

THE *MODERN FAMILY*:* WHY THE FLORIDA LEGISLATURE SHOULD REMODEL ITS ANTILAPSE STATUTE FOR WILLS TO REFLECT THE CHANGING FAMILIAL STRUCTURE

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I. INTRODUCTION

The traditional familial structure has changed substantially over time. Consider the family in the ABC television series *Modern Family*.¹ Jay Pritchett represents the patriarch of the family, a middle-aged man with two children from his first marriage, Claire and Mitchell, who are adults who have begun families of their own.² Claire is married to Phil Dunphy and together they have three children: Haley, Alex, and Luke Dunphy.³ Mitchell and his partner, Cameron Tucker, are a gay couple who adopt a baby named Lily and eventually marry.⁴ Jay remarries a woman named Gloria and becomes the stepfather to her ten-year old son, Manny,

* *Modern Family* (ABC television series 2009–present).

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1. *Modern Family*, *supra* note *. This television series depicts the truly “modern family”: a family with biological children, stepchildren, adopted children, gay marriage, and second marriages. *Id.* A large family such as this may find professional estate planning particularly desirable.

2. *Id.* Claire and Phil share the most “traditional” familial relationship on the show: two parents living together in the same home with their biological children. See Gretchen Livingston, *Fewer Than Half of U.S. Kids Today Live in a ‘Traditional’ Family*, PEW RES. CENTER (Dec. 22, 2014), <http://www.pewresearch.org/fact-tank/2014/12/22/less-than-half-of-u-s-kids-today-live-in-a-traditional-family/> (describing a “traditional” family as one where the children live in a home with “two married heterosexual parents in their first marriage”). As *Modern Family* demonstrates, considering this definition to be “traditional” is, in a sense, outdated.

3. *Modern Family*, *supra* note *.

4. *Id.*

from her first marriage.⁵ Jay and Gloria eventually have a biological child together, Joe, and live in one home with both of their sons.⁶

The large family depicted in *Modern Family* may have various concerns regarding the creation of an effective estate plan. For example, contemplate a situation in which Jay never formally adopts his stepson Manny, who eventually has a daughter. Jay executes two estate planning documents: (1) a will leaving his car to Manny; and (2) a trust leaving his stock portfolio to Manny. Unfortunately, Manny passes away before Jay, who also dies a year later. Under current Florida law, Manny's daughter will not receive Jay's car because the statute controlling gifts to predeceased beneficiaries in a will—the antilapse statute—does not allow the descendants of a testator's stepchild to take a devise in the predeceased stepchild's place.⁷ However, under the Florida Trust Code's antilapse statute, Manny's daughter *will* receive Jay's stock portfolio, because the Florida Trust Code allows the descendant of any predeceased beneficiary to take in the beneficiary's place, regardless of the beneficiary's relationship to the settlor of the trust.⁸ This result may confuse and surprise laypeople who are relatively unfamiliar with estate planning laws.

The familial relationships expressed in *Modern Family*, especially between Jay, Gloria, and their children, are not uncommon. An estimated 4.6 million children under the age of eighteen in the United States live in a household with a stepparent.⁹ However, this figure—collected by the United States Census Bureau—is merely an estimate, likely an underestimate, of the true number of blended families in this country.¹⁰ When researchers considered cohabitation, rather than figures solely

5. *Id.*

6. *Id.*

7. FLA. STAT. § 732.603(1) (2016) (allowing only biological family members the option to substitute the predeceased beneficiary with a descendant in regards to gifts).

8. *Id.* § 736.1106(2).

9. Rose M. Kreider & Daphne A. Lofquist, *Adopted Children and Stepchildren: 2010*, U.S. CENSUS BUREAU 5 (Apr. 2014), <http://census.gov/content/dam/Census/library/publications/2014/demo/p20-572.pdf>.

10. See *id.* at 3 (discussing how some stepparents choose to adopt their stepchildren and no longer consider them a stepchild). “[G]overnment reporting of population figures indicate families in which the child resides. So if the child lives with a divorced, single parent and the other nonresident parent has remarried, the child is not included in the calculations as being a member of a stepfamily.” *Stepfamily Fact Sheet*, NAT’L STEPFAMILY RES. CENTER, <http://www.stepfamilies.info/stepfamily-fact-sheet.php> (last visited Apr. 7, 2017).

from families involving a married couple, a 1995 study estimated that “about two-fifths of all women and [thirty percent] of all children are likely to spend some time in a stepfamily.”¹¹ This data makes sense when considering the marked decline of children who lived in a home with two married parents from 1960 (when eighty-five percent of children under the age of eighteen lived with two married parents) to 2012 (when only sixty-four percent of children lived in a home with two married parents).¹² Overall, a 2010 survey found that forty-two percent of American adults have at least one steprelative in their family (whether it be a stepparent, stepsibling, or stepchild).¹³

These changes in the family structure over the past several decades have led to difficulty in the estate planning arena for individuals who have an idea of how they would like to distribute their wealth, but little clue on how to effectuate their desires when multiple marriages and/or various familial relationships are involved.¹⁴ Several professionals in the area of estate planning have sought to simplify (or at least illuminate) the estate planning process for such individuals, but it may be difficult to do so when some state statutory schemes are not viable for the modern, developing family.

The antilapse statute introduced above is one specific type of state statute applied in wills and trusts that may prove to be particularly cumbersome for blended families.¹⁵ Prior to the enactment of protective statutes for wills, when a beneficiary (taker) predeceased the testator (drafter) of a will, the beneficiary’s devise (gift) lapsed and the devise passed to the testator’s

11. Larry L. Bumpass, R. Kelly Raley & James A. Sweet, *The Changing Character of Stepfamilies: Implications of Cohabitation and Nonmarital Childbearing*, 32 DEMOGRAPHY 425, 428 (1995) (studying family trends in the United States).

12. *Family Structure: Indicators on Children and Youth*, CHILD TRENDS DATA BANK 3 (Dec. 2015), <http://www.childtrends.org/indicators/family-structure/>.

13. Pew Research Ctr., *A Portrait of Stepfamilies*, PEW SOCIAL TRENDS (Jan. 13, 2011), <http://www.pewsocialtrends.org/2011/01/13/a-portrait-of-stepfamilies/>.

14. See RICHARD E. BARNES, ESTATE PLANNING FOR BLENDED FAMILIES: PROVIDING FOR YOUR SPOUSE & CHILDREN IN A SECOND MARRIAGE (Mary Randolph ed., 2009) (providing guidelines on the difficulties that blended families may face during estate planning and solutions and suggestions to common issues). See also James R. Allen, Jr., *Estate Planning for the Modern Family*, J. FIN. SERV. PROF’LS, Sept. 2012, at 40, 40–46 (using the family from *Modern Family* to provide various estate planning options for blended families).

15. See FLA. STAT. § 732.603(1) (2016) (limiting substitution of a predeceased beneficiary to only biological members of the testator).

residuary takers or, if none, to the testator's heirs at law.¹⁶ To counteract this harsh result to the beneficiary, a large majority of states have enacted antilapse statutes that protect¹⁷ a devise to certain relative beneficiaries who predecease the testator by allowing the descendants (children) of the beneficiary to take the devise.¹⁸ The Florida Antilapse Statute for wills places a limit on the protected relationships: if the predeceased beneficiary is the testator's grandparent or a descendant of the testator's grandparent, the beneficiary's surviving descendants take the devise.¹⁹ If the beneficiary does not fit either of these relational categories, the beneficiary's surviving descendants are unable to take the devise, which will instead lapse and fall to the residual takers under the will or to the testator's heirs at law, if no such residual clause exists.

Unlike Florida, the antilapse statute in some states protects a gift to a predeceased stepchild.²⁰ In Florida, if a testator drafts a will and leaves a gift to his or her stepchild and the stepchild dies before the testator, the gift will not go to the stepchild's descendants because Florida's Antilapse Statute for wills does not protect this type of relationship.²¹ Therefore, even if the testator had a relationship with his or her stepgrandchildren, the gift will instead go to the testator's residual takers or the testator's heirs at law, who may not have received a gift under the will otherwise.

This Article seeks to propose a remedy to the deficiency in Florida's Antilapse Statute for wills that leaves out takers,

16. JESSE DUKEMINIER & ROBERT H. SITKOFF, *WILLS, TRUSTS, AND ESTATES* 357 (Wolters Kluwer Law & Bus, New York, 9th ed. 2013).

17. To "protect" or "save" a devise means that the gift to a predeceased taker does not go to the testator's residual takers or the testator's heirs at law. *Id.* Instead, the gift goes to the predeceased taker's descendants. *Id.*

18. *Id.*

19. FLA. STAT. § 732.603(1). Under Florida law, adopted relatives are treated the same as biological relatives. *See id.* § 63.032(2) (explaining that the adoption of a child creates a "legal relationship between parent and child where it did not exist," such that the child is the parents' "heir at law and entitled to all the rights and privileges and subject to all the obligations of a child born to such adoptive parents in lawful wedlock"). Therefore, the testator's grandparents and the descendants of the testator's grandparents include both the testator's biological and adopted relatives, but not steprelatives.

20. *See infra* notes 84–85 (identifying jurisdictions that protect gifts to stepchildren with antilapse statutes for wills).

21. A stepchild will not meet the requirement of Florida's antilapse statute that the predeceased beneficiary be a relative of the testator unless the testator legally adopted the stepchild. *See supra* text accompanying note 19. If the testator did legally adopt the stepchild, this distinction is obsolete as an adopted child has identical legal rights as a biological child. FLA. STAT. § 63.032(2).

specifically the descendants of a testator's stepchildren, that a testator may have intended to favor in his or her devise over the residual or intestate takers. Part II of this Article provides a brief overview of estate planning and the various instruments an individual may use for distribution of his or her property after death. Part III of this Article discusses antilapse statutes in Florida as compared to the antilapse statutes in other states throughout the country.

