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## Article

# Reconfiguring Estate Settlement

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### I. THE HOSTILE ENVIRONMENT FOR PROBATE

Estate settlement through probate has been under persistent assault for nearly half a century. Initially, the attack on probate was popularized by a layperson's bestseller.<sup>1</sup> Despite some umbrage and denial,<sup>2</sup> the legal profession reacted promptly and responsibly to the vitriolic charges by formulating the Uniform Probate Code (UPC) and vigorously advocating its adoption.<sup>3</sup> Probate, however, continues to have its vocal crit-

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1. NORMAN F. DACEY, *HOW TO AVOID PROBATE!* (1965) [hereinafter DACEY, *PROBATE*]. First published in 1965, the book was extremely popular. Ultimately, this broadside against probate went through five editions, the most recent publication date being 1993. See NORMAN F. DACEY, *HOW TO AVOID PROBATE!* (Harper Perennial 1993) (1965); Richard D. Lyons, *Norman Dacey*, N.Y. TIMES, Mar. 19, 1994, at 52.

2. Some authorities defended probate and denounced or attacked Mr. Dacey. See Grievance Comm. of Bar v. Dacey, 222 A.2d 339, 341–42 (Conn. 1966); York County Lawyers' Ass'n v. Dacey, 283 N.Y.S.2d 984, 987 (N.Y. App. Div. 1967); Julee C. Fischer, *Policing the Self-Help Legal Market: Consumer Protection or Protection of the Legal Cartel?*, 34 IND. L. REV. 121, 134–35 (2000). But see Richard V. Wellman, *Recent Developments in the Struggle for Probate Reform*, 79 MICH. L. REV. 501, 501–03 (1981) [hereinafter Wellman, *Recent Developments*] (acknowledging that probate had become excessively complicated); Richard V. Wellman, *The Uniform Probate Code: Blueprint for Reform in the 70's*, 2 CONN. L. REV. 453, 453 (1970) [hereinafter Wellman, *Blueprint for Reform*] (indicating that the Uniform Probate Code “matured in a period of unparalleled public criticism of the existing probate institution”).

3. The UPC was approved by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in August 1969. J. Pennington Straus, *The Uniform Probate Code Approved: A Bold and Progressive Reform*, 41 PA. B. ASS'N Q. 71, 72 (1969). The origins of reform can be traced to 1946 and the

ics.<sup>4</sup> The deficiencies of probate, chief among them being delay, expense, and lack of privacy, are acknowledged by estate planners and by other voices within the legal community who have joined in a chorus of criticism.<sup>5</sup> But probate is not just criticized. It is studiously avoided.<sup>6</sup>

The UPC, with its flexible system of administration, offers multiple alternatives for conducting settlement of an estate through the probate system.<sup>7</sup> Over the years, other procedural

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promulgation of the Model Probate Code in that year by the American Bar Association Section of Real Property, Probate, & Trust Law. *Id.* Due in large measure to public pressure, efforts to update the Model Probate Code evolved into the Uniform Probate Code project. *Id.* (“Never before had there been so much popular attention directed to the probate laws as that which followed the attack made by Dacey and others on probate procedures.”). The UPC was promptly adopted by sixteen states in 1969 and is currently adopted, at least in part, in eighteen states. *Id.* Many others have adopted or have been influenced by portions of the UPC. See UNIF. PROBATE CODE prefatory note (amended 2008), 8 U.L.A. pt. I, at 364 (1998) (stating that the Uniform Probate Code has been “enacted in close to complete form in about twenty states but influential in virtually all”); Roger W. Andersen, *The Influence of the Uniform Probate Code in Nonadopting States*, 8 U. PUGET SOUND L. REV. 599, 599–600 (1985).

4. For a fairly recent and particularly scathing attack on probate see PAULA A. MONOPOLI, AMERICAN PROBATE: PROTECTING THE PUBLIC, IMPROVING THE PROCESS 39 (2003) (“The American probate process has long been perceived as slow, expensive and corrupt.”); see also sources cited *infra* note 5.

5. There is no shortage of commentary about the deficiencies of probate and the laws of succession. See Lawrence M. Friedman, *The Law of the Living, the Law of the Dead: Property, Succession, and Society*, 1966 WIS. L. REV. 340, 365 (“[T]he rules within the law of succession are rigid, inflexible, and technical. . . . [S]uccession at death is formal in the sense that the estate is required to ‘go through probate,’ a long and formal process.”); Susan N. Gary, *Transfer on Death Deeds: The Nonprobate Revolution Continues*, 41 REAL PROP. PROB. & TR. J. 529, 531 (2006) (“Many people choose to avoid the probate process, either because of concerns about delays and costs or because of a desire for privacy.”); Adam J. Hirsch, *Inheritance Law, Legal Contraptions, and the Problem of Doctrinal Change*, 79 OR. L. REV. 527, 542 (2000) (characterizing administration by the probate court as “a process that can be time-consuming and costly, or even in some venues a modern form of grave-robbing”); John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1116 (1984) (noting that it is impossible to deny public dissatisfaction with probate); Robert A. Stein & Ian G. Fierstein, *The Role of the Attorney in Estate Administration*, 68 MINN. L. REV. 1107, 1209 (1984) (noting that most complaints about probate focus on the length of the proceeding and its cost).

6. Even the *American Bar Association Journal* recounts—and approves—the efforts to sidestep probate procedures. See Steven Seidenberg, *Plotting Against Probate: Efforts by Estate Planners, Courts and Legislatures to Minimize Probate Haven’t Killed It Yet*, 94 A.B.A.J., May 2008, at 56 (describing efforts to transfer assets outside of wills to avoid probate).

7. See Wellman, *Blueprint for Reform*, *supra* note 2, at 476. The UPC’s

innovations have been proposed to minimize or avoid the drawbacks of probate.<sup>8</sup> Moreover, there has been considerable effort to unify doctrinal principles so that the same rules apply to transfers at death under governing documents that are quite different than a will.<sup>9</sup> Nevertheless, both practitioners and academics continue to address the deficiencies of probate by creating and promoting transfer devices that bypass probate.<sup>10</sup> Unfortunately, the insistence on avoiding probate produces unnecessary expenditures on bypass devices, considerable inconvenience, and uncertainty in result.<sup>11</sup> It encourages the

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flexible system of administration is described as “the heart of the Uniform Probate Code” in the General Comment to Article III of the Code. UNIF. PROBATE CODE art. III gen. cmt. (amended 2008), 8 U.L.A. pt. II, at 27 (1998). The flexible system includes informal or ex parte proceedings, formal procedures marked by traditional notice to all interested parties prior to a judicial hearing, and a single *in rem* settlement proceeding known as supervised administration. *Id.*

8. Small estate proceedings have proved quite popular. Other proposals have proven less successful. *See infra* Part I.C.3. Avoidance devices have proliferated. *See infra* Part I.C.2.

9. The 1990 amendments to the UPC Article II, for example, extended to nontestamentary documents the same rules as apply to wills for survival, choice of law, exercise of powers of appointment, construction of class gifts, representation, disclaimer, revocation by operation of law, and effect of homicide. UNIF. PROBATE CODE § 6-101 (amended 1990), 8 U.L.A. pt. II, at 430 (1998). In 2008, another round of revisions to the UPC was adopted. These made adjustments to the suggested dollar amounts that describe the spouse’s intestate share and the exemptions and allowances for a spouse and minor or dependent children. UNIFORM PROBATE CODE § 2-102 (amended 2008), 8 U.L.A. pt. I, at 37 (Supp. 2009). They also adopted a cost-of-living adjustment provision to assure that these dollar amounts maintain their real value. *Id.* § 2-102 cmt., 8 U.L.A. pt. I, at 37 (Supp. 2009). The 2008 revisions also dealt with the status of parent and child, adopted the concept of a notarized will, revised class gift rules, and brought to the Code provisions permitting reformation and modification of wills and other governing instruments. *Id.* § 2-115, 8 U.L.A. pt. I, at 50 (Supp. 2009); *id.* § 2-116, 8 U.L.A. pt. I, at 53 (Supp. 2009); *id.* § 2-502, 8 U.L.A. pt. I, at 89 (Supp. 2009); *id.* § 2-705, 8 U.L.A. pt. I, at 112 (Supp. 2009).

10. *See infra* notes 11, 12, 67, 68, and 72, for description of the revocable trust as a device commonly used by estate planners to avoid probate for clients. Individuals often use joint tenancies. *See* Gary, *supra* note 5, at 533. Less commonly they may use a paid-on-death or transfer-on-death account form sanctioned by UPC §§ 6-201 to -229 and 6-301 to -311. *Id.* The newest avoidance device is the transfer-on-death deed, presently recognized by statute in ten states and also now a uniform law of the NCCUSL, which was presented to the states for enactment in July 2009. *Id.*

11. Revocable trusts are not inexpensive. The attorney fee for drafting a revocable trust may average \$1500. Seidenberg, *supra* note 6, at 58. (In the author’s experience, a fee of that amount would be modest and would include minimal, if any, estate tax planning.) Other probate avoidance devices may be less costly, but use of any device involves an expense that would be unneces-

peddling, often unscrupulous peddling, of devices to avoid probate.<sup>12</sup> Additionally, the ever-expanding number of devices used to transfer assets at death is difficult to coordinate at the planning stage.<sup>13</sup>

Today, it is openly admitted that more wealth passes outside probate than through it.<sup>14</sup> What appears to be the normal process for transmitting wealth at death is actually a default system for those who fail to plan around it.<sup>15</sup> This Article sug-

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sary if a will could perform the wealth transmission task. Utilizing any avoidance device is also inconvenient. People are confused by the multiplicity of transfer modes. Many erroneously believe a will governs all shifts in ownership that occur at death. See John H. Langbein, *The Twentieth Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722, 749 (1988). Many also believe the use of will substitutes is estate planning. *Id.* Placing a bank account in joint tenancy does not clearly signal unambiguous intent. The action could be intended only to give lifetime access to a co-owner, it could constitute a present gift, or it could evidence the intent to shift ownership only at the time of death. See Langbein, *supra* note 5, at 1112. Uncertainty exists whether substantive principles of wills apply to will substitutes. Hirsch, *supra* note 5, at 545–46. The ability of creditors to reach assets that pass outside of probate is both problematic and contentious. See Elaine H. Gagliardi, *Remembering the Creditor at Death: Aligning Probate and Nonprobate Transfers*, 41 REAL PROP. PROB. & TR. J. 819, 821–23 (2007); Grayson M.P. McCouch, *Probate Law Reform and Nonprobate Transfers*, 62 U. MIAMI L. REV. 757, 762 (2008); The 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. & TR. J. 1189, 1189 (1985).

12. Trust mills have proliferated. These businesses, sometimes fronted by lawyers, often promoted by laypersons, feed on the fear of probate to sell revocable trusts to persons who have little or no need for them. Angela M. Vallario, *Living Trusts in the Unauthorized Practice of Law: A Good Thing Gone Bad*, 59 MD. L. REV. 595, 596 (2000). For descriptions of the operation of these promotions and the use of unauthorized practice rules to inhibit them see *id.* For one state's recent experience see Ohio State Bar Ass'n. v. Jackel, 887 N.E.2d 340 (Ohio 2008); Columbus Bar Ass'n v. Willette, 884 N.E.2d 581 (Ohio 2008); Cleveland Bar Ass'n v. Sharp Estate Serv. Inc., 837 N.E.2d 1183 (Ohio 2005).

13. One of the primary obstacles to a coherent plan is the incomplete information supplied by nonlawyers employed by financial institutions. Additionally, there is a significant risk that numerous transfer devices will be used in a haphazard, uncoordinated fashion. Langbein, *supra* note 5, at 1140.

14. UNIF. PROBATE CODE art. III Prefatory Note (amended 2008), 8 U.L.A. pt. II, at 75 (1998) (“[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.”); see also Langbein, *supra* note 5, at 1108; Robert A. Stein & Ian G. Fierstein, *The Demography of Probate Administration*, 15 U. BALT. L. REV. 54, 104 (1985) (suggesting that significant wealth passes outside the probate process).

15. Stein & Fierstein, *supra* note 14, at 104. Probate can be avoided easily through the use of so-called will substitutes. The ease of avoidance may explain in part the persistence of probate administration even though it is re-

gests that it is time to shift the focus away from developing additional ways to avoid probate. It is time to update the wealth transmission process itself. The hypothesis here is that fundamental but attainable changes can address and redress the many and persistent problems of probate. Part I of the Article states the basic objections to probate, describes alternative methods used by laypersons and lawyers for transferring interests at death, and both lauds the reforms of the Uniform Probate Code and laments their limitations. Part II introduces a simple, nonjudicial alternative to probate: a registration system. Part III examines the operative features of and benefits from shifting estate settlement to a registration system.

#### A. PROBATE AND ADMINISTRATION

In its narrow sense, probate simply means to prove or validate a will.<sup>16</sup> More broadly, and as used in this Article, probate refers to the process by which a decedent's affairs are wound up and her assets are distributed to the proper recipients. In the United States this broader meaning of probate is a judicial process for testate and intestate decedents alike.<sup>17</sup> There are set procedures for determining whether the decedent died with or without a valid will, appointing a personal representative, ascertaining liabilities for debts and taxes, preparing an inventory of assets, submitting (and perhaps approving) an accounting, distributing the net assets, and closing the estate.<sup>18</sup>

The entire process operates under the aegis of a judicial system, but the degree of actual court involvement varies considerably among jurisdictions. Under the solemn form of pro-

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viled. Professor Gordon offered a similar explanation for the persistence of the prudent-man rule that once guided the investment authority of a trustee. See Jeffrey N. Gordon, *The Puzzling Persistence of the Constrained Prudent Man Rule*, 62 N.Y.U. L. REV. 52, 75–76 (1987).

16. The word probate has as its antecedent the Latin verb, *probare*, “to prove.” RAYMOND E. LAURITA, *LATIN ROOTS AND THEIR MODERN ENGLISH SPELLINGS* 248 (Leonardo Press 2000).

17. For a general description of administration procedure see PAUL G. HASKELL, *PREFACE TO WILLS, TRUSTS AND ADMINISTRATION* (The Foundation Press, Inc. 2d ed. 1994). For an explanation of the historical rise of administration see generally ALISON REPPY & LESLIE J. TOMPKINS, *HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS, DESCENT AND DISTRIBUTION, PROBATE AND ADMINISTRATION* (Callaghan & Co. 1928); Thomas E. Atkinson, *Brief History of English Testamentary Jurisdiction*, 8 MO. L. REV. 107 (1943); see also Wellman, *Blueprint for Reform*, *supra* note 2.

18. The textual list of procedures is abbreviated. See Stein & Fierstein, *supra* note 14, at 67–68 (identifying fourteen separate steps that may be required “in the course of a ‘normal’ estate administration”).

bate, admission of the will, if any, and appointment of a personal representative is accomplished by court order issued after notice to all interested parties and following a hearing.<sup>19</sup> Intermediate administrative steps such as filing an inventory, determining claims, obtaining permission to sell assets, and presenting and gaining approval of accountings may also require court contact and hearings.<sup>20</sup> In contrast, the common form of probate eschews judicial orders, permitting the will to be validated in an ex parte proceeding and other steps to be taken with limited court involvement.<sup>21</sup> The Uniform Probate Code, now in effect in more than one-third of the states<sup>22</sup> offers in smorgasbord fashion both solemn form and common form probate, naming them formal and informal procedures.<sup>23</sup> The Code also offers a third procedural form called supervised administration.<sup>24</sup> Although the UPC offers a wide selection of alternatives for settling a decedent's estate, even its most minimal steps occur in a judicial setting and their use is still called "going through probate."<sup>25</sup>

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19. For a description of solemn form probate see UNIF. PROBATE CODE § 3-401 cmt. (amended 2008), 8 U.L.A. pt. II, at 76 (1998); HASKELL, *supra* note 17, at 189; REPPY & TOMPKINS, *supra* note 17, at 112.

20. Although these administrative steps may occur without formal judicial action, the process involves the probate court or its equivalent. HASKELL, *supra* note 17, at 183.

21. For description of the common form of probate, see HASKELL, *supra* note 17, at 183-87; *see also* REPPY & TOMPKINS, *supra* note 17, at 112.

22. The UPC has been adopted at least in part by eighteen states. Cornell University Law School, Uniform Probate Code Locator, <http://www.law.cornell.edu/uniform/probate.html> (last visited Oct. 10, 2009).

23. UNIF. PROBATE CODE §§ 3-301, 3-401 (amended 2008), 8 U.L.A. pt. II, at 55, 76 (1998). UPC-supervised administration requires not only judicial determination of testacy and court appointment of a personal representative, but also requires court approval of distributions to beneficiaries and a formal judicial closing of the estate settlement. *Id.* §§ 3-501, -504, -505, 8 U.L.A. pt. II, at 105, 108-09 (1998).

24. Supervised administration is described in UNIF. PROBATE CODE §§ 3-501 to -505 (amended 2008), 8 U.L.A. pt. II, at 105-10 (1998). Its distinguishing feature is the requirement of court approval for all distributions to beneficiaries. *Id.* § 3-503(c).

25. This is inescapable due to the very name of the Code. The drafters of the UPC hoped that the availability of informal procedures would keep the will that involves no controversy from becoming entangled with judicial proceedings. *See id.* § 3-302 cmt., 8 U.L.A. pt. II, at 58 (1998). Certainly commencement of settlement proceedings (determining the validity of a will, if any, or the fact of intestacy) is separate and distinct from administration of assets. This is a natural division that previous to the Code was underappreciated. *See* Paul E. Basye, *Dispensing With Administration*, 44 MICH. L. REV. 329, 330-32 (1945). The General Comment to UPC Article III indicates that

## B. OBJECTIONS TO PROBATE

Delay, expense, and lack of privacy are three universal criticisms of probate. All are products of mandatory steps embedded within a judicial process. While the required procedures are intended to be salutary and responsive to the potential needs of those who might be interested in an estate settlement, forced observance of a multistep and public court proceeding extends the process and frustrates the participants.

The delay of which beneficiaries complain is the deferred access to the decedent's assets.<sup>26</sup> Beneficiaries correctly perceive they have not obtained their shares until estate administration is completed and the settlement proceedings finalized. Until then, the personal representative is in complete control of the assets, having sole authority to determine whether an asset

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this separation is an essential feature of the UPC and of any probate code that seeks to attain its objectives. UNIF. PROBATE CODE art. III gen. cmt. (amended 2008), 8 U.L.A. pt. II, at 27 (1998). It seems, however, that the linkage of these separate functions in a single article of the UPC together with the difficulty of breaking old habits has caused practitioners to overlook the ability to avoid administration of an estate in instances where there is no controversy. Equally important, because the informal approach to settlement is articulated in a probate code, the UPC is not a convenient vehicle for articulating a unified approach for addressing transfers at death that occur both within and outside of a will. See C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism* (pt. 2), 43 FLA. L. REV. 599, 717 (1991).

