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A Comment on Unification

Grayson M.P. McCouch
University of Florida Levin College of Law, gmccouch@law.ufl.edu

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Editors' Synopsis: This Article discusses recent proposals aimed at unifying the law of wills and nonprobate transfers. The author notes that default rules of construction present the strongest case for unification, but contends that distinctions between wills and nonprobate transfers remain important in the areas of formalities and restrictions affecting third-party rights. The author concludes that the policy goal should be to allow wills and nonprobate transfers to operate smoothly as complementary methods of deathtime wealth transmission.

Ira Bloom raises interesting and provocative questions concerning the relationship between wills and revocable trusts in the context of federal estate tax apportionment.[1] His main focus is not on specific methods of apportioning the burden of the estate tax but rather on the means by which a transferor can direct a scheme of apportionment that departs from the default rules of state and federal law. His central premise is that a transferor's intent should be respected, whether that intent is expressed in a will or a revocable trust. He vigorously criticizes the disparate treatment of wills and revocable trusts under current law and proposes a statutory approach that would give controlling effect to apportionment directions in a transferor's most recently executed will or revocable trust.[2]

Although Bloom's discussion focuses on specific problems of federal estate tax apportionment, his proposal can and should be viewed in a broader context. Bloom's call for equal treatment of wills and revocable trusts echoes the case for a "unified law of succession" advanced by John Langbein in an influential 1984 article analyzing the origins and implications of the "nonprobate revolution."[3] Langbein's basic insight is that

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[1] *See* Ira Mark Bloom, *Unifying the Rules for Wills and Revocable Trusts in the Federal Estate Tax Apportionment Arena: Suggestions for Reform*, 43 REAL PROP. TR. & EST. L.J. 447 (2008), *originally printed in* 62 U. MIAMI L. REV. 767 (2008).

[2] *See id.* at 496–97 ("I would propose a federal statute that allows revocable trusts to do exactly what can be done under a will in changing a state's default rules. . . . My bright-line rule would simply provide that the latest instrument controls, treating the latest will or revocable trust as expressing the decedent's final intent."); *see also id.* at 496 (proposing a federal statute that would resolve choice of law issues in favor of the decedent's domicile in matters of apportionment).

[3] John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1109 (1984) (noting the possibility of a "unified law

revocable trusts and other will substitutes are functionally indistinguishable from wills; they perform the will-like function of transferring property at death, but they generally do so outside the probate system and without having to comply with wills formalities. Indeed, he describes will substitutes as "nonprobate wills" and argues that they should presumptively be subject to the same rules of construction as wills.[4] Langbein's analysis deserves close attention, for it furnishes the conceptual foundation for Bloom's proposal as well as for several comprehensive reform projects that share the common goal of "unifying the law of wills and will substitutes."[5]

In setting forth the rationale for unification, Langbein focuses primarily on default rules of construction, which he refers to as "subsidiary" rules.[6] The case for equal treatment of wills and will substitutes in this area is fairly obvious and straightforward. Default rules of construction generally seek to carry out an ordinary transferor's intent and, unlike mandatory rules, yield to evidence of contrary intent. To the extent transferors use wills and will substitutes interchangeably, they presumably intend identical language in different instruments to be interpreted consistently and gap-filling rules of construction to apply uniformly to both types of instruments. As it happens, the law of wills provides a comprehensive and well-developed body of constructional rules which can readily be expanded or adapted to apply to will substitutes concerning matters such as survival, lapse, and divorce. It is hardly surprising, then, that the goal of uniform constructional rules commands broad consensus among reformers.[7]

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of succession").

[4] *Id.* at 1137 ("Once we understand that will substitutes are nothing more than 'nonprobate wills' and that no harm results from admitting that truth, we have no basis for interpreting will substitutes differently from wills. Both as a matter of legislative policy and as a principle of judicial construction, we should aspire to uniformity in the subsidiary rules for probate and nonprobate transfers.").

[5] RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 7.2 cmt. a (2003) (noting that the same policy goal is reflected in the *Restatement (Third) of Trusts*, the Uniform Probate Code, and the Uniform Trust Code).

[6] Langbein, *supra* note 3, at 1134–40. I am grateful to Professor Langbein for clarifying this point of terminology.

[7] *See*; UNIF. PROBATE CODE art. II, Prefatory Note, 8 U.L.A. (pt. I) 75 (1998); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 7.2 (2003); RESTATEMENT (THIRD) OF TRUSTS § 25 (1998); UNIF. TRUST CODE § 112, 7C U.L.A. 453 (2006).

