NOMINAL BEQUESTS

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ABSTRACT

De minimis non curat lex.

This maxim provides that the law does not concern itself with trifles. Regardless of whether the law generally abides by this principle, the law of wills does not. For centuries, case after case has delved into the consequences of de minimis bequests of one shilling or of one dollar or, in fact, of one cent. Should the law of wills concern itself with these trifling nominal bequests?

Somewhat ironically, this Article extensively considers this question and reaches this answer: Sometimes, yes. Other times, no. The law's concern with some nominal bequests is justified because they represent true benevolent acts of donors. Legal recognition of them furthers the law's overarching policy objectives of facilitating donative transfers and efficiently administering decedents' estates. Other nominal bequests, however, are not acts of generosity. Instead, they are either induced by mistakes of law or motivated by spite. As such, the law's regard for them is inconsistent with its policy goals.

Policymakers should therefore fundamentally reconsider how the law treats nominal bequests. Some should be treated like any other bequest. The law should respect them and facilitate their completion. The law, however, should curtail the use and effect of other nominal bequests. Distinguishing nominal bequests with which the law should be concerned from those about which it

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should not is a nontrivial endeavor. This Article develops the analytical framework to do so.

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INTRODUCTION

Stella Abbott died on October 20, 1998 in Hamilton County, Ohio.[1] Her will made several bequests, including a bequest of $1,000.00 to her friend, Jenenine, and a bequest of her residuary estate to her son, John,[2] which was valued at $86,273.89.[3] Stella also had four daughters, and to each of them she kindly bequeathed $1.00.[4] Typically, the law defers to the intent of testators[5] like Stella. In whatever way they decide to divide their property at death, the law strives to effectuate their intent,[6] and indeed, Hamilton County's probate court oversaw the administration of Stella's estate in accordance with her wishes. Stella's executor distributed $1,000.00 to Jenenine and her residuary estate to John.[7] Despite their triviality, Stella's bequests to her daughters were treated no differently; her executor tendered $1.00 to each of them.[8] This Article argues that, contrary to conventional doctrine, the law should not have deferred to Stella's intent to bequeath each of her daughters $1.00. Some nominal bequests like Stella's are wasteful and therefore undermine the fundamental policies of the law of succession.

To understand why, consider that the law grants testators donative freedom to maximize societal interests,[9] as individual property owners

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1 Application to Probate Will, Estate of Abbott, No. 2000003165 (Ohio Prob. Ct., Hamilton Cnty. 2012).

2 Last Will and Testament of Stella Abbott at 1-2, *Abbott*, No. 2000003165.

3 Fiduciary's Account at 4, *Abbott*, No. 2000003165.

4 Last Will and Testament of Stella Abbott, *supra* note 2, at 2.

5 *See* Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L.J. 643, 643-44 (2014) ("The American law of succession embraces freedom of disposition, authorizing *dead hand* control, to an extent that is unique among modern legal systems.").

6 *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 (AM. L. INST. 2003) ("The donor's intention is given effect to the maximum extent allowed by law.").

7 Fiduciary's Account at 4, *Abbott*, No. 2000003165.

8 *Id.*

9 *See* Pamela R. Champine, My *Will Be Done: Accommodating the Erring and the Atypical Testator*, 80 NEB. L. REV. 387, 432 (2001) ("The most prevalent justification for testamentary freedom is the utilitarian view which posits that testamentary freedom is not a right but rather a privilege offered for the purpose of motivating socially desirable behavior.").

are considered to have the best information and appropriate incentives to make the most beneficial dispositions of their property.[10] Of course, they do not always make the best decisions, but, on the whole, the law views them as the best equipped to decide how their property should be distributed at death. Sometimes, however, the improvidence of donative decisions and the societal harms they cause are so obvious that the law does not defer to testators' express intent. As Professor Austin Wakeman Scott explained:

> [I]t is clear that one has no right to dispose of his property in a manner which is not merely capricious, but which is also positively detrimental to society . . . . The right of the individual to dispose of his property as he likes is subordinate to the right of the community to insist that property shall not be devoted to a purpose inimical to its interests . . . .[11]

Thus, when donors' foolishness is so extreme that it becomes harmful, their intended dispositions of property violate public policy, and the law steps in to protect societal interests.

Although there is a line between testamentary decisions that are merely imprudent and those that violate public policy, it is not bright. As Scott explained:

> Public policy may be an unruly horse, but it is one [that policymakers] have to ride. The fact that it is difficult to draw the line between dispositions which are merely unwise and those which are opposed to public policy does not excuse [policymakers] from attempting to draw the line.[12]

Although they are the exceptions, policymakers have identified various types of bequests that violate public policy. For example, a bequest conditioned on the beneficiary committing a crime has obvious societal harms and therefore violates public policy.[13] Similarly, a bequest

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[10] *See* Daniel B. Kelly, *Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications*, 82 FORDHAM L. REV. 1125, 1127-29 (2013).

[11] Austin W. Scott, *Control of Property by the Dead: II*, 65 U. PA. L. REV. 632, 632 (1917).

[12] *Id.* at 657.

[13] *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. L. INST. 2003); Kelly, *supra* note 10, at 1162.

conditioned on the beneficiary divorcing a spouse undermines society's interest in preserving familial relations and therefore also violates public policy.[14]

This Article argues that, although they do not induce crime or marital discord, some nominal bequests, like Stella's $1.00 gifts to her daughters, nonetheless violate public policy. Specifically, it argues that such bequests are wasteful and therefore undermine the public policy favoring efficient probate administration. Just like society has an interest in suppressing crime and fostering families, it also has an interest in ensuring that its subsidization of posthumous wealth transmission produces net societal benefits.[15] Some nominal bequests, like Stella's gifts to her daughters, are not socially beneficial and therefore are not worth the cost of administering them.

This public policy concern arises not just because of the bequests' small pecuniary size but also because, in some cases, their diminutive value is reduced and perhaps even eliminated by the testator's purposes in making them. Why, for instance, did Stella give each of her daughters $1.00? Was she acting benevolently? Of course not. A dollar bequest from a mother to a daughter cannot be motivated by beneficence. Why then did Stella make those $1.00 bequests? Two motivations might explain them. Neither involve generosity.

First, Stella might have believed that she legally could not disinherit her daughters, so she gave each a trifle to satisfy the requirements of the

[14] *See* Kelly, *supra* note 10, at 1162.

[15] *See* Reid Kress Weisbord, *The Governmental Stake in Private Wealth Transfer*, 98 B.U. L. REV. 1229, 1244 (2018) ("[M]aximizing efficiency in the administration of justice[] reflects a longstanding and bipartisan political preference to streamline the costs and burdens of government bureaucracy. The efficient administration of justice reduces the costs and burdens borne by taxpayers in funding the government as a whole. In the private wealth transfer context, this interest is served by principles of judicial economy that favor conserving the resources of courts through procedural rules that, where appropriate, reduce the volume of litigated matters."); Peter T. Wendel, *Wills Act Compliance and the Harmless Error Approach: Flawed Narrative Equals Flawed Analysis?*, 95 OR. L. REV. 337, 387 (2017) ("With the myriad of competing claims on public resources, it is poor public policy to spend excessive funds on ascertaining testator's intent . . . . Limiting the costs of administration associated with ascertaining and giving effect to a decedent's testamentary intent is a reasonable and important public policy consideration, just as important as ascertaining and giving effect to a decedent's intent.").

law. To be sure, the law did not require Stella to do so, but she may have been mistaken about the law.[16] If this explains Stella's bequests, then, despite the unambiguous words of her will, Stella actually intended to give her daughters nothing — by bequeathing $1.00 to each of her daughters, she was complying with a nonexistent legal formality rather than making a genuine gift. Second, Stella might have been motivated by spite.[17] If this explains the $1.00 bequests, then Stella wanted to give her daughters something worse than nothing — rather than being generous through the terms of her will, she was being petty. While genuine de minimis bequests are beneficial, if only minimally so, bequests induced by mistakes of law and bequests motivated by spite raise questions regarding whether they have any benefit at all.

Whether a particular bequest is wasteful depends not only upon its benefits but also upon its costs. The administration of decedents' estates comes with costs, some of which are borne by estate beneficiaries, whose gifts are reduced to cover costs, such as executor fees and other estate expenses.[18] Other costs are borne by society, which provides the infrastructure for estate administration, such as the salary of probate judges and court staff and the facilities to house probate courts and probate records.[19] Generally, the law views the societal benefits of posthumous wealth transmission as justifying these costs. Nominal bequests, however, have not only questionable benefits but also unique administrative costs that render them inefficient.[20]

These efficiency concerns suggest that policymakers should fundamentally reconsider how nominal bequests are treated. As explained previously, testators generally enjoy the freedom to make

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[16] *See infra* Part II.A.

[17] *See infra* Part II.

[18] *See* Daniel B. Kelly, *Toward Economic Analysis of the Uniform Probate Code*, 45 U. MICH. J.L. REFORM 855, 874-75 (2012).

[19] *See id.* at 875 (explaining that there are "public costs of operating a probate system" including "the salaries of probate judges and other court personnel"); Peter L. Murray, *Maine's Overdue Judicial Reforms*, 62 ME. L. REV. 631, 634 n.4 (2010) (reporting that in Maine, probate courts "are supported by county budgets," and that in one county's 2009 budget "the probate judge was paid $25,341" and "the registrar, deputy, and part-time clerk typist together received $73,321").

[20] *See infra* Part III.

whatever bequests that they want.[21] But should the law permit testators to make bequests that have little or no benefit? This Article argues that, at least in some circumstances, the answer is no. Some nominal bequests do more harm than good. They should not be treated like other bequests, and the law should curtail their use and effect.[22]

This Article proceeds in four parts. Part I provides the context in which to evaluate nominal bequests by explaining the policies underlying freedom of disposition and probate administration. Part II then questions whether nominal bequests that are induced by mistakes of law or motivated by spite have any meaningful societal benefits. Next, Part III identifies unintended consequences of nominal bequests that can disrupt efficient estate administration, and which ultimately render them wasteful. Finally, Part IV argues that the law should curtail nominal bequests either through application of the doctrine of reformation or by a restraint of donative freedom that restricts testators from making some types of nominal bequests.

I. CONTEXTUALIZING NOMINAL BEQUESTS

The *Restatement (Third) of Property* ("*Restatement*") explains that "[t]he organizing principle of the American law of donative transfers is freedom of disposition."[23] Pursuant to this principle, property owners have nearly absolute freedom to decide when, how, and to whom to give their property.[24] Thus, under current doctrine, Stella was free to leave her daughters $1.00 each, and the probate court was right to carry out her express intent. To understand why nominal bequests, like Stella's, are problematic and should be curtailed, they must be analyzed within the context of this organizing principle. This Part therefore explains (1) the policy foundations of freedom of disposition, (2) the rationales for the law's limited restrictions of this freedom, and (3) how the law facilitates the exercise of donative freedom through efficient probate administration.

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[21] *See supra* notes 5–6 and accompanying text.

[22] *See infra* Part IV.

[23] RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. a (AM. L. INST. 2003).

[24] *See* Sitkoff, *supra* note 5, at 643-44.

A. Justifying Freedom of Disposition

The law recognizes freedom of disposition because society is better off when property owners' desired estate plans are carried out.[25] Contemporary justifications of freedom of disposition are based upon what Professor Kelly describes as "functional considerations."[26] He explains, "[t]his functional perspective emphasizes the 'social welfare' of the parties and seeks to determine how the law can create the best incentives for the donor, donees, and other parties that a donor's disposition of property may affect."[27] Three general consequences of freedom of disposition contribute to the maximization of social welfare.

First, broad freedom of disposition maximizes the donor's utility.[28] Put simply, property owners value the right to dispose of property upon death.[29] Through the exercise of this right, property owners can do any number of things that increase their utility, such as supporting close friends and family or pursuing important philanthropic endeavors.[30] Thus, the ability to freely dispose of property at death is a property right, and if the law substantially curtailed freedom of disposition, property owners would be deprived of that right[31] and the utility of property ownership would decrease.

Second, freedom of disposition maximizes the donee's utility.[32] Because property owners cannot take their wealth with them when they die, someone must benefit from decedents' estates. Of course, whoever succeeds to a decedent's wealth will experience increased utility. Freedom of disposition, however, is founded in part upon the idea that

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[25] *See* Mark Glover, *A Social Welfare Theory of Inheritance Regulation*, 2018 UTAH L. REV. 411, 415-17.

[26] *See* Kelly, *supra* note 10, at 1135.

[27] *Id.*

[28] *See id.*

[29] *See* Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 8 (1992) ("[P]ersons derive satisfaction out of bequeathing property to others.").

[30] *See* Mark Glover, *A Therapeutic Jurisprudential Framework of Estate Planning*, 35 SEATTLE U. L. REV. 427, 445-46 (2012).

[31] *See* Gordon Tullock, *Inheritance Justified*, 14 J.L. & ECON. 465, 474 (1971); Hirsch & Wang, *supra* note 29, at 8.

[32] *See* Kelly, *supra* note 10, at 1136.

not all donees are created equal. Although anyone would experience increased utility from receiving an inheritance, some will experience greater increases than others. Freedom of disposition permits property owners to select those beneficiaries who will benefit the most.[33] They do not necessarily do so, but the law views property owners as being well positioned to make those decisions. Because they have the best information regarding their family's needs and preferences,[34] property owners can engage in more intelligent estate planning than probate courts or state legislatures, which would be tasked with crafting estate plans for property owners absent freedom of disposition.[35]

Third, freedom of disposition creates beneficial incentives. For instance, because property owners know that they can dispose of property at death, they are encouraged to be productive and save during life.[36] By contrast, if freedom of disposition were substantially curtailed, individuals might be less productive and consume more, which, as Kelly explains, "will affect not only the donor's utility but also society's savings and its capital base."[37] Policymakers therefore view freedom of disposition as maximizing social welfare by not only increasing the individual utility of donors and donees but also incentivizing wealth generation, all of which is beneficial to society.

B. Restricting Freedom of Disposition

"We are not here to test whether [the testator] did something foolish or not. We are here to test whether he wanted to do it and knew what

33 *See* Adam J. Hirsch, *Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives*, 73 WASH. U. L.Q. 1, 44 (1995) [hereinafter Hirsch, *Spendthrift Trusts*] ("Certainly, benefactors can be expected to possess the information and insight into their families' affairs necessary to distribute their wealth in a rational manner.").

34 *See* Michael Rosenbloum, *Give Me Liberty and Give Me Death: The Conflict Between Copyright Law and Estates Law*, 4 J. INTELL. PROP. L. 163, 177 (1996) ("Testamentary freedom . . . allows the testator to weigh the varying needs of his family."); Joshua C. Tate, *Conditional Love: Incentive Trusts and the Inflexibility Problem*, 41 REAL PROP. PROB. & TR. J. 445, 484 (2006) ("[T]he testator . . . can distribute property in accordance [with] each family members' needs.").

35 *See* Kelly, *supra* note 10, at 1136-37.

36 *See* Hirsch & Wang, *supra* note 29, at 8.

37 Kelly, *supra* note 10, at 1136.

he wanted to do."[38] Here, the Supreme Court of Washington rightly describes the court's role in the administration of decedent's estates. Because donors have broad freedom of disposition,[39] the law generally defers to the donors' choices.[40] Although, as the *Restatement* explains, "American law does not grant courts any general authority to question the wisdom, fairness, or reasonableness of the donor's decisions about how to allocate his or her property,"[41] it does limit freedom of disposition when, as Scott noted earlier, the donor's estate plan violates public policy.[42]

For example, the law restricts a donor's ability to unreasonably interfere with a beneficiary's freedom to marry.[43] Although the donor generally is free to make conditional gifts, when those conditions intrude upon the beneficiary's autonomy over personal decisions, the law scrutinizes them. To illustrate, consider *Shapira v. Union National Bank*, in which David Shapira conditioned a bequest to his son upon the son's marrying a Jewish woman within seven years, and if the son did not comply, his bequest would instead go to the State of Israel.[44] The court noted that freedom of disposition permits conditional bequests but that conditions that unreasonably interfere with a beneficiary's freedom to marry violate public policy.[45]

Although the court ultimately found Shapira's marital condition to be a reasonable and therefore an appropriate exercise of freedom of disposition,[46] the case illustrates why courts question these kinds of bequests. For instance, one potential rationale of this restraint of

38 *In re* Hansen's Estate, 401 P.2d 866, 867 (Wash. 1965); *see* Lingo v. Lingo, Nos. 1622-MG, 4483-S, 2009 WL 623720, at *7 (Del. Ch. Feb. 26, 2009) ("As in determining other probate issues, the intent of the testator is the touchstone, no matter how foolish, unusual or unfair that intent may appear.").

39 *See supra* Part I.A.

40 *See* Sitkoff, *supra* note 5, and accompanying text.

41 RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. L. INST. 2003).

42 *See supra* notes 11–14 and accompanying text.

43 *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 6.2 (AM. L. INST. 1983).

44 *See* Shapira v. Union Nat'l Bank, 315 N.E.2d 825, 826 (Ohio Ct. Com. Pl., Mahoning Cnty., Prob. Div. 1974).

