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## How Should Non-Probate Transfers Matter in Intestacy?

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# How Should Non-Probate Transfers Matter in Intestacy?

Mary Louise Fellows<sup>†\*</sup> and E. Gary Spitko<sup>\*\*</sup>

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## INTRODUCTION

The primary objective of U.S. intestacy statutes is to promote the unexpressed or ineffectively expressed donative intent of an intestate decedent.<sup>1</sup> To achieve this goal, intestacy statutes generally rely upon status-based rules grounded in formal relationships within the traditional family.<sup>2</sup> For example, intestacy statutes in most cases favor the decedent's surviving spouse but do not favor the decedent's surviving unmarried committed partner, let alone the decedent's best friend or favorite neighbor.<sup>3</sup>

As American family structures have become more heterogeneous, status-based intestacy statutes have become less suited to promoting donative intent.<sup>4</sup> Indeed, numerous scholars of wealth transfer law have noted the critical need for intestacy law reform to address the needs of decedents whose donative intent does not comport with traditional family norms.<sup>5</sup> Professor Shelly Kreiczer-Levy, for example, has argued recently that intestacy law suffers from three critical shortcomings

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<sup>1</sup> Danaya C. Wright & Beth Sterner, *Honoring Probable Intent in Intestacy: An Empirical Assessment of the Default Rules and the Modern Family*, 42 ACTEC L.J. 341, 345 (2017).

<sup>2</sup> See Shelly Kreiczer-Levy, *Big Data and the Modern Family*, 2019 WIS. L. REV. 349, 354 (2019) ("Despite various reforms over the years, intestate rules continue to privilege a family based on formal relationships: biology, adoption, and marriage.").

<sup>3</sup> See *id.* at 356-57.

<sup>4</sup> See Naomi Cahn & Amy Zietlow, "Making Things Fair": *An Empirical Study of How People Approach the Wealth Transmission System*, 22 ELDER L.J. 325, 359 (2015) ("With the married parent family characterizing a minority of Americans today, and with increasing rates of divorce among Baby Boomers, the traditional inheritance system becomes correspondingly less useful."); Wright & Sterner, *supra* note 1, at 345 ("But as the typical person becomes less and less typical, the disjuncture between the cookie-cutter intestacy model and the atypical decedent becomes wider."). A number of the interviewees in our study remarked on the estate planning they do for clients in nontraditional family relationships. See Question 7, Interviewee IK; Question 8, Interviewee IM; Question 9A, Interviewee IP; Question 9B, Interviewee IJ. For more information about our study, see *infra* notes 29-30 and accompanying text. The complete Kasner survey used in our study is reproduced *infra* as Appendix A. The complete interview script is reproduced *infra* as Appendix B. A transcription of all of the responses to the survey are available from the authors upon request.

<sup>5</sup> See, e.g., Bridget J. Crawford & Anthony C. Infanti, *A Critical Research Agenda for Wills, Trusts, and Estates*, 49 REAL PROP. TR. & EST. L.J. 317, 338 (2014) (urging "scholars [to] focus on exploring how wills, trusts, and estates law might be reformed to break down this privileging [based on marital status and traditional family norms] and embrace the multiplicity of family forms that exist"); Wright & Sterner, *supra* note 1, at 369 ("The more people in non-traditional family structures must rely on intestacy for passing wealth to their loved ones, the less likely the fit will be equitable, as the intestacy laws rely heavily on marriage and biological relationships for inheritance rights.").

which disadvantage “modern forms of associations and relationships”<sup>6</sup>: (1) a too-narrow definition of family that fails to recognize informal familial relationships, such as unmarried committed partners and functional parents, (2) a strict approach to application of rules that fails to examine whether a decedent and a statutorily-determined heir had developed, maintained, or otherwise continued a familial relationship or whether they lacked any familial-type contact with each other, and (3) an exclusive focus on family that fails to recognize meaningful but nonfamilial relationships, such as those with caregivers and neighbors.<sup>7</sup>

We propose addressing each of these concerns by looking to intestate decedents’ non-probate transfers. Beneficiaries designated in intestates’ non-probate transfers, such as a revocable trust, life insurance policy, 401(k) account, brokerage account, or joint tenancy with right of survivorship deed, can convey more information about intestates’ preferred heirs than family-status relationships. To that end, we previously proposed two potential reforms that would introduce non-probate transfer beneficiary designations into the intestacy scheme.

The proposed new heir reform is premised on the hypothesis that, under certain circumstances, when designated beneficiaries of non-probate transfers are not otherwise heirs, most intestates would prefer to have those beneficiaries take some or all of a probate estate.<sup>8</sup> The proposed advancement reform is premised on the hypothesis that most intestates prefer equality among family members in the same generation.<sup>9</sup> Therefore, the advancement reform equalizes the amount passing to heirs in the same generation to the extent possible by taking into account the amount an heir has otherwise received from a non-probate transfer.<sup>10</sup> In 2010, we, along with our coauthor Charles Q. Strohm, tested these hypotheses in the first published study to consider the relationship between donative intent with respect to the probate estate and donative intent as expressed in non-probate transfers.<sup>11</sup>

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<sup>6</sup> Kreiczer-Levy, *supra* note 2, at 349-51.

<sup>7</sup> *Id.* at 350-51, 355-357.

<sup>8</sup> Mary Louise Fellows, E. Gary Spitko & Charles Q. Strohm, *An Empirical Assessment of the Potential for Will Substitutes to Improve State Intestacy Statutes*, 85 *IND. L.J.* 409, 414 (2010).

<sup>9</sup> We borrow the term *advancement* from the statutory concept in which a gift by the intestate to a potential heir is treated as an advancement against that heir’s intestate share only if the intestate declares the gift to be an advancement in a writing executed contemporaneously with the gift or the heir at any time executes a written acknowledgment that the gift should be treated as an advancement. See UNIF. PROB. CODE § 2-109(a) (UNIF. LAW COMM’N 2010).

<sup>10</sup> See Fellows et al., *supra* note 8, at 417.

<sup>11</sup> See *id.* at 414.

Specifically, we employed a factorial design — a series of vignettes — to examine whether beneficiary designations in non-probate transfers could be used to approximate donative intent in an intestacy statute. On our behalf, the Minnesota Center for Survey Research conducted a random-digit-dial telephone survey of the noninstitutionalized English-speaking adult population in the forty-eight contiguous United States. The interviewer presented each respondent with a series of eight vignettes that differed across four dimensions.<sup>12</sup> The survey collected data from 202 individuals who told the interviewer how they would distribute a hypothetical probate estate if they were in the same situation as the decedent described in the various vignettes.<sup>13</sup> The results of our study offered support for our new heir hypothesis, that, depending on the identity of the non-probate transfer beneficiary and the identity of the existing heir, a decedent would want a non-probate transfer beneficiary who is not otherwise an heir to be treated as a new heir.<sup>14</sup> The advancement hypothesis garnered far less support from respondents.<sup>15</sup> Based upon these results, we concluded that “[t]he question no longer is *whether* will substitutes should be integrated into intestacy schemes, but *how*.”<sup>16</sup>

Our proposed reforms integrating non-probate transfers into a jurisdiction’s intestacy scheme would ameliorate each of the failures that Professor Kreiczler-Levy identifies. Decedents’ beneficiary designations found in non-probate transfers, which are at the center of our reform proposals, speak directly to decedents’ likely donative wishes and indirectly to the likelihood of meaningful relationships between non-probate transferors and their transferees. Under our proposed reforms, a designated beneficiary of a non-probate transfer becomes an intestate heir of a decedent in certain circumstances, even if the beneficiary did not have status as a family member or, even if a

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<sup>12</sup> The vignettes presented a story about a decedent who died without a will, with certain probate property, and with certain non-probate property. The vignettes varied with respect to (1) the relationship between the decedent and the non-probate transfer beneficiary, (2) the identity of the heir under existing intestate succession statutes, (3) the value of the non-probate transfer or non-probate transfers, and (4) the number of non-probate transfers. *See id.* at 423.

<sup>13</sup> *Id.* at 421-23.

<sup>14</sup> *See id.* at 425, 441-42.

<sup>15</sup> *See infra* note 108 and accompanying text (outlining empirical data suggesting that intestacy law should not reduce an heir’s share of the intestate’s estate because that heir is a designated non-probate transfer beneficiary).

<sup>16</sup> Fellows et al., *supra* note 8, at 414.

family member, did not qualify as an heir under a jurisdiction's intestacy scheme.<sup>17</sup>

The new heir reform, which infers how intestates would want a state to distribute their probate estates based on the designated beneficiaries found in their non-probate transfers, has precedent in existing inheritance law.<sup>18</sup> For example, Uniform Probate Code ("UPC") Section 2-301 presumptively entitles spouses omitted from premarital wills to receive the share of the probate estate that they would have received had the testators of those premarital wills died intestate.<sup>19</sup> The UPC provides an exception to the omitted spouse's entitlement, however, in cases where "the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence."<sup>20</sup> UPC Section 2-302 has a similar entitlement and exception "if a testator becomes a parent of a child after the execution of the testator's will and fails to provide in the will for the child . . . ."<sup>21</sup>

The California Probate Code's ("CPC") omitted spouse and omitted child provisions are even more robust in developing the relationship between non-probate transfers and distribution of the probate estate pursuant to family protection provisions.<sup>22</sup> Under the CPC, an omitted spouse or omitted child who takes under these family protection provisions takes the value of a share in the decedent's estate calculated using the fiction that the decedent had died without having executed

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<sup>17</sup> Even a relatively close family member may fail to qualify as an heir under a jurisdiction's intestacy scheme. For example, a niece would not take as an heir if the niece's parent who was a sibling of the decedent survived the decedent. See UNIF. PROB. CODE §§ 2-103(a)(3), 2-106(c) (UNIF. LAW COMM'N 2010).

<sup>18</sup> Cf. Adam J. Hirsch, *Incomplete Wills*, 111 MICH. L. REV. 1423 (2013) (considering when a will that results in partial intestacy should be consulted to determine distribution of the intestate estate).

<sup>19</sup> Unless circumstances surrounding the will indicate testator's contrary intent to have the surviving spouse not take under the will, the intestate share going to the spouse can be "no less than the value of the share of the estate the spouse would have received if the testator had died intestate as to that portion of the testator's estate, if any, that neither is devised to a child of the testator who was born before the testator married the surviving spouse and who is not a child of the surviving spouse nor is devised to a descendant of such a child or passes under Sections 2-603 or 2-604 [antilapse provisions] to such a child or to a descendant of such a child . . . ." UNIF. PROB. CODE § 2-301(a)(1)-(3).

<sup>20</sup> *Id.* § 2-301(a)(3).

<sup>21</sup> *Id.* § 2-302(a) & (b)(2).

<sup>22</sup> See CAL. PROB. CODE §§ 21610-21612, 21620-21621(2019).

any will or any revocable trust.<sup>23</sup> A spouse or child whom the decedent provided for in any revocable trust, however, does not qualify as an omitted spouse or omitted child respectively.<sup>24</sup> Moreover, protections for the omitted spouse and certain omitted children do not apply if the decedent executed any revocable trust after marriage to the spouse or birth or adoption of the child, respectively.<sup>25</sup> Thus, under these family protection provisions, the donor's execution of a revocable trust and the revocable trust's beneficiary provisions may directly impact whether a decedent's spouse or child is entitled to a share of the donor's probate estate. For example, the decedent's revocable trust beneficiary designation in favor of a non-heir executed after the decedent's marriage to the spouse or birth or adoption of the decedent's child cuts off the right of the spouse or child, respectively, to a share of the decedent's probate estate under these family protection provisions. The new heir reform builds on this precedent and should be viewed as part of a larger project to promote donative intent and to bring coherency to the legal rules governing non-probate and probate transfers.<sup>26</sup>

Our two-part study of estate planners, which we describe below, produces additional knowledge about how best to integrate non-probate transfers into intestacy statutes. In the first part of our study, from September 2010 through April 2011, we conducted a paper survey of forty-five estate planners. The responses to this survey greatly influenced the second part of our study in which, from June 2019 through August 2019, we conducted in-person or telephone interviews with nineteen estate planners.

Some might reasonably question the extent to which intestacy reform should be grounded in practical knowledge gained from estate planners.<sup>27</sup> After all, by definition, an intestacy statute is concerned primarily with decedents who have not sought estate planning advice. Moreover, as Professor Naomi Cahn has urged, wealth transfer law scholars should be cognizant of the potential for class bias when studies of "the population who can pay the bills of estate planning attorneys

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<sup>23</sup> See *id.* §§ 21610, 21620. The share of the decedent's separate property passing to the surviving spouse under these family protection provisions, however, may not exceed "one-half the value of the separate property in the estate." *Id.* § 21610(c).

<sup>24</sup> See *id.* §§ 21610, 21620.

<sup>25</sup> See *id.*

<sup>26</sup> See E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063, 1066 (1999) (identifying a "movement toward the unification of the subsidiary laws of wills and will substitutes" as a principal value grounding the 1990 Uniform Probate Code).

<sup>27</sup> Cf. Cahn & Zietlow, *supra* note 4, at 327 (noting that "the typical trusts and estates client is a member of the elite").



and who are most likely to write wills” are used to inform the drafting of intestacy statutes.<sup>28</sup> As we designed our two-part study and report on the data, we have striven to remain mindful of the limitations inherent in any empirical project seeking information from estate planners about reform of intestacy laws. We believe that the three goals that we established for the two-part study helped us to minimize class bias as well as unwarranted deference to experts. First, we sought to identify the procedural challenges that might arise by the introduction of non-probate transfers into the law of intestacy. We believed that estate planners’ experiences with probate administration would inform us about the feasibility of our proposed reforms. Second, we wanted to take advantage of estate planners’ experiences when they have their first meetings with clients seeking wills and other related advice. Estate planners were able to give us some insights about what their clients knew and did not know about probate as distinct from non-probate transfers before any planning begins. The third goal was to gauge the likelihood that our proposed reforms could be enacted. Bar associations have significant involvement in the adoption of wills and trusts legislation. We viewed the two-part study as an opportunity to assess the level of the estate planning bar’s enthusiasm for the proposed reforms and what facets of the reforms would likely raise concerns.

#### I. ESTATE PLANNERS SURVEY

After conducting a quantitative survey that explored the general public preferences when asked to consider the relationship between non-probate transfers and intestacy law,<sup>29</sup> we decided to take advantage of an estate planning symposium held in 2010 — the 6th Annual Jerry A. Kasner Estate Planning Symposium, in San Jose, California — where we distributed a written survey asking questions about our proposed reform (“the Kasner survey”).<sup>30</sup> The responses made clear that policy makers and practitioners are likely to view integrating non-probate transfers into the intestacy statute as a major, if not radical, modification of current law. The respondents to the Kasner survey did not see our proposal as a recognition that transferees have increased substantially their use of non-probate transfers in both number and value.<sup>31</sup> Nor did

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<sup>28</sup> Naomi Cahn, *Dismantling the Trusts and Estates Canon*, 2019 WIS. L. REV. 165, 175-76 (2019).

<sup>29</sup> See Fellows et al., *supra* note 8.

<sup>30</sup> The symposium took place on September 29, 2010.

<sup>31</sup> See Compilation of Responses to Kasner Survey [hereinafter Kasner Survey Compilation] (on file with authors) (reflecting that no respondent mentioned the

they situate our proposed reforms within the decades of statutory enactments applying probate law and principles to non-probate transfers.<sup>32</sup> As explained below, the results of the survey led us to (1) limit integrating non-probate transfers into intestacy law to those situations where the new heir reform avoids either escheat or inheritance by great-grandparents, their descendants, or even more distant relatives and (2) reject the advancement reform, which proposed to equalize the amount passing to heirs in the same generation to the extent possible by taking into account the amount an heir has otherwise received from a non-probate transfer.<sup>33</sup>

#### A. *Methods*

The Kasner survey consisted of twenty-five questions that we designed principally to determine estate planners' views on whether and how state intestacy statutes and probate administration should take a decedent's non-probate transfers into account.<sup>34</sup> Twenty-nine attendees completed and turned in the Kasner survey at the symposium. We then contacted symposium registrants by email and asked any who had not completed our paper survey at the symposium to complete the Kasner survey via a link that we provided to a Survey Monkey iteration of the survey identical to the paper survey that we had distributed at the symposium.<sup>35</sup> An additional sixteen respondents completed the Kasner survey via Survey Monkey, for a total of forty-five respondents. The forty-three respondents to the survey who provided information about their estate planning practice had an average of 20.5 years of estate planning experience and a median twenty-one years of estate planning experience.

The Kasner survey consisted of four sets of questions. One set focused on the new heir proposed reform in the context of a decedent whose

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increased use of non-probate transfers and no respondent situated our proposed reforms within the movement toward unification of the law of probate transfers and non-probate transfers).

