuary legatee.[286]

On appeal, the Appellate Court reversed and held that there was nothing to indicate that the testator had changed her mind about leaving the bequest to Betty.[287] The Court observed that Lucille had reinvested the proceeds from the

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[276] Lundwall, *supra* note 255, at 114.
[277] Mary Kay Lundwall, *The Case Against the Ademption by Extinction Rule: A Proposal for Reform*, 29 Gonz. L. Rev. 105, 108 (1993).
[278] *Id.*
[279] Pascoal, *supra* note 252, at 192.
[280] *Estate of Austin*, 169 Cal. Rptr. 648 (Ct. App. 1980).
[281] *Id.* at 649.
[282] *Id.* at 649-50.
[283] *Id.* at 650.
[284] *Id.*
[285] *Estate of Austin*, 169 Cal. Rptr. at 650.
[286] *Id.*
[287] *Id.* at 651.

promissory note in an identical type of asset and she did not revoke her bequest of the oil painting to Betty.[288] Therefore, the Court concluded that there was no evidence to suggest that the testator intended to adeem the bequest of the promissory note.[289]

B. The Uniform Probate Code.

The ademption provisions of the 1969 UPC were fairly traditional in nature.[290] After stating the identity rule relating to the ademption of property not found in the testator's estate at death, section 2-607 provided that specific devisees of securities would be entitled to additional securities of the same entity owned by the testator by reason of actions initiated by the entity as well as securities of another entity owned by the testator as the result of a corporate reorganization initiated by the that entity.[291] Another provision created four limited exceptions to the identity theory when the testator was not under a conservatorship.[292]

The 1990 UPC retains much of this, but also adds a number of controversial provisions. The Code begins by declaring that the beneficiary of specifically devised property is entitled to any of the devised property that remains in the testator's estate at death.[293] Next, section 2-606 (a) incorporates the very limited exceptions set forth in the 1969 UPC, namely the balance of the purchase price of any property owed by the purchaser at the testator's death,[294] the amount of any condemnation award unpaid at the testator's death,[295] any proceeds unpaid at death on fire or casualty insurance for injury to the testator's property,[296] and any property acquired as the result of a foreclosure of a security interest for a specifically devised obligation.[297]

1. Replacement Property.

Section 2-606 (a) (5) contains a new provision which saves a gift from ademption when it qualifies as a "replacement" for property that had been sold

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[288] *Id.*
[289] *Id.* at 652.
[290] Alexander, *supra* note 257, at 1076.
[291] UNIF. PROB. CODE § 2-607 (1969).
[292] *Id.*
[293] UNIF. PROB. CODE § 2-606 (a) (1990).
[294] *Id.* at § 2-606 (a)(1).
[295] *Id.* at § 2-606 (a)(2).
[296] *Id.* at § 2-606 (a)(3).
[297] *Id.* at § 2-606 (a)(4).

or otherwise disposed of by the testator.[298] The drafters of the this new provision claim that it is merely an extension of the traditional change in form doctrine.[299] Unfortunately, neither the language of section 2-606 (a) (5) nor the examples set forth in the Comment to section 2-606 provide much guidance as to what constitutes replacement property.[300]

The Comment provides the following example of the replacement concept. G's will devised "my 1984 Ford" to X. She subsequently sold the vehicle and bought a 1988 Buick. Later, G sold the Buick and purchased a 1993 Chrysler. According to the Comment, X would receive the Chrysler as a replacement for the Ford.[301] Furthermore, X would receive any vehicle that G owned at G's death under section 2-606 (a) (5) even if it had not been purchased with funds that were not obtained from the sale of one of the other vehicles.[302]

2. Adoption of the Intent Theory.

Section 2-606 (a) (6) provides for a pecuniary devise equal to the value as of its date of disposition of other specifically devised property disposed of during the testator's lifetime.[303] The pecuniary devise is only to the extent it is established that ademption would be inconsistent with the testator's manifested plan of distribution or that at the time the will was made, the date of disposition or otherwise, the testator did not intend ademption of the devise.[304] When this verbose and convoluted sentence is reduced to plain English, it essentially states that a bequest will not be adeemed unless the testator clearly wants it to be.

