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UNIFORM PROBATE CODE SECTION 6-201: A PROPOSAL TO INCLUDE STOCKS AND MUTUAL FUNDS

Uniform Probate Code (UPC) section 6-201, entitled "Provisions for Payment or Transfer at Death,"¹ authorizes the use of will substitutes² as alternatives to testamentary disposition.³ Will substitutes are the functional equivalents of wills; they are used by property owners to transfer property at death, yet they need not satisfy the legal formalities which attend testamentary disposition. Will substitutes attract property owners because they enable them to transfer property at their death outside the probate system, thus avoiding the system's costs and delays.⁴

Since will substitutes became popular in the 1960s, courts have treated them erratically, sometimes characterizing them as valid nontestamentary transfers, other times as invalid testamentary transfers.⁵ In enacting section 6-201, the drafters endeavored to eliminate the confusion surrounding will substitutes by deeming nontestamentary a variety of arrangements made in "payable on death" (POD) or "transfer on death" (TOD) form.⁶ The statute's

¹ UNIF. PROBATE CODE § 6-201 (1983). See *infra* text accompanying note 85 for statutory language.

² See Browder, *Giving or Leaving—What is a Will?*, 75 MICH. L. REV. 845 (1977) (defining "will substitute" as inter vivos transaction which seems to serve purposes of will).

³ T. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 1 (2d ed. 1953) ("testamentary disposition" is transfer of property made through will).

⁴ Professors Dukeminier and Johanson summarize the expense of probate as follows:

The administrative costs of probate are mainly probate court fees, the commission of the personal representative, the attorney's fee, and sometimes appraisers' and guardians ad litem's fees. In most states the personal representative's commission is set by statute at a fixed percentage of the probate estate. The fee of the attorney for the personal representative is sometimes set by statute, but more often is determined by the court by reference to a number of factors (including customary charges for probate work, complexity of the estate, time and labor required, and whether the attorney prepares the tax returns).

J. DUKEMINIER & S. JOHANSON, WILLS, TRUSTS AND ESTATES 39 (3d ed. 1985) (citations omitted).

Will substitutes and alternative forms of dual ownership have limits; in certain situations a will is still the most effective means of property transfer. See Wellman, *The Uniform Probate Code: A Possible Answer to Probate Avoidance*, 44 IND. L.J. 191, 194 (1968) (wills and probate are still best options for large estates that require extensive planning and estates which are expected to invite bitter contests).

⁵ See *infra* notes 88-95 and accompanying text.

⁶ For convenience, this Note uses the term "POD" to denote both the POD and TOD forms.

vague provisions, however, have left open to question⁷ whether the statute encompasses two extremely important forms of wealth—stocks and mutual funds.⁸

This Note explores the inadequacy of the present form of UPC section 6-201. It discusses the statute's purpose and structure, its relation to the rest of the UPC, and its potential application to stocks and mutual funds. Part I briefly addresses the law of wills, including the role will substitutes play in property transfer.⁹ Part II examines the general theory of the UPC and its attempt to respond to heightened dissatisfaction with probate systems.¹⁰ Part III analyzes UPC section 6-201.¹¹ It addresses the limited scope of the statute and recommends that the present form be amended to include PODs on stocks and mutual funds. Part IV proposes a more comprehensive nonprobate transfer statute: it recommends that section 6-201 transfers be deemed valid testamentary transfers in order to allow established doctrines of the law of wills to govern situations requiring legal interpretation.¹²

I

BACKGROUND TO THE LAW OF WILLS

A. Wills: The Traditional Tools of Property Transfer

Since at least sixteenth-century England,¹³ the classic form of property transfer has been testamentary disposition—disposition through a will.¹⁴ Many traditional English concepts inhere in con-

⁷ The Joint Editorial Board of the UPC is currently considering revisions to article 6 of the UPC, including section 6-201. Telephone interview with Richard Wellman, Educational Director of the Joint Editorial Board of the UPC (Nov. 1985).

Professors Dukeminier and Johanson pose the following hypothetical to their readers: "Merrill Lynch, Pierce, Fenner and Smith, a brokerage house, holds stocks as custodian for many of its customers. Can a customer of Merrill Lynch put on her custodial account a legally effective payable-on-death designation, thus passing the stocks upon her death directly to the designee, bypassing probate?" J. DUKEMINIER & S. JOHANSON, *supra* note 4, at 315.

⁸ Wiesenberger Investment Companies Service, Investment Companies 10 (45th ed. 1985) [hereinafter Wiesenberger]. A "mutual fund" is an open-ended investment company whose total number of shares outstanding fluctuates on a day-to-day basis. Investment companies pool many investors' funds and invest that pool in a variety of securities. Thus, mutual funds give their shareholders the benefits of continual professional management and a diversified portfolio.

⁹ See *infra* notes 13-73 and accompanying text.

¹⁰ See *infra* notes 74-95 and accompanying text.

¹¹ See *infra* notes 96-110 and accompanying text.

¹² See *infra* notes 111-26 and accompanying text. The language of this Note's proposed amendments to § 6-201 is presented at *infra* note 119.

¹³ Although the first statute of wills was passed in England in 1540, rudimentary forms of testamentary disposition were used throughout the Anglo-Saxon era. T. ATKINSON, *supra* note 3, § 3.

¹⁴ *Id.* § 1.

temporary succession law;¹⁵ in particular, modern will law observes certain formalities of execution which evolved as the requirements for valid testamentary transfer. The formalities required by the Statute of Wills of 1540,¹⁶ the Statute of Frauds of 1677,¹⁷ and the Wills Act of 1837¹⁸ find modern expression in statutes which provide that a will must be in writing,¹⁹ signed by the testator,²⁰ and attested by two disinterested witnesses.²¹ In the aggregate, the formalities serve cautionary, evidentiary, protective, and channeling functions that ensure that a will clearly reflects the testator's intent.²²

The legal formalities of wills serve a cautionary or ritual function by attempting to force the testator to analyze seriously the contents and consequences of his final testament.²³ The ritual of execution helps ensure that a testator does not act haphazardly.²⁴

The legal formalities of wills serve an evidentiary function by ensuring that evidence of testamentary intent is cast in the most "reliable and permanent" form possible.²⁵ The writing requirement controls the interpretation of any ambiguities in the testament, the signature positively identifies the testator as the maker of the document, and attestation provides proof of the circumstances of due execution.²⁶ The evidentiary function is important because when the testator dies, the best evidence for proving the validity of his will

¹⁵ *Id.* § 3.

¹⁶ Statute of Wills, 1540, 32 Hen. 8, ch. 1. This statute permitted a devise of land by written instrument but did not require either signature by the testator or attestation. The instrument was revocable and inoperative until death, but did not pass property obtained after the will's execution. T. ATKINSON, *supra* note 3, at 83.

¹⁷ Statute of Frauds, 1677, 29 Car. 2, ch. 3. This statute specified that testaments for both land and personalty (subject to certain exceptions) be in written form, but it did not require signature or attestation. However, a testator in his final sickness could, in the presence of witnesses, make an oral will for the passage of chattels. *Id.*

¹⁸ Wills Act, 1837, 7 Will. 4 and 1 Vict., ch. 26. This Act prescribed uniform rules for execution, revival, and construction of wills for realty and personalty. It required that a will be signed by the testator (or by someone in his presence and by his direction) and by two or more witnesses in his presence. *Id.*

¹⁹ T. ATKINSON, *supra* note 3, § 63.

²⁰ *Id.* § 64. Signing a will by a proxy in the testator's presence is also acceptable. *Id.*

²¹ *Id.* § 65.

²² Gulliver & Tillson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 5-13 (1941) (outlining functions served by statutes of wills); see also Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800-01 (1941) (disentangling formal and substantive elements in context of consideration).

