Executor Discretion

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ABSTRACT: The fundamental purpose of the law of wills is to distribute an owner's property according to their intent. When a will is implemented, despite no longer reflecting the intent of the person who wrote it, the law fails at this purpose. As the average age of wills at death has increased, families and wealth have become more fluid, and a growing number of people live for a long time without the mental capacity to change their will, this happens all the time. But the enthusiastic reforms in wills law of the past half-century have largely ignored the problem.

This Article discusses a possible drafting solution to the challenge of expired intents in wills law. A testator might, after laying out a specific estate plan, include a clause granting their executor discretion to make adjustments reflecting what the testator would have wanted when the will is implemented. As bounded discretion offers flexibility in many legal contexts, an "executor discretion clause" along these lines might help better implement the intent of the testator at the time of their death.

Notwithstanding potential challenges sounding in compliance with the Wills Act and indefinite standing, executor discretion clauses are enforceable, or should be with modest doctrinal changes. And while implementing them raises new difficulties and concerns about abuse these issues are hardly insurmountable—the familiar doctrine of substituted judgment can cabin executor discretion, subject to challenge by those injured by its exercise, against a presumption of validity in executor decisions.

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INTRODUCTION

Consider a person who, in the early years of their retirement, duly executed a will leaving everything to two favored children, to the exclusion of an estranged third. When this person dies fifteen years later, they'd reconciled with the estranged child, and planned to update their will—but never did. Or someone who, thinking there wouldn't be much left, validly executed a will leaving everything to a surviving spouse. But when their last illness came sooner

than anticipated, and it was clear there would be more than enough, wanted to make a token bequest to a thoughtful caregiver—but didn't manage to call a lawyer in time.[1] Or what about someone living with serious dementia for ten years, legally incapable of amending their will.[2] In that time, grandchildren are born, children marry and divorce. Some children distinguish themselves, others never call. When this person dies, it can only be their pre-dementia will admitted to probate, now at least a decade old.[3]

The fundamental, organizing purpose of the law of wills is to implement the intent of the "testator"—the drafter of the will.[4] Our system of transmitting property across generations grants property owners the right to decide what happens to their belongings after they die.[5] From this perspective, the goal of the law of wills is to discern what a now-deceased owner wanted and make it happen.[6] Whenever a will is probated, even though it no longer represents what the testator would have wanted, wills law fails on its own terms.[7]

This evidently happens all the time.[8] Over the past century, the average age of wills admitted to probate has increased dramatically, with as many as a third of wills today composed at least a decade before death.[9] In that same time, family life has become more dynamic, wealth more volatile, and planning for one's final years more difficult.[10] Of course, people *can* change their wills as

1. *See, e.g.*, James L. Robertson, *Myth and Reality—Or, Is It "Perception and Taste"?—In the Reading of Donative Documents*, 61 FORDHAM L. REV. 1045, 1070 (1993) (discussing this sort of case).

2. *See, e.g.*, Reid Kress Weisbord & David Horton, *The Future of Testamentary Capacity*, 79 WASH. & LEE L. REV. 609, 613 (2022) ("Under the ancient doctrine of testamentary capacity, courts strike down wills executed by testators who lack a 'sound mind.'").

3. *See, e.g.*, Mary Louise Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611, 622–23 (1988) ("If an incompetent property owner cannot make a donative transfer, the estate plan becomes frozen.").

4. *See, e.g.*, Reid Kress Weisbord, *Fiduciary Authority and Liability in Probate Estates: An Empirical Analysis*, 53 U.C. DAVIS L. REV. 2561, 2563–64 (2020) (describing the "core mission" of probate law "implementing testamentary intent"); Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L.J. 643, 643 (2014) ("The American law of succession embraces freedom of disposition . . . .").

5. *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmts. a, c (AM. L. INST. 2003) ("Property owners have the nearly unrestricted right to dispose of their property as they please.").

6. *Id.* cmt. c ("The main function of the law in this field is to facilitate rather than regulate.").

7. *See infra* Section I.B.

8. *See, e.g.*, Adam J. Hirsch, *Text and Time: A Theory of Testamentary Obsolescence*, 86 WASH. U. L. REV. 609, 612 (2009) ("One estate planner offers a bleak assessment: 'If truth were known, I believe that we would be aghast at the number of outstanding wills of living persons in this country which are obsolete, as far as reflecting the present wishes of the testator.'" (quoting Paul B. Sargent, *Drafting of Wills and Estate Planning*, 43 B.U. L. REV. 179, 190 (1963))).

9. *See, e.g.*, Mark Glover, *The Timing of Testation*, 107 KY. L.J. 221, 225 (2018) (synthesizing available data); *see also* David Horton, *Wills Law on the Ground*, 62 UCLA L. REV. 1094, 1129 (2015) ("[M]ost testators engage in estate planning long before they pass away.").

10. *See infra* Section II.B.

their intentions change—wills law largely expects them to.[11] But many, maybe most, don't. The law of wills itself recognizes this dynamic through a handful of crude, impersonal presumptions designed to update old wills on major life changes, based on what the testator might have wanted.[12] Moreover, a large and growing group of people *cannot* change their wills in their later years, no matter how much they want to—individuals without testamentary capacity, perhaps because of advanced dementia, can neither validly modify a will, nor delegate their power to do so.[13]

This Article suggests and discusses a possible drafting solution to the problem of expired intents in wills. Suppose that a testator, after expressing their intent at the time of drafting with various specified bequests, were to include a clause granting the executor or executors of their estate discretion to modify these bequests. I'll call such a clause an "executor discretion clause." And while executor discretion clauses might take many different forms, here's a broad one:

> The foregoing dispositions reflect my intentions at the time this will was executed. Cognizant that my intentions might change by the time of my death, and that I may fail to update this will or draft a new one, I hereby grant my chosen executor, in whom I have absolute trust and confidence, discretion to modify the foregoing dispositions, including eliminating dispositions and making new ones, based on what I most recently wanted or would have wanted.[14]

This Article argues that executor discretion clauses on this model ought to be included in the arsenal of estate planning tools to help mitigate the problem of expired intents in wills and ensure the probate process better fulfills its fundamental purposes.

Throughout the law, guided and reviewable discretion is a tool for flexibility in unanticipated circumstances—from constitutional and administrative law to common law agency.[15] So too here. Granting someone discretion to update bequests in light of changed circumstances and intentions at death—in

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11. ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 224 (11th ed. 2022) ("A will is said to be *ambulatory*, meaning that it is subject to amendment or revocation by the testator at any time prior to death.").

12. *See, e.g.*, Hirsch, *supra* note 8, at 613–14 ("In a perfect world, the authors themselves would attend to the task of updating their texts with precision and dispatch. In the real world, that may not happen . . . ."); Mark Glover, *A Taxonomy of Testamentary Intent*, 23 GEO. MASON L. REV. 569, 595–99 (2016) (summarizing these rules and their purpose in approximating the hypothetical intent of the testator).

13. *See, e.g.*, Alexander A. Boni-Saenz, *Personal Delegations*, 78 BROOK. L. REV. 1231, 1244 (2013) ("Courts and legislatures have generally designated willmaking as nondelegable, viewing that decision as too personal to be made by another.").

14. There are a variety of ways these clauses could be customized. For instance, testators could grant more limited discretion say, only to decrease, but not to increase bequests. Or they might provide some standard to guide the executor's decision-making other than "my intentions at the time of my death." *See infra* Section IV.A.

15. *See infra* Section III.A.

much the same way as one might grant discretion under a durable power of attorney, another relatively recent legal innovation that addresses comparable problems[16]—can better ensure that what happens to people's property at death is actually what they wanted.[17] For most testators who are already appointing a trusted loved one as executor, the executor makes the most sense as the bearer of this discretion.[18]

To be sure, there are mechanisms for incorporating discretion in estate plans currently in use by sophisticated planners, for which there is clearly demand—specifically, powers of appointment and discretionary trusts. But neither captures the distinctive features of an executor discretion clause. Powers of appointment are not constrained by fiduciary duties.[19] And while trusts are, they must be for the benefit of ascertainable beneficiaries—a trustee cannot exercise discretion to add additional beneficiaries.[20] For testators who want to grant duty-bound discretion that includes the discretion to add beneficiaries, an executor discretion clause may be their best bet.

In the past fifty years, wills law has been an active area of statutory and common law reform. Scholarly criticism highlighting that many of the law of wills' more arcane doctrines undermine rather than further its aspirations to accurately implement the testator's intent has led to reforms across the country.[21] These reforms—which make it easier to correct scrivener's errors or to probate documents that were clearly intended to be wills but which do not qualify for some technical reason—have largely sidestepped the problem of expired intent, relying on the traditional answer that people simply ought to update their wills and have only themselves to blame if they don't.[22]

My argument here builds on these calls for reform. Like these other calls, I acknowledge that law reform on the problem of expired intent might ultimately be helpful or necessary. But one benefit of executor discretion clauses is that they offer a *drafting* solution that testators and attorneys could adopt now. Indeed, executor discretion clauses appear to be valid under current law.[23] And to the extent a court finds technical barriers to their implementation,

16. *See, e.g.*, Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 GA. L. REV. 1, 1 n.1 (2001) (discussing the development of the durable power of attorney).

17. *See infra* Section III.A.

18. *See* Weisbord, *supra* note 4, at 2600–01; *infra* Section III.B.

19. *See, e.g.*, SITKOFF & DUKEMINIER, *supra* note 11, at 822 (noting that powers of appointment are nonfiduciary); *In re* Estate of Zucker, 122 A.3d 1112, 1116–17 (Pa. Super. Ct. 2015) (noting that powers of appointment do not even need to be exercised in good faith).

20. *See, e.g.*, Clark v. Campbell, 133 A. 166, 170–71 (N.H. 1926) (invalidating a purported trust for the benefit of decedent's "friends" for lack of ascertainable beneficiaries).

21. *See, e.g.*, John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV. 521, 577 (1982) (arguing for reformation for mistake); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 489 (1975) (arguing that courts should admit any document that substantially complies with the required formalities).

22. *See* Langbein & Waggoner, *supra* note 21, at 581 (describing failure to update one's will as "uncorrectable").

23. *See infra* Section III.C.

it should, for reasons discussed below, simply hold those challenges unavailing as a common law matter and authorize executor discretion clauses as a private mechanism to anticipate changed intent.[24]

Because executor discretion clauses are not currently in widespread use, implementing them will take some work on the part of courts to develop appropriate doctrine. Substituted judgment—a familiar standard in structurally comparable circumstances in health law and elder law[25]—makes sense as a default standard to guide the exercise of discretion, subject to the testator's election of an alternative.[26] To ensure compliance with this standard, anyone harmed by its exercise (including those *not* given a new bequest who, had the executor been complying with their duties, *should* have been), must have standing to sue.

At the same time, to deter frivolous litigation, executor decisions must be presumed valid, and the burden placed on the challenger to show the decision inconsistent with the standard by which the executor must decide.[27] The exception involves situations in which the executor seeks to increase their own bequest, and perhaps also to increase bequests to those uniquely closely related to them.[28] Because of the high risk of abuse in those transactions, and as elsewhere in fiduciary law, executors must seek court approval in advance, and bear the burden of showing the transaction consistent with the relevant standard.[29]

The argument proceeds in four parts. Part I offers a brief survey of the law of wills, and argues that the basic commitment of this area of law is to implement the most recent actual or hypothetical intent of the testator, for which the law takes written instructions of wills to be the best evidence. Wills law is *not* organized around any freestanding commitment to implementing the words of wills for their own sake—that would make no sense. The law, then, fails on its own terms where it enforces the text of a will over actual contrary intent of the testator.

In Part II, I discuss the problem of expired intents in wills. When the law's singular solicitude for the written text of wills was developed, most wills were written shortly before the testator's death, minimizing the risk of expired intent. This is no longer true. And the problem is compounded by changes to family structure and the nature of wealth and health that make it even less likely that intent written in a ten-year-old document reflects intent at death.

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24. *See infra* Section III.C.5.

25. *See, e.g.*, James Toomey, *Love, Liberalism, Substituted Judgment*, 99 IND. L.J. 1289, 1295–99 (2024) (summarizing the substituted judgment standard in various legal contexts).

26. *See infra* Section IV.A.

27. *See infra* Section IV.C.

28. *See infra* Section IV.D.

29. *See infra* Section IV.D; *see also* UNIF. POWER OF ATT'Y ACT § 116 (UNIF. L. COMM'N 2006) (providing procedures for challenges to abuse under durable powers of attorney); Boxx, *supra* note 16, at 44–45 (same); SUSAN GARY, GEORGE GLEASON BOGERT, GEORGE TAYLOR BOGERT & AMY MORRIS HESS, BOGERT'S THE LAW OF TRUSTS AND TRUSTEES § 543 (2024) (noting that prior court approval can validate self-dealing transactions that would otherwise violate trustees' fiduciary duties).

Part III makes the case for executor discretion clauses, arguing that they are both desirable and legal. Although there are arguments that they would violate the Wills Act or create an indefinite class of quasi-fiduciary relationships, analogous grants of discretion to executors have been upheld unproblematically, and are recognized in agency law and the law governing powers of appointments.

Finally, in Part IV, I offer some thoughts on how courts might go about implementing executor discretion clauses. Unless the will specifies otherwise, executors should be held to the substituted judgment standard—to make the decision the testator would have made. To enforce this standard, courts can borrow a basic structure from other areas of fiduciary law—a presumption of validity in executor decision-making, unless it is to their own benefit, in which case it would require prior court approval.

I. INTENT AND THE LAW OF WILLS

The organizing, fundamental purpose of the law of wills is to implement the most recent actual or hypothetical intent of the testator.[30] Thus, when a will that no longer reflects the testator's intent is probated, the law fails at its purposes. This may seem obvious—it's black letter law that the law of wills exists to implement the testator's intent.[31] But on closer inspection, there are important disagreements about the role of intent in this body of law—what it means, how it is understood, and how it ought to be implemented. To make the case that probating a will that no longer represents the testator's intent is an error, we must go deeper.

This Part first offers a brief survey of the law of wills—its intent-implementing aspirations and some ways in which it has failed. I then argue that the "intent" with which this body of law is concerned is the most recent actual or hypothetical subjective intent of the testator—not primarily to enforcing the words of the will, the function of which is evidentiary.

A. *WILLS LAW, IN BRIEF*

The fundamental purpose of the law of wills is to implement the intent of the testator.[32] Indeed, as the Restatement of Property puts it, "The organizing principle of the American law of donative transfers is freedom of disposition."[33]

30. *See, e.g.*, Glover, *supra* note 9, at 235 ("[T]he law's goal is to distribute the testator's property according to her wishes.").

31. *See, e.g.*, Richard F. Storrow, *The Secret Life of Testamentary Schemes*, 68 DRAKE L. REV. 85, 87 (2020) ("The law of wills emphasizes above all the importance of determining and carrying out the intention of testators."); Glover, *supra* note 12, at 569 (describing the "fundamental principle within the law of succession" that "intent . . . is the cornerstone of a will").

32. *See, e.g.*, Frederic S. Schwartz, *Misconception of the Will as Linguistic Behavior and Misperception of the Testator's Intention: The Class Gift Doctrine*, 86 U. DET. MERCY L. REV. 443, 443 (2009) (describing as "the most fundamental rule[] in the law of wills . . . that the testator's intention is paramount"); RAY D. MADOFF, IMMORTALITY AND THE LAW 6–7 (2010) (criticizing the power American law grants testators over disposition of their property while recognizing it is the purpose of the system).

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

At a basic level, owners may determine who gets their property after their death, and law's role is to facilitate rather than regulate.[34] This wasn't always the case. Under feudal law, property descended under strict principles of primogeniture.[35] It wasn't until the sixteenth century that British law adopted by statute a system of inheritance based on the owner's intent.[36] This history means that, where scholars and courts are left to speculate about the purposes of older common law doctrines like tort and contract,[37] the intent-implementing purpose of the law of wills is black-letter and widely recognized by courts.[38]

Since the advent of a law of succession organized around intent, courts and legislatures have struggled against concerns about fraud.[39] In general, if the law (or anyone) wants to know what someone wants, we ask them and take their word for it.[40] By hypothesis, in the case of wills, we cannot do that[41]—what John Langbein called the "worst evidence" problem entailed by any system of succession based in intent.[42] The British Wills Act of 1837 struck a balance by codifying the aspiration of descent by intent while addressing concerns of

34. *Id.*

35. *See, e.g.*, Gerry W. Beyer & Claire G. Hargrove, *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?*, 33 OHIO N.U. L. REV. 865, 870–71 (2007) (summarizing this history); *see also* SITKOFF & DUKEMINIER, *supra* note 11, at 30 ("Under the feudal system, most English land could not be devised. Upon the death of a landholder, the land descended by operation of law . . . .").

36. The Wills Act 1540, 32 Hen. 8, c. 1 (Eng.) (authorizing disposition of real property by will after death); *see also* Scott T. Jarboe, Note, *Interpreting a Testator's Intent from the Language of Her Will: A Descriptive Linguistics Approach*, 80 WASH. U. L.Q. 1365, 1371 (2002) (summarizing the history of a shift towards implementing the intent of testators in British wills law).

37. *See generally, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (5th ed. 1998) (arguing that the purpose of tort is to allocate loss in economically efficient ways); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (2012) (arguing that the purpose of tort law is rather to implement corrective justice grounded in Aristotelian and Kantian theories of ethics).

38. *See, e.g.*, Zaidman v. Zaidman, 305 So. 3d 330, 332 (Fla. Dist. Ct. App. 2020) ("The primary goal of the law of wills, and the polestar guiding the rules of will construction, is to effectuate the manifest intent of the testator." (quoting Bertoglio v. Dickson (*In re* Estate of Dickson), 590 So. 2d 471, 472 (Fla. Dist. Ct. App. 1991))); Wheeling Dollar Sav. & Tr. Co. v. Stewart, 37 S.E.2d 563, 567 (W. Va. 1946) ("It is a cardinal principle in the law of wills that the intent of the testator will be sought, and, when ascertained, will be given effect, if not contrary to some positive rule of law."); Hutton v. Safe Deposit & Tr. Co. of Balt., 133 A. 308, 313 (Md. 1926) ("The intent of a testator is the law of wills, unless in conflict with some settled rule of law or of property.").

39. *See, e.g.*, W.J.V. WINDEYER, LECTURES ON LEGAL HISTORY 216 (2d rev. ed. 1974) (acknowledging this concern as the historical motivation for the Statute of Frauds); C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism*, 43 FLA. L. REV. 167, 189–97 (1991) (summarizing fraud in oral and written wills before the Statute of Frauds).

40. *See, e.g.*, Peter Meijes Tiersma, Comment, *The Language of Offer and Acceptance: Speech Acts and the Question of Intent*, 74 CALIF. L. REV. 189, 189 (1986) ("Courts attempt to discover whether the parties have assented to an agreement by examining their words and deeds.").

41. *See, e.g.*, John H. Langbein, *Will Contests*, 103 YALE L.J. 2039, 2044 (1994) (book review); *see also* Kent Greenawalt, *A Pluralist Approach to Interpretation: Wills and Contracts*, 42 SAN DIEGO L. REV. 553, 550 (2005) ("When courts construe wills, their writers are not available to say what they were trying to do (or how their wishes might have changed by the time they died)." (footnote omitted)).