26. Critics mention delay as well as other problems associated with probate. See JOEL C. DOBRIS ET AL., *ESTATES AND TRUSTS, CASES AND MATERIALS* 46 (2d ed. 2002) ("[M]any testators seek to avoid the probate process because of its reputation—sometimes but not always deserved—for delay and expense."); WILLIAM M. MCGOVERN, JR. & SHELDON F. KURTZ, *WILLS, TRUSTS AND ESTATES* 469 (2d ed. 2001) ("[A]dministration is needless expense."); MONOPOLI, *supra* note 4, at 39 (describing American probate as slow, expensive and corrupt); Comm. on Admin. and Distribution of Decedent's Estates, *Clearing Title of Heirs to Intestate Real Property*, 10 REAL PROP. PROB & TR. J. 454, 459 (1975) (describing administration as "expensive and time-consuming"); Friedman, *supra* note 5, at 366 (portraying the nature of probate as formal and bureaucratic); Gary, *supra* note 5, at 531 ("Many people choose to avoid the probate process, either because of concerns about delays and cost or because of a desire for privacy."); John T. Gaubatz, *Notes Toward a Truly Modern Wills Act*, 31 U. MIAMI L. REV. 497, 515 (1977) (citing complexity in administration as pushing estate planners away from probate); Hirsch, *supra* note 5, at 542 (describing probate as "time-consuming and costly"); Langbein, *supra* note 5, at 1116 ("The probate system has earned a lamentable reputation for expense, delay, clumsiness, make work, and worse."); William M. McGovern, Jr., *Nonprobate Transfers Under the Revised Uniform Probate Code*, 55 ALB. L. REV. 1329, 1352 (1992), (arguing that "delay and expense of probate" and "fear of lawyers and their fees" motivates efforts to avoid probate).

is needed for administrative purposes, such as for production of income or for sale to produce cash to discharge liabilities.<sup>27</sup> Quite simply, the property is “tied up” until all of the court-centered and statutorily required steps are taken and the estate is closed.

Delay is particularly acute when solemn form or the UPC’s formal procedures are employed. To initiate the probate process, a petition must be prepared and filed, a hearing date secured, notices given, and court appearances made.<sup>28</sup> Even when informal or common form probate is used, a pleading must be prepared, submitted, and acted upon.<sup>29</sup> Creditors of the decedent normally have a prescribed time within which to submit or forfeit their claims.<sup>30</sup> Although a shortened statute of limitations is advantageous to beneficiaries,<sup>31</sup> a claims period applicable to all probate estates becomes a mandatory waiting period, which constitutes an imposition for the vast majority of estates that involve no disputed or unknown claims.<sup>32</sup> The op-

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27. UNIF. PROBATE CODE § 3-709 (amended 2008), 8 U.L.A. pt. II, at 155 (1998).

28. A formal hearing is optional in an uncontested matter. *Id.* § 3-405, 8 U.L.A. pt. II, at 155 (1998). There is practical difficulty, however, in obtaining consent from all beneficiaries in order to proceed in a timely manner when there are numerous parties. *See id.* §§ 3-402, 3-403, 3-405, 8 U.L.A. pt. II, at 79–81 (1998).

29. *See, e.g., id.* §§ 3-301 to -302, 8 U.L.A. pt. II, at 55–56, 58 (1998). Under the UPC’s informal procedures, the pleading is an application directed to the Registrar. *Id.* § 3-301. No notice is required as the registrar responds to the application without the need for a hearing and without consent or waiver from the beneficiaries. *Id.* §§ 3-301 to -302.

30. *See, e.g.,* Gagliardi, *supra* note 11, at 829. The time period may depend on whether the claim arose prior to, at, or after death and whether notice is given to the creditors and, if given, the type of notice. For example, the Uniform Probate Code, as amended in 1989, provides that the statute of limitations on claims arising prior to death is suspended for four months and then resumes running. *Id.* § 3-802(b), 8 U.L.A. pt. II, at 211 (1998). If a creditor is notified to present his claim, the claims and limitations period is four months from notice by publication, sixty days from actual notice to the creditor, or the later of four months from publication or sixty days from actual notice if both methods of notification are utilized. *Id.* §§ 3-801, -803, 8 U.L.A. pt. II, at 208, 215 (1998). If no notice is given, § 3-803(a) provides a one-year statute of limitations on all claims against the decedent that arose before death. *Id.* § 3-803(a).

31. If claims are not barred, the beneficiaries face uncertainty as to the net value of the assets they have received and may lack marketable title to those assets. The time during which this uncertainty exists is marked by general statutes of limitation or by the relatively short special statute in a probate code, such as the one-year period of § 3-803(a) of the Uniform Probate Code. *Id.*

32. The personal representative will be reluctant to distribute assets until

portunity to close an estate may arrive only after another mandatory waiting period elapses,<sup>33</sup> and there may be yet another court date to make and keep before the estate closing receives a court blessing.<sup>34</sup>

A second universal criticism of probate is expense.<sup>35</sup> The expense of probate is caused in large measure by the forced, repetitive contacts with the court or the forced adherence to prescribed functions. Satisfying statutory and court rule requirements necessitates expenditure of attorney and legal assistant time and talent.<sup>36</sup> Moreover, court fees and exactions must be paid.<sup>37</sup>

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it is clear that claims are presented or barred because he may fear that distribution before complete resolution of potential claims may expose him to personal liability. *See, e.g., id.* § 3-803 cmt., 8 U.L.A. pt. II, at 216–18 (Supp. 2009). In some states, the estate settlement through the court cannot be terminated until after the claims period has run. Michigan, for example, stipulates that an estate cannot be closed by a sworn statement earlier than five months after appointment of the personal representative and after publication to creditors and the expiration of the claims period. MICH. COMP. LAWS ANN. § 700.3954 (West 2002).

33. The five-month rule in Michigan is an example of a mandatory waiting period separate from the claims period. *Id.*

34. For example, a formal closing would entail a pleading, notice, and hearing. *See* UNIF. PROBATE CODE §§ 3-1001 to -1002 (amended 2008), 8 U.L.A. pt. II, at 288, 294 (1998). It typically is not possible to avoid a closing process. *See* LAWRENCE W. WAGGONER, ET AL., FAMILY PROPERTY LAW 1301 (3d ed. 2002).

35. *See* DOBRIS, ET AL., *supra* note 26, at 46; MCGOVERN, JR. & KURTZ, *supra* note 26; MONOPOLI, *supra* note 4, at 39; Gary, *supra* note 5, at 531; Langbein, *supra* note 5, at 1116; McGovern, Jr., *supra* note 26, at 1352; Memorandum from ABA Leadership on Real Estate Transfer on Death Deeds to Dennis M. Horn, ABA Advisor for NCCUSL Uniform Law Project (Dec. 4, 2007) (“Probate is an expensive process, both in the court resources used and in expenses to the litigants.”), available at <http://www.abanet.org/rp/Reports/Publications/ereport/2008/2/RPArticles.pdf>.

36. For example, publication costs are significant, especially in urban locales. *See* UNIF. PROBATE CODE § 3-801 cmt. (amended 2008), 8 U.L.A. pt. II, at 208 (1998). Completing and transmitting required court forms—including publication notices—require the time of a legal assistant or secretary. If a court hearing is mandated on the opening of an estate or for any other procedural step, attorney fees certainly will be incurred. At the same time, a thorough study of estate settlement in five states concludes that varying probate procedures has little effect on the attorney time committed to the major time-consuming tasks of estate administration, i.e., communication with the personal representative and with beneficiaries. *See* Stein & Fierstein, *supra* note 5, at 1158. In light of this finding, the study questions whether reducing court involvement will save substantial attorney time in uncontested cases. *Id.* at 1161.

37. Probate court fees differ in the various jurisdictions. North Carolina, for example, imposes a fee of four-tenths of one percent on the gross estate, not

Lack of privacy is a third significant objection to traditional probate.<sup>38</sup> Probated wills are filed in court.<sup>39</sup> They become public records.<sup>40</sup> If an inventory of assets must be filed, it too becomes a public record.<sup>41</sup> The intimate details of family and finance are available to be viewed by anyone with a healthy curiosity, be it a neighbor or the local newspaper.<sup>42</sup> The current controversy over privacy with regard to revocable trusts provides a good example of the intensity of the objections to mandatory disclosure of family financial matters.<sup>43</sup>

Those who defend public access to probate records generally argue that these are court records.<sup>44</sup> It is said that the public must have complete access in order to retain confidence in the

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to exceed \$6,000. N.C. GEN. STAT. § 32-55(a) (Supp. 2008). Michigan assesses an inventory fee based upon the value of the probate assets. MICH. COMP. LAWS ANN. § 600.871 (West Supp. 2009). California exacts a probate filing fee that is graduated, based upon the value of the assets passing through probate. CAL. GOV'T CODE § 70650 (West 2008) (formerly § 26827) (current version at 2009 Cal. Leg. Serv. 4th Ex. Sess. ch. 22). The Second Appellate District Court of California recently held that California's graduated probate filing fee is an unconstitutional estate tax under the California Constitution. *In re Estate of Claeysens*, 74 Cal. Rptr. 3d 304, 311 (Cal. Ct. App. 2008).

38. See DACEY, PROBATE, *supra* note 1, at 14. In contrast to probate, privacy prevails when a revocable trust is used as a will substitute. See Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 ARIZ. ST. L.J. 713, 727 (2006). A comprehensive survey of fellows of the American College of Trust and Estate Counsel regarding the use of revocable trusts revealed that revocable trusts are widely used to prevent public disclosure of trust terms. Ira Mark Bloom, Summary of ACTEC Survey on Revocable Trusts 9 (2007) (unpublished manuscript, on file with author).

39. See Foster, *supra* note 38, at 722.

40. *Id.*

41. See Frances H. Foster, *Trust Privacy*, 93 CORNELL L. REV. 555, 560 (2008).

42. See JESSE DUKEMINIER, ET AL., WILLS, TRUSTS, AND ESTATES 318 (7th ed. 2005); Foster, *supra* note 38, at 716.

43. See, e.g., Foster, *supra* note 38, at 739–51. Foster discusses the limited rights of inspection given to trust beneficiaries under UPC § 7-303(b) *Id.* at 741–43. Additionally, she also traces the development of the section 813 of the Uniform Trust Code, which addresses a beneficiary's right to information. *Id.* at 743–44. Finally, Foster laments the trend toward restricting the ability of trust beneficiaries to access information about the terms and administration of a trust. *Id.* at 744–48. Foster believes that the contrast between public access to probate files and the privacy restrictions placed on access to information about a trust has impeded the unification of substantive law pertaining to trusts and wills and the unification of trust law through adoption of the Uniform Trust Code. *Id.* at 717.

44. See Foster, *supra* note 41, at 561.

integrity of the judicial system.<sup>45</sup> While it is true that present-day probate records are court records, the real question is why the details of an individual's assets and transfers to friends and family should be the subject of a judicial proceeding and therefore be in the files of a court. The public interest in a transparent judicial system seems fundamentally different from—and not pertinent to—public curiosity about the transmission of private wealth.<sup>46</sup> Thus, routine wealth transmission seems unlikely to be a proper subject of the judicial process.

### C. OTHER FACTORS CONTRIBUTING TO THE DECLINE OF PROBATE

#### 1. Changes in Wealth and Time and Mode of Transfer

The consistent hostility to and criticism of probate are not the only forces that have produced significant changes in how wealth is transmitted at death. Change also has resulted from the shift in predominant forms of wealth.<sup>47</sup> In the latter half of the twentieth century, retirement plans, annuities, and equity investments came to replace the family farm and small business as common forms of wealth.<sup>48</sup> At the same time, other societal changes worked to further the decline of transfers at death through the probate system. Substantial numbers of young adults matriculate at institutions of higher education. Parental payment for the high cost of postsecondary education marks a substantial transfer of wealth to the younger generation at a time well before the parents' deaths.<sup>49</sup> Increased longevity both postpones the time for intergenerational wealth transfer and reduces it as more wealth is consumed prior to death.<sup>50</sup>

Life insurance policies, annuities, and retirement plans not only evidence intangible wealth, they also are assets that have an embedded transmission technique that sidesteps probate. The policy owner or plan participant is allowed to designate a beneficiary to whom the financial intermediary agrees to pay

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45. *See id.* (“Wills are public record because of the ‘public’s interest in openness and accessibility’ of court proceedings and records.”).

46. The South Dakota legislature appears to have reached this conclusion. By statute, court proceedings involving any trust are not part of the public record. S.D. CODIFIED LAWS § 21-22-28 (2004).

47. Langbein, *supra* note 11, at 722.

48. *Id.* at 723.

49. *Id.* at 723, 732.

50. *Id.* at 740–43.

benefits in the event of the death of the insured, the annuitant, or the plan participant.<sup>51</sup> Payment is direct, without the intervention of a court, without probate.<sup>52</sup> The beneficiary designation feature makes a will unnecessary to the transfer of these benefits.<sup>53</sup> The cost of utilizing the beneficiary designation is negligible for it is inseparable from the expense of making the financial investment. Transfer at death is without expense or delay, and there is no public record for a third party to view.<sup>54</sup>

## 2. Use of Title Formats to Avoid Probate

The use of the transfer function, which is inherent in contractual assets such as life insurance, annuities, and retirement plans, developed as part of the evolution of these forms of wealth. While not conceived as vehicles to avoid probate administration, they perform that task perfectly. Other forms of title-holding that evolved long before probate came to be shunned also have come to be widely used because of their ability to transfer ownership expeditiously at the death of the prior holder. These title devices include the joint tenancy with right of survivorship and the revocable living trust.

### a. Joint Tenancy

A joint tenancy with right of survivorship may exist to hold real estate or personal property.<sup>55</sup> When the joint owners are

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51. See Gary, *supra* note 5, at 534–35.

52. When challenged as will imposters, courts found these lifetime contractual arrangements to be nontestamentary, thereby permitting them to shift ownership at death with neither the necessity to conform to requirements for execution of a will nor the need to participate in a probate administration. See, e.g., Ridge v. Bright, 93 S.E.2d 607, 613 (N.C. 1956) (holding that the instrument concerning capital stock in Investors Mutual, Inc. created a valid inter-vivos trust); Farkas v. Williams, 125 N.E.2d 600, 608–09 (Ill. 1955) (holding that stock decedent issued in his name as trustee for defendant was nontestamentary); *In re Estate of Anderson*, 217 N.E.2d 444, 450 (Ill. App. Ct. 1966) (finding that the savings accounts opened by decedent were not revocable by will); Merchs. Nat'l Bank of Aurora v. Weinold, 138 N.E.2d 840, 848 (Ill. App. Ct. 1956) (holding that the trust agreement, including securities, constituted a valid inter-vivos trust and was not testamentary); *In re Estate of Kovalyshyn*, 343 A.2d 852, 853 (Hudson County Ct. 1975) (finding that decedent created an inter-vivos trust concerning shares he purchased in a mutual fund).

53. Because will substitutes are classified as lifetime transfers, there is no property interest remaining in the decedent's name. The shift in beneficial rights at death occurs outside of the rules governing testamentary transfers, i.e., free from the judicial administration and formalities applicable to wills. See, e.g., Gary, *supra* note 5, at 535.

54. See *id.*

55. See 2 AMERICAN LAW OF PROPERTY §§ 6.1–6.4 (A. James Casner ed.,

husband and wife, the arrangement may be a tenancy by the entirety.<sup>56</sup> The joint owners generally have equal rights to possess and enjoy the property.<sup>57</sup> When one dies, the surviving owner automatically is the sole owner. There is no probate, no assignment, indeed no transfer of any type. The ownership in the survivor simply continues after death has extinguished the rights of the first to die.<sup>58</sup> The simplicity of a joint tenancy with right of survivorship makes it a most attractive device for avoiding probate. It is not, however, a foolproof mechanism. People die in the “wrong” order.<sup>59</sup> A co-tenant may become a debtor,<sup>60</sup> may divorce,<sup>61</sup> may need to qualify for governmental assistance,<sup>62</sup> or may refuse to follow the desires of the original owner.<sup>63</sup> Nevertheless, for those who do not appreciate these risks, or choose to ignore them, the enticement of the joint ownership form is compelling. If no unanticipated event occurs, the

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Little, Brown & Co. 1952); JOHN E. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 94 (2d ed. 1975).

56. See 2 AMERICAN LAW OF PROPERTY, *supra* note 55, § 6.6(c); CRIBBET, *supra* note 55, at 95. At common law, a tenancy by the entirety was created by operation of law when a conveyance was made to husband and wife. *Id.* Under a tenancy by the entirety, the husband possessed sole authority to make decisions but he could not unilaterally defeat his wife’s survivorship right. *Id.* Married women’s property acts, passed to remove the common law disabilities of coverture, were interpreted differently in the separate states insofar as they affected the common law tenancy by the entireties. *Id.* In some states the tenancy was abolished, in others it continued to exist, but usually in modified form. *Id.*

57. See *supra* note 55.

58. *Id.*

59. For example, if Mother puts her home in joint tenancy with Daughter, so that Daughter also receives that property to the exclusion of her siblings, but Daughter predeceases Mother, the property will again be in Mother’s estate. Unless Mother takes additional steps, the home will pass through probate at Mother’s death and may well pass to unintended beneficiaries.

60. For example, the creditor of one living cotenant may be able to reach the property held in joint tenancy. See *DUKEMINIER ET AL.*, *supra* note 42, at 345.

61. For example, the cotenant has an ownership interest that may be subject to allocation in a divorce proceeding. See 7 POWELL ON REAL PROPERTY §§ 51.02[4], 51.04[3] (Michael Allan Wolf ed., 2009).

62. For example, the interest in the joint tenancy of the one who seeks to qualify for Medicaid or other governmental programs may be a countable resource and may disqualify the applicant. See *Troy v. Hart*, 697 A.2d 113, 114 (Md. Ct. Spec. App. 1997).

63. After Mother puts her home in joint tenancy with Daughter, intending only to facilitate passage of title at death, Mother may decide to sell her home. Her decision will be stymied if Daughter refuses to acquiesce in Mother’s decision.

transfer at death is immediate, without expense, and wholly private.<sup>64</sup>

b. *The Revocable Trust*

For the estate planner, the most significant probate avoidance device is the revocable trust.<sup>65</sup> Lawyers have turned to and perfected it as a comprehensive transfer mechanism. The revocable living trust, long used as a vehicle for lifetime management of property, now is embraced enthusiastically to transfer assets at death without an intervening probate administration. Often the settlor serves as her own trustee.<sup>66</sup> To the extent that lifetime management is not needed, assets still titled in the settlor are moved into the trust at death by naming the trustee as residual beneficiary under a so-called pour-over will.<sup>67</sup> The pour-over will, however, requires probate, making the revocable trust, at least from this viewpoint, an imperfect will substitute.<sup>68</sup> The best lawyers can do to remedy this

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64. See, e.g., 7 POWELL ON REAL PROPERTY, *supra* note 61, § 51.03[3] (explaining that the joint tenant who survives the other joint tenant takes the estate and there is nothing for the will of the decedent to transmit).

65. See CARLA NEELEY FREITAG, THE FUNDING OF LIVING TRUSTS 1 (2004); MCGOVERN, JR. & KURTZ, *supra* note 26, at 317–19. The Revocable Trust Survey revealed a consensus in sixteen states that a revocable trust (and not a will) should be the primary device to transmit property at death. Bloom, *supra* note 38, at 2. In sharp contrast, there was a consensus in only three states that a will should be the primary document. See *id.* at 5.

