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## FREEDOM OF INHERITANCE

Mark Glover\*

### *Abstract*

*The law grants individuals the broad freedom of disposition to decide how their property should be distributed upon death. The rationale underlying freedom of disposition is that the choices of individual donors produce results that maximize social welfare. Policymakers are rightfully skeptical that they can craft a mandatory estate plan that fits all situations or that probate courts can consistently and accurately assess the merits of particular dispositions of property. By contrast, the donor is in the best position to evaluate her own specific circumstances and to place property in the hands of the donees who will benefit the most.*

*The donor, however, is not the sole decision-maker regarding the disposition of her property after death. To be sure, she enjoys broad freedom to craft an estate plan to her liking. But when the donor decides to make a gift to a particular donee, the donee must also make a decision. Specifically, she must decide either to accept the gift from the donor or to reject it. Whereas the donor's discretion to decide which testamentary gifts to make is referred to as freedom of disposition, the donee's discretion to decide which testamentary gifts to accept or to reject can be labeled "freedom of inheritance."*

*Although legal scholars have paid much attention to the donor's freedom of disposition and have explained that it plays an important role in maximizing social welfare, relatively little attention has been paid to the donee's freedom of inheritance and the role it plays in maximizing the utility generated from the donor's estate. To fill this analytical void, this Article defines the donee's freedom of inheritance and identifies how it works in concert with the donor's freedom of disposition to maximize social welfare. Ultimately, this Article argues that the donee's freedom of inheritance is an important part of the process of transferring wealth after death and that policymakers should strive to facilitate the donee's exercise of this freedom when crafting the law of succession.*

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## INTRODUCTION

Freedom of disposition is the cornerstone of the modern law of succession.<sup>1</sup> Individuals enjoy nearly unfettered discretion to decide how property should be distributed upon death,<sup>2</sup> and the law is largely designed to facilitate the exercise of this freedom.<sup>3</sup> Because of freedom of disposition's central role within the law of succession, it is easy to view the decision-making process regarding inheritance as one-sided—the donor decides what property the donee should receive upon her death, and the donee gladly accepts the gift when that time comes. Although this view of inheritance is perhaps intuitive, the donee is not a passive participant in the disposition of the donor's property. To the contrary, when the donor decides to name a donee as a beneficiary of her estate, the donee must make a decision of her own. After the donor's death, she must decide whether to accept the gift from the donor or to reject it.<sup>4</sup> Whereas the donor's discretion to decide which testamentary gifts to make is referred to as “freedom of disposition,” the donee's discretion to decide which testamentary gifts to accept or to reject can be labeled “freedom of inheritance.”<sup>5</sup>

Although freedom of disposition's primary role within the law of succession is unmistakable, the role of freedom of inheritance is not clearly defined or well

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<sup>1</sup> See RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 10.1 cmt. a, (AM. LAW INST. 2003); Daniel B. Kelly, *Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications*, 82 FORDHAM L. REV. 1125, 1133–34 (2013); Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L.J. 643, 643 (2014); see also *infra* notes 7–9 and accompanying text.

<sup>2</sup> See RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 10.1 cmt. a, (AM. LAW INST. 2003) (“Property owners have the nearly unrestricted right to dispose of their property as they please.”); Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 882–85 (2012) (“Americans enjoy nearly unbridled testamentary freedom, a right that has been fully engrained in the American psyche.”).

<sup>3</sup> See RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 10.1 cmt. c, (AM. LAW INST. 2003); JESSE DUKEMINIER & ROBERT H. SITKOFF, *WILLS, TRUSTS AND ESTATES* 1 (9th ed. 2013).

<sup>4</sup> See *infra* Part II.

<sup>5</sup> See Kelly, *supra* note 1, at 1133 n.37 (“Testamentary freedom, i.e., a donor's right to select beneficiaries is technically distinct from the freedom of inheritance, i.e., the donee's right to receive property . . .”). The term “freedom of inheritance” is rarely used within legal scholarship. See, e.g., Robert J. Lynn, *Legal and Economic Implications of the Emergence of Quasi-Public Wealth*, 65 YALE L.J. 786, 787 n.4 (1956) (quoting Josiah Stamp, *Inheritance: Economic Aspects*, in 12 ENCYCLOPEDIA BRITANNICA 357 (1937)). In addition to the meaning ascribed to it in this Article, freedom of inheritance is sometimes used to describe “the freedom of an owner at death to avoid confiscation of her property by the state.” Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 6 n.16 (1992); see Eike G. Hosemann, *Protecting Freedom of Testation: A Proposal for Law Reform*, 47 U. MICH. J.L. REFORM 419, 421 n.5 (2014); Kelly, *supra* note 1, at 1133 n.37.

