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What's Wrong with Partial Intestacy?

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WHAT'S WRONG WITH PARTIAL INTESTACY?

RICHARD F. STORROW*

This article questions whether wills law's disapproval of partial intestacy rests on defensible assumptions about testamentary intent. After examining the causes of and antidotes to partial intestacy, I make three primary points. First, the presumption against intestacy applies only to wills that contain an ambiguous bequest of the residue. Second, the law's disapproval of partial intestacy is due in part to its failure to make an important distinction between testamentary intention and dispositive intention. Third, a theory of passive intention, heretofore barely alluded to in the law of wills, supplies the necessary validation of partially intestate estates.

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I. INTRODUCTION

Statutes around the country provide that "[a]ny part of a decedent's estate not effectively disposed of by will passes by intestate succession to the decedent's heirs."[1] What appears to be a straightforward and utterly sensible codification of the common law is surprisingly steeped in controversy. That one would ever write an incomplete will is apparently so rare and unthinkable that the presumption against intestacy is one of the most powerful in the law of succession. As legal scholar Isaac Redfield has stated, "'[t]he idea of anyone deliberately proposing to die testate as to a portion of his property, and intestate as to another portion, is so unusual in the history of testamentary disposition as to justify almost any construction to avoid it.'"[2] Redfield was writing in the nineteenth century, but contemporary courts have adopted his sentiments.[3] Scholars, too, have looked askance at partial intestacy:

> The basis for the decision in *Hughes v. Allen* [31 Ga. 483] was nothing more than a play on words; the court turned an immaterial verbal difference into an excuse for making an exception to the general rule. It is ridiculous to allow the draftsman's accidental choice of language—the use of "specified" instead of "disposed of"—to produce a partial intestacy in the absence of greater proof of his intent to exclude the residuary takers in favor of his heirs at law.[4]

The prevailing wisdom holds that "no will has a brother,"[5] meaning

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1. UNIF. PROB. CODE 2-101(a) (amended 2010), 8 pt. 1 U.L.A. 98 (2013); *see also* CAL. PROB. CODE § 6400 (1990); DEL. STAT. tit. 12 § 501 (2017); FLA. STAT. § 732.101 (2015); 755 ILL. COMP. STAT. 5/4-14; IND. CODE § 29-1-2-4; IOWA CODE § 633.272; MD. CODE ANN., EST. & TRUSTS § 3-101; MISS. CODE ANN. § 91-1-13; MO. REV. STAT. § 474.03; NEV. REV. STAT. § 132.195; 20 PA. CONS. STAT § 2101(a); S.C. CODE ANN. § 62-2-101 (2009).

2. 2 ISAAC F. REDFIELD, THE LAW OF WILLS 235 (3d ed. 1876), quoted in Cooper v. English, 1898 WL 3212, at **5 (Ill. App. Ct. Nov. 1, 1898).

3. *See, e.g.*, In re Estate of O'Brien, 627 N.Y.S.2d 544, 545 (Sur. Ct. Rensselaer County 1995); In re Estate of Barker, 448 So. 2d 28, 31 (Fla. Dist. Ct. App. 1984); *see also* In re Smith, 49 So. 2d 337, 339 (Fla. 1950) (holding that the law favors any reasonable construction of a will that disposes of all of the testator's property over an interpretation that results in partial intestacy).

4. Verner F. Chaffin, *The Time Gap in Wills: Problems under Georgia's Lapse Statutes,* 6 GA. L. REV. 268, 296 (1972).

5. Hammons v. Hammons, 327 S.W.3d 444, 448 (Ky. 2010); Epworth Children's Home v. Beasley, 616 S.E.2d 710, 715 (S.C. 2005); In re Maloney Trust, 377 N.W.2d 791, 797 (Mich. 1985) (Brickley, J., concurring).

that each will must be evaluated on its own terms. Courts *interpret* wills to discover a testator's actual intent, hoping that the testator has expressed it with plain language. If the will is ambiguous, the court may use evidence specific to the testator and his will to help resolve that ambiguity. Courts *construe* wills only when interpretation has failed to clarify the testator's actual intent. Construction is the act of ascribing *presumed* intent to a will with the aid of presumptions about what most testators desire and canons setting out what words usually mean in a testamentary context.[6] Since actual intent trumps presumed intent in the pecking order, construction is the last resort for probate courts examining an ambiguous will.[7] Although probate courts are familiar with how the process of will interpretation and construction unfolds, they are inconsistent with their use of terminology and often use the terms interpretation and construction interchangeably.

The negative judicial response to partial intestacy has upended the two-step approach to will interpretation and construction in this context. Although intestacy statutes seek to capture what would be the preferred testamentary dispositions of those who die without wills,[8] partial intestacy is thought to subvert a testator's intentions. Evidently intestacy, defined by absence, cannot be easily squared with the *presence* of a will. Partial intestacy also means that some beneficiaries will receive property under the terms of the will and via intestacy,[9] a "mixing" of regimes that was disliked by the common law but tolerated under the tenet that there is no residue of a residue.[10] As a result of this dislike of partial intestacy, even in cases of unambiguous wills, we find judges struggling to fill whatever gaps they find in testators' wills with whatever evidence of actual intention exists and bolstering their conclusions with the presumption against intestacy. Some courts have even gone as far as to say that partial intestacy cannot occur in the absence of express words

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6. Besch v. Schumacher, 599 N.W.2d 846, 851 (Neb. Ct. App. 1999) (noting that a presumption "cannot supply the actual intent of the testator to be derived from the language of the will").

7. Richard F. Storrow, *Judicial Discretion and the Disappearing Distinction Between Will Interpretation and Construction,* 56 CASE. W. RES. L. REV. 65, 80–81 (2005).

8. Margaret M. Mahoney, *Stepfamilies in the Law of Intestate Succession and Wills,* 22 U.C. DAVIS L. REV. 917, 918 (1989). Rebecca Friedman refers to this as "intestate intent." Rebecca Friedman, *Intestate Intent: Presumed Will Theory, Duty Theory, and the Flaw of Relying on Average Decedent Intent,* 49 REAL PROP. TR. & ESTATE L.J. 565, 566 (2015).

9. Quattlebaum v. Simmons Nat'l Bank of Pine Bluff, 184 S.W.2d 911, 913 (Ark. 1945).

10. In re Estate of Melton, 272 P.3d 668, 675, 680, 681 (Nev. 2012) (applying a will's disinheritance provision to block intestate distribution).

in the will indicating that the testator wanted his intestate heirs to take a portion of his estate. In short, partial intestacy is a problem that needs to be fixed, even if extraordinary measures are required to do so.

The remainder of this Article consists of three parts. In Part II, I discuss several characteristics of wills and scenarios that result in partial intestacy or play a prominent role in cases involving partial intestacy. In Part III, I examine the various antidotes to partial intestacy that exist in the law and offer a critique of how these antidotes have been employed in judicial decisions struggling to avert partial intestacy. In Part IV, I posit that our current approach to partial intestacy is misguided and advocate an alternative understanding. Partial intestacy is not the worrying phenomenon that courts and scholars, invoking the presumption against intestacy, have made it seem. I argue that a more coherent body of law could develop around partial intestacy if the courts would embrace the concept of passive intention, a theory more in keeping with what actually happens in cases of partial intestacy, rather than the assumption that partially intestate testators are mistaken or forgetful when portions of their probate estate are not covered by the language of their wills. In the course of my analysis, I reveal that the presumption against intestacy plays the limited role of helping courts construe wills that contain an ambiguous bequest of the residue that cannot be resolved with the aid of extrinsic evidence. I also explain that the law's disapproval of partial intestacy is due in part to its failure to make a fundamental distinction between testamentary intention and dispositive intention. Finally, I develop a theory of passive intention and argue that it supplies the necessary basis for validating partially intestate estates.

It is important to identify what is not at issue in this discussion. This is not a debate pitting formalism against functionalism. The formalism with which wills must be executed has long been a source of consternation, undermining as it does bona fide attempts to execute a valid will. Although not all states have adopted it, the dispensing power has been developed to address this problem. The power enables courts to excuse harmless errors in execution if the evidence shows clearly and convincingly that the testator intended the document in question to be his will. This Article is also not an examination of whether a document does or does not evince testamentary intent, a related problem that has less to do with the formalities of execution than with whether the testator intended specific language in his will to have a future significance.

II. THE CAUSES OF PARTIAL INTESTACY

Bequests in wills are classified as general, specific, demonstrative, or

residuary. General bequests are gifts of value and can be satisfied through transfers of money or property.[11] Specific bequests are gifts of identifiable items in the estate,[12] perhaps a painting that hung in the testator's home[13] or a parcel of real estate.[14] Demonstrative bequests are gifts of value that the testator directs be satisfied from a specific source.[15] For example, a will provision might read, "the sum of $100,000 to be paid from the proceeds of sale of my Apple stock."[16] Residuary provisions are gifts of all that remains after general, specific, and demonstrative bequests have been satisfied.[17] A residuary provision also captures the invalid portions of specific and demonstrative bequests, which are then distributed pro rata to the residuary beneficiaries.[18] If not all of the testator's probate estate is included within one of these classifications of bequests, then a partial or total intestacy will result.

What follows describes the various scenarios that can lead to partial intestacy.

A. Residuary Bequest

Since a residuary clause "manifests an intention on the testator's part to make a complete disposition of his estate and to avoid intestacy as to any portion thereof,"[19] the lack of a residuary bequest or problems with its enforceability play an important role in creating a partial intestacy. Indeed, probably most partial intestacies can be traced to the absence of or problems with a will's residuary provision. Missing, incomplete, or ineffective residuary bequests are the usual culprits.

1. Missing or Incomplete Residuary Bequest

It may seem odd at first blush that any testator would leave a residuary bequest out of his will, but it does happen,[20] sometimes as the

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11. In re McDougald's Estate, 6 So. 2d 274, 274 (Fla. 1942).

12. *Id.*

13. *See, e.g.*, Clark v. Greenhalge, 582 N.E.2d 949, 951, n.3 (Mass. 1991).

14. *See, e.g.*, In re Estate of Olson, 744 N.W.2d 555, 557 (S.D. 2008).

15. In re Estate of Lund, 633 N.W.2d 571, 574 (Minn. Ct. App. 2001).

16. JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 374 (9th ed. 2013).

17. *Id.*

18. *See id*.

19. In re Will of Shannon, 587 N.Y.S.2d 76, 77 (Sur. Ct. Nassau County 1992). *See also* Dudley v. Jake & Nina Kamin Found., 2014 WL 298270, at *3 (Tex. Ct. App. Jan. 28, 2014) ("The basic purpose of a residuary clause . . . is to prevent partial intestacy.") (alteration in original).

20. *See, e.g.*, Bowman v. Brown, 149 A.2d 56, 58 (Pa. 1959); In re Zeevering, 78 A.3d 1106, 1107 (Pa. Super. Ct. 2013); Chambers v. Davis, No. C-130635, 2014 WL 2957242, at *1 (Ohio Ct.

result of a scrivener's error,[21] a testator's inadvertence,[22] or a testator's desire to express her testamentary wishes about some, but not all, of her estate.[23] Empirical work is scant, but in one study of 145 holographic wills offered for probate in Pittsburgh, the investigator found that twenty-four percent lacked a residuary clause.[24] One explanation may be that attorneys drafting wills will insist on including a residuary clause but that individuals without a knowledge of succession law who draft their own wills may not know their function. Nonetheless, as one court has pointed out, "[i]ntestate transfer occurs if the residuary clause is uncertain."[25]

An incomplete or unfinished residuary bequest was the subject of *Holcomb v. Newton*.[26] There the testator used language introducing a residuary bequest but failed to name any beneficiaries of it.[27] The court refused to name the executors the beneficiaries of the residuary. Even if that is what the testator intended (extrinsic evidence suggested that he did), the language of the will did not support the bequest.[28] The court reasoned: "It is a general rule that extrinsic evidence is not admissible to fill up a total blank on the face of a will, or to determine the person or property intended by the testator, where there is a total failure to designate any."[29] The will was not ambiguous; its residuary clause was

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App. June 27, 2014); Davis v. Estate of Perry, No. 2419-VCG, 2013 WL 53991, at *1 (Del. Ch. Jan. 2, 2013); Carr v. Rogers, 383 S.W.2d 383, 385 (Tex. 1964) (text of residuary was restricted to certain types of property; court refused to treat it as a residuary); In re Estate of Milam, 181 S.W.3d 344, 355 (Tenn. Ct. App. 2005). For other examples, see Pamela R. Champine, *My Will Be Done: Accommodating the Erring and the Atypical Testator,* 80 NEB. L. REV. 387, 421, n.147 (2001).

21. *See, e.g.*, In re Estate of Goodkind, 827 N.E.2d 6, 16 (Ill App. Ct. 2005); McLaughlin v. McLaughlin, 2014 ONSC 3162, 2014 CarswellOnt 9315 at para. 87 (Can. Ont. Sup. Ct.).

22. Jane B. Baron, *Irresolute Testators, Clear and Convincing Wills Law,* 73 WASH. & LEE L. REV. 3, 68 (2016).

23. *See, e.g.*, *Milam*, 181 S.W.3d at 355 (testator stated in executed will that it was not complete and that she would revisit it when she had more information about her assets). Related are wills that cover fewer than all of the possible contingencies. *See, e.g.*, In re Estate of Watts, 336 N.Y.S.2d 781, 789 (Sur. Ct. Hamilton County 1972) (joint will contained final disposition of surviving spouse's estate only in the event of the spouses' simultaneous death).

24. Stephen Clowney, *In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking,* 43 REAL PROP. TR. & EST. L.J. 27, 49 (2008).

25. Margolis v. Pagano, 528 N.E.2d 1331, 1335 (Ohio Com. Pl. 1986).

26. 226 S.W.2d 670 (Tex. Ct. App. 1950).

27. *Id.* at 671.

