Proposing a Model Antilapse Clause

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ABSTRACT

The complexity of state antilapse statutes exacerbates the task of many estate planners seeking to give prudent expression to the postmortem wishes of a client. These statutes vary as to which predeceasing beneficiaries they should apply, who should be the substitute takers to benefit instead of these lapsed beneficiaries, and how to treat beneficiaries who are treated as predeceasing because of renunciation agreements, final decrees of divorce, or, when the beneficiary kills, exploits, or abuses the one from whom the beneficiary would take. Within the modern statutory framework, there exists an abundant array of testamentary devices by which a transferor may transfer property to a transferee, both at death and during lifetime. Wills are traditionally relied upon, but an arsenal of nonprobate contractual transfers, increasingly including revocable intervivos trusts, has developed over the last fifty years. Should antilapse apply to all of these transfer methods?

Today's professional estate planner must accommodate for the mobility of modern clients. Often a transfer instrument is executed in one state under one set of laws, but years later the client dies domiciled in a second state with a vastly different set of laws. The fluidity of modern family structures also adds to this challenge. Traditional lines of consanguineous descent are often less relevant in today's society with access to no-fault divorce, genetic and gestational surrogacy, various assisted reproductive technologies, stepparent adoption, and an increasing number of nonmarital cohabiting couples, many with children.

This Article rejects the idea of a "one size fits all" statute—the idea that a uniform statute addresses all of these complex issues and ideally captures the intent of today's client. Even if all of the states could agree on a single statute, each law would still remain a mere default rule, easily discarded if the client's different intention is made clear and convincing. Hence, the goal of this Article is not to propose a model statute but is instead to equip estate planners with three different clauses to offer clients options, with an avoidance of perplexing alternatives. It is reasonable to

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presume that once a client understands what happens when a named beneficiary predeceases the client, the client may then choose one of the three optional clauses for inclusion in any Last Will and Testament, payableon-death contract, or intervivos trust. This choice, then evidenced clearly and convincingly in one of the three proposed clauses, will enhance the accuracy of the client's intent and, best of all, facilitate the goal of the professional estate planner.

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I. INTRODUCTION

To adequately articulate a client's intent amidst an evolving social order and applicable transfer devices is the elusive goal of any estate planning practitioner. Specifically, in drafting wills, creating myriad nonprobate transfers, and accommodating state and federal statutes, practitioners are under a duty to craft language carefully; primarily, to capture a client's intent, secondarily, to avoid costly litigation. As George Bernard Shaw quipped, "My method is to take the utmost trouble to find the right thing to say, and then to say it with the utmost levity."[1] Today's estate planner may be excused for a lack of levity, but not for failing to find the right thing to say.

There are many vexing drafting tasks confronting the practitioner; one is to avoid the unintended consequences of the "lapse" of a transfer to an intended transferee who predeceases the transferor prior to gaining possession of the benefit. To illustrate, at "common law, when a named beneficiary under a will predeceased the testator, the share of the deceased beneficiary passed not to his descendants, but rather 'lapsed.'"[2] The consequence of this unintended lapse was that the transfer then resulted back to the transferor's residuary estate, or worse, through the transferor's intestate estate. To address this unintended outcome, state legislatures took initiative and began enacting remedial devices, which are termed antilapse statutes. Enactment of these statutes began as early as the eighteenth century, legislatures intending thereby to permit lapse to occur, but then to provide for a logical "substitute taker" if the transfer should lapse for any reason, but most likely the death of the transferee.[3] Today, antilapse statutes vary significantly among the states, and, even though the National Commissioners on Uniform State Laws provide a model Uniform Probate Code approach,[4]uniformity in application has never been achieved.

Irrespective of what each statute may provide, the polestar of estate planning remains to effectuate the intent of the transferor.[5] At times, this premise conflicts with whether any antilapse statute may be used at all, resulting

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[1] G. BERNARD SHAW, NINE ANSWERS (1896) (answers to nine questions submitted by Clarence Rook, who had interviewed him in 1895).

[2] Ruotolo v. Tietjen, 890 A.2d 166, 169 (Conn. App. Ct. 2006), *aff'd*, 916 A.2d 1 (Conn. 2007).

[3] *See id.* at 170. Massachusetts enacted the first antilapse statute in 1783 and Maryland in 1810. *Id*. Today, every state has enacted an antilapse statute, Louisiana being the last to do so. *See* LA. CIV. CODE ANN. art. 1593 (2023); *see also* Susan F. French, *Antilapse Statutes Are Blunt Instruments: A Blueprint for Reform*, 37 HASTINGS L.J. 335 (1985).

[4] *See* UNIF. PROB. CODE § 2-603 (UNIF. L. COMM'N amended 2019) (applying to wills); s*ee also id.* § 2-706 (applying to other governing instruments other than trusts).

[5] *See, e.g.*, *In re* Est. of Harper, No. M2000-00553-C0A-R3-CV, 2000 WL 1100206, at *1-2 (Tenn. Ct. App. Aug. 8, 2000) (holding that the antilapse statute controls "unless a different disposition thereof is made or required by the will").

in ambiguity at a minimum, or worse, unforeseen consequences. For example, if the estate planner wrote standard language into the transfer instrument, including "who survive me,"[6] "per capita," "per stirpes,"[7] or "to the express exclusion of any other,"[8] did the testator intend for the state's antilapse statute not to apply even in the instance of a lapse? Accordingly, not only is there lapse, but the remedy of the state's antilapse statute, a default rule, is unable to apply because it would conflict with the transferor's intent. Confronting uncertainty in the language used by a client, understandably often courts have ruled that the antilapse statute applies unless there is clear and unambiguous language to the contrary.[9] This is a high bar to overcome, illustrating the importance attributed to antilapse statutes.

Compounding the oftentimes ambiguous nature of a document's language are the state-by-state vagaries within each state statute. First, when must the lapse occur in order for the statute to apply? For instance, does the statute apply to persons already deceased when the transfer instrument is executed, or only to those who die after execution? What if a transferee dies simultaneously with the transferor; or, is convicted of an intentional homicide perpetrated upon the transferor, financial or domestic abuse of the transferor, or it is proven that the transferee exercised undue influence, fraud, or duress resulting in unjust enrichment from the transferor? Second, who are protected by antilapse statutes? The majority of states and the Uniform Probate Code restrict eligibility to transferees who are relatives by consanguinity—blood relatives—of the transferor.[10] Nonetheless, a minority of statutes apply to anyone except to the spouse of the transferor.[11]

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[6] *See, e.g.*, McGowan v. Bogle, 331 S.W.3d 642, 645-47 (Ky. 2011) (holding that words of survivorship contained in the will precluded use of the state's antilapse statute).

[7] *See, e.g.*, Belardo v. Belardo, 930 N.E.2d 862, 866-68 (Ohio Ct. App. 2010) (holding that mere use of the phrases "per capita" or "per stirpes" was insufficient to overcome the application of the state's antilapse statute).

[8] *See, e.g.*, Kubiczky v. Wesbanco Bank Wheeling, 541 S.E.2d 334, 341 (W. Va. 2000) (holding that phrase "to the express exclusion of any other" was insufficient to overcome the operation of the antilapse statute).

[9] *See, e.g.*, Kelly v. Duvall, 107 A.3d 1174, 1180 (Md. 2015); *see also* Norwood v. Barclay, 298 So. 3d 1051, 1055 (Ala. 2019) (finding that a testator's intent must be precise to overcome use of the antilapse statute); Murray v. Murray, 564 S.W.2d 5, 7-8 (Ky. 1978) (holding that the antilapse "distribution controls 'unless a different disposition thereof is made or required by the will[,]'" which aptly reflects the intention of the testator (citation omitted)).

[10] *See, e.g.*, Dawson v. Yucus, 239 N.E.2d 305, 310 (Ill. App. Ct. 1968) (holding that decedent's reference to nephews did not qualify beneficiaries as issue when in fact they were not her consanguineous nephews).

[11] *See, e.g.*, Larson v. Sec. Nat'l Bank of Sioux City, No. 10–0704, 2010 WL 4484001, at *1-3 (Iowa Ct. App. Nov. 10, 2010). *But see* KAN. STAT. ANN. § 59-615(a) (2023) (specifically including "spouse" within the parameters of the state's antilapse statute). [12] *See* French, *supra* note 3, at 339 n.16.

Third, and this scenario is increasingly pertinent to modern wealth transfers, to which transfer device should these statutes apply? Traditionally, antilapse statutes applied solely to Last Wills and Testaments.[12] Today, other forms of wealth transfer devices proliferate, such as designated beneficiaries on contracts of insurance or retirement benefits, but increasingly revocable intervivos trusts. Addressing this modern development, the Uniform Probate Code applies antilapse to nonprobate transfers, governing contracts with a named beneficiary designation who predeceases the decedent transferor, in addition to wills.[12] Further, a few states make antilapse applicable to revocable intervivos trusts.[13]

The addition of intervivos revocable trusts to antilapse illustrates that wealth transfers and who constitutes a transferor's family each continue to evolve. While many antilapse statutes apply only to consanguineous relatives,[14] persons considered as family to many of today's clients now encompass nonmarital cohabitants, close friends, and equitably adopted children and their progeny.[15] In addition, adoption, particularly stepparent adoption, may affect those seeking to qualify as family members under traditional antilapse statutes.[16] Accounting for this societal shift, the Uniform Probate Code was revised in 2019 to accommodate the 2017 revisions to the Uniform Parentage Act, which permit more children and adults who are in the process of being adopted, are adopted by the relative of a deceased parent, or are adopted by a stepparent, to benefit as family members.[17] Compounding identifying relatives by consanguinity is the expanding array of options for assisted reproductive technology,[18] including posthumous conception, relatives by the whole and half blood, and establishing paternity or maternity, particularly when using increasingly common surrogacy contracts.[19]Among the many lessons learned

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[12] *See* UNIF. PROB. CODE § 2-706 (UNIF. L. COMM'N amended 2019).

[13] *See, e.g.*, VA. CODE ANN. § 64.2-418 (2023). *But see* Baldwin v. Branch, 888 So. 2d 482, 485 (Ala. 2004) (holding that the state's antilapse statute does not apply to intervivos trusts).

[14] *See, e.g.*, *In re* Haese's Est., 259 N.W.2d 54, 59-60 (Wis. 1977).

[15] *See generally* Raymond C. O'Brien, *Marital Versus Nonmarital Entitlements*, 45 ACTEC L.J. 79, 107-14 (2020) (discussing the statistical data pertaining to cohabitation).

