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Traveling the Road of Probate Reform: Finding the Way to Your Will (A Response to Professor Ascher)

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In the United States during this century, probate law and practice have undergone significant changes. Some of the changes are attributable to exogenous factors, such as the development of state and federal income and transfer tax systems, the development of a variety of types of insurance and other contractual arrangements, and the transformation of the American family profile. Other changes are attributable to endogenous factors, such as the growing frustration with traditional will formalities.

These dynamic legal and social environments inevitably, and appropriately, have led to widespread demand for the restructuring of probate law's substance and procedure.[1] Professor Mark L. Ascher's essay, "The 1990 Uniform Probate Code: Older and Better, or More Like the Internal Revenue Code?,"[2] focuses on the 1990 revisions to Article II of the Uniform Probate Code (UPC).[3] His essay is one of the first of hopefully many writings to analyze and attempt to improve the UPC and probate law in general as we prepare to meet the challenges of the twenty-first century.

Ascher's primary criticism of the 1990 Article II is that

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1. Evidence of this demand is found in the influence the pre-1990 UPC has had on probate law in the United States. In addition to being adopted in Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Maine, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Dakota, South Carolina, and Utah, it has been substantially adopted in Alabama and has been the model for many provisions found in other states, such as New Jersey and California. *See* UNIF. PROBATE CODE, 8 U.L.A. 1 (Supp. 1992); Martin D. Begleiter, *Article II of the Uniform Probate Code and the Malpractice Revolution*, 59 TENN. L. REV. 101, 101-02 (1991).

2. Mark L. Ascher, *The 1990 Uniform Probate Code: Older and Better, or More like the Internal Revenue Code?*, 77 MINN. L. REV. 639 (1993).

3. For a history of the UPC and an explanation of pre-1990 Article II and 1990 Article II terminology, see Ascher, *supra* note 2, at 639 n.2.

some of the revisions produce questionable benefits and that, in any case, those benefits do not outweigh the significant administrative costs created by the statutory modifications. In particular, he argues that the reforms pertaining to nonademption and antilapse will increase litigation and require all testators to revise their existing estate plans. Since two of the primary goals of probate reform are to reduce litigation and to facilitate estate planning, his charges are serious and deserve careful attention.

This response addresses two central features of Ascher's arguments. First, it challenges the academic/practitioner bifurcation that informs his entire analytical framework. Second, it demonstrates why the attested/unattested intent bifurcation, which is pivotal in his analysis of the nonademption and antilapse provisions, is misguided.

I. THE ACADEMIC/PRACTITIONER BIFURCATION

Throughout his essay, Ascher places academic lawyers in opposition to practicing lawyers for the purpose of undermining the legitimacy of the 1990 UPC. He gives the impression that academics are responsible for the 1990 revisions to Article II, and that they cannot be trusted because their central interest is promoting their pet theories, which are inevitably disconnected from and antagonistic toward real people with real problems.

Ascher uses a number of rhetorical devices in creating the image that Article II reflects the thinking of eggheads gone amok. He writes about the 1990 version of Article II as being "much less clear and much wordier,"[4] and then proceeds to compare the number of lines of two of the statutory provisions under the pre-1990 Article II with the number of lines in the comparable provisions under the 1990 Article II, referring to the latter as being "breathtakingly resplendent in statutory verbiage."[5] His scornful conclusion is that "[t]here ought to be

4. Ascher, *supra* note 2, at 640.

5. *Id.* at 640 n.6. The provisions to which Ascher refers have to do with the spouse's elective share. His ground for condemning those provisions is that "they occupy 467 lines; those in the pre-1990 version occupied only 176." *Id.* Ascher is apparently making the argument that the mere fact that text was added makes the new statute inferior to the one it replaced regardless of the reasons why the new text was added. There are basically four reasons why the statutory text was expanded in the 1990 version: first, to implement an accrual-type elective share; second, to strengthen the protection against evasion by will substitute, including subjecting life insurance to the elective share; third, to provide for payor protections; and fourth, to provide a system

a law against this type of statutory pollution."[6]

He further reinforces the image of the academic tilt of the 1990 version by referring to it as "pretentious",[7] "arrogan[t]",[8] and reflecting a "compulsion to deal individually with every conceivable variation."[9] Strikingly, one of his examples to prove this compulsion is the spousal intestate succession share.[10] This provision reflects the UPC's acknowledgment of the changing American family profile by making the spouse's intestate share depend upon whether the decedent was survived by children of that marriage, children from a prior marriage, or stepchildren.[11] Perhaps this statute could be criticized for failing to address the family in which the parents are not legally married. Some might even criticize it for assuming that a stepparent will use the property inherited from the decedent to treat her or his own children more generously than the decedent's children. It seems irresponsible, however, to suggest that, in the 1990s, the UPC should not have added statutory text in order to recognize the emergence of blended families.

Ascher not only uses oblique negative references to academia, but he also states his contempt for academics as law reformers quite directly. This occurs most obviously when he contends that the UPC has "become a laboratory for academicians bent on reaching, at any cost, what they imagine to be the 'correct' result"[12] and when he advises those academicians that "[t]hose who revise the UPC should never forget that estate planners and lay people must live under, and pay the costs of implementing, their work product."[13]

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of funding the elective share that is consistent with its overall redesign. *See generally* 1990 UNIF. PROBATE CODE art. II, pt. 2, gen. cmt. (discussing the structure of and purposes behind the revised elective share provision). Rather than quibble about the length of the statute, it seems that the more useful and pertinent questions are: first, whether the reformed elective share represents good policy; second, whether the policies of the elective share have been successfully achieved through this statutory design?

6. Ascher, *supra* note 2, at 640 n.6. *See* Edward C. Halbach, Jr. & Lawrence W. Waggoner, *The UPC's New Survivorship and Antilapse Provisions*, 55 ALB. L. REV. 1091, 1148 (1992) (arguing strongly that detailed statutes serve the public better than less complicated statutes because statutes that leave many issues unresolved require "legal research and perhaps lengthy litigation and appeal in order to resolve the case").

