# PRO-NATALISM IN PROBATE LAW

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*"Pro-natalism" is a term that has been variously used to describe any and all government policies that favor birth, babies, children, families, and population growth, as well as more focused laws that incentivize childbirth; burden, ban, or criminalize abortion and/or contraception; and otherwise disfavor the childless. Whether and to what extent U.S. law is or should be pro-natalist is central to current and ongoing debates about reproductive rights and the deeply vexed question of when life begins. A robust legal feminist literature has aimed to identify and critique pro-natalist law and policy, particularly in forms that constrain the autonomy of those who may become pregnant. Some such laws may even amount to compulsory maternity. This literature has also explored the relationship between pro-natalism and gender- and sex-based inequality more broadly.*

*This Article breaks new ground by identifying pro-natalism in a completely different area of law: the law of decedent's estates. Rather than incentivizing reproduction as such, pro-natalism in probate law undermines autonomy through rules that privilege and naturalize the parent-child relationship as the proper site of post-mortem property transfer. Prior literature has explored the misuse by probate courts of both formalities law and the law of undue influence to favor dispositions within the family and disfavor less traditional plans. This Article, drawing on cases and statutes from more than forty states, focuses both more narrowly, on the parent-child relationship specifically, and more widely, taking in several aspects of the law of both intestate succession and wills. Intestate succession is an estate plan by default, not chosen by the decedent; but in the law of wills, testamentary freedom and autonomy are loudly proclaimed. Yet a review of interested witness purging statutes, the law of testamentary capacity, rules for resolving ambiguous language in wills, anti-lapse statutes, the law of pretermission, and the undue influence case law, reveals deep and*

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*pervasive pro-natalist bias. Taken together, these familiar components of probate law codify and perpetuate ideas about the connections between parents and their children that are also central to current debates about reproductive freedom and autonomy in intimate life. Uncovering pro-natalism in probate law is therefore part of the larger project of understanding how pro-natalism undermines autonomy in areas of law apparently far removed from reproductive rights.*

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## INTRODUCTION

The United States is currently experiencing a historic roll-back of hard-won legal protections for women's reproductive freedom. The 2022 Supreme Court decision in *Dobbs v. Jackson Women's Health Organization*[1] opened the door for numerous state-level legislative actions restricting abortion, amounting very nearly to compulsory maternity in many states.[2] While the voters and state legislatures in some states have pushed back hard against these developments,[3] an explicitly Christian religious and gendered discourse around motherhood, the family, and reproduction has (re-)emerged.[4]

These current battles focus intensely on questions around when (and how) life begins, with arguments about termination of pregnancy spilling over into controversies about assisted reproductive technologies, such as *in vitro* fertilization (IVF), and abortifacient contraception (contraception that prevents pregnancy after fertilization has occurred) not far behind.[5] In all such conversations, the rights and duties of women to be or become mothers, and the state's role in promoting birth, remain perennial topics of both feminist and anti-feminist concern. Background assumptions about

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1. 142 S. Ct. 2228, 2242, 2257, 2259 (2022) ("hold[ing] that *Roe*. . . must be overruled" and stating that the power to regulate abortion should be returned to the states).

2. See *Interactive Map: U.S. Abortion Policies and Access After Roe*, GUTTMACHER INST., https://states.guttmacher.org/policies/?gad_source=1&gclid=CjwKCAiA_5WvBhBAEiwAZtCU78cWLDJw5N7K1Back2ULM_8NXM79c28iuSqYUvz_Gkvn3aR3YhbBOBoCklsQAvD_BwE (last visited Nov. 21, 2024), for a visual representation of which states have put restrictions and protections in place.

3. *See, e.g.*, VT. CONST. ch. I, art. 22 (amending the Vermont constitution to protect reproductive freedom); *Fact Sheet: Actions to Expand Abortion Access in Oregon*, OREGON HOUSE DEMOCRATS, https://www.oregonlegislature.gov/housedemocrats/Documents/FactSheet%20Abortion%20Access%20in%20Oregon.pdf (Oregon is "committed to . . . expanding access and protections to abortion."); *Kansas Abortion Amendment Election Results*, N.Y. TIMES (Sept. 28, 2022), https://www.nytimes.com/interactive/2022/08/02/us/elections/results-kansas-abortion-amendment.html (rejecting an amendment, fifty-nine percent to forty-one percent, to the Kansas state constitution, which—if passed—would have "pave[d] the way for state lawmakers to pass far-reaching abortion restrictions, or even to pursue a ban"); OHIO CONST. art. I, § 22 (amending the Ohio constitution to protect reproductive freedom).

4. *See, e.g.*, LePage v. Ctr. for Reprod. Med., P.C., Nos. SC-2022-0515, SC-2022-0579, 2024 WL 656591, at *6, *16 (Ala. Feb. 16, 2024) (Parker, C.J., concurring) ("The People of Alabama have declared the public policy of this State to be that unborn human life is sacred. We believe that each human being, from the moment of conception, is made in the image of God, created by Him to reflect His likeness.").

5. *Id.*

the legal, social, biological and other ties between parents (especially mothers) and children, and the state's role in fostering such ties (one meaning of "pro-natalism") loom large.

This Article explores a body of law whose concerns might seem diametrically opposed to current debates about how and when life begins—probate law, which focuses on the end of life and the distribution and devolution of property, especially from parents to children, upon the happening of that inevitable event. Centered as they are upon death, not birth, the probate code and probate law more generally might seem like unlikely places to find pro-natalism, particularly given the express commitment of courts to testamentary freedom and autonomy. Yet it is there, burdening testamentary autonomy and continuously channeling property back into the family.

The jurisprudence of undue influence has long been subjected to searching critique for its interference with testamentary freedom. It is by now nearly a truism that "excluded family members" (mis)use claims of alleged undue influence to challenge dispositions they don't like and appeal to courts' "sense of fairness and morality."[6] These analyses have identified a genuine problem, but often fail to identify the specific preference for dispositions to children, as distinct from a preference for "family" more generally.[7] This Article remedies that shortcoming. Pro-natalism operates within the law of wills in many ways, constraining and burdening the testamentary autonomy of parents and non-parents alike, just as pro-natalism in reproductive law constrains the reproductive autonomy of unwilling parents (especially pregnant persons). Historic common-law assumptions built into all probate codes in the United States both reflect and perpetuate certain ways of thinking about family ties generally, and parental obligations specifically, that undergird reactionary strands in reproductive rights as well.[8] And while pro-natalism is quite explicit as part of the so-called "pro-life" ideology of opponents of abortion, the pro-natalism of the probate code is equally pervasive yet much less obvious. Recognizing the presence of pro-natalism in probate law is therefore part of the larger project of unearthing ways in which "traditional" mores continue to shape the law in problematic and often unseen ways.

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6. ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 290 n.23 (11th ed. 2022); *see* sources cited *infra* note 21.

7. See *infra* Part II for a discussion of the preferential treatment that family members receive in the disposition of an estate.

8. *See infra* notes 50–54 and accompanying text (discussing the common law roots of U.S. probate codes).

Part I defines "pro-natalism" both generally and in the specific context of probate law. Part II describes the pro-natalism of intestate succession, dating back to its common law origins and persisting through more contemporary innovations, including adoption and the inclusion of step-relatives related only by marriage. Part III explores the pro-natalism of the law of wills in areas other than undue influence. This includes interested witness "purging" statutes that protect the intestate share of a related interested witness who is themselves a parent, even when they are unable to rebut the presumption of undue influence; the law of testamentary capacity, which requires that a will-maker be aware of the "natural objects of their bounty"; a principle of will interpretation that reads ambiguous provisions of an otherwise-valid will to favor heirs over non-relatives; anti-lapse statutes, which save gifts to deceased beneficiaries only if they are both related to the testator and leave issue of their own; and lastly, pretermission, which protects an inheritance for an omitted child by attributing to all parents an intention to benefit their children, notwithstanding their failure to do so. Part IV explores the recent cases applying the law of undue influence, including the continuing deployment of the concept of an "unnatural" disposition by the testator as a sign of undue influence. The Conclusion brings all of this together with some reflections.

## I. WHAT IS "PRO-NATALISM"?

The term "pro-natalism" has been used to mean many different things, so it is important first to clarify how I mean to use it here. Prior uses, with or without a hyphen, fall into a few categories, emphasizing both "carrot" and "stick" aspects of government policy. The first category includes all explicit state policies (of the United States and elsewhere) that promote reproduction and large(r) families, by creating various incentives.[9] *New York Times* reporter Claire Cain Miller defined "pronatalist policies" rather benignly as "[g]overnment

9. *See, e.g.*, *Effects of Population Growth on Natural Resources and the Environment: Hearing Before a Subcomm. of the H. Comm. on Gov't Operations*, 91st Cong. 68 (1969) [hereinafter Blake, *Effects of Population Growth*] (statement of Dr. Judith Blake Davis, Chairman, Department of Demography, University of California, Berkeley) (discussing explicit U.S. "pronatalist policies" that incentivize reproduction); Melanie A. Vogel, Note, *Israel's Demographic War*, 2 GEO. J. GENDER & L. 841, 841 (2001) (reflecting on Israeli policies that promote pro-natalism); Meghan Boone, *Reproductive Due Process*, 88 GEO. WASH. L. REV. 511, 533–34 (2020) (discussing how the United States has an interest in pro-natalist policies for economic and other reasons).

benefits to encourage women to have children."[10] The other side emphasizes policies that favor or mandate childbearing even by the unwilling, by restricting access to or punishing abortion and/or contraception.[11] This second meaning is often found in feminist critiques of the full range of pressures, legal and otherwise, brought to bear on women to become and remain pregnant, to bear children, and to rear them.[12]

Historically, the term first came into use in the late 1960s and early 1970s, in the context of population growth and concerns about its environmental impact. Congressional hearings were held in 1969, in which sociologist and demographer Judith Blake testified about what she called "pronatalist policies."[13] She gave the following non-exhaustive list of examples:

> We penalize homosexuals of both sexes, we insist that women must bear unwanted children by depriving them of ready access to abortion, we bind individuals into marriages that they do not wish to maintain, we force single and childless individuals to pay for the education of other people's children, we make people with small families support the schooling of those who have larger ones, and we offer women few viable options to full-time careers as wives and mothers except jobs that are, on the average, of low status and low pay. In effect, we force a massive investment of human resources into the reproductive sphere—far more than we need to invest. It should not surprise us that our demographic productivity is in excess of what we would like.[14]

In 1972, she published *Coercive Pronatalism and American Population Policy*, which explored these ideas further.[15] At that historical moment,

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10. Claire Cain Miller, *Would Americans Have More Babies if the Government Paid Them?*, N.Y. TIMES (Feb. 17, 2021), https://www.nytimes.com/2021/02/17/upshot/americans-fertility-babies.html ("Government benefits to encourage women to have children, known as pronatalist policies, are common in other rich countries . . . .").

11. *See* Blake, *Effects of Population Growth*, *supra* note 9; Boone, *supra* note 9, at 517 (discussing how the state coerces pregnancy by providing "no compensation, protection, or minimum conditions of care").

12. See *infra* notes 14–16, 27–29 and accompanying text for a discussion of feminist critiques of pro-natalist policies.

13. Blake, *Effects of Population Growth*, *supra* note 9.

14. *Id.*

15. Judith Blake, *Coercive Pronatalism and American Population Policy*, *in* 6 COMM'N ON POPULATION GROWTH & AMERICAN FUTURE, ASPECTS OF POPULATION GROWTH POLICY 85, 86–88, 105 (Robert Parks, Jr. & Charles F. Westoff eds., 1972) (expanding on how seemingly anti-natalist policies such as women's pursuit of higher education or women

pro-natalism encompassed a variety of policies we might describe today as expressions of heteropatriarchy, some of which are arguably obsolete. For now, at least, same-sex marriage enjoys constitutional protection,[16] and no-fault divorce is the law of the land.[17] But pro-natalism is not a thing of the past. When Blake published *Coercive Pronatalism*, *Roe v. Wade*[18] had not yet been decided. But today, more than fifty years later, it has been overruled, and once again, state law forces women to "bear unwanted children by depriving them of ready access to abortion."[19]

Pro-natalism thus can be taken to refer to all state-sponsored strategies aimed at population growth, both incentives and restrictions, some more obviously focused on the control of women's bodies and choices than others. Critical accounts of such policies often focus on totalitarian regimes. For example, Paul Lombardo used the term this way in his discussion of 1930s Nazi and French eugenics programs and their American supporters.[20] Alicia Ely Yamin and Agustina Ramón Michel analyzed Argentina's ban on abortion and contraceptives during the third Perón mandate (1973 to 1976), advanced as part of a "pronatalist discourse" under which "contraception and abortion were officially considered to be strategies of imperialist domination of Third World regions by the United States."[21] Recently, Alex Ang Gao critically evaluated the effectiveness of some of China's current pro-natalist policies motivated by "the eagerness of governments . . . to adopt new

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entering the workforce actually reflect pro-natalist views that only further solidify traditional gender roles).

16. Obergefell v. Hodges, 576 U.S. 644, 675 (2015) (holding that same-sex couples may not be deprived of the fundamental right to marry under the Due Process and Equal Protection Clauses of the Fourteenth Amendment).

17. *See No-Fault Divorce States 2024*, WORLD POPULATION REV., https://worldpopulationreview.com/state-rankings/no-fault-divorce-states [https://perma.cc/8ULY-JZ25] (indicating that all U.S. states now allow no-fault divorces, which allow a couple to divorce without providing a reason to the court).

18. 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

19. Blake, *Effects of Population Growth*, *supra* note 9.

20. Paul A. Lombardo, *"A Vigorous Campaign Against Abortion": Views of American Leaders of Eugenics v. Supreme Court Distortions*, 51 J.L. MED. & ETHICS 473, 475–76 (2023) ("Laughlin focused on the pronatalist Nazi program of outlawing abortions . . . .").

21. Alicia Ely Yamin & Agustina Ramón Michel, *Using Rights to Deepen Democracy: Making Sense of the Road to Legal Abortion in Argentina*, 46 FORDHAM INT'L L.J. 377, 389 (2023).

policies to boost declining fertility and birth rates."[22] Gao also favorably assessed the pro-natalist goals, though not the methods, of similar post-World War II Soviet policies.[23]

The political valence of pro-natalism is thus highly contentious. Michelle Oberman recently used the term to describe Israel's policies, simply stating "that the government wants people to have babies,"[24] while more than twenty years ago, Melanie Vogel presented a searching (and scathing) indictment of Israel's pro-natalism as a part of "a war in which Israeli women's bodies are used as weapons, and pronatalist policies are used as ammunition."[25] Similarly, Meghan Boone details a variety of U.S. policies constituting a "pronatalist position,"[26] while acknowledging that government efforts to boost birthrates have not been applied across all demographic groups and reflect the history of white supremacy and anti-Black racism.[27] Boone is also among those scholars, following Blake, who see pro-natalist policies as inevitably shading into "compelled [reproduction]" with anti-feminist consequences.[28]

In a narrower way, the term can also be used to simply mean pro-*birth* or pro-*baby*. Judith Daar uses it this way when she argues that "IVF is a fundamentally pronatalist medical technique" and refers to it as a "pronatalist technology,"[29] because it aims at baby-making, even while acknowledging that IVF results in the destruction of (some) embryos.[30]

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22. *See* Alex Ang Gao, Comment, *Babies and Individual Income Tax: How to Boost China's Fertility*, 18 U. PA. ASIAN L. REV. 275, 296 (2023).

