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Boilerplate in Pour-Over Wills

Mark Glover*

In their intriguing and innovative Article, *Boilerplate and Default Rules in Wills Law: An Empirical Analysis*,¹ Professors Reid Kress Weisbord and David Horton examine the use of language in wills that “is copied wholesale from other documents” and “is unlikely to leap out to testators.”² Through a review of 230 wills that were probated in Sussex County, New Jersey in the first half of 2015,³ Weisbord and Horton find that estate-planning lawyers commonly use this type of boilerplate language to address “important but obscure topics.”⁴ These “non-salient” issues include (1) how property is distributed among a multi-generational class, (2) which beneficiaries are responsible for exonerating liens on gifted property, and (3) how tax liability is apportioned among beneficiaries.⁵

Although it is possible that estate-planning lawyers include commonly recycled language in wills deliberately and with their clients’ informed consent,⁶ Weisbord and Horton conclude that language addressing these non-salient issues frequently is indiscriminately placed boilerplate.⁷ Two observations drive their conclusion. First, they suggest that these non-salient issues are so obscure that they are not likely the subjects of considered discussions during the estate-planning process,⁸ and second, their empirical study reveals that individual law firms typically use the same language to

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1. Reid Kress Weisbord & David Horton, *Boilerplate and Default Rules in Wills Law: An Empirical Analysis*, 103 IOWA L. REV. 663 (2018).

2. *Id.* at 669.

3. *See id.* at 685–86 (explaining that the timeframe of their search was “a six-month period beginning February 1, 2015 and ending July 31, 2015”).

4. *Id.* at 668.

5. *See id.* at 669.

6. *See id.* at 676, 701 (exploring the possibility that testators deliberately waive the default bonding requirement for executors).

7. *See id.* at 668 (“[W]e show that wills often deal with non-salient matters through language that sounds authoritative, but makes little sense in context.”).

8. *See id.* at 702–04 (suggesting that “there are reasons to doubt that testators truly understand these jargon-laced provisions” and that “it [is] hard to believe that the authors of these wills explained to their clients the subtleties of these” issues).

address these issues in most, if not all, of the wills that they prepare.⁹ If lawyers do not meaningfully discuss these obscure issues with their clients and routinely include recycled language to address them in the wills that they draft, then such language is boilerplate.¹⁰

Weisbord and Horton find the use of boilerplate in wills problematic for a variety of reasons. First, their evidence suggests that the indiscriminate inclusion of recycled language frequently undermines the testator's intent by haphazardly overriding majoritarian default rules.¹¹ If a testator does not address particular issues in her will, the law generally supplies default rules that are designed to fulfill the probable intent of most individuals.¹² But because the primary goal of the law of wills is to fulfill the testator's intent,¹³ these default rules give way to expressions of contrary intent in wills.¹⁴

Like many other issues that arise during the distribution of a decedent's estate,¹⁵ the non-salient issues that Weisbord and Horton identify are subject to majoritarian default rules. For example, if the testator does not specify how property should be distributed among members of a multi-generational class (*e.g.*, the testator's descendants), the law steps in and provides a method for

9. See *id.* at 703 (“These patterns suggest that it is robotically inserted, ready-made language—not reasoned deliberation—that drives estate planning ‘choices’ about non-salient matters.”).

10. See *id.* at 669 (explaining that Weisbord and Horton define boilerplate as “text that is unlikely to leap out to testators and is copied wholesale from other documents”).

11. See *id.* at 673 (describing boilerplate as “a kind of anti-matter force that undermines the intent-serving function of majoritarian default rules”).

12. See *id.* at 670 (“Default rules are generally calibrated to reflect what most parties want”); see also Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 *FORDHAM L. REV.* 1031, 1033 (2004) (concluding “that contractual default rule theory provides a model that is readily adaptable to inheritance defaults and points the way to their ideal composition”).

