Rel: June 24, 2022

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2021-2022

1200706

Andrew Shirley

v.

Deborah Diane Dawkins, as personal representative of the Estate of Donald Wayne Shirley, Sr., deceased

Appeal from Shelby Probate Court
(PR-2020-000964)

WISE, Justice.

This appeal arises from a petition for a declaratory judgment filed by the plaintiff below, Deborah Diane Dawkins, as the personal representative of the estate of Donald Wayne Shirley, Sr. ("Shirley"),

deceased. The defendant below, Andrew Shirley ("Andrew), Shirley's grandson and the son of Shirley's son, Donald Wayne Shirley, Jr. ("Donald"), appeals from judgment of the Shelby Probate Court declaring that § 43-8-224, Ala. Code 1975, Alabama's antilapse statute, does not apply in this case and that, therefore, Dawkins was the sole beneficiary under the terms of Shirley's will. We reverse and remand.

Facts and Procedural History

Shirley executed will on August 20, 2014. The will first provided that he gave, devised, and bequeathed all of his property, whether real, personal, or otherwise, to his wife, Nancy Lynette King Shirley ("Nancy"). Article three of the will provided:

> "In the event my beloved wife, Nancy Lynette King Shirley, named in the immediately preceding article of this Will, should predecease me, or we should die at or about the same time or under circumstances that are such that the order of our deaths cannot be ascertained with reasonable certainty, then in any of such events, and only in any such events, I give, devise and bequeath all of my property, whether real, personal or mixed, chooses in action, wheresoever situated, that I may own or have the power of testamentary disposition over at the time of my death, I hereby give, devise, and bequeath to my beloved children, Donald Wayne Shirley, Jr. and Deborah Diane Shirley Dawkins, in equal shares, to share and share alike."

Article five of the will included the following provision:

> **"THE OMMISION [sic] on my part to devise and bequeath any part of my Estate to any of my relatives and to anyone other than those heretofore named hereinabove is purposely made by me."**

(Bold typeface in original.)

Nancy died on March 14, 2020; Donald died on August 6, 2020; and Shirley died on August 7, 2020. On November 25, 2020, Dawkins filed a petition for letters of administration and a petition to probate Shirley's will. The probate court subsequently issued letters of administration to Dawkins and admitted the will to probate.

On February 1, 2021, Dawkins filed a petition for a declaratory judgment as to Andrew's purported interest under the will. Dawkins asserted that the will made no mention of Andrew; that the will included the provision that Shirley's omission to devise and bequeath any part of his estate to any of his relatives or anyone other than the named beneficiaries was purposely made by him; that Andrew was alive and known to Shirley at the time of the execution of the will; and that Dawkins believed that Andrew was not entitled to a share of Shirley's estate because the will "specifically omitted Andrew." Dawkins argued:

> "Alabama Code Section 43-8-2, provides that a will must be 'liberally construed' to promote its underlying purposes, one of which is to 'make effective the intent of a decedent in

the distribution of his property.' 43-8-2(b)(2). It further allows someone to omit family from inheriting their property pursuant to their will. If '[i]t appears from the will that the omission was intentional' then the omission is permitted. See Ala. Code § 43-8-91(a)(1), Gray v. Gray, 947 So. 2d 1045, 1048 (Ala. 2006). Mr. Shirley did not provide for his grandson, Andrew Shirley, in his Last Will and Testament. He did not utilize any 'per stirpes' language nor mention the issue or descendants of any of his children. In fact, Mr. Shirley went so far as to intentionally omit 'any of my relatives' not otherwise mentioned in his Last Will and Testament. It is clear from the four-corners of his Last Will and Testament that Mr. Shirley's intention was to omit his grandson.

"... The Will provides for Mr. Shirley's children, in equal shares, to share and share alike. The phrase 'to share and share alike' by itself does not create a presumption of per stirpes inheritance sufficient to override the clear intention of the testator. See Lee v. Moxley, [286 Ala. 134,] 237 So. 2d 656 (Ala. 1970). In fact, unless a contrary intention is stated in a will, the provision for a division 'equally' or 'share and share alike' between or among two or more persons means per capita and not per stirpes. Jackson v. Baker, [207 Ala. 519,] 93 So. 469 (Ala. 1922) (stating that utilizing the phrase '"equally" divided between the devisees and legatees therein named and that they shall take "per capita" excludes all idea of an intention by the testator that any of them should take per stirpes, and to so hold would violate the plain letter of the will as well as the only reasonable intention to be gathered from the language used'). There is no ambiguity in the instant case. The intention of the testator is clear from the plain language utilized in capitalized and bold print in his Last Will and Testament. It is clear from [sic] Mr. Shirley specifically omitted all other relatives, other than his two children, in his Last Will and Testament. Further, applying the intention of Mr. Shirley to allow [Dawkins] to solely inherit his estate does not conflict with any other law."

The parties subsequently advised the probate court that they did not believe that a hearing would be necessary, but they asked for an opportunity to submit briefs in support of their positions. Andrew filed an opposition and brief in response to Dawkins's petition for a declaratory judgment. Citing Norwood v. Barclay, 298 So. 3d 1051 (Ala. 2019), Andrew asserted that the antilapse statute should apply to this case and asked the probate court to deny Dawkins's petition for a declaratory judgment. In her reply to Andrew's response, Dawkins argued that the antilapse statute is inapplicable in this case and that Norwood is factually distinguishable.

On June 1, 2021, the probate court entered a judgment in which it stated, in pertinent part:

> "The Court having considered the Pleadings and briefs filed by the parties, the Court hereby FINDS as follows:
>
> "....
>
> "4. In the event that Nancy Lynette King Shirley predeceased the decedent, Article Three of the decedent's Last Will and Testament bequeaths all of his property, real, personal and mixed to his children, Donald Wayne Shirley, Jr. and Deborah Diane Shirley Dawkins, in equal shares, to share and share alike.