23. *Id.* at 326 (discussing how the Bachelor Tax in the Soviet Union incentivized people to have children (citing Aaron O'Neill, *Total Fertility Rate in Russia from 1840 to 2020*, STATISTA (Aug. 9, 2024), https://www.statista.com/statistics/1033851/fertility-rate-russia-1840-2020 [https://perma.cc/S7ZB-V7JH])).

24. Michelle Oberman, *What Will and Won't Happen When Abortion is Banned*, 9 J.L. & BIOSCIENCES 1, 12 (2022); *see also* Deborah A. Widiss, *Time off Work for Menstruation: A Good Idea?*, 98 N.Y.U. L. REV. ONLINE 170, 177 (2023) (referring to "pro-natalist government policies" and their impact on sex equality).

25. Melanie A. Vogel, Note, *Israel's Demographic War*, 2 GEO. J. GENDER & L. 841, 841 (2001).

26. Meghan Boone, *Reproductive Due Process*, 88 GEO. WASH. L. REV. 511, 531 (2020).

27. *See id.* (citing DOROTHY E. ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY (1997)).

28. *See generally id.* at 530–35 (describing the various state interests in compelled reproduction that have been asserted or could be imagined, i.e., protecting potential life, promoting childbirth, and other moral and economic reasons that support a pro-natalist stance).

29. Judith Daar, *Where Does Life Begin? Discerning the Impact of* Dobbs *on Assisted Reproductive Technologies*, 51 J.L. MED. & ETHICS 518, 523, 525 (2023).

30. *Id.* at 523.

Pro-natalism, understood this way, is at least compatible with reproductive freedom and autonomy.[31] However, the adoption of a "pro-natalist [medical] principle that health care decisions during pregnancy should be guided by the goal of saving the life of the fetus, if at all possible,"[32] when this is understood to mean prioritizing the unborn over the mother, immediately implicates feminist concerns.

The term is also sometimes used more loosely, applied to any "pro-family" policy regardless of whether it tends to encourage larger families,[33] and even *more* loosely, to any position simply advocating for "increasing the number of humans,"[34] in effect as a synonym for pro-population growth. By contrast, a much narrower use of the term applies it to the regulation of pregnancy, legal burdens on access to abortion, and laws favoring childbirth by comparison. J. Shoshanna Ehrlich uses it this way in evaluating parental notification laws for minors seeking abortions, but not childbirth, thus "leaving childbirth unburdened."[35] Nikolas Youngsmith effectively brings these anti-abortion, anti-contraception, and population growth goals of pro-natalism together to include all policies that "aim to ensure that as many fetuses are carried to term as possible."[36]

For my purposes here, I give the term yet another meaning, to refer to the systematic privileging of the connection between parents and children in the context of wills and intestate succession. Children are the first generation of "issue," the term used in probate law to refer to

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31. In fact, it might enhance it; see, for example, Ana B. Ibarra, *Should Health Insurers Cover the Cost of Fertility Treatment?*, CALMATTERS (May 19, 2022), https://calmatters.org/health/2022/05/fertility-treatment-costs-california [https://perma.cc/7U4R-LV4M], for a discussion about a proposed California law that would have required insurance companies to offer fertility treatment as a covered benefit to give people the choice about when they start a family.

32. Joan H. Krause, *Pregnancy Advance Directives*, 44 CARDOZO L. REV. 805, 807 (2023).

33. Mona L. Hymel, *The Population Crisis: The Stork, the Plow, and the IRS*, 77 N.C. L. REV. 13, 48–49 (1998) ("Consistent with national population policies, U.S. tax policies historically have been pronatalist, primarily through government subsidies that provided for the financial burden of children.").

34. Joshua L. Sohn, *Can Pro-Natalists and Environmentalists Find Common Ground?*, INST. FOR FAM. STUD. (Jan. 23, 2020), https://ifstudies.org/blog/can-pro-natalists-and-environmentalists-find-common-ground [https://perma.cc/BVZ3-73SS].

35. J. Shoshanna Ehrlich, *The Abortion Rights of Teens in the Post-*Dobbs *Era*, 30 CARDOZO J. EQUAL RTS. & SOC. JUST. 1, 22–23 (2023).

36. Nikolas Youngsmith, Note, *The Muddled Milieu of Pregnancy Exceptions and Abortion Restrictions*, 49 COLUM. HUM. RTS. L. REV. 415, 426 (2018).

a person's lineal descendants (children, grandchildren, and so on).[37] This metaphor is material and evocative. Heterosexual conception depends on reproductive material that issues from a male and enters a female gestational body, from which a child later issues. Pro-natalism in probate law refers to all of the ways this biological process is given *legal* significance, none of which is necessary or automatic. In this context, pro-natalism refers to all the rules by which the law simultaneously codifies and seeks to naturalize the dramatically preferential inheritance-related legal treatment of biological family members generally, of issue more specifically, and of children most of all. Numerous probate provisions reflect deep assumptions about "natural" affections and affinities that in turn shape normative preferences about property distribution, including at death, facilitating those dispositions that align with these assumptions and burdening those that do not.[38] Taken together, these provisions place obstacles in the way of leaving property away from children, especially outside the family, and regularly impose default rules whose effect is to bring property back into the hands of the testator's children and issue.[39] Those who wish to defy or deviate from those rules must plan much more deliberately, and anticipate more, and more successful, challenges to their plans.

Unlike some state policies labeled as pro-natal, these probate rules do not create incentives to reproduce as such. However, they create an easy, almost frictionless, way to transmit property to those who choose (and are able) to do so.[40] The probate system rewards children for simply existing—handsomely, given that inheritance is a primary form of intergenerational wealth transmission and the reproduction of economic inequality in the United States.[41] It is in all of those senses that probate law can accurately be described as pro-natal.

Many of the rules I will survey here are default rules, meaning that it is possible (and in fact, not terribly difficult) to effectively opt out of

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37. *See* UNIF. PROB. CODE § 1-201(9), (24) (UNIF. L. COMM'N 2019) (defining "issue" and "descendant").

38. *See infra* Part III (discussing the prevalence of pro-natalism underlying the law of wills).

39. *See infra* Section III.E (discussing the rule of pretermission, which allows an omitted child to receive their full intestate share).

40. See *infra* Part III for a discussion of various court-sanctioned pro-natalist practices found in the law of wills.

41. Andrew Van Dam, *How Inheritance Data Secretly Explains U.S. Inequality*, WASH. POST (Nov. 10, 2023, 6:00 AM), https://www.washingtonpost.com/business/2023/11/10/inheritance-america-taxes-equality.

them by proper drafting. However, the reality is that most people die intestate, and even among those who plan their estates, only the most motivated and sophisticated testators would be likely to draft around some of these provisions.[42] And of course, the idea that one's property "ought" to pass to one's children is so deeply embedded that few might wish to deviate, even if they knew they could.[43]

The claims made here about statutory probate law will be supported primarily by reference to the Uniform Probate Code (UPC) and the California Probate Code. Cases are drawn from many states over many years, although the focus is on more recent cases. The UPC has been adopted partially or in its entirety by nineteen states,[44] and many of the specific provisions addressed here have been adopted more widely, even by states that have not adopted the entire UPC.[45] Louisiana, which has a civil law system, has adopted substantively similar provisions also discussed herein.[46] While individual state probate codes, common law, and cases applying them may not exhibit every one of the features described here, they are common enough to support the claims made.

## II. THE PRO-NATALISM OF THE LAW OF INTESTATE SUCCESSION

Most individuals in the United States die intestate—that is, without a valid will disposing of their property at death.[47] Some die wholly intestate, having never executed any planning documents at all; others

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42. *See* Reid Kreiss Weisbord & David Horton, *68% of Americans Do Not Have a Will*, THE CONVERSATION (May 19, 2020, 8:13 AM), https://theconversation.com/68-of-americans-do-not-have-a-will-137686 [https://perma.cc/93MN-BM99] (noting that there are many differences among states in what they allow testators to do when drafting their wills).

43. *See infra* Part II.

44. *Uniform Probate Code*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/uniform_probate_code [https://perma.cc/SU3T-W5JK].

45. RACHEL HIRSHBERG, UNIFORM PROBATE CODE (UPC) ADOPTION BY THE STATES (Lewis, Rice & Fingersh 2013), https://www.scribd.com/document/267956698/50-State-Probate-Code-Survey-authcheckdam (seventeen states having fully adopted the UPC and thirty-three states having their own probate codes with some influence from the UPC).

46. *See* LA. CIV. CODE ANN. art. 1493 (2003) and discussion *infra* note 52. Arguably, the forced heirship statute in Louisiana and other jurisdictions with Roman civil law origins is even *more* pro-natal than the common law. *See, e.g.*, Ralph C. Brashier, *Protecting the Child from Disinheritance: Must Louisiana Stand Alone?*, 57 LA. L. REV. 1, 1, 4 (1996) (commending Louisiana for protecting the "young children of its testators . . . from disinheritance").

47. Some recent surveys suggest the fraction may be as high as two-thirds. *See* Weisbord & Horton, *supra* note 42.

die partially intestate because a valid will fails to dispose of the entirety of their property.[48] The estate of an intestate decedent is distributed under the probate code in effect in the state of the person's domicile at death.[49] As a result, the scheme of intestate succession provided for by the law of the decedent's home state matters a great deal in determining the ultimate bottom-line question in any probate matter: who gets what.

At the most general level, no one but a relative is *ever* a presumptive heir, with descendants always favored over ancestors or collateral kindred.[50] This, all by itself, is perhaps the most over-arching pro-natalist aspect of intestate succession, so familiar as to seem perhaps obvious and unquestionable. Feudal artifacts like primogeniture and inheritance only by males are long gone.[51] But the UPC and the probate codes of every state reflect their common law origins by continuing to place one category of heirs above all others: issue, the direct descendants of the intestate decedent,[52] including children,

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48. RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 2.1(a) (AM. L. INST. 1999).

49. SITKOFF & DUKEMINIER, *supra* note 6, at 70.

50. This principle has deep common law roots, going back to the earliest years after the Norman Conquest. As S.F.C. Milsom explained,

> By the Assize of Northampton in 1176 the heir was to have seisin of his dead ancestor's holdings . . . . No longer was a lord to resume seisin upon the death of his tenant, even for the purpose of giving that seisin to the heir. The heir was to go straight in.

S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 94, 115 (1969). This action, called *Mort d'ancestor*, is "almost a final step[] in the rise of heritability," *id.*,— in other words, the beginning of inheritance as we know it. At common law, provision for spouses (widows) was made outside of intestate succession, by the right known as "dower," confirmed by the Magna Carta in 1215. *See, e.g.*, *Dower in Equitable Estates*, 1 ST. JOHN'S L. REV. 195, 195 (1927).

51. The American colonies did not adhere to primogeniture, even in the pre-Revolutionary period. *See, e.g.*, JAMES DAVIS, A COMPLETE REVISAL OF ALL THE ACTS OF ASSEMBLY, OF THE PROVINCE OF NORTH-CAROLINA, NOW IN FORCE AND USE 343–44 (1773), https://digital.ncdcr.gov/Documents/Detail/complete-revisal-of-all-the-acts-of-assembly-of-the-province-of-north-carolina-now-in-force-and-use-together-with-the-titles-of-all-such-laws-as-are-obsolete-expired-or-repealed-with-marginal-notes-and-references-and-an-exact-table-to-the-whole/1955563?item=2095089 ("An Act appointing the Method of distributing Intestates Estates."). The United Kingdom did not abolish primogeniture until the 1925 Administration of Estates Act. Administration of Estates Act 1925, 15 & 16 Geo. c. 23 (Eng.), https://www.legislation.gov.uk/ukpga/Geo5/15-16/23/introduction.

52. UNIF. PROB. CODE § 2-103(c) (UNIF. L. COMM'N 2019); CAL. PROB. CODE § 6402(a) (Deering 2015). Forced heirship, the civil law approach, exists in the United States only in Louisiana. LA. CIV. CODE ANN. art. 1493 (2003). This statute provides for

grandchildren, and so on, by birth or (since the nineteenth century) adoption.[53]

Statutes of intestate succession list groups of heirs in lexical priority. This means that the statute ranks groups of potential heirs from the top down; and if there is even *one* person in a particular category, they inherit to the complete exclusion of all other potential heirs further down in the scheme.[54] Issue constitute the top category under every succession scheme, and take to the derogation of everyone else, including the next category, parents.[55] When the surviving issue include persons from different generations (for example, a group of heirs including children of the decedent, as well as grandchildren who are the issue of a decedent's deceased child), probate codes have developed a variety of approaches for distributing those shares.[56] In a general way, however, children take "by representation" of their deceased parent, following the common law rule of thumb that no one inherits who has a living parent who inherits.[57]

After issue come parents. In California, if an intestate decedent has even one surviving parent, that person takes the entire estate, and does not share it with the intestate decedent's siblings (including half-siblings who are children of a predeceased parent), nieces, nephews, and their issue, and so on.[58] The UPC takes a slightly different approach: living parents take in preference to any of their *own* descendants (other than the intestate's own issue), but if a parent is

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"descendants of the first degree"—that is, children of the decedent. This is not simply a default statute; it is mandatory. *Id.*

53. The recognition of adoption as creating full rights of inheritance appears in U.S. law in 1851. 1851 Mass. Acts 815 ("An Act to provide for the Adoption of Children.").

54. *E.g.*, UNIF. PROB. CODE § 2-103(c) (noting that if a decedent is survived by one or more descendants, any part of the intestate which does not pass to the surviving spouse passes to the descendants).

55. *Id.*

56. *See* CAL. PROB. CODE §§ 240, 245–247 (Deering 1991) (outlining the division and distribution of property among a variety of generations).

57. UNIF. PROB. CODE § 2-103(c) (stating that any part of the intestate not passing to the surviving spouse passes by representation to the surviving descendants).

58. CAL. PROB. CODE § 6402(a)–(c). California Probate Code section 6402(d) is slightly misleading on this front, because it includes both grandparents and the issue of grandparents. The language of section 6402(d), however, makes clear that even one grandparent would take to the exclusion of any issue of any grandparent. *Id.* § 6402(d).

deceased, issue of that parent (not of the surviving parent) take that parent's share.[59]

Rules about how a surviving spouse and decedent's issue share the estate illuminates another dimension of pro-natalism and assumptions about parents, children, and stepfamilies. The assumption, perhaps often empirically accurate, is that a parent will "naturally" look out for the future property interests of their own children but not of any (unadopted) stepchildren. Thus, under the UPC, if all the children of the surviving spouse are also the intestate decedent's children, the surviving spouse (their other parent) takes it all, and those children do not inherit.[60] The implicit assumption here is presumably that the children of the surviving spouse and the decedent will someday inherit from their second parent to die, if anything is left. Under the UPC, only if one or more of the children are *not* in common do the decedent's children and the surviving spouse share the estate.[61] In other words, the rule prevents an intestate decedent's property from passing entirely to a surviving spouse with children of their own, who might later be favored over the children of the first spouse to die.[62]

Intestate schemes of succession thus reflect, in an unbroken line hundreds of years old, the pro-natalist preference for keeping property within the family, with preference for lineal descendants ("issue"). This has been altered in just a few important ways in the past five hundred years: the abolition of primogeniture and male-only inheritance; the recognition of adoption as creating two-way rights of inheritance (beginning in the United States in 1851 in Massachusetts, and then spreading more widely[63]); and finally, much more recently, the

59. *Compare id.* § 6402(b) (instructing that part or the entire intestate passes to the decedent's parent or parents equally if there is no surviving issue), *with* UNIF. PROB. CODE § 2-103(d)–(e) (directing that if a decedent is survived by parents, the estate is divided equally between surviving parents and deceased parents with surviving descendants).