13. See *RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS* § 10.1 cmt. c (AM. LAW INST. 2003) (“The main function of the law in this field is to facilitate rather than regulate. The law serves this function by establishing rules under which sufficiently reliable determinations can be made regarding the content of the donor’s intention.”); Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 *ST. LOUIS U. L.J.* 643, 644 (2014) (“For the most part . . . , the American law of succession facilitates, rather than regulates, the carrying out of the decedent’s intent. Most of the law of succession is concerned with enabling posthumous enforcement of the actual intent of the decedent or, failing this, giving effect to the decedent’s probable intent.”). See generally Mark Glover, *A Taxonomy of Testamentary Intent*, 23 *GEO. MASON L. REV.* 569 (2016) (categorizing various types of testamentary intent).

14. See Weisbord & Horton, *supra* note 1, at 673; see also *RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS* § 10.1 (“The controlling consideration in determining the meaning of a donative document is the donor’s intention. The donor’s intention is given effect to the maximum extent allowed by law.”).

15. Perhaps the most obvious majoritarian default rule is the default estate plan of intestacy that governs the distribution of the decedent’s estate in the absence of a will. See Sitkoff, *supra* note 13, at 645 (“In accordance with the principle of freedom of disposition, the primary objective in designing an intestacy statute is to carry out the probable intent of the typical intestate decedent—that is, to provide majoritarian default rules for property succession at death.”).

divvying up the gift.¹⁶ In particular, the law specifies a form of representation under which members of younger generations take in place of members of older generations who have predeceased the testator.¹⁷ The modern law presumes that the testator would prefer a form of representation, known as “per capita at each generation,”¹⁸ rather than the traditional form of representation, known as “per stirpes.”¹⁹

Like the issue of how property is distributed to a multi-generational class, the issues of which beneficiaries are responsible for exonerating liens on encumbered property and which beneficiaries are responsible for estate and inheritance tax liability are governed by majoritarian default rules. The modern law presumes that the testator would prefer that the recipient of specifically bequeathed property be responsible for exonerating liens, rather than the responsibility falling upon the residuary beneficiary.²⁰ Similarly, the modern law presumes that the testator would prefer tax liability to be apportioned equitably among all beneficiaries rather than falling solely upon the residuary beneficiary.²¹

As default rules, all of these can be overridden by a contrary expression in the testator’s will, and Weisbord and Horton find that these default rules are in fact frequently supplanted by contrary boilerplate provisions. For instance, 36% of testators opted out of the default rule for multi-generational class gifts.²² Although most testators relied upon the default for this issue, the percentage that did not rely upon the default rule for other non-salient issues was significantly higher.²³ Up to 70% of testators opted out of the default rule for exoneration of liens,²⁴ and 58% opted out of the default rule for tax apportionment.²⁵ If the law correctly presumes that most people would want

16. See Weisbord & Horton, *supra* note 1, at 692–94.

17. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.3 cmt. c (AM. LAW INST. 1999).

18. See UNIF. PROBATE CODE § 2-106(b) (UNIF. LAW COMM’N amended 2013); see also RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.3 cmt. g (AM. LAW INST. 1999).

19. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.3 cmt. d (2003).

20. See UNIF. PROBATE CODE § 2-607 (amended 2013) (“A specific devise passes subject to any mortgage interest existing at the date of death, without right of exoneration . . .”).

21. See *id.* § 3-9A-104 (“To the extent that apportionment of an estate tax is not controlled by an instrument . . . the estate tax is apportioned ratably to each person that has an interest in the apportionable estate.”).

22. See Weisbord & Horton, *supra* note 1, at 704 (“We were startled to discover that 82 of the 230 instruments (36%) in our sample select per stirpes instead of New Jersey’s background rubric of per capita at each generation.”).

23. See *id.* at 702.

24. See *id.* at 701 (“Although unsettled New Jersey law makes it difficult to generalize, only 70 of the wills in our sample (30%) were clearly subject to the non-exoneration default.”).

25. See *id.* (“[D]espite the fact that the equitable tax apportionment rule applies *either* if a testator adopts it *or* does not include a clause that speaks to the allocation of death taxes, this

the default rule to apply, and the default rule is overridden by boilerplate provisions that the testator did not consider or understand and that the lawyer placed in the will as a matter of routine, then the testator's intent is likely undermined by the use of boilerplate.

