Boilerplate and Default Rules in Wills Law: An Empirical Analysis

Iowa Law Review, Vol. 103 (forthcoming 2018)

Reid Kress Weisbord
Vice Dean, Professor of Law, and Judge Norma L. Shapiro Scholar
Rutgers Law School

David Horton
Professor of Law and Chancellor's Fellow
UC Davis School of Law

IN THE NAME OF GOD, AMEN.

I, ROBERT C. PAULSON, of the Township of Green, in the County of Sussex and the State of New Jersey, being of sound and disposing mind, memory and understanding, do hereby make, publish and declare this instrument as and for my Last Will and Testament, in the manner and form following, that is to say:

FIRST: I hereby cancel and revoke any and all Wills, Testaments or other testamentary dispositions by me at any time heretofore made.

SECOND: I hereby order and direct that all of my just debts, funeral and administration expenses, transfer inheritance and estate taxes, if any, be paid from my estate as soon after my decease as can be conveniently done.

THIRD: To my daughter, SHARON L. PAULSON, if she survives me, my real property, the house thereon and the furnishings therein (i.e., furniture and household goods) located at 701 Creek Drive, in the Town of Kunkeltown, Pennsylvania, where she presently resides and rents with the option to buy. In the event that she shall predecease me, this devise and bequest shall lapse and shall go to her children, AUSTIN R. SCARPONE and ISABELLA A. K. SCARPONE, equally, share and share alike, or to the survivor.

THIRD: All the rest, residue and remainder of my estate and property, whether real, personal or mixed, of which I may die seized or possessed or in which I may have any interest at the time of my death, I hereby give, devise and bequeath unto my beloved wife, REBECCA A. PAULSON, provided that she shall survive me, to her use, absolutely and forever.

FOURTH: Should my wife predecease me or should she die with me in a common accident or disaster, or under such circumstances as make it impossible or difficult to determine which of us died first, or within thirty (30) days after my death, I give, devise and bequeath my estate as follows:

SIXTH: Except as otherwise provided in this my LAST WILL AND TESTAMENT, I have intentionally omitted to provide for any other relatives or any other person, whether claiming to be an heir of mine or not.

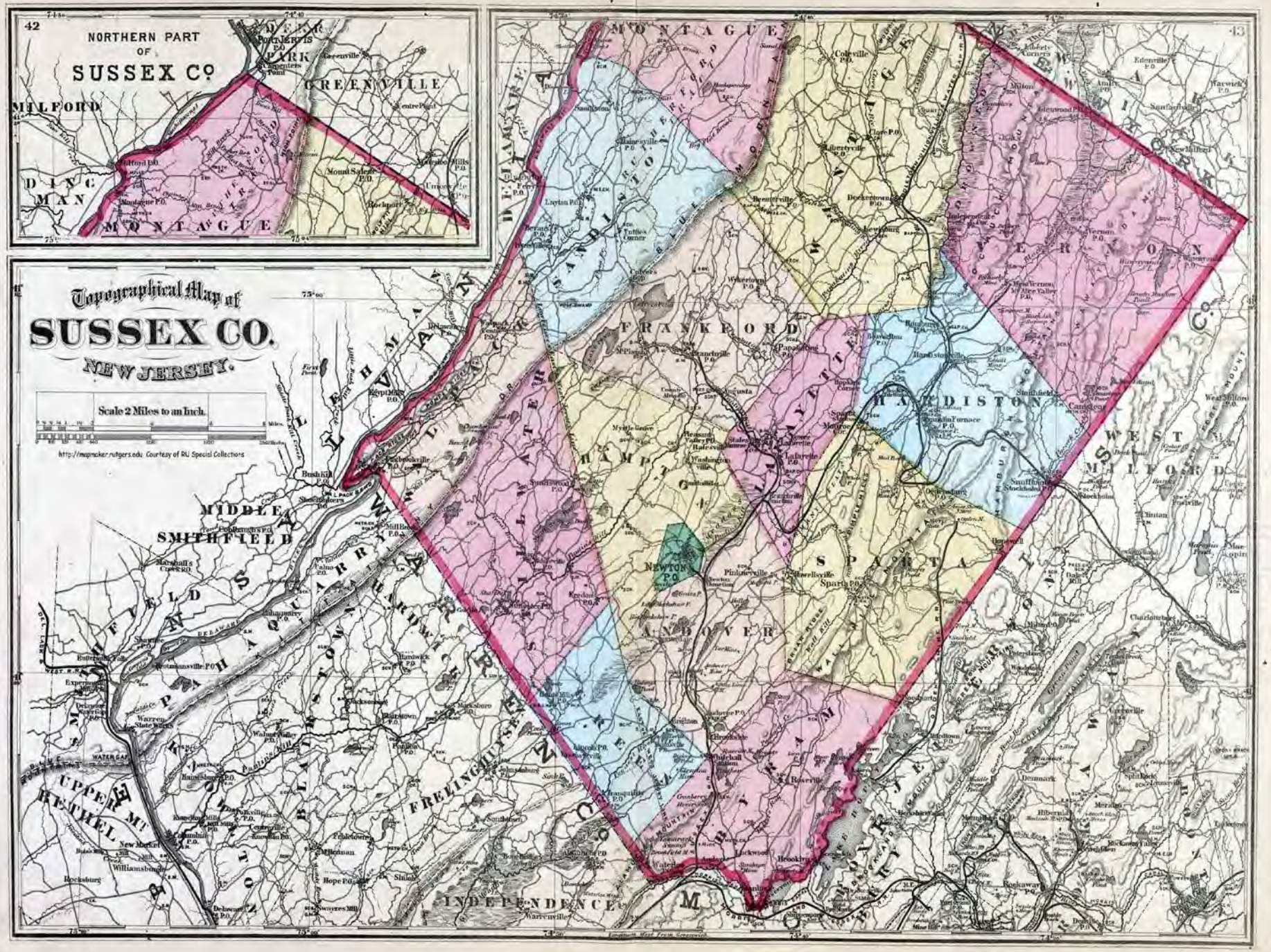
SEVENTH: I appoint my wife, REBECCA A. PAULSON, as Executor of this my LAST WILL AND TESTAMENT. In the event that my said wife shall not survive me, shall resign or die or otherwise fail to qualify, prior to the completion of the administration of my estate, I appoint JOHN E. SNYDER III in her place and stead as substitute Executor. It is my direction that no bond or other security shall be required of my Executor either in New Jersey or in any other jurisdiction. My Executor shall also be exempt from the necessity of making any inventory, report or accounting to any court.