42. Langbein, *supra* note 41, at 2046.

fraud.[43] This balance has created the basic architecture of the American law of wills.[44] In short order, every American jurisdiction had adopted a Wills Act closely modeled on the British one, and, subject to largely cosmetic modifications, these still provide the structure of testation in every state.[45]

These Wills Acts authorize disposition by intent, but require it to be evidenced by a specified formalized procedure.[46] While the details vary from state to state, in all jurisdictions a formal will must be in writing, signed by the testator, and attested by at least two witnesses.[47] Moreover, courts have traditionally required strict compliance with these formalities, and find technically defective wills invalid regardless of evidence of the testator's intent.[48] A testator can change, replace, or revoke their will at any point until their death, but only by a new will executed with the same formalities.[49]

Valid wills pass property through state probate courts. Most wills nominate an "executor," empowered to collect the testator's property, pay their debts, and make the dispositions in the will.[50] Many wills name more than one executor, and provide procedures for how they must work together (consensus, majority

43. *See, e.g.*, Wills Act 1837, 7 Will. 4 & 1 Vict. c. 26, § 9 (Eng.) (requiring that all wills be in writing, signed by the testator, and attested).

44. *See, e.g.*, James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 547–48 (1990) (summarizing the changes made by the Wills Act and its influence on American jurisdictions).

45. *See, e.g.*, SITKOFF & DUKEMINIER, *supra* note 11, at 143 ("The probate code of every state includes a provision, known for historical reasons as the *Wills Act*, which prescribes rules for making a valid *will*.").

46. *See, e.g.*, Wills Act 1837, 7 Will. 4 & 1 Vict. c. 26, § 9 (Eng.) ("[N]o will shall be valid unless it shall be in [w]riting and executed in manner herein-after mentioned . . . ."); UNIF. PROB. CODE § 2-502 (amended 2019) (outlining similar formalities to create a valid will).

47. JEFFREY A. SCHOENBLUM, MULTISTATE GUIDE TO ESTATE PLANNING 1001–80 (Barbara L. Post ed., 2022) (surveying variation in formalities across states). *See generally* Bridget J. Crawford, *Wills Formalities in the Twenty-First Century*, 2019 WIS. L. REV. 269 (discussing Wills Act formalities). More than half the states also recognize less formal holographic wills—a device of civil law—that enforce wills written entirely in the testator's hand and signed by the testator, but not attested. SITKOFF & DUKEMINIER, *supra* note 11, at 205.

48. *See, e.g.*, *In re* Groffman [1969] 1 W.L.R. 733, 735 (PC) (refusing to probate a will that was not attested by two witnesses in each other's physical presence, though the court was "perfectly satisfied that the document was intended by the deceased to be executed as his will and that its contents represent his testamentary intentions"); Bitetzakis v. Bitetzakis, 264 So. 3d 297, 300 (Fla. Dist. Ct. App. 2019) (refusing to probate a will the testator only partially signed on the misapprehension that it needed to be notarized).

49. *See, e.g.*, Wilson v. Francis, 155 S.E.2d 49, 51 (Va. 1967) ("A will is an ambulatory instrument, not intended or allowed to take effect until the death of the maker. It may be changed during life as often as the mind and purpose of the testator change." (quoting Timberlake v. State-Planters Bank of Com. & Trs., 115 S.E.2d 39, 44 (Va. 1960))). Revocation can also be accomplished by physical act, but physical acts cannot otherwise alter dispositions. *See, e.g.*, UNIF. PROB. CODE § 2-507 (amended 2019) (governing revocation).

50. *See, e.g.*, SITKOFF & DUKEMINIER, *supra* note 11, at 42; *see also* Weisbord, *supra* note 4, at 2563 ("[E]xecutors shoulder the lion's share of administrative burden in testate estates.").

vote, etc.).[51] If a will does not provide an executor, the named executor is unable or unwilling to serve, or the testator has failed to make a valid will at all, the court will nominate an "administrator," with comparable powers.[52] Questions about a will's validity, its meaning, or the conduct of the executor are litigated in probate court.[53]

In litigating such questions, courts have adopted interpretive rules strictly tied to the plain text of the will, irrespective of other evidence of the testator's intent.[54] Under the "plain meaning" rule, courts read the words of the will as a reasonable speaker of the language would.[55] Under the "no reformation" rule, courts disclaim any ability to modify wills, even upon compelling evidence of straightforward drafting errors.[56] At the same time, courts and legislatures have adopted a handful of crude interpretive presumptions where changed circumstances make following the text of the will impossible or presumptively misguided—for instance, wills are presumed revoked as to later-divorced spouses,[57] children born after execution may be able to claim a default share,[58] and a labyrinthine set of common law and statutory rules govern when a named beneficiary predeceases the testator.[59]

That these formalisms routinely frustrate the intent of testators, as determined by strong extrinsic evidence, has led to a significant movement for reform in the past fifty or so years.[60] The basic argument is that the formalities have gone too far, overcorrecting for fears of fraud and leading to results

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51. *See, e.g.*, Weisbord, *supra* note 4, at 2590 (discussing the frequency of testator's naming alternative executors); *see also* Karen J. Sneddon, *The Will as Personal Narrative*, 20 ELDER L.J. 355, 359 (2013) (observing that "a will may . . . nominate guardians, executors, and trustees, those individuals (or entities)—at least to a certain extent—who perpetuate the legal existence of the testator").

52. *See, e.g.*, SITKOFF & DUKEMINIER, *supra* note 11, at 42 (discussing administrator selection).

53. *See id.* at 46–50 (discussing the process of probating a testate estate).

54. *See, e.g.*, Glover, *supra* note 12, at 601 ("Under conventional law, ... courts cannot reform a will." (footnotes omitted)).

55. *See* Mahoney v. Grainger, 186 N.E. 86, 87 (Mass. 1933) (interpreting the phrase "heirs at law" to unambiguously refer to the decedent's intestate heir, one aunt, notwithstanding testimony by the drafting attorney that it was intended to refer to the decedent's cousins).

56. *See* Sanderson v. Norcross, 136 N.E. 170, 172 (Mass. 1922) ("Courts have no power to reform wills. . . . [M]istakes of testators cannot be corrected. Omissions cannot be supplied.").

57. *See, e.g.*, UNIF. PROB. CODE § 2-804 (amended 2019) (providing for presumptive revocation on divorce as to bequests to the divorced spouse).

58. *See, e.g.*, *id.* § 2-302 ("[I]f a testator becomes a parent of a child after the execution of the testator's will and fails to provide in the will for the child, the omitted child receives a share in the estate as follows . . . .").

59. *See, e.g.*, *id.* § 2-605 (providing that bequests to certain related named beneficiaries passes to the descendants of those beneficiaries, rather than to the residuary or intestacy under common law lapse rules).

60. *See, e.g.*, Langbein, *supra* note 21, at 513–26 (arguing that courts should admit any document that substantially complies with the required formalities); Langbein & Waggoner, *supra* note 21, at 521–22 (arguing that the no-reformation rule should be reformed in favor of a power to reform on clear and convincing evidence of a drafting mistake); *see also* Bitetzakis v. Bitetzakis, 264 So. 3d 297, 300 (Fla. Dist. Ct. App. 2019) (refusing to probate a will that apparently reflected the testator's intent because he signed the wrong document by mistake).

inconsistent with the doctrine's more fundamental, intent-implementing purposes.[61] Critiques along these lines have had a substantial influence on law reform, influencing the Uniform Probate Code and the laws of many states.[62]

These reforms have focused on ensuring that documents intended to be a testator's will do not fail for technical reasons,[63] while authorizing courts to correct drafting errors.[64] In these sorts of cases, rigid insistence on formalism can lead to dispositions that are obviously inconsistent with what the testator wanted when they wrote the document.[65] But the kinds of distinctions between intent and execution that the reforms seek to ameliorate is a fairly limited set—only those involving egregious departures between a person's actual intent in composing a document and the legal effects of that document.[66]

The reforms have not purported to address the possibility that the testator's intent has *changed*. For instance, the "harmless error rule" admits technically defective wills proved by clear and convincing evidence to have been the testator's intended will.[67] It would do the same whether or not the document *still* reflected what the testator wanted. Similarly, courts that allow reformation for mistake only do so on evidence of "actual and specific intent at the time the will was drafted," whether or not it was still the testator's intent at the time of their death.[68]

Building on these efforts, my argument presumes that the law of wills *also* fails where it enforces a writing that *no longer* represents the intent of the testator. Neither the harmless error rule nor a movement towards reforming drafting errors has anything to say about *this* problem. Indeed, to see that it *is* a problem, we will have to take a close look at the role of "intent" in the law of wills.

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61. *See supra* note 60 and accompanying text.

62. *See, e.g.*, SITKOFF & DUKEMINIER, *supra* note 11, at 181.

63. *See, e.g.*, UNIF. PROB. CODE § 2-503 (amended 2019) (providing that documents that do not strictly comply with required formalities may nevertheless be admitted to probate if proven by clear and convincing evidence to have been intended as the testator's will).

64. *See, e.g.*, *id.* § 2-805 (authorizing courts to reform wills for mistake "if it is proved by clear and convincing evidence what the transferor's intention was and that the terms of the governing instrument were affected by a mistake of fact or law"); *see also* Glover, *supra* note 12, at 602 ("[A] push is underway to allow courts to reform the language of wills . . . .").

65. *See, e.g.*, Radin v. Jewish Nat'l Fund, 352 P.3d 863, 875 (Cal. 2015) ("In cases in which clear and convincing evidence establishes both a mistake in the drafting of the will and the testator's actual and specific intent at the time the will was drafted, it is plain that denying reformation would defeat the testator's intent and result in unjust enrichment of unintended beneficiaries.").

66. *See, e.g.*, Jane B. Baron, *Intention, Interpretation, and Stories*, 42 DUKE L.J. 630, 641 (1992) ("[D]espite their apparently vehement disagreement over interpretive issues, the commentators are surprisingly uniform in their insistence that interpretation must focus on the *words*."); *see also* Langbein & Waggoner, *supra* note 21, at 578 ("The contention that 'if only my aunt had understood how much I loved her, she'd have left me more,' will not suffice to transform disappointment into mistake.").

67. UNIF. PROB. CODE § 2-503 (amended 2019).

68. *Radin*, 352 P.3d at 875–76.

B. Most Recent Actual or Hypothetical Intent

"Intent" is a slippery thing, and it is one thing to agree that the law of wills implements "intent" and another to agree on what that means.[69] In making sense of what the law means by "intent" in this context, let's take a person's *actual subjective intent* (or just "actual intent") to be a claim about a mental state at some point in time.[70] Pre-philosophically, actual intent may seem coterminous with the ordinary concept of "intent," but a scholarly tradition running back to Oliver Wendell Holmes argues that the law of wills is rather organized around a construct of *objective intent*—*not* the testator's actual mental states, but a reasonable interpretation of their legally-relevant expressions.[71] Finally, a *hypothetical subjective intent* (or "hypothetical intent") is an intent a person did not in fact have, but would have had they considered the question.[72]

It has always been a puzzle why the law might justifiably distribute property according to a deceased owner's intent, rather than, say, by some more redistributive scheme.[73] But on any plausible account of an intentionalist law of succession, it can only be the testator's *most recent actual intent*, or, barring that, their *hypothetical intent*, with which the law is fundamentally concerned. Freedom of testation can only be justified, if at all, by solicitude for the testator's most recent actual or hypothetical intent—not "objective" or expired intents for their own sake.

Consider three of the most prominent justificatory accounts of a scheme of intentional posthumous property distribution. First, many argue that freedom of testation is justifiable for its *lifetime* benefits—people, while living, want to

69. *See, e.g.*, Elisabeth Pacherie & Patrick Haggard, *What Are Intentions?*, *in* CONSCIOUS WILL AND RESPONSIBILITY. A TRIBUTE TO BENJAMIN LIBET 70, 70 (L. Nadel & W. Sinnott-Armstrong eds., 2010) ("Providing a satisfactory definition of intention is notoriously difficult."); James M. Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886, 888 (1930) ("Intent is unfortunately a confusing word . . . .").

70. *See, e.g.*, Pacherie & Haggard, *supra* note 69 ("[W]e assume that intention is a mental state, which may be associated with particular brain states."); John-Dylan Haynes, *The Neural Code for Intentions in the Human Brain*, *in* BIOPREDICTION, BIOMARKERS, AND BAD BEHAVIOR 173, 173 (Ilina Singh, Walter P. Sinnott-Armstrong & Julian Savulescu eds., 2014) (describing intentions as brain states).

71. *See, e.g.*, Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 420 (1899) (arguing for an objective understanding of testamentary intent in the law of wills); Robertson, *supra* note 1, at 1054 (arguing that interpretation of wills should be based on their reasonable meaning, not claims about the actual intent of testators); Albert M. Kales, *Considerations Preliminary to the Practice of the Art of Interpreting Writings—More Especially Wills*, 28 YALE L.J. 33, 33–36 (1918) (arguing that the law of wills implements objective intents rather than subjective ones).

72. *See, e.g.*, Linus Broström & Mats Johansson, *Surrogates Have* Not *Been Shown to Make Inaccurate Substituted Judgments*, 20 J. CLINICAL ETHICS 266, 267 (2009) (distinguishing between actual and hypothetical intent).

73. *See, e.g.*, Paul B. Miller, *Freedom of Testamentary Disposition*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EXPRESS TRUSTS 176, 183 (Simone Degeling, Jessica Hudson & Irit Samet eds., 2023) ("[L]eading defences of testamentary freedom are half-hearted or implausible.").

be assured that their wishes will be followed.[74] Others argue that testators are best positioned to put their wealth to its best use after their death.[75] And on the nonutilitarian side, scholars have argued that some basic morally-inflected concept like gifting or love can justify following the wishes of property owners after their death.[76]

What all of these accounts—and any others that have been plausibly proffered—have in common is that they justify freedom of testation in terms of respect for the autonomy of persons; broadly construed, the same kind of reasons that justify respecting the decision-making of persons while they are alive.[77] Whether we respect autonomy because it makes people happier, or leads to improved decision-making, or for some deontic reason, freedom of testation can, facially, only be justified by solicitude for the autonomous decision-making of persons.[78]

And if we care about the autonomy of persons, what we care about is their *actual intents*. Privileging anything else would simply not be caring about their autonomy.[79] This is plainly true on deontic accounts—the autonomy of persons is made up, at least in part, of their actual intents, and to ignore those and pursue something else would be to treat them not as persons.[80] But it is true of utilitarian accounts too. If we want to mollify people's intuitions of control,

74. *See, e.g.*, LEWIS S. SIMES, PUBLIC POLICY AND THE DEAD HAND 21 (1955) ("[T]he desire to dispose of property by will is very general, and very strong. A compelling argument in favor of it is that it accords with human wishes.").

75. *See, e.g.*, Daniel B. Kelly, *Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications*, 82 FORDHAM L. REV. 1125, 1127 (2013) ("[A] donor may have more information than either a legislature or court about the optimal distribution of property to family members or other donees.").

76. *See* Toomey, *supra* note 25, at 1309–16 (offering a theory justifying the following of wishes of incapacitated individuals based in the concept of love); Miller, *supra* note 73, at 177–78 (justifying testamentary freedom in the logic of gifting).

77. *See, e.g.*, SITKOFF & DUKEMINIER, *supra* note 11, at 16–20 (summarizing justifications for freedom of disposition); *see also* Reid Kress Weisbord, *The Governmental Stake in Private Wealth Transfer*, 98 B.U. L. REV. 1229, 1238 (2018) (describing "individual autonomy" as "underlying dispositional freedom").

78. *See, e.g.*, Miller, *supra* note 73, at 177 ("[T]estamentary disposition, where defensible, is defensible through elaboration of a set of moral reasons embedded in the juridically familiar notion that dispositions are gifts."); Katheleen R. Guzman, *Give or Take an Acre: Property Norms and the Indian Land Consolidation Act*, 85 IOWA L. REV. 595, 638 (2000) (describing testation by intent as "protect[ing] autonomy by permitting the decedent and none other to designate who will take the estate at death").

79. *See, e.g.*, Howard Engelskirchen, *Consideration as the Commitment to Relinquish Autonomy*, 27 SETON HALL L. REV. 490, 535 (1997) ("Respect for autonomy means an individual's own reasons for action must cause his or her action, and another who wishes to induce such action must appeal, one way or another, to those reasons."); CHARLES FRIED, CONTRACT AS PROMISE 1 (2d ed. 2015) ("The promise principle, which in this book I argue is the moral basis of contract law, is that principle by which persons may impose on themselves obligations where none existed before.").

80. *See, e.g.*, IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 38 (Mary Gregor trans. & ed., 1997) ("So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means." (emphasis omitted)).

we have to assure them that what they *actually* want to happen, will.[81] And if we think they are best positioned to put property to its most efficient use, we care about the actual conclusions of their consideration.[82]

In contrast, no theory of freedom of testation justifies a primary concern with *objective intent*. Indeed, the problem is deeper than that—solicitude for objective intents could not justify a scheme of freedom of testation because objective intents do not exist.[83] Persons have intents; objects do not.[84] Wills, strictly speaking, can have no more "intent" than blank pieces of paper—it is only that we can speak that way by attributing an author; a person who in fact intended to communicate something in the symbols they chose.[85] So where the actual intents of persons plainly exist,[86] and there are, at least, plausible normative reasons for respecting them,[87] the law could not possibly be organized around a commitment to enforcing objective intents as such.[88]

What proponents of this view rather *mean* is that the law is (or should be) committed to implementing the "objective meaning" of the language of the legally-circumscribed category "will"—the words interpreted as a reasonable speaker of the language would interpret them.[89] That may be right, but it is an evidentiary argument, not a *justification* for authorizing posthumous disposition

81. *See, e.g.*, Mark Glover, *Freedom of Inheritance*, 2017 UTAH L. REV. 283, 296 ("[T]he law's respect of the personal autonomy of the donor maximizes the donor's utility.").

82. *See, e.g.*, Kelly, *supra* note 75, at 1168–70.

83. *See, e.g.*, H.P. Grice, *Meaning*, 66 PHIL. REV. 377, 385 (1957) ("'*x* meant something' is (roughly) equivalent to 'Somebody meant$_{NN}$ something by *x*.'"); Tiersma, *supra* note 40, at 196 ("Any statement or expression of intent is valid only to the extent that it reflects the actual, subjective intent of the speaker.").

84. *See, e.g.*, Richard Ekins, *Objects of Interpretation*, 32 CONST. COMMENT. 1, 3 (2017) ("Persons have goals; communications do not."); Noël Carroll, *Art, Intention, and Conversation*, *in* INTENTION & INTERPRETATION 97, 120 (Gary Iseminger ed., 1995) ("An intention is made up of beliefs and desires.").

85. *See, e.g.*, Grice, *supra* note 83, at 385; Ekins, *supra* note 84, at 4 ("Language use consists in one person's attempt to convey an intended meaning by uttering some words in some context, which meaning other persons should try to recognize."); *see also* Baron, *supra* note 66, at 664 ("Real people, not abstractions, write wills—and real people read them. If wills law's individualist rhetoric is to be made meaningful, interpretation must seek the human voice behind every will.").

86. Indeed, note that genuine doubts about the ontological status of collective intents, applicable in other areas of law, see, for example, Tracy Isaacs, *Collective Moral Responsibility and Collective Intention*, 30 MIDW. STUD. PHIL. 59, 59–63 (2006), are entirely inapplicable here, where the law has only ever been concerned with the intent of a *single* person, see, for example, Michael Hancher, *Dead Letters: Wills and Poems*, 60 TEX. L. REV. 507, 521 (1982) ("[T]he intention of the individual testator is a less obviously tricky concept than, say, the intention of the collective Framers of the Constitution.").

87. *See supra* notes 74–76 and accompanying text.

88. *See, e.g.*, Grice, *supra* note 83, at 385 ("'*x* means$_{NN}$ (timeless) that so-and-so' might as a first shot be equated with some statement or disjunction of statements about what 'people' (vague) intend (with qualifications about 'recognition') to effect by *x*.").

