

# To Lapse or Not to Lapse: Does the Tennessee Antilapse Statute Further the Testator’s Intent?

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## I. INTRODUCTION

Wanda Joyce Watkins passed away following a bout with cancer on May 28, 2012, leaving a will that devised the residue of her estate to her predeceased husband, John M. Vance.<sup>1</sup> Mrs. Watkins executed the will in April 1991 while married to Mr. Vance, who was

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1. The residuary provision in question states: “FIFTH: All the rest, residue and remainder of my estate, I give, devise and bequeath to my husband, JOHN M. VANCE.” *In re Estate of Watkins*, No. E2016-02388-COA-R3-CV, 2017 Tenn. App. LEXIS 497, at \*2 (Tenn. Ct. App. July 25, 2017).

her second husband.<sup>2</sup> Mr. Vance died on July 14, 1996, but Watkins neither updated nor revoked her will following the death of Mr. Vance.<sup>3</sup> On November 12, 2013, Mrs. Watkins's daughter and executrix of the estate, Kimberly B. Jenkins, filed a "Petition to Construe Will," and the children of Mr. Vance immediately filed a motion to intervene.<sup>4</sup> The Vance children claimed that, by application of the Tennessee antilapse statute, they were entitled to the assets directed to John M. Vance under Ms. Watkins's will.<sup>5</sup>

In May 2014 at a hearing to construe Mrs. Watkins's will, Ms. Jenkins testified that the relationship between Mrs. Watkins and the Vance children was "very tense."<sup>6</sup> Jenkins also provided that Mrs. Watkins had never indicated that she wanted the Vance children to receive a part of her estate when she executed the will.<sup>7</sup> The trial court subsequently held that the antilapse statute did not apply, which resulted in the residuary estate passing to Mrs. Watkins's heirs by intestate succession.<sup>8</sup> The court noted the "tense" relationship between Mrs. Watkins and the Vance children and recognized that the will made no reference to them.<sup>9</sup>

In 2017, the Tennessee Court of Appeals at Knoxville reversed the decision of the trial court.<sup>10</sup> The appellate court held that the Tennessee antilapse statute controlled in the case because the will failed to provide for a "different disposition" of the residuary in the event that John M. Vance predeceased Mrs. Watkins.<sup>11</sup> The court also noted that the trial court erred by considering the parol evidence of the

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2. *Id.* at \*2.

3. *Id.*

4. *Id.* at \*3.

5. *Id.* The Tennessee antilapse statute is very broad with respect to protected devisees, allowing the issue of any predeceased devisee to take unless a different disposition is made or required by the will. *See* TENN. CODE ANN. § 32-3-105 (2019). For a detailed discussion of this statute, see *infra* Part III.

6. *Watkins*, 2017 Tenn. App. LEXIS 497, at \*4.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at \*2.

11. *Id.* at \*9. The controlling statute states: "[T]he issue shall take . . . unless a different disposition thereof is made or required by the will." TENN. CODE ANN. § 32-3-105(a) (2019).

tense relationship between Mrs. Watkins and the Vance children.<sup>12</sup> As a result, the Vance children received the residue of Mrs. Watkins's estate to the exclusion of her natural children.<sup>13</sup> Of particular concern was a family farm passed down to Mrs. Watkins from her family; however, after the appellate court's decision, this farm fell into the hands of Mrs. Watkins's step-children instead of her biological heirs.<sup>14</sup>

This unfortunate decision was not the result of error on the part of the Tennessee Court of Appeals, but instead the result of an outdated and overly broad statute that can easily circumvent rather than effectuate a testator's probable intent.<sup>15</sup> This Note identifies the problems with the current Tennessee antilapse statute, particularly as evidenced in the case of *In re Estate of Watkins*; compares Tennessee's approach to that of the Uniform Probate Code ("UPC") and other states; and evaluates which approaches are more likely to effectuate the testator's probable intent.

Part II of this Note provides a background of will construction principles, an explanation of the common law rule of lapse, a discussion of the history and background of antilapse in the law of wills, and the objective of antilapse statutes in general. Part III analyzes the Tennessee antilapse statute and the inherent problems with the current statute as evidenced in *Watkins*. Part IV provides a comprehensive look at the UPC's approach to antilapse. Specifically, Part IV discusses the development and construction of the UPC approach, explores provisions in states that have adopted the revised and original versions of the UPC antilapse statute, and examines some of the more controversial aspects of section 2-603. Part V discusses antilapse statutes in states that have not adopted the UPC approach, noting some of the pros and cons of those statutes, and provides an analysis of some of the trends and characteristics of antilapse statutes. Finally, Part VI encourages the Tennessee legislature to adopt a new antilapse statute and provides a model approach that will better effectuate the probable intent of the typical testator.

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12. *Watkins*, 2017 Tenn. App. LEXIS 497, at \*6-7.

13. *Id.* at \*9.

14. *Id.* at \*3.

15. See TENN. CODE ANN. § 32-3-105 (2019); see also *Watkins*, 2017 Tenn. App. LEXIS 497, at \*9 (granting the testator's estate to stepchildren rather than the testator's own children).

## II. LAPSED RESIDUARY GIFTS: DISTRIBUTION AND RELATION TO WILL CONSTRUCTION PRINCIPLES

The most fundamental duty of courts when construing wills is to determine the testator's intent and carry out the testator's desires.<sup>16</sup> The testator's intent should be gleaned "from the particular words used in the will itself, from the context in which those words are used, and from the general scope and purposes of the will, read in the light of the surrounding and attending circumstances."<sup>17</sup> In Tennessee, courts generally must give effect to a testator's intent unless it contravenes some rule of law or public policy.<sup>18</sup>

In certain circumstances, courts will consider parol or extrinsic evidence to ascertain the intent of the testator. Parol evidence is often admissible "both to place the [c]ourt in a knowledge of the condition and circumstances surrounding the testator when he executed his will, and to resolve uncertainties or ambiguities in the will as to the testator's intentions."<sup>19</sup> However, in Tennessee, parol evidence often cannot be used in the absence of ambiguity on the face of the will.<sup>20</sup> For example, in the *Watkins* case, the appellate court held that the trial court erred by admitting parol evidence to determine the testator's intent because the

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16. "The intent of the testator is the most important factor in will construction cases." *In re Will of Tipler*, 10 S.W.3d 244, 249 (Tenn. Ct. App. 1998); *see also* *Winningham v. Winningham*, 966 S.W.2d 48, 50 (Tenn. 1998); *In re Walker*, 849 S.W.2d 766, 768 (Tenn. 1993); *Cowden v. Sovran Bank/Cent. S.*, 816 S.W.2d 741, 744 (Tenn. 1991) ("The cardinal and basic rule in the construction of wills is that the court shall seek to discover the intention of the testator, and will give effect to it unless it contravenes some rule of law or public policy." (quoting *Bell v. Shannon*, 367 S.W.2d 761, 766 (Tenn. 1963))). The word "testator" is often used generally to refer to a person who makes a will and, therefore, dies "testate." *See* 1 PRITCHARD ON THE LAW OF WILLS AND ADMIN OF ESTATES § 2 (2018). Similarly, "testatrix" refers to a female who makes a will. *See id.*

17. *Watkins*, 2017 Tenn. App. LEXIS 497, at \*5–6 (quoting *Fisher v. Malmo*, 650 S.W.2d 43, 46 (Tenn. Ct. App. 1983)).

18. *Tipler*, 10 S.W.3d at 249.

19. *Watkins*, 2017 Tenn. App. LEXIS 497, at \*6 (quoting *Treanor v. Treanor*, 152 S.W.2d 1038, 1041 (Tenn. Ct. App. 1941)).

20. *Id.* at \*6 (holding that parol evidence is admissible to resolve ambiguity in wills but "parol evidence can not be admitted either to contradict, add to, or explain a will, where there is no ambiguity on its face." (quoting *Clark v. Clark*, 70 Tenn. 723, 725 (1879))).

residuary clause unambiguously disposed of the remainder of the estate.<sup>21</sup>

In Tennessee, a court engages in three presumptions while examining the language of the will to ascertain the testator's intent.<sup>22</sup> First, a court presumes that the testator did not intend to die intestate or partially intestate.<sup>23</sup> Second, a court reads a will as if it was executed immediately prior to the testator's death.<sup>24</sup> This presumption often comes into play because many problems arise between the time that a testator prepares the will and the testator's death. Third, a court presumes that a testator is familiar with the applicable rules of law when executing a will.<sup>25</sup> These presumptions are also applicable in situations involving the common-law rule of lapse.<sup>26</sup>

Antilapse statutes were derived in response to the common law rule of lapse and, in line with the primary goal of the court in will construction cases, are presumed to further the testator's intent.<sup>27</sup> The common law rule of lapse is based on the presumptions that a will transfers property at the testator's death, not when the will was

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21. *Id.* at \*6–7.

