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Killing Your Chances of Inheriting: The Problem with the Application of the Slayer Statute to Cases of Assisted Suicide

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I. Introduction

Whether garnering growing public support and empathy, or spawning negative backlash and legal reaction, assisted suicide is a topic that has been thrust into the limelight in the last few decades.[1] While adjudicating the criminality and morality of such an act is beyond the scope and focus of this paper, the issue's growing presence is undeniably going to impact legal doctrine reexamination moving forward. The focus of this paper is on the effects of assisted suicide with regard to the law of succession. Namely, our discussion will center on the treatment of knowing participants in assisted suicide and participants in mercy killings,[2] and such a participants' subsequent legal right to inherit from the recent decedent.

The law in all states, either by express statute or case law, provides that a person who murders a testator is not allowed to inherit from the will of that testator and thereby benefit from his or her own "wrongdoing." In addition, the Uniform Probate Code provides that one who feloniously and intentionally kills the decedent forfeits all benefits relating to the decedent's estate.[3] Application of this rule focuses most heavily on the degree or nature of the crime as intentional or felonious, rather than on any criminal conviction.[4] As such, a large problem arises when a person, through wishes of a testator, assists or participates in the suicide of the testator. Should that person automatically be prohibited from inheriting from the testator's estate? Should the act of assisted

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1 *See infra* Part V.B.

2 For the purposes of this paper and our discussion throughout, the terms assisted suicide and mercy killing may both be used when referring to the acts which we believe should not result in an individual being barred under a slayer statute. While we recognize and appreciate the differences between assisted suicides and mercy killings, a complete analysis and explanation of the two different yet similar acts is not provided in this paper. However, we do provide for the circumstantial differences of both acts in our statutory modification proposals. *See infra* Part VIII.

3 Unif. Probate Code § 2-803(b) (2010).

4 *Id.*

suicide really cause the person to forfeit all benefits relating to the decedent's estate?

This paper will attempt to answer these complex questions and provide a framework for how the slayer statute should apply in cases involving assisted suicide. Section II of this paper will briefly discuss the increase in cases of assisted suicide and the varying legal and political treatment of such cases in the United States. Next, Section III will provide a historical background on the origins of the slayer statute and the framework of the law as it exists today. Section IV of this paper will then discuss the public policy rationales of the slayer statute and the true intent behind the application of the rule and the law of succession generally: trying to effectuate the intent of the testator. Section V will touch briefly on some specific occurrences of assisted suicide and mercy killing, while also examining a recent Wisconsin case, which dealt directly with the central inquiry of this paper.

Following that examination, Section VI will summarize some of the prevailing viewpoints and reactions from various legal commentators on the subject. Section VII will argue that the slayer statute should not be automatically and rigidly applied to cases of assisted suicide and mercy killings because the statute's main purposes are not similarly reached under cases of murder and assisted suicide/mercy killing. Finally, Part VIII will propose modifications to the Uniform Probate Code's slayer statute,[5] and more specifically Arizona Revised Statute ("A.R.S.") Section 14-2803.

II. The Trend of Increased Assisted Suicide Discussion in Legal and Political Arenas

Historically, society has had a negative view toward suicide and has even imposed laws that would prevent property from passing to the heirs of someone who committed suicide.[6] Such laws have since been repealed due to their unfairness. Although negative views toward suicide are still prevalent today, advancements in modern technology have changed the way society views and deals with death. The medical profession's ability to sustain life beyond what most would consider a natural end has transformed natural death into a situation where medical professionals must consciously decide when to withhold treatment.[7] The debate around assisted suicide boils down, in its simplest form, to society's inability to reach agreement of whether such act is suicide, murder

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[5] *Id.*

[6] *See* Washington v. Glucksberg, 521 U.S. 702, 711-13 (1997).

[7] Andrew H. Malcolm, *What Medical Science Can't Seem to Learn: When to Call it Quits*, N.Y. Times, Dec. 23, 1990, at E6.

or mercy.[8] The issue of physician-assisted suicide first gained publicity in the 1990's when Dr. Jack Kevorkian began helping terminally ill patients commit suicide and has continued to be a relevant issue as states have had to decide how to handle such situations.[9]

In 1997, the United States Supreme Court addressed the issue of an individual's right to commit suicide and obtain assistance in doing so in *Washington v. Glucksberg*.[10] Dr. Harold Glucksberg, along with other physicians, and terminally ill patients challenged Washington State's ban on assisted suicide under the Natural Death Act of 1979.[11] Dr. Glucksberg and the other physicians occasionally treated terminally ill patients and claimed they would assist the patients in ending their lives if it were not for Washington's ban on assisted suicide.[12] The Court held that the right to physician-assisted suicide was not a fundamental right protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[13] Although the court held that physician assisted suicide was not a fundamental right, the Court recognized the need for further debate on the topic.[14] By allowing the debate to continue, the Court "did not foreclose the possibility that physician-assisted suicide could be legalized and regulated at the state level."[15]

Currently, four states have legalized physician-assisted suicide. In 1994, Oregon passed the Oregon Death With Dignity Act.[16] Fourteen years later, Washington passed the Death With Dignity Act in 2008.[17] In 2009, the Supreme Court of Montana held that, under the Montana Code, the consent of a terminally ill patient to physician-assisted suicide constituted a statutory defense to homicide.[18] More recently, Vermont passed the Patient Choice and Control at End of Life Act allowing physician-assisted suicide.[19] In addition, other states such as California, Maine, New Hampshire, Iowa and Michigan have all attempted to pass some form of physician assisted suicide measure, although each was ulti-

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8 Kelly Lyn Mitchell, *Physician-Assisted Suicide: A Survey of the Issues Surrounding Legalization*, 74 N.D. L. REV. 341, 354 (1998).

