EXTENDING ABATEMENT TO NON-PROBATE SUCCESSION

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I. INTRODUCTION

Estate planning clients often view the will principally as a document to dispose of accumulated wealth upon their death.[1] In a well drafted will, the first dispositive provision[2] may leave certain items of personal property to the testator's daughter. The next dispositive clause may leave cash bequests to other children.[3] After that, there may be a devise of real estate to the surviving spouse.[4] To complete the estate plan, the final dispositive provision leaves everything else to the named beneficiaries.[5]

For purposes of wills, these four dispositive clauses are technically distinct.[6] Specific, demonstrative, general, and residuary devises[7] are defined

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1. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.1(a) (AM. LAW INST. 2003).

2. A dispositive provision is a will clause that provides for the transfer of the property to a named beneficiary. *Dispositive Clause*, BLACK'S LAW DICTIONARY (9th ed. 2009).

3. *Id.*

4. *Id.*

5. *Id.*

6. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 5.1(a) (AM. LAW INST. 2003).

7. *Id.* § 2.1(a)–(e). At common law, there was a distinction made between bequests and devises. *See id.* As a technical matter, a testamentary bequest related to a gift of personal property and a devise addressed a transfer of real property. *See id.* Today, although these terms are used interchangeably, many

in the Restatement (Third) of Property: Wills and Other Donative Transfers.[8] "A specific devise is a testamentary disposition of a specifically identified asset."[9] A specific bequest is a gift of a particular item or asset of personal property.[10] By making the bequest specific, the legatee is only entitled to receive a distribution of that identified property.[11] A gift in the will that is a specific devise is a gift of particular real property.[12] In contrast, a general bequest or devise is "a testamentary disposition, usually of a specified amount of money or quantity of property, that is payable from the general assets of the estate" as opposed to a gift of a particular asset.[13] A general bequest/devise is a gift of economic value rather than a gift of a specific asset.[14] Therefore, it can be satisfied from the general assets of the estate instead of a particular fund or asset.[15] A bequest of a set dollar amount to the beneficiary is a very common form of a general bequest.[16] A demonstrative devise is a testamentary disposition, usually of a specified amount of money or quantity of property, that is initially payable from a specifically designated source, but is thereafter payable from the general assets of the estate to the extent that the primary source is insufficient.[17] Therefore, a demonstrative gift is in part specific and in part general.[18] It is general but payable from a specific source.[19] Any insufficiency in the specific source is to be satisfied out of the other property in the estate.[20] "A residuary devise is a testamentary disposition of property of the testator's net probate estate not disposed by a specific, general, or demonstrative devise" contained in the will.[21]

In most situations, there will be a time period between the date the will is signed and the testator's death.[22] Though common, this time gap may create a number of challenges when it comes time to administer the testator's estate.[23] Although the will referenced in the first paragraph may read well and be validly executed under applicable law, there may be insufficient

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wills contain a definitional section to equate these terms. *See id.* Often the will may use the term "give" with a definition later in the document that the term means either a bequest or devise. *See id.*

8. *Id.* § 5.1.
9. *Id.*
10. *See id.*
11. *See id.* The specific legatee would have no other claim against any other estate assets. *See id.*
12. *See id.*
13. *Id.*
14. *See id.*
15. *See id.*
16. *See id.*
17. *See* Houston Land & Trust Co. v. Campbell, 105 S.W.2d 430, 433 (Tex. App.—El Paso 1937, writ denied).
18. *Id.*
19. *Id.*
20. *Id.*
21. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 5.1 (AM. L. INST. 2003).
22. *See* John P. Ludington, Annotation, *Sufficiency of Evidence that Will was Not Accessible to Testator for Destruction, in Proceeding to Establish Lost Will*, 86 A.L.R. 3d § 2[b] (1978).
23. *Id.*

property remaining in the estate to pay administration expenses and claims against the estate, including debts owed to creditors and the various bequests and devises in the will.[24] There may also be a problem even when the estate property has not been reduced to satisfy estate expenses and creditor claims.[25] For example, the will may simply provide for more property transfers than the estate has included in it at the time of death.[26]

If the estate does not have sufficient assets to pay all the debts, expenses, and taxes, as well as to satisfy all the transfers contained in the will in full, statutes and case law set forth the order of abatement, that is, they create a hierarchy of bequests that are subject to reduction.[27] The rules of abatement require that various testamentary transfers made in the will be classified (or categorized) and differentiated.[28]

II. PROBATE AND NON-PROBATE PROPERTY; PAYMENT OF CLAIMS

When someone dies owning property, the property passes pursuant to the decedent's will, or in the absence of a valid will, by intestacy.[29] Property passing under the will or by intestacy is referred to as probate property.[30] The terms "probate estate" and "probate property" are frequently used to discuss testate and intestate succession when the property owner dies.[31] The Restatement provides:

> [T]he term probate estate or probate property refers to assets subject to administration under applicable laws relating to decedents' estates, unless the context indicates that the term "probate" refers to the procedure of "probating" (proving) a decedent's will. To be subject to administration, the property must be owned by the decedent at death or acquired by the decedent's estate at or after the decedent's death. Property owned at death or acquired at or after death is commonly called probate property.[32]

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24. *See generally* Johnson v. McLaughlin, 840 S.W.2d 668, 670 (Tex. App.—Austin 1992, writ ref'd) (illustrating a similar problem when during administration, it was discovered that the assets set aside in the will to provide for payment of taxes, debts, and expenses would be insufficient).

25. *See generally* Harris v. Hines, 137 S.W.3d 898, 903 (Tex. App.—Texarkana 2004, no pet.) (discussing ademption).

26. *Id.* Assume the testator's sole asset is $1 million cash in a bank account at the time the will is executed. He leaves $200,000 to A, $300,000 to B and the residuary clause to C. At the time of execution, C would rightly believe that $500,000 would be distributed to him. However, upon testator's subsequent death, the executor determines that the bank account balance equals $800,000.

27. *See* TEX. EST. CODE ANN. § 355.109.

28. *Id.*

29. *See* Aaron Bieber & Randall K Sadler, *Basics-Passage of Title Upon Death*, TX CLE OIL, GAS & MIN. TITLE EXAMINATION COURSE 6.III (2018).

30. *See* Ronald R. Cresswell, et. al., *Property Subject to Probate*, 3 TEX. PRAC. GUIDE WILLS, TRUSTS & EST. PLAN. § 10:162 (2020).

31. *Id.*

32. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 1.1 cmt. a (AM. L. INST. 1999).