<sup>32</sup> See, e.g., UNIF. PROB. CODE § 2-702 (UNIF. LAW COMM'N 2010) (providing a "simultaneous death" provision applicable to both wills and non-probate transfers); *id.* § 2-706 (providing an antilapse provision applicable to non-probate transfers that parallels the UPC's antilapse provision applicable to wills); *id.* § 2-804 (providing a revocation-upon-divorce provision applicable to both wills and non-probate transfers).

<sup>33</sup> See *supra* note 9 (discussing the advancement concept).

<sup>34</sup> The complete Kasner survey is reproduced *infra* as Appendix A. A transcription of all of the responses to the survey are available from the authors upon request.

<sup>35</sup> We solicited Kasner Estate Planning Symposium attendees to complete our survey via Survey Monkey in April 2011.

probate property otherwise would escheat (new heir/escheat reform). A second set focused on the new heir proposed reform in the context of a decedent whose probate property otherwise would pass to distant relatives (second cousins once removed) (new heir/distant relations reform). When we speak hereafter of the new heir reform without qualification, we generally mean to refer to both the new heir/escheat reform and the new heir/distant relations reform. A third set asked respondents to contemplate a reform that promotes equality among heirs who were members of the same generation through a rule that reduces the share otherwise going to a member of that generation if the intestate had designated that heir as a beneficiary of a non-probate transfer (advancement reform). Finally, the fourth set of questions solicited information about the respondents' estate planning practices.

### B. Results and Discussion

We recognized from the outset that we needed to restrict our proposal to displace an heir under a current intestacy statute with a new heir based on an intestate's designation of a beneficiary in a non-probate transfer. We have previously argued that intestacy reform to take account of non-probate transfer beneficiary designations should not apply if the decedent is survived by a spouse or descendants.<sup>36</sup> This limitation is grounded in empirical evidence showing the strong desire of most individuals to have their surviving spouses take all or nearly all of their probate estates and to have any children inherit the balance of the probate estates, if any.<sup>37</sup> The results of the Kasner survey demonstrate little support for a reform that substitutes non-probate transfer beneficiaries for intestates' parents or their descendants or intestates' grandparents or their descendants. Instead, the data support a reform that eliminates or reduces shares passing to heirs, determined under current intestacy statutes, only if an intestate's nearest heirs trace their familial relationships with the intestate exclusively through the intestate's great-grandparents or more distant ancestors. Only children of two only-child parents who survive their ancestors and leave no spouse or issue would fit this scenario. The scenario is likely to become more common as marriage rates and fertility rates continue to decline.<sup>38</sup>

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<sup>36</sup> Fellows et al., *supra* note 8, at 420-21.

<sup>37</sup> *See id.* at 420.

<sup>38</sup> *See, e.g.,* JOYCE A. MARTIN ET AL., DEP'T OF HEALTH AND HUMAN SERVS., BIRTHS: FINAL DATA FOR 2018, at 3, 5 (2019) (noting that the general fertility rate (GFR) for the United States fell to an all-time low in 2018 and that the GFR for the United States declined every year from 2007-2018 except for 2014); Lawrence W. Waggoner, *With*

### 1. The New Heir/Escheat Reform

The Kasner survey found considerable enthusiasm for the new heir reform when the probate estate otherwise would escheat.<sup>39</sup> When asked whether they believed “it would better promote the intestate decedent’s donative intent to distribute the probate estate to the decedent’s will substitute beneficiary [with respect to several non-probate transfers] rather than have it escheat to the state,” thirty-five of forty-five respondents responded affirmatively, while ten responded negatively.<sup>40</sup> Of the thirty-five affirmative responses, four were qualified with language such as “probably,” “should be taken into account and perhaps be determinative,” “if will subs cover substantial portion of the estate,” and “only in the highly unlikely event that the decedent has no living heirs.”<sup>41</sup> Of the ten negative responses, one respondent stated that they would “maybe” support reform if there were more evidence of intent beyond the beneficiary designations in non-probate transfers.<sup>42</sup> A majority of the remaining respondents answering in the negative gave responses that do not speak to donative intent directly, such as commenting on how escheat is “such a remote possibility” and wanting to encourage estate planning — “State will otherwise get it so do your plan.”<sup>43</sup>

When asked the ultimate question of whether they would “favor amending a state’s intestacy statute to distribute the entire probate estate to the decedent’s will substitute beneficiary rather than allowing it to escheat to the state,” thirty of forty-five respondents said “yes,”

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*Marriage on the Decline and Cohabitation on the Rise, What About Marital Rights for Unmarried Partners?*, 41 ACTEC L.J. 49, 50-56 (2015) (discussing evidence of the decline of marriage rates between 1967 and 2012).

<sup>39</sup> This result is consistent with the hostility in inheritance law to escheat. Many states, for example, do not apply the requirement that an heir survive the decedent by 120 hours to take in intestacy if that requirement results in the probate estate passing to the state. *See, e.g.*, UNIF. PROB. CODE § 2-104(c) (UNIF. LAW COMM’N 2019); CAL. PROB. CODE § 6403(a) (2019).

<sup>40</sup> Kasner Survey Compilation, *supra* note 31, Responses to Question A.1.

<sup>41</sup> *Id.* (responses of Respondents 1, 14, 19, SM8). We use “SM” in the identification of certain respondents to denote that the respondent completed the Kasner survey via Survey Monkey.

<sup>42</sup> *Id.* (response of Respondent 12). When referring to a respondent of the Kasner survey, we use the gender-neutral pronouns “they” and “their” in both the singular and plural context. We do the same when referring to an interviewee. In the case of the survey respondents, we do not know the respondent’s gender. In the case of the interviewees, this practice helps to maintain the anonymity that we promised them. In addition, the use of “they” and “their” reflects the growing grammatical trend to treat gender as fluid and not binary.

<sup>43</sup> *See, e.g., id.* at Responses to Question A.1 (responses of Respondents 22, 29).

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fourteen said “no,” and one gave an ambiguous answer.<sup>44</sup> Six of the affirmative answers were qualified with statements such as “need to take on case-by-case & have available as option in probate administration,” “at least to a portion,” and other statements conditioning approval on solutions to concerns raised, such as a having a procedure “to deal with deceased beneficiaries and to deal with multiple alternate instruments with different beneficiaries and/or different percentages in different instruments.”<sup>45</sup>

## 2. The New Heir/Distant Relations Reform

The survey respondents were almost equally split on whether they supported a reform that substituted non-probate transfer beneficiaries, in whole or in part, when the intestate takers of a decedent’s estate otherwise would be distant relations. When asked whether “it would better promote the intestate decedent’s donative intent to distribute at least some of the probate estate to the decedent’s will substitute beneficiary [of several non-probate transfers] rather than have the entire probate estate pass to the decedent’s second cousins once removed,” twenty-three of forty-five respondents answered in the affirmative, two additional respondents answered in a way that we interpret as “maybe,”<sup>46</sup> one respondent was ambiguous,<sup>47</sup> eighteen answered negatively, and one answered in a way that could be described as unresponsive.<sup>48</sup> When asked the ultimate question of whether they would “favor amending a state’s intestacy statute to distribute some of the probate estate to the non-heir will substitute beneficiary rather than having the entire probate estate pass to the decedent’s second cousins once removed,” twenty-one of forty-four answered affirmatively, one

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<sup>44</sup> *Id.* at Responses to Question A.3. The respondent giving an ambiguous answer stated, “All seems like too big a change, maybe treat it as a fraction (the way intestacy has different percentages if 1 child or more).” *Id.* (response of Respondent SM9).

<sup>45</sup> *See, e.g., id.* at Responses to Question A.3 (responses of Respondents 1, 2, 15).

<sup>46</sup> For example, one respondent commented that “[t]his might make sense, but it will be a ‘facts and circumstances’ approach that would lead to litigation.” *Id.* at Responses to Question B.1 (response of Respondent 16).

<sup>47</sup> This respondent commented as follows: “The decedent expressed its donative intent effectively through its will substitutes comprising — substantial portion of the total estate. Preparing a simple will is not bothersome. Should be encouraged when the will substitutes are adopted.” *Id.* (response of Respondent 11).

<sup>48</sup> *See id.* at Responses to Question B.1. The unresponsive respondent advocated for an expanded application of escheat to encourage estate planning. They would have the state take the intestate estate of any unmarried decedent who is not survived by issue or a parent. *See id.* (response of Respondent 19).

answered that it “might be OK,” twenty-one answered negatively, and one was unresponsive.<sup>49</sup>

Support for the new heir reform dropped as the decedent’s existing heirs became closer relations of the decedent. We asked respondents whether any of their answers to this series of questions would change “if the decedent’s intestate heirs were the decedent’s first cousins.”<sup>50</sup> A total of six respondents said that an answer would or might change under that circumstance: three respondents who had been in favor of our new heir proposed reform said “yes” an answer would change, two respondents who had been in favor of the reform said “possibly” an answer would change, and one respondent who had said they “might” be in favor of the reform said one of their answers “possibly” might change.<sup>51</sup> Those who gave a reason for their change suggested that the decedent was more likely to have maintained contact with first cousins over the decedent’s lifetime.<sup>52</sup> Thus, under this circumstance, only sixteen of forty-five respondents remained definitely in favor of the new heir proposed reform.<sup>53</sup>

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<sup>49</sup> *Id.* at Responses to Question B.3. The unresponsive respondent again advocated for the expanded use of escheat as a means to encourage execution of wills. *See id.* (response of Respondent 19).

<sup>50</sup> Kasner Survey, Appendix A, at Question B.5.

<sup>51</sup> Kasner Survey Compilation, *supra* note 31, at Responses to Question B.5 (responses of Respondents 3, 5, 23, 26, 28, SM4).

<sup>52</sup> *See id.* (responses of Respondents 3, 26, 28, SM4).

<sup>53</sup> In sum, we asked respondents four principal questions relating to the new heir/distant relations reform: (1) whether the respondent believed the reform would better promote the decedent’s donative intent; (2) what administrative difficulties the respondent foresaw arising from the reform; (3) whether the respondent would favor the reform; and (4) what portion of the probate estate the non-probate transfer beneficiary should receive. Kasner Survey, Appendix A, at Questions B.1-B.4. Although we asked respondents to explain how any of their answers to this set of questions would change if the heirs were the decedent’s first cousins rather than second cousins once removed, none of the six respondents who said an answer would or might change elaborated in a way that would allow us to determine whether their answer to the ultimate question of whether they would support our reform would change. *See* Kasner Survey Compilation, *supra* note 31, at Responses to Question B.5 (responses of Respondents 3, 5, 23, 26, 28, SM4). Thus, while only sixteen of forty-five respondents remained definitely in favor of the new heir proposed reform in a context in which the heirs were the intestate’s first cousins, it is possible that some of the six respondents who said an answer would or might change would remain in favor of the reform, but would or might change an answer with respect to whether the reform would better promote a decedent’s intent, administrative difficulties they foresee, or the portion of the probate estate that the new heir should receive. We are reading the results in the most conservative way in stating that only sixteen of forty-five respondents remained definitely in favor of the new heir reform.

We also asked respondents whether any of their answers to this set of questions would change “if the decedent’s intestate heirs were the decedent’s nephews and nieces.”<sup>54</sup> Support for the new heir reform dropped greatly under this circumstance. A total of fifteen respondents said that an answer would (eleven respondents) or might (four respondents) change.<sup>55</sup> Nine respondents who had been in favor of the new heir reform said “yes” an answer would change, while four respondents who had been in favor of the reform suggested an answer might change.<sup>56</sup> One respondent who had said they “might” be in favor of the reform said one of their answers would change.<sup>57</sup> Finally, the one respondent who did not answer the ultimate question of whether they would favor the new heir reform, but who answered in the affirmative the question of whether “it would better promote the intestate decedent’s donative intent to distribute at least some of the probate estate to the decedent’s will substitute beneficiary [of several non-probate transfers] rather than have the entire probate estate pass to the decedent’s second cousins once removed,” suggested that one of their answers would change.<sup>58</sup> One respondent expressed a common sentiment that degree of relationship between the intestate and the existing heirs matters in the following way: “Yes. Because the decedent would be much more likely to have had personal contact with nephews and nieces than with very distant relatives who in most cases would not have known the decedent.”<sup>59</sup> Thus, under this circumstance, only eight of forty-five respondents remained definitely in favor of the new heir reform when the intestate’s heirs under current law were nephews and nieces.<sup>60</sup>

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<sup>54</sup> Kasner Survey, Appendix A, at Question B.6.

<sup>55</sup> Kasner Survey Compilation, *supra* note 31, at Responses to Question B.6 (responses of Respondents 3, 4, 5, 10, 13, 18, 21, 23, 26, 28, SM4, SM7, SM9, SM10, SM16).

<sup>56</sup> *Id.* (responses of Respondents 4, 5, 10, 18, 21, 23, 26, 28, SM4, SM7, SM9, SM10, SM16).

<sup>57</sup> *Id.* (response of Respondent 3).

<sup>58</sup> *See id.* (response of Respondent 13).

<sup>59</sup> *Id.* (response of Respondent SM4).

<sup>60</sup> Although we asked respondents to explain how any of their answers to the survey’s distant relations set of questions — (1) whether the respondent believed the reform would better promote the decedent’s donative intent; (2) what administrative difficulties the respondent foresaw arising from the reform; (3) whether the respondent would favor the reform; and (4) what portion of the probate estate the non-probate transfer beneficiary should receive — would change if the heirs were an intestate’s nephews and nieces, only three of the fifteen respondents who said an answer would or might change elaborated in a way that would allow us to determine that their answer to the ultimate question of whether they would support our proposed reform would

The data from the survey support a new heir reform if limited to the situation in which a decedent dies without a spouse, descendants, parents or their descendants, or grandparents or their descendants.<sup>61</sup> Such an approach would be consistent with the UPC, which, aside from a provision in favor of a decedent's stepchildren or their descendants, does not provide any share to relatives more distant from the intestate than grandparents or their lineal descendants.<sup>62</sup> Instead, it provides for an intestate's estate to escheat to the state in those instances in which an intestate is survived only by relatives more distant than grandparents or their descendants.<sup>63</sup>

### 3. Implementation of the New Heir Reform

#### a. *Determination of the Share Passing to a New Heir and Who Qualifies as a New Heir*

The Kasner survey invited respondents to comment on substantive difficulties the respondents foresaw in the implementation of the new heir reform to avoid escheat, and also to suggest how the law might ameliorate these concerns.<sup>64</sup> The issue most frequently raised was the need for the reform to specify how to allocate the probate estate among

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change. *See id.* (responses of Respondents 3, 5, 10). Thus, while only eight of forty-five respondents remained definitely in favor of the new heir reform in a context in which the heirs were the intestate's nephews and nieces, it is possible that some of the remaining twelve respondents who said an answer would or might change would remain in favor of the reform, but would or might change an answer with respect to whether the reform would better promote the decedent's intent, administrative difficulties they foresee, or the portion of the probate estate that the new heir should receive. In any event, the responses make clear that at least twenty-four of forty-four respondents would not support the new heir reform if an intestate's heirs otherwise were the intestate's nephews and nieces.

<sup>61</sup> Given the data from the Kasner survey, we chose not to focus directly in our interviews on the circumstances warranting a displacement of heirs identified under intestacy statutes. Nonetheless, one interviewee raised the issue on their own and expressed the view that our proposed reform should apply to displace relatives of a decedent who were more distantly related than the decedent's parents or their descendants, such as a first cousin. *See* Interview Final Thoughts, Interviewee IC. Another interviewee, who also raised the issue on their own, went so far as to favor the new heir reform when a decedent was survived by siblings or their descendants. *See* Question 10, Interviewee IP.

<sup>62</sup> *See* UNIF. PROB. CODE § 2-103(j) (UNIF. LAW COMM'N 2019).

<sup>63</sup> *See id.* § 2-105.

<sup>64</sup> *See* Kasner Survey, Appendix A, at Question A.2.



multiple beneficiaries.<sup>65</sup> In our earlier study, we examined this issue. We considered an “absolute-threshold” approach and a “mirroring” approach.<sup>66</sup>

An “absolute-threshold” approach would make non-probate transfer beneficiaries a new heir only if they receive a high percentage of the non-probate assets.<sup>67</sup> If the necessary percentage is set at over fifty percent, there would be no need to divide the probate estate among non-probate transfer beneficiaries. As we have explained earlier, “[t]he rationale for such an absolute-threshold approach would be that the larger proportion of the nonprobate estate a will-substitute beneficiary receives, the more confident we can be that the decedent would want that beneficiary to take from the intestate estate as well.”<sup>68</sup> We have concluded, “[n]evertheless, the absolute-threshold approach may be too inflexible, given the multitude of circumstances surrounding will-substitute beneficiary designations.”<sup>69</sup> Moreover, the absolute-threshold approach is arguably ill-suited to a new heir reform that only applies in those instances in which solely relatives more distant than grandparents or their descendants survive an intestate. The more distantly related an intestate’s default heirs (*i.e.*, those who would take absent substitution of new heirs under the proposed reform), the more legislatures should tolerate uncertainty about an intestate’s preference for new heirs to share in the probate estate.