9 *See* Council on Ethical and Judicial Affairs, *Decisions Near the End of Life*, 267 JAMA 2229, 2233 (1992) (Council Report).

10 *See Glucksberg*, 521 U.S. 702.

11 *Id.* at 707-08.

12 *Id.* at 707.

13 *Id.* at 728.

14 *Id.* at 735.

15 Alexandra Dylan Lowe, *Facing the Final Exit*, 83 A.B.A. J. at 48, 50 (Sept. 1997).

16 *See generally* OR. REV. STAT. ANN. § 127.800 to .995 (West 2007).

17 *See generally* WASH. REV. CODE § 70.245 (2009).

18 *See* Baxter v. State, 2009 MT 449, ¶ 50, 224 P.3d 1211; *see also* MONT. CODE. ANN. § 45-2-211 (2006).

19 *See* VT. STAT. ANN. tit. 18, § 5281 to 5292 (2013).

mately defeated by a narrow margin.[20] Assisted suicide is still expressly forbidden in many states and can lead to prosecution. Thirty-nine states have statutes criminalizing the act of assisting in a suicide (regardless of whether force or duress is used), while other states criminalize the act through case law.[21]

As with any topic centering on assisted suicide, there are going to be commentators on both sides of the debate. Our focus, however, is not on whether the act itself should or should not be permitted. Rather, our focus centers on whether the law should act to prohibit someone who does participate in such an act from inheriting from the decedent in any manner. The criminal law can and does operate independently to deal with any possible criminal prosecution for such participation. As such, our examination of the slayer statute revolves around the necessity, or lack thereof, of the application of the rule with regard to the decedent's estate.

III. The History of the Slayer Statute

The slayer statute, in its simplest form, operates to prevent a person from inheriting from a decedent if that person killed the decedent. Al-

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[20] *See* James Podgers, *Matters of Life and Death: Debate Grows Over Euthanasia*, 78 A.B.A. J. 60, 61 (1992); *Legislative Update*, Timelines, Mar.-Apr. 1996, at 4 (Hemlock Soc'y, Denver, Co.).

[21] Alaska Stat. § 11.41.120 (2012); Ariz. Rev. Stat. Ann. § 13-1103 (2010); Ark. Code Ann. § 5-10-104 (2006 & Supp. 2011); Cal. Penal Code § 401 (West 2010 & Supp. 2013); Colo. Rev. Stat. Ann. § 18-3-104 (2013); Conn. Gen. Stat. Ann. § 53a-56 (West 2013 & Supp. 2013); Del. Code Ann. tit. 11, § 645 (West 2010); Fla. Stat. Ann. § 782.08 (West 2007 & Supp. 2012); Ga. Code Ann. § 16-5-5 (2011); 720 Ill. Comp. Stat. Ann. 5/12-31 (West 2003 & Supp. 2006) (current version at 5/12-34.5 (2011)); Ind. Code Ann. § 35-42-1-2.5 (LexisNexis 2013); Iowa Code Ann. § 707A.2 (West 2003); Kan. Stat. Ann. § 21-3406 (1995 & Supp. 2006); Ky. Rev. Stat. Ann. § 216.302 (LexisNexis 1999); La. Rev. Stat. Ann. § 14:32.12 (2007 & Supp. 2013); Me. Rev. Stat. Ann. tit. 17-A, § 204 (2006); Md. Code Ann., Crim. Law § 3-102 (West 2008); Mich. Comp. Laws Ann. § 750.329a (West 2004); Minn. Stat. Ann. § 609.215 (West 2009 & Supp. 2013); Miss. Code Ann. § 97-3-49 (West 2011 & Supp. 2013); Mo. Ann. Stat. § 565.023 (West 2012 & Supp. 2006); Mont. Code Ann. § 45-5-105 (2013 & Supp. 2006); Neb. Rev. Stat. Ann. § 28-307 (LexisNexis 2009); N.H. Rev. Stat. Ann. § 630:4 (2007); N.J. Stat. Ann. § 2C:11-6 (West 2005); N.M. Stat. Ann. § 30-2-4 (West 2003); N.Y. Penal Law §§ 120.30, 125.15 (McKinney 2009 & Supp. 2013); N.D. Cent. Code § 12.1-16-04 (2012); Ohio Rev. Code Ann. § 3795.02 (West 2006); Okla. Stat. Ann. tit. 21, § 813-15 (West 2002 & Supp. 2013); Okla. Stat. Ann. tit. 63, § 3141.3 (West 2004 & Supp. 2013); Or. Rev. Stat. Ann. § 163.125(1)(b) (2007 & Supp. 2013); Tit. 18 Pa. Cons. Stat. Ann. § 2505 (b) (West 1998 & Supp. 2013); S.C. Code Ann. § 16-3-1090(b) (2003); S.D. Codified Laws § 22-16-37 (2006); Tenn. Code Ann. § 39-13-216(g) (2010 & Supp. 2012); Tex. Penal Code Ann. § 22.08(b) (West 2011 & Supp. 2012); Va. Code Ann. § 8.01-622.1 (2007); Wash. Rev. Code Ann. § 9A.36.060 (2) (West 2009 & Supp. 2013); Wis. Stat. Ann. § 940.12 (West 2005).