Upon proving the will, an executor or personal representative is appointed and qualified to serve.[33] Once qualified, the executor will be responsible for collecting the probate property, managing assets during the administration, paying debts and claims of the decedent, paying taxes, and, ultimately, distributing what remains of the probate property to the proper beneficiaries.[34]

Upon the decedent's death and prior to the transfer of property to the proper beneficiaries, claims of the decedent's estate must be paid. According to the Uniform Probate Code:

> the term "claims," in respect to estates of decedents, includes liabilities of the decedent, whether arising in contract, tort, or otherwise, and liabilities of the estate arising at or after the death of the decedent, including funeral expenses and expenses of administration.[35]

These claims are entitled to be satisfied out of the probate estate.[36] Provisions included in the will may designate which assets are to be used to satisfy the claims against the estate.[37]

In addition to owning probate assets at death, the deceased property owner may also have an interest in property held in various non-probate alternatives.[38] Rather than being governed by the will or intestacy, these non-probate asset transfers occur by will substitutes.[39] Unlike probate assets, succession to property transferred through these will substitutes occurs outside of probate, and the property transferred in this manner is referred to as non-probate property.[40]

There are a number of various arrangements regarded as will substitutes.[41] An owner of property may fund an inter-vivos trust with assets during life so that the property passes under the terms of the trust and avoids having to be administered through the probate process.[42] Title to a financial account or real property may be held in a joint tenancy with rights of survivorship.[43] Upon the death of the owner, title vests in the survivor upon

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33. *Id.*
34. *Id.*
35. UNIF. PROB. CODE § 1-201(6) (UNIF. L. COMM'N 2019); *see also* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 1.1 cmt. f.
36. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 1.1 cmt. f. (citing UNIF. PROB. CODE 6-§ 215 (Revised 1998) (providing that "[t]he decedent's creditors may also be entitled to have their claims satisfied out of the decedent's will substitutes, to the extent provided by applicable law")).
37. *Id.*
38. *Id.* § 7.1 cmt. a.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*

the survivor's providing a death certificate for the predeceasing joint owner.[44] Property may be held at financial institutions or brokerage firms in accounts that provide for the payment on death (POD) or transfer on death (TOD) by beneficiary designation selected by the owner.[45] The named beneficiary is able to collect the property in the POD or TOD account by submitting a death certificate rather than utilizing the probate process.[46] Rather than having to rely on the probate administration process, an insured may direct that life insurance proceeds are paid to the beneficiaries named in the insurance policy.[47] The beneficiaries will receive the insurance proceeds upon providing the insurer with the insured's death certificate.[48]

III. ABATEMENT

The common law recognized the need for rules applicable when there was not enough to go around.[49] At common law, the type of testamentary transfer contained in the will mattered for abatement purposes by setting forth the source for establishing the priority in which claims against the estate were to be paid.[50] Not all estate beneficiaries were treated alike.[51] In terms of a ranking order that prevents a reduction triggered by abatement from most to least protective, the following order applied: specific, general, and residuary.[52] In other words, the residuary dispositions abate before general dispositions and general bequests abate before reducing specific bequests.[53]

A. Uniform Laws and Restatements

The Uniform Probate Code generally follows this historical ordering priority previously mentioned and provides:

> Except as provided in subsection (b) . . . shares of distributees abate, without any preference or priority as between real and personal property, in the following order: (i) property not disposed of by the will;[54] (ii) residuary

44. *See id.* For jointly held real estate, the death certificate is filed in the appropriate local real estate records; for jointly held bank and brokerage accounts, the death certificate is submitted to the bank or brokerage firm. *See id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *See* Thomas M. Featherston, Jr., *How the Legislature Has Changed Your Documents*, 2008 EST. PLAN., GUARDIANSHIP & ELDER L. UTCLE 8, https://www.baylor.edu/content/services/document.php/118432.pdf [https://perma.cc/2CQE-VJB7].

50. *See id.*

51. *See id.*

52. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 512–13 (1765).

53. *See* Featherston, *supra* note 49, at 8.

54. *See id.* (as a technical matter, any property passing by intestacy abates first).

> devises; (iii) general devises; (iv) specific devises.[55] [Demonstrative bequests appear to be left off of the abatement hierarchy list.] However, for purposes of abatement, a general devise charged on any specific property or fund is a specific devise to the extent of the value of the property on which it is charged, and upon the failure or insufficiency of the property on which it is charged, a general devise to the extent of the failure or insufficiency.[56]

The consequences of abatement can be illustrated by an example. Suppose testator has a valid will that bequeaths testator's property as follows:[57]

1. my entire golf club collection to N;
2. $25,000 to O;
3. $50,000 to P;
4. the residue to Q.

The will makes a specific bequest in article 1, general bequests in articles 2 and 3, and a residuary bequest in article 4.[58] Suppose at death, testator's assets were his golf clubs and raw land worth $60,000.[59] Article 4 abates first so the residuary beneficiary Q receives nothing.[60] The cash left to O and P are general bequests and abate on a pro-rata basis.[61] O will get $20,000 worth of land and P will get $40,000 worth.[62] N is entitled to the golf club collection without any abatement reduction required.[63]

The default pecking order contained in Section 3-902(a) may be overridden and altered if the testator provides a different order of abatement in the will or "if the testamentary plan or the express or implied purpose of the devise would be defeated by the default order of abatement" stated in Section 3-902(a).[64]

In determining the order of abatement, the U.P.C. eliminates any distinction between real and personal property.[65] However, this is not

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55. UNIF. PROB. CODE § 3-902(a) (UNIF. L. COMM'N 2019).

56. *See id.* (abatement within each category is pro-rata).

57. *Id.* (note that a valid will disposing of all property in the estate (i.e., no partial intestacy) will have no property passing by intestacy; therefore, there is are no abatement issues under the common law and other statutory schemes). *Id.*

58. *Id.*

59. *Id.*

60. *Id.*; UNIF. PROB. CODE § 3-902(a) (UNIF. L. COMM'N 2019).

61. O's fractional share equals 1/3 ($25k/$75k) and P's share is 2/3 ($50k/$75k); *see also* UNIF. PROB. CODE § 3-902(a).

