When the Beneficiary Predeceases: A Primer on Ohio's New (2012) Wills and Trusts Antilapse Statutes

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I. Background

A. Common law of lapse

1. At common law, if a will includes a gift to a devisee who predeceases the testator, the gift will lapse (i.e., fail) unless the will provides otherwise.

a. Thus, in the absence of a provision in the will to the contrary, the common law rule – still the law, if an antilapse statute is not applicable – is that gifts made by will are subject to an implied condition that the devisee survive the testator.

2. At common law, who takes a lapsed gift depends on the kind of gift that lapsed. There are four possibilities and four corresponding common law rules. These rules apply if and to the extent (i) the will does not provide otherwise and (ii) an antilapse statute is not applicable.

a. First, the lapse of a preresiduary gift causes the failed devise to fall into the residue.

i. Example 1. T's will provides: "I give Blackacre to A and the residue of my estate to B." A predeceased T. At common law, if the will does not address the possibility of A dying before T, and if an antilapse statute is not applicable, Blackacre will pass as a part of the residue to B.

b. Second, the lapse of a residuary gift causes the residue to pass by intestacy to the testator's heirs.

i. Example 2. T's will provides: "I give Blackacre to B and the residue of my estate to A." A predeaceased T. At common law, if the will does not address the possibility of A dying before T, and if an antilapse statute is not applicable, the residue of T's estate will pass to T's intestate heirs.

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c. Third, the lapse of a part of a residuary gift causes that part of the residue to pass by intestacy to the testator's heirs, rather than to the other residuary devisees. (This widely discredited common law rule, which has been rejected by statute in most jurisdictions, is sometimes referred to as the "no-residue-of-a-residue" rule.)

i. Example 3. T's will provides: "I give the residue of my estate equally to A and B." A predeceased T. At common law, if the will does not address the possibility of A dying before T, and if an antilapse or other statute is not applicable, A's half of the residue will pass to T's intestate heirs, rather than to B.

d. Fourth, if a testamentary gift is made to a class, and a member of the class predeceased the testator, the share of the gift that would have passed to the predeceased class member instead passes to the other members of the class.

i. Example 4. T's will provides: "I give Blackacre to A's children and the residue of my estate to B." A had two children, X and Y, but X predeceased T. At common law, if the will does not address the possibility of X dying before T, and if an antilapse statute is not applicable, Blackacre will pass entirely to Y, rather than half of Blackacre passing as a part of the residue of T's estate to B.

B. Antilapse statutes

1. Because the common law rules of lapse set forth above are thought to often produce results that are inconsistent with the presumed intention of the testator, most if not all states have enacted antilapse statutes to override them.

2. If applicable, such a statute typically substitutes for the predeceased devisee his or her descendants who, by representation, will take the failed gift instead of it passing under the otherwise applicable common law rule.

a. Note that technically, antilapse statutes are misnamed.

b. If an antilapse statute actually prevented a lapse, the devise to the predeceased devisee would pass as a part of his or her estate to his or her testate devisees or intestate heirs. As mentioned, instead, if an antilapse statute is applicable, the gift to the predeceased devisee still fails, but the antilapse statute operates to substitute for the predeceased devisee his or her descendants to receive the gift.

3. Fundamentally, antilapse statutes are rules of construction, not rules of law. Accordingly, they apply only when the testator has not expressed a contrary intent in the will.

a. In other words, if it is determined from the testator's will that the testator did not intend the antilapse statute to apply to a gift to a

devisee who predeceased the testator, the statute will not apply. That is the case even if the will does not expressly provide for an alternative taker of the devise that was to have passed to the predeceased devisee.

b. Rather, if (i) a devisee predeceases the testator, (ii) the will negates application of the antilapse statute, and (iii) the will does not expressly provide for an alternative taker for the lapsed devise, the applicable common law rule of lapse discussed above will instead apply.

4. Similarly, if a devisee predeceases the testator and an antilapse statute otherwise would apply, but no descendant of the predeceased devisee survives the testator, a substitute gift to the predeceased devisee's descendants cannot be made and the failed gift instead will pass under the applicable common law rule of lapse discussed above.

5. Importantly, antilapse statutes typically provide that they apply only to gifts to predeceased devisees who bore a specified relationship with the testator. For example, the Uniform Probate Code's (UPC's) antilapse statute, §2-603 (and Ohio's two new antilapse statutes, discussed below), apply only to a gift to a predeceased devisee who was a grandparent, descendant of a grandparent, or stepchild of the testator.

a. The rationale for such a limitation are the assumptions that (i) if a testator devised property to such a relative who predeceased the testator, the testator likely would have preferred that the devise pass to the relative's descendants rather than that it pass under the common law rules of lapse discussed above, but (ii) if a testator devised property to a non-relative who predeceased the testator, the testator likely would not have preferred the non-relative's descendants to the person or persons who would take under the applicable common law rule.

b. Antilapse statutes rarely apply to gifts to a predeceased spouse of a testator, because substituting the spouse's descendants for the spouse to receive the gift sometimes would cause the testator's property to pass to descendants of the spouse who were not the testator's descendants, but instead were his or her step-descendants.

C. Revocable trusts

1. Traditionally, the lapse doctrine – requiring a devisee to survive the testator in order to take – applied only to wills; it was not applicable to gifts made under revocable trust instruments.

2. Similarly, in most jurisdictions, traditional antilapse statutes applied only to failed gifts passing by will; they were not applicable to revocable trust instruments.