The application of antilapse statutes to blended families is addressed in Part IV, including two slightly different hypotheticals that serve as examples of Florida's antilapse application and antilapse application in other states with broader statutes. Finally, Part V argues that Florida's antilapse statute for wills should be expanded to include other individuals with a close relationship to the testator, beginning with the testator's stepchildren, because modern times have shown an increase in blended families with family members that a testator may intend to include in a devise. Part V also includes a model statute for the proposed expanded antilapse statute. This Article concludes by emphasizing the reasons why the Florida legislature must consider expanding its antilapse statute for wills to protect the developing family structure.

II. ESTATE PLANNING INSTRUMENTS

While many individuals and families may believe that estate planning is only for the rich, in fact anyone with property valuable to them or anyone with minor children should consider creating an estate plan. Not only do individuals with estate plans have incredible power over the distribution of their property following death, but creating such a plan also enhances familial security and decreases the stress of surviving loved ones. With only a basic understanding of relevant state law, obtained through a rudimentary Internet search, anyone can create a will that may protect their property and children after death. However, while many individuals may not prefer the time or expense of securing a professional estate planner, those with particularly valuable

assets or an extended or blended family²² may find professional expertise desirable.

There are two main ways property is inherited after an individual dies: (1) through the probate system²³ or (2) outside of the probate system by nonprobate succession.²⁴ State laws governing probate and nonprobate transfers vary considerably and can be quite murky without professional guidance.²⁵ Antilapse statutes are used in the probate context when a testator drafts a will.²⁶ In the nonprobate context, antilapse statutes come into play when a settlor creates a revocable trust.²⁷ Florida is among a group of states that has decided to extend antilapse protection to revocable trusts, with support from the Uniform Probate Code (UPC)²⁸ and following the lead of the Uniform Trust Code (UTC).²⁹ Under Florida's Antilapse Statute for trusts, the descendants of *any* predeceased beneficiary may take, regardless of the beneficiary's relationship to the settlor.³⁰ Thus, while a revocable trust is much like a will in form and function, revocable trusts are actually provided more antilapse protection than wills.³¹

22. In this Article, the term "blended family" will be used to express a family with children from a prior marriage of the wife, husband, or both. *See, e.g.*, Jeanne Segal & Lawrence Robinson, *Step-Parenting and Blended Families: How to Bond with Stepchildren and Deal with Stepfamily Issues*, HELPGUIDE.ORG, <https://www.helpguide.org/articles/family-divorce/step-parenting-blended-families.htm?pdf=true> (last updated Apr. 2017) (defining a blended family as a family including children from the prior marriage of one or both spouses).

23. Black's Law Dictionary defines probate as a "judicial procedure by which a testamentary document is established to be a valid will; the proving of a will to the satisfaction of the court." BLACK'S LAW DICTIONARY (Bryan A. Garner ed., 10th ed. 2014).

24. Nonprobate transfers following an individual's death are those done outside of the context of a will. BLACK'S LAW DICTIONARY, *supra* note 23. *See infra* Part II(B) for examples of the varying types of nonprobate transfers.

25. *See, e.g.*, *infra* Part III(A) (examining the difference between the antilapse statute under the Florida Probate Code versus the antilapse statute under the Florida Trust Code).

26. *See, e.g.*, FLA. STAT. § 732.603(1) (2016) (using an antilapse statute in the probate context when a testator drafts a will).

27. *See, e.g.*, *id.* § 736.1106(2) (using antilapse statutes when creating a revocable trust).

28. UNIF. PROB. CODE § 2-707(b) (1969) (amended 2010) ("If a beneficiary of a future interest under the terms of a trust fails to survive the distribution date . . . and the deceased beneficiary leaves surviving descendants, a substitute gift is created in the beneficiary's surviving descendants.").

29. *See infra* note 42 (discussing the enactment of the UTC).

30. FLA. STAT. § 736.1106(2).

31. Professor Waggoner aptly points out that the antilapse-type protection found in the UPC and in states that have adopted a similar provision applies solely to poorly drafted trusts. A proper, professionally drafted trust instrument will in fact have takers in default who will take a devise that lapses due to the death of a beneficiary. Lawrence W. Waggoner, *The Uniform Probate Code Extends Antilapse-Type Protection to Poorly Drafted Trusts*, 94 MICH. L. REV. 2309, 2310 (1996).

A. Probate Administration

When a testator drafts a will, his property passes through the probate system.³² Although nonprobate transfers have become increasingly popular as American wealth grows, probate administration is truly an “indispensable institution”³³ because of its ability to collect and distribute property after death from those individuals who do not dispose of some or all of their property via will substitutes. After all, although revocable trusts are becoming more popular, it is estimated that only twenty percent of Americans have created an effective trust.³⁴ Although indispensable, the probate system remains a complicated one. It can be especially confusing due to many variations in probate laws throughout the United States.

Originally promulgated in 1969, the UPC was developed with the intent to encourage states to adopt uniform probate laws.³⁵ The UPC was substantially revised in 1990³⁶ and then again in 2008.³⁷ Sixteen states, including Florida, adopted the 1969 version of the UPC in its entirety with slight modifications.³⁸ Although it has not been uniformly adopted by all states, the UPC remains an influential uniform code and has the potential to adapt to changing societal norms regarding families faster than some state statutes.³⁹

32. BLACK'S LAW DICTIONARY, *supra* note 23.

33. John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1108 (1984).

34. Michelle Fabio, *Top Three Benefits of a Living Trust*, LEGALZOOM (Nov. 2015), <https://www.legalzoom.com/articles/top-three-benefits-of-a-living-trust>.

35. Lawrence H. Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 ALB. L. REV. 891, 896 (1992).

36. *Id.* at 898.

37. Joseph J. Carroll, *Avoiding Backlash: The Exclusion of Domestic Partnership Language in the 2008 Amendments to the Uniform Probate Code and the Future for Same-Sex Intestacy Rights*, 85 TEMP. L. REV. 623, 631 (2013).

38. The following sixteen states have adopted the UPC “in its entirety (in some cases with significant modifications)”: Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Maine, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Dakota, South Carolina, South Dakota, and Utah. *Uniform Probate Code*, LEGAL INFO. INST., <https://www.law.cornell.edu/uniform/probate> (last visited Apr. 7, 2017).

39. One goal of the UPC is to bring probate laws in line with “developing public policy and family relationships.” UNIF. PROB. CODE art. II, pt. 1, gen. cmt. (1969) (referring specifically to amendments to intestate succession rules). The UPC antilapse statute, for example, protects gifts to predeceased stepchildren, allowing the descendants of the stepchild to take the gift as a substitute. *Id.* § 2-603(b). However, there are some areas where the UPC may not live up to its goal of providing for progressing familial relationships, such as its lack of provisions on same-sex inheritance rights. Compare Carroll, *supra* note 37 (arguing that the UPC properly excluded language recognizing same-sex inheritance rights in its 2008 amendments), with Lawrence W. Waggoner, *Marital Property Rights in*

B. Nonprobate Succession

Due to the time and hassle commonly associated with probate administration, much of the property distributed at death today passes through will substitutes.⁴⁰ The four main methods of nonprobate transfer are (1) revocable trusts, (2) joint, pay-on-death and convenience accounts, (3) pension accounts, and (4) life insurance policies.⁴¹

1. Revocable Trusts

A revocable trust is used by individuals wishing to procure a flexible instrument for controlling property during life and after death.⁴² Put in the most basic sense, to establish a trust, the settlor (creator of the trust) needs only some intent to do so, some property to put in the trust (the res), someone to give the property to (the beneficiary), and someone to control the property placed in the trust (the trustee).⁴³ Like the beneficiaries under a will, the beneficiaries of a revocable trust have no claim against the trust during the settlor's lifetime.⁴⁴ As the use of trusts as will

Transition, 59 MO. L. REV. 21 (1994) (advocating for UPC expansion to embrace greater intestate succession rights for nontraditional couples, including unmarried heterosexual cohabitating couples and gay couples).

40. Today, many people die with vast amounts of wealth in financial assets, such as joint accounts and life insurance policies. These financial assets pass through financial intermediaries, which handle the transfer of property held in these types of accounts outside of the court system upon the owner's death. While the probate system has traditionally been preferred by creditors as added protection to obtain debts owed at death, some creditors are also choosing to protect their interests through nonprobate methods. Grayson M.P. McCouch, *Probate Law Reform and Nonprobate Transfers*, 62 U. MIAMI L. REV. 757, 759–60 (2008).

41. Langbein, *supra* note 33, at 1109. These four methods of nonprobate transfer are commonly referred to as “will substitutes,” because they generally allow the creator control over his or her property during life and act much in the same manner as a properly executed will. *Id.*

42. In 2000, the drafters of the UPC, the National Conference of Commissioners on Uniform State Laws (formally the Uniform Law Commission), drafted a Uniform Trust Code (UTC). UNIF. TRUST CODE (2000) (amended 2010). The UTC reflects many equivalent provisions as the UPC, tailored to the more flexible trust. *Id.* The UTC was adopted virtually in its entirety by twenty-five states, including Florida, while other states chose to adopt only certain provisions. John Spencer Treu, *The Mandatory Disclosure Provisions of the Uniform Trust Code: Still Boldly Going Where No Jurisdiction Will Follow—A Practical Tax-Based Solution*, 82 MISS. L.J. 597, 603 (2013).