I give and grant to my Executor, in addition to and not in limitation of the powers conferred by law, the full power to sell, retain, exchange or otherwise dispose of any and all property, real or personal, of which I may die seized and to give good and sufficient title therefor. The foregoing power of sale is given not only for the purpose of the administration of my estate but for the purpose of selling any and all of my property and distributing the proceeds to my beneficiaries hereinabove set forth, if, in the judgment of my Executor, such action is for the best interest of my estate.

Whenever I mention Executor in this instrument, I also mean to include substitute Executor.

I, ROBERT C. PAULSON, sign my name to this instrument, consisting of four (4) pages, this 5th day of APRIL, 2010, and being duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my Last Will and that I sign it willingly, that I execute it as my free and voluntary act for the purposes therein expressed and that I am eighteen years of age or older, of sound mind and under no constraint or undue influence.

Robert C. Paulson L.S.
ROBERT C. PAULSON


42
NORTHERN PART
OF
SUSSEX Co
MILFORD
GREENVILLE
DING
MAN
MONTAGUE
43
MONTAGUE
VERNON
FRANKFORD
HAMPTON
SPARTA
ANDOVER
NEWTON
P.O.
WEST
MILFORD
MIDDLESEX
SMITHFIELD
INDEPENDENCE
Topographical Map of
SUSSEX CO.
NEW JERSEY.
Scale 2 Miles to an Inch.
http://mapmaker.rutgers.edu Courtesy of RU Special Collections

Just Debts

THE WILL OF GEN. GEORGE WASHINGTON.

IN THE NAME OF GOD, *AMEN.*

I, GEORGE WASHINGTON, of *Mount-Vernon*, a Citizen of the United States, and lately *Prefident* of the fame, DO make, ordain, and delare this inftrument, which is written with my own Hand*, and every page thereof fubfcribed with my name, to be my laft WILL and TESTAMENT, revoking all others---*Imprimis*: All my debts, of which there are but few, and none of magnitude, are to be punctually and fpeedily paid, and the Legacies herein after bequeathed, are to be difcharged as foon as circumftances will permit, and in the manner directed.

Item. To my [illegible] I give and bequeath the ufe, profit and benefit of my whole eftate, real and perfonal, for the term of her natural life, except fuch parts thereof as are fpecially [illegible] of hereafter. My improved Lot in the town [illegible] dria, fituated on Pitt and Cameron-ftreets, I [illegible] and her heirs forever; as I alfo do my Houfhold [illegible] en Furniture of every fort and kind, with the Liquors and Groceries which may be on hand at the time of my deceafe, to be ufed and difpofed of as fhe may think proper.

Item. Upon the deceafe of my wife, it is my will and defire, that all the Slaves which I hold in my *own right*, fhall receive their freedom. To emancipate them during her life, would, tho earneftly wifhed by me, be attended

Therefore, we must examine the language of the Trust Agreement to determine Pamela's intent and interpret the Trust Agreement's terms to see if those terms have a technical meaning.

