

4-2008

Probate Law Reform and Nonprobate Transfers

Grayson M.P. McCouch

University of Florida Levin College of Law, gmccouch@law.ufl.edu

Follow this and additional works at: <http://scholarship.law.ufl.edu/facultypub>



Part of the [Estates and Trusts Commons](#)

Recommended Citation

Grayson M.P. McCouch, *Probate Law Reform and Nonprobate Transfers*, 62 U. Miami L. Rev. 757 (2008), available at <http://scholarship.law.ufl.edu/facultypub/439>

This Article is brought to you for free and open access by the Faculty Scholarship at UF Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of UF Law Scholarship Repository. For more information, please contact outler@law.ufl.edu.

Probate Law Reform and Nonprobate Transfers

GRAYSON M.P. MCCOUCH*

For over forty years, probate law reformers have struggled to come to grips with nonprobate transfers. When the Uniform Probate Code¹ was initially promulgated in 1969, its chief reporter vigorously promoted the Code as a “possible answer to probate avoidance” and urged estate lawyers to support it on grounds of enlightened self-interest.² His premise—that wholesale adoption of the Code would restore public confidence in the probate system and preserve the traditional role of lawyers in estate planning and administration³—has yet to be fully tested. While the Code has prompted renewed debate over probate reform, its core provisions setting forth a streamlined system of probate administration have not been widely adopted,⁴ and probate avoidance has lost none of its power as a marketing slogan for purveyors of revocable trusts and other will substitutes. Recognizing the growing importance of nonprobate transfers, reformers have recently embraced a policy of “unifying the law of wills and will substitutes.”⁵ This ambitious project of unification highlights some basic questions about the relationship between probate and nonprobate transfers and their respective roles in a unified law of succession.

* Professor of Law, University of San Diego. I would like to thank Adam Hirsch and Bill McGovern for their helpful comments and the University of San Diego School of Law for generous research support. I am also grateful to my former colleague John Gaubatz and his wife Kathy for offering me shelter from Hurricane Andrew and for many other acts of kindness, large and small, during our time together in Miami.

1. UNIF. PROBATE CODE, 8 (Parts I & II) U.L.A. (1998 & Supp. 2007) [hereinafter UNIF. PROBATE CODE].

2. See Richard V. Wellman, *The Uniform Probate Code: A Possible Answer to Probate Avoidance*, 44 IND. L.J. 191, 191 (1969).

3. See *id.* at 195–98.

4. See Roger W. Andersen, *The Influence of the Uniform Probate Code in Nonadopting States*, 8 U. PUGET SOUND L. REV. 599, 600 (1985) (noting lack of support for “controversial reforms, such as the installation of a system for informal probate”). Adoptions of the Code slowed to a trickle following an initial surge of enthusiasm in the 1970s; today the total number of adopting states remains less than twenty. See UNIF. PROBATE CODE, Table of Jurisdictions Wherein Code Has Been Adopted. In 1998, the Uniform Succession Without Administration Act, which appears in Code sections 3-312 to 3-322, was declared “obsolete” and “withdrawn from recommendation for enactment” after failing to be adopted in any state. See UNIF. SUCCESSION WITHOUT ADMIN. ACT, 8B U.L.A. 92 (Supp. 2007).

5. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 7.2 cmt. a (2003).

The proliferation of probate avoidance techniques can be traced directly to several features of the probate process. Broadly speaking, *probate* refers to the body of substantive and procedural rules that govern the devolution of decedents' estates by will or intestacy. In this country, probate has traditionally been organized around judicial proceedings. Control over testamentary transfers is lodged firmly with the local probate court: A will has no binding effect until it is allowed by the court; estate administration cannot begin until the court appoints a personal representative; and the personal representative often remains subject to court supervision until the court orders a final distribution and discharge. Moreover, if estate assets are located outside the state of the decedent's last domicile, it may be necessary to open separate probate proceedings in several states. Court-supervised administration also brings with it the need for lawyers to represent personal representatives and assist them in navigating a maze of arcane procedural requirements. The basic structure of the probate system has changed remarkably little since the nineteenth century, and some of its standard procedural safeguards—e.g., court-appointed referees, fiduciary bonds, notice by newspaper publication, and frequent court hearings on uncontested matters—seem hopelessly anachronistic in a world of electronic communication, paperless transactions, and automated recordkeeping. A growing number of states now provide for independent administration with minimal court supervision, as well as informal procedures for administering small estates and collecting specific types of assets, but comprehensive reform proposals still encounter stiff resistance from lawyers, probate judges, surety bond companies, legal notice publishers, and other groups with vested interests in perpetuating the existing system.⁶ As a result, the probate process is widely perceived as costly, slow, and cumbersome, and many transferors actively seek to avoid it.⁷