89. *See, e.g.*, Lawrence M. Solan, *Contract as Agreement*, 83 NOTRE DAME L. REV. 353, 357–62, 379 (2007) ("[P]lain or ordinary language is nothing more than evidence of a drafter's intent. That is the only sense in which meaning *can* be plain or ordinary."); *see also, e.g.*, Carroll, *supra* note 84, at 113–14 (surveying arguments to *treat* authorial intention as irrelevant in literary interpretation, even if, ontologically, it is not).

by intent in the first place.[90] And indeed, it only makes sense on evidentiary grounds if we already *assume* that the law ought to be implementing the actual intents of testators as best it can.[91]

In short, insofar as the law of will's solicitude for intents is justifiable, it must be actual intents with which the law is fundamentally concerned. Moreover, these same sorts of reasons—broadly, respect for autonomy—support that the law's basic concern must be with the testator's *most recent* actual intent; or, barring that, their *hypothetical* intent.[92] Part of autonomy is the autonomy to change one's mind.[93] To respect someone else's autonomy is to respect that they might.[94] Once again, this is straightforwardly true on deontic accounts grounded in respect for the evolving personal identity of another,[95] but is an equally robust conclusion on utilitarian accounts. People subjectively value the ability to change their minds,[96] and epistemically, an intent revised based on awareness of a prior view, updated to new information, is presumptively more accurate.[97]

The law of wills—which enforces the most recent duly executed will and relies on updating interpretive presumptions—itself recognizes that it is the testator's most recent intent that ought to be enforced.[98] Indeed, this is characteristic of many circumstances where other areas of law seeks to implement intent—from healthcare to property law to the law of sexual consent, it is intent

90. *See, e.g.*, Grice, *supra* note 83, at 387 ("An utterer is held to intend to convey what is normally conveyed (or normally intended to be conveyed), and we require a good reason for accepting that a particular use diverges from the general usage . . . ."); Tiersma, *supra* note 40, at 229 ("Of course, the law might for practical reasons decide to measure illocutionary intent based on the perception of the reasonable hearer.").

91. *See infra* Section I.C.

92. *See* Glover, *supra* note 9, at 236 ("If the testator's intent as expressed in her will substantially aligns with her actual intent at death, then the will has a high expected benefit.").

93. *See, e.g.*, Dori Kimel, *Personal Autonomy and Change of Mind in Promise and in Contract*, *in* PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 96, 101 (Gregory Klass, George Letsas & Prince Saprai eds., 2014) ("[C]onsiderable freedom to change one's mind is just as essential for the ongoing pursuit of personal autonomy as is the capacity and the willingness to make long-term commitments or to persevere with past choices."); GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY 15–17 (1988) ("The idea of autonomy is not merely an evaluative or reflective notion, but includes as well some ability both to alter one's preferences and to make them effective in one's actions . . . .").

94. *See, e.g.*, Leslie Pickering Francis, *Decisionmaking at the End of Life: Patients with Alzheimer's or Other Dementias*, 35 GA. L. REV. 539, 571 (2001) ("Genuine changes of mind about health-care decisions should be respected, just as are changes of mind about other important life choices."); Mindy Chen-Wishart, *Contractual Remedies: Beyond Enforcing Contractual Duties*, 85 GEO. WASH. L. REV. 1617, 1622 (2017) (describing "a concept of valuable autonomy that accommodates change of mind").

95. *See* Toomey, *supra* note 25, at 1312–14.

96. *See* Jane B. Baron, *Fixed Intentions: Wills, Living Wills, and End-of-Life Decision-Making*, 87 TENN. L. REV. 375, 377 (2020) (observing that "the reported cases show that, over and over again, testators informally 'revise' their estate plans").

97. *See, e.g.*, Dana Howard, *The Medical Surrogate as Fiduciary Agent*, 45 J.L. MED. & ETHICS 402, 410 (2017) ("A central feature of [a] person's will is her capacity to change her mind as her circumstances change and as new information becomes available.").

98. *See supra* notes 57–59 and accompanying text.

now, even if a change of heart, that the law is concerned with, not prior intent.[99] Granted, there are contexts in which the law insists on enforcing intent crystallized at a particular, legally significant moment—contracts and statutes perhaps most prominently. But note that those contexts implicate concerns—reliance, expectations, the moral nature of promises, notice, and the rule of law—entirely inapposite here.[100]

In short, the organizing aspiration of the law of wills is to implement the most recent actual intent of the testator. But a regime grounded *only* in actual intent would be cumbersomely thin. Many contingencies, having never been squarely presented to the testator, were never the subject of their actual intent.[101] Incapacitated individuals, moreover, are incapable of presently forming legal intent, and dead individuals could not be asked at all.[102] In these cases, rather than doing nothing, the same reasons that support the law's solicitude for actual intent justify looking to hypothetical intent—what this person *would have* wanted—as the next best thing.

After all, to respect the autonomy of persons is, at least in part, to treat them as the individual person that they are.[103] It is to respect *their* decision-making, their interests and aspirations, and not to impose what you think they *should* have wanted.[104] On any account that privileges autonomy, where evidence

99. *See, e.g.*, Margie Hodges Shaw, Timothy E. Quill & Bernard L. Sussman, *The Legacy of* Cruzan*: Balancing the Moral Agency of Surrogates and the State*, 73 SMU L. REV. 179, 181 (2020) ("It is well recognized that patients with capacity have the legal right to consent to or to refuse to consent to any and all treatment options . . . ."); Larissa Katz, *Property's Sovereignty*, 18 THEORETICAL INQUIRIES L. 299, 300 (2017) ("The agenda-setting authority vested in the office of ownership is perpetual, exclusive, non-reviewable and, in its sphere, subordinate to none."); MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.0(2)(e)(v) (AM. L. INST., Tentative Draft No. 5, 2021) ("Consent may be revoked or withdrawn any time before or during the act . . . .").

100. *See generally* Jay M. Feinman, *The Last Promissory Estoppel Article*, 61 FORDHAM L. REV. 303 (1992) (summarizing the debate between contract as promise and contract as reliance); Hirsch, *supra* note 8, at 613 ("Fidelity to the intent of legislators or framers follows from our observance of democratic principles.").

101. *See, e.g.*, Storrow, *supra* note 31, at 103 ("The predictions of many testators are simply unequal to the unexpected events that befall families."); Philip Mechem, *Some Problems Arising Under Anti-Lapse Statutes*, 19 IOWA L. REV. 1, 2 (1933) (observing that in many questions of what a testator actually intended in circumstances they did not consider, "[p]robably no such thing exists").

102. *See, e.g.*, Megan S. Wright, *End of Life and Autonomy: The Case for Relational Nudges in End-of-Life Decision-Making Law and Policy*, 77 MD. L. REV. 1062, 1072–77 (2018) (describing decision-making procedures on behalf of patients without capacity); Weisbord & Horton, *supra* note 2, at 613 ("Under the ancient doctrine of testamentary capacity, courts strike down wills executed by testators who lack a 'sound mind.'").

103. *See, e.g.*, Toomey, *supra* note 25, at 1313–14.

104. *See, e.g.*, Benjamin Eidelson, *Respect, Individualism, and Colorblindness*, 129 YALE L.J. 1600, 1606 (2020) ("Like the obligation to treat people as *equals* (emphasized by Ronald Dworkin), or the obligation to treat people *as ends in themselves* (famously posited by Immanuel Kant), claims of an obligation to treat people *as individuals* asserts that one should act toward a person only in ways that account for an important facet of her personhood—in this instance, her individuality." (footnotes omitted)); Samuel Reis-Dennis, *Understanding Autonomy: An Urgent Intervention*, J.L. & BIOSCIS. 6 (June 4, 2020), https://academic.oup.com/jlb/article/7/1/lsaa037/5850807 [https://perma.cc/6GJU-2YWJ] ("In allowing patients to self-govern, medical providers recognize them

of a person's actual intent has run out, it makes sense to turn to a best guess of their hypothetical intent. At least doing so treats them as an individual, and decides based on what *they* probably would have actually intended.[105] And indeed, this is exactly what the law does in a variety of domains, with the doctrine of substituted judgment, in the cognate context of deciding for the incapacitated—where an individual lacks decision-making capacity, a surrogate decision-maker is to make the decision they would have if able to; their hypothetical intent.[106]

In sum, on any plausible theory of freedom of disposition, the law's fundamental concern must be the actual intent of testators. Specifically, their most recent actual intent. But in the absence of actual intent, the same reasons that justify a system of succession based on actual intent support turning to hypothetical intent.

C. *EVIDENCE AND WRITING*

Of course, though, the law of wills only recognizes actual intents that are expressed through specified procedures.[107] And the way in which courts seek the testator's intent—through plain meaning and no-reformation rules—have routinely frustrated testamentary intent.[108] Proponents of the "objective intent" theory infer that the law is not actually concerned with testators' actual intent at all. That can't be right.[109] But if the law is fundamentally concerned with actual intent, why *has* it adopted such apparently intent-frustrating rules?

On an actual intent theory of the law of wills, its formalisms and interpretive principles serve *evidentiary* and *administrative* functions in the search for actual intent.[110] If the fundamental purpose of the doctrine is to implement the most recent actual intent of the testator, it fails at its purposes whenever it implements something other than the testator's actual intent—whether because it denies probate to a will that represents the testator's intent, *or* because it probates a will that does not.[111] The law of wills has historically

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as persons whose perspectives matter and who enjoy the same basic status and rights as other rational agents.").

105. *See, e.g.*, Jacqueline J. Glover, *A Philosophical Analysis of Substitute Decision-Making: The Case of Ms. Nancy Cruzan*, MIDW. MED. ETHICS, Winter/Spring 1989, at 10, 11 ("[R]especting choices is part of a much richer concept of respecting persons and their own unique identities."); Leslie P. Francis, *The Roles of the Family in Making Health Care Decisions for Incompetent Patients*, 1992 UTAH L. REV. 861, 872 ("Autonomy is respected either by letting the patient choose, or by relying upon an already-developed template of values, preferences, interests, and choices.").

106. *See, e.g.*, Toomey, *supra* note 25, 1290–94 (explaining substituted judgment).

107. *See supra* notes 46–49 and accompanying text.

108. *See, e.g.*, Baron, *supra* note 66, at 635 ("Unfortunately, as has long been recognized, the doctrines created to serve the testator's wishes have the potential to undercut them.").

109. *See supra* notes 83–88 and accompanying text.

110. *See supra* notes 89–91 and accompanying text; *see also* Jarboe, *supra* note 36, at 1371 (describing the historical focus on the words of the will as an evidentiary approach to discerning actual intent, tempered by a history of fraud); Greenawalt, *supra* note 41, at 557 (justifying the plain meaning rule on concerns about "evidentiary unreliability").

111. *See, e.g.*, SITKOFF & DUKEMINIER, *supra* note 11, at 144 (discussing these two kinds of errors).

been concerned with preventing a particular variation of the second kind of error—probating a will that *never* represented the actual intent of a testator.

This concern is not unreasonable. After all, designing a robust legal regime to effectively enforce people's actual intent after their death *is* a difficult task.[112] In place of asking the testator, we are left with almost necessarily self-interested secondhand reports.[113] There *is* a particular risk in this context of probating documents that never represented the intent of the testator—entirely fraudulent wills—and doing so is a failure of wills law.

From this perspective, the formalisms of the law of wills are evidentiary rules designed to prevent this kind of error—a reasonable goal. The requirements of signature and attestation hope to ensure that the document represented the testator's intent at some point.[114] The no-reformation rule prevents courts from substituting their own views of what the testator should have wanted for what the testator did want.[115] And the plain meaning rule assumes that actual intent is more likely to be frustrated by testimony that the testator meant something else than the possibility that they actually did.[116] None of these rules suggest that the fundamental purpose of the law of wills is anything other than implementing testators' actual intent. They only make sense if it is.

Of course, if the purpose of wills law is to implement the actual intent of testators, it *also* fails where it declines to probate a will that *does* represent the testator's intent. And so it is fair to argue, with the reformers, that the law's prophylaxis against entirely fraudulent wills has gone too far, that formalities should be relaxed or extrinsic evidence more generally admissible.[117] But neither side of this debate really disagrees about the juridical status of actual intent. Rather, the disagreement in the law of wills is about how, as a matter

112. *See, e.g.*, Baron, *supra* note 66, at 670 ("The will's author, being unable to communicate in the present, does not stand on equal footing with the will's reader; the dead and the living are not equally powerful.").

113. *Id.*; *see also* Deborah S. Gordon, *Reflecting on the Language of Death*, 34 SEATTLE U. L. REV. 379, 385–86 (2011) ("One reason for the interest in will interpretation is that the author of a will is necessarily unavailable to describe the meaning of ambiguous or controversial sections when the text takes its effect.").

114. *See, e.g.*, Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 3 (1941) (discussing the evidentiary, cautionary, and protective functions of formalities in the law); Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800–06 (1941).

115. *See, e.g.*, Polsey v. Newton, 85 N.E. 574, 575 (Mass. 1908) ("To allow the reformation of a will in favor of disappointed devisees or contesting heirs and upon such evidence as they might produce after the death of the testator, would open the door for fraud and perjury to substitute designs of interested beneficiaries for the deliberately expressed intent of a testator.").

116. *See, e.g.*, Mahoney v. Grainger, 186 N.E. 86, 87 (Mass. 1933) ("The will must be construed as it came from the hands of the testatrix.").

117. *See, e.g.*, Langbein & Waggoner, *supra* note 21, at 522, 568–69, 577 (arguing that the no-reformation rule should be reformed in favor of a power to reform on clear and convincing evidence of a drafting mistake).

of institutional design, we ought to discern actual intent—most reliably, at cheapest cost.[118]

Regardless of one's views on that question, then, probating an intent other than the testator's most recent actual intent—even one memorialized in a duly executed will—is a mistake.[119] This Article is about a failure of wills law on its own terms, inadequately addressed by traditional law and largely sidestepped by reformers and courts—where the law probates a will that *used to* represent the testator's intent, but no longer does.

II. CHANGING INTENTS

How often is this a problem? It's hard, maybe impossible, to measure precisely. But there are good reasons to believe that *many* contemporary wills no longer represent the testator's intent by the time they reach probate. Indeed, there are reasons to believe it is a *growing* problem—social, demographic, cultural, and medical changes have over the past two centuries made it more likely today than when the Wills Act was passed that an old will no longer represents the intent of a testator.

First, the age of wills at probate has increased dramatically over the past two centuries, radically decreasing their epistemic value. At the same time, changes in family structure and the nature of wealth have increased the probability that in any given span of time, changes of the sort likely to change a testator's intent will occur. And though the law is not *unaware* of this problem, its traditional mechanisms are not up to its breadth.

A. THE AGE OF WILLS

If you're trying to determine whether something I said reflects my intent now, your best heuristic might be *when* I said it.[120] You can be pretty confident that the testamentary preferences I told you yesterday remain my preferences.[121] In contrast, I wouldn't count on anything about my political views I said in college. If I texted you that I'd meet you for dinner tonight yesterday, I'll probably show up; if I texted that I'd meet you for dinner tonight three years ago, you'd want to check in first. Of course, a recent expression of intent carries no *guarantee* of accuracy—I could have been lying, or I may have

118. *Cf.* Solan, *supra* note 89, at 379 ("[N]otwithstanding the enormous attention it has received, the 'objective theory of contracts' appears to be a simple—and sensible enough—rule of evidence . . . .").

119. *See, e.g.*, Glover, *supra* note 9, at 223 (arguing that "because the law's primary objective is to carry out the decedent's intent," where it implements an expired intent, it has failed at its purposes).

120. *See, e.g.*, Glover, *supra* note 12, at 596 ("[C]hanged circumstances might suggest that the testator would want a different disposition of her estate than what the language of her will reflects.").

121. *See, e.g.*, Katheleen R. Guzman, *Intents and Purposes*, 60 U. KAN. L. REV. 305, 349 (2011) ("[A] will executed a day before death more convincingly secures the recency and primacy of the testator's stated desires matched to extant circumstances . . . .").

regretted what I said instantly.[122] But all else equal, a more recently expressed preference is more likely to remain accurate: preferences expressed long ago, less so.[123]

All else equal, then, the older a will is when it is admitted to probate, the less likely it is to reflect the testator's most recent intent.[124] It is striking, from this perspective, that the age of wills has increased so dramatically over the past two centuries—from most wills executed within weeks or months of the testator's death centuries ago, to years or decades today.[125] In an important study, Mark Glover synthesized the extant evidence.[126] In the nineteenth century, a majority of wills were executed within a year of the testator's death[127]—and one study of an 1893 sample found that more than eleven percent of wills were executed within *three days* of the testator's death; quite literally deathbed wills.[128]

This shifted dramatically over the course of the twentieth century. In the mid-century only somewhere between fifteen percent[129] and thirty-six percent[130] of wills were executed within a year of the testator's death. In contrast, as many as thirty percent of wills were more than ten years old at the testator's death.[131] Today, roughly seventy percent of wills are at least three years old at the

122. *See, e.g.*, H.P. Grice, *Logic and Conversation*, *in* 3 SYNTAX AND SEMANTICS: SPEECH ACTS 41, 46 (Peter Cole & Jerry L. Morgan eds., 1975) (discussing the presumption that conversational partners are telling the truth in making conversational inferences).

123. *See, e.g.*, Glover, *supra* note 9, at 243 ("[A]s the testator's relationships . . . change over time, these incremental changes can render the testator's will increasingly obsolete.").

124. *See, e.g.*, Storrow, *supra* note 31, at 103 ("The passage of time allows for the evolution of circumstances that the will simply does not anticipate.").

125. *See, e.g.*, Lindgren, *supra* note 44, at 554 ("Centuries ago many, if not most, wills were executed on the deathbed. . . . Yet today deathbed wills are rare."); Adam J. Hirsch, *Formalizing Gratuitous and Contractual Transfers: A Situational Theory*, 91 WASH. U. L. REV. 797, 848 (2014) ("In the Middle Ages, testators typically made their wills as part of the last confession. Today, testators rarely wait until the eleventh hour to execute their wills . . . ." (footnote omitted)).

126. *See, e.g.*, Glover, *supra* note 9, at 248–66.

127. *See* Lawrence M. Friedman, *Patterns of Testation in the 19th Century: A Study of Essex County (New Jersey) Wills*, 8 AM. J. LEGAL HIST. 34, 37 (1964) (finding approximately fifty-one percent of wills in a sample from 1900 were executed within one year of the testator's death); Kristine S. Knaplund, *The Evolution of Women's Rights in Inheritance*, 19 HASTINGS WOMEN'S L.J. 3, 19 (2008) (finding fifty-eight percent of wills in an 1893 sample were executed within a year of the testator's death).

128. Knaplund, *supra* note 127, at 18.

129. MARVIN B. SUSSMAN, JUDITH N. CATES & DAVID T. SMITH, THE FAMILY AND INHERITANCE 66 (1970) (finding that 14.6% of wills in a sample from Cuyahoga County, Ohio, from 1964 to 1965 were executed within a year of the testator's death).

130. Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 279 (1963) (finding that thirty-six percent of wills, in a sample from Cook County, Ilinois in 1953 and 1957, were executed within a year of the testator's death).