60. UNIF. PROB. CODE § 2-102(1)(B).

61. *Id.* §§ 2-102(3)–(4), 2-103(c).

62. Under California law, the surviving spouse and the children of the intestate decedent inherit regardless of whether those children are also the surviving spouse's children. *See* CAL. PROB. CODE § 6401 (Deering 2015) (noting the share of property received by the spouse); *id.* § 6402(a) (noting the share of property received by the issue).

63. 1851 Mass. Acts 815 ("An Act to provide for the Adoption of Children.").

insertion of unadopted stepchildren into the line of succession (albeit well below most kindred).[64]

Under the UPC, unadopted stepchildren can inherit, but they are the very lowest-priority heirs, only taking in the absence of anyone as closely related as a first cousin.[65] After them comes "escheat," the return of the property to the sovereign (the state) because there is no heir.[66] The UPC has abolished inheritance by so-called "laughing heirs" (relatives more distant than grandparents and their descendants).[67] In California, quite strikingly, unadopted stepchildren take *ahead* of "next of kin," that is, ahead of blood relations as close as great-grandparents and their descendants (such as second cousins).[68] This may reflect California's role at the cutting edge of marriage and divorce law; California also has by far the largest absolute number of multiply-married people (although not even close to the highest *prevalence* of remarriage).[69] California's intestacy statute also includes, far down the list, after next of kin but before escheat, in-laws (parents of a predeceased spouse, as well as their issue, sisters- and brothers-in-law, nieces, nephews, and so on of a predeceased spouse).[70] California takes a maximalist approach to avoiding escheat, combining deference to history with contemporary innovation. As at common law, there is no limit on how closely related a relative must be to inherit, and the circle of inheritance has been widened to permit many persons related to the decedent only by marriage to do so. For all these changes, however, the primacy of "issue" in intestate succession is undisturbed.

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64. This took place in California with a 1983 legislative reform, effective in 1984. University of the Pacific, McGeorge School of Law, *Administration of Estates*, 15 PAC. L.J. 423, 441 n.202 (1984) (citing CAL. PROB. CODE § 6402(e)).

65. UNIF. PROB. CODE § 2-103(j), (g).

66. *Id.* § 2-105 ("If there is no taker under the provisions of this [article], the intestate estate passes to the state." (alteration in original)).

67. *Id.* § 2-103(c) (limiting inheritance to grandparents and their issue); *see also In re* Verrall Est., 25 Pa. D. & C.2d 692, 695 (Pa. Orphans' Ct. 1961) (discussing change in the law cutting off first cousins and more distant relatives as "serving to frustrate the so-called 'laughing heir'"); United States v. Orth, 51 F. Supp. 682, 687 (E.D.S.C. 1943) ("his laughing heirs spend his illgotten wealth").

68. CAL. PROB. CODE § 6402(e), (f).

69. Andrew Lisa, *States that Remarry the Most*, STACKER (Sept. 5, 2018), https://stacker.com/your-state/states-remarry-most [https://perma.cc/YE53-L3L4].

70. PROB. § 6402(g).

## III. THE PRO-NATALISM OF THE LAW OF WILLS

While pro-natalism in one form or another may be unsurprising in the intestacy laws, we would not necessarily expect to find it in the law of wills. After all, by making a will, a person is typically putting a *different* distribution in place than would be achieved by intestate succession. Second, especially in the U.S. context (as distinct from both its British roots and other European schemes of succession), American probate law and courts explicitly prize testamentary autonomy, the right of a competent testator to dispose of their property at death however they wish.

As the Supreme Court of Illinois put it, "Neither the Constitution of the United States nor the Constitution of the State of Illinois speaks to the question of testamentary freedom. However, our statutes clearly reveal a public policy in support of testamentary freedom."[71] The court explicitly identified this freedom with "the ability of a testator to choose the objects of his bounty."[72] They continued, "Our case law also demonstrates the existence of a public policy favoring testamentary freedom, reflected in the many cases in which a court strives to discover and to give effect to the intent of a deceased testator or settlor of a trust."[73] The Supreme Court of Washington similarly stated, "A basic principle underlying any discussion of the law of wills is that an individual has the right and the freedom to dispose of his or her property, upon death, according to the dictates of his or her own desires."[74] The Supreme Court of Missouri: "the law favors freedom in the testamentary disposition of property."[75] Louisiana's Civil Code is to the same effect: "a testator possesses broad testamentary freedom."[76] The Supreme Court of Oregon referred to "the long and firmly-established public policy of this jurisdiction to give great latitude to a testator in the final disposition of his estate."[77] It then quoted with approval this paean to testamentary freedom, from a 1902 Oregon Supreme Court case:

> The right of one's absolute domination over his property is sacred and inviolable, so that he may do what he will with his own, if it is not to the injury of another. He may bestow it [whithersoever] he

71. *In re* Est. of Feinberg, 919 N.E.2d 888, 895 (Ill. 2009).
72. *Id.*
73. *Id.* at 896.
74. *In re* Est. of Malloy, 949 P.2d 804, 806 (Wash. 1998) (en banc).
75. McCormack v. Berking, 290 S.W.2d 145, 150 (Mo. 1956).
76. Succession of Weidig, 690 So. 2d 134, 136 (La. Ct. App. 1997).
77. Streight v. Est. of Streight, 360 P.2d 304, 305 (Or. 1961).

> will and upon whomsoever he pleases, and this without regard to natural or legitimate claims upon his bounty; . . . and the right to dispose of one's property by will, and bestow it upon whomsoever he likes, is a most valuable incident to ownership, and does not depend upon its judicious use.[78]

Courts recognize limits on testamentary freedom ("[t]estamentary freedom is not absolute"[79]) but generally confine them to the claims of creditors, statutory rights of children to child support, and spousal shares.[80] At common law, among all potential takers of a person's estate, only a spouse has inheritance rights that cannot be defeated—even minor children may be completely disinherited.[81] In community property states, the surviving spouse is protected by receiving a share of the community property by operation of law; the testator-spouse thus has the right to leave any separate property however they wish.[82]

To obtain a disposition different from that provided for by the state's intestacy scheme, a person must execute a valid will. Because of the universal statutory preference for inheritance by family, and specifically by issue, no matter how a person's actual life is arranged, anyone who wishes for their property to pass to a non-relative must affirmatively so plan. Those who are comfortable with property staying in the family need only plan if they wish to vary the priority order imposed by statute. But the transaction cost of will-making itself,

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78. *Id.* at 305 (omission in original) (quoting *In re* Holman's Est., 70 P. 908, 913 (Or. 1902)).

79. L.W.K. v. E.R.C., 735 N.E.2d 359, 363 (Mass. 2000).

80. *See, e.g.*, *id.* at 363–64 (identifying claims of creditors, child support obligations, and spousal elective shares as "certain preexisting obligations[, which] have priority over all testamentary dispositions").

81. *See, e.g.*, *Streight*, 360 P.2d at 305 ("In 1853 the legislature conferred upon every person of qualified age and sound mind the right to devise and bequeath all his estate, real and personal, saving such as is specially reserved by law to the decedent's spouse."). Except in Louisiana. *Compare* Herbert D. Laube, *The Right of a Testator to Pauperize His Helpless Dependents*, 13 CORNELL L.Q. 559, 594 (1928) (asserting that the legislature has a duty to address the existing judicial interpretation which enables minors to be disinherited), *and* Brian C. Brennan, Note, *Disinheritance of Dependent Children: Why Isn't America Fulfilling Its Moral Obligation?*, 14 QUINNIPIAC PROB. L.J. 125, 126 (1999) (noting that most of the United States has not enacted a statute to protect children against disinheritance in a parent's will), *with* Ralph Brashier, *Protecting the Child From Disinheritance: Must Louisiana Stand Alone?*, 57 LA. L. REV. 1, 1 (1996) (stating that Louisiana is the only state to provide young children of its testators with direct protection from disinheritance).

82. *See, e.g.*, CAL. PROB. CODE § 100(a) (Deering 2017); First Nat'l Bank of Nev. v. Wolff, 202 P.2d 878, 882 (Nev. 1949) ("Since everything that would pass under the will of decedent was his separate property, he had complete testamentary freedom . . . .").

imposed on all of those with non-natalist wishes, is just the beginning of pro-natalism in the wills law (as distinct from the law of intestate succession).

### *A. "Purging" Interested Witnesses Down to Their Intestate Share: The Pro-Natalism of the Law of Will Attestation*

A formal will under the law of all states must be "attested"—that is, witnessed by persons who affix their signatures and could testify that the necessary will formalities were fulfilled.[83] Hundreds of years ago under English law, a person who received a gift in a will and also witnessed that will was disqualified from testifying in support of it, potentially resulting in intestacy.[84] This unfortunate result was solved by a statute enacted in 1752, during the reign of George II.[85] This statute provided, in pertinent part,

> that if any person shall attest the execution of any will or codicil, to whom any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate, other than and except charges on lands, [etc.,] for payment of any debt or debts, shall be thereby given or made, such devise . . . shall, so far only as concerns such person attesting the execution of such will or codicil, or any person claiming under him, be utterly null and void, and such person shall be admitted as a witness to the execution of such will or codicil, within the intent of said Act; notwithstanding such devise.[86]

In other words, under this law, the *gift* is "null and void," but the *will* is valid. This original ("first generation") statute, which became known as a "purging" statute, became the law of all British colonies, and later of each of the United States.[87] In some states, the purging approach

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83. Approximately half of the states, including California, also recognize holographic (handwritten and unwitnessed) wills. *See* CAL. PROB. CODE § 6111 (Deering 1991).

84. SITKOFF & DUKEMINIER, *supra* note 6, at 163. This was also the law of Louisiana. LA. CIV. CODE ANN. art. 1592 (1870), *amended by* LA. CIV. CODE ANN. art. 1582 (1997); *see also id.* art. 1582 cmt. (b) (noting "[h]istorically, legatees were prohibited altogether from being witnesses to testaments, under penalty that the entire testament was invalid").

85. Wills Act 1751, 25 Geo. 2 c.6 (Eng.) (repealed 1837).

86. Taylor v. Taylor, 30 S.C.L. 531, 537 (1 Rich.) (1845) (quoting Wills Act 1751, 25 Geo. 2 c.6 (Eng.) (repealed 1837)).

87. *See, e.g.*, Elliot v. Brent, 17 D.C. 98, 102 (6 Mackey) (1887) ("That this statute is in force in this District cannot be questioned. . . . [I]t was intended to apply to the colonies . . . and it was recognized as in force in Maryland from its passage to the date

taken by the Statute of George II is still the law. For example, North Carolina's purging statute, first enacted in 1784, is to the same effect even today.[88] Whatever approach is taken, however, the law throughout the United States is that the presence of an interested witness does not invalidate a will.[89]

In its original form, the purging statute made no distinction between family and non-family interested witnesses. However, in 1785, Virginia enacted a statute preserving the intestate share of "the witness-legatee who would have taken a share under the statute of descent and distribution if the testator had died without a will."[90] A provision like this has been part of Texas law since 1840.[91] Texas law currently reads,

> Should any person be a subscribing witness to a will, and also be a legatee or devisee therein, if the will cannot be otherwise established, such bequest shall be void, and such witness shall be allowed and compelled to appear and give his testimony in like manner as if no such bequest had been made. But, if in such case the witness would have been entitled to a share of the estate of the testator had there been no will, he shall be entitled to as much of such share as shall not exceed the value of the bequest to him in the will.[92]

Thus, under Texas law, a witness-beneficiary-heir is only purged to the extent their bequest exceeds their intestate share. By contrast, a "stranger" loses everything. Many states enacted these second-generation purging statutes in the nineteenth century and still have

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of the cession of the District."). Louisiana did not change its law until 1986. LA. CIV. CODE ANN. art. 1592 (1997), cmt. (b) ("The harshness of that result was mitigated in 1986 when Article 1592 (1870) was revised by Act No. 709 to permit the testament to be upheld and merely deprive the witness of the legacy.").

88. Allison's Ex'rs v. Allison, 11 N.C. 141, 175 (4 Hawks) (1825) (stating that a will is valid when it is in writing, signed by the testator, and attested to by two uninterested witnesses); N.C. GEN. STAT. § 31-10(b) (2012) (explaining that a will is void unless there are at least two uninterested witnesses present at the time of signing). *See generally* HENRY POTTER, J.L TAYLOR & BARTLETT YANCEY, LAWS OF THE STATE OF NORTH CAROLINA INCLUDING THE TITLES OF SUCH STATUTES AND PARTS OF STATUTES OF GREAT BRITAIN 471 (1821), https://digital.ncdcr.gov/documents/detail/laws-of-the-state-of-north-carolina-including-the-titles-of-such-statutes-and-parts-of-statutes-of-great-britain-as-are-in-force-in-said-state-...-with-marginal-notes-and-references-1821-v.1/558788?item=681375("An Act to Regulate the Descent of Real Estate").

89. *See, e.g.*, CAL. PROB. CODE § 6112(b) (Deering 1991); UNIF. PROB. CODE § 2-505(b) (UNIF. L. COMM'N 2019); LA. CIV. CODE ANN. art. 1582 (1997).

90. 9 GERRY W. BEYER, TEXAS LAW OF WILLS § 18:32 (4th ed. 2023).

91. *Id.*

92. TEX. PROB. CODE ANN. § 254.002 (West 2014).

them today. Louisiana enacted a statute like this in 1977.[93] Second-generation purging statutes are clearly pro-natal, because only related persons have any inheritance rights at all.

California and a (bare) majority of the states have enacted an even more permissive purging statute. Under these third-generation purging statutes, attestation by an interested witness does not automatically deprive the witness of their gift, but rather raises a rebuttable presumption that the bequest was procured by undue influence.[94] This statutory innovation is not pro-natal; both related and unrelated witnesses have the opportunity to receive their full bequest if they can rebut the presumption. But the bias reappears if the interested witness *fails* to rebut it. Under California Probate Code section 6112(d), District of Columbia Code section 18-104(b), and similar statutes, an interested witness unable to rebut the presumption is only purged down to the lesser of their gift or their intestate share, of the estate.[95] What this means as a practical matter is that while an interested witness who is a "stranger to the blood"[96]—not present in the scheme of intestate succession at all—will lose their entire gift if they cannot rebut the presumption, an heir is purged down only to their intestate share or the gift itself, whichever is less.[97]

Both second- and third-generation purging statutes, together constituting the law of a majority of the states, favor witness-beneficiary-

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93. LA. CIV. CODE ANN. art. 1582 cmt. (b) ("This article changes the law to permit a witness who is related to the testator to inherit at least as much as he or she would have been able to inherit under the laws of intestacy if the decedent had died intestate. The new rule does not protect a legatee/witness who is unrelated to the testator, but it mitigates somewhat the harshness of the existing rule, and it is in accord with the prevailing rule in most of the United States.").