7. Ascher, *supra* note 2, at 640.

8. *Id.* at 655.

9. *Id.* at 640.

10. *Id.* at 640 n.7.

11. *See* 1990 UNIF. PROBATE CODE § 2-102.

12. Ascher, *supra* note 2, at 642.

13. *Id.* at 642.

Who are the academic drafters that Ascher intends to make "squirm"?[14] The 1990 Article II revisions are the product of joint efforts of both academic and practicing lawyers working as partners, rather than adversaries, to improve the substance and procedure of probate law. The Joint Editorial Board for the Uniform Probate Code (JEB-UPC) drafted Article II,[15] and the National Conference of Commissioners on Uniform State Laws approved it.[16]

Since 1969, when the Uniform Law Commissioners first promulgated the UPC, the JEB-UPC has operated as a supervisory body to monitor the UPC. The JEB-UPC is composed of nine voting members—three from the Uniform Law Commissioners, three from the American Bar Association, and three from the American College of Trust and Estate Counsel. Six of the nine voting members, including the chair, are practitioners; only three are academic lawyers. In addition to these nine voting members, there are a number of nonvoting positions—an Executive Director, a Director of Research and Chief Reporter, and three liaisons—one to probate judges and two to law teachers.[17] The voting practitioners include past presidents of the American College of Trust and Estate Counsel and past chairpersons of the American Bar Association's Section of Real Property, Probate and Trust Law. A former probate judge with many years of experience on the bench in a UPC state presently serves as the probate judge liason. Combined, they bring many decades of practical experience to bear on the end product. Another troubling facet of Ascher's academic/practitioner bifurcation is that it leaves no place for the estate planner who is a teacher, scholar, practitioner, and law reformer. Of the people who have played major roles in the development of the 1990 Article II, several can rightfully claim decades of experience in all four roles, and all four roles inform their analyses of probate law issues.

In sum, Ascher uses the stereotypes of the academic lawyer and the practicing lawyer to suggest that to support the 1990 revisions of Article II is to support anti-populism. By typecasting academics as ungrounded in reality and practitioners as disinterested in theoretical frameworks, Ascher falsely posits a the-

14. *Id.* at 642 n.23.

15. 1990 UNIF. PROBATE CODE art. II, pref. note.

16. 1990 UNIF. PROBATE CODE art. II, hist. note.

17. As of 1991, I have participated at the JEB-UPC meetings as one of the liaisons to law teachers.

ory/practice conflict that leads syllogisticly to the conclusion that Article II chooses theory over the needs of legal consumers—testators. To suggest that the 1990 Article II is nothing more than the abstract ramblings of some isolated and indifferent law professors is both incorrect and unhelpful to a fair analysis of the proposals. One can disagree with the approach and policies of the revised UPC without impugning the motives, judgment, and qualifications of the revisers.

II. ATTESTED/UNATTESTED INTENT BIFURCATION

A. ADEMPTION

Ascher begins his criticism of the 1990 UPC changes to the ademption statute by claiming that the identity theory of ademption is consistent with the intent of most testators.[18] While acknowledging that the identity theory "has the potential to frustrate a testator's intent,"[19] Ascher argues that "elimination of a specific bequest when the underlying asset disappears is what most testators want."[20] The grounds for this argument are his suppositions about why most testators use a specific devise. They do so, according to him, either because of a particular devisee's relationship to a particular asset or because the testator wants to protect the asset itself and is entrusting it to the care of a particular devisee.[21] In either situation, once the asset is no longer in the estate, Ascher maintains that the specific devise serves no further purpose and should become void.[22] The beneficiary of a specific devise should receive nothing based on that devise and any traceable proceeds or identifiable replacement property should pass to the residuary devisees.

The logical implication of Ascher's assertion about the common intent of testators would lead to rejection of the last twenty years of statutory and case-law development regarding ademption. Legislatures, led by the pre-1990 UPC, have adopted exceptions to the identity theory where the asset is involuntarily removed from the probate estate.[23] If it is true, as

18. Ascher, *supra* note 2, at 644.
19. *Id.* at 643.
20. *Id.* at 643-44.
21. *Id.* at 644.
22. *Id.* at 644-45.
23. *See* PRE-1990 UNIF. PROBATE CODE § 2-608. The involuntary-removal situations for which the specific devisee receives substitute property include: (1) condemnations, *id.* § 2-608(a)(2); (2) fires or other casualties, *id.* § 2-608(a)(3); *but see In re* Wright's Will, 165 N.E.2d 561, (N.Y. 1960) (holding lega-

Ascher asserts, that the nexus among the testator, the particular asset, and the particular devisee at the time the testator executed the will means that, once the asset is no longer in the estate, the specific devise serves no further purpose and should be void, the involuntary nature of the asset's removal from the estate would seem to be irrelevant. Neither the circumstances surrounding a subsequent relinquishment of the asset nor the connection between the asset and other assets found in the estate at the testator's death would seem to have any role to play within Ascher's ademption framework.

Notwithstanding the breadth of his common-intent argument in support of the identity theory, however, Ascher embraces the pre-1990 UPC exceptions to the identity theory.[24] He approves of the exceptions because they limit departure "from the traditional rule only in the clearest of circumstances."[25] What he means by "clearest of circumstances" is somewhat unclear. At one point, Ascher describes the exceptions as recognizing that the identity theory "might or might

