ADMINISTRABILITY OVER TESTAMENTARY FREEDOM OF DISPOSITION

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"Maybe these maps and legends
Have been misunderstood"

— R.E.M., *Maps and Legends*, FABLES OF THE RECONSTRUCTION (I.R.S. 1985)

INTRODUCTION

Freedom of disposition is unquestionably accepted as the organizing principle of inheritance law in the United States. But what if we've been wrong about that this whole time? Or perhaps we haven't been wrong exactly, but instead have been badly overstating things? Regardless of the answers, these are questions worth exploring. It's time for a reckoning.

Administrability, or the ability to efficiently administer an estate, gets some mentions as a limitation on the outer edges of freedom of disposition. But maybe that is backward. Perhaps the first priority of inheritance law is to ensure an administrable system, and freedom of disposition is only permitted to exist because it creates only marginal administrative hassles? After all, eliminating freedom of disposition wouldn't streamline the administration of estates in a profound way. We'd still need the same administrative apparatus to identify a decedent's property, take control of it, identify the proper taker,[1] and transfer title. But whenever freedom of disposition disrupts administrability too mightily, it gets shut down in favor of a streamlined system.

If you are feeling bold, try out saying these words: "The primary purpose behind inheritance law in the United States is to create an administrable system." If you teach Trusts and Estates, or even if you took Trusts and Estates, that probably felt strange. But let's think it through.

First, I'll start by establishing that freedom of disposition is regarded as a Really Big Deal in domestic inheritance law.[2] Next, I'll discuss the substantial inability that individuals possess to control the administration of their estates.[3] Decedents' autonomy in this realm is greatly curtailed, such that many decisions about the

1. Even if the decedent isn't the one selecting the taker, there must be some mechanism (presumably, statutory) for identifying the proper recipient. *See infra* Section III.A (discussing intestacy).

2. *See infra* Part I.

3. *See infra* Part II.

probate process are placed outside of decedents' control entirely, and the probate process affects probate outcomes. If the process affects outcomes, and decedents lack control over the process, then the only fair deduction is that decedents don't possess the level of control over the outcome that is advertised by our system of inheritance.

After that, I'll point out how freedom of disposition is only a small piece of a larger system of administration of estates and how certain components of the system (namely, intestacy and settlement agreements) significantly defeat or impair freedom of disposition.[4] When push comes to shove, freedom of disposition gets shoved out of the way in favor of administrability. If freedom of disposition were as almighty as it is made out to be, it would be doing the shoving, but that just isn't the case. This underrecognized limit on freedom of disposition demonstrates that administrability is the true priority in setting inheritance law policy. Administrability is the bully that calls the shots in the hallways and alleyways of inheritance law. Finally, I'll end with some closing thoughts reflecting back and wrapping it up.[5]

I. HOW WE TALK ABOUT TESTAMENTARY FREEDOM OF DISPOSITION

Testamentary freedom of disposition refers to the ability of decedents to control the distribution of their property at death through a will.[6] It is sometimes referred to as "dead-hand control" because it cedes control over the distribution of property to the instructions left by someone who is no longer alive enough to care or appreciate whether the instruction is followed.[7]

4. *See infra* Part III.

5. *See infra* Part IV.

6. I may, from time to time, refer to either "testamentary freedom" or "freedom of disposition" in this Article to mean the same thing as "testamentary freedom of disposition." Folks tend to use these terms loosely and sometimes interchangeably. While it is conceivable to imagine a system in which deathtime freedom of disposition exists without a will (the "testament" in "testamentary"), a will is very much required to direct a deathtime disposition of property in the United States. Because the freedom to make an enforceable will and the freedom to control the disposition of property at death are inextricably linked in the United States, it seems unimportant to closely distinguish between the "testamentary freedom" and "freedom of disposition" for purposes of this Article.

7. *See, e.g.*, ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 3 (10th ed. 2017) (noting that the term "'dead hand' control" is used by critics of freedom of disposition).

Relative to many other countries, the United States purports to confer more testamentary freedom of disposition to its residents.[8] Most other countries decree by law where at least a portion of decedents' estates shall go,[9] or at least expressly permit courts to posthumously deviate from the instructions in a decedent's will.[10] Inheritance law in the United States does neither of these things, at least not expressly or to the same degree.

When the amount of testamentary freedom of disposition in the United States is discussed, however, the comparative component is often left out of the discussion. Rather than say that domestic testators possess a large amount of testamentary freedom compared to testators in, say, France,[11] descriptions often bypass the relative portion of testamentary freedom and instead state full-stop that domestic testators possess an extra large helping of testamentary freedom.[12]

Part of the struggle with describing freedom of disposition, no doubt, is that courts and commentators must do it so often, and no one wants to repeat the same rote proposition over and over.[13] In the struggle for elegant variation, the purported dominance of testamentary freedom has gone more or less unquestioned and, like a decades-long game of "telephone," the words used to describe it have become imprecise.[14]

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8. RAY D. MADOFF, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD 58 (2010) ("Americans have greater rights to control their property after death than anyone else in the world.").

9. *Id.* at 58–59. Such "forced heirship" is typical in civil-law countries like France. *See* Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RSRV. L. REV. 83, 117 (1994).

10. Such "family maintenance" systems are typical in other common-law countries like England. *See* Brashier, *supra* note 9, at 121–22; MADOFF, *supra* note 8, at 59–60.

11. The distribution of a decedent's estate in France is largely dictated by statute. *See, e.g.*, MARVIN B. SUSSMAN, JUDITH N. CATES & DAVID T. SMITH, THE FAMILY AND INHERITANCE 8 (1970) (describing the "severe restrictions on testamentary freedom in France"); Terry L. Turnipseed, *Why Shouldn't I Be Allowed to Leave My Property to Whomever I Choose at My Death? (Or How I Learned to Stop Worrying and Start Loving the French)*, 44 BRANDEIS L.J. 737, 753 (2006) ("In France, testamentary freedom became taboo after the revolution."); Kevin Bennardo, *The Madness of Insane Delusions*, 60 ARIZ. L. REV. 601, 610 (2018) [hereinafter Bennardo, *Insane Delusions*] (noting that the French approach "stands in stark contrast to the American focus on the decedent's right to bequeath").

12. *See infra* notes 15–48 and accompanying text.

13. Not even a clown prefers to repeat itself. *See* STEPHEN KING, IT 14 (Viking 1986) ("I only repeat myself because you really do not seem that eager.").

14. For those unfamiliar with the game 'telephone':

> Players form a line or circle, and the first player comes up with a message and whispers it to the ear of the second person in the line. The second player

The following sampling is illustrative, not exhaustive. It is meant to provide the tenor of the conversation. It is not meant to isolate any particular statement as correct or incorrect. Some of the quotes, plucked from the context of their sources, do not reflect their authors' beliefs. Indeed, you'll find some of my own verbiage in the samples below.

According to the bench, testamentary freedom is "too valuable and important in every aspect to be restricted without the most stringent reasons."[15] It is "[a] basic principle underlying any discussion of the law of wills."[16] It is "[t]he object of the whole law concerning wills."[17] It is a "privilege and [a] right."[18] Not just any right, though—indeed, it is a "fundamental" right,[19] "a basic principle,"[20] and a "core principle."[21] As a right, a testator's freedom "to bestow his property by will at death is as absolute as his right to convey it during his life time."[22] That's right—it is an "absolute" (!) right.[23] It is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[24] As such, it is "valuable."[25] Not only that, but it is "one of the greatest excitements to enterprise and industry."[26] No wonder, then, that it is "closely

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> repeats the message to the third player, and so on. When the last player is reached, they announce the message they just heard to the entire group. The first person then compares the original message with the final version. Although the objective is to pass around the message without it becoming garbled along the way, part of the enjoyment is that, regardless, this usually ends up happening. Errors typically accumulate in the retellings, so the statement announced by the last player differs significantly from that of the first player, usually with amusing or humorous effect. Reasons for changes include anxiousness or impatience, erroneous corrections, or the difficult-to-understand mechanism of whispering.

Telephone Game, WIKIPEDIA, https://en.wikipedia.org/wiki/Telephone_game [https://perma.cc/66F5-8TAD].

15. Godden v. Ex'rs of Burke, 35 La. Ann. 160, 183 (1883).

16. Malloy v. Smith (*In re* Est. of Malloy), 949 P.2d 804, 806 (Wash. 1998).

17. Carroll v. Lessee of Carroll, 57 U.S. (16 How.) 275, 281 (1853).

18. *In re* Est. of Burk, 468 N.W.2d 407, 412 (S.D. 1991).

19. Mock v. Dowling, 222 S.E.2d 773, 774 (S.C. 1976).

20. Tolson-Lafont v. Arden (*In re* Est. of Tolson), 947 P.2d 1242, 1251 (Wash. Ct. App. 1997).

21. Briggs v. Briggs (*In re* Certification of a Question of L. from the U.S. Dist. Ct., Dist. of S.D., S. Div.), 931 N.W.2d 510, 515–16 (S.D. 2019).

22. *In re* Caruthers' Est., 151 S.W.2d 946, 948 (Tex. Civ. App. 1941).

23. *In re* Est. of Martinson, 190 P.2d 96, 97 (Wash. 1948).

24. Hodel v. Irving, 481 U.S. 704, 716 (1987).

25. Nat'l Bank of Com. of Seattle v. Miracle (*In re* Est. of Meagher), 375 P.2d 148, 149 (Wash. 1962).

26. Wogan v. Small, 11 Serg. & Rawle 141, 145 (Pa. 1824).

protected"[27] and "jealously guarded."[28] Such jealous guarding makes sense, as it is "among our country's cherished rights."[29] Not only is it cherished, but it is also "one of the most sacred rights attached to the possession of property."[30] Why stop at sacred? Heck, it is "a natural condition of all law"[31] and a part of the "principles of natural justice."[32]

And that is just a sampling of what courts have said about it. Commentators have described it just as extravagantly. No less authoritative of a source than the Restatement dubs freedom of disposition to be the "controlling consideration" and "organizing principle" that bestows upon testators "the nearly unrestricted right to dispose of their property as they please."[33] Professor Langbein called it the "first principle of the law of wills," an assertion so basic that he felt it needed no citation for support.[34] Others have called it the "guiding principle"[35] (not just any old guiding principle, but "[t]he most fundamental guiding principle"[36]), "the bedrock principle," "a hallmark," and the "keystone of the law of succession."[37] As both a "basic . . . principle"[38] and a "Sacred Privilege,"[39] it both "grounds the law of testation"[40] and is "exalt[ed] . . . as central to

27. *In re* Est. of Martinson, 190 P.2d 96, 97 (Wash. 1948).

28. Am. Comm. for the Weizmann Inst. of Sci. v. Dunn, 883 N.E.2d 996, 1002 (N.Y. 2008).

29. Fantin v. Fantin, No. FSTCV166027439S, 2017 Conn. Super. LEXIS 4428, at *65 (Sept. 6, 2017).

30. Deering v. Adams, 37 Me. 264, 269 (1853).

31. Ruggles v. Seattle-First Nat'l Bank (*In re* Est. of Hastings), 567 P.2d 200, 204 (Wash. 1977) (quoting Saul Touster, *Testamentary Freedom and Social Control–After-Born Children*, 6 BUFF. L. REV. 251, 255 (1957)).

