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Mark Glover

University of Wyoming College of Law, mglover2@uwyo.edu

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The Solemn Moment:

Expanding Therapeutic Jurisprudence Throughout Estate Planning

Mark Glover*

“With the check written but not yet signed, he swiveled back in his desk chair and seemed to ponder. The agent, a stocky, somewhat bald, rather informal man named Bob Johnson, hoped his client wasn’t having last-minute doubts. Herb was hardheaded, a slow man to make a deal; Johnson had worked over a year to clinch this sale. But, no, his customer was merely experiencing what Johnson called the Solemn Moment—a phenomenon familiar to insurance salesmen. The mood of a man insuring his life is not unlike that of a man signing his will; thoughts of mortality must occur.”¹

In the above excerpt from his true-life crime thriller, *In Cold Blood*, Truman Capote touches upon two important insights regarding estate planning. The first is the connection between the traditional estate planning tool of the will and newer modes of posthumous wealth transmission, such as life insurance. A will’s primary function is to transfer property upon death,² and life insurance, revocable trusts, joint bank accounts, and other so-called “will substitutes” function similarly.³ Specifically, each results in the transfer of wealth at the time of the donor’s death.⁴ For example, just as a will transfers property to designated beneficiaries upon the testator’s death, life insurance results in the transfer of the death benefit to designated beneficiaries upon the death of the

* Assistant Professor of Law, University of Wyoming College of Law; LL.M., Harvard Law School, 2011; J.D., *magna cum laude*, Boston University School of Law, 2008. Thanks to the University of Wyoming College of Law for research support and to Professor David Yamada and Suffolk University Law School for organizing and hosting the conference, titled The Study and Practice of Law in a Therapeutic Key: An Introduction to Therapeutic Jurisprudence, from which this essay originates.

1. TRUMAN CAPOTE, *IN COLD BLOOD: A TRUE ACCOUNT OF A MULTIPLE MURDER AND ITS CONSEQUENCES* 46-47 (1965).

2. *See* *Edmundson v. Estate of Fountain*, 189 S.W.3d 427, 430 (Ark. 2004) (“A will is a disposition of property to take effect upon the death of the maker of the instrument.”); Kent D. Schenkel, *Testamentary Fragmentation and the Diminishing Role of the Will: An Argument for Revival*, 41 CREIGHTON L. REV. 155, 166 (2008) (“Wills remain the archetypal vehicle for effecting gratuitous transfers of property interests at death.”).

3. JESSE DUKEMINIER & ROBERT H. SITKOFF, *WILLS, TRUSTS, AND ESTATES* 435 (9th ed. 2013).

4. *See id.*

insured. This connection between wills and other modes of posthumous wealth transmission has drawn considerable scholarly attention, and the prominent role that will substitutes play in contemporary estate planning has been labeled the “Nonprobate Revolution.”⁵

Capote’s second important insight is the connection between estate planning and mortality. Putting one’s affairs in order, whether through the execution of a will or the purchase of a life insurance policy, places death at the forefront of one’s mind.⁶ After all, estate planning is essentially preparation for the unpredictability of one’s own death, and as Capote puts simply, “thoughts of mortality must occur” when undertaking such preparation.⁷ Because of this unavoidable confrontation with mortality, estate planning can have psychological consequences.⁸ In the seconds prior to insuring his life, Herb experienced a brief moment of reflection—an occurrence that Herb’s insurance salesman calls “the Solemn Moment.”⁹ Others experience more severe consequences, such as fear or death anxiety.¹⁰ Some avoid estate planning altogether in order to escape the unpleasantness of confronting their mortality.¹¹

Although the connection between estate planning and mortality may seem evident, legal scholars have not significantly considered the effect of estate planning on the psychological wellbeing of those preparing for death. More specifically, they have devoted little thought to the role that therapeutic jurisprudence can play in the analysis of the estate planning process and the related law of succession. Therapeutic jurisprudence, which focuses attention on the psychological consequences of the law and seeks to increase its therapeutic potential,¹² would seem to provide an obvious framework through which to evaluate the law in an area that has so many psychological repercussions.

Again, the mere act of preparing for one’s death has clear psychological implications. But beyond the possible fear and anxiety experienced by the one

5. John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984).

6. See Mark Glover, *Formal Execution and Informal Revocation: Manifestations of Probate’s Family Protection Policy*, 34 OKLA. CITY U. L. REV. 411, 438 (2009) (describing psychological effect of estate planning ceremony).

7. CAPOTE, *supra* note 1, at 47.

8. See generally Mark Glover, *A Therapeutic Jurisprudential Framework of Estate Planning*, 35 SEATTLE U. L. REV. 427 (2012).

9. CAPOTE, *supra* note 1, at 47.

10. See Gerry W. Beyer, *The Will Execution Ceremony—History, Significance, and Strategies*, 29 S. TEX. L. REV. 413, 419 (1988) (explaining psychological effects of will execution ceremony).

11. See Gerry W. Beyer, *Statutory Fill-In Will Forms—The First Decade: Theoretical Constructs and Empirical Findings*, 72 OR. L. REV. 769, 778 (1993) (highlighting notable historical figures who died without wills).

