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Disinheritance And The Anti-Lapse Statute

In application, *Ianniello* is the same as the earlier cases of *Black* and *Groban*, which denied a right to counsel and emphasized the right against self-incrimination as the witness' only protection. All three cases presuppose knowledge on the part of the witness which may, in fact, be lacking. Even though most witnesses may actually know of their privilege against self-incrimination, it seems unlikely that many will have knowledge of the actual procedures to follow in invoking that privilege and in forcing the question into open court.

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DISINHERITANCE AND THE ANTI-LAPSE STATUTE

When a legatee predeceases the testator the legacy is said to "lapse" and pass into the residuary.[1] Anti-lapse statutes have been enacted to prevent the passage of such legacies into the residuary, and to effect the probable intention of the testator had he thought of the possibility of surviving the legatee.[2] Generally, these statutes, by preventing the legacy from passing into the residuary, provide that property which would have passed into the residuary passes instead to the lineal descendants of the deceased legatee.[3] A problem arises, however, when

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[1] T. ATKINSON, WILLS, § 140, at 777 (2d ed. 1953); 6 PAGE, WILLS, § 50.10, at 77 (Bowe-Parker ed. 1962). It is possible that the lapsing legacy will itself be the residuary, in which case the lapsed residuary passes by intestate distribution.

[2] *E.g.*, CONN. GEN. STAT. ANN. § 45-176 (1958); IOWA CODE ANN. § 633.273 (1964); N.Y. EPTL § 3-3.3 (McKinney 1967); OHIO REV. CODE ANN. § 2107.52 (Baldwin 1964). *See In re* Estate of Pew, 10 Cal. App. 41, 50 P.2d 1045 (Dist. Ct. App. 1935); *In re* Estate of Braun, 256 Iowa 55, 126 N.W.2d 318 (1964); Gianoli v. Gabaccia, 82 Nev. 108, 412 P.2d 439 (1966); *In re* Force's Estate, 23 N.J. Misc. 141, 42 A.2d 302 (Orphans' Ct. 1945); *In re* Howes' Estate, 35 Misc. 2d 109, 229 N.Y.S.2d 469 (Sur. Ct. 1962); *In re* Estate of Burn, 78 S.D. 223, 100 N.W.2d 399 (1960).

> This statutory provision was enacted to avoid the lapse of bequests to certain near relatives of a testator and the purpose of the statute was to fulfill an unexpressed intention of the testator by providing a disposition of a legacy in circumstances where the testator's failure to provide a disposition could be regarded as an oversight on his part.... The statute was not intended either to establish a public policy or to substitute a legislative intent for a testamentary intent and, accordingly, the statute is without application if it is evident from a will that the failure to provide for the passing of a legacy in conformity with the statute in not an oversight and the statutory disposition would not be in harmony with the testator's testamentary purpose....

In re Howes' Estate, 35 Misc. 2d 109, 229 N.Y.S.2d 469, 470 (Sur. Ct. 1962).

[3] CAL. PROB. CODE § 92 (West 1956); MD. ANN. CODE art. 93, § 353 (1957); N.J. REV. STAT. § 3A:3-13 (1951).

the application of the anti-lapse statute defeats the apparent intention of the testator to disinherit a lineal descendant or heir of the legatee.

In *Bruner v. First National Bank*,[4] the testatrix expressly disinherited certain parties, stating:

> I give and bequeath my son, Doc Mack, my daughter, Bertha Quiver, my grandsons Floyd Mack and *Raymond B. Mack*, the sum of Ten Dollars ($10.00) each. I intentionally make no other provision for the above named persons. I am expressly disinheriting all of the above persons except ... my daughter Dressie Mack Reynolds ....[5]

