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Melanie B. Leslie

*Benjamin N. Cardozo School of Law*, [leslie@yu.edu](mailto:leslie@yu.edu)

Stewart E. Sterk

*Benjamin N. Cardozo School of Law*, [sterk@yu.edu](mailto:sterk@yu.edu)

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# REVISITING THE REVOLUTION: REINTEGRATING THE WEALTH TRANSMISSION SYSTEM

MELANIE B. LESLIE\*  
STEWART E. STERK\*\*

**Abstract:** Thirty years ago, John Langbein published “The Nonprobate Revolution and the Future of Succession.” The article celebrated testators’ newfound ability to avoid the expense and delay of the probate court system by holding assets in a variety of non-probate devices, such as retirement and bank accounts with beneficiary designations and revocable trusts. Langbein highlighted problems the revolution might generate and predicted how they might be resolved. Since then, significant problems have indeed developed. First, wills law doctrines designed to effectuate intent of testators have not been universally extended to non-probate transfers. Second, the fragmentation of the wealth transmission process has created coordination problems that did not exist when almost all of a decedent’s assets passed through the decedent’s probate estate. This has increased opportunities for attorney error. Even when attorneys get it right, rogue clients can easily undermine a carefully constructed estate plan, and the law does not always allow courts to correct these errors. Third, the non-probate system increases the potential for wrongful takers to dissipate assets before rightful beneficiaries have an opportunity to make claims to those assets. As we explain, neither lawyers, financial institutions nor the legal system have successfully resolved these issues. We advance several proposals that might ameliorate the costs of the non-probate system, such as conferring broader power on estate executors to coordinate non-probate assets, and a voluntary registration system that would reduce the risk of inadvertent conflicts among wealth transmission documents.

## INTRODUCTION

Thirty years ago, in one of the most influential articles ever written about Trusts and Estates, Professor John Langbein observed and celebrated the end

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\* Professor of Law and Vice Dean, Benjamin N. Cardozo School of Law.

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of what he called the "probate monopoly" and the growth of a parallel system of non-probate transfers.<sup>1</sup> Langbein noted, correctly, that for many testators and beneficiaries, the opportunity to bypass the probate process would avoid wasteful expense and delay.<sup>2</sup> Langbein did not ignore potential problems generated by the "nonprobate revolution," but was optimistic that those problems would be solved.

When the probate system dominated the wealth transmission process, a single document—the will—controlled most gratuitous transfers made by all but the very richest property owners. Executing a will required formalities designed to ensure that the document reflected the decedent's intent. The probate process mandated some judicial supervision of all estates, providing, at least in theory, additional protection against distributions inconsistent with the decedent's wishes.

The proliferation of mechanisms for transferring property at death outside the probate process—revocable trusts, "payable on death" ("POD") bank accounts, beneficiary designations on retirement accounts and life insurance policies<sup>3</sup>—presented challenges for the legal system. Langbein identified three such challenges.<sup>4</sup> First, how would the system ensure that the non-probate instruments of transfer, often prepared without formalities and without lawyer involvement, would accurately reflect the intent of the decedent?<sup>5</sup> Second, how would the system coordinate distribution of a fragmented estate, in which multiple documents rather than a single will would govern the transmission of the decedent's wealth?<sup>6</sup> Third, what substitutes would emerge for the protections afforded by judicial supervision of the probate estate? On this score Langbein surmised that hard cases—those that require judicial supervision—would end up in court just as they do in a system that requires judicial supervision of all cases, hard and easy.<sup>7</sup>

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<sup>1</sup> John H. Langbein, *The Nonprobate Revolution and the Future of Succession*, 97 HARV. L. REV. 1108, 1129 (1984).

<sup>2</sup> *Id.* at 1116–17. As Langbein put it, many transferors "view probate as little more than a tax imposed for the benefit of court functionaries and lawyers." *Id.* at 1117.

<sup>3</sup> *Id.* at 1109. As Langbein observed, "It would not be unusual for someone in mid-life to have a dozen or more will substitutes in force, whether or not he had a will." *Id.*

<sup>4</sup> See *id.* at 1120, 1137, 1140; *infra* notes 5–7 and accompanying text.

<sup>5</sup> Langbein, *supra* note 1, at 1137 (indicating that financial intermediaries are generally careful in the wording of transfer forms, but that business practice would not overcome the absence of "subsidiary rules" designed to reflect transferor intent).

<sup>6</sup> *Id.* at 1140 (noting danger that transferor may "neglect to update one or more components of an estate that involves numerous instruments").

<sup>7</sup> *Id.* at 1120 (noting that the probate system backstops the practice of financial intermediaries and stating that "[f]inancial intermediaries execute easy transfers and shunt the hard ones over to probate. In the nonprobate system, genuine disputes still reach the courts, but routine administration does not.").

Three decades later, it is time for reassessment. The use of revocable trusts and POD accounts has expanded, aided in many states by statutory changes. The Employee Retirement Income Security Act of 1974 (ERISA), in its infancy thirty years ago, has provoked a revolution of its own. In the course of that revolution, it has dramatically increased the dollar volume of assets likely to pass outside the probate system.<sup>8</sup> For many people planning their estates, the will is now the *least* important document in their estate plan. This expansion in the importance of the non-probate system makes it imperative to evaluate the legal system's responses to the challenges Professor Langbein identified.<sup>9</sup>

Although the non-probate system has adequately met the needs of most decedents—particularly those with the most traditional and typical estate plans—the legal system has not met all of the challenges Langbein identified.<sup>10</sup> The practicing bar bears part of the blame. Too many lawyers have been slow to appreciate the changing landscape of succession law, and, as a result, have served their clients poorly. This Article aims to highlight the pitfalls that lawyers face in the current environment, with the hope that more of them will avoid errors that frustrate the estate plans of their clients.

Many of the problems, however, are beyond the capacity of the practicing bar to fix—either because clients do not consult them when preparing estate planning documents, or because clients act on their own to undo the work of their lawyers. Neither financial intermediaries nor legal doctrine have adapted to this situation. Part I argues that financial intermediaries have not developed forms designed to effectuate the intent of their clients, and that state legislatures have been slow to make the changes that would overcome the deficiencies in non-probate instruments of transfer.<sup>11</sup> Part II demonstrates that asset coordination remains a significant problem in a world where people inevitably rely on multiple instruments, often executed at different times and outside the presence of lawyers, to transfer their assets upon death.<sup>12</sup> Part III examines the greater potential for asset dissipation that may reduce the value of judicial supervision for at least some beneficiaries.<sup>13</sup>

These problems are not serious enough to relinquish the cost savings generated by the non-probate system. Part IV, therefore, focuses on potential reforms: statutory designation forms, expanded authority over non-probate transfers for

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<sup>8</sup> See generally Stewart E. Sterk & Melanie B. Leslie, *Accidental Inheritance: Retirement Accounts and the Hidden Law of Succession*, 89 N.Y.U. L. REV 165 (2014) (providing a detailed discussion of ERISA's impact on the probate system).

<sup>9</sup> See Langbein, *supra* note 1, at 1120, 1137, 1140.

<sup>10</sup> See *id.*

<sup>11</sup> See *infra* notes 15–105 and accompanying text.

<sup>12</sup> See *infra* notes 106–273 and accompanying text.

<sup>13</sup> See *infra* notes 274–298 and accompanying text.

estate executors and administrators, and a voluntary registration system to enhance asset coordination.<sup>14</sup> These reforms would better enable the non-probate system to meet the challenges identified by Professor Langbein thirty years ago.

## I. ENSURING THAT NON-PROBATE INSTRUMENTS REFLECT TESTAMENTARY INTENT

Two factors combine to ensure that a decedent's properly executed will passes her probate assets to her intended beneficiaries: the formalities surrounding execution (which often include lawyer supervision), and a set of well-developed, intent-effectuating, rules of construction. Decedents' non-probate assets, by contrast, are often distributed pursuant to documents executed with fewer formalities and without the benefit of comparable constructional rules. Moreover, the beneficiary designation forms financial institutions provide for distribution of non-probate assets are often designed not to ensure effectuation of decedent intent, but rather to minimize inconvenience for the financial institution.

This Part explores how the confluence of these factors leads to frustration of decedent intent. Section A discusses the process by which beneficiaries are typically chosen in the probate system,<sup>15</sup> while Section B discusses beneficiary selection in the non-probate world.<sup>16</sup> Section C critiques the forms commonly used to designate beneficiaries in non-probate instruments.<sup>17</sup> Finally, Section D analyzes the challenges involved in effectuating the intent of an incapacitated testator.<sup>18</sup>

### *A. The Process of Selecting Beneficiaries in the Probate World*

Any person who sets out to make a gratuitous transfer starts with one or more objectives in mind: to provide for a spouse, children, a favorite charity, a faithful friend, or some combination. In the probate system, two features increase the likelihood that the testator will achieve those objectives. First, in part because of the formalities associated with execution of wills, lawyers often supervise preparation of wills. Second, wills doctrine includes rules of construction designed to fill gaps in poorly drafted wills, and to account for events that occur after execution of the will.

The classic testator consults a lawyer, who acts to refine the testator's objectives—principally by identifying legal alternatives and factual possibilities that the testator might not have independently contemplated. Once the lawyer

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<sup>14</sup> See *infra* notes 299–313 and accompanying text.

<sup>15</sup> See *infra* notes 19–24 and accompanying text.

<sup>16</sup> See *infra* notes 25–73 and accompanying text.

<sup>17</sup> See *infra* notes 74–88 and accompanying text.

<sup>18</sup> See *infra* notes 89–105 and accompanying text.

refines the testator's objectives, the lawyer translates those objectives into language designed to ensure that they are accomplished.

For instance, suppose a testator approaches a lawyer and indicates that she wants to divide her property between her husband and her children, with perhaps some provisions for her husband's children. The lawyer might ask whether the testator would prefer to set up a trust, so that the husband would be the primary beneficiary during his lifetime, with the remainder to pass to the children upon death. The lawyer would certainly ask how much property the testator has to advise the testator about potential tax consequences. In addition, a thorough lawyer would certainly ask whether the testator has considered how property for the children should be distributed if one of them happens to die before the testator, or before the testator's husband. Armed with the testator's responses, the lawyer would then draft a will (and potentially other documents) designed to accomplish settlor's objectives.

Moreover, if the will the lawyer drafts is not sufficiently clear, or if unanticipated circumstances arise, statutes and common law rules of construction operate to reflect the intent of the average testator. Imagine, for instance, a testator who writes a will leaving \$10,000 to her sister and dividing the balance of her estate between her husband and their daughter. When testator dies ten years later, her sister has already died, she is divorced from her first husband and she has remarried. She has also had a son with her new husband. How would testator's estate be distributed?

Every state has an anti-lapse statute that "saves" bequests to close relatives of the testator who have predeceased the testator.<sup>19</sup> So, absent language in the will, the testator's sister's bequest would pass to the sister's descendants.<sup>20</sup> Similarly, almost every state would treat divorce as an act that revokes a bequest to the divorced spouse, so that the testator's first husband would not share in the testator's estate.<sup>21</sup> The Uniform Probate Code ("UPC") also includes a provision that would give a share of the estate to a spouse who married the testator after execution of the testator's will, giving the testator's new husband a share of the estate.<sup>22</sup> Some states, including those that have adopted a version of the UPC,

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<sup>19</sup> See, e.g., CAL. PROB. CODE § 21110 (West 2011); MD. CODE ANN., EST. & TRUSTS § 4-403 (LexisNexis 2011); MASS. GEN. LAWS ch. 190B, § 2-603 (West Supp. 2014); N.Y. EST. POWERS & TRUSTS LAW § 3-3.3 (McKinney 2012); N.C. GEN. STAT. § 31-42 (2013); 20 PA. CONS. STAT. § 2514(9) (2010); TEX. EST. CODE ANN. §§ 255.151–154 (West, Westlaw through end of the 2013 Third Called Session of the 83rd Legislature) (formerly codified as TEX. PROB. CODE ANN. § 68 (West 2003)).

<sup>20</sup> See, e.g., UNIF. PROBATE CODE § 2-603 (amended 2010), 8 U.L.A. 546 (2013).

<sup>21</sup> See, e.g., CAL. PROB. CODE § 6122 (West 2009); N.Y. EST. POWERS & TRUSTS LAW § 5-1.4 (McKinney Supp. 2014); UNIF. PROBATE CODE, § 2-804 (amended 2010), 8 U.L.A. 330–32 (2013).

<sup>22</sup> UNIF. PROBATE CODE § 2-301 (amended 2010), 8 U.L.A. 192 (2013).

also provide a share for afterborn children, subject to some qualifications.<sup>23</sup> So, if the UPC were in force, the sister and the testator's first husband would not inherit, even though they are named in the will, and the sister's descendants would share, even though they are not named in the will. These statutes, then, provide a backstop to capture the presumed intent of similarly situated testators even when a will itself does not contemplate events that would almost certainly have caused the testator, if she had thought about them, to modify the language of the will.<sup>24</sup>

### *B. Beneficiary Selection in the Non-Probate World: Construction Doctrines*

The process of establishing a revocable trust sometimes mirrors the process of preparing a will. Lawyers often serve as intermediaries, ensuring that the trust instrument reflects the trust settlor's intent. But increasingly, inadequately trained non-lawyers are marketing revocable trusts.<sup>25</sup> Lawyers rarely supervise other non-probate transfers, including retirement accounts, POD accounts, and life insurance policies. As a result, construction doctrines must play a more important role if the goal is to ensure that clients achieve their objectives. Although legislatures and courts have made progress in adapting wills law doctrines to other non-probate transfers, the adaptation process is far from complete—even in jurisdictions that have enacted the UPC. The following three Subsections illustrate the way in which the UPC and state law have attempted to effectuate testator's intent in light of a change in the testator's or beneficiary's circumstances.<sup>26</sup> Subsection 1 discusses the revocation-upon-divorce rule and how non-probate assets can frustrate a divorced decedent's intent.<sup>27</sup> Subsection 2 describes the way that state law, and the UPC in particular, has dealt with marriage or the birth of a child as well as the issues caused by non-probate assets, especially retirement accounts, in those circumstances.<sup>28</sup> Subsection 3 analyzes the result when a beneficiary predeceases the testator with regards to both probate and non-probate property and highlights the role of forms in designating beneficiaries of non-probate property.<sup>29</sup>

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<sup>23</sup> See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 5-3.2 (McKinney Supp. 2014); UNIF. PROBATE CODE § 2-302 (amended 2010), 8 U.L.A. 194-95 (2013).

<sup>24</sup> See, e.g., UNIF. PROBATE CODE § 2-603, 8 U.L.A. 546 (providing that in the case where a devisee does not survive the testator, and is a sufficiently close relative, a substitute gift to the devisee's descendants will be created subject to certain limitations); *Id.* § 2-804, 8 U.L.A. 330-32 (providing that divorce revokes both probate and non-probate transfers).

<sup>25</sup> See generally Angela M. Vallario, *Living Trusts in the Unauthorized Practice of Law: A Good Thing Gone Bad*, 59 MD. L. REV 595 (2000) (describing the consequences of non-lawyers creating and selling revocable living trusts).

<sup>26</sup> See *infra* notes 30-73 and accompanying text.

<sup>27</sup> See *infra* notes 30-41 and accompanying text.

<sup>28</sup> See *infra* notes 42-57 and accompanying text.

<sup>29</sup> See *infra* notes 58-73 and accompanying text.

## 1. Divorce

UPC section 2-804 applies the revocation-upon-divorce rule both to wills and to other revocable testamentary transfers.<sup>30</sup> The statute provides that divorce or annulment “revokes any revocable disposition . . . of property made by a divorced individual to his [or her] former spouse in a governing instrument” and any disposition in a governing instrument “to a relative of the divorced individual’s former spouse.”<sup>31</sup>

Yet, for two reasons, the distribution of non-probate assets often frustrates the divorced decedent’s intent. First, a number of states have failed to extend the revocation-on-divorce rule uniformly to both revocable trusts and contracts with beneficiary designations. Some states cling to older revocation statutes that revoke only will provisions.<sup>32</sup> Others take a more piecemeal approach.<sup>33</sup> For example, both Illinois<sup>34</sup> and New Hampshire<sup>35</sup> law provide that divorce automatically revokes provisions in both wills and revocable trusts that pertain to the ex-spouse. Neither, however, extends this rule to beneficiary designations in contracts, such as life insurance, IRAs or POD provisions.<sup>36</sup> California statutes provide for automatic revocation on divorce for wills and all non-probate instruments except for life insurance policies.<sup>37</sup>

Second, ERISA precludes application of UPC section 2-804 and similar statutes to non-probate accounts, such as life insurance and retirement plan savings accounts that are provided by the deceased’s employer as part of an employee-benefits package.<sup>38</sup> ERISA, which governs the administration and

<sup>30</sup> UNIF. PROBATE CODE § 2-804(b)(1) (amended 2010), 8 U.L.A. 331 (2013).

<sup>31</sup> *Id.*

<sup>32</sup> See, e.g., ARK. CODE ANN. § 28-25-109; CONN. GEN. STAT. § 45a-257c (2013); DEL. CODE ANN. tit. 12, § 209 (2008); GA. CODE ANN. § 53-4-49 (2011); IDAHO CODE ANN. § 15-2-508 (2014); IND. CODE ANN. § 29-1-5-8 (LexisNexis 2012); KAN. STAT. ANN. § 59-610 (2005); KY. REV. STAT. ANN. § 394.092 (LexisNexis 2011); LA. CIV. CODE ANN. art. 1608 (2000); ME. REV. STAT. tit. 18-A, § 2-508 (2012); MD. CODE ANN., EST. & TRUSTS § 4-105 (LexisNexis 2011); NEB. REV. ST. ANN. § 30-2333 (2009); N.H. REV. STAT. ANN. § 551:13(II) (2007); N.C. GEN. STAT. § 31-5.4 (2013); TENN. CODE ANN. § 32-1-202 (2008); W. VA. CODE ANN. § 41-1-6 (LexisNexis 2011). See generally Susan N. Gary, *Applying Revocation-on-Divorce Statutes to Will Substitutes*, 18 QUINNIPIAC PROB. L.J. 83 (2004) (discussing the history of revocation-on-divorce statutes and the need to expand such statutes to include will substitutes).

<sup>33</sup> See generally Kristen P. Raymond, Note, *Double Trouble—An Ex-Spouse’s Life Insurance Beneficiary Status & State Automatic Revocation Upon Divorce Statutes: Who Gets What?*, 19 CONN. INS. L.J. 399, 402 (2013) (noting that in some states, including Michigan, Colorado, Minnesota, Missouri, Ohio, Arizona, Oklahoma, and Texas, “a final divorce automatically revokes the status of the designated spouse as a beneficiary and terminates their right to the life insurance proceeds of their former spouse”).

<sup>34</sup> 755 ILL. COMP. STAT. 5/4-7(b) (2012); *Id.* 45/2-6(b); 760 ILL. COMP. STAT. 35/1 (2012).

<sup>35</sup> N.H. REV. STAT. ANN. § 551:13(II) (2007).

<sup>36</sup> 755 ILL. COMP. STAT. 5/4-7(b) (2012); *Id.* 45/2-6(b); 760 ILL. COMP. STAT. 35/1 (2012); N.H. REV. STAT. ANN. § 551:13(II) (2007).

<sup>37</sup> CAL. PROB. CODE §§ 5600(c), 5601, 6122 (West 2009).

<sup>38</sup> 29 U.S.C. § 1144(a), (c) (2012).



distribution of these assets, expressly provides that it “shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan” covered by ERISA.<sup>39</sup> In 2001, in *Egelhoff v. Egelhoff*, the Supreme Court of the United States construed this preemption provision broadly to hold that plan administrators are required to distribute assets in accordance with the plan documents even if state law might command a different result.<sup>40</sup> Thus, ERISA preempts state-law revocation on divorce statutes with respect to any non-probate asset that is employer provided.<sup>41</sup>

As a result, the assets of a decedent who failed to change beneficiary designations after divorce may be distributed inconsistently. To illustrate, suppose that soon after her marriage, a testator executes a will naming her husband as her beneficiary. Thereafter, she accumulates a mutual fund account, and, as part of her employee-benefits package, a 401K and a life insurance policy. She names her husband as the death beneficiary of all the non-probate assets. After the testator and her husband go through an acrimonious divorce, the testator dies unexpectedly before engaging in any post-divorce estate planning. Will the ex-husband be entitled to any of the testator’s assets?

If the testator were domiciled in a state with a modern revocation-on-divorce statute, the ex-husband would not be entitled to any of the testator’s probate assets or the proceeds of the mutual fund account. Due to the ERISA preemption rule, he would collect the proceeds of the employer-provided retirement account and life insurance policy.

## 2. Marriage or Birth of a Child

### a. *State Law*

Many state statutes give an omitted spouse or child rights to claim a portion of the deceased spouse’s estate when the deceased’s will was executed prior to the marriage or the child’s birth. While some statutes provide that marriage or birth of a child revokes a previous will,<sup>42</sup> most are more elaborate in the quest to effectuate the presumed intent of most testators. For example, UPC section 2-302 provides that only a child born or adopted after the will’s execu-

<sup>39</sup> *Id.* § 1144(a).

