NATURAL OBJECTS AND TESTAMENTARY FREEDOM

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INTRODUCTION

The "organizing principle" of inheritance law is advertised to be freedom.[1] Specially, it is the freedom of decedents to select the beneficiaries of their estates virtually without interference.[2] Despite this alleged freedom, inheritance law does not regard all potential beneficiaries equally. It deems some beneficiaries to be the *natural objects* of a decedent's bounty.[3] Members of this class are granted preferences

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1. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmt. a (AM. L. INST. 2003). The Restatement goes on to claim that "[p]roperty owners have the nearly unrestricted right to dispose of their property as they please." *Id.*

2. *See, e.g.*, *id.* § 10.1 cmt. c ("American law does not grant courts any general authority to question the wisdom, fairness, or reasonableness of the donor's decisions about how to allocate his or her property."); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 491 (1975) ("The first principle of the law of wills is freedom of testation."). Indeed, "virtually 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." *Id.*

3. A common initial misunderstanding is that the term "natural objects" refers to a decedent's possessions rather than to their would-be beneficiaries. As used in this context, the "objects" of a decedent's bounty are people, not things. *See* discussion *infra* Section I.A.

throughout inheritance law.[4] Usually the natural objects of a decedent's bounty are the decedent's close family members.[5] After all, "[i]nheritance law is entrenched in a family paradigm,"[6] reflecting that "[s]ociety's main concern with the devolution of property is safeguarding the family."[7] If a decedent chooses to leave her estate to a different beneficiary (often someone outside of the decedent's family), such a disposition is by implication an *unnatural* one.[8] While unnatural dispositions are legally permitted, inheritance law reminds us that if we don't leave our estates to certain individuals, we are acting counter to the laws of nature.[9] It is an odd sort of freedom that is coupled with judgment if it is not exercised in the expected way.

Aside from expressing a negative judgment on such devises, inheritance law also makes it more difficult to leave bequests to "unnatural" beneficiaries than to "natural" ones.[10] When a will is contested, "the content of the will factors heavily into the adjudication of will disputes,"[11] which skews adjudications in favor of distributions to the natural objects of the decedent's bounty and away from distributions to everyone else.[12] Legally speaking, the natural objects of a decedent's

4. *See* Frances H. Foster, *Individualized Justice in Disputes over Dead Bodies*, 61 VAND. L. REV. 1351, 1357 (2008) ("Rules governing disposition of a decedent's estate—be it disposition by intestacy, will, contract to devise, or will substitute—give preference to the so-called 'natural objects of the decedent's bounty,' the decedent's closest family members by blood, adoption, or marriage.") (quoting Mundy v. Simmons, 424 A.2d 135, 139 (Me. 1980)).

5. *See id.*; *see also* Frances H. Foster, *Should Pets Inherit?*, 63 FLA. L. REV. 801, 805 (2011).

6. Foster, *supra* note 4, at 1357; *see also* Foster, *supra* note 5, at 805.

7. Edwin M. Epstein, *Testamentary Capacity, Reasonableness and Family Maintenance: A Proposal for Meaningful Reform*, 35 TEMPLE L.Q. 231, 232 (1962).

8. *See* David Horton, *Testation and Speech*, 101 GEO. L.J. 61, 93 (2012) ("Courts in many states automatically deem any bequest to a nonfamily member to be 'unnatural.' ") (quoting *In re* Ingersoll Trust, 950 A.2d 672, 698 (D.C. 2008)); *see also* Foster, *supra* note 5, at 806 ("[I]nheritance law's bias in favor of the traditional family is so strong that dispositions to those outside the immediate family circle are considered 'unnatural.' ") (quoting *In re* Est. of Gersback, 960 P.2d 811, 817 (N.M. 1998)).

9. *See* Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 245 (2001) (noting that inheritance law "declares 'unnatural' the very relationships that many people, but most frequently ethnic and cultural minorities often experience as 'natural'—caring relationships with extended family members, nonmarital partners, close friends, and nonrelated caregivers").

10. *See* Foster, *supra* note 5, at 806 ("Efforts to bypass the family paradigm by will, trust, or contract also fall victim to the paradigm's narrow status-based definition of natural objects."); Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 243-68 (1996) (providing numerous examples of situations in which judges and juries manipulated flexible doctrines to invalidate wills or devises that would have resulted in "unnatural" dispositions).

11. Pamela Champine, *Expertise and Instinct in the Assessment of Testamentary Capacity*, 51 VILL. L. REV. 25, 43 (2006).

12. Irene D. Johnson, *There's a Will, but No Way—Whatever Happened to the Doctrine of Testamentary Freedom and What Can (Should) We Do to Restore It?*, 4 EST. PLAN. & CMTY. PROP. L.J. 105, 108-09 (2011) ("Courts and juries seem loathe to uphold plans that do not dispose of the leftover property to 'the natural objects of the testator's bounty'—the testator's closest family members.").

bounty are relevant in several areas, but primarily in determining whether the decedent has sufficient capacity to make a will and whether the will should be invalidated as the product of undue influence. If you attempt to leave your estate to a beneficiary that the law deems unnatural, you might just find your will invalidated for lack of mental capacity or undue influence.[13]

The term *natural objects of bounty* is a normative one. It drips with judgment. It elevates some potential beneficiaries to a favorable status and casts suspicion upon the rest. This lack of equal treatment is starkly at odds with the concept of testamentary freedom. A system truly rooted in testamentary freedom would harbor no preference over whom decedents select as their beneficiaries. It would be beneficiary neutral. There would be beneficiary equality. That is not the system of inheritance law that we have.

This Article explores the tension between inheritance law's designation of certain beneficiaries as *natural* and *unnatural* for certain purposes and its organizing principle of testamentary freedom. Either inheritance law is primarily concerned with effectuating the preference of the decedent or it is primarily concerned with safeguarding the economic health of the family. It cannot be both. Ultimately, one of these two must yield. Either we acknowledge that decedents don't have the level of dispositional freedom that is advertised or we change the law's designation of some devises as natural and other as unnatural.

This Article proposes a pathway to relieve the tension and better align the concept of *natural objects of bounty* with testamentary freedom. The fix is relatively simple: edit out the word *natural* and replace it with a something like *intended* to focus the inquiry on the decedent's preferences rather than our view of what the decedent's preferences should have been. The test should be descriptive rather than normative. A devise that runs counter to what the decedent intended should raise a red flag. That is an "unnatural" outcome. But, if testamentary freedom means anything, a devise should not ring warning bells for running counter to what society thinks a decedent *should* do. After all, testamentary freedom is only meaningful if it effectively protects decedents who wish to do unexpected things with their estates.

This Article proceeds in a few parts. The first part focuses on the natural objects of one's bounty: who they are and how they are relevant to legal determinations. The second part focuses on freedom of disposition in inheritance law: what it is and why we have it. The third part

13. *See, e.g.*, Foster, *supra* note 9, at 210-11 (noting that "[b]equests to individuals other than 'natural objects of the decedent's bounty'—essentially family members—raise judicial red flags" and that "in practice, judges and juries manipulate" doctrines such as mental capacity and undue influence "to reach results more in accord with the family paradigm").

discusses the tensions between these two concepts and suggests sensible reforms to relieve the tensions. Finally, the Article concludes with some closing thoughts.

I. NATURAL OBJECTS OF ONE'S BOUNTY

In order to understand the tension created by the law's prioritization of the natural objects of a decedent's bounty, it is first necessary to understand how the term is defined. Second, it is necessary to understand the role that the natural objects of a decedent's bounty play in inheritance law. This part addresses both of those topics in sequence.

A. Who Are They?

As a historical matter, the term's genesis has been traced back to the early nineteenth century.[14] It quickly caught on in the state courts and has subsequently appeared in several state statutes.[15] Despite all this, it escapes pat definition. Perhaps it would be more accurate to say that courts and legislators have largely escaped providing a clear definition for the term.[16] That is not to say that none have attempted it. As it proliferated across U.S. jurisdictions, various courts have put their hand to defining the term, either expressly or through its application. What has emerged is a hodgepodge of evolving definitions. A historical look at Black's Law Dictionaries provides useful examples: the natural objects of a decedent's bounty went from being a synonym for the decedent's legally defined heirs[17] to being a term that much more dynamically inquires into the "nature and circumstances" of the decedent's relationships.[18] Like the foregoing examples, attempted def-

14. Robert E. Mensel, *Right Feeling and Knowing Right: Insanity in Testators and Criminals in Nineteenth Century American Law*, 58 OKLA. L. REV. 397, 425 (2005) (crediting the first use of the term in a reported judicial opinion to Daly's Lessee v. James, 21 U.S. (8 Wheat.) 495, 504 (1823)).

15. *See, e.g.*, *id.* at 425-36 and authorities cited therein.

16. *See, e.g.*, Bradley E.S. Fogel, *The Completely Insane Law of Partial Insanity: The Impact of Monomania on Testamentary Capacity*, 42 REAL PROP. PROB. & TR. J. 67, 78 (2007) ("Although the phrase 'natural object of the testator's bounty' is used frequently in describing capacity, the phrase is much less frequently defined."); *see also* Champine, *supra* note 11, at 48 ("[I]t is unclear who is covered by the [natural objects of his or her bounty] phrase . . . ."). Even requests for a definition of the term by juries during deliberation have been rebuffed by courts. *See, e.g.*, Wysick v. Est. of Wysick, 562 S.W.2d 903, 904 (Tex. Civ. App. 1978).