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tee of lost diamond ring not entitled to insurance money); (3) foreclosures based on secured obligations that were the subject of specific devise, PRE-1990 UNIF. PROBATE CODE § 2-608(a)(4); (4) sales of specifically devised property by a guardian or conservator acting on behalf of an incapacitated testator, *id.* § 2-608(b); *accord, e.g.*, Estate of Mason, 397 P.2d 1005 (Cal. 1965) (holding no ademption where guardian sold specific property to pay expenses of testatrix due to mental incompentency); Estate of Warren, 344 S.E.2d 795 (N.C. Ct. App. 1986) (holding no ademption where trustee sold gift of livestock during testator's incompetency); Estate of Swoyer, 439 N.W.2d 823 (S.D. 1989) (holding no ademption where "the testator becomes incompetent following the execution of a will and a guardian sells property specifically devised by the will. . ."); (5) actions initiated by the entity regarding specifically devised securities that result in the issuance of additional or other securities of the entity to the testator, PRE-1990 UNIF. PROBATE CODE § 2-607(a)(2); and (6) actions initiated by the entity, including mergers, consolidations, and reorganizations, regarding specifically devised securities that result in the issuance of securities of another entity to the testator, *id.* § 2-607(a)(3); *accord, e.g.*, Stenkamp v. Stenkamp, 723 P.2d 336 (Or. Ct. App. 1986) (holding no ademption where retirement plan stock in decedent's name was transferred to him). In fact, the pre-1990 UPC goes so far as to include the situation of a voluntary sale of specifically devised property where all or part of the purchase price is still owing. PRE-1990 UNIF. PROBATE CODE § 2-608(a)(1). *But see, e.g., In re* Hills' Estate, 564 P.2d 462 (Kan. 1977) (holding that certain real property passed as personal property where the only remaining obligation at testator's death was to pay the balance of purchase price); *In re* Reposa's Estate, 427 A.2d 19 (N.H. 1981) (holding ademption occurred where testator no longer owned farm, but only mortgage and promissory note). For further discussion of these nonademption rules, see Gregory S. Alexander, *Ademption and the Domain of Formality in Wills Law*, 55 ALB. L. REV. 1067, 1069-73, 1076-77 (1992).

24. Ascher, *supra* note 2, at 645.

25. *Id.*

not accord with a testator's intention,"[26] suggesting that he, in fact, believes the involuntary nature of an asset's removal from the estate may be relevant in determining a testator's intent. Two sentences later, however, he suggests that he means "clearest of circumstances" to have something to do with limiting the exceptions to those situations where "the clearest sort of tracing" is possible.[27] Perhaps he means to have the language of "clearest of circumstances" apply to both intent and tracing. His sharp criticisms of subsections (a)(5) and (a)6) of UPC section 2-606, which were added in the 1990 revisions, suggest as much.

1. 1990 UPC § 2-606(a)(5): Replacement Property

Ascher condemns subsection (a)(5), which provides that a specific devisee receive real or tangible personal property that the testator acquired as a replacement for the specifically devised property. He argues that (a)(5) is misguided because the replacement standard is insufficiently defined either to assure that the testator's intent is achieved or to prevent "a flood of litigation."[28] Ascher uses a series of examples in his text and footnotes to demonstrate how far afield the replacement standard could take us.

First, he builds on an example found in the commentary to UPC § 2-606, which indicates that if a testator devises a 1984 Ford and subsequently sells it and buys a Buick and then subsequently sells it and buys a new Chrysler, the specific devisee should receive the Chrysler under the will. Ascher explores this example by hypothesizing that when the testator executed the will, the Ford was "well-used and badly-dented."[29] Ascher never forthrightly states that the devisee's claim to the Chrysler turns on one's view of the testator's likely intent. He merely says that allowing the specific devisee to take the brand-new luxury car "does not seem to me to be an intuitively obviously better result than ademption."[30]

In fact, the only way to understand Ascher's dispute with the 1990 UPC is to focus on the question of testator's intent. This is a difficult case for Ascher because his benchmark for determining intent for ademption purposes is the time the tes-

26. *Id.*
27. *Id.*
28. *Id.* at 646.
29. *Id.*
30. *Id.*

tator executed the will. Intent at the time of will execution was central to his defense of the identity theory.[31] It is also central to his unease over the replacement exception to ademption. In contrast, the 1990 UPC commentary makes clear that the reason the UPC abandons the identity theory is because it does not allow for an inquiry "into the testator's intent to determine whether the testator's objective in disposing of the specifically devised property was to revoke the devise."[32] The UPC focuses on the testator's intent at the time the specifically devised property is removed from the testator's estate because that is the time when the removal of the asset potentially operates to revoke the devise.

This difference in focus is critical to understanding Ascher's hostility to the 1990 amendment. From Ascher's point of view, the testator has provided in the will a clear statement of donative intent: "I devise my 1984 Ford to X." To give X anything other than the 1984 Ford makes him uneasy, because to do so effectively allows the state (read "the state" to mean the courts and the legislature) to "rewrite" the will. From the UPC's point of view, it is not that the will's language should be ignored; it is that the will does not address the question of what the testator would want X to take if the 1984 Ford is not in the probate estate. The simple devise of "my 1984 Ford to X" provides no indication that the testator contemplated this possibility. For the UPC, the issue is not whether the state should "rewrite" unambiguous *attested* language. For the UPC, the issue is how best can the state further the testator's *unattested* intent in light of a contingency event that the testator failed to contemplate when executing her or his will.

In resolving that question, the UPC focuses on the date of disposition of the 1984 Ford. The disposition is the testator's last objective act demonstrating donative intent and the UPC provides for investigation of the circumstances surrounding that act to determine if the testator intended to revoke the devise to X. The acquisition of a replacement car near and around the time of the disposition is a fact that the UPC treats as relevant in seeking to determine whether the testator intended to revoke the devise to X by disposing of the 1984 Ford.

Ascher refers to the intent to replace the 1984 Ford with the 1993 Chrysler as "unexpressed," meaning intent not ex-

31. *See supra* text accompanying notes 18-22.

32. 1990 UNIF. PROBATE CODE § 2-606 cmt.

pressed in a validly executed will or unattested intent.[33] He treats unattested intent as lesser in value than "expressed" or "attested" intent and not worthy of as much state protection. He creates this hierarchy of intent in this instance by arguing that the increased litigation about the meaning of the term "replacement" "is a high price to pay for a small improvement in faithfulness to the *unexpressed* [*unattested*] intention of the testator."[34] What he fails to recognize is that treating the devise of the 1984 Ford as revoked is also giving effect to the testator's unattested intention. Giving effect to unattested intention is unavoidable in this case. The testator failed to contemplate the possibility that she or he would dispose of the 1984 Ford. The state is left with a choice: treat the disposition of the 1984 Ford as a revocation of the devise or treat the disposition of the Ford and purchase of the replacements as a substitute devise. In either instance, the state gives effect to intent expressed outside of the will. Thus, the distinction between attested and unattested intent is wholly unhelpful in determining the appropriate ademption rule.