22. *See In re Estate of McFarland*, 167 S.W.3d 299, 303 (Tenn. 2005).

23. *Id.* at 303 (citing TENN. CODE ANN. § 32-3-101 (2015)). The Tennessee Supreme Court originally incorporated this presumption into case law in 1836. *See Williams v. Williams*, 18 Tenn. 20, 20 (1836).

24. *McFarland*, 167 S.W.3d at 303 (citing TENN. CODE ANN. § 32-3-101 (2015)). The Tennessee legislature first codified this statute, abrogating common law, in 1842. *Nashville Tr. Co. v. Grimes*, 167 S.W.2d 994, 997 (Tenn. 1942) (quoting *Nichols v. Todd*, 101 S.W.2d 486, 488 (Tenn. Ct. App. 1936)).

25. *McFarland*, 167 S.W.3d at 303 (citing *McCarley v. McCarley*, 360 S.W.2d 27, 29 (Tenn. 1962)).

26. *See id.*

27. In 1783, Massachusetts became the first state to enact an antilapse statute. Erich Tucker Kimbrough, Note, *Lapsing of Testamentary Gifts, Antilapse Statutes, and the Expansion of Uniform Probate Code Antilapse Protection*, 36 WM. & MARY L. REV. 269, 274 (1994). The statute provided:

When a devise of real or personal estate is made to any child or other relation of the testator, and the devisee shall die before the testator, leaving issue who survive the testator, such issue shall take the estate so devised, in the same manner as the devisee would have done, if he had survived the testator; unless a different disposition thereof shall be made or required by the will.

MASS. REV. STATS. ch. 62, § 24 (1836). *See Susan F. French, Antilapse Statutes are Blunt Instruments: A Blueprint for Reform*, 37 HASTINGS L.J. 335, 339 n.16 (1985).

executed, and also that property cannot be transferred to a deceased person.<sup>28</sup> Therefore, under the rule of lapse, a devise to a devisee who predeceases the testator fails, or lapses, and does not pass to the devisee's estate.<sup>29</sup> For example, if the Tennessee antilapse statute had not been applicable in the *Watkins* case, the devise to John M. Vance would have lapsed and fallen into the residue of Mrs. Watkins's estate.<sup>30</sup> Lapse is a fairly common problem because there is often a considerable period of time between the will's execution and the death of the testator, during which some of the beneficiaries may die.<sup>31</sup> Antilapse statutes provide an alternative disposition of property in situations where the testator did not provide for the distribution of a devise should the devisee predecease the testator.<sup>32</sup>

Contrary to the name, antilapse statutes do not reverse the common-law rule of lapse but instead provide a substitute gift, most commonly to certain relatives of the testator specified in the statute.<sup>33</sup>

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28. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 5.5 cmt. a (AM. LAW INST. 1999) (explaining the common law theory of lapse in relation to antilapse).

29. *Id.* Although this is the case with individuals, when a devise is in the form of a class gift it lapses only if all of the members of the class predecease the testator. *See id.* The term "devise" includes gifts under will of both real and personal property. *See* 1 PRITCHARD ON THE LAW OF WILLS AND ADMIN OF ESTATES § 2 (2018) ("By statutory definition, no distinction is made between a will which disposes of real property and a will which disposes of personal property; a devise embraces both."). Accordingly, the person to whom a devise of either real or personal property is made under will is the "devisee." *Id.* Historically, the term "devisee" referred to a recipient of real property under will, while "legatee" referred to a recipient of personal property. *Id.* Currently, the term "devisee" is often used in reference to a recipient of either real or personal property. *See In re Estate of Swift*, No. W2012-00199-COA-R3-CV, 2012 Tenn. App. LEXIS 802, at \*17 (Tenn. Ct. App. Nov. 20, 2012) ("[T]he more recent edition of [Black's Law Dictionary] defines 'devisee' simply as a 'recipient of property by will.'").

30. *See supra* Part I. The residue, in the absence of a beneficiary, would have been distributed according to the laws of intestate succession. *See supra* Part I.

31. *See supra* Part I. A period of more than twenty years passed between the execution of the will and the death of Mrs. Watkins. *In re Estate of Watkins*, No. E2016-02388-COA-R3-CV, 2017 Tenn. App. LEXIS 497, at \*2-3 (Tenn. Ct. App. July 25, 2017).

32. *See French, supra* note 27, at 335.

33. If antilapse statutes actually reversed the lapse rule, they would defeat the survivorship requirement, resulting in the devise passing to the deceased devisee's

With a few notable exceptions, most antilapse statutes do not extend to all devisees who fail to survive the testator; instead, the trend is to provide protection only to devisees who are the testator's grandparents or descendants of grandparents.<sup>34</sup> The disposition of qualified protected devisees who predecease the testator varies from state to state depending on the language of the statute, and this type of disposition is discussed in detail in Parts III, IV, and V of this Note.<sup>35</sup>

For antilapse statutes to be applicable, the devisee must have qualifying substitute takers and, in most cases, there must be an absence of contrary intent expressed by the testator.<sup>36</sup> Statutory provisions are almost universal regarding qualifying substitute takers, with most statutes allowing only descendants, or issue, of the devisee to take.<sup>37</sup> Additionally, most states require that antilapse statutes apply unless there is evidence of contrary intent, which relies on the presumption that antilapse statutes carry out the testator's intent.<sup>38</sup> The type of contrary intent required depends on the statute, with many states only

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estate. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 5.5 cmt. b (AM. LAW INST. 1999); Edward C. Halbach, Jr. & Lawrence W. Waggoner, *The UPC's New Survivorship and Antilapse Provisions*, 55 ALB. L. REV. 1091, 1101 (1992).

34. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 5.5 cmt. c (AM. LAW INST. 1999) (“The prevailing pattern, including the pattern under section 2-603 of the revised Uniform Probate Code, is to extend antilapse protection to grandparents and descendants of grandparents.”).

35. See *infra* Parts III (discussing Tennessee's approach), IV (discussing the UPC approach), and V (discussing the approaches of other states). The term “protected devisees” is noted in the *Restatement (Third) of Property*. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 5.5 cmt. c (AM. LAW INST. 1999).

36. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 5.5 cmt. d, f (AM. LAW INST. 1999).

37. *Id.* cmt. d. An exception to this rule is found in the Maryland statute, which takes a broader approach, allowing those persons who would have taken the property if the legatee had died, testate or intestate, owning the property. MD. CODE ANN., EST. & TRUSTS § 4-403 (LexisNexis 2010). Thus, in Maryland, a testator's devise to a predeceased qualified devisee can pass pursuant to that qualified devisee's will. The devise will pass to the qualified devisee's heirs only if the qualified devisee died intestate concerning the devise. *Id.*

38. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 5.5 cmt. f (AM. LAW INST. 1999).

recognizing contrary intent if evidenced in the will itself.<sup>39</sup> The UPC provision and some other statutes allow extrinsic evidence when determining contrary intent.<sup>40</sup> Contrary intent in the will can include an alternative devise, either specific or in the form of a class gift, or survival language expressly provided in the will.<sup>41</sup> The extent to which survival language applies is often litigated, and the specificity required depends upon the jurisdiction.<sup>42</sup>

### III. THE TENNESSEE ANTILAPSE STATUTE

The Tennessee antilapse statute is one of the broadest in the country regarding protected devisees, allowing for the issue of any predeceased devisee or legatee to take.<sup>43</sup> The statute is so broad in construction that the result of its application can easily frustrate a testator's intent, possibly leaving the testator's assets in the hands of strangers at the expense of the testator's own family.<sup>44</sup>

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39. *Id.*

40. *Id.*; UNIF. PROB. CODE § 2-601 cmt. (amended 2010).

41. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 5.5 cmt. g (AM. LAW INST. 1999); UNIF. PROB. CODE § 2-603(b)(4).

42. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 5.5 cmt. h (AM. LAW INST. 1999). For further discussion related to words of survivorship, see *infra* Part VI.