though many states have enacted slayer statutes today, the slayer statute developed as a common law principle. Courts in the United States first applied the principle of the slayer statute in the 1889 case of *Riggs v. Palmer*.[22] In 1880, Francis Palmer made his last will, leaving small portions of his estate to his two daughters, Mrs. Riggs and Mrs. Preston, and the majority of his estate to his grandson, Elmer Palmer.[23] Elmer Palmer was aware of the provisions in his grandfather's will and knew that on multiple occasions his grandfather mentioned his intent to change such provisions.[24] To prevent his grandfather from changing the provisions that were in his favor, Palmer killed his grandfather by poisoning him.[25] Mrs. Riggs and Mrs. Preston brought suit challenging the portion of the will that resulted in Palmer inheriting.[26]

Under New York law at the time, under no circumstance could a will be modified once the testator had passed away.[27] The purpose of the law was to "enable testators to dispose of their estates to the objects of their bounty at death, and to carry into effect their final wishes legally expressed."[28] Palmer argued that the testator's will was properly made and admitted to probate, and because the testator was dead the estate must pass according to the terms of the will.[29] Narrowly interpreting the law, the New York Supreme Court agreed and dismissed Mrs. Riggs and Mrs. Preston's challenge.[30] However, the New York Court of Appeals reversed, using the rationale behind today's slayer statute to prevent Palmer from inheriting property from the man he killed.

The Court of Appeals looked to the rationale and intent of the lawmakers who drafted the law requiring that the donees in a will be given the property, regardless of the circumstances. The court stated "it never could have been their intention that a donee who murdered the testator to make the will operative should have any benefit under it."[31] The court looked to equitable construction, stating that "[i]f there arise out of them any . . . absurd consequences manifestly contradictory to common reason, they are with regard to those collateral consequences void."[32] The court referenced the application of a statute in Bologna

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22 Riggs v. Palmer, 22 N.E. 188 (1889).

23 *Id.*

24 *Id.* at 189.

25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.*

30 *See id.* at 188.

31 *Id.* at 189.

32 *Id.* (quoting WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS 91 (1753)).

stating "whoever drew blood in the streets should be severely punished, and yet it was held not to apply to the case of a barber who opened a vein in the street."[33] The court went on to say

> "[A]ll laws, as well as all contracts, may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes."[34]

The court noted that these maxims applied to wills and had been used to set aside or decree void a will that was procured by fraud or deception.[35]

In this case, there was no guarantee that Palmer would outlive the testator or that the testator would not change his will prior to death. Palmer made himself an heir by murdering his grandfather, seeking to take the property as a "fruit[ ] of his crime."[36] The court noted that this was not a decision to leverage any greater or additional punishment on Palmer and not to take any property from him, but rather was a decision preventing him from being rewarded for his crime.[37] The court realized that the rigid application of the law at the time, although enacted with the intent to carry out the testator's will, would result in an inequitable distribution of property. That is, the testator would not likely distribute his estate to his murderer. In addressing this issue, the court laid out the framework and rationale for the modern day slayer statue.

IV. The Intent and Public Policy Behind the Slayer Statute

Some version of the slayer statute has been adopted in 48 states and the District of Columbia.[38] The remaining two states, Massachusetts

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33 *Id.* at 189-90.

34 *Id.* at 190.

35 *See id.* (citing Allen v. M'Pherson, [1847-1848] 1 H.L. 191 (appeal taken from Eng.); Harrison's Appeal, 48 Conn. 202 (1880)).

36 *Id.*

37 *Id.*

38 *See* Ala. Code § 43-8-253 (1991); Alaska Stat. § 13.12.803 (2012); Ariz. Rev. Stat. Ann. § 14-2803 (2012); Ark. Code Ann. § 28-11-204 (West 2012); Cal. Prob. Code §§ 250-258 (West 2002 & Supp 2013); Colo. Rev. Stat. Ann. § 15-11-803 (West 2011 & Supp. 2012); Conn. Gen. Stat. Ann. § 45a-447 (West 2007); Del. Code Ann. tit. 12, § 2322 (West 2006); D.C. Code § 19-320 (2001); Fla. Stat. Ann. § 732.802 (West 2010); Ga. Code Ann. § 53-1-5 (2011); Haw. Rev. Stat. § 560:2-803 (2007); Idaho Code Ann. § 15-2-803 (2009); 755 Ill. Comp. Stat. Ann. § 5/2-6 (West 2007 & Supp. 2013); Ind. Code Ann. § 29-1-2-12.1 (West 2010); Iowa Code Ann. § 633.535 (West

and New Hampshire, do not have a slayer statute, but rather rely on case law to bar the slayer from inheriting.[39] Although the exact motivation behind the slayer statute may vary from state to state, the central focus of the law of succession remains, along with the two key principles of the slayer statute, which undoubtedly play a role in its adoption—equity and morality.

