Because Property Became Contract: Understanding the American Nonprobate Revolution[*]

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In modern American practice the state-operated court system for transferring wealth on death, called probate, is being displaced. The wealth-transfer process has been increasingly privatized, conducted now mostly in the back offices of financial institutions rather than in the probate courts. Driving this privatization of wealth transfer has been a profound change in the nature of personal wealth, away from land and tangibles into contract claims against financial intermediaries such as banks, securities issuers, mutual funds, brokerage houses, insurers, and pension funds. Financially intermediated wealth has the distinctive attribute that it arises from the administrative processes of these institutions, work that entails recurrent transactions and communications. Once a staff is in operation to perform such tasks, extending its role to include the transfer of account balances on death has been easy. The account owner shunts the asset away from probate by completing a beneficiary designation form directing the institution to distribute the account asset in designated shares to designated persons. The emergence of this free-market transfer system has disrupted the application of a variety of the default features of the probate process, most ominously, the creditor protection function.

I. Probate: State-Operated Wealth-Transfer-on-Death
II. Personal Wealth: From Property to Contract
III. The Wealth Management Industry: Enabling Transfer-on-Death Services
IV. Reconciling the Two Systems of Transfer

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A central function of the legal system in advanced countries is to provide and operate institutions and procedures for transferring wealth on death.   My theme in this essay is that changes in the nature of wealth in the United States have undermined this publicly operated system of wealth transfer. Across the nineteenth and twentieth centuries, personal wealth changed character away from land and tangibles, and into financial assets. This new property consists mostly of contract-based claims against financial intermediaries, including banks, corporations that issue equity and debt securities, mutual fund companies, pension funds, brokerage houses, insurers, and others. For reasons that I shall discuss, these financial intermediaries have become free-market competitors against the long-established state-operated system of wealth-transfer on death. They have largely privatized the wealth-transfer process.

I.   Probate: State-Operated Transfer on Death

In the United States, wealth-transfer law is a field of state as opposed to federal law. We have 50+ legal systems, each with its own law of wealth transfer. Our state systems have broadly similar features that derived from English law[1] (except for the state of Louisiana, where civil jurisdiction has been rooted French and Spanish models.[2]) A distinguishing feature of American substantive law in this field is that the decedent has much more freedom of disposition regarding property owned at death than in European legal systems. American law recognizes no forced

[1]In the twentieth and twenty-first centuries the American Law Institute's Restatements of property and trust law have promoted common development of the states' wealth-transfer laws, as has the model legislation drafted by the multi-state coordinating body, the Uniform Law Commission. I have discussed the influence of these organizations in John H. Langbein, Why Did Trust Law Become Statute Law in the United States?, 58 Alabama L. Rev. 1069 (2007).

[2]See generally Legal Traditions in Louisiana and the Floridas 1763-1848 (S. P. Donlan & V. V. Palmer, eds., 2019).

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share (*legitime*, *Pflichtteil*) for children or other descendants. Most states provide a one-third forced share for a surviving spouse,[3] unless the spouse has waived that right by contract. Each state legal system has a default regime – the intestacy statute – that governs the disposition of the property of a decedent who dies without having left a valid will. These statutes typically provide for the surviving spouse to receive most or all of the property; anything that does not pass to the spouse passes to the decedent's children or their descendants, and in some circumstances to other relatives.[4]

The state-operated transfer systems in American practice take the shape of a court-conducted process called probate, from the Latin *probare*, to prove the will. The probate court appoints and supervises a person known as the personal representative, commonly a family member, who serves as a fiduciary in administering and distributing the decedent's property.[5]

Probate courts serve multiple purposes in the wealth transfer process. One function is creditor protection: Persons to whom the decedent was indebted when he or she died are allowed to prove the debts and obtain court-ordered payment from the decedent's assets.[6] The other main

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[3]For the details, see Jeffrey A. Schoenblum, Multistate Guide to Estate Planning 6035-63 (2019 ed.).

[4]See, e.g., Uniform Probate Code (UPC) §§ 2-102/103.

[5]See UPC §§ 3-601/721 (appointment and powers of personal representative). It is common for a decedent who dies leaving a will to designate a particular person or institution known as the executor to conduct this work.