43. The Tennessee antilapse statute provides:

(a) Whenever the devisee or legatee or any member of a class to which an immediate devise or bequest is made, dies before the testator, or is dead at the making of the will, leaving issue that survives the testator, the issue shall take the estate or interest devised or bequeathed that the devisee or legatee or the member of the class, as the case may be, would have taken, had that person survived the testator, unless a different disposition thereof is made or required by the will. (b) Subsection (a) shall apply also to a revocable (living) trust that became irrevocable upon the death of its settlor or grantor. The surviving issue of a beneficiary who predeceased a settlor or grantor shall take the trust interest the beneficiary would have received had the beneficiary survived the settlor or grantor, unless the trust agreement provides otherwise.

TENN. CODE ANN. § 32-3-105 (2019).

44. *Watkins* is an example of a devise that seems contrary to what the testator would have intended. See *In re Estate of Watkins*, No. E2016-02388-COA-R3-CV, 2017 Tenn. App. LEXIS 497, at \*2 (Tenn. Ct. App. July 25, 2017); see also Robinson

The Tennessee antilapse statute, dating back to 1842, was derived from an antilapse provision in the English Wills Act of 1837.<sup>45</sup> Notably, however, the English statute provided for the application of antilapse only when the devisee is a “child or issue of the testator,” thus keeping the asset within the line of the testator’s descendants.<sup>46</sup> In contrast, Tennessee allows the issue of any devisee to take, regardless of the devisee’s relationship to the testator.<sup>47</sup> The Tennessee legislature amended the statute in 1852 with little change in substance from the original statute.<sup>48</sup> In the most recent revision, the statute was amended

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v. Ray, 327 S.E.2d 721, 722–23 (Ga. 1985) (leaving testator’s estate to his predeceased wife’s son from a previous marriage to the exclusion of the testator’s own relatives). Georgia’s antilapse statute, by protecting the issue of any devisee, is very similar to Tennessee’s antilapse statute. See GA. CODE ANN. § 53-4-64 (2019). In *Robinson*, the court seemed to reluctantly apply the Georgia antilapse statute, stating:

We recognize, in passing, that it is at least arguable whether, in every case where [the antilapse statute] is applied, the result accurately reflects the true intent of the testator. However, whatever the merits of that argument, the statutory language at issue is plain and unambiguous, and admits of no judicial construction.

327 S.E.2d at 723.

45. *Dixon v. Cooper*, 12 S.W. 445, 445–46 (Tenn. 1889). The court provided the English statute:

That where any person, being a child or issue of the testator, to whom any real or personal estate shall be devised or bequeathed, for any estate or interest not determinable at or before the death of such person, shall die in the life-time of the testator, leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

*Id.* (quoting Wills Act 1837, 1 Vict. c. 26, § 33 (Eng.)). For more on this history, see David R. Foster, Note, *Testamentary Gifts of Future Interests: Is There an “Immediate” Problem with the Tennessee Antilapse Statute?*, 17 MEM. ST. U. L. REV. 263, 268–69 (1987) (providing a history of the Tennessee antilapse statute); *In re Estate of Prather Buchanan Harper*, No. M2000-00553-COA-R3-CV, 2000 Tenn. App. LEXIS 516, at \*3 (Tenn. Ct. App. Aug. 8, 2000) (noting that the Tennessee antilapse statute “first . . . appeared in 1842”).

46. *Dixon*, 12 S.W. at 445–46.

47. Compare *id.*, with TENN. CODE ANN. § 32-3-105 (2019).

48. See Foster, *supra* note 45, at 269–70. As Foster observes, the legislature may have found inspiration for the 1852 amendment in the antilapse statutes of sister-

in 1997 for the purpose of adding subsection (b), which extends antilapse protection to revocable living trusts.<sup>49</sup>

As is generally the case with antilapse statutes, the Tennessee statute only applies when the devisee or legatee dies before the testator and leaves issue surviving the testator.<sup>50</sup> If there are no surviving issue, the antilapse statute is inapplicable, and the devise or legacy lapses.<sup>51</sup> The word “issue” in the Tennessee statute was used by the legislature for the purpose of saving the devise only if there were direct descendants of the devisee.<sup>52</sup> In Tennessee and most other states, adopted children of a protected devisee are now treated as biological issue under the antilapse statute.<sup>53</sup> It is common for antilapse statutes to apply only when there is surviving issue of the protected devisee, but, the great majority of states do not extend antilapse protection beyond devisees in the testator’s consanguineous or adoptive family.<sup>54</sup>

Why Tennessee originally decided to take such a broad approach regarding protected devisees remains unclear.<sup>55</sup> Even more

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states such as North Carolina and Virginia. *Id.* at 269–70 n.40. Virginia’s statute at the time was especially similar to Tennessee’s 1852 statute and is very similar to the current Tennessee statute, with both protecting the issue of any devisee from lapse. *Id.* Importantly, however, Virginia has since repealed the old statute protecting the issue of any devisee, replacing it with a statute that protects only the issue of grandparents or descendants of grandparents of the testator. *See* VA. CODE ANN. § 64.2-418 (2019).

49. *See* TENN. CODE ANN. § 32-3-105 (2019), for the current version of the statute.

50. *Id.*

51. *Id.*

52. *Id.*; *White v. Kane*, 159 S.W.2d 92, 95 (Tenn. 1942) (“The Court on the whole is satisfied with the conclusion that the word ‘issue’ was used by the legislature in order to express its purpose of saving the gift, if there were any direct descendants of the donee, and not with any intention of declaring a different rule of inheritance in the case of gifts so saved.”).

53. *Craft v. Blass*, 8 Tenn. App. 498, 504 (1928) (“It will be observed that our Supreme Court has held in unmistakable terms, that the adopted child is given the legal status of a legitimate natural child.”).

54. *See infra* notes 84, 85, 89. “Consanguinity refers to a relationship by blood,” whereas “[a]ffinity refers to relationship by marriage.” *In re Estate of Marks*, 187 S.W.3d 21, 30 nn.3–4 (Tenn. Ct. App. 2005) (citing BRYAN A. GARNER, *DICTIONARY OF MODERN LEGAL USAGE* 35 (2d ed. 1995)).

55. The Tennessee legislature may have originally modeled the statute after Virginia’s statute in 1852. *See supra* note 48.

puzzling is why this broad approach remains the law today. Tennessee is one of only eight states that still allows the issue of any devisee to take under its antilapse statute.<sup>56</sup> Most other states have adopted the UPC approach, either entirely or in part, or have enacted their own antilapse statutes that are more limited regarding protected devisees.<sup>57</sup> Frankly put, Tennessee's archaic antilapse statute that applies indiscriminately to protected devisees seems ill-designed to accomplish the polestar of will construction: effectuating the testator's probable intent.<sup>58</sup>

#### IV. THE UNIFORM PROBATE CODE APPROACH TO ANTILAPSE

The Uniform Probate Code is the product of an endeavor begun in 1962 by the Real Property, Probate, and Trust Law Section of the American Bar Association and the National Conference of Commissioners on Uniform State Laws.<sup>59</sup> The primary purpose of the UPC is to encourage uniformity in state probate law by setting forth model statutes that can be adopted by state legislatures.<sup>60</sup> The UPC approach to antilapse, found in section 2-603, is more comprehensive in scope and much longer than the antilapse statutes of most states.<sup>61</sup> The UPC approach was drafted to reduce some of the ambiguity found in the statutes of a number of states.<sup>62</sup> Two additional components of the UPC, sections 2-706 and 2-707, extend antilapse protection to other forms of transfers, both testamentary and non-testamentary.<sup>63</sup>

The UPC illustrates a well-considered approach to antilapse that is narrower in scope than the Tennessee statute and yet broader in scope

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56. See *infra* note 91 and accompanying text.

57. See *infra* Parts IV, V.

58. See *supra* Part I for a discussion of the *Watkins* case.

59. The first official text emerged in 1969 and has been amended several times since then. Robert Whitman, *Revocation and Revival: An Analysis of the 1990 Revision of the Uniform Probate Code and Suggestions for the Future*, 55 ALB. L. REV. 1035, 1042 (1992); see also 31 AM. JUR. 2D *Executors and Administrators* § 130 (2008).

60. Whitman, *supra* note 59, at 1041–42.

61. Kimbrough, *supra* note 27, at 298; see also UNIF. PROB. CODE § 2-603 (amended 2010).

62. See Kimbrough, *supra* note 27, at 298; see also UNIF. PROB. CODE § 2-603.

63. UNIF. PROB. CODE §§ 2-706, -707.

than some of the states with the most narrowly-constructed statutes. Subsection (a) of section 2-603 provides definitions that apply to the entire section, subsection (b) denotes the conditions under which antilapse applies, and subsection (c) describes which devisee takes when there is more than one substitute gift.<sup>64</sup> Subsection (b) is the heart of the statute and is the subject of particular focus in this Note.