3. Rather, if the settlor of a revocable trust provided for trust property to be distributed at the settlor's death to a beneficiary who predeceased the settlor, and if the trust instrument did not provide for that contingency, the gift would pass under future interest property law, not under the doctrine of lapse or an antilapse statute.

    a. Example 5. S's revocable trust instrument provided that at S's death, the trust assets were to be distributed to S's child, C. C, however, predeceased S (and the trust instrument did not provide for that contingency). Absent legislation to the contrary, in most states C would be treated as having had a vested remainder in the trust assets (subject to divestment by S's exercise of S's reserved power to revoke the trust or amend its terms). Thus, C's vested remainder would have passed at C's death as a part of his or her estate to his or her devisees (if C died testate) or heirs (if C died intestate). Upon S's subsequent death (without S having provided for the contingency of C's prior death or S having revoked the trust or amended its terms), the trust assets would be distributable to C's heirs or devisees (or their successors).

4. Note that under these rules, very different results could arise if a decedent provided for property to pass at the decedent's death to a person who predeceased him or her, depending on whether the decedent had used a revocable trust instrument or a will for the disposition of his or her property.

    a. Example 6. Assume that (i) P was single and had one child, C; (ii) C was married to S; (iii) C had one child, GC; (iv) P's estate plan provided for all of P's property to pass to C at P's death; (v) P's estate plan did not provide for the possibility of C predeceasing P; (vi) C predeceased P, leaving a will that devised C's estate to S; and (vii) P then died survived by GC and S.

    b. If P had used a will, the devise to C would have lapsed and P's estate would pass to GC under the jurisdiction's antilapse statute.

    c. By contrast, if P had used a revocable trust, C's vested (subject to divestment) remainder would have passed as a part of C's estate to S, so that at P's death, the assets in P's trust would be distributable to S.

    d. To avoid such anomalous results, and because revocable trusts typically are used as will substitutes and generally should be subject to the same rules that apply to wills, many states, including Ohio with its 2012 antilapse legislation, have enacted statutes to extend the lapse and antilapse rules to revocable (and, in many states, including Ohio, irrevocable) trusts.

II. Ohio's former antilapse statute

A. Ohio's former antilapse statute was R.C. §2107.52.

1. Under the 2012 legislation, former R.C. §2107.52 was repealed and replaced with a new antilapse statute that also is numbered 2107.52.

B. The key features of former R.C. §2107.52 were:

1. As a rule of construction, the statute did not apply if "a contrary intention is manifested in the will."

2. The statute applied only to testamentary gifts to a "relative" of the testator who predeceased the testator.

a. "Relative" was defined to include (i) anyone who was related to the testator by consanguinity (i.e., blood) and (ii) anyone the testator had designated as an heir under the procedure set forth in R.C. §2105.15 (under which a person can designate someone as the designator's heir to take as if the designatee were a child if the designator dies intestate).

3. The statute applied not only to testamentary gifts to relatives who were living when the testator executed the will but predeceased the testator, but also to testamentary gifts to relatives who were not living when the testator executed the will.

4. The statute rejected the common law "no-residue-of-a-residue" rule, described above.

a. Thus, if the testator named multiple residuary devisees and one or more, but not all, predeceased the testator, the failed portion of the residue (that did not pass to descendants of the predeceased residuary devisee because, for example, he or she was not a relative of the testator's or had no descendants who survived the testator) was to pass to the surviving residuary devisees, prorata, rather than to the testator's intestate heirs.

5. Perhaps most important, the statute applied only to failed gifts under wills; it was not applicable to revocable trusts.

a. Although the Ohio Supreme Court had applied the antilapse statute to a revocable trust in *Dollar Savings & Trust Company of Youngstown v. Byrne*, 529 N.E.2d 1261 (Ohio 1988), that decision effectively was overruled prospectively by amendments to R.C. §§ 2107.01 and 2107.52, under which it was made clear that the anti-lapse statute was limited to failed gifts under wills and did not apply to trusts.

b. Thus, prior to the enactment of the new trusts antilapse statute (R.C. §5808.19), unless the instrument provided otherwise, the remainder beneficiary of a revocable trust held a vested remainder (subject to defeasance by the settlor's exercise of the reserved

power to revoke or amend). If the remainder beneficiary died before the settlor, the vested remainder passed through his or her probate estate to his or her will devisees or intestate heirs. (For a case to that effect, decided before *Dollar Savings* and the resulting amendments to R.C. §§2107.01 and 2107.52, see *First National Bank of Cincinnati v. Tenney*, 165 Ohio St. 513, 138 N.E.2d 15 (1956).)

III. The new (2012) trusts antilapse statute (R.C. §5808.19)

A. Introduction

1. Effective March 22, 2012, new R.C. §5808.19 is an antilapse statute for trusts. A copy is attached as Appendix A. The new statute was based on two UPC statutes (UPC §2-707, applicable to trusts, and UPC §2-603, applicable to wills), but also modeled on less complex trusts antilapse statutes recently enacted in Florida and Massachusetts.

2. A significant impetus for Ohio's new statute was a desire to address the issue of what to do about a predeceased beneficiary in the revocable trust context with lapse/antilapse rules similar to those that apply to wills, particularly since revocable trusts are so commonly used as substitutes for wills.

3. New §5808.19, however, is not limited to revocable trusts, but also applies to irrevocable trusts.

B. Implied condition of survivorship

1. There are two fundamental rules of the new trusts antilapse statute. First, unless the governing instrument expresses the settlor's intent to the contrary, a beneficiary's future interest under the terms of a trust is contingent on the beneficiary's surviving the "distribution date" by at least 120 hours. See division (B)(2)(a).

a. In effect, if the instrument is silent on the issue of a beneficiary dying before the distribution date, the statute imposes a condition of survivorship similar to the one that underlies the doctrine of lapse under the law of wills.

2. The "distribution date" the beneficiary must survive by at least 120 hours is "the time when the future interest is to take effect in possession or enjoyment." See division (A)(4).

a. Example 7. Settlor, S, created a revocable trust for S for life. The trust instrument provided that at S's death, the assets remaining in the trust were to be distributed to R. Thus, the date of S's death would be the "distribution date" under the statute (because that is when R's future interest would take effect in possession or enjoyment). Unless the instrument expresses a contrary intent, R's

future interest is contingent on R surviving S by at least 120 hours. If R does not do so, R's future interest fails.

b. Example 8. O created a revocable trust for O's spouse, S, for life, remainder to O's child, C. O died, survived by S and C. Unless the instrument expresses a contrary intent, C's future interest is contingent on C's surviving S's death (the distribution date) by at least 120 hours.