²³ Gulliver & Tillson, *supra* note 22, at 5.

²⁴ *Id.*

²⁵ *Id.* at 6.

²⁶ *Id.* at 6-8.

dies, also.²⁷

Testamentary formalities serve a channeling²⁸ function by expediting wills through the legal system. If a will has certain standard characteristics, the legal system processes it with greater speed and confidence than if the will requires prolonged scrutiny for evidence of testamentary intent.²⁹

Finally, Wills Act³⁰ formalities serve a protective function:³¹ they guard against fraud or coercion by interested beneficiaries. For example, some statutes require that witnesses to the execution of a will be "competent," that is, that they have no financial interest in the testamentary provisions³² and are therefore not motivated to undermine the testator's chosen plan.³³ Some commentators suggest that the protective function afforded by Wills Act formalities, although still important, has shifted from its original emphasis.³⁴ In the past, testators often executed wills on their death beds, providing an ideal setting for fraud and undue influence.³⁵ Today, however, most people execute their wills in the presence of an attorney and at a relatively young age, reducing significantly the potential for that type of abuse.³⁶

Perhaps a will's most attractive feature is that it is ambulatory: it is both revocable and ineffective to pass title until death.³⁷

²⁷ *Id.* at 6. In addition, the time lapse between execution and probate may dull the attesting witnesses' memories. *Id.*

²⁸ Fuller, *supra* note 22, at 801. The channeling function was not among the original aims of the law of wills, but rather derives from Professor Lon Fuller's article on the functions of legal formalities in contracts. Professor Fuller specifically addressed the role of seals as a means of channeling contracts through the legal system. *Id.*

²⁹ *Id.* (discussing how form offers channels for "legally effective expression of intention"). The estate and its beneficiaries benefit from formalities because routine judicial administration lowers costs.

³⁰ This Note uses the term "Wills Act" to refer generally to any state statute (or statutes) which sets forth the requirements for validly attested wills.

³¹ Gulliver & Tillson, *supra* note 22, at 9.

³² For example, under the Statute of Frauds, a devisee-witness was not a valid attesting witness to a will. T. ATKINSON, *supra* note 3, § 65. Very few states today have such a requirement. *But see* IND. CODE ANN. § 29-1-5-2 (Burns 1986); KAN. STAT. ANN. § 59-604 (1986).

³³ Gulliver & Tillson, *supra* note 22, at 11. The Uniform Probate Code has eliminated the requirement of disinterested witnesses. Unif. Probate Code § 2-505 (1983). The official comment to § 2-505 notes that the requirement that witnesses be disinterested to qualify as competent failed to prevent fraud and undue influence—apparently, a disinterested witness may undermine a testator as well as an interested witness. *Id.* comment.

³⁴ *See, e.g.*, Gulliver & Tillson, *supra* note 22, at 9-10.

³⁵ *Id.* at 10.

³⁶ *Id.*

³⁷ Bordwell, *Testamentary Dispositions*, 19 Ky. L.J. 283, 285 (1931) ("The non-obligatory character of a will until the testator's death, its inoperativeness on the property until that time, its revocability by the testator, the fact that it leaves the testator unhampered

Although perhaps mutually inconsistent,³⁸ these characteristics of testamentary disposition are attractive to estate planners³⁹ because they enable property owners to maintain control over the bulk of their wealth until they die.⁴⁰ To complicate matters, many property owners also wish to avoid the costs, delays, and inefficiency of probate by giving away some property interests as inter vivos transfers.⁴¹ As a result, they manipulate inter vivos transfers to approximate the favorable ambulatory characteristics of testamentary disposition.⁴² The incompatibility of these goals creates tension and confusion regarding nonprobate transfers made in will substitute form.

B. Will Substitutes: Modern Innovations in Property Transfer

The level of public dissatisfaction with contemporary probate systems peaked in the mid-1960s.⁴³ Numerous critical books⁴⁴ and articles⁴⁵ appeared. Typical complaints were that courts had unnecessary and lengthy control over fiduciary estate administration and

in the control of the property are summed up . . . in the technical phrase that a will is ambulatory until the testator's death.").

³⁸ See *id.* at 283-85. In 1931, Professor Bordwell recognized that in certain respects ineffectiveness until death and revocability are parts of the same testamentary requirement that the testator not be bound until his death. *Id.* Nonetheless, he saw a distinction between the two characteristics: ineffectiveness until death relates to property and revocability relates to a person. *Id.* Forty-six years later, Professor Browder stated that the two elements are either two ways of saying the same thing or inconsistent—he found the notion of revoking a property transfer which has not yet taken effect inherently illogical. Browder, *supra* note 2, at 850.

³⁹ T. ATKINSON, *supra* note 3, § 38 (defining advantages of a will as providing secrecy over plan of disposition, total enjoyment of property for testator during life, and revocation privileges).

⁴⁰ *Id.* § 31.

⁴¹ See *infra* notes 43-58 and accompanying text.

⁴² Langbein, *Substantial Compliance With the Wills Act*, 88 HARV. L. REV. 489, 504 (1975).

⁴³ Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1116 (1984) (discussing poor reputation of probate system with general public); Wellman, *The Uniform Probate Code: A Possible Answer to Probate Avoidance*, 44 IND. L.J. 191, 192-94 (1968) (discussing public perceptions of probate system).

⁴⁴ See, e.g., N. DACEY, *HOW TO AVOID PROBATE* (1966). Dacey's chief criticisms are that probate law and procedure are archaic, needlessly complex, and function for the benefit of the probate bench and bar. Furthermore, Dacey asserts that property succession through probate is expensive and time-consuming and that lawyers' interests in probate fees conflict with their clients' best interests. In essence, Dacey recommends that property owners avoid probate by placing their property in trusts and joint tenancies. Wellman, *supra* note 43, at 193; see National Conference of Commissioners on Uniform State Laws, Proceedings in Committee of the Whole Uniform Probate Code 1 (Aug. 4, 1966, available on microfiche) [hereinafter Proceedings] (statement of Richard Wellman) (describing Dacey's book as "non-fiction bestseller").

⁴⁵ E.g., Wellman, *Introduction to the Uniform Probate Code*, 9 CREIGHTON L. REV. 446, 448 (1976). For a discussion of the evolution of the UPC, see *infra* notes 74-77 and accompanying text.

that estate distribution was too complicated, taking up to four years and creating burdensome expenses exacerbated by unnecessary court procedures.⁴⁶ In addition, steadily rising levels of affluence and complex tax laws led to increased public awareness of estate planning techniques.⁴⁷

In response, property owners turned from testamentary disposition to prepackaged probate avoidance mechanisms known as will substitutes. Will substitutes are financial instruments or arrangements which, like wills, provide for property transfer at the owner's death. Unlike wills, however, they take effect without conforming to Wills Act formalities or clearing probate. Courts have validated most will substitutes under two theories: the present interest theory and the alternative formality theory. Under the present interest theory the transferee is said to acquire an interest during the transferor's lifetime. Because the transfer is not made at the testator's death, it is deemed nontestamentary; hence, the transfer need not satisfy Wills Act requirements in order to be effective.⁴⁸

The other popular basis for validating will substitutes is the alternative formality theory.⁴⁹ This theory holds that will substitutes exhibit formalities (such as written terms and signatures) that adequately parallel Wills Act requirements.⁵⁰ If there is evidence that the alternative formalities discourage testators' impulsive actions and reduce the threat of forgery, fraud, or coercion, courts adhering to this theory accept the alternative formalities as substitutes for Wills Act requirements.⁵¹ As one commentator explains, "Alterna-

⁴⁶ *Administrative Portions of Draft Uniform Probate Code—An Appraisal*, 2 REAL PROP. PROB. & TR. J. 273, 274 (1967) [hereinafter *Draft*]; see also J. DUKEMINIER & S. JOHANSON, *supra* note 4.

