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SUPREME COURT

No. 2023AP366

In the

Supreme Court of Wisconsin

IN RE THE ESTATE OF ALMA E. ALVIS:

LEROY F. ALVIS, JR.,
APPELLANT-PETITIONER,

v.

RIAN ALVIS,
RESPONDENT.

PETITION FOR REVIEW

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

The issue presented for review is:

Whether the exception in Wisconsin's anti-lapse statute for wills designating "contingent transferees," Wis. Stat. § 854.06(4)(a)2., requires a court to substitute for a predeceased beneficiary any contingent transferee of the gift or only one designated for the contingency of the lapse that has occurred.

This question was raised in merits briefing before the Court of Appeals below. *See, e.g.*, Pet.'s COA Br. 20-22; Pet.'s COA Reply Br. 6-10. The Court of Appeals concluded that the contingent transferees exception only applies where the instrument has designated a contingent transferee for the specific lapse that has occurred. *See* P.App. 9.

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INTRODUCTION

In 1991 Alma Alvis and LeRoy F. Alvis, Sr. executed a joint will that Alma had written out by hand. R. 38. In it the couple designated themselves as primary beneficiaries and their five children as contingent beneficiaries in case the couple died simultaneously, while also making clear that once Alma and LeRoy had both died, even if not at the same time, the children would likewise take. R. 38. Although one of those children, Danny Alvis, predeceased his parents, the will was never changed. R. 29:15. LeRoy Sr. died shortly after Danny, followed by Alma, and Alma's estate was then submitted to probate. *Id.*; R.1. The ultimate question on this appeal, which arises from those proceedings, is who takes Danny's share: Danny's only child Rian Alvis (the Respondent), or Danny's four surviving siblings (including LeRoy Alvis Jr., the Petitioner)?

Resolution of this question requires application of Wisconsin's anti-lapse statute, which sets rules for who receives a gift when the primary beneficiary has predeceased the testator. That statute directs that "contingent transferees" of a gift in a will take in preference to the children of the predeceased beneficiary. Wis. Stat. § 854.06(4)(a)2. The complication in this case is that while LeRoy Jr. and his siblings were "contingent transferees" with respect to each of their parents—who each left their estate to the other spouse unless both should die, in which case it passed to their children—they were not contingent transferees with respect to the lapse of Danny's gift during the transfer from the surviving parent to the children. *See* R. 38. In other words, the issue presented is what kind of contingent transferee counts under the anti-lapse statute.

Unfortunately, no published Wisconsin case has ever applied the contingent transferees exception.

The Court of Appeals below read into the statute an implicit requirement that the anti-lapse statute's "contingent transferees" provision is limited to those transferees designated for the contingency that actually occurred. *See* P.App. 9. But there are two problems with this ruling. First, the anti-lapse statute does not contain this limitation. This is so even though analogous legislation of which the Legislature is undoubtedly aware, the Uniform Probate Code, does contain it. *See* Uniform Probate Code § 2-603(b)(4) (2019). Second, the Legislature might have had good reason for not including this qualifying language, particularly a judgment that a testator is more likely to prefer that a failed gift go to a beneficiary actually contemplated by the testator as a potential recipient, albeit for a contingency that did not occur, than to an individual that the will may never have mentioned at all. This approach, which finds some support in the doctrine of gift by implication, *see, e.g.*, *Matter of McWilliams' Est.*, 78 Wis. 2d 328, 334-35, 254 N.W.2d 277 (1977), produces a logical outcome in this case, where Alma and LeRoy Sr. made clear in their joint will that their only concern after each other was their children, and never once mention more remote issue (or used words that would signify concern for such issue like "per stirpes" or "by right of representation," *see, e.g.*, Wis. Stat. § 854.04(1)(a)).

The Court of Appeals' decision thus effectively amends the anti-lapse statute without the approval of the political branches or notice to Wisconsin testators and beneficiaries. This Court should grant review to definitively answer a question of first impression and ensure that the

anti-lapse statute—a critical part of Wisconsin's probate framework—is applied according to its plain language.

