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Murder in Mecklenburg -- To the Issue Go the Spoils

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One early summer morning in 1980, Isam Misenheimer was in his kitchen, cooking up country ham.[1] His son John appeared, and the men spoke. They may have fought; at some point John pulled from under his jacket a .22 caliber rifle shortened by the removal of its stock. A bullet raced through the older man's brain and soon he lay dead or dying, a small pool of blood staining the floor around his head.[2] John now is serving time at Central Prison in Raleigh.[3]

Isam Misenheimer left a will dividing his estate equally among John and John's seven brothers and sisters.[4] The following year, John's siblings sued for a declaratory judgment[5] barring John from taking anything under Isam's will. The trial court agreed with plaintiffs that John was barred by North Carolina's slayer statute from taking his one-eighth share of his father's estate. The court, however, rejected plaintiffs' argument that the slayer statute also barred John's two sons, ruling instead that they could take their father's share by substitution.[6] The North Carolina Court of Appeals upheld the trial court's decision in *Misenheimer v. Misenheimer*,[7] thus determining that the slayer statute will not deny a slayer's issue benefits from a death the slayer has caused.

The need for determining the rights of the slayer's issue arose because two succession statutes governed the case. The slayer statute, North Carolina General Statutes sections 31A-3 to 31A-15, provides for forfeiture of the slayer's share through the fiction that the slayer had predeceased his testator-victim.[8] Section 31-42, the anti-lapse statute, provides for the passing of any estate or

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1. Record at 32 (testimony of Sharon Misenheimer), State v. Misenheimer, 304 N.C. 108, 282 S.E.2d 791 (1981) Isam was shot on the morning of June 10, 1980. Ivan Misenheimer lived and died in Charlotte.

2. *Id.* at 57 (testimony of Dr. Hobart Wood, medical examiner); *Id.* at 84 (voluntary statement of John Misenheimer, June 10, 1980). The North Carolina Supreme Court found no error in the trial court's finding of first-degree murder. State v. Misenheimer, 304 N.C. 108, 111, 282 S.E.2d 791, 794 (1981).

3. Record at 3, Misenheimer v. Misenheimer, 62 N.C. App. 706, 303 S.E.2d 415 (1983). Unless otherwise noted, subsequent references in the text and notes to *Misenheimer* refer to the 1983 wills case of Misenheimer v. Misenheimer. Misenheimer v. Misenheimer, 62 N.C. App. 706, 303 S.E.2d 415 (1983).

4. Misenheimer v. Misenheimer, 62 N.C. App. 706, 707, 303 S.E.2d 415, 415 (1983). Isam's will left no specific gifts. After payment of debts, funeral expenses, administration costs, and death taxes, the will provided for distribution of all the residue to the eight named children.

5. N.C. GEN. STAT. §§ 1-253 to -267 (1983). The actual alignment of the parties was Donald Misenheimer (John's brother and administrator of Isam's estate) against all the named beneficiaries, including John, and also against John's two sons. References in the text to "the Misenheimer plaintiffs" refer to the seven siblings who sought to bar John and his two sons from taking under Isam's will.

6. Misenheimer v. Misenheimer, 62 N.C. App. 706, 707, 303 S.E.2d 415, 415-16 (1983).

7. 62 N.C. App. 706, 303 S.E.2d 415 (1983).

8. The slayer statute is article III of Acts Barring Property Rights, 1961 N.C. Sess. Laws 350, N.C. GEN. STAT. §§ 31A-3 to -15 (1976 & Cum. Supp. 1983). The relevant section of article III is § 31A-4 (1976):

> The slayer shall be deemed to have died immediately prior to the death of the decedent and the following rules shall apply:

part of an estate that would otherwise fail because a beneficiary died before his testator.[9] The anti-lapse statute determines that when a beneficiary predeceases the testator, the beneficiary's issue take the beneficiary's share by substitution.[10] In reconciling the slayer statute with the anti-lapse statute, the question was this: If the slayer is *deemed* to have predeceased the testator for the purpose of depriving the slayer of any share in the testator's estate, should the slayer also be deemed to have predeceased the testator for the purpose of the anti-lapse statute?