Will substitutes, as the name implies, are designed to achieve the

6. See Richard V. Wellman, *The Uniform Probate Code: Blueprint for Reform in the 70's*, 2 CONN. L. REV. 453, 496–501 (1970) (discussing opposition to reform from the legal advertising and surety bond industries, and describing the existing probate system as “a sad monument to the predilections of the legal and political communities to serve their specialized interests” in the face of “public ignorance or indifference”).

7. See John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1116–17 (1984) (discussing the probate system's “lamentable reputation for expense, delay, clumsiness, makework, and worse” and noting that “many transferors . . . view probate as little more than a tax imposed for the benefit of court functionaries and lawyers”). The reasons for avoiding probate may be more compelling in some cases than others, depending on the goals and circumstances of particular transferors and the procedural requirements of state probate law. See WILLIAM M. MCGOVERN, JR. & SHELDON F. KURTZ, *WILLS, TRUSTS & ESTATES: INCLUDING TAXATION AND FUTURE INTERESTS* 344 (3d ed. 2004) (“One should *not* assume that avoiding probate for all assets of all clients is desirable.”). On the whole, public dissatisfaction with the probate system does not appear to have curtailed the

practical effect of a will—designating beneficiaries to receive property at the owner’s death—outside the probate system. The main doctrinal obstacle to nonprobate transfers is the conventional view that all property owned by a decedent at death automatically becomes part of the probate estate subject to administration and can be disposed of only by will or intestacy. Accordingly, will substitutes ordinarily take the form of a gift, trust, contract, or other nontestamentary arrangement that technically operates as a lifetime transfer while leaving the transferor with substantially undiminished ownership rights (i.e., access to the property as well as power to revoke or amend the beneficiary designation) until death. For example, life insurance has long been recognized as a nontestamentary vehicle that permits the insured policy owner to transfer property (i.e., proceeds) at death outside the probate system. Similarly, joint accounts with right of survivorship and tentative trusts serve a similar function for bank accounts. The era of large-scale probate avoidance truly began, however, in the mid-twentieth century when courts decisively upheld the validity of revocable trusts, which, in many respects, are practically indistinguishable from wills.⁸ The decisions upholding revocable trusts, for all their doctrinal gyrations, are best understood as signaling judicial approval of a will substitute that offers a reliable, efficient, and socially useful alternative to probate.⁹

According to the standard account of the “nonprobate revolution,” the rise of will substitutes is basically a story about deregulating the process of deathtime wealth transfers and allowing private-sector competitors to challenge the probate system’s state-sponsored monopoly.¹⁰ Will substitutes flourish because they perform the essential functions of probate in a commercially viable, cost-effective manner. Today, decedents’ wealth consists predominantly of financial assets (e.g., stocks, bonds, bank deposits, brokerage accounts, mutual funds, and life insurance), and financial intermediaries that routinely handle title registrations and transfers of such assets for living owners stand ready and willing to carry out nonprobate transfers to designated beneficiaries of deceased owners.¹¹ In the vast majority of cases, where no dispute arises concerning the validity or terms of a transfer, there is simply no

role of lawyers in estate planning. Instead, the burgeoning volume and complexity of nonprobate transfers highlights the need for competent, professional advice.

8. See, e.g., *Farkas v. Williams*, 125 N.E.2d 600 (Ill. 1955); *Nat’l Shawmut Bank of Boston v. Joy*, 53 N.E.2d 113 (Mass. 1944).

9. See Langbein, *supra* note 7, at 1126–29.

10. See *id.* at 1117 (describing will substitutes as “formidable competitors of the probate system”).

11. See *id.* at 1119. Even in the case of real estate, where probate remains important in establishing marketable title, probate is readily avoidable by various techniques, including joint tenancies with right of survivorship, inter vivos trusts, corporations, and (in several states)

need for probate court proceedings with their attendant costs and delays. Apparently, even creditors rarely find it necessary to use the probate safeguards designed for their benefit, preferring instead to protect their interests through informal methods or nonprobate alternatives such as credit life insurance and security interests.¹²