17. *Natural Object of Testator's Bounty*, BLACK'S LAW DICTIONARY (6th ed. 1990) (defining "[n]atural object of testator's bounty" as a term that "comprises whoever would take, in the absence of a will, because they are the persons whom the law has so designated, and in the ordinary case the law follows the normal condition of near relationship").

18. *Natural Object*, BLACK'S LAW DICTIONARY (7th ed. 1999) (defining "natural object" as "[a] person likely to receive a portion of another person's estate based on the nature and circumstances of their relationship").

initions range from those statically based on relationships and bloodlines[19] to more dynamic hybrid definitions that inspect the quality of the relationship between the decedent and the potential beneficiary.[20]

If "[f]requently, the 'natural objects of a testator's bounty' are his heirs,"[21] a sensible starting point for identifying whom the law regards as the natural objects of a decedent's bounty is the jurisdiction's statute of descent and distribution, otherwise known as the intestacy statute. An intestacy statute governs the inheritance of a decedent's estate in the absence of a will.[22] It is, essentially, the legislature's best attempt for creating an estate plan for decedents who did not create one for themselves.[23] Thus, a decedent's heirs, as identified by the intestacy statute, are "those whom the Legislature conceived to be the natural objects of the bounty of the deceased."[24]

Distributions under intestacy statutes are governed by degrees of relationship; the quality of the actual relationship is irrelevant.[25] Although variations exist across jurisdictions, intestacy statutes gener-

19. These definitions often default to the decedent's heirs. *See, e.g.*, *supra* definition in note 17; Mundy v. Simmons, 424 A.2d 135, 139 (Me. 1980) (identifying "the surviving spouse and those who stand in closest relationship within the blood line as the natural objects of the decedent's bounty").

20. These definitions remain "hybrid" because often certain relationships (e.g., surviving spouses) always qualify as natural objects of a decedent's bounty without inquiry into the quality of the relationship. *See, e.g.*, *infra* text accompanying notes 39-40.

21. Fogel, *supra* note 16, at 78 n.68; *see also* Elizabeth R. Carter, *Tipping the Scales in Favor of Charitable Bequests: A Critique*, 34 PACE L. REV. 983, 998 (2014) ("The testator's spouse and intestate heirs are, generally, the persons deemed to be the natural objects of his bounty.").

22. *See, e.g.*, UNIF. PROB. CODE §§ 2-101 through 2-114 (UNIF. L. COMM'N 2019) (providing the "general rules" of intestate succession). The Uniform Probate Code had been adopted in about a third of U.S. jurisdictions, although additional jurisdictions have adopted it in part. *See, e.g.*, ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 69 (10th ed. 2017); *Probate Code Enactment History*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=35a4e3e3-de91-4527-aeec-26b1fc41b1c3 [https://perma.cc/XMJ9-CULT] (last visited Jan. 11, 2023).

23. SITKOFF & DUKEMINIER, *supra* note 22, at 65 ("[T]he primary objective in designing an intestacy statute is to carry out the probable intent of the typical intestate decedent.").

24. Garwols v. Bankers' Tr. Co., 232 N.W. 239, 241 (Mich. 1930) ("The object of the statute of descent and distribution is to provide for the devolution of estates of persons dying intestate among those whom the Legislature conceived to be the natural objects of the bounty of the deceased.").

25. SITKOFF & DUKEMINIER, *supra* note 22, at 134 ("In the United States, unworthy heirs—whose conduct bars inheritance—are usually limited to slayers. In nearly all other situations, intestate succession is fixed by status: bloodline kinship, marriage, or adoption."); *see also* Kymberleigh N. Korpus, Note, *Extinguishing Inheritance Rights: California Breaks New Ground in the Fight Against Elder Abuse but Fails to Build an Effective Foundation*, 52 HASTINGS L.J. 537, 541-42 (2001) (explaining that many elder abuse victims, "if not most, will pass on their estates to their abusers unless they exercise their testamentary capacity to disinherit them"); Foster, *supra* note 9, at 206 (noting that the rules of intestate succession "provide rigidly for inheritance by status").

ally prioritize inheritance by surviving spouses, followed by descendants, ancestors, and collateral kindred.[26] It matters not for purposes of inheritance whether a child or sibling had a contentious or close relationship with the decedent; it only matters whether they fall within the class of relatives who is entitled to inherit. There is a cut-off point, often second-line collaterals, beyond which more distant relatives may not inherit based on a presumption that they lacked a close relationship with the decedent.[27] Similarly, non-relatives may not inherit under intestacy statutes because identifying beneficiaries would be too administratively burdensome (e.g., who qualifies as a "lover" or a "friend" of the decedent?).[28]

While courts use intestacy statutes to distribute the estates of decedents who made no wills, courts also use intestacy statutes as a guide when determining the natural objects of a decedent's bounty for decedents who died with a will.[29] Indeed, intestacy statutes "influence[] testamentary dispositions" by "expressing a legislative judgment about what is typical or normal."[30] As one court put it, "all things being equal, the natural objects of a testator's bounty are those who unless a will exists will inherit his property."[31] But, when all things are not equal, "the question of who come within the range of a testator's bounty depends largely upon the circumstances surrounding the testator" so that "a person related to a testator [c]ould be a natural object of his bounty to the exclusion of another within the same degree of relationship."[32]

Thus, under a more dynamic approach, an individual may qualify as a natural object of the decedent's bounty even if they do not fit within any of the qualifying relationships in the intestacy statute.

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26. *See* UNIF. PROB. CODE §§ 2-102 through 2-103 (UNIF. L. COMM'N 2019); *see also* SITKOFF & DUKEMINIER, *supra* note 22, at 71-86.

27. *See* UNIF. PROB. CODE § 2-103 (UNIF. L. COMM'N 2019) (drawing the line of heirship at a decedent's grandparents and their descendants); SITKOFF & DUKEMINIER, *supra* note 22, at 87-88 (discussing inheritance by distant "laughing heirs").

28. *See, e.g.*, SITKOFF & DUKEMINIER, *supra* note 22, at 74-76 (discussing the challenges of orchestrating a standard to extend heirship to unmarried cohabiting partners).

29. Foster, *supra* note 9, at 213 ("[C]ourts often use intestate succession statutes as their charter to determine the likely, most 'natural' intent of the testator."); *see also* Susan N. Gary, *The Parent-Child Relationship Under Intestacy Statutes*, 32 U. MEM. L. REV. 643, 644 (2002) ("Courts may use the [intestacy] statutes as a way to identify the 'natural objects of the decedent's bounty.' "). Perhaps most telling as to whose bounty it truly reflects, the above quote was once misquoted as referring to intestacy statutes as reflecting "the 'natural objects of the *legislator's* bounty.' " Lee-ford Tritt, *Sperms and Estates: An Unadulterated Functionally Based Approach to Parent-Child Property Succession*, 62 SMU L. REV. 367, 380 (2009) (emphasis added).

30. SITKOFF & DUKEMINIER, *supra* note 22, at 63.

31. Norris v. Bristow, 219 S.W.2d 367, 370 (Mo. 1949).

32. *Id.*

Thus, for example, a long-term cohabiting romantic partner,[33] in-law,[34] or even potentially a charity[35] may be deemed to be a natural object of a decedent's bounty, even if they would not qualify as an heir under intestacy statutes.[36] In doing so, some courts have expressly acknowledged "the absurdity of an assumption that natural objects of one's bounty mean[s] only heirs."[37]

If some individuals who fall outside the scope of the intestacy statute may be found to be natural objects of a decedent's bounty based on the quality of their relationship with the decedent, it stands to reason that the converse should also be true: some individuals who fall within the scope of the intestacy statute may not found to not be natural objects of a decedent's bounty based on the poor quality of their relationship with the decedent. In practice, however, it is quite difficult to find such examples in the caselaw.[38] Indeed, some courts have expressly adopted a hybrid approach that always includes certain relationships as natural objects of one's bounty, regardless of the quality of the relationship, but leaves the door open for others to qualify as natural objects of bounty based on the quality of the relationship. For example, California courts have accepted the following definition in a jury instruction:

> The expression 'natural objects of a testator's bounty' has reference to the descendants, surviving spouse, and parents of the Testator who purely by reason of relationship may be presumed to have had claims upon his bounty. Collateral heirs such as brothers and sisters, nieces and nephews are not because of such relationship alone, 'natural objects of bounty' and such next of kin not provided for in the Will, in order to establish that the instrument is unnatural, must show affirmatively, that he had peculiar or superior claims to the decedent's

33. *See, e.g.*, Rakhman v. Zusstone, 957 S.W.2d 241, 244 (Ky. 1997) ("[O]ne with whom the donor has shared a home for nearly twelve years, who has been represented to the public as the donor's spouse, who has adopted the use of the donor's surname, and who has borne the donor two children and has shared the demands and joys of parenting with the donor, would come within a practical definition of the phrase.").

34. *See, e.g.*, Lacey v. Van Royen, 267 A.2d 91, 95 (Md. 1970) (son-in-law); Mermon v. Mermon, 390 A.2d 796, 798 (Pa. Super. Ct. 1978) (daughter-in-law).