"5. Donald Wayne Shirley, Jr. passed away on August 6, 2020; prior to the decedent.

"6. Deborah Diane Shirley Dawkins survived her father.

"7. The decedent's Last Will and Testament does not mention or name Andrew Shirley, his grandson.

"8. Article Five of the decedent's Last Will and Testament provides as follows: 'The omission on my part to devise and bequeath any part of my Estate to any of my relatives and to anyone other than those heretofore named hereinabove is purposely made by me.'

"9. It is not disputed, that Andrew Shirley was alive and known to the decedent at the time of the execution of his Last Will and Testament.

"10. The testator's intent expressed in his will controls the legal effect of the disposition of his property. Ala. Code § 43-8-222 (1975).

"11. 'The intention of the testator is always the polestar in the construction of wills, and … the cardinal rule is to give that intention effect if it is not prohibited by law.' Hansel v. Head, 106 So. 2d 1142, 1144 (Ala. 1997), quoting deGraaf v. Owen, 598 So. 2d 892, 895 (Ala. 1992).

"12. The decedent utilized the language 'share and share alike' rather than 'per stirpes' when making the disposition of his property

> in Article Three of his Last Will and Testament. Further the language contained in Article Five clearly sets out that the omission of any relative was a purposeful act.
>
> "13. The decedent's estate would escheat to the state in the event that both of his children predeceased him. In this case, however, the decedent was survived by his daughter[;] thus she is the sole beneficiary under the terms of the decedent's Last Will and Testament."

(Capitalization in original.) This appeal followed.

Discussion

Andrew argues that the probate court erroneously "found the default application of the antilapse statute to be precluded by the language contained in Article 5 of the testator's will." Andrew's brief at p. 8.

Section 43-8-222, Ala. Code 1975, provides:

> "The intention of a testator as expressed in his will controls the legal effect of his dispositions. The rules of construction expressed in the succeeding sections of this article [i.e., Title 43, Chapter 8, Article 8] apply unless a contrary intention is indicated by the will."

The antilapse statute, § 43-8-224, Ala. Code 1975, provides:

> "If a devisee who is a grandparent or a lineal descendant of a grandparent of the testator is dead at the time of execution of the will, fails to survive the testator, or is treated

> as if he predeceased the testator, the issue of the deceased devisee who survive the testator by five days take in place of the deceased devisee and if they are all of the same degree of kinship to the devisee they take equally, but if of unequal degree then those of more remote degree take by representation. One who would have been a devisee under a class gift if he had survived the testator is treated as a devisee for purposes of this section whether his death occurred before or after the execution of the will."

Thus, if the antilapse statute applies in this case, Andrew would take in place of Donald.

In Norwood v. Barclay, 298 So. 3d 1051 (Ala. 2019), this Court addressed the issue whether the antilapse statute applied in that case. In Norwood, Josephine Mary Damico executed a will on June 16, 2013. That will left the entirety of her estate to her sister, Sara Frances Cox. She further expressly disinherited all of her other heirs. Damico died on June 15, 2017. Elise Barclay filed a petition to probate the will and a petition for letters testamentary in the Jefferson Probate Court. On July 10, 2017, the probate court in that case granted the petition and issued letters testamentary to Barclay ("the personal representative"). On July 21, 2017, Damico's nieces, Regina Norwood and Rita Patelliro ("the nieces"), filed a "motion for letters of instruction" in which they asserted that Cox had predeceased Damico; that they were Cox's two surviving

children; and that they were entitled to inherit Damico's estate in place of Cox pursuant to the antilapse statute. They further asserted that Damico had other siblings who had predeceased her and that those other siblings all had surviving children. The personal representative filed a response in which she asserted that Damico's estate should pass through intestacy. Ultimately, the probate court entered an order in which it held that the antilapse statute did not apply because Damico had clearly stated that she had disinherited all of her relatives except for Cox. The nieces appealed to this Court.

On appeal, this Court addressed whether the antilapse statute applied:

> "The nieces argue that they are entitled to inherit the sister's share devised by the testator's will based on the application of the antilapse statute and that the antilapse statute operates to prevent the other nieces and nephews from receiving any portion of the testator's estate and also prevents the estate from escheating to the State of Alabama.
>
> "The personal representative, on the other hand, argues that the will unambiguously represents the testator's intent to disinherit all of her heirs except the sister and, therefore, pursuant to § 43-8-222, [Ala. Code 1975,] the antilapse statute cannot be applied because its application is contrary to the testator's intent. Accordingly, she argues, the testator's estate should pass by intestacy and the testator's estate, therefore, escheats to the State of Alabama pursuant to § 43-8-44, [Ala. Code 1975,] which provides that, '[i]f there is no taker under

the provisions of this article, the intestate estate passes to the state of Alabama.'

"Section 43-8-222 provides that '[t]he intention of a testator as expressed in his will controls the legal effect of his dispositions. The rules of construction expressed in the succeeding sections of this article apply unless a contrary intention is indicated by the will.' This Court has explained:

> "'"In Alabama the law is well settled that 'the intention of the testator is always the polestar in the construction of wills, and that the cardinal rule is to give that intention effect if it is not prohibited by law.'" Hansel v. Head, 706 So. 2d 1142, 1144 (Ala. 1997), quoting deGraaf v. Owen, 598 So. 2d 892, 895 (Ala. 1992). "To determine the intent of a testator or testatrix, the court must look to the four corners of the instrument, and if the language is unambiguous and clearly expresses the testator's or testatrix's intent, then that language must govern." Born v. Clark, 662 So. 2d 669, 671 (Ala. 1995).'