62. Or, if the land is sold, O and P will be entitled to $20,000 and $40,000, respectively.

63. *Id.*

64. UNIF. PROB. CODE § 3-902(b) (subsection (b) states, "If the will expresses an order of abatement, or if the testamentary plan or the express or implied purpose of the devise would be defeated by the order of abatement stated in subsection (a), the shares of the distributees abate as may be found necessary to give effect to the intention of the testator.") (suppose the will left testator's property to a surviving spouse or qualified charitable organization in a manner designed to secure the estate tax marital or charitable deduction, §§ 2056 and 2055, respectively. The language in § 3-902(b) permits a court to find an intent to minimize taxes that would be thwarted if the property so disposed of in the will were abated and could allow for a different abatement order). *Id.*

65. *See id.* §§ 1-201(10), (38), 3-902(a) (amended 2019).

necessarily the rule in all states.[66] For example, in Texas, personal property devised in the residuary abates before land devised in the residuary, and specifically devised personal property abates before specifically devised land.[67] The U.P.C. provides creditor protection by giving creditors the ability to subject non-probate property to claims.[68] In permitting estate creditors to reach non-probate property, the U.P.C. does not fully equate non-probate property with probate property.[69] Creditors must first go after the probate property, and thereafter may seek recourse against the non-probate property to the extent probate assets are insufficient.[70] U.P.C. section 6-102(b) further limits creditors by allowing only non-probate property that is otherwise not exempt under state law to be subjected to claims.[71] As a result, this provision serves to exonerate exempt property passing by non-probate transfer from claims of estate creditors.[72]

In addition to the U.P.C., the Restatement (Third) of Property also includes provisions regarding abatement.[73] As is typical in most abatement ordering, the Restatement provides:

> Unless otherwise provided by will or applicable statute, shares of heirs and devisees abate in the following order to pay claims: (1) intestate shares; (2) residuary devises; (3) general devises; (4) specific devises. The shares of heirs and devisees abate proportionately within each class.[74]

A decision to include non-probate property to claims of creditors, i.e., subjecting the assets of a decedent's revocable trust to creditors' claims, does not address the priority among creditors or among the intended probate beneficiaries.[75] The Restatement (Second) of Property, Donative Transfers provides:

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66. *See id.* §§ 1-201(10), (38) (amended 2019), 3-902(a) (amended 2019).

67. *See* TEX. EST. CODE ANN. § 355.109 (historically, land has been treated differently from personalty. Generally, land vests in the successor as of the decedent's death whereas personalty remained subject to administration by the personal representative of the estate. Under Texas law, the historical preference enjoyed by real estate is reflected in each category where personal property abates prior to realty). *Id.*

68. UNIF. PROB. CODE § 6-102 (amended 2019) (in addition to creditors, the decedent's spouse and children entitled to statutory allowances are eligible to recover claims against non-probate assets).

69. *See id.*

70. *Id.* § 6-102(b).

71. *Id.* (in addition to exempt property, survivorship interests for joint tenancy real estate receive protection against claims from creditors of the deceased joint tenant).

72. *See id.*

73. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 1.1 cmt. f (AM. L. INST. 1999).

74. *Id.* (the four identified sources in the abatement ordering scheme fail to include demonstrative bequests. Comment f to § 1.1 addresses this omission by providing that "[f]or purposes of abatement, a demonstrative devise is treated as a specific devise to the extent that the designated source is sufficient to cover the devise, but is treated as a general devise to the extent that the designated source is insufficient and the devise must be paid from the general assets of the estate").

75. *See id.*

> The creditors of a decedent are entitled within the time limits imposed by the controlling state law to have their claims satisfied out of the property owned by the decedent at the time of the decedent's death, as well as out of any property included in an inter vivos donative transfer made by the decedent that is a substitute for a will or that is revocable by the decedent at the time of the decedent's death.[76]

While the restatement provides that creditors are able to reach both probate and non-probate property, comment j to section 34.3(3) establishes that creditor's claims are to be first satisfied out of probate property absent a contrary intent.[77] Regarding the necessity to first exhaust claims against the probate estate, comment j states:

> Nonprobate property, such as property in a revocable trust and property in any other revocable donative transfer, is not to be used to satisfy creditors' claims except to the extent the probate property is not sufficient, unless the decedent provides otherwise, or unless a court applying basic equitable principles determines that some other order of reaching property subject to creditors' claims is appropriate.[78]

The Uniform Trust Code is in accord with the Restatement by providing that a revocable trust will be subject to the decedent's creditors to the extent the probate estate is inadequate to satisfy creditors' claims.[79] The Uniform Trust Code provides:

> SECTION 505. CREDITOR'S CLAIM AGAINST SETTLOR.
> (a) ****
>
> (3) After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that was revocable at the settlor's death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and[statutory allowances] to a surviving spouse and children to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and [allowances].

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76. RESTATEMENT (SECOND) PROP.: DONATIVE TRANSFERS § 34.3(3) (AM. L. INST. 2020). *See also*, RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 7.2 cmt b (noting that in addition to the decedent's probate estate, "decedent's creditors and the decedent's surviving spouse and children claiming statutory allowances may also be entitled to have their claims satisfied out of the decedent's will substitutes of various types, to the extent provided by applicable law").

77. RESTATEMENT (SECOND) PROP.: DONATIVE TRANSFERS § 34.3(3) cmt. j.

78. *Id.*

79. UNIF. TR. CODE § 505(a)(3) (UNIF. L. COMM'N 2000).

The commentary then adds:

> Subsection (a)(3) recognizes that a revocable trust is usually employed as a will substitute. As such, the trust assets, following the death of the settlor, should be subject to the settlor's debts and other charges. However, in accordance with traditional doctrine, the assets of the settlor's probate estate must normally first be exhausted before the assets of the revocable trust can be reached.[80]

B. State Law Divergency from the Sequential Approach—Examples

It is useful to examine two states with statutory schemes that diverge from the sequential approach treatment of non-probate property found in the uniform acts and the Restatement.[81] In departing from the sequential approach, these states have attempted to more equitably apportion the burden of abatement reduction by incorporating non-probate transfers within the traditional ordering structure.[82] Therefore, this approach integrates non-probate assets with probate assets.[83]

The abatement statute contained in the Revised Code of Washington (R.C.W.) section 11.10.010 broadens the scope of abatement and contains some provisions that are not included in the U.P.C model it is based upon.[84]

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80. *Id.* § 505, cmt.

81. *See* discussion *infra* Section III.B.

82. Mark R. Siegel, *Who Should Bear the Bite of Estate Taxes on Non-Probate Property?*, 43 CREIGHTON L. REV. 747, 749, 751, 766, 774 (2010) (addressing the equitable apportionment of federal estate taxes in greater detail. In jurisdictions adopting the equitable apportionment of federal estate taxes, the executor charges probate and non-probate beneficiaries with a pro-rata share of the estate tax liability).

