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Articles

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I. INTRODUCTION

Lawyers in the United States are all-too familiar with the inconvenience, inefficiency, and confusion caused by wide variations in laws across U.S. jurisdictions. Alleviating this jurisdictional inconsistency is "the one purpose" that defines the work of the National Conference of Commissioners on Uniform State Laws (also referred to as the "Uniform Law Commission").[1] The Uniform Probate Code ("UPC") first presented in 1969 and amended several times since then, represents one such effort.[2] The UPC is the Uniform Law Commission's attempt at a model act that represents a modern and efficient system of laws relating to donative transfers. But model acts can only achieve their purposes as the individual states adopt them.[3] And although the adoption of a new model act is intended to improve the law, it necessarily involves replacing familiar old rules with confusing and sometimes difficult to understand new ones. During the period of transition, questions arise as to what practices and procedures the new laws will affect and how they will be interpreted. Additionally, since model acts are comprehensive treatments in a particular legal area, they can produce disruptive change in the adopting jurisdiction's legal environment. The UPC, for example, includes laws addressing the drafting and interpretation of wills, the impact of and procedures surrounding most nonprobate transfer techniques, the determination of fundamental property rights in the law of gratuitous transfers,

1. NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS CONST. art. I, § 1.2, *in* HANDBOOK OF THE NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, 2010, at 500. The National Conference of Commissioners on Uniform State Laws was founded in 1892. About the ULC, http://www.nccusl.org/Narrative.aspx?title=About the ULC (last visited June 22, 2011). It is a non-profit organization whose goal is to provide "states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law." *Id.* The only requirement for the Commissioners is that they must be licensed attorneys. *Id.*

2. Probate Code Summary, http://uniformlaws.org/ActSummary.aspx?title=Probate%20Code (last visited June 22, 2011).

3. As of the date of this writing, eighteen states have adopted the UPC, in many cases with modifications, and many other states have adopted parts of the statute. *See* LEGAL INFO. INST., Uniform Probate Code Locator, http://www.law.cornell.edu/uniform/probate.html (last visited Apr. 22, 2011); Probate Code Summary, *supra* note 2.

the question of who gets what in the laws governing intestacy, whether and when probate is necessary, and the procedure and structure of probate and many other important areas of law.[4] Needless to say, mastering legal changes on such a scale can be a baffling and even overwhelming experience.

On January 15, 2009, Massachusetts enacted the Massachusetts Uniform Probate Code ("MUPC").[5] While a few provisions of the new law became effective July 1, 2009,[6] most were initially deferred until July 1, 2011. By recent legislation, most have again been deferred until January 2, 2012.[7] As many observers have already pointed out, the new law brings major changes to Massachusetts estate planning and estate administration. This article highlights and explains some of the changes wrought by MUPC that are likely to affect the typical will and trust drafting and the estate planning practice in general. It includes an exploration of many of those aspects of the law that concern the ever-growing area of will substitutes, such as beneficiary designations and joint bank and brokerage accounts. Except in cases where it might have a particular effect on the planning process, this article does not attempt to cover the significant changes MUPC makes to probate and other administration of estates.

Overall, MUPC represents an important step in bringing Massachusetts law up to date with current legal thinking. For the most part, the UPC follows considered consensus among practitioners and academics, and thus it reflects many good choices. And yet, the UPC is not without its areas of controversy and debate. For this reason and others, most legislatures do not adopt a uniform statute as complex as the UPC in its entirety. Massachusetts is no exception; although most UPC provisions were adopted verbatim, others were adopted in amended form or even rejected entirely. And although in some areas of deviation

4. *See, e.g.*, UNIF. PROBATE CODE §§ 2-501, 2-502, § 6-101, §§ 2-101to - 114,§ 3-102 (2006).

5. *See generally*, MASS. GEN. LAWS ch. 190B (2009).

6. *Id.* at §§ 1-201, 1-401, art. V (2009). Section 1-201 contains definitions and inclusions and Section 1-401 governs the method and timing of giving notice. Article V covers guardianships, property management of minors and disabled persons, and durable powers of attorney.

7. Appropriations – Fiscal Year 2011, 2010 Mass. Legis. Serv. ch. 409, § 23 (West).

the Commonwealth seems to have made the sensible choice, in other areas its failure to update some of its old rules to reflect modern practices seems misguided and confounding. For example, Massachusetts wisely rejected the overreaching scope of the UPC's antilapse provisions, but it continues to cling to its outmoded elective share statute.[8] Perhaps once MUPC becomes familiar to lawyers and judges in the Commonwealth, further improvements will come. It is hoped that this article will be a boost to that familiarity.

II. BASIC STRUCTURE OF MUPC

MUPC is divided into seven "Articles," each of which has a number of "Parts."[9] This paper gives primary attention to the generally applicable provisions and definitions of Article I, Article II's specific provisions on intestacy, wills and other governing instruments, and the nonprobate transfer provisions of Article VI. One should keep in mind that MUPC directs that it be "liberally construed and applied to promote its underlying purposes and policies."[10] Those policies include simplification of the law,[11] furthering the testamentary and donative intent of decedents,[12] promoting the speed and efficiency of administration,[13] improving trust use and enforcement,[14] and making the law more consistent across jurisdictions.[15] The Act makes explicit that legal and equitable "principles" not specifically "displaced" will "supplement its provisions."[16]

8. *See* MASS. GEN. LAWS ch. 190B, § 2-102 (effective Jan. 2, 2012).

9. Article I: General Provisions, Definitions, and Probate Jurisdiction of Court; Article II: Intestacy, Wills and Donative Transfers; Article III: Probate of Wills and Administration; Article IV: Foreign Fiduciaries; Article V: Protection of Persons Under Disability and Their Property; Article VI: Nonprobate Transfers on Death; and Article VII: Trust Administration. MASS. GEN. LAWS ch. 190B.

10. MASS. GEN. LAWS ch. 190B, § 1-102(a) (effective Jan. 2, 2012).

11. *Id.* at § 1-102(b)(1).

12. *Id.* at § 1-102(b)(2).

13. *Id.* at § 1-102(b)(3).

14. *Id.* at § 1-102(b)(4).

15. *Id.* at § 1-102(b)(5).

16. MASS. GEN. LAWS ch. 190B, § 1-103 (effective Jan. 2, 2012).

III. WILLS—IN GENERAL

A. Formal Requirements of Wills

Basic formal requirements for execution of wills are mostly unchanged by MUPC from pre-MUPC law, at least as would generally be encountered in the everyday law practice. As required pre-MUPC, testators must be of sound mind and at least eighteen years of age.[17] Since pre-MUPC law also requires "sound mind," case law outlining the parameters of testamentary capacity should remain valid.[18] Wills must be in writing, signed by the testator[19] and signed by two witnesses.[20] MUPC relaxes current law with respect to witnesses in two ways. First, the witnesses need not attest and subscribe in the presence of the testator,[21] so long as they have either witnessed the signing by the testator or had the testator acknowledge to them the signing of the will or the fact of the will.[22] Second, even though "interested" witnesses (and their spouses) must presumptively purge their gifts, the interested witness can receive a devise if the witness can establish "that the bequest was not inserted, and the will was not signed, as a result of fraud or undue influence by the witness."[23] Given that the interested witness bears the burden of proof here, interested

17. *Compare* MASS. GEN. LAWS ch. 190B, § 2-501 (effective Jan. 2, 2012), *with* MASS. GEN. LAWS ch. 191, § 1 (2004).

18. Another provision of MUPC provides that any principles of law and equity not displaced by MUPC "supplement its provisions." MASS. GEN. LAWS ch. 190B, § 1-103 (effective Jan. 2, 2012). Under Massachusetts law, a testator meets the sound mind requirement if the testator, at the time of execution, is "free from delusion and understand[s] the purpose of the will, the nature of her property, and the persons who could claim it." O'Rourke v. Hunter, 848 N.E.2d 382, 392 (Mass. 2006).

19. Alternatively, another person may sign for the testator in the testator's "conscious presence and by the testator's direction." MASS. GEN. LAWS ch. 190B, § 2-502(a)(2) (effective Jan. 2, 2012). As under current law, the testator must at least eighteen years of age and of sound mind. *Id.* at § 2-501.

20. *Id.* at § 2-502.

21. A requirement of MASS. GEN. LAWS ch. 191, § 1 (2004).

22. Though not part of the Massachusetts version, this provision of the UPC was amended in 2008 to allow notarized wills that are not otherwise witnessed. *See* UNIF. PROBATE CODE § 2-502 (2008).

23. MASS. GEN. LAWS ch. 190B, § 2-505 (effective Jan. 2, 2012). In a concession to its pre-MUPC law, MUPC statute differs from the UPC here; the UPC flatly states that "an interested witness does not invalidate the will or any provision of it." UNIF. PROBATE CODE § 2-505(b) (2008).

witnesses should be avoided in all events.[24] The potential expense and risk of bringing a suit under these circumstances would mean that for practical purposes, at least in most cases, the pre-MUPC purging statute remains in effect.

As is the case under pre-MUPC law, two types of self-proving affidavits, which must be executed "before an officer authorized to administer oaths under the laws of the state in which execution occurs," are permitted.[25] The two-step affidavit is executed as an additional matter after the execution of the will. Though usually signed in connection with the execution of the will, this affidavit can be signed any time after the will's execution.[26] Subsequent execution of a self-proving affidavit should be particularly beneficial when the lawyer must bring a foreign will into compliance with the self-proving requirements of the Commonwealth. A one-step affidavit is also permissible, which eliminates the requirement that the testator and witnesses sign twice; the "simultaneous" signatures constitute those required for execution and attestation of the will as well as an affirmation of the self-proving oath contained in the affidavit.[27]

Confusion over the two options for self-proof of wills has resulted in mistakes leading to unfortunate results in some other jurisdictions.[28] In these cases, a two-step self-proving affidavit was affixed to the will, but the testator and witnesses signed only the affidavit and not the will. Courts ruled inconsistently. For this reason, the UPC, in a provision adopted by MUPC, also provides that "[a] signature affixed to a self-proving affidavit attached the will is considered a signature affixed to the will, if necessary to prove the will's due execution."[29]

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24. As it has done in many instances in MUPC, the Massachusetts legislature has chosen here to modify the UPC provisions to bring the statute closer to current Massachusetts law. The UPC, in § 2-505, simply allows interested witnesses. UNIF. PROBATE CODE § 2-505(b) (2008).

