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Will Substitutes Under the Revised Uniform Probate Code

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ARTICLES

WILL SUBSTITUTES UNDER THE REVISED UNIFORM PROBATE CODE

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INTRODUCTION

Recent years have witnessed a dramatic increase in probate avoidance. Revocable trusts, joint-and-survivor or pay-on-death ("POD") bank accounts, transfer-on-death ("TOD") security registrations and other will substitutes have proliferated and emerged as successful competitors of the probate system. In response to this "nonprobate revolution,"[1] the drafters of the Uniform Probate Code ("UPC")[2] have begun to reconsider the scope and direction of probate reform.[3] The 1989 and 1990 UPC revisions reflect a new emphasis on integrating the law of probate

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[1] *See* John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984).

[2] UNIF. PROBATE CODE, 8A U.L.A. 1 (Supp. 1992). In the present discussion, references to the UPC include amendments through 1991 except when indicated by specific reference to the pre-1989 version of UPC article 6 or the pre-1990 version of article 2. Technical amendments proposed in 1993 are noted where appropriate.

On the background and structure of the UPC generally, see Lawrence H. Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 ALB. L. REV. 891 (1992); William F. Fratcher, *Toward Uniform Succession Legislation*, 41 N.Y.U. L. REV. 1037 (1966); Richard V. Wellman, *The Uniform Probate Code: Blueprint for Reform in the 70's*, 2 CONN. L. REV. 453 (1970); James N. Zartman, *An Illinois Critique of the Uniform Probate Code*, 1970 U. ILL. L.F. 413.

[3] [W]ill substitutes and other inter-vivos transfers have so proliferated that they now constitute a major, if not the major, form of wealth transmission. . . . The proliferation of will substitutes and other inter-vivos transfers is recognized, mainly, in measures tending to bring the law of probate and nonprobate transfers into greater unison.

UPC, art. 2 prefatory note.

and nonprobate transfers.

Nevertheless, the nonprobate revolution remains incomplete. Although the revised UPC establishes uniform constructional rules for wills and will substitutes, its approach to validating will substitutes requires rethinking. The failure to address creditors' rights with respect to nonprobate assets other than multiple-person accounts represents another serious gap in the present UPC. Solutions for these and other problems call for a careful balancing of the respective formal and functional characteristics of wills and will substitutes.

This Article explores the impact of the revised UPC on will substitutes and recommends further revisions in the areas of validation and creditor protection. Part I examines the problem of defining and validating nonprobate transfers. Part II discusses the background and operation of specific constructional rules for will substitutes under the revised UPC. Part III analyzes the need to protect the rights of creditors and other third parties while preserving flexibility and efficiency in implementing will substitutes. Finally, the Article concludes with a brief summary and recommendations for further reform.

I. VALIDATION OF NONPROBATE TRANSFERS

Will substitutes include many different arrangements for transferring property outside the probate system to designated beneficiaries at the owner's death.[4] Although they resemble wills in function, conventional will substitutes take the form of lifetime transactions. In some cases, however, courts anxious to protect the integrity of the probate system routinely deny dispositive effect to any "testamentary" arrangement that fails to comply with will formalities. In response, the UPC's validating statute simply declares a broad range of will substitutes "nontestamentary" without differentiating them from wills in form or substance.

A. *Testamentary and Nontestamentary Transfers*

Each state has its own probate system governing identification of successors, probate of wills and administration of dece-

[4] For a list of common will substitutes, see 1 WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS § 6.1, at 219 (rev. ed. 1960 & Supp. 1992).

dents' estates.[5] Despite variations in particular substantive and procedural provisions, state probate codes generally subject a decedent's property to administration[6] and recognize a valid will as the exclusive method for affirmatively directing the disposition of property owned at death. To the extent not effectively disposed of by will, the net probate estate (after paying statutory allowances, expenses of administration and other claims) passes by intestacy.[7] Moreover, a will generally becomes enforceable only if it is executed with prescribed formalities and admitted to probate.[8] Courts eager to preserve the primacy of the probate system often assume that any deathtime disposition that could have been accomplished by will cannot be achieved in any other manner.[9]

Accordingly, conventional will substitutes take the form of lifetime transfers, trusts, contracts or joint tenancies. Technically, they avoid the reach of the probate system by disposing of property during life, leaving the owner only with rights or interests that terminate at death.[10] To the extent that a will substitute leaves the owner with practically undiminished possession, enjoyment and control of the property, however, its validity may come into question. If a particular arrangement is not recognized as an effective lifetime disposition, the property becomes part of

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[5] Technically, "probate" refers to the process of determining the validity of a will, while "administration" refers to the process in which a court-appointed personal representative collects the decedent's property, pays statutory allowances, taxes and claims, and distributes the remaining property to the decedent's successors. The term "probate" is often used more broadly to cover both aspects of estate settlement. *See* MAX RHEINSTEIN & MARY ANN GLENDON, THE LAW OF DECEDENTS' ESTATES 477-78 (1971).

[6] *See* UPC § 3-101 (estate subject to administration). Administration may be substantially simplified or dispensed with in certain cases. *See id.* §§ 3-312 to -322 (universal succession), 3-1201 to -1204 (collection by affidavit, summary administration).

[7] *See* UPC §§ 2-101 (intestate succession), 3-101 (devolution to devisees or "in the absence of testamentary disposition" to heirs). A decedent's "probate estate" comprises all "probate assets," *i.e.*, property owned by the decedent at death. *See* UPC §§ 1-201(14) (definition of estate), 1-201(39) (definition of property).

[8] *See* UPC §§ 2-502 (will formalities), 3-102 (will proves transfer only if declared valid in probate proceeding).

[9] Professor Langbein has coined the term "probate monopoly theory" to describe the assumption "that will-like results may be achieved only by instruments that are wills and that invoke the probate system." Langbein, *supra* note 1, at 1129.

[10] If the owner's interest in property or under a contract terminates at death, the underlying property is not included in the probate estate. Thus, the probate estate might be viewed as "a residual entity containing only the property not disposed of by will substitute." *Id.* at 1129-30. Of course, the conclusion that a will substitute removes property from the probate estate assumes the validity of the will substitute.

the owner's probate estate at death and passes to the owner's testate or intestate successors, subject in most cases to administration. Courts describe invalid will substitutes as "testamentary"; this label expresses, but does not explain, the conclusion that the attempted disposition is ineffective.

The distinction between testamentary and nontestamentary dispositions has generated much doctrinal confusion and uncertainty.[11] A will is often described as "ambulatory"—it has no dispositive effect until the testator's death and remains revocable until then.[12] By contrast, a lifetime disposition is normally viewed as having some dispositive effect during life: an outright conveyance or gift transfers an "interest" in property; an inter vivos trust involves a fiduciary relationship with respect to specific property; a contract creates "rights" in the parties (and in third-party beneficiaries). The interests or rights may amount to little more than a present possibility of future possession and enjoyment, subject in some cases to revocation or change. By fragmenting ownership into present and future interests, separating legal title from beneficial rights, or exchanging property for an obligation to make future payments, property owners may tailor an arrangement to meet the formal requirements of a lifetime disposition while preserving substantially unrestricted ownership.

Some will substitutes, such as revocable trusts[13] and benefi-

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[11] On the classification and operation of will substitutes generally, see Olin L. Browder, *Giving or Leaving—What is a Will?*, 75 MICH. L. REV. 845 (1977); Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1 (1941); Langbein, *supra* note 1; William M. McGovern, Jr., *The Payable On Death Account and Other Will Substitutes*, 67 NW. U. L. REV. 7 (1972); John Ritchie, *What Is a Will?*, 49 VA. L. REV. 759 (1963); Edward M. Wagner, Note, *Non-Probate Transfers—Provisions Relating to Effect of Death: Will UPC § 6-201 Be "Effective" in Nebraska?*, 12 CREIGHTON L. REV. 1173, 1184-1201 (1979); Richard V. Wellman, *Transfer-On-Death Securities Registration: A New Title Form*, 21 GA. L. REV. 789 (1987).

[12] *See* Percy Bordwell, *Testamentary Dispositions*, 19 KY. L.J. 281 (1931); THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 1, at 1 (2d ed. 1953); *see also* RESTATEMENT (SECOND) OF PROPERTY (Donative Transfers) § 33.1 (1990) (defining will as "a donative document of transfer intended to be legally operative to effect a transfer of property upon the donor's death," subject to required formalities). Professor Browder notes that some find it odd to speak of revoking a disposition before it takes effect. Browder, *supra* note 11, at 850. Others may find it equally odd to insist that a disposition take effect before it can be revoked.

[13] *See, e.g.*, Farkas v. Williams, 125 N.E.2d 600 (Ill. 1955) (declaration of trust); National Shawmut Bank v. Joy, 53 N.E.2d 113, 121-25 (Mass. 1944) (transfer in trust). On revocable trusts generally, see IA AUSTIN W. SCOTT & WILLIAM F. FRATCHER, THE LAW

ciary designations under life insurance policies[14] or pension plans,[15] have achieved wide acceptance. In the absence of a validating statute, other will substitutes continue to breed litigation, with mixed results. For example, courts have traditionally refused to recognize a surviving POD beneficiary's interest in a bank account[16] and have not hesitated to look behind the form of joint bank accounts.[17] Similarly, a common-law joint tenancy[18] may fail if a court finds that the person who contributed

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OF TRUSTS § 57, at 124-91 (4th ed. 1987) [hereinafter SCOTT].

[14] *See, e.g.*, Gurnett v. Mutual Life Insurance Co., 191 N.E. 250 (Ill. 1934); Gordon v. Portland Trust Bank, 271 P.2d 653 (Or. 1954). On the beneficiary's interest in a life insurance policy, see 4 GEORGE J. COUCH & RONALD A. ANDERSON, CYCLOPEDIA OF INSURANCE LAW §§ 27:57-:64, at 676-94 (2d ed. rev. Mark S. Rhodes 1984) [hereinafter COUCH]; SCOTT, *supra* note 13, § 57.3, at 148-66.

[15] *See, e.g.*, Hart v. Savings & Profit Sharing Pension Fund, 291 F. Supp. 95 (E.D. Va. 1968); Buehler v. Buehler, 323 S.W.2d 67 (Tex. Civ. App. 1959); *see also* Davis v. Wark, 217 Cal. Rptr. 734 (Cal. Ct. App. 1985) (individual retirement account); *In re* Koss, 150 A. 360 (N.J. Eq. 1930) (corporate stock purchase plan).

[16] *See, e.g.*, Truax v. Southwestern College, 522 P.2d 412 (Kan. 1974); *In re* Will of Collier, 381 So. 2d 1338 (Miss. 1980); Young v. McCoy, 40 N.W.2d 540 (Neb. 1950); Blais v. Colebrook Guar. Sav. Bank, 220 A.2d 763 (N.H. 1966); Waitman v. Waitman, 505 P.2d 171 (Okla. 1972); Brown's Estate, 22 A.2d 821 (Pa. 1941); Northwestern Nat'l Bank v. Daniel, 127 N.W.2d 714 (S.D. 1964); Tucker v. Simrow, 21 N.W.2d 252 (Wis. 1946). *But see In re* Estate of Wright, 308 N.E.2d 319 (Ill. App. Ct. 1974) (upholding POD account on alternative grounds of tentative trust or contract); Butler State Bank v. Duncan, 319 S.W.2d 913 (Mo. Ct. App. 1959) (upholding POD account as tentative trust); Peoples Bank v. Baxter, 298 S.W.2d 732 (Tenn. Ct. App. 1957) (upholding POD certificate of deposit on contract theory, without addressing issue of testamentary character); *see generally* McGovern, *supra* note 11, at 9.

[17] The form of a joint bank account is inherently ambiguous: if *A* opens an account in the name of "*A* or *B* or the survivor," *A* may intend to create in *B* (1) a present beneficial right coupled with a survivorship right, (2) merely a survivorship right (a POD account), or (3) merely a right to withdraw funds on behalf of *A* (an agency account). In the absence of an applicable statute, courts have traditionally refused to recognize survivorship rights in a joint account that confers no beneficial rights on the co-tenant during the depositor's life. *See, e.g.*, Jenkins v. Meyer, 380 S.W.2d 315, 321-23 (Mo. 1964) (certificates of deposit); Barbour v. First Citizens Nat'l Bank, 86 N.W.2d 526 (S.D. 1957) (bank account). On joint bank accounts generally, see Donald Kepner, *The Joint and Survivorship Bank Account—A Concept Without a Name*, 41 CAL. L. REV. 596 (1953); Donald Kepner, *Five More Years of the Joint Bank Account Muddle*, 26 U CHI. L. REV. 376 (1959); Richard V. Wellman, *The Joint and Survivor Account in Michigan—Progress Through Confusion*, 63 MICH. L. REV. 629 (1965).

[18] All too frequently, a person takes title to property in joint tenancy form solely to avoid probate, without intending to confer any present right to possession or control on the co-tenant. A dispute may arise if the person who contributed consideration attempts to revoke the entire arrangement or the co-tenant attempts to sever the joint tenancy. On joint tenancies generally, see N. William Hines, *Real Property Joint Tenancies: Law, Fact and Fancy*, 51 IOWA L. REV. 582 (1966); N. William Hines, *Personal Property Joint Tenancies: More Law, Fact and Fancy*, 54 MINN. L. REV. 509 (1970) [hereinafter Hines,

consideration intended to create a revocable survivorship right while retaining undiminished lifetime ownership of the underlying property.[19] Faced with a deed that expressly purports to "take effect" at the grantor's death, a court may just as readily strike down the transfer as uphold it.[20]

In attempting to rationalize the disparate treatment of substantially equivalent will substitutes, courts have resorted to formalistic distinctions.[21] While rejecting POD bank accounts, for example, courts have accepted the "tentative trust" doctrine, which authorizes the transfer at death of a savings account balance subject to an implied survivorship condition and an implied power of revocation.[22] Without relaxing the constraints of common-law joint tenancy doctrine for most types of property, courts have developed ingenious special rules to circumvent those constraints in cases concerning joint bank accounts.[23]

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[19] *See, e.g.*, Blanchette v. Blanchette, 287 N.E.2d 459 (Mass. 1972) (corporate stock); Hughes v. Hughes, 678 P.2d 702 (N.M. 1984) (land); Kinney v. Ewing, 492 P.2d 636 (N.M. 1972) (corporate stock); Neuschafer v. McHale, 709 P.2d 734 (Or. Ct. App. 1985) (corporate stock). Occasionally, however, courts refuse to look behind the form of a joint tenancy. *See, e.g.*, Pollock v. Brown, 569 S.W.2d 724, 733-34 (Mo. 1978) (land); Main v. Howard, 629 P.2d 870 (Or. Ct. App. 1981) (corporate stock).

[20] Courts that strike down such transfers characterize them as testamentary. *See, e.g.*, Gardner v. Thames, 154 S.E.2d 926 (Ga. 1967); Armstrong v. Shell, 26 So. 2d 344 (Miss. 1946); Wheeler v. Rines, 375 S.W.2d 48 (Mo. 1964); Butler v. Sherwood, 196 A.D. 603, 188 N.Y.S. 242 (1921). Courts that uphold such transfers characterize them as present transfers with postponed possession. *See, e.g.*, Innes v. Potter, 153 N.W. 604 (Minn. 1915); Barker v. Barker, 219 S.W.2d 391 (Mo. 1949); Cook v. Daniels, 306 S.W.2d 573 (Mo. 1957); Vigil v. Sandoval, 741 P.2d 836 (N.M. Ct. App. 1987).

[21] *See* Gulliver & Tilson, *supra* note 11, at 18 (describing passing-of-an-interest test as a "vague and abstract criterion" which "has achieved respectability as the verbal clothing of the result"); Langbein, *supra* note 1, at 1126-29 (criticizing use of "doctrinal ruses" to disguise will substitutes as lifetime transfers).

[22] A tentative trust arises with respect to the deathtime balance of a savings account established in the name of the depositor as trustee for another, without any further formalities; unlike other express trusts, a tentative trust becomes enforceable only at the depositor's death and may be revoked by the depositor by will or by withdrawing funds from the account during life. *See* RESTATEMENT (SECOND) OF TRUSTS § 58 (1957); *see, e.g., In re* Estate of Petralia, 204 N.E.2d 1 (Ill. 1965); *In re* Totten, 179 N.Y. 112, 71 N.E. 748 (1904). Professor Scott observes that a tentative trust is "a very thin trust and could easily be held to be testamentary." SCOTT, *supra* note 13, § 58.3, at 201.

Occasionally, courts use trust doctrine to uphold a POD bank account. *See, e.g., In re* Estate of Wright, 308 N.E.2d 319 (Ill. App. Ct. 1974); Butler State Bank v. Duncan, 319 S.W.2d 913 (Mo. Ct. App. 1959).

[23] In interpreting bank protection statutes to authorize a "statutory" joint tenancy where each tenant enjoys presumptive beneficial ownership during life in proportion to net contributions coupled with a presumptive right of survivorship, courts abandon the

While refusing to recognize contractual provisions for deathtime dispositions of bank accounts, courts have invoked third-party-beneficiary doctrine to uphold beneficiary designations in life insurance policies and annuities.[24]

Several commentators attempt to explain judicial treatment of will substitutes in functional terms, emphasizing the operation and purpose of particular arrangements rather than their formal classification. Under a functional view, a governing instrument that reliably reflects an owner's voluntary and deliberate wishes concerning the disposition of property at death should not fail merely because it fails to comply with will formalities.[25] For example, the settlor of a revocable trust typically executes a written trust declaration or agreement in relatively standard form setting forth the essential dispositive and admin-

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common-law unities and acknowledge a survivorship right independent of co-ownership during life. *See, e.g., In re* Wimmer's Estate, 260 N.W. 655 (Wis. 1935).

[24] *See* Fratcher, *supra* note 2, at 1084; McGovern, *supra* note 11, at 10-11. If a life insurance company agrees to pay an annuity to an individual for life and a fixed amount at death to the individual's estate or designated beneficiary, the arrangement may be upheld as a third-party-beneficiary contract. *See, e.g.*, Mutual Benefit Life Ins. Co. v. Ellis, 125 F.2d 127 (2d Cir. 1942); Zimmerman v. Mutual Life Ins. Co., 156 F. Supp. 589 (N.D. Ala. 1957); Kansas City Life Ins. Co. v. Rainey, 182 S.W.2d 624 (Mo. 1944). *But cf.* Wilhoit v. Peoples Life Ins. Co., 218 F.2d 887 (7th Cir. 1955). Despite widespread judicial hostility to POD accounts, courts occasionally invoke third-party-beneficiary contract analysis in interpreting bank-protection statutes to validate POD accounts. *See, e.g.*, Logan v. Citizens Nat'l Bank, 460 So. 2d 1239 (Ala. 1984); Virginia Nat'l Bank v. Harris, 257 S.E.2d 867 (Va. 1979); *see also* Peoples Bank v. Baxter, 298 S.W.2d 732 (Tenn. Ct. App. 1957) (upholding POD certificate of deposit on contract theory, without addressing issue of testamentary character).

[25] *See* Browder, *supra* note 11, at 851-54 (advocating validity of will substitute if transaction creates no greater risk than typical lifetime transaction or provides "comparable substitute for the formal requirements for wills"); Lawrence M. Friedman, *The Law of the Living, the Law of the Dead: Property, Succession and Society*, 1966 WIS. L. REV. 340, 368 ("regularized and formal course of practice of business or social institutions"); John T. Gaubatz, *Notes Toward a Truly Modern Wills Act*, 31 MIAMI L. REV. 497, 561 (1977) ("That some forms of expression are prima facie valid does not, however, require that all other forms of expression be held invalid. . . . [Many expressions of testamentary intent that do not comply with will formalities] could reasonably be validated, so long as the basic elements of a valid testament—testamentary intent, dispositive scheme, and lack of influence—could be proved by clear and convincing evidence."); Gulliver & Tilson, *supra* note 11, at 17 (advocating "functional test" for validity of will substitutes based on substantial performance of ritual and evidentiary functions of will formalities); Langbein, *supra* note 1, at 1130-32 ("alternative formality" as a test for excusing compliance with will formalities); Ritchie, *supra* note 11, at 765-67 (adequacy of safeguards provided by will substitutes against abuses at which will formalities are aimed).

istrative terms of the trust.[26] Similarly, life insurance companies and pension plan administrators normally accept beneficiary designations only in standard form over the signature of the policy owner or plan participant. Furthermore, under a functional view, a will substitute that provides a reliable mechanism for transferring property to the intended beneficiaries should not fail merely because it bypasses the probate system.[27] In the case of a revocable trust, the trustee is responsible for transferring property to the beneficiaries after the settlor's death; in the case of a life insurance policy or pension plan, the institutions that administer these arrangements tend to be able to implement routine transfers more efficiently than the probate system.[28]

Courts, however, have often refused to validate POD accounts and other contractual arrangements for deathtime transfers.[29] When these arrangements fail, the underlying property often passes in a manner clearly not intended by the decedent, usually after expensive and time-consuming litigation. In view of the judicial acceptance of revocable trusts and beneficiary designations in life insurance policies and pension plans, there appears to be no reason to deny similar treatment for POD accounts or other contractual arrangements for deathtime property dispositions. Indeed, recognizing such contractual arrangements as valid will substitutes would encourage property owners to use them instead of more cumbersome, problematic

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[26] In theory, if the Statute of Frauds does not apply, a trust may be purely oral. *See* RESTATEMENT (SECOND) OF TRUSTS §§ 17 (trust creation), 39 (no writing required at common law) (1957). Because of the evidentiary problems in proving the existence and terms of an oral trust, however, courts tend to scrutinize such arrangements carefully. *See, e.g.*, Monell v. College of Physicians and Surgeons, 17 Cal. Rptr. 744 (Cal. Ct. App. 1961) (invalid oral trust of money).

[27] Administration generally involves collecting assets, resolving claims and distributing the remaining property to rightful successors. *See supra* note 5. Collection and distribution of the underlying property tend to be no more burdensome for a will substitute than for a lifetime transfer. In addition, the availability of the probate system as a "backstop" may reduce the need for creditor protection. *See* Langbein, *supra* note 1, at 1120. For a discussion of creditor protection, see *infra* Part III.C.

[28] *See* Langbein, *supra* note 1, at 1119.

[29] From a functional perspective, the form of a POD bank account probably reflects the depositor's intent more reliably than the form of a tentative trust (which may be intended to create a revocable trust, an irrevocable trust or no trust at all) or a joint account (which may be intended as a joint tenancy, a POD account or an agency account). The 1989 UPC revisions eliminate trust accounts as a separate category and treat them as POD accounts. *See* UPC § 6-201 cmt.; *see also* RESTATEMENT (SECOND) OF PROPERTY (Donative Transfers) § 32.4 cmt. d (1990) (recognizing POD designations).

arrangements. Undoubtedly, the uneven judicial response to will substitutes accounts in large part for the statutory solution adopted by the UPC drafters.

B. *Validation Under the UPC*

The UPC declares, with disarming simplicity, that "[a] provision for a nonprobate transfer on death in [certain arrangements] is nontestamentary."[30] This blanket validating statute is intended primarily to confirm that certain types of written will substitutes need not comply with will formalities or be admitted to probate, and that the underlying property is not subject to administration.[31] Technically, the statute operates in a rather backhanded manner by preventing certain dispositions from being struck down solely on account of their "testamentary" characterization.[32] The validating statute does not affirmatively grant dispositive effect to any will substitute, nor does it defeat will substitutes that fall outside its scope. Just what it does accomplish is less certain. Read literally, the validating statute states a tautology that has no operative effect. Under a more liberal reading, however, it may operate far beyond its intended scope.[33]

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[30] UPC § 6-101(a). The UPC validates multiple-person accounts and TOD security registrations in similar terms. *See id.* §§ 6-214 (multiple-person account "not testamentary or subject to [provisions concerning estate administration]"), 6-309 (TOD security registration "not testamentary"). For background on this provision and its predecessor (section 6-201(a) of the original UPC), see Langbein, *supra* note 1, at 1108, 1132-34; Wagner, *supra* note 11; Wellman, *supra* note 2, at 483-85.

[31] Because the modes of transfer authorized by an instrument under this section are declared to be nontestamentary, the instrument does not have to be executed in compliance with the formalities for wills . . .; nor does the instrument have to be probated, nor does the personal representative have any power or duty with respect to the assets. . . . The sole purpose of this section is to prevent the transfers authorized here from being treated as testamentary.

UPC § 6-101 cmt.