A. The Underlying Focus: Intent of the Testator

The main underlying principle of the law of succession is to effectuate the intent of the testator in the distribution of the testator's estate.[40] It is important to not lose sight of this principle when enacting and interpreting laws. In situations of murder, it is logical to assume that the victim would not want the murderer to inherit. Thus, the slayer statute is an attempt to carry out the testator's intent, through the realization that the testator would likely change their will to disinherit the person that killed them. Without the opportunity to change their will, the slayer statue essentially makes the changes the testator would likely have made if given the opportunity. While this makes logical sense in situations of traditional murder, the slayer statute may actually under-

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2003); KAN. STAT. ANN. § 59-513 (West 2008 & Supp. 2012); KY. REV. STAT. ANN. § 381.280 (West 2012); LA. CIV. CODE ANN. art. 946 (2000 & Supp. 2013); ME. REV. STAT. ANN. tit. 18-A, § 2-803 (2007); MICH. COMP. LAWS ANN. § 700.2803 (West 2002 & Supp. 2013); MINN. STAT. ANN. § 524.2-803 (West 2012); MISS. CODE ANN. § 91-1-25 (West 1999); MO. ANN. STAT. § 461.054 (West 2007); MONT. CODE ANN. § 72-2-813 (2013); NEB. REV. STAT. ANN. § 30-2354 (LexisNexis 2010); NEV. REV. STAT. ANN. § 41B.200 (West 2000); N.J. STAT. ANN. §§ 3B:7-5 to 7-7 (West 2007); N.M. STAT. ANN. § 45-2-803 (West 2006); N.Y. EST. POWERS & TRUSTS LAW § 4-1.6 (McKinney 2012); N.C. GEN. STAT. §§ 31A-3 to -12 (2012); N.D. CENT. CODE § 30.1-10-03 (2010); OHIO REV. CODE ANN. § 2105.19 (West 2008); OKLA. STAT. ANN. tit. 84, § 231 (West 2013); OR. REV. STAT. ANN. §§ 112.455-.555 (West 2007); 20 PA. CONS. STAT. ANN. §§ 8801-8815 (West 2007); R.I. GEN. LAWS §§ 33-1.1-1 to 33-1.1-16 (2011); S.C. CODE ANN. § 62-2-803 (2009); S.D. CODIFIED LAWS § 29A-2-803 (2004); TENN. CODE ANN. § 31-1-106 (2007); TEX. PROB. CODE ANN. § 41(d) (West 2003); UTAH CODE ANN. § 75-2-803 (LexisNexis 1998 & Supp. 2013) (original version at UTAH CODE ANN. § 75-2-804 (LexisNexis 1993 & Supp. 2013)); VT. STAT. ANN. tit. 14, § 551(6) (West 2007) (*repealed by* VT. STAT. ANN. tit. 14, § 314 (West 2009); VA. CODE ANN. §§ 55-401 to 55-415 (West 2008) (*repealed by* VA. CODE ANN. §§ 64.2-2501 to 64.2-2511 (West 2012)); WASH. REV. CODE ANN. §§ 11.84.010 to 11.84.900 (West 2006 & Supp. 2013); W.VA. CODE ANN. § 42-4-2 (West 2008); WIS. STAT. ANN. §§ 852.01(2m), 854.14 (West 2002 & Supp. 2012); WYO. STAT. ANN. § 2-14-101 (2013).

39 *See* Slocum v. Metro. Life Ins. Co., 139 N.E. 816, 816 (Mass. 1923); *cf.* Kelley v. New Hampshire, 196 A.2d 68, 69 (N.H. 1963) (indicating this is a case of first impression).

40 *In re* Estate of Shumway, 3 P.3d 977, 984 (Ariz. Ct. App. 1999); *In re* Estate of Kirkes, 273 P.3d 664, 667 (Ariz. Ct. App. 2012); *In re* Estate of Johnson, 811 P.2d 360, 362 (Ariz. Ct. App. 1991); *In re* Estate of Smith, 580 P.2d 754, 756 (Ariz. Ct. App. 1978).

mine the main principle of the law of succession, if rigidly applied in cases of mercy killings or assisted suicides.

B. Equity

One of the primary rationales supporting the slayer statute is the principle that no man can take advantage of his own wrong. Without such a policy, people would benefit from their wrongful acts, essentially serving as an incentive to commit such wrongful acts. The policy serves as a punishment for, and a deterrent to, people committing acts that are harmful to society. The slayer statute serves to prevent unjust enrichment by erasing any financial incentive one may have in taking the life of someone they will inherit from. The court in *Riggs v. Palmer* applied the equity theory and concluded that property law should not benefit a murderer when such laws were "passed for the orderly, peaceable, and just devolution of property."[41] This supports the principle that "no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person."[42] The slayer statute does not take into account the slayer's intent or motivation behind the killing. Regardless of whether or not financial gain was a motivating factor in the killer's mind, the slayer statute will apply.

C. Morality

As with any issue relating to the life and death and the sanctity of life, morality plays a role in the development and application of the slayer statute. Most cultures believe killing to be immoral regardless of the motivation because of the sanctity of life.[43] Mercy killings and assisted suicides create tension because society prioritizes the sanctity and sacredness of human life above everything else. This hierarchy leads many people to believe that killing of any kind, regardless of motive or situation, violates this morality principle. The medical profession has encountered this tension as demand for mercy killings have increased. Medical professionals often take oaths upon entering practice, almost all of which reference their duty to the preservation of life.[44] The slayer statute acts as a deterrent and attempts to preserve life and maintain

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41 *Palmer*, 22 N.E. at 190.

42 Cleaver v. Mut. Reserve Fund Life Ass'n, [1891] 1 Q.B. 147 (C.A.) at 156 (Eng.).

43 *See* Joseph Boyle, *Sanctity of Life and Suicide: Tensions and Developments Within Common Morality*, *in* 35 SUICIDE AND EUTHANASIA: HISTORICAL AND CONTEMPORARY THEMES 221, 221 (Baruch A. Brody ed., 1989).

