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THE ILLINOIS PROBATE ACT:
DISPOSITIONS SUBJECT TO CONTRARY
WILL INTENT

INTRODUCTION

That the testator's intention governs the interpretation of
a will is one of the major rules of judicial construction.1 When
the testator's intention is clearly expressed in the will, it is en-
titled to preference over an interpretation that the testator
meant something other than what is clearly stated.2 Absent
a clear statement of intent, the courts are at liberty to employ
the canons of construction to arrive at a determination of the
testator's intention. In so doing, the language of the clause in
question and the provisions of the entire will are considered,3
as well as the circumstances surrounding the testator at the time
of the making of the will.4

Absent a clear indication of the testator's intention, the
distribution of property under the will and the administration
of the estate is controlled by statute.5 In ascertaining the inten-
tion of an ambiguously drafted will, the courts will proceed on
the assumption that the testator was knowledgeable of the ap-
licable statutory provisions and acted in accordance therewith.
In this manner, judicial interpretation of ambiguous testamen-
tary provisions often results in defeating the testator's actual in-
tention. The Probate Act, however, enables a testator to avoid
statutory regulation of the construction of a will by manifesting
his contrary intent.

Knowledge of the operation of these provisions is imperative
since they control the distribution of property and the adminis-
tration of the estate absent a clear indication of the testator's

   (1934); Dahmer v. Wensler, 350 Ill. 23, 182 N.E. 799 (1932); Continental
   (1940); Chicago Daily News Fresh Air Fund v. Kerner, 305 Ill. App. 237,
   27 N.E.2d 310 (1940).
   501, 503 (1934).
   Suiter, 323 Ill. 519, 154 N.E. 337 (1926); Porterfield v. Lenover, 310 Ill.
   App. 37, 33 N.E.2d 718 (1941); Chicago Daily News Fresh Air Fund v.
4. See Dahmer v. Wensler, 350 Ill. 23, 182 N.E. 799 (1932); Porter-
   field v. Lenover, 310 Ill. App. 37, 33 N.E.2d 718 (1941).
5. See People v. Flanagin, 331 Ill. 203, 162 N.E. 848 (1928); Buerger
   v. Buerger, 317 Ill. 401, 148 N.E. 274 (1925); Zakroczymski v. Zakroczymski,
   303 Ill. 264, 135 N.E. 398 (1922); Hardesty v. Mitchell, 302 Ill. 369,
   134 N.E. 745 (1922); Dibble v. Winter, 247 Ill. 243, 93 N.E. 145 (1910).
intention. Knowledge of the type of language which constitutes contrary intent is important for two reasons. First, the draftsman must know what language may be used to avoid the operation of the statute if that is the testator's desire. Secondly, he must know what language to use when the testator's desire is to follow the statutory scheme so that the testamentary provisions are not mistakenly interpreted by the courts as indicating a contrary intent.

Sample clauses, suggesting various methods by which to express contrary intent, may help reduce the possibility of prolonged battles over the construction and interpretation of wills. The best way to avoid legal entanglements, however, is to unequivocally declare the testator's intentions in his will.

SECTION 2-4—ADOPTED CHILDREN

Section 2-4 provides that an adopted child is to be treated as a descendant of the adopting parent for the purpose of inheritance from the adopting parent and from the lineal and collateral kindred of the adopting parent. Section 2-4(e) states that an adopted child is to be treated as a natural child for the purpose of determining property rights under any instrument executed on or after September 1, 1955, unless a contrary intent is clearly indicated in the instrument. On first reading, it would appear that an adopted child has the same rights as a child born in wedlock. The Probate Act, however, does not define the term “natural child.” Cases from other jurisdictions have defined this term as meaning a bastard or an illegitimate child or a child born out of wedlock.

The courts must interpret the terminology in a will to determine whether the testator intended to include or exclude adopted children. Terms, such as “children,” are construed so that they are consistent with other provisions in the will. The

   For the purpose of determining the property rights of any person under any instrument executed on or after September 1, 1955, an adopted child is a natural child unless the contrary intent plainly appears by the terms of the instrument. This subsection does not apply in determining the taker of the property under any instrument executed before September 1, 1955.

facts and circumstances existing at the time of the will's execution are often referred to by the courts in determining the testator's intention.

An adopted child was held not to be included in the meaning of the word "children" in Moffet v. Cash,8 where the testator devised to each of his sons a life estate with a remainder over "to his children" and devised to each of his daughters a life estate with a remainder over to "the issue of her body." Another provision in the will stated that the sons and daughters were only to take a life estate with the remainder to his or her children. The court reasoned that the latter provision indicated the testator's intention to make no distinction between the type of child that could take a life estate from a daughter and the type that could take a life estate from a son—both had to be "issue of the body."9 In determining the testator's intention, the court not only looked to the specific language used throughout the will but also looked to the circumstances existing at the time of the making of the will. The court was swayed by the fact that the son's child was adopted twenty-six years after the testator's death indicating that the testator probably had not considered the possibility of an adopted grandchild.

In Miller v. Wick,10 the testator's will provided that upon his sister's death, one-third of the income from the trust property was to be paid to the testator's nephew for his life "or until such time in his life as he shall have a child, his lawful issue, who shall attain unto the age of three years," in which event the nephew was to receive the principal of one-third of the trust. The nephew adopted a child after the testator's death who subsequently claimed that he was entitled to one-third of the principal. The phrase to "have a child, his lawful issue," according to the court, indicated that the testator intended that a child be begotten by and born to the nephew in wedlock.11 However, in Munie v. Grunewald, an adopted child was held to be included in the word "children" under a provision in a will which gave property to the testator's children after the death of his wife with a provision that in case of the death of either of the children during the wife's lifetime the deceased's share should go to his "children." The distinguishing feature according to the court was the testator's knowledge of the adoption. The court was impressed by the fact that the testator had treated the adopted child in the same manner he had treated his other grandchildren. The court reasoned that if the testator had intended to exclude this child

8. 346 Ill. 287, 178 N.E. 658 (1931).
9. Id. at 293-94, 178 N.E. at 660.
10. 311 Ill. 269, 142 N.E. 490 (1924).
11. Id. at 276, 142 N.E. at 492.
from participating in his estate, he could have limited the devise to the “heirs of his body,” the “children of the blood of his children,” or the “children born to his children.”

“Descendant” is another term which the courts have had to construe when adopted children claim under the will. “Descendant” is synonymous with “issue,” and an adopted child does not come within the ordinary meaning of “issue” unless there is language in the will or circumstances surrounding the testator at the time he made the will indicating that the adopted child was intended to be included. The claim of an adopted child that he was entitled to take under a will as a “descendant” was rejected in Stewart v. Lafferty. Because the will was executed three years before the adopted child’s birth and the adoption took place six years after testator’s death, the court reasoned that neither the language of the will nor the surrounding circumstances indicated that the testator intended a special meaning for the word “descendant.”

Ordinarily the term “heirs” does not include adopted children as is illustrated in Orme v. Northern Trust Co. The will in question provided that the testatrix’s granddaughters were to receive life estates and that on the death of the last surviving granddaughter the trust estate was to be divided equally among the “children or heirs” of the granddaughters. An adopted child of a granddaughter, who claimed he was entitled to a share of the estate as an adopted heir of the granddaughter, was excluded from taking under the will since the court found an intention to limit the property to the testatrix’s blood kin. The court based its determination on the testatrix’s exclusion of the husbands of the granddaughters and on a provision for a gift over to their “issue,” which at that time meant heirs of the body.

These cases illustrate that the courts will determine the testator’s intention regarding the inclusion or exclusion of an adopted child in his will according to the language used by the testator and by circumstances surrounding the testator at the time of the making of the will. Special attention must be given to the problem of adopted children during the drafting of a will since the words “children,” “heirs,” and “issue” have been con-

14. Id.
15. Id. at 228, 145 N.E.2d at 642-43.
17. Id. at 161, 183 N.E.2d at 512 (citing Keegan v. Garaghty, 101 Ill. 26 (1881) and Winchell v. Winchell, 259 Ill. 471, 102 N.E. 823 (1913)).
strued to manifest an intent to exclude adopted children.\textsuperscript{18} Therefore, it would be beneficial to include a clause which would clearly state whether adopted children are to be included or excluded when words such as "issue," "children," and "heirs" are used, in light of the ambiguity such words create.\textsuperscript{19} The utilization of such a clause will lessen the likelihood that the will could be construed in a manner which was not contemplated by the testator or his attorney.