"Cottingham v. McKee, 821 So. 2d 169, 171-72 (Ala. 2001).

"The antilapse statute, which is a rule of construction, provides, in part:

> "'If a devisee who is a grandparent or a lineal descendant of a grandparent of the testator is dead at the time of execution of the will, fails to survive the testator, or is treated as if he predeceased the testator, the issue of the deceased devisee who survive the testator by five days take in place of the deceased devisee and if they are all of the same degree of kinship to the devisee they take equally, but if of unequal degree then those of more remote degree take by representation. ...'

"§ 43-8-224[, Ala. Code 1975].

"In her will, the testator specifically directed as follows:

> "'I direct that all items of my estate, whether real, personal or mixed, wheresoever situated and howsoever held, of which I shall die seized and possessed or to which I may be entitled to at the time of my death, I give, devise, and bequeath to my sister SARAH FRANCES COX.
>
> "'I have intentionally omitted all my heirs who are not specifically mentioned herein, and I hereby generally and specifically disinherit each, and any and all persons whomsoever claiming to be or who may be lawfully determined to be my heirs at law, except as otherwise mentioned in this will.'

"(Capitalization in original.)

"The sister predeceased the testator, and the testator had made no provision for that contingency. Ordinarily, the gift would lapse, and the application of the antilapse statute would result in the nieces taking the sister's share.

"We must determine, however, whether a 'contrary intention ... indicated by the will' prevents the default application of the antilapse statute. § 43-8-222. If the antilapse statute is inapplicable and the testator's estate cannot be disposed of by her will, the testator's estate would pass by intestacy. See § 43-8-40, Ala. Code 1975 ('Any part of the estate of a decedent not effectively disposed of by his will passes to his heirs as prescribed in the following sections of this chapter.').

"This Court has not had the occasion to consider a situation similar to this one. We 'presume that, when a testator undertakes to make a will of all his property, he did not intend to die intestate as to any of it or during any period of time.' Roberts v. Cleveland, 222 Ala. 256, 259, 132 So. 314, 316 (1931). Moreover, this Court 'on a number of occasions has affirmed the doctrine that every doubt in a will must be resolved in favor of a testator's heirs at law.' Rhodes v. First Alabama Bank, Montgomery, 699 So. 2d 204, 209 (Ala. Civ. App. 1997)(citing Festorazzi v. First Nat'l Bank of Mobile, 288 Ala. 645, 656, 264 So. 2d 496, 506 (1972), and Wilson v. Rand, 215 Ala. 159, 160, 110 So. 3, 4 (1926)). Further, '[i]t is a well-settled principle that the law does not favor escheat, because society prefers to keep real property within the family as most broadly defined, or within the hands of those whom the deceased has designated.' 27A Am. Jur. 2d Escheat § 13 (2019). See also District of Columbia v. Estate of Parsons, 590 A.2d 133, 138 (D.C. 1991)('Moreover, escheats are not favored by the law, "and any doubt whether property is subject to escheat is resolved against the state." 27 Am. Jur. 2d Escheat § 10 (1966).'); In re Estate of Melton, 128 Nev. 34, 54, 272 P.3d 668, 681 (2012) ('The law disfavors escheats.'); Stokan v. Estate of Cann, 100 Ark. App. 216, 220, 266 S.W.3d 210, 213 (2007)('Considered as a whole, our intestacy statutes disfavor escheats. This sound policy echoes the common law. 30A C.J.S. Escheat § 1 (2007).'); and In re Estate of Shannon, 107 A.D.2d 1084, 486 N.Y.S.2d 502 (N.Y. App. Div. 1985)(explaining that a presumption arising from the mere existence of a will is that the testator intended to avoid escheat).

"Alabama's antilapse statute is modeled after § 2-605, the antilapse provision in the original Uniform Probate Code. See Hellums v. Reinhardt, 567 So. 2d 274, 277 (Ala. 1990)('Alabama's current probate code was derived from the Uniform Probate Code ("UPC") drafted by the National Conference of Commissioners on Uniform State Laws.'). The comments to § 2-603, which is the revised and renumbered

antilapse provision in the Uniform Probate Code, state that '[a]n anti-lapse statute is a rule of construction, designed to carry out presumed intention. In effect, Section 2-603 declares that when a testator devises property "to A (a specified relative)," the testator (if he or she had thought further about it) is presumed to have wanted to add: "but if A is not alive (120 hours after my death), I devise the property in A's stead to A's descendants (who survive me by 120 hours)."'

"Under the Restatement of Property, antilapse 'statutes should be given the widest possible sphere of operation and should be defeated only when the trier of fact determines that the testator wanted to disinherit the line of descent headed by the deceased devisee....' Restatement (Third) of Property: Wills & Donative Transfers § 5.5 (1999). See Rhodes v. First Alabama Bank, Montgomery, 699 So. 2d at 209 ('Alabama law is in accord with the fundamental principle underlying the Restatement.').