28. *Id.* at 672.

29. *Id.*

simply missing an element critical to its validity.[30] The presumption against intestacy was thus irrelevant.

In *In re Estate of Oliverio* the will contained no residuary clause.[31] The dispositive provisions it did contain included one that bequeathed the one-third share of real property the testator owned with her stepchildren at the time she executed the will.[32] After the execution of the will, the children conveyed their shares of the property to their stepmother so that she died owning the property outright.[33] Holding that two-thirds of the property passed by intestacy to the testator's intestate distributees, the court noted that the language of the will bequeathing "my one-third (1/3) interest" was "unequivocal and specific."[34] Despite the testator's evident desire to provide for her stepchildren, her will nonetheless contained no language that encompassed the property she acquired after executing her will.[35]

A residuary bequest may be incomplete because it is merely partial, as where the estate is divided into shares that do not amount to the whole. Such was the case in *In re Will of Shannon.*[36] In that case, the testator devised seventy-five percent of her estate to thirteen named beneficiaries and made no reference to the other twenty-five percent.[37] The named devisees argued that they were entitled to the twenty-five percent in part because the will contained no indication that the testator wished to benefit her legal heirs.[38] That was, in some measure, the problem. The testator indicated neither one way nor the other what she wished to become of the twenty-five percent. The court wisely determined that it had no authority to rewrite the will and declared a partial intestacy.[39] A similar iteration of the partial residuary bequest is found in *Bowman v. Brown,* where the testator left the residue of his estate to his wife for life but did not mention what he wanted to become

30. *Id.* at 673.

31. In re Estate of Oliverio, 415 N.Y.S.2d 335, 338 (Sur. Ct. Cattaraugas County 1979).

32. *Id.* at 339.

33. *Id.*

34. *Id.* at 340.

35. *Id*. at 338, 341.

36. 587 N.Y.S.2d 76 (Sur. Ct. Nassau County 1992).

37. *Id*. at 77.

38. *Id*.

39. *Id. See also* Brown v. Quintard, 177 N.Y. 75, 84–85 (1903) (three-fourths of estate left undisposed).

of the remainder.[40] The court raised the presumption against intestacy but reasoned that it had been rebutted in this case, since the will evinced an intention to benefit the testator's legal heirs upon the death of his wife.[41]

The lack of a residuary provision in a testator's estate plan can also be the result of his revocatory acts or writings. For example, in *In re White,* the testator executed a will revoking his prior will.[42] The prior will had bequeathed the residue of his estate to his wife.[43] But the new will made specific dispositions of only a portion of his assets and made no mention of the residue.[44] The result was a partial intestacy of the estate.[45] Partial revocation by physical act, if permitted by the jurisdiction in question, may result in a similar outcome, as where a testator makes changes to his will that revoke only portions of the residuary provision.[46]

None of the foregoing is meant to suggest that without a residuary clause, intestacy as to the whole or a part of the estate is inevitable. For example, a devise of all of one's real property to A and all of one's personal property to B would be sufficient, barring other problems discussed below, to dispose of the entire estate.[47]

2. Ineffective Residuary Bequest

The law provides that "when a party makes a will containing a residuary clause or other language of similar import, he did not intend to die intestate as to any part of his estate."[48] Where problems arise with residuary clauses that appear to be valid and complete on their face, partial intestacy may result. The causes of this invalidity vary and may include lapse, revocation, the satisfaction of a legacy, some species of fraud or undue influence,[49] perpetuities problems,[50] or provisions that

40. Bowman v. Brown, 149 A.2d 56, 57 (Pa. 1959).

41. *Id.* at 60.

42. In re Estate of White, 566 P.2d 720, 721 (Colo. App. 1977).

43. *Id.*

44. *Id.*

45. *Id.*

46. *See, e.g.*, Estate of Uhl, 81 Cal. Rptr. 436, 438 (Cal. Ct. App. 1969).

47. *See, e.g.*, In re Marinos' Estate, 102 P.2d 443, 447 (Cal. Ct. App. 1940).

48. Lyon v. Safe Deposit & Tr. Co., 87 A. 1089, 1093 (Md. 1913).

49. Research reveals no case of a will contest on the basis of testamentary incapacity, undue influence or fraud that resulted in partial intestacy. Although will contests have been brought requesting a declaration of partial invalidity, *see, e.g.*, In re Estate of Burger, 898 A.2d 547, 548 (Pa. 2006) ("limited will contest"), successful will contests invariably involve the rejection of the *entire* will from probate, *see, e.g.*, In re Estate of Dougherty, C.A. No. 9694-JL,

violate public policy.[51] If only a portion of the residuary bequest is invalid, that portion will benefit the other residuary takers in states that have enacted remain-in-the-residue legislation.[52] I elaborate on lapse, revocation, and the ineffective exercise of a power of appointment in the remainder of this section.

A testator may designate a particular person to take the residue. If that person predeceases the testator and no anti-lapse provision applies, the residue itself will lapse and will be distributed in intestacy.[53] This intestacy will be partial if the will also contains valid specific or demonstrative bequests. It will also be partial if the residuary bequest names more than one beneficiary but the jurisdiction in question has no remain-in-the-residue statute. Such a partial intestacy may result, of course, in some beneficiaries receiving property under the terms of the will and via intestacy,[54] a mixing of regimes that, as mentioned above, was disliked by the common law but tolerated under the tenet that there is no residue of a residue.[55] Whether a bequest has lapsed tends to be self-evident. It would not render an otherwise straightforward bequest in the will ambiguous. Thus, the strong presumption in wills law against partial intestacy would have no application in this context.

Cases involving the revocation of the whole of or a part of the residuary bequest can also result in partial intestacy. Statutory revocations, too, such as the automatic revocation of residuary provisions in favor of one's former spouse upon the issuance of the divorce decree could have a similar effect.[56] An example of the former is *Hansel v.*

2016 WL 4130812, at *13 (Del. Ch. July 22, 2016). Thus, the relevance of will contests to partial intestacy is slight and will not be discussed here.

50. Perkins v. Iglehart, 39 A.2d 672, 676, 681 (Md. 1944).

51. In re Estate of Pratt, 80 S.2d 499, 501 (Fla. 1956) (mortmain); Note, *Restrictions on Charitable Testamentary Gifts,* 5 REAL PROP. PROBATE & TR. J. 290, 297 (1970). Mortmain has been abolished in the United States. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 9.7 cmt. c (Am. Law Inst. 2003).

52. *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW. 3–3.4. (McKinney 2012).

53. *See, e.g.*, Flannery v. McNamara, 738 N.E.2d 739, 740–41 (Mass. 2000); In re Estate of Jayne, 463 N.Y.S.2d 544, 545 (N.Y. App. Div. 1983) (lapse resulted in escheat, the testatrix leaving no heirs); In re Kossak, (1990) 72 O.R. 2d 313, 37 E.T.R. 235 (Can. Ont. H.C.J.), *discussed in* Laurie S. Redden, *Lapse of Testamentary Gifts of Residue,* 11 EST. & TR. J. 244, 244–45 (1992).

54. Quattlebaum v. Simmons Nat'l Bank of Pine Bluff, 184 S.W.2d 911, 913 (Ark. 1945).

55. In re Estate of Melton, 272 P.3d 668, 675, 680 (Nev. 2012) (applying a will's disinheritance provision to block intestate succession).

56. *See, e.g.*, In re Estate of Forrest, 706 N.E.2d 1043, 1047 (Ill. App. Ct. 1999). Research did not uncover a case involving a statutory revocation by reason of divorce that resulted in partial intestacy. Note that the common law rule providing for revocation of premarital wills

Head.[57] The joint will in that case disposed of the residue in equal shares to two groups of named individuals. Later the testators obliterated what appeared to be one of the names. The text was so completely obscured that it was impossible to discern what lay beneath the obliteration.[58] Given the invalidity of partial revocations by physical act in Alabama, the court held that the will would be probated in its original form, save for the indecipherable legacy, which would be distributed in intestacy.[59] An example of the latter is *Johnson v. Kirby.*[60] In that case, the will devised the entire estate to the former spouse.[61] Under West Virginia law, this meant that the bequest to the ex-spouse was automatically revoked, leaving the estate to pass via intestate succession.[62] Under the typical statutory provision, the ex-spouse is treated as having predeceased the testator.[63] This means that in some cases a named contingent beneficiary will take the property,[64] and no partial intestacy results, even if the contingent beneficiary is a relative of the ex-spouse.[65] Thus, if a testator divorced his wife but left in place a will benefiting his spouse and, in the alternative, her mother, the mother would take the property.[66] Other courts have ruled to the contrary, however, and the Uniform Probate Code is in agreement.[67] Under these provisions, a partial intestacy could result if the will made specific or general bequests in addition to a devise of the residue to the former spouse.[68]

The failure to exercise or the ineffective exercise of a power of appointment can also create a partial intestacy. Testators sometimes bequeath the residue of their estates in trust and divide them into life

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upon marriage exists in very few states today. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 4.1 cmt. q (Am. Law Inst. 1999).

57. 706 So. 2d 1142, 1147 (Ala. 1997) (obliteration case; undiscernible matter disposed of through intestacy).

58. *Id.* at 1144.

59. *Id.* at 1147.

60. 739 S.E.2d 283 (W. Va. 2013).

61. *Id*. at 284.

62. *Id.* at 290.

63. Jones v. Brown, 248 S.E.2d 812, 813 (Va. 1978) (ascertaining this to be the rule in a majority of jurisdictions); Roeske v. First Nat'l Bank of Lake Forest, 413 N.E.2d 476, 479 (Ill. App. Ct. 1980).

64. In re King's Estate, 592 P.2d 231, 232 (Or. Ct. App. 1979).

65. *See, e.g.*, Bloom v. Selfon, 531 A.2d 12, 17 (Pa. Super. Ct. 1987).

66. In re Estate of Graef, 368 N.W.2d 633, 636 (Wis. 1985).

67. *Id.* at 635; UNIF. PROB. CODE § 2-804 (amended 2010), 8 pt. 1 U.L.A. 330–34 (2013).

68. *Id*.

estates and corresponding remainders. A testator might not name the takers in remainder in her will or inter vivos trust but instead give someone else the power to do so.[69] Often the donee of such a power of appointment is the life tenant,[70] the testator reasoning that the life tenant will be well positioned to identify worthy recipients of the remainder as she draws closer to the end of her tenancy. If the donee releases the power, fails to exercise the power, or her exercise is somehow ineffective,[71] as where it violates the rule against perpetuities,[72] the property will be distributed to the testator's named takers in default.[73] But if the testator has named no takers in default, the remainder, because it was part of the testator's residuary bequest, will be distributed in intestacy.[74]

B. Pretermission

The children of testators can wreak havoc on their estate plans. A child's birth or adoption after the parent executes her will renders the child "pretermitted,"[75] i.e., omitted from the will, unless the will contains a gift to the testator's children as a class.[76] In the spirit of protecting children against such omissions, statutes bestow upon them a share of the estate. There is not "true uniformity" among these provisions,[77] but the most up-to-date version provides that if the testator had other children at the time he executed his will, the pretermitted child will share equally with them, even if they were excluded from the will,[78] thus averting partial intestacy. If the testator had no children at the time of

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69. *See, e.g.*, Roger's Estate, 31 Pa. Superior Ct. 620 (Pa. Super. Ct. 1906).

70. *See, e.g.*, Estate of McKenna, 170 Cal. Rptr. 240, 247 (Cal. Ct. App. 1980).

71. I have dealt with the question of lapsed residuary bequests above. Suffice it to say here that what law exists in the United States considers an appointment to have lapsed where the appointee of the property predeceases the donee. *See, e.g.*, Brown v. Fid. Union Tr. Co., 9 A.2d 311, 312 (N.J. Ch. 1939). *See* JESSE DUKEMINIER, ROBERT H. SITKOFF & JAMES LINDGREN, WILLS TRUSTS & ESTATES 298 (8th ed. 2009); *see also* Susan F. French, *Application of Antilapse Statute to Appointments Made by Will,* 53 WASH. L. REV. 405, 438–39 (1978).

72. *See, e.g.*, In re Estate of Trotter, 175 Misc. 356, 357 (Sur. Ct. New York County 1940).

73. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS §§ 19.21(a), 19.22(a) (Am. Law Inst. 2011).

74. *See, e.g.*, Davis v. Kendall, 107 S.E. 751, 763 (Va. 1921).

75. Bailey v. Warren, 319 S.W.3d 185, 189 (Tex. Ct. App. 2010).

76. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 9.6 cmt. f (Am. Law Inst. 2003). *See, e.g.*, In re Estate of Markowitz, 312 A.2d 901, 905 (Essex County Ct. 1973).

77. Adam J. Hirsch, *Airbrushed Heirs: The Problems of Children Omitted from Wills,* 50 REAL PROP. TR. & EST. L.J. 175, 181 (2015).

78. *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW. § 5-3.2(a)(1)(A)-(B) (McKinney 2017).

the will's execution and the pretermitted child has not been provided for outside of the will, she is entitled to an intestate share of the estate.[79] The Uniform Probate Code denies the pretermitted child a share if the testator devised most of the estate to the child's other parent and that beneficiary survives the testator and is not otherwise barred from taking.[80]

The authorities do not agree whether pretermission statutes create partial intestacies. Some courts and commentators describe the intestate share given to the pretermitted child as creating a partial intestacy in the estate.[81] The Arkansas Supreme Court thought otherwise, reasoning that partial intestacy does not accurately describe the share of a pretermitted child since "pretermitted children are said to take under the will from which they have been omitted, not against it."[82] Either way, the existence of pretermission statutes reflects a policy choice by legislators to safeguard children against testamentary omission that appears to be (but admittedly may not be) unintended. This policy overrides the concerns that partial intestacies caused by other means raise.