⁴⁷ See Wellman, *supra* note 43, at 194.

Most individuals want property to pass quickly at their death, with little interference from courts and third parties.

Frequently, clients believe that the making of a will renders court proceedings unnecessary at death. After the client is informed that this is a false assumption, his next inquiry is what can be done now to avoid a court proceeding at death? Thus, there is a public misunderstanding of the function of our system of passing property at death and a general distrust of the probate court as such.

Draft, *supra* note 46, at 274.

⁴⁸ Langbein, *supra* note 43, at 1108; see *Hart v. Savings & Profit Sharing Pension Fund of Sears, Roebuck & Co.*, 291 F. Supp. 95, 97 (E.D. Va. 1968) (pension fund valid as either inter vivos trust or third party beneficiary contract because settlor passed an interest "in praesenti" and beneficiary received vested, albeit defeasible, interest); *Farkas v. Williams*, 5 Ill. 2d 417, 421-22, 125 N.E.2d 600, 603 (1955) (stock issued in inter vivos trust form valid in part because settlor intended to create present interest in property).

⁴⁹ See Langbein, *supra* note 43, at 1130-34.

⁵⁰ For a discussion of Wills Act formalities and their functions, see *supra* notes 15-27 and accompanying text.

⁵¹ Langbein, *supra* note 43, at 1131; see, e.g., *Farkas v. Williams*, 5 Ill. 2d 417, 433,

tive formality is not a test for compliance with the Wills Act; *it is a test for not having to comply with the Wills Act.*"⁵²

One commentator divides will substitutes into two types: imperfect and pure.⁵³ Imperfect will substitutes are used to effect completed lifetime transfers, the most popular of which is the common law joint tenancy.⁵⁴ Although joint tenancies may achieve the same results as wills, their clear disadvantage is that they are not ambulatory: one party can never revoke or modify a joint tenancy because both parties have undivided ownership interests.⁵⁵

Pure will substitutes such as life insurance, pension accounts, joint accounts, and revocable trusts more closely achieve the functions of a will. Unlike imperfect will substitutes, pure will substitutes afford the owner complete lifetime dominion over his property, including the power to name and change beneficiaries until he dies. For instance, if the holder of a life insurance policy designates a beneficiary, he is not bound to that choice; like a testator, he can freely change beneficiaries until he dies. Nevertheless, because the policy is a will substitute it need not be probated.⁵⁶ Property owners may purchase pure will substitutes from a variety of institutional sources: life insurance companies, pension plan operators, commercial banks, savings banks, investment companies, and brokerage houses.⁵⁷ Because financial intermediaries market such will substitutes by using standard form instruments with fill-in-

125 N.E.2d 600, 608 (1955) (revocable inter vivos trust valid in part because intent manifested in solemn and formal manner).

⁵² Langbein, *supra* note 43, at 1132 (distinguishing alternative formality and substantial compliance).

⁵³ *Id.* at 1109 (separating will substitutes according to whether owner maintains complete control over property during his life (pure) or relinquishes all control (imperfect)).

⁵⁴ *Id.* at 1114. "[E]ach [joint tenant] owns the undivided whole of the property; this being so, when one joint tenant dies nothing *passes* to the surviving joint tenant or tenants. Rather, the estate simply continues in survivors freed from the participation of the decedent, whose interest is extinguished." J. DUKEMINIER & J. KRIER, PROPERTY 486 (1981) (citations omitted).

⁵⁵ See Langbein, *supra* note 43, at 1114. In a joint tenancy arrangement involving stocks, registered bonds, or promissory notes, both parties must endorse the instrument in order to transact any business while both parties are alive. Sheard, *Avoiding Probate of Decedents' Estates*, 36 U. CINN. L. REV. 70, 78 (1967). For an in-depth discussion of the limitations of the joint tenancy, see *infra* notes 65-68 and accompanying text.

⁵⁶ Langbein, *supra* note 43, at 1109.

⁵⁷ *Id.* at 1108. Scholars and estate planners alike recognize the general utility of will substitutes. See, e.g., UNIF. PROBATE CODE, introductory remarks 4-6 (National Conference of Commissioners on Uniform State Laws Working Draft No. 3, 1967) [hereinafter DRAFT CODE] (statement of Richard Wellman, Project Director). In his opening address at the 1966 annual meeting of the commissioners, UPC Chief Reporter Richard Wellman stated, "Lawyers, whose stock in trade has been the will, cannot, in good conscience, describe the will as competitive from the standpoint of post-death expense and delay, with the host of will substitutes that are available." *Id.* at 5.

the-blank beneficiary designations, they have been described as "mass will substitutes."⁵⁸

The advent of will substitutes has led to a significant decline in the need for formal testamentary disposition. However, this decline does not derive from a diminished need for the safeguards established by Wills Act formalities—generally, such protections are as needed as ever.⁵⁹ As property transfer mechanisms shift from probate to nonprobate, we must find ways to approximate the old forms without compromising these protections.

C. Stocks and Mutual Funds: Their Limited Use as Will Substitutes

Increased affluence since World War II is largely responsible for the current deluge of will substitutes.⁶⁰ This wealth has spurred the rise in two forms of investment: stocks and mutual funds⁶¹ offered through investment companies. As of mid-1983, 42,360,000 individuals had holdings in stocks and mutual funds, in addition to the holdings of institutional investors such as colleges and pension funds.⁶² At year-end 1984, there was a total of \$363 billion placed with investment companies by individuals and institutional investors,⁶³ matched by a total of \$775 billion invested in stock exchanges at year-end 1983.⁶⁴

At present, stocks and mutual fund shares may be held only in imperfect will-substitute arrangements. No form of registration enables shareholders to name a share certificate beneficiary; a property owner who wishes to transfer share certificates outside of probate must settle for a dual ownership option such as a joint tenancy with right of survivorship, a tenancy in common, a tenancy by the en-

⁵⁸ Langbein, *supra* note 43, at 1109.

⁵⁹ *But see supra* note 36 and accompanying text.

⁶⁰ *Draft, supra* note 46, at 274-75 (describing increased economic wealth and suggesting that property owners demand better system to handle transfer of accumulated wealth at death).

⁶¹ For a brief discussion of mutual funds, see *supra* note 8. For a detailed explanation of investment companies and how they operate, see Weisenberger, *supra* note 8, at 10-18.

⁶² NEW YORK STOCK EXCHANGE FACT BOOK 1984, at 54, 57 (Kalich ed. 1984) [hereinafter FACT BOOK]; see also Weisenberger, *supra* note 8, at 13 (noting that investors are both individuals and institutions).

⁶³ Weisenberger, *supra* note 8, at 12. Total funds invested in investment companies grew from approximately \$1 billion in 1940 to over \$19 billion in 1960 and \$363 billion in 1984. *Id.* In 1948 there were only 100 registered investment companies in the United States; today there are over 1,100 mutual funds nationwide. *Id.* at 11.

⁶⁴ FACT BOOK, *supra* note 62, at 74. Holdings on registered stock exchanges grew from a total of \$18,725 million in 1950 to \$37,960 million in 1960, \$102,494 million in 1970, and \$775,337 million in 1983. *Id.*

tirety, or a life tenancy with remaindermen.⁶⁵ Although these forms adequately serve situations where neither tenant objects to relinquishing full power over the property, they are ill-suited where one party contributes all the money to purchase the shares and wants to retain full control of the property during his lifetime. For instance, in a joint tenancy with right of survivorship, each party owns an undivided one-half interest and takes full title on the other's death.⁶⁶ Accordingly, by choosing the joint tenancy as a probate avoidance mechanism, the property owner gives up the autonomy associated with full ownership and forfeits his ability to dispose freely of the asset.⁶⁷ The same holds true for a tenancy by the entirety, which is essentially a joint tenancy with right of survivorship between husband and wife, with the condition that neither tenant can unilaterally terminate the right of survivorship.⁶⁸

By contrast, in a tenancy in common each party owns a divisible interest—one can give away his portion regardless of the original purchaser's intentions.⁶⁹ Consequently, the tenant in common loses his autonomy not because he needs other tenants' permission to dispose of the property, but because he has given away a discrete portion of his original interest. Life tenancy is an equally poor form of joint ownership because property owners must use a will, trust, or legal life estate to ascertain the authority of the life tenant,⁷⁰ and complex legal instruments are precisely what property owners using will substitutes seek to avoid.