32. Carroll v. Lessee of Carroll, 57 U.S. (16 How.) 275, 281 (1853).

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

34. John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 491 (1975).

35. LAWRENCE M. FRIEDMAN, DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS AND INHERITANCE LAW 46 (2009).

36. Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt out of Intestacy*, 53 B.C. L. REV. 877, 882 (2012).

37. Mark Glover, *A Social Welfare Theory of Inheritance Regulation*, 2018 UTAH L. REV. 411, 414 & n.12 (2018).

38. Joshua C. Tate, *Immortal Fame: Publicity Rights, Taxation, and the Power of Testation*, 44 GA. L. REV. 1, 6–7 (2009).

39. LAWRENCE W. DIXON, WILLS, DEATH AND TAXES: BASIC PRINCIPLES FOR PROTECTING ESTATES 3 (rev. ed. 1977) (chapter titled "Exercise of Sacred Privilege").

40. E. Gary Spitko, *Gone but Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RSRV. L. REV. 275, 278 (1999).

gratuitous transfer[] policy."[41] Not only is it "integral to one's property rights,"[42] it is a "paramount jurisprudential touchstone[] in the area of trusts and estates."[43] It is a "fixation,"[44] even an "American Obsession"[45] that is "fully engrained in the American psyche"[46] and seen as essential to the very notion of private property.[47] And why not? It is no less than one of "humans' basic desire[s]."[48]

While testamentary freedom is often discussed in effusive terms in the United States, it is not limitless. There are several accepted limitations to it. Thus, it is common for a statement regarding the sweeping breadth of testamentary freedom in the United States to immediately be followed by a tidy description of its boundaries. There are some things that testators just can't do, even in our land of unparalleled freedom. The discussion usually evolves in a manner along these lines: "Inheritance law in the United States is all about freedom, but there are limits. We're not savages here. Even we think some things are worth protecting at the expense of a dab of freedom every now and again."[49]

The accepted list of restrictions on testamentary freedom is well trodden.[50] Testators lack the freedom to decline to repay their

41. Adam J. Hirsch, *The Problem of the Insolvent Heir*, 74 CORNELL L. REV. 587, 632 (1989).

42. Tonya M. Evans, *Statutory Heirs Apparent?: Reclaiming Copyright in the Age of Author-Controlled, Author-Benefitting Transfers*, 119 W. VA. L. REV. 297, 311 (2016).

43. Paula A. Monopoli, *Toward Equality: Nonmarital Children and the Uniform Probate Code*, 45 U. MICH. J.L. REFORM 995, 1010 n.94 (2012).

44. Bennardo, *Insane Delusions*, *supra* note 11, at 605.

45. *Id.*

46. Weisbord, *supra* note 36, at 882.

47. MADOFF, *supra* note 8, at 57 (also describing testamentary freedom as "central to the American psyche").

48. RONALD CHESTER, FROM HERE TO ETERNITY? PROPERTY AND THE DEAD HAND 9 (2007).

49. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. L. INST. 2003) ("American law curtails freedom of disposition only to the extent that the donor attempts to make a disposition or achieve a purpose that is prohibited or restricted by an overriding rule of law.").

50. This is at least the fourth time in the last five years I've participated in writing a version of this exact paragraph, and there was nothing original about my summary the first time around. *See* Bennardo, *Insane Delusions*, *supra* note 11, at 607–08 (subsection titled "Exceptions to Testamentary Freedom"); Kaity Y. Emerson & Kevin Bennardo, *Unleashing Pets from Dead-Hand Control*, 22 NEV. L.J. 349, 358–60 (2021) (subsection titled "Exceptions to Testamentary Freedom"); Kevin Bennardo, *Natural Objects and Testamentary Freedom*, 51 FLA. STATE U. L. REV. 991, 1005 (2024). Yet I feel pressure to vary the wording of my description each time, thus increasing the potential for misstatements. I have fallen victim to the dangers of elegant variation. *See supra* notes 13–14 and accompanying text.

creditors.[51] They lack the freedom to totally disinherit a surviving spouse.[52] They lack the freedom to leave property in a way that furthers an illegal cause or violates an established public policy.[53] They lack the freedom to violate the rule against perpetuities.[54] They lack the freedom to transfer property to a person who intentionally slays them.[55] Aside from that, testators in the United States are said to be able to do more or less what they want with their estates.

Then there are the testamentary freedom mythers.[56] They see testamentary freedom in the United States as a sham show, "a thing of smoke and mirrors."[57] If freedom is measured by how well it works in the most unpopular situations, then the way to measure testamentary freedom is to see how it treats devises in wills that direct counter-majoritarian dispositions.[58] According to the mythers, the actual application of inheritance law in the United States does not pass the test of testamentary freedom because decisionmakers do not take kindly to testamentary distributions that diverge from majoritarian sensibilities and norms.[59] When faced with testamentary instructions with which they disapprove, decisionmakers bend flexible doctrines to rewrite or delete testamentary transfers with which they disagree.[60] For all its big talk of

51. *See* Emerson & Bennardo, *supra* note 50, at 359 & n.61.

52. *Id.* at 358–59 & n.60.

53. *Id.* at 359 & n.65.

54. *Id.* at 359 & n.64.

55. *Id.* at 359 & n.63.

56. Here, I've borrowed the title from Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235 (1996), which has influenced subsequent works by other scholars. *See* Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571 (1997); Carla Spivack, *Why the Testamentary Doctrine of Undue Influence Should Be Abolished*, 58 Kan. L. Rev. 245 (2010); Irene D. Johnson, *There's a Will, but No Way—Whatever Happened to the Doctrine of Testamentary Freedom and What Can (Should) We Do to Restore It?*, 4 EST. PLAN. & CMTY. PROP. L.J. 105 (2011); Spitko, *supra* note 40; Bennardo, *Insane Delusions*, *supra* note 11.

57. Johnson, *supra* note 56, at 106; *see also* Bennardo, *Insane Delusions*, *supra* note 11, at 603 (describing testamentary freedom as "a con game of sorts" and "a classic bait and switch").

58. Most testators do not test testamentary freedom because most wills fall within societal norms. *See, e.g.*, SUSSMAN ET AL., *supra* note 11, at 7 ("In practice, however, will makers conform, by and large, to cultural prescriptions of familial responsibility over generational time.").

59. *See, e.g.*, Leslie, *supra* note 56, at 237 ("[T]estamentary freedom exists for the vast majority of testators who happen to have the same sense of duty and moral obligation that the law implicitly imposes—but often not for those who hold non-conforming values.").

60. Mythers point to the use of the doctrines of undue influence, testamentary incapacity, and fraud, as well as the test for valid will execution, as easy to manipulate to achieve

freedom, the mythers point to evidence of very real unexpressed limitations on testamentary freedom just below the surface.

Discussions of testamentary freedom, whether by truthers or mythers, tend to focus on outright limitations on testators' ability to name their own beneficiaries and the shares devised to each.[61] What tends to go unmentioned in discussions of testamentary freedom is the inability of testators to select the process through which and the rules under which their estates will be distributed. This Article hopes to bring those considerations to foreground of future discussions of testamentary freedom. Because if process affects outcomes, then the extent to which testators can control the process of probate administration should be a very real part of conversations surrounding the extent to which testators do or do not possess considerable testamentary freedom.

II. TESTATORS LACK POWER OVER THE PROBATE PROCESS AND PROCESS AFFECTS DISPOSITIONS

Evidence abounds of the oversized importance of administrability in the probate process in setting probate policy. A decedent wields almost no control over the administration of the probate process itself. The Uniform Probate Code expressly states that "[t]he power of a person to leave property by will . . . [is] subject to the restrictions and limitations contained in this Code to facilitate the prompt settlement of estates."[62] Translation: testators possess the freedom to make their choices, but not about things that impair administrability. Let's look at several examples: selection of the executor of the estate, choice of law, no contest clauses, and settlement agreements.

a decisionmaker's preferred outcome. *See* Leslie, *supra* note 56, at 236–37, 243–46; Spitko, *supra* note 40, at 280, 283; Johnson, *supra* note 56, at 106–07; Bennardo, *Insane Delusions*, *supra* note 11, at 621–24.

61. *See, e.g.*, Leslie, *supra* note 56, at 273 (suggesting that testamentary freedom in the United States is limited to "carefully delineated channels in accordance with prevailing norms").

62. UNIF. PROB. CODE § 3-101 (1969) (UNIF. L. COMM'N, amended 2019).

A. *Selection of Executor*

In their wills, testators often name who is to be the executor of their estate.[63] The executor of a will is the one charged with carrying out the terms of the will and administering the probate estate.[64] However, a clause in a will naming an executor is not self-executing. It is a nomination rather than an appointment. It is the probate court that actually appoints the executor according to a statutory provision governing preference in appointment.[65] While first priority typically goes to the person named in the will as the testator's choice,[66] for "[w]hom the testator will trust so will the law,"[67] other considerations, such as qualification requirements and even sometimes the court's own discretion, may ultimately trump the testator's preferred selection.

No matter how badly the testator desires it, an individual cannot serve as executor if the probate court finds that the individual fails the qualification requirements. The Uniform Probate Code states two grounds for disqualification: an executor may not be too young (the Uniform Probate Code suggests a minimum age of twenty-one) or otherwise be found "unsuitable" for the role.[68] Many states require the executor of an estate to be a resident of the state or at least to have an appointed resident agent to accept service of process.[69] A laundry list of additional requirements and limitations that appear in various state statutes include disqualifying persons

63. *See, e.g.*, 31 AM. JUR. PROOF OF FACTS 3D 433 § 2 (1995) (providing a sample provision).

64. *See, e.g.*, MARGARET C. JASPER, EXECUTORS AND PERSONAL REPRESENTATIVES: RIGHTS AND RESPONSIBILITIES 9, 13–14 (2003) (listing responsibilities of the personal representative); SITKOFF & DUKEMINIER, *supra* note 7, at 43.

65. *See, e.g.*, 31 AM. JUR. 2D *Executors and Administrators* § 129 (2022) (citing Heaphy v. Ogle, 896 N.E.2d 551, 557–58 (Ind. Ct. App. 2008) ("A testator's naming of an executor under the testator's will, in and of itself, does not clothe the executor with any rights, duties, or power.")).

66. *See, e.g.*, UNIF. PROB. CODE § 3-203(a)(1) (1969) (UNIF. L. COMM'N, amended 2019). The Uniform Probate Code refers to the "personal representative" of the estate, a term that includes executors. JASPER, *supra* note 64, at 9.

67. Klauser v. Schmitz (*In re* Est. of Schmitz), 667 N.W.2d 862, 867 (Wis. Ct. App. 2003).

68. UNIF. PROBATE CODE § 3-203(f) (1969) (UNIF. L. COMM'N, amended 2019). By placing the age of twenty-one in brackets, the UPC expressly contemplates that the specific age will vary among the states. *See, e.g.*, F. Philip Manns, Jr., *Powers of Attorney Under the Uniform Power of Attorney Act Including Reference to Virginia Law*, 43 ACTEC L.J. 151, 160 & n.35 (2018) (explaining the purpose of bracketed language in uniform acts); *American Academy of Matrimonial Lawyers Proposed Model Relocation Act*, 15 J. AM. ACAD. MATRIM. LAWS. 1, 3 n.1 (1998). Other states set the minimum age at eighteen. *See, e.g.*, WIS. STAT. § 856.23(1)(a) (2001).