C. Substitute gift to predeceased beneficiary's descendants

1. The second fundamental rule of the new trusts antilapse statute is that if a beneficiary of a future interest does not survive the distribution date by at least 120 hours, his or her descendants who do so will be substituted, per stirpes, to receive the gift, but only if the deceased beneficiary was a grandparent, a descendant of a grandparent, or a stepchild of the transferor. See division (B)(2)(b).

a. Thus, in Example 7, at S's death, the trust assets would be distributed to R's descendants, per stirpes, if R were S's grandparent, a descendant of S's grandparent, or S's stepchild.

b. Similarly, in Example 8, at S's death, the trust assets would be distributed to C's descendants, per stirpes, but only if C were O's grandparent, a descendant of O's grandparent, or O's stepchild.

2. In effect, new R.C. §5808.19 converts what was a vested remainder under prior law (subject, in the case of a revocable trust, to divestment by the settlor's exercise of the reserved power to revoke or amend) to a contingent remainder conditioned on the beneficiary's surviving the distribution date by at least 120 hours. (As a result, the new statute effectively overturns the *Tenney* case, discussed above on page 6.)

D. When a substitute gift will not be made to a predeceased beneficiary's descendants

1. In three circumstances a substitute gift will not be created in the descendants of a predeceased beneficiary whose remainder was contingent on surviving the distribution date by at least 120 hours.

2. First, if the terms of the trust provide for an alternative gift if a beneficiary of a future interest does not survive the distribution date by at least 120 hours, the alternative taker will take, rather than the predeceased beneficiary's descendants.

3. Second, if a beneficiary of a future interest does not survive the distribution date by at least 120 hours, his or her descendants cannot be substituted to take the gift if the predeceased beneficiary did not have any descendants who survive the distribution date by at least 120 hours. See division (D).

a. Example 9. Settlor, S, created a revocable trust for S for life. The trust instrument provided that at S's death (which would be the

distribution date), the assets remaining in the trust were to be distributed to R. If the instrument did not express a contrary intent, R's future interest was contingent on R surviving S by at least 120 hours. If R did not do so, but no descendant of R's did either, a substitute gift to R's descendants could not be made.

4. Third, a substitute gift will not be made to the descendants of a beneficiary who does not survive the distribution date by at least 120 hours if the predeceased beneficiary was not a grandparent, a descendant of a grandparent, or a stepchild of the transferor. See division (D).

    a. In Example 9, if R did not survive S by at least 120 hours, but one or more descendants of R did, a substitute gift would not be created in those descendants of R's if R was not a grandparent, a descendant of a grandparent, or a stepchild of S's.

E. If (i) a beneficiary of a future interest does not survive the distribution date by 120 hours; (ii) the instrument does not provide for an alternative taker in that circumstance; and (iii) the predeceased beneficiary either had no descendants who survive the distribution date by 120 hours or was not a grandparent, descendant of a grandparent, or stepchild of the transferor, who takes?

1. The answer to that question depends on how the future interest that failed was created. There are four possible outcomes.

2. First, if the future interest was created in a preresiduary trust created under the transferor's will, the devisees of the residue of the testator's estate will take. See division (D)(2).

    a. Example 10. D's will left (i) Blackacre in trust for D's brother, B, for life, remainder to B's child, N, and (ii) the residue of D's estate to D's spouse, S. D died, survived by B, N, and S. N, who had no descendants, predeceased B. At B's subsequent death, the remaining trust assets will be distributable to S.

3. Second, if the future interest was created in a preresiduary trust created under the settlor's revocable trust instrument, the beneficiaries of the residue of the settlor's revocable trust will take. See division (D)(3).

    a. Example 11. Same facts as in Example 10, except that D had used a revocable trust instrument instead of a will to dispose of D's property at D's death. Again, S will take.

4. Third, if the future interest was created by the exercise of a power of appointment, the property will pass under the donor's taker-in-default-of-exercise clause, if any. See division (D)(1).

    a. Example 12. Assume (i) settlor created a trust for Spouse for life, remainder to such of the settlor's descendants as Spouse appoints by will, or to the settlor's descendants, by representation, if Spouse does not exercise the power; (ii) Spouse died survived by multiple children and grandchildren of the settlor's; (iii) Spouse's will

exercised the power by appointing the property in trust for a child of the settlor's, Child, for life, remainder to Child's own child, Grandchild; (iv) Grandchild, who had no descendants, predeceased Child; and (v) Child then died. Spouse's exercise of the power created a future interest in trust in Grandchild. Because the instrument did not address the possibility of Grandchild dying before Child, Grandchild's future interest was contingent on Grandchild surviving Child's death – the distribution date – by at least 120 hours. Because Grandchild did not do so (and no descendants of Grandchild did either), Grandchild's future interest failed and the property remaining in the trust at Child's death would be distributed to the takers in default of Spouse's exercise of the power (the settlor's descendants, by representation, who survived Child's death by at least 120 hours).

5. Fourth, if a future interest that failed (again, because the beneficiary did not survive the distribution date by at least 120 hours, the instrument did not provide for that possibility, and the predeceased beneficiary either had no descendants who survived the distribution date by at least 120 hours or was not a grandparent, descendant of a grandparent, or stepchild of the transferor) is not disposed of in one of the three ways described above, the property that was the subject of the failed interest will pass to the transferor's intestate heirs, determined as if the transferor had died intestate on the distribution date. See division (D)(4).

   a. Example 13. Under settlor's revocable trust instrument, at settlor's death, the trust was to continue for settlor's brother, B, for life, remainder to the settlor's niece, N. B and N survived the settlor, but N predeceased B. B then died, not survived by any descendants of N's. The trust assets would be distributed to the settlor's heirs as if the settlor had died intestate on the date of B's death.