"Although the testator expressly disinherited all of her heirs with the exception of the sister, her will was executed while the sister was living. 'In arriving at the proper meaning of the will the terms used should be interpreted in the light of the contingencies which the testatrix could foresee.' Cooper v. Birmingham Tr. & Sav. Co., 248 Ala. 549, 555, 28 So. 2d 720, 726 (1947). The testator could foresee that, if she devised the entirety of her estate to her sister, the sister could thereafter devise it, upon her death, to her own issue, the nieces. Moreover, the testator could foresee that, if her sister predeceased her, as happened, the nieces would inherit the sister's share pursuant to the antilapse statute. If the testator wanted to prevent the nieces from inheriting her estate, she could have included language in her will preventing the application of the antilapse statute. The testator gave no indication in her will that the antilapse statute should not apply. See, e.g., Annotation, Testator's Intention as Defeating Operation of Antilapse Statute, 63 A.L.R.2d 1172 § 7 (1959)

> ('The expression of an intention to exclude from participation persons not mentioned in the will continues to be held insufficient in itself to exclude such persons from taking by virtue of the application of the antilapse statute.'). See also Erich Tucker Kimbrough, Lapsing of Testamentary Gifts, Antilapse Statutes, and the Expansion of Uniform Probate Code Antilapse Protection, 36 Wm. & Mary L. Rev. 269, 288 (Oct. 1994)('Accordingly, the disinheritance does not mean that the testator intends that the disinherited individual not take if the ancestor has died. Furthermore, applying an antilapse statute to allow a disinherited heir to take a lapsed devise makes sense when viewed in light of the rule that disinherited heirs cannot be prevented from taking by intestacy.').
>
> "Accordingly, based on the above applicable rules of construction and the persuasive authority interpreting those, we hold that the antilapse statute applies in this case and that the nieces are entitled to take the sister's share of the testator's estate."

Norwood, 298 So. 3d 1053-55.

Similarly, in this case, Shirley's will was executed while Donald was still living. Applying the reasoning of Norwood, Shirley could have foreseen that, if he devised his estate to Donald and Dawkins, Donald could, upon his death, devise his share of the estate to Andrew. Additionally, Shirley could have foreseen that, if Donald predeceased him, Andrew would inherit Donald's share pursuant to the antilapse statute. However, Shirley's will did not give any indication that the antilapse statute should not apply.

Dawkins and the probate court both point to the fact that Shirley used the language "share and share alike" rather than "per stirpes" as an indication that Dawkins, as the sole living named beneficiary, should receive Donald's share of the estate. However, in Kling v. Goodman, 236 Ala. 297, 181 So. 745 (1938), Mary Kling's will "devised and bequeathed all her property, real, personal, and mixed, to her four children, naming them, share and share alike." 236 Ala. at 298, 181 So. at 745. One of those children, Charles William Kling, predeceased Mary. Charles had five children who survived Mary. This Court noted that, pursuant to the antilapse statute that was in effect at the time, Charles's five children were "entitled to take the share bequeathed to their father in the will of their grandmother." Kling, 236 Ala. at 298, 181 So. at 745. Similarly, in Leyden v. Bentley, 286 Ala. 174, 238 So. 2d 342 (1970), the will provided: "'I will, devise and bequeath unto my niece, Mary Upchurch Bentley and to my nephew, Dr. Samuel Earl Upchurch, share and share alike all of the personal property I may own at the time of my death.'" 286 Ala. at 176, 238 So. 2d at 343 (emphasis added). This Court noted:

> "But Dr. Upchurch, one of the legatees under the will, died on June 5, 1968, a few days before the death of the testatrix, and his untimely death has been to a large degree the cause of this litigation. Dr. Upchurch not being a

> descendant of testatrix (§ 16, Title 61, Code 1940), the legacy to him lapsed and as to the interest which he would have taken if he had survived testatrix, the testatrix died intestate. Kimbrough v. Dickinson, 247 Ala. 324, 24 So. 2d 424 [(1946)]; Morgan County Nat. Bank of Decatur v. Nelson, 244 Ala. 374, 13 So. 2d 765 [(1943)]."

Thus, the mere use of the term "share and share alike" does not support the conclusion that Shirley intended that, if either of his children predeceased him, the surviving child would take his entire estate or the conclusion that the antilapse statute does not apply to Donald's share of the estate.

Conclusion

Based on the reasoning set forth in Norwood, King, and Leyden, we hold that the antilapse statute applies in this case and that Andrew is entitled to take Donald's share of Shirley's estate.

REVERSED AND REMANDED.

Parker, C.J., and Shaw, Bryan, Mendheim, and Stewart, JJ., concur.

Bolin, J., concurs specially, with opinion, which Sellers, J., joins.

Mitchell, J., concurs specially, with opinion.

BOLIN, Justice (concurring specially).

I concur with the majority opinion; that is, under the particular dispositive and limiting language of the will at issue in this case, I agree that the testator in this case intended for his grandson to receive the testator's predeceased son's share of the testator's estate. I write specially only to address, and lament, the problem of wills that fail to both specifically and unambiguously dispose of a testator's entire estate to specific beneficiaries that survive him or her.

The testator in this case, Donald Wayne Shirley, Sr., executed his will on August 20, 2014, leaving his entire estate, pursuant to article two, to his "beloved wife, Nancy Lynette King Shirley," and, if she predeceased him, pursuant to article three, to his two "beloved children, Donald Wayne Shirley, Jr. and Deborah Diane Shirley Dawkins, in equal shares, to share and share alike." In article four, the testator further bequeathed a specific vehicle to each of the children should his wife predecease him. The will also provided, in article five, which was located between the part of the will addressing the appointment of a personal representative and his testimonium:

> "The ommision [sic] on my part to devise and bequeath any part of my Estate to any of my relatives and to anyone

> other than those heretofore named hereinabove is purposely made by me."

(Capitalization and bold typeface omitted.)

The testator's wife died on March 14, 2020. The testator's son died on August 6, 2020, and the testator died on August 7, 2020. According to the brief filed by the personal representative of the testator's estate, all three died from complications related to COVID-19. The testator's daughter petitioned the probate court for letters of administration cum testamento annexo.[1] She then petitioned for a declaratory judgment, arguing that the testator's son's death prior to the death of the testator triggered the operation of § 43-8-224, Ala. Code 1975, the antilapse statute but that, under the antilapse statute, article five of the will ("the omission clause") evinced a contrary intent on the part of the testator sufficient to defeat the application of that statute. The learned probate-court judge concluded that the testator had purposefully omitted any relative not otherwise mentioned in the will and that that omission

[1]In his will, the testator had nominated his wife to serve as personal representative of his estate and had nominated his son as alternate personal representative. The daughter was not named in the will as an alternate personal representative in the event that the wife and son predeceased him.

precluded the testator's grandson from inheriting the son's share of the testator's estate, because the grandson had been alive when the testator had executed his will and had purposely omitted from inheriting from his estate any relatives not named in the will.