Further justification for the 1990 UPC's replacement exception can be found by looking to its treatment of partial revocation by physical acts and its dispensing-power rule. For the 1990 UPC, disposition of the 1984 Ford and purchase ultimately of the Chrysler is essentially equivalent to the testator lining out the words in his will "my 1984 Ford" and adding the words "my 1988 Buick," and then later lining those words out and adding "my 1993 Chrysler." In general, the 1990 UPC treats inserted words unaccompanied by a signature as invalidly executed—i.e., unattested.[35] The 1990 UPC, however, further provides in section 2-503 that the unattested intent can be given effect "if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the . . . writing to constitute . . . an addition to or an alteration of the will . . . ." One of the primary justifications for adopting this dispensing-power approach in section 2-503 is that it elimi-

33. Ascher, *supra* note 2, at 646.

34. *Id.* (emphasis added).

35. *See* 1990 UNIF. PROBATE CODE § 2-502(a), (b) (formalities of execution and holographic will provisions). The term "unattested" in the text may seem incongruent in the context of a reference to holographic wills. I am using the terms "attested" and "unattested" in the text to describe most simply and accurately Ascher's distinction between intent found in a validly executed will and intent found outside a validly executed will. I do not use it for the purpose of distinguishing between attested and holographic wills.

nates disputes about technical lapses, thus limiting the litigable issues to the central question of whether the writing accurately reflects the testator's intent.[36] This can also be seen as a principal justification for the replacement exception to 1990 UPC § 2-606(a)(5).

The identity theory, just like will formalities, imposes a rule of law that leads to results, based on extrinsic evidence (unattested intent) that everyone agrees frustrates the testator's intent. Courts have developed several escape devices to avoid the harsh results of the identity theory, including classifying a devise as general or demonstrative to avoid ademption, finding a substitute for the devised asset by applying the mere-change-in-form principle, and interpreting the will provision as of the time of the testator's death rather than as of its execution.[37] Although application of these escape devices furthers the testator's intent, they do so only indirectly. The 1990 UPC's policy, as demonstrated in section 2-503 as well as section 2-606, is to focus the dispute directly on the testator's intent. Notably, Ascher praises this approach when found in 1990 UPC § 2-503,[38] but fails to see the connection between sections 2-503 and 2-606.

The replacement rule of 1990 UPC § 2-606(a)(5), of course, is distinguishable from 1990 UPC § 2-503 in one important way. Rather than requiring a proponent for the specific devise to prove by clear and convincing evidence that the testator intended to substitute a newly acquired asset for a specifically devised asset that was removed from the estate, the UPC adopts a rule that the specific devisee receives the replacement asset unless a contrary intent is demonstrated.[39] The UPC takes the position that in the overwhelming number of cases in which the issue arises, the existence of a replacement asset constitutes powerful evidence of testator's intent. Therefore, it adopts a rebuttable presumption that existence of replacement property avoids ademption. To limit disputes about the question of testator's substitution of one asset for another, the UPC rejected any requirement of tracing, which can cause a raft of factual squabbles.[40] In sum, (a)(5) is designed to further the intent of most testators and to limit ademption litigation.

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36. *See id.* § 2-503 cmt.

37. *See* LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 319-22 (1991).

38. Ascher, *supra* note 2, at 641-42 n.13.

39. *Compare* 1990 UNIF. PROBATE CODE § 2-503 *with id.* §§ 2-601, 2-606(a)(5).

40. *See* 1990 UNIF. PROBATE CODE § 2-606 cmt.

Ironically, Ascher attacks this narrowly circumscribed rule because he fears that it will produce "a flood of litigation over the meaning of 'replacement'."[41] He believes that the term, "replacement" is too vague. To prove his point he varies the fact pattern in the Ford-Chrysler example and hypothesizes that the testator buys an antique Rolls Royce[42] or an electric cart[43] or a painting of the testator's favorite vacation spot.[44] He appears to be making two arguments through this series of variations of the Ford-Chrysler example. The first is that the value of and nature of the subsequently acquired assets are so different from the 1984 Ford that to allow X to take any of them would be contrary to the testator's intent. His second point is that the term "replacement" is sufficiently open-textured that it creates a litigable issue in each of these cases.

One answer to Ascher's two criticisms is to refer back to his own standards for judging will statutes. In praise of the pre-1990 version of the UPC, he said it "was content to provide practical and workable solutions to most of the biggest problems most of the time."[45] In condemnation of the 1990 version, he said it had a "compulsion to deal individually with every conceivable variation."[46] Of course, the assessment one makes is a matter of judgment, but it seems reasonable to conclude that the term "replacement" meets the test of providing a practical and workable solution for the vast majority of situations.

The other answer to Ascher's criticisms is that, as stated, they distort the nature of the choices available to the UPC. The choice was not between the identity theory that produces no litigation and achieves the testator's *attested* intent in the overwhelming number of cases and the replacement exception that produces more litigation and achieves the testator's *unattested* intent in some of the cases. The identity theory produces just as much, if not more, litigation, but it is litigation that only indirectly focuses on testator's intent. The replacement exception provides a self-executing rule, because most after-acquired items of property will either be clearly replacement or clearly not replacement property. If the nature of the after-acquired property is at the margin, however, litigation may occur. It is

41. Ascher, *supra* note 2, at 646.
42. *Id.*
43. *Id.* at 646 n.23.
44. *Id.*
45. *Id.* at 640.
46. *Id.*

not irrelevant, however, that the litigation will focus on the centrally important question of whether the testator acquired the property as a replacement for the specifically devised asset.[47]

Undoubtedly, an empirical study of probate estates that analyzed the will provisions for specific devises, the nature of the assets found in the probate estate, and the testator's general plan of distribution would provide important information for deciding whether the replacement rule furthers testamentary intent in most instances and whether it provides a workable standard. Absent this kind of study, however, it seems that the charge that the UPC's replacement rule undermines testamentary intent and manifests an indifference to litigation costs is unduly harsh.