25. *See* MASS. GEN. LAWS ch. 190B, § 2-504 (effective Jan. 2, 2012).

26. *Id.* at § 2-504(b).

27. *Id.* at § 2-504(a).

28. *See, e.g.*, Douthit v. McLeroy, 539 S.W.2d 351, 352 (Tex. 1976) (holding that where witnesses signed self-proving affidavit, but not will itself, trial court erred in admitting will to probate); *see also* Bruce H. Mann, *Self-Proving Affidavits and Formalism in Wills Adjudication*, 63 WASH. U. L.Q. 39, 39, 40-42 (1985).

29. MASS. GEN. LAWS ch. 190B, § 2-504(c) (effective Jan. 2, 2012).

B. Making Lists of Tangible Personal Property

Many lawyers counsel their clients to leave a memorandum or separate list directing the disposition of tangible personal property. Currently these directives are nonbinding, as they usually do not comply with wills act formalities. But section 2-513 creates a new opportunity for streamlining the drafting and amendment of basic wills. The provision permits the testamentary disposition of tangible personal property by a separate list created before or after the execution of the will.[30] Current law would require that any such list be in existence at the time of execution of the will to fit within the doctrine of incorporation by reference.[31] In the past, wasteful litigation has ensued in Massachusetts and other jurisdictions over whether documents intended to be incorporated into the will for this purpose were legally effective.[32] Other obvious benefits to the MUPC provision are that the lawyer's time and the client's money are not frittered away by drafting provisions for and making revisions to wills to effect dispositions of items of household furniture or furnishings, photographs and other items that sometimes are divided among a number of persons. Clients who are not ready to make a decision as to how to distribute particular items, or who may change their minds, need not delay arrangements for preparation and execution of their will, for these decisions can now be made at any time without the necessity of revising the will or adding a codicil.

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30. *Id.* at § 2-513 (effective January 2, 2012).

31. *See* Bemis v. Fletcher, 146 N.E. 277, 279(Mass. 1925)(quoting Newton v. Seaman's Friend Soc., 130 Mass. 91, 93 (1881)); Taft v. Stearns, 125 N.E. 570, 572 (Mass. 1920). The traditional doctrine is retained in the Commonwealth by MASS. GEN. LAWS ch. 190B § 2-510 (effective Jan. 2, 2012).

32. Clark v. Greenhalge, 582 N.E.2d 949 (Mass. 1991). In this case, the decedent, Helen Nesmith, named Greenhalge as the executor and primary beneficiary of her estate except those items which she "designate[d] by a memorandum left by [her] and known to [Greenhalge], or in accordance with [her] known wishes." *Id.* at 950. Nesmith subsequently amended the will, the accompanying memorandum, and a notebook containing specific bequests. *Id.* at 950-51. Greenhalge, as executor, claimed that the notebook could not be construed as a "memorandum" because it was not specifically identified as such. *Id.* at 952. The court held that such a literal interpretation was inappropriate and would "undermine [the] long-standing policy of interpreting wills in a manner which best carries out the known wishes of the testatrix." *Id.* at 952-53.

The section requires that the will refer to the separate list, that the list or statement be signed, and that the items be described with "reasonable certainty."[33] The UPC comment points out that each item need not be specifically itemized so long as the reasonable certainty requirement is met.[34] Many lawyers may wish to make reference in their will forms with boilerplate language such as "I may prepare a separate list - disposing of some or all of my items of tangible personal property. Any such list not located by my personal representative by a reasonable search within a period of thirty days after probate of my will shall be deemed not to exist."[35] A residuary-type clause that sweeps in any tangible personal property not otherwise disposed of by the separate list would always be appropriate. To ensure that the client complies with the requirement that any such list be signed, the lawyer could prepare a form to be given to the client with language stating that it is the separate list referred to in the will and a "fill-in-the-blank" signature line. It would also be prudent to inform the client in writing that the list should be dated in case more than one list is found after the client's death.

Closely related is the concept of "acts of independent significance." Wills formalities statutes generally do not allow dispositions made in a will to be dependent on nontestamentary acts unless those acts have a purpose or significance apart from their testamentary effect. The Massachusetts Supreme Judicial Court long ago generously conceded that a revocable trust that is a devisee under a will can be amended subsequent to the execution of the will despite the general rigidity of this doctrine.[36] MUPC further expands the doctrine by providing specifically that "the execution or revocation of another individual's will" has independent significance.[37] This would cover the situation where a testator devises property to a private foundation, for example, that

33. MASS. GEN. LAWS ch. 190B, § 2-513 (effective Jan. 2, 2012).

34. UNIF. PROBATE CODE § 2-513 cmt. (2008).

35. *See also id.* ("A document referring to 'all my tangible personal property other than money' or to 'all my tangible personal property located in my office' or using similar catch-all type of language would normally be sufficient.").

36. Second Bank-State St. Trust Co. v. Pinion, 170 N.E.2d 350, 353 (Mass. 1960).

37. MASS. GEN. LAWS ch. 190B, § 2-512 (effective Jan. 2, 2012).

is created by another person's subsequently executed will.[38]

C. Testamentary Additions to Trusts

In enacting MUPC the Massachusetts legislature repealed the Massachusetts Uniform Testamentary Additions to Trusts Act (the "UTATA"),[39] effective January 1, 2012, but replaced it with section 2-511 of MUPC. The UTATA permits a testator to make a devise to the trustee of a trust so long as "the trust is identified in the will and the terms of the trust are set forth in a written instrument executed before or concurrently with the execution of the testator's will or set forth in the valid will of a person who has predeceased the testator."[40] Since it does not matter whether the trust instrument is subsequently amended,[41] the UTATA stands as an exception to the doctrine of incorporation by reference.[42] Section 2-511 of MUPC is essentially the same as the UTATA, but also provides that the trust at issue can be created at the testator's death, and that even if the trust is revoked or terminates prior to the testator's death the devise will not lapse if the testator's will "provides otherwise."[43] This new rule should quell any concern that a trust must be "funded" in order for its trustee to be a valid devisee under a will. Due to this concern, some practitioners long ago developed the habit of ensuring that clients wishing to make a devise to a trust execute the trust instrument and at least nominally fund the trust (with perhaps

38. *See e.g.*, First Nat'l Bank of Birmingham v. Klein, 234 So.2d 42, 44, 46 (Ala. 1970) (holding that where testatrix executed a codicil to her will providing that if her son predeceased her, a one-third undivided interest in her residuary estate would go to the residuary legatees and beneficiaries of her son's estate under his last will and testament; the fact that the residuary legatee of her son's estate was trustee did not void gift); In the Matter of the Last Will and Testament of Tipler, 10 S.W.3d 244, 249-50 (Tenn. Ct. App. 1998) (holding that a codicil referring to husband's not yet written will contained all material provisions in testator's handwriting and, thus, was valid).

39. MASS. GEN. LAWS ch. 203, § 3B (1963).

40. *Id.*

41. *Id.*

42. In order to fit within the doctrine, the writing must be in existence in its entirety at the time of the execution of the will. *Bemis*, 146 N.E. at 279 . From a policy perspective, the doctrine prevents wills from being indirectly amended without wills acts formalities. *But see* Second Bank-State Str. Trust Co., 170 N.E.2d at 353.

43. MASS. GEN. LAWS ch. 190B, § 2-511 (effective Jan. 2, 2012).

ten dollars) before the execution of the will that devises property to its trustee. In Massachusetts, nominal funding has not been necessary since the enactment of the Uniform Testamentary Additions to Trusts Act. Additionally, the 1985 decision of *Clymer v. Mayo*[44] held that such trusts need not be funded before death. But the comment to section 2-511 contends that the trust in *Clymer* had been "funded" with "the contract right to the proceeds of the life insurance policy."[45] Although this does not seem to be the case from the court's description of the facts[46] it is doubtful that would have changed the result.[47] But even if it was not clear in the aftermath of *Clymer*, it is certainly clear under MUPC that no pre-death funding is needed.[48] The lawyer can have the client execute the will and trust instrument in any order and need not direct that the trust be funded by property other than the will's devise.

D. Revocation of Wills

Wills remain revocable by the testator either by a subsequent act on the will conducted with the intent to revoke or by a subsequent writing executed with the formalities of a will.[49] The testator may also direct another person to perform the revocatory act, so long as that person undertakes the act in the "conscious presence" of the testator.[50] Historically, litigation has been

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44. 473 N.E.2d 1084 (Mass. 1985).

45. UNIF. PROBATE CODE § 2-511 cmt. (2008). *See also Clymer*, 473 N.E.2d at 1090 ("we agree with the court's conclusion that 'the statute is not conditioned upon the existence of a trust but upon the existence of a trust *instrument*.'"(emphasis in original)).

46. At the decedent's death the trust was no longer the beneficiary of the life insurance but was the named beneficiary of the decedent's retirement annuity contracts. *Clymer*, 473 N.E.2d at 1086-87.

47. The court explicitly stated that the facts concerned "a revocable pour-over trust funded entirely at the time of the decedent's death." *Id.* at 1093.

48. Of course this statute does not address the state law requirements for a valid trust.

49. *Compare* MASS. GEN. LAWS ch. 190B, § 2-507 (effective Jan. 2, 2012) ("'revocatory act on the will' includes burning, tearing, canceling, obliterating, or destroying the will or any part of it."), *with* MASS. GEN. LAWS ch. 191, § 8 (2004) ("No will shall be revoked except by burning, tearing, cancelling or obliterating it with the intention of revoking it . . . or by some other writing . . . in the same manner as a will.").

50 MASS. GEN. LAWS ch. 190B, § 2-507(a) (effective Jan. 2, 2012). "Conscious

conducted over whether revocation by physical act requires that the act leave a physical impression of some sort on at least some of the words of the writing themselves.[51] Apparently, unless the act consists of burning or tearing, most cases hold that the act must actually touch some of the words on the writing.[52] The Commonwealth seems to follow this general rule.[53] It is not clear whether MUPC would permit revocation by an act on the writing that does not touch the words, but the statute does provide that a revocatory act on the writing "includes burning, tearing, canceling, obliterating, or destroying the will *or any part of it.*"[54] Perhaps the phrase "or any part of it" refers only to the destroying of the will. To be safe, practitioners should continue to make sure that any cancelation by act actually defaces in some manner some of the words on the writing.[55] The statute also permits partial

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presence" is a phrase used in statutes and case law in some jurisdictions to reduce the rigidity of the requirement that a will's witnesses attest in the "presence" of one another or the testator. *See, e.g.*, MONT. CODE ANN. § 72-2-522 (1)(b) (2007); N.D. CENT. CODE § 30.1-08-02(1)(b) (2009); N.J. STAT. ANN. § 3B:3-2(a)(2) (West 2007); OHIO REV. CODE ANN. § 2107.03 (West 2009); WIS. STAT. ANN. § 853.03(1) (West 2008); In Re Damaris' Estate, 110 P.2d 571, 585 (Or. 1941); Brown v. Traylor, 210 S.W.3d 648, 687 (Tex. App. 2006); In the Matter of the Estate of McGurrin v. Scoggin, 743 P.2d 994, 1002 (Idaho Ct. App. 1987).