The remainder of the estate was left by the residuary clause to Dressie Mack Reynolds. The testatrix made no provision for the contingency of her daughter predeceasing her, and one year before testatrix's death, her daughter died. The daughter's sole heir was her son, Raymond B. Mack, who was one of the persons expressly disinherited in testatrix's will. The testatrix did nothing to change her will, and upon her death, Raymond B. Mack contended that the Oregon anti-lapse statute[6] should be applied by the court to prevent the legacy to his mother from lapsing. The other disinherited parties, however, contended that the testatrix manifested a contrary intention in her will when she expressly disinherited Raymond, and that application of the anti-lapse statute would be contrary to that apparent intent. If the statute were applied, Raymond B. Mack would take the entire estate, and if it were not applied, the testatrix's estate would pass by the statute of descent and distribution as though the testatrix had died intestate.[7]

The Supreme Court of Oregon determined that the anti-lapse statute should be applied to the residuary clause, reasoning that by expressly disinheriting certain parties, the testatrix intended only to prevent them from claiming a portion of her estate under the pre-

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[4]— Ore. —, 443 P.2d 645 (1968).

[5]*Id.* at 645-46 (emphasis added).

[6]The Oregon anti-lapse statute is as follows:

> When any estate is devised to any child, grandchild or other relative of the testator, and such devisee dies before the testator, leaving lineal descendants, such descendants shall take the estate, real and personal as such devisee would have done if he had survived the testator.

ORE. REV. STAT. § 114.240 (1965).

There are several kinds of anti-lapse statutes. They differ as to the type of legatee which comes under the influence of the statute and who is susbstituted in his place, but these differences are irrelevant for purposes of the discussion here. *See* 6 PAGE, WILLS, § 50.10 (Bowe-Parker ed. 1962).

[7]Since the testaror's residuary clause lapses if the anti-lapse statute does not apply, it is as if the testator had died intestate. The Oregon statutes of descent and distribution are ORE. REV. STAT. §§ 111.020-.030 (1957).

termitted heirs statute.[8] While the disinheritance prevented Raymond B. Mack from claiming under the pretermitted heirs staute, it did not preclude him from claiming under the anti-lapse statute. If the testatrix intended to disinherit completely the grandson, she would have taken steps to accomplish this intention after her daughter had died.[9]

The judicial function in construing a will is to ascertain and give effect to the probable intention of the testator as gleaned from a reading of his will in light of all surrounding facts and circumstances.[10] Accordingly, the anti-lapse statute is not mandatory and it will not be applied where it will defeat the manifest intention of the testator.[11] However, unless the testator actually provides substitutes for his legatees, it is exceedingly difficult to disinherit a specific party and prevent the operation of the anti-lapse statute. The primary reason for this is that courts place the burden of proof upon the party contending that the anti-lapse statute should not be applied,[12] and

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[8]A "pretermitted heirs" statute provides that a child omitted from his parent's will may take his intestate share of the parent's estate, unless it appears that the omission is intentional or he is otherwise provided for. ORE. REV. STAT. § 114.250 (1965) concerning pretermitted heirs is as follows:

> If any person makes his will and dies, leaving a child or children, or, in case of their death, *descendants of such child or children,* not named or provided for in such will, although born after the making of such will or the death of the testator, every such testator, so far as regards such child or children or their descendants, not provided for, shall be deemed to die intestate; and such child or children, or their decendants, shall be entitled to such proportion of the estate of the testator, real and personal, as if he had died intestate; and the same shall be assigned to them, and all the other heirs, devisees and legatees shall refund their proportional part. (emphasis added).

It should be noted that the testatrix had six unmentioned grandchildren, a fact which the court seemingly ignored. If the testatrix were trying to keep relatives from claiming under the pretermitted heirs statute, then it would seem she would have named all her relatives. Supplemental Brief for Appellant at 1, Bruner v. First Nat'l Bank, — Ore. —, 443 P.2d 645 (1968).

[9]443 P.2d at 646-47.

[10]*In re* Estate of Daley, 6 Ariz. App. 443, 433 P.2d 296 (1967); *In re* Will of Faber, 259 Iowa 1, 141 N.W.2d 554 (1966); *In re* Barnum's Will, 53 Misc. 2d 413, 278 N.Y.S.2d 934 (Sur. Ct. 1967), *rev'd on other grounds,* 289 N.Y.S.2d 25 (Sup. Ct. 1968); Ashley v. Volz, 218 Tenn. 420, 404 S.W.2d 239 (1966).