Second, the authors find that boilerplate is often ambiguously drafted, which leads to uncertainty and, in turn, litigation regarding the testator's intent. For example, wills that contain generic boilerplate language that simply directs the executor to pay all of the testator's "just debts" without any further elaboration have frequently generated litigation regarding whether such language expresses the testator's intent to opt out of the default rule regarding exoneration of liens.²⁶ Despite the possibility of litigation, Weisbord and Horton report that 68% of the wills in their sample contain generic "just debts" provisions that do not specifically address the issue of exoneration of liens.²⁷ From this finding, they conclude that "most lawyers cl[ing] to generic 'just debts' language, even though it is pure risk with no corresponding benefit."²⁸

Like the effect of a generic "just debts" clause, the effect of a simple statement in a will that directs the executor to pay estate and inheritance taxes is an unsettled issue under New Jersey law. A court might interpret such a statement as overriding the default tax apportionment rule, or it might not.²⁹ However, "[d]espite this uncertainty," Weisbord and Horton report that "22 wills (14%) featured generic tax appointment clauses[,] and they again conclude that "[t]his vague language simply invites litigation."³⁰ In this way, the routine inclusion of boilerplate in wills exposes the testator's estate to potential litigation that could be avoided by more thoughtful drafting.

Finally, Weisbord and Horton's study shows that boilerplate language oftentimes exposes its author's ignorance or carelessness regarding non-salient issues. Indeed, the wills in their study demonstrate that lawyers frequently include boilerplate in wills that do not present the non-salient issues that the language purports to address. For example, 21% of the wills

default applied only to a mere 97 (42%) wills.").

26. See *id.* at 679–80 ("[J]ust debts' provisions have a tendency to spark disputes about a testator's intent.").

27. See *id.* at 698 (reporting that 157 wills contained generic "just debts" provisions).

28. *Id.*

29. See *id.* at 699 ("[I]n New Jersey, it is an open question whether a generic tax apportionment clause—one that merely instructs the executor to pay death taxes in the same breath as it instructs the executor to pay debts and funeral expenses—is enough to rebut the presumption of equitable apportionment.").

30. *Id.* ("Even worse, some of the tax appointment provisions were marred by logical inconsistencies. The most extreme example was a clause that contradicted itself by making a general bequest of \$200,000 and then stating: 'Said bequest shall be responsible for the [i]nheritance tax due and owing. Any [i]nheritance taxes owed shall be paid from my residuary estate.'").

contain references to schemes of representation, such as per capita or per stirpes, in relation to gifts to individual beneficiaries.³¹ Because these schemes of representation direct the disposition of property amongst a multi-generational class, Weisbord and Horton explain that the inclusion of these boilerplate provisions “is a non-sequitur in a devise to *one person*” and therefore “illogical.”³² Similarly, 30% of the wills in their study contain boilerplate provisions regarding the apportionment of tax liability among multiple beneficiaries, despite the fact that the wills benefit only a residuary beneficiary.³³ As Weisbord and Horton lament, “These wills did not need language mandating that the residuary beneficiaries pay death taxes for a simple reason: *There were no other beneficiaries.* . . . At worst, [this] implies that potentially important but obscure language in wills goes unnoticed until it is too late to change it.”³⁴

Weisbord and Horton’s findings regarding boilerplate in wills is important because they highlight the risks associated with relying upon recycled language during the estate-planning process. Their findings should serve as a warning to estate-planning attorneys to be diligent in ensuring that seemingly innocuous testamentary language neither undermines the testator’s intent nor exposes the testator’s estate to avoidable litigation. Perhaps more importantly, Weisbord and Horton’s findings also provide insights into how policymakers should craft the law to ensure that the testator’s act of opting out of majoritarian default rules is taken with deliberate intent.³⁵