45 *See id.* at 828-29.

46 *See id.* at 832.

freedom of disposition is that the benefits of the bequest are offset by the costs associated with the intrusion into the beneficiary's personal lives. The *Restatement (Third) of Trusts* ("*Restatement of Trusts*") provides that a "trust provision is invalid if . . . it is contrary to public policy,"[47] and its official commentary suggests that "where a provision is unnecessarily *punitive*. . . the provision may be invalid."[48] As an example of unnecessarily punitive trust provisions, the commentary points to provisions that unreasonably restrain the beneficiaries' marital decisions.[49]

Thus, the *Restatement of Trusts* suggest that, when the donor meddles in the beneficiary's personal affairs, questions arise regarding whether the donor is even attempting to benefit the beneficiary or is instead attempting to control or, in fact, harm the beneficiary. The law of succession is not structured to facilitate the infliction of harm but is instead structured to bestow benefits. The court in *Shapira* acknowledged this when it stated:

> [Shapira's] purpose was not merely a negative one designed to punish his son for not carrying out his wishes. His unmistakable testamentary plan was that his possessions be used to encourage the preservation of the Jewish faith and blood, hopefully through his sons, but, if not, then through the State of Israel. Whether this judgment was wise is not for this court to determine. But it is the duty of this court to honor the testator's intention within the limitations of law and of public policy.[50]

Thus, although Shapira's bequest was not punitive, restriction of some conditional bequests may be warranted because the costs to the beneficiary outweigh the benefits.

In addition to the costs imposed upon the beneficiaries, conditional bequests that unreasonably interfere with marital freedom impose costs broadly upon society.[51] Policymakers view marriages as socially

[47] RESTATEMENT (THIRD) OF TRUSTS § 29 (AM. L. INST. 2003).

[48] *Id.* § 29 cmt. l.

[49] *See id.* § 29 cmt. j.

[50] *Shapira*, 315 N.E.2d at 832.

[51] *See* Kelly, *supra* note 10, at 1162 ("[A] court may refrain from enforcing a devise on the basis of public policy if the devise entails a significant externality. For example,

beneficial. As the Supreme Judicial Court of Massachusetts explained, "Marriage is a vital social institution. The exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society."[52] When testators unreasonably restrain marital autonomy through conditional bequests, their exercise of freedom of disposition disrupts an important social institution and therefore generates societal costs that testators likely do not consider when crafting their estate plans.[53] These costs are referred to as negative externalities, and, because they undermine the policy justification of freedom of disposition, they are one rationale for restricting such freedom.[54]

Another justification for restricting these types of conditional bequests is that donors are shielded from the consequences of meddling in the beneficiaries' personal lives. If Shapira had conditioned an inter vivos gift to his son on the same marital requirements as the testamentary gift, he would have had to live with the consequences, such as potential interpersonal conflict with his son.[55] By conditioning a bequest on the marital decisions of his son, rather than a lifetime gift, Shapira avoided this conflict, and therefore his donative decision making did not account for all of the consequences of his estate plan. Scott put the point this way: "It is bad enough when the power conferred by the possession of property is exercised by a living man who is wicked or foolish; it is worse if it is exercised by the wicked and foolish dead; the dead are beyond our reach."[56] This situation in which decision makers are shielded from the negative consequences of their decision is referred to as a moral hazard, and, along with concerns regarding punitive bequests and negative externalities, it is a potential justification for restraining freedom of disposition.[57]

although disrupting family relationships is often legal, a will provision that attempts to encourage divorce or separation is unenforceable.").

52 Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003).

53 *See* Glover, *supra* note 25, at 435.

54 *See* Kelly, *supra* note 10, at 1161-63.

55 *See* Adam J. Hirsch, *Bequests for Purposes: A Unified Theory*, 56 WASH. & LEE L. REV. 33, 73 (1999) ("Death spares the testator from interpersonal costs.").

56 Scott, *supra* note 11, at 657.

57 *See* Glover, *supra* note 25, at 436-38.

C. Facilitating Freedom of Disposition

Because freedom of disposition is the organizing principle of the law of succession,[58] a primary objective of estate administration is to carry out the intent of the decedent.[59] As the *Restatement* explains: "The main function of the law in this field is to facilitate rather than regulate. The law serves this function by establishing rules under which sufficiently reliable determinations can be made regarding the content of the donor's intention."[60] Although the law is concerned with accurately determining a decedent's intent, it is also concerned with doing so efficiently. Effectuating a decedent's intended estate plan, while beneficial, comes with the costs of gathering and evaluating evidence of that intent.[61] The efficiency of estate administration therefore depends on two variables — (1) how accurately the system carries out the decedent's intent,[62] and (2) how costly it is for the system to determine the decedent's intent.[63] Efficient probate administration requires that the benefit of carrying out the decedent's intent outweighs the cost of doing so.[64]

Concerns of efficiency and the weighing of costs and benefits pervade the law of succession. For instance, when decedents fail to exercise freedom of disposition, someone must still acquire their property. Thus,

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58 *See supra* Part I.

59 *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 (AM. L. INST. 2003).

60 *Id.* at § 10.1 cmt. c.

61 *See* Kelly, *supra* note 18, at 865 ("[A] court (or legislature) can incur additional costs to improve the accuracy of its determination (e.g., by conducting an especially sophisticated cost-benefit analysis or by collecting more data and conducting econometric studies), but these administrative or decision costs . . . constitute transaction costs.").

62 *See* RESTATEMENT (THIRD) OF PROP. § 10.1 cmt. a; Richard Lewis Brown, *The Holograph Problem – The Case Against Holographic Wills*, 74 TENN. L. REV. 93, 96 (2006); Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 2 (1941). *See generally* Mark Glover, *A Taxonomy of Testamentary Intent*, 23 GEO. MASON L. REV. 569 (2016) (describing the varied types of testamentary intent with which the law of wills in concerned).

63 *See* Mark Glover, *Incremental Change in Wills Adjudication*, 49 FLA. ST. U. L. REV. 883, 923-25 (2022).

64 *See* Wendel, *supra* note 15, at 384-85.

in the absence of a will, the law provides a decedent with a default estate plan, which is referred to as intestacy.[65] Intestacy statutes invariably rely upon the structure of the decedent's surviving family to provide insights into the decedent's probable intent.[66] In particular, the law presumes that the decedent would prefer to benefit more closely related individuals over those who are more distantly related.[67] So, for example, if a decedent dies with a surviving spouse, the law typically directs the decedent's property to the spouse to the exclusion of others.[68] Similarly, if a decedent has no surviving spouse but surviving descendants, the law typically directs the decedent's property to the descendants to the exclusion of more remote relatives.[69]

Intestacy's reliance on the decedent's familial structure is driven by efficiency concerns.[70] Not only do the identities of the decedent's surviving relatives provide reliable information regarding how the decedent likely wanted their property divided, but the decedent's surviving relatives are also easily identifiable.[71] Of course, any given decedent might not prefer the default estate plan of intestacy, and reliance upon the structure of the decedent's surviving family might not accurately fulfill a particular decedent's actual intent. The law, however,

[65] *See* ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 65 (11th ed. 2021).

[66] *See id.* at 65-66.

[67] *See id.* at 68.

[68] *See, e.g.*, UNIF. PROB. CODE § 2-102 (UNIF. L. COMM'N 2019) (providing that decedent's children and parent share with a surviving spouse only in limited situations).

[69] *See, e.g.*, *id.* § 2-103(c) (providing that the decedent's surviving descendants take the entirety of the estate in the absence of a surviving spouse).

[70] *See* Estate of Britel, 186 Cal. Rptr. 3d 321, 329 (Cal. Ct. App. 2015) ("The purposes of the intestacy statutes are (1) to carry out the decedent's 'likely intent at the time of death' as to the distribution of his or her estate and (2) to do so in an efficient and expeditious manner."); Estate of Cox, 476 A.2d 367, 372 (Pa. Sup. Ct. 1984) ("[T]he state has a legitimate interest in assuring that the estate of a citizen, who dies without designating the beneficiaries of his property, is distributed in an orderly, accurate and efficient manner."); Emily S. Taylor Poppe, *Choice Building*, 63 ARIZ. L. REV. 103, 116-17 (2021) ("The primary goal [of intestacy] is to institute majoritarian defaults defined by probable intent, tempered by the need for efficient administration of intestate estates.").

[71] *See* Poppe, *supra* note 70, at 117 ("[I]ntestacy is characterized by bright-line tests and personalized based only on easily identified family structure . . . .").

tolerates inaccuracy in intestacy in part because reaching more accurate outcomes could be costly, as sometimes conflicting evidence would have to be collected and assessed.[72]

Even when the donor affirmatively exercises freedom of disposition, efficiency concerns influence how the donor's intent is identified. For example, the traditional law of testamentary construction includes the no reformation rule and the plain meaning rule.[73] Pursuant to the former, courts interpret the words of the testator's will and cannot rewrite them.[74] Pursuant to the latter, courts attribute the plain meaning to the will's words, and if they are unambiguous, courts cannot consider extrinsic evidence to aide them in their interpretive endeavor.[75] In tandem, these rules limit the type and amount of evidence that can assist courts in the interpretation of wills.[76] The words that testators include in their wills are the court's focus, and, in the absence of ambiguity, the objective meaning of the words control.[77]

[72] *See* Thomas E. Simmons, *A Chinese Inheritance*, 30 QUINNIPIAC PROB. L.J. 124, 128 (2017) ("The settlement of an estate under intestacy is intended to be predictable. With predictable, mathematical outcomes, estate administration should achieve savings in time and attorney's fees, as well as emotional cost savings for family members who avoid litigation."); *see also* Adam J. Hirsch, *Inheritance on the Fringes of Marriage*, 2018 U. ILL. L. REV. 235, 262 (2018) ("Rules of intestacy are mechanical — they do not yield to extrinsic evidence of contrary intent.").

[73] *See* Alexander A. Boni-Saenz, *Distributive Justice and Donative Intent*, 65 UCLA L. REV. 324, 337 (2018).

[74] *See* Sanderson v. Norcross, 136 N.E. 170, 172 (Mass. 1922) ("Courts have no power to reform wills. Hypothetical or imaginary mistakes of testators cannot be corrected. Omissions cannot be supplied. Language cannot be modified to meet unforeseen changes in conditions. The only means for ascertaining the intent of the testator are the words written and the acts done by him."); Sitkoff, *supra* note 5, at 651 ("Courts may not reform a will to correct a mistaken term to reflect what the testator intended the will to say.").

[75] *See* Lee-ford Tritt, *The Stranger-to-the-Marriage Doctrine: Judicial Construction Issues Post-Obergefell*, 2019 WIS. L. REV. 373, 380; Sitkoff, *supra* note 5, at 651.

[76] *See* SITKOFF & DUKEMINIER, *supra* note 65, at 334.

[77] *See* Clark v. Evans, 417 S.E.2d 856, 857 (S.C. 1992) ("A will must be read in the ordinary grammatical sense of the words employed, unless some obvious absurdity, repugnancy or inconsistency with the declared of the testator, as abstracted from the whole will, should follow from such construction."); *In re* Stephens' Will, 238 N.W. 900, 903 (Wis. 1931) (Fairchild, J., dissenting) ("[N]o rule of construction is more effective to discover the testator's intention than that which requires that words shall be given

By limiting the scope of admissible evidence regarding the decedent's intent, these rules are designed to both produce accurate outcomes and minimize administrative cost. With respect to accuracy, conventional testamentary construction rules treat a will's unambiguous language as the best evidence of the testator's intent.[78] Thus, less reliable, extrinsic evidence of intent is excluded so that the determination of the testator's intent is founded upon the best evidence.[79] In addition, a will's plain language is the most easily accessible evidence. By limiting the evidence of intent to the four corners of the will in the absence of ambiguity, conventional rules of testamentary construction minimize the administrative costs of gathering and assessing other types of evidence.[80]

In sum, nominal bequests must be evaluated within the context of the policy objectives of the law of succession. These include maximizing social welfare through broad freedom of disposition and facilitating freedom of disposition through efficient estate administration. The following Parts utilize this context to address some thorny questions regarding nominal bequests. First, do they contribute to the social goals of freedom of disposition by increasing the utility of donors and donees or by creating beneficial incentives? Second, are they the product of estate plans that produce negative externalities or that are influenced by moral hazards? Finally, do they generate administrative costs that perhaps render estate administration inefficient?

II. QUESTIONING THE BENEFITS OF NOMINAL BEQUESTS

Although freedom of disposition generally increases social utility, nominal bequests can be questioned regarding whether they generate the benefits that most bequests do. To be sure, some nominal bequests

their plain and ordinary meaning. The words used by the testator in this instance are final and comprehensive.").

[78] *See* SITKOFF & DUKEMINIER, *supra* note 65, at 334.

[79] *See* Lohr v. Viney, 497 N.W.2d 730, 735 (Wis. Ct. App. 1993) ("Because the language of the will is the best evidence of the testator's intent, we look to it first; if there is no ambiguity or inconsistency in the will's provisions, there is no need for further inquiry into the testator's intent.").

[80] *See* William Hubbard, Note, *Communicating Entitlements: Property and the Internet*, 22 YALE L. & POL'Y REV. 401, 422 (2004).

represent genuine acts of beneficence, and consequently further the law's social welfare goals. Consider, for example, *In re Moody's Will*,[81] which involved a will that provided: "I . . . request my Executor to pay to each of the signers, as witnesses, of this my last Will, the sum of Five Dollars each, as a token of appreciation."[82] The bequests were of de minimis sum; nothing suggested that they represented anything but true pecuniary gifts; and the court treated them as such. In this situation, the donor's utility was likely increased by the gratitude that he expressed toward the beneficiaries. Moreover, the beneficiaries' utilities likely were increased as well, not only by the small monetary gift but also by the acknowledgment they received. Thus, even de minimis bequests, can contribute to the law's social welfare objectives.[83]

Other cases, however, portray nominal bequests differently. Consider for example *Estate of Frinchaboy*,[84] in which the court stated that "a bequest of only $1 to a child of the testatrix is *never intended as a gift* from

[81] 154 A.2d 165 (Me. 1959).

[82] *Id.* at 166.

[83] Despite that the bequests in *Moody's Will* likely would have increased social welfare, the court invalidated them because the state's law at the time rendered beneficiaries incompetent to serve as attesting witnesses. *See id.* at 168.

[84] Estate of Frinchaboy, 238 P.2d 592 (Cal. Dist. Ct. App. 1951); *see In re* Johnson's Estate, 379 P.2d 824, 825 (Wyo. 1963) ("It is elementary and even axiomatic that a bequest of a nominal sum, often a dollar but sometimes more, to a child or descendant of a testator is for all practical purposes equivalent to complete disinheritance, and is treated by courts as such."). Other courts have also openly acknowledged that testators purport to give gifts when they intend to give nothing. *See, e.g.*, Appeal of Scully, 98 A. 350, 353 (Conn. 1916) ("The gift of $5 in an estate of the proportions of this signifies that it is a nominal bequest. . . . [I]n the case of an heir, it is a method of practically disinheriting . . . ."); *In re* Hartwig's Estate, 211 P.2d 399, 401 (Idaho 1949) ("The nominal gifts to eight of the children tend to show an intention to virtually disinherit such children."); Branscombe v. Jenks, 387 N.E.2d 215, 215 (Mass. Ct. App. 1979) ("[T]he will plainly indicates that the testator intended to disinherit his daughter by the bequest to her of a nominal sum."); Murphy v. Nett, 130 P. 451, 455 (Mont. 1913) ("As to the brothers and sisters who are mere nominal legatees, recipients of a sum established as a polite mode of disinheritance, it is a case where the law does not care for trifles."); *In re* Forde's Estate, 108 N.Y.S.2d 715, 716 (N.Y. Surr. Ct. 1951) ("The nominal bequests to three of the distributees would seem to indicate an intent to disinherit them . . . ."); Cowan v. Cowan, 6 A.2d 179, 181 (N.H. 1939) ("[T]he nominal bequest of one dollar was an employment of a customary method of disinheritance. It signified a purpose that the legatee was to have no share of the estate, the nominal bequest being given to indicate that the heir was in mind and was not to be an object of any bounty.").

the testatrix."[85] If the testator did not intend her unambiguous words to mean what they say, then what did she mean? The court answered that such a bequest "is merely another way of saying, 'I leave nothing to my daughter.'"[86] As *Moody's Will* illustrates, situations in which testators truly intend to give beneficiaries small gifts are not unimaginable.[87] However, when they purport to bequeath $1.00[88] or even $0.01,[89] testators' actual intent can be questioned.

Bequests of such sums are so small that many would consider them essentially to be nothing.[90] As one court explained, "[a]n insignificant bequest such as one dollar is tantamount *to no bequest at all*."[91] Of course, the line between gifts that are so small that they raise suspicion of being essentially nothing and those that are large enough to avoid suspicion is not bright.[92] By specifically identifying a gift of $1.00 as being "no bequest at all,"[93] the court quoted in the above passage suggests that

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[85] *Frinchaboy*, 238 P.2d at 594 (emphasis added).