51. *See* Thompson v. Royall, 175 S.E. 748, 750 (Va. 1934); In Re Sax's Estate, 202 N.Y.S.2d 774, 776-77 (1960).

52. *See* UNIF. PROBATE CODE § 2-507 cmt. (2008).

53. *See* Putnam v. Neubrand, 109 N.E.2d 123, 125-26 (Mass. 1952) ("Cancellation is effected by some defacement or mutilation of the words of the will."); Yont v. Eads, 57 N.E.2d 531, 532 (Mass. 1944) (holding that even though made with the intent to revoke, a notation in the margin of the will noting that it was cancelled by a subsequent writing was insufficient to cancel the will where no subsequent will was ever found.).

54. MASS. GEN. LAWS ch. 190B, § 2-507(a)(2) (effective Jan. 2, 2012) (emphasis added). In the 2008 version of the UPC, not adopted by Massachusetts, a sentence was added to § 2-507(a)(2) as follows: "A burning, tearing, or canceling is a 'revocatory act on the will,' whether or not the burn, tear, or cancellation touched any of the words on the will."

55. In this way, they might avoid the plight of poor old Judge S.M.B. Coulling, who advised his client that a cancellation act that did not touch the words of the writing was sufficient. *See* Thompson, 175 S.E. at 748-49. After the client died and the will was held to be unrevoked and was admitted to probate, the judge "suffered greatly from shame and loss of reputation in his community." JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 293 (8th ed. 2009). Such an act would certainly be insufficient in the Commonwealth pre-MUPC (*see* Yont, 57 N.E.2d at 532) and possibly post-MUPC as well.

revocation by physical act,[56] as permitted under preexisting law,[57] though a subsequent writing should be used instead for this purpose due to the high risk of ambiguity.[58]

With respect to subsequent writings, the MUPC provision on revocation is considerably more detailed than preexisting law but probably does little to change it. For example, the statute provides that execution of a subsequent writing that does not expressly revoke the current will does so if the testator so intended.[59] Subsequent wills making a complete disposition of the testator's estate will carry a presumption of revocation of any previous will while writings that do not completely dispose of one's estate are presumed to only supplement the current document.[60]

A separate section of MUPC permits a will (will number one) revoked by a subsequent will (will number two) to be revived where will number two is revoked with the intent that will number one be revived.[61] Preexisting Massachusetts law on the subject of revival of wills in this manner is represented by the 1883 case of *Pickens v. Davis*,[62] which lines up well with the new MUPC provision. *Pickens* held that when a testator revokes will number two, will number one is revived if the testator so intended, and further that extrinsic evidence could be admitted to determine the testator's intent.[63] MUPC contains additional rules as well: If will number two only partly revoked will number one then the presumption is that revocation of will number two (in this case, the codicil) "by a revocatory act" (not a subsequent writing) revives the revoked part of will number one *unless* it is evident that the testator did not so intend.[64] If will number two (again, the codicil) is revoked by a subsequent will (not a revocatory act), then will number one is revived "to the extent it appears from the terms of

56. MASS. GEN. LAWS ch. 190B, § 2-507(a)(2) (effective Jan. 2, 2012).
57. *See* Worcester Bank & Trust Co. v. Ellis, 197 N.E. 637, 639 (Mass. 1935); Bigelow v. Gillott, 123 Mass. 102, 107 (1877).
58. Opportunities for fraud can also be a concern here. *See* Frederic S. Schwartz, *Models of Will Revocation*, 39 REAL PROP. PROB. & TR. J. 135, 150-51 (2004).
59. MASS. GEN. LAWS ch. 190B, § 2-507(b) (effective Jan. 2, 2012).
60. *Id.* at § 2-507(c)-(d).
61. *Id.* at § 2-509(a).
62. 134 Mass. 252 (1883).
63. *Id.* at 256.
64. MASS. GEN. LAWS ch. 190B,§ 2-509(b) (effective January 2, 2012).

the later will" that the testator so intended.[65]

E. Negative Disinheritance

Under the common law, a will could only express the testator's positive distributional directives. Any property that was left undistributed by the will passed to the testator's heirs through intestacy regardless of any direction in the will that a particular heir was to be disinherited. Thus, a testator might direct in the will that "X is to receive none of my estate under any circumstances." If the testator's will failed to dispose of the entire estate and it happened that X was one of the testator's heirs, then X would nonetheless receive the statutorily-mandated intestate share. Wills could therefore affect the intestacy process only by distributing all of the decedent's estate and leaving none to be distributed by intestacy. MUPC reverses this rule and legitimizes the technique of negative disinheritance.[66] The share of X under MUPC would pass as though X disclaimed the intestate share.[67] Of course this will not affect most practitioners' drafting habits, as most will use a residuary clause that fully disposes of the estate and anticipates possible predeceasing devisees.

F. Omitted Descendants and Spouses

Pre-MUPC law in Massachusetts regarding children and grandchildren omitted from the will is largely retained, but with some detailed modifications. First, while preexisting law applies to all children and issue of deceased children of a testator, MUPC section 2-302 applies only to those "children born or adopted after the execution of the will . . . ."[68] Even then, if the testator devised nothing to other children who were born before the execution of the will or if the will devised "all or substantially all the estate to the other parent of the omitted child" who survives and is entitled to take, MUPC does not apply. Second, while current law simply

65. *Id.* at § 2-509(c).
66. *Id.* at § 2-101(b).
67. *Id.*
68. *Compare* MASS. GEN. LAWS ch. 191, § 20 (2004) *with* MASS. GEN. LAWS ch. 190B, § 2-302(a) (effective Jan. 2, 2012). The statute also applies to children for whom the testator fails to provide solely because of a mistaken belief that they are dead. MASS. GEN. LAWS ch. 190B, § 2-302(c) (effective Jan. 2, 2012).

provides that the omitted child will take the share that the child would have received had the testator died intestate,[69] MUPC is much more complicated.[70] Finally, preconditions to the statute's application are different.[71] Nonetheless, the bottom line for drafters is the same as under current law: avoid the statute by ensuring that, in cases where all or most of the estate is not devised to the other parent, the will reflects that any omission of an unborn child is unintentional.

What of the omitted spouse? Under pre-MUPC Massachusetts law a person who marries is subjected to automatic revocation of any existing will "unless it appears from the will that it was made in contemplation" of the marriage.[72] Where such a testator fails to take subsequent action, the obvious result is intestacy, meaning that the surviving spouse receives an intestate share. At least as far as the surviving spouse's share is concerned, MUPC retains much of the effect of this law with some modifications. The new statute does not actually revoke the will; instead it provides that the surviving spouse shall receive at least the value of the spouse's intestate share.[73] Importantly, however, the spouse is not entitled to an intestate share of any portion of the estate that passes to children or more remote descendants of the testator (and not the

69. MASS. GEN. LAWS ch. 191, § 20 (2004).

70. *See* MASS. GEN. LAWS ch. 190B, § 2-302 (effective Jan. 2, 2012). "If the testator had no child living when the will was executed, an omitted after-born... child receives a share in the estate eqaual in value to that which the child would have received had the testator died intestate, unless the will devised all or substantially all the estate to the other parent... and that other parent survives the testator." *Id.* at § 2-302(a)(1). If the testator had one or more living children at the time the will was executed, the after-born's share is limited to: (1) "devises made to the testator's then-living children under the will"; (2) "the share of the testator's estate that the child would have received had the testator included all omitted after-born children with the children to whom devises were made under the will and had given an equal share of the estate to each child"; (3) "the same character, as that devised to the testator's then-living children under the will." *Id.* at § 2-302(a)(2)(i)-(iii). In providing for the omitted after-born child in situations in which the decedent had living children at the time the will was executed, each share provided for the then-living children is to be reduced pro rata. *Id.* at § 2-302(a)(2)(iv).

71. Subsection (a) will not apply if the omission appears to be intentional or the omitted child was provided for by a transfer outside the will and the "intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements" or can be reasonably inferred. *Id.* at § 2-302(b).

72. *Id.* at ch. 191, § 9.

73. MASS. GEN. LAWS ch. 190B, § 2-301(a) (effective Jan. 2, 2012).

spouse) born before the marriage.[74] Further, none of the remedial provisions of the statute will apply if any one of three conditions are present:

> (1) it appears from the will that the will was made in contemplation of the testator's marriage to the surviving spouse;
>
> (2) the will expresses the intention that it is to be effective notwithstanding any subsequent marriage; or
>
> (3) the testator provided for the spouse by transfer outside the will and any intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence.[75]

Avoiding the statute's potential subversion of testamentary intent is thus somewhat simpler than under preexisting law. Language inserted into a will in compliance with condition (2) above is universally effective and simpler than referring in each case to potential marriage to a particular spouse. In fact, because any overlooked surviving spouse can always take advantage of the elective share statute,[76] lawyers may wish to insert boilerplate in many or most wills providing that the provisions of the will are to survive any subsequent marriage. Remember, though, that MUPC does not adopt the UPC's elective share statute. Indeed, Massachusetts' anachronistic elective share statute persists, despite calls for reform.[77]

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74. *Id.* Any devise actually made to the surviving spouse is used to satisfy the mandated share before other property is seized for this purpose. *Id.* at § 2-301(b). Devises to a child who is not a child of the surviving spouse are not utilized. *Id.* Other property abates as provided in MASS. GEN. LAWS ch. 190B, § 3-902 (effective January 2, 2012).

75. *Id.* at § 2-301(a)(1)-(3).