Although the innovativeness of Weisbord and Horton’s study and the importance of their findings are clear, a critical reader could take issue with one aspect of their methodology. As mentioned earlier, Weisbord and Horton compiled their sample set of wills by combing the probate records of Sussex County, New Jersey covering the first half of 2015.³⁶ While the sample set that they use in their study contains 230 wills, their initial search of Sussex County’s probate records returned a total population of 260 wills that were submitted to probate during the six-month search window.³⁷ They first eliminated all sixteen wills that were executed outside of the state of New

31. See *id.* at 694 (“Bizarrely, . . . many of the Sussex County wills invoke language of representation in gifts to *individual* beneficiaries, not multi-generational classes. For instance, four testators left property to single recipients ‘per capita.’ . . . An additional 44 wills—nearly one out of every five in our sample—contained a similarly illogical devise to an individual ‘per stirpes.’”) (footnote omitted).

32. *Id.* In addition, “[t]his carelessness suggests that both testators and their attorneys often pay little heed to language of representation.” *Id.* at 704.

33. See *id.* at 702 (“69 of the 124 instruments (56%) featured *no* general or specific devises and instead *only* included a residuary clause.”).

34. *Id.* (footnote omitted).

35. See *id.* at 699–710.

36. See *id.* at 668.

37. See *id.* at 686.

Jersey.³⁸ Then, from the remaining 244 wills, Weisbord and Horton excluded all fourteen pour-over wills.³⁹ By excluding the subpopulations of both non-New Jersey wills and pour-over wills, Weisbord and Horton selected a sample of 230 wills from the original population of 260.⁴⁰

While one could question whether broad conclusions regarding the use of boilerplate should be drawn from wills that were probated in one county in New Jersey during one six-month timeframe,⁴¹ Weisbord and Horton's decision to exclude pour-over wills from their study deserves particular scrutiny. A pour-over will is a will that distributes the testator's estate to the trustee of a revocable trust that the testator created during her lifetime.⁴² The trust document, rather than the will, contains the bulk of the dispositive provisions of the testator's estate plan.⁴³ Weisbord and Horton excluded pour-over wills from their sample because such wills are subordinate to the trusts into which they pour.⁴⁴ The authors explain: "Because pour over wills are not the primary estate planning vehicle for the testators who create them, they tend to be relatively short and simple, and thus are less relevant for our purposes."⁴⁵

Precisely what Weisbord and Horton mean by pour-over wills being "less relevant" to their research is unclear. However, one interpretation of their assertion is that simplicity makes pour-over wills unlikely to include boilerplate addressing the non-salient issues that were the focus of their study. That pour-over wills are less likely to exhibit boilerplate due to their simplicity might be true. For instance, if a pour-over will simply distributes the entirety of the decedent's probate estate to the trustee of a revocable trust, then there is no need for the will to specify how property is distributed to a multi-generational class or how tax liability is apportioned amongst multiple beneficiaries.⁴⁶

38. See *id.* "16 of the original 260 wills (6%) in our raw data—a small but non-negligible number—were created in states other than New Jersey." *Id.* at 689.

39. See *id.* at 686. Weisbord and Horton do not expressly state that there were fourteen New Jersey pour-over wills that they excluded. However, to get to their sample size of 230 wills, fourteen New Jersey pour-over wills, in addition to the sixteen non-New Jersey wills, must have been excluded.

40. See *id.*

41. Elsewhere Horton has "caution[ed] against drawing sweeping conclusions from . . . statistics from a single county [because they] are a pinprick of light in the vast darkness of probate," and he has acknowledged that "[o]ther parts of the . . . country may be experiencing different trends." David Horton, *Wills Law on the Ground*, 62 *UCLA L. REV.* 1094, 1122 (2015).