\textbf{SECTION 4-10—AFTER-BORN CHILDREN}

A child of a testator born after the execution of the will is entitled to receive what would be his intestate share of the estate, unless there is a provision in the will for the child, or it appears by the will that it was the testator's intention to disinherit him.\textsuperscript{20} The underlying basis for this provision is the presumption that the testator would have provided for such a child if he had anticipated the event.\textsuperscript{21} Therefore, if any provision is made in the will for after-born children, they will be unable to seek the benefits of the statute. Even though a provision for the after-born or for a class including the after-born is contingent and has the effect of disinheritance when the contingency does not occur, the statute will not operate to give the after-born a share in the testate assets.\textsuperscript{22}

The testator may also avoid the operation of the statute by expressing an intention in his will to disinherit after-born children. It is not necessary to use express terms to disinherit, since the intention to disinherit may be implied. An implied intention to disinherit cannot arise by proof of the facts and circumstances surrounding the testator unless language in the will itself indicates an intention to disinherit.\textsuperscript{23} Where the language

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\footnote{18. Hardin & Gill, Will Clauses to Cover Adopted Children, 47 ILL. B.J. 360, 361 (1957).}
\footnote{19. For example, the drafter could incorporate a clause which provides: The word 'children,' whenever used in this will, is intended to mean children by birth and blood and not by adoption [or mean children both by blood and adoption].}
\footnote{9A R. HOBERT, K. SIMON, & E. SMITH, NICHOLS CYCLOPEDIA OF LEGAL FORMS \S 9.1361 (rev. 1977).}
\footnote{20. Probate Act of 1975 \S 4-10, ILL. REV. STAT. ch. 3, \S 4-10 (1975) (formerly ILL. REV. STAT. ch. 3, \S 48 (1939)), which provides: Unless provision is made in the will for a child of the testator born after the will is executed or unless it appears by the will that it was the intention of the testator to disinherit the child, the child is entitled to receive the portion of the estate to which he would be entitled if the testator died intestate and all legacies shall abate proportionately therefor.}
\footnote{21. J. MURPHY, MURPHY'S WILL CLAUSES \S 428.17 (1975).}
\footnote{22. Osborn v. Jefferson Nat'l Bank, 116 Ill. 130, 4 N.E. 791 (1886).}
\footnote{23. Kahn, Probate and Trust Questions, 41 ILL. B.J. 17 (1952).}
\end{footnotes}
employed in the will is ambiguous, parol evidence concerning the facts and circumstances surrounding the testator at the time of the execution of the will may be introduced. Although parol evidence may not be used to import a new intention into the will, it may be used to clarify the intention of the testator as expressed by the terms of the will. 24

The outcome of the cases concerning after-born children have revolved around the facts and circumstances surrounding the testator at the time the will was executed. Although there are no clearly defined rules regarding the significance of certain factual situations, the courts have generally reacted to similar situations in a consistent manner. Where a testator has no children at the time he executed his will and made no express provision in his will to disinherit after-born children, the courts have generally found no intention to disinherit them and have allowed them their intestate share under the statute, presuming that the testator was relying on the statute. 25 The courts have indulged in this presumption even though the testator was expecting a child at the time he executed the will. 26 If the testator had children at the time of the execution of his will and an absolute provision was made for them, the courts have not found an intention to disinherit the after-born children. 27 However, if the testator had not provided for his then existing children, the courts have been swayed to find an intention to disinherit after-born children. 28 Furthermore, an intention to disinherit


25. Hawkins v. McKee, 321 Ill. 198, 151 N.E. 577 (1926) (Where testator's will made before birth of children indicates no intention respecting after-born children and no circumstances established such intention, it could not be said that the testator intended to disinherit the after-born children, and the devises and legacies abated in proportion to what children were entitled to receive). Cf. Froehlich v. Minwegen, 304 Ill. 462, 136 N.E. 669 (1922) (Where testator had two children born at the time his will was made who were disinheritied by express terms and five children were born thereafter for whom no provision was made, the fact that testator allowed his will to remain unrevoked showed conclusively that he intended for his wife to have the property).

26. Hedlund v. Miner, 395 Ill. 217, 69 N.E.2d 862 (1946) (Where testator, having no children but expecting the birth of a child, executed a will devising his property to his wife absolutely, the court held that the will did not disclose intention to disinherit the child, and, therefore, the child was entitled to the portion of the testator's estate which he would have been entitled to if there had been no will).

27. Lurie v. Radnitzer, 166 Ill. 609, 46 N.E. 1116 (1897) (Where the will gave two-fifths to testator's wife and one-fifth to each of three children and one-fifth to an unborn child, but the clauses referring to the unborn child were crossed out, the court held that it did not appear that it was the testator's intention to disinherit such unborn child).

28. Peet v. Peet, 229 Ill. 341, 82 N.E. 376 (1907) (Where testator died leaving a widow and two sons, the youngest of whom was born after the making of the will by which he bequeathed all his property to his wife,
may be found if there is a provision granting contingent rights to children alive at the time the will was executed, and the provision has the effect of disinheritance in the event the contingency fails to occur.29

Although it seems fairly predictable as to whether or not the courts will find an intention to disinherit after-born children in a given factual situation, the draftsman should not rely on anything less than a direct reference to the after-born child. The response from the courts absent such a reference may be predictable, but it cannot be doubted that the response may not always coincide with the testator's true desires had he been confronted with the question of after-born children. Furthermore, it would probably be a rare occasion that a testator who desires to provide for after-born children would actually make a provision for a bequest equal to their intestate shares. The testator, therefore, should either specifically provide for the disinheritance of such children30 or specifically provide for an alternate scheme of distribution which includes such children.31

**Section 15-1—Spouse and Child Awards**

Section 15-1 of the Probate Act provides that the surviving spouse of a resident decedent is entitled to receive a spouse's
award. The award is a sum of money which the court deems reasonable for the proper support of the surviving spouse in a manner suited to the condition of life of the surviving spouse and the condition of the estate for a period of nine months after the decedent's death. The surviving spouse is automatically entitled to the award, unless either the unrenounced will provides that the provisions are in lieu of the award, or the surviving spouse has waived the right to the award by contract.

In order to bar one's right to receive a spouse's award, the terms of the instrument, whether it is a will or a contract, must sufficiently manifest an intention to deny the right. The Act does not require the use of the exact words, "widow's award" or "surviving spouse award" to effectuate a denial of the award. All that is required is language broad enough to disclose the testator's intention to bar the spouse's award. In the absence of an express reference to the award, however, the question of whether certain language is broad enough to include the award is subject to litigation.

It has been held that a wife's waiver of all her rights to "dower,... or by virtue of any statutory provision made for her benefit in lieu of dower," or that she might have "to a dis-
tributive share in any personal property” of her husband, did not create a release of her widow’s award.\textsuperscript{37} The court reasoned that this language was not broad enough to include the widow’s award since the widow’s award is neither dower, in lieu of dower, nor is it a distributive share in personalty.\textsuperscript{38} A widow’s claim to the award was barred, however, where the testator bequeathed one-third of his estate to his wife “in lieu of dower rights, and of all other rights, interests and claims which she might have or claim in or to my estate.”\textsuperscript{39} The court felt this language showed a clear intention that the widow was to take only the one-third specifically given in the will and that no part of the estate should descend according to the statute.\textsuperscript{40}

Although it is not absolutely necessary, it would be advisable for the draftsman of a will to use the exact words as set forth in the statute if it is intended that the surviving spouse not be entitled to the award. There would be little room for argument over a clause which stated that “the provisions hereof for the surviving spouse are in lieu of the award.”

\textbf{SECTIONS 2-7 AND 2-8—
DISCLAIMER AND RENUNCIATION}

Section 2-7 enables an heir, legatee, or beneficiary to disclaim in whole or in part the succession to any real or personal property given by will or by testamentary power of appointment, if they file a written disclaimer in the manner prescribed by the section.\textsuperscript{41} Section 2-8 provides that the testator’s surviving spouse may renounce a will, whether or not the will contains any provision for the benefit of the surviving spouse, provided that the surviving spouse files a written instrument declaring the renunciation in compliance with the method set forth in the statute.\textsuperscript{42} If the surviving spouse’s renunciation of the will causes

\textsuperscript{37} In re Estate of Guttman, 349 Ill. App. 58, 61, 110 N.E.2d 87, 88 (1952).
\textsuperscript{38} Id. at 62, 110 N.E.2d at 89.
\textsuperscript{39} Cowdrey v. Hitchcock, 103 Ill. 262, 271 (1882).
\textsuperscript{40} Id. at 272.
\textsuperscript{41} Probate Act of 1975 § 2-7(e), ILL. REV. STAT. ch. 3, § 2-7(e) (1975) (formerly ILL. REV. STAT. ch. 3, § 15d (1939)), which provides:

Unless the decedent or donee of the power has otherwise provided by will, the property or interest therein or part thereof disclaimed descends or shall be distributed as if the disclaimant had predeceased the decedent, or if the disclaimant is one designated to take pursuant to a power of appointment exercised by a will, as if the disclaimant had predeceased the donee of the power. In every case the disclaimer relates back for all purposes to the date of death of the decedent or the donee, as the case may be.

\textsuperscript{42} Probate Act of 1975 § 2-8(c), ILL. REV. STAT. ch. 3, § 2-8(c) (1975) (formerly ILL. REV. STAT. ch. 3, § 16a (1939)), which provides:

If a will is renounced in the manner provided by this Section, any future interest which is to take effect in possession or enjoyment
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legacies or devises given to others to be diminished or increased, the court may abate from or add to the legacies or devises so as to apportion the loss or increase among all legatees and devisees in proportion to the amount and value of their legacies.43

The result of a disclaimer, which is, in reality, a release of one's interest in the property,44 is that the property or interest disclaimed will descend or will be distributed as if the disclaimant had predeceased the testator or the donee of the power, unless the decedent or donee has provided otherwise by will.45 An effective disclaimer will terminate the interest given to the disclaiming party, and, if there is a future interest in the property, the future interest will be accelerated, provided there is no indication that the testator intended the interest not to vest until the actual date of the death of the disclaiming party.46 Similarly, when a surviving spouse renounces a will, any future interest which is to take effect in possession or enjoyment at or after the termination of an estate or other interest given by the will to the surviving spouse shall take effect as though the surviving spouse had predeceased the testator, unless the will expressly provides that in case of renunciation such future interests shall not be accelerated. Under section 2-8(c), any future interest may be accelerated whether it is vested, vested subject to divestiture or contingent.47 The doctrine of


44. A disclaimer is defined as a formal mode of expressing a grantee’s dissent to the conveyance of property before the title has become vested in him. The object of a disclaimer is to prevent an estate passing from the grantor to the grantee. See Watson v. Watson, 13 Conn. 83 (1839); Kinne v. Beebe, 6 Conn. 494 (1827); Jackson v. French, N.Y., 3 Wend. 337, 20 Am. Dec. 699 (1829).