Nevertheless, despite their practical advantages, will substitutes have not completely displaced wills or probate administration; indeed, they cannot do so. The probate system continues to serve the indispensable function of collecting and distributing property owned at death (i.e., property not otherwise disposed of by lifetime gift or by will substitute). Not all transferors avail themselves of will substitutes, and those who do should be aware that most will substitutes apply only to specific assets. Even revocable trusts, which can hold a virtually unlimited variety of assets, avoid probate only to the extent that they are funded with identifiable, existing property during life. Thus, while in theory a transferor in the last moments of life might be able to sweep every last item of property into a revocable trust, as a practical matter, there will almost always be some assets that remain outside the trust at death and become part of the probate estate subject to administration. By the same token, transferors continue to execute wills in order to direct the disposition of property—including failed nonprobate transfers—that otherwise would fall into intestacy. In a typical pour-over arrangement, for example, the transferor executes a will that leaves the residuary estate to be added to property held and administered as part of a separate inter vivos trust. The point of the arrangement is not necessarily to avoid probate completely, but rather to dispose of the pour-over assets (after they have gone through probate) and other trust assets under an integrated plan without subjecting the trust to public scrutiny or probate court supervision. Thus, wills and will substitutes should be viewed not as irreconcilable opposites, but rather as complementary components of an increasingly varied and complex system of deathtime transfers.

From the outset, the drafters of the Uniform Probate Code have acknowledged the utility and legitimacy of nonprobate transfers. To be sure, the Code, as originally promulgated in 1969, focused primarily on the law of wills and probate administration and promoted salutary reforms in both areas, including streamlined wills formalities and a flexible, informal system of administration. At the same time, the Code

transfer-on-death deeds. See Susan N. Gary, *Transfer-on-Death Deeds: The Nonprobate Revolution Continues*, 41 REAL PROP. PROB. & TR. J. 529 (2006).

12. See Langbein, *supra* note 7, at 1120–23 (noting that “[i]n general, creditors do not need or use probate” and discussing alternative debt collection methods).

addressed nonprobate transfers in a separate article, which included detailed rules for bank accounts held in joint-and-survivor, pay-on-death, or trust form, as well as an open-ended provision declaring any pay-on-death direction or beneficiary designation in a written contract, deed of gift, conveyance, or trust agreement to be “nontestamentary” and hence not subject to wills formalities or probate administration.¹³ Initially, the drafters seem to have been content to affirm the validity of nonprobate transfers without attempting to prescribe comprehensive rules governing construction or creditors’ rights. More recently, as nonprobate transfers continue to proliferate, the drafters of the Code, along with other law reformers, have sought to “bring the law of probate and nonprobate transfers into greater unison.”¹⁴ Accordingly, in 1990, as part of a comprehensive overhaul of the Code’s articles concerning wills and intestacy, the drafters rewrote several key rules of construction originally aimed at wills—notably those relating to survival, lapse, and divorce—and expanded them to apply more broadly to will substitutes.¹⁵ The 1990 revisions reflect a growing awareness of the functional similarities between will substitutes and specific bequests, as well as a recognition that rules of construction, developed in the law of wills to discover a transferor’s presumed intent, also lend themselves to filling gaps in the relatively fragmented and underdeveloped law of will substitutes. In keeping with the goal of unification, reformers have also sought to ameliorate some of the most rigidly formalistic aspects of traditional wills doctrine. For example, the 1990 Code revisions intro-

13. The validating statute, originally enacted as section 6-201 in 1969, was revised and renumbered in 1989. In its current form, this provision declares that “[a] provision for a nonprobate transfer on death in [any enumerated type of contract, agreement, plan, trust, conveyance, deed of gift,] or other written instrument of a similar nature is nontestamentary.” UNIF. PROBATE CODE § 6-101 & cmt; *see also* Grayson M.P. McCouch, *Will Substitutes Under the Revised Uniform Probate Code*, 58 BROOK. L. REV. 1123, 1131–36 (1993); William M. McGovern, Jr., *Nonprobate Transfers Under the Revised Uniform Probate Code*, 55 ALB. L. REV. 1329, 1337–38 (1992).

14. UNIF. PROBATE CODE art. II prefatory note. For similar policy goals reflected in other recent law reform projects, *see* UNIF. TRUST CODE, art. 6, 7C U.L.A. 368 (2000) [hereinafter UNIF. TRUST CODE]; RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 7.2 cmt. a (2003); *id.* § 25 cmts. a, d, e.

