PUBLIC POLICY AND THE PROBATE PARIAH: CONFUSION IN THE LAW OF WILL SUBSTITUTES

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I. INTRODUCTION

Firmly rooted in the English history of the law of succession is the notion that the rights of creditors should be protected.[1] Handling the claims of creditors against a decedent's estate has become a routine matter.[2] Just as deeply entrenched is the sentiment of protecting the surviving spouse.[3] However, the increasing use of will substitutes[4] to dispose of a decedent's property[5] has also had the effect of removing many gifts which pass at death from the purview of the probate courts and the policies they impose.[6] "The trend toward the use of

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1. GEORGE CRABB, A HISTORY OF ENGLISH LAW; OR AN ATTEMPT TO TRACE THE RISE, PROGRESS, AND SUCCESSIVE CHANGES, OF THE COMMON LAW; FROM THE EARLIEST PERIOD TO THE PRESENT TIME 98 (Fred B. Rothman & Co. 1987) (1831) (noting during the feudal period, a debtor could not dispose of his property at death without the consent of his heirs because an heir of legal age was bound to pay the deficiency out of his inheritance). The impact of religion upon testamentary dispositions encouraged testators to provide for the payment of their debts. MICHAEL M. SHEEHAN, MARRIAGE, FAMILY, AND LAW IN MEDIEVAL EUROPE: COLLECTED STUDIES 205 (James K. Farge ed., 1996). Sheehan lists wills he has collected which were executed prior to 1300. *See id.* at 9-15. Model wills in the 1300s generally included clauses specifically providing for creditors. *Id.* at 205 n.23. After "the royal courts came to recognize the executor as the active and passive representative of the testator, . . . debt pleas in which the executor was the defendant . . . began to multiply . . . ." *Id.* at 205.

2. Richard J. Ruebel, *Planning for the Impact of Creditors' Claims Against a Client's Nonprobate Property*, 15 EST. PLAN. 38, 38 (1988).

3. *See* CRABB, *supra* note 1, at 83-85 (crediting scripture as authority for the use of dower, the widow's right against her deceased husband's property, "in the earliest ages of the world," although it was "unknown to the Romans" and noting that "[o]n the establishment of the feudal system, dowries became universal"). Similarly, by this point in time, curtesy—the husband's rights against his deceased spouse's property—was well established in the English system. *Id.* at 86.

4. Property owners use will substitutes to transfer property at death as the functional equivalent to a will. Diane C. Amado, Note, *Uniform Probate Code Section 6-201: A Proposal to Include Stocks and Mutual Funds*, 72 CORNELL L. REV. 397, 397 (1987). Will substitutes "need not satisfy the legal formalities which attend testamentary disposition." *Id.* "[W]ill substitutes . . . accomplish the primary effect of a will: the transfer of property to the owner's selected successor at death." 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*, 43 FLA. L. REV. 167, 181-84 (1991).

5. *See* John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1109 (1984).

> The typical American of middle- or upper-middle-class means employs many will substitutes. The precise mix of will and will substitutes varies with individual circumstances—age, family, employment, wealth, and legal sophistication. It would not be unusual for someone in mid-life to have a dozen or more will substitutes in force, whether or not he had a will.

Id. (footnotes omitted).

6. *See* Ruebel, *supra* note 2, at 38.

nonprobate assets to pass wealth at death has increased so rapidly that it has outpaced the ability of states to deal with the situation."[7] Increased use of will substitutes has resulted in ad hoc judicial reform that is largely unsystematic.[8] Although substantive policies restricting the disposition of property at death "would seem to make most sense if applicable as well to will substitutes, they are often expressed in narrow statutory language referring only to wills or to decedents' estates."[9]

Adam Hirsch, Professor of Law at Florida State University, has attempted to demonstrate structural inconsistencies in the law of inheritance.[10] Although the law of succession "is an ancient corner of the legal universe [that] has had centuries to settle into logically coherent patterns and orbits,"[11] according to Hirsch:

> [m]any legal doctrines today appear jarringly, carelessly, almost randomly out of harmony with one another. The chaos has gone largely undetected and hence has continued to swirl unimpeded. But it is there to be seen, if only we care to look. To observe the chaos, one has simply to forsake all instruments of magnification and scan the skies with the naked eye.[12]

Structural consistency of the law—applying the same legal principles to analogous situations—is not only necessary to preserve the legitimacy of law, but would also aid the lay person in his decision making.[13] Most lay people are justifiably pensive about their succession choices.

Although not without its problems, the probate system does serve several functions, including the implementation of public policies.

> It is generally recognized that the underlying purpose of administering a decedent's estate is to collect the assets, pay those who have claims against the decedent and the assets, and transmit possession with unencumbered title to the next owner as quickly and as inexpensively as possible. . . . *If the functional protection of those concerned can reasonably be obtained by*

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7. *Id.*
8. *See* Miller, *supra* note 4, at 344.
9. RESTATEMENT (THIRD) OF TRUSTS § 25 cmt. d. (Tentative Draft No. 1, 1996).
10. *See* Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057 (1996).
11. *Id.* at 1059.
12. *Id.* at 1058. Hirsch accuses legal scholars of concentrating too much effort on the analysis of details of minute points of law while ignoring the larger picture. *Id.* Hirsch also seems frustrated by what he perceives to be a failed attempt by the National Conference of Commissioners on Uniform State Laws to "fashion order out of chaos," at least in many instances, through the Uniform Probate Code. *Id.* at 1059 (stating "[a]las, the Conference (in both of its incarnations) has left much of the chaotic doctrine intact").
13. *Id.* at 1138-39.

> *less expensive alternatives to administration, those alternatives should be employed.*[14]

Circumvention of the probate court by the use of legal devices such as revocable trusts is, of course, being used as an alternative to the administration of estates.[15] How the law can provide functional protection to those concerned when this method of probate avoidance is used without falling prey to the presupposed dangers of the probate system is the theme of this Note.

First, this Note discusses the problems with probate reform in a complex estate planning environment where reform may not seem necessary. Second, this Note discusses the public policy reasoning behind the probate process with a comparative view toward the major complaints about the probate system and the low likelihood of reform. Third, this Note explores the treatment of wills and will substitutes with regard to creditors claims, concentrating on the arguments that have been advanced to apply those claims to will substitutes. Likewise, this Note discusses methods that have been used to apply statutory family protections to will substitutes and the potential for unintentional disinheritance of the spouse. Next, this Note discusses the problems inherent to the separation of will substitutes and wills analogous to the wills concept of abatement. Finally, this Note discusses the problems with judicial reform in this arena of public policy.

II. WHY WAIT FOR PROBATE REFORM?

A. *Why Reform Is Not Forthcoming*

Concentration on probate avoidance has seemingly become a fixture of modern estate planning such that the idea has become the end sought rather than the means employed to reach an end.[16] While much of the literature concentrates on the evils of the probate system as a means of justifying the idea that judicial

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14. Eugene F. Scoles, *Succession Without Administration: Past and Future*, 48 MO. L. REV. 371, 386 (1983) (emphasis added) (discussing possible alternatives to the probate system with an eye toward retaining the substantive protections at a lower cost).

15. *See* NORMAN F. DACEY, HOW TO AVOID PROBATE! 45-47 (1990).

16. *See* MARY RANDOLPH, 8 WAYS TO AVOID PROBATE I/2-I/6 (1996) (quickly noting reasons why one might want to avoid the probate system). Note, while most commentators do list the underlying reasons for avoiding probate, rarely are arguments made for reform of the probate system, rather, the solution suggested is probate avoidance. *But see* EUGENE F. SCOLES & EDWARD C. HALBACH, JR., DECEDENTS' ESTATES AND TRUSTS 617 (5th ed. 1993) (relaying to students that the probate procedure is ripe for reform and the "student should constantly consider whether the procedures . . . could not be improved to accomplish economies of time and effort").

administration is a thing to be avoided,[17] the real question which should be faced by policy makers is whether the difference in form and the benefits which estate planners seek to derive therefrom justify circumvention of the policy imposed upon testamentary disposition.[18] If truly laudatory policies are the source of the problems which "plague" estate administration, then a cost benefit analysis is imperative to determine whether reform should occur.

> The nonprobate revolution is a benign and irreversible development. Free-market competitors have relegated probate to the periphery of the succession process. . . . [T]he business practice of financial intermediaries has rendered probate so often superfluous. But legal doctrine has not caught up with this great transformation in the practice of succession.[19]

Circumventing probate and avoiding the problems associated with it exacerbates the problem of slow reform by further trivializing the very problems which those preaching probate avoidance use to justify their positions.[20] Further buttressing the probate system against reform are the political pressures of lobbying groups.[21]

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17. *See, e.g.*, ROBERT A. ESPERTI & RENNO L. PETERSON, THE LIVING TRUST REVOLUTION: WHY AMERICA IS ABANDONING WILLS AND PROBATE 221-25 (1992) (noting some states have adopted statutory schemes which prevent spousal disinheritance by the use of revocable trusts, but touting spousal disinheritance as one possible advantage of choosing nonprobate estate plans); NAN L. GOODART, THE TRUTH ABOUT LIVING TRUSTS 18-29 (1995) (discussing costs associated with probate, the duration of administration, and invasion of privacy as drawbacks of probate, and reasons for the avoidance of probate).

18. RANDOLPH, *supra* note 16, at I/6 (discussing briefly the problems with waiting for probate reform and the choice of many estate planners to simply avoid the system "[i]f you can't change it").

19. Langbein, *supra* note 5, at 1140.

20. Although it may be to the advantage of many testators to avoid the probate system, this solution to the problems associated with administration does nothing to fix what was perceived as the error. Dacey describes the costs of probate as extortionate, the delays as interminable, and the publicity as undesirable. *See* DACEY, *supra* note 15, at 23-28. While he certainly argues for probate reform, his interim solution, if widely accepted, turns political attention away from such reform by making it seem unnecessary. *See id.* at 36 (expressing disgust at the response of an attorney to his complaint about "the inequity of the probate system"). However, if we assume that the administration of estates, because of these problems, is in need of reform we penalize those who die intestate beyond simply making a statutory distribution of their estate by further subjecting it to the purported "evils" of the administration system.

21. RANDOLPH, *supra* note 16, at I/6. Aside from the fact that taking a stand on inheritance policy is unlikely to win an election, probate reform is further impeded by the political impact of lobbying groups which have much to either gain or lose. *Id.*; *see* JOINT EDITORIAL BOARD FOR UNIFORM PROBATE CODE, STATEMENT OF THE JOINT EDITORIAL BOARD IN RESPONSE TO THE SECURITY LIFE LEGISLATIVE ALERT DATED FEBRUARY 4 (1994) (on file with author); *see also* DACEY, *supra* note 15, at 8-19 (berating lawyers for supporting, rather than helping to reform the

B. *Why Reform Is Seldom Gratifying*

The method by which reform occurs is often the key reason why reform fails to address many problems and may, in fact, create more. Given the reluctance of state legislatures to act, reform has often been left to judicial decision espousing policy.[22]

> [J]udicial power hardly oversteps the bounds when it refuses to lend its aid to a promotional project which would circumvent or undermine a legislative policy. To deny it that function would be to make it impotent in situations where historically it has made some of its most notable contributions. If the judicial power is helpless to protect a legislative program from schemes for easy avoidance, then indeed it has become a handy implement of high finance. *Judicial interference to cripple or defeat a legislative policy is one thing; judicial interference with the plans of those whose corporate or other devices would circumvent that policy is quite another.* Once the purpose or effect of the scheme is clear, once the legislative policy is plain, we would indeed forsake a great tradition to say that [the courts] were helpless to fashion the instruments for appropriate relief.[23]

While the judiciary may have the power to extend policy to reach those who would circumvent it by use of some device, judicial restraint—deciding only the question before the court—typically leaves more questions unanswered than answered when such a change does take place.[24]

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probate system, or failing to help clients avoid it because of the fear of losing a "'fortune in fees' wrung from the widows and orphans of America, fees that the lawyers 'rightfully deserve' but which they are being denied" by self-help probate avoidance).

22. Many changes in the landscape of inheritance law are the result of borrowing equitable maxims from other bodies of law or statutory policies. *See* Sullivan v. Burkin, 460 N.E.2d 572, 577 (Mass. 1984) (applying the statutory spousal elective share to revocable trusts). *Compare* Soble v. Breault (*In re* Estate of Breault), 211 N.E.2d 424, 435 (Ill. App. Ct. 1965) (applying the same policy to a general power of appointment), *and* Silberman v. Brown, 72 N.E.2d 267, 269 (Ohio Ct. C.P. 1946) ("The oft quoted maxim that 'A man must be just before he is generous,' limits this right of testamentary disposition."), *with* Balzer & Assocs., Inc. v. Lakes on 360, Inc., 463 S.E.2d 453, 455-56 (Va. 1995) ("The principle upon which voluntary conveyances are held void as to existing creditors is that a man should be just before he is generous." (citing Battle v. Rock, 131 S.E. 344, 348 (Va. 1926))).

23. Anderson v. Abbott, 321 U.S. 349, 366-67 (1944) (emphasis added) (discussing the ability of courts to fashion equitable remedies).

24. For instance, holding that the assets of a revocable trust are subject to the spousal share raises the question of whether another revocable trust given to a spouse could be used as a satisfaction of the share, and whether other statutory protections for spouses might apply to trusts in their favor, such as exemptions from creditors claims.

C. *Methods of Validation as a Source of Confusion*

The Uniform Probate Code (UPC) validates will substitutes by declaring them to be nontestamentary.[25] The main purpose for this distinction is to avoid finding will substitutes that are not properly executed under a state wills act from being rendered ineffective or subjected to probate.[26] The UPC, however, does not make any differentiation between wills and will substitutes in either form or substance.[27]

> The juridical fiction by which these transfers are upheld, even though they do not meet the formal wills act requirements, relates to the timing of the supposed transfer. The will substitutes are treated as creating an interest in the intended transferee during the lifetime of the transferor, specifically at the time the transferor relinquishes the requisite fraction of control, *notwithstanding the transferor's express or implied reservation of a virtually unlimited right to reclaim the interest that was transferred.*[28]

This fictional present-interest approach has fueled the debate over why courts continue to uphold these transfers as valid.[29]

> The odor of legal fiction hangs heavily over the present-interest test. We see courts straining to reach right results for wrong reasons and insisting that will-like transfers possess gift-like incidents. Courts have used such doctrinal ruses to validate not only the revocable inter vivos trust, but the other will substitutes as well. Why is a transfer by life insurance policy or by pension plan not void for violation of the Wills Act? Because the beneficiary's interest is "vested" during the transferor's lifetime. But how can it be vested when the transferor may freely revoke the beneficiary's interest? Well, the power to revoke simply makes the interest "vested

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25. UNIF. PROBATE CODE § 6-101(a) (amended 1989), 8 U.L.A. 430 (1998).

26. *Id.* § 6-101.

> The law of wills is notorious for its harsh and relentless formalism. The Wills Act prescribes a particular set of formalities for executing one's testament. The most minute defect in formal compliance is held to void the will, no matter how abundant the evidence that the defect was inconsequential. Probate courts do not speak of harmless error in the execution of wills. To be sure, there is considerable diversity and contradiction in the cases interpreting what acts constitute compliance with what formalities. But once a formal defect is found, Anglo-American courts have been unanimous in concluding that the attempted will fails.

John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 489 (1975).

27. Grayson M.P. McCouch, *Will Substitutes Under the Revised Uniform Probate Code*, 58 BROOK. L. REV. 1123, 1124 (1993).

