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Models of the Will and Negative Disinheritance

by Frederic S. Schwartz*

I. INTRODUCTION

The issue of so-called negative disinheritance arises when a testator provides in her will that a particular person or persons (whom I shall call the "negative beneficiary(s)") shall take none of the testator's property upon her death.¹ Under the orthodox (and still almost universal) rule, such a disinheritance provision² is ineffective.³ If the negative beneficiary becomes the testator's heir⁴ and some property passes in intestacy (because the testator has not named or described

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1. The issue is also raised when the testator provides that the negative beneficiary shall take no part of her property *in addition to* the property passing by an affirmative devise. See *infra* text at note 11.

2. The courts and commentators commonly use the term "negative disinheritance" to describe such a provision. *E.g.*, *In re Estate of Farber*, 204 N.W.2d 478, 481 (Wis. 1973); 4 WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS § 30.17 (1961). I do not favor that term; surely what we wish to characterize as "negative" is not the *disinheritance* itself—every disinheritance is negative in the sense that the heirs are deprived of property they would otherwise take—but the language that expresses the intent to disinherit. Thus, in my view, it is appropriate to speak of negative words (or language, etc.) of disinheritance (a statement that a certain heir shall receive no part of the estate) and affirmative words of disinheritance (language that disinherits the heirs by distributing all the testator's property, or the residue, to others). Throughout this Article, I shall use the expression "disinheritance provision" to refer to negative words of disinheritance. Although the phrase literally includes affirmative words of disinheritance as well, in the present context it should cause no confusion.

3. See, *e.g.*, *In re Estate of Levy*, 196 So. 2d 225, 229 (Fla. Dist. Ct. App. 1967); *Strohm v. McMullen*, 89 N.E.2d 383, 387 (Ill. 1949); *Coffman v. Coffman*, 8 S.E. 672 *passim* (Va. 1888) (reviewing several early cases); 4 BOWE & PARKER, *supra* note 2, § 30.17, at 115 & n.1; J. Andrew Heaton, Comment, *The Intestate Claims of Heirs Excluded by Will: Should "Negative Wills" Be Enforced?*, 52 U. CHI. L. REV. 177, 178 n.6 (1985) (citing cases).

4. The negative beneficiary may become the sole heir or one of several heirs.

beneficiaries for all her property), the negative beneficiary will take his intestate share of that property. Thus, under the orthodox rule, a testator can prevent an heir from taking in intestacy only by making affirmative dispositions of all the testator's property.⁵

Despite its condemnation by a commentator,⁶ the orthodox rule continues to be enthusiastically endorsed by the courts. The cases in which it is rejected are extremely few.⁷ Yet those who condemn the rule have not explained its attraction. Appeals for judicial or legislative reform will likely fail unless the rule's appeal is exposed and refuted. In this Article, I seek to do so.

My argument, in short, is that the rule denying effect to a disinheritance provision is a consequence of the fact that the courts have implicitly rejected one model of the will in favor of another. The rejected model—the will as a *directive*—represents the will (obviously enough) as the testator's instructions regarding ownership of her property after her death. Under the model implicitly favored by the courts, the will as a *declaration*, the will is, in effect, a post-mortem deed, an instrument creating ownership. Such a model is very uncongenial to a disinheritance provision. Moreover, the proposals for reform—what I shall call the “standard remedies” for the orthodox rule—will not be successful unless the courts abandon the declaration model in favor of the directive model.

In Part I of this Article, I consider the possible justifications for the orthodox rule. In Part II, I describe the directive model of the will and discuss its implications for the effectiveness of a disinheritance provision. In Part III, I do the same for the declaration model. In Part IV, I show that the judicial treatment of disinheritance provisions reflects the declaration model. In Part V, I discuss the deficiencies of the standard remedies. Finally, in Part VI, I recapitulate what the preceding discussion implies: Judicial adoption of the directive model of the will provides the best, and probably the only, path to reform.

II. THE ORTHODOX RULE EVALUATED

Consider a testator whose heirs are her two brothers, *B1* and *B2*. Her will states that *B2* is to receive no part of the estate. The residuary

5. See generally Heaton, *supra* note 3; Annotation, *Effect of Will Provision Cutting off Heir or Next of Kin, or Restricting Him to Provision Made, To Exclude Him from Distribution of Intestate Property*, 100 A.L.R.2d 325 (1965); John W. Fisher, II & Scott A. Curnutte, *Reforming the Law of Intestate Succession and Elective Shares: New Solutions to Age-old Problems*, 93 W. VA. L. REV. 61, 68-72 (1990).

6. Heaton, *supra* note 3, at 183-87.

7. See *infra* note 45.

clause is ineffective⁸ or absent. In virtue of the rule that a disinheritance provision is ineffective, the residue passes to both brothers equally, including the negative beneficiary,⁹ *B2*.¹⁰

The rule would be invoked also if the will contains a devise to *B2* and provides further that *B2* is to receive no additional part of the testator's estate. Again, under the orthodox rule any property whose disposition is not described by any affirmative provision passes in intestacy equally to *B1* and *B2*. Note that in this case, also, we can properly refer to a "disinheritance provision" relating to *B2*. Although the will does not purport to provide that *B2* shall take no part of the testator's estate, it does provide, in effect, that *B2* shall not *inherit* any part of the estate.¹¹

The orthodox rule denying effect to a disinheritance provision has been criticized.¹² We shall see later in this Article that the proposed remedies are inadequate.¹³

8. It may be completely ineffective or partially ineffective. The former occurs when, for example, the sole residuary beneficiary predeceases the testator. The latter occurs when one of several residuary beneficiaries predeceases the testator and the court applies the majority rule that a partial intestacy results. See, e.g., *Moffett v. Howard*, 392 So. 2d 509, 512 (Miss. 1981); 4 *BOWE & PARKER, supra* note 2, § 33.56, at 390-91; 6 *id.* § 50.18, at 97; Annotation, *Devolution of Lapsed Portion of Residuary Estate*, 36 A.L.R.2d 1117 § 2(a) (1954). In the case of a partially ineffective residuary clause, only the lapsed portion of the residue would pass as described in the text.

9. I shall speak of the person whom the testator wishes to exclude as a "negative beneficiary."

10. A variation of the rule appears in *In re Estate of Scott*, 659 So. 2d 361 (Fla. Dist. Ct. App. 1995), in which a disinheritance provision was ineffective to prevent taking under an antilapse statute. The testator stated in her will that she "specifically and intentionally make[s] no provisions" for her nephews, issue of the testator's sister (who was herself a beneficiary). *Id.* at 362. Because the sister predeceased the testator, the antilapse statute created a substitute devise in the nephews "[u]nless a contrary intention appears in the will." *Id.* (quoting FLA. STAT. ANN. § 732.603 (West 1995)). The court held that the issue took, basing its decision on two cases holding a disinheritance provision ineffective to prevent heirs from taking in intestacy. *Id.*

11. The examples in the text assume also that the disinheritance provision names the negative beneficiary or heirs. A disinheritance provision might take the alternative form of stating that *no* heir can take (or, indeed, no person can take) except those named or described. For example, in *In re Estate of Cancik*, 476 N.E.2d 738 (Ill. 1985), the testator stated in his will, "I have intentionally omitted the names of any of my relatives . . . for reasons I deem good and sufficient, with the exception of my aforesaid cousin, Charles E. Cancik." *Id.* at 739. Charles E. Cancik was an heir and the beneficiary of all the testator's personal property. The court held, applying the traditional rule, that the intestate property passed to all the heirs. *Id.* at 741.

12. Heaton, *supra* note 3, at 183-87. But see Alfred Gordon, Note, *Eliciting the True Intent of a Testator: Do Negative Wills Have a Place?*, 13 PROB. L.J. 1, 11-27 (1995) (defending the rule).

13. See *infra* text accompanying notes 123-38.

The justifications given by the courts themselves in support of the orthodox rule are unsatisfactory.¹⁴ In the early, leading case of *Zimmerman v. Hafer*,¹⁵ the court stated the rule and the supposed reason for the rule as follows:

"[T]hough the intention to disinherit the heir be ever so apparent, he must, of course, inherit, unless the estate is given to somebody else; and the reason is that the law provides how a man's estate at his death shall go, unless he, by his will, plainly directs that it shall be disposed of differently." An explicit and unequivocal declaration, therefore, that the heir shall not inherit, will be wholly ineffectual to defeat his right unless the estate be given by the will to some one else.¹⁶

To the extent the subsequent cases attempt to justify the orthodox rule, they do so mostly on terms similar to those used in *Zimmerman*: A disinheritance provision is ineffective because it represents an attempt by the testator to dispose of property over which she has no power of disposition, and the reason she has no such power is that the property is already subject to the intestacy statute. Thus, courts have stated that a disinheritance provision "can only apply to property actually passing through the will and has no effect as to intestate property"¹⁷ and that "the intestate property passes by law rather than by will, [and therefore] the statute and not the testator controls the distribution of this property."¹⁸

Our immediate inclination, perhaps, is to dismiss this justification as obviously circular. The negative beneficiary takes in intestacy, the courts are saying, because the will fails to make any other disposition—when whether the will has made some other disposition is the very question under consideration. The court in *Zimmerman*, in the passage quoted, is particularly striking in this regard. Surely it is a profound mystery why the requirement that the testator "plainly direct[] that [his estate] shall be disposed of differently" than by the intestacy statute was

14. They are reviewed and criticized in Heaton, *supra* note 3, at 186-87.

15. 32 A. 316 (Md. 1895).