[16] *See, e.g.*, *In re* Est. of Murphy, 843 N.E.2d 140, 144 (N.Y. 2005) (holding that stepparent adoption did not prohibit use of the state's antilapse statute); *see also In re* Est. of Dye, 112 Cal. Rptr. 2d 362, 367-69 (Ct. App. 2001) (holding that when a child is adopted by a stepparent, the child remains a child of the decedent biological parent). *See generally* Lee-Ford Tritt, *Technical Correction or Tectonic Shift: Competing Default Rule Theories Under the New Uniform Probate Code*, 61 ALA. L. REV. 273, 315-16, 321 (2010).

[17] *See* UNIF. PROB. CODE §§ 2-118, 2-119.

[18] *See* Raymond C. O'Brien, *The Immediacy of Genome Editing and Mitochondrial Replacement*, 9 WAKE FOREST J.L. & POL'Y, 419, 421-30 (2019).

[19] *See generally* Raymond C. O'Brien, *Assessing Assisted Reproductive Technology*, 27 CATH. U. J.L. & TECH. 1, 23 (2018) (describing the prevalence of surrogacy arrangements in the United States).

from the movement to legalize samesex marriage in 2015 is that family is now more a matter of personal choice than consanguinity.[20] Practitioners cannot afford to wait for legislatures to act; the responsibility lies with today's scriveners, professional estate planners.

The purpose of this Article is to consider the evolving nature of today's transferor and to offer to estate planners the means to accommodate the client's intent more accurately, clearly, and concisely. Initially, it appeared logical to propose a model antilapse statute as a "best approach" towards addressing current challenges. But the National Conference of Commissioners on Uniform State Laws already provides us with such a model statute as a provision in the Uniform Probate Code, which some states have adopted in whole, in part, or in modified form.[21] A model statute, however, is not the most advantageous approach because adoption would be sporadic at best, and confusion in the language of transfer documents would nonetheless persist. Instead, this Article offers to practitioners a choice among three different model clauses, any one of which may be inserted into any effective Last Will and Testament, designated beneficiary nonprobate contract, or intervivos trust.[22] Each clause is designed to assist estate planners to purposefully identify clients' intent and to accommodate the consequences of possible lapse.[23]

While not foolproof, the clause triggers issues such as when and to whom the antilapse provision should apply. Further, if antilapse measures are never intended by the client, there is at least sufficient clear and convincing evidence stating so. At its core, antilapse remains a default rule,[24] meant to effectuate a transferor's primary intent and avoid what are often harsh consequences.[25] This Article begins by discussing the rationale for antilapse legislation,[26] then

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[20] *See* Obergefell v. Hodges, 576 U.S. 644, 681 (2015) (holding that same-sex marriage is a right under the Constitution). *See generally* Lee-Ford Tritt, *Sperms and Estates: An Unadulterated Functionality Based Approach to Parent-Child Property Succession*, 62 SMU L. REV. 367 (2009).

[21] *See* UNIF. PROB. CODE § 2-603.

[22] This Article's approach is somewhat similar to what was done to ameliorate the harshness of the Rule Against Perpetuities prior to the states, by either adopting the Uniform Statutory Rule Against Perpetuities (USRAP) or abolishing the Rule altogether.

[23] For a discussion of various saving clauses, see David M. Becker, *Estate Planning and the Reality of Perpetuities Problems Today: Reliance upon Statutory Reform and Saving Clauses Is Not Enough*, 64 WASH. U. L.Q. 287, 378-87 (1986). *See also* Atl. Richfield Co. v. Whiting Oil & Gas Corp., 320 P.3d 1179, 1191 (Colo. 2014) (holding that a clause in an instrument may be used to rectify any violation if one occurs).

[24] *See In re* Est. of Roesler, No. 2021AP1887-FT, 2022 WL 1251799, at *7 (Wis. Ct. App. Apr. 28, 2022).

[25] *See In re* Est. of Smith, No. 5-14-0225, 2015 WL 5773835, at *2 (Ill. App. Ct. Sept. 30, 2015).

[26] *See* UNIF. PROB. CODE § 2-707 cmt. ("preventing disinheritance of a descending line that has one or more members living on the distribution date and preventing a share from passing down a descending line that has died out by the distribution date").

analyzes the confusion that results from boilerplate language in transfer instruments, and, finally, discusses the current state statutory schemes. This framework will demonstrate three main deficiencies regarding antilapse: First, that statutes are often outdated and impracticable; second, that the common language used by estate planners is haphazard; and third, that the varieties among state statutes create uncertainty in application. Based on these assumptions, this Article proposes three distinct model antilapse clauses, from which estate planners may choose to capture the intent of the client considering the elements and intended consequences of each.

II. RATIONALE FOR ANTILAPSE

Procedures pertaining to the transfer of property upon death are replete with default rules. That is, rules that apply unless the transferor adequately states otherwise. The laws of intestate succession are the largest grouping of default rules, "designed to provide suitable rules for the person of modest means who relies on the estate plan provided by law."[27] Concomitantly, there are default rules for testate succession, such as protection of omitted (forgotten) children,[28] omitted (pretermitted) spouses,[30] and revocation of provisions in an instrument because of operation of law (divorce).[29] There are also a myriad of rules pertaining to survivorship, ademption by extinction and satisfaction, and correcting deficiencies in testamentary formalities, if there is clear and convincing evidence that the testator intended the instrument to be valid.[30]

A controversial default rule, now adopted in many states, is similar to antilapse because it too provides for substitute takers when a bequest to a designated beneficiary lapses because of death. This new rule, assimilated into the Uniform Probate Code as Section 2-707, provides for a substitute taker when any trust beneficiary fails to survive to a designated point and the settlor of that trust fails to provide an alternate taker.[31] Similar to antilapse, a substitute gift under this provision is created in the lapsed trust beneficiary's surviving descendants.[34] But in spite of similarities, Section 2-707 is dissimilar because this "section applies only to future interests under the terms of a trust,"[35] thus it is not intended as a nonprobate transfer and is not under the aegis of traditional antilapse legislation. Nonetheless, there are many similarities between Section

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[27] *Id.* art. II, pt. 1, gen. cmt.

[28] *Id.* § 2-302(a). [30]

Id. § 2-301(a).

[29] *Id*. § 2-804(b).

[30] *See, e.g.*, *id*. § 2-503 (discussing a model Harmless Error statute, where a writing that was not properly executed can be treated as a proper will if the writing can be established as such through clear and convincing evidence).

[31] *Id*. § 2-707. "The objective of this section is to project the antilapse idea into the area of future interests." *Id.* cmt. For a critique of the provision, see, for example, Jesse

2-707 and antilapse, for it too "yields to a finding of a contrary intention,"[36] emphasizing again the importance of the settlor's intent. Consistent then with both antilapse and Section 2-707, clients' intentionality remains the focal point: "Default rules of succession law should facilitate the effectuation of testator's intent and nothing else."[37] The Uniform Trust Code acknowledges this similarity, commenting that utilizing a substitute gift is just as problematic as when the beneficiary takes under a will or any will substitute payable at death of the transferor.[38] Accordingly, any model clause must address both antilapse statutes and Section 2-707.

Unfortunately, the intent-focused rationale for antilapse is too often lost with imprecise drafting for application to various novel nonprobate transfers,[39] as opposed to solely wills.[40] Gradually, states have begun to explicitly apply antilapse statutes to intervivos revocable trusts, which have emerged as a favored form of will substitute.[41] Nonetheless, no matter which wealth transfer device is used, all are subject to any contrary intention adequately expressed by the transferor. Words used are important; the late Justice Antonin Scalia was fond of telling his law clerks that "[t]erminology is destiny."[42] Litigious conflict occurs between a testator's purported intent and a state's antilapse statute, resulting from both the inartful phrases adopted by drafting attorneys and variations among state statutes.[43] Commentators suggest that statutory

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Dukeminier, *The Uniform Probate Code Upends the Law of Remainders*, 94 MICH. L. REV. 148, 148 (1995).

[34] *See* UNIF. PROB. CODE § 2-707(b)(1). [35] *Id.* cmt.

[36] *Id.*

[37] Tritt, *supra* note 17, at 316. *But see* Mark L. Ascher, *The 1990 Uniform Probate Code: Older and Better, or More Like the Internal Revenue Code?*, 77 MINN. L. REV. 639, 640-41 (1993) (arguing that society should care less about how the dead want their wealth used than how the living want to use it).

[38] *See* UNIF. TR. CODE § 112 cmt. (UNIF. L. COMM'N amended 2010) (suggesting that antilapse and substitute gifts are analogous with the latter being an extension of all will substitutes).

[39] *See, e.g.*, UNIF. PROB. CODE § 2-706. [40] *See id.* § 2-603.

[41] *See, e.g.*, VA. CODE ANN. § 64.2-418(C) (West 2023); TENN. CODE ANN. § 32-3105(b) (West 2023).

[42] Gonzalez v. Thaler, 565 U.S. 134, 169 (2012) (Scalia, J., dissenting).

[43] *See, e.g.*, Polen v. Baker, 752 N.E.2d 258, 261-62 (Ohio 2001) (holding that words of survivorship defeated application of the antilapse statute in spite of two strong dissents

revisions have only complicated matters further, such as the 1990 Uniform Probate Code, which lessened the importance of words of survivorship without added elements.[44] Estate planners have added more standardized gobbledegook to their residuary clauses, or to standardize separate clauses containing that gobbledegook [that] is extremely unlikely either to make estate planners more sensitive to their clients' wishes on these issues or to make it easier for clients

to ascertain their documents' meaning under circumstances they generally do not even care to envision.[45]

The solution to preserving clients' intent lies with good drafting by knowledgeable estate planners. For them, the issue is clear: if a transferor purposefully transfers property to a transferee using a will, a payable-on-death designated contract, or a revocable intervivos trust, what does the transferor intend to happen if that designated transferee is dead at the time of the execution of the instrument or dies prior to the transferor? At common law, the transfer lapsed and the property went to an alternate taker, the transferor's residuary clause, or to the transferor's intestate estate.[46] So as to accommodate equality among descending lines of descent, state legislatures enacted antilapse statutes, convinced that the transferor would prefer the property to go to the descendants of the deceased transferee rather than to the transferor's residuary clause or intestate heirs. The exception would be if the transferor provided for an alternate taker who would take if the property lapsed. Nevertheless, the language qualifying as sufficient to establish a bona fide alternate taker is often nebulous, at best, which can precipitate expensive litigation.

