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## Filling in the Blanks

William P. LaPiana

*New York Law School*, [william.lapiana@nyls.edu](mailto:william.lapiana@nyls.edu)

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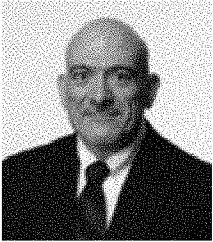
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# Filling in the Blanks

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Adam J. Hirsch, *Incomplete Wills*, 111 *Mich. L. Rev.* 1423 (2013).



William LaPiana

In his latest article, *Incomplete Wills*, Professor Adam Hirsch undertakes an elaborate analysis of the law governing the disposition of the portion of the testator's probate estate undisposed of by the testator's will. The breadth and depth of the research on which the article rests is formidable indeed. Although at first thought one might quarrel with the author's assertion that the examination and classification of reported cases is a form of empirical research, he is candid about the limitations of the technique and his use of the cases is really quite traditional: they are illustrations of the great variety of circumstances in which the courts have considered real problems, in this instance, those caused by incomplete wills. And this use of the illustrations that the cases provide is the message of the article. Because wills are incomplete for many reasons, all of which are to some degree unintentional, the usually bright line rules that govern, exemplified by the closely related treatment of these topics in Restatement (Third) of Property (Wills and Donative Transfers) and the Uniform Probate Code (UPC), often give results that to varying degrees are out of sync with what we can learn of testators' intentions.

Prof. Hirsch first discusses negative wills at great length, asking under what circumstances express disinheritance should be effective to supplant the intestacy statute in the event of a partial intestacy (providing along the way a complete discussion of current American law on the subject). With appropriate noting of the limitations of the data, he attempts to classify the reported cases according to the reason for disinheriting a family member by means of a negative will. The most we can conclude from this effort is that "the data suggest a substantial scattering of testamentary motives." That fact, in turn, leads to the conclusion that neither the traditional refusal to honor negative wills nor their blanket approval by the modern view exemplified by the Restatement and the UPC is the best way to go. He suggests instead a close inquiry into the motives for making a negative will. The legislature will need to create a presumption about the testator's intent to create a negative will or not, a presumption which for now will be arbitrary but in the future will be refined in light of cases decided under the new rule of ascertaining testator intent.

Prof. Hirsch also draws a distinction between negative wills disinheriting potential heirs by name and "global negative wills" disinheriting all of the testator's potential heirs. Although neither the Restatement nor the UPC draw the distinction, he believes it is worthwhile to do so because "scrupulous observance of global negative wills" would likely not carry out the testator's intent. Global disinheritance clauses, he believes, citing cases in support, often result from clumsy attempts to excluded pretermitted children. In addition, where we can conclude such provisions are an expression of hostility toward the testator's heirs, there are surely gradations of hostility. Besides, he asks, of a will that unexpectedly fails to dispose of the testator's estate, if the resulting choice is between distribution in intestacy and escheat, how many testators who have disinherited all of their potential heirs would stick to a complete override of the intestacy statute? He suggests the legislative creation of

a rebuttable presumption that a testator would not want a global disinheritance clause to stand in the event of an unanticipated partial intestacy.

The remainder of the article is similar: the existing rules, often as not enshrined in the Restatement and the UPC, do not take into account the wide range of testator intent illustrated in the cases. For example, both the Restatement and the UPC require that a negative will be created using express language and both state that the result of an effective negative will is that the disinherited are deemed to have disclaimed their intestate shares. In both cases, these bright line rules do not necessarily capture the intent of every testator who creates, or attempts to create a negative will. The deemed disclaimer in particular creates odd results because under the UPC, a disclaimer overrides the application of the per capita at each generation scheme of representation, which is the default meaning of “representation” under the Restatement and the UPC.

The article continues with a fascinating discussion of “estate planning gimmickry” made possible by the negative will. For example, by disinheriting heirs, the testator might be able to prevent anyone from challenging the will (although Prof. Hirsch does note that the effectiveness of such an attempt is not at all certain). The author also suggests that it should be possible to create a “positive” will, a will that alters the statutory pattern of intestate succession. The article concludes with a discussion of the application of the doctrine of advancements to partial intestacy and the possibility of a distribution in partial intestacy following the distribution in the effective portion of the will. Here, Prof. Hirsch notes the problematic nature of the abolition of the “no-residue-of-a-residue” rule. Again, one can never be certain that an inflexible rule yields results that carry out the unexpressed intent of a majority of testators whose wills are incomplete and one can certainly point to cases where we can be fairly confident the rule does quite the opposite.

In the end, Prof. Hirsch advocates an approach to these cases of incomplete testamentary provision that is more like the approach of both courts and legislatures to cases of incomplete contracts, “a domain in which bracketed judicial discretion seems to function well enough in practice.” This is the sort of suggestion that is genuinely thought provoking, and when well described and supported, as it is here, well worth the effort to understand.

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