By contrast, as Langbein recognizes, the rationale for unification does not apply to mandatory rules concerning the formalities of will execution.[8] A moment's reflection reveals why this is so. Execution formalities play a crucial role in distinguishing wills from will substitutes; wills generally must be executed with prescribed statutory formalities, while will substitutes are subject to alternative—often less stringent—formalities.[9] More importantly, the formal line between wills and will substitutes also marks the boundary between probate and nonprobate transfers; property transferred by will (or by intestate succession) is generally subject to probate administration, while property transferred by will substitute passes outside the probate system.[10] Langbein is undoubtedly correct that with the rise of will substitutes the probate system itself has become essentially a default method for transferring property at death.[11] This does not mean, however, that the formal distinction between wills and will substitutes has become unimportant. Indeed, will substitutes must be clearly distinguishable from wills if they are to succeed in their primary goal of carrying out deathtime transfers without becoming entangled in costly, protracted, and burdensome court proceedings.

The rationale for unification becomes more complicated in the area of mandatory restrictions that protect the rights of third parties. In principle, proponents of unification agree that a transferor should not be able to use will substitutes to defeat a surviving spouse's elective share or creditors' claims.[12] Accordingly, the Uniform Probate Code allows a decedent's surviving spouse and creditors to look beyond the probate estate and reach nonprobate assets to satisfy their respective claims. In the case of the spouse's elective share, liability is apportioned more or less ratably among other beneficiaries of probate and nonprobate transfers,[13] while in

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[8] *See* Langbein, *supra* note 3, at 1139 (noting "intrinsic limit" of unified approach).

[9] *See id.* at 1130–32 (discussing concept of "alternative formality").

[10] *See id.* at 1129 ("The Wills Act tells us what formalities are necessary to effect a probate transfer[.]"); *id.* at 1140 ("American law has defined testation and probate in terms of each other[.]").

[11] *See id.* at 1132 ("The real state of the law is that the transferor may choose to pass his property on death in either the probate or the nonprobate system or in both.").

[12] *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 7.2 cmts. a, b, g (2003); RESTATEMENT (THIRD) OF TRUSTS § 25 cmts. d, e (2003).

[13] *See* UNIF. PROBATE CODE § 2-209, 8 U.L.A. (pt. I) 122 (1998). The elective share is satisfied first from amounts passing to or already owned by the surviving spouse. Only if those amounts are insufficient are other beneficiaries liable for the deficiency, and liability is apportioned ratably except for two narrow categories of transfers occurring during marriage and within two years before death. *See id.*

the case of creditors' claims, nonprobate assets can be reached only if the probate estate is insolvent.[14] These provisions highlight a major functional limitation of nonprobate transfers. To enforce a right of contribution against nonprobate assets, the spouse or creditor must invoke the procedural machinery of the probate system. Effective enforcement requires an orderly, centralized process to determine the amounts of various claims, classify them in order of priority, and identify the assets available to pay them. The probate system is uniquely suited to perform this function and therefore plays an indispensable role in protecting the rights of third parties. By contrast, nonprobate transfers flourish precisely because they provide no comparable protection. As Langbein observes, nonprobate transfers "execute easy transfers and shunt the hard ones over to probate."[15]

In apportioning federal estate tax liability, the general concept of equitable apportionment seems fully compatible with the rationale for unification.[16] It is less clear, however, how a transferor's specific apportionment directions in a will or revocable trust should be treated. Bloom advocates identical treatment for apportionment directions in both types of instruments.[17] This full-parity approach can be defended as a robust application of the rationale for unification, but it raises a problem concerning execution formalities. As a general matter, it may be reasonable to presume that an apportionment direction or beneficiary designation in an existing will substitute can be amended or revoked by a subsequent will, unless the will substitute provides to the contrary.[18] (Of course, many will substitutes expressly prohibit amendment or revocation by will in order to

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[14] *See* UNIF. PROBATE CODE § 6-102 (amended 1998), 8 U.L.A. (pt. II), 184–85 (Supp. 2008); *see also* UNIF. TRUST CODE § 505, 7C U.L.A. 534–35 (2006).

[15] Langbein, *supra* note 3, at 1120.

[16] *See id.* at 1138 ("The law governing the apportionment of estate taxes between probate and nonprobate assets has been moving strongly toward equal treatment of the two.").