45. Probate Act of 1975 § 2-7(e), ILL. REV. STAT. ch. 3, § 2-7(e) (1975) (formerly ILL. REV. STAT. ch. 3, §§ 15b-15d (1939)).


47. Prior to the enactment of the predecessor of § 2-8(c), vested remainders could be accelerated on renunciation, see Danz v. Danz, 373 Ill. 482, 26 N.E.2d 872 (1940); Kern v. Kern, 293 Ill. 238, 127 N.E. 396 (1920); Sherman v. Flack, 283 Ill. 457, 119 N.E. 293 (1918); Kane v. Schofield, 332 Ill. App. 505, 76 N.E.2d 216 (1947); Cravens v. Haas, 318 Ill. App. 447, 48 N.E.2d 611 (1943), while contingent remainders could not be accelerated, see Campbell v. Campbell, 380 Ill. 22, 42 N.E.2d 547 (1942); Sueske v. Schofield, 376 Ill. 431, 34 N.E.2d 399 (1941). Pursuant to § 2-8(c), however, vested, vested subject to divestiture and contingent future interests can be accelerated unless the testator expresses an intention to the contrary.

Even though § 2-8(c) sets up a simple rule regarding the accelera-
acceleration of remainders is based on the proposition that although the ultimate bequest is, according to its terms, not to take effect in possession until the death of the life tenant, it should be read so as to take effect on any event which removes the prior estate. The underlying presumption is that the testator intended that the remainderman should take on the failure of the previous estate, notwithstanding the fact that the prior donee is still alive.\(^4\)

When drafting a will, an attorney should call his client's attention to the possible effects of a disclaimer by a beneficiary or of a renunciation by a surviving spouse.\(^4\) It would be advisable to include a specific clause in the will which sets forth the testator's wishes in the event of a disclaimer or renunciation. Such a provision should provide for alternate beneficiaries.\(^5\) In like manner, if the testator does not want the future interests given under his instrument to vest prematurely, a clause could

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\(^4\) Sherman v. Flask, 283 Ill. 457, 119 N.E. 293 (1918). See also Danz v. Danz, 373 Ill. 482, 26 N.E.2d 872 (1940) (Under a will which devised property to widow for so long as she remain unmarried and created vested remainders, renunciation by the widow accelerated the vested remainders.); Kern v. Kern, 293 Ill. 238, 127 N.E. 396 (1920) (Property was devised to widow for use during her widowhood, with vested remainders over to her children. The court determined that the widow's renunciation worked an extinguishment of her life estate and accelerated the remainder interests.); Northern Trust Co. v. Wheaton, 249 Ill. 606, 94 N.E. 980 (1911) (The testator put property in trust for the life of his wife and sister or the survivor of them, with the remainder to be distributed to certain named people at the end of said period. The court held that upon the renunciation by the widow, the remaindermen whose interests had become vested by testator's death, become entitled to enjoyment of the property upon the sister's death); Kane v. Schofield, 332 Ill. App. 505, 76 N.E.2d 216 (1947) (The court found that where widow renounced the will, the fact that the remainder interests were contingent was not controlling since in absence of testamentary intent that remainderman take only at widow's death, renunciation puts life estate out of the way and remainder takes effect.).

\(^5\) In regards to disclaimer the clause could provide:

If, for any reason, Beneficiary A decides to and does disclaim his interest given under this will, I hereby give and devise said interest to Beneficiary B.

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2 J. MURPHY, MURPHY'S WILL CLAUSES Form 14:40 at 568 (1975).

In regards to renunciation, the clause would read as follows:

Should [spouse] renounce this will and elect to take the share of a surviving spouse in the deceased [spouse's] estate, under the laws of inheritance of the state of my domicile at the time of my death, I then give, devise and bequeath all of my property to _________.

be drafted which states when the future interests are to vest. With respect to renunciation the most effective type of provision which would prevent the interests' acceleration would use the language of section 2-8 (c), "that in case of renunciation future interests shall not be accelerated."51

**SECTION 3-1—SIMULTANEOUS DEATHS**

Section 3-1 of the Probate Act enacted the Uniform Simultaneous Death Act into law in Illinois.52 It provides for the distribution of property, the devolution of which is dependent upon priority of death, in the event there is insufficient evidence53 that the persons died other than simultaneously. Section 3-1(a) provides that the property of persons, when there is insufficient evidence that they have died other than simultaneously, must be disposed of as if each person had survived. The statutory provision does not apply, however, when a will or other governing instrument provides for the distribution of the property in a different manner.

There are three types of clauses, differing in application, that a draftsman can use when avoidance of the statute is desired.54 The simultaneous death clause applies only when there is insufficient evidence that the deaths were other than simultaneously. It does not matter that the deaths were due to different causes or occurred at different places. In states which have adopted the Uniform Simultaneous Death Act, the inclusion of such a clause in a will is not essential if the testator desires the property to pass as if the beneficiary died first, but it may be used to unequivocally inform the court of the testator's desired disposition of his estate in the event of simultaneous death.55 The testator may also use the simultaneous death clause to negate the

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52. Probate Act of 1975 §§ 3-1, 3-2, ILL. REV. STAT. ch. 3, §§ 3-1, 3-2 (1975) (formerly ILL. REV. STAT. ch. 3, §§ 41a-41f (1939)). See ILL. ANN. STAT. ch. 3, art. IIA (Smith-Hurd 1976) (list of states which have adopted the Uniform Simultaneous Death Act).
55. MODERN LEGAL FORMS, supra note 54, at § 10130 n.15. A simultaneous death clause provides as follows:

In the event that any beneficiary under this will and I shall die under such circumstances that there is no sufficient evidence that we died otherwise than simultaneously, such beneficiary shall be deemed to have predeceased me.

MODERN LEGAL FORMS, supra note 54, at § 10130.
effect of the Act and provide that the property shall pass as though he predeceased the beneficiary.\textsuperscript{58} However, it should be noted that to negating the Act results in burdening the asset with the administration of two estates.

In contrast, the common disaster clause\textsuperscript{57} determines which of two or more parties should be deemed the survivor in case of death resulting from a common disaster or accident. The clause is effective even though the evidence shows who died first. Even though there is positive proof that one spouse survived the other, the clause is effective if they both died as a result of a common disaster.\textsuperscript{58} The clause is applicable, however, only when deaths occur as a result of violence or accident. Therefore, should the deaths be simultaneous or within a relative short time span of each other, the clause would be inapplicable if one party died from natural causes.\textsuperscript{59}

A survivorship clause\textsuperscript{60} provides that the gift to the legatee should be conditioned on the requirement that he survive the testator for a stated period of time of relatively short duration, such as sixty or ninety days. If the legatee fails to survive the required period of time, the gift will descend to others, as provided in the will or by statute. It is applicable whether or not the deaths are simultaneous or due to a common disaster.

The survivorship clause appears to be the most useful of these clauses. It applies to many situations which cannot be provided for by either the simultaneous death clause or the common disaster clause. Furthermore, it is applicable to all simultaneous deaths and to most deaths resulting from a common disaster.

\textsuperscript{56} In re Fowles' Will, 222 N.Y. 222, 118 N.E. 611 (1918).
\textsuperscript{57} A common disaster clause reads as follows:
In the event that any beneficiary under this will and I shall die in [or as the result of] a common disaster, I direct that this will shall be construed as if such beneficiary had predeceased me.
MODERN LEGAL FORMS, supra note 54, at § 10132.
\textsuperscript{58} In re Estate of Messenger, 208 Kan. 763, 494 P.2d 1107 (1972) (Where the husband's will provided that his wife be disinherited if they both died at or about the same time as a result of a common disaster, and both were pronounced dead at the scene of a car accident. The court held it to be a valid clause, even though the wife had survived for a short period of time.)
\textsuperscript{59} In re Davis' Estate, 186 Misc. 955, 61 N.Y.S.2d 427, aff'd 271 App. Div. 970, 69 N.Y.S.2d 327 (1946) (Clause, which provided that if testator and a beneficiary died in a common accident or disaster or under such circumstances that it was doubtful which died first, then the will was to take effect as if such beneficiary had predeceased the testator, had no effect when testator and his wife died within one day's time from natural causes unrelated to an accident or violence.)
\textsuperscript{60} A survivorship clause provides as follows:
In the event that any beneficiary under this will shall die within 30 days [or 60 days, or 90 days, etc.] after my death, such beneficiary shall be deemed to have predeceased me, and I direct that the provisions of this will shall be construed upon that assumption.
MODERN LEGAL FORMS, supra note 54, at § 10135.
survivorship clause, therefore, has the broadest application of the three clauses. A clause of even broader application could be drafted by combining the survivorship clause with the common disaster clause, presenting a fourth possible choice to the draftsman.\textsuperscript{61}

SECTION 4-11—ANTI-LAPSE STATUTE

The main purpose of the “anti-lapse” statute is to prevent bequeathed property from passing intestate. It provides alternate takers for certain categories of legacies to beneficiaries who predecease the testator.\textsuperscript{62} The predeceased descendant’s legacy passes to his descendants. A legacy to a predeceased class member passes to the other members of the class, unless the deceased member is a descendant of the testator which results in the legacy passing to the deceased member’s descendants per stirpes.\textsuperscript{63} The Act also provides that a legacy to any other legatee who predeceases the testator will pass as part of the residue to be taken proportionately by the residuary legatees.\textsuperscript{64}

In order for the testator to avoid the operation of the statute, it must clearly appear from the will and the surrounding circum-

\textsuperscript{61} Shockett v. Silberman, 209 Va. 490, 165 S.E.2d 414 (1969) (Where will provided that if the testator’s wife should die with him “in a common accident or disaster or under such circumstances as make it impossible or difficult to determine which of us dies first or within ninety days after my death” she should be conclusively deemed not to have survived him.)