understood. Because freedom of disposition has received substantial scholarly attention, significant issues, such as why the donor has broad liberty to distribute property at death and how the law should facilitate the exercise of this freedom, have been deeply explored.<sup>6</sup> By contrast, because freedom of inheritance has resided in obscurity, similarly important questions regarding the donee's discretion to accept or to reject testamentary gifts have gone unanswered. To fill this analytical void, this Article defines the donee's freedom of inheritance and identifies the rationales that justify this freedom's place within the law of succession. Ultimately, this Article argues that the donee's freedom of inheritance is an important part of the process of transferring wealth after death and that policymakers should strive to facilitate the donee's exercise of this freedom when crafting the law of succession.

This Article proceeds in three Parts. Part I describes freedom of disposition's fundamental status within the law of succession, including the rationales underlying this freedom. Part II then shifts the Article's focus to the related, yet overlooked freedom of inheritance. Specifically, Part II differentiates the donee's freedom of inheritance from the donor's freedom of disposition and explains why the law grants the donee the discretion to accept or to reject transfers from the donor's estate. Part III concludes the Article by exploring how the law should facilitate the donee's exercise of freedom of inheritance.

## I. FREEDOM OF DISPOSITION

The modern law of succession is founded upon the donor's freedom of disposition.<sup>7</sup> As The Restatement (Third) of Property (the "Restatement") explains, "The organizing principle of the American law of donative transfers is freedom of disposition," and as such, "[p]roperty owners have the nearly unrestricted right to

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<sup>6</sup> See *infra* Part I.

<sup>7</sup> See *In re Estate of Malloy*, 949 P.2d 804, 806 (Wash. 1998) ("A basic principle underlying any discussion of the law of wills is that an individual has the right and the freedom to dispose of his or her property, upon death, according to the dictates of his or her own desires."); THOMAS P. GALLANIS, FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 349 (5th ed. 2011) ("Freedom of disposition is a hallmark of the American law of succession."); Mark Glover, *A Therapeutic Jurisprudential Framework of Estate Planning*, 35 SEATTLE U. L. REV. 427, 444-45 (2012) ("Testamentary freedom is so fundamental that it has consistently been heralded as the keystone of the law of succession."); Adam J. Hirsch, *The Problem of the Insolvent Heir*, 74 CORNELL L. REV. 587, 632 (1989) ("[C]ourts traditionally exalt freedom of testation and the fulfillment of testamentary intent as central to gratuitous transfers policy."); Paula A. Monopoli, *Toward Equality: Nonmarital Children and the Uniform Probate Code*, 45 U. MICH. J.L. REFORM 995, 1010 n.94 ("Freedom of testation and testator's intent are frequently identified as paramount jurisprudential touchstones in the area of trusts and estates."); E. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275, 278 (1999) ("The ideal of testamentary freedom grounds the law of testation.").

dispose of their property as they please.”<sup>8</sup> Whereas the Restatement describes the ability of owners to dispose of property both during life and at death, Professor Robert Sitkoff specifically describes freedom of disposition’s place within the law of succession:

The American law of succession embraces freedom of disposition, authorizing *dead hand* control, to an extent that is unique among modern legal systems . . . . The right of a property owner to dispose of his or her property on terms that he or she chooses has come to be recognized as a separate stick in the bundle of rights called property.<sup>9</sup>

Because of the primacy of dead-hand control, an analysis of the donee’s freedom of inheritance must build upon an understanding of the donor’s freedom of disposition. This section therefore explains the mechanics of and rationales underlying this freedom.

#### A. Mechanics

Traditionally, the donor exercises freedom of disposition by executing a will in which she expresses how she wants her estate distributed.<sup>10</sup> In particular, the donor specifies what property goes to which donees.<sup>11</sup> However, because a will becomes effective only upon death, the donor retains full ownership over her property, maintaining the right during life to do with her property as she pleases.<sup>12</sup>

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<sup>8</sup> RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 10.1 (AM. LAW INST. 2003).