35. Bowles' Est. v. Bowles' Heirs, 114 N.E.2d 229, 235 (Ohio Ct. App. 1953) (referencing "the persons who, or charities that would be the natural objects of the testator's bounty"); *see also* Carter, *supra* note 21, at 1038-39 (summarizing cases).

36. While at least one commentator has argued that the term should encompass a decedent's pets as well, *see* Foster, *supra* note 5, at 844-54, the law has yet to adopt this suggestion, *see, e.g.*, Kaity Y. Emerson & Kevin Bennardo, *Unleashing Pets from Dead-Hand Control*, 22 NEV. L.J. 349, 351-55 (2021) (describing the law's treatment of pets as personal property).

37. *In re* Fiedler, 132 A.3d 1010, 1022 (Pa. Super. Ct. 2016) (citing Stevenson's Ex'r v. Stevenson, 33 Pa. 469, 472 (1859)).

38. *But see, e.g.*, *In re* Finkler's Est., 46 P.2d 149, 154-55 (Cal. 1935) (finding that estranged nieces and nephews-in-law, who were "heirs at law of the testator," "were in no sense legally or morally the natural objects of his bounty").

> bounty, and if no such claim is established the instrument cannot be held to be unnatural.[39]

Under an instruction such as this, certain relationships (here, descendants, the surviving spouse, and parents) always qualify as natural objects of a decedent's bounty regardless of the quality of the relationship. Others (here, siblings, nieces, and nephews) must prove their status as a natural object of the decedent's bounty based on more than just their familial kinship.

The Restatement (Second) of Trusts incorporated similar language in a provision referring to "a wife, child or other natural object of bounty."[40] Language such as this conclusively supposes that spouses and children are natural objects of bounty due to the class of relationship but leaves the remainder of the definition flexible with regard to who else may potentially qualify.

Finally, some authorities suggest that certain classes of individuals can never attain the status of natural objects of a decedent's bounty. Language exists in the case law that would seemingly cut off all collateral relatives from qualifying as the natural objects of a decedent's bounty. A Texas appellate court, for example, has succinctly stated that "[c]ollateral kin are not natural objects of bounty."[41] South Dakota courts have held that a "testator's collateral heirs, such as brothers, sisters, nephews and nieces, may not be considered natural objects of his bounty, notwithstanding they would take by intestacy."[42] Similarly, the official commentary to the Uniform Probate Code, which has been adopted by various states, seemingly conclusively excludes step-children from being considered the natural objects of a step-parent's bounty.[43]

Whether natural objects of a decedent's bounty are defined dynamically, statically, or a hybrid of the two, the definition incorporates a normative approach. Even a dynamic approach that inquires into whether the decedent had an abnormally contentious relationship with a close relative or an abnormally close relationship with a non-relative remains normative in the sense that what the decisionmaker ultimately determines is to whom it expects the decedent should have wanted to pass on her property based on the quality of the decedent's

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39. *In re* Robbins' Est., 342 P.2d 933, 940 (Cal. Dist. Ct. App. 1959) (citing other cases approving similar instructions).

40. RESTATEMENT (SECOND) OF TRUSTS § 442 (AM. L. INST. 1959).

41. Vincent v. Vincent, 320 S.W.2d 217, 219 (Tex. Civ. App. 1958).

42. *In re* Fleege's Est., 230 N.W.2d 230, 231 (S.D. 1975) (internal quotations omitted) (citing cases).

43. *See* UNIF. PROB. CODE § 2-102 cmt. 1990 (UNIF. L. COMM'N 2019) ("[T]he decedent's descendants who are not descendants of the surviving spouse are not natural objects of the bounty of the surviving spouse."); *see also* MASS. GEN. LAWS ch. 190B, § 2-102 (same commentary); MONT. CODE ANN. § 72-2-112 (same); N.D. CENT. CODE § 30.1-04-02 (same); UTAH CODE ANN. § 75-2-102 (same).

relationships. Critically, this inquiry is not the same as asking to whom the decedent actually preferred to pass on her property. It remains a fully normative inquiry: given the quality of the decedent's relationships, who do we think she *should* have desired to leave her property to?

B. How Are They Relevant?

The natural objects of a decedent's bounty are relevant in several areas of inheritance law, including testamentary capacity, undue influence, and construction of wills and trusts. This subpart describes each in turn.

First and foremost, the natural objects of a decedent's bounty are vital to the question of the mental capacity required to make a will. Mental capacity is a crucial component of the validity of a will. If the maker of the will lacks a "sound mind," the will and all of its provisions are ineffective.[44] Generally, the threshold for mental capacity to make a will is intentionally low,[45] and requires the testator to be "capable of knowing and understanding in a general way the nature and extent of his or her property, the natural objects of his or her bounty, and the disposition that he or she is making of that property."[46] The testator must "also be capable of relating these [three] elements to one another and forming an orderly desire regarding the disposition of the property."[47] Thus, the natural objects of his or her bounty are one-third of the information that the testator must be capable of understanding in order to possess the necessary mental capacity to make a will. This requirement serves the purpose of protecting the family "from having an incompetent testator unwittingly pass his property outside of the bloodline."[48] Conversely, however, sufficient mental capacity does not require a testator to be capable of recognizing potential beneficiaries who would *not* be considered natural objects of her bounty.

Second, the natural objects of a decedent's bounty may be relevant when testing for undue influence. Undue influence occurs when someone exerts such influence over a donative transfer "that it overcame the donor's free will and caused the donor to make a donative transfer that the donor would not otherwise have made."[49] The doctrine is

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44. *See, e.g.*, UNIF. PROB. CODE § 2-501 (UNIF. L. COMM'N 2019) (requiring an individual to be "of sound mind" to make a valid will); *see also* Adam J. Hirsch, *Testation and the Mind*, 74 WASH. & LEE L. REV. 285, 299-300 (2017) (discussing the "sound mind" requirement).

45. SITKOFF & DUKEMINIER, *supra* note 22, at 264.

46. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.1(b) (AM. L. INST. 2003).

47. *Id.*

48. Epstein, *supra* note 7, at 232 (further noting that "the feeling is deep-rooted in our culture that wealth should descend within the bloodline").

49. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3(b) (AM. L. INST. 2003).

meant to protect "vulnerable testator[s] . . . against imposition by cunning or domineering persons" in situations that "are less overtly coercive than fraud or threat of force but that overcome the will of the testator nonetheless."[50] A bequest procured by undue influence is invalid.[51]

In application, undue influence is an "unruly" concept,[52] indeed, it is "one of the most bothersome concepts in all the law."[53] Direct evidence of undue influence is almost always in short supply: "most acts of undue influence occur in a private setting where the only observers were the testator and the wrongdoer, one of whom is dead and the other uncooperative."[54] To compensate for the evidentiary difficulties surrounding undue influence, "courts have developed an elaborate scheme of inferences, presumptions, and burden shifting."[55] By default, a challenger of a bequest usually has the burden of proving undue influence,[56] but in many jurisdictions a showing of a confidential relationship between the alleged influencer and the decedent and one or more suspicious circumstance is sufficient to create a presumption of undue influence.[57] Once a presumption of undue influence has been erected, the burden of proof shifts to the proponent of the bequest to disprove undue influence.[58] Although stated variously in different jurisdictions, one contributing factor to gaining a presumption of undue influence is to demonstrate that the recipient of the challenged bequest was not a natural object of the decedent's bounty.[59] Though the Restatement commentary does not use the exact natural-object-of-bounty

50. SITKOFF & DUKEMINIER, *supra* note 22, at 282.

51. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3(a) (AM. L. INST. 2003); *see also* Thomas E. Simmons, *Testamentary Incapacity, Undue Influence, and Insane Delusions*, 60 S.D. L. REV. 175, 201 (2015) ("When undue influence is shown, the testamentary intent of an otherwise competent testator has been effectively displaced by the wrongful influence of another person.").

52. SITKOFF & DUKEMINIER, *supra* note 22, at 282.

53. *Id.* at 281.

54. Simmons, *supra* note 51, at 203.

55. SITKOFF & DUKEMINIER, *supra* note 22, at 282.

56. UNIF. PROB. CODE § 3-407 (UNIF. L. COMM'N 2019).

57. SITKOFF & DUKEMINIER, *supra* note 22, at 288-89; *see also* Simmons, *supra* note 51, at 203-04 (explaining one such burden-shifting framework).