28. Miller, *supra* note 4, at 184 (emphasis added).

29. Langbein, *supra* note 5, at 1125.

> subject to defeasance." What is the difference between the revocable and ambulatory interest created by a will, and a vested but defeasible interest in life insurance or pension proceeds? None at all, except for the form of words. . . . The lesson of this case law is that the courts sympathize with people who want to avoid probate.[30]

In truth, will substitutes generally create no more than a mere expectancy[31] because they are ambulatory.[32] Ambulatory transfers are subject to change or revocation until the death of the transferor.[33]

> The interests or rights may amount to little more than a present possibility of future possession and enjoyment, subject in some cases to revocation or change. By fragmenting ownership into present and future interests, separating legal title from beneficial rights, or exchanging property for an obligation to make future payments, property owners may tailor an arrangement to meet the formal requirements of a lifetime disposition while preserving substantially unrestricted ownership.[34]

Recognizing that wills and will substitutes are of the same character—revocable and creating mere expectancies—provides a foundation for treating will substitutes in a manner consistent with substantive restrictions on testation.[35]

"The distinction between testamentary and nontestamentary dispositions has generated much doctrinal confusion and uncertainty."[36] This confusion is well-warranted given the clash between the willingness of the courts to fashion equitable remedies under the guise of legislative or public policy and the means of validation of revocable trusts. The validation of a revocable trust as conveying some minimal future interest is misleading; it leads one to believe the

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30. *Id.* at 1128-29.

31. Although a fictional "interest" is created in the property conveyed by will substitutes for purposes of validation, in reality, pure will substitutes create no actionable ownership interest in the property and give the beneficiary no control over the property which cannot be extinguished at the whim of the donor. Miller, *supra* note 4, at 184.

32. *Id.*

33. *Id.*

> The will substitutes, characteristically revocable, are thus in effect also ambulatory because the transferee has neither possession, enjoyment, nor any ownership interest permitting any degree of practical control over the property. This is true despite the ubiquitous fiction that an 'interest' in the property is transferred at the time of the disposition.

Id.

34. McCouch, *supra* note 27, at 1126.

35. Langbein, *supra* note 5, at 1109. Langbein advocates a more unified law of succession rather than "pointless skirmishing about how to draw the probate/nonprobate line." *Id.*

36. McCouch, *supra* note 27, at 1126.

traditional trust doctrine should apply, and the close substantive kinship to testamentary transfers should be disregarded. In reality, the courts have been slowly breaking down the insulation around these transfers even in spite of language which seems to limit the application of statutes restricting testation to wills.[37] By comparing the method of validation of will substitutes with statutes purporting to restrict testation, the problem becomes obvious. When one justifies a will substitute as a valid, present transfer of an interest, many statutory schemes intended to limit the ability of a person to make a purely ambulatory transfer when literally construed simply do not apply. "Some statutory rules only apply to wills. Iowa laws specify what happens if, after a person makes a will, there are changes in that person's life such as the birth of a child, the death of a beneficiary or divorce."[38] Since the drafting of this Note, Iowa has bridged some of these gaps in the area of trust law by passing the Iowa Trust Code.[39]

> Our preoccupation with denying the will-like character of the will substitutes has distorted legal doctrine on a range of issues. Constructional questions that are functionally identical are now handled under different rubrics, and outcomes differ depending on whether a transfer occurred in a probate or a nonprobate mode.[40]

III. PUBLIC POLICY AND THE PROBATE PARIAH

Although many commentators attack the probate system,[41] the reasons for uniform treatment of testamentary disposition are safely ensconced in our system of succession.[42] Reasons often cited to support the proposition that probate should be avoided include the following: cost, the length of time involved, avoiding ancillary jurisdiction over real estate, and unwanted publicity.[43] Other reasons for using a revocable trust might include determining the level of responsibility of a trustee or beneficiary during the settlor's life, providing for the settlor's incapacity,[44] choosing another state's law to control, and more

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37. *See infra* Parts IV.A, V.A.2.

38. IOWA STATE BAR ASS'N & IOWA TRUST ASS'N, LIVING TRUSTS: ARE THEY RIGHT FOR YOU? (n.d.).

39. 1999 Iowa Legis. Serv. 125 (West 1999); *see, e.g.*, IOWA CODE ANN. § 633.3106 (West Supp. 2000) (providing for after-born or after-adopted children); IOWA CODE ANN. § 633.3107 (discussing the effect of dissolution on a distribution from a revocable trust to a spouse).

40. Langbein, *supra* note 5, at 1109.

41. *See generally* DACEY, *supra* note 15, at 23-36 (discussing the evils of probate).

42. *See supra* notes 1-3 and accompanying text.

43. *See* RANDOLPH, *supra* note 16, at I/2-I/5.

44. Louis A. Mezzullo et al., *Planning for Incapacity*, C712 A.L.I.-A.B.A. 319, 333-34 (1991).

prompt distribution of assets after the decedent's death.[45] There is a common misconception that the use of a revocable trust or other will substitute will avoid taxes.[46] Although some of the benefits of the use of a trust or other device to avoid probate correspond directly with a complaint about the probate system, others do not.

Many have been quick to protect probate and to downplay the value of the teachings of those such as Norman Dacey.[47] Probably the most compelling complaint about the probate system is the cost and delay involved, as Eugene Scoles points out.[48] However, the cost and delay may be determined in large part by the participants, not the attorneys and the system.[49]

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45. JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 527-28 (3d ed. 1984).

46. Clifton B. Kruse, Jr., *Twenty-Six Reasons for Caution in Using Revocable Trusts*, 21 COLO. LAW. 1131, 1131 (1992).

> In some respected publications, including *The Wall Street Journal*, the erroneous impression has been given that estate taxes can be avoided only by using a revocable trust as the primary estate planning arrangement. Nevertheless, revocable trusts do not avoid more death taxes than do wills. While use of a revocable trust may avoid the need for probate proceedings, avoiding probate does not mean avoiding estate taxes. Many nonlawyers mistakenly equate the two.

Id.

47. *See, e.g.*, Patricia P. Wagner, *Avoiding Probate: What Does It Mean?*, 37 RES GESTAE 218, 219 (1993) (stating the goal of avoiding probate is overrated). *But see* DACEY, *supra* note 15, at 6.

> Dozens of law journals have carried articles bitterly assailing *How to Avoid Probate!* A characteristic of this wave of negative opinion has been the youth of the authors—and their consequent lack of practical experience and understanding of the problems the book highlighted. They invariably were recent law school graduates, still imbued with the idealism of students, and not yet educated to the cynicism of probate practitioners.

DACEY, *supra* note 15, at 6.

48. Scoles, *supra* note 14, at 386.

49. Howard B. Solomon, *Revocable Trusts—A Contrarian's Viewpoint*, 68 N.Y. ST. B.J. 34, 34-35 (1996). *But see* RANDOLPH, *supra* note 16, at I/4 (noting local custom, or ill contrived fee restriction statutes serve to set attorney fees in probate of estates). The Iowa attorney fee statutes allow for "a reasonable fee . . . not in excess of the schedule . . . for personal representatives." IOWA CODE § 633.198 (1999). These fees are limited to 6% of the first $1000, 4% of the value of the next $4000, and 2% of the gross estate thereafter. *Id.* § 633.197. The unfortunate result has been that rather than first determining what is a reasonable fee and then applying the limitations, it would seem that 2% of the gross estate has become the rule, rather than the exception and is often used to determine what the attorney's fees for an estate will be. IOWA STATE BAR ASS'N & IOWA TRUST ASS'N, *supra* note 38 (noting "[a]ttorneys' fees in Iowa for the probate of an estate are limited by statute to approximately 2% of the value of the estate" and noting that no such limitations are imposed on the creation and administration of living—or revocable—trusts). To further muddle the fee system, necessary and extraordinary expenses may be compensated beyond the limitations. IOWA CODE § 633.199.

"Complete freedom of testation should be permitted except to the extent that there is some public policy against it."[50] The real problem arises when the will substitutes are used as tools of avoidance, not of the pariah of probate, but the valid policy espoused therein.

> Trusts have, historically and in modern times, been used to circumvent or to attempt to circumvent legal policies. In the hands of resourceful lawyers and judges, the trust device has been an effective tool of avoidance—sometimes of outmoded rules, rigid concepts of technical disabilities, and sometimes of legitimate fiscal and social policies. It has been a constructive force for justice in individual cases and for innovation and progress in the law. As in feudal times, however, it continues to confound tax administrators and reformers. One of the most obvious illustrations of its role in policy avoidance is the use of revocable trusts to circumvent the forced heirship rights of a surviving spouse.[51]

Revocable trusts have, likewise, been used in attempts to thwart the claims of creditors.[52]

Given the purported validation of revocable trusts as lifetime transfers, the application of wills doctrines which are typically expressed in narrow statutes seems questionable. Nonetheless, courts are sometimes willing to impose these remedies without much consideration of the justification underlying the validity of these transfers.[53] This is often accomplished by the use of equitable remedies which generally achieve the right results but for the wrong reasons.[54]

IV. CREDITORS' CLAIMS AGAINST WILL SUBSTITUTES

> The puzzle in the story of the nonprobate revolution is not that transferors should have sought to avoid probate, but rather that other persons whose interests probate was meant to serve—above all, creditors—should have allowed the protections of the probate system to slip away from them. . . . Although the will substitutes are not well suited to . . . protecting creditors, a series of changes in the nature of wealth and in the business

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50. LEWIS M. SIMES, PUBLIC POLICY AND THE DEAD HAND 21 (1955).

51. SCOLES & HALBACH, *supra* note 16, at 319.

52. Clifton B. Kruse, Jr., *Revocable Trusts: Creditors' Rights After Settlor-Debtor's Death*, PROB. & PROP., Nov.-Dec. 1993, at 40, 40 (citing cases in which settlors mistakenly believed placing assets in trust shielded those assets from creditors during the lifetime of the settlor).

53. *See supra* Part II.C.

54. Langbein, *supra* note 5, at 1128-29.

> practices of creditors has diminished the importance of [this function of probate].[55]

John Langbein differentiates between "pure" and "imperfect" will substitutes by including revocable trusts, pension funds, joint accounts, and life insurance in the former and other dispositions, such as through joint tenancy, in the latter because they more closely resemble lifetime transfers.[56] This distinction becomes clearer after an analysis of the interest created by the particular will substitute. Life insurance, transfer-on-death (TOD) accounts,[57] payable-on-death (POD) accounts,[58] and revocable trusts create mere expectancies, while joint tenancy creates an actionable present interest in the transferee.

Academia appears satisfied that will substitutes should be treated similarly to probate assets.[59] The American Law Institute lumps together wills and will substitutes in what it calls donative transfers, "the stuff of family estate planning."[60] The Third Restatement of Property applies many will doctrines to will substitutes.[61] Courts are less likely to find will substitutes other than trusts are subject to creditors' claims or spousal election either because they analyze the transfers as lifetime transfers, requiring that proof of a fraudulent conveyance be adduced,[62] or they determine they are restricted by statute.[63]

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55. *Id.* at 1117.

56. *Id.* at 1109.

57. *See infra* note 100 and accompanying text.

58. *See infra* note 97.

59. "In response to this 'nonprobate revolution,' the drafters of the [UPC] have begun to reconsider the scope and direction of probate reform. The 1989 and 1990 UPC revisions reflect a new emphasis on integrating the law of probate and nonprobate transfers." McCouch, *supra* note 27, at 1123-24; UNIF. PROBATE CODE § 6-101(b) (amended 1992), 8 U.L.A. 433-37 (1998) (noting although will substitutes are nontestamentary, this classification "does not limit the rights of creditors under other [state laws]"); UNIF. PROBATE CODE §§ 2-201 to -205, 8 U.L.A. at 101-07 (including nonprobate transfers in the augmented estate used to compute the spousal elective share).

60. RESTATEMENT (THIRD) OF PROPERTY 3 (1999).

61. *Id.* § 4.1 cmt. p (applying the doctrine of revocation by operation of law after dissolution of marriage to will substitutes); *id.* § 4.3 cmt. k (applying the doctrine of dependent relative revocation to will substitutes); *id.* § 5.5 cmt. p (applying anti-lapse statutes to will substitutes); *id.* § 5.2 cmt. i (applying the doctrine of ademption by extinction to will substitutes).

62. In order to invalidate a lifetime transfer in favor of a creditor, many courts require a finding that the transfer was fraudulent. McCouch, *supra* note 27, at 1186-87; *see* ROBERT F. KLUEGER, A GUIDE TO ASSET PROTECTION: HOW TO KEEP WHAT'S LEGALLY YOURS 37-49, 75 (1997) (discussing briefly the law of fraudulent conveyances).

63. *See, e.g.*, Schofield v. Cleveland Trust Co., 21 N.E.2d 119, 122 (Ohio 1939) (holding a statutory provision allowing creditors of a settlor of a revocable trust during the settlor's lifetime was in reality a right to compel the settlor to revoke the trust and that this right therefore

Fraudulent conveyance law is applied broadly enough to embrace all transfers, including will substitutes, in order to protect creditors. Revocable trusts and other will substitutes typically bear some badges of fraud;[64] it may be argued that will substitutes, which create a mere expectancy, as a class are void against creditors' claims. However, the Ohio Supreme Court, in facing that issue squarely, found "[a] power of revocation in the settlor does not necessarily render [a] trust fraudulent."[65] Even if fraudulent conveyance law were applied, it would yield only uncertain outcomes.[66] What remains is a system in which the discordant laws of succession[67] in the several states provide "checkerboard"[68] rules to deal with analogous problems.

A. *"Pure" Will Substitutes*

1. *Revocable Inter Vivos Trusts*

It is well settled, if not universally accepted, that "[w]here a person creates for his own benefit a trust for support or a discretionary trust, his . . . creditors can reach the maximum amount which the trustee under the terms of the trust could pay to him or apply for his benefit."[69] Regardless of this rule, people have continued to attempt to shield their assets—generally without success—from

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terminated at the death of the settlor). The court noted that in order to reach the trust assets, a plaintiff would be required to prove that the transfer was fraudulent. *Id.*

64. Badges of fraud typically applicable to revocable trusts and other will substitutes would include: (1) the transfer being made without consideration, (2) a relationship between the settlor and beneficiary or beneficiaries, and (3) retention of the benefits or possession of the asset. KLUEGER, *supra* note 62, at 42.

65. Schofield v. Cleveland Trust Co., 21 N.E.2d at 122. *But see* Johnson v. Commercial Bank, 588 P.2d 1096, 1100 (Or. 1978) (stating under statute, "the transfer [creating a revocable trust] . . . was [v]oid as against . . . existing or subsequent creditors"). Although the reasoning in *Johnson* does not specifically discuss fraudulent conveyance law, the end result is curiously similar to the common result in successful claims of fraudulent conveyances. *See* Johnson v. Commercial Bank, 588 P.2d at 1100. "[C]reditors can ignore the transfer, and sue the transferee . . . [or] ask the judge to nullify the transfer, ordering [the transferee] to transfer the property back to [the transferor]." KLUEGER, *supra* note 62, at 39.

66. KLUEGER, *supra* note 62, at 49.

67. *See* Hirsch, *supra* note 10, at 1136.

68. "'Checkerboard' lawmaking, as Dworkin puts it, applying one legal principle to one problem and a different legal principle to another analogous problem, would . . . throw the law into disrepute." *Id.* at 1137 (citing RONALD DWORKIN, LAW'S EMPIRE 164-224 (1986)).