[32] Arguably, validation could be achieved less circuitously by the semantic short-cut of declaring will substitutes "testamentary, but valid." *See* Diane C. Amado, Note, *Uniform Probate Code Section 6-201: A Proposal to Include Stocks and Mutual Funds*, 72 CORNELL L. REV. 397, 416 (1987). By obliterating the distinction between wills and will substitutes, this approach raises the interesting (though probably unintended) possibility that a will substitute might revoke a previously-executed will or that property disposed of by will substitute might be subject to administration.

[33] *See* Richard W. Effland, *Rights of Creditors in Nonprobate Assets*, 48 Mo. L. REV. 431, 434 (1983) (observing that the statute, though not yet widely used, "may well prove to be a sleeper because of its broad wording"); Wagner, *supra* note 11, at 1206

The validating statute applies to a provision for a nonprobate transfer at death in several enumerated arrangements—for example, a life insurance policy, security, account agreement, employee benefit plan, trust, conveyance or gift—or in any "other written instrument of a similar nature."[34] Apparently, the statute contemplates that the dispositive terms of the contract, trust or transfer, including the provision for a nonprobate transfer, are to be embodied in a written instrument, but specifies no minimum requirements concerning the form or content of the instrument.[35] The beneficiary of a nonprobate transfer may be designated by the decedent either in the written instrument or in a separate writing, which may be "executed" before, after or at the same time as the written instrument.[36] Although the statute does not define the term "nonprobate transfer," it does identify three general types of permitted deathtime dispositions with respect to money, property or other benefits owned or controlled by a decedent immediately before death: (1) payment of money or other benefits, (2) cancellation of outstanding indebtedness, and (3) transfer of property that is the subject of a written instrument.[37]

(arguing that the statute has little effect on existing law); Wellman, *supra* note 2, at 484 ("[The validating statute] might prove to be a very important provision of the Code. On the other hand, it could be viewed as adding nothing to existing case law."); Wellman, *supra* note 11, at 809 n.58 (conceding that the catch-all clause arguably must be "qualified in some way" to avoid "wholesale repeal" of will formalities).

[34] UPC § 6-101(a). The 1989 UPC revisions add several new categories of enumerated arrangements (notably, certificated and uncertificated securities, individual retirement plans and marital property agreements) and revise the catch-all clause to read as quoted in the text.

[35] The statute does not expressly require that the written instrument be signed by the person who owns the underlying property or furnishes consideration for the transfer. *See, e.g.*, Union Nat'l Bank of Texas v. Ornelas-Gutierrez, 772 F. Supp. 962 (S.D. Tex. 1991) (upholding POD provision in written brokerage-custodial agreement not signed by beneficial owner). In addition, the effect of the statute remains unclear in the case of a written agreement that provides for revocation or amendment by a method other than a signed writing. The official comment merely notes that the statute "does not speak to the phenomenon of the oral trust to hold property at death for named persons." *Id.* cmt.

[36] UPC § 6-101(a). The 1989 revisions add a clause permitting the separate writing to be executed before the written instrument. The statute still does not expressly require execution in the case of a provision for automatic cancellation of an obligation to pay money.

[37] *See* UPC § 6-101(a). The UPC defines a "beneficiary designation" by reference to a "governing instrument" that names a "beneficiary" of an insurance or annuity policy, POD account, security registered in TOD form, employee benefit plan "or other nonprobate transfer at death." *Id.* § 1-201(4); *see also id.* §§ 1-201(3) ("beneficiary"), 1-201(19)

The official comment describes the validating statute as "authoriz[ing] a variety of contractual arrangements that had sometimes been treated as testamentary in prior law." The official comment cites as examples a promissory note providing for payment to a third party in the event of the original payee's death and an installment sale contract providing for cancellation of any principal balance outstanding at the seller's death.[38] The arrangements described in the official comment, however, are essentially non-ambulatory: the timing of payments and the identity of the recipient may be contingent on external circumstances, but the original payee or seller normally lacks the ability to amend or revoke the arrangement unilaterally. Thus, the validating statute merely reinforces the weight of judicial authority upholding such arrangements.[39]

In its original form, the validating statute applied to provisions for deathtime payments or transfers in enumerated categories of arrangements or in "any other written instrument effective as a contract, gift, conveyance, or trust."[40] The ambiguities inherent in this catch-all clause became apparent in two cases involving conveyances of land with possession postponed until the grantor's death. In *First National Bank in Minot v. Bloom*[41] an uncle executed a deed of land to his nephew and kept the deed in his safe deposit box where it was found after the uncle's death in an envelope with typed instructions for delivery "upon my death" to the nephew. The court held without hesitation that the deed was invalid for lack of delivery and that the stat-

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("governing instrument").

[38] UPC § 1-201 cmt.

[39] *See In re* Estate of Hillowitz, 22 N.Y.2d 107, 238 N.E.2d 723, 291 N.Y.S.2d 325 (1968) (upholding provision in partnership agreement for deathtime payment in liquidation of deceased partner's interest). *Hillowitz* limited the notorious holding of McCarthy v. Pieret, 281 N.Y. 407, 24 N.E.2d 102 (1939) (invalidating a POD provision in a mortgage bond) to its facts. Courts frequently uphold self-canceling provisions in an original installment note representing sale proceeds. *See, e.g.*, Valenzuela v. Anchonda, 527 P.2d 109 (Ariz. Ct. App. 1974); Miller v. Allen, 90 N.E.2d 251 (Ill. App. Ct. 1950); McGrath v. McGrath, 220 A.2d 760 (N.H. 1966); *In re* Estate of Lewis, 98 P.2d 654 (Wash. 1940); Hunt v. Dallmeyer, 517 S.W.2d 720 (Mo. Ct. App. 1974). For a decision invalidating a self-canceling note in unusual circumstances, however, see Jennings v. Neville, 54 N.E. 202 (Ill. 1899) (father sold land to son, took back son's note to be held in escrow until father's death and cancelled if son paid pecuniary bequests).

[40] UPC § 6-201(a) (pre-1989). The 1989 UPC revisions amend the catch-all clause. The current version is quoted in the text accompanying note 30 *supra*.

[41] 264 N.W.2d 208 (N.D. 1978).

ute validating any "written instrument effective as a . . . conveyance" did not apply.[42]

By contrast, in *Estate of O'Brien v. Robinson*[43] a majority of another court took a different view. In *O'Brien* a mother executed two deeds of land to her daughter. The deeds were kept in a safe deposit box accessible to both mother and daughter until some seven months before the mother's death when the safe deposit box was closed and the daughter took possession of the deeds. The mother, however, retained possession and control of the land until death. To avoid the "terribly illogical" result that would flow from insisting on "strict compliance with a fictional legal delivery requirement," a divided court concluded that the deeds were effective, holding "(1) that when it is determined that the proved intent of the grantor was to pass title upon his or her death, the legal requirement of 'delivery' is satisfied, and (2) that [the validating statute] removes the conveyance from the requirements of the [will statute]."[44]

Under a narrow reading, the *O'Brien* holding may reflect a finding that the mother's continuing possession and enjoyment of the land amounted to a retained life estate. Since she executed deeds in proper form and relinquished physical control of them before death, the majority may have concluded that the conveyances should be sustained under a liberal view of the delivery requirement.[45] The holding might be read more broadly to mean that the majority would have upheld the conveyances even if the mother had retained either a power of revocation[46] or physical control over the executed deeds until her death.[47] Under the broader reading, a grantor might be able to dispose of

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[42] "There is nothing in [the validating statute] . . . which eliminates the necessity of delivery of a deed to effectuate a conveyance from one living person to another." *Id.* at 212.

[43] 749 P.2d 154 (Wash. 1988), *rev'g In re* Estate of O'Brien, 733 P.2d 235 (Wash. Ct. App. 1987).

[44] 749 P.2d at 157-58.

[45] *See id.* at 157 ("If proof of delivery of these deeds had been made, the facts here would indicate a valid inter vivos passage of a future interest with the grantor retaining a lifetime interest.").

[46] Since the mother neither expressly reserved nor attempted to exercise a power to revoke the deed, it is impossible to know whether she intended to retain such a power.

[47] Since the mother did not retain possession of the deeds until death, it is impossible to know whether the *O'Brien* majority would have gone so far. The majority did not cite *Bloom* or bother to distinguish that case on its facts.

a specific parcel of land at death by a deed in recordable form, without regard to will formalities.

Under any reading, the *O'Brien* holding points up a serious ambiguity in the validating statute. As the dissenters observed, the majority's conclusion that the delivery requirement was met (based on the mother's intent to transfer the land at death) should have obviated the need to resort to the validating statute.[48] On the other hand, as the majority pointed out, the validating statute would be superfluous if it applied only to transactions that were independently effective as conveyances.[49] The fundamental problem is that the catch-all clause does not define its own scope with any precision.[50] Indeed, it cannot do so if it is to remain sufficiently flexible to embrace new and evolving will substitutes.[51] Although the UPC official comment expressly ap-

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[48] *O'Brien*, 749 P.2d at 158-59.

[49] If an instrument were effective as a conveyance it, by definition, would have passed a present title during the decedent's lifetime. Therefore, there would be no need to validate the instrument as nontestamentary. . . . Stated differently, the [validating statute] cannot operate upon a conveyance which is effective as a conveyance because its operation as a conveyance would in and of itself make it nontestamentary.

Id. at 157.

Unfortunately, the dissenters' reading of the validating statute is no more helpful. They argued that the statute was "intended to validate an instrument against testamentary attack only where the instrument has been made in the manner usual to the type of transaction involved"—a requirement arguably met in *O'Brien*, since each deed was executed in proper form and absolute on its face—and that "[i]n the context of a conveyance of an interest in land at death, [the statute] added nothing to existing . . . law." *Id.* at 159 (Dore, J., dissenting). In arguing that the deeds failed "because they were *undelivered* and had no independent legal effect" and not "because they did not comply with the requirements of the statute of wills," the dissenters failed to identify any transaction that would fall within the catch-all clause of the validating statute. *Id.* (emphasis in original).

[50] In response to the concern that the broad scope of the validating provision might lead to "wholesale repeal" of will formalities, Professor Wellman proposes that the catch-all clause be interpreted (consistently with the enumerated arrangements) to cover only arrangements that "involve at least two persons, each of whom has selfish interests that are served by entering into the transaction with the other." Wellman, *supra* note 11, at 809 n.58. From a functional point of view, this may be a relevant consideration, but it represents a material modification of the current provision.

A related question is whether the original UPC's validating provision by itself would be adequate to validate a TOD direction in the registration of a security. *See id.* at 807-19 (discussing possible arguments in favor); Amado, *supra* note 32, at 411 (assuming no validation).

[51] *See* Langbein, *supra* note 1, at 1133 (catch-all clause reaches "whatever future products of financial intermediation may emerge").

proves *Bloom* and disapproves *O'Brien*,[52] it fails to identify any additional transactions that the revised statute is intended to validate.

By contrast, the UPC provisions concerning multiple-person accounts and TOD security registration define their scope and operation relatively clearly. The multiple-person account provisions apply to all accounts in financial institutions,[53] and specifically authorize deathtime transfers of accounts to surviving parties or POD beneficiaries.[54] The UPC classifies any account—whether preexisting or newly created—as "either a single-party account or a multiple-party account, with or without right of survivorship, and with or without a POD designation or an agency designation," and defines the rights of parties, POD beneficiaries and agents accordingly.[55] To clarify the terms of accounts and avoid litigation,[56] the UPC provides optional

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[52] The official comment states that the *O'Brien* court "read [the catch-all clause] to relieve against the delivery requirement of the law of deeds, a result that was not intended," and that "[t]he point was correctly decided in [*Bloom*]." UPC § 6-101 cmt. As Professor McGovern observes, it is unclear why the UPC drafters considered delivery to be more important than other will formalities. *See* William M. McGovern, Jr., *Nonprobate Transfers Under the Revised Uniform Probate Code*, 55 ALB. L. REV. 1329, 1338 (1992).

[53] *See* UPC §§ 6-201(1) ("account"), 6-201(4) ("financial institution"). The UPC drafters concede that the "distinction between bank accounts and securities has begun to crumble" as banks offer large-denomination certificates of deposit and brokerage houses offer cash management accounts subject to small recurrent transactions. *Id.*, art. 6 prefatory note. For an informative discussion of the revised UPC provisions concerning multiple-person accounts and TOD security registration, see McGovern, *supra* note 52, at 1329-53.

[54] A special validating statute declares that any deathtime transfer of an account to surviving parties or POD beneficiaries is "effective by reason of the terms of the account involved and [the multiple-person account provisions] and is not testamentary." UPC § 6-214.

[55] UPC § 6-203(b). If the statute forcibly rearranges beneficial rights in a preexisting account, its constitutionality may be called into question. On the other hand, if the statute simply reclassifies the account to reflect the beneficial rights intended by the parties, any constitutional challenge should be rejected. *Compare* Whirlpool Corp. v. Ritter, 929 F.2d 1318 (8th Cir. 1991) (holding revocation-by-divorce statute unconstitutional) *with* Kindleberger v. Lincoln Nat'l Bank of Washington, 155 F.2d 281, 285 (D.C. Cir. 1946) (upholding application of statute implying substitute disposition to deceased beneficiary's successors). *See* Edward C. Halbach, Jr. & Lawrence W. Waggoner, *The UPC's New Survivorship and Antilapse Provisions*, 55 ALB. L. REV. 1091, 1128-30 (1992) (criticizing *Ritter*).

[56] *See, e.g.*, Corning Bank v. Rice, 645 S.W.2d 675 (Ark. 1983) (suit against bank by disappointed POD beneficiary); Robinson v. Colebrook Guar. Sav. Bank, 254 A.2d 837 (N.H. 1968) (same). "A major goal of the 1989 revision is to encourage financial institutions to use the statutory forms and abandon their practice of routinely offering joint

statutory forms which (at least with respect to accounts with provisions "substantially" in the prescribed form) conclusively define the beneficial interests of surviving parties and POD beneficiaries at the death of a party.[57] In establishing a mechanical rule governing ownership of accounts at the death of a party, and decoupling that rule from the more flexible presumption governing ownership during life,[58] the UPC moves away from the troublesome joint account form and encourages financial institutions to offer accounts conforming to the statutory pattern.

Problems may arise in determining the rights of surviving parties when the UPC reclassifies a nonconforming account to fit the statutory pattern.[59] In the case of a traditional joint account, the intent of the parties can generally be accommodated by simply relabeling the arrangement either as a multiple-party account with or without a right of survivorship or as a mere agency account.[60] But the statute may frustrate the parties' intent in other cases. For example, the UPC automatically reclassifies ex-

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accounts to customers who merely wish to add another person's name to an account for agency, death beneficiary, or multiple-owners-with-no-survivorship purposes." LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW 408 (1991). The UPC offers financial institutions protection as an incentive to cooperate in offering the statutory forms. *See* UPC § 6-226.

[57] The statutorily-prescribed forms determine the presence or absence of survivorship rights among parties, as well as the effect of a POD designation, in an account with conforming provisions, regardless of evidence of the parties' contrary intent. Even if evidence of mistake cannot defeat the rights of a named surviving party or POD beneficiary, however, evidence of incapacity, fraud or undue influence should be admissible. *See* WAGGONER ET AL., *supra* note 56, at 407 (evidence of incapacity, fraud or undue influence admissible to defeat POD beneficiary's claim under original UPC).

[58] In the case of a multiple-party account, parties are presumed to own the account in proportion to their respective net contributions, in the absence of "clear and convincing evidence of a different intent." *See* UPC §§ 6-204(a) (forms), 6-211(b) (lifetime ownership), 6-212 (deathtime ownership). This conceptually elegant mechanism for determining lifetime rights permits the parties "to be as definite, or as indefinite, as they wish" in apportioning lifetime ownership, *see id.* § 6-211 cmt., but may prove difficult to apply if it requires tracing of contributions and withdrawals. *See* Zartman, *supra* note 2, at 461.

[59] The UPC defines beneficial rights in accounts that are not substantially in the prescribed statutory form by reference to "the type of account that most nearly conforms to the depositor's intent." UPC § 6-204(b).

[60] The statute does not specify an evidentiary standard for determining the parties' intent. Perhaps a joint tenant's presumed survivorship right will fail if a preponderance of the evidence indicates that the parties intended to create an agency account or a multiple-party account without survivorship rights. *See* WAGGONER ET AL., *supra* note 56, at 408 n.6. This would be inconsistent, however, with the clear-and-convincing standard specified in the original UPC. *See* UPC § 6-104(a) (pre-1989).

isting "trust accounts" as accounts with POD designations, apparently precluding the trustee's successors from contesting the beneficiary's ownership rights at the trustee's death.[61] The terms of an account agreement may even conflict with the dispositive patterns permitted by the statute. If the parties clearly intend to create a tenancy-in-common account with a separate POD beneficiary for each party's deathtime share of the account, the POD designation may simply fail, leaving a multiple-party account with no right of survivorship.[62] Or perhaps the evidence will show that the parties would have preferred to sever their respective interests in order to sustain separate POD designations.[63] The POD beneficiary, however, may argue that the original arrangement should be upheld according to its terms under the blanket validating provision.[64] A saving clause permitting the parties to show nonconforming ownership for preexisting accounts might alleviate these problems.

The provisions for TOD security registration permit an owner to register a security in "beneficiary form" under an agreement with a "registering entity," and specifically authorize a deathtime transfer of the security to the owner's designated beneficiary.[65] The operative TOD provisions are closely modeled on the POD account provisions and provide statutory forms il-

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[61] *See* UPC § 6-201(8) (definition of POD account). The statute also precludes the beneficiaries from showing that they were intended to take the account with rights of survivorship among themselves. *Compare* UPC § 6-212(b)(2) (conclusive rights of surviving beneficiaries, with no survivorship rights) *with* UPC § 6-104(c)(2) (pre-1989) (account belongs to surviving beneficiaries at trustee's death unless clear evidence of contrary intent; no survivorship rights among beneficiaries unless expressly provided by account or agreement).

[62] *See* UPC § 6-212(c) (POD designation in multiple-party account without right of survivorship is "ineffective").

[63] In the analogous case where multiple owners of a security attempt to register the security in beneficiary form, the UPC requires a right of survivorship among the owners. *See* UPC § 6-302. This provision could be read to impose a right of survivorship even if the owners would have preferred to eliminate the registration in beneficiary form in order to preserve their rights as tenants-in-common.

[64] *Compare* UPC § 6-101 (validating "deposit agreement" providing for deathtime payments) *with id.* § 6-204(b) (nonconforming accounts governed by §§ 6-201 to -227).

[65] *See* UPC § 6-301 (defining terms). "A transfer on death resulting from a registration in beneficiary form is effective by reason of the contract regarding the registration between the owner and the registering entity and [the TOD provisions] and is not testamentary." *Id.* § 6-309(a). The statute also attempts to validate a TOD registration that was made without express statutory authorization, by reciting that such a registration is "presumed to be valid and authorized as a matter of contract law." *Id.* § 6-303. On TOD security registration generally, see Wellman, *supra* note 11.

lustrating registration in beneficiary form.[66] The statute also authorizes each registering entity to establish its own "terms and conditions" for accepting and implementing registrations in beneficiary form.[67] By permitting registering entities maximum flexibility in adopting TOD registration, the UPC drafters hope to encourage the spontaneous use of a simple, straightforward form of nonprobate transfer to replace less reliable will substitutes such as joint-and-survivor registration.[68]

C. *Refining the UPC Standard*

The UPC provisions concerning multiple-person accounts and TOD security registration offer a useful starting point for refining the blanket validating statute.[69] Initially, as a technical matter, the statute should affirmatively authorize nonprobate transfers instead of merely labeling them "nontestamentary." For example, the statute might declare that a provision in a governing instrument or separate written beneficiary designation for a nonprobate transfer at death of property, rights or benefits is "effective in accordance with its terms," as long as certain minimum formalities are met.[70] The statute should also provide that

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[66] The TOD provisions address the rights of multiple owners of a security only at the death of the last surviving owner, perhaps because traditional concepts of co-ownership are more readily adaptable to securities than to the fluctuating balance of an account in a financial institution. The elements of a common-law joint tenancy may explain why the owners of a security registered in beneficiary form—unlike the parties to a multiple-party account—must be individuals. *See* UPC §§ 6-302 (TOD registration), 6-201 (definition of "party"). The POD account rules concerning lifetime ownership may be appropriate, however, for some securities such as mutual fund accounts. The 1989 revisions extend the blanket validating statute to cover certificated and uncertificated securities. *See id.* § 6-101(a).

[67] *See id.* § 6-310.

[68] *See* McGovern, *supra* note 52, at 1350-51; Wellman, *supra* note 11, at 794; *see also* Milliken v. First Nat'l Bank, 290 A.2d 889 (Me. 1972) (stock certificates providing "[A] & on his decease [B] if she survives him is the owner" not effective to create joint tenancy; no discussion of alternative theory).

[69] The Missouri nonprobate transfers law, enacted in 1989, develops the basic structure of the UPC's TOD provisions for application to a broad range of nonprobate transfers. *See* MO. REV. STAT. §§ 461.003-.081 (1986 & Supp. 1992). The Missouri law provides numerous points of comparison with the UPC, especially in the areas of validation, construction and creditors' rights.

[70] *Cf.* UPC §§ 6-214, 6-309(a). Interestingly, an early draft of the validating statute followed this approach. *See* Fratcher, *supra* note 2, at 1084 & n.225 (draft statute declaring that a provision "in a written contract" for deathtime payments to a designated beneficiary "is effective in accordance with its terms").

a nonprobate transfer is effective at death without regard to will formalities or probate administration.[71] By authorizing nonprobate transfers at death without relying on the common-law distinction between testamentary and nontestamentary transfers, the statute would sidestep much of the doctrinal confusion that plagues conventional will substitutes.

As a structural matter, it is crucial to define the transactions that the statute validates. In confirming the validity of conventional will substitutes in the form of contracts, trusts and lifetime transfers, the statute does neither much harm nor much good. On the other hand, to the extent that it validates new methods of transferring property at death, the statute raises important questions concerning the form and function of will substitutes.

Multiple-person accounts and securities registered in TOD form represent new types of nonprobate transfers which remain ambulatory during life and expressly become effective only at death. These transfers relate to specific property (an account or security) which remains readily identifiable at all times despite fluctuations in the balance or number of units during the owner's life. Moreover, they are administered by an institutional third-party "payor"[72] who has a strong incentive to implement transfers promptly and efficiently. Finally, a governing instrument (generally in the form of an agreement between the payor and the owner of the underlying property) sets forth the essential dispositive and administrative terms of the transfer.[73]

Conceivably, the blanket validating statute could be expanded to authorize any sort of written agreement between an owner and a payor for the nonprobate transfer of property at death.[74] A simple example, however, reveals the potential

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[71] *Cf.* UPC §§ 6-214 (multiple-person accounts), 6-309 (TOD registration). To the extent that nonprobate transfers are includible in the augmented estate or available to satisfy statutory allowances or claims, the statute should specifically so state. *See infra* Parts III.B & III.C.

[72] The term "payor" as used in the UPC includes the person authorized or obligated to make payments or transfer property under most will substitutes. *See* UPC § 1-201(34) ("payor" includes trustee, insurer or other person authorized or obligated by law or governing instrument to make payments).

[73] *See* UPC § 6-308(b) (registering entity that accepts request for TOD registration agrees to implement deathtime transfer).

[74] *See, e.g.*, MO. REV. STAT. §§ 461.012 (agreement between owner and payor for nonprobate transfer), 461.014 (acceptance of agreement), 461.021 (authorizing nonpro-

problems with such a broad statute. Assume that *A* (a payor) and *B* (an owner) enter into an agreement (evidenced by a written instrument and supported by consideration, but not complying with will formalities) which provides that at *B*'s death *A* shall take possession of all *B*'s property and distribute it in accordance with *B*'s written directions. Despite some authority for determining the validity of a contractual arrangement without regard to its probate-avoidance function,[75] the arrangement probably would not be upheld as a contract,[76] donative transfer,[77] trust[78] or power of appointment.[79] Because the arrange-

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bate transfer of property by beneficiary designation in written instrument) (1986 & Supp. 1992).