STATEMENT OF THE CRITERIA SUPPORTING REVIEW

This Court only accepts cases "when special and important reasons are presented." Wis. Stat. § 809.62(1r). All of the following criteria identified by this Court as relevant to its consideration of whether to accept the case are met here:

> A decision by the supreme court will help develop, clarify or harmonize the law, and
>
> 1. The case calls for the application of a new doctrine rather than merely the application of well-settled principles to the factual situation; or
>
> 2. The question presented is a novel one, the resolution of which will have statewide impact; or
>
> 3. The question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the supreme court.

Wis. Stat. § 809.62(1r)(c). Specifically, this petition presents a legal question of first impression involving the application of the "contingent transferees" exception in Wisconsin's modern anti-lapse statute. Indeed, there appear to be no opinions by this Court interpreting the modern anti-lapse statute *at all*, and most opinions interpreting the statute's predecessors are 50 years old or more. Beyond providing guidance in cases where two spouses execute a will and are predeceased by a beneficiary, then, a decision by this Court would serve as landmark precedent any time judges or attorneys are called on to assess potentially lapsed gifts, not only in a will but in any of the numerous types of documents subject to the anti-lapse statute like insurance policies,

retirement plans, and contracts—items which frequently constitute a decedent's most valuable assets.[1,2]

STATEMENT OF THE CASE

I. Nature of the Case[3]

This appeal arises from probate proceedings initiated by Petitioner LeRoy F. Alvis, Jr. to administer the estate of his mother, Alma E. Alvis. *See, e.g.*, R.1. As explained below, Alma and her husband LeRoy F. Alvis Sr. executed a joint, handwritten will that first left their possessions to each other and then, in the event of the death of both spouses, to their five children (with some exceptions). *See.* R. 38. However, Danny, one of their five children, predeceased them and the joint will was never changed. *See* R. 29:15-18; 38. The basic question underlying all legal issues on this appeal is whether Alma and LeRoy Sr. wanted, and/or

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[1] *See* Wis. Stat. §§ 854.06(2) (applying anti-lapse statute to qualifying "revocable provisions in a governing instrument"); 854.01 (defining "[g]overning instrument" to mean "a will; a deed; a trust instrument; an insurance or annuity policy; a contract; a pension, profit-sharing, retirement, or similar benefit plan; a marital property agreement under s. 766.58 (3) (f); a beneficiary designation under s. 40.02 (8) (a); an instrument under ch. 705; an instrument that creates or exercises a power of appointment; or any other dispositive, appointive, or nominative instrument that transfers property at death").

[2] Although the decision below was an unpublished per curiam decision, *see* P.App. 1-2, the bench and bar still read such decisions and use them for direction. *See, e.g.*, *State v. Higginbotham,* 162 Wis. 2d 978, 998, 471 N.W.2d 24 (1991) (unpublished Court of Appeals decision not citable as precedent or authority nevertheless could produce a "decisional conflict" between Court of Appeals districts). Indeed, a rule that unpublished per curiam decisions are never worthy of review would deprive a huge number of Wisconsinites of any ability to seek high court review. *See* Court of Appeals Annual Report 4 (2022) (only 9% of 2022 opinions published; about 45% of 2022 opinions were issued per curiam). Fortunately, this Court routinely reviews such opinions. *See, e.g.*, *Lowe's Home Centers, LLC v. City of Delavan*, 2023 WI 8, ¶1, 405 Wis. 2d 616, 985 N.W.2d 69.

[3] This case involves many individuals with the last name "Alvis," including both parties to this appeal. First names are therefore generally used throughout for clarity and simplicity.

Wisconsin's probate law requires, Danny's share to go to his four other siblings or to Danny's daughter Rian (the Respondent).