2. 1990 UPC § 2-606(a)(6): A Presumption Against Ademption

Ascher reserves his severest criticisms for subsection (a)(6), which provides for a presumption against ademption. He accuses the revisers of having stood the identity theory "on its head"[48] and doing so "without the kind of forthright drafting one might have expected."[49] The charge that the UPC is less than forthright is difficult to understand in view of the fact that the title to section 2-606 is "Nonademption of Specific Devises" and that the comment specifically states that the identity theory is rejected.

The central force of Ascher's argument, however, is that he disagrees with abandoning the identity theory. He views subsection (a)(6) as "tear[ing] a longstanding rule out by the roots and then encourag[ing] private litigants to determine whether the old rule applies nonetheless."[50] Although he tries to put aside the question of whether the identity theory "is more in keeping with the 'average' testator's unexpressed [unattested] intent than ademption,"[51] it is difficult to understand his concerns without keeping the question of probable testamentary intent at the center of the analysis.

His first criticism apparently is that the UPC condemns will beneficiaries to litigation by abandoning a rule of law, the

47. *See* 1990 UNIF. PROBATE CODE § 2-606(a)(5).
48. Ascher, *supra* note 2, at 645.
49. *Id.*
50. *Id.* at 647.
51. *Id.*

identity theory, and substituting a presumption of nonademption.[52] He believes it would be preferable to adopt a nonademption rule than to create a presumption of nonademption.[53] The problem with this aspect of his argument is that it is based on the faulty premise that a rule of law avoids litigation. As I indicated earlier, the identity theory has been a source of litigation as courts tried to escape its harsh results by adopting an array of theories.[54] There is no reason to believe that an opposite rule of law would not eventually be the progenitor of a similar array of escape devices as courts struggle to avoid results that seem contrary to a testator's intent.

To be sure, Ascher never questions the need for one or another presumption once the UPC abandoned the identity theory. To accommodate the case in which there is equally contradictory evidence or no evidence of the testator's intent, the UPC adopts a presumption for nonademption. In this regard, the UPC lives up to its responsibility of providing an easily determined answer to the difficult situation arising when a testator's intent is unknown or unknowable.

The fundamental thrust of Ascher's criticism of subsection (a)(6) is his belief that facts and circumstances surrounding the making of the will and the disposition of a specifically devised asset—in other words, the testator's *unattested* intent—should not be considered. This view is at odds with the underlying premise of subsection (a)(6), which is that neither a rule of ademption nor a rule of nonademption is satisfactory. Neither

52. *Id.* at 647. In note 26, Ascher compares the UPC's abandonment of the rule of law represented by the identity theory with Justice Cardozo's demotion of the doctrine of worthier title from a rule of law to a rule of construction and implies that a similar litigation quagmire can be expected. *Id.* at 647 n.26. The analogy to the doctrine of worthier title is inapt for two reasons. First, the doctrine of worthier title as a rule of law was never defended on the basis that it furthered dispository intent. On the contrary, the justification for the rule was that it served the public policy goal of increasing alienability of property. *See* LAWRENCE W. WAGGONER, FUTURE INTERESTS IN A NUTSHELL 150-51 (1981). Second, the difficulty of treating the doctrine as a rule of construction was that the very language that one would expect to use to create a remainder interest in one's heirs was the same language that was used to create a presumption that the testator intended to retain a reversionary interest. To overcome the presumption, an estate planner would have to adopt cumbersome language, such as: "to my heirs at law, such persons to take as purchasers, my intention being to create a remainder interest in favor of my heirs at law; I do not intend to retain a reversion in myself." It is hardly fair to suggest that it would be equally as difficult to adopt language to overcome a presumption of nonademption.

53. Ascher, *supra* note 2, at 647.

54. *See supra* note 37 and accompanying text.

rule will invariably operate to further intent or to defeat intent. That Ascher's analysis does not address this point is understandable because he continually treats ademption as operating within a narrow range of types of specific devises that he believes are best accommodated by the identity theory.[55] The fact is, however, that specific devises can be used in a myriad of circumstances to accomplish a myriad of testamentary goals. The possiblities include wanting to recognize a special relationship between the devisee and a particular asset; wanting to provide for a group of devisees, such as children, to share in a class of accumulated assets, like an antique collection; wanting to provide for a group of devisees in an estate that has a number of relatively valuable, illiquid assets; or wanting to protect a particular asset by devising it to a trusted devisee.[56] I believe it is in recognition of this wide range of possible desires that the UPC directs consideration of the facts and circumstances surrounding the execution of the specific devise and the disposition of the specifically devised asset.[57]

If one devalues unattested intent, as Ascher does, then any statutory provision that allows an investigation of that intent will seem misguided. I come to the law of ademption believing that: first, making a specific devise, in and of itself, is not a sufficient indication that the testator intended to embrace the identity theory; second, no rule or presumption regarding ademption can avoid some level of litigation; and third, the circumstances surrounding the asset's disposition are relevant in seeking to determine whether ademption is appropriate. From this point of view, subsection (a)(6) seems a reasonable and appropriate response to a complex set of circumstances and concerns.

3. The "Consumer-Unfriendly" Charge

Ascher asserts that both subsections (a)(5) and (a)(6) are consumer unfriendly. He bases this charge on the following contentions: testators will have to have their wills reviewed to avoid litigation regarding ademption at death;[58] the ademption exceptions do not correlate with most testators' intent, thus requiring them to retain sophisticated attorneys to achieve their

55. *See* Ascher, *supra* note 2, at 644.
56. *See* Alexander, *supra* note 23, at 1080-81.
57. *See* 1990 UNIF. PROBATE CODE § 2-606(a)(6) & cmt.
58. Ascher, *supra* note 2, at 649.

estate planning goals;[59] and nonademption works to the detriment of residuary devisees, residuary devisees are likely to be the testator's primary donative concern, and, therefore, nonademption operates to undermine the testator's plan.[60] All three of these contentions are deeply embedded in Ascher's narrow view of the use of the specific devise, his view that the testator's intent at the time she or he disposes of the asset is irrelevant, and his belief in the completeness of the expression of intent found in the testator's will.