A devise lapses when a named beneficiary cannot or will not take the gift at the testator's death.[11] At common law, a lapsed legacy could pass under the residuary clause of the will, but a lapsed devise had to be treated as intestate property.[12] North Carolina's statutory provision against lapses grew out of 1844 legislation providing that lapsed devises could pass under a will's residuary clause.[13] The North Carolina anti-lapse statute now provides that, if possible and if the will shows no contrary intent,[14] a beneficiary's issue should take the beneficiary's share by substitution when the beneficiary dies before the testator.[15] The statute further provides for gifts that cannot be saved from lapsing. The anti-lapse statute provides that any specific gift that has lapsed

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(1) The slayer shall not acquire any property or receive any benefit from the estate of the decedent by testate or intestate succession or by common law or statutory right as surviving spouse of the decedent.

(2) Where the decedent dies intestate as to property which would have passed to the slayer by intestate succession, such property shall pass to others next in succession in accordance with the applicable provision of the Intestate Succession Act.

(3) Where the decedent dies testate as to property which would have passed to the slayer pursuant to the will, such property shall pass as if the decedent had died intestate with respect thereto, unless otherwise disposed of by the will.

9. N.C. GEN. STAT. § 31-42(a) (1976) provides for a devise or legacy to a beneficiary who would have taken had he survived the testator, but who died before the testator did. Such a devise or legacy passes by substitution to the beneficiary's issue, provided that (1) the beneficiary had issue living at his own death, and (2) the beneficiary's issue would have been heir of the testator, under the Intestate Succession Act, in the absence of a will. Section 31-42(b) provides that a devise or legacy to a class member who predeceases the testator also passes to the beneficiary's issue. Under subsection (b), if the beneficiary is not survived by issue, the gift devolves upon the remaining class members who survive the testator. Subsection (b) was not relevant to *Misenheimer*, since there the testator named each of the beneficiaries. Presumably, if Isam Misenheimer had left his residuary estate to the class "my children," the court would just as easily have found John's sons entitled to take John's share by substitution. Section 31-42(c) provides for cases in which subsections (a) and (b) do not apply, and a devise or legacy lapses: if there is a residuary clause, the gift passes under it; lacking a residuary clause in the will, the gift passes as if the testator had died intestate with respect to the gift. Further, under subsection (c), if a residuary gift lapses with respect to one beneficiary, the gift continues in the residue for distribution to the other residuary beneficiaries. If there are no other residuary beneficiaries, the gift passes as intestate property. Operation of subsection (a), (b), or (c) is contingent on no contrary instruction appearing in the will.

10. N.C. GEN. STAT. § 31-42(a) (1976). *See supra* note 9.

11. T. ATKINSON, WILLS § 140, at 777 (2d ed. 1953).

12. N. WIGGINS, NORTH CAROLINA WILLS AND ADMINISTRATION OF ESTATES IN NORTH CAROLINA § 149, at 149 (1983).

13. *Id.* *See* 1844 N.C. Sess. Laws, ch. 88, § 4, *reprinted in* B. MOORE & A. BIGGS, REVISED CODE OF NORTH CAROLINA 608 (1855).

14. A contrary intent could be shown, for example, by a gift to a beneficiary, "if he survives me," or by a gift over to another if the beneficiary does not survive the testator. T. ATKINSON, *supra* note 11, § 140, at 780.

15. N.C. GEN. STAT. § 31-42 (1976). *See supra* note 9.

goes into the residuary portion of the estate, while any residuary gift that has lapsed passes to the other residuary beneficiaries. If no other residuary beneficiaries exist, the gift passes as if the testator had died intestate.[16]

In *Bear v. Bear*[17] the court of appeals indicated that the plain meaning of the anti-lapse statute controlled any construction: subsection (a) of the statute, which passed the testate gift intended for a predeceased beneficiary to the beneficiary's issue, applied to any devise, residuary or specific. More relevant to the facts of *Misenheimer*, the *Bear* court held that a gift is not lapsed when the gift can pass to issue of the predeceased beneficiary. This proposition is central to the purpose of the anti-lapse statute—to prevent lapses, not just to provide for their eventuality.[18]