In subsection (b), the UPC provides for the application of antilapse “[i]f a devisee fails to survive the testator and is a grandparent, a descendant of a grandparent, or a stepchild of either the testator or the donor of a power of appointment exercised by the testator’s will.”<sup>65</sup> For gifts to individuals, the devisee must leave one or more surviving descendants for a substitute gift to be created, and when there are surviving descendants, they take the property by representation in the way in which the devisee would have taken.<sup>66</sup> As denoted in subsection (b)(2), class gifts are also expressly protected under the UPC.<sup>67</sup> Going beyond many other statutes, however, the UPC specifically allows descendants of a testator’s own stepchild to take if the stepchild is the devisee.<sup>68</sup>

For example, in the *Watkins* case discussed in Part I, the stepchildren of Mrs. Watkins would not take under the UPC because the stepchildren themselves were not devisees, and the UPC does not treat the testator’s spouse as a protected devisee.<sup>69</sup> Although the exclusion of a spouse may at first seem odd, upon reflection it has its basis in the clear realities of modern family life. Including the spouse as a protected devisee may lead to the testator’s assets landing in the

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64. *Id.* § 2-603.

65. *Id.* § 2-603(b).

66. Subsection (b)(1) of UPC section 2-603 provides:

Except as provided in paragraph (4), if the devise is not in the form of a class gift and the deceased devisee leaves surviving descendants, a substitute gift is created in the devisee’s surviving descendants. They take by representation the property to which the devisee would have been entitled had the devisee survived the testator.

*Id.* § 2-603(b)(1).

67. *Id.* § 2-603(b)(2).

68. *Id.* § 2-603(b).

69. *See supra* Part I. The protected devisee in *Watkins* was John M. Vance, not Mrs. Watkins’s stepchildren. *See In re Estate of Watkins*, No. E2016-02388-COA-R3-CV, 2017 Tenn. App. LEXIS 497, at \*2 (Tenn. Ct. App. July 25, 2017).

hands of her stepchildren and their descendants by default, contrary to her probable wishes.<sup>70</sup> The UPC recognizes that a testator who has a close relationship with her stepchildren is likely to include those stepchildren as devisees.<sup>71</sup> Had Mrs. Watkins devised an asset to a stepchild who predeceased her, the stepchild's issue could then take under the UPC.<sup>72</sup> It is common practice among antilapse statutes for the issue of grandparents and descendants of grandparents to take, but the UPC recognizes that when a testator includes stepchildren as devisees in her will, she is likely to consider them close family members, possibly even the same as her own biological children.<sup>73</sup> Because blended families are increasingly common in today's society and testators have varying relationships with their stepchildren, the drafters of the UPC decided to adopt a more modern approach by protecting devises to the testator's stepchildren *if she has named them as devisees in her will*.<sup>74</sup> It is quite likely that a testator who specifically named a stepchild as a devisee had a true parent-child relationship, or at least a very strong relationship, with the named stepchild.<sup>75</sup> Yet, the UPC also implicitly recognizes that many testators would not want their assets to wind up in the hands of their stepchildren.<sup>76</sup> This is particularly true for later-in-life marriages when the stepchildren and testator never lived in the same household.

One of the more controversial provisions of section 2-603 lies in subsection (b)(3), which provides that words of survivorship are not sufficient to indicate contrary intent in the absence of additional evidence.<sup>77</sup> The question of whether mere words of survivorship, such

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70. See, e.g., *Watkins*, 2017 Tenn. App. LEXIS 497, at \*2; see also *Robinson v. Ray*, 327 S.E.2d 721, 722–23 (Ga. 1985) (leaving testator's estate to his predeceased wife's son from a previous marriage to the exclusion of the testator's own relatives).

71. See UNIF. PROB. CODE § 2-603(b).

72. *Id.*

73. *Id.*

74. See *id.* art. II, prefatory note (explaining the 1990 revisions to Article II of the UPC: "In the twenty or so years between the original promulgation of the Code and 1990, several developments occurred that prompted the systematic round of review. Four themes were sounded: . . . (3) the advent of the multiple-marriage society, resulting in a significant fraction of the population being married more than once and having stepchildren and children by previous marriages . . .").

75. *Id.*

76. See *id.* § 2-603(b).

77. Subsection (b)(3) of UPC section 2-603 provides:

as “if he survives me” or “to my surviving children,” defeat antilapse statutes is an often-litigated issue with arguments both for and against the UPC’s approach to this question.<sup>78</sup> The results are divided, and many courts in states across the country have ruled that words of survivorship automatically defeat antilapse statutes because the testator has clearly conditioned the devise on the survival of the devisee.<sup>79</sup> However, a significant number of jurisdictions follow the lead of the UPC in holding that mere words of survivorship alone do not defeat antilapse statutes.<sup>80</sup> A positive aspect of the UPC’s approach is that it removes some of the uncertainty about words of survivorship, encouraging the use of clear language to express the testator’s intent. The Official Comment to UPC section 2-603 states that “[a] foolproof means of expressing a contrary intention is to add to a devise the phrase ‘and not to [the devisee’s] descendants.’”<sup>81</sup> Section 2-603 does yield to a finding of contrary intention under section 2-601, but the intention must be indicated clearly and words of survivorship alone are not sufficient to automatically defeat the antilapse statute.<sup>82</sup>

A growing number of states have adopted the UPC’s approach to antilapse either entirely or in part.<sup>83</sup> Twelve states have adopted the

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For the purposes of [s]ection 2-601, words of survivorship, such as in a devise to an individual “if he survives me,” or in a devise to “my surviving children,” are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section.

*Id.* § 2-603(b)(3).

78. Halbach & Waggoner, *supra* note 33, at 1105.

79. *Id.*

80. *See id.* at 1105 n.59 (citing *Schneller v. Schneller*, 190 N.E. 121 (Ill. 1934); *In re Estate of Bulger*, 586 N.E.2d 673 (Ill. App. Ct. 1991); *Detzel v. Nieberding*, 219 N.E.2d 327 (Ohio Prob. Ct. 1966); *In re Estate of Kehler*, 411 A.2d 748 (Pa. 1980); *Henderson v. Parker*, 728 S.W.2d 768 (Tex. 1987)).

81. UNIF. PROB. CODE § 2-603 cmt. (amended 2010) (citing RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 5.5 cmt. i (AM. LAW INST. 1999)).

82. *Id.* §§ 2-601, -603.

83. Twenty-one states have adopted the revised or original UPC, or a close variation of it. *Probate Code*, UNIFORM L. COMMISSION <https://my.uniformlaws.org/committees/community-home?communitykey=a539920d-c477-44b8-84fe-b0d7b1a4cca8&tab=groupdetails> (last visited Nov. 15, 2019); *see also* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 5.5 statutory note (AM. LAW INST. 1999).

revised UPC antilapse statute, section 2-603, or a similar variant.<sup>84</sup> Nine states enacted the original UPC antilapse statute, section 2-605, or a similar variant.<sup>85</sup> The UPC has also influenced states that have not

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84. Many states have enacted the revised UPC or a close variation. *See, e.g.*, ALASKA STAT. §§ 13.12.603–.604 (1997) (Alaska); ARIZ. REV. STAT. ANN. § 14-2603 (2001) (Arizona) (deviating from revised UPC section 2-603 in three ways: (1) that an alternative devise supersedes the substitute gift whether or not an expressly designated devisee of the alternative devise is entitled to take under the will; (2) words of survivorship are a sufficient indication of a contrary intention unless there is clear and convincing evidence to the contrary; and (3) a residuary devise may constitute an alternative devise with respect to a nonresiduary devise, whether or not the will specifically provides that, on lapse or failure, the nonresiduary devise pass under the residuary clause); COLO. REV. STAT. §§ 15-11-603, -604 (1995) (Colorado) (deviating from revised UPC section 2-603 by expressly providing that the use of language such as “and if he does not survive me the gift shall lapse” or “to A and not to A’s descendants” shall be sufficient indication of a contrary intent; also, unlike revised UPC section 2-603, the Colorado statute does not cover devises to stepchildren who fail to survive the testator); HAW. REV. STAT. §§ 560:2-603, -604 (1996) (Hawaii); MASS. GEN. LAWS ch. 190B, § 2-603 (2012) (Massachusetts); MICH. COMP. LAWS SERV. § 700.2709 (LexisNexis 2000); MINN. STAT. § 524.2-603 (2001) (Minnesota) (deviating from revised UPC section 2-603 by providing that words of survivorship are a sufficient indication of a contrary intention; also, unlike revised UPC section 2-603, statute does not cover devises to stepchildren who fail to survive the testator); MONT. CODE ANN. §§ 72-2-613, -614 (1995) (Montana); N.J. STAT. ANN. §§ 3B:3-35, -36 (West 2005) (New Jersey); N.M. STAT. ANN. §§ 45-2-603, -604 (2011) (New Mexico); S.D. CODIFIED LAWS §§ 29A-2-603, -604 (1995) (South Dakota) (deviating from revised UPC section 2-603 by omitting subsections (a), (b)(3)-(5), and (c)); UTAH CODE ANN. §§ 75-2-603, -604 (2010) (Utah) (deviating from revised UPC section 2-603 by providing that words of survivorship are a sufficient indication of a contrary intention unless there is clear and convincing evidence to the contrary); *see also* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 5.5, statutory note (AM. LAW INST. 1999).