66. See JEFFREY N. PENNELL, WEALTH TRANSFER PLANNING AND DRAFTING 27 (2005); John H. Martin & John W. Nicholson, *The New Phenomenon: Settlor as Trustee of a Funded Living Trust*, TR. & EST., Mar. 1971, at 165. The results of the Revocable Trust Survey indicate it is common practice in forty-eight states for the settlor to serve as sole trustee. Bloom, *supra* note 38, at 25. The settlor of a revocable trust commonly is the sole beneficiary in all states. See *id.* at 26.

67. See PENNELL, *supra* note 66, at 19. The transfer from the will to the revocable trust is valid under any of several theories: statutory validation; incorporation of the trust by reference in the will; treating the trust as a recipient having independent legal significance; treating the will and trust as a single dispositive vehicle that satisfies the formalities required of a will under a harmless error, substantial compliance, or other judicial dispensing doctrine. See RESTATEMENT (THIRD) OF TRUSTS § 19 (2003); see also UNIF. PROBATE CODE § 2-511 (amended 1990), 8 U.L.A. pt. I, at 156–57 (1998) (representing a statutory validation of the pour-over technique).

68. The revocable trust is imperfect from the standpoint that probate may not be avoided completely and the trustee is incapable of transferring assets that remain in the settlor's name at her death. See FREITAG, *supra* note 65, at 9; PENNELL, *supra* note 66, at 19. Professor Langbein classifies a revocable trust as a pure or perfect will substitute in the sense that it enables the settlor to retain complete control over the terms of the trust and its assets for a lifetime. Langbein, *supra* note 5, at 1109.

problem is to exhort the settlor to transfer everything into trust during lifetime.<sup>69</sup>

Given the widespread acceptance of the revocable trust as a will substitute by lawyers and their clients, it is instructive to examine its operation in light of the comments made about the problems of delay, expense, and lack of privacy in probate administration. A decedent's assets placed into trust before death are in the trustee's hands and available for distribution immediately upon the death of the settlor.<sup>70</sup> While the trustee has full power to make transfers to beneficiaries very soon after the settlor's death, nevertheless some period of time usually elapses before the assets are distributed to the designated recipients. The prudent trustee first will identify and satisfy liabilities to creditors<sup>71</sup> and tax authorities.<sup>72</sup>

During the period of trust administration after the settlor's death, activities take place that are not unlike the tasks that must be accomplished in a probate administration.<sup>73</sup> Importantly, however, there is significant freedom in the settlement of a trust that is not available under a probate administration. There is no wait for a court to commence the settlement process or to appoint a fiduciary.<sup>74</sup> There is no need to prepare and file

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69. See FREITAG, *supra* note 65, at 12–15.

70. See PENNELL, *supra* note 66, at 16. If the settlor has served as trustee until settlor's death, a successor will need to qualify as trustee. Quite likely the only step needed to qualify is the execution of an acceptance of office.

71. Under Uniform Trust Code section 505(a)(3), the retention of the power to revoke exposes the assets to liabilities of the settlor that exist at death. See AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 15.4.2 (5th ed. 2007). In at least one state, however, revocable trust assets may be insulated from the reach of the settlor's creditors. See *Schofield v. Cleveland Trust Co.*, 21 N.E.2d 119, 121–22 (Ohio 1939).

72. A decedent's final income tax return may be necessary. The filing obligation falls upon the court-appointed fiduciary "or other person charged with the property of such decedent." I.R.C. § 6012(b)(1) (2006). A federal estate tax return may need to be prepared, filed, and cleared. If the bulk of the settlor's assets are held in the revocable trust and the value of her assets exceeds the threshold for filing a federal estate tax return, the trustee will be the statutory executor, with the obligation to file the return. *Id.* § 6012(b)(4). Any unpaid federal estate tax is a lien on the property for ten years from the decedent's death. *Id.* § 6324(a)(1). Moreover, the trustee has personal liability to the extent of value held or received at death. *Id.* § 6324(a)(2).

73. In general, the tasks are to inventory and value assets, pay liabilities, and distribute the net assets to the beneficiaries. For a listing of the tasks that may need to be addressed in either an estate or trust administration, see Stein & Fierstein, *supra* note 14, at 67–79.

74. Even the UPC's informal proceedings require an application to the court, requesting either or both informal probate and appointment of a per-

pleadings and no mandatory waiting period for creditors to identify themselves.<sup>75</sup> The trustee has the ability to proceed as quickly or as deliberately as the trustee believes appropriate. Only those steps need be taken that are deemed necessary to the unique facts of the particular trust. In contrast, a probate administration proceeds on a rigid time schedule and assumes all estates need to follow each and every one of the prescribed steps.<sup>76</sup>

Expenses incurred in a revocable trust settlement may be modest or significant. A number of variables affect the result. Fiduciary fees may be significant if a professional fiduciary serves as trustee,<sup>77</sup> but modest when a family member acts as trustee, without or at nominal compensation.<sup>78</sup> The expense is

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sonal representative. UNIF. PROBATE CODE § 3-301(a) (amended 2008), 8 U.L.A. pt. II, at 55 (1998).

75. General statutes of limitation may apply to creditors' claims against trust assets. A state, however, may have a special claims procedure that applies to assets held in a revocable trust. *See, e.g.*, MICH. COMP. LAWS ANN. § 700.7501 (West 2008) (providing for a revocable trust the same statute of limitations and a similar system for presentation of claims and resolution of disputes as applicable to a probate estate). Even though there may be a statute of limitations that has not run, if the trustee believes that all claims are satisfied, the trustee may be confident that assets can be distributed safely to the beneficiaries.

76. Even the more flexible approach of informal procedures under the Uniform Probate Code features mandatory steps and time schedules. Within thirty days after probate of a will, the applicant must notify heirs and beneficiaries of that fact. UNIF. PROBATE CODE § 3-306(b) (amended 2008), 8 U.L.A. pt. II, at 61 (1998). The personal representative must notify interested parties of appointment within thirty days. *Id.* § 3-705, 8 U.L.A. pt. II, at 150 (1998). An inventory of estate assets must be prepared within three months and be submitted to those who request it. *Id.* § 3-706, 8 U.L.A. pt. II, at 152 (1998). While the proceedings can be closed formally or informally, even informal closing requires verification by the personal representative that a "full account in writing" was prepared and submitted to the beneficiaries. *See id.* § 3-1003(a)(3), 8 U.L.A. pt. II, at 294-95 (1998).

77. Most professional fiduciaries, bank trust departments, or boutique trust companies publish standard fee schedules for estate settlement services, whether through probate or a revocable trust. Deviation from the standard fees is likely for larger estates. Current fee schedules (on file with the author) for three corporate fiduciary institutions (one national, one regional, and one state specific) indicate the range of fees is from 1% of asset values (for the smaller, state-specific fiduciary) to 3% (quoted by the national institution). In one case, that of the state-specific fiduciary, a discount of 25% is available if no probate is necessary.

78. It is a fair observation that payment for the qualified services of a professional fiduciary may be less expensive than the uninformed and lackadaisical services of a family member who serves for no fee. *See* WAYNE M. GAZUR & ROBERT M. PHILLIPS, ESTATE PLANNING, PRINCIPLES AND PROBLEMS 151 (2d ed. 2008).

greater when a federal estate tax return must be filed for the settlor but less when no transfer tax issues are raised.<sup>79</sup> Expense is less if all assets are in trust before death or are payable to the trustee under beneficiary designations. But, if the trust was only partially funded before the settlor's death, the pour-over will must be probated to move assets into the trust, and that requirement is likely to precipitate the additional expenses of a normal probate administration. Nevertheless, and without regard to these variables, there are no filing fees for the trust administration itself, no inventory fees, and no attorney fees for navigating a petition and hearing process that is characteristic of a probate administration.

Privacy may be the trump card held by the revocable trust. Typically, there are no pleadings that identify interested parties, no notice requirements, no filing of a copy of the trust, and no public identification of the trustee. Indeed, there may be no record that a trust even exists. Complete privacy potentially is damaging to the interests of those who have a genuine need to know<sup>80</sup> and may provide inappropriate cover for the unscrupulous.<sup>81</sup> But, even those who have nothing improper to conceal and who want beneficiaries to be fully informed derive considerable comfort from knowing that details of family and finance are shielded from the prying eyes of friend and stranger.

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79. Preparation of a federal (or state) estate tax return generally requires incurring expense and devoting time to a careful description of assets; confirmation of values, often by appraisal or confirmatory statements from financial institutions; analysis of inclusion and exclusion rules; assembly of legal arguments to support the taxpayer's positions; and completion of a sizeable return, with exhibits. Compliance with tax rules often constitutes the most significant portion of the expense of estate settlement for estates that must file an estate tax return.

80. Those who survive a deceased family member have a legitimate interest in knowing whether the decedent established a trust to dispose of assets, who serves as trustee, what assets are held in the trust, who are beneficiaries, and what the trust terms stipulate. If a person is told he or she is a beneficiary, there still is the need to see a copy of the trust to confirm the accuracy of the trustee's statements. On the other hand, a settlor may wish to shield one or more of the beneficiaries from knowing the trust terms or even learning of its existence. The tension between the arguments in favor of and against disclosure has infected consideration of the Uniform Trust Code. *See Foster, supra* note 38, at 742–47.

81. A complete privacy shield allows for a secret trust, which arguably yields a dangerous result. If a person is unaware she is a beneficiary, who is to enforce the trustee's obligations to her? Is there really a trust if no one has the ability or incentive to enforce fiduciary obligations? *See generally Foster, supra* note 41, at 559–67 (detailing the public policy reasons that underlie the public and private distinctions between wills and will-like trusts).

A recitation of the attributes of the revocable trust makes it look like a successful replacement for the will. The revocable trust, however, remains hobbled by its inability to reach and transmit assets that remain titled in the decedent. Its trustee is dependent on a pour-over will and a probate administration to reach those assets. And, that dependency leads right back to the problems of probate—these problems being delay, expense, and lack of privacy.

*c. New Nonprobate Title Forms*

The legal profession not only spurred transformation of the revocable trust into a worthy and successful competitor to the will; the profession also helped develop and promote other title forms to serve as will substitutes. Article VI of the UPC creates a new form of ownership for accounts in financial institutions, payable on death (POD) accounts,<sup>82</sup> and a unique security registration form, transfer on death (TOD) accounts.<sup>83</sup> The provisions of UPC Article VI also exist as free-standing uniform acts.<sup>84</sup> The POD and TOD title forms facilitate and encourage transfer of financial assets at death without probate. Only the original and current owner of both the financial and security accounts has the right to the possession and benefit of the assets and only she may amend and revoke the accounts.<sup>85</sup> No ownership interest passes to the one or those named as successors until the death of all current owners.<sup>86</sup> Most importantly, both forms of account explicitly are labeled as nontestamentary so the accounts pass to the intended takers without estate administration.<sup>87</sup> Use of a stipulated form of ownership registra-

82. See UNIF. PROBATE CODE §§ 6-201 to -227 (amended 1989), 8 U.L.A. pt. II, at 433–48 (1998).

83. See *id.* §§ 6-301 to -311, 8 U.L.A. pt. II, at 449–57 (1998). The designation POD (pay on death) may be used rather than TOD (transfer on death). See *id.* § 6-305, 8 U.L.A. pt. II, at 452 (1998).

84. The provisions regarding POD accounts in financial institutions may be adopted as the Uniform Multiple Person Accounts Act. The TOD security registration provisions constitute the Uniform TOD Security Registration Act. All of the 1989 Revised Uniform Probate Code Article VI constitutes the Uniform Nonprobate Transfers on Death Act. All three freestanding acts were approved in 1989 by the National Conference of Commissioners on Uniform State Laws.

85. See UNIF. PROBATE CODE §§ 6-211, 6-213(a) (amended 1990), 8 U.L.A. pt. II, at 438, 441 (1998) (highlighting provisions on POD accounts in financial institutions); see also *id.* § 6-306, 8 U.L.A. pt. II, at 452 (1998) (outlining provisions on TOD security registration).

86. *Id.* §§ 6-211(c), -307, 8 U.L.A. pt. II, at 438, 453 (1998).

87. *Id.* §§ 6-214, -309 (amended 1989), 8 U.L.A. pt. II, at 442, 454 (1998).

tion is the sole requirement for a self-executing passage of title at death.

A separate UPC provision<sup>88</sup> boldly stipulates that a provision for transfer at death contained in almost any contract, financial instrument, or property agreement is nontestamentary and, therefore, valid and effective to transfer title at the death of the current holder in the manner described in the writing. To effect transfer there is no court intervention, no determination of validity, no administration, nothing.<sup>89</sup> While this provision was intended to encourage creation of competitors to the traditional will,<sup>90</sup> its sweeping language can be read as the repeal of the formalities for a valid will<sup>91</sup> and indeed the repeal of the traditional notion of what constitutes a will.<sup>92</sup>

The active development and promotion of new title forms that avoid probate continues unabated. Most recently, the National Conference of Commissioners on Uniform State Laws established a drafting group to prepare a transfer on death real estate deed.<sup>93</sup> The TOD deed unabashedly will be an ambulatory document that transfers no interest to the beneficiary until the death of the present owner.<sup>94</sup> Neither delivery nor accep-

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88. *See id.* § 6-101, 8 U.L.A. pt. II, at 430 (1998). In addition to being repositioned in Article VI in 1989, the language of present section 6-201 was amended to clarify its meaning. *See id.* § 6-101 cmt., 8 U.L.A. pt. II, at 430–31 (1998).

89. *See id.* § 6-101 cmt.

90. *See* Wellman, *Blueprint for Reform*, *supra* note 2, at 485; *see also* Richard V. Wellman, *Transfer-on-Death Securities Registration: A New Title Form*, 21 GA. L. REV. 789, 794 (1987) [hereinafter Wellman, *Transfer-on-Death*].

91. *See* Wellman, *Transfer-on-Death*, *supra* note 90, at 809 n.58.

92. In classic understanding, a will directs transmission of property at the owner's death in contrast to a document that transfers an interest during the owner's lifetime. The latter is labeled nontestamentary. *See* Gagliardi, *supra* note 11, at 821; *see also* Wellman, *Transfer-on-Death*, *supra* note 90, at 808 n.55 (noting the line that exists between inter-vivos dispositions that fall outside Wills Act sanctions and 'testamentary' dispositions that fail unless in compliance with Wills Act mandates).

93. *See* REAL PROPERTY TRANSFER ON DEATH ACT (Discussion Draft 2009), [http://www.law.upenn.edu/bll/archives/ulc/tod/2009jan12\\_draft.pdf](http://www.law.upenn.edu/bll/archives/ulc/tod/2009jan12_draft.pdf).

94. *See* Memorandum to Dennis M. Horn, *supra* note 35 ("During the owner's lifetime, the beneficiaries [of a transfer on death deed] have no interest in the property, and the owner retains full power to transfer or encumber the property or to revoke the TOD deed."). As of 2007, TOD statutes permitting a testamentary transfer of real estate through a deed revocable until the grantor's death were already in effect in at least ten states: Arizona, Arkansas, Colorado, Kansas, Missouri, Montana, Nevada, New Mexico, Ohio, and Wisconsin. *Id.*

tance during the transferor's lifetime will be necessary.<sup>95</sup> Thus, there will be no pretense of a lifetime transfer to make the arrangement nontestamentary.<sup>96</sup> The TOD deed simply represents another rejection of probate as the preferred method of effecting a transfer at death.<sup>97</sup>

The new forms of title produce transfers at death that are quick, inexpensive, and, in some cases, private. There could be some modest cost to plan and execute the governing instrument, but there is little or no expense at the decedent's death.<sup>98</sup> The transfer is either automatic or takes very few steps to effect.<sup>99</sup> The details of a POD financial or TOD securities transfer generally will be completely private, but the TOD deed, of course, will be a matter of public record.<sup>100</sup>

The great drawback to these new title forms is their single-purpose character. None is capable of serving as an omnibus transfer device. Moreover, employing an array of separate formats in a single estate plan presents a challenge of planning and implementation that few can master.

### 3. Procedural Alternatives to Traditional Probate

Challenges to probate also have taken aim at the traditional judicial procedures used to implement transfers at death.

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95. Gary, *supra* note 5, at 550.

96. *See id.* at 542. The distinction between a testamentary and nontestamentary transfer is that the latter involves the passage of some interest to the recipient during the transferor's lifetime. *Farkas v. Williams*, 125 N.E.2d 600, 603 (Ill. App. Ct. 1955). The interest may be ephemeral and the distinction illusory. *Cf. id.* (finding that an interest passed to the recipient during the transferor's lifetime but failing to name that interest). The distinction is highly criticized. *See infra* note 257.

97. *See Gary, supra* note 5, at 531–33.

98. *See id.* at 542–43.

99. A POD account in a financial institution should be transferable upon request and submission of a death certificate. *See* UNIF. PROBATE CODE § 6-223(2) (amended 2008), 8 U.L.A. pt. II, at 446 (1998). The TOD security registration statute permits the issuer of the security to impose “applicable requirements” in addition to proof of death. *Id.* § 6-307, 8 U.L.A. pt. II, at 453 (1998). The anticipated Uniform TOD deed will operate automatically at the grantor's death to vest title in the beneficiaries who survive the grantor (subject to the spousal elective share and rules regarding lapse, revocation by divorce or homicide, and the effect of survivorship or simultaneous death, to the extent that the elective share and those rules apply in the jurisdiction to non-probate transfers). *See REAL PROP. TRANSFER ON DEATH ACT § 209* (Discussion Draft 2009), available at [http://www.law.upenn.edu/bll/archives/ulc/tod/2009jan12\\_draft.pdf](http://www.law.upenn.edu/bll/archives/ulc/tod/2009jan12_draft.pdf).

100. *See id.* § 205(3) (requiring the TOD deed to be recorded before the grantor's death).

Alternatives have emerged that permit abbreviated routes around the multiple stages of normal probate for assets that remain titled in the decedent. These efforts are modest in scope, and they have experienced varied degrees of success. One of the reforms, small estate procedures, makes probate administration unnecessary when the value of the decedent's assets falls below a ceiling amount.<sup>101</sup> A different and incomplete reform contemplated the retention and strengthening of the traditional system of probate administration. It called for the development of a will that could operate as a dominant governing instrument, dictating the dispositions under will substitutes. Radical in a different manner, a third reform effort strips away all requirements of judicial administration for an estate of any value and substitutes a European-style system of automatic devolution of title to the decedent's successors.

*a. Small Estate Procedures*

The probate laws of most states feature small estate procedures.<sup>102</sup> These procedures permit the transfer of assets, often excluding real estate,<sup>103</sup> in a single step, but only up to the statutorily fixed value.<sup>104</sup> There are two variants of the one-step procedure. One features a court assignment of assets to the de-

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101. Several studies indicate that the large majority of probate estates are of modest value, meaning that small estate procedures may have a significant impact. See UNIF. PROBATE CODE pt. 12 cmt. (amended 2008), 8 U.L.A. pt. II, at 307 (1998); Stein & Fierstein, *supra* note 14, at 87–89. The opinion of what constitutes a small estate ranges widely. The California Probate Code permits collection and transfer of up to \$100,000 of personal property by an affidavit procedure. CAL. PROB. CODE § 13100 (West Supp. 2009). In contrast, the UPC affidavit procedure suggests \$5,000 of personal property as the maximum. UNIF. PROBATE CODE § 3-1201 (amended 2008), 8 U.L.A. pt. II, at 307 (1998). Michigan's limit on collection of personal property by affidavit currently is \$20,000, as adjusted for inflation from the original statutory amount of \$15,000. MICH. COMP. LAWS ANN. § 700.3983 (West 2002). Texas permits collection of personal property of an intestate decedent by affidavit in total amounts up to \$50,000, but the affidavit must be approved by the judge. TEX. PROB. CODE ANN. § 137(c) (Vernon Supp. 2008).