[11]Brewer v. Curtis, 30 Del. (7 Boyce) 503, 108 A. 673 (1920); Gianoli v. Gabaccia, 82 Nev. 108, 412 P.2d 439 (1966); Day v. Brooks, 39 Ohio Op. 2d 441, 224 N.E.2d 557 (P. Ct. 1967); Kunkel v. Kunkel, 267 Pa. 163, 110 A. 73 (1920).

[12]*See* Brewer v. Curtis, 30 Del. (7 Boyce) 503, 108 A. 673 (1920); *In re* Estate of Braun, 256 Iowa 55, 126 N.W.2d 318 (1964); Vance v. Johnson, 171 Md. 435, 188 A. 805 (1937); Henney v. Ertl, 7 N.J. Super. 401, 71 A.2d 546 (Ch. 1950); Detzel v. Nieberding, 36 Ohio Op. 2d 358, 219 N.E.2d 327 (P. Ct. 1966).

the failure to meet this burden results in the operation of the statute.[13]

Moreover, it is exceedingly difficult to prevent the anti-lapse statute from applying when unforeseen circumstances occur after the execution of a will and the testator never thought of the contingency confronting the court. In this situation courts are reluctant to admit parol evidence as to the testator's probable intent[14] and they resort to rules of construction.[15] In some jurisdictions these rules have been codified.[16] The utilization of these rules and of presumptions makes the burden of proof more difficult for the party contending that the anti-lapse statute should not apply. For instance, the courts favor a construction of any will which leaves no intestacy; *i.e.,* there is a presumption against intestacy.[17] Furthermore, the testator is pre-

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[13]Brewer v. Curtis, 30 Del. (7 Boyce) 503, 108 A. 673 (1920); Henney v. Ertl, 7 N.J. Super. 401, 71 A.2d 546 (Ch. 1950); *In re* Estate of Burn, 78 S.D. 223, 100 N.W.2d 399 (1960); Detzel v. Nieberding, 36 Ohio Op. 2d 358, 219 N.E.2d 327 (P. Ct. 1966).

[14]*In re* Estate of Winslow, 259 Iowa 1316, 147 N.W.2d 814 (1967); *In re* Estate of Martin, 199 So. 2d 829 (Miss. 1967); *In re* Estate of Fowler, 338 S.W.2d 44 (Mo. 1960); *See In re* Estate of Hoffman, 53 N.J. Super. 396, 147 A.2d 545 (App. Div. 1965).

In the contruction of a will, the type of evidence admissable in discovering the testator's intent is decisive. Extrinsic evidence is not permitted in the unambiguous will. If the will is ambiguous, however, the courts must determine whether the ambiguity is latent or patent. Latent ambiguities arise from outside circumstances and courts allow extrinsic evidence. Patent ambiguities arise from a death of clarity within the will. Opinion is not uniform concerning the admissability of extrinsic evidence here. But even courts which allow extrinsic evidence in patent ambiguity situations limit this evidence to the determination of surrounding circumstances, and do not allow parol evidence to determine the testator's probable intent. Also, courts allowing extrinsic evidence in patent situations often circumvent this by declaring the will unambiguous. *See* Weir v. Leafgreen, 26 Ill. 2d 406, 186 N.E.2d 293 (1962); *In re* Estate of Hoffman, 53 N.J. Super. 396; 147 A.2d 545 (App. Div. 1965).

[15]Interpretation is the process of discovering, from permissible data, the meaning or intention of the testator as expressed in his will. If interpretation discloses a clear and full intention on the part of the testator, further inquiry is not necessary. On the other hand, courts resort to the process of construction if the discovered intention is partial or ambiguous and therefore inconclusive. In pursuing this process a court is aided by certain rules of construction or presumptions. In applying these rules the court is seeking to assign intention to the words used by the testator, and is not seeking the testator's action intention, for it has already failed to find this. 20 WASH. & LEE L. REV. 104 (1963).