16. *Id.* at 318 (citation omitted). The court indicates that the quotation is from *Denn v. Gaskin*, 98 Eng. Rep. 1292 (1777), but in fact only the quoted language preceding the semicolon appears in the opinion as printed in *English Reports*.

17. *In re Estate of Swanson*, 140 N.W.2d 665, 667 (Neb. 1966); *cf. In re Estate of Smith*, 353 S.W.2d 721, 724 (Mo. 1962) ("[t]he negative admonition applies only to property passing under the will").

18. *Cook v. Seeman*, 858 S.W.2d 114, 115 (Ark. 1993). Essentially the same rationale is given in *Kimley v. Whittaker*, 306 A.2d 443, 444 (N.J. 1973), discussed *infra* text accompanying notes 104-19. See also *In re Weissmann's Will*, 243 N.Y.S. 127, 131 (Surr. Ct. 1930) (ascribing orthodox rule to "the English conception of the semivested rights of a natural heir in his ancestor's estate").

not satisfied in that case by the testator's "ever so apparent" "intention to disinherit the heir."

To say that the courts have failed to give a noncircular justification for the orthodox rule is not to say that none exists.¹⁹ The candidates for a justification are not, however, satisfactory.

In the first place, the statutory text contains no clear authority for denying effect to a disinheritance provision. The statutory requirements for a valid will are formal requirements only.²⁰ Nor can a basis for the orthodox rule be found in the text of the intestacy statutes. To be sure, the terms of those statutes typically specify the distribution of "property not disposed of by will" to the persons listed as heirs.²¹ But, again, the very question at issue is whether property that, according to the terms of the will, is *not* to go to the negative beneficiary is "property . . . disposed of by will" for purposes of preempting the provisions of the intestacy statute. Moreover, it is the general purport of the intestacy statutes that their provisions be overridden by indications of a contrary intent in a properly executed will. There is no justification, then, for construing the phrase "disposed of" (or similar language) narrowly to exclude a negative "disposition."

To be sure, some alleged disinheritance provisions should be ineffective by virtue of the rule that any will provision that is hopelessly vague is ineffective.²² That is the case when a will lacks an explicit statement that an heir take nothing but contains some other provision arguably indicating such an intent.²³ Or, if the will makes only a small devise, say ten dollars, to an heir, an inference of an intent that the heir take nothing more by way of intestacy is problematic.²⁴ There is no denying

19. For a defense of the traditional rule, see Gordon, *supra* note 12 (arguing that a disinheritance provision requires impermissible speculation about the intended takers and that such a provision is not even reliable evidence of an intent to disinherit in the first place).

20. A will must be in writing and signed by the testator (except for nuncupative wills in very limited circumstances); a nonholographic will must be attested and signed by witnesses. There is also the requirement of testamentary intent, *see infra* notes 31-32 and accompanying text, but a disinheritance provision poses no special problem relating to that.

21. *E.g.*, MD. CODE ANN., EST. & TRUSTS § 3-101 (1991) (property "not effectively disposed of by [the testator's] will"); N.Y. EST. POWERS & TRUSTS LAW § 4-1.1 (McKinney Supp. 1995) (property "not disposed of by will").

22. *See* Early v. Arnold, 89 S.E. 900, 902 (Va. 1916) (holding void for uncertainty a devise to "whoever has been [the] best friend" of the testator's son); *LaMere v. Jackson*, 284 N.W. 659, 661 (Mich. 1939); 4 BOWE & PARKER, *supra* note 2, § 34.37, at 476-77.

23. Gordon, *supra* note 12, at 11-16.

24. *Cf. In re Estate of McWilliams*, 254 N.W.2d 277, 282 (Wis. 1977) (when the will devised one-third of the personal property to the testator's wife, "[o]ne might read in the will a wish to limit [her] to one-third"; but such an inference would not prevent heirs from

that such cases of irremediable vagueness exist. Obviously, however, they cannot justify a rule that makes any disinheritance provision ineffective, no matter how clearly it may express the testator's intent that the negative beneficiary inherit nothing.²⁵

On the other hand, one might attempt to justify the orthodox rule on the basis of an indeterminacy distinct from the kinds of vagueness we have just considered. To give effect to a disinheritance provision requires that the potential intestate share of the negative beneficiary be received by someone else, but the testator has not stated who that someone else is. Determining a substitute recipient of that share, the argument goes, would require the court to engage in impermissible speculation about the testator's intent regarding distribution of her property.²⁶

No doubt this defense of the orthodox rule has the greatest surface appeal, but it is not a satisfactory justification for the orthodox rule either. To see why that is so requires a consideration of the essential nature of a will. The next part of this Article discusses one model of a will and shows that a disinheritance provision should be given effect under that model.

III. THE MODEL OF THE WILL AS A DIRECTIVE

The directive model of a will starts with the obvious observation that a will is an expression of the testator's desires regarding ownership of her property after her death. This is not quite complete, however. We would not wish to give effect to such an expression unless the testator

taking under orthodox rule); *In re Forde's Estate*, 108 N.Y.S.2d 715, 716 (Surr. Ct. 1951) (bequest of \$1 indicates an intent to disinherit); *In re Estate of Barker*, 448 So. 2d 28, 31 (Fla. Dist. Ct. App. 1984) (bequests of \$1 "do not necessarily indicate an intent to 'disinherit' even if they did, property would pass to heirs under orthodox rule).

25. Gordon, *supra* note 12, at 11-14, makes the argument that even the typical, literal disinheritance provision does not reliably indicate an intent that the negative beneficiary take none of the intestate property. According to Gordon, a disinheritance provision can express only an intent with respect to property that the testator *knew* would pass by intestacy, and in almost all cases there is *no* property about which the testator has such knowledge. This, it seems to me, is holding the disinheritance provision to a standard to which no other provision is held. Indeed, the author concludes that

it appears that no language employed by a will drafter can show the clear intent of the testator as to any property that remains undistributed under her will, since she is presumed to have believed she would not die with any intestate property Only if a testator *lists all of her property* and expressly states that her heir is to receive none of it can a court ever be truly certain that the testator intends her heir to have nothing.

Id. at 14-15 (emphasis added). In such a case, of course, there will be no intestacy anyway.

26. See Heaton, *supra* note 3, at 187; Gordon, *supra* note 12, at 2, 11-14, 20.

intended that we do so. The courts have put this in terms of a requirement of "testamentary intent":²⁷ The testator must "intend[] that very paper to take effect as a will."²⁸ Moreover, in most cases the testator knows that the pattern of ownership she has described will be brought about by the actions of the executor named in the will. Even if the testator does not know this (because, for example, she has not named an executor) or is mistaken in thinking so (because the executor she has named does not qualify or refuses to serve, and another is appointed in his place), still the testator knows that someone has the duty and power to distribute her property in accordance with her desires as set forth in the will.

We can take account of these aspects of a will by saying that a will is a list of instructions by the testator regarding distribution of her property after her death. As such it is a list of *directives*,²⁹ attempts by the writer "to get the [personal representative] to do something."³⁰ For simplicity, I shall use the term "directive" to refer to the will as a whole as well as each dispositive provision.³¹

I readily concede—indeed, I hope—that the directive model appears to be a very simple and obvious one. These are precisely the characteristics that so strongly recommend it. Yet, we shall see that the courts have implicitly rejected it in their treatment of disinheritance provisions.

What does the model imply about the effectiveness of a disinheritance provision? The testator's expression of a desire that Bob *not* own any

27. 1 BOWE & PARKER, *supra* note 2, § 5.14, at 195-99; Lawrence Lanctot, Comment, *A Letter as a Will or Codicil: Testamentary Intent in California*, 2 U.S.F. L. REV. 367, 367-68 (1968).

28. *Early v. Arnold*, 89 S.E. 900, 901 (Va. 1916). See also *McBride v. McBride*, 67 Va. (26 Gratt.) 476 (1875):

A paper is not to be established as a man's will merely by proving that he intended to make a disposition of his property similar to or even identically the same with that contained in the paper. It must satisfactorily appear that he intended the very paper to be his will.

Id. at 481 (quotation marks omitted) (quoting a "Judge Cabell" but source otherwise not indicated), quoted in *In re Henry's Estate*, 248 N.W. 853, 855 (Mich. 1933).

29. JOHN R. SEARLE & DANIEL VANDERVEKEN, *FOUNDATIONS OF ILLOCUTIONARY LOGIC* 198, 201 (1985). We are here using the terminology of the theory of illocutionary acts, given rough outline in J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 98 & *passim* (2d ed. 1975) but described more completely by the philosopher John Searle. See generally JOHN R. SEARLE, *EXPRESSION AND MEANING* (1979) [hereinafter SEARLE, *EXPRESSION AND MEANING*]; SEARLE & VANDERVEKEN, *supra*; JOHN R. SEARLE, *SPEECH ACTS* (1969) [hereinafter SEARLE, *SPEECH ACTS*].