III. ANTIDOTES TO PARTIAL INTESTACY

As we have seen above, the law has been keen to minimize the incidence of intestacy in the probate of wills. There is now a stable body of statutes and legal doctrines aimed at averting it. Some examples are that the will speaks as of the moment of death, capturing, if possible, after-acquired property within its ambit.[83] Others are more obscure, such as New York's statute allowing certain clauses of a testator's will to be taken as exercises of a power of appointment.[84] I focus here on the most common: the presumption against intestacy, gifts by implication, and certain doctrines relating to the construction of future interests.

A. The Presumption Against Intestacy

Extravagant statements like we find in Redfield and in judicial

79. *See, e.g.*, *id.* § 5-3.2(a)(2). Similar provisions entitle a spouse to an intestate share when the testator dies leaving a premarital will. DUKEMINIER & SITKOFF, *supra* note 16, at 307.

80. UNIF. PROB. CODE § 2-302(a)(1) (amended 2010), 8 pt. 1 U.L.A. 194–95 (2013).

81. *Markowitz*, 312 A.2d at 902; G. Harold Blaxter, *Some Problems Introduced by the After-Born Children Clause of the 1947 Wills Act,* 10 U. PITT. L. REV. 219, 220 (1948).

82. Armstrong v. Butler, 553 S.W.2d 453, 459 (Ark. 1977).

83. Fitzgerald v. Bell, 39 N.E.2d 186, 188 (Ohio. Ct. App. 1941); Hodgkins v. Hodgkins, 108 N.Y.S. 173, 174 (N.Y. App. Div. 1908).

84. N.Y. EST. POWERS & TRUSTS LAW. § 10-6.1 (McKinney 2017).

opinions declaring that "the law abhors intestacy"[85] have led to the presumption against intestacy, a doctrine as deeply rooted in wills law as is the tenet that the testator's intention is the polestar of will construction.[86] The presumption exists in every state in the nation and in other common law countries and is cited copiously in jurisprudence.[87] The presumption is notoriously difficult to rebut. The evidentiary hurdle required to overcome it is placed very high,[88] particularly when it involves the distribution of an estate's residue.[89]

The substance of the presumption has its origins in a presumption about the intention of a testator who includes a residuary clause in his will. As one court has observed, "[t]he basic purpose of a residuary clause . . . is to prevent partial intestacy. Where one is contained in a will every presumption will be made against *intended* intestacy."[90] Such a proposition is reasonable, since a residuary provision comprises, by definition, whatever is left over after the distribution of the gifts the testator enumerated specifically.[91] A residuary disposition is meant to comprise property the testator may have forgotten or about which he may have been ignorant.[92] Its presence in a will signals a resolve not to die intestate.[93] Thus, the presumption against intestacy relies heavily on

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85. In re Estate of Baer, 446 So. 2d 1128, 1128 (Fla. Ct. App. 1984). *See also* Kroll v. Nehmer, 705 A.2d 716, 720 (Md. 1998); In re Estate of Teubert, 298 S.E.2d 456, 460 (W. Va. 1982) ("[T]he law favors testacy over intestacy."). The court in *Estate of Teubert* was referring to how allowing holographic wills encourages laypersons to execute their own wills. *See id.*

86. 2-3 NEW YORK CIVIL PRACTICE: EPTL ¶ App. 3.02[5] ("[I]t is deeply rooted in our jurisprudence of succession and is one of the strongest presumptions known to the law.").

87. *See, e.g.*, In re Bellows, 480 N.Y.S.2d 925, 929 (N.Y. App. Div. 1984). *See* Richard Kelly, Jr., *Distinction Between Construction and Interpretation of Wills,* 20 WASH. & LEE L. REV. 104, 107, n.17 (1963) (collecting cases).

88. *See, e.g.*, Halstead v. Plymale, 750 S.E.2d 894, 898 (N.C. Ct. App. 2013) (holding that the presumption arises unless a plain and unequivocal intent to die intestate is "expressed in the will").

89. McKinney v. Mosteller, 365 S.E.2d 612, 614 (N.C. 1988); Guilano v. Gore, 223 Md. App. 772 (Md. Ct. App. 2015); Dudley v. Jake & Nina Kamin Found., 2014 WL 298270, at *3 (Tex. Ct. App. Jan. 28, 2014).

90. Morris v. Finkelstein, 442 S.W.2d 452, 455 (Tex. Ct. App. 1969) (emphasis supplied). *See also* 80 AM. JUR. 2D *Wills* § 1304 (2013).

91. Moore v. McKinley, 69 N.W.2d 73, 86 (Iowa 1955).

92. Benjamin v. JP Morgan Chase Bank, 305 S.W.3d 446, 452 (Ky. Ct. App. 2010); *Moore*, 69 N.W.2d at 88.

93. *See* In re Will of Shannon, 587 N.Y.S.2d 76, 77 (Sur. Ct. Nassau County 1992); Wolkewitz v. Wood, 216 S.W.2d 611, 613 (Tex. Ct. App. 1948) (noting that the presumption against intestacy "may be applied in construing a will only where an intention to pass the whole estate is expressed in some form"); 80 AM. JUR. 2D Wills § 1015 (2013).

the presence of residuary bequests in wills,[94] because the absence of a residuary bequest usually portends partial intestacy.

Over time, the presumption that a testator whose will contains a residuary clause has the intention not to die partially intestate has transformed itself into a presumption that arises from the very act of making a will. Indeed, some courts have declared that the mere act of making a will triggers the presumption.[95] One in particular remarked that "[t]here is a presumption that a testator does not intend to die intestate as to part of his estate," with no reference whatsoever to the importance of a residuary clause in triggering the presumption.[96] In fact, it appears that the *absence* of a residuary clause from the will triggers the presumption as well. Making this unusual point, one court commented, "the absence of a residuary clause strengthens the presumption that the decedent intended by other provisions of his will to dispose of his entire property."[97] Another court has opined that the absence of a residuary clause "suggests that it was the impression of the testator that there was nothing to dispose of by a residuary clause, that everything had been disposed of by the will."[98] On this reasoning, the presumption against intestacy applies whenever a testator executes a will, no matter what clauses it contains.[99]

A variation on the presumption against intestacy holds that the presence of a residuary clause in a will makes the presumption "particularly strong."[100] In seeking to harmonize these various iterations of the presumption, the student of wills will perceive that there are

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94. *See* In re Dobrovolny's Estate, 318 P.2d 1053, 1057 (Kan. 1957) (noting that the presumption against intestacy "exists only if there is an applicable general residuary clause").

95. *See, e.g.*, *In re Fabbri's Will*, 159 N.Y.S.2d at 243; *Dudley*, 2014 WL 298270, at *3.

96. *Finkelstein*, 442 S.W.2d at 455; *see also* In re Bellows, 480 N.Y.S.2d 925, 929 (N.Y. App. Div. 1984) ("[O]nce executed a will creates the presumption that it was the testator's intent to dispose of his entire estate.").

97. In re Estate of Oliverio, 415 N.Y.S.2d 335, 338 (Sur. Ct. Cattaraugus County 1979). *See also* In re Owen, 36 N.Y.S.2d 60, 62 (Sur. Ct. New York County 1942); In re Faust, 145 N.Y.S. 842, 844 (Sur. Ct. New York County 1913).

98. Besch v. Schumacher, 599 N.W.2d 846, 853 (Neb. Ct. App. 1999).

99. *See, e.g.*, In re Estate of Herceg, 747 N.Y.S.2d 901, 903 (Sur. Ct. Broome County 2002); In re Fabbri's Will, 159 N.Y.S.2d 184, 190 (N.Y. 1957); In re Estate of Tully, 525 N.E.2d 244, 245 (Ill App. Ct. 1988); Halstead v. Plymale, 750 S.E.2d 894, 898 (N.C. Ct. App. 2013); Dudley v. Jake & Nina Kamin Found., 2014 WL 298270, at *3 (Tex. Ct. App. Jan. 28, 2014) ("Jake left a will. We thus presume that he did not intend to die intestate."); *see also* 80 AM. JUR. 2D *Wills* § 1015 (2013).

100. Moore v. McKinley, 69 N.W.2d 73, 87 (Iowa 1955); *Bellows*, 480 N.Y.S.2d at 932; 80 AM. JUR. 2D *Wills* § 1015 (2013).

actually two presumptions against intestacy, one arising when a decedent dies testate and another, stronger presumption arising when the will contains a residuary clause.

These varying sentiments about the presumption against intestacy deserve scrutiny because what gets lost in them is that presumptions in wills law normally apply when needed to resolve ambiguities in wills.[101] By advancing the presumption to a position prior to any finding of ambiguity, a court will sidestep what typically is *de rigueur* when it undertakes to interpret or construe a will. Guided by the admonition that "an intestacy is always to be avoided when possible,"[102] a court would be empowered to interpret the language of even a plain will as an "accidental choice of words"[103] in an effort to avert partial intestacy. Admonitions that the presumption against intestacy cannot be used to alter a plain meaning in a will are more in keeping with the function of presumptions but appear infrequently.[104]

A more precise rendering of the role of the presumption against intestacy as an "artificial rule of construction . . . to be resorted to when the intent of the testator cannot be determined by giving the words their usual meaning"[105] can be found in the words of Kimberly Whaley and Ameena Sultan: "if a will has two possible constructions one of which would make an effective disposition of all or part of the estate, and the other [of which] would result in intestacy, a court may prefer the former."[106] In referring to construction, Whaley and Sultan are

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101. In re Estate of Wagner, 507 N.W.2d 711, 714 (Iowa Ct. App. 1993) ("The presumption against partial intestacy may be invoked when intention is not clearly expressed."); In re Smith's Estate, 191 P.2d 413, 416 (Cal. 1948) (noting that the presumption "applies only where there exists an ambiguity or uncertainty in the language of the testator"); Estate of Jenkins, 904 P.2d 1316, 1321 (Colo. 1995); Harrison v. Harrison, 120 S.W.3d 144, 147 (Ark. Ct. App. 2003) ("The rule against partial intestacy is not used unless there is some ambiguity."); In re Dobrovolny's Estate, 318 P.2d 1053, 1057 (Kan. 1957) (remarking that the presumption "can be invoked only to aid the interpretation of a will where the intention of the testator is expressed in uncertain and ambiguous terms."); Cuthbertson Estate, 2011 ABQB 704.

102. In re Arnold's Estate, 87 A. 590, 591 (Pa. 1913).

103. White v. Smith, 89 A. 272, 274 (Conn. 1914).

104. 80 AM. JUR. 2D *Wills* § 1015 (2013).

105. Armstrong v. Butler, 553 S.W.2d 453, 458 (Ark. 1977).

106. Kimberly Whaley & Ameena Sultan, *Where There's (Not) a Will: Intestacies, Partial Intestacies and Remedies,* Draft at 3 (2014) (citations omitted), http://welpartners.com/resources/WEL_Intestacies_Partial_Intestacies_and_Remedies_Oct2014.pdf [https://perma.cc/S824-CESL]. *See also* In re Gregory's Estate, 70 So. 2d 903, 907 (Fla. 1954).

necessarily indicating cases where the ambiguity in the will cannot be resolved through interpretation. In other words, the presumption arises when an ambiguity cannot be resolved by extrinsic evidence, and it is determinative when it stands unrebutted. At this stage of the process of interpretation and construction, however, there would be nothing left to rebut the presumption, except, perhaps, another competing and more important presumption. This is the reason the presumption is so strong. At the point it becomes an appropriate consideration, it is very nearly determinative. That is why it needs to enter later into the process of construing wills rather than earlier, where it would function more to short-circuit the interpretative process rather than contribute to it.[107]

There is the danger, too, that a court will declare the will ambiguous in order to apply the presumption against intestacy. Courts have wide latitude to determine a will ambiguous, including cases where the testator has not distributed all of her property via her will.[108] The presumption thus carries a certain inevitability and operates circularly: because the will does not dispose of all of the property it is ambiguous and because it is ambiguous the presumption against intestacy arises. One safeguard against a court's overreaching in this manner is the likelihood that neither the language of the will nor extrinsic evidence will reveal how the partial intestacy should be resolved.[109]

The argument that the presumption should have a more limited application is supported by the Restatement.[110] The presumption is not a presumption at all, as it happens, but is at best a constructional *preference* for completeness of disposition and is subsumed within the more general preference for "the construction [that] render[s] the document as effective as possible."[111] But the preference yields to the

107. Richard F. Storrow, *Dependent Relative Revocation: Presumption or Probability?*, 48 REAL PROP. TR. & EST. L.J. 497, 508–09 (2014) (explaining how courts in dependent relative revocation cases may allow the presumption to overwhelm the analysis rather than engaging in a more searching inquiry).

108. *See generally* Federal Tr. Co. v. Ost., 183 A. 830 (N.J. Ch. 1936); 80 AM. JUR. 2D. *Wills* § 1015 (2013).

109. *See, e.g.*, *Federal Tr. Co.*, 183 A. at 836 ("Recognition of that rule of presumption does not justify revision of the clear language of a will. It would be intolerable for courts to furnish both the donation and the donee where the testator himself omitted to do so."); Malo v. Markowsky, 2014 SKQB 261 (Can.) (will was ambiguous, but court would not construe the provision as a residuary clause because that would have amounted to rewriting the will).

110. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 11.3 cmt. a (Am. Law Inst. 2003).

111. *Id.* at § 11.3 cmt. i.

constructional preference for "the construction that accords as closely as possible to the donor's general dispositive plan,"[112] which may actually be intestacy or even partial intestacy.[113] The Restatement makes the point that the effective-as-possible preference may not have "crystallized into a rule of construction,"[114] suggesting that some courts may be overstating its true force.