\textsuperscript{63} Probate Act of 1975 \textsection 4-11 (a) and (b), ILL. REV. STAT. ch. 3, \textsection 4-11 (a) and (b) (1975) (formerly ILL. REV. STAT. ch. 3, \textsection 49 (1939)), which provides:

Unless the testator expressly provides otherwise in his will, (a) if a legacy of a present or future interest is to a descendant of the testator who dies before or after the testator, the descendants of the legatee living when the legacy is to take effect in possession or enjoyment, takes per stirpes the estate so bequeathed; (b) if a legacy of a present or future interest is to a class, and any member of the class dies before or after the testator, the members of the class living when the legacy is to take effect in possession or enjoyment take the share or shares which the deceased member would have taken if he were then living, except that if the deceased member of the class is a descendant of the testator, the descendants of the deceased member then living shall take per stirpes the share or shares which the deceased member would have taken if he were then living;

\textsuperscript{64} Probate Act of 1975 \textsection 4-11(c), ILL. REV. STAT. ch. 3, \textsection 4-11(c) (1975) (formerly ILL. REV. STAT. ch. 3, \textsection 49 (1939)), which provides:

except as above provided in (a) and (b), if a legacy lapses by reason of the death of the legatee before the testator, the estate so bequeathed shall be included in and pass as part of the residue under the will, and if the legacy is or becomes part of the residue, the estate so bequeathed shall pass to and be taken by the legatees or those remaining, if any, of the residue in proportions and upon estates corresponding to their respective interests in the residue. The provisions of (a) and (b) do not apply to a future interest which is or becomes indefeasibly vested at the testator’s death or at any time thereafter before it takes effect in possession or enjoyment.
stances that it was the intention of the testator, at the time he executed his will, to provide for the contingency of the prior death of the beneficiary. For the testator's intention to prevail, it must be clear that he had the contingency in mind and that he specifically provided for its occurrence. It has been held that the mere use of a phrase such as "to the survivors or survivor of them" in connection with a bequest is not sufficient to avoid the operation of the statute.

A provision which was sufficiently specific to prevent the operation of the anti-lapse statute was presented in Vollmer v. McGowan. The clause in dispute stated:

In case any child above named should depart this life, either with or without heirs of his or her body, at any time previous to my demise, then and in that case, the surviving children under this will shall become seized equally of the property specified of such deceased child or children so departing this life aforesaid, and the property interest so accruing of such deceased child or children under this will.

The Supreme Court of Illinois held that this will disclosed an unequivocal intent to disinherit children of any of his seven children who predeceased him. The court based its decision on the fact that the testator's will clearly demonstrated that he anticipated the contingency of the death of a child prior to his own death and provided for this contingency.

In order to effectuate the testator's intention, whether he plans to avoid the statute or to follow its outcome, it is necessary to use clear and precise language to demonstrate the testator's desired intention in the event that a beneficiary predeceases him. The most effective provision would include a reference to the contingency of death before setting forth the testator's desired disposition should the contingency occur.

66. Schneller v. Schneller, 356 Ill. 89, 93, 190 N.E. 121, 123 (1934).
68. Id. at 309-10, 99 N.E.2d at 339.
69. Id. at 313, 99 N.E.2d at 340.
70. The testator may avoid the statute if he uses one of the following provisions:

If for any reason any legacy or legacies left by this my will, either pecuniary or residuary, shall lapse or fail, or for any reason not take effect, either in whole or in part, I give and bequeath the amount which shall lapse or fail, or not take effect, absolutely to the persons hereinafter named as my executors.

In the event any legatee and/or person hereinbefore mentioned as recipients under and by the terms of this will predecease me, then and in that event, such bequest or bequests hereinbefore made to such person or persons shall lapse and become void, and the same shall become part of the residuary of my estate and pass in accordance with the terms of this will disposing of such residuary.

2 J. Murphy, Murphy's Will Clauses Forms 14:38 and 14:39 at 567 (1975).
If the testator's estate is insufficient to pay all legacies, section 24-3(b) provides that unless the will directs otherwise, specific legacies are to be satisfied before general legacies, and general legacies are to be satisfied pro rata, without any priority between realty and personality. The testator who anticipates a deficiency in his estate may direct the order of abatement so that it conforms with his preferences among legatees or particular legacies. In the event of a deficiency in the estate, the testator's direction will be followed by the courts provided that his preferences are set forth in a manner "beyond dispute." Absent such a direction by the testator in his will, the statute will operate first to the detriment of general legacies which will abate pro rata.

The courts operate upon the general presumption that the testator believed his estate would be sufficient to satisfy his testamentary dispositions. Therefore, an intention contrary to the statute will not be derived from mere inferences but will be found only if the will clearly provides for an alternate scheme. In the case of In re Estate of Fleer, the petitioners contended that the testamentary scheme of the testator's will manifested an intent to prefer the natural objects of his bounty over charitable institutions. They argued that this intention was evidenced by the order and manner in which the bequests were made and by the use of endearing terms in references to the relatives in the will. The court found that the statute controlled the order of abatement because the will did not clearly provide for an alternate scheme. Therefore, all the general legacies, whether to relation or institution, would suffer pro rata.

71. Probate Act of 1975 § 24-3(b), ILL. REV. STAT. ch. 3, § 24-3(b) (1975) (formerly ILL. REV. STAT. ch. 3, § 291(b) (1939)), which provides: Unless otherwise provided by the will, if the estate of a testator is insufficient to pay all legacies under his will, specific legacies shall be satisfied pro rata before general legacies, and general legacies shall be satisfied pro rata, without any priority in either case as between real and personal estate.


76. Id. at 60, 315 N.E.2d at 262. But see Moody Bible Inst. v. Pettibone, 289 Ill. App. 69, 81, 6 N.E.2d 676, 682 (1937), which states that as a general rule, legacies to otherwise unprovided relatives are given preference over legacies to strangers. The court in In re Estate of Fleer cited Moody but found it to be unpersuasive.
There are a number of ways in which the testator's preference in regards to abatement can be expressed clearly and easily. The draftsman can list the legacies in the order in which they are to be satisfied and direct that they are to be satisfied in the order in which they appear in the will. A scheme for abatement could be based on the status of the legatee. It is also possible to draft a provision for abatement which is dependent upon the value of the estate. Whatever approach is used, it should be made clear that the testator is providing an alternate scheme in lieu of the statutory provision.

SECTION 20-19—EXONERATION OF ENCUMBRANCES

Any real estate, leasehold estate or beneficial trust interest subject to an encumbrance is taken by the recipient subject to that encumbrance and is not entitled to exoneration of the indebtedness from the decedent's estate, unless the testator has provided to the contrary. If the representative pays any part of the indebtedness from assets other than those subject to the debt, the estate is entitled to reimbursement from the recipient.

77. In case my estate should prove insufficient to pay all the pecuniary legacies in full, I direct that they shall be paid in full in the order in which they are stated in this Will.
MODERN LEGAL FORMS, supra note 54, at § 9909.

78. In case my estate should prove insufficient for the payment of all the pecuniary legacies and bequests herein given, I direct them to apply my estate, first, to the payment in full of the legacies given to my relations; second, to the payment of the legacies given to other individuals; and third, to the payment of legacies and devises to institutions and corporations in such proportions as the residue divided pro rata shall suffice for; and this direction is to apply as well to all those legacies given in trust, it being my wish that individuals shall be fully paid, and that all institutions and corporations named herein should be paid pro rata from my estate in case of insufficiency.
MODERN LEGAL FORMS, supra note 54, at § 9910.

79. I expressly declare that the legacies to charities made in the preceding paragraph of this Will shall be paid in full only in case my total estate, as valued by my executors, shall amount to dollars, and in case my estate shall be valued by my executors at less than dollars, then said legacies shall abate proportionately.
MODERN LEGAL FORMS, supra note 54, at § 9911.

80. Probate Act of 1975 § 20-19(a), ILL. REV. STAT. ch. 3, § 20-19(a) (1975) (formerly ILL. REV. STAT. ch. 3, § 219b (1939)), which provides:
Except as otherwise expressly provided by decedent's will:
(a) When any real estate or leasehold estate in real estate subject to an encumbrance, or any beneficial interest under a trust of real estate or leasehold estate in real estate subject to an encumbrance, is specifically bequeathed or passes by joint tenancy with right of survivorship or by the terms of a trust agreement or other nontestamentary instrument, the legatee, surviving tenant or beneficiary to whom the real estate, leasehold estate or beneficial interest is given, who takes it subject to the encumbrance, is not entitled to have the indebtedness paid from other real or personal estate of the decedent.
of the encumbered property. However, if the indebtedness extends to other property, the reimbursement is limited to the portion of the amount paid by the representative in the same proportion which the value of the recipient's encumbered property bears to the total value of all the encumbered property.

This section eliminated the doctrine of exoneration which required the discharge of a lien against specifically devised real estate by placing the burden of exoneration on the testator's personal estate.

The statute requires an express provision in the decedent's will to overcome its effect. To provide for exoneration, however, the will must provide for more than the mere payment of the testator's debts. An express provision for the payment of the encumbrance is required. Furthermore, in the process of drafting testamentary provisions regarding the exoneration of encumbrances, it is important for the draftsman to correctly ascertain the testator's intentions. The testator may unintentionally favor one legatee over another by bequeathing property of equal value to each, if one parcel is subject to a larger mortgage than the other parcel.