30. SEARLE, *EXPRESSION AND MEANING*, *supra* note 29, at 13.

31. To be precise, the will is not the directive but the means by which the testator performs the directive(s). The distinction is not important for the purposes of this Article, however.

part of the testator's property has as much the character of a directive—an instruction to the personal representative—as does any affirmative provision. The testator is instructing the personal representative to distribute the testator's property in such a way that the negative beneficiary, Bob, will not become the owner of any of it. Now, if the residuary clause fails and Bob turns out to be one of the testator's heirs, the personal representative is receiving two conflicting instructions about distribution of the residue, one from the testator and one from the legislature in the form of the intestacy statute. But the statute itself states how this conflict is to be resolved: The testator's instructions take precedence. Therefore, the residue should be distributed in accordance with the intestacy statute except to the extent that the statute is inconsistent with the disinheritance provision. (Exactly what this might mean is taken up in a subsequent paragraph.)

Earlier, we mentioned the problem of indeterminacy: The testator has not said who should own the property that Bob would normally receive as heir. Under the directive model of the will, however, this is not a satisfactory justification for refusing to give effect to the disinheritance provision. Certainly it is true that the testator has not specified a recipient for the property that would normally go to the negative beneficiary; by hypothesis there is a partial intestacy. The testator has said only where that property is not to go. But it should be evident that this lacuna in the testator's expressed intent makes the task of giving effect to the testator's intent less problematic, not more so. The only effective expression of the testator's intent with respect to the residue³² is the disinheritance provision. That provision can be given complete effect by denying the negative beneficiary any share in the residue. The task with which the personal representative is faced, then, is not to fashion a distribution that complies with some ambiguously expressed (or unexpressed) intent of the testator. Rather, his task is to fashion a distribution that, while it fulfills the testator's (clearly and unambiguously expressed) intent that the negative beneficiary take nothing, also fulfills the legislature's intent (as expressed in the intestacy statute) in all other respects.³³ That is, once the personal representative has

32. We continue to assume that the residuary clause is partly or wholly ineffective or, indeed, absent.

33. A somewhat similar point is made in Heaton, *supra* note 3, at 184-85, in which the author criticizes the traditional rule on the ground that the intestacy statute represents the testator's probable intent and that, therefore, a contrary expression of intent in the testator's will should be effective. What the author leaves largely unexplained is the courts' widespread and longstanding adherence to the orthodox rule in the face of such an obvious rationale for the effectiveness of a disinheritance provision. In this Article, I seek to explain these matters by reference to the directive and declaration models.

excluded the negative beneficiary as a recipient of the residue, selecting the recipient(s) is a matter of applying the intestacy statute, not the will. If there is a difficulty in determining the proper distribution of the residue, it is a difficulty in determining the proper application of the intestacy statute.

But I do not think that there *is* very much difficulty. Any aspect of the statutory distribution that is inconsistent with the disinheritance provision should be ineffective; otherwise, the statute should govern normally. Consider our earlier example of the testator survived by her two brothers, *B1* and *B2* (with *B2* the negative beneficiary). Again we assume that there is no valid residuary clause. The intestacy statute provides for a distribution equally to *B1* and *B2*. The testator has said that no distribution shall be made to *B2*; therefore, we simply ignore that part of the statute. The residue would be distributed entirely to *B1*, the other heir.³⁴ This "simple-exclusion" rule seems to satisfy an important criterion: modification of the operation of the intestacy statute to the least extent necessary to fulfill the testator's intent as expressed in the disinheritance provision.³⁵

There is another solution, however, that is preferable because it better reflects the structure of the intestacy statute. We have said that any part of the statutory distribution that is inconsistent with the disinheritance provision should be ineffective. But the statute itself provides, in substance, for alternative distributions when part of it is ineffective. Suppose the testator is still alive, and her only living relatives are her brothers, *B1* and *B2*, and the issue of *B2*. If the testator were to die immediately, the intestacy statute would decree a distribution equally to *B1* and *B2*. If, however, *B2* dies before the testator does, the potential distribution to *B2* becomes ineffective. Under these circumstances, the statute provides for an alternative distribution: *B2*'s potential share goes to his issue. Similarly, if a disinheritance provision makes ineffective a potential distribution to a presumptive heir, we should apply the statute as if he had predeceased the testator. A provision disinheriting *B2* should result in an application of the intestacy statute as if *B2* predeceased the testator. Under this "nonsurvival rule," *B1* would take half of the residue and *B2*'s issue (if any) would take the

34. As the statute does not provide in terms for a distribution of *one-half* to each of *B1* and *B2*, but only for an equal distribution between them, ignoring *B2*'s share would result in *B1* taking all. If there were more than one other heir, the negative beneficiary's share would be distributed among them in proportion to their shares under the intestacy statute.

35. To be sure, the simple-exclusion rule does more than simply exclude the negative beneficiary because it gives the other heir, *B1*, a greater share in the intestate property than he would have received in the absence of the disinheritance provision.

other half. (Note that the testator has expressed no intention to disinherit *B2*'s issue.) If *B2* dies without issue, then *B1* would take the entire residue, just as he would under the simple-exclusion rule. In the remainder of this Article, I shall use the phrase "other intestate takers" to refer to all those persons who would take under a nonsurvival rule.³⁶

The simple-exclusion rule seems to have been endorsed by one American court³⁷ and the English courts.³⁸ The Uniform Probate Code,³⁹ a state statute,⁴⁰ and a commentator⁴¹ have endorsed the nonsurvival rule.

The most difficult circumstances for the application of a nonsurvival rule are presented by a disinheritance provision stating that *no* "heir" shall take. Here, the testator's intent may be unclear. If the testator is survived only by *B1*, *B2*, and *B2*'s issue, her heirs are *B1* and *B2*. Does the testator intend by the disinheritance provision to exclude only *B1* and *B2*? In that case, *B2*'s issue would take under a nonsurvival rule. Or does the testator intend to exclude all actual and "potential" heirs, that is, *B1*, *B2*, and *B2*'s issue—and indeed all relatives of a more remote degree of kindred? In that case, the nonsurvival rule would mandate a distribution to the state under the escheat provision of the intestacy statute. This does present a difficult case of ambiguity, but the courts should admit extrinsic evidence of the testator's intent just as they do in any other case of ambiguity.

There are two important points for present purposes. First, fashioning an adequate solution for distribution of the testator's estate should be an exercise in interpreting the intestacy statute, not the will. That exercise does not, I believe, present insuperable difficulties. Whatever difficulties

36. I am avoiding use of the phrase "other heirs" because the persons to whom I am referring might not be heirs. In the case of the testator survived by *B1*, *B2*, and *B2*'s issue, for example, *B2*'s issue (who would take under a nonsurvival rule if *B2* were the negative beneficiary) are not heirs.

37. *LaMere v. Jackson*, 284 N.W. 659, 661 (Mich. 1939) (giving no explanation and without explicitly rejecting the orthodox rule).

38. *In re Wynn*, [1984] 1 W.L.R. 237, 241 (Ch. D. 1983). See Gordon, *supra* note 12, at 2-4; Heaton, *supra* note 3, at 180.

39. UNIF. PROBATE CODE § 2-101(b), 8 U.L.A. 97 (Supp. 1996) (negative beneficiary treated as if he had disclaimed); *id.* § 2-801(d)(1), 8 U.L.A. 195 (Supp. 1996) (disclaimant generally treated as predeceasing the decedent); see also *id.* § 1-201(56), 8 U.L.A. 14 (Supp. 1996) ("will" includes a testamentary instrument containing only a disinheritance provision). See *infra* notes 127-29 and accompanying text.

40. 20 PA. CONS. STAT. ANN. § 2101 (Supp. 1995) (mandating distribution as if negative beneficiary had disclaimed); *id.* § 6205(b) (disclaimant treated as having predeceased the decedent); see also N.Y. EST. POWERS & TRUSTS LAW § 1-2.19 (McKinney Supp. 1995) (formerly § 1-2.18) (authorizing a disinheritance provision but not providing otherwise how the property is to be distributed).

41. Heaton, *supra* note 3, at 188-93. But see discussion *infra* note 126.

do appear cannot justify a court in decreeing a distribution that is clearly at odds with the testator's intent unambiguously expressed in a disinheritance provision.

Second, denying effect to a disinheritance provision is still less justified in circumstances in which the interpretation and application of the intestacy statute are, or should be, absolutely clear. If, for example, the testator's only surviving relatives are her two brothers, *B1* and *B2*, and *B2* is disinherited, we are faced with the statute's mandate that *B1* and *B2* take equally and the testator's instruction that *B2* take nothing. Under any intestacy statute that gives precedence to the wishes expressed in a valid will (and, of course, they all do), there can be no serious doubt that distribution of the entire estate to *B1* is well within the terms of the statute. Yet even in this least problematic of cases, the courts have refused to give effect to a disinheritance provision.⁴²

Moreover, because the statutory construction required by the nonsurvival rule is just that—construction—it is well within the authority of the courts. As I stated earlier, the typical statute specifies the distribution of “property not disposed of by will.”⁴³ Under a reasonable reading of such a statute, its provisions are overridden by any contrary expression of intent in a will; the nonsurvival rule attempts to do no more than that.

Just as important, the analysis I have given does not require a court to create any implied devises or other provisions in the will. In particular, it is inappropriate (because it is unnecessary) to imply a devise of the negative beneficiary's potential intestate share in favor of other persons. To repeat: They take because the statute (as reasonably construed) says so, not because the testator has (impliedly) said so.⁴⁴

Indeed, there is no significant difference between an affirmative provision and a disinheritance provision under the directive model. In virtue of either provision, the personal representative is receiving conflicting instructions about distribution from the testator and the legislature; in both cases, he resolves that conflict under a rule, given by the legislature, that the testator's instructions take precedence. To the extent that the intestacy statute is *not* in conflict with any of the

42. See cases discussed *infra* Part IV.

43. *E.g.*, MD. CODE ANN., EST. & TRUSTS § 3-101 (1991) (property “not effectively disposed of by [the testator's] will”); N.Y. EST. POWERS & TRUSTS LAW § 4-1.1 (McKinney Supp. 1995) (property “not disposed of by will”).