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indicating this was not intent of the testator). *But see In re* Est. of Smith, No. 5-14-0225, 2015 WL 5773835, at *3-4 (Ill. App. Ct. Sept. 30, 2015) (affirming that words of survivorship alone will not defeat application of the antilapse statute); OR. REV. STAT. § 112.395 (2022) (predeceasing transferee does not have to be a relative of the transferor for statute to apply); WYO. STAT. ANN. § 2-6-106 (West 2023) (transferee must be a grandparent or lineal descendent of a grandparent of the transferor for the statute to apply); WASH. REV. CODE § 11.84.040 (2023) (slayers and abusers of the transferor are treated as predeceasing, causing the antilapse statute to apply).

[44] *See* Ascher, *supra* note 37, at 652-55; *see also* Eloisa C. Rodriguez-Dod, "*I'm Not Quite Dead Yet!": Rethinking the Anti-Lapse Redistribution of a Dead Beneficiary's Gift*, 61 CLEV. ST. L. REV. 1017, 1018 (2013) (concluding that current antilapse statutes are "flawed, controversial, and, at times, result in inconsistent application").

[45] Ascher, *supra* note 37, at 655.

[46] *See generally* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 1.2 (AM. L. INST. 1999) ("An individual who fails to survive the decedent cannot take as an heir or a devisee.").

No legislative solution to the issue of establishing a transferor's intent is perfect. State statutes always seem to trail the modern understanding of who constitutes family[32] and are slow to adapt to novel means of wealth transfer. Statutes vary considerably among the states; what may have been the effect of lapse in the state of execution may differ from when lapse occurs in the state of

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[32] *See, e.g.*, Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 200-01 (2001).

the transferor's domicile at death.[33] One advantage of the proposed model antilapse clause is that it errs on the side of inclusivity, maximum applicability to all forms of wealth transfer, and it remains a consistent element in the transfer document even though the transferor may change domicile between execution and date of death. A comparison of the various statutes illustrates the complexity of relying on codified defaults and the advantages of a model clause.

III. Current Statutory Scheme

A. Uniform Probate Code

The ostensible goals of the Uniform Probate Code are to provide a model for state legislatures, guidance for estate planners, and, specifically, to provide sundry default rules whenever the transferor inadequately expresses his or her intentions.[49] There are three individual sections of the Code that either expressly or impliedly apply to antilapse: Section 2-603, Section 2-706, and Section 2-707.

1. *Uniform Probate Code § 2-603: Last Will and Testament*

This section of the Code solely provides the classic application of antilapse to wills, not addressing the burgeoning array of will substitutes. Section 2-603 applies to designated beneficiaries (devisees) who die prior to the *execution* of the transfer instrument, as well as those who die after execution but prior to the *death* of the transferor.[34] Antilapse applies only if the designated beneficiary is a relative of the transferor, defined as "a descendant of a grandparent," including stepchildren of the transferor.[51] Furthermore, that predeceasing relative must have descendants who survive the testator; these descendants become the substitute takers under the antilapse statute,[35] taking not by virtue of the intent of the testator or that of the deceased beneficiary, but rather by the terms of the statute.[36] Sometimes, however, even certain surviving persons may be treated as predeceasing for the applicability of the antilapse statute, so long

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[33] *See, e.g.*, Diller v. Diller, 182 N.E.3d 370, 379-81 (Ohio Ct. App. 2021) (holding that the statute in effect at the testator's death applied to the transfer, but that the statute in effect when the will was executed provided the interpretation of the testator's intent). [49] *See* Ascher, *supra* note 37, at 649-57.

[34] *See* Unif. Prob. Code § 2-603(a)(6) (Unif. L. Comm'n amended 2019). *But see In re* Est. of Guthrie, No. 07–1427, 2008 WL 2039401, at *2-3 (Iowa Ct. App. May 14, 2008) (holding that state's antilapse statute does not apply to persons who die prior to the execution of a will unless the transferor states otherwise).

[35] *See, e.g.*, *In re* Est. of Mooney, 87 Cal. Rptr. 3d 115, 119-22 (Ct. App. 2008) (holding that these descendants take per stirpes and not per capita).

[36] *See In re* Pierce's Est., 196 P.2d 1, 3-4 (Cal. 1948).

as they qualify as a relative. For example is an explicit or default rule requiring survival for a specified period of time after the death of the transferor; the Code requires survival by 120 hours,[37] but transfer documents may specify a different length of time. Other circumstances may warrant treating a devisee as predeceasing, such as abusive conduct,[38] conviction under slayer statutes,[39] undue influence, [40] and release of claims under premarital or marital agreements.[41]

Illustrating the importance legislatures attach to antilapse statutes, a fourth provision addresses whenever the will includes words of survivorship—or those of similar ilk—and whether such phrases prohibit application of antilapse. [42] Admittedly, they should since the testator expressly required survival. The Code, however, stipulates that these words alone do not prevent the use of the antilapse provision "in the absence of additional evidence . . . ."[43] Left unclear is what constitutes additional evidence, but the presence of an alternate taker seems sufficient.[44] A

[51] *See* UNIF. PROB. CODE § 2-603(a)(3), (7). *But see* Larson v. Sec. Nat'l Bank of Sioux City, No. 10-0704, 2010 WL 4484001, at *1 (Iowa Ct. App. Nov. 10, 2010) (holding that the Iowa antilapse statute applied to anyone, regardless of consanguinity, other than spouses). *See also In re* Est. of Samuelson, 757 N.W.2d 44, 47 (N.D. 2008) (finding that North Dakota's antilapse statute strictly defined family and that it excluded stepchildren).

[37] *See* UNIF. PROB. CODE §§ 2-702(a), 2-603(a)(8); *see, e.g.*, *In re* Est. of Lensch, 99 Cal. Rptr. 3d 246, 251-53 (Ct. App. 2009) (discussing the effect of simultaneous death on the state's antilapse statute).

[38] *See, e.g.*, *In re* Est. of Evans, 326 P.3d 755, 761 (Wash. Ct. App. 2014) (financial abuse caused beneficiary to be treated as predeceasing, triggering the antilapse statute).

[39] *See, e.g.*, Clark v. Off. of Pers. Mgmt., 256 F.3d 1360, 1364 (Fed. Cir. 2001) (holding that common law and the state's slayer statute both treated the designated beneficiary as having predeceased).

[40] *See, e.g.*, *In re* Est. of Burger, 898 A.2d 547, 559 (Pa. 2006) (Eakin, J., concurring) (arguing that the antilapse statute should apply when the legatee is barred due to proof of undue influence).

[41] *See, e.g.*, UNIF. PROB. CODE § 2-213 (waiver of right to elect and other rights); *see also* McLeod v. McLeod, 145 So. 3d 1246, 1251-53 (Miss. Ct. App. 2014) (holding that the premarital agreement was not unconscionable because it was fair, the wife had the chance to consult with an attorney, and she asserted that she understood agreement's terms).

[42] *See* UNIF. PROB. CODE § 2-603(b)(3).

[43] *Id.*

[44] *See, e.g.*, Lorenzo v. Medina, 47 So. 3d 927, 929 (Fla. Dist. Ct. App. 2010) (holding that presence of an alternate taker prevented use of the statute); *see also* Blevins v. Moran, 12 S.W.3d 698, 703 (Ky. Ct. App. 2000) (holding that a will's residuary clause does not constitute an alternate taker).

few states require clear and convincing evidence to negate use of the statute,[45] or at least a countervailing intention expressed with reasonable clarity.[46]

Consistent with modern practice, the Code uniquely applies antilapse to class gifts in which one or more members of a class of devisees fails to survive the testator and is both a relative and has descendants who do survive.[47] In the event that these conditions are not met and antilapse does not apply, the share that would have gone to the predeceasing class member results to the surviving members of the class rather than to the transferor's residuary clause or heirs in intestacy. Finally, the Code applies antilapse to the exercise of a testamentary power of appointment by the donee of that power,[48] regardless of whether the power given was general or special, and the appointee may be a consanguineous relative of the donor or the donee.

2. *Uniform Probate Code § 2-706: Designated Beneficiaries*

The majority of wealth transfers occurring at death are facilitated through means other than wills; instead, wealth often passes through "will substitutes," otherwise known as nonprobate transfers.[49] These devices have ascended in popularity partially because they are speedy, often avoid taxation and costs associated with probate, and allow for designated beneficiaries to be changed easily without the necessity of following strict statutory formalities applicable to wills.[50] Nonprobate transfers are distinguishable from wills and intestacy, both of which require probate.[51] With the adoption of Sections 2-603 and 2-706, the Code applies antilapse to transfers by valid wills and, as has become increasingly common in the last fifty years, will substitutes, such as contracts

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[45] *See, e.g.*, Norwood v. Barclay, 298 So. 3d 1051, 1052 (Ala. 2019); Kelly v. Duvall, 107 A.3d 1174, 1177 (Md. 2015); Belardo v. Belardo, 930 N.E.2d 862, 866–68 (Ohio Ct. App. 2010) (holding that the use of the terms "per capita" and "per stirpes" are insufficient to overcome the applicability of the statute); Ruotolo v. Tietjen, 916 A.2d 1, 2 (Conn. 2007) (affirming that words of survivorship alone are insufficient to overcome the use of the statute); Kubiczky v. Wesbanco Bank Wheeling, 541 S.E.2d 334, 341 (W. Va. 2000) (holding that there must be clear and convincing evidence of intent favoring an alternative distribution to overcome use of the statute). *But see* McGowan v. Bogle, 331 S.W.3d 642, 647 (Ky. Ct. App. 2011) (holding that words of survivorship precluded use of the statute).

[46] *See In re* Est. of Harper, No. M2000-00553-C0A-R3-CV, 2000 WL 1100206, at *2 (Tenn. Ct. App. Aug. 8, 2000).

[47] *See* UNIF. PROB. CODE § 2-603(b)(2).

[48] *See id.* § 2-603(a)(5)-(7), (9), (b)(5).

[49] *See generally* Emily S. Taylor Poppe, *The Future is Bright Complicated: AI, Apps & Access to Justice*, 72 OKLA. L. REV. 185, 196 (2019).

[50] *See id.* at 194.