A second objection to the use of the presumption against intestacy in wills cases relates to how courts have required the presumption to be rebutted. As mentioned above, given that there is no role for the presumption until after the signification of the language of the will has been fully analyzed, there is no proper rebuttal to the presumption but a competing constructional preference.[115] Despite this, at least one court has remarked that there is a presumption against "intentional partial intestacy."[116] We can infer from such a statement that rebutting the presumption against intestacy will require the terms of the will to show plainly that the testator *did* intend a partial intestacy.[117] We might call this a requirement that the testator demonstrate an active intention to die intestate. There may be, but usually is not, this quality of evidence supporting a finding that a testator intended to die partially intestate. But as will be discussed below in Part IV, a theory of passive intention would support such a finding.

Part of the problem with the presumption against intestacy is that it arises "unless there is such an intent plainly and unequivocally expressed in the will."[118] Such a statement is in tension with the tenet that the language of the will must be susceptible to interpretation as disposing of the entire estate. The courts cannot have it both ways. They cannot command, on the one hand, that the act of making a will raises a presumption against intestacy that cannot be rebutted except by

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112. *Id.*

113. *Id.* *See also* Storrow, *Dependent Relative Revocation*, *supra* note 107, at 508 (explaining how the evidence in a case of dependent relative revocation may point to a preference for intestacy).

114. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 11.3 cmt. b (Am. Law Inst. 2003).

115. *See* 80 AM. JUR. 2D *Wills* § 1015 (2013).

116. Shaw v. Wertz, 369 S.W.2d 215, 218 (Mo. 1963); Wiechert v. Wiechert, 294 S.W. 721, 722 (Mo. 1927); In re Schult's Estate, 49 N.Y.S.2d 573, 576 (Sur. Ct. Bronx County 1944).

117. *See, e.g.*, Bowman v. Brown, 149 A.2d 56, 60 (Pa. 1959).

118. Halstead v. Plymale, 750 S.E.2d 894, 898 (N.C. Ct. App. 2013). *See also* In re Will of Shannon, 587 N.Y.S.2d 76, 77 (Sur. Ct. Nassau County 1992) (remarking the lack of evidence that the testator "had any intention of benefitting her relatives who would take in intestacy").

unequivocal expression in the will that the testator has an intention die intestate and also require, on the other, that the language the testator has used be the basis upon which the court determines whether he has died testate. There must be some boundary across which and beyond which the presumption must yield. Otherwise its application becomes haphazard and unprincipled. That boundary exists in the familiar two-step process of will interpretation and construction. Since presumptions are not used in this process until such point as an ambiguous will has been shown to be incapable of clarification through the use of extrinsic evidence, the presumption against intestacy should not be invoked until that point.[119]

Some courts have been very plain that the presumption is limited in its application. One court described the presumption as "in derogation of the common law" and "to be strictly construed."[120] When the plaintiffs in another case arguedargued that the execution of the will by itself raised the presumption, the court vehemently disagreed:

> [T]he presumption only applies when the court can ascertain from the face of the will how the testator intended that his or her property be distributed. Notwithstanding the presumption, it is well settled that a testator's estate passes by intestacy when the plain language of the will requires such a result. For example, when the testator has failed to anticipate an event that has transpired (such as the named beneficiary predeceasing the testator), and the face of the document does not indicate how the testator would have distributed the property had he or she foreseen that event, the presumption would not apply.[121]

Yet another court insisted:

> The application of the presumption against intestacy is one of degree. The presumption against intestacy may not

119. Metzgar v. Rodgers, 128 S.W.3d 5, 15 (Ark. Ct. App. 2003) ("[T]he rule against partial intestacy is not used unless there is some ambiguity."); Chlanda v. Estate of Fuller, 932 S.W.2d 760, 763 (Ark. 1996) ("[A] probate court should not resort to the rules of construction unless the intent of the testator, as shown by his expressed words, is in doubt."); Besch v. Schumacher, 599 N.W.2d 846, 851 (Neb. Ct. App. 1999) ("doubtful expressions").

120. Davis v. Price, 226 S.W.2d 290, 292 (Tenn. 1949).

121. Flannery v. McNamara, 738 N.E.2d 739, 743, n.5 (Mass. 2000) (citations omitted). *See also* In re Wilson, 2011 WL 3855461, at *3 (Tex. Ct. App. Aug. 31, 2011) ("[T]he presumption must yield when the testator, through design or otherwise, has failed to dispose of his entire estate.").

> be used to supply an omission. The proper application of the presumption against intestacy is . . . that the court will not go to desperate lengths to avoid intestacy. To avoid intestacy the court cannot create a deposition not expressed or readily to be implied. The court cannot and will not rewrite or add to a will in order to avoid intestacy.[122]

B. Reformation

In addition to will interpretation and construction, courts sometimes entertain requests to correct mistakes in wills. The words of the *Oliverio* court just cited capture the sentiment of many courts toward reformation. The traditional rule is that courts have no power to reform wills on the ground of mistake.[123] Indeed some states are explicitly anti-reformation.[124] But in a few states, under contemporary reformation statutes[125] the question is not whether the will is ambiguous but what the testator's intention was. The court can reform the will to conform with this intention, even if the meaning of the instrument is plain and even if the evidence of intent contradicts the plain meaning.[126]

The no-reformation rule has an ancient lineage, according to John Langbein and Lawrence Waggoner, two legal theorists who, in an influential article, advocated importing reformation principles from contract law into the law of wills and articulated criteria for a rule.[127] It should be understood up front, however, that, in spite of the reform efforts of Langbein, Waggoner, and others,[128] contemporary courts still tend to reform wills only at the most rudimentary level and with the minimum amount of intervention with the language the testator employed. Still, to the extent courts believe partial intestacy to be a

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122. In re Estate of Oliverio, 415 N.Y.S.2d 335, 340–41 (Sur. Ct. Cattaraugus County 1979) (citations omitted). *See also* Malo v. Markowsky, 2014 SKQB 261 (Can.) (will was ambiguous, but court would not construe the provision as a residuary clause because that would have amounted to rewriting the will); 80 AM. JUR. 2D *Wills* § 1015 (2013).

123. Cahill v. Michael, 45 N.E.2d 657, 664 (Ill. 1942); Arnheiter v. Arnheiter, 125 A.2d 914, 915 (N.J. Ch. 1956).

124. *See, e.g., Flannery*, 738 N.E.2d at 745 ("Reformation of wills is presently prohibited in Massachusetts.").

125. *See, e.g.*, Fla. Stat. § 736.0415.

126. *See* Reid v. Estate of Sonder, 63 So.3d 7, 11 (Fla. Ct. App. 2011) (Wells, J., dissenting).

127. John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change in the Direction of American Law?*, 130 U. PA. L. REV. 521, 523, 577–79 (1982).

128. *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 12.1 (Am. Law Inst. 2003).

mistake rather than an ambiguity, the reformation of wills has an important role to play.

Misdescription, unlike ambiguity, occurs when a testator's oversight makes identification impossible or somehow erroneous.[129] The classic case in this vein is *Patch v. White,* in which the owner of lot number 3 in square 406 bequeathed "lot numbered 6, in square 403."[130] Although identification was not rendered impossible by the oversight,[131] the fact that the testator did not own the property he described rendered his will powerless to bequeath it to anyone. The misdescription in *Patch,* then, is not an ambiguity but rather an outright mistake. Nevertheless, misdescriptions fall under the maxim of *falsa demonstratio non nocet* (a false description causes no harm),[132] an exception to the mistake rule. A court may simply strike the erroneous language.[133] In *Patch,* this meant that the "lot" that extrinsic evidence revealed the testator owned and intended to devise through his will passed to the intended beneficiary.[134]

Attorneys who draft wills may also make mistakes that cause partial intestacy.[135] Apart from the exceptions to the plain-meaning rule discussed above, scriveners' mistakes in drafting have inspired little sympathy in the courts.[136] This is particularly true in disputes over the meaning of technical legal terms in wills drafted by attorneys.[137] *Mahoney v. Grainger*[138] and *San Antonio Area Foundation v. Lang*[139] are examples. In *Mahoney,* the testator directed her attorney to draft a will bequeathing her residuary estate to her first cousins.[140] The attorney

129. Patch v. White, 117 U.S. 210, 216 (1886).

130. *Id.* at 211.

131. *Id.* at 215 (stating that the testator did not own lot 6 in square 403).

132. Arnheiter v. Arnheiter, 125 A.2d 914, 915 (N.J. Ch. 1956).

133. *See, e.g.*, *id.* For other examples, see In re Estate of Goldstein, 363 N.Y.S.2d 147, 150 (N.Y. App. Div. 1975), and cases cited therein.

134. *Patch*, 117 U.S. at 215.

135. *See, e.g.*, Lee v. Gaylord, 214 N.W. 104, 106 (Mich. 1927) (scrivener's error caused half of residue to descend in intestacy).

136. *See, e.g.*, Scarlett v. Hopper, 823 P.2d 435, 437 (Or. Ct. App. 1992).

137. In re Estate of Kime, 193 Cal. Rptr. 713, 728 (Cal. Ct. App. 1983) ("Technical words are to be taken in their technical sense unless it satisfactorily appears that the will was drawn solely by the testator, and that he was unacquainted with such technical sense.") (internal quotation marks omitted); Bergin v. Bergin, 315 S.W.2d 943, 946 (Tex. 1958) ("[A]s a layman rather than a lawyer, [Mr. Bergin] cannot be deemed to have used words in the same technical sense that the words might have if they were used by an attorney.").

138. 186 N.E. 86 (Mass. 1933).

139. 35 S.W.3d 636 (Tex. 2000).

140. 186 N.E. 86.

read the will to the testator, and she executed it, but the will as drafted bequeathed the residuary to the testator's "heirs at law," who as a legal matter was her aunt and not her first cousins.[141] Given the lack of ambiguity in the will, the fact that the drafter made an error in carrying out the testator's instructions was of no consequence. Had the testator "habitually referred to her [twenty-five] first cousins as her 'heirs,'" the case might have qualified for the personal-usage exception.[142]

In *Lang,* the testator devised her "real property" to her niece and nephew Lang and the residuary of her estate to a charity.[143] At some point between the execution of her will and her death, some of the testator's real property, originally part of a large family-owned tract, was sold and became the subject of cash and promissory notes still held by her at her death.[144] The Langs claimed that the testator meant "real property" to include the cash and promissory notes because she considered all of that property to be part of a single real estate development scheme from which she wished the Langs to benefit.[145] Noting the well-established legal meaning of "real property," the Supreme Court of Texas rejected the Langs' proffered extrinsic evidence and held that the cash and promissory notes passed to the charity under the residuary clause of the will.[146] Although the result may have been different had the testator drafted her own will, the fact that an attorney drafted the will made it unlikely that the testator had employed a novel and altogether unfamiliar definition of "real property" in her last will and testament.

As a technique for averting partial intestacy, reformation has a long way to go in the United States. But scriveners' errors have inspired an expansion of the doctrine. The idea is that human error should not be allowed to short-circuit the design of the testator.[147] Texas, the site of the *Lang* decision, now specifically permits the reformation of a will if the mistaken provision or omission was due to a "scrivener's error."[148] Ontario's approach to reformation or, as the Canadians label it,

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141. *Id.*

142. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 11.2 illus. 23 (Am. Law Inst. 2003).

143. 35 S.W.3d at 638.

144. *Id.*

145. *Id.* at 639.

146. *Id.* at 642.

147. Palumbo v. U.S., 788 F. Supp. 2d 384, 394 (W.D. Pa. 2011).

148. *Id.* at 394; TEX. EST. CODE ANN. § 255.451(a)(3) (2016).

rectification, has the virtue of being not only broader but more specific:

> Where there is no ambiguity on the face of the will and the testator has reviewed and approved the wording, Anglo-Canadian courts will rectify the will and correct unintended errors in three situations:
>
> (1) where there is an accidental slip or omission because of a typographical or clerical error;
>
> (2) where the testator's instructions have been misunderstood; or
>
> (3) where the testator's instructions have not been carried out.[149]

The court in *Re Das Estate* delivered a gloss on this provision as follows:

> The first is that the court must be satisfied that there has been an inaccurate expression by the testator of his intention, and the second is that it must be clear what words the testator had in mind at the time when he made the apparent error which appears in the will. . . . Unless one can be reasonably certain from the context of the will itself what are the words which have been omitted, then one cannot apply the principle at all, and one has to take the language as one finds it.[150]

One reformation doctrine that is well established in the law of wills and trusts is *cy pres.* The doctrine specifies that "if a charitable trust's specific purpose becomes *illegal, impossible* or *impracticable*, the court may direct the application of the trust property to another charitable purpose that approximates the settlor's general charitable intent."[151] An example is *In re Estate of Carper.*[152] Here the testator left her residuary estate to her sister and her sister's husband "to be used by them in their sole discretion for the purpose of establishing in a charitable institution or institutions, memorials to the fond memory of our parents . . . and my late husband . . . in such manner and to such extent as I shall make known

149. McLaughlin v. McLaughlin, 2014 ONSC 3162, 2014 CarswellOnt 9315 at para. 51. The power is even more circumscribed in the United Kingdom where § 20 of the *Administration of Justice Act* permits "rectification" only for clerical errors or failure to understand the testator's instructions. *See* Whaley, *supra* note 106, at 13.

150. In re Das Estate, 2012 NSSC 441 ¶ 33 (Can. N.S.) (citing In re Follett Estate, [1955] 1 W.L.R. 429, 437 (Can. C.A.)).