69. 89 RACHEL M. KANE, CAUSES OF ACTION § 14 (2d ed. 2019) (listing statutes).

from serving as executors who are convicted felons, suspended or disbarred attorneys, improvident with money, intemperate with intoxicating drink, engaged in substance abuse, of bad moral character, dishonest, mentally or physically unfit, financially incapable, illiterate, a licensed funeral service practitioner, a judge or officer of a court, a surviving business partner of the testator, and a corporation not authorized to act as a personal representative.[70] Additionally, an individual may be statutorily disqualified from serving as an executor because of a conflict of interest or because of hostility between the person and the named beneficiaries.[71]

A catch-all disqualification provision, like the Uniform Probate Code's disqualification of individuals who are "unsuitable" for the role of executor, is broad enough to potentially capture all of the specific characteristics mentioned above and potentially more.[72] A significant number of states have such a broadly worded requirement.[73] Because "[n]o comprehensive, discrete explanation exists delineating the attributes which make someone unsuitable," it provides flexibility to account for the specifics of a particular

70. *See id.* §§ 7–18.

71. *Id.* § 11.

72. Here is one court's non-exhaustive summary of potentially "unsuitable" characteristics:

> Past maladministration of a comparable trust, bad character, misconduct, neglect of duty, or physical or mental incapacity, warrants a finding that an executor or administrator is unsuitable. Such a finding may also be based upon the existence of an interest in conflict with his duty, or a mental attitude toward his duty or toward some person interested in the estate that creates reasonable doubt whether the executor or administrator will act honorably, intelligently, efficiently, promptly, fairly and dispassionately in his trust. It may also be based upon any other ground for believing that his continuance in office will be likely to render the execution of the will or the administration of the estate difficult, inefficient or unduly protracted. Actual dereliction in duty need not be shown.

Quincy Tr. Co. v. Taylor, 57 N.E.2d 573, 574 (Mass. 1944) (upholding finding that executor was unsuitable based on "utter neglect of her duty"); *see also* Spies v. Miller, 928 S.W.2d 317, 319 (Tex. Ct. App. 1996) (holding that probate court did not abuse its discretion in determining that a potential executor was unsuitable for reasons including that she "had difficulty dealing with professionals" and substantial evidence of "discord and animosity between [the potential executor] and the other relatives involved in this probate proceeding"); *In re* Est. of Cutler, 368 N.W.2d 724, 729 (Iowa Ct. App. 1985) (holding that executor was unsuitable "either by his gross inattention" to the decedent's business affairs "or by his advancing [his own] personal welfare").

73. 89 KANE, *supra* note 69, § 10. Some jurisdictions require a showing of unsuitability "for good cause shown," WIS. STAT. § 856.23(1)(e) (2001), or that the appointment of an individual as the executor would "be contrary to the best interests of the estate," MASS. GEN. LAWS ch. 190B, § 3-203(f)(2) (2024).

individual's situation.[74] In doing so, however, it vests a substantial amount of discretion in and deference to the probate court's view of suitability.[75]

As a qualification of service, an executor may also be required to post a bond to safeguard against the loss of estate property.[76] Failure to post a required bond equals ineligibility to serve as executor. Some states require a bond unless it is waived in the testator's will, while other states leave it to the probate court's discretion to decide whether a bond is required.[77] While it is common for a testator's will to state that the bond requirement is waived for an executor nominated by the testator,[78] a probate court is never bound by a testator's preference regarding whether to impose a bond on the executor. For example, under the Uniform Probate Code, a bond may be imposed even if it was waived in the will if a "bond has been requested by an interested party and the court is satisfied that it is desirable."[79] Moreover, even if a testator's will states that a bond is required, the Uniform Probate Code permits the probate court to dispense with a bond "upon determination by the court that it is not necessary."[80]

Thus, while the testator's nomination of the executor is an important input in the process of appointing an executor, it is not determinative. The probate court makes the ultimate selection of the executor. While this decision relies on statutory qualification requirements, these requirements are often broadly worded and permit the probate court "wide discretion" over the disqualification of individuals it deems to be "unsuitable."[81]

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74. *In re* Est. of Gaines, 262 S.W.3d 50, 56–57 (Tex. App. 2008) (finding that probate court did not abuse its discretion in deeming potential executor to be unsuitable). In at least one decision, sexual conduct was not found to be an adequate ground to deny appointment under statutory language requiring the executor to be a "suitable person." *In re* Est. of Nagle, 317 N.E.2d 242, 244–45 (Ohio Ct. App. 1974).

75. A probate court's decision regarding the suitability of an executor is generally reviewable only for an abuse of discretion. *See, e.g.*, *Gaines*, 262 S.W.3d at 55–56 (reviewing for abuse of the probate court's "broad discretion" to determine the suitability of a potential executor).

76. *See* 31 AM. JUR. 2D *Executors and Administrators* § 258 (2022).

77. *See id.*

78. SITKOFF & DUKEMINIER, *supra* note 7, at 45.

79. UNIF. PROB. CODE § 3-603 (1969) (UNIF. L. COMM'N, amended 2019).

80. *Id.*

81. Quincy Tr. Co. v. Taylor, 57 N.E.2d 573, 574 (Mass. 1944) ("The statutory word 'unsuitable' gives wide discretion to a probate judge.").

B. *Choice of Law Provisions*

The probate of a decedent's estate is governed by the law of the decedent's domicile at the time of death for personal property and by the law of situs for real property.[82] Probate administration is governed in each state "by a collection of statutes and court rules that give meticulous instructions for each step in the process."[83] For example, the Uniform Probate Code provides detailed rules regarding probate administration in Article III, including procedures for formal, informal, and supervised administration of estates.[84] In addition to the Article III rules, the Uniform Probate Code also contains general provisions regarding a wide variety of procedural and administrative matters, including venue,[85] jury trials[86] qualifications of judges,[87] and notice.[88] For matters not covered in these specialized rules, procedure is generally governed by the rules of civil procedure[89] and appellate procedure.[90]

Simply put, a testator may not select the rules that govern the probate of their estate. A testator may not dictate that another jurisdiction's rules shall apply, nor may she create a private or idiosyncratic set of rules to govern the probate of her own estate. A testator lacks the power to dictate the rules concerning the execution, validity, and revocation of wills just as she lacks the power to control the qualifications of who may be a probate judge or the formatting, length, and timing rules applied to briefs filed in probate matters. A testator may not tweak the test for mental capacity to make a will or dictate the application of another jurisdiction's rules regarding the right of a surviving spouse to claim an elective share.

The general principle that a testator may not choose the law that applies to her will has one "exception"—though it should hardly be considered a true exception—a testator can control the law that is

82. *See, e.g.*, Christopher A. Whytock, *Situs and Domicile in Choice of Law for Succession Issues*, 97 TUL. L. REV. 1181, 1182–83 (2023); 16 AM. JUR. 2D *Conflict of Laws* § 50 (2009).

83. SITKOFF & DUKEMINIER, *supra* note 7, at 44.

84. UNIF. PROB. CODE §§ 3-301 to -322 (informal probate), §§ 3-401 to -414 (formal probate), §§ 3-501 to -505 (supervised administration) (1969) (UNIF. L. COMM'N, amended 2019).

85. *Id.* § 1-303.

86. *Id.* § 1-306.

87. *Id.* § 1-309.

88. *Id.* § 1-401.

89. *See, e.g.*, *id.* § 1-304.

90. *See, e.g.*, *id.* § 1-308.

applied to determine the meaning of the words of her will. For example, Section 2-703 of the Uniform Probate Code requires that "[t]he meaning and legal effect" of wills and other instruments "is determined by the local law of the state selected in the governing instrument," unless such an interpretation would be contrary to public policy.[91] The commentary clarifies that the rule is limited to the interpretation of the words in the instrument.[92] Thus, the rule's reference to the "legal effect" of a will refers to the will's legal meaning and not to its validity.[93] Indeed, a separate provision dictates the law that applies in analyzing whether a will is validly executed, and that provision does not grant the testator any power or discretion over selecting the applicable law.[94]

Granting a testator the power to control the meaning of their own words is hardly inconsistent with denying a testator the power to control the law that generally applies to the probate of their estate. After all, the purpose of interpreting the words of a will is to determine the testator's intent behind the words,[95] and a testator may use whatever words she chooses to communicate that intent. If a testator wishes to assign an idiosyncratic definition to a particular term or even to create their own private lexicon whole cloth, the words of the will should be interpreted in a manner consistent with the testator's intent for those words.[96] Thus, it is sensible to

91. *Id.* § 2-703; *see also* RESTATEMENT (SECOND) OF CONFLICT OF LS. §§ 240(1), 264(1) (AM. L. INST. 1969) (providing that a will "is construed in accordance with the local law of the state designated for this purpose in the will" for devises of both movable property and land); 16 AM. JUR. 2D *Conflict of Laws* § 67 (2009) ("If the testator specifically states or definitely implies what law the testator intends to govern, the will is ordinarily construed accordingly.").

92. UNIF. PROB. CODE § 2-703 cmt. (1969) (UNIF. L. COMM'N, amended 2019) ("[T]his section enables the law of a particular state to be selected in the governing instrument for purposes of interpreting the instrument without regard to the location of property covered thereby.").

93. *See* Jeffrey A. Schoenblum, *Multijurisdictional Estates and Article II of the Uniform Probate Code*, 55 ALB. L. REV. 1291, 1318 (1992) (explaining that, as it is used in Uniform Probate Code § 2-703, "legal effect relates to the consequences of the use of certain words").

94. *See* UNIF. PROB. CODE § 2-506 (1969) (UNIF. L. COMM'N, amended 2019) ("Choice of Law as to Execution").

95. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 (AM. L. INST. 2003) (labeling the testator's intent as "[t]he controlling consideration" when determining the meaning of the words of a will).

96. A testator could, for example, direct that a word has a meaning for purposes of the will that is contrary to the ordinary meaning of the word. In such a situation, it is best for the testator to clearly communicate idiosyncratic meanings through a definitions section, key, or decoder (for example, "The words 'my brother Clarence' should be interpreted to mean 'my sister Clarice' throughout this instrument. And the word 'house' means 'pants,' but the word 'pants' means 'cat.'"). Like Humpty Dumpty, when a testator uses a word, "it

permit a testator to control the interpretation of their words by, for example, directing the application of a certain body of interpretive rules.