[51] *See id.* at 196.

naming a beneficiary, which transfer property to named beneficiaries at the death of the transferor.[52]

Antilapse applies to these nonprobate transfers under Section 2-706 since contracts providing for payment upon death contain a "designated beneficiary" who, similar to wills, may predecease or be treated as predeceasing the transferor's death.[53] The Code applies antilapse to these beneficiary designation accounts, including any "governing instrument naming a beneficiary of an insurance or annuity policy, of an account with a POD designation, of a security registered in beneficiary form (TOD), or of a pension, profit-sharing, retirement, or similar benefit plan, or other nonprobate transfer at death."[54]

Unlike for wills in Section 2-603, Section 2-706 adds protections for payors who make payments under the terms of a contract, as well as the personal liability of any recipient purchasers.[55] Protection is necessary because of the speed of the nonprobate transfer and the absence of probate court supervision. The similarities between 2-603 and 2-706, however, include issues such as who qualifies for antilapse treatment, the time frame in which antilapse is to apply, survivorship language, applicability to class gifts and powers of appointment, and who qualifies as substitute takers in the event of lapse.[56]

Increasingly, state statutes that traditionally applied to wills have been modified or interpreted to apply to nonprobate transfers. For example, revocation by operation of law[57] applies to nonprobate transfers, the former spouse treated as predeceased as soon as a divorce is final.[75] If, instead, the spouse remains married and survives the transferor, any assets passing under nonprobate devices are, similar to testate wills, subject to that spouse's elective share calculation.[58] Likewise, creditors of the transferor have access to any proceeds payable to designated beneficiaries once the assets in the probate estate have been exhausted.[77] If the designated beneficiary is benefitted by a plan governed by federal law, state law becomes subservient to federal

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[52] For the seminal description of the impact of the nonprobate revolution, see generally John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984).

[53] *See generally* UNIF. PROB. CODE § 2-706(b).

[54] *Id.* § 2-706 cmt. (stating that this section provides an antilapse statute for "beneficiary designations" that is defined under § 1-201(4)).

[55] *See id.* § 2-706(d)-(e).

[56] *Compare id.* § 2-706, *with* § 2-603.

[57] *See id*. § 2-804(a)(6). [75]

See id. § 2-804(b).

[58] *See id.* § 2-203. [77]

See id. § 6-102.

supremacy.[59] Recently, a few states have applied antilapse to revocable intervivos trusts since they have become a significant form of nonprobate wealth transfer.[60]This development is logical because these intervivos trusts contain a designated beneficiary, and, similar to wills, that beneficiary may no longer be revoked upon the death of the transferor. Currently, not all states apply antilapse to these trusts, but the trend is inevitable.

Applying antilapse to intervivos revocable trusts must not be confused with another section of the Code that applies to future interests and utilizes the structure of antilapse. In 1990, the Code adopted Section 2-707, which anticipates vesting of a future interest beyond the death of the transferor,[61] most often upon the happening of a designated event. Unlike Section 2-707, revocable intervivos trusts vest upon the death of the settlor because they can no longer be revoked, thus functioning as a form of nonprobate transfer. The new Section 2-707 provision applicable to future interests was not welcomed by all,[62] yet it has been adopted in many states, indicating that "there is a movement, albeit slowly developing and largely dependent on statutory warrant, toward reversing the common law rule of construction and finding an implied condition of survival with a substitute gift in descendants."[63] Its similarity to the process of antilapse legislation confuses clients and estate planners alike. At a minimum, adoption of Section 2-707 poses an additional hazard for estate planners seeking to capture the intent of the client and is worth evaluating in this context.[64]

3. *Uniform Probate Code § 2-707: Future Interests*

Traditionally, unless the intent of the transferor of any interest is stated clearly and convincingly, future interests were considered as vested at the time of creation of the interest, subject only to possession upon the occurrence of a

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[59] *See, e.g.*, 29 U.S.C. § 1144(a) (providing that provisions of subchapter I and III of the *Employee Retirement Income Security Act of 1974* (ERISA) shall supersede any and all state laws insofar as they "relate to any employee benefit plan"); *see also* Egelhoff v. Egelhoff, 532 U.S. 141, 150 (2001) (holding that Washington state's revocation by operation of law statute applicable to nonprobate transfers was preempted by ERISA); Raymond C. O'Brien, *Equitable Relief for ERISA Benefit Plan Designation Mistakes*, 67 CATH. U. L. REV. 433, 463-67 (2018).

[60] *See, e.g.*, VA. CODE ANN. § 64.2-418 (2023).

[61] For a discussion, see, for example, Lawrence W. Waggoner, *The Uniform Probate Code Extends Antilapse-Type Protection to Poorly Drafted Trusts*, 94 MICH. L. REV. 2309, 2310 (1996) and Edward C. Halbach, Jr. & Lawrence W. Waggoner, *The UPC's New Survivorship and Antilapse Provisions*, 55 ALA. L. REV. 1091, 1139 (1992).

[62] *See, e.g.*, Dukeminier, *supra* note 33, at 166. *But see* Edward C. Halbach, Jr., *Uniform Acts, Restatements and Trends in American Trust Law at Century's End*, 88 CAL. L. REV. 1877, 1904 (2000).

[63] ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 866 (10th ed. 2017).

[64] *See, e.g.*, Laura E. Cunningham, *The Hazards of Tinkering with the Common Law of Future Interests: The California Experience*, 48 HASTINGS L.J. 667, 701–02 (1997).

future event, such as the death of a life tenant.[65] As a result, if a transfer instrument provided for a life estate in A and a remainder to B, B automatically has a vested interest upon creation. If B dies before A, the interest would go to B's estate upon the death of A, thus passing to either B's testate or intestate heirs. With the adoption of Section 2-707, however, a "future interest under the terms of a trust is contingent on the beneficiary's surviving the distribution date,"[66] creating an implied condition of survivorship for B that would deprive B's estate of its interest were B to predecease A. Instead, rather than result B's interest back to the transferor—still assuming that B did not survive A—the Code creates a substitute gift in B's descendants who survive A.[67] It is important to note that B's estate does not benefit; only B's descendants take under the terms of Section 2-707.[68] Should B die without descendants, then the interest would result back to the estate of the transferor. Ultimately, Section 2-707 seeks to benefit B's descending heirs, and if none is available, then to A's estate. The loser is B's estate, which could include persons or entities other than B's descendants.

The distinctive feature of Section 2-707, and the source of its criticism, is the provision's creation of an implied condition of survivorship where previously there was a vested interest. This process devalues early vesting and replaces the *estate* of the now contingent heir with the heir's *descendants*. Upending the traditional rule of early vesting rankles many, but it should be noted that the words of any governing instrument still control; the transferor is still in charge and may exercise due diligence, as well as expressly designate the heir as having a vested interest.[88] The expert estate planner will understand this and plan accordingly, relying upon the Comment to Section 2-707: "Note that Section 2-707 is a rule of construction. It is qualified by the rule set forth in Section 2-701, and thus it yields to a finding of contrary intention."[69]Nonetheless, the burden is upon the estate planner to provide for an ascertainable contrary intent.

Mere words of survivorship are insufficient. Similar to the Code's antilapse provisions applicable to wills (Section 2-603) and will substitutes (Section 2-706), words of survivorship are vulnerable to additional evidence that sufficiently indicates an intent contrary to the application of the antilapse

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[65] *See, e.g.*, Sec. Tr. Co. v. Irvine, 93 A.2d 528, 530 (Del. Ch. 1953) (finding that the law favors early vesting).

[66] UNIF. PROB. CODE § 2-707(b) (UNIF. L. COMM'N amended 2019).

[67] *See id.* § 2-707(b)(1).

[68] For a description of how this may benefit the transferor's intent, see Melanie B. Leslie & Stewart E. Sterk, *Revisiting the Revolution: Reintegrating the Wealth Transmission System,* 56 B.C. L. REV. 61, 73–74 (2015). [88] *See* UNIF. PROB. CODE § 2-707(b)(4).

[69] *See id*. § 2-707(b) cmt.

statute.[70] Instead, "[a] foolproof means of expressing a contrary intention is to add to a devise the phrase 'and not to [the devisee's] descendants.'"[71]

Section 2-707 is similar to antilapse in several ways; for example, words of survivorship alone do not count, evidence of contrary intent controls, substitute takers are provided by the statute, and predeceasing beneficiaries are the focus.[92] Section 2-707, however, is not antilapse. It does not function as applying antilapse to revocable intervivos trusts and it carries the potential to create unnecessary confusion among estate planners.

The Uniform Probate Code provides a backdrop to applicable state antilapse statutes, illustrating the confusion the varying framework may create—including Section 2-707—and further justifying the use of a model clause to be used by estate planners.

B. Applicable State Statutes

Probate proceedings have traditionally been left to the individual state legislatures and courts.[72] Recently, however, the Supreme Court of the United States has somewhat narrowed the probate exception to federal diversity jurisdiction,[73] holding that the exception does not apply to bankruptcy or tortious interference with an expectancy.[95] That said, it is safe to assume that the individual statutes in effect within the domicile of a decedent will control the probate of said decedent's property. But antilapse statutes vary among the states, which in turn creates unique subsets of issues. The goal in reviewing these variations is to illustrate the vagaries among the statutes, the uncertainty of which statute will apply upon the death of a transferor, and to accept that these default statutes seldom depict the intent of the transferor.

1. *When Should Antilapse Apply?*

The Uniform Probate Code and most state statutes provide that antilapse applies if the transferee dies prior to execution of the transfer instrument, as well as between the time of execution and the transferor's death.[74] Still a

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[70] *See id.* § 2-707(b)(3). If the transferor provides for an alternate taker, then substitute gift will not apply. *See id.* § 2-707(b)(4).

[71] *Id.* § 2-603 cmt. (citing RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 5.5 cmt. i (AM. L. INST. 1999)). [92] *See id.* § 2-707.

[72] *See* Markham v. Allen, 326 U.S. 490, 494 (1946) (finding that federal courts generally should not interfere with probate proceedings); *see also* Jay W. Freiberg & Hillary A. Frommer, *The Probate Exception: We're Not Just in State Court Anymore*, 161 TRS. & ESTS. 12 (2022).

[73] *See* Marshall v. Marshall, 547 U.S. 293, 311–12 (2006) (permitting the exception to federal jurisdiction to apply to the administration of an estate). [95] *See id.* at 312.

[74] *See, e.g.*, ALA. CODE § 43-8-224 (2022); ARIZ. REV. STAT. ANN. § 14-2603 (2022); ARK. CODE ANN. § 28-26-104 (West 2023); CAL. PROB. CODE § 21110 (West 2023);

reticent minority permits antilapse only for transferees who "die after the execution of the will but prior to the death of the testator,"[75] thereby adopting the common law rule that gifts to transferees dead at the time of execution of the transfer instrument are void.[76]Of course, the clear and convincing intent of the transferor may direct that if antilapse applies at all, it applies to transferees who die only within a certain time frame or not at all.