94. PROB. § 6112(c).

95. *Id.* § 6112(d); D.C. CODE § 18-104(b) (1965).

96. This phrase goes back to the eighteenth century and is still in use. Stuart v. Carson, 1 S.C. Eq. 500, 511 (1 Des. Eq. 1796); *see also* State v. Clark, 71 P. 20, 23 (Wash. 1902) (validating a tax exemption for the first $10,000 passing to a relative but not to a "stranger to the blood"); Buzzard v. Fass, 315 A.3d 1119, 1132 (Conn. App. Ct. 2024) (discussing the common law presumption to exclude adopted children—"stranger[s] to the blood"—from inheritance where intent of the testator was ambiguous).

97. There is a different result if undue influence is affirmatively proved. In that case, the undue influencer loses their bequest entirely (and is treated as predeceasing). *See* CAL. PROB. CODE § 6104 (Deering 2009) ("The execution or revocation of a will or a part of a will is ineffective to the extent the execution or revocation was procured by duress, menace, fraud, or undue influence."); UNIF. PROB. CODE § 3-407 (UNIF. L. COMM'N 2019) ("Contestants of a will have the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake or revocation.").

heirs over strangers. For example, if a one-half heir (one of two surviving children of the testator, for example) is a witness to a will in which they receive one-third of the estate (with, perhaps, the other two-thirds going to their own children), and they are unable to rebut the presumption of undue influence, they still receive one-third of the estate—their gift in the will—because that is a smaller share than their one-half inheritance by intestacy. A stranger would receive nothing at all. Conversely, if a one-third heir (one of three children of the testator) receives one-half of the estate in a will that heir has witnessed, if they are unable to rebut the presumption, they are purged down to their one-third inheritance. Again, a stranger would receive nothing. These third-generation statutes almost eliminate purging—but just for heirs (typically, though not exclusively, issue).[98] Thus, the same favoritism for heirs first introduced by Virginia in 1785 persists today in most state statutes addressing interested witnesses.

Notably, the UPC has eliminated pro-natalism in the treatment of interested witnesses by eliminating purging entirely. UPC section 2-505(b) simply provides that an interested witness does not invalidate a will, and lets it go at that.[99] Only the comment reflects the historical favoritism shown to witness-beneficiary-heirs, explaining the abolition of purging under UPC section 2-505(b) by stating, "the rare and innocent use of a member of the testator's family [as a witness] on a home-drawn will is not penalized."[100] But neither, of course, is the use of an unrelated witness-beneficiary. Section 2-505(b) does not distinguish between interested family-member witnesses and strangers,

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98. Note also that California Probate Code section 6110(c)(2) is available to cure defects in witnessing, which may result in the attestation of an interested witness being completely disregarded. CAL. PROB. CODE § 6110(c)(2) (Deering 2009). Although the language of section 6110(c)(2) appears to permit this, no such case has yet been decided in California.

99. UNIF. PROB. CODE § 2-505(b).

100. *Id.* § 2-505(b) cmt. Louisiana Civil Code article 1479 is called "Nullity of donation procured through undue influence," although the text of the code section itself deliberately does *not* use the word "undue" in its text. LA. CIV. CODE ANN. art 1479 (1991). Instead, it says, "A donation *inter vivos* or *mortis causa* shall be declared null upon proof that it is the product of influence by the donee or another person that so impaired the volition of the donor as to substitute the volition of the donee or other person for the volition of the donor." *Id.* As the 1991 Revision Comment explains, "This Article intentionally does not use the word 'undue' to describe the influence (although the word is intentionally used in the title of the Article and in two later Articles that refer to this Article), but instead defines the influence as being of such a nature that it destroys the free agency of the donor." *Id.* cmt. b.

nor is it restricted to "home-drawn" (unlawyered) wills.[101] Perhaps it is no coincidence that only four states appear to have adopted this provision,[102] possibly reflecting the persistence both of concerns about interested witnesses and of residual pro-natalist bias.

### *B. The "Natural Objects of the Testator's Bounty": Building Pro-Natalism into the Law of Testamentary Capacity*

In order to make a valid will, the testator must have testamentary capacity. As an expression of both the preference for testacy and respect for testamentary autonomy, the standard is a low one. In fact, testamentary capacity is the second-lowest level of capacity known to the law (only marital capacity is lower).[103] The definition of capacity is not even phrased in terms of what a testator must *actually* know, but only what they must be *able* to know and understand, in order to make a valid will.[104] The standard is intentionally minimal and undemanding.

The UPC borrows its standard of capacity from the Restatement (Third) of Property section 8.1(b), which in turn codifies a longstanding common law definition:

> If the donative transfer is in the form of a will . . . the testator . . . must be capable of knowing and understanding in a general way the nature and extent of his or her property, the natural objects of his or her bounty, and the disposition that he or she is making of that property, and must also be capable of relating these elements to one another and forming an orderly desire regarding the disposition of the property.[105]

For our purposes here, the key phrase is "natural objects of his or her bounty." Some version of this element of capacity exists in most

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101. UNIF. PROB. CODE § 2-505(b) cmt.

102. ALA. CODE § 43-8-134 (1982); N.D. CENT. CODE § 30.1-08-05 (1973); S.D. CODIFIED LAWS § 29A-2-505 (1995); VA. CODE ANN. § 64.2-405 (1950).

103. *See, e.g.*, *In re* Marriage of Greenway, 158 Cal. Rptr. 3d 364, 373 (Ct. App. 2013) (reviewing relevant case law and concluding "mental capacity can be measured on a sliding scale, with marital capacity requiring the least amount of capacity, followed by testamentary capacity, and on the high end of the scale is the mental capacity required to enter contracts").

104. *Testamentary Capacity*, BLACK'S LAW DICTIONARY (12th ed. 2024).

105. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.1 (AM. L. INST. 1999) (emphasis added); *see also* UNIF. PROB. CODE § 6-407 (UNIF. L. COMM'N 2019).

probate codes, generally without further definition.[106] This element is essential; it has been held to be reversible error to leave it out of jury instructions about capacity.[107] The Supreme Court of Colorado explained with this example:

> To illustrate, let us assume a case, where the testatrix, by reason of disease, has no recollection whatever at the time she signs a will that she has a son. In her mental confusion she believes herself to be without children. She knows she has property and she knows of what it consists. Erroneously believing that she has no son, she intends to leave that property, let us say, to a church, to an orphan asylum, to her physician, or, as in the instant case, to a nephew and her brothers and sisters. Obviously, if such is the mental state of the testatrix, she is incompetent to make a will.[108]

The traditional view strictly equates these "natural objects" with the testator's intestate heirs (or heirs at law)—especially children. As a Connecticut court remarked in 2022, "It is axiomatic that children are the natural objects of a parent's bounty."[109] Thus, the statement in a will by a testator that he had no children, despite having acknowledged an adopted child as his son for over sixty years, supported a finding

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106. Even in Louisiana, which only added it in 1991. *See* LA. CIV. CODE ANN. art. 1477 (1991) ("To have capacity to make a donation *inter vivos* or *mortis causa*, a person must also be able to comprehend generally the nature and consequences of the disposition that he is making."). The 1991 Revision Comment further explains,

> Although new for Louisiana, the test given in this Article did not spring *ex nihil*. In many respects it is derived from the common-law test for testamentary (donative) capacity that requires a person to be able to understand in a general way the nature and extent of his property, and his relationship to the persons who are considered to be the *natural objects of his bounty*, and the consequences of the disposition that he is making. In other words, at [common law] to be competent to make a will, a person must have a general and approximate understanding of the nature and extent of his assets to be disposed of, and he must know what it means to make a will.

*Id.* cmt. b (second emphasis added).

107. *See* Cunningham v. Stender, 255 P.2d 977, 982 (Colo. 1953) (en banc) (holding that it was a reversible error to not instruct the jury on whether the testatrix had sufficient mental capacity to know who the natural objects of her bounty were).

108. *Id.* at 930.

109. Fontana v. Fontana, No. LLI FA 206024532S, 2022 WL 21748268, at *10 (Conn. Super. Ct. Aug. 19, 2022); *see also* Dinan v. Patten, 116 A.3d 275, 287 (Conn. 2015) (noting that the testator's children are the natural objects of the testator's bounty); Goldrich v. Mulrooney, No. CV 20-6102668, 2023 WL 6993726, at *2 (Conn. Super. Ct. Oct. 17, 2023) (referring to testator's "three children, who are the natural objects of her bounty").

that the testator lacked capacity.[110] By contrast, the mis-description of one of the testator's two sons as his "stepson," and unequal provision as between them, did not show lack of capacity.[111]

In *Salvatore v. Hayden*,[112] the Connecticut Supreme Court said, quoting *Page v. Phelps*,[113]

> "the natural objects of the testator's bounty . . . in this case, embrace[] the same persons as the phrase 'heirs-at-law.'" The testator's heirs at law were his wife and his children. We have indicated that the phrase "natural objects of the testator's bounty" does not mean those with whom the testator "has been on terms of confidence, intimacy, and affection, but those who will take in the absence of a will, his next of kin."[114]

In *Jackson v. Folsom*,[115] decided in 1918, an Indiana Supreme Court justice expressed it this way:

> Where a testator at the time he makes a will has a wife and children, I think that all right-minded persons would agree that they were the natural objects of his bounty. . . . In cases where the testator has no close family ties and where his only relatives are remote kindred, it is no doubt true that reasonable minds could differ as to what persons would be the natural objects of his bounty.[116]

Though it is often not put this explicitly, this two-tiered notion of naturalness is not uncommon. If a testator *has* a spouse and children (or issue), they are the natural objects, but if not, it is a more open question as to who exactly would qualify. Such an approach is strongly pro-natal, in differentiating between the higher-priority treatment accorded to one's own children, without necessarily generalizing to other relatives.

By contrast, the comments to the Restatement define the class ostensively and much more generously, offering a variety of persons who "are" or "could be counted as" such "natural objects."[117] As in

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110. DeHart v. DeHart, 978 N.E.2d 12, 19 (Ill. App. Ct. 2012) ("It is reasonable to infer from the facts as pled that Donald was of unsound mind and memory when he denied that he had a son given the fact that he had acknowledged James as his son for over 60 years.").

111. *See* Sloger v. Sloger, 186 N.E.2d 288, 290 (Ill. 1962).

112. 133 A.2d 622 (Conn. 1957).

113. 143 A. 890 (Conn. 1928).

114. *Salvatore*, 133. A.2d at 624 (citation omitted) (quoting *Page*, 143 A. at 894).

115. 118 N.E. 955 (Ind. 1918).

116. *Id.* at 956.

117. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.1 cmt. c (AM. L. INST. 1999).

*Jackson v. Folsom*, it supplements the idea of naturalness with the distinct but equally figurative concept of "closeness," contrasting it with "remoteness."[118] It also expressly interprets the phrase to reach beyond issue and other statutory heirs.

> The natural objects of a testator's bounty *include* the testator's *closest* family members, who are not limited to blood or adoptive relatives or to those who would take by intestacy. For example, a testator's stepchildren are natural objects of the testator's bounty, even though stepchildren do not ordinarily take by intestacy. Relatives by affinity do not take by intestacy but *could be counted as* natural objects of a testator's bounty in the case in which the testator was *close* to them. To have testamentary capacity, the testator need not know the identity or location of *remote* relatives who are beyond his or her immediate family circle.[119]

Despite the Restatement's expansiveness and solicitousness for stepfamilies specifically ("a testator's stepchildren are natural objects of the testator's bounty"), case law in most states is not necessarily in accord. For example, in *Cresto v. Cresto*,[120] decided in 2015, the Supreme Court of Kansas explicitly stated, "stepchildren are not the natural objects of a [d]ecedent's bounty."[121]

The UPC's actual provisions (as distinct from the Restatement) also impliedly enforce this more pro-natal understanding of who qualifies as a natural object of the testator's bounty. The UPC applies a different distribution rule when the intestate decedent and surviving spouse have all their children in common, and when they do not.[122] In explaining this rule, the UPC comment says:

> If the decedent has other descendants [not descendants of the surviving spouse], the surviving spouse receives $150,000 plus one-half of the balance [rather than a larger amount]. In this type of case, the decedent's descendants who are not descendants of the

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118. *Id.*; *see also Jackson*, 118 N.E. at 956 (having no close family relatives is contrasted with a testator whose "natural objects of his bounty" are his wife and children).

119. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.1 cmt. c (emphasis added) (citation omitted); *see also id.* (including certain non-marital partners, "[f]or example, a testator's domestic partner . . . is a natural object of the testator's bounty").

120. 358 P.3d 831 (Kan. 2015).

121. *Id.* at 843; *accord* CAL. PROB. CODE § 6402(e) (West 1990) (unadopted stepchildren).

122. *See supra* Part II.

> surviving spouse [in other words, stepchildren and their issue] are not *natural objects of the bounty* of the surviving spouse.[123]

In other words, the Restatement may claim that a testator's stepchildren are natural objects of the testator's bounty, but the UPC does not suppose the surviving spouse feels the same way about the decedent's children once the decedent spouse has died.

These traditional notions persist even when the statutory language has been updated. California no longer uses the "natural objects" language in its statutory definition of testamentary capacity, although it formerly did.[124] Instead, under California law, the would-be testator must have "sufficient mental capacity to be able to . . . [r]emember and understand the individual's relations to living descendants, spouse, and parents, and those whose interests are affected by the will."[125] "Descendants, spouse, and parents" are, of course, the intestate heirs under Section 6402 and 6401 respectively—the same people otherwise described as "natural objects of the testator's bounty."[126] Thus, despite new terminology, the older concept (and language) are still found in recent California cases. For example, in the 2010 case *Estate of Winans*,[127] a California appellate court interpreted a (now-repealed) provision of the probate code related to disqualified transferees "to ensure that persons who are the natural objects of a testator's bounty are not excluded inadvertently or improperly in favor of a disqualified person."[128] In 2024, the California Court of Appeals cited California

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123. UNIF. PROB. CODE § 2-102 (UNIF. L. COMM'N 2019) (emphasis added).

124. *See, e.g.*, *In re* Arnold's Est., 107 P.2d 25, 33 (Cal. 1940) (en banc) ("Absolutely no showing was made that the testator at the time of executing his will was not in the possession of sufficient mental capacity to understand the nature of his act, the extent and character of his property, and the relationship to persons who were the natural objects of his bounty. If a person has sufficient mental capacity to know and understand these three requirements, he is possessed of sufficient mental capacity to make a will disposing of his estate."); *see also In re* Shay's Est., 279 P. 1079, 1081 (Cal. 1925) (holding that there was nothing in the record to show that the testator was without the sufficient mental capacity); *In re* Sexton's Est., 251 P. 778, 783 (Cal. 1926) (en banc) (noting there was no evidence that the will was not the product of the decedent's mind and that the mind "must have had testamentary capacity").

125. CAL. PROB. CODE § 6100.5(a)(1)(C) (West 1990).

126. *Id.* §§ 6401, 6402(a), 6402(b); Est. of Winans v. Timar, 107 Cal. Rptr. 3d 167, 178 (Ct. App. 2010).