**SECTION 18-14—CLAIMS CHARGEABLE AGAINST THE ESTATE**

Section 18-14 provides that the decedent's realty and personalty and the income therefrom are chargeable without distinction with the claims against the estate, the expenses of administration, and estate and inheritance taxes and legacies, unless otherwise provided in the Act or by decedent's will. There is to be no priority between realty and personalty in the deter-

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81. Probate Act of 1975 § 20-19(b), ILL. REV. STAT. ch. 3, § 20-19(b) (1975) (formerly ILL. REV. STAT. ch. 3, § 219b (1939)), which provides:
   If the representative pays all or any part of the indebtedness from assets other than the real estate, leasehold estate or beneficial interest or the income or proceeds therefrom, he is entitled to reimbursement from the legatee, surviving tenant or beneficiary and, in the event of nonreimbursement, the court may adjudge a lien on the real estate, leasehold estate or beneficial interest for the amount so paid with interest.

82. Probate Act of 1975 § 20-19(c), ILL. REV. STAT. ch. 3, § 20-19(c) (1975) (formerly ILL. REV. STAT. ch. 3, § 219b (1939)), which provides:
   If the encumbrance embraces or extends to other property, the reimbursement shall be limited to the portion of the amount paid by the representative which the value of the real estate, leasehold interest or beneficial interest bears to the value of all property subject to the encumbrance as of the date of the decedent's death.


84. Id. at 215.

85. See Martin v. Martin, 310 Ill. App. 622, 3 N.E.2d 560 (1941) (Where each devisee was required to bear the burden of the mortgage indebtedness on land devised to him. The indebtedness could not be prorated or equalized, in spite of the fact that one devisee received more land which was much less heavily encumbered than the others).
mination of what is to be leased, sold, mortgaged or pledged in
order to satisfy the claims, expenses and legacies against the
estate.\footnote{86} The statutory provision destroys the former rule that
the personal estate of a deceased person was the primary asset
for the payment of debts and legacies unless a contrary inten-
tion, either express or implied, appeared in the will.\footnote{87}

Even though there are no recent decisions under the new
rule, courts have dealt with the issue of contrary will intent
under the former rule. In Hartman v. Meier,\footnote{88} the testator be-
queathed $20,000 in cash to his daughter and made this bequest
"a charge and lien upon all my farm real and farm personal prop-
ty."\footnote{89} The court, recognizing that the former general rule
required legacies to be paid out of the personal property of an
estate, stated that the testator's intention must be the controlling
factor in the construction of a will. Accordingly, the court de-
determined that the testator clearly intended to make the legacies
a charge upon the farm land which had been specifically devised
to his son.\footnote{90}

Although the former general rule that the personal estate
must be exhausted before resort can be made to the realty is
no longer applicable in the administration of an estate, the per-
sonal estate will generally continue, as a practical matter, to be
used first in satisfying all debts, expenses and legacies.\footnote{91}
For this reason, it is necessary, notwithstanding the provisions of sec-
tion 18-14, to clearly manifest the testator's intention if he wishes
to make the debts, expenses or legacies charges upon his realty.\footnote{92}

(formerly Ill. Rev. Stat. ch. 3, § 207 (1939)), which provides:
All the real and personal estate of the decedent and the income
therefrom during the period of administration are chargeable with
the claims against the estate, expenses of administration, estate and
inheritance taxes and legacies without distinction except as other-
wise provided in this Act or by decedent's will and may be leased,
sold, mortgaged or pledged as the court directs in the manner pre-
scribed in this Act. In determining what property in the estate shall
be leased, sold, mortgaged or pledged for any purpose provided in
this Section, there is no priority as between real and personal estate,
except as provided in this Act or by decedent's will.}

\footnote{87}{Reid v. Corrigan, 143 Ill. 402, 405, 32 N.E. 387, 387 (1892); Suiter
v. Suiter, 311 Ill. App. 618, 621, 37 N.E.2d 561, 562 (1941); In re Estate
of Ridel, 247 Ill. App. 175, 180 (1928); Boue v. Kelsey, 53 Ill. App. 295,
297 (1884); Truett Sons & Morgan v. Cummons, 6 Ill. App. 73, 76 (1890).

\footnote{88}{34 Ill. App. 2d 239, 181 N.E.2d 211 (1962).}
\footnote{89}{Id. at 241, 181 N.E.2d at 213.
\footnote{90}{Id. at 247-48, 181 N.E.2d at 216.
\footnote{91}{H. Williams & J. Haughey, Horner Probate Practice and Es-
tates § 469 (Supp. 1976).}
\footnote{92}{The testator could provide as follows:
All debts and charges of my estate, including death taxes, se-
cured obligations, expenses of administration, and taxes resulting
from joint tenancy, life insurance proceeds, and property subject to
a power of appointment are to be paid from the proceeds of those
life insurance policies which are payable to my estate. If such pro-}
Dispositions Subject to Contrary Will Intent

SECTION 19-1—ADMINISTRATION OF PERSONAL ESTATE

A representative, pursuant to court order, may lease, sell, mortgage or pledge the personal estate of the decedent when it is necessary for the administration of the estate. Before leasing, selling, mortgaging or pledging any of the personal assets, the representative must file a petition with the court stating the facts and circumstances of the transaction. The court has the right to determine whether the sale shall be public or private. These provisions of the Probate Act do not apply to leases, sales, mortgages or pledges made under a power given in the will. However, personal property selected by the surviving spouse or child or specifically bequeathed or directed by the testator not to be sold may not be sold, mortgaged or pledged unless necessary for the payment of claims, expenses or taxes.

ceeds are insufficient, as many United States savings bonds as are needed are to be cashed and those funds used to pay such debts. No reimbursement will be required from anyone who, in the absence of this paragraph, would have been primarily liable for payment of such debts, taxes and expenses.

O'BYRNE & MCCORD, DESKBOOK FOR ILLINOIS ESTATE PLANNERS § 3D.0.3 (1969).

95. Probate Act of 1975 § 19-1(c), ILL. REV. STAT. ch. 3, § 19-1(c) (1975) (formerly ILL. REV. STAT. ch. 3, § 213.1 (1939)), which provides:

The provisions of this Article for the lease, sale, mortgage or pledge of personal estate do not apply to leases, sales, mortgages or pledges made without order of court by a representative under a power given in the will. The lease, sale, mortgage or pledge of any personal estate by a representative under a power given in a will is valid regardless of the subsequent setting aside of the will or any other action which might limit or restrain the right of the representative to transfer title or to lease, sell, mortgage or pledge such personal estate. A lessee, purchaser, mortgagee or pledgee from a representative under a power in a will obtains the same title or interest as though the instrument were executed by the decedent immediately prior to his death and the rights and claims of all parties claiming under or through the decedent shall be transferred to the consideration received or to be received from the lease, sale, mortgage or pledge.

96. Probate Act of 1975 § 19-1(a) and (b), ILL. REV. STAT. ch. 3, § 19-1 (a) and (b) (1975) (formerly ILL. REV. STAT. ch. 3, §§ 209 and 213.1 (1939)), which provides:

(a) By leave of court, a representative may lease, sell, mortgage or pledge the personal estate of the decedent when it is necessary for the proper administration of the estate. Personal property selected by the surviving spouse or child or specifically bequeathed or directed by the testator not to be sold may not be sold, mortgaged or pledged unless necessary for the payment of claims, expenses of administration, estate or inheritance taxes or the proper administration of the estate.

(b) If the sale of the personal estate is not necessary for the payment of claims or expense of administration or the proper distribution of the estate, the court may order the personal estate to be distributed in kind.
The power of the representative to sell, mortgage or pledge personal property may be found in the will either by an express grant or by implication. In either event, the testator's intention “must be carried out if it violates no rule of law.” Where a will provides for the division of the testator's estate into a definite number of shares with distribution to be made in stated portions by the executor, the courts have found an implied power in the executor to sell both the real and personal property. An express power has been found to exist where the will provided in effect that all the rest, residue and remainder of the estate, both real and personal, of whatsoever kind and character should be sold and distributed in equal shares.

If the testator intends that his representative is to have the power to sell, lease or mortgage his personal property this intention should be clearly demonstrated by the language chosen by the draftsman. If the testator does not want certain property to be sold, mortgaged or leased, it would be beneficial for the draftsman to include a detailed description of the property which is to be left intact, since an implied power to sell may unexpectedly be found in the will.

SECTION 20-15—POWER TO LEASE, SELL OR MORTGAGE REAL ESTATE

Section 20-15 provides that the provisions of the Probate Act regarding the lease, sale or mortgage of real estate by a repre-

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98. Id. at 648, 165 N.E. at 210.
99. Schroeder v. Benz, 9 Ill. 2d 589, 138 N.E.2d 496 (1956) (Where the testatrix gave, devised and bequeathed to her brothers and sisters and to children of her deceased brother, all the rest, residue and remainder of her estate, both real and personal, to be sold and distributed in equal shares, share and share alike, the court found the executor had power to sell the property to effectuate the testatrix's intention).
100. A power to sell could provide:

I authorize and empower my executors or the survivor of them, or the executors or executor for the time being of this my Will, if and whenever in the settlement of my estate they shall deem it advisable, to sell at private or public sale at such price as they shall think fit the whole or any part of my real and personal estate, and to execute good and sufficient deeds and other instruments necessary or proper to convey and transfer the same to the purchasers, who shall not be bound to see to the application of the purchase money.

MODERN LEGAL FORMS, supra note 54, at § 9811.

A power to mortgage could provide:

I authorize and empower my executors or the survivor of them, or the executors or executor for the time being of this my Will, if and whenever in the settlement of my estate they shall deem it advisable, to mortgage upon such terms and conditions as they may think fit all or any part of my real estate, and I declare that no mortgagee shall be bound to see to its application of any money raised thereby.