42. See ROBERT H. SITKOFF & JESSE DUKEMINIER, *WILLS, TRUSTS, AND ESTATES* 466 (10th ed. 2017).

43. See Weisbord & Horton, *supra* note 1, at 686.

44. *Id.*

45. *Id.*

46. Some wills that pour the bulk of the decedent's probate estate into a revocable trust may include minor bequests to other beneficiaries. Indeed, in a previous empirical study Horton

In addition to simplicity, another consideration might also make the subpopulation of pour-over wills unlikely to present evidence of boilerplate. In particular, an estate plan featuring a pour-over will and revocable trust is considered by some to be indicative of relatively sophisticated estate planning.⁴⁷ For instance, Professor Danaya Wright and Beth Sterner enthusiastically describe the technique of “using wills that pour[] over . . . property into a revocable trust” as “the holy grail of estate planners.”⁴⁸ If, as Wright and Sterner suggest, pour-over wills are utilized by testators who engage in relatively sophisticated estate planning, then such wills might not be subject to the problems of boilerplate because they are drafted more thoughtfully and carefully than other wills. Thus, while their simplicity might render pour-over wills less likely to include recycled language that addresses non-salient issues, their sophistication might also suggest that pour-over wills constitute a subpopulation of wills that is unlikely to include boilerplate.

This is where a critical reader could take issue with Weisbord and Horton’s methodology. The specific concern is that by excluding pour-over wills from their sample, Weisbord and Horton’s findings potentially overstate the prevalence of boilerplate in the entire population of wills. If pour-over wills are, in fact, unlikely to include boilerplate, then their exclusion would inflate the reported percentages of wills that contain specific boilerplate provisions.

While this is a legitimate concern, the overstatement of the prevalence of boilerplate is likely not substantial. The authors found only fourteen pour-over wills among the total 260 wills that their initial search returned; pour-over wills were therefore a mere 5% of the entire population of wills submitted to probate in Sussex County in the first half of 2015.⁴⁹ Even if all fourteen

found several “matters [that] featured wills that left nominal amounts of property to beneficiaries other than the trustee.” See David Horton & Andrea Cann Chandrasekher, *Probate Lending*, 126 YALE L.J. 102, 131 n.171 (2016). In such cases, the will might address the issues of representation and tax apportionment.

47. See, e.g., *In re Estate of George*, 265 P.3d 222, 231 n.1 (Wyo. 2011) (describing an estate plan featuring a pour-over will and revocable trust as “rather complex and legally sophisticated”); John V. Orth, “*The Race to the Bottom*”: *Competition in the Law of Property*, 9 GREEN BAG 2D 47, 53 (2005) (“The revocable-trust-pour-over-will arrangement is for well advised, usually wealthy clients.”); Comment, Danaya C. Wright & Beth Sterner, *Response to Professor Horton, Mr. James Pressly and Mr. J. Grier Pressly*, 43 ACTEC L.J. 351, 353 (2018) (explaining that the existence of pour-over wills in probate records suggest that the testator has “gone one step beyond the basic will to create a trust,” which “impl[ies] that th[e] decedent[] at least ha[s] taken advantage of the opportunity to do more comprehensive estate planning than those who died just with a will and those who died intestate”).

48. Danaya C. Wright & Beth Sterner, *Honoring Probable Intent in Intestacy: An Empirical Assessment of the Default Rules and the Modern Family*, 42 ACTEC L.J. 341, 355 (2017).

49. The authors do not expressly identify the number of pour-over wills that they excluded. However, they do identify that they excluded sixteen non-Jersey wills. See Weisbord & Horton, *supra* note 1, at 689. Therefore, to get from the total number of wills of 260 to their data set of 230, they must have excluded fourteen New Jersey pour-over wills. Although pour-over wills represented only 5% of the total population of wills, it should be noted that in another study,

pour-over wills that Weisbord and Horton excluded contain no evidence of indiscriminately placed recycled language, their findings do not significantly overstate the prevalence of boilerplate.

Consider, for example, the generic “just debts” clauses that Weisbord and Horton conclude are boilerplate.⁵⁰ With their sample set of 230 wills, which excluded the 14 pour-over wills, they found that 157 (68%) included boilerplate “just debts” clauses.⁵¹ If the 14 pour-over wills are added back into their sample, the total number of wills in their study would be 244. Assuming that all of the excluded pour-over wills do not include boilerplate provisions, the percentage of wills including a generic “just debts” clause would drop from 68% to 64%.