127. 107 Cal. Rptr. 3d 167 (Ct. App. 2010).

128. *Id.* at 178. *Winans* has since been cited in unreported cases for the same point, including in *Estate of Stewart v. Downey*, No. A148396, 2019 WL 1746687, at *9 (Cal. Ct. App. Apr. 18, 2019), and *Conservatorship of Person & Estate of Anderson v. Smith*, No. PRO1002583, 2013 BL A132474, at *11 (Cal. Ct. App. May 17, 2013).

Jurisprudence to explain that "the expression 'natural objects of the testator's bounty' refers to the descendants, surviving spouse, and parents of the testator, who, purely by reason of that relationship, may be assumed to have had claims on the testator's bounty."[129] Meanwhile, in 1990, a California appellate court held that the decedent's brother, as a "collateral heir," is "not . . . a natural object of decedent's testamentary disposition,"[130] aligning its interpretation with one from 1940, in which the California Supreme Court held that siblings or their issue were not natural objects of the testator's bounty "as that term is used in the interpretation of wills."[131] Other courts have held that nieces and nephews *are* natural objects of a testator's bounty, but only if the testator has no issue of their own.[132]

While changing times and family formations thus may expand who is regarded as a "natural object of the testator's bounty," the testator's children, top-priority heirs in intestacy, universally qualify.[133]

Interestingly, a number of cases reach the conclusion that a testator aware of the existence of his children nevertheless lacked capacity because of false beliefs *about* them. The older cases, decided before DNA testing was available to conclusively resolve such questions, found that a testator who disinherited a son based on a mistaken belief about the son's paternity, in turn based on a delusion about his wife's fidelity, lacked capacity.[134] A 2020 Indiana case concluded that a testator who

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129. Syre v. Douglas, 324 Cal. Rptr. 3d 553, 564 n.7 (Ct. App. 2024) (citing 64. Cal. Jur. 3d Wills § 144 (2024)).

130. Est. of Sarabia v. Gibbs, 221 Cal. Rptr. 560, 565 (Ct. App. 1990) (citing *In re* Arnold's Est., 107 P.2d 25, 33 (Cal. 1940)).

131. *In re* Arnold's Est., 107 P.2d at 33.

132. *See* Woodard v. Hendrix, No. 123900, 2022 WL 2286922, at *1 (Kan. Ct. App. June 24, 2022) (noting that "[a]lthough Wendell had no children, his two brothers and four sisters had several children between them, Wendell's nieces and nephews, who were the natural objects of the bounty of Wendell's estate").

133. Spouses also qualify. *See, e.g.*, *In re* Est. of Mowdy, 973 P.2d 345, 347 (Okla. Civ. App. 1998) (observing that "[i]t is well known that . . . a spouse is generally the natural object of a testator's bounty"); *In re* Est. of Glogovsek, 618 N.E.2d 1231, 1239 (Ill. App. 1993) (stating that childless testator's spouse "had no equal, morally or legally, after 34 years of marriage, to her claim for testator's bounty").

134. Petefish v. Becker, 52 N.E. 71, 73 (Ill. 1898) ("If the testator, utterly without cause or reason, and without expressing distrust of the fidelity of his wife, doubted the paternity of his son, and from that cause alone disinherited him, when he was one of the natural objects of his bounty, it might well be said that he did not then know who were the natural objects of his bounty; and if he was in such condition of mind that he did not know the natural objects of his bounty, and such condition caused him to make

had been unduly influenced by his second wife to make a will entirely in her favor, disinheriting his daughters, also lacked testamentary capacity, because he lacked the capacity to know, when he executed the will, "[his daughters'] deserts, with respect to their treatment of and conduct toward him."[135] This additional element of capacity, found only in the law of Indiana and Missouri,[136] enables a court to find that a testator who acknowledges the existence of the natural objects of the testator's bounty, especially children, may nevertheless lack capacity as to the making of a will affecting them, a further pro-natal protection built into the law of capacity itself.[137]

### *C. Resolving Ambiguous Language in Favor of Heirs: The Pro-Natalism of the Law of Will Interpretation*

Nearly 200 years ago, in 1825, Supreme Court Justice Joseph Story articulated a pro-natalist principle for the interpretation of wills that remains in use to this day. In *Wright v. Denn, ex dem. Page*,[138] he explained, "the law will not suffer the heir to be disinherited upon conjecture. He is favoured by its policy; and though the testator may disinherit him, yet the law will execute that intention only when it is put in a clear and unambiguous shape."[139] Whether in Justice Story's precise words or not, this rule is so generally accepted as to have been described as "a rule of universal application."[140]

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a will be would not have otherwise made, then he was not of sound and disposing mind."). *Compare id.* (identifying lack of expressing distrust of marital fidelity as one of the factors contributing to the conclusion that the testator was not of sound mind), *with In re* Hargrove's Will, 28 N.Y.S.2d 571, 573–74 (App. Div. 1941) (finding a decree holding the decedent as lacking capacity could not be sustained because his "intimate personal affairs incident to [his] marriage relation" provided a rational basis for the decedent's belief that he was not the father).

135. Moriarty v. Moriarty, 150 N.E.3d 616, 624 (Ind. Ct. App. 2020).

136. *See, e.g.*, Pulitzer v. Chapman, 85 S.W.2d 400, 415 (Mo. 1935) (en banc) (holding that if a person lacks the ability to understand the persons who are the objects of their natural bounty and the ability to retain these facts while making their will, they will not be found to have the testamentary capacity required by law to make a will).

137. By contrast, failure to take account of collateral kin, even when they are heirs at law, does not show lack of capacity. *See, e.g.*, *In re* Moran's Will, 28 A.2d 239, 242 (Me. 1942).

138. 23 U.S. 204 (1825).

139. *Id.* at 228.

140. *In re* Wood's Est., 184 A. 113, 116 (Pa. 1936) (reasoning that the appellant had no basis to claim an equal share with the testator's children because the law adheres to the general rule of inheritance which favors next of kin where there are ambiguities in expression in a will).

In the two centuries since Justice Story wrote them, his words have been quoted approvingly (though not always with attribution) by UPC and non-UPC states alike, including Arkansas,[141] California,[142] Kentucky,[143] Nebraska,[144] New Hampshire,[145] and New York.[146] Others apply the same rule in slightly different verbiage. The Pennsylvania Supreme Court stated it this way: "Where ambiguous or contradictory expressions appear in a will, the law adheres as closely as possible to the general rule of inheritance and favors the heir or next of kin in preference to strangers."[147] Following Justice Story, Pennsylvania law holds that "[an] heir at law . . . cannot be disinherited except by express words or necessary implication."[148] As the Supreme Court of Georgia stated in 2001,

> In the construction of a will, the courts should look to that interpretation which carries out the provisions of the statute of distribution [the intestacy statutes], rather than that which defeats them; . . . in the absence of anything in the will to the contrary, the presumption is that the ancestor intended that her property should go where the law [of intestacy] carries it, which is supposed to be the channel of natural descent. To interrupt or disturb this descent or

141. *See* Hughes v. Strickland, 295 S.W. 722, 724 (Ark. 1927) (directly quoting Justice Story in *Wright* and affirming the rule that the natural heir will not be disinherited by conjecture).

142. *See In re* Garner's Est., 39 Cal. Rptr. 577, 581 (Ct. App. 1964) (noting that the court follows the settled rule that when there is doubt about the testator's intent, the interpretation that favors the natural heirs will be adopted).

143. *See* Underwood v. Underwood, 117 S.W.2d 596, 597 (Ky. 1938) (highlighting the rule espoused by Justice Story in *Wright* that the "law will not suffer the heir to be disinherited upon conjecture").

144. *See* Lowry v. Murren, 236 N.W.2d 627, 629 (Neb. 1975) (noting that in order to disinherit the heirs at law, the testator must dispose of said property by will with an express provision to disinherit the heirs).

145. *See* Smith v. Furbish, 44 A. 398, 414 (N.H. 1894) (quoting Justice Story to support the court's conclusion that a reasonable reading of the will does not show the testator's intent to disinherit the heirs).

146. *In re* Pettit's Will, 271 N.Y.S. 757, 760 (App. Div. 1934) ("[A] primary rule applicable to the construction of wills [is] that the heirs at law shall not be disinherited by conjecture, but only by express words, or necessary implication. The heirs of a testator are favored by the policy of the law and cannot be disinherited upon mere conjecture, and when the testator intends to disinherit them, he must indicate that intention clearly.").

147. *In re* Wood's Est., 184 A. 113, 116 (Pa. 1936).

148. *In re* Potter's Est., 101 A. 758, 759 (Pa. 1917).

> direct it in a different course, should require plain words to that effect.[149]

In a weak form, this principle might be read simply as a requirement for clarity in will-drafting, as every will represents a departure from the default scheme of intestacy. But a principle that resolves the inevitable ambiguities in the language of wills systematically in favor of heirs (often, issue), rather than, for example, permitting extrinsic evidence of the testator's actual intent,[150] is a pro-natalist principle both in who it favors substantively, and insofar as it burdens testamentary autonomy, even threatening to overcome the testator's valid expression of wishes different than those contained in the intestacy statutes. This interpretive preference in favor of intestate heirs (and the assertion of its naturalness) persists even after the testator has validly sought to dispose of property away from those heirs, creating a sort of friction or resistance to such attempts. The making of a valid will is not enough, on its own, to overcome the continuing preference (the "favour[]") the law shows for the heirs.[151] Notably, this principle attributes the wish to favor the heirs to the *very person* who has sought to do something else, and explicitly expressed a contrary preference.

The 1964 California case *In re Garner's Estate*[152] is illustrative of the principle in operation.[153] There, the testator made gifts to eight named nieces and nephews, one gift to a sister-in-law, and a charitable residuary gift (to the City of Hope).[154] The gifts to named relatives amounted to approximately half of the $100,000 estate.[155] However, one bequest contained an ambiguity, about whether three nieces, the daughters of one of testator's sisters, were to share a bequest of $5,000 or receive $5,000 apiece, the sum given to the other individual donees

149. Fleming v. First Union Nat'l Bank, 555 S.E.2d 728, 730 (Ga. 2001) (quoting Harrison v. Odom, 241 Ga. 284, 285 (1978)); *see also* Piccione v. Arp, 806 S.E.2d 589, 592–93 (Ga. 2017) (affirming the rule in *Fleming* that courts should adopt an interpretation of the will that carries out the provisions of the intestate statutes rather than an interpretation that defeats them).

150. Because the testimony of the testator is not available to clarify ambiguities, by analogy to the parol evidence rule, extrinsic evidence has historically been completely disallowed for unambiguous wills. This has changed somewhat in recent times; see, for example, Estate of Duke v. Jewish National Fund, 352 P.3d 863, 865–66 (Cal. 2015). For ambiguous wills, rules of construction have been adopted to avoid "rewriting" the will based on the testimony, typically, of interested persons.

151. Wright v. Denn, 23 U.S. 204, 228 (1825).

152. *In re* Est. of Garner, 39 Cal. Rptr. 577 (Ct. App. 1964).

153. *Id.*

154. *Id.* at 578.

155. *Id.* at 577–78.

unambiguously.[156] In interpreting the ambiguous language in favor of the three nieces (giving them $5,000 each and thereby enlarging the total amount passing to family), the court said, "We therefore follow 'the settled rule that if there is any doubt or uncertainty as to the testator's intent, an interpretation will be adopted which prefers his natural heirs as against strangers.'"[157] In *Garner*, the so-called "stranger" is the City of Hope, the charity expressly selected by the testator to receive the residue of his estate. More recently, a California appellate court applied a version of this rule in *Estate of Stober v. Dieter*,[158] when it was called upon to interpret a Pennsylvania instrument, stating that "preference is to be given to a construction favoring the natural objects of the testator's bounty,"[159] rather than others.

At the same time, this interpretive preference is not to be read so strongly as to overcome another probate principle, the preference for testacy. The preference for testacy reflects the law's non-neutrality on the question of whether persons who wish to die testate should be enabled to do so. The tension here emerges when the will varies quite significantly from intestacy, and especially, when the estate is left outside the family. In 1979, the California appellate court clarified in *Estate of Murphy v. Murphy*[160] that the interpretive preference applies only as between conflicting *interpretations* of a valid will's language, and *not* as between a will and intestacy.[161] In other words, ambiguous language in a will is not to be interpreted to defeat the testator's intent to die testate with respect to as much of their estate as possible. Rather, ambiguous language is interpreted to favor those heirs already benefited by the will. In articulating this rule, the *Murphy* court relied on a 1941 California Supreme Court case, *In re Lawrence's Estate*.[162] Under *Lawrence*, "where a will is capable of two interpretations, under one of which those of the blood of the testator will take, while under the other the property will go to strangers, the interpretation by which the property goes to those of the blood is preferred."[163] But, as *Murphy*

156. *Id.* at 577–79.
157. *Id.* at 581 (quoting *In re* Est. of Salmonski, 238 P.2d 966, 975 (Cal. 1951)).
158. Est. of Stober v. Dieter, 166 Cal. Rptr. 628 (Ct. App. 1980).
159. *Id.* at 632 (holding that allowing the trustee to declare an emergency in order to invade the corpus would destroy the successor beneficiaries' rights and thwart the original expressed intent of the will).
160. Est. of Murphy v. Murphy, 154 Cal. Rptr. 859 (Ct. App. 1979).
161. *Id.* at 868.
162. 108 P.2d 893 (Cal. 1941).
163. *Id.* at 899.

explained, still quoting *Lawrence*, the preference gives way when "in order to prefer those of the blood of the testator, it is necessary to ignore the presumption against intestacy."[164]

### *D. "Saving" Gifts for Issue of Predeceased Related Beneficiaries: The Pro-Natalism of the Law of Anti-Lapse*

When a gift is made in a will to a person who predeceases (or is treated as predeceasing) the testator, that gift is said to "lapse." Ordinarily, such gifts then pass by the residuary clause of the will or by intestacy.[165] However, lapsed gifts are sometimes "saved" by a provision of the probate code known as "anti-lapse." Anti-lapse saves gifts devised to predeceasing beneficiaries and gives them to the issue of the deceased beneficiary—so long as the deceased beneficiary (and thus, their issue) is *also* within the high-priority intestate succession groups. As the UPC comments clarify, "anti-lapse" is something of a misnomer, because the devise does *not* go to the estate of the deceased beneficiary, but rather creates a "statutory substitute gift in the case of specified relatives," for issue.[166]

Under California Probate Code section 21110, "the issue of the deceased transferee" take in place of their deceased ancestor, so long as the deceased transferee was "kindred of the transferor or kindred of a surviving, deceased, or former spouse of the transferor."[167] Both requirements are pro-natalist: only relatives of the deceased beneficiary qualify for anti-lapse, and that beneficiary must have issue (not simply heirs), who then take in their place.[168] The current UPC is basically the same, but draws the family circle considerably more closely. UPC section 2-603 applies anti-lapse only to "a grandparent, a descendant of a grandparent, or a stepchild," not "kindred" generally and "a substitute gift is created in the devisee's surviving descendants."[169] The inclusion of stepchildren is narrow and specific: "Antilapse protection is not extended to devises to descendants of the testator's stepchildren or to stepchildren of any of the testator's

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164. *Murphy*, 154 Cal. Rptr. at 868.