44. For the contrary view, see Gordon, *supra* note 12, at 22 (“[a]llowing a negative will [*i.e.*, a disinheritance provision] to take effect is equivalent to writing an additional bequest that the testator never contemplated”).

testator's instructions, it takes precedence. There is nothing very complicated about this.

However, no court has endorsed this analysis. In a very few cases, the courts have arrived at the *result* I have urged, giving effect to a disinheritance provision by decreeing a distribution to the other intestate takers; but no rationale was offered in those cases, and indeed the orthodox rule was not even considered, much less explicitly rejected.⁴⁵

Perhaps more to the point, no court that has endorsed the orthodox model has done so in any way that recognizes this analysis. If the analysis is correct, the only problematic aspect of giving effect to a disinheritance provision is the necessity of judicial construction of the intestacy statute. We would expect that ground to be the motivation for a court's endorsement of the orthodox rule. The court would state its reasoning, in substance, as follows: "We cannot give effect to the disinheritance provision because we cannot tell who is to take the intestate property. And we cannot tell who is to take the intestate property because the intestacy statute is unclear on the matter, and we lack any guidance for construing the statute." Although many courts have, of course, refused to give effect to a disinheritance provision, no court has done so on this ground.

The analysis I have given is based on the directive model of a will. The almost complete absence from the cases of anything consistent with, or responsive to, that analysis is evidence that the directive model does not, in fact, reflect the courts' conception of a will. In the next part of this Article, I shall consider an alternative model of the will and what it implies for the effectiveness of a disinheritance provision.

45. In *LaMere v. Jackson*, 284 N.W. 659, 661 (Mich. 1939), the court allowed a disinheritance provision to take effect without explanation and, indeed, without explicitly rejecting the orthodox rule.

In *In re Fellman's Estate*, 99 N.Y.S.2d 259 (Surr. Ct. 1944), the court gave effect to a disinheritance provision. The will devised \$3,000 to an heir "in lieu of all interest in my estate." *Id.* at 259 (quoting will). The court held, without explanation, that the beneficiary-heir did not share in a lapsed portion of the residue. *Id.* at 259-60. Because the disinheritance provision applied to a *beneficiary* however, the case is not necessarily inconsistent with the orthodox rule. The court's (unstated) rationale might have been that the disinheritance provision invoked the equitable election doctrine. Indeed, that was the theory explicitly adopted in another case, *Ward v. Dodd*, 5 A. 650 (N.J. Ch. 1886), discussed *infra* text accompanying notes 61-66.

In *Succession of Allen*, 20 So. 193, 198 (La. 1896), the court gave effect to a disinheritance provision without discussion.

Some New Jersey cases state that a disinheritance provision will be given effect if the testator's intent is clear, but in none of those cases does the court find that the testator's intent was clear. See *infra* note 111 and accompanying text.

In *In re Weissmann's Will*, 243 N.Y.S. 127, 131-32 (Surr. Ct. 1930), the court explicitly criticizes the orthodox rule but states that precedent requires adherence to it.

IV. THE MODEL OF THE WILL AS A DECLARATION

Under the model of the will as a directive, as we have seen, the will is viewed as a list of instructions by the testator to the personal representative regarding distribution of her property after her death. Under an alternative model, the will is viewed as an *instrument*—something that itself changes the ownership of the testator's property. In this respect, the will is viewed rather like a post-mortem deed.

Consider the nature of a deed. A deed is not simply the expression of the grantor's desire that the grantee own the property. Nor is it, of course, an instruction to another to make the grantee the owner. Rather, the deed itself brings about that result.⁴⁶ We would say that the deed is a *declaration*.⁴⁷ In virtue of the deed's statement that a named person is the owner of an interest in property, he becomes so.

Under the model of a will as a declaration,⁴⁸ a will acts in a similar fashion. (For simplicity, I shall use the term "declaration" to refer to the will as a whole as well as to each devise.⁴⁹) We are not denying, of course, that in the typical will each devise is literally the expression of the testator's desire regarding ownership of her property after her death or, perhaps, literally an instruction to the personal representative. But, under the model, the essential nature of the devise is that of a declaration. The devise makes a named or described person the owner of part of the testator's property simply by declaring him to be the owner. And, to the extent that the will fails to declare someone the owner of particular property, that property will pass to the persons described in the intestacy statute.

How would a disinheritance provision fare under this model? Consider a variation on one of the hypothetical examples discussed earlier. The testator is survived only by her brothers, *B1* and *B2*, who are her heirs. The will devises Whiteacre to *B1*. A disinheritance provision expresses

46. The deed will be effective, however, only if it is delivered.

47. SEARLE & VANDERVEKEN, *supra* note 29, at 205-11. More precisely, we would say that the deed is the means by which the grantor performs a declaration.

48. Devises are characterized as declarations in SEARLE & VANDERVEKEN, *supra* note 29, at 56; SEARLE, *EXPRESSION AND MEANING*, *supra* note 29, at 18; DENNIS KURZON, *IT IS HEREBY PERFORMED . . . EXPLORATIONS IN LEGAL SPEECH ACTS* §§ 4.2, 4.5 (1986) (presenting a fuller and more complicated account). Cf. F.R. PALMER, *SEMANTICS* 163 (2d ed. 1981) (noting the similarity between the declaration "I name this ship Queen Elizabeth" and "I give and bequeath my watch to my brother," but not using the term "declaration").

49. Again, to be precise, the will or devise is not the declaration but the means by which the testator performs the declaration(s). The distinction is not important for the purposes of this Article.

the testator's desire that *B2* own no part of the testator's estate. The will lacks a valid residuary clause.

Now, if the affirmative devise of Whiteacre to *B1* were stated in the form of an explicit declaration, it would appear as, "I hereby make it the case that *B1* owns Whiteacre"⁵⁰ or something similar. If the disinheritance provision were stated in the form of an explicit declaration, it would have to appear as, "I hereby make it the case that *B2* owns no part of my property" or something similar. There are several difficulties in giving effect to this (restated) disinheritance provision—let us call it a "negative declaration."

In the first place, the negative declaration does not appear to do anything. It states what is already the case: that *B2* owns no part of the testator's property. It is not at all clear that such a statement can properly be viewed as a declaration at all; the point or purpose of a declaration "is to change the world in such a way that the propositional content [here, that someone owns some property] matches the world."⁵¹ The only way that such a statement can do anything would be to divest *B2* of property that he has already received by intestate succession and transfer it to *B1*.⁵² But this is not a satisfactory solution; it requires the testator to control the ownership of property that belongs to another. As we shall see below, this is exactly the position taken in one of the cases.⁵³

The second objection is related to the first. Even if we were willing to give effect to the disinheritance provision as a negative declaration, the ownership it describes is consistent with anyone (or everyone) other than *B2* owning the residuary estate.⁵⁴ That is not a sufficient declaration of ownership. The testator simply has not done her job under the declaration model.

This appears to be the problem of indeterminacy that we discussed in connection with the directive model. That problem was only apparent under the directive model. The testator's responsibility under the directive model is to give instructions to the personal representative. The personal representative then determines what pattern of ownership would be consistent with those instructions. The personal representative is perfectly capable of taking into account an instruction even when, as

50. For simplicity I have omitted any statement of the time at which *B1* is the owner, namely at the testator's death.

51. John R. Searle, *How Performatives Work*, 58 TENN. L. REV. 371, 376 (1991). See generally SEARLE & VANDERVEKEN, *supra* note 29, at 205-11.

52. We have not, of course, answered the question of how it is possible to infer from the statement that *B2* take nothing a declaration that the entire residue belongs to *B1*.

53. See *infra* text accompanying notes 61-66.

54. See Gordon, *supra* note 12, at 2.

in the case of a disinheritance provision, it does not completely determine the ownership of property. In such a case, the personal representative refers to the instructions contained in the intestacy statute to supplement the testator's instructions.

Under the declaration model, by contrast, it is not enough for the testator to make a partial provision with respect to particular property⁵⁵—a partial declaration—and let the personal representative fill in the rest by reference to the intestacy statute. Under the model, the personal representative does not determine ownership of particular property by reconciling the description of the owners found in the intestacy statute with that, if any, found in the will. Rather, if the testator wants to affect the ownership of her property after her death, she must do it herself, by stating who the owners are. A declaration that someone is not the owner does not work because, on one account, it is not a declaration of ownership at all or because, on another account, it is too indefinite to create ownership. So the intestacy statute steps in; it acts upon property whose ownership the testator herself has not successfully created.

Again, the indeterminacy of the negative declaration would be remedied by using the distribution made by the intestacy statute as the starting point. We could say that the intestacy statute acts first by distributing the residue equally to *B1* and *B2*; then the negative declaration destroys *B2*'s share, leaving the entire residue in *B1*'s hands by some (so far unexplained) process of absorption. We have already noted that this solution is unsatisfactory, however, because it requires the testator to affect property that already belongs to someone else—an observation made in a case discussed below.⁵⁶

V. THE DECLARATION MODEL IN THE CASES

In this section, I return to a consideration of the caselaw on disinheritance provisions. My purpose is to discover the explanatory power of the declaration model: The cases reflect an underlying assumption of the will as a declaration.

