Heirs, Legatees and Related Issues

Faculty:
Deborah A. Cohn, Esq.
Frederick R. Franke, Jr., Esq.
Kathleen J. Masterton, Esq.
Hon. Joseph Murphy (Ret.)
Norman L. Smith, Esq.

Moderator
Hon. Theresa A. Lawler

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- JUDICIAL INSTITUTE OF MARYLAND -

Heirs, Legatees and Related Issues

Friday, March 15, 2013, 9:00 a.m. – 4:00 p.m.

Agenda

9:00 a.m. - 9:05 a.m.	Welcome and Introduction to Faculty *Moderator: Hon. Theresa A. Lawler* *Orphans' Court for Baltimore County*
9:05 a.m. - 10:00 a.m.	Who is in the Family? Changing Definitions of Child, Issue, Spouse and Marriage in Maryland *Deborah A. Cohn, Esquire* *Paley Rothman*
10:00 a.m. - 10:15 a.m.	Break
10:15 a.m. - 11:25 a.m.	Content and Execution of Wills (Requirements of a Valid Will and Holographic Wills); Types of Bequests; Division of Property: "*Per Stirpes* and *Per Capita"*; Revocation of Will (Right to Revoke, Method of Revocation and Evidence of Revocation, Dependent Relative Revocation) *Norman L. Smith, Esquire* *Fisher & Winner, LLP*
11:25 a.m. - 12:25 p.m.	Adoption and Equitable Adoption under Maryland Law; Spouse's Right to Elective Share *Hon. Joseph F. Murphy, Jr. (Retired)* *Silverman Thompson Slutkin & White*
12:25 p.m. - 1:25 p.m.	Lunch
1:25 p.m. - 2:35 p.m.	The Slayer's Rule; Codification of Slayer's Rule; Disclaimers, Anti-Lapse, Void and Inoperable Legacies; Transfer of Expectancy; Family Settlement Agreements and In Terrorem Clauses *Frederick R. Franke, Jr., Esquire* *Law Office of Frederick R. Franke, Jr. LLC*
2:35 p.m. - 2:50 p.m.	Break
2:50 p.m. - 3:50 p.m.	Intestate Succession (Surviving Spouse, Child, Half Blood, Stepchild, Illegitimate Children and Other Relations); Escheat; Testamentary Doctrines (Abatement, Ademption and Advancement), and Post-Administration Issues *Kathleen J. Masterton, Esquire* *Law Office of Kathleen J. Masterton, PC*
3:50 p.m. - 4:00 p.m.	Questions and Answers

TABLE OF CONTENTS

TAB

THE SLAYER'S RULE

1.1 Introduction. The Slayer's Rule arose from common law based on the principle that one should not profit from his or her wrongful act. Although fairly straightforward in theory, the operation and effect of the Slayer's Rule has not been easy to implement.

The vast majority of jurisdictions have a statutory Slayer's Rule. The Restatement (Third) Prop.: Wills and other Donative Transfers § 8.4 (2003) (hereafter the "Restatement Third") counts 46 such statutes. Historically, Maryland has relied upon the common law for its rule.

1.2 Background – the Common Law: the Nature of the Act. Under the common law in Maryland, a person was disqualified to inherit if he or she "feloniously" kills the person from whom he or she would otherwise inherit. Not all killings trigger the rule. Thus, a husband who killed his wife through gross negligence could inherit. *Schifanelli v. Wallace*, 271 Md. 177, 315 A.2d 513 (1974).