A mirroring approach calls for a non-probate transfer beneficiary to receive a percentage of the total probate estate allocated to new heirs that is proportional to the beneficiary’s percentage of the non-probate estate.<sup>70</sup> Like the absolute-threshold approach, the mirroring approach is premised on the notion that the larger the non-probate transfer to a beneficiary, the more certainty we should have that the decedent would want the beneficiary to take from the probate estate as well. As we have explained earlier, “[u]nder the mirroring approach, the risk and, indeed, the likelihood of making an incorrect decision with respect to

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<sup>65</sup> See Kasner Survey Compilation, *supra* note 31, at Responses to Question A.2 (responses of Respondents 2, 3, 4, 5, 9, 11, 13, 17, 18, 19, 22, 25, 26, 28, SM1, SM4, SM6, SM8, SM12, SM13, SM14, SM16).

<sup>66</sup> See generally Fellows et al., *supra* note 8, at 442-44.

<sup>67</sup> Under such an approach, the need would remain to identify all of the non-probate transfers, their value, and the designated beneficiaries.

<sup>68</sup> Fellows et al., *supra* note 8, at 442-43.

<sup>69</sup> *Id.* at 443.

<sup>70</sup> See *id.*

the decedent's donative intent is inversely proportional to the consequences of making that wrong decision."<sup>71</sup>

Although we did not mention a mirroring approach in our survey, nine of the forty-five respondents raised the possibility of applying a mirroring-type approach to allocate the intestate estate among the non-probate transfer beneficiaries.<sup>72</sup> Indeed, the mirroring approach was the most frequently raised solution. No respondent raised the possibility of using an absolute-threshold approach.<sup>73</sup> One respondent offered a twist on proportionate distribution: "The law might . . . dictat[e] an order of priority involving the classes of types of will substitutes (e.g., retirement plan and insurance policy designations of beneficiaries versus joint checking accounts), with proportionate weighting among equal classes of will substitutes by value of assets passing thereunder."<sup>74</sup> Implicit in this suggestion is the notion that our reform should treat some non-probate transfers as more reliable indicators of donative intent with respect to the probate estate than other non-probate transfers, with joint checking accounts falling into the category of less reliable indicators.<sup>75</sup>

Additional substantive, rather than procedural, issues raised by the respondents included the following: (1) whether the new heir/escheat reform should specify a requisite percentage of the total estate that non-

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<sup>71</sup> *Id.*

<sup>72</sup> See Kasner Survey Compilation, *supra* note 31, at Responses to Question A.2 (responses of Respondents 2, 9, 26, 28, SM1, SM4, SM8, SM13, SM16). To be clear, no respondent used the term "mirroring approach" when describing what we have labeled the mirroring approach. See also Question 9, Interviewee IO (suggesting a mirroring approach).

<sup>73</sup> With a mirroring approach, as with an absolute-threshold approach, it is critical to specify the time at which the non-probate transfers should be valued. Valuing the non-probate transfers as of the time of the decedent's death would seem best to promote administrative convenience and certainty. See, e.g., CAL. PROB. CODE § 21612(a)(2) (2019) (adopting a mirroring approach in an abatement provision concerning an omitted spouse's share, specifying that "the share shall be taken from all beneficiaries of decedent's [wills and trusts] in proportion to the value they may respectively receive," and providing that "[t]he proportion of each [will or revocable trust] beneficiary's share that may be taken pursuant to this subdivision shall be determined based on values as of the date of the decedent's death"). Several respondents to the survey raised the issue of valuation, but no respondents explicitly suggested an approach. See Kasner Survey Compilation, *supra* note 31, Responses to Question A.2 (responses of Respondents 27, SM1). However, one might interpret the respondent's comments calling for proportionate weighting "by value of assets passing" via non-probate transfers as implicitly calling for a time of death valuation. See *id.* (response of Respondent SM13).

<sup>74</sup> *Id.* (response of Respondent SM13).

<sup>75</sup> See *infra* notes 116–151 and accompanying text (discussing responses to estate planner interview questions relating to whether the new heir reform should differentiate among types of non-probate transfers and types of designated beneficiaries).

probate transfers must comprise before the reform applies and, if so, what the necessary percentage of the total estate should be;<sup>76</sup> (2) whether the new heir/escheat reform should treat some types of non-probate transfers as less persuasive evidence of donative intent than other non-probate transfers and, if so, which ones;<sup>77</sup> (3) how the new heir/escheat reform should deal with non-probate transfer beneficiary designations that had become “stale” because, for example, the beneficiary predeceased the intestate, the intestate and the beneficiary had ended their marriage or nonmarital relationship, or simply a significant amount of time passed between a designation and a decedent’s death, raising the concern that a decedent had forgotten about a non-probate transfer or who was designated as a beneficiary in a non-probate transfer;<sup>78</sup> (4) whether the new heir/escheat reform should exclude a non-probate transfer “if the will substitute was not a ‘gift,’ but a bargained for, arms[-]length contractual payment”;<sup>79</sup> (5) how the new heir/escheat reform should value non-probate transfers;<sup>80</sup> (6) whether the new heir/escheat reform should retain partial escheat to incentivize people to adopt an estate plan;<sup>81</sup> and (7) whether the new

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<sup>76</sup> See Kasner Survey Compilation, *supra* note 31, at Responses to Question A.2 (response of Respondent 1).

<sup>77</sup> See *id.* (responses of Respondents 2, SM13). One respondent suggested “JT substitute is less persuasive than others.” *Id.* (response of Respondent 2); see also *infra* notes 116–151 and accompanying text (discussing interview responses concerning whether the new heir reform should differentiate among types of non-probate transfers and among types of non-probate transfer beneficiaries).

<sup>78</sup> See Kasner Survey Compilation, *supra* note 31, at Responses to Question A.2 (responses of Respondents 12, 16, 25, SM3, SM9, SM16). Proffered solutions included (a) apply a revocation-upon-divorce principle to the reform and (b) set a “statute of limitations” that denies beneficiaries of non-probate transfers new heir status if the intestates made the beneficiary designations more than a certain number of years before the time of their deaths. See *id.* (responses of Respondents SM9, SM16); see also *infra* notes 121–140 and accompanying text (discussing responses to estate planner interview questions relating to stale non-probate transfer beneficiary designations).

<sup>79</sup> Kasner Survey Compilation, *supra* note 31, at Responses to Question A.2 (response of Respondent SM1). An example of this might be a beneficiary designation in a non-probate transfer that was part of a divorce settlement. See *infra* note 141 (estate planner interview respondent discussing this issue).

<sup>80</sup> See Kasner Survey Compilation, *supra* note 31, at Responses to Question A.2 (responses of Respondents 27, SM1). One respondent suggested that some gifts — such as income streams from annuities, future interests, and the remainder interest in a life estate — may be harder to value. *Id.* (response of Respondent SM1). This issue is important whether the intestacy reform uses a mirroring approach or an absolute-threshold approach.

<sup>81</sup> The concern is that the new heir/escheat reform might tend to make people lax about executing a will or trust, “thinking that if things no longer escheat to the state,

heir/escheat reform would give rise to an obligation on the part of estate planners or non-probate transfer financial intermediaries to advise non-probate transfer donors of the effect their non-probate transfer beneficiary designations may have on the distribution of their intestate estate.<sup>82</sup>

The survey also invited respondents to comment specifically on substantive implementation issues that might arise upon a state's adoption of the new heir/distant relations reform. The survey also asked them to suggest how the law might ameliorate those concerns.<sup>83</sup> Respondents raised the following concerns: (1) where the new heir/distant relations reform should draw the line cutting off or reducing the intestate share of a decedent's distant relations,<sup>84</sup> (2) whether the distant relations should have standing to contest the designation of a new heir,<sup>85</sup> and (3) how the new heir/distant relations reform should apportion the intestate estate among or between the non-probate transfer beneficiaries and the distant relations.<sup>86</sup> Also, a number of respondents expressed concern about the costs of litigation that the non-probate transfer beneficiaries and the distant relations could incur.<sup>87</sup> These responses are a cautionary reminder that the introduction of both the new heir/escheat and new heir/distant relations reforms could lead to increased litigation. Interested parties could challenge the validity of non-probate transfers by, for example, alleging an intestate's failure to meet all the procedural requirements necessary for a valid execution of a non-probate transfer or a beneficiary designation, an intestate's mental incapacity at the time of a beneficiary designation, or the presence of fraud or undue influence at the time of a beneficiary designation.

The survey also offers insight into how the new heir/distant relations reform should allocate the probate estate between non-probate transfer beneficiaries and those who otherwise would be heirs. When asked what portion of the probate estate a new heir should receive when the decedent's heirs otherwise would be the decedent's second cousins once removed, at least fifty percent of the twenty-four respondents who

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their property will somehow go where they would like it to because they did one or more substitutes." *Id.* (response of Respondent SM1).

<sup>82</sup> See *id.* (responses of Respondent 17, SM11).

<sup>83</sup> Kasner Survey, Appendix A, at Question B.2.

<sup>84</sup> Kasner Survey Compilation, *supra* note 31, at Responses to Question B.2 (responses of Respondents 1, 4).

<sup>85</sup> See *id.* (responses of Respondents 9, SM3).

<sup>86</sup> See *id.* (responses of Respondents 14, 17, SM1, SM7, SM11).

<sup>87</sup> See *id.* (responses of Respondents 3, 9, 17, SM10, SM13).

assigned a portion of the intestate estate to the new heir would assign all of the intestate estate to the new heir<sup>88</sup>: twelve of twenty-four respondents chose “All” and a thirteenth drew a circle including both “All” and “Most.”<sup>89</sup> Of the remaining eleven respondents, six chose “Most,” four chose “Half,” and one chose “Less than half.”<sup>90</sup> Thus, the data support a new heir/distant relations reform that gives the entire estate to the new heir or heirs if the decedent’s nearest relations are more distant than grandparents or their lineal descendants.<sup>91</sup>

*b. Procedural Implementation of the New Heir Reform*

The respondents suggested some procedural issues that a comprehensive proposal implementing the new heir/escheat reform might need to address. Several respondents speculated that a personal representative responsible for distribution of the intestate estate might encounter difficulties discovering all of an intestate’s non-probate transfers and who the designated beneficiaries of each of those transfers may be.<sup>92</sup> A related issue raised was whether there should be a time limit for determining non-probate transfers and the designated beneficiaries named in those transfers.<sup>93</sup> A substantial number of respondents raised issues relating to notice, including how the personal representative would give notice to non-probate transfer beneficiaries; whether a state would have standing to contest the substitution of non-probate transfer beneficiaries for the state and, if so, how the personal representative should give notice to the state; how the personal representative should

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<sup>88</sup> Of the forty-five survey respondents, twenty-four assigned a portion of the intestate estate to the non-probate transfer beneficiary. Seventeen assigned “none” of the probate estate to the non-probate transfer beneficiary. Three respondents ignored the choices the survey provided but offered a comment, including “Depends on when substitute beneficiary named,” “How could a standard ratio be established?” and “Totality of circumstances nature & value of non-relative beneficiary’s gifts/devises.” One respondent neither chose one of the choices the survey provided nor offered a comment. *Id.* at Responses to Question B.4.

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

<sup>90</sup> *Id.*

<sup>91</sup> If the reform adopted were to affect existing heirs who are close relations to the decedent, empirical evidence suggests that the reform should not entirely displace the existing heirs. *See* Fellows et al., *supra* note 8, at 444 (reporting that “[v]ery few of the respondents in our survey awarded the entire probate estate to the nonheir will-substitute beneficiary” and concluding that “our empirical study suggests that, at least when the existing heirs are close blood relations of the decedent, new heirs should not wholly displace otherwise existing heirs”).

<sup>92</sup> *See* Kasner Survey Compilation, *supra* note 31, at Responses to Question A.2 (responses of Respondents 6, 17, SM1, SM9, SM12).

<sup>93</sup> *See id.* at Responses to Question A.3 (response of Respondent 6).

give notice to the creditors; and which other entities might deserve notice.<sup>94</sup> One respondent opined that publication alone probably would not be adequate.<sup>95</sup>

A large number of respondents expressed concerns that accompanying procedures to the new heir reform needed to minimize the use of court resources and prevent undue delays in the distribution of the intestate estate while still protecting creditors and adjudicating challenges to the validity of non-probate transfers.<sup>96</sup> Respondents raised other issues, including who should get priority in being the personal representative of the estate;<sup>97</sup> whether probate always would be necessary or whether distribution of the estate might be accomplished, in some circumstances, through otherwise applicable summary procedures;<sup>98</sup> and whether states enacting the new heir reform should also statutorily require enhanced execution requirements for non-probate transfers, such as witnessing or notarization.<sup>99</sup> One respondent suggested that the new heir reform might “[u]se same procedures + remedies already statutorily in place.”<sup>100</sup>

The survey also invited respondents to comment on the administrative difficulties, if any, they foresaw pertaining specifically to the new heir/distant relations reform. The survey also asked them to suggest how the law might ameliorate these administrative difficulties.<sup>101</sup> Many respondents raised concerns similar to those that respondents had raised in connection with the new heir/escheat reform.<sup>102</sup>

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<sup>94</sup> See *id.* at Responses to Question A.2 (responses of Respondents 4, 7, 12, 15, 17, 20, SM1, SM10).

<sup>95</sup> *Id.* (response of Respondent SM1).

<sup>96</sup> See *id.* (responses of Respondents 5, 14, 15, 21, 22, 23, SM2).

<sup>97</sup> See *id.* (responses of Respondents 17, SM1). One respondent pondered whether the beneficiary with the largest non-probate transfer gift should be given priority. See *id.* (response of Respondent SM1); see also *infra* notes 192–206 and accompanying text (discussing responses to estate planner interview questions relating to who should get priority in being the personal representative of the estate under the new heir reform).

<sup>98</sup> See *id.* at Responses to Question A.2 (responses of Respondents 3, 5, 24, SM5, SM7).

<sup>99</sup> See *id.* (response of Respondent 18).

<sup>100</sup> *Id.* (response of Respondent 21).

<sup>101</sup> Kasner Survey, Appendix A, at Question B.2.

<sup>102</sup> See Kasner Survey Compilation, *supra* note 31, at Responses to Question B.2 (numerous respondents answering “same as” previous answer).

#### 4. The Advancement Reform

The set of questions asking about our proposed advancement reform produced the survey's clearest results. The respondents demonstrated near unanimous opposition and sometimes even hostile opposition to the advancement reform. We asked respondents to consider a situation with the following components: (1) an intestate decedent left several non-probate transfers, (2) the intestate designated the same beneficiary in each non-probate transfer, (3) the designated beneficiary was also an heir sharing the probate estate with other heirs in the same generation, and (4) the non-probate transfers comprised a substantial portion of the probate and non-probate estates.<sup>103</sup> When asked whether they believed

it would better promote the intestate decedent's donative intent for a state's intestacy statute to treat the will substitutes as an advancement and distribute to the will substitute beneficiary less of the probate estate than he or she otherwise would have received so as to equalize shares of the total estate (probate and non-probate) going to the heirs in the same generation,

forty-one of forty-two estate planner respondents responded negatively. Only one of the forty-two respondents responded affirmatively.<sup>104</sup>

When asked the ultimate question of whether they would

favor amending a state's intestacy statute to treat the will substitutes as an advancement of the heir's intestate inheritance and thereby distribute less of the probate estate to the will substitute beneficiary than would otherwise pass to him or her under existing intestacy statutes so as to equalize shares of the total estate (probate and non-probate) going to the heirs in the same generation,

thirty-six of thirty-eight respondents said "no" and only two said "yes."<sup>105</sup> The respondents' comments across this set of questions indicated that, by far, the principal concern with the advancement reform was that it would undermine the decedent's intent.<sup>106</sup> A

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<sup>103</sup> See Kasner Survey, Appendix A, at Question C.

<sup>104</sup> See Kasner Survey Compilation, *supra* note 31, at Responses to Question C.1.

<sup>105</sup> *Id.* at Responses to Question C.3.

<sup>106</sup> See, e.g., *id.* at Responses to Question C.1 (response of Respondent SM5 stating "[t]he very idea boggles my mind! Such a statute may completely unravel what the decedent had in mind"); *id.* at Responses to Question C.2. (response of Respondent 6 stating that "I cannot comment on this as it would likely be contrary to the decedent's intent"); *id.* at Responses to Question C.3. (response of Respondent 25 stating "[n]ot decedent's intent").

significant number of respondents also expressed the fear that the proposed reform would significantly increase litigation.<sup>107</sup>

The opposition among respondents to the advancement reform is consistent with the results of our quantitative vignette study. In that earlier study, we concluded that that “[a]lthough more empirical study is necessary, based on this study, there is little support for the advancement hypothesis.”<sup>108</sup> Given this data, one might reasonably conclude that law reform should not include the advancement reform and should be limited to the new heir/escheat and new heir/distant relations reforms.<sup>109</sup>

## II. ESTATE PLANNER INTERVIEWS

The Kasner survey results guided us in structuring our interviews with estate planners as we introduced them to the idea of the new heir reform. We omitted those aspects of the new heir reform where respondents to the Kasner survey reached broad consensus and included those that had proved most contentious. As we designed the interview script, we had to remain cognizant that we could only expect each interviewee to give us a limited amount of time. Wanting to maximize the value of each interview with a skilled professional and

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<sup>107</sup> See *id.* at Responses to Question C.2 (responses of Respondents 1, 9, SM4, SM7, SM8, SM9, SM10).