II. Factual Background

The facts of this case are limited and undisputed. On October 15, 1991, LeRoy F. Alvis Sr. and Alma E. Alvis executed a handwritten joint will. R. 38. The provisions of that will read as follows:

> Last will & testimony
> of
> LeRoy F. Alvis Sr. and Alma E. Alvis
>
> This is to cancel out our outher [sic] Will.
>
> I, LeRoy F. Alvis Sr., on this day, Oct. 15, 1991, being of sound mind, do leave everything I own to my wife Alma E. Alvis.
>
> I, Alma E. Alvis, on this day, Oct. 15, 1991, being of sound mind, do leave everything I own to my husband, Leroy F. Alvis Sr.
>
> In case we die together, we both want our sons, LeRoy (Robby) F. Alvis Jr. & Donald (Donnie) Wesley Alvis to be Executors of our Estate.
>
> Our home to be sold at Fair Market Value & divided to all 5 children. If our Executors feel it to be the right thing to do, they can rent it until sold.
>
> The cars, tractor and big tool are to be sold at fair market value & divided.
>
> All our Insurance, Bonds, IRA's [sic] and CD are to be divided.
>
> All our Household Items and outher [sic] items we own – The 5 Kids can take what each wants, if it can be settled with our Executors[']approval, outher [sic] wise sold & then divided.
>
> Page I of II
>
> Page II of II
>
> Donald Wesley Alvis is to give 1/5 of $4,000 of his share of our Estate to his brothers and sister.
>
> Danny L. Alvis has first choise [sic] of buying our 1940 Ford at Fair Market Value, giving a 1/5 of that value to each of the outher [sic] 4 children.

Signed, Oct. 15, 1991

> [signatures of Alma, LeRoy Sr., two witnesses, and a notary, and related text].

Id. The five children of LeRoy Sr. and Alma, some of whom were referenced by name in the joint will, were LeRoy F. Alvis Jr., Darrell, Desiree, Danny, and Donald (Donnie). R. 29:15. All were living at the time the joint will was executed. *Id.*

On April 11, 2007, Danny predeceased his parents. *Id.* LeRoy Sr. passed away a little over four years later, on September 3, 2011. *Id.* Alma died next, on June 3, 2013. *Id.* At no time between Danny's death and their own did LeRoy Sr. or Alma amend the joint will, such as to add Danny's daughter Rian as a named beneficiary.[4]

After Alma's death, Donnie discovered the joint will in a fireproof box in a closet in Alma and Leroy Sr.'s house. R. 30:6.

III. Procedural Background

LeRoy Jr. applied for informal administration of Alma's estate on March 16, 2022, nominating himself to serve as personal representative and noting that he and his brother Donnie were named as personal representatives in the joint will. R. 1:1. LeRoy Jr.'s surviving siblings Desiree, Darrell, and Donnie all waived any further notice of the hearing on LeRoy Jr.'s application and consented to admission of the joint will. R. 3-6. Donnie further declined to serve as personal representative, allowing his brother LeRoy Jr. to do so on his own. R. 10:1.

LeRoy Jr.'s application for informal administration had named himself and his three siblings as heirs of Alma's estate, but added that

[4] The record confirms that Rian was living at the time that Danny, Alma, and LeRoy Sr. each passed away. *See* R. 29:18.

Rian should be provided notice as an additional "person[] interested," *see* Wis. Stat. § 851.21(1). *See* R. 1:3. On April 13, 2022, Rian appeared by counsel and demanded formal proceedings, among other things challenging the validity of the joint will. R. 15. Following a Proof of Will hearing on September 2, 2022 at which Donnie testified, the Marathon County Circuit Court, the Honorable LaMont K. Jacobson presiding, ordered the joint will admitted to probate. R. 27.

The parties then briefed questions relating to interpretation of the joint will, particularly whether Alma and LeRoy Sr. wanted Danny's share to go to his siblings or to Rian. R. 29, 33-34. On January 31, 2023, the Circuit Court concluded that the joint will's silence regarding "what to do when one of [the children] has already died" was a "gap" "fill[ed]" by Wisconsin's anti-lapse statute, Wis. Stat. § 854.06. R. 35:5. That statute, the Court determined, required that Danny's share go to Rian. *Id.*