85. The original UPC antilapse statute, section 2-605, provided:

[Anti-lapse; Deceased Devisee; Class Gifts.] If a devisee who is a grandparent or a lineal descendant of a grandparent of the testator is dead at the time of execution of the will, fails to survive the testator, or is treated as if he predeceased the testator, the issue of the deceased devisee who survive the testator by 120 hours take in place of the deceased devisee and if they are all of the same degree of kinship to the devisee they take equally, but if of unequal degree then those of more remote degree take by representation. One who would have been a devisee under a class gift if he had survived the testator is treated as a devisee for purpose of this section whether his death occurred before or after the execution of the will.

adopted it, leading to the incorporation of certain provisions into state statutes or the use of the UPC as a model to solve common statutory problems.<sup>86</sup> As a result, antilapse statutes across the country exist along a spectrum, with the UPC seen generally as a middle or common ground. The antilapse approach of some states that have not adopted the UPC is discussed in Part V of this Note.

Section 2-603 of the UPC illustrates a well-thought-out and comprehensive approach to antilapse that should be particularly influential when the Tennessee legislature considers a new approach to antilapse. Some states have opted for a partial adoption as opposed to a strict adoption of the UPC approach, but the Tennessee legislature should strongly consider adopting the UPC approach in its entirety.<sup>87</sup> Although either option would more effectively further the testator's intent than the antiquated antilapse statute still on the books in Tennessee, the legislature should, at the very least, adopt the UPC's approach of narrowing the class of protected devisees.

#### V. APPROACH TO ANTILAPSE IN STATES THAT HAVE NOT ADOPTED THE UPC

All states except for Louisiana have enacted some type of antilapse statute.<sup>88</sup> Twenty-eight states, including Tennessee and the District of Columbia, have enacted their own form of antilapse

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RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 5.5 statutory note (AM. LAW INST. 1999). Some states enacted the original UPC or a close variation. *See, e.g.*, ALA. CODE §§ 43-8-224, -225 (1982) (Alabama); DEL. CODE ANN. tit. 12, § 2313 (1995) (Delaware); FLA. STAT. §§ 732.603-.604 (2007) (Florida); IDAHO CODE ANN. §§ 15-2-605, -606 (West 1971) (Idaho); ME. REV. STAT. ANN. tit. 18-A, §§ 2-605, -606 (1981) (Maine); NEB. REV. STAT. §§ 30-2343, -2344 (1974) (Nebraska); N.D. CENT. CODE §§ 30.1-09-05, -06 (1995) (Nebraska); S.C. CODE ANN. §§ 62-2-603, -604 (2014) (South Carolina); WYO. STAT. ANN. §§ 2-6-106, -107 (1980) (Wyoming).

86. *See infra* Part V.

87. For further discussion of the benefits of a strict adoption as opposed to a partial adoption of the UPC approach and the possible concerns the Tennessee legislature may have regarding the more debatable provisions of the UPC approach, *see infra* Part VI.

88. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 5.5 statutory note (AM. LAW INST. 1999); *see also* LA. CIV. CODE ANN. art. 1589 (2019) ("A legacy lapses when: (1) [t]he legatee predeceases the testator.").

statute.<sup>89</sup> The antilapse statutes in twenty of the non-UPC states protect only devisees that are descendants or relatives of the testator.<sup>90</sup> California and Kansas are the only states in this group that specifically protect spouses or relatives of spouses of the transferor in addition to descendants or blood relatives.<sup>91</sup> Including Tennessee, only eight states

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89. See *supra* notes 83, 85 and accompanying text.

90. Some states have non-UPC antilapse statutes which protect either children, issue, descendants, or other family members of the testator depending on the language of the statute. See, e.g., ARK. CODE ANN. § 28-26-104 (LEXIS through 2018 legislation) (Arkansas) (protecting child or other descendant of the testator); CAL. PROB. CODE §§ 21110, 21111 (West 2019) (California) (protecting kindred of the transferor or kindred of a surviving, deceased, or former spouse, but not spouse or transferor); CONN. GEN. STAT. § 45a-441 (LEXIS through 2018 Sess.) (Connecticut) (protecting child, stepchild, grandchild, brother, or sister of the testator); 755 ILL. COMP. STAT. ANN. 5/4-11 (LexisNexis 2019) (Illinois) (protecting descendants of the testator); IND. CODE § 29-1-6-1(g) (2012) (Indiana) (protecting any descendant of testator); KAN. STAT. ANN. § 59-615 (LEXIS through 2018 legislation) (Kansas) (protecting spouse, any relative by lineal descent, and any relative within the sixth degree, whether by blood or adoption); MISS. CODE ANN. § 91-5-7 (LEXIS through HB 366, 2019 Sess.) (Mississippi) (protecting child or descendant of the testator); MO. REV. STAT. § 474.460 (LEXIS through 2018 legislation) (Missouri) (protecting child, grandchild, or other relative of the testator); NEV. REV. STAT. § 133.200 (2011) (Nevada) (protecting descendants of the testator); N.Y. EST. POWERS & TRUSTS LAW § 3-3.3 (Consol. 2013) (New York) (protecting issue or brothers or sisters of the testator); N.C. GEN. STAT. § 31-42 (2007) (North Carolina) (protecting grandparents or descendants of grandparents of the testator); OHIO REV. CODE ANN. § 2107.52 (LexisNexis 2012) (Ohio) (protecting grandparents, descendants of grandparents, and stepchildren of the testator); OKLA. STAT. tit. 84, § 142 (LEXIS through 2018 legislation) (Oklahoma) (protecting child or other relation of the testator); OR. REV. STAT. §§ 112.395, .400 (LEXIS through 2018 legislation) (Oregon) (protecting any person related by blood or adoption to the testator); 20 PA. CONS. STAT. § 2514(9) to (11) (2017) (Pennsylvania) (protecting child or other issue, brother, sister, or child of a brother or sister of the testator); TEX. EST. CODE ANN. § 255.153 (West 2014) (Texas) (protecting descendants of testator or testator's parents); VT. STAT. ANN. tit. 14, § 335 (2017) (Vermont) (protecting child or other kindred of the testator); VA. CODE ANN. § 64.2-418 (2018) (Virginia) (protecting grandparents or descendants of grandparents of the testator); WASH. REV. CODE § 11.12.110 (2005) (Washington) (protecting issue of grandparents of the testator); WIS. STAT. §§ 853.27, 854.06 (Westlaw through 2017 Act 370) (Wisconsin) (protecting grandparent, issue of grandparent, or stepchild of the decedent).

91. In relation to the antilapse provision, section 21110 of the California Probate Code states: “‘transferee’ means a person who is kindred of the transferor or kindred of a surviving, deceased, or former spouse of the transferor, but does not mean

and the District of Columbia have antilapse statutes still in effect that generally protect the descendants of any devisee from lapse.<sup>92</sup>

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a spouse of the transferor.” CAL. PROB. CODE § 21110 (West 2019). The Kansas statute states:

If a devise or bequest is made to a spouse or to any relative by lineal descent or within the sixth degree, whether by blood or adoption, and such spouse or relative dies before the testator, leaving issue who survive the testator, such issue shall take the same estate which said devisee or legatee would have taken if he or she had survived, unless a different disposition is made or required by the will.

KAN. STAT. ANN. § 59-615 (2019). Kansas protects devisees to a spouse while California only protects devisees to kindred of a spouse. *Compare id.*, with CAL. PROB. CODE § 21110 (West 2019).