<sup>9</sup> Sitkoff, *supra* note 1, at 643–44; *see* Cantrell v. Cantrell, No. M2002-02883-COA-R3-CV, 2004 WL 3044907 \*5 (Tenn. Ct. App. Dec. 30, 2004) (“A fundamental principle of the law of wills is that a testator is entitled to dispose of the testator’s property as he or she sees fit, regardless of any perceived injustice that may result from such a choice.”); Weisbord, *supra* note 2, at 882 (“The most fundamental guiding principle of American inheritance law is testamentary freedom—that the person who owns property during life has the power to direct its disposition at death.”).

<sup>10</sup> *See* Kent D. Schenkel, *Testamentary Fragmentation and the Diminishing Role of the Will: An Argument for Revival*, 41 CREIGHTON L. REV. 155, 156 (2008) (explaining that “estate planning . . . at one time involved not much more than the drafting and execution of a will”).

<sup>11</sup> A gift of particular property, such as a piece of real property, is called a specific bequest, and a gift of a general benefit, such as a sum of money, is called a general bequest. *See* DUKEMINIER & SITKOFF, *supra* note 3, at 374.

<sup>12</sup> *See* John C.P. Goldberg & Robert H. Sitkoff, *Torts and Estates: Remediating Wrongful Interference with Inheritance*, 68 STAN. L. REV. 335, 342 (2013) (“The interest of a prospective beneficiary under a will or will substitute does not ripen into a cognizable right until the donor’s death. Until then, a prospective beneficiary has a mere ‘expectancy’ that is subject to defeasance at the donor’s whim.”).

Furthermore, because a will is ambulatory, the donor can change her mind regarding the disposition of her estate by revoking or amending her will prior to death.<sup>13</sup>

In addition to executing a will, the donor can exercise freedom of disposition by distributing property upon death through other avenues, such as life insurance policies, payable-on-death bank accounts, and revocable trusts.<sup>14</sup> Scholars adopted the term “will substitute” to describe these instruments because they are the functional equivalents of wills.<sup>15</sup> Specifically, the donor can retain ownership of property during life and designate a donee who takes ownership of the property after the donor’s death.<sup>16</sup> For example, when the donor deposits funds in a payable-on-death bank account, she retains ownership of the property and can do as she pleases with the account funds.<sup>17</sup> Moreover, she can designate a beneficiary, who will become the owner of the account assets after her death.<sup>18</sup> Under this scenario, ownership of the account funds transfers from the donor to the donee upon the donor’s death without the need for a will. Thus, within the context of contemporary estate planning, the donor’s options for exercising freedom of disposition have expanded to include not only the traditional will but also various will substitutes that function similarly to wills.

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<sup>13</sup> See DUKEMINIER & SITKOFF, *supra* note 3, at 215.

<sup>14</sup> “A donor may exercise her freedom of disposition at death other than by will in probate. . . . [R]evocable inter vivos trusts, life insurance and other pay-on-death contracts, pension plans and retirement accounts, and other legal arrangements . . . have the effect of passing property at death outside of probate. Taken together, these will substitutes constitute a nonprobate system of private succession . . . .” *Id.* at 435; see Mark Glover, *The Solemn Moment: Expanding Therapeutic Jurisprudence Throughout Estate Planning*, 3 SUFFOLK U. L. REV. ONLINE 19, 19–20 (2015); see generally John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1108–09 (1984) (describing the “demand for probate avoidance” and the rise of “free-market competitors of the probate system”); Melanie B. Leslie & Steward E. Sterk, *Revisiting the Revolution: Reintegrating the Wealth Transmission System*, 56 B.C. L. REV. 61, 61–64, (2015) (describing the growth of a “system of non-probate transfers.”).

<sup>15</sup> See Grayson M.P. McCouch, *Probate Law Reform and Nonprobate Transfers*, 62 U. MIAMI L. REV. 757, 758–59 (2008) (“Will substitutes, as the name implies, are designed to achieve the practical effect of a will—designating beneficiaries to receive property at the donor’s death . . .”).

<sup>16</sup> See *id.*

<sup>17</sup> See *Jordan v. Burgbacher*, 883 P.2d 458, 463 (Ariz. Ct. App. 1994) (“A POD account belongs to the original depositor during that person’s lifetime and not to the POD payee or payees.”).

<sup>18</sup> See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 7.1 cmt. g (AM LAW INST. 2003) (“There are several types of payable-on-death arrangements. One is a POD bank account that is carried in the name of the depositor (the donor) and is ‘payable on the death of the depositor to’ the designated beneficiary.”).