6. Recall that the new trusts antilapse statute, R.C. §5808.19, applies to irrevocable as well as revocable trusts. Thus, it is possible that a future interest could fail under the new statute and the settlor could be living on the distribution date. The rules described above will still apply and the trust property will not revert to the settlor.

   a. Example 14. Settlor, S, created an irrevocable inter vivos trust for settlor's brother, B, for life, remainder to settlor's niece, N. The trust instrument did not address the possibility of N dying before B, which is what occurred. At B's subsequent death, survived by S, the trust assets would not be distributed to S, but would instead be distributed to S's heirs as if S had died intestate on the date of B's death.

F. Class gifts

1. The new trusts antilapse statute applies to class gifts, as well as to gifts to individuals. Thus, the statute provides that if a future interest class gift is

made, and a beneficiary/class member (i) does not survive the distribution date by at least 120 hours and (ii) was a grandparent, descendant of a grandparent, or a stepchild of the transferor, a substitute gift is created in the surviving descendants of the predeceased beneficiary/class member. See division (B)(2)(b)(ii).

2. The statute, however, provides that it is not applicable to future interests in the form of a class gift "to 'issue,' 'descendants,' 'heirs of the body,' 'heirs,' 'next of kin,' 'relatives,' or 'family,' or a class described by language of similar import." See division (B)(2)(b)(ii). In *Castillo v. Ott*, 28 N.E.3d 157, 2015 -Ohio- 905 (Ohio Ct. App. 2015), the court interpreted that language to make the statute inapplicable to a future interest to a testator's "children."

3. The quoted, class gift language was derived from UPC §§ 2-603 (antilapse for wills) and 2-707 (antilapse for trusts). A comment to UPC §2-603 explains why the antilapse/substitute gift approach of the statutes is not applicable to class gifts "to 'issue,' 'descendants,' 'heirs of the body,' 'heirs,' 'next of kin,' 'relatives,' or 'family,' or a class described by language of similar import":

> In line with modern policy, subsection (b)(2) continues the pre-1990 Code's approach of expressly extending the antilapse protection to class gifts. Subsection (b)(2) applies to single-generation class gifts … in which one or more class members fail to survive the testator (by 120 hours) leaving descendants who survive the testator (by 120 hours); in order for the section to apply, it is not necessary that any of the class members survive the testator (by 120 hours). Multiple-generation class gifts, i.e., class gifts to "issue," "descendants," "heirs of the body," "heirs," "next of kin," "relatives," "family," or a class described by language of similar import are excluded, however, because antilapse protection is unnecessary in class gifts of these types. They already contain within themselves the idea of representation, under which a deceased class member's descendants are substituted for him or her.

4. Because a class gift to "children" is not such a multiple-generation class gift, and does not have its own internal system of representation, it (and other class gifts to single generation classes) should be subject to the antilapse/substitute gift provisions of new R.C. §5808.19. To make that clear, the council of the Estate Planning, Trust, and Probate Law section of the OSBA has proposed amending division (B)(2)(b)(ii) of the statute to add the following italicized and underlined language:

> If the devise is in the form of a class gift, other than a devise to "issue," "descendants," "heirs of the body," "heirs," "next of kin," "relatives," or "family," or a class described by language of similar

import *that includes more than one generation*, a substitute gift is created in the surviving descendants of any deceased devisee.

a. This proposed amendment was approved by the OSBA's Council of Delegates in early 2016 and is expected to be presented to the General Assembly for enactment in 2017.

G. Survivorship language

1. The new statute's antilapse/substitute gift rules are rules of construction, meaning that they only apply if the settlor does not express a contrary intent in the governing instrument. See division (B)(2).

a. As a practical matter, that means that well drafted instruments that address the possibility of a beneficiary dying before the distribution date, and provide for an alternative disposition of the trust assets in that circumstance, will not be subject to the statute.

2. There has been a significant amount of wills litigation on the question of whether survivorship language in a will is sufficient to negate the application of an antilapse statute, even if the will does not expressly provide an alternative disposition for the devise that was to have passed to the predeceased devisee.

3. Example 15. A classic example of the problem is a will of a testator, T, that provides: "I give Blackacre to my child, C, if C survives me. I give the residue of my estate to my spouse, S, if S survives me." C dies during T's lifetime, leaving a child, GC. T then dies, survived by S and GC. If the antilapse statute applies, GC takes Blackacre; if not, it passes to S.

a. The majority, common law rule in cases like this is that the "if-C-survives-me" language is treated as expressing T's intent that the antilapse statute not apply if C dies before T (even though the instrument does not expressly provide for an alternative gift in that circumstance), and thus precludes application of the statute. Consequently, in Example 15, absent a statute to the contrary, in most states S would take Blackacre.

b. That also would have been the result under Ohio's former wills antilapse statute, R.C. §2107.52. As stated in Ohio Jurisprudence 3d, Decedents' Estates, §629: "When the testator uses words of survivorship, indicating an intention that the legatee will take the gift only if outliving the testator, the statute against lapse does not apply" (citing *Shalkhauser v. Beach*, 14 Ohio Misc. 1, 43 Ohio Op. 2d 20, 233 N.E.2d 527 (Prob. Ct. 1968); *Polen v. Baker*, 92 Ohio St. 3d 563, 2001-Ohio-1286, 752 N.E.2d 258 (2001); and *Cowgill v. Faulconer*, 57 Ohio Misc. 6, 8 Ohio Op. 3d 423, 11 Ohio Op. 3d 59, 385 N.E.2d 327 (C.P. 1978)).