3. Conservators and Attorneys-in-Fact.

Sections 2-606 (b) through (e) address the troublesome question of whether property sold by conservators or holders of a durable power of attorney should cause such property to be adeemed.[305] Section 2-606 (b) provides that if specifically devised property is sold or mortgaged by a conservator or an agent acting pursuant to a durable power of attorney for an incapacitated testator, or

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[298] *See* Ascher, *supra* note 144, at 645-47.
[299] Alexander, *supra* note 257, at 1077-78.
[300] Pascoal, *supra* note 252, at 192.
[301] UNIF. PROB. CODE § 2-606, cmt (1990).
[302] *Id.* However, if G used the proceeds from the sale of the Ford to purchase shares in a mutual fund, X would not receive them as replacement property.
[303] *Id.*
[304] *Id.* at § 2-606 (a)(6).
[305] *See generally* Alexander, *supra* note 257, at 1070-73.

if certain proceeds are paid to them, the specific devisee is given the right to a general pecuniary devise equal to such sale price or proceeds.[306]

C. Critique.

Section 2-606 has been criticized by some legal commentators[307] and, as of 2019, only five states have adopted it in its entirety.[308] One problem is that section 2-606 tries to recognize both the identity theory and the intent theory of ademption instead of making a firm commitment to one or the other.[309] The result is unnecessary complexity and confusion which is certain to promote litigation. Sections 2-606 (a) (5) and 2-606 (a) (6) are the worst offenders. Section 2-606 (a) (5) adopts a replacement property approach without clearly describing what is meant by that term.[310] Section 2-606 (a) (6) is also flawed.[311] Having suggested at the beginning of § 2-606 (a) that the identity theory may be a proper default rule, the drafters then reverse course in section 2-606 (a) (6) and declare that ademption will not occur unless there is clear proof that the testator intends it.[312]

Each of these theories, standing alone, has its strong points. For example, it is said that the identity theory is "logical, simple and... easy to apply."[313] In addition, it reduces confusion and discourages litigation, and avoids unseemly inquiries into the testator's state of mind.[314] On the other hand, strict application of the identity theory will sometimes frustrate the testator's plan of distribution.[315]

In contrast, by definition, the intent theory is more likely to effectuate the testator's intent, especially when the property in question changes form, is destroyed or is sold or otherwise disposed of by someone other than the testator.[316] That being said, proving intent often involves the admission of

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[306] UNIF. PROB. CODE § 2-606 (b).
[307] Ascher, *supra* note 144, at 645-49.; *But see*, Alexander, *supra* note 257, at 1068 (declaring that "Section 2-606 represents a sensible doctrinal reform that incrementally changes the law in a way that is likely to strengthen the extent to which wills law reflects rather than frustrates testamentary preferences.").
[308] Pascoal, *supra* note 252, at 194.
[309] *See* UNIF. PROBATE CODE §2-606.
[310] *Id.*
[311] *See generally* Ascher, *supra* note 144, at 646-48.
[312] *Id.* at 647.
[313] Philip Mechem, *Specific Legacies of Unspecific Things—Ashburner v. Macguire Reconsidered*, 87 U. PA. L. REV. 546, 550 (1939).
[314] Lundwall, *supra* note 255, at 108.
[315] *Id.* at 109.
[316] Gregory S. Alexander, *Ademption and the Domain of Formality in Wills Law*, 55 Alb. L. Rev. 1067, 1067 (1992).

extrinsic evidence, such as hearsay, that may be unreliable or downright false.[317] In any event, one can argue that the intent theory will generate litigation.