The slayer statute is based on the principle that no one should profit from his wrongdoing.[19] North Carolina's slayer statute was enacted in 1961, replacing inadequate existing statutes and unsatisfactory case law.[20] The statutes had been limited to cases in which one spouse had killed the other and stood to gain from the victim's death.[21] In other cases, courts had applied the equitable principle of the constructive trust.[22] In the absence of an applicable statute, courts would refuse to invoke a forfeiture against a murderer, and instead hold that the murderer held his vested interest in the victim's estate in trust for

16. N.C. GEN. STAT. § 31-42(c)(1)(b) (1976).

17. 3 N.C. App. 498, 165 S.E.2d 518 (1969). In *Bear* testator executed a will in 1917 and died in 1968. The will gave the residue of the estate to two brothers, Emanuel and Sigmond. Emanuel died before the testator, leaving two children who took Emanuel's one-half share by substitution. Sigmond also died before the testator, but left no issue, so his half of the residue lapsed. Because there were no other named residuary beneficiaries, Sigmond's half had to be distributed as intestate property.

> 18. It appears to us that section (a) of the statute is designed and intended to prevent the lapse of a devise or bequest, whether it be specific or residuary, in a situation where the devisee or legatee who would have taken had he survived the testator predeceases testator survived by issue who survive the testator and who would have been heirs of testator had there been no will.

Id. at 504, 165 S.E.2d at 522.

19. "Nullus commodum capere potest de injuria sua propria." *See* McGovern, *Homicide and Succession to Property*, 68 MICH. L. REV. 65, 71 (1969). *See also* Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967). Dworkin states that courts have applied this principle in the absence of any preexisting rule, and that the principle illustrates a failure of positivist jurisprudence. The principle that no one should profit from his wrongdoing was first used to defeat a devise in the famous case of Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889). Defendant in *Riggs* murdered his grandfather, and the court held that the slayer-grandson could not take anything under the will, despite the will's provisions for a gift to the grandson, and despite the lack of any barring provisions in New York's statutes or case law.

Riggs also served as the point of departure for an imaginative consideration of the predictability of unwritten law in D'Amato, *Elmer's Rule: A Jurisprudential Dialogue*, 60 IOWA L. REV. 1129 (1975).

20. *See* N. WIGGINS, *supra* note 12. *See generally* Bolich, *Acts Barring Property Rights*, 40 N.C.L. REV. 175 (1962).

21. One year before the New York decision of Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889), the North Carolina Supreme Court had allowed a wife who had been accessory to her husband's murder to take her intestate share of the husband's estate. Owens v. Owens, 100 N.C. 240, 6 S.E. 794 (1888). The legislature responded to *Owens* with statutes aimed at preventing a recurrence of that result. *See* 1889 N.C. Sess. Laws, ch. 499 (repealed partially in 1959; balance repealed in 1973).

22. *See, e.g.*, Garner v. Phillips, 229 N.C. 160, 47 S.E.2d 845 (1948) (constructive trust applied after son murdered parents).

the remaining beneficiaries.[23] To cover more situations in which a slayer might benefit from his wrongdoing, the North Carolina legislature in 1961 turned to the model slayer statute that Professor Wade had proposed in 1936.[24]

North Carolina adopted most of Wade's model statute, but as the discussion in *Misenheimer* indicates, the divergences from the Wade model were significant. Wade provided that neither the slayer nor anyone claiming through him could take as a result of the slayer's wrongdoing.[25] The North Carolina statute provides merely that the slayer cannot benefit, without mentioning those who might claim through him. Citing its opinion in an earlier slayer case,[26] the court wrote, "the public policy sought to be fostered by the enactment of G.S. 31A is predicated upon the theory that the murderer *himself* will not profit by his own wrongdoing, however, this principle does not extend to those related to the slayer."[27] Most important, Wade's statute specifically provided that the anti-lapse statute would not apply to the slayer's share of the victim's will. The omission of this provision in the North Carolina statute strongly suggests that the anti-lapse statute should be read in conjunction with the slayer statute.[28]

In *Misenheimer* the courts found John to be a slayer within the definition of "slayer" in the statute,[29] but the courts still had to determine who would

23. *See* A. SCOTT, TRUSTS §§ 492-494.4 (1967).