165. CAL. PROB. CODE § 21111(a) (Deering 2024); UNIF. PROB. CODE § 2-604(a) (UNIF. L. COMM'N 2019).

166. UNIF PROB. CODE § 2-603(b) cmt. General Rule of Section 2-603 – Subsection (b); *see also id.* cmt. Subsection (b)(4), ex. 2.

167. PROB. § 21110(a),(c).

168. *Id.* § 21110(a).

169. UNIF. PROB. CODE § 2-603(b).

relatives. . . . Other than stepchildren, devisees related to the testator by affinity are not protected by this section."[170]

Under these laws, a gift to a predeceased friend of the testator is not saved by anti-lapse (unless the will explicitly so provides), even if that friend has surviving children; nor is a gift to a childless sibling or cousin who predeceases the testator (no "issue"). Moreover, the operation of anti-lapse favors the issue of the predeceased beneficiary for inheritance purposes even if that person did not do so, even if they validly disinherited their own issue in favor of other persons.[171] The gift goes to the *issue* of the predeceased beneficiary regardless, not to their legatees.[172] The law of anti-lapse is therefore triply pro-natalist: it only applies to gifts to persons related to the testator (within a certain degree of relationship, under the UPC); it only provides a substitute gift to the issue of that person (who are also testator's relatives); and if a gift lapses and cannot be saved, the property may then pass by intestacy to the testator's relatives after all.

### *E. "Unintentional" Omission: The Pro-Natalism of the Law of Pretermission*

Strictly speaking, apart from spousal protection, no one has a right to inherit under the American law of wills. It is possible, despite all the obstacles already described, to disinherit one's children.[173] But one further pro-natalist hurdle remains: the law of pretermission. This rule makes provision for children born (or adopted) after the execution of the last of the testator's testamentary instruments, and not provided for in those instruments (for example, by being included in a class gift to "my children" or "my issue" contained in a will or trust) or otherwise (for example, as a beneficiary of an *inter vivos* trust or life insurance policy).[174] Under California law, that provision is generous: the omitted child receives their full intestate share, which, in the absence of a spouse or other issue, is potentially the entire estate.[175] Under the UPC

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170. *Id.* cmt. Protected Relatives.

171. *See, e.g.*, Adam J. Hirsch, *When Beneficiaries Predecease: An Empirical Analysis*, 72 EMORY L.J. 307, 367–68 (2022) ("If a predeceased spouse is named as the sole beneficiary . . . [t]he testator's failure to update the will following a spouse's death would then result in the children's disinheritance—a catastrophic outcome from the standpoint of intent-effectuation."); *see also* UNIF. PROB. CODE § 2-603(b).

172. *See* UNIF. PROB. CODE § 2-603(b) cmt. Subsection (b)(4), ex. 2.

173. Except in Louisiana. *See* LA. CIV. CODE ANN. art. 1495 (2020) (requiring a portion of the decedent's property to be left for forced heirs).

174. *See, e.g.*, CAL. PROB. CODE § 21110(c) (Deering 2024).

175. *Id.* §§ 6402(a), 21620.

(following New York's approach), if property is devised to other children, the omitted child is made an equal participant in those gifts.[176] Whichever approach is taken, note that it applies to children of any age, not just minors.

The approaches are interestingly different. Under California law, the omitted child's share is calculated without reference to whether other children of the testator receive gifts in the will larger or smaller than their intestate shares, or whether other children are treated equally with one another.[177] The omitted child may thus receive much more or less than their siblings; equal treatment among them is not a feature of California's omitted child statute. By contrast, under the New York/UPC approach, the total disinheritance of children already born when the will was executed is not a bar to the omitted child receiving their full intestate share; only if the testator has made testamentary gifts to other children is the omitted child limited to participating in those gifts.[178] Each approach is, of course, a different recipe for sibling strife. Under California law, if existing children receive less than their intestate share (or nothing), the omitted child is favored over them; if they receive large gifts, funding the omitted child's share threatens to reduce what they receive.[179] Under the New York/UPC approach, if other children are disinherited completely, the omitted child receives a share of the estate anyway; but if the other children receive a gift, large or small, the omitted child necessarily reduces their gift proportionately.[180] Whichever approach is taken, resentment towards the younger child by their elder siblings seems almost inevitable.

Pretermission statutes purport to stand for the idea that omitting a child from one's will is unintentional, even in the complete absence of any evidence to this effect. In other words, testators who did not provide for their after-born children are effectively presumed to have intended to do so anyway, regardless of the lapse of time between the birth of a post-testamentary child and the death of the testator. (The UPC, but not California law, does consider whether the testator provided for any children already born at the time they executed their

176. UNIF. PROB. CODE § 2-302 cmt. One or More Children Living When Will Executed ("Subsection (a)(2) is modeled on N.Y. Est. Powers & Trusts Law § 5-3.2.").

177. CAL. PROB. CODE § 21623 (Deering 2024).

178. UNIF. PROB. CODE § 2-302(a)(2); N.Y. EST. POWERS & TRUSTS LAW § 5-3.2 (McKinney 2007).

179. PROB. § 21623.

180. UNIF. PROB. CODE § 2-302(a)(2); EST. POWERS & TRUSTS § 5-3.2.

will, and if so, ensures that the after-born child participates in that gift.[181]) Such statutes not only attribute to testators a pro-natalist intention not supported by evidence, they also do so in the face of *contrary* evidence, in the form of the testator's failure to change their will after the birth or adoption of the child. Keep in mind that this person has made a valid will, and so is necessarily familiar with will-making. Unlike an intestate decedent, whose intentions are unknown, a testate decedent has made those wishes known, but they are disregarded for the sake of the omitted child.

Like other default statutes, it is possible to draft around pretermission statutes (for example, by stating in the will, "I intentionally make no provision for any child of mine, whenever born or adopted" or "I intentionally make no provision for any child of mine, born or adopted after the date of this instrument").[182] Pretermission statutes do have exceptions—in addition to having made provision for the child outside the will, a child is not pretermitted if "substantially all" of the estate is "devised or otherwise directed . . . to the other parent of the omitted child."[183] This exception is itself also strongly pro-natalist, in its assumption that property passing to the child's other parent will eventually reach the child (or be used for their benefit). In fact, the UPC comment attributes this pro-natalist sentiment per se to all testator-parents who leave everything to their spouse: "The testator's purpose is not to disinherit the children; rather, such a will evidences a purpose to trust the surviving parent to use the property for the benefit of the children, as appropriate."[184]

## IV. "UNNATURAL DISPOSITIONS": THE PRO-NATALISM OF THE LAW OF UNDUE INFLUENCE

The wills law is clear that a will or a gift within a will is invalid to the extent it is the product of undue influence.[185] Undue influence is one of the most frequent bases for challenging a will, and a review of the

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181. UNIF. PROB. CODE § 2-302(a)(2); EST. POWERS & TRUSTS § 5-3.2.

182. CAL. PROB. CODE § 21621(a) (Deering 2024); UNIF. PROB. CODE § 2-302(b)(1) ("[I]t appears from the will that the omission [any child of mine] was intentional.").

183. PROB. § 21621(a), (b); *see also* UNIF. PROB. CODE § 2-302(b)(2).

184. UNIF. PROB. CODE § 2-302 cmt. Basic Purposes and Scope of 1990 Revisions.

185. *See* CAL. PROB. CODE § 6104 (Deering 2024) ("The execution or revocation of a will or a part of a will is ineffective to the extent the execution or revocation was procured by duress, menace, fraud, or undue influence."); UNIF. PROB. CODE § 3-407 ("Contestants of a will have the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake or revocation.").

cases demonstrates pro-natalist bias here, as well.[186] We have already seen pro-natalist bias at work in the law of attestation, where the law protects the intestate share of related interested witnesses, despite a presumption of undue influence. When undue influence is affirmatively alleged, pro-natalist bias emerges in how courts evaluate such claims, depending on who makes the claim of undue influence (children, other issue, relatives, or others) and who is alleged to have engaged in the misconduct (other children or issue, relatives, or non-family members).

Despite its prominence in the law of wills, undue influence is hard to define. As courts often remark, undue influence is also often difficult to prove (frequently, no one but the alleged influencer and the testator are present when any wrongdoing occurs, and neither is talking) and must be shown indirectly.[187] A leading casebook describes the concept of undue influence as "one of the most bothersome concepts in all the law," and rather than try to define it, simply recommends that "the best way to appreciate the challenge presented by undue influence . . . is to immerse yourself in the cases."[188] As the Louisiana codifiers quite incisively remarked when enacting their own article 1479,

> No single definition of "undue influence" has been found acceptable in all of the relevant legal writings. The common-law rules concerning "undue influence," fraud, and duress are derived almost entirely from case law rather than statutes. Any number of definitions exist in court opinions and in instructions to juries, but the law clearly deals largely with subjective elements, making the term "undue influence" therefore very difficult to define. In the case law, the objective aspects of undue influence are generally veiled in secrecy, and the proof of undue influence is either largely or entirely circumstantial.[189]

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186. Mary Joy Quinn, *Defining Undue Influence: A Look at the Issue and at California's Approach*, 35 BIFOCAL 72, 72 (2014) ("Most undue influence cases are seen in probate courts with petitions for guardianships, conservatorships, and with disputed wills and trusts.").

187. *E.g.*, Maimonides Sch. v. Coles, 881 N.E.2d 778, 791 (Mass. App. Ct. 2008) ("In many instances a finding of undue influence rests largely on circumstantial evidence, since direct evidence of such influence is often difficult to establish.").

188. SITKOFF & DUKEMINIER, *supra* note 6, at 290–91.

189. LA. CIV. CODE ANN. art. 1479, cmt. b (1991).

Different jurisdictions have developed a variety of multi-factor tests for detecting undue influence.[190] A 2023 Texas appellate case, *In re Estate of Bristow*,[191] surveys ten "non-exhaustive factors" used by Texas courts in "determining whether undue influence exists,"[192] of which the tenth is "whether the will executed is unnatural in its disposition of the testator's property."[193] This concept—an "unnatural" disposition of assets—appears on nearly every list, often using that exact term.[194] But even when the word "unnatural" is not used, the same pro-natal assumption that the most natural disposition is always from parent to child still operates powerfully to shape outcomes.

*In re Estate of Bristow*, for example, the Texas appeals court offered "disinheritance of a child" as the paradigm example of "an unnatural disposition," nearly setting it down as a per se rule.[195] While the label "unnatural" is often applied without much explanation, *Estate of Russey*,[196] an unreported Texas Court of Appeals undue influence case from 2019, laid out quite clearly how it would determine "whether the disposition of property is unnatural."[197] Borrowing language from two 1926 cases, the court explained,

> The philosophy of law allows untrammeled range for natural affection. One of the main objects of the acquisition of property by the parent is to give it to his child; and that child in turn will give it to his, in this way the debt of gratitude we owe to our parent is paid to our children. Thereby, each generation pays what it owes to the preceding one by payment to the succeeding one. This seems to be the natural law for the transmission of property. Any departure from that course, though it may not be uncommon or unusual, is unnatural.[198]

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190. *See, e.g.*, Rosenberg v. Sanders, 539 P.3d 120, 125 (Ariz. 2023) (eight factors); *In re* Est. of Bristow, No. 11-22-00035-CV, 2023 WL 7198344, at *4–5 (Tex. App. Nov. 2, 2023) (ten "non-exhaustive" factors); SITKOFF & DUKEMINIER *supra*, note 76, at 290–91 (listing four types of circumstantial evidence a trier of fact may use to determine if undue influence was present at the time of a donative transfer).

191. *In re* Est. of Bristow, 2023 WL 7198344, at *4.

192. *Id.*

193. *Id.*

194. *See, e.g.*, Moore v. Smith, 582 A.2d 1237, 1239 (Md. 1990) ("The will contains an unnatural disposition . . . ."); O'Rourke v. Hunter, 848 N.E.2d 382, 392 (Mass. 2006) ("[A]n unnatural disposition has been made . . . .").

195. *In re* Est. of Bristow, 2023 WL 7198344, at *4.

196. Est. of Russey, No. 12-18-00079-CV, 2019 WL 968421, at *6 (Tex. App. Feb. 28, 2019).

197. *Id.*

198. *Id.* (citations omitted).

Most courts are not nearly so explicit about what dispositions will be considered natural, and why, but simply assert this conclusion as self-evident, sometimes with reference to the "natural objects of the testator's bounty," the prioritized list of heirs (with issue at the top), found in the applicable statute of intestacy. One California court said in 1967, "'Unnatural provisions' are defined as those which prefer strangers in blood to the natural objects of the testator's bounty."[199] More than thirty-five years later, another California appellate court asserted, "Provisions are 'unnatural' when they prefer strangers rather than natural objects of a testator's bounty."[200] A Kentucky practice guide, favorably cited by its own supreme court in 2019, says, "When a will disposes of the testator's property so that his children or other natural objects of his bounty are excluded or are favored unequally, the will is said to be 'unnatural' and that fact has an important bearing on the issue of undue influence."[201] (By contrast, "[p]referring one relative over another relative does not make the testamentary provisions unnatural."[202])

Not all courts explicitly embrace a fully pro-natal understanding of what is "natural" in a testamentary disposition. For example, the Arizona Supreme Court suggested a more fact-specific and individualistic approach, by contrasting an "unnatural" will with one that is "reasonable . . . in view of the testat[or's] circumstances, attitudes, and family."[203] Others include "unnaturalness" as one of multiple factors that might make a disposition suspicious. For example, New York law considers whether the will is "unnatural *or* the result of an unexplained departure from a previously expressed intention of the decedent."[204]

Nevertheless, the widespread use of the term "unnatural" and/or the reference to gifts not given to the "natural objects of the testator's bounty" activate the normative dimension of the natural/unnatural binary. Using these terms goes beyond the assertion that dispositions in favor of issue or family are the most common, conventional, or

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199. *In re* Est. of Straisinger, 55 Cal. Rptr. 750, 758 (Ct. App. 1967).

200. *In re* Basmajian, No. B156908, 2003 WL 21290947, at *10 n.11 (Cal. Ct. App. June 5, 2003) (citing *In re* Nolan's Est., 78 P.2d 456, 458 (Cal. Dist. Ct. App. 1938)).

201. Getty v. Getty, 581 S.W.3d 548, 558–59 (Ky. 2019) (citing *Kentucky Practice Series*, 1 Ky. Prac. & Proc. § 553, Undue Influence—Effect of Unnatural Will (Nov. 2018 update)).

202. *In re* Basmajian, 2003 WL 21290947, at *10 n.11 (citing *In re* Welch's Est., 272 P.2d 512, 516 (Cal. 1954)).