<sup>40</sup> 532 U.S. 141, 143 (2001); see also Katherine A. McAllister, Note, *A Distinction Without a Difference? ERISA Preemption and the Untenable Differential Treatment of Revocation-on-Divorce and Slayer Statutes*, 52 B.C. L. REV. 1481, 1490–93 (2011) (discussing the Egelhoff case in the context of the overlap between ERISA preemption and the substantive law of wills).

<sup>41</sup> See Lawrence W. Waggoner, *The Creeping Federalization of Wealth-Transfer Law*, 67 VAND. L. REV. 1635, 1639–40 (2014).

<sup>42</sup> See, e.g., GA. CODE ANN. § 53-4-48(a) (2011); KAN. STAT. ANN. § 59-610 (2005) (subsequent marriage plus birth or adoption of child revokes will); LA. CIV. CODE art. 1705; MD. CODE ANN., EST. & TRUSTS § 4-105 (LexisNexis 2011) (subsequent marriage plus birth of child revokes will); MISS. CODE ANN. § 91-5-3 (2013) (will is revoked if no child living when will executed).

tion can claim a share of the testator's estate, and then only if: (i) the testator has other children and the will makes a provision for those children, or the testator has no other children and his will does not leave substantially all of his estate to the omitted child's other parent;<sup>43</sup> (ii) it does not appear from the will that the omission was intentional; and (iii) the testator failed to provide for the omitted child by a transfer outside the will. With respect to omitted spouses, UPC section 2-301 provides that the omitted spouse is entitled to her intestate share of assets not devised to testator's descendants, unless it appears that the testator intended the will be effective even if he/she subsequently married, the will was made in contemplation of marriage, or the testator provided for that spouse by non-probate transfers.<sup>44</sup>

The UPC confines the omitted spouse and child's rights to a share of *probate* assets, which can operate to frustrate the probable intent of testators who neglect to amend their beneficiary designations or revocable trusts after marriage.<sup>45</sup> In this sense, the UPC is typical of most states.<sup>46</sup> Drafting omitted spouse and child statutes to account for non-probate transfers would be exceedingly complex. Nevertheless, the failure of these statutes to recognize revocable living trusts as will substitutes is especially problematic because the trust often holds the bulk of the client's assets. Placing most assets in the trust allows the settlor to avoid probate—the pour-over will operates only to mop up

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<sup>43</sup> UNIF. PROBATE CODE § 2-302 (amended 2010), 8 U.L.A. 194–95 (2013). For examples of statutes modeled on section 2-302, see ALASKA STAT. § 13.12.302 (2014); ARIZ. REV. STAT. ANN. § 14-2302 (2014); COLO. REV. STAT. § 15-11302 (2014); FLA. STAT. ANN. § 732.302 (West 2010); HAW. REV. STAT. § 560:2-302 (2006); IDAHO CODE ANN. § 15-2-302 (2009); IND. CODE ANN. § 29-1-3-8 (West 2011); ME. REV. STAT. tit.18-A, § 2-302 (2012).

<sup>44</sup> See UNIF. PROBATE CODE § 2-301(a)(1), (3) (amended 2010), 8 U.L.A. 192 (2013); see also ME. REV. STAT. tit. 18A § 2-301 (2012); N.J. STAT. ANN. § 3B:5-15 (West 2007); UTAH CODE ANN. § 75-2-301 (LexisNexis Supp. 2013). Omitted spouses in common law property states may be able to exercise a right to elect. The UPC and other modern elective share statutes include most non-probate assets in the value of the estate for elective share purposes. See, e.g., ALASKA STAT. § 13.12.203 (2012); COLO. REV. STAT. § 15-11-202 (2014); HAW. REV. STAT. § 560:2-203 (2006); KAN. STAT. ANN. § 59-6a203 (2005); MINN. STAT. ANN. § 524.2-203 (West 2012); MONT. CODE ANN. § 72-2-222 (2013); N.Y. EST. POWERS & TRUSTS LAW § 5-1.1-A (McKinney Supp. 2014); N.D. CENT. CODE § 30.1-05-02 (2010); S.D. CODIFIED LAWS § 29A-2-203 (2004); UTAH CODE ANN. § 75-2-203 (LexisNexis Supp. 2013); W. VA. CODE ANN. § 42-3-2 (LexisNexis 2010).

<sup>45</sup> In some of the decided cases, courts advanced testator's probable intent by *not* applying these statutes to non-probate transfers. In *In re Estate of Jackson*, 194 P.3d 1269, 1275 (Okla. 2008), *Kidwell v. Rhew*, 268 S.W.3d 309, 312 (Ark. 2007), and *Robbins v. Johnson*, 780 A.2d 1282, 1284 (N.H. 2001), the courts had to apply omitted child statutes that allow *any* child not expressly mentioned in the will, including one born before the will was executed, to claim a share of the estate. In all three cases, it was clear that the testator did not intend to benefit the omitted child. See *Jackson*, 194 P.3d at 1275; *Kidwell*, 268 S.W.3d at 310; *Robbins*, 780 A.2d at 1283. Because these are state supreme court cases, they will likely be read broadly, treated as a matter of black letter law, and are likely to produce intent-defeating results when applied by lower courts in the future.

<sup>46</sup> See, e.g., *Jackson*, 194 P.3d at 1275; *Kidwell*, 268 S.W.3d at 312; *Robbins*, 780 A.2d at 1284; *In re Estate of Cayo*, 342 N.W.2d 785, 786 (Wis. Ct. App. 1983).

any assets not transferred to the trust during life.<sup>47</sup> Thus, the failure to include the value of the assets in the revocable trust when determining the omitted spouse or child's share—even if understandable pragmatically in light of the difficulty of drafting and enacting the necessary legislation—cannot be justified conceptually or as a policy matter.<sup>48</sup>

In sum, an omitted child or spouse whose loved one took pains to avoid probate is worse off than the omitted child or spouse of someone who dies with a simple will or engaged in no planning. Consider an example involving testator A and testator B. Assume that both women executed simple wills devising all of their estate to their parents, that each subsequently married and had a child, and that neither revoked her will or executed a new one before dying unexpectedly. Suppose that all of testator A's assets, totaling \$100,000, passed through probate at her death. Suppose testator B's probate estate is of negligible value, but she died owning an IRA (\$20,000), a savings account with a POD designation (\$10,000), a life insurance policy (\$50,000) and mutual fund account (\$20,000). She filled out the beneficiary designations before her child's birth and named her parents as beneficiaries. Testator A's spouse and child are entitled to their intestate shares of her estate. Testator B's child will receive nothing and her spouse may not fare much better. Under a modern elective share statute, the spouse may be entitled to a fractional share of testator B's non-probate assets,<sup>49</sup> but because elective share statutes are not designed to be intent effectuating, testator B's spouse may end up with less of her estate than testator B would have preferred.<sup>50</sup>

The limited reach of these statutes can also operate to defeat intent by giving a spouse or child *more* than the deceased intended to give. In *Prestie v.*

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<sup>47</sup> In one case, the court was able to shield the revocable trust from the omitted spouse's share while effectuating intent. In *Bell v. Estate of Bell*, the testator's children from a prior marriage were the principal beneficiaries of testator's revocable trust. 181 P.3d 708, 710 (N.M. Ct. App. 2008). Applying UPC section 2-301, the court ruled that the omitted spouse could obtain a share only of the estate assets. *Id.* at 713. Because there were no estate assets, the spouse was entitled to nothing—the same result the court would have reached if all of the assets were included, because the testator's children from a prior marriage were trust beneficiaries. *Id.* at 716.

<sup>48</sup> California has amended its probate code to allow omitted children and spouses to obtain a share of assets in a revocable living trust. See CAL. PROB. CODE § 21601 (West 2011) (defining "testamentary instruments" as including wills and revocable trusts); *id.* § 21601(b) (including revocable trusts in the definition of "estate"); *id.* § 21610 (providing that an omitted spouse is entitled to a share of the deceased spouse's "estate"); *id.* § 21620 (providing that an omitted child is entitled to a share of the deceased spouse's "estate").

<sup>49</sup> See N.Y. EST. POWERS & TRUSTS LAW § 5-1-1.A (McKinney Supp. 2014); UNIF. PROBATE CODE §§ 2-201 to -207 (amended 2010), 8 U.L.A. 441-66 (2013).

<sup>50</sup> For example, the UPC keys the amount of the surviving spouse's elective share to the length of the marriage. UNIF. PROBATE CODE § 2-203(b) (amended 2010), 8 U.L.A. 153-54 (2013). Thus, a surviving spouse who was married to the decedent for two years is entitled to end up with only twelve percent of the value of their combined property. See *id.*

*Prestie*,<sup>51</sup> the Nevada Supreme Court affirmed a lower court's order awarding testator's wife an intestate share of testator's probate estate, even though testator had provided for his wife through his revocable trust, on the ground that the statute applied unless the spouse was provided for *in the will*.<sup>52</sup> Although the court expressly acknowledged that "modern estate planning regularly utilizes revocable inter vivos trusts with pour-over wills," and that the usual procedure for amending an estate plan was to amend the trust, not the will, it chose to apply the plain meaning of the statute.<sup>53</sup>

#### b. *Omitted Spouse and Child Statutes and ERISA-Governed Retirement Accounts*

ERISA creates no protection for children of account holders.<sup>54</sup> Given ERISA preemption, the only way to ensure that a child receives the proceeds of an ERISA governed account is to fill out a beneficiary designation form after the child's birth. Conversely, the omitted spouse will have rights to those accounts regardless of what the plan participant's beneficiary designation directs. ERISA provides that upon marriage, a spouse obtains a legal right to some or all of the account holder's retirement account.<sup>55</sup> Therefore, a new spouse automatically becomes the beneficiary of an employer-sponsored account, regardless of what the plan participant's beneficiary designation directs. Although the ERISA provisions granting spousal rights are not motivated by a concern for effectuating intent, the provisions may in fact comport with account holders' intentions in many cases. In other cases, however, an account holder might erroneously assume that the beneficiary designation executed prior to marriage will remain valid afterward. ERISA, however, contains no provisions authorizing a court to consider the deceased spouse's preferences.

Account holders frequently assume that a prenuptial agreement can extinguish the new spouse's rights to any retirement account proceeds. Nevertheless, federal courts agree<sup>56</sup> that no matter how clearly a prenuptial agreement

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<sup>51</sup> 138 P.3d 520, 525 (Nev. 2006). The testator had divorced his wife, Maria, and later executed a pour-over will and living trust naming Scott, his son from an earlier marriage, as trustee and primary beneficiary of the trust. *Id.* at 521. Testator experienced health problems, and Maria increasingly assumed responsibility for his care, eventually moving into his condominium. *Id.* The following year, the testator amended his living trust to grant Maria a life interest in his condominium, and a few weeks later, he and Maria remarried. *Id.* at 521–22. Testator died nine months later. *Id.* at 522. Maria petitioned the court for an omitted-spouse share of the testator's estate and the testator's son objected, arguing that the testator's trust amendment was made in contemplation of his remarriage. *Id.*

<sup>52</sup> *Id.* at 525.

<sup>53</sup> *Id.* at 523 n.13.

<sup>54</sup> See 29 U.S.C. § 1055 (2012).

<sup>55</sup> *Id.*

<sup>56</sup> See, e.g., *Greenebaum Doll & McDonald PLLC v. Sandler*, 256 F. App'x 765, 767 (6th Cir. 2007) ("There is little support for the notion that a prenuptial agreement by itself can satisfy ERISA's spousal-consent requirement."); *Hagwood v. Newton*, 282 F.3d 285, 290–91 (4th Cir. 2002) (noting

waives the new spouse's right to account proceeds, the spouse will be entitled to the proceeds on the employee's death unless the spouse has executed a valid waiver.<sup>57</sup>

### 3. Death of a Beneficiary

All states have intent-effectuating anti-lapse statutes that apply to create substitute will beneficiaries when a testator has failed to direct an alternative distribution in the event a beneficiary predeceases her.<sup>58</sup> The most prevalent approach, reflected in UPC section 2-603, is to create a substitute gift in the descendants of any predeceased legatees who are descendants of the decedent's grandparents.<sup>59</sup> Thus, if a testator devises her estate in equal shares to her three children, and one child predeceases testator leaving surviving descendants, the deceased child's descendants will take in her stead, unless the will expressly directs otherwise by creating an alternative devise. This effectuates the probable intent of most testators.

The UPC extends parallel protection to non-probate transfers. Section 2-603 does not itself extend anti-lapse protection to trusts and non-probate transfers.<sup>60</sup> Instead, the UPC includes two provisions, one for trusts and another for other non-probate transfers, each of which incorporate the survivorship framework developed in the UPC's anti-lapse statute.

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that a prenuptial agreement generally cannot serve as a valid waiver of spousal rights as required by ERISA); *Nat'l Auto. Dealers & Assocs. Ret. Trust v. Arbeitman*, 89 F.3d 496, 502 (8th Cir. 1996) (same); *Hurwitz v. Sher*, 982 F.2d 778, 781 (2d Cir. 1992) (same); *Robins v. Geisel*, 666 F. Supp. 2d 463, 467-68 (D.N.J. 2009) (same); *Ford Motor Co. v. Ross*, 129 F. Supp. 2d 1070, 1073-74 (E.D. Mich. 2001) (same); *Zinn v. Donaldson Co.*, 799 F. Supp. 69, 73 (D. Minn. 1992) (same); *Nellis v. Boeing Co.*, No. 91-1011-K, 1992 WL 122773, at \*4 (D. Kan. May 8, 1992) (same).

<sup>57</sup> ERISA requires compliance with a very specific procedure to waive a spouse's statutory rights: the spouse's waiver must be made after marriage, in a writing that names an alternate beneficiary and that is executed in front of a plan representative or notary public. 29 U.S.C. § 1055(c)(2)(A). Going forward, the spouse must consent to any change of beneficiary designation. *Id.* By definition, prenuptial agreements fail to meet these exacting requirements: they are executed prior to marriage, and therefore do not divest a spouse of statutory survivorship rights. In addition, couples may have difficulty complying with ERISA's exacting timing requirements. *See Sterk & Leslie, supra* note 8, at 195 n.121.

<sup>58</sup> *See, e.g.*, CAL. PROB. CODE § 21110 (West 2011); MASS. GEN. LAWS ANN. ch. 190B, § 2-603 (West Supp. 2014); MD. CODE ANN., EST. & TRUSTS § 4-403 (LexisNexis 2011).

<sup>59</sup> *See* UNIF. PROBATE CODE § 2-603 (amended 2010), 8 U.L.A. 241 (2013); *see also, e.g.*, ALA. CODE § 43-8-224 (1991); ALASKA STAT. § 13.12.603 (2012); ARIZ. REV. STAT. ANN. § 14-2603 (2012); COLO. REV. STAT. § 15-11-603 (2014); DEL. CODE ANN. tit. 12, § 2313 (2007); FLA. STAT. ANN. § 732.603 (West 2010).

<sup>60</sup> *See* UNIF. PROBATE CODE § 2-603, 8 U.L.A. 241, 244 cmt.

### a. Revocable Trusts

With respect to trusts, UPC section 2-707 reverses centuries-old common law to create a strong presumption that remainder interests are contingent on the remainder beneficiary's surviving to the time of possession, even if the trust instrument does not expressly impose such a condition.<sup>61</sup> The statute then directs—in parallel with the anti-lapse statute—that if a remainder beneficiary fails to survive, the trustee must distribute the remainder interest to the surviving descendants of the predeceased remainder beneficiary.<sup>62</sup>

Although several states have adopted section 2-707,<sup>63</sup> the statute has generated much controversy, especially because it reverses centuries-old common law rules governing remainder interests in irrevocable trusts.<sup>64</sup> But the statute is less controversial as it applies to revocable trusts because it appropriately aligns the treatment of revocable trusts with wills. To illustrate, compare two testators, testator A and testator B. Testator A has a simple will, which devises his entire estate to his child. Testator B has a pour-over will and a revocable living trust. The will passes testator B's probate estate to the trustee of his revocable trust. The revocable trust instrument provides that the trust principal is to be distributed at testator B's death to his child. Suppose both children predecease their father, survived by a spouse and descendants. How will each father's estate be distributed?

In almost every state, testator A's bequest to his child will be "saved" by an anti-lapse statute, which will designate the child's (and testator A's) descendants as the substitute devisees. But under the majority common law rule governing trust remainders, testator B's child's remainder interest was vested (subject to divestment if testator revoked the trust prior to his death).<sup>65</sup> Thus, testator B's child's remainder will be distributed to the child's residuary will beneficiary, who could be someone other than her descendants. If testator B's child died intestate, at least half, if not all, of the property subject to the remainder will be distributed to the child's husband. But because revocable trusts

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<sup>61</sup> *Id.* § 2-707 (amended 2010), 8 U.L.A. 299–302 (2013).

<sup>62</sup> *Id.*

<sup>63</sup> See, e.g., ALASKA STAT. § 13.12.707 (2012); ARIZ. REV. STAT. ANN. § 14-2707 (2012); COLO. REV. STAT. § 15-11-707 (2014); HAW. REV. STAT. § 560:2-707 (2006); IOWA CODE ANN. § 633A.4701 (West 2014); MICH. COMP. LAWS ANN. §§ 700.2713–2716 (2002 & Supp. 2011); MONT. CODE ANN. § 72-2-717 (2013); N.M. STAT. ANN. § 45-2-707 (Supp. 2013); N.D. CENT. CODE § 30.1-09.1-07 (2010).

<sup>64</sup> See generally, e.g., Jesse Dukeminier, *The Uniform Probate Code Upends the Law of Remainders*, 94 MICH. L. REV. 148 (1995); Laura E. Cunningham, *The Hazards of Tinkering with the Common Law of Future Interests: The California Experience*, 48 HASTINGS L.J. 667 (1997).

<sup>65</sup> Alternatively, one could construe the child's remainder as contingent, with the condition precedent to vesting being that testator B not revoke the trust prior to his death. Either way, at common law the remainder would not be contingent on surviving testator B, and would be transmitted through the child's estate.

are simply will substitutes, it makes no sense to treat them differently than wills. UPC section 2-707 addresses this by authorizing the trustee to distribute the trust principal to testator B's child's descendants.<sup>66</sup>

### b. Other Non-Probate Transfers

Most anti-lapse statutes do not apply to accounts or products with beneficiary designations.<sup>67</sup> UPC section 2-706, which has been adopted in several states,<sup>68</sup> changes that common law rule by extending anti-lapse protection to all types of non-probate accounts and insurance policies.<sup>69</sup> Under section 2-706(b), if a beneficiary predeceases the account holder and is a grandparent, descendant of a grandparent, or stepchild of the account holder, a substitute gift is created in the beneficiary's surviving descendants, if any.<sup>70</sup> For two reasons, however, UPC section 2-706 furnishes inadequate protection against the unexpected death of a designated beneficiary.

First, the comment to section (b)(4) explains that a printed provision in a contract directing how an account holder's estate should be distributed if there is no effective beneficiary designation constitutes an "alternate beneficiary designation" that preempts application of the statute.<sup>71</sup> Many beneficiary designation forms, life insurance contracts or custodial agreements provide that if one primary beneficiary predeceases the account holder, that beneficiary's share will be distributed to other primary beneficiaries. These and similar provisions gut the UPC's statutory protection.<sup>72</sup> If no designated beneficiaries survive the account holder, then the funds shall be distributed as the contract or custodial agreement directs—not as the statute directs.

Second, the UPC is arguably internally inconsistent with respect to bank accounts with POD provisions. Section 6-212 of the UPC, which incorporates the Uniform Multiple-Persons Account Act of 1989, provides that on the death of the last surviving account holder, "sums on deposit belong to the surviving beneficiary or beneficiaries . . . . If no beneficiary survives, sums on deposit

<sup>66</sup> UNIF. PROBATE CODE § 2-707 (amended 2010), 8 U.L.A. 299–302 (2013).

<sup>67</sup> See, e.g., MASS. GEN. LAWS ANN. ch. 190B, § 2-706 (West Supp. 2014); UTAH CODE ANN. § 75-2-706 (LexisNexis Supp. 2013).

<sup>68</sup> See, e.g., MASS. GEN. LAWS ANN. ch. 190B, § 2-706; N.D. CENT. CODE § 30.1-09.1-06 (2010); UTAH CODE ANN. § 75-2-706.

<sup>69</sup> See, e.g., ARIZ. CODE § 14-2706; COLO. REV. STAT. § 15-11-706 (2014); COLO. REV. STAT. § 15-15-212 (stating that "[n]either the provisions of section 15-11-706 nor the provisions of any other anti-lapse statute apply to the disposition of an account with a POD designation."); HAW. REV. STAT. § 560:2-706 (2006) N.M. STAT. ANN. § 45-2-706 (Supp. 2013); UTAH CODE ANN. § 75-2-706.

<sup>70</sup> UNIF. PROBATE CODE § 2-706 (amended 2010), 8 U.L.A. 291–94 (2013).

