Transmitting Retirement Accounts: Getting It Right

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Stewart E. Sterk & Melanie B. Leslie, Accidental Inheritance: Retirement Accounts and the Hidden Law of Succession, 89 **N.Y.U.L. Rev.** 165 (2014).

Articles routinely appear that serve up a simple, everyday scenario that has potential to morph into a terribly complex legal situation and in the process, twist legal doctrines pretzel-like to reach the preferred result. We read them, digest them for the nugget to divulge in class, and file them away to cite in a later article. Rare is the article that serves up a simple everyday scenario that could have a disastrous effect that causes us to actually do something to avert the potential disaster. Stewart E. Sterk and Melanie B. Leslie have done just that in their masterful, co-authored piece, *Accidental Inheritance: Retirement Accounts and the Hidden Law of Succession*.

Starting with the fairy tale beginning of "once upon a time," the authors bring us back to the days when wills controlled the disposition of property at death. Judges were in control of the probate process, much, if not most, property was probate, and rules had developed to ameliorate the routine mistakes and missteps that occur between the signing of the will and the date of death. Marriage, birth of a child, divorce, and the death of a beneficiary no longer have to upset the decedent's presumed intent for his heirs, as we had developed rules for the probate process to reach the preferred result. As the non-probate revolution has settled into mainstream life, the issue has become how many of those presumed-intent rules apply. So far pretty standard fare, but consider $9 trillion in retirement accounts (a most significant non-probate asset), a changing American family, and the impending demise of the baby boomer generation, and the consequences have the potential to be dramatic and, in the view of the authors, intolerable.

Sterk and Leslie dig deep into the succession law of retirement accounts to reveal an unsettling and uneven picture as to how those accounts may be distributed upon the participant's death. Their article first discusses the growing importance of retirement accounts, noting in particular the impact of companies switching from defined benefit plans to defined contribution plans. In many defined benefit plans, there was no asset to pass on after the participant's (and usually the participant's spouse's) death. A consequence was that as employers set up these plans, there was no focus on transfers at death, because there probably wasn't going to be anything left to pass on. These accounts were not, and are not seen as, will substitutes.

The beating heart of the article is the description of the current state of the law governing the distribution of these accounts at death. Sterk and Leslie analyze the materials in the context of four common life changes: marriage, birth of a child, divorce, and death of a beneficiary. First, they consider those participants who do not try to change their beneficiary designations. They show the different treatment that may be afforded the same person depending on whether the account is an IRA account or one governed by ERISA. Second, they compare the results that can occur when one tries to change the beneficiary designation but does not fully comply with the plan requirements. Results can vary depending on the judicial standard of review and depending on the type of document that attempted the change (will or trust provision, prenuptial, or divorce decree). This section is comprehensive and particularly impressive in its clear presentation of results that are hard to justify.

The article next argues that the connection between the beneficiary designation and the participant's intent for the passage of property at death is tenuous. There are several reasons advanced: the passage of time, the lack of foresight, inattention, and bureaucratic obstacles, including opaque forms. The obvious problem is that in many plans the beneficiary designation remains the sole evidence of the participant's intent, despite changes in the participant's life.

The authors propose potential reforms, including statutory, recognizing that those reforms would have to be at the state and federal level. Another avenue for reform is the industry itself, which could begin by redesigning beneficiary forms. The authors helpfully nudge that process by including suggested language. Equally important, they encourage lawyer consultation in the process, a suggestion they readily acknowledge that "may seem quaint" in today's online world. Yet, the authors remind us that the "oft-identified 'ritual' and 'protective' functions of formalities have not disappeared."

It is almost impossible to read this wonderfully written article without a sense of disbelief at the complexity and injustice of the system. The disconnect between what the participant-decedent intended and what the system delivered can be striking. "Can be" is the operative phrase. I urge all of you to double check your beneficiary designations on all your retirement accounts. My guess is that some of you will be surprised at what is on file, and some of you will discover that you do not have any form on file. Accidental inheritance is not something that a T&E professor's estate should stumble upon.

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