[86] *Id.*; *see In re* Eckart's Estate, 348 N.E.2d 905, 907 (N.Y. 1976) ("If anything, the grant of a nominal bequest to a close relation is the more accepted or customary way of indicating an intent to disinherit.").

[87] *See, e.g.*, *In re* Moody's Will, 154 A.2d 165, 166 (Me. 1959) (involving a will in which the testator bequeathed $5.00 "as a token of appreciation" to the individuals who served as witnesses to the will).

[88] *See, e.g.*, Thomas v. Sands, 668 S.E.2d 731, 731 (Ga. 2008) (involving "a will in which he left one dollar to Appellant Melvin Thomas, Jr., which was his only son"); *In re* Benolken's Estate, 205 P.2d 1141, 1142 (Mont. 1949) (involving a will that provides: "I hereby give and bequeath unto each of my heirs-at-law not elsewhere mentioned or provided for, the sum of One Dollar ($1.00)").

[89] *See, e.g.*, Gurley v. Bushnell, 76 So. 324, 325 (Ala. 1917) (involving a will that provides: "To all my nieces and nephews, all of whom I remember by name, I give the sum of one cent each . . ."); Graham v. Graham & Norris, 1 S.W.2d 16, 16 (Ark. 1927) (involving a will that "expressly states that he gives his wife . . . 1 cent").

[90] *See* Gus G. Tamborello, *In Terrorem Clauses Are They Still Terrifying?*, 10 EST. PLAN. & CMTY. PROP. L.J. 63, 93 (2017) (describing a bequest of "the proverbial $1.00" as "next to nothing").

[91] Estate of Kaseroff, 131 Cal. Rptr. 284, 289 (Cal. Ct. App. 1976) (Jefferson, J., dissenting).

[92] *See* Adam J. Hirsch, *Incomplete Wills*, 111 MICH. L. REV. 1423, 1450 (2013) [hereinafter Hirsch, *Incomplete Wills*] ("To be sure, the distinction between a nominal and substantial bequest is one of degree, and where along the continuum of ascending bequests the implication of disappears remains vague.").

[93] *Kaseroff*, 131 Cal. Rptr. at 289.

$1.00 bequests are inherently suspect. Indeed, there is something telling about gifts of $1.00,[94] and such gifts are sometimes referred to as bequests of the "*proverbial* one dollar."[95] But while bequests of $1.00 raise obvious doubts regarding the testator's true intent, whether courts should view gifts of $10.00, $100.00, or $1,000.00 differently is unclear.

Nonetheless, regardless of where that line is drawn, some nominal bequests, like Stella's and that in *Frinchaboy*, simply feel different than the nominal bequests in *Moody's Will*. This Part argues that, while some nominal bequests produce the benefits that freedom of disposition is intended to achieve, others are of questionable utility. These bequests fall within one of two categories — (1) bequests induced by mistake of law, and (2) bequests motivated by spite.

A. Bequests Induced by Mistake

One situation in which the benefits of nominal bequests can be questioned is when, despite the will's unambiguous words, the testator does not intend to make a bequest at all. Consider that *Black's Law Dictionary* defines "nominal" as (1) "([o]f a price or amount) trifling, esp[escially] as compared to what would be expected;" or (2) "[e]xisting in name only."[96] Courts sometimes use the first definition and refer to bequests as nominal simply due to their size.[97] Rather than "nominal," these bequests are perhaps better classified as "de minimis,"[98] because, by making these bequests, testators truly intend to give beneficiaries substantive gifts. They may be trifling, but they exist in more than name. By contrast, as *Frinchaboy* illustrates, courts sometimes view a nominal

[94] Indeed, a de minimis general bequest that is not a whole dollar amount, like $1.00, $5.00, or $10.00, raises perplexing questions. *See* Jeffrey N. Pennell, *Individuated Determination of a Surviving Spouse's Elective Share*, 53 UC DAVIS L. REV. 2473, 2496-97 (2020) (questioning the motives of a testator who left $1.04 to her husband).

[95] SITKOFF & DUKEMINIER, *supra* note 65, at 576 (emphasis added).

[96] *Nominal*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[97] *See, e.g.*, Jensen v. Cunningham, 596 S.W.2d 266, 268-69 (Tex. Ct. Civ. App. 1980) (describing bequests of $1,000.00 as "nominal" in relation to a larger residuary bequest).

[98] *De Minimis*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining de minimis as either "[t]rifling; negligible" or "([o]f a fact or thing) so insignificant that a court may overlook it in deciding an issue or case").

bequest as no bequest at all. In accordance with *Black's* second definition, these bequests exist in name only.

Although courts have frequently observed that testators sometimes purport to give gifts that they do not truly intend to give, questions remain: Why do they do so? Why do testators disinherit heirs by nominally giving them gifts? One answer to these questions is that the practice of disinheritance by nominal bequest is founded upon a misconception of the law that has deep historical roots. William Blackstone, writing in the eighteenth century, suggested that this practice, which became referred to as "cutting off the heir with a shilling,"[99] originated in Roman law.[100] He explained:

> The Romans were . . . wont to set aside testaments as being . . . deficient in natural duty, if they disinherited or totally passed by (without assigning a true and sufficient reason) any of the children of the testator. But if the child had any legacy, though ever so small, it was proof that the testator had not lost his memory or reason, which otherwise the law presumed, but was then supposed to have acted thus for some substantial cause: and in such case no *querela inofficiosi testamenti* was allowed.[101]

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[99] THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS 93 (1937); *see* Stevenson's Ex'r v. Stevenson, 33 Pa. 469, 472 (1859); Hill v. Page, 36 S.W. 735, 741 (Tenn. Ct. Ch. App. 1895); Edward Jenks, *English Civil Law I*, 30 HARV. L. REV. 109, 119 (1916). A few reported American cases involve wills that expressly provide for nominal bequests of a shilling. *See, e.g.*, McCamant v. Nuckolls, 12 S.E. 160, 161-62 (Va. 1888) (involving a will that provides: "I further will and direct that if either of my said children shall attempt to break this will, or to defeat its provisions, that the one making such effort shall be cut off absolutely with a shilling"); Rickards v. Adams, 1 Del. 439, 441 (Del. Sup. Ct. 1834) ("It is not less apparent that the testator intended his daughter Unice Adams, the present petitioner, should in no event have any thing more than the shilling he bequeathed her.").

[100] *See* 2 WILLIAM BLACKSTONE, COMMENTARIES *502-03. Courts have approved of Blackstone's tracing the practice to Roman law. *See, e.g.*, *In re* Newlin's Estate, 58 A. 846, 849 (Pa. 1904) (quoting Blackstone approvingly).

[101] 2 WILLIAM BLACKSTONE, *supra* note 100, at *502-03.

What Blackstone refers to as *querela inofficiosi testamenti*, was an action under Roman law pursuant to which a testator's relatives could challenge the validity of a will because their exclusion was unjustified.[102]

This action was founded upon the idea the individuals had a duty to care and support their families after death.[103] Thus, if a testator excluded a close relative from a will, a court could question whether the testator had legitimate and worthy reason for doing so and could invalidate the will if it found that the testator's justifications were deficient.[104] However, if the testator provided for the relative, no matter how triflingly, the relative could not challenge the will by *querela inofficiosi testament*.[105] Romans who desired to disinherit relatives consequently made nominal bequests to circumvent the need to justify outright disinheritance.

[102] *See* Katherine Connell-Thouez, *The New Forced Heirship in Louisiana: Historical Perspectives, Comparative Law Analyses and Reflections Upon the Integration of New Structures into a Classical Civil Law System*, 43 LOY. L. REV. 1, 9 (1997); Ronald J. Scalise Jr., *Undue Influence and the Law of Wills: A Comparative Analysis*, 19 DUKE J. COMP. & INT'L L. 41, 82 (2008).

[103] *See* Alina-Monica Axente, *Familiy and Family Heritage in Roman Law*, 2021 INT'L CONF L., EUR. STUD. & INT'L RELS. 328, 333; Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 629 (1997).

[104] *See* Katherine Shaw Spaht, Kathryn Venturatos Lorio, Cynthia Picou, Cynthia Samuel & Frederic W. Swaim, Jr., *The New Forced Heirship Legislation: A Regrettable "Revolution,"* 50 LA. L. REV. 409, 485 (1990). Eventually, the permissible reasons for disinheritance were defined by law. *See id.* at 486; M. Kelly Lanning Turner, *Succession of Lauga: Amendments to Forced Heirship Article Violate Louisiana Constitution*, 68 TUL. L. REV. 1390, 1392 (1994). However, initially, whether the reason for disinheritance was justified was left to the discretion of the court. *See* Spaht et al., *supra* note 104, at 485. When testators disinherited close kin without sufficient reason, the law treated them as lacking the requisite capacity to execute a will. *See* Christoph G. Paulus, *Changes in the Power Structure Within the Family in the Late Roman Republic*, 70 CHI.-KENT L. REV. 1503, 1505 (1995); Spaht et al., *supra* note 104, at 485. *But see* Scalise, *supra* note 102, at 83 ("Marcian, quoted in the Digest, states that the querela inofficiosi testament is brought on grounds that the testator was of 'unsound mind,' but by that it is not meant that the testator was a lunatic or without capacity but merely that the 'will was correctly made without due regard for natural claim.'").

[105] *See* Scalise, *supra* note 102, at 82-83; Spaht et al., *supra* note 104, at 486; Turner, *supra* note 104, at 1391-92.

In contrast to the Roman law that Blackstone described, American law permits testators to disinherit anyone other than surviving spouses,[106] and it does not require that testators explain their reasons for doing so.[107] Importantly, American law does not require the testator to give beneficiaries de minimis sums to be free from a court's second-guessing, and it does not, in most instances, require that a testator even mention individuals in a will to disinherit them. Instead, the testator must simply give her property to other beneficiaries; if the testator disposes of their estate to others, then nothing is left for the disinherited to take.[108]

Despite that testators need not give nominal bequests to disinherit, the practice, which can now be described as cutting off the heir with a dollar,[109] persists.[110] Because the practice was unnecessary during Blackstone's time, he described it as a "groundless vulgar error."[111] Likewise, because it has no foundation in today's law, American courts have noted that such practice is unnecessary.[112] For instance, one court described it as "an illustration[, which] may almost be called pathetic[,]

[106] *See* Frances H. Foster, *Linking Support and Inheritance: A Model from China*, 1999 WIS. L. REV. 1199, 1217-18 ("In the United States, a testator can 'pauperize his helpless dependents' by will. Under the banner of freedom of testation, American inheritance law permits disinheritance of even the decedent's closest family dependents. Indeed, in most states today parent can disinherit minor, disabled, and unborn children without cause or remedy. U.S. inheritance law purports to protect one potential dependent — the decedent's surviving spouse . . . .").

[107] *See* Brown v. Mack, 56 N.Y.S.2d 910, 917 (N.Y. Sup. Ct. 1945) ("A testator may properly give the reasons for disinheriting the natural objects of his bounty[,] [t]hough such provisions are neither necessary nor dispositive . . . .").

[108] *See* SITKOFF & DUKEMINIER, *supra* note 65, at 92.

[109] *See* Steele v. McAteer, 66 S.E. 1045, 1046 (S.C. 1910); *see also* George W. Stumberg, *Testamentary Disposition and the Conflict of Law*, 34 TEX. L. REV. 28, 29 (1955).

[110] *See* Broomall v. Fiorentino Corvino, No. B294843, 2020 WL 2142016, at *17 (Cal. Ct. App. May 4, 2020) ("[T]here is no question that a bequest of $1.00 often has been used to signal a disinheritance."); Estate of Gordon, No. 165214, 2017 WL 11652642, at *6 (Pa. Ct. Com. Pl. Mar. 20, 2017) ("It is not uncommon for a testator to bequeath a nominal sum to an heir in order to disinherit that heir.").

[111] 2 BLACKSTONE, *supra* note 100, at *503.

[112] *See, e.g.*, St. Louis Union Tr. Co. v. Little, 10 S.W.2d 47, 53-54 (Mo. 1928) (referring to "the popular impression that a near relative must be mentioned and given a nominal sum in a will"); *In re* McCaffrey's Estate, 20 N.Y.S.2d 178, 188 (N.Y. Surr. Ct. 1940) (referring to "the mistaken popular notion that to disinherit certain heirs they must be mentioned in the will and given a nominal legacy").

of the persistency of popular error."[113] Although disinheritance by nominal bequest is historically rooted in a misconception of the law and is unnecessary, testators continue to make nominal bequests when they intend to disinherit, and they most commonly appear in relation to a few discreet wills doctrines and estate planning practices.

First, although American law does not protect most heirs, including the testator's children, from intentional disinheritance,[114] it does protect the testator's children from unintentional disinheritance through what are known as pretermitted heir statutes.[115] These statutes provide a testator's children a share of the testator's estate when circumstances suggests that their omission from a will was unintended.[116] Thus, a child who is born after the execution of a parent's will is entitled to a share of the testator's estate, despite that the will is silent as to that child.[117] The rationale of these statutes is that the testator's failure to update a will in light of the child's birth is not an expression of the testator's intent to disinherit the child but is the result of inattentiveness to the needs of estate planning after a major life event.[118] These statutes are rules of construction that are designed to achieve the testators' probable intent when circumstances suggest that their wills do not express their actual intent.[119]

Because pretermitted heir statutes protect against unintentional disinheritance, they can be overcome by evidence that establishes that

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[113] *In re* Emernecker's Estate 67 A. 701, 702 (Pa. 1907); *see* Walter Kennedy, *Mistakes to Avoid in Drafting Wills*, 1 ALA. LAW. 137, 140 (1940) ("A popular fallacy that frequently appears in wills, is a bequest of one cent or one dollar to some relative in the mistaken belief that a nominal bequest is necessary to prevent a contest by such beneficiary.").

[114] *See* Foster, *supra* note 106, at 1217-18.

[115] *See* Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223, 253-54 (1991) (explaining that the purpose of the UPC's "omitted-spouse provision" is "to protect the surviving spouse against unintentional disinheritance" and explaining that "[n]early, all states and the UPC have a similar type of statute for children, called a 'pretermitted-heir' statute").

[116] *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 9.6 (AM. L. INST. 2003).

[117] *See id.*

[118] *See id.*

[119] *See id.*

the testator truly intended to disinherit an heir.[120] A testator can render these statutes inapplicable by expressly stating that the will disinherits future children,[121] or the testator can achieve the same result by benefitting these future heirs through the will,[122] including in some states by bequeathing them a nominal sum.[123] Thus, some testators make nominal bequests to afterborn children that they intend to disinherit as way to avoid application of pretermitted heir statutes.

Second, in addition to communicating an intent that beneficiaries should receive nothing through a will, nominal bequests sometime also communicate the intent that the beneficiaries receive nothing from any portion of testators' estates that pass via intestacy. Under traditional law, for testators to prevent heirs from benefitting through intestacy, they must dispose of the entirety of their estates through their wills, thereby avoiding intestacy altogether.[124] Modern law, however, recognizes the ability to create what are known as "negative wills."[125] Instead of affirmatively disposing of property, negative wills include provisions that restrict named individuals from taking from decedents' estates.[126] Thus, even if a will does not entirely dispose of the testator's

[120] *See id.* § 9.6 cmt. i ("[S]uch statutes yield to a contrary intent.").

[121] *See* SITKOFF & DUKEMINIER, *supra* note 65, at 593-94.

[122] *See id.* at 593.

[123] *See In re* Lindsay's Estate, 168 P. 113, 113 (Cal. 1917) (finding that the pretermitted heir statute was overridden by a will that state: "[s]hould any other person or persons present themselves claiming to be heirs of mine, I give and bequeath to such person or persons the sum of five dollars ($5.00)"); *In re* Estate of James, 1999 OK 7, ¶ 20, 472 P.3d 205, 211 (Okla. 2020) (explaining that the pretermitted heir statute by "provid[ing] only a nominal amount for the child who claims to be pretermitted"); Roberta Rosenthal Kwall & Anthony J. Aiello, *The Superwill Debate: Opening the Pandora's Box?*, 62 TEMP. L. REV. 277, 296 n.81 (1989) ("The main controversies in this respect arise when a will contains a mention of or nominal provision for the testator's 'heirs,' 'children,' or the 'contestants of this will,' and the children argue that such a group designation is not sufficient to prevent them from taking an intestate share under the pertinent state pretermitted heir statute. The results in such cases vary.").

[124] *See* J. Andrew Heaton, Comment, *The Intestate Claims of Heirs Excluded by Will: Should "Negative Wills" Be Enforced?*, 52 U. CHI. L. REV. 177, 179-83 (1985); SITKOFF & DUKEMINIER, *supra* note 65, at 92.

[125] *See* UNIF. PROB. CODE § 2-101 cmt. (UNIF. L. COMM'N 2019); Hirsch, *Incomplete Wills*, *supra* note 92, at 1435.

[126] *See* PROB. § 2-101(b).

property, a negative statement in the will can prevent heirs from taking through intestacy.