58. SITKOFF & DUKEMINIER, *supra* note 22, at 289.

59. *See, e.g.*, Bean v. Wilson, 661 S.E.2d 518, 519 (Ga. 2008) (" '[A] rebuttable presumption of undue influence arises when a beneficiary under a will occupies a confidential relationship with the testator, is not the natural object of his bounty, and takes an active part in the planning, preparation, or execution of the will.' " (internal quotation omitted)); *In re* Est. of Holcomb, 63 P.3d 9, 16 (Okla. 2002) (listing "whether the alleged influencer was or was not a natural object of the maker's bounty" as a factor "[i]n determining whether a contestant's evidence establishes the basic facts that give rise to the presumption of undue influence"); Pepin v. Ryan, 47 A.2d 846, 847 (Conn. 1946) ("Ordinarily, the burden of proving undue influence rests upon him who seeks to have a will set aside on this ground, but where the natural object of the testator's bounty is excluded from participation in his estate, where

language, it captures the concept in its listing of suspicious circumstances: "whether the disposition of the property is such that a reasonable person would regard it as unnatural, unjust, or unfair, for example, whether the disposition abruptly and without apparent reason disinherited a faithful and deserving family member."[60]

Moreover, the alleged undue influencer's behavior regarding the natural objects of the decedent's bounty may become relevant to the ultimate determination of undue influence. Efforts by an alleged undue influencer "to exclude the natural objects of [a] testator's bounty from [the testator's] society" support shifting the burden of proof to the proponent of the will.[61] Similarly, "a will may be invalidated for undue influence under certain circumstances where a person makes false statements and accusations to a testator concerning the natural objects of his bounty"[62] or a fiduciary of the testator engenders bias or feelings of hostility toward the natural objects of the decedent's bounty.[63]

Next, the natural objects of a decedent's bounty may also be relevant to the construction or interpretation of a will. Numerous courts have suggested that an understanding of the natural objects of a decedent's bounty is either necessary or helpful in construing ambiguous language in a will.[64] These courts, however, usually stop short of explaining *how* it is helpful for an interpreting court to appreciate who were the natural objects of the testator's bounty. At least one court has expressly stated what so many others have implied: a decedent's will "should be construed, if possible, so as not to work an injustice to the

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a stranger supplants children, and the will is in favor of the guardian having charge of his person and estate there is imposed upon the proponents of the will, upon the trial of the issue as thus raised, the obligation of disproving by a clear preponderance of evidence the affirmation of the actual exercise of undue influence by such beneficiaries of the will." (internal quotation omitted)); *see also* Taliaferro v. Green, 622 S.W.2d 829, 832-33 (Tenn. Ct. App. 1981) (upholding jury instruction on the issue of undue influence that identified the following as a relevant factor: "Do the provisions of the Will prefer strangers in blood to the natural objects of the decedent's bounty[?]").

60. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3 cmt. h (AM. L. INST. 2003).

61. *E.g.*, *In re* Raynolds' Est., 27 A.2d 226, 231 (N.J. Prerog. Ct. 1942).

62. *In re* Accomazzo's Est., 492 P.2d 460, 461 (Ariz. Ct. App. 1972).

63. *In re* Ulrich's Will, 130 A. 806, 808 (N.J. Prerog. Ct. 1925).

64. *See, e.g.*, *In re* Shadden's Est., 599 P.2d 1071, 1075 (N.M. Ct. App. 1979) (approving of language stating that the meaning of a will "cannot be understood" until "the court understands [the] testator's situation with reference to his property, the natural objects of his bounty, and his contemplated beneficiaries"); *In re* Newlin's Est., 80 A.2d 819, 821 (Pa. 1951) (stating that a will must be read in light of the circumstances surrounding the testator at the time it was made, including the natural objects of his bounty); Breckner v. Prestwood, 600 S.W.2d 52, 55 (Mo. Ct. App. 1980) (stating that extrinsic evidence identifying the natural objects of a decedent's bounty may be admissible to resolve a patent ambiguity in a will); *see also In re* Nelson, 926 S.W.2d 707, 710 (Mo. Ct. App. 1996) (same rule for interpreting trust instruments).

natural objects of his bounty."[65] Under this approach, ambiguous provisions must be interpreted in favor of the natural objects of the testator and against all other potential (unnatural) beneficiaries.

Natural objects of bounty play an interpretive role elsewhere in inheritance-adjacent law. For example, consider a situation in which one person (*A*) supplies the money to purchase property for another person (*B*). Unless *B* can show that *A* intended to make a gift to *B*, *B* holds the property on resulting trust to *A*.[66] Despite its name, a "resulting trust" is not a trust at all; rather the would-be trustee must convey the property to the beneficial owner upon demand.[67] Thus the property would typically revert to *A* upon *A*'s demand. This is not the case, however, if *B* is a natural object of *A*'s bounty. If *B* is a natural object of *A*'s bounty, the conveyance is presumed to be a gift and no resulting trust occurs unless affirmative evidence demonstrates that the conveyance was not a gift.[68] In short, this is a matter of construction as well: the law flips what it construes to be *A*'s presumed intent based on *A*'s relationship with *B*.

Beyond the major categories of capacity, undue influence, and construction, there exists a hodgepodge of other inheritance-related areas in which the natural objects of one's bounty may be relevant. For example, when a conservator creates an estate plan for a minor, one factor that the court must consider before authorizing the estate plan is whether the proposed transferees are "natural objects of the minor's bounty by relationship or prior behavior of the minor."[69] In the professional responsibility context, attorneys are generally prohibited from preparing an instrument, such as a will, for a client that makes a substantial gift to the attorney.[70] One exception to this general rule arises when the attorney-donee is a natural object of the client's bounty.[71]

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65. *In re* Pettit's Will, 271 N.Y.S. 757, 761 (N.Y. App. Div. 1934); *see also In re* Tomljenovich's Will, 154 N.Y.S.2d 327, 332 (N.Y. Surr. Ct. 1956) (citing *Pettit's Will* with approval for the same proposition).

66. RESTATEMENT (THIRD) OF TRUSTS § 9 (AM. L. INST. 2003).

67. SITKOFF & DUKEMINIER, *supra* note 22, at 417-18; *see also* RESTATEMENT (THIRD) OF TRUSTS § 7 (AM. L. INST. 2003).

68. RESTATEMENT (THIRD) OF TRUSTS § 9(2) & cmt. b (AM. L. INST. 2003); *see also* Fitzpatrick v. Fitzpatrick, 29 A.2d 790, 793 (Pa. 1943) (similar); *In re* Marriage of Kendra, 815 N.E.2d 22, 25 (Ill. App. Ct. 2004) ("[I]t is presumed that the placement of title in the name of a child by a parent is a gift, rather than a resulting trust . . . because a child is the natural object of the bounty of the person paying the purchase price." (internal citation omitted)).

69. GA. CODE. ANN. § 29-3-36(b)(3).

70. *See, e.g.*, Wis. S. Ct. Rules 20:1.8(c).

71. *See, e.g.*, *id.*; State v. Collentine, 159 N.W.2d 50, 53 (Wis. 1968) (establishing the rule that "a lawyer may be the scrivener of a will in which he is a beneficiary only when he stands in relationship to the testator as the natural object of the testator's bounty and where under the will he receives no more than would be received by law in the absence of a will"); *see also* MODEL RULES OF PRO. CONDUCT r. 1.8 cmt. 7 (AM. BAR ASS'N 1983) ("If effectuation of a substantial gift [to an attorney] requires preparing a legal instrument such as a will or

Elsewhere in the law, equity may step in to salvage an incomplete gift if the would-be donee was a natural object of the would-be donor's bounty.[72]

II. TESTAMENTARY FREEDOM

In order to understand the tension created by the law's prioritization of the natural objects of a decedent's bounty, it is also necessary to understand the role of testamentary freedom in inheritance law. This part first explains the concept of testamentary freedom and then explains the rationales behind testamentary freedom.

A. What Is It?

Testamentary freedom is the liberty to control the distribution of one's own estate.[73] Given "the American obsession with testamentary freedom," almost every policy decision embedded in U.S. inheritance law can be explained either fully or partially as facilitating testamentary freedom.[74] As such, it has been summarized and re-summarized in many secondary sources that attempt to describe inheritance law or advocate for changes to it.[75]

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conveyance, the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.").

72. As stated by the Restatement of Restitution:

> Where the owner of property makes a gratuitous conveyance of it and the conveyance is ineffective to transfer the property, the donor holds the property upon a constructive trust for the intended donee, if . . . (b) the donor has died believing that he has made an effective conveyance, and the intended donee was a natural object of his bounty, and it is not inequitable to permit him to have the property.

RESTATEMENT (FIRST) OF RESTITUTION § 164 (AM. L. INST. 1937); *see also* Hebrew Univ. Ass'n v. Nye, 223 A.2d 397, 400-01 (Conn. Super. Ct. 1966) ("[W]here an owner of property makes an ineffective conveyance of it as an intended gift he will not ordinarily be compelled to complete the gift, but if he dies believing that he has made an effective gift and if the donee was a natural object of his bounty, such as a wife or child, the donee can obtain the aid of the court of equity to complete the gift as against the heirs or next of kin.").

73. It is sometimes referred to as "dead-hand control" because, in essence, it permits the decedent to effectuate transfers of property from beyond the grave. *See, e.g.*, Ronald Chester, *The Psychology of Dead Hand Control*, 43 REAL PROP. TR. & EST. L.J. 505, 506 (2008); LEWIS M. SIMES, PUBLIC POLICY AND THE DEAD HAND 2 (1955).

74. Kevin Bennardo, *The Madness of Insane Delusions*, 60 ARIZ. L. REV. 601, 605-07 (2018).

75. Here are a few such attempts that I was involved in: Kevin Bennardo & Mark Glover, *Crimes Against Probate*, 75 FLA. L. REV. 357, 362-68 (2023) (section titled "Probate's Search for Intent"); Emerson & Bennardo, *supra* note 36, at 357-62 (section titled "Dead-Hand Control and Its Limits"); Bennardo, *supra* note 74, at 604-10 (section titled "The Appearance of Testamentary Freedom").