As mentioned above, Trust Agreement section 3.1.1 requires the Trustee to pay Pamela's "legal debts" after her death. We have not previously addressed the meaning of a general directive in a trust agreement to pay "legal debts." But we have previously considered the meaning of a similar phrase in a last will and testament. Nearly one century ago, in *Larson v. Curran*, we analyzed the following will provision: "I hereby direct that all my just debts shall be paid out of my estate...." 121 Minn. 104, 106, 140 N.W. 337, 337 (1913) (internal quotation marks omitted). In *Larson*, we declined to give the phrase "all my just debts shall be paid" much significance because we treated this general debt directive as boilerplate will language. *See Black's*, *supra*, at 198 (defining "boilerplate" as "[r]eady-made or all-purpose language that will fit in a variety of documents"). More specifically, in *Larson* we concluded that a "direction to 'pay all my just debts ...' is a purely formal phrase, commonly employed and ... superfluous."[4] 121 Minn. at 110, 140 N.W. wholly unnecessary,

Other jurisdictions agree with our analysis and conclusions in *Larson*. The Supreme Court of Georgia recently explained that a general directive in a last will and testament to pay legal debts is a "generic phrase ... routinely included in a will and most likely reflect[s] the testat[rix]'s intent to leave the world with [her] accounts paid and to be remembered as an upright and respectable person." *Manders v. King*, 284 Ga. 338, 667 S.E.2d 59, 61 (2008) (citation omitted) (internal quotation marks omitted). Courts in California, Delaware, Iowa, and Ohio have reached similar conclusions.[5]

The foregoing case law makes it evident that a phrase such as "pay ... my legal debts" has come to have a well-understood technical meaning when used in a document like a last will and testament. Put simply, the typical common-law directive to pay debts does not authorize a testator's personal representative or executor to pay the testator's secured obligations. *Cf. Manders*, 667 S.E.2d at 60 (concluding that the typical debt-payment clause is insufficient to require "exoneration" of a

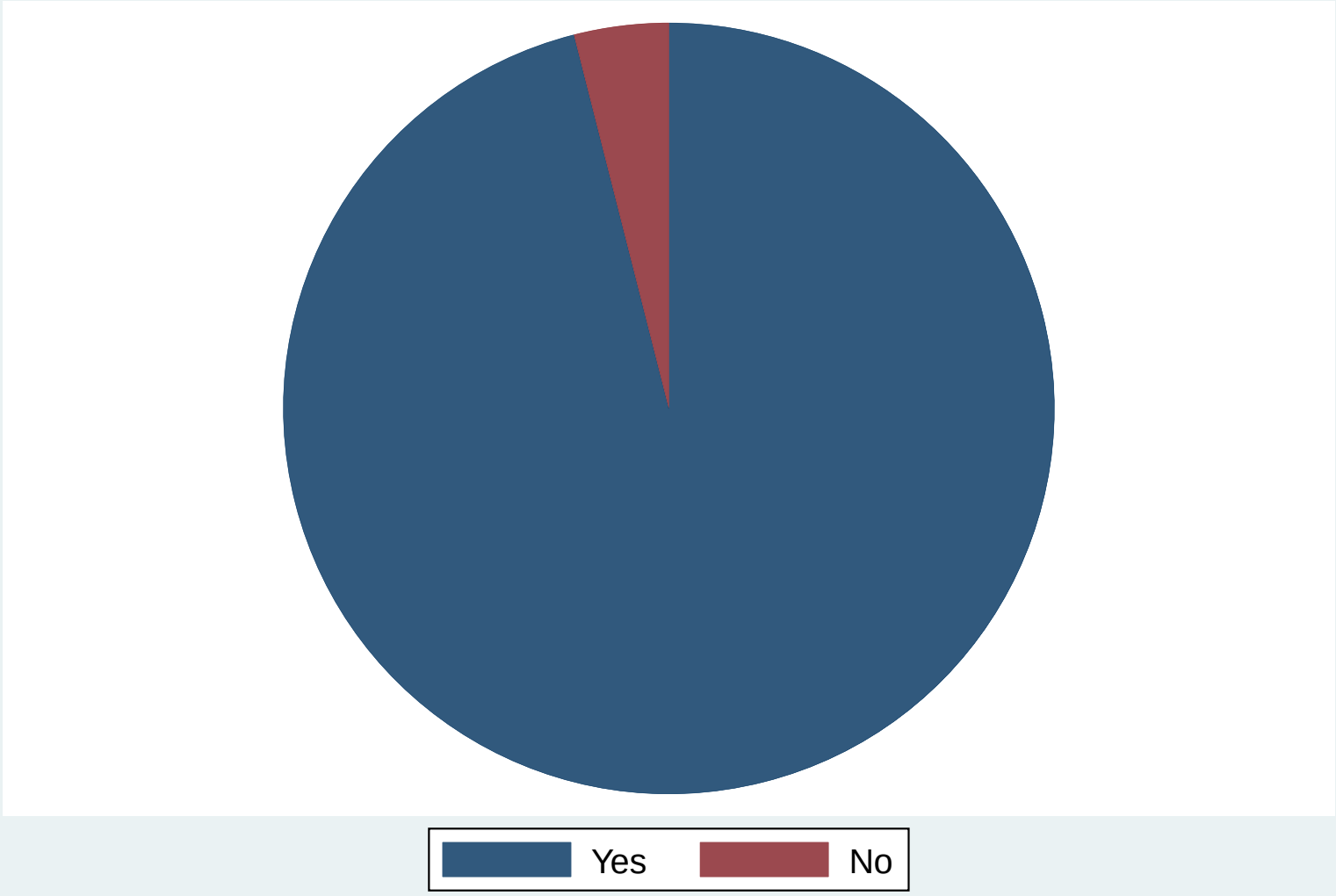
4. Although the boilerplate language of a standard debt-payment clause is now generally viewed as being superfluous, it once carried greater significance. At common law, an executor could be held liable for a testator's debts. 5B George W. Thompson, *Commentaries on the Modern Law of Real Property* § 2631, at 136 (1978 replacement ed.). And an executor had no power to sell real estate to pay those debts in the absence of express authorization. *Id.* at 137. Hence, testators commonly employed standard debt-payment clauses to empower their executor to pay their debts. In modern times, statutes have empowered executors to pay a testator's debts, even without a general directive. *See, e.g.*, Minn.Stat. § 524.3-715(27) (2010) (authorizing a personal representative to "satisfy and settle claims and distribute the estate"). Nevertheless, the general debt directive remains omnipresent in modern wills and trust agreements.