LeRoy Jr. appealed. R. 39. Relevant here, he argued that the anti-lapse statute's exception requiring that "contingent transferees" take in preference to surviving issue of the decedent required that the estate go to the surviving children. *See,* Pet.'s COA Br. 20-22; Pet.'s COA Reply Br. 6-10. On January 9, 2024, the Court of Appeals affirmed in an unpublished per curiam decision, rejecting this argument. P.App. 9. Instead applying *Firehammer v. Marchant*, 224 Wis. 2d 673, 676, 591 N.W.2d 898 (Ct. App. 1999), which it characterized as "directly on point," the Court agreed with the Circuit Court that the anti-lapse statute required that Danny's share of the estate go to Rian. *Id.* at 6-7, 9. It ruled that the anti-lapse statute's "contingent transferees" exception applied not to contingent beneficiaries generally, but instead only to those

designated for the exact contingency that occurred: here, the death of one of Alma and LeRoy Sr.'s children before the death of the surviving spouse. *Id.* at 9.

This petition for review follows.

STANDARD OF REVIEW

This case involves the interpretation of statutes and wills. Both present questions of law reviewed by this Court de novo. *See, e.g.*, *Greenwald Fam. Ltd. P'ship v. Vill. of Mukwonago*, 2023 WI 53, ¶14, 408 Wis. 2d 143, 991 N.W.2d 356 (statutes); *In re McGuire Marital Tr.*, 2003 WI App 44, ¶10, 260 Wis. 2d 815, 660 N.W.2d 308 (testamentary documents).

ARGUMENT

I. This Court should grant review to clarify when the anti-lapse statute's "contingent transferees" exception applies.

Both courts below applied Wisconsin's anti-lapse statute to resolve this case. That statute serves the useful purpose of providing default rules for cases where a testamentary gift fails due to the early death of a beneficiary. *See* Wis. Stat. § 854.06(3). In particular, the general rule in the case of lapse is that "the issue of the [predeceased] transferee take the transfer per stirpes." *Id.*

But the Legislature qualified this general rule with an exception: it does not apply where "[t]he governing instrument designates one or more persons, classes, or groups of people as contingent transferees," as this manifests a "contrary intent." Wis. Stat. § 854.06(4)(a)2. (capitalization removed). In such cases, "those transferees take in preference" to the issue of the predeceased transferee. *Id.*

Here Alma and LeRoy Sr. had designated each other as primary beneficiaries and their children as contingent transferees for the named

gifts for a particular contingency: "[i]n case we die together." R. 38:1. Under the anti-lapse statute, these children likewise serve as contingent transferees in the case of lapse, and each thus takes in preference to any issue of predeceased beneficiaries.

A. Wisconsin's anti-lapse statute and its exception for "contingent transferees."

"The paramount object of will construction is the ascertainment of the testatrix's intent." *In re Ganser's Est.*, 79 Wis. 2d 180, 186, 255 N.W.2d 483 (1977). Sometimes, however, a decedent's intent is not expressed at all. In such circumstances, Wisconsin law provides numerous default rules aimed at accomplishing what the decedent probably wanted. *See, e.g.*, Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 St. Louis U. L.J. 643, 644 (2014) ("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*." (emphasis added)). For example, Wis. Stat. ch. 852 sets forth rules of intestate succession for use in cases where there is no will. Even if the Legislature fails in a particular case in "giving effect to the decedent's probable intent," these statutes at least put Wisconsinites on notice about how their property will be treated following their death unless they affirmatively establish a contrary intent.

Another important set of legislative default rules, and the ones at issue in this case, are contained in Wisconsin's anti-lapse statute, Wis. Stat. § 854.06. "Lapse" is "[t]he failure of a testamentary gift, esp. when the beneficiary dies before the testator." LAPSE, Black's Law Dictionary (11th ed. 2019). It is a foreseeable problem in the law of probate because of "the gap in time," "which may span years or even decades," between a

will's "execution and the testator's death." Jesse Dukeminier & Robert H. Sitkoff, *Wills, Trusts, and Estates* 351 (9th ed. 2013). The anti-lapse statute thus addresses lapse due to a predeceased transferee by directing the gift to some other transferee specified in the law. *See* Wis. Stat. § 854.06(3). The statute calls this a "substitute gift," *id.* (capitalization removed), and the usual substitute transferees are the issue of the transferee, *id.*, that is, his or her children, grandchildren, great-grandchildren, and so on. Wis. Stat. § 851.13 (defining "issue").