151. DUKEMINIER & SITKOFF, *supra* note 16, at 752.

152. 415 N.Y.S.2d 550 (N.Y. App. Div. 1979).

to them."[153] The executors believed the provision to be of no effect and that the testator had died partially intestate.[154] The Attorney General argued that the provision evinced a general charitable intent and that the *cy pres* doctrine was applicable.[155] The trial court disagreed, finding a partial intestacy.[156] Reversing, the Appellate Division declared that "the application of cy pres to designate beneficiaries of the charitable gifts prevents any of the residue of testatrix's estate from passing by intestacy."[157]

In another case, the will bestowed the residue of the estate upon a charitable institution that later closed.[158] When the testator died, the argument was made that her estate should pass via intestacy. But the court inferred a general charitable intent because the testator had not provided a gift over in the event of the failure of the gift to the charity.[159] "Because the testator did not address what would happen in the case of a lapse, I can infer that she planned that the money would go towards a general charitable purpose. . . . There is no indication of any intent . . . to see the money fall into intestacy."[160]

The problem with using reformation to avert partial intestacy is that when a court attempts to correct mistakes in wills, there is no question of ambiguity. Thus, presumptions do not apply. Instead, the function that a court is undertaking is one of pure mistake correction, which, as I have noted, is quite limited to easy fixes, where the language used does not quite match what exists in reality, but comes close. Fixing partial intestacy with mistake correction would involve inserting entire provisions in the will at a juncture where there remain no questions about the will's validity or clarity.[161] In other words, the question of curing partial intestacy simply comes too late in the process to warrant reformation.

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153. *Id.* at 552.

154. *Id.*

155. *Id.*

156. *Id.* at 553.

157. *Id.* at 554.

158. In re McGregor Estate, 2014 BCSC 896 ¶ 10 (Can.).

159. *Id.* ¶ 34.

160. *Id.* ¶¶ 34–35.

161. Champine, *supra* note 20, at 421 ("[W]here failure to dispose of a portion of the estate is unexplained in the will, relief from strict application of the historic approach is arguably unjustifiable because the will itself is effective, and the property not disposed of pursuant to express provisions might have been intended to pass to intestate heirs.").

C. *Anti-Lapse Provisions*

Contemporary American statutes directing that a gift that would otherwise lapse be taken by the surviving issue of the predeceased beneficiary using a representational scheme similar to that used for intestate distribution do important work in averting partial intestacy. These anti-lapse statutes are narrow departures from lapse and voidness principles holding that testamentary bequests to predeceasing beneficiaries are ineffective and thus become part of the residuary bequest or are distributed in intestacy. Such statutes apply, almost without exception, only to testamentary gifts to certain consanguineous or adopted relatives;[162] the included relatives vary in scope significantly across states. Many apply to gifts to the testator's issue[163] or issue and siblings.[164] Some variations include gifts to children and grandchildren,[165] gifts to any descendant,[166] or gifts to the children of siblings.[167] Some are more expansive, extending to the testator's parents and their descendants,[168] grandparents and their descendants,[169] great-grandparents and their descendants,[170] the testator's kindred,[171] his heirs,[172] or even to *any* beneficiary.[173] The Uniform Probate Code, more expansive than most anti-lapse provisions, includes grandparents, the issue of grandparents, and stepchildren.[174] All of these provisions are

162. *See, e.g.*, TEX. EST. CODE ANN. § 255.153(a) (West 2015) (including "a descendant of the testator or a descendant of a testator's parent").

163. *See, e.g.*, 755 ILL. COMP. STAT. ANN. 5 / 4-11(a) (West 2015).

164. *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 3-3.3 (McKinney 2015).

165. *See, e.g.*, CONN. GEN. STAT.ANN. § 45a-441 (West 2015).

166. *See, e.g.*, IND. CODE ANN. § 29-1-6-1(g) (West 2015).

167. *See, e.g.*, 20 PA. CONS. STAT. ANN. § 2514(9) (West 2015).

168. *See, e.g.*, TEX. EST. CODE ANN. § 255.153(a) (West 2015).

169. *See, e.g.*, ALA. CODE § 43-8-224 (2016); N.C. GEN. STAT. ANN. § 31-42 (2016).

170. *See, e.g.*, S.C. CODE ANN. § 62-2-603(A) (2015).

171. *See, e.g.*, CAL. PROB. CODE § 21110(c) (West 2015); VT. STAT. ANN. tit. 14, § 335 (West 2015).

172. KAN. STAT. ANN. § 59-615(a) (West 2015). The statute reads "[n]one of such property shall pass except by lineal descent to a person further removed from the decedent than the sixth degree" and is thus congruent with the definition of heirs in intestate succession. *See* KAN. STAT. ANN. § 59–509 (West 2015).

173. *See*, D.C. CODE § 18-308 (2015); GA. CODE ANN. § 53-4-64(a) (West 2015); IOWA CODE § 633.273(1) (2015) (excepting spouses, IOWA CODE § 633.274 (2015)); KY. REV. STAT. ANN. § 394.400 (LexisNexis 2016); MD. CODE ANN., EST. & TRUSTS § 4-401 (West 2015) (excepting spouses); 33 R.I. GEN. LAWS § 33-6-19 (2011); TENN. CODE ANN. § 32-3-105 (2015); W. VA. CODE ANN. § 41-3-3 (LexisNexis 2014).

174. UNIF. PROBATE CODE § 2-603(b) (amended 2010) (UNIF. LAW COMM'N 1969). *See also*

aimed at carrying out the probable intent of a testator when a gift to a relative lapses.[175] The thought is that "the testator would prefer a substitute gift to the devisee's descendants rather than for the gift to pass in accordance with the common law of lapse."[176]

One common anti-lapse provision that applies to *any* beneficiary is the statutory abrogation of the rule that a lapsed residuary devise is distributed through intestate succession.[177] The common law no-residue-of-a-residue rule has been severely criticized as an override of a testator's intent *not* to benefit his heirs and as a concession to the antiquated English common law that favored intestacy.[178] An appellate court judge has characterized critics of the no-residue-of-a-residue rule as opponents of partial intestacy.[179] Some courts have simply ruled that the lapsed portion of a residuary devise to individuals is shared by the surviving residuary takers.[180] Others have refused to take that step.[181] Today, statutes in many states embody this rule.[182] The rule prevents the distribution in intestacy of certain lapsed residuary devises. The "remain-in-the-residue rule"[183] is itself trumped by the relevant anti-lapse statute in instances where the predeceased residuary beneficiary falls within its ambit.[184]

MICH. COMP. LAWS ANN. § 700.2709 (WEST 2016); N.J. STAT. ANN. § 3B:3-35 (West 2015).

175. THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS 779 (2d ed. 1953).

176. DUKEMINIER & SITKOFF, *supra* note 16, at 357.

177. For examples, *see infra* note 186.

178. *See, e.g.*, In re Slack Trust, 220 A.2d 472, 472–73 (Vt. 1966); In re Gray's Estate, 23 A. 205, 206 (Pa. 1892); Chaffin, *supra* note 4, at 306–08.

179. In re Jackson, 471 P.2d 278, 280 (Ariz. 1970).

180. *See* Hedges v. Payne, 154 N.E. 293, 294–95 (Ind. Ct. App. 1926) (noting the conflict with the weight of authority); In re Frolich Estate, 295 A.2d 448, 451 (N.H. 1972) (noting the judicial trend toward discarding traditional rule) (citing *In re Estate of Jackson*, 471 P.2d at 281 and *In re Slack*, 220 A.2d at 474); Indus. Nat. Bank of R.I. v. Glocester Manton Free Pub. Library of Glocester, 265 A.2d 724, 729 (R.I. 1970) (noting the widespread criticism of the common law rule).

181. *See, e.g.*, Swearingen v. Giles, 565 S.W.2d 574, 576 (Tex. Ct. App. 1978) (rejecting argument that the presumption against intestacy applies to lapsed residuary gifts); In re Estate of McFarland, 167 S.W.3d 299, 304–05 (Tenn. 2005).

182. *See, e.g.*, CAL. PROB. CODE § 21111(b) (West 2015); GA. CODE ANN. § 53-4-65(b) (West 2015); 755 ILL. COMP. STAT. ANN. 5/4-11(c) (West 2015); N.J. STAT. ANN. § 3B:3-37 (West 2015); N.Y. EST. POWERS & TRUSTS LAW 3-3.4 (McKinney 2015); N.C. GEN. STAT. ANN. § 31-42(b) (West 2015); 20 PA. CONS. STAT. ANN. § 2514(11) (West 2015); OHIO REV. CODE ANN. § 2107.52(D)(2) (LexisNexis 2015); 33 R.I. GEN. LAWS ANN. § 33-6-20 (West 2015); UNIF. PROBATE CODE § 2-604(b) (amended 2010) (UNIF. LAW COMM'N 1969).

183. Hirsch, *supra* note 77, at 214 n.156 (2015).

184. *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 3-3.3(a)(3) (McKinney 2015).

Even though its distributional scheme is borrowed from intestacy law, the theory of anti-lapse is that the will's terms capture the gift, saving it from intestate distribution. Thus anti-lapse and remain-in-the-residue enactments are tools legislatures have developed to promote presumed testamentary intent and avert partial intestacy.

D. Dependent Relative Revocation

The doctrine of dependent relative revocation (DRR) allows a will to stand that would otherwise be deemed revoked where the evidence points to the testator's having revoked the will by mistake or on condition.[185] Although the theory underlying DRR is a matter of serious definitional variation,[186] some generalizations can be made. First, the theory is that "[a]s long as the revocation and he mistake about the validity of the preferred disposition so relate to each other that they form a single transaction, the doctrine treats the revocation as conditional on that validity."[187] Second, the typical case involves two instruments. A testator, contemplating changes to his or her will, might draft a new testamentary plan and tear up or make marks of cancellation across the old one.[188] The new will may even be fully executed and contain a clause revoking all previous wills[189] but is not entirely valid for some reason; perhaps it fails for lack of due execution or contains void bequests.[190] A less common scenario finds the testator destroying his or her most recent will under the mistaken impression that the revocation will revive a previous will.[191] The use of DRR to address these matters means that the testator's original will stands.

Most courts agree that DRR is a matter of the testator's intention and is a question of fact for the court.[192] But while DRR strives to temper rigid

185. *Id*.

186. Storrow, *Dependent Relative Revocation, supra* note 107, at 513.

187. Storrow, *Dependent Relative Revocation*, *supra* note 107, at 513.

188. *See* Carter v. First United Methodist Church of Albany, 271 S.E.2d 493, 495 (Ga. 1980).

189. *See* Second Church of Christ v. Kaufman (In re Kaufman's Estate), 155 P.2d 831, 832 (Cal. 1945); Linkins v. Protestant Episcopal Cathedral Found., 187 F.2d 357, 358 (D.C. Cir. 1951).

190. When a specific gift fails in a later (and otherwise valid) will as opposed to the total failure of a new will, some jurisdictions require that the testamentary intent be apparent from language contained in the valid (probated) will. *See, e.g.*, In re Estate of Pratt, 88 So. 2d 499, 501–04 (Fla. 1956).

191. *See* Ruedisili v. Henkey (In re Alburn's Estate), 118 N.W.2d 919, 920 (Wis. 1963).

192. *See, e.g.*, DeWald v. Whittenburg (In re Estate of Carroll), 925 P.2d 903, 906 (Okla. Civ. App. 1996).

formalism and to promote testamentary intent; it has also been used as a tool for averting intestacy.[193] At least one court, for example, has characterized DRR as a doctrine in the service of "the law's preference for a testate disposition."[194] Another has used the doctrine to undo a revocation performed to achieve an intestate distribution of the testator's property.[195] The court believed the evidence in the case indicated the testator was under a misimpression about how his estate would be distributed in intestacy.[196]

Schneider v. Harrington is an illustration of how DRR can avert intestacy.[197] There the testatrix made an attempt to partially revoke the gift of the residue of her estate, which she had bequeathed to three relatives in equal shares.[198] The court determined that what she had done could constitute, under the right circumstances, an effective cancellation of that portion of her will.[199] It would have devolved via intestate succession if DRR had been inapplicable. But the court held that the testator's act of revocation, accompanied as it was by ineffective attempts, in pencil, to redistribute the residue equally to the two remaining beneficiaries, provided a sound basis for the application of DRR.[200] The revocation and the interlineations were "inextricably linked together as parts of one transaction," demonstrating the testator's intent that the revocation be conditional on the validity of the interlineations.[201]

One seemingly common thread linking judicial decisions applying DRR is that courts should apply the doctrine narrowly and with caution since probate courts should not be in the business of correcting wills through "speculation, supposition, conjecture or possibility."[202] Given the hesitation of the courts to apply it widely, then, and given the fact that the doctrine has been employed primarily in cases involving complete revocation, the doctrine is not a reliable antidote for partial intestacy. In

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193. *See* Storrow, *Dependent Relative Revocation*, *supra* note 107, at 501.

194. Kroll v. Nehmer, 705 A.2d 716, 720 (Md. 1998).

195. In Estate of Southerden [1925] P. 177 at 180 (Eng. C.A.).

196. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 4.3 cmt. g rptr's n. 7 (Am. Law Inst. 1999) (describing In Estate of Southerden [1925] P. 177 at 180 (Eng. C.A.)).

197. 71 N.E.2d 242, 244 (Mass. 1947).

198. *Id.* at 243.

199. *Id.* ("[A] part of a will may be canceled, leaving the rest in full force.").

200. *Id.* at 244.

201. *Id.*

202. *See* In re Estate of Melton, 272 P.3d 668, 678 (Nev. 2012) (citing In re Patten's Estate, 587 P.2d 1307, 1309 (Mont. 1978)).

this connection, the Supreme Court of Arkansas has recognized: "An express revocation clause is ordinarily operative even if the effect of the later will and the revocation of the earlier one results in a partial intestacy."[203] Moreover, it goes without saying that although the doctrine of DRR can avert a partial intestacy that might result from a conditional or mistaken revocation, it cannot undo whatever partial intestacy problems the will thus preserved already contains.

E. Future Interests

Future interests raise interesting questions about partial intestacy. But unlike a gift of outright ownership, partial intestacy problems involving future interests typically result from the failure of a testator who creates a testamentary trust with the residue of his estate to name the taker of the remainder.[204] We would classify an inter vivos gift of this nature as one in which the owner retained a reversion, having carved out only a present possessory estate in the property for the donee.[205] But in a gift of the residue, the failure of a testator to include a remainder along with the gift of a life estate risks partial intestacy in the same way missing or invalid residuary provisions do. The testamentary reversion, if created within a specific or general bequest, would be distributed to the residuary beneficiary under the will.[206] But a testamentary reversion of the residue would be distributed to the testator's intestate heirs. The courts have developed certain doctrines that assist them in averting intestacy.