Likewise, an intentional killing where the slayer suffers from mental illness and is therefore not culpable may inherit:

> "Equally a matter of equity, justice and morality and a reflection of public policy is the present enlightened definition of criminal insanity under which punishment for the commission of a crime is prohibited. The terms of that definition simply make the maxims prompting the rule – no one shall be permitted to profit by his own fraud, to take advantage of his own iniquity, or to acquire property by his own crime – inappropriate when a person is criminally insane. A person who suffers a mental disorder or is mentally retarded and falls under the cognitive and volitive components of the criminal responsibility statute does not, by the very terms of those components, act with an unfettered will. His conduct is controlled and his will is dominated by his mental impairment. Fundamentally, a killing is "felonious" when the homicide is a felony. In the frame of reference of the slayer's rule, however, the legislative policy regarding criminal responsibility leads to a qualification of this meaning. We believe that a homicide to be "felonious" in the context of the slayer's rule, it must be a felony for which the killer is criminally responsible under Maryland's criminal insanity test. Therefore, if a killer is "insane" at the time he killed, the killing is not felonious in the

> contemplation of the slayer's rule. If the killing is not felonious, even though it may be intentional, the rule does not apply. Our view does not do violence to the broad public policies inherent in both the rule and the criminal insanity statutes. On the contrary, it furthers the principles of equity, justice and morality recognized by both the rule and the statute."

Ford v. Ford, 307 Md. 105, 123, 512 A.2d 389, 398 (1986). The Slayer's Rule would apply, however, to voluntary manslaughter as that offense is both "felonious and intentional." *Chase v. Jennifer*, 219 Md. 564, 150 A.2d 251 (1959).

1.3 Background – the Common Law: The Operation of the Slayer's Rule. Obviously, the slayer does not inherit. Who, however, does inherit? Under the common law, two basic approaches were recognized. One approach imposed the disqualification to the slayer but permitted the moral intestacy statutes to operate. The other approach, which Maryland adopted, precluded the slayer and his or her heirs and personal representatives from taking. In *Price v. Hitaffer*, 164 Md. 505, 165 A.2d 470 (1933) a husband murdered his wife and then committed suicide. The wife died childless. The issue was whether the husband's sister and brother inherited the husband's one-half of the estate. The Court of Appeals held that the act of murder meant that the husband never acquired an interest in his wife's estate. Thus, her entire estate went to her parents. [Not incidentally, this holding side-stepped the issue of the Maryland constitutional (and statutory) prohibition against "corruption of blood" and forfeiture by conviction of a felony because the husband never acquired an interest to forfeit.]

Arguably an equitable result was effectuated in the *Price* case. The application of this theory as to the Slayer's Rule, however, can produce odd, and perhaps unjust, results. In *Cook v. Grierson*, 380 Md. 502, 845 A.2d 1231 (2004) a son murdered his father. The father died intestate with a surviving spouse (the stepmother), his son (the murderer) and his grandchildren (the children of the murderer). The Court held that the grandchildren did not inherit. They were

not intestate heirs because § 1-209 of the Md. Code Ann., Est. & Trust Article defines "issue" as "any living lineal descendants except a lineal descendant of a living lineal descendant." The son is precluded from inheriting due to the Slayer's Rule and the grandchildren are not "issue" per the statute. In *Cook v. Grierson*, the grandchildren tried to rely on an earlier case that permitted the "innocent" heirs of a slayer from receiving benefits under an insurance contract. In the case, however, those heirs received by the terms of the contract not by intestacy as alternative takers. *Diep v. Rivas*, 357 Md. 668, 745 A.2d 1098 (2000).

CODIFICATION OF SLAYER'S RULE

2.1 The Codification in General. In 2013, the Maryland General Assembly considered a Bill to codify the Slayer's Rule. Basically, it followed the Uniform Probate Code model to treat the slayer as having disclaimed his or her intestate share or bequest under a Will or Trust.

For intestacy, it would effectively reverse the holding of *Cook v. Grierson*. If the Bill controlled, the son would have been treated as disclaiming his intestate share and that share would pass to the grandchildren. The widow would receive her share ($15,000 plus 1/3) per the statute (§ 3-102).

