Law on the Books Meets Law in Action

Author : Kerry Ryan

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David Horton, *Wills Law on the Ground: Empirically Assessing Probate Reform*, 62 **UCLA L. Rev.** (forthcoming, 2015), *available at* SSRN.

This article contains a fascinating study of a year in the life of a probate court in one California county. Professor Horton uses his data to examine the fit between existing wills doctrine (derived from the small number of disputed estates that become reported appellate decisions) and routinized probate administrations. In other words, how does wills law on the books compare to "Wills Law on the Ground"? Horton frames his analysis within the existing debate in the field between "formalists" (who favor strict compliance with wills act rules even if intent-defeating) and "functionalists" (who reject formalism for its own sake favoring an intent-serving-standards-based wills act). Most state lawmakers and judges sit squarely in the former category; whereas, the latter faction includes the brain trust behind the Restatement (Third) of Property: Wills (Restatement) and the Uniform Probate Code (UPC). Part I of Horton's article aptly describes several areas in will execution (attestation, holographic wills, and harmless error) and will construction (ademption by extinction and antilapse) where the contrast between the two camps is most stark.

Part II describes Horton's empirical methodology and reports the results. The study examined every probate administration in Alameda County, California (CA) from January 2008 to March 2009 relating to decedents dying in 2007.[1] After discarding abandoned matters and those involving pour-over wills, the dataset consisted of 571 cases. Fifty-seven (57) percent of these decedents died with a will and 43 percent without. After providing descriptive statistics on testate versus intestate estates (cost, length, litigation, beneficiaries), Horton analyzes how the data informs the issues that drive a wedge between formalists and functionalists.

Reformers contend that the attestation requirement is a relic of a time when deathbed wills were the norm and currently operates to deny probate to otherwise valid wills. While Horton's data generally supports this claim, he cautions that in a sizable minority of cases "[w]itnesses protect . . . gravely ill testators and furnish additional proof of testamentary intent." Traditionalists oppose the admission of holographic wills on the grounds that they are unreliable and breed litigation. The holographic wills in the sample support the second objection ("[they] do seem to spawn more than their fair share of litigation") but not the first (they appeared authentic and voluntary).

The study is least illuminating on the most divisive will execution issue: harmless error. Unfortunately, this curative doctrine was not available in CA until January 1, 2009 (when over half of the sampled estates had closed). After acknowledging this limitation, Horton reports that none of the litigants invoked harmless error (tempering formalists' claims about the rule overburdening courts) and the data supports extending harmless error to all signature defects (pushing back against the view that the doctrine can never apply to an unsigned instrument).

With regard to ademption by extinction, CA is still a rule-based identity jurisdiction rejecting the standard-based intent theory of the UPC/Restatement. Since only 6 percent of the reported cases involved ademption, Horton infers that "ademption is unlikely to be a fount of litigation." Moreover, most of the adeemed bequests involved personal property chosen as "a tribute to a particular person,

rather than as part of [a] property-distribution scheme." This called into question the reformist doctrine that presumptively provides the monetary value of an adeemed asset to a beneficiary. However, since financial assets were adeemed in a significant minority of cases, Horton cautions against "a reflexive rule of non-compensated ademption." This analysis leads to an endorsement of the UPC regime, which presumes ademption without remuneration but allows a beneficiary to present evidence of a testator's contrary intention.

Horton also addresses the issue of whether survivorship conditions should prevent application of an antilapse statute. The traditional view is that they do. The UPC and Restatement presume the opposite—that words of survivorship are not sufficient, without additional evidence of intent, to opt out of the antilapse regime. The concern of reformists is the rote inclusion of survivorship clauses in form wills without an understanding of their legal effect. The subject wills provide modest support for the legitimacy of this issue—of the five testators who employed survivorship provisions, three were unnecessarily attached to non-antilapse triggering bequests. Horton advocates a middle-ground approach—flipping the UPC/Restatement presumption to reflect the traditional view (generally enforce survivorship conditions), but in a nod to reformers, allow the beneficiary to "prove that the testator did not intend to supplant antilapse."

I will leave debate over the quality of the dataset or the statistical analysis employed (or not employed, as the case may be) to the empiricists. Horton himself cautions against drawing any "sweeping conclusions" from his data given its limited nature. Instead, I commend this article to you based on the cogency of the analysis of existing wills doctrine in light of insights gleaned from this survey of law in action.

1. Professor Horton utilized this same dataset in another article examining the probate process. *See* David Horton, In Defense of Probate: Evidence from Alameda County, California, 103 **Geo. L.J.** (forthcoming, 2015).

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