The first contention, that testators will have to have their existing wills revised because they were drafted assuming ademption, is highly debatable. The identity theory is not an invariable rule of law, but is subject to an array of exceptions.[61] Therefore, the claim that estate planners could "confidently draft a specific bequest safe in the knowledge that if the asset disappeared, the bequest would, too"[62] is wrong, or at least, too strongly stated. No knowledgeable estate planner could be as confident as Ascher suggests because there are many reported cases and statutory rules that provide that, even when the asset disappears, the specific devise remains intact. If, as Ascher asserts, specific devises in existing wills need to be rewritten, it is not because the 1990 version extends the exceptions, but because the estate planners are late in realizing that the identity theory is unreliable.[63]

As for the second contention, only a well-designed empirical study can hope to settle the dispute Ascher raises with regard to whether subsections (a)(5) and (a)(6) further most testators' testamentary intent. Until contrary empirical evidence is produced, the UPC should be commended for shaping a statutory scheme that comes as close as any statute in the United States to establishing a workable approach that respects the complex uses of specific devises.

As for the third contention, subsection (a)(6) is designed to address the very question raised regarding the tensions between specific and residuary devisees. The subsection provides that if ademption is consistent with the testator's manifested plan of distribution, then the devise is adeemed and the share

59. *Id.*
60. *Id.*
61. *See supra* note 37 and accompanying text.
62. Ascher, *supra* note 2, at 648.
63. This contention, of course, assumes Ascher's assertion that estate planners consciously expect the identity theory to be applied to specific devises they draft.

of the estate passing to residuary devisees increases. With this as the test for determining nonademption, it is difficult to argue that (a)(6) undermines the testator's plan to favor residuary devisees. On all three grounds, therefore, the claim of consumer unfriendliness seems unfounded.

B. ANTILAPSE

Ascher's concerns regarding the 1990 version of the UPC's antilapse statute parallel those he has regarding the UPC's nonademption statute—i.e., that the revision produces litigation and requires rewriting of existing estate plans. This is unsurprising because many parallels exist between the problems the statutes are designed to address and the proposed solutions. Ademption involves the question of what should happen when a specifically devised asset is not in the testator's estate at her or his death. Lapse involves the question of what should happen when a beneficiary named in the will fails to survive the testator's death. Changes in circumstances between the time of execution and the time of death create questions about how to further testamentary intent when the testator's preferred plan cannot be achieved. Ademption always involves nonresiduary devises; however, lapse can involve either nonresiduary or residuary devises. As for nonresiduary devises to individuals, as opposed to a class of individuals, the competing interests are the same: should the nonresiduary devise fail and increase the amount of property available to the residuary devisees, or should the devise pass to the predeceased devisee's lineal descendants?

Ascher's criticisms of both the nonademption and antilapse provisions of the 1990 UPC provide even more parallels between these two areas of the law. Just as he asserts that estate planners have relied on the identity theory when drafting specific devises, he asserts that estate planners have relied on case precedent that treats the antilapse statute as inapplicable so long as the will contains words requiring a beneficiary to survive the testator.[64] In addition, he believes that the 1990 UPC makes the same mistake under its antilapse statute as it does under its nonademption statute by allowing evidence to be introduced to rebut the presumptions it creates.[65] Unsurprisingly, my answers to his criticisms regarding the 1990 UPC

64. Ascher, *supra* note 2, at 651.
65. *Id.* at 652.

antilapse statute parallel those I made with regard to the charges he levelled against the nonademption statute.

Two propositions inform Ascher's analysis and evaluation of the 1990 UPC antilapse statute: first, an antilapse statute should not interfere with a testator's dispositive scheme when survivorship of the testator by a devisee or devisees has been expressly considered in the will,[66] and second, preserving equality of treatment among different lines of succession in wills is an inappropriate remedial goal and, in any case, does not justify "rewriting" a testator's will through application of an antilapse statute.[67] To Ascher, in other words, survivorship language alone is a clear expression of all the contingencies surrounding survivorship and the substitution of a predeceased devisee's lineal descendants for those persons who would otherwise take is, in any case, a highly suspect solution.

Ascher's rationale for the first proposition is that the prevailing understanding by estate planners of current law is that survivorship language is sufficient to defeat the application of an antilapse statute.[68] He goes on to argue that survivorship language in and of itself is sufficient evidence that the estate planner has assisted the client in giving careful consideration to the consequences of lapse, making application of an antilapse statute and the substitution of the predeceased devisee's lineal descendants inappropriate.[69] Ascher views the 1990 UPC's antilapse statute, which potentially applies regardless of the presence or absence of survivorship language, as working affirmative harm because he views survivorship language as a complete expression of testator's intent. He sees no value in a review of wills containing survivorship language because he believes that each of them accurately reflects the testator's intent and, even if it is possible that this might not be true for some

66. *Id.* at 651.

67. *Id.* at 655.

68. *Id.* at 651. Professor Begleiter raises a related concern that the 1990 UPC's reform regarding survivorship language may generate malpractice litigation. *See* Begleiter, *supra* note 1, at 127-30. Professors Halbach and Waggoner have responded to this criticism by demonstrating that testimony by the attorney that she or he told the client that survivorship language would negate operation of the antilapse statute would be admissible to prevent application of the statute and avoid a malpractice claim. *See* Halbach & Waggoner, *supra* note 6, at 1108-09 n.62; *cf.* Schreiner v. Scoville, 410 N.W.2d 679 (Iowa 1987) (holding that petition stated a cause of action in negligence against attorney when attorney, who drafted will and codicil and participated in sale of specifically devised property, failed to tell the testator about the effect of the sale on her will and codicil).