5. *See In re Porter* 138 Cal. 618, 72 P. 173, 174 (1903) (comparing the phrase "pay all my just debts" to the 'formal, meaningless terms of endearment and pious phrases printed in the formal part of blanks for making wills"); *In re Estate of Keil*, 145 A.2d 563, 564 (Del.1958) ("The provision for the payment of debts is merely the standard provision found in most wills...."); *In re Grilk's Will*, 210 Iowa 587, 231 N.W. 327, 328–29 (Iowa 1930) (concluding that a direction to "[pay] my just debts" is "so formal as to be no more than mechanical"); *In re Estate of Carrington*, 136 N.E.2d 182, 185 (Ohio Prob.Ct.1956) (describing the "ordinary 'boilerplate' reference to payment of debts, taxes and costs of administration").

boilerplate will lan-

guage.

Does a Will Contain a Just Debts Clause?



ASSEMBLY, No. 2046

STATE OF NEW JERSEY

211th LEGISLATURE

INTRODUCED FEBRUARY 5, 2004

Sponsored by:
Assemblywoman LINDA R. GREENSTEIN
District 14 (Mercer and Middlesex)

SYNOPSIS
Revises wills and estates.

CURRENT VERSION OF TEXT
As introduced.

88. N.J.S.3B:25-1 is amended to read as follows:

3B:25-1. Nonexoneration of property subject to mortgage or security interest; exception.

When property subject to a mortgage or security interest descends to an heir or passes to a devisee, the heir or devisee shall not be entitled to have the mortgage or security interest discharged out of any other property of the ancestor or testator, but the property so descending or passing to him shall be primarily liable for the mortgage or secured debt, unless the will of the testator shall [expressly or impliedly] direct that the mortgage or security interest be otherwise paid. A general direction in the will to pay debts shall not be deemed a direction to pay the mortgage or security interest.

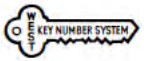
sary's expert. In both situations, a party should be required to demonstrate exceptional circumstances before being permitted to call an expert originally retained by an adversary.

To be sure, in limited circumstances "trial surprise or other unfairness will require that such expert opinion evidence be allowed." *Graham, supra*, 126 *N.J.* at 374, 599 *A.*2d 149. Here, the testimony of defendant's expert was not substantially different from the anticipated testimony defendant sought to be obtained from plaintiff's expert. Simply stated, defendant failed to demonstrate exceptional circumstances.

Because I find no abuse of discretion in the trial court's ruling that prohibited defendants from calling plaintiff's expert at trial, I would affirm on that issue.

For reversal and remandment—Chief Justice PORITZ and Justices LONG, LaVECCHIA, ZAZZALI, WALLACE, and RIVERA–SOTO—6.

Opposed—None.



186 N.J. 324

In the Matter of the ESTATE OF Theodore M. PAYNE, Deceased.

Supreme Court of New Jersey.

Argued Jan. 4, 2006.
Decided April 20, 2006.

Background: Homosexual partner of testator brought will contest, alleging that estate was responsible for payment of the mortgage debts on home which was bequeathed to partner. The trial court concluded that partner failed to establish that testator intended to give him the home debt-free. Partner appealed. The Superior Court, Appellate Division, affirmed. Partner petitioned for certification.

Holdings: The Supreme Court, Wallace, J., held that:

(1) testator's probable intent was for partner to receive home debt-free, and thus estate was required to pay off the mortgage debts, and

(2) testator's probable intent was for estate to pay off mortgage debts on vacation home owned in joint tenancy with right of survivorship first and then to pay off the mortgage debts on the home bequeathed to his partner.

Reversed.

Rivera–Soto, J., dissented and filed opinion.

1. Wills ⇦439

In interpreting a will, court's aim is to ascertain the probable intent of the testator.

2. Wills ⇦441, 470(1)

In determining the testator's subjective intent, courts will give primary emphasis to his dominant plan and purpose as they appear from the entirety of his will when read and considered in the light of the surrounding facts and circumstances.