[6]The U.S. Supreme Court has held as a matter of federal constitutional law that that a known creditor is entitled to timely notice of a probate proceeding. See *Tulsa Prof. Collection*

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function of probate is distribution, that is, transfering the property that remains after creditors' claims are discharged to the persons who are entitled to it under the decedent's will or by intestacy. (In many jurisdictions probate courts also serve as courts of protection, dealing with the affairs of minors and impaired adults,[7] but that role is distinct from the work of wealth-transfer on death.)

A vital part of the distribution function of probate is title-clearing. Subject to a few exceptions that I shall mention later, if a decedent died owning real estate or registered property (for example, securities, automobiles, boats), the decree of a court is needed to transfer ownership of those assets to a living person, and hence to make the assets marketable again.

Probate also has an adjudicative dimension, that is, a dispute-resolving function. When a dispute arises about the property being transferred or the persons who are entitled to receive it, the probate court conducts a civil proceeding, hearing evidence, to resolve the dispute. Such proceedings are comparable in character to the litigation of other types of civil disputes. The probate process developed at a time when most private wealth took the form of land or tangibles. The cautious, litigation-like procedures of probate administration seemed especially appropriate for transferring title to land, because the values tended to be large and the financing often

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Services v. Pope, 485 U.S. 478 (1988). The processing of creditor claims in probate is the subject of UPC §§ 3-801/816.

[7]See, e.g., Uniform Guardianship and Protective Proceedings Act, also codified as UPC Art. 5.

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complex. Ownership of land is still the factor most likely to determine whether a death will lead to a probate proceeding.[8]

All legal systems must have an institution with governmental power that can carry out the functions of probate – to enforce creditors' claims, to clear title, to adjudicate disputes about entitlement, and to effectuate donative transfers. What's peculiar about the American tradition has been the idea that such court-supervised transfer procedures should be routine, whenever a propertied person dies, even if there are no disputes with creditors or among heirs. By contrast, in European practice, court intervention in wealth transfer only need occur when some party is aggrieved. In routine cases the decedent's heirs or other successors discharge creditor claims and make the transfers required under the will or the intestacy statute without court supervision. This involuntary attribute of American probate procedure has come to be much resented among survivors, because probate proceedings are costly and time-consuming. Probate administration is also disliked because probate courts, like other civil courts, must conduct their affairs in public, which invites unwelcome publicity about family wealth and in some cases about family discord.

Another source of popular hostility to probate has been the reputation for corruption that has emanated from some probate courts. Fiorello La Guardia, when serving as the mayor of New York City (1934-1945), disparaged the Manhattan Surrogates' Court as "the most expensive

[8]Empirical study has found a high concentration of real property in probate estates. See Robert Stein, Probate Administration Study: Some Emerging Conclusions, 9 Real Property, Probate & Trust J. 596, 597 (1974).

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undertaking establishment in the world,"[9] on account of the judges' penchant for abuses such as appointing politically connected lawyers to render unneeded services as *guardians ad litem*. The disrepute of probate was evidenced in the 1960s when a book titled *How to Avoid Probate*[10] sold two million copies.[11]

Not surprisingly, in recent decades there has been a growing tendency among propertied persons to hold their property in ways that allow the decedent to circumvent probate. The inclination to avoid the government-operated wealth-transfer system in English-derived legal systems is centuries old. The earliest manifestation is the device we call the revocable inter vivos trust. The historical sources allow us to trace the inter vivos trust being used as a will substitute as far back as the fourteenth century.[12] The revocable inter vivos trust continues in modern practice as the prototypical wealth-transfer device for the lawyer-served carriage trade. The wealth-holder transfers property to an intermediary, the trustee, on condition that the trustee hold the property for the transferor for life, and on the transferor's death, that the trustee transfer the

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[9]Jan Hoffman, "Obituary: Marie Lambert, 76; Ex-Surrogate Court Judge," N.Y. Times, Mar. 30, 1997, https://www.nytimes.com/1997/03/30/nyregion/marie-lambert-76-ex-surrogate-court-judge.html.

[10]Norman F. Dacey, How to Avoid Probate (1966) (later eds. to 1993).

[11]Richard D. Lyons, "Obituary: Norman Dacey, 85; Advised His Readers To Avoid Probate," N.Y. Times, Mar. 19, 1994, https://www.nytimes.com/1994/03/19/nyregion/norman-dacey-85-advised-his-readers-to-avoid-probate.html.

[12]See Petition of Thomas and Joan Godwin (c. 1396-1399), Select Cases in Chancery: 1364-1471, at 48-49 (W.P. Baildon ed. 1896) (Selden Soc., vol. 10), reprinted in John H. Langbein et al., History of the Common Law: The Development of Anglo-American Legal Institutions 302-03 (2009).