<sup>71</sup> *Id.* § 2-706 cmt. (amended 2010), 8 U.L.A. 294–95 (2013).

<sup>72</sup> See *infra* notes 183–199 and accompanying text.

belong to the estate of the last surviving party.”<sup>73</sup> Because the comments to this section do not cross-reference section 2-706, it is unclear whether the provision supersedes section 2-706.

### C. The Role of Forms in Selecting Non-Probate Beneficiaries

Although lawyers sometimes supervise creation of revocable trusts, they do not typically supervise the process of filling out a beneficiary designation form. Life insurance benefits, POD accounts, and retirement accounts all pass pursuant to beneficiary designation forms that are rarely prepared with the assistance of lawyers trained to refine and express testator’s objectives. Eliminating lawyers obviously reduces the cost of preparing the documents, and one might hope that financial intermediaries would develop forms that served as an adequate substitute for the more expensive lawyer-drafted documents tailored to each testator’s individual preferences. Unfortunately, the record of those financial intermediaries has been uneven at best. Subsection 1 examines life-insurance beneficiary-designation forms and their potential to lead policyholders astray when attempting to change a beneficiary designation.<sup>74</sup> Subsection 2 analyzes beneficiary-designation forms for retirement accounts and suggests that those forms are more problematic than the life-insurance beneficiary-designation forms.<sup>75</sup>

#### 1. Life-Insurance Beneficiary-Designation Forms

Examining beneficiary designation forms for seven of the largest U.S. life insurers<sup>76</sup> reveals that although the forms vary considerably, they share a number of common problems.

First, all of the forms but one include critical instructions or sample beneficiary designations on a page separate from the page on which the insured is asked to complete beneficiary designations.<sup>77</sup> As a result, even an insured with

<sup>73</sup> UNIF. PROBATE CODE § 6-212(b)(2) (amended 2010), 8 U.L.A. 371 (2013). See generally UNIF. MULTIPLE PERS. ACCOUNT ACT (amended 1998).

<sup>74</sup> See *infra* notes 76–84 and accompanying text.

<sup>75</sup> See *infra* notes 85–88 and accompanying text.

<sup>76</sup> MetLife, Prudential, Northwestern Mutual, ING, Lincoln Financial, New York Life, and Hartford Life were the seven largest U.S. life insurers by total life insurance issued in 2010. *2011 Life Insurers Fact Book*; AMER. COUNCIL OF LIFE INSURERS 109 tbl. 11.12, <https://www.acli.com/Tools/Industry%20Facts/Life%20Insurers%20Fact%20Book/Documents/2011%20Fact%20Book.pdf>, archived at <https://perma.cc/6YAC-U6BP>. This Article focuses on change of beneficiary forms rather than the forms included in the original policy because change of beneficiary forms were more readily available online without applying for a new life insurance policy. There is no reason to believe that a firm’s change of beneficiary forms would be materially different from the same firm’s original beneficiary designation forms. The forms are on file with the authors.

<sup>77</sup> See, e.g., *Beneficiary Change for Life Policy*, LINCOLN FIN. GRP., <https://www.lfg.com/LincolnPageServer> (follow “Beneficiary Change for Life Policy (PDF)” hyperlink), archived at <https://perma.cc/6YE5-RG8D?type=pdf> (last visited Dec. 30, 2014); *Life Insurance Change of Beneficiary*, METLIFE, <https://eforms.metlife.com/wcm8/PDFFiles/31163.pdf>, archived at <https://perma.cc/>



the capacity to understand all of her options would have to move back and forth from page to page in order to comply with the insurer's instructions. This Article questions whether the ordinary lay purchaser of an insurance policy, a purchaser who has identified her spouse or her currently living child or children as primary beneficiaries, would take the time to read the often-complicated instructions with care.

Second, even if the insured did read all of the directions with care, many of the forms make it nearly impossible for an intelligent person to figure out how to complete any designation other than one that identifies particular living beneficiaries. Consider an insured whose preferences mirror those of many testators who write wills: the insured wants the proceeds to pass to her spouse if the spouse survives the decedent, and if the spouse does not survive, the insured wants the proceeds to pass to her issue. Providing for "issue" or "descendants" as a class accommodates two preferences shared by most testators: the preference to include children born after execution of the policy (without the need for amendment), and the preference that, if one of the insured's children predeceases the insured, the deceased child's descendants will take her share, instead of having the share divided up among decedent's living children. How easy would it be for the insured to complete a designation form that accomplishes these objectives?

Two of the seven forms<sup>78</sup> make no provision at all for distribution to a class of beneficiaries; the only designations explicitly authorized are designations of trusts<sup>79</sup> or of named individuals. The same two forms make no provision for the insured to provide for issue of deceased beneficiaries; neither form indicates what happens if some, but not all, of the primary beneficiaries predecease the testator. A third form would permit a designation to issue of the insured, and, on the instruction page, includes language that would be effective to make the designation—but the language the form suggests for making that designation takes up five lines and the designation form has room for only one, leaving a reasonable insured scratching her head.<sup>80</sup> A fourth form's instruction

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2AB5-9Z9L (last visited Dec. 30, 2014). The lone exception, Hartford Life, includes virtually no instructions with the form. See *Change of Beneficiary Request Form*, THE HARTFORD, <https://forms.hartfordlife.com/ipsforms/101954HL.pdf>, archived at <https://perma.cc/698A-UAHB> (last visited Dec. 30, 2014).

<sup>78</sup> *Beneficiary Change for Life Policy*, LINCOLN FIN. GRP., *supra* note 77; *Change of Beneficiary Request Form*, THE HARTFORD, *supra* note 77.

<sup>79</sup> The Lincoln form has a separate box labeled "Trust Designation." See *Beneficiary Change for Life Policy*, LINCOLN FIN. GRP., *supra* note 77. The Hartford form's instructions indicate that if the new "beneficiary is a trust, as copy of the trust document must be submitted and the trust name and date must be included as the name in the information box below." *Change of Beneficiary Request Form*, THE HARTFORD, *supra* note 77.

<sup>80</sup> The ING form includes the five lines under a heading "Per Stirpes" at the bottom of a page of "Suggested Beneficiary Designations." See ING, BENEFICIARY DESIGNATION CHANGE REQUEST

page provides no instructions for designating beneficiaries, but rather a set of “Examples of Beneficiary Designations.”<sup>81</sup> Among the examples are two for designating “children” as a class, and one for designating named children or the children of deceased named children, but the page provides no language for making a class gift to issue or descendants. A fifth form’s instruction page provides the alternative of a designation of “Children of the insured, their children by representation,” but instructs the insured to include the designation in the “Additional/Special Beneficiary Requests” section.<sup>82</sup> To do that, the insured would have to leave blank all five sections that ask for various kinds of beneficiary designations—an action that most insureds would find counterintuitive. Only two of the seven forms, then, provide a reasonably understandable way for a lay insured to designate her issue as beneficiaries—and even those two have provisions that will induce most insureds not to designate children or issue as a class as beneficiaries.<sup>83</sup>

Statutory or common law rules of construction could correct for beneficiary designation forms that lead policyholders astray. As already noted, the rules of construction that are already in place do not generally apply to contract dispositions like insurance policies. Even the UPC, which does extend such protection, includes a significant loophole by providing that the default clause in the policy overcomes the Code’s anti-lapse protection.<sup>84</sup>

When life and death events unfold as the insured expects, existing beneficiary designation forms will be more than adequate to accomplish the insured’s objectives. In those cases, disputes are unlikely to arise. In cases where life events depart from the norm, neither existing forms nor rules of construction provide much assurance that the insured’s wishes will be honored.

## 2. Retirement Accounts

The form problem is even worse with retirement accounts. For a variety of reasons, the average holder of a retirement account is likely to spend less time fretting over beneficiary designations than the average purchaser of a life

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(2014) (on file with author). The form does not explain in laymen’s terms why an insured would want to make a “Per Stirpes” designation. *Id.*

<sup>81</sup> See *Change of Beneficiary*, N.Y. LIFE, <https://www.vsc3.newyorklife.com/VSCRegWebApp/formrep/211310911.PDF>, archived at <https://perma.cc/7U8A-NEDE>, (last visited Dec. 30, 2014).

<sup>82</sup> See *Request to Select/Change Beneficiary*, PRUDENTIAL (2014) (on file with author).

<sup>83</sup> The Metlife form includes the option to include all children, and the option to provide for the issue of deceased children, as “Optional Beneficiary Provisions and Requests” to be checked off after the decedent has already listed “Primary Beneficiaries” and “Contingent Beneficiaries.” See *Life Insurance Change of Beneficiary*, METLIFE, *supra* note 77. The Northwestern Mutual form also asks for named beneficiaries and provides that “naming a direct beneficiary is required” before it gives the option to include all children of the insured as direct beneficiaries without naming them. See NORTHWESTERN MUTUAL, DESIGNATION OF BENEFICIARIES BY OWNER FOR DEATH PROCEEDS ONLY (2014).

<sup>84</sup> UNIF. PROBATE CODE § 2-706, cmt. ex. 1 (amended 2010), 8 U.L.A. 331 (2013).

insurance policy. First, in many cases, people purchase life insurance with estate planning in mind, and come to the process thinking about beneficiaries they want to protect.<sup>85</sup> By contrast, people who open IRA or 401(k) accounts do so to provide for their own retirement, or to shelter some of their income from taxation. Filling out the beneficiary designation form is a necessary evil to be completed as quickly as possible. Second, because many retirement accounts are opened when the account holder starts a new job, the account does not yet have a significant amount of money, making it less likely that the account holder will expend effort deciphering beneficiary designation forms. Third, many account holders undoubtedly believe (mistakenly) that the beneficiary designation form is unimportant because transmission of retirement assets, like other assets, will ultimately be governed by the terms of a will or trust instrument.

In addition, the forms themselves are less likely than the life insurance forms to prompt users to designate beneficiaries in a way that accounts for potential life changes. For instance, most retirement account forms do not give account holders the option of providing for the issue of deceased designated beneficiaries.<sup>86</sup>

Two other factors exacerbate the problem with retirement account forms. First, account holders are less likely to update retirement account designations than life insurance designations, in part because they may lose track of accounts established with previous employers and in part because they assume that the accounts will pass by will. Second, state law cannot operate to protect account holders from poorly designed designations on 401(k) and 403(b) accounts, because the Supreme Court has construed ERISA to preempt state law with respect to those accounts, and has developed the “plan documents” rule, under which the form designations must be treated as conclusive in virtually all circumstances.<sup>87</sup> The Court has taken the rule so far as to require that a wife designated as a beneficiary while married to the account holder take account proceeds, despite a subsequent divorce decree that expressly provided that the

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<sup>85</sup> Individual life insurance accounts for fifty-eight percent of all life insurance policies in force in the United States in 2012. *2013 Life Insurers Fact Book*, AMER. COUNCIL OF LIFE INSURERS 63, [https://www.acli.com/Tools/Industry%20Facts/Life%20Insurers%20Fact%20Book/Documents/Life\\_Insurers\\_Fact\\_Book\\_2013\\_All.pdf](https://www.acli.com/Tools/Industry%20Facts/Life%20Insurers%20Fact%20Book/Documents/Life_Insurers_Fact_Book_2013_All.pdf), archived at <https://perma.cc/BEW6-R3D3>. By contrast group life insurance, which accounts for thirty-nine percent of life insurance policies in force is often purchased in conjunction with acceptance of a position, and the choice of beneficiary on these policies may be subject to the same inattention as beneficiary designations associated with retirement accounts. *See id.* at 65.

<sup>86</sup> *See* Sterk & Leslie, *supra* note 8, at 201–04 (providing a more complete account of the deficiencies of retirement account forms).

<sup>87</sup> *See* Kennedy v. Plan Adm’r for DuPont Sav. & Inv. Plan, 555 U.S. 285, 288 (2009).

she was “divested of all right, title, interest, and claim in and to . . . any other rights related to any . . . retirement plan.”<sup>88</sup>

#### D. Effectuating the Intent of the Incapacitated Testator

When a guardian or conservator is appointed to act on behalf of an incapacitated ward, what power does the guardian or conservator have to upset the ward’s estate plan? Even when all of the ward’s assets are probate assets, a guardian or conservator can exert some influence over distribution of those assets, but the potential for distorting the ward’s estate plan increases substantially when the ward has multiple non-probate assets.

Consider first a world where all of decedent’s assets would pass through probate. The guardian is often subject to court supervision<sup>89</sup>, which prevents some acts that would constitute an abuse of the guardian’s power. In some states, the guardian could nevertheless affect the disposition of specifically devised property by transferring that property before the decedent’s death.<sup>90</sup> In most states, however, including those that have adopted the UPC, the beneficiary of the specific devise might receive the value of that property even if the property was no longer in the decedent’s estate.<sup>91</sup> And with respect to property not specifically devised, even if the guardian spent money to meet the ward’s needs, the statutory abatement scheme would determine which beneficiaries would see their shares reduced as the size of the ward’s fortune dwindled.<sup>92</sup>

When decedent has both probate and non-probate assets, the guardian or conservator has expanded power to affect the disposition of the ward’s estate by deciding which assets the ward consumes during his lifetime, and, perhaps, by revoking or modifying the ward’s non-probate dispositions.

Consider the facts of *Estate of Strang v. Strang*, where, in 2004, the Court of Appeals of Ohio considered whether a guardian’s actions amounted to misconduct.<sup>93</sup> At the time the decedent’s daughter was appointed as his guardian, the decedent had a certificate of deposit (“CD”) at a local bank, payable on

<sup>88</sup> *Id.* at 289.

<sup>89</sup> See Karen E. Boxx & Terry W. Hammond, *A Call for Standards: An Overview of the Current Status and Need for Guardian Standards of Conduct and Codes of Ethics*, 2012 UTAH L. REV. 1207, 1235.

<sup>90</sup> See, e.g., *In re Estate of Greenamyre*, 219 S.W.3d 877, 883, 887 (Tenn. Ct. App. 2005) (holding that specific bequest was adeemed, leaving devisee without any right to proceeds, when conservator transferred property before testator’s death). The *Greenamyre* court noted that the UPC, subsequently adopted in Tennessee, was not applicable retroactively. *Id.*

<sup>91</sup> See UNIF. PROBATE CODE § 2-606(b) (amended 2010), 8 U.L.A. 263 (2013); see also, e.g., *In re Estate of Mason*, 397 P.2d 1005, 1008 (Cal. 1965); *Brown v. Labow*, 69 Cal. Rptr. 3d 417, 419 (Ct. App. 2007). Many states also hold that property transferred pursuant to a power of attorney is not adeemed if the transfer is made after an adjudication of incapacity. See *Rodgers v. Rodgers*, 406 S.W.3d 422, 423 (Ark. 2012); *In re Estate of Anton*, 731 N.W.2d 19, 28 (Iowa 2007).

<sup>92</sup> See, e.g., UNIF. PROBATE CODE § 3-902 (amended 2010), 8 U.L.A. 347–48 (2013).

<sup>93</sup> No. 03-COA-071, 2004 WL 1549685, at \*1 (Ohio Ct. App. July 12, 2004).

death to his son.<sup>94</sup> The guardian-daughter and two other daughters were residual beneficiaries under the decedent's will.<sup>95</sup> First, was the guardian entitled to, or obligated to, pay for the decedent's living expenses out of the CD? Note that if the guardian paid living expenses out of the CD, the ward's daughters benefited at the expense of the son, while if the guardian paid the same expenses out of probate assets, the son benefited at the expense of the daughter.

Second, was the guardian entitled to revoke the POD designation, or, when the CD matured, was the guardian required to renew the CD with the same designation? Again, the guardian's decision could have a significant impact on the ultimate distribution of the decedent's assets.

*Estate of Strang* generated three separate opinions. The guardian-daughter had, in fact, renewed the CD, but deleted the designation of her brother as POD beneficiary.<sup>96</sup> The opinion for the court held that at the time of the ward's death, the CD funds were estate assets, reasoning that following the finding of incompetency, the guardian obtained ownership rights to the ward's estate, including the right to designate a change in account registration.<sup>97</sup> A concurring opinion argued that, in reviewing the guardian's action, the court was required to consider the effect of the guardian's action on the ward's estate plan.<sup>98</sup> On the facts of the case, the concurring justice concluded that the trial court had not abused its discretion in finding no misconduct by the guardian, suggesting that failure to renew the POD account was somehow different from cancelling an existing POD account.<sup>99</sup> A dissenting opinion concluded that the guardian should have no authority to interfere with a ward's testamentary disposition, and would have held that the guardian had authority to withdraw funds from the POD account only if needed to support the ward during his lifetime.<sup>100</sup> Because it was conceded that the funds were not needed for that purpose, the dissenting judge would have invalidated the guardian's action.<sup>101</sup>

The law on the issues raised in *Estate of Strang* remains unsettled. The opinion for the court would appear to authorize a guardian or conservator to choose which non-probate assets should be used for the ward's needs without regard to the effect of that decision on the estate plan the ward had developed while competent. Moreover, nothing in that opinion would limit the guardian's power to transfer assets in and out of various non-probate accounts, even if the transfers were not necessary to support the ward during the ward's lifetime. If

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at \*2.

<sup>98</sup> *Id.* at \*3-4 (Wise, J., concurring).

<sup>99</sup> *Id.* at \*4.

<sup>100</sup> *Id.* (Gwin, J., dissenting).

<sup>101</sup> *Id.*

that view were to prevail, a self-interested guardian would have significant power to alter the ward's estate plan.

The opinion for the court in *Estate of Strang* appears to authorize a guardian not merely to move funds into or out of non-probate accounts, but also to revoke or modify a beneficiary designation on one of those accounts.<sup>102</sup> Section 5-407 of the UPC authorizes a court "directly or through a conservator" to "create revocable or irrevocable trusts of property of the estate which may extend beyond the disability or life of the protected person."<sup>103</sup> Although the UPC does not directly address the problem in *Estate of Strang*, a number of courts have construed their statutes to permit *judicial* modification of revocable trusts (generally on petition of a guardian or conservator).<sup>104</sup> By contrast, at least one court has held that once a guardian is appointed because of settlor's incapacity, a revocable trust created by the ward becomes irrevocable.<sup>105</sup>

Legal doctrine on this point remains in a state of flux, which leaves considerable potential that a testator's carefully framed estate plan could be undone if and when testator loses capacity and requires appointment of a guardian or conservator. Although breach of fiduciary duty claims might ultimately be available against a self-interested guardian or conservator, the cost of litigating those claims is a byproduct of the expanded use of non-probate transfers.

## II. COORDINATING FRAGMENTED ASSETS

Even if legal doctrine were reconstructed to increase the likelihood that each individual document in decedent's estate plan reflected the intent of the decedent, a problem would remain. The collection of documents that make up the estate plan, often executed at different times and under different circumstances, generates inconsistencies that would not arise if decedent's estate plan were reflected in a single instrument. This Part explores the coordination problems that arise when a decedent's estate is fragmented among a probate estate and a variety of non-probate transfers. Section A discusses the coordination that is required for proper planning during the settlor's or account holder's life.<sup>106</sup> Section B analyzes issues related to the coordination of assets after the

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<sup>102</sup> See *id.* at \*1 (majority opinion).

<sup>103</sup> UNIF. PROBATE CODE § 5-407(b)(3) (amended 2010), 8 U.L.A. 209 (2013); see also, e.g., 755 ILL. COMP. STAT. § 5/11a-18(a-5)(11) (2012) (giving Illinois probate courts the power to modify the terms of any revocable trust created by a person under guardianship).

<sup>104</sup> See, e.g., *In re Estate of Michalak*, 934 N.E.2d 697, 719 (Ill. App. Ct. 2010) (authorizing guardian to amend revocable trust created before ward was adjudicated an incompetent); *In re Guardianship & Conservatorship of Garcia*, 631 N.W.2d 464, 470 (Neb. 2001) (upholding statutory power of courts to modify, but finding no clear and convincing evidence to grant the conservator leave to amend, modify, or revoke the trust).

<sup>105</sup> *In re Guardianship of Lee*, 982 P.2d 539, 541 (Okla. Civ. App. 1999).

<sup>106</sup> See *infra* notes 108–195 and accompanying text.

testator's death, such as the estate tax liability, creditor claims against the estate, and apportionment of the estate's liabilities.<sup>107</sup>

### A. Coordination During the Life of the Settlor or Account Holder

When a decedent's estate plan involves only a will, the procedure for changing the estate plan is simple—return to a lawyer who will draft a codicil or a new will. Estate planning, even for modest estates, has become more complex. When a client has a revocable living trust, and/or one or more accounts or insurance policies that include beneficiary designations, attorneys must ensure that these vehicles are coordinated to form one coherent estate plan. Because many clients have multiple non-probate accounts, attorneys must do far more than draft and supervise the execution of a will. Now, the attorney must ensure that the client identifies all existing non-probate accounts and properly amends or revokes them, if necessary.