[75] *See* Mutual Benefit Life Ins. Co. v. Ellis, 125 F.2d 127 (2d Cir. 1942) (upholding revocable beneficiary designation for deathtime payment under contract with life insurance company); Kansas City Life Ins. Co. v. Rainey, 182 S.W.2d 624 (Mo. 1944) (same). Professor Browder makes the argument forcefully:

> Any inclination a court may have toward condemning contracts as testamentary dispositions of property should be summarily suppressed. The only issue that really exists when enforcement of a promise is sought is governed by the law of contract—that is, whether under that law the promise is valid and binding. There should be no reason to question any contract on the ground that it is a substitute for a will, for, if it is, there is no law against it.

Browder, *supra* note 11, at 875; *see also* SCOTT, *supra* note 13, § 56.5A, at 111-19.

[76] *See, e.g.*, Halldin v. Usher, 321 P.2d 746 (Cal. 1958) (written agreement between spouses disposing of specific property at survivor's death); Jennings v. Neville, 54 N.E. 202 (Ill. 1899) (father sold land to son, took back son's note; written agreement provided for cancellation of note at father's death conditioned on son's payment of specified legacies under father's existing will); Lucas v. Smith, 383 S.W.2d 513 (Mo. 1964) ("partnership agreement" between owner and housekeeper providing for transfer of property at owner's death); Neylon v. Parker, 128 N.W.2d 690 (Neb. 1964) (reciprocal deeds reflecting oral agreement between sisters disposing of real and personal property owned at death); Spinks v. Rice, 47 S.E.2d 424 (Va. 1948) (written agreement between unmarried persons disposing of all property owned at death). The agreements in these cases, however, may be distinguished from the arrangement described in text on the ground that they restrain the owner's ability to dispose of property by will. *See* Browder, *supra* note 11, at 858-59 (commenting on *Spinks* case).

In *In re* Estate of Langley, 546 N.E.2d 1287 (Ind. Ct. App. 1989), the court held that "a safe deposit box lease agreement that specifically provides for joint ownership of and survivorship rights in the contents is sufficient to serve as a contract between the parties to establish survivorship rights in a co-tenant." *Id.* at 1290. The court expressly refused to invoke the blanket validating statute, and based its holding exclusively on general principles of contract and property law. *See id.* at 1289 n.2.

[77] *See, e.g.*, Goins v. Melton, 121 S.W.2d 821 (Mo. 1938) (deed of any portion of specific real property unsold at grantor's death and all personal property); Neylon v. Parker, 128 N.W.2d 690 (Neb. 1964) (reciprocal deeds disposing of sisters' real and personal property owned at death); Butler v. Sherwood, 196 A.D. 603, 188 N.Y.S. 242 (1921) (wife's revocable deed of all real and personal property to husband, to take effect at death if husband then living); *cf.* RESTATEMENT (SECOND) OF PROPERTY (Donative Trans-

ment has no purpose or effect other than probate avoidance and because it raises substantial dangers of fraud and mistake with no corresponding safeguards, the arrangement should also fall outside the scope of the blanket validating statute.[80]

When an institutional third-party payor administers a nonprobate transfer, the statute should leave the terms of the transfer (including formalities for making and changing beneficiary designations) to agreement between the owner and payor.[81] A statute that imposes unnecessary or burdensome formalities undermines the practical advantages of nonprobate transfers.[82]

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fers) §§ 32.1 (inter vivos donative document of transfer must be legally operative while donor is alive), 32.4 (inter vivos donative document of transfer may be valid will substitute despite donor's retained beneficial enjoyment and power to revoke), 32.4 cmt. a (will substitute executed immediately before death might dispose of donor's remaining property, leaving no property to pass at death by will or intestacy) (1990).

[78] In the absence of identifiable trust property or a manifested intent to create a present fiduciary relationship, no express trust is created. *See* RESTATEMENT (SECOND) OF TRUSTS §§ 23, 26, 74, 76 (1957). The blanket validating statute, however, raises a related problem in the context of a pourover trust. The UPC validates a devise to an unfunded trust created at the testator's death "if the trust is identified in the testator's will and its terms are set forth in a written instrument, other than a will . . . ." UPC § 2-511(a). The property so devised, though normally subject to administration, "is not held under a testamentary trust of the testator." *Id.* § 2-511(b). It remains unclear whether the blanket validating statute may permit an owner to declare a trust that expressly comes into existence at death and removes the underlying property from the probate system.

[79] *See, e.g.*, Dawson v. Dawson's Administratrix, 272 S.W.2d 666 (Ky. Ct. App. 1954) (written memorandum designating beneficiaries of fixed sum of money if owned at death). The official comment to the original UPC validating statute noted the "analogy of the power of appointment" as an alternative approach to contractual arrangements providing for payments or transfers at death. UPC § 6-201 cmt. (pre-1989). In the 1989 revisions, however, this portion of the official comment was deleted. *See* UPC § 6-101 cmt.; *see also* Browder, *supra* note 11, at 875 (suggesting UPC validating statute should not apply to inter vivos transfers completed by informal writing, "[o]therwise a new method will have been created for conveying land without satisfying either the requirements for wills or for inter vivos conveyances").

[80] *See* Hibbler v. Knight, 735 S.W.2d 924, 927 (Tex. Ct. App. 1987) ("the legislature did not intend for [the blanket validating statute] to validate agreements allowing testamentary disposition of a person's entire estate, including real property, without the requirements of a will or the formalities of will execution"); Wellman, *supra* note 11, at 809 n.58 (arrangement described in text not within intended scope of blanket validating statute).

[81] Thus, a payor should be able to impose additional formalities for its own convenience or protection as part of a contractual arrangement. *See, e.g.*, UPC § 6-310(a) (registering entity may establish terms for implementing TOD registration).

[82] Under the Missouri nonprobate transfers law, unless a payor adopts its own rules, a beneficiary designation must be made "in writing, subscribed by the owner or owners, dated, witnessed by at least one person who is not expressly named a beneficiary in the designation and be delivered to the [payor] or [its authorized agent]." MO. REV. STAT.

The present requirement of a written instrument probably represents an irreducible minimum level of formality.[83]

On the other hand, specific alternative formalities may prove useful when no third-party payor is involved, as in the case of real property. The UPC drafters might consider authorizing a form of deed that would transfer real property at the owner's death, relying on the recording system as a substitute for probate formalities. Under such a statute, an owner would be able to execute and record a deed which expressly conveys real property at death and has no effect on legal ownership or control during the owner's life.[84] Mechanically, such a deathtime transfer is just as simple as a conventional joint tenancy or a lifetime conveyance with retained life estate. It also raises no greater danger of fraud or mistake than any other beneficiary designation. To preserve the integrity of the recording system, however, the owner should be required to comply with the recording formalities in exercising any retained power of appointment under a recorded deed.[85]

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§ 461.062(1) (1986 & Supp. 1992). If a beneficiary designation may fail due to a misplaced signature, an equivocally abbreviated date or an acknowledgment by a beneficiary, the owner might find it less troublesome to execute a will.

[83] *Cf.* RESTATEMENT (SECOND) OF PROPERTY (Donative Transfers) § 32.1 (1990) (inter vivos donative document of transfer is a writing or writing equivalent, signed by the donor or identified as coming from the donor, that identifies the donor and donee, describes the subject matter of the gift, specifies the nature of the transferred interest, and manifests the donor's intention that the document be legally operative while the donor is alive).

Surprisingly, although the UPC requires a signed writing to modify the type of an existing account, *see* UPC § 6-213(a), it does not expressly require a signature or a writing to create a multiple-person account. As a result, oral instructions may be sufficient to create survivorship rights but ineffective to revoke them. *See, e.g.*, Estate of Wolfinger v. Wolfinger, 793 P.2d 393 (Utah 1990). In the case of a TOD registration of an uncertificated security, the written instrument may consist simply of an account reflecting registration in beneficiary form. *See* UPC §§ 6-301 (definitions), 6-304 (TOD registration of uncertificated security evidenced by account).

[84] *See, e.g.*, MO. REV. STAT. § 461.025(1) (1986 & Supp. 1992) (authorizing deed of real property "that expressly states that the deed is not to take effect until the death of the grantor," if executed and recorded before grantor's death). As a practical matter, the Missouri nonprobate transfers law might not affect the result in many cases striking down deeds as testamentary. *See, e.g.*, Wheeler v. Rines, 375 S.W.2d 48 (Mo. 1964) (expressly ambulatory deed physically delivered to the grantee but not recorded before the grantor's death); First Nat'l Bank in Minot v. Bloom, 264 N.W.2d 208 (N.D. 1978) (deed not recorded before grantor's death); Estate of O'Brien v. Robinson, 749 P.2d 154, 156 (Wash. 1988) (deed recorded before grantor's death did not expressly state that it was not to take effect until grantor's death).

[85] For example, assume that *A* executes and records a deed of real property that

The blanket validating statute gives effect to an attempted deathtime disposition that might otherwise fail due to noncompliance with will formalities. The statute has no effect on a will substitute that falls outside its ambit. Nor does it directly modify the formalities prescribed for wills under the probate code. Thus, the dispositive effect of a will substitute that is not covered by a validating statute—for example, an oral trust agreement or an undelivered deed of land—must be determined under the passing-of-an-interest test or some other common-law standard.[86] But what if an instrument intended as a will substitute also happens to comply with the will formalities?

To illustrate the problem, assume that *A* executes two instruments in the form of attested deeds of separate parcels of land. One instrument expressly states that it is not to take effect or pass any interest until *A*'s death. In the absence of a validating statute, this instrument may be ineffective as a lifetime conveyance but may still be admitted to probate if it complies with applicable will formalities.[87] By contrast, the second instrument recites an absolute present conveyance but remains undelivered at *A*'s death. This instrument may fail both as a lifetime conveyance and as a will (notwithstanding compliance with the will formalities), if extrinsic evidence is inadmissible to show testamentary intent in the probate proceeding.[88] Should a validating

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names *B* as grantee and states that the deed is not to take effect until *A*'s death, as provided in the Missouri nonprobate transfers law. *See* MO. REV. STAT. § 461.025(1) (1986 & Supp. 1992). Should the conveyance fail if the deed also reserves to *A* a power of revocation or amendment exercisable at any time by an instrument signed by *A*? If the deed refers to a separate written beneficiary designation executed or to be executed by *A*? If the deed designates a beneficiary by reference to events of independent significance existing at *A*'s death? If the specific provision for conveyances of real property does not apply, may the conveyance nevertheless be saved under the blanket validating statute? *See* UPC § 6-101(a); Wagner, *supra* note 11, at 1204.

[86] *See* UPC § 6-101 cmt.

[87] *See In re* Wnuk's Will, 41 N.W.2d 294 (Wis. 1950) (deed, undelivered during life, admissible to probate although it was expressly "null and void until after [grantor's] death"). Of course, the instrument might be interpreted as a valid lifetime conveyance, obviating the need to offer it as a will. *See* Vigil v. Sandoval, 741 P.2d 836 (N.M. Ct. App. 1987).

[88] *See* Noble v. Tipton, 76 N.E. 151 (Ill. 1905) (deed absolute in form invalid for lack of delivery); Noble v. Fickes, 82 N.E. 950 (Ill. 1907) (same instrument not admissible to probate, extrinsic evidence inadmissible to show testamentary intent). In the latter case, the court observed: "It would be a strange result if the same evidence which destroyed the instrument as a deed should bring it to life as a will." 82 N.E. at 954. To the dissenters, it seemed even stranger to defeat the intended disposition both as a deed and

statute produce a different result in either case, assuming the instrument falls within its ambit?

If the instrument is admissible to probate, *A*'s intended disposition can be given effect regardless of whether the instrument is treated as a will or a will substitute;[89] the principal consequence of applying the validating statute is to remove the land from *A*'s probate estate.[90] The validating statute, however, should not apply to an instrument that is admissible to probate as a will.[91] If the instrument is not admissible to probate, a strong argument can be made for applying the validating statute in order to prevent the intended disposition from being completely frustrated.[92] Since the validating statute does not clearly distinguish a failed will from a valid will substitute, a court inclined to avoid intestacy might well invoke the statute to validate a formally defective will.[93] In any event, the statute should not apply to a disposition that is tainted by fraud, undue influence or a similar substantive defect.[94]

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as a will, in the former case by admitting extrinsic evidence of testamentary intent and in the latter case by excluding the same evidence.

[89] The 1990 UPC revisions extend several constructional rules to apply to nonprobate transfers as well as wills. *See infra* Part II.

[90] Under the UPC, the land would be included in the grantor's augmented estate for purposes of determining the surviving spouse's elective share. *See* UPC § 2-202(b)(2). However, it would not necessarily be available to pay statutory allowances or creditors' claims. *See infra* Part III.C.

[91] The official comment states that "[t]he sole purpose of this section is to prevent the transfers *authorized here* from being treated as testamentary." UPC § 6-101 cmt. (emphasis added). The validating statute authorizes "nonprobate" transfers. An instrument that complies with statutory formalities and is admissible to probate is valid without regard to the validating statute, and it would be absurd to reclassify a will as "nontestamentary." The Missouri nonprobate transfers law makes this explicit by defining nonprobate transfers and beneficiary designations in terms of "a writing that is not a will." MO. REV. STAT. §§ 461.005(2), .005(5) (1986 & Supp. 1992). Of course, if an instrument intended as a will is not offered for probate, or is not admitted because of a technical defect, it remains unclear whether the intended disposition can or should be validated as a nonprobate transfer.

[92] On the facts of a particular case, the grantor's testate or intestate successor might coincidentally be the same person as the intended grantee under the instrument. In such a case, the validating statute would not affect the disposition of the land, but would still affect the classification of the land as a probate or nonprobate asset.

[93] On the other hand, the court may refuse to apply the validating statute on the ground that a defective will is not a "conveyance, deed of gift . . . or other written instrument of a similar nature." *See* UPC § 6-101(a).

[94] Curiously, when a beneficiary is disqualified from taking a nonprobate transfer due to fraud, duress, undue influence or homicide, the Missouri nonprobate transfers law does not simply invalidate the tainted disposition but provides a mandatory substitute

It may seem anomalous that the applicability of the validating statute—and thus the removal of the underlying property from the probate estate—should depend on whether an equivocal instrument happens to be admissible to probate. As a practical matter, the "dispensing power" introduced in the 1990 UPC revisions greatly reduces the risk that a purely formal defect will prevent an instrument intended as a will from being admitted to probate.[95] Indeed, the UPC's dispensing power may signal a convergence of formalities for wills and will substitutes.[96] Nevertheless, a workable distinction between probate and nonprobate transfers remains important for the efficient implementation of both types of transfers.

Consider the situation where an owner designates *A* as beneficiary of a nonprobate transfer of property at death and later executes a valid will specifically devising the same property to *B*. In the absence of an applicable statute, the result depends in the first instance on whether the governing instrument for the nonprobate transfer expressly permits or prohibits amendment or revocation of a beneficiary designation by will. If the governing instrument is silent, the result may depend on the type of will substitute.[97] In the reverse situation, where the owner designates

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disposition in favor of the owner's surviving spouse and children, if any. *See* MO. REV. STAT. § 461.054 (1986 & Supp. 1992) (nonprobate assets).

[95] *See* UPC § 2-503 (dispensing power).

[96] On will formalities generally, see Gaubatz, *supra* note 25; John H. Langbein, *Substantial Compliance With the Wills Act*, 88 HARV. L. REV. 489 (1975); John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1 (1987); James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541 (1990); C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislation Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism*, Parts I & II, 43 FLA. L. REV. 167, 599 (1991).

[97] In the case of a tentative savings account trust, courts generally imply a power to revoke by will. *See* RESTATEMENT (SECOND) OF TRUSTS § 58 cmt. c (1957); *see, e.g.*, Jones v. First Nat'l Bank, 234 S.E.2d 794 (Ga. Ct. App. 1977); *In re* Estate of Stein, 42 Misc. 2d 787, 249 N.Y.S.2d 223 (N.Y. Surr. Ct. 1964); *In re* Estate of Bol, 429 N.W.2d 467 (S.D. 1988). By contrast, courts generally permit a settlor to revoke an express trust by will only if the terms of the trust so provide. *See* RESTATEMENT (SECOND) OF TRUSTS § 330 cmt. j (1957); *id.* § 331 cmt. d; *see, e.g., In re* Estate of Stein, 42 Misc. 2d 787, 249 N.Y.S.2d 223 (N.Y. Surr. Ct. 1964) (revocable trust of mutual funds; no revocation by will); *In re* Estate of Kovalyshyn, 343 A.2d 852 (N.J. Super. Ct. 1975) (same); Estate of Lowry, 418 N.E.2d 10 (Ill. App. Ct. 1981) (revocation by will permitted under terms of trust).

The owner of a life insurance policy may generally revoke or amend a beneficiary designation by will, unless the policy prescribes a different method; most policies do. *See*

A as beneficiary after executing the will in *B*'s favor, the analysis is slightly different. Here, the only sensible result is to treat the nonprobate transfer as removing the underlying property from the probate system; otherwise, the beneficiary designation has no effect.[98]

The UPC provisions concerning revocation and amendment by will require clarification. The blanket validating statute, which specifically applies to account agreements and securities, expressly permits a beneficiary designation by will.[99] By contrast, the UPC provisions concerning multiple-person accounts specifically prohibit any alteration by will of the rights of a surviving party or POD beneficiary.[100] The TOD provisions are silent, apparently leaving the matter to agreement between the owner and registering entity.[101] In the absence of material differences justifying special treatment for certain types of nonprobate transfers, a uniform rule is undoubtedly desirable. Not surprisingly, the content of such a rule proves controversial.

One current proposal would permit an owner to override

COUCH, *supra* note 14, §§ 28:5, :59-61, at 10-13, 94-99. In Wisconsin, the owner of an insurance policy generally cannot change the beneficiary by will, but may do so by "any act that unequivocally indicates an intention to make the change." WIS. STAT. § 632.48(1)(b) (1992); *see* Empire General Life Ins. Co. v. Silverman, 399 N.W.2d 910 (Wis. 1987) (statute does not require writing).

In the case of an employee benefit plan covered by ERISA, the beneficiary designation may control as a matter of federal law. *See* MacLean v. Ford Motor Co., 831 F.2d 723 (7th Cir. 1987); *cf.* Lyles v. Teachers Retirement Board, 33 Cal. Rptr. 328 (Cal. Ct. App. 1963) (permitting revocation of beneficiary designation by will, by analogy to tentative trust; ERISA not applicable).

[98] The UPC does not expressly permit partial revocation of a will by a subsequent inconsistent will substitute. *See* UPC § 2-507 (revocation by will or physical act). Nevertheless, by analogy to a lifetime disposition of specifically devised property, a beneficiary designation should cause an ademption of the underlying property. *See id.* § 2-606(a)(6) (ademption consistent with testator's intent).

[99] *See* UPC § 6-101(a) (owner may designate beneficiary in "separate writing, including a will, executed either before or at the same time as the instrument, or later").

[100] UPC § 6-213(b); *see* Estate of Schwendeman, 251 N.E.2d 99 (Ill. App. Ct. 1969) (POD designation controls subsequent inconsistent disposition in will). On the other hand, courts may refuse to enforce the rights of a POD beneficiary or surviving party that conflict with a deceased party's valid, preexisting contractual will. *See, e.g.*, Foulds v. First Nat'l Bank, 707 P.2d 1171 (N.M. 1985) (POD account); Morse v. Williams, 740 P.2d 884 (Wash. Ct. App. 1987) (joint bank account).

The UPC reverses the common-law rule with respect to tentative trusts and treats them the same as POD accounts. *See* UPC § 6-201(8) (definition of POD account).

[101] *See* UPC § 6-306 cmt. (statute "says nothing about how a TOD beneficiary designation may be canceled, meaning that the registering entity's terms and conditions, if any, may be relevant").

beneficiary designations by an express provision in the will.[102] From the owner's perspective, this proposal offers the attractive prospect of a convenient, centralized means of changing beneficiary designations in numerous will substitutes without regard to the formalities applicable to each particular will substitute. From the perspective of a payor, however, the proposal threatens substantial inconvenience: uncertainty concerning the existence or effect of a will,[103] disruption of contractual terms and administrative procedures,[104] and potential liability for negligent payment to the wrong person.[105]

A successful system of nonprobate transfers must strike a reasonable balance between the convenience of property owners and the practical constraints of the payors who administer most nonprobate transfers. To the extent that the terms of a particular will substitute expressly permit or prohibit revocation or amendment of a beneficiary designation by will, those terms

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[102] *See* Michael D. Carrico, *Uniform "SuperWill" Legislation Project*, 14 PROB. & PROP. 45 (1986); Debra Lynch Dubovich, Note, *The Blockbuster Will: Effectuating the Testator's Intent to Change Will Substitute Beneficiaries*, 21 VAL. U. L. REV. 719 (1987); Mark L. Kaufmann, Note, *Should the Dead Hand Tighten Its Grasp: An Analysis of the SuperWill*, 1988 U. ILL. L. REV. 1019; Roberta R. Kwall & Anthony J. Aiello, *The Superwill Debate: Opening the Pandora's Box?*, 62 TEMP. L. REV. 277 (1989); *see also* Langbein, *supra* note 1, at 1138-39.

[103] If a beneficiary designation is subject to revocation or amendment by will, it may be difficult to determine whether the will sufficiently indicates an intent to override a particular beneficiary designation. For example, a simple residuary clause by itself ordinarily does not control the disposition of property already subject to a valid will substitute. *See In re* Ryan's Will, 52 N.Y.S.2d 502, 507-08 (N.Y. Surr. Ct. 1944); *In re* Pozzuto's Estate, 188 A. 209 (Pa. Super. Ct. 1936). *But cf. In re* Estate of Bol, 429 N.W.2d 467 (S.D. 1988). What if the residuary clause purports to dispose of "all property not otherwise effectively disposed of under this will and any property that would otherwise pass at death pursuant to a nonprobate transfer"? *Cf.* UPC § 2-608 (exercise of power of appointment).

[104] If a payor can no longer rely conclusively on a standard beneficiary designation to ascertain the proper recipient of a nonprobate transfer, the transfer will unavoidably require more time and expense. In addition, a standard contractual arrangement used in many different jurisdictions would become subject to a patchwork of different state probate codes. Choice of law may also be far from clear. *Compare* Riggio v. Southwest Bank of St. Louis, 815 S.W.2d 51 (Mo. Ct. App. 1991) (disposition of joint and trust accounts determined under situs law) *with* Morris v. Cullipher, 816 S.W.2d 878 (Ark. 1991) (disposition of joint certificates of deposit determined under domiciliary law).

[105] The problem of liability might be alleviated by statutory protection for a transferor or registering entity that carries out a nonprobate transfer according to its terms and without actual written notice of objection. *See* UPC §§ 6-226 (multiple-person accounts), 6-308 (TOD security registration). For a discussion of the UPC's payor-protection provisions, see *infra* Part III.A.

should be respected.[106] In the absence of an express provision, however, a statutory presumption against amendment or revocation by will may be justified to preserve the autonomy of nonprobate transfers and avoid unnecessary entanglement with the probate system.

II. Ascertaining Dispositive Intent

Most will substitutes provide for a payment of money or transfer of specific property at the owner's death directly to ascertained beneficiaries in fixed proportions. Indeed, it is the routine, standardized character of the typical nonprobate transfer that enables payors to administer will substitutes promptly and efficiently. Uncertainty concerning the disposition of nonprobate assets tends to arise either from ambiguous expressions in the governing instrument or from unforeseen events that intervene between the making of a beneficiary designation and the owner's death. Since problems of ambiguity and changed circumstances are common to wills and will substitutes, judicial and statutory solutions developed in interpreting wills often prove well suited for broader application to will substitutes.[107] The 1990 UPC revisions restructure several rules concerning the dispositive effects of wills and expand them to apply to a broad range of written will substitutes in an attempt to "bring the law of probate and nonprobate transfers into greater unison."[108]

A. *Will Substitutes and Specific Devises*

The analogy between a will substitute and a specific devise offers a useful starting point for developing integrated rules of construction. Like a specific devise, a will substitute typically

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[106] The UPC's categorical prohibition on changing the beneficiary of a POD account by will discourages challenges to an account that conforms to the statutory pattern. At the same time, however, it is unclear why the statute should prevent the parties from expressly agreeing to a different arrangement. *See* UPC § 6-213(b) (prohibiting alteration by will of survivorship rights).

[107] "Both as a matter of legislative policy and as a principle of judicial construction, we should aspire to uniformity in the subsidiary rules for probate and nonprobate transfers." Langbein, *supra* note 1, at 1136.