At common law, when a named beneficiary under a will predeceased the testator, the share of the deceased beneficiary did not pass to his or her descendants but, rather, "lapsed." The reason for such a lapse is because a will by its nature is "ambulatory" and does not become operative until the death of the testator, and, therefore, until the occurrence of that event, the devise to the beneficiary has never vested. 1 Jarman on Wills 307 (5th Am. ed. 1893). Antilapse statutes are intended to prevent devises from lapsing when the intended deceased beneficiary has descendants.

Alabama's antilapse statute, § 43-8-224, Ala. Code 1975, requires construction of a will in such a way that the devise passes to the surviving heir or heirs, within a statutorily defined degree of kinship, of a person who was originally designated by the will to receive the devise but who predeceased the testator. Specifically, § 43-8-224 provides:

> "If a devisee who is a grandparent or a lineal descendant of a grandparent of the testator is dead at the time of

> execution of the will, fails to survive the testator, or is treated as if he predeceased the testator, the issue of the deceased devisee who survive the testator by five days take in place of the deceased devisee and if they are all of the same degree of kinship to the devisee they take equally, but if of unequal degree than those of more remote degree take by representation. One who would have been a devisee under a class gift if he had survived the testator is treated as a devisee for purposes of this section whether his death occurred before or after the execution of the will."

Section 43-8-225, Ala. Code 1975, provides:

> "(a) Except as provided in section 43-8-224 if a devise other than a residuary devise fails for any reason, it becomes a part of the residue.
>
> "(b) Except as provided in section 43-8-224 if the residue is devised to two or more persons and the share of one of the residuary devisees fails for any reason, his share passes to the other residuary devisee, or to other residuary devisees in proportion to their interests in the residue."

Section 43-8-224 saves a devise from lapsing in the event that a devisee within its scope dies and is survived by a statutorily specified descendant or group of descendants who survive the testator. Section 43-8-225 provides for the disposition in the event that the devise is not saved by § 43-8-224.

> "The overwhelming majority of states have partially modified the common law lapse rule by enacting antilapse legislation. Antilapse laws provide that, when a predeceased

> beneficiary is a close relative of the testator (usually a descendent of the testator's grandparents), then the gift does not lapse. Instead, the property flows to the predeceased beneficiary's descendants. ...
>
> "However, antilapse statutes are default rules that can be displaced by expressions of contrary intent -- and here the trouble begins."

Reid Kress Weisbord & David Horton, Boilerplate and Default Rules in Wills Law: An Empirical Analysis, 103 Iowa L. Rev. 663, 676-77 (2018) (footnotes omitted).

I note that it is often difficult for a probate court (or this Court, for that matter) to apply any general rule of will construction, such as Alabama's antilapse statute, to a testator's written words expressing how the testator wants his or her estate to be distributed when the testator is no longer here to speak for himself or herself. Specifically, and at the heart of the issue before us, are the questions whether the testator in this case was aware of the antilapse statute and, thus, relied upon it to provide an alternate distribution in the event that one (or both) of his children predeceased him, rather than simply adding a clause to the will providing that, under such circumstances, a predeceased child's heirs should take in his or her place, per stirpes. Under the facts of this case,

where the testator, the testator's wife, and the testator's son all died within a five-month period during the COVID-19 pandemic, there is logical support for applying the antilapse statute; otherwise, if both the testator's children had predeceased him, the testator's estate would have escheated to the state. However, we are also faced with the question whether the testator was aware of the antilapse statute but attempted to prevent its applicability through the inclusion of the omission clause, which contained the "in equal shares, to share and share alike" provision that is, in essence, per capita in nature.[2]

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[2]Cf. In re Estate of Kuruzovich, 78 S.W.3d 226, 228 (Mo. Ct. App. 2002) ("Here, Testator never used the terms 'per capita' or 'per stirpes' in his will; he simply directed that named beneficiaries were to 'share and share alike.' While it is true that terms of equality, such as 'share and share alike,' whether referring to specifically named individuals or to a class of individuals, have been interpreted 'to cause an equal division of the property [on a] per capita and not per stirpes' basis, Wooley v. Hays, 285 Mo. 566, 226 S.W. 842, 844-45 (Mo. 1920), Mavrakos v. Papadimitriou,31 S.W.2d 161, 164 (Mo. App. 1960), it is equally true that terms such as these 'have application in determining the mode of distribution among a class and not in establishing the members of that class.' [In re Estate of] Renner, 895 S.W.2d [180] at 182 [(Mo. Ct. App. 1995)] (emphasis supplied). Accordingly, Testator's use of the term 'share and share alike,' standing alone, only evidences an intent on how the property shall ultimately be divided, not who will ultimately take. One purpose of the anti-lapse statute is to answer the precise question of who will be the ultimate beneficiaries. Applying the foregoing principles, we conclude the trial court erred when it found that the 'share and share alike' language evidenced Testator's intent to give Respondent all the

Recently, this Court addressed what a testator intended by including a clause disinheriting heirs not specifically named in the will. In Norwood v. Barclay, 298 So. 3d 1051 (Ala. 2019), the testator's will devised her entire estate to her sister. The sister predeceased the testator. The will contained a disinheritance clause providing:

> "'I have intentionally omitted all my heirs who are not specifically mentioned herein, and I hereby generally and specifically disinherit each, and any and all persons whomsoever claiming to be or who may be lawfully determined to be my heirs at law, except as otherwise mentioned in this will.'"