1. Gifts by Implication

The doctrine of gifts by implication is the antidote of choice for testamentary trusts whose remainders are at risk of distribution in intestacy because the trust's terms do not apply to the precise series of events that actually occurred. Read literally, a will setting up such a trust names no beneficiary of the remainder under the actual circumstances. There is, in short, a gap in the will. The will does, though, name remainder beneficiaries for one or more sets of circumstances that did *not* occur.[207] As the Court of Appeals of New York described it, "the

203. Armstrong v. Butler, 443 S.W.2d 453, 459 (Ark. 1977).

204. *See e.g.,* In re Cedar, 458 N.Y.S.2d 799, 804 (Sur. Ct. Kings County 1982).

205. Shaw v. Arnet, 33 N.W.2d 609, 611 (Minn. 1948).

206. *Cedar*, 458 N.Y.S.2d at 805; RESTATEMENT (THIRD) OF PROP: WILLS & OTHER DONATIVE TRANSFERS § 4.1 cmt. i illus. 5 (Am. Law Inst. 1999).

207. *Cedar*, 458 N.Y.S.2d at 803 (noting that the facts of a gift by implication case should

expressed intention of the will is to make a gift, a number of eventualities are stipulated, but the event that did occur is omitted."[208] A court may infer[209] from the remainder designations the will does contain whom the testator wanted written into the gap.

Gifts by implication are "provocative of controversy" precisely because they appear to conflict with the tenet that the intention of the testator must be found in the words of the will[210] and with the principle that if a gift is not somewhere expressed in the will, a court cannot fabricate one. The fact that gifts by implication cut against the grain of these principles explains why they are disfavored[211] and why establishing them requires proof beyond a reasonable doubt,[212] making them "rare and exceptional" indeed.[213]

Some case examples will serve to illustrate the difficulty of establishing a gift by implication. In some of the cases holders of a shared remainder that is to vest in the one who survives the other do not survive to the time of distribution. Consider, by way of example, *In re Astor's Will.*[214] The testator's will created testamentary trusts for the benefit of two of her brothers with remainders to be distributed to their surviving

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include "an express bequest or devise covering a contingency from which the intendment of the testator with respect to the events which did, in fact, occur was deemed manifest").

208. In re Englis' Will, 161 N.Y.S.2d 39, 42–43 (1957). *See also Bellows*, 480 N.Y.S.2d at 928 (quoting In re Thall's Estate, 273 N.Y.S.2d 33, 36 (1966)) (Gifts by implication arise "'where the express language of the entire will manifests such an intention or purpose and the testator has impliedly neglected to provide for the exact contingency which occurred.") (internal quotation marks omitted).

209. The term gift by implication means the language of the will strongly suggests a missing gift. Courts, though, *infer* the gift from the language of the will. Although the semantics may be unimportant, it bears noting that inferences and implications are not identical. An inference is more akin to a deduction. Indeed, a court considers the gift a matter of logic. *See* In re Bellows, 480 N.Y.S.2d 925, 929 (N.Y. App. Div. 1984) ("Such conclusion logically flows from a perusal of the testamentary instrument."). Since an implication is only a strong suggestion, however, it leaves room for speculation. Because a gift by implication must be supported by evidence beyond a reasonable doubt, it would be more appropriate to call it a gift by inference.

210. Ogle v. Fuiten, 445 N.E.2d 1344, 1347 (Ill. App. Ct. 1983). *See also Bellows*, 480 N.Y.S.2d at 28 (citing In re Selner, 26 N.Y.S.2d 783, 786 (N.Y. App. Div. 1941)).

211. Bellows, 480 N.Y.S.2d at 928.

212. In re Will of Shannon, 587 N.Y.S.2d 76, 78 (Sur. Ct. Nassau County 1992); *Bellows*, 480 N.Y.S. at 928 ("[S]uch dispositions are sustainable where this is such a strong probability of an intention to give the gift that a contrary intention cannot be supposed."); *Cedar*, 458 N.Y.S.2d at 803; In re Estate of Cancik, 476 N.E.2d 738, 741 (Ill. 1985); In re Estate of Zeevering, 78 A.3d 1106, 1109 (Pa. Super. Ct. 2013).

213. In re Bieley, 673 N.Y.S.2d 38, 42 (1998); *Cedar*, 458 N.Y.S.2d at 804.

214. 162 N.Y.S.2d 46 (Sur. Ct. Columbia County 1957), *aff'd* 172 N.Y.S.2d 780 (N.Y. App. Div. 1958).

issue.[215] The testator even went so far as to express her desire that the property governed by the will "be retained in my family as long as possible."[216] In this case, however, neither life tenant had surviving issue,[217] thus presenting a question of what should become of the remainders.

The court cautioned that the jurisprudence on gifts by implication typically involves

> inadvertent omissions, ambiguous language and unstudied draftsmanship fairly obvious on the face of the will. Courts can and have gone to great lengths to spell out a testator's apparent intention where his purpose would be scuttled by awkward expression, unskilled wording or inept phraseology. Great latitude seems to prevail where Courts strive to clarify a testator's evident design. Language may be made subordinate to meaning but Courts should not mistake construction for recomposition.[218]

The court could not ascertain, in Malvina Astor's validly executed and perfectly plain will, any necessary implication that there was a gift by implication of the unaccounted for remainders to the takers of the remainders of other trusts established in her will that would override the partial intestacy.[219] Astor's intentions were, quite simply, unknown, the subject of "speculation, fancy and conjecture."[220] Thus, by virtue of the rules of lapse, the remainders of the two trusts passed by intestacy.[221]

In *In re Matter of Bellows,* the testator's will settled the residue of her estate in trust with income to be shared by her husband and children for his life.[222] At the death of the husband, the corpus was to be divided into as many shares as the testator had children surviving the husband.[223] Each surviving child was given the income from his share with the remainder to go to his or her issue, if any, or shared by the surviving

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215. *Id.* at 49–50.
216. *Id.* at 50.
217. *Id.* at 50–51.
218. *Id.* at 52–53.
219. *See id.* at 53.
220. *Id.* at 56.
221. *Id.* at 55.
222. 480 N.Y.S.2d 925, 926 (N.Y. App. Div. 1984).
223. *Id.*

siblings.[224] Oddly, the testator never specified what should become of the remainder interest of the last to die if he died leaving no children, an eventuality that did occur.[225] The two competing positions were for distribution to the testator's grandchildren—the issue of the siblings who had predeceased the last to die—or intestacy. The court declared that a gift by implication in favor of the testator's grandchildren was supported by the testator's purpose "that the bulk of her estate enure to the benefit of her children or their lineal descendants"[226] and not to have any of her estate distributed in intestacy. Not only were the trust's terms indicative of this purpose, but another provision of the will made clear that the husband's life income would be reduced if he remarried or undertook to support his other relatives.[227]

The court in *Bellows* struggles a bit with the requirement that the evidence in support of the gift by implication be beyond a reasonable doubt. It first states that the facts "raise a firm presumption" of the gift and later that it "is more than sufficiently clear" that they do.[228] The court does muster a declaration that "no contrary intent can be supposed," but its final conclusion is curiously expressed in the negative: "It was obviously not her intent that any interest of such persons be defeated by the demise of her children 'as it were in the wrong order.'"[229] But if the gift were truly beyond a reasonable doubt, it would have been obvious that her intention *was* to provide a gift to her grandchildren, a statement the court makes earlier in the decision.[230]

Gifts by implication were also an issue in *In re Gibbon's Will.* Here the testator devised his estate alternatively to his son for life, remainder to the son's children or, should the son predecease the testator without leaving issue, to the testator's niece. There was no provision for what did occur, the son's death *after* the testator but with*out* leaving issue.[231] The court reasoned that the testator must have understood the possibility that his son would die without leaving issue and in that event must have intended either intestacy or a gift outright to his niece. The court noted the "particularly forceful" presumption against partial intestacy,

224. *Id.* at 926–27.
225. *Id.* at 927.
226. *Id.* at 931.
227. *Id.* at 929, 931.
228. *Id.* at 929, 932.
229. *Id.*
230. *Id.* at 930.
231. In re Gibbon's Will, 306 N.Y.S.2d 236, 238 (Sur. Ct. Westchester County 1969).

particularly where the bulk of the estate is concerned.[232] Despite the absence of any language applicable to the contingency that did occur and thus no real ambiguity to resolve, the court was convinced that the will disclosed "a positive intention to dispose of the entire estate and not to die intestate as to any part thereof."[233] The court's reasoning is limited to stating the difficulty of believing that the testator did not wish to benefit the niece in these circumstances and the lack of any "plausible explanation" for the omission.[234] It is of course not beyond a reasonable doubt in *Gibbon* that the testator wanted his niece to benefit should his son survive him but die without issue.[235] Even though that intention is possible, and perhaps even probable, no real attempt is made to employ the evidence to satisfy the high standard of proof required to establish a gift by implication.

The reasoning is similarly reed-thin in *In re Cedar,* a case wherein the court judged the theory, as applied to an omission to make an express bequest, "an unwarranted extension of the doctrine."[236] Here the trust instrument provided for no final distribution of the corpus after successive life estates of first, the testator's wife, and second, his two daughters.[237] The one surviving daughter claimed that there was a gift by implication of the corpus to her issue on her death and that the constructional preference against partial intestacy bolstered the claim.[238] The court, however, could locate "no gift . . . covering any contingency whatever from which an irresistible, or even confident, conclusion might be drawn."[239] Without a mirror provision bequeathing the remainder under a different set of circumstances and without any other language in the will upon which the court could build an inference, there was simply no basis for considering the surviving daughter's gift by implication theory. Nevertheless, in a surprise finale, the court deemed the will to contain sufficient "indicia of implied [dual] remainders"[240] and that the argument in their favor was of equal weight to the argument for partial

232. *Id.* at 238–39.

233. *Id.* at 239.

234. *Id.*

235. *See* In re Bieley, 673 N.Y.S.2d 38, 41 (1998) ("[T]he implication must be so 'strong . . . that the contrary cannot be supposed.'").

236. In re Cedar, 458 N.Y.S.2d 799, 803 (Sur. Ct. Kings County 1982).

237. *Id.* at 801.

238. *Id.* at 802.

239. *Id.* at 804.

240. *Id.* at 806.

intestacy. Because of this balance, the court determined that the presumption against intestacy should control and granted both the predeceased sister's estate and the surviving sister the remainder interests in their respective trusts.[241]

Thus, whereas the presumption against intestacy was used to bolster the gift by implication argument in *Gibbon,* the gift by implication theory was used to bolster the presumption against intestacy in *Cedar.* Both courts found ingenious ways to avert partial intestacy in the absence of both ambiguity and evidence beyond a reasonable doubt that the testator intended a gift that the wills' plain language did not express.

2. Early Vesting

The preference for early vesting of future interests is of long standing in the law and "affects the construction of almost every instrument establishing a future interest."[242] It was thought to avert a host of property problems, among them unclear title, unmarketability, perpetuities,[243] and others that can no longer be recalled.[244] In addition to these other salutary effects, early vesting may help avert partial intestacy. Indeed, the preference the law has for it is often cited alongside the presumption against intestacy itself,[245] and becomes very nearly irrebuttable "where the gift is to a named individual."[246] In cases of ambiguity, the presumption is in favor of vested rather than contingent remainders.[247]

The preference for early vesting is forceful enough to override the

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241. *Id.* at 806–07.

242. Edward. H. Rabin, *The Law Favors the Vesting of Estates. Why?,* 65 COLUM. L. REV. 467, 468 (1965).

243. DUKEMINIER & SITKOFF, *supra* note 16, at 843–44; Susan F. French, *Imposing a General Survival Requirement on Beneficiaries of Future Interests: Solving the Problems Caused by the Death of a Beneficiary Before the Time Set for Distribution,* 27 ARIZ. L. REV. 801, 802 (1985) (citing marketability and carrying out a donor's intent).

244. French, *supra* note 243, at 802 n.7 (quoting 10 POWELL ON REAL PROPERTY § 797[2] at 74–78 (Michael Wolf ed., 2016) ("[I]t is certain that the considerations of social policy which originally caused their formulation have for the most part been forgotten, and when dug out are found to have largely, if not wholly, ceased to function.").

245. *See, e.g.*, Haysley v. Rogers, 255 S.W.2d 649, 652 (Ky. Ct. App. 1952); In re Young's Will, 308 N.Y.S.2d 585, 589 (Sur. Ct. Kings County 1969); In re Bogart's Will, 308 N.Y.S.2d 594, 600 (Sur. Ct. Kings County 1970); In re Estate of Sprinchorn, 546 N.Y.S.2d 256, 258 (N.Y. App. Div. 1989).

246. In re Marine Midland Bank, 513 N.Y.S.2d 311, 312 (N.Y. App. Div. 1987); *Bogart's Will*, 308 N.Y.S.2d at 600.

247. Besch v. Schumacher, 599 N.W.2d 846, 851 (Neb. Ct. App. 1999).

suggestion in the terms of a testamentary trust that at least one of the named remainder takers must survive the life tenant to be entitled to present possession. Thus, in each of two cases where a remainder was bequeathed to two beneficiaries if they survived the life tenant or all to the sole survivor of the life tenant, but where *neither* survived the life tenant, the court in one case reasoned that the testator had demonstrated a solicitude for his remainder beneficiaries that warranted not construing the proviso as a condition of survival.[248] The testator had moreover not provided a substitutional gift, indicating that he did not intend a condition of survivorship.[249] In the second case, the court dispensed with the discussion of intention and reasoned that the provision was limited: it "provided for divestment of only the first remainderman to die, and operated only in the event that one remainderman, and not the other, predeceased the life tenant."[250] Since that set of events did not occur, the condition was of no effect,[251] leaving the default preference for early vesting unaffected by any contrary language in the will and, most significantly, preventing the distribution of it to the intestate heirs of the testator who had created the trust. Since the conditions specified in the will had no effect, in both cases the court divided the remainder between the estates of the two remaindermen rather than giving it over to the estate of the one who had survived the other.[252]

Despite what appears to be the preference's important role in staving off partial intestacy, in actuality it has to do with partial intestacy only at the margins. If a gift of the remainder fails, the gift is not necessarily distributed in intestacy. It would first be distributed through the residuary clause of the will.[253] If the subject of the gift *is* the residuary estate or a portion of it, then, despite the life tenant's having enjoyed the life estate, the remainder would be distributed in intestacy. Still, this

248. *Sprinchorn*, 546 N.Y.S.2d at 257.