Under the directive model, a disinheritance provision can be exactly what it appears to be: an effective instruction to the personal representative to refrain from distributing any property to the negative beneficiary. If a court operates under the directive model and if the

55. By "partial" I mean, of course, partial as to the *recipients* of particular property. All provisions (except a devise of the entire estate) are partial as to property, and to the extent they do not exhaust the testator's property, the intestacy statute fills in.

56. See *infra* text accompanying notes 61-66.

account of the model given in Part II is correct, then the court can be expected either to recognize the effectiveness of a disinheritance provision (using the simple-exclusion rule or the nonsurvival rule) or to blame its ineffectiveness on the ambiguity of the intestacy statute. Every case that refuses to give direct⁵⁷ effect to a disinheritance provision on any other ground represents a rejection of the directive model.

The cases discussed in this section fit that description, but they hold an additional, special interest. These are cases in which the court addresses the issue of what, precisely, a testator is trying to do in a disinheritance provision. The court then produces an interpretation of the disinheritance provision that is unjustified by the actual language used and completely unmotivated under the directive model but explicable under the declaration model.

The cases fall into three categories. First are those cases in which the court reads the disinheritance provision as a dispositive provision, an attempt by the testator to affect directly the ownership of his property. But because such an attempt must be made by a declaration, the court reads the disinheritance provision in the only way that makes sense (or, as we might say, "counts") as a declaration: an attempt to divest an heir of an interest he already owns. In the second and third groups, the court refuses to read the disinheritance provision as a dispositive provision because (I suggest) it does not count as a declaration; the testator cannot, after all, be attempting to control someone else's property. Instead, the court reads the disinheritance provision as the testator's commentary on other parts of the will: either an expression of intent about the proper operation of some other provision (in cases in the second group) or a statement that no (affirmative) devise is being made to the negative beneficiary (in cases in the third group).

We begin our discussion of the first group of cases by comparing our objections to a disinheritance provision under a declaration model with the courts' standard justification for the orthodox rule. We noted earlier that a disinheritance provision seems to fail as a declaration because it does not appear to do anything. A disinheritance provision, rather than purporting to create ownership by declaring the owners, simply states what is already the case: The negative beneficiary does not own any of the testator's property. We noted also the problem of indeterminacy: To declare that one person is not the owner of property is to declare that anyone or everyone is the owner. Both these objections were answered, after a fashion, by assuming that the negative beneficiary already owns

57. We shall see below how some courts give *indirect* effect to a disinheritance provision in a way that reflects the declaration model.

his share of the intestate property at the testator's death and that the disinheritance provision is an attempt to destroy that share and transfer it to another;⁵⁸ the intestacy statute acts first and the will afterwards. In this way, the disinheritance provision counts as a declaration—albeit an unsuccessful one because the testator is attempting to affect the ownership of another's property.

It is just this solution that the courts appear to be considering in the standard justification for the rule. We saw earlier that the courts have stated that a disinheritance provision is ineffective because it "can only apply to property actually passing through the will and has no effect as to intestate property"⁵⁹ or because "the intestate property passes by law rather than by will, [and therefore] the statute and not the testator controls the distribution of this property."⁶⁰ This explanation is based on the premise that the property whose ownership the testator is attempting to affect is already intestate property; because it already belongs to the heirs, obviously the testator has no power over it. Earlier, we criticized this explanation as simply circular. The circularity disappears when we observe that the courts are simply assuming an interpretation of a disinheritance provision under which it makes sense as a declaration.

This view of the matter appears with greater clarity in one of the earliest cases, *Ward v. Dodd*.⁶¹ There, the testator expressed an intent that the negative beneficiary take nothing in addition to the life estate in real property devised to him: The life estate was to be the negative beneficiary's "full portion of"⁶² the testator's property. A part of the residue passed in intestacy, and the negative beneficiary was an heir.⁶³

The court states that a will beneficiary cannot be deprived of his intestate share unless "it appears clearly that such was the testator's

58. The indeterminacy problem is solved if we are willing to say that the shares of the other heirs automatically absorb it, so to speak. This would give a simple-exclusion rule, however.

59. *In re Estate of Swanson*, 140 N.W.2d 665, 667 (Neb. 1966). Cf. *In re Estate of Smith*, 353 S.W.2d 721, 724 (Mo. 1962) ("[t]he negative admonition applies only to property passing under the will").

60. *Cook v. Seeman*, 858 S.W.2d 114, 115 (Ark. 1993) (will lacked residuary clause). Essentially the same rationale is given in *Kimley v. Whittaker*, 306 A.2d 443, 444 (N.J. 1973), discussed *infra text* accompanying notes 104-19. See also *In re Weissmann's Will*, 243 N.Y.S. 127, 131 (Surr. Ct. 1930) (ascribing orthodox rule to "the English conception of the semivested rights of a natural heir in his ancestor's estate").

61. 5 A. 650 (N.J. Ch. 1886).

62. *Id.* at 650 (internal quotation marks omitted).

63. *Id.* at 651.

intention."⁶⁴ The court goes on to describe the precise way in which that intention is given effect:

A testator may provide that his legatee or devisee, in consideration of the legacy or devise, shall not enjoy such legal right [to take under intestate succession]. Such a provision might perhaps be regarded as equivalent to a gift [devise] of the property from which the legatee or devisee is so excluded, to the testator's other heirs or next of kin. If it were not so regarded, the legatee or devisee would be put to his election.⁶⁵

Under neither one of the court's two alternative readings is the disinheritance provision represented as an instruction to the personal representative to refrain from distributing property to the negative beneficiary. Under the first alternative (in the second quoted sentence), the court avoids the problem altogether by suggesting an (implied) affirmative gift to the testator's other heirs.

Under the second alternative (in the third quoted sentence), the court describes an "equitable election." According to the doctrine of that name, if the will makes a devise to a beneficiary and purports to devise that beneficiary's own property to another, the beneficiary is "put to his election": He must elect either to take the devised property, in which case he must allow his own property to pass in accordance with the testator's will, or to keep his own property, in which case he must relinquish the devised property.⁶⁶

It is clear, then, that under the court's second alternative reading the disinheritance provision in *Ward* does not prevent the negative beneficiary from taking in the first instance. If it did, the doctrine of equitable election would never have come into play. That doctrine applies only when the testator is making a devise of the beneficiary's own property—here, the intestate property inherited by the negative beneficiary. The court gives the disinheritance provision an interpretation that, as we have seen, allows the provision to count as a declaration. The testator is attempting to transfer the negative beneficiary's property (the intestate share he has already received) to the other heirs. This

64. *Id.*

65. *Id.*

66. A leading treatise describes the doctrine as follows:

When a testator makes a gift by will in such a manner that the gift or other provisions of the will are in conflict with some other right of the devisee, the gift is considered to be the equivalent of an offer, the acceptance of which requires the surrender of the other right. The will is viewed as offering something to the devisee in return for his property or interest.

5 BOWE & PARKER, *supra* note 2, § 47.1, at 595-96 (footnotes omitted).

interpretation satisfies the declaration model at the cost of invoking the equitable election doctrine.

The cases in the second group contain a different kind of evidence for the declaration model and, as we shall see later, demonstrate the inadequacy of the standard remedies. In these cases, the courts appear eager to give effect to the intent expressed in a disinheritance provision. But they do so in a way that is consistent with the declaration model. The disinheritance provision has no direct effect on ownership of the testator's property because it is not a dispositive provision at all; it cannot be one because (I suggest) it makes no sense as a declaration. Instead, a disinheritance provision is an expression of the testator's intent about the proper operation of another provision in the will—or even outside it.

In *Strauss v. Strauss*,⁶⁷ a codicil devised the income from a trust fund to the testator's son Albert (one of eight children).⁶⁸ The codicil continued with a disinheritance provision: "The foregoing trust fund which I have created for the benefit of my said son, Albert Strauss, shall be and is in full of all claim of any kind or character which he is to have out of my estate."⁶⁹ Elsewhere the codicil stated, "I hereby expressly declare that my son, Albert, shall have no other or further interest in my said estate or any part thereof, except as provided and given him in this codicil."⁷⁰ The residue was devised "in equal parts" to the testator's seven other children (whom he named). Another provision stated that the children of a deceased child would take his or her share of the residue. One of the children (not Albert) predeceased the testator without issue. Thus, unless the residuary devise were construed as a class gift⁷¹ under these circumstances,⁷² the predeceasing child's share of the residue would pass in intestacy to all the testator's surviving

67. 2 N.E.2d 699 (Ill. 1936).

68. *Id.* at 701.

69. *Id.*

70. *Id.* at 701-02.

71. In a class gift, the share of a predeceasing beneficiary is distributed to the others, so that the entire subject matter of the devise passes to those beneficiaries who survive the testator.

72. I have said "under these circumstances" because clearly the testator did *not* intend a class gift under *other* circumstances. Had the predeceasing child been survived by children, those grandchildren would have taken the predeceasing child's share of the residue by explicit provision in the will. For the sake of simplicity, I shall refer to the supposed intent by the testator in *Strauss* that the surviving residuary beneficiaries take the entire residue under the circumstances that occurred (*i.e.*, the death of one of the residuary beneficiaries before the testator without children) as an intent to devise the residue as a "class gift." This is consistent with the court's use of the term.

children—including Albert if the disinheritance provision were not effective.