3. Wills ⇦453

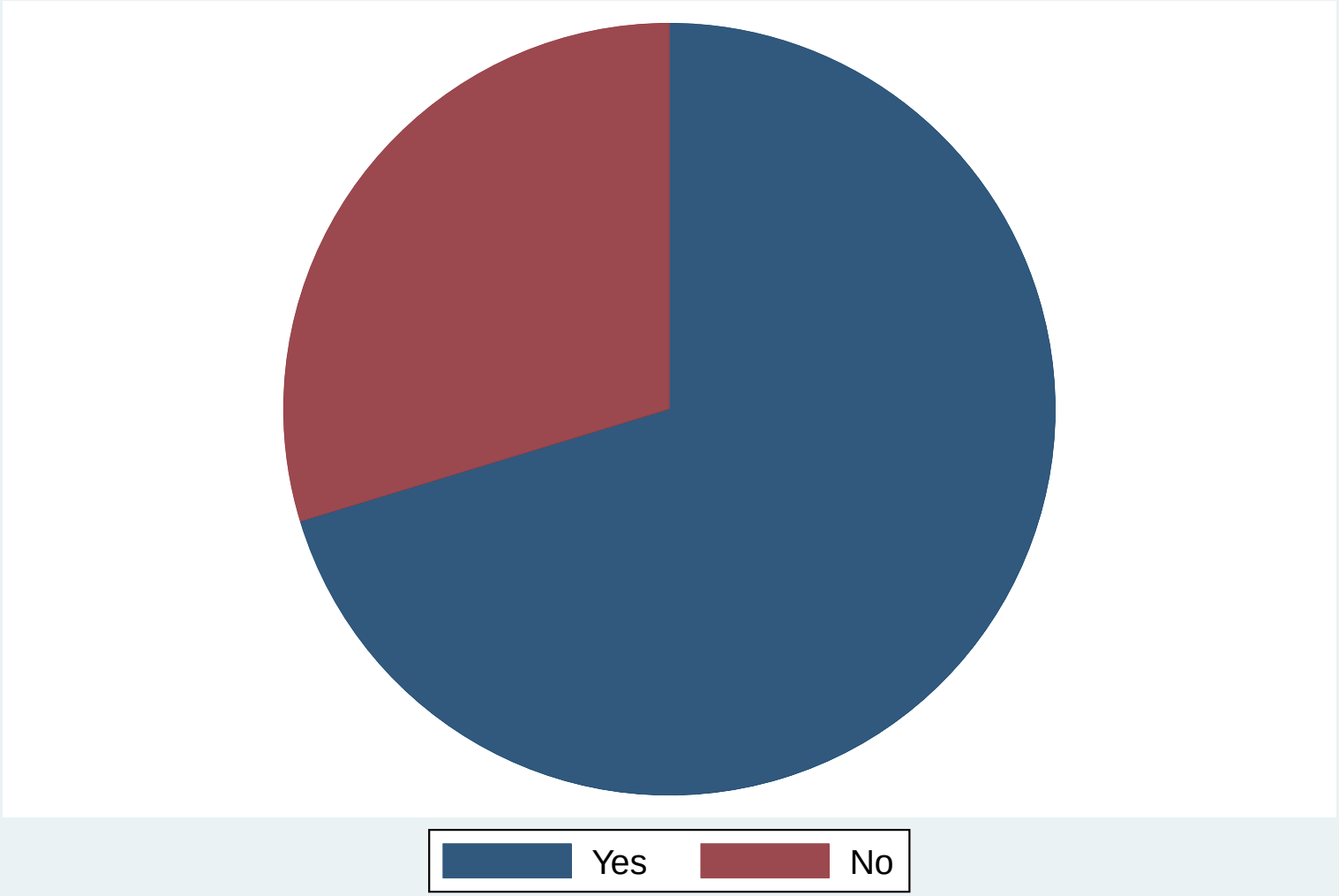
Trial court should ascribe to the testator those impulses which are common to human nature and construe the will so as to effectuate those impulses.