131. SUSSMAN ET AL., *supra* note 129 (finding that 28.5% of wills in the Cuyahoga County sample were more than ten years old).

testator's death.[132] True deathbed wills—once a staple of testation—have become a rounding error.[133]

In other words, there has been an unmistakable trend over the past two centuries from wills executed within months, or even days, of the testator's death to years, even decades before. The reasons for this shift are not entirely clear. The increase in longevity probably has something to do with it.[134] A shift in the way in which concerns about fraud and the authenticity have been expressed since the Wills Act may be another factor. The Wills Act has largely addressed the problem of proponents proffering entirely fraudulent documents. But it did not eliminate worries that a will might not even have reflected the testator's intent when written—a concern addressed with doctrines of capacity and undue influence.[135] Best practice to stave off these challenges involves encouraging clients to start estate planning in the prime of one's life, and it's possible the bar's solicitations to this effect have borne fruit.[136]

Whatever the causes of the shift towards older wills, it has raised the widespread probability that many no longer reflect the intent of the testator.[137] If deathbed wills are otherwise valid, and not the product of undue influence, it is *very* likely they reflect the most recent actual intent of the testator. But what are the chances that a will executed more than ten years before the testator's death reflects what they wanted when they died?[138] Surely some do, but that's more or less a coincidence.[139]

132. Horton, *supra* note 9 (finding two-thirds of wills from a 2007 sample in Alameda County, California, were more than one-thousand days old at the testator's death); Glover, *supra* note 9, at 259 (finding 73.7% of wills fit this description in a 2014 sample from Hamilton County, Ohio).

133. Horton, *supra* note 9, at 1130 (finding three percent of wills in Alameda County sample executed within one week of the testator's death); *see* Glover, *supra* note 9, at 259 (finding only 1.3% of wills executed within one week of the testator's death).

134. *See, e.g.*, Baron, *supra* note 96, at 391 ("In the United States and Western Europe, people now routinely live longer than was historically the case.").

135. *See, e.g.*, Fellows, *supra* note 3, at 621 ("The requirements that a property owner be mentally competent and free from undue influence and fraud when making a donative transfer are viewed as logically necessary under a system of law designed to effectuate donative intent.").

136. *See, e.g.*, SITKOFF & DUKEMINIER, *supra* note 11, at 313–16 (discussing strategies to dissuade will contests, including "making *multiple wills* across an extended period of time"); Sneddon, *supra* note 51, at 391 (observing that "most nineteenth century" will overtures "acknowledge[d] the poor health of the testator in a manner that no drafter would highlight today").

137. *See, e.g.*, Gordon, *supra* note 113, at 410 (acknowledging the problem of "testamentary obsolescence"); Fellows, *supra* note 3, at 623 ("After a property owner drafts a dispository instrument, certain factual patterns may arise over which that person has minimal or no control.").

138. *See, e.g.*, Hirsch, *supra* note 8, at 611 ("Wills drafted in the prime of life implicate a different peril—the risk of being overtaken by events.").

139. *See, e.g.*, Glover, *supra* note 9, at 224 ("To be sure, some wills substantially express the testator's intent . . . .").

B. TIME'S CHANGING CHANGES

All else equal, the growing age of wills should give us pause.[140] But all else is not equal. Indeed, the problem goes deeper—not only have wills gotten older, but, in the *same* period of time, a testator's intent today is more likely to change than it was two centuries ago.

Time doesn't *cause* changes of its own—it is a proxy for changes of intent because *things happen* over time. And those things are not random—people tend to change their minds in fairly predictable ways in response to fairly predictable stimuli.[141] Perhaps the two most likely things to change someone's testamentary intent are: (1) changes in their lives, in the lives of their intended beneficiaries, or their relationships with beneficiaries; or (2) changes in the nature of the estate.[142] Both of these sorts of changes are more likely to take place within a given period of time today than two centuries ago.

1. Family Structures Are More Complex and Evolving

The structure of American families has changed dramatically over the past two centuries. For our purposes, the important point is that family arrangements have become increasingly *dynamic*—the range of options and lack of predictability about whether and when they will be relied on in a given period of time has increased dramatically.

Let's start with divorce. The divorce rate is substantially higher today than it was in the nineteenth century—though it has fallen in the past few decades, divorce remains nearly four times more common today than it was at the turn of the twentieth century.[143] And there is no doubt that divorce—and long stretches of unmarried life—are more acceptable now than they were in the early nineteenth century.[144] The sheer probability of a testator or beneficiary getting divorced is much higher than it was.

The point may be even more subtle, though, because the *meaning* of divorce has also changed, at least in some cases. In the nineteenth and early twentieth centuries, cause had to be shown for divorce, from a list of approved causes from which, if pled in earnest, a court could confidently infer the parties no

140. *See, e.g.*, *id.* at 264 ("Simply put, the more time there is for circumstances to change, the more likely a will becomes obsolete.").

141. *See, e.g.*, James Toomey, *Narrative Capacity*, 100 N.C. L. REV. 1073, 1117–23 (2022) (offering an account distinguishing narrative changes in personal identity from aberrant ones).

142. *See, e.g.*, Glover, *supra* note 9, at 238 ("The testator's relationships with potential beneficiaries can change over time. Likewise, the nature of the testator's property can change as she disposes and acquires property during the ordinary course of her life.").

143. *See, e.g.*, Valerie Schweizer, *Divorce: More Than a Century of Change, 1900–2018*, BOWLING GREEN ST. U. (Apr. 6, 2021, 2:08 PM), https://www.bgsu.edu/ncfmr/resources/data/family-profiles/schweizer-divorce-century-change-1900-2018-fp-20-22.html [https://perma.cc/6TX7-E5HE]; Steven Ruggles, *The Rise of Divorce and Separation in the United States, 1880-1990*, 34 DEMOGRAPHY 455, 455 (1997) ("Only about [five percent] of marriages contracted in 1867 ended in divorce, but over one-half of marriages contracted in 1967 are expected to end in divorce.").

144. *See, e.g.*, Stephanie Coontz, *The Origins of Modern Divorce*, 46 FAM. PROCESS 7, 10 (2007) (observing that before the mid-nineteenth century, divorce was rare and difficult).

longer want each other in their lives—adultery, cruelty, abandonment, etc.[145] It *could not* be that the spouses had simply drifted apart romantically.[146] Since the rise of no-fault divorce, the inference that a divorced person who had not updated their will would not want their ex-spouse to inherit anything—while it still exists—is perhaps less strong. The percentage of divorced couples with joint physical custody has risen from twelve and a half percent before 1985 to thirty-four percent in 2014.[147] In short, as divorce has become more common, it has come to mean different things to different people.

These kinds of evolving and bespoke familial arrangements are not unique to divorce. Marriage too. Overwhelmingly, in the nineteenth century, people got married, and at predictable ages.[148] In contrast, today, a record percentage of forty-year-olds have never been married and the median age of marriage has increased to over twenty-nine for men and nearly twenty-eight for women.[149] At the same time, the number of unmarried cohabitating partners has increased more than 132% in the past twenty years, with the expectations of these sorts of relationships varying from partnership to partnership.[150]

So, imagine yourself a potential testator in 1850, say, with children in their early twenties. It is a fair bet that in the next ten years, they will get married, and when you die, they will probably still be married, still to the same person. They'll start having children, and they may well have several more by the time you die, or even after. So there will be changes in the next ten years, sure, but they are largely predictable ones. We might be justified in presuming your testamentary intent has remained the same during that time.

Things look different today. If you are a potential testator with children in their early twenties, in the next ten years some might get married, some might not. If not married, your children might be in a committed, long-term relationship, maybe moving towards marriage, maybe not; maybe moving towards children, maybe not. Those children that get married are more likely to get divorced, and if they do, it's not clear what that might mean both for them and your estate plan.

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145. *See, e.g.*, Emily J. Stolzenberg, *Nonconsensual Family Obligations*, 48 BYU L. REV. 625, 639 (2022) ("Spouses had only limited scope to deviate from these [marital] duties and obligations, and they could not exit their unions without state permission, which was granted only in cases of grievous marital fault.").

146. *See, e.g.*, Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1470–71 ("[D]ivorce was not the recognition of a private decision to terminate a marriage; it was a privilege granted by the state to an innocent spouse against a guilty one.").

147. *See, e.g.*, Daniel R. Meyer, Marcia J. Carlson & Md Moshi Ul Alam, *Increases in Shared Custody After Divorce in the United States*, 46 DEMOGRAPHIC RSCH. 1137, 1148 (2022).

148. *See, e.g.*, STEVEN RUGGLES, *Marriage, Family Systems, and Economic Opportunity in the USA Since 1850*, *in* 6 GENDER AND COUPLE RELATIONSHIPS 3, 5 (Susan M. McHale, Valarie King, Jennifer Van Hook & Alan Booth eds., 2016).

149. *See id.*; Richard Fry, *A Record-High Share of 40-Year-Olds in the U.S. Have Never Been Married*, PEW RSCH. CTR. (June 28, 2023), https://www.pewresearch.org/short-reads/2023/06/28/a-record-high-share-of-40-year-olds-in-the-us-have-never-been-married [https://perma.cc/U7HE-VK8R].

150. SITKOFF & DUKEMINIER, *supra* note 11, at 77.

Time, of course, has always changed families. But more today than when the architecture of our probate system was designed.

2. Personal Wealth Is More Likely to Change Substantially

While family relationships have become more complex and dynamic, so too have estates. In the nineteenth century, most wealth was real property—a family farm, say.[151] Today, most wealth is held in liquid financial assets—stocks, bonds, etc.[152] Indeed, the top one percent holds less than an eighth of their wealth in land, and nearly half in corporate equity.[153] This shift in the nature of wealth has raised the probability that the quantum of what a person owns will change in a given ten-year period.

First, part of the transition towards wealth as liquid financial assets has been the rise of the cultural practice of retirement. People today save significantly for retirement—$37.8 trillion is held in U.S. retirement plans and accounts,[154] and for many wealthy and upper-middle class people that is their most valuable asset.[155] This practice is historically contingent—the aspiration of an earned retirement in older adulthood is a cultural artifact of the late-nineteenth century.[156]

The point of retirement savings is to be spent down in retirement.[157] But the thing about retirement is that no one can be sure how long it will last or how much it will cost. A potential testator in their fifties with comfortable savings might die suddenly in their sixties, leaving behind a sizable balance. Or they might live in relatively good health until their nineties, spending it down. Either of these possibilities is plausible; you have no way of knowing what will

151. *See, e.g.*, John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722, 723 (1988) ("Into the eighteenth century, land was the dominant form of wealth."); Julia A. Smith, *Land Ownership and Social Change in Late Nineteenth-Century Britain*, 53 ECON. HIST. REV. 767, 767 (2000) (discussing the nineteenth century emergence of business-men class and use of land ownership to integrate into historically landed aristocracy).

152. Langbein, *supra* note 151, at 723.

153. *See, e.g.*, Jerusalem Demsas, *The Homeownership Society Was a Mistake*, ATLANTIC (Dec. 20, 2022), https://www.theatlantic.com/newsletters/archive/2022/12/homeownership-real-estate-investment-renting/672511 (on file with the *Iowa Law Review*).

154. JOHN J. TOPOLESKI, ELIZABETH A. MYERS & JOHN H. GORMAN, CONG. RSCH. SERV., R47699, U.S. RETIREMENT ASSETS: DATA IN BRIEF 1 (2023).

155. *See, e.g.*, Elizabeth Gravier, *High-Net-Worth Individuals Have Over Half Their Wealth in IRAs and 401(k)s*, CNBC SELECT (Apr. 5, 2024), https://www.cnbc.com/select/retirement-accounts-make-up-over-half-of-hnwi-wealth [https://perma.cc/DCX6-NXAW] (noting that for households with net worth over $1 million, fifty-five percent of wealth was held in retirement accounts).

156. *See, e.g.*, Mark R. Luborsky & Ian M. LeBlanc, *Cross-Cultural Perspectives on the Concept of Retirement: An Analytic Redefinition*, 18 J. CROSS-CULTURAL GERONTOLOGY 251, 254 (2003) ("Modern retirement is a relatively new phenomenon."); *see also* Sarah Laskow, *How Retirement Was Invented*, ATLANTIC (Oct. 24, 2014), https://www.theatlantic.com/business/archive/2014/10/how-retirement-was-invented/381802 (on file with the *Iowa Law Review*) (discussing the emergence of expectations of retirement in the nineteenth century).

157. *See, e.g.*, James Poterba, Steven Venti & David Wise, *The Composition and Drawdown of Wealth in Retirement*, 25 J. ECON. PERSPS. 95, 95–96 (2011).

happen. For estate planning purposes, we are talking about the difference between passing on a life-altering inheritance and leaving nothing at all.

Moreover, liquid financial assets are more volatile than real property. A testator's holdings might be dramatically more or less valuable when they die than when they wrote their will, where real property values are typically more stable.[158] Similarly, the risk of inflation has risen dramatically. With currency pegged to the gold standard, inflation basically did not exist in the nineteenth century.[159] Inflation today is ubiquitous and unpredictable.[160] For example, a bequest of "$10,000" written in a will in 2000 would have the purchasing power of $5,500 if the testator died in 2023.[161]

In short, just as the pace of change in family structures has accelerated, so too has the likelihood of in changes of wealth. In many ways, from the perspective of testamentary intent, then, ten years is a much *longer* time today than it was in the nineteenth century.

C. *The Current Law to Address Changed Circumstances Is Inadequate*

People have always changed their minds, and wills law has always recognized that—but not adequately. The primary way in which the law of wills accounts for changes of intent is by letting people change their wills. But many people do not or cannot. And although the law of wills provides default rules to modify dispositions based on a limited number of changed circumstances, proliferation of crude generalized rules is no substitute for attention to individual testators. Finally, sophisticated estate planners today often try to address these problems through powers of appointment and discretionary trusts, but both suffer from limitations that executor discretion clauses do not.

1. There Are Many Reasons People Don't Change Their Wills

The law of wills allows testators to change their will at any time until their death by subsequent writing executed with Wills Act formalities.[162] Thus, if a testator *hasn't* changed their will until their death, the law presumes that it still reflects their intent.[163] So, the solution offered by the trusts and estates bar (and

158. *See, e.g.*, Alani Asis, *Real Estate vs. Stocks: Which Has Higher Returns?*, U.S. NEWS & WORLD REP. (Nov. 10, 2023, 1:32 PM), https://money.usnews.com/investing/articles/real-estate-vs-stocks-which-has-higher-returns (on file with the *Iowa Law Review*) ("[I]nvesting in the stock market tends to be more volatile than real estate.").

159. *See, e.g.*, Bryan Taylor, *The Century of Inflation*, GLOB. FIN. DATA (Oct. 27, 2020), https://globalfinancialdata.com/the-century-of-inflation [https://perma.cc/M53C-W484] ("From the end of the Napoleonic Wars in 1815 until the start of World War II in 1914 [*sic*], there was no inflation in most countries, and in many cases, prices were lower in 1914 than they had been in 1815.").

160. *See, e.g.*, *Current US Inflation Rates: 2000-2024*, US INFLATION CALCULATOR, https://www.usinflationcalculator.com/inflation/current-inflation-rates [https://perma.cc/A7UH-QESS].

161. *See Value of $10,000 from 2000 to 2024*, CPI INFLATION CALCULATOR, https://www.in2013dollars.com/us/inflation/2000?amount=10000 [https://perma.cc/6Q9H-RELZ].

162. *See supra* note 49 and accompanying text.

163. *See, e.g.*, Hirsch, *supra* note 8, at 630 ("Lawmakers may reasonably require testators to execute a codicil to reflect a change of mind, at least when nothing stands in the way of their doing so.").

even many the most intent-sympathetic reformers[164]) is simply to ask testators to retain lawyers more frequently and update their estate plans more often.[165]

But in real life, people change their minds but not their wills all the time.[166] After all, most Americans have no estate plan *at all*, generally citing the time and cost involved as reasons not to do so.[167] These considerations don't disappear after the first time.[168] Many people fail to *ever* update their estate plan.[169] Indeed, as Naomi Cahn and Amy Ziettlow have shown, much of the American transmission of wealth takes place entirely outside the formal legal structures designed to facilitate it.[170] And of course the very sorts of changes in people's lives that are likely to cause changes to testamentary intent—a birth, death, marriage, or divorce—are important *life* changes, and the sorts of things during which revisiting complex legal documents is rarely at the top of people's minds.[171]

Many people, presumably, do not change their will in the midst of life changing events because they simply don't think to.[172] Some surely mean to

164. *See, e.g.*, Langbein & Waggoner, *supra* note 21, at 581 (attributing responsibility for failure to update wills to testators).

165. *See, e.g.*, *How Often Should I Update My Will?*, MILLER L. OFF. PLLC, https://www.aaronmillerlaw.com/blog/updating-wills-how-often-should-a-will-be-updated-.cfm [https://perma.cc/3MJG-JUDM] ("When it comes to updating your will, your best bet is to do so every five years or whenever there is a significant change in your life."); Ronna L. DeLoe, *18 Reasons to Revise Your Estate Plan*, LEGALZOOM (Apr. 22, 2024), https://www.legalzoom.com/articles/18-reasons-to-revise-your-estate-plan [https://perma.cc/P8ZC-5HFP] (noting that "[e]state planning attorneys generally advise their clients to review their estate plan every few years, and after any major life changes" and listing life changes); Sarah O'Brien, *When It Comes to a Will or Estate Plan, Don't Just Set It and Forget It. You Need to Keep Them Updated*, CNBC (Dec. 10, 2021, 4:09 PM), https://www.cnbc.com/2021/12/07/its-essential-to-review-your-will-or-estate-plan-every-few-years.html [https://perma.cc/C3CZ-8KXD] ("Experts recommend revisiting your will and other estate-planning documents at least every few years . . . .").

166. *See, e.g.*, Hirsch, *supra* note 8, at 613–14.

167. *See, e.g.*, Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. Rev. 877, 879 (2012); SITKOFF & DUKEMINIER, *supra* note 11, at 67.

168. *See, e.g.*, Hirsch, *supra* note 8, at 618 (noting that updating a will "requires time—always a scarce resource").

169. *See, e.g.*, *What's at Risk if You Don't Update Your Estate Plan Regularly?*, LAW OFF. ROSARIO MARIO F. RIZZO (Oct. 4, 2021), https://www.rizzolawfirm.com/blog/2021/10/whats-at-risk-if-you-dont-update-your-estate-plan-regularly [https://perma.cc/VD2R-W8YW] ("Failing to update your estate plan can also be a major issue."); Bob Carlson, *7 Reasons It's Time to Update Your Estate Plan*, FORBES (Dec. 15, 2020, 2:59 PM), https://www.forbes.com/sites/bobcarlson/2018/12/02/7-reasons-its-time-to-update-your-estate-plan (on file with the *Iowa Law Review*) (observing that a "widespread error[] . . . . is to fail to update the will and estate plan"); Hirsch, *supra* note 8, at 634 (describing estate planning as "a one-time (or at best infrequent) activity").

170. Naomi Cahn & Amy Ziettlow, *"Making Things Fair": An Empirical Study of How People Approach the Wealth Transmission System*, 22 ELDER L.J. 325, 329–32 (2015) (demonstrating that much wealth transmission happens informally, including by family members following oral instructions, *inter vivos* transfers, and family members distributing property among themselves after death).

171. *See, e.g.*, Hirsch, *supra* note 8, at 618 ("It may happen that an event has the interesting, dual property of altering the testator's intent while also depriving the testator of a realistic opportunity to revise his or her estate plan to reflect the change.").

172. *See, e.g.*, *id.* at 639 ("Testators do not revise their wills overnight.").

and forget.[173] Others might not update their will for the very reason that their life is changing—if people know their family structure or their views are likely to change in the short term, they may feel there is no point going through the time and expense.[174] If my son is going through a divorce, why not wait until it is finalized? If I think I might re-marry in the next few years, why revise my will now?

In short, although the law *allows* people to change their will as their intent changes, many people *don't*, and for understandable reasons.