At the risk of self-plagiarism from one of those sources, here is my own description of the primacy of testamentary freedom in U.S. inheritance law from an article published several years ago:[76]

> The concept of testamentary freedom is foundational to the law of decedents' estates in the United States.[77] It is, after all, the "controlling consideration" and the "organizing principle" motivating policy decisions in this area of the law.[78] As the "first principle of the law of wills," testamentary freedom is paramount.[79] Everything else is secondary. Students of decedents' estates learn it on day one,[80] and it recurs throughout the doctrine as an ever-ready explanation for almost every policy decision in this area of the law.[81]

To better appreciate the primacy of testamentary freedom in U.S. law, it is helpful to understand how it fits within the context of other jurisdictions' approaches to inheritance law. In short, it doesn't really fit. In other countries, it is not typical to cede so much control of the distribution of the estate to the decedent. In the word of Professor Melanie Leslie, "[t]he United States alone insists on paying lip service to the idea that testamentary freedom is preeminent."[82] Rather, in civil law countries, the distribution of a significant portion of a decedent's estate is controlled by law,[83] and, in common law countries, family-maintenance statutes allow a reviewing court to revise the distribution of a testator's estate.[84]

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76. The paragraph that follows originally appeared in Bennardo, *supra* note 74, at 605. The footnotes are copied from the original, but the footnote numbers and citation formatting have been updated to match this Article.

77. *See* LAWRENCE M. FRIEDMAN, DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW 46 (2009) ("Freedom of testation is supposed to be the guiding principle of modern law. In essence, you can leave your money to anybody you choose to leave it to. . . . This is a fundamental principle of law. It is also, apparently, a fundamental social norm."); Mark Glover, *A Social Welfare Theory of Inheritance Regulation*, 2018 UTAH L. REV. 411, 414 & n.12 (referring to testamentary freedom as "the bedrock principle of the modern law of succession" and listing supporting sources).

78. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 & cmt. a (AM. L. INST. 2003).

79. Langbein, *supra* note 2, at 491. This proposition is so central that Professor Langbein did not even cite authority for it.

80. *See* Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L.J. 643, 644 (2014) (noting that "the nature and function of freedom of disposition" is one of the topics that ought to be taught "at the outset of the Trusts and Estates course").

81. Not all commentators agree that testamentary freedom should be so dominant. *See, e.g.*, Jeffrey Evans Stake, *Biologically Biased Beneficence*, 48 ARIZ. ST. L.J. 1101, 1101 (2016) (identifying testamentary biases and concluding that "testamentary freedom should be demoted from the organizing principle to an important consideration in the design of the law of succession").

82. Leslie, *supra* note 10, at 273.

83. For more on forced succession in civil law countries, see Bennardo, *supra* note 74, at 609-10.

84. For more on family-maintenance statutes in common law countries, see *id*. at 609.

Even in the U.S., testamentary freedom is not without its limits.[85] Prescriptive restrictions, though rare, require certain transfers from decedents' estates.[86] A decedent may not opt out of paying back outstanding creditors.[87] And, unless declined by the transferee,[88] the law requires a decedent to leave some share of her estate to her surviving spouse.[89] Proscriptive restrictions that prohibit certain transfers also limit testamentary freedom by, for example, disallowing testamentary transfers that violate an established public policy or the rule against perpetuities.[90] Otherwise, however, testators in the U.S. supposedly enjoy an unparalleled level of testamentary freedom.

B. Why Is It?

Testamentary freedom is best understood as a tool that legislatures use to achieve other societal goals. Although the provenance of the doctrine has become a little clouded over time, it is best understood that the freedom to select the beneficiaries of one's estate is neither a natural right nor a constitutional one; it simply exists as the result of legislative judgment and could be expanded, contracted, or abolished at the whims of the legislature.[91] Professor Mark Ascher and others have offered a robust buffet of examples from the United States Supreme Court on down affirming and re-affirming that freedom of testation is a statutory right rather than a natural or constitutional one.[92]

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85. *See* Emerson & Bennardo, *supra* note 36, at 358 ("Dead-hand control is not absolute."); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. L. INST. 2003) ("American law curtails freedom of disposition only to the extent that the donor attempts to make a disposition or achieve a purpose that is prohibited or restricted by an overriding rule of law.").

86. Glover, *supra* note 77, at 424.

87. *See, e.g.*, *id.* at 425; SITKOFF & DUKEMINIER, *supra* note 22, at 44 (noting that distributions to intended beneficiaries through probate occur "after the decedent's creditors are paid").

88. *See, e.g.*, Adam J. Hirsch, *Disclaimers and Federalism*, 67 VAND. L. REV. 1871, 1872 (2014) ("Under most circumstances today, beneficiaries are free to accept or reject an inheritance as they see fit."); SITKOFF & DUKEMINIER, *supra* note 22, at 135-40 (explaining disclaimer of an inheritance and its exceptions).

89. *See, e.g.*, UNIF. PROB. CODE § 2-202 (UNIF. L. COMM'N 2019); SITKOFF & DUKEMINIER, *supra* note 22, at 520-53 (explaining the power of the surviving spouse to elect to receive a share of a decedent's estate).

90. *See, e.g.*, Glover, *supra* note 77, at 424-29; Emerson & Bennardo, *supra* note 36, at 359-60.

91. The cloudiness comes in the form of *Hodel v. Irving*, 481 U.S. 704 (1987), which held that forcing ownership of fractionated parcels of Native American lands to escheat to the Tribal government at the death of the landowner amounted to a taking that required just compensation. Simply put, *Hodel* is an outlier that fails to fit with the wealth of authorities that preceded it. *See infra* note 92 and accompanying text.

92. Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69, 77-78, 84-85 (1990). Here is a tasting:

Creating the appearance of freedom of testation is thought to lead to beneficial consequences for society as a whole.[93] Considering that a legislature could theoretically abolish testation and declare that all decedents' estates become the property of the government, the perceived benefits of freedom of testation must indeed be staggering. Indeed, the societal benefit of freedom of testation must be worth more than whatever the government could buy with all of the wealth in the estate of every decedent.

Largely, what legislatures are purchasing by ceding control of decedents' estates to the decedents themselves are incentives on the living. In effect, by permitting the dead to control testamentary transfers, legislatures seek to obtain some level of social control over the behaviors on the living. Freedom of testation is believed to motivate living individuals "to earn, save, and amass wealth."[94] If an individual did

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- "[T]he right to dispose of . . . property by will has always been considered purely a creature of statute and within legislative control." United States v. Perkins, 163 U.S. 625, 627 (1896).
- "Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction." Irving Tr. Co. v. Day, 314 U.S. 556, 562 (1942).
- "[T]o-morrow, if it pleases, [the legislature could] absolutely repeal the statute of wills and that of descents and distributions and declare that upon the death of a party, his property shall be applied to the payment of his debts, and the residue appropriated to public uses." Eyre v. Jacob, 55 Va. 422, 430 (1858).
- Daniel J. Kornstein, *Inheritance: A Constitutional Right?*, 36 RUTGERS L. REV. 741, 787 (1984) (concluding, after thorough examination of the pre-*Hodel* landscape, "[t]here is no right of inheritance in the United States Constitution" although states could interpret their own constitutions differently to recognize it as a protected constitutional right at the state level).

Hodel, introduced *supra* in note 91, cited approvingly to some of these authorities and expressly did not overrule them. 481 U.S. at 717 ("reaffirm[ing] the continuing vitality of the long line of cases" recognizing governmental power to regulate testation without implicating the taking clause). In attempt to come to some sort of reconciliation between *Hodel* and the preceding authorities, Ascher pointed to the fact that *Hodel* dealt with an act of the federal Congress rather than the more typical case, which deals with an act of a state legislature. Ascher, *supra* note 92, at 85. Thus, in Ascher's view, *Hodel* stands for only the narrow proposition that it amounts to a taking for specifically the federal Congress (as opposed to state legislatures) to completely abolish inheritance. *Id.* This explanation is not especially satisfying given the lack of differentiation between state legislatures and the federal Congress in *Hodel*, *see, e.g.*, 481 U.S. at 717, but I appreciate the attempt.

93. *See, e.g.*, Bennardo, *supra* note 74, at 605. The mere appearance or impression that individuals possess testamentary freedom, as distinguished from true testamentary freedom, is the necessary ingredient to capture the desired benefits. *Id.* at 603; *see also* Johnson, *supra* note 12, at 106 (describing freedom of testation as "a thing of smoke and mirrors" that "lull[s] testators into a false sense of security about their testamentary plans"); Mary Louise Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611, 612 (1988) (noting that donative transfer law "does not accomplish the property owner's will, but accomplishes only the property owner's will *as the state identifies it*").

94. Emerson & Bennardo, *supra* note 36, at 358; *see also* Mark Glover, *Freedom of Inheritance*, 2017 UTAH L. REV. 283, 291.

not approve of the government's estate plan, they would potentially attempt to spend (or gift away) their assets down to zero in a way that coordinates the depletion of their assets with the timing of their death.[95] Moreover, freedom of testation is believed to motivate living individuals to treat other living individuals well—especially elderly and ailing ones—in the hopes that these other individuals may remember them in their estate plans.[96]

In addition to incentivizing socially beneficial behavior, freedom of testation also harnesses the informational advantage that many individuals possess regarding high-value use of specific property.[97] Relative to legislatures or courts who would control the distribution of estate property, testators often possess superior information about who would derive utility from receiving certain property.[98] This is especially true with tangible personal property, which oftentimes is much more sentimentally valuable to friends or families relative to its monetary value. Permitting individuals to control the distribution of these items helps to enhance the utility of these transfers quite efficiently. It may in some cases be true of real property, especially when the testator's preferred beneficiary already resides on the property and would be displaced by a transfer of title to someone else. However, the informational advantage and efficiency arguments ring less true with monetary transfers because while a testator may recognize certain that certain of their own family members are more financially needy than others, individual testators generally do not redistribute wealth effectively throughout society.[99]

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95. *See, e.g.*, Glover, *supra* note 94, at 288 (opining that "people would find ways around" the abolishment of freedom of testation).