[108] UPC art. 2 prefatory note. The revised rules generally apply to the construction of governing instruments, and are thus not limited to wills or will substitutes. For example, a "governing instrument" includes an irrevocable inter vivos trust agreement. *See id.* § 1-201(19) (defining "governing instrument").

disposes of specific, identifiable property—an account or security, or rights under a life insurance policy or pension plan. By contrast, a will substitute rarely disposes of a fixed sum payable from general, unidentified sources or the owner's residual property.[109] The asset-specific character of a will substitute sets the underlying property apart from the owner's general assets, thereby obviating the need for several rules of will construction that allocate benefits and burdens between a specific devisee and other beneficiaries. For example, a beneficiary designation with respect to a particular security or account automatically adjusts for certain changes in or additions to the underlying property.[110] Similarly, a sale or other disposition of the underlying property normally has the same effect as ademption, although in some cases—an inter vivos trust or security account, for example—the will substitute may automatically extend to proceeds of the original property.[111] The relation between probate and nonprobate transfers in the context of creditors' rights becomes more complicated: some will substitutes prevent a deceased owner's creditors from reaching the underlying property and, in effect, shift the burden of repayment to the probate estate.[112]

Most will substitutes are administered by a payor who performs the ministerial function of transferring the underlying property to designated beneficiaries at or after the owner's death. The arrangement may be purely contractual, as in the case of a bank account, life insurance policy or TOD registration, or the payor may technically owe fiduciary duties, as in the case of a revocable trust declaration.[113] In comparison with a

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[109] An inter vivos trust, of course, may receive testamentary additions of the settlor's general assets, but such assets are poured over under a will only after probate and administration. *See* UPC § 2-511.

[110] *Cf.* UPC § 2-605 (devise of securities of same or related organization acquired by distribution, reorganization or reinvestment plan).

[111] *Cf.* UPC § 2-606 (nonademption of specific devise to extent of unpaid purchase price, condemnation award or casualty insurance proceeds).

[112] For a discussion of creditors' rights in nonprobate assets, see *infra* Part III.C. *Cf.* UPC §§ 2-607 (specific devise presumed subject to encumbrances without right of exoneration), 3-902 (order of abatement with respect to probate assets).

[113] *See, e.g.*, Farkas v. Williams, 125 N.E.2d 600 (Ill. 1955) (revocable trust of mutual fund shares). The standardized terms of such a trust may render the settlor-trustee's basic duties of loyalty, impartiality, care and prudent investment unenforceable as a practical matter. *See* Langbein, *supra* note 1, at 1127-28. Fiduciary obligations tend to have more substance in the case of a trust agreement between the settlor and an institutional trustee.

personal representative, the payor performs the single, simple function of distributing specific property to designated beneficiaries. Generally, the payor is not responsible for collecting general assets, paying creditors' claims, exercising discretion or resolving disputes among beneficiaries. Indeed, in the event of a dispute, the payor may simply deposit the underlying property with a court and interplead the competing beneficiaries. By the same token, the payor has a strong incentive to minimize disputes by channelling beneficiary designations into simple, standardized patterns involving few contingencies and no discretion.

Most will substitutes involve direct payments of cash or transfers of property either to named beneficiaries or to a class consisting of the owner's children or descendants who survive the deceased owner.[114] More sophisticated dispositions involving discretionary standards or postponed class gifts normally justify the additional expense and administrative safeguards of a formal trust agreement.[115] Even a simple, immediate class gift, though, may raise constructional problems concerning the intended treatment of adopted children and children born out of wedlock or their respective descendants, as well as half-blood relatives.[116] Since the relevant statutory provisions in the intestacy context reflect the presumed intent of the average decedent, the revised UPC sensibly borrows them as constructional rules which apply not only to wills[117] but also to donative transfers under other governing instruments.[118]

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[114] As alternatives to a lump-sum payment, some conventional will substitutes, such as life insurance policies, offer various settlement options such as annuities for one or more lives, or payments over a fixed term or at a fixed rate. Certain employee benefit plans must offer a "qualified joint-and-survivor annuity" or "qualified preretirement survivor annuity" *See* ERISA § 205, 29 U.S.C. § 1055 (1988 & Supp. III 1991); I.R.C. §§ 401(a)(11), 417 (1988).

[115] Accordingly, the UPC provisions added in 1990 concerning certain class gifts and future interests under trusts are more relevant to long-term trusts than to pure will substitutes. *See* UPC §§ 2-707, 2-711. *See generally* William F. Fratcher, *Class Gifts to "Heirs," "Issue," and Like Groups*, 55 ALB. L. REV. 1205 (1992).

[116] *See* Edward C. Halbach, Jr., *Issues About Issue: Some Recurrent Class Gift Problems*, 48 Mo. L. REV. 333 (1983). As a practical matter, a governing instrument may address recurring problems either by limiting the permissible types of beneficiary designations or by establishing constructional rules to resolve ambiguous designations.

[117] The original UPC included a similar constructional rule limited to wills. *See* UPC § 2-611 (pre-1990).

[118] *See* UPC §§ 2-701, 2-705, 2-708. The revised UPC presumes that if the terms of a class gift do not differentiate relatives by blood from relatives by affinity the latter are excluded. In the intestacy context, the UPC treats an individual who lives at least 120

B. *Survival, Lapse and Substitute Takers*

Probably the most common source of constructional problems concerns the unexpected death of a beneficiary either before or shortly after the death of a property owner. In the will context, a devisee must survive the testator's death to take any property under the will; if the devisee predeceases the testator, the devise fails.[119] Unless the will provides an alternative devise or an antilapse statute applies, the devised property passes as part of the residuary estate or by intestacy.[120] Similarly, if the beneficiary of a will substitute fails to meet an applicable survival requirement,[121] the underlying property generally passes to alternative takers under the governing instrument or becomes part of the owner's probate estate.

Before the promulgation of the original UPC, many states enacted a simultaneous-death statute which raised a presumption, for purposes of intestacy, devises and other dispositions dependent on the order of deaths, that a beneficiary failed to survive a testator or owner in the absence of "sufficient evidence that the persons . . . died otherwise than simultaneously."[122] The

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hours after birth as living from the time of conception. UPC § 2-108. Although this provision arguably is not limited to intestate dispositions, a parallel provision should be adopted as a rule of construction for wills and will substitutes. Otherwise, a survival requirement in a governing instrument might defeat the share of a person who was conceived during the owner's life and born after the owner's death.

[119] *See* ATKINSON, *supra* note 12, § 140, at 777-86; RESTATEMENT (SECOND) OF PROPERTY (Donative Transfers) § 18.5 (1984). A devise to the estate of a predeceased person may be valid, *see* RESTATEMENT (SECOND) OF PROPERTY (Donative Transfers) § 18.5 cmt. a (1984), as may a devise to the successors or appointees of a predeceased person, *see id.* § 18.4 cmt. e. *See generally* John O. Fox, *Estate: A Word to Be Used Cautiously, If at All*, 81 HARV. L. REV. 992 (1968); John C. Huston, *Transfers to the "Estate" of a Named Person*, 15 SYR. L. REV. 463 (1964).

[120] *See* UPC §§ 2-101, 2-604.

[121] The UPC incorporates a mandatory survival requirement in defining beneficial rights under certain nonprobate transfers at death. *See* UPC §§ 6-212(a) (multiple-party account with right of survivorship), 6-212(b)(2) (POD account), 6-307 (TOD security registration). By contrast, in the case of a conventional will substitute, such as a life insurance policy or an inter vivos trust, the governing instrument may expressly require that a beneficiary survive the owner, but need not do so. Such a disposition fails, however, if the beneficiary predeceases the attempted creation of a right or interest. *See* COUCH, *supra* note 14, §§ 130-132, 135, at 813-17, 819-20 (life insurance); SCOTT, *supra* note 13, §§ 112.3, 128.8, at 166-67, 395-99 (trusts).

[122] Uniform Simultaneous Death Act (1953), § 1, 8A U.L.A. 557. In the case of multiple beneficiaries or joint tenants whose rights depend on surviving each other, the statute treated each beneficiary or joint tenant as owning a ratable share of the property. *See id.* §§ 2, 3. The statute also applied specifically to life insurance proceeds. *See id.*

statutory presumption of nonsurvival operated as an evidentiary rule in cases where the order of deaths could not be ascertained. While the presumption did not impose an independent survival requirement, it yielded readily to evidence of a beneficiary's survival.[123] The original UPC introduced a 120-hour survival requirement which largely displaced the simultaneous-death statute for purposes of intestacy and wills.[124] By requiring an heir or devisee to survive for at least 120 hours, the original UPC avoided the expense and inconvenience (as well as the potentially arbitrary dispositive effects) of passing property through a second probate estate when deaths occurred in quick succession.[125] At the same time, however, the original UPC created an unwarranted discrepancy between probate and nonprobate transfers,[126] and invited litigation concerning the effect of boilerplate clauses relating to survival or simultaneous deaths.[127]

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§ 4. The presumption of nonsurvival could be rebutted by a different disposition under a governing instrument. *See id.* § 6. The uniform statute was substantially revised in 1991 to conform to the revised UPC. *See* Uniform Simultaneous Death Act (1991), 8A U.L.A. 557 (Supp. 1992).

[123] In Janus v. Tarasewicz, 482 N.E.2d 418 (Ill. App. Ct. 1985), a husband and wife died from cyanide poisoning. An insurance policy on the husband's life named the wife as primary beneficiary and the husband's mother as alternative beneficiary. Ambiguous evidence concerning the time of the wife's death was held sufficient to support a finding under the simultaneous-death statute that she survived her husband. As a result, the life insurance proceeds were payable to the wife's successors rather than the husband's mother.

[124] *See* UPC §§ 2-104, 2-601 (pre-1990). In the will context, the 120-hour survival requirement did not completely displace the simultaneous-death statute: a will might override the 120-hour survival requirement while leaving the presumption of nonsurvival under the simultaneous-death statute intact.

[125] For example, in Schmitt v. Pierce, 344 S.W.2d 120 (Mo. 1961), a husband and wife each died intestate in an automobile accident leaving children from a prior marriage. Although the husband died instantaneously, there was some evidence that the wife survived for a brief interval. Accordingly, under the simultaneous-death statute the wife's children received not only all of the wife's property but much of the husband's property as well, to the exclusion of the husband's children. The original UPC would have produced a different result.

[126] For example, in Janus v. Tarasewicz, 482 N.E.2d 418 (Ill. App. Ct. 1985), the 120-hour survival requirement would have prevented the wife (or her successors) from inheriting the husband's probate assets but would not have applied to the beneficiary designation under the husband's life insurance policy. *See supra* note 123.

[127] The original UPC's 120-hour survival requirement applied "unless the will of decedent contains some language dealing explicitly with simultaneous deaths or deaths in a common disaster, or requiring that the devisee survive the testator . . . ." UPC § 2-601 (pre-1990). If *T* devises property "to *X*, or if *X* does not survive *T* then to *Y*," courts routinely hold that the 120-hour requirement does not apply; if *X* survives *T* by even a moment, *X* takes the devise. *See, e.g., In re* Estate of Kerlee, 557 P.2d 599 (Idaho 1976).

The 1990 UPC revisions reinforce the 120-hour survival requirement and extend its scope. In the absence of a finding of contrary intent, the revised UPC treats a beneficiary who fails to survive an event (including the death of a testator or owner) by 120 hours as having predeceased the event.[128] Although the 120-hour period is framed as a constructional rule which may be overcome by a finding of a contrary intent, a casual reference in a governing instrument to survival or simultaneous deaths no longer suffices to override the statute.[129] A survival clause must state that survival is (or is not) required for a "specified period"[130] and a simultaneous-death clause must be "operable under the facts of the case."[131] Moreover, the revised UPC requires "clear and convincing evidence" (rather than mere preponderance of the evidence) to rebut the presumption of nonsurvival. These 1990 UPC amendments should discourage a deceased beneficiary's successors from challenging the operation of the 120-hour survival requirement on the basis of ambiguous language in a governing instrument or equivocal evidence of survival.

The revised 120-hour rule applies to a survival requirement under most will substitutes.[132] A technical amendment proposed in 1993 extends the rule to securities registered in TOD form,

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Indeed, under the literal terms of the original UPC, a devise in *T*'s will "to *Z*, unless *T* and *Z* die in a common disaster" would also override the 120-hour survival requirement, even if *Z* died one hour after *T* from unrelated causes.

[128] *See* UPC § 2-702. For an illuminating discussion of the background and operation of the revised UPC provisions, see Halbach & Waggoner, *supra* note 55, at 1091-1149.

[129] *See* UPC § 2-701 (effect of constructional rules). Even in the absence of specific provisions in the governing instrument, the statute suspends the 120-hour survival requirement if its application would violate the rule against perpetuities or trigger "an unintended failure or duplication of a disposition" under "multiple governing instruments." *Id.* § 2-702(d)(3)-(4).

[130] UPC § 2-702(d)(2). Thus, a devise "to *X*, if she survives" by itself does not negate the 120-hour period under the revised UPC. *See id.* § 2-702 cmt.

[131] UPC § 2-702(d)(1). Thus, a devise in *T*'s will "to *X*, but if she dies at the same time as *T* or in a common disaster with *T*, then to *Y*" does not override the 120-hour survival requirement unless *T* and *X* actually die simultaneously or in a common disaster. *See id.* § 2-702 cmt.

[132] *See* UPC § 2-702(a)-(b). The rule applies for purposes of the UPC and any donative provision of a governing instrument, other than TOD security registration. In light of the expanded rule, the separate 120-hour survival requirement for intestate succession appears redundant, although it remains unclear whether the 120-hour survival requirement applies when it results in escheat. *See id.* § 2-104.

which were conspicuously omitted from the 1990 version of the statute.[133] Indeed, even without the technical amendment, a registering entity that wished to do so could have adopted the 120-hour survival requirement as part of the terms and conditions of TOD registration.[134] By the same token, notwithstanding the extension of the general rule to TOD security registrations, a registering entity has the same opportunity as any other payor to override the 120-hour survival requirement by an explicit provision in the governing instrument.

When a disposition fails because an applicable survival requirement is not met, the disposition of the underlying property may raise additional constructional problems. In the will context, an "antilapse" statute does not prevent a devise from failing; it prevents the property from becoming part of the testator's general assets by implying a substitute disposition in favor of the predeceased devisee's surviving descendants, if any. The original UPC, for example, provided such a substitute disposition if the predeceased devisee was a grandparent, or a lineal descendant of a grandparent, of the testator.[135] Like other rules of construction, antilapse statutes yield to a contrary intent expressed in the will.[136] Courts routinely hold that a bare survival requirement in a will sufficiently expresses an intent to negate the application of a conventional antilapse statute, even if as a result the property passes by intestacy or in a manner clearly not intended by the testator.[137] Occasionally, however, courts

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[133] The official comment to the 1990 version explained that for purposes of the TOD provisions survival was used in the conventional sense of "outliving another for any time interval no matter how brief . . . to avoid imposition of a new and unfamiliar meaning of the term on intermediaries familiar with the meaning of 'survive' in joint tenancy registrations." UPC § 6-301 cmt.

[134] *See id.* § 6-310(a) (registering entity may establish terms and conditions for accepting and implementing registrations in beneficiary form).

[135] The deceased devisee's descendants who survived the testator by 120 hours took their ancestor's devise as substitute takers by representation. *See id.* § 2-605 (pre-1990).

[136] *See* UPC, art. 2, pt. 6, general cmt. (pre-1990).

[137] For example, in *In re* Estate of Stroble, 636 P.2d 236 (Kan. Ct. App. 1981), the testator's will purported to disinherit her estranged husband, and devised the residuary estate to her mother "if she shall survive me by 30 days." The testator and her mother died on the same date; since the mother failed to survive for 30 days, the actual order of deaths was immaterial. The court held that the survival requirement prevented application of the antilapse statute, with the result that the residuary estate passed to the testator's husband by intestacy. *See also* Harris Trust and Savings Bank v. Beach, 495 N.E.2d 1173 (Ill. App. Ct. 1986); *In re* Estate of Burruss, 394 N.W.2d 466 (Mich. Ct. App. 1986). *But see In re* Estate of Bulger, 586 N.E.2d 673 (Ill. App. Ct. 1991); Estate of

strain to avoid a lapse by interpreting a survival requirement as inapplicable or satisfied on particular facts.[138]

The 1990 UPC revisions attempt to give the antilapse statute for wills "the widest possible latitude to operate" without foreclosing inquiry into the testator's intent.[139] For example, the revised statute expressly provides that "words of survivorship . . . are not, in the absence of additional evidence, a sufficient indication" of an intent to override antilapse treatment.[140] The statute also provides that an alternative devise conditioned on the nonsurvival of the primary devisee supersedes a substitute disposition "only if an expressly designated devisee of the alternative devise is entitled to take under the will."[141] Thus, a residuary clause that specifically includes "all lapsed or failed nonresiduary devises" apparently prevents the antilapse statute from operating on non-residuary devises.[142] The revised anti-

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Kehler, 411 A.2d 748 (Pa. 1980).

[138] *See, e.g., In re* Estate of Ulrikson, 290 N.W.2d 757 (Minn. 1980) (residuary devise to testator's brother and sister or the survivor; words of survivorship did not apply where both siblings predeceased testator, leaving antilapse statute free to operate); Henderson v. Parker, 728 S.W.2d 768 (Tex. 1987) (devise to "surviving children" interpreted to mean children living at execution of will).

[139] *See* UPC § 2-603 cmt.

[140] *See id.* § 2-603(b)(3). This reversal of a substantial body of case law concerning the effect of words of survivorship, *see supra* note 137 and accompanying text, has proved especially controversial. *See* Mark L. Ascher, *The 1990 Uniform Probate Code: Older and Better, or More Like the Internal Revenue Code?*, 77 MINN. L. REV. 639, 649-57 (1993); Mary Louise Fellows, *Traveling the Road of Probate Reform: Finding the Way to Your Will (A Response to Professor Ascher)*, 77 MINN. L. REV. 659, 674-80 (1993); Mark L. Ascher, *A Response to Professor Fellows*, 77 MINN. L. REV. 683, 683-87 (1993); Averill, *supra* note 2, at 921-25; Martin T. Begleiter, *Article II of the Uniform Probate Code and the Malpractice Revolution*, 59 TENN. L. REV. 101, 126-30 (1991); Sheldon F. Kurtz, *Powers of Appointment Under the 1990 Uniform Probate Code: What Was Done—What Remains to be Done*, 55 ALB. L. REV. 1151, 1188-89 (1992); Halbach & Waggoner, *supra* note 55, at 1109-15.

[141] UPC § 2-603(b)(4). Thus, if *T* devises property "to *X*, or if *X* predeceases *T* to *Y*" and *X* predeceases *T* leaving issue who survive *T* by 120 hours, the alternative devise to *Y* takes effect if *Y* survives *T* by 120 hours. If *Y* fails to survive *T* by 120 hours, the substitute gift to *X*'s issue takes effect. *See id.* § 2-603 cmt. The revised statute also codifies the result in *In re* Estate of Ulrikson, 290 N.W.2d 757 (Minn. 1980). *See id.* § 2-603 cmt., example 5 (1990).

[142] *See* UPC § 2-603(a)(1). Indeed, the official comment describes such a clause as a "foolproof" method of negating the application of the antilapse statute. *Id.* § 2-603 cmt. Nevertheless, just as words of survivorship may represent "no more than a casual duplication of the survivorship requirement imposed by the rule of lapse, with no independent purpose," Halbach & Waggoner, *supra* note 55, at 1109, broad language like that quoted in the text may well represent no more than a casual duplication of the dispositive effect of the rule of lapse.

lapse statute cannot completely eliminate uncertainty concerning its application in particular cases, any more than it can compel clarity in will drafting. The statute does, however, reduce the likelihood of litigation in marginal cases and may help to implement the average testator's probable intent.

The rationale of the antilapse statute applies with equal force to nonprobate transfers. In view of the close analogy between a specific devise and a beneficiary designation, the 1990 UPC revisions introduce a separate statute for deathtime transfers of nonprobate assets which mirrors the antilapse statute.[143] The UPC drafters speculate that the nonprobate statute may be especially helpful because many beneficiary designations are drafted without the assistance of a lawyer.[144] As a practical matter, however, many institutional payors use standardized governing instruments that expressly provide for the contingency of a predeceased beneficiary.[145] The impact of the nonprobate statute should closely approximate that of the antilapse statute.

In the trust context, the UPC introduces a separate statute for future interests under trusts which replaces the traditional constructional preference for early vesting with a statutory presumption modeled on the antilapse statute.[146] The statute

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[143] *See* UPC § 2-706. The official comment to the antilapse statute indicates that it would be "anomalous" to treat devises and beneficiary designations differently in this respect. *Id.* § 2-603 cmt. Although wills and beneficiary designations require different terminology, the two statutes are essentially identical in operation, except that the provisions of the antilapse statute concerning residuary devises have no counterpart in the nonprobate context. A technical amendment proposed in 1993 provides that the statute does not apply to property held in joint tenancy or joint accounts, although it apparently does apply to POD accounts and securities registered in TOD form. For most other purposes, the UPC treats a joint account as a revocable transfer rather than a joint tenancy. *See id.* § 1-201(26).

[144] *See id.* § 2-603 cmt. On the other hand, the cases concerning wills drafted by lawyers offer little reason to expect that the participation of a lawyer would alleviate the need for a statutory solution.

[145] The UPC provides that a TOD registration may include a substitute disposition to a named beneficiary's "lineal descendants per stirpes" ("LDPS"). It also authorizes a registering entity to establish terms and conditions which may—or may not—include a provision "substituting a named beneficiary's descendants to take in the place of the named beneficiary in the event of the beneficiary's death." UPC § 6-310(a); *cf.* MO. REV. STAT. § 461.045 (1986 & Supp. 1992) (antilapse presumption for certain nonprobate transfers, rebuttable by including "no LDPS" in beneficiary designation).

[146] *See* UPC § 2-707. For a detailed discussion of this provision, see Fratcher, *supra* note 115. Under the traditional approach, a future interest failed entirely if the beneficiary did not meet an applicable survival requirement. Courts often avoided this result by invoking a constructional preference for early vesting which ensured that a vested

presumes that a trust beneficiary must survive to the time the beneficiary's interest becomes possessory; if the beneficiary dies before that time the statute provides a substitute disposition in favor of the beneficiary's surviving descendants, if any. Although the statute sweeps more broadly than the antilapse statute, it represents a substantial step toward harmonizing the treatment of wills and trusts that function as will substitutes.[147]

C. *Divorce*

Another recurring constructional problem arises when a testator or owner becomes divorced but fails to revoke provisions for the former spouse under a will or will substitute executed before the divorce.[148] In the absence of an applicable statute, divorce alone has no effect on the former spouse's rights as a devisee, beneficiary or joint tenant.[149] The UPC, however, like most contemporary probate codes, provides that divorce automatically revokes any disposition previously made by will to the testator's

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future interest passed to the deceased beneficiary's testate or intestate successors. *See, e.g.*, Hinds v. McNair, 413 N.E.2d 586 (Ind. Ct. App. 1980); Detroit Bank & Trust Co. v. Grout, 289 N.W.2d 898 (Mich. Ct. App. 1980); *cf.* Zweifel v. Dougherty, 761 S.W.2d 215 (Mo. Ct. App. 1988) (deed of land). By abolishing the preference for early vesting, the UPC opens the way to introduce antilapse principles by analogy into the law of trusts.

[147] The UPC's rule for trusts, unlike the antilapse statute for wills, does not require any particular relationship between the settlor and the beneficiary. Moreover, its implied survivorship requirement relates to the time a beneficial interest becomes possessory, which need not coincide with the settlor's death. Commentators, and occasionally courts, have endorsed the notion of applying antilapse principles either directly or by analogy to revocable trusts that function as will substitutes. *See* Dewire v. Haveles, 534 N.E.2d 782 (Mass. 1989); Dollar Savings & Trust Co. v. Turner, 529 N.E.2d 1261 (Ohio 1988); *In re* Estate of Button, 490 P.2d 731 (Wash. 1971); RESTATEMENT (SECOND) OF PROPERTY (Donative Transfers) § 27.1 cmt. e, § 27.2 cmt. f (1987). A few states have enacted statutes adopting a comparable constructional rule. *See, e.g.*, CAL. PROB. CODE § 6147 (West 1991) (devise to kindred of testator or testator's spouse); ILL. COMP. STAT. ch. 755, § 5/4-11 (1992) (devise to testator's descendant); 20 PA. CONS. STAT. § 2514 (1992) (devise to class); TENN. CODE. ANN. § 32-3-104 (1984) (class gift).