43. Donna Litman, *Revocable Trusts Under the Florida Trust Code*, 34 NOVA L. REV. 1, 7 (2009).

44. Rochelle A. Smith, Note, *Why Limit A Good Thing? A Proposal to Apply the California Antilapse Statute to Revocable Living Trusts*, 43 HASTINGS L.J. 1391, 1406–07 (1992). If a beneficiary attempted to sue under the terms of a trust while the settlor was

substitutes has increased—particularly the use of revocable trusts⁴⁵—so have the similarities between the two methods of estate division. Many of the rules of construction and policy limits that apply to wills are interpreted by courts and legislatures as also applicable to revocable trusts.⁴⁶

2. *Joint Accounts, Pay-on-Death Accounts, and Convenience Accounts*

Pay-on-death (POD) accounts provide a simple method to control money during life and then devise it at death. For example, an owner of a bank account need only designate a beneficiary to the funds upon the owner's death. Following death, the account institution will transfer the funds to the beneficiary outside of probate.⁴⁷ Joint accounts act in the same manner. Joint accounts are owned by two people with a right of survivorship such that when the first owner dies, the second owner has the right to the funds.⁴⁸ The owners of a joint account may establish a POD (payable on death) beneficiary who will take the funds after both owners die.⁴⁹

Florida is one of several states⁵⁰ that authorizes a third type of financial account that may be used by an individual to avoid probate upon death: the convenience account.⁵¹ A convenience account acts as a substitute to guardianship because the account is in the principal's name, but designated agents are permitted to

still alive, the settlor would have the power to simply revoke the trust or revoke the beneficiary's interest in the trust, thus giving the beneficiaries little, if any, control over the trust during the settlor's lifetime. *Id.*

45. Professors Dukeminier and Sitkoff found that trusts actually have "eclipsed wills as the preferred vehicle for implementing a donor's freedom of disposition." *DUKEMINIER & SITKOFF, supra* note 16, at 385.

46. *Id.* at 457. *See also* Litman, *supra* note 43, at 5–6 (focusing on the comparison between Florida's trust laws and the "parallel rules applicable to wills"). Antilapse statutes are one example of applicable rules of construction that have been applied to revocable trusts in addition to wills. *Id.* at 68–69.

47. MARY RANDOLPH, 8 WAYS TO AVOID PROBATE 16 (10th ed. 2014).

48. *Id.* at 19.

49. *Id.*

50. *See, e.g.*, Title 2 TEX. EST. CODE ANN. § 113.004(1) (West 2014) (stating that a financial convenience account is one that "is established . . . by one or more parties in the names of the parties and one or more convenience signers; and . . . has terms that provide that the sums on deposit are paid or delivered to the parties or to the convenience signers 'for the convenience' of the parties").

51. FLA. STAT. § 655.80 (2016).

make withdrawals and deposits into the account.⁵² The agents have no interest in the convenience account, which is operated solely in the principal's benefit.⁵³ Upon the principal's death, the remaining balance of the account is paid according to the method prescribed by the principal during his or her lifetime or capacity.⁵⁴

3. *Pension Accounts and Life Insurance Policies*

As of the end of 2010, Americans held \$18.4 trillion in life insurance coverage.⁵⁵ Additionally, many Americans likely have rights to some type of pension account as a benefit of their employment.⁵⁶ Because of the massive amount of wealth in these institutions, there are strict laws in place to protect the assets in life insurance⁵⁷ and pension accounts,⁵⁸ and to ensure fair and timely administration upon the insured's death. Put simply, life insurance policies and pension accounts act similarly in that a designated beneficiary receives the life insurance or pension funds upon the death of the insured.⁵⁹ However, since most life insurance and pension plans obtained through employment are governed by federal law, state law may be preempted.⁶⁰

52. J. Richard Caskey, *Use of Joint Ownership*, FLA. GUARDIANSHIP PRAC., 2014, § 6.7. This agency relationship is not affected by the principal's death or incapacity. FLA. STAT. § 655.80(1); Caskey, *supra*, § 6.7.

53. FLA. STAT. § 655.80(2).

54. *Id.* § 655.80(3).

55. American Council of Life Insurers, *2011 Life Insurers Fact Book*, LIBR. OF CONGRESS CATALOG 63 (2011), <http://docplayer.net/8090343-2011-life-insurers-fact-book.html>.

56. Langbein, *supra* note 33, at 1111.

57. *See generally* FLA. STAT. ch. 627 (2016) (including examples of the strict laws in place for the regulation of life insurance policies in Florida). On the federal level, the Employee Retirement Income Security Act (ERISA) may preempt some state laws in relation to life insurance and pension plans. 29 U.S.C. § 1001 (1974). *See also infra* text accompanying note 60 (noting the preemption of certain state laws as applied to federal pension plans).

58. *See generally, e.g.*, U.S. Office of Personnel Management, *Federal Employees Retirement System (FERS) Information*, OPM.GOV, <https://www.opm.gov/retirement-services/fers-information/> (last visited Apr. 7, 2017) (containing a broad overview of the federal regulations controlling pension plans).

59. Langbein, *supra* note 33, at 1110–11.

60. *See, e.g.*, *Egelhoff v. Egelhoff*, 532 U.S. 141, 143 (2001) (holding that the state of Washington was preempted from applying its revocation-upon-divorce statutes to federal pension plans).

III. ANTILAPSE STATUTES THROUGHOUT THE UNITED STATES

Turning specifically to probate administration and the application of antilapse statutes in wills, many of the fifty states apply antilapse statutes very differently. The UPC was created—as its name suggests—with the goal of uniformity in probate administration throughout the states.⁶¹ However, this goal fell short as less than half of the states adopted the UPC in its entirety.⁶² It has been feared that this lack of uniformity “may cause not only unjust results but also an inherent confusion and distrust among a very mobile lay populace.”⁶³

Despite the lack of uniform enactment of the UPC throughout the states, it has still proven influential. While some states have rejected some or all of the provisions prescribed by the UPC, it is not uncommon for courts to cite to the uniform law as persuasive authority,⁶⁴ or legislatures to refer to it when revising a state’s probate code.⁶⁵ Additionally, as a result of the UPC drafter’s motivation to secure enactment of the UPC throughout the states, further future uniform laws were created, such as the UTC.⁶⁶ The UTC and related uniform laws were spearheaded by the Joint Editorial Board for Uniform Trusts and Estates Act, which was formed to assist the enactment process of the UPC.⁶⁷ Thus, even though the UPC may not have gained as much acceptance as was originally sought, it still has played an important role in the shaping of probate laws in the United States.

61. See UNIF. PROB. CODE § 1-102(b) (explaining the purpose behind the UPC).

62. See *supra* note 38 (listing the states that adopted the UPC in its entirety, with some modifications).

63. Averill, *supra* note 35, at 895.

64. David Horton, *Wills Law on the Ground*, 62 UCLA L. REV. 1094, 1119–20 (2015).

65. Robert A. Stein, *Strengthening Federalism: The Uniform State Law Movement in the United States*, 99 MINN. L. REV. 2253, 2268 (2015).

66. See *supra* note 42 (discussing the enactment of the UTC).

67. Stein, *supra* note 65, at 2268–69. Professor Stein offers a detailed examination of the benefits and importance of uniform laws in the United States, especially in three main areas of law that previously lacked uniformity: “Business Entity Law, Commercial Law, and Trusts and Estates Law.” *Id.* at 2258.

A. Florida's Legislative Decision to Broaden Antilapse Statutes Exclusively for Trusts

The UPC and more than a third of the states have enacted statutes that extend the antilapse protection in wills “to future interests in trust as if the settlor were a testator who died on the distribution date.”⁶⁸ Florida is one of these states. However, the Florida Trust Code is much more expansive than its wills-law equivalent, allowing the descendants of *any* trust beneficiary (i.e., not just the settlor's grandparents and descendants of the settlor's grandparents, as in the Florida Probate Code's antilapse statute) to take a devise in a trust if the beneficiary fails to survive the distribution date.⁶⁹

This difference between antilapse statutes for wills and trusts in Florida is quite notable. If a donor drafts a will devising his or her assets to particular individuals, Florida is among a group of states that creates an assumption of donative intent for the testator regarding some of the beneficiaries outside of the testator's immediate family—like grandparents, aunts, uncles, and cousins—but does not allow the statute to apply to other individuals that the testator may reasonably desire to have protection in the case of an early death, such as his or her stepchildren.⁷⁰ However, if the donor has chosen to give a devise through a trust, rather than a will, the antilapse statute protects gifts to everyone with surviving descendants, regardless of the beneficiary's relationship to the settlor.⁷¹

By broadening Florida's Antilapse Statute for trusts, the legislature sought to enhance the purpose of the trust code by ensuring that revocable trusts are workable and flexible for the settlor.⁷² “The absence of a relationship test in [section] 736.1106[, Florida Statutes,] rests on a subtle but important distinction

68. DUKEMINIER & SITKOFF, *supra* note 16, at 856.

69. FLA. STAT. § 736.1106 (2016).

70. *See id.* § 732.603(1) (“Unless a contrary intent appears in the will, if a devisee who is a grandparent, or a descendant of a grandparent, of the testator [predeceases the testator in fact or by law] . . . a substitute gift is created in the devisee's surviving descendants.”).

71. *See id.* § 736.1106(2) (“Unless a contrary intent appears in the trust instrument, if a beneficiary of a future interest under the terms of a trust fails to survive the distribution date, and the deceased beneficiary leaves surviving descendants, a substitute gift is created in the beneficiary's surviving descendants.”).

72. *Cf. Engelke v. Estate of Engelke*, 921 So. 2d 693, 697 (Fla. 4th Dist. Ct. App. 2006) (“Revocable living trusts are widely used will-substitute devices that provide flexibility in managing the settlor's assets during his or her lifetime.”).

between the underlying rationales for that section compared with the Probate Code antilapse provision.”⁷³ Whereas the provisions in the Florida Probate Code exist exclusively to further a testator’s intent, the main rationale of section 736.1106 is “in large part . . . economy and administrative convenience.”⁷⁴ By eliminating the need for the beneficiary of the trust to have a relationship of some degree with the settlor, the trust can be administered quickly and efficiently upon the settlor’s death.