102. HALT, Small Estates Best Practices, <http://www.halt.org/articles/7/827.php> (last visited Oct. 10, 2009) (claiming that every state has some form of a small estate procedure and that over half of the procedures may be used only for estates of \$40,000 or less). Evidently, some form of small estate statute has existed in most states since early statehood. Eugene F. Scoles, *Succession Without Administration: Past and Future*, 48 MO. L. REV. 371, 380 (1983).

103. See, e.g., UNIF. PROBATE CODE § 3-1201(a) (amended 2008), 8 U.L.A. pt. II, at 307 (1998).

104. See *supra* notes 101 and 102.

cedent's successors.<sup>105</sup> If no estate settlement is pending and the total value is under the applicable amount, a simple petition, detailing the assets and their value, will bring a responsive order from the court transferring the assets to the designated beneficiaries.<sup>106</sup> A nonjudicial variant permits collection of assets by an affidavit that evidences the affiant's entitlement as a successor to the decedent.<sup>107</sup> Under either approach, those persons who receive the property may be limited to family members designated by statute<sup>108</sup> or they may be the decedent's devisees.<sup>109</sup> They may take subject to, or free from, liabilities to creditors.<sup>110</sup> Yet a third type of small estate procedure permits conversion of a traditional judicial settlement proceeding into a summary proceeding with immediate transfer of assets to the decedent's successors.<sup>111</sup> This variation is available when the value of the estate is discovered to be less than the sum of the statutory exemptions and allowances plus the liabilities of the estate.<sup>112</sup>

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105. See, e.g., MICH. COMP. LAWS ANN. § 700.3982 (West 2002). Under Michigan's single-step provisions, real and personal property having total gross value up to \$20,000 may be transferred by court order following an application to the court that details the assets and their value. *Id.* While court action is required, there is no commencement of an estate administration. See *id.*

106. See *id.*

107. The UPC features an affidavit procedure for collection of personal property but only when the value of the entire estate does not exceed \$5,000. UNIF. PROBATE CODE § 3-1201(a) (amended 2008), 8 U.L.A. pt. II, at 307 (1998). In addition to the court assignment of a small estate, Michigan permits collection of a decedent's tangible or intangible personal property by affidavit when the total value is less than \$20,000. MICH. COMP. LAWS ANN. § 700.3983 (West 2002).

108. The decedent's spouse or, if none, the decedent's heirs are the only permitted distributees under the Michigan court assignment procedure. MICH. COMP. LAWS ANN. § 700.3982 (West 2002). On the other hand, Michigan permits any successor to the decedent to collect personal property by affidavit. *Id.*

109. The affidavit procedure in California, which does involve court contact, permits the property to flow to testate as well as intestate takers. See CAL. PROB. CODE § 13100 (West Supp. 2009).

110. Under Michigan's single-step petition and assignment procedure, the spouse and minor children take free of debts but other heirs who receive property are subject to those liabilities. MICH. COMP. LAWS ANN. § 700.3982 (West 2002). In California, the distributees under affidavit procedures take subject to the decedent's unsecured debts. CAL. PROB. CODE § 13109 (West Supp. 2009).

111. See UNIF. PROBATE CODE § 3-1203 (amended 2008), 8 U.L.A. pt. II, at 309 (1998).

112. See *id.* Under the UPC's conversion-type summary administration, the personal representative is permitted to terminate the proceedings immediate-

Both the single-step court assignment and the affidavit procedure should entail minimal expense.<sup>113</sup> Delay in getting the assets to the recipients also should be minimal as there is no appointment of a personal representative and no administration of the assets. On the other hand, the expense and delay associated with the conversion of a traditional administration to a summary procedure depends entirely on the point in the proceedings at which the personal representative realizes that the value of the probate assets does not exceed the exemptions, allowances, and liabilities payable from the estate.<sup>114</sup> Use of any of the small estate procedures is limited, perhaps severely limited, by the ceiling on the value the jurisdiction allows to be transferred under these alternatives to probate.<sup>115</sup> Moreover, if court involvement is required to precipitate a small estate proceeding, the full descriptions of the assets, their value, and the identity of the recipients will be a matter of public record.<sup>116</sup> Thus, the procedure may be unavailable or privacy may be lacking, but when usable, a small estate procedure is relatively speedy and inexpensive.

*b. The Superwill*

In the late 1970s a number of practitioners and academics began to question whether there was a device that could coordinate the dispositions made under a will with those made by the testator's numerous will substitutes.<sup>117</sup> Exploration was

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ly and to distribute the net estate to those entitled without giving notice to creditors. *See id.*

113. When a court must be involved, there will be a filing fee. Presumably, an attorney usually will be used to prepare the affidavit or court petition.

114. If the personal representative discovers that charges will exceed assets early in the administration, the conversion to a summary procedure may be made before costs are incurred in notifying creditors and before waiting for the claims period to expire. But if the realization of the opportunity to shorten the proceeding does not take place until the administration has run its normal course, the opportunity for savings in time and expense may disappear.

115. The \$5,000 maximum featured in the UPC is so low as to make the procedure seldom useful. *See* UNIF. PROBATE CODE § 3-1201 (amended 2008), 8 U.L.A. pt. II, at 307 (1998). In contrast, the \$100,000 ceiling in California should cover a large number of estates. *See* CAL. PROB. CODE § 13100 (West Supp. 2009). As previously noted, apparently more than one-half of the states limit the small estate procedures to \$40,000 or less. *See* HALT, *supra* note 102.

116. *See* Scoles, *supra* note 102, at 381.

117. The author personally participated in several discussions of this topic by the Joint Editorial Board for the Uniform Probate Code in the period 1977-81. Mention of the Superwill does not appear in the literature, however, until the mid- and late-1980s. *See infra* notes 118, 120, 121, and 123.

undertaken to determine whether the dispositive reach of a will could extend to transfers under nonprobate devices such as insurance policies, retirement plans, and joint bank and securities accounts. In 1986 the ABA Section of Real Property, Probate and Trust Law announced a Uniform "SuperWill" Legislation Project.<sup>118</sup> The anticipated statute would allow a so-called Superwill to control the disposition of specific nonprobate assets and override inconsistent nonprobate dispositions while protecting rights of creditors, surviving spouses, pretermitted heirs, and financial institutions.<sup>119</sup>

The project was not intended to force all transfers at death through a probate administration.<sup>120</sup> Nevertheless, the ABA project came to naught.<sup>121</sup> Although touted by one commentator as the "bold next step in the evolution of probate law,"<sup>122</sup> the Superwill faced substantial hurdles, among them the threat of delayed distributions from nonprobate devices while the Superwill is probated, the necessity to specify in the Superwill each specific nonprobate document affected by its terms (a residuary clause being viewed as too vague and general), the exposure of nonprobate transfers to creditors and other claimants, and the need to separately notify each insurance company, financial institution, or other holder of a nonprobate asset of the existence of a Superwill.<sup>123</sup>

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118. Michael D. Carrico, *Uniform "SuperWill" Legislation Project*, 14 PROB. & PROP. 45, 45 (1986).

119. *See id.* at 45–46.

120. *See id.*; Roberta Rosenthal Kwall & Anthony J. Aiello, *The Superwill Debate: Opening the Pandora's Box?*, 62 TEMP. L. REV. 277, 292 (1989).

121. No uniform act was drafted. One state, Washington, has enacted a diluted version of the Superwill concept entitled the Testamentary Disposition of Nonprobate Assets Act. WASH. REV. CODE § 11.11.070 (Supp. 2009). Although emblazoned with a broad title, the act does not permit a will to modify beneficiary designations under life insurance or annuity policies or under retirement plans. Cynthia J. Artura, *Superwill to the Rescue? How Washington's Statute Falls Short of Being a Hero in the Field of Trust and Probate Law*, 74 WASH. L. REV. 799, 819–22 (1999) (critiquing the act's narrow definition of a nonprobate asset). Thus, its reach falls substantially short of creating an omnibus will that might coordinate the disposition of probate and all nonprobate assets. *Id.* These limitations no doubt reflect the lobbying efforts of the life insurance industry.

122. Artura, *supra* note 121, at 813.

123. *See id.*; *see also* Debra Lynch Dubovich, *The Blockbuster Will: Effectuating the Testator's Intent to Change Will Substitute Beneficiaries*, 21 VAL. U. L. REV. 719, 734–36 (1987); Kwall & Aiello, *supra* note 120, at 292–94; Mark L. Kaufmann, Note, *Should the Dead Hand Tighten Its Grasp: An Analysis of the Superwill*, 1988 U. ILL. L. REV. 1019, 1026–30. The Superwill also faced a technical argument. A will operates not earlier than the death of the

Even had it succeeded, the Superwill would have failed to garner top marks for low cost, celerity, or confidentiality. The Superwill would need to be admitted to probate; presumably creditors would need to be notified; other administrative steps observed; and a closing of the estate accomplished.<sup>124</sup> All of these steps are common to traditional probate and they take time and incur expense.<sup>125</sup> Moreover, the Superwill's provisions, covering all assets of every nature, would be exposed to public view. Indeed, the detailed allocation of distributions made through will substitutes would result in less privacy than under traditional probate.

Interestingly, the Uniform Trust Code (UTC) has a provision that bears superficial resemblance to the Superwill approach. The UTC gives a will a potentially broad reach over a revocable trust established by the testator. It provides that a will can amend or revoke the testator's revocable living trust unless the trust agreement denies this authority.<sup>126</sup> If the draft of the trust does not negate this possibility, the will could operate as the final expression of terms to govern distribution of both probate and living trust assets. While this coordination may prove attractive, the will would have no effect on will substitutes other than the revocable trust.<sup>127</sup> Moreover, because it is the will rather than the revocable trust that is given primacy, probate administration, with its expense and lack of privacy, remains a necessity.

*c. Universal Succession*

Probate administration, with its judicial trappings, is unique to English and American law.<sup>128</sup> Its roots lie in the supervision originally given to transfers at death by the English church.<sup>129</sup> The supervision came to be centered in the ecclesias-

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testator. *See* Dubovich, *supra* at 736. At that moment, the testator lacks authority to make any change to a nonprobate transfer because the asset has already passed to the designated successor. *Id.*

124. *See* Artura, *supra* note 121, at 811–14 (pointing out that Washington's Superwill provisions require a testator to comply with probate procedures).

125. *See id.*

126. UNIF. TRUST CODE § 602(c), 7 U.L.A. 546 (2006).

127. In rare instances courts have permitted a later will to alter the provisions of will substitutes. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 7.2 cmt. (e) (2003).

128. Basye, *supra* note 25, at 331.

129. REPPY & TOMPKINS, *supra* note 17, at 101–02, 108, 177–78; Atkinson, *supra* note 17, at 107, 116.

tical courts. When those courts declined in stature, the task was assumed by Chancery courts.<sup>130</sup> The American colonies mimicked the civil court antecedents from England.<sup>131</sup> But, from the very beginning until now, both in England and in this country, the locus of estate settlement has been within a judicial system. In contrast, in continental Europe those who succeed to a decedent's assets do so directly.<sup>132</sup> There is no intervening court administration or personal representative to receive, administer, and distribute the assets.<sup>133</sup> The successors acquire title immediately, subject to liabilities to creditors and tax authorities.<sup>134</sup> Thus, universal succession provides a relatively quick settlement at modest cost.<sup>135</sup>

In 1983 the Uniform Succession Without Administration Act was adopted by the National Conference of Commissioners on Uniform State Laws.<sup>136</sup> It also was approved as a constituent element of the Uniform Probate Code.<sup>137</sup> Under that Act, if all competent beneficiaries, under the decedent's will or, if no will, under the intestate succession law, agree, they become universal successors.<sup>138</sup> The Registrar's statement of universal succession is evidence of marketable title vested in the benefi-

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130. REPPY & TOMPKINS, *supra* note 17, at 145–50, 159; Atkinson, *supra* note 17, at 117–18.

131. See REPPY & TOMPKINS, *supra* note 17, at 159–60; Atkinson, *supra* note 17, at 122. See generally Wellman, *Blueprint for Reform*, *supra* note 2, at 455–58 (illustrating state-by-state probate characteristics and preceding “English traditions”).

132. See Max Rheinstein, *European Methods for the Liquidation of the Debts of Deceased Persons*, 20 IOWA L. REV. 431, 469 (1935). Under its civil law heritage, Louisiana follows this model with its system of unconditional acceptance. LA. CIV. CODE ANN. art. 962 (2000); see also Leon Sarpy, *Probate Economy and Celerity in Louisiana*, 34 LA. L. REV. 523, 523 (1974).

133. A person may be designated to be the universal successor and will possess authority to pay debts and distribute assets among the recipients. Rheinstein, *supra* note 132, at 431. There is, however, no formal administration. *Id.* at 468–75; see also H. EMMERICH, *ESTATE PRACTICE IN THE UNITED STATES AND IN EUROPE* 16–18 (1950).

134. Rheinstein, *supra* note 132, at 433–34, 440, 463, 468–75.

135. See Sarpy, *supra* note 132, at 524–25.

136. UNIF. PROBATE CODE tbl. of free-standing acts (amended 2008), 8 U.L.A. pt. I, at 2 (1998); see also Scoles, *supra* note 102, at 387–92 (providing a narrative description of the Act by the Chairman of the drafting committee).

137. UNIF. PROBATE CODE §§ 3-312 to -322 (amended 2008), 8 U.L.A. pt. II, at 66–75 (1998).

138. UNIF. SUCCESSION WITHOUT ADMIN. ACT § 201; UNIF. PROBATE CODE § 3-312 (amended 2008), 8 U.L.A. pt. II, at 331 (1998).

ciaries,<sup>139</sup> conferring upon them the authority to collect assets<sup>140</sup> and the duty and authority to discharge liabilities.<sup>141</sup> The assurance that they will discharge liabilities comes from the fact that each beneficiary is liable for a pro rata share of those liabilities.<sup>142</sup> Because there is no notice to creditors, the default statute of limitations applies.<sup>143</sup> Interestingly, the trustee of the decedent's revocable trust, as sole beneficiary under a pour-over will, could be the universal successor, with authority to collect assets, discharge liabilities, and distribute the residue under the trust, all without the appointment of a personal representative.<sup>144</sup>

Universal succession would transfer title quickly and economically. Neither delay nor significant expense would be caused by the required legal proceeding. Potential problems can be visualized, however, if there are numerous beneficiaries or complicated allocation directions in a will. Multiple beneficiaries could disagree or could attempt to collect the same assets; one person may take possession of property left to a different person. These and similar issues suggest the procedure would most likely be used when there are few assets or few beneficiaries. From a privacy standpoint, the universal succession model is deficient. The decedent's will is admitted to probate and therefore is a public document. There is, however, no inventory of assets and no accounting to file with a public office.<sup>145</sup>

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139. UNIF. SUCCESSION WITHOUT ADMIN. ACT § 204; UNIF. PROBATE CODE § 3-315 (amended 2008), 8 U.L.A. pt. II, at 70 (1998).

140. UNIF. SUCCESSION WITHOUT ADMIN. ACT § 205; UNIF. PROBATE CODE § 3-316 (amended 2008), 8 U.L.A. pt. II, at 71 (1998).

141. UNIF. SUCCESSION WITHOUT ADMIN. ACT § 206; UNIF. PROBATE CODE § 3-317 (amended 2008), 8 U.L.A. pt. II, at 71-72 (1998).

142. UNIF. SUCCESSION WITHOUT ADMIN. ACT §§ 206(b), 210; UNIF. PROBATE CODE §§ 3-317(c), 3-321 (amended 2008), 8 U.L.A. pt. II, at 72, 74 (1998).

143. Section 304 of the Uniform Succession Without Administration Act states a default limitation period of three years after the decedent's death or one year after distribution. Section 208(b) is an optional provision that, if enacted, allows publication of notice to creditors to secure a four month limitation period against unknown creditors. This optional provision does not appear in the parallel UPC sections. *Cf.* UNIF. PROBATE CODE §§ 3-312 to -321 (amended 2008), 8 U.L.A. pt II, at 66-74.

144. UNIF. SUCCESSION WITHOUT ADMIN. ACT § 202 cmt. This possibility provides an excellent vehicle for moving assets from the decedent's individual name to her revocable trust without the necessity for opening a probate estate. The Uniform Succession Without Administration Act should be embraced enthusiastically for this feature alone.

145. See Cynthia Ann Samuel, *The 1997 Successions and Donations Revision—A Critique in Honor of A.N. Yiannopoulos*, 73 TUL. L. REV. 1041, 1051 (1999) (describing universal succession under Louisiana law).

The concept of universal succession is very similar to a statutory small estate proceeding,<sup>146</sup> without, of course, any dollar limitation on the value of assets and without any statutory restriction on the identity of beneficiaries who may utilize the procedure. Although the Uniform Succession Without Administration Act has been available for twenty-five years, no state has enacted it.<sup>147</sup> And no state adopting the UPC included its provisions on universal succession. Moreover, in 1998 the Act was withdrawn from recommendation for enactment by the Commissioners on Uniform State Laws.<sup>148</sup> Lack of familiarity with the concept may be a primary reason for the lack of adoptions. It is doubtful that a belief in the necessity of judicial proceedings to settle an estate is the motivation for ignoring the Act. More plausible is that its lack of popularity is the awkwardness and uncertainty that arises from the absence of any person being in charge of the settlement. For all the drawbacks of probate administration, the figure of a personal representative provides centralized control and responsibility for the often necessary and multiple tasks of estate settlement.

#### D. THE UNIFORM PROBATE CODE

The Uniform Probate Code (UPC) was the legal profession's initial and monumental response to the public outcry over probate.<sup>149</sup> The heart of the UPC is the "Flexible System of

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146. They are similar in that through a single step the successors are invested with title to the decedent's assets, subject to the decedent's liabilities. In the case of some of the small estate proceedings, however, if the successors are the spouse or minor descendants, they may take free of liabilities. MICH. COMP. LAWS ANN. § 700.3982 (West 2000). See generally *supra* notes 102–15 (explaining small estate and single-step proceedings).

147. See Lawrence H. Averill, Jr., *An Eclectic History and Analysis of the Uniform Probate Code*, 55 ALB. L. REV. 891, 925 (1992); Karen J. Sneddon, *Beyond the Personal Representative: The Potential of Succession Without Administration*, 50 SO. TEX. L. REV. 449, 449 (2009) (suggesting that succession without administration has been overlooked and the adoption should be considered by the states).

148. The reason stated for the withdrawal of the recommendation for enactment is that the act has become "obsolete." UNIF. SUCCESSION WITHOUT ADMIN. ACT §§ 101–404, 8 U.L.A. pt. II, at 118 (Supp. 2009).