44 HELGA KUHSE, THE SANCTITY-OF-LIFE DOCTRINE IN MEDICINE: A CRITIQUE 6-7 (Clarendon Press, 1987); *see* RUTH MACKLIN, MORTAL CHOICES: BIOETHICS IN TODAY'S WORLD 5-9 (Pantheon Books, 1987).

morality by removing any financial incentives one may have in assisting in the suicide or killing of another.

V. Occurrences of the Issue: Assisted Suicide and Its Treatment

A. Introduction

The diverse social, political, and even legal reactions and subsequent treatment to the growing trend of assisted suicide has created a state of flux. As with any issue concerning life and death, there will never likely be full-fledged support on either side of the movement. However, the reality is, issues associated with assisted suicide and mercy killings continue to emerge within various political and legal arenas. As these issues continue to evolve within such arenas, the ability to fit them neatly within already-existing legal constraints severely diminishes.

This section will summarize several seminal cases involving assisted suicide and mercy killings, highlighting, in particular, the vast differences in both the legal and moral culpability between the actors in such cases and a "killer" in the traditional sense. This section will then analyze a Wisconsin Court of Appeals decision that faced this issue head-on.

B. Assisted Suicide in the News

The tragic 1920 Michigan case of *People v. Roberts* is one of the more well known assisted suicide cases. *Roberts* involved a husband who provided his physically disabled wife, who suffered from multiple sclerosis and was in great pain, with poison in order to kill herself.[45] Following unsuccessful attempts to commit suicide herself, Roberts' wife asked him to provide her with poison.[46] Roberts placed a cup of poison within her reach, knowing that she would likely drink the poison voluntarily to commit suicide and relieve herself of her pain.[47] Roberts argued that since suicide was not a crime in Michigan, it was not a crime to help someone commit suicide.[48] Roberts was convicted of first-degree murder even though he did not force his wife to ingest the poison.[49]

Perhaps the most famous instance of assisted suicide covered by the media was the case of Dr. Jack Kevorkian, which thrust the issue of

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45 People v. Roberts, 178 N.W. 690, 691 (Mich. 1920), *overruled by* People v. Kevorkian, 527 N.W.2d 714 (Mich. 1994).

46 *Id.*

47 *Id.* at 691.

48 *Id.* at 692.

49 *Id.* at 690, 693.

assisted suicide to the national headlines.[50] By the mid 1990's, Dr. Kevorkian's name was synonymous with assisted suicide. Dr. Kevorkian created a "suicide device" that injected chemicals into the patient's veins.[51] The first chemical caused the patient to become unconscious, while the second chemical would stop the patient's heart.[52] Janet Adkins was a woman with Alzheimer's disease.[53] At her request, Dr. Kevorkian attached Adkins to the "suicide device" and instructed her on how to operate it.[54] Adkins subsequently pushed the button and passed away five minutes later.[55] Adkin's last words to Dr. Kevorkian were "Thank you."[56] Dr. Kevorkian was charged with first-degree murder, but the chargers were ultimately dropped.[57] Prosecutors then sought and were granted an injunction, barring Dr. Kevorkian from assisting others in committing suicide.[58]

More recently was the tragic story of the Sun City couple, George and Ginger Saunders. George met Ginger in 1946 when she was 15 years old.[59] In 1969 Ginger was diagnosed with multiple sclerosis and shortly after was confined to a wheel chair.[60] George, a loving husband, served as Ginger's sole caregiver for 40 years, catering to her daily needs. In this time, Ginger's health continued to deteriorate and she eventually contracted gangrene. Knowing that she would likely wind up in a nursing home, Ginger pleaded with George to end her suffering. George repeatedly told her that he couldn't do it, but she continued to beg.[61] Ginger repeatedly said, "Do it. Do it. Do it."[62] Eventually, George shot and killed Ginger. George was charged with first-degree murder but later plead guilty to manslaughter. Prosecutors did not ask the judge to sentence George to prison.[63] Judge John Ditsworth sentenced George

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50 Jeffrey G. Sherman, *Mercy Killing and the Right to Inherit*, 61 U. Cin. L. Rev. 803, 833 (1993).

51 *Id.*

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.*

58 *Id.*

59 Brian Skoloff, George Sanders Gets Probation for 'Mercy Killing' Wife, Virginia Sanders, THE HUFFINGTON POST, (Mar. 29, 2010, 7:29 PM), http://www.huffingtonpost.com/2013/03/29/george-sanders-virginia-sanders-mercy-killing_n_2978179.html.

60 *Id.*

61 *Id.*

62 *Id.*

63 *Id.*

to two years unsupervised probation in a sentence that Ditsworth said "tempers justice with mercy."[64]

C. Tackling the Issue: In re Schunk

While various news media outlets have covered incredibly tragic stories and circumstances of many instances like the ones previously discussed, it has taken much longer for a court to reach the proverbial next step of deciding whether participants in assisted suicide and mercy killings, regardless of criminal liability, should be allowed to inherit from the decedent. However, in 2008, the Wisconsin Court of Appeals took that next step.