24. Wade, *Acquisition of Property by Wilfully Killing Another—A Statutory Solution*, 49 HARV. L. REV. 715 (1936).

25. *Id.* at 724.

26. Gardner v. Nationwide Life Ins. Co., 22 N.C. App. 404, 206 S.E.2d 818, *cert. denied*, 285 N.C. 658, 207 S.E.2d 753 (1974). *Gardner* involved a different problem from *Misenheimer*. Under § 31A-11 of the slayer statute, the principle that the murderer shall not benefit from his wrongdoing applies to insurance proceeds. In *Gardner* the insured slayer killed the beneficiary under the policy, then killed himself. The court held that the slayer's mother, who was named an alternate beneficiary in the policy, could take the proceeds.

27. *Misenheimer*, 62 N.C. App. at 709-10, 303 S.E.2d at 417 (citing Gardner v. Nationwide Life Ins. Co., 22 N.C. App. 404, 409, 206 S.E.2d 818, 821, *cert. denied*, 285 N.C. 658, 207 S.E.2d 753 (1974)).

28. *See* Wade, *supra* note 24, at 727. Under Wade's model, "the heirs or next of kin of the slayer may claim the property if they are entitled to it in their own right, but they cannot claim through an ancestor who has disqualified himself by his wrong." *Id.*

29. A "slayer" is defined under N.C. GEN. STAT. § 31A-3 (1976) as any person who, as a principal or accessory in the "willful and unlawful killing of another person," (a) is found guilty, (b) pleads guilty, or (c) pleads nolo contendere in a criminal action. In addition, subsection (d) provides that a slayer who commits suicide or otherwise dies before being tried for the slaying, and before settlement of the estate, can be found a slayer in a civil action. Such an action must be brought within one year after the testator's death. Subsection (d) thus provides that in murder-suicide cases in which the slayer cannot be tried for murder, the slayer's share of the victim's estate will not go into the slayer's estate. One need not be a slayer under the definition of § 31A-3(3) to be barred from taking under the decedent's estate. In Quick v. United Benefit Life Ins. Co., 287 N.C. 47, 213 S.E.2d 563 (1975), the beneficiary shot her husband. She was tried for murder, but found guilty of involuntary manslaughter. Quick had stipulated in the subsequent suit for the husband's insurance proceeds that she had killed her husband, and that the only issue was whether the slayer statute barred her from taking the proceeds. Apparently, she was under the "misapprehension that the decisive question was whether she was a *slayer* as defined by G.S. § 31A-3(3)." *Id.* at 56, 213 S.E.2d at 569. Since Quick's act was found to have been unwilful, she could not have met the test of a slayer. But the court went on to apply the common law as preserved in the statute—the broad construction provision of N.C. GEN. STAT. § 31A-15 (1976)—"both substantively and procedurally, as to all acts not specifically provided for in Chapter 31A."

receive John's share under Isam's will. To prevent John and his two sons from taking under the will, John's siblings raised two arguments against the trial court's finding for John's sons. First, they argued that the slayer statute exclusively controlled distribution of the estate, and that the anti-lapse statute did not apply when the slayer merely was deemed to have predeceased the testator. Second, they argued that if the anti-lapse statute did apply, the gift to John had lapsed and should have passed into the residue for distribution to the other residuary beneficiaries, under the terms of section 31-42(c)(2).[30]

In rejecting the second argument, the court noted *Bear*,[31] which had suggested that the anti-lapse statute should prevent lapse whenever possible, and thus, that the statute favors passage of the beneficiary's share to his issue over a lapse. Thus, once the *Misenheimer* court decided that the anti-lapse statute did apply, plaintiffs had to overcome the presumption that a lapse should be avoided. They failed to overcome this presumption.