83. *See id.*

84. WASH. REV. CODE ANN. §11.10.010 (West 2008) providing as follows:

> Abatement—Generally.
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> (1) Except as provided in subsection (2) of this section, property of a decedent abates, without preference as between real and personal property, in the following order:
>
> (a) Intestate property;
>
> (b) Residuary gifts;
>
> (c) General gifts;
>
> (d) Specific gifts.
>
> For purposes of abatement a demonstrative gift, defined as a general gift charged on any specific property or fund, is deemed a specific gift to the extent of the value of the property or fund on which it is charged, and a general gift to the extent of a failure or insufficiency of that property or fund. Abatement within each classification is in proportion to the amounts of property each of the beneficiaries would have received if full distribution of the property had been made in accordance with the terms of the will.
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> (2) If the will expresses an order of abatement, or if the testamentary plan or the express or implied purpose of the devise would be defeated by the order of abatement stated in subsection (1) of this section, a gift abates as may be found necessary to give effect to the intention of the testator.
>
> (3) If the subject of a preferred gift is sold, diminished, or exhausted incident to administration, not including satisfaction of debts or liabilities according to their community or separate status under RCW 11.10.030, abatement must be achieved by appropriate adjustments in, or contribution from, other interests in the remaining assets.

R.C.W. section 11.10.010 (5) contains an express inclusion of nonprobate property when it states "nonprobate assets must abate with those disposed of under the will . . . ."[85] Pursuant to R.C.W. Section 11.10.040, these nonprobate transfers are then to be categorized among the ordering regime set out in §11.10.010(1)(a) and (b) applicable to probate transfers.[86] Subsection 2(b) treats nonprobate transfers covering an identifiable asset passing to beneficiaries upon the decedent's death (such as, but not limited to, joint tenancy or payable on death assets) as specific bequests.[87] However, the statute does not automatically categorize all nonprobate transfers as specific bequests.[88] Subsection (2)(b) provides that other nonprobate transfers are to be categorized comparably to the nature of the interest transferred.[89] As a result, it appears that the terms of the governing revocable trust dispositions upon the grantor's death will dictate the proper categorization through analogous or comparable dispositions if made by a will.[90] For example, if, according to the governing instrument, the trustee is directed to distribute $50,000 to the beneficiary upon the grantor's death, this

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(4) To the extent that the whole of the community property is subject to abatement, the shares of the decedent and of the surviving spouse or surviving domestic partner in the community property abate equally.
(5) If required under RCW 11.10.040, nonprobate assets must abate with those disposed of under the will and passing by intestacy).

85. *Id.* at § 11.10.010 (5).

86. *Id.* at § 11.10.040(2); Section 11.10.040 provides as follows:
Nonprobate assets.
(1) If abatement is necessary among takers of a nonprobate asset, the court shall adopt the abatement order and limitations set out in RCW 11.10.010, 11.10.020, and 11.10.030, assigning categories in accordance with subsection (2) of this section.
(2) A nonprobate transfer must be categorized for purposes of abatement, within the list of priorities set out in RCW 11.10.010(1), as follows:
(a) All nonprobate forms of transfer under which an identifiable nonprobate asset passes to a beneficiary or beneficiaries on the event of the decedent's death, such as, but not limited to, joint tenancies and payable-on-death accounts, are categorized as specific bequests.
(b) With respect to all other interests passing under nonprobate forms of transfer, each must be categorized in the manner that is most closely comparable to the nature of the transfer of that interest.
(3) If and to the extent that a nonprobate asset is subject to the same obligations as are assets disposed of under the decedent's will, the nonprobate assets abate ratably with the probate assets, within the categories set out in subsection (2) of this section.
(4) If the nonprobate instrument of transfer or the decedent's will expresses a different order of abatement, or if the decedent's overall dispositive plan or the express or implied purpose of the transfer would be defeated by the order of abatement stated in subsections (1) through (3) of this section, the nonprobate assets abate as may be found necessary to give effect to the intention of the decedent.

87. *Id.* § 11.10.040(2)(a). (Categorization as specific bequests results in this form of nonprobate transfer being last in line to abate for liability for creditors' claims).

88. *See id.*

89. *Id.* § 11.10.040(2)(b).

90. *Id.*

would be treated as a general bequest because of its similarity to its counterpart if the distribution provision were made by a will.[91]

To the extent non-probate property is subject to the decedent's liabilities before death, those non-probate assets remain subject to claims of creditors.[92] Importantly, Washington creates certain categories of exempt property through the definition of non-probate property.[93] The definition of non-probate property excludes a payable on death provision of a life insurance policy, annuity, or other similar contracts, or of an employee benefit plan.[94] Therefore, although these beneficiaries are the recipients of non-probate transfers, life insurance and retirement plan beneficiaries are exempt from creditors' claims.[95]

In 2019, the Texas legislature added Texas Property Code section 112.0335 to generally provide that the rules of construction and interpretation of wills contained in Texas Estates Code Chapter 255 are applicable to revocable trusts.[96] The chapter 255 wills rules include lapsed gifts, advancements, pretermitted children and class closing.[97] Moreover, the abatement provisions contained in Estates Code section 355.109 are made applicable to such trusts.[98]

Under the Property Code section 112.0335, abatement applies at the grantor's death to at-death transfers from a revocable trust, treating the settlor as the testator and the trust beneficiaries as devisees.[99] Under the new statute, an at-death transfer in the trust is equated to will transfers as follows:

> (1) an at-death transfer of specifically identifiable trust property is a specific bequest, devise, or legacy;
> (2) an at-death transfer from the general assets of the trust that does not transfer specifically identifiable property is a general bequest, devise, or legacy; and
> (3) an at-death transfer of trust property that remains after all specific and general transfers have been satisfied is the residuary estate.[100]

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91. *See, e.g., id.* (interests "must be categorized in the manner that is most closely comparable to the nature of the transfer of that interest.")

92. *Id.* § 11.18.200.

93. *See id.* § 11.02.005(10).

94. *Id.* § 11.02.005(10) (1994).

95. *See id*.

96. TEX. PROP. CODE ANN. § 112.0335 (These rules apply where the trust is revocable by the settlor or the settlor and the settlor's spouse.).

97. *Id.*

98. TEX. EST. CODE ANN. § 355.109.

99. TEX. PROP. CODE ANN. § 112.0335.

100. *Id.* § 112.0335(d).

