Honoring Decedents' Wishes—Non-Probate Devices Included

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Melanie B. Leslie and Stewart E. Sterk, *Revisiting the Revolution: Reintegrating the Wealth Transmission System*, 56 **B.C. L. Rev.** 61 (2015).

Two years ago, my friend Myra[1] died of cancer. She was survived by her husband Scott and their six-year old daughter Isla, as well as her parents, siblings, and many nieces and nephews. As Scott tried to make sense of his wife's death, he was somewhat comforted by the knowledge that her pension and life insurance would cover the mortgage and keep their daughter in the only school she had ever known—the school where her mother had taught kindergarten.

Scott's comfort was short-lived. Although Myra did have a pension and life insurance, neither Scott nor their daughter were the beneficiaries. When Myra began working as a school teacher many years ago, she designated her mother and only nephew at the time as the beneficiaries of her life insurance and state pension. Years later, she married Scott and had a daughter together, but never updated her beneficiary designations. She simply forgot. But she also believed that because she did not have a will, Scott would inherit everything she owned and use it to take care of their daughter. She was wrong. Although Scott inherited her very modest intestate estate, her pension and life insurance benefits went to her mother and oldest nephew instead of Scott—her intended beneficiary and intestate heir.[2] The family was torn apart and Isla has had almost no contact with her maternal relatives since her mother's death.

In their article, *Revisiting the Revolution: Reintegrating the Wealth Transmission System*, Professors Melanie B. Leslie and Stewart E. Sterk illustrate the law's failure to address the problems created by the proliferation of non-probate instruments. This failure has deprived intended beneficiaries, like Scott, of assets that the decedent intended them to take and has also enabled wrongful takers, including former spouses, to receive assets that the decedent clearly did not want them to have.

Many individuals hold the bulk of their assets in non-probate instruments, such as retirement accounts, life insurance contracts, payable on death (POD) bank accounts, and revocable trusts. These instruments are not governed by wills law doctrines or the default rules of intestacy—rules that aim, among other goals, to honor decedent's likely intent. Yet, the law does little to effectuate (and sometimes even frustrates) the decedent's intent when her assets are held in non-probate instruments. As Leslie and Sterk demonstrate, these non-probate instruments have led to a fragmented and uncoordinated wealth transfer system in which donors, lawyers, and beneficiaries often lack accurate and complete information. They have also increased both the likelihood of error when creating an estate plan and the risk that wrongful takers of assets held in non-probate devices will squander them before their rightful beneficiaries have an opportunity to claim them.

Leslie and Sterk remind us that these problems were not unforeseen. They note that thirty years ago Professor John Langbein cautioned that non-probate transfers would create some potential challenges but he was optimistic that these would be addressed by lawmakers and financial intermediaries. Yet, they have not been. Leslie and Sterk's examination of the beneficiary forms provided by insurance companies demonstrate that these forms are rarely designed to carry out the donor's intent. In fact,

they are often downright confusing—even to experts like Leslie and Sterk. In addition, state legislators have failed to extend wills law doctrines that are designed to effectuate the decedent's intent (such as anti-lapse statutes, revocation-upon-divorce rules, and doctrines dealing with spouses and children omitted from a will) to non-probate assets.

In Leslie and Sterk's view, the benefits of avoiding probate are sufficiently advantageous that we should not throw the baby out with the bath water. Consequently, they focus on reforms that would allow donors to continue to transfer wealth outside of the probate process while also ensuring that non-probate transfers accurately reflect the donor's intent. For example, they recommend the creation of statutory forms for non-probate transfers to ensure donors understand the transfers they are making. They also recommend that states require custodians of non-probate assets to notify the decedent's spouse and children of their existence and that they wait thirty to sixty days before distributing the assets to the designated beneficiaries to ensure that they are not dissipated before the intended takers have an opportunity claim them.

Their most important proposal, in my view, is one that some states and the UPC have adopted, but not fully. Leslie and Sterk propose extending all of the wills law doctrines designed to carry out decedent's intent to non-probate instruments. Although some states apply certain intent-furthering doctrines (like revocation-upon-divorce) to both probate and non-probate instruments, they have not extended all of these doctrines to non-probate devices. Had the rule dealing with an omitted spouse in a will (UPC 2-301) applied to Myra's pension and life insurance, Scott would have received Myra's entire pension and life insurance, as she wished.

Leslie and Sterk's most controversial reform is probably their recommendation to grant executors and administrators authority to alter the decedent's non-probate transfers when they believe the transfers would thwart the decedent's overall estate plan. Such power risks increased litigation from beneficiaries who receive less after the executor's or administrator's adjustments than under decedent's designation (as Leslie and Sterk acknowledge). It could also take us down a dangerous road that, in my view, is best avoided. It is quite challenging for neutral factfinders in a courtroom with clear evidentiary rules to determine a decedent's wishes. I think it would be more difficult, maybe impossible, for an executor or administrator (who is often a family member or friend) to objectively ascertain decedent's wishes even if she lacks a financial interest in the disposition of assets.

One of Leslie and Sterk's reforms directly addresses the problem of forgetful donors. They propose creating a nationwide *voluntary* registration system that would list each individual's nonprobate transfers. Anytime a registered individual (again, registration is *voluntary*) attempts to make a transfer, the financial intermediary would remind her about her past designations. This reminder might be all some individuals need to help them coordinate their non-probate transfers and incorporate them into their overall estate plan. Other donors, like Myra, might benefit from an annual email reminder to check their beneficiary designations to make sure they reflect their wishes.

My initial reason for selecting this article as a Jotwell read was personal as I saw firsthand how a nonprobate transfer tore a family apart. However, the reforms Leslie and Sterk recommend are sure to help carry out the intentions of countless decedents even when they chose to avoid probate.

1. The name of the decedent and her family members have been changed to protect their privacy.
2. Myra was a state employee. As such her benefits were not governed by the federal Employee Retirement Income Security Act of 1974 (ERISA) which would have entitled Scott, as her spouse, to at least half her pension.

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