The court of appeals briefly considered plaintiffs' argument for the exclusive operation of the slayer statute.[32] Plaintiffs had stressed that section 31A-15 provides that Chapter 31A applies exclusively to all acts it specifically covers. The court interpreted this argument as a cue to refer to the provision of the slayer statute governing in the case of a slain testator, North Carolina General Statutes section 31A-4. Section 31A-4(3) provides that "where the decedent dies testate as to property which would have passed to the slayer pursuant to the will, such property shall pass as if the decedent had died intestate with respect thereto, unless otherwise disposed of by the will." The court concluded: "Since nothing to the contrary appears in the will of Isam R. Misenheimer, the anti-lapse statute is deemed a part of the will."[33]

Thus, the court focused on the last phrase of subsection (3) without addressing the operative clause, "such property shall pass as if the decedent had died intestate with respect thereto." This clause suggests that John's one-eighth share should have been distributed according to the laws of intestate succession. Since the eight named beneficiaries also would have been Isam's heirs in intestacy, they would have shared equally in any intestate property, except John's sons would have taken John's share by substitution. Thus, under this construction, John's one-eighth share would have been divided

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Quick, 287 N.C. at 56, 213 S.E.2d at 569. Thus, although the specific provisions of the slayer statute did not cover cases of involuntary manslaughter, the broad construction section could be invoked when the specific provisions of the slayer statute might otherwise fail to prevent one from profiting from his wrongdoing. Mr. Quick's death resulted from his wife's "culpable negligence, that is conduct incompatible with a proper regard for human life . . . . Culpable negligence proximately resulting in death comes within the purview of the common law maxim that no one shall be permitted to profit by his own wrong." *Id.* at 59, 213 S.E.2d at 570-71. *See supra* note 19. *See also* Note, *Decedents' Estates—Forfeitures of Property Rights by Slayers*, 12 WAKE FOREST L. REV. 448 (1976).

30. *See supra* note 9. John's defense counsel in the murder case apparently thought this was the correct construction, and that it explained the siblings' pecuniary interest in hiring a private prosecutor at the murder trial. Brief for Appellant at 6, State v. Misenheimer, 304 N.C. 108, 282 S.E.2d 791 (1981).

31. *See supra* note 17.

32. *Misenheimer*, 62 N.C. App. at 708, 303 S.E.2d at 416.

33. *Id.*

again by eight, so that John's seven siblings each would have taken an additional one-sixty-fourth share, while John's two sons would have divided only a one-sixty-fourth share as a result of intestate succession.[34]

Admittedly, this construction lends little grace to the statutory architecture. The *Misenheimer* court saw a mesh between the slayer and anti-lapse statutes; although the slayer statute provides that "the slayer shall be deemed to have died immediately prior to the death of the decedent," the anti-lapse statute can prevent lapse or provide for passage of the slayer's share after lapse. The first sentence of the slayer statute, however, continues, "and the following rules shall apply: . . . (3) Where the decedent dies testate as to property which would have passed to the slayer pursuant to the will, such property shall pass as if the decedent had died intestate with respect thereto, unless otherwise disposed of by the will."[35] Subsection (3) is surplusage if the anti-lapse statute operates on a testate slaying victim's property, because the anti-lapse statute itself provides for the possibility that a gift to the slayer might pass by intestacy.[36] In the anti-lapse statute, intestate succession is the final solution, to be avoided whenever a predeceased beneficiary leaves surviving issue, or whenever there are other residuary beneficiaries. For example, if John Misenheimer had predeceased his father without leaving issue, under section 31-42(c)(2) John's share of the residuary estate would have gone back into the residue of Isam's estate for distribution to the other residuary beneficiaries.[37] Under section (3) of the slayer statute, however, property "which would have passed to . . . [John] . . . pursuant to the will . . . shall pass as if the decedent had died intestate with respect thereto."[38] If the legislature had wanted the courts to read the anti-lapse and slayer statues together, it would not have written a section pertaining to wills that so contradicted the anti-lapse statute. Instead, the legislature could have written a subsection (3) of the slayer statute specifically applying the anti-lapse statute, or it could have remained silent about wills in the slayer statute, which also would have implicated the anti-lapse statute.