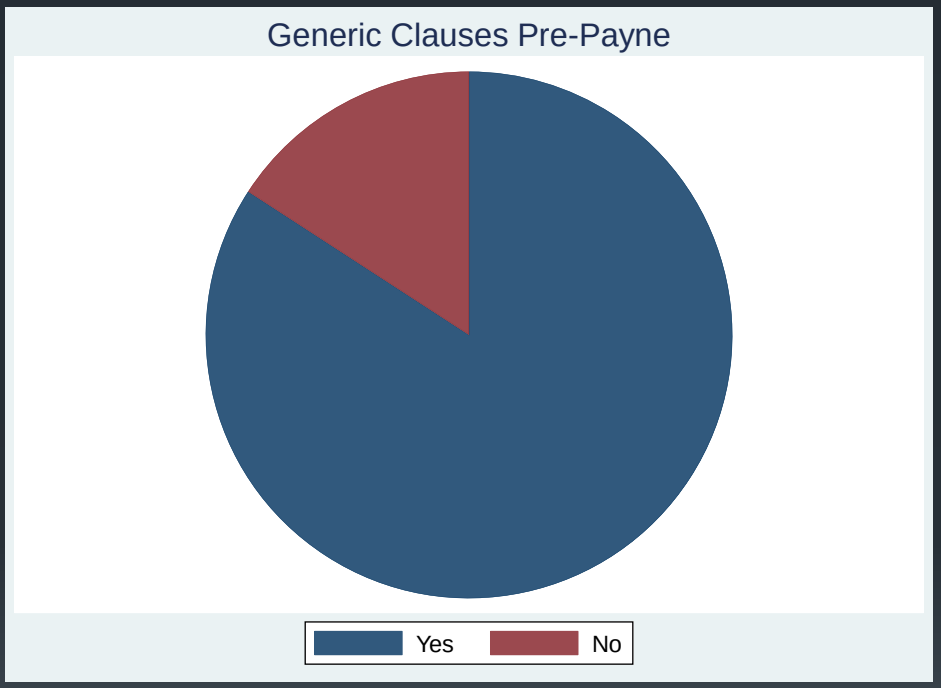
4. Wills ⇦440

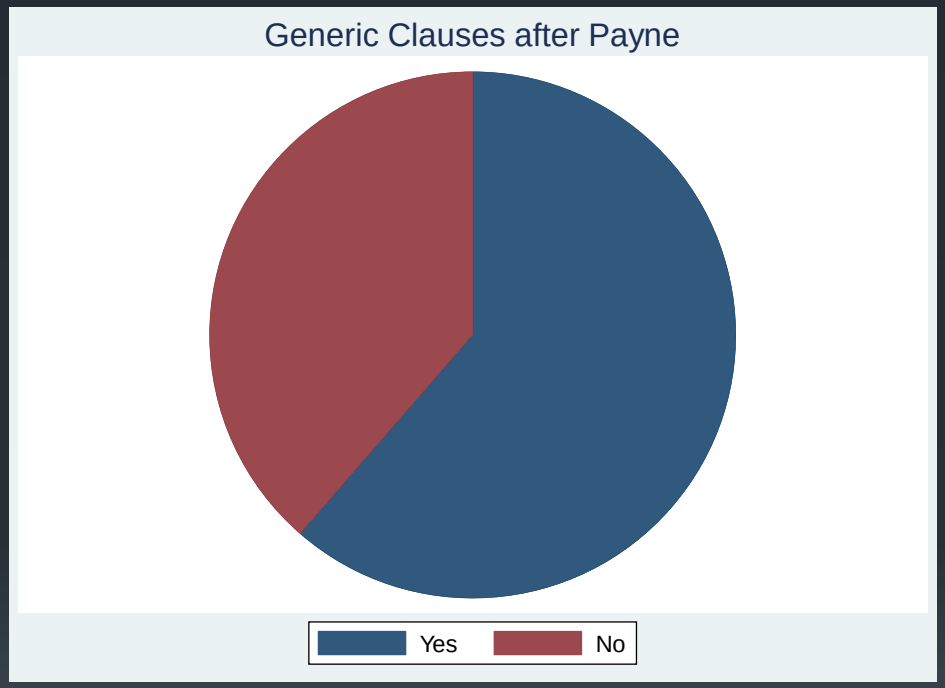
Trial court is not limited simply to searching out the probable meaning intended by the words and phrases in a will.

that the "all my just debts" clause was a direction for the estate to pay the mortgage debts on the New Jersey property.

If a Will has a Just Debts Clause, is it "Generic"?




Generic Clauses Pre-Payne
Yes
No


Generic Clauses after Payne
Yes
No

Antilapse

UNIFORM PROBATE CODE (1969)

(Last Amended or Revised in 2010)

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

WITH COMMENTS

Uniform Law Commission
National Conference of Commissioners on Uniform State Laws
111 N. Wabash Ave., Suite 1010 • Chicago, IL 60602
(312) 450-6600, Fax (312) 450-6601
www.uniformlaws.org

August 1, 2016

(3) For the purposes of Section 2-601, words of survivorship, such as in a devise to an individual "if he survives me," or in a devise to "my surviving children," are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section.

The 1990 Uniform Probate Code: Older and Better, or More like the Internal Revenue Code?

Mark L. Ascher*

For more than a decade, I have taught Estates & Trusts in Arizona, one of the relatively few states to have adopted the Uniform Probate Code (UPC).[1] During that time, I have grown quite fond of the pre-1990 version of the UPC.[2] It is a model of clear and concise drafting.[3] Its distaste for estate planning esoterica[4] marks it as distinctly "consumer friendly." Its sure and sensible handling of issues that otherwise would have generated litigation[5] evidences thorough common sense. As one who also teaches Tax, I have jealously guarded the opportunity to continue teaching my UPC course, for the welcome relief it has provided from the Internal Revenue Code's statutory pollution, esoteric vocabulary, and litigation incentives.

I expected the 1990 revisions to make the UPC even better. I am not sure they have. The 1990 version lacks several of the

* Professor of Law, University of Arizona College of Law. B.A., 1975, Marquette University; M.A., 1977, Kansas State University; J.D., 1978, Harvard Law School; LL.M. (in Taxation), 1981, New York University. I wish to thank my colleagues, Arthur Andrews, Charles Ares, Leslie Espinoza, Ted Schneyer, John Strong, and Willard Van Slyck, for comments on prior drafts of this article.