203. Rosenberg v. Sanders, 539 P.3d 120, 125 (Ariz. 2023).

204. *In re* Walther, 159 N.E.2d 665, 669 (N.Y. 1959) (alteration in original) (emphasis added).

expected, or even the claim that this is what most people want to do (which it may be, though empirical evidence is lacking). When certain dispositions are characterized as "natural," there is the clear implication that other wishes and dispositions are not just unusual, but deviant; not merely statistically rare, but morally suspect. Conversely, the assumption that disposing of property in favor of one's children (even adult, self-supporting, or estranged children) is "natural" also means that such dispositions require no explanation and raise no presumptions of wrongdoing, while other dispositions do.[205] One would hope that any such assertions today would rest on a firmer foundation than the strange and flimsy theory set out in *Estate of Russey* about the naturalness of parent-child property transfer, a theory that did not seem to recognize, much less take account of, the many motives for property acquisition (by persons who are parents or otherwise), nor of the cultural, individual, and even geographic variations in kinship structures and expectations of support.[206] In the probate court setting, however, these pro-natal assumptions frequently translate into shifting burdens onto non-related beneficiaries as a matter of persuasion and proof that make it easier to prove that a will in favor of non-relatives (or even relatives other than children) is the product of undue influence, than any disposition in favor of children, however procured.

It should be noted, however, that a number of courts have resisted treating any disposition not in favor of the "natural objects of the testator's bounty," or the intestate heirs, as suggesting undue influence. In *Estate of Sarabia*,[207] the California Court of Appeals explained:

> [I]ntestate succession . . . has the potential for directing too much of the trier of fact's attention to the presence or absence of "unnatural" provisions in the will. Because the law of intestate

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205. Although it is beyond the scope of this Article, a similar distinction is seen in how the courts treat spouses and non-marital intimate partners. Under the law of some states, although a confidential relationship raises a presumption of undue influence, the spousal relationship, a per se confidential one, does *not*, in effect because dispositions in favor of spouses are regarded as "natural." *See, e.g.*, SITKOFF & DUKEMINIER, *supra* note 6, at 530 (explaining that spousal protection may come from "the marital support obligation or rather is rooted in a partnership theory of marriage").

206. Est. of Russey, No. 12-18-00079-CV, 2019 WL 968421, at *6 (Tex. App. Feb. 28, 2019) (asserting that the natural law for the transmission of property is when the parent passes it on to the child, and when that child becomes a parent, they pass it to their child and so on).

207. 221 Cal. Rptr. 560 (Ct. App. 1990).

> succession is confined to the decedent's relatives, [comparing the will's dispositions to intestacy] would invariably work to the advantage of relatives. The test thus threatens to impinge on the testator's right and freedom to devise property to persons or entities with whom the testator has no genetic or legal relationship.[208]

In *Chapman v. Varela*,[209] the New Mexico Supreme Court stated pointedly, "If any transfer that diverged from the intestacy statute could be considered unnatural, testamentary freedom would be threatened."[210]

Indeed, Melanie Leslie's 1996 article, *The Myth of Testamentary Freedom*, persuasively demonstrates just that: courts have manipulated formalities rules, imposed different burdens of proof, and even altered substantive law, "when they found it necessary to ensure a subjectively just distribution of a testator's estate" or to "invalidat[e] problematic wills . . . that do not conform to societal norms."[211] The specific "societal norm" Professor Leslie has in mind is the weakly pro-natalist preference for family/heirs over "strangers." And in fact, Professor Leslie's research confirmed this. Her review of 160 undue influence cases reported between 1984 and 1990 found that among the seventy cases in which "contestants and will beneficiaries . . . were related to the testator in equal or substantially equal degree (for instance, both contestants and beneficiaries were the testator's children, or both were siblings, nieces and nephews)," just eighteen (a little over twenty-five percent) succeeded; while in "the 36 cases where a testator's relatives contested wills that disinherited them in favor of non-relatives, fully 18, or 50%, of the wills . . . were found to be the product of undue influence."[212]

But if we look even more closely at the cases, other patterns also emerge. Although prior research and scholarship have shown a general preference of courts for dispositions within the family (weak pro-natalism), a closer analysis actually reveals a much stronger form of pro-natalism than formerly identified. Specifically, the cases show that dispositions in favor of one or more of the testator's children (specifically) are almost unassailable, other than by other children

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208. *Id.* at 565.
209. 213 P.3d 1109 (N.M. 2009).
210. *Id.* at 1120.
211. Melanie Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 289 (1996).
212. *Id.* at 244 n.42. The remaining cases did not fall clearly into either category. *Id.*

(specifically) of the testator,[213] and that completely disinherited children are much likelier to prevail than those who receive a legacy less than their intestate share.

Courts are less sympathetic than they used to be to children's allegations of undue influence exerted by stepmothers (subsequent spouses), but children prevail against almost everyone else.[214] A judicial commitment to the "naturalness" of dispositions to spouses and children thus remains strong.

### *A. The "Wicked Stepmother" Cases (Children of the Testator vs. Step-Parent)*

The rivalry between the children of a prior marriage and a subsequent spouse forms the core of the literary trope of the "wicked stepmother," a common character from Grimm to Disney.[215] Whether there is a reality behind this idea has been the topic of significant social-scientific research.[216]

Professor Leslie identified eight cases (in her sample of 160) alleging undue influence by a step-parent, but did not analyze them.[217] Notably, *all eight* involved stepmothers, and children prevailed in six of them. In *Blits v. Blits*,[218] summary judgment in favor of the stepmother was reversed based on the son's testimony that "his stepmother threatened to put his father in a nursing home unless the decedent made her the sole beneficiary under the will."[219] In *Noble v. McNerney*,[220] the appeals court upheld a finding of undue influence by a stepmother in relation to certain non-probate assets brought by one of the decedent's two

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213. *In re* Est. of Coffman, 234 N.E.3d 57, 71 (Ill. 2023) (rejecting challenge by testator's siblings to plan in favor of testator's daughter and spouse).

214. *See, e.g.*, *In re* Davisson, 211 So. 3d 597 (La. Ct. App. 2016) (disinherited son prevails against will in favor of attorney-drafter's wife).

215. *See, e.g.*, Ali Francis, *The Myth of the Evil Stepmother*, BBC (Nov. 21, 2022), https://www.bbc.com/worklife/article/20221118-the-myth-of-the-evil-stepmother [https://perma.cc/J5N9-TWLS] (providing examples of the evil stepmother trope in popular media that support the dominant culture's support for the nuclear family).

216. *See, e.g.*, Katherine Shaw Spaht, *The Remnant of Forced Heirship: The Interrelationship of Undue Influence, What's Become of Disinherison, and the Unfinished Business of the Stepparent Usufruct*, 60 LA. L. REV. 637, 662 (2000) (stating that extensive research shows "stepchildren are more likely to be abused, both physically and sexually, and even more likely to be killed by a parent—100 times as likely—compared with kids being raised by two biological parents").

217. Leslie, *supra* note 211, at 280–81.

218. 468 So. 2d 320 (Fla. Dist. Ct. App. 1985).

219. *Id.* at 321.

220. 419 N.W.2d 424 (Mich. Ct. App. 1988).

daughters.[221] In *Hodges v. Hodges*,[222] the court reversed and found that the issue of undue influence, alleged by three sons against their stepmother, should not have been submitted to the jury.[223] In *In re Estate of Villwok*,[224] the Supreme Court of Nebraska held that the disinherited daughters' allegations of undue influence by their stepmother, and their own testimony to this effect, precluded summary judgment.[225] In *McKee v. Stoddard*,[226] the court affirmed an undue influence finding against a stepmother brought by the testator's three disinherited children.[227] In *Estate of Cooper*,[228] the appeals court reinstated an undue influence finding by the Court of Common Pleas, in a son's challenge to a will benefiting his stepmother.[229]

Only two cases did not succeed. In *Hall v. Hall*,[230] the disinherited children's challenge was rejected in the absence of "a scintilla of evidence of undue activity" by their stepmother.[231] Similarly, in *In re Will of Gardner*,[232] the children's challenge was rejected almost summarily.[233] The North Carolina Court of Appeals even remarked, "The final disposition that Mr. Gardner made of his property—to the wife that had looked after his needs and comfort during many years of declining health—was completely natural."[234] Six of eight "wicked stepmother" cases identified by Professor Leslie reached the strong pro-natal result, well above the fifty percent result she found for the relative versus non-relative cases.[235]

Over the past twenty-five years, however, the pattern of successful suits by stepchildren has reversed.[236] Today, most such challenges fail,

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221. *Id.* at 427, 434.
222. 692 S.W.2d 361 (Mo. Ct. App. 1985).
223. *Id.* at 375, 379.
224. 413 N.W.2d 921 (Neb. 1987) (cited as *Villwok v. Villwok* in Leslie, *supra* note 211).
225. *Id.* at 924–26.
226. 780 P.2d 736 (Or. Ct. App. 1989).
227. *Id.*
228. 506 A.2d 451 (Pa. Super. Ct. 1986).
229. *Id.* at 455.
230. 502 So. 2d 712 (Ala. 1987).
231. *Id.* at 714.
232. 339 S.E.2d 455 (N.C. Ct. App. 1986).
233. *Id.* at 457.
234. *Id.*
235. Leslie, *supra* note 211, at 244 n.42.
236. This Section intends to review comprehensively all undue influence cases officially reported or reported on Westlaw, involving step-relatives (fifty-five cases). The search was performed in the ALLCASES database using the following search:

particularly if the subsequent marriage was a long one. In *Riley v. Tizzano*,[237] a will made a year before testator's death, expressly disinheriting testator's three children in favor of the testator's spouse of fifteen years (and her children, if she did not survive him) withstood an undue influence challenge by one of the testator's children.[238] In *In re Estate of Mowdy*,[239] the testator's three children unsuccessfully challenged their lawyer father's will in favor of their stepmother (who had been his legal secretary).[240] The death of actor/comedian Richard Pryor was followed by a variety of unsuccessful challenges by his children to dispositions in favor of their stepmother.[241] In *Bassford v. Bassford*,[242] a son's challenge to his father's will based on undue influence by his stepmother was rejected.[243] In *Robinson v. Estate of Robinson*,[244] the testator's son unsuccessfully challenged his father's will in favor of his second wife, a woman twenty years younger than his father, but to whom his father had been married for fifteen years, following a decades-long affair that began during the testator's prior marriage.[245] In *In re Will of Aoki*,[246] the challenge brought by the six children of Rocky Aoki (the founder of the Benihana chain of restaurants) to his will disinheriting them in favor of their stepmother, Keiko, failed.[247] In *Proctor v. White*,[248] two daughters unsuccessfully challenged their father's will leaving everything to their stepmother.[249]

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("Undue influence" /s (stepchild stepson stepdaughter stepmother stepparent)) and DATE (after 1999) and probate.

237. No. 06CA3, 2006 WL 3691661, at *1 (Ohio Ct. App. Dec. 7, 2006).

238. *Id.* at *5.

239. 973 P.2d 345 (Okla. Civ. App. 1998).

240. *Id.* at 349.

241. Est. of Pryor, 99 Cal. Rptr. 3d 895, 903 (Ct. App. 2009). Much of this litigation focused on now-superseded California Probate Code provisions related to care custodians, made more complicated in this case because Richard and Jennifer Pryor were married two separate times, with the second marriage unbeknownst to his children until after his death, and she was his care custodian both before and during their second marriage. *Id.* at 896–97.

242. 183 A.3d 680 (Conn. App. Ct. 2018) (per curiam).

243. *Id.* at 696–97 (holding that evidence pointed against undue influence by the stepmother, despite her capacity to do so by virtue of being the decedent's conservatrix).

244. 485 S.W.3d 261 (Ark. Ct. App. 2016).

245. *Id.* at 263, 268.

246. 948 N.Y.S.2d 597 (App. Div. 2012).

247. *Id.* at 601, 605, 608.

248. 155 S.W.3d 438 (Tex. Ct. App. 2004).

249. *See id.* at 440–41 (holding that the issue of undue influenced is waived on appeal because it was not adequately briefed).

In *In re Estate of Biddle v. Biddle*,[250] the Supreme Court of Mississippi rejected the testator's sons' claim that their stepmother (married to their father for twenty-seven years) had exercised undue influence over him, in the making of a will by which one of the testator's sons received $50,000 (of an estate worth several hundred thousand dollars), and the other son's daughter (the testator's only grandchild) was the beneficiary of a trust (including the testator's home).[251] A rare challenge by the testator's children to a will in favor of their step-father failed in *In re Estate of Harris*.[252] So too did a challenge by a step-father alleging undue influence related to his wife's transfer to her daughter, his stepdaughter, in *O'Brien v. Belsma*.[253]

Children do occasionally win against stepparents, but much less often than formerly. In *Wolfson v. Wolfson*,[254] the testator's two daughters and a stepson (from two prior marriages) successfully challenged a 2000 codicil to their father's will, cutting them out almost completely in favor of their stepmother, the testator's third wife.[255] In *Cresto v. Cresto*,[256] the Supreme Court of Kansas upheld an undue influence challenge brought by the testator's children to a will disinheriting them in favor of the testator's third wife (their second stepmother).[257] A similar result was reached where the new partner was not (yet) a spouse: in *Tyson v. Harbin*,[258] the Alabama Supreme Court in 2024 found that a will leaving most of the estate to the testator's new fiancé, rather than to her two sons, was unnatural.[259]

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250. 369 So. 3d 525 (Miss. 2023).
251. *Id.* at 528.
252. 352 P.3d 20, 22, 27 (Mont. 2015) (holding that children failed to provide sufficient evidence to challenge decedent's testamentary capacity or support their allegations of undue influence). In *Jarzemski v. St. Francis Seminary, Archdiocese of San Diego*, the children's challenge to a charitable trust set up by their mother and step-father was barred as untimely, and thus, their allegation that it was the product of his undue influence over their mother was never adjudicated on the merits. No. D038798, 2002 WL 31186647, at *6 (Cal. Ct. App. Oct. 2, 2002).
253. 816 P.2d 665, 668 (Or. Ct. App. 1991).
254. No. C042266, 2003 WL 22884048, at *1 (Cal. Ct. App. Dec. 8, 2003).
255. *Id.* at *9.
256. 358 P.3d 831 (Kan. 2015).
257. *Id.* at 835, 849.
258. No. SC-2023-0387, 2024 WL 503711, at *1 (Ala. Feb. 9, 2024).
259. *Id.* at *3.

### *B. Disputes Among Issue: "Feuding Siblings" and Children vs. Grandchildren*

Courts frequently find that wills preferring just one or two of testator's children over the others to be unnatural, and a product of undue influence by the favored child(ren). However, challenges by grandchildren to dispositions in favor of the testator's children rarely succeed.

For example, a Massachusetts court found the gift of a home to just one of five children, after the testator expressed a wish that it go to them all, to be unnatural.[260] An Idaho court reached the same result about a will in favor of the testator's lawyer son, drafted by him, completely excluding his siblings.[261] A Texas court determined that a will leaving the testator's entire estate to just one of her three sons, after several prior wills had omitted that son on the basis that he had received other property, was unnatural, although the court ultimately did not find undue influence.[262] In *In re Dunn*,[263] a North Carolina court found that two of the testator's six children unduly influenced the testator to revoke a will in favor of two of the other children, intending to have the decedent die intestate.[264] *Wilder v. Hill*[265] involved a dispute between stepchildren (in the apparent absence of issue), and a successful claim by a stepson that his sister had unduly influenced a will in her favor.[266]

However, a Texas appellate court upheld a will in favor of just one of testator's three children, disinheriting a son, a daughter, and a granddaughter (child of a predeceased son), when a prior will had divided the estate between just two sons and also omitted the daughter and granddaughter.[267]

Cases pitting grandchildren against children of the testator favor the children. A Massachusetts court described as "unnatural" the conveyance of real property from a grandmother to her six-year-old

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260. Coscia v. Sweezy, No. 20-P-1235, 2021 WL 4765696, at *3 (Mass. App. Ct. Oct. 13, 2021) (per curiam).