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remainder to designated survivors, whom we call beneficiaries. This arrangement replicates the defining elements of a transfer by will. No wealth passes to the beneficiaries until the transferor's death, and the transferor can alter or revoke the projected transfer at any time until his or her death. Upon the transferor's death, the trustee rather than the probate court makes the intended transfer to the beneficiaries whom the transferor selected. In the fourteenth century the trustee was commonly an individual, such as the transferor's brother-in-law or a clergyman. In modern usage the trustee is commonly a fee-paid financial intermediary[13] named something like the Northern Trust Company.[14]

II. Personal Wealth: From Property to Contract

Quite apart from revocable trusts, there has been a vast expansion of nonprobate transfers in recent decades. We do not have good data about the magnitudes,[15] but we think that *most* wealth-transfer-on-death in the United States now occurs without probate. In the scholarly

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[13]Regarding the contract-like character of the deal between transferor and trustee, see John H. Langbein, The Contractarian Basis of the Law of Trusts, 105 Yale L.J.625 (1995).

[14]The Northern has discussed the range of its services in a volume titled Legacy: Conversations about Wealth Transfer (2d ed. 2011); see also https://www.northerntrust.com/united-states/what-we-do/wealth-management/global-family-office-services/fiduciary-services. Regarding the historical development of institutional trustees, see John H. Langbein, The Rise of the Management Trust, 143 Trusts & Estates Magazine 52, 53 (Oct. 2004); regarding the Boston variety, see Thomas E. Bator, Heidi Seely, The Boston Trustee (2015).

[15]I have discussed the available data in John H. Langbein, Major Reforms of the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers, 38 ACTEC L.J. 1 (2012).

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literature, this development, which has been called "the nonprobate revolution,"[16] is understood to have resulted from the change in the character of personal wealth, away from land and tangibles, and into financial assets. Writing in 1922, Roscoe Pound, then dean of the Harvard Law School, emphasized that transformation in an insightful aphorism: "Wealth, in a commercial age, is made up largely of promises."[17] Pound was speaking of a trend that has become ever more intense: Most modern wealth[18] takes the form of contract rights against financial intermediaries – rights in bank deposits, securities (that is, stocks and bonds) issued by corporations and other business entities, government bonds, brokerage accounts, mutual fund shares, pension fund claims, insurance and annuity contracts, and so forth.

This change in the nature of wealth arose from profound changes in economic organization. The household had been the characteristic unit of production in the world of small farms, artisans, and shopkeepers, which prevailed into the nineteenth century. Thereafter the growing technological sophistication and scale of modern modes of production and marketing imposed enormous capital requirements that were beyond the capacities of household

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[16]E.g., Melanie B. Leslie & Stewart E. Sterk, Revisiting the Revolution: Reintegrating the Wealth Transmission System, 56 Boston Col. L. Rev. 61 (2015); John H. Langbein, The Nonprobate Revolution and the Future of the Law of Succession, 97 Harvard L. Rev. 1108 (1984).

[17]Roscoe Pound, An Introduction to the Philosophy of Law 236 (1922).

[18]Disregarding human capital (the investment in marketable skills); and government transfer programs such as Social Security, regarding which see Charles Reich, The New Property, 73 Yale L. J. 733 (1964).

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producers.[19] Financial intermediaries arose to gather and pool capital from savers and investors, and to supply that capital to the new enterprises that would deploy it.[20] Personal wealth came ever less to consist of direct ownership of productive property such as the family farm and the family firm, and ever more to take the form of contract claims against the financial intermediaries who operate the new economic order.

In the realm of wealth-transfer on death, the financial intermediaries who administer these contract-based forms of wealth have been able to compete with the state-operated wealth-transfer system by attaching beneficiary-designation terms to the contracts that govern the accounts between investors and intermediaries. The beneficiary designation is an option that allows the account owner to direct that, on the event of his or her death, the intermediary shall transfer the account balance to such persons and in such shares as the account owner has directed. The terms of the account permit the account owner to select and to change beneficiaries by completing, signing, and submitting a form supplied by the intermediary, either in paper or on-line.[21] The intermediaries draft the content of these forms, and require their use. The account terms, which resemble the formalities required for probate transfers under the Statute of Wills (writing and

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[19] I have discussed this transition in John H. Langbein, The Twentieth-Century Revolution in Family Wealth Transmission, 86 Michigan L. Rev. 722, 727-29 (1988).