15. *See* UNIF. PROBATE CODE §§ 2-702, 2-706, 2-804 (setting forth provisions concerning survival, lapse, and revocation by divorce); *see also* McCouch, *supra* note 13, at 1152–63. Even these provisions fall short of full unification. For example, the antilapse rule of section 2-706 expressly excludes joint tenancies and joint bank accounts, and the analogous rule of section 2-707 applies to all beneficiaries of future interests in trust, regardless of their relationship with the settlor. Interestingly, the provisions granting a share of the probate estate to an inadvertently omitted surviving spouse or child do not include nonprobate assets, even though a nonprobate transfer may suffice to cut off the statutory share. *See* UNIF. PROBATE CODE §§ 2-301 to -302; *see also* John T. Gaubatz, *Notes Toward a Truly Modern Wills Act*, 31 U. MIAMI L. REV. 497, 528, 551 (1977) (noting the limited scope of the original Code’s protection for omitted children); McCouch, *supra* note 13, at 1179–80; McGovern, *supra* note 13, at 1345.

duced a “harmless error” provision that allows an instrument to be admitted to probate as a will, notwithstanding defects of execution, upon a clear and convincing showing that the instrument was so intended.¹⁶

The unification project extends not only to intent-furthering constructional rules and protective or remedial doctrines,¹⁷ but also, in principle, to substantive restrictions that protect the interests of third parties such as a decedent’s surviving spouse or creditors.¹⁸ One of the Code’s most notable innovations is the concept of the “augmented estate” as the basis for the surviving spouse’s elective share.¹⁹ The Code allows the surviving spouse to look beyond the decedent’s net probate estate to other property, including the decedent’s nonprobate transfers, in determining the size of the elective share and the sources available for its payment. In this way, the Code discourages transferors from attempting to defeat the surviving spouse’s elective share by means of nonprobate transfers.

In a similar vein, the Code seeks to prevent the use of nonprobate transfers to defeat creditors’ claims. A provision added in 1998 makes the beneficiaries of nonprobate transfers personally liable to the decedent’s probate estate for allowed creditors’ claims to the extent the estate is insolvent.²⁰ As a practical matter, this provision may be difficult to enforce, for it contemplates not only that probate proceedings will be opened and creditors’ claims will be allowed, but also that the personal representative (or, failing action by the personal representative, the creditors themselves at their own expense) will be able to track down the beneficiaries of nonprobate transfers and recover from each beneficiary a ratable share of the unpaid claims. The difficulties of enforcement may prove to be illusory, of course, if creditors are not interested in collecting claims through the probate system—in that case, the notion of extending existing creditor protection to nonprobate transfers may be misguided.²¹ Recent case law, however, belies any suggestion of indif-

16. See UNIF. PROBATE CODE § 2-503. The drafters also revised the general provision concerning rules of construction to eliminate a potential barrier to “the judicial adoption of a general reformation doctrine for wills.” *Id.* § 2-601 cmt.

17. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS §§ 8.1(b), 8.3, 8.4, 8.5 (2003) (addressing mental capacity, undue influence, fraud, duress, slayer rule, and no-contest clauses).

18. See *id.* § 7.2 cmt. b. By similar reasoning, nonprobate assets should be available to pay statutory allowances for family support, exempt property, and homestead if probate assets are insufficient. See *id.*; see also UNIF. PROBATE CODE § 6-102.

19. See *id.* §§ 2-202 to -207. The details of the elective-share computation were substantially revised in 1990, but the augmented-estate concept dates back to the original 1969 Code.

20. See *id.* § 6-102; see also Elaine H. Gagliardi, *Remembering the Creditor at Death: Aligning Probate and Nonprobate Transfers*, 41 REAL PROP. PROB. & TR. J. 819, 851–73 (2007).

21. See AMENDMENTS TO UNIFORM PROBATE CODE BY ADDING SEC. 6-102 AND DELETING SECS. 6-215 AND 6-309(B) AND TO MAKE CONFORMING CHANGES IN FREE STANDING ACTS

ference on the part of creditors, who continue to pursue remedies against probate and nonprobate assets.²² A more fundamental problem stems from the nature of nonprobate transfers. Vehicles for transferring assets outside the probate system have evolved in a haphazard, unsystematic way, often relying on customized administrative provisions drafted to suit the needs of a particular bank, corporate trustee, life insurance company, securities issuer, or other registering entity.²³ The result is a patchwork of diverse, self-contained transfer mechanisms that function efficiently in routine cases and at the same time resist any attempt to impose standardized procedural requirements. Indeed, nonprobate transfers have flourished and proliferated precisely because of their flexibility and informality, but these characteristics fit uneasily with the goal of a unified, orderly process for enforcing creditors' rights.