69. RESTATEMENT (SECOND) OF TRUSTS § 156(2) (1959). The Iowa Trust Code, which takes effect on July 1, 2000 applies this rationale to a debtor's revocable trust during his lifetime statutorily. IOWA CODE ANN. § 633.3104(1) (West Supp. 2000).

creditors by the use of a revocable inter vivos trust.[70] However, "[c]an creditors reach the assets of a . . . revocable trust after the settlor has died?"[71] The Iowa Supreme Court, in *Phillips v. Roe* (*In re Estate of Nagel*),[72] recently joined a majority of states which have faced the issue by answering in the affirmative.[73] This development should come as no surprise: the trend in the law of trusts has been to "decreasingly insulate" such trusts from the reach of creditors.[74] *Totten*—or tentative—trusts[75] have been the subject of legislation which sets the trust aside where probate assets are insufficient to satisfy creditors' claims in many states.[76]

Under the American Law Institute's approach, the law of fraudulent conveyances is irrelevant to determining creditors rights against trust assets or income during the life of the settlor.[77] Some states have adopted "statutes which provide that a trust created by a person for his own benefit shall be void as against his creditors."[78] Reserving a general power of appointment would also result in allowing creditors to reach the corpus of the trust.[79]

As an anomaly, Alaska has enacted a statute validating self-settled spendthrift trusts.[80] Although it appears, at first blush, the statutory scheme adopted by the Alaska legislature would only allow self-settled "irrevocable trusts,"[81] the caveats reserved clearly conflict with that interpretation.[82] The

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70. Kruse, *supra* note 52, at 40 (citing cases in which settlors mistakenly believed placing assets in trust shielded those assets from creditors during the lifetime of the settlor).

71. *Id.*

72. Phillips v. Roe (*In re* Estate of Nagel), 580 N.W.2d 810 (Iowa 1998).

73. *Id.* at 812; *see also* IOWA CODE ANN. § 633.3104(2) (allowing collection by a creditor from the assets of a revocable trust settled by a debtor when the debtor's probate assets have been exhausted).

74. Donna R. Blaustein & Paul Ward, *The Future of Revocable Intervivos Trusts: Are the Lines Between Wills and Trusts Blurring?*, PROB. & PROP., Sept.-Oct. 1995, at 46, 46.

75. *Totten* trusts, named for the New York case *In re Totten*, 71 N.E. 748 (1904), which reaffirmed their validity, are trusts created when a settlor deposits funds in his own name "in trust" for another, thereby declaring himself trustee while relinquishing no control over the funds. Nancy Kline, Totten *Trusts: Dilemmas, Concerns, and Suggested Solutions*, 9 PROB. L.J. 117, 134 (1989). The depositor of a *Totten* trust retains control over the funds and may change the beneficiary of the trust or revoke the trust by merely withdrawing the funds. *Id. Totten* trusts go by several names in different states including: POD accounts, revocable bank account trusts, informal trusts, and tentative trusts. RANDOLPH, *supra* note 16, at 1/3; *see infra* Part IV.A.2.

76. Kline, *supra* note 75, at 137 & n.140.

77. RESTATEMENT (SECOND) OF TRUSTS § 156 cmt. a (1959).

78. *Id.* § 156 cmt. b; *see also* IOWA CODE ANN. § 633.3104 (subjecting revocable trusts in Iowa to the claims of creditors after July 1, 2000).

79. RESTATEMENT (SECOND) OF TRUSTS § 156 cmt. c.

80. ALASKA STAT. § 34.40.110(a)–(b) (Michie 1998).

81. *Id.* § 34.40.110(b)(2).

82. *Id.*

power to revoke or terminate is narrowly defined in the statute not to include the power to veto distributions from the trust, the retention of a special testamentary power of appointment, or *the right to receive the income, corpus, or both at the discretion*[83] of another.[84] This person need not be the trustee but may not be the settlor.[85] Although under the Alaska scheme the settlor may not retain unfettered discretion to use or possess the assets, where a willing trustee can be found, this arrangement can be made in contravention of the rights of creditors.

Alaska not only created this loophole but extended an invitation to those in other jurisdictions to take advantage of it by moving trust assets to Alaska.[86] One can only ponder why Alaska would adopt such a seemingly illogical approach to the problems that arise when debtor-creditor law and the law of succession intersect. The fact that the change was effected by statute suggests a political motivation. It may be that Alaska sought to reap the same rewards that many foreign jurisdictions have already realized—a large source of investment capital[87] for those states or nations which are willing to act disfavorably toward creditors.[88] One can surmise a possible motivation for Alaska's approach was the state's comparative economic situation.[89]

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83. A trust which *requires* the distribution of income or principal to the settlor is not protected against invasion by creditors to the extent of the interest retained by the settlor. *Id.* § 34.40.110(b)(3).

84. *Id.* § 34.40.110(b)(2).

85. *Id.*

86. *Id.* § 13.36.043(b) (providing that the protection afforded by § 34.40.110 would be honored as applied to assets from foreign—out of state—trusts so long as the trust situs is moved to Alaska).

87. The countries in which foreign asset protection trusts flourish have sought to boost their economies by attracting assets to their shores and placing procedural barriers in the path of creditors who would seek to assert a claim against those assets. Ronald Lipman, *Alaskan Trust Law Provides New Place to Park Property*, HOUS. CHRON., Aug. 4, 1997, at 4D.

88. Foreign asset protection trusts operate on principles very similar to those adopted by Alaska. *See* KLUEGER, *supra* note 62, at 132-58. However, offshore trusts often have their situs in countries which are less politically stable than the United States. *Id.* at 154 (listing factors to use in choosing the situs—or location of the corpus—of a foreign asset protection trust). Another important difference is that foreign jurisdictions are not constrained by the Full Faith and Credit Clause. U.S. CONST. art. IV, § 1.

89. Alaska ranked forty-ninth in a comparison of the growth of domestic state product over the nine year period ending in 1996. Midwest Regional Economic Data, *Total Gross State Product by State: 1987-1996* (visited Nov. 10, 1998) <http://www.nemw.org/gsp.html>. *See generally* Amy Lynn Waenfeld, Note, *Law for Sale: Alaska and Delaware Compete for the Asset Protection Trust Market and the Wealth That Follows*, 32 VAND. J. TRANSNAT'L L. 831 (1999) (discussing the self-settled spendthrift trust and comparing the laws of Delaware and Alaska as well as examining the ability of such schemes to succeed). Other scholars have discussed the advisability of using an Alaska trust rather than an offshore trust. *See* John Paul Parks, *Evaluating the Alaska Trust's Ability to Shield Assets From the Claims of Creditors*, ARIZ. ATT'Y, Nov. 1998,

The tentative draft of the Third Restatement of Trusts moves in the direction of recognizing the trust as "nontestamentary."[90] However, this recognition is, in large part, only to prevent requiring that trusts be executed with the same formality as wills.[91]

> In brief, the fundamental and pervasive policy underlying [section twenty-five] and related rules of [the] Restatement is that diverse forms of revocable trusts (i) are valid without compliance with Wills Act formalities but (ii) absent persuasive reason for departure, are subject to the same restrictions . . . and other rules and constructional aids that are applicable to wills. In other substantive respects (such as creditors' rights) the property held in a revocable trust is ordinarily to be treated as if it were property of the settlor and not of the beneficiaries.[92]
>
> Although a revocable trust is nontestamentary and is therefore not subject to the Wills Act or to the usual procedures of estate administration, property held in trust is subject to the claims of creditors of the settlor or of the deceased settlor's estate if the same property belonging to the settlor or the estate would be subject to the claims of the creditors . . . .[93]

The implications of *Nagel*[94]—and similar cases in other jurisdictions[95]—reach far beyond the treatment of trusts by calling into question the future treatment of other testamentary substitutes which now enjoy some protection from creditors. The premise is "[a] person ought not to be able to shelter his assets from his creditors in a discretionary trust of which he is the beneficiary and thus be able to enjoy all the benefits of ownership of the property without any of the burdens."[96]

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at 28, 28-32 (expressing disbelief that the Alaska trust can meet its objectives given the combination of the impact between the Full Faith and Credit Clause and the fact that other states' courts will be construing Alaska law).

90. RESTATEMENT (THIRD) OF TRUSTS § 25(1) (Tentative Draft No. 1, 1996).

91. *Id.* § 25(2).

92. *Id.* § 25 cmt. a.

93. *Id.* § 25 cmt. e.

94. Phillips v. Roe (*In re* Estate of Nagel), 580 N.W.2d 810 (Iowa 1998).

95. *See, e.g.*, State Street Bank & Trust Co. v. Reiser, 389 N.E.2d 768 (Mass. App. Ct. 1979); *In re* Estate of Kovalyshyn, 343 A.2d 852 (N.J. Hudson County Ct. 1975); Johnson v. Commercial Bank, 588 P.2d 1096 (Or. 1978).

96. Phillips v. Roe (*In re* Estate of Nagel), 580 N.W.2d at 811 (citing McKeon v. Department of Mental Health, 479 N.W.2d 25, 28 (Mich. Ct. App. 1991)).

2. *TOD and POD Accounts*[97]

Many states have adopted in whole or in part the Uniform TOD Security Registration Act.[98] Transfer-on-death registration of stocks and bonds allows the owner to name someone to receive those stocks and bonds upon the death of the owner. These accounts also have many similarities to POD accounts.[99] Both POD and TOD accounts are created by naming a beneficiary to an account held by the grantor during his lifetime, with the former containing cash and the latter containing securities.[100]

The Uniform TOD Security Registration Act does not protect creditors as vigorously as other provisions of the UPC dealing with creditors rights against POD accounts.[101] The TOD Security Registration Act provides only that "the rights of creditors of security owners against beneficiaries and other transferees under other laws of [the] State" are not limited by the Uniform TOD Security Registration Act.[102] However, if the law of the state protects creditors only in instances of fraudulent conveyance, creditors rights remain uncertain.[103]

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97. Similar to POD accounts, TOD designations allow the owner of brokerage accounts, stocks, or bonds to name a beneficiary without will formalities thereby allowing the assets to pass outside of probate. RANDOLPH, *supra* note 16, at 3/2-3/4.

98. UNIF. PROBATE CODE §§ 6-301 to -311 (amended 1989), 8 U.L.A. 449-57 (1998). Mary Randolph points out that more than half of the states had adopted the Uniform TOD Security Registration Act by 1996 and predicted "others [would] follow suit." RANDOLPH, *supra* note 16, at 3/3, 3/5. Randolph's predictions were correct; several more states have adopted—in whole or in part—or are considering adoption of the Uniform TOD Security Registration Act. *See* ALA. CODE §§ 8-6-6 to -12 (1999); ALASKA STAT. § 13.33.310 (Michie 1998); DEL. CODE ANN. tit. 12, §§ 801–812 (Supp. 1998); IND. CODE ANN. §§ 32-4-1.6-1 to .6-15 (Michie Supp. 1999); IOWA CODE §§ 633.800–.811 (1999); MICH. COMP. LAWS ANN. §§ 451.471–.480 (West Supp. 1999); MISS. CODE ANN. §§ 91-21-1 to -25 (1999); NEV. REV. STAT. §§ 111.480–.650 (1997); N.H. REV. STAT. ANN. §§ 563-C:1 to :12 (Supp. 1999); 20 PA. CONS. STAT. ANN. §§ 6401–6413 (West Supp. 1999); S.C. CODE ANN. §§ 35-6-10 to -100 (Law. Co-op. Supp. 1999); *see also* LA. REV. STAT. ANN. § 6:314 Historical and Statutory Notes (West Supp. 2000) (viewing these historical statutory notes the Louisiana State Law Institute was asked to recommend changes in the law to the legislature of Louisiana so the Uniform TOD Security Registration Act can be adopted in Louisiana).

99. RANDOLPH, *supra* note 16, at 3/2-3/3.

100. *Id.* at 3/2.

101. *Compare* UNIF. PROBATE CODE § 6-215 (amended 1989), 8 U.L.A. at 442-43 ("A surviving party, or beneficiary who receives payment from an account after death of a party is liable to account to the personal representative of the decedent for a proportionate share of the amount received to which the decedent, immediately before death, was beneficially entitled . . . to the extent necessary to discharge the claims [against the estate] remaining unpaid after application of the decedent's estate."), *with* UNIF. PROBATE CODE § 6-309(b), 8 U.L.A. at 455 ("This part does not limit the rights of creditors of security owners against beneficiaries and other transferees under other laws of this State.").

102. *Id.* § 6-309(b), 8 U.L.A. at 455.

103. KLUEGER, *supra* note 62, at 46-49.

The Superior Court of Pennsylvania, in exploring that state's law on point explained:

> The underlying assumption [of Pennsylvania's multiple party account legislation] is that anyone using a joint or trust account wants the survivor or survivors to have all balances at death. It permits the continued employment of such an account as an informal will. As recognized in subsection (c) it is possible to negate the rights of survivorship. Like a will, it does not defeat the rights of a creditor to collect if assets of the . . . estate are insufficient . . . .[104]

3. *Life Insurance*

Life insurance proceeds to a named beneficiary have generally been protected by statute from the reach of creditors.[105] This protection varies to some extent during the lifetime of the insured but generally is accepted as absolute after the death of the insured—at least where the proceeds go to certain related individuals.[106] Using insurance as a means of defrauding creditors, however, may or may not prove fruitful.[107]

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104. *In re* Estate of Stevenson, 648 A.2d 559, 562 (Pa. Super. Ct. 1994) (citations and quotations omitted) (noting the "omission of Section 6-107 of the Uniform Probate Code . . . should not be construed as an intention to reach contrary results"). Uniform Probate Code § 6-107 has been repealed and in its place, § 6-215 was adopted. Uniform Probate Code § 6-215(b) states in no uncertain terms that:

> [a] Surviving party [POD payee] or beneficiary who receives payment from an account *after the death* of a party is liable to account to the personal representative of the decedent for a proportionate share of the *amount received to which the decedent, immediately before his death, was beneficially entitled* . . . to the extent necessary to discharge the claims [against the estate] remaining unpaid after application of the decedent's estate.

UNIF. PROBATE CODE § 6-215(b), 8 U.L.A. at 442 (emphasis added) (differing from its predecessor, Uniform Probate Code § 6-107, by making beneficiaries liable proportionally).

105. Ruebel, *supra* note 2, at 38.

106. *See, e.g.*, IOWA CODE § 627.6 (1999) (exempting proceeds from life insurance from the claims of creditors if payable to a spouse, child, or dependent of the insured, and allowing an insured to exempt $10,000 of the cash surrender value of a life insurance policy if compelled during life to exercise rights against such a policy by a creditor's claim); FLA. STAT. ANN. § 222.14 (West 1998) (exempting the cash surrender value of life insurance policies and the proceeds of life insurance policies both during life and after death of the insured absolutely). *But see* Succession of Sweeney, 607 So. 2d 996, 999 (La. Ct. App. 1992) (holding even if the proceeds of a life insurance policy were payable to the decedent's estate, the proceeds were exempt although the decedent expressed a desire to pay his creditors in his will).