Permitting individuals to hold stocks and mutual fund shares as pure will substitutes would avoid the problems associated with hold-

⁶⁵ M. TOROSIAN, *SECURITIES TRANSFER: PRINCIPLES AND PROCEDURES* 60-63 (3d ed. 1979). For further explanation of these forms of property ownership, see *infra* notes 66-70 and accompanying text.

⁶⁶ M. TOROSIAN, *supra* note 65, at 60.

⁶⁷ Courts have sometimes allowed one who uses a joint tenancy as a will substitute to regain full control of the asset by ruling that, under gift theory, the donor lacked the requisite intent to relinquish control during his lifetime. See, e.g., *Blanchette v. Blanchette*, 362 Mass. 518, 287 N.E.2d 459 (1972). *Blanchette* exemplifies the doctrinal manipulation surrounding will substitutes. In *Blanchette*, a man purchased stock through a plan offered by his employer. He wanted to give his wife a legal right to the stock if he died but to deny her rights during his lifetime. He also wanted the stock to avoid probate. Therefore, he chose to have the shares issued to him and his wife as "Joint Tenants with rights of Survivorship and not as Tenants in Common." *Id.* at 520, 287 N.E.2d at 461. Eventually the couple divorced and the wife claimed a right to the stock. To defeat her claim, the court relied on gift theory in holding that there was no present gift of the stock to support the donative intent requirement of the joint tenancy form. *Id.* at 522, 287 N.E.2d at 462. The court expressly avoided deciding for the husband on a more traditional ground, namely, finding that he donated a future interest subject to a life estate and a power to revoke. *Id.* at 522, 287 N.E.2d at 462.

⁶⁸ M. TOROSIAN, *supra* note 65, at 62.

⁶⁹ *Id.* at 61-62.

⁷⁰ *Id.* at 63.

ing such assets in imperfect will substitutes. Significantly, stocks and mutual fund shares resemble pure will substitutes in that both are asset-specific, that is, they symbolize an ownership interest in a single, identifiable piece of property.⁷¹ Furthermore, both are marketed by financial intermediaries using standard form instruments.⁷² Share certificates representing stock or mutual funds appear to possess the same alternate formalities that validate pension plans, multiple-party bank accounts, and other pure will substitutes. At present, however, no form of registration enables shareholders to transfer share certificates while retaining the ambulatory features that pure will substitutes provide. Without clear legal authority, financial intermediaries are unwilling to risk having their clients' instruments adjudged testamentary and therefore void for failing to comply with the Wills Act.⁷³

Express statutory recognition of the validity of POD share certificates would enable individuals to hold these instruments as pure will substitutes. Although the UPC authorizes a variety of POD arrangements, it does not expressly validate POD share certificates. The remainder of this Note explains how POD ownership may be expanded to effectuate nonprobate transfer of stocks and mutual funds while maintaining the reliability provided by testamentary safeguards.

II

THE UNIFORM PROBATE CODE

The same disenchantment that caused property owners to turn from wills toward will substitutes prompted the UPC probate reform movement.⁷⁴ In addition to providing will substitutes where pro-

⁷¹ Langbein, *supra* note 43, at 1115.

⁷² *Id.* at 1109.

⁷³ A book published to teach the Chase Manhattan Bank's clients about proper stock registration listed the accepted forms of stock registration and warned that stock certificates should not contain POD designations:

Stock should not be registered in the form "X PAYABLE ON DEATH TO Y". Stock is property and cannot be made payable on death to anyone, except by testamentary disposition. If the stock is held by X as Life Tenant, a reference to the deed or Will creating the life tenancy should be included in the inscription. In the absence of a deed or Will the attempted gift to Y might be void in its inception, or it might be testamentary in character, and, lacking the formality of a Will, void on the death of X.

B. ROGERS, FORMS OF REGISTRATION FOR CORPORATE STOCK 23 (1957).

⁷⁴ A precursor to the UPC was the Model Probate Code of 1946. L. SIMES, PROBLEMS IN PROBATE LAW v (L. Simes & P. Basye ed. 1946) (preface). The Model Probate Code prompted many states to recast their probate laws and to incorporate its provisions to varying degrees. *Uniform Probate Code Approved by Council*, 4 REAL. PROP. PROB. & TR. J. 206, 207 (1969). In 1962, the Council of the American Bar Association Section of Real Property Probate and Trust Law appointed a special committee to con-

bate is clearly unnecessary, the UPC's drafters attempted to restore testamentary disposition to its central role in property transfer by decreasing the costs and delays associated with probate. Consequently, the UPC endorses a streamlined approach to probate administration,⁷⁵ central to which is "testator-successor control of estate settlements."⁷⁶ The drafters believed that allowing the testator's chosen successors to control the estate would convince more people to opt for probate administration.⁷⁷

Article 6, entitled "Non-probate Transfers," typifies the UPC's innovative approach to estate planning.⁷⁸ Article 6 authorizes use of will substitutes to transfer asset-specific property to family members by deeming various transfer arrangements nontestamentary. The nontestamentary designation is crucial: as one of the drafters' comments to article 6 explains, "The purpose of classifying the transactions contemplated by Article VI as nontestamentary is to bolster the explicit statement that their validity as effective modes of transfers at death is not to be determined by the requirements for wills."⁷⁹

Part 1 of article 6, "Multiple Party Accounts," deals explicitly with accounts in financial institutions, including joint, POD, and trust accounts.⁸⁰ It explains in detail the rights of the persons and institutions who are parties to these accounts, treating separately the relationship between the depositor and the beneficiary and that between the depositor and the financial institution.⁸¹ Section 6-106 specifically deems all transfers effected through rights of survivor-

sider updating the Model Code to promote greater national uniformity. Wellman, *supra* note 43, at 201. The project culminated in the 1969 promulgation of the UPC. *Draft*, *supra* note 46, at 273.

⁷⁵ Wellman, *The Uniform Probate Code: Blueprint for Reform in the 70's*, 2 CONN. L. REV. 453, 454 (1970).

⁷⁶ Wellman, *Recent Developments in the Struggle for Probate Reform*, 79 MICH. L. REV. 501, 508 (1981); see also UNIF. PROBATE CODE § 3-203 (1983) (limiting those who may serve as estate's personal representative to named executor, surviving spouse who is estate beneficiary, or someone selected by all successors).

⁷⁷ Wellman, *supra* note 76, at 508-10 (citing primary reasons why private, family administration will benefit and be attractive to most parties).

⁷⁸ UNIF. PROBATE CODE art. 6 (1983). The Model Code of 1947 included no such provisions for nonprobate transfers at death.

⁷⁹ UNIF. PROBATE CODE § 6-106 comment (1983). As Professor Wellman stated: "Transfers serving as will substitutes should not be condemned nor discouraged. Rather, the office of the law should be to define transactions with a view to implementing, rather than discouraging what people want." DRAFT CODE, *supra* note 57, at 7 (statement of Richard Wellman).

⁸⁰ UNIF. PROBATE CODE § 6-101(1), (5) (1983).