[148] For this purpose, the UPC treats divorce and annulment identically. *See* UPC §§ 2-804(a)(2), 2-804(b)(1); UPC § 2-508 (pre-1990). On the former spouse's rights as beneficiary of life insurance and other will substitutes generally, see Mark Davis, Note, *Life Insurance Beneficiaries and Divorce*, 65 TEX. L. REV. 635 (1987); Robert J. Lynn, *Will Substitutes, Divorce, and Statutory Assistance for the Unthinking Donor*, 71 MARQ. L. REV. 1 (1987); Alan S. Wilmit, Note, *Applying the Doctrine of Revocation by Divorce to Life Insurance Policies*, 73 CORNELL L. REV. 653 (1988).

[149] *See* ATKINSON, *supra* note 12, § 85, at 431-32 (wills); COUCH, *supra* note 14, § 112, at 777-85 (life insurance); II AMERICAN LAW OF PROPERTY § 6.2, at 7-11 (A. James Casner ed., 1952 & Supp. 1977) (joint tenancy).

former spouse, unless the will expressly provides otherwise.[150] While framed in terms of revocation by operation of law,[151] the statute operates as a rule of construction. In effect, it makes any devise to a person who is a spouse of the testator at or after the execution of the will conditional on the devisee being married to the testator at the testator's death, unless the will expresses a contrary intent. Since most revocation-by-divorce statutes refer expressly to wills, however, courts have generally refused to apply them directly or by analogy to will substitutes.[152] Some courts, however, have adopted a more flexible approach.

In *Clymer v. Mayo*[153] the court broke new ground by applying a revocation-by-divorce statute to an inter vivos trust. In that case, the settlor, while married, executed a will and an unfunded revocable trust agreement that included substantial dispositions in favor of her husband if he survived her. The trust was to be funded at the settlor's death with a pourover devise of her residuary estate and with proceeds of retirement annuity contracts payable at death directly to the trustees. The settlor divorced and then died without having amended the will, the trust agreement or the beneficiary designation in the annuity contracts. The court recognized that the will and the trust were "integrally related components of a single testamentary scheme" and that to treat them as separate dispositions would produce "inconsistent results."[154] Accordingly, the court applied the stat-

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[150] *See* UPC § 2-804(b)(1); UPC § 2-508 (pre-1990). Like the original UPC, the revised UPC also revokes powers of appointment created in or exercised in favor of the former spouse, and any nomination of the former spouse as a fiduciary. If the testator remarries the former spouse, any provisions revoked solely by the divorce are revived. *See* UPC § 2-804(e); UPC § 2-508 (pre-1990).

[151] This approach stems from the common-law doctrine of revocation by operation of law on subsequent marriage (in the case of a woman) or marriage and birth of issue (in the case of a man). *See* ATKINSON, *supra* note 12, § 85, at 431-32. The original UPC, like most contemporary probate codes, protects the surviving spouse's rights in a more sophisticated manner, *see* UPC §§ 2-201, 2-301, and sharply limits revocation by operation of law, *see id.* § 2-804(f).

[152] *See, e.g.*, Adams Estate, 288 A.2d 514 (Pa. 1972) (life insurance); Equitable Life Assurance Soc'y v. Stitzel, 1 Pa. Fiduc. 2d 316 (1981) (life insurance).

[153] 473 N.E.2d 1084 (Mass. 1985).

[154] 473 N.E.2d at 1092. Outright devises under the settlor's will to her former spouse were deemed revoked under the statute and fell into the residuary estate which poured over to the trust. The trust included a marital deduction portion (Trust A) and a residuary portion (Trust B) with income payable to the former spouse for life. Since the settlor was unmarried at death, the marital deduction was unavailable and Trust A failed for impossibility; consequently, all the assets that poured over from the will ended up in

ute directly to the trust, with the result that the former spouse forfeited his interest in all the trust property, including the annuity contract proceeds which never passed through the probate estate.[155] Although the court in *Clymer* narrowly tailored its holding to the facts before it, the court left open the possibility of fashioning an analogous constructional rule for will substitutes that fall outside the scope of the revocation-by-divorce statute.[156]

In the absence of an applicable statute, unrevoked beneficiary designations in favor of a divorced owner's former spouse continue to breed litigation. A comprehensive property settlement agreement in connection with the divorce may merely compound the problem. In contrast to the liberal construction of such agreements with respect to probate assets,[157] most courts

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Trust B. Failure to apply the statute to Trust B would have restored to the former spouse a life income interest in the very assets which he forfeited under the statute. The court could have reached the same result, while avoiding the issue of impossibility, by applying the statute to Trust A as well as to Trust B.

[155] Although the court might have strained the doctrine of incorporation by reference to reach a similar result, it sensibly declined to do so. *See* 473 N.E.2d at 1093. Properly applied, incorporation by reference merely validates dispositions in a will by reference to certain written instruments; it does not modify the terms of the incorporated instrument, nor does it transform nonprobate assets into probate assets. *But cf.* Miller v. First Nat'l Bank & Trust Co., 637 P.2d 75 (Okla. 1981) (relying on incorporation by reference to bring unfunded pourover trust within scope of revocation-by-divorce statute).

[156] The court restricted its holding to "the particular facts of this case—specifically the existence of a revocable pour-over trust funded entirely at the time of the decedent's death." 473 N.E.2d at 1093. (Some commentators might argue that the trust was funded in part when the settlor designated beneficiaries under the annuity contracts.) Had the trust been funded in part during life and in part at death, the court might well have refused to apply the revocation-by-divorce statute while reaching the same result under an analogous constructional rule.

Lower courts, however, may be reluctant to fashion such a constructional rule. In Stiles v. Stiles, 487 N.E.2d 874 (Mass. App. Ct. 1986), an employee, divorced and remarried, died without having expressly revoked a pre-divorce beneficiary designation in favor of his former spouse. In determining that the decedent's surviving spouse (rather than his former spouse) was entitled to receive the decedent's accrued vacation and sick pay, the court relied on statutes specifically governing the benefits in question and did not cite *Clymer*.

[157] The UPC, for example, presumes that a "complete property settlement" in connection with a divorce operates as a waiver by each spouse of any elective share, statutory allowance or benefit passing from the other spouse by intestate succession or under a previously-executed will. *See* UPC § 2-204(d). Indeed, the statutory presumption applies if the property settlement is entered into after or in anticipation of separation, even if no divorce is sought or obtained. A parallel rule of construction for nonprobate assets would further reduce disparities between the treatment of wills and will substitutes.

hold that an agreement awarding exclusive ownership of a life insurance policy or pension account to one spouse has no effect on an existing beneficiary designation in favor of the other spouse unless the beneficiary spouse explicitly waives the right to receive the property at the owner-spouse's death.[158] Of course, a court may find that a particular agreement sufficiently expresses the spouses' intent to terminate an existing beneficiary designation even in the absence of an explicit waiver.[159] Several states have attempted to reduce litigation and give effect to the average owner's presumed intent by enacting revocation-by-divorce statutes concerning contractual death benefits,[160] revocable trusts[161] and joint tenancies.[162]

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[158] *See* COUCH, *supra* note 14, § 115, at 791-95; *see, e.g.*, Lyman Lumber Co. v. Hill, 877 F.2d 692 (8th Cir. 1989) (qualified profit sharing plan); *In re* Estate of Schleis, 642 P.2d 164 (N.M. 1982) (life insurance); Culbertson v. Continental Assurance Co., 631 P.2d 906 (Utah 1981) (profit-sharing plan and life insurance); Bersch v. VanKleeck, 334 N.W.2d 114 (Wis. 1983) (life insurance). One court, however, has recently adopted a presumption that a comprehensive property settlement overrides existing designations of life insurance beneficiaries. *See* Vasconi v. Guardian Life Ins. Co., 590 A.2d 1161 (N.J. 1991).

Under certain employee benefit plans, at the death of a divorced participant a beneficiary designation in favor of the surviving former spouse must generally be respected except to the extent overridden by a "qualified domestic relations order" or by the right of a surviving spouse to receive a survivor annuity. *See* McMillan v. Parrott, 913 F.2d 310 (6th Cir. 1990) (surviving spouse entitled to half proceeds as survivor annuity, former spouse designated as beneficiary entitled to balance); *cf.* Fox Valley & Vicinity Construction Workers Pension Fund v. Brown, 897 F.2d 275 (7th Cir. 1989) (en banc) (divided court upheld beneficiary's specific waiver by analogy to life insurance cases).

[159] *See, e.g.*, Beneficial Life Ins. Co. v. Stoddard, 516 P.2d 187 (Idaho 1973) (life insurance); Sorenson v. Nelson, 342 N.W.2d 477 (Iowa 1984) (life insurance); Hollaway v. Selvidge, 548 P.2d 835 (Kan. 1976) (life insurance); Phillips v. Pelton, 461 N.E.2d 305 (Ohio 1984) (life insurance).

[160] The Ohio and Oklahoma statutes cover a variety of contractual death benefits, including life insurance, annuities, POD accounts and employee death benefits. *See* OHIO REV. CODE ANN. § 1339.63 (1988 & Supp. 1992); OKLA. STAT. tit. 15, § 178 (1991). The Michigan and Texas statutes apply specifically to life insurance, annuities and employee benefits. *See* MICH. COMP. LAWS § 552.101 (1991); TEX. FAM. CODE ANN. §§ 3.632, .633 (West 1993).

The Missouri nonprobate transfers law provides that when a nonprobate transfer is revoked by divorce, the owner's surviving spouse and children (or their descendants), if any, automatically become entitled to the underlying property, without regard to any alternative disposition provided in the governing instrument. *See* MO. REV. STAT. § 461.051(1) (1986 & Supp. 1992). The substitute disposition under the Missouri law not only departs from the analogous provision for wills but may drastically distort the owner's dispositive plan. The substitute disposition does not apply to life insurance or to revocable trusts. *See id.* §§ 461.073(5)-.073(6).

[161] *See, e.g.*, OHIO REV. CODE ANN. § 1339.62 (1988); OKLA. STAT. tit. 60, § 175 (1991).

The 1990 UPC revisions extend the revocation-by-divorce statute to cover virtually all will substitutes. The revised statute provides that divorce revokes any revocable disposition made by a divorced individual in favor of the former spouse under a will or other governing instrument executed before divorce.[163] Revoked dispositions include not only devises but also revocable beneficiary designations with respect to deathtime transfers of nonprobate assets and revocable dispositions under a deed or trust.[164] The dispositive provisions of the governing instrument take effect "as if the former spouse and relatives of the former spouse disclaimed the revoked provisions."[165] In addition, the revised statute provides that divorce severs any joint tenancy between spouses.[166] Statutory revocation occurs automatically on divorce, except as provided by the "express terms" of a governing instrument, court order or property settlement agreement.[167] Although courts may occasionally have to determine whether particular language overrides the statutory presumption in favor of revocation,[168] the revised statute represents a signifi-

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[162] *See, e.g.*, MICH. COMP. LAWS § 552.102 (1991); OHIO REV. CODE ANN. § 5302.20(c)(5) (1986).

[163] *See* UPC § 2-804.

[164] Statutory revocation does not apply, however, to a disposition made by one person in favor of another person's former spouse. Thus, if *A*'s parent creates a trust for the benefit of *A* and *A*'s spouse *B*, with a power exercisable solely by *A* to revoke or amend the trust, a divorce between *A* and *B* does not revoke the provisions in favor of *B*.

[165] UPC § 2-804(d). Thus, in the case of a will and most will substitutes, the former spouse and relatives are treated as predeceased. *See id.* §§ 2-804(d) (effect of revocation), 2-801(d) (effect of disclaimer). The original UPC provided simply that the revoked devise passed as if the former spouse predeceased the testator. *See* UPC § 2-508 (pre-1990). A technical amendment proposed in 1993 revises the provision as described in text, to clarify that revoked dispositions may pass to descendants of the former spouse as substitute takers under an antilapse (or similar) statute.

[166] UPC § 2-804(b)(2). The UPC excludes a multiple-party account with right of survivorship—including a reclassified common-law joint account—from the definition of a joint tenancy. *See id.* § 1-201(26). Presumably, a divorce would merely eliminate the survivorship right of each spouse in such an account but would not affect the lifetime ownership rights of the respective spouses.

[167] *Id.* § 2-804(b).

[168] For example, if a property settlement agreement states that "beneficiary designations shall be treated as revoked only as expressly provided herein," should the quoted language prevent revocation, in the absence of any provision concerning a particular beneficiary designation? Courts have faced a similar problem in determining whether a general waiver of property rights is sufficiently explicit to override the common-law presumption *against* revocation. Faced with ambiguous language, one court has resorted to extrinsic evidence of intent. *See, e.g.*, Life Ins. Co. of North America v. Cassidy, 676 P.2d 1050 (Cal. 1984).

cant step toward reducing litigation and preventing unintended dispositive consequences.

Under the revised UPC, divorce also revokes dispositions made by a divorced individual in favor of the former spouse's relatives to the same extent as those in favor of the former spouse.[169] This innovation would have a substantial impact on a case like *Clymer*, for example, where the trust provided an alternative disposition in favor of the settlor's "nephews and nieces"—all related to the settlor solely through her former spouse.[170] The *Clymer* court, applying the original UPC, refused to imply a revocation of the disposition in favor of the former spouse's relatives.[171] By contrast, the revised UPC would revoke the alternative disposition, based on an untested assumption about the likely level of antagonism between a divorced individual and the former spouse's relatives.[172] The UPC should probably limit the strong presumption of revocation to dispositions in favor of the former spouse, where revocation reflects the divorced individual's probable intent most reliably, and allow more flexibility in interpreting other dispositions.

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[169] UPC § 2-804(b)(1). The former spouse's relatives do not include any individual who, after the divorce, was related to the decedent by blood, adoption or affinity. *Id.* § 2-804(a)(5). Thus, for example, a disposition in favor of a former spouse's child who was adopted by the decedent is not revoked.

[170] 473 N.E.2d 1084, 1094 (Mass. 1985). The trust instrument provided for discretionary distributions to the settlor's nephews and nieces if her husband failed to survive her. Since the statute provided that a revoked devise passed as if the former spouse failed to survive the decedent, the express condition of the husband's nonsurvival did not prevent the alternative disposition to the nephews and nieces from taking effect. The revised UPC presumes that a class gift to "nephews and nieces" excludes relatives by affinity, *see* UPC § 2-705(a), but the presumption should be rebutted if, as in *Clymer*, there were no living blood relatives who met the class description when the governing instrument was executed. *See* RESTATEMENT (SECOND) OF PROPERTY (Donative Transfers) § 25.8 cmt. e (1987).

[171] 473 N.E.2d at 1095-96. In this respect, the *Clymer* court's interpretation of the statute is typical. *See, e.g.*, Porter v. Porter, 286 N.W.2d 649 (Iowa 1979) (devise to former spouse's child); Bloom v. Selfon, 555 A.2d 75 (Pa. 1989) (devise to former spouse's uncle).

[172] "[D]uring the divorce process or in the aftermath of the divorce, the former spouse's relatives are likely to side with the former spouse, breaking down or weakening any former ties that may previously have developed between the transferor and the former spouse's relatives . . . ." UPC § 2-804 cmt. *But see* Porter v. Porter, 286 N.W.2d 649 (Iowa 1979) (finding testator intended to favor former spouse's child over own children).

D. *Homicide*

A person who unlawfully and intentionally kills another generally forfeits any right to receive property from the victim by testate or intestate succession.[173] In many states, early decisions reaching a contrary result have been reversed by statute.[174] In the absence of an applicable statute, contemporary courts hold that the killer either takes no legal title to the victim's property or takes title as constructive trustee for the benefit of the victim's other successors.[175] Although the general principles of preventing the killer's unjust enrichment and preserving the victim's dispositive freedom should produce comparable results in the context of will substitutes such as life insurance,[176] joint bank accounts[177] and other jointly-owned property,[178] applying these principles has proved especially troublesome in two respects.

First, a statute that expressly regulates the effect of homicide on testate or intestate succession but does not extend to will substitutes may produce anomalous results. This problem is

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[173] On the common-law background and the statutory response to the problem of killer-beneficiaries generally, see Mary Louise Fellows, *The Slayer Rule: Not Solely A Matter of Equity*, 71 IOWA L. REV. 489 (1986); Linda J. Maki & Alan M. Kaplan, *Elmer's Case Revisited: The Problem of the Murdering Heir*, 41 OHIO ST. L.J. 905 (1980); William M. McGovern, Jr., *Homicide and Succession To Property*, 68 MICH. L. REV. 65 (1969); John W. Wade, *Acquisition of Property By Willfully Killing Another—A Statutory Solution*, 49 HARV. L. REV. 715 (1936).

[174] Examples of statutes enacted to overrule early cases are noted in Bradley v. Fox, 129 N.E.2d 699 (Ill. 1955); *In re* Estate of Foster, 320 P.2d 855 (Kan. 1958); Garner v. Phillips, 47 S.E.2d 845 (N.C. 1948); and *In re* Tarlo's Estate, 172 A. 139 (Pa. 1934).

[175] While several older leading cases held that the killer acquired no legal title, *see, e.g.*, Perry v. Strawbridge, 108 S.W. 641 (Mo. 1908); Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889), modern courts favor the constructive trust approach, *see, e.g.*, Kelley v. State, 196 A.2d 68 (N.H. 1963); Garner v. Phillips, 47 S.E.2d 845 (N.C. 1948); *In re* Will of Wilson, 92 N.W.2d 282 (Wis. 1958). Although the distinctions between the two approaches are mainly procedural, a bona fide purchaser from the killer would be protected only under the constructive-trust approach. On constructive trusts generally, see RESTATEMENT OF RESTITUTION § 187 (1937). SCOTT, *supra* note 13, § 492, at 436-40.

[176] *See* COUCH, *supra* note 14, §§ 27:149-:165, at 840-69; RESTATEMENT OF RESTITUTION § 189 (1937); SCOTT, *supra* note 13, § 494.1, at 486-92.

[177] *See, e.g.*, Glass v. Adkins, 436 So. 2d 844 (Ala. 1983) (killer forfeited right to account where victim furnished consideration); Vesey v. Vesey, 54 N.W.2d 385 (Minn. 1952) (same). *But cf.* Smith v. Greenburg, 218 P.2d 514 (Colo. 1950) (statutory survivorship right not qualified by equitable principles); Oleff v. Hodapp, 195 N.E. 838 (Ohio 1935) (same).

[178] *See* AMERICAN LAW OF PROPERTY, *supra* note 149, § 6.4, at 16-18; RESTATEMENT OF RESTITUTION § 188 (1937); *see also infra* notes 181-85 and accompanying text.

illustrated by two Illinois decisions involving the same facts. A wife killed her husband, who died intestate and without having made an effective beneficiary designation under his state pension plan. The wife was convicted of voluntary manslaughter. In the first decision, the court held, as a matter of common law, that the wife's intentional killing of her husband disqualified her as a "survivor" eligible for death benefits under the husband's pension plan. Accordingly, the death benefits became part of the husband's probate estate.[179] In the second decision, the court held that a statute which treated a convicted murderer as having predeceased the victim for purposes of testate and intestate succession did not disqualify the wife as sole heir for purposes of intestate succession.[180] The statute superseded the common law disqualification for purposes of the probate code: since the wife stood convicted of manslaughter, not murder, neither the statute nor the common law barred her from taking the husband's property (including the death benefits from the pension plan) by intestate succession. The court apparently saw no anomaly in permitting the wife to receive indirectly, through administration, the same death benefits that she was not permitted to receive directly by nonprobate transfer.

A second problem involves the effect of homicide on a will substitute, such as a joint tenancy or tenancy by the entirety, which confers equal undivided lifetime ownership rights coupled with a right of survivorship. In the common case where two spouses are the only co-tenants, the incidents of both types of tenancy are substantially identical except that a joint tenancy may be severed by either spouse acting alone while a tenancy by the entirety cannot be severed during marriage without the consent of both spouses. When one spouse kills the other, courts have taken divergent views of the extent to which the killer should be permitted to retain a beneficial interest in the underlying property, often without distinguishing between the two forms of co-ownership.[181] Two alternative approaches have be-

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[179] Seipel v. State Employees' Retirement System, 289 N.E.2d 288 (Ill. App. Ct. 1972).

[180] Estate of Seipel, 329 N.E.2d 419 (Ill. App. Ct. 1975). Both cases were decided by unanimous three-judge panels, including two judges who participated in both decisions.

[181] Professor Scott identifies at least five judicial approaches in discussing the extent to which the killer should be permitted to retain property held in joint tenancy or tenancy by the entirety when the killer is the victim's spouse and there are no other surviv-

come widely accepted. Under one view, the homicide severs the co-tenancy, leaving the victim and the killer (or their respective successors) with equal undivided interests in the property as tenants in common.[182] Under the other view, the killer retains a beneficial income interest for life (or its commuted value), but holds the rest of the property as constructive trustee for the victim's other successors.[183] Both approaches are based on the notion that the killer should neither gain nor lose as a result of the homicide, but should be put in the same position as if the homicide had not occurred.[184] The discrepancy between the alternative measures of gain or loss reflects the difficulty of ascertaining how long each co-tenant would have lived and how long the co-tenancy would have lasted had the homicide not occurred. Courts do not hesitate to resolve factual uncertainties arising from the homicide against the killer.[185]

The original UPC disqualified a person who "feloniously and intentionally" killed another from taking property as a result of the victim's death by testate or intestate succession or as designated beneficiary under a life insurance policy or other contractual arrangement.[186] In the case of a joint tenancy or multiple-party account, the original UPC treated the homicide as severing the joint tenancy and defeating the killer's right of

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ing co-tenants: (1) the killer retains the entire property (*see* Beddingfield v. Estill & Newman, 100 S.W. 108 (Tenn. 1907)); (2) the killer retains the entire property subject to an equitable charge for the commuted value of the victim's life interest (*see* Sherman v. Weber, 167 A. 517 (N.J. Ch. 1933)); (3) the killer retains a life estate in the entire property (*see* Bryant v. Bryant, 137 S.E. 188 (N.C. 1927)), or a lien for the commuted value of a life estate in half the property (*see* Neiman v. Hurff, 93 A.2d 345 (N.J. 1952)); (4) the killer retains nothing (*see* Van Alstyne v. Tuffy, 103 Misc. 455, 169 N.Y.S. 173 (N.Y. Sup. Ct. 1918)); and (5) the killer retains an undivided one-half interest as tenant in common (*see* Grose v. Holland, 211 S.W.2d 464 (Mo. 1948)). *See* SCOTT, *supra* note 13, § 493.2, at 475-85.

[182] The killer, of course, is barred from taking any portion of the victim's share. *See, e.g.*, Ashwood v. Patterson, 49 So. 2d 848 (Fla. 1951); Bradley v. Fox, 129 N.E.2d 699 (Ill. 1955); Maine Savings Bank v. Bridges, 431 A.2d 633 (Me. 1981); Grose v. Holland, 211 S.W.2d 464 (Mo. 1948); Duncan v. Vassaur, 550 P.2d 929 (Okla. 1976); *In re* Estate of Safran, 306 N.W.2d 27 (Wis. 1981).

[183] *See, e.g.*, Neiman v. Hurff, 93 A.2d 345 (N.J. 1952); Hargrove v. Taylor, 389 P.2d 36 (Or. 1964); Colton v. Wade, 80 A.2d 923 (Del. Ch. 1951); *see also* RESTATEMENT OF RESTITUTION § 188 (1937).

[184] In other words, to prevent unjust enrichment, the killer should disgorge any benefit to the extent—but only to the extent—attributable to the homicide.

[185] *See* SCOTT, *supra* note 13, § 493.2, at 479-80; RESTATEMENT OF RESTITUTION § 187 cmt. a (1937).