[17] *See* Bloom, *supra* note 1, at 448–49 ("[T]rue unification in the area of federal estate tax apportionment will be achieved only when American law places the revocable trust device, the functional equivalent of a will, on par with wills in terms of a decedent's ability to change default apportionment rules.").

[18] *See* Langbein, *supra* note 3, at 1138–39; RESTATEMENT (THIRD) OF TRUSTS § 63 cmt. h (2003); UNIF. PROBATE CODE § 6-101, 8 U.L.A. (pt. II) 430 (1998); UNIF. TRUST CODE § 602(c) (amended 2003), 7C U.L.A. 546–47 (2006). This presumption is not universally accepted, however. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 7.2 cmt. e (2003); UNIF. PROBATE CODE § 6-213(b) (amended 1995), 8 U.L.A. (pt. II) 441 (1998).

avoid becoming entangled in probate proceedings at the transferor's death.) The real difficulty arises in the reverse situation. An attempt to amend or revoke an existing will by a subsequent will substitute is likely to fail if it does not comply with statutory wills formalities.[19] Although Bloom does not address this point, his argument that a revocable trust should be effective to alter apportionment directions in a prior will in effect calls for an implied special-purpose exception to the wills formalities.

Wills formalities do not necessarily preclude a revocable trust from modifying apportionment directions contained in a prior will.[20] In some cases, it may be possible to avoid a direct conflict with wills formalities if the new apportionment direction reduces the tax burden on the probate estate. For example, suppose an existing will directs payment of the federal estate tax from the residuary probate estate without apportionment, and a subsequent revocable trust directs payment of the tax from the trust property. The new apportionment direction may be valid if it is viewed not as an (invalid) attempt to amend the prior will but rather as a pourover gift to the residuary devisees, in accordance with its substantive effect. Apart from wills formalities, some jurisdictions impose limits on the use of revocable trusts to achieve wholesale shifting of tax burdens. For example, a provision in a revocable trust directing payment from the trust property of the tax attributable to the trust may be effective to modify an inconsistent direction in a prior will, while a provision purporting to exonerate the trust property from all tax liability may be ineffective. Bloom apparently rejects any approach that does not treat wills and revocable trusts identically. Although he confines his discussion to the treatment of apportionment directions in wills and revocable trusts, his concept of unification could have far-reaching consequences if extended to other types of will substitutes or to areas other than federal estate tax apportionment.

Bloom's proposal provides a welcome opportunity to review the rationale for unification as an organizing principle for current law reform efforts.[21] In seeking to unify the law of wills and will substitutes, reform-

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[19] *See* UNIF. PROBATE CODE § 2-507, 8 U.L.A. (pt. I) 151–52 (1998) (requiring a "subsequent will" or "revocatory act"). Arguably, the attempt might be salvaged under a statutory dispensing power. *See id.* § 2-503.

[20] *Cf.* UNIF. ESTATE TAX APPORTIONMENT ACT § 3(a) (2003), 8A U.L.A. 137 (Supp. 2008) (giving categorical priority to directions in a will over directions in will substitutes).

[21] *See* Grayson M.P. McCouch, *Probate Law Reform and Nonprobate Transfers*, 62 U. MIAMI L. REV. 757 (2008).

ers should recognize that unification is an abstract concept, not a self-defining policy prescription. Will substitutes come in many different forms; they rely on diverse mechanisms to transfer property at death; and they have evolved and proliferated largely in response to real or perceived shortcomings of the probate system. In some respects will substitutes are functionally indistinguishable from wills and the rationale for unification is correspondingly strong, as in the area of default rules of construction. In other respects, however, there are real differences which may justify disparate treatment of wills and will substitutes. Execution formalities, for example, play a crucial role in marking the boundary between wills and will substitutes, between probate and nonprobate transfers. Protecting the rights of third parties, such as spouses and creditors, may justify invoking the procedural safeguards of the probate system and limiting the advantages of probate avoidance. The same is true of federal estate tax apportionment, which requires a centralized forum to identify the beneficiaries of probate and nonprobate transfers, compute the values of their respective interests and their shares of the tax, and enforce rights of contribution against them. To reduce the likelihood of confusion arising from inconsistent directions in multiple will substitutes, it may be reasonable to establish an order of priority among wills, revocable trusts, and other will substitutes. The rationale for unification does not require the obliteration of all distinctions between wills and will substitutes. Instead, the policy goal should be to allow probate and nonprobate transfers to operate smoothly as complementary methods within the expanding universe of deathtime transfers.