[16]*E.g.,* CAL. PROB. CODE §§ 102, 103 (West 1956); N.Y. EPTL § 9-1.3 (McKinney 1967).

[17]Pfadenhauer v. Hecht, 159 Cal. App. 2d 686, 324 P.2d 693 (Dist. Ct. App. 1958); Detzel v. Nieberding, 36 Ohio Op. 2d 358, 219 N.E.2d 327 (P. Ct. 1966); Snyder's Estate v. Denit, 195 Md. 81, 72 A.2d 757 (1950).

sumed to know the law and, consequently, to know that the anti-lapse statute will be applied if no substitute legatees are named.[18]

Judicial reluctance not to apply the anti-lapse statute in cases of general disinheritance is exemplified by *Larwill's Executors v. Ewing*.[19] There the testator made a specific legacy of $50,000 to his daughter, Elizabeth L. Miller, and in a subsequent codicil he disinherited *all* persons not specifically mentioned in his will: "This omission is not accidental or inadvertent or from any unkind feelings on my part, but deliberate and determined, and for reasons which seem to me good and sufficient."[20] Elizabeth L. Miller predeceased the testator, but he did not revoke the legacy to her. Elizabeth's daughter, who was not mentioned in the testator's will, contended that she should take her mother's legacy by way of the anti-lapse statute. The court, in applying the statute, utilized the presumption that the testator knew of the anti-lapse statute and of its effect when he made the legacy to Elizabeth. "Stability and consistency of adjudication require the conclusive presumption that the gift was made with knowledge of the statute and its effect."[21]

As *Larwill's Executive* illustrates, in those cases involving a general disinheritance, the testator has manifested no specific intent to disinherit any particular person, and courts apply rules of construction. In cases involving a specific disinheritance, even though the testator has manifested a specific intent to disinherit a particular person, courts still employ these rules. In *In re Carleton's Will*,[22] a testatrix made a specific legacy of $5,000 to her son, Alexander Carleton. In another clause of the will, a specific legacy of $1000 was made to each of her grandchildren. This clause was subsequently modified by a codicil which specifically excluded two of the grandchildren by name. One of the excluded grandchildren was Horace M. Carleton, son of Alexander Carleton. The testatrix stated in the codicil: "For reasons best known to myself and my grandson Horace M. Carleton, I feel that I should not remember him in any financial way in my Will."[23] Alexander Carleton predeceased testatrix, and she never revoked the legacy to him. Upon her death Horace M. Carleton contended that

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[18] *In re* Estate of Braun, 256 Iowa 55, 126 N.W.2d 318 (1964); Vance v. Johnson, 171 Md. 435, 188 A. 805 (1937); *In re* Force's Estate, 23 N.J. Misc. 141, 42 A.2d 302 (Orphans' Ct. 1945); Schneider v. Dorr, 32 Ohio Op. 2d 391, 210 N.E.2d 311 (P. Ct. 1965).

[19] 73 Ohio St. 177, 76 N.E. 503 (1905).

[20] *Id.* at 504.

[21] *Id.*

[22] 3 Misc. 2d 677, 151 N.Y.S.2d 338 (Sur. Ct. 1956).

[23] *Id.* at 339-40.

the anti-lapse statute should be applied and that he, as a lineal descendant of his father, should take his proportional share of that legacy. Notwithstanding the *specific* disinheritance, the court applied the anti-lapse statute by reasoning that the specific disinheritance in the codicil related only to the clause in the will which granted Horace the $1000, and not to the will in its entirety.[24]

Perhaps a specific disinheritance should be treated differently by courts than a general disinheritance. A specific disinheritance clearly manifests an intent to exclude a lineal descendant of the legatee. If the courts truly wish to effectuate the intent of the testator, they should consider parol evidence and the circumstances surrounding the disinheritance of the specific person. Among the factors which might be considered are: whether the testator actually had ill feelings toward the disinherited person; whether the testator wished to preclude the disinherited person from claiming under a pretermitted heirs statute; and whether the testator thought that by providing for the disinherited person's parents, he had, in effect, provided for the disinherited person.

