

Don't Forget About the Fakes

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Reid Kress Weisbord & David Horton, [Inheritance Forgery](#), 69 **Duke L. J.** 855 (2020).

In the Estates textbook I use, most of the will execution cases involve testators whose clear intent is unrealized because they bungled strict execution requirements. The Uniform Probate Code and the *Restatement (Third) of Property: Wills and Other Donative Transfers*—mainstays in any Estates class—are drafted to minimize the possibility of formal requirements interfering with testator intent. Reid Kress Weisbord and David Horton's *Inheritance Forgery* is a counter-narrative that demonstrates how forgery remains a real and substantial risk of which the law must take account.

Weisbord and Horton argue that “counterfeit donative instruments are a serious problem.” (P. 855.) They focus on three donative transfers: wills, deeds, and life insurance beneficiary designations. To explore the prevalence of forged wills, the authors conduct empirical research in Alameda County, California. In a dataset consisting of every matter on the probate court's docket in a one-year period, ten percent of will contests involved a forgery claim. (P. 876.) To document the forgery risk with deeds, the authors examine reported opinions since 2000, grand jury reports, and journalistic accounts of cases that were never litigated. As Weisbord and Horton explain, “these cases and stories share a common thread: deed forgers tend to prey on property that is owned by a decedent's estate.” (P. 883.) To demonstrate that courts “routinely preside[] over claims that a life insurance form was falsified or fabricated,” the authors study reported opinions since 2000. (P. 889.) This empirical work reveals the extent to which forgery threatens the integrity of donative transfers.

Will forgery remains such a problem because policy makers fail to appreciate that it *is* a problem. Instead, the popular perception is that “forged wills are rare” and “just the stuff of novels.” (P. 870.) The Restatement (Third) does not even include forgery on its list of grounds for refusing to probate a will. (P. 871.) The Uniform Probate Code and some states have abolished purging statutes that disincentivize beneficiaries from serving as witnesses; the Uniform Probate Code allows testators to use a notary instead of two witnesses; and in the most recent developments the Uniform Law Commission and some states have endorsed electronic wills. Unless policy makers appreciate the prevalence of forgery, they underestimate the risks inherent in each of these statutory changes. Moreover, Weisbord and Horton argue, the lack of attention to will forgery creates “festering areas of doctrinal uncertainty”, including issues about the burden of proof and burden shifting; whether a judge may look beyond the four corners of an instrument to determine due execution; and the “shaky science” of forensic handwriting analysis. (P. 882.)

The risk of forgery also plagues life insurance beneficiary designations, largely because life insurance companies lack adequate incentives to police for forgery. Under the rules of interpleader, the insurer that sues to compel adverse claimants to resolve their conflict can recover costs and attorney's fees. Moreover, an insurer who learns of a forgery after it has paid the death benefit can fall back on facility-of-payment statutes. These statutes shield insurers from liability if they have acted in good faith and paid proceeds to the beneficiaries named on the policy—even if the names of those beneficiaries were forged. (P. 890.) Moreover, impleader rules and facility-of-payment statutes “create perverse incentives for insurers to avoid scrutinizing death-beneficiary designations.” (P. 890.) This is because the less insurers know about the authenticity of the signature, the easier it is for the insurer to reap the benefit of the facility-of-payment statute and recover costs and fees in the interpleader action. Because less knowledge is advantageous to the insurer, companies make only “hollow gestures toward discouraging forgery.” (P. 891.)

Forgery on deeds may seem like a real property problem, not an estates problem. But Weisbord and Horton explain

that forgers have “discovered another soft target: vacant real estate owned by the recently deceased.” (P. 885.) When a parcel is unoccupied and moving through the probate process, a counterfeit deed or trespasser may not be immediately detected. (P. 885.) Often the forger’s job is simple because recording a fake deed is “shockingly easy.” (P. 884.) The “overwhelming majority of Deed Registers [do] not try to authenticate legal instruments,” and many states expressly prohibit them from passing upon the validity of deeds because Registers are merely “ministerial officers.” (P. 884.) While all fake deeds are void, “untangling these legal knots can be time-consuming and expensive.” (P. 887.)

Weisbord and Horton’s explanation of why forgery is a contemporary problem previews their solutions. For beneficiary designations, they propose rule changes that would force life insurance companies to shoulder the burden of deterring forgery. For deeds, they suggest authentication protocols that would make it difficult to record a forged document. For wills, they are careful to note that many of the Uniform Probate Code’s innovations—harmless error, the abolition of purging statutes, and holographic wills that only have material portions in the decedent’s handwriting—do not appear to increase the possibility of forgery. (Pp. 895-96.) However, Weisbord and Horton are skeptical of the trend to allow a notary to substitute for witnesses because “crooked notaries” appear in an alarmingly number of the will forgery cases. (P. 878.) The authors also are concerned about the potential of forgery with electronic wills and argue that authentication characteristics must be hard to fabricate, such as biometric measures. (P. 898.) Weisbord and Horton also advocate for reform of burden shifting and other doctrinal rules so as to eliminate the “powerful procedural advantage” held by the proponent of a will. (P. 899.)

From the first sentence to the last, *Inheritance Forgery* functions as a wake-up call: forgery is a modern-day problem that thwarts the intent of decedents and weakens our system of donative transfers. Policy makers should take note.

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