> The extent of the exemption, and the beneficiaries who benefit, depends upon the terms of the particular statute. The exemption may be limited to proceeds payable to particular beneficiaries, such as the surviving spouse or children or a trust for

Beneficiary designations, which may be changed at any time before death by the policy holder—presumably the insured—are ambulatory, but typically substantial.[108]

> The only significant assets of the estates of most people are the proceeds of one or more life insurance policies. For such people, constituting a majority of the population, determination of the distribution of that "property" through the designation of a beneficiary under the insurance contract not only has *precisely the same function as a will*, but constitutes a much more important "testament" than the will. In view of the numbers of people involved, the life insurance beneficiary designation is the principal "last will and testament" of our legal system.[109]

Typical statutes validate securing a debt with the proceeds of a life insurance policy, thereby circumventing or conditioning the exemption.[110] Additionally, a minority of courts have reached results which differ from a literal interpretation of the applicable statutes where a "duty of support" was owed by the decedent.[111] The Appellate Division of the New Jersey Superior Court in

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> their benefit. The exemption may be limited to a particular dollar amount, or may be unlimited. Some states exempt the proceeds from claims of both the insured's and the beneficiary's creditors, and some even exempt proceeds payable to the insured's estate.

Ruebel, *supra* note 2, at 38-39.

107. *See* OHIO REV. CODE ANN. § 3911.15 (Anderson 1996) (pointing out the intent to defraud creditors will defeat the exemption); Diviney v. Smith, No. CV 91 0287011S, 1992 WL 43214, at *3 (Conn. Super. Ct. Feb. 26, 1992) ("Any right to the insurance proceeds by the insured's estate or creditors rests upon a showing of fraud, not upon any equitable right in the proceeds."). Creditors of the beneficiary of an insurance policy are therefore left with a great deal of uncertainty. In a case where the beneficiary curiously—under circumstances evidencing a fraudulent conveyance—gave up her rights to insurance policy proceeds, her creditors were unable to reach the proceeds. Baltrusaitis v. Cook, 435 N.W.2d 417, 420 (Mich. Ct. App. 1988). However, in a case in which the facts—and compassion—would militate in favor of exempting the proceeds, the Indiana court reached the opposite result. Estate of Chiesi v. First Citizens Bank, 613 N.E.2d 14, 14-15 (Ind. 1993) (holding where a spouse who was the beneficiary of a life insurance policy murdered the decedent, the insurance proceeds were payable to the decedent's estate but were not exempt upon petition by their minor children).

108. Langbein, *supra* note 5, at 1110-11.

109. *Id.* (emphasis added) (quoting Kimball, *The Functions of Designations of Beneficiaries in Modern Life Insurance: U.S.A.*, *in* LIFE INSURANCE LAW IN INTERNATIONAL PERSPECTIVE 74, 75-76 (J. Hellner & G. Nord eds., 1969)).

110. *See, e.g.*, IOWA CODE § 627.6(6) (imposing the exemption "[i]n the absence of a written agreement or assignment to the contrary"); FLA. STAT. ANN. § 222.14 (West 1997) (imposing the exemption "unless the insurance policy or annuity contract was effected for the benefit of such creditor").

111. *See, e.g.*, DeCeglia v. Estate of Colletti, 625 A.2d 590, 595 (N.J. Super. Ct. App. Div. 1993) (holding the purpose of the life insurance exemption is to protect beneficiaries from

deciding what they termed "a difficult question," determined claims by disinherited children to whom the decedent was required to pay support were not necessarily foreclosed.[112]

It is questionable whether such special treatment of insurance proceeds is a result of a substantive difference or a political difference.[113] While trusts do not have a single coherent body which might lobby for their exemption from creditors' claims, insurance is not similarly impeded.[114] Certainly, the allure of the ability to circumvent creditors by filtering one's assets through insurance companies could be a valuable asset to those interested in selling insurance. However, these distinctions are somewhat illusory because much of the difference between the pure will substitutes is a difference in form rather than substance.[115] For example, whereas other pure will substitutes pass by operation of statute or property law, insurance proceeds pass by means of contract law.[116] This does nothing to change the ambulatory nature of the transfer because, in either case, the beneficiary may be changed, or the "gift" of the proceeds revoked, until the time of the donee's death.[117]

It could be argued that the nature of statutes exempting only those policy proceeds which are payable to surviving spouses or issue are intended to promote a policy of protection of the family of a decedent. However, all states provide specific, limited exemptions from creditors' claims for the benefit of at least the surviving spouse in the probate estate.[118] These more specific provisions for protection would represent a more clear legislative intent because they reveal the degree to which the legislature has concluded surviving spouses ought to be protected.

B. *The Imperfect Will Substitute—Joint Tenancy*

"The joint estate consists of a property interest held by two or more persons concurrently, with the survivor of them to take the entire interest."[119]

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commercial creditors, and the provisions do not necessarily foreclose claims where claimant owes a duty of support); Abrego v. Abrego, 812 P.2d 806, 812-13 (Okla. 1991) (noting the minority view, which the court adopts, "recognizes the greater likelihood of a divorced father leaving a child without financial protection or security").

112. DeCeglia v. Estate of Colletti, 625 A.2d at 595.

113. *See* JOINT EDITORIAL BOARD FOR UNIFORM PROBATE CODE, *supra* note 21, at 12-18.

114. *See id.*

115. Lanbein, *supra* note 5, at 1110.

116. *Id.*

117. *Id.*

118. For a discussion of exemption statutes, see *infra* Part V.B.

119. 7 RICHARD R. POWELL, POWELL ON REAL PROPERTY (MB) ¶ 615[1], at 51-3 (Patrick J. Rohan ed., 1998).

Joint tenancies are created only through certain formal requirements: the four unities of time, title, interest, and possession.[120] While the unities of time and title would technically be violated by a transfer from a grantor to himself and others as joint tenants with a right of survivorship, this requirement has been relaxed in some jurisdictions and would otherwise be easily circumvented by the use of a "straw deed conveyance to a third party, who then reconveys" the property.[121] The rights during lifetime to the possession and enjoyment of property held in a joint tenancy mirror those of tenancies in common.[122] "Like tenants in common, each joint tenant has the right to possess the entire parcel."[123] "Most states follow a variation of the common law joint tenancy theory, under which each joint tenant owns either a present undivided interest or a life estate in the whole, with a remainder over to the survivor."[124]

The irrevocable nature of joint tenancy makes it a less than perfect will substitute.[125] While "pure" will substitutes have precisely the same gift-giving effect as a will which is subject to change until the death of the testator, the creation of a joint tenancy is irreversible without the consent of the joint owner.[126] This difference in character would seem to set apart joint tenancies as more deserving of special treatment that does not conform to the substantive restrictions on testation. In truth, however, joint tenancies are often used as a

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120. 7 *id.* ¶ 617[1], at 51-10.

121. 7 *id.* ¶ 616[3], at 51-7.

122. 7 *id.* ¶ 617[4], at 51-13.

123. JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES AND PRACTICES 709 (2d ed. 1997).

124. Ruebel, *supra* note 2, at 39.

> It should be noted that the right of survivorship in the joint tenancy "is not considered to be a type of future interest. . . ." [A]t common law, the joint tenancy was considered as a single entity "made up of the cotenants collectively," and that entity continued "so long as any of the joint tenants survive[d]. . . . When the first joint tenant dies, his individual right to share possession and enjoyment ceases. . . . His heirs or devisees take nothing because the individual cotenant has no estate of inheritance to pass on to them. . . . The deceased tenant's estate is extinguished [upon] his death [and] the estate continues in the survivor or survivors." Of course the last survivor "owns the whole estate . . . because he [or she] no longer shares the estate with his [or her] former cotenants."

John W. Fisher, II, *Creditors of a Joint Tenant: Is There a Lien After Death?*, 99 W. VA. L. REV. 637, 640-41 (1997) (quoting 2 AMERICAN LAW OF PROPERTY § 6.1 (A. James Casner ed., 1952)).

125. Langbein, *supra* note 5, at 1109.

126. *See supra* Part II.C. *But see* Langbein, *supra* note 5, at 1114.

means of disposing of property at death.[127] Such a transfer is effected by "titling" the property in joint tenancy with a right of survivorship.[128]

These transfers—although less ambulatory than other will substitutes—may, nonetheless, have estate tax implications.[129] Section 2040 of the Internal Revenue Code requires inclusion of the value of property held in joint tenancy before death in the gross estate of the decedent, to the extent that the property so held did not originally belong to the survivor, or was received for adequate consideration "in money or money's worth."[130] Therefore, to the extent a decedent placed property which he owned outright in a joint tenancy with a right of survivorship, the appreciated value of that portion of the property is included in his gross estate for estate tax purposes.[131] The tax implications are similar to those imposed upon other will substitutes.[132]

Although joint tenancies may be the most popular of the will substitutes,[133] "their clear disadvantage is that they are not entirely ambulatory."[134] It is also true "one party can never revoke or modify a joint tenancy because both parties have undivided ownership interests."[135]

> It should be emphasized that the joint tenancy interest *that passes on the death of the first to die* is in the nature of a testamentary transfer. The joint

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127. John F. MacArthur & George S. Cabot, *Tax Aspects of Creating Non-Spousal Joint Tenancies*, 65 MICH. B.J. 706, 706 (1986).

128. *Id.*

129. *See* I.R.C. § 2040 (West 1999) (requiring inclusion in the gross estate of the portion of the value of a joint tenancy which was contributed by the donor in acquiring the property).

130. *Id.*

131. *Id.*

132. *See supra* note 43 and accompanying text; *see also* I.R.C. § 2038(a)(1) (including in the decedent's gross estate "the value of all property" transferred by the decedent "where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power . . . to alter, amend, revoke, or terminate"); *id.* § 2036(a) (going even farther by including the value of property transferred by the decedent who retains either the possession or enjoyment of the property, or the income from the property, or the right to designate the recipient of the property, or the income in the decedent's gross estate); *id.* § 2042 (including in the gross estate the proceeds of life insurance where either the beneficiary was the executor of his estate or he retained incidents of ownership upon his death). Notice that although § 2036 would include the entire value of the property transferred, and in the case of § 2038 the value of the property over which the power is retained, § 2040 dealing with joint tenancies includes only the value of the joint tenancy that was provided by the donor by excluding the portion to which the donee might have contributed. *See id.* §§ 2036, 2038, 2040. The Code deals with this in § 2043(a) by "backing out" the value of any consideration paid for the transfer by the donee which was not "adequate and full consideration in money or money's worth." *Id.* § 2043(a).

133. Amado, *supra* note 4, at 403.

134. *Id.*

135. *Id. But see* Langbein, *supra* note 5, at 1114.

> tenant retains full control over his interest until the time of his death. He can transfer it by sale or gift and he can partition, in each instance depriving the other joint tenant of his survivorship right in that interest. If there is no transfer or partition prior to death, the interest passes to the surviving tenant by the nature of the joint tenancy. *The movement of the interest to the surviving tenant is, in effect, a testamentary transfer by the deceased tenant.*[136]

The right of survivorship is an essential aspect of joint tenancy.[137] A survivor takes the property in its entirety by virtue of the conveyance which created the tenancy rather than some transfer from the decedent.[138] "A surviving joint tenant takes joint tenancy property by right of survivorship, not by descent, [and] such property is not usually part of a decedent joint tenant's probate estate."[139] This aspect of joint tenancy, in spite of the age of the institution of joint tenancy, has only recently raised the serious question of whether such property can be held subject to creditor's claims.[140] "It is fair to assume that this scarcity of cases reflects the fact that the common law incident of cotenancy was accepted as the 'law,' and challenges to the common law concepts were simply not pursued . . . ."[141]

> When a joint tenant dies . . . his interest moves to the survivor without an instrument of transfer or estate administration. That interest which passes is not subject to the claims of the deceased joint tenant's creditors. During that joint tenant's life his interest could be reached by his creditors, but at his death his interest disappears, so there is nothing for the creditors to reach.[142]

Much like the revocable trust, or the *Totten* trust, the right of survivorship is based upon a juridical fiction.[143] The joint tenancy can be traced to the thirteenth century.[144] At that time, it was determined joint tenants through a

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136. PAUL G. HASKELL, PREFACE TO WILLS, TRUSTS, AND ADMINISTRATION 117-18 (1987) (emphasis added).

137. 7 POWELL, *supra* note 119, ¶ 617[3], at 51-11.

138. 7 *id.*

139. 7 *id.* ¶ 619[2], at 51-23.

140. Fisher, *supra* note 124, at 637-38 (stating "[i]n spite of the significant amount of property owned by cotenants and the corresponding attention the subject area has received from [the] courts, there remain a number of unresolved questions" and presenting by example the problem of whether creditors have rights in a deceased joint tenant's joint property).

141. *Id.* at 643.

142. HASKELL, *supra* note 136, at 117.

143. *Compare supra* Part II.C, *with infra* notes 144-47 and accompanying text.

144. Fisher, *supra* note 124, at 638-39.

fictitious unity took the property as a single entity.[145] Therefore, the right of survivorship was not considered a future interest contingent upon survival, but rather the right to possession and use of the entire property including the incidental expansion of the undivided interest at the cessation of the deceased joint tenant's right to the possession and enjoyment of the property during his lifetime.[146] Given the important interests of the feudal system in the equality of the interests of joint tenants, the four unities were developed.[147]

Joint tenancy differs from other will substitutes in that the transferor conveys a present, actionable interest in the property conveyed.[148] The recipient of a gift transferred by a grantor into joint tenancy with a grantee has options unavailable to the typical beneficiary of a will substitute.[149] Joint tenants may unilaterally sever or partition the joint tenancy during the lifetime of the joint tenants.[150] Similarly, a judgment creditor may, during the life of the judgment debtor, bring a judgment creditor suit to have the partition and sale of the property ordered.[151] Under the common law rule, this forced severance is necessary to protect the creditor's rights prior to the death of the joint tenant.[152]

The cases on point make it clear that a fractional interest of a joint tenant may not be executed against by a judgment creditor after the death of the debtor joint tenant.[153] The Supreme Court of Wisconsin held the mere docketing of a judgment against a joint tenant did not effect a severance of the tenancy.[154] In addition, it found that execution against the joint property was precluded after the death of the debtor joint tenant by the extinguishment of his interest through

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145. *Id.* at 639. Fisher, and the commentators he cites, attribute the inception and development of joint tenancy to the feudal system. *Id.*

146. *Id.* at 640.

147. *Id.* at 639-40. "Since the joint tenant's were seised as a fictitious unity, there was of necessity 'a community of interest which required that the individual interests of the joint tenants be equal in all respects.'" *Id.* (alterations omitted) (quoting 2 AMERICAN LAW OF PROPERTY, *supra* note 124, at § 6.1).

148. 7 POWELL, *supra* note 119, ¶ 617[3], at 51-11 to -12.

149. *See* 7 *id.* ¶ 618[1]–[2], at 51-14 to -20 (discussing the rights of joint tenants to sever the tenancy or bring an action for partition).

150. 7 *id.*

151. Fisher, *supra* note 124, at 658.

152. *Id.* at 670-71.

153. *See infra* notes 154-63 and accompanying text. Notice however that these cases express the common law rule. *See* Fisher, *supra* note 124, at 642. A statute on point would affect the outcome. *Id.* at 670. Statutory interference with joint tenancy is nothing new. Some states have abolished the joint tenancy or require a showing of intent to create the tenancy rather than allowing the joint tenancy to occur by default. *See* 7 POWELL, *supra* note 119, ¶ 616[1], at 51-4.1 to -5.