However, in a society where many individuals are part of a stepfamily, it is time for the legislature to also consider expanding the antilapse statute for wills. Probate administration is notoriously complicated,⁷⁵ but in a developing society there are changes that may be made to the probate code to facilitate the process. Florida must follow the lead of the UPC and various states to expand the scope of its antilapse statute for wills to ensure that a testator’s intent is honored.

B. Antilapse Statutes for Wills in Other States

The first state to adopt an antilapse provision was Massachusetts in 1783.⁷⁶ The original text of the provision stated:

[W]hen any child, grandchild or other relation, having a devise of personal estate or real estate, and such devisee shall die before the testator, leaving lineal descendants, such descendants shall take the estate, real or personal, in the same way and manner such devisee would have done in case he had survived the testator, any law, usage or custom, to the contrary notwithstanding.⁷⁷

Accordingly, this statute protected devises to any individual related to the testator such that should a relative predecease the testator, the devise to that relative would fall to his or her

73. JUDICIARY COMM., SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT, CS/SB 1170, 52 (Fla. Mar. 10, 2006).

74. *Id.*

75. See *supra* Part II for an explanation of the benefits and drawbacks of probate versus nonprobate administration.

76. See Erich Tucker Kimbrough, Note, *Lapsing of Testamentary Gifts, Antilapse Statutes, and the Expansion of Uniform Probate Code Antilapse Protection*, 36 WM. & MARY L. REV. 269, 273–75 (1994) (providing a detailed examination of the history of the antilapse statutes in and throughout the United States).

77. 1783 MASS. ACTS 553, available at <https://ia802606.us.archive.org/24/items/actsresolvespass178283mass/actsresolvespass178283mass.pdf> (last visited Apr. 7, 2017).

surviving descendants.⁷⁸ Since Massachusetts' initial adoption of the first antilapse statute, every state except Louisiana⁷⁹ has adopted an antilapse statute—although they vary in scope throughout the remaining forty-nine states.

Like Florida, some states have antilapse statutes for wills that only save gifts to beneficiaries who are the testator's grandparents or descendants of the testator's grandparents.⁸⁰ Other states extend this protection to gifts to additional relatives,⁸¹ while others have narrower antilapse statutes protecting gifts to even fewer individuals. For example, Arkansas protects only gifts to the testator's child or other descendant,⁸² while New York goes slightly further by protecting gifts to the descendants and siblings of the testator.⁸³

78. *Id.*

79. Jeffrey A. Cooper, *A Lapse in Judgment: Ruotolo v. Tietjen and Interpretation of Connecticut's Anti-Lapse Statute*, 20 QUINNIPIAC PROB. L.J. 204, 208 (2007). *See also In re Moore*, 353 So. 2d 353, 354 (La. Ct. App. 1977) (holding that if a beneficiary predeceases a testator, the gift to the beneficiary lapses and falls into the residue of the testator's estate).

80. *See, e.g.*, ALA. CODE. § 43-8-224 (1975):

If a devisee who is a grandparent or a lineal descendant of a grandparent of the testator is dead at the time of execution of the will, fails to survive the testator, or is treated as if he predeceased the testator, the issue of the deceased devisee who survive the testator by five days take in place of the deceased devisee. . . .

See also COLO. REV. STAT. ANN. § 15-11-603 (West 1995) ("If a devisee fails to survive the testator and is a grandparent or a descendant of a grandparent of . . . the testator . . . and the deceased devisee leaves surviving descendants, a substitute gift is created in the devisee's surviving descendants."); N.D. CENT. CODE ANN. § 30.1-09-05 (2-603) (West 1976) ("If a devisee who is a grandparent or a lineal descendant of a grandparent of the testator [predeceases the testator in fact or by law] the issue of the deceased devisee who survive the testator by one hundred twenty hours take in place of the deceased devisee. . . .").

81. *See infra* text accompanying notes 84–87.

82. ARK. CODE. ANN. § 28-26-104 (2015):

Whenever property is devised to a child, natural or adopted, or other descendant of the testator . . . and the devisee shall die in the lifetime of the testator, leaving a . . . descendant who survives the testator, the devise shall not lapse, but the property shall vest in the surviving . . . descendant of the devisee.

83. N.Y. EST. POWERS & TRUSTS LAW § 3-3.3(a)(2) (Consol. 2013):

Whenever a testamentary disposition including a disposition of a future estate other than a future estate subject to a condition precedent of surviving the testator is made to a beneficiary who is one of the testator's issue or a brother or sister, and such beneficiary dies during the lifetime of the testator leaving issue surviving such testator, such disposition does not lapse but vests in such surviving issue.

Some states, such as Michigan⁸⁴ and New Mexico,⁸⁵ have followed the lead of the UPC by adopting antilapse statutes for wills that protect gifts to stepchildren. A small number of states include antilapse provisions that protect gifts to spouses, which would in turn allow the testator's stepchild to take in a predeceased spouse-beneficiary's place.⁸⁶ Finally, some states and the District of Columbia do not have any limitation on the protected gifts and allow the descendants of any predeceased beneficiary to take a devise.⁸⁷

IV. ANTILAPSE STATUTES AND BLENDED FAMILIES

Antilapse statutes were created to further the alleged societal presumption that a donor would prefer a gift to fall to a beneficiary's descendants rather than passing by intestate succession.⁸⁸ Of course, it is impossible to truly discern the probable intent of a deceased testator, and courts must attempt to overcome this "worst evidence" rule: that the individual in the best position to verify and explain a will—the testator—is dead by the time the will is contested.⁸⁹ This worst evidence rule consistently creates a hurdle to determining the validity of a will and the capacity of the testator who created it. A few jurisdictions allow the testator to bring a declaratory judgment action during his

84. See MICH. COMP. LAWS § 700.2709 (2014) ("If a beneficiary fails to survive the decedent and is a grandparent, a grandparent's descendant, or the decedent's stepchild . . . and the deceased beneficiary leaves surviving descendants, a substitute gift is created in the beneficiary's surviving descendants.").

85. See N.M. STAT. ANN. § 45-2-603 (2011) ("If a devisee fails to survive the testator and is a grandparent, a descendant of a grandparent or a stepchild of . . . the testator . . . and the deceased devisee leaves surviving descendants, a substitute gift is created in the devisee's surviving descendants.").

86. See, e.g., KAN. STAT. ANN. § 59-615 (2014):

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

87. See, e.g., D.C. CODE § 18-308 (2012) ("Unless a different disposition is made or required by the will, if a devisee or legatee dies before the testator, leaving issue who survive the testator, the issue shall take the estate devised or bequeathed as the devisee or legatee would have done if he had survived the testator."); GA. CODE ANN. § 53-4-64 (West 2014) (allowing the descendants of all predeceased beneficiaries to take the devise).

88. See Kimbrough, *supra* note 76, at 269–70 (examining the history of antilapse statutes and the rationale behind their creation).

89. Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L.J. 643, 647 (2014).

lifetime to determine his capacity to create a will,⁹⁰ but the remaining jurisdictions “insist that the testator be dead before . . . investigat[ing] the question whether he had capacity when he was alive.”⁹¹

Even if a testator did have a clear strategy in mind when crafting the disposition of her estate and had the capacity to properly do so, an estate plan is usually created with the intention that the beneficiaries will outlive the donor. If there is an untimely death of a loved one, a donor may not be immediately concerned about revising her estate plan in the wake of tragedy. Thus, antilapse statutes, by their very nature, make an assumption about a testator or settlor’s intent without any express statement by the donor.

A. Words of Survivorship to Preclude Application of Antilapse Statutes

A “universal *caveat*” to antilapse statutes is that they, like many other statutes governing wills, “yield to an adverse intention of the testator.”⁹² Therefore, words of survivorship in a devise—such as “to A, if A survives me”—preclude application of antilapse statutes in some jurisdictions.⁹³ In *In re Estate of Wagner*,⁹⁴ the testator bequeathed thirty percent of the residue of his estate to his three sisters.⁹⁵ The testator’s will also provided that, should any of his sisters predecease him, the devise was to be distributed to his “surviving sisters.”⁹⁶ Florida’s Second District Court of Appeal held that the state’s antilapse statute for wills was inapplicable to the testator’s devise due to the survivorship language present in his will.⁹⁷ Therefore, even though one of the testator’s sisters predeceased him, and Florida’s antilapse statute

90. One state that allows such a declaratory action is Ohio, in which the executor of a will may submit his or her will to a state court to determine its validity during his or her lifetime. OHIO REV. CODE ANN. § 2107.081 (West 2012).

91. John H. Langbein, *Will Contests*, 103 YALE L.J. 2039, 2044 (1994).

92. *In re Estate of Wagner*, 423 So. 2d 400, 402 (Fla. 2d Dist. Ct. App. 1982). *See also* FLA. STAT. § 732.603 (2016) (stating that the antilapse provisions apply “[u]nless a contrary intent appears in the will”).

93. Eloisa C. Rodriguez-Dod, “*I’m Not Quite Dead Yet!*”: Rethinking the Anti-Lapse Redistribution of a Dead Beneficiary’s Gift, 61 CLEV. ST. L. REV. 1017, 1026–27 (2013).

94. 432 So. 2d 400.

95. *Id.* at 401.

96. *Id.*

97. *Id.* at 403–04.

generally protects gifts to the siblings of a testator by distributing it to the siblings' descendants instead, the devise was distributed to the testator's remaining sisters, not the descendants of the testator's predeceased sister.⁹⁸

Without survivorship language indicating that a beneficiary must survive in order to take, such as the language used by the testator in *Wagner*, courts will apply the antilapse statute, presuming that the testator would have preferred a gift to fall to a descendant of the predeceased beneficiary, who is a grandparent of the testator or a descendant of the testator's grandparent,⁹⁹ rather than another relative who would receive the gift via intestacy. However, this may not always be the desired result.