*B. Rationales*

The underlying rationale of freedom of disposition has long been a topic of debate. Of the various justifications of freedom of disposition that have been proposed, perhaps the oldest, is that the donor has a natural right to distribute property at death.<sup>19</sup> Professors Adam Hirsch and William Wang explain this rationale as: “Having created wealth by the sweat of her brow, the testator is naturally free to do with it as she pleases—including passing it along to others.”<sup>20</sup> Although this natural rights rationale of freedom of disposition has deep roots,<sup>21</sup> it also has long been questioned and has largely lost favor.<sup>22</sup>

A second general explanation of freedom of disposition’s place within the modern law of succession is that most people expect and prefer to have broad liberty to dispose of property upon death.<sup>23</sup> Professor Lewis Simes proposed this idea by suggesting that “the desire to dispose of property by will is very general, and very strong” and, as such, “[a] compelling argument in favor of it is that it accords with human wishes.”<sup>24</sup> The recognition of the strong political preference for broad freedom of disposition leads to the realization that freedom of disposition is difficult to restrain.<sup>25</sup> Even if the law attempted to severally limit the ability to dispose of property upon death, for example by eliminating disposition of property by will, people would find ways around these limitations, such as by transferring property during life or by other means designed to transfer property at death.<sup>26</sup> Similar to the natural rights theory,<sup>27</sup> this pragmatic take on freedom of disposition does not adequately explain freedom of disposition’s central role in the modern law of succession.<sup>28</sup>

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<sup>19</sup> See Hirsch & Wang, *supra* note 5, at 6–7. “Such a natural right was posited by Roman jurists.” *Id.* at 6 n.17.

<sup>20</sup> *Id.* at 6.

<sup>21</sup> See *id.* at 6–7 (explaining that seventeenth century commentators John Locke and Hugo Grotius supported the natural rights theory of freedom of disposition); see also Kelly, *supra* note 1, at 1135 n.48 (same).

<sup>22</sup> See Hirsch & Wang, *supra* note 5, at 6–7 (suggesting that “from at least the seventeenth century, ideologists have disputed the natural rights theory of testation” but that “after centuries in eclipse” the natural rights theory of freedom of disposition “has lately drawn flickers of judicial support”); see also Ronald Chester, *Essay: Is the Right to Devise Property Constitutionally Protected? – The Strange Case of Hodel v. Irving*, 24 SW. U. L. REV. 1195, 1195–96 (1995) (casting doubt on the validity of dead-hand control over property).

<sup>23</sup> See Hirsch & Wang, *supra* note 5, at 14 (“[T]he power to bequeath comports with political preferences . . .”).

<sup>24</sup> LEWIS M. SIMES, PUBLIC POLICY AND THE DEAD HAND 21 (1955).

<sup>25</sup> See Hirsch & Wang, *supra* note 5, at 11–12 (“A secondary justification for the right of testation is that it would in practice be difficult to curtail.”).

<sup>26</sup> See *id.*

<sup>27</sup> See *supra* notes 19–22 and accompanying text.

<sup>28</sup> See Hirsch & Wang, *supra* note 5, at 11–12.

Whatever the merits of justifying freedom of disposition as either a natural right or a political preference, much of the discussion surrounding the underlying rationale of freedom of disposition now focuses on what Professor Daniel Kelly describes as “functional considerations.”<sup>29</sup> He explains, “This functional perspective emphasizes the ‘social welfare’ of the parties and seeks to determine how the law can create the best incentives for the donor, donees, and other parties that a donor’s disposition of property may effect.”<sup>30</sup> When viewed from this functional perspective that focuses on maximizing the wellbeing of society as a whole, broad freedom of disposition could be based upon several rationales,<sup>31</sup> including that it increases the donor’s utility, increases the donee’s utility, and provides incentives that increase social welfare.

### *1. Donor Utility*

First, broad freedom of disposition increases the satisfaction of the donor.<sup>32</sup> Indeed, the ability to pass property upon death, particularly to close family members, can improve the welfare of individual members of society.<sup>33</sup> As Professor Edward Halbach suggests,

[A] society should be concerned with the total amount of happiness it can offer, and to many of its members it is a great comfort and satisfaction to know during life that, even after death, those whom one cares about can be provided for and may be able to enjoy better lives because of the inheritance that can be left to them.<sup>34</sup>

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<sup>29</sup> Kelly, *supra* note 1, at 1135.