4. The traditional rule – that use of survivorship language, even without an alternative disposition if a devisee predeceased the testator, negated application of an antilapse statute – has been rejected by the UPC. Under

both its antilapse wills statute (UPC §2-603) and its antilapse trust statute (UPC §2-707), words of survivorship are not, in the absence of additional evidence, a sufficient indication of an intent of the testator or settlor that the antilapse statute not apply if a beneficiary predeceased. (For a recent case also rejecting the traditional rule, but without a statute addressing the issue, see *Ruotolo v. Tietjen*, 890 A.2d 166 (Conn. App. 2006).)

5. Ohio's new trusts antilapse statute takes a unique approach to the survivorship language issue. Under it, one form of survivorship language is treated one way, and all other survivorship language is treated another.

    a. First, under R.C. §5808.19(C)(1), if the beneficiaries of a future interest class gift are simply described as "surviving" or "living," with no indication of when they must be surviving or living, the antilapse statute will apply, and thus a substitute gift will be made to the predeceased beneficiary's descendants, unless there is other language in the instrument or other evidence that the settlor intended otherwise.

        i. Example 16. The statute provides an example. If a gift in trust is made for the settlor's spouse for life, remainder to the settlor's surviving (or living) children (with no indication of when the children must be surviving (or living), the antilapse statute will apply if (i) a child of the settlor's predeceases the settlor's spouse; (ii) at least one descendant of the predeceased child survives the settlor's spouse by at least 120 hours; and (iii) there is no other language in the instrument or extrinsic evidence that the settlor did not want the antilapse statute to apply.

        ii. Example 17. S, who was 35 years old, was married to Spouse. They had two children, Child 1 and Child 2, who were ages 3 and 5. S created a revocable trust, the terms of which provided that at S's death, the trust would continue for Spouse for life, remainder to S's "surviving children" (or "living children"). The instrument did not indicate when the children must be surviving (or living). Following S's death years later, the trust continued for Spouse. But by the time of S's death (or at least before Spouse's death), Child 1 has children of his or her own, and then dies before the death of Spouse. If the survivorship language negated application of the antilapse statute, the grandchildren, who S may not have contemplated when S created the trust (given that his or her own children were only 3 and 5 years old at the time) would be disinherited, with the disinheritance likely being inadvertent and by mistake. Under R.C. §5808.19(C)(1), however, the antilapse statute would apply (absent language in the trust instrument or extrinsic evidence that S intended otherwise) and Child 1's

descendants would take half of the trust assets at Spouse's death.

b. Second, under division (C)(2), "attaching [other] words of survivorship to a future interest under the terms of a trust…is, in the absence of other language in the trust instrument or other evidence to the contrary, a sufficient indication of an intent to negate the application of" the antilapse/substitute gift provisions of the statute.

i. Examples 18 and 19. Division (C)(2) provides two examples of survivorship language that will, absent other language in the instrument or other evidence of a contrary intent, negate application of the statute: (i) a gift "for my spouse for life, then to my children who survive my spouse" and (ii) a gift "for my spouse for life, then to my then-living children."

c. Note that whether survivorship language is covered by division (C)(1) or by division (C)(2), the statute's applicable rule of construction will not apply if the instrument includes other language, or if there is other evidence, indicating that the settlor had a contrary intent. But in the absence of such other trust language or other evidence (i) the antilapse/substitute gift result will apply if the gift is a class gift and the beneficiaries are simply described as "surviving" or "living," with no indication of when they must be surviving or living, but (ii) the antilapse/substitute gift result will not apply if other survivorship language is used.

H. Effective date

1. R.C. §5808.19 became effective on March 22, 2012.

2. The statute applies to all trusts that became irrevocable on or after that date, even if created prior to that date. See division (E). Thus, if a settlor created a revocable trust prior to March 22, 2012, the new statute will apply to it if the settlor dies on or after that date.

3. It is expected that such retroactive application of the statute to revocable trusts will not violate the Ohio Constitution.

a. As stated in the Supreme Court's decision in *Bielat v. Bielat*, 87 Ohio St.3d 350, 721 N.E.2d 28 (Ohio 2000): "Section 28, Article II of the Ohio Constitution prohibits the General Assembly from passing retroactive laws and protects vested rights from new legislative encroachments."

b. The question raised is whether a remainder beneficiary under a revocable trust instrument of a living settlor has a vested right protected by the Ohio Constitution from being adversely affected by subsequently enacted, retroactive legislation.

c. Under the traditional, common law of future interests, the remainder beneficiary's interest is vested, subject to divestment through the settlor's exercise of the power of revocation or amendment. That was the basis of the Supreme Court's decision in *Tenney*, cited and discussed above on page 6, holding that a remainder interest in a revocable trust of a living settlor passed through the predeceased remainder beneficiary's estate to her residuary devisee.

d. On the other hand, a remainder beneficiary of a revocable trust of a living settlor does not have an interest that can be protected under the recently enacted Ohio Trust Code, because during the settlor's life, the trustee's duties are owed exclusively to the settlor. See R.C. §5806.03(A).

i. That makes a remainder beneficiary's interest in a revocable trust of a living settlor essentially the same as an expectancy of a devisee under a will of a living testator.

ii. That is important because, as noted by the Supreme Court in *Bielat*, a devisee under the will of a living person does not have a vested right with respect to the living person's property: "This court has held that '[u]ntil a * * * will has been probated * * *, the legatee under such will has no rights whatever. A mere expectation of property in the future is not a vested right.' Carpenter v. Denoon (1876), 29 Ohio St. 379, 386."

iii. See also *Lewis v. Star Bank*, N.A., 90 Ohio App.3d 709, 630 N.E.2d 418 (Ohio App. 1993), which denied standing to remainder beneficiaries of a revocable trust in their suit against the settlor's attorney and trustee.