[20] Regarding the advent of so-called managerial capitalism, in which professional managers displaced family members from the management of enterprise, see Alfred D. Chandler, The Visible Hand: The Managerial Revolution in American Business (1977).

[21] See, e.g., the sample forms and commentary for account holders of mutual funds sponsored by the Vanguard organization, https://investor.vanguard.com/beneficiaries/nonretirement.

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signature, but not attestation), serve business purposes, helping the intermediary operate its transfer process.[22]

III. The Wealth Management Industry: Absorbing Transfer-on-Death Services

How did financial service entities such as banks and mutual fund companies become competitors of the probate system? I come here to a point of fundamental importance: Financial intermediation is intrinsically administrative. "Administrators intermediate between savers and borrowers, between passive owners and active users of capital. Pooling wealth and servicing the resulting liabilities involves recurrent transactions and communications. Once a bureaucracy appropriate to those tasks is in operation, only a [modest] adaptation is [needed] to extend [the] functions and procedures [of the financial intermediary] to include the transfer of account balances on death."[23] Financially intermediated property comes with an internal administrative capacity that is without counterpart with older forms of property.

Why have the financial intermediaries chosen to offer transfer-on death services? This development is part of a larger trend, to develop themselves as providers of an array of services

[22]A substantial case law has arisen concerning situations in which the transferor fails to comply with the contractually required formalities, especially in life insurance beneficiary designations. See, e.g., Annotation, "Change of Beneficiary in Old Line Insurance Policy as Affected by Failure to Comply with Requirements as to Manner of Making Change," 19 A.L.R.2d 5 (1951 & Supp.). "By the great weight of authority, a change of beneficiary under a policy containing the usual change-of-beneficiary clause can be accomplished without strict or complete compliance therewith." Id. at 30.

[23]Langbein, Nonprobate, *supra* note 14, at 1119.

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that the intermediaries now call "wealth management."[24] Back in the day when stocks and bonds were certificated in paper, the banks and brokerage houses often served as custodians of these documents, safeguarding them against destruction or theft. From that work they moved into the business of collecting and reinvesting the dividends and bond interest owed under the safeguarded certificates. From there they developed investment advisory services, helping customers construct investment portfolios.[25] In more recent times, as modern portfolio theory has underscored the wisdom of investing in broadly diversified holdings,[26] firms in the wealth management business have come to provide pooled investment vehicles such as mutual funds and collective investment funds, which allow small investors to participate in portfolios large enough to optimize diversification.

Compensation has been an incentive for financial services firms to offer wealth management services. Some firms charge fees for performing transfer-on-death services, but that has not been the main inducement. Financial services firms are routinely compensated on a percentage of the amount of assets that they have under management. Offering transfer-on-death services helps a firm to retain the assets in an investor's account until the investor's death. Moreover, because the assets in question are already with the firm, the firm obtains a practical

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[24]See, e.g., Norbert M. Mindel & Sarah E. Sleight, Wealth Management in the New Economy: Investor Strategies for Growing, Protecting and Transferring Wealth (2010); Nigel Edwards Morecroft, The Origins of Asset Management from 1700to 1960 (2017).

[25]Sketched in Gabriel Zucman, The Hidden Wealth of Nations 11-12 (2015).

[26]See Jonathan R. Macey, An Introduction to Modern Financial Theory (American College of Trust and Estate Counsel, 2d. ed., 1998).

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advantage after the investor's death in competing to retain management of the assets when ownership passes to the beneficiaries.[27]

An important change in American contract law, which took place in the second half of the nineteenth century, enabled the financial intermediaries to take on this contract-based work of wealth-transfer-on-death. That change was the recognition of third-party-beneficiary contracts,[28] which were not enforced in English law.[29] The beneficiary designation in a contract of deposit with a bank or in the account terms of a life-insurance policy or a mutual fund account is in function a third-party-beneficiary contract. The financial intermediary promises the account owner to pay the account balance or to transfer the account assets to the designated third-party death beneficiary.

Another factor in the growth of the nonprobate system has been the vast increase in the size of the financial services industry. For example, as of 2017, American life insurance companies had more than $13 trillion of insurance in force and in that year made $479 billion in

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[27]The observation in text derives from John H. Langbein, Major Reforms of the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers, 38 ACTEC L.J. 1, 14 (2012).