Admittedly, few transferors intentionally transfer property to a person already deceased; if this occurs, one may argue for a revision of the document based on mistake. But often transferors benefit a class of transferees, such as siblings or nephews and nieces. Secretly, the transferor may have intended only those alive at the date of his or her death to take a share, but antilapse statutes apply to class gifts if the class member transferee predeceases and the transferee's descendants survive the transferor.[77] Inclusion is illustrated by state statutes that often include the phrase, "The provisions of . . . this Code section shall also apply to a testamentary gift to a class unless there appears a clear intent to the contrary."[78]

COLO. REV. STAT. § 15-11-603 (2023); CONN. GEN. STAT. § 45a-441 (2023); DEL. CODE ANN. tit. 12, § 2313 (West 2023); D.C. CODE § 18-308 (2023); FLA. STAT. § 732.603 (2022); GA. CODE ANN. § 53-4-64 (2023); HAW. REV. STAT. § 560:2-603 (2023); IDAHO CODE § 15-2-605 (2023); 755 ILL. COMP. STAT. 5/4-11 (2022); IND. CODE § 29-2-6-1 (2023) (including a spouse as a relative); IOWA CODE § 633.273 (2023); KAN. STAT. ANN. § 59615 (2023); KY. REV. STAT. ANN. § 394.400 (West 2023) ("dies before testator"); LA. CIV. CODE ANN. art. 1593 (2023); ME. REV. STAT. tit. 18-C, § 2-603 (2023); MICH. COMP. LAWS § 700.2603 (2023); MINN. STAT. § 524.2-603 (2023); MISS. CODE ANN. § 91-5-7 (2023); MO. REV. STAT. § 474.460 (2022); MONT. CODE ANN. § 72-2-613 (2023); NEB. REV. STAT. § 30-2343 (2022); NEV. REV. STAT. § 133.200 (2023); N.H. REV. STAT. ANN. § 551:12 (2023); N.J. STAT. ANN. § 3B:3-35 (West 2023); N.M. STAT. ANN. § 45-2-603 (West 2023); N.Y. EST. POWERS & TR. LAW § 3-3.3 (McKinney 2023); N.D. CENT. CODE § 30.1-09-05 (2023); OHIO REV. CODE ANN. §§ 2107.52, 5808.19 (West 2023) (applying to revocable trusts); OKLA. STAT. tit. 84, § 142 (2023); OR. REV. STAT. § 112.395 (2022) ("who dies before the testator"); 20 PA. CONS. STAT. § 2514 (2022); 33 R.I. GEN. LAWS § 33-6-19 (2023); S.C. CODE ANN. § 62-2-603 (2023); S.D. CODIFIED LAWS § 29A-2-603 (2023); TENN. CODE ANN. § 32-3-105(a) (2023) ("or is dead at the making of the will");

TEX. EST. CODE ANN. § 255.153 (West 2023); UTAH CODE ANN. § 75-2-603(1)(b) (West 2023) ("fails to survive the testator"); VT. STAT. ANN. tit. 14, § 335 (2022); WASH. REV. CODE § 11.12.110 (2023); W. VA. CODE § 41-3-3 (2023): WIS. STAT. § 854.06 (2022); WYO. STAT. ANN. § 2-6-106 (2023).

[75] MD. CODE ANN., EST. & TRUSTS § 4-403(a) (West 2022).

[76] *See* Ruotolo v. Tietjen, 890 A.2d 166, 177 (Conn. App. Ct. 2006), *aff'd*, 916 A.2d 1 (Conn. 2007).

[77] SITKOFF & DUKEMINIER, *supra* note 82, at 381.

[78] GA. CODE ANN. § 53-4-64(b) (West 2023).

2. *Who Are Relatives Today?*

Antilapse statutes originated to promote equality among the testator's lineal descendants.[79] If lapse is permitted, the death of a relative to whom a transfer has been made "can have the draconian effect of disinheriting an entire branch of the testator's family tree."[80] So as to prevent this, the vast majority of state antilapse statutes apply to consanguineous relatives, those "related by blood or adoption to the testator," and who die before the testator leaving lineal descendants.[81] The Uniform Probate Code, used as a model by many states, continues this consanguinity feature by employing antilapse to "a grandparent, a descendant of a grandparent, or a stepchild."[82] Rarely does a state apply its statute to a lapsed nonconsanguineous transferee, but Maryland's statute does; it simply applies to "a legatee,"[83] thereby rejecting the traditional restriction to blood relatives. Oddly, some of these nonconsanguineous states specifically exclude predeceasing spouses,[84] meaning that antilapse would apply to a transfer to a romantic partner, but not to a spouse.

Modern attitudes, often with corresponding laws, have shifted from benefitting only formal relationships based on blood, marriage, or adoption to greater acceptance of functional relationships, such as caregivers, friends, and nonmarital cohabitants.[85] Nonetheless, in the vast majority of states, the "family paradigm prizes status above need, desert, or affection . . . [and] presumes that family members—particularly close family members—are most entitled to inherit regardless of their actual relationship with the decedent."[86] Consequently, absent a clear indication of a transferor's intent such as to override the default principle of the state's consanguineous antilapse statute, courts often enforce statutes that significantly depart from decedents' intent.[87]

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[79] *See* French, *supra* note 3, at 350-52.

[80] David Horton, *Wills on the Ground*, 62 UCLA L. Rev. 1094, 1109 (2015).

[81] *See* Or. Rev. Stat. § 112.395 (2022).

[82] *See* Unif. Prob. Code § 2-603(b) (Unif. L. Comm'n amended 2019); *see also* Wis. Stat. § 854.06(2)(a) (2022) (to a grandparent or issue of a grandparent).

[83] *See* Md. Code Ann., Est. & Trusts § 4-403(a)(1) (West 2022); *see also* Cal. Prob. Code § 21110(a) (West 2023) ("a transferee"); D.C. Code § 18-308 (2023) ("a devisee or legatee"); Ga. Code Ann. § 53-4-64 (a beneficiary); Iowa Code § 633.273(1) (2023); Ky. Rev. Stat. Ann. § 394.400 (West 2023) ("a devisee or legatee"); 33 R.I. Gen. Laws § 33-6-19 (2023) ("any person"); Tenn. Code Ann. § 32-3-105(a) (2023) ("the devisee or legatee"); W. Va. Code § 41-3-3 (2023) ("a devisee or legatee").

[84] *See, e.g.*, Iowa Code § 633.274 ("The devise to a spouse of the testator, where the spouse does not survive the testator, shall lapse notwithstanding the provisions of section 633.273, unless from the terms of the will, the intent is clear and explicit to the contrary."). *But see* Kan. Stat. Ann. § 59-615(a) (2023) (including spouses within antilapse protection).

[85] *See* Raymond C. O'Brien, *Marital Versus Nonmarital Entitlements*, 45 ACTEC L.J. 79, 115, 117, 120-21, 125 (2020).

[86] Foster, *supra* note 47, at 240.

[87] *See* Rodriguez-Dod, *supra* note 44, at 1037; Unif. Prob. Code § 2-603(a)(1).

Even if legislatures were willing to depart from form-family to a more function-based status, how would such a statute be phrased? "Societal notions of family have changed . . . and the definition of that unit has become more elusive."[88]Without guidance from the transferor, states permitting antilapse for "any person" predeceasing the transferor seems best equipped to address the changing norm of family.

One fact is certain: evolving family norms and differences in antilapse applicability among the states adds further pressure on estate planners to identify the intent of the transferor so as to avoid any uncertainty of application when a transfer document becomes effective. "It is a credo of estate planning that a well-drafted will should anticipate contingencies and never rely on default rules."[89] Likewise, "the intent of the testator is the 'pole-star by which the courts must steer.'"[90] "Generally, antilapse statutes apply only if the testator's will fails to evidence a 'contrary intention.'"[91]

3. *Who Are Substitute Takers?*

The reality of antilapse is that any transfer to a predeceasing transferee does in fact lapse; but instead of then passing to the transferor's residuary or intestate estate, the antilapse statute provides for what the statute terms "substitute takers," who are the descendants of the predeceasing transferee.[92] Substitute takers most often take per stirpes, not per capita, and they do so specifically because of the state's antilapse statute rather than because of any intention expressed on the part of the transferor or the transferee.[93] Nonetheless, the antilapse statute remains a default statute; any clear and convincing evidence of a contrary intention on the part of the transferor will prevent the statute from applying.[94]

Several issues arise as a consequence of the statute providing for default substitute takers. Following the lead of the Uniform Probate Code, state statutes define these substitute takers as "descendant[s]" of the predeceasing transferee, a term that incorporates the intestate succession rules of the state.[95] Accordingly, only those descendants of the predeceasing transferee who qualify to take under state intestate succession may be valid substitute takers.[118] In

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[88] Rodriguez-Dod, *supra* note 44, at 1037.

[89] Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of its Context*, 73 FORDHAM L. REV. 1031, 1039 (2004).

[90] *Id.* at 1042.

[91] Ascher, *supra* note 37, at 652–53 (1993).

[92] *See* Halbach, Jr. & Waggoner, *supra* note 80, at 1093.

[93] *See, e.g.*, *In re* Pierce's Est., 196 P.2d 1, 4 (Cal. 1948); *see also* UNIF. PROB. CODE § 2-603(b)(2) (UNIF. L. COMM'N amended 2019).

[94] *See, e.g.*, McGowen v. Bogle, 331 S.W.3d 642, 646-47 (Ky. Ct. App. 2011).

[95] *See* UNIF. PROB. CODE § 2-603(a)(3). 118 *Id.*

defining these descendants, many state statutes, often enacted more than a century ago, do not consider assisted reproductive technology (ART), which now provides options that heretofore were unimaginable.[96] Posthumous conception is one illustration. Until the recent enactment of some state statutes permitting children posthumously conceived to inherit intestate, such children were barred from taking intestate from a genetically supported parent.[97] Likewise, ART has enabled enforceable surrogacy contracts to expand, both genetic and gestational surrogacy, thereby permitting a person with no genetic connection with a child to become a parent.[98] These modern developments significantly blur the strict parameters of parenthood guiding the majority of state antilapse statutes.