76. *Id.* at ch. 191, § 15. Massachusetts declined to adopt Part 2 of Article II of the Uniform Probate Code, which contains fourteen separate statutes outlining the elective share of the surviving spouse. Massachusetts therefore retains its current elective share statute. *Id.*

77. *See* Sullivan v. Burkin, 460 N.E.2d 572, 578 (Mass. 1984) (noting that the current statute left many questions open that were appropriate for legislative action); *see also* Kathleen M. O'Connor, Note, *Marital Property Reform in Massachusetts: A Choice for the New Millennium*, 34 NEW ENG. L. REV. 261, 261-62, 271 (2000) (calling for legislative reform). Prior to the modernization of elective share statutes, many courts developed tests to

G. Revocation on Divorce

Post-MUPC, divorcing one's spouse no longer simply revokes only the will provisions in place for the surviving former spouse.[78] MUPC provisions that change the estate plan of a divorced spouse are much more comprehensive. Like preexisting law, divorce does not include separation.[79] However, for purposes of determining whether a person is entitled to rights in an estate as a "surviving spouse" under MUPC, if a final decree or judgment of divorce is assented to by the individual but is somehow invalid in the Commonwealth, then it will prevent the person from being recognized as a surviving spouse.[80]

In contrast to its puzzling failure to amend its elective share statute in light of the ubiquitous proliferation of will substitutes, section 2-804 of MUPC represents a legislative recognition of the vast nontestamentary estate planning environment. By virtue of

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prevent attempts to avoid the elective share through non-probate transfers. More recently, states are enacting statutes that subject non-probate transfers to the elective share as well. *See, e.g.*, DEL. CODE ANN. tit. 12, § 902(a) (2007) (subjecting the decedent's entire gross estate to the elective share); N.Y. EST. POWERS & TRUSTS LAW § 5-1.1(a)(1)(A) (McKinney1999) (granting the surviving spouse one-third of the decedent's net estate); N.C. GEN. STAT. § 30-3.1 (2009) (granting the surviving spouse a share of the total net assets of the decedent). The proliferation of nonprobate options mean that elective share statutes must be made more comprehensive. *See, e.g.*, UNIF. PROBATE CODE §§ 2-202, 2-203 (2008) (granting the surviving spouse one-half of the augmented estate).

78. *Compare* MASS. GEN. LAWS ch.191, § 9 (2004) *with* MASS. GEN. LAWS ch. 190B, §§ 2-802, 2-804 (effective Jan. 2, 2012)

79. MASS. GEN. LAWS ch. 190B, § 2-804(a)(2) (effective Jan. 2, 2012)

80. *Id.* at § 2-802(b). The statute provides:

> a surviving spouse shall not include:
>
> (1) an individual who obtains or consents to a final decree or judgment of divorce from the decedent or an annulment of their marriage, which decree or judgment is not recognized as valid in the commonwealth, unless subsequently they participate in a marriage ceremony purporting to marry each to the other or live together as husband and wife;
>
> (2) an individual who, following an invalid decree or judgment of divorce or annulment obtained by the decedent, participates in a marriage ceremony with a third individual; or
>
> (3) an individual who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights.

Id.

this provision, divorce now revokes not only the provisions made in the will for a surviving spouse, but also any provisions made in favor of the spouse in a host of will substitutes.[81] Preexisting law that failed to acknowledge the realities of modern estate planning by providing only that provisions in the will were revoked led to litigation when, for example, a decedent made provision for a spouse in a revocable trust. In the well-known case of *Clymer v. Mayo*,[82] already mentioned above, the Supreme Judicial Court conceded a tiny bit of slack in pre-MUPC law, holding that the statute also applied to certain revocable trusts, but only those that were funded entirely at death, and that were to be funded at least in part by a pour-over will.[83] So finally the oddly narrow holding of *Clymer* can be relegated to the dustbin, for the new statute revokes just about any interest in any revocable will substitute that a decedent had in place before the divorce or annulment of marriage.[84] MUPC uses the term "governing instrument," to define such devices, which include just about any property passing by beneficiary designation, such as an insurance policy, bank account with a pay-on-death feature, or any of a number of will substitutes.[85]

Three other features of the statute are markedly different from preexisting law. First, revocation of such provisions also extends to any disposition made to a "relative" of the former spouse.[86] A relative is any person related to the former spouse "by blood, adoption, or affinity and who, after the divorce or annulment, is not related to the divorced individual by blood, adoption or affinity."[87] Second, title to any property held by the decedent and the former spouse with rights of survivorship is severed and "transformed" into tenants in common.[88] Interests in any such property held by third parties are not affected without additional steps being taken.[89] Finally, the nomination of a former

81. *Id.* at § 2-804.
82. 473 N.E.2d 1084 (Mass. 1985).
83. Clymer, 473 N.E.2d at 1093.
84. Like pre-MUPC law, it also revokes powers of appointment. MASS. GEN. LAWS ch. 190B, § 2-804(b)(1) (effective Jan. 2, 2012).
85. *Id.* at §§ 2-804(b)(1), 1-201(19).
86. *Id.* at § 2-804(b)(1).
87. *Id.* at § 2-804(a)(5).
88. *Id.* at § 2-804(b)(2).
89. *Id.* at § 2-804(c). Section 2-804(c) states:

spouse or relative of the former spouse in any "fiduciary or representative capacity" by way of any such device is revoked.[90] This includes not only a personal representative, trustee, conservator or guardian, as is the case under current law, but also any "agent" of the decedent.[91] For purposes of determining who will be the successors to interests vacated under this statute, former spouses and their relatives are deemed to have disclaimed them.[92] As to provisions nominating former spouses and their relatives as fiduciaries, they are deemed to have died "immediately before the divorce or annulment."[93]

These new provisions are sure to provide some relief to the relatives of those who fail to amend their estate planning instruments after divorce. However, they are not intended to, and certainly do not, obviate the need for lawyers to urge clients to amend their documents (including will substitutes) after divorce or annulment of marriage. Even where the revocation-on-divorce provisions perfectly carry out a decedent's intent, the one-size-fits-all nature of this statutory cure for the dithering divorced is sure to result in estate plans that pass property other than according to their wishes. Further, unlike wills, which are simple client directives and do not implicate third parties, will substitutes are almost always third-party beneficiary contracts. So despite the comprehensive scope of the statutory language, legal considerations to third parties will in some cases prevent revocation of a beneficiary designation from taking effect.

One very important example of which all estate planners should be aware is created by the Employee Retirement Income Security Act of 1974 (ERISA), which applies to all qualified employer-sponsored retirement plans.[94] ERISA contains a federal

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A severance under subsection (b)(2) shall not affect any third-party interest in property acquired for value and in good faith reliance on an apparent title by survivorship in the survivor of the former spouses unless a writing declaring the severance has been noted, registered, filed, or recorded in records appropriate to the kind and location of the property which are relied upon, in the ordinary course of transactions involving such property, as evidence of ownership.

90. MASS. GEN. LAWS ch. 190B, § 2-804(b)(1) (effective Jan. 2, 2012).
91. *Id.*
92. *Id.* at § 2-804(d).
93. *Id.* at § 2-804(e).
94. 29 U.S.C. § 1001 (1974).

preemption clause that has been interpreted very broadly.[95] In the important case of *Egelhoff v. Egelhoff*,[96] the decedent died after divorcing his wife without having changed the beneficiary designation on his life insurance and pension plan provided by his employer and governed by ERISA.[97] A Washington state statute provided that the designation of the spouse as beneficiary of any nonprobate asset was automatically revoked upon divorce.[98] After the decedent's death, his children argued that they were entitled to the proceeds as the decedent's heirs.[99] The Supreme Court held that ERISA expressly preempted the Washington statute by its language that stated that it was to "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" that was governed by ERISA.[100] The Court reasoned that the Washington statute attempted to bind the ERISA plan administrators to its rules where determination of beneficiaries was concerned, when ERISA required that the beneficiary was to be determined only by plan documentation.[101] Since ERISA governs all qualified employer-sponsored retirement plans, it is currently very unlikely that MUPC provisions for revocation-on-divorce will work with respect to those plans. Unless the particular plan contains provisions in line with state law, plan participants will need to complete new beneficiary designation forms subsequent to divorce. And even if the participant wants the benefit to go to the same person as was named pre-divorce, a new form must be executed if that beneficiary happens to fall within the scope of the statute.

The planner cannot even rely on the statute for will substitutes not governed by ERISA. Insurance companies and other contracting parties with respect to these devices who are unaware of the divorce may well pay the benefit to the person designated on the form, regardless of the new MUPC provision. In fact, the statute contains provisions that absolve the paying party from liability in such a contingency. Any "payor"[102] that has not

95. *Id.* at § 1144(a).
96. 532 U.S. 141 (2001).
97. *Id.* at 144.
98. *Id.* at 141.
99. *Id.*
100. *Id.* at 146.
101. *Id.* at 147.
102. MUPC defines a payor as "a trustee, insurer, business entity,

received written notice of the divorce is not liable for paying the benefit to the person designated in the contract.[103] Written notice for purposes of the statute is to be "mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action."[104] Payors who receive notice may pay the property into the court for disbursement, regardless of whether a probate action has been commenced.[105] The divorcing party will clearly find it easier to simply change the beneficiary designation form. However, if he or she dies not having done so, then those who would take in lieu of the spouse under the statute, if they are aware of the nonprobate asset, can provide the notice to the payor to ensure that the benefit is not paid to the former spouse.

Further, a former spouse (or former spouse's relative) who is paid the benefit by mistake is not entitled to keep it. The recipient, or even someone who subsequently receives the property from the recipient for no value, is personally liable for its payment to the entitled beneficiary.[106] If, however, a third party receives the property by purchase from the wrong payee for value and without notice, then the third party is not liable to the entitled beneficiary.[107] Finally, the statue contains an anti-*Egelhoff* provision. Where federal law preempts the statute, any person receiving the property solely because of the preemption is personally liable to the entitled beneficiary.[108] According to the UPC comment, this provision reflects that while federal law has an interest in the administration of ERISA-governed plans, it is not concerned with the ultimate disposition of the property.[109]

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employer, government, governmental agency or subdivision, or any other person authorized or obligated by law or a governing instrument to make payments." MASS. GEN. LAWS ch. 190B, § 1-201(35) (2009).

103. *Id.* at § 2-804(g)(1).

104. *Id.* at § 2-804(g)(2).

105. *Id.*

106. *Id.* at § 2-804(h)(1).