[28]The landmark case was *Lawrence v. Fox*, 20 N.Y. 268 (1859). Regarding the emergence of American third-party-beneficiary law, see Anthony J. Waters, The Property in the Promise: A Study of the Third Party Beneficiary Rule, 98 Harvard L. Rev. 1109 (1985).

[29]See Vernon V. Palmer, The Paths to Privity: The History of Third Party Beneficiary Contracts at English Law (1992). Recent legislation allows some enforcement. See Contracts (Rights of Third Parties) Act 1999, https://www.legislation.gov.uk/ukpga/1999/31/contents.

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benefit payments.[30] The mutual fund industry in that year held assets of $22 trillion.[31] The movement in the 1980s and thereafter from defined benefit to defined contribution pension plans[32] has resulted in a burgeoning of individual account holders who have potential death balances governed by beneficiary designations. (Distribution under defined benefit plans typically took the form of an annuity for the lives of the employee and his or her spouse, which left no death balance.) Thirty-nine percent of American workers currently have defined contribution pension accounts,[33] and the assets held in all forms of individual-account retirement plans are currently reckoned at about $17 trillion.[34]

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[30]American Council of Life Insurers, 2018 Fact Book, at 3.

[31]Investment Company Institute, 2018 Fact Book, at 34. See generally Robert Pozen & Theresa Hamacher, The Mutual Fund Industry: How Your Money Is Managed (2011).

[32]A prominent scholar of pension law has described the financial services industry as the "sales force" of the defined contribution movement. Edward A. Zelinsky, The Origins of the Ownership Society: How the Defined Contribution Paradigm Changed America 96-97 (2007). The industry also became a sales force for the nonprobate system, actively promoting probate avoidance (and in the case of life insurance, creditor avoidance) as desirable features of their investment products.

[33]See Boston College Center for Retirement Research, "Pension Participation of All Workers, by Type of Plan, 1989-2016."

[34]"At the end of 2017, employer-sponsored Defined Contribution plans—which include 401(k) plans, 403(b) plans, 457 plans, the federal Thrift Savings Plan (TSP), and other private-sector Defined Contribution plans—held an estimated $7.7 trillion in assets." Investment Company Institute, 2018 Fact Book, at Fig. 8.10. Assets held in Individual Retirement Accounts (IRAs) amounted to $9.20 trillion in 2017. Craig Copeland, Individual Retirement Accounts: EBRI Issue Brief: How Balances of Older Account Owners Change Over Time, Mar. 21, 2019, https://www.ebri.org/content/individual-retirement-accounts-how-balances-of-older-account-owners-change-over-time.

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Another background factor occurring in the 1960s and thereafter that facilitated the growth of nonprobate transfers was the transition away from paper certificates for shares of stocks and bonds.[35] The electronic book-entry registry systems that have displaced paper certificates make it easier for financial intermediaries to transfer these interests. (This development is known in the specialist literature by the wonderful name of "dematerialization.")

Although the nonprobate system began in the practice of financial intermediaries, the legal system has provided important confirmation and support. The Uniform Law Commission, which operates a legislative drafting service for the American state governments, has promoted the trend in various ways. A provision of the Uniform Probate Code of 1969, lightly revised in 1990,[36] validates nonprobate transfers against the claim that they are void for noncompliance with the Statute of Wills.[37] The American Law Institute endorsed that position in a Restatement published in 2003.[38] In 1989 the Uniform Law Commission promulgated a model act facilitating

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[35]See generally Erica Johansson, Property Rights in Investment Securities and the Doctrine of Specificity (2009) (reviewing European and American law).

[36]UPC § 6-101.

[37]When this concern was taken seriously, courts that validated the will substitutes typically did so on the supposed ground that such transfers functioned as lifetime gifts rather than transfers-on-death. This maneuver required the court to identify some fictional "present interest" passing to the beneficiary during the lifetime of the transferor. The leading case is *Farkas v. Williams,* 125 N.E.2d 600 (Il1. I955). Regarding the shortcomings of the "present interest" standard, see Langbein, Nonprobate, *supra* note 14, at 1126-34.

[38]Restatement (Third) of Property: Wills and Other Donative Transfers §7.1(b) (2003).