Nevertheless, the court of appeals' construction of the slayer and anti-lapse statues in *Misenheimer* is at least consistent with its perception of public policy—that the murderer's wrongdoing should not bar the murderer's relatives from taking his share. If consideration of the slayer's children indeed represents the legislature's will, the decision in *Misenheimer* gives effect to that will. The *Misenheimer* decision also ensures that the treatment of bequests to the slayer will not depend on whether the decedent leaves a will. Under the Wade model statute, the slayer's issue are not barred from taking an intestate share, provided they are heirs in their own right. But if the slayer is named in the testator's will, the slayer's issue only can take a share the testator may have

34. Thus, John's seven siblings would each take a total of 9/64 of the residuary estate, while John's sons would each take 1/128.

35. N.C. GEN. STAT. § 31A-4(3) (1976).

36. N.C. GEN. STAT. § 31-42(c)(2) (Cum. Supp. 1983). *See supra* note 9.

37. *Id.*

38. N.C. GEN. STAT. § 31A-4(3) (1976).

given them specifically.[39] The Uniform Probate Code may operate similarly.[40] Section 2-803 of the Code provides that, if the decedent dies intestate, the slayer-heir's portion passes to the slayer's issue under the Code's intestate succession provisions.[41] If the decedent dies testate, however, and the killer is named in the will, the killer's portion may fall back into the residue or pass on to another residuary beneficiary.[42] In *Misenheimer* the decedent had simply written into his will the same equal distribution to his eight children that intestate succession would have provided without a will. It would have been unfortunate if the slayer's children's claim to part of the decedent's estate depended not only on an act of their parent that they could not influence, but also on the uncontrollable (and normally desirable) decision of the decedent to write a will.

The decedent's intent is one consideration in determining whether a slayer's issue should take the slayer's share from the victim's estate by substitution. Anti-lapse statutes are said to affect the average testator's probable intentions if the testator had considered the possibility of surviving his beneficiary.[43] The intentions of a slain testator are questionable, however, because the court must speculate about what the testator would have intended had he known the slayer would kill him. Could Isam Misenheimer have thought, after having been shot on that fateful June morning, "I do not wish for John or his two sons to take from my estate"? North Carolina law supplants silence from the grave with a determination of public policy; if John's sons are innocent in the death of their grandfather, they may take their father's share.

In addition to policy considerations, a constitutional issue arises in construing the slayer statute. If a slayer statute is read to bar the succession rights of issue who claim through an ancestor slayer, a court may risk imposing the ancient penalty of corruption of the blood.[44] This penalty, which Blackstone called an "oppressive mark of [Norman] feodal tenure,"[45] extended the forfeiture penalty imposed on someone found guilty of treason or other felonies to his descendants. The descendants could not claim through the convicted ancestor and had to take title from a more remote ancestor. Professor Wade flatly denied that his model statute would work corruption of the blood, "since it does not prevent heirs of the slayer from inheriting from him property which he already owns, but merely keeps him from acquiring property in an illegal

39. *See supra* note 28.

40. UNIFORM PROBATE CODE § 2-803, 8 U.L.A. 172 (1983).

41. *Id.* Section 2-803(a) provides as follows:

> A surviving spouse, heir or devisee who feloniously and intentionally kills the decedent is not entitled to any benefits under the will or under this Article, and the estate of decedent passes as if the killer had predeceased the decedent. Property appointed by the will of the decedent to or for the benefit of the killer passes as if the killer had predeceased the decedent.

42. *Id. See* UNIFORM PROBATE CODE PRACTICE MANUAL 77 (R. Wellman 2d ed. 1977).

43. T. ATKINSON, *supra* note 11, § 140, at 778.

44. N. WIGGINS, *supra* note 12, § 203.

45. 4 W. BLACKSTONE, COMMENTARIES *388.

way."[46] Technically Wade is correct, but any law that bars issue from taking under a will by substitution because their ancestor is deemed to have predeceased the testator rather than actually having predeceased him, comes as close to a modern enactment of the corruption penalty as would legislation of the penalty itself. Since the Constitution forbids corruption of the blood,[47] any slayer statute should indicate clearly that it prevents only the wrongdoer himself from profiting from his wrong, and not innocent parties.