261. State Bar v. Smith, 513 P.3d 1154, 1166 (Idaho 2022).

262. Neal v. Neal, NO. 01-19-00427-CV, 2021 WL 1031975, at *13 (Tex. App. Mar. 18, 2021).

263. 500 S.E.2d 99 (N.C. Ct. App. 1998).

264. *Id.* at 104–05.

265. 625 S.E.2d 572 (N.C. Ct. App. 2006).

266. *See id.* at 574–75 (describing stepson's successful caveat proceeding).

267. *In re* Hogan, No. 11-20-00170-CV, 2022 WL 2070331, at *1 (Tex. App. June 9, 2022).

granddaughters (children of a living son) with only a retained life estate for herself, cutting out her disabled daughter who lived in the home, had adapted it for her needs, and expected to inherit it.[268] In that case, the undue influence was exerted by the granddaughters' father, testator's son, to the detriment of his sister.[269] In *Estate of Morris v. Morris*,[270] the testator's grandchildren (remainder beneficiaries of a trust contained in a prior instrument) alleged that their stepmother unduly influenced their grandmother to leave her estate outright to their own father.[271] Their challenge failed, in a pro-natalist result favoring the testator's children over the testator's own more distant issue.[272] So too did multi-millionaire heiress Samantha Perelman's challenge to the will of her grandfather, Robert Cohen, alleging undue influence by her uncle, James, Robert's son.[273] Grandchildren rarely succeed even against non-relatives: in *In re Estate of Simpson*,[274] grandchildren who received bequests were unable to show that a will leaving twenty-five percent of the estate to a caretaker was the product of undue influence.[275]

### *C. Children vs. Stepchildren*

While stepmothers (and the occasional stepfather) fare better today than in the past, turning back many challenges by their stepchildren, disputes *between* children and stepchildren strongly support the (biological) pro-natalist preference for a testator's own children.

In *Erickson v. Olsen*,[276] the North Dakota Supreme Court affirmed a lower court decision finding undue influence by the testator's stepchildren, as alleged by his children.[277] In *Kelly v. McNeel*,[278] the

268. Erikson v. Erikson, No. 20 MISC 000381, 2023 WL 4379119, at *9 (Mass. Land Ct. July 6, 2023).
269. *Id.* at *10.
270. 329 S.W.3d 779 (Tenn. Ct. App. 2009).
271. *Id.* at 780–81.
272. *Id.* at 786.
273. Cohen v. Perelman, Nos. A-3275-14T4, A-3286-14T4, 2018 WL 6034978, at *6, *7 (N.J. Super. Ct. App. Div. Nov. 19, 2018) (per curiam); *see also* Tara Palmeri & Laura Italiano, *Samantha Perelman Loses Battle over Grandfather's Millions*, PAGE SIX (June 25, 2014, 2:35 PM), https://pagesix.com/2014/06/25/samantha-perelman-loses-court-battle-over-granfathers-millions [https://perma.cc/VS7C-YTJU] (providing further background on the familial dispute leading to Samantha's loss in court).
274. 595 A.2d 94 (Pa. Super. Ct. 1991).
275. *Id.* at 98–99.
276. 844 N.W.2d 585 (N.D. 2014).
277. *Id.* at 596–97.
278. 250 P.3d 1105 (Wyo. 2011).

Wyoming Supreme Court upheld a finding of undue influence by a stepdaughter (and her husband) in procuring testamentary instruments disinheriting the testator's son.[279] In *In re Estate of Martin*,[280] an Iowa appellate court affirmed a summary judgment in favor of the testator's daughters, against an undue influence challenge from a stepson.[281] In *Gestner v. Divine*,[282] the Idaho Supreme Court rejected an undue influence challenge by stepchildren to a change in a trust that cut them out in favor of the settlor's daughter.[283] In *Estate of Brown*,[284] the stepchildren failed to invalidate their stepmother's will in favor of her own son on the grounds of undue influence.[285] In *Wiseman v. Keeter*,[286] children and stepchildren of the testator joined together to allege that just one of the testator's children had exerted undue influence over the testator, and prevailed.[287] It seems likely that a prior will, dividing the estate more equally among all the children and stepchildren, as well as the presence of siblings challenging their brother's conduct, contributed to this outcome.[288]

A prior instrument in their favor is helpful to stepchildren even when no child is on their side, particularly when they are seeking to vindicate equal treatment. In *In re Estate of McComb*,[289] two stepdaughters of the testator prevailed in overturning a will entirely in favor of the testator's only surviving biological child, a son.[290] The three were equal beneficiaries under a prior instrument, and the stepdaughters were able to prove that the son unduly influenced the testator with respect to the instrument at issue.[291] Similarly, in *Lillard v. Owens*,[292] the Supreme Court of Georgia upheld an undue influence challenge brought by unadopted stepchildren of the testator's twenty-

279. *Id.* at 1107.
280. No. 23-0173, 2023 WL 8805577 (Iowa Ct. App. Dec. 20, 2023).
281. *Id.* at *3.
282. 519 P.3d 439 (Idaho 2022).
283. *Id.* at 443.
284. 402 S.W.3d 193 (Tenn. 2013). However, the stepchildren prevailed on other grounds; the mother's will was executed in violation of a contract to make (and not revoke) mutual wills, voiding the later will under applicable Tennessee law. *Id.* at 195.
285. *Id.*
286. 550 S.W.3d 883 (Ark. Ct. App. 2018).
287. *Id.* at 893, 895.
288. *Id.* at 884, 893.
289. No. 1087 WDA 2019, 2021 WL 5370826, at *1 (Pa. Super. Ct. Nov. 18, 2021).
290. *Id.* at *1, *10.
291. *Id.*
292. 641 S.E.2d 511 (Ga. 2007).

seven year second marriage, against the testator's two children, a biological child and an adopted stepchild from a previous marriage.[293] A prior will shared the estate more evenly among all the children, and the will disfavoring the stepchildren was executed just twelve days before the testator's death.[294] But a prior will in their favor is no guarantee of success: in *Reinhardt v. Powell*,[295] stepchildren were unable to show undue influence by the testator's own children, in the execution of a will solely in favor of those children, despite a prior will in favor of stepchildren and children alike.[296] Stepchildren fare unevenly against collateral relatives.[297] In *Kidwell v. Pitts*,[298] the testator's stepchildren unsuccessfully challenged the will of an otherwise-childless testator who left everything to her sister (with the sister's issue as back-up beneficiaries).[299] In *Noblin v. Burgess*,[300] an aunt, uncle, and first cousins unsuccessfully challenged certain non-probate transfers in favor of stepchildren.[301] All in all, stepchildren fare better than collaterals, but cannot compete with the testator's biological (or adopted) children, affirming the pro-natalist hypothesis.

### *D. Challenges By and Among Collateral Relatives*

Further supporting a strong pro-natalist hypothesis, collateral relatives appear to enjoy none of the advantages children do in undue influence challenges. The cases follow no obvious pattern. A challenge by three of the elderly testator's nephews (the children of one deceased brother) alleging undue influence by three other nephews (children of a different deceased brother) was rejected by the court in *Estate of Lista*.[302]

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293. *Id.* at 512, 514.
294. *Id.* at 512.
295. No. E2008–01905–COA–R3–CV, 2009 WL 2242684, at *1 (Tenn. Ct. App. July 28, 2009).
296. *Id.* at *1.
297. *See infra* Section IV.D (putting forth various cases that demonstrate inconsistencies in how courts analyze challenges of undue influence brought by collateral relatives); *see also* SITKOFF & DUKEMINIER, *supra* note 6, at 87 (defining "collateral kindred" as "[a]ll persons who are related by blood to the decedent but who are not descendants or ancestors").
298. No. 22370, 2008 WL 3990827 (Ohio Ct. App. Aug. 29, 2008).
299. *Id.* at *1–2.
300. 54 So. 3d 282 (Miss. Ct. App. 2010).
301. *Id.* at 285.
302. No. O.C. No. 1474 AP of 2003, 2006 WL 321189, at *1 (Pa. Ct. Com. Pl. Jan. 26, 2006).

Non-marital partners also fare inconsistently. In the absence of issue or close relatives, challenges by stepchildren against non-marital partners have succeeded.[303] In *In re Estate of Evans v. Taylor*,[304] the Mississippi appellate court upheld a finding that the elderly, childless testator's twenty-years-younger girlfriend of fifteen years had failed to rebut a presumption of undue influence, in a challenge brought by *fifteen* (!) of his heirs, including, *inter alia*, a grandniece and grandnephew.[305] The Massachusetts Supreme Judicial Court found an unnatural disposition where an uncle left his estate to his housekeeper rather than his nephew (his heir), despite promises to the nephew and a longstanding close relationship between them.[306] But a will in favor of decedent's live-in (same-sex) partner, who was also his "paid manager/agent for most of decedent's financial affairs and [who] took care of running their household," rather than decedent's brother, was found not to be unnatural.[307] In *In re Estate of Kottke*,[308] the Alaska Supreme Court rejected an undue influence challenge to a will in favor of the testator's live-in girlfriend/caretaker, brought by a stepchild and sibling of the testator.[309]

### *E. Summary*

Unlike the intestacy statutes, which set out a strict hierarchy of heirs, in the pro-natal jurisprudence of undue influence, only one category matters: children. Children reliably prevail in undue influence claims against everyone other than stepparents; the same cannot be said for any other category of takers. Although the law itself states no such pro-natal preference, the effect of courts' evaluations of "unnatural" dispositions, in light of the "natural objects of the testator's bounty," reliably favors children over all others.

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303. *See, e.g.*, Struever v. Yoswig, NO. 4-19-0038, 2019 WL 6655279, at *1, *2, *6 (Ill. App. Ct. Dec. 5, 2019) (affirming the trial court's finding that there was no conceivable scenario where the decedent would have wanted to cut out the stepchildren of all assets).

304. 830 So. 2d 699 (Miss. Ct. App. 2002).

305. *Id.* at 700 (emphasis added).

306. Popko v. Janik, 167 N.E.2d 853, 854–55 (Mass. 1960).

307. Est. of Sarabia v. Gibbs, 270 Cal. Rptr. 560, 561–62, 565 (Ct. App. 1990).

308. 6 P.3d 243 (Alaska 2000).

309. *Id.* at 244.

## CONCLUSIONS

As the foregoing analysis has shown, pro-natalism is not only a feature of the intestacy statutes, sometimes referred to as "an estate plan in default."[310] It is also a pervasive part of the law of wills. Several important parts of the wills law expressly protect the interests of heirs, of whom children are the most favored. Even neutral laws and doctrines are applied to favor the testator's children. Again and again, if things go wrong, the default rules of probate law opt for the pro-natalist remedy, even when this imposes additional complications and is unsupported, or even contradicted, by evidence of what the testator actually wanted. An interested witness who is a stranger may lose their gift entirely, but an interested witness who is an heir (not engaged in undue influence) never will. If the purging statute is like Texas's, they will receive up to their intestate share; in California, they can actually receive the full bequest, even if it is larger than their intestate share, simply by rebutting a presumption of undue influence. This is not hard to do for those closely within the family circle, given the likelihood that gifts to them will appear "natural." And even if the presumption is unrebutted, they still receive their share by intestacy. The unrelated witness-beneficiary enjoys none of this favoritism. The children of a predeceased beneficiary unrelated to the testator get nothing, but even the expressly disinherited issue of a beneficiary who is related to the testator may receive their ancestor's share. Because children are the "natural objects of the testator's bounty," failing to mention or acknowledge one's children may suggest a lack of capacity (resulting in an intestate distribution in favor of those children), or entitle an omitted child to an intestate share. The collective effect is to channel both testate and intestate estates toward the testator's children, regardless of whether this is what the decedent wanted. In one way or another, this is often justified by a fictitious assumption that this is what the parent intended, but it would be more accurate to say that this is what the probate law intends irrespective of the testator's expressed wishes.

The extreme favoritism shown towards the children of the testator or intestate decedent, throughout the probate law, may in fact reflect the actual preferences of many people, or their assumptions about how their estates would or should be distributed if they died without a

310. SITKOFF & DUKEMINIER, *supra* note 6, at 65.

will.[311] Even if probate law is pro-natal, perhaps there is nothing wrong with that. After all, if this really is what most testate and intestate decedents want and expect, shouldn't the law reflect that?

In answering that question, we should first consider that these desires and expectations may be as much the result as the cause of these long-standing rules. While courts or legislatures may blithely assume that what is found in the probate code reflects what most people would want or expect (though those are not themselves the same!), no opinion polls have been taken, and there is no reason confidently to make such assertions.[312] Perhaps these preferences seem "natural" in large part because centuries of law have made them so. The provisions of probate codes are not the product of a popular vote, and even if they were, people would likely not be voting from a standpoint of neutrality about what the best rules should be, or from behind a veil of ignorance about their own specific actual family configuration, but rather would bring all their preexisting ideas about the subject to bear.

Intersectional legal feminism has taught us to be especially vigilant about rules related to family life that are characterized as "natural," because we know that calling something "natural" only tends to obscure its ideological character.[313] When children are presumptively assumed to be the "natural objects" of a parent's testamentary "bounty," and when any disposition away from them is characterized as "unnatural" thus suggesting undue influence by somebody, we should understand how the rhetoric of naturalness is being deployed. It is used to cast a shadow both on those who seek to transfer property outside the family and on those who would receive it. We should be wary of calling something "natural" simply because it is common or popular under prevailing social norms, or "unnatural" because it is not. We should notice when the law gives legal meaning to biological facts, including facts of parenthood, especially when this happens under a rubric of "naturalness," as if what is called natural is right or beyond critique, and must be accepted because it cannot be changed. We

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311. One of the first serious studies of this subject will result in two articles, the first of which addresses preferences about spouses and non-marital partners. Yair Listokin & John Morley, A Survey of Preferences for Estate Distribution at Death Part 1: Spouses and Partners 5 (Yale L. & Econ. Working Paper, Feb. 14, 2023), https://ssrn.com/abstract=4332171.

312. *See id.* at 6.

313. *See supra* Part IV (discussing various cases in which the court's disposition relied on what they deem to be "natural" or "unnatural" behavior of decedents that had allegedly devised their wills under undue influence).

should be acutely aware of the many forms of inequity and subordination that have been historically justified on the basis of specious claims about what is "natural." Norms of this kind have long operated for too long to constrain the life choices and life prospects of people of color and white women, regardless of our own choices.

In will-making, the principle of testamentary autonomy, of freedom of testation, is an important expression of the rights of competent testators to dispose of their estates as they wish, itself an important dimension of our understanding of private property ownership.[314] It may be that the overwhelming majority of parent-testators do in fact wish to pass their estates to their children. But the law of wills ought not to use a host of concealed pro-natalist devices to unfairly burden and even overturn the wishes of those who do not.

314. *See* Leslie, *supra* note 211, at 235 (explaining that freedom of testation is often treated as a fundamental principle of the law of wills because it affords the "right to distribute property upon death solely according to the dictates of one's own desires").