⁸¹ *Id.* § 6-102 to -113; see also Johnson, *Joint, Totten Trust and P.O.D. Bank Accounts: Virginia Law Compared to the Uniform Probate Code*, 8 U. RICH. L. REV. 41, 49-57 (1973-74) (explaining operation of part 1 of UPC article 6).

ship⁸² nontestamentary.⁸³

Part 2 of article 6 consists of a single, more ambiguous provision codifying the remaining mass will substitutes not covered by part 1. Section 6-201, "Provisions for Payment or Transfer at Death," focuses on contractual agreements designed to shift or cancel property rights by reason of the owner's death.⁸⁴ This section provides:

(a) Any of the following provisions in an insurance policy, contract of employment, bond, mortgage, promissory note, deposit agreement, pension plan, trust agreement, conveyance or any other written instrument effective as a contract, gift, conveyance, or trust is deemed to be nontestamentary, and this Code does not invalidate the instrument or any provision:

(1) that money or other benefits theretofore due to, controlled or owned by a decedent shall be paid after his death to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently;

(2) that any money due or to become due under the instrument shall cease to be payable in event of the death of the promisee or the promisor before payment or demand; or

(3) that any property which is the subject of the instrument shall pass to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently.

(b) Nothing in this section limits the rights of creditors under other laws of this state.⁸⁵

Section 6-201 treats the enumerated arrangements as nontestamentary, thereby eliminating the need to satisfy the UPC version of Wills Act requirements.⁸⁶ Significantly, the drafters recognized that most

⁸² UNIF. PROBATE CODE § 6-104 (1983) (defining rights of surviving parties to joint, POD, and trust accounts).

⁸³ *Id.* § 6-106 (incorporating notions of § 6-104 in applying nontestamentary label).

⁸⁴ *Id.* § 6-201 (1983); *see* Wellman, *supra* note 75, at 483.

⁸⁵ *Id.* § 6-201 (1983).

⁸⁶ *See id.* § 2-502 (listing UPC formalities for execution of witnessed will). The comment accompanying § 6-201 explains the reason for deeming the arrangements nontestamentary:

[T]here appear to be no policy reasons for continuing to treat these varied arrangements as testamentary. The revocable living trust and the multiple-party bank accounts, as well as the experience with United States government bonds payable on death to named beneficiaries, have demonstrated that the evils envisioned if the statute of wills is not rigidly enforced simply do not materialize. The fact that these provisions often are part of a business transaction and in any event are evidenced by a writing to eliminate the danger of "fraud."

Id. § 6-201 comment.

of the arrangements the section covers occur within the family.⁸⁷ Thus, this provision bolsters the UPC's effort to allow testators and their successors to control the disposition of their assets.

The concepts underlying section 6-201 date back to the 1950s. The New York legislature passed a statute in 1952 that designated the payment of certain "institutional debts" by the debtor to the deceased creditor's surviving spouse nontestamentary.⁸⁸ Similarly, in 1959 the Illinois legislature enacted a law designed to insulate insurance and pension benefits from attack under the statute of wills.⁸⁹

The efforts of the UPC drafters went farther, however, and validated a greater variety of will substitutes. As stated during the 1968 Proceedings in Committee of the Whole Uniform Probate Code, section 6-201 addresses two problems: first, whether certain instruments are testamentary and therefore ineffective because they may not comply with the requirements for valid wills; and second, whether two or more parties can contract to transmit property without probating the estate.⁹⁰ Section 6-201 attempted to rectify the confusion that had developed over whether will substitutes are testamentary or inter vivos in character. The statute validated instruments such as promissory notes and land contracts containing provisions ceasing or continuing payments to named beneficiaries upon the original payee's death.⁹¹ Prior to the UPC, courts deemed such instruments void when not executed in accordance with Wills Act requirements⁹² by interpreting the death provisions as testa-

⁸⁷ *Id.* § 6-201 comment (provisions in promissory notes and land contracts either cancelling or transferring payments on death of payor usually occur in "family arrangements").

⁸⁸ 1952 N.Y. ch. 824 (incorporated by N.Y. SURRE. CT. PROC. ACT § 1310 (Consol. 1967)); see National Conference of Commissioners on Uniform State Laws, Uniform Probate Code, Proceedings in Committee of the Whole Uniform Probate Code 348, 349 (July 1968) (explaining that intent of statute was to cover such things as war savings bonds, unpaid wages of deceased, industrial insurance policies, proceeds of savings bank trusts, and joint savings accounts).

⁸⁹ ILL. REV. STAT. ch. 1101/2, § 401 (1978) ("concerning rights of a person entitled to succeed upon the death of another person to an interest in certain third-party beneficiary contracts and assignments") (formerly ILL. ANN. STAT. ch. 3, § 601 (Smith-Hurd 1969)); see Comment, *NonProbate Transfers—Provisions Relating to Effect of Death: Will UPC § 6-201 Be "Effective" in Nebraska?*, 12 CREIGHTON L. REV. 1173, 1179-80 (1979).

⁹⁰ Proceedings, *supra* note 44, at 341 (July 31, 1968) (statement of Charles Horowitz). Although the legislative history is unclear, the reference to contracting to transmit property without probating the estate appears to refer to contracting in a manner which replicates testamentary disposition but does not carry with it the potential for being declared testamentary (and therefore invalid for failure to comply with the Wills Act). The commissioners' response was to deem the transaction nontestamentary. This Note suggests an alternative characterization. See *infra* notes 111-26 and accompanying text.

⁹¹ UNIF. PROBATE CODE § 6-201 comment (1983).

⁹² *Id.* Earlier courts consistently found that provisions such as these constitute at-

mentary rather than finding a present interest and validating them as *inter vivos*.⁹³

Wherever courts draw the line between testamentary and non-testamentary transfers, they invariably characterize functionally similar instruments in dramatically different ways, thereby yielding inconsistent and often perplexing results.⁹⁴ For example, while some courts rejected contractual designations in other instruments, POD designations had for years been upheld in life insurance contracts.⁹⁵ Their comment to section 6-201 demonstrates the UPC drafters' desire to purge will substitutes of the seemingly arbitrary distinctions which previously hindered their use.

tempted testamentary dispositions and are therefore void for violating the Wills Acts. *See, e.g.*, *McCarthy v. Pieret*, 281 N.Y. 407, 24 N.E.2d 102 (1939) (limited to its facts in *Estate of Hillowitz*, 22 N.Y.2d 107, 238 N.E.2d 723 (1968)) (provision in bond and mortgage to continue payments to brother and other heirs on payee's death held testamentary); *Juneau v. Dethgens*, 200 Wis. 360, 228 N.W. 496 (1930) (provision in land contract to be paid in installments that balance was due at death of payor/grantor and title was to pass to grantee in fee held testamentary).

Modern courts have upheld similar provisions on the basis of third party beneficiary concepts borrowed from contract law. Apparently, § 6-201 codified the existing majority view and cleared up the confusing remnants of the older doctrines. *See, e.g.*, *Church of Jesus Christ of Latter Day Saints v. Scarborough*, 189 F.2d 800 (10th Cir. 1951) (agreement by creditor that balance owing at creditor's death deemed paid upheld as binding contract); *Miller v. Allen*, 339 Ill. App. 471, 90 N.E.2d 251 (1950) (provision in mortgage note that it be considered fully paid on death of mortgagee upheld as valid contract creating present, existing, enforceable, and binding right); *McGrath v. McGrath*, 107 N.H. 242, 220 A.2d 760 (1960) ("The weight of authority supports the validity of an agreement contemporaneous with a debt or a legal obligation that such obligation shall be extinguished or terminated by the death of the creditor or the obligee.").