2. Medical Advances Have Compounded This Problem

Moreover, many people *can't*.[175] Advances in medicine over the last century have dramatically extended average lifespans, and we can today cure many somatic ailments that would have previously been fatal.[176] But medicine has not been nearly as successful in treating age-linked cognitive decline, like Alzheimer's Disease.[177] The result is that today, a large and growing group of people live for a long time—maybe over a decade—with substantial and increasing cognitive decline.[178]

To change a will, a testator must have sufficient mental capacity.[179] Many people with advanced Alzheimer's or other cognitive ailments do not have the mental capacity the law demands.[180] Perhaps many more are of *questionable* capacity, and to change their will now would simply invite litigation.[181] For

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173. *See, e.g.*, Cheryl Winokur Munk, *The Biggest Mistakes People Make with Their Wills*, WALL ST. J. (Feb. 16, 2023, 12:00 PM), https://www.wsj.com/articles/biggest-mistakes-wills-2d13dc44 (on file with the *Iowa Law Review*) ("Write it and forget it is a common theme for wills.").

174. *See, e.g.*, Hirsch, *supra* note 8, at 636 ("[E]state planning might appear premature even though testamentary intent has already changed.").

175. *See, e.g.*, *id.* at 615 ("One circumstance that could stymie self-revision of a will is incapacity.").

176. *See, e.g.*, David Cutler & Grant Miller, *The Role of Public Health Improvements in Health Advances: The Twentieth-Century United States*, 42 DEMOGRAPHY 1, 1–6 (2005).

177. *See, e.g.*, C. Kwon Kim et al., *Alzheimer's Disease: Key Insights from Two Decades of Clinical Trial Failures*, 87 J. ALZHEIMER'S DISEASE 83, 84 (2022) ("Current validated AD treatments modestly slow its progression, and none can reverse it.").

178. *See, e.g.*, SITKOFF & DUKEMINIER, *supra* note 11, at 507 ("This increase in longevity has brought with it an increased chance that a person's last days, months, or even years will be spent in a state of mental or physical decay.").

179. *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.1 (AM. L. INST. 2003).

180. *See, e.g.*, Adam Gerstenecker, Roy C. Martin, Katina Hebert, Kristen Triebel & Daniel C. Marson, *Cognitive Correlates of Impaired Testamentary Capacity in Alzheimer's Dementia*, 37 ARCHIVES CLINICAL NEUROPSYCH. 1148, 1154–56 (2022) (summarizing findings on testamentary capacity in a sample of Alzheimer's patients); Alexandra Economou & John Kontos, *Testamentary Capacity Assessment in Dementia Using Artificial Intelligence: Prospects and Challenges*, FRONTIERS PSYCH. 1 (May 31, 2023), https://www.frontiersin.org/journals/psychiatry/articles/10.3389/fpsyt.2023.1137792/full [https://perma.cc/78ZJ-4FQD].

181. *See, e.g.*, Peter Margulies, *Access, Connection, and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity*, 62 FORDHAM L. REV. 1073, 1073 (1994) ("Elder law attorneys enter an uncertain realm when they represent senior citizens of questionable capacity."); *Is a Will*

them, it may be better to stick with a clearly valid will executed before cognitive decline, at least if it isn't *too* far off.

Other areas of law recognize a number of mechanisms for making legally effective decisions for those without mental capacity, including appointing a surrogate decision-maker to decide on their behalf.[182] But under the laws of most states, surrogate decisionmakers do not have, *and cannot be given*, the power to change a person's will[183]—a power generally considered to be nondelegable, too personal to the testator.[184] Only eight states allow a conservator to modify a will even with court approval,[185] and a handful of others allow guardians to change a will but only for narrow, specified tax purposes.[186]

This leaves us with a group of people who are physically healthy enough to live for years, maybe decades, but who have cognitive impairments that render their testamentary capacity questionable at a minimum. During this time—and the births, deaths, marriages, divorces, and changes in personal values and preferences that entails—it is overwhelmingly likely that the testator's actual or hypothetical intent will change. But in these cases, the testator may literally be unable to change their will to reflect that.[187] They can't change it themselves because they lack the required testamentary capacity, and their proxy can't do that for them, because it is a power that cannot be delegated.

So here is an entire class of old wills that must be admitted to probate—technically valid as they are—but which cannot be assumed to still reflect what the testator most recently wanted.

3. Default Rules for Changed Circumstances Are Not Sufficient

Finally, though the law's primary solution to changing intents is to exhort testators to execute new wills, it acknowledges that people often do not. Indeed,

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Valid if It Is Signed by Someone with Dementia?, CIPPARONE & ZACCARO PC, https://www.trustsestateselderlawct.com/blog/will-valid-if-it-signed-someone-dementia [https://perma.cc/2EBM-L5U9] ("Ensuring that your assets go where you want them to is why you need to create a will or estate plan, if not before you are diagnosed with dementia, then certainly shortly thereafter.").

182. *See, e.g.*, Toomey, *supra* note 25, at 1297.

183. *See, e.g.*, Boni-Saenz, *supra* note 13 ("Courts and legislatures have generally designated willmaking as nondelegable, viewing that decision as too personal to be made by another."); Hirsch, *supra* note 8, at 616 ("Historically, guardians' tutelary powers failed to include a right to revise the estate plan of a ward.").

184. *See, e.g.*, Boni-Saenz, *supra* note 13 ("The act of making a will is thus a personal decision because it relates to multiple fundamental human capabilities, including the capabilities to have control over one's property, expression, and affiliation."); *see also In re* Estate of Runals, 328 N.Y.S.2d 966, 976 (Surr. Ct. 1972) ("[T]he right to make a will is personal to a decedent. It is not alienable or descendable. It dies with the decedent.").

185. *See, e.g.*, Ralph C. Brashier, *Policy, Perspective, and the Proxy Will*, 61 S.C. L. REV. 63, 69 n.23 (2009) (noting that only California, Colorado, Hawaii, Massachusetts, Minnesota, Nevada, New Hampshire, and South Dakota permit a court to authorize a conservator to modify a will).

186. *See, e.g.*, 755 ILL. COMP. STAT. ANN. 5/11a-18 (West 2007) (allowing delegation of will-making authority for general tax purposes); FLA. STAT. ANN. § 744.441(18) (LexisNexis 2011) (allowing delegation of will-making authority only in the case of an estate tax charitable deduction).

187. *See, e.g.*, Fellows, *supra* note 3, at 653; *see also* Hirsch, *supra* note 8, at 615 (describing this class of estate plans as "unalterable").

the law provides a handful of default rules for updating un-changed wills based on presumed intent.[188] These rules, however, are crude, impersonal, and an inadequate substitute for attention to the testator themselves.[189]

Perhaps the most significant of these doctrines is the presumption of revocation on divorce. Statutes in almost all states provide that a marital will is presumed revoked as to any provision for the testator's ex-spouse.[190] This seems a reasonable enough presumption, though as Adam Hirsch has pointed out, the question is actually "not whether someone would probably want to revise a will following a consequential event [like divorce], but whether someone *who has not done so* would probably want to do so. And that, on reflection, is a separate question."[191] Similarly, another presumption allows children born after the will was executed to claim an intestate share—maybe a reasonable enough guess most of the time, but entirely agnostic to the testator themselves.[192]

Beyond these, presumptions become much more dubious. An important body of law involves so-called "antilapse statutes"—which govern bequests to certain beneficiaries who predecease the testator.[193] At common law, devises to predeceasing beneficiaries were all said to "lapse," and pass to those listed under a residuary clause or by intestacy.[194] This rule has superficial logic but leads to odd outcomes in many cases. Consider a bequest of the family home to one's daughter. At death, the daughter has already passed, but is survived by the testator's grandchildren. State antilapse statutes provide instead that lapsed bequests to beneficiaries who stand in specified blood relations to the testator go to their descendants, rather than the residuary.[195]

Is this presumption right? Does it go too far? Or not far enough? Who knows—statutes vary, some applying antilapse only to bequests to the testator's descendants, others even to bequests to blood kin of the testator's spouse.[196] All these rough generalizations about presumed intent, based on intuition rather

188. *See, e.g.*, Glover, *supra* note 12, at 596 (summarizing these rules and their purpose in approximating the hypothetical intent of the testator).

189. *See, e.g.*, Richard F. Storrow, *Wills and Survival*, 34 QUINNIPIAC L. REV. 447, 477 (2016) ("Anti-lapse statutes are blunt . . . .").

190. *See, e.g.*, SITKOFF & DUKEMINIER, *supra* note 11, at 246 ("Statutes in nearly all states provide that a divorce presumptively revokes a provision in a decedent's will for the decedent's divorced spouse.").

191. Hirsch, *supra* note 8, at 633.

192. *See, e.g.*, UNIF. PROB. CODE § 2-302 (amended 2019) (an exemplary "pretermitted heir" statute).

193. *See, e.g.*, SITKOFF & DUKEMINIER, *supra* note 11, at 359–60.

194. *Id.*

195. *See, e.g.*, UNIF. PROB. CODE § 2-605 (amended 2019) (an exemplary antilapse statute).

196. *See, e.g.*, SITKOFF & DUKEMINIER, *supra* note 11, at 366 (describing variation in the scope of antilapse statutes).

than evidence, are crude, controversial, and, according to many commentators, often wrong.[197]

The bottom line is that although the law of wills recognizes that people do not always change their wills when their intent changes, its approaches to dealing with this problem suffer the same basic structural problem. They are *generalizations* about intent, some of which appear to be wrong in many cases. So long as wills law's approach to changed intents are statutory presumptions, this problem seems unavoidable.[198]

4. Contemporary Planning Techniques Are Not Adequate

Finally, sophisticated estate planners cognizant of the benefits of discretion have settled on two techniques for building discretion into estate plans already—powers of appointment and discretionary trusts. But neither accomplishes the same goals as an executor discretion clause.

Powers of appointment grant a specified person a nonfiduciary power to select a person to receive property.[199] They are frequently included in wills to introduce flexibility into estate plans.[200] But they are *nonfiduciary* powers—they may be "exercise[d] . . . arbitrarily as long as the exercise is within the scope of the power."[201] Indeed, courts have held that powers of appointment need not even be exercised in "good faith."[202] In other words, so long as the holder of a power of appointment complies with its terms, and appoints the property to a listed permissible object, their election cannot be challenged.[203] A testator might want to incorporate discretion into their estate plan, but ensure that its use is bounded by enforceable standards tethered to *their* intent.

In a discretionary trust, a trustee holds legal title to property on behalf of its beneficial owners, with discretion as to when and how much is paid to them outright.[204] Trustee discretion *is* paradigmatically constrained by

197. *See, e.g.*, Eloisa C. Rodriguez-Dod, *"I'm Not Quite Dead Yet!": Rethinking the Anti-Lapse Redistribution of a Dead Beneficiary's Gift*, 61 CLEV. ST. L. REV. 1017, 1019 (2013) (describing antilapse statutes as passed "without any empirical evidence" and that the "current system is now so convoluted").

198. *See, e.g.*, Glover, *supra* note 9, at 240 ("The very fact that the law must resort to rules of construction to address the issue of an impossible estate plan highlights the ambiguity of the testator's intent and the resulting uncertainty regarding whether the testator's intent is accurately expressed in her will.").

199. *See, e.g.*, SITKOFF & DUKEMINIER, *supra* note 11, at 817–20 (describing powers of appointment).

200. *Id.* at 818.

201. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 17.1 cmt. g (AM. L. INST. 2011).

202. *In re* Estate of Zucker, 122 A.3d 1112, 1116–17 (Pa. Super. Ct. 2015).

203. *See, e.g.*, UNIF. POWERS OF APPOINTMENT ACT § 307 (UNIF. L. COMM'N 2013) ("[A]n exercise of a power of appointment in favor of an impermissible appointee is ineffective.").

204. *See, e.g.*, AUSTIN WAKEMAN SCOTT & MARK L. ASCHER, 1 SCOTT AND ASCHER ON TRUSTS § 1.1 (6th ed. 2019) (describing the structure of a trust); RESTATEMENT (THIRD) OF TRS. § 50 (AM. L. INST. 2003) (describing discretionary trusts).

enforceable fiduciary duties,[205] but a trust must have ascertainable, identifiable beneficiaries to be created. Trusts that purport to be for, say, the settlor's "friends," "associates," "acquaintances," etc., will fail for lack of ascertainable beneficiaries.[206] A testator could not use a trust to give someone discretion to make bequests to people not specifically identified by its authorizing document.

In sum, there is demand among sophisticated estate planners for devices that grant discretion in ultimately determining who gets what after the testator's death—clear in the popularity of powers of appointment and discretionary trusts. But thus far, the bar has presented testators with a choice of two imperfect tools—a testator can either grant discretion constrained by no enforceable duties, with a power of appointment, or discretion that can only be exercised in favor of pre-identified beneficiaries, in a discretionary trust. We can imagine testators who want *both* kinds of discretion—discretion to make additional gifts to beneficiaries who are not identifiable at execution, but guided and constrained by some enforceable standard. An executor discretion clause might be just that mechanism.

III. EXECUTOR DISCRETION FOR CHANGED CIRCUMSTANCES

Wills law has a problem of changed circumstances and expired intents. This Part explores a possible drafting solution that testators and the bar might begin putting into use now—testators (or their attorneys) might draft a provision in their will authorizing their executors to modify the disposition, in their discretion, most likely to better emulate their more recent intent.

Why might this work? First, discretion is a mechanism for addressing unanticipated circumstances throughout the law, allowing for bounded flexibility. Second, in most cases, the executor is the person in whom it makes the most sense to vest discretion. And finally, I argue that these clauses are either enforceable under current law or should be enforceable with minimal doctrinal changes, notwithstanding some possible challenges.

A. DISCRETION AND CHANGED CIRCUMSTANCES

The law of wills is hardly the only area of law for which changed circumstances and intentions are a problem. Things are always changing, and many of those changes have important legal consequences. Contract parties encounter situations they haven't provided for; patients confront new experiences and feelings in illness; executive agents face circumstances unaccounted for in legislation. Lawmakers and contracting parties can try to anticipate as many possible changes as they can and provide for them in written

205. *See, e.g.*, RESTATEMENT (THIRD) OF TRS. § 70 (AM. L. INST. 2007) ("[A] trustee . . . is subject to the fiduciary duties stated and explained hereafter . . . .").

206. *See, e.g.*, Clark v. Campbell, 133 A. 166, 170–71 (N.H. 1926) (invalidating a purported trust for lack of ascertainable beneficiaries).

instruments, but it is hubris to think they could anticipate all changes, or even *want* to lock in an inability to change their mind.[207]

The law addresses unanticipated circumstances in many domains by granting bounded discretion in certain agents.[208] Take, for example, the role of discretion in the basic structure of our government and separation of powers.[209] Legislatures with a view that some conduct ought to be criminal may not be able to prescribe in advance which side of the line every factual variation might fall. So they write somewhat overbroad statutes, recognizing that prosecutors have discretion to decline to prosecute.[210]

The same goes for the theory of the administrative state. Congress could revise a massive statute on food safety every time a new meta-analysis comes out—but better to create an agency with discretion and expertise to do so.[211] Granted, executive officers do not have *unbounded* discretion to do whatever they want. They must "take Care" that the laws be faithfully executed.[212] Nowhere in the law ratifies boundless discretion.[213] But *bounded* discretion addresses changing circumstances in many public law contexts.

And bounded discretion serves a similar function in private law. Consider a classic agency relationship—you hire an agent to purchase cattle at auction. You will have, naturally, a certain budget, reasons for why you want to buy additional cattle, and plans on what they will be used for. However, you have no way of knowing what particular steer will be offered. So you give your agent general instructions—perhaps a limit, a kind of heifer to target, and so on. But you might also give them discretion to select among the options available.[214]

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207. *See, e.g.*, Gregg P. Macey, *Coasean Blind Spots: Charting the Incomplete Institutionalism*, 98 GEO. L.J. 863, 877 (2010) ("Complete contracting is . . . impossible."); *see also* Robert H. Sitkoff, *An Economic Theory of Fiduciary Law*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 197, 199 (Andrew S. Gold & Paul B. Miller eds., 2014) ("Removing or limiting the agent's discretion is not a satisfactory answer to an agency problem.").

208. *See, e.g.*, Hirsch, *supra* note 8 ("[T]ext makers may concede the futility of trying to anticipate every contingency and empower a delegate to revise their texts as circumstances evolve.").

209. *See, e.g.*, Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 673 (2014) ("Enforcement discretion . . . is central to the operation of both the federal criminal justice system and the administrative state.").

210. *See, e.g.*, Robert Leider, *The Modern Common Law of Crime*, 111 J. CRIM. L. & CRIMINOLOGY 407, 422 (2021) ("[E]xecutive officers must use their discretion to determine which crimes to prosecute and against whom.").

211. *See, e.g.*, Ryan Snyder, *Trading Nonenforcement*, 39 GA. ST. U. L. REV. 777, 839 (2023) (defending agency discretion in administrative law).

212. U.S. CONST. art. II, § 3.

213. While executive discretion may not be *judicially* reviewable in many cases, this is justifiable on the theory that this discretion will at least be *politically* reviewable. Truly unbounded, unreviewable discretion is lawless. *See, e.g.*, LON L. FULLER, THE MORALITY OF LAW 41 (rev. ed. 1969) (arguing that stability is a conceptual necessity of lawfulness).

214. *See, e.g.*, Paul B. Miller, *The Fiduciary Relationship*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 207, at 63, 80 ("Consider the purchasing agent who acts under instructions to obtain a particular good for a specified maximum price, but is otherwise free to negotiate purchase terms. The agent's discretion is limited by *ex ante* instruction and . . . *ex post* consultation, but very rarely is it eliminated.").

This is a banal agency arrangement.[215] And even if you do not explicitly grant your agent discretion, if the circumstances have changed enough, and the agent can't get in touch with you, the law might imply it anyway.[216]

As discretion can address unanticipated circumstances in all these domains, so too in the law of wills. Trusts and estates attorneys encourage their clients to consider as many conceivable circumstances as they can, and provide for contingencies.[217] But we recognize in criminal law, constitutional law, administrative law, agency law, and elsewhere that this is ultimately an exercise in futility. We should expect the same here, and recognize similar discretion in executors who are granted it.[218]

B. EXECUTOR DISCRETION

To implement discretion in the law of wills, we need a discretionary decision-maker. In the context of wills, at least in most cases, the executor makes the most sense.

Courts have long supported the plain meaning and no reformation rules on the ground that wills are the best evidence of what the testator would have wanted.[219] From the court's perspective, that may be true. The court *doesn't* know anything about the testator. And courts have good reasons for not wanting to litigate questions of the testator's actual intent from the ground up in every case.[220]

But that is not true about executors. In a recent study, "[m]ore than [ninety percent] of testators nominated a spouse or blood relative . . . as the

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215. *See, e.g.*, RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. b (AM. L. INST. 2024) (discussing agent's duties arising from specified grants of discretion); *see also* Miller, *supra* note 214, at 72 ("The fiduciary has freedom of choice and action but it is not unlimited.").

216. *See, e.g.*, Deborah A. DeMott, *The Fiduciary Character of Agency and the Interpretation of Instructions*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 207, at 321, 327 (surveying older cases in which discretion was implied in this way); Miller, *supra* note 214, at 80 ("[V]irtually all agents have *discretion* in the exercise of powers notwithstanding the presence of instructions.").

217. *See, e.g.*, Casey C. Harrison, *Do's and Don'ts for Your Disposition of Property by Will*, HARRISON EST. L. (Jan. 4, 2022), https://www.harrisonestatelaw.com/dos-and-donts-for-your-disposition-of-property-by-will [https://perma.cc/A6XX-CF6A] ("Each disposition of property in your Last Will and Testament should include an alternate beneficiary or two, to account for unexpected developments in the future."); Evan H. Farr, *Will My Estate Plan Be Followed as Intended?*, FARR L. FIRM (Sept. 29, 2023), https://www.farrlawfirm.com/estate-planning-incapacity-planning/will-my-estate-plan-be-followed-as-intended [https://perma.cc/HC7T-QC5C] ("In order to truly have a comprehensive estate plan that will be followed as long as possible, you need to think through all of these possible issues and make a contingency plan to cover each of these foreseeable issues.").