149. See *supra* text accompanying note 3. The UPC truly is a comprehensive code that covers far more than procedures for perfecting property transfers at death. The Code contains rules governing intestate succession, wills, construction of testamentary and nontestamentary governing instruments, and guardians and conservators. Of course it also covers estate administration, ancillary administration, and some rules governing dispositions under other forms of ownership.

Administration of Decedents' Estates."<sup>150</sup> The flexible system allows those interested in an estate to select the degree of contact with the court system and correspondingly the degree of judicial protection that is desired and appropriate to the circumstances. If there is no dispute over the validity of the will or any other matter pertaining to settlement, the interested parties may opt for an entirely nonjudicial proceeding.<sup>151</sup> But, if there is a dispute to resolve or if certainty and protection are important, formal procedures may be invoked that will result in binding court orders.<sup>152</sup>

Initially the drafters of the UPC believed that simplification of probate would result in a return to the use of probate as the normal method for implementing transfers at death.<sup>153</sup> The will would be restored to its central role. Adoption of the UPC undoubtedly made probate administration more attractive and more responsive to the needs and desires of attorneys and clients alike.<sup>154</sup> The UPC, however, did not restore the will to its former primacy. Probate continued and continues to be shunned.<sup>155</sup> Moreover, the emphasis of the Joint Editorial

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150. UNIF. PROBATE CODE art. III cmt. (amended 2008), 8 U.L.A. pt. II, at 26–28 (1998). Article III allows the beneficiaries to select informal or formal procedures for probating a will, and for court appointment of a personal representative. It also allows administration to proceed either without contact with the court or under expressly sought supervised administration. There is extensive coverage in Article III of the office and authority of personal representatives, creditors' claims, distribution of assets, and closing estates. *Id.*

151. Informal probate and appointment proceedings in UPC §§ 3-301 to -311 are directed to the Registrar, a nonjudicial clerical position. If all documentation appears facially to comply with applicable requirements, the Registrar grants probate and additionally or alternatively may appoint a personal representative without prior notice to interested parties and without an evidentiary hearing.

152. *See* UNIF. PROBATE CODE §§ 3-401 to -414 (amended 2008), 8 U.L.A. pt. II, at 76–104 (1998) (providing a description of formal proceedings). The formal testacy proceedings (to determine the validity of a will or that the decedent died intestate) and appointment proceedings may be initiated by an interested person even after informal probate or appointment has been requested. *Id.* § 3-401.

153. *Id.* § 2-501 to -513 cmt., 8 U.L.A. pt. I, at 144–59 (1998); Stein & Fierstein, *supra* note 14, at 105; Richard V. Wellman, *The Uniform Probate Code: A Possible Answer to Probate Avoidance*, 44 IND. L.J. 191, 195–98 (1968).

154. Adoption of the UPC by some eighteen states speaks for itself in demonstrating the attractiveness of the Code to those jurisdictions. UNIF. PROBATE CODE (amended 2008), 8 U.L.A. pt. I, at 1 (Supp. 2009); *see also* McGovern, Jr., *supra* note 26, at 1350–53 (suggesting the UPC reforms make it unnecessary to avoid probate); Stein & Fierstein, *supra* note 14, at 87–104 (indicating that informal procedures are helpful).

155. *See supra* notes 5–6.

Board for Uniform Trust and Estate Acts has turned away from reform of settlement procedures and moved toward unification of principles of substantive law applicable to transfers that take effect at death.<sup>156</sup> The 1990 amendments to the UPC openly acknowledge that multiple wealth transfer devices will continue to exist, but make an effort to bridge differences between these devices by unifying the applicable doctrinal law.<sup>157</sup> While unification of substantive law pertaining to wills and will substitutes has begun, it is quite incomplete. The 1990 amendments to the UPC have been adopted in only eleven states.<sup>158</sup> A major-

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156. Professors Langbein and Waggoner admit that “sensitivity to the non-probate revolution” was one of the grand themes of the 1990 revisions to the UPC. John H. Langbein & Lawrence W. Waggoner, *Reforming the Law of Gratuitous Transfers: The New Uniform Probate Code*, 55 ALB. L. REV. 871, 873–75 (1992). The UPC is not alone in seeking to unify the law of wills and will substitutes. The Uniform Trust Code and Third Restatements of both Property and Trusts join the refrain of the 1990 UPC amendments. See UNIF. TRUST CODE prefatory note, 7 U.L.A. 368 (2006) (“The basic policy of [Article 6] and of the Uniform Trust Code in general is to treat the revocable trust as the functional equivalent of a will.”); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 7.2 cmt. (a) (2003) (“This Restatement (along with the Restatement Third, Trusts; the Revised Uniform Probate Code; and the Uniform Trust Code) moves toward the policy of unifying the law of wills and will substitutes.”); RESTATEMENT (THIRD) OF TRUSTS introductory note (2003) (noting that a trust may be used “for the flexible disposition of decedents’ estates”); Foster, *supra* note 38, at 718–19. In the effort to respond to the proliferation of will substitutes, the 1990 Amendments extended beyond substantive law issues and into execution formalities. The comment to the 1990 UPC section 2-503 states, “consistent with the general trend of the revisions of the UPC, section 2-503 unifies the law of probate and nonprobate transfers, extending to will formalities the harmless error principle that has long been applied to defective compliance with the formal requirements for nonprobate transfers.” UNIF. PROBATE CODE § 2-503 cmt. (amended 2008), 8 U.L.A. pt. I, at 146–47 (1998). The 2008 amendments to the UPC brought the Uniform Trust Code concepts of reformation and modification into the UPC, extending them to wills and other governing instruments. See *id.* §§ 2-805 to -806, 8 U.L.A. pt. I, at 133 (Supp. 2009).

157. With adoption of the 1990 UPC amendments, a state may provide a single set of rules applicable to wills and multiple governing instruments for such matters as the required period of survival, choice of applicable law, class gift rules, lapse, beneficiary designations and trusts, representation, the effect upon succession of wrongful killing, and the effect of divorce. See UNIF. PROBATE CODE §§ 2-702, -703, -705, -706, -707, -709, -802, -803, -804 (amended 1990), 8 U.L.A. pt. I, at 182–204, 210–22 (1998). As mentioned, the 2008 amendments to the UPC extend this unification of substantive law. See *supra* note 156.

158. These states are Alaska, Arizona, Colorado, Hawaii, Minnesota, Montana, New Jersey, New Mexico, North Dakota, South Dakota, and Utah. UNIF. PROBATE CODE (amended 2008), 8 U.L.A. pt. I, at 1 (Supp. 2009). In addition, Michigan has adopted most of the 1990 amendments. *Id.*

ity of jurisdictions lack unified laws applicable to the multiplicity of extant wealth transmission devices.<sup>159</sup>

#### E. THE NADIR PERSISTS

UPC informal procedures appear to be widely used when available.<sup>160</sup> Yet, even in UPC jurisdictions, attorneys still embrace the revocable trust as the transfer vehicle of choice.<sup>161</sup> Probate avoidance remains popular, and the will did not return to the center stage of gratuitous wealth transfers because probate reforms have been only partially responsive to the problems of probate. Delay continues to be an issue because it takes time to invoke the court process and to obtain a response.<sup>162</sup> Mandatory steps must be taken even when UPC informal proceedings are utilized. Bond of the personal representative may be required even if the testator's will waives bond and the personal representative is the sole beneficiary.<sup>163</sup> The personal representative may be required to publish on claims even if all creditors are paid.<sup>164</sup> The estate must be closed by deliberate

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159. Bloom, *supra*, note 38, at 29 (“There is a severe lack of uniformity in this country on default constructional rules.”). In the absence of statutory provisions, unification must occur through the painfully slow development of case law. *See, e.g.*, Clymer v. Mayo, 473 N.E.2d 1084, 1093 (Mass. 1985) (determining that, like a will, a trust is revoked by divorce); State St. Bank & Trust Co. v. Reiser, 389 N.E.2d 768, 771–72 (Mass. App. Ct. 1979) (allowing a creditor to reach trust assets in a manner parallel to the ability of creditors to reach probate assets). *But see In re Estate and Trust of Pilafas*, 836 P.2d 420, 425 (Ariz. Ct. App. 1992) (refusing to consider whether to extend to trusts the common law presumption that a missing original will traced to the testator's possession is presumed revoked).

160. “In 2007, courts were asked to supervise the administration of only 610 out of 16,897 new decedent estates.” ANNUAL REPORT OF THE MICHIGAN SUPREME COURT 42 (2007), available at <http://www.courts.michigan.gov/scao/resources/publications/statistics/2007/2007execsum.pdf>.

161. In a December 1999 study of adults over age fifty, the American Association of Retired Persons found that twenty-three percent had a revocable trust. This percentage rose to thirty-four percent for those with household incomes over \$50,000. While there is a higher percentage of adults over fifty with a will (sixty percent), the popularity of the living trust is striking. AM. ASS'N OF RETIRED PERSONS, WHERE THERE IS A WILL . . . LEGAL DOCUMENTS AMONG THE 50+ POPULATION: FINDINGS FROM AN AARP SURVEY 1, 4 (2000), available at <http://assets.aarp.org/rgcenter/econ/will.pdf>.

162. *See generally* Hirsch, *supra* note 5.

163. This is apparently the practice in several counties in Florida, a UPC jurisdiction. *See* E-mails from Fellows of the American College of Trust and Estate Counsel, to author (July 24, 2008, 10:08–16:22 EST) (on file with author) (describing practices in Broward and Pinellas counties).

164. Although the Uniform Probate Code, as amended in 1989, suggests that an enacting state may select between either a mandatory or permissive

action,<sup>165</sup> and an accounting must be supplied even if all beneficiaries are content to waive its preparation.<sup>166</sup> Compliance with unnecessary but mandatory steps absorbs time, results in expenditure of money, and produces frustration in beneficiaries.<sup>167</sup>

In addition to expenses caused by required procedural steps, probate, even UPC informal probate, often precipitates fees and other charges that are not present if nonprobate methods of transfer are used.<sup>168</sup> Governments discovered long ago that transfers at death represent a flow of funds that can be tapped as a revenue source.<sup>169</sup> Probate simply is a convenient and identifiable location for exacting the sovereign's tariff,

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publication and provides a one-year limitation period on claims when no notice is given to creditors, an estate cannot be closed by an informal, sworn statement unless the personal representative has "determined that the time limited for presentation of creditors' claims has expired." UNIF. PROBATE CODE § 3-1003(a)(1) (amended 2008), 8 U.L.A. pt. II, at 294 (1998); *see also id.* § 3-801(a), 8 U.L.A. pt. II, at 208 (1998) (explaining mandatory or permissive publication notice); *id.* § 3-803(a), 8 U.L.A. pt. II, at 215 (1998) (discussing one-year limitation period). This forces an estate to publish a notice to creditors in order to close the estate as soon as four months following publication, or to wait to close the estate until the first anniversary of the decedent's death. *See id.* §§ 3-801(a), -1003(b), 8 U.L.A. pt. II, at 208, 295 (1998). These waiting periods apply to all estates, even those whose personal representative and beneficiaries believe all claims are satisfied and are willing to take the risk of an unknown claim.

165. The UPC provides alternative methods for closing an estate. *See, e.g., id.* § 3-1003, 8 U.L.A. pt. II, at 294-95 (1998) (permitting an informal closing by the filing of a sworn statement confirming the personal representative's completion of the significant steps of an estate administration); *id.* § 3-1002, 8 U.L.A. pt. II, at 294 (1998) (describing a formal court proceeding that will cover settlement matters excluding the testacy status of the decedent); *id.* § 3-1001, 8 U.L.A. pt. II, at 288 (1998) (describing a formal proceeding of an order of complete settlement).

166. Even when the personal representative closes an estate simply by filing a sworn statement, the personal representative must verify that he or she "has furnished [to all distributees] a full account in writing of the . . . administration." *Id.* § 3-1003(a)(3), 8 U.L.A. pt. II, at 295 (1998).

167. *See* MONOPOLI, *supra* note 4, at 39 (stating that the probate process is "slow, expensive, and corrupt").

168. Fees that apply only to estate settlement under probate are found in many states. *See sources supra* note 37.

169. Many commentators indicate that taxation at death was known as far back as the ancient regimes of the Egyptians, Greeks, and Romans. *See* DUKEMINIER ET AL., *supra* note 42, at 845. Inheritance taxation by the states became widespread in the late nineteenth century. *See id.* Some states continue to levy inheritance taxes while others have turned to estate taxes.

whereas tapping nonprobate transfers is much more difficult and generally is not attempted.<sup>170</sup>

In addition to the continued problems of delay and expense, privacy remains an issue even with UPC informal procedures. All UPC filings take place in the probate court.<sup>171</sup> Everything there is a matter of public record. It may well be true that seldom does a person without an economic interest peruse an estate's probate file, but the very fact that probate records are an open book is repugnant to most testators and estate beneficiaries. Perception is more important than reality; most people do not want to take the chance that their affairs will become known to others.<sup>172</sup>

The limited scope of a will, controlling only those assets titled in the decedent at death, sometimes is given as a reason that the will is not used as the primary document for transfer of wealth.<sup>173</sup> In contrast to the will, the revocable trust is billed as a convenient receptacle to collect and allocate the decedent's

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170. The exactions apply only to probate assets. *See supra* note 36. States also may impose a transfer tax on a broader range of wealth transfers. Many states formerly imposed an estate tax equal to the previously available (for decedents dying before 2005) credit against the federal estate tax under I.R.C. § 2011 (2006). Jeffrey A. Cooper, *Interstate Competition and State Death Taxes: A Modern Crisis in Historical Perspective*, 33 PEPP. L. REV. 835, 841 (2006). Under the Economic Growth and Tax Relief Reconciliation Act of 2001, Congress enacted a phaseout of the estate tax over the next ten years, which would completely repeal the estate tax in 2010. A sunset provision within the Act reinstates the tax on January 1, 2011. Today, some states impose their own estate tax. The amounts excluded or deductible from state tax may be the same as or less than the exclusion and deductions available under the federal estate tax. *See* Anthony E. Woods, *Decoupling's Dilemma*, TR. & EST., Apr. 2004, at 50, 50–52.

171. As a probate code, the UPC adopted and codified the American and English systems of validating a will and administering an estate through a judicial procedure. *See supra* note 17. To be effective, a will must be declared valid. UNIF. PROBATE CODE § 3-102 (amended 2008), 8 U.L.A. pt. II, at 33–34 (1998). Even the UPC statement of probate that is issued in informal proceedings is supplied by the Registrar, a court official. *See id.*

172. “Most persons believe that succession to wealth of a [family member] should be a private matter.” Wellman, *Recent Developments*, *supra* note 2, at 509; *see also supra* note 38.

173. The reason appears repeatedly in the literature discussing the so-called Superwill. *See* Artura, *supra* note 121, at 809–11; Dubovich, *supra* note 123, at 719, 735; Kwall & Aiello, *supra* note 120, at 289–90. Under the testamentary/nontestamentary distinction, the nontestamentary transfer is a transfer during lifetime leaving the transferor with nothing upon which the will might operate. *See infra* note 270.

assets.<sup>174</sup> So, for great numbers of clients, a trust is prepared and items representing substantial value such as life insurance, retirement plans, annuities, pay-on-death accounts, and transfer-on-death securities are directed by beneficiary designations to flow into the trust.<sup>175</sup>

In actuality, the will is just as capable as is the revocable trust of serving as a collection point and conduit for contractual items because the personal representative, like the trustee of a revocable trust, can be named a beneficiary under the nonprobate device.<sup>176</sup> Under current law, however, there are some significant disadvantages to having actual payment flow to the personal representative.<sup>177</sup> Substantive law may need to change in order to facilitate the designated payment of nonprobate benefits to the personal representative or, more promisingly, the designation of the personal representative as beneficiary

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174. See, e.g., FREITAG, *supra* note 65, at 9; MCGOVERN, JR. & KURTZ, *supra* note 26, at 316; Bloom, *supra* note 38, at 2.

175. See PENNELL, *supra* note 66, at ch. 4 (discussing the use of trusts in estate planning); see also Bloom, *supra* note 38, at 25–26 (discussing asset management). Although the revocable trust is a convenient collection vehicle and conduit, clients frequently leave assets of substantial value to particular individuals through life insurance, pay on death accounts, or separate retirement plans. They also often hold assets in joint tenancies that are not coordinated with a revocable trust. See Martin & Nicholson, *supra* note 66, at 355.

176. Naming the personal representative as beneficiary is not the same as providing in the will for disposition of the nonprobate asset. The payment of the nonprobate asset to the personal representative is, in effect, a reverse pour-over. If there is to be a continuing trust for a beneficiary, an alternative to naming the personal representative as recipient is to name the trustee under the will as the beneficiary. Statutes exist in many states that expressly validate a designation of a trustee under the will as recipient in order to overcome the argument that there is no beneficiary at the moment of the testator's death because the testamentary trustee does not then exist. See, e.g., MICH. COMP. LAWS ANN. § 700.6101(1)(a) (West 2009) (expressly stipulating that a testamentary trustee may be named as beneficiary under an insurance policy and many other forms of agreement).

177. There may be consequences that arise from naming the personal representative as beneficiary that are different from those consequences stemming from designation of a trustee of a revocable trust as beneficiary. Possible differences include exposure to both governmental and fiduciary fees, exposure to rights of a surviving spouse, and exposure to creditors' claims. There is also a significant difficulty under qualified retirement plans with naming the personal representative as beneficiary. Only an individual may be a designated beneficiary for purposes of ascertaining the length of time over which retirement benefits may be drawn down. An estate is not a designated beneficiary. A trustee, but not an estate, could be a designated beneficiary if the provisions of the trust satisfy the "look-through" rules of Treasury Regulations. Treas. Reg. § 1.401(a)(9)-4, Q&A (1)(a), Q&A (3)(a) (2009).

should be clarified to mean distribution as provided under the provisions of the will.<sup>178</sup>

The real objections to having most if not all wealth flow through the will, to be subject to its dispositive terms, whether by beneficiary designation or otherwise are that doing so usually exposes the testator's wealth to fees and expenses, to a mandatory administrative process, to perceived delay, and to the public gaze.<sup>179</sup> Until those fundamental drawbacks are addressed, there will be no resurrection of the will as the dominant vehicle for transfer of wealth at death. Until then, there will continue to be the need to prepare a trust to avoid probate even for those clients who intend to make all outright distributions at death.<sup>180</sup> Until then, trust mills will prey on fears of probate to peddle a document that truly may be unneeded. Until then, estate planning attorneys will wrestle with the problems of coordinating multiple transfer devices and adopting strategies to avoid probate. Until then, clients will use a multiplicity of devices to avoid both probate administration and a comprehensive estate plan.<sup>181</sup>

Whether a plan is assembled covering diverse assets under multiple transfer modes or whether all such items are directed into a revocable trust upon death, the effort required represents expense incurred at the planning stage that could be avoided if transfers under a will were more attractive. And, until the problems of expense, delay, and privacy found in probate are faced and resolved, lawyers who represent estates and their

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178. Thus, payment would not be made to the personal representative and the assets technically would not be a part of the decedent's estate. The will would be the full articulation of the beneficiary designation, an elaboration of the designation on file with the intermediary who holds the nonprobate asset and who is fully aware from the designation that there is this elaboration in the will.