⁹³ *E.g.*, *In re Montgomery*, 2 Ill. App. 3d 821, 277 N.E.2d 739 (1972) (deeming valid savings account trusts established by decedent for benefit of and payable on death to her children despite decedent's extensive control over funds on grounds that declaration of trust created valid equitable interest), *aff'd in part and rev'd in part*, *Montgomery v. Michaels*, 54 Ill. 2d 532, 301 N.E.2d 465 (1973); *see Langbein, supra* note 43, at 1126 ("The main stratagem has been to identify some so-called 'present interest' in the transferee, acquired during the lifetime of the transferor, which makes the transferee a donee and distinguishes the will substitute from a will."); *see also* T. ATKINSON, *supra* note 3, § 44 (validity of contractual instruments as nontestamentary documents depends on whether they create present interest in someone other than maker).

⁹⁴ Langbein, *supra* note 43, at 1134.

⁹⁵ UNIF. PROBATE CODE § 6-201 comment (1983). Using the third party donee-beneficiary theory, courts characterize life insurance policies as *inter vivos* transactions effective before the policy owner's death. The third party beneficiary concept gives beneficial disposition effect at designation, but enjoyment of the policy amount is postponed until the policy holder's death. Furthermore, the policy holder always has a right of revocation. *See, e.g.*, *Kansas City Life Ins. Co. v. Rainey*, 182 S.W.2d 624 (Mo. 1944) (third party beneficiary entitled to enforce policy as contract); *Mutual Beneficiary Life Ins. Co. v. Ellis*, 125 F.2d 127 (2d Cir. 1942) (right of beneficiary to enforce life insurance policy is based upon contractual obligation and not property interest).

III ANALYSIS

A. Present Coverage of Section 6-201: Implications for Stocks and Mutual Funds

Section 6-201 does not currently validate POD stocks and mutual fund shares. Although stocks and mutual fund shares are important elements of many people's estates, the drafters failed to enumerate them among the instruments⁹⁶ which section 6-201 clearly validates.⁹⁷ Furthermore, it is unlikely that courts would interpret the section's residual clause validating "any other written instrument effective as a contract, gift conveyance or trust"⁹⁸ to include stocks and mutual fund shares.

Apparently, no courts have been called upon to discern the scope of section 6-201's residual clause. One commentator has suggested that the residual clause extends the section's validation to "whatever future products of financial intermediation that may emerge."⁹⁹ However, it is unlikely that the "future products" interpretation could cover stocks and mutual fund shares because they are not really "future" products at all. Share certificates merely symbolize a property interest. And although one commentator has suggested that share certificates could be viewed as contracts evidencing the investment,¹⁰⁰ they are not contracts in the traditional

⁹⁶ Although this Note confines its discussion to the utility of contract theory as a means of validating will substitutes, one could obviously ensure that an arrangement falls within § 6-201 by constructing the instrument such that it fits into one of § 6-201's enumerated categories. For example, one could cast the POD share as a trust or gift. Such an approach, however, defeats the purpose of preserving the revocable and ambulatory features of the mass will substitute: the original owner clearly uses the POD arrangement to avoid a detailed process such as putting the shares in a revocable trust.

⁹⁷ Missouri has adopted a version of § 6-201 that specifically includes stock certificates. MO. REV. STAT. § 456.231 (1986). The statute's opening sections are identical to § 6-201, except that the Missouri statute adds the phrases "stock certificate" and "declaration of trust." Specifying stocks evidences the Missouri legislature's judgment that § 6-201's coverage of POD share certificates is ambiguous and that a court might invalidate such a designation. One Missouri commentator has suggested that the residual clause in the Missouri statute validates POD designations in stock dividend reinvestment accounts, equity accounts in cooperatives and mutual insurance associations, brokerage accounts for stocks and commodities, custodial accounts, escrow accounts, and many more property interests founded on debt or contract relationships. Eickhoff, *Transfer on Death Directions*, 40 J. MO. BAR 93 (1984).

⁹⁸ UNIF. PROBATE CODE § 6-201(a)(1983).

⁹⁹ Langbein, *supra* note 43, at 1133.

¹⁰⁰ See Comment, *supra* note 89, at 1197. Arguably, contract analysis is the one area in which the rationales applicable to mutual funds and stocks diverge. Because the mutual fund purchaser buys the expertise and supervision of an investment company, mutual fund shares are essentially service contracts. See *supra* note 8. Accordingly, it is possible to validate POD mutual fund shares on a purely contractual level. Nevertheless, mutual fund shares ultimately represent a property interest in the fund's stock portfolio. Validation of mutual fund PODs under the present version of § 6-201 is an

sense. Moreover, share certificates have been in existence for years; clearly they were not "future products" at the time the UPC was drafted. Share certificates were widely used, and therefore not easily overlooked, when the drafters validated specific instruments in section 6-201, which suggests that their omission was deliberate. Thus, the "future" concept of the residual phrase fails as a means of extending the coverage of section 6-201 to stocks and mutual fund shares. The residual clause is more logically viewed as a protective device aimed at those incipient instruments the enumerated portion fails to cite.

One commentator suggests that section 6-201 adds nothing new to nontestamentary contractual arrangements; it merely codifies forms effective at the time of its passage.¹⁰¹ Courts never accepted POD designations as effective modes of contracting for certificate transfer. Consequently, relying upon such a vaguely worded statute to validate POD designations would be odd indeed. "Section [6-201] governs 'effective contracts' and it would be a grave error to suppose that the statute possesses some special power by which all imaginable transfers of property at death may be validated without any consideration for existing contract law."¹⁰²

B. Future Implications of Section 6-201: The Rationale Behind the Proposed Amendment

Amending section 6-201 to include POD share certificates would alleviate probate burdens and satisfy the policies underlying the UPC and Wills Act formalities. Presumably, share certificates currently pass through probate only because no alternate form of ownership retains the ambulatory feature characteristic of testamentary disposition. Yet forcing successors through the costly probate process may be unnecessary and wasteful if there are effective substitutes for testamentary safeguards. POD share certificates closely resemble instruments already within section 6-201's reach; an amendment explicitly including them would be consistent with the UPC's validation of similar will substitutes. Like revocable trusts, life insurance, United States government bonds, and multiple-party bank accounts,¹⁰³ POD share certificates are asset-specific and re-

inadequate solution to the problems posed. For a discussion of contract analysis's failings in the present context, see *infra* notes 111-25 and accompanying text.

¹⁰¹ Comment, *supra* note 89, at 1186 ("As has been the case in the past, . . . courts will closely scrutinize an arrangement which purports to transfer property at death; and once a valid and enforceable contract is found, the provisions of the parties will be given effect.").

¹⁰² *Id.* at 1198.

¹⁰³ For a discussion of these analogous transactions, see *infra* notes 109-10 and accompanying text.

quire similar alternate formalities in their execution. Moreover, the POD share form preserves revocability for testators and entitles successors to immediate control of nonprobate estate assets.¹⁰⁴

As previously noted, the alternative formality theory holds that other devices may supply the protections formerly provided by Wills Act formalities.¹⁰⁵ For example, financial institutions utilize routines which approximate Wills Act formalities. POD share certificates could be executed with the same formalities as the will substitutes presently validated by section 6-201.¹⁰⁶ First, executing the POD form preserves the ritual function of executing a will. Second, the permanent form of the share certificate, complete with its seal, serves the evidentiary function. Third, the expedition of nonprobate transfers resulting from adherence to a standard form fulfills the channeling function. Last, a number of factors serve the protective function. As with wills, persons execute PODs in their prime, when they are generally capable of appreciating the nature of their acts.¹⁰⁷ Furthermore, requiring that a representative of the financial institution sign each POD share would parallel testamentary attestation, affording at least as much protection as life insurance agents provide.¹⁰⁸

Authorizing POD share certificate use would easily fulfill the same goals as section 6-201's validation of other will substitutes. Like revocable living trusts, multiple party bank accounts, United States government bonds, and other pure will substitutes,¹⁰⁹ UPC-authorized POD share certificates would be revocable, reserve full beneficial enjoyment until the original payor's death,¹¹⁰ and entitle successors to immediate control of the assets. In effect, amending section 6-201 to include POD share certificates would further the UPC's goal of facilitating transfer of asset-specific property at death.