The court recently held that a mother and daughter who assisted in the suicide of the husband/father did not commit an "unlawful and intentional killing," and thus were not barred from inheriting under his will.[65] In coming to this conclusion, the court agreed with the circuit court's finding that the "unlawful and intentional killing" requirement of the Wisconsin Slayer Statute does not include assisting another to commit suicide.[66]

In this case, Edward Schunk was terminally ill with non-Hodgkin's lymphoma and died from a self-inflicted shotgun wound.[67] His wife, Linda, and his daughter, Megan, were two of several beneficiaries of Edward's will.[68] Stipulated "factual submissions show[ed] that Edward was hospitalized several days before his death [and] on the day of his death his doctor allowed him to leave on a one-day pass to see his home and his dogs" once more.[69] Accordingly, Linda and Megan brought him home from the hospital.[70] That is where the factual clarity becomes convoluted. According to one of Edward's older daughters, and four of her other siblings, Linda and Megan drove Edward "to a cabin on their property, helped him inside, gave him a loaded shotgun, and left."[71] Linda and Megan, rather, asserted that Edward drove himself to the cabin, and that they did not know of his intention to kill himself.[72] Edward was found dead from a single gunshot wound to the chest later that day.[73]

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64 *Id.*
65 *In re* Estate of Schunk, 760 N.W.2d 446, 446 (Wis. Ct. App. 2008).
66 *Schunk,* 760 N.W.2d at 450; *see also* Wis. Stat. Ann. § 854.14 (West 2002).
67 *Id.* at 446.
68 *Id.* at 447.
69 *Id.*
70 *Id.*
71 *Id.*
72 *Id.*
73 *Id.*

The Court of Appeals, like the Circuit Court below, assumed for the sake of the motion for summary judgment that the factual assertion of Edward's other children was correct: that Linda and Megan assisted Edward in committing suicide.[74] Even assuming the actions of Linda and Megan helped to bring about Edward's death, the Court of Appeals concluded that the phrase "unlawful and intentional killing" does not plainly encompass the conduct of and actions taken by Linda and Megan.[75] The court chose to look at the plain meanings of the words and found that the first definition of the word "kill" is "to deprive of life."[76] Additionally, the court noted that "to commit suicide" is defined as "to put (oneself) to death: kill."[77] As such, the court reasoned that "[a] person who assists another in voluntarily and intentionally taking his or her own life is plainly not depriving the other of life."[78] Edward deprived himself of life by shooting himself with the shotgun. The court disagreed with the argument that because Linda and Megan provided the means with which Edward killed himself they were agents of his death and thus "killers," and stated that "killer" is not commonly understood to mean the person who provides the means that enable another to kill.[79]

The court even went as far as to realize that "[a] testator might, for example, contemplate that an intended beneficiary might kill the testator in an act of euthanasia . . . and the testator might want this to happen."[80] Simply, the court concluded that "unlawful and intentional killing" does not include assisting another to commit suicide.[81]

By making a conscious decision to exclude the act of assisted suicide from their legal definition of "unlawful and intentional killing," the Wisconsin Court of Appeals not only recognized the factual incongruences between the two acts, but even further recognized that the wake left behind from the implementation of these acts differs greatly as well. This proactive recognition symbolizes a stance against the rigid and automatic application of the slayer rule and provides an example for how future courts can empower themselves to effectuate the true purpose of the law of succession and attempt to ensure to the best of their abilities the true intent of the testator.

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74 *Id.* at 448.

75 *Id.*

76 *Id.*

77 *Id.*

78 *Id.* at 448-49.

79 *Id.* at 449.

80 *Id.* at 449-50.

81 *Id.* at 450.

VI. The Court of Public Opinion

Just as the treatment of assisted suicide in political and legal arenas differs vastly, the public reaction and viewpoints amongst legal and social commentators is similarly diverse.

The former chairman of the elder law section of the New Jersey State Bar Association suggests that slayer statutes need further examination in the realm of assisted suicide, especially when consideration is given to the many degenerative diseases inflicting so many people today.[82] As he states, "[p]robate law and the law of succession need not follow the criminal law."[83] While the criminal law acts to punish the wrongdoing, the law of succession is centrally focused on determining and putting into effect the intent of the testator. And if the death is truly the result of an assisted suicide, the intent of the testator would likely be to benefit the assisting individual, rather than punishing them.[84]

Another commentator agrees, stating that "courts should be given the freedom to follow the decedent's intent and allow the slayer to benefit,"[85] with certain safeguards.[86] As he states plainly, "the policy of preventing a murderer from benefitting from her act should not apply to mercy killing."[87] The policies underlying the prevailing yet rigid slayer statute are unpersuasive in the context of assisted suicide.[88] In his mind, and in the minds of many others, "[k]illing out of mercy is not a 'wrongful act.'"[89] There is no injury to either society or the decedent, since "those who beg to be killed in mercy do so to obtain relief," and therefore the "equitable policy against killing lacks force . . . when considered in the context of mercy killings."[90]

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82 Arne Siegel, Letter to the Editor, *Don't Make Me Choose Between Life and Death: Slayer's Rule,* N.Y. Times, June 13, 1994, *available at* http://www.nytimes.com1994/06/13/opinion/l-don-t-make-me-choose-between-life-and-death-slayer-s-rule-385239.html.

83 *Id.*

84 *Id.*

85 Kent S. Berk, Comments, *Mercy Killing and the Slayer Rule: Should the Legislatures Change Something?* 67 Tul. L. Rev. 485, 506 (1993).

86 *Id.* at 506–07 ("[T]o prevent murderers who act out of greed, hatred, or prospective personal gain from benefitting under the pretense of mercy killing.").

87 *Id.* at 486.

88 *Id.* at 495 (advocating adherence to the decedent's intent by "allowing the mercy killer to take under the decedent's will or otherwise").

89 *Id.* at 496 ("People who aid in a mercy killing tend to share a close relationship with the decedent and therefore act out of love, affection, and a desire to see their loved one freed from suffering. They are not driven by a desire to accelerate or ensure their inheritance." (footnotes omitted)).