MODERN LEGAL FORMS, supra note 54, at § 9812.
sentative do not apply to leases, sales or mortgages made by the representative under a power given in the will.\textsuperscript{101} Absent such power, the representative must comply with various provisions in the Probate Act which subject the sale of real estate to court supervision. For example, before selling or mortgaging real estate, the representative must file a petition with the court setting forth all the facts and circumstances of the transaction, the description and value of the property, and the nature and extent of all liens upon the property. All persons having an interest in the property are required by the Act to be made parties defendant.\textsuperscript{102} If the testator believes that these protections are unnecessary and desires to minimize the costs of administration, then he may grant broad or specific powers to his representative, making it unnecessary to comply with these provisions which would incur additional fees.

In order to determine the extent of the power, the intention of the testator must be gathered from the will's language.\textsuperscript{103} The power to sell, lease or mortgage may be either expressly\textsuperscript{104} or impliedly\textsuperscript{105} conferred. Since a determination of the executor's

\begin{footnotes}
\footnotetext[101]{Probate Act of 1975 § 20-15, ILL. REV. STAT. ch. 3, § 20-15 (1975) (formerly ILL. REV. STAT. ch. 3, § 246 (1939)), which provides in part: The provisions of this Article for the lease, sale or mortgage of real estate or interest therein do not apply to leases, sales or mortgages made without order of court by a representative under a power given in the will, but before making a sale or mortgage of real estate it is the duty of the representative to execute, file in and have approved by the court which issued letters of office to him a bond as provided in Section 12-9.}


\footnotetext[103]{Pope v. Kitchell, 354 Ill. 248, 256, 188 N.E. 451, 454 (1933); Heyne v. Scheffauer, 321 Ill. 266, 151 N.E. 893 (1926).}

\footnotetext[104]{See Schroeder v. Benz, 9 Ill. 2d 589, 138 N.E.2d 496 (1956) (Where the will provided that "all the rest, residue and remainder of his estate both real and personal of whatsoever kind and character and wherever situated should be sold and distributed in equal share, share and share alike," the court held it expressly provided for the sale of the property); Heyne v. Scheffauer, 321 Ill. 266, 151 N.E. 893 (1926) (Where the executor was given "full power and authority to sell, mortgage and convey" the whole estate and "to compound and settle any and all claims in favor of or against the estate," the court decided the testator had vested broad powers and ample discretion in the executor, since the language did not limit the sale to the purpose of paying claims and legacies); In re Estate of Link, 132 Ill. App. 2d 893, 895-96, 271 N.E.2d 393, 394-95 (1971) (The appellate court held that, under a provision of the will giving executor the power to sell "all or any part" of the real estate, testator provided broad and independent power of sale to executor not only to pay legacies and debts but also, in the absolute discretion of executor, to accomplish any other purpose).}

\footnotetext[105]{See Grove v. Willard, 280 Ill. 247, 117 N.E. 499 (1917) (Where a will had no provision for the payment of debts which exceeded the value of the personal property, and the widow was given control over the personal property and real estate with the power to sell or dispose}
powers depends on the court's interpretation of the language employed by the testator, it would be advisable for the draftsman to use very clear and precise terms. There are a variety of methods by which the testator can grant this authority to his representative—by separate grants of power, such as, the power to sell, the power to mortgage or the power to pay debts, or by a single grant of authority encompassing the separate powers.106

SECTION 20-1—ADMINISTRATION OF REAL ESTATE

The Probate Act in section 20-1 provides that unless the testator expresses a contrary intention in his will or the statute provides otherwise, the representative is to take possession of all real estate during the administration of the estate.107 However, he cannot take possession of real estate used by an heir or legatee as a residence, unless directed by the testator to do so, or unless the court finds that possession is necessary in order to pay claims against the estate, expenses of administration or taxes.108 While of the property as she thought best, the court believed that the language of the will inferred that all the real estate and personality should be sold by the widow).

106. An example of a power to sell would provide:

I authorize and empower my executors or the survivor of them, or the executors or executor for the time being of this my Will, if and whenever in the settlement of my estate they shall deem it advisable, to sell at private or public sale at such price as they think fit the whole or any part of my real and personal estate, and to execute good and sufficient deeds and other instruments necessary or proper to convey and transfer the same to the purchasers, who shall not be bound to see to the application of the purchase money.

An example of a power to mortgage reads as follows:

I authorize and empower my executors or the survivor of them, or the executors or executor for the time being of this my Will, if and whenever in the settlement of my estate they shall deem it advisable, to mortgage upon such terms and conditions as they may think fit all or any part of my real estate, and I declare that no mortgagee shall be bound to see to its application of any money raised thereby.

MODERN LEGAL FORMS, supra note 54, at §§ 9811, 9812.

107. Probate Act of 1975 § 20-1(a), ILL. REV. STAT. ch. 3, § 20-1(a) (1975) (formerly ILL. REV. STAT. ch. 3, § 219a (1939)), which provides:

Except as otherwise provided by subsection (b) of this Section or by decedent's will, every representative shall take possession, subject to the exempt estate of homestead, of all real estate of the decedent during the period of administration and, while retaining possession, (1) shall collect the rents and earnings therefrom, (2) shall keep in tenantable repair the buildings and fixtures, (3) shall pay the taxes, mortgages, and other liens thereon in accordance with their terms, (4) may protect the real estate by insurance, (5) may employ agents and custodians and (6) may make all reasonable expenditures necessary to preserve the real estate. He may maintain an action for the possession of or to determine the title to real estate, except that no action to determine the title to real estate may be commenced without authorization of the court which issued his letters.

108. Probate Act of 1975 § 20-1(b), ILL. REV. STAT. ch. 3, § 20-1(b) (1975) (formerly ILL. REV. STAT. ch. 3, § 219a (1939)), which provides:
retaining possession of real estate, the representative has certain duties and discretionary powers with respect to the property. His mandatory duties include collecting rents, keeping the buildings and fixtures in tenable repair, and paying taxes, mortgages and other liens. Protecting the real estate by insurance, employing agents and custodians and making expenditures to preserve the property are the discretionary powers conferred upon the representative.109 Because of the particular importance of insuring property, it may be advisable to direct that the executor is to obtain insurance, rather than leave the matter to his discretion.

Prior to the enactment of this section the rule was that the real estate of which a decedent died seized descended directly to the heir or devisee, and no title or right of possession or interest therein passed to an executor unless given to him by the will, either expressly or by implication.110 The Probate Act as amended gives executors a new interest in the real estate of an estate, but this change affects only the estates of persons dying after July 1, 1965.111 Therefore, if the testator wants the real estate to pass directly to the beneficiary upon his death, it is important to state this intention in the will in clear and unambiguous language.112

SECTION 19-6—CONTINUATION OF DECEDENT’S BUSINESS

As a general rule, the personal representative of a testator
has no authority to continue the decedent's business.\textsuperscript{113} Section 19-6 allows the representative to continue the decedent's unincorporated business for one month following the issuance of his letters or for such time as the court may authorize.\textsuperscript{114}

The Probate Act imposes certain burdens on the representative who is operating the decedent's business under court authority. The representative must file monthly reports with the court setting forth such items as receipts and disbursements for the month.\textsuperscript{115} The testator may circumvent these costly statutory burdens by expressly authorizing his representative to continue the operation of his business. Even though the testator's intention will usually be carried out, the court has the option to acquire supervision over the business if the representative operates it in a manner disadvantageous to the estate.\textsuperscript{116}

It is important that the draftsman, while ascertaining his client's testamentary scheme, have his client consider the personal liability of his representative for losses incurred in the operation of his business during the administration of his estate. The Probate Act provides that the representative will be liable only for losses caused by his malfeasance or misfeasance.\textsuperscript{117}

\textsuperscript{113} See Nonnast v. Northern Trust Co., 374 Ill. 248, 259, 29 N.E.2d 251, 258 (1940); Chicago Title & Trust Co. v. Corporation of Fine Arts Bldg., 288 Ill. 142, 149, 123 N.E. 300, 302 (1919); Grace v. Seibert, 235 Ill. 190, 193, 85 N.E. 308, 309 (1909).

\textsuperscript{114} Probate Act of 1975 § 19-6(a) ILL. REV. STAT. ch. 3, § 19-6(a) (1975) (formerly ILL. REV. STAT. ch. 3, § 213a (1939)), which provides:

Except as otherwise directed by the decedent in his will or except as otherwise provided by law, a representative has authority, for the preservation and settlement of the estate of a decedent, to continue the decedent's unincorporated business during one month next following the date of issuance of his letters unless the court directs otherwise, and for such further time as the court from time to time may authorize, without personal liability except for malfeasance or misfeasance for losses incurred. The court may order such notice of the time and place of the hearing on the petition to be given to any interested persons as it deems expedient or the court may hear the petition without notice. Obligations incurred or contracts entered into are entitled to priority of payment out of the assets of the business, but, without approval of the court first obtained, do not involve the estate beyond these assets.

\textsuperscript{115} Probate Act of 1975 § 19-6(b), ILL. REV. STAT. ch. 3, § 19-6(b) (1975) (formerly ILL. REV. STAT. ch. 3, § 213a (1939)), which provides:

During the time the business is so conducted, unless otherwise ordered by the court, the representative shall file monthly reports in the court, setting forth the receipts and disbursements of the business for the preceding month and such other pertinent information as the court may require.

See Chicago Title & Trust Co. v. Corporation of Fine Arts Bldg., 288 Ill. 142, 123 N.E. 300 (1919) (Where the executor was authorized to conduct decedent's business for sixty days, the court held that the lower court did not intend to extend the executor's authority beyond sixty days when the executor was ordered to sell part of decedent's personal property).

\textsuperscript{116} In re Estate of Szantay, 92 Ill. App. 2d 317, 324, 235 N.E.2d 861, 865 (1968).