<sup>108</sup> Fellows et al., *supra* note 8, at 413; see also *id.* at 429 (bivariate analysis showing that in “57% of the vignettes, respondents divided the probate estate equally between the will-substitute beneficiary and the other legal heir” and “[i]n [only] 34% of the vignettes, respondents allocated ‘little’ or ‘none’ to the will-substitute beneficiary”); *id.* at 445 (“In a majority of cases involving the advancement vignettes, respondents treated the heir who was a will-substitute beneficiary and the heir who was not a will-substitute beneficiary equally with respect to distribution of the probate estate (i.e., the results indicate that the law should not take will-substitute beneficiary designations into account.”); *id.* at 446 (concluding that the study results “provide significant support for the law to ignore will substitutes when the will-substitute beneficiary is otherwise an heir of the decedent”).

<sup>109</sup> For the reasons outlined in the text, we did not ask questions about the advancement reform during our interviews with estate planners. Rather, our interviews focused solely on the new heir reform. Notably, a number of interviewees talked about how, at the outset, they explain to their clients that they should not distinguish between their non-probate and probate estates. Once the clients decide on the amount or percentage to go to each beneficiary based on that combined estate, then the interviewee assists them in executing that plan through their wills, revocable trusts, if any, and other non-probate transfers. Question 1, Interviewee IP, IQ; see Question 5, Interviewee II; Question 6, Interviewee IB, IG, II, IP; see also *infra* notes 241–244 and accompanying text (discussing responses to estate planner interview questions detailing how interviewees work with clients to consider the combined effect of their probate and non-probate allocations).



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having the benefit of the results from the Kasner survey, we confined the interview topics to those critical to the new heir reform where we needed more guidance and to those for which we needed further expert advice on how to evaluate less than ideal solutions to implementation challenges. In addition to discussing the specific features of the new heir reform with interviewees, we explored, through a range of questions, whether their clients' understanding and use of non-probate transfers corroborate or undermine the underlying rationale of the new heir reform — intestates' non-probate transfers reveal those persons who intestates would prefer to have share in their probate estates.

#### A. *Methods*

We utilized several means to identify potential interviewees: our personal networks, internet searches of estate planning practice groups in the targeted geographic areas, listings of estate planners found in the directory of a national organization of estate planning professionals, and referrals from colleagues. We made a conscious and successful effort to obtain a group of interviewees that was diverse with respect to years of estate planning experience and size of affiliated firm as well as gender: our interviewees ranged from junior associate to retired partner with more than forty years of estate planning experience and from solo practitioner to affiliate with the largest estate planning practice in the region. Nine of our nineteen interviewees were women. We solicited participation of the targeted estate planners either by telephone or through email.

We conducted interviews with nineteen estate planners.<sup>110</sup> All but one of our interviewees practiced in California or Minnesota. Eight of our interviews took place in the estate planner's office, seven took place by telephone, two were held over a meal in a restaurant, and two were conducted in the estate planner's home. The interviews lasted from roughly thirty-five minutes to over ninety minutes. We audiotaped all but one of the interviews.<sup>111</sup> For each interview, we generally followed the same script with exceptions made as the conversation required.<sup>112</sup> We began each interview with a promise of anonymity for the interviewee and with descriptions of the focus of our study and of the general nature of the new heir reform. We then asked a series of questions in each of three major areas of inquiry, which we describe in the following section.

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<sup>110</sup> One of us conducted nine of the interviews and the other conducted ten of them.

<sup>111</sup> We failed to audiotape one interview because of a technical malfunction.

<sup>112</sup> The complete interview script is reproduced *infra* as Appendix B.

*B. Results and Discussion*

As we introduced our project at the outset of our meetings with each estate planner, we included this description of our proposal:

[W]e have concluded that intestacy reform to take account of will-substitute beneficiary designations should apply only if the decedent is not survived by a spouse or issue; by parents or issue of parents . . . or by grandparents or issue of grandparents . . . . Our contemplated reform would amend state intestacy statutes so that, under certain circumstances, a decedent's will substitute beneficiaries would share in the intestate estate . . . . A will-substitute beneficiary who shares in the estate would receive a percentage of the total probate estate that is proportional to the beneficiary's percentage of the nonprobate estate [i.e., the mirroring approach].<sup>113</sup>

With the two questions of who qualifies as a distant relation and how to determine the share of the probate estate each non-probate transfer beneficiary inherits settled, we focused the interview on other issues where we needed the interviewees' expertise and experience. For example, we asked them whether the reform should give some types of non-probate transfers more weight than others for determining an intestates' donative intent with regard to the distribution of their probate estates. We also asked them a few questions having to do with stale beneficiary designations, meaning ones that occurred a number of years before an intestate died or ones that had not been amended after, for example, a designated beneficiary died or no longer had familial status due to divorce or similar type of event. Another area where the interviewees' insights proved to be invaluable had to do with probate administration procedures. We especially wanted guidance with regard to the practical challenges personal representatives face as they try to identify each of the intestates' non-probate transfers, beneficiary designations, and their respective values. As part of that discussion, we wanted to know what would be a reasonable time-limit to impose on a personal representative conducting that type of investigation. We also asked advice about whether they thought, in the context of the new heir reform where designated beneficiaries of non-probate transfers qualify as interested parties, current probate administration procedures could sufficiently protect all interested parties and what delays, procedural complications, and expense might arise due to the search for and possible delays in the identification of non-probate transfer

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<sup>113</sup> Estate Planner Interview Script, Appendix B, at I.

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beneficiaries. Finally, we asked interviewees a set of questions designed to reveal the differences and similarities between their clients' expression of donative intent in non-probate transfers as compared to in their clients' wills and revocable trusts. This set of questions was vital to a valid assessment of whether the new heir reform likely furthers intestates' donative intent.

1. Whether to Differentiate Among Types of Non-Probate Transfers and Among Types of Non-Probate Transfer Beneficiaries

Given the wide array of non-probate transfers available to the public, we asked interviewees whether, in the context of the new heir reform, they viewed some types of non-probate transfers as less reliable than others to determine who intestates would prefer take under a jurisdiction's intestacy statute. We first asked a general question about whether the new heir reform should differentiate among various types of non-probate transfers and, if so, in what way.<sup>114</sup> We followed up the general question by asking all interviewees next specifically whether the new heir reform should "exclude all or some joint tenancies from the reform" and even more specifically whether we "[s]hould . . . distinguish between joint tenancies for real estate v. joint tenancy bank accounts."<sup>115</sup>

An overwhelming consensus emerged that joint tenancy bank accounts were problematic in the context of the new heir reform. The gist of the concerns expressed is that many property owners do not understand the significance of a joint tenancy and many may want only a convenience account rather than an account with a right of survivorship. Sixteen of the nineteen interviewees expressed concern that a joint tenancy bank account may not reflect donative intent.<sup>116</sup> Nine interviewees mentioned that personnel at banks and similar institutions, with good intentions, promote joint tenancy accounts and discourage other more appropriate arrangements.<sup>117</sup> Two interviewees suggested, however, that the size of the joint tenancy account should be a relevant consideration: when a significant amount of money is held in a joint tenancy account, the account is more likely to reflect donative

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<sup>114</sup> *Id.* at III.9.

<sup>115</sup> *Id.* at III.9A.

<sup>116</sup> Question 9, Interviewee IQ; Question 9A, Interviewee IA, IB, IC, ID, IE, IF, IG, IH, IJ, IK, IL, IO, IP, IR, IS.

<sup>117</sup> Question 9, Interviewee IQ; Question 9A, Interviewee ID, IE, IF, IG, IJ, IO, IP, IR.

intent.<sup>118</sup> Notwithstanding the numerous concerns expressed by interviewees about inclusion of joint bank accounts within the new heir reform, we do not favor their exclusion. First, we credit the view that when a joint tenancy bank account holds relatively significant assets, it is more likely to reflect donative intent. Also, if the bank account holds only relatively insignificant assets, the mirroring approach will make it of minor importance to the overall distribution of an intestate's probate estate.

Interviewees were almost equally split between those who felt that joint tenancies with right of survivorship for real estate were similarly problematic and those who felt that joint tenancies for real estate, for purposes of the new heir reform, were more likely to reflect accurately an intestate's donative intent. Several of those who stated that real estate joint tenancies may not accurately reflect donative intent suggested that real estate agents and escrow companies often give buyers inadequate or inaccurate information when buyers are making their decisions to take title to real estate in joint tenancy.<sup>119</sup> On the other hand, several interviewees considered real estate joint tenancies to be a more reliable indicator of donative intent. They emphasized the lack of a convenience motive and the "momentous" nature of making a real estate purchase, which may very well represent an individual's most valuable asset.<sup>120</sup>

By far the most prevalent concern interviewees expressed in their answers was that the greater the amount of time between a beneficiary designation and an intestate's death the less likely the non-probate transfer reflects the intestate's donative intent at death.<sup>121</sup> One interviewee, for example, elaborated, "They may forget that fifteen years ago they named their boyfriend or girlfriend, who they don't even speak to anymore."<sup>122</sup> We followed up by asking each interviewee specifically, "Should we exclude will-substitute designations if a significant amount of time passed between the designation and the decedent's death?" and

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<sup>118</sup> Question 9A, Interviewee IB, IL.

<sup>119</sup> Question 9A, Interviewee IC, ID, IG, IP.

<sup>120</sup> Question 9A, Interviewee IA, IB, IJ, IL, IO, IP.

<sup>121</sup> Seven of the nineteen interviewees raised this concern in response to our general question. Question 9, Interviewee IA, IB, IE, IH, IP, IQ, IR; *see also* Cahn & Zietlow, *supra* note 4, at 362 ("While retirement beneficiaries are designated at hiring, they can become stale after decades-long employment, and these initial decisions may never be revisited."); John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1140 (1984) (noting that "there is considerable danger that the transferor may neglect to update one or more components of an estate that involves numerous instruments and institutions of transfer").

<sup>122</sup> Question 9, Interviewee IE.

“[i]f so, how long?”<sup>123</sup> A majority of interviewees clearly opposed excluding non-probate transfers from the operation of the new heir reform because the time between the intestate’s beneficiary designation and death was too long.<sup>124</sup> The comments indicate interviewees’ unease with an arbitrary staleness rule, which would exclude a non-probate transfer when an intestate’s beneficiary designation did not occur within a certain number of years before the intestate’s death. They expressed a concern that many, perhaps most, of the beneficiary designations in non-probate transfers that the new heir reform would ignore would, in fact, be an accurate reflection of intestates’ donative intent at death.<sup>125</sup> Also, interviewees appreciated that the adoption of a fixed rule risks errors of over- and under-inclusiveness while a flexible standard introduces uncertainties, time delays, and other inefficiencies into probate administration.<sup>126</sup> Two interviewees commented that staleness is a concern with wills also.<sup>127</sup> The law, however, does not challenge wills based on a concern that they are stale.

Given that our question focused solely on the passage of time between execution of the non-probate transfer beneficiary designation and the death of the intestate, it is notable that nearly half (eight) of the interviewees either suggested that the more important issue is a significant change in status or circumstances or they specifically focused on such changes of status or circumstances in their responses.<sup>128</sup> For example, six interviewees raised questions about the proper treatment under the new heir reform of non-probate transfers where an intestate had divorced or a designated beneficiary had predeceased the intestate.<sup>129</sup>

Based on these responses of the interviewees, we conclude that the new heir reform should not exclude any non-probate transfer beneficiary designation solely on the basis of length of time between when the decedent made the beneficiary designation and when the

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<sup>123</sup> Estate Planner Interview Script, Appendix B, at III.9.B.

<sup>124</sup> Question 9B, Interviewee IA, IE, IG, IJ, IL, IM, IN, IO, IR, IS.

<sup>125</sup> See Question 9B, Interviewee IA, IB, IG, IL, IO, IS.

<sup>126</sup> See Question 9B, Interviewee IB, IE, IF, IH, IL.

<sup>127</sup> Question 9, Interviewee IP; Question 9B, Interviewee IF.

<sup>128</sup> Question 9B, Interviewee IC, ID, IF, IH, II, IJ, IM, IO.

<sup>129</sup> Question 9B, Interviewee IC, IF, IH, II, IJ, IO. Two interviewees suggested that a certain length of time between the non-probate transfer beneficiary designation and the death of the intestate should give rise to a conclusive presumption that such a change of status or circumstances has occurred and, thus, our proposed reforms should exclude the designation. See Question 9B, Interviewee IC, II. In contrast, another interviewee thought time per se should not be a consideration and expressly argued “it is more important to focus on . . . change in lifestyle.” Question 9B, Interviewee IM.

decedent died. Rather, the results of our interviews suggest that the new heir reform should, instead, focus on significant changes in status or circumstances likely to impact donative intent. For example, it should exclude beneficiary designations executed during a marriage in favor of a spouse or the spouse's relatives when that marriage ended in divorce. This exclusion should apply even if a revocation-upon-divorce statute precluding an ex-spouse or that spouse's relatives from taking under a non-probate transfer does not otherwise apply.<sup>130</sup>

A lapsed gift raises a particular staleness issue. We asked each interviewee to contemplate a situation where the non-probate transfer beneficiary has predeceased the intestate yet, for whatever reason, the predeceased beneficiary's estate takes in accordance with the terms of the non-probate transfer. We then asked, "should the reform (i) allow the predeceased beneficiary's estate to take in intestacy, (ii) apply an antilapse statute to substitute takers for the predeceased beneficiary's estate, or (iii) erase the predeceased beneficiary from the calculation?"<sup>131</sup> Given the legal principle that a dead person cannot be an heir, we wanted to know if the interviewees would choose to adhere closely to this principle and ignore the designated beneficiary's estate as a new heir or, instead, would choose to follow the dictates of a non-probate transfer contractual agreement and treat a designated beneficiary's estate as an eligible new heir. Two interviewees questioned the significance of the issues raised by the question. They pointed out that an intestate's non-probate transfer contract frequently would expressly provide for lapsed beneficiary designations by substituting the intestate's estate.<sup>132</sup> Other interviewees pointed out that in many jurisdictions an antilapse statute would be inapplicable, because the

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<sup>130</sup> Cf. Melanie B. Leslie & Stewart E. Sterk, *Revisiting the Revolution: Reintegrating the Wealth Transmission System*, 56 B.C. L. REV. 61, 67 (2015) (noting that many states do not extend revocation-upon-divorce statutes uniformly to non-probate transfers and that ERISA may preempt application of such statutes to non-probate transfers that the decedent's employer provided to the decedent as part of an employee-benefits package).

<sup>131</sup> Estate Planner Interview Script, Appendix B, at III.9.C.

<sup>132</sup> Question 9C, Interviewee IA, IP. Other interviewees pointed out that non-probate transfer contracts sometimes have their own antilapse provisions, which may or may not apply in the context of only distant relations surviving, and sometimes have their own intestacy scheme in the case of a donor's failure to name a beneficiary. Question 1, Interviewee IS (contract might have its own intestacy scheme); Question 9, Interviewee IQ (contract might have its own antilapse provisions); Question 9C, Interviewee IA (contract might have its own intestacy scheme); Question 10A, Interviewee IS (contract might have its own intestacy scheme).

new heir reform concerns those situations when an intestate dies leaving only distant relations.<sup>133</sup>

If a non-probate transfer does provide that the estate of a predeceased beneficiary takes, the consensus among interviewees was that the new heir reform should ignore that non-probate transfer for all purposes.<sup>134</sup> Some interviewees who took this position explained that an intestate who left no spouse and no issue most likely did not think about the problem of a non-probate transfer beneficiary predeceasing the intestate. In any case, an intestate likely would prefer that the non-probate transfer fail and pass through the intestate's estate.<sup>135</sup> One interviewee explained,

I think it is case specific in the sense that if you are talking about — yeah if my child dies, of course I'd like it to go to my grandchildren. If I am making a gift to my next-door neighbor, just cause they've been really nice to me and run a lot of errands for me, then no I probably don't want to benefit their [estate]. In that case, I do think it should be erased. I think most people would.<sup>136</sup>

A significant minority (four) of interviewees would allow the estate of the predeceased beneficiary to take.<sup>137</sup> One such interviewee explained, "If you ascribe the most educated and well-thought out construct of the beneficiary designation, this was the result that they agreed to."<sup>138</sup> Others thought this result would be a safeguard against escheat.<sup>139</sup>

Although beyond the immediate scope of the new heir reform, discussions with interviewees made manifest the general need to address stale non-probate transfers. At a minimum, efforts should be

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<sup>133</sup> Question 9C, Interviewee IA, IF; *see also* UNIF. PROB. CODE § 2-706(b) (UNIF. LAW COMM'N 2010) (creating a substitute gift in the descendants of a predeceased beneficiary of a non-probate transfer who "is a grandparent, a descendant of a grandparent, or a stepchild of the decedent").