Although the Uniform Probate Code labels section 2-703 "choice of law as to meaning and effect of governing instrument," the interpretation of the testator's words "involves a search for the testator's actual intent and, thus, does not implicate a conflict of laws."[97] Thus, section 2-703 is actually "quite limited in the freedom of choice that it affords a testator."[98] And because the Uniform Probate Code conspicuously does not grant the testator any choice-of-law discretion over other issues concerning a will's validity or probate administration, it has been suggested that section 2-703 "may actually be read as narrowing the scope of the transferor's freedom to choose the governing law."[99] Simply put, the Uniform Probate Code's discretionary choice-of-law provision is a fake choice-of-law provision—it only allows the testator to control the meaning of their own words—and does not extend to the selection of the governing law regarding any substantive or procedural issues.[100]

C. *No-Contest Clauses*

A typical no-contest clause states that any beneficiary (or a particular beneficiary) named in the will shall receive nothing if they challenge the validity of the will or any of its provisions.[101] The purpose of such a clause is to deter challenges to the will's validity by individuals who would receive a greater share of the decedent's estate under a prior will or through intestacy: "[a] prospective contestant will be put to the choice of taking the smaller but certain provision in the will, or challenging the will for a chance at more if

means just what [they] choose it to mean—neither more nor less." SITKOFF & DUKEMINER, *supra* note 7, at 325 (quoting LEWIS CARROLL, THROUGH THE LOOKING GLASS, AND WHAT ALICE FOUND THERE 123 (Henry Altemus Co. 1897) (1871)).

97. UNIF. PROB. CODE § 2-703, (UNIF. L. COMM'N 2019); Schoenblum, *supra* note 93, at 1318.

98. Schoenblum, *supra* note 93, at 1319.

99. *Id.*

100. *See id.*

101. *See, e.g.*, RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 9.1 cmt. b (AM. L. INST. 1983) (providing example language, such as requiring a beneficiary to "acquiesce in and consent to the will"); *see also* FRIEDMAN, *supra* note 35, at 83.

the will is set aside, but at the risk of taking nothing if the will is upheld."[102]

The true nature of a no-contest clause is that of a conditional devise—it conditions a donative transfer on particular behavior by the beneficiary. The behavior required by a no-contest clause, of course, is that the beneficiary must refrain from challenging the will. Generally speaking, conditions on devises are given effect, and the beneficiary must adhere to the condition to receive the bequest.[103] The only limitation is that a condition may not run afoul of public policy, although this limitation is more theoretical than practical, "as American courts have generally been loath to use their authority to restrict these conditions, seeing it as outside their bailiwick."[104]

Unlike almost all other conditions on devises,[105] no-contest clauses are generally not given effect except in cases of extreme violation.[106] Under both the Uniform Probate Code and the Restatement, a no-contest clause will only be enforced to deny a bequest to a beneficiary if the beneficiary's challenge to the will was not founded on any probable cause.[107] In this context, "the term 'probable cause' means the existence, at the time of the initiation

102. SITKOFF & DUKEMINER, *supra* note 7, at 302–03.

103. *See, e.g.*, Meelad Hanna, Note, *Discriminatory Strings Attached: Reining in the Testator's Intent in Conditioning Will and Trust Bequests*, 25 U. FLA. J.L. & PUB. POL'Y 331, 337–56 (2014) (summarizing approaches to conditional devises); Ray D. Madoff, *A Tale of Two Countries: Comparing the Law of Inheritance in Two Seemingly Opposite Systems*, 37 B.C. INT'L & COMPAR. L. REV. 333, 339–40 (2014) (noting that "the only relevant restriction on conditional bequests is that a court will not enforce a condition that is 'against public policy'"); Jeffrey G. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 1999 U. ILL. L. REV. 1273, 1276 (1999) ("Courts traditionally have upheld these testamentary conditions calculated to restraint legatees' personal conduct, unless the conditions violate public policy.").

104. Madoff, *supra* note 103, at 339–40. Even restraints on marriage, which are generally considered to be invalid as violative of public policy, will be upheld if they are characterized as motivated by a purpose to provide support rather than by a purpose to stifle nuptials. *See, e.g.*, RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 6.1 (AM. L. INST. 1983); *see also* Madoff, *supra* note 103, at 341 (noting the rule against conditioning a bequest upon divorce "is easy to circumvent because although courts will not enforce conditional bequests where the testator intended to encourage divorce, they will enforce such conditions if the testator intended to provide support in the event of divorce").

105. While a condition that requires the beneficiary to perform an illegal act to receive the gift would almost invariably be struck, such a condition is more of a hypothetical "favorite of law professors" than an actual scenario "as there are no actual cases on record involving illegal conditions." Madoff, *supra* note 103, at 339.

106. *See, e.g.*, FRIEDMAN, *supra* note 35, at 200 n.4 ("Some courts, and many who write about these issues, do not seem to like no-contest clauses very much.").

107. UNIF. PROB. CODE §§ 2-517, 3-905 (1969) (UNIF. L. COMM'N, amended 2019); RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 9.1 (AM. L. INST. 1983).

of the proceeding, of evidence which would lead a reasonable person, properly informed and advised, to conclude that there is a substantial likelihood that the contest or attack will be successful."[108] Many states follow this approach or a similar one,[109] while Florida goes further and outright bans the enforcement of no-contest clauses regardless of whether the will's challenger acted on good cause.[110]

Inheritance law's approach to no-contest clauses can rightfully be called an exception to the general rule that conditions on devises are enforceable. While the exception falls within the general ambit of 'conditions against public policy,' the distinguishing feature of no-contest clauses is that they attempt to control a beneficiary's behavior in the administration of the testator's estate. The public has an interest in estates being properly distributed under the law; thus, there is a public interest in favor of challenging suspect wills or will provisions.[111] Even a testator—and perhaps particularly a testator—may not deter a challenge to the validity of a suspect will.[112]

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108. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 9.1 cmt. j (AM. L. INST. 1983).

109. *See* SITKOFF & DUKEMINIER, *supra* note 7, at 303 (calling the Uniform Probate Code's approach to no-contest clauses "[t]he most common rule"); *see also* Gus. G. Tamborello, *In Terrorem Clauses: Are They Still Terrifying?*, 10 EST. PLAN. & CMTY. PROP. L.J. 63, 98–100 (2017) (listing fifty-state survey in an appendix).

110. FLA. STAT. § 732.517 (2024). Indiana had a similar provision until 2018, when it replaced its complete prohibition on enforcement to one limiting enforcement to an enumerated list of situations. *See* Sarah C. Jenkins, *How Testators Can Leverage Indiana's Repeal of the Prohibition on No Contest Clauses*, RES GESTAE, May 2018, at 26, 26; *see also* IND. CODE § 29-1-6-2 (2024).

111. According to the Restatement:

> When, however, the contestant establishes that there was probable cause, there is a public interest in having the donative transfer challenged. It would be a contravention of public policy to place a deterrent upon such action. Hence, the rule of this section does not permit the risk of a forfeiture of a transfer to be imposed when there is probable cause to believe the donative transfer is not valid.

RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 9.1 cmt. a (AM. L. INST. 1983).

112. The nature of these challenges is that they often question the voluntariness of the will by bringing a claim of fraud, duress, undue influence, or mental incapacity. *See id.* It would be ironic that a no-contest clause provision that was part of a will that was alleged to have been executed involuntarily against the testator's true intent and volition would deter a challenge to the validity of the will.

D. *No Settlement Clauses*

With consent of the probate court, the Uniform Probate Code permits the settlement of challenges to "the construction, validity, or effect of any governing instrument," including wills.[113] Such statutes are relatively common, and they guarantee devisees and heirs the "*right* to compromise their differences and to partition estate property among themselves by mutual consent."[114] Indeed, courts deem the settlement of estates to further the public policies of "family harmony and avoiding lengthy litigation" even while acknowledging that such settlement agreements inherently "thwart[] the testator's expectations."[115]

Because the law favors settlement agreements and encourages them as the preferred vehicle for resolving estate disputes,[116] testators likely have no power to forbid them. This is especially true under the Uniform Probate Code, which, as noted above, expressly subjects a testator's freedom of disposition to the "restrictions and limitations contained in this Code to facilitate the prompt settlement of estates."[117] A testamentary attempt to require challenges to be resolved by litigation through a no-settlement clause would almost assuredly be deemed invalid as violative of the public policy in favor of settlement by mutual consent.[118] We'll return to settlement agreements a little later on.[119]

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113. UNIF. PROB. CODE § 3-1101 (1969) (UNIF. L. COMM'N, amended 2019); *see also* 31 AM. JUR. 2D *Executors and Administrators* § 67 (2024); 80 AM. JUR. 2D *Wills* § 948 (2024).

114. 80 AM. JUR. 2D *WILLS* § 944 (2024) (emphasis added).

115. *Id.* § 946.

116. *Id.* § 946 & nn.4–6 & 9–10 (citing cases).

117. UNIF. PROB. CODE § 3-101 (1969) (UNIF L. COMM'N, amended 2019). The term "settlement of estates" quoted in the text is meant in the sense of closure of estates and should not be confused with "settlement" in the sense of a mutual consent agreement. In an attempt to avoid confusion regarding the term "settlement" in the probate context, the Uniform Probate Code uses the term "compromise" when referring to settling estates through mutual consent agreements. *See id.* §§ 3-1101 to -1102.

118. *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. L. INST. 2003) (invalidating testamentary provisions that are "prohibited or restricted by an overriding rule of law," which is "used in a broad sense to include rules and principles derived from . . . public policy"); SUSSMAN ET AL., *supra* note 11, at 11 ("The state functions in matters of inheritance in the best interests of society by defining the outer boundaries within which inheritance may occur. It does not permit distributions that are contrary to the public interest.").

119. *See infra* Section III.B.

E. *Probate Process Influences Probate Outcomes*

The preceding four subsections provided examples of how individuals lack the ability to control the probate process. These examples matter in terms of influencing probate outcomes. Certain processes are biased in favor of and against certain results.[120] In short, process influences outcomes.[121] If process influences outcomes, and if outcomes in the probate context mean distributions of the testator's estate, then a testator's lack of control over the probate process diminishes their control over the distribution of their estate.

Take, for example, the selection of the executor of the estate. The individual named as the executor of an estate has a huge amount of influence over how the estate is eventually distributed. No estate plan is clear or comprehensive enough to preclude the need for the executor to exercise individual judgment.[122] Often, the judgment calls are numerous, and the testator nominates an individual to serve as executor precisely because the testator trusts and approves of the executor's judgment.[123] Moreover, as long as no one objects, executors largely have free rein over every aspect of a testator's estate with the court performing, in the words of one commentator, "an official, rubber stamp function."[124] Indeed, under the Uniform Probate Code, the default procedure is for the executor to administer the estate without court supervision.[125] In an unsupervised administration, the executor "has the broad powers of a trustee in dealing with the estate property and may collect assets, clear titles, sell property, invest in other assets, pay creditors, continue

120. *See, e.g.*, WILLIAM P. MCLAUCHLAN, AMERICAN LEGAL PROCESSES 2 (1977) ("It is quite possible for someone to have a very valid claim but to lose in court for failure to proceed correctly, or because the process is biased against certain kinds of claims or parties.").

121. *See, e.g.*, *id.* at 1 ("The procedures courts use to settle litigated conflicts often influence the result.").

122. *See, e.g.*, JASPER, *supra* note 64, at 13–14 (listing twenty non-exhaustive responsibilities of executors).

123. Indeed, some even imply that the testator's selected executor has the testator's blessing to diverge from the testator's instructions. For example, Senator Joe Lieberman, in justifying his choice to not strictly enforce a religious restriction as executor of his uncle's will, said that his uncle knew "that by my nature I'm not as hard as the will was. He knew what I would do [if he named me the executor]." SITKOFF & DUKEMINIER, *supra* note 7, at 11.