In *In re Estate of Scott*,¹⁰⁰ Florida's First District Court of Appeal held that the antilapse statute properly allowed a devise to fall to the testator's predeceased sister's children, even though the testator specifically stated that she did not intend to provide for her sister's children in her will.¹⁰¹ While the testator's intent was clear—that is, not to provide for her sister's children—absent specific language indicating survivorship in order to take, application of the antilapse statute was not precluded and the testator's intent could not be honored.¹⁰²

Because the antilapse statute for wills is in derogation of the common law, courts have consistently held that it must be strictly construed.¹⁰³ Following this settled principle, the court in *Scott* refused to construe the testator's will by applying what she “would or should have done”¹⁰⁴ and made the necessary holding that the antilapse statute applied, even if it seemed contrary to the testator's intent.¹⁰⁵

98. *Id.*

99. FLA. STAT. § 732.603(1) (2016).

100. 659 So. 2d 361 (Fla. 1st Dist. Ct. App. 1995).

101. *Id.* at 362.

102. *Id.*

103. See, e.g., *Lorenzo v. Medina*, 47 So. 3d 927, 929 (Fla. 3d Dist. Ct. App. 2010) (stating that “[b]ecause section 732.603 is in derogation of the common law,” the court “must strictly construe its provisions”); *Drafts v. Drafts*, 114 So. 2d 473, 475 (Fla. 1st Dist. Ct. App. 1959) (acknowledging the general rule that “statutes which are in derogation of the common law must be strictly construed”).

104. 659 So. 2d at 362.

105. *Id.*

When the UPC was substantially revised in 1990, it created a relatively unpopular rule¹⁰⁶ that words of survivorship, absent other evidence, do not preclude application of antilapse statutes.¹⁰⁷ Therefore, even if the testator's will devises property "to A, if A survives me," if there is no additional evidence to demonstrate the testator's desire that A survive in order to take, a state following the UPC will allow the antilapse statute to apply and the devise will fall to A's descendants, if A has any. Under the UPC analysis, it is likely that the survivorship language in *Wagner* would not have been enough to preclude application of the antilapse statute.¹⁰⁸ Thus, instead of distributing the devise equally among the testator's still-living sisters,¹⁰⁹ the court would have had to distribute the portion of the devise given to the predeceased sister to her living descendants. In spite of the sharp criticism of the UPC's revised survivorship rule, a few states have accepted the UPC's position.¹¹⁰

These varying positions on antilapse statutes and survivorship language raise one important question: do antilapse statutes really achieve the purpose of furthering the testator's intent? Most, if not all, statutes construing wills have been enacted with the legislatures' genuine objective to enforce the testator's probable intent. However, in the real world with real people (many of whom are likely unaware of a majority of the statutes that will one day construe their will), intentions vary, and it is impossible

106. See Mark L. Ascher, *The 1990 Uniform Probate Code: Older and Better, or More Like the Internal Revenue Code?*, 77 MINN. L. REV. 639 (1993) (presenting a particularly scathing opinion of the 1990 revisions to the UPC). Professor Ascher criticizes the reversal of the survivorship rule as "pretentious" and argues that it "disputes what should be obvious[—]that most testators expect their wills to dispose of their property completely[—] without interference from a statute of which they have never even heard." *Id.* at 654 (emphasis removed) (footnotes omitted). Professor Rodriguez-Dod expresses similar concerns, asking whether it is appropriate for the UPC to so "cavalierly disregard[]" a testator's clear intention to require a beneficiary to survive in order to take. Rodriguez-Dod, *supra* note 93, at 1027.

107. UNIF. PROB. CODE § 2-603(b)(3).

108. Recall that the testator in this case devised property to his "surviving sisters." 423 So. 2d at 401. The UPC specifically states: "words of survivorship, such as in a devise to an individual 'if he survives me,' or in a devise to 'my *surviving children*,' are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of" the antilapse statute. UNIF. PROB. CODE § 2-603(b)(3) (emphasis added).

109. *In re Estate of Wagner*, 423 So. 2d at 403–04.

110. See, e.g., ALASKA STAT. § 13.12.603(a)(3) (2014) ("[W]ords of survivorship, as in a devise to an individual 'if the individual survives me,' or in a devise to 'my surviving children,' are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section.").

for even the most sound legislature to account for every conceivable intention of every conceivable testator. As families change, it is important that the legislatures creating these rules, which ultimately govern the fate of the average citizen's property and the actions of the citizen's surviving family, remain flexible and realistic to account for a progressing society.

B. Terry, Henry, and Sam: A Hypothetical Application of Antilapse Statutes

Take, for example, Terry the testator, who married her second husband, a man named Henry. As of the date of Terry and Henry's wedding, Henry had a ten-year-old son from a previous marriage named Sam. Sam lived part-time with Terry and Henry, and part-time with his biological mother during his childhood. He enjoyed a close relationship with all three adults. Terry and Henry never had children of their own, but Terry treated Sam like a son throughout his adolescence and into his adulthood. When Sam was sixteen, Terry created a will in which she left half of her estate to Henry, one-third of her estate to Sam, and the remainder of her estate to her brother, Bob. When Sam was twenty-four, he had a daughter named Darcy. Terry and Henry maintained a close relationship with Sam and his daughter. Unfortunately, Sam passed away when he was thirty. One year later, Terry passed away without revising her original will, leaving Henry, Darcy, and Bob as survivors. Because Sam predeceased Terry, the gift of one-third of Terry's estate to Sam lapses under Florida law.¹¹¹

1. *Applying Florida's Antilapse Statute for Wills*

Under Florida's antilapse statute for wills, a lapsed gift falls to the descendant of the beneficiary, if the beneficiary is the testator's grandparent or a descendant of the testator's grandparent. Because Sam fits neither of these categories, and Florida does not save gifts to the testator's stepchild, the gift to Sam would lapse under Florida law, and the one-third of Terry's estate originally gifted in her will to Sam would go to Bob as the

111. As many scholars have pointed out, the term "antilapse" is really a misnomer. See, e.g., Kimbrough, *supra* note 76, at 273 (noting that antilapse statutes do not *prevent* a gift from lapsing, but instead act to "redirect a lapsed testamentary gift . . . [to] substitute takers").

residual taker instead of Darcy. Therefore, Henry would take one-half of Terry's estate and Bob would take the other half.

2. *Applying Broader Antilapse Statutes*

The antilapse statute for wills in Michigan, a broader statute than that of Florida, allows the descendant of a predeceased beneficiary to take in the beneficiary's place "if [the] beneficiary . . . is a grandparent, a grandparent's descendant, or the decedent's stepchild."¹¹² Applying this antilapse statute, Terry's gift to Sam, her stepson, would be saved because Michigan has carved out "stepchild" as a relationship of allowable takers under its antilapse statute.¹¹³ Therefore, because Darcy is a living descendant of Sam, Darcy would take in Sam's place. Henry would thus take one-half of Terry's estate, Darcy would take one-third, and Bob would take the residue (one-sixth) of the estate.

3. *Consequences of Narrower Antilapse Statutes in Varying Relational Situations*

Because Florida has a narrower antilapse statute, Darcy would not be able to enjoy her father's share of Terry's estate in Florida, even if it would have been Terry's genuine intention for her to do so. A Florida court may find evidence that Terry intended for Darcy to take in Sam's place due to Terry's close relationship with Sam and Darcy, but a strict application of Florida's antilapse statute would still not allow the court to reach any result besides permitting Bob to take Sam's share, even if Terry did not want her brother to end up with one-half of her estate.¹¹⁴

The potential negative consequences of antilapse statutes are less clear in an example such as the one provided above involving

112. MICH. COMP. LAWS § 700.2709 (2014).

113. *Id.*

114. This analysis would remain the same even if Terry had included survivorship language in her will. For example, the relevant provision in Terry's will may have stated: "One-third of my estate to my stepson, Sam, should he survive me." In Florida, this language would have been sufficient to preclude application of the antilapse statute and the devise to Sam would have fallen to the residual taker under Terry's will, her brother Bob, automatically upon Sam's death. However, Sam's daughter is unable to take his devise in his place under the Florida Probate Code Antilapse Statute for wills regardless, as Sam does not share the required relationship with Terry to permit application of the antilapse statute. Therefore, including words of survivorship will be immaterial and the devise to Sam still falls into the residual clause of Terry's will.

Terry, Sam, and Darcy. A more concerning hypothetical is presented where the facts are tweaked just a bit: instead of Terry and Henry marrying when Sam was ten-years-old, and Terry treating Sam like a son during his adolescence, Terry and Henry married when Sam was twenty-three-years-old. In this scenario, Sam lived in another state where he was attending college. Such is the case that Terry and Sam only met a handful of times, only spent some holidays together, and ultimately had a polite, yet distant, relationship. Terry instead wrote a will leaving one-half of her estate to Henry, but left Sam only one-eighth of her estate, with the residue still to her brother, Bob. Sam had one daughter, Darcy, and predeceased Terry, who in turn died one year later without revising her will.

On one hand, antilapse statutes may still justify allowing Darcy to take Sam's devise. Terry felt enough of a connection to Sam to specifically mention him in her will, although providing him with a relatively small share of her estate. After all, antilapse statutes can never apply to a predeceased individual who was never actually a beneficiary under the will.¹¹⁵ Thus, since Terry included Sam in her will, there may have been some intent to allow his daughter to take should Sam predecease Terry.

On the other hand, Terry may only have felt an obligatory desire to include Sam in her will as her stepson, even though they only had a relationship in Sam's adulthood and were never particularly close. And even more to the point, because Terry and Sam never shared a meaningful relationship, Terry may have been even less likely to share a meaningful relationship with Sam's daughter.¹¹⁶ This is one concern that legislatures attempt to alleviate by narrowing the scope of antilapse statutes. Because Terry, the testator, may not have a close relationship with the descendants of her stepchild, a friend, or another distant relative,

115. By their very nature, antilapse statutes apply only to protect gifts to a predeceased devisee. FLA. STAT. § 732.603(1) (2016). A beneficiary is a devisee in a testate estate (involving a will). *Id.* § 731.201(2). Under Florida law, only an "interested person" may contest the provisions of a will. 18 FLA. JUR. 2d *Decedents' Property* § 250 (2015). This right "extends to spouse's creditors, or others having a property right or claim against the estate being administered, as well as to heirs, distributees, legatees, and devisees." *Id.* § 249. Florida courts have held that the descendant of a beneficiary of a will is a contingent beneficiary who properly qualifies as an interested person with standing to challenge the will. *E.g., In re Estate of Watkins*, 572 So. 2d 1014, 1015 (Fla. 4th Dist. Ct. App. 1991).