The anti-lapse statute is very precisely drafted, containing numerous limitations and exceptions. Relevant here, the statute provides the following:

> (4) CONTRARY INTENT.
>
> (a) Subsection (3) [providing the default rule discussed above] does not apply if any of the following applies:
>
> 1. The governing instrument provides that a transfer to a predeceased beneficiary lapses.
>
> 2. The governing instrument designates one or more persons, classes, or groups of people as contingent transferees, in which case those transferees take in preference to those under sub. (3). But if none of the contingent transferees survives, sub. (3) applies to the first group in the sequence of contingent transferees that has one or more transferees specified in sub. (2) who left surviving issue.
>
> (bm) If the person who executed the governing instrument had an intent contrary to any provision in this section, then that provision is not applicable to the transfer. Extrinsic evidence may be used to construe the intent.

The exceptions thus emphasize that ascertainment of the testator's intent remains "paramount," *In re Ganser's Est.*, 79 Wis. 2d at 186, and directs that the existence of a contingent transferee is conclusive evidence that the testator wanted that transferee to take in preference to the issue of the predeceased beneficiary. But what is a

"contingent transferee"? That is a question of statutory interpretation, and one not answered in any Wisconsin case, published or unpublished.

This Court has repeatedly stated that statutory interpretation "begins with the language of the statute," and "[i]f the meaning of [a] statute is plain, [it] ordinarily stop[s] the inquiry." *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (2004) (quoting *Seider v. O'Connell*, 2000 WI 76, ¶43, 236 Wis. 2d 211, 612 N.W.2d 659). A statute's words are given their "common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id.*

"Contingent transferee" is not defined in the anti-lapse statute and does not appear to have been used anywhere else in the Wisconsin Statutes. Although the phrase "contingent transferee" additionally does not appear in Black's Law Dictionary, the phrase "contingent beneficiary" does; Black's lists the term as one specially used in the "[w]ills & estates" context to mean "[a] person designated by the testator to receive a gift if the primary beneficiary is unable or unwilling to take the gift." *See* BENEFICIARY, Black's, *supra* (italicization removed). Further, "beneficiary" is a synonym for "transferee." *Compare id.* (defining "beneficiary" in the wills and estates context to mean "[s]omeone designated to receive money or property from a person who has died"), *with* TRANSFEREE, Black's, *supra* (defining "transferee" to mean "[o]ne to whom a property interest is conveyed"). The Legislature may have used the latter word rather than the former because the anti-lapse statute applies beyond the context of wills, to deeds, trusts,

insurance policies, contracts, and more. *See* Wis. Stat. §§ 854.01(2); 854.06(2).

With this definition in hand, there is no question that LeRoy Sr. and Alma's children were "designated by the testator to receive a gift if the primary beneficiary is unable or unwilling to take the gift." Alma and LeRoy Sr. first left everything they owned to each other, but then listed alternate devises to the children "[i]n case we die together," a specific contingency. R. 38:1. At the time the will was executed, then—before Alma, LeRoy Sr., or Danny had died—the children were "contingent transferees." If Alma and LeRoy had died together, the children would immediately take. If only one spouse died, they would not immediately take.[5]

But Rian has argued, and the courts below agreed, that the anti-lapse statute uses "contingent transferees" in a narrower sense: that it applies only to those transferees designated for one specific contingency, namely the lapse that has occurred. As will now be explained, this was error.