[186] *See* UPC §§ 2-803(a), (c) (pre-1990).

survivorship.[187] Whether a killing was felonious and intentional was determined conclusively by a conviction in criminal proceedings or by a preponderance of the evidence in a civil proceeding.[188] Situations not specifically covered were to be treated "in accordance with the principles of [the statute]."[189] Under the original UPC, the estate of the victim passed "as if the [disqualified] killer had predeceased the decedent."[190] One problem with this mechanical rule may be illustrated by a hypothetical example. Assume that the victim (*G*) is unmarried and has two children, of whom one is the disqualified killer (*A*) and the other is actually predeceased (*B*). If *G* dies intestate, survived at least 120 hours by *A*, *A*'s two children and *B*'s only child, the literal terms of the original UPC gave *B*'s child only one third of *G*'s estate instead of the half the child would have taken had *A* died of natural causes.[191]

The 1990 UPC revisions refine the original statute in several respects and reformulate the operative provisions in terms substantially parallel to the revocation-by-divorce statute.[192] The revised statute expressly applies to intestate succession, joint tenancies and dispositions under a will or other governing instrument. A felonious and intentional killing[193] is treated as re-

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[187] *Id.* § 2-803(b) (pre-1990). The provision included tenancies by the entirety in brackets, presumably to accommodate local variations in existing case law.

[188] *Id.* § 2-803(e) (pre-1990). Thus, a killer who was acquitted or entered a negotiated plea bargain to a lesser offense in a criminal proceeding might still be disqualified in a civil proceeding. Similarly, if the killer committed suicide before trial the question of disqualification might be raised in a civil proceeding. *See id.* cmt.

[189] *Id.* § 2-803(d) (pre-1990).

[190] *Id.* § 2-803(a) (pre-1990).

[191] *See* UPC §§ 2-803(a) (estate passes as if *B* predeceased *A*), 2-103 (estate passes to *A*'s descendants by representation), 2-106 (each child of *B* or *C* takes equal share if *B* and *C* both predeceased; *B*'s children take one half and *C*'s child takes one half if *B* not predeceased) (pre-1990); JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS AND ESTATES 120-21, 124-25 (4th ed. 1990).

[192] *See* UPC § 2-803.

[193] The standard for determining a felonious and intentional killing remains substantially unchanged. In the absence of a criminal conviction, an interested person may seek a determination "whether, under the preponderance of evidence standard, the individual would be found criminally accountable for the felonious and intentional killing of the decedent." *Id.* § 2-803(g). This language is apparently intended to clarify that an accomplice or co-conspirator as well as a killer may be disqualified. *See id.* cmt. Unfortunately, it could be read to require a finding (by a preponderance of the evidence) that an individual would actually have been found criminally accountable—*i.e.*, convicted under a reasonable-doubt standard—had a criminal proceeding taken place. It should, however, be read to require only that the substantive elements of a felonious and intentional kill-

voking any disposition under a will or governing instrument in the killer's favor that the victim could have unilaterally revoked;[194] provisions that are not revoked take effect "as if the killer disclaimed all revoked provisions."[195] A felonious and intentional killing also converts a joint tenancy or tenancy by the entirety between the killer and the victim into a tenancy in common.[196] Finally, the statute directs that any "wrongful acquisition" of property by a killer not otherwise covered be treated "in accordance with the principle that a killer cannot profit from his [or her] wrong."[197] This open-ended provision may reflect a recognition by the UPC drafters that even a well-conceived statute lacks the flexibility of traditional equitable remedies for unjust enrichment.

E. *Disclaimer*

A person who refuses to accept an interest in property under a will or will substitute usually does so with the intent either to shield the property from creditors' claims or to reduce the impact of gift, estate or inheritance taxes. A valid disclaimer defeats the disposition in favor of the disclaimant and permits the disclaimed interest to pass directly to alternative or residuary takers under the will or other governing instrument, or by intestate succession.[198] Since a disclaimer "relates back" to the

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ing be proved by a preponderance of the evidence in a civil proceeding.

[194] *Id.* § 2-803(c)(1). Multiple-party accounts with right of survivorship are treated as revocable dispositions rather than joint tenancies. *See id.* §§ 1-201(26), 2-803 cmt. For a discussion of deemed revocation in the context of assisted suicide, see Jeffrey G. Sherman, *Mercy Killing and the Right to Inherit*, 61 U. CIN. L. REV. 803 (1993).

[195] UPC § 2-803(e). The disclaimer provisions attempt to prevent a disclaimant from manipulating the amount of a share passing to the disclaimant's descendants by providing a substitute gift. *See infra* notes 207-08 and accompanying text; WAGGONER ET AL., *supra* note 56, at 459 ("this means that the killer is treated as having predeceased the decedent for purposes of allowing the killer's interest to pass to her or his surviving descendants, if any, but not for purposes of changing the shares").

[196] UPC § 2-803(c)(2).

[197] *Id.* § 2-803(f). This provision, for example, might be intended to reach a case where an individual procures the death of another in order to divert a gift to the natural objects of the killer's bounty. *See* WAGGONER ET AL., *supra* note 56, at 459. On the other hand, if the killer does not acquire property or an interest in property, the provision might not apply.

[198] *See* UPC § 2-801(d). If the disclaimant is also the alternative taker, a disclaimer of the primary disposition does not prevent the property from passing to the disclaimant under the alternative disposition. *See, e.g.*, Cook v. Dove, 203 N.E.2d 892 (Ill. 1965) (appointee disclaimed property passing under exercised power of appointment while ac-

time of the transfer, the disclaimant's creditors normally cannot reach the disclaimed interest.[199] Moreover, if the disclaimer meets the independent requirements of applicable federal tax law, the transaction is treated for federal tax purposes as if the disclaimed interest passed directly from the testator or owner to the ultimate recipient without passing through the disclaimant's hands.[200]

The common law of disclaimers has been largely superseded by statutes which expand the range of interests that may be disclaimed and prescribe formal and procedural requirements for a valid disclaimer.[201] As revised in 1990, the UPC's disclaimer statute authorizes disclaimers of any interest that "devolves by whatever means," including dispositions by intestacy, will or other governing instrument.[202] The 1990 UPC revisions retain the formal requirements for a valid disclaimer essentially unchanged. Generally, a signed writing describing the disclaimed interest and the extent of the disclaimer must be delivered or

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cepting same property as taker in default). Since an heir could not disclaim an intestate share at common law, a residuary devisee who was also an heir could not avoid receiving at least a portion of a decedent's estate.

[199] For purposes of creditors' rights, the effect of the disclaimer is analogous to a release by a donee of a presently-exercisable general power of appointment created by a third party. *See* RESTATEMENT (SECOND) OF PROPERTY (Donative Transfers) §§ 13.2, 14.1 (1984). Nevertheless, under the Bankruptcy Code of 1978, disclaimed property may be included in the disclaimant's bankruptcy estate. *See* 11 U.S.C. § 541 (1988); RESTATEMENT (SECOND) OF PROPERTY (Donative Transfers) § 13.6 (1984); *see, e.g.*, Williams v. Chenoweth (*In re* Chenoweth), 132 B.R. 161 (Bankr. S.D. Ill. 1991).

[200] For federal gift, estate and generation-skipping tax purposes, a "qualified disclaimer" is defined in part by reference to state law and in part by independent federal law. *See* I.R.C. §§ 2518, 2046, 2654(c) (1988).

[201] On the state law treatment of disclaimers generally, see ATKINSON, *supra* note 12, § 139, at 774-76; RONALD BRAND & WILLIAM LAPIANA, DISCLAIMERS IN ESTATE PLANNING (1990); S. Alan Medlin, *An Examination of Disclaimers Under U.P.C. Section 2-801*, 55 ALB. L. REV. 1233 (1992).

[202] UPC § 2-801(a). Unlike the original UPC, which was limited to interests passing by testate or intestate succession or under an exercised testamentary power of appointment, *see* UPC § 2-801(a) (pre-1990), the revised statute embraces at least as broad a range of interests as may be revoked by divorce or homicide. *See infra* note 206 and accompanying text. The disclaimer statute is not limited to dispositions under a governing instrument, since it applies to interests passing by intestacy, but it is unclear whether the statute authorizes disclaimers of beneficial interests created by a trust, contract or gift that is not evidenced by a written instrument. The UPC drafters should consider revising the statute to authorize a disclaimer by a fiduciary of administrative powers that may affect the amount or character of a beneficiary's interest; such a provision could authorize a trustee to disclaim powers that might otherwise jeopardize a marital or charitable deduction for federal gift or estate tax purposes.

filed no later than the expiration of a nine-month disclaimer period, subject to earlier waiver or termination.[203] Although a disclaimer that meets the requirements of the UPC relates back "for all purposes" under state law,[204] failure to satisfy applicable federal tax requirements may produce unwelcome tax consequences.[205]

The revised UPC's disclaimer statute controls the disposition of interests forfeited by a former spouse or killer under the statutes concerning divorce and homicide, as well as interests actually disclaimed.[206] As applied to a revocable will substitute, the disclaimer statute resembles the antilapse statute: the disclaimed interest normally passes to alternative or residuary takers, if any, under the governing instrument as if the disclaimant predeceased the owner,[207] subject to a saving clause which preserves the right of the disclaimant's surviving descendants to

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[203] *See* UPC §§ 2-801(b), (c). The nine-month period generally runs from (1) the death of the testator or owner in the case of a transfer of a present interest by will or other governing instrument which remained revocable by the owner until death, or (2) "the event determining that the taker of the property or interest is finally ascertained and his [or her] interest is indefeasibly vested" in the case of a future interest. The running of the nine-month period may be postponed in certain cases until the disclaimant learns of "the existence of the interest." *See id.* § 2-801(b)(1)-(2). The right to disclaim may be barred before the end of the nine-month period by a transfer or encumbrance, a written waiver, an acceptance of benefits or a judicial sale. *See id.* § 2-801(e).

[204] *See id.* §§ 2-801(d)(1)-(2). In the case of a transfer under a nontestamentary instrument or contract, the disclaimer relates back to the "effective date" of the instrument. *Id.* § 2-801(d)(2). The effective date of a revocable instrument is defined in the context of the nine-month disclaimer period as "the date on which the maker no longer has power to revoke it or to transfer to himself [or herself] or another the entire legal and equitable ownership of the interest." *Id.* § 2-801(b)(2). The UPC should be revised to clarify the effective date of a governing instrument under which (1) the owner retains a non-general power of appointment, (2) the owner retains a power of appointment exercisable under limited conditions or with the consent of another person, or (3) the owner may be unable by reason of incapacity to exercise a retained power of appointment.

[205] A disclaimer that is valid under the UPC may fail to satisfy the federal tax law requirements for a "qualified disclaimer" in several ways, for example: (1) the disclaimer may be untimely, *see* I.R.C. § 2518(b)(2)(A) (1988); (2) the disclaimed interest may impermissibly pass to the disclaimant under an alternative or residuary disposition or by intestate succession, *see id.* § 2518(b)(4)(B); Treas. Reg. § 25.2518-2(e)(5), Example 1; (3) the disclaimant may retain an impermissible interest or power with respect to disclaimed property, *see* Treas. Reg. § 25.2518-3(d), Examples 2, 9. Conversely, a disclaimer that is untimely under state law may nevertheless be treated as a qualified disclaimer for federal tax purposes under certain circumstances. *See* I.R.C. § 2518(c)(3) (1988).

[206] *See* UPC §§ 2-803(c)(1), 2-804(d).

[207] If the owner's absolute power of revocation terminated before death, the disclaimant would be treated as having predeceased the earlier "effective date" of the instrument. *Id.* § 2-801(d)(2); *see supra* note 204.

take by representation.[208] The official comment illustrates the application of the saving clause in the case of an unmarried, intestate decedent (*G*) survived by one child (*A*), *A*'s two children and the only child of a predeceased child (*B*). *A* disclaims the intestate share. The official comment explains that, but for the saving clause, *A*'s disclaimed interest—one half of the estate—would be divided equally between *G*'s three grandchildren; the saving clause preserves the disclaimed interest solely for *A*'s children.[209] Even in the absence of a saving clause, it should be clear that the general rule treating a disclaimant as predeceased should not affect the devolution of interests that are not disclaimed. Thus, *B*'s child should take half of *G*'s estate by intestate succession whether or not *A* disclaims.[210]

The UPC's treatment of disclaimers of interests in joint tenancy property requires reworking. The statute permits a surviving joint tenant to disclaim at least the accretive portion of the underlying property devolving by right of survivorship (measured by reference to the share of the deceased joint tenant immediately before death). Moreover, the surviving joint tenant may disclaim the "entire interest" if the joint tenancy was created by a deceased joint tenant and the survivor neither joined in its creation nor accepted a benefit under it.[211] For example, assume that *A* furnishes all the consideration for property acquired in the names of *A* and *B* as joint tenants with right of survivorship, and that *B* neither joins in creating the joint tenancy nor accepts a benefit under it. If the joint tenancy remains unsevered at *A*'s death, the statute might view *B* (the surviving

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[208] *See id.* § 2-801(d)(2). A technical amendment proposed in 1993 reformulates the saving clause to provide that "the disclaimed interest passes by representation to the [surviving] descendants of the disclaimant" if under applicable law or the governing instrument "the descendants of the disclaimant would share in the disclaimed interest by representation or otherwise were the disclaimant [predeceased]."

[209] *See id.* § 2-801 cmt. The same approach should apply if *A* has one child (instead of two) and *B* left two children (instead of one). In each case, the saving clause is intended to treat *A* as predeceased "for purposes of allowing [*A*'s] interest to pass to [*A*'s] surviving descendants, if any, but not for purposes of changing the shares." WAGGONER ET AL., *supra* note 56, at 459.

[210] *But see* Estate of Bryant, 196 Cal. Rptr. 856 (Cal. Ct. App. 1983); Medlin, *supra* note 201, at 1261-62 n.162 (suggesting that the official comment "fails to address accurately the danger that *A* can disclaim and appropriate some of *B*'s share through an ingenious manipulation of the UPC's rules for representation").

[211] *See* UPC § 2-801(b)(3); *see also* UNIF. DISCLAIMER OF TRANSFERS UNDER NONTESTAMENTARY INSTRUMENTS ACT (1978), § 1 cmt., 8A U.L.A. 112, 113-14.

joint tenant) either as receiving half the property at the creation of the joint tenancy and the other half at *A*'s death (a two-stage transfer), or as receiving the entire property at *A*'s death (a single-stage transfer).[212] The timing and extent of *B*'s right to disclaim should be determined accordingly, as should the disposition of the disclaimed interest.[213] The statute, however, appears to treat the transaction as a single-stage transfer if *B* survives *A* but as a two-stage transfer if *A* survives *B*.[214] In other contexts, the UPC treats an arrangement that operates as a single-stage deathtime transfer as a revocable transfer and excludes it from the operation of provisions concerning property held as joint tenants with right of survivorship.[215] The same approach in the disclaimer context would dispel much of the ambiguity of the provisions concerning joint-tenancy property and would make the statute more consistent with the rest of the UPC.[216]

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[212] Both views reject the highly formalistic common-law view that *B* receives no additional interest at *A*'s death but merely retains a preexisting undivided interest free of *A*'s expired rights.

[213] The statute does not prescribe a separate disclaimer period with respect to joint-tenancy property. If the time limit for disclaiming an interest devolving under a nontestamentary instrument also applies to an interest devolving by right of survivorship, the disclaimed interest must be classified as a present interest or a future interest. *See* UPC § 2-801(b)(2).

The statute also does not prescribe a separate disposition for an interest disclaimed by a surviving joint tenant. The provisions governing the disposition of an interest devolving under a nontestamentary instrument, if applicable, treat the surviving joint tenant as predeceased. *See id.* § 2-801(d)(2). Presumably, the disclaimed interest should become part of the deceased joint tenant's probate estate.

[214] If *B* survives *A*, *B* may disclaim the entire property which is treated as passing to *B* in a single transfer at *A*'s death. If *A* survives *B*, *A* may disclaim the undivided half interest which is treated as being transferred to *B* at the creation of the joint tenancy and retransferred to *A* by right of survivorship.

[215] The UPC's definition of property held as "joint tenants with right of survivorship" specifically includes a tenancy by the entirety but excludes a co-ownership arrangement—such as a multiple-party account with right of survivorship—in which ownership is proportional to net contributions. *See id.* § 1-201(26). The distinction is reflected, for example, in the constructional rules concerning the effect of homicide and divorce. *See id.* §§ 2-803(c) (slayer statute providing for revocation of revocable transfer, severance of joint tenancy with right of survivorship), 2-804(b) (revocation-by-divorce statute providing similar treatment).

[216] The official comment acknowledges that even after the 1990 UPC revisions, "the Joint Editorial Board believes that this and the other Uniform Disclaimer Acts are in need of revision." *Id.* § 2-801 cmt.

III. Protection of Payors and Creditors

As a practical matter, the success of any will substitute depends on its ability to transfer property at the owner's death more promptly and efficiently than the probate system. If the payors who administer will substitutes were strictly liable for erroneous payments or transfers, the costs of administering will substitutes would increase dramatically. Similarly, if transfers of nonprobate assets could not be implemented until the rights of the decedent's creditors and surviving spouse were finally determined under the probate system, will substitutes would soon lose their comparative advantage over the probate system. The UPC attempts to resolve the questions of payor liability and surviving spouse's rights by shifting both the benefits and the burdens of probate avoidance to the interested beneficiaries. The UPC leaves largely unaddressed controversial questions concerning the availability of nonprobate assets to satisfy expenses of administration and claims of a deceased owner's creditors. The provisions concerning multiple-person accounts, however, suggest a workable basis for a generalized statutory solution.

A. *Protection of Payors*

Several UPC rules attempt to avoid awkward or unexpected dispositive consequences by implying provisions that substantially modify or qualify the literal terms of a will or other governing instrument. The UPC's statutory remedies for poor drafting should ultimately produce sensible results in accordance with presumed dispositive intent while reducing pointless litigation concerning gaps and ambiguities in governing instruments. At the same time, the UPC rules increase the risk that the prescribed dispositive results may depart from the literal terms of the governing instrument. To give effect to the intended disposition without creating undue administrative burdens, the UPC separates the question of beneficial rights from that of payor liability. The UPC also grants broad protection to financial institutions, registering entities and other payors that pay money or transfer property in accordance with the literal terms of a governing instrument.

The provisions governing multiple-person accounts in finan-

cial institutions clearly reflect this bifurcated approach.[217] The UPC expressly discharges a financial institution from "all claims" for amounts paid "in accordance with the type of account . . . whether or not the payment is consistent with the beneficial ownership of the account as between parties, beneficiaries, or their successors."[218] Thus, a financial institution may pay amounts on deposit in a multiple-party account with right of survivorship at any time to any party, even though another party may be entitled to recover the withdrawn amount from the withdrawing party.[219] A financial institution may even be discharged by a payment that ultimately turns out to have been erroneous. For example, in the case of a single-party account with a POD designation, if the party and the POD beneficiary are both dead and the death certificates indicate—incorrectly, as it turns out—that the POD beneficiary survived the party, a financial institution should be protected in paying the account balance to the successors of the POD beneficiary.[220] The statutory protection does not apply, however, to payments made after receipt of written notice objecting to further payments.[221] A financial institution that receives such a written notice or "has other reason to believe that a dispute exists" concerning beneficial rights may with impunity refuse to make payments in accordance with the terms of the account.[222] Presumably, the financial institution may remit the disputed amount either to a proper court in an interpleader proceeding or to a party who furnishes appropriate indemnification.

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[217] *See* UPC §§ 6-206 (distinguishing subpart 2 concerning beneficial rights from subpart 3 concerning liability of financial institutions), 6-226(d) (distinguishing beneficial rights from liability of financial institution).

[218] *Id.* § 6-226(a). Similarly, a registering entity that registers a transfer of a security in accordance with a TOD registration in good faith is discharged from all claims to the security. *Id.* § 6-308(c).

[219] *See id.* § 6-222(1) (authorized payment); *cf. id.* §§ 6-211(b) (ownership during life), 6-212(a) (rights at death).

[220] *See id.* §§ 6-223(3) (authorized payment), 6-226 (discharge of liability); *id* § 1-107 (proof of death); *cf. id.* § 6-308(c) (good-faith reliance on available information).

[221] *See id.* § 6-226(b). To terminate statutory protection of the financial institution, the notice must be received in the appropriate office, *see id.* § 6-201(9), from a party (or a deceased party's representative or successor), *see id.* § 6-226(b), and must afford the financial institution "reasonable opportunity to act." *Id.*; *cf. id.* § 6-308(c) (protection of registering entity suspended by written notice of objection from "claimant to any interest in the security").

[222] *See id.* § 6-226(c).

The 1990 UPC revisions extend similar protection to payors and third parties specifically with respect to the statutory rules concerning 120-hour survival, substituted takers and deemed revocation on homicide or divorce. The UPC expressly protects a payor or other third party from liability for paying money or transferring property to a person who would have been entitled to the money or property under the terms of the governing instrument but for the application of one of the specified statutory rules, in the absence of written notice that the payment or transfer is or may be improper.[223] A payor or third party who has received such written notice is liable for any subsequent payment or transfer that turns out to be improper by reason of one of the specified statutory rules, but is protected in remitting the disputed money or property to a proper court.[224]

In effect, these protective provisions relieve payors from responsibility for independently investigating or determining certain facts—nonsurvival, homicide or divorce—that may affect beneficial interests under a governing instrument. The separation of payor liability from beneficial rights strikes a balance between the payor's interest in prompt and efficient administration and the rival claimants' interest in accurate resolution of disputes concerning beneficial rights. As a technical matter, the UPC drafters should consider consolidating the statutory protection for financial institutions, registering entities and other payors into a single provision. Such a provision might clarify the source, content and timing of a written notice suspending protection.[225] It might also authorize a payor who has received written notice to proceed with a proposed payment or transfer un-

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[223] *See id.* §§ 2-702(e)(1) (120-hour survival), 2-706(d)(1) (substitute takers), 2-803(h)(1) (homicide), 2-804(g)(1) (divorce). The UPC also extends protection to other acts performed in good-faith reliance on the terms of the governing instrument. A few states offer similar protection in the case of a trust or other nonprobate transfer. *See* SCOTT, *supra* note 13, § 226, at 423-24 n.7 (trustee protection); MO. REV. STAT. § 461.067(4) (1986 & Supp. 1992) (payor protection).

[224] *See* UPC §§ 2-702(e)(1)-(2) (120-hour survival), 2-706(d)(1)-(2) (substitute takers), 2-803(h)(1)-(2) (homicide), 2-804(g)(1)-(2) (divorce).

[225] For example, the statute should probably require that a notice (1) identify the governing instrument and property in question, (2) originate from a person claiming a beneficial interest, and (3) afford the payor a reasonable opportunity to act. *See id.* §§ 6-226(b), 6-308(c), 2-702(e)(1), 2-706(d)(1), 2-803(h)(1), 2-804(g)(1); *cf.* UNIF. ACT FOR SIMPLIFICATION OF FIDUCIARY SECURITY TRANSFERS (1958), § 5, 7B U.L.A. 689, 699.

less an adverse claimant promptly obtains a restraining order.[226] Furthermore, a consolidated provision would eliminate potential conflicts between the existing UPC provisions discharging a financial institution or registering entity from liability and those imposing liability on payors generally.[227] Finally, a consolidated provision should protect a payor who has no notice of a disclaimer and makes a payment or transfer that would be proper but for the disclaimer.

In relieving a payor of responsibility for ascertaining the proper recipient of a payment or transfer, the UPC's protective provisions relax the traditional standard of liability for a personal representative or trustee.[228] It seems anomalous that a fiduciary's duty of inquiry in making distributions should depend on the particular statutory source of the beneficiary's right. For example, assume that a revocable trust agreement provides for payments of net income to the settlor's named spouse until death or remarriage and that the settlor dies shortly after becoming divorced from the spouse. Apparently, the trustee may distribute net income to the former spouse with impunity until

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[226] The statute might provide that after receipt of a proper notice of objection from a claimant, a payor is nevertheless discharged from liability for making a payment or transfer to a designated beneficiary in accordance with the terms of a governing instrument, if (1) the payment or transfer occurs at least 30 days after the payor gives written notice thereof to the claimant, and (2) no judicial order restraining the payment or transfer is entered within the 30-day period. Such a provision would permit a claimant to block a deathtime transfer for up to 30 days, and would shift the burden of initiating judicial proceedings to the claimant. *Cf.* UNIF. ACT FOR SIMPLIFICATION OF FIDUCIARY SECURITY TRANSFERS (1958), § 5, 7B U.L.A. 689, 699; U.C.C. § 8-403 (1989); *see also* Wellman, *supra* note 11, at 823.