Norwood, 298 So. 3d at 1054. After testator died and probate proceedings were initiated, the testator's nieces, the daughters of the testator's deceased sister, filed a "motion for letters of instruction" in the probate proceedings asserting that, pursuant to the antilapse statute, they were entitled to receive the testator's estate in place of the sister.

This Court determined that the issue was whether the disinheritance clause in the will expressed a "contrary intention" preventing the default application of the antilapse statute. See § 43-8-

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residuary estate if George and Anna died before Respondent, but left lineal descendants.").

222, Ala. Code 1975. ("The intention of a testator as expressed in his will controls the legal effect of his dispositions. The rules of construction expressed in the succeeding sections of this article [i.e., Title 43, Chapter 8, Article 8] apply unless a contrary intention is indicated by the will."). This Court reasoned:

> "This Court has not had the occasion to consider a situation similar to this one. We 'presume that, when a testator undertakes to make a will of all his property, he did not intend to die intestate as to any of it or during any period of time.' Roberts v. Cleveland, 222 Ala. 256, 259, 132 So. 314, 316 (1931). Moreover, this Court 'on a number of occasions has affirmed the doctrine that every doubt in a will must be resolved in favor of a testator's heirs at law.' Rhodes v. First Alabama Bank, Montgomery, 699 So. 2d 204, 209 (Ala. Civ. App. 1997) (citing Festorazzi v. First Nat'l Bank of Mobile, 288 Ala. 645, 656, 264 So. 2d 496, 506 (1972), and Wilson v. Rand, 215 Ala. 159, 160, 110 So. 3, 4 (1926)). Further, '[i]t is a well-settled principle that the law does not favor escheat, because society prefers to keep real property within the family as most broadly defined, or within the hands of those whom the deceased has designated.' 27A Am. Jur. 2d Escheat § 13 (2019). See also District of Columbia v. Estate of Parsons, 590 A.2d 133, 138 (D.C. 1991)('Moreover, escheats are not favored by the law, "and any doubt whether property is subject to escheat is resolved against the state." 27 Am. Jur. 2d Escheat § 10 (1966).'); In re Estate of Melton, 128 Nev. 34, 54, 272 P.3d 668, 681 (2012) ('The law disfavors escheats.'); Stokan v. Estate of Cann, 100 Ark. App. 216, 220, 266 S.W.3d 210, 213 (2007) ('Considered as a whole, our intestacy statutes disfavor escheats. This sound policy echoes the common law. 30A C.J.S. Escheat § 1 (2007).'); and In re Estate of Shannon, 107

A.D.2d 1084, 486 N.Y.S.2d 502 (N.Y. App. Div. 1985) (explaining that a presumption arising from the mere existence of a will is that the testator intended to avoid escheat).

"Alabama's antilapse statute is modeled after § 2-605, the antilapse provision in the original Uniform Probate Code. See Hellums v. Reinhardt, 567 So. 2d 274, 277 (Ala. 1990) ('Alabama's current probate code was derived from the Uniform Probate Code ("UPC") drafted by the National Conference of Commissioners on Uniform State Laws.'). The comments to § 2-603, which is the revised and renumbered antilapse provision in the Uniform Probate Code, state that '[a]n anti-lapse statute is a rule of construction, designed to carry out presumed intention. In effect, Section 2-603 declares that when a testator devises property "to A (a specified relative)," the testator (if he or she had thought further about it) is presumed to have wanted to add: "but if A is not alive (120 hours after my death), I devise the property in A's stead to A's descendants (who survive me by 120 hours)."'

"Under the Restatement of Property, antilapse 'statutes should be given the widest possible sphere of operation and should be defeated only when the trier of fact determines that the testator wanted to disinherit the line of descent headed by the deceased devisee....' Restatement (Third) of Property: Wills & Donative Transfers § 5.5 (1999). See Rhodes v. First Alabama Bank, Montgomery, 699 So. 2d at 209 ('Alabama law is in accord with the fundamental principle underlying the Restatement.').

"Although the testator expressly disinherited all of her heirs with the exception of the sister, her will was executed while the sister was living. 'In arriving at the proper meaning of the will the terms used should be interpreted in the light of

> the contingencies which the testatrix could foresee.' Cooper v. Birmingham Tr. & Sav. Co., 248 Ala. 549, 555, 28 So. 2d 720, 726 (1947). The testator could foresee that, if she devised the entirety of her estate to her sister, the sister could thereafter devise it, upon her death, to her own issue, the nieces. Moreover, the testator could foresee that, if her sister predeceased her, as happened, the nieces would inherit the sister's share pursuant to the antilapse statute. If the testator wanted to prevent the nieces from inheriting her estate, she could have included language in her will preventing the application of the antilapse statute. The testator gave no indication in her will that the antilapse statute should not apply. See, e.g., Annotation, Testator's Intention as Defeating Operation of Antilapse Statute, 63 A.L.R.2d 1172 § 7 (1959) ('The expression of an intention to exclude from participation persons not mentioned in the will continues to be held insufficient in itself to exclude such persons from taking by virtue of the application of the antilapse statute.'). See also Erich Tucker Kimbrough, Lapsing of Testamentary Gifts, Antilapse Statutes, and the Expansion of Uniform Probate Code Antilapse Protection, 36 Wm. & Mary L. Rev. 269, 288 (Oct. 1994) ('Accordingly, the disinheritance does not mean that the testator intends that the disinherited individual not take if the ancestor has died. Furthermore, applying an antilapse statute to allow a disinherited heir to take a lapsed devise makes sense when viewed in light of the rule that disinherited heirs cannot be prevented from taking by intestacy.').
>
> "Accordingly, based on the above applicable rules of construction and the persuasive authority interpreting those, we hold that the antilapse statute applies in this case and that the nieces are entitled to take the sister's share of the testator's estate."

