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A Response to Professor Fellows

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Though Professor Fellows's words leave me every bit as unpersuaded as mine have apparently left her, I am content to go rather quietly on matters of substance.[1] I do, however, wish to point out several respects in which Professor Fellows has misread my essay and unknowingly made my case for me.

The plainest of Professor Fellows's misreadings occurs in a discussion of a bit of dispositive language she herself has drafted: "one half of my residuary estate to B if B survives me and one half to my lineal descendants per stirpes."[2] While I agree with Professor Fellows[3] that her drafting is incompetent, she gives the clear impression that I would call this language good drafting.[4] I never said that all language that involves a survival requirement is good drafting. What I said was that most estate planners do a pretty good job of handling the lapse issue.[5] Obviously, I believe that most competent estate planners would avoid falling into Professor Fellows's trap.

Professor Fellows alone deserves credit for the "attested/unattested intent bifurcation."[6] I want nothing to do with it.[7] She uses this distinction to trivialize my essay so that

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1. Another commentator has recently published doubts similar to mine about the 1990 version of section 2-603(b)(3) governing the effect of words requiring survival on the antilapse statute. *See* Martin D. Begleiter, *Article II of the Uniform Probate Code and the Malpractice Revolution*, 59 TENN. L. REV. 101, 126-30 (1991).

2. Mary Louise Fellows, *Traveling the Road of Probate Reform: Finding the Way to Your Will*, 77 MINN. L. REV. 659, 677 (1992).

3. *Id.* at 678.

4. *Id.*

5. Mark L. Ascher, *The 1990 Uniform Probate Code: Older and Better, or More like the Internal Revenue Code?*, 77 MINN. L. REV. 639, 651 (1992).

6. Fellows, *supra* note 2, at 660.

7. Professor Fellows badly misreads my words when she substitutes her word, "unattested," for my word, "unexpressed." *Id.* at 666-67. They do not mean the same thing. Professor Fellows criticizes me for not wanting to effectuate post-execution intentions. She attributes my lack of interest to my adherence to her "attested/unattested intent bifurcation." My objection to postmortem inquiry into post-execution intent is not, however, that such intent is *unattested*, but that it probably never existed and, even if it did, the testator

the reader could dismiss it as the work of a reclusive refugee from the nineteenth century.[8] That refugee, it seems, refuses to read cases or acknowledge trends that threaten the Statute of Wills with the contagion of post-mortem inquiry into "unattested intent."[9] Yet it is I, not Professor Fellows, who carefully analyze the late twentieth-century cases the revisers cite in support of their work.[10] My essay is not a defense of the Statute of Wills, as footnote 13 makes clear.[11] I have repeatedly stated that my primary point is that the revisers' willingness to move mountains to produce tiny improvements in faithfulness to the unexpressed intentions of those who hire no one or no one competent to plan their estates will result in unjustifiable statutory interference with the wills of those who have hired competent estate planners.[12]

In explaining why I feel so strongly about allowing estate planners to speak for their clients unaided[13] or unimpeded[14] by the legislature, I do have something for which to thank Professor Fellows. She makes my case eloquently. In discussing another of her hypotheticals, Professor Fellows candidly acknowledges her own inability to determine how the testator would have wanted a particular issue resolved:

> [I]t is difficult for me to determine the proper distribution of the estate without consideration of [first,] the contents of the residuary devise, [second,] the nature of testator's relationship with her nieces, and [third,] 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 [fourth,] other information can we begin to draw conclusions about whether the testator would prefer the entire [amount] to pass under the residuary clause rather than having at least [half] pass to X.[15]

That kind of indeterminacy—not Professor Fellows's "attested/unattested intent bifurcation"—is my point. Neither

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probably never *expressed* it to anyone. Ascher, *supra* note 5, at 641. I do not believe that the average testator forms any intent about what should happen to various bequests in light of subsequent events. And even those who do generally do not *express* that intent to anyone.

8. Fellows, *supra* note 2, at 680.

9. *Id.* at 680-81.

10. Ascher, *supra* note 5, at 647-48 n.29, 652-53 nn.44-45.

11. My acceptance of the 1990 version of section 2-503 should have warned Professor Fellows off. She clearly has read footnote 13, because she uses my acceptance of § 2-503 to accuse me of not understanding my own essay. Fellows, *supra* note 2, at 668.

12. Ascher, *supra* note 5, at 642, 649, 654, 655, 659.

13. Probably Professor Fellows's word.

14. Certainly my word.

15. Fellows, *supra* note 2, at 679.

Professor Fellows, the rest of the revisers, nor any legislature has access to the individualized client information that is necessary to decide the issues the revisers are so eager to decide on behalf of all testators. Neither the revisers nor the legislature has carefully interviewed the testator to determine her intentions. Nor have they sweated over the selection of each word necessary for the meticulous implementation of those intentions. When a competent estate planner has already performed these functions, the UPC should not attempt to impose what the revisers imagine is the "average" testator's intent. The UPC should gladly give the testator exactly what her estate planner has asked for on her behalf.