249. *Id.* at 258. *See also Marine Midland Bank*, 513 N.Y.S.2d at 313.

250. *Marine Midland Bank*, 513 N.Y.S.2d at 313.

251. *Sprinchorn*, 546 N.Y.S.2d at 257 ("[T]he will fails to provide for disposition of the trust corpus if, as happened, both remaindermen predecease the surviving income beneficiary . . . ."); *Marine Midland Bank*, 513 N.Y.S.2d at 313 (The "survivorship condition . . . operated only in the event that one remainderman, and not the other, predeceased the life tenant.").

252. *Sprinchorn*, 546 N.Y.S.2d at 258; *Marine Midland Bank*, 513 N.Y.S.2d at 313. Two out of five judges dissented in *Marine Midland,* reasoning that "the intent of the testatrix here [is] that the gift to the named remaindermen is conditioned upon both or one of them surviving termination of the trust."

253. *See generally Sprinchorn*, 546 N.Y.S.2d at 257.

partial intestacy is viewed differently by the law of estates than it is in the law of wills.[254] "[G]aps do not persist in the common law theory of estates," as Langbein and Waggoner point out, "because any interest not expressly disposed of is considered to have been retained by the testator."[255] The fear that the property will be dispersed far and wide to persons the testator never contemplated is nowhere nearly as potent as where a testamentary gift fails immediately and the testator's estate plan is revealed to be damaged as soon as probate proceedings commence.

IV. EMBRACING PARTIAL INTESTACY: A THEORY OF PASSIVE INTENTION

In recent years, academic work on partial intestacy has been scant. As Adam Hirsch points out in his contribution to the subject, "not a single work has perused the problem as a theoretical whole, and hardly any studies have addressed even bits of it."[256] Hirsch believes that the way courts approach intestacy that results from a wholly ineffective will is unsuited to cases of partial intestacy.[257] In other words, we should not simply plug the default rules of intestacy into the dispositive gaps in a validly executed and unambiguous will.

I disagree. I believe there is much to be gained from conceiving of wills as primarily the opportunity to alter the default estate plan of intestacy rather than thinking of them as writings on a blank slate. Hirsch objects, as others have, that those of lesser means will be caught unawares by partial intestacy and will be disadvantaged by the lack of ability to hire counsel.[258] I think these concerns are overblown. First, while many hesitate to engage in thoughtful estate planning with respect to their own assets, none of us is truly ignorant of what happens to the assets of those who die around us, particularly those to whom we are close. We understand that a commonly accepted, if not universally loved, system of entitlement to the property of deceased persons exists and that if we desire to alter what that system dictates will happen in our own case, we will need to do something about it. We then decide, according to our circumstances, whether we wish to alter those expectations or accept them. No better examples exist than wills that disinherit particular heirs

254. *See* Langbein & Waggoner, *supra* note 130, at 553.
255. *Id.*
256. Adam J. Hirsch, *Incomplete Wills,* 111 MICH. L. REV. 1423, 1425 (2013).
257. *Id.* at 1424–25.
258. *Id.* at 1426.

but say no more.[259] Testators who execute such wills are attempting to override the intestacy default in connection with at least one of their heirs but not necessarily all of them. Even if its finer points are not well understood, the system of intestate distribution is a familiar set of defaults that will show through any gaps in the dispositive scheme we wish to lay over it. This theory mirrors the doctrine of partial revocation by inconsistency, also known as implied revocation, exemplified by the case where a testator executes a will disposing of his entire estate and later executes a will disposing of less than his entire estate. The wills are read together, the gaps in the subsequent will filled in by whatever provisions of the earlier will have not been overridden.[260]

My position is supported by two separate theories of intention: first, that testamentary intention is qualitatively distinct from dispositive intention,[261] and second, that we embrace the gap-filling function of intestate distribution on the basis of what I call passive intention. I believe that partial intestacy is not a problem of undermined intention, as Hirsch would have it, but one of undetermined intention. It may not be deliberate, but neither is it inadvertent.

A. The Philosophy of Intention

The philosophy of intention is an enormous and thoroughly researched topic. Scholars divide the subject roughly into three areas of inquiry: intention for the future, the intention with which one acts, and intentional action.[262] Intention for the future is the idea that one will do or wants to do x but is not necessarily doing x now.[263] The intention with which one acts refers to one's objective in acting, as when one writes with the intention of finishing a letter.[264] Intentional action is simply the intent to act by itself, without any particular goal in mind.[265] When one takes up a pen to write, for example, one intends to take up the pen, no matter whether any writing actually takes place.

The law recognizes only the latter two forms of intention, since

259. *See supra* notes 10 & 56 and accompanying text.

260. Boucek v. Boucek, 305 P.3d 597, 605 (Kan. 2013).

261. The distinction between intention for the future and the intention with which one acts has been recognized by courts hearing cases raising questions of testamentary intent.

262. *Intention*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, (Jan. 20, 2014), http://plato.stanford.edu/entries/intention/ [https://perma.cc/WQ3H-JQEA].

263. *Id.*

264. *Id.*

265. *Id.*

thoughts without action have no consequence in the law. In *Pierce v. Foster Wheeler Constructors,* for example, the Court of Appeals defined "intentional act" as where an actor "(1) consciously desires the physical result of his act, whatever the likelihood of that result happening from his conduct; or (2) knows that the result is substantially certain to follow from his conduct, whatever his desire may be as to that result."[266]

In the context of wills, we think primarily of testators as individuals making plans for the future. At first blush, then, the form of intention that seems most relevant is intention for the future. As it turns out, however, intention for the future, or "pure intending" as Donald Davidson calls it,[267] and intentional action[268] count for little by themselves in succession law.[269] For a will to be valid, the intention and the action must occur contemporaneously—a "[j]oint operation of act and intention"[270] as it were—and the action must comply with the applicable rules of will execution, with some room for error under the nascent harmless-error doctrine.[271] Courts recognize the necessity of conjoining intention and action in will execution,[272] one in particular remarking that the standard definition of intention "obviously implies action."[273] In other words, testators must act with intention, not merely act intentionally. Thus, the intention with which one acts is what counts in wills law. "It is in virtue of its relation to a primary reason that the action counts as intentional,

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266. Pierce v. Foster Wheeler Constructors, 2008-0906, 2008 WL 5377808, *3 (La. App. 1 Cir. Dec. 23, 2008).

267. Donald Davidson, *Intending,* in Essays on Actions and Events 83, 88 (2d ed. 2001).

268. Brackenridge v. Roberts, 267 S.W. 244, 246 (Tex. 1924) (objecting that "[t]he case thus rests entirely upon the mechanical acts of the testator, regardless of his intention as to the writing or for what use or for what purpose it was prepared by him"). Cases of sham wills demonstrate that the action of executing a will without testamentary intent is invalid. *See, e.g.*, Fleming v. Morrison, 72 N.E. 499, 499 (Mass. 1904) (testator's purpose in executing will was to induce beneficiary to have sex). Although the question has not been litigated, it is doubtful that a will executed without testamentary intent can thereafter be rendered valid merely by the testator's decision that it be so.

269. In re Will of Smith, 528 A.2d 918, 919, 922 (N.J. 1987) (testator wrote note to lawyer specifying how "I want my estate to go"); In re Probate of Macool, 3 A.3d 1258, 1264 (N.J. App. Div. 2010) (distinguishing between an intention to make a will and the intention that a document be a will).

270. Carter v. First United Methodist Church of Albany, 271 S.E.2d 493, 497 (Ga. 1980) (internal quotation marks omitted).

271. *See, e.g.*, In re Kuralt, 15 P.3d 931, 934 (Mont. 2003).

272. In re Astor's Will, 162 N.Y.S.2d 46, 53 (Sur. Ct .Columbia County 1957) ("[T]he intention [to make a will] is one thing and its execution is quite another thing.").

273. In re Mann's Will, 244 N.Y.S. 673, 684 (Sur. Ct. Kings County 1930).

and this reason gives the intention with which the action is done."[274] Not only must testators act, but they must intend a result—a document with dispositive provisions that can be enforced as soon as, but not before, the testator dies.

B. Active Intention

The philosophy of intention as it applies to wills focuses most prominently on active intention. Carrying out the testator's actual intent is the "polar star" of wills law and the primary inspiration for the tenet that "no will has a brother."[275] "When a will is proper in form, it is presumed to reflect serious, genuine, authentic testamentary intent."[276] Given the vagaries of testamentary preferences that stem from the relationships testators have actually experienced, the search for a testator's actual intent can feel like a "search after a phantom."[277] The reality is that, as Philip Mechem has commented, "[p]robably no such thing exists."[278]

The primary tools for ascertaining a testator's actual intent are the plain meaning rule and the admission of extrinsic evidence in cases of ambiguous wills. Left with doubts about a testator's actual intent, courts are left to conjure the "average actual intent" or probable intent of reasonable testators.[279] Legislators are left to speculate on what most people would want under the circumstances and to develop guideposts to help decision makers come as close to the intent of the testator as the evidence before them will allow. But it must be remembered, as noted in connection with the presumption against intestacy discussed above, that these guideposts are rules of construction, resort to which is reserved for cases of ambiguous wills. They are inapplicable where the meaning of the will is plain.

Given the predominant theoretical framework, the student of wills is justified in thinking that express, active intention is prized above all in the law of wills. Lawyers are familiar with the notion of active intent from tort law requiring liability for malicious conduct to be grounded

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274. Stanford Encyclopedia, *supra* note 262.

275. Hammons v. Hammons, 327 S.W.3d 444, 448 (Ky. 2010).

276. Baron, *supra* note 22, at 24.

277. In re Chalmer's Will, 190 N.E. 476, 478 (N.Y. 1934).

278. Philip Mechem, *Some Problems Arising under Anti-Lapse Statutes,* 19 IOWA L. REV. 1, 2 (1933).

279. A. James Casner, *Class Gifts—Effect of Failure of Class Member to Survive the Testator,* 60 HARV. L. REV. 751, 751 (1947).

upon the active intent to defraud or injure[280] and fraudulent conveyances to be made with "active intent to defraud existing creditors . . . ."[281] The concept is also prominent in wills law where we find judicial insistence on "actual, active intention."[282] The rational testator is understood to be one who knows the objects of his bounty, understands what a will is, and has the wherewithal to bring his thoughts together in order to create an orderly estate plan.[283] In short, the rational testator knows what is at stake, knows what she wants, and makes a formal declaration of her wishes that includes a disposition of the entirety of her estate. The prevailing doctrine gives her precious little room for error.

There are numerous instances, however, where courts hearing wills cases render judgments based on an intention the testator never expressed. Good examples exist in the realm of dependent relative revocation, discussed above in Part III.D. The doctrine has various theoretical underpinnings, among them that the revocation in question took place upon a condition that did not occur or was simply mistaken in view of the new estate plan's invalidity.[284] The doctrine thus operates even in cases of unambiguous wills and is used to determine what the testator must have wanted in the circumstances but probably never actively considered. Courts erroneously label their conclusions presumed intent, but since the doctrine tends to be applied to unambiguous wills, it makes no sense to speak of a presumed intention of reasonable testators in this context. Instead, a court in a DRR case is attributing an *actual* intention to the testator in the specific circumstances of the case. The intention lies behind the words of the will; it is not embodied in them, although it may be suggested by them. Courts in such cases recognize that the intention they are discerning in such cases is a pure invention.[285] Invented intention is surely not active intention, but we could reasonably call it passive.

In contrast to DRR, the scholarly literature assumes that the lack of active intention in partial intestacy cases is what makes it a problem. The predominant theory is that partial intestacy results where testators have

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280. *See, e.g.*, Geiger & Peters, Inc. v. Berghoff, 854 N.E.2d 842, 850 (Ind. Ct. App. 2006); Crowley v. Langdon, 86 N.W. 391, 394 (Mich. 1901).

281. House v. Johnson, 76 P. 743, 743 (Colo. App. 1904).

282. In re Botsford, 52 N.Y.S. 238, 241, 243 (Sur. Ct. Chenango County 1898).

283. *See, e.g.*, Estate of Quirin, 348 P.3d 658, 661 (Mt. 2015).

284. Storrow, *Dependent Relative Revocation, supra* note 107, at 513–14.

285. *Id.* at 532.

inadvertently neglected to include all of their intended dispositions in their wills. Hirsch's understanding of partial intestacy, for example, is that it is "hardly ever" intentional and "typically stems from [the] planning errors" committed by those who write their own wills.[286] To Hirsch, then, partial intestacy is a marker for an "incomplete will," whose gaps the law should attempt to fill through intent-effectuation measures. William LaPiana sympathizes with this view. In his examination of Hirsch's work, he laments that succession law is "out of sync with what we can learn of testators' intentions."[287] Both Hirsch and LaPiana view the testator, as Jane Baron would characterize it, as a rational actor with a fully formed set of intentions about his property who then makes innocent planning errors.[288] Since this testator has "a finalized testamentary intent of which unambiguous evidence can be found,"[289] expanded judicial discretion in the area of testamentary mistakes should be brought to bear to cure the partial intestacy "problem."