154. Musa v. Segelke & Kohlhaus Co., 272 N.W. 657, 659 (Wis. 1937).

operation of the right of survivorship.[155] The court relied largely on the fact that a lien attached to property may attach only to such an "interest only as the judgment debtor actually had in the premises at the time when [the judgment] was docketed or thereafter acquired . . . prior to [the] expiration" of the interest.[156] Other courts have likewise held that the failure to timely execute a judgment lien against a decedent's joint tenancy property although the lien had been docketed would preclude recovery from the property.[157]

The foregoing cases holding that judgment debtors could not execute on a joint tenancy after the death of the debtor joint tenant would seem to have sealed the fate of creditors who, without a prior judgment, made their claims against joint tenancies after the death of the insolvent debtor joint tenant. Nevertheless, the Supreme Court of North Dakota was forced to decide whether the operation of the right of survivorship could constitute unjust enrichment.[158] The court quickly dispelled this misconception basing its opinion on the decedent's lack of any interest to devise.[159]

The Iowa Supreme Court has more recently addressed the issue from the standpoint of a public policy argument.[160] In *Rembe v. Stewart*[161] the plaintiff argued that although the general rule would preclude recovery against property which had been held in joint tenancy by a decedent, an exception should be recognized where the probate estate is insolvent.[162] While the court noted the merit of the plaintiff's argument, it declined to accept the offer of the opportunity to change the rule on the grounds that if the change "were to occur by judicial fiat, the cure might be worse than the disease."[163] Unlike the case law in other states,[164] the Iowa court seemed more willing to discuss the merits of the claimant's contentions,[165] although it rejected the notion that its case law had

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155. *Id.* at 658.

156. *Id.*

157. *See, e.g.*, Zeigler v. Bonnell, 126 P.2d 118, 119-20 (Cal. Dist. Ct. App. 1942) (finding the creditor with a judgment lien can have no greater right than the debtor in the joint property); Eder v. Rothamel, 95 A.2d 860, 862-63 (Md. 1953) (citing *Musa v. Segelke & Kohlhaus Co.* extensively and reaching the same conclusion).

158. Schlichenmayer v. Luithle, 221 N.W.2d 77, 82-83 (N.D. 1974).

159. *Id.*

160. Rembe v. Stewart, 387 N.W.2d 313, 313 (Iowa 1986).

161. Rembe v. Stewart, 387 N.W.2d 313 (Iowa 1986).

162. *Id.* at 314.

163. *Id.* at 315.

164. *See supra* text accompanying notes 154-59.

165. *Compare* Rembe v. Stewart, 387 N.W.2d at 314-15 (discussing the merits of claimants' argument but declining to change long-standing rule absent legislative action that surviving joint tenant takes real property free of debts of deceased joint tenant), *with* Zeigler v. Bonnell, 126 P.2d 118, 119-20 (Cal. Dist. Ct. App. 1942) (noting the appellee neither filed a brief

indicated a trend toward upsetting the common law rule.[166] The court stated Plaintiff Rembe had pointed to persuasive public policy and "[o]ne highly respected Iowa commentator appear[ed] to agree."[167] The court explained this view of the general rule as one that:

> "is particularly harsh on the creditor holding a lien on the property good against only one of the joint tenants. If the debtor tenant is the first to die then the lien is lost.
>
> The vulnerability of the creditor whose apparently affluent debtor owns all of his property subject to survivorship rights is a facet of joint tenancy that has generated some concern in recent years. Strangely, laymen seem little aware of this seemingly important attribute of joint tenancy. If the desirability of the joint tenancy form would be only mildly weakened by removing this feature, perhaps, in the interest of fair dealing, creditors with liens should be permitted to follow unexempt joint tenancy property into the hands of the survivor, at least to the extent that they could have reached the deceased debtor's interest in the property during his life."[168]

The result in *Rembe* presents an interesting contrast to the court's apparent willingness in *Nagel* to fashion an equitable remedy for creditors who attacked a revocable trust.[169] Although in *Nagel* the equitable principle that one must be just before he can be generous was enough to overcome the operation of trust law, in *Rembe*, the same principle did not win the day.[170] The distinction could

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nor presented any theory upon which the court could validate the lower court's result, and after condemning them for not doing so, approached the problem methodically from the standpoint of common law precepts, including citing profusely *Musa* and the annotation it prompted: G.V.I., Annotation, *Rights and Remedies of a Judgment Creditor or of Purchaser Under Execution, in Respect of Estate in Real Property Held in Joint Tenancy*, 111 A.L.R. 171 (1937)), *and* Eder v. Rothamel, 95 A.2d 860, 862-63 (Md. 1953) (setting forth the validity of and requirements for the creation of a joint tenancy, while discussing the *Musa* case noting it had "been referred no case in the United States or England, nor . . . found any, which holds otherwise"), *and* Schlichenmayer v. Luithle, 221 N.W.2d 77, 82-83 (N.D. 1974) (dismissing the claimant's unjust enrichment claim based on the extinguishment of the right of a deceased joint tenant), *and* Musa v. Segelke & Kohlhaus Co., 272 N.W. 657, 657-59 (Wis. 1937) (reaching its conclusion solely on the basis of the extinguishment of any property right at the death of a joint tenant using only sparse citations for general property principles).

166. Rembe v. Stewart, 387 N.W.2d at 315.

167. *Id.*

168. *Id.* (quoting N. William Hines, *Real Property Joint Tenancies: Law, Fact, and Fancy*, 51 IOWA L. REV. 582, 597 (1966)).

169. *See* Phillips v. Roe (*In re* Estate of Nagel), 580 N.W.2d 810, 812 (Iowa 1998).

170. *See* Rembe v. Stewart, 387 N.W.2d at 315 (holding a surviving joint tenant takes property free of debts).

be the result of the less ambulatory nature of the transfer[171] or a differentiation between the legal fictions used to validate the transfer.[172] On the other hand, this discrepancy is more likely a reflection of the relative age of the institutions being attacked[173] in conjunction with the precept that common law principles simply are not to be attacked.[174] The unwillingness to upset common law principles seems unjust when the circumstances which justified their creation have changed to the extent that they are no longer required.[175] Another problem with aged property doctrines is the lack of understanding among the members of the bar as to their application.[176] The age of the precepts of property law often perpetuate

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171. While the revocable trust is purely ambulatory, the transfer of property into a joint tenancy is not so easily undone. *Compare* Amado, *supra* note 4, at 403 (discussing the difference between joint tenancy and other will substitutes), *with* Langbein, *supra* note 5, at 1114 (discussing the irrevocability of joint tenancy and the leaning of the courts toward allowing a grantor to "unscramble the transaction by proving that he lacked donative intent").

172. *Compare supra* Part II.C (discussing the fiction used to support purely ambulatory will substitutes by finding a present interest), *with supra* notes 143-47 and accompanying text (discussing the fictional unity used to create a community of interest in feudal times in support of the joint tenancy). Notice that the legal fiction employed in the support of purely ambulatory transfers need not be applied in the case of a joint tenancy where a present interest is conveyed.

173. *Compare* Langbein, *supra* note 26, at 507 (noting "[i]n some jurisdictions . . . the courts voided tentative trusts for Wills Act noncompliance well into the twentieth century, but at present even these states have ceased to resist"), *with* Fisher, *supra* note 124, at 638-39 (dating the creation of the joint tenancy in the thirteenth century).

174. Fisher, *supra* note 124, at 643.

175. W. Barton Leach, *Perpetuities Legislation, Massachusetts Style*, 67 HARV. L. REV. 1349, 1349 (1954).

176. Martin D. Begleiter, *Attorney Malpractice in Estate Planning—You've Got to Know When to Hold Up, Know When to Fold Up*, 38 U. KAN. L. REV. 193, 230-31 (1989) (describing the rule against perpetuities as "perhaps the most complicated of the nontax areas"). Indeed, the California Supreme Court at one time concluded that because of the complexity of the rule, its violation could not be the ground for a malpractice action. Lucas v. Hamm, 364 P.2d 685, 690 (Cal. 1961). The California appellate courts have since backed down from this position. *See* Wright v. Williams, 121 Cal. Rptr. 194, 199 n.2 (Ct. App. 1975). The Iowa Supreme Court in stretching to avoid holding an attorney liable for malpractice on these grounds simply charged the populace of the state with knowledge—and apparently understanding—of the rule. Millwright v. Romer, 322 N.W.2d 30, 33 (Iowa 1982). For an indication of the general population's understanding of the rule against perpetuities, see the film *Body Heat* in which the asserted remedy for a violation of the rule in a will was to render the entire will invalid. BODY HEAT (Warner Bros. 1981).

> The rule against perpetuities is a technicality-ridden nightmare, designed to meet problems of past centuries that are almost nonexistent today. Most of the time it defeats reasonable dispositions of reasonable property owners, and often it defeats itself. It is a dangerous instrumentality in the hands of most members of the bar. It ought to be substantially changed by statute, and the lawyers ought to see that this is done.

their policies as given.[177] However, when we compare the justification for the rule—maintaining a community of interest in feudal land[178]—with the use of joint tenancies today merely as a means of probate avoidance,[179] it does not seem the rule preventing a creditor from taking against joint tenancy property after the death of the debtor should continue to survive in contravention of other policies which remain valid today. Still, one has to admire the *Rembe* court for its reluctance to open a judicially created can of worms.[180]

C. *Conclusions on the Rights of Creditors Against Nonprobate Assets*

Today's estate planning attitude preaches the avoidance of probate.[181] Indeed, "[r]ecent years have witnessed a dramatic increase in probate avoidance.

Leach, *supra* note 175, at 1349 (finding a lack of response in support of the rule over a two-year period since these allegations were made constituted a running of the "academic statute of limitations" and holding the rule was "guilty as charged"). Why have attorneys not seen to the change requested? One answer might be that they do not understand the problem. *See* Lucas v. Hamm, 364 P.2d 685, 690 (Cal. 1961). The one ray of shining hope in all of this muddle is that the rule seems to be losing its momentum after its 300 years of blind application. *See* Brian Layman, *Perpetual Dynasty Trusts: One of the Most Powerful Tools in the Estate Planner's Arsenal*, 32 AKRON L. REV. 747, 761 & n.72 (1999). In this spring's session, the Iowa Legislature initially considered the abolition of the rule, however, the bill died in committee. *See* S.F. 2060, G.A. (Iowa 2000); *Iowa General Assembly: Senate File 2060* (last modified May 9, 2000) <http://www.legis.state.ia.us/GA/78GA/BillHistory/SF/02000/SF02060.html>.

177. A good example of this phenomenon is the rule against perpetuities. Originally set forth in the *Duke of Norfolk's Case*, the rule was a fixture of the common law of England and was codified by many states. SIMES, *supra* note 50, at 33; SINGER, *supra* note 123, at 595. The rule was meant to provide for the alienability of land in a time when land was the equivalent of wealth, thereby protecting the economic state of the community. SIMES, *supra* note 50, at 36-37. The productivity of property was therefore the justification for the rule. *Id.* at 38-40. Given this purpose, the justification for the rule would seem to be diminished. *Id.* at 40. "[I]t is no exaggeration to say that, at the present time, due to changes in both the nature of capital investments and in the law, the proposition that contingent future interests make property unproductive is rarely true in the United States and almost never true in England." *Id.* (emphasis omitted). Present day trusts to which the rule is applied generally do not remove the property from productive uses. *Id.* at 40-41. Some legislatures have undertaken to abolish the rule. *See, e.g.*, Iowa S.F. 2060 (failing to survive funnel week). However, other jurisdictions, in spite of the diminished need for the rule, have perpetuated its existence.

178. Fisher, *supra* note 124, at 639-40.

179. Langbein, *supra* note 5, at 1114.

180. Rembe v. Stewart, 387 N.W.2d 313, 315 (Iowa 1986). Potential problems that would have stemmed from such a decision would include the valuation of the joint property subject to the claim. One could argue for the appreciated value of the amount of consideration furnished by the decedent, or merely the value which the decedent could have reached during his lifetime in fee simple by partition.

181. *See generally* DACEY, *supra* note 15 (berating the probate system, minimizing the prospects for reform and teaching probate avoidance techniques).

Revocable trusts, joint-and-survivor or [POD] bank accounts, [TOD] security registrations and other will substitutes have proliferated and emerged as successful competitors of the probate system."[182] As this expansion has occurred, creditors have crafted many arguments to attack transfers that reduce the probate assets which have long been available to creditors through the probate process.[183] The trend clearly favors creditors even where legislatures are silent in the newer will substitute forms of wealth transmission. Given the explosion of unsecured consumer credit,[184] the speed at which consumption is outpacing the growth of income,[185] soaring health care costs for the elderly,[186] longer life expectancies,[187] and the rise in litigation,[188] it is surprising that so few attorneys discuss asset protection with their clients on a regular basis in formulating an estate plan, particularly when opportunities to thwart creditors continue to exist in the nonprobate realm.[189]

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182. McCouch, *supra* note 27, at 1123; *see also* Solomon, *supra* note 49, at 34 ("Revocable trusts . . . have gained enormous popularity in recent years, often being advertised in seminars and literature as the cure all for estate . . . planning ills.").

183. McCouch, *supra* note 27, at 1180-87.

184. *See* JAMES MEDOFF & ANDREW HARLESS, THE INDEBTED SOCIETY: ANATOMY OF AN ONGOING DISASTER 13 (1996). "American consumers owed $2.7 billion in credit card debt in 1969 . . . [as compared to] $74 billion in 1994" as adjusted for inflation. *Id.*

185. *Id.* at 16. Around the early 1990s, Stephen Wilson wrote in *The Bankruptcy of America* that debt financing "became a way of life for America's gullible generation of future deadbeats, who assumed that their paychecks would expand exponentially to meet the continually rising burden of debt." STEPHEN DELOS WILSON, THE BANKRUPTCY OF AMERICA: HOW THE BOOM OF THE 80'S BECAME THE BUST OF THE 90'S 199 (1992).

186. Peter Develett, *As Medical Costs Go Down, Health Care Spending Soars*, SAN JOSE & SILICON VALLEY BUS. J., Aug. 31-Sept. 6, 1998, at 17.

187. Victor Fuchs, Stanford University economist, stated although the costs of individual treatments have dropped, more patients lead longer, healthier lives and spend more on medical bills than has historically been the case. *Id.*

188. JAY W. MITTON, COVER YOUR ASSETS: LAWSUIT PROTECTION 1 (1995) (reporting "more than 90 million lawsuits are filed in the United States each year"). "[L]itigation has become the United States' Number One indoor sport. . . . And with 600,000 hungry lawyers out there ready to help, anyone can be a target." KLUEGER, *supra* note 62, at 12 (referring to the following characterization by retired Chief Justice Warren Burger: "Six hundred thousand lawyers in America—hungry as locusts").

189. Admitting the results of their survey might be skewed by a sample containing a disproportionate number of attorneys from Florida, Malcolm Moore and Jeffrey Pennell reported 27% of the attorneys surveyed seldom, if ever, discuss asset protection techniques to protect against the client's creditors. Malcolm A. Moore & Jeffrey N. Pennell, *Practicing What We Preach: Esoteric or Essential?*, 27 UNIV. OF MIAMI L. CTR. PHILIP E. HECKERLING INST. ON EST. PLAN. (MB) ¶¶ 1200, 1208, at 12-2 to -6, 12-28 to -29 (1993). Further, the survey indicated that 37% discussed asset protection for the client's benefit only "sometimes." *Id.*

V. FAMILY PROTECTION IN THE BALANCE

A. *The Spousal Share: A Confusing Comparison*

Dower and curtesy were the common law solutions to spousal disinheritance, providing for a life estate in some or all of a deceased spouse's land in the surviving spouse.[190] These common law rules, in most jurisdictions, have given way to elective share statutes and the implementation of community property.[191] Jeffrey Pennell notes:

> Every American jurisdiction except Georgia has a regime designed to protect a decedent's surviving spouse in some respect against disinheritance, either with community property or an elective share statute. Although they are designed to protect a surviving spouse against disinheritance, however, elective share statutes are toothless to the extent decedents effectively can defeat the spousal entitlement by placing property outside the probate process. This may be accomplished through inter vivos gifts (with or without retained enjoyment for life), Totten trusts, joint tenancy, life insurance, employee benefit and other annuity beneficiary designations, payable on death or transfer on death accounts, and other forms of probate avoidance transfers.[192]

Indeed, excepting Georgia,[193] every American jurisdiction has some form of spousal protection against disinheritance.[194] In all, fifteen states have adopted variations of the UPC's augmented estate approach.[195] Three states retain the old

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190. *See supra* note 3 and accompanying text; *see also* SCOLES & HALBACH, *supra* note 16, at 91-92; Van Foreman McClellan, Note, *Inter Vivos Transfers: Will They Stand Up Against the Surviving Spouse's Elective Share?*, 14 OKLA. CITY U. L. REV. 605, 606 (1989).