<sup>134</sup> *See* Question 9C, Interviewee IA, IB, IE, IF, II, IJ, IK, IN, IQ; *cf.* Question 9C, Interviewee IG (commenting that if the donor has not named a successor beneficiary "you are just guessing").

<sup>135</sup> *See* Question 9C, Interviewee IE, IB, IK.

<sup>136</sup> Question 9C, Interviewee II; *see also* Question 9C, Interviewee ID (noting that people are less likely to want a gift to go to the descendants of a predeceased beneficiary when the predeceased beneficiary is a neighbor as opposed to a close relative).

<sup>137</sup> Question 9C, Interviewee IL, IO, IP, IS; *see also* Question 9C, Interviewee IR (suggesting the reform should "at least want to look to what the contingent beneficiary would be as well").

<sup>138</sup> Question 9C, Interviewee IO; *see also* Question 9C, Interviewee IL.

<sup>139</sup> Question 9C, Interviewee IR, IS.

made to encourage financial intermediaries to establish best practices that include periodic communication, no less than yearly, with account owners to remind them that they have an account or accounts with the institution. Best practices should also include a yearly reminder of the beneficiaries designated on each account accompanied by a cautionary statement that these beneficiaries may no longer be appropriate because of a change in circumstances, such as a change in marital status, birth or death of family members, or death of others to whom the account owner had a significant relationship. Financial intermediaries should not find providing this information to their account owners administratively or financially burdensome given their technical sophistication and the communication protocols they already have in place to keep their account owners informed. Our hope is that a byproduct of legislative consideration of the new heir reform would be an impetus to promote donative intent through improvements in financial intermediaries' management and oversight of non-probate transfers.<sup>140</sup>

Another more general issue regarding designated beneficiaries is whether the new heir reform should deny new heir status to a beneficiary of a non-probate transfer because of the type of beneficiaries intestates named. Six interviewees mentioned, without our prompting, what we thought would be two obvious candidates for exclusion from consideration under the new heir reform: (1) non-probate transfers executed to satisfy business obligations or court settlements or decrees or (2) non-probate transfers intended to fund death time expenses, such as funeral expenses, taxes, and the like.<sup>141</sup> We focused specific questions

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<sup>140</sup> See Question 10, Interviewee IG (suggesting that even “if [we] do nothing else” procedural reform “would be a huge benefit”). One interviewee suggested that financial intermediaries managing non-probate transfers should be required to include in their periodic statements to clients a reminder as to whom the client currently has named as beneficiary. Question 9B, Interviewee IR. ERISA's broadly written preemption clause, as well as a series of cases limiting the role of state law in the operation of retirement accounts governed by ERISA, means that any reforms a state may enact would not apply to these accounts. See Leslie & Sterk, *supra* note 130, at 82, 105-06 (noting that ERISA governs certain retirement accounts and preempts and is often inconsistent with state law that would otherwise govern those non-probate transfers); Raymond C. O'Brien, *Equitable Relief for ERISA Benefit Plan Designation Mistakes*, 67 CATH. U. L. REV. 433, 491 (2018) (“The future extent of federal ERISA preemption remains uncertain, but among the federal circuits and repeatedly in the Supreme Court, efforts to apply state law to ERISA plans, even laws traditionally left to the states for decades, like family law and probate, are preempted to provide ease of administration.”).

<sup>141</sup> Two interviewees offered the view that a non-probate transfer beneficiary designation executed as part of a divorce decree would not reflect donative intent. Question 9, Interviewee IJ; Question 9D1, Interviewee IO. Four other interviewees



on beneficiary designations to charities.<sup>142</sup> We asked the interviewees whether their “clients who name charities as will-substitute beneficiaries do so for reasons in addition to donative intent.”<sup>143</sup> We also asked, “Should the reform allow a charity to become an intestate heir? Or should we ignore those will substitutes that name a charity as beneficiary?”<sup>144</sup>

The responses indicate that tax-planning considerations influence decisions to name a charity as a non-probate transfer beneficiary and also how to allocate beneficiary designations to charities among non-probate transfers.<sup>145</sup> The most prominent tax planning issue concerns distributions from deferred retirement accounts. For example, a charity enjoys 100 percent of a distribution from an IRA, while a tax liability arises when an individual, such as a friend of the account holder, receives that same distribution. Interviewees explained that, to minimize taxes to beneficiaries, they advise their clients to allocate a portion or all of their IRAs to charities and to use other types of non-probate transfers to benefit non-charitable beneficiaries.<sup>146</sup> Ten interviewees strongly indicated, however, that regardless of the potential tax savings, their clients name charities as non-probate transfer beneficiaries principally because they want to support those charities for social and political reasons.<sup>147</sup> Five interviewees also discussed how some of their clients name a charity because they do not

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suggested that small or multiple life insurance policies or small bank accounts intended to pay final expenses or to bring liquidity to pay taxes should be excluded. Question 9, Interviewee IA, IQ; Question 9A, Interviewee ID, IL.

<sup>142</sup> No interviewee argued that we should exclude non-probate transfer beneficiary designations to a charity in response to our general inquiry about differentiating between types of non-probate transfers. One interviewee, however, mentioned that because “charities are overly pushy,” for example, by demanding an accounting even if the charity has received only a small gift, the interviewee advises clients to leave gifts to charities only in vehicles, such as an IRA, that do not entitle the charity to notice and an accounting. Question 9, Interviewee ID.

<sup>143</sup> Estate Planner Interview Script, Appendix B, at III.9.D1.

<sup>144</sup> Estate Planner Interview Script, Appendix B, at III.9.D2. In our quantitative vignette study, respondents were, by far, least likely to support making the non-probate transfer beneficiary a new heir when the beneficiary was a charity. See Fellows et al., *supra* note 8, at 425.

<sup>145</sup> Ten of the interviewees who answered our question about other reasons why their clients name a charity beyond donative intent mentioned the distorting influence of tax planning. Question 9D1, Interviewee IA, IB, IC, IJ, IL, IM, IN, IO, IP, IR.

<sup>146</sup> Question 1, Interviewee IP; Question 2, Interviewee IA, IR; Question 9, Interviewee ID; Question 9D, Interviewee IJ; Question 9D1, Interviewee IP.

<sup>147</sup> Question 9D, Interviewee IB; IH, IJ, IP, IR; Question 9D1, Interviewee IJ, IL, IM, IN, IO; Question 9D2, Interviewee IF.

want their family members to take.<sup>148</sup> One interviewee phrased the attitude as follows: “I will give it to any charity, just don’t give it to my fill in the blank.”<sup>149</sup> The overwhelming consensus among interviewees (sixteen of seventeen responsive interviewees) was that the new heir reform should treat a charity named as a non-probate transfer beneficiary as an heir.<sup>150</sup> The seventeenth interviewee would allow a charity to become an heir if the charity had been named in all the intestates’ multiple non-probate transfers.<sup>151</sup>

Except for some concern about joint tenancies with right of survivorship, most interviewees wanted to have the new heir reform apply to all types of non-probate transfers and most types of designated beneficiaries, except in the limited situations when a beneficiary predeceased an intestate, an intestate named beneficiaries to meet contractual or court-mandated obligations or to pay final expenses, or the intestate’s familial circumstances changed. The interviewees’ implicit expression of general support for the new heir reform is further made clear by their unwillingness to ignore non-probate transfers merely because intestates made beneficiary designations many years before they died. Besides confirming the breadth of the new heir reform, as the next Subsection demonstrates, the interviewees also provided vital guidance on how to implement the new heir reform within current probate administration procedures.

## 2. Probate Administration and the New Heir Reform

The feasibility of the new heir reform depends upon the following: (1) personal representatives’ ability to discover intestates’ non-probate transfers and to learn the value and identity of the named beneficiaries of each transfer and (2) probate procedures that provide protection to all interested parties. We designed a set of questions to inquire into existing probate processes and how suited they are to the new heir reform and what additional probate administration procedures the new heir reform might require.<sup>152</sup>

In response to our question whether personal representatives currently have a duty to determine a decedent’s non-probate transfers, several interviewees situated the new heir reform within current probate

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<sup>148</sup> Question 7, Interviewee IS; Question 9D, Interviewee II; Question 9D1, Interviewee IB, ID, IE.

<sup>149</sup> Question 9D1, Interviewee IB.

<sup>150</sup> Question 9D2, Interviewee IB, IC, ID, IE, IF, IG, IH, II, IJ, IK, IL, IM, IN, IO, IP, IR.

<sup>151</sup> Question 9D2, Interviewee IA.

<sup>152</sup> See Estate Planner Interview Script, Appendix B, at IV & V.

administration practices by considering why personal representatives currently need to investigate whether a decedent had made non-probate transfers and, if so, determine the value and the designated beneficiaries of those transfers. If a decedent fails to name a valid beneficiary of a non-probate transfer, the terms of the underlying contract may provide for the estate to be the default taker.<sup>153</sup> The possibility of a failed non-probate transfer means that a personal representative should have a duty to search for a decedent's non-probate transfers to ensure that the probate estate receives all of the assets to which it is entitled.<sup>154</sup> Some interviewees also mentioned wealth transfer taxes, which apply to both probate and non-probate transfers.<sup>155</sup> Notwithstanding that most decedents' estates are not subject to wealth transfer taxes given current state and federal exemption levels, a personal representative needs to know the value of a decedent's non-probate transfers to know whether wealth transfer taxes are due and to determine the appropriate funding sources of those taxes.<sup>156</sup> Another situation where a personal representative may need to investigate a decedent's non-probate transfers concerns family protection laws. Non-probate transfers may be necessary to satisfy statutorily provided family and exempt property allowances, if a probate estate is otherwise insufficient.<sup>157</sup> Although not raised by interviewees, there are remedial statutes, such as those we described earlier having to do with wills executed before a testator's marriage to a surviving spouse or before a testator becomes a parent of a child, that may require a personal representative to obtain substantial information about non-probate transfers.<sup>158</sup> Finally, a personal

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<sup>153</sup> See Question 10B, Interviewee IP.

<sup>154</sup> See Question 10B, Interviewee IP, IR.

<sup>155</sup> See I.R.C. § 2038 (2019) (providing for inclusion of various non-probate transfers in the decedent's gross estate); see also *id.* § 2002 (imposing a duty upon an estate's executor to pay any estate tax due); UNIF. PROB. CODE §§ 3-9A-101 to -115 (UNIF. LAW COMM'N 2010) (having to do with the apportionment of federal, state, or foreign wealth transfer taxes, excluding inheritance taxes and some generation-skipping taxes).

<sup>156</sup> See Question 10, Interviewee IO; Question 10A, Interviewee IP, IQ; Question 10B, Interviewee IL, IS; Question 11, Interviewee IS; see also Leslie & Sterk, *supra* note 130, at 95-99 (discussing the law governing apportionment of liability for estate taxes among recipients of probate and non-probate transfers).

<sup>157</sup> See Question 10A, Interviewee IQ; Question 10B, Interviewee IL; see also UNIF. PROBATE CODE § 6-102(b) ("Except as otherwise provided by statute, a transferee of a nonprobate transfer is subject to liability to any probate estate of the decedent for . . . statutory allowances to the decedent's spouse and children to the extent the estate is insufficient to satisfy those . . . allowances.").

<sup>158</sup> See *supra* notes 19-25 and accompanying text (discussing omitted spouse and omitted child provisions). A surviving spouse seeking to enforce elective share rights in a state in which the augmented estate includes will substitutes also will benefit from an

representative may need to investigate the decedent's non-probate transfers in connection with creditors' claims against the estate. Where the probate estate is insufficient to satisfy a decedent's debts, a non-probate transferee may be liable to the estate, at least in part, for allowed claims against the estate.<sup>159</sup>

Our interviewees made clear that whether a decedent dies testate or intestate or whether a decedent has modest or considerable wealth, current law and probate administration practice does not seamlessly integrate decedents' probate and non-probate estates.<sup>160</sup> Several interviewees discussed their own efforts and those of their clients to discover decedents' non-probate transfers. Personal representatives may collect a decedent's mail over a period of time to look for account statements that will reveal whether the decedent had any joint tenancy with right of survivorship or transfer on death accounts.<sup>161</sup> Personal representatives also will review prior federal, state, and local tax returns and deeds to real estate in their search for non-probate assets.<sup>162</sup> One interviewee expressed the view that discovering the existence of non-probate transfers rarely presents a significant challenge.<sup>163</sup>

Many of the interviewees indicated that the far greater challenge is determining the identities of the non-probate transfer beneficiaries.<sup>164</sup> This topic, by far, generated the most intense responses in our interviews. The complaint most frequently raised by our interviewees is that financial intermediaries refuse to release information to anyone

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efficient means to obtain this information. *See* UNIF. PROBATE CODE §§ 2-201 to -214; Question 10, Interviewee IQ (discussing how the spouse asserting a forced share has the burden to uncover will substitutes and identify their takers).

<sup>159</sup> UNIF. PROB. CODE § 6-102(b) (providing that “[e]xcept as otherwise provided by statute, a transferee of a nonprobate transfer is subject to liability to any probate estate of the decedent for allowed claims against decedent’s probate estate . . . to the extent the estate is insufficient to satisfy those claims”); *see id.* § 6-102(c) (establishing an order of priority among the transferees liable to the probate estate for the allowed claims); *see also* Leslie & Sterk, *supra* note 130, at 101-06 (describing the liability and the apportionment of that liability among non-probate assets, including a specific discussion of IRAs and retirement accounts governed by ERISA).

<sup>160</sup> None of the issues regarding non-probate transfers discussed below, of course, arise if a decedent has obtained expert estate planning advice and keeps impeccable and easily accessible records.

<sup>161</sup> Question 10, Interviewee IB. Two interviewees noted that this technique has become less useful as more people forego paper statements in favor of electronic correspondence, as personal representatives may not have access to a decedent’s email. Question 10, Interviewee IB; Question 10B, Interviewee ID.

<sup>162</sup> *See* Question 10, Interviewee IB, IR; Question 10A, Interviewee IQ.

<sup>163</sup> Question 10, Interviewee IB.

<sup>164</sup> *See* Question 10, Interviewee IA, IB, IC, ID, IS; Question 10B, Interviewee ID.

except a named beneficiary.<sup>165</sup> As one interviewee commented, financial intermediaries typically are “incredibly opaque and difficult to deal with” in relation to non-probate transfer beneficiary designations.<sup>166</sup> If individuals do not know that a decedent named them as beneficiaries of non-probate transfers, the personal representative’s problems are exacerbated.<sup>167</sup> Two interviewees described the “guessing game” they play with non-probate transfer intermediaries<sup>168</sup>:

So what my paralegal will say is, “Well, I’m sitting here with Annie. Will you confirm that she is the beneficiary?” and they will say “Yes” . . . or they will say, “I can’t talk to you.” Then you can presume generally that Annie wasn’t the beneficiary and you can try a different name.<sup>169</sup>

The game is hard to win, however, if a beneficiary is a “stray person” who has not come otherwise to the attention of the personal representative. Also, two other interviewees described the frustration that their clients have had when they knew, or believed they knew, that their deceased loved one had an account with a financial intermediary, but the intermediary would not disclose to them the existence of the account or the account’s designated beneficiary or beneficiaries.<sup>170</sup> Indeed, one of these interviewees told of seeing clients cry over such a situation.<sup>171</sup> Two of the interviewees noted that this difficulty exists even when the person asking is the estate’s personal representative.<sup>172</sup>

A number of interviewees explained to us how they overcome these obstacles. Two interviewees mentioned that they have had to subpoena financial intermediaries or sue them to obtain the necessary information.<sup>173</sup> Several other interviewees, however, stated that if they obtain letters testamentary or letters of administration (hereafter collectively referred to as letters), the intermediaries generally will provide the names of the non-probate transfer beneficiaries.<sup>174</sup> “With

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<sup>165</sup> See Question 10, Interviewee IA, IB, IC, ID, II, IJ, IS; Question 10A, Interviewee IM, IP.

<sup>166</sup> Question 10, Interviewee IB.

<sup>167</sup> See Question 10A, Interviewee IP.

<sup>168</sup> Question 10, Interviewee II; *see also* Question 10A, Interviewee IP.

<sup>169</sup> Question 10A, Interviewee IP; *see also* Question 10, Interviewee II (describing a similar process and labeling it a “guessing game”).

<sup>170</sup> Question 10, Interviewee IG; Question 10A, Interviewee IM (stating that this happens “all the time”).

<sup>171</sup> Question 10, Interviewee IG.

<sup>172</sup> Question 10, Interviewee IA, IO.

<sup>173</sup> Question 10, Interviewee IB, IF.