The court uses the disinheritance provision only as an aid in construction of the residuary devise.⁷³ The court notes:

Where an intention to disinherit an heir is expressed clearly and manifestly in a will, so as to leave no reason for doubt, a construction of the will which would leave the testator intestate as to any portion of the property will not be adopted to defeat that intention and thus allow the heir to have some share in the estate.⁷⁴

The court then proceeds to consider whether the residuary devise is a class gift. Under the "general rule,"⁷⁵ a gift to persons named individually (as were the residuary beneficiaries in this case) is a distributive gift⁷⁶ and not a class gift.⁷⁷ "[Y]et reasons are here found in the language and structure of the will for deciding that the intent of the testator, which is, of course, paramount to the rule [requiring construction as a distributive gift], would be best subserved by disregarding it."⁷⁸ Although the court purports to find "numerous" expressions of a countervailing intent,⁷⁹ by far the most important is the disinheritance provision. That "alone would have been sufficient"⁸⁰ to construe the residuary devise as a class gift, and it "is as binding upon the court as if it had been attached to and made part of the . . . residuary clause of the will."⁸¹ Because the residuary clause is a class gift, no property passes in intestacy, and Albert inherits nothing.

What is striking about the opinion is its juxtaposition of an insistence on the primacy of the intent expressed in the disinheritance provision and a refusal to serve that intent in the most straightforward way. To put the matter differently, it is odd that a provision clearly expressing

73. Prior cases in the jurisdiction fully embraced the orthodox rule. *E.g.*, *Tea v. Millen*, 101 N.E. 209, 211 (Ill. 1913).

74. 2 N.E.2d at 703.

75. *Id.*

76. In a distributive gift, the share of a beneficiary who predeceases the testator lapses. If it is a pre-residuary distributive gift, the share falls into the residue. If it is a residuary distributive gift, the share passes (under the traditional rule) in intestacy. See authorities cited *supra* note 8.

77. 2 N.E.2d at 703.

78. *Id.*

79. *Id.* By way of summary, the court states that the will "placed Albert in a preferred class by himself" while "[t]he other seven children were all treated as a separate class, with common and equal interests, and were to take whatever remained after the debts were paid, Albert's trust fund created, and their mother provided for." *Id.*

80. *Id.*

81. *Id.*

the testator's intent about distribution of his property does not directly affect that distribution; it is not a dispositive provision at all. Thus, the court takes account of the disinheritance provision in the only way allowed under the declaration model:⁸² not as a declaration, but as a mere expression of intent serving to inform the court about the proper interpretation of some other, dispositive provision.

There are two unfortunate consequences of the court's approach. The less serious consequence is distortion of class-gift doctrine. Given the facts of the case and precedent, there is every reason to construe the residuary devise as a distributive gift, not a class gift. First, as the court itself notes, the residuary beneficiaries were individually named, a fact which by prior decisions is strong evidence of a distributive gift. Second, there was no persuasive extrinsic evidence of an intent to make a class gift.⁸³ Third, and most importantly, the testator demonstrated elsewhere in the will that he knew how to give an explicit description of a class gift. In creating a trust for his wife,⁸⁴ the testator directed that upon her death the corpus be distributed "equally among my children who shall then (at the death of my said wife) be living, and *in the case of the death of any of said children, then to my children who shall then (at the death of my said wife) be surviving.*"⁸⁵ The absence of similar language describing a survivorship feature in devising the residue indicates that the residuary devise was not intended as a class gift.⁸⁶

The more serious consequence of the approach in *Strauss* is that it might lead, under other facts, to a disinheritance of *all* heirs, not just the negative beneficiary. Now it is true that under the facts of the case,

82. If, that is, it is not an invalid attempt to change the ownership of property already owned by the heirs.

83. The court refers to a partnership agreement made by the testator that also excluded Albert from participation. *Id.* at 702. This simply evidences the intent already stated in the disinheritance provision of the will.

84. The provision was revoked after the wife's death. *Id.* at 701.

85. *Id.* (emphasis added). The provision went on to exclude Albert. This is not a class gift, as it requires survivorship beyond the death of the testator, but the survivorship feature is similar to that under a class gift.

86. An intestacy would be prevented under a rule that the entire residue always passes to the surviving residuary beneficiaries, that is, whether or not the residuary devise satisfies the orthodox criteria for a class gift. The court in *Strauss* appears not to be applying such a rule, however. It is true that the court states, "It is the general rule to so construe a residuary clause as to prevent the intestacy of any part of the testator's estate unless there is an apparent intention to the contrary." *Id.* at 703. But the court appears to do little or nothing with this observation. The court's purpose might be to support the conclusion that a specific legacy to the predeceasing child passed by the residuary clause. In any event, we have already noted that the court states that the disinheritance provision "alone would have been sufficient," *id.*, for the court's decision.

the court's approach produces the same result that would be produced by the straightforward implementation of the disinheritance provision allowed under the directive model (combined with an honest application of class-gift doctrine). That reasoning would proceed as follows. Prior cases indicate that the residuary devise is a distributive gift. An intestacy results, therefore, with respect to the share of the predeceasing child. Because the testator plainly indicated his wish that Albert take nothing, the intestate property passes consistently with that intent. Under either the nonsurvival rule or the simple-exclusion rule,⁸⁷ the intestate property passes to the testator's six other children (that is, the surviving children excluding Albert).⁸⁸ As we have seen, the approach used by the court in *Strauss* produces the same result but for a different reason: The six other children take the entire residue because they are the surviving members of the supposed class.

So it is not the result that is objectionable; it is the theory by which the court reaches that result. Under the rule applied by the court, "an intention to disinherit an heir . . . [prohibits] a construction of the will which would leave the testator intestate as to any portion of the property,"⁸⁹ that is, a class-gift construction is required. But this rule is a bad one because a class-gift construction of the residuary devise does much more than disinherit the negative beneficiary; it disinherits all the heirs.⁹⁰ Thus, suppose that in *Strauss* the residue had been devised to two friends of the testator, and one had predeceased him. The court's rule, literally applied, would require construction of the residuary devise as a class gift; this would lead to a disinheritance of all the testator's children, not just Albert. That result is justified neither by the language

87. The testator's wife predeceased him; his heirs were his seven surviving children. *Id.* at 700. Therefore, the testator's heirs other than Albert (applying the simple-exclusion rule) were the six children who were residuary beneficiaries. The takers under a nonsurvival rule would be the same persons, because the predeceasing child was not survived by issue. *See id.*

88. An alternative rule is that every residuary devise to more than one person, even if they are individually named, is a devise to those persons who survive the testator. This is a reasonable interpretation of a residuary clause, which, after all, purports to dispose of the testator's entire estate. In that event, there would be no intestacy, and the entire residue would be distributed to the six surviving children other than Albert, just as the court decreed. My objection is to the court's use of the *disinheritance provision* as the evidence of the testator's intent to make a class gift of the residue.

89. 2 N.E.2d at 703.

90. *See Strohm v. McMullen*, 89 N.E.2d 383 (Ill. 1949). There, the court, distinguishing *Strauss*, finds that the disinheritance provision does not indicate that the residuary devise is a class gift. *Id.* at 387. "The fact that the testator did not want certain relatives to share in his estate does not indicate that he desired that the named residuary devisees be clothed with the right of survivorship." *Id.*

of the will nor by the intestacy statute.⁹¹ If it be said in reply that the court in *Strauss* would not find a class gift in the hypothetical case supposed because there is no intent to disinherit all the heirs, then we have a different problem: A disinheritance provision will be effective only under the fortuitous circumstance of an identity between the residuary beneficiaries and the heirs other than the negative beneficiary.⁹²

*Blochowitz v. Blochowitz*⁹³ is a variation on *Strauss*. The testator executed deeds of land to his four sons. His will, executed on the same day, stated, "All of my four sons . . . are entitled to no further part of inheritance as all each and every one of them have received all that they are entitled to."⁹⁴ Some property passed by intestacy; the court held that the sons did not share in it.⁹⁵ The disinheritance provision, says the court, should be "considered in the nature of a contemporaneous charge of an equitable advancement by ancestor to heirs."⁹⁶ The court is referring to the doctrine of advancements. Under that doctrine, an inter-vivos gift made by a decedent to his child will generally be charged

91. Where the negative beneficiaries are *all* the testator's heirs (or relatives), the class-gift construction is justified. Cf. *Iozapavichus v. Fournier*, 308 A.2d 573, 574 (Me. 1973) (construing a devise of entire estate as class gift when will provided, "I purposely and intentionally omit all my relatives from this my Last Will and Testament"); *Sutherland v. Sutherland*, 298 N.E.2d 869, 870-72 (Mass. App. Ct. 1973) (construing a devise of entire estate to two named persons as class gift where will provided, "I leave nothing to any relative of mine who has not been hereinbefore mentioned").

Horseman v. Horseman, 217 S.W.2d 645 (Ky. Ct. App. 1949), also can be distinguished from *Strauss*. The testator devised his farm to his wife for life, remainder to three of his four sons. *Id.* at 646. The will continued:

Item Five: I have another son, Esten B. Horseman, I have not made any provision for him in this will. This is not because of any lack of affection for my said son, but my three other sons hereinabove named have worked with me to make what I have, and I feel that it is only just and right that I should provide for them as hereinabove stated.