One can envision, however, circumstances where the disclaimer applied may not produce what the victim may have wanted. In *Price v. Hitaffer*, a husband murdered his wife who was childless. The wife's parents inherited her estate (over the husband's siblings) because the court ruled that the husband never acquired an interest in her estate. If the murderer is treated as having disclaimed, this would not change the *Price* result in intestacy. Slightly different facts, however, could raise very different considerations. Assume in *Price*, that the wife had a Will leaving everything to her husband without a provision requiring survivorship. Then the anti-lapse statute

would kick in to mean that the bequest to the murderer would go to his relatives. One commentator suggests changing the anti-lapse statute to not operate to pass property to non-relatives of the victim in slayer rule situations. Tara L. Pehush, *Maryland is Dying for a Slayer Statute: The Ineffectiveness of the Common Law Slayer Rule in Maryland*, 35 U. Balt. L. Rev. 271 (2006).

2.2 Codification of the Slayer's Rule. As these materials were being prepared, the outcome of the Bill is not known.

2.3 Codification and Joint Property. The Maryland proposal if adopted, would terminate any survivorship provisions for joint property held by the decedent and the slayer ("severed at the time of the death"). This proposal states that the property then passes as if the decedent and the slayer have no rights of survivorship. The Uniform Probate Code version states that such property reverts to being held equally as tenants in common. Comments to that Act, however, point to a change between the pre- and post-1990 versions of the UPC. The current version excludes joint and multiple bank accounts and other forms of co-ownership with rights of survivorship from inclusion in this provision. Those accounts are treated as giving the slayer a general or non-general power of appointment that is revoked by the felonious killing. The effect of this decision is that the underlying ownership of each party is in proportion to that party's contribution to the account. By using disclaimer treatment generally, the Maryland rule would arguably yield the same result.

DISCLAIMERS

3.1 Introduction. A disclaimer is a refusal to accept property otherwise passing to you by intestacy, by Will or by non-probate transfer. Generally (with one exception described below) the disclaimer makes the property pass directly from the original transferor to the person

who would receive the property if the disclaimant had predeceased the transferor. It does not mean that the transferee/disclaimant is making the transfer.

3.2 Effective October 1, 2004, Maryland adopted the Uniform Disclaimer of Property Interests Act ("MUDOPIA"). It largely tracks the uniform act promulgated by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") in 1999, as amended in 2002. The uniform act "was drafted to allow the full range of disclaimers recognized under the Internal Revenue Service Code ("IRC)" Section 2518." William P. LaPiana, "Some Property Law Issues in the Land of Disclaimers," 38 Real Prop. Prob. & Tr. J., 207, 209 (Summer 2002) (hereinafter "LaPiana").

3.2.1 Although designed to take advantage of all of the possibilities under IRC § 2518, it purposefully "decoupled" the statute from the nine-month requirement of IRC § 2518 and, of course, prior Maryland law. See Md. Code Ann., Est. & Trusts § 9-202 of the pre-October 1, 2004 statute. The decoupling was "designed to reduce confusion" by signaling that a tax qualified disclaimer had to qualify under the § 2518 rules which, in the case of disclaimers of future interests, had to be made within nine months of the creation of the interest. The earlier versions of the uniform acts (including Est. & Trusts § 9-202) authorized disclaimers within nine months of when the contingent interest was finally ascertained and the disclaimant's right to possession or enjoyment became indefeasibly vested. "The removal of all mention of time limits will clearly signal the practitioner that the requirements for a tax qualified disclaimer are set by different law." Comment, Prefatory Note, UDOPIA (2002).

3.2.1.1 Other than for federal tax liens[1], a disclaimer is not a transfer for fraudulent conveyance purposes in most jurisdictions. *Essen v. Gilmore*, 607 N.W.2d 829, 835

[1] The U.S. Supreme Court has held that a disclaimer is not effective to effectuate a transfer of property free of a federal tax lien in place against the disclaimant. *Drye v. United States*, 528 U.S. 49 (1999). *Drye* should only apply to federal tax liens. See pages 215-216 of the attached article.