<sup>174</sup> Question 10, Interviewee IE; Question 10A, Interviewee IM, IN, IR.

testamentary letters, you are standing in the shoes of the decedent and so are entitled to all of the information that the decedent would be entitled to.”<sup>175</sup> Yet, as we learned from interviewees, the procurement of letters may not resolve the problem and has its own disadvantages. Some interviewees reported difficulties persuading financial intermediaries to provide the identities of beneficiaries even when they presented those intermediaries with letters.<sup>176</sup> The reluctance of a financial intermediary to share with a personal representative information about a beneficiary without letters means that a personal representative faces a chicken-and-egg problem. In some cases, unless the estate is the beneficiary of one or more non-probate transfers, probate would not be necessary. Interviewees, expressing their frustration, describe how they have had to open a formal probate to obtain letters so that they might learn the identity of beneficiaries of a decedent’s non-probate transfers to determine whether a probate is necessary.<sup>177</sup> The interviewee responses make evident that current practices waste too much time, effort, and expense as personal representatives or their delegates investigate whether a decedent made non-probate transfers and, if so, the value of those transfers and the identity of the designated beneficiaries. Current practices also have a randomness to them, with success too often depending upon which employee of a financial intermediary personal representatives or their delegates happen to reach.

The new heir reform creates one more reason why personal representatives have a need to obtain detailed information about non-probate transfers. For interviewees, the new heir reform became a vehicle for them to express their dissatisfaction with current probate/non-probate administration practice.<sup>178</sup> No single person has duties to both a decedent’s probate and non-probate beneficiaries, and no single person has authority to learn about a decedent’s total estate.<sup>179</sup> Although beyond the scope of the new heir reform, policy makers ought to consider a comprehensive reform that designs a new type of fiduciary

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<sup>175</sup> See Question 10A, Interviewee IM (“If you do walk in with letters testamentary, then they will tell you everything — open sesame.”).

<sup>176</sup> Question 10, Interviewee IE, IO; Question 10A, Interviewee IR.

<sup>177</sup> See Question 10, Interviewee IE, IN; Question 10A, Interviewee IM.

<sup>178</sup> Question 9B, Interviewee IR; Question 10, Interviewee IA, IB, IE, IG; Question 10A, Interviewee IM; Question 11B, Interviewee II; Interview Final Thoughts, Interviewee IE.

<sup>179</sup> See Leslie & Sterk, *supra* note 130, at 107-10 (“The executor has no inherent common law authority over assets that pass outside probate, and without statutory authority, the executor may be unable to coordinate assets.”).

with statutory authority to oversee both probate and non-probate assets and processes.<sup>180</sup>

Whatever the challenges facing personal representatives with the responsibility to identify potential new heirs under our reform, a significant number of interviewees endorsed imposing time limits on personal representatives' investigations of intestates' non-probate transfers.<sup>181</sup> No interviewees expressed opposition to such a time limit. They reasoned that the new heir reform must have time limits so that the process does not "go on forever"<sup>182</sup> or become "really messy."<sup>183</sup> Interviewees respectively suggested time limits of two months to six months, "longer than four months," one year, one year to eighteen months, and two years.<sup>184</sup>

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<sup>180</sup> See *id.* at 116-18 (suggesting reform that would give estate executors and administrators expanded authority over the non-probate estate). Statutory reform may need a federal component given that federal law governs certain non-probate transfers and preempts state law. See 29 U.S.C. § 1114(a) (2019) (providing that ERISA preempts state laws relating to certain employee benefit plans). Interviewees suggested other possible, but less comprehensive reforms. The principal reform that interviewees suggested to address these difficulties quite simply would statutorily authorize a person appointed to act for the decedent's estate (e.g., the personal representative, the trustee of a revocable trust, etc.) more easily to obtain non-probate transfer beneficiary information from financial intermediaries and would require such institutions to provide the information. See Question 10, Interviewee IA, IE, IH, IJ; Question 10A, Interviewee IO; Question 10B, Interviewee IB, IC, ID. Several interviewees further suggested that it would be useful to further compliance by financial intermediaries to grant them immunity from liability if they complied with a request that met the requirements set forth in the statute. Question 10, Interviewee II; Question 10A, Interviewee IM; Question 10B, Interviewee IC, IE. One interviewee advocated for reform that would require a financial intermediary that has been presented with a decedent's death certificate to notify all of the decedent's named beneficiaries of a decedent's account, its value, and of their beneficiary status. Question 10, Interviewee IG. In response to a separate set of questions, however, a different interviewee pointed out that a financial intermediary is unlikely to know the current addresses of a decedent's beneficiaries. Question 11, Interviewee ID. They proposed a reform that would require a financial intermediary that learns of a decedent's death to send a notice to the deceased's last known address of the existence of an account and the name of the account's beneficiaries. *Id.* The hope grounding the proposal is that the decedent's family members or personal representative, when reviewing the deceased's mail, would then learn this information. See Leslie & Sterk, *supra* note 130, at 117 (arguing that custodians of non-probate transfers who learn of the death of an account holder should be required to provide notice to the account holder's spouse and children before distributing account proceeds).

<sup>181</sup> Question 10, Interviewee IK, IL, IN, IP, IR, IS.

<sup>182</sup> Question 10, Interviewee IN.

<sup>183</sup> Question 10, Interviewee IL.

<sup>184</sup> Question 10, Interviewee IK, IL, IP, IR, IS.

When we asked interviewees to suggest what changes might need to be made to probate and non-probate procedures to accommodate the new heir reform, a significant number of interviewees suggested that it could simply build upon existing probate processes given that “all [we] are doing is adding a new class of beneficiaries to the process of the probate.”<sup>185</sup> Indeed, with respect to protection of creditors, the consensus among interviewees was that existing procedures would be adequate.<sup>186</sup> Two California-based estate planners opined that creditors are not well-protected under existing California succession law, but neither suggested that our reforms would exacerbate their situation.<sup>187</sup>

Interviewees recognized that the new heir reform would necessitate a requirement that the personal representative give notice to those who would take in the absence of any non-probate transfers and also to all beneficiaries named in each of an intestate’s non-probate transfers. Potential new heirs and default heirs would have standing to contest non-probate transfers that might impact their intestate share. The standing rules parallel those currently in place for the contest of wills.<sup>188</sup> Several interviewees indicated, however, that after personal representatives send out initial notices and after the time limit has elapsed for the identification of intestates’ non-probate transfers and the designated beneficiaries associated with them, they may need to send a second round of notices. The personal representative must send those notices to the newly identified beneficiaries and also to those whose rights to the probate estate may be impaired by the discovery of non-probate transfers or non-probate beneficiaries subsequent to the time when they received their initial notices.<sup>189</sup> As one interviewee noted, this second round of notice almost surely will add delay and costs to the probate process.<sup>190</sup>

As part of our consideration of the operation of probate administration under the new heir reform, we asked interviewees to consider “who should get priority in being the personal representative of the estate, given that a default heir may be displaced as heir by a will-

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<sup>185</sup> Question 11, Interviewee IF; *see also* Question 11, Interviewee IN, IP, IR, IS.

<sup>186</sup> *See* Question 11B, Interviewee IA, IB (“You just have more beneficiaries but creditors get paid first.”), IJ, IL, IN, IP, IS.

<sup>187</sup> Question 11B, Interviewee IC, ID (noting that creditors are not well-protected under California law, but our proposed reforms will not make things worse for creditors).

<sup>188</sup> *See* Question 10B, Interviewee IQ; Question 11, Interviewee IA, IE, IR.

<sup>189</sup> *See* Question 11, Interviewee IB, IO, IR.

<sup>190</sup> *See* Question 11, Interviewee IO.



substitute beneficiary?”<sup>191</sup> A strong consensus emerged among interviewees that the priority list for personal representatives with authority to administer the intestate estate should include non-probate transfer beneficiaries who qualify as newly created heirs.<sup>192</sup> Several interviewees indicated the benefits of a personal representative who has a strong incentive to administer the estate.<sup>193</sup> As one interviewee explained, non-probate transfer beneficiaries who stand to become new heirs under intestacy reform would have an incentive to administer the estate efficiently.<sup>194</sup> Several interviewees further suggested that non-probate transfer beneficiaries should have priority over creditors to serve as the personal representative.<sup>195</sup>

A number of interviewees were concerned that one may not know the identity of any or all of the non-probate transfer beneficiaries at the time another individual agrees to the appointment as personal representative.<sup>196</sup> Several interviewees suggested that, given the possibility of subsequent discovery of non-probate transfers and beneficiaries of those transfers, any non-probate transfer beneficiary eligible to be a new heir should be eligible to serve as personal representative.<sup>197</sup> Because of the possibility of newly identified beneficiaries, a number of interviewees agreed about the impracticality of a priority list that favored the non-probate beneficiary who likely would take the largest share of the probate estate.<sup>198</sup> One interviewee suggested a general rule that the personal representative should be whoever, among the known beneficiaries at the time of the appointment, has the highest priority on the priority list.<sup>199</sup> They further added that a personal representative should not be removed solely because a non-probate transfer beneficiary of higher priority is later uncovered<sup>200</sup>: “There are procedures for removing a PR if they are not

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<sup>191</sup> Estate Planner Interview Script, Appendix B, at V.11A. We did not specifically ask about the relative priority a non-probate transfer beneficiary should be accorded.

<sup>192</sup> See Question 11A, Interviewee IA, IB, IC, ID, IF, IJ, IK, IL, IO, IR, IS.

<sup>193</sup> Question 10, Interviewee IP; Question 11A, Interviewee IC, II, IM, IP.

<sup>194</sup> Question 11A, Interviewee IC.

<sup>195</sup> Question 11A, Interviewee IC, ID, IF.

<sup>196</sup> Question 11A, Interviewee IA, IB, ID, IO.

<sup>197</sup> Question 11A, Interviewee IA, IB, IF.

<sup>198</sup> Question 11A, Interviewee IA, IB, ID.

<sup>199</sup> The person with the highest known priority at the time of appointment may be a default heir who would be displaced under the new heir reform by a later-discovered non-probate transfer beneficiary.

<sup>200</sup> Question 11A, Interviewee IO.

doing a good job and appointing a successor. So why do we need to make this any harder than we already have?”<sup>201</sup>

Given the need for a speedy appointment and the challenges of identifying non-probate transfers and the beneficiaries associated with them, one interviewee suggested that a public administrator’s office, if a jurisdiction has established one, would be an acceptable alternative to handle cases under the new heir reform. That same interviewee stated that they would “have a higher confidence in the public administrator than [they] would in a more remote nonprobate beneficiary.”<sup>202</sup> In sharp contrast, another interviewee said they would favor “anybody but the public administrator” in their state. They reasoned that the public administrator’s office is overworked and underpaid and questioned how much effort they would put into finding the non-probate transfer beneficiaries.<sup>203</sup>

One interviewee similarly concerned about a personal representative’s incentive to identify non-probate transfers and non-probate beneficiaries, raised the problem that, if non-probate beneficiaries serve as personal representatives, they may have an interest *not* to find other non-probate transfer beneficiaries with whom they would have to share.<sup>204</sup> The possibility of personal representatives having a conflict of interest with regard to one issue or another during probate administration is not unique to the new heir reform. As one interviewee explains, like all personal representatives in other contexts, new heirs or default heirs serving as personal representatives would have a duty to use due diligence and demonstrate good faith. They would have a fiduciary obligation to find and give notice to default heirs and also to non-probate transfer beneficiaries who qualify as new heirs.<sup>205</sup> Indeed, even though our interview question underscored the disincentive default heirs have to find intestates’ non-probate transfers and non-probate beneficiaries, another interviewee had confidence in default heirs serving as personal representatives, because they believed that the obligation of due diligence and the benefit of fees for serving as a personal representative provided sufficient incentive.<sup>206</sup>

The final probate administration issue, which arose out of our interviews, concerns the privacy of both intestates and their designated beneficiaries. Non-probate transfers’ exclusion from probate

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

<sup>202</sup> Question 11A, Interviewee IQ.

<sup>203</sup> Question 11A, Interviewee IC.

<sup>204</sup> Question 10, Interviewee IA.

<sup>205</sup> *Id.*

<sup>206</sup> Question 11A, Interviewee IE.

administration means that they generally are not subject to public disclosure. As some of our interviewees explained, settlors of revocable trusts, in particular, frequently prize the privacy such trusts afford to them and to their beneficiaries as contrasted with the lack of privacy surrounding a probated will.<sup>207</sup> Under current probate administration practices, the new heir reform means that the personal representative would have an obligation to notify default heirs about each non-probate transfer and the beneficiary designation(s) associated with it. The personal representative would owe the same duty of disclosure to every new heir. The non-probate transfers, their respective values, and their respective beneficiary designations also would become part of the public record as part of the probate administration of an intestate's estate.

Those interviewees who raised the privacy issue did not think that it was a sufficient reason not to support the new heir reform. Some approached the issue as one of competing equities, believing that the new heir reform could be accompanied by measures that balanced intestates' interests in their having their likely donative intent furthered and intestates' and designated beneficiaries' privacy interests.<sup>208</sup> At a minimum, some interviewees suggested the new reform should allow donors and beneficiaries to opt out of the reform in order to safeguard their privacy.<sup>209</sup> For example, reform might provide that a signed non-probate transfer beneficiary designation form indicating the donor's desire to opt out would govern over the intestacy scheme.<sup>210</sup> The new heir reform might also provide for sealing records relating to an intestates' non-probate transfers as a default rule.<sup>211</sup> Alternatively, the new heir reform could provide probate judges with the authority to seal records after conducting an in-camera investigation of the privacy concerns.

Although interviewees raised a number of thorny probate administration issues, no interviewee expressed the view that one or more of them could not be overcome or were so serious as to warrant abandonment of the new heir reform. Most reforms designed to further

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<sup>207</sup> Question 10, Interviewee IO ("That's why we avoid probate — privacy is one of the big factors."); Question 10B, Interviewee IP ("So, 98% of the work I do is revocable trusts because the people don't want it public.").

<sup>208</sup> Question 8, Interviewee IO; Question 10B, Interviewee IP.

<sup>209</sup> Question 10A, Interviewee IO (making this suggestion respecting non-probate transfer beneficiaries); Question 11, Interviewee IA (making this suggestion respecting non-probate transfer donors).

<sup>210</sup> Question 11, Interviewee IA.

<sup>211</sup> See Question 10, Interviewee IO.

donative intent like the new heir reform frequently have the potential to increase administrative costs.<sup>212</sup> What should not be lost in discussions of probate administration challenges facing the new heir reform is that current intestacy statutes, with their emphasis on familial status, no longer reflect the likely donative intent of those intestates who have no close relatives. The Kasner survey suggests this and, as will become apparent from the section below, the results of our interviews of estate planners provide strong evidence that the new heir reform, with its reliance on non-probate transfers, achieves succession law's fundamental goal, which is to promote donative intent.

### 3. A Comparison Between Donative Intent Found in Decedents' Non-Probate Transfers and Donative Intent Found in Their Wills and Revocable Trusts

In a set of eleven questions to interviewees, we sought to uncover differences and similarities between decedents' donative intent expressed in non-probate transfers as compared to their wills and revocable trusts.<sup>213</sup> For this set of questions, we asked the interviewees to consider wills and revocable trusts together, given the widespread use of revocable trusts as functional wills in estate planning and that neither governing instrument is asset specific. We also asked them to exclude joint bank accounts when considering their clients' expressed donative intent in non-probate transfers, because of widespread suspicion that individuals often use them not to express donative intent, but, instead, to achieve other purposes related to convenience.<sup>214</sup>

We first asked interviewees whether they believe that their clients understand the difference between a will and non-probate transfers.<sup>215</sup> The near unanimous consensus among interviewees was that a

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<sup>212</sup> See, e.g., UNIF. PROB. CODE § 2-503 (UNIF. LAW COMM'N 2010) (allowing probate of an instrument that fails to comply with the formalities for the execution of a will "if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute" a will); *id.* § 2-805 (allowing judicial reformation of even an unambiguous will "to conform the terms to the transferor's intention if it is proved by clear and convincing evidence what the transferor's intention was and that the terms of the governing instrument were affected by a mistake of fact or law, whether in expression or inducement"); see also *Flannery v. McNamara*, 738 N.E.2d 739, 746 (Mass. 2000) (expressing concern that application of the reformation doctrine to wills "would open the floodgates of litigation and lead to untold confusion in the probate of wills").

<sup>213</sup> See Estate Planner Interview Script, Appendix B, at II.

<sup>214</sup> See *supra* notes 116–117 and accompanying text (discussing the consensus among interviewees that joint tenancy bank accounts may not reflect donative intent).

<sup>215</sup> Estate Planner Interview Script, Appendix B, at II.1.

significant number of their clients do not understand that distinction before the interviewees explain the differences during their initial estate planning meeting.<sup>216</sup> One interviewee explained that this issue always takes a lot of follow-up, even for quite sophisticated clients. “The concept that there are different types of assets that have to be dealt with in different ways is not something that most people would grasp.”<sup>217</sup> Another interviewee said, “I’m actually quite amazed about how little people understand about probate and non-probate.”<sup>218</sup> The public’s general failure to appreciate the distinction between probate and non-probate transfers demonstrates how the new heir reform alleviates at least one aspect of the negative consequences resulting from the public’s bewilderment about the law of succession.