Once the law permitted wills to affect intestate distribution through negative statements, questions arose regarding what testators must say to create negative wills.[127] The Uniform Probate Code (UPC) suggests that, to disinherit heirs through negative statement, wills must "*expressly* exclude or limit the right of an individual or class to succeed to property of the decedent passing by intestate succession."[128] The UPC's official comment explains that "[w]hether or not in an individual case the decedent's will has excluded or limited the right of an individual or class to take a share of the decedent's intestate estate is a question of construction."[129] As such, wills need not include any specific language, but they must sufficiently express testators' intent to exclude heirs from intestacy.[130]

Whether nominal bequests, without additional evidence of intent, expressly exclude beneficiaries from taking via intestacy is an unsettled question. The UPC's official commentary provides some guidance when it suggests that a "rather clear case would be one in which the will states that an individual is to receive only a nominal devise, such as 'I devise $50.00 to my brother, Hector, and no more.'"[131] Courts have grappled with whether a nominal bequest, alone, is sufficient to alter intestate distribution, or whether the "and no more" language or words of similar import are necessary.[132] But regardless of whether particular courts require more than nominal bequests, the intent to create a negative will is one explanation for testators' decision to make them.[133]

Third, in addition to conveying the intent to intentionally disinherit under any circumstance, nominal bequests sometimes disinherit beneficiaries in some scenarios but not others. In particular, testators

[127] *See* Hirsch, *Incomplete Wills*, *supra* note 92, at 1434-46.

[128] PROB. § 2-101 (emphasis added); *see* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.7 (AM. L. INST. 2003).

[129] PROB. § 2-101 cmt.; *see* RESTATEMENT (THIRD) OF PROP. § 2.7 cmt. B (AM. L. INST. 2003).

[130] *See* Hirsch, *Incomplete Wills*, *supra* note 92, at 1448.

[131] PROB. § 2-101 cmt.

[132] *See* Hirsch, *Incomplete Wills*, *supra* note 92, at 1449.

[133] *See id.* at 1450.

occasionally employ nominal bequests as part of no-contest clauses.[134] These provisions are designed to discourage challenges to will by reducing the amount that challengers receive.[135] If a will includes a no-contest clause, potential challengers have a choice — either contest the will and risk a reduction of their gifts or remain silent and be content with whatever the testator provided them in the will.[136]

The extent to which a challenger's benefit is reduced by a no-contest clause is within the testator's discretion but is typically a complete elimination or a reduction to a de minimis sum.[137] For example, in a recent case before the Supreme Court of Wyoming, a will included the following provision: "Should any person named herein challenge this Will or contest any provision hereof, to each such person pursuing such challenge or contest I bequeath the sum of One Dollar ($1.00) in lieu of any bequest or devise otherwise provided for such person . . . ."[138] When testators include de minimis gifts, like this $1.00 bequest, within a no-contest clause, such gifts clearly are gifts in name only. Not only are these gifts of de minimis sums, but their context within no-contest clauses makes clear that their beneficiaries are effectively disinherited.

[134] *See* Estate of Leonetti, 171 Cal. Rptr. 303, 306 (Cal. Ct. App. 1981); *In re* Estate of Primiani, No. 35845-3-III, 2019 WL 2304057, at *1 (Wash. Ct. App. May 30, 2019); Alan R. Gilbert, Annotation, *Partial Invalidity of Will: May Parts of Will be Upheld Notwithstanding Failure of Other Parts for Lack of Testamentary Mental Capacity or Undue Influence*, 64 A.L.R.3d 261 § 6 n.95 (1975) ("A no-contest clause, often referred to as an 'in terrorem' clause, generally takes the form of a nominal bequest to any person (sometimes any 'beneficiary') who contests the will, or else provides that any such person (or beneficiary) should receive nothing.").

[135] *See* Donegan v. Wade, 70 Ala. 501, 505 (1881) (explaining that such a clause is "designed to prevent the inauguration or prosecution of a suit or contest in the courts, commenced with the view of defeating the will of the testator"); Karen J. Sneddon, *Voice, Strength, and No-Contest Clauses*, 2019 WIS. L. REV. 239, 244-46; Tamborello, *supra* note 90, at 2.

[136] *See* SITKOFF & DUKEMINIER, *supra* note 65, at 311.

[137] *See* Hallman v. Bosswick, 899 N.Y.S.2d 233, 234 (N.Y. Ct. App. 2010) ("[T]he applicability of the in terrorem clause is a matter of the decedent's intent" (citation omitted)); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.5 cmt. b (AM. L. INST. 2003) ("The starting point for analyzing the validity of no-contest clauses is the policy in favor of the freedom of disposition.").

[138] *In re* Estate of Britain, 2018 WY 101, ¶ 4, 425 P.3d 978, 980 (Wyo. 2018).

Yet, testators need not make nominal bequests as part of no-contest clauses.[139]

Regardless of the context in which they are used, nominal bequests that are induced by mistake of law are not beneficial and are therefore not justified by the policy objective of freedom of disposition. To begin with, although genuine exercises of freedom of disposition increase donor utility,[140] nominal bequests that are induced by mistake are not exercises of freedom of disposition. Testators include these nominal bequests in their wills not because they want to, but because they think they must. Furthermore, nominal bequests do not maximize the donee's utility. True, the donee receives the de minimis benefit, but the donor's allocation of that benefit was not based upon an informed decision. Again, it was based upon a perceived compulsion of the law. Thus, while freedom of disposition permits the donor to engage in intelligent estate planning that maximizes donee utility,[141] nominal bequests that are induced by mistake are not the product of freedom of disposition. Finally, nominal bequests do not contribute to any beneficial incentive. The ability to control the disposition of property upon death incentivizes the generation of wealth,[142] but because nominal bequests are erroneous formalities they do not incentivize the donor to do anything during life. In short, because some nominal bequests are not genuine exercises of freedom of disposition, they do not contribute to the maximization of social utility in the way that other bequest do.

B. Bequests Motivated by Spite

In addition to disposing of property upon death, wills serve an expressive function.[143] Most fundamentally, the act of affirmatively dividing one's property among friends and family expresses something

[139] *See* State *ex rel.* Bank of Am. N.A. v. Kanatzar, 413 S.W.3d 22, 24 n.2 (Mo. Ct. App. 2013) ("An in terrorem clause in a trust or will, is a clause which provides for the forfeiture of some or all of the benefits by any beneficiary who brings a context, lawsuit or legal challenge to the terms, provision or administration of the trust or will.").

[140] *See supra* notes 28–31 and accompanying text.

[141] *See supra* notes 32–35 and accompanying text.

[142] *See supra* notes 36–37 and accompanying text.

[143] *See* SITKOFF & DUKEMINIER, *supra* note 65, at 146.

about the testator's relationships with those individuals.[144] Consider again the will of Stella Abbott.[145] If Stella had died without a will, her estate would have been distributed to her heirs according to the default estate plan of intestacy.[146] Intestacy statutes limit the decedent's heirs to family relations.[147] Friends and other nonrelatives are not heirs and, consequently, do not take from a decedent's estate in the absence of a will.[148] Because Stella had no surviving spouse and five surviving children, each of her five children would have received a one-fifth share of her intestate estate,[149] which, because it consisted of $87,277.89,[150] would entitle each child to $17,455.58.

Instead of relying upon this default estate plan, Stella affirmatively exercised freedom of disposition by executing a will. As described previously, Stella's will included five general bequests.[151] To each of her four daughters, the will bequeathed $1.00, and to her friend, Jenenine, it bequeathed $1,000.00.[152] Stella's will also included a residuary bequest

[144] *See In re* Frederick's Estate, 246 N.Y.S.2d 320, 322 (N.Y. Surr. Ct. 1964) ("Normally the size of a bequest in relation to other bequests is some measure of the testator's affection."); David Horton, *Testation and Speech*, 101 GEO. L.J. 61, 85 (2012) ("Testators and settlors also communicate by dividing their property. Although they memorialize this decision in writing, its true expressive impact comes not from the actual text of the document but from what it implies.").

[145] *See supra* notes 1–8 and accompanying text.

[146] *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS §§ 2.1–.4 (AM. L. INST. 2003); SITKOFF & DUKEMINIER, *supra* note 65, at 67-68.

[147] *See* SITKOFF & DUKEMINIER, *supra* note 65, at 66 ("American law generally favors a decedent's spouse, then descendants, then parent, and then collateral and more remote kindred.").

[148] *See* Estate of Joseph, 949 P.2d 472, 478 (Cal. 1998) ("[A] friend . . . is not an heir."); Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 240-41 (2001) ("The family paradigm prefers so-called 'laughing heirs,' relatives so distant that they 'laugh all the way to the bank rather than grieve' for the decedent, over the most beloved or needy friend or companion.").

[149] *See* OHIO REV. CODE ANN. § 2105.06(A) (2023).

[150] This value represents the net probate estate after the deduction of debts, taxes, and other expenses. *See* Fiduciary's Account, *supra* note 3, at 2.

[151] *See supra* notes 1–8 and accompanying text.

[152] Last Will and Testament of Stella Abbott, *supra* note 2, at 1-2.

of the remainder of her estate,[153] which went to her son, John,[154] and which amounted to $86,273.89.[155] Thus, it radically altered her default estate plan. It increased her son's benefit from $17,455.57 to $86,273.89,[156] and it increased Jenenine's share from $0.00 to $1,000.00.[157] By contrast, Stella's will decreased each of her daughters benefit from $17,455.58 to $1.00.[158]

Stella's division of her estate and the substantial changes she made to her default estate plan is expressive. She valued her friendship with Jenenine, and she clearly favored her son over her four daughters. This expressiveness of Stella's will would be apparent if, instead of $1.00, Stella expressly gave her daughters nothing, or indeed failed to mention them at all. Thus, without more insight into Stella's motivations, her bequests to her daughters might have been induced by mistake of law. However, for various reasons, these bequests likely were not but were instead motivated by spite.

To begin with, Ohio, the law of which governed Stella's will, does extend pretermitted heir protection to children who are alive at the time of will execution.[159] Thus, because all of her daughters were alive at the time she executed her will, Stella likely was not concerned with overriding a pretermitted heir statute. Likewise, Stella likely was not concerned with negatively disinheriting her daughters, as the bequests were not needed to achieve this result because her will completely

[153] "A residuary devise . . . conveys that portion of the testator's estate not otherwise effectively devised by other parts of the will, such as a devise to *A* of 'all the rest, residue, and remainder of my property and estate.'" SITKOFF & DUKEMINIER, *supra* note 65, at 383.

[154] Last Will and Testament of Stella Abbott, *supra* note 2, at 2.

[155] Fiduciary's Account, *supra* note 3, at 4.

[156] Last Will and Testament of Stella Abbott, *supra* note 2, at 2.

[157] *Id. See generally* Shelly Kreiczer-Levy, *Big Data and the Modern Family*, 2019 WIS. L. REV. 349, 351 ("Friends, godchildren, children of friends or neighbors are never intestate heirs. . . . To [this] problem[], a skeptic will simply reply that decedents can execute a will, stipulating their desired distribution of the estate and creating a personalized list of preferred beneficiaries."); Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 205 n.65 (2007) ("Friends can execute wills leaving property to each other, but in the absence of a validly executed will, friends are not entitled to any part of their deceased friends' estate.").

[158] *See* Last Will and Testament of Stella Abbott, *supra* note 2, at 4.

[159] *See* OHIO REV. CODE ANN. § 2107.34 (2023) (applying to situations in which, "after making a will, a testator has a child born alive [or] adopts a child").

disposed of her estate.[160] Consequently, none of her property passed via intestacy. Finally, Stella's will did not include a no-contest clause. Therefore, none of the common scenarios in which nominal bequests are deployed in contemporary estate planning were present in Stella's will.

So, the question remains — why did Stella bequeath $1.00 to each of her four daughters? In short, she did so to further express her displeasure towards her daughters. In addition to the relative distribution of wealth among similarly situated beneficiaries, the mere size of a bequest can be expressive. When the bequeathed amount is de minimis, the message might be clear.[161] As one practice treatise explains, "the nominal bequest is a slap in the face that is worse than nothing."[162] Beyond simply bequeathing de minimis sums, testators can more explicitly communicate their spite. As Professor Adam Hirsch observes, "[i]n some instances, wills including nominal bequests have gone on to spell out the testator's hostility toward the nominal beneficiaries in no uncertain terms, and the formula itself seems almost to breathe resentment — adding insult to penury."[163]

Examples of spiteful language accompanying de minimis bequests are plentiful.[164] Perhaps the most notorious provides:[165]

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[160] *See* Last Will and Testament of Stella Abbott, *supra* note 2, at 2.

[161] *See, e.g.*, *In re* Estate of Williams, 787 N.Y.S.2d 444, 446 (N.Y. App. Div. 2004) ("The attorney had known and represented decedent for several years and testified that decedent discussed his wishes concerning the will — including his intentions with respect to his children — directly with him. Indeed, after he sent an initial draft of the will to decedent, decedent expressed his dissatisfaction with it because it left nothing to his children, while it was his intention to leave them each a dollar. The attorney expressed his opinion to decedent that such a bequest was insulting and decedent ultimately agreed to leave the children $100 each.").

[162] Robert S. Hunter, *The Right to Disinherit Heirs*, 19 Ill. Prac. Series (West) § 178:10, 19 ILPRAC § 178:10 (2023); *see also General Clause*, 3 Mich. Legal Forms (West) § 4:138, MI LF § 4:138 (2023) ("[I]t is . . . recommended that the use of nominal bequests, such as one dollar, be strongly discouraged. Not only are the bequests unnecessary, but they are insulting to the heir . . . .").

[163] Hirsch, *Incomplete Wills*, *supra* note 92, at 1450; *see also* John Marshall Gest, *Some Jolly Testators*, 8 TEMP. L.Q. 297, 310 (1934).

[164] *See* Elmer M. Million, *Humor in or of Wills*, 11 VAND. L. REV. 737, 741-43 (1958).

[165] This example has been excerpted numerous times. *See* Lloyd Andrew Baron, Note, *When Testators Get Testy, They May Be Liable for Libel*, 1 CONN. PROB. L.J. 255, 266 (1986)

> [B]efore anything else is done fifty cents be paid to my son-in-law to enable him to buy for himself a good stout rope with which to hang himself, and thus rid mankind of one of the most infamous scoundrels that ever roamed this broad land or dwelt outside of a penitentiary.[166]

Although her will did not contain such clearly hostile language, Stella's spite likely explains her de minimis bequests.

In addition to the nominal sum of $1.00, Stella's will bequeaths her "blessing" to each of her four daughters.[167] While such language could be interpreted as expressing Stella's genuine gratitude toward her daughters, such interpretation seems erroneous. To begin with, coupling the platitude of her blessing with a bequest of $1.00 seems disingenuous without further explanation. Moreover, greater suspicion regarding Stella's sincerity is warranted, given that she did not include such language in the $1,000.00 general bequest to her friend, Jenenine, or in the residuary bequest to her son.[168] Stella's bequest of her blessings to her daughters therefore seems likely to be made sarcastically or even vindictively.

More obviously, Stella appended not only her "blessing" to the $1.00 bequest to her daughter, Patricia, but also "the return of the photographs she gave my former husband to use in my divorce action."[169] More so than the somewhat ambiguous bequest of her "blessing," this language clearly evinces Stella's animosity toward at least one of her daughters for siding with Stella's ex-spouse in their divorce proceedings. Within this context, Stella's bequests to her daughters are unmistakably spiteful in nature.

(quoting the example); Leona M. Hudak, *The Sleeping Tort: Testamentary Libel*, 27 MERCER L. REV. 1147, 1148 (1976) (same); Judith G. McMullen, *Keeping Peace in the Family While You Are Resting in Peace: Making Sense of and Preventing Will Contests*, 8 MARQ. ELDER'S ADVISOR 61, 86 (2006) (same); Karen J. Sneddon, *Speaking for the Dead: Voice in Last Wills and Testaments*, 85 ST. JOHN'S L. REV. 683, 744 n.305 (2011) (same); Paul T. Whitcombe, *Defamation by Will: Theories and Liabilities*, 27 J. MARSHALL L. REV. 749, 751 n.13 (1994) (same); Horton, *supra* note 144, at 81 (same); Million, *supra* 164, at 742 (same).

166 Gest, *supra* note 163, at 311.

167 Last Will and Testament of Stella Abbott, *supra* note 2, at 4.

168 *See id.*

169 *Id.*

Like nominal bequests that are induced by mistake of law, the benefits of spiteful bequests are questionable. To begin with, because spiteful bequests are typically of de minimis sum, they do not incentivize productivity and saving. The donor has no reason to increase their wealth during life to functionally disinherit the beneficiary at death. Furthermore, the donee likely reaps no utility and perhaps disutility from a spiteful bequest. While the beneficiary is entitled to a de minimis sum, the donor did not allocate that sum to the beneficiary to increase the beneficiary's utility. In fact, the donor made the bequest in order to do the opposite — to make the sting of being disinherited that much sharper.