IV. FEDERAL TRANSFER TAXATION

The federal estate tax is a tax upon the transfer of property.[101] The value of property interests passing through the decedent's probate estate is the starting point in determining the gross estate.[102] However, the gross estate is not limited to merely the probate estate.[103] It includes property passing outside the decedent's probate estate, and therefore, includes non-probate property.[104] The federal estate tax rules recognize wealth transfers upon death through probate and non-probate means.[105]

Determining the gross estate is the beginning step to determine the tax base for the estate tax calculation.[106] The estate tax code permits certain deductions[107] to be subtracted from the gross estate when calculating the federal estate tax liability.[108] Of particular relevance is section 2053, permitting a deduction for administration expenses.[109] This section permits several categories of deductions: funeral expenses, estate administration expenses, claims against the estate, and mortgages.[110]

After a decedent's death, if there is a will, it is submitted to the probate court.[111] Upon finding the will valid, an executor is appointed in order to manage the estate following the decedent's death.[112] Through the probate process, the executor of the decedent's estate may incur a variety of expenses on behalf of the estate in administering the assets.[113]

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101. *Estate Tax*, IRS (Dec. 17, 2020) https://www.irs.gov/businesses/small-businesses-self-employed/estate-tax#:~:text=The%20Estate%20Tax%20is%20a,Form%20706%20PDF%20(PDF) https://perma.cc/T3EW-NRDL].

102. *Id.*

103. I.R.C. § 2207.

104. *Id.*

105. *Id.*

106. *Estate Tax*, *supra* note 101.

107. I.R.C §§ 2053, 2055–56. Typical estate tax deductions may include deductions for administration expenses, section 2053, deductions for amounts transferred to charitable organizations, section 2055, and deductions for amounts passing to the decedent's surviving spouse, section 2056.

108. *Estate Tax*, *supra* note 101. The gross estate minus the deductions equals the taxable estate. To the taxable estate is added any adjusted taxable gifts (gifts made after 1976 that are not otherwise required to be included in the decedent's gross estate). A tentative tax is calculated on this aggregated figure.

109. I.R.C. § 2503.

110. Treas. Reg. § 2053-1(a)(1)(i)–(iv) (2009).

111. Harvey Jones, *Dealing With Probate in 2013*, THE GUARDIAN (MAR. 9, 2021) www.theguardian.com/Money/2013/feb/15/dealing-with-probate-in-2013 [https://perma.cc/D8D9-U5RN].

112. *See, e.g.*, TEX. EST. CODE ANN. ch. 351. The executor has the responsibility to collect and inventory assets; manage the assets during the estate administration; receive and pay creditors' claims determined to be valid against the estate; clear title to any assets of the estate; and distribute the property remaining to the proper beneficiaries after creditors have been paid. *Id.* The probate process functions to (1) provide evidence of the transfer of title and ownership of the decedent's assets to the will beneficiaries (or heirs if the decedent died intestate); (2) provide a mechanism for the payment of decedent's debts in order to protect those creditors of the decedent; and (3) distribute the decedent's property to the intended and proper beneficiaries.

113. Jones, *supra* note 111.

On the corresponding deduction side of the estate tax calculation equation, Treasury Regulation section 20.2053-1 recognizes that both probate property and non-probate property are included in the estate tax calculation.[114] Treas. Reg. § 20.2053-1 (a) divides the allowable deductions for expenses into two categories: (i) amounts payable out of property subject to claims and (ii) amounts "representing expenses incurred in administering property which is included in the gross estate but which is not subject to claims."[115] As to this latter second category of deductible expenses, the regulation provides that the deduction is for amounts that would be allowed as deductions in the first category, but only if the property being administered were subject to claims.[116]

Treas. Reg. § 20.2053-8 provides amplification that expenses incurred in administering property included in the gross estate but not subject to claims may be allowed as deductions if they:

> (1) Would be allowed as deductions in the first category if the property being administered were subject to claims; and
> (2) Were paid before the expiration of the period of limitation for assessment provided in section 6501.[117]

Regarding expenses attributable to non-probate property, the regulation further states:

> Usually, these expenses are incurred in connection with the administration of a trust established by a decedent during his lifetime. They may also be incurred in connection with the collection of other assets or the transfer or clearance of title to other property included in a decedent's gross estate for estate tax purposes but not included in his probate estate.[118]

By including the revocable trust as merely an example but in no way seeking to limit its application to other forms of property passing outside of the will, the regulation supports a broad definition of non-probate assets as property not subject to claims.[119]

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114. Treas. Reg. § 2053-1(a)(1).
115. *Id.*
116. *Id.* § 20.2053-1(a)(2).
117. *Id.* § 20.2053-8(a)(1)–(2).
118. *Id.* § 20.2053-8(a).
119. As non-probate property, the revocable lifetime trust avoids probate and is frequently thought, therefore, to be less time consuming and expensive as a mechanism to transfer wealth upon death when compared to the traditional probate process.

V. REVOCABLE TRUSTS

A. Validity to Transfer Property

In order to validly dispose of the decedent's property upon death and avoid intestacy, the will must be executed in compliance with the applicable wills act statutory formalities.[120] A trust arrangement involves one party—the trustee—holding the property for the benefit of another party, the beneficiary.[121] The party creating the trust (the grantor or settlor) can either transfer the property to another to act as trustee or declare the grantor of the trust as trustee for the beneficiary.[122] Like a will, the trust arrangement can be created prior to death.[123] These lifetime trusts can be utilized to avoid probate.[124] Further, these trusts may include provisions granting the party creating the trust the power to revoke the trust.[125] The trust may also provide the settlor with the right to receive distributions of income and principal from the trust during the settlor's life.[126] Additionally, the trust can provide who will receive the remaining trust property upon the death of the settlor.[127] As a result, the lifetime revocable trust can end up appearing to be the functional equivalent of a will.[128] But what about the necessity of complying with the

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120. *See, e.g.*, U.P.C. § 2-502. To be valid, a formal witnessed will must comply with certain statutory requirements. Generally, under the U.P.C. it must be in writing, signed by the testator and signed by two individuals who either witnessed the testator's signing of the will or acknowledgement of that signature. In this regard the U.P.C. § 2-502, addressing execution, witnessed or notarized wills, and holographic wills, provides:

> (a) [Witnessed or Notarized Wills.] Except as otherwise provided in subsection (b) and in Sections 2-503, 2-506, and 2-513, a will must be:
> (1) in writing;
> (2) signed by the testator or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction; and
> (3) either:
> (A) signed by at least two individuals, each of whom signed within a reasonable time after the individual witnessed either the signing of the will as described in paragraph (2) or the testator's acknowledgment of that signature or acknowledgement of the will; or
> (B) acknowledged by the testator before a notary public or other individual authorized by law to take acknowledgements.