As this decrease in the percentage of wills with a generic “just debts” clause illustrates, Weisbord and Horton’s exclusion of pour-over wills does not result in a substantial overstatement of the prevalence of boilerplate. This does not mean, however, that the exclusion of pour-over wills from their study is warranted. In order to get a full perspective of the prevalence of boilerplate, Weisbord and Horton should consider the entire spectrum of wills, not only those that are more likely to include boilerplate but also those that are less likely to include boilerplate. Indeed, contrary to Weisbord and Horton’s assertion, the unlikelihood that pour-over wills exhibit evidence of boilerplate does not render them less relevant to their research than other wills.

Not only does the exclusion of pour-over wills remove an entire subpopulation of relevant wills from Weisbord and Horton’s study, but it also results in a missed opportunity to evaluate whether pour-over wills are part of relatively sophisticated estate planning. Horton himself has previously painted a different picture of pour-over wills, at least those that travel through the probate process, than the one in which pour-over wills and their accompanying revocable trusts are seen as the product of sophisticated estate planning. For example, in a reply to Wright and Sterner, Horton argued:

The authors use the fact that an estate contains a pour over will as evidence that the decedent engaged in relatively sophisticated planning. . . . But to me, the fact that a pour over will appears in the probate files is not necessarily probative of access to counsel, effort, or care. Instead, because pour over wills are designed *not* to be probated, it is a telltale sign that a decedent *failed* to transfer all of her property into the trust. Thus, although Wright and Sterner treat the existence of a pour over will as evidence of

Horton found a significantly higher percentage of pour-over wills. See David Horton, *In Partial Defense of Probate: Evidence from Alameda County, California*, 103 GEO. L.J. 605, 628 (2015) (“Of the 399 wills I discovered, seventy (17%) were ‘pour over’ wills.”).

50. See *supra* notes 26–28 and accompanying text.

51. See Weisbord & Horton, *supra* note 1, at 698.

privilege, one could just as easily spin it counterclockwise.⁵²

There are legitimate arguments that support Wright and Sterner's view that pour-over wills, even those that are probated, are the product of relatively sophisticated estate planning.⁵³ However, given Horton's perspective that a pour-over will that passes through probate indicates flawed estate planning, it would seem that Weisbord and Horton would at least be curious whether pour-over wills evidence any indication of boilerplate. If the mere fact that a pour-over will goes through the probate process is evidence of flawed estate planning, then perhaps pour-over wills possess other evidence of flawed estate planning, specifically in the form of boilerplate language.

In the end, Weisbord and Horton's exclusion of pour-over wills likely does not significantly affect their findings,⁵⁴ and it does not undermine their conclusions or reform recommendations. However, it does seem like a missed opportunity to provide insight into the relative sophistication of pour-over wills. As such, an empirical study of boilerplate in pour-over wills is an endeavor that Weisbord and Horton should consider undertaking in the future.

52. David Horton, *Intestacy, Wills, and Intent: A Short Comment on Wright & Sterner*, 43 ACTEC L.J. 339, 342 (2018); see David Horton, *Tomorrow's Inheritance: The Frontiers of Estate Planning Formalism*, 58 B.C. L. Rev. 539, 581 (2017) ("Well-advised settlors usually back up their trusts by executing 'pour-over' wills," but "the fact that a pour-over will surfaces in the probate records is a telltale sign that something went dramatically wrong with a settlor's effort to create a trust.").

53. Wright and Sterner specifically suggest that "simple probate makes sense" for pour-over wills, "even if the dispositive provisions are outlined in a separate trust document" because "a pour-over is designed to capture any after-acquired property and dispose of any and all property that was not put into the trust, thereby allowing the decedent full control until death." Wright & Sterner, *supra* note 47, at 352–53. In addition, Horton, himself, admits that there are legitimate reasons a pour-over will is probated. See Horton, *supra* note 52, at 581–82 n.342 (2017) (suggesting that a pour-over will might be probated "in order to get this short statute of limitations running against potential malpractice lawsuits" and that "one might probate a pour-over will in order to exercise a testamentary power of appointment").

54. See *supra* notes 49–51 and accompanying text.