A will substitute is sometimes referred to as a "nonprobate will."²⁴ The phrase neatly captures the functional similarities between a will and a will substitute, but it should not be allowed to obscure the formal distinction between the two. Conventional doctrine insists that a will is the only instrument that can dispose of property at death—a logical conclusion from the premise that all property owned at death becomes part of the probate estate and passes either by will or by intestacy.²⁵ By implication, to transfer property outside probate, a will substitute must be formally classified as a lifetime arrangement, even if it is functionally indistinguishable from a will.²⁶ Arguably, it might be more candid to

DERIVED FROM UNIF. PROBATE CODE ART. 6, Prefatory Note (Proposed Official Draft 1998) ("The decision to generate more creditor protection against nonprobate transfers at death may be misguided. Some discussants question the need for new protections for unsecured creditors of decedents. Their skepticism is warranted because commercial creditors, by continuing to ignore the national trend towards streamlining probate by cutting creditor protections, have demonstrated lack of interest in probate law protections.").

22. See *Tulsa Prof'l Collection Serv., Inc. v. Pope*, 485 U.S. 478 (1988) (discussing due process requirements of notice to creditors in probate proceedings); MCGOVERN & KURTZ, *supra* note 7, at 623–27 (noting subsequent cases). For cases involving creditors' recourse against nonprobate assets, see *Dobler v. Arluk Med. Ctr. Indus. Group, Inc.*, 107 Cal. Rptr. 2d 478 (Ct. App. 2001); *In re Estate of Nagel*, 580 N.W.2d 810 (Iowa 1998); *State St. Bank & Trust Co. v. Reiser*, 389 N.E.2d 768 (Mass. App. Ct. 1979).

23. See, e.g., UNIF. PROBATE CODE § 6-310 (authorizing registering entity to establish terms and conditions for accepting and implementing security registration in beneficiary form); MCGOVERN, *supra* note 13, at 1336–37.

24. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 7.2 cmt. a (2003) ("[A] will substitute is in reality a nonprobate will."); LANGBEIN, *supra* note 7, at 1109 ("[W]ill substitutes are simply 'nonprobate wills'—'wills' that need not comply with the Wills Act.").

25. See *id.* § 1.1.

26. See *id.* § 7.1 & cmt. a ("To be valid, a will substitute need not be executed in compliance with the statutory formalities for a will because a will substitute is not a will. A will transfers ownership of probate property at death. Property subject to a will substitute is not probate property at death because it is then treated as no longer owned by the donor.") (citation omitted).

recognize that wills and will substitutes are alternative methods of transferring property at death, that the probate system is a default setting, and that transferors can freely choose to avoid probate by using will substitutes.²⁷ But this approach puts increased stress on the formal manifestation of the transferor's intent. Most formal wills are readily recognizable as wills because they comply, literally or substantially, with statutory formalities that encourage standardized expressions of testamentary intent.²⁸ As a practical matter, most will substitutes are also easy to classify, despite the absence of mandatory statutory formalities, because they usually exhibit some "alternative formality"—as, for example, in the case of a revocable trust instrument or a boilerplate beneficiary designation for financial assets.²⁹

At the margin, however, it may be difficult to tell the difference between a botched will that might (or might not) be salvaged by the Uniform Probate Code's dispensing power³⁰ and a home-made will substitute that might (or might not) come within the Code's blanket validating statute for nonprobate transfers.³¹ To compound the difficulty, the concept of a will substitute is sufficiently protean to defy any definition that is not merely circular.³² Thus, it remains an open question whether the Code's validating statute applies to unconventional but clearly intended transfers that arguably fall within its literal terms—for example, an executed deed intended to be delivered after the transferor's

27. See Langbein, *supra* note 7, at 1132; cf. McGovern, *supra* note 13, at 1352 ("Our current system, providing two distinct paths for the transmission of property on death, probate and nonprobate, seems illogical.").

28. See John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 493–94, 523–26 (1975) (discussing the "channeling function" of will formalities).

29. See Langbein, *supra* note 7, at 1132–34.

30. See UNIF. PROBATE CODE § 2-503.

31. See *id.* § 6-101. Commenting on the original version of the validating statute, the Code's chief reporter suggested that it "might prove to be a very important provision of the Code. On the other hand, it could be viewed as adding nothing to existing case law." Wellman, *supra* note 6, at 484; see also Richard V. Wellman, *Transfer-On-Death Securities Registration: A New Title Form*, 21 GA. L. REV. 789, 809 n.58 (1987) (conceding that the provision "must be qualified in some way" to avoid a "wholesale repeal of the Wills Act").

32. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 7.1(a) (2003) ("A will substitute is an arrangement respecting property or contract rights that is established during the donor's life, under which (1) the right to possession or enjoyment of the property or to a contractual payment shifts outside of probate to the donee at the donor's death; and (2) substantial lifetime rights of dominion, control, possession, or enjoyment are retained by the donor."). The Uniform Probate Code generally uses the term "nonprobate transfer" without definition. In the provision dealing with liability for creditors' claims, however, the Code offers a special-purpose definition that appears broad enough to include a transfer by will. See UNIF. PROBATE CODE § 6-102(a) (defining "nonprobate transfer" as "a valid transfer effective at death . . . to the extent that the transferor immediately before death had power, acting alone, to prevent the transfer by revocation or withdrawal and instead to use the property for the benefit of the transferor or apply it to discharge claims against the transferor's probate estate").

death,³³ or a written agreement providing for collection of the transferor's estate at death and distribution to designated beneficiaries outside probate.³⁴ Clarifying the formal relationship between wills and will substitutes would also help to dispel potential confusion arising when the provisions of a transferor's will conflict with beneficiary designations in various will substitutes. Many will substitutes expressly prohibit amendment or revocation by will in order to allow nonprobate transfers to proceed promptly without becoming entangled in probate proceedings. By contrast, a rule allowing amendment or revocation by will would, paradoxically, require that the will's validity (and possibly its date of execution and the meaning of its provisions) be determined in a probate proceeding in order to carry out a nonprobate transfer.³⁵

The advent of widespread, large-scale probate avoidance has added a new dimension to the project of probate law reform. When the Uniform Probate Code made its debut in 1969, its primary goal was to modernize traditional probate procedures and make them more uniform, flexible, and efficient. The Code's reforms were in part a response to the rise of will substitutes, which offered a ready means of transferring property at death outside the probate system. In the intervening years, however, will substitutes have continued to proliferate, while traditional probate procedures have resisted comprehensive reform. The probate system has not become obsolete—it provides valuable safeguards in many cases and remains indispensable in dealing with residual assets and resolving disputes—but it now plays a relatively modest role in regulating deathtime wealth transfers. Today, wills operate side by side with an ever-expanding array of will substitutes, and it no longer makes sense for reformers to focus exclusively, or even primarily, on the pro-

33. *Compare* First Nat'l Bank v. Bloom, 264 N.W.2d 208 (N.D. 1978) (invalidating attempted transfer), *with* Fortner v. Robinson (*In re* Estate of O'Brien), 749 P.2d 154 (Wash. 1988) (upholding attempted transfer). The Code drafters favor the holding in the former case, noting that the validating statute was not intended "to relieve against the delivery requirement of the law of deeds." UNIF. PROBATE CODE § 6-101 cmt. Nevertheless, "[i]t is not clear what effect the UPC will have on such cases, or why delivery was considered to be more important than the [wills] formalities prescribed in article II." McGovern, *supra* note 13, at 1338.

34. *See* Hibbler v. Knight, 735 S.W.2d 924 (Tex. App. 1987) (invalidating attempted transfer); McCouch, *supra* note 13, at 1140–42; McGovern, *supra* note 13, at 1337.

35. The Uniform Probate Code prohibits amendment or revocation by will of a survivorship right or pay-on-death beneficiary designation in a bank account, but apparently allows beneficiary designations in other nonprobate transfers to be made or changed by will, at least as a default rule. *See* UNIF. PROBATE CODE §§ 6-101, 6-213(b). In general, revocable trusts may also be amended or revoked by will unless their terms specify a different rule. *See* UNIF. TRUST CODE § 602(c); RESTATEMENT (THIRD) OF TRUSTS § 63 cmt. h (2003); *cf.* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 7.2, cmt. e (2003) (protecting payor who in good faith and without notice pays beneficiary of record, but instructing payor who receives notice of inconsistent direction in subsequent will to follow provisions of will, notwithstanding contrary terms of will substitute).

bate system. Accordingly, they have taken the first steps toward articulating a unified law of probate and nonprobate transfers. Much still remains to be done. Ultimately, the success of the reformers' project will require a sustained and vigorous effort to maintain conceptual coherence and achieve practical implementation.