Id. The disfavored son, Esten, had lived with a relative since shortly after his birth. *Id.* One of the three sons who were remaindermen predeceased the testator. There was no residuary clause. The court relies on Item Five to conclude that the gift of the remainder is a class gift. *Id.* at 648. This is a very different case from *Strauss*: Item Five is much more the expression of an intent that the two surviving sons take the remainder than the expression of an intent that Esten take nothing.

92. Similar to *Strauss* is *In re Young's Estate*, 232 N.Y.S. 427, 428 (Surr. Ct. 1928) (provision stating that testator "leave[s] nothing" to those heirs not mentioned as residuary beneficiaries taken as evidence that devise of entire estate was class gift).

93. 266 N.W. 644 (Neb. 1936).

94. *Id.* at 646.

95. The testator was survived also by his wife and daughters. *Id.*

96. *Id.* at 652.

against the child's intestate share if that was the decedent's intent.⁹⁷ Whether an inter-vivos gift is treated as an advancement is a function of the donor's intent when the gift is made—here, an intent expressed in the disinheritance provision. As in *Strauss*, the court in *Blochowitz* reads the disinheritance provision as an expression of the testator's intent regarding the operation of some other, dispositive language—here, language outside the will itself. The disinheritance provision itself cannot be a dispositive provision because it makes no sense as a declaration.⁹⁸

So far, we have considered cases in which the courts have read a disinheritance provision as something other than an instruction to the personal representative to refrain from distributing property to the negative beneficiary. In each case, the strained reading was completely unmotivated under the directive model but consistent with the declaration model—consistent, that is, in the sense that the disinheritance provision could not work as a dispositive provision because it could not be a successful declaration or a declaration at all.

In the third group of cases, the declaration model induces a different strained (mis)reading of a disinheritance provision. It is viewed as an "illocutionary denegation,"⁹⁹ that is, as the denial of a declaration in favor of the negative beneficiary. Thus, when the testator states her desire that *B2* take none of her property, the testator is simply denying that any affirmative devise is being made to *B2*. Such an illocutionary denegation cannot possibly have any effect on distribution of the testator's intestate estate. This interpretation has been adopted in at least three cases.¹⁰⁰ As I hope to make clear in my discussion of those cases immediately below, the best explanation is that the courts are operating under the assumption of a declaration model.

In *In re Estate of Levy*,¹⁰¹ the will stated, "I make no provision in this my Last Will and Testament for my wife, Gertrude nor for the issue

97. See 6 BOWE & PARKER, *supra* note 2, §§ 55.1, at 300, 55.5, at 308. Immediately following the passage quoted in the text, the court characterizes the disinheritance provision alternatively as "a condition inhering in the deeds of gift, or as substantially a part of the consideration of such deeds." 266 N.W. at 652. These seem to be simply other ways of stating the advancement doctrine.

98. Indeed, the viability of the orthodox rule after *Blochowitz* is shown by the court's subsequent decisions, which endorse the orthodox rule without citing *Blochowitz*. *In re Estate of Swanson*, 140 N.W.2d 665, 667 (Neb. 1966); *Kula v. Kula*, 31 N.W.2d 96, 98 (Neb. 1948); *In re Estate of Coryell*, 118 N.W.2d 1002, 1005 (Neb. 1963).

99. SEARLE & VANDERVEKEN, *supra* note 29, at 4, 76; SEARLE, SPEECH ACTS, *supra* note 29, at 32.

100. *In re Estate of Levy*, 196 So. 2d 225 (Fla. Dist. Ct. App. 1967); *Kimley v. Whittaker*, 306 A.2d 443 (N.J. 1973); *Cattell v. Evans*, 4 N.W.2d 67 (Mich. 1942).

101. 196 So. 2d 225 (Fla. Dist. Ct. App. 1967).

of my marriage. I have not seen my wife for approximately eleven years and have never seen the issue of my marriage."¹⁰² According to the court, that provision is the denial of a declaration; it serves only to state the testator's "intent . . . not to include [the negative beneficiaries] . . . among the legatees."¹⁰³ To be sure, that is the literal meaning of the first sentence in the quotation from the will. But surely the testator meant to say something other than what was already abundantly clear from the rest of the will. Nor does it help the court's interpretation to point out that the testator did say something else: his description of the motives for leaving out his wife and issue (the second sentence in the quotation from the will). Those motives make clearer still his intent that they take no part of his estate.

The court's cramped reading is a wholly unreasonable one if the task at hand is to discover the testator's intent, but it is a wholly reasonable one if the task is to classify every provision in terms congenial to the declaration model. If a court expects the testator to express himself only in declarations and if a declaration of nonownership makes no sense (as I have argued earlier), then the only alternative is the denial of a declaration. To put the matter crudely, the negation has to go somewhere.

A New Jersey Supreme Court case followed the same approach, but in a much more striking way because there the testator could hardly have been more explicit in expressing her intent that the negative beneficiaries take nothing. The fourth paragraph of the will in *Kimley v. Whittaker*¹⁰⁴ gave the entire estate to the testator's husband with no gift over in case of his nonsurvival.¹⁰⁵ The husband predeceased the testator. The subsequent two paragraphs contained the disinheritance provision:

FIFTH: For reasons I care not to disclose, I hereby make no provision for my daughter, Mary Palmer, nor my grandchildren and *it is my will that my daughter and grandchildren be deprived of any interest whatsoever that I may own at my death.*

SIXTH: Those of my heirs not herein mentioned or provided for have been omitted by me with full knowledge thereof.¹⁰⁶

102. *Id.* at 226 (quoting from the will).

103. *Id.* at 230.

104. 306 A.2d 443 (N.J. 1973).

105. *Id.* at 144.

106. *Id.* (emphasis added).

The testator was survived by the negative beneficiaries (one of whom, her daughter Mary, was her sole heir) and a number of other relatives.¹⁰⁷

The court begins its discussion by reciting the orthodox rule that a disinheritance provision is ineffective.¹⁰⁸ "One reason given for the rule is that since the intestate property passes by law, not by will, the statute, not the testator, controls its distribution."¹⁰⁹ The court notes, however, that the New Jersey cases are in conflict, some holding that the negative beneficiary does not take, others stating that "the testator's intent would control, but that such intent must be clearly expressed and the words used free from doubt."¹¹⁰

That test seems to be satisfied here, and the trial court so held.¹¹¹ According to the trial court (and as paraphrased by the New Jersey Supreme Court), "paragraph Fifth of decedent's will constituted a strong and unambiguous expression of intent to exclude decedent's daughter and the daughter's children from receiving any part of decedent's estate even though it was distributed as intestate property under the statute."¹¹² The appellate division upheld the trial court's decision.¹¹³ The New Jersey Supreme Court reversed; it did not agree that the testator had expressed a clear intent to disinherit.¹¹⁴

The court's rationale is as follows (numerals have been inserted for reference):

[1] Paragraph Fifth can be read as a confirmation of paragraph Fourth wherein the entire estate is left to the husband. [2] In other words, the testatrix might have intended to indicate that she was aware of her daughter and grandchildren, but, nevertheless, wanted everything to go to her husband. [3] The "reasons" for the exclusionary clause, which testatrix said she cared "not to disclose," might have been the husband's needs or mental or physical condition. [4] It cannot be said that the paragraph clearly expressed the intent that the daughter (and her children) be excluded should the bequest to the husband lapse. [5] The reference in paragraph Sixth to the knowing omission of "[t]hose of my heirs not herein mentioned or provided for" would

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* "However, in none of these cases [in the latter category] were the words used found to be free from doubt." *Id.* at 444-45.

111. *Id.* at 445.

112. *Id.*

113. *Id.*

114. *Id.*

seem to indicate that the decedent had in mind testamentary disposition only.¹¹⁵

This passage constitutes a statement that the disinheritance provision is the denial of an affirmative declaration. An explicit statement that the daughter and her children take nothing appears, of course, in paragraph Fifth. Yet we are told by the court (in sentences [1] and [2] of the quoted passage) that paragraph Fifth merely confirms that the only devise she wishes to make is the one to her husband (which, because it is a devise of the entire estate, excludes the daughter and her children from any share). This is to characterize paragraph Fifth as the denial of a declaration in favor of the persons named there. Sentence [3] is further evidence that the court reads the disinheritance provision as the denial of an affirmative declaration. In the court's view, the only "reasons" there set forth for the disinheritance provision have nothing to do with any desire that the daughter and her children take nothing. Rather, they serve only to explain (if true) why the testator devised her entire estate to the husband, that is, why she made no devise to the daughter and her children. Sentences [3] and [4]—in which the court speculates about the possible motives for a provision and then finds the provision ineffective because the supposed motives cannot be fulfilled—would be preposterous if it were made in connection with an affirmative devise.

Finally, the court assumes an illocutionary denegation when it responds to an argument made by the testator's other relatives (who would take in intestacy if the disinheritance provision were effective). They argued that the "will should be construed so as to incorporate by reference the [intestacy statute] . . . , but at the same time exclude . . . [the negative beneficiaries] from participation."¹¹⁶ This is, of course, an argument in favor of an implied devise to the other heirs.¹¹⁷ The court appeared to accept that argument as an accurate statement of the issue (though not necessarily of the conclusion): The disinheritance provision can be effective only if there is an implied affirmative devise to the testator's other surviving relatives, who would be her heirs in the absence of the negative beneficiaries.