116. Of course, by the time Terry's will is contested, these facts will all be speculative, as Terry—the individual in the best position to explain her will—is dead. For a brief examination of this "worst evidence" rule, see the introduction to Part IV.

courts presume that Terry may have preferred a gift to one of these individuals who predeceases her to go to her named residual takers or to her heirs at law, whether or not they received another devise under the will.

V. *THE EXPANSION OF FLORIDA'S ANTILAPSE STATUTE FOR WILLS*

Many of the issues associated with antilapse statutes and the construction of wills can be avoided by a professionally drafted instrument by a lawyer, where the donor's intent is clearly stated and effectively applied following his or her death. For the average citizen, however, lawyers may be too expensive or thought to be unnecessary for a relatively modest estate. A will may be an attractive path for these individuals, but even then only a little more than half of the adults in the United States have written a will.¹¹⁷ For the half of Americans who have a post-death plan for at least some of their estate, the relevant state statutes may make it difficult for them to truly devise property according to their wishes. Because the goal of most state statutes relating to estate planning is to further the donor's intent, it is crucial that legislative definitions of presumed intent develop along with family structures and reflect today's society.

A. *Aldrich v. Basile* and the Difficulty of Laypeople Drafting Wills

Florida Supreme Court Justice Barbara Pariente penned a concurring opinion in the 2014 case of *Aldrich v. Basile*,¹¹⁸ which, although not involving antilapse statutes, seamlessly captured the difficulty of a layperson drafting his or her own will. The testator in *Aldrich* drafted her will using a preprinted "E-Z Legal Form," which "was duly signed and witnessed";¹¹⁹ however, after the will's execution, the testator acquired new property not distributed by the provisions of the previously executed will.¹²⁰ In a subsequent handwritten addendum to the testator's will, she stated that she

117. Ashlea Ebeling, *Americans Lack Basic Estate Plan*, FORBES (Mar. 1, 2010, 6:22 PM), <http://www.forbes.com/2010/03/01/estate-tax-living-will-schiavo-personal-finance-no-estate-plans.html>.

118. 136 So. 3d 530 (Fla. 2014).

119. *Id.* at 531.

120. *Id.* at 531–32.

wanted “all [her] worldly possessions” to pass to her brother.¹²¹ This addendum was not properly witnessed and executed in accordance with Florida’s Probate Code, and thus could not properly be enforced as a testamentary instrument.¹²²

However clear the testator’s true intent, her property could not pass in accordance with her intent because the property acquired after the will’s execution was neither properly incorporated into the original will nor into a properly executed addendum to the will.¹²³ Florida’s Supreme Court held that the properly executed original will was unambiguous and any extrinsic evidence (i.e. the addendum) could not properly be considered when construing the provisions of the testator’s estate.¹²⁴ Accordingly, the testator’s estate passed by the provisions in the original will, regardless of whatever intent may have been expressed in the addendum.¹²⁵

While Justice Pariente believed that the majority reached the correct result by interpreting the Florida Probate Code, she recognized that the outcome under Florida law was in clear conflict with the testator’s true intent as shown by evidence that could not be legally considered.¹²⁶ While a layperson may choose to employ a preprinted form such as that used by the testator in *Aldrich*, it is likely that this form will be inadequate to completely devise the testator’s estate. While resources may be saved when the will is drafted by using a preprinted form instead of the aid of experienced legal counsel, these resources may later be exhausted should litigation ensue to construe the provisions of the will. To this end, in her concurring opinion, Justice Pariente suitably stated:

While I appreciate that there are many individuals in this state who might have difficulty affording a lawyer, this case does remind me of the old adage “penny-wise and pound-foolish.”

121. *Id.* at 533.

122. *Id.* Even though the testator signed the addendum, there was only one witness signature attached to the document. Florida’s probate code demands two witnesses to properly execute a testamentary document, and a will must strictly adhere to this requirement in order to be admitted into probate. FLA. STAT. § 732.502(1) (2016) (requiring two witnesses to a testator’s signature to effectuate a valid will); *In re Estate of Dickson*, 590 So. 2d 471, 472 (Fla. 3d Dist. Ct. App. 1991) (“[S]trict compliance with statutory requirements is a prerequisite for the valid creation or revocation of a will.”).

123. *Aldrich*, 136 So. 3d at 537.

124. *Id.* at 536.

125. *Id.*

126. *Id.* at 537 (Pariente, J., concurring).

Obviously, the cost of drafting a will through the use of a pre-printed form is likely substantially lower than the cost of hiring a knowledgeable lawyer. However, as illustrated by this case, the ultimate cost of utilizing such a form to draft one's will has the potential to far surpass the cost of hiring a lawyer at the outset. In a case such as this, which involved a substantial sum of money, the time, effort, and expense of extensive litigation undertaken in order to prove a testator's true intent after the testator's death can necessitate the expenditure of much more substantial amounts in attorney's fees than was avoided during the testator's life by the use of a pre-printed form.¹²⁷

Justice Pariente's view in *Aldrich* expressed a valid concern with wills written by laypeople who are unaware of the statutory schemes empowering their testamentary instrument of choice. Because hiring an attorney is expensive and many individuals may not believe their estate necessitates professional expertise, using preprinted forms to draft a will—or worse, not drafting a will at all—may be appealing but ultimately prove inadequate following death. This marks another reason why Florida probate laws need updating to fit with the developing world of estate planning.

With the broad leaps that antilapse statutes already make regarding donative intent, and to continue enforcing the probable intent of a common testator, Florida's legislature must consider revising the antilapse statute for wills to reflect the changing relationships in today's society. While an entire rehashing of the antilapse statute is improbable in the foreseeable future, Florida should follow the lead of the UPC in creating an antilapse statute that makes a preliminary change to account for the close relationship adults may have with their stepchildren.¹²⁸

127. *Id.* at 538.

128. Allowing the descendants of a testator's stepchild to take in the predeceased stepchild's place is just one step the Florida legislature may take to update Florida's antilapse statute for wills to conform to the changing family. Another notable relationship absent from the current section 732.603, Florida Statutes, is the testator's spouse. *Cf.* FLA. STAT. § 732.603(1) (2016) (clarifying that, under current law, if the testator's spouse receives a devise in the will but predeceases the testator, the spouse's devise would lapse—that is, it will fall to the testator's residual takers or intestate). Some states protect against this harsh result by including the testator's spouse in the state's antilapse statute. *See supra* text accompanying note 86. While this Article addresses the expansion of Florida's antilapse statute for wills solely to the testator's stepchild as an initial step, there are certainly further steps the Florida legislature may take to update the Florida Probate Code's antilapse statute, by allowing, for example, the descendants of a testator's spouse to take in a predeceased spouse's place.

B. The Parent-Child Relationship

One way Florida may modify its antilapse statute for wills is by including a provision regarding application of the statute only if the testator shared a “parent-child relationship” with his or her stepchild. Of course, determining whether two individuals share a parent-child relationship is a daunting task. Courts historically hesitate to interfere with the family dynamic and risk making an improper decision for a family’s youth.¹²⁹ Because of this, it is difficult to discern a uniform definition of what type of relationship properly qualifies as a parent-child relationship. The UPC gives some guidance regarding whether a parent-child relationship exists, and it may if the parent “[f]unctioned as a parent of the child”¹³⁰ by behaving as a parent would and fulfilling duties that a parent is obligated to fulfill by virtue of his or her parentage.¹³¹ Legislatures and scholars alike have also provided factors to consider when determining if a parent-child relationship exists.¹³²

While it might be difficult for a court to truly conclude that a parent-child relationship exists between two individuals, this type of relationship is a legitimate concern for inheritance rights in estate planning. With the need for the Florida legislature to reconsider its probate code to reflect modern families, the definition of a parent-child relationship may also be relevant to

129. Courts often employ a rudimentary balancing test between reluctance to interfere with a family and a genuinely-held desire to protect the state’s youth. “While we are loath to sanction government interference in the sacrosanct parent-child relationship, we are more reluctant still to forsake the welfare of our youth. Florida’s children are simply too important.” *Padgett v. Dep’t of Health & Rehab. Servs.*, 577 So. 2d 565, 571 (Fla. 1991).

130. UNIF. PROB. CODE § 2-115(4).

131. *Id.* The UPC elaborates further on the definition of “[f]unctioned as a parent of the child” by supplying a detailed list of responsibilities and functions that a parent undertakes that may satisfy this definition, including: (1) custodial and decisionmaking responsibilities; and (2) caretaking and parenting functions. *Id.* § 2-115 cmt.

132. *See, e.g.*, CAL. PROB. CODE § 6454 (West 2015):

[T]he relationship of parent and child exists between [a] person and the person’s foster parent or stepparent if both of the following requirements are satisfied: (a) The relationship began during the person’s minority and continued throughout the joint lifetimes of the person and the person’s foster parent or stepparent. (b) It is established by clear and convincing evidence that the foster parent or stepparent would have adopted the person but for a legal barrier.

See also Terin Barbas Cremer, *Reforming Intestate Inheritance for Stepchildren and Stepparents*, 18 CARDOZO J.L. & GENDER 89, 97 (2011) (providing several factors that should be considered when determining whether a parent-child relationship exists between a stepparent and stepchild).

determine if the beneficiaries of a testator's predeceased stepchild should be protected by Florida's antilapse statute for wills.