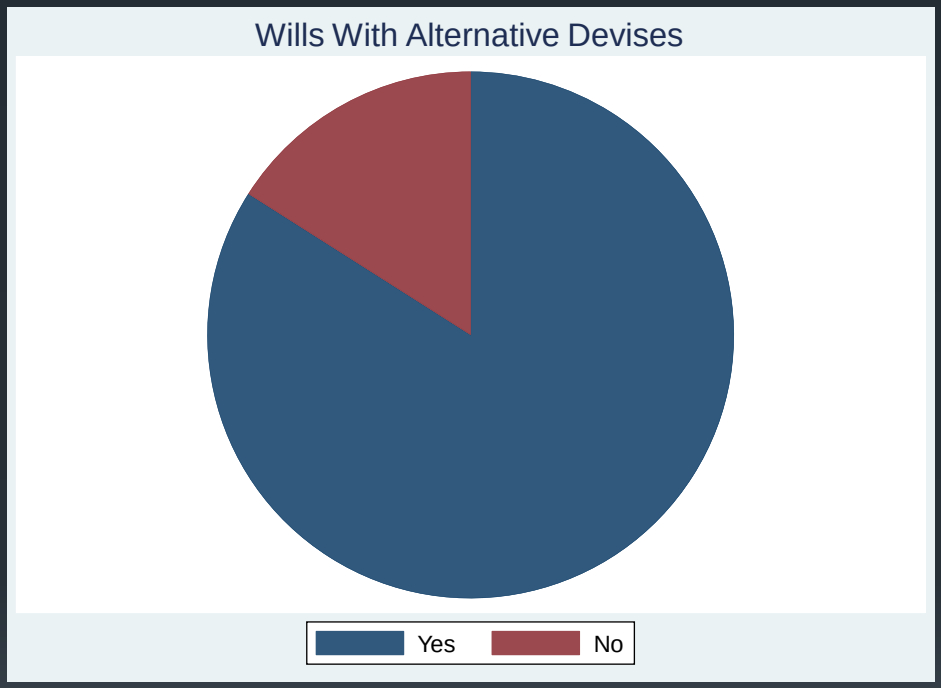
1. ARIZ. REV. STAT. ANN. §§ 14-1101 to 14-7307 (1975). Only 15 states have adopted the UPC. UNIF. PROBATE CODE, 8 U.L.A. 1 (Supp. 1993).

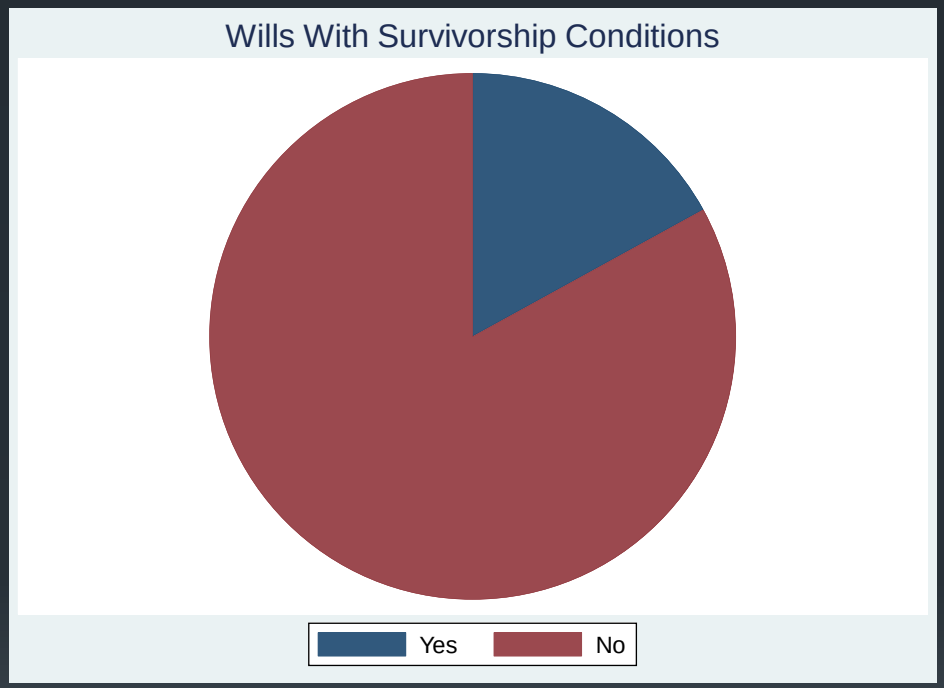
2. The "pre-1990 version" of UPC Article II was originally promulgated in 1969, and last amended in 1987. The "1990 version" of Article II represented a significant revision of the old article, and was itself amended in 1991. For clarity, this article will cite to the old Article II as "PRE-1990 UNIF. PROBATE CODE" and the new Article II as "1990 UNIF. PROBATE CODE," omitting information about the provisions' subsequent revision or amendment.