69. Ascher, *supra* note 2, at 655 n.52.

wills, furthering *unattested* intent for those testators does not warrant putting other testators' estates through the cost and risk of review. These conclusions are not unrelated to his second proposition. Ascher's views about treating survivorship language as a complete expression of intent are integrally connected to his skepticism that substituting a predeceased devisee's lineal descendants as takers furthers testators' plans.

The problem that Ascher ignores by proclaiming that survivorship language is a complete expression of intent is that survivorship language without an expression of a substitute devise is not necessarily a complete expression of intent. Even if we accept his claim that standard practice reveals that estate planners use survivorship language to prevent application of an antilapse statute, that does not mean that the language is free of ambiguity. Nor does it mean that the same language might not be used without the antilapse statute or the question of substitute takers in mind.[70] Moreover, just as he did with regard to ademption, Ascher distorts the question by ignoring the fact that survivorship language has been the subject of significant litigation.[71]

Any UPC reform had to face the difficult dilemma of having an obligation to address the survivorship question underlying this litigation, to respect standard practice of the estate planning bar, and to provide access to remedial statutes for those estates where the will expression was incomplete.[72] If, as is true for Ascher, one does not value the policy goal of furthering a testator's unattested intent, and if one doubts that substituting a predeceased devisee's lineal descendants is likely to further the testator's intent, then it is easy to resolve this di-

70. *See infra* notes 72-76 and accompanying text.

71. Ascher notes that the UPC comment to section 2-603 only cites three cases that "to one extent or another" support the 1990 revision. Ascher, *supra* note 2, at 652. He describes these cases as "stray cases" and concludes that he, Ascher, "would have expected substantially stronger precedents to support a change in a rule in which all estate planners must rely daily." *Id.* at 653 & n.45.

In fact, the UPC comment prefaces the citation of the three cases with an "e.g." signal, which indicates that other authority exists that could have been cited. 1990 UNIF. PROBATE CODE § 2-603 cmt. It seems unfair to expect a comment to a uniform act to present a complete discussion of relevant case law. In fact, there are many more cases in which survivorship language has caused litigation and has not prevented application of the antilapse statute. A number of these additional cases are given in Halbach & Waggoner, *supra* note 6, at 1105 n.59.

72. *See generally* Halbach & Waggoner, *supra* note 6 (discussing the rationales behind the UPC's revised survivorship and antilapse provisions).

lemma in favor of standard estate planning practice. If one believes, as I do, that antilapse statutes can further a testator's attested and unattested intent, then the question of how to treat survivorship language is significantly more difficult. Neither a rule that treats survivorship language as always insufficient to counteract an antilapse statute nor a rule that treats survivorship language as always sufficient to counteract an antilapse statute is satisfactory.

I am persuaded that the 1990 UPC, which requires more evidence than mere survivorship language to avoid application of the antilapse statute, is ultimately correct. I come to that conclusion after considering the complexity of the situations that can arise in which survivorship language is included, but the disposition remains incomplete. Let me use just two examples to illustrate why Ascher's recommendation to treat survivorship language as conclusively barring the antilapse statute is unworkable and unsatisfactory.

Consider the situation in which a testator leaves a will containing the following residuary devise: "one half of my residuary estate to B if B survives me and one half to my lineal descendants per stirpes." B, who was the testator's domestic partner, predeceases the testator. Ascher asks us to believe that this type of provision is usually the product of thoughtful estate planning when he says:

> [M]ost estate planners believe that if a bequest contains language such as, "if he survives me," the antilapse statute cannot apply. Other portions of the will (or the law of intestate succession), rather than the antilapse statute, will determine what happens to the property that is the subject of a bequest if the beneficiary predeceases the testator.[73]

In this passage, he suggests that the testator would prefer that B's half of the residuary pass by intestacy rather than to the testator's lineal descendants in accordance with 1990 UPC § 2-604(b).[74] Does this residuary bequest reflect an atypical distrib-

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73. Ascher, *supra* note 2, at 651.

74. The 1990 version of section 2-603(b)(3) provides that "[f]or the purposes of Section 2-601 [stating that the rules of construction, including those found in sections 2-603 and 2-604, apply in the absence of a finding of a contrary intention], words of survivorship . . . are not, in the absence of additional evidence, a sufficient indication of an intent contrary *to the application of this section.*" 1990 UNIF. PROBATE CODE § 2-603(b)(3) (emphasis added). One inference from section 2-603(b)(3) is that the UPC takes no position regarding survivorship language when the antilapse rule subject to section 2-604 applies. Another possible inference is that the policy not to treat survivorship language alone as precluding the operation of section 2-603 should be extended to section 2-604. Ascher seems to have assumed that the policy applied to

utive plan? According to Ascher, it is quite typical to include spouses and lineal descendants as residuary beneficiaries[75] and I would assume he would extend that reasoning to domestic partners. Is it a competently drafted residuary bequest as Ascher would seem to want us to believe? My answer to that is a resounding no. The drafter may have used the words of survivorship, but failed to indicate what should happen to B's half of the residuary in the event she failed to survive the testator, what should happen to the other half in the event that the testator died without any lineal descendants surviving, or what should happen to the entire residuary in the event that the testator should die after B died and without any lineal descendants. The UPC treats this kind of disposition as incomplete and ambiguous. It requires consideration of the testator's entire distributive scheme and any other extrinsic evidence available that provides information about testator's likely unattested intent. In the absence of evidence of a contrary intention, it assumes that the testator would prefer the lineal descendants to receive B's failed devise and would prefer B to receive the lineal descendants failed devise. Only if none of the residuary devisees survives the testator would the UPC conclude that intestacy is the preferred result.

One possible response to this example and to the 1990 UPC's treatment is that survivorship language should not be sufficient when found in a residuary devise, but should be sufficient when found in nonresiduary devises. In residuary devises survivorship language is insufficient because the testator has failed to provide for substitute takers. For nonresiduary devises, however, the residuary devisee is always the substitute taker and therefore arguably, survivorship language never stands alone. It seems that Ascher would certainly be more sympathetic to this more limited type of rule than the one found in the 1990 UPC.