Similarly, adoption has become more inclusive, thereby less rigid in application but creating difficulties in defining descendants.[99] Modern adoption now includes stepparent adoption without requiring that the parental rights of the non-custodial parent be terminated, only modified.[100] In addition, the Uniform Probate Code treats children in the process of being adopted as a child of the adopter if the adoption is later granted.[124] Some states have adopted "de facto parentage" that may establish parenthood of a child if defined conditions are met,[101] which is statutory and thus beyond the scope of equitable adoption.[102]

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[96] *See generally* O'Brien, *supra* note 19, at 422 ("Because of the rapidity of medical advances and the complexity of the procedures involved, comprehensive legislative reaction to new science is absent on a national and a transnational level." Rather than evincing approval or disapproval, however, legislative silence is most likely a sign of a "lack of engagement" with this nascent area of science. *Id.*). *See also* O'Brien, *supra* note 20, at 38; Raymond C. O'Brien, *The Momentum of Posthumous Conception: A Model Act*, 25 J. CONTEMP. HEALTH L. & POL'Y 332, 333 (2009).

[97] *See, e.g.*, CAL. PROB. CODE § 249.5 (West 2023); UNIF. PROB. CODE § 2-120(k); UNIF. PARENTAGE ACT § 708 (UNIF. L. COMM'N 2017). *See generally* O'Brien, *supra* note 119, at 359 (explaining how states are slowly beginning to consider the implications of posthumous conception, but with varying conclusions).

[98] *See, e.g.*, P.M. v. T.B., 907 N.W.2d 522, 522 (Iowa 2018) (holding that the genetic surrogacy agreement did not violate any state statute or public policy); *see also* UNIF. PARENTAGE ACT §§ 813-14, 815(a), 816(a)-(b), 817(a), 818(a).

[99] *See* UNIF. PROB. CODE §§ 2-116 cmt., 2-117, 2-118(a), 2-119, 2-705(b).

[100] *See id.* § 2-119(c) ("but only for the purpose of the right of the adoptee or a descendant of the adoptee to inherit from or through either genetic parent"). [124] *See id.* § 2-118(b).

[101] *See* UNIF. PARENTAGE ACT § 609(d); PRINCIPLES OF L. OF FAM. DISSOLUTION: ANALYSIS & RECOMMENDATIONS § 2.03(1)(c) (AM. L. INST. 2002).

[102] *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.5 cmt. k (AM. L. INST. 1999); Lankford v. Wright, 489 S.E.2d 604, 606–07 (N.C. 1997) (defining the elements of equitable adoption and its limitations); *see also* Raymond C. O'Brien, Obergefell*'s Impact on Functional Families*, 66 CATH. U. L. REV. 363, 413 (2016).

Contemporary events indicate that when a state statute provides for substitute takers who constitute a class of persons defined as descendants in accordance with intestate succession, such descendants may not correspond with the intent of the transferor. Instead, they are foisted upon the transferor through the conduct of the transferee and often their intentions are dissimilar.

4. *Who Is Predeceased?*

In addition to the typical scenario where a transferee dies prior to the transferor, lapse may also occur when a transferee dies within a certain time period after the transferor.[103] There are other factual scenarios when lapse may result due to the conduct of the transferee, the transferor, or both. To illustrate, all states have enacted what are termed "slayer statutes," which provide that, upon conviction for feloniously and intentionally killing the transferor from whom the transferee would take, the transferee forfeits all benefits arising from any transfer.[104] If the conditions of the statute are met, the transferee is treated as predeceasing, and, if survived by descendants, the state's antilapse statute can and should apply.[105] The Uniform Probate Code applies its slayer provision to wills, trusts, jointly held assets, life insurance contracts, and any beneficiary designations.[106]

There are other predeceasing events. Many modern couples routinely enter into premarital or marital agreements, either before or after marriage. Many of these agreements provide that upon the occurrence of certain events, predominantly divorce or death, each of the parties is treated as predeceased to the other.[107] And without a valid agreement addressing the issue, the Uniform Probate Code and all of the states provide that transfers intended for a spouse

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[103] *See, e.g.*, UNIF. PROB. CODE § 2-702(a) ("[A]n individual who is not established by clear and convincing evidence to have survived an event . . . by 120 hours is deemed to have predeceased the event."); MINN. STAT. § 524.2-603 (2023) (specifying that the descendants of the deceased transferee must also survive the transferor by 120 hours to take under the antilapse statute); *In re* Est. of Lensch, 99 Cal. Rptr. 3d 667, 668 (Ct. App. 2009) (describing the effect of simultaneous death on the state's antilapse statute).

[104] *See, e.g.*, UNIF. PROB. CODE § 2-803; *see also* Willingham v. Matthews, 163 So. 3d 1016, 1018 (Ala. 2014) (finding that the effect of the slayer statute is to treat the slayer as having predeceased the victim); GA. CODE ANN. § 53-4-64(c) (2023) (Antilapse applies to revocation by divorce "or due to the beneficiary being responsible for the death of the testator.").

[105] *See, e.g.*, Fiel v. Hoffman, 169 So. 3d 1274, 1274 (Fla. Dist. Ct. App. 2015) (holding that slayer statute did not prohibit descendants of slayer from taking).

[106] *See* UNIF. PROB. CODE § 2-803(b); *see also* Addison v. Metro. Life Ins. Co., 5 F. Supp. 2d 392, 395 (W.D. Va. 1998) (holding that as a matter of federal common law, a beneficiary who murdered spouse is not entitled to ERISA benefits); 38 C.F.R. § 9.5(e)(1)-(2) (2022).

[107] *See* UNIF. PREMARITAL & MARITAL AGREEMENTS ACT § 2(2), (5) (UNIF. L. COMM'N 2012); *see also* Fick v. Fick, 851 P.2d 445, 449 (Nev. 1993) (holding that, for a premarital agreement to be valid, each party must have a clear understanding of the other party's assets and obligations).

terminated upon a final decree of divorce through operation of law.[108] The Code also applies revocation by operation of law to any relative of the former spouse who is not also a relative to the transferor spouse,[109] which includes stepchildren. Transferees are often included in antilapse statutes even though they are not consanguineous relatives of the transferor.[110]

A few states consider certain conduct of the transferee as sufficient to warrant treating the transferee as predeceased. For example, in the Pennsylvania decision of *In re Estate of Burger*,[111] the concurring opinion argues that when a transfer in a will fails because of the undue influence of the transferee, the antilapse statute should apply unless the transferor, whose intent is primary, provides otherwise.[112] Other states utilize antilapse statutes when the transferee commits financial abuse and is thus treated as predeceasing.[113] Barring a statute, states may treat a transferee as predeceasing under equity, for example in instances of abandonment, desertion, or domestic violence.[114]

5. *How to Address Trusts?*

Concurrent with the evolution of forms of wealth transfers is the evolving application of antilapse statutes. In 1783, when the first antilapse statute was enacted,[115] the provision focused exclusively on decedents' wills.[116] With the modernization of wealth transfers beyond wills, states enacted statutes that applied to nonprobate transfers such as contracts with a named beneficiary, which take effect upon the death of the principal.[117] Similar to wills, these "payable on death" contracts provide a beneficiary with a specified benefit, and the beneficiary could predecease the principal and be survived by descendants.

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[108] *See* UNIF. PROB. CODE § 2-804(b)-(h). *But see* Hillman v. Maretta, 569 U.S. 483, 495-97 (2013) (holding that state revocation by operation of law statutes did not apply to federal benefits such as ERISA or FEGLIA).

[109] *See* UNIF. PROB. CODE § 2-804(b)(1)(A) ("a relative of the divorced individual's former spouse").

[110] *See, e.g.*, *id.* § 2-603(b) ("or a stepchild of either the testator or the donor of a power of appointment"); OHIO REV. CODE ANN. § 2107.52(A)(6) (West 2023); UTAH CODE ANN. § 75-2-603(1)(e) (West 2023).

[111] *See* 898 A.2d 547, 558–59 (Pa. 2006) (Eakin, J., concurring).

[112] *See id.*

[113] *See, e.g.*, WASH. REV. CODE ANN. § 11.84.040 (West 2023); *In re* Est. of Evans, 326 P.3d 755, 761 (Wash. Ct. App. 2014) (holding that any property passing to an abuser will be treated as if the abuser had predeceased).

[114] *See, e.g.*, N.J. Div. of Youth & Fam. Servs. v. M.W., 942 A.2d 1, 20 (N.J. Super. Ct. App. Div. 2008) (holding that a mother's abandonment of her children barred her from taking intestate from her children).

[115] *See* French, *supra* note 3, at 339 n.16.

[116] *See id.* at 338-39.

[117] *See, e.g.*, VA. CODE ANN. § 64.2-418 (West 2023).

Professor John H. Langbein was prescient in describing the effect these nonprobate transfers would have upon overall wealth transfer in the United States,[118] but the author suspects that even Langbein did not grasp the extent of today's wealth that passes through nonprobate transfers.

In response to the growing number of beneficiary designated nonprobate transfers, the Uniform Probate Code enacted a separate applicable provision.[119] For the most part, the terms of Code Section 2-706 parallel those of Section 2-603 (applicable to wills). This means that the rules governing time applicability, who are considered relatives, who constitute substitute takers, and those which disregard words of survivorship, without more, all now apply to nonprobate transfers. And yet there is a method of nonprobate transfer that has proliferated but is not covered under either Section 2-603 or Section 2-706: a revocable intervivos trust.[120] This popular nonprobate device permits a settlor of an intervivos revocable trust to name a beneficiary who may take upon the settlor's death, make modifications, incorporate by reference, allow independent significance, and best of all, avoid the costs and delays most often associated with probate procedures such as wills and intestacy.[145] Today, all trusts are considered to be revocable, unless otherwise stated, and therefore may easily be terminated.[146]

To accommodate intervivos revocable trusts, a modest number of states have enacted antilapse statutes that specifically encompass them, despite the fact that these trusts seem a logical progression following enactment of antilapse statutes for wills and for "payable on death" contracts. It is simply logical to apply antilapse to revocable intervivos trusts, as it applies to wills and other forms of nonprobate transfers, because each device names the intended beneficiaries, is revocable, and distributes the benefit(s) at the death of the settlor.

To date, Virginia is one of a few states to enact a statute specifically applying antilapse to revocable intervivos trusts.[147] Its statute follows the general approach of antilapse, specifying that, unless a contrary intention appears in the trust document, if a consanguineous beneficiary predeceases the settlor and is survived by descendants, then those descendants share in the benefit in accordance with the pattern of intestate succession.[148] This model is

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[118] *See* John H. Langbein, *Major Reforms of the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers*, 38 ACTEC L.J. 1, 15–19 (2012); John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722 (1988); John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1124-25 (1984).