4. As noted above, the statute does not apply to trusts that were irrevocable before March 22, 2012. To avoid having the statute apply to part, but not all of a trust, it will not apply at all to a trust that was irrevocable before March 22, 2012, even if property was added to it after that date. See division (E).

IV. The new (2012) wills antilapse statute (R.C. §2107.52)

A. Introduction

1. As discussed above, Ohio has long had an antilapse statute for wills.

2. Ohio's new trusts antilapse statute (R.C. §5808.19) was not based on Ohio's former wills antilapse statute. Rather, the new trusts antilapse statute was based on the UPC's wills antilapse statute (§2-603), as well as its trusts antilapse statute (§2-707) and recent trusts antilapse statutes enacted in Massachusetts and Florida.

3. To have consistency between Ohio's new antilapse rules for trusts and its antilapse rules for wills, the former wills antilapse statute (R.C. §2107.52) was repealed and replaced with a new wills antilapse statute (also numbered R.C. §2107.52).

    a. New R.C. §2107.52, a copy of which is attached as Appendix B, was modeled after the new trusts antilapse statute (R.C. §5808.19) and the UPC's two wills antilapse statutes (§§2-603 and 2-604).

4. New R.C. §2107.52's effective date, like that of the new trusts antilapse statute,was March 22, 2012. It applies to the wills of decedents who die on or after that date. See division (F).

B. Substantive differences between the former and new versions of R.C. §2107.52

1. The former statute applied to a devise to a devisee who predeceased the testator if the predeceased devisee was a "relative," which was broadly defined to include (i) anyone who was related to the testator by consanguinity (i.e., blood) and (ii) anyone the testator had designated as an heir under the procedure set forth in R.C. §2105.15.

    a. Consistent with the new trusts antilapse statute, new R.C. §2107.52 will apply only if the predeceased devisee was a grandparent, descendant of a grandparent, or stepchild of the testator. (If not, the common law rules of lapse, discussed at the beginning of these materials, will apply.) See division (B)(2).

2. The former statute applied "unless a contrary intention is manifested in the will." It did not, however, address the effect of a testator's use of words of survivorship on the question of whether the testator had manifested an intention that the antilapse/substitute gift result not apply if a devisee predeceased the testator. (As discussed on page 11, above, generally such language was interpreted as expressing the testator's intention that the antilapse statute not apply if the devisee predeceased the testator.)

    a. New R.C. §2107.52 addresses the survivorship language issue similarly to how it is addressed in the new trusts antilapse statute.

    b. Thus, "[a]ttaching the word 'surviving' or 'living' to a devise, such as a gift 'to my surviving (or living) children,' is not, in the absence of other language in the will or other evidence to the contrary, a sufficient indication of an intent to negate" the antilapse/substitute gift result if one of T's children does not survive T by 120 hours, but one or more descendants of the predeceased child do survive T by 120 hours. See division (C)(1).

    c. Similarly, "[a]ttaching other words of survivorship to a devise, such as 'to my child, if my child survives me,' is, in the absence of other language in the will or other evidence to the contrary, a sufficient indication of an intent to negate the application of" the substitute gift result of the statute. See division (C)(2).

3. Former R.C. §2107.52 did not address the question of whether the inclusion of a residuary clause in the will negates application of the antilapse statute.

   a. The new statute does so. Under it, generally, the inclusion of a residuary clause in a will is not a sufficient indication of a testator's intent to negate application of the antilapse statute. See division (C)(3).

      i. Example 20. T's will provided: "I give Blackacre to my niece, N, and the residue of my estate to my cousin, C." N predeceased T, leaving a child, GN. T was survived by C and GN. The residuary clause in favor of C, alone, will not negate GN taking Blackacre under the antilapse statute.

   c. If, however, the will specifically provides that upon lapse or failure, a nonresiduary gift, or nonresiduary gifts in general, pass under the residuary clause, the antilapse/substitute gift result will not apply. See division (C)(3).

      i. Example 21. T's will included several preresiduary gifts to named nieces and nephews and devised the residue of the estate, "including all lapsed devises," to T's brother, B. One of T's nephews who was a devisee under the will, N1, predeceased T, leaving a child, GN. T died survived by GN and B. The devise to N1 will not be saved by the antilapse statute for GN, but will instead pass with the residue to B.

4. Former R.C. §2107.52 did not address powers of appointment.

   a. Under the new statute, "devise" is defined to include the exercise of a power of appointment (see division (A)(3)) and "devisee" is defined to include an appointee under a power of appointment exercised by the testator's will. See division (A)(4)(c). Thus, under the new statute, descendants of a predeceased appointee under a power of appointment exercised by the testator's will may be substituted for the appointee to receive the appointed property at T's death.

      i. Example 22. T had a power of appointment over property in a trust created by T's parent, P. The permissible appointees were P's descendants. T's will exercised the power in favor of one of P's descendants, A, but A predeceased T. A descendant of A's, B, however, survived T. Unless the instrument under which P created the power of appointment expressly excludes the substitution of an appointee's descendants for the appointee, the appointed property will pass to B.

   b. For the descendants of a predeceased appointee of a power of appointment exercised by a testator's will to take the property that

had been appointed to the predeceased appointee, the predeceased appointee may be a grandparent, descendant of a grandparent, or stepchild of either (i) the donor (creator) of the power or (ii) the donee (holder) of the power.

Appendix A
Trusts Antilapse Statute

R.C. §5808.19 Anti-lapse provisions

(A) As used in this section, unless otherwise provided in any other provision in this section:

(1) “Beneficiary” means the beneficiary of a future interest and includes a class member if the future interest is in the form of a class gift.

(2) “Class member” means an individual who fails to survive the distribution date by at least one hundred twenty hours but who would have taken under a future interest in the form of a class gift had the individual survived the distribution date by at least one hundred twenty hours.