191. *See* SCOLES & HALBACH, *supra* note 16, at 92.

192. Jeffrey N. Pennell, *Minimizing the Surviving Spouse's Elective Share*, 32 INST. ON EST. PLAN. (MB) ¶¶ 900, 904 (1998) (footnotes omitted). It is important to note at the outset that although one can substantially diminish the spousal share when disinheritance is involved, no degree of planning can guarantee that no assets will pass through probate and thereby entirely defeat the spousal share. DACEY, *supra* note 15, at 669; *see* IOWA STATE BAR ASS'N & IOWA TRUST ASS'N, *supra* note 38.

193. GA. CODE ANN. § 5-2-9 (1998).

194. Pennell, *supra* note 192, ¶ 904, at 9-19 to -20. The remaining nine states—Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin—are community property states in which the marital property system serves the same function as elective share statutes. *See* ROBERT L. MENNELL & THOMAS M. BOYCOFF, COMMUNITY PROPERTY IN A NUTSHELL 2 (1988) (identifying the community property states); Pennell, *supra* note 192, ¶ 904, at 9-19 to -20 (indicating that community property or an elective share statute can serve to protect a decedent's surviving spouse).

195. ALASKA STAT. §§ 13.12.202, .205 (Michie 1998); COLO. REV. STAT. §§ 15-11-201 to -202 (1999); HAW. REV. STAT. §§ 560:2-201, -205 (1993 & Supp. 1998); KAN. STAT. ANN. §§

English titles of dower and curtesy;[196] and, although the interests have changed somewhat and are now framed in a statutory form, the election presumably applies only to the probate estate. Several states have elective share statutes which either imply or expressly state the elective share may only be asserted against the probate estate.[197] The statutes of thirteen states are unclear about the extent of the "estate" to be considered in computing the spousal share.[198] Delaware takes an interesting approach by defining the estate for purposes of the elective share as the amount of the decedent's gross estate for federal tax purposes.[199] Under certain circumstances, the statutes of Minnesota and Tennessee allow the surviving spouse to elect to take against some non-probate transfers.[200] The remaining nine states—Arizona, California, Idaho, Louisiana,

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59-6a202 to -6a205 (1993 & Supp. 1998); ME. REV. STAT. ANN. tit. 18-A, §§ 2-201 to -202 (West 1998) (applying the UPC augmented estate concept through more general language); MONT. CODE ANN. §§ 72-2-221 to -222 (1999); NEB. REV. STAT. ANN. §§ 30-2313 to -2314 (Michie 1995) (using general language to mimic the UPC's augmented estate system); N.J. STAT. ANN. §§ 3B:8-1, -3 (West 1983 & Supp. 1999) (employing a bare bones version of the UPC's augmented estate system); N.Y. EST. POWERS & TRUSTS LAW § 5-1.1-(a)–(b) (McKinney 1981 & Supp. 1999) (treating certain will substitutes as testamentary for the purpose of computing the elective share); N.D. CENT. CODE §§ 30.1-05-01 to -02 (1996); PA. CONS. STAT. ANN. tit. 20, §§ 2203–2204 (West Supp. 1999) (listing property to be subjected to the spousal share in addition to "[p]roperty passing from the decedent by will or intestacy"); S.D. CODIFIED LAWS §§ 29A-2-202, -205 (Michie 1997); UTAH CODE ANN. §§ 75-2-202, -205 (1993 & Supp. 1999); VA. CODE ANN. §§ 64.1-13, -16.1 (Michie 1995 & Supp. 1999); W. VA. CODE §§ 42-3-1 to -2 (1997).

196. *See* ARK. CODE ANN. § 28-39-401 (Michie 1987); KY. REV. STAT. ANN. §§ 392.020, .080 (Michie 1999); R.I. GEN. LAWS § 33-25-2 (1995 & Supp. 1998).

197. *See* CONN. GEN. STAT. ANN. § 45a-436 (West 1993 & Supp. 1999) (creating a spousal share of one-third of "value of all property passing under the will"); OKLA. STAT. ANN. tit. 84, § 44(B)(1) (West 1990) (prohibiting a testator only from devising or bequeathing property away from the spouse); S.C. CODE ANN. § 62-2-201 (Law. Co-op. 1997 & Supp. 1998) (creating a spousal share of "one-third of the decedent's probate estate"); VT. STAT. ANN. tit. 14, § 401 (1989) (creating a right to a one-third share of the decedent's estate "not lawfully disposed of by . . . will"); WYO. STAT. ANN. § 2-5-101 (Michie 1999) (providing for a spousal share in property which is subject to disposition by the will).

198. *See* ALA. CODE § 43-8-70 (1999); 755 ILL. COMP. STAT. ANN. 5/2-8 (West 1999); IND. CODE ANN. § 29-1-3-1 (West 1999); IOWA CODE ANN. § 633.238 (West Supp. 2000); MD. CODE ANN., EST. & TRUSTS § 3-203 (Supp. 1999); MASS. GEN. LAWS ANN. ch. 191, § 15 (West Supp. 1999); MICH. COMP. LAWS ANN. § 700.2202 (West Supp. 1999) (repealing and replacing MICH. COMP. LAWS ANN. § 700.282 (West 1997)); MISS. CODE ANN. § 91-5-25 (1999); MO. ANN. STAT. § 474.160 (West 1992 & Supp. 2000); N.H. REV. STAT. ANN. § 560:10 (1997); N.C. GEN. STAT. § 30-1 (1999); OHIO REV. CODE ANN. § 2106.01 (Anderson 1998); OR. REV. STAT. § 114.105 (1999).

199. DEL. CODE ANN. tit. 12, § 902 (1998).

200. MINN. STAT. ANN. § 525.213 (West 1975 & Supp. 2000) (excluding insurance proceeds, but treating as testamentary a "conveyance of assets by a person who retains a power of appointment by will, or a power of revocation or consumption" at the election of the surviving

Nevada, New Mexico, Texas, Washington, and Wisconsin—are community property states in which the marital property system serves the same function as elective share statutes.[201] "In community property states, a spouse may dispose of her separate property and one-half of the community property by will. . . . [F]orced share statutes do not generally exist in community property states, given the spouse's vested ownership of one-half of the community property."[202] However, this has not precluded these states from experimenting with elective share statutes as well.[203]

Pennell supports providing an opportunity to avoid the elective share because he is "simply pro-choice in estate planning matters."[204] He predicts a rise in the number of elections against the will—and if allowed, the entire estate plan—of deceased spouses and cites the incidence of divorce and subsequent blending of families as one reason, as well as changes in demographics; particularly more husbands survive their wives, and the increase in the number of lawyers willing to represent surviving spouses in acting against a decedent's wishes.[205] Pennell points out that in some circumstances spousal disinheritance might be the right thing for a client to do.[206]

Spousal disinheritance is often touted as one of the benefits of using revocable trusts[207] and other non-probate transfers.[208] While it may be true that freedom of testation is an important interest, it has long been realized that

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spouse); TENN. CODE ANN. § 31-1-105 (1999) (making conveyances calculated to defeat the elective share voidable).

201. *In re* Brollier, 165 B.R. 286, 289 n.4 (Bankr. W.D. Okla. 1994).

202. SINGER, *supra* note 123, at 1110.

203. *See, e.g.*, ARIZ. REV. STAT. ANN. § 14-2301 (West 1999) (providing an elective share to a surviving spouse under certain circumstances where the spouse married a testator after the will was executed); IDAHO CODE § 15-2-202 (1999) (providing for an elective share of an augmented estate in quasi-community property of a decedent).

204. Moore & Pennell, *supra* note 189, ¶ 902, at 9-5.

205. *Id.* ¶ 900, at 9-2.

206. *Id.* ¶ 902, at 9-6.

207. Jeff Kohn, Jr., *Revocable Trusts—an Overview*, 49 ALA. LAW. 332, 334 (1988); Ronald J. Russo & Peter T. Kirkwood, *The Use of a Revocable Trust to Defeat the Elective Share*, 57 FLA. B.J. 110, 110-11 (1983). *But see* Peter A. Borrok, *The Benefits of Living Trusts: Just a Figment of Your Imagination?*, 20 WESTCHESTER B.J. 295, 296, 302 (1993) (noting in New York the benefit of "avoiding the spousal right of election" through the use of a revocable, living trust is a figment of the imagination).

208. *See* Jeffrey A. Baskies, *Step Two in Any Divorce Proceeding: See an Estate Planning Attorney*, 72 FLA. B.J. 80, 81 (1998) (admitting in some states the goal of spousal disinheritance is unattainable, but pointing out the opportunity for estate planning in the divorce situation in other states). *But see* RANDOLPH, *supra* note 16, at I/7 (stating accurately the law in many jurisdictions, however, failing to note the many exceptions).

restrictions could be placed on that right based on policy.[209] Although the general rule in many states remains that the spousal share may be defeated by the use of non-probate transfers, academia, legislatures, and the courts have wrangled with finding an equitable solution to this disparate treatment of transfers which are essentially alike.

1. *Applying the Spousal Share to Will Substitutes by Statute*

Since the passage of revisions to the UPC in 1990, the ability of the surviving spouse to elect against will substitutes is one of the more hotly debated topics in estate planning.[210] "The drafters of the UPC were concerned that the statutory share of the surviving spouse could be defeated by the use of various ownership arrangements (including revocable trust transfers) for avoiding probate."[211] The UPC's augmented estate[212] statute is meant to reflect a "contemporary view of marriage as an economic partnership."[213] In addition to providing protection from spousal disinheritance through the use of will substitutes, the UPC protects against the spouse who seeks an undue share of the estate.[214] In today's particularly complex estate planning environment, this comprehensive approach to the law of succession, rather than maintaining a tight focus on wills, seems to make more sense.

In contravention to strong lobbying, some states have even elected to include life insurance benefits payable to those other than the spouse in the

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209. *See supra* notes 1-3 and accompanying text.

210. *See generally* McClellan, *supra* note 190, at 605-06 (examining the "means used to make inter vivos transfers outside the scope of the probate estate"); L.A. McElwee, Comment, *The Surviving Spouse's Sacred Right to Elect Against the Will: Is It a Pyrrhic Victory?*, 19 CAP. U. L. REV. 553, 554 (1990) (suggesting "a trend toward the more equitable posture of allowing a surviving spouse to take against inter vivos trusts"); Rena C. Seplowitz, Note, *Transfers Prior to Marriage and the Uniform Probate Code's Redesigned Elective Share—Why the Partnership Is Not Yet Complete*, 25 IND. L. REV. 1, 1-2 (1991) (examining the UPC's treatment of prenuptial transfers of property).

211. Russo & Kirkwood, *supra* note 207, at 110.

212. The augmented estate includes not only assets passing through probate, but assets in certain non-probate transfers in computing the spousal share. UNIF. PROBATE CODE § 2-202 (amended 1990), 8 U.L.A. 102-03 (1998).

213. SCOLES & HALBACH, *supra* note 16, at 96.

214. For example, consider the spouse who was only provided for through a life insurance policy, or revocable trust, the value of which is far greater than the decedent's probate estate. If the decedent were to disinherit her in his will, the spouse could still elect against the will and receive a share of the decedent's probate assets in addition to the provisions he had made for her "outside" the will unless such transfers are also used to satisfy the spousal share. *See* UNIF. PROBATE CODE § 2-202, 8 U.L.A. at 102-03.

augmented estate,[215] much to the chagrin of insurers.[216] "Indeed, the life insurance lobby seems determined to make its product exempt from the spouse's elective share."[217] In response to insurance lobbying, the Joint Editorial Board for the UPC responded:

> We deem it very important that the Security Life Legislative Alert does not put forward a principled case for distinguishing life insurance from other will substitutes nor, indeed, from wills themselves. The only argument that Security Life makes is that subjecting life insurance to the spouse's elective share would displease the decedent's non-spouse beneficiaries. That argument, if persuasive, would not merely support exempting life insurance from the elective share, but *all* donative transfers—by will or by will substitute. At its base, that argument, in other words, is an anti-spouse argument—an argument for entirely abolishing the elective share. It is, after all, also true that subjecting probate assets to the elective share displeases the decedent's legatees and devisees, for they may be forced to give up part of what the decedent wanted them to have (but did not have the right to give them). The same is true of beneficiaries of revocable trusts, surviving joint tenants, and other beneficiaries of nonprobate transfers.[218]

The American Law Institute is in accord with the National Conference of Commissioners on Uniform State Laws on the inclusion of life insurance and other nonprobate transfers in computation of the elective share.[219]

While many states have adopted the UPC augmented estate form,[220] Delaware has relied upon federal tax law in determining what kinds of transfers should be included in computing the elective share.[221] Delaware allows the spouse to elect against a deceased spouse's "estate" and defines the estate as the gross estate used in computing federal estate taxes.[222] The Internal Revenue Code interpretation of the gross estate includes many of the same lifetime

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215. *See, e.g.*, ALASKA STAT. § 13.12.205(1)(D) (Michie 1998); COLO. REV. STAT. § 15-11-202(2)(b)(I)(D), (3)(b) (1999) (including insurance in the computation of the elective share unless arranged as part of a dissolution agreement); HAW. REV. STAT. § 560:2-205(1)(D) (Supp. 1998); S.D. CODIFIED LAWS § 29A-2-205(1)(iv) (Michie 1997); UTAH CODE ANN. § 75-2-205(1)(d) (Supp. 1999) (including insurance proceeds only to the extent they do not exceed the greater of the cash surrender value of the property, or the payments made by the decedent).

216. *See* JOINT EDITORIAL BOARD FOR UNIFORM PROBATE CODE, *supra* note 21, at 12-18.

217. *Id.* at 2.

218. *Id.*

219. *See* RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 34.1(3) (1992); *see also* RESTATEMENT (THIRD) OF TRUSTS § 25 cmt. d (Tentative Draft No. 1, 1996) (disclosing revocable trust cannot be used to circumvent the elective share statutes).

220. *See supra* note 195 and accompanying text.

221. *See* DEL. CODE ANN. tit. 12, §§ 901–02 (1995 & Supp. 1998).

222. *Id.* §§ 901(a), 902(a).

transfers as the UPC.[223] This novel scheme relies upon the tax code for a service which it is most qualified to provide, preventing circumvention of the policies underlying the law by the use of form over substance.

