End-of-Life Health Care Decision Making: Lessons for Wills, Trusts and Estates Law

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Jane B. Baron, *Fixed Intentions: Wills, Living Wills, and End-of-Life Decision Making*, 87 **Tenn. L. Rev.** __ (forthcoming, 2020), available at SSRN.

For years, I have tried to understand why my father refuses to execute a will or an advance directive, even though my sisters and I have asked him to please "make plans for the future." As a not-so-subtle nudge, I have told him stories of siblings torn apart by disagreements over health care decisions when a parent is incompetent and disagreements over property distribution after a parent's death—family feuds that might have been prevented by an advance directive or a will, respectively. After reading Jane Baron's article, *Fixed Intentions: Wills, Living Wills, and End-of-Life Decision Making*, I have a clearer understanding of the reasons that might underlie my father's reluctance.

In the article, Baron challenges estates law's fundamental assumptions that: (1) all or most individuals have intentions with regard to the disposition of their property at death, (2) these intentions are fixed, and (3) these intentions should be recorded in a written document. Drawing on studies of end-of-life health care decision making that explain why efforts to increase the use of advance directives have failed, Baron concludes that similar reasons may apply in the property distribution context. Specifically, she argues, if some individuals do not care to make decisions about their medical treatment should they become incompetent, it is likely that some individuals similarly do not care to make decisions about disposition of their property after death.

Baron acknowledges that some individuals do wish to make health care decisions post-competency, as demonstrated by execution of advance directives, but she notes that studies have shown that these intentions are often fluid. Patients change their minds and contradict the preferences they expressed in the advance directive, or the health care proxy challenges the advance directive as inconsistent with the patient's true preferences. Baron argues that the numerous instances of testators who attempt to change their wills by making handwritten notations on them or by making oral statements that are inconsistent with the dispositions expressed in their wills strongly suggest that the intentions recorded in testamentary instruments are similarly fluid. Intentions may shift depending on a number of factors, including changes in health and relationships with family members, which make wills unreliable indicators of testators' intentions—at least in some cases.

Baron concedes that decisions about property distributions after death are not the same as those involving end-of-life health care. She recognizes that because wills operate at death, not incompetence, and thus do not affect the testator or have any financial implications for the testator, wills may not be as emotionally challenging as end-of-life health care decisions. She also acknowledges that health care decision making might inherently be more complex due to the number of potential illnesses, medical conditions, and interventions that no individual could foresee.

However, Baron identifies a number of similarities between the two that demonstrate the relevance of the studies on end-of-life health care decision making to estates law. She points out that both wills and advance directives may take effect long after execution during which health status, family circumstances, or relationships may have changed, thereby affecting the individual's preferences. She also argues that the cognitive biases that limit individuals' abilities to predict preferences—such as how their wishes might change as they near death or are in an emotional state—apply in both the end-of-life medical treatment and end-of-life property distribution contexts.

These observations are critical to estates law given its central focus on honoring individuals' fixed intentions, even

though only a minority of American adults have a will. As Baron notes, the testator's intention is the polestar of estates law, including intestacy law which aims to distribute property based on the imputed intentions of the majority of decedents if only they had recorded their intentions. But Baron questions the law's assumption that most individuals have fixed intentions. In her view, "[t]he literature on end-of-life health care decision making suggests that the group of individuals for whom conventional wills law is inapposite may be larger than has previously been understood." (P. 25.) She contends that the studies on end-of-life health care decision making "suggest that [individuals'] failure to make wills is not a function of irresponsibility, but of more complex emotions." (P. 25.) She stresses that "[e]nd-of-life property decisions require people to confront death, family, and property in one simultaneous act," and thus, "it is not entirely surprising that faced with these potent forces many individuals will not actually want to make final decisions." (P. 25.)

Baron's recommendations are wisely modest, raising questions for further study rather than proposing radical reforms without empirical support. Given the lack of empirical evidence about individuals' reasons for making a will or not making one, or the reasons and frequency with which individuals' preferences about the wills they made change, Baron calls for research examining individuals' attitudes and preferences. Under our current fixed-intentions paradigm, the attorney's role is assumed to be that of a scrivener who records the client's wishes. But as Baron explains, if research reveals that some individuals do not wish to make specific decisions about how to distribute their property after they die and that testators' preferences are influenced by their emotional state and the way in which the attorney frames possibilities, it may lead to a reexamination of the law's assumptions about the role of estates attorneys and how they should counsel clients.

While Baron does not suggest radical changes at this moment, she does ask thought-provoking questions. If the research reveals that some individuals' intentions with respect to the distribution of their property at death are fluid, should wills law consider a conversational model currently used in the end-of-life health care decision making context, she asks? She does not suggest that the law discard formal wills but rather that it consider giving effect to a testator's informal statements in cases in which persuasive evidence demonstrates that the testator's preferences have shifted. In her view, "if, as the studies of end-of-life health care decisions suggest, preferences are unstable and changing, why should the earlier-formed preferences stated in a will control over later-formed preferences not stated in a documentary document? Why not accept alternative ways of expressing end-of-life property decisions?" (P. 48.)

After reading Baron's compelling article, I was left with one burning question. What might this research on individuals' intentions with respect to end-of-life property distribution suggest the law do, if anything, to encourage individuals like my father who are likely to refuse to make a will even if the law were to consider informal expressions of their preferences? Is intestacy the only solution for individuals who do not wish to decide who should get what upon their death? Or, should the law consider a conversational model of estate planning that includes the individual and their family members? Would individuals who reject formal wills benefit from a conversation with an estates attorney and family members about their values and goals even if it does not result in a formal will? Some families are attempting to engage in these conversations but are doing so without the benefit of an attorney or the guidance of the law. What is the role of law and attorneys when individuals reject formal wills?

Baron's article unsettles our assumptions and leaves the reader wanting to know more. That is the measure of excellent legal scholarship. It is a must-read piece for practitioners, teachers, and students alike.

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