218. *See, e.g.*, Storrow, *supra* note 31, at 103; *see also* Gordon, *supra* note 113, at 411 (arguing that including more general principles in wills "might prove helpful to the readers—court, beneficiaries, other mourners, fiduciaries—in understanding, accepting, and carrying out the testator's intent").

219. *See, e.g.*, Mahoney v. Grainger, 186 N.E. 86, 87 (Mass. 1933) ("The will must be construed as it came from the hands of the testatrix.").

220. *See, e.g.*, Guzman, *supra* note 121, at 316 (acknowledging that "even the most ardently intent-driven advocates" do not propose individualized judicial inquiry into the testator's actual intent).

executor."[221] Executors can be presumed to know *a great deal* about the testator, and are likely to have been selected for exactly that reason.[222] As one older study found, wills themselves "sometimes ma[ke] clear that the testator reposed great confidence in [their] chosen personal representatives."[223] After all, in many ways, the purpose of the office of executor is to "carr[y] on the testator's legal existence."[224] In most cases, for most testators who want to authorize discretion, then, their executor is likely to be the best person in whom to entrust it.[225]

Of course, not everyone has such a relationship with their chosen executor; some people might nominate the drafting attorney or a professional fiduciary.[226] These testators could empower someone else with discretion, if they'd like, similar to a "directed trust," where a trustee with property-management powers must follow the dispositive instructions of a nominated "trust director."[227] Or they could appoint multiple executors, with competing interests and knowledge about different parts of the testator's life, to use discretion by majority vote or consensus. At the same time, some people are simply not good candidates for *anyone* to exercise discretion over their estate plan. If a testator does not have anyone who knows them well enough, or who they trust enough, to serve as executor, or if they don't *want* to grant anyone discretion, there may be no getting around their being on top of their estate planning themselves. Executor discretion is a drafting choice—for some people, with some family relationships, it is clearly a bad idea.[228]

But for those of us—maybe most of us—who want and are able to nominate as executor a person or people we love and trust, giving them discretion to update our dispositions makes sense.

C. THE LEGAL STATUS OF EXECUTOR DISCRETION

Whether granting your executor discretion is a good idea is one thing—whether courts would enforce it is another. Although there is little direct authority on the question, executor discretion clauses either are or ought to be enforceable. After all, the organizing principle of wills law is to implement the intent of the testator—lawful clauses in duly executed wills are to be followed. Moreover, some authority has vindicated discretion in executors, and the law

221. Weisbord, *supra* note 4, at 2600.

222. *See, e.g.*, R.J.R. GOFFIN, THE TESTAMENTARY EXECUTOR IN ENGLAND AND ELSEWHERE 38 (1901) ("The executors of the will, we are told, should be those whom the testator has chosen for the purpose and to whom he has committed the charge.").

223. Friedman, *supra* note 127, at 45.

224. Sneddon, *supra* note 51, at 372.

225. *See, e.g.*, Gordon, *supra* note 113, at 411 (noting that executors "essentially stand in the testator's shoes and act as the testator's surrogates with respect to distribution and ongoing administration of estate property").

226. *See, e.g.*, Weisbord, *supra* note 4, at 2600.

227. *See, e.g.*, SITKOFF & DUKEMINIER, *supra* note 11, at 668–72 (discussing directed trusts).

228. *See, e.g.*, Baron, *supra* note 96, at 412 ("Some individuals are surely able and willing to make once-and-for-all decisions about what should happen to their property at death and to accurately record those decisions in their wills.").

recognizes similar discretion in agency law, particularly through durable powers of attorney, and powers of appointment.

Executor discretion clauses are likely to be challenged on two primary grounds—as violating the Wills Act, or rendering bequests too indefinite. Neither is fatal.

1. The Intent of the Testator

Courts enforce the lawful intent of testators as written in duly executed wills.[229] From one perspective, that is all that is required to find an executor discretion clause enforceable. The testator wrote it in the will, it is lawful and well within the broad boundaries of public policy. These clauses are clearly neither impossible to implement or enforce,[230] nor illegal in any substantial sense. Granting a loved one discretion to modify decisions about property made years ago offends no public policy of which I am aware—indeed, it is hard to fathom that a legal regime that lets testators disinherit their children, divorce spouses without cause to avoid their taking an elective share, and put onerous, cruel, and borderline capricious conditions on bequests would find an executor discretion clause void against public policy.[231] At one level, that's all there is to it.[232] Whether or not the argument from testator intent is dispositive, it at least puts the burden to the skeptic to show why that could not be done.[233]

2. The Cases

Generally, courts have enforced grants of discretion to executors. As the First Edition of American Jurisprudence put it, "the testator has a right to dispose of his property as he pleases, and he may subject all, or any part, of it to the discretion of his executor."[234] Similarly, Corpus Juris Secundum holds

229. *See, e.g.*, Barnhart v. Hedelund (*In re* Robinson's Estate), 298 N.W. 559, 562 (Neb. 1941) ("[T]he court will determine the intent of the testator and give effect thereto if lawful." (quoting Lincoln Nat'l Bank & Tr. Co. v. Grainger, 262 N.W. 11, 14 (Neb. 1935))); *In re* Preston's Will, 124 N.Y.S.2d 578, 580 (Surr. Ct. 1953) ("[I]t is fundamental that it is the intent of the testator as expressed in his will, that governs."); Roberts v. Scyphers, 104 S.E. 698, 700 (Va. 1920) (enforcing a "lawful intent of the testator expressed in his will" over presumptions to the contrary).

230. *See infra* Part IV.

231. *See, e.g.*, Shapira v. Union Nat'l Bank, 315 N.E.2d 825, 826, 832 (Ohio Ct. Com. Pl. 1974) (upholding a provision requiring testator's son to marry, within a specified period of time, "a Jewish girl whose both parents were Jewish," in order to get his bequest).

232. *See, e.g.*, Hogue v. Wessell, No. CA 97–39, 1997 WL 663578, at *2 (Ark. Ct. App. Oct. 22, 1997) ("When a decedent's will grants power to an executor that is wholly discretionary, the probate court generally lacks the authority to intervene . . . .").

233. *See, e.g.*, Hartnett v Wandell, 60 N.Y. 346, 350 (1875) ("[E]ffect shall be given to the will of a testator when not contrary to the rules of law, as such will, and the intent of the author of it can be gathered from the whole instrument.").

234. Borga v. Hendrickson (*In re* Hirshorn's Estate), 209 P.2d 543, 546 (Colo. 1949) (en banc) (quoting 21 AM. JUR. *Executors and Administrators* § 213); *see also* Weisbord, *supra* note 4, at 2564 ("Under modern probate law, testators enjoy broad autonomy to customize many aspects of estate administration, including the work of the executor.").

that "[a] testator may leave it to the discretion of the executor whether a legacy shall be paid at all."[235]

Girard v. Futterer is illustrative.[236] In a codicil executed during the Civil War, testator Stephen Spuller provided that his will's legacies:

> shall not be payable in case that, by reason of the existing war, *or other circumstances*, my said wife, Julia Spuller, shall not deem it discreet to pay the same, in view of the wants and requirements of herself and family; hereby intending to make the payment of said legacies, or any part thereof, entirely subject to the sound discretion of my said wife.[237]

After Stephen died in the war, Julia evidently found retention of the estate in keeping with her wants and needs.[238] The court found this unproblematically enforceable.[239]

This is close to an executor discretion clause—the clause authorized the executor to make or not make bequests entirely in her discretion, in light of "the existing war, or *other circumstances*." The only material distinction is that it didn't authorize her to increase bequests to others or make new ones. But in *Ellison v. Ellison*, a testator made bequests of specified cash value, with the caveat that "[a]ll moneys referred to in this will are based on the present value of the American dollar and may be adjusted by the executor according to any change in value and the financial position of the estate,"[240] thus allowing the executor to vary dispositions *up* based on the cost of living. The court enforced this provision.[241]

And in *In re Hirshorn's Estate*, the court resolved an analogous question.[242] The provision there gave the executor discretion in *selecting beneficiaries* of a particular bequest, comparable to creating new ones subject to an enforceable standard.[243] Citing cases upholding executor discretion in arbitrating

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235. 97 C.J.S. *Wills* § 2213 (2024).

236. *See generally* Girard v. Futterer, 3 So. 516 (Ala. 1888).

237. *Id.* at 518 (emphasis added).

238. *Id.* (noting that the will was admitted to probate in September 1864, and that Julia retained the testator's real property).

239. *Id.*; *see also* Drexler v. Drexler, 83 A.2d 367, 369 (N.J. Super. Ct. Ch. Div. 1951) (upholding the exercise of discretion under a similarly phrased clause more recently).

240. Ellison v. Ellison, 164 S.W.2d 775, 778 (Tex. Civ. App. 1942).

241. *Id.* at 781.

242. Borga v. Hendrickson (*In re* Hirshorn's Estate), 209 P.2d 543, 546–51 (Colo. 1949) (en banc).

243. *Id.* at 544 (enforcing executor discretion in selecting beneficiaries of a bequest to "all employees who have been determined by my executor to be bona fide employees of the Algerian Club for more than one year prior to my death").

interpretive disputes,[244] in paying funeral expenses,[245] in distributing bequests in cash or kind,[246] and in selecting co-executors,[247] the court upheld the executor's discretion.

In sum, although there is little authority squarely on executor discretion clauses, comparable clauses have regularly been upheld.

3. Durable Powers of Attorney

Beyond cases explicitly upholding clauses granting executors discretion, their enforceability is suggested by analogy to grants of discretion in agency law—particularly under durable powers of attorney, a statutory innovation to extend a discretionary agency relationship beyond the principal's incapacity.

Agents, as discussed above, can be (and almost always are) granted discretion in accomplishing the principal's goals.[248] At common law, executors could not technically be an agent of the decedent, because agency relationships terminate at the death or incapacity of the principal.[249] Nevertheless, executors have long been recognized to be *something like* an agent of the testator and estate.[250] From this perspective, a will can be understood as a kind of agency contract, establishing something like an agency relationship between the testator (or "the estate") and the executor.[251] And we might think that, just as

244. *See, e.g.*, Pray v. Belt, 26 U.S. (1 Pet.) 670, 670, 672–73 (1828) (upholding discretion under clause, "whereas my will is lengthy, and it is possible I have committed some error or errors, I therefore authorize and empower, as fully as I could do myself if living, a majority of my acting executors, my wife to have a voice as executrix, to decide in all cases, in case of any dispute or contention: whatever they determine is my intention, shall be final and conclusive").

245. *See, e.g.*, Nat'l Metro. Bank of Wash. v. Joseph Gawler's Sons, Inc., 168 F.2d 571, 572 (D.C. Cir. 1948) ("The executors here were expressly empowered by decedent's will to pay funeral expenses in such amount as they deemed proper.").

246. *See, e.g.*, *In re* Estate of Fiedler, 151 A.2d 201, 204 (N.J. Super. Ct. App. Div. 1959) ("Under the express terms of the will plaintiff is given absolute discretion to distribute the remaining assets of the estate in kind."); *In re* Van Dam's Estate, 43 N.Y.S.2d 184, 187 (Surr. Ct. 1943); Richter v. Anderson, 10 N.E.2d 789, 792 (Ohio Ct. App. 1937).

247. *See, e.g.*, Hartnett v. Wandell, 60 N.Y. 346, 346, 349 (1875) (upholding will that named testator's wife and "such male friend as she may desire, shall be appointed with her as executor").

248. *See, e.g.*, RESTATEMENT (THIRD) OF AGENCY § 2.01, cmt. d (AM. L. INST. 2006) (noting that many kinds of agents have discretion); Miller, *supra* note 214, at 80 (observing that agents generally have discretion).

249. *See, e.g.*, T.P. Gallanis, *Default Rules, Mandatory Rules, and the Movement for Same-Sex Equality*, 60 OHIO ST. L.J. 1513, 1519 (1999) ("At common law, the death or incapacity of the principal automatically terminated the agent's authority.").

250. *See, e.g.*, Peck v. Botsford, 7 Conn. 172, 175 (1828) ("An executor stands in the place of his testator."); *see also* Manson v. Felton, 30 Mass. (13 Pick.) 206, 211–12 (1832) ("It is true, there is some distinction between the official character of an executor, and that of a guardian . . . . The distinction stated, between the character of a guardian and an executor . . . is immaterial . . . .").

251. *See, e.g.*, Storrow, *supra* note 189, at 479 ("In essence . . . the will is a set of directions to an agent . . . ."); Karen E. Boxx & Terry W. Hammond, *A Call for Standards: An Overview of the Current Status and Need for Guardian Standards of Conduct and Codes of Ethics*, 2012 UTAH L. REV. 1207, 1241 ("A particular fiduciary's duty includes the duty to carry out the purpose of the specific relationship."); GOFFIN, *supra* note 222, at 119–22 (describing alternative theories of the

a principal can grant an agent discretion, so too a testator can grant discretion to their executor.

Indeed, discretion is favored by and suffuses agency law.[252] An agent has actual authority to do whatever they "reasonably believe[], in accordance with the principal's manifestations to the agent, that the principal wishes the agent" to do.[253] So an agent who reasonably believes that, because of changes in circumstances, the principal would want (or have wanted) them to do something other than what they had literally been told, is protected from liability in acting.[254]

Moreover, in the past forty years, the analogy between executors and common law agents has become even tighter. The common law theory was that death necessarily terminates an agency relationship because the agent derives their legal powers from the principal. This no longer holds. Under durable power of attorney statutes, enacted in all states in the last forty or so years, principals can create agency relationships that last beyond—indeed, might be triggered by—their incapacity.[255] These agents do not derive their legal powers from the principal who, incapacitated, does not have them. Nevertheless, durable power of attorney relationships are largely governed by the common law of agency.[256]

And just as principals of traditional agency relationships can grant their agents discretion, those executing durable powers of attorney can do the same.[257] Indeed, because of the long duration through which agents under durable powers of attorney must operate, and their inability to receive updated dispositive instructions from their principals, durable powers of attorney are understood to imply *even more* discretion to update the principal's instructions than common law agency.[258]

In other words, the logic of durable powers of attorney removes a traditional barrier to thinking of executors as agents of their testators, notwithstanding a

executor as "the formal representative of the testator," or "an independent kind of testamentary disposition by means of which the testator bestows on a person power to carry out his will").

252. *See, e.g.*, Miller, *supra* note 214, at 80 ("This is unsurprising, for usually it would be pointless to hire an agent without affording her some discretion.").

253. RESTATEMENT (THIRD) OF AGENCY § 2.01 (AM. L. INST. 2006).

254. *See, e.g.*, DeMott, *supra* note 216, at 324 ("Agency doctrine protects the agent and the third party when the agent's action is reasonable under the circumstances, in light of the principal's present wishes as the agent understands them."); *see also* RESTATEMENT (THIRD) OF AGENCY § 2.02 cmt. f ("If the principal does not respond to the agent's inquiry and viewed objectively the action then taken by the agent reasonably serves the principal's interests as the agent could best discern them, the agent acted with actual authority.").

255. *See, e.g.*, Boxx, *supra* note 16, at 5 ("The principal's incapacity automatically terminated the agency because of the assumption that an agent acts at the direction of the principal and the principal has the power to terminate the agency relationship at any time." (footnote omitted)).

256. *Id.* at 4 ("The common law principles of agency therefore govern powers of attorney, and since the term attorney-in-fact means an agent appointed via a power of attorney, the attorney-in-fact's duties are determined under the laws of agency." (footnote omitted)).

257. *See id.* at 51 (discussing the attorney-in-fact's discretion to follow the principal's most recent wishes).

258. *Id.* at 3–4 (describing durable powers of attorney as authorizing "an unusual level of discretion").

long-standing tendency in the case law to analogize executors to agents.[259] Specifically, durable powers of attorney have made possible agency relationships beyond the principal's loss of legal capacity. There's no longer a conceptual reason, internal to private law, that executors cannot be thought of as agents of the testator. If ordinary agents can be granted discretion, and agents acting under durable powers of attorney can be granted discretion—and indeed, in both cases discretion can be implied—then there is no structural reason the same could not be explicitly granted to executors.

4. Powers of Appointment

Finally, given that powers of appointment are enforceable, *a fortiori* executor discretion clauses are. Suppose that a testator, concerned about their own ephemeral intentions, executes a will that reads—"I grant my friend the power to choose to whom all my property goes." This is a power of appointment.[260] The friend gets a nonfiduciary power to appoint the property to whomever—subject to no standard, reviewable by no court. While this may seem extreme, there is sense to it. After all, a testator could simply leave everything to their friend outright, to do with what they will. The power of appointment itself is justified *a fortiori*, from the possibility of outright gifts.

The existence of powers of appointment suggests that a *more limited* grant of discretion is also enforceable.[261] After all, if I can leave everything to a random third party with a power to appoint it to whomever she wants, perhaps accompanied by unenforceable oral instructions, perhaps not, why couldn't I give my executor instructions, but authorize her to deviate from them for good reason?

5. Legal Challenges

For these reasons, there is a strong case that executor discretion clauses are or should be legal. Nevertheless, these clauses face two primary legal challenges, sounding in violation of the Wills Act and the possibility that they create bequests too indefinite to be enforced.

a. Violation of the Wills Act

Although courts have enforced some grants of discretion to executors,[262] they have occasionally invalidated similar provisions as violations of the Wills Act, on the theory that discretion validates oral wills.[263]

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259. *See* sources cited *supra* note 251.

260. *See, e.g.*, RESTATEMENT (THIRD) OF TRS. §46 cmt. c (AM. L. INST. 2003) ("[P]owers of appointment may even be general, with no limit whatever with respect to permissible appointees.").

261. *See, e.g.*, Guzman, *supra* note 121, at 361 (arguing that wills that do nothing other than name an executor should be enforceable).

262. *See supra* Section III.C.2.

263. *See, e.g.*, Hancher, *supra* note 86, at 513 (describing how anxieties about authorizing oral wills, contrary to the Wills Act, has led courts to invalidate a number of efforts to better reflect the actual intent of the testator).

Consider *In re Estate of Reiman*.[264] The will there contained a provision directing the executor to "make all distributions of all my tangible and real property in accordance with the aforegoing paragraphs and the verbal guide lines last given by me, and in accord with his best judgment."[265] The Illinois Court of Appeals held that "[d]ecedent's attempt to create an oral plan of testamentary devise . . . must fail," because "it is fundamental that any disposition by way of verbal guidelines is prohibited by" the Wills Act.[266] The theory is that enforcing this clause would probate unattested oral evidence of the testator's preferences.[267] And while the drafting attorney clearly did themselves no favors here by so obviously raising the specter of oral testation, a similar argument could be made against executor discretion clauses.

But no court should be persuaded. Enforcing an executor discretion clause *written in the testator's attested language in a duly executed will* does *not* authorize probating unattested language.[268] Because the boundaries of the discretion are written into the document, it is no more than probating language in a valid will that complies with all formalities.[269] The fact that in enforcing the language we must look at facts about the world is no objection. That happens *every* time a will is probated.[270] In *Ellison*, the testator granted his executor discretion to vary bequests based on the then-value of the American dollar. This requires the executor to look to the Consumer Price Index, but it is facile to say that entails probating the unattested Consumer Price Index. A bequest to "my descendants" may require an executor to look at an intestacy statute without probating the intestacy statute; or a bequest of "my 2015 Ford Escape" might require an executor to look at *Kelley Blue Book* to figure out which car that is, but this wouldn't be probating *Kelley Blue Book*.