¹⁰⁴ For a discussion of the trend toward testator-successor control of estates, see *supra* notes 76-77 and accompanying text.

¹⁰⁵ See *supra* notes 49-52 and accompanying text.

¹⁰⁶ See Langbein, *supra* note 43, at 1131 ("Motivated by considerations of efficiency and accuracy, the financial intermediaries who operate the nonprobate system have developed simplified formalities that largely serve the purposes of the Wills Act.").

For a discussion of how institutional routines can be used to approximate Wills Act formalities, see *infra* notes 111-23 and accompanying text.

¹⁰⁷ See *supra* text accompanying note 36.

¹⁰⁸ See Langbein, *supra* note 43, at 1131.

¹⁰⁹ For a discussion of pure will substitutes, see *supra* notes 51-53 and accompanying text.

¹¹⁰ Although in some instances beneficiaries of pure will substitutes do receive certain benefits during the payor's lifetime, full beneficial enjoyment does not completely vest until the payor dies. See *supra* notes 48-55 and accompanying text.

IV

A PROPOSAL FOR A MORE COMPREHENSIVE STATUTE

A. Formal Changes in the Statutory Language

The first step in amending section 6-201 is to add “stock certificates” and “mutual fund shares” to the enumerated arrangements.¹¹¹ Such a change, though simple, will eliminate any question as to section 6-201’s coverage; it will clearly signal corporations, brokerage houses, transfer agents, and courts in UPC states that POD designations are valid means of transferring stock upon the owner’s death.

In addition, section 6-201 should be amended to provide for the proper POD form. Adding POD share certificates to the 6-201 arrangements without specifying the incidents of the transactional form would render the statute’s application even more problematic: individual transfer agents, courts, and financial institutions would apply their own notions of the formalities necessary to execute PODs and of the appropriate measures to be taken upon a change of circumstances, thereby resulting in a lack of uniformity.¹¹² Unlike part 1 of article 6, which explains in detail the accounts covered and the involved parties’ rights and relationships, part 2 (as currently written) lacks a description of POD and TOD forms. Section 6-201 provides only that a few arrangements—those continuing payments to a named person in event of the payee’s death, those ceasing payments in event of either the payee’s or payor’s death, and those providing for automatic land transfers at the payee’s death—will not be held testamentary. Specifying proper form is essential to the proposed amendment’s success because the amended section will reach a much wider array of transactions.

Complete statutory explication of the proper transactional form will prove impractical because of the variety of institutional and individual arrangements (including land contracts, promissory notes, and share certificates) in which PODs will appear. Nevertheless, the statute should specify the basic features of a valid POD. Like the Wills Act, the statute should include writing and signature requirements. Most significantly, however, the transactions’ institutional nature will render traditional attestation unnecessary. Because most

¹¹¹ This Note proposes that § 6-201(a) provide in part: “Any of the following provisions in an insurance policy, contract of employment, bond, mortgage, promissory note, deposit agreement, pension plan, trust agreement, conveyance, *stock certificate*, *mutual fund share*, or any other written instrument effective as a contract, gift, conveyance, or trust” See *infra* note 119 and accompanying text for suggested changes to the remaining portion of § 6-201(a).

¹¹² For a discussion of the role of change of circumstances in this proposal, see *infra* notes 120-24 and accompanying text.

of the arrangements are contractual or debt-oriented, each involves at least two parties; a properly executed POD thus should require the signature of a representative of each. The two-party relationship will provide the protection that witnesses usually give. With the two parties serving as mutual attestors, a sort of modified alternative formalities regime will be established.¹¹³

Finally, the amended statute should include detailed provisions such as those in article 6, part 1, defining the parties and outlining their rights. As discussed earlier,¹¹⁴ section 6-201 merely defines the types of accounts (POD and TOD) and the parties to those accounts (payee and beneficiary).¹¹⁵ Part 1, however, also defines the parties' ownership rights during their lives and upon their deaths¹¹⁶ and describes the conditions under which the financial institution is authorized to make payments from those accounts.¹¹⁷ Amending section 6-201 to include analogous provisions will notify owners and beneficiaries of their exact rights to beneficial enjoyment of the transaction's proceeds and instruct courts and financial institutions as to the proper remittance of payments.¹¹⁸

B. Substantive Changes

More importantly, the amended section 6-201 should accept

¹¹³ The statute should therefore be amended to provide: "Any arrangement containing a provision authorizing payment or transfer at death must be in writing and must be signed simultaneously by both the property owner and a representative of the issuing institution in order for that arrangement to be valid." Obviously, this aspect of the amendment would necessitate some personal contact between the issuing institution and the shareowner.

¹¹⁴ See *supra* notes 80-83 and accompanying text.

¹¹⁵ UNIF. PROBATE CODE § 6-201 (1983).

¹¹⁶ See, e.g., *id.* § 6-102 (ownership as between parties and others; protection of financial institutions); *id.* § 6-103 (ownership during lifetime); *id.* § 6-104 (right of survivorship); *id.* § 6-105 (effect of written notice to financial institution).

¹¹⁷ See, e.g., *id.* § 6-108 (financial institution protection; payment on signature of one party); *id.* § 6-109 (financial institution protection; payment after death or disability; joint account); *id.* § 6-111 (financial institution protection; payment of P.O.D. account); *id.* § 6-111 (financial institution protection; payment of trust account); *id.* § 6-112 (financial institution protection; discharge); *id.* § 6-113 (financial institution protection; set-off).

¹¹⁸ Section 6-201 need not be as complex as article 6, part 1. Section 6-201 contemplates POD and TOD accounts only, and such accounts' beneficiaries cannot possess lifetime rights to account proceeds. Amended § 6-201 would have to include (1) definitions of "POD account," "TOD account," "payor," "POD payee," and "TOD payees"; (2) a provision deeming POD and TOD accounts fully revocable and outlining the way to effect that revocation; (3) a provision that POD and TOD payees have no rights to transactional proceeds until the payor's death; (4) a provision protecting the financial institution by prohibiting any transfer of proceeds without proper proof of the payor's death and adequate evidence of the beneficiary's identity; and (5) a provision explaining the disposition of account proceeds should the beneficiary fail to survive the payor (whether or not a right of survival is implicated by the statute).

the true testamentary nature of the arrangements it authorizes. The statute should embrace the theory that any disposition authorized by section 6-201 is testamentary, but valid, and that the UPC's other provisions protecting testamentary transfers cover such disposition (to the extent that those provisions do not contradict section 6-201).¹¹⁹ Perpetuating the fiction that the transactions covered are nontestamentary precludes courts from applying established doctrines of the law of wills to situations arising under will substitutes which require interpretive analysis, such as when either the payor's (owner's) intent is unclear, or effectuating the payor's expressed intent is impractical or impossible. The amended statute rejects this fiction; by recognizing the testamentary nature of pure will substitutes it incorporates the interpretive principles of the law of wills while rejecting the current statute's artificial testamentary/nontestamentary dichotomy.