Norwood, 298 So. 3d at 1054-55 (emphasis added).

Like the specific disinheritance clause in Norwood, the omission clause in this case purports to omit devises to any relatives not specifically named in the will. Comparing the two clauses, I believe the disinheritance clause in Norwood more strongly indicates the possibility of the testator's desire that the antilapse statute not apply. The common thread between Norwood and the case at bar, however, is the complete absence of any language specifically negating applicability of the antilapse statute. The Norwood Court reasoned that the terms used in the will should be interpreted in light of the contingencies that the testator could have foreseen at the time she executed the will and that the testator could have foreseen that if she devised her entire estate to her sister and her sister survived her, her sister could then devise it to her own children. As in this case, the testator in Norwood could have used language preventing the default application of the antilapse statute upon the foreseeable circumstance that her sister predeceased her.

Here, the testator failed to anticipate or specifically provide for an alternate distribution in the event of the early death of his son. Like in Norwood, the testator in this case could have foreseen that his grandson might benefit indirectly from the devise to the testator's son if the son

survived the testator. No language in the will, including, importantly, the specific language of the omission clause itself, expressly excluded application of the antilapse statute.[3] Additionally, the testator expressed no hostility toward the grandson, as do some disinheritance clauses that

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[3]In other jurisdictions, courts have held that antilapse statutes applied even though the testator disinherited certain relatives. Estate of Tolman, 181 Cal. App. 4th 1433, 104 Cal. Rptr. 3d 924 (2010) (holding that provision in will, stating that testator intentionally omitted to provide for any heirs except "as otherwise specifically provided for herein" did not preclude testator's deceased daughter's child from taking a gift in daughter's place pursuant to California's antilapse statute, where the will did not provide that the gift would lapse if daughter predeceased testator, and the will did provide that other gifts would lapse if the designees predeceased the testator); Lindsey v. Burkemper, 107 S.W.3d 354, 360 (Mo. Ct. App. E.D. 2003)(holding that disinheritance clause did not override the Missouri antilapse statute where the disinheritance clause did not express testator's intent to disinherit the descendants of a nephew as the surviving lineal descendants of the testator's named devisee); In re Estate of Scott, 659 So. 2d 361, 362 (Fla. Dist. Ct. App. 1995) (finding that simply because the testator chose not to provide for a relative in her will did not prevent the relative from inheriting under the Florida antilapse statute and that, "[i]n order to cut off an heir's right to succession, a testator must do more than evince an intention that the heir shall not share in the estate; the testator must make a valid disposition of the property passing under the will"); Bruner v. First Nat'l Bank, 250 Or. 590, 443 P.2d 645 (1968)(holding that will clause expressly disinheriting certain named persons, to whom nominal bequests were made, including the son of testator's daughter, who was principal beneficiary under will and predeceased the testator, did not evidence testator's intention to preclude grandson from taking under Oregon antilapse statute but, rather, was designed simply to prevent any claim by him as pretermitted heir).

specifically name those individuals or classes of individuals who are excluded from inheriting.

"[V]irtually the entire law of wills derives from the premise that an owner is entitled to dispose of his property as he pleases in death as in life." John H. Langbein, Substantial Compliance With the Wills Act, 88 Harv. L. Rev. 489, 491 (1975). As one law review article noted:

> "[C]ontracts are analogous [to wills]. As enforceable ones require both offer and acceptance, as well as consideration on both sides, there will always be at least two parties bearing a relevant intent with which to color the analysis or inform the result. Moreover, as contracts are formed between the living, there is no contextual determinant that one party must die by the time that litigation will arise.
>
> "A testator could die a day or a decade after executing a will. Irrespective of the temporal brevity between testamentary intent, will execution, and testator death, the very question over whether testamentary intent exists does not surface until probate, after the death of the sole party to have known with conviction whether it had been formed. The inability to question a decedent over intent makes its certainty tricky ...."

Katheleen R. Guzman, Intents and Purposes, 60 U. Kan. L. Rev. 305, 350-51 (2011)(emphasis added; footnotes omitted).

In conclusion, § 43-8-222 provides:

> "The intention of a testator as expressed in his will controls the legal effect of his dispositions. The rules of

> construction expressed in the succeeding sections of this article [i.e., Title 43, Chapter 8, Article 8, which includes § 43-8-224, the antilapse statute] apply unless a contrary intention is indicated by the will."

(Emphasis added.)

In this case, the intention of the testator regarding the ultimate issue in this appeal is not clearly expressed in his will. Accordingly, there also being no contrary intention indicated by the will concerning "a devisee who is ... a lineal descendant of a grandparent of the testator [who] … fails to survive the testator," §43-8-224, the antilapse statute provides the testator's implied intent that "the issue of the deceased devisee who survive the testator by five days take in place of the deceased devisee." Id.

I began this special writing with a lamentation concerning "the problem of wills that fail to both specifically and unambiguously dispose of a testator's entire estate to specific beneficiaries that survive him or her." Unfortunately, I end with it also.

Sellers, J., concurs.

MITCHELL, Justice (concurring specially).

I join the main opinion in full. I write separately to explain why, in my view, a testator's use of the language "share and share alike" does not indicate that he sought to avoid the antilapse rule set forth in § 43-8-224, Ala. Code 1975.