96. *See, e.g.*, Adam J. Hirsch, *Freedom of Testation / Freedom of Contract*, 95 MINN. L. REV. 2180, 2187-88 (2011) (discussing the "market for reciprocal altruistic transfers" produced by freedom of testation).

97. *See, e.g.*, Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 12 (1992) (characterizing this as the "father knows best" hypothesis regarding beneficial use of estate property); Daniel B. Kelly, *Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications*, 82 FORDHAM L. REV. 1125, 1136 (2013) ("Th[e] informational advantage [of individual testators] may allow donors to select the highest-valued donee (e.g., a gifted or disabled child).").

98. *See, e.g.*, Glover, *supra* note 94, at 290 ("Donors likely have a better understanding of how to distribute their wealth upon death in a way that maximizes the utility of donees rather than the policymakers who would direct the disposition of estates in the absence of freedom of disposition."); Hirsch, *supra* note 96, at 2189.

99. Indeed, permitting decedents to select their own beneficiaries (rather than, say, giving it all to the government and allowing the government to spread it broadly throughout society) contributes meaningfully to the perpetuation of wealth inequality across society. *See, e.g.*, SITKOFF & DUKEMINIER, *supra* note 22, at 19-20 ("A common argument against freedom of disposition is that it may be exercised in a manner that perpetuates inequalities in the distribution of wealth; concentrates economic power in the hands of a few, distorting politics and markets; and denies equal opportunity to the poor.").

III. THE TENSION BETWEEN NATURAL OBJECTS OF BOUNTY AND FREEDOM OF TESTATION

There is an unsubtle tension between a scheme of testamentary disposition that claims to prioritize the decedent's preferences above all else and a system that classifies potential beneficiaries as natural or unnatural objects of the decedent's bounty. It is especially troubling when inheritance law uses the supposed unnaturalness of a disposition—as defined by its own standards—as evidence that the devise or the entire will is invalid.

Starting with the nomenclature itself, categorizing beneficiaries as either natural or unnatural is inherently normative. It calls to mind the concept of a singular natural law that governs humanity regardless of whether it is codified by human legislators. The "natural" label communicates a preference for certain beneficiaries (the natural ones) and a disapproval of other beneficiaries (the unnatural ones). This preference, communicated through the terminology of inheritance law, may or may not align with a decedent's actual preferences. Therein lies the tension.

Relieving the tension requires stepping away from a normative inquiry to a descriptive one. Instead of inquiring into the "natural" objects of a decedent's bounty—that is, whom society believes the decedent *should* have named as a beneficiary, inheritance law should concern itself with the "intended" objects of a decedent's bounty—that is, whom the decedent's wished to name as a beneficiary. In a system built upon testamentary freedom, what society thinks a decedent *should* have done with her estate is not a relevant inquiry. Whether she names a beneficiary that matches up with most decedents' preferences is irrelevant. All that matters is whether she names a beneficiary that aligns with her own preferences.

Indeed, if a decedent wishes to go along with societal preferences wholesale, she need not make a will at all and instead let her estate be distributed according to the intestacy statute. By making a will at all, a decedent communicates a desire to opt out of intestacy. A will is a request by a decedent that her own preferences be heard and followed. Once a will is in play, true testamentary freedom should dictate that the preferences anyone other than the decedent should no longer inform the inquiry. Rather, the law should approach potential beneficiaries neutrally and without a preference to whom the decedent selects. And, in this sense, the universe of potential beneficiaries is vast and almost limitless. It includes not just family or friends of the decedent, but every potential individual and entity who could be named as a beneficiary. In a system built on freedom of testation, there should be no natural or unnatural beneficiaries, only chosen and unchosen ones.

Thus, for decedents who make wills, the law should shift its focus away from the "natural" objects of the decedent's bounty and toward the "intended" objects of the decedent's bounty. The relevant question, in terms of mental capacity, undue influence, and the like, is not whether the decedent created a testamentary plan that aligns with societal preferences, but whether she created a testamentary plan that aligns with her own preferences. Failing the former inquiry should matter not, but failing the latter one should sound alarms.

An earlier part of this Article chronicled several ways in which the natural objects of a decedent's bounty are relevant to inheritance law: (1) in testing for testamentary capacity, (2) in testing for undue influence, and (3) in the construction of a will.[100] The remainder of this part will address the benefits of revising the test in each of these inquiries in turn.

A. Testamentary Capacity

While I agree that a decedent likely lacks testamentary capacity if she is unable to recognize the natural objects of her bounty, the tension here is that the inquiry creates a self-fulfilling loop and invites error or abuse by decisionmakers.[101] When there are doubts about a decedent's capacity, it is rare for the proponent of a will to be able to demonstrate that a testator recognized the natural objects of her bounty without including them in her estate plan.[102] A well drafted will that seeks to exclude close family members will do so expressly through a disinheritance clause and thereby communicate that the decedent considered and rejected the person as a potential beneficiary.[103] But when the will is not so carefully drafted and a close family member is not mentioned at all in a decedent's will, a decision to exclude natural objects of a decedent's bounty from sharing in the decedent's estate too often becomes evidence of incapacity.[104] Incapacity leads to invalidation of

100. *See* discussion *supra* Section I.B.

101. *See* Champine, *supra* note 11, at 43 ("The ultimate criterion that non-experts can capably apply to assess testamentary capacity is their own sense of the will's fairness."); *see also* Epstein, *supra* note 7, at 258 (calling testamentary capacity "little more than a convenient peg upon which to hang a will contest").

102. *See* Johnson, *supra* note 12, at 112-13.

103. *See, e.g.*, Rogerson v. Wheeling Dollar Sav. & Tr. Co., 222 S.E.2d 816, 821 (W. Va. 1976) ("A construction [of a will] which will disinherit the natural objects of the testator's bounty is not favored."); 96 C.J.S. *Wills* § 1139 ("In some jurisdictions, no testator should be understood to intend to disinherit one of his children or grandchildren upon any less clear evidence than his actually naming or distinctly referring to them personally so as to show that he had them in his mind."); 26 IND. PRAC., ANDERSON'S WILL, TRUSTS & ESTATE PLANNING § 3:59 (2022-2023 ed.) ("It should be noted that there is judicial reluctance to disinherit a child unless a clear intent to disinherit the child is show in a will."). *But see* Foster, *supra* note 9, at 244 (noting that the "power of [the family] paradigm is so great that it presents a challenge even to the clearly competent testator advised by the best lawyers").

104. *See* Johnson, *supra* note 12, at 112-13.

the will, which often leads to the estate being distributed through intestacy to the decedent's close family members.[105] Thus, the practical outcome is either for decedents to expressly name close family members as beneficiaries in their will or risk posthumous invalidation of their will, in which case close family members will inherit through intestacy.[106]

To avoid this preordained outcome, the law should not limit its inquiry to only whether the decedent is able to recognize the natural objects of her bounty. Nor should it inquire whether the decedent is able to recognize the intended objects of her bounty because a claim of mental incapacity touches the individual's subjective intent. Rather, as a component of the test for mental capacity to make or revoke a will, the law should inquire whether the testator has the capacity to understand and recognize the individuals or entities who were the beneficiaries of her most recently valid testamentary plan.

An individual must have standing to challenge the validity of a will, and the only ones with standing are those who stand to gain financially from a will being invalidated.[107] In other words, the only ones who are ever going to bring a claim of mental incapacity are those who were the would-be beneficiaries of the decedent's most recent estate plan (either through a previous will or through intestacy if there was no previous will).[108] Thus, if a testator revokes one will in favor of another, the beneficiaries under the revoked will have standing to challenge the newer will.[109] Or if a testator dies with her very first will in place, her heirs who would have inherited under the intestacy statute have standing to challenge the will.[110] Or if a testator executes a string of ten wills, her intestate heirs may challenge the validity of *all* ten wills

105. *See supra* notes 22-28, 44 and accompanying text.

106. As one commentator pointedly put it: "It is a small step from requiring the testator to know who these people are—the 'natural objects of the testator's bounty'—to requiring the testator to give property to them, or, at least, to question why the testator has not done so." Johnson, *supra* note 12, at 109 n.19; *see also* Epstein, *supra* note 7, at 231 (noting that courts "have tended increasingly to disregard the protective function of testamentary capacity, and have, in some instances, used the concept to subvert the decedent's testamentary desires" by "equating mental capacity with 'reasonableness,' [and] upsetting those wills which appear unfair to them").

107. *See, e.g.*, 79 AM. JUR. 2D *Wills* § 765 ("For a person to have standing to contest the validity of a will as an 'interested person,' he or she must demonstrate a pecuniary interest in a successful challenge to the will."); 95 C.J.S. *Wills* § 500 ("[A] person interested is any person who has such a direct, immediate, and legally ascertainable pecuniary interest in the devolution of the testator's estate as would be impaired or defeated by the probate of the will, or be benefited by setting aside the will, or those whose direct pecuniary interests will be either detrimentally or advantageously affected by the probate of the will.").