121. Julia Kagan, *Trust*, INVESTOPEDIA (OCT. 19, 2020), https://www.investopedia.com/terms/t/trust.asp [https://perma.cc/TMW6-VDD6].

122. *See, e.g.*, TEX. PROP. CODE ANN. § 112.001(1)–(2) (property transferred to another to act as trustee is known as a deed of trust; in a declaration of trust, the grantor of the trust acts as trustee).

123. *See id.* § 112.001(3) (a trust created in the provisions of the will of the testator is known as a testamentary trust).

124. Liz Smith, *What Is a Revocable Living Trust?*, SMARTASSET, (Jan. 20, 2021), https://smartasset.com/retirement/what-is-a-revocable-living-trust [https://perma.cc/HTB7-QYDH].

125. *Id.*

126. Guidebook, *Revocable Trusts: How They Work — and if They're Right for You*, ARAG 3, https://www.araglegal.com/legal-now/learning-center/topics/planning-your-legacy/revocable-trusts-guidebook [https://perma.cc/X5RH-FMA9] (download PDF to view) (last visited Feb. 13, 2021).

127. *Id.*

128. *See* Smith, *supra* note 124.

statutory formalities for will execution when a revocable trust is used as the vehicle to transfer assets to the beneficiaries upon the grantor's death?[129]

In *Farkas v. Williams*, the validity of the revocable trust was called into question.[130] The settlor declared himself trustee of certain property for his own economic benefit during life, with the trust remainder to be distributed to his named beneficiary following the settlor's death.[131] The *Farkas* court was called upon to determine whether the revocable trust created was valid so that the beneficiary would be entitled to receive the trust remainder.[132] Against the beneficiary's argument for trust validity that rested on escaping will characterization was the notion that there was an "attempted testamentary disposition . . . [that was] invalid for want of compliance with the statute on wills."[133]

Despite the many similarities between the will and revocable trust, the *Farkas* court differentiated the revocable trust from a will.[134] Relying on a present transfer theory, the revocable trust was deemed valid and not an attempted testamentary disposition required by the applicable Wills Act to be executed in compliance with the statutory formalities.[135] In overcoming the testamentary disposition notion of the revocable trust with transfers upon death, the present transfer theory embraces the idea that these trusts are effectuating an inter vivos transfer.[136] As stated in the Restatement (Third) of Property:

> [T]he traditional explanation for why will substitutes are not wills is the present-transfer theory. A will substitute need not be executed in compliance with the statutory formalities required for a will because a will substitute effects a present transfer of a nonpossessory future interest or contract right, the time of possession or enjoyment being postponed until the donor's death.[137]

The theory that was originally utilized to recognize the validity of revocable inter vivos trust arrangements as not testamentary, is not without its critics.[138] As stated by Professor Langbein:

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129. *See id.*
130. Farkas v. Williams, 125 N.E. 2d 600 (Ill. 1955).
131. *Id.*
132. *Id.* at 602.
133. *Id.*
134. *Id.* at 608–09.
135. *Id.* at 603–04.
136. *See id.*
137. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 7.1 cmt. a (AM. L. INST. 2003).
138. John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1128 (1984).

> The odor of legal fiction hangs heavily over the present-[transfer] test. We see courts straining to reach right results for wrong reasons and insisting that will-like transfers possess gift-like incidents. Courts have used such doctrinal ruses to validate not only the revocable inter vivos trust, but other will substitutes as well . . . . What is the difference between the revocable and ambulatory interest created by a will, and a vested but defeasible interest in life insurance or pension proceeds? None at all, except for the form of words.[139]

In the years following *Farkas*, the use of revocable trusts and other will substitutes have been on the rise and contribute to more wealth passing through non-probate succession than the probate system.[140] As noted in the Restatement (Third) of Property: Wills and other Donative Transfers, "a will substitute serves the function of a will. It shifts the right to possession or enjoyment to the donee at the donor's death. In this sense, a will substitute is in reality a non-probate will."[141]

The original validating theory articulated in *Farkas* has evolved beyond the need to search for the inter vivos or present transfer to a beneficiary.[142] The Restatement (Third) of Property provides:

> [W]ill substitutes need not be characterized as effecting a present transfer to escape characterization as a will. Rather, the donor is free to transfer wealth on death either in the probate system or in the nonprobate system or in both. When using the nonprobate system, the donor uses its forms, which typically arise from the commercial practice of financial intermediaries. When using the state-operated transfer system of probate administration, the donor uses the forms appropriate to that system (for testation) or allows that system to operate by default (in the case of intestacy). The statute of wills does not require wealth transfers on death to occur by probate; the statute merely requires that probate transfers comply with the statute's formalities. Because the statute of wills does not govern nonprobate transfers, wealth holders may use these alternative wealth-transfer systems on death by means of will substitutes.[143]

Revocable inter vivos trusts are valid nontestamentary dispositions of the grantor's property.[144] The revocable trust (and other forms of will substitutes) may be valid to transfer property upon death, thereby functioning much like a will, even though executed without complying with a wills act.[145]

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139. *Id.*

140. Russell N. James III, *The New Statistics of Estate Planning: Lifetime and Post-Mortem Wills, Trusts, and Charitable Planning*, 8 EST. PLAN. & CMTY. PROP. L.J. 1, 27–28 (2015).

141. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 7.2 cmt. a.

142. Farkas v. Williams, 125 N.E.2d 600, 603–04 (Ill. 1955).

143. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 7.1 cmt. a.

144. RESTATEMENT (THIRD) OF TRUSTS § 25 (AM. L. INST. 2003).

145. *See id.*

B. Contextually Ignoring Validity of Revocable Trust for Purposes Other Than to Transfer Property

Current legal authority recognizes revocable trusts, specifically, and will substitutes, generally, as valid methods to transfer wealth upon death.[146] This is so despite the arrangements not being executed in accordance with the statutory formalities applicable to wills.[147] By recognizing the revocable trust as a valid form of transfer to the beneficiary, should the trust form be disregarded or ignored in other contexts? Embedded in the probate system is its function of creditor protection.[148] While a beneficiary has no rights in the revocable trust until the death of the grantor, does the same hold true for a creditor? As a functional equivalent to a will, are trust assets within the reach of the grantor's creditors after death? According to the Restatement (Third) of Property:

> Although the validity of a will substitute does not depend on its being executed in compliance with the statutory formalities required for a will, a will substitute serves the function of a will. It shifts the right to possession or enjoyment to the donee at the donor's death. In this sense, a will substitute is in reality a nonprobate will. A will substitute is therefore, to the extent appropriate, subject to substantive restrictions on testation and to rules of construction and other rules applicable to testamentary dispositions. Substantive restrictions on testation constitute important policies restricting disposition of property after the owner's death that should not be avoidable simply by changing the form of the death-time transfer. By contrast, rules of construction and other interpretative devices aid in determining and giving effect to the donor's intention or probable intention and hence should apply generally to donative documents.[149]

In *State Street Bank and Trust Co. v. Reiser*, the court confronted the question whether a creditor of the trust grantor could reach assets in the revocable trust after the grantor had died.[150] In ignoring the trust and allowing the decedent's creditors to reach the revocable trust assets, the court held:

> [T]hat where a person places property in trust and reserves the right to amend and revoke, or to direct disposition of principal and income, the

146. *See* Handelsman v. Handelsman, 852 N.E.2d 862, 864 (Ill. App. Ct. 2006).