The analogy to durable powers of attorney is again instructive. Just like wills, durable powers of attorney must be executed according to certain formalities to be effective—indeed, in many states the formalities for durable powers of attorney are *stricter* than for wills, requiring two witnesses, the signature of the agent, *and* a notary.[271] Yet principals can grant their agents discretion in their durable powers of attorney, and nobody thinks this violates the statute authorizing durable powers of attorney, or circumvents its formalities. Compliance with formalities happens when the document is executed, and as

264. *See generally In re* Estate of Reiman, 450 N.E.2d 928 (Ill. App. Ct. 1983).

265. *Id.* at 929.

266. *Id.* at 929–30.

267. *See id.* at 930.

268. *Cf.* Glover, *supra* note 12, at 602–03 (considering and rejecting the parallel argument that considering extrinsic evidence in reforming wills for mistake violates the Wills Act).

269. *See supra* notes 46–49 and accompanying text.

270. *See, e.g.*, Langbein & Waggoner, *supra* note 21, at 539 (observing that the courts frequently enforce "unattested intention[s]," many of which are "probable or imputed as opposed to actual").

271. *See, e.g.*, N.Y. GEN. OBLIG. LAW § 5-1501B (McKinney 2024) ("To be valid . . . a statutory short form power of attorney . . . must . . . . [b]e signed, initialed and dated by a principal with capacity . . . in the principal's presence . . . [and notarized] and witnessed by two persons who are not named in the instrument[s] . . . .").

long as execution complies with the required formalities, there is no reason implementing it cannot be guided by future facts.

In other words, if a testator wants to grant their executor the kind of discretion contemplated in this Article—and they *tell us so* in precisely the manner required by the Wills Act—there is no *statutory* reason this preference could not be enforced. Any misguided case law to the contrary should not stand in the way.[272]

b. Indefinite Duties

Another, related theory that has invalidated grants of discretion to executors is that they might render bequests too indefinite to be enforced. It is "a rule, of which there appears to be no disapproval, that a bequest which by its terms may be applied . . . to persons not defined by name or by class, is too indefinite to be carried out."[273] This theory has led courts to invalidate a bequest to "that person . . . who shall have rendered to me the greatest service in my declining months or years . . . selected and determined by my executor,"[274] to a beneficiary's "best friend,"[275] or to "whomever the executor should select."[276]

Indeed, the cases enforcing limited grants of discretion to executors are different from the executor discretion clause proposed above in one critical respect—none openly granted the executor the power to *add beneficiaries* or *make a new bequest* (though determining eligible beneficiaries under a specified standard amounts to the same thing).[277] This distinction might matter because to the extent that executor discretion will be constrained by duties and reviewable by courts, anyone harmed by an executor's breach must have standing to sue.

Thus, if it could be a breach of duty to *not* to have made a *new* bequest to someone, standing is not strictly limited to the named beneficiaries of the will.[278] In principle, *anyone* could sue alleging breach for failure to make a gift to them. And *that* raises some difficulties. In exercising discretion, does the executor owe *everyone in the world* fiduciary duties? If not, how could it be consistent with fiduciary theory for them to have standing to sue? This is the logic of courts in

272. *See, e.g.*, Langbein & Waggoner, *supra* note 21, at 575 ("[T]he courts are prepared to enforce the testator's true intent even though it is unattested and must be proved by extrinsic evidence of an inherently suspect nature . . . .").

273. State v. Remsberg (*In re* Long's Estate), 67 P.2d 331, 332 (Wash. 1937).

274. *Id.* at 331–32.

275. Early v. Arnold, 89 S.E. 900, 902 (Va. 1916).

276. Thomas E. Simmons, Leach v. Hyatt*: Recasting Indefiniteness*, 43 ACTEC L.J. 121, 124 (2017). This would be a limited power of appointment. And historically, "the majority of jurisdictions . . . invalidate[] limited powers of appointment in an executor on grounds of indefiniteness." *Id.*

277. *See supra* notes 242–47 and accompanying text.

278. *See, e.g.*, Pearson v. Pearson (*In re* Estate of Pearson), 319 N.W.2d 248, 249–50 (Iowa 1982) ("An 'interested party' . . . must have an immediate interest rather than a contingent interest, which may never vest."); 80 AM. JUR. 2D *Wills* § 776 (2024) ("A person who is not otherwise qualified does not have the right to contest a will or maintain suit for revocation of its probate by virtue of his or her status as the spouse or prospective heir of a living person who is entitled to, but does not, exercise the right to contest the will or consent to a contest by others.").

invalidating bequests for indefiniteness—"under this bequest there is no person or class of persons who have the right to come into court and demand the fund, and, in case of refusal, to compel compliance with the demand."[279]

Of course, an executor discretion clause need not authorize the executor to make new bequests to unnamed beneficiaries—a testator could write a clause authorizing the executor to raise or lower the *amounts* of specified bequests, without the authority to make gifts to persons not named in the will. And, indeed, it might be possible to build more flexibility by making placeholder bequests within which executors could exercise discretion—"$0 to my caretaker or caretakers at my death, to be increased up to $10,000 at the discretion of my executor." A will authorizing this sort of constrained discretion would raise no issues of generalized standing.

But this approach might not work for everyone, and many testators may want to grant their executors broad discretion to make new bequests. Luckily, conceptual challenges sounding in the nature of fiduciary relationships are not persuasive. Indeed, the office of executor has always had a complex fiduciary status. It is not true that all fiduciary relationships entail the bilateral beneficiary–fiduciary relationship so characteristic of trust law in which the beneficiary, and only the beneficiary, has enforceable claims for breach of fiduciary duties to them against the fiduciary.[280]

Indeed, courts routinely observe that executors are fiduciaries of, and owe fiduciary duties to, the *estate*.[281] An estate is not a legal person, and so a fiduciary relationship between an executor an estate is not literally between a fiduciary and beneficiary.[282] An estate cannot sue an executor for breach of fiduciary duties.[283] Similarly, although the testator obviously has no capacity

279. *Remsberg*, 67 P.2d at 332.

280. *See, e.g.*, Ethan J. Leib, Davd L. Ponet & Michael Serota, *Mapping Public Fiduciary Relationships*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 207, at 388, 389–90 ("[I]ntense debate surrounds the mapping of fiduciaries and beneficiaries in [other areas] . . . .").

281. *See, e.g.*, Hall v. Schoenwetter, 686 A.2d 980, 983 (Conn. 1996) ("At all times subsequent to her appointment as executrix, the plaintiff served as a fiduciary for the decedent's estate."); *In re* Estate of McCool, 553 A.2d 761, 768 (N.H. 1988) ("[Executor] totally failed in his fiduciary duties to the Estate."); *In re* Estate of Kahr, 379 N.Y.S.2d 638, 641 (Surr. Ct. 1976) ("[T]he remedy is most appropriately invoked based upon respondent's long and continual history of dilatory tactics and avoidance to fulfill his duties as fiduciary in this estate."); *see also* Weisbord, *supra* note 4, at 2575 ("The duty of loyalty required that the executors act solely in the best interests of the estate and its beneficiaries.").

282. *See, e.g.*, Price v. Est. of Anderson, 552 S.W.2d 690, 691 (Tex. 1975) ("The parties recognized that the 'estate' of a decedent is not a legal entity and may not properly sue or be sued as such."); Isaac v. Mount Sinai Hosp., 490 A.2d 1024, 1026 (Conn. Ct. App. 1985) ("An estate is not a legal entity." (quoting State Bar Ass'n of Conn. v. Conn. Bank & Tr. Co., 131 A.2d 646, 654 (Conn. Super. Ct. 1957))).

283. *See, e.g.*, *Isaac*, 490 A.2d at 1026; *see also* Mareskas-Palcek v. Schwartz, Wolf & Bernstein, LLP, 90 N.E.3d 463, 471 (Ill. App. Ct. 2017) ("The well established rule in this state is that an estate lacks the capacity to sue or be sued, and any action must be brought by the executor or representative of the estate.").

to sue, courts often say that executors owe duties to *testators* under the terms of the will.[284]

But the fact that neither estates nor testators have capacity and standing does not mean the executors' duties towards them are precatory. Beneficiaries and creditors can sue executors for breach of duties to the estate.[285] Granted, executors owe beneficiaries personal, direct fiduciary duties—duties not to mismanage a specific bequest, for example, or to inform and account—on which they can sue.[286] But when beneficiaries sue for an executor's breach of duty to follow the terms of a will, these actions look more derivative—the breach is to the *estate* (or testator), but beneficiaries are granted standing to bring an action on its behalf.[287] And other courts have even recognized that third parties—not named beneficiaries—who are harmed by an executor's breach of duty to the estate have comparable standing.[288]

In other words, executors have always been subject to suit for breaches of duties owed to an estate or the testator. It is not a conceptual violation of the fiduciary status of executors that standing to sue for breach may not be limited to the discrete universe of individuals to whom the executor owes personal fiduciary duties. Above all else, executors have a duty to follow the terms of the will, which duty can only be to the estate or the testator.[289] If the terms of the will include an executor discretion clause, then, anyone harmed by the exercise of that discretion can have standing to sue, whether or not they are named in the will, and whether or not, as a theoretical matter, the executor is considered to have a direct, bilateral fiduciary relationship with them.

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284. *See, e.g.*, *In re* Estate of Schultz, 961 N.Y.S.2d 618, 621 (Sup. Ct. 2013) ("An executor is a fiduciary who owes 'a duty of undivided loyalty to the decedent . . . .'" (quoting *In re* Estate of Donner, 626 N.E.2d 922, 926 (N.Y. 1993))).

285. *See, e.g.*, Anderson v. Hunt, 122 S.W.2d 345, 346 (Tex. Civ. App. 1938) (analyzing a claim by a purported beneficiary against executors for failure to follow the terms of the will); Am. Sur. Co. of N.Y. v. White, 127 S.E. 178, 179 (Va. 1925) (analyzing a suit by beneficiaries against executor for mismanaging the estate).

286. *See, e.g.*, DeNatalie v. Mazza, 145 A.D.2d 404, 405 (N.Y. App. Div. 1988) (executor "merely owes a fiduciary duty to the estate beneficiaries to account for the assets of the decedent").

287. *See, e.g.*, *In re* Karavidas, 999 N.E.2d 296, 307 (Ill. 2013) (upholding finding of breach of fiduciary duty to the estate for failure to follow the will, in action brought by beneficiaries); Prignano v. Prignano, 934 N.E.2d 89, 101 (Ill. App. Ct. 2010) ("Louis's fiduciary duties as executor flowed to those who were beneficiaries of the will and included the duty to properly carry out the provisions of the will.").

288. *See, e.g.*, Latimer v. Mechling, 301 S.E.2d 819, 826 (W. Va. 1983) (holding that a third party with "no interest in the property or the estate which would entitle him to maintain this action" nevertheless had standing because "but for the executrix' breach of her fiduciary duty he would have acquired title to the land").

289. *See, e.g.*, Burke v. Burke, 14 Tenn. App. 381, 383 (Ct. App. 1931) (discussing the executor's duties to follow the terms of the will); *cf. In re* Estate of Skelly, 284 A.D.2d 336, 336 (N.Y. App. Div. 2001) ("[A]n executor's duties are derived from the will itself . . . ."); Lionel D. Smith, *Can We Be Obliged to Be Selfless?*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 207, at 141, 154 ("[I]n exercising a dispositive power, the fiduciary . . . . is required to do what he thinks will best fulfil the purposes for which the power was granted.").

Finally, this basic structure is actually quite common in fiduciary law.[290] Attorneys-in-fact acting on behalf of incapacitated principals owe fiduciary duties to those principals.[291] But incapacitated principals do not have capacity to enforce those duties,[292] so states grant broad standing to enforce the attorney-in-fact's duties to the principal to any "person that demonstrates sufficient interest in the principal's welfare."[293] This is extremely broad standing—arguably *broader* than the kind of standing that might arise under executor discretion clauses.[294] The same goes for corporate law—we call corporations legal entities, and say directors are in a fiduciary relationship with them.[295] But corporations can only sue through natural persons, and we grant natural person shareholders the power to bring suit against directors for fiduciary breach not to them personally, but to the corporation.[296]

In short, while courts have worried about indefiniteness for purposes of assessing duties and standing in invalidating clauses that look like executor discretion clauses, they need not be. It is no violation of the fiduciary structure to say that executors' primary duties are to the estate or the testator, but nevertheless grant standing to those harmed by an executor's failure to comply with those duties.

IV. IMPLEMENTING EXECUTOR DISCRETION

Executor discretion clauses are not currently in wide use and implementing them will raise novel questions for the courts. In this Part, I offer some preliminary thoughts on how the probate courts might best go about putting executor discretion clauses into practice.

First, I discuss the substantive standard by which the exercise of discretion ought be guided. I suggest that, unless directed otherwise, executors should

290. Indeed, given that "[a] trust can be established for the benefit of a cat or a dog or an unborn child," perhaps it is not so anathema even to trust law after all. Tamar Frankel, *Watering Down Fiduciary Duties*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 207, at 242, 245 (footnotes omitted).

291. *See, e.g.*, Boxx, *supra* note 16, at 56–57 (discussing the fiduciary duties attorneys-in-fact owe to incapacitated principals).

292. *See, e.g.*, FED. R. CIV. P. 17(b)–(c) (discussing mental capacity to sue in federal court).

293. UNIF. POWER OF ATT'Y ACT § 116 (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2006); *see also id.* cmt. ("Allowing any person with sufficient interest to petition the court is the approach taken by the majority of states that have standing provisions." (citing CAL. PROB. CODE § 4540 (West Supp. 2006); COLO. REV. STAT. ANN. § 15-14-609 (West 2005); 755 ILL. COMP. STAT. ANN. 45/2-10 (West 1992); IND. CODE ANN. § 30-5-3-5 (West 2001); KAN. STAT. ANN. § 58-662 (2005); MO. ANN. STAT. § 404.727 (West 2001); N.H. REV. STAT. ANN. § 506:7 (LexisNexis 1997 & Supp. 2005); WASH. REV. CODE ANN. § 11.94.100(e) (West 2005); WIS. STAT. ANN. § 243.07(6r) (West 2001))).

294. *Id.* § 116 cmt.

295. *See, e.g.*, N. Am. Cath. Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 101 (Del. 2007) ("It is well settled that directors owe fiduciary duties to the corporation.").

296. *See, e.g.*, Atkins v. Tony Lama Co., 624 F. Supp. 250, 254 (S.D. Ind. 1985) (noting allegations for breach of fiduciary duties "allege wrongs primarily against the corporation"); *see also* Leib et al., *supra* note 280, at 394 ("[T]here is not necessarily a one-to-one correlation between standing to sue and to whom a duty is owed . . . .").

be constrained by the substituted judgment standard. Next, I discuss how those harmed by executors' inappropriate use of discretion might seek remedies. Third, I argue that executors' discretionary decisions must be presumed valid. Finally, I suggest that cases in which the executor wants to increase a bequest to themselves (or possibly those closely related to them) must be treated differently—because of the high risk of abuse, executors should be required to obtain prior court approval, and bear the burden of showing the increase is consistent with the substantive standard.

A. SUBSTITUTED JUDGMENT AND OTHER STANDARDS

The basic purpose of an executor discretion clause is to better approximate the most recent actual subjective intent of the testator—or barring that, their most recent hypothetical subjective intent.[297] The best way for executors with discretion to do that is to make the decision the testator would have made under the circumstances.[298] This is, essentially, the standard of substituted judgment, a familiar standard widely employed in healthcare and property decision-making for permanently incapacitated adults who previously had legal capacity.[299]

The substituted judgment standard requires a surrogate decision-maker to make the decision that a person under their care would have made under the circumstances.[300] Today, substituted judgment is most associated with healthcare decision-making for those with dementia or other cognitive impairments.[301] But it has broad application. Indeed, the doctrine was developed to make financial decisions (gifts, as a matter of fact) for people incapacitated by cognitive impairments.[302]

Deploying substituted judgment in any of these situations—healthcare, financial decision-making in guardianships, and so on—is analogous to executors operating under executor discretion clauses. In these cases, one person is

297. *See supra* Section I.B.

298. *See, e.g.*, Fellows, *supra* note 3, at 623.

299. *See, e.g.*, Toomey, *supra* note 25, at 1295–301 (summarizing applicability of the substituted judgment standard in private law and healthcare); *see also* Megan S. Wright, *Dementia, Healthcare Decision Making, and Disability Law*, 47 J.L. MED. & ETHICS 25, 26 (2019) ("Healthcare decision-making law . . . emphasi[zes] . . . following advance directives and directions to surrogates to make decisions based on a patients' prior wishes . . . .").

300. *See, e.g.*, Boni-Saenz, *supra* note 13, at 1254–55 ("[T]he common view is that [a] surrogate must employ a substituted judgment standard. . . . [S]he must mimic, to the extent possible, the decisions the ward would make if the ward had capacity.").

301. *See, e.g.*, Jacob M. Appel, *Substituted Judgment for the Never-Capacitated: Crossing* Storar's *Bridge Too Far*, 36 BIOETHICS 225, 225–27 (Dec. 2, 2021) (asserting that substituted judgment is a widely-used method of decision-making for incapacitated patients); Lawrence A. Frolik, *Is a Guardian the Alter Ego of the Ward?*, 37 STETSON L. REV. 53, 67 (2007) (noting that in healthcare decision-making, "the substituted-judgment doctrine is the overwhelming choice").

302. *See Ex parte* Whitbread (1816) 35 Eng. Rep. 878, 879 (authorizing a gift on behalf of a legally incapacitated person on the ground that they would have made it if capacitated); *see also* Louise Harmon, *Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 YALE L.J. 1, 16 (1990) (discussing the origins and development of the doctrine of substituted judgment).

legally authorized to decide on behalf of another who is unavailable and unable to themselves. In each case, the decision-maker does what the person under their care would have done. And in each case, the intent by which they are supposed to be deciding is hypothetical—it is, by stipulation, not based on contemporaneous reports of what the person wants, because they are unavailable. Thus, for the same reasons as in deciding for the incapacitated, the default standard under executor discretion clauses should be substituted judgment.

And just as substituted judgment broadly works as a litigable standard in other contexts, it can work here.[303] Of course, discerning the hypothetical intent of someone else is always difficult.[304] People are complicated, and people *themselves* are not all that good at predicting what they would do in circumstances they haven't encountered.[305] But people do have preferences, values, and things they care about.[306] Hypothetical intents are hypothetical in the sense that they are not actual, subjectively experienced brain states, but claims about them can be right or wrong in a litigable way.

In applying substituted judgment in the testamentary context, just as elsewhere, executors should of course give substantial weight to the written dispositions of the will.[307] That *is* a clear and definitive expression of the testator's actual intent at a point in time.[308] If it was written relatively recently, and there have not been substantial changes in circumstances, it probably *is* the strongest evidence of the testator's hypothetical intent at the time of

303. *See, e.g.*, Baron, *supra* note 96, at 414 ("[The healthcare] experience is useful . . . as it suggests that giving effect to some informal statements need not seriously erode the existing architecture of wills law.").

304. *See, e.g.*, David I. Shalowitz, Elizabeth Garrett-Mayer & David Wendler, *The Accuracy of Surrogate Decision Makers: A Systematic Review*, 166 ARCHIVES INTERNAL MED. 493, 495 (2006) (conducting a meta-analysis finding that "[o]verall surrogates predicted patients' treatment preferences with [sixty-eight percent] accuracy").

305. *See, e.g.*, Robert P. Vallone, Dale W. Griffin, Sabrina Lin & Lee Ross, *Overconfident Prediction of Future Actions and Outcomes by Self and Others*, 58 J. PERSONALITY & SOC. PSYCH. 582, 590 (1990) ("In self-predictions . . . subjects proved to be consistently overconfident.").

306. *See* Toomey, *supra* note 141, at 1111–16 (offering a theory of personal identity as life story).