108. *See, e.g.*, Epstein, *supra* note 7, at 247-48 ("[T]estamentary capacity cases do not arise unless an heir or a legatee under a prior will regards the instrument in question as unreasonable or unnatural as it pertains to him.").

109. *See, e.g.*, 95 C.J.S. *Wills* § 501 ("Persons entitled under prior will maintaining action to contest or establish will.").

110. *See, e.g.*, Johnson, *supra* note 12, at 112-13.

and claim them all to be invalid. Similarly, if a testator revokes her will in favor of intestacy, the beneficiaries of the revoked will have standing to challenge the validity of the revocation. In all those scenarios, the individuals with standing to challenge the validity of a testamentary act are those who stand to lose as a result of the act being validated.

Testation requires both a selection of beneficiaries and a rejection of all other potential beneficiaries. While the ideal practice would be for each testator to individually consider all eight billion individuals on our planet (and countless more juridical entities) as potential beneficiaries, that is not a feasible ask. Remember though, that the test for mental capacity inquiries into a decedent's *capacity* to recognize and understand rather than into actual recognition and understanding. However, it would still be too stringent a requirement for testators to be capable of recognizing and understanding every one of the billions of potential beneficiaries on Earth. The bar for mental capacity to make a will is intentionally set low, and rightfully so. Thus, the subset of potential beneficiaries that the testator must be capable of recognizing and understanding to possess mental capacity to make a will is decidedly smaller than all eight billion plus potential beneficiaries in existence.

The question is who should comprise the subset of potential beneficiaries who matter for mental capacity. Who must the decedent be capable of recognizing and understanding? It should be the ones who are harmed by the act of testation. The individuals who stand to lose as the result of a testamentary act should be the ones who matter to the test of mental capacity. They are the only ones with standing to challenge the testamentary act anyway.

The individuals who are harmed by an act of testation will oftentimes be natural objects of the testator's bounty. After all, a decedent's takers through intestacy will be her closest living family members. Executing a will that deviates from intestacy will almost always mean that at least one natural object of a decedent's bounty will either receive a lesser share of the decedent's estate or no share at all. The same is oftentimes true when a will is revoked or amended. Because the beneficiaries of wills are oftentimes close family members, revoking or amending a will often results in a diminished portion of an estate for a natural object of a decedent's bounty. Thus, for mainstream testators who leave some or all of their estates to natural objects of their bounties anyway, there would be overlap (including potentially total overlap) between the natural objects of their bounties and the individuals who stand to lose as a result of an act of testation being validated.

But for a freedom to truly be a freedom, it must protect the choices of nontraditional testators as well as traditional ones.[111] For nontraditional testators who do not seek to leave their estates to the natural objects of their bounties, there may be no overlap between the beneficiaries named in their will and the natural objects of their bounties as judged by societal standards. If freedom of testation is to mean anything, it is the nontraditional testator who most needs protected by the law of inheritance. For the traditional testator who wishes to leave most of her estate to close family members, there is little risk that her general estate plan will not be carried out. Even if her will is invalidated for some reason, the law of intestacy will distribute her estate to close family members. It is the nontraditional testator—the ones who want to distribute their estates in ways that do not align with majoritarian preferences—that the law needs to safeguard. They are at the greatest risk of having post-mortem inference with their estate plans by second-guessing judges and juries.

Consider a non-traditional testator with a family. To keep it relatively simple, let's say our testator is a widow with no spouse, but she does have living children, grandchildren, and collateral kindred. Let's even say that she has a perfectly unremarkable relationship with her family members—neither remarkably close or unordinarily acrimonious. She is, to put it plainly, the stereotypically conventional grandmother. However, starting in 2011, she decided that she wanted to leave the entirety of her estate to basketball all-star Kyrie Irving.[112] She doesn't know Kyrie Irving. She's never met Kyrie Irving. She has no insane delusions regarding Kyrie Irving. She has carefully weighed the benefits and drawbacks of various potential beneficiaries and has decided that Kyrie Irving is the best recipient of her utterly ordinary-sized estate. Therefore, in 2011 she executes a will leaving the entirety of her estate to Kyrie Irving. Let's even say that she executes amendments to the will over the next ten years making small alterations to the contingent beneficiaries, but never disturbing Kyrie Irving's place as the sole primary beneficiary.

Now let's say that our non-traditional testator enters a period of mental decline in 2021. By 2022, she is in seriously declining physical and mental health. She has lost all sense of the world outside her hospital room. Not only does she not remember Kyrie Irving, but she is incapable of understanding or recognizing Kyrie Irving. She still, however, is capable of understanding and recognizing her close family members. While in this state of diminished capacity, she revokes her

111. *See* Johnson, *supra* note 12, at 125 ("Freedom of testation becomes more important in cases in which testators desire a different distribution, one not contemplated by the stated norm of the 'natural objects of [their] bounty.' ").

112. *See* Bennardo, *supra* note 74, at 618 & nn.99-100.

will completely. She then dies and her estate is distributed to her family members according to the intestacy statute.

Who is harmed by the revocation of our testator's will? Kyrie Irving. However, Kyrie Irving is a decidedly unnatural object of our testator's bounty. Under the current test for mental capacity, whether our testator was capable of understanding and recognizing Kyrie Irving is wholly irrelevant to whether she had capacity to revoke a will that left the entirety of her estate to Kyrie Irving. Note how strange this is. After all, Kyrie Irving is the *only one with standing to challenge the validity of the revocation of her will*. He is the only one who stands to lose if her questionable revocation is upheld. And, even though strong and repeated evidence establishes that our testator steadfastly intended to leave Kyrie Irving her estate for more than a decade, her ability to comprehend him plays no role in determining whether she had mental capacity when she revised that estate plan.

The current test that inquires about the testator's ability to comprehend the natural objects of their bounties is a fairly good fit for majoritarian testators, but that is only because the majority of testators desire to leave large portions of their estates to the natural objects of their bounties. When a testator has consistently maintained an estate plan that does not leave their estate to the natural objects of her bounty, the inquiry of whether she can comprehend the natural objects of her bounty is distinctly less relevant than whether she remains able to comprehend the beneficiary who stands to lose if the current estate plan is altered. While this will rarely be a celebrity like Kyrie Irving, it will much more commonly be a charity, organization, or even a friend, lover, distant relative, or in-law who falls outside of a particular jurisdiction's definition of natural object of the decedent's bounty. A testator should be capable of understanding the person or entity who will lose out as a result of a testamentary act; if she cannot, then the act should be invalid for lack of capacity.

B. Undue Influence

The current role that the natural objects of a decedent's bounty play in the undue influence analysis greatly undermines the concept of testamentary freedom. Using the beneficiary's status as an object (or non-object) of the decedent's bounty to determine whether to create a presumption of undue influence displays the law's clear preference for testamentary gifts to certain recipients and concomitant distaste for testamentary gifts to other recipients. A beneficiary who is a natural object of the decedent's bounty—someone whom *we* think the decedent should naturally want to remember in her estate plan—will escape a presumption of undue influence. But the law looks askance at "unnatural" beneficiaries—those whom we don't think the decedent should have named—and consequently saddles them with a presumption of

undue influence. By doing so, the doctrine of undue influence "restrict[s] excessive impecunious gifts outside the family and protect[s] the natural recipients of the testator's bounty."[113]

This scheme flies directly in the face of testamentary freedom. Again, the relevant question should never be who *we* think the decedent should have named as beneficiaries. It should be who the *decedent* intended to name as beneficiaries. Granting a safe haven from undue influence to *our* preferred beneficiaries undermines the decedent's ability to deviate from *our* preferred estate plan. Indeed, it has been well observed by other commentators that undue influence is a doctrine that is particularly susceptible to abuse. Given the haziness surrounding what constitutes undue influence, it invites decisionmakers to substitute their own post-hoc judgment for the actual judgment of the decedent. The doctrine of undue influence is notoriously prone to abuse by decisionmakers who use it to invalidate devises with which they disagree.[114] However, even when decisionmakers apply the undue influence test properly, the law calls on them to inject their own judgment regarding which individuals are the natural recipients of the decedent's estate. That is not testamentary freedom.

A simple way to relieve this tension would be to eliminate the beneficiary's status as a natural object (or non-object) of the decedent's bounty from the undue influence analysis. That would send the message that all devises are welcome, and that the law regards all potential beneficiaries equally. It would also diminish the opportunity for abusive decisionmakers to substitute their own judgment for the decedents.

This might cause some to bristle and question why a devise that is surprising (to outsiders like ourselves) shouldn't create a presumption of undue influence. After all, that is what an undue influencer does: they swoop in and influence the decedent to make an unexpected devise. True, but again it is a matter of perspective. A devise that is unexpected to *us* should not be a sign of undue influence because *our* expectations don't matter. Rather, the true warning sign should be a devise that is surprising or unexpected given the decedent's intended estate plan.

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113. Ronald J. Scalise, Jr., *Undue Influence and the Law of Wills: A Comparative Analysis*, 19 DUKE J. COMPAR. & INT'L L. 41, 81 (2008).

114. *See* Carla Spivack, *Why the Testamentary Doctrine of Undue Influence Should Be Abolished*, 58 KAN. L. REV. 245, 276-86 (2010); Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 592-600 (1997); *see also* E. Gary Spitko, *Gone but Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275, 283 (1999) (noting that undue influence is "sufficiently nebulous" to allow courts "to rewrite the testator's estate plan in accordance with societal norms").