147. *See generally* TEX. EST. CODE ANN. § 251.051 (demonstrating will formalities for Texas).

148. *See supra* note 112 and accompanying text.

149. RESTATEMENT (THIRD) OF PROPERTY: WILLS & OTHER DONATIVE TRANSFERS § 7.2 cmt. a (AM. L. INST. 2003).

150. State St. Bank and Tr. Co. v. Reiser, 389 N.E.2d 768 (Mass. App. Ct. 1979). According to the Uniform Trust Code § 501(a)(1), during the settlor's lifetime, trust property is subject to claims of creditors. *Id.* at 769. In the case *In re Estate of Nagel*, the court relied on *Reiser* in concluding that the tort plaintiff in a wrongful death action could reach the assets decedent's revocable trust. *In re* Est. of Nagel, 580 N.W.2d 810 (Iowa 1998).

> settlor's creditors may, following the death of the settlor, reach in satisfaction of the settlor's debts to them, to the extent not satisfied by the settlor's estate, those assets owned by the trust over which the settlor had such control at the time of his death as would have enabled the settlor to use the trust assets for his own benefit.[151]

In *Handelsman v. Handelsman*, the grantor created a revocable trust for the benefit of his wife and children.[152] Pursuant to section 3.2, after the grantor's death the trustee was to distribute to grantor's wife certain real estate, $1 million, and all of grantor's fine art.[153] In section 4.1, grantor's daughter and son were to each receive $1 million.[154] On the grantor's death, the trust had insufficient assets to fund the called-for cash bequests.[155] At issue was whether Illinois' wills abatement would be applied to the revocable trust.[156]

The grantor's children argued that because the revocable trust their father created was a will substitute, the trust agreement should be subjected to wills law construction rules.[157] As such, the state law abatement provisions would apply.[158] In reversing the lower court's decision holding that the section 3.2 cash bequest should be made before transferring anything to the children under section 4.1, the court relied on section 7.2 of the Restatement (Third) of Property in extending the abatement provisions of the Illinois Probate Act.[159] In adopting the principle that will substitutes should be construed according to wills construction rules, the court stated:

> Defendants reason that it is logical to apply the rules for construing wills to testamentary trusts that differ from wills in form but not in purpose or substance. We agree. "Issues of formality and procedure aside, the availability of nontestamentary methods of making disposition should not mean that substantive policies applicable to testamentary dispositions have no application. Thus, increasingly, statutes and case law in the various states

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151. *Reiser*, 389 N.E.2d at 771. In failing to recognize the revocable trust to prevent creditors from reaching trust assets, the court looked to the federal estate tax law and stated as follows: This view was adopted in *United States v. Ritter*, 558 F.2d 1165, 1167 (4th Cir. 1977). In a concurring opinion in that case Judge Widener observed that it violates public policy for an individual to have an estate to live on, but not an estate to pay his debts with. The Internal Revenue Code institutionalizes the concept that a settlor of a trust who retains administrative powers, power to revoke or power to control beneficial enjoyment "owns" that trust property and provides that it shall be included in the settlor's personal estate. *Id.*; I.R.C. §§ 2038, 2041.

152. Handelsman v. Handelsman, 852 N.E.2d 862 (Ill. App. Ct. 2006). He also executed a will on the same date as the trust. *Id.* The will contained a pour-over clause that directed that the residuary estate be added to the revocable trust. *Id.* at 864.

153. *Id.* at 865.

154. *Id.*

155. *Id.*

156. *Id.* at 866.

157. *Id.*

158. *Id.*

159. *Id.*

> are coming to recognize that the rights of the spouses and creditors of testators and of settlers of revocable trusts are fundamentally alike, because both the testator and the settlor have retained their complete control over the property that is subject to the will or trust instrument. Similarly, whatever the technicalities of concept and terminology, the interests the revocable-trust beneficiaries will receive on the death of the settlor should, generally at least, receive the same treatment and should be subject to the same rules of construction as the 'expectancies' of devisees. RESTATEMENT (THIRD) OF TRUSTS § 25, Comment a, at 379 (2003).[160]

Thus, abatement, being part of the rules of construction for wills, logically may be used in construing trusts, particularly when the trust in question differs from a will in form but not in purpose or substance.[161]

VI. ANALYSIS AND CONCLUSION

Despite rocky and unwelcome beginnings, will substitutes are recognized as the functional equivalent of wills for purposes of at-death transfers.[162] In general, non-probate assets are subject to federal estate taxes.[163] Should the equating of probate and non-probate transfers subject the non-probate property to claims against the estate?[164] And if so, are these claims to be charged ratably among probate and non-probate property?[165]

Depending on applicable federal and state law certain non-probate assets receive divergent treatment.[166] Washington, for example, does not treat all nonprobate transfers alike.[167] Life insurance proceeds and employee benefit plans receive favorable treatment because, by statute, they are excluded from the definition of non-probate property.[168] Consequently, beneficiaries of these items do not have to contribute to the payment of claims against the estate.[169]

In the course of human events when thinking about typical beneficiaries, it would indeed be surprising to learn that they would be indifferent to the

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160. *Id.* at 868. *See also In re* Est. of Boyar, 964 N.E.2d 1248 (Ill. App. Ct. 2012) *rev'd*, 986 N.E.2d 1170 (2013) ("our courts have noted the similarities in interest obtained by a beneficiary of a trust and a will and observed that it is logical to apply the rules for construing wills to testamentary trusts that differ from wills in form but not in purpose or substance.").

161. *See Handelsman*, 852 N.E.2d at 870 (the court stated that the construction of will substitutes is governed by the same rules as the construction of wills, and applied this principle to ratable abatement; using the same reasoning, the court applied the same principle to the reformation of will substitutes such as a trust agreement).