In the first hypothetical above, Terry and her stepchild, Sam, had a close relationship in Sam's adolescence. Because Terry and Sam shared a meaningful relationship, it may be simple to establish that a parent-child relationship existed, even though Terry never formally adopted Sam. However, in the modified hypothetical above, in which Terry and Henry did not marry until Sam was an adult, it is less clear that Terry and Sam shared a parent-child relationship because they were not acquainted during Sam's adolescence. As antilapse statutes are intended to reflect the probable intent of a common testator, legislatures may be hesitant to afford antilapse protection to the relationship between Terry and Sam in the second hypothetical. To rectify the complicated familial situations in which issues like this arise, the Florida Probate Code antilapse statute should consider the existence of a parent-child relationship between the testator and the predeceased stepchild in order to determine whether the stepchild's descendants should be afforded antilapse protection.

C. The Necessary Expansion of Florida's Antilapse Statute for Wills

A revised antilapse statute for wills in Florida may incorporate language requiring a parent-child relationship between the testator and stepchild in the stepchild's adolescence in order for the relationship to be protected. The Florida legislature's incorporation of this language in the Florida Probate Code's antilapse statute will provide incremental protection for a developing family while still alleviating the concern that expanded antilapse statutes may disregard the intent of the testator.

1. *Florida's Antilapse Statute for Wills: A Model*

To expand Florida's antilapse protection for wills to include the descendants of a testator's predeceased stepchild, section 732.603, Florida Statutes, should be remodeled as follows:

(1) Unless a contrary intent appears in the will, if a devisee who is a grandparent, ~~or~~ a descendant of a grandparent, or a stepchild,¹³³ of the testator:

(a) Is dead at the time of the execution of the will;

(b) Fails to survive the testator; or

(c) Is required by the will or by operation of law to be treated as having predeceased the testator,

a substitute gift is created in the devisee's surviving descendants who take per stirpes the property to which the devisee would have been entitled had the devisee survived the testator. . . .

(3) In the application of this section: . . .

(b) The term: . . .

5. "Stepchild" includes only an individual with whom the testator shared a parent-child relationship before the individual reached twenty-one¹³⁴ years of age that continued into the individual's majority. A parent-child relationship is established by clear and convincing evidence if the testator functioned as the parent of the individual by openly behaving toward the individual in a manner consistent with being the individual's parent and performing functions toward or on behalf of the individual that are customarily performed by a parent.¹³⁵

133. The phrase "or a stepchild" added to Florida's Antilapse Statute is the controlling provision allowing the descendants of the testator's predeceased stepchild to inherit through the stepchild. Like the grandparent or descendant of a grandparent, adding "stepchild" to this list permits this additional relationship to be afforded antilapse protection. To ensure that the testator's probable intent is respected, "stepchild" will be further defined in this model antilapse statute in section (3)(b) to clarify the necessary factors that must be met in order for the stepchild's descendant to inherit.

134. Providing an age limit in the model statute may cut off some potentially viable claims of a parent-child relationship. However, this will also act as a slight simplification to a court's application of the statute by providing a strict rule that must be met before further consideration of the parent-child relationship can commence.

135. The language from this model statute pulls in part from the provision in the UPC dealing with a parent-child relationship for the purposes of adoption. UNIF. PROB. CODE § 2-115.

a. Parent-Child Relationship Must Begin Before the Child Turns Twenty-One

This model statute seeks to further the testator's probable intent by including general factors a court must look to when determining whether the requisite parent-child relationship existed between the stepparent and stepchild to afford the stepchild's descendants antilapse protection. First, to allow the descendants of the testator's predeceased stepchild to take in the stepchild's place, courts must ensure that the relationship shared between the testator and the stepchild began before the child turned twenty-one.

Generally, it is not unusual for definitions of a parent-child relationship to include a provision that the relationship must begin in the child's minority.¹³⁶ While the UPC provision addressing parent-child relationships does not specifically require that the relationship begin in the child's minority, the comment to section 2-115 nevertheless states: "Ideally, a parent would perform all of the above functions throughout the child's minority."¹³⁷ Additionally, the factors provided in section 2-115, that may be considered to determine the existence of a parent-child relationship, generally imply that such a relationship would begin in the child's minority. For example, in the UPC, a parent-child relationship may exist if the parent ensured that the child's nutritional needs were satisfied, provided residential care to the child, and assisted in the enhancement of the child's developmental skills.¹³⁸ These are factors one might employ when parenting a minor, rather than an adult.

This model statute attempts to add some flexibility to the relational analysis by acknowledging that many parent-child relationships begin after the age of majority, while a child is still living in the parental home. While the age of majority in most American jurisdictions is eighteen,¹³⁹ with the increasing number

136. See *infra* Part V(C)(3) (examining California's probate code provision stating that a stepparent and stepchild must have a parent-child relationship during the child's minority in order for the stepchild to inherit from the stepparent).

137. UNIF. PROB. CODE § 2-115 cmt.

138. *Id.*

139. The legal age of majority is eighteen in each state in America with the exception of Alabama and Nebraska, where the legal age of majority is nineteen. *Determining the Legal Age to Consent to Research*, WASHINGTON UNIVERSITY IN ST. LOUIS (July 26, 2012),

of individuals attending college, many parents find that their children live with them up until, or beyond, the age of twenty-one.¹⁴⁰ Because this model antilapse provision is intended to serve as a legislative stepping stone in Florida to a more workable probate code for blended families, requiring that the parent-child relationship begin by the time the child reaches a certain age will be an initially simple element for courts to apply.

b. The Parent Must Perform Parental Duties and Openly Hold
Him or Herself Out to be the Parent of the Child

Under the model statute, the parent must have performed parental duties customarily performed by a parent and acted openly toward the child as his or her parent. Courts interpreting this provision may further develop the relatively broad description of parental function by applying and interpreting specific factors that are “customarily performed by a parent.”¹⁴¹ It is in this provision that the comment to section 2-115 of the UPC may become a helpful reference.¹⁴²

The openness of the parent-child relationship is another important factor for courts to consider when interpreting the provisions of the model antilapse statute. Florida statutes have considered the propriety of an open and obvious relationship between parent and child in the context of establishing paternity when the biological parents are unmarried.¹⁴³ Relevantly, if a man “openly held himself out to be the father of the child” he is properly “deemed to have developed a substantial relationship with the

<https://hrpo.wustl.edu/wp-content/uploads/2015/01/5-Determining-Legal-Age-to-Consent.pdf>.

140. See Richard Fry, *A Rising Share of Young Adults Live in Their Parents' Home*, PEW RES. CENTER (Aug. 1, 2013), <http://www.pewsocialtrends.org/2013/08/01/a-rising-share-of-young-adults-live-in-their-parents-home/>.

141. UNIF. PROB. CODE § 2-115(4).

142. The UPC derives its definition of “functioned as a parent of the child” from the Restatement (Third) of Property: Wills and Other Donative Transfers. UNIF. PROB. CODE § 2-115 cmt. The Restatement lists four broad categories of parental function: (1) custodial responsibility; (2) decisionmaking responsibility; (3) caretaking functions; and (4) parenting functions. RESTATEMENT (THIRD) OF PROP.: WILLS & DON. TRANS. § 14.5 cmt. e (2011). Contained within each of these four categories are specific descriptions of actions which are included as parental functions. *Id.* A court applying the model antilapse statute may wish to look to any of these four categories of parental function to determine if the stepparent and stepchild shared a parent-child relationship.

143. FLA. STAT. § 63.062(2)(a) (2016).

child. . . .”¹⁴⁴ Florida is not the only state to place importance on whether the parent openly holds him or herself out to be the parent of a child. For example, California also allows an unmarried father to establish paternity by openly holding the child out to be his own.¹⁴⁵ In the context of antilapse statutes, if the stepparent openly held the stepchild out to be his or her own child, a court may be inclined to find that the requisite parent-child relationship existed to allow the descendants of the predeceased stepchild to take a devise in the stepchild’s place.

c. The Parent-Child Relationship Must be Established by Clear and Convincing Evidence

Finally, this model statute employs the “clear and convincing evidence” standard to properly establish a parent-child relationship between stepparent and stepchild. Black’s Law Dictionary defines clear and convincing evidence as “[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.”¹⁴⁶ On the burden of proof scale, clear and convincing evidence falls somewhere in between a “preponderance of the evidence” (the burden usually applied in civil matters) and “evidence beyond a reasonable doubt” (the burden applied in criminal matters).¹⁴⁷

The clear and convincing standard is not uncommon in statutes regarding the division of an estate. For example, the Florida Probate Code allows a court to reform unambiguous terms in a will if the proponent of the reformation establishes by clear and convincing evidence “that both the accomplishment of the testator’s intent and the terms of the will were affected by a mistake of fact or law, whether in expression or inducement.”¹⁴⁸ Similarly, if the settlor of a revocable trust has not established a particular method that must be used to revoke the trust, the Florida Trust Code allows the settlor to revoke the trust by

144. *Id.* § 63.062(2)(a)(1)(b)(2).

145. CAL. FAM. CODE § 7611 (West 2013) (“A person is presumed to be the natural parent of a child if the person . . . (d) . . . receives the child into his or her home and openly holds out the child as his or her natural child.”).