To complicate matters, the law governing non-probate transfers has become more complex, which can generate additional confusion for the less-than-diligent lawyer.<sup>108</sup> Within states, the rules applicable to beneficiary designations for accounts governed by state law differ depending on the nature of the non-probate asset.<sup>109</sup> In addition, recent state law changes reverse long-standing common law doctrines. Finally, certain non-probate assets are governed by federal law, which preempts, and is often inconsistent with, state law.<sup>110</sup> The complexity of the law makes it more likely that lawyers without extensive training in the nuances of estate planning will make mistakes.

Finally, it has become popular wisdom that revocable trusts are a necessary staple of every estate plan. This has facilitated a market for cheap revocable trusts, which non-attorneys are only too happy to provide. These form trusts often lead to litigation, even when lawyers provide ostensible supervision while, in fact, acting as little more than expeditors for so-called "trust mills."

Putting lawyer error aside, there are limits to what even the most diligent lawyer can do to ensure that the client dies with an integrated estate plan in place. The non-probate revolution has created opportunities for clients to disturb their estate plans outside the watchful gaze of their attorneys. For one thing, clients may fail to give an accurate list of their non-probate assets to their attorneys. Once the client's estate plan is in place, the client may acquire

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<sup>107</sup> See *infra* notes 196–273 and accompanying text.

<sup>108</sup> See, e.g., *In re Brown*, O.C. No. 1435 IV of 2003, 2005 WL 3753142, at \*1 (Pa. Ct. C.P. Dec. 29, 2005) (exemplifying the complexity of the rules, and challenges the rules present to lawyers, in a case where an attorney attempted to assign all non-probate assets to a client's trust, but failed to do so because he did not comply with individual institution's change-of-beneficiary requirements).

<sup>109</sup> See *infra* notes 121–122 and accompanying text.

<sup>110</sup> See, e.g., 29 U.S.C. § 1144(a) (2012) (providing that ERISA preempts state law).

new non-probate accounts, or may attempt to change beneficiary designations on old ones without attorney supervision. Because the beneficiary designation forms provided by financial institutions can produce counter-intuitive results, account holders' assets can pass in ways the account holder did not anticipate. The following sections elaborate on these points.<sup>111</sup>

## 1. Increased Opportunities for Attorney Error

### a. Procedure is More Complicated

When a client has multiple non-probate assets, the opportunities for attorney error multiply as well. It is critical that estate planners obtain thorough and accurate lists of the client's non-probate mechanisms, and that he or she follow the correct procedure for changing the beneficiary designation for each one. For example, in *In re Brown*,<sup>112</sup> the Court of Common Pleas of Pennsylvania considered a case where an attorney's attempt to "simplify" his client's estate plan backfired. Charlie Mae Moore Brown summoned an attorney to the hospital bed where she lay dying.<sup>113</sup> The attorney failed to obtain from the client a thorough accounting of her numerous non-probate assets.<sup>114</sup> Instead, he created a revocable living trust and a document titled "assignment," which purported to convey to the revocable trust all of Brown's "right, title and interest in and to assets of every kind," including "all 'policies' of every kind . . . regardless of whether the form of beneficiary designation otherwise required by the payor of such benefits is executed by me at any time after the date of this Assignment."<sup>115</sup> Three days after Brown signed the documents, the attorney sent her a letter stating that "many of the assets" required additional "documentation," and that the attorney intended to "procure the appropriate change of beneficiary forms from the insurance company and/or payors of retirement benefits."<sup>116</sup> The attorney then left for vacation, and Brown died.<sup>117</sup>

The successor trustee of the new revocable trust claimed ownership of Brown's joint bank accounts, life insurance policies, IRA account, 403(b) retirement account, and pension.<sup>118</sup> After two years of litigation, the court determined that the assignment did not transfer Brown's non-probate assets to the trust because Brown had made no attempt to comply with each institution's procedures for changing a beneficiary designation.<sup>119</sup> Thus, "the failure of ei-

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<sup>111</sup> See *infra* notes 112–195 and accompanying text.

<sup>112</sup> 2005 WL 3753142, at \*1.

<sup>113</sup> *Id.* at \*2.

<sup>114</sup> See *id.* at \*2–3.

<sup>115</sup> *Id.* at \*3.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at \*4.

<sup>118</sup> *Id.* at \*1.

<sup>119</sup> *Id.* at \*18–19, \*21.



ther the decedent or her attorney to track down her considerable assets, check the relevant documentation and execute change of beneficiary forms”<sup>120</sup> resulted in costly litigation and an almost total defeat of testator’s estate plan.

### b. *The Law Is More Complicated*

Ideally, attorneys would always ensure that the client executes the appropriate change of beneficiary form supplied by the financial institution holding the account. Unfortunately, attorneys can fail to follow this procedure. Instead, they might attempt to change beneficiary designations through provisions in other documents: wills, revocable trusts, divorce settlements, or prenuptial agreements. These attempts often generate litigation, and frequently result in the frustration of the account holder’s intent.

Although it is tempting to attribute this to simple attorney negligence, it is important to note that beneficiary designations on some types of accounts *can* be changed using these various methods. The law surrounding this issue is unwieldy and complex, which can generate confusion for the less-than-diligent lawyer. This complexity has three components. First, state law rules regarding beneficiary designation changes differ within states depending on the nature of the asset. For example, in Washington, a revocable trust or POD account may be revoked or amended by a provision in the account holder’s will,<sup>121</sup> while a beneficiary designation in an IRA or life insurance policy cannot.<sup>122</sup>

Second, some state rules are relatively new, and reverse long-standing common law doctrine. For example, UPC section 6-213 reverses more than a century of well-established law that permits revocation of Totten trust bank accounts by any act that manifests an intent to revoke, including oral or written statements or a provision in the account holder’s will.<sup>123</sup>

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<sup>120</sup> *Id.* at \*1.

<sup>121</sup> See WASH. REV. CODE ANN. § 11.11.020 (West 2012) (providing that beneficiary designations on non-probate assets can be changed by will); *id.* § 11.11.010 (failing to exclude POD accounts or revocable trusts from the category of non-probate assets that can be revoked by will).

<sup>122</sup> See *id.* § 11.02.005 (excluding life insurance policies from the definition of non-probate assets); *id.* § 11.11.010 (excluding IRAs from the category of non-probate assets with beneficiary designations that can be changed by will).

<sup>123</sup> See RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 7.2 (2003) (providing examples of cases where courts have considered the application of wills doctrine to will substitutes); see also RESTATEMENT (THIRD) OF TRUSTS § 26 cmt. c (2003); RESTATEMENT (SECOND) OF TRUSTS § 58 cmt. c (1959); William H. Danne, Jr., Annotation, *Revocation of Tenative (“Totten”) Trust of Savings Bank Account by Inter Vivos Declaration or Will*, 46 A.L.R.3d 487 (1972) (stating that “[v]irtually all courts adopting the Totten trust doctrine adhere to [the Restatement (Second) of Trust’s] liberal policy and recognize that a Totten trust is effectively revoked where some declaration of the depositor, regardless of form, and regardless of whether made inter vivos or in a will, sufficiently expresses or implies the existence of a revocatory intent”). The UPC provides that a savings account POD designation can be changed only by written notice delivered to the bank during the account holder’s lifetime. UNIF. PROBATE CODE § 6-213 (amended 2010), 8 U.L.A. 373 (2013).

Third, ERISA's preemption provision adds another layer of complication, because beneficiary designations attached to employer-provided accounts can never be changed by provisions in documents other than change of beneficiary designation forms.<sup>124</sup> Each of these doctrinal wrinkles generates confusion for the generalist attorney.

Perhaps the most common lawyer error is the attempt to change beneficiary designations through will or trust provisions. Until recently, it was quite clear that Totten trusts could be revoked or changed in this way—in fact, for more than a century of common law doctrine had instructed that Totten trusts can be revoked or amended by *any method* that manifests clear and convincing evidence of intent.<sup>125</sup> An attorney aware of this rule might assume that a will executed after the establishment of Totten trusts will simply operate to revoke the trusts. He or she might also assume that the rule is the same for other types of non-probate assets, such as IRAs, 401Ks, or life insurance policies. Both assumptions will lead to costly litigation.

For example, in *Araiza v. Younkin*,<sup>126</sup> an attorney had created a 2005 revocable living trust and listed the settlor's bank account, which named a payable on death beneficiary, as a trust asset, despite the fact that the California legislature had reversed the common law rule by statute more than a decade before. California Probate Code section 5303 provides that an account holder can change a beneficiary designation by only one of three methods: closing the account and reopening it under different terms, delivering a writing to the bank, or complying with the financial institution's own instructions.<sup>127</sup> Although the court strained to give effect to the account holder's intent, the litigation itself was the costly product of lawyer error.<sup>128</sup>

Similarly, in *Estate of Taylor*,<sup>129</sup> a lawyer attempted to change a divorcing client's IRA beneficiary designations through a provision in the client's will. Testator had several pre-existing nonprobate accounts, including an IRA that

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<sup>124</sup> 29 U.S.C. § 1144(a) (2012).

<sup>125</sup> See, e.g., *In re Rodgers' Estate*, 97 A.2d 789, 792 (Pa. 1953) (a will that did not refer to testator's Totten trusts nevertheless operated to revoke those trusts, when considered in light of surrounding circumstances); *Parks' Ex'rs v. Parks*, 156 S.W.2d 480, 485 (Ky. 1941) (holding that will provision was ineffective to change beneficiary because a contrary rule "would be perilous to all insurance companies"); *In re Estate of Taylor*, Nos. 63761-4-I (consolidated with 63762-2-I, 63763-1-I), 63462-3-I, 2010 WL5464751, at \*3, \*4 (Wash. Ct. App. 2010) (holding that a provision in an IRA account holder's will leaving the proceeds to his son was ineffective to change the beneficiary designation, despite his attorney's testimony that his client intended to leave everything to his son); *Suga v. Suga*, 182 N.E.2d 922, 924 (Ill. App. Ct. 1962) (finding that clear will provision changing beneficiary from wife to son was ineffective).

<sup>126</sup> 116 Cal. Rptr. 3d 315, 317 (Ct. App. 2010).

<sup>127</sup> *Id.* at 318–19; see CAL. PROB. CODE § 5303 (West 2009).

<sup>128</sup> See *Araiza*, 116 Cal. Rptr. 3d at 320.

<sup>129</sup> 2010 WL5464751 at \*1.

named his brother and sister as death beneficiaries.<sup>130</sup> The will's residuary clause created a testamentary trust to benefit his minor son.<sup>131</sup> The will provided that "the Trust shall include all my monies and properties . . . from my Charles Schwab accounts (Schwab IRA's, Schwab One, etc.) . . ." <sup>132</sup> After the testator died in a boating accident, his executor claimed that the IRA was property of the testamentary trust.<sup>133</sup> Although the court noted that there "certainly is strong evidence of William's intent to leave the Schwab IRA to his son," because he had taken no steps to comply with Schwab's procedure for changing the designation, the IRA would be distributed to the named beneficiaries.<sup>134</sup>

These problems would be minimized if statutes authorized courts to take the same approach that they take when an attorney botches a will execution. In states that have adopted UPC section 2-503, courts may overlook failure to comply with will formalities, as long as there is clear and convincing evidence that the testator intended the document to serve as her will.<sup>135</sup> The trend in wills law is to admit wills to probate when intent is clear. This rescues the client with the poor attorney.

Nevertheless, section 2-503 applies only to wills, and the UPC contains no spiritual twin that would forgive botched attempts to coordinate assets. Although courts are often willing to resort to the "substantial compliance" doctrine,<sup>136</sup> the doctrine has limited utility, because it can be invoked only in a narrow category of cases—where an account holder or settlor has attempted to comply with a financial institution or trust's procedural rules. It does not give courts broad authority to effectuate intent in other cases, even if the account holder or settlor's failure is attributable to attorney error.

<sup>130</sup> *Id.* at \*3.

<sup>131</sup> *Id.* at \*1.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at \*4.

<sup>134</sup> *See id.* at \*3. A Washington statute provided that "upon the death of an owner the owner's interest in any non-probate asset specifically referred to in the owner's will belongs to the testamentary beneficiary named to receive the non-probate asset, notwithstanding the rights of any beneficiary designated before the date of the will." WASH. REV. CODE ANN. § 11.11.020(1) (West 2012). Other statutory provisions excluded IRA and life insurance policies from this rule, however. *Id.* § 11.11.010(7)(a). The executor argued that the court had the common law power to determine that the testator had changed the beneficiary. *Id.*

<sup>135</sup> UNIF. PROBATE CODE § 2-503 (amended 2010), 8 U.L.A. 350 (2013); *see, e.g., In re Hall*, 51 P.3d 1134, 1136 (Mont. 2002); *In re Ehrlich*, 47 A.3d 12, 19 (N.J. Super. Ct. App. Div. 2012).

<sup>136</sup> In ERISA cases, federal courts have generally been more willing to apply the substantial compliance standard. *See, e.g., BankAmerica Pension Plan v. McMath*, 206 F.3d 821, 830 (9th Cir. 2000) (holding that "ERISA does not preempt the application of California's doctrine of substantial compliance"); *Harpole v. Entergy Ark., Inc.*, 197 F. Supp. 2d 1152, 1159–60 (E.D. Ark. 2002) (noting that under either state or federal law, substantial compliance doctrine would sustain an employee's attempt to change the beneficiary from his ex-wife to his son even though employee failed to provide son's social security number as required by the form); *Unum Life Ins. Co. v. Scott*, No. 3:10CV00538 (DJS), 2012 WL 1068978, at \*3–4 (D. Conn. Mar. 29, 2012); *Hartford Life Ins. Co. v. Einhorn*, 676 F. Supp. 2d 116, 135–38 (E.D.N.Y. 2009).

Divorce presents another opportunity for lawyer error. With some frequency, divorcing parties fail to consult estate-planning attorneys in conjunction with the divorce, leaving questions about distribution of property to their divorce attorneys. If the cases are any indication, a fair number of those attorneys either are insufficiently versed in estates law and ERISA's plan documents rule or view estate planning issues as outside the scope of representation. As a result, the lawyers may express their clients' intent in their property settlement agreements or divorce decrees, but may fail to change beneficiary designation forms. In states that have not adopted a version of UPC section 2-804, a provision in a divorce decree will operate to revoke a beneficiary designation *only* if a court determines that the language in the divorce decree is sufficiently precise.<sup>137</sup> The cases are inconsistent, and it is difficult to predict whether a court will find the language to be sufficiently precise to constitute a waiver.<sup>138</sup>

ERISA's preemption rules compound the opportunity for error by generalist lawyers. In *Kennedy v. Plan Administrator for DuPont Savings and Investment Plan*,<sup>139</sup> the employee's divorce lawyer made sure that the divorce decree expressly provided that his ex-wife was "divested of all right, title, interest, and claim in and to . . . any other rights related to any . . . retirement plan, pension plan, or like benefit program" existing by reason of the employee's present or future employment.<sup>140</sup> Despite this fairly clear provision, the Supreme Court held that the plan documents controlled, and that the plan administrator had properly distributed the account balance to the ex-wife.<sup>141</sup>

Another opportunity for lawyer error arises when a lawyer drafts a prenuptial agreement for a client with ERISA-governed retirement accounts. Recall that ERISA provides that upon marriage, a spouse obtains a legal right to some or all of the account holder's retirement account.<sup>142</sup> A typical prenuptial agreement will be ineffective to divest the new spouse of this right, because a waiver is effective only if the spouse executes it *after marriage*, in the pres-

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<sup>137</sup> See *Pinkard v. Confederation Life Ins. Co.*, 647 N.W.2d 85, 89, 90 (Neb. 2002) (determining that language providing that deceased spouse would "receive as his sole and separate property all right, title, and interest in his employee benefit plans" sufficient to override beneficiary designation); *Deryke v. Teets*, 702 S.E.2d 205, 208 (Ga. 2010) (same). See generally *Stribling v. Stribling*, 632 S.E.2d 291 (2006) (concluding that decree stating that the parties waive "*any interest they may have in the other party's retirement*" was sufficient to override beneficiary designation) (emphasis added).

<sup>138</sup> See *Sterk & Leslie*, *supra* note 8, at 197, 207 (discussing the way courts have treated testators' attempts to change the beneficiary designation by a provision in an agreement that is incorporated into the divorce decree).

<sup>139</sup> 555 U.S. 285, 288 (2009).

<sup>140</sup> *Id.* at 289.

<sup>141</sup> *Id.* at 288.

<sup>142</sup> See 29 U.S.C. § 1055 (2012).

ence of a notary or plan representative.<sup>143</sup> The spouse must thereafter consent to any change of beneficiary designation.<sup>144</sup> If the client's lawyer does not know that, the client's intent might be frustrated.

Yet another problem of lawyer error arises not merely from inadequate knowledge about the changing legal landscape, but from conflict of interest. Savvy financial planners have harnessed the energy of the non-probate revolution and often include revocable trusts in the package of services they sell. The disciplinary cases indicate that some of these individuals create "trust mills" that aggressively sell living trust forms as something that is necessary for everyone.<sup>145</sup> To avoid the charge that they are practicing law without a license, these individuals include a lawyer or two on their team. These lawyers place themselves in a conflict of interest position, because it is against their financial self-interest to recommend against a living trust. Worse, some function as rubber stamps instead of rendering meaningful legal advice and consultation. As a result, settlors often execute trust documents that they do not understand and that do not accomplish their purposes.

*McGovern v. Bigelow*<sup>146</sup> provides an astonishing example. After Jean Bigelow was diagnosed with leukemia, she and Ed, her husband of forty-five years, paid a fifteen-minute visit to a non-lawyer employee of a "trust services institution," who sold them a revocable living trust.<sup>147</sup> Because their goals were to avoid probate and ensure that their assets were distributed to their children, the trust agreement should have provided that the trust would become irrevocable at the death of the first spouse.<sup>148</sup> Instead, the trust provided that at the death of the first spouse, "the designation of beneficiaries or specific gifts in the Trusts created by this Declaration shall become irrevocable and not subject to amendment or modification."<sup>149</sup> Neither the employee nor the attorney who oversaw the Bigelows' execution of the trust document discussed this revocability issue with the Bigelows.<sup>150</sup> The attorney, who was retained by the trust company, had never prepared a living trust, and he offered no legal advice—he simply notarized the settlors' signatures on the documents.<sup>151</sup>

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<sup>143</sup> See *id.* at §§ 1055(c)(1)–(2), 1055(c)(2)(A)(i); see also Sterk & Leslie, *supra* note 8, at 197, 207 (providing a more detailed discussion of ERISA's waiver provisions).

<sup>144</sup> See 29 U.S.C. § 1055(c)(2)(A)(i).

<sup>145</sup> See, e.g., *Cleveland Bar Assoc. v. Sharp Estate Serv. Inc.*, 837 N.E.2d 1183, 1185–86 (Ohio 2005); *People v. Cassidy*, 884 P.2d 309, 310 (Colo. 1994); *Comm'n on Prof'l Ethics & Conduct v. Baker*, 492 N.W.2d 695, 697–98 (Iowa 1992).

<sup>146</sup> No. CO43097, 2003 WL 22229688, at \*1 (Cal. Ct. App. Sept. 29, 2003).

<sup>147</sup> *Id.*

<sup>148</sup> See *id.* at \*2.

<sup>149</sup> *Id.*

<sup>150</sup> See *id.* at \*1.

<sup>151</sup> *Id.*

The result was a disaster for the Bigelow children. Ed remarried, and revoked the trust.<sup>152</sup> The California appellate court upheld the revocation, because the trust document—an admittedly “poorly drafted hodgepodge” of “boilerplate provisions”—did not provide that the trust *itself* would become irrevocable at the death of the first spouse.<sup>153</sup> The Bigelow children paid the price for their parents’ failure to consult with competent and independent counsel.

## 2. The Limits of Attorney Control

Even the most diligent lawyer cannot ensure that a client will die with an integrated estate plan in place. Clients may forget about non-probate assets, preventing the attorney from crafting an integrated plan. After an estate plan is established, the client might “go rogue” and change beneficiary designations or acquire new accounts without consulting the attorney. These acts often result in litigation that drains value from the estate. Point (a) provides an example of the harm that can result from a client’s failure to inform his attorney of non-probate assets.<sup>154</sup> Point (b) highlights the consequences of a client independently opening new accounts or attempting to change beneficiary designations once an established estate plan is in place.<sup>155</sup> Point (c) discusses cases in which a testator or account holder failed to understand the revocation requirements for a non-probate asset, which is a common problem due to the precise procedures required by institutions.<sup>156</sup>

### a. Clients Fail to Inform Attorneys of Non-Probate Assets

Clients often fail to inform their attorneys about pre-existing non-probate assets. For example, in *Midwest Trust Company v. Ong*, the settlor had purported to transfer her home to a new trust.<sup>157</sup> Unfortunately, her attorney was unaware that she had transferred the home to a previous joint trust more than twenty years before.<sup>158</sup> As a result, the attorney did not have the settlor execute an instrument of revocation (as required by the first trust), and he allowed her to execute a deed that identified her as grantor in her personal capacity instead of as the settlor of the previous trust.<sup>159</sup> Noting that the first trust’s terms required revocation to be accomplished only by the settlor’s delivering of a writing to the trustee, the court determined that settlor’s execution of the second

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<sup>152</sup> *Id.* at \*2.