90 *Id.*

However, not everyone believes that assisted suicide should operate outside the reach of the slayer statute. At least one public commentator believes that the Wisconsin Court of Appeals erred in its analysis and conclusions regarding the right of Linda and Megan Schunk to inherit.[91] Specifically, this commentator argues that the court's decision "frustrated the purpose of the slayer [statute] by allowing individuals who commit assisted suicide to inherit."[92] While analyzing the court's opinion, he advocates that the legal definition of "to kill" should have a much broader definition than the one given to the phrase by the Wisconsin Court of Appeals.[93] He believes that the act of assisted suicide is indeed encompassed within the notion of Wisconsin's Slayer Statute and that the proper legal definition of "to kill" includes acts that are a substantial factor in causing the death of an individual, and not merely direct causes of death like the Wisconsin Court of Appeals put forth.[94] In short, he argues that culpability in Wisconsin is not limited only to acts that are the direct cause of death, and thus Wisconsin's Slayer Statute should punish cases of assisted suicide and their participants as the state punishes crimes of accomplice liability and felony murder.[95]

Yet, what this definitional-focused viewpoint fails to take into account is that the greater emphasis should always be placed on trying to effectuate the central purpose behind an entire body of law, rather than trying to pigeonhole incongruent actions like murder and assisted suicide into one neat, coffin-shaped box . The commentator, cited above, states that placing assisted suicide outside the scope of the law's reach "frustrated the purpose of the slayer rule by allowing individuals who commit assisted suicide to inherit."[96] But this argument fails to see the forest through the trees. It is simply illogical to argue that in order to maintain the limited purpose of a single rule, the larger body of law within which the single rule operates needs to be tossed aside altogether. For if one chooses to lump assisted suicide within the ill-fitting confines of the slayer statute, the broader and more established main goal of the law of succession of attempting to effectuate the true intent of the testator, becomes utterly forgotten. Simply put, the application of the slayer statute to cases of assisted suicide does more harm to the long-standing aim of the law of succession than it could ever offer in beneficial simplicity.

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91 Matthew Barry Reisig, Comment, *O to A, For Helping Kill O: Wisconsin's Decision Not to Bar Inheritance to Individuals Who Assist A Decedent in Suicide*, 17 AM. U. J. GENDER SOC. POL'Y & L. 785, 787 (2009).

92 *Id.* at 787.

93 *Id.* at 793-95.

94 *Id.* at 795.

95 *See id.* at 795-800.

96 *Id.* at 787.

VII. The Slayer Statute Should Not Be Rigidly and Automatically Applied to Cases of Assisted Suicide

The slayer statute should not automatically be applied to cases of assisted suicide and likewise automatically bar an assisting or knowing participant from inheriting, because the two main areas of focus and emphasis of the slayer statute are not similarly affected by intentional and felonious murders and cases of assisted suicide.

First, it is important to remember that the crux of the law of transfers and wills is to effectuate the intent of the testator to the best of the law's ability. One of the two main purposes behind the slayer statute is the presumption that a deceased testator would most likely not wish or intend for the murderous actor to continue to inherit, either by intestacy or by will. This is a logical presumption and one that would seem to apply in most, if not all, cases of a murdered testator. However, this presumption does not hold weight when the factual circumstances of a particular case shift from that of a murder to that of assisted suicide.

Unlike a murder scenario where the decedent had no intention or wish to cease living and the alleged guilty actor took matters into his/her own hands, a case of assisted suicide presumably encompasses a factual scenario whereby two or more individuals participate in a set of events designed to carry out the intentions and wishes of the decedent to achieve an end, admittedly a tragically sad end, that was welcomed by the decedent. In such a scenario, the surviving participants would likely be looked upon with gratitude by the decedent, rather than with disdain. It likewise follows that such a decedent would not only want to stop any such participant from being barred, but might wish to go as far as insuring a form of inheritance for that party.

As such, a rigid and automatic application of the slayer statute to cases of assisted suicide fails to fully effectuate and comprehend the likely wishes and intent of the testator. A forced application of the rule would turn a worthy party in the eyes of the decedent into a barred afterthought.

The second argument for why the slayer statute should not be automatically applied to cases of assisted suicide arises when examining the public policy rationale behind the rule itself. As discussed previously, the slayer statute derives from the commonly accepted notion that a wrongdoer should not be able to benefit from his/her crimes. As applied to the slayer statute, a killer should not be able to participate in criminal acts in order to gain rights and ownership in the property of the victim of those acts. Underlying this common belief is the presumption that the killer acted against the wishes of the decedent and committed an act that society views as morally and criminally wrong. As discussed previously in this section, the first presumption does not apply uniformly

to instances of murder and assisted suicide alike. While a murdered decedent would likely look upon the killer with disdain or ill will, a decedent who has died as the result of an assisted suicide or mercy killing would likely look upon the participating party who brought about such result with gratitude. Similarly, the public policy rationale differs when the focus shifts from murder to assisted suicide. While murder is commonly accepted as criminally punishable and morally reprehensible, assisted suicide has both proponents and opponents.

No matter which side of the assisted suicide argument one personally falls on, the realization that the criminal culpability of a participant in such an act is up for more debate is undeniable. While our argument by no means advocates that the slayer statute should never be applied in assisted suicide cases, a rigid and automatic application of the slayer statute to bar all such participants in every scenario effectuates a public policy emphasis that is much too strong and turns a blind eye to the realities and circumstances of the case at hand.