The appellee in this case, Deborah Diane Dawkins, as personal representative of the estate of her father, Donald Wayne Shirley, Sr., argues that her father's testamentary gift to her and her brother "in equal shares, to share and share alike," created a "per capita" division between the two siblings and, as a result, required that one sibling take the entire estate if the other sibling were to die before their father. The probate court adopted this reasoning, but in doing so it seems to have "confuse[d] two separate issues in will construction: who may take under the will and in what manner they will take." Belardo v. Belardo, 187 Ohio App. 3d 9, 15, 930 N.E.2d 862, 866 (2010).

Dawkins and the probate court are correct that equal-share or share-and-share-alike language creates a per capita rather than a per stirpes division. See Jackson v. Baker, 207 Ala. 519, 519, 93 So. 469, 469 (1922). But they misapprehended the legal effect of that division. As

other courts confronting similar arguments have explained, the terms "per capita" and "per stirpes" are legal terms of art, which "do not designate who will share in the estate but rather how the estate will be divided among those who do share." Belardo, 187 Ohio App. 3d at 15, 930 N.E.2d at 866 (emphasis added); see also In re Estate of Walters, 519 N.E.2d 1270, 1273 (Ind. Ct. App. 1988) ("[T]he term per stirpes and its companion, per capita, have application only to the mode of distribution of a bequest among a designated class. The terms have no function in the establishment of the class who shall take.").

"A per capita" division means that each of the named beneficiaries takes an amount equal to that taken by others, while a "per stirpes" division means that beneficiaries take according to their ancestor's share. To see this difference in action, imagine the following scenario: a testator has two daughters, A and B. A has two children of her own, A1 and A2, while B has none. A dies, followed by the testator. The testator's will specifies that his estate will be divided among his daughters and grandchildren. Under a per capita distribution, the one living child (B) and the two grandchildren (A1 and A2) each take a 1/3 share of the estate. Under a per stirpes distribution, A's children cannot take more than A

would have taken, so they each take 1/4 of the estate, while B takes 1/2 of the estate. Of course, the distinction between per capita and per stirpes is irrelevant in wills such as Shirley's, in which all devisees are members of the same generation. In such a scenario, a will's use of the language " 'equally, share and share alike' has 'no broader meaning than would be ascribed to the term "equally." ' " Martin v. Summers, 101 Ohio App. 3d 269, 272, 655 N.E.2d 424, 425 (1995) (quoting Godfrey v. Epple, 100 Ohio St. 447, 455, 126 N.E. 886, 888 (1919)). In other words, Shirley's gift to his children "in equal shares, share and share alike," likely just indicates that he desired each of them to receive a 50% interest in his estate; it does not reveal an intention to avoid the antilapse statute.[4]

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[4]Several courts in other jurisdictions have reached similar conclusions. See, e.g., Belardo, 187 Ohio App. 3d at 16, 930 N.E.2d at 867 (bequest "to my beloved sons," A and B, "share and share alike" does not preclude application of Ohio's antilapse statute, so when B predeceased the testator, B's son was entitled to take B's share); Martin, 101 Ohio App. 3d at 271, 655 N.E.2d at 425 (gift to testator's "son and wife, share and share alike," did not manifest an intent to defeat operation of Ohio's antilapse statute, but simply indicated that the wife and son were to receive equal portions); In re Estate of Sinner, No. 05-1593, Oct. 11, 2006 (Iowa Ct. App. 2006) (unpublished opinion) ("the words 'share and share alike' " merely "refer[] to the shares the designated individual beneficiaries are to take as among or between them" and do not connote an intention to devise the gift only to those individuals "who are living at the date the bequest … vests"); In re Estate of Delmege, 759 N.W.2d 812 (Iowa Ct. App. 2008) (unpublished opinion) (testator's gift to his brothers

The precedents cited in the main opinion cohere with this understanding, see ___ So. 3d at ____ (citing Kling v. Goodman, 236 Ala. 297, 181 So. 745 (1938), and Leyden v. Bentley, 286 Ala. 174, 238 So. 2d 342 (1970)), but they do not spell out their reasoning. For the reasons discussed above, I am convinced that the logic implicit in those

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and sisters "per capita" did not indicate an intention "that only the brothers and sisters who survived him would be his sole beneficiaries, to the exclusion of his pre-deceased sister's issue"); Kubiczky v. Wesbanco Bank Wheeling, 208 W. Va. 456, 458, 541 S.E.2d 334, 336 (2000) (a testator's instruction that his estate "be divided equally among my three (3) sisters, [Anna, Mary, and Helen], share and share alike, to the express exclusion of any other person or persons" did not prohibit Mary's grandson from taking Mary's share when Mary predeceased the testator); In re Estate of Renner, 895 S.W.2d 180, 182 (Mo. Ct. App. 1995) (language stating that bequest was to be distributed "per capita and not per stirpes" is not sufficient to override Missouri's antilapse statute, since those terms apply only when determining the mode of distribution among a class, not in establishing members of that class); In re Estate of Goldberg, 36 A.D.2d 631, 631-32, 319 N.Y.S.2d 116, 117-18 (1971) (gift to designees "per capita and not per stirpes" does not evince an intent to override New York's antilapse statute). I am not aware of any cases reaching a contrary conclusion. There are some cases holding that "share and share alike" language, when combined with survivorship language (e.g., "I leave my money to those of my children, A, B, and C, who survive me"), indicates that the testator intended to treat the designees "as a class" limited solely to the surviving designees. See In re Estate of Raymond, 276 Mich. App. 22, 29, 739 N.W.2d 889, 893 (2007), aff'd, 483 Mich. 48, 764 N.W.2d 1 (2009). See also ___ So.3d at ___ n.2 (Bolin, J., concurring specially). But the survivorship language, not the equal-share language, is what seems to be doing the work in those cases.

precedents is correct. With that explanation, I concur in the main opinion.