<sup>153</sup> *Id.* at \*4, \*6.

<sup>154</sup> See *infra* notes 157–161 and accompanying text.

<sup>155</sup> See *infra* notes 162–167 and accompanying text.

<sup>156</sup> See *infra* notes 168–195 and accompanying text.

<sup>157</sup> See No. 106,744, 2013 WL 310353, at \*1 (Kan. Ct. App. Jan. 18, 2013).

<sup>158</sup> *Id.* at \*3.

<sup>159</sup> See *id.* at \*2.

trust document and deed did not operate to remove the home from the first trust.<sup>160</sup> The court emphasized that “the requirements for revocation or modification were lacking because she never specified that she was acting in her capacity as grantor of the 1983 Trust when she executed the warranty deed.”<sup>161</sup>

b. *After an Estate Plan has Been Put in Place, Clients Obtain New Accounts or Change Beneficiary Designations on Old Ones Without Consulting an Attorney*

One consequence of the non-probate revolution is that clients must visit their estate planners more frequently than before. Because many of the rules of construction applicable to wills law do not extend to non-probate assets, clients who open new non-probate account without attorney consultation threaten to wreak havoc with their estate plans.

Reconsider *Estate of Taylor*, where a testator created a testamentary trust for his minor son and attempted to transfer his non-probate assets to the trust.<sup>162</sup> The testator named his brother Charles as the executor and trustee, and his father Reuben as alternative trustee.<sup>163</sup> Months after the testator executed his will, and without his attorney’s knowledge, the testator changed the beneficiary of his life insurance policies to his father Reuben, and the beneficiary designation on an IRA to his brother Charles (naming his father as alternative beneficiary).<sup>164</sup> Thereafter, he took out three new life insurances policies through his employer, and designated his brother Charles as the beneficiary and father Reuben as contingent beneficiary.<sup>165</sup> The appellate court held that compelling evidence that Taylor intended to provide for his minor son created a triable issue of fact as to whether he intended to name his father and brother as beneficiaries in their own right, or in their capacity as trustee and alternative trustee of the testamentary trust.<sup>166</sup> Accordingly, the court remanded the case for trial.<sup>167</sup>

c. *Settlors or Account Holders Misunderstand Revocation Requirements*

Many non-probate instruments specify precise procedures for revoking dispositions. Settlers or account holders, however, frequently misunderstand or ignore those procedures, resulting in litigation, and sometimes, in frustration of the estate plan.

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<sup>160</sup> *Id.* at \*5, \*7.

<sup>161</sup> *Id.* \*6.

<sup>162</sup> 2010 WL5464751 at \*1.

<sup>163</sup> *Id.* at \*2.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at \*6.

<sup>167</sup> *Id.* at \*7.

With respect to POD accounts, depositors frequently ignore statutory requirements that the bank receive a signed writing changing the designated POD beneficiary. For example, in *Jordan v. Burghbacher*, an account holder had called the bank and asked the employee to remove his ex-wife's name as the payable-on-death beneficiary of a bank account.<sup>168</sup> The evidence suggests that the employee did so, because the ex-wife's name was not listed on the account statements going forward.<sup>169</sup> There was also evidence that the account holder sent a follow-up letter confirming the change, but the bank had no record of receiving such a letter.<sup>170</sup> In awarding the ex-wife the account proceeds, the court emphasized that "[t]he question whether the account holder intended or attempted to communicate an account change order to the bank is not material under [Arizona Revised Statute] section 14-6105. It is the receipt of the written order by the bank that is material."<sup>171</sup>

In *Jordan*, and in other cases, the result is frustration of the depositor's intent.<sup>172</sup> In other cases, even if courts honor the depositor's change, that result would be achieved only after litigation dissipates the depositor's assets.<sup>173</sup>

When a settlor creates a revocable trust and names herself as trustee, she may see even less reason to worry about the formalities needed to revoke the trust. And, ordinarily, few formalities are required. The common law, and Uniform Trust Code (UTC) section 602, which largely restates it, gives courts

<sup>168</sup> See 883 P.2d 458, 461 (Ariz. Ct. App. 1994).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 464. Arizona Revised Statute section 14-6105 provided that before the death of a party, the form of an account may be changed by a written order that is signed by a party, received by the institution before the death of the party, and is not "countermanded by other written order of the same party prior to the death." See ARIZ. REV. STAT. ANN. § 14-6105 (2014).

<sup>172</sup> See *Jordan*, 883 P.2d at 464; see, e.g., *Newman v. Thomas*, 652 N.W.2d 565, 571–72 (Neb. 2002) (holding that account holder who did not follow the requirements of Nebraska's version of the multi-party accounts act did not add a POD beneficiary to his account because "[t]o construe [the relevant statute] as permissive would be to render the statute meaningless . . . . Signed written notice would simply be a nonbinding legislative suggestion."); *In re Conservatorship of Milbrath*, 508 N.W.2d 360, 364 (N.D. 1993) (reversing trial court's determination that account holder had created a POD designation by oral statement, because account holder was required to comply with North Dakota's multi-party accounts act); *In re Moore*, 97 P.3d 103, 105 (Ariz. Ct. App. 2004) (depublished) (holding that the owner of two POD accounts was required to comply with the statutory formalities in order to change the beneficiary on the accounts and the owner's failure to do so resulted in the original beneficiary receiving the proceeds when the owner died); *Childs v. First Nat'l Bank of Pickens Cnty.*, 410 S.E.2d 17, 18 (S.C. Ct. App. 1991) (holding that South Carolina's adoption of UPC § 6-212 repudiates common law, and account holder must comply with statute to effectively change form of bank account); *In re Wolfinger*, 793 P.2d 393, 396 (Utah Ct. App. 1990) (determining that account holder's oral request to remove daughter's name from his bank account was ineffective, because compliance with Utah's multi-party account statute was mandatory).

<sup>173</sup> See, e.g., *West Greeley Nat'l Bank v. Wygant*, 650 P.2d 1339, 1340 (Colo. App. 1982) (honoring a change of POD beneficiary made when a bank employee, at the request of the depositor, simply crossed out the old beneficiary's name and inserted the name of depositor's new wife).



wide leeway to effectuate settlors' intentions.<sup>174</sup> Section 602 provides that a settlor may revoke or amend a revocable trust by substantially complying with the trust instrument's requirements for amendment or revocation, or, if the trust instrument is silent, by any method that manifests clear and convincing evidence of intent.<sup>175</sup>

Problems arise, however, when the trust instrument includes a procedure for revoking or amending trust provisions, usually designed to reduce the possibility of litigation at the settlor's death. Unfortunately, settlors frequently disregard these directives, and attempt to revoke trusts through their informal writings<sup>176</sup> or wills.<sup>177</sup> When this occurs, courts vary in their willingness to effectuate intent. For example, in *In re Estate of McCreath*,<sup>178</sup> the Colorado Court of Appeals considered a case where the settlor had named herself and her daughter as co-trustees of a trust into which she transferred real property. The trust instrument instructed that only a writing delivered to the trustees could revoke it.<sup>179</sup> The settlor later executed a will purporting to revoke the trust and showed the will to her daughter.<sup>180</sup> Nevertheless, the court determined that a "will" was not an "instrument" within the meaning of the trust, because it did not become operative until the testator's death.<sup>181</sup> In so holding, the court emphasized that "[i]f a trust agreement provides a specific method for revocation, that method must be strictly adhered to in order [to] revoke the trust."<sup>182</sup>

Because revocable trust settlors often treat trust assets as their own, litigation issues arise when they attempt to transfer trust property. First, is the transfer effective at all if the settlor does not identify herself as trustee of the trust? For example, in *McCreath*, the settlor also executed a quitclaim deed from her-

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<sup>174</sup> See UNIF. TRUST CODE § 602(c) (amended 2010).

<sup>175</sup> See *id.* Section 602(c), which mirrors the common law, provides: "(c) The settlor may revoke or amend a revocable trust: (1) by substantial compliance with a method provided in the terms of the trust; or (2) if the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by: (A) a later will or codicil that expressly refers to the trust or specifically devises property that would otherwise have passed according to the terms of the trust; or (B) any other method manifesting clear and convincing evidence of the settlor's intent." See *id.*; see also FLA. STAT. ANN. § 736.0602 (West 2010); VA. CODE ANN. § 64.2-751 (2012); RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 7.2 (2003); RESTATEMENT (THIRD) OF TRUSTS § 63 cmt. h (2003).

<sup>176</sup> See, e.g., *In re Daoang*, 953 P.2d 959, 960 (Haw. Ct. App. 1998) (holding that where trust required that amendment be made by an instrument signed by both the settlor and the trustee, settlor/trustee's letter to co-trustee was sufficient to substantially comply with trust directives).

<sup>177</sup> See, e.g., *In re Lowry*, 418 N.E.2d 10, 16 (Ill. App. Ct. 1981) (holding that the settlor/trustee had complied with trust directives because her will constituted a "writing" that was "delivered" to herself as trustee).

<sup>178</sup> 240 P.3d 413, 416 (Colo. App. 2009).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 421.

<sup>182</sup> *Id.* at 418.

self “as trustee” to her daughter.<sup>183</sup> The court affirmed the trial court’s determination that the deed was ineffective to transfer ownership: because the mother was the settlor, she did not “own” the trust estate, and because she was co-trustee, she could not transfer title without acting jointly with the co-trustee (her daughter, to whom she conveyed the trust property).<sup>184</sup>

Second, if the transfer itself was effective, did the transfer revoke the trust, or are the assets the settlor received in return still subject to the trust? In *Heaps v. Heaps*, a husband and wife had transferred the title to their home to a joint revocable trust, but neglected to record the deed.<sup>185</sup> They later sold the home, taking a note in the names of “George and Barbara Heaps as joint tenants.”<sup>186</sup> After Barbara’s death, George transferred the note to a new revocable trust he created with his second wife.<sup>187</sup> At George’s death, his second wife claimed ownership of the note, arguing that the point of the revocable trust was to enable the settlor to deal with his assets easily while avoiding probate.<sup>188</sup> George’s children with Barbara argued that the note was property of the first trust, and the court agreed, relying on two trust provisions: the first allowed revocation only by a instrument of revocation delivered to the trustee; the second stated that trust property would remain trust property regardless of how title was taken.<sup>189</sup>

Cases like *McCreath* and *Heaps* indicate that settlors do not understand the consequences of holding property in a revocable trust, and their failure to understand makes it difficult to determine what their transactions were designed to accomplish, thereby threatening the integrity of their estate plans. Perhaps the most common misunderstanding about revocation is the commonsense and intuitive belief that one can revoke a non-probate transfer by will. This belief has upset many an estate plan. Although a number of states do allow an explicit provision in a will to revoke some non-probate transfers, statutes in other states preclude that result. UPC section 6-213 prohibits changes in POD designations by will or trust, and many courts have been reluctant to hold that a depositor’s trust agreement or will can alter a POD designation.<sup>190</sup> Most

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<sup>183</sup> *Id.* at 416.

<sup>184</sup> *Id.* at 421–22.

<sup>185</sup> *Heaps v. Heaps*, 21 Cal. Rptr. 3d 239, 241 (Dist. Ct. App. 2004).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 242.

<sup>188</sup> *See id.* at 242, 243.

<sup>189</sup> *Id.* at 243.

<sup>190</sup> *See, e.g., Estate of Burks v. Kidd*, 100 P.3d 328, 330, 331 (Wash. App. 2004) (holding that testator’s will, which stated that certain joint accounts were created for convenience only and specifically bequeathed them, was inadequate to do so, notwithstanding a Washington statute that authorized testators to override beneficiary designations by will); *Moore*, 97 P.3d at 105 (holding that owner of two POD accounts did not revoke the POD designations by executing a declaration of trust, declaring herself trustee of the accounts and assigning the accounts to her trust).

states do not allow life insurance policy<sup>191</sup> or IRA beneficiary designations<sup>192</sup> to be revoked by will. This is a case, then, where the law is inconsistent with lay expectations. Because the non-probate system relies less heavily on legal advice than does the probate system, non-probate transfers present a greater risk of frustrating intention.

To compound the problem, many courts have refused to take a substantial compliance approach when a settlor or account holder attempts to revoke a trust or beneficiary designation. Although UTC section 602 directs courts to adopt a substantial compliance approach in determining whether a revocable trust settlor has complied with the trust's instructions for revocation,<sup>193</sup> many courts insist that the settlor strictly adhere to the procedure set forth in the trust instrument.<sup>194</sup> Some states have recently adopted rather rigid statutory requirements for amending or revoking *all* revocable trusts.<sup>195</sup> With respect to POD accounts, the trend is

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<sup>191</sup> See RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 32.4 (1992); Wanda Ellen Wakefield, Annotation, *Effectiveness of Change of Named Beneficiary of Life or Accident Insurance Policy By Will*, 25 A.L.R. 4th 1164 (1983); *Parks Ex'rs*, 444 156 S.W.2d at 485 (holding that will provision was ineffective to change beneficiary because a contrary rule "would be perilous to all insurance companies"); *Suga*, 182 N.E.2d at 924 (finding that clear will provision changing beneficiary from wife to son was ineffective); *Union Cent. Life Ins. Co. v. MacBrair*, 31 N.E.2d 172, 173, 174 (Ohio Ct. App. 1940) (holding that insured's act of signing a writing with instructions to add a beneficiary, having a witness sign the document, attaching the document to the life insurance policy and keeping it in a locked box was insufficient to change the designation). *But see Allen v. First Nat'l Bank of Fort Smith*, 547 S.W.2d 118, 121 (Ark. 1977) (recognizing that a will provision clearly identifying the insurance policy can be effective to change the beneficiary); *Conn. Gen. Life Ins. Co. v. Peterson*, 442 F.Supp. 533, 537 (W.D. Mo.1978) (giving effect to will provision changing life insurance beneficiary designation to effectuate intent).

<sup>192</sup> *See, e.g., In re Estate of Taylor*, No. 63761-4-1, 2010 WL 5464751, at \*4 (Wash. Ct. App. Dec. 20, 2010); *McCarthy v. Aetna Life Ins. Co.*, 704 N.E.2d 557, 559 (N.Y. 1998); *Sterk & Leslie*, *supra* note 8, at 192-93 (collecting cases).

<sup>193</sup> UNIF. TRUST CODE § 602 (amended 2010).

<sup>194</sup> *See, e.g., McCreath*, 240 P.3d at 418 (holding that a will provision ordering revocation of a trust did not comply with trust's instructions for revocation); *Conn. Gen. Life Ins. Co. v. First Nat'l Bank of Minneapolis*, 262 N.W.2d 403, 405, 406 (Minn. 1977) (same); *In re Estate of Sanders*, 929 P.2d 153, 162 (Kan. 1996) (same); *In re Estate of Kovalyshyn*, 343 A.2d 852, 857 (Hudson County Ct. 1975) (same).

<sup>195</sup> *See, e.g., ALA. CODE* § 19-3B-602 (2007) (curiously, providing that a revocable trust can be revoked by any method, except that a "written" revocable trust can be revoked only by a later writing that is delivered to the trustee); *ALASKA STAT.* § 13.36.340 (2012) (allowing revocation only by a writing signed by the settlor and delivered to the trustee during the settlor's lifetime, unless the trust otherwise provides); *CAL. PROB. CODE* § 15401 (West Supp. 2014) (providing that a trust may be revoked by complying with the process set forth in the trust or, if that process is not exclusive or if the trust is silent, by a writing, other than a will, signed by the settlor or other person holding the power of revocation and delivered to the trustee); *N.Y. EST. POWERS & TRUSTS LAW* §§ 7-1.16-.17 (McKinney Supp. 2014) (allowing revocation only by a writing that complies with formalities or an express provision in testator's will); *20 PA. CONS. STAT.* § 7752(c)(2) (2010) (directing that a trust can be revoked "by a later writing, other than a will or codicil, that is signed by the settlor and expressly refers to the trust or specifically conveys property that would otherwise have passed according to the trust instrument"); *MONT. CODE ANN.* § 72-38-602 (2013) (providing that a trust can be revoked by a writing delivered to the trustee that manifests clear and convincing evidence of the settlor's intent); *WASH.*

toward replacing intent-effectuating approaches with black letter rules that prioritize administrative efficiency. Many courts have interpreted UPC section 6-213 as overturning common law to set forth the exclusive procedure for changing a POD designation. And, of course, the Supreme Court's ERISA decisions ensure that account holders' intentions will be frustrated in a broad swath of cases.

### B. Coordination of Assets After Death

Fragmentation of decedent's assets—a consequence of the non-probate revolution—generates a related set of problems after the decedent's death. First, who is liable for federal and estate taxes? Second, against which assets do creditors have claims? Third, who is responsible for coordinating assets to make sure that liability for taxes and debts is allocated appropriately? As Professor Langbein cautioned, lawyer-drafters must anticipate these problems before death.<sup>196</sup> The evidence, however, suggests that many lawyers are having difficulty navigating the system—in part because of doctrinal confusion that remains even thirty years after publication of Langbein's article. Subsection 1 examines the liability for estate taxes both when the governing instruments are silent and when one or more of the governing instruments address estate tax liability.<sup>197</sup> Subsection 2 examines the liability of non-probate beneficiaries for decedent's debts and estate expenses.<sup>198</sup> Subsection 3 explores absence of clear responsibility for coordinating estate assets and liabilities in situations where there are both probate and non-probate assets.<sup>199</sup>

#### 1. Liability for Estate Taxes

For federal estate tax purposes (and for state estate-tax purposes in at least some states), decedent's estate includes not only the probate estate but also a variety of non-probate transfers. Unfortunately, neither federal nor state law is entirely clear on how liability should be apportioned among the recipients of some of these transfers. Moreover, although federal and state law give decedents considerable latitude to specify who should bear tax liability, what specification is adequate to overcome default allocations remains fraught with confusion. Point (a) addresses liability for estate taxes when the governing instru-

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REV. CODE ANN. § 11.103.030(3) (West Supp. 2014) (directing that unless the trust instrument expressly provides, a revocable trust can be revoked or amended by a later will or a written instrument signed by the trustor).

<sup>196</sup> See Langbein, *supra* note 1, at 1140.

<sup>197</sup> See *infra* notes 200–237 and accompanying text.

<sup>198</sup> See *infra* notes 238–263 and accompanying text.

<sup>199</sup> See *infra* notes 264–273 and accompanying text.

ments are silent on that issue.<sup>200</sup> Point (b) discusses the effect of language in the dispositive instruments.<sup>201</sup>

### a. *Liability When the Dispositive Instruments Are Silent*

When decedents transmitted most of their assets through the probate estate, the respective roles of state and federal law were relatively clear: federal law governed how much estate tax was due, and state law governed how the tax would be apportioned among the estate's beneficiaries. With the growth of testamentary substitutes, the roles of state and federal law have become muddier. The Internal Revenue Code (the "Code") makes explicit provisions for some non-probate transfers, but not others, and state law about the tax liability of beneficiaries of non-probate transfers is not always clear.

Consider a decedent whose assets pass entirely through probate. Section 2002 of the Code imposes on the estate's executor or administrator the obligation to pay the estate tax.<sup>202</sup> Federal law, however, does not control which of the estate's beneficiaries pay the tax; that is an issue on which state law controls.<sup>203</sup> Unlike debts, which most states treat as an expense of the estate, to be borne by the estate's residuary beneficiaries, states overwhelmingly provide for apportionment of estate taxes among the estate's beneficiaries. For instance, if a decedent had an estate valued at \$7 million, and a will leaving \$1 million to her grandchildren and the balance to her children, state apportionment statutes would require that one-seventh of the estate tax due be subtracted from the grandchildren's \$1 million share.<sup>204</sup> Testator could alter that distribution of the tax burden by including in her will a "direction against apportionment." This would reduce the size of the residuary estate and leave the grandchildren's \$1 million intact. A single provision in a single document operates to control allocation of the tax burden among estate beneficiaries.

Now, consider a decedent whose estate also includes a life insurance policy, a 401(k) account, an IRA, a revocable trust, and a POD bank account. All of those assets will be included within decedent's taxable estate. Federal law is no longer silent on allocation of the tax burden. Section 2206 of the Code requires that the beneficiaries of the life insurance policy bear a proportionate

<sup>200</sup> See *infra* notes 202–226 and accompanying text.

<sup>201</sup> See *infra* notes 227–237 and accompanying text.

<sup>202</sup> 26 U.S.C. § 2002 (2012) ("The tax imposed by this chapter shall be paid by the executor."); see *id.* § 2203 (defining executor to mean "the executor or administrator of the decedent, or, if there is no executor or administrator appointed, qualified, and acting within the United States, then any person in actual or constructive possession of any property of the decedent").

<sup>203</sup> See *Riggs v. Del Drago*, 317 U.S. 95, 97–98 (1942) (holding, in part, that "applicable state law as to the devolution of property at death should govern the distribution of the remainder and the ultimate impact of the federal tax").