107. *Id.*

108. MASS. GEN. LAWS ch. 190B, § 2-804(h)(2) (effective Jan. 2, 2012).

109. *Id.* at § 2-804 cmt. The comment states:

> This provision respects ERISA's concern that federal law govern the administration of the plan, while still preventing unjust enrichment that would result if an unintended beneficiary were to receive the

The takeaway for the estate planning lawyer is that, despite the statute's provision for revocation of benefits to former spouses and their relatives, unpredictability can result if beneficiary designation forms are not changed after divorce. Where that has not been done lawyers representing entitled beneficiaries can assist their clients by giving notice in compliance with the statute. Wrongful recipients are never off the hook, however; they remain personally liable to the entitled beneficiaries.

MUPC also contains a comprehensive codification of what is often referred to as a "slayer rule."[110] It essentially prevents a person who "feloniously and intentionally kills the decedent" from sharing in the decedent's estate.[111] As in the case of the revocation-on-divorce provisions, the statute encompasses more than simply the probate estate. It bars the killer from benefitting from nonprobate assets and from serving as a fiduciary.[112] The structure of the statute is similar to the revocation-on-divorce provisions. Interestingly, the Commonwealth enacted a slayer statute effective in 2003, although the MUPC provision is more detailed and provides answers to questions about the scope of the preexisting law that were unclear.[113]

H. Terms and Definitions

Practitioners may wish to make sure their form documents are consistent with definitions provided in MUPC. Most of these definitions are consistent with preexisting law,[114] but some represent trends in terminology that will provide the lawyer with a good opportunity to update language no longer in favor. For example, MUPC reflects that the dichotomy between "bequest" (personal property) and "devise" (real property) is no longer seen as needed or helpful. So MUPC defines devise, whether used as a

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pension benefits. Federal law has no interest in working a broader disruption of state probate and nonprobate transfer law than is required in the interest of smooth administration of pension and employee benefit plans.

110. *See id.* at § 2-803.

111. *Id.* at § 2-803(b).

112. *Id.* at § 2-803(c)(1).

113. *See* MASS. GEN. LAWS ch. 265, § 46 (2003).

114. For example, the term "child" is defined to include natural and adopted children and to exclude a stepchild and a foster child. *Id.* at ch. 190B, § 1-201(5).

noun or verb, as encompassing both real and personal property.[115] Lawyers who carefully differentiate between bequests and devises in their documents should consider whether that is any longer necessary. Likewise, the term "personal representative" seems to be the favored way of referring to executors, administrators, and all other fiduciaries charged with the administration of an estate.[116] Again, and perhaps especially in light of new options for probate,[117] lawyers should consider whether form documents that refer to an executor should use this more generic term.

Optimal drafting of wills, trust instruments, and beneficiary designation directives often means including contingent distributions to the descendants of a taker who does not survive the testator.[118] Thus it is common for wills to provide for a devise such as "my residuary estate to my daughter A, if she survives me, and if she does not, then to her descendants, per stirpes." Because the meaning of per stirpes and like terms such as "by representation" can vary from jurisdiction to jurisdiction and even within a jurisdiction from time to time, it is generally advisable to define such terms within the documents. Suppose, for example, that A in the above example predeceased the testator and left only three grandchildren, X and Y (children of deceased son E) and Z (child of deceased daughter F), as her living descendants. The amount received by an individual grandchild would depend upon whether the "stocks" or branches of distribution in this per stirpes arrangement were intended to be the children or the grandchildren. If the testator intended the distribution to follow the pre-MUPC Massachusetts intestacy scheme (sometimes called "modern" per stirpes),[119] the stocks are determined by the first generation with descendants alive; here that is the grandchildren of A. Under the traditional "English" per stirpes scheme, however, the stocks are the first generation of descendants who are alive, or, if dead, who left any descendants of their own alive; here, the

115. *Id.* at § 1-201(10).
116. *Id.* at § 1-201(37).
117. Except in a couple of cases where they have a particular effect on the drafting process, the extensive changes to the Massachusetts probate process wrought by MUPC are beyond the scope of this paper.
118. For purposes of a particular will, surviving the testator may mean survival by a period of time, such as thirty days.
119. *Id.* at ch. 190, § 3.

children of A. So under the Massachusetts scheme, X, Y and Z in our example would each get an equal share—one-third of the residuary estate. In a jurisdiction following the English per stirpes rule the children would be the stocks, so X and Y would split E's one-half and get one-fourth each, while Z would receive one-half. If the Massachusetts testator does not define the term per stirpes, the courts would presumably follow the Massachusetts intestacy scheme, although no cases are precisely on point.[120]

MUPC institutes considerable changes here. Under MUPC, if either the term "per stirpes" or "by representation" is used in a will or other governing instrument whose terms do not indicate a contrary definition, then its meaning is defined under section 2-709.[121] But unfortunately it is not clear whether section 2-709(c) uses English per stirpes or modern per stirpes.[122] The statute reads as follows:

> If a governing instrument calls for property to be distributed "by representation" or "per stirpes", the property is divided into as many equal shares as there are (i) surviving children of the designated ancestor and (ii) deceased children who left surviving descendants. Each surviving child is allocated 1 share. The share of each deceased child with surviving descendants is divided in the same manner, with subdivision repeating at each succeeding generation until the property is fully allocated among surviving descendants.[123]

While MUPC adopts most of the UPC version of section 2-709(c), a crucial phrase is missing. The second sentence of the UPC version reads, "[e]ach surviving child, *if any*, is allocated one share."[124] One would surmise that the omission of the phrase in MUPC was an intentional choice to adopt modern per stirpes,

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120. *See, e.g.*, Bank of New England v. McKennan, 477 N.E.2d 170, 172 (Mass. App. Ct. 1985);*see also* DUKEMINIER , *supra* note 55, at 868 (suggesting that when "by representation" is used the trend is toward interpreting the instrument as meaning the system of representation followed in the intestacy statutes but when "per stirpes" is used it is usually taken to mean English per stirpes.

121. MASS. GEN. LAWS ch. 190B, § 2-709(c) (effective Jan. 2, 2012).

122. *See id.*

123. *Id.*

124. UNIF. PROBATE CODE § 2-709(c) (amended 1993) (emphasis added).

rather than the English version of the UPC. In fact, the phrase "if any" was added to the UPC version of the statue in 1993; before that time it read just as the MUPC version. But the comments to the UPC version say that the phrase was inserted not to change the statute's meaning but rather to make its meaning clearer. According to the comment, the phrase was thought necessary only "to clarify the point that, under per stirpes, the initial division of the estate is made at the children [sic] generation even if no child survives the ancestor."[125] This would imply that MUPC means the same thing as the UPC version. But if that is the case, why was the phrase deleted in the MUPC version?[126] Needless to say, this confusion makes defining the phrase within the document even more important.[127]

Post-MUPC, drafters may wish to avoid this confusion altogether and, after consultation with their clients of course,[128] to default to the method described as "per capita at each generation." This method of distribution has a couple of advantages. First, it is consistent with the method used by MUPC's intestacy statute and therefore should soon become familiar to judges and practitioners.[129] Presumably it is already familiar to practitioners and courts in other jurisdictions that have adopted the UPC and would line up with MUPC's stated goal of making "uniform the law among the various jurisdictions."[130] Second, and most important, the only empirical study done on representation methods offers support for a conclusion that a substantial majority of clients preferred per capita at each generation to other methods.[131] Like the modern per stirpes regime used by pre-MUPC law, this method does not divide the distribution until it

125. *Id.* cmt.

126. Certainly not to make the meaning *muddier*, one would guess.

127. Another commonly used term when distributing property among descendants is "by representation." Under MUPC, this phrase carries the same meaning as per stirpes. MASS. GEN. LAWS ch. 190B, § 2-709(c) (effective Jan. 2, 2012).

128. How many of us actually discuss this particular issue in any detail with the client?

129. *See* MASS. GEN. LAWS ch. 190B, §§ 2-103(1), 2-106(b) (effective Jan. 2, 2012).

130. *Id.* at § 1-102(b)(5).

131. Raymond H. Young, *Meaning of "Issue" and "Descendants,"* 13 PROB. NOTES 225, 225, 226 (1988).

arrives at the first generation that has takers alive—this is where the "stocks" are determined. As in modern per stirpes one share is distributed to each living person at this "first generation" and one share is set aside for each deceased person at the first generation who leaves living descendants. Where it differs from modern per stirpes is in what it does with any shares brought to the next-lower generation ("second generation") and any succeeding generations. At this point, under modern per stirpes, the stocks having been determined, shares belonging to a stock are divided only among members of that stock. But under per capita at each generation those shares are combined and the process is begun anew with any persons alive at the second generation level who have no first generation ancestors. Thus, under per capita at each generation, takers at all generational levels receive an equal share with all other takers at their generational level. And again, since this is what is used in the intestacy statute, it makes sense to adopt it as a default.

I. Simultaneous Death

It is generally advisable to provide in the will for the possibility of simultaneous death of the testator and the named devisee. Thus the will often contains a provision requiring the devisee to survive for a stated time period after the testator's death, usually thirty days or more, in order to take the devise. Those Massachusetts wills that do not contain such a provision must rely on state law in the event of simultaneous death, the pre-MUPC version of which includes a Uniform Simultaneous Death Act ("USDA"),[132] repealed by MUPC effective January 2, 2012.[133] Although the Uniform Law Commission revised the USDA in 1990 to require that an individual survive for 120 hours in order to be deemed to have survived an event, Massachusetts retained the older version, which defined a simultaneous death as one in which there was "no sufficient evidence that the persons concerned have died otherwise than simultaneously."[134] In such a case, the devisee is conclusively presumed to have predeceased the testator

132. MASS. GEN. LAWS ch. 190A (2004).

133. *See* An Act Relative to the Uniform Probate Code, ch. 521, 2008 Mass. Acts.