(3) “Descendant of a grandparent of the transferor” means an individual who would qualify as a descendant 5808.19of a grandparent of the transferor under the rules of construction that would apply to a class gift under the transferor's will to the descendants of the transferor's grandparent.

(4) “Distribution date,” with respect to a future interest, means the time when the future interest is to take effect in possession or enjoyment. The distribution date need not occur at the beginning or end of a calendar day but may occur at a time during the course of a day.

(5) “Future interest” means an alternative future interest or a future interest in the form of a class gift.

(6) “Future interest under the terms of a trust” means a future interest that was created by a transfer creating a trust or a transfer to an existing trust, or by an exercise of a power of appointment to an existing trust, that directs the continuance of an existing trust, designates a beneficiary of an existing trust, or creates a trust.

(7) “Per stirpes” means that the shares of the descendants of a beneficiary who does not survive the distribution date by at least one hundred twenty hours are determined in the same way they would have been determined under division (A) of section 2105.06 of the Revised Code if the beneficiary had died intestate and unmarried on the distribution date.

(8) “Revocable trust” means a trust that was revocable immediately before the settlor's death by the settlor alone or by the settlor with the consent of any person other than a person holding an adverse interest. A trust's characterization as revocable is not affected by the settlor's lack of capacity to exercise the power of revocation, regardless of whether an agent of the settlor under a power of attorney, or a guardian of the person or estate of the settlor, was serving.

(9) “Stepchild” means a child of the surviving, deceased, or former spouse of the transferor and not of the transferor.

(10) “Transferor” means any of the following:

(a) The donor and donee of a power of appointment, if the future interest was in property as a result of the exercise of a power of appointment;

(b) The testator, if the future interest was devised by will;

(c) The settlor, if the future interest was conveyed by inter vivos trust.

(B)

(1)

(a) As used in “surviving descendants” in divisions (B)(2)(b)(i) and (ii) of this section, “descendants” means the descendants of a deceased beneficiary or class member who would take under a class gift created in the trust.

(b) As used in divisions (B)(2)(b)(i) and (ii) of this section, “surviving beneficiaries” or “surviving descendants” means beneficiaries or descendants, whichever is applicable, who survive the distribution date by at least one hundred twenty hours.

(2) Unless a contrary intent appears in the instrument creating a future interest under the terms of a trust, each of the following applies:

(a) A future interest under the terms of a trust is contingent on the beneficiary's surviving the distribution date by at least one hundred twenty hours.

(b) If a beneficiary of a future interest under the terms of a trust does not survive the distribution date by at least one hundred twenty hours and if the beneficiary is a grandparent of the transferor, a descendant of a grandparent of the transferor, or a stepchild of the transferor, either of the following applies:

(i) If the future interest is not in the form of a class gift and the deceased beneficiary leaves surviving descendants, a substitute gift is created in the beneficiary's surviving descendants. The surviving descendants take, per stirpes, the property to which the beneficiary would have been entitled had the beneficiary survived the distribution date by at least one hundred twenty hours.

(ii) If the future interest is in the form of a class gift, other than a future interest to “issue,” “descendants,” “heirs of the body,” “heirs,” “next of kin,” “relatives,” or “family,” or a class described by language of similar

import, a substitute gift is created in the surviving descendants of the deceased beneficiary or beneficiaries. The property to which the beneficiaries would have been entitled had all of them survived the distribution date by at least one hundred twenty hours passes to the surviving beneficiaries and the surviving descendants of the deceased beneficiaries. Each surviving beneficiary takes the share to which the surviving beneficiary would have been entitled had the deceased beneficiaries survived the distribution date by at least one hundred twenty hours. Each deceased beneficiary's surviving descendants who are substituted for the deceased beneficiary take, per stirpes, the share to which the deceased beneficiary would have been entitled had the deceased beneficiary survived the distribution date by at least one hundred twenty hours. For purposes of division (B)(2)(b)(ii) of this section, "deceased beneficiary" means a class member who failed to survive the distribution date by at least one hundred twenty hours and left one or more surviving descendants.

(C) For purposes of this section, each of the following applies:

(1) Describing a class of beneficiaries as "surviving" or "living," without specifying when the beneficiaries must be surviving or living, such as a gift "for my spouse for life, then to my surviving (or living) children," is not, in the absence of other language in the trust instrument or other evidence to the contrary, a sufficient indication of an intent to negate the application of division (B)(2)(b) of this section.

(2) Subject to division (C)(1) of this section, attaching words of survivorship to a future interest under the terms of a trust, such as "for my spouse for life, then to my children who survive my spouse" or "for my spouse for life, then to my then-living children" is, in the absence of other language in the trust instrument or other evidence to the contrary, a sufficient indication of an intent to negate the application of division (B)(2)(b) of this section. Words of survivorship under division (C)(2) of this section include words of survivorship that relate to the distribution date or to an earlier or an unspecified time, whether those words of survivorship are expressed as condition-precedent, condition-subsequent, or in any other form.

(3) A residuary clause in a will is not a sufficient indication of an intent that is contrary to the application of this section, whether or not the will specifically provides that lapsed or failed devises are to pass under the residuary clause. A residuary clause in a revocable trust instrument is not a sufficient indication of an intent that is contrary to the application of this section unless the distribution date is the date of the settlor's death and the revocable trust instrument specifically provides that upon lapse or failure the nonresiduary devise, or nonresiduary devises in general, pass under the residuary clause.

(D) If, after the application of divisions (B) and (C) of this section there is no surviving taker of the property, and a contrary intent does not appear in the instrument creating the future interest, the property passes in the following order:

(1) If the future interest was created by the exercise of a power of appointment, the property passes under the donor's gift-in-default clause, if any, which clause is treated as creating a future interest under the terms of a trust.

(2) If no taker is produced under division (D)(1) of this section and the trust was created in a nonresiduary devise in the transferor's will or in a codicil to the transferor's will, the property passes under the residuary clause in the transferor's will. For purposes of division (D)(2) of this section, the residuary clause is treated as creating a future interest under the terms of a trust.