<sup>204</sup> See, e.g., CAL. PROB. CODE § 20110 (West 2011); N.Y. EST. POWERS & TRUSTS LAW § 2-1.8 (McKinney 2012).

share of the total estate tax.<sup>205</sup> Section 2207B requires that the beneficiaries of the revocable trust bear a proportionate share of the tax burden.<sup>206</sup> By contrast, the Code includes no comparable provisions governing IRAs, 401(k)s or POD accounts.

As Professor Ira Bloom has persuasively argued, relying on legislative history and statutory purpose, sections 2206 and 2207B appear to preempt state apportionment law with respect to transfers covered by those statutes.<sup>207</sup> But the general assumption has been that state law governs apportionment of tax liability among non-probate beneficiaries not covered by those statutes. That assumption derives from the Supreme Court's 1942 decision in *Riggs v. Del Drago*, in which the Court concluded that state law governs with respect to apportionment of tax liability among probate beneficiaries not expressly covered by federal statute.<sup>208</sup> The issue in *Riggs* was whether the predecessor of section 2206 preempted a New York statute apportioning tax liability among beneficiaries of decedent's probate estate.<sup>209</sup> The Court found no preemption.<sup>210</sup> But *Riggs* did not involve a claim against the beneficiaries of non-probate transfers.<sup>211</sup> Despite language in the opinion that might be read to limit the holding to statutes apportioning the probate estate,<sup>212</sup> the opinion is almost universally read to permit state law to apportion liability among probate and non-probate transfers unless the Code expressly directs otherwise.

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<sup>205</sup> 26 U.S.C. § 2206.

<sup>206</sup> Section 2207B mandates apportionment against the beneficiaries of "property included in the gross estate by reason of section 2036 (relating to transfers with retained life estate)." *Id.* § 2207B. Revocable trusts are included within the gross estate both by reason of section 2036 and by reason of section 2038. See *In re Estate of Meyer*, 702 N.E.2d 1078, 1081 n.3 (Ind. Ct. App. 1998); I.R.S. Tech. Adv. Mem. 1999-15-001 (Apr. 16, 1999).

<sup>207</sup> See Ira Mark Bloom, *Unifying the Rules for Wills and Revocable Trusts in the Federal Estate Tax Apportionment Arena: Suggestions for Reform*, 62 U. MIAMI L. REV. 767, 786-800 (2008). By contrast, the drafters of the 2003 Uniform Estate Tax Apportionment Act took the position that the statutes do not have preemptive effect. See UNIFORM ESTATE TAX APPORTIONMENT ACT § 3 (revised 1984), 8B U.L.A. 269-70 (2003). That position, however, appears difficult to justify in light of statutory language and history.

<sup>208</sup> 317 U.S. at 97-98.

<sup>209</sup> *Id.* at 96.

<sup>210</sup> *Id.* at 102.

<sup>211</sup> See *id.* at 97.

<sup>212</sup> In explaining why federal statutes dealing with life insurance and property over which decedent holds a power of appointment did not have preemptive effect, the Court wrote:

But these sections deal with property which does not pass through the executor's hands, and the Congressional direction with regard to such property is wholly compatible with the intent to leave the determination of the burden of the estate tax to state law as to properties actually handled as part of the estate by the executor.

*Id.* at 102 (emphasis added). In other words, the Court's rationale for holding that the federal statute did not preempt state law rested, at least in part, on the fact that the federal statutes dealt with property that did not pass through the estate. See *id.*

Not every state apportions estate tax liability against beneficiaries of POD and “transfer on death” (“TOD”) accounts.<sup>213</sup> For instance, in *Estate of Sheppard v. Schleis*, the Wisconsin Supreme Court held that the beneficiary of POD accounts and TOD accounts did not have to pay any share of decedent’s estate tax bill.<sup>214</sup> There, the decedent died intestate with an estate valued at \$12 million.<sup>215</sup> The decedent had also established a POD account and a TOD account, worth a total of \$3.8 million, naming his goddaughter as beneficiary.<sup>216</sup> The estate sought reimbursement from the goddaughter for estate taxes paid by the estate.<sup>217</sup> The court acknowledged that many states have statutes requiring beneficiaries of non-probate transfers to pay a share of estate tax liability, but noted that Wisconsin had no statute directing apportionment.<sup>218</sup> In the absence of federal or state statute, the court declined to recognize an equitable apportionment principle that would require contribution from the beneficiary of POD and TOD accounts.<sup>219</sup>

*Estate of Sheppard* presumably settles the law in Wisconsin (absent subsequent statutory enactments), but the same issue remains open in other states where the issue has not been explicitly resolved by statute or authoritative court decision. Moreover, choice-of-law problems sometimes compound the confusion. For instance, in *Estate of McGathy*, the Court of Appeals of Arizona held that state law applied to the apportionment of estate tax liability.<sup>220</sup> In that case, an Arizona decedent had executed her will ten years before her death in her then-domicile, New York.<sup>221</sup> New York, but not Arizona, provided for apportionment of estate tax liability against non-probate transfers.<sup>222</sup> Decedent’s will was silent about apportionment, and decedent died with a life insurance policy, an annuity contract, and a residence held in joint tenancy.<sup>223</sup> The court concluded that Arizona law applied, and held that the residuary estate should bear all estate tax liability.<sup>224</sup> The court rejected the estate’s argument that, at the time she wrote her New York will, the decedent expected that New York apportionment law would apply.<sup>225</sup> It also declined to address the liability of

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<sup>213</sup> See *Estate of Sheppard v. Schleis*, 782 N.W.2d 85, 88 (Wis. 2010).

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 89.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 94.

<sup>219</sup> *Id.* at 96.

<sup>220</sup> No. 1 CA-CV 09-0022, 2011 WL 3300393, at \*3 (Ariz. Ct. App. Aug. 2, 2011).

<sup>221</sup> *Id.* at \*1.

<sup>222</sup> *Id.* at \*2.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at \*3.

<sup>225</sup> *Id.*

the life insurance beneficiaries under federal law—because neither party’s lawyers raised the issue!<sup>226</sup>

### b. *The Effect of Language in Dispositive Instruments*

Federal and state statutory provisions furnish default rules for apportionment of estate tax burdens, but those default rules are always subject to override by express language in decedent’s dispositive instrument or instruments.<sup>227</sup> When decedent’s property passes entirely through probate, a simple clause in testator’s will can deal with the apportionment problem.

The ascendancy of non-probate transfers does not preclude a properly advised decedent from allocating estate tax burdens as she sees fit. But at least three separate, but sometimes related, problems make frustration of decedent’s wishes (not to mention expensive litigation) more likely. First, too many lawyers still do not understand the interplay between non-probate and probate transfers, and fail to draft appropriately. Second, because, as Professor Langbein observed, distribution of property now proceeds through multiple “wills” rather than one, conflict among the documents becomes a more significant problem.<sup>228</sup> Third, even if a lawyer engages in impeccable drafting, an uncounseled client may undo the lawyer’s efforts by making non-probate transfers not anticipated by the lawyer.

Consider first the drafting issues facing a testator who wants to make sure that the entire tax is borne by the residuary beneficiary of her probate estate rather than other will beneficiaries or beneficiaries of non-probate transfers. Directing that estate taxes be treated as an expense of the estate, or be paid out of the residue—a strategy used by some lawyers—is problematic because there may be no residue, leading to litigation about the testator’s probable intent.<sup>229</sup> Moreover, even if the estate would be sufficient to pay the taxes, courts have occasionally concluded that the direction is not precise enough to avoid appor-

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<sup>226</sup> *Id.* at \*2, n.3.

<sup>227</sup> For instance, in *Rosen v. Wells Fargo Bank Texas, N.A.*, the drafter provided that taxes “shall be paid out of the residue of my estate without apportionment.” 114 S.W.3d 145, 148 (Tex. App. 2003).

<sup>228</sup> See Langbein, *supra* note 1, at 1109.

<sup>229</sup> See, e.g., *Rosen*, 114 S.W.3d at 150 (will stated that estate taxes “shall be paid out of the residue of my estate without apportionment” and provided that in the absence of a residue, the court should apportion liability among probate assets and beneficiaries of life insurance policies and gift to minors account); *In re Wesey*, No. 342395, 2007 WL 1702514, at \* 1 (Surr. Ct. June 8, 2007) (will directed executor “to pay from my residuary estate all estate, transfer, inheritance, succession or other death taxes . . . upon or in respect of all property, whether passing under or outside this Will, includable as part of my gross estate for the purpose of computation of any such taxes” and provided that, if residue of estate were insufficient to pay taxes, residuary beneficiary of revocable trust would pay tax, instead of apportioning tax among will beneficiaries).



tionment.<sup>230</sup> Conversely, if the direction is too precise—for instance, by explicitly stating that a non-probate asset is to be excused from bearing a share of the tax burden—at least one court has concluded that the failure to name another non-probate asset justified an inference that testator intended apportionment against that other asset.<sup>231</sup>

Next, consider the conflicts that arise when a decedent has engaged in estate planning that includes both a will and a revocable trust. Typically, those documents will have been drafted at the same time, and coordinated with one another. But, even then, the potential for conflict exists. *Estate of Thornhill v. Bloom* is illustrative.<sup>232</sup> On the same day, testator executed a trust agreement and a “pour over will.”<sup>233</sup> The will provided that inheritance taxes should “be paid out of and be charged generally against the principal of my residuary estate without reimbursement from any person.”<sup>234</sup> The trust agreement, by contrast, included no comparable language about estate taxes, but did provide that “the Trustee may, in the Trustee’s discretion, pay, out of the trust, the debts of the Grantor, the estate and inheritance Taxes, . . . arising because of the Grantor’s death . . . . The Trustee may pay any such taxes directly or . . . distribute such sums to the Personal Representative as shall be necessary to pay all or any portion of such taxes.”<sup>235</sup> Relying on language in the will indicating that the probate assets were to be distributed in accordance with the terms of the trust, the court concluded that the trust language controlled, and that estate taxes should therefore be apportioned.<sup>236</sup>

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<sup>230</sup> See, e.g., *Pleska v. Zakutansky*, 459 N.E.2d 745, 749 (Ind. Ct. App. 1984) (where will directed that estate taxes be paid out of the corpus of the estate, court nevertheless apportioned against joint bank account after holding that the specificity of testator’s general bequests “support[ed] a determination that he did not intend for his probate estate to be exhausted by the payment of taxes on the non-probate assets.”). Moreover, litigation has arisen over the sufficiency of the will’s language even in those cases where the court ultimately sustains the direction. See *Peterson v. Masye*, 993 S.W.2d 217, 220–22 (Tex. App. 1999) (where will directed payment of death taxes out of estate and defined death taxes to include “estate, inheritance, and succession taxes . . . which are assessed by reason of my death[.]” estate beneficiaries argued that language was insufficient because it did not explicitly exonerate non-probate property from the burden of death taxes, but the court determined testator’s clear intent was to pay all death taxes out of residuary probate estate).

<sup>231</sup> See *Patrick v. Patrick*, 182 S.W.3d 433, 435, 438 (Tex. App. 2005) (where will directed taxes payable by reason of death to be charged against and paid out of testator’s estate, and provided explicitly that “[n]o contribution for any of the above taxes upon the proceeds of any insurance policy on my life shall be made by the beneficiary . . . of any such insurance policy,” court relied on exclusion of life insurance to hold that will’s direction did not exclude IRA accounts from paying a share of estate tax).

<sup>232</sup> No. 02A04-0908-CV-489, 2010 WL 1222757 (Ind. Ct. App. 2010).

<sup>233</sup> *Id.* at \*1, \*3.

<sup>234</sup> *Id.* at \*3.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at \*7; see *Blanton v. PNC Bank, N.A.*, No. 2010-CA-001142-MR., 2011 WL 3862788, at \*2, \*9 (Ky. Ct. App. Jan. 10, 2012) (struggling to reconcile language of will with language of trust instrument executed simultaneously).

Finally, consider the impact of events beyond the control of the estate-planning lawyer. While the lawyer can coordinate a will and a revocable trust, the lawyer often has less control over other non-probate transfers. For instance, a client may acquire retirement accounts, or POD bank or brokerage accounts, without any lawyer participation. If the lawyer's inquiries do not lead her to discover the existence of these accounts, the resulting estate plan might not reflect the client's wishes about who should bear tax burdens. If the lawyer drafts a will providing that all estate taxes should be treated as an expense of the probate estate, and in fact the bulk of the client's assets are held in IRA or POD accounts, general and specific legatees may be wiped out—frustrating the decedent's likely intent.<sup>237</sup> Of course, a careful lawyer will generally be in a position to uncover any accounts the client has at the time of the consultation, but the lawyer has no control over future actions of the client (including opening new brokerage accounts or changing beneficiaries on existing retirement or brokerage accounts) that would undermine the purpose of the will's directions on tax apportionment.

None of these problems existed at a time when the probate process was dominant and a single will operated to govern most succession questions.

## 2. Liability for Decedent's Debts and Estate Expenses

If all of decedent's assets pass through her probate estate, apportionment of liability for creditor claims is straightforward. Most default abatement rules provide that residuary devises abate before general devises, which abate before specific devises. Apportionment of liability becomes significantly more complicated, and uncertain, when a decedent dies with a variety of non-probate assets. Point (a) discusses the apportionment of liability for the decedent's debts and estate expenses under state law and examines the effect on revocable trusts, POD accounts, and TOD accounts.<sup>238</sup> Point (b) examines the liability of beneficiaries of a decedent's IRA for decedent's debts and estate expenses.<sup>239</sup> Point (c) considers the liability of beneficiaries of retirement accounts covered by ERISA.<sup>240</sup> Point (d) explores the difficulties faced by drafters who wish to depart from the default regime.<sup>241</sup>

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<sup>237</sup> Cf. *In re Poffenbarger*, 961 N.Y.S.2d 731, 735 (Surr. Ct. 2013) (where decedent's will included direction against apportionment, court found charitable remainder beneficiary bore entire tax burden, while wife, who was not a beneficiary under the will but the named beneficiary of two IRA accounts, took accounts free of tax liability).

<sup>238</sup> See *infra* notes 242–248 and accompanying text.

<sup>239</sup> See *infra* notes 249–254 and accompanying text.

<sup>240</sup> See *infra* notes 255–262 and accompanying text.

<sup>241</sup> See *infra* note 263 and accompanying text.

a. *State Law: Revocable Trusts, POD Accounts, and TOD Accounts*

Suppose decedent, a widow, dies with a will naming her daughter as executor, and leaving all of her property to her two children. In addition, she had a revocable trust and two POD accounts. The revocable trust and one of the POD accounts names her long-time companion as the primary beneficiary; the other POD account names the children. If decedent died with significant debts, how should liability for those debts be apportioned? To exempt the non-probate transfers from all liability for creditor claims would enable debt evasion by any decedent with the resources to obtain adequate counseling. Not surprisingly, not even the most debtor-friendly states have been willing to adopt that approach.

If the non-probate assets are available to satisfy creditor claims, when should they be available—in all cases where the decedent left debts or expenses, or only in those cases where the probate estate is insufficient to satisfy decedent's obligations? The UPC and the UTC, following the prevailing approach,<sup>242</sup> hold the beneficiaries of non-probate transfers liable for decedent's debts only if the probate estate is insufficient to satisfy those debts,<sup>243</sup> or if the will or some other dispositive instrument directs apportionment of liability.<sup>244</sup>

UPC section 6-102 provides a comprehensive approach to creditor claims against non-probate property. The statute starts by defining non-probate transfer to include all transfers effective at the transferor's death to the extent that the transferor had the power, immediately before death, to revoke the transfer and use the property for the benefit of the transferor or her estate.<sup>245</sup> The expansive statutory definition encompasses revocable trusts and POD and TOD accounts. The statute then provides that "[e]xcept as otherwise provided by statute," the transferee of any non-probate transfer is liable to the probate estate for claims against the estate to the extent that the estate is insufficient to satisfy those claims.<sup>246</sup> Finally, the UPC provides an order or priority: first, claims should be paid by any non-probate transferee designated in the governing instrument, second, by a trust serving as "the principal non-probate instrument in the decedent's estate plan," typically but not inevitably the trust designated as the residuary beneficiary of decedent's pour-over will, and third, by

<sup>242</sup> See, e.g., CAL. PROB. CODE § 19001 (West 2011) (property subject to power of revocation at time of decedent's death is subject to creditor claims "to the extent that the deceased settlor's estate is inadequate to satisfy those claims"); *In re Estate of Martin*, 686 N.Y.S.2d 195, 197 (App. Div. 1999) (holding that creditors may reach non-probate assets upon proof that decedent's estate is insolvent).

<sup>243</sup> UNIF. PROBATE CODE § 6-102(b) (amended 2010), 8 U.L.A. 357 (2013); UNIF. TRUST CODE § 505(a)(3) (amended 2010).

<sup>244</sup> UNIF. PROBATE CODE § 6-102(e), 8 U.L.A. 357; UNIF. TRUST CODE § 505(a)(3).

<sup>245</sup> UNIF. PROBATE CODE § 6-102(a), 8 U.L.A. 357. The formulation explicitly excludes one form of non-probate transfer: the "transfer of a survivorship interest in a joint tenancy of real estate." *Id.*

<sup>246</sup> *Id.* § 6-102(b), 8 U.L.A. 357. The statute also subjects beneficiaries of non-probate transfer to claims for the UPC's statutory allowances to decedent's spouse and children.

other non-probate transferees in proportion to the value received.<sup>247</sup> Under the UPC, then, if decedent dies with probate property valued at \$50,000, a revocable living trust whose value at death was \$100,000, a POD account valued at \$50,000, and \$100,000 in debts, the beneficiaries of the probate estate would take nothing, the beneficiaries of the revocable trust would take \$50,000 of the trust property, and the POD account beneficiary would be unaffected by creditor claims.

The UPC's scheme will generally operate effectively for any estate planned by a capable lawyer, but has the potential to frustrate the wishes of a decedent with less competent counsel or none at all. If the decedent or a lawyer with marginal estate planning experience drafts a will without recognizing that the will may be ineffective to distribute non-probate assets, the UPC's scheme assures that creditor claims will be paid from the probate estate, even though the decedent assumed that a later-drafted will would supersede any (potentially stale) designations previously made on a bank or brokerage, or retirement account. So, for instance, if decedent established a brokerage account naming her mother as a POD beneficiary, and then, ten years later, executed a will leaving all of her property to her husband, debts and estate expenses would be borne by the husband, not the mother (unless the debts exceeded the value of the probate estate, triggering a right to reach non-probate assets).<sup>248</sup> In a world where all assets passed through the probate process, this problem would not have arisen.

The UPC's scheme also undermines common abatement rules (including the UPC's) that give priority to specific devises over general devises and accord last priority to residuary devises. For instance, if decedent writes a will leaving all of her jewelry and other personal property to her children, and the remainder of her estate to her husband, the husband, as residuary beneficiary, would bear the cost of any debts unless the debt exceeded the value of the residuary estate. By contrast if the decedent writes the same will, and holds \$100,000 in a POD account naming the husband as beneficiary, UPC section 6-102 would require the children to relinquish their specifically devised property before the husband would have to relinquish any of the POD account. If one believes that the abatement rules, developed by courts and legislatures

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<sup>247</sup> *Id.* § 6-102(c), 8 U.L.A. 357.

<sup>248</sup> The UPC's scheme also undermines the typical abatement rules, common to most statutes including the UPC, which give preferences to specific devises. For instance, if decedent writes a will leaving all of her jewelry and other personal property to her children, and the remainder of her estate to her husband, the husband, as residuary beneficiary, would bear the cost of any debts unless the debt exceeded the value of the residuary estate. But if the decedent writes the same will, and holds \$100,000 in a POD account naming the husband as beneficiary, UNIF. PROBATE CODE § 2-601 would require the children to relinquish their specifically devised property before the husband would have to relinquish any of the POD account.

based on long experience generally reflect testamentary intent, it is hard to see how UPC Section 6-102 represents an improvement.

### b. *Individual Retirement Accounts*

Recall that UPC section 6-102 subjects revocable transfers to creditor claims “[e]xcept as otherwise provided by statute.” In many states, whether or not the UPC is in force, IRAs receive special treatment with regard to creditor claims. Because IRAs are not covered by ERISA, ERISA’s anti-alienation provisions do not apply, and state law therefore governs creditor rights. State statutes often exempt an account holder’s IRAs from claims of the account holder’s creditors, reflecting a public policy in favor of retirement security.<sup>249</sup> That policy, of course, is far less compelling once the account holder (and perhaps her spouse) has died, but states vary considerably in their treatment of retirement accounts after the death of the account holder.<sup>250</sup>

Some states have enacted statutes that expressly exempt IRA assets from creditor claims against the estate of the primary account holder.<sup>251</sup> In other states, courts have relied on less than crystalline statutory language to reach the same result.<sup>252</sup> Other states take the opposite position, concluding that IRAs are

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<sup>249</sup> See, e.g., CONN. GEN. STAT. § 52-321a (2013) (exempting specified retirement accounts, including IRAs from creditor claims); IOWA CODE ANN. § 627.6(8) (West. Supp. 2014) (exempting IRAs from creditor claims).