[119] *See* UNIF. PROB. CODE § 2-706 (UNIF. L. COMM'N amended 2019) (providing antilapse protection for beneficiary designations under which the beneficiary is expected to survive the decedent).

[120] For an acknowledgement of the proliferation of revocable intervivos trusts, see RESTATEMENT (THIRD) OF TR. § 25 (AM. L. INST. 2003); for effect of revocability, see

easily recognizable in those specifically applicable to wills and other nonprobate transfers.[149] Illustrating the statute's recent adoption, Virginia applies antilapse only to revocable trusts of settlors who die after July 1, 2018.[150]

Washington also has an antilapse statute applicable to revocable trusts,[151] as does Tennessee,[152] which specifically applies to revocable intervivos trusts that become irrevocable at the death of the settlor.[153] Wisconsin also applies antilapse to intervivos revocable trusts but with more convoluted statutory language, stating that the statute applies "to revocable provisions in a governing instrument executed by the decedent that provide for an outright transfer upon the death of the dece-

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UNIF. TR. CODE § 603 (UNIF. L. COMM'N amended 2010) (beneficiary of a revocable trust has no legally enforceable interest while the settlor may revoke).

145 Similar to wills, revocable trusts are also available to the settlor's creditors, as well as being susceptible to claims made by a surviving spouse to an elective share against the settlor's estate. *See* UNIF. TR. CODE § 505(a)(3); *see also* UNIF. PROB. CODE § 2205(1).

146 UNIF. TR. CODE § 602(a).

147 *See* VA. CODE ANN. § 64.2-418 (2023). 148 *See id.* § 64.2-418(B).

149 *See, e.g.*, OHIO REV. CODE ANN. § 2107.52 (West 2023).

150 *See* VA. CODE ANN. § 64.2-418(C).

151 WASH. REV. CODE § 11.12.110 (2023).

152 *See* TENN. CODE ANN. § 32-3-105(b) (2023). 153 *See id.*

dent."[121] The statute further stipulates that antilapse does not apply if a contrary intention appears in the instrument, if there are contingent transferees, or if there exists extrinsic evidence contrary to the application of the statute.[122] The inclusion of extrinsic evidence to rebut application is unique.

North Carolina engrafts intervivos trusts into its general antilapse provision.[123] On the other hand, Ohio has two separate antilapse provisions; one applies to revocable trusts, the other applies to wills and provides that any consanguineous beneficiary who does not survive the settlor by at least 120 hours is subject to its provisions unless otherwise stated in the instrument.[124][125] Courts have considered whether generally applicable antilapse statutes applicable to wills should also be applied to intervivos trusts. In *Ex Parte Byrom*,[158] the Alabama Supreme Court expressly rejected this implied

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121 WIS. STAT. § 854.06(2) (2021).

122 *See id*. § 854.06(4).

123 *See* N.C. GEN. STAT. § 36C-6-605(a) (2022).

124 *Compare* OHIO REV. CODE ANN. § 5808.19(B)(2)(b) (West 2023), *with* OHIO REV. CODE ANN. § 2107.52(B)(2).

125 So. 3d 791 (Ala. 2010); *see also* Baldwin v. Branch, 888 So. 2d 482, 485 (Ala. 2004).

applicability argument, holding that such an implication would clearly usurp the role of the state legislature.[126]

Since a few states apply antilapse to revocable intervivos trusts, it is important to distinguish such trusts and corresponding statutes from Uniform Probate Code Section 2-707.[127] Admittedly, Section 2-707 and revocable intervivos trusts utilize similar formats. Antilapse statutes and Section 2-707 both create substitute takers and descendants, as well as establish when lapse occurs; both also seek to prevent disinheritance of a descending line of inheritance,[128] provide that words of survivorship without more can have no effect upon application of the statute, and involve trusts (distinctive from wills and other forms of nonprobate transfers). Unabashedly, Section 2-707 embraces the format of lapse statutes, with comments to the section acknowledging that "the structure of this section substantially parallels the structure of the regular antilapse statute, Section 2-603 and the antilapse-type statute relating to beneficiary designations, Section 2-706."[129] Yet, there remains a significant difference between the two.

In addition to the heated debate over the impact of Section 2-707 on traditional trust law,[130] the provision is distinctive for two key reasons. First, it references an event other than the death of the settlor, unlike current state intervivos revocable trust antilapse statutes. Therefore, Section 2-707 involves more general trusts, whenever a "future interest under the terms of a trust is contingent on the beneficiary surviving the distribution date."[131] Accordingly, current intervivos revocable trust antilapse statutes are meant to apply to an evolution of nonprobate transfers, not to future interests used in a much larger fashion under Section 2-707. Second, by implying an actual requirement of survivorship to a named distribution event, other than simply the death of a settlor, Section 2-707 seeks to prevent disinheritance of a beneficiary that does not survive but is survived by descendants.[165] That is, even though a beneficiary did not survive, the beneficiary's descendants may nevertheless take in an antilapse fashion. This is a significant departure from common law, which would have skipped the application of the antilapse format and resulted the

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[126] *See Byrom*, 47 So. 3d at 795 (holding the statute is "applicable to wills, not trusts, and is thus inapplicable, absent a legislative act that directs its application to trusts").

[127] *See* UNIF. PROB. CODE § 2-707(a)(1) (UNIF. L. COMM'N amended 2019) ("an expressly created future interest that can take effect in possession or enjoyment instead of another future interest on the happening of one or more events, including survival . . . or failure to survive an event, whether an event is expressed in a condition-precedent, condition-subsequent, or any other form").

[128] *See id.* cmt.

[129] *See id.*

[130] *See generally* Dukeminier, *supra* note 33, at 148-49.

[131] UNIF. PROB. CODE § 2-707(b). [165] *See id.*

beneficiary's interest to surviving class members or back to the settlor.[132] The drafters of the Code suggest that Section 2-707 is necessary to protect the beneficiary's descendants from the inadvertent use of words such as "surviving," drafted by an estate planner and inserted into a trust instrument often with little forethought.[133]

The complex consequences to estate planning resulting from antilapse are only further exacerbated when Code Section 2-707 is introduced. Thankfully, as is true for traditional antilapse statutes pertaining to wills or nonprobate transfers, Section 2-707 is also subject to evidence of a contrary intention adequately expressed by the transferor or settlor.[134] With the presence of so many options, however, the task of any estate planner remains fraught with risk of error in seeking to identify a client's true intent. This risk becomes substantially aggravated when clients possess multiple forms of wealth transfer and often execute governing instruments in one state but later die while domiciled in another. Such risks precipitate need for a model antilapse clause that allows the estate planner to describe the process of antilapse and then adopt one of three options into any governing instrument, which travels with the modern client.

IV. Model Antilapse Clause

Drafting a model antilapse clause to insert into any will, trust, or nonprobate transfer begins with the assumption that a well-drafted clause may prevent default application of an antilapse statute or Code Section 2-707, as evidence of a contrary intent.[169] Any contradictory clause must be clearly and convincingly drafted. Based on this assumption, there remains the practical matter of how to gauge the intent of the client concerning an issue with so many moving parts. Recall that modern clients generally employ an array of nonprobate transfers, including intervivos trusts, augmented with a will often utilized as a pour-over device. This assortment of transfers can be complicated enough; consider then the complexity added by antilapse statutes, such as whether it will apply, to whom it will apply, who will qualify as substitute takers, and under what circumstances a beneficiary should be treated as

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[132] *See generally* Raymond C. O'Brien, *Analytical Principle: A Guide for Lapse, Survivorship, Death Without Issue, and the Rule*, 10 Geo. Mason U. L. Rev. 383, 388 n.17 (1988); Ruotolo v. Tietjen, 890 A.2d 166, 169 (Conn. App. Ct. 2006), *aff'd*, 916 A.2d 1 (Conn. 2007).

[133] *See* Waggoner, *supra* note 80, at 2331–32.

[134] *See* Unif. Prob. Code § 2-701 ("In the absence of a finding of a contrary intention, the rules of construction in this [part] control the construction of a governing instrument . . . of any type . . . ."). The Code defines a "governing instrument" as:

> [A] deed, will, trust, insurance or annuity policy, account with POD designation, security registered in beneficiary form (TOD), transfer on death (TOD) deed, pension, profit-sharing, retirement, or similar benefit plan, instrument creating

predeceased. As a practical matter, how may an estate planner possibly decipher the client's intent?

One option is to create a check list of intent, illustrated with boxes for the client to check manifesting approval or disapproval. Such forms are not without precedent; for instance, they are available in the health care setting under the Uniform Health Care Decisions Act (1993).[170] The Act permits the principal to "fill in the blanks" when designating primary and alternate agents, and then to check a series of boxes that designate instructions for health care, organ donation, and selection of a primary and alternate physician.[171] Albeit expeditious, this process ap-

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or exercising a power of appointment or a power of attorney, or a dispositive, appointive, or nominative instrument of any similar type.

Id. § 1-201(18).

[169] *See* Kubeczky v. Wesbanco Bank Wheeling, 541 S.E.2d 334, 341 (W. Va. 2000) (holding that evidence to overcome the use of the state's antilapse statute must be clear and convincing); *see also* Shirley v. Dawkins, No. 1200706, 2022 WL 2286416, at *2 (Ala. June 24, 2022) (holding that the antilapse statute was effective because the testator did not adequately express a contrary intent).

[170] *See* UNIF. HEALTH-CARE DECISIONS ACT § 4 (UNIF. L. COMM'N 1993). [171] *See id.*

pears cumbersome, fraught with mistake, and, just as with lapse, unmalleable to potential changes in preference over time.

Compared to checked boxes, a model antilapse clause is preferable because it promotes clarity and efficiency; clients either prefer antilapse or they do not. It is incumbent upon the estate planner to explain the consequences of lapse and then to offer a choice among three options: (1) a general clause that provides there is to be no antilapse at all; (2) the state's antilapse statute is to be fully employed in a liberal fashion; and finally (3) at the death of the client, a designated person is then given a "power of direction" to decide if antilapse should apply and, if so, to whom and to what extent. Such a power of direction under the third option is modeled after the goals of the Uniform Directed Trust Act (2017), which permits a person other than a trustee to exercise discretion in the distribution of a decedent's trust.[135] The person to whom the power of direction is entrusted could be the personal representative of the decedent's estate, a trustee of any trust, or a third party serving in the best interest of the decedent's substituted judgment.[136]

In essence, the agent with the power of direction under the third option has the authority to perform all of the acts attributed to the principal,[137] to include,

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[135] *Compare* UNIF. DIRECTED TR. ACT § 2(5) (UNIF. L. COMM'N 2017) (general power of appointment is also similar), *with* UNIF. POWER OF APPOINTMENT ACT § 203 (UNIF. L. COMM'N 2013) (giving a donee the presumption of unlimited authority to distribute assets).