12. See generally David Wexler, *Therapeutic Jurisprudence: An Overview*, 17 T.M. COOLEY L. REV. 125 (2000).

confronting mortality, estate planning and the law of succession can also have negative psychological consequences for those left behind. After a loved one's death, the family not only must deal with a profound loss but also must navigate the process of settling the decedent's estate. If disputes arise during this process, familial conflict and the emotional and psychological issues of grieving family members can intensify.¹³ Because the law of succession and the lawyers that aid in the estate planning process interact with those dealing with these negative psychological experiences, legal scholars should explore how the law and the role of the estate-planning lawyer can be shaped to ease these anti-therapeutic effects.

Although few and far between, a handful of scholars have drawn attention to the psychological implications of estate planning, the law of succession, and the probate process.¹⁴ For example, Professor Thomas Shaffer has explored ways that the estate-planning attorney can positively affect the psychological wellbeing of those confronting their mortality during the estate-planning process.¹⁵ A small body of scholarship has also developed around the issue of how the probate process can become a more therapeutic experience for the decedent's family.¹⁶ While this prior work sheds important light on the psychological consequences of the law and has suggested innovative reforms that could make the estate planning and probate processes more therapeutic, much of this scholarship does not specifically use therapeutic jurisprudence as its analytical foundation.

With the goal of inspiring broader therapeutic-jurisprudential analysis within this area, I have worked to develop a therapeutic-jurisprudential framework of estate planning through which to analyze a variety of aspects of the law of succession; and I have applied this framework to evaluate and suggest reforms of the law of will-execution.¹⁷ However, as Capote reminds us, estate planning involves much more than visiting a lawyer and executing a will.¹⁸ Indeed, contemporary estate planning employs various will substitutes, and the use of

13. See Ronald Chester, *Less Law, but More Justice?: Jury Trials and Mediation as Means of Resolving Will Contests*, 37 DUQ. L. REV. 173, 195-96 (1999).

14. See Beyer, *supra* note 10, at 419-20; Pamela R. Champine, *A Sanist Will?*, 46 N.Y.L. SCH. L. REV. 547, 560-62 (2002-2003).

15. See Thomas L. Shaffer, *The "Estate Planning" Counselor and Values Destroyed by Death*, 55 IOWA L. REV. 376, 382 (1969); Thomas L. Shaffer, *Will Interviews, Young Family Clients and the Psychology of Testation*, 44 NOTRE DAME L. REV. 345, 377 (1969).

16. See, e.g., Chester, *supra* note 13, at 193-203; Susan N. Gary, *Mediation and the Elderly: Using Mediation To Resolve Probate Disputes over Guardianship and Inheritance*, 32 WAKE FOREST L. REV. 397, 425-28 (1997); Patricia Monroe Wisnom, Note, *Probate Law and Mediation: A Therapeutic Perspective*, 37 ARIZ. L. REV. 1345, 1356-58 (1995).

17. See Glover, *supra* note 8; Mark Glover, *The Therapeutic Function of Testamentary Formality*, 61 U. KAN. L. REV. 139 (2012); see also Mark Glover, *The Heiligenstadt Testament: Beethoven's Therapeutic Estate Planning Experience*, ARIZ. ST. L.J. (Apr. 30, 2012), <http://arizonastatelawjournal.org/the-heiligenstadt-testament-beethovens-therapeutic-estate-planning-experience/>, archived at <http://perma.cc/D6FU-FJ3R>.

18. See CAPOTE, *supra* note 1, at 46-47.

will substitutes to transfer property upon death would seem to raise similar psychological issues as the use of wills. Yet, scholars have not examined this area of estate planning through the lens of therapeutic jurisprudence. Therefore, the goal of the remainder of this essay is to begin the discussion of how therapeutic-jurisprudential analysis could be applied to the role that will substitutes play in the estate planning process.

Because they transfer property upon death, will substitutes, such as revocable trusts, life insurance, joint bank accounts, and pension accounts, function similarly to wills.¹⁹ Despite this functional similarity, many will substitutes differ from traditional wills in one important respect. Unlike wills, the confrontation with death is not an inherent consequence of all nonprobate transfers. A donor may have a legitimate lifetime purpose to effectuate a nonprobate transfer apart from preparing for death. For example, when a husband and wife open a joint bank account, they might have motives other than preparing for the transfer of the account assets upon one of their deaths. Instead, the couple may open the account for reasons of convenience or simplicity, to reduce banking fees, or to symbolize their marital commitment.²⁰ Likewise, when an employee designates a death beneficiary for a pension account, she might not fully consider that she is planning for her own death but may simply complete the designation along with the many other forms required to start a new job. Because a donor pursuant to these nonprobate transfers may have motives other than planning for death, the use of these will substitutes is less likely to produce death anxiety than the execution of a will.