While neither the identity theory nor the intent theory provides an optimal solution to the ademption problem, a combination of the two, the approach chosen by the drafters of section 2-606, is worse than either. Perhaps, the best option is to return to the 1969 UPC which generally followed the identity theory but identified four very specific exceptions where it was highly unlikely that the testator would want the bequest to be adeemed.[318] Like the general rule, these exceptions would be *per se* rules that would not involve an inquiry into the testator's probable intent.

VII. Conclusion.

Although there is much to like about the 1990 UPC, some of its innovations are problematic. In many cases, the new provisions add unnecessary complexity in order to solve relatively trivial problems. Other provisions are vague and open-ended when bright-line rules would be better.

The problem of unnecessary complication is exemplified by the per capita at each generation rule in section 2-106.[319] This provision may achieve a slight degree of additional fairness, but it also introduces significant mathematical challenges into the law of intestacy. Section 2-503, the harmless error rule, on the other hand, is not particularly complex.[320] Rather, as written, it is vague and open-ended, thereby opening the door to increased litigation.[321] To be sure, the strict compliance rule sometimes frustrated testators' intent and enriched unintended beneficiaries. However, the Code's response seems like overkill. The 1969 UPC's approach, which did away with a number of questionable wills act formalities was a better approach to the strict compliance problem. At the very least, if the Code's harmless error rule is retained at all, it should be expressly limited to noncompliance with attestation requirements.

Excessive complexity also rears its ugly head in section 2-509, which deals with the doctrine of revival.[322] Instead of retaining the 1969 UPC's intent-based approach, section 2-509 creates a complex system of presumptions based

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[317] *Id.*
[318] Ascher, *supra* note 144, at 645.
[319] *See* UNIF. PROBATE CODE §2-106.
[320] *See* UNIF. PROBATE CODE §2-503.
[321] *Id.*
[322] *See* UNIF. PROBATE CODE §2-509.

on whether the covering will is wholly or partially revoked by physical act or whether it is revoked by a subsequent testamentary instrument.[323] Although the 1969 UPC's intent-based approach necessarily relied on extrinsic evidence, always a legitimate concern, it had the virtue of producing a simple and reasonably reliable solution to the revival problem without recourse to all of the 1990 Code's bells and whistles.

The 1990 UPC's provision on lapsed gifts manages to combine bad policy with excessive complexity in the subsections dealing with survivorship requirements and substitute gifts.[324] Until the promulgation of section 2-603, drafters could usually rely on words of survivorship in a bequest to preclude the anti-lapse statute from operating.[325] Although the use of boilerplate language sometimes led to unintended consequences, there is no reason to suppose that this was common. Now, in those states that have adopted section 2-603, drafters run the risk of malpractice liability unless they put additional language into their clients' wills.[326]

The Code also unnecessarily complicates the issue of alternative gifts. The phrase "to *A* if she survives me and if *A* does not survive me, to *B*" is about as explicit as one can get.[327] However, section 2-603 introduces a number of complex rules, along with a lengthy Comment, to determine what happens when both the primary and the alternative taker fail to survive the testator.[328] While all of this is interesting, it might be better to replace the current section 2-603 with the 1969 UPC's more elegant version.

Section 2-606 is both disingenuous and unnecessarily prolix. The section is disingenuous because it purports to adopt the identity theory of ademption by extinction and then creates a series of six intent-based exceptions that virtually swallow up the general rule.[329] The first four exceptions are carryovers from the 1969 UPC and are fairly modest in scope.[330] However, the remaining exceptions are quite troublesome, particularly the provision relating to "replacement property."[331] This is almost certain to be a litigation breeder because almost anything can be a replacement if a court decides that it should be.

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[323] *Id.*
[324] UNIF. PROB. CODE §2-603.
[325] *See* UNIF. PROBATE CODE §2-603.
[326] *Id.*
[327] *Id.*
[328] *Id.*
[329] *See* UNIF. PROBATE CODE §2-606.
[330] *See id.*
[331] *Id.* at §2-606 (a)(5).

Perhaps, it is time to consider an overhaul of the current UPC. The five provisions discussed in this Article might be a good place to start.