307. *See, e.g.*, Arianne Brinkman-Stoppelenburg, Judith AC Rietjens & Agnes van der Heide, *The Effects of Advance Care Planning on End-of-Life Care: A Systematic Review*, 28 PALLIATIVE MED. 1000, 1020 (2014) ("[Advance care planning] is seen as a process of communication between patients and professional caregivers that may include (but is not limited to) the completion of written agreements and advance directives."); INST. OF MED. OF THE NAT'L ACADS., DYING IN AMERICA: IMPROVING QUALITY AND HONORING INDIVIDUAL PREFERENCES NEAR THE END OF LIFE 118 (2015) ("[I]deally . . . discussions would start early in adulthood, addressing global values and the identification of potential surrogate decision makers . . . .").

308. *See, e.g.*, *In re* Roche, 687 A.2d 349, 354 (N.J. Super. Ct. Ch. Div. 1996) ("[T]he Court intended the guardian of an incompetent to consider a wide variety of types of information in ascertaining the subjective intent of the ward with respect to a particular medical decision.").

probate.[309] In many, maybe most, cases, executors with discretion should simply execute the terms of wills.[310]

But where a will is a decade or decades old, or there have been substantial changes in circumstances, executor discretion comes apart from traditional wills law. In these cases, the executor must, of course, take the dispositive provisions of the will seriously.[311] But after decades that is unlikely to be the best evidence of their most recent intent.[312] In these circumstances, the executor can and should rely on other evidence—from the executor's knowledge of the testator and what has happened in their lives—in determining what the testator would have wanted today.[313] Based on evidence from healthcare decision-making, this is probably what testators want executors to do.[314]

That all being said, the choice to include an executor discretion clause is a choice of the testator.[315] And there is no reason that a testator could not outline some alternative standard to which their executor should hew. A testator could, for instance, direct their executor to pursue best interests of certain beneficiaries.[316] And we can imagine various standards governing more limited grants of discretion, such as the testator in *Ellison*, who granted his executor

309. *See, e.g.*, Kelly C. Mulholland, *Protecting the Right to Die: The Patient Self-Determination Act of 1990*, 28 HARV. J. ON LEGIS. 609, 612 (1991) ("The courts may . . . consider written advance directives."); *see also* Glover, *supra* note 9, at 237 (observing that where a will is composed two years before a sudden death, "the testator's intent likely did not significantly change in the intervening period between will-execution and death").

310. *Cf., e.g.*, John F. Kennedy Mem'l Hosp., Inc. v. Bludworth, 452 So. 2d 921, 926 (Fla. 1984) ("If such a person, while competent, had executed a so-called 'living' or 'mercy' will, that will would be persuasive evidence of that incompetent person's intention and it should be given great weight . . . .").

311. *See, e.g.*, Baron, *supra* note 96, at 413 ("The wisdom is not that a writing is unimportant, but rather that it is not the only important thing.").

312. *See, e.g.*, *id.* at 390 ("Peoples' wills, like their advance directives, may take effect long after the document was executed and may reflect wishes that the testator no longer has.").

313. *See, e.g.*, Rosebush v. Oakland Cnty. Prosecutor (*In re* Rosebush), 491 N.W.2d 633, 637 (Mich. Ct. App. 1992) ("[S]urrogate decision makers should make the best approximation of the patient's preference on the basis of available evidence . . . ."); *In re* A.C., 573 A.2d 1235, 1251 (D.C. Ct. App. 1990) ("[T]o determine the subjective desires of the patient, the court must consider the totality of the evidence . . . ."); *see also* Fellows, *supra* note 3, at 628–30 (discussing examples of courts doing this in wills law); Guzman, *supra* note 121, at 369 ("[W]here a document is proffered as a will, a court should consider all evidence relevant to its maker's testamentary intent—whether documentary, oral, or circumstantial—and leave basic evidentiary rules to cover questions of relevance and the extent to which prejudicial harm outweighs probative value.").

314. *See, e.g.*, Nikki Ayers Hawkins, Peter H. Ditto, Joseph H. Danks & William D. Smucker, *Micromanaging Death: Process Preferences, Values, and Goals in End-of-Life Medical Decision Making*, 45 GERONTOLOGIST 107, 113 (2005) ("[Ninety-one percent] of our sample desired that surrogate decision makers be allowed at least some leeway to override their written directives if the surrogates believed it would be best."); Ashwini Sehgal et al., *How Strictly Do Dialysis Patients Want Their Advance Directives Followed?*, 267 JAMA 59, 62 (1992) ("[O]ver half the subjects would allow very specific advance directives to be overridden.").

315. *See supra* Section III.B.

316. *See, e.g.*, Drexler v. Drexler, 83 A.2d 367, 369 (N.J. Super. Ct. Ch. Div. 1951) (upholding a grant of discretion to vary bequests to other beneficiaries in the best interests of testator's wife).

the discretion to vary bequests based on the cost of living.[317] Any of these should be enforceable, for the same reason that executor discretion clauses should be enforceable—limited grants of discretion, governed by bespoke standards, are within the prerogative of testators.

The only thing that a testator cannot grant in an executor discretion clause is *truly standardless* discretion. Rather, they *can* do that if they want, but that ceases to be an executor discretion clause—that is just a general, unlimited power of appointment (a nonfiduciary power, the exercise of which is unreviewable) or an outright bequest in fee simple.[318] If a testator wants to do that, more power to them, but it is not the sort of thing under consideration here.

B. CHALLENGING EXECUTOR DISCRETION

In practice, particularly in uncontroversial cases, executor discretion clauses need not require substantially more oversight by the probate court than typical wills—it is the executor, not the probate court, that the testator granted discretion, and for the most part the court can step back into its typical, loosely involved supervisory role.[319] Certainly, *ex ante* judicial review of executors' every decision would defeat the purpose, turning the clause into discretion in the court rather than the executor. But executors must exercise their discretion consistent with the governing standard.[320] And where they do not, their duties must be judicially enforceable.[321]

Challenges to discretionary decisions, as any challenges to executor conduct, would be brought in probate court. Standing in probate court is a messy area that has only recently started to receive sustained scholarly attention.[322] But David Horton has shown that, although statutes often purport to limit standing to specified status-categories, and courts have a peculiar historical concern with limiting probate standing to ensure the timely administration of estates, the basic rule of standing in probate is largely the same as anywhere else—anyone who stands to gain by the outcome of a particular challenge has standing

317. Ellison v. Ellison, 164 S.W.2d 775, 778 (Tex. Civ. App. 1942).

318. *See, e.g.*, Sitkoff, *supra* note 207, at 205 ("A person may give property to another person and authorize the other person to act whimsically with respect to the property. But this mode of transfer is an absolute gift, and this mode of holding property is fee simple."); Frankel, *supra* note 290, at 246 ("The absence of these conditions converts a possible fiduciary relationship into a gift.").

319. *See, e.g.*, SITKOFF & DUKEMINIER, *supra* note 11, at 46–50 (discussing different supervisory roles for probate courts in execution of estates); Weisbord, *supra* note 4, at 2565 ("In most jurisdictions, the default fiduciary powers are now very broad and allow executors to perform most routine administration functions without direct court supervision.").

320. *See supra* Section IV.A.

321. *Cf., e.g.*, Dana v. Gring, 371 N.E.2d 755, 760 (Mass. 1977) (arguing that even the broadest discretion of trustees is held to a "judicially enforceable, external, and ascertainable standard" (quoting Woodberry v. Bunker, 268 N.E.2d 841, 843 (Mass. 1971))).

322. *See, e.g.*, David Horton, *Probate Standing*, 123 MICH. L. REV. 1, 5–7 (2024).

to bring it.[323] Thus, anyone who has been harmed by an executor's breach of duty in the exercise of discretion would have standing to challenge their action.

The theoretical boundaries of standing to challenge executor discretion thus include anyone whose bequest was either inappropriately increased or decreased. In principle, this is quite broad—maybe infinite. While named beneficiaries who had their bequests reduced have standing, so too do *un*named individuals to whom the executor ought have made a new bequest but did not.[324] This feature of executor discretion clauses might give probate courts pause, concerned as they historically have been about constraining probate standing.[325]

But rather than holding the potential for broad standing fatal to executor discretion clauses, courts can screen out meritless challenges promptly in other ways. Perhaps most importantly, probate courts in some ways have *less* reason to be concerned about the theoretical expansion of standing than other courts, because of the quasi-inquisitorial way in which they manage estate administration.[326] Where standing doctrines are thought to ensure the best representation of a particular claim in an adversarial setting,[327] probate courts are empowered to raise their own questions about the validity of a will or the conduct of an executor, and litigate many *sua sponte*.[328] Probate courts can quickly reach the merits of a challenge to executor discretion, and demand real evidence that, or at least some plausible account of how, the executor's breach of duty has harmed a plaintiff. They need not even await a motion to dismiss. Moreover, carefully enforcing pleading standards demanding honesty and factual plausibility can serve a similar function as standing doctrine in deterring frivolous litigation and hold ups.[329]

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323. *See id.* at 13–20 (observing that although some courts adopted a "status theory" under which certain categories of people automatically had standing and no one else did, this was always a minority, and "not a comprehensive theory of probate standing," while "judges did not exclude a party unless their connection to a matter was quite remote").

324. *See supra* Section III.C.5.a.

325. *See, e.g.*, Horton, *supra* note 322, at 37 ("Because death is relentless, probate judges need to keep the conveyor belt moving. They cannot get sidetracked by claims filed by random people with nothing to gain.").

326. *Id.* at 30 (describing probate courts as "featur[ing] . . . dynamic[s] that [are] almost inquisitorial").

327. *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497, 517 (2007) ("At bottom, 'the gist of the question of standing' is whether petitioners have 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.'" (quoting Baker v. Carr, 369 U.S. 186, 204 (1962))).

328. *See* Horton, *supra* note 322, at 36 ("Arguably, inviting bystanders into court would transform the steel-eyed solemnity of trials into a carefree 'debating society.' But this ship sailed long ago in probate." (footnote omitted)).

329. *See, e.g.*, Richard A. Epstein, Bell Atlantic v. Twombly*: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL'Y 61, 98–99 (2007) (defending heightened pleading standards in subsets of cases where there is particularly likely to be frivolous challenges); Keith N. Hylton, *When Should a Case Be Dismissed? The Economics of Pleading and Summary Judgment Standards*, 16 SUP. CT. ECON. REV. 39, 50–53 (2008) (defending pleading standards as a mechanism

In short, anyone harmed by an executor's use of discretion has standing to bring a challenge in probate court. And probate courts have many tools to make short work of frivolous litigation—including a unique, quasi-inquisitorial supervisory posture of estate administration—and need not approach challenges to executor discretion differently than the many other sensitive challenges they hear.

C. PRESUMPTION OF VALIDITY

Executors making discretionary decisions are likely to anger people. After all, their discretion includes the power to limit or eliminate bequests to beneficiaries named in the testator's will. And while substituted judgment is a litigable standard,[330] it is highly fact intensive.[331] The law governing executor discretion clauses must take account of the possibility of dilatory litigation.[332]

Thus, an executor's discretionary decisions would be shielded by a robust rebuttable presumption of validity. The burden to show that the executor's decisions are *invalid*—that the decision *was not* what the testator would have wanted—must fall on the challenger. This presumption can go a long way to limiting theoretically capacious standing to judicially manageable levels.[333] Challengers must plead against this presumption, sufficient to meet whatever standard is applicable, and against the probate courts *sua sponte*, discretionary review of the merits. If the complaint is not dismissed, the challenger will then have to produce concrete evidence of the executor's breach.[334]

Indeed, a presumption in favor of executors' discretionary acts is more than a good idea—it reflects the law's approach to discretion wherever manifested. Throughout the law of discretionary decision-making, discretion entails deference. An agent's discretionary decision-making in the scope of their agency is presumed valid, and a regretful or frustrated principal has the burden to

for screening out weak cases); *see also* Marcus Gadson, *Federal Pleading Standards in State Court*, 121 MICH. L. REV. 409, 459 (2022) ("[C]ivil procedure has other ways besides pleading standards to filter out meritless claims.").

330. *See, e.g.*, Guzman, *supra* note 121, at 369 ("Courts perform hard tasks all the time. That is their job.").

331. *See, e.g.*, Jackson v. Legacy Health Servs., Inc., 640 S.W.3d 728, 734 (Ky. 2022) (describing substituted judgment analysis as "fact intensive").

332. *See, e.g.*, Margaret Ryznar & Angelique Devaux, Au Revoir*, Will Contests: Comparative Lessons for Preventing Will Contests*, 14 NEV. L.J. 1, 7 (2013) (observing that many "frivolous contests . . . stem from people's unhappiness rather than a sincere concern for the testator's intent"); *see also* David Horton & Reid Kress Weisbord, *Probate Litigation*, 2022 U. ILL. L. REV. 1149, 1157 ("[E]ven if the incidence of shakedown will contests may be exaggerated, these disputes deserve[] their reputation as slow, expensive, and nasty.").

333. *See supra* Section IV.B.

334. *See, e.g.*, Steven W. Lippman, Comment, *A Corporation's Securities Litigation Gambit: Fee-Shifting Provisions That Defend Against Fraud-on-the-Market*, 49 U. RICH. L. REV. 1321, 1323 (2015) (observing that presumptions can "deter frivolous suits because plaintiffs will need stronger claims").

show the action was beyond their authority.[335] In public law, the discretionary decisions of executive officials are presumed valid—often unreviewably—and, if reviewable, subject to a burden on the challengers.[336]

So too for executor discretion. Indeed, where testators have granted executors some kind of discretion in the past, courts have presumed them to be valid.[337] Not irrebuttably—those harmed by the executor's acts inconsistent with their standard are entitled to sue—but the challengers bear the burden of showing breach.

D. EXECUTORS' SELF-DEALING

So far, so good. One substantial context-specific concern remains—the fear of abuse by the executor themselves. After all, unless the will prohibits it, an executor with discretion to vary dispositive provisions would have discretion to increase their own share. This raises a risk of abuse, and indeed it may seem a risk substantial enough to undermine the enterprise.[338]

On the one hand, testators worried about this possibility can simply stipulate that their executor's discretion does not extend to modifying their own share. A testator may choose their executor as the closest person or persons in their life and make a substantial, perhaps a primary, bequest to them.[339] Some testators may be willing to gamble that this particular relationship is unlikely to change (and, if it does, they'll have bigger problems—that's a clear case where the testator will simply have to rewrite the will),[340] and that the large bequest is close enough to what they would want in all other circumstances.[341]

But other testators may want to grant their executors discretion to increase their own bequests. It would be a mistake to prohibit that. If what we want is

335. *See, e.g.*, Hayes v. Berea Coll., 136 S.W.2d 563, 565 (Ky. 1940) ("[W]here *general* authority is established and the act of the agent is shown not to be of an unusual or extraordinary character, the presumption is that the agent had authority to do such act."); *see also* RESTATEMENT (THIRD) OF AGENCY § 2.02 cmt. f (AM. L. INST. 2006) ("Regardless of any later regret, the principal is bound by the agent's acts so long as the agent's interpretation was reasonable.").

336. *See, e.g.*, Citizens for Resp. & Ethics in Wash. v. FEC, 993 F.3d 880, 882 (D.C. Cir. 2021) ("In our system of separated powers, an agency's decision not to enforce the law is an exercise of executive discretion and therefore generally unreviewable by the courts."); Amisub (PSL), Inc. v. State of Colo. Dep't of Soc. Servs., 879 F.2d 789, 800 (10th Cir. 1989) (describing judicial review of agency actions as "highly deferential" (quoting Cal. Hosp. Ass'n v. Schweiker, 599 F. Supp. 110, 116 (C.D. Cal. 1982))).

337. *See, e.g.*, 21 AM. JUR. *Executors and Administrators* § 214 ("Where the power given to an executor to do, or not to do, a particular thing is wholly discretionary, the court has no jurisdiction to lay a command or prohibition upon him as to the exercise of that power, provided his conduct is bona fide and his determination is not influenced by improper motives." (citation omitted)).

338. *See, e.g.*, GOFFIN, *supra* note 222, at 8 ("The vice of the Roman system lay in this, that the execution of a will was thrown upon the shoulders of persons who would benefit by disobeying the directions of the testator.").

339. *See, e.g.*, Weisbord, *supra* note 4, at 2590 ("Since most executors were related to the decedent by blood or marriage, it is unsurprising that the vast majority of executors were also beneficiaries under the will.").

340. *See supra* note 49 and accompanying text.

341. *See, e.g.*, Robertson, *supra* note 1 (discussing this sort of case).

to best enforce the most recent actual or hypothetical intent of the testator,[342] then executors, at least sometimes, ought to be permitted to use their discretion to increase bequests to themselves. Consider a testator who has had a falling out with certain beneficiaries and would prefer the executor to take those shares.

In order to increase their own bequest, however, executors should be required to petition for judicial approval in *advance*, with the burden to show that doing so is consistent with the required standard.[343] This is, indeed, the rule for all fiduciaries.[344] Fiduciaries, including executors, who petition the court for approval for what would otherwise be a self-dealing breach of the duty of loyalty—and can show it to be consistent with the standard by which they must decide—are relieved of liability after the fact.[345] The same procedure should apply here. Indeed, courts might further extend this hesitation about self-dealing, categorically or in particular factual circumstances, to executors—exercising discretion in favor of certain parties that raise comparable risks of abuse—their spouses, or perhaps blood relatives of the executor who are not related to the testator.[346]

In short, while self-interested transactions do raise a particular risk of abuse, fiduciary law already offers a solution—if an executor thinks that the testator would have wanted them to increase the gift to themselves, they'll have to make that case to the court on the front end.

CONCLUSION

If we care about implementing testators' intents about what they want to happen to their stuff after they die, what we care about is their most recent actual or hypothetical intent. Of course, we have no direct access to that. And granted, courts could not feasibly open their doors in a freewheeling way to litigate that question *ex nihilo* every time someone dies. But there may be ways to do better than we currently do, where expired intents are probated all the time.

This Article proposed and explored a potential drafting solution that could mitigate the problem—testators granting their executors discretion in the will

342. *See supra* Section I.B.

343. *Cf., e.g.*, RESTATEMENT (THIRD) OF TRS. § 78 cmt. c(1) (AM. L. INST. 2007) (noting that prior court approval can validate self-dealing transactions that would otherwise violate trustees' fiduciary duties).

344. Indeed, even in civil law jurisdictions, "[q]uite often, the transactions of [an] administrator must be approved by the court, if they involve risk of abuse or misappropriation." Michele Graziadei, *Virtue and Utility: Fiduciary Law in Civil Law and Common Law Jurisdictions*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW, *supra* note 207, at 287, 295–96.

345. *See, e.g.*, RESTATEMENT (THIRD) OF TRS. § 78 cmt. c(1) (describing advance court approval as foreclosing the applicability of the no-further-inquiry rule and relieving trustees of liability for self-dealing transactions); *see also* Barron v. Snapp (*In re* Estate of Snapp), 502 N.W.2d 29, 35 (Iowa Ct. App. 1993) (observing that Iowa law "expressly require[s] court approval for compensation of executors and attorneys"); *In re* Will of McCaffrey v. Fortenberry, 592 So. 2d 52, 54 (Miss. 1991) (surcharging executor for "unauthorized attorney's fees which [executor] withdrew from the estate without prior court approval").

346. *See, e.g.*, Hartman v. Hartle, 122 A. 615, 615 (N.J. Ch. 1923) (holding that an executor's sale of estate property to his wife was self-dealing and a per se breach of the duty of loyalty).

to modify bequests based on their understanding of the testator's most recent intent. On this approach, which appears to be legal or could at least be adopted without substantial law reform, courts won't have to litigate the question from the ground up. They can defer, within boundaries, to the executor, who knew the testator, loved the testator, and was likely chosen for those very reasons.