Wanting interviewees to focus principally on the population that would be most affected by the new heir reform, we prefaced the remaining questions with the following direction:

Think about your clients who have no spouse, no issue, no relatives through a parent — such as a sibling or niece or nephew, and no relatives through a grandparent — such as an aunt or uncle or a cousin. If you have had few of these, think simply about your clients who are unmarried and have no issue.<sup>219</sup>

One of us, through further exploration of this directive, learned that a number of interviewees had little experience with clients whose relations were more distant than cousins. Five of that interviewer’s nine interviewees had had “virtually none,” “very few,” or “not that many” with several indicating, however, that they had plenty of clients who had only cousins.<sup>220</sup> The interviewer directed these interviewees to consider only their clients who have no spouse, no issue, no parents, and no descendants of parents when responding to the questions. The remaining four of that interviewer’s interviewees had had a significant number of clients with no spouse, no issue, no grandparents, and no

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<sup>216</sup> See Question 1, Interviewee IA, IB, ID, IE, IF, IH, II, IJ, IK, IL, IM, IN, IO, IP, IQ, IR, IS.

<sup>217</sup> Question 1, Interviewee IB.

<sup>218</sup> Question 1, Interviewee IJ.

<sup>219</sup> Estate Planner Interview Script, Appendix B, at II.1.

<sup>220</sup> Question 1(a), Interviewee IC, ID, IF, IG, II. One of these interviewees mentioned that even though they had few clients without close relatives to the degree our reforms are contemplating, the interviewee routinely explores with clients what they would want to have happen to their property if their close relatives predecease them. Thus, “experience” tells the interviewee that our proposed reforms “make[] complete sense.” End of interview question, Interviewee II.

descendants of grandparents.<sup>221</sup> Three of these interviewees respectively estimated that twenty-five to thirty percent, twenty to twenty-five percent, and five percent of their clients fell into this category.<sup>222</sup> The interviewer asked these four interviewees to focus on such clients. The other interviewer did not obtain this level of detail, but, as the interviews proceeded, learned about the estate plans of clients or probate administration of decedents who had only distant relatives. Also, interviewees discussed various estate plans of clients who had no surviving spouse or descendants, but sometimes did have cohabitating partners.<sup>223</sup>

Frequently reminding interviewees of the directive to focus on clients without close relations as described above, we asked interviewees whether their “clients’ testamentary instruments (that is, wills and revocable trusts) generally name the same beneficiaries as their will substitutes.”<sup>224</sup> The strong consensus was that yes, they generally do.<sup>225</sup> Tax planning or a client’s sentimentality regarding a specific asset frequently accounted for the differences between a client’s will and revocable trusts on the one hand and one or more of that client’s non-probate transfers on the other.<sup>226</sup> We also asked the interviewees whether all of a client’s non-probate transfers name the same beneficiaries.<sup>227</sup> A strong consensus emerged that they generally do with one significant exception<sup>228</sup>: several of the interviewees reported that, because of the favorable tax treatment afforded charities, clients’ 401(k)s and IRAs often contain beneficiary designations to charities that are not otherwise found in clients’ other non-probate transfers.<sup>229</sup>

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<sup>221</sup> See Question 1(a), Interviewee IA, IB, IE, IH.

<sup>222</sup> Question 1(a), Interviewee IA, IE, IH.

<sup>223</sup> Question 7, Interviewee IK, IS; Question 8, Interviewee IM.

<sup>224</sup> Estate Planner Interview Script, Appendix B, at II.2.

<sup>225</sup> Thirteen interviewees answered in the affirmative. Question 2, Interviewee IA, IB, ID, IE, IF, IG, II, IK, IL, IM, IO, IR, IS. Two interviewees answered that they did not know. Question 2, Interviewee IH, IQ. One interviewee answered in the affirmative but, by the end of their answer, changed the response to say that they could not say there was one dominant pattern. Question 2, Interviewee IC.

<sup>226</sup> See Question 2, Interviewee IA, IB, IC, IO, IP, IR; Question 2A, Interviewee IM, IO.

<sup>227</sup> Estate Planner Interview Script, Appendix B, at II.3.

<sup>228</sup> Fourteen interviewees responded in the affirmative generally or in the negative citing retirement accounts. Question 3, Interviewee IA, IB, IE, IF, IG, IH, II, IJ, IL, IN, IO, IP, IR, IS. Four interviewees said no. Question 3, Interviewee IC, ID, IK, IM. One interviewee stated that they did not know. Question 3, Interviewee IQ.

<sup>229</sup> See Question 3, Interviewee IB, IG, IJ. A non-charitable beneficiary of a deferred retirement account has to pay income tax on the distributions from that account whereas a charity does not. See *supra* note 145 and accompanying text.

A clear majority of interviewees told us that they believe that the named beneficiaries in their clients' non-probate transfers accurately reflect their clients' donative intent at the time they first come to visit the interviewee.<sup>230</sup> Still, a significant number of interviewees gave examples of how they would need to adjust the designations to better carry out donative intent. Examples include designations in retirement accounts that they alter for tax saving reasons;<sup>231</sup> designations in favor of minors that they alter to avoid a guardianship;<sup>232</sup> stale designations, such as to an ex-spouse, that reflected what the client wanted at the time of the designations, but do not reflect what the client presently wants;<sup>233</sup> and designations that do not accurately reflect what the donor would want if the beneficiary were to predecease.<sup>234</sup> Similarly, a clear majority of interviewees told us that they believe that the named beneficiaries in their clients' non-probate transfers accurately reflect their clients' donative intent with respect to their probate property at the time they first come to visit the interviewee.<sup>235</sup> Interviewees again mentioned tax avoidance planning and staleness as reasons for divergence.<sup>236</sup> In addition, three interviewees mentioned that, when the non-probate transfer beneficiary designations do not reflect donative intent with respect to the probate estate, it is sometimes because the client has allocated property using an "asset-by-asset" approach. With that approach, the client achieved an equitable allocation by designating one person as a beneficiary of a non-probate transfer and another person as a devisee in the client's will.<sup>237</sup>

We sought to learn more about how allocation of the non-probate estate influences allocation in wills and revocable trusts by asking the interviewees whether their clients take into account non-probate transfers when they determine the shares their beneficiaries receive

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<sup>230</sup> See Question 4, Interviewee IB, IC, IE, IF, IG, IH, II, IJ, IK, IN, IO. Another interviewee stated, "probably 50%." Question 4, Interviewee IS. One interviewee clearly answered "no" but then after giving several examples stated, "I'm dealing with the exception. Most people are pretty straight-forward in terms of if they name their partner, for instance, or their best long-term friend, that is probably who they want to name on others." Question 4, Interviewee IP.

<sup>231</sup> Question 4, Interviewee IC, II.

<sup>232</sup> See Question 4, Interviewee ID.

<sup>233</sup> Question 4, Interviewee IB, IE, IF, II, IR.

<sup>234</sup> See Question 4, Interviewee IM, IO.

<sup>235</sup> See Question 5, Interviewee IA, IB, IE, IF, IH, II, IJ, IK, IN, IO, IP, IS. An additional interviewee answered, "that's a definite maybe." Question 5, Interviewee IG.

<sup>236</sup> Question 5, Interviewee IC, IR.

<sup>237</sup> See Question 5, Interviewee II, IL, IS.

under clients' wills and revocable trusts.<sup>238</sup> Responses to this question, perhaps more than any other, drove home to us our continuing need to be cognizant of the inherent limitations of the type of study we conducted. Most importantly, we have to recognize the dangers of making any assumptions about an intestate's donative intent based on clients' donative intent as described by our interviewees. For one thing, we have to rely on the accuracy of interviewees' description of their clients' intent and, for another, the clients' donative intent is influenced by the interviewees' professional estate planning advice. A majority of interviewees described how they work with clients to consider the combined effect of their probate and non-probate allocations.<sup>239</sup> One interviewee explained, for example, that when an estate planner is involved, planning typically begins "from the trust out."<sup>240</sup> That interviewee starts with allocation within the trust and only then decides whether to advise an adjustment to a non-probate transfer beneficiary designation. That same interviewee thought estate planners are less likely to start with allocation among non-probate transfers and then decide how to adjust the revocable trust or probate estate.<sup>241</sup> No clear consensus emerged among interviewees as to whether their clients would have done this kind of planning absent the estate planner's advice. Several interviewees expressed the view that, absent their estate planning advice, their clients generally would not consider the relationship between the distribution to devisees in their wills and the distribution to beneficiaries they designated in their non-probate estate transfers.<sup>242</sup> Others expressed uncertainty on this point.<sup>243</sup> Still others suggested that their clients would or, at least, some of their clients would take this relationship into account.<sup>244</sup>

The last two questions asked interviewees whether their clients' testamentary instruments mirrored the state intestacy statute and similarly whether their clients' non-probate transfers (excluding revocable trusts and joint checking accounts) mirrored the state intestacy statute.<sup>245</sup> The nine interviewees who expressly considered only clients who had no spouse, no issue, and no relatives closer than grandparents or descendants of grandparents or, alternatively, no

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<sup>238</sup> See Estate Planner Interview Script, Appendix B, at II.6.

<sup>239</sup> See Question 6, Interviewee IA, IB, ID, IF, IG, IH, II, IK, IN, IO, IP.

<sup>240</sup> Question 6, Interviewee ID.

<sup>241</sup> *Id.*

<sup>242</sup> See Question 6, Interviewee IA, IE, IK.

<sup>243</sup> Question 6, Interviewee IF, II.

<sup>244</sup> Question 6, Interviewee IB, IC, IJ.

<sup>245</sup> Estate Planner Interview Script, Appendix B, at II.7 & 8.



relatives closer than great-grandparents or descendants of great-grandparents, answered quite emphatically and uniformly, as to both questions, that they do not.<sup>246</sup> Among the ten interviewees who considered both those clients who had only relatives more distant than grandparents and their descendants and those who had no spouse or descendants, but did have parents or descendants of parents, only two interviewees indicated that the intestacy statute matched closely their clients' non-probate transfer beneficiary designations.<sup>247</sup> One of these two further indicated, however, that non-probate transfer beneficiary designations were "[t]otally different for unmarried cohabitants. I'm excluding nontraditional families. They have to jump through hoops."<sup>248</sup> A third interviewee stated that they could not generalize but "sometimes" there was a match.<sup>249</sup> The remaining seven interviewees indicated that the non-probate transfers of their clients in this group generally did not reflect the intestacy scheme.<sup>250</sup> Their answers were substantially the same when asked about whether clients' testamentary instruments (wills and revocable trusts) mirrored the state's intestacy statute.<sup>251</sup>

Throughout the discussions revealing the donative intent of clients, whether through will, revocable trusts, or other types of non-probate transfers, the interviewees frequently referred to clients' chosen family members and sometimes even favorite charities rather than to those who the law recognizes as relatives and deserving heirs.<sup>252</sup> The responses to this last set of questions make manifest that current intestacy laws inadequately reflect the likely donative intent of intestates who die without a spouse or issue.<sup>253</sup> Also, according to those responses, the need for reform escalates for those intestates whose only surviving relatives are more distant than parents, parents' descendants,

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<sup>246</sup> Question 7, Interviewee IA, IB, IC, ID, IE, IF, IG, IH, II; Question 8, Interviewee IA, IB, IC, ID, IE, IF, IG, IH, II.

<sup>247</sup> Question 8, Interviewee IM, IR.

<sup>248</sup> Question 8, Interviewee IM.

<sup>249</sup> Question 8, Interviewee IQ.

<sup>250</sup> Question 8, Interviewee IJ, IK, IL, IN, IO, IP, IS.

<sup>251</sup> Compare Question 7, Interviewee IJ, IK, IL, IN, IO, IP, IQ, IS, with Question 8, Interviewee IJ, IK, IL, IN, IO, IP, IQ, IS (each interviewee respectively giving substantially the same answer to the second question as they gave to the first).

<sup>252</sup> See Preface to Question 2, Interviewee II; Question 2, Interviewee IJ; Question 5, Interviewee IO; Question 7, Interviewee IF, IG, IK, IL, IN, IR, IS; Question 8, Interviewee IF, IS; Question 9A, Interviewee IP; Question 9B, Interviewee IJ; Question 9D2, Interviewee IB; Question 10B, Interviewee IP.

<sup>253</sup> See *supra* notes 247–250 and accompanying text.

grandparents, or grandparents' descendants.<sup>254</sup> The data also show that non-probate transfers provide a promising means for intestacy laws to further donative intent. They, through written beneficiary designations, identify members of intestates' chosen families or favorite charities and thereby provide strong evidence of intestates' preferred intestate takers. Some commentators have questioned whether non-probate transfers accurately reflect donative intent, given their various shortcomings, such as confusing or restrictive beneficiary designation forms.<sup>255</sup> The responses of interviewees to this last set of questions, however, suggest that non-probate transfer beneficiary designations generally accurately reflect a transferor's donative intent.<sup>256</sup> Equally as important in an evaluation of the new heir reform, the data indicate that beneficiary designations in non-probate transfers mirror testators' likely donative intent as to the distribution of their probate estates.<sup>257</sup> The interviewees' responses to this last set of questions persuasively supports the new heir reform by demonstrating first the inadequacy of current intestacy law and second that an intestates' beneficiary designations in non-probate transfers provide compelling evidence of the intestates' likely preferred distribution of their probate estates.

#### CONCLUSION

The sociological and legal literature has demonstrated conclusively the emergence of non-traditional family arrangements.<sup>258</sup> The new heir reform, by reference to an intestate's non-probate transfers, ameliorates the limitations of an intestacy statute that focuses exclusively on legally recognized familial relationships. It also addresses the growing phenomenon of one-child families. If only children of parents who also were only children die without surviving descendants or ancestors, under current intestacy statutory schemes, either heirs who trace their relationship with the decedents through the decedents' great-

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<sup>254</sup> See *supra* note 246 and accompanying text.

<sup>255</sup> See, e.g., Leslie & Sterk, *supra* note 130, at 64, 75-79, 115 (asserting that "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" and examining problems with beneficiary-designation forms for life insurance and for retirement accounts).

<sup>256</sup> See *supra* notes 230-234 and accompanying text.

<sup>257</sup> See *supra* note 235 and accompanying text.

<sup>258</sup> See Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 FAM. L.Q. 309, 309-14 (2008); Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 168-70 (2015); see also *supra* notes 4-5 and accompanying text.

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grandparents or more distant ancestors (e.g., second cousins once removed) share their probate estates or it passes to the state by escheat. The pervasiveness of non-probate transfers, along with social and demographic changes, makes the new heir reform a vital part of twenty-first century succession laws committed to meet the needs of the citizenry.

Few proposals to change succession law have had the advantage of the three empirical investigations described in this study. Together they reveal the general public's likely preferences related to the integration of the probate and non-probate estates and the practicing bar's viewpoint regarding both the substance and procedural viability of the new heir reform. The qualitative empirical research based on partially structured interviews of estate planners built on the results of the Kasner survey of estate planners, which in turn relied on the results of the factorial-designed survey of the general public.

Besides providing significant support for the new heir reform, the three-part empirical inquiry offers insight into empirical methodology of certain types of proposed changes to succession law. If a proposal has to do with likely donative intent or the expression of donative intent, the results of general public surveys can capture twenty-first century shifting community attitudes, customs, and conventions. Results obtained from the quantitative and qualitative investigations of estate planners that align with those acquired from general public surveys strengthen the validity of all the findings. Nevertheless, the persuasiveness of this study requires acknowledgment of the limitations of the three empirical investigations and how we addressed them.

A deficiency of surveys of the general public is that the results are unlikely to reflect respondents' thoughtful and informed preferences, but only their first impressions of the issues presented. A deficiency of surveys of estate planners is that they are unlikely to value the importance of a rule of law or construction designed to further donative intent and overestimate the administrative complexities that might arise in the determination of donative intent. After all, the very nature of their work is to further clients' donative intent through private ordering and not to rely, if not to avoid altogether, default rules. Concerns about surveys of estate planners may intensify when the inquiries relate to their understanding of their clients' preferred dispositive schemes or appreciation of current succession law. The demographics of many estate planners' clientele are unlikely to represent a broad sector of the population. Additionally, the legal marketplace of estate planning, in which clients resist the high cost of plans and estate planners respond by proposing a flat fee for the work or otherwise limiting their billable

hours, may very well affect the accuracy of estate planners' narrations of their clients' likely preferences and understanding of legal rules. The economic dynamics raise questions about whether estate planners can take the time needed to listen carefully to each of their clients and to set aside their presuppositions about what each client does or does not know or what a client's estate plan should be. We guarded against the shortcomings of the three types of empirical investigations by keeping them utmost in mind in the design and analysis of the findings, comparing the results among the three investigations to emphasize those findings where the three investigations were in alignment, and relying primarily on those findings that had substantial support.