124. MCLAUCHLAN, *supra* note 120, at 88.

125. SITKOFF & DUKEMINIER, *supra* note 7, at 46 (discussing Uniform Probate Code § 3-715).

any business of the decedent, and distribute the estate—all without court approval."[126]

Evidence of the importance of the identity of the executor abounds.[127] First, many testators bother to nominate one or more individuals for the position. Second, probate courts ensure that executors are qualified for the position. Third, the identity of the executor may be a litigated point, either at the time of appointment or in a petition for removal. Presumably no one would bother with any of that if the individual executor did not exert considerable influence over important aspects of the distribution of a decedent's estate. And yet a testator lacks the power to authoritatively select their own executor; the most they can do is voice their preference and hope the statutory scheme and probate court of their jurisdiction honors that preference. This should be recognized as a blow to testamentary freedom.

Next, the testator's inability to select the body of substantive and procedural law that will apply to the administration of their estate is another significant blow to testamentary freedom. The body of law that will be applied is important because the rules that apply to wills and probate administration vary widely across jurisdictions.[128] A testator has the power to shop for the jurisdiction of their choosing only in the most indirect and inconvenient way: by relocating her domicile.[129] But aside from matters of interpretation, she may not direct that a different jurisdiction's rules will govern.[130] And, aside from default rules that are designed to be flexible according to the testator's preferences, she may not select the substantive law that applies to the probate of her estate as well.[131]

Consider the identity of the decisionmaker as a component of the decision-making process. To probate a will or adjudicate a will contest, a court must have subject-matter jurisdiction over the

126. *Id.*

127. For support for the assertions in this paragraph, *see supra* Section II.A.

128. *See, e.g.*, EUNICE L. ROSS & THOMAS J. REED, WILL CONTESTS § 1:2 (2d ed. rev. 2024); JASPER, *supra* note 64, at 1 (noting the "lack of uniformity among the states" is a "problem with the American probate system"); MCLAUCHLAN, *supra* note 120, at 86–87 (noting that "[t]he substantive law of probate" and, consequentially, "the Probate Court system" vary widely among the states).

129. *See supra* text accompanying note 82.

130. *See supra* Section II.B.

131. *See supra* Section II.B.

dispute.[132] Federal courts generally treat probate matters as an exception to diversity jurisdiction and therefore do not exercise jurisdiction over probate matters.[133] This jurisdictional limitation is not waivable by a testator. A testator cannot direct that their local U.S. District Court will probate their will or adjudicate contests to their will. Jurisdiction is a matter of statutory or constitutional authorization to adjudicate,[134] and neither testamentary freedom nor anything else vests testators with the power to confer this authorization.

To step further into the identity of the decisionmaker, state law on probate proceedings takes a variety of approaches to the availability and role of a jury in the decision-making process.[135] Some states permit juries,[136] some do not,[137] and others strike a middle path, such as permitting juries to render advisory verdicts that the probate court is free to disregard.[138] One reason that some states diminish or eliminate the role of juries in probate proceedings is the belief that juries are more prone to be swayed by their own values, opinions, and preferences regarding whether the testator's will results in a distribution that is fair to the living. In short, the customary view is that a jury is more apt to find against the validity of a will than a judge is.[139] In those cases, the outcome is a product of a process—judge or jury?—that the testator does not and cannot control.

Standing, of course, is necessary to challenge the validity of a will.[140] Not just anyone can challenge a will.[141] Usually standing extends to anyone with a financial interest in the will's validity—generally the testator's heirs and named beneficiaries, but not to

132. *See* ROSS & REED, *supra* note 128, §§ 4:1–4:2.

133. *See id.* § 4:10 (summarizing the probate exception to diversity of citizenship jurisdiction in federal courts); *see also* Dragan v. Miller, 679 F.2d 712, 713 (7th Cir. 1982) (applying the probate exception and describing it as "one of the most mysterious and esoteric branches of the law of federal jurisdiction").

134. *See* Sutton v. English, 246 U.S. 199, 200, 205–08 (1918) (applying the probate exception); James E. Pfander & Michael J.T. Downey, *In Search of the Probate Exception*, 67 VAND. L. REV. 1533, 1560–73 (2014) (exploring the roots of the probate exception).

135. *See* ROSS & REED, *supra* note 128, § 4:9.

136. *See id.* § 4:9 n.1 (listing states).

137. *See id.* § 4:9 n.2 (listing states).

138. *See id.* § 4:9 ("A handful of states do not permit jury trials in will contests unless the jury is an advisory jury which the court is free to disregard in reaching a decision.").

139. *See id.* § 1.1.

140. FRIEDMAN, *supra* note 35, at 83.

141. *See id.* at 83–84.

anyone else.[142] Consider a testator who sought to meddle with the standing requirement either by expanding or constraining who could challenge the validity of their will. Perhaps the testator wishes to allow anyone and everyone to challenge their will or no one at all or only a specified list of individuals. The enforceability of such provisions could greatly alter the likelihood that a will would be deemed valid or invalid. But such provisions are not enforceable because standing is a requirement of the probate court; it is not delegable to the wishes of the testator or anyone else.

Standing and the type of decision-maker available in probate proceedings are but two examples. There are literally scores, if not hundreds or thousands, of rules, requirements, and prohibitions, big and small, that affect the probate process. Rules of procedure, rules of evidence, and the probate code itself are not uniform. There is, in fact, a healthy variation among the states, particularly in the probate context.[143] And these rules, which operate outside the scope of the testator's freedom or influence, have consequences on the distribution of a decedent's estate.

Perhaps nowhere is the variation among states so great and the effect on distribution so direct than in the context of a surviving spouse's elective share.[144] In separate-property states, the elective share, or statutory share, is the share of a decedent's estate that they cannot prevent from passing to their surviving spouse.[145] Procedurally, a testator's surviving spouse can elect to take their statutory share of the testator's estate rather than whatever the testator left to them.[146] States vary greatly on the amount of the statutory elective share and how it is calculated. While the typical elective share is a claim to about one third of the decedent's probate property and certain non-probate property, this number may be

142. *See id.* at 83. For deeper background on the evolution of the standing doctrine in probate matters, *see* David Horton, *Probate Standing*, 123 MICH. L. REV. 2, 11–23 (2024).

143. *See supra* Section II.B.

144. SITKOFF & DUKEMINIER, *supra* note 7, at 525 ("[T]here is no subject in this book on which there is more statutory variation.").

145. *See* Lawrence W. Waggoner, *The Uniform Probate Code's Elective Share: Time for a Reassessment*, 37 U. MICH. J.L. REFORM 1, 1–3 (2003). In community-property states, an elective share is unnecessary to protect a surviving spouse from disinheritance because title in half of the couple's community property automatically vests in the surviving spouse. *See* SITKOFF & DUKEMINIER, *supra* note 7, at 520; FRIEDMAN, *supra* note 35, at 16 ("[I]n a community property state husbands and wives form a 'community': half of what he earns belongs automatically to her, and half of what she earns belongs automatically to him.").

146. *See, e.g.*, SITKOFF & DUKEMINIER, *supra* note 7, at 521–22.

much lower or much higher depending on the jurisdiction.[147] In accord with the Uniform Probate Code's approach, some states vary the percentage of the elective share depending on the length of the marriage.[148] Others do not.[149] Different states have different rules regarding how much non-probate property is subject to the elective share—and thus how much property a decedent may shield from a surviving spouse through non-probate transfers.[150] Of the forty-one separate-property states, only Georgia has no elective share.[151]

Consider a testator in Illinois, a state with an elective share statute that is relatively protective of surviving spouses.[152] This Illinois testator provides in their will that Georgia law should apply for

147. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 9.1(a) (AM. L. INST. 2003); SITKOFF & DUKEMINIER, *supra* note 7, at 522; Waggoner, *supra* note 145, at 2.

148. *See* UNIF. PROB. CODE § 2-203(b) (1969) (UNIF. L. COMM'N, amended 2019) (defining the martial property that will determine the elective share using a sixteen-step scale ranging from 3% for a marriage of less than one year to 100% for a marriage of fifteen years or more). Regardless of the length of the marriage, the amount of the elective share cannot fall beneath $75,000, indexed for inflation. *Id.* § 2-202(b). Some states have adopted the sixteen-step scale approach, *see, e.g.*, ME. STAT. tit. 18-C, § 2-203(2) (2023), while other states have devised their own scales to account for the length of the marriage on the elective share, *see, e.g.*, N.C. GEN. STAT. § 30-3.1(a) (2023) (using a four-step scale); COLO. REV. STAT. § 15-11-203(2) (2024) (using an eleven-step scale).

149. *See, e.g.*, FLA. STAT. § 732.2065 (2024) (setting the elective share at 30% of the elective estate); CONN. GEN. STAT. § 45a-436 (2023) (setting the elective share at one third of the decedent's probate estate).

150. *See, e.g.*, CONN. GEN. STAT. § 45a-436 (2023) (limiting the elective share to "the real and personal property passing under the will of the deceased spouse"). The Connecticut approach of limiting the scope of the elective share to only probate property makes it relatively easy for a decedent to avoid it entirely through placing property in a revocable trust. *See* RALPH H. FOLSOM & LAURA WEINTRAUB BECK, REVOCABLE TRUSTS AND TRUST ADMINISTRATION IN CONNECTICUT § 5:9 (2024) (noting that Connecticut is "one of the relatively few states which offer a way to avoid this right of election"). Many other states, and the Uniform Probate Code, extend the scope of the elective share to include at least some of the decedent's non-probate assets as well. *See* UNIF. PROB. CODE §§ 2-203 to -208 (1969) (UNIF. L. COMM'N, amended 2019) (including a significant amount of the decedent's non-probate transfers in the calculation of the elective share); *see also* SITKOFF & DUKEMINIER, *supra* note 7, at 540–44; Waggoner, *supra* note 145, at 7–8.

151. *See* GA. CODE ANN. § 53-4-1 (2024) (expressly specifying that a testator "may give all the property to strangers, to the exclusion of the testator's spouse and descendants"). *See generally* Kristi L. Barbre, Comment, *Death and Disinheritance in Georgia: Reconciling Year's Support and the Elective Share*, 4 J. MARSHALL L.J. 139 (2011); SITKOFF & DUKEMINIER, *supra* note 7, at 521. While Georgia does not provide a traditional elective share, surviving spouses are permitted to apply for twelve-months of support "to maintain a surviving spouse's way of life for one year following the death of the decedent so as to facilitate the administration of the decedent's estate." Barbre, *supra*, at 140.

152. 755 ILL. COMP. STAT. 5/2-8(a) (2024) (providing an elective share of one third of the estate if the testator leaves one or more descendants or one half of the estate if the testator leaves zero descendants); *see also* Ross S. Levey & Kelley L. Menzano, *Marriage and Divorce at Midlife and Beyond*, 100 ILL. B.J. 544, 545 (2012) (explaining how the elective share functions in Illinois).

purposes of determining their surviving spouse's elective share. Such a provision is akin to a testator opting out or waiving an elective share requirement. Simply put, the Illinois probate court is not going to allow it. The elective share is designed to limit testamentary freedom in favor of ensuring the economic health of families and, in particular, of surviving spouses.[153] If testators could control whether the elective share should exist or how it should be calculated through choice-of-law provisions in their wills, they would have greater control over the distribution of their estates. But the law does not grant testators such freedom because it does not trust them all to exercise it wisely.