The fact that estate planners are fallible is beside the point. Any vaguely competent estate planner knows Professor Fellows's first, second, and fourth items. And many estate planners (in conjunction with their clients) are willing to venture thoughtful speculation about her third item. Thus, even the vaguely competent estate planner is infinitely better equipped to determine and effectuate a particular client's intentions than the most thoughtful legislature, even one that has enacted the carefully crafted proposal of a panel of distinguished experts.

Despite my willingness to go quietly in the face of Professor Fellows's substantive comments, I must protest her nonsubstantive attacks. She, not I, developed the scapegoat "academic/practitioner bifurcation."[16] Most of the "oblique negative references to academia"[17] she points to are so oblique *I* never made the connection. Apparently I have a much higher opinion of academicians than Professor Fellows does, for I would never claim, on behalf of our mutual profession, a monopoly on pretentiousness or arrogance; lawyers sometimes share these characteristics. Lawyers, too, are sometimes wordy and fail to say clearly what they mean. Lawyers also sometimes feel compelled to deal individually with every conceivable variation.

The only time my essay enters even the general vicinity of the scapegoat issue is in characterizing the UPC as "a laboratory for academicians bent on reaching, at any cost, what they imagine to be the 'correct' result."[18] Because Professor Fellows draws so much meaning from this single statement, I want to clear the air on exactly what I intended in employing it. My

16. *Id.* at 660.
17. *Id.* at 661.
18. Ascher, *supra* note 5, at 642.

basic criticism of the 1990 UPC as a whole is that the revisers—all of them—may have seriously misjudged its chances for widespread enactment.[19] After almost twenty-five years, only fifteen states have adopted the UPC. Until 1990, even I would have characterized the UPC as mildly reformist. Just how many states do the revisers think will adopt their much more reformist version? Some states that adopted the pre-1990 UPC will certainly shy away from parts or all of the 1990 version. A century or two from now all of the 1990 UPC may be widely adopted. But it will not happen any time soon. The probate reforms of the last several centuries occurred at a much slower pace. The UPC should not be the shining city on the top of the hill. It should instead be the best package the revisers justifiably believe is widely adoptable now. It is a "uniform," not an "ideal," act. To do their jobs well, the revisers must frequently trade off reformist ideals against political reality, for it is the ability of a uniform act to become widely adopted that is the surest measure of its success.

My essay is about the inappropriateness of the revisers' efforts to substitute their words for the carefully selected words that appear in competently drafted wills. I object, for example, to the revisers' eagerness to convert "I give my car to Bob" into "I give my car to Bob if I still own it at my death or, if I do not still own my car at my death, I give Bob anything with which I have replaced my car, or, if I have disposed of my car but not replaced it, I give Bob cash in the amount of the fair market value of what was once my car, as of the moment of my death."[20] Such a will contains no reference to replacements (cars or otherwise) or alternative cash bequests, yet the revisers are confident that is what the testator's words mean. Professor Fellows demonstrates the same eagerness to substitute her own words for the carefully selected words that appear in my essay. For example, my essay uses words like "less clear," "much wordier," "pretentious," "arrogance," and "squirm." Professor Fellows substitutes for these words "pet theories,"[21] "eggheads

19. This is certainly true of those who promulgated the Uniform Marital Property Act, for example. After almost a decade, UMPA still has been enacted only in Wisconsin, leading two individuals deeply involved in uniform law work to conclude that UMPA's future is "bleak." John H. Langbein & Lawrence W. Waggoner, *Redesigning the Spouse's Forced Share*, 22 REAL PROP., PROB. & TR. J. 303, 306 (1987).

20. Ascher, *supra* note 5, at 649.

21. Fellows, *supra* note 2, at 660.

gone amok,"[22] "a theory/practice conflict,"[23] "abstract ramblings of some isolated and indifferent law professors,"[24] and so forth, apparently equally confident that is what I mean. The fact that she is so wide of the mark is the best proof for which I could have hoped.

Yet Professor Fellows is not satisfied with substituting her words for mine. On the basis of my supposed adherence to the "academic/practitioner bifurcation" that she herself has created, she chastises me: "One can disagree with the approach and policies of the revised UPC without impugning the motives, judgment, and qualifications of the revisers."[25] I suppose it is understandable (but somewhat odd) to say that I have impugned the judgment of the revisers. My essay certainly is critical of aspects of their work. But a fair reading of my essay does not lead to the conclusion that I have impugned the revisers' motives or qualifications. Academicians are under an obligation to try to push the law in ways they believe to be correct. Hence, I fail to see how my statement impugns anyone's motives. Nor do I understand how I have impugned anyone's qualifications. In academia, earnest criticism on matters of substance is the sincerest form of flattery. I would never have imagined that my willingness, as a member of the academy, to take on the work of those with vastly greater experience and qualifications would have resulted in outright distortions of a personal nature. Even one who writes sharply, as I sometimes do, deserves to have his work evaluated on the basis of the words he himself has chosen, not on the basis of words someone else chooses for him.

22. *Id.*
23. *Id.* at 662-63.
24. *Id.* at 663.
25. *Id.*