162. RESTATEMENT (THIRD) OF TRUSTS § 25, cmt. a, at 379 (Am. L. Inst. 2003).

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. RESTATEMENT (THIRD) OF TRUSTS § 25, cmt. a, at 379 (Am. L. Inst. 2003).

169. *Id.*

consequences of abatement. After all, to be advised that you were on the receiving end of a property reduction certainly would be adverse economic news. The economic reality is not made any less significant whether it arises because there are substantial creditors whose claims reduce the amount available for beneficiary distribution, or the testamentary plan actually disposes of more property than the estate comprises.[170]

In the probate world, under the default ordering rules, specific devisees and legatees are the last to be subjected to abatement and therefore are the most protected against reduction.[171] Because they failed to comply with the execution requirements of the applicable jurisdictional Wills Act, non-probate transfers were not initially well received as enforceable mechanisms to transfer property upon death.[172] With the passage of time, will substitutes have become widely accepted as valid mechanisms for the transfer of non-probate property, despite the absence of execution formalities attendant to wills.

With more wealth being transferred today in the form of non-probate property than probate property, there is little question that these transfers have earned their rightful place at the table. Abatement, a cornerstone of the law of wills, should likewise be applicable to non-probate wealth transfers. To do otherwise elevates form over substance, and in the context of abatement, creates a super-priority of beneficiaries protected against wealth transfer reduction.[173] The absence of a signed and witnessed writing should not serve to exonerate the transferee.

A default rule that frees non-probate property transferees from abatement serves to disrupt the potential for fairness and harmony amongst probate and non-probate beneficiaries. Extending parity between probate and non-probate transfers should not be an unbending goal when applying the wills law doctrine to non-probate transfers. As a result, there may be limited situations where it is appropriate to retain a preference regarding non-probate transfers over probate ones. First, the non-probate transfer may be subject to an applicable state or federal exemption.[174] In this regard, the exemption many states grant to life insurance proceeds should be preserved.[175] Retirement plan benefits subject to ERISA likewise receive preferential treatment that should be retained and not subject to abatement.[176] Second, by appropriate written provision contained in the governing instrument, the

170. *See generally* UNIF. PROBATE CODE § 3-902 (amended 2019).

171. *See* UNIF. PROBATE CODE § 3-902 (amended 2019).

172. *See* RESTATEMENT (THIRD) OF PROP: WILLS & OTHER DONATIVE TRANSFERS § 1.1 (amended 2020).

173. *See id.*

174. *See id.*

175. *See id.*

176. *See* WASH. REV. CODE ANN. § 11.02.005(10) (1994).

decedent should be able to provide for an abatement direction contrary to the default rule.[177]

The Uniform Probate Code addresses abatement for property passing outside of probate and consequently extends the law of wills and its interpretative rules to non-probate transfers.[178] In so doing, however, non-probate property is subjected to abatement only after the probate assets are exhausted.[179] Although property passing outside of probate is not fully exonerated from the harshness of abatement, this approach effectively engrafts a further category of protection following specific devises, which is traditionally the most protected category under the hierarchy of law of wills abatement.[180]

Like the approaches contained in the Uniform Laws and Restatement, the rules in Washington and Texas subject both probate and non-probate property to creditors' claims.[181] However, one set of rules may prefer non-probate transfers over probate transfers by requiring the probate estate to be inadequate.[182] The sequential approaches found in the Uniform Law's provisions and Restatement do not necessarily result in treating at death transfers on an equal footing.[183] As reflected in Washington and Texas, the alternative approach of incorporation or integration treats both means of transfer at death comparably.[184] As a tandem approach rather than sequential, at death transfers of probate and non-probate property are aggregated and characterized within the time-honored residuary-general-specific ordering hierarchy.[185]

The sequential method found in both the Uniform Probate Code and Uniform Trust Code as well as the Restatement properly leave room for the decedent to alter the default preferential order.[186] Should the decedent prefer non-probate property to pass to the designated transferee without reduction, there should be required a clear and express written directive to capture the decedent's intent.[187] The estate planner will need to make sure that the estate planning questionnaire is completed correctly and, more than ever, the client

177. *See* TEX. EST. CODE ANN. § 355.109(c).

178. *See* UNIF. PROB. CODE §§ 3-902(a), 6-102(b) (amended 2019).

179. *See id.*

180. *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 34.3(3) cmt. j (AM. L. INST. 1992) (the Restatement view tracks the U.P.C. in that non-probate property will be subject to claims to the extent the probate estate is insufficient); UNIF. PROB. CODE § 6-102(b), *supra* text accompanying notes 27–38.

181. *See* TEX. EST. CODE ANN. § 355.109; *see* WASH. REV. CODE ANN. § 11.10.040(3) (1994).

182. *See* WASH. REV. CODE ANN. § 11.10.040(4).

183. *See* UNIF. PROB. CODE § 3-902(a); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 1.1 (AM. L. INST. 1999).

184. *See* TEX. EST. CODE ANN. § 355.109; WASH. REV. CODE ANN. § 11.10.040(3).

185. *See* TEX. EST. CODE ANN. § 355.109; WASH. REV. CODE ANN. § 11.10.010(1).

186. *See* UNIF. PROB. CODE § 3-902(a); *see also* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 1.1.

187. *See* TEX. EST. CODE ANN. § 355.109(c) (explaining how if a decedent's intent can be ascertained from the will, it will take authority to the sequence of abatement).

may need to be counseled regarding the differences between probate and non-probate property disclosed in the questionnaire.[188] Of necessity, the estate planner will have to educate and discuss the abatement issue with the client in light of the client's holdings in order to ascertain whether the default rule should be overridden by directive.[189] The question of who gets assets when there is not enough to go around clearly must be raised.[190] Finding out the client's wishes as to whether non-probate property beneficiaries are to be called upon to contribute is essential.[191] Far from leaving things to chance, the client's intent whether to opt out of the default provisions in the context of probate and non-probate transfers should be coordinated and expressed in the governing instruments.[192] Ascertaining whether the client intends to favor beneficiaries of non-probate property should not be overlooked when drafting the estate plan.[193]

188. *See id.*; *see supra* Part II.

189. *See supra* Part III.

190. *See supra* Part III.

191. *See supra* Parts II, III.

192. *See generally* TEX. EST. CODE ANN. § 355.109(c) (explaining how if the decedent's intent is to opt out of the default provisions, proper intent must be demonstrated); *see supra* Part II.

193. *See supra* Part II.