Other will substitutes, however, potentially produce death anxiety similar to that caused by traditional wills. As Capote eloquently illustrates, by purchasing life insurance, the insured acknowledges the inevitability of death and must explicitly contemplate her mortality.²¹ Not surprisingly, people display similar hesitation and anxiety when purchasing life insurance as they do when executing wills.²² Consequently, as a tactic to make their products and services more marketable, insurance companies sell life insurance rather than death insurance, and “agents are careful to omit the word *death* from their discussions with clients.”²³ These marketing ploys are not always successful because, just as death anxiety contributes to high rates of intestacy, similar concerns

19. See *supra* notes 2-5 and accompanying text.

20. See LAWRENCE J. GITMAN & MICHAEL D. JOEHNK, *PERSONAL FINANCIAL PLANNING* 115 (11th ed. 2008) (“One advantage of the joint account over two individual accounts is lower service charges.”); TERENCE MYERS ET AL., *CCH FINANCIAL AND ESTATE PLANNING GUIDE* 72 (18th ed. 2009) (explaining that joint accounts “are obviously very convenient for married couples”).

21. See CAPOTE, *supra* note 1, at 46-47.

22. See David W. Marnold, *The Challenge of Selling Life Insurance*, 26 LIMRA’S MARKETFACTS Q. 30, 30 (2007) (“Consumers simply don’t want to think about buying life insurance because of what it implies about their own mortality.”).

23. JESSE DUKEMINIER ET AL., *WILLS, TRUSTS, AND ESTATES* 71-72 (8th ed. 2009).

“contribute to [the] inadequate purchase of life insurance.”²⁴

In addition to life insurance, revocable trusts have the potential to produce death anxiety. But while life insurance’s death anxiety potential stems from the insured’s desire to plan for death and not necessarily from an intent to avoid the use of a will, the creation of a revocable trust may produce death anxiety because the settlor specifically uses the trust as a substitute for a traditional will. Revocable trusts are well suited for use as intentional will substitutes because they are “the most will-like” nonprobate transfer.²⁵ Other will substitutes generally govern the transfer of specific assets, such as the cash deposited in a joint bank account or the death benefit of a life insurance policy, but revocable trusts can be used to dispose of a variety of assets and therefore more closely resemble traditional wills.²⁶ Because of their flexibility and similarity to traditional wills, most settlors create revocable trusts specifically to avoid the need for wills.²⁷ In such situations, the settlor’s potential for death anxiety mirrors that of a testator who executes a will.

Over the last several decades, the role of will substitutes within contemporary estate planning has grown.²⁸ In fact, decedents now pass more wealth via will substitutes than through wills.²⁹ With this increased significance of will substitutes, particularly revocable trusts,³⁰ a major issue within the scholarly discourse of the law of succession is the degree to which the law of wills and the law of will substitutes should be harmonized.³¹ For instance, legal scholars have devoted much attention to the issue of whether the rules that govern the creation, construction, and substantive limitations of wills should also apply to will substitutes.³² Because of the evolving nature of this area of law, will substitutes present a ripe opportunity for policymakers to consider the psychological consequences of estate planning. Ultimately they

24. Lauren E. Willis, *Against Financial-Literacy Education*, 94 IOWA L. REV. 197, 234 (2008).

25. DUKEMINIER ET AL., *supra* note 23, at 414.

26. See Langbein, *supra* note 5, at 1115 & n.32.

27. See UNIF. TRUST CODE § 601 cmt. (2010) (“The revocable trust is used primarily as a will substitute.”); Stanley M. Johanson, *Revocable Trusts and Community Property: The Substantive Problems*, 47 TEX. L. REV. 537, 550 (1969) (explaining “distinctive characteristic of” revocable trust where settlor is also trustee “is that it is not incidentally, not primarily, but solely intended as a substitute for a will.”).

28. See Langbein, *supra* note 5, at 1109.

29. See DUKEMINIER & SITKOFF, *supra* note 3, at 435.

30. See *id.* (“The revocable trust has . . . emerged as the successor to the will as the centerpiece instrument in contemporary estate planning.”).

31. See *id.* “The rise of private succession raises two principal legal questions. First, must a will substitute be executed with *Wills Act formalities* to be valid? Second, to what extent should the policy-based substantive limits on testation by will, and the rules of construction applicable to a will, collectively the *subsidiary law of wills*, apply also to a will substitute?” See *id.*

32. See, e.g., Elaine H. Gagliardi, *Remembering the Creditor at Death: Aligning Probate and Nonprobate Transfers*, 41 REAL PROP. PROB. & TR. J. 819 (2007); Susan N. Gary, *Applying Revocation-on-Divorce Statutes to Will Substitutes*, 18 QUINNIPIAC PROB. L.J. 83 (2004); Jeffrey S. Kinsler, *The Unmerry Widow: Spousal Disinheritance and Life Insurance in North Carolina*, 87 N.C. L. REV. 1869 (2009); Alan Newman, *Revocable Trusts and the Law of Wills: An Imperfect Fit*, 43 REAL PROP. TR. & EST. L.J. 523 (2008).

exemplify therapeutic jurisprudence's potential to provide important insights on a variety of issues throughout the law of succession.³³

33. See Glover, *supra* note 8, at 467-70 (suggesting potential areas within law of succession to analyze from therapeutic-jurisprudential perspective).