B. The "contingent transferees" exception applies by its terms to any contingent beneficiaries of a gift, not just those who

[5] A wrinkle in this case arises from the fact that Alma and LeRoy Sr.'s joint will was not probated when LeRoy Sr. died and from the double meaning assigned to the phrase "in case we die together." R. 38:1. Given that LeRoy Sr. left his estate to his wife upon his death, had the will been probated at that time, a court might have ruled that Alma took the entire estate and thereby put her on notice that she needed to update her will. Instead, the will was discovered and probated only after both had died. Although the joint will speaks only of what happens if Alma and LeRoy "die together," the courts below did not conclude that Alma had died intestate on the basis of a possible gap in a joint will that was handwritten without apparent legal counsel. Instead, they implicitly interpreted the phrase "die together" to include the circumstance at bar, where both had passed away even though not at the exact same time. *See* P.App. 2, 13. Neither side has disputed that interpretive decision on appeal.

are made contingent for the specific purpose of preventing lapse.

The Court of Appeals explained its interpretation of the "contingent transferees" exception in the anti-lapse statute as follows:

> [LeRoy Jr.] also asserts that the five children are contingent transferees for purposes of WIS. STAT. § 854.06(4)(a)2. because the joint will "bequeathed everything to the surviving spouse as primary beneficiary," and "then in the event the primary beneficiary predeceases, the contingent beneficiary is the '5 children.'" We agree with the circuit court, however, that this "is simply the nature of a joint will." What matters, for purposes of § 854.06(4)(a)2., is not that the joint will granted the five children shares of the estate following the surviving spouse's death; the salient fact is that the joint will did not designate any persons, classes, or groups of people as contingent transferees *in the event that one or more of the five children predeceased the surviving spouse*. As Rian correctly notes, nothing in the joint will "addresses a contingency related to any of the five children such as the death of one or more [of the children] prior to the death of the second spouse to die."

P. App. 9.

There is a significant problem with this reasoning relating to the emphasized words in the excerpt. That emphasis is the Court of Appeals', not LeRoy Jr.'s, and it is helpful here because it identifies the words that the Legislature *could have* included in the anti-lapse statute, but did not. *See Indus. to Indus., Inc. v. Hillsman Modular Molding, Inc.,* 2002 WI 51, ¶19 n.5, 252 Wis. 2d 544, 644 N.W.2d 236 ("We presume that the legislature 'carefully and precisely' chooses statutory language to express a desired meaning." (quoting *Ball v. Dist. No. 4, Area Bd. of Vocational, Tech. & Adult Educ.*, 117 Wis. 2d 529, 539, 345 N.W.2d 389 (1984))). That is, the Legislature *could have* established a rule whereby issue of the predeceased beneficiary take unless a testator foresaw the specific lapse that would occur and expressly designated an individual as a contingent beneficiary to receive the transfer in that event. In fact,

that is the approach used in the Uniform Probate Code, which includes the following in its proposed anti-lapse statute:

> If the will creates an alternative devise *with respect to a devise for which a substitute gift is created by [the anti-lapse provisions]*, the substitute gift is superseded by the alternative devise if (A) the alternative devise is in the form of a class gift *and one or more members of the class is entitled to take under the will*; or (B) the alternative devise is not in the form of a class gift *and the expressly designated devisee of the alternative devise is entitled to take under the will*.

Uniform Probate Code § 2-603(b)(4) (2019) (emphases added); *see also, e.g.*, Mich. Comp. Laws § 700.2603 (largely adopting the UPC approach).[6] Although the UPC uses slightly different language (*i.e.* "alternative" rather than "contingent" and "devise" rather than "transfer[]"), it is analogous to Wisconsin's exception and accomplishes the same goal, with one critical distinction: it expressly limits qualifying alternate devises to those drafted "with respect to a devise for which a substitute gift is created by" the anti-lapse statute and for transferees who are "entitled to take under the will."

But Wisconsin's exception does not contain this or similarly restrictive language. It speaks only of whether a contingent transferee exists, period. And it is elementary that "[c]ourts must avoid interpretations that require inserting words into statutes." *Myers v. Wisconsin Dep't of Nat. Res.*, 2019 WI 5, ¶25, 385 Wis. 2d 176, 922

[6] "Alternative devise" in the UPC "means a devise that is expressly created by the will and, under the terms of the will, can take effect instead of another devise on the happening of one or more events, including survival of the testator or failure to survive the testator, whether an event is expressed in condition-precedent, condition-subsequent, or any other form. A residuary clause constitutes an alternative devise with respect to a nonresiduary devise only if the will specifically provides that, upon lapse or failure, the nonresiduary devise, or nonresiduary devises in general, pass under the residuary clause." Uniform Probate Code § 2-603(a)(1) (2019).