3. *See, e.g.*, PRE-1990 UNIF. PROBATE CODE §§ 2-605 (the antilapse statute), 2-608 (providing for exceptions to ademption).

4. *See, e.g., id.* §§ 2-302 (minimizing claims of pretermitted children), 2-502 (liberalizing presence requirements for will execution), 2-503 (liberalizing holograph requirements), 2-505 (liberalizing witness requirements), 4-201 to 4-207 (minimizing need for ancillary probate).

5. *See, e.g., id.* §§ 2-110 (minimizing advancements), 2-504 (providing for self-proved wills), 2-612 (minimizing satisfactions).


Wills With Alternative Devises
Yes
No


Wills With Survivorship Conditions
Yes
No

Representation

- Systems of “representation” provide rules for distributing multi-generational gifts to multiple beneficiaries.

- 21% of wills illogically invoked representation in a devise to an individual person (e.g., “to my daughter, per stirpes”) or beneficiaries within the same generation (e.g., “to my son and daughter, per stirpes”).

- The purpose of representation is to allocate shares among multiple recipients, so it is illogical in a gift to an individual or beneficiaries within the same generation.

Will of Cullen

"Should my wife, Virginia Ann Cullen, predecease me, then I give and devise all the rest, residue and remainder [of] my property, both real and personal, to my three children, Cherie Ann Chernesky, Dawn Marie Stone, and Raymond Joseph Cullen, III, in equal shares, share and share alike, per stirpes."

Will of Farber

“Per Stirpes, for the purposes set forth herein, shall mean any child born or adopted by any of my children prior or subsequent to the signing of this my Last Will and Testament and living at the time of my death.”

Conclusions:

- Illogical representation language is a common form of bad boilerplate.
- Illogical representation language is in fact meaningless and should be disregarded.
- The UPC and Restatement are entirely silent on this problem.

Tax Apportionment

- Default : Beneficiaries pay estate tax in proportion to their share of the estate.
  - Reverses common law “burden on the residue” rule that disadvantaged surviving spouses & children and increased transfer taxes.

- 14% of wills contained a generic tax apportionment clause (directing the executor to pay all estate taxes).
  - Creates ambiguity similar to generic Just Debts clauses: Does the will opt out of the apportionment default and direct the residuary beneficiary to pay all estate taxes?

- 86% of Tax Apportionment clauses expressly opted out of the equitable apportionment default.

Will of Eppler

“Said bequest [of $200,000] shall be responsible for the inheritance tax due and owning. Any inheritance taxes owed shall be paid from my residuary estate.”

Conclusions:

- Tax apportionment clauses seem to be rank boilerplate used by attorneys who do not fully understand them.

- 56% of wills that opted out of equitable tax apportionment contained no general or specific devises.
  - Why direct taxes to be paid from residue if there are no beneficiaries other than residuary beneficiaries?
  - In NJ, a Tax Apportionment clause must expressly address nonprobate transfers, but 23% of these wills opted out of equitable apportionment without mentioning nonprobate transfers.

Boilerplate Recycling

- 91 wills revealed the drafting attorney's name, so we identified several repeat players.

- Wills drafted by the same law firm often contain the same provisions.

	Number of Wills (Total)	Just Debts Clause With Non-Exoneration	Residue Pays Taxes	Changes Per Capita to Per Stirpes
Firm 1	7	7/7: Yes (100%)	7/7: Yes (100%)	7/7: Yes (100%)
Firm 2	5	5/5: No (100%)	5/5: Yes (100%)	5/5: No (100%)
Firm 3	4	4/4: No (100%)	4/4: No (100%)	4/4: No (100%)
Firm 4	4	4/4: Yes (100%)	4/4: Yes (100%)	2/4: Yes (50%)
Firm 5	3	3/3: No (100%)	3/3: Yes (100%)	2/3: Yes (67%)

Policy Implications

- The UPC and Restatement drafters were correct in identifying boilerplate as a problem.
- Absent empirical research, however, they identified the right problem in the wrong context (antilapse).
- Our research suggests that sticky defaults can provide an effective antidote to the problem of boilerplate, but sticky defaults must be applied with better care.

What Are “Sticky” Defaults?

- Sticky defaults allow individuals with a contrary preference to opt out, but they make displacement of the default more difficult.
- Sticky defaults are a form of choice architecture used to “nudge” individuals toward the default.
- By increasing the procedural burden of opting out the default, sticky defaults exploit the inertial pull of inaction.

Improving Wills Law Defaults

- Most wills law defaults seem to reflect majoritarian preferences accurately, but are highly susceptible to interference by boilerplate drafting.

- Sticky defaults could fortify the default rules against boilerplate by imposing requirements that: (1) increase the burden of opting out; and (2) require draftsmanship that cannot be copied from one will to the next.

Sticky Default Examples

- To opt out of nonexoneration, the will must identify each item of property for which the residuary beneficiary must exonerate a lien.
- To opt out of a default rule, the testator must initial next to the provision in the instrument to manifest such intent.