Thus, the suspicious circumstance that triggers the presumption of undue influence should not be whether the beneficiary was not a natural object of the decedent's bounty, as measured by whom we think the decedent should've selected as potential beneficiaries. Rather, the triggering circumstance should be whether the decedent named a beneficiary who was outside her own circle of intended beneficiaries. In other words, would the decedent herself have found the devise to be unexpected?

This test would be difficult to administer, given the absence of the testator from probate proceedings. The question then becomes whether this is a test that is worth having at all. When a devise is challenged for undue influence, it will be relatively rare to have sufficient independent evidence of a decedent's intended beneficiaries.[115] The evidence would need to be extrinsic to the will itself. While extrinsic evidence is increasingly accepted in various contexts in will contests, it does undermine the safe haven of finality that testation is designed to afford. The existence of a test that inquires into the decedent's truly intended beneficiaries—though not the ones the decedent named in her will—would invite just the sort of evidentiary clash that wills are supposed to avoid. Various parties would be incentivized to introduce all sorts of evidence claiming to provide a window into the decedent's "true" intent. But the witness with the best evidence of the decedent's true intent—the decedent herself—is inherently unavailable to rebut or explain the evidence.

To guard against dubious self-serving testimony ("she told me that she wanted *me* to have the painting"), the evidentiary threshold could be elevated. We could accept only written evidence. Stronger yet, we could accept only written and signed evidence. Stronger still, we could accept only written and signed evidence that is also attested by two witnesses. See the problem? If we ratchet the evidentiary threshold high enough to be confident in the evidence, we simply create the requirement that the decedent must have left a will executed with all the usual formalities. But in this situation, the decedent already left a will, and the will has been challenged for undue influence. It would be nonsensical to require another will (or quasi-will) to serve as evidence of the undue influence.

The options, as I see them, are both unattractive. We either set the evidentiary threshold so low that we can't trust the evidence or so high that we essentially duplicate the will-making requirement. Both options have the additional drawback: asking a decisionmaker to identify the decedent's "true" preferences creates the opportunity for the deci-

115. If there was such evidence, there may also be direct evidence of the named beneficiary's intermeddling. Such a case would then proceed on a theory of fraud rather than rely on presumptions and undue influence.

sionmaker to substitute her own preferences for the decedent's preferences. It invites abuse by the decisionmaker, whether it be well-intentioned or not. Anytime a decisionmaker is asked to resolve the question of "what did the decedent intend to do?", they must fight the temptation to answer a different question: "what would I do?" or "what should the decedent had done?"[116]

In the end, I don't think it is worth asking whether a named beneficiary is someone whom the decedent intended to name as a beneficiary. While an answer of "no" should create a presumption of undue influence (or worse), it is not a question that is easily separable from the greater undue influence inquiry. Moreover, it is not a question that decisionmakers will be able to answer truthfully and confidently very often. Rather, it is a question that is likely to cause more trouble than it eases. It will pit friends and relatives against each other in an evidentiary battle of "she said this" versus "she said that," which is just the type of evidence that a will is supposed to preclude. Further, it will create an additional opportunity for decisionmakers to elevate their own preferences over the preferences of the decedent. While it is a better question than the one the law currently asks, it remains a question unworthy of asking.

Therefore, if undue influence remains as a ground for a will contest, it should not ask whether the named beneficiary was a natural object of the decedent's bounty. Further, it should not ask whether the named beneficiary was an intended object of the decedent's bounty. It will need to rely on other so-called suspicious circumstances to give rise to a presumption of undue influence.

C. Construction and Other Applications

Using the natural objects of a decedent's bounty as an aid to interpreting a will endangers the concept of testamentary freedom. Testamentary freedom is not served by an interpretive rule instructing that a decedent's will "should be construed, if possible, so as not to work an injustice to the natural objects of [the decedent's] bounty."[117] Such a rule makes it increasingly difficult for a testator to exercise testamentary freedom because it instructs a construing court to search for any possible way to interpret a will in favor of the natural objects of the

116. *See, e.g.*, Foster, *supra* note 9, at 248 (noting that the current structure of inheritance law "encourages judges and jurors to 'bend' the law to ensure 'appropriate' distribution of decedents' estates"). Professor Foster goes on to describe that this process results in the "corrupt[ion]" of judges, juries, and the probate process itself and leads to cynicism and disdain by the legal profession for the probate process and those who administer it. *Id.* at 249-50.

117. *In re* Pettit's Will, 271 N.Y.S. 757, 761 (N.Y. App. Div. 1934); *see also supra* note 65 and accompanying text.

decedent's bounty. For freedom of testation to be meaningful, opting out of an externally imposed estate plan should not be so difficult.[118]

Similar to the test for mental capacity, the focus should be on the testator's preferences rather than the preferences that the law deems to be natural. To the extent that understanding the intricacies of a decedent's life is relevant to construing their will, courts should concern themselves with understanding the intended objects of testators' bounties rather than their natural objects. After all, the testator's intent is supposed to be the organizing principle of inheritance law.[119] Only in the most limited circumstances—those in which the testamentary document is ambiguous, and zero extrinsic evidence exists regarding the testator's actual preferences—should the natural objects of a testator's bounty play any manner of tie-breaking role when construing a devise.[120]

The way that the natural objects of a decedent's bounty are used in the constructive of a purchase-money resulting trust scenario is somewhat more benign. It creates little, if any, tension with freedom of disposition because it does not prioritize certain "natural" beneficiaries over other "unnatural" beneficiaries. Rather, it uses the identity of the beneficiary to help understand the donor's intent behind the transfer. While perhaps the beneficiary's status as a natural object of the donor's bounty is not an ideal proxy for the donor's intent, this application at least avoids expressly requiring courts to construe dispositions in a way that directly favors certain beneficiaries (the natural ones) over other potential beneficiaries (the unnatural ones).

Even more benign is the professional responsibility rule that permits attorneys to draft a will that names them as the beneficiary of a substantial gift when the testator is a natural object of the decedent's bounty.[121] Essentially, the relationship between the testator and the attorney-beneficiary overcomes a presumption of malfeasance on the

118. This same concern is present in the way the law considers the natural objects of the decedent's bounty in determining whether to approve the estate plan that a conservator has created on behalf of a minor. *See supra* note 69 and accompanying text. It is a small step for a court to take between "considering" natural objects and "favoring" them. Favoring any potential beneficiary is inherently at odds with freedom of testation.

119. *See* discussion *supra* Part II.

120. For example, imagine a testator who names a beneficiary in her will, but there is no evidence that the testator knew (or even knew of) anyone by that name during her lifetime. If multiple individuals with that name came forward to claim the devise, I could see the sense in breaking the tie in favor of a family member who happened to have that name over non-family members who also happen to have the same name. But again, this is only where there is zero evidence that the testator actually knew any of the would-be beneficiaries, so the court is simply picking almost at random from individuals who happen to otherwise fit the description in the will. It is a circumstance that is almost so rare that it hardly warrants a footnote.

121. *See supra* notes 70-71 and accompanying text.

part of the attorney-beneficiary.[122] Because this rule relates to professional responsibility rather than to the construction of the will or the distribution of the decedent's estate, it creates little if any tension with the decedent's freedom of testation.

IV. CLOSING THOUGHTS

There may well be sensible reasons for the law to prefer inheritance by members of a decedent's family. Maintaining the financial stability of families is important. Indeed, it is so important that most countries expressly provide for it either through forced succession to family members or through a family-maintenance system. My argument is not that freedom of testation is more important than family maintenance. If anything, it is closer to the opposite.

My argument is that testamentary freedom in U.S. inheritance law is closer to a myth than most policymakers and scholars would like to admit. We can't have it both ways—we can't both prioritize testamentary freedom *and* protect the financial stability of families. If we want to protect the financial stability of families, we should do so expressly like other countries.[123] We should be willing to be more honest with ourselves about our priorities. Instead of advertising testamentary freedom as our most sacred tenet but covertly putting a heavy thumb on the scale in favor of close family, the law should openly limit testators' abilities to fully devise their estates outside the family. By being honest about this process and moving it into the open, I think that we would find the inheritance system to be more consistent, even-handed, and respected.

Otherwise, policymakers should fix the system so that it actually operates as advertised—that is, in accordance with testamentary freedom rather than in accordance with what society thinks a testator should have done with their estates. One step in doing so would be to adopt this Article's recommendations by revising natural objects of a decedent's bounty out of the tests for mental capacity, undue influence, and construction of wills. Either way, policymakers have a choice: step toward an honest and open expression of maintaining the financial health of families through inheritance law or double down on testamentary freedom by actually making it a reality.

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122. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.8 cmt. 6 (AM. BAR ASS'N 1983) (noting that gifts by clients to attorneys are generally treated as "presumptively fraudulent"); Chad A. Hopper, *When May an Attorney Accept Gifts or Donations from Clients Without Breaching Rules Relating to Conflicts of Interest?*, 24 J. LEGAL PRO. 445, 449 (2000) (same but referring to undue influence rather than fraud).

123. *See, e.g.*, Epstein, *supra* note 7 at 249-58 (suggesting that U.S. law should further the economic stability of families in inheritance expressly through family maintenance legislation rather than by misapplying the test for testamentary capacity).