[136] *See generally* UNIF. DIRECTED TR. ACT § 5(b) (listing exclusions to the power of direction).

[137] *See* UNIF. POWER OF ATT'Y ACT § 201(c) (UNIF. L. COMM'N 2006).

upon lapse of any beneficiary, rejecting or limiting substitute takers, or enhancing the benefits of those eligible to take. Acting in a fiduciary capacity, the agent serves in accordance with how the agent perceives the client would have preferred (a form of substituted judgement).[138] The ability to fashion a remedy in accordance with the intent of the transferor is consistent with reformation permitted under the Uniform Statutory Rule Against Perpetuities, now incorporated into the Uniform Probate Code.[139] As such, the designated person with the power of direction may "reform a disposition in the manner that most closely approximates the transferor's manifested plan of distribution."[140] Accordingly, three remedial antilapse clauses are offered as follows:

A. No Antilapse

> *Upon the lapse of any beneficiary named herein, consanguineous or not, that beneficiary's descendants shall not take as substitute takers of any property that would have gone to any beneficiary predeceasing the transferor or any designated event established under the terms of a trust.*

The substance of this clause arises from the comment to Section 2603: "A foolproof means of expressing a contrary intention is to add to a devise the phrase 'and not to [the devisee's] descendants.'"[141] The language is sufficient to eliminate the substitute takers under antilapse statutes applicable to wills, payable at death nonprobate transfers, and intervivos revocable trusts. In addition, because Section 2-707 also employees substitute takers, it, too, would be barred by the text of this clause.

B. All Inclusive Antilapse

> *Upon the lapse of any beneficiary named herein, consanguineous or not, at any time prior to my death or a designated event, the surviving legal, equitable or intended descendants of this beneficiary, including those in gestation or adopted or in the process*

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[138] *See e.g.*, *In re* Trott, 288 A.2d 303, 307–08 (N.J. Super. Ct. Ch. Div. 1972) (utilizing the court's substitute judgement rather than the best interest of the ward standard in permitting a guardian to act on behalf of a ward). *See generally* Lawrence A. Frolik & Linda S. Whitton, *The UPC Substituted Judgement/Best Interest Standard for Guardian Decisions: A Proposal for Reform*, 45 U. MICH. J.L. REFORM 739 (2012) (positing that when a surrogate decisionmaker is unable to carry out the incapacitated individual's wishes because they are unknown, those who know the individual best may help inform the decisionmaker).

[139] *See* UNIF. PROB. CODE § 2-903 (UNIF. L. COMM'N amended 2019).

[140] *See id.*

[141] *See id.* § 2-603 cmt. (citing RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 5.5 cmt. i (1999)).

> *of adoption, shall share by representation as substitute takers in that which was given to the predeceasing beneficiary.*

There are several features to this clause that will appeal to a client's sense of equity and recent sociological inclusivity trends. First, the clause is not concerned about maintaining consanguineous lines of descent. Instead, any predeceasing beneficiary may benefit, including spouses, acquaintances, and members of a class.[142] Second, the predeceasing beneficiary may die prior to the execution of the transfer instrument, which would otherwise void the transfer under the common law and a few state statutes. Further, beneficiaries may die subsequent to execution but prior to the transferor or designated event. Any state rules pertaining to beneficiaries as predeceased due to marital agreements, renunciation, divorce, or felonious murder of the transferor by the transferee remain in place. Third, the class of substitute takers has been enhanced to include those equitably adopted,[143] in the process of being adopted,[144] and those intended, so as to encompass descendants occurring as a result of assisted reproductive technology. Maternity or paternity must still be proven in accordance with state law.[145] Some states treat issue in gestation as eligible to take, including those posthumously conceived.[146] Fourth, sharing by representation (per stirpes), is a common feature among state antilapse statutes and should accommodate the intentions of a vast majority of clients. Finally, the use of the term "designated event" permits the process to occur as described in Section 2-707.[147]

C. Directed Antilapse

> *Upon my death I appoint [primary agent], and in the alternative [alternative agent], to serve as my agent in accommodating my intent in regards to any transfer made to any beneficiary predeceasing me or the occurrence of any designated event, without constraints imposed by any existing state statute, but strictly in accord with what my agent considers to be my intent in regards to distribution, but with the exception that my agent is not permitted to appoint to*

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[142] *See generally id.* § 2-603(b)(2) ("Each surviving devisee takes the share to which the surviving devisee would have been entitled had the deceased devisees survived the testator.").

[143] *See, e.g.*, Lankford v. Wright, 489 S.E.2d 604, 606–07 (N.C. 1997) (naming the elements of equitable adoption).

[144] *See* UNIF. PROB. CODE § 2-118(b) (stepparent adoption).

[145] *See, e.g.*, Reese v. Muret, 150 P.3d 309, 314 (Kan. 2007) (finding that there must be a hearing to determine the best interest of a child before rebutting a statutory presumption of paternity).

[146] *See, e.g.*, CAL. PROB. CODE § 249.5 (West 2023).

[147] *See generally* UNIF. PROB. CODE § 2-707.

himself/herself, his/her estate, his/her creditors, or the creditors of his/her estate.

This directed clause provides a named agent with powers similar to those of a donee under a general power of appointment, but with a very important exception. The provisions of this directed clause require that the agent focus on the client's intent in a substituted fashion, rather than the unlimited authority given to a donee of a general intervivos power of appointment.[148] In addition, the agent is not permitted to make a distribution to himself/herself, his/her creditors, or the creditors of his/ her estate. This limitation is intended to protect the agent's estate against the tax consequences of holding a general power of appointment.[186]

Consequently, the agent's decisions are only limited by the requirement that a named beneficiary, of whatever relationship to the client, either predeceased the transferor at any time or is treated as predeceased by an existing pertinent state statute. By establishing a designated event, the statute may also incorporate the process to occur that is described in Section 2-707.[149]

The agent is not limited to consanguineous descendants of that predeceasing beneficiary; instead, the agent is empowered to allow the transfer to lapse, or to create substitute takers from any surviving person or entity, excluding the agent himself, so long as the agent acts in a fiduciary manner in accordance with the substituted judgement of the deceased client.[150] Extrinsic evidence may establish such intent, including the client's prior actions, writings, and arrangements made prior to the death of the client.[189]

Increasingly, the law recognizes that circumstances may change from when transfer documents were executed until the client's death or the occurrence of an event.[151] To accommodate evolving circumstances, states have approved powers of appointment that allow for donees to make decisions long after the donor has died.[152] Likewise, both the Uniform Trust Decanting Act and the Uniform Directed Trust Act permit agents of the deceased transferor to modify instructions contained in wills and trusts.[153] The Uniform Health-Care Decisions Act permits agents the power to make legal decisions over the affairs

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[148] *See* UNIF. POWERS OF APPOINTMENT ACT § 203 (UNIF. L. COMM'N 2013). [186] *See* 26 C.F.R. § 20.2041-1(c)(1)(b) (2021).

[149] *See* UNIF. PROB. CODE § 2-707(b)-(d).

[150] *See, e.g.*, Matter of Hourihan, No. A-1289-18T4, 2020 WL 5049128, at *3 (N.J. Super. Ct. App. Div. Aug. 27, 2020) (illustrating that limitations on substituted judgement may occur because there is no clear indication of what the decedent would have wanted). [189] *See In re* Miller, 935 N.E.2d 729, 739 (Ind. Ct. App. 2010).

[151] *See* UNIF. PROB. CODE § 2-707(a)(1).

[152] *See, e.g.*, VA. CODE ANN. § 64.2-427 (2023).

[153] *See* UNIF. TR. DECANTING ACT § 2(10) (UNIF. L. COMM'N 2015); *see also* UNIF. DIRECTED TR. ACT § 6 cmt. (UNIF. L. COMM'N 2017).

of a client, to include withholding extraordinary life support.[154] Certainly, permitting a client to choose an agent to expedite the vagaries of lapse is not so farfetched.

V. Conclusion

The complexity of state antilapse statutes exacerbates the task of many estate planners seeking to give prudent expression to the postmortem wishes of a client. These statutes vary as to which predeceasing beneficiaries they should apply, who should be the substitute takers to take instead of these lapsed beneficiaries, and how to treat beneficiaries who are treated as predeceasing because of renunciation agreements, final decrees of divorce, or when the beneficiary kills, exploits, or abuses the one from whom the beneficiary would take.

There is also an increasing array of probate and nonprobate devices by which a transferor may transfer property to a transferee. Wills remain the traditional method, but an arsenal of nonprobate contractual transfers, including revocable intervivos trusts, has developed over the last fifty years. Should antilapse apply to all of these transfers? Further confusion is generated since Uniform Probate Code Section 2-707, which provides for a substituted gift, borrows the process of lapse.

Modern clients are very mobile, tend to live longer, and use an increasing array of transfer documents. Often, a transfer instrument is executed by a client in one state with its own set of laws, but years later the client dies domiciled in a second state with different laws. The professional estate planner must accommodate mobility. Traditional lines of consanguineous descent are also often less relevant in today's society with access to no-fault divorce, genetic and gestational surrogacy, various manners of assisted reproductive technology, stepparent adoption, and an increasing number of nonmarital cohabiting couples, many with children. The fluidity of family structures progressively challenges estate planners.

With respect to postmortem transfers, this Article rejects the need for a "one size fits all" uniform statute that ideally captures the intent of all modern clients. Even if all of the states could agree on a single statute, each and every provision would still remain a mere default rule, easily discarded if the client's different intention is otherwise made clear and convincing. This article arms the estate planner with three clauses that will allow him or her, with an eye towards simplicity, to offer the client three unique choices. Once the client is made privy to the ramifications of when a beneficiary predeceases the client or a named designated event, the client may then choose one of the three optional clauses for inclusion in any Last Will and Testament, payable-on-death contract, or revocable intervivos trust. Even a future interest designated event may be

[154] *See* Unif. Health-Care Decisions Act § 1(6)(iii) (Unif. L. Comm'n 1993).

accommodated in accordance with Section 2-707. The client's choice, evidenced clearly and convincingly in one of the three proposed clauses, will enhance the accuracy of the expression of the client's wishes and, best of all, facilitate the goal of the professional estate planner.