<sup>30</sup> *Id.*; see Pamela R. Champine, *My Will Be Done: Accommodating the Erring and the Atypical Testator*, 80 NEB. L. REV. 387, 432 (2001) (“The most prevalent justification for testamentary freedom is the utilitarian view which posits that testamentary freedom is not a right but rather a privilege offered for the purpose of motivating socially desirable behavior.”).

<sup>31</sup> See Kelly, *supra* note 1, at 1135–38; see also Hirsch & Wang, *supra* note 5, at 6–13 (listing the “varied” and “controversial . . . rationales for testamentary freedom”).

<sup>32</sup> See Kelly, *supra* note 1, at 1135–36.

<sup>33</sup> See Glover, *Therapeutic Jurisprudential*, *supra* note 7, at 443–46; see also Hirsch & Wang, *supra* note 5, at 8 n.26 (“The nature of that satisfaction – whether (or to what extent) it is genetically programmed (‘nepotism’) rather than derived from social interaction (‘altruism’), and whether it can involve altruistic impulses other than those signaling interdependent utilities with the beneficiaries – remains unclear.”).

<sup>34</sup> Edward C. Halbach, Jr., *An Introduction to Chapters 1-4*, in DEATH, TAXES AND FAMILY PROPERTY 3, 5 (Edward C. Halbach, Jr. ed., 1977); see Hirsch & Wang, *supra* note 5, at 8 (explaining that “modern social scientists” assume that “persons derive satisfaction out of bequeathing property to others”).



If freedom of disposition were substantially curtailed, a source of individual satisfaction would be eliminated, and overall societal happiness would decrease.<sup>35</sup> Freedom of disposition could therefore be explained as promoting social welfare by providing a source of happiness and satisfaction to individual donors.

## 2. *Donee Utility*

Second, the donor's ability to direct the disposition of property upon death allows for intelligent estate planning.<sup>36</sup> Donors likely have a better understanding of how to distribute their wealth upon death in a way that maximizes the utility of donees rather than the policymakers who would direct the disposition of estates in the absence of freedom of disposition.<sup>37</sup> As Kelly explains, "compared to legislatures or courts, donors may possess better information about the circumstances of family members and other donees," and "[t]his informational advantage may allow donors to select the highest-valued donee (e.g., a gifted or disabled child)."<sup>38</sup> If freedom of disposition were eliminated, the superior knowledge of donors would be ignored and property would likely be distributed in a less optimal way.<sup>39</sup> As such, freedom of disposition could be based upon the rationale that it allows those with the best knowledge of familial need to direct wealth to its most beneficial use.

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<sup>35</sup> See STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 65 (2004) ("In an important sense, bequeathing property is simply one way of using property. And therefore society should not interfere with bequests for the same general reason that it is undesirable for society to constrain the use of property. Namely, this tends to reduce individuals' utility directly (a person will derive less utility from property if he wants to bequeath it but is prevented from doing so) . . ."); Hirsch & Wang, *supra* note 5, at 8 ("To the extent that lawmakers deny persons the opportunity to bequeath freely, the subjective value of property will drop, for one of its potential uses will have disappeared."); Gordon Tullock, *Inheritance Justified*, 14 J.L. & ECON. 465, 474 (1971) ("Individuals before death would be injured if they are prohibited from passing on their estate to their heirs because it eliminates one possible alternative which they might otherwise choose.").

<sup>36</sup> See Hirsch & Wang, *supra* note 5, at 12–13; Kelly, *supra* note 1, at 1136–37.

<sup>37</sup> See Adam J. Hirsch, *Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives*, 73 WASH. U. L.Q. 1, 44 (1995) ("Certainly, benefactors can be expected to possess the information and insight into their families' affairs necessary to distribute their wealth in a rational manner.").

<sup>38</sup> Kelly, *supra* note 1, at 1136; see Michael Rosenblum, *Give Me Liberty and Give Me Death: The Conflict Between Copyright Law and Estates Law*, 4 J. INTELL. PROP. L. 163, 177 (1996) ("Testamentary freedom . . . allows the testator to weigh the varying needs of his family."); Joshua C. Tate, *Conditional Love: Incentive Trusts and the Inflexibility Problem*, 41 REAL PROP. PROB. & TR. J. 445, 484 (2006) ("[T]he testator . . . can distribute property in accordance [with] each family members' needs.").

<sup>39</sup> See Kelly, *supra* note 1, at 1136–37.