In a way, nominal bequests that are motivated by spite are akin to bequests that are conditioned upon unreasonable restraints of marriage. Like a gift that punitively interferes with the life of the beneficiary, a spiteful bequest is intended by the testator to confer a real property right to the beneficiary but is not intended to solely be beneficial. Moreover, nominal bequests could be viewed as more punitive than conditional bequests that interfere with marital autonomy. Therefore, the latter might at least confer a substantial pecuniary benefit upon the beneficiary. Thus, while the personal intrusion of marital restraints is likely a greater cost than that which accompanies a nominal bequest, the benefit is also likely greater. Again, with a nominal bequest, the testator's aim is to functionally disinherit the beneficiary, and the testator uses a nominal bequest to add insult to that disinheritance.

In short, nominal bequests that are motivated by spite are not beneficial in nature, and what, if any, pecuniary benefit they confer is offset by the costs borne by the beneficiary who endures their insult. Moreover, the punitive nature of nominal bequests is particularly problematic because the testator's decision-making suffers from a moral hazard. Because the testator will be dead at the time the beneficiary suffers a nominal bequest's insult, they are shielded from the consequences of their actions.[170]

Nonetheless, unlike nominal bequests that are induced by mistake, spiteful bequests do increase the donor's utility, as the donor reaps pleasure from giving the donee worse than nothing. While the donee's

[170] *See supra* notes 55–57 and accompanying text.

utility might decrease from receiving a spiteful bequest, the donor's utility is increased by the trivial but real pecuniary gift. In this sense, spiteful bequests are more than gifts in name only; they are genuine gifts. However, just because the donor of a spiteful bequest truly intended to transfer a property interest to the donee does not mean that the bequest is socially beneficial. Indeed, the law grants freedom of disposition and states fund the probate system, not so that donors can maliciously inflict harms, but so that they can intelligently bestow benefits. Even if nominal bequests that are motivated by spite increase the donor's utility more than they decrease the donee's, the law can rightly prevent the donor from utilizing the publicly funded probate system for malevolent purposes. Thus, nominal bequests that are motivated by spite do not produce the benefits that freedom of disposition and the state's facilitation of that freedom are intended to generate.

III. IDENTIFYING THE COSTS OF NOMINAL BEQUESTS

The wastefulness of nominal bequests depends both upon their benefits and their costs. Like all bequests, nominal bequests have administrative costs. However, due both to their de minimis size and nonbeneficent motivations, these costs are especially problematic. As the Supreme Court of Pennsylvania once observed, "[t]he notion that to disinherit the heir he must be 'cut off with a shilling' . . . started more than 300 years ago, never was the law either in England or Pennsylvania, and yet survives with such potency as to lead to results apparently as unjust as they were unintended."[171] Although the unintended and potentially problematic consequences to which the court refers are numerous and varied, some of the administrative issues that arise can be ordered into three categories — (1) issues related to who has standing to participate in probate proceedings, (2) issues that arise when beneficiaries are dead at the time of probate, and (3) issues that occur when bequests go unclaimed.

[171] *In re* Emernecker's Estate, 67 A. 701, 701 (Pa. 1907).

A. Probate Standing

The first type of administrative complication of nominal bequests relates to who has standing to participate in the probate process. A will's validity can be challenged for various reasons, such as the testator's lack of capacity or wrongdoing like undue influence or fraud.[172] Likewise, during the administration of a decedent's estate, claims can be made against the estate's executor for breach of fiduciary duties.[173] However, only those who have probate standing can institute these challenges.[174]

Most states have codified probate standing requirements that are modeled after the UPC's standing provision.[175] The UPC uses the term "interested person" to refer to those who have the right to participate in the probate process, and it defines this term to include "heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against . . . the estate of the decedent."[176] Although this provision has provided a common starting point for probate standing analysis in most jurisdictions, courts have not uniformly interpreted it.[177]

Some courts have interpreted the statute as identifying certain classes of individuals that always have standing to participate in the probate process.[178] In these jurisdictions, the decedent's "heirs, devisees, children, spouses, creditors, [and] beneficiaries" have standing, regardless of whether they have a "property right" in the decedent's estate.[179] From this perspective, a decedent's children can always

[172] *See* Sitkoff, *supra* note 5, at 649-50.

[173] *See* UNIF. PROB. CODE § 3-703 (UNIF. L. COMM'N 2019).

[174] *See generally* David Horton, *Probate Standing*, 122 MICH. L. REV. 1 (2024) (exploring the issue of probate standing in depth).

[175] *See id.* at 20 (reporting that "[t]wenty-six states have adopted [the UPC] provision or language much like it").

[176] PROB. § 1-201(23).

[177] *See* Horton, *supra* note 174, at 21-23.

[178] *See* Estate of Daniels, 575 S.W.3d 841, 846 (Tex. App. 2019) ("[I]f one is not an heir, devisee, spouse, or creditor, then one must have a property right in or a claim against the estate to be an interested person. However, an interest an interested person does not have to be both '(1) an heir, devisee, spouse, or creditor and (2) a person with a property right in or claim against the estate.'").

[179] *See* Estate of Schlenker, 808 N.E.2d 995, 1000 (Ill. 2004) ("Under the plain and unambiguous language of the Probate Act, one's status as an heir is sufficient, in itself,

challenge their parent's will, even when the will itself gives them nothing and they would receive nothing if the will were invalid because all of the decedent's property would go to the decedent's spouse in the absence of a will.

By contrast, other courts have interpreted the same statutory language as requiring anyone with probate standing to have a "property right in or claim against . . . the estate of the decedent,"[180] regardless of whether the individual is an heir, devisee, child, spouse, creditor, or beneficiary of the decedent. In these jurisdictions, the children described in the preceding paragraph would lack probate standing because under no scenario would they benefit from their parent's estate. If the will is valid, they receive nothing; if the will is invalid, they also receive nothing. When the decedent's children or anyone else lack a financial stake in probate proceedings, they likewise lack standing to participate in those proceedings.[181]

Regardless of which of these two interpretations a given jurisdiction adopts, problems can arise within probate standing analysis when nominal bequests are involved. For instance, consider that the class of interested persons includes devisees.[182] A devisee is an interested party because such individual was named in the testator's will. Indeed, "devisee" itself is a defined term, which "means a person designated in a will to receive a devise."[183] "Devise" is in turn defined as a "testamentary disposition of real or personal property."[184] A sum of

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to confer standing to contest a will's validity. . . . What you stand to receive under the challenged will or any prior wills is irrelevant.").

[180] *See In re* Estate of Pawlik, 845 N.W.2d 249, 252 (Minn. Ct. App. 2014) ("The grammatical structure of the statutory provision and the comprehensive applicability of the qualifying phrase compel us to conclude that the qualifying phrase 'having a property right in or claim against the estate of a decedent' modifies all nouns in the series.").

[181] *See* Price v. Lotlikar, 397 P.3d 54, 57 (Or. Ct. App. 2017) ("Viewing the definition of 'interested person' in its broader statutory and historical context, we are persuaded that the legislature intended 'interested person' to include only persons — including heirs, devisees, children, spouses, creditors, and others — who have a claim or property right against the estate that may be affected by the proceeding.").

[182] UNIF. PROB. CODE § 1-201(23) (UNIF. L. COMM'N 2019).

[183] *Id.* § 1-201(11).

[184] *Id.* § 1-201(10).

money, no matter how little, is personal property,[185] and consequently, a recipient of a nominal bequest would seem to fit within the definition of devisee and, therefore, interested person.

Devisees, as interested persons, can intervene in the administration of the decedent's estate in various ways, including by requesting continuous judicial supervision of the executor,[186] suing the executor for breach of fiduciary duties,[187] and petitioning for removal of the executor.[188] Recipients of nominal bequests, who perhaps view their gifts as slights, might use their status as devisees to disrupt estate administration by exercising these rights. This scenario cannot be what the testator intended, and it comes with the costs of expense and delay of navigating probate procedures that otherwise would not have been necessary. These costs not only deplete estate resources, which undermines the benefits of intelligent estate planning that freedom of disposition permits,[189] but also consumes state resources, which fund the probate system's infrastructure.[190]

A different scenario is perhaps more problematic. Consider a situation in which the testator executes a will that disinherits their children by leaving them each a bequest of one dollar. Later, the testator executes a new will, which revokes the prior will. This new will also disinherits their children but does so by expressly bequeathing them nothing, rather than by nominal bequests. The testator then dies. Because the children stand to benefit, albeit by one dollar, from the invalidity of the second will, they have standing to institute a will contest.[191] In a jurisdiction that does not give children probate standing in all cases, this scenario could have been avoided if the testator never made the nominal bequests.

[185] *See* Walls v. Walls, 117 So. 670, 672 (Ala. 1928) ("Money is personal property, of course . . . .").

[186] *See* PROB. § 3-502.

[187] *See id.* § 3-703.

[188] *See id.* § 3-611(a).

[189] *See supra* notes 32–35 and accompanying text.

[190] *See supra* notes 15–20 and accompanying text.

[191] This scenario is based upon the facts of *Danforth v. Danforth*, 663 S.W.2d 299 (Mo. Ct. App. 1983). *See* Horton, *supra* note 174, at 43 n.319 (describing Danforth as "implying that a beneficiary who received $1 under an earlier will was 'interested' in contesting a will that left them nothing").

Like the previous scenario, this cannot be a result that the testator intended by making the bequests. In this hypothetical, the testator disinherited the child in two consecutively executed wills; the testator could not have wanted the child to be capable of disrupting their clearly established estate plan. Even if the disinherited child's will contest is unsuccessful, there are costs associated with defending the claim that could lessen the benefit that goes to the testator's intended beneficiaries. Again, this outcome undermines the intelligent estate planning rationale of freedom of disposition and depletes judicial resources on a frivolous proceeding.[192] The risk of frivolous will contests is not trivial. Wills have long been notorious for inviting disputes.[193] Moreover, nominal beneficiaries may be a particularly aggrieved and therefore an especially litigious subset of potential will contestants, given that nominal bequests have the practical effect of disinheriting the beneficiaries and may express the testator's ill will toward the beneficiary.[194]

Recognizing the problematic consequences associated with nominal bequests and probate standing, some courts have sought to avoid them.[195] Consider *Estate of Gordon*, which involved two wills executed by Hollis Gordon.[196] Gordon's first will bequeathed "only the amount of $5.00, and nothing else" to three of his ten children, and bequeathed the residue of his estate to his other seven children.[197] His second will bequeathed nothing to the three children who were to receive $5.00 in

[192] *See supra* notes 189–190 and accompanying text.

[193] *See* Leon Jaworski, *The Will Contest*, 10 BAYLOR L. REV. 87, 88 (1958) ("It has been said, and I think accurately, that will is more apt to be the subject of litigation than any other legal instrument.").

[194] *See* Horton, *supra* note 174, at 37 ("[T]here are reasons to be skeptical of litigants who have not suffered demonstrable harm. Some of them apparently want to grind axes and settle scores. Injury-free lawsuits typically arise out of vicious family quarrels, which suggests that their goal is to conscript the legal system into resolving grudges.").

[195] *See, e.g.*, Jolley v. Henderson, 154 S.W.3d 538, 543 (Tenn. Ct. App. 2004) (finding that a $10.00 bequest in a prior will was insufficient to confer standing to challenge a subsequent will); Newman v. Newman, 766 So. 2d 1091, 1093-94 (Fla. Dist. Ct. App. 2000) (finding that a $1.00 bequest in a prior will was insufficient to confer standing to challenge a subsequent will).

[196] Estate of Gordon, No. 165214, 2017 WL 11652642 (Pa. Ct. Com. Pl. Mar. 20, 2017).

[197] *Id.* at *1.

his previous will, and it bequeathed his residuary estate to the seven other children and three grandchildren.[198] When Gordon died, the three children who were disinherited by his second will challenged the will by arguing that Gordon lacked testamentary capacity and that the will was procured by undue influence and duress.[199]

The executor of Gordon's estate objected to the plaintiff's claims for lack of standing, arguing that the three children were effectively disinherited under both the first and second will, and therefore they had nothing to gain by bringing the contest to invalidate the second will.[200] The court agreed; it explained:

> While Petitioners arguably have *some* interest in the [first will] because they inherit $5.00 each . . . , in order for that to confer standing on them, it must be a substantial interest. We agree with Respondent's assertion . . . that the $5.00 bequest in the [first will] is not sufficiently *substantial* to confer standing.[201]

From the court's perspective, a financial stake in the outcome of the dispute is insufficient to confer probate standing; instead, a financial stake of a sufficient magnitude is necessary.

The outcome seems reasonable from a policy perspective. Gordon clearly intended to disinherit three of his children, and he could not have intended their status as disinherited heirs to permit them to disrupt the administration of his estate based upon what the court described as "threadbare allegations."[202] Even if such allegations would not ultimately invalidate Gordon's will, they could drain estate resources, as the personal representative defends against them,[203] and they produce externalities that are borne by the state, which provides the forum to resolve these disputes.[204] Given these concerns, recognition of probate

[198] *Id.*

[199] *See id.* at *1 n.2.

[200] *Id.* at *2.

[201] *Id.* at *6 (emphasis added); *see also In re* Estate of Spivey, No. 01A01-9407-CH-00309, 1994 WL 697884, at *2 n.2 (Tenn. Ct. App. Dec. 14, 1994) ("We think . . . that . . . a de minimis interest [such as $1.00] is not sufficient to give . . . standing.").

[202] *Gordon*, 2017 WL 11652642, at *1.

[203] *See* Weisbord, *supra* note 15, at 1272.

[204] *See* Horton, *supra* note 174, at 37 ("Arguably, it makes sense not to commit the finite capital of the judiciary and the estate to providing a forum for vendettas.").

standing based upon the receipt of a nominal bequest seems inappropriate.

Denying beneficiaries standing in this situation, however, has dubious doctrinal foundations. First of all, the requirement that a bequest be substantial has little basis in the statutes governing probate standing. *Gordon* was decided under the law of Pennsylvania, which provides probate standing to a "party in interest."[205] Pennsylvania's probate code does not define "party in interest,"[206] so it was within the court's purview to supply a meaning, including one that requires a substantial interest. However, even if this interpretation is appropriate under Pennsylvania law, it is particularly questionable under the statutory schemes of most states, which have adopted the UPC's defined term of "interested person."[207] As Professor David Horton explains, judicial imposition of a substantial benefit requirement "reads words into the statutory definitions of 'interested person,'" which "focus[] on whether a litigant has a 'property right' or 'claim' on the line — not a 'property right' or 'claim' of a sufficient magnitude."[208] Under the UPC and the state statutes that are modeled after it, a substantial benefit requirement is simply not founded upon the statutory text. Thus, messy doctrinal issues emerge when courts address the issue of an individual obtaining probate standing via a nominal bequest.

B. Deceased Beneficiaries

A second administrative concern of nominal bequests occurs when a beneficiary predeceases the testator. All testamentary gifts are conditioned upon the beneficiaries surviving the donor.[209] When beneficiaries predecease testators, they cannot take, and alternate

[205] 20 PA. CONS. STAT § 908(a) (2024); *Gordon*, 2017 WL 11652642, at *5 ("Only a 'party in interest' may 'challenge the probate of a will.'").

[206] *See* PA. CONS. § 10.

[207] UNIF. PROB. CODE § 1-201(23) (UNIF. L. COMM'N 2019).

[208] Horton, *supra* note 174, at 42-43.

[209] *See* Katheleen R. Guzman, *Give or Take an Acre: Property Norms and the Indian Land Consolidation Act*, 85 IOWA L. REV. 595, 616 (2000); SITKOFF & DUKEMINIER, *supra* note 65, at 359.

takers must be identified.[210] If testators anticipate the contingency of predeceasing beneficiaries, they can expressly identify alternate takers.[211] If not, the law provides rules to do so, which are of two types.

First are the common law rules of lapsed gifts. Lapsed gifts benefit predeceasing beneficiaries, and the common law identifies alternate takers based upon the type of bequest the predeceasing beneficiaries would have received had they survived.[212] If the gifts are of specific property or general bequests of sums of money, then the residuary beneficiaries take instead of the predeceased beneficiaries.[213] If the predeceasing beneficiaries are residuary takers, who are entitled to property that is not the subject of specific or general bequests, then the alternate takers are either the surviving residuary takers or the testators' heirs depending upon the particularities of the wills and the law of the relevant jurisdiction.[214]

Second, states have enacted antilapse statutes that alter the common law rules of lapse in some circumstances.[215] These statutes direct bequests of predeceasing beneficiaries to the beneficiaries' surviving descendants.[216] These statutes, however, typically are applicable only to bequests to particular predeceasing beneficiaries.[217] For example, the UPC's antilapse statute applies to bequests made to the testator's grandparents and their lineal descendants.[218] More remote kin and nonrelatives typically are excluded from an antilapse statute's applicability.[219] If the relationship is outside the antilapse statute's scope, then the common law rules of lapsed gifts apply.[220]

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[210] *See* Adam J. Hirsch, *Text and Time: A Theory of Testamentary Obsolescence*, 86 WASH. U. L. REV. 609, 625 (2009) [hereinafter Hirsch, *Text and Time*].

[211] *See* SITKOFF & DUKEMINIER, *supra* note 65, at 376.

[212] *See id.* at 359-60.

[213] *See id.*

[214] *See id.*

[215] *See id.* at 365-68.

[216] *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 5.5 (AM. L. INST. 1999).

[217] *See id.* § 5.5 cmt. c ("Very few antilapse statutes apply to all devisees who fail to survive the testator.").