134. MASS. GEN. LAWS ch. 190A, §1 (2004).

for purposes of determining the fate of the devise. A will that requires a devisee to survive by some period avoids the potentially considerable emotional and financial toll of determining who died first in the case of a common accident, for example.[135] Since in most such cases the testator would want the alternative plan of disposition to take effect regardless of whether the devisee technically survived for a short period of time, such a provision is generally recommended. This will continue to be especially important in the drafting of the Massachusetts will, because, even though MUPC repeals the USDA, the MUPC provision is simply that a person who is not "established to have survived an event" is deemed to have predeceased it.[136] Whether this changes current law depends upon whether there is a legal difference between a situation in which there is "no conclusive evidence" that one survives and a situation in which a person is not "established to have survived." It would seem not, especially given MUPC's directive that law not particularly "displaced" by MUPC is retained.[137] In any event, it should be noted that MUPC here fails to follow the UPC provision, which, as does the USDA, contains the 120-hour requirement.[138] But more importantly, MUPC does

135. *See, e.g.*, Janus v. Tarasewicz, 482 N.E.2d 418 (Ill. App. Ct. 1985). In this case, both husband and wife died as a result of ingesting cyanide-laced Tylenol. *Id.* at 419. Upon arrival at the hospital, the husband had no blood pressure and was not breathing on his own; however, his wife still had a pulse and blood pressure upon arrival. *Id.* at 420. The wife's heart rate was be stabilized and she showed some neurological response. *Id.* Shortly thereafter, she was deemed to have sustained total brain death and was removed from life support, dying shortly thereafter. *Id.* at 420-21. Concluding that the wife survived the husband, the insurance company paid the proceeds of his life insurance policy to her estate. *Id.* at 421. The mother of the husband, who was the contingent beneficiary of his life insurance policy, contested the payment to the wife's estate. *Id.* at 419, 421. The neurologist who testified at trial determined that the wife was dead on her arrival at the hospital and that the minimal neurological response that showed on the tests was a result of interference from surrounding equipment. *Id.* at 421. Another expert witness, however, determined that she actually did not die until she was taken off of life support two days after her arrival. *Id.* Despite the conflicting testimony, the court looked at the evidence as a whole and determined that the wife did survive the husband and that the exact time of death was not important. *Id.* at 424.

136. MASS. GEN. LAWS ch. 190B, § 2-702(a) (effective Jan. 2, 2012).

137. *Id.* at § 1-103.

138. UNIF. PROBATE CODE § 2-104 (amended 2008) ("An individual born before a decedent's death who fails to survive the decedent by 120 hours is

permit the provisions of a testator's will to override the presumption.[139] Again, it is recommended that this be done.

J. Contracts Concerning Succession

One should never enter into a contract concerning succession where a trust would be more effective in accomplishing intended goals, as trusts are easier to create and generally achieve more predictable results. Nonetheless, there may be occasions when an irrevocable trust will not be sufficient to meet one's purposes. Pre-MUPC, Massachusetts contracts concerning succession were required to be in writing and signed by the person whose estate is to be charged.[140] Case law provided that all of the material terms of a contract had to be in writing; a written "memorandum" was not sufficient.[141] MUPC greatly relaxes these requirements. Contracts to make or refrain from making a will, to revoke or refrain from revoking a will, or even to die without a will, are enforceable if "established" by:

> (i) provisions of a will stating material provision of the contract,
>
> (ii) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract, or
>
> (iii) a writing signed by the decedent evidencing the contract.[142]
>
> As under pre-MUPC law, no presumption of a contract not to revoke is created by the fact of a joint will or mutual wills.[143]

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deemed to have predeceased the decedent . If it is not established by clear and convincing evidence that an individual born before the decedent's death survived the decedent by 120 hours, it is deemed that the individual failed to survive for the required period.").

139. MASS. GEN. LAWS ch. 190B, §§ 2-702(d)(1) and (2) (effective Jan. 2, 2012); *see also id.* at § 2-701 (the "rules of construction" of Part 2, which includes § 2-702, apply "[i]n the absence of a finding of a contrary intention shown by the terms of the will").

140. *Id.* at ch. 259 §§ 5, 5A (2004).

141. Rowell v. Plymouth-Home Nat. Bank, 434 N.E.2d. 648, 649 (Mass. App. Ct. 1982) (holding that recovery in quantum meruit was appropriate); *but see* Hastoupis v. Gargas. 398 N.E. 2d 745, 750 (Mass. App. Ct. 1980).

142. MASS. GEN. LAWS ch. 190B, § 2-514 (effective Jan. 2, 2012).

143. *Id.* at § 2-514.

K. Penalty Clause for Will Contests

The UPC follows the majority American rule that clauses imposing a forfeiture or other penalty on a person challenging a will are invalid if probable cause exists for the contest, but the Commonwealth did not adopt that position. MUPC instead retains pre-MUPC law providing that these clauses are enforceable.[144] Presumably this law transfers to MUPC fully intact. That being the case, Massachusetts practitioners wishing to use such a clause should be mindful of the recent case of *Savage v. Oliszczak*.[145] That case held that where an in terrorem clause was inserted into a revocable trust but not the pour-over will, a challenge to the will did not trigger a forfeiture.[146] Since the MUPC provision references only "a provision in a will" the holding of this case would also presumably remain intact.

IV. RULES OF CONSTRUCTION APPLICABLE ONLY TO WILLS

A. Antilapse

Antilapse statutes are intended to correct a failure of the scrivener to anticipate the predecease of a devisee.[147] They typically provide that, where the predeceased devisee stands in a certain relation to the testator, the devise will go to the devisee's descendants unless the will otherwise provides. In the absence of the statute, the gift would lapse, and be distributed to the residuary beneficiaries or, in the case of a lapse of the residue, to the intestate heirs.[148] MUPC gives the Commonwealth's antilapse provisions an overhaul; fortunately, however, they do not get the full UPC treatment, as will be explained below. Pre-MUPC law extended antilapse treatment to any "child or other relation of the testator," specifically including adopted children within its reach.[149] MUPC, on the other hand, applies to any "grandparent

144. MASS. GEN. LAWS ch. 190B, § 2-517 (effective Jan. 2, 2012). Pre-MUPC law is stated by Old Colony Trust Co. v. Wolfman, 42 N.E. 2d 574, 574 (Mass. 1942).

145. 928 N.E.2d 995 (Mass. App. Ct. 2010).

146. *Id.* at 997.

147. *See generally* DUKEMINIER, *supra* note 55, at 364-74.

148. *See* RESTATEMENT (THIRD) OF PROPERTY, WILLS AND OTHER DONATIVE TRANSFERS § 1.2 (1999).

149. MASS. GEN. LAWS ch. 191, § 22 (2004).

or lineal descendant of a grandparent."[150] As a practical matter, this striking difference in the description of those to whom the statute applies achieves little or no change. Case law in Massachusetts interpreted the pre-MUPC provision to apply only to relations by blood;[151] thus, in-laws[152] and stepchildren[153] were not included. Neither were husbands and wives considered relations of the testator under pre-MUPC law,[154] while cousins[155] and their offspring[156] were. It seems then, that the MUPC description of grandparents and their lineal descendants will result in a similar, if not identical, interpretation. Now, however, one need not venture into the case law to determine to whom the statute applies.

In the case of a class gift, the pre-MUPC rule specifically applied even to those class members who were deceased at the execution of the will. MUPC retains this rule, although it is not technically restricted to class gifts.[157] Presumably this would also cover the situation where the testator was unaware at the time of execution of the will that a particular intended devisee was deceased. Although the new statute does not contain language like that found in the pre-MUPC version making clear that the statute does not apply if the will provides otherwise, as a rule of construction applicable to wills, the statute is contained in Part 6 of MUPC. Section 2-601 states that the Part 6 rules apply absent "a finding of a contrary intention shown by the terms of the will."[158] The pre-1990 UPC statute, which section 2-603 roughly

150. *Id.* at § 2-603.
151. Union Trust Co. of Springfield v. Bingham, 173 N.E. 435, 436 (Mass. 1930).
152. Horton v. Earle, 38 N.E. 1135, 1135 (Mass. 1894).
153. Kimball v. Story, 108 Mass. 382, 385 (1871).
154. State St. Trust Co. v. White, 26 N.E. 2d 356, 358 (Mass. 1940).
155. *Id.*
156. *Union Trust Co. of Springfield*, 173 N.E. at 436.
157. MASS. GEN. LAWS ch. 190B, § 2-603 (effective Jan. 2, 2012). In addition to devises to those who are alive at execution but who predecease the testator, the statute specifically extends its application to devises where the "devisee is...dead at the time of execution of the will[.]" *Id.* Redundantly, it also specifically applies to those persons who would have been devisees under class gifts "whether [their] death occurred before or after the execution of the will." *Id.* The MUPC provision is close to the pre-1990 version of the UPC.
158. *Id.* at § 2-601.

tracks,[159] was also so intended and interpreted. Many practitioners use words like "if she survives me" to indicate such a contrary intention. So where the will says "I give the sum of $10,000 to my niece, Martha, if she survives me," the antilapse statue will not apply in the event Martha predeceases the testator. But Massachusetts lawyers should be aware that the 1990 version of the UPC's antilapse statute contains a quite controversial provision providing 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 contrary intent.[160] Although the Massachusetts legislature wisely chose not to enact this newer version of the UPC statute, the UPC comment takes the position that these "words of survivorship" are "much-litigated" and states boldly that lawyers who believe that language such as this "is a foolproof method of defeating an antilapse statute are mistaken."[161] As if to prove this point, Connecticut's Supreme Court, in the 2006 case of *Ruotolo v. Tietjen*, held that the phrase "if she survives me" did not prevent that state's antilapse statute from applying, even though it contained no such provision as that found in the UPC version.[162] This case has been soundly criticized,[163] but it signals that practitioners in all states should switch to alternative language to indicate that the antilapse statutes are not intended to apply. Something in the nature of "To my niece, Martha, if she survives me; and if not then this devise shall lapse," should suffice. Alternatively the antilapse statute can be nullified by the insertion of boilerplate language in the document indicating that it is not to apply in any event.[164]

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159. The only difference between the MUPC statute and the pre-1990 version of the UPC is the omission in MUPC of language requiring the issue of the testator to survive by at least 120 hours in order to take. *See* UNIF. PROBATE CODE § 2-601 (1969).

160. UNIF. PROBATE CODE § 2-603(b)(3) (2008). *See* Jeffery A. Cooper, *A Lapse in Judgment:* Ruotolo v. Tietjen *and Interpretation of Connecticut's Anti-Lapse Statute*, 20 QUINNIPIAC PROB. L.J. 204, 216-17 (2007); Mark L. Ascher, *The 1990 Uniform Probate Code: Older and Better, or More Like the Internal Revenue Code?*, 77 MINN. L. REV. 639, 651-52 (1993).

161. UNIF. PROBATE CODE § 2-603 cmt. (2008).

162. Ruotolo v. Tietjen, 890 A.2d 166, 177 (Conn. App. Ct. 2006).

163. *See, e.g.*, Cooper, *supra* note 160, at 204.