92. Some non-UPC antilapse states generally protect any devisee. *See, e.g.*, D.C. CODE ANN. § 18-308 (2019) (D.C.); GA. CODE ANN. § 53-4-64 (LEXIS through 2018 Extra Sess. of Gen. Assemb.) (Georgia); IOWA CODE §§ 633.273–.274 (LEXIS through 2018 Reg. Sess.) (Georgia) (excepting spouse from protected devisees); KY. REV. STAT. ANN. §§ 394.400, .410, .500 (LEXIS through 2018 legislation) (Kentucky); MD. CODE ANN., EST. & TRUSTS § 4-403 (LexisNexis 2010) (Maryland); N.H. REV. STAT. ANN. § 551:12 (Westlaw through Chapter 379 of the 2018 Reg. Sess.) (New Hampshire); 33 R.I. GEN. LAWS §§ 33-6-19, -20 (LEXIS through Chapter 4 of the Jan. 2019 Sess.) (Rhode Island); TENN. CODE ANN. § 32-3-105 (2019) (Tennessee); W. VA. CODE ANN. § 41-3-3 (2019) (West Virginia).

TABLE 1. COMPARISON OF DEVISEES PROTECTED BY STATE ANTILAPSE STATUTES		
	State	Total
<i>Only children, issue, descendants, or relatives by consanguinity of testator</i>	Ala., Ark., Colo., Del., Fla., Idaho, Ill., Ind., Me., Miss., Mo., Mont., Neb., Nev., N.Y., N.C., N.D., Okla., Or., Pa., S.C., Tex., Vt., Va., Wash., Wis., Wyo.	26
<i>Stepchildren in addition to children, issue, descendants, or relatives by consanguinity of testator</i>	Alaska, Ariz., Cal., Conn., Haw., Mass., Mich., Minn., N.J., N.M., Ohio, S.D., Utah, Wis.	14
<i>Spouses specifically (in addition to relatives)</i>	Kan.	1
Any devisee	D.C., Ga., Iowa, Ky., Md., N.H., R.I., Tenn., W. Va.	9
No antilapse statute	La.	1

In summary, taking into account states that have adopted the UPC, only eight states and the District of Columbia have antilapse statutes that allow issue of any devisee to take, whereas forty-one states have limitations on the devisees that are protected from lapse.<sup>93</sup> Almost all of the states that limit the devisees that can take under antilapse protect only the issue of children, descendants, relatives, or in some cases, stepchildren of the testator.<sup>94</sup> The exceptions to this rule are Kansas and California, which also limit devisees to relatives but include spouses and spouses' relatives, respectively.<sup>95</sup> Louisiana does not have an antilapse statute, which results in lapse for any devisee where the devisee does not survive the testator.<sup>96</sup>

Applying these approaches to the *Watkins* case discussed in Part I of this Note, the stepchildren of Mrs. Watkins would have taken only

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93. See *supra* notes 84, 85, 89, 91.

94. See *supra* note 89.

95. See *supra* note 90.

96. See *supra* note 87.

in nine states and the District of Columbia.<sup>97</sup> Under current laws, the devise to Mrs. Watkins's predeceased husband would have lapsed in the remaining forty-one states—approximately 80%—resulting in the residuary devise passing to Mrs. Watkins's children by intestacy.<sup>98</sup>

## VI. ADOPTION OF A NEW TENNESSEE ANTILAPSE STATUTE

The Tennessee Antilapse Statute, section 32-3-105, applies far too indiscriminately in its current form regarding protected devisees.<sup>99</sup> The Tennessee legislature should take under careful consideration the comprehensive approach of the UPC, as well as the approaches of other states, and adopt the UPC approach in its entirety or, at the very least, adopt the UPC's approach to protected devisees.<sup>100</sup> Some aspects of the UPC's approach, such as protecting the testator's issue and grandparents and their issue under antilapse, are noncontroversial. More debatable, however, are the following aspects of the UPC and other state antilapse statutes: whether stepchildren or spouses should be included as protected devisees; to what extent the antilapse statute yields to a finding of contrary intention; and by what methods contrary intention can be ascertained.

### *A. Stepchildren or Spouses as Protected Devisees*

The UPC expressly includes stepchildren as protected devisees, which seems to be the modern trend with more states adopting the UPC approach to antilapse statutes.<sup>101</sup> With nuclear families becoming increasingly uncommon, it is reasonable to believe that a testator would want the issue of her own stepchildren to be protected if the testator

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97. The states where the stepchildren would have taken include Kansas, *see* KAN. STAT. ANN. § 59-615 (West 2019), and the eight states listed *supra* note 91. The stepchildren would not have taken in California because the statute protects kindred of spouses named as transferees but not spouses. *See* CAL. PROB. CODE §§ 21110, 21111 (West 2019).

98. *See In re Estate of Watkins*, No. E2016-02388-COA-R3-CV, 2017 Tenn. App. LEXIS 497, at \*2 (Tenn. Ct. App. July 25, 2017).

99. *See* TENN. CODE ANN. § 32-3-105 (2019).

100. *See supra* Parts IV, V.

101. In addition to states that have adopted the UPC, California, Connecticut, Ohio, and Wisconsin also protect devisees to stepchildren. *See supra* note 89.

thought enough of the stepchildren to name them in her will.<sup>102</sup> In contrast, under the Tennessee statute, stepchildren themselves can take even if they are not named in the will.<sup>103</sup> This distinction is important because the UPC approach works more efficiently to further the testator's intent in lapse situations whereas the Tennessee statute easily frustrates a testator's intent by saving devises that should lapse. The UPC only extends this protection to stepchildren themselves and not to descendants of the testator's stepchildren or to the stepchildren of other relatives.<sup>104</sup>

Another important factor for the legislature to consider in relation to stepchildren is the effect of devises upon divorce. The UPC clarifies this question in section 2-804. Upon divorce, a devise is revoked not only to the spouse but also to the spouse's relatives.<sup>105</sup> For example, a devise to a stepchild under the UPC would be revoked automatically upon the testator's divorce from the stepchild's parent, preempting application of the antilapse statute.<sup>106</sup> In contrast, the current Tennessee statute for revocation by divorce, section 32-1-202, only revokes dispositions to a former spouse, with no mention of a former spouse's relatives.<sup>107</sup> If the Tennessee legislature decides to

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102. For a discussion of the term "nuclear family" and of changes in modern family structures and their treatment under inheritance law, see generally RALPH C. BRASHIER, *INHERITANCE LAW AND THE EVOLVING FAMILY* 1-4 (2004) (noting year 2000 census statistics).

103. See, e.g., *Watkins*, 2017 Tenn. App. LEXIS 497, at \*2-\*9.

104. UNIF. PROB. CODE § 2-603 cmt. (amended 2010).

105. *Id.* § 2-804(b). The applicable section of 2-804 states:

(b) [Revocation Upon Divorce.] Except as provided by the express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce, or annulment, the divorce or annulment of a marriage: (1) revokes any revocable (A) disposition or appointment of property made by a divorced individual to his [or her] former spouse in a governing instrument and any disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse.

*Id.*

106. *Id.*

107. Compare TENN. CODE ANN. § 32-1-202 (2019), with UNIF. PROB. CODE § 2-804(b) (amended 2010). The Tennessee statute states:

(a) If after executing a will the testator is divorced or the testator's marriage annulled, the divorce or annulment revokes any disposition

adopt the UPC antilapse statute, section 2-603, it should also consider adopting UPC section 2-804 or amending the current Tennessee revocation by divorce statute to clarify what happens with dispositions to stepchildren upon divorce.

The UPC does not provide protection from lapse to spouses or any devisees related to the testator by affinity other than stepchildren.<sup>108</sup> Protecting spouses through antilapse is uncommon, with only eight states and the District of Columbia protecting spouses by statute.<sup>109</sup> Most of these states are those that, like Tennessee, have failed to update their antilapse statutes and still protect any devisee.<sup>110</sup> Modeled on the nuclear family that was the paradigm for most nineteenth and twentieth century probate laws, these old statutes fail to take into account the many varied family structures in modern society.<sup>111</sup> Today's lack of lapse protection for spouses in most states is not an aspersion on the role of the spouse but rather reflects the reality that the spouse's issue are often neither the issue of the testator nor the objects of her bounty.