N.W.2d 47; *In re Matthew D.*, 2016 WI 35, ¶17, 368 Wis. 2d 170, 880 N.W.2d 107 ("We are not at liberty to disregard the plain words of the statute and we will not attempt to improve the statute by adding words not chosen by the legislature."); *Stockbridge Sch. Dist. v. Dep't of Pub. Instruction Sch. Dist. Boundary Appeal Bd.*, 202 Wis. 2d 214, 229, 550 N.W.2d 96 (1996) ("If, as [the Petitioner] submits, the legislature meant something other than what the legislative history indicates, the remedy is not in the courts. Modifications of the statute, if it works badly or in undesirable ways feared by [the Petitioner], must be obtained through legislative, not judicial, action."). The Court of Appeals' decision does not follow this rule.

But even were this Court otherwise inclined to correct legislative drafting mistakes, there is no reason to think that the Legislature's exclusion of limiting language was accidental. An example illustrates this:

> Testator ("T") executes a will that states "I leave my house to my daughter A, but if A is unwilling to accept, I leave my house to my son B." A predeceases T, leaving a son X. T dies without changing her will.

In this circumstance, the gift is poised to lapse and the Legislature is tasked with setting a default anti-lapse rule that best matches T's "probable intent." *See Implementing Freedom of Disposition*, *supra*, at 644. The Legislature could set a rule whereby, because T did not plan for the death of A, the gift goes to A's issue—the rule contended for by Rian. But it is not at all absurd for the Legislature to conclude that, as T had specifically contemplated B as an alternate transferee for a particular planned contingency involving the gift that did not happen, T would prefer that the house go to B for the unplanned contingency that did

happen rather than a third party, X, who was never referred to in the will at all.

In fact, this is analogous to the doctrine of gift by implication:

> If, however, the property or estate claimed to be bequeathed or devised by implication, in a contingency which has occurred, has been made the subject of an express bequest or devise in another contingency, which did not occur, then effect may be given to such bequest or devise by implication, in the contingency which did occur, if a reading of the entire will makes manifest that such was the intention of the testator.

Matter of McWilliams' Est., 78 Wis. 2d at 334-35 (quoting *Spathariotis v. Spathas' Est.*, 156 Colo. 131, 142, 398 P.2d 39 (1964)). Thus in *Spathariotis*, the case quoted by this Court above, a testator directed that certain business property go to a trustee to pay income (1) to his spouse during her life but, if she should predecease him, (2) to his nephew. *Spathariotis*, 156 Colo. at 142-43. The spouse outlived the testator and the question was who was entitled to the remainder (after the spouse's life), the will not discussing that eventuality. *See id.* The Court "us[ed] an express devise which was to take effect only in the event of a particular contingency, which contingency did not occur," *i.e.*, the devise to the testator's son in the event of the spouse's death, "as the basis for implying a like devise in a contingency which did occur but was not fully covered or provided for by the will," *i.e.* the devise of the remainder in the event the testator's spouse survived him. *Id.* at 143-44 (emphasis added and removed).

To be sure, this is an imperfect analogy because a Court will only apply the doctrine of gift by implication where "[t]he will itself . . . provide[s] the clues" that that is what the testator wanted, and the anti-lapse statute of necessity is drafted without reference to any particular will. *Matter of McWilliams' Est.*, 78 Wis. 2d at 335. But the Legislature is confronted with the same problem with respect to any default rule it

might set, including one by which the issue of a predeceased beneficiary are given preference; *any* blanket rule the Legislature chooses may disappoint a testator in an individual case. The point is that it is rational to set a default rule where contingent transferees take in preference to issue of predeceased beneficiaries. Such a rule still allows courts to search testamentary documents for indications of contrary intent or to receive extrinsic evidence for that purpose. *See* Wis. Stat. § 854.06(4). But here the rule produces a result in keeping with Alma and LeRoy's intent expressed in their joint will, which repeatedly references their children without making any reference to more remote issue.