(3) If no taker is produced under divisions (D)(1) and (2) of this section, the transferor is deceased, and the trust was created in a nonresiduary gift under the terms of a revocable trust of the transferor, the property passes under the residuary clause in the transferor's revocable trust instrument. For purposes of division (D)(3) of this section, the residuary clause in the transferor's revocable trust instrument is treated as creating a future interest under the terms of a trust.

(4) If no taker is produced under divisions (D)(1), (2), and (3) of this section, the property passes to those persons who would succeed to the transferor's intestate estate and in the shares as provided in the intestate succession law of the transferor's domicile if the transferor died on the distribution date. Notwithstanding division (A)(10) of this section, for purposes of division (D)(4) of this section, if the future interest was created by the exercise of a power of appointment, “transferor” means the donor if the power is a nongeneral power, or the donee if the power is a general power.

(E) This section applies to all trusts that become irrevocable on or after the effective date of this section. This section does not apply to any trust that was irrevocable before the effective date of this section even if property was added to the trust on or after that effective date.

Appendix B
Wills Antilapse Statutes

R.C. §2107.52 Anti-lapse provisions.

(A) As used in this section:

(1) “Class member” means an individual who fails to survive the testator but who would have taken under a devise in the form of a class gift had the individual survived the testator.

(2) “Descendant of a grandparent” means an individual who qualifies as a descendant of a grandparent of the testator or of the donor of a power of appointment under either of the following:

(a) The rules of construction applicable to a class gift created in the testator's will if the devise or the exercise of the power of appointment is in the form of a class gift;

(b) The rules for intestate succession if the devise or the exercise of the power of appointment is not in the form of a class gift.

(3) “Devise” means an alternative devise, a devise in the form of a class gift, or an exercise of a power of appointment.

(4) “Devisee” means any of the following:

(a) A class member if the devise is in the form of a class gift;

(b) An individual or class member who was deceased at the time the testator executed the testator's will or an individual or class member who was then living but who failed to survive the testator;

(c) An appointee under a power of appointment exercised by the testator's will.

(5) “Per stirpes” means that the shares of the descendants of a devisee who does not survive the testator are determined in the same way they would have been determined under division (A) of section 2105.06 of the Revised Code if the devisee had died intestate and unmarried on the date of the testator's death.

(6) “Stepchild” means a child of the surviving, deceased, or former spouse of the testator or of the donor of a power of appointment and not of the testator or donor.

(7) “Surviving devisee” or “surviving descendant” means a devisee or descendant, whichever is applicable, who survives the testator by at least one hundred twenty hours.

(8) “Testator” includes the donee of a power of appointment if the power is exercised in the testator's will.

(B)

(1) As used in “surviving descendants” in divisions (B)(2)(a) and (b) of this section, “descendants” means the descendants of a deceased devisee or class member under the applicable division who would take under a class gift created in the testator's will.

(2) Unless a contrary intent appears in the will, if a devisee fails to survive the testator and is a grandparent, a descendant of a grandparent, or a stepchild of either the testator or the donor of a power of appointment exercised by the testator's will, either of the following applies:

(a) If the devise is not in the form of a class gift and the deceased devisee leaves surviving descendants, a substitute gift is created in the devisee's surviving descendants. The surviving descendants take, per stirpes, the property to which the devisee would have been entitled had the devisee survived the testator.

(b) If the devise is in the form of a class gift, other than a devise to “issue,” “descendants,” “heirs of the body,” “heirs,” “next of kin,” “relatives,” or “family,” or a class described by language of similar import, a substitute gift is created in the surviving descendants of any deceased devisee. The property to which the devisees would have been entitled had all of them survived the testator passes to the surviving devisees and the surviving descendants of the deceased devisees. Each surviving devisee takes the share to which the surviving devisee would have been entitled had the deceased devisees survived the testator. Each deceased devisee's surviving descendants who are substituted for the deceased devisee take, per stirpes, the share to which the deceased devisee would have been entitled had the deceased devisee survived the testator. For purposes of division (B)(2)(b) of this section, “deceased devisee” means a class member who failed to survive the testator by at least one hundred twenty hours and left one or more surviving descendants.

(C) For purposes of this section, each of the following applies:

(1) Attaching the word “surviving” or “living” to a devise, such as a gift “to my surviving (or living) children,” is not, in the absence of other language in the will or other evidence to the contrary, a sufficient indication of an intent to negate the application of division (B) of this section.

(2) Attaching other words of survivorship to a devise, such as “to my child, if my child survives me,” is, in the absence of other language in the will or other evidence to the contrary, a sufficient indication of an intent to negate the application of division (B) of this section.

(3) A residuary clause is not a sufficient indication of an intent to negate the application of division (B) of this section unless the will specifically provides that upon lapse or failure the nonresiduary devise, or nonresiduary devises in general, pass under the residuary clause.

(4) Unless the language creating a power of appointment expressly excludes the substitution of the descendants of an appointee for the appointee, a surviving descendant of a deceased appointee of a power of appointment may be substituted for the appointee under this section, whether or not the descendant is an object of the power of appointment.

(D) Except as provided in division (A), (B), or (C) of this section, each of the following applies:

(1) A devise, other than a residuary devise, that fails for any reason becomes a part of the residue.

(2) If the residue is devised to two or more persons, the share of a residuary devisee that fails for any reason passes to the other residuary devisee, or to other residuary devisees in proportion to the interest of each in the remaining part of the residue.

(3) If a residuary devise fails for any reason in its entirety, the residue passes by intestate succession.

(E) This section applies only to outright devises and appointments. Devises and appointments in trust, including to a testamentary trust, are subject to section 5808.19 of the Revised Code.

(F) This section applies to wills of decedents who die on or after the effective date of this section.