Including spouses as protected devisees can lead to devises that are contrary to a testator's intention, as evidenced in *Watkins*.<sup>112</sup> Studies show that testators often leave their property to surviving

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or appointment of property made by the will to the former spouse, any provision conferring a general or special power of appointment on the former spouse, and any nomination of the former spouse as executor, trustee, conservator or guardian, unless the will expressly provides otherwise. (b) Property prevented from passing to a former spouse because of revocation by divorce or annulment passes as if the former spouse failed to survive the decedent but [section] 32-3-105 shall not apply. Other provisions conferring some power or office on the former spouse are interpreted as if the spouse failed to survive the decedent.

TENN. CODE ANN. § 32-1-202 (2019).

108. UNIF. PROB. CODE § 2-603 (amended 2010).

109. Georgia, Kentucky, Maryland, New Hampshire, Rhode Island, Tennessee, West Virginia, and the District of Columbia protect any devisee, while Kansas specifically protects spouses. *See supra* note 91.

110. *See* CAL. PROB. CODE §§ 21110, 21111 (West 2019); KAN. STAT. ANN. § 59-615; *see also supra* note 91.

111. *See* UNIF. PROB. CODE art. II, prefatory note. The drafters of the revised UPC noted the modern change in family structures, providing the "advent of the multiple-marriage society" as one explanation for the 1990 revisions to the UPC. *Id.*

112. *See supra* Part I.

spouses, sometimes even when the spouse has children from outside of the marriage,<sup>113</sup> as in the *Watkins* case. Moreover, many testators never contemplate that their devisees may predecease them.<sup>114</sup> If the spouse predeceases in those situations, often the testator would not want the property to pass to the issue of the spouse rather than to the testator's own children, especially if the stepchildren were not reared by the testator.<sup>115</sup> This is the root of the reason why many states do not protect spouses or have changed their antilapse statutes to exclude spouses.<sup>116</sup> As a default rule for modern society, antilapse statutes tend to work best when they do not allow property intended for a family member to pass outside of the family.<sup>117</sup> Protecting a spouse's devise from lapse allows the testator's property to pass to stepchildren whom the testator never considered part of her family.<sup>118</sup>

### *B. Contrary Intention*

As a rule of construction, antilapse statutes are designed to carry out a testator's presumed intention in situations that the testator has failed to consider.<sup>119</sup> As a result, courts are often reluctant to consider contrary intent to defeat the application of antilapse.<sup>120</sup> Depending on the jurisdiction, contrary intent may be ascertained only from the will itself or, in the case of the UPC, from extrinsic evidence.<sup>121</sup> Additionally, under the UPC, words of survivorship alone are not a sufficient indication of contrary intent.<sup>122</sup> This is in opposition to the current law in Tennessee and should be addressed by the Tennessee legislature when adopting a new antilapse statute.

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113. *See French, supra* note 27, at 357–58.

114. *Id.* at 337.

115. *Id.* at 358.

116. *See id.* For an example of a statute that was amended to exclude spouses, see IOWA CODE §§ 633.273–.274 (2019).

117. *See French, supra* note 27, at 349–50.

118. *See supra* Part I.

119. UNIF. PROB. CODE § 2-603 cmt. (amended 2010).

120. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 5.5 cmt. f (AM. LAW INST. 1999).

121. *See id.*; UNIF. PROB. CODE §§ 2-601, -603.

122. UNIF. PROB. CODE § 2-603(b)(3).

## 1. Words of Survivorship

In Tennessee, words of survivorship are sufficient to indicate contrary intent and make the antilapse statute inapplicable.<sup>123</sup> In many jurisdictions, the inclusion of words of survivorship in a devise is, and has been, a sufficient method to prevent an antilapse statute from being applied.<sup>124</sup> However, under the UPC and in a significant number of jurisdictions, words of survivorship alone are not enough to prevent application of antilapse statutes.<sup>125</sup> The Tennessee legislature may hesitate to adopt UPC section 2-603 simply because of this provision.

UPC subsection 2-603(b)(3) reverses the established rule regarding words of survivorship. Under the UPC, words of survivorship by themselves are insufficient to prevent the application of antilapse. Although this rule may initially seem to be in opposition to a testator's presumed intention, there are several justifications for the UPC's position.

First, across the country, the question of whether mere words of survivorship automatically defeat an antilapse statute is a much-litigated one.<sup>126</sup> The Official Comment to UPC section 2-603 states bluntly that "[l]awyers who believe that the attachment of words of survivorship to a devise is a foolproof method of defeating an antilapse statute are mistaken."<sup>127</sup> The frequency of this issue in probate litigation evidences that mere words of survivorship are not foolproof in automatically defeating antilapse statutes.<sup>128</sup> Although many cases have certainly held that words of survivorship automatically defeat antilapse statutes, other cases and the *Restatement (Third) of Property*

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123. See *In re Estate of Swift*, No. W2012-00199-COA-R3-CV, 2012 Tenn. App. LEXIS 802, at \*20 (Tenn. Ct. App. Nov. 20, 2012) ("[W]here the will's survivorship language indicates that the issue of the beneficiaries take nothing if the beneficiary does not survive the testator, the Court will honor that intent.").

124. See *supra* note 78 and accompanying text.

125. Kimbrough, *supra* note 27, at 289; Halbach & Waggoner, *supra* note 33, at 1105.

126. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 5.5 cmt. h (AM. LAW INST. 1999); UNIF. PROB. CODE § 2-603 cmt. (amended 2010).

127. UNIF. PROB. CODE § 2-603 cmt.

128. *Id.*

take the contrary conclusion: language, by itself, is not enough to signify contrary intent.<sup>129</sup>

A second justification for the UPC's position is that the UPC provides a rigid rule to follow, which can clarify expectations and produce more consistent results.<sup>130</sup> A rigid rule presumably encourages drafters to use clear and direct language to signify intent.<sup>131</sup> As indicated in the *Restatement*, the language should be direct and understandable to the testator, while leaving no doubt that the testator considered that the devisee may fail to survive the testator and the devisee's descendants were not to be substituted.<sup>132</sup> The *Restatement* goes on to say that "[l]anguage such as 'and not to [the devisee's] descendants if [the devisee] fails to survive me' is an unmistakable expression of a contrary intent."<sup>133</sup> The Official Comment to UPC section 2-603 cites this section of the *Restatement* and reiterates the

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129. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 5.5 cmt. h (AM. LAW INST. 1999); UNIF. PROB. CODE § 2-603 cmt.; see also *Ruotolo v. Tietjen*, 93 Conn. App. 432, 450 (2006) ("We therefore conclude that words of survivorship, such as 'if she survives me,' alone do not constitute a 'provision' in the will for the contingency of the death of a beneficiary, as the statute requires, and thus are insufficient to negate operation of [the antilapse statute]."); *Detzel v. Nieberding*, N.E.2d 327, 336 (Ohio P. Ct. 1966); *Estate of Ulrikson*, 290 N.W.2d 757, 759 (Minn. 1980). It is important to note that under UPC section 2-603 words of survivorship can indicate contrary intent if supported by additional evidence of the testator's intent. UNIF. PROB. CODE § 2-603 cmt. The additional evidence can also be evidence that is extrinsic to the will. *Id.* An example presented in the Official Comment to UPC section 2-603 makes clear that "the combination of the words of survivorship and the extrinsic evidence of the client's intention would support a finding of a contrary intention under [s]ection 2-601." *Id.* Example 1 in the Official Comment provides that:

Relevant evidence tending to support such a finding might be a pre-execution letter or memorandum to G from G's attorney stating that G's attorney used the word "surviving" for the purpose of assuring that if one of G's children were to predecease G, that child's descendants would not take the predeceased child's share under any statute of rule of law.

*Id.*

130. See *Kimbrough*, *supra* note 27, at 289.

131. *Id.*

132. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 5.5 cmt. i (AM. LAW INST. 1999).

133. *Id.*

point by adding that the use of this particular language is “[a] foolproof means of expressing a contrary intention.”<sup>134</sup>

The UPC justifies this rigid rule regarding survival language on the idea that survival provisions are often “boiler-plate” and do not necessarily signify that the testator understood that the language could disinherit the line of descent of a particular devisee.<sup>135</sup> Unless the drafting lawyer discussed the particular matter with the testator, any link between the lawyer’s intent and the testator’s intent is speculative.<sup>136</sup> The Official Comment goes on to say that “[e]specially in the case of younger-generation devisees, such as the client’s children or nieces and nephews, it cannot be assumed that all clients, on their own, have anticipated the possibility that the devisee will predecease the client and will have thought through who should take the devised property in case the never-anticipated event happens.”<sup>137</sup>

By drawing such a hard line in relation to survival language, extrinsic evidence can be very important to providing evidence of contrary intent under the UPC. If when adopting the UPC the Tennessee legislature decides to take the position of UPC subsection 2-603(b)(3) regarding survival language, the legislature should also strongly consider adopting the UPC’s position in relation to extrinsic evidence.