Other courts have disagreed about whether slayer statutes bar the slayer's issue from sharing in the decedent's estate. In addition to North Carolina, six states have adopted varying forms of the Wade model slayer act.[48] Of these six, only South Dakota adopted verbatim the provisions that unquestionably would have denied the slayer's share to his issue.[49] At least one Pennsylvania case, however, has held that a specific devise or bequest to the slayer would be included in the residuary estate, and if the slayer was named as a residuary beneficiary, his share would pass to the other residuary beneficiaries.[50]

Among states that have slayer statutes not based on the Wade model, Kentucky has allowed the slayer's children to take from the decedent's estate, holding that the legislature had not intended to punish "an innocent child."[51] In *McGhee v. Banks*,[52] however, the Georgia Court of Appeals ruled against reading that state's anti-lapse statute in conjunction with the slayer statute. In *McGhee* a husband killed his wife. The husband had a daughter from a previous marriage who was not an heir of the murdered wife. The trial court had applied the state anti-lapse statute[53] so that the entire estate, which would have gone to the husband under the wife's will, passed to the husband's daughter. Because under the slayer statute, the property should have gone to the heirs of the person killed, the court of appeals reversed. Since the husband's daughter was not the wife's heir, the wife's property passed to her own nieces and nephew.[54] The *Misenheimer* plaintiffs cited *McGhee* as support for their case, but the court refused to follow it.[55]

Ironically, a North Carolina court should have no difficulty in following the Georgia court if faced with facts similar to *McGhee*. The North Carolina

46. Wade, *supra* note 24, at 721.

47. U.S. CONST. art. III, § 3: "The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."

48. IDAHO CODE § 15-2-803 (1979); OR. REV. STAT. § 112.455-.555 (1981); PA. STAT. ANN. tit. 20, § 8802 (Purdon 1975); R.I. GEN. LAWS § 33-1.1-1 to -1.1-16 (1969); S.D. CODIFIED LAWS ANN. § 29-9-2 (1976); WASH. REV. CODE ANN. § 11.84.010 to .84.900 (1967).

For an exhaustive study of slayer statutes in all jurisdictions, see Maki & Kaplan, *Elmer's Case Revisited: The Problem of the Murdering Heir*, 41 OHIO ST. L.J. 905 (1980).

49. S.D. CODIFIED LAWS ANN. § 29-9-2 (1976).

50. *In re* Taylor's Estate, 34 Delaware County 557 (Pa. C. 1948).

51. Bates v. Wilson, 313 Ky. 572, 574, 232 S.W.2d 837, 838 (1950).

52. 115 Ga. App. 155, 154 S.E.2d 37 (1967).

53. GA. CODE § 113-812 (1933) (current version at GA. CODE ANN. § 53-2-103 (1982)).

54. *McGhee*, 115 Ga. App. at 156, 154 S.E.2d at 39 ("We are convinced that to include heirs of the person killing who are not also heirs of the person killed . . . would not carry out the reasonable legislative intent [of the slayer statute].").

55. *Misenheimer*, 62 N.C. App. at 710, 303 S.E.2d at 417.

anti-lapse statute provides that when a beneficiary predeceases the testator, the beneficiary's issue take the property, provided they also would be testator's heirs under the Intestate Succession Act.[56] Under the facts of *McGhee* the slayer-husband's daughter was not the wife's heir, so she would not have taken anything from the victim-wife's estate under the anti-lapse statute. John Misenheimer's sons, however, were also Isam Misenheimer's heirs. If application of the anti-lapse statute had been the only question in administering Isam's will, John's sons could have taken John's share by substitution because they were both John's issue and Isam's heirs.

In considering *McGhee*, the *Misenheimer* court also was unpersuaded by the Georgia court's distinction between the actual death of a beneficiary, which would trigger the anti-lapse statute, and the fictive prior "death" of a slayer-beneficiary under the slayer statute. The Georgia court did not agree that a death in words could operate as a death in deed, so it held the slayer statute and the anti-lapse statute to operate exclusively of each other.[57] The North Carolina court had no such metaphysical inhibitions. For that, slayer's issue in this state can be glad.

JAMES R. SAINTSING

56. N.C. GEN. STAT. § 31-42(a) (1976). *See supra* note 9.
57. *McGhee*, 115 Ga. App. at 157-58, 154 S.E.2d at 39-40.