Established rules of the law of wills resolve the problems caused by a change of circumstances following the execution of a will. In the event that marriage, divorce, afterborn children, predecease of a legatee, or the like render fulfillment of the testator's original intent impossible or inappropriate, a variety of presumptions adjust the distribution of the estate property.¹²⁰

In the will substitute context, however, there are no such presumptions. For example, if a needy child is unintentionally disinherited, a court has no recourse to provide for that child if all of the deceased's assets were in will substitute form. Similarly, if a POD beneficiary of a will substitute predeceases the payor (owner) and the payor dies without redesignating a beneficiary, a court has no

¹¹⁹ Under this proposal, the introduction to § 6-201(a) would provide:

Any of the following provisions in an insurance policy, contract of employment, bond, mortgage, promissory note, deposit agreement, pension plan, trust agreement, conveyance, *stock certificate*, *mutual fund share*, or any other written instrument effective as a contract, gift, conveyance, or trust is testamentary, but valid: any provision of the Code concerning testamentary disposition not contradicted by the language of this section is applicable, and this Code does not invalidate the instrument or any provision: . . .

This change entails the following addition to the official comment:

The language of subdivision (a) of this statute is intended to incorporate provisions such as UPC section 2-201, concerning the spouse's right to the elective share, and UPC section 2-202, including the value of property transferred extra-probate in the augmented estate. As the statutory language indicates, any provision contained within this section that contradicts other provisions of this Code, such as revocation or survival requirements, supercedes those provisions concerning arrangements authorized pursuant to this section.

¹²⁰ For examples of such statutory presumptions, see UNIF. PROBATE CODE §§ 2-601, 2-605, 2-802 (1983). For a discussion of change of circumstance presumptions in the article 6, part 1 context, see McGovern, *The Payable on Death Account and Other Will Substitutes*, 67 Nw. U.L. REV. 7, 23-25 (1972).

fixed means of naming an alternate taker.¹²¹

The following hypothetical illustrates how the proposed amendment solves these interpretive problems: posit a case where a payor designates a share certificate as POD to a single beneficiary. If the certificate is in writing and is signed by the payor and a representative of the issuing institution, section 6-201 establishes its validity. Assume that the beneficiary subsequently falls out of the payor's favor and that the payor designates his child as beneficiary. Statutory provisions deeming the POD fully revocable will provide that this action is clearly within the payor's power. If the beneficiary predeceases the payor, who then dies without again changing the beneficiary, the proposed amendment's third feature comes into play. The amended statute will deem the POD share certificate a pure will substitute with testamentary effect. Thus, the UPC's other protections will ensure that the share certificate is disposed of in accordance with established principles of testate succession. In this case, the UPC's antilapse provision, section 2-605,¹²² will provide a clear solution if the devisee is a blood relative who predeceases the testator. When a deceased devisee is a grandparent or a lineal descendant of the testator's grandparent, the section allows the issue of the devisee who survive the testator to take in the deceased devisee's place.¹²³ In order to apply section 2-605 in this context, the statutory words "payor" and "beneficiary" must replace the existing language, "testator" and "devisee."

Section 6-201's present form would precipitate conflicting judicial responses to changes of circumstances surrounding a POD

¹²¹ Indeed, at the 1968 Proceedings of the National Conference of Commissioners on Uniform State Laws, the Commissioners discussed § 6-201's inability to respond to these very issues. See Proceedings, *supra* note 44, at 349-50 (July 31, 1968) (statement of Mr. Braucher).

¹²² UNIF. PROBATE CODE § 2-605 (1983) (anti-lapse; deceased devisee; class gifts). For UPC § 2-605 to apply, the statute must authorize a right of survival. See *supra* note 118 (suggesting right of survival be included in amendment to § 6-201).

¹²³ UNIF. PROBATE CODE § 2-605 (1983). Section 2-605 provides:

If a devisee who is a grandparent or a lineal descendant of a grandparent of the testator is dead at the time of execution of the will, fails to survive the testator, or is treated as if he predeceased the testator, the issue of the deceased devisee who survive the testator by 120 hours take in place of the deceased devisee

Id. Application of the section is limited to cases where the deceased devisee is a direct descendant of the testator or of the testator's grandparents. Thus, the section will not provide clear solutions for all of the potential contingencies. If the devisee were a friend or a more distant relative, the only other option would be for his share to pass through the residuary clause in the testator's will. Thus, in the example given in the text, if the predeceased beneficiary were a friend of the payor's, his share certificates would pass through the residuary clause of the payor's will. See *id.* § 2-606 (failure of testamentary provision).

transfer.¹²⁴ Without statutory guidance, some courts might appropriately apply rules of the law of wills, while others might seek to achieve their own sense of a just result. The amended section 6-201 includes too many arrangements to permit courts to respond to interpretive problems in an ad hoc manner and thus necessitates a set of workable rules.¹²⁵

Not only does the proposed statute provide courts with the rules necessary to address the interpretive problems associated with the use of POD share certificates, it adapts equally well to transactions already validated by section 6-201.¹²⁶ For instance, consider a land contract under circumstances similar to those of the above hypothetical: assume that the contract contains a provision to continue payments to a named beneficiary in event of the original payee's death. Both parties will sign the contract, thereby clearly placing the instrument within the proposed statute's scope. The beneficiary provision will be solely of testamentary effect and the original payee can revoke and change it. Furthermore, if the new beneficiary is the payee's child and predeceases the payee, section 2-605 will apply if the payee neglects to elect a new beneficiary.

Aside from maintaining the status quo, the sole alternative to this Note's proposed amendment would be to permit institutions supplying will substitutes to formulate their own guidelines addressing a wide variety of contingencies for which courts and probate codes already provide answers. Industry-based, firm-by-firm promulgation of regulations would entail tremendous transaction costs and promote objectionable disuniformity as individual institutions possessing a variety of notions concerning the ideal purpose and form of a POD designation would draft POD forms. Furthermore, it is also undesirable to encourage industry-wide adoption of POD guidelines: even though this would create more uniformity than firm-by-firm development, it would be inefficient. The proper forum for innovations in issues of probate and succession is the legis-

¹²⁴ Expanding the statute's scope without directing courts how to apply it to problems posed by changes of circumstances would not adequately eliminate the uncertainty surrounding will substitutes. For a discussion of courts' inconsistent treatment of similar issues in early nonprobate transfer decisions, see *supra* notes 94-95 and accompanying text.

¹²⁵ See Langbein, *supra* note 43, at 1134 ("By practicing deception to validate the will substitutes . . . the courts have entangled themselves in a web of doctrinal inconsistency on interpretive questions of recurring importance in the law of succession.").

¹²⁶ Arguably, the proposal is designed more for institutional arrangements than individually contracted ones. However, the theory underlying the two types of agreements is similar. There is no reason why the provisions cannot be adapted to apply to individuals. For example, the same process for revoking an institutional POD would apply to revoking the POD in a land contract—the parties would simply be individuals rather than institutions.

lature. The most desirable solution is for the Commissioners of Uniform State Laws to broaden the scope of the nonprobate transfers covered by section 6-201, deem them testamentary, and allow their interpretive problems to be settled by established legislative and common-law doctrines.

CONCLUSION

Section 6-201 of the Uniform Probate Code does not authorize the use of the POD designation with the broad range of asset-specific pure will substitutes that it should. In particular, the section does not authorize POD stocks and mutual funds, yet these are precisely the sorts of financial instruments that should avoid probate. This Note's proposed statute represents a means of modernizing rigid categorical distinctions which plague nonprobate property transfer. Specifically, section 6-201 of the UPC should be amended to expand the list of authorized nonprobate transfer arrangements and should include detailed provisions defining the parties, the accounts, and the rights governing their relations. The law should label section 6-201 transactions based on their true testamentary nature, rather than perpetuate the nontestamentary fiction that the present statute authorizes. By suggesting a framework for the transactional form, this proposed amendment allows established rules of the law of wills to address interpretive problems. The time has arrived for traditional inter vivos/testamentary barriers to break down and accommodate modern forms of wealth with equally modern methods of property transfer.

Diane C. Amado



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