(Neb. 2000) ("A review of the jurisprudence of other states shows that it is the majority view that a renunciation under the applicable state probate code is not treated as a fraudulent transfer of assets under the Uniform Fraudulent Transfer Act ("UFTA"), and creditors of the person making the renunciation cannot claim any rights to the renounced property in the absence of an express statutory provision to the contrary."). Also see, *Pauw v. Agee*, 2000 U.S. Dist. LEXIS 22323 (U.S. Dist. Ct. for S.C. 2000), which permitted a debtor to disclaim his inheritance then rent the property back from his brother who received the property due to the operation of the disclaimer: "This view (that a disclaimer will defeat the judgment against the debtor/disclaimant) corresponds with the majority view that a creditor cannot prevent a debtor from disclaiming an inheritance." Id. at 19.

3.2.1.2 One court permitted a creditor's lien to bar the disclaimer because the property was encumbered before the decedent's death. That decision, *Pennington v. Bigham*, 512 So. 2d 1344 (Ala. 1987), turned on the direct interest an heir has in estate property. In Alabama, as in Maryland, for decedents dying before January 1, 1970, real estate directly passes to intestate heirs. "When John Thomas Bigham died intestate …, the legal title to a one-half interest in his real property vested in Bobby Bigham (the disclaimant); however, it vested subject to the statutory power of the administratrix to take possession of it and obtain an order to have it sold for payment of the debts of his father's estate." *Pennington* at 1345-46. In *Pennington*, a judgment creditor had perfected her lien against all of the disclaimant's property before the disclaimant's father died. Thus, the lien acted as an encumbrance of the disclaimant's share. The Supreme Court of Alabama held that a disclaimer after the lien attached under the circumstances of that case constituted a fraudulent conveyance.

3.2.1.3 There is no decision in Maryland (other than for Medicaid

purposes, discussed below) that addresses the operation of the "relation back" provision under prior law, or the "not a transfer, assignment, or release" provisions under the current act. MUDOPIA § 9-203(f)(1); prior act § 9-205; Comment, Section 5, UDOPIA: "Subsection (f) restates the long standing rule that a disclaimer is a true refusal to accept and not an act by which the disclaimant transfers, assigns, or releases the disclaimed interest. This subsection states the effect and meaning of the traditional 'relation back' doctrine of prior Acts."

3.2.2 Like in *Pennington*, Maryland has a provision barring disclaimers if the property to be disclaimed is encumbered.[2] Unlike *Pennington*, Md. Code Ann., Est. & Trusts § 1-301(a) reversed the common law rule passing real property directly to the heirs by providing that: "All property of a decedent shall be subject to the estates of decedent's law, and upon the person's death shall pass directly to the personal representative, who shall hold legal title for administration and distribution, without any distinction, preference, or priority between real and personal property." This is the Maryland rule for all decedents dying on or after January 1, 1970. An existing lien operating against the disclaimant of a Maryland estate would therefore not attach to the disclaimed property unless the property was actually distributed to him/her.

3.2.2.1 Perhaps more telling, however, is the language of the Maryland statute under the current act and its predecessor. Section 9-202(f)(2) of the MUDOPIA states: "Creditors of the disclaimant have no interest in the property disclaimed." This comports with the prior statute: "Creditors of the disclaimant have no interest in the property or interest disclaimed, whether their claims are based on contract, tort, tax obligations, or otherwise."

3.3 In a MUDOPIA case, the Court of Special Appeals looked at the propriety of a Medicaid recipient disclaiming an intestate share of an estate. In *Troy v. Hart*, 116 Md. App. 468, 697 A.2d 113 (1997), cert. denied, 347 Md. 255, 700 A.2d 1215 (1997), the Court first

[2] As noted, however, the newer uniform act added voluntarily to the bar.

looked at whether excepting benefits after receiving Medicaid benefits constituted "an assignment, conveyance, voluntary encumbrance … " under the statute. The Court held that a disclaimer was not barred by that Section due to the disclaimant receiving Medicaid payments. The Court held that the disclaimer of benefits, however, would disqualify the disclaimant for Medicaid payments because those assets, in effect, constituted an available resource:

> What this Court is more broadly faced with is the propriety of the disclaimer in light of societal interest and overall policy considerations. What is ludicrous, if not repugnant, to public policy is that one who is able to regain the ability to be financially self-sufficient, albeit for a temporary or even brief period of time, may voluntarily relinquish his windfall.
>
> While we are mindful that social agencies are 'skewered through and through with office pens, and bound hand and foot with red tape,' this acknowledgment does not vitiate legal obligation to report a recipient's change in financial status. Lettich had a legal obligation to 'pay his own way' (by means of the inheritance) until such time as his resources were exhausted. Had the disclaimed funds actually been acquired and exhausted, Lettich most certainly would have been eligible to resume his receipt of Medicaid benefits.
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> In Molloy v. Bank, 214 A.D.2d 171, 631 N.Y.S.2d 910 (1995), the Supreme Court of New York, Appellate Division, confronted the same issue now before this Court. Molloy, a resident of a nursing home, was a recipient of medical assistance. Upon the death of her daughter, Molloy, pursuant to intestacy law, was entitled to her statutory share of the estate. Prior to disposition of the estate, Molloy renounced her interest in it. Acknowledging that the right to renounce a intestate is irreconcilable with the principle that public aid is of a limited nature and should only be afforded to those who demonstrate legitimate need, 631 N.Y.S.2d at 911, the court found that '[Molloy]'s renunciation of a potentially available asset was the functional equivalent of a transfer of an asset since by refusing to accept it herself, she effectively funneled it to other familial distributes.' Id. At 913.
>
> Applying this analysis to the case sub judice, we adopt the reasoning of the New York court. The result of such a transfer prior to application for benefits is that the transferee enjoys a 'windfall' for which the applicant/transferor is penalized against the inception of his eligibility. So too should this penalty result in a circumstance in which a Medicaid recipient disclaims or otherwise transfers an inheritance that if accepted would result in a loss of eligibility.

Unfortunately, the Court then went on to "suggest" that the State had a potential cause of action

for a constructive trust to seek reimbursement for the payments it made to the disclaimant improperly. [This was a "suggestion" because, as the case stated, the personal representative of the estate had acquiesced to reimbursing the State for any Medicaid benefits erroneously paid for the benefit of the disclaimant.]

3.3.1 Presumably, to the extent it is still good law under the new statute, *Troy v. Hart* carves out a narrow exception to the provision that creditors have no interest in the property disclaimed. Generally, the Medicaid override is a policy trumping of the statute. Comment to UDOPIA (at Section 13):

> A number of States refuse to recognize a disclaimer used to qualify the disclaimant for Medicaid or other public assistance. These decisions often rely on the definition of 'transfer' in the federal Medical Assistance Handbook which includes a 'waiver' of the right to receive an inheritance (see 42 U.S.C.A. § 1396p(e)(1)). See Hinschberger v. Griggs County Social Services, 499 N.W.2d 876 (N.D. 1993); Department of Income Maintenance v. Watts, 211 Conn. 323 (1989), Matter of Keuning, 190 A.D.2d 1033, 593 N.Y.S.2d 653 (4th Dept. 1993), and Matter of Molloy, 214 A.D.2d 171, 631 N.Y.S.2d 910 (2nd Dept. 1995), Troy v. Hart, 116 Md. App. 468, 697 A.2d 113 (1997), Tannler v. Wisconsin Dept. of Health & Social Services, 211 Wis. 2d 179, 564 N.W.2d 735 (1997); but see, Estate of Kirk, 591 N.W.2d 630 (Iowa, 1999) (valid disclaimer by executor of surviving spouse who as Medicaid beneficiary prevents recovery by Medicaid authorities). It is also likely that state policies will begin to address the question of disclaimers of real property on which an environmental hazard is located in order to avoid saddling the State, as title holder of last resort, with the resulting liability, although the need for fiduciaries to disclaim property subject to environmental liability has probably been diminished by the 1996 amendments to CERCLA by the asset Conservation Act of 1996 (PL 104-208). These larger policy issues are not addressed in this Act and must, therefore, continue to be addressed by the States. On the federal level, the United States Supreme Court has held that a valid disclaimer does not defeat a federal tax lien levied under IRC § 6321, Drye, Jr. v. United States, 528 U.S. 49, 120 S. Ct. 474 (1999).