164. One wonders, however, when the Uniform Law Commission, which apparently has significant influence on the courts, will decide that boilerplate

Where the antilapse statute does not apply to a devise to a predeceased devisee, the devise becomes a part of the residue.[165] If the lapsed devise is part of the residue, then it will pass to the intestate heirs if there are no other residuary beneficiaries. If there are other residuary beneficiaries, then those persons take the lapsed devise "in proportion to the interest of each in the remaining part of the residue."[166]

B. Ademption of Specific Devises

Massachusetts has long followed the traditional "identity" theory of ademption.[167] Under this theory, if property that was the subject of a specific devise is not a part of the testator's estate at his death, the devise is "adeemed" or considered void. No attempt is made to determine whether the testator would have intended this result.[168] Section 2-606 of MUPC largely codifies this common law rule. The statute does contain many very specific exceptions where, for example, property has been sold but the purchase price has not been fully paid, the property is the subject of a condemnation award that has not been fully paid, or the property was destroyed by fire or casualty that is reimbursable by insurance not fully paid.[169] The Massachusetts legislature rejected that portion of the UPC that integrated the so-called "intent" theory of ademption into the statute.[170] Lawyers drafting wills for clients who may wish to provide a substitute gift for specifically devised property no longer a part of the estate at death will still need to specifically provide for such an alternative in the will.

C. Exercise of Powers of Appointment by Will

Under pre-MUPC case law, a general residuary clause in a will was effective to exercise a general power of appointment unless the language creating the power requires that specific

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should also be ignored.

165. MASS. GEN. LAWS ch. 190B, § 2-604(a) (effective Jan. 2, 2012).

166. *Compare* MASS. GEN. LAWS ch. 190B, § 2-604(b) (effective Jan. 2, 2012) *with* MASS. GEN. LAWS ch. 191, § 1A(5) (calling for shares of the residuary to be divided proportionately).

167. *See* Walsh v. Gillespie, 154 N.E.2d 906, 908 (Mass. 1959).

168. *See* UNIF. PROBATE CODE § 2-606 cmt. (2008).

169. MASS. GEN. LAWS ch. 190B, §§ 2-606(a)(1) through (3) (effective Jan. 2, 2012).

170. *See* UNIF. PROBATE CODE § 2-606(a)(5)-(6) (2008).

reference be made to it in order for exercise to be effective.[171] On the other hand, a limited or special power of appointment was not exercised by a general residuary clause.[172] This was changed by rules of construction applicable to wills enacted by the Massachusetts Legislature in 1976, providing that a "general residuary clause" does not exercise a power of appointment "unless reference is made to powers of appointment or there is some other indication of intention to exercise the power."[173] Under MUPC, a general residuary clause, without more, remains ineffective to exercise a general power of appointment. MUPC section 2-608 goes on to provide that a general residuary clause in a will is effective to exercise a general power only under two circumstances: First, it is effective if the instrument creating the power does not create a gift over or taker in default of exercise of the power.[174] Second, it is effective if the "will manifests an intention to include the property subject to the power."[175] The old Massachusetts common law rule apparently evolved because general powers, unlike special powers, were deemed to be akin to full ownership of property.[176] It would make sense under this thinking that a comprehensive residuary clause would serve to exercise a general power of appointment. But the subsequent legislation, and now the MUPC rule, seems to be the better one given current practice. Powers of appointment, whether general or special, often operate either to ensure a tax benefit[177] or to provide flexibility in the event the default disposition is no longer deemed optimal. While careful practitioners creating these powers make sure the creating language requires a specific reference to the power to trigger an exercise, it makes sense to shift the default

171. Beals v. State St. Bank and Trust Co., 326 N.E.2d 896, 900 (Mass. 1975).

172. *Id.*; *see also* McKelvy v. Terry, 346 N.E. 2d 912, 914 (Mass. 1976).

173. MASS. GEN. LAWS ch. 191, § 1A(4) (2004).

174. MASS. GEN. LAWS ch. 190B, § 2-608(a)(i) (effective Jan. 2, 2012) (stating that the residuary clause exercises the power if "the creating instrument does not contain an effective gift if the power is not exercised"); *see also id.* at § 2-608 cmt. (explaining the cryptic "effective gift" language stating the residuary clause is effective if "the instrument that created the power does not contain a gift over in the event the power is not exercised (a 'gift in default')").

175. *Id.* at § 2-608(a)(ii).

176. *Beals*, 326 N.E.2d at 900.

177. *See, e.g.*, 26 U.S.C. § 2056(b)(5) (2006).

rule to one of non-exercise. The MUPC rule will prevent the inadvertent exercise of powers. Nonetheless, unless the intent is to exercise a power, it remains prudent to include language in the residuary clause indicating that there is no intention to do so.[178]

V. RULES OF CONSTRUCTION FOR WILLS AND "OTHER GOVERNING INSTRUMENTS"

Perhaps the biggest advantage MUPC gives the Massachusetts estate planner over pre-MUPC law is brought about by MUPC's recognition that nonprobate transfers are a major part of the process of donative transfers of property interests. For this reason, MUPC contains a number of rules that explicitly apply not only to wills, but to all governing instruments. The term "governing instrument" is defined to include just about any document that can effect a donative transfer of property.[179] It includes the well-known nonprobate devices, such as life insurance contracts and retirement plans, as well as just about any other instrument that can be used for this purpose.[180] This section of the article discusses some of the rules of construction for all governing instruments with which the estate planner should be familiar.

A. Simultaneous Deaths

MUPC's general principles regarding simultaneous death as discussed above regarding the will are carried over to governing instruments as a whole.[181] That is, in general, a person who is not "established" to have survived an event is deemed to have predeceased it.[182] This puts the burden on beneficiaries who wish

178. A phrase such as, "except that if I have been given a power of appointment under any other instrument I do not intend by this devise to exercise such power" should suffice.

179. MASS. GEN. LAWS ch. 190B, § 1-201(19) (2009).

180. The definition specifically includes "a deed, will, trust, insurance or annuity policy, account with POD designation, security registered in beneficiary form (TOD) pension, profit-sharing, retirement, or similar benefit plan, instrument creating or exercising a power of appointment or a power of attorney, or a donative, appointive, or nominative instrument of any other type." *Id.*

181. *See supra* Part III.I.

182. *See generally* MASS. GEN. LAWS ch. 190B, § 2-702 (effective Jan 2, 2012).

to share in a transfer to prove survival. As is the case regarding the will's simultaneous death provisions, MUPC unwisely foregoes the UPC's 120-hour requirement. Here, as in the case of the will, a governing instrument can override the rule, so practitioners would be well-advised to require survival for a period of time in beneficiary designation forms and other nonprobate transfers.[183] With respect to co-owners of jointly-held survivorship property, one-half of the property will pass as if each had survived in the event it cannot be established that one survived the other.[184] This provision extends to "joint tenants, tenants by the entireties" and other property interests where the death of one co-owner triggers full ownership in the survivor or survivors.[185] MUPC's omission of the UPC's 120-hour requirement here could be particularly inconvenient where real property interests are concerned as one cannot draft around the constructional rule where tenants by the entirety, for example, are concerned. But with respect to interests such as joint bank accounts, contracts with the banks should include some temporal survival requirement if at all possible. Certainly the lawyer can easily insert such a requirement in beneficiary designation forms for life insurance contracts, retirement accounts and other contractual interests in property involving third-party intermediaries. Although financial institutions sometimes balk at accepting these types of amendments to their forms, it is the author's personal experience that the persistent lawyer will generally prevail.

MUPC also continues its scheme of liability protection for "payors" under these types of donative transfers. Payors, which include "a trustee, insurer, . . . or any other person authorized or obligated by law or a governing instrument to make payments"[186] escape liability for making payment to the wrong beneficiary so long as the payee was named in the governing instrument.[187] This seems like a pretty large escape hatch and one wonders whether such an easy route to immunity is necessary or provides the proper incentives for institutional third parties. More sensibly,

183. The MUPC permits the governing instrument to override the rules of construction. *Id.* at § 2-702(d)(1).
184. *Id.* at § 2-702(c).
185. *Id.*
186. MASS. GEN. LAWS ch. 190B, § 1-201(35) (2009).
187. MASS. GEN. LAWS ch. 190B, § 2-702(d)(1) (effective Jan. 2, 2012).

payors are also exonerated where they relied in "good faith" on the person's "apparent entitlement under the terms of the governing instrument."[188] Payors can only be held liable for payment to the wrong beneficiary under these circumstances where they make payment after having "received written notice of a claimed lack of entitlement."[189] Needless to say, this broad payor immunity for improper payment means that lawyers representing estates and beneficiaries should be prepared to send notices to payors where a beneficiary's entitlement to a benefit could be subject to confusion. MUPC contains very specific requirements for doing so.[190]

On the receiving end, the doling out of liability is different. While persons who receive property "for value and without notice" are shielded from liability, donees who are improperly paid a benefit do not fare so well. In contrast to the mistaken payor, the donative payee is fully liable, and must return the property or face personal liability for same.[191] This raises the question whether the immunity from liability for the mistaken payor extends only to the estate of the donor, or whether the mistaken payee who innocently spent the payout and is now liable to the proper beneficiary can seek contribution from a payor who was negligent. Given that the language of the statue granting payor immunity is broad (the payor "is not liable"), one would think that the payee is on his own.[192] Again, lawyers representing estates should err on the side of sending the proper notices where any question might arise as to the proper payee.

Practitioners need to be keenly aware of what might be called an "anti-*Egelhoff*" provision contained in the statute. *Egelhoff*, discussed above,[193] held that ERISA's rule that a qualified plan is to "specify the basis on which payments are made to and from the plan,"[194] preempted any state law regarding payment of the plan benefits.[195] MUPC's rules regarding payout might be inconsistent with plan documentation that, for example, might include a minimum temporal survivorship requirement. In such a case,

188. *Id.* at § 2-702(e)(1).
189. *Id.*
190. *Id.* at § 2-702(e)(2).
191. *Id.* at § 2-702(f)(1).
192. *See id.* at § 2-702(e)(1).
193. *See supra* Part III.G.
194. 29 U.S.C. § 1102(b)(4) (1974).
195. *Egelhoff*, 532 U.S. at 146.

MUPC would impose personal liability on the donative payee for return of the benefit to the person so-entitled under the rules of MUPC, even though the payout was proper according to the plan documentation.[196] This section is curious to say the least, and should these facts arise it is entirely unclear whether it would be enforceable given that the dictates of federal law would conflict with the obligations of the parties under state law. Nonetheless, it is a part of MUPC and those practitioners who encounter the facts should be aware of the rule.