<sup>250</sup> See Elaine H. Gagliardi, *Remembering the Creditor at Death: Aligning Probate and Nonprobate Transfers*, 41 REAL PROP. PROB & TR. J. 819, 864 (2007) (noting that “[t]he law among states varies substantially regarding whether the state offers complete or partial protection for retirement plans”).

<sup>251</sup> See, e.g., TEX. PROP. CODE ANN. § 42.0021(a) (West Supp. 2014) (providing that “a person’s rights to the assets held in or to receive payments . . . under any . . . pension, annuity, deferred compensation, profit-sharing, or similar plan, including . . . an individual retirement account . . . is exempt from attachment, execution, and seizure for the satisfaction of debts to the extent the plan . . . is exempt from federal income tax, or to the extent federal income tax on the person’s interest is deferred”). The Texas statute further provides that “[t]he interest of a person in a plan . . . whether as an owner, participant, beneficiary, survivor, coannuitant, heir, or legatee, is exempt to the same extent that the interest of the person from whom the plan . . . was acquired was exempt on the date of the person’s death.” See *id.*; see also, e.g., FLA. STAT. ANN. § 733.707(3)(a) (West Supp. 2011) (providing that creditors can reach assets over which a decedent had a right of revocation at death, but then providing that IRAs “shall not be considered a trust over which the decedent has a right of revocation”).

<sup>252</sup> Two New York cases have taken this position. See *In re Estate of King*, 764 N.Y.S.2d 519, 524 (Surr. Ct. 2003); *In re Gallet*, 765 N.Y.S.2d 157, 158 (Surr. Ct. 2003). A California statute appears to exempt IRA assets only to the extent necessary to provide support for the account holder’s dependents. See CAL. CIV. PROC. CODE § 704.115 (West 2009); NATHANIEL STERLING, CALI. LAW. REVISION COMM’N, BACKGROUND STUDY: LIABILITY OF NONPROBATE TRANSFER FOR CREDITOR CLAIMS AND FAMILY PROTECTIONS 16 (2010), available at <http://www.clrc.ca.gov/pub/2010/MM10-27.pdf>, archived at <http://perma.cc/346C-6TLB>. Nevertheless, an appellate decision held that an IRA made payable to beneficiary other than account holder’s estate is not subject to creditor claims. *Wark v. Davis*, 217 Cal. Rptr. 734, 735 (Dist. Ct. App. 1985).

available to the account holder's creditors once the account holder dies.<sup>253</sup> In still other states, the liability of IRA beneficiaries remains uncertain because no statute expressly extends IRA exemptions past the account holder's death, but courts have not yet had occasion to address whether the exemption impliedly applies even after the account holder has died.<sup>254</sup>

As a matter of policy, it is entirely unclear why a decedent whose assets are all held in a \$200,000 IRA should be able to pass the IRA to his preferred beneficiaries free of all creditor claims, while a decedent with a \$200,000 probate estate receives no comparable exemption for creditor claims. From an estate planning perspective, the distortions created by disparate treatment of IRAs and other assets—both probate and non-probate—have the potential to frustrate decedent intent. For instance, if a decedent's primary assets are a \$200,000 IRA account at a brokerage account and a \$200,000 POD account at the same firm, a decedent who has designated one of her children as IRA beneficiary and the other as POD beneficiary will find the two accounts subject to radically different treatment with respect to creditor claims.

### *c. Retirement Accounts and the Preemption Problem*

Even if a state statute were to subject IRAs to creditor claims, the statute might well exclude one increasingly important category of decedent assets: those held in retirement accounts governed by ERISA, primarily 401(k) and 403(b) accounts. Because these accounts typically allow the account holders to withdraw the funds they have contributed at any time (albeit with a tax penalty if the withdrawals are made prematurely), the accounts, on their face, would (like IRAs) appear to fall within the scope of non-probate transfers available to creditors under UPC section 6-102.

A creditor seeking to reach these accounts after the account holder's death would, however, face significant obstacles. The first is ERISA's anti-alienation provision, which precludes creditors from advancing any claim against funds in a debtor's retirement account while the debtor is alive.<sup>255</sup> Whether the anti-

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<sup>253</sup> See *Commerce Bank, N.A. v. Bolander*, 239 P.3d 83, 95 (Kan. Ct. App. 2007) (holding that statutory exemptions applicable to IRA accounts expire at the death of the account holder, at least where the account holder designated a revocable trust as the account beneficiary).

<sup>254</sup> See, e.g., N.J. STAT. ANN. § 25:2-1(b) (West Supp. 2014) (exempting qualifying trusts and distributions from qualifying trusts from all creditor claims, but not indicating whether exemption extends beyond death of account holder).

<sup>255</sup> Section 401(a)(13) provides that a trust shall not be qualified within the meaning of the statute "unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated." 26 U.S.C. § 401(a)(13) (2012). The regulations enacted pursuant to the statute makes it clear that an assignment or alienation includes "any direct or indirect arrangement (whether revocable or irrevocable) whereby a party acquires from a participant or beneficiary a right or interest enforceable against the plan in, or to, all or any part of a plan benefit payment which is, or may become, payable to the participant or beneficiary." 26 C.F.R. § 1.401(a)-13(c)(ii) (2014):

alienation provision continues to insulate retirement account funds from creditor claims once the claims have been distributed to designated beneficiaries remains unclear. Most, but not all, of the courts that have confronted the issue have held that the anti-alienation provisions no longer apply when the funds have been distributed to beneficiaries.<sup>256</sup>

In 2013, the Supreme Court cast doubt on these holdings. In *Hillman v. Maretta*, a decedent's second wife sued the decedent's former wife who was the named beneficiary on decedent's government-issued life insurance policy.<sup>257</sup> The plaintiff based her claim on a Virginia statute requiring a divorced spouse designated as a beneficiary to disgorge the policy proceeds.<sup>258</sup> Although federal law was entirely silent on the effect of divorce on beneficiary designations, the Court nevertheless held that federal law requiring payment of government-issued life insurance policies to the persons designated as beneficiaries preempted the Virginia disgorgement statute.<sup>259</sup> The Court rejected the argument that federal law was concerned only with the administrative convenience that results from allowing the government to pay policy proceeds to the designated beneficiary, finding instead a congressional intent that policy proceeds "would actually 'belong' to that beneficiary"<sup>260</sup> and that the proceeds will "be paid to the named beneficiary and that the beneficiary can use them."<sup>261</sup>

Although *Hillman* involved construction of the Federal Employees' Group Life Insurance Act (FEGSIA), not construction of ERISA, the likelihood seems depressingly great that the Court would apply the same analysis to ERISA,<sup>262</sup> and would hold that state law giving a claim to persons against the designated beneficiary is preempted by federal law directing payment to the designated beneficiary. If that is so, the UPC or any other state statute would be ineffective in its effort to give creditors a claim against beneficiaries of ERISA-governed retirement accounts, resulting in arbitrary, and potentially intent-defeating, distribution of the burden to satisfy creditor claims.

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<sup>256</sup> See, e.g., *Hoult v. Hoult*, 373 F.3d 47, 54, 55 (1st. Cir. 2004) (considering a parallel provision to section 401 and joining majority of courts after noting that "[f]our of the five courts of appeals to consider the question have construed § 1056(d)(1) as applying to benefits only while held by the plan administrator and not after they reach the hands of the beneficiary"). But see *United States v. Smith*, 47 F.3d 681, 684 (4th. Cir. 1995) (holding that anti-alienation provisions do apply to post-retirement annuity benefits even after they are distributed to the beneficiary).

<sup>257</sup> 133 S. Ct. 1943, 1947 (2013).

<sup>258</sup> *Id.* at 1947.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 1952 (quoting *Ridgway v. Ridgway*, 454 U.S. 46, 56 (1981)).

<sup>261</sup> *Id.* at 1953.

<sup>262</sup> See generally John H. Langbein, *Destructive Federal Preemption of State Wealth Transfer Law in Beneficiary Designation Cases: Hillman Doubles Down on Egelhoff*, 67 VAND. L. REV. 1665 (2014) (providing penetrating criticism of the *Hillman* decision).

#### d. Language in the Dispositive Instruments

We have discussed the difficulties that face the drafter who seeks to avoid the default regime for tax liability by including appropriate language in the dispositive instruments. The same difficulties face the drafter seeking to depart from the default regime for liability for debts and expenses.<sup>263</sup>

### 3. Coordinating Estate Assets and Liabilities

Even when a decedent's dispositive instruments, augmented by state and federal law, make it absolutely clear which assets are liable for payment of taxes and estate obligations, an important issue remains: who bears responsibility for making sure a decedent's directions (and state and federal law) are followed? For a decedent who holds only probate assets, the responsibility for paying taxes and assessing and paying creditor claims falls on a single person: the estate's executor or administrator. The executor or administrator has both the power and the incentives to coordinate estate assets and liabilities. Title to all of the decedent's property vests in the executor or administrator upon appointment, giving the executor or administrator power and responsibility to use those assets to satisfy outstanding tax and debt liabilities. At the same time, personal liability for failure to distribute estate assets properly creates adequate incentive for the executor or administrator to comply with the obligation to pay debts and taxes.

By contrast, with a fragmented estate in which some but not all assets pass through the hands of the executor or administrator, no single person is in a position to ensure that debts and taxes are paid, or to ensure that liabilities are properly allocated among estate beneficiaries. Consider first the trustee of a revocable trust or the custodian of an IRA or a POD account. Although both owe fiduciary duties to the designated beneficiaries, neither has the power to marshal the decedent's assets to ensure that those beneficiaries do not bear an excessive share of tax liability or liability to creditors. Of greater importance, neither has any incentive to ensure that their beneficiaries satisfy any tax or debt liability for which those beneficiaries might be obligated.

Even though most jurisdictions subject revocable trust assets to creditor claims, a trustee with full knowledge of outstanding claims against the decedent may not be personally liable for distributing trust assets to the trust beneficiaries. In *Arluk Medical Center Industrial Group v. Dobler*, a California Court of Appeal illustrated the principle by holding that a trustee does not have

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<sup>263</sup> Moreover, even if the drafter could overcome those difficulties, the *Hillman* case presents another potential obstacle for the person who wants to shift liability to ERISA plan beneficiaries: unless the obligation to pay debts appears in the plan documents, state law rules that would enforce a provision in a will or trust instrument might not be enforceable even against the beneficiaries named in those plan documents.



a general duty to preserve trust assets for the benefit of a creditor of the estate.<sup>264</sup> There, an incorporated medical group filed a claim in the probate proceeding of one of its founders, alleging breach of contract.<sup>265</sup> While litigation between the medical group and decedent's estate was pending, the trustees of the revocable trust distributed more than \$500,000 to the designated beneficiaries.<sup>266</sup> The trustees, who were also the co-administrators of the decedent's probate estate,<sup>267</sup> were active participants in the litigation against the medical group. After the medical group obtained a judgment that exceeded \$800,000,<sup>268</sup> but found that the remaining assets in the estate and trust were insufficient to satisfy the judgment, the group sought to surcharge the trustees for distributing assets while the litigation was pending.<sup>269</sup> The court denied their petition, holding that a trustee has no general duty to preserve trust assets for the benefit of creditors with claims pending against decedent's probate estate.<sup>270</sup> The creditor retains a claim against the trust beneficiaries, even after the distribution,<sup>271</sup> but not against the trustee.<sup>272</sup>

Now consider the custodian of an IRA or POD account. In most states, the custodian does not have to rely on common law principles for insulation from creditor or tax claims. Instead, statutes explicitly protect the custodian who makes payment to the designated beneficiary from liability to anyone else with a claim to the assets.<sup>273</sup>

<sup>264</sup> 11 Cal. Rptr. 3d 194, 195 (Ct. App. 2004).

<sup>265</sup> *Id.* at 196.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *Id.* The judgment was entered less than two months after the trustees made their last payment to the beneficiaries. *Id.*

<sup>269</sup> *Id.* at 197. The trustees had earlier resisted, unsuccessfully, the group's petition to have the balance of its judgment (after exhaustion of decedent's probate estate) satisfied from trust assets. *Id.*

<sup>270</sup> *Id.* at 195. The court indicated that the trustees "only duty to such creditors is to refrain from affirmative misconduct that defeats the creditors' reasonable expectation for a recovery from trust assets." *Id.* The court later explained that a trustee might be liable if it distributed assets "knowing, for example, that an order in favor of the creditor has been entered and judgment is imminent, and the assets will be expended or otherwise unavailable to the creditor once distributed." *Id.* at 205.

<sup>271</sup> *Id.* at 203–04 (reasoning that "trust property legislatively authorized to be subject to a claim of the deceased settlor's creditors is no less subject to that claim simply because it was transferred from one beneficiary of the trust (the settlor) to another").

<sup>272</sup> The court emphasized that the pendency of a probate proceeding "does not alter the trustee's statutory duty to administer the trust solely for the benefit of trust beneficiaries," suggesting that unlike the personal representative of an estate, the trustee of a revocable trust owes no fiduciary duty to the settlor's creditors. *Id.* at 203. Section 6-102(i)(2) appears to endorse the same result, at least unless the decedent's personal representative sends the trustee "a written notice asserting that a decedent's probate estate is nonexistent or insufficient to pay allowed claims." UNIF. PROBATE CODE § 6-102(i)(2) (amended 2010), 8 U.L.A. 358 (2013).

<sup>273</sup> The UPC authorizes a financial institution to pay sums on deposit to the designated beneficiary "if proof of death is presented to the financial institution showing that the beneficiary or beneficiaries survived all persons named as parties." UNIF. PROBATE CODE § 6-223(2), 8 U.L.A. 378. The UPC then goes on to say that payment made "in accordance with the terms of the account discharges

Insulating trustees and custodians from creditor or tax claims helps channel money to beneficiaries more quickly, avoiding some of the delays associated with probate. If trustees and custodians were held liable for failure to withhold moneys necessary to pay creditor and tax claims, they would be reluctant to make distributions to beneficiaries until all potential claims were fully settled. Once the prospect of liability is removed, the trustee or custodian has every reason to distribute funds to beneficiaries even in cases like *Arluk Medical Center*, where the trustee knows that creditors have a plausible claim against non-probate assets. As a result, creditors, and potentially the executor, will face the more difficult task of recovering assets from the potentially fragmented group of individual beneficiaries, some of whom may quickly place the assets outside the easy grasp of creditors.

The probate estate's executor or administrator may be the only plausible candidate for coordinating tax and debt liabilities, but under current law the executor faces difficult hurdles. First, although statutes like UPC section 6-102 give the executor power to serve notice on a financial institution holding a non-probate transfer indicating that the estate will be insufficient to satisfy claims and allowances, the statute provides no protection against a financial institution that distributes proceeds before the executor has assessed the financial state of decedent's estate. The executor has no inherent common law authority over assets that pass outside of probate, and without statutory authority, the executor may be unable to coordinate assets. Moreover, in cases where the probate estate is clearly insolvent because decedent used non-probate transfers to dispose of her assets, family members may see no reason to seek appointment as personal representative. In that event, creditors might have standing to seek appointment, but by the time creditors recognize the need to seek appointment, non-probate assets may all have been distributed.

The proliferation of non-probate transfers, then, has created both a substantive problem—which beneficiaries are liable for debts and taxes—and a procedural problem—who is responsible for making sure the right beneficiar-

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the financial institution from all claims for amounts so paid, whether or not the payment is consistent with the beneficial ownership of the account as between parties, beneficiaries, or their successors." *Id.* § 6-226(a), 8 U.L.A. 380 (2013). The statute does provide that if a personal representative (but not a creditor) serves the institution with written notice that payment should not be permitted, the financial institution is not protected with respect to payments made after receipt of the notice. *Id.* § 6-226(b), 8 U.L.A. 380; *see also* CAL. PROB. CODE §§ 5403, 5405 (West 2009) (containing the same substance as the UPC provisions); N.Y. EST. POWERS & TRUSTS LAW § 7-5.4 (McKinney 2002) (insulating financial institution from liability for payment of funds to designated beneficiary); TEX. ESTATES CODE ANN. § 113.209 (West 2014) (same). The UPC applies the same rule to IRAs. UNIF. PROBATE CODE § 6-101, 8 U.L.A. 354 (2013). Section 6-101 defines non-probate transfers to include individual retirement plans, and section 6-102(i)(1) provides that "[p]ayment or delivery of assets by a financial institution, registrar, or other obligor, to a nonprobate transferee in accordance with the terms of the governing instrument controlling the transfer releases the obligor from all claims for amounts paid or assets delivered." *Id.* §§ 6-101, 6-102(i)(1), 8 U.L.A. 354, 358.

ies pay their share of the liability. To date, doctrine has not come up with adequate solutions to those problems.

### III. THE POTENTIAL FOR ASSET DISSIPATION

In both the probate system and the non-probate system, cases will arise in which an excluded beneficiary can establish that the exclusion was inconsistent with established legal rules. Imagine, for instance, a decedent whose dispositions leave nothing to her spouse, despite a legal regime that mandates a spousal share regardless of the decedent's intent.<sup>274</sup> Or suppose a close relative can establish that a testator's dispositions were the product of incapacity, or undue influence. Cases like these present a problem in both a probate system and a non-probate system, and both systems handle the cases the same way: through litigation.

In fact, however, the structure of the non-probate transfer makes it less likely that deserving beneficiaries will be able to vindicate their rights through litigation. The primary problem is the increased likelihood that a wrongdoer will dissipate the decedent's assets before beneficiaries realize that they have a valid claim. Section A provides background on asset dissipation in the probate system.<sup>275</sup> Section B discusses asset dissipation in the non-probate system during the decedent's lifetime,<sup>276</sup> while Section C discusses the same issue after the decedent's death.<sup>277</sup>

#### *A. Asset Dissipation in the Probate System*

First, consider the structure of the probate system. The estate's personal representative marshals all probate assets<sup>278</sup> and provides notice to all beneficiaries and intestate heirs that the will has been offered for probate.<sup>279</sup> Any interested party is then free to contest the will, or to assert another claim to the estate assets—such as an elective share claim, or an omitted child or spouse claim. The personal representative has no incentive to distribute funds until after settlement or judicial resolution of those claims, because the personal representative would be liable for wrongful distribution of funds.<sup>280</sup> Once the testator has died, then, judicial supervision of the personal representative's actions limits the potential for asset dissipation. The primary opportunity for dis-

<sup>274</sup> See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 5-1.1-A (McKinney Supp. 2014).

<sup>275</sup> See *infra* notes 278–280 and accompanying text.

<sup>276</sup> See *infra* notes 281–298 and accompanying text.

<sup>277</sup> See *infra* Part III, Section C.

<sup>278</sup> See, e.g., UNIF. PROBATE CODE § 3-709 (amended 2010), 8 U.L.A. 190 (2013) (empowering personal representative to take control of decedent's property).

<sup>279</sup> See, e.g., *id.* § 3-402, (amended 2010), 8 U.L.A. 86–87 (2013) (providing that notice be provided to heirs and devisees).

<sup>280</sup> See, e.g., *id.* § 3-712 (amended 2010), 8 U.L.A. 197 (2013) (personal representative liable to interested persons for damage or loss resulting from breach of fiduciary duty).

sipation comes before the testator dies, when a caretaker or other wrongdoer might induce an unsuspecting or incapacitated testator to transfer funds, either directly or through use of a power of attorney, that would otherwise pass to deserving beneficiaries.

### *B. Non-probate Transfers: Asset Dissipation During a Decedent's Lifetime*

For purposes of incapacity, undue influence, and the elective share, emerging doctrine in most states treats a revocable trust in which the settlor names herself as trustee as the functional equivalent of a will.<sup>281</sup> If the settlor changes beneficiaries, or dissipates assets, the beneficiaries harmed by the settlor's actions have nearly the same opportunity to prove that the actions were tainted by incapacity or undue influence as would the beneficiaries of a prior will.<sup>282</sup> But suppose the settlor does not name herself as trustee of the trust, but instead designates another person as the trustee. The Uniform Trust Code, mirroring the law in other states, provides that the trustee owes duties only to the settlor, not to other beneficiaries.

But suppose the settlor has capacity but is simply no longer up to the task of monitoring the trustee's actions. Does that mean the trustee gets a free pass against any claims for breach of fiduciary duty? Most, but not all, courts that have faced the question hold that the trust beneficiaries have standing to assert breach of fiduciary duty claims against the trustee, but only after the settlor's death.<sup>283</sup> The California Supreme Court's opinion in *Estate of Giralдин* is illus-

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<sup>281</sup> There is near uniform agreement that the standard for capacity to create a revocable trust is identical to the standard for making a will. *See, e.g.,* *Jervis v. Tucker*, 82 So. 3d 126, 128 (Fla. Dist. Ct. App. 2012); *Des Lauriers v. Marilyn Irene Deslauriers Revocable Trust*, 374 S.W.3d 732, 736 (Ark. Ct. App. 2010); *Lah v. Rogers*, 707 N.E.2d 1208, 1214 n.7 (Ohio Ct. App. 1998); UNIF. TRUST CODE § 601 (amended 2010); RESTATEMENT (THIRD) OF TRUSTS § 11(2) (2003). *But see* *Queen v. Belcher*, 888 So. 2d 472, 476–77 (Ala. 2003) (holding that capacity to create revocable trust is higher than standard for executing a will); *Suntrust Bank, Middle Ga., N.A. v. Harper*, 551 S.E.2d 419, 425 (Ga Ct. App. 2001) (holding that the capacity standard for contracts, not for wills, governs IRA designations).