ANTI-LAPSE, VOID AND INOPERABLE LEGACIES

4.1 The common law is grounded on the principal that property cannot be transferred to a deceased person:

"A will transfers property at the testator's death, not when the will was executed.

> The common-law rule of lapse is predicated on this principle and on the notion that property cannot be transferred to a deceased individual. Under the rule of lapse, all devises are automatically and by law conditioned on survivorship of the testator. A devise to a devisee who predeceases the testator fails (lapses); the devised property does not pass to the devisee's estate, to be distributed according to the devisee's will or pass by intestate succession from the devisee."

Unif. Probate Code § 2-603 cmt.

The Maryland statute reverses the rule at common law. Md. Code Ann., Est. & Trusts § 4-403. Apparently, this reversal is different from most other state statutes which, rather than simply reversing the common law, re-direct the property to specific classes of substantive takers:

> "Modern anti-lapse statutes do not reverse the lapse rule. To do so, they would have to provide that a devise to a devisee who fails to survive the testator passes to the deceased devisee's estate. Instead, they provide that the property that the devisee would have taken had he or she survived the testator passes to specified substitute takers, typically the descendants of the deceased devisee who survives the testator."

Restatement (Third) of Prop.: Wills and Other Donative Transfers § 5.5 cmt. b.

The Maryland statute provides that "[u]nless a contrary intent is expressly indicated in the will" a legacy to a deceased taker will "have the same effect and operation in law to direct the distribution of the property directly from the estate of the person who owned the property to those persons who would have taken the property if the legatee had died, testate or intestate, owning the property." § 4-403. As with all anti-lapse statutes, the Maryland rule has no application where the legatee was dead at the time the will was made; it only applies if a legatee is living when the will is made but dies thereafter. See *Billingsley v. Tongue*, 9 Md. 575 (1856).

There are numerous Maryland cases interpreting the anti-lapse statute. In *Rowe v. Rowe*, 124 Md. App. 89, 91 A. 777 (1998), a mother's will provided for her property go to her two sons "equally, share and share alike." *Id.* at 93. One of the sons had predeceased and had left his wife as sole residuary legatee. The trial court applied § 4-403 to direct one-half of the estate to the

deceased son's widow. On appeal, the surviving brother argued that the share and share alike language indicated intent of a per capita distribution which is dependent on survivorship. The surviving brother argued that this language evidenced a contrary intent in the will. The Court of Special Appeals affirmed the lower court's judgment and held that contrary intent must be clearly expressed, not inferred.

Segal v. Himelfarb, 136 Md. App. 539, 766 A.2d 233 (2001), involved the possible double application of the anti-lapse statute. A wife left her entire estate to her husband with no contingent beneficiaries named in the will; her husband left everything to go to the wife if she survived him. The wife outlived the husband but did not revise her will before death. The issue before the court was whether the trial court erred in applying the anti-lapse law in a manner that ultimately directed the estate back to the wife's heirs. The Court of Special Appeals upheld a distribution to the wife's heirs. The court applied the anti-lapse statute to send the wife's property to the deceased husband. As his will directed his property to his surviving wife, and as the wife out-lived her husband, the court found that the husband's will effectively directed the property back to the wife and thus onto her heirs.

> "Although we do not reach this decision easily, we agree with appellees' interpretation of the anti-lapse statute. The proper interpretation is that the anti-lapse statute is applicable at the time of the legatee's death, rather than at the time the asset actually comes into the legatee's estate. This is of primary significance in this case because the point in time when the statute is applicable determines to whom the disposition passes. At the time of Louis Segal's death, his wife was still alive and, therefore, if appellee's interpretation is correct, the estate passes back to her according to his will."

Id. at 541.