179. As reflected *supra* note 177, there may also be exposure to claims of a surviving spouse and of creditors, claims that might be avoided under current law if nonprobate devices were utilized.

180. If a trust is thought unnecessary or too expensive, clients will use diverse, single-purpose transfer devices. Contractual benefits can be directed to named recipients. Bank and brokerage accounts can be put into pay-on-death wrappers to avoid probate. And soon with the development of the transfer-on-death deed, different parcels of real estate can be inserted into single purpose deeds and directed to particular beneficiaries.

181. Even if a plan is assembled with a series of single-purpose devices, it is devilishly difficult to provide dispositions through these separate designations that will function in a coordinated manner, as contingencies occur from the moment the plan is conceived and put in place to the much later time of the owner's death.

beneficiaries will confront differing rules for such issues as survival periods, construction of class gifts, lapse, revocation by operation of law, exposure to creditor claims, exposure to spousal rights, and other issues whose answers depend upon the nature of the transfer device used by the decedent.<sup>182</sup>

The thesis in the balance of this Article is that the problems of probate can be addressed successfully. Expenses can be reduced by greatly minimizing mandatory settlement procedures. A personal representative, if one is needed, can be installed in office quicker and with more certainty than through a court appointment process. Settlement can be allowed to proceed in as few or as many steps as pertinent to estate assets and in a manner that is responsive to the needs or desires of beneficiaries for protection and certainty. The settlement process can be terminable at the time and at the option of the fiduciary or the interested parties. Fees can be reduced by eliminating disguised taxes. The next section suggests, necessarily in broad, general terms, a structure for attaining these objectives.

## II. A REGISTRATION SYSTEM FOR ESTATE SETTLEMENT

Multiple factors dictate the development of an alternative, comprehensive yet expeditious process for wealth transmission at death. These factors include the delay, expense, and privacy issues associated with traditional probate,<sup>183</sup> the difficulties these issues present for estate planners,<sup>184</sup> and the expense incurred by the public in efforts to avoid probate. There seems to be no alternative but to construct a system unlike the judicial administration that is the hallmark of the probate process. Even if it were desirable, in the name of unification, to force all transfers that take effect at death to pass through a judicial procedure, it is too late in the day for that to occur. Modern transfer devices and modern forms of wealth have made a judicial mechanism obsolete.<sup>185</sup> The public wants to avoid pro-

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182. See *supra* text accompanying notes 4–6, 11 (discussing the disadvantages of probate).

183. See *supra* text accompanying notes 5–6.

184. Demands from clients to avoid probate, coordination of multiple transfer devices, and uncertainty and diversity in the applicable substantive laws are the primary problems planners face. See *supra* text accompanying note 51.

185. See McCouch, *supra* note 11, at 759–60; see also Langbein, *supra* note 5, at 1119 (discussing modern transfer methods).

bate.<sup>186</sup> The profession willingly aids and abets that desire.<sup>187</sup> There is no going back.

The magnetic appeal of the revocable trust,<sup>188</sup> standing in contrast to the image of probate as a public villain, offers instructive lessons for the design of a workable system of wealth transmission. Like the revocable trust, an alternative to probate should be capable of implementation promptly upon the decedent's death, should mandate only those procedural steps that are pertinent to each unique estate,<sup>189</sup> and should impose only those costs necessitated by the facts of the particular estate.<sup>190</sup> Moreover, as with the revocable trust, the alternative system should be capable of governing distribution of assets held in multiple forms of ownership by the decedent,<sup>191</sup> and should respect privacy except when a truly public need dictates otherwise.<sup>192</sup> And, perhaps as important as any other point, an alternative process should have a name other than probate.<sup>193</sup>

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186. See Gary, *supra* note 5, at 531.

187. See Vallario, *supra* note 12, at 610.

188. See *supra* notes 10–12 (acknowledging the present widespread use of the revocable trust).

189. Both the publication of a notice to creditors and a several month wait for the claims period to expire are common requirements in estate administration. See *supra* note 164. Many estates, however, derive little benefit from the mandatory claims procedure. They discharge liabilities promptly and are willing to accept the minimal risk of potential unknown claims. Another common mandate is the preparation and submission by the personal representative of a formal accounting. Beneficiaries of many estates have no need or desire for a written accounting. And despite being required, closing procedures are unwanted by beneficiaries of many estates.

190. Probate fees, such as those discussed *supra* note 37, may be justified as a fee for use of the judicial system. When, as is often the case, those fees are based on inventory values, the fees bear little or no relationship to the actual demands placed on the system by a given estate.

191. The revocable trust excels as a receptacle for gathering assets from multiple sources and unifying them under a single dispositive scheme. See *supra* note 155. A will is capable of performing the same function. See *supra* text accompanying note 178.

192. There certainly exist divergent views about the public's need to know. See generally Foster, *supra* note 38; see also discussion *supra* notes 38, 43.

193. The very word probate engenders hostility. The reaction to probate, although emotional and illogical to some extent, means that the term should not be applied to a new procedure, no matter how greatly reformed or sanitized. See, e.g., DOBRIS ET AL., *supra* note 26, at 503 ("Americans have developed—not without reason—a near obsession with avoiding probate."); Stephan P. Magowan, *Probate and Administration of Decedents' Estates*, 804 TAX MGMT (BNA) at A-9 (2000) ("Law firms and estate planners continue to market devices, particularly inter-vivos revocable trusts, as ways of avoiding what they practically describe as an unspeakable evil—probate.").

#### A. REGISTRATION OF GOVERNING INSTRUMENT

A Registration System for Estate Settlement is offered as a new approach to implementing transfers of assets at death. A registration system would operate from an Office of Estate Registration, with a Registrar as the primary official. Upon death, the will of a testate decedent would be submitted for registration.<sup>194</sup> A document that appears to be executed with the requisite formalities would qualify for registration. Registration means the original will is accepted and recorded in the Office of Estate Registration. A registered will presumptively would be valid.<sup>195</sup> If the decedent dies without a will and owns assets that require transfer, an interested party could file an affidavit of heirship with the Office of Estate Registration. Like the registered will, the affidavit of heirship presumptively would be valid. The infrequent challenge to a registered will or to an affidavit of heirship would constitute litigation to be prosecuted in a separate judicial proceeding.

#### B. OPTIONAL FIDUCIARY POSITION AND DUTIES

Standing alone, the registered will or the affidavit of heirship could serve quite adequately as the muniment of title evidencing the fact that ownership passed either to the beneficiaries under the registered will or to those identified as successors by the jurisdiction's law of intestate succession. Thus, title would pass in a manner similar to that under the Uniform Probate Code. Under the Code, title to a decedent's assets passes directly from the decedent to her heirs or devisees.<sup>196</sup> If administration is required, the Code gives the personal representative control over the decedent's assets as necessary to fulfill administrative responsibilities, but the personal representative does not obtain title to the assets.<sup>197</sup> At the close of probate administration, the personal representative conveys real estate and assigns other assets to the beneficiaries.<sup>198</sup> The transfer document confirms title in the recipient

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194. There undoubtedly will need to be an application that accompanies the request for registration, setting forth the date and place of death, establishing domicile, identifying interested parties, and, if desired, requesting confidentiality. See discussion *supra* notes 29, 74.

195. This presumption is the same presumption as attaches to an informally probated will under UNIF. PROBATE CODE § 3-302 (amended 2008), 8 U.L.A. pt. II, at 58 (1998).

196. *Id.* § 3-101, 8 U.L.A. pt. II, at 29 (1998).

197. See *id.* § 3-711 & cmt, 8 U.L.A. pt. II, at 158 (1998).

198. *Id.* § 3-907, 8 U.L.A. pt. II, at 274 (1998).

and provides evidence of title. In like fashion, the personal representative under a registration system would not receive title and then pass it to the beneficiaries. Instead, the beneficiaries from the moment of their predecessor's death would be the owners of the decedent's assets.

Despite the immediate placement of title in the decedent's successors, there may be the practical need to have someone attend to segments of the settlement process. For example, it might be necessary to collect some or all of the assets, to pay liabilities, or to distribute net assets to the beneficiaries or heirs via a tangible and recognized transfer document. When that is either convenient or necessary, the personal representative<sup>199</sup> named in the will simply would file an acceptance of office with the Registrar. Upon the filing, the personal representative would be entitled to receive a certificate from the Registrar to evidence that she is invested with the authority of that office, either statutorily or as specified in the will. In the case of intestacy and upon request, the Registrar would designate as personal representative the one given statutory priority to serve in that position. If more than one person possesses statutory priority,<sup>200</sup> those with the same priority could serve together or agree upon the one or those to be designated by the Registrar. If they do not agree, a judicial proceeding would be needed to identify the one or those to be designated as personal representative.

The personal representative's responsibilities under a registration system would be familiar ones. They include notification to heirs and beneficiaries of the registration of the will and of the representative's acceptance of office. The personal representative also would be responsible for supplying the beneficia-

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199. The term personal representative is used here as the name for the one who is given the authority and responsibility for implementing settlement because that is a familiar title. In order to sharpen the distinction between a registration system and traditional probate it may be wise to employ a different name. Possibilities that come to mind are manager, estate executive, or controller. Professor Richard V. Wellman used "controller" in describing the office and function of the personal representative under the UPC informal probate. Wellman, *Recent Developments*, *supra* note 2, at 507.

200. The problem of equal priority to serve as personal representative held by many persons arises often under the UPC; if there is no will and no surviving spouse (a frequent occurrence), all heirs share equal priority for appointment as personal representative. See UNIF. PROBATE CODE § 3-203(a) (amended 2008), 8 U.L.A. pt. II, at 49 (1998).

ries with an inventory of assets, keeping beneficiaries informed of the settlement, and, if requested, providing an accounting.<sup>201</sup>

Neither an inventory nor an accounting would need to be filed with the Office of Estate Registration. Indeed, neither would need to be prepared unless a personal representative took office. If a personal representative assumes office, that fiduciary would have the duty to supply an inventory to the beneficiaries. In addition, that fiduciary would be obligated to supply an accounting, but only upon request.<sup>202</sup> If the fiduciary desired to have approval of an accounting in order to secure protection against a later complaint from beneficiaries, he could file the accounting with the court, give notice to affected parties, and obtain approval in a judicial proceeding.<sup>203</sup> Importantly, communications under a registration system would be between the personal representative and the interested party or parties, not through a court system.

The overwhelming majority of probate proceedings do not require judicial oversight.<sup>204</sup> But, sometimes judicial oversight is desired or needed.<sup>205</sup> For instance, there may be a dispute as to the validity of the will, the fitness of the personal representative to serve, or the proper interpretation of a dispositive provision in the will. Any party wishing to make a challenge or desiring judicial review or intervention on these or any other matter could make the challenge or request the review in the same fashion and with the same ease as presently is available

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201. See *id.* §§ 3-701 to -721, 8 U.L.A. pt. II, at 136–205 (stating the duties and powers of personal representatives).

202. The UPC requires an accounting even if no beneficiary believes it important. See *id.* § 3-1003, 8 U.L.A. pt. II, at 294–95 (1998); see also *supra* text accompanying note 189.

203. Similar options for a judicial closing are given to a personal representative under the UPC. The UPC permits a closing of the estate to be accomplished informally by filing a sworn statement, however. UNIF. PROBATE CODE § 3-1003 (amended 2008), 8 U.L.A. pt. II, at 294–95 (1998). Closing may also be done formally, without securing a determination of the decedent's testacy status, or may be secured through an order of complete estate settlement. See *id.* §§ 3-1001 to -1002, 8 U.L.A. pt. II, at 288–94 (1998).

204. See WAGGONER ET AL., *supra* note 34, at 1300–01 (“Most estates pass without controversy to a sole surviving heir or a small group of adults who are eager to expedite estate settlement and to release the fiduciary.”); Stein & Fierstein, *supra* note 14, at 87 (“[R]elatively few decedents leave a substantial estate requiring judicial administration.”).

205. See Wellman, *Recent Developments*, *supra* note 2, at 509 (observing that the proper role of the state in the wealth transfer process is limited to providing a backdrop of governing law and a forum in which to resolve disputes).

for bringing a matter to the court's attention under traditional probate administration.<sup>206</sup>

Beneficiaries of the estate would take subject to all liabilities of the decedent and her estate for claims of creditors and the tax authorities.<sup>207</sup> Normal statutes of limitation would apply unless the personal representative, if one assumes office, publishes a notice to creditors and gives actual notice to known creditors. Publication and actual notice would precipitate a short statute of limitations, providing certainty for those who desire it. But, those estates whose beneficiaries believe all liabilities are known and satisfied would not be required to observe unnecessary and unwanted claims procedures.<sup>208</sup>

There would be no need under a registration system for a closing procedure or even a notice to the Office of Estate Registration that the estate settlement process was finished.<sup>209</sup> If the only contact with the office is the registration of the will or affidavit of heirship, that would be the end of the matter. Should a personal representative assume office, the authority given the fiduciary, and evidenced by a document issued by the Regi-

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206. See UNIF. PROBATE CODE art. III gen. cmt. (amended 2008), 8 U.L.A. pt. I, at 26–28 (1998) (stating that persons interested in an estate may engage the court for proceedings and challenges on an as-needed basis).

207. In this respect, the registration system bears resemblance to universal succession. See UNIVERSAL SUCCESSION WITHOUT ADMIN. ACT § 201 (withdrawn 1998), 8 U.L.A. pt. I, at 118 (Supp. 2009). Although protecting creditors by securing payment of a decedent's debts has been a longstanding justification for judicial administration of decedents' estates, the claims procedures under probate have fallen into disuse. See Langbein, *supra* note 5, at 1120, ("In general, *creditors do not need or use probate.*") (emphasis in original). But, at a minimum, in case of a need to intervene in a settlement procedure to enforce a claim, the creditor under a registration system must have access to records in the Office of Estate Registration for the purpose of determining whether a decedent's will is registered or an affidavit of heirship is filed. The creditor should also be entitled to identify the personal representative or, if none has accepted that position, to discover the names of the beneficiaries. For a discussion of the plight of creditors, especially in light of nonprobate transfers, see Gagliardi, *supra* note 11, at 823–28, 851–78.

208. Forced waiting for a statutory claims period to expire is a prime contributor to delay in probate. See, e.g., UNIF. PROBATE CODE § 3-108 (amended 2008), 8 U.L.A. pt. II, at 42–43 (1998) (discussing the three-year statute of limitation on probate proceedings).

209. As indicated *supra* in the text accompanying notes 165–168, the Uniform Probate Code requires closing by some deliberate action. Its least burdensome method is closing by filing of a sworn statement. UNIF. PROBATE CODE § 3-1003 (amended 2008), 8 U.L.A. pt. II, at 294–95 (1998). But the affirmations required in the sworn statement force the personal representative to perform numerous settlement steps, some of which frequently may be unwanted or unnecessary.

strar, would have a finite life, say fifteen months. Thus, there would be an automatic expiration of the personal representative's authority. That authority could be extended upon routine notice to the Office of Estate Registration. If not extended, the authority would end automatically. If a beneficiary believed a settlement remained incomplete and inquiries to and responses from the personal representative did not resolve the matter, the beneficiary could file an application and thereby precipitate a judicial review. In the absence of a complaint from an interested party, the Office of Estate Registration need not be concerned about unfinished administrations.<sup>210</sup> Self-interest should be sufficient impetus for triggering the court's attention.<sup>211</sup> In the absence of a complaint, there is scant justification for a public, judicial intervention.<sup>212</sup>

### C. NONPROBATE WILLS

A registration system would permit transfers to be made in a way not commonly possible under today's bifurcated probate/nonprobate distinction. Wills would take effect without probate administration.<sup>213</sup> They would be nonprobate wills. A

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210. In general, if probate cases remain open, it is taken as a sign that something is wrong. See WAGGONER ET AL., *supra* note 34, at 1301 ("[P]ersonal representatives can't shortcut mandatory closing procedures. If they do, they're subject to possible sanction by the probate court."); see also MICH. COMP. LAWS ANN. § 700.3951 (West 2008) (requiring the personal representative to file with the court and all beneficiaries a notice of continued pendency and the reason for the continuation in order to continue administration beyond one year). If the notice is not filed, the court is to close the estate and suspend the authority of the personal representative. *Id.*

211. See UNIF. PROBATE CODE art. III gen. cmt. (amended 2008), 8 U.L.A. pt. II, at 26–28 (1998) (adopting the philosophy that the role of a probate court should be passive until an interested party indicates there is a problem that deserves the court's attention). If there is an issue that goes unresolved or a wrong that is not addressed, the beneficiaries only have themselves to blame. See Wellman, *Recent Developments*, *supra* note 2, at 508.

212. Some commentators believe supervision of probate administration by a court is necessary to protect beneficiaries and creditors against personal representatives and lawyers. See MONOPOLI, *supra* note 4, at 39. *But see* Stein & Fierstein, *supra* note 14, at 105–06 ("It seems unwise to require tens of thousands of estates to incur the time and expense of a particular judicial review because one or two of the thousands of estates might have a particular problem."). If mandatory procedures are imposed on all estates in the hopes of preventing abuse, this generates a misleading sense of security. See Wellman, *Blueprint for Reform*, *supra* note 2, at 469 ("Perhaps the most insidious aspect of supervised administration in many areas is that its promise of protection for survivors is almost totally deceptive.").

213. See UNIF. PROBATE CODE § 3-302 (amended 2008), 8 U.L.A. pt. II, at 58 (1998). There is no obligation to seek appointment of a personal representa-

will would acquire presumptive validity simply by the act of registration.<sup>214</sup> Following registration, the will would have a status from the time of the testator's death similar to that of a revocable trust. There would be no government-sanctioned or required administration. If tasks needed to be performed by a personal representative, they certainly would be administrative in nature, but the administration would be voluntary and only as-needed.

In a family setting where there is no dispute as to the validity of the will, no doubt about the meaning of its provisions, and the desire simply to pay known debts and taxes and to place the assets into the control of the beneficiaries, registration of the will and, in some instances, the personal representative's acceptance would be the sole contacts with any governmental official. In the routine estate settlement, there would be no need for anything more, either from the perspective of the beneficiaries<sup>215</sup> or from that of the government.<sup>216</sup>

#### D. REVOCABLE TRUST AS A NONPROBATE WILL

A registration system also would allow a revocable trust to be operable as a nonprobate will. As noted previously,<sup>217</sup> a revocable trust has many uses. Unlike a will, it may be a vehicle for lifetime management of the settlor's assets by a third par-

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tive after the registrar issues a statement of informal probate. *Id.*; see also *id.* art. III, gen. cmt. 8 U.L.A. pt. II, at 26–28 (1998). The proposed registration system uses the same concept but does so through registration of the will in a nonjudicial office.

214. Presumptive validity is sufficient for the will to have operative effect. If not challenged, the presumptive validity should be given conclusive effect after the passage of a reasonable length of time. UPC section 3-108 gives conclusive effect to an informally probated will three years after the decedent's death. See *id.* § 3-108, 8 U.L.A. pt. II, at 42–43 (1998) (stating that no informal proceeding can be commenced after the three year period).

215. If beneficiaries desire protection from potential but unknown creditor claims, they may elect to publish an appropriate notice. Creditors, on the other hand, may want and need access to information about the estate and, indeed, to be able to learn that an estate exists. On the latter point, see discussion *supra* notes 11, 30, 32, and 207.