[227] Assume, for example, that the sole POD beneficiary on a single-party bank account murders the party, that the bank receives notice of the murder by an anonymous letter delivered the next morning to the bank's main office by registered mail, and that within minutes after delivery of the letter the POD beneficiary requests and receives payment of the account balance. The letter may constitute written notice sufficient to deprive the bank of protection under the provision concerning homicide, *see* UPC § 2-803(h)(1) (liability for payment after written notice), but not under the provision concerning financial institution protection, *see id.* § 6-226(a), (b) (payment in accordance with multiple-person provisions and type of account, absent notice and reasonable opportunity to act). Moreover, it remains unclear whether the POD beneficiary becomes even presumptively entitled to the account until 120 hours after the party's death. *See id.* § 2-702(e)(1) (payor protected in relying on beneficiary's "apparent entitlement under the terms of the governing instrument").

[228] *See id.* § 3-703 (personal representative protected for distribution "authorized at the time"); RESTATEMENT (SECOND) OF TRUSTS § 226 (1957) (trustee liable for unauthorized distribution).

receiving written notice of the divorce,[220] but may incur liability for continuing to make distributions after the former spouse remarries even if the trustee lacks notice of the remarriage.[230] Similarly, a personal representative may enjoy statutory protection in failing to inquire whether a devisee has survived a deceased testator by 120 hours,[231] but may incur liability for failing to inquire whether the antilapse statute prescribes a substitute gift.[232] A consolidated provision protecting payors should clarify the extent to which it modifies the traditional standard for a trustee or personal representative.

Although a payor may be protected from liability for a payment or transfer that turns out to be improper under specified statutory rules, the UPC imposes liability on the recipient—or any transferee other than a bona fide purchaser—to restore the money or property or its value to the rightful beneficiary.[233] These provisions, which mirror the UPC's treatment of improper distributions from a probate estate,[234] approximate the remedy of a constructive trust.[235]

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[229] *See* UPC § 2-804(b)(1), (g)(1). If the trust became irrevocable more than nine months before the divorce, a problem might arise in determining the effect of the divorce. *See id.* §§ 2-804(d) (deemed disclaimer), 2-801(b)(2) (limited disclaimer period following effective date of nontestamentary instrument), 2-801(d)(2) (disposition of disclaimed interest as if disclaimant predeceased effective date of nontestamentary instrument).

[230] *See* National Academy of Sciences v. Cambridge Trust Co., 346 N.E.2d 879 (Mass. 1976) (trustee liable for improper distributions).

[231] *See* UPC § 2-702(e)(1). The protective provisions apply to payors and other third parties who rely on the terms of a governing instrument. A "governing instrument" clearly includes a will, and the term "payor" apparently includes a personal representative. *See id.* §§ 1-201(19) ("governing instrument" includes will), 1-201(34) ("payor" includes any person authorized or obligated by law or governing instrument to make payments).

[232] *See id.* §§ 2-603 (antilapse statute for wills), 3-703 (fiduciary standard of care; duty to distribute estate in accordance with terms of will; protection for distribution "authorized at the time"). The antilapse statute applicable to wills contains no payor-protection provisions.

[233] *See id.* §§ 2-702(f)(1) (120-hour survival), 2-706(e)(1) (substitute takers), 2-803(i)(1) (homicide), 2-804(h)(1) (divorce).

[234] *See id.* §§ 3-909 (liability of recipient to restore improper payment or distribution from probate estate), 3-910 (protection of purchasers).

[235] The UPC also uses the constructive trust analogy in an attempt to neutralize the possibility of preemption with respect to employee benefit plans covered by ERISA. *See* ERISA § 514(a), 29 U.S.C. § 1144(a) (1988) (preempting any state laws that "relate to" covered employee benefit plans). *Compare* Metropolitan Life Ins. Co. v. Hanslip, 939 F.2d 904 (10th Cir. 1991) (slayer statute preempted) *with* New Orleans Elec. Pension Fund v. DeRocha, 779 F. Supp. 845 (E.D. La. 1991) (slayer statute not preempted);

B. *Family Protection*

The UPC offers protection against disinheritance to a decedent's surviving spouse and children. In the case of a surviving spouse, a statutory elective share has superseded common-law dower and curtesy in most separate-property states. The statutes, however, reflect divergent approaches to nonprobate assets in measuring and satisfying the elective share.[236] Statutes that simply authorize the surviving spouse to elect a share equal to a fixed portion of the decedent's estate, if interpreted literally, permit ready avoidance of the elective share by means of a funded revocable trust[237] or other will substitute.[238] On the other hand, judicial attempts to determine whether a disposition is "fraudulent" or "illusory" have failed to reduce litigation or produce predictable results.[239]

The UPC's elective-share provision expressly takes account of most will substitutes in determining the amount and source of

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Mendez-Bellido v. Board of Trustees, 709 F. Supp. 329 (E.D.N.Y. 1989) (same). The UPC provides that if specified dispositive rules are preempted, the recipient of a payment or transfer is liable to restore the money or property received, or its value, to the person who would have been entitled to receive it in the absence of preemption. *See* UPC §§ 2-702(f)(2) (120-hour survival), 2-706(e)(2) (substitute takers), 2-803(i)(2) (homicide), 2-804(h)(2) (divorce). These provisions may be defended as "respect[ing] ERISA's concern that federal law govern the administration of the plan, while still preventing unjust enrichment that would result if an unintended beneficiary were to receive the pension benefits." Halbach & Waggoner, *supra* note 55, at 1127; *see also* UPC § 2-804 cmt.

[236] A statutory elective share is largely unnecessary in community-property states because each spouse generally enjoys present ownership rights in property acquired during the marriage (other than by donative transfer). If one spouse earns a disproportionate share of the marital property in a separate-property state and dies domiciled in a community-property state, however, the rights of the surviving spouse may be drastically curtailed unless the latter state recognizes the concept of quasi-community property. *See* DUKEMINIER & JOHANSON, *supra* note 191, at 419-20; WAGGONER ET AL., *supra* note 56, at 469-70.

[237] *See, e.g.*, Kerwin v. Donaghy, 59 N.E.2d 299 (Mass. 1945) (subsequently overruled); Smyth v. Cleveland Trust Co., 179 N.E.2d 60 (Ohio 1961); *see also* RESTATEMENT (SECOND) OF TRUSTS § 57 cmt. c (1957).

[238] *See, e.g.*, Toman v. Svoboda, 349 N.E.2d 668 (Ill. App. Ct. 1976) (joint stock); Snodgrass v. Lyndon State Bank, 811 P.2d 58 (Kan. Ct. App. 1991) (POD account).

[239] *See, e.g.*, Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966 (1937) (revocable trust illusory); Smith v. Northern Trust Co., 54 N.E.2d 75 (Ill. App. Ct. 1944) (revocable trust illusory); *In re* Halpern's Estate, 303 N.Y. 33, 100 N.E.2d 120 (1951) (tentative savings account trust not illusory); Johnson v. LaGrange State Bank, 383 N.E.2d 185 (Ill. 1978) (revocable trust and joint account not illusory). One court has rejected the illusory-transfer test as "unsatisfactory." Sullivan v. Burkin, 460 N.E.2d 572, 577 (Mass. 1984).

the elective share, independently of their validity for dispositive purposes.[240] For example, in the base for measuring the elective share the UPC includes property over which the decedent retained a general power of appointment or a power to revoke, as well as life insurance proceeds and the decedent's share of property passing by right of survivorship.[241] To minimize the disruption of these dispositions, however, the UPC provides for satisfaction of the elective share first from property passing to or owned by the surviving spouse.[242] The 1990 UPC revisions reformulate the elective share to reflect a "partnership theory of marriage"[243] which maintains the original UPC's fully integrated approach to the surviving spouse's elective share in probate and nonprobate assets.

The UPC also provides limited protection against inadvertent disinheritance of a testator's surviving spouse under a will executed before the marriage by granting the spouse a modified intestate share of the probate estate.[244] An analogous provision protects children of the testator who were born or adopted after the execution of the will.[245] These protective provisions are intended to cure inadvertent disinheritance; they do not apply if the testator intentionally omits a spouse or child from the will.[246] Similarly, they do not apply if the testator makes a trans-

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[240] *See* UPC §§ 2-202(b)(2) (amount), 2-207(b)-(c) (source). Treating will substitutes as "testamentary" solely for elective share purposes should pose no conceptual obstacle. *See* Browder, *supra* note 11, at 883-86; Effland, *supra* note 33, at 434-35.

[241] *See* UPC §§ 2-202(b)(2). The 1990 UPC revisions expand the scope of the augmented estate to include property subject to a power released or exercised by the decedent within two years before death and life insurance proceeds payable to a beneficiary other than the surviving spouse. *Cf.* UPC §§ 2-202(1)(ii), 2-202(1) (flush language) (pre-1990).

[242] *See* UPC § 2-207(a).

[243] *Id.* art. 2, part 2, general cmt.; *see* John H. Langbein & Lawrence W. Waggoner, *Redesigning the Spouse's Forced Share*, 22 REAL PROP., PROB. & TR. J 303 (1987); Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223 (1990).

[244] *See* UPC § 2-301. The 1990 UPC revisions reformulate this provision to take account of devises in a premarital will to the surviving spouse or to certain children of the testator. The effect of transfers outside the will, however, remains unchanged.

[245] *See id.* § 2-302. The 1990 UPC revisions reformulate this provision to put the omitted child as nearly as possible on an equal footing with existing children provided for in the will. The effect of transfers outside the will, however, remains unchanged.

[246] *See id.* §§ 2-301(a)(1)-(3), 2-302(b). Thus, the omitted-spouse provision serves a different purpose from the elective share, which applies regardless of the testator's intent. *See id.* § 2-201.

fer outside the will that is intended to take the place of a testamentary provision for the spouse or child.[247] The provisions protecting an omitted spouse or child apply only to probate assets and operate essentially as constructional rules for wills: they take will substitutes into account solely for the purpose of determining whether a testator's failure to provide for a spouse or child in the will was intentional.[248] In interpreting a will, which normally disposes of a decedent's residual property, it makes sense to inquire into the testator's overall dispositive plan.[249] By contrast, the same inquiry with respect to each separate will substitute makes no sense as a practical matter.[250] The UPC properly does not attempt to extend the provisions protecting an omitted spouse or child beyond the will context.

C. *Protection of Creditors*

By limiting payor liability, the UPC permits beneficiaries to resolve uncertainties and disputes concerning their respective rights without unduly hindering the efficient administration of will substitutes in routine cases. The determination of beneficial rights, however, may be considerably complicated by claims of

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[247] *See id.* §§ 2-301(a)(1)-(3), 2-302(b); *see, e.g., In re* Estate of Aspenson, 470 N.W.2d 692 (Minn. Ct. App. 1991) (joint accounts, life insurance and retirement account); *In re* Estate of Taggart, 619 P.2d 562 (N.M. Ct. App. 1980) (joint account and retirement account); *In re* Estate of Frandson, 356 N.W.2d 125 (N.D. 1984) (joint tenancy property); *In re* Estate of Bartell, 776 P.2d 885 (Utah 1989) (gifts).

[248] *See In re* Estate of Cayo, 342 N.W.2d 785 (Wis. Ct. App. 1983) (settlor failed to provide in revocable trust for afterborn child; omitted-child provision inapplicable to trust property).

[249] Accordingly, several of the UPC's constructional rules apply only to wills. *See, e.g.*, UPC §§ 2-602 (after-acquired property), 2-604 (failed devises), 2-608 (exercise of general testamentary power of appointment), 2-609 (satisfaction).

[250] In principle, it may be desirable to extend uniform protection to an omitted spouse or child with respect to nonprobate and probate assets. *See* McGovern, *supra* note 52, at 1345; RESTATEMENT (SECOND) OF PROPERTY (Donative Transfers) § 34.2(2) (1990). As a practical matter, however, such protection raises severe difficulties. *See id.* cmt. g (protection should apply to will substitute providing "comprehensive post-death dispositive plan" but not to will substitute disposing of single item). For an awkward attempt to extend omitted-child protection to nonprobate transfers, see MO. REV. STAT. § 461.059 (1986 & Supp. 1992) (child born to or adopted by owner subsequent to beneficiary designation takes "equal share of any property transferable to the owner's children under the beneficiary designation"). Under this provision, if an owner, married with two children, names each child as sole beneficiary under a separate will substitute and then dies after the birth of a third child, the afterborn child apparently takes half of each will substitute; the disparity would be even more pronounced if there were additional afterborn children.

the deceased owner's creditors. In the absence of an applicable statute, it is often unclear to what extent or by what means a decedent's creditors may reach particular nonprobate assets. Not surprisingly, courts have taken divergent approaches and reached conflicting results.[251] Although the UPC currently addresses the problem only in the limited context of multiple-person accounts, the same approach lends itself to broader application.

1. Will Substitutes as Asset Shelters

The ability of a deceased owner's creditors to reach the owner's nonexempt property[252] depends in large part on whether the owner disposed of the property by will or by will substitute. In the case of probate assets, the probate system preserves the rights of a deceased owner's unsecured creditors more or less as they existed immediately before death, subject to two important restrictions. First, the owner's death gives rise to statutory allowances, expenses of administration and other claims payable from the probate estate that automatically take priority over preexisting debts.[253] If the owner was only marginally solvent immediately before death, the estate may become insolvent as a result of expenses arising at or after death, leaving unsecured creditors to bear their share of the loss. Second, the probate sys-

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[251] On creditors' rights in nonprobate assets generally, see Thomas R. Andrews, *Creditors' Rights Against Nonprobate Assets in Washington: Time for Reform*, 65 WASH. L. REV. 73 (1990); Effland, *supra* note 33.

[252] Certain property, such as a homestead, life insurance proceeds, or employee benefits under a qualified plan, may be wholly or partially exempt from creditors' claims both during life and after death. *See* UPC § 2-402 (1990) (homestead); COUCH, *supra* note 14, §§ 29:114, :118-19, 25, at 411-18, 424-27, 434 (life insurance); ERISA § 206(d), 29 U.S.C. § 1056(d) (1988 & Supp. III 1991) (employee benefits). These exemptions are often coupled with restrictions on disposition which reflect an underlying policy of protecting specific assets or family members. *See* Andrews, *supra* note 251, at 103-12; Effland, *supra* note 33, at 446-48.

[253] The UPC provides statutory allowances for homestead, exempt property and family support, which take priority over all claims. *See* UPC §§ 2-402 (homestead), 2-403 (exempt property), 2-404 (family support). The UPC also classifies claims in order of priority for payment, ranging from expenses of administration to claims having no preference under state or federal law. *See id.* § 3-805 (priority of claims). Although the UPC excludes death taxes from the definition of claims, *see id.* § 1-201(6), such taxes are normally payable in the first instance from the probate estate, see I.R.C. §§ 2002, 2203, 2205 (1988), even if the ultimate burden is apportioned by will or statute, *see* UPC § 3-916 (death tax apportionment).

tem imposes procedural restrictions, including an automatic bar on reaching probate assets to satisfy any claim that arose before death unless the claim is presented within prescribed time limits.[254]

By comparison with the statutory procedure for collecting debts from uncooperative living debtors,[255] the UPC's claims procedure appears simple and orderly, but it may still impose unnecessary delays and administrative burdens on creditors seeking to collect undisputed claims. It is hardly surprising, therefore, that many creditors prefer to use more efficient private collection arrangements—security agreements, credit insurance or third-party guarantees—rather than statutory collection procedures.[256] Nevertheless, the statutory collection procedures serve several essential functions: they represent the only practical remedy for creditors who lack the sophistication or opportunity to obtain alternative protection;[257] they provide a means of resolving disputed claims; and they indirectly reinforce the negotiating position of creditors who rely primarily on voluntary out-of-court settlements.[258] The probate claims procedure applies only to probate assets and neither extends nor limits creditors' rights in nonprobate assets.[259]

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[254] Under the UPC, for example, a claim arising before death may be presented, if not otherwise barred, up to the later of four months after published notice to creditors or 60 days after mailed notice, or in the absence of notice up to one year after death. Claims arising at or after death (*e.g.*, administrative expenses) are subject to separate time limits. *See* UPC §§ 3-801, 3-803. The personal representative may disallow a claim up to 60 days after presentation, and the creditor may seek an adjudication of the claim within 60 days after disallowance. *See id.* §§ 3-804, 3-806. A personal representative who fails to observe the respective rights of creditors and beneficiaries may incur personal liability. *See id.* §§ 3-703, 3-805, 3-807. Accordingly, distribution of the bulk of the probate estate is unlikely to occur before the expiration of the period for presenting claims.

[255] An unsecured creditor may be deterred from pursuing even a clearly meritorious claim against a living debtor under the statutory collection process; after obtaining a money judgment, the creditor may be forced to expend additional time and resources searching for non-exempt property of sufficient value to satisfy the judgment after expenses of execution, levy and sale. By contrast, the probate system shifts responsibility for collecting assets and paying claims in the statutory order of priority to the personal representative.

[256] *See* Effland, *supra* note 33, at 431-32; Langbein, *supra* note 1, at 1120-23.

[257] Individual creditors—for example, a divorced spouse or a child asserting rights under a property settlement or support agreement, or a personal injury claimant—may lack access to alternative arrangements. *See* Effland, *supra* note 33, at 432-33.

[258] Langbein, *supra* note 1, at 1124.

[259] Under the UPC, a claim that is not timely presented is "barred against the estate, the personal representative, and the heirs and devisees of the decedent." UPC § 3-

In the absence of an applicable statute, the law concerning creditors' rights in nonprobate assets remains fragmented and underdeveloped. The determination that a particular will substitute is "nontestamentary"—effective to dispose of the underlying property—does not necessarily put the property beyond the reach of the owner's creditors at death.[260] For example, conventional doctrine permits the settlor of a revocable trust to achieve dispositive results practically equivalent to a specific devise while sharply limiting the ability of the settlor's creditors to reach the trust property. During the settlor's life, it is true, the creditors may reach any beneficial interest retained by the settlor (regardless of spendthrift restrictions), as well as the maximum amount that the trustee could distribute for the settlor's benefit under a discretionary trust.[261] Moreover, some statutes simply treat a revocable trust as void from inception with respect to claims of the settlor's creditors.[262] In the absence of an applicable statute, however, the conventional distinction between a general power of appointment and a power of revocation may permit a settlor who retains an income interest for life coupled with a power of revocation to shield the trust property (though not the retained income interest) from creditors' claims.[263] Even under a statute that permits a court to compel

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803. The UPC includes no comparable provision concerning nonprobate assets. *See* Andrews, *supra* note 251, at 83-87; Effland, *supra* note 33, at 435.

[260] Of course, if a will substitute is branded as "testamentary," the attempted disposition fails and the underlying property is available both before and after the owner's death to satisfy creditors' claims.

[261] *See, e.g.*, Greenwich Trust Co. v. Tyson, 27 A.2d 166 (Conn. 1942); Ware v. Gulda, 117 N.E.2d 137 (Mass. 1954); *see* RESTATEMENT (SECOND) OF TRUSTS § 156 (1957); SCOTT, *supra* note 13, § 156, at 168 n.5 (collecting statutes).

[262] *See* SCOTT, *supra* note 13, § 330.12, at 375 n.8 (collecting statutes); *see also* Johnson v. Johnson, 645 P.2d 911 (Kan. Ct. App. 1982) (treating power of revocation as retained beneficial interest under statute declaring trusts for settlor's use void against settlor's creditors).

[263] The statement in text assumes that the creation of the trust is not fraudulent as to the settlor's creditors and that the power of revocation remains unexercised. *See, e.g.*, Murphey v. C.I.T. Corp., 33 A.2d 16 (Pa. 1943); RESTATEMENT (SECOND) OF TRUSTS § 330, cmt. o (1957). By contrast, conventional doctrine permits the settlor's creditors to reach the trust property during the settlor's life and after death if the settlor retains a life income interest coupled with a general power of appointment over the remainder, even if the power of appointment remains unexercised. *See* RESTATEMENT OF PROPERTY § 328 (1940); RESTATEMENT (SECOND) OF TRUSTS § 156, cmt. c (1957); RESTATEMENT (SECOND) OF PROPERTY (Donative Transfers) § 13.3 (1984). *But cf.* Fidelity Trust Co. v. New York Fin. Co., 125 F. 275 (3d Cir. 1903) (unexercised testamentary general power of appointment).

the exercise of a retained power of revocation for the benefit of the settlor's creditors, the termination of the power at death may defeat the claims of creditors who failed to act during the settlor's life.[264]

The technical distinction between a general power of appointment and a power of revocation appears to be eroding.[265] Courts that reject the distinction have readily subjected revocable trust property to claims of the settlor's creditors after death as well as during life, at least if the settlor's other property is insufficient to pay all claims.[266] This approach affords creditors essentially the same access to revocable trust property as they would have to property disposed of by a savings account trust,[267] an exercised testamentary general power of appointment[268] or a

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[264] *See, e.g.*, Schofield v. Cleveland Trust Co., 21 N.E.2d 119 (Ohio 1939).

[265] *See* State Street Bank & Trust Co. v. Reiser, 389 N.E.2d 768, 771 (Mass. App. Ct. 1979) ("same analysis and policy" applicable to power of revocation and general power of appointment); Johnson v. Com'l Bank, 588 P.2d 1096, 1099 (Or. 1978) (power of revocation "essentially the same as a general power of appointment"). *Compare* RESTATEMENT OF PROPERTY § 318(2) cmt. a (1940) (excluding power of revocation from definition of power of appointment) *with* RESTATEMENT (SECOND) OF PROPERTY (Donative Transfers) § 11.1 cmt. c (1984) (including power of revocation in definition of power of appointment).

[266] In State Street Bank & Trust Co. v. Reiser, 389 N.E.2d 768 (Mass. App. Ct. 1979), the settlor created an inter vivos trust, reserving a power to amend or revoke the trust and the right during life to direct the disposition of principal and income. Subsequently, the settlor borrowed money from an unsecured creditor and died insolvent. The court found the power of revocation substantially equivalent to a general power of appointment. It held that "where a person places property in trust and reserves the right to amend and revoke, or to direct disposition of principal and income, the settlor's creditors may, following the death of the settlor, reach in satisfaction of the settlor's debts to them, to the extent not satisfied by the settlor's estate, those assets owned by the trust over which the settlor had such control at the time of his death as would have enabled the settlor to use the trust assets for his own benefit." *Id.* at 771; *see also* Johnson v. Com'l Bank, 588 P.2d 1096 (Or. 1978) (revocable trust void against creditors under statute concerning self-settled trusts); *In re* Estate of Kovalyshyn, 343 A.2d 852 (N.J. Super. Ct. 1975) (analogy to savings account trust).

[267] *See* Montgomery v. Michaels, 301 N.E.2d 465 (Ill. 1973); *In re* Reich's Estate, 146 Misc. 616, 262 N.Y.S. 623 (N.Y. Surr. Ct. 1933); RESTATEMENT (SECOND) OF TRUSTS § 58 cmt. d (1957). In *In re* Estate of Kovalyshyn, 343 A.2d 852 (N.J. Super. Ct. 1975), the court expressly relied on the similarity between a revocable trust of mutual funds and a savings account trust.

[268] The exercise of a testamentary general power of appointment by an insolvent donee subjects the appointive assets to the donee's creditors regardless of whether the power was created by the donee, *see* RESTATEMENT OF PROPERTY § 328 (1940); RESTATEMENT (SECOND) OF PROPERTY (Donative Transfers) § 13.3 (1984), or by a third person, *see* RESTATEMENT OF PROPERTY § 329 (1940); RESTATEMENT (SECOND) OF PROPERTY § 13.4 (1984).

gift causa mortis.[269] Indeed, courts that permit creditors to reach such property after exhausting probate assets might be viewed as adopting an expanded common-law doctrine of abatement.[270] The scope and priority of creditors' rights in revocable trust property, as well as the procedure for asserting and resolving claims, are more appropriately addressed by statute than by case law.[271]

Outside the revocable trust context, courts appear less inclined to permit a decedent's creditors to reach nonprobate assets. In several cases involving federal savings bonds registered in joint-and-survivor or POD form, for example, courts have held that the owner's interest terminates at death and defeats the ability of creditors to reach the bonds even if the probate estate is insolvent.[272] Similarly, when one joint tenant dies survived by another, the decedent's interest in the joint tenancy property simply terminates, defeating any rights the decedent's creditors might have asserted against the property during life and relegating them to the decedent's probate assets.[273] These

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[269] *See* ATKINSON, *supra* note 12, § 116, at 639-40.

[270] *See In re* Reich's Estate, 146 Misc. 616, 262 N.Y.S. 623 (N.Y. Surr. Ct. 1933) (explicit analogy between savings account trust and specific devise); *In re* Walsh's Estate, 23 Misc. 2d 873, 200 N.Y.S.2d 159 (N.Y. Surr. Ct. 1960) (ratable contributions from multiple savings account trusts).