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transfer-on-death provisions for bank accounts.[39] Another act, now in force in almost all the states, facilitates the use of beneficiary designations in holdings of corporate shares, brokerage accounts, and mutual fund accounts.[40]

I have emphasized that the nonprobate system entails a privatization of the wealth-transfer process. Business enterprises, acting as free market competitors of the probate process, have captured a function that had been the work of governmental actors. I need to qualify that observation slightly, to observe that governmental entities have also been promoting certain types of nonprobate transfers. Some states allow the owner of a motor vehicle to title the vehicle in a transfer-on-death mode of registration, by which the owner designates a death beneficiary. When such a registration is in effect, the Department of Motor Vehicles (DMV) will transfer title to the death beneficiary without a probate decree, upon presentation of a death certificate or an affidavit reciting the death of the record owner. Even in states lacking such a mode of registration, it is common to find a statutory provision enabling the DMV to re-register the vehicle of a deceased owner in the name of an heir, on receipt of an affidavit reciting heirship and that the decedent's estate does not otherwise require probate.[41] A similar development has occurred with respect to land. In 2009 the Uniform Law Commission, following some nonuniform state-law initiatives,

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[39]Uniform Multiple-Person Accounts Act (1989, amended 1998), also codified as UPC § 6-201 et seq.

[40]Uniform Transfer on Death Security Registration Act (1989, amended 1998), also codified as UPC § 6-301 et seq.

[41]See. e.g., "Virginia DMV Guide for Family Members and Friends of the Recently Deceased," https://www.dmv.virginia.gov/webdoc/pdf/dmv105.pdf, summarizing these alternatives under Virginia law.

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promulgated an act[42] that allows the owner of land to take title in transfer-on-death form, by which the owner designates a beneficiary to take title without probate, on filing proof of the record owner's death.[43]

Moreover, the probate system supports the nonprobate system in important ways. The beneficiary designation forms of the nonprobate system all but invariably name the transferor's probate estate as the ultimate contingent beneficiary. If, therefore, the named beneficiaries predecease the transferor or cannot be located, the financial intermediary remits the fund to the probate process for distribution. Likewise, if the proper course of distribution is for some reason doubtful, or if contest threatens, the financial intermediary can force the probate court to decide the matter. The intermediary can interplead,[44] or simply refuse suspect claims and force the claimants to sue. In this way the nonprobate system is a free rider on the probate system. Financial intermediaries execute the easy transfers but delegate the troubled ones to probate. Because virtually all transfers are easy, this attribute of the nonprobate system is a major source

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[42]Uniform Real Property Transfer on Death Act (2009), codified in the Uniform Probate Code as UPC § 6-401 et seq. For discussion of the device see Susan N. Gary, Transfer-on-Death Deeds: The Nonprobate Revolution Continues, 41 Real Property, Probate & Trust J. 529 (2006). The development is critiqued in Danaya C. Wright & Stephanie Emrick, Tearing Down the Wall: How Transfer-on-Death Real-Estate Deeds Challenge the Inter Vivos/Testamentary Divide, 78 Maryland L .Rev. 511 ((2019).

[43]These state-operated nonprobate devices take advantage of an existing administrative capacity (in the DMV and in the recording office for land transfers), comparable to that of the financial intermediaries that have been the driving force in the nonprobate revolution.

[44]E.g., Federal Rules of Civil Procedure, Rule 22.

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of its efficiency and comparative advantage. In the nonprobate system, genuine disputes still reach the courts, but routine administration does not.[45]

IV. Reconciling the Two Systems of Transfer

The nonprobate revolution has not been an unqualified success.[46] It has displaced a system in which there was a single authoritative decision-maker, overseeing all the decedent's assets and all the claims against those assets. The probate system of concentrated administration was particularly effective in satisfying creditor claims, because it marshaled all the assets and resolved creditor claims before any donative transfers could occur. In the nonprobate system, assets get transferred to the designated account beneficiaries without regard to whether the decedent had debts. Mortgage and automobile lenders, the two types of creditor who frequently have large claims against decedents, have been largely unaffected by the nonprobate revolution, because they rely upon a security interest in the asset financed, an interest that operates outside the probate process. But the nonprobate system does disadvantage unsecured creditors in circumstances in which the assets in the probate estate are insufficient to satisfy all claims,[47] and

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[45]The point in text derives from Langbein, Nonprobate, *supra* note 14, at 1120.

[46]For insightful discussion of some of the drawbacks, see Melanie B. Leslie & Stewart E. Sterk, Revisiting the Revolution: Reintegrating the Wealth Transmission System, 56 Boston Col. L. Rev. 61 (2015).