Again, the elective share is but one example of variation in state law that meaningfully affects distributions. States disagree on the requirements to make a valid will[154] (including the validity of holographic wills[155]) and how strictly the validity requirements must be followed.[156] States disagree on presence requirements in will execution—both whether to require presence and what presence means.[157] States disagree on slayer rules.[158] States disagree on the

153. *See, e.g.*, Waggoner, *supra* note 145, at 3–7 (discussing the supporting theory behind elective share statutes).

154. *See, e.g.*, ROSS & REED, *supra* note 128, § 5:2 (noting that execution requirements generally fall into one of three classifications: (1) those based on the Statute of Frauds, Statute of Wills, and the Statute of Distributions; (2) those based on the Wills Act of 1837; and (3) those based on Uniform Probate Code § 2-502, which "represent a compromise between the two predominant classifications of formalities requirements").

155. A holographic will is handwritten and signed by the testator but is not attested by witnesses. *See* SITKOFF & DUKEMINIER, *supra* note 7, at 198 (noting that a little more than half of the states permit holographic wills).

156. While some state statutes direct judges to apply the execution requirements to make a will as written, others contain curative doctrines to excuse non-compliance. *Compare* N.C. GEN. STAT. § 31-3.1 (2023) ("No will is valid unless it complies with the requirements prescribed therefor by this Article."), *with* SITKOFF & DUKEMINIER, *supra* note 7, at 176–77 (noting that eleven states had adopted some version of the "harmless error rule" of Uniform Probate Code § 2-503, which excuses non-compliance with the execution requirements where there is clear and convincing evidence that the decedent intended the document to be their will).

157. *See* SITKOFF & DUKEMINIER, *supra* note 7, at 152–53; *see also* Demaris v. Fuller (*In re* Demaris' Est.), 110 P.2d 571, 580–82 (Or. 1941) (explaining the "sight test" versus the "mental apprehension test" and noting that "[t]he meaning of the phrase 'in the presence of the testator' has been the subject of much controversy and of diversity of opinion" amongst different jurisdictions).

158. The slayer rule prohibits the perpetrator of a felonious and intentional killing from inheriting from her victim. *See, e.g.*, Mary Louise Fellows, *The Slayer Rule: Not Solely a Matter of Equity*, 71 IOWA L. REV. 489, 496–504 (1986) (summarizing the various requirements to trigger the slayer rule in different jurisdictions).

mental capacity[159] and the minimum age necessary to execute a will.[160] Any doctrine you can think of has variation across jurisdictions. It matters not whether the purpose of the doctrine is to expressly limit testamentary freedom (like the elective share),[161] to safeguard the decedent against involuntary transfer (like mental capacity),[162] or to promote equity (like the slayer rule).[163] All of these rules potentially affect the distribution of the testator's estate, and the testator has control over none of it.

The types of rules over which the testator does have control tend to be default rules of interpretation. These are areas where the law infers something that has usually gone unspoken in the testator's will. The rules on "simultaneous death" provide a good example. Under the Uniform Probate Code's version of the simultaneous death rule, a beneficiary named in a will must outlive the testator by at least five days or else the beneficiary does not take.[164] Thus, a provision in a will that leaves "my bicycle to my sister" is interpreted to actually mean "my bicycle to my sister, but only if clear and convincing evidence establishes that she outlived me by at least five days."[165] The presumption is that testators do not want property to pass to beneficiaries who do not live long enough to enjoy it.[166] However, it is only an interpretive presumption, and the testator can quash it or change it through express language.[167]

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159. *See, e.g.*, ROSS & REED, *supra* note 128, § 6:13 ("The allocation of burden of proof in will contests based on testamentary capacity is a crazy quilt of apparently conflicting and confusing maxims and principles which vary from state to state in an astounding variety of verbal formulae.").

160. *See, e.g.*, Mark Glover, *Rethinking the Testamentary Capacity of Minors*, 79 MO. L. REV. 69, 70 n.2 (2014) (summarizing state statutes placing the minimum age of testation at fourteen, sixteen, and eighteen).

161. *See supra* notes 143–153 and accompanying text; *see also* FRIEDMAN, *supra* note 35, at 35–36 (overviewing protections of surviving spouses from disinheritance).

162. *See, e.g.*, FRIEDMAN, *supra* note 35, at 89–93 (overviewing mental capacity challenges in will contests); SITKOFF & DUKEMINIER, *supra* note 7, at 263–64 (categorizing mental capacity as an issue of voluntariness to make a will).

163. *See, e.g.*, UNIF. PROB. CODE § 2-803 cmt. (1969) (UNIF. L. COMM'N, amended 2019) (stating that "a wrongdoer may not profit by his or her own wrong" and "the killer should not gain from the killing"); *see also* Kevin Bennardo, *Slaying Contingent Beneficiaries*, 24 U. MIA. BUS. L. REV. 31, 38 (2015) (summarizing the equitable justification for the slayer rule).

164. UNIF. PROB. CODE § 2-702(b) (1969) (UNIF. L. COMM'N, amended 2019).

165. *See id.*

166. *See* Edward C. Halbach, Jr. & Lawrence W. Waggoner, *The UPC's New Survivorship and Antilapse Provisions*, 55 ALB. L. REV. 1091, 1095–96 (1992).

167. *See* UNIF. PROB. CODE § 2-702(d)(1) (1969) (UNIF. L. COMM'N, amended 2019) (providing that the rule does not apply if the will "contains language dealing explicitly with simultaneous deaths or deaths in a common disaster and that language is operable under

The same goes for the doctrine of revocation upon divorce, which interprets a statement that "I leave it all to my lovely spouse Amy" to mean "I leave it all to my lovely spouse Amy unless we get divorced."[168] The same goes for anti-lapse rules, which interpret a statement that "I leave a third of my estate to my brother John" to mean "I leave a third of my estate to my brother John or, if he should predecease me, to his surviving descendants."[169] A testator may opt out of these rules[170] because what these rules have in common is that they presume to infer the true meaning of the testator's words.[171] Allowing testators to control matters of interpretation does not interfere with the process of probate administration.

Not only may a testator not preclude a will contest or change its procedural or substantive rules by choosing the law that will be applied at probate, but she may also not even effectively disincentivize would-be beneficiaries from challenging her will in the hopes to receive more. As explained in the last section, such no-contest clauses are generally not enforceable except in cases of frivolous challenges. This, again, is a limitation on the testator's control over the process of probate administration, but this time it is not a direct limitation. Rather, it limits the testator's ability even to encourage others to engage with the process in a particular way. And, again, it is a limitation that potentially has considerable ramifications over the ultimate outcome.

If no-contest clauses were enforceable, a couple of things would be different. First, there would be fewer will contests which, in turn, would mean that some wills would be validated that otherwise would not be. For those estates, the difference in outcome would likely be substantial. Second, for beneficiaries who brought

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the facts of the case"); *see also* Halbach & Waggoner, *supra* note 166, at 1096 (noting that the simultaneous death provision is "a rule of construction, or default rule, that yields to a contrary intention").

168. *See* UNIF. PROB. CODE § 2-804(b)(1) (1969) (UNIF. L. COMM'N, amended 2019).

169. *See id.* § 2-603(b)(1).

170. *See id.* § 2-804(b)(1) (applying revocation upon divorce "[e]xcept as provided by the express terms of a governing instrument"); *Id.* § 2-603(b)(4) (superseding anti-lapse "[i]f the will creates an alternative devise").

171. *See* Lawrence W. Waggoner, *Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 REAL PROP. PROB. & TR. J. 683, 700 (1992) (explaining that Uniform Probate Code § 2-804 "merely establishes a rule of construction designed to implement intention" but that this "judgment yields to a contrary intention" by the testator); Halbach & Waggoner, *supra* note 166, at 1101–04 (explaining that Uniform Probate Code § 2-603 is meant to reflect "common dispositive preferences" but may be avoided by a testator's clear expression of a contrary intention).

an unsuccessful will contest, the consequence of losing their inheritance would be enforced. This again would affect the outcome—instead of that portion of the estate going to one beneficiary, it would go to another. Removing no-contest clauses as an effective tool in testator's kits meaningfully alters distributions.

Finally, the lack of a testator's ability to prevent parties from settling their disputes by agreement[172] is a massive blow to testamentary freedom. A negotiated settlement inherently ends in a distribution not intended by the testator. While it has been said that settlement of an estate among interested parties "balances" the right of the decedent to make a disposition with the competing right of a beneficiary to convey their rights,[173] the outcome of that so-called balancing is a clear declaration that beneficiaries' rights take primacy over testators' rights. A better description than a balancing is that "courts recognize that while a testator has a right to dispose of his or her property by will, the persons interested in the estate have an equal right to renounce the will by agreement."[174] Distributing an estate according to a negotiated settlement guarantees that the payout will be out of accord with the decedent's preferences.

III. INHERITANCE LAW IGNORES FREEDOM OF DISPOSITION WHEN IT BECOMES TOO DIFFICULT TO ADMINISTER

When someone dies, something must happen to their property. A lot of things could happen, but plenty of the options would incentivize undesirable behavior and lead to negative societal consequences. Destroying a person's property at death is wasteful.[175] Treating a decedent's property as unowned and allowing a free-for-all where scavengers claim it for themselves has its drawbacks.[176] Thus, a government-sanctioned system of property redistribution is sensible.

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172. *See supra* Section II.D.

173. *In re* Est. of Halbert, 172 S.W.3d 194, 199–200 (Tex. Ct. App. 2005).

174. 80 AM. JUR. 2D *Wills* § 951 (2024).

175. *E.g.*, Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 838 (2005) ("As a general matter, the law recoils at the idea of allowing the dead hand to destroy property.").

176. *See, e.g.*, Sophie Dodd, *The Most Insane Black Friday Stories Ever, from 15 Retail Workers Who Are Still Scarred*, PEOPLE (Nov. 25, 2020, 11:00 AM), https://people.com/home/crazy-black-friday-horror-stories/ [https://perma.cc/S6WU-D4FK] ("I was about 9 and an old lady grabbed a cat [beanie baby] out of my hand. I stomped on her foot and stole it back.").

Such a system needs process. It must evidence transfer of title to allow the new owner full enjoyment of the property, including the ability to resell it without trouble.[177] This process inherently involves identifying decedent's property, taking possession of the property, identifying the rightful beneficiary of the property, and transferring ownership of the property to the rightful beneficiary. Now imagine that we took freedom of disposition out of the equation and individuals had no control over their beneficiaries. How different would the process look? Three out of the four steps would not change: we'd still need to identify the decedent's property, take possession of the property, and transfer ownership of the property to someone else.