216. See UNIF. PROBATE CODE art. III gen. cmt. (amended 2008), 8 U.L.A. pt. I, at 26–28 (1998) (stating that the government should supply a forum for the resolution of disputes). These dispute resolution forums would be available under a registration system in a related court system. The government also may be interested in collecting an estate or inheritance tax at the decedent's death. If a registration system were in effect, appropriate taxing authorities should have access to the names of decedents for whom a will or Affidavit of Heirship is registered.

217. See *supra* text accompanying notes 65–81.

ty.<sup>218</sup> With proper dispositive provisions, it also may serve as the primary vehicle for distributions at the settlor's death or for continued administration for others following the settlor's death.<sup>219</sup> But, unless all of the settlor's assets have been titled in the trust prior to death, the settlor also must be the testator of a pour-over will.<sup>220</sup> And, those individually owned assets must be judicially administered in probate before transfer to the trustee for disposition under the provisions of the trust.

Under a registration system of wealth transfer, the revocable trust would be given a broader reach than it presently enjoys. Put simply, the trust could be allowed to serve as a will, and the trustee could be invested with the authority of a personal representative. This would occur if the settlor states in the trust that the trust is intended to be the instrument governing the disposition at death of all her assets and that the trustee expressly is authorized to be the person to settle the settlor's affairs. If those statements are made, the trust would be the only document needed to transfer the decedent's assets at death, including assets that remain titled in the decedent's sole name. If the settlor states this intent and grants that authority, the trustee would be permitted to register the trust at the Office of Estate Registration in the settlor's domicile and to accept the task of serving as personal representative.<sup>221</sup> Upon application, the Registrar would issue a statement evidencing the trustee's authority to proceed to collect assets, determine and discharge liabilities, and distribute the assets under the provisions of the trust agreement.

As with a personal representative serving under a non-probate will, the trustee serving as personal representative would be subject to jurisdiction of the court in the decedent's domicile. The trustee/personal representative would be obligated to give notice to heirs and beneficiaries and to keep them

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218. See PENNELL, *supra* note 66, ch. 4.

219. See *id.*

220. See *supra* text accompanying notes 66–74.

221. In contrast to a will, a revocable trust is assumed to be valid when established. Cf. MCGOVERN, JR. & KURTZ, *supra* note 26, § 4.6. It is so treated unless and until a successful challenge determines otherwise. Its validity does not depend upon execution under the formalities of the Wills Act, i.e., there is no need for the settlor to sign in the presence of two subscribing witnesses or satisfy other requirements for proper execution of a will. See RESTATEMENT (THIRD) OF TRUSTS § 25 (2003). Nor does its validity depend upon a judicial determination. The Survey on Revocable Trusts indicates that, with a few notable exceptions, there are no execution formalities for a revocable trust unless its purpose is to own real estate. See Bloom, *supra* note 38, at 13.

fully informed of the assets under the trustee's control and of the status of the settlement. Any interested party aggrieved by the trustee/personal representative's action or inaction would have full access to the court for review or redress of that fiduciary's behavior. Court proceedings would be available "on demand" of either the fiduciary or an interested party. But, court proceedings would be the exception, not the routine. They would be chosen, not imposed.

#### E. NONPROBATE INTESTACY

Not every decedent leaves a will and few establish a revocable trust.<sup>222</sup> An intestate decedent almost never designates a person to serve as personal representative.<sup>223</sup> Yet, under a registration system the settlement of an intestate estate also could proceed free from judicial administration and be almost wholly independent of any contact with a governmental office.

Intestate succession rules are default provisions.<sup>224</sup> They reflect the legislature's best judgment as to the dispositive choices most people would make most of the time if they stopped to think about it. Of course, many people don't stop to think about it. But some who do may decide that the results under the intestate succession law fit perfectly with their preferences and choices. This particularly may be true in a state that has adopted the pattern of intestate succession reflected in the UPC, for its pattern is believed to echo relatively well contemporary choices for leaving wealth.<sup>225</sup>

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222. See AM. ASS'N OF RETIRED PERSONS, *supra* note 161, at 1, 4 (reporting that sixty percent of Americans over fifty have a will and twenty-three percent have a living trust).

223. A document executed with the requisite formalities that only names a personal representative is admissible to probate. See UNIF. PROBATE CODE § 1-201 (amended 2008), 8 U.L.A. pt. I, at 37 (1998). Often this is a codicil to a will that changes only the identity of the personal representative. Such a document as the decedent's only testamentary writing is *rara avis*. If the document does not contain dispositive provisions, the rules of intestate succession necessarily control the distribution of the decedent's property. *Id.* § 2-101(a), 8 U.L.A. pt. I, at 79 (1998). In contrast to the general rule, the UPC does permit a so-called negative will, enabling the testator to omit or disinherit a person, with the result that the property that will pass to another or others as if the omitted person had disclaimed. *Id.* § 2-101(b), 8 U.L.A. pt. I, at 79 (1998).

224. DOBRIS ET AL., *supra* note 26, at 62.

225. The drafters of the intestate succession provisions of the 1969 UPC relied extensively on empirical studies of wealth distribution patterns found in probated wills of testate decedents. See Thomas J. Mulder, *Intestate Succession Under the Uniform Probate Code*, 3 PROSPECTUS 301, 304 n.10 (1970); see also MARVIN B. SUSSMAN ET AL., THE FAMILY AND INHERITANCE 36-61 (1970);

A person who finds the intestacy statute of her domicile to reflect her dispositive choices may decide not to incur the expense of having a will prepared. And, if a simple, independent mode of wealth transmission is available, she need not incur the expense and exert the effort to establish and fund a revocable trust or employ other will substitutes to avoid the inconveniences of probate. If a registration system were in effect, she could execute a document that appoints a personal representative, but does no more than that. Upon her death, the personal representative would register the document, execute and file an affidavit of heirship, and, if needed, accept the office of personal representative and proceed with those steps that are required to wind up and conclude the decedent's affairs. Statutory provisions and case law pertaining to intestate succession would govern the personal representative's actions.<sup>226</sup>

### III. FACETS AND BENEFITS OF A REGISTRATION SYSTEM

Numerous features of the proposed registration system are central to its ability to be a legitimate alternative to traditional

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Olin L. Browder, Jr., *Recent Patterns of Testate Succession in the United States and England*, 67 MICH. L. REV. 1303, 1305-13, 1348-57 (1967); Allison Dunham, *The Method, Process and Frequency of Wealth Transmissions at Death*, 30 U. CHI. L. REV. 241, 251-57 (1963); Edward H. Ward & J. H. Beuscher, *The Inheritance Process in Wisconsin*, 1950 WIS. L. REV. 393, 411-15. The 1990 revisions to Article II of the UPC relied upon these and other empirical studies, including studies based on interviews with living persons. See, e.g., Contemporary Studies Project, *A Comparison of Iowans' Dispositive Preferences with Selected Provisions of the Iowa and Uniform Probate Codes*, 63 IOWA L. REV. 1041, 1047-54 (1978); Mary Louise Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 319, 340-85. Discussion of the rationale for the UPC approach appears in John W. Fisher, II & Scott A. Curnutte, *Reforming the Law of Intestate Succession and Elective Shares: New Solutions to Age-Old Problems*, 93 W. VA. L. REV. 61, 67-115 (1991); Martin L. Fried, *The Uniform Probate Code: Intestate Succession and Related Matters*, 55 ALB. L. REV. 927, 928-35 (1992); Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223, 230 (1991).

226. The statutory provisions, of course, relate to allocating the estate among the decedent's heirs, but also include substantive rules governing such topics as statutory protections against creditors for a spouse and minor children, advancements, survival requirements, and bars to succession. See UNIF. PROBATE CODE § 2-109 (amended 2008), 8 U.L.A. pt. I, at 88 (1998) (advancements); *id.* art. II, pt. 4, 8 U.L.A. pt. I, at 139-43 (1998) (exemptions); *id.* § 2-702, 8 U.L.A. pt. I, at 182-84 (1998) (survival by 120 hours); *id.* art. II, pt. 8, 8 U.L.A. pt. I, at 206-22 (1998) (bars to succession); *id.* § 3-703(a), 8 U.L.A. pt. I, at 138 (1998) (distribution of the estate).

probate. Already noted have been the registration upon request of either an affidavit of heirship for an intestate decedent or the will of a testate decedent if the will facially comports with required formalities,<sup>227</sup> direct descent of title to those beneficiaries identified in the will or affidavit of heirship,<sup>228</sup> simple acceptance of office by a nominated personal representative rather than investiture through an appointive procedure,<sup>229</sup> and strictly optional procedures for notifying creditors, accounting to beneficiaries, and closing the settlement process.<sup>230</sup> Additional comments now will focus on some of these features of a registration system, followed by an identification of possible concerns about a registration system and an articulation of responses to those concerns.

#### A. ELIGIBILITY OF DOCUMENT FOR REGISTRATION

A key to a registration system is the ability to register a document easily and promptly. It is also essential that the document be a valid expression of the testator's desires. This means the Registrar must be able to recognize that it satisfies the jurisdiction's requirement for a valid will. If the Registrar is not satisfied that the document satisfies the requisite formalities, registration should be denied. Thus, clearly identifiable compliance with the applicable Wills Act is highly desirable.<sup>231</sup>

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227. See *supra* text accompanying note 195.

228. See *supra* text accompanying note 201.

229. See *supra* text accompanying note 196.

230. For comments regarding notice to creditors, see *supra* text accompanying notes 207–08. For further reading regarding accountings, see *supra* text accompanying notes 201–03. Finally for more information pertaining to closing of estate, see *supra* text accompanying notes 209–10.

231. All American jurisdictions require a will to be in writing, signed by the testator, and witnessed by two witnesses, except Vermont, which requires three witnesses, and Louisiana which requires two witnesses and a notary. See DUKEMINIER ET AL., *supra* note 42, at 216 (citing LA. REV. STAT. ANN. § 9:2401 (2004); VT. STAT. ANN. tit. 14, § 112 (2004)). The particular requirements vary among the American states. See 1 JEFFREY A. SCHOENBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING §§ 14.01–.03 (2d ed. 1999). The requirements or formalities are derivatives of two English statutes. See Wills Act, 1837, 7 Will. 4 & 1 Vict., c. 26, § IX (Eng.); Statute of Frauds, 1677, 29 Car. 2, c. 3, § V (Eng.); see also UNIF. PROBATE CODE § 2-502(a) (amended 2008), 8 U.L.A. pt. I, at 144 (Supp. 2009) (introducing modern formality requirements). As the title to section 2-502 indicates, the UPC, as a result of the 2008 amendments, now permits a will to be notarized as an alternative to execution by two witnesses. *Id.* Although the requirements of section 2-502(a) are the customary formalities, they are not mandatory; if the will meets the test for a holographic will or if a court decides the failure to comply

Attorneys can be expected to continue to use familiar will formats for documents intended to be registered at death if for no other reason than they intend that wills they prepare be implemented without controversy. In short, the channeling function<sup>232</sup> performed by the formalities for executing a will and the benefits that flow from observance of that function will be maintained under a registration system.

A dispute as to the correctness of a Registrar's decision to deny registration as well as challenges to facial compliance can be settled judicially. If a will contains a self-proving affidavit,<sup>233</sup> such as permitted under the Uniform Probate Code, matters addressed by the affidavit should be insulated from attack.<sup>234</sup>

Under a registration system, a trustee would be allowed to qualify as personal representative and to distribute, pursuant to the terms of the trust, all assets remaining at death in the settlor's individual name if authorized to do so by the settlor. The only formality usually required for a valid revocable trust is a writing signed by the settlor, although oral trusts may be recognized in limited circumstances.<sup>235</sup> Presumably, the evidentiary function performed by formalities that are required of wills would dictate that a trust must be in writing in order to

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with some requirement was a harmless error, the will can be determined valid. *See id.* § 2-502(b), -503, 8 U.L.A. pt. I, at 146 (Supp. 2009).

232. *See generally* Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 5–11 (1941) (identifying three functions performed by Wills Act formalities). The ritual function indicates finality of intent; the evidentiary function provides a reliable record of purpose and the dispositive provisions; and the protective function guards against chicanery by others, including fraud and undue influence. Professor Langbein suggested a fourth function, that being the channeling function. *See* DUKEMINIER ET AL., *supra* note 42, at 201 (citing John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 494 (1975)). That function demands that a document be recognizable as a will in order to permit routine processing of the steps in probate administration. *Id.* Thus, the requirements of the Wills Act induced lawyers to using standard formats for wills.

233. A self-proving affidavit is a sworn statement of the testator and witnesses that the will was executed in conformity with the statutory requirements. The affidavit may be contained in or be separate from the will. *See* UNIF. PROBATE CODE § 2-504 (amended 2008), 8 U.L.A. pt. I, at 148 (1998).

234. The signature requirement may not be contested if a will is self-proved. *Id.* § 2-504 cmt., 8 U.L.A. pt. I, at 150 (1998).

235. The requirement of a writing is traced to the Statute of Frauds, 1677, 29 Car. 2, c. 3, § V (Eng.). *But see* 1 AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS* §§ 40–52 (4th ed. 1989) (noting that some American states do not impose this requirement).

be registered.<sup>236</sup> As witnessing and attestation or notarization generally are not required to make a trust valid,<sup>237</sup> a provocative policy question is presented by a registration system: Should a trust that contains provisions directing distributions at death be required to be executed with the same formalities as required for a will? Such a mandate would require the trust, or at least its testamentary dispositive provisions, to be attested by two witnesses.<sup>238</sup> In the alternative, the attestation requirement for a will could be—and perhaps should be—eliminated, with the consequence that neither the trust nor a standard will would require witnesses' signatures for registration.<sup>239</sup>

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236. Even when a jurisdiction recognizes a harmless error rule to excuse noncompliance with execution formalities, the writing requirement appears to remain inviolate. See 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, 52 (1987). A study of the last two decades of experience in South Australia, New South Wales, and Queensland bears out that conclusion. Stephanie Lester, *Admitting Defective Wills to Probate, Twenty Years Later: New Evidence for the Adoption of the Harmless Error Rule*, 42 REAL PROP. PROB. & TR. J. 577, 590–93 (2007). Of course, what constitutes a writing may be a disputed question, as may be the alleged verbal adoption of a writing as a will. See UNIF. PROBATE CODE § 2-502(a) cmt. (amended 2008), 8 U.L.A. pt. I, at 145 (1998) (stating that “[a]ny reasonably permanent record is sufficient” to constitute a writing); Lester, *supra*, at 603–05; see also McGovern, Jr., *supra* note 26, at 1335 (noting that the UPC does not require a writing for POD or TOD will substitutes).

237. In order for a trust to be enforceable, a jurisdiction's statute of frauds generally requires it to be evidenced by a writing signed by the settlor or, in some cases, by the trustee. RESTATEMENT (THIRD) OF TRUSTS §§ 20–23 (2003). No other formalities are required. See GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* §§ 86–87 (rev. 2d ed. 1984); SCOTT & FRATCHER, *supra* note 235, §§ 39–42.

238. If a state adopts UPC section 2-502(a)(3)(B) allowing a will to be notarized but not witnessed, that alternative would be available for a trust as well. UNIF. PROBATE CODE § 2-502(a)(3)(B) (amended 2008), 8 U.L.A. pt. I, at 145 (1998). Florida presently requires that the testamentary aspects of a revocable trust executed by a Florida resident after July 1, 2007 comply with the requirements for execution of a will. FLA. STAT. § 736.0403(2)(b) (2008).

239. See James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 541 (1990) (arguing that the original reasons for the attestation requirement no longer apply). For the argument that execution formalities for wills must be maintained so that the boundary between wills and will substitutes remains clear, see Grayson M.P. McCouch, *A Comment on Unification*, 43 REAL PROP. TR. & EST. J. 499, 501 (2008). It could be said, however, that if wills were able to transmit assets at death without costly, protracted, and burdensome court proceedings, the need for all of the present execution formalities becomes questionable.

## B. FOCAL POINT FOR SETTLEMENT MATTERS

A registration requirement is not particularly onerous. Should even this requirement be imposed, however, if the intent is to move away from mandatory procedures to effect transfers of wealth at death? Many will substitutes, such as pay-on-death and transfer-on-death accounts, life insurance, and annuity contracts, presently are not subject to registration or anything akin to it. Thus, a registration system would not be as simple a transfer device as some will substitutes. Unlike those substitutes, however, a will is not a single purpose device. Almost always, it is a comprehensive set of directions for the disposition of all the testator's assets. Additionally, it has been black letter law from time immemorial that a will has no effect until, after the testator's death, it is determined to be valid.<sup>240</sup> Registration is a relatively modest mechanism for identifying the document that allegedly contains the genuine directions for disposing of the testator's assets. While making that identification, registration also provides a specific location and procedure for resolving doubt as to the validity or meaning of the document. Moreover, a system of registration discloses the person(s) who will have authority to wind up the decedent's affairs and evidences that she or they assumed the fiduciary office. Registration thus identifies the valid controlling document, centralizes essential functions, and provides a venue for resolving questions that may need response.

## C. ALIGNMENT OF COSTS WITH SETTLEMENT DEMANDS

The fees for registering either a will or an affidavit of heirship or for filing an acceptance of a fiduciary appointment should be nominal. Reference to the filing fees for recordation of deeds and similar documents may provide a proper guide for the development of an appropriate fee schedule.<sup>241</sup> On the other hand, if a dispute ensues regarding the validity of a document or its interpretation or if some other judicial intervention becomes necessary, levy of more substantial fees would be appropriate because a greater demand then would be placed upon governmental resources. The fee structure for civil litigation

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240. See MCGOVERN, JR. & KURTZ, *supra* note 26, § 12.1.

241. In some instances, those fees include a transfer tax based on the value of the consideration paid for the transfer of real estate. See, e.g., MICH. COMP. LAWS ANN. §§ 207.523, 207.525 (West 2008). The Registration system would impose a fee similar to the base fee for recording a real estate document absent any tax element.

matters in the jurisdiction becomes a logical reference for establishing those levies.

A registration system should not be an excuse for imposition of a transfer tax disguised as an inventory fee or as a filing fee determined by value of the estate assets. Those fees are nothing less than stealth death taxes.<sup>242</sup> Presently, those types of fees burden transfers made via a will or intestate succession, but they do not reach assets that pass under will substitutes. This uneven burden is a significant reason, in and of itself, for avoiding the probate system. That burden should be eliminated if the blurred line between inter-vivos and testamentary transfers is to be erased and all transfers that actually take effect at death are to be unified under a registration system. If the state cannot forgo the revenue, it should admit the fee is a tax and extend it to all transfers that take effect at death.

#### D. CONFIDENTIALITY

Privacy must be a distinguishing feature of a Registration System.<sup>243</sup> Complete privacy, however, would be undesirable and would be a proper objection to a registration system. As a threshold matter, the contents of the registered will should be subject to disclosure only to those listed at the time of registration as interested parties.<sup>244</sup> Likewise, the contents of the affidavit of heirship should be private and accessible only by interested parties. Those interested include tax authorities, the heirs of the decedent, and, if there is a will, those named as beneficiaries.