A final observation about empirical methods relates to the two-part study of estate planners and the distinctions between the survey and the interviews of estate planners. The survey of estate planners included vignettes similar to those included in the survey of the general public. The partially structured interviews did not because the earlier surveys of the general public and estate planners demonstrated substantial support for the new heir reform and substantial lack of support for the advancement reform. With those central issues settled, instead, we described the new heir reform at the outset of the interviews, allowing us more time to explore implementation issues and to learn more about how interviewees' clients use non-probate transfers in accomplishing their estate plans. In the interviews, the estate planners engaged in extended discussions about the implications of the proposal, including a number of implementation issues. They seemed genuinely to enjoy the opportunity to use their expertise to evaluate a proposal that they had not previously considered. We could only partially capture their keen attention through this study's inclusion of numerous quotations where the interviewees describe their clients' situations, raise procedural challenges, and explore possible solutions. We did not, and knew we could not, replicate the richness of findings produced by a qualitative investigation in a quantitative survey of estate planners. Undoubtedly, the social aspects surrounding an in-person interview accounts for much of the difference in the richness of responses between the quantitative and qualitative investigations of estate planners' preferences and concerns, notwithstanding that we conducted a substantial majority of the interviews in estate planners' offices and interrupted their otherwise busy days. While policy makers might not give great weight to results of a qualitative empirical investigation of estate planners, when analyzed next to the quantitative Kasner survey, the findings of both provide compelling evidence about why and how jurisdictions should enact the new heir reform.

The findings reported in this study provide the framework for statutory reform. The new heir reform applies if an intestate's probate estate would otherwise pass to that intestate's relations more distant than grandparents or their descendants or to the state through escheat. The new heir reform includes all types of non-probate transfers. With some narrow exceptions, it treats all beneficiaries validly designated under non-probate transfers as new heirs. Those exceptions include designations made to a spouse or a spouse's relatives if the marriage ended in divorce; pursuant to a business obligation, court settlement, or decree; or for the exclusive purpose to fund death time expenses. Also, a new heir would not include a designated beneficiary's estate, notwithstanding that, pursuant to the contractual terms of the non-probate transfer, the estate of a predeceased beneficiary takes. New heirs displace all distant heirs who otherwise would take or the state under escheat. The percentage of the non-probate estate that a beneficiary receives from an intestate's non-probate transfers determines the percentage of the probate estate that beneficiary takes. The new heir reform generally would rely on current probate administration procedures for purposes of notice and protection of interested parties. It would be necessary, however, to consider new procedures establishing a time limit for the identification of an intestate's non-probate transfers and beneficiary designations, determining new heirs' eligibility and priority to be personal representatives, and giving probate courts the authority to protect the privacy concerns of intestates and new heirs.

Another procedural issue related to the new heir reform, but not unique to it, concerns the challenges faced by personal representatives in the identification of non-probate transfers and the beneficiaries associated with them. Financial intermediaries can and have made it difficult for personal representatives to obtain that information if they do not have letters and, sometimes, even if they do. The need for letters means that delays and costs of administration increase, because the personal representative must open a formal probate and forego less expensive and more cost-efficient summary procedures. The intermediaries, pursuant to their understanding of due diligence, ironically exacerbate the very administrative inefficiencies that the decedents were hoping to avoid through non-probate transfers. Jurisdictions could solve this problem if they were to give personal representatives or trustees the authority to obtain this information from financial intermediaries once those persons provided proof of their fiduciary status and supplied a death certificate. This recommendation, which albeit needs to be addressed in further detail in a future study,

would go a long way to facilitate the administration of probate and non-probate estates. It would also aid in the administration of other probate statutory rules that rely on non-probate transfers in their operation, such as omitted spouse and omitted child provisions. For purposes of the new heir reform, if personal representatives had the authority to secure information about an intestates' non-probate transfers without opening a formal probate, they could save time and administrative expenses.

Current intestacy laws inadequately meet the needs of intestates. This study demonstrates that the new heir reform increases the likelihood of promoting intestates' donative intent in a growing number of twenty-first century familial situations. Legislatures are left to consider the following: Would intestates who have executed non-probate transfers prefer the loss of administrative efficiency due to delays and increased expense of probate administration if that means their likely families of choice share in their probate estates over a process that delivers their probate estate sooner and less expensively to the state or to distant relations with whom they had no actual relationship?

## APPENDIX A

## Survey of Estate Planners

Given at the Jerry A. Kasner Estate Planning Symposium, San Jose, CA,  
Sept. 29, 2010

For several years, we have been studying the relationship between donative intent with respect to the probate estate and donative intent as expressed in will substitutes, such as a life insurance policy, 401(k) account, brokerage account, or joint tenancy with right of survivorship. More specifically, we are studying whether when an unmarried decedent with no living descendants has died without a will but with one or more will substitutes, those will substitutes might better predict how the decedent would want his or her probate estate to pass than does existing intestacy law. We are exploring whether state intestacy statutes should be amended to take such a decedent's will substitutes into account in determining the distribution of the probate estate.

Through this survey instrument, we are seeking to access the knowledge of estate planners concerning several matters pertaining to this inquiry. We are most appreciative of your willingness to take the time to complete this survey. We expect that completion of the survey should take between twelve and fifteen minutes. We wish to emphasize that your completion of this survey is voluntary and you may decline to answer the survey or any part of the survey. If you have any questions or comments regarding this survey, feel free to contact either of us at our email address listed below. Thank you!

-Mary Louise Fellows, Everett Fraser Professor of Law, Emerita,  
University of Minnesota Law School (fello001@umn.edu)

-E. Gary Spitko, Professor of Law, Santa Clara University School of  
Law (gspitko@gmail.com)

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(The survey begins on the next page.)

A. The following questions are based on a situation where an intestate decedent has died with NO SPOUSE AND NO LIVING DESCENDANTS. The decedent also is not survived by any parents, siblings or descendants of siblings, grandparents, aunts or uncles or descendants of aunts or uncles. The decedent left several will substitutes naming the same beneficiary. Under the applicable state intestacy statute, the decedent's probate estate would escheat to the state.

1. Do you believe it would better promote the intestate decedent's donative intent to distribute the probate estate to the decedent's will substitute beneficiary rather than have it escheat to the state in accordance with the applicable intestacy statute? Why or why not?

2. If an intestacy statute were to take this decedent's will substitutes into account in determining the distribution of the probate estate and distribute the entire probate estate to the will substitute beneficiary rather than have it escheat to the state, what administrative difficulties, if any, do you foresee arising from this change? How might the law ameliorate these administrative difficulties?

3. On balance, taking into consideration your opinion with respect to the decedent's donative intent and also any administrative difficulties that you foresee, would you favor amending a state's intestacy statute to distribute the entire probate estate to the decedent's will substitute beneficiary rather than allowing it to escheat to the state? Why or why not?

B. The following questions are based on a situation where an intestate decedent has died with NO SPOUSE AND NO LIVING DESCENDANTS. The decedent also is not survived by any parents, siblings or descendants of siblings, grandparents, aunts or uncles or descendants of aunts or uncles. Assume that the decedent's closest surviving blood relations and intestate heirs are the decedent's "second cousins once removed." The decedent left several will substitutes naming the same beneficiary, who IS NOT otherwise an heir. These will substitutes comprise a substantial portion of the total estate (the combined probate and non-probate estates).

1. Do you believe it would better promote the intestate decedent's donative intent to distribute at least some of the probate estate to the decedent's will substitute beneficiary rather than have the entire probate estate pass to the decedent's second cousins once removed in accordance with the applicable intestacy statute? Why or why not?



2. If an intestacy statute were to take this decedent's will substitutes into account in determining the distribution of the probate estate and give part of the probate estate to the will substitute beneficiary, what administrative difficulties, if any, do you foresee arising from this change? How might the law ameliorate these administrative difficulties?

3. On balance, taking into consideration your opinion with respect to the decedent's donative intent and also any administrative difficulties that you foresee, would you favor amending a state's intestacy statute to distribute some of the probate estate to the non-heir will substitute beneficiary rather than having the entire probate estate pass to the decedent's second cousins once removed in accordance with the applicable intestacy statute? Why or why not?

4. What portion of the probate estate should the will substitute beneficiary receive?

- a. All
- b. Most
- c. Half
- d. Less than half
- e. None

5. Would any of your answers to questions B.1, B.2, B.3, or B.4 change if the decedent's intestate heirs were the decedent's first cousins? If so, how?

6. Would any of your answers to questions B.1, B.2, B.3, or B.4 change if the decedent's intestate heirs were the decedent's nephews and nieces? If so, how?

**C. The following questions are based on a situation where an intestate decedent has left several will substitutes naming the same beneficiary, who IS otherwise an heir. These will substitutes comprise a substantial portion of the total estate (the combined probate and non-probate estates).**

1. Do you believe it would better promote the intestate decedent's donative intent for a state's intestacy statute to treat the will substitutes as an advancement and distribute to the will substitute beneficiary less of the probate estate than he or she otherwise would have received so as to equalize shares of the total estate (probate and non-probate) going to the heirs in the same generation? Why or why not?

2. If an intestacy statute were to take the decedent's will substitutes into account in determining the distribution of the probate estate by treating the will substitutes as an advancement and thereby distribute less of the probate estate to the will substitute beneficiary than would otherwise pass to him or her under existing intestacy statutes so as to equalize shares of the total estate (probate and non-probate) going to the heirs in the same generation, what administrative difficulties, if any, do you foresee arising from this change? How might the law ameliorate these administrative difficulties?

3. On balance, taking into consideration your opinion with respect to the decedent's donative intent and also any administrative difficulties that you foresee, would you favor amending a state's intestacy statute to treat the will substitutes as an advancement of the heir's intestate inheritance and thereby distribute less of the probate estate to the will substitute beneficiary than would otherwise pass to him or her under existing intestacy statutes so as to equalize shares of the total estate (probate and non-probate) going to the heirs in the same generation? Why or why not?

**D. The following questions solicit information about your estate planning practice:**

1. For how many years have you been an estate planner?
2. In the last twelve months, approximately how many clients have you advised regarding their estate planning?
3. With respect to the clients that you have advised in the last twelve months regarding their estate planning:
  - 3(a). What is your best estimate of the most typical size of the estates of your clients? Circle one
    - under \$250,000.
    - between \$250,000 and \$1,000,000.
    - more than \$1,000,000 but less than \$5,000,000.
    - \$5,000,000 or more.
  - 3(b). What is your best estimate of the size of the largest estate you planned?
  - 3(c). What is your best estimate of the size of the smallest estate you planned?

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- 3(d). For a typical client, what is your best estimate of the percentage of the total estate that is made up of will substitutes **excluding** any revocable trusts?
- 3(e). For a typical client, what is your best estimate of the percentage of the total estate that is made up of will substitutes **including** any revocable trusts?
4. In the past twelve months, approximately how many UNMARRIED clients with NO LIVING DESCENDANTS have you advised regarding their estate planning?
5. With respect to the UNMARRIED clients with NO LIVING DESCENDANTS that you have advised in the last twelve months regarding their estate planning:
- 5(a). What is your best estimate of the most typical size of the estate of your clients? Circle one
- under \$250,000.
  - between \$250,000 and \$1,000,000.
  - more than \$1,000,000 but less than \$5,000,000.
  - \$5,000,000 or more.
- 5(b). What is your best estimate of the size of the largest estate you planned?
- 5(c). What is your best estimate of the size of the smallest estate you planned?
- 5(d). For a typical client, what is your best estimate of the percentage of the total estate that is made up of will substitutes **excluding** any revocable trusts?
- 5(e). For a typical client, what is your best estimate of the percentage of the total estate that is made up of will substitutes **including** any revocable trusts?

APPENDIX B

Interview ID#: \_\_\_\_\_

Estate Planner Interviews Script for “How Should Non-Probate Transfers Matter in Intestacy?”

Mary Louise Fellows

E. Gary Spitko

I. Summary of our contemplated reform:

For more than ten years, we have been studying the relationship between donative intent with respect to the probate estate and donative intent as expressed in will substitutes, such as a life insurance policy, 401(k) account, brokerage account, or joint tenancy with right of survivorship.

More specifically, we have been studying whether when an unmarried decedent with no living descendants and no other close blood relations has died without a will but with one or more will substitutes, those will substitutes might better predict how the decedent would want his or her probate estate to pass than does existing intestacy law.

Based on our earlier studies and other empirical studies on donative intent, we have concluded that intestacy reform to take account of will-substitute beneficiary designations should apply **ONLY IF THE DECEDENT IS NOT SURVIVED BY** a spouse or issue; by parents or issues of parents—such as a sibling or a niece or nephew; or by grandparents or issue of grandparents—such as an aunt or uncle or a cousin.

Under current law in some states [such as Minnesota and Michigan], the intestate property of such a decedent would escheat to the state. In other states [such as California], the intestate property of such a decedent would pass to distant relations who trace their relationship with the decedent through the decedent’s great-grandparents or more distant ancestors.

Our contemplated reform would amend state intestacy statutes so that, under certain circumstances, a decedent’s will-substitute beneficiaries would share the intestate estate.

Our reform would employ a mirroring approach—so that a will-substitute beneficiary who shares in the intestate estate would receive a percentage of the total probate estate that is proportional to the beneficiary’s percentage of the nonprobate estate.

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II. The relationship between the interviewee's clients' donative intent with respect to the probate estate and donative intent as expressed in will substitutes:

For this first series of questions, we'd like you to think about wills and revocable trusts on the one hand v. will substitutes — excluding revocable trusts and joint bank accounts — on the other hand.

1. Do you think your clients understand the difference between a will and will substitutes?

Think about your clients who have no spouse, no issue, no relatives through a parent — such as a sibling or niece or nephew, and no relatives through a grandparent — such as an aunt or uncle or a cousin.

Have you had many such clients?

If you have had few of these, think simply about your clients who are unmarried and have no issue.

2. Do your clients' testamentary instruments (that is, wills and revocable trusts) generally name the same beneficiaries as their will substitutes?

2A. [If the respondent answers no,] what are the reasons for the differences?

3. Do all of the will substitutes name the same beneficiaries?

3A. [If the respondent answers no,] what are the reasons for the differences?

4. Do you think that the named beneficiaries in your clients' will substitutes accurately reflect your clients' donative intent at the time they first come to visit you?

5. Do you think that the named beneficiaries in your clients' will substitutes accurately reflect your clients' donative intent with respect to their probate property at the time they first come to visit you?

6. Do your clients take into account will substitutes when determining the shares of what their beneficiaries receive from the probate estate as they design their estate plans?

7. How closely do your clients' testamentary instruments (that is, wills and revocable trusts) mirror the intestacy statute in \_\_\_\_\_ [estate planner's state]?

8. How closely do your clients' will substitutes (excluding revocable trusts and joint checking accounts) mirror the intestacy statute in \_\_\_\_\_ [estate planner's state]?

III. Whether our reform should differentiate between types of will substitutes:

9. Should the reform statute treat some types of will substitutes as less persuasive evidence of donative intent than other will substitutes? If so, which ones?

Specific follow-up questions:

9A. Should we exclude all or some joint tenancies from the reform? Should we distinguish between joint tenancies for real estate v. joint tenancy bank accounts?

9B. Should we exclude will substitute designations if a significant amount of time passed between the designation and the decedent's death? (If so, how long? 5 years? 25 years?)

9C. If the will-substitute beneficiary has predeceased the intestate decedent, yet for some reason the beneficiary's estate is the will substitute taker, should the reform (i) allow the predeceased beneficiary's estate to take in intestacy, (ii) apply an antilapse statute to substitute takers for the predeceased beneficiary's estate, or (iii) erase the predeceased beneficiary from the calculation?

9D. If the will-substitute beneficiary is a charity, how should that factor into our reform?

9D1. Do your clients who name charities as will-substitute beneficiaries do so for reasons in addition to donative intent?

9D2. Should the reform allow a charity to become an intestate heir? Or should we ignore those will substitutes that name a charity as beneficiary?

IV. Finding the will-substitute beneficiaries:

10. How can we best ensure that the entity responsible for distribution of the intestate estate will find out about all the people who may be a beneficiary of a will substitute? Relatedly, should there be a time limit for determining the will-substitute beneficiaries?

Specific follow-up questions:

10A. Do you do probate administration?

-If yes, when you do probate administration, does the executor or administrator gather information about all of the decedent's will substitutes?

10B. Is it not the case that a personal representative currently has the duty to determine all of a decedent's will substitutes in order to determine what state or federal transfer taxes, if any, are due at the decedent's death? If so, why would additional procedures be required for our reform?

V. Protecting all parties with a potential interest in the estate:

11. How will probate and non-probate processes need to be altered to accommodate our proposed reform while ensuring that (a) everyone who has an interest in the proceeding receives notice and an opportunity to be heard, (b) creditors are protected, and (c) will-substitute beneficiary designations are given effect only if valid?

Specific follow-up questions:

11A. Relatedly, who should get priority in being the personal representative of the estate, given that a default heir may be displaced as heir by a will-substitute beneficiary?

11B. Given that processes exist to protect creditors and to interpret and validate will substitutes, why would these existing procedures not be adequate?