<sup>282</sup> Section 603(a) provides: "While a trust is revocable [and the settlor has capacity to revoke the trust], rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor." UNIF. TRUST CODE § 603(a) (amended 2010). An earlier version of the UTC provided expressly that once the settlor lost capacity to revoke, the beneficiaries held enforcement rights, but the current version bracketed the language about capacity, effectively giving states a choice about whether beneficiaries should have rights against the trustee once the settlor becomes incapacitated. *See* UNIF. TRUST CODE § 603 (2004 amendment). One of the concerns the drafters cited in retreating from the UTC's original position was the disparity between the treatment of revocable trusts and the treatment of wills. *See id.*

<sup>283</sup> *See, e.g.,* *Estate of Giralдин*, 290 P.3d 199, 210 (Cal. 2012); *Siegel v. J.P. Morgan Chase Bank*, 71 So. 3d 935, 945 (Fla. App. 2011); *Siegel v. Novak*, 920 So. 2d 89, 95 (Fla. Dist. Ct. App. 2006); *Brundage v. Bank of America*, 996 So. 2d 877, 882 (Fla. Dist. Ct. App. 2008). Before the death of the settlor, only the settlor may bring those claims. *See, e.g., Ex parte Synovus Trust Co.*, 41 So. 3d 70, 74 (Ala. 2009) (applying UTC section 603 to bar claims by remainder beneficiaries of revocable trust while settlors were still alive).

trative.<sup>284</sup> There, the settlor, who had a total of nine biological and adopted children, created a revocable trust naming one of his twin sons as trustee.<sup>285</sup> The settlor funded the trust with more than \$4 million of stock in a company started by the trustee's twin brother, in which the trustee was also a part owner.<sup>286</sup> The settlor died less than two years later.<sup>287</sup> Because the company did badly, resulting in loss of most of the \$4 million, several of settlor's other children—all of them remainder beneficiaries of the trust—brought an action alleging that trustee had breached his fiduciary duty.<sup>288</sup> In rejecting the trustee's argument that the beneficiaries lacked standing, the court noted that California statutes did not expressly address the issue, but relied in part on a comment to UTC section 603 indicating that “[f]ollowing the death or incapacity of the settlor, the beneficiaries would have a right to maintain an action against a trustee for breach of trust.”<sup>289</sup> The court expressed no view on the merits of the breach of fiduciary duty claim,<sup>290</sup> but indicated that the beneficiaries had standing, after the settlor's death, to raise the claim that the trustee had breached his fiduciary duty to the settlor.<sup>291</sup>

The court's holding in *Giraldin* leaves trust beneficiaries in a position roughly comparable to that enjoyed by beneficiaries challenging a wrongful transfer of decedent's assets by a person holding a power of attorney. But other courts have held that beneficiaries may not challenge the actions of a trustee of a revocable trust, even after the death of the settlor. In 2013, the Iowa Supreme Court held that remainder beneficiaries are not entitled to require the trustee of a revocable trust to account for periods before the settlor's death.<sup>292</sup> In *In re Trust of Trimble*, the settlor had remained the trustee of her revocable trust until eight months before her death at the age of 104.<sup>293</sup> When she died, one of the settlor's nieces sought an accounting from the niece's sister, the successor trustee, for the eight-month period before settlor's death.<sup>294</sup> In rejecting the *Giraldin* approach, the court suggested that the settlor's interest in privacy mil-

<sup>284</sup> See 290 P.3d at 199.

<sup>285</sup> *Id.* at 201.

<sup>286</sup> *Id.* at 202.

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> *Id.* at 209 (emphasis omitted) (citing UNIF. TRUST CODE § 603 cmt. (amended 2010)).

<sup>290</sup> *Giraldin*, 290 P.3d at 210.

<sup>291</sup> *Id.* Other cases reaching the same conclusion include an earlier California case, *Evangelho v. Presoto*, 79 Cal. Rptr. 2d 146, 151 (Ct. App. 1999), as well as cases from other jurisdictions. See *Siegel v. J.P. Morgan Chase Bank*, 71 So. 3d 935 at 945 (applying New York state law); *Siegel v. Novak*, 920 So. 2d at 95 (applying New York state law); *Brundage*, 996 So. 2d 877, 882; see also *In re Estate of Allmares*, 737 N.W.2d 612, 614 (N.D. 2007) (allowing beneficiaries of POD account to bring claim against conservator for failing to restore money to POD account after theft).

<sup>292</sup> See *In re Trust of Trimble*, 826 N.W.2d 474, 478 (Iowa 2013). The court conceded that the applicable Iowa statutes were ambiguous on the point. *Id.* at 485.

<sup>293</sup> *Id.* at 478.

<sup>294</sup> *Id.* at 479.

itated against giving beneficiaries a right to an accounting,<sup>295</sup> and emphasized that in the time before settlor's death, settlor's interests and the beneficiaries might not be perfectly aligned.<sup>296</sup> The result is to insulate the trustee from claims by trust beneficiaries even when there is no evidence that the settlor was monitoring trustee behavior in the settlor's declining years.<sup>297</sup> *Trimble*, then, increases the potential for a faithless trustee to deplete decedent's assets without leaving any recourse for the decedent's intended beneficiaries.<sup>298</sup>

### C. Non-Probate Transfers: Asset Dissipation at a Decedent's Death

In addition to the risk of asset dissipation during a decedent's lifetime, non-probate transfers present expanded opportunities for asset dissipation at a decedent's death. If a decedent established a POD account with a bank or a TOD account with a brokerage firm, the bank or financial institution is entitled to pay or transfer the assets without providing notice to heirs or other potential beneficiaries, and without any judicial supervision. The same is true of the trustee of a revocable trust that authorizes payment on death of the settlor. If the designated beneficiary secured the designation as a result of undue influence, or at a time when the decedent had lost capacity, the "rightful" beneficiaries may not learn of the designation until after the wrongdoers have received the assets. By that time, they may not find it worthwhile to litigate because the wrongdoers may have immediately dissipated or hidden the assets. Moreover, unlike the personal representative of an estate, the financial institutions that distributed the assets to the wrongdoer will bear no liability for the distribution.

The relaxed formality associated with non-probate transfers exacerbates the asset dissipation problem. Many financial institutions will permit a depositor to make a POD designation online. Although this may be convenient for the depositor, it also provides a boon for potential undue influencers with access to the depositor's password. And even if the depositor makes the designation by way of a paper form, the financial institution is unlikely to scrutinize the capacity or motivations of the depositor. As a result, upon death, it may be relatively easy for

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<sup>295</sup> *Id.* at 487.

<sup>296</sup> *Id.* at 488.

<sup>297</sup> The *Trimble* result makes considerable sense in a situation where there is evidence that the settlor actually was monitoring the trustee's behavior. See *id.* at 478; cf. *In re Stephen M. Gunther Revocable Trust*, 350 S.W.3d 44, 46, 47 (Mo. Ct. App. 2011) (concluding that beneficiaries are not entitled to accounting from prior trustee when settlor took back reins from that trustee, and managed trust for three years without bringing action against prior trustee); *Moon v. Lesikar*, 230 S.W.3d 800, 806 (Tex. App. 2007) (holding that beneficiaries have no standing to make claim against trustee who served as co-trustee with the settlor).

<sup>298</sup> See *In re Trust of Trimble*, 826 N.W.2d at 478.

a wrongdoer to obtain control over an account, and to dissipate the assets before other beneficiaries have an opportunity to challenge the designation.

#### IV. POTENTIAL SOLUTIONS

The non-probate revolution has generated enormous savings for many decedents and their beneficiaries. But these have come at a cost. While it is impossible to eliminate all of these costs, there may be ways to minimize many of them. This Article advances several proposals here to stimulate thinking about this question. Section A recognizes the importance of expanding lawyer awareness.<sup>299</sup> Section B recommends the application of more intent-effectuating constructional rules.<sup>300</sup> Section C suggests that standardized forms should be improved,<sup>301</sup> while Section D considers the benefits of requiring the provision of notice to executors.<sup>302</sup> Finally, Section E considers the possibility of establishing a voluntary registration system as a potential solution.<sup>303</sup>

##### *A. Expand Lawyer Awareness*

As this Article has emphasized, many of the problems generated by the non-probate revolution arise because clients do not always consult lawyers to supervise non-probate transfers. As a result, no program of lawyer education can eliminate these problems. Nevertheless, greater lawyer awareness does have the potential to reduce frustration of client intent in those cases where clients consult lawyers to prepare wills, trust instruments, or other estate planning documents. Each lawyer, when consulting with an estate planning client, should inquire about any beneficiary designation forms and trust instruments the client might have executed, and develop a strategy for ensuring that these documents work together as part of a comprehensive estate plan.

##### *B. Expanded Adoption of Constructional Rules*

The most obvious way to minimize some costs associated with non-probate transfers would be to apply more intent-effectuating rules of construction to these transfers. The UPC has already embraced this strategy, and broader enactment of statutes like UPC section 2-804, which extends the revocation-on-divorce rule to all non-probate mechanisms, would be a helpful reform.

The UPC itself, however, does not go far enough in extending rules of construction to non-probate transfers. The UPC could be amended to permit

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<sup>299</sup> See *infra* note 304 and accompanying text.

<sup>300</sup> See *infra* notes 305–307 and accompanying text.

<sup>301</sup> See *infra* notes 308–310 and accompanying text.

<sup>302</sup> See *infra* note 311 and accompanying text.

<sup>303</sup> See *infra* notes 312–313 and accompanying text.

omitted spouses and children to reach revocable trusts and other non-probate assets. An even more significant improvement would be a revision to the comments to section 2-706 to provide that language included on a preprinted form is not a sufficient indication of intent contrary to the application of the section.<sup>304</sup> That revision would extend application of the UPC's antilapse rules to IRA beneficiary designations, life insurance policies, and other non-probate transfers typically executed on forms prepared by financial intermediaries.

Another intent-effectuating reform—one suggested by John Langbein thirty years ago—could also be incorporated into the UPC or other state law: permit a subsequent will or trust instrument, by explicit language, to revoke a previously executed revocable trust instrument or beneficiary designation.<sup>305</sup> The only reason not to adopt such a reform is to protect financial intermediaries, but as Langbein observed, it would be easy enough to insulate those intermediaries from liability for paying the wrong beneficiary while still giving the intended beneficiary a claim against the beneficiary of a revoked trust or designation.<sup>306</sup>

Rules of construction, however, are a less-than-ideal mechanism for effectuating decedent intent. These rules operate at the back end, cleaning up messes that arise when a decedent has executed documents without completely understanding their implications. They do nothing, however, to increase decedents' understanding of the documents they sign. At best, they provide better-educated guesses about what the account holder would have wanted if the account holder had understood the documents. By their very nature, rules of construction involve litigation and delay in distribution, sacrificing one of the primary efficiency advantages of the non-probate system.

### C. Standardized Forms

If the goal is to capture the intent of the decedent who uses the non-probate system, reform might better focus on ensuring that decedents understand the documents they sign. Lawyers, who typically supervise preparation of wills, play an important role in explaining the significance of a document's language. By contrast, lawyers rarely supervise execution of life insurance policies, retirement account beneficiary designation forms, or POD or TOD account forms. Increasingly, decedents execute revocable trusts with little or no lawyer supervision. Without a professional to translate the documents, it becomes critical that the documents be easy for a layperson to understand and

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<sup>304</sup> See UNIF. PROBATE CODE § 2-706 (amended 2010), 8 U.L.A. 291–94 (2013). The language would be parallel to current section 2-706(b)(3), which provides that general language of survivorship does not constitute “sufficient indication of an intent contrary to the application of this section.” *Id.* § 2-706(b)(3), 8 U.L.A. 292.

<sup>305</sup> Langbein, *supra* note 1, at 1138–39.

<sup>306</sup> *Id.* at 1139.



navigate. As this Article has demonstrated, current life insurance and retirement plan beneficiary designation forms generally fall wide of the mark.<sup>307</sup>

Elsewhere, a design for retirement plan beneficiary designation forms has been suggested.<sup>308</sup> Similar forms would be suitable for life insurance beneficiary designations and these forms could also be adapted for revocable trusts. Statutory provisions could deny effectiveness to non-probate transfers unless the relevant documents are either prepared under the supervision of a lawyer, or prepared on a statutorily prescribed form.

Some might object to a statutorily mandated form, arguing that market forces, instead of the state, should dictate the form to be used. As this Article has observed, information asymmetries make it unlikely that market competition will generate efficient forms.<sup>309</sup> Potential account holders are unlikely to think about beneficiary designation forms when choosing banks, brokers, retirement account custodians or life insurance providers. Employers, as repeat players, might have some leverage with life insurance companies and 401(k) or 403(b) custodians, but they have little financial stake in the issue, and decisionmakers may lack knowledge of estate planning issues.<sup>310</sup>

#### *D. Notice and Expanded Authority for Estate Executors and Administrators*

Neither rules of construction nor better forms would address the problems generated by fragmentation of the decedent's estate. Some of the difficulties associated with fragmentation—particularly coordination of tax and debt obligations—might be ameliorated by expanding the power of estate executors and administrators—without requiring that non-probate assets pass through probate. Expanding executor power would also have the potential to reduce the risks of asset dissipation.

The optimal scope of expanded executorial power remains open for discussion. At a minimum, executors should have clear authority to collect assets

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<sup>307</sup> See *supra* notes 74–88 and accompanying text.

<sup>308</sup> See Sterk & Leslie, *supra* note 8, at 231–37.

<sup>309</sup> See *supra* notes 74–88 and accompanying text; see also Sterk & Leslie, *supra* note 8, at 223.

<sup>310</sup> Professor Todd Rakoff has emphasized that even when the parties to a form contract are businesses, the adhering party may act reasonably in failing to read and shop for many of the terms in the form contract. Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1250–55 (1983). For an employer choosing among plan providers, the language in beneficiary designation forms may be relatively unimportant compared to facts of cost and ease of plan administration. Moreover, with respect to employer-provided retirement accounts, small employers, faced with the high cost of individually-tailored defined-contribution plans, have increasingly turned to mass-marketed “prototype plans” for which the provider has obtained preapproval from the IRS. See Rev. Proc. 2005-16, 2005-10 I.R.B. 674, available at <http://www.irs.gov/pub/irs-drop/rp-05-16.pdf>, archived at <http://perma.cc/5NEN-WJKH> (setting forth procedures for IRS approval of prototype plans). By contrast, account custodians have a stake in the forms used, and an overwhelming interest in reducing administrative costs. See Sterk & Leslie, *supra* note 8, at 224.

from trustees, custodians, and beneficiaries of non-probate transfers to pay debts and taxes owed either by the decedent or the decedent's estate.

One might even give the executor a broader power to adjust the decedent's non-probate dispositions in cases where giving effect to all of those dispositions would appear to frustrate the decedent's overall estate plan. This Article advances this suggestion tentatively because it poses an increased risk of litigation by beneficiaries unhappy with the executor's adjustment. That risk, however, could be minimized by creating a set of prerequisites or conditions to the executor's exercise of the adjustment power. For instance, one could authorize use of the adjustment power only in cases where decedent has prepared an estate planning document with the assistance of counsel, but subsequently made a non-probate transfer without the benefit of counsel.

Giving executors expanded power over non-probate assets would accomplish nothing if the executor had no mechanism to learn of those assets. Elsewhere, it has been argued that custodians of retirement plan assets should, upon learning of the death of the account holder, be required to provide notice to the account holder's spouse and children, if any, before distributing account proceeds.<sup>311</sup> Imposing a similar obligation on custodians of other nonprobate assets—much as the executor of a probate estate has an obligation to notify decedent's intestate heirs—would go a long way toward preventing dissipation of non-probate assets, while also providing a mechanism for transmitting notice of the accounts to the estate's executor or administrator.

Once the custodian sends that notice, a modest thirty or sixty day waiting period on distribution should be required. During that period, the executor or administrator, armed with letters testamentary or letters of administration, would be entitled to demand that some or all of the assets not be distributed to the designated beneficiaries. The demand, which would also be served on the designated beneficiaries, would explain the nature of the claim—either that the funds were necessary for payment of debts or taxes, or that the beneficiaries were named at a time of incapacity or as the result of undue influence, or that the designation had been revoked by a subsequent instrument, such as a will. If the executor authorized the custodian to release some of the funds, those funds could be released immediately, even before expiration of the waiting period. Otherwise, the custodian would continue to hold the funds until provided with proof of judicial resolution or settlement.

What would this waiting period accomplish? First, it would enable the estate executor to guard against dissipation of assets, preserving for the estate and any other potential beneficiaries the practical ability to obtain meaningful judicial resolution of claims. Second, it would enable the executor to determine what share of the estate's debt and tax burdens should be borne by beneficiar-

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<sup>311</sup> See Sterk & Leslie, *supra* note 8, at 226.

ies of the probate estate, and what share should be borne by the beneficiaries of various non-probate transfers. That information might even speed up distribution of decedent's probate estate.

For the vast majority of estates, the waiting period and expanded executorial authority would result in trivial change from current practice. Because there will be no dispute over how obligations will be paid or how assets will be distributed, the executor will not exercise the power to demand that the custodian retain control of non-probate assets. The only change will be that the beneficiaries will have to wait thirty or sixty days for distribution of the assets. The delay would not be significant; even in the current regime, few beneficiaries run from the funeral directly to the bank or the insurance company. Moreover, those beneficiaries who do rush to seek distribution will often need to collect the paperwork necessary to satisfy the financial institution's bureaucrats that they are entitled to payment. And in cases of no controversy, the executor would be able to expedite payment by waiving her right to demand that assets not be distributed to the designated beneficiaries.

The delay would be significant only in cases of real dispute. Nevertheless, those are precisely the cases where delay is appropriate if the goal is to ensure that decedent's wishes are respected.

### *E. A Voluntary Registration System*

Although enhancing executor power to coordinate non-probate assets after death would be helpful in many estates, it represents a second-best solution. The optimal solution would increase the likelihood of coordination by the decedent while she is still alive. As shown above, even when a decedent relies on lawyer to coordinate her estate plan, the lawyer's careful plan might go awry if the client subsequently makes non-probate transfers—opening up a new IRA account, or setting up a revocable trust—without consulting the lawyer. The lawyer herself is at the client's mercy in identifying the client's nonprobate assets.

A promising way to address this problem would be to establish a nationwide voluntary registration system, in which, whenever a person made a non-probate transfer, the transfer would be registered in a centralized database. The bank, brokerage, insurance company, or other entity responsible for managing the assets would be charged with the registration responsibility. Whenever a person sought to make a new non-probate transfer, the financial institution or lawyer supervising the transfer would check the database to see what other transfer, if any, the client had made, and would notify the client about the beneficiaries the client had designated for each of those transfers.

A registration system that confronted the client with past designations whenever the client made a new designation would, by itself, assist the client in updating old designations and in coordinating new designations with old

ones. Registration would also make it easier for lawyers to ensure that the estate plans they devise deal comprehensively with all of the client's assets. Registration, therefore, might go a long way to eliminating some of the problems that result from fragmentation of the wealth transmission process.

Of course, some clients, perhaps concerned about privacy, would steer clear of any registration system, but those clients would be no worse off than they are under current law. Perhaps their lawyers could convince at least some of them of the merits of a registration system, that would essentially enlist both lawyers and financial intermediaries in the process of coordinating the client's estate.

Ultimately, the biggest challenge of establishing a registration system might be financing, creating, and maintaining the database. But as technology reduces costs, even a government-maintained database might not be prohibitively expensive. In other areas of law—real property recording systems, for instance—government entities have undertaken the task of establishing computerized databases of property transfers.<sup>312</sup> At the same time, private entities have established databases that compete with the government database.<sup>313</sup> In the wealth transfer context, the IRS, which already obtains records of many of the accounts held by each person, might have comparative advantages in establishing a database. The point is not that a private or public database would be superior, but that any centralized database has the potential to overcome many of the coordination problems generated by the non-probate revolution.

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<sup>312</sup> See, e.g., Emily Bayer-Pacht, *The Computerization of Land Records: How Advances in Recording Systems Affect the Rationale Behind Some Existing Chain of Title Doctrine*, 32 CARDOZO L. REV. 337, 340–44 (2010) (detailing growth of electronic recording of land records).

<sup>313</sup> In the real property context, Mortgage Electronic Registrations Systems, Inc. (“MERS”), a privately held company operates a centralized, electronic registry to track mortgages. See generally Zachary A. Kisber, *Revaluating MERS in the Wake of the Foreclosure Crisis*, 42 REAL EST. L.J. 183, 189–90 (2013) (describing the structure of MERS); Nolan Robinson, *The Case Against Allowing Mortgage Electronic Registration Systems, Inc. (MERS) to Initiate Foreclosure Proceedings*, 32 CARDOZO L. REV. 1621, 1632–34 (2011) (describing how MERS works).