[218] *See* UNIF. PROB. CODE § 2-603(b) (UNIF. L. COMM'N 2019).

[219] *See* RESTATEMENT (THIRD) OF PROP. § 5.5 cmt. c.

[220] *See* Hirsch, *Text and Time*, *supra* note 210, at 627.

As an example, consider *In re Estate of Skwarlo*, which involved the will of Stanley Skwarlo.[221] The will made general bequests to each of Skwarlo's siblings.[222] One of them survived him and was therefore entitled to receive the bequest.[223] The others, however, predeceased Skwarlo and consequently could not take from their brother's estate.[224] Because of the close relationship between Skwarlo and the predeceasing beneficiaries, the relevant antilapse statute directed that the bequests of these beneficiaries be distributed to their descendants.[225]

Generally, this outcome seems reasonable. Antilapse statutes are intended to better carry out the testator's probable intent than the common law rules of lapse — the rationale being that, in most instances, the testator prefers a beneficiary's descendants to take when a close family member predeceases.[226] For example, in *Skwarlo*, application of the antilapse statute results in the testator's nieces and nephews taking in place of his predeceasing siblings rather than more remote relatives and nonrelatives taking through the will's residuary clause.[227] Although this outcome is sensible in most situations, *Skwarlo* is not a run of the mill antilapse situation because the testator gave each of his siblings a bequest of $1.00.[228]

Application of the antilapse statute to nominal bequests is problematic from a policy perspective for two reasons. First, nominal bequests do not represent genuine acts of beneficence.[229] Either the bequest was induced by a mistake of law or was an act of malevolence.[230] Regardless of the testator's motivations, if the testator truly intended to disinherit the predeceasing nominal beneficiary, then directing the bequest to an alternate beneficiary would not seem to conform with the

[221] *In re* Estate of Skwarlo, No. 3135 K-33, 2001 WL 312451, at *1 (Del. Ch. Mar. 12, 2001).

[222] *See id.*

[223] *See id.*

[224] *See id.*

[225] *See id.*

[226] *See* Hirsch, *Text and Time*, *supra* note 210, at 627.

[227] *See Skwarlo*, 2001 WL 312451, at *1.

[228] *See id.*

[229] *See id.* ("As the administrator has pointed out, the one dollar bequest was clearly meant as a mechanism to indicate his intent to disinherit his siblings.").

[230] *See supra* Part II.

testator's probable intent. Second and perhaps more troubling, application of the antilapse statute to nominal bequests produces administrative costs that cannot be offset by accompanying benefits. In particular, the decedent's executor must locate the potentially numerous descendants of the predeceased beneficiary who are entitled to take in the deceased's stead. When the benefits of this search are insignificant, as is the case with nominal bequests, the costs necessarily outweigh the benefits.[231] The *Skwarlo* court nicely summarized these twin concerns when it explained, "[t]he decedent could not have meant that the one dollar bequest should pass through the generations, requiring the estate to expend its funds to determine how shares which amount to mere pennies should be distributed."[232]

Given these policy concerns, nominal bequests perhaps should be excluded from the application of antilapse statutes, and in fact *Skwarlo* reached this outcome when the court held that, "since I find the application of the anti-lapse statute would defeat the intention of the testator, it shall not apply to the one dollar bequests to the siblings and the one dollar bequests made to those siblings who predeceased the testator accordingly have lapsed."[233] Application of the common law rules of lapse better fulfills the testator's intent because the residuary beneficiary, whom the testator identified and clearly intended to take a portion of the estate, receives the bequest rather than the descendants of the predeceased beneficiary, whom the testator intended to disinherit. Moreover, lapse of these bequests produces no additional administrative costs because the residuary beneficiary must be identified and located regardless of whether any gifts lapse.

Although policy considerations support this outcome, the law does not. Because antilapse statutes are designed to fulfill testators' probable

[231] A similar issue can arise when a beneficiary of nominal bequest survives the testator but dies prior to the administration of the decedent's estate. *See, e.g.*, Estate of Nelson, No. B234966, 2012 WL 5077898, at *2 (Cal. Ct. App. Oct. 19, 2012) ("Borden noted that Mr. Nelson's will left bequests of $1 each to his brother and son, both of whom post-deceased Mr. Nelson. Borden requested permission to abate the $1 bequests because the costs associated with identifying their heirs greatly outweighed the amount of the bequests.").

[232] *See Skwarlo*, 2001 WL 312451, at *1.

[233] *See id.*

intent,[234] *Skwarlo* correctly explains that they are "not to be imposed so as to defeat the intent of the testator."[235] *Skwarlo*'s doctrinal problem therefore is not the court's recognition that antilapse statutes can be overridden by the testator's expressions of contrary intent. The doctrinal problem instead lies in how the court identifies that intent.

As explained previously, the fundamental rules of testamentary construction include the no reformation rule, which prohibits the court from rewriting the will,[236] and the plain meaning rule, which requires the court to attribute the plain meaning to a will's unambiguous language.[237] Only when such language is ambiguous can the court consider extrinsic evidence to determine the testator's intent.[238] The court openly acknowledged this immediately prior to addressing the antilapse issue when it explained,

> I rely on two guiding [principles]. . . : 1) where the language of a will is unambiguous, the court must enforce its terms as written . . . ; and 2) where the language used in a will is unambiguous, the court must give the language that meaning which will effectuate the intent of the testator.[239]

Despite this express recognition of the traditional rules of testamentary construction, the court seemingly ignores them when interpreting Skwarlo's $1.00 bequests. Antilapse statutes are rules of construction that bend to contrary expressions of intent.[240] A testator can opt out of the application of an antilapse statute by expressly stating in a will that it should not apply[241] or by naming an alternative taker to take in place of a predeceasing beneficiary.[242] Alternatively, a testator can also opt out of the application of an antilapse statute by

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[234] *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 5.5 cmt. f (AM. L. INST. 1999).

[235] *See Skwarlo*, 2001 WL 312451, at *1.

[236] *See supra* note 74 and accompanying text.

[237] *See supra* note 75 and accompanying text.

[238] *See* SITKOFF & DUKEMINIER, *supra* note 65, at 334.

[239] *Skwarlo*, 2001 WL 312451, at *1.

[240] *See* RESTATEMENT (THIRD) OF PROP. § 5.5 cmt. f.

[241] *See* SITKOFF & DUKEMINIER, *supra* note 65, at 376.

[242] *See* RESTATEMENT (THIRD) OF PROP. § 5.5 cmt. g.

conditioning a bequest with words of survivorship,[243] such as "to *A* if *A* survives me."[244]

Skwarlo did none of these things. He did not expressly opt out of the antilapse statue; he did not provide an alternate disposition of the bequests in the event of a predeceasing beneficiary; nor did he condition the bequests with any sort of survivorship language.[245] This is unsurprising because Skwarlo did not think of the bequest as beneficent. There was no reason for him to mention the antilapse statute or to name an alternate taker or to include survivorship language. Instead, Skwarlo simply provided, "[my] executor [shall] pay each of my brothers and sisters the sum of one dollar ($1.00) each as full and final bequeath from my estate."[246] The words of this provision clearly identify the beneficiaries and the nominal sums they should receive. There is no ambiguity, and the court does not suggest that there is. In fact, the court not only fails to identify ambiguity in the testator's language but it also expressly recognizes that "[t]here is *nothing ambiguous* about the language."[247]

Skwarlo unambiguously bequeathed $1.00 to two of his siblings and made no attempt to express an intent that the antilapse statute not apply to those bequests. The court, nonetheless, found the antilapse statute inapplicable because Skwarlo did not intend the statute to apply.[248] In some states, courts can consider extrinsic evidence to determine whether the testator intended an antilapse statute to apply to a particular bequest.[249] Thus, if evidence outside the will established that Skwarlo did not intend antilapse treatment, the court's reasoning might be sound. However, the court mentions no evidence whatsoever

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[243] *See id.* § 5.5 cmt. h.

[244] *But see* UNIF. PROB. CODE § 2-603(b)(3) (UNIF. L. COMM'N 2019) ("[W]ords of survivorship, such as in a devise to an individual 'if he [or she] survives me,' or in a devise to 'my surviving children,' are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of [the antilapse statute.]").

[245] *See In re* Estate of Skwarlo, No. 3135 K-33, 2001 WL 312451, at *1 (Del. Ch. Mar. 12, 2001).

[246] *Id.*

[247] *Id.* (emphasis added).

[248] *See id.*

[249] *See* Adam J. Hirsch, *When Beneficiaries Predecease: An Empirical Analysis*, 72 EMORY L.J. 307, 375 (2022).

related to Skwarlo's intent regarding the anitlapse issue.[250] Instead, it summarily stated that "the one dollar bequest was clearly meant as a mechanism to indicate his intent to disinherit his siblings" and that Skwarlo "could not have meant that the one dollar bequest" be subject to the antilapse statute.[251] Both statements are likely true, but the plain language of the will does not support them, and the court considered no other evidence that does.

In short, nominal bequests can cause problems when beneficiaries predecease testators. In such situations, an antilapse statute might require the executor to search for potentially numerous descendants of the predeceased, which would waste estate resource in furtherance of a disposition of property that the testator did not intend. Once again, this outcome undermines the policy rationales of freedom of disposition and the state's interest in efficient probate administration.[252] Recognizing these problems, courts sometimes bend established doctrine to avoid them — ignoring a will's plain language and overriding the default rules of antilapse statutes in the absence of evidence.

C. Unclaimed Bequests

A third scenario in which nominal bequests produce administrative costs is when they go unclaimed. During the administration of a decedent's estate, the personal representative must conduct a reasonable search to locate those who are entitled to take under the decedent's will.[253] This search is not always successful, and named beneficiaries sometimes cannot be located.[254] The law of most states provides that unclaimed bequests of unlocated beneficiaries be held by some governmental entity for a prescribed length of time.[255] In some

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[250] *See Skwarlo*, 2001 WL 312451, at *1.

[251] *Id.*

[252] *See supra* notes 189–190 and accompanying text.

[253] *See* Smith v. Estate of King, 501 So. 2d 1120, 1123-24 (Miss. 1987) ("The administratrix must exercise reasonable and ordinary diligence to determine and locate heirs.").

[254] *See generally* Mark Glover, *Absent Heirs*, 52 PEPP. L. REV. 675 (2025) (reporting an original empirical study of unclaimed inheritances).

[255] *See id.* at 683-86.

states the custodial period is as short as three years,[256] and in others, unclaimed bequests are held in perpetuity.[257] If beneficiaries surface within the prescribed time, they may claim their bequests, but if they do not, most states provide that their unclaimed bequests escheat to the state.[258]

Governmental custodianship of unclaimed bequests is sound policy when the bequests are not nominal.[259] In such situations, the testator actually intended to benefit the beneficiary, and it is reasonable to assume that the testator would not want beneficiaries to forfeit their gifts simply because they could not be located during the administration of the decedent's estate.[260] Providing an absent beneficiary an opportunity to claim a bequest that extends beyond the process of administering the decedent's estate therefore likely furthers the law's overall objective of fulfilling the decedent's intent. Moreover, when the process of safekeeping unclaimed inheritances is properly calibrated, the benefits of better fulfilling the decedent's intent outweigh the administrative costs of doing so.[261]

This rationale of governmental custodianship of unclaimed bequests breaks down when unclaimed bequests are nominal. To begin with, nominal bequests that are induced by mistake are not true pecuniary

[256] *See, e.g.*, N.H. REV. STAT. ANN. § 471-C:30(I) (2025) (establishing a custodial period of three years before delivering the property to the county treasurer).

[257] *See, e.g.*, HAW. REV. STAT. § 560:3-914 (2025) (providing that the "state director of finance, at any time, may authorize the payment out of the general funds of any amount . . . to any person who establishes . . . that the person is legally entitled as an heir, devisee, or claimant of the decedent"); OHIO REV. CODE ANN. § 2113.67 (2025) (providing that "[w]hen a person entitled to the money invested or turned into the county treasury . . . satisfies the probate court of the person's right to receive it, the court shall order it to be paid over and transferred to the person"); WASH. REV. CODE § 11.76.245 (2025) (providing that "the absentee claimant may, at any time . . . notify the department of revenue of his or her claim to the estate").

[258] *See, e.g.*, CAL. CIV. PROC. CODE § 1441 (2025) (providing that unclaimed funds "if not claimed within five years . . . [are] permanently escheated to the state"); FLA. STAT. § 733.816(3) (2025) ("All funds . . . not claimed within 10 years from the date of deposit shall escheat to the state . . . ."). The UPC also adopts this approach. *See* UNIF. PROB. CODE § 3-914(a) (UNIF. L. COMM'N 2019).

[259] *See* Glover, *supra* note 254, at 705-28.

[260] *See id.* at 710.

[261] *See generally id.* (analyzing how unclaimed inheritances should be regulated).

benefits.[262] Because the decedent never intended to bestow a substantive gift upon the absent beneficiary, the decedent also likely never intended for the nominal bequest to be held for the benefit of its absent recipient. Indeed, governmental custodianship of a nominal bequest that is induced by mistake is likely contrary to the decedent's probable intent for two reasons. First, governmental custodianship theoretically increases the likelihood that the beneficiary actually receives a real (albeit likely de minimis) benefit,[263] and second, the receipt of this unintended benefit by the nominal beneficiary necessarily reduces the benefit (although minimally) of those whom the decedent truly intended to benefit.[264]

With respect to nominal bequests that are motivated by spite, it is plausible that the testator would want an unclaimed bequest to be held for the beneficiary. Testators who make spiteful bequests actually intend to give the beneficiary a pecuniary benefit, but that benefit is motivated by malice instead of generosity.[265] Thus, while the sting of an unclaimed spiteful bequest might be delayed, whenever the beneficiary appears, the expressiveness of the bequest will be clear. As explained previously, however, vindictiveness does not produce intelligent estates plans, and it is not what the probate system was established to facilitate.[266]

The rationale of governmental custodianship of unclaimed nominal bequests deteriorates further when the administrative costs of custodianship are considered. The custodian incurs costs associated with safekeeping unclaimed bequests, maintaining records, and processing claims.[267] Custodianship of unclaimed bequests is sensible policy whenever the marginal benefit of custodianship outweighs it marginal cost.[268] But as just explained, custodianship of nominal bequests likely has no benefit in fulfilling the policies of freedom of

262 *See supra* Part II.

263 *See* Glover, *supra* note 254, at 721.

264 In particular, a nominal bequest reduces the share of the estate's residuary beneficiary. *See infra* note 307 and accompanying text.

265 *See supra* Part II.

266 *See supra* notes 189–190 and accompanying text.

267 *See* Glover, *supra* note 254, at 708.

268 *See supra* notes 259–261 and accompanying text.

disposition.[269] The benefit of custodianship can be conceptualized in other ways, however. For example, in many states the state benefits from the interest generated from the unclaimed bequest,[270] and custodianship of unclaimed property and its eventual escheat is sometimes viewed as a revenue generator for states.[271] However, because nominal bequests tend to be de minimis, the administrative costs of custodianship likely outweigh whatever benefit custodianship might have, including potential interest income. In the end, it is perverse to require the state to bear the costs of custodianship that outweigh the face value of the gift itself.

Consider again the will of Stella Abbot, which left nominal bequests to her daughters.[272] Stella's executor attempted to distribute the $1.00 bequest to each of them. However, only one accepted the gift.[273] Because the other three failed to claim their inheritances, the personal representative deposited their $1.00 gifts within the county treasury,[274] where they have been waiting for nearly twenty-five years for the daughters to claim them.[275] Although governmental custodianship of unclaimed inheritances generally is sound policy,[276] the decades-long custody of $3.00, which represents the inheritance of three children

[269] *See supra* notes 262–264 and accompanying text.

[270] *See* Teagan J. Gregory, Note, *Unclaimed Property and Due Process: Justifying "Revenue-Raising" Modern Escheat*, 110 MICH. L. REV. 319, 323 (2011); John V. Orth, *Interest Follows Principal: Why North Carolina Should Pay Interest on Unclaimed Personal Property*, 37 CAMPBELL L. REV. 321, 330 (2015).

[271] *See* State *ex rel.* Furman v. Jefferson Lake Sulphur Co., 178 A.2d 329, 336 (N.J. 1962); Sean M. Diamond, Comment, *Unwrapping Escheat: Unclaimed Property Laws and Gift Cards*, 60 EMORY L.J. 971, 973 (2010); Shelly Kreiczer-Levy, *The Mandatory Nature of Inheritance*, 53 AM. J. JURIS. 105, 110 (2008).

[272] *See* Last Will and Testament of Stella Abbott, *supra* note 2, at 2.

[273] Receipts and Disbursements at 2, Estate of Abbott, No. 2000003165 (Ohio Prob. Ct., Hamilton Co. Apr. 5, 2002) (attachment to Fiduciary's Account, *supra* note 3).

[274] Entry Authorizing the Deposit of Funds into the County Treasury, *Abbott*, No. 2000003165.