B. Choice of Law

Many nonprobate devices are represented by form documents prepared by the institution that supplies the document to the transferor. For example, a bank will supply a pay-on-death form for a bank account and an insurance company will supply a beneficiary designation form for policies it issues. MUPC provides that where any such instrument contains a choice-of-law provision, that provision will be respected as to questions regarding the "meaning and legal effect" of the disposition.[197] Needless to say this could cause some additional complication for practitioners. For example, suppose that an insurance company provided a beneficiary designation form that by its terms was to be interpreted under Connecticut law. Even though this document was being used by an owner of the policy who was domiciled in Massachusetts and who named a Massachusetts-domiciled beneficiary, Connecticut law would be applied to determine the meaning and effect of the disposition. Since Connecticut has determined, by case law, that the words "if she survives me" does not prevent an antilapse statute from applying,[198] this rule may be applied to the insurance benefit at issue even though the Commonwealth has specifically rejected this interpretation. For this reason, in the age of the ubiquitous nonprobate transfer, the lawyer cannot afford to be unaware of major trends in other jurisdictions.

196. MASS. GEN. LAWS ch. 190B, § 2-702(f)(2) (effective Jan. 2, 2012).

197. *Id.* at § 2-703. Exceptions exist where this might be contrary to the Massachusetts elective share, exempt property, and allowances or "public policy" of the Commonwealth. *Id.*

198. *See supra,* notes 162-64 and accompanying text.

C. Class Gifts

Lawyers should take care to define class gifts very carefully. Absent contrary indication in the governing instrument, class gifts are deemed under MUPC to include persons who qualify by adoption and those born out of wedlock.[199] Also, class labels "that do not differentiate relationships by blood from those by affinity" will exclude those who qualify by affinity.[200] Case law exists across jurisdictions addressing whether persons who adopt adults can thereby bring them into the scope of a class.[201] This ploy will generally be ineffective under MUPC because, for purposes of construing class gifts, the adopted person will not be considered the child of the adopting parent unless that parent is also the transferor.[202]

D. Applying Antilapse to Trusts

Future interests, including those created by trusts, can be either vested or contingent. Massachusetts law has followed the general rule that favors vested interests. This means that a trust instrument providing for a remainder beneficiary creates a vested interest unless the instrument specifically indicates that "the remainderman must survive the life tenant in order to take."[203] Thus, "a transfer of property to A for life, to B for life, and remainder to C vests upon the creation of the interest and goes to C whether or not C is living when the property vests in possession."[204] C's interest is vested and transmissible, so if C predeceases B, then the property goes to C's estate upon the death of B.

Section 2-707 of MUPC would change this result.[205] The section does two things. First, it reverses the above presumption

199. MASS. GEN. LAWS ch. 190B, § 2-705(a) (effective Jan. 2, 2012).
200. *Id.* Half-blood relationships are included in the class to the same extent as are whole-bloods. *Id.*
201. *See, e.g.*, Commerce Bank v. Blasdel, 141 S.W.3d 434, 442, 448, 449 (Mo. 2004); In re Trust Created Under Agreement With Lane, 660 N.W.2d 421, 426-27 (Minn. 2003); Minary v. Citizens Fidelity Bank & Trust Co., 419 S.W.2d 340, 344 (Ky. 1967).
202. MASS. GEN. LAWS ch. 190B, § 2-705(b) (effective Jan. 2, 2012).
203. Williams v. Welch, 265 N.E.2d 854, 857 (Mass. 1970).
204. *Id.*
205. MASS. GEN. LAWS ch. 190B, § 2-707 (effective Jan. 2, 2012).

in favor of vested interests.[206] This means that the remainder beneficiary must survive the distribution date in order to take. In the example above C's remainder would be contingent upon C surviving the distribution date unless the trust instrument provides otherwise. The statute goes further, however, and here is where the "antilapse" part of the statute comes into play. Where, as in the example above, the interest is not a class gift, a "substitute gift" is created in C's surviving descendants, if there are any.[207] For class gifts other than those "to issue, descendants, heirs of the body, heirs, next of kin, relatives or family, or a class described by language of similar import, a substitute gift is created in the deceased beneficiary or beneficiaries' surviving descendants."[208] If there are no surviving takers, then the property passes through the residuary clause if the transfer is created by will or otherwise to the transferor's heirs.

Like the standard antilapse provisions, this statute is remedial and should be avoided through careful drafting.[209] There are a couple of drafting lessons here. First, lawyers should generally draft trusts so that the ultimate remainder beneficiaries are multiple-generation classes. Second, a survival requirement should be specifically imposed. For example, suppose that a client tells the lawyer that she wants a revocable trust that becomes irrevocable at her death and benefits her child, C, for life, and terminates at the death of C with the remainder being distributed to the client's grandchildren (C's children). Lawyer could draft the disposition in the instrument one of four basic ways:

To C for life, then to C's children.

To C for life, then to those of C's children who survive C.

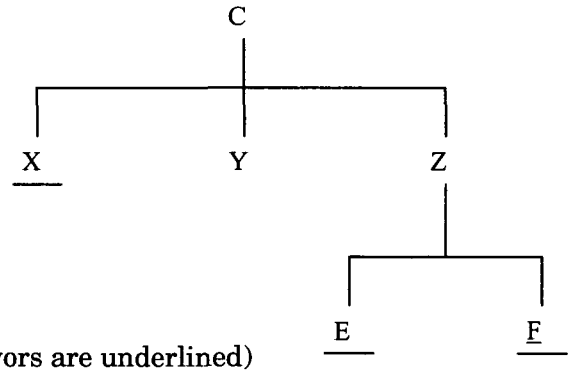
To C for life, then to C's descendants (by representation).

To C for life, then to those of C's descendants who survive C (by representation).

Each of these methods would achieve the same result only in the

206. *Id.* at § 2-707(b).
207. *Id.* at § 2-707(b)(1).
208. *Id.* at § 2-707(b)(2).
209. Indeed, the principal drafter of the UPC version of this statute has boldly stated that it exists to remedy provisions of "poorly drafted trusts." Lawrence W. Waggoner, *The Uniform Probate Code Extends Antilapse-Type Protection to Poorly Drafted Trusts*, 94 MICH. L. REV. 2309, 2313 (1996).

case where, when C dies, she leaves children, all of whom survive her. This is what the client is generally thinking will happen, and probably what will happen under most circumstances, but of course the lawyer must always anticipate the situation where the subsequent taker predeceases. To illustrate why this is important let's suppose that C has three children (X, Y and Z), all of whom survive the client, but only one of whom, X, survives C. Y predeceases C leaving no children surviving and Z predeceases C leaving two children (E and F) surviving. Thus, although all children were alive at the death of the client, this is the picture at the death of C:



(survivors are underlined)

The statute presumes that most clients would prefer that in this case X would receive one-half of the remainder, and Z's children would divide the other one-half. If we apply pre-MUPC law to each of these drafting methods and then apply the statute we can see how the result varies under all but the last one:

Method	**Pre-MUPC (interests presumed vested and transmissible)**				
	X	Y	Z	E	F
1	1/3	1/3	1/3		
2	all				
3	1/3	1/3	1/3		
4	1/2			1/4	1/4

Method	MUPC (interests contingent on survival but antilapse applies)				
	X	Y	Z	E	F
1	1/2			1/4	1/4
2	all*				
3	1/2			1/4	1/4
4	1/2			1/4	1/4

*[210]

As can be seen, only method 4 would achieve the result under pre-MUPC law that most clients would presumably want. On the other hand, all methods except the second one would achieve that result under MUPC. Of course, another result, if desired by the client, could still be reached under MUPC, so long as it was specifically drafted for.

VI. NONPROBATE TRANSFERS IN GENERAL

As mentioned above, Article VI of MUPC addresses nonprobate transfers on death. While most of the article has been reserved for future provisions, it does include the Uniform Security Registration Act.[211] That act permits securities to be registered in beneficiary form and thus pass to a survivor outside of the probate process. But the most broadly applicable provision of Article VI is contained in section 6-101, which generally and broadly enables nonprobate transfers on death.[212] What is perhaps most notable about this section is that in addition to its approval of a laundry list of specific nonprobate devices, it also leaves open the possibility of just about any contractual or other written transfer of assets at death as "nontestamentary."[213] The comment in the UPC version of the section makes clear that the

210. Under the UPC version of section 2-707, in a provision wisely rejected by MUPC, "words of survivorship attached to a future interest are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of [the] section." *See* UNIF. PROBATE CODE § 2-707(b)(3) (2008). This is consistent with other UPC antilapse provisions. *See supra* notes 159-61 and accompanying text.

211. MASS. GEN. LAWS ch. 190B, §§ 6-301 through 311 (effective Jan. 2, 2012).

212. *Id.* at § 6-101.

213. *Id.*

effect of labeling such actions nontestamentary is to make clear that wills acts formalities are not required, that probate is not necessary for transfer of the assets, and that the personal representative of the decedent's estate has no "power or duty with respect to the assets."[214] Although the UPC version of this statute has been revised from the one adopted by MUPC, the provision has been a part of the UPC in some form since 1969. Adoption of this provision by the Commonwealth signifies its recognition that nonprobate devices, if legally effective to make a general transfer of property, should not need additional and specific enabling in each instance in order to effect a transfer at death.

VII. CONCLUSION

Adoption of MUPC represents the culmination of efforts of many that have been ongoing since the mid-1990's. Its enactment is a step forward for the Commonwealth in that it modernizes many of the old Massachusetts wills and estates rules that are no longer in keeping with contemporary methods of donative transfers. It also helps in the overall effort to unify laws across the various jurisdictions of the United States. The scope of the changes brought by MUPC means that Massachusetts lawyers will have much to learn about the new rules. Lawyers who only prepare the occasional will, as well as those engaged in significant estate planning will all need to modify their approach in some respects. This article has been an attempt to introduce the Massachusetts lawyer to some of the changes that MUPC brings to the basic estate planning practice. Although the changes it has discussed are many, it did not cover the significant modifications to guardianship and probate, for example, that MUPC puts in place. Additionally, it is hoped that Massachusetts will see fit to further amend its rules in the future as to those areas, such as the elective share, where it continues to lag behind current trends in law and society. This means that the changes discussed in this article are only the beginning of new ways of practice to be encountered by the Massachusetts lawyer both now and in the not too distant future.

214. UNIF. PROBATE CODE § 6-101 cmt. (2008).