The third step, identifying the rightful beneficiary, would change. It would remain a step in the process—we'd still need to identify the proper recipient of the property—but the step would look different. Just how it would look different depends on who the beneficiary would be. As an extreme example, if the estate tax was 100% and the beneficiary was always the government, then the step would be cursory because the answer would always be the same. But no functional system of inheritance operates with a 100% estate tax.[178]

A more reasonable alternative would be a forced heirship system in which a decedent's estate was divided among takers designated by statute. This is how inheritance operates in civil-law countries.[179] This is also how inheritance operates in the United States when a decedent does not make a will (more on that soon).[180] Under forced heirship, the proper statutory takers must be identified and the property must be divided according to their statutory portions. This can lead to disputes, and disputes must be resolved by a decisionmaker. In other words, even if we did away with freedom of disposition completely and instituted a system of forced heirship, we would need just about all the same apparatus of estate administration and distribution that we currently have. We'd need to identify the decedent's property and take control of it. We'd need

177. SITKOFF & DUKEMINIER, *supra* note 7, at 44.

178. *See* Frances Foster-Simons, *The Development of Inheritance Law in the Soviet Union and the People's Republic of China*, 33 AM. J. COMP. L. 33, 36–37, 40–43 (1985) (chronicling the history of property succession at death in the Soviet Union, including the failed attempt from 1918–1922 to abolish inheritance).

179. *See supra* note 9 and accompanying text.

180. *See infra* Section III.A.

to identify the proper heirs and resolve disputes regarding heirship. Once those disputes were resolved, we'd need to transfer legal ownership of the decedent's property.

Yes, on balance, freedom of disposition complicates the process of identifying the proper beneficiaries of a decedent's property. But this complication is relatively minor in comparison to the overall probate administration apparatus. Freedom of disposition causes only a marginal increase in administration within a larger system of estate settlement that would exist with or without freedom of disposition.

Freedom of disposition is only permitted to exist because it does not impose too many costs on the process of probate administration. Try this thought out: we wouldn't permit freedom of disposition if it were too inconvenient to administration. And what is the evidence for that? The evidence is the fact that *we already do not permit freedom of disposition when it becomes too burdensome*. Consider a couple of examples.

Under our current probate system in the United States, the process of identifying beneficiaries often leaves the decedent's preferences unexamined or undermined by agreement. Decedent's preferences—freedom of disposition—do not factor into distributions when a decedent dies intestate (meaning, without a will).[181] And when a decedent dies with a will, the parties are free to enter into a settlement agreement that bears little, if any, resemblance to the instructions in the will.[182]

A. *Intestacy as Forced Heirship*

Let's start with intestacy. When a person dies without a will, they are said to die "intestate," and the distribution of their estate is governed by their jurisdiction's intestacy statute.[183] An intestacy statute directs who receives an estate in the absence of a will and in what portions.[184] The potential takers under an intestacy

181. *See infra* Section III.A.

182. *See infra* Section III.B.

183. *E.g.*, SITKOFF & DUKEMINIER, *supra* note 7, at 63.

184. *Id.* at 65 (branding intestacy an "estate plan by default"); *see also* Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNIPIAC PROB. L.J. 36, 36 (2009) ("Those who fail to create an individualized estate plan become subject to the rules of intestacy laws, which provide a scheme of distribution in default of active choice.").

statute are almost always family members, with close family members usually taking to the exclusion of more distant ones.[185] At some point, most intestacy statutes cut off who may be a potential taker.[186] If a decedent leaves no one who falls within the scope of the intestacy statute, the decedent's estate is said to "escheat" to the government.[187]

For example, under the Uniform Probate Code, an intestate decedent's estate will largely or completely be left to a surviving spouse if there is one.[188] In the absence of a surviving spouse, the estate will, roughly speaking, be distributed first to descendants, then to ancestors, and then to collateral kindred.[189] The intestacy provision of the Uniform Probate Code sets the cut-off point for inheritance by blood relatives at the decedent's grandparents and their descendants.[190] More remote relatives, such as great aunts and second cousins, never inherit through the Uniform Probate Code's intestacy statute. Rather than distribute the decedent's property to these relatives, it escheats to the government.[191]

The traditional explanation for intestacy in the United States is that it facilitates freedom of distribution because the distributive choices made in the intestacy statute mirror the preference of the typical intestate decedent.[192] In other words, a distribution under

185. SITKOFF & DUKEMINIER, *supra* note 7, at 65–66; DiRusso, *supra* note 184, at 55 ("Common default intestacy schemes seek primarily to benefit descendants and the surviving spouse, and to a lesser extent, parents and their descendants.").

186. SITKOFF & DUKEMINIER, *supra* note 7, at 66.

187. *Id.*

188. UNIF. PROB. CODE § 2-102 (1969) (UNIF. L. COMM'N, amended 2019).

189. *Id.* § 2-103(b)–(j).

190. *Id.* § 2-103(i). However, the Uniform Probate Code does provide for inheritance by stepchildren in the absence of a surviving spouse or qualified blood relative. *Id.* § 2-103(j).

191. *Id.* § 2-105.

192. *See, e.g.*, SITKOFF & DUKEMINIER, *supra* note 7, at 65 ("In accordance with the principle of freedom of disposition, the primary objective in designing an intestacy statute is to carry out the probable intent of the typical intestate decedent."); *see also* Mark Glover, *Probate-Error Costs*, 49 CONN. L. REV. 613, 639–40 & n.145 (2016) (citing sources); Susan N. Gary, *The Probate Definition of Family: A Proposal for Guided Discretion in Intestacy*, 45 U. MICH. J.L. REFORM 787, 789 (2012) ("The primary goal of intestacy statutes, as stated by the drafters of the UPC and by scholars, is to transfer property according to the probable intent of a decedent who dies without a will. The statutes try to reach the result that most intestate decedents likely would want . . . ." (footnote omitted)); Danaya C. Wright & Beth Sterner, *Honoring Probable Intent in Intestacy: An Empirical Assessment of the Default Rules and the Modern Family*, 42 ACTEC L.J. 341, 345 (2017) ("The predominant goal of intestacy statutes is to carry out the probable intent of most decedents in the disposition of their property.").

The Model Probate Code, the predecessor to the Uniform Probate Code, expressly justified its system of intestacy as facilitating the presumed-but-unstated preferences of the

the intestacy statute is our best guess at what the decedent wanted based on popular preferences.[193] That sounds nice, but that isn't freedom of disposition.[194] It's not even a proxy for freedom of disposition. It is forced heirship.

Forced heirship outside of the United States is regarded as the opposite of freedom of disposition.[195] No one looks at France and claims that its system of forced heirship to close family members facilitates freedom of disposition—rather, they say that freedom of disposition is "severe[ly] restrict[ed]" and "taboo" in France.[196] If someone told you that you had to eat pizza for dinner because they thought you probably wanted pizza for dinner (or because they thought you *should* want pizza for dinner or because *most people* enjoy pizza for dinner), you likely wouldn't feel the same as if you had actually been allowed to choose what you ate for dinner. Yet when we look at our own system of forced heirship for intestate individuals in the United States, we somehow reach the opposite conclusion. We simply don't draw the same conclusions about our

decedent. MODEL PROB. CODE § 22 cmt. (UNIV. OF MICH. 1946) (stating that a system of intestacy "should in the main express what the typical intestate [decedent] would have wished had he expressed his desires in the form of a will or otherwise"). The current Uniform Probate Code stops short of expressing the same goal for its intestacy statute, instead expressing the more ambiguous purpose of providing "suitable rules for the person of modest means who relies on the estate plan provided by law." UNIF. PROB. CODE art. II, pt. 1 cmt. (1969) (UNIF. L. COMM'N, amended 2019). Specific revisions to the intestacy rules are justified, however, based on empirical studies into testators' behaviors, which indicate that the Uniform Probate Code's intestacy rules were meant in large part to facilitate the unspoken preferences of intestate decedents. *See, e.g.*, *id.* § 2-102 cmt. This is confirmed by Professor Waggoner, who oversaw the 1990 revisions to the Uniform Probate Code's intestacy rules: "Various considerations drive the formulation of intestate-succession laws. The most obvious and perhaps predominant consideration is the decedent's intention. Of course, the law gives effect to intention to imputation." Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223, 230 (1991).

193. This is sometimes referred to as the "presumed will" theory of intestacy. *See* Ronald J. Scalise Jr., *Honor Thy Father and Mother?: How Intestacy Law Goes Too Far in Protecting Parents*, 37 SETON HALL L. REV. 171, 173 (2006) ("The presumed will theory asserts that the rules of intestacy distribute property according to the objects of the decedent's natural affection and consequently fulfill the presumed wishes of the decedent.").

194. *See* DiRusso, *supra* note 184, at 55 (opining that intestacy "often fails to meet" its "noble goals" and "cannot provide the individuated control the law of wills allows people to wield"); *see also* Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031, 1036 (2004) (calling intestacy "a theoretical grab-bag" that incorporates "virtually every conceivable preference—that of the decedent, that of survivors, that of society—all mixed together in no particular order and following no unified formula").

195. *Cf.* Scalise, *supra* note 193, at 174 & n.7 (citing historical sources for the proposition that forced heirship under the French Civil Code has the same justification as intestacy in the United States).

196. *See supra* note 11 and accompanying text.

own system of forced heirship as we draw about forced heirship in other countries. We say that intestacy in the United States facilitates freedom of disposition by proxy. But that is pretense. It's wishful thinking. Upon closer inspection, it is little more than boosterism designed to promote our domestic system of succession.

A system actually founded on freedom of disposition would necessarily inquire into an intestate decedent's actual individual preferences.[197] Functionally, that would be tough to do. There would be issues with credibility of evidence and self-serving testimony by property-seeking survivors,[198] but it would at least be an attempt at divining an intestate decedent's actual dispositive preference. Our system doesn't even try. One big reason why it doesn't try is that attempting to ascertain the individualized preferences of intestate decedents would be administratively taxing.[199] So instead we consider dispositive preferences only for decedents who opt into making a will. For intestate decedents, there is absolutely no inquiry or mechanism for considering dispositive preferences no matter how credible the evidence of those preferences may be.[200] Freedom of disposition plays no role in the administration and distribution of their estates. When freedom of disposition becomes too administratively taxing, we just don't do it.

B. *Settlement Agreements Defeat Freedom of Disposition*

Even for decedents who do make a will (and die "testate"[201]), freedom of disposition is greatly subverted by settlement agreements among the survivors. Consider the following informal study of students of U.S. inheritance law. When I teach Trusts and Estates, I have my students write an essay answer to a policy

197. *See, e.g.*, Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 257–60, 263–64 (2001) (summarizing the "decedent intent approach," including its potential to "transform intestacy" through individualized evidence of intent).

198. *See* Tanya K. Hernández, *The Property of Death*, 60 U. PITT. L. REV. 971, 1017 (1999) ("[O]pening an inquiry to ascertain the most likely preferences of the individual decedent may sometimes be a fruitless endeavor of contradictory narratives that fail to yield a definitive understanding of the decedent's preferences.").

199. *See* STEWART E. STERK, MELANIE B. LESLIE & JOEL C. DOBRIS, ESTATES AND TRUSTS 66 (4th ed. 2011) ("Perhaps for reasons of administrative convenience, American legislatures have universally preferred a mechanical scheme of intestate succession: we do not focus on the preferences and circumstances of the particular decedent; instead, intestate succession statutes are generally 'one size fits all.'").