## 2. Extrinsic Evidence

Extrinsic evidence is admissible under the UPC and can be an essential tool to aid the court in determining a testator’s intent.<sup>138</sup> In

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134. UNIF. PROB. CODE § 2-603 cmt. (amended 2010).

135. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 5.5 cmt. h (AM. LAW INST. 1999) (“When the testator is older than the devisee and hence does not expect the devisee to die first, or if the devisee was childless when the will was executed, it seems especially unlikely that a provision requiring the devisee to survive the testator was intended to disinherit the devisee’s descendants.”); UNIF. PROB. CODE § 2-603 cmt.

136. UNIF. PROB. CODE § 2-603 cmt.

137. *Id.*

138. The admission of extrinsic evidence was one of the issues in the *Watkins* case discussed *supra* Part I. “Extrinsic” is defined as being “[f]rom outside sources; of or relating to outside matters.” *McKenzie v. McKenzie*, No. M2013-02003-COA-R3-CV, 2015 Tenn. App. LEXIS 100, at \*27 n.8 (Tenn. Ct. App. Feb. 27, 2015) (quoting BLACK’S LAW DICTIONARY (9th ed. 2009)). The term “parol” is often used

the case of Mrs. Watkins, her will did not impose a survivorship requirement for the devise to Mr. Vance or provide for an alternative devise in the case that Mr. Vance predeceased.<sup>139</sup> If Mrs. Watkins's will had provided either a survivorship requirement or an alternative devise, the court would have ruled that the antilapse statute was inapplicable.<sup>140</sup> However, the Tennessee Court of Appeals did not consider extrinsic evidence to aid in determining Mrs. Watkins's intent.<sup>141</sup> Under Tennessee common law, extrinsic evidence is inadmissible "to add to, vary, or contradict the language used in a will" when there is no ambiguity on the face of the will, and the Tennessee antilapse statute does not provide otherwise.<sup>142</sup> Without an alternative, the court was forced to apply the antilapse statute instead of considering evidence that suggested the testator would have preferred the devise to lapse.<sup>143</sup>

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interchangeably with "extrinsic" by Tennessee courts when referring to evidence from sources outside of the plain language of the will. *Perdue v. Estate of Jackson*, No. W2012-02710-COA-R3-CV, 2013 Tenn. App. LEXIS 386, at \*10 (Tenn. Ct. App. June 12, 2013). Regardless of which term is used, in Tennessee "[g]enerally, parol or extrinsic evidence may not be used to vary, contradict, or add to unambiguous language used in a will." *Id.* (quoting *Horadam v. Stewart*, No. M2007-00046-COA-R3-CV, 2008 Tenn. App. LEXIS 601, at \*5 (Tenn. Ct. App. Oct. 6, 2008)).

139. *In re Estate of Watkins*, No. E2016-02388-COA-R3-CV, 2017 Tenn. App. LEXIS 497, at \*8–9 (Tenn. Ct. App. July 25, 2017).

140. *Id.* ("Thus, if the will in this case had specifically stated who would receive the residuary estate should Mr. Vance predecease the Decedent, the anti-lapse statute would not be operative. Moreover, a 'different disposition' is implicated when the will imposes a survivorship requirement on the named beneficiary."); *see also In re Estate of Swift*, No. W2012-00199-COA-R3-CV, 2012 Tenn. App. LEXIS 802, at \*20 (Tenn. Ct. App. Nov. 20, 2012).

141. *See Watkins*, 2017 Tenn. App. LEXIS 497, at \*5–9. The trial court in *Watkins* did consider parol evidence and, as a result, held that the antilapse statute did not apply. *Id.* at \*4. The Tennessee Court of Appeals decided that the antilapse statute controlled and that there was no reason to consider parol evidence because there was no ambiguity on the face of the will. *Id.* at \*8–9.

142. *Id.* at \*6 (quoting *Treanor v. Treanor*, 152 S.W.2d 1038, 1041 (Tenn. Ct. App. 1941)).

143. *Id.* at \*3–7. The trial court took under advisement the testimony of Mrs. Watkins's daughter, Kimberly Jenkins, regarding the tense relationship between Mrs. Watkins and the Vance children. *Id.* at \*3–4. The Tennessee Court of Appeals decided that parol evidence of the relationship was not admissible because there was no ambiguity on the face of the will and, instead, applied the antilapse statute without regard to the relationship between Mrs. Watkins and her stepchildren. *Id.* at \*6–7.

Under UPC section 2-601, evidence extrinsic to the will as well as the content of the will itself is admissible for purposes of rebutting the rules of construction.<sup>144</sup> This allows the court to consider evidence that could show whether the testator would have wanted the antilapse statute to apply, rather than forcing the court to apply the statute to produce a result that violates the testator's probable intent. In the *Watkins* situation, the UPC's position on contrary intent likely would have allowed extrinsic evidence to determine Mrs. Watkins's intent.<sup>145</sup> Without the ability to admit extrinsic evidence, courts are forced to apply mechanical rules in all situations where the statute could apply rather than allow the gift to lapse in situations that would likely frustrate the testator's intent.<sup>146</sup>

## VII. CONCLUSION

Antilapse statutes should be designed to further the testator's presumed intention in situations the testator failed to consider. The purpose of antilapse statutes is not only for the benefit of the dead devisee, but also to safeguard the interests of those whom the testator would most likely want to take. An antilapse statute that applies indiscriminately by allowing the issue of any devisee to take often frustrates, rather than furthers, the testator's intention. An update to the Tennessee antilapse statute is long overdue and imminently important to protect the interests of testators and their families.

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144. See UNIF. PROB. CODE §§ 2-601, -603 (amended 2010).

145. See *supra* Part I.

146. Allowing extrinsic evidence could complicate litigation by introducing additional costs. Although this may be true in some instances, allowing extrinsic evidence also reduces the risk of nonsensical and erroneous holdings that are, as evidenced in *Watkins*, undoubtedly contrary to the testator's intent. See 2017 Tenn. App. LEXIS 497, at \*3-7. The cardinal rule in will construction cases is for the court to discover and give effect to the intention of the testator. *Cowden v. Sovran Bank/Cent. S.*, 816 S.W.2d 741, 744 (Tenn. 1991) ("The cardinal and basic rule in the construction of wills is that the court shall seek to discover the intention of the testator, and will give effect to it unless it contravenes some rule of law or public policy." (quoting *Bell v. Shannon*, 367 S.W.2d 761, 766 (Tenn. 1963))). Extrinsic evidence can undeniably aid in determining the intention of the testator, and courts in Tennessee should be allowed to utilize this essential tool, as opposed to being forced to apply a statute that may easily frustrate, rather than further, a testator's intent. See *French*, *supra* note 27, at 342.

Uniform Probate Code section 2-603 addresses many of the historical shortfalls of antilapse statutes in general and, consequently, resolves the problems with Tennessee's antilapse statute. The UPC offers a comprehensive approach that provides for the modern family structure of today's society.<sup>147</sup> It yields to contrary intent in combination with section 2-601, and contrary intent can be found through the admission of extrinsic evidence, thus allowing the court to better understand the testator's true intention.<sup>148</sup> Most importantly, adoption of section 2-603 would correct the major problem with Tennessee's current antilapse statute related to protected devisees by limiting qualifying devisees to grandparents, descendants of a grandparent, or stepchildren of the testator.<sup>149</sup>

At the very least, the Tennessee legislature should adopt an antilapse statute that employs the UPC's approach to protected devisees. Such a change is necessary to reflect the realities and complexities of modern family life. Like many legislative decisions, the decision to change the Tennessee antilapse statute will likely be the result of compromise, and this discussion needs to be brought to the table sooner rather than later. The court's ruling in *Watkins* and those future rulings that are likely to come as a result of the *Watkins* precedent are decisions that cause irreparable damage to the parties involved and are undoubtedly in opposition to the testator's intent.<sup>150</sup>

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147. See UNIF. PROB. CODE art. II, prefatory note.

148. See *Watkins*, 2017 Tenn. App. LEXIS 497, at \*3-7.

149. See UNIF. PROB. CODE § 2-603(b).

150. See *supra* Part I.