[275] *See Hamilton County Auditor, Listing of Unclaimed Inheritances*, HAMILTON CNTY. AUDITOR, https://www.hamiltoncountyauditor.org/pdf/inheritance.pdf (lasted visited May 15, 2024) [https://perma.cc/4ZH4-VN9G] (listing the unclaimed inheritances held by the Hamilton County treasurer).

[276] *See supra* notes 259–261 and accompanying text.

whose mother effectively disinherited them, cannot be what Stella intended and is not a good use of state resources.

Although Stella's nominal bequests and those of other testators remain in the custody of the state, waiting for beneficiaries who likely will never arrive, some states have addressed the problem. For example, New Hampshire provides for governmental custodianship of unclaimed bequests of $5,000.00 or more, and smaller unclaimed bequests are distributed to the decedent's other beneficiaries.[277] Exclusion of relatively small unclaimed bequests solves the problems associated with unclaimed nominal bequests because the cost of custodianship is avoided, and the testator's intended beneficiaries take the nominal bequest in the nominal beneficiary's place.

In addition to state legislatures, courts sometime create fixes for the problem of unclaimed nominal bequests. South Carolina's legislature, for example, has taken the opposite approach to unclaimed bequests as New Hampshire.[278] In particular, the South Carolina probate code permits governmental custodianship of unclaimed bequests of $5,000.00 or less but provides for an alternative disposition of unclaimed bequests of more than $5,000.00.[279] Obviously, this approach does not solve the problem of unclaimed nominal bequests, as most, if not all, of these bequests fall below the $5,000.00 threshold.

At least one South Carolina probate court judge has recognized the problems associated with governmental custodianship of nominal bequests. In response to a question regarding the misconception that "[t]o cut someone out of [a] will, [the testator should] leave him only $1," the judge responded:

> I find that provision in wills more often than I would like. In many cases when someone is left a dollar, the devisee, from spite, will not accept the dollar or sign a receipt. . . . [A] devise of $100 or less may be paid to the treasurer of the State of South Carolina, but is it cost effective for the taxpayers to have the treasurer handle a $1 devise? In Spartanburg County, we think not, so we allow the [executor] to receive the dollar as trustee

277 N.H. REV. STAT. ANN. § 561:10 (2025).

278 *See* Glover, *supra* note 254, at 685-86.

279 S.C. CODE ANN. § 62-3-914 (2025).

> and sign a statement that if the person ever wants his dollar, the [executor] will give it to him.[280]

Creative judges can therefore avoid the inefficiencies of governmental custodianship of unclaimed nominal bequests, but the extent to which they do is unclear.

While both the New Hampshire legislative solution and the approach of at least one South Carolina probate court avoid the problematic consequences of unclaimed nominal bequests, they are unusual. Indeed, New Hampshire stands alone in specifically excluding small unclaimed bequests from governmental custodianship,[281] and it is unclear how pervasive the South Carolina judicial solution is even within a single state.[282] Thus, while legislative and judicial piecemeal approaches marginally avoid the problematic consequences of unclaimed nominal bequests, a more comprehensive solution is needed.

In sum, nominal bequests are problematic. In some instances, they undermine the testator's intent and generate unwarranted administrative costs. In other instances, courts implement judicial fixes that belie honest and consistent doctrinal application. In still others, state legislatures have enacted piecemeal statutory fixes and probate courts have adopted remedial procedures that are localized to lone counties, thereby creating an inconsistent patchwork of approaches to nominal bequests. A more comprehensive approach is therefore needed to better achieve the policy goals of the law of succession.

IV. CURTAILING NOMINAL BEQUESTS

Nominal bequests that are either induced by mistake of law or motivated by spite are wasteful. They do not contribute to the policy foundations of the law of succession or the probate system. This Part therefore examines two potential solutions to address the issues raised

[280] Joanne Hughes Burkett, *Misconceptions About Probate Law*, 20 S.C. LAW. 19, 20 (2008).

[281] *Compare* N.H. REV. STAT. § 561:10 (2025) (excluding unclaimed bequests under $5,000.00 from governmental custodianship), *with* S.C. CODE ANN. § 62-3-914 (2025) (excluding unclaimed bequests over $5,000.00 from governmental custodianship).

[282] *See supra* note 280 and accompanying text (describing the approach in a single county).

by nominal bequests in a coherent and consistent manner. First, the doctrine of reformation should be used to reform unambiguous language that creates nominal bequests. Second, a substantive restraint of freedom of disposition should be implemented that partially limits the use of nominal bequests. While these options have promise in addressing the issues of nominal bequests, each come with challenges.

A. Reforming Nominal Bequests

One approach to curtail the negative consequences of nominal bequests is to use the doctrine of reformation to alter testators' unambiguous expressions of intent. If testators mistakenly express intent that is different than their true intent, the reformation doctrine permits courts to reform the mistaken language to better reflect the testators' actual intent.[283] As explained previously, conventional law prohibits reformation of testamentary language.[284] Under this approach, testators have complete control over selecting the words of wills, and the courts' role is to interpret those words.

However, in recent decades, a reform movement has advocated for change to the traditional rules of testamentary construction.[285] For instance, recognizing that testators sometimes err, the UPC alters conventional law and provides courts the power to reform wills. Specifically, the UPC states:

> The court may reform the terms of a [will], even if unambiguous, to conform the terms to the transferor's intention if it is proved by clear and convincing evidence what the transferor's intention was and that the terms of the

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[283] *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 12.1 (AM. L. INST. 2003).

[284] *See supra* notes 73–75 and accompanying text.

[285] *See* John H. Langbein, *Major Reforms of the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers*, 38 ACTEC L.J. 1, 7-10 (2012). *See generally* John H. Langbein, *Curing Execution Errors and Mistaken Terms in Wills*, 18 PROB. & PROP. 18 (2004) (explaining the arguments in favor of the reformation doctrine); John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Position in American Law?*, 130 U. PA. L. REV. 521 (1982) (same).

> governing instrument were affected by a mistake of fact or law, whether in expression or inducement.[286]

Several states have followed the UPC's lead in abandoning the law's traditional aversion to reformation of wills, either through the legislature's adoption of the UPC's reformation provision or through courts unilaterally claiming the power to openly reform mistaken testamentary language.[287]

Given the increasing approval of reformation of mistaken testamentary language, the reformation doctrine should be used in the context of nominal bequests. After all, as has been explained, some nominal bequests unambiguously but erroneously express the testator's intent. Nominal bequests clearly describe a general bequest, but the testator truly intends to disinherit the named beneficiary. Thus, if the requirements of the reformation doctrine are satisfied in a particular case, a nominal bequest can be reformed to give the beneficiary nothing, thereby avoiding the previously described negative, unintended consequences.

To use the reformation doctrine to rewrite unambiguous language, the testator's mistake must first be identified. The UPC makes clear that the mistake can be one of either law or fact.[288] The distinction between mistakes of law and mistakes of fact is straightforward. A mistake of fact occurs when the testator erroneously believes something that does not conform with reality.[289] By contrast, a mistake of law occurs when the testator misapprehends the substance of the law.[290] Either type of mistake is a sufficient basis for reformation of a will.

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[286] UNIF. PROB. CODE § 2-805 (UNIF. L. COMM'N 2019).

[287] *See, e.g.*, FLA. STAT. § 732.615 (2011) ("[T]he court may reform the terms of a will, even if unambiguous."); ME. REV. STAT. tit. 18-C, § 2-805 (2019) ("The court may reform the terms of a governing instrument, even if unambiguous . . . ."); N.M. STAT. ANN. § 45-2-805 (2012) ("The district court may reform the terms of a governing instrument, even if unambiguous . . . ."); Estate of Duke, 352 P.3d 863, 865 (2015) ("We conclude that the categorical bar on reformation of wills is not justified, and we hold that an unambiguous will may be reformed . . . ."). The *Restatement* also endorses the reformation doctrine. RESTATEMENT (THIRD) OF PROP. § 12.1.

[288] *See* PROB. § 2-805.

[289] *See* RESTATEMENT (THIRD) OF PROP. § 12.1 cmt. i.

[290] *See id.* § 12.1.

In addition to the testator laboring under a mistake of fact or law, the reformation doctrine also requires the mistake to affect the testator's will.[291] In this regard, the mistake can affect the testator's will in expression or in inducement.[292] A mistake affects the expression of the testator's intent when the testator truly intended to include a particular provision but, because of a mistake, the testator's words do not accurately express that intent.[293] By contrast, a mistake affects the inducement of the testator's intent when it causes the testator to include or exclude a particular testamentary provision.[294] Thus, a mistake in the expression relates to how the testator's intent is communicated, but a mistake in the inducement relates to how the testator's intent is formed.

Within this framework, some nominal bequests can be characterized as being induced by a mistake of law. As explained previously, one overarching reason why testators make nominal bequests is because they believe such bequests are necessary to effectively disinherit the beneficiaries.[295] Although this practice can be traced to Roman law, contemporary American law does not impose the requirement of a token bequest to disinherit.[296] Characterizing nominal bequests as induced by mistakes of law justifies reformation of many nominal bequests. For instance, when testators give beneficiaries nominal bequests under the mistaken belief that doing so is necessary to avoid application of pretermitted heir statutes,[297] reformation is justified by a mistake of law that induces otherwise unintended bequests. The same is true if testators believe that nominal bequests are a necessary part of no contest clauses or are required to negatively disinherit heirs.[298]

[291] *See id.* (explaining that the mistake must "affect[] specific terms of the document").

[292] *See* PROB. § 2-805.

[293] *See* RESTATEMENT (THIRD) OF PROP. § 12.1 cmt. i ("A mistake of expression arises when a donative document includes a term that misstates the donor's intention . . . .").

[294] *See id.*

[295] *See supra* notes 99–105 and accompanying text.

[296] *See supra* notes 106–108 and accompanying text.

[297] *See supra* notes 114–123 and accompanying text.

[298] *See supra* notes 124–139 and accompanying text.

Although the reformation doctrine can alleviate some of the problems associated with nominal bequests, in particular those caused by bequests that are induced by mistakes of law, it cannot address the issues raised by spiteful bequests. Recall that one reason testators make spiteful bequests is to exercise testamentary self-expression.[299] In this situation, testators are induced to make spiteful bequests, not by mistakes of law, but instead by malice. If testators are affected at all by mistakes when expressing themselves through spiteful bequests, they would seem to be mistakes of judgment rather than mistakes of law. Reformation would therefore be inappropriate.

In sum, the problematic consequences of nominal bequests can partially be avoided through use of the reformation doctrine. In states that have recognized the reformation doctrine, courts should use it to reform nominal bequests that clearly were induced by a mistake of law. Furthermore, in states that have not recognized the reformation doctrine, nominal bequests present yet another reason why state policymakers should adopt the UPC's reformation provision.

B. Restricting Nominal Bequests

Although the reformation doctrine can address some of the problems of nominal bequests, it cannot solve them all. The reformation doctrine requires clear and convincing evidence of a mistake,[300] and in some instances of nominal bequests, such evidence might be unavailable. Indeed, as explained previously, when a bequest is motivated by spite, the testator is not mistaken at all.[301] A broader solution that does not depend upon evidence of mistake is therefore needed to curtail nominal bequests. In particular, policymakers should implement a new restraint of freedom of disposition that restricts testators' ability to make some nominal bequests. Implementing such a restriction, however, is not without difficulty.

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[299] *See supra* notes 143–144 and accompanying text.

[300] *See* UNIF. PROB. CODE § 2-805 (UNIF. L. COMM'N 2019).

[301] *See supra* notes 297–299 and accompanying text.

1. Identification of Restricted Bequests

One difficulty is identifying which bequests to restrict. As explained in Part II, the wastefulness of a nominal bequest depends, in part, upon the donor's subjective motivations in making the bequest. Probate courts could therefore be tasked with identifying which bequests are wasteful based upon the circumstances of the specific case. However, given the difficulty of identifying wasteful bequests with certainty and the law's policy objective of efficiently administering decedents' estates,[302] the issue of whether a particular bequest is wasteful should not be judged on a case-by-case basis. Instead of asking courts to go inside the mind of the testator, a restriction on wasteful nominal bequests could rely on objective criteria to identify those bequests that should be restricted.

In particular, three considerations can help draw the line between genuine benevolent gifts that should be honored and bequests that are induced by mistake of law or motivated by spite, which are wasteful and should be restricted — (1) the size of the bequest, (2) the type of property bequeathed, and (3) the identity of the beneficiary. First and most obviously, mistaken bequests and spiteful bequests typically are of de minimis value. Giving significant property would, after all, undermine their purpose. Although selecting a threshold below which bequests should be treated as mistaken or spiteful entails some arbitrary line drawing,[303] a relatively small value threshold, say of below $100.00, is reasonable.

Second, in addition to the size of gift, the type of bequest that the testator purports to make is relevant to a determination of whether it is mistaken or spiteful and should therefore be restricted. Bequests are of various types. To begin, testators sometimes make general bequests.[304] With such gifts, the beneficiary is not entitled to any specifically

[302] *See In re* Heigho's Estate, 186 Cal. App. 2d 360, 367-68 (1960) ("It is the public policy of this state that there be an efficient administration and prompt settlement of estates not only for the sake of creditors but also for the benefit of heirs and beneficiaries."); PROB. § 1-102(b)(3) ("The underlying purposes and policies of this care are . . . to promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to the decedent's successors[.]").

[303] *See supra* note 92 and accompanying text.

[304] *See* SITKOFF & DUKEMINIER, *supra* note 65, at 383.

identified property, but is entitled to a specific amount of the decedent's assets, which typically is described as a sum of money.[305] Additionally, testators sometimes make specific bequests. Rather than a general benefit from the testator's estate, these bequests entitle beneficiaries to specific property of the decedent.[306] Finally, wills typically include residuary bequests, which are catchall provisions that dispose of property that is not part of the will's other bequests.[307]

Although testators could potentially employ any type of gift as part of mistaken or spiteful bequests, some are better suited than others. Because testators communicate the intent to disinherit through mistaken bequests and spiteful bequests,[308] testators likely select insignificant property to give as token gifts. Given this context, residuary bequests are ill-suited for the purposes of nominal bequests. Residuary bequests capture all of testators' probate property that is not otherwise bequeathed,[309] and they therefore dispose of property that testators do not own at the time of will-execution.[310] Because testators do not know at the time they execute wills precisely what property will pass to residuary beneficiaries, they have no certainty regarding whether their residuary estates will include significant or insignificant property.[311] Testators are therefore unlikely to use gifts of their residuary estates as part of nominal or spiteful bequests.

Unlike residuary bequests, specific bequests are not catchall provisions. When testators employ specific bequests, they identify specific property to bequeath,[312] but, even if testators know what property specific bequests convey, two considerations complicate testators' selection of specific property to include as part of nominal

[305] *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 5.1(2) (AM. L. INST. 2003).

[306] *See id.* § 5.1(1).

[307] *See id.* § 5.1(4).

[308] *See supra* Part II.

[309] *See* RESTATEMENT (THIRD) OF PROP. § 5.1(4).

[310] *See* SITKOFF & DUKEMINIER, *supra* note 65, at 383.

[311] *See In re* Curtis, 119 N.Y.S. 605, 607 (N.Y. Surr. Ct. 1909) (recognizing that "fluctuations . . . periodically occur in the values of estate and property of all kinds" and that "the disposition of the residue" of an estate entails a gift of "uncertain value").

[312] *See* RESTATEMENT (THIRD) OF PROP. § 5.1(1).

bequests. First, wills have no significance during testators' lives; they become operative only when testators die.[313] Testators consequently select specifically bequeathed property before beneficiaries ultimately benefit from their bequests. During the intervening period between will-execution and death, which can last days, months, years, or even decades,[314] the objective value of property can fluctuate.[315] Because markets change over time, testators have no assurance that assets of insignificant value will be equally insignificant at the time of their deaths. The purpose of nominal bequests therefore is undermined if wills bequeath property that is insignificant at the time that testators execute them but that significantly appreciates by the time they become effective.

Second, although specific property might have an ascertainable, objective value at the time testators execute wills, beneficiaries might subjectively value specifically bequeathed property differently than the market.[316] Indeed, they might place sentimental or other idiosyncratic value on specifically bequeathed property of which testators are unaware.[317] Attempts to disinherit beneficiaries by nominal bequests would therefore fail if testators bequeath property that is objectively

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313 *See* Sitkoff, *supra* note 5, at 646-57 ("A will is a peculiar legal instrument . . . in that it does not take effect until after the testator dies.").

314 *See* Mark Glover, *The Timing of Testation*, 107 KY. L.J. 221, 258-61 (2019); David Horton, *Wills Law on the Ground*, 62 UCLA L. REV. 1094, 1129-30 (2015).

315 *See* Nicole M. Paschoal, *The Problem of Replacement Property in the Law of Ademption*, 44 ACTEC L.J. 183, 198 (2019) (noting "that specific bequests can always fluctuate in value after a will is executed"); *see also* Hirsch, *Spendthrift Trusts*, *supra* note 33, at 35 n.117 ("Some estate planners advise against making specific bequests of capital assets because they fluctuate in value before the will matures . . . .").