But the court refused to imply such a devise. According to the court, the respondent's contention "is unsupported by any evidence either extrinsic or found in the will itself. It is pure speculation to say that

115. *Id.*

116. *Id.*

117. Or, under a nonsurvival rule, to the persons who would take in the event of the negative beneficiary predeceasing the testator.

decedent *had intestacy in mind*.¹¹⁸ The court is more explicit on this point in its summary:

Our conclusion is (1) that decedent did not incorporate the statutory scheme of distribution into her will to be applicable in the event her husband predeceased her, and (2) that paragraph Fifth of decedent's will does not contain a clear expression of intent that it was to be effective where an intestacy has come about and the estate is being distributed under the statute.¹¹⁹

Thus, only if the testator was thinking about intestacy when she wrote the disinheritance provision is a court justified in reading that provision as applicable to intestate property. Otherwise, it applies only to property already disposed of under the will; that is, it states simply that no affirmative devise is being made to the negative beneficiaries.

A third illocutionary denegation case can be dealt with briefly. In *Cattell v. Evans*,¹²⁰ the will devised thirty-five dollars each to the testator's son and daughter and further stated, "I give nothing, except the two legacies above provided for, to the immediate members of my family [the son and daughter] because in the separation from my wife I paid a large sum which I feel is *all they are entitled to out of my estate*."¹²¹ The court characterizes the disinheritance provision as "merely explanatory" of the absence of further devises to them;¹²² there was no intent to disinherit.

VI. DEFICIENCIES OF THE STANDARD REMEDIES

Two remedies have been proposed as the means for reforming the orthodox rule. First, there is the judicially implied devise: The court, without legislative intervention, implies a devise of the negative beneficiary's intestate share to the persons who would have taken had the negative beneficiary predeceased the testator.¹²³ The judicially implied devise suffers from an important defect: There is every reason

118. 306 A.2d at 445 (emphasis added).

119. *Id.*

120. 4 N.W.2d 67 (Mich. 1942).

121. *Id.* at 69 (quoting from will; emphasis added).

122. *Id.*

123. See Heaton, *supra* note 3, at 188-93. It is not absolutely clear that Heaton endorses a nonsurvival rule. Under his approach, "the excluded heir is treated as if he had predeceased the testator, and his share of the intestate portion of the estate is divided among the testator's *remaining heirs*." *Id.* at 179 (emphasis added). Elsewhere in the article, Heaton describes a distribution to the testator's "other heirs." *E.g., id.* at 189. It is not clear whether "remaining heirs" or "other heirs" would include persons who would be heirs only under the supposition that the "excluded heir" predeceased the testator.

to doubt that the courts will create it. Courts are, in general, very reluctant to imply any provisions in a will. To do so would, in the view of the courts, be adding words to the will, contrary to the statutory requirement that the testator express her wishes in writing. Moreover, the reform represented by the judicially implied devise is incomplete in that it provides no independent motivation for its adoption. To be sure, the judicially implied devise is said to fulfill the intent expressed in a disinheritance provision, but the basic point of the typical case applying the orthodox rule is that such an intent simply cannot be given effect.¹²⁴

Moreover, even if a court were willing in principle to imply a devise, the cases with which we are concerned present some of the weakest reasons for doing so. The court is being asked to imply a devise on the basis of a supposed probable intent that the other intestate takers¹²⁵ be the beneficiaries,¹²⁶ an intent for which there is usually no evidence in the will. The testator might not have known—indeed, probably did not know—the identity of the other intestate takers and had no intent about them; all she intended is that the negative beneficiary get nothing.

The second remedy for the orthodox rule is a legislative one. Uniform Probate Code (“UPC”) section 2-101(b)¹²⁷ provides:

A decedent by will may expressly exclude or limit the right of an individual or class to succeed to property of the decedent passing by intestate succession. If that individual or a member of that class survives the decedent, the share of the decedent’s intestate estate to which that individual or class would have succeeded passes as if that individual or each member of that class had disclaimed his [or her] share.¹²⁸

The disclaimer provision of the UPC, in turn, provides generally for a nonsurvival rule.¹²⁹

124. See *supra* text accompanying notes 18-22. A judicially implied devise will not work in a case like *Ward v. Dodd*, 5 A. 650 (N.J. Ch. 1886), for a different reason: It is treated as a devise of property already owned by the negative beneficiary. See *supra* text accompanying notes 64-68.

125. Recall that we are using this term to refer to the persons who would take if the negative beneficiary predeceased the testator.

126. See Heaton, *supra* note 3, at 189-90 (describing the doctrine in approximately this way).

127. 8 U.L.A. 97 (Supp. 1996).

128. UNIF. PROBATE CODE § 2-101(b), 8 U.L.A. 97 (Supp. 1996) (brackets in original). Cf. *id.* § 1-201(56), 8 U.L.A. 14 (Supp. 1996) (“will” includes a testamentary instrument containing only a disinheritance provision).

129. *Id.* § 2-801(d)(1), 8 U.L.A. 195 (Supp. 1996) (disclaimant generally treated as predeceasing the decedent). I say “generally” because the intestate estate will not always

The remedy given in the UPC is even more problematic than the judicially implied devise. The UPC requires the testator to “*expressly* exclude or limit the right . . . to succeed to property . . . passing by *intestate succession*.”¹³⁰ This appears to require that the testator refer expressly to property passing by intestate succession. In the typical disinheritance provision, no such reference appears.

But, for the sake of argument, let us put both of these problems aside. Let us assume that the courts are willing to imply a devise of the negative beneficiary’s intestate share to the other intestate takers. And let us assume that the UPC would be satisfied by a disinheritance provision expressing the intent that the negative beneficiary take none of the testator’s property (without necessarily referring explicitly to property passing by intestate succession). Both remedies still require that the disinheritance provision be evidence of an *intent about distribution of intestate property*. The fact that the implied devise is a devise in favor of the other intestate takers (rather than, say, to the other beneficiaries in the will) creates this requirement. The same intent is required under the UPC; the disinheritance provision must concern “the right of an individual or class to succeed to *property* of the decedent passing by *intestate succession*.”¹³¹

But the testator likely has no such intent. In almost all the cases involving a disinheritance provision, the testator is not thinking of intestate property because she does not expect any to exist;¹³² her will contains a residuary clause and purports to dispose of all her property. The intent expressed in a disinheritance provision is simply an intent that the negative beneficiary take no part of the testator’s property, whatever the basis of his claim. The testator does not know what that basis might be. Or perhaps she does know of a basis other than intestate succession.¹³³ A disinheritance provision does not necessarily, and does not typically, represent an intent about the intestate property in particular.

This view of the matter is reflected in some of the cases discussed in the preceding part. In *Strauss*¹³⁴ the testator’s statement that an

pass exactly as it would if the negative beneficiary had predeceased the testator. The difference arises from the UPC’s scheme of distribution to issue by “representation,” *id.* § 2-106(b), 8 U.L.A. 101 (Supp. 1996), a matter beyond the scope of this Article.

130. UNIF. PROBATE CODE § 2-101(b), 8 U.L.A. 97 (Supp. 1996) (emphasis added).

131. *Id.* (emphasis added).

132. See Gordon, *supra* note 12, at 11-14 (making the same point but reaching the conclusion that disinheritance provisions should be ineffective).

133. Under appropriate circumstances, the negative beneficiary might claim as a substitute beneficiary under an antilapse statute.

134. See *supra* text accompanying notes 69-91.

affirmative devise to his son "shall be and is in full of all claim of any kind or character which he is to have out of my estate,"¹³⁵ far from being an expression of the testator's intent regarding his intestate property, was (according to the court) an expression of an intent that there be no intestate property, that is, that the residuary devise be a class gift.¹³⁶ As we have noted, the intent to give the residue as a class gift, though it may be equivalent to an intent that no property pass in intestacy, is not equivalent to an intent that a particular heir or heirs receive nothing.

In *Kimley*¹³⁷ and the other illocutionary denegation cases,¹³⁸ the courts find a disinheritance provision to be merely a description of the fact of (and the reasons for) the testator's failure to include a devise in favor of the negative beneficiary. It does not represent the testator's intent about distribution of the intestate property. Moreover, in view of the clarity and explicitness of the disinheritance provision in *Kimley*—"it is my will that my daughter and grandchildren be deprived of any interest whatsoever that I may own at my death"—it is difficult to see how a testator can ever write a disinheritance provision that would invoke either the judicially implied devise or the UPC rule.

VII. CONCLUSION

The most reliable way to relieve a symptom is to cure the disease. The symptom here is the courts' refusal to give straightforward effect to a disinheritance provision. In this Article, I have sought to identify the disease as the underlying model of a will.

A court operating under the directive model would give effect to a disinheritance provision in the simplest, most straightforward way: Any inconsistent distribution under the intestacy statute is ineffective. In all other respects, the residue is distributed under the statute to the persons named there. There is no implied devise to anyone.

A court operating under the declaration model is unable to reach that solution. Such a court is forced to read a disinheritance provision either as an ineffective dispositive provision (ineffective because it is a declaration about someone else's property), an effective nondispositive provision (used only to construe other language), or indeed nothing at all (a statement about the absence of a devise). In the latter two instances,

135. 2 N.E.2d at 701.

136. See *supra* notes 67-88 and accompanying text.

137. See *supra* text accompanying notes 104-19.

138. See *supra* text accompanying notes 99-122.

the courts give to a disinheritance provision an interpretation that appears to put the case out of the reach of the standard remedies.

Reform of the law relating to the effectiveness of a disinheritance provision lies most simply and most reliably in the courts' abandonment of the declaration model in favor of the directive model. This Article is an attempt to push the courts in that direction.