If the courts wish to persist in mechanically applying rules of construction to both specific and general disinheritances, they should at least shift the burden of proof as to whether the anti-lapse statute is to be applied to the disinherited person or persons. Where a legatee predeceases a testator and the inquiry is whether the anti-lapse statute should be applied, there is usually no general or specific disinheritance. The burden of proof in this instance is properly placed upon the party contending that the anti-lapse statute should not be applied. There is nothing on the face of the will to indicate that the statute should not be applied. However, a different situation exists when in addition to a legatee predeceasing the testator, a particular person or class has been disinherited. In this instance the will on its face seems to indicate that it was the testator's intention that the particular person or class not be a beneficiary. The burden of proof in this situation should be placed on the person contending that the anti-lapse statute does apply.

There are decisions in which the anti-lapse statute has not been applied. The intent of the testatrix, rather than rules of construction, was determined to be crucial in *In re McKeon's Estate.*[25] A testatrix revoked a bequest in a codicil by stating, "I hereby annul and revoke

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[24]*Id.* at 341.

[25]182 Misc. 906, 46 N.Y.S.2d 349 (Sur. Ct. 1944); *accord,* Fischer v. Mills, 248 Iowa 1319, 85 N.W.2d 533 (1957).

the conditional bequest and legacy of One hundred ($100) Dollars to my niece, Catherine Doughty Smith, ... and *I hereby declare and direct that my said niece shall receive no part of my estate.*"[26] The testatrix died without having changed a legacy to the niece's deceased mother. The niece was not permitted to take her mother's legacy by operation of the anti-lapse statute. The court determined that the testatrix clearly expressed her intent in the codicil that the niece was to take no part of her estate.[27]

In cases where the testator makes his legacy contingent on the survival of the legatee, the majority rule is that the anti-lapse statute should not be applied.[28] Such legacies are determined to be conditional gifts; the condition having failed, the gift fails.

Ironically, the very rules which the courts develop to aid in the construction of the will in order to ascertain the testator's intention hinder their actual determination. In situations where unforeseen circumstances occur after the execution of a will, courts are seemingly more interested in stability and consistency of adjudication through applying artificial rules of construction than in the testator's probable intention had he thought of the contingency facing the court. By the weight of authority, *Bruner* reaches the only permissable result: the anti-lapse statute applies unless the will specifically and irrefutably states otherwise. New Jersey has taken an enlightened approach in determining what the testator's probable intention would have been in such situations by liberally admitting parol evidence and considering the circumstances surrounding the execution of the will, as well as circumstances from that time until the testator's death:[29]

> Since the goal is the ascertainment of the testator's probable intent in [a] ... will construction case, precedents involving the construction of other wills have no great force. [Citations omitted]. Similarly, canons of construction which are

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[26]46 N.Y.S.2d at 351 (court's emphasis).

[27]*Id.*

[28]Brewer v. Curtis, 30 Del. (7 Boyce) 503, 108 A. 673 (1920); Vollmer v. McGowan, 409 Ill. 306, 99 N.E.2d 337 (1951); Hay v. Dole, 119 Me. 421, 111 A. 713 (1920); *In re* Robinson's Will, 37 Misc. 2d 546, 236 N.Y.S.2d 293 (Sur. Ct. 1963); Day v. Brooks, 39 Ohio Op. 2d 441, 224 N.E.2d 557 (P. Ct. 1967); Kunkel v. Kunkel, 267 Pa. 163, 110 A. 73 (1920). *But cf. In re* Will of LeRoy, 54 Misc. 2d 33, 281 N.Y.S.2d 287 (Sur. Ct. 1967); Detzel v. Nieberding, 7 Ohio Misc. 262, 219 N.E.2d 327 (1966).

The survival condition is typically worded "if A survives me" or "if living at the time of my decease."

[29]*In re* Cook, 44 N.J. 1, 206 A.2d 865 (1965). Fidelity Union Trust Co. v. Robert, 36 N.J. 561, 178 A.2d 185 (1962).