Considerable litigation in several jurisdictions has focused on whether a contrary intent was indicated in the will. Such disputes can be prevented through careful drafting:

"A foolproof means of expressing a contrary intention is to add to a devise the

> phrase 'and not to [the devisee's] descendants.' In the case of a power of appointment, the phrase 'and not to the appointee's descendants' can be added by the donor of the power in the document creating the power of appointment, if the donor does not want the antilapse statute to apply to an appointment under a power. In addition, adding to the residuary clause a phrase such as 'including all lapsed or failed devises,' adding to a nonresiduary devisee a phrase such as 'if the devisee does not survive me, the devise is to be passed under the residuary clause,' or adding a separate clause providing that generally 'if the devisee of any non-residuary devise does not survive me, the devise is to pass under the residuary clause' makes the residuary clause and 'alternative devise'."

Unif. Prob. Code § 2-603(b)(3) cmt.

Much litigation had also addressed whether certain terms of survivorship (e.g., "to my son if he survives me") automatically defeat the anti-lapse statute. Not surprisingly, language explicitly providing that the taker must survive is regularly found to constitute express indication of contrary intent. However, this is not always the case:

> "An often litigated question is whether language requiring the devisee to survive the testator, without more, constitutes a sufficient expression of a contrary intent to defeat the anti-lapse statute. The majority view is that such language signifies a contrary intent. Because such a survival provision is often boiler-plate form-book language, the testator may not understand that such language could disinherit the line of descent headed by the deceased devisee. When the testator is older than the devisee and hence does not expect the devisee to die first, or if the devisee was childless when the will was executed, it seems especially unlikely that a provision requiring the devisee to survive the testator was intended to disinherit the devisee's descendants."

Restatement (Third) of Prop.: Wills and Other Donative Transfers § 5.5 cmt. h.

The Unif. Probate Code § 2-603b(3) states that terms of survivorship (e.g., "if he survives me" or "my surviving children") are not sufficient indication of intent contrary to the application of the anti-lapse statute in the absence of additional evidence of contrary intent, The rationale for this approach parallels that of the Restatement cited above. Conversely, Maryland case law has found that survivorship language constitutes express indication of contrary intent.

Like the majority of statutes governing wills in the Md. Code Ann., Est. & Trusts Article,

the anti-lapse statute does not apply to trusts. *See* Md. Code Ann., Est. & Trusts § 14-102.

Section 4-404 provides that a void or inoperable legacy not covered by the anti-lapse statute is treated as if the legacy had not existed. A void legacy would be one to a person dead at the time of the execution of the Will and an inoperable legacy would be one conditioned on survivorship with no alternative legatee provided.

TRANSFER OF EXPECTANCY

5.1 Under the common law, no living person having an heir (therefore no heir) could be seen as having a property interest in an inheritance. Thus, under common law, expectancies could not be transferred. A purported transfer of an expectancy, however, can be enforced in equity if it is for adequate consideration. *Keyes v. Keyes,* 148 Md. 397, 129 A. 504 (1925). *Keyes* notes that a transfer of an expectancy, if supported by consideration, is particularly valid as part of a family settlement.

FAMILY SETTLEMENT AGREEMENTS

6.1 An agreement among all of the beneficiaries, all of whom are competent, is valid and not subject to approval of the Orphans' Court. *Brewer v. Brewer,* 386 Md. 183, 872 A.2d 48 (2005) (An appeal upholding the opinion of the Orphans' Court for Baltimore County). *Brewer* held, however, that such agreement should be filed in the estate proceedings for chain of title purposes.

IN TERROREM CLAUSES

7.1 Md. Code Ann., Est. & Trusts Article § 4-413 contains a statutory restriction on the use of in terrorem clauses: "If probable cause exists for instituting proceedings, a provision in a will purporting to penalize an interested person for contesting the will or instituting other proceedings related to the estate is void." From a practical standpoint, an in terrorem clause is

only an effective deterrent if the potential challenger is left a substantial bequest. If the potential challenger is left, for example, $10.00 then he or she would only default $10.00 for bringing suit. Therefore, if one is relying on the in terrorem clause to discourage lawsuits it is usually (and ironically) better to leave a substantial bequest to be forfeited.