Certain information necessarily would not be private. There are some details pertaining to the distribution of a decedent's assets that should be openly available. But, they are precious few in number. Certainly, the public should have access to the name of the decedent, fact of death, fact that the registration process has been invoked, and identity of any fiduciary who represents the decedent's estate. Those details must be accessible or otherwise an heir, a potential beneficiary, or a creditor may be unable to learn of and to protect his or her economic

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242. See *supra* text accompanying notes 169–70.

243. The privacy issue is a pivotal one. Lack of privacy is a prime reason for avoidance of probate. See *supra* text accompanying notes 38–43, 171–72.

244. There should be an application to register the will or affidavit of heirship that requires disclosure, under penalty of perjury, of all interested parties. Similar disclosures must be made in an application for informal probate of a will under the UPC. See UNIF. PROBATE CODE § 3-301(a)(1)(ii) (amended 2008), 8 U.L.A. pt. II, at 55 (1998).

interest. Thus, the fiduciary should be required to supply to a person who has or believes she has an economic interest in the estate, including a creditor, a full description of the interest and such information as is necessary to understand that interest.

Creditors should be able to obtain the essential information directly from the Office of Estate Settlement.<sup>245</sup> Information of interest primarily to a possible heir or potential beneficiary should be obtainable, at least in the first instance, only from the fiduciary if there is one in office. It should not be spread automatically on a public record for others to access freely.

If there is a document that is to serve as a muniment of title, be it the registered will, a trust, or other document such as the affidavit of heirship, the personal representative or beneficiaries should identify it for public access. The document then would be accessible by the public directly from the Office of Estate Settlement. When a fiduciary engages in a transaction with third parties who need or desire to have confirmation of the fiduciary's incumbency or authority, the needed evidence should be available directly from the fiduciary. Little else, if anything, beyond these particulars need be available routinely.

If settlement is not confined to the registration process and disputes arise that force the parties into court, the parties may be called upon to insert considerable private information into the public record. At that point, the normal rules applicable to disclosure of court records can apply, including those rules, if any, pertaining to sealing of the file for legitimate reasons.<sup>246</sup>

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245. Creditors need this access because the estate may have no personal representative or, even if one assumes office, there may be no notice given to creditors. See Gagliardi, *supra* note 11, at 831–33, 881.

246. Once a matter becomes a court proceeding, the “abstract public interest is deemed so compelling that it supersedes the privacy rights of individual decedents and beneficiaries.” Foster, *supra* note 41, at 561–62 (citing multiple appellate decisions that have upheld the public's right to know). Professor Foster would strip private trusts of an absolute right to privacy, although she discusses several intermediate approaches to privacy. *Id.* at 614–19. Courts have not always required full details of a trust or estate to be placed on the public record. See, e.g., Page v. Gowthorpe, 310 N.W.2d 381, 384 (Mich. Ct. App. 1981), *rev'd*, 341 N.W.2d 453 (Mich. 1983) (“[T]he theatrical business is a highly competitive business and . . . a more detailed accounting on the public record should not be required.”). In some instances, mediation of disputes rather than litigation may provide an avenue for maintaining family privacy even when matters become contested. See Susan N. Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes Over Guardianship and Inheritance*, 32 WAKE FOREST L. REV. 397, 424–25 (1997).

## E. STREAMLINED ESTATE PLANNING

Estate planners and clients would benefit from a means of transmitting wealth that is easier to coordinate and to implement than are existing devices.<sup>247</sup> Contemporary estate planning is done in the face of deep-seated hostility to probate,<sup>248</sup> in a matrix of an accelerating number of disjointed transfer devices,<sup>249</sup> and with disparate substantive rules applicable to different transfer mechanisms.<sup>250</sup> These facts make comprehensive estate planning difficult and problematic.<sup>251</sup> There would be savings to realize if time and effort were not required to sidestep probate.<sup>252</sup> Estate planning, its documentation, and its outcomes could be simpler and more certain if settlement procedures were simpler.

Today, the revocable trust is used as a receptacle to collect assets at death so that most of a decedent's wealth can be subjected to a single dispositive pattern.<sup>253</sup> The revocable trust would not disappear, of course, if a registration system were in place. A revocable trust, however, would be unnecessary unless the settlor desires to use it for lifetime management of her assets. But, as noted previously,<sup>254</sup> when no current trust management is needed, a will is sufficient to implement testamentary transfers.

Although the purposeful revocable trust would not disappear, the present, unnecessary use of revocable trusts to avoid probate should disappear. Trust mills feed on the fear of probate.<sup>255</sup> Eliminate that fear and the motive for the probate avoidance product churned out by trust mills is removed.

## F. BRIDGING THE CHASM BETWEEN INTER-VIVOS AND TESTAMENTARY TRANSFERS

The great divide between probate and nonprobate and between a will and will substitutes is produced by the separation of transfers into two great categories. Transfers that take effect during the transferor's lifetime are not subject to execution

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247. See *supra* text accompanying notes 10–12.

248. See *supra* text accompanying notes 26–45.

249. See *supra* text accompanying notes 55–100.

250. See *infra* text accompanying notes 256–67.

251. See *supra* notes 13, 180, 181.

252. See *supra* note 11.

253. See *supra* text accompanying notes 65–69.

254. See *supra* text accompanying notes 173–76.

255. See *supra* note 12.

formalities required for wills and are not subject to passing through the probate keyhole. Those that are labeled as testamentary because they take effect only at death of the transferor must be described in a document that satisfies the requirements for a will and must pass through probate.<sup>256</sup> The development of will substitutes is a history of judicial straining and stretching in order to classify a transfer as inter-vivos and hence able to operate without looking, smelling, and feeling like a will.<sup>257</sup> Consequences of having these two distinct systems for wealth transfers include inconsistent treatment of similar substantive issues,<sup>258</sup> inconsistent application of protective devices,<sup>259</sup> and, of course, difference in expense, implementation time, and confidentiality that generate the hostility to traditional probate.<sup>260</sup>

A registration system offers a bridge to connect the worlds of testamentary and inter-vivos transfers. A registration system would permit a trust to serve as a will (assuming the settlor clearly evidences the intent that it operate to shift property interests upon his death) and a will to operate like a trust (in that it could effect transfers at death without judicial administration).<sup>261</sup> The probate monopoly<sup>262</sup> would be broken for there

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256. The doctrinal distinction between inter-vivos transfers and those to take effect at death has been described in many places. *See, e.g.*, Olin L. Browder, *Giving or Leaving—What is a Will?*, 75 MICH. L. REV. 845, 847 (1977); Friedman, *supra* note 5, at 352–53; Gary, *supra* note 5, at 535–42; Gulliver & Tilson, *supra* note 232, at 5–17; Hirsch, *supra* note 5, at 542–46; Langbein, *supra* note 5, at 1109. Interestingly, the creation of a transfer-on-death deed, described by Professor Gary, illustrates an emerging third category of transfer. It is a transfer at death that has no effect during the lifetime of the transferor that also is excused from compliance with the formalities required of a will. Gary, *supra* note 5, at 542.

257. *See, e.g.*, Farkas v. Williams, 125 N.E.2d 600, 603 (Ill. 1955) (illustrating how a court located an interest that was transferred during lifetime, making the arrangement nontestamentary, but was hard-pressed to describe the interest). Professor Hirsch describes this judicial straining and stretching as a “game of make-believe.” Hirsch, *supra* note 5, at 544. He correctly notes that confronting the issue of probate avoidance directly could have avoided the “needless complexity and pointless inconsistencies” of an undesired probate system and multiple will substitutes, each with its own independent body of law. *Id.* at 546.

258. *See supra* text accompanying notes 156–59. The Revocable Trust Survey discloses “[t]here is a severe lack of uniformity in this country on default constructional rules” applicable to wills and trusts. Bloom, *supra* note 38, at 29.

259. *See infra* notes 265–67.

260. *See supra* text accompanying notes 26–45.

261. *See supra* text accompanying notes 209–21.

would be a pathway separate from judicial administration for making transfers at death.

The breakdown of the harsh and artificial distinctions between inter-vivos and testamentary transfers would pave the way for further unification of the substantive law that pertains to similar problems that arise under wills, intestate succession, revocable trusts and other wealth transfer documents. In states that have adopted the 1990 amendments to the Uniform Probate Code, lapse, representation, and other substantive doctrines apply in the same manner to revocable trusts and other will substitutes as to wills.<sup>263</sup> Most states, however, have not aligned the substantive rules applicable to wills and will substitutes.<sup>264</sup> If a registration system were in place allowing a will to operate much like will substitutes, there should be both a greater perception of the similarity of the issues that arise under all gratuitous transfers and a concomitant impetus to standardize the applicable rules.

The melding of lifetime and testamentary transfers also would offer the opportunity to harmonize the application of protective devices such as spousal elective rights<sup>265</sup> and exemptions and allowances that benefit close family members.<sup>266</sup> In

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262. The term *probate monopoly* refers to the insistence of the law that any transfer that is to take effect only upon the transferor's death must pass through the probate system. Several commentators have noted and lamented the existence of this monopoly. See, e.g., Hirsch, *supra* note 5, at 542; Langbein, *supra* note 5, at 1109.

263. UNIF. PROBATE CODE §§ 2-701 to -711 (amended 2008), 8 U.L.A. pt. I, at 181–205 (1998). See *supra* note 157 and accompanying text.

264. See *supra* notes 141–42 and accompanying text (noting that only eleven states have adopted the 1990 amendments to Article II of the Uniform Probate Code which unify, to a substantial degree, the substantive law controlling construction of dispositions under wills and similar governing instruments).

265. Spousal elective rights or forced shares are available in all common law states but Georgia. In community property states, the system of community property serves as a spousal protective device. Elective statutes reflect the societal policy of protecting a surviving spouse against total disinheritance. The foundation of this policy rests upon a desire to provide economic protection for the surviving spouse and upon a partnership model of marriage that presumes that spouses intend to share their marital wealth. See UNIF. PROBATE CODE ch. 2, pt. 2 cmt. (amended 2008), 8 U.L.A. pt. I, at 66 (1998).

266. Most probate laws give to the surviving spouse or to minor children a minimum amount that is free from the reach of creditors. See, e.g., *id.* § 2-402, 8 U.L.A. pt. I, at 83 (Supp. 2009) (homestead allowance for surviving spouse or, if none, for each minor and each dependent child, in the suggested aggregate amount of \$22,500); *id.* § 2-403, 8 U.L.A. pt. I, at 84 (Supp. 2009) (exempt allowance in tangible personal or other property for surviving spouse or, if none, decedent's children in the suggested aggregate amount of \$15,000); *id.*

some states, there is protection only when assets pass through probate.<sup>267</sup> If societal policies are to protect spouses, minors, and other dependents at a decedent's death, the protections should extend to all transfers that are substantively equivalent. A registration system under which wills and will substitutes perform similar roles in almost identical manners is likely to force state legislatures to consider and adopt policy solutions that apply to all transfers at death. Debate and decisions as to the correct policy choices is for other times and places. Here, it need only be said that unification of wealth transfer processes offers greater likelihood that the debate will occur and policy choices will be made.

#### G. ACCOMPLISHING THE GOALS OF ESTATE SETTLEMENT

Some may oppose a registration system on grounds that stakeholders in the wealth transmission process will lose essential safeguards. Certainly, the historic justifications for probate administration, with its mandatory steps and required court contacts, are necessary to protect creditors, including tax authorities, to protect estate beneficiaries, and to provide good title to assets.<sup>268</sup> While protection of creditors is an historic

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§ 2-405, 8 U.L.A. pt. I, at 85–86 (Supp. 2009) (family allowance for surviving spouse and minor children for support during estate settlement period). Under section 2-405, the family allowance may be set by the personal representative in an amount up to \$27,000 (not exceeding \$2,250 per month). *Id.*

267. In a very recent article, Professor McCouch comments on the fact that protection of third parties is uniquely the province of the probate system. The judicial system is needed so that the protective function can be performed. McCouch, *supra* note 239, at 502. The Revocable Trust Survey discloses that in ten states the revocable trust can limit or avoid spousal elective share rights. Bloom, *supra* note 38, at 8. It may be possible to accomplish this in another ten states. *Id.* Michigan and Ohio provide examples of the erratic availability of spousal protective devices. In both states, the surviving spouse has an elective right against the probate estate alone, not against a revocable trust or other will substitute. MICH. COMP. LAWS ANN. § 700.2202 (West 2002); OHIO REV. CODE ANN. § 2106.01 (LexisNexis 2007). In Michigan, family exemptions and allowances are liabilities of a revocable trust only if a personal representative is appointed in a timely manner. MICH. COMP. LAWS ANN. § 700.7502(1) (West Supp. 2009).

268. “The rights of creditors to the assets of a deceased person is usually the principal reason for requiring official administration . . . .” 2 J.G. WOERNER, AMERICAN LAW OF ADMINISTRATION § 201 (3d ed. 1923). Langbein identifies the three essential functions of probate administration to be title-clearing, payment of debts, and implementation of donative intent. Langbein, *supra* note 5, at 1117. Completion of these tasks certainly protects the ultimate beneficiaries. Professor Foster would assert that the public aspect of probate administration is a deterrent to fraud and to other abuse. Foster, *supra* note 41, at 588. Monopoli finds that court supervision, with required accountings and

function of probate, its continued desirability and necessity must be questioned. Creditors have no problem protecting themselves from harm from nonprobate transfers; in few instances do they rely on the probate procedures to collect debts.<sup>269</sup> Nevertheless, a registration system would offer creditor protection by having a default statute of limitations on pre-death claims that is sufficiently long to encourage beneficiaries and personal representatives who are uncertain about the existence of claims to give notice to creditors in order to obtain a shorter cut-off date. Additionally, the accessibility of public records to provide basic information about the decedent and her representative would enable an aggrieved creditor to make timely demand for payment. If a demand is ignored, the creditor may pursue its claim in court.

Existence of a court system means that protection for estate beneficiaries is readily available. A registration system, however, would rely on self-identification by stakeholders of instances when judicial intervention is needed. Self-interest would be the motive for obtaining information and self-interest would precipitate governmental attention. This would bring the implementation of the provisions of wills and intestate succession into the same legal environment as pertains to the administration of trusts and to the implementation of will substitutes.<sup>270</sup> These other nonprobate devices exist within a framework of statutory and common law rules and regulations governing their use and implementation. If there is a violation of the rules, however, an aggrieved party must take the initiative to assert or protect her rights. The fiduciary obligations and responsibilities of personal representatives and trustees

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effective court oversight, is essential. MONOPOLI, *supra* note 4, at 11, 39, 49, 150.

269. See Langbein, *supra* note 5, at 1120 (“In general, creditors do not need or use probate.”). But see Richard W. Effland, *Rights of Creditors in Nonprobate Assets*, 48 MO. L. REV. 431, 432 (1983) (noting that, while institutional creditors are generally able to protect themselves against the inability to reach will substitutes, the individual creditor may be hurt when assets do not pass through the probate system).

270. As will substitutes pretend to be inter-vivos transfers, they are implemented in much the same manner as are gifts and contracts—they are self-executing, without aid of a court procedure. They escape both the formalities required of wills and the need to pass through probate administration. See Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057, 1078 (1996); Hirsch, *supra* note 5, at 542–46; C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code “Harmless Error” Rule and the Movement Toward Amorphism* (pt. 1), 43 FLA. L. REV. 167, 344 (1991).

also exist within a well-established body of law. Enforcement of fiduciary responsibilities should take place in response to specific requests for judicial intervention, just as private law obligations pertaining to nonprobate transfer devices are enforced at the instigation of a private party. Moving away from traditional probate administration would permit this to occur.

Government is called upon to protect those unable to protect themselves in many spheres of commercial and ordinary social activity. Those who have studied probate procedure or who practice within the traditional probate system know that the supposed protection and supervision it offers is unfortunately more illusion than substance.<sup>271</sup> Someone or some event must trigger attention to gain a response. The court simply does not, and lacks the resources to, function as a super-administrative body overseeing each step of the process and insuring against deviant behavior. It is misleading to intimate that there is effective court oversight and protection under probate administration. It is a waste of time and expense to force all estates through the traditional system in the hope that doing so will offer such protection. The stampede to will substitutes is mute but deafening testimony from the public regarding the desire and need for a mandatory approach to protection.

A registration system would be able to provide good title to assets through two features. One is the provision that cuts off creditor claims at a point certain. The other is through prevention of challenges to a registered will or affidavit of heirship after a set time period. In these respects, a registration system uses mechanisms that have been tested and validated by the informal procedures of the Uniform Probate Code.<sup>272</sup>

## CONCLUSION

Dissatisfaction with the probate process of estate settlement continues unabated despite the fairly widespread adoption of the Uniform Probate Code. The public is hostile. Estate planners react by shunting clients into revocable trusts and by pasting together estate plans using those trusts alongside diverse and multiple single-purpose asset forms. Consequently,

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271. See, e.g., Stein & Fierstein, *supra* note 14, at 68–73; Wellman, *Recent Developments*, *supra* note 2, at 508–10.

272. E.g., UNIF. PROBATE CODE § 3-108 (amended 2008), 8 U.L.A. pt. II, at 42 (1998) (prohibiting, with limited exceptions, submission of a will or commencement of a contest after three years from death); *id.* § 3-803(a), 8 U.L.A. pt. II, at 215 (Supp. 2009) (cutting off most claims after one year).

the expense and many inconveniences of probate are not eliminated but instead are shifted into the testator's lifetime. Moreover, certainty in result is threatened due to the fact that doctrinal solutions to common transfer problems are far from uniform.

The objections to traditional probate can be alleviated to a large degree by removing routine estate settlement from the court system. Probate could be replaced by a system that would feature registration in an Office of Estate Settlement of wills of testate decedents and affidavits of heirship for those who die intestate. If actions are necessary to collect assets, pay liabilities, or distribute assets, a personal representative may qualify simply by filing an acceptance of office. If no dispute arises between beneficiaries, no further contact with the Office of Estate Registration would be necessary. There would be no requirement to file an inventory, no requirement to account to a public official, and no requirement to close the proceeding. At the same time, heirs and devisees would remain entitled to full disclosure and to full information about the assets and settlement matters. Limited public accessibility to records in the Office of Estate Registration would be a cardinal feature of the system.

Under a registration system, estate planning can become both easier and more rational. The client who intends to make only outright gifts at death can select a will as her dispositive vehicle. She will not be diverted into a trust solely to avoid probate. On the other hand, the client who visualizes the need for lifetime management of assets (that cannot be obtained just as well through a durable power of attorney) or who wishes to provide ongoing trusts for beneficiaries (that for whatever reason cannot be articulated just as well in a will) may select a revocable trust for her dispositive vehicle. The decision to use a will or a revocable trust can be made without a lurking fear of the probate process. If the revocable trust is the chosen vehicle, the client need not rush to fund it with each and every property interest she possesses. Assets that remain titled in the client can be collected after death following qualification by the trustee as personal representative. If the will is the vehicle selected, the client may name the personal representative as beneficiary of life insurance, annuities, or retirement plan proceeds because those designations would not expose those assets to probate administration or to probate fees. With the possibility of the use of either trust or will, the client has new freedom to design a coherent and certain estate plan.

A final and not insignificant benefit from the institution of a registration system is the elimination of the probate stigma. An attorney honestly could tell her client, “Your will does not go through probate. It only needs to be registered. And settlement of your estate can be done privately, without delay, outside of any court system.”