\textsuperscript{117} Probate Act of 1975 § 19-6(a), ILL. REV. STAT. ch. 3, § 19-6(a)
Similarly, if the testator expressly authorizes the representative to operate the business according to his own discretion, the common law provides that the representative will not be personally liable in the absence of fraud or negligence. The representative who is given a discretionary power has to exercise prudence in managing the business to avoid liability.\textsuperscript{118}

Where a testator desires to have his business carried on until distribution or liquidation, it is advisable to incorporate suitable provisions in his will pertinent to the type of business interest owned by the testator. If the testator is a sole proprietor, the will should define exactly which assets constitute the business and which funds may be used for business purposes.\textsuperscript{119} Obligations incurred or contracts entered into are entitled to priority of payment out of the assets of the business, but do not involve the estate beyond those assets without prior court approval.\textsuperscript{120} If the testator had a partnership interest, authority could be granted for the representative to make a settlement agreement with the surviving partners or to accept a certification by the surviving partners as to the testator's partnership interest. If the testator owns all or the controlling stock of a closely held corporation, it would be wise to authorize the executor to hold the investment regardless of the applicable trust rules. The will could also authorize the retention of the stock despite losses incurred and possibly authorize the executor to participate in the management and conduct of the business.\textsuperscript{121}

\textsuperscript{118} Compare In re Estate of Szantay, 92 Ill. App. 2d 317, 235 N.E.2d 861 (1968) (The court stated that where a testator expressly authorized his representative to continue the business and allowed him to exercise his own discretion in the business operation, the decisions of the representative were conclusive in the absence of fraud or negligence) with In re Estate of Wenzlaff, 55 Ill. App. 2d 92, 204 N.E.2d 149 (1964) (abstract opinion) (The court held the administrator personally responsible for losses sustained by jewelry business during period she operated business without court's permission).

\textsuperscript{119} See Moore v. McFall, 263 Ill. 596, 105 N.E. 723 (1914) (Where the testator directed that his business should be continued and devised all of his property to his wife, the court held all debts contracted by the widow in connection with the business were charges upon the entire estate, since the testator had not made clear an intention to distinguish between his business assets and his other property).

\textsuperscript{120} Probate Act of 1975 § 19-6(a), ILL. REV. STAT. ch. 3, § 19-6(a) (1975) (formerly ILL. REV. STAT. ch. 3, § 213a (1939)).

\textsuperscript{121} Moore, Drafting Business Clauses, 43 ILL. B.J. 648, 649-50 (1955).

The following is a sample clause granting the representative power to carry on a business:

I authorize my executors or executor for the time being to carry on the whole or any part of the business of —— now carried on by me at —— until such time as they shall deem it expedient to sell the same or to wind up the said business, as the case may be, and to employ therein any capital which may be employed therein at my death, and to augment or decrease the capital employed therein, and to appoint any person, including any one or more
SECTION 4-15—DEBTOR AS EXECUTOR

Section 4-15 provides that the appointment of a debtor of the testator as executor of his will does not extinguish any debt due from the executor to the testator, unless the testator declares in his will his intention to extinguish the debt and the testator’s estate is sufficient to discharge all claims without the collection of the debt due from the executor. At common law, the mere appointment of the debtor as executor extinguished the debt, however, a court of equity could compel payment of the debt if the estate could not satisfy its creditors. The logic underlying the common law rule allowing a court of equity to compel payment if the estate was insolvent was that the debtor’s indebtedness was considered paid to the executor at the time of appointment but remained an asset in the executor’s possession.

Under the statute, the testator must expressly declare his intention to relieve the executor of his liability to the estate. That intention will be difficult to find if the debt was not in existence at the time of the execution of the will and no reference is made to future debts. In Updike v. Tompkins, the testatrix provided in her will that a $900 note held against her brother was to be cancelled and further provided that “at my death I want all other notes cancelled and surrendered.” At the time of her death, the testatrix held six notes against her brother, five of which were not in existence when the will was written and executed. The court stated that the language in the will could only cover notes in existence at the time of the execution of the will and, therefore, notes subsequently made were not cancelled. For this reason, should a testator wish

of themselves, manager, or agent to act therein at a salary or otherwise, and generally to act in the premises as if they were absolute owners thereof without being liable or responsible for any loss arising thereby, and, in case the same shall be carried on at a loss, I declare that my executors shall be reimbursed for all losses so incurred by them out of my general estate.

Modern Legal Forms, supra note 54, at § 9817.


The appointment of the debtor of the testator as executor of his will does not extinguish any debt due from the executor to the testator, unless the testator in the will expressly declares his intention to extinguish the debt and unless the estate of the testator without collection of the debt due from the executor is sufficient to discharge all claims against the testator’s estate.


125. 100 Ill. 406 (1881).

126. Id. at 409 (emphasis added).

127. Id. at 411.
to extinguish debts owed him, including those which come into existence after the execution of the will, it is necessary that his intention be set forth unequivocally in the will. If that intention is not originally expressed and new debts accrue after the signing of the will, a codicil would be necessary to extinguish the subsequent debts.

Section 12-4—Waiver of Security

The testator's intention will govern even in the area of security for bonds which are required by Article XII of the Probate Act. Section 12-4 provides that no security is required of a person who is excused by the will from giving bond or security and that no greater security can be required than that specified by the will, unless the court from its own knowledge or from the suggestion of any interested person, has cause to suspect the representative of fraud or incompetence or believes the estate to be insufficient to discharge all claims.128

It is important to note that when a testator excuses a person from giving bond or security, this pardon applies only to the specific role stated in the will. If a person is to serve as executor and trustee, and the will provides that the executor should serve without bond, the person would still be required to post security for bond in his role as trustee.129 Therefore, when the person appointed executor is also to fill another role in the will, it is important to specifically exclude him from posting security for bond in all of his roles provided that is the testator's intent. Although the problem of multiple roles should be kept in mind, the draftsman may, in the usual circumstance, use a very simple

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128. Probate Act of 1975 § 12-4, ILL. REV. STAT. ch. 3, § 12-4 (1975) (formerly ILL. REV. STAT. ch. 3, § 150 (1939)), which provides:

Except as provided in Section 6-11(c) with respect to a nonresident executor, no security is required of a person who is excused by the will from giving bond or security and no greater security than is specified by the will is required, unless in either case the court, from its own knowledge or the suggestion of any interested person, has cause to suspect him of fraud or incompetence or believes that the estate of the decedent will not be sufficient to discharge all the claims against the estate, or in the case of a testamentary guardian of the estate, that the rights of the minor will be prejudiced by failure to give security.

It is interesting to note that under § 12-4 the court may require security, if it suspects fraud or incompetence on the part of the representative based on its own knowledge or from "the suggestion of any interested person." Under prior law the court could require security based on the "suggestions of creditors and legatees" only. Due to this change in language, § 12-4 enables the court to require security in a greater variety of cases. See Wood v. Stewart, 120 Ill. App. 34 (1906).

129. Gahan v. Golden, 330 Ill. 624, 162 N.E. 164 (1928) (Widow required to give personal security as trustee, but not as executor).
clause to excuse the executor from posting security for his bond.  

SECTION 21-1—
INVESTMENTS BY REPRESENTATIVE

Under section 21-1, the testator's representative has the right to make investments in any one or more of the investments specified in sections 21-1.01 through 21-1.06 in addition to any investments authorized by the decedent in his will. If the testator does not grant authority to the executor to make other investments, the executor is limited to those specified by the statute. The authority granted by the testator may be very broad or it may be very limited. What will be a prudent grant of power

130. A testator may provide for waiver of bond by utilizing the following clause:

   I direct that he [or she, or they, or my said executors] be exempt from giving any [surety or sureties upon his (or her, or their)] official bond[s].

Modern Legal Forms, supra note 54, at § 9765.

131. Probate Act of 1975 § 21-1, ILL. REV. STAT. ch. 3, § 21-1 (1975) (formerly ILL. REV. STAT. ch. 3, § 257a (1939)), which provides:

   In addition to any investments which a decedent may authorize his executor to make by the terms of his will, the representative of his estate, in his discretion, may invest money of the estate of a decedent in any one or more of the investments specified in Sections 21-1.01 through 21-1.06.

132. The representative would be limited to investments in:

   1. direct obligations of or guaranteed by the United States or any instrumentality or agency of the United States, provided the maturity date is less than 5 years from the date of purchase;
   2. certain obligations of a local public agency or a public housing agency;
   3. savings accounts or certificates of deposit of a state or national bank doing business in Illinois to the extent that the deposits are insured by the United States or agency thereof;
   4. withdrawable accounts or shares of a state or federal savings and loan association doing business in Illinois to the extent such accounts or shares are insured by the United States or agency thereof;
   5. interests in certain common trust funds; and
   6. any other investments authorized by a court or declared by the legislature to be legal investments by representatives of decedent's estate.

Probate Act of 1975 §§ 21-1.01 to 21-1.06, ILL. REV. STAT. ch. 3, §§ 21-1.01 to 21-1.06 (1975) (formerly ILL. REV. STAT. ch. 3, § 257a(a)-(f) (1939)).

133. The testator could provide:

   I grant to my executors and trustees power to do everything they deem advisable, even though it would not be authorized or appropriate for fiduciaries (but for this power) under any statutory or other rule of law, including in this grant power (without impairing its plenary nature) to:

   1. acquire by purchase or otherwise, and retain, temporarily or permanently, any kind of realty and personality—even stocks and unsecured obligations, undivided interests, interests in investment trusts and discretionary common trust funds, property which produces much, little or no income, or which is wasting, or is outside of my domicile or abroad—all without diversification as to kind or amount.

Modern Legal Forms, supra note 54, at § 9781.

134. The testator could restrict his or her representative by granting:
in most circumstances will largely depend upon the capacities of the intended executor.