316 *See In re* Estate of Greenblatt, 86 A.3d 1215, 1218 (Me. 2014) (involving an estate that included "personal property items [that did] not have significant monetary value but [had] sentimental value to members of the [decedent's] family"); Alice M. Noble-Allgire, *Desegregating the Law School Curriculum: How to Integrate More of the Skills and Values Identified by the MacCrate Report Into a Doctrinal Course*, 3 NEV. L.J. 32, 52 (2002) ("The decedent's property typically includes items with significant sentimental value to one or more parties.").

317 *See* Andrew Stimmel, Note, *Mediating Will Disputes: A Proposal to Add a Discretionary Mediation Clause to the Uniform Probate Code*, 18 OHIO ST. J. ON DISP. RESOL. 197, 201 (2002) ("Certain items of personal property may have great sentimental value attached, value that varies from person to person and is difficult to quantify.").

insignificant but upon which nominal beneficiaries place subjective significance. Because of these difficulties in valuing specific bequests, it seems unlikely that testators would bequeath specific property as part of nominal bequests.

Given these difficulties in determining the significance of residuary bequests and specifically bequeathed property, general bequests are best suited for nominal gifts. Unlike specific bequests, general bequests do not entitle beneficiaries to any particular property,[318] and unlike residuary bequests, they do not fluctuate in size as testators acquire and dispose of property during life. Instead, general bequests entitle beneficiaries to a general benefit, which testators typically identify as sums of money.[319] Because beneficiaries of general bequests are not entitled to specific assets,[320] the valuation issues associated with other types of bequests are absent. Thus, although testators can purport to bequeath any type of property as part of nominal bequests, they are most likely to employ general bequests of small sums of money, and consequently, only those types of bequests should be flagged as potentially wasteful. Specific bequests and residuary bequests should not be restricted.

Finally, compared to a bequest's size and the type of property bequeathed, the identity of the beneficiary is perhaps the most important consideration when identifying mistaken or spiteful bequests. Recall *Frinchaboy*, in which the court explained, "[A] bequest of only $1 to a child of the testatrix is never intended as a gift from the testatrix, but is merely another way of saying, 'I leave nothing to my daughter.'"[321] While this proclamation is definitive, it is also limited. According to the court, not all $1.00 bequests are necessarily nominal,

318 *See In re* Buck's Estate, 186 P.2d 708, 711 (Cal. Dist. Ct. App. 1947) ("Briefly stated, a specific bequest deals with specific property and can be satisfied with no other, whereas, a general bequest is pecuniary in character and the nominal subject matter thereof is mentioned merely to indicate the amount which the legatee is to receive.").

319 *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 5.1(2) (AM. L. INST. 2003).

320 *In re* Estate of Porath, No. 2005AP2975, 2006 WL 1983141, at *2 (Wis. Ct. App. July 18, 2006) ("A general bequest is one that confers a general benefit but not a specific asset.").

321 *In re* Estate of Frinchaboy, 238 P.2d 592, 594 (Cal. Dist. Ct. App. 1951).

but those to the testator's children are.[322] Thus, the court intimates that a beneficiary's identity is relevant to a determination of whether a bequest is tantamount to nothing, and it suggests that bequests to the testator's family should be viewed differently than the gifts to nonrelatives.

In particular, bequests cannot be viewed in isolation but must instead be assessed against the backdrop of the default estate plan of intestacy.[323] When a will benefits individuals who would not otherwise share in the testator's estate, such as Stella's will, which gave $1,000,00 to her friend,[324] such bequests necessarily increase the beneficiary's share of the decedent's estate. However, as the court in *Frinchaboy* suggests, when beneficiaries are the testator's heirs, testamentary bequests do not necessarily produce net gains. In such situations, beneficiaries would receive at least a portion of the decedent's estate in the absence of a will, and consequently testamentary gifts can reduce what the beneficiaries receive. A testator's decision not only to give a de minimis sum but also to significantly reduce the amount the beneficiary would receive absent a will therefore bolsters the suspicion that such bequests are either induced by mistake or spiteful. Thus, only those general bequests below $100.00 that reduce the recipient's intestate share of the decedent's estate should be restricted as wasteful.

In short, wasteful nominal bequests should be restricted, but identifying which bequests are wasteful is complicated because it requires assessing the donor's subjective motivations. Rather than requiring courts to pursue this inquiry on a case-by-case basis, objective criteria should be used to identify those bequests that are most likely induced by mistake or motivated by spite and therefore wasteful. Various considerations might suggest that a bequest is induced by mistake or spiteful. A trivial amount, alone, can raise suspicion regarding the testator's true intent. The type of bequest, whether specific, general, or residuary, can support or contradict that suspicion.

322 *Id.*

323 *See* Megan Doherty Bea & Emily S. Taylor Poppe, *Marginalized Legal Categories: Social Inequality, Family Structure, and the Laws of Intestacy*, 55 L. & SOC'Y REV. 252, 254 (2021) ("[T]he default rules of intestacy are the backdrop against which all estate planning occurs.").

324 *See supra* note 2 and accompanying text.

Finally, the beneficiary's identity, and more particularly whether the beneficiary is an heir of the testator, can all but confirm that suspicion. Thus, the law should restrict general bequests to the decedent's heirs that are of de minimis value, such as less than $100.00, because such bequests are the most likely to be wasteful.

2. Disposition of Restricted Bequests

In addition to identifying which bequests to restrict, a second difficulty with restricting wasteful bequests relates to the consequences of the restriction. One possibility is that the law should treat the bequest as a nullity — the beneficiary's interest is completely eliminated so that not only are the administrative costs of wasteful bequests avoided but also the beneficiary loses any chance to benefit from the testator's will. This outcome would solve the problems of wasteful bequests, but it might seem odd or harsh to preclude beneficiaries, who are expressly identified in a will, from receiving their bequests. After all, the beneficiaries did nothing wrong, and the problems of wasteful bequests arise when their de minimis benefit is considered alongside their administrative costs.[325] Thus, if the administrative costs of wasteful bequests could be avoided without treating the bequests as a complete nullity, then the law should permit the beneficiaries to take.

To that end, the law should treat wasteful bequests as powers of appointment. A power of appointment is a mechanism by which a donor gives someone the discretion to decide who ultimately receives gifted property.[326] A power of appointment can be general, meaning that the recipient of the power has broad discretion, including, for example, the discretion to appoint the property to themself.[327] Alternatively, a power of appointment can be limited, so that the recipient's discretion is restricted to a class of permissible appointees that does not include the

[325] *See supra* Part III.

[326] *See* UNIF. POWERS OF APPOINTMENT ACT § 102(13) (UNIF. L. COMM'N 2013); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 17.1 (AM. L. INST. 2003); SITKOFF & DUKEMINIER, *supra* note 65, at 817.

[327] *See* POWERS OF APPOINTMENT § 102(6); RESTATEMENT (THIRD) OF PROP. § 19.13; SITKOFF & DUKEMINIER, *supra* note 65, at 819.

recipient of the power.[328] Regardless of the scope of the donee's power, they can decide who among the permissible appointees should take the gifted property, and if they elect not to exercise their discretion, the gifted property goes to the takers in default, who can be identified by the donor at the time the power is created.[329]

Within this context, a wasteful bequest would be treated as creating a limited power of appoint in favor of the decedent's executor with the nominal beneficiary being the permissible appointee. The personal representative would have the discretion to appoint the de minimis bequest to the beneficiary, but if they decline to do so, then the taker in default would be the will's residuary beneficiary or, if the will does not contain a residuary clause, the decedent's heirs. Two primary benefits flow from transforming wasteful bequests into limited powers of appointment in favor of the executor.

First, it addresses the overinclusivity problem caused by identifying wasteful bequests by the bequest's type, size, and beneficiary. While most wasteful bequests are de minimis and will fall under the proposed threshold, some de minimis bequests, even those that are less than the recipient's intestate share, are not wasteful.[330] A blanket restriction on de minimis general bequests could impede some genuine and unproblematic exercises of freedom of disposition. However, if the restricted bequests become powers of appointment, the executor can employ sound discretion in deciding whether to exercise the power in favor of the beneficiary. If the executor, who might have insights into the testator's intended estate plan,[331] decides that the testator truly intended to benefit the beneficiary, then they can exercise the power. If not, then the executor need not exercise the power, and the de minimis sum would go to those whom the testator more likely intended to benefit. In this way, a restriction of freedom of disposition that

[328] *See* POWERS OF APPOINTMENT § 102(10); RESTATEMENT (THIRD) OF PROP. § 19.14; SITKOFF & DUKEMINIER, *supra* note 65, at 819.

[329] *See* POWERS OF APPOINTMENT § 310; RESTATEMENT (THIRD) OF PROP. § 19.23; SITKOFF & DUKEMINIER, *supra* note 65, at 852-53.

[330] *See supra* Parts II–III.

[331] *See* James Toomey, *Executor Discretion*, 111 IOWA L. REV. 1323, 1355 (2025) ("Executors can be presumed to know *a great deal* about the testator, and are likely to have been selected for exactly that reason.").

transforms a wasteful nominal bequest into a limited power of appointment increases the likelihood that the testator's true beneficent intent will be carried out.

Second, the proposed restraint of donative freedom avoids the administrative costs of wasteful bequests. To begin with, the problems associated with lapsed gifts and unclaimed inheritances would be minimized because anytime that a beneficiary of a de minimis bequest either predeceases the testator or cannot be located after the decedent's death, the executor would have no reason to exercise the power in the beneficiary's favor. Thus, granting the executor discretion that is associated with a limited power of appointment not only better fulfills the decedent's probable intent but also avoids the issues of lapsed and unclaimed gifts.

Furthermore, unlike a recipient of a general bequest, a permissible appointee does not necessarily have standing to interfere in estate administration. Recall that most states confer probate standing to interested persons, which includes those who have a financial stake in the decedent's estates.[332] Arguably, a permissible appointee's interest in the decedent's estate is so remote that they would have an insufficient financial stake to obtain probate standing. Indeed, a permissible appointee's interest is entirely contingent upon the exercise of the power,[333] and those who hold powers of appointment can exercise them or not for any reason whatsoever.[334] Because of the uncertain nature of a permissible appointee's interest, it is frequently referred to as a "mere expectancy,"[335] rather than a property interest.

[332] *See supra* Part III.

[333] *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 11.2 cmt. d (AM. L. INST. 1986) ("An object of a power of appointment has an interest analogous to a contingent future interest in property subject to the power . . . .").

[334] *See* RESTATEMENT (THIRD) OF PROP. § 17.1 cmt. g ("In the case of a discretionary power of appointment, . . . the donee may exercise the power arbitrarily as long as the exercise is within the scope of the power.").

[335] N.C. GEN. STAT. § 36C-1-103 supp. N.C. cmt. (2021) ("A permissible appointee has a mere expectancy with no vested rights."); *In re* Estate of Feinberg, 919 N.E.2d 888, 900-01 (Ill. 2009) ("By creating a power of appointment . . . , [the donor] created a situation in which the interests of the grandchildren were contingent on whether and in what manner [the done] would exercise her . . . powers of appointment. Thus, the grandchildren had a mere expectancy . . . ."); Diana S.C Zeydel & Jonathan G.

Little caselaw directly addresses this issue, but at least one case supports the proposition that permissible appointees of a power of appointment lack probate standing. In *Martone v. Martone*, a testator died with a will that did not provide for his granddaughter.[336] At probate, the granddaughter sued to set aside the will in favor of an earlier will.[337] The proponent of the later will moved to dismiss the granddaughter's complaint for lack of standing.[338] The motion was granted, and the issue was appealed all the way to the Supreme Court of Virginia, which ultimately affirmed the lower court's decision.[339]

The rationale for dismissing the granddaughter's complaint for lack of standing was based upon her interest in the testator's earlier will, which, unlike the later will, presented the possibility that she would benefit from her grandfather's estate. In particular, the earlier will granted the testator's executor the sole discretion to distribute income generated from his estate during the course of administration to various individuals, including the granddaughter, or to withhold distributions of income for any reason.[340] To have probate standing under Virginia law, this interest must be sufficient to render the granddaughter a "person interested."[341] Virginia's probate code does not define this term, but the court explained that "the term means that an individual must have a legally ascertainable, pecuniary interest, which will be impaired by probating a will or benefited by setting aside the will, and not a mere expectancy."[342]

Based upon this definition of "person interested," the court found that the granddaughter's interest in the earlier will was simply too remote to convey probate standing.[343] The court stressed the broad

Blattmachr, *Tax Effects of Decanting — Obtaining and Preserving the Benefits*, 111 J. TAX. 288, 295-96 (2009) (explaining that a "permissible appointee may be . . . properly regarded as a person with a mere expectancy").

336 *See* Martone v. Martone, 509 S.E.2d 302, 303-05 (Va. 1999).

337 *See id.* at 304.

338 *See id.* at 305.

339 *See id.*

340 *See id.* at 304-05.

341 VA. CODE ANN. § 64.2-448 (2012).

342 *Martone*, 509 S.E.2d at 306.

343 *See id.* (describing the interested as a "mere expectancy").

discretion that the testator gave the executor to make distributions of income and characterized the executor as having a power of appointment.[344] It explained:

> [T]he executor has *absolute discretion* in deciding whether to accumulate income and add it to the principal of the residuary estate; to apply it to the payment of debts, taxes, and other expenses of the estate; or to distribute it to members of the designated class. Even if the executor chooses to disburse income, he also has *complete discretion* as to the amount of any distribution and to whom it will be paid. In other words, he can disburse income to some members of the class and exclude others. We have stated that "equity will not compel or control . . . [the] discretion or exercise" of "a mere naked power [of disposal among the members of a class that is] purely discretionary with the donee."[345]

Thus, in Virginia and other jurisdictions with likeminded courts, beneficiaries whose nominal bequests are transformed into powers of appointment likely would not have probate standing based solely on their status as permissible appointees.

Nonetheless, even if some courts do not follow *Martone*'s example and instead treat a permissible appointee as an interested person, that interest would vanish once the executor decides not to exercise the power. Therefore, if a nominal beneficiary unnecessarily interferes with estate administration, the executor can immediately release the power

[344] *See* J. Rodney Johnson, *Wills, Trusts, and Estates*, 33 U. RICH. L. REV. 1075, 1097-98 (1999) (discussing *Martone* under the heading "Will Contest — Person Interested — Object of Power of Appointment"); Ronald R. Volkmer, *Standing to Contest a Will*, 26 EST. PLAN. 281, 282 (1999) ("The court's analysis, from the standpoint of powers of appointment, confirms the time-honored 'relation-back' theory. Under this theory, until the power of appointment is exercised, no title vests in the appointee."); *see also* Roger A. McEowen, *Recent Developments in Estate Planning Impacting Farmers and Ranchers*, 5 DRAKE J. AGRIC. L. 57, 112-13 (2000) ("Interestingly, the court did not characterize the granddaughter's interest as an interest of a beneficiary in a discretionary trust. Generally, beneficiaries of discretionary trusts are treated as having a property interest, not a mere expectancy.").

[345] *Martone*, 509 S.E.2d at 306 (emphasis added) (quoting Daniel v. Brown, 159 S.E. 209, 211 (Va. 1931)).

without exercising it and strip the nominal beneficiary of probate standing. In this way, transforming a wasteful bequest into a power of appointment alleviates the administrative problems associated with probate standing.

In sum, the law should treat de minimis general bequests that are less than the recipient's intestate share as limited powers of appointment. Doing so would solve some of the problems that nominal bequests create with respect to probate standing, lapsed gifts, and unclaimed bequests. It would also leave open the possibility that the beneficiary receives the bequest if the executor decides to exercise the power. Executors would have no duty to exercise the power, but they could if they determine that doing so would best fulfill the testator's intent.[346]

CONCLUSION

De minimis bequests that are not motivated by benevolence but are instead either induced by mistakes of law or motivated by spite are wasteful and therefore violate the fundamental policies of the law of succession. For example, when Stella Abbott bequeathed each of her four daughters $1.00, she was not engaging in thoughtful estate planning, and she was not attempting to benefit her daughters.[347] Instead, Stella either thought she had to give her daughters the proverbial $1.00 to disinherit them, or, out of spite, she wanted to give them something worse than nothing.[348] Wasteful bequests, like Stella's, do not increase social welfare — they substantially increase neither donors' nor donees' utility, and whatever benefit they do have is outweighed by the costs of administering them.[349] Put simply, wasteful bequests do more harm than good.

To remedy this problem, policymakers should consider two solutions. First, traditional testamentary construction doctrine should be altered

[346] In most instances, the testator's personal representative would be well suited to wield such discretion. *See* Toomey, *supra* note 331, at 1355 ("Executors can be presumed to know *a great deal* about the testator, and are likely to have been selected exactly for that reason.").

[347] *See supra* notes 16–17 and accompanying text.

[348] *See supra* Part II.

[349] *See supra* Parts II–III.

to permit reformation of wasteful nominal bequests.[350] This would solve some, but not all, of the problems associated with nominal bequests. Second, freedom of disposition should be restrained, so that testators' ability to make wasteful nominal bequests is eliminated or substantially curtailed.[351] Either solution would both reduce the administrative burdens that nominal bequests create and further the overarching policy objectives of the law of succession.

[350] *See supra* Part IV.

[351] *See supra* Part IV.