200. *See id.*

201. *E.g.*, SITKOFF & DUKEMINIER, *supra* note 7, at 43.

question as part of a practice midterm exam. The question asks whether a proponent and a contestant of a decedent's will should be permitted to settle the dispute by splitting the estate. Both parties are acting in good faith and the validity of the will is unclear. Just about all of my students consistently say that the parties should not be permitted to settle because it would undermine the decedent's freedom of disposition. Although we can't tell whether the decedent meant to make a will (and leave 100% of their estate to the proponent) or meant to not make a will (and leave 100% of their estate to the contestant), one thing we know for certain is that the decedent did not intend to leave 50% to each. Thus, they opine—often fiercely—that settlement agreements should not be permitted in will contests.[202]

That's not at all how estate litigation works. Settlement agreements are not only permitted, they are encouraged.[203] With the consent of the probate court, the Uniform Probate Code permits the settlement of challenges to "the construction, validity, or effect of any governing instrument," including wills.[204] Such statutes are relatively common, and guarantee devisees and heirs the "*right* to compromise their differences and to partition estate property among themselves by mutual consent."[205] Indeed, courts deem that the settlement of estates are beneficial by advancing the public policies of "family harmony and avoiding lengthy litigation" even while acknowledging that such settlement agreements inherently "thwart[] the testator's expectations."[206]

If settlements were perfectly efficient, there is at least an argument that settlement furthers the decedent's dispositive intent. Let's fill out the hypothetical from a couple of paragraphs ago with some numbers. Consider a decedent with an estate of $200,000. The decedent left a document stating that he wanted his estate distributed to his friend, but there are legitimate questions about the validity of the document as a legal will. If the document is a valid will, the friend takes the whole $200,000. If the document is not a valid will, the decedent's sister takes the whole $200,000

202. Presumably, many of the students would have given the opposite answer on the first day of class before they had ever been introduced to freedom of disposition or exposed to my teaching.

203. 80 AM. JUR. 2D *Wills* § 946 & nn.4–6 & 9–10 (2024) (citing cases).

204. UNIF. PROB. CODE § 3-1101 (1969) (UNIF. L. COMM'N, amended 2019); *see also* 31 AM. JUR. 2D *Executors and Administrators* § 67 (2024); 80 AM. JUR. 2D *Wills* § 948 (2024).

205. 80 AM. JUR. 2D *Wills* § 944 (2024) (emphasis added).

206. *Id.* § 946.

through intestacy. Unsure what the outcome of litigation would be, the friend and the sister settle for $100,000 each.

Obviously, the decedent did not intend this distribution, but we don't know whether the decedent intended the friend or the sister to receive 100% of the estate. If the odds of each outcome are truly a 50/50 toss-up, then arguably the 50/50 split furthers the decedent's intent because it transfers half of his estate to its intended beneficiary, albeit at the cost of ensuring that the other half of the estate goes to an unintended beneficiary. If settlement were not possible, either 0% of the estate or 100% of the estate would go to the intended beneficiary. Where there is such uncertainty, arguably it is better (or at least no worse) to sacrifice half of the estate to an unintended beneficiary to guarantee that the other half goes to the intended beneficiary. Mathematically, there's no difference between a 50% chance of being 100% correct and a 100% chance of being 50% correct.[207]

Settlement, however, is rarely so efficient in practice. "[L]egal settlements do not reflect the expected judgments on a one-to-one basis."[208] Parties often settle for amounts that do not accurately reflect the odds of success because of risk aversion, aversion to the cost and uncertainty of litigation, or other reasons.[209] Consider a party with only a 5% chance of success, but who manages to negotiate a settlement for 10% of a $200,000 estate. Based on likelihood of success, the party's fair share of the estate would be $10,000,[210]

207. The difference, of course, is that the settlement scenario actually transfers $100,000 to the intended beneficiary, whereas the litigation scenario confers an equal chance of the intended beneficiary receiving $0 or $200,000.

208. Uri Weiss, *The Regressive Effect of Legal Uncertainty*, 2019 J. DISP. RESOL. 149, 151; *see also* Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113, 128–31 (1996) (arguing that litigants value settlement differently depending on whether they psychologically frame the payment as a loss or a win); Chris Guthrie, *Better Settle Than Sorry: The Regret Aversion Theory of Litigation Behavior*, 1999 U. ILL. L. REV. 43, 62, 67, 72 (proposing that emotions, including a desire to minimize future regret, plays a role in litigation settlement).

209. Greater aversion to risk tends to lead to greater discounting in settlement negotiations:

> A risk averse person cares not only about the magnitude of the expected value, but also about the dispersion of the possible payoffs: she will not, for example, be indifferent between a fifty percent chance of receiving $1000 and a guaranteed payment equal to $500. She will accept some amount of money (the "certainty equivalent") less than $500 in order to avoid the risk of receiving no payoff.

Note, *Settling for Less: Applying Law and Economics to Poor People*, 107 HARV. L. REV. 442, 445 (1993).

210. $200,000 x 0.05 = $10,000.

but they bargained their way to $20,000. Or consider a beneficiary with a 50% chance of success who settles for only 40% of the same estate.[211] Again, their actual payout ($80,000[212]) does not match their "fair share" based on the likelihood that they were the decedent's intended beneficiary ($100,000[213]). Where settlement does not accurately reflect the odds of success at litigation, it no longer matches litigation in terms of facilitating testamentary intent.

On top of that, the previous examples assumed that the beneficiaries are litigating and settling in good faith based on the probability of litigated outcomes, but that is hardly always the case. In short, "the beneficiaries under a will have the right to agree among themselves to abrogate a will" and distribute the estate assets in another way.[214] Parties may collude to engineer a result that bears little if any resemblance to the distribution called for in the purported will.[215] For example, one sibling (S1) may think that the testator was wrong to leave another sibling (S2) nothing in their will. Even though the odds of S2 successfully challenging the will through litigation are zero, S1 and S2 may still agree to split the estate fifty-fifty. Even if the settlement needs approval by the probate court,[216] the court has a strong interest in approving settlements and closing estates, especially where they promote familial harmony amongst the living.[217] After all, what is the harm to ignoring the will if no living individual objects?

The harm is to testamentary freedom. While the testator lacks the aliveness to object, families who divvy up the testator's estate based on their own sense of fairness inherently ignore or subvert the testator's preferences. While such outcomes may be for the best for the living, they undeniably erode the ability of testators to

211. *See Settling for Less: Applying Law and Economics to Poor People*, *supra* note 209, at 445 ("A risk-averse plaintiff facing a range of possible judgments will reasonably accept a settlement that is smaller than her [expected monetary value of trial].").

212. $200,000 x 0.40 = $80,000.

213. $200,000 x 0.50 = $100,000.

214. 80 AM. JUR. 2D *Wills* § 952 (2024). The beneficiaries may not, of course, agree to prejudice creditors or avoid the payment of costs and expenses of administration. *See id.* § 953.

215. *See, e.g.*, *id.* § 951 ("A decedent's legatees may agree on how to divide the decedent's property. In other words, the heirs or beneficiaries under a will may agree among themselves as to the distribution of the estate contrary to that of the will." (footnote omitted)).

216. *See, e.g.*, *id.* § 962 (discussing the necessity, and lack thereof, of obtaining judicial approval).

217. *See, e.g.*, *id.* § 946 ("Settlement agreements in probate cases do not violate public policy by thwarting the testator's expectations but rather are supported by the public policy of furthering family harmony and avoiding lengthy litigation." (footnote omitted)).

dictate the eventual distributions of their estates. Here again, we have another large class of distributions under our current system that aren't the product of freedom of distribution. Settlement agreements are little more than an exception to freedom of disposition—the law follows the decedent's instructions unless the living agree to a different outcome. And why? Because it facilitates easy administration of estates.

What this all means is that freedom of disposition only plays a small role in the overall course of probate administration. When there is no will, it plays no role. When there is a will, but the living agree to settle, it plays a diminished role. When there is a will and the living don't agree to a contrary settlement of the estate, then freedom of distribution plays a large role in the selection of beneficiaries. Even there the law places some limits. But putting those limits aside, selection of beneficiaries fits within a larger process of administration. If it wasn't workable within an administrable system, we wouldn't do it. After all, there is little point of an outcome that is not administrable.

IV. CONCLUDING THOUGHTS: FREEDOM OF DISPOSITION IS BUT A COG IN GREATER WHEEL OF PROBATE ADMINISTRATION

The preceding sections hopefully established two things: first, that testators lack meaningful control over the probate process and the process affects outcomes, and second, that the probate system removes freedom of disposition when it becomes too difficult to administer. These observations do not paint the picture of a probate system built around the principle of freedom of disposition.

I'm not saying that freedom of disposition isn't important to the law of succession in the United States. It is important, or at least the appearance of freedom of disposition is important.[218] But maybe we can pump the brakes a little bit when we talk about just how important it is. Freedom means little if it isn't administrable. When push comes to shove, the law is never going to promote an unworkable system founded on freedom of disposition. Sure, it'll allow freedom of disposition to impose marginal administrative costs in terms of time, effort, and complexity, but those are

218. Bennardo, *Insane Delusions*, *supra* note 11, at 603 ("The appearance of freedom is both sufficient and necessary to achieve the goal of incentivizing behavior. Actual freedom is unnecessary.").

allowances that are only granted within a workable system of orderly administration. When freedom of disposition becomes too bothersome for probate courts to manage, it goes away.

If there is anything that is sacred in our systems of laws, it is an administrable system. Maybe that is an unspoken truth for all areas of law, not just inheritance law. No law can achieve any policy goal without first being functional. And maybe because that concept is so elemental and pervasive, it is tacitly understood that it should be taken for granted in any discussion of law.

I acknowledge that it is entirely possible that this idea that has now dawned on me has been an unstated assumption that everyone else has already relied upon for ages. Perhaps I should have recognized it sooner, but the literalist in me has been holding me back from recognizing this unspoken convention. Perhaps every time someone said that freedom of disposition is the central, integral, guiding, fundamental keystone hallmark principle of domestic inheritance law, I should've visualized an asterisk that led to a footnote that said, "aside from baseline functionality, which is obviously the central, integral, guiding, fundamental keystone hallmark principle of all law."

Even if that is the case, I think it is helpful to expressly remind ourselves of it on occasion. Taking things for granted for too long usually doesn't produce positive results.[219] Hopefully reminding ourselves of the fundamental role of administrability will help ground some of our conceptions—and our descriptions—of the role of freedom of disposition going forward. A testator's ability to control the distribution of her estate is limited by very real constraints. Some of those constraints, such as limitations explicitly built into the law, are well known. Others, such as the tendency of decision-makers to disregard or minimize counter-majoritarian testamentary preferences, are well documented though still not adequately accepted. Others, such as the inability of testators to control the process of probate administration, are almost never acknowledged as a limit on distributive freedom despite the obvious link between process and outcomes.

The United States' devotion to testamentary freedom may be extraordinary relative to other countries' systems of inheritance, but

219. *See* BARBIE (Warner Bros. Pictures 2023) ("Not every night had to be girls' night."). The preceding sentence is both a supporting source and a recommendation.

let's be careful not to overstate things. It is only extraordinary (literally, not ordinary) when compared to others. It is not extraordinary in isolation. Other considerations also play enormous roles in our probate system and deserve their fair share of acknowledgement. It is more of a balancing act than some discussions let on. And if there is an elephant in the room, its name is administrability. Let this serve as a reminder to be mindful of the true nature of freedom of disposition in our system of inheritance, both in terms of its compass and its limitations. Testamentary freedom of disposition has always been, and will always be, subservient to inheritance law's principal focus on administrability.