SECTION 19-12—NOMINEE REGISTRATION

Section 19-12 provides that a representative or his agent, custodian or depository may have stocks, bonds and other personal property of the estate registered and held in the name of a nominee, unless the testator has otherwise provided in his will. The representative is liable for the nominee’s acts since the ownership, possession and control of the property remains in the representative.185

Legal title in and possession of the personal assets of the testator’s estate are generally acquired by the representative.136 Due to this general principle, a representative is entitled to have the stock of a decedent transferred to him in his representative capacity on the books of a corporation.137 This rule is based on the fact that the representative must be able to bring suit in order to protect the property interests of the estate.138

In the management of the property of my estate, I recommend that my trustees invest and reinvest from time to time, as occasion may offer, the moneys of said trust funds and the proceeds in notes secured by first mortgages upon productive real estate, or in first mortgage bonds of leading trunk lines of established railroads, which are paying dividends on their stock, or in the bonds of cities or populous towns, counties or school districts not largely in debt, or in bonds of any of the states of the Union, or in bonds of the United States of America, having always in view the largest income from the estate consistent with the safe investment thereof. They may also invest and reinvest the moneys of said trust fund in any securities eligible for investment by savings banks or trustees under the laws of the state of —; but I direct that no part of the moneys of my estate shall be invested in the capital stock of any corporation, nor in real estate; but nothing herein shall be construed to require my executors or trustees to sell any corporate stock which I may own at the time of my decease, unless it shall seem to them for the interest of my estate so to do.

MODERN LEGAL FORMS, supra note 54, at § 9782.

135. Probate Act of 1975 § 19-12, ILL. REV. STAT. ch. 3, § 19-12 (1975) (formerly ILL. REV. STAT. ch. 3, § 340b (1939)), which provides:

Unless otherwise provided by the will, a representative or his agent, custodian or depository may cause stocks, bonds and other personal property of the estate to be registered and held in the name of a nominee without mention of the fiduciary relationship in any instrument or record constituting or evidencing title thereto. The representative is liable for the acts of the nominee with respect to any property so registered. The records of the representative shall at all times show the ownership of the property. Any property so registered shall be in the possession and control of the representative and kept separate from his individual property.


138. Bante v. Bante Dev. Co., 27 S.W.2d 481, 485 (1930); S. THOMPSON
Nominee registration of securities usually occurs when they are held in trust. Officers of a trust company may form a partnership for the sole purpose of holding title to the trust property. The securities will then be registered in the partnership name with no mention of the trust. Under such registration, the securities are more readily transferable. If they were registered in the name of a trustee, the transfer could not be completed until the authority of the trustee was established.139

If the testator intends his stocks or bonds to be registered in the name of a specific person, that intention should be expressly stated in the will. In all other cases the representative will have the right to possession and control of the property even though the property is to be distributed at some future time to a specific legatee.140

SECTION 6-12—SUCCESSOR-EXECUTORS

Unless otherwise provided by the will, if one of several executors named in the will fails or refuses to qualify, dies, resigns or has his letters revoked, letters testamentary are to be issued to the remaining executor who qualifies or accepts the office. The remaining executor has all the powers vested in the executors named in the will. If no successor-executor is named, then letters are issued pursuant to section 9-3 which sets forth the preferences for issuance of letters testamentary.141 In order to provide for a successor-executor, the testator should use clear

140. The testator may empower his or her representative to register securities in a nominee in the following manner:

My executor and trustee shall, in addition to other powers and discretions granted by law or necessary or appropriate for proper administration, have the following rights, powers and discretions, without obtaining court permission or approval:

To register securities in the name of a nominee.

Id.

141. Probate Act of 1975 § 6-12, ILL. REV. STAT. ch. 3, § 6-12 (1975) (formerly ILL. REV. STAT. ch. 3, §§ 75-76 (1939)), which provides:

Unless otherwise provided by the will, (a) if one of several executors named in the will fails or refuses to qualify and accept the office, letters testamentary shall be issued to the executor who qualifies and accepts the office, (b) if one of several executors to whom letters have been issued dies or resigns or his letters are revoked, the remaining executor shall continue to administer the estate, and (c) in either event the remaining executor has all powers vested in all the executors named in the will. If no executor is named in the will or the named executor fails or refuses to qualify and accept the office or, if after letters are issued the sole executor or all the named executors die or resign or their letters are revoked, letters shall be issued in accordance with the preferences in Section 9-3.
and unambiguous language. The intention of the testator to appoint successor-executors should be precisely stated in the order in which they are to serve.

If the testator appoints an executor, as well as a successor-executor, and grants the executor a special power, problems may arise if the successor-executor assumes office after the original executor has exercised the special power. In the case of In re Estate of Lynch, the testator's brother, William, was appointed as executor while the testator's brother, Richard, was appointed as successor-executor. The testator bequeathed the residue of his estate to William "for him to distribute amongst the other heirs or retain as he in his own best judgment may decide," and the successor-executor was empowered with the same powers as given to the executor "including the distribution of the residue." The court held, however, that the provision empowering Richard to act as successor-executor related merely to his appointment of a successor-executor and did not constitute a condition precedent to the distribution of the residue and that the executor's distribution was binding on the estate.

If the testator empowers the executor with a power to distribute assets in his discretion and also designates a successor-executor, it would be prudent, in the light of In re Estate of Lynch, to clearly indicate that any exercise of the power by the original executor is binding on the estate. Furthermore, in the event that no person assumes the post of executor, a provision for an alternate disposition of the assets subject to the special power should be provided.

The use of ambiguous terms may also raise difficulties when two or more executors are named to administer the estate in concert rather than in succession. Should one of the co-executors die, the question of whether the testator intended a joint executorship may be presented, unless the intention is clearly expressed. Under a joint executorship, both persons appointed must be able to serve. If one person is disqualified or is in some other manner unable to serve, an administrator with the will annexed will be appointed by the court.

The question has arisen as to whether the use of the term "co-executors" creates a joint executorship. In holding that the

142. See Kinney v. Keplinger, 172 Ill. 449, 50 N.E. 131 (1898) (Where testator specifically provided for a successor-executor).
144. Id. at 164, 212 N.E.2d at 522.
145. Id. at 164, 212 N.E.2d at 522-23.
146. In re Estate of Wolfner, 27 Ill. 2d 221, 188 N.E.2d 712 (1963) (Where testator appointed her two sons as co-executors and one could not serve, the court found that she intended the remaining son to act as executor).
term “co-executors” does not require the creation of a joint executorship, the Illinois Supreme Court relied heavily upon the statutory provision requiring that the “remaining executor” shall continue to administer the estate and has all powers vested in all the executors named in the will. Therefore, if a joint executorship is desired, a clear provision to that effect must be provided.

SECTION 6-16—POWER OF THE ADMINISTRATOR WITH THE WILL ANNEXED

Section 6-16 gives the administrator with the will annexed all the powers and duties of the executor under the will unless the will provides otherwise. This section, however, does not excuse the administrator from providing security for his bond.

It is important that this provision be kept in mind if the testator empowers his executor with special powers, since the executor may fail to qualify, refuse to undertake the office, or die. If these special powers are based on the named executor's personal expertise or experience the testator may not intend for another to exercise them. The testator may also grant special powers to the executor, because of personal qualities such as honesty, trustworthiness, and the like. Therefore, the testator should be made aware that in the event an administrator with the will annexed is appointed, the administrator will exercise the same powers granted to the executor unless a provision is made to the contrary. Depending on the testator's intention, the draftsman may provide that an administrator with the will annexed is not empowered with the same powers as granted to the executor.

CONCLUSION

Judicial interpretation of ambiguous provisions in a will may

147. An example clause for the appointment of a successor-executor would provide:

I appoint my wife, ———- as her successor.

MODERN LEGAL FORMS, supra note 54, at § 9751.

148. Probate Act of 1975 § 6-16, ILL. REV. STAT. ch. 3, § 6-16 (1975) (formerly ILL. REV. STAT. ch. 3, § 81 (1939)), which provides:

Unless otherwise expressly provided by the will, an administrator with the will annexed has all the powers and duties of the executor under the will, but this does not excuse the administrator from giving security on his bond.

149. If the testator desires the appointed administrator to have the same powers as the executor, he or she may insert the phrase “including an administrator with the will annexed” after the words executor or personal representative in the clause appointing his executor. See O'BYRNE & McCORD, DESKBOOK FOR ILLINOIS ESTATE PLANNERS § 3C0.8 (1969).
often result in defeating the testator's actual intentions. The interpretation of a will lacking any expression of intent regarding a particular situation, may also result in defeating the testator's actual intentions, since the courts will turn to the provisions of the Probate Act to fill in the gaps in the distribution and administration of the testator's estate. Such a result can be avoided, if the testator's intention is clearly expressed in the will, since the court's interpretation must be governed by the testator's manifest intention.\textsuperscript{150}

A review of the provisions of the Probate Act subject to contrary will intent highlights the key areas in which the client's intentions must be ascertained. The client's intention must cover, not only the situations involved in these provisions of the Probate Act, but also contingencies which may occur during the client's lifetime or during the administration of his estate. Testamentary provisions must be drafted so as to unambiguously declare the testator's intentions.

Even though a clearly manifested intention is sufficient to contravene the statutory dictates of the Probate Act, it may be wise for the draftsman to refer to the Probate Act when desiring to provide in lieu of the Act's provisions. If the testator wishes to comply with the Act's provisions, a clearly expressed intent to do so could also be incorporated into the will by the draftsman. Such a provision would decrease the vulnerability of wills to expensive contest proceedings and provide the court with little opportunity to defeat the actual intention of the testator by judicial construction.

Louise M. Calvert

\textsuperscript{150} See notes 1-4 and accompanying text supra.