### 3. *Incentives*

Finally, freedom of disposition provides two important incentives that increase social welfare. First, freedom of disposition promotes the maximization of societal wealth.<sup>40</sup> The knowledge that one has the ability to direct the disposition of property at death provides individuals an incentive to be productive during life and to save and invest, rather than to consume.<sup>41</sup> By contrast, if freedom of disposition were substantially restrained, this incentive for productivity and savings would disappear because a potential use of property would be eliminated.<sup>42</sup> Individuals might work less and consume more during life,<sup>43</sup> which, as Kelly suggests, “will affect not only the donor’s utility but also society’s savings and its capital base.”<sup>44</sup> Thus, freedom of disposition could be justified as providing an incentive for productivity, which has overarching societal benefits.

Second, freedom of disposition incentivizes intrafamily caregiving.<sup>45</sup> If family members know that donors have the ability to direct the distribution of wealth upon death, they may be more willing to care for aging or ailing donors.<sup>46</sup> The possibility of disinheritance incentivizes the provision of family caregiving, which in turn promotes overall social welfare. As Hirsch and Wang explain, freedom of disposition “serves the public interest” by “support[ing] . . . a market for the provision of social services” and “encourage[ing] . . . beneficiaries to provide [the donor] with care and comfort—services that add to the total economic ‘pie.’”<sup>47</sup> Therefore, although family members may provide care to donors absent the incentives created by the possibility of disinheritance,<sup>48</sup> freedom of disposition might be justified as encouragement of intrafamily caregiving.

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<sup>40</sup> See *id.* at 1136.

<sup>41</sup> See Hirsch & Wang, *supra* note 5, at 8 (“[F]reedom of testation creates an incentive to industry and saving.”); Jeffrey E. Stake, *Darwin, Donations, and the Illusion of Dead Hand Control*, 64 TUL. L. REV. 705, 749 (1990) (“Allowing owners to give their assets and money to others, whether at death or inter vivos, creates an incentive for productive activities.”).

<sup>42</sup> See SHAVELL, *supra* note 35, at 65 (explaining that restricting freedom of disposition “lowers [individuals’] incentives to work (a person will not work as hard to accumulate property if he cannot then bequeath it as he pleases)”).

<sup>43</sup> See Hirsch & Wang, *supra* note 5, at 8 (“[T]hwarted testators will choose to accumulate less property, and the total stock of wealth existing at any given time will shrink.”).

<sup>44</sup> Kelly, *supra* note 1, at 1136; see Hirsch & Wang, *supra* note 5, at 8 (“Testamentary freedom accordingly fulfills the normative goal of wealth maximization, which is advanced by its proponents as the best available barometer of utility maximization.”).

<sup>45</sup> See Hirsch & Wang, *supra* note 5, at 9–11; Kelly, *supra* note 1, at 1137.

<sup>46</sup> See Kelly, *supra* note 1, at 1137.

<sup>47</sup> Hirsch & Wang, *supra* note 5, at 9–10.

<sup>48</sup> See *id.* at 11 (“[T]he strongest argument against this rationale may be the practical observation that supplies of social services appear generally to be inelastic; they are forthcoming, in poor families as in rich, more or less irrespective of the suppliers’ inheritance

As illustrated above, freedom of disposition's place within the law of succession is not necessarily explained by a single rationale. In the past, freedom of disposition may have enjoyed some support based upon the theory that the ability to transfer property upon death is a natural right.<sup>49</sup> In modern times, perhaps freedom of disposition is simply explained as a political preference that would be difficult to curtail.<sup>50</sup> However, regardless of the merits of these two rationales, most scholars today analyze freedom of disposition from a functional perspective that focuses on the maximization of social welfare.<sup>51</sup> When viewed from this perspective, freedom of disposition could be justified as a way to increase donor utility,<sup>52</sup> increase donee utility,<sup>53</sup> and incentivize productivity and intrafamily caregiving.<sup>54</sup>

## II. FREEDOM OF INHERITANCE

Just as the law grants the donor the general freedom to decide how to distribute property upon death,<sup>55</sup> the law also grants the donee the general freedom to decide whether to accept or to reject testamentary gifts. As Hirsch explains, "Most beneficiaries accept inheritances with open arms; other ones prefer, for whatever reason, to reject them. Under most circumstances today, beneficiaries are free to accept or reject an inheritance as they see fit."<sup>56</sup> The donee's discretion over the acceptance of transfers from the donor's estate can be labeled "freedom of inheritance."<sup>57</sup> Whereas