The Iowa Trust Code, while not foreclosing the idea that the spousal share could be applied to revocable trusts in Iowa, would require a finding that the spousal elective share is a "claim" against the estate analogous to that of a creditor in order to support such a finding expressly.[224] Even such a finding would not expand the spousal share, rather it would only provide a source of assets to satisfy the share as computed under the Iowa Probate Code.[225] The share would still be computed based solely on probate assets but could be satisfied with assets which were held in a revocable trust.

2. *Judicial Intervention as an Alternative.*

Many states retain statutes which do not specify whether a surviving spouse can reach assets which pass outside of probate.[226] This leaves the courts to decide whether, and under what circumstances, nonprobate assets are subject to the spousal share.[227] Because of the lack of legislation, courts have fashioned several different approaches to the question of whether a spouse may collect against these assets.[228] However, precedent bound law in the area of estate administration and hesitant courts sometimes stand in the way of such an extension of the term estate.[229] The solutions have ranged from a complete refusal to apply the elective share to assets which are not subject to

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223. I.R.C. §§ 2031, 2033-2042 (1994 & Supp. III 1997); *see* UNIF. PROBATE CODE § 2-202 (amended 1990), 8 U.L.A. 102-03 (1998).

224. IOWA CODE ANN. § 633.3104 (West Supp. 2000).

225. Note under Iowa Trust Code § 633.3104, the assets of a trust are subjected to a creditors claims. *Id.* This would not require the assets of the trust be included in the computation of the spousal share. *Id.* Rather, the spousal share is determined under the elective share statute in the Probate Code. IOWA CODE § 633.238 (1999).

226. *See* ALA. CODE § 43-8-70 (1991); 755 ILL. COMP. STAT. ANN. 5/2-8 (West 1992); IND. CODE ANN. § 29-1-3-1 (West 1989); IOWA CODE § 633.238 (1999); MD. CODE ANN., EST. & TRUSTS § 3-203 (1991 & Supp. 1999); MASS. GEN. LAWS ANN. ch. 191, § 15 (West 1990 & Supp. 1999); MICH. COMP. LAWS ANN. § 700.2202 (West Supp. 1999); MISS. CODE ANN. § 91-5-25 (1999); MO. ANN. STAT. § 474.160 (West 1992); N.H. REV. STAT. ANN. § 560:10 (1997); N.C. GEN. STAT. § 30-1 (1999); OHIO REV. CODE ANN. § 2106.01 (Anderson 1998); OR. REV. STAT. § 114.105 (1997).

227. Karin Lalendorf, Note, Dumas v. Estate of Dumas*: The Ohio Supreme Court's Continued Endorsement of Spousal Disinheritance*, 25 U. TOL. L. REV. 847, 854 n.75 (1994).

228. *See* McClellan, *supra* note 190, at 617-27 (discussing the intent-to-defraud test, the illusory transfer test, and the present-donative-intent test used by courts).

229. Lalendorf, *supra* note 227, at 866.

administration[230] to the application of elective share statutes against certain nonprobate transfers regardless of the donor's intent in making them.[231] Between these extremes, however, the courts of some states have applied various tests in order to determine whether nonprobate transfers should be used to compute the spousal share. Potential claims for inclusion on a case-by-case basis include fraud on the spousal share, and claims that a trust was illusory.[232] Some claims are "necessarily founded on the notion that the claiming spouse's statutory rights in the deceased spouse's estate have been wrongfully impaired,"[233] while the argument for inclusion as a general rule of law would be that the transfers were in fact testamentary in character.[234]

a. *Fraud on the Spousal Share.* Similar to cases in fraudulent conveyance law regarding creditors, the result in a claim of fraud on the spousal share is somewhat unpredictable,[235] however, this approach has gained some acceptance.[236] The theory employs many factors that may help to determine whether a transfer was in fact intended to defraud the surviving spouse, presumably because the intent of the dead is particularly hard to prove.[237] These factors might include:

> the degree of control reserved by the settlor, [as well as] the amount transferred in relation to the size of the settlor's estate, the relationship between the settlor, his spouse, and the beneficiaries of the trust, the financial circumstances of the surviving spouse, property previously given by the settlor to the surviving spouse, the proximity of the challenged transfer to the date of the settlor's death, and the source of the property transferred.[238]

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230. *See, e.g., In re* Estate of Solnik, 401 So. 2d 896, 897 (Fla. Dist. Ct. App. 1981) (stating an argument to include nonprobate assets in computing the elective share "is unacceptably contrary to the unambiguous statutory language [the legislature] eventually chose" after rejecting the UPC).

231. *See, e.g.*, Sullivan v. Burkin, 460 N.E.2d 572, 577 (Mass. 1984) (holding revocable inter vivos trusts are subject to the spousal share regardless of the intent of the decedent in making the conveyance).

232. Daniel M. Schuyler, *Revocable Trusts—Spouses, Creditors and Other Predators*, 8 INST. ON EST. PLAN. ¶ 74.1301(A), at 13-3 (1974).

233. *Id.* at 13-2.

234. *Id.* at 13-3.

235. *Compare Id.* ¶ 74.1301(D)(1), at 13-5, *with supra* notes 62-64 and accompanying text.

236. McClellan, *supra* note 190, at 618-20.

237. *See* Schuyler, *supra* note 232, ¶ 74.1301(B), (D)(1), at 13-3 to -5.

238. *Id.* ¶ 74.1301(B), at 13-3.

At once, one notices striking similarities to the "badges of fraud" analysis to determine whether a conveyance is fraudulent.[239]

b. *Testamentary in Character or Illusory Trust Claims.* As an alternative to guessing at the intent of the dead, some courts have turned to determining only whether the decedent exercised such a degree of control over trust assets as to render the trust illusory.[240] Although the New York Court of Appeals used the illusory trust test in the context of a spousal share dispute, it used the test to entirely invalidate a trust when it took back all that was given.[241] However, it is not beyond the pale to find that a trust is illusory only as against spousal rights or the rights of creditors.[242]

These claims make the basic assertion that revocable trusts created for the benefit of the settlor are so similar to a will—because the settlor retains the benefit or use of the assets as well as the right to revoke the gift altogether or to appoint a new beneficiary—that they should be required to be executed with will formalities or, in the alternative, should be void.[243] This argument has not won the day,[244] although a variation of this argument has been used in the realm of creditors rights making the trust void as to a decedent's creditors.[245] Clearly, such a restricted holding—that a certain nonprobate transfer is void as applied to the election by a surviving spouse—is also possible regarding the spousal share.[246]

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239. *See supra* notes 62-64 and accompanying text; *see also* KLUEGER, *supra* note 62, at 41-42 (describing the badges of fraud used to identify fraudulent conveyances).

240. *See* Schuyler, *supra* note 232, ¶ 74.1301(C) at 13-4 to -5.

241. Newman v. Dore, 9 N.E.2d 966, 968-70 (N.Y. 1937).

242. *See generally* Sullivan v. Burkin, 460 N.E.2d 572 (Mass. 1984) (determining that revocable trusts should be subjected to the spousal share without invalidating the revocable trust).

243. These claims are the embodiment of the reason why nontestamentary transfers were initially held invalid. *See supra* Part II.C.

244. *See supra* Part II.C.

245. *See, e.g.*, Phillips v. Roe (*In re* Estate of Nagel), 580 N.W.2d 810, 812 (Iowa 1998) (holding "when the settlor of a revocable living trust dies, the property is . . . still subject to his debts"); State St. Bank & Trust Co. v. Reiser, 389 N.E.2d 768, 771-72 (Mass. App. Ct. 1979) (ruling bank could reach assets of an inter vivos trust to pay a debt owed by estate of the settlor of the trust); *In re* Estate of Kovalyshyn, 343 A.2d 852, 856 (N.J. Hudson County Ct. 1975) (invading a mutual fund held in a revocable trust to pay the just debts of a deceased settlor where probate assets were insufficient); Johnson v. Commercial Bank, 588 P.2d 1096, 1100 (Or. 1978) (ruling a creditor was entitled to reach trust assets to pay decedent's debt).

246. *See, e.g.*, Sullivan v. Burkin, 460 N.E.2d 572, 578 (Mass. 1984) (issuing a warning, in the future, revocable trust assets would be included in the "word 'estate' in its broad sense" and pointing out several other nonprobate transfers that might be ripe for similar attack). The court in *Sullivan* was particularly disenchanted with the difference in result between an assertion of a claim by a former spouse (creditor) as compared to that of the spouse at time of death given the state's

The Supreme Judicial Court of Massachusetts in *Sullivan v. Burkin*[247] seemed to shy away from the idea that a revocable trust could be considered testamentary for the purpose of the spousal share while remaining nontestamentary to the extent necessary to validate the trust as against the rest of the world.[248] Nonetheless, it asked the question "whether, even if the trust was not testamentary on general principals, *the widow has special interests which should be recognized.*"[249] The court had no qualms about comparing the revocable trust with other will substitutes that might be susceptible to subsequent attack.[250]

B. *Exempt Property: The Potential for Unintentional Disinheritance*

Many states exempt some private property from the claims of creditors against the decedent's estate by statutes which generally provide for an election to take either an amount of money as equity or property of the same value.[251] One commonality of these schemes is that they protect exempt property only in favor of the surviving spouse and children, or minor children, and would not provide for unrelated parties who are otherwise beneficiaries of a will.[252] This exempt property is that which the legislature has seen fit to set aside showing some small degree of favoritism for the family of a decedent over his creditors.

Although the adequacy of the exempt amount in any given jurisdiction is beyond the scope of this Note, it is worth pointing out the disparity in the amount of inheritance that a spouse or minor child may take that is not subject to creditors claims. The National Conference of Commissioners on Uniform State

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law regarding creditors as against the spousal share. *Id.* at 577; *see also* State St. Bank & Trust Co. v. Reiser, 389 N.E.2d at 771-72.

247. Sullivan v. Burkin, 460 N.E.2d 572 (Mass. 1984).

248. *Id.* at 575.

249. *Id.* (emphasis added).

250. *Id.* at 577-78.

251. Many state statutes conform directly with the UPC. *See* UNIF. PROBATE CODE § 2-403 (amended 1990), 8 U.L.A. 141 (1998). Other states applying basically the same format as the UPC vary the value of the amount exempted. *See, e.g.*, IDAHO CODE § 15-2-402 (1979) (limiting exempt property to $3500 in value); ME. REV. STAT. ANN. tit. 18-A, § 2-402 (West 1998) (exempting $3500 in property value); NEB. REV. STAT. ANN. § 30-2323 (Michie 1995 & Supp. 1999) (exempting personal property up to $3500 in value); S.C. CODE ANN. § 62-2-401 (Law. Co-op. 1997 & Supp. 1999) (limiting the exemption to $5000 in value). Several other exemption schemes have been applied to decedents' property. *See, e.g.*, MO. ANN. STAT. § 474.250 (1992 & Supp. 2000) (exempting several different types of property without regard to their value); UTAH CODE ANN. § 75-2-403 (1993 & Supp. 1999) (honoring the disposition of exempt property though non-probate transfers to children in the absence of a surviving spouse).

252. *See, e.g.*, UNIF. PROBATE CODE §§ 2-402 to -403 (amended 1990), 8 U.L.A. at 139-41 (limiting the allowance to the surviving spouse and dependent children).

Laws has increased the amount of both the homestead allowance exemption, and the exemption imposed on personal effects by the UPC to conform with inflation.[253] Although the statutes of most states are modeled directly after the UPC,[254] and many also adhere to the dollar amount as adjusted[255] the personal effects exemption statutes of some states have not kept pace with the increase in the UPC's exempt amount.[256] Similarly, homestead exemption statutes vary greatly in the value exempted.[257] As a class, these statutes represent a limited if not hollow victory for family protection over the rights of creditors, both of which are long recognized objects of the law of succession.[258] Some courts have stated that spousal rights are superior to the rights of a decedent's judgment creditors,[259] however, this view is not widely held.[260]

Most married people would prefer to leave most, if not all, of their estate to their surviving spouse.[261] One may choose to make this gift through the probate system or by nonprobate transfers. However, the question that has not yet been answered is whether exemptions in favor of the spouse or children

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253. *Id.* §§ 2-402 cmt., 2-403 cmt., 8 U.L.A. at 140-41 (creating a homestead exemption of $15,000 and allowing for exempt property valued at $10,000).

254. *See supra* note 251.

255. *See* ALASKA STAT. § 13.12.403 (Michie 1998); MONT. CODE ANN. § 72-2-413 (1999); UTAH CODE ANN. § 75-2-403 (1993 & Supp. 1999).

256. Some states retain the $3500 exemption provided for by the UPC in 1969. *Compare* UNIF. PROBATE CODE § 2-402 cmt., 8 U.L.A. at 331 (prior to amendments to adjust for inflation), *with* ALA. CODE § 43-8-11 (1991) (providing for a $3500 exemption), *and* IDAHO CODE § 15-2-402 (stating a surviving spouse of a decedent is entitled to a $3500 exemption), *and* ME. REV. STAT. ANN. tit. 18-A, § 2-402 (providing for a $3500 exemption), *and* MICH. COMP. LAWS § 700.286 (1995) (retaining a $3500 exemption). Other states have exemptions, which are greater than the old UPC but do not conform to the new UPC. *Compare* UNIF. PROBATE CODE § 2-403, 8 U.L.A. at 141, *with* ARIZ. REV. STAT. § 14-2403 (1995) (exempting $7000 worth of personal effects); NEB. REV. STAT. § 30-2323 (exempting $5000 for personal effects); S.C. CODE ANN. § 62-2-401 (exempting a value of $5000).

257. *Compare* IDAHO CODE § 15-2-401 (exempting only $4000 of the estate as a homestead exemption), *with* ALASKA STAT. § 13.12.402 (exempting $27,000 of the estate for a homestead exemption).

258. *See supra* notes 1-3 and accompanying text.

259. *See* Quick v. Davidson, 545 S.W.2d 917, 919 (Ark. 1977) (noting the "rights of curtesy were superior to that judgment" for purposes of computing a monetary interest of a deceased spouse in the proceeds of a sale forced by a creditor).

260. Smyth v. Cleveland Trust Co., 163 N.E.2d 702, 708 (Ohio Ct. C.P. 1959) (stating "[c]ertainly a spouse's rights should be superior to those of a creditor), *aff'd in part, rev'd in part*, 179 N.E.2d 60, 64 (Ohio 1961) (reexamining "the extreme position . . . in the light of the statutory law of [Ohio], the previous decisions of [the] court and the more recent trend in the law tending to recognize the *inter vivos* trust in its traditional form"); *In re* Estate of Beeruk, 241 A.2d 755, 759 (Pa. 1968) (finding creditor's rights superior to those of the surviving spouse).

261. RANDOLPH, *supra* note 16, at I/7.

would be applicable to transfers outside of probate. Although it would be more likely that such transfers in augmented estate jurisdictions might enjoy the protection as a matter of consistency, the answer is unclear in the UPC.[262] In jurisdictions which have not adopted the 1990 revisions to the UPC, the answer is even more uncertain. This presents the real potential for unintentional disinheritance of a spouse in states where creditors have access to nonprobate transfers after the death of the decedent. Although the testator may have chosen to pass the bulk of his estate to his spouse outside of probate, she may or may not enjoy protection under these exemptions merely because of the form of the transfer, not its character.