[271] The pitfalls in drafting such a statute are graphically illustrated by a Missouri statute that authorizes any trustee having a duty or power to pay a decedent's debts to start a six-month non-claim period running by publishing a notice to creditors, and bars the enforcement of debts not presented to the trustee within the six-month period against the trustee or the trust property. *See* MO. REV. STAT. § 456.610 (1986 & Supp. 1992). Unfortunately, the statute fails to clarify (1) the procedure for presenting and allowing claims, (2) the priority for payment of debts, and (3) the circumstances in which creditors of a deceased settlor or beneficiary may reach trust property. *See* ABA Probate and Trust Committee, *Rights of Creditors to Reach Assets of a Revocable Trust After the Death of the Grantor—The Missouri Approach*, 20 REAL PROP., PROB. & TRUST J. 1189 (1985).

[272] *See, e.g.*, Reynolds v. Danko, 36 A.2d 420 (N.J. Ch. 1944) (POD bonds); Application of Laundree, 277 A.D. 994, 100 N.Y.S.2d 145 (1950) (POD bonds); *In re* Estate of Simon, 5 Misc. 2d 1018, 162 N.Y.S.2d 678 (N.Y. Surr. Ct. 1957) (joint-and-survivor bonds); *see also In re* Walsh's Estate, 23 Misc. 2d 873, 200 N.Y.S.2d 159 (N.Y. Surr. Ct. 1960) (permitting insolvent decedent's creditors to reach savings account trust but not joint-and-survivor bonds, joint bank accounts or a retirement account with designated beneficiary).

[273] *See, e.g.*, Park State Bank v. McLean, 660 P.2d 13 (Colo. Ct. App. 1982); Rembe v. Stewart, 387 N.W.2d 313 (Iowa 1986); Irvin L. Young Foundation, Inc. v. Damrell, 511 A.2d 1069 (Me. 1986); DeForge v. Patrick, 76 N.W. 2d 733 (Neb. 1956); *In re* Walsh's Estate, 23 Misc. 2d 873, 200 N.Y.S.2d 159 (N.Y. Surr. Ct. 1960); Schlichenmayer v. Luithle, 221 N.W.2d 77 (N.D. 1974); Ladd v. State of Oklahoma, ex rel. Oklahoma Tax

results are logically consistent with, though certainly not compelled by, the passing-of-an-interest analysis that courts originally developed to rationalize and validate will substitutes.[274] By insisting that the probate system provides the exclusive procedure not only for disposing of property at death but also for enforcing claims by a decedent's creditors, courts ignore the possibility that a disposition may be "testamentary with respect to creditors without being testamentary for all purposes."[275]

One possible method of protecting the rights of a decedent's creditors in nonprobate assets relies on the concept of a fraudulent transfer at death. Under existing fraudulent-transfer statutes, creditors of an insolvent debtor may generally reach property transferred by the debtor for less than reasonably equivalent value.[276] In addition, the UPC grants a decedent's personal representative exclusive authority to recover property fraudulently transferred to the extent necessary to pay the decedent's unsecured debts.[277] If courts treated will substitutes as deathtime transfers, these statutes might be applied to authorize an insolvent decedent's personal representative to reach nonprobate assets to the extent necessary to pay the decedent's unsecured debts after exhausting probate assets.[278]

The main difficulty with this approach is that courts gener-

Comm'n, 688 P.2d 59 (Okla. 1984); *see* AMERICAN LAW OF PROPERTY, *supra* note 149, § 6.1, at 6-7; Effland, *supra* note 33, at 435-38; Hines, *More Law, supra* note 18, at 545-47. In a few states, statutes subject property passing to a surviving joint tenant to claims of the decedent's creditors. *See, e.g.*, CONN. GEN. STAT. § 47-14e (1992); N.C. GEN. STAT. § 41-2.2(c) (1984 & Supp. 1992) (corporate stock and investment securities); OKLA. STAT. tit. 60, § 74 (1991); S.D. CODIFIED LAWS § 30-21A-1 (1984); WIS. STAT. § 700.24 (1992).

[274] *See supra* notes 11-20 and accompanying text.

[275] *See* Browder, *supra* note 11, at 883-86; *see also* Effland, *supra* note 33, at 434. Courts occasionally recognize that a nonprobate transfer may be nontestamentary under a validating statute yet subject to claims of the deceased owner's creditors. *See, e.g.*, Russell v. Posey County Department of Public Welfare, 471 N.E.2d 1209 (Ind. Ct. App. 1984) (POD provision in contract for sale of land).

[276] *See* UNIF. FRAUDULENT CONVEYANCE ACT (1918), 7A U.L.A. 427; UNIF. FRAUDULENT TRANSFER ACT (1985), 7A U.L.A. 639.

[277] *See* UPC § 3-710.

[278] *See* Andrews, *supra* note 251, at 79-82; Effland, *supra* note 33, at 441-42 (1983); William M. McGovern, Jr., *supra* note 11, at 27; *see also* RESTATEMENT (SECOND) OF PROPERTY (Donative Transfers) § 34.3(3) (decedent's creditors should be able to reach "any property included in an inter vivos donative transfer made by the decedent that is a substitute for a will or that is revocable by the decedent at the time of the decedent's death"), § 34.3, cmt. j (inference that claims should be satisfied from nonprobate assets only after exhausting probate assets) (1990).

ally analyze will substitutes as lifetime transfers and grant relief under the fraudulent-transfer statutes only if the transfer was fraudulent as to creditors when made.[279] Moreover, the fraudulent-transfer statutes, even if applicable, provide for recovery of property to the extent necessary to pay unsecured debts but not expenses of administration, statutory allowances or other items that take priority over distributions to heirs and devisees. Occasionally, however, courts adopt a fraudulent-transfer analysis. In *In re Granwell*[280] a husband, while solvent, purchased mutual funds in the names of himself and his wife as joint tenants with right of survivorship. He also contributed additional mutual funds to a revocable trust naming his wife as remainder taker. The husband died insolvent. The court treated the mutual funds as fraudulently transferred at death to the extent of the husband's retained lifetime control, *i.e.*, one half of the jointly-owned mutual funds and all of the mutual funds held in the revocable trust. "It would violate the spirit and purpose of . . . [the fraudulent-transfer statute] to decide that the rights of his creditors were extinguished when [the wife] succeeded to his interest as the surviving joint tenant."[281]

2. The UPC Right of Recovery (Multiple-Person Accounts)

Although the UPC's blanket validating statute expressly preserves creditors' rights in nonprobate assets, it neither creates such rights nor establishes a procedure for asserting them.[282] In the limited context of multiple-person accounts, however, the UPC authorizes a deceased party's personal representative to recover account balances passing to surviving parties or POD beneficiaries to the extent needed to pay claims and

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[279] *See, e.g.*, Splaine v. Morrissey, 184 N.E. 670 (Mass. 1933) (joint bank account); Casagranda v. Donahue, 585 P.2d 1286 (Mont. 1978) (joint bank account); Angier v. Worrell, 31 A.2d 87 (Pa. 1943) (joint tenancy in land); Application of Laundree, 277 A.D. 994, 100 N.Y.S.2d 145 (1950) (POD bonds); *In re* Estate of Simon, 5 Misc. 2d 1018, 162 N.Y.S.2d 678 (N.Y. Surr. Ct. 1957) (joint bonds and POD bonds); Reynolds v. Danko, 36 A.2d 420 (N.J. Eq. 1944) (POD bonds).

[280] 20 N.Y.2d 91, 228 N.E.2d 779, 281 N.Y.S.2d 783 (1967).

[281] *Id.* at 96, 228 N.E.2d at 782, 281 N.Y.S.2d at 787. The court in Kashan v. Kosoff, 112 A.D.2d 350, 491 N.Y.S.2d 801 (2d Dep't 1985), adopted the same approach to a joint tenancy in land, citing *Granwell*.

[282] *See* UPC §§ 6-101(b), 6-309(b); Effland, *supra* note 33, at 449.

statutory allowances after exhausting probate assets; any amounts so recovered are administered as part of the probate estate.[283] Although this statutory framework may serve as a model for a more comprehensive provision, attempts to extend it to nonprobate assets generally will undoubtedly prove controversial.[284]

The UPC treats surviving parties and POD beneficiaries as if they received a "special form of specific devise" that takes priority over all probate assets but remains subordinate to claims and statutory allowances in the usual order of priority.[285] The recoverable amounts include statutory allowances, expenses of administration and funeral expenses as well as the decedent's lifetime liabilities that survive death.[286] Although it might be argued that the recipients of nonprobate assets should not bear the burden of statutory allowances or administration expenses, the provision concerning priority of claims ensures that these items will be recovered to the maximum possible extent from probate assets.[287] Similarly, it might be argued that nonprobate assets should abate ratably with specific devises, but such treatment would make the statute considerably more complex and might unnecessarily expose nonprobate assets to a right of recovery while the probate estate remains solvent.[288] The priority

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[283] UPC § 6-215.

[284] The UPC drafters may have deliberately avoided addressing creditors' rights in the 1989 revisions to article 6 of the UPC to avoid losing support for statutory reform and to enhance the attractiveness of the TOD form by comparison to "the highly troublesome joint owner form." *See* Wellman, *supra* note 11, at 838-39.

[285] UPC § 6-215 cmt.; *cf. id.* § 3-902 (abatement). Unlike the general abatement rules, the right-of-recovery statute does not expressly yield to a different order if necessary to preserve the decedent's dispositive plan. Frequently the terms of a funded inter vivos trust permit or require payment to a deceased beneficiary's personal representative of amounts needed for claims, taxes or expenses of administration. *See* Effland, *supra* note 33, at 438 n.40. Presumably, in such a case, if the trustee (without breaching any fiduciary duty) provides sufficient amounts to pay amounts that would otherwise be recoverable, the right-of-recovery statute should not apply.

[286] *See* UPC § 1-201(6) (definition of "claims"). The original UPC included death taxes in the recoverable amount, *see* UPC § 6-107 (pre-1989), but the 1989 UPC revisions exclude them, presumably on the ground that the apportionment of liability for death taxes is adequately covered in a separate provision. *See* UPC § 3-916 (death tax apportionment).

[287] *See* UPC § 3-805 (priority for payment of statutory allowances and expenses of administration from probate assets).

[288] *Compare* Hines, *More Law*, *supra* note 18, at 565 (recommending joint property abate after probate assets) *with* Andrews, *supra* note 251, at 125 (recommending ratable abatement). *See also* McGovern, *supra* note 11, at 28-29 (priority and apportionment

of nonprobate assets over specific devises is no more arbitrary or unfair than any other priority under the abatement rules, and operates similarly to simplify the administration of probate and nonprobate assets. By limiting the right of recovery to cases where the probate estate is insolvent, the UPC preserves the advantages of avoiding administration as far as possible while reinforcing the priority of statutory allowances and claims over donative transfers.[289]

The UPC does not attempt to trace funds received from an account, but imposes personal liability on the recipients for amounts received. The recoverable amount is the lesser of (1) the total amount received by surviving parties and POD beneficiaries under the multiple-person account provisions at the death of a party or (2) the total amount of statutory allowances and claims remaining unpaid after exhausting the deceased party's probate assets. The total recoverable amount is apportioned among the surviving parties and POD beneficiaries in proportion to the amounts received by each.[290]

Although the apportionment provision appears simple and elegant, it may prove troublesome in practical operation. Assume, for example, that a deceased party leaves two single-party accounts, each with a deathtime balance of $6000 and a different POD beneficiary, and that $10,000 of statutory allowances and claims remain unpaid after exhausting the probate assets. If both beneficiaries are ascertained and solvent, each should be liable for $5000. But what if one beneficiary is absent, unknown or insolvent? Under the apportionment provision, the other beneficiary may be liable for either $5000 or $6000, depending on whether the uncollectible amount received by the delinquent

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issues "are not likely to arise often, particularly if creditors can reach non-probate assets only as a last resort").

[289] The right-of-recovery statute improves the position of recipients of statutory allowances (who might otherwise have no recourse against recipients of nonprobate assets) and creditors when the probate estate is insolvent, while leaving nonprobate transfers undisturbed when the probate estate is solvent. Of course, if it turns out that both the decedent's probate estate and the recipients of nonprobate assets are insolvent, the statute may fail to provide an effective remedy. *See* McGovern, *supra* note 11, at 28-29.

[290] *See* UPC § 6-215(b). The apportionment provision, added by the 1989 UPC revisions, ensures that a surviving party or POD beneficiary is not held accountable for more than the amount actually received. *Cf.* UPC § 6-107 (pre-1989) (liability to account for "amounts the decedent owned beneficially immediately before his death" to extent necessary to pay recoverable amount).

beneficiary is included in the apportionment. The literal terms of the statute support the former result, but the latter result appears more consistent with its underlying purpose.

The UPC provides that a proceeding to recover amounts from surviving parties or POD beneficiaries may be commenced only after the deceased party's personal representative has received a "written demand" from a surviving spouse, creditor or child of the decedent and only within one year after death.[291] The statute contemplates that such a proceeding may be brought by the decedent's personal representative, since amounts recovered "by the personal representative" are administered as part of the probate estate.[292] Although the statute does not expressly limit authority to initiate the proceeding to the personal representative, such a limitation may be appropriate even if it occasionally forces the opening of administration for the sole purpose of exercising a right of recovery.[293] Whenever it becomes necessary to assert the right of recovery, the probate estate will necessarily be insolvent, multiple creditors are likely to be competing for the same limited nonprobate assets, and administration offers a convenient and reliable procedure for resolving competing claims.[294] Moreover, the personal representative is well situated to ascertain the existence and terms of accounts and to coordinate recoveries from multiple surviving parties or POD beneficiaries.[295]

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[291] Notice may also be given by "a person acting for a child" of the decedent. *See* UPC § 6-215(b). The 1989 UPC revisions replace the two-year limitation under the original UPC with a one-year limitation that corresponds to the "self-executing" bar on claims. *See id.* §§ 3-803(a)(1), 6-215 cmt.; *cf.* UPC § 6-107 (pre-1989).

[292] *See* UPC § 6-215(d).

[293] *Cf. id.* § 3-710 (personal representative's exclusive authority to recover fraudulently-transferred property to pay unsecured debts). The UPC permits a creditor to qualify as personal representative if no other qualified person seeks an appointment. *See id.* § 3-203(a)(6).

[294] Of course, a creditor may still seek payment of a claim informally from recipients of nonprobate assets; the statutory right of recovery may even encourage informal settlements. *See* Hines, *More Law*, *supra* note 18, at 566-67 (administration produces orderly collection and fair allocation); Effland, *supra* note 33, at 442 (administration avoids separate proceedings for asserting claims against nonprobate assets). *But cf.* Andrews, *supra* note 251, at 120-24 (arguing creditors should be permitted to proceed directly against recipients of nonprobate assets).

[295] A person against whom a proceeding is brought may join a surviving party or POD beneficiary "of any other account of the decedent" as parties; joinder of a surviving party or POD beneficiary of the same account should likewise be permitted. *See* UPC §§ 6-215(b), (c).

3. Expanding the Right of Recovery

The approach of the present UPC multiple-person account provisions can readily be expanded to apply to a broad range of will substitutes. The primary technical challenge lies in defining the scope of property that should be available to satisfy an expanded right of recovery.[296] Once that question is addressed, the statutory right of recovery for other will substitutes should operate in much the same manner as for multiple-person accounts under the present UPC. Measuring the recoverable amount and apportioning it among the recipients of different types of nonprobate assets raises no more administrative problems than in the case of several different accounts under the present statute.

In the context of a multiple-person account, it seems self-evident that the recoverable amount should be measured by the deceased owner's net contributions, which define both the extent of the owner's beneficial ownership and the rights of creditors immediately before death. Implicit in the present statute is the notion that the right of recovery should preserve the ability of a deceased owner's creditors to reach property to the same extent after death as immediately before death. Since the amount of the decedent's net contributions would normally have been available to satisfy creditors' claims during life,[297] the transfer of that amount at death to a surviving party or POD beneficiary should neither enhance nor diminish creditors' rights with respect to the account. Thus, an expanded right of recovery should apply to nonprobate assets to the extent they were available immediately before the owner's death to satisfy claims of the owner's unsecured creditors.[298]

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[296] A right of recovery is probably preempted by federal law to the extent that it "relate[s] to" ERISA-covered employee benefit plans. *See* ERISA § 514(a), 29 U.S.C. § 1144(a) (1988) (preemption); Mackey v. Lanier Collections Agency & Service, Inc., 486 U.S. 825 (1988).

[297] *See, e.g.*, Giove v. Stanko, 882 F.2d 1316 (8th Cir. 1989); Nieman v. First Nat'l Bank of Joplin, 420 S.W.2d 20 (Mo. Ct. App. 1967); Union Properties, Inc. v. Cleveland Trust Co., 89 N.E.2d 638 (Ohio 1949); Yakima Adjustment Serv., Inc. v. Durand, 622 P.2d 408 (Wash. Ct. App. 1981). *But cf.* Park Enter., Inc. v. Trach, 47 N.W.2d 194 (Minn. 1951).

[298] This notion appears in the Missouri nonprobate transfers law. *See* MO REV STAT. § 461.071 (1986 & Supp. 1992) (right of recovery against any person who receives "property of [a] decedent . . . that was subject to satisfaction of the decedent's debts during the decedent's lifetime" outside the probate system). The Missouri right of recovery does not apply to life insurance proceeds or to tenancy-by-the-entirety property,

A distinct, though not necessarily inconsistent, approach focuses on the owner's beneficial rights immediately before death.[299] This approach reflects the notion that an owner should not be able to possess and enjoy property during life and transfer it at death without satisfying creditors' claims. The same notion underlies the generally acknowledged public policy against fraudulent transfers and self-settled spendthrift trusts.[300] This approach may cause technical problems, especially as applied to trust property. For example, if property held in a revocable trust can be reached by the settlor's creditors during life, the trust property should also be reachable at death, whether or not the power of revocation constitutes beneficial ownership. On the other hand, if the settlor retains a life income interest but no power of revocation, creditors who are able to reach only trust income during the settlor's life should not gain access to trust corpus solely by reason of death. Similarly, if a person dies holding an unexercised general power of appointment over assets in a trust created by another person, the creditors of the deceased power holder should be able (or unable) to reach the trust property to the same extent after death as during life.[301] On balance, the concept of beneficial ownership adds nothing to the basic notion of preserving creditors' rights.

With respect to joint tenancy property other than a multiple-party account with right of survivorship,[302] the expanded

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which are largely sheltered from creditors' claims during life as well as after death. *See id.* § 461.071.

[299] This approach appeared in the original UPC, *see* UPC § 6-107 (pre-1989) (right of recovery for amounts owned beneficially by decedent immediately before death), and persists in the Missouri nonprobate transfers law. *See* Mo. REV. STAT. § 461.071 (1986 & Supp. 1992) (liability for recoverable amount apportioned among recipients of nonprobate assets in proportion to the deathtime value of their respective shares of "property that the decedent owned beneficially immediately before death").

[300] *See* SCOTT, *supra* note 13, § 156, at 164-69; *see supra* notes 261-62 and accompanying text.

[301] *See* RESTATEMENT (SECOND) OF PROPERTY (Donative Transfers) § 13.2 (1984) (unexercised general power of appointment created by person other than donee); *but cf.* Mo. REV. STAT. § 461.071(3) (1986 & Supp. 1992) (right of recovery against recipients of trust property subject to decedent's general power of appointment).

[302] Under an expanded right of recovery, a multiple-party account with right of survivorship should continue to be treated as a revocable transfer (to the extent of the respective net contributions) rather than as a joint tenancy.

An account or other property held in tenancy by the entirety is presently excluded from the right of recovery under the UPC and the Missouri nonprobate transfers law. *See* UPC § 6-216(b); Mo. REV. STAT. § 461.071 (1986 & Supp. 1992). At common law,

right of recovery should similarly apply to the undivided fractional share of the property that a deceased tenant's unsecured creditors could have reached immediately before death.[303] Thus, if *A* purchases property in the names of *A* and *B* as joint tenants with right of survivorship, intending to give *B* an undivided half interest, and *A* dies insolvent survived by *B*, *A*'s creditors should be able to reach half the property either before or after *A*'s death; the same result should hold for *B*'s creditors if *B* dies insolvent survived by *A*. The general rule of permitting a decedent's creditors to reach property to the same extent after death as before operates more fairly and consistently than a rule based on the tenants' respective contributions.[304]

Thus, the scope of an expanded right of recovery should reflect the principle of affording a decedent's creditors equivalent access to nonprobate assets after death as immediately before death. Although the right of recovery will undoubtedly become more complex to administer as it becomes applicable to multiple beneficiaries of different will substitutes, the administrative burden can be minimized by limiting the right of recovery to cases

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property held in tenancy by the entirety is treated as owned by the marital unit as an entity; creditors of each individual spouse cannot reach the property. *See, e.g.*, Strout Realty, Inc. v. Henry, 758 S.W.2d 197 (Mo. Ct. App. 1988); Vaughn v. Spitz, 682 S.W.2d 847 (Mo. Ct. App. 1984). In states that adhere to the common-law view, there is no reason why creditors of either spouse should have greater rights after the debtor's death than during life—even if both spouses die simultaneously.

[303] *See* Effland, *supra* note 33, at 450 (proportionate-share rule is simple and consistent with measurement of interests during joint lives); Andrews, *supra* note 251, at 95-96 (recommending proportionate-share rule); Hines, *More Law*, *supra* note 18, at 559-62 (recommending rule measuring joint tenants' interests by respective contributions for all types of property and allowing creditors to reach property to same extent after death as before). Each joint tenant generally owns an equal undivided interest in the property regardless of their respective net contributions, and creditors of any joint tenant can reach only the debtor's fractional interest. *See, e.g.*, Remax of Blue Springs v. Vajda & Co., Inc., 708 S.W.2d 804 (Mo. Ct. App. 1986).

[304] The problem with a contribution-based rule is illustrated by the Missouri nonprobate transfers law, which provides that the right of recovery applies "only to the extent of the decedent's contribution" to joint tenancy property. MO. REV STAT. 461.071(3) (1986 & Supp. 1992). Under a contribution-based rule, if *A* dies first, *A*'s creditors may reach the full value of the property after *A*'s death even though they could have reached only half its value during *A*'s life. (*B*'s creditors, of course, may also seek to reach the entire value of the property after *A*'s death. Presumably, if part of the property is recovered to pay *A*'s creditors, the value available to *B*'s creditors should be correspondingly reduced.) Conversely, if *B* dies first, a contribution-based rule prevents *B*'s creditors from reaching any of the property after *B*'s death even though they could have reached half its value during *B*'s life.

in which the probate estate is insolvent and by channeling proceedings through the probate system. Within its proper sphere, the probate system represents an orderly, unified procedure for collecting assets, determining the solvency of the estate and paying statutory allowances and claims.[305]

It may seem ironic that a comprehensive statutory framework designed to validate and implement a broad range of will substitutes ultimately falls back on the probate procedures it was designed to avoid. But it should be clear that will substitutes ultimately rely on the probate system to resolve the inevitable cases in which uncertainties, disputes and competing claims require more than ministerial attention.[306]

CONCLUSION

Will substitutes flourish because they implement simple, routine deathtime transfers more promptly and efficiently than the probate system. Although they resemble specific devises in many respects, will substitutes dispense with the formal and procedural safeguards of the probate system. To reduce the risk of fraud or mistake, a general validating statute should apply to arrangements administered by accountable third-party payors or meeting prescribed alternative formalities. In framing constructional rules, the revised UPC achieves substantial parity between wills and will substitutes. At the same time, the UPC still lacks a mechanism for resolving creditors' claims with respect to most nonprobate assets. Refining the blanket validating statute and clarifying the rights of creditors represent the next steps toward realizing the UPC drafters' goal of integrating the law of wills and will substitutes.

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[305] *See* Effland, *supra* note 33, at 442 ("troublesome questions about how and when the claimant should proceed to establish his claim are avoided by channeling all claims through the regular administration process"); Hines, *More Law*, *supra* note 18, at 567-68 (recommending centralized estate administration rather than separate procedures by particular claimants).

[306] *See* Langbein, *supra* note 1, at 1120 ("Financial intermediaries execute easy transfers and shunt the hard ones over to probate. . . . In the nonprobate system, genuine disputes still reach the courts, but routine administration does not.").