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Review: Linking the Certainty of Death and Taxes

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LINKING THE CERTAINTY OF DEATH AND TAXES

Jan 13, 2014 | Browne Lewis | Add a Comment

Reid Kress Weisbord, *Wills For Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C.L. Rev. 877 (2012).

Testamentary freedom gives a person the right to control the distribution of his or her property upon death. The main way for a person to exercise that right is to execute a Will. In the event a person dies without a Will, his or her estate is distributed based upon the scheme set forth in the applicable intestacy statute. Even though most Americans die without executing Wills, [Professor Weisbord](#) is convinced that the decision not to execute a Will is not an indication that a person wants his or her property to be distributed under the intestacy system. Professor Weisbord opines that most people do not understand the consequences of dying intestate.



[Browne Lewis](#)

Professor Weisbord seeks to articulate a reason for the high rate of intestacy. He rejects the argument that people fail to execute Wills because they are afraid to think about their own mortality. To justify his rejection of that argument, Professor Weisbord asserts that people confront and plan for death by using non-testamentary transfer devices like life insurance and retirement plans with death benefit provisions. Professor Weisbord concludes that procrastination is the most plausible explanation for the high rate of intestacy. He maintains that most people procrastinate when it comes to making a Will because the process is complex and intimidating. According to Professor Weisbord, the Will-making process is complicated because the Will has to be attested to by witnesses and drafted using complex legal language. Professor Weisbord states, "In short, simplifying the will-making process would likely reduce testamentary procrastination."

In an attempt to make Will execution more accessible, Professor Weisbord proposes linking Will making to tax filing. At the time a person files his or her state income tax return, he or she would have the opportunity to fill in the blanks of a testamentary schedule. This schedule would be attached to the state income tax return just like any other tax schedule. Professor Weisbord thinks a testamentary schedule would have several advantages. First, the testator would have the opportunity to fill out the schedule when he or she is already gathering information on money, income, property, and dependents. Second, people filing income tax returns are the ones who are likely to have property to distribute at death. Third, since income

taxes have to be filed annually, the information contained in the testamentary schedule would be updated yearly. This would give a person the chance to review and to make changes to his or her testamentary distributions at least once a year. Fourth, the state would keep the testamentary schedule until it is probated, so the testator would not have to worry about losing his or her Will. Fifth, linking testamentary decision-making with income tax filing might help reduce the intestacy rate because the majority of Americans file their income taxes. Sixth, a person who hires a professional tax preparer might decide to consult with an estate planner if he or she makes a Will at the same time he or she files taxes. Seventh, preparation of the testamentary schedule may help a person who decides to execute a formal Will in the future. Once the person has a copy of the testamentary schedule, he or she can take that to an attorney to have a Will drafted. Finally, over a period of time, people may become used to dealing with estate planning issues and be prompted to execute Wills.

In the final part of the article, Professor Weisbord acknowledges that his proposal has some shortcomings. One concern is that someone other than the testator may file a testamentary schedule on the testator's behalf. As a result, there is a potential for fraud. For instance, the testator's daughter may file a testamentary schedule indicating that the testator desired to leave her the bulk of his or her estate. Professor Weisbord contends that the possibility of fraud will be diminished because the schedule would contain a warning indicating the criminal sanctions that a person would face if they filed a fraudulent testamentary schedule. In addition, prior to filing the testamentary schedule, the person would be required to submit confidential information from the testator's previous state income tax return. Another weakness of the proposed testamentary schedule is the possibility that the testator's private information would be disclosed. According to Professor Weisbord, testamentary privacy would be protected by the confidentiality and nondisclosure rules already in place to protect filed income tax returns. A further concern is that the testator may be unable to create a customized estate plan because the testamentary schedule will have a limited number of estate planning options. Without a customized estate plan, the court may not be able to ascertain the testator's intent. In response to that shortcoming, Professor Weisbord notes that having a limited statement of testamentary intent will benefit a decedent more than dying intestate. One purpose of the Will formalities is to ensure that the testator appreciates the significance of the testamentary act. That purpose may be defeated because the proposed testamentary schedule process may be too informal. Nonetheless, Professor Weisbord notes that, for most people, filing income taxes is a serious process, so linking estate planning to income tax filing will enable people to understand the legal significance of making a Will. A final shortcoming of the proposed testamentary schedule is the fact that states have limited resources; therefore, they may be unable to absorb the expense of processing and storing the testamentary schedules. In order to reduce those costs, Professor Weisbord recommends that states charge a nominal fee for the service.

The distribution under the intestacy system often does not reflect the intent of the majority of people who die without executing a will. The innovative proposal Professor Weisbord discusses in his article may help to lower the rate of intestacy by making the Will making process simpler and more affordable.



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