[47]The declining regard for creditor interests in American wealth-transfer law is also evident in the spread of state statutes authorizing so-called asset protection trusts, which allow a wealth-holder to establish a trust that can benefit the transferor at the expense of the transferor's creditors. See generally Asset Protection Strategies (Alexander A. Bove, Jr., ed.) (American Bar Association, Section of Real Property, Probate & Trust Law, 2002).

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I have been surprised that lenders and other creditors have put up so little resistance to the increasing prevalence of nonprobate transfers. The Uniform Probate Code[48] and nonuniform statutes in some states allow such creditors a right of action for unjust enrichment against nonprobate transferees, but the process is awkward because of the dispersion of assets and claims.[49] I should mention that I have done some interviewing about the debt collection problem among repeat creditors such as electric utilities and credit-card lenders. Many report that as a generality, survivors tend to pay off a decedent's account spontaneously, without the need for court process. Among these credit-industry professionals the belief is widespread that voluntary payment is motivated largely by moral considerations. Many survivors want to discharge the decedent's just debts, for honor's sake.

In the privately-operated nonprobate system death triggers a profusion of separate transfers, each bearing no relationship to the others. It is not uncommon for a propertied person to have a dozen or more will-like beneficiary designations in effect on various banking, brokerage, investment, life insurance, and pension accounts.[50] Moreover, most nonprobate

[48]UPC § 6-102.

[49]The nonprobate revolution appears not to have much impaired the collection of estate taxes. Probate and nonprobate assets are equally liable to estate taxation under Internal Revenue Code § 2036, and the decedent's personal representative is required to report both when filing an estate tax return.

[50]See,, e.g., Jerilyn Klein Bier, "Did You Hear The One About The Client With A Dozen 401(k) Plans?," Financial Adviser Magazine, June 1, 2019, https://www.fa-mag.com/news/did-you-hear-the-one-about-the-client-with-a-dozen-401-k--plans-45096.html (discussing the experience of a financial adviser whose client had accumulted a dozen different 401(k) accounts from episodic employment relationships).

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accounts are asset-specific. Each deals with the single type of asset that the particular type of financial intermediary happens to offer and to service: Insurance companies transfer proceeds arising under insurance policies, banks transfer bank account balances, and so forth. The reason that this feature of the main will substitutes is troublesome is that there is seldom any logic to asset-specific transfers. In the probate world, when we draft wills, we do not create a separate will for each asset or asset type. We know how to make a specific devise when one is wanted – for example, the piano to James, the Picasso to Mary – but normal practice is for the drafter of the will to consolidate assets of all types under a so-called residuary clause, and to divide that pile of assets among the beneficiaries in fractional shares. Dealing with the multiplicity of nonprobate transfers – coordinating them into a sensible plan, and keeping beneficiary designations up to date in accord with changing family circumstances and changing asset values in the various accounts – has become a central problem of modern estate planning.

A particularly ominous consequence of the nonprobate revolution is that it has contributed to the declining use of lawyers in wealth-transfer planning. Substantial wealth-holders continue to seek legal counsel for estate planning, but for downmarket persons nonprobate increasingly means nonlawyer. The lawyer-served sector of the American wealth-transfer market has declined for many reasons, most importantly the diminished need for tax planning in consequence of the precipitous decline in federal and state estate and inheritance taxes.[51] The relocation of wealth-transfer decision-making from the lawyer-guided probate

[51]See Michael J. Graetz & Ian Shapiro, Death by a Thousand Cuts: The Fight over Taxing Inherited Wealth (2005).

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system to the financial services industry has been an important factor. The ease with which an account owner can fill out a financial institution's beneficiary-designation form seems to signal that professional estate-planning guidance is no longer needed. The focus on avoiding probate deflects attention from considerations that laypersons often do not apprehend, such as the desirability of planning for contingencies such as lapse or incapacity. Moreover, some nonprobate assets present distinctive planning challenges of their own, notably in choosing among the various distribution options for retirement[52] and insurance[53] accounts.[54] Decisions about beneficiary designations are commonly made in circumstances that do not lend themselves to careful planning -- for example, when opening a bank account or when doing the employee-benefits paperwork associated with starting a new job.[55] My concern is that the nonprobate revolution is helping the wealth-management industry to displace lawyers from wealth-transfer planning, but too often without supplying the guidance that transferors need.[56]

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[52]See e.g., Natalie Choate, Life and Death Planning for Retirement Benefits (8th ed. 2019).