Consider a second example, however, before concluding that this kind of solution is preferable to the one adopted in the 1990 UPC. Suppose testator executes a will devising "$100,000 to my two nieces, A and B, or to the survivor of them." Further suppose that both A and B predecease the testator. X, the daughter of A, survives the testator; B dies childless. Presumably, Ascher would conclude that the presence of survivorship

nonresiduary and residuary devises alike. Clarification of the 1990 UPC language on this point would be desirable.

75. Ascher, *supra* note 2, at 656.

language indicates that the estate planner and the testator had considered the question of lapse carefully. He would further argue that to allow the antilapse statute to apply in this case and to allow X to inherit the $100,000 would be inconsistent with the testator's expressed intent. His preferred result would be to bar application of the antilapse statute and have the $100,000 pass under the residuary devise.[76]

I find this a difficult case. Ascher may accuse me of "look[ing] down [my] nose[] at estate planners who rely on the rule"[77] and that I do not believe that "these estate planners . . . know what they are doing",[78] but I find this disposition badly drafted. I think it is badly drafted because it does not indicate that the testator, through the drafter, contemplated the unlikely possibility that both nieces might not survive the testator, or that they might die leaving lineal descendants. Moreover, it is difficult for me to determine the proper distribution of the estate without consideration of the contents of the residuary devise, the nature of testator's relationship with her nieces, and whether she was survived by other close family members who might be provided for in the residuary devise. Only after consideration of this and perhaps other information can we begin to draw conclusions about whether the testator would prefer the entire $100,000 to pass under the residuary clause rather than having at least $50,000 of the $100,000 general devise pass to X.

For example, if the nieces were the testator's closest blood relatives and she left the rest of her estate to various charities, then it is harder for me to conclude that the testator would prefer that X receive nothing in the absence of affirmative evidence that these charities were especially important to her during her life and that her nieces and their families played only a minor role in her life. If, however, she had left the rest of her estate to her lesbian partner and evidence showed that she had only minimal contact with her nieces, then I would be more comfortable concluding that the testator intended to preclude operation of the antilapse statute and to have the residuary devisee receive the entire $100,000.

My point is not to convince anyone that there are necessar-

76. The example in the text is similar to the facts found in Estate of Ulrikson, 290 N.W.2d 757 (Minn. 1980) (en banc). Ascher suggests that he disagrees with the results in that case, which applied the antilapse statute. *See* Ascher, *supra* note 2, at 652-53 & nn.44-45.

77. Ascher, *supra* note 2, at 652.

78. *Id.*

ily correct answers to the above example when considering all the variations of facts presented. My point is to show the value of the 1990 UPC, which allows for the kind of inquiry I am describing. Ascher might agree that this type of inquiry furthers unattested intent in a few cases of this type, but presumably he would remain convinced that the advantages obtained are not worth the cost of requiring review of all existing estate plans and creating a litigable issue. My response is that survivorship language comes in too many forms and occurs in too many different situations to have it be the polestar for determining the application of the antilapse statute.

CONCLUSION

Early in his essay, Ascher shows that his thinking on the general question of giving effect to donative intention is not in the mainstream. He has argued elsewhere, he notes,

> that society ought to care less about how the dead want their wealth used than how the living want to use it. . . . I am less interested in a system that seeks to carry out a decedent's intent (particularly where the decedent has never bothered to express that intent) than in a system that simply and without litigation disposes of a decedent's assets.[79]

It is revealing, I believe, that Ascher does not use the parenthetical phrase to limit this sentence, but to illustrate instances in which he merely believes in it more strongly.

Ascher elevates the goal of "disposing of" a decedent's assets "simply and without litigation" above the goal of carrying out a decedent's intent. The asserted logic of this goal is that "disposing of" a decedent's assets "simply and without litigation" serves the living rather than the dead, and is therefore to be preferred. In many ways, however, Ascher's arguments are best understood as a plea for something akin to nineteenth-century formalism. Even the legal realists, who highly valued predictability and determinacy, appreciated that the complexity of factual situations required lawmakers to abandon determinate rules.

Ascher fails to recognize that experience has shown that rules purporting to dispose of a decedent's assets "simply and without litigation," but defeating intention are not simple and do not prevent litigation. The law has always acknowledged that the benchmark for arbitrating disputes between "the living" is the decedent's intention. What has been happening in

79. *Id.* at 640-41 (footnote omitted).

the last decade or so is that the law is moving in the direction of implementing that principle more thoroughly and forthrightly.[80]

The first step in this evolutionary process is that the scope of the rule is gradually reduced as courts refuse to apply it rigidly. They open the rule up to exceptions, sometimes even ad hoc exceptions. The courts do not openly label the rule as unjust, but find a variety of reasons for not applying it in increasing numbers of cases.[81] This first step has already occurred in connection with ademption and the antilapse statutes. Regarding ademption, the courts for the most part still cling to the identity theory, but frequently find ways to avoid applying it. Regarding antilapse statutes, the courts for the most part cling to the rule that survivorship language defeats the statute, but frequently find ways to apply the statute despite survivorship language.

Eventually, in this evolutionary process, the facade breaks down as a few courts and legislatures come out directly and reverse or modify the old rules forthrightly. Ascher fails to appreciate that the first step has been taken and, in effect, scorns the UPC for abruptly upsetting what he visualizes, incorrectly, as settled rules that dispose of a decedent's assets "simply and without litigation." In sum, contrary to Ascher's claim that the UPC resembles *Alice in Wonderland*,[82] this essay shows how and why the UPC is very much in the mainstream of an ongoing evolutionary process of probate reform.

80. *See, e.g.*, Estate of Branigan, 609 A.2d 431 (N.J. 1992) (giving effect to unexpressed intention under the doctrine of probable intention to give the decedent's estate a better tax result under post-execution and post-death change in tax law, and reciting earlier cases applying doctrine of probable intention in a variety of non-tax settings).

81. *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1699-1701 (1976).

82. Ascher, *supra* note 2, at 658.