VI. "ABATEMENT" AND INTENT

> Exploration of the development of legal rules applying to will substitutes presents an opportunity to understand how courts have searched mistakenly for a property owner's intent to achieve a legal result. When presented with an attempted testamentary-like transfer, courts frequently assumed that the donor had taken sufficient action to manifest an intent to make a transfer. Equal planning under the law suggests that a further inquiry into intent was unnecessary. Nevertheless, the courts went on and asked whether the donor manifested an intent to make a present transfer of a future interest to a donee or to make a testamentary transfer. This issue arose because it was a key element in the courts' reasoning why the states' wills statutes did not apply.[263]

Every probate scheme includes an order of abatement for instances where claims against the estate cause a reduction in the estate, such that all of the postmortem gifts may not be paid from the remaining balance of the probate estate.[264] "This plan is believed to follow the testator's intent . . . ." [265] Certain types of gifts, such as a residuary clause, are deemed to be a less clear expression of the decedent's intent to make a gift than are gifts or devises of specific tracts

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262. UNIF. PROBATE CODE §§ 2-401 to -403 (amended 1990), 8 U.L.A. 139-41 (1998) ("This Part applies to the *estate* of a decedent," while so much of the revised UPC, as applied to the surviving spouse, applies to the *augmented* estate which includes will substitutes).

263. Mary Louise Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611, 617 (1988).

264. DUKEMINIER & JOHANSON, *supra* note 45, at 374-75 (noting in the typical order of abatement: "(1) residuary bequests are reduced first, (2) general legacies [typically a gift of money or a certain number of securities] are reduced second, and (3) specific [gifts of particular items or] demonstrative legacies [gifts from a particular source] are the last to abate and are reduced pro rata").

265. *Id.* at 375.

of land or bequests of particular items.[266] This order of abatement is a contingent system set up to honor those gifts that the testator expressed through clear intent in those situations where honoring all of the testamentary gifts made by the testator is impossible.

Likewise, the importance of the testator's intent is enshrined in the common Wills Act, requiring certain formalities in order to validate an attested will.[267] The formalities are required to ensure that the will is an accurate statement of what the testator intended.[268]

> One fundamental proposition is that, under a legal system recognizing the individualistic institution of private property and granting to the owner the power to determine his successors in ownership, the general philosophy of the courts should favor giving effect to an intentional exercise of that power. . . .
>
> If this objective is primary, the requirements of execution, which concern only the form of the transfer—what the transferor or others must do to make it legally effective—seem justifiable only as implements for its accomplishment, and should be so interpreted by the courts in these cases. They surely should not be revered as ends in themselves, enthroning formality over frustrated intent.[269]

The general rule, in jurisdictions which allow creditors access to some nonprobate assets of a decedent, is that the claimant must first exhaust the decedent's probate assets.[270] The Iowa Trust Code provides the assets of a revocable trust settled by a debtor are subject to the claims of the debtor's creditors after his death to the extent "the settlor's estate is inadequate to satisfy those claims and costs."[271] One argument for this anomaly might be the established system for probate and administration of wills—at least arguably—

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266. Michael Hancher, *Dead Letters: Wills and Poems*, 60 TEX. L. REV. 507, 521-22 (1982). It follows that if the decedent gave the residuary legatee—or beneficiary—what "was left over" after other gifts had been made, it is possible nothing would be left over, even in the absence of an election against the will, or assertion of a creditor's claim. *Id.* Even if some amount remained, that amount would be uncertain. However, it is equally true when the decedent makes a gift in the will of a gold watch to a legatee, his intention is crystal clear. *Id.*

267. *See* Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 5-13 (1941).

268. *See id.*

269. *Id.* at 2-3.

270. *See supra* text accompanying note 76; *supra* note 104 and accompanying text; *see, e.g.*, IOWA CODE ANN. § 633.3104(2) (West Supp. 2000) (stating that the property of a revocable trust is subject to the settlor's estate's inadequacy to satisfy claims of creditors and costs of administration).

271. IOWA CODE ANN. § 633.3104(2).

executes the efficient determination and payment of both the creditors' claims and the potential spousal share.[272]

Requiring that the probate estate be exhausted prior to attacking nonprobate transfers at death does not comport with the heightened indication of intent, which is the ultimate goal of the Wills Act.[273] This discrepancy is very apparent in revocable trusts, *Totten* trusts, and TOD accounts,[274] which would seem to be the nonprobate, functional equivalents to a residuary clause giving the recipient whatever remains in the account or trust at the decedent's death.[275] If we are to allow the invasion of nonprobate assets in addition to invading the probate estate, the result will often be the distortion of the decedent's estate by abating first testamentary gifts which bear a higher standard to prove intent by conforming with the Wills Act and may present a more specific gift than that given by the will substitute.

VII. SPLITTING THE POLICY HAIR

The debate over the inclusion of revocable trusts and other will substitutes in the computation of the spousal share, and the arguments advanced by creditors against nonprobate assets[276] lays bare the opportunities as they exist for reforming the law of succession. Clearly, the problem with which reformers are faced is the means by which we have upheld will substitutes would not allow their being fitted neatly into the probate form of public policy enforcement.[277] Judicial hair splitting over which wills doctrines to apply to will substitutes have been haphazard at best[278] and, at worst, display a blatant disregard for valid legislative policies.[279]

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272. *See* DUKEMINIER & JOHANSON, *supra* note 45, at 38.

273. *See* Gulliver & Tilson, *supra* note 267, at 3.

274. *See supra* note 75 and accompanying text; *see also* UNIF. PROBATE CODE § 6-215 (amended 1991), 8 U.L.A. 442-43 (1998) (allowing the invasion of *Totten* trusts and TOD accounts "to the extent necessary to discharge the claims . . . remaining unpaid after application of the decedent's estate").

275. This statement requires that one view the transfer as separate and distinct. Notice in the alternative, these gifts could be characterized as specific bequests in the overall estate plan. The argument would be that decedent intended the recipient to have the contents of the specific account.

276. *See supra* Parts IV.A, V.A.2.a-b.

277. *See supra* Part II.C.

278. Unwillingness of courts to decide questions not yet presented is likely to leave litigants in other areas of trust law which might be equally subject to public policy attack without the same remedies that they would otherwise have if the same property had been subject to probate.

279. The Ohio Supreme Court has repeatedly held invalid attacks on revocable trusts that were based upon statutory language applicable to wills. *See, e.g.*, Dumas v. Estate of Dumas, 627 N.E.2d 978, 983 (Ohio 1994) (preventing disinherited spouses from electing against the revocable

"Formal requirements for wills have been reduced. . . . [However, f]or the law to invalidate nonprobate transfers would do more harm than good . . . ."[280] Subjecting revocable trusts and other will substitutes to probate would have its "drawbacks."[281] What could be lost are the benefits that do not inhere from avoidance of a valid policy, but rather, benefits such as lowered cost, privacy, choice of law controlling the transfer, and continuous—or more prompt—payment to beneficiaries after death.[282]

Clearly, subjecting will substitutes to probate and administration is a result that few would approve.[283] However, in order to maintain integrity, one must also concede that will substitutes should be subject to valid policy driven restraints.[284] While policy might be a factor in the fashioning of equitable remedies by the judiciary,[285] it is more properly the purview of legislatures to enforce public policy.[286]

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trust of a decedent); Schofield v. Cleveland Trust Co., 21 N.E.2d 119, 122-23 (Ohio 1939) (holding a decedent's creditors could not reach the assets of a revocable trust as a result of restrictive statutory language); *see also* Lalendorf, *supra* note 227, at 854 (stating in *Smyth v. Cleveland Trust Co.* the court focused on "the need to respect a valid trust as a will substitute . . . [and] no mention [was made] of Ohio's longstanding policy to protect the spouse from disinheritance"). The court's avoidance of activism, while ignoring the legislative policy, is at least commendable for its consistency in applying plain language, rather than opening a judicial can of worms.

280. William M. McGovern, Jr., *Nonprobate Transfers Under the Revised Uniform Probate Code*, 55 ALB. L. REV. 1329, 1353 (1992).

281. *Id.* "Courts have winked at evasions of probate because they understood its drawbacks, and thought the formal requirements for wills were unnecessarily strict." *Id.* at 1352-53.

282. Critics of probate avoidance have downplayed the benefits of probate avoidance as being overstated. *See generally* Kruse, *supra* note 46, at 1131, 1134 (preaching caution in the use of revocable trusts because of the potential that the benefits sought will, in some circumstances, be illusory); Solomon, *supra* note 49, at 34-37 (comparing "perceptions" with "reality"); Wagner, *supra* note 47, at 218-19 (comparing "misconceptions" about probate avoidance with "reality). Notice that other valid benefits of the revocable trust, such as the ability to test the responsibility of trustees and beneficiaries and providing for incapacity during the settlor's life, would be attained even if revocable trusts were subjected to the probate process in its entirety because these benefits accrue prior to the grantor's death and the rigors of the probate process.

283. William McGovern, Jr. argues because the two systems—wills and revocable trusts—"perform the same function, discrepancies between them should be eliminated," however, Dacey and his minions would vehemently disagree. McGovern, *supra* note 280, at 1353; *see also* DACEY, *supra* note 15, at 8-36 (complaining about the probate system and the players involved and suggesting avoidance as an alternative).

284. *See* SCOLES & HALBACH, *supra* note 16, at 319.

285. Anderson v. Abbott, 321 U.S. 349, 366-67 (1944) (emphasizing the importance of public policy in fashioning equitable remedies).

286. Rembe v. Stewart, 387 N.W.2d 313, 315 (Iowa 1986).

The UPC, as a whole, presents one method of dealing with the similarities between wills and other donative transfers, without subjecting them to the full blown rigors of probate. While the UPC does place restrictions on assets held in a will substitute form by applying various wills doctrines,[287] it retains distinctions sufficient to avoid cumbersome probate problems.[288] The 1990 amendments were prompted by "the recognition that will substitutes and other inter vivos transfers have so proliferated that they now constitute a major, if not the major, form of wealth transmission . . . ."[289] The aim was to recognize this shift to nonprobate transfers, "mainly, in measures tending to bring the law of probate and nonprobate transfers into greater unison."[290] The result has been to attack the avoidance of valid social policy without applying to revocable trusts the "outmoded rules [and] rigid concepts of technical disabilities" typically associated with the probate of wills.[291]

VIII. CONCLUSION

Although the law of inheritance is replete with structural inconsistencies,[292] probate reform is "hardly a hot-button issue."[293] Instead, the slow evolution of the law of inheritance seems more geological than biological. Reform is slow to occur and does not seem to take a steady pace. Rather, "landslide" developments occur, after which the complex environment will begin to slowly acclimate to the affected area. Given the fact that reform, which is unimportant to the legislature,[294] often takes place in the courts in the environment of a complex, long-standing, statutory backdrop and is always—supposedly—subject to the reigns of judicial restraint, this analogy is particularly apt.

The coherent patterns do appear in the comparison of the rights of spouses and creditors seem to indicate that in jurisdictions where one group is allowed a

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287. *See, e.g.*, UNIF. PROBATE CODE § 2-202 (amended 1990), 8 U.L.A. 102-03 (1997) (allowing a spouse to elect against not only the will, but, among other things, revocable trusts).

288. *Compare id.* §§ 6-601 to -609, 8B U.L.A. at 82-98 (applying some rules of construction only to wills), *with id.* §§ 7-701 to -711, 8B U.L.A. at 99-122 (applying other rules of construction to both wills and revocable trusts); *compare also id.* § 2-202, 8B U.L.A. at 39-44 (defining the augmented estate as including revocable trusts), *with id.* § 001(10), 8B U.L.A. at 11 (defining the estate in the same words as the 1969 version of the Act).

289. 8 U.L.A. 75 (1997) (containing prefatory note to the Uniform Act on Intestacy, Wills, and Donative Transfers).

290. *Id.*

291. SCOLES & HALBACH, *supra* note 16, at 319.

292. Hirsch, *supra* note 10, at 1139-40.

293. RANDOLPH, *supra* note 16, at I/6.

294. *Id.*

right as against nonprobate assets, the law is typically destined to change in order to allow claims by the other.[295] However, so long as we retain a "checkerboard" approach[296] of separate treatment for wills and their substitutes in the application of substantive doctrines, we continue to operate a fertile playground for the imaginative estate planner to draft some new transfer just beyond the reach of those with valid claims against a decedent's estate. "[A] logical, internally consistent system for transferring property at death requires a rethinking of the doctrinal foundations of the present system, as opposed to the use of piecemeal 'solutions' . . . ."[297]

"Once people accepted law for the good it could do in its fundamental purpose, they, for some reason, assumed it could do even more if expanded. Those in control of the law never failed to expand it and usually for their own greedy purposes. A fundamental law is enough . . . ."[298]

> The law would function better if it admitted that will substitutes are simply "nonprobate wills." The inconsistent treatment of identical interpretive questions raised by wills and will substitutes is often linked to the mischaracterization of will substitutes as lifetime transfers. The law of wills has reached sound solutions to the interpretive questions . . . . The result would be a unified American law of succession.[299]

Holdings like *Nagel*, and statutes such as section 633.3104 of the Iowa Trust Code[300] in jurisdictions which have not adopted augmented estate statutes seem incongruous with the existing law and create more questions than they resolve. Judicial intervention can make only piecemeal efforts to solve this

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295. Those jurisdictions which have adopted a particular stance on the issue of creditors rights as against revocable trusts have also adopted some system through which a spouse may elect against revocable trusts. *Compare* State St. Bank & Trust Co. v. Reiser, 389 N.E.2d 768, 771 (Mass. App. Ct. 1979) (allowing creditors to reach assets held in revocable trusts), *with* Sullivan v. Burkin, 460 N.E.2d 572, 577-78 (Mass. 1984) (holding revocable intervivos trusts are subject to the spousal share regardless of the intent of the decedent in making the conveyance); *compare also In re* Estate of Kovalyshyn, 343 A.2d 852, 859 (N.J. Hudson County Ct. 1975) (holding debts must be paid first when assets held in revocable trust), *with* N.J. STAT. ANN. §§ 3B:8-1, :8-3 (West 1998) (employing a bare bones version of the UPC's augmented estate system). *But compare* Johnson v. Commercial Bank, 588 P.2d 1096, 1100 (Or. 1978) (holding creditors may reach assets in trust after death), *with* OR. REV. STAT. § 114.105 (1997) (presenting a more traditional elective share statute which is subject to interpretation).

296. *See* Hirsch, *supra* note 10, at 1137 (citing DWORKIN, *supra* note 67, at 164-224).

297. Miller, *supra* note 4, at 174.

298. DONALD L. KIMBALL, THE CHOICE: FREEDOM OR SLAVERY 9 (1982).

299. Langbein, *supra* note 5, at 1140-41.

300. IOWA CODE ANN. § 633.3104(2) (West Supp. 2000) (providing that revocable trusts are subject to the claims of a settlor's creditors after her death).

problem of inconsistency, while the revised UPC presents a more principled and consistent system. The trend is clearly toward allowing access to will substitutes for both creditors and surviving spouses who elect against the will. The legislatures of states such as Oregon and Iowa, where the courts have adopted one policy, should clearly reconsider the adoption of the other in order to properly strike the balance between these competing interests of freedom of testation, spousal protection, and creditor's rights.

Unless and until broad based legislative reform takes place, many states will remain in the quagmire of uncertainty concerning the applicability of policy-driven substantive restrictions on testation to a decedent's nonprobate, but essentially testamentary transfers. However, given political pressures on legislatures from those interested in both the probate system, and the avoidance of probate by some transfers, it seems unlikely that legislatures will be willing to review the importance of those policies expressed in their probate codes to determine whether their reach should be extended. In reforming the law of succession, legislatures should set forth clearly whether the policy favoring creditors should bend in favor of spousal protection in the law of both wills and will substitutes, and if so, to what extent.

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