[53]See e.g., Harry S. Redeker & Charles K Reid, Life Insurance Settlement Options (2d ed. 1964).

[54]The discussion in text derives from Langbein, *supra* note 24, at 16-17 (2012).

[55]This point is developed in Leslie & Sterk, *supra* note 43, at 78 (2015).

[56]Lawyers are fiduciaries, acting under an obligation to advise in the best interest of their clients. Many financial intermediaries are resisting regulatory efforts to hold them to fiduciary standards in their advisory work. See, e.g., *Chamber of Commerce v. U.S. Department of Labor*, 885 F.3d 360 (5th Cir. 2018), defeating the Department of Labor's draft fiduciary rule for financial advisers servicing retirement savings accounts.

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A very serious danger that inhered in the rise of the nonprobate system was the concern that decedents might take advantage of nonprobate transfers to defeat state-law spousal protection requirements. As previously mentioned, in virtually all American states a surviving spouse is entitled by statute to a minimum share of the decedent's estate.[57] These statutes, when drafted before nonprobate transfers became common, were often worded to apply only to the decedent's probate estate. For a wealth-holder caught in a sour marriage and looking to defeat the spouse's share, the temptation was to use nonprobate transfers to divert most or all of the assets away from the probate estate.[58] Modern forced-share statutes, such as the Uniform Probate Code's augmented-estate regime,[59] have responded by extending the spouse's share to assets passing under various types of nonprobate transfers.

The default law of wills contains some distinctive constructional doctrines that deal with changes of circumstance occurring after the decedent makes her or her will. The question arises whether these doctrines apply beyond the law of wills to will-like beneficiary designations in the nonprobate world. Take for example the divorce-revocation rule. Suppose these facts: John and Mary get married in 2001. In 2003 John executes a will devising his residuary estate to Mary, and in 2005 he executes a beneficiary-designation form naming Mary as the death beneficiary on his Vanguard mutual fund account. In 2017, John and Mary get divorced. John neglects to

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[57] *Supra* note 3.

[58] The strategem in a celebrated New York case, *Newman v. Dore*, 9 N.E.2d 966 (N.Y 1937).

[59] UPC § 2-205.

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update either his will or the beneficiary designation on his Vanguard account. He dies suddenly in 2018, leaving both documents of transfer nominally in effect. Statutes in several states provide that when a decedent has named his or her spouse to take under the will, and subsequent to the execution of the will the decedent and the spouse divorce, the devise to the ex-spouse is treated as revoked, on the premise that the decedent would not have wished to benefit an ex-spouse. Under such a statute, Mary in my example is treated as though she predeceased John, and the property devised to her under John's will passes to the next contingent beneficiary under his will, or if none, by intestacy. Statutes of this sort that predate the nonprobate revolution and that are addressed only to transfers by will leave the courts to wrestle with the question of whether they should extend the statute to nonprobate beneficiary designations[60] – in my example, John's Vanguard account. Modern divorce-revocation statutes, such as the Uniform Probate Code's version,[61] expressly cover both probate and nonprobate transfers. The 2003 Restatement endorses a "policy of unifying the law of wills and will substitutes,"[62] and observes that a will substitute such as the Vanguard beneficiary designation in my example should be treated as "a nonprobate will,"[63] hence covered under a statute that speaks only of wills.

Conclusion

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[60]E.g., Equitable Life Assurance Society v. Stitzel, 1 Pa. Fiduc.2d 316 (C.P.1981), refusing to apply the statute to the nonprobate transfer.

[61]UPC § 2-804.

[62]Restatement (Third) of Property: Wills and Other Donative Transfers §7.2, Comment a (2003).

[63]Id.

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The main theme of this paper has been that the transformation in the nature of property from hard assets like land and tangibles to contract rights against financial intermediaries enabled the nonprobate revolution in American wealth-transfer practice. I have particularly emphasized the point that, in contrast to traditional family property, financially intermediated property is intrinsically administered property, because the work of maintaining financial accounts requires incessant transactions and communications. Once a corps of personnel develops to conduct such work, extending their functions to include account transfers on the death of an account-holder has been an easy fit. The resulting displacement of probate courts and procedures has effectively privatized a function that has long been the preserve of public officials. Whether on balance that development will prove to have been benign or malign remains to be seen. Was the probate-court monopoly on the work of wealth-transfer simply another rotten borough, or did probate's centralization and consolidation of assets and claimants reflect circumstances that made probate an intrinsic public good?

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