The reason Hirsch gives for expanding judicial discretion is that cases of partial intestacy present peculiar problems of intention that do not exist in cases of complete intestacy.[290] In the case of complete intestacy, a testator's intent to override the default scheme of intestacy is completely absent. But the intent of testators is bound to vary when they die partially intestate. Courts could take one of two approaches: treat the will's "blank spaces" as devoid of intent or use the terms of an incomplete will to fill in the missing terms.[291] Hirsch's preference for the latter would require the more prodigious exercise of judicial alchemy.

I am especially sympathetic to Hirsch's obvious commitment to finding ways of effectuating testatorial intent. I am not convinced, however, that partial intestacy is a problem that needs to be cured, though I understand that presenting the matter as one of "blank spaces," "gaps," and "incompleteness" has undoubted semantic force in suggesting it does. In other words, I doubt that partial intestacy is necessarily a marker of incompleteness, and I doubt that judges are in a very good position to patch up the holes and gaps in such wills. As Hirsch himself

286. Hirsch, *supra* note 256, at 1426.

287. William LaPiana, *Filling in the Blanks,* JOTWELL (Oct. 29, 2013), http://trustest.jotwell.com/filling-in-the-blanks [https://perma.cc/AF8T-ZZQ8].

288. Baron, *supra* note 22, at 3.

289. *Id.* at 8.

290. Hirsch, *supra* note 256, at 1425.

291. *Id.*

admits, there is no analytical framework that could possibly aid them in filling in such gaps, that is, none that would not lead to a set of precedents more incoherent than already exists under the current scheme.[292] My sense is that jurisprudential incoherence will be the inevitable outcome of greater judicial discretion in this area.

I also think it important to note the limitations of Hirsch's proposal. At bottom, Hirsch is advocating the expansion of probate courts' mistake-correcting power rather than its power to construe wills. His proposal does not encompass wills that are genuinely ambiguous on the question of partial intestacy and for which there is already a well-established two-step interpretative process.[293] In such cases, the court would interpret the will with the aid of extrinsic evidence of the testator's circumstances,[294] and, if such evidence failed to reveal the testator's actual intent with respect to partial intestacy, with the aid of presumptions about testators' probable intent.

C. Passive Intention

I remain unconvinced that the quality of a testator's intention truly differs or that we should approach the question of that testator's intention differently depending on whether he has died partially intestate or has died with a wholly ineffective will. I do think, however, that, having ascertained that succession law is mostly concerned with active intention, it is left to us to refine the understanding of intention in succession law to be able to appreciate how it manifests in cases of partial intestacy.

A will is valid if it manifests testamentary intent.[295] To manifest testamentary intent, the will must contain technical terms such as "devise" or "bequeath," conditional language expressing that the document is meant to take effect upon one's death, words such as "last will and testament," or words indicating that the document is to have a "future significance."[296] There is no debate in the law about whether testamentary intention must appear in the language of the will (even if an ambiguity in this respect must be resolved) and not even a hint that a

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292. *Id*.

293. Storrow, *Judicial Discretion*, *supra* note 7, at 80–81.

294. This is known as the "armchair rule" in Canada and England. *See* Whaley, *supra* note 106, at 6. The English provision relating to the admission of extrinsic evidence to interpret ambiguous wills is contained in Administration of Justice Act 1982 § 21 (U.K.).

295. In re Hefner's Will, 122 N.Y.S.2d 252, 253 (Sur. Ct. Queens County 1953).

296. *Id.*

testator would be allowed to make a judicially correctable mistake in this realm.

Dispositive intention is distinct from testamentary intention. One court has stated that "three elements are required for a clause to be considered a bequest: the name of the beneficiary, language 'sufficiently clear and unequivocal to show an intention' to pass property, and the identity of the property to be gifted."[297] Although this is an accurate statement, we must not gather from it the false impression that a dispositive provision must itself contain language of testamentary intent. It is the entirety of the will that must evince testamentary intent, and the intent required to give dispositive provisions a testamentary flavor can certainly be borrowed from the preamble of the will. This leaves dispositive provisions, if contained in a testamentary document, as necessitating the name of the beneficiary and the property intended to be bequeathed.

If we do not recognize the distinction between testamentary and dispositive intentions, we risk assuming that the active intention required to execute a valid will must be very same quality of intention that is required to find that it contains dispositive provisions. Obviously, "[a] paper may be testamentary without being dispositive; a codicil changing the executor or adding a co-executor is testamentary but not dispositive."[298] Thus, one may execute a document applicable or related to death that merely names an executor. It is still a will.[299]

A will thus cannot come into existence without testamentary intent, but it can remain one without explicit dispositive provisions. Once a testator has executed a valid will and dies, the judicial machinery acts to ensure that the will's terms are carried out, even to the extent of entertaining a presumption that the testator meant the will's terms to control all of his estate. As was explained above in Part III.A., such a presumption is overbroad and often misapplied.[300] The intention required for a document to be considered testamentary must be active, but the dispositive provisions may be the product of passive intention,

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297. Dudley v. Jake & Nina Kamin Found., 2014 WL 298270, at *2 (Tex. Ct. App. Jan. 28, 2014). I would include within this definition negative provisions declaring to whom property should *not* be gifted.

298. Poindexter v. Jones, 106 S.E.2d 144, 146 (Va. 1958) (quoting BROCKENBROUGH LAMB, VIRGINIA PROBATE PRACTICE § 33 (1957)).

299. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmt. a (Am. Law Inst. 1999).

300. *See supra* Part III.A.

the intention to allow the legislatively mandated intestate distribution scheme to fill in "missing" provisions. The presumption against intestacy is thus unnecessary when one considers the possibility of passive intention.

Given the law's prevailing insistence on certainty, it is unsurprising that the concept of passive intention is not prominent in the law. The law has a hard enough time determining and giving effect to active intent. In the criminal law, for instance, even accomplice liability requires specific intent rather than mere passive assent.[301] Nonetheless, we find recognition of the significance of passive intention in property law, for example, in cases of boundary disputes. The doctrine of acquiescence holds that neighboring landowners, by their *in*action or passive intent, can be said accept a boundary line.[302] Passive conduct, too, has important ramifications in tort law, where negligence may be grounded upon the failure to discover and remedy a dangerous situation.[303]

Cases of gifts by implication like *Bellows, Cedar,* and *Gibbon,* discussed above in Part III.E.1 are examples where courts are visibly struggling to combat the sense that a testator has intended, albeit passively, to die partially intestate. In the guise of drawing inferences, which would be much more like deductions, the courts makes suppositions from a "sympathetic reading" of the will and the circumstances in which it was executed. A "sympathetic reading" is all very well, but it means little more than the idea that the intention of the testator must be found within its four corners, and the contingencies the courts needed the wills in those cases to address were simply not there. Thus the courts were left to prop up their conclusions with the thin reed of judicial antipathy for partial intestacy.

In *Bellows* in particular the court reasoned that the testator's will manifested an intention to avert partial intestacy.[304] Most wills make no such assertion and nor did Stella Bellows's. But the court had before it a document that spoke, in their estimation, with such unbending logic and clarity that the gift by implication was not only inevitable but a matter of

301. State v. Coleman, 231 P.3d 212, 217 (Wash. Ct. App. 2010); Rudolph v. State, 114 So. 2d 299, 299 (Ala. Ct. App. 1959).

302. *See, e.g.*, RHN Corp. v. Veibell, 96 P.3d 935, 941 (Utah 2004) (noting that the acquiescence may be tacit).

303. *See, e.g.*, Eclectic Inc. v. Patterson, 323 P.3d 473, 475 (Or. Ct. App. 2014) (remarking on active versus passive negligence in indemnity law); Borne v. Estate of Carraway, 118 So. 3d 571, 588 (Miss. 2013) (same).

304. In re Bellows, 480 N.Y.S.2d 925, 932 (N.Y. App. Div. 1984).

simple justice. The *Bellows* case involved an estate carved up into present possessory estates and future interests which did not vest in possession until fifty-seven years after the testator's death in individuals she never knew.[305] Nonetheless, the court felt compelled to refer to the ultimate beneficiaries as her "five grandchildren"[306] and to the presumption that "heirs of the blood should be preferred to strangers."[307] The presumption has no application here, of course, since there was no issue of ambiguity to be resolved, but rather a complete failure to address a contingency that came to pass. Nor would a presumption that favored heirs of the blood counsel against partial intestacy, since the corpus would have devolved in part to her son's estate and her grandchildren in any event.[308] That her son's will would control the property was simply a function of the fact that the distribution of the estate took place so long after the testatrix's death, a period of in excess of sixty years if one includes the prolonged litigation. The risk that beneficiaries will not survive to the time of distribution is presented by any will that delays distribution in this fashion, but it nonetheless is a risk that Bellows and her counsel failed even remotely to contemplate. The tortured gift by implication analysis the courts felt compelled to undertake in order to "fix" the will was a reckless dissipation of judicial resources.

At the risk of belaboring a point made in more detail above, the disfavor of partial intestacy is not a balancing mechanism for fixing mistakes in wills. It is an "axiom of testamentary construction"[309] and thus should be limited to resolving cases of ambiguity of testamentary language. As there was no such ambiguity in any of the three gift by implication cases discussed,[310] the gift by implication analysis, since the evidence did not achieve the beyond-a-reasonable-doubt standard, should have been resolved in favor of partial intestacy. In the same vein, if the gift by implication had been established beyond a reasonable doubt, there would have been no cause for resort to presumptions or preferences.

By contrast, the logic of passive intent can be ascertained in the

305. *Id.* at 926–27.

306. *Id.* at 927.

307. *Id.* at 929 (quoting In re Larkin, 172 N.E.2d 555, 557, 558 (1961)).

308. *Id.* at 929–30.

309. In re Bieley, 673 N.Y.S.2d 38, 41 (1998).

310. *Supra* Part III.E.1.

reasoning of the trial court in *In re Zeevering.*[311] There the testator left a residue of $217,000, but his will contained no residuary clause.[312] The trial court reasoned:

> [I]t may be he was reserving judgment on what he wanted to do and purposefully left out a residuary clause. He may have been aware that the estate residue would distribute equally to these natural objects of his bounty if he did not include a residuary clause. It may be he thought the rest of the estate was in a joint account with the right of survivorship and the cash would transfer in that manner. It may be he intended to distribute the $217,000 during his lifetime, but never got around to it. It may be that a combination of one or all of the above motivated [George] Zeevering to write his Will the way he wrote it. The point is, we do not know.[313]

The *Zeevering* court comes closer than the courts in *Bellows, Cedar,* and *Gibbon* to acknowledging, as Jane Baron has, that there is a population of testators who are irresolute, emotional and ambivalent.[314] These are testators of "much less determinate intent" than wills law typically envisions or allows.[315] Their wills should not be forced to fit, through unsupported presumptions or myopic suppositions, the stereotype of the rational, detail-oriented testator that predominates in succession law. Judicial recognition of passive intention, based on the defensible proposition that the testator accepted that the intestacy statute would fill the gaps in her will if indeed there were any, would help bring about this result.

V. CONCLUSION

The pendulum of the common law has swung from preferring intestacy to testacy to preferring testacy to intestacy. Given that the law does not in reality abhor intestacy or create any real incentive to execute wills to avoid it, it is curious indeed that when one does create a will a judicial machinery is set in motion to ensure that partial intestacy does not occur. Among the antidotes to partial intestacy figure the formidable presumption against intestacy and doctrines with which it often operates

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311. 78 A.3d 1106, 1110 (Pa. Super. Ct. 2013).
312. *Id.* at 1107.
313. *Id.* at 1110.
314. Baron, *supra* note 22, at 7–8.
315. *Id.* at 8.

in tandem: reformation of mistakes, anti-lapse, dependent relative revocation, gifts by implication, and the preference for early vesting.

I find nothing abhorrent, suspicious, or even surprising about a will that results in partial intestacy. When we invest the presumption against intestacy with such force we constrict the testamentary choices of those who have not yet decided how they want their *entire* estate to be distributed but stand ready to make an enforceable plan concerning at least a portion of their estate, for example, an item of tangible personal property or piece of land that has been promised to one who would not otherwise take it in intestacy.[316] It would be very unusual for an estate planner and certainly for an individual proceeding without counsel to include a residuary clause stating "I wish the rest of my estate to be distributed in accordance with the applicable laws of descent and distribution." Such language would be wholly unnecessary were courts to recognize wills as giving testators the opportunity to carve their estates out of the existing intestate distribution scheme, leaving the scheme to fill in the gaps based on the theory of passive intention.

It is laudable, indeed, to promote ways of discovering and furthering testatorial intent, but, I prefer at the very least to couch whatever approach the law chooses to take with respect to partial intestacy in the familiar approach to the interpretation of wills. The presumption against intestacy may be meant to serve only as a tool for clarifying ambiguities in wills, but we have let it take on a life of its own, leaving no room for what I want to suggest here is the importance of passive intention.

At the end of the day, intention does not speak for itself and because it does not it is an easily manipulated concept that has an inordinate influence on the direction policy is taking in the law of succession. As the California Court of Appeal wisely remarked in *Estate of Uhl,* "A testator has the right to make a will that does not dispose of all of his property but leaves a residue to pass to his heirs under the laws of succession. Such a will is not the usual one but when the language that leads to the result is clear, the will must be given effect accordingly."[317]

316. Consider, in this connection, In re Estate of Sharp, 889 N.Y.S.2d 323, 324 (N.Y. App. Div. 2009), where a decedent died intestate despite a succession of wills. I have analyzed the case as one where the testator had changed her mind about leaving her estate to a sole beneficiary but had not yet decided what percentages of her estate she wanted to leave him and a second beneficiary. Storrow, *Dependent Relative Revocation, supra* note 107, at 525.

317. Estate of Uhl, 81 Cal. Rptr. 436, 439 (Cal. Ct. App. 1969).