In order to cause automatic application, public policy derivatives need to be uniform and applicable to all situations. Here, the public policy condemnation of a killer benefiting from his crimes loses quite a bit of strength when the factual circumstances shift from that of a murder to one of assisted suicide. Given such a shift, a rigid and automatic application of the slayer statute to cases of assisted suicide seems even more erroneous.

VIII. Proposed Modifications to Arizona's Slayer Statute; ARS Section 14-2803[97]

Before discussing our proposed modifications to the language of the slayer statute, it is first noteworthy to mention that in some states a testator is expressly and statutorily allowed to provide in their will that a person who kills the decedent may nevertheless inherit.[98] While the drafting and subsequent inclusion of such a provision certainly raises some interesting ethical questions about a supervising attorney, the inclusion of a provision such as this also risks throwing the baby out with the bath water. Not only would a participant in an assisted suicide to be allowed to inherit, the inclusion of such a provision would allow even a felonious and intentional killer of an unwilling decedent to inherit. So while we ultimately still believe that including such a broad provision should be allowed, we also believe that other statutory exceptions should be made, whereby an individual who assists another to commit suicide or participates in a mercy killing can nevertheless inherit, even in

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97 Ariz. Rev. Stat. Ann. § 14-2803 (1995) (West).

98 *See, e.g.,* Wis. Stat. Ann. § 854.14(6)(b) (West 2002).

the absence of an explicit clause or provision evidencing an intent to override a slayer statute in the testator's will.

Proposed Modifications to A.R.S. Section 14-2803:[99]

(A) A person who feloniously and intentionally kills the decedent forfeits all benefits under this chapter with respect to the decedent's estate, including an intestate share, an elective share, an omitted spouse's or child's share, a homestead allowance, exempt property and a family allowance. If the decedent died intestate, the decedent's intestate estate passes as if the killer disclaimed that person's intestate share.

(B) Subsection (A) shall not apply if the decedent's will expressly provides that a person who kills the decedent may nevertheless inherit, and such provision is witnessed by three disinterested witnesses, none of whom is the killer.

(C) A person will not be deemed to have feloniously and intentionally killed the decedent under the terms of Subsection (A), and thus will not forfeit any benefit under this chapter with respect to the decedent's estate, if such person proves by clear and convincing evidence that either:

(1) the person's actions or omissions consisted solely of assisting or facilitating the decedent's suicide; or

(2) the person caused the decedent's death, but such person's actions were performed at the request of the decedent and with the intent to relieve the decedent from one of the following conditions:

(a) a permanent vegetative state;

(b) a permanent and incurable illness or disease that is likely to have caused the decedent's death; or

(c) a permanent and irreversible illness or disease that renders the decedent severely incapacitated or causes the decedent severe physical, physiological or psychological pain.

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99 Our proposed modifications are merely suggestions and are intended to replace the now existing Section A of A.R.S. § 14-2803. After insertion of our proposed language, and its corresponding Sections A–E, the remaining portion of the now existing B–L would be sequentially moved down and re-titled accordingly.

(D) The exceptions provided in Subsection (C) shall not apply if the party seeking to bar the person's inheritance pursuant to Subsection (A) proves by clear and convincing evidence that:

(1) the decedent's will expressly provides that a person who kills the decedent shall not inherit;

(2) the decedent's will expressly provides that a person who assists in or facilitates the decedent's suicide shall not inherit; or

(3) the person intentionally used force, fraud, duress, deceit, or misrepresentation to cause the decedent to commit suicide or to request that the person kill the decedent.

(E) This section does not apply if the factual circumstances of the decedent's death lead the court to believe that the intent of the decedent would best be carried out in another manner.

These proposed modifications encompass our suggested solution to fix the current slayer statute and the problems that can arise from the now existing version of the rule as applied to cases of assisted suicide or mercy killings. Embodied in these modifications is the original language of the rule itself, supplemented by three key additional components.

First, Section (B) provides a statutory means to allow a testator to expressly override the slayer statute. And while, in our opinion, the inclusion of this express provision is not one that is likely to be used often, we believe that it important enough to warrant existence. This addition grants a testator full power in the disposition of their property, without state interference, regardless of the testator's cause of death.

Next, Section (C) provides the exceptions to Section (A) whereby a person who would normally not be allowed to inherit because of that Section's general rule is allowed to prove that his/her actions meet the statutory requirements for an assisted suicide or mercy killing circumstance. Section (D) then provides a method for those arguing that the person shall nevertheless still not inherit due to either an express provision in the decedent's will, or intentional wrongful action of the individual. Finally, Subsection (E) empowers the court, after a full examination of the circumstances of the decedent's death, to alter the recipients of the property and the manner by which the property is disposed in order to best effectuate the intent of the decedent.

IX. Conclusion

No matter one's stance on the morality and criminality of the issue at large, there is no denying that assisted suicide is becoming a more

common practice in American society. Due to this increasing trend, the law can no longer stay silent on the issue nor try to fit cases of assisted suicide within old laws and precedent. And while the realm of criminal law will undoubtedly continue to make its feelings known on the subject, the law of succession can and must operate independently in order to maintain the integrity its own goals and policies. This protection can no longer come from broad statutes and general treatments. Nor can the law of succession continue to treat assisted suicide as akin to murder. This growing trend has peculiarities and motivations that warrant different treatment. As such, the slayer statute should not be rigidly and automatically applied to assisted suicide. Rather, modifications or revisions need to be made to the slayer statute in order to rightfully accommodate these cases and equitably refocus on the statute's application to effectuating the true intent of the testator.