Despite the unqualified language in the anti-lapse statute (and logical bases for it), the Court of Appeals found that its earlier decision in *Firehammer v. Marchant*, 224 Wis. 2d 673, 591 N.W.2d 898 (Ct. App. 1999) was "directly on point." P.App. 6. But *Firehammer* is a straightforward case. There a testator left shares of his estate to each of two daughters, a sister, a niece, and a trust for his grandchildren. *Firehammer*, 224 Wis. 2d at 675. One daughter predeceased him. *Id.*[7] The Court of Appeals concluded that under the anti-lapse statute, the predeceased daughter's son took the gift. *Id.*

The differences between this case and *Firehammer* could not be more apparent. *Firehammer* did not concern a joint will or two testators. It did not feature contingent beneficiaries at all, much less a spouse as the primary beneficiary and children as contingent beneficiaries. And it did not involve application of the "contingent transferees" exception to the anti-lapse statute. *Firehammer* essentially illustrates how the anti-

[7] Actually she died one week after her father, but the will essentially directed that any beneficiary dying within 5 months of the testator be treated as predeceased. *Firehammer*, 224 Wis. 2d at 675.

lapse statute operates generally, something that no one disputes. The important legal question not presented in *Firehammer* but that is presented here—and the one for which this Court should grant review—is whether the anti-lapse statute's contingent transferees exception applies because Alma and LeRoy Sr. designated their children as contingent transferees for the gifts to each other when they first executed their will. For all the reasons discussed—the plain language of the statute, the qualifiers that the Legislature easily could have added but did not, and the rational bases for the Legislature's decision—the answer to that question is yes.[8]

CONCLUSION

The opinion of the Court of Appeals below significantly broadens the scope of the anti-lapse statute on the basis of words that the Legislature could have added to the statute but did not. The opinion does not cite any controlling case law for this decision but instead relies on *Firehammer*, a case that did not even feature the anti-lapse exception at issue.

It is difficult to square the result that that change produces in this case with the obvious intent of LeRoy Sr. and Alma, who repeatedly expressed a desire that their children take all their possessions and

[8] Rian has waived any argument that, assuming the "contingent transferees" exception fully applies, Danny's lapsed share goes to his four surviving siblings (*i.e.* does not lapse a second time). *See, e.g.* Wis. Stat. § 854.06(4)(a)2. (discussing application of anti-lapse statute's substitute gift provision to contingent transferees only if "*none* of the contingent transferees survives" (emphasis added)). For this reason, a separate issue discussed in the courts below—whether Alma and LeRoy's children constitute a class under the joint will—is no longer material. Were Rian to now argue otherwise for the first time, LeRoy reserves the right to revisit this separate issue and to discuss the meaning of the statutory phrase "one or more persons, classes, or groups of people." *Id.*

nowhere mentioned Rian as a beneficiary despite having an opportunity to do so following Danny's death.

But the impact of this case will extend far beyond the Alvis family. The Court of Appeals' interpretation of the anti-lapse statute affects not just wills, but trusts, life insurance policies, retirement plans (401(k)s, IRAs, and the like), and more. *See* Wis. Stat. § 854.01(2). These documents and their beneficiary designations—which, as in this case, may be completed by hand and without the assistance of legal counsel—frequently involve a decedent's most valuable assets.

The broad potential scope of the Court of Appeals' decision and the dearth of case law involving the anti-lapse statute and its contingent transferees exception make this exactly the type of case this Court exists to review. A decision by this Court will provide clear guidance so that Wisconsinites can ensure their assets are well protected and their families well cared for after they are gone.

Dated: February 6, 2024

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CERTIFICATION OF PETITION FORM AND LENGTH

I hereby certify that this petition conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b), (bm), and (8g) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 6,180 words.

Dated: February 6, 2024

Electronically signed by Anthony LoCoco
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