146. BLACK’S LAW DICTIONARY, *supra* note 23.

147. *Id.*

148. FLA. STAT. § 732.615 (2016).

“[a]ny . . . method manifesting clear and convincing evidence of the settlor’s intent.”¹⁴⁹

The clear and convincing evidence standard also makes a regular appearance in the UPC, from which the model statute pulls the parent-child relationship analysis. Under the UPC, an individual is deemed to have predeceased a testator if it cannot be established by clear and convincing evidence that the individual survived for 120 hours after the testator’s death.¹⁵⁰ Furthermore, an individual other than the birth mother is properly treated as the parent of a child born by assisted reproduction if it can be established by clear and convincing evidence that that individual intended to be treated as the parent of a posthumously conceived child.¹⁵¹ Finally, a parent-child relationship is proven by facts and circumstances establishing clear and convincing evidence of an individual’s intent to be treated as the parent of a gestational child conceived by the use of the individual’s sperm or eggs “after the individual’s death or incapacity.”¹⁵²

Along these lines, by requiring a parent-child relationship to be established by clear and convincing evidence in order for the model antilapse statute to protect gifts to the descendants of a testator’s predeceased stepchild, Florida courts can better ensure that only those individuals who truly shared such a relationship are protected. This will enhance a court’s ability to further the testator’s true intent. If the proponent of the antilapse statute (i.e., the descendant of the predeceased stepchild) cannot establish that his or her parent (the testator’s stepchild) enjoyed a parent-child relationship with the testator, the descendant of the stepchild will be unable to take the devise and it will instead fall to the residue of the testator’s estate (or to the testator’s heirs at law, if there is no residual clause). This model statute ultimately ensures that Florida courts will be able to properly allow the descendants of a testator’s predeceased stepchild to take in the stepchild’s place provided it be shown that this was the testator’s true intention.

149. *Id.* § 736.0602(3)(b)(2).

150. UNIF. PROB. CODE § 2-702.

151. *Id.* § 2-120.

152. *Id.* § 2-121.

2. *Establishing a Presumption of the Existence of a Parent-Child Relationship*

To enhance judicial efficiency, the Florida legislature may consider adding a provision to the model statute that creates a rebuttable presumption of the existence of a parent-child relationship should key factors be established. Section 732.603, Florida Statutes, would thus also include the following provision:

(3) In the application of this section: . . .

(c) A rebuttable presumption of a parent-child relationship is established if the proponent of the relationship shows by clear and convincing evidence that the child resided with the testator (1) full time for more than six (6) months prior to the child's 18th birthday or (2) at least fifty (50) percent of the time for one (1) year prior to the child's 18th birthday.

A rebuttable presumption may be defined as “[a]n inference drawn from certain facts that establish a prima facie case, which may be overcome by the introduction of contrary evidence.”¹⁵³ The Florida Statutes create rebuttable presumptions in a variety of contexts, with the presumption of undue influence particularly notable in the Florida Probate Code.¹⁵⁴ While the party alleging that the will was procured through undue influence still has the initial burden of providing evidence to establish the undue influence, this burden can be met by providing enough evidence to establish a presumption that the will was secured by undue influence.¹⁵⁵ This presumption is rebuttable—that is, it is now the other party's responsibility to provide evidence overcoming the

153. BLACK'S LAW DICTIONARY, *supra* note 23.

154. FLA. STAT. § 733.107(1) (2016). The Florida legislature revised section 733.107 in 2002 to add a burden shifting framework to the undue influence analysis. *Id.* § 733.107(2).

155. Steven G. Nilsson, *Florida's New Statutory Presumption of Undue Influence: Does It Change the Law or Merely Clarify?*, FLA. B.J., Feb. 2003, at 20, 24. Mr. Nilsson comments on the revised statute's burden-shifting framework, which conflicted with prior Florida caselaw holding that “the burden of proof in a will contest must remain with the party contesting the will.” *Id.* at 22. *See also In re Estate of Carpenter*, 253 So. 2d 697, 704 (Fla. 1971) (holding that “the burden of proof in will contests shall be on the contestant to establish the facts constituting the grounds upon which the probate of the purported will is opposed”).

presumption of undue influence.¹⁵⁶ If that party can successfully do so, the party alleging undue influence has failed to meet the statutory burden.¹⁵⁷ Conversely, the Florida Probate Code has also prescribed situations where no such rebuttable presumption arises: such as when two individuals make joint or mutual wills.¹⁵⁸ In this situation, a presumption *does not* arise that there existed a contract to make or not to revoke the wills.¹⁵⁹

The rebuttable presumption is a useful tool because it places the burden of proof on the opposing party to argue that whatever is presumed is in fact untrue. In the context of this model statute, a presumption that a parent-child relationship existed between the testator and his or her stepchild would arise if the stepchild resided with the testator full time for more than six months, or at least fifty percent of the time for one year, before the stepchild turned eighteen. If the opposing party does not introduce sufficient contrary evidence to the proposition that the parent-child relationship existed, then the parent-child relationship is properly established.

The inclusion of a presumption in the model statute will provide a simple method for courts to apply in situations such as the first hypothetical above,¹⁶⁰ where Terry's stepson, Sam, lived with Terry at least fifty percent of the time beginning when Sam was ten-years-old. Because the elements of the model statute are met, a presumption would be established that Terry and Sam shared a parent-child relationship. Unless the opponent provides evidence that such a relationship did not exist, Darcy (Sam's daughter) would be able to take the devise to Sam in his place under the shortcut provided in the model statute.

156. Nilsson, *supra* note 155, at 25. Whether a party has overcome the presumption of undue influence is a fact-specific analysis; however, Florida courts have generally stated that this presumption may be overcome by a preponderance of the evidence. *See, e.g.*, Hack v. Janes, 878 So. 2d 440, 444 (Fla. 5th Dist. Ct. App. 2004) (adopting the preponderance of the evidence standard for a contested will due to an exercise of undue influence).

157. Nilsson, *supra* note 155, at 25.

158. FLA. STAT. § 732.701(2) (2016).

159. *Id.*

160. *See supra* Part IV(B).

3. *The Model Statute Will Not Impose an Undue Burden on the Judicial System*

While it may be argued that incorporating a test into the antilapse statute requiring courts to determine the existence of a parent-child relationship places a burden upon the judicial system, Florida would not be the first state to include such a factors test in its probate code. California's probate code is illustrative.¹⁶¹ To determine whether a stepchild may inherit from a stepparent, a California court applying the state's probate code must ensure that two factors are met: (1) "The [parent-child] relationship began during the person's minority and continued throughout the joint lifetimes of the person and the person's . . . stepparent," and (2) "[i]t is established by clear and convincing evidence that the foster parent or stepparent would have adopted the person but for a legal barrier."¹⁶²

As in Florida, a stepparent in California must obtain consent from the child's biological parents in order to adopt the child.¹⁶³ This necessarily may impose a burden on the stepparent, inhibiting his or her ability to adopt the stepchild.¹⁶⁴ If a biological parent is unwilling to consent to the adoption, the stepparent will be unable to adopt the stepchild even if they enjoy a substantial parent-child relationship. This lack of a legal relationship between stepparent and stepchild may be one of the reasons Florida has avoided expanding its antilapse statute for wills to include this relationship in the first place. However, when considering the leap the Florida Trust Code already makes in foregoing a relational barrier to antilapse protection, the wide array of families in America today, and the many reasons why a stepparent may not adopt his or her stepchild, expanding Florida's antilapse statute

161. CAL. PROB. CODE § 6454 (West 1993).

162. *Id.*

163. In Florida, consent from the child's birth mother must be obtained prior to the child's adoption by a stepparent. FLA. STAT. § 63.062(1)(a) (2016). Additionally, consent from the child's biological father must be obtained if the father has satisfied any of several enumerated factors that determine his parentage. *Id.* § 63.02(1)(b). See also CAL. FAM. CODE § 9003 (West 2011) (stating that consent of the child's birth parents must be obtained in a signed writing in order for a stepparent to adopt the child).

164. Of course, there is a plethora of other reasons why a stepparent may not adopt a stepchild, such as the parties' feeling that such a legal measure is unnecessary when they already share such a strong bond. Though there may be no legally recognized relationship between parent and child, a strong familial relationship may still exist. Whatever the reason a stepparent has for not adopting his or her stepchild, it is imperative that statutes develop to protect those families where legal adoption is not pursued.

for wills to protect the parent-child relationship shared between stepparent and stepchild is a logical first step for the Florida Probate Code in providing workable solutions for blended families.

Thus, Florida's antilapse statute must provide protection for the situation where a testator shared a close relationship with his or her stepchild irrespective of their legal relationship. Even though determination of the existence of a parent-child relationship between the testator and his or her stepchild will add some extra burden on the courts, ultimately "the United States Supreme Court has repeatedly acknowledged that states have a legitimate interest in developing statutory classifications that promote an 'accurate and efficient method of disposing of property at death' despite additional judicial responsibility."¹⁶⁵ Because the UPC and other states have already enacted antilapse statutes protecting a devise to the testator's stepchildren,¹⁶⁶ Florida would not be alone in its attention to the valuable relationship many testators share with their stepchildren and the descendants of their stepchildren.

VI. CONCLUSION

Florida's antilapse statute for wills is presently much narrower than its equivalent statute for trusts. While the antilapse statute for trusts protects gifts to any beneficiary, the statute for wills protects only beneficiaries who are the testator's grandparents and the descendants of the testator's grandparents. Some states and the UPC have expanded antilapse statutes to include stepchildren, and the Florida legislature should consider doing the same and expand the state's antilapse statute for wills to reflect changes in today's society.

Should the model antilapse statute presented by this Article be enacted in Florida, it will serve to increase the scope of relationships covered by the Florida Probate Code's antilapse provision. By initially revising the Florida Antilapse Statute to protect gifts to stepchildren who enjoyed a parent-child relationship with the testator before the stepchild turned twenty-one, Florida would take the first step in promoting presumed

165. Cremer, *supra* note 132, at 108 (quoting *Lalli v. Lalli*, 439 U.S. 259, 265 (1978); *Trimble v. Gordon*, 430 U.S. 762, 766 (1977)).

166. See *supra* text accompanying notes 84–85 (explaining that Michigan and New Mexico have enacted antilapse statutes protecting a devise to the testator's stepchildren).

testator intent in a modern society. The legislature's adoption of a broader antilapse statute will assure Florida citizens that it is aware of the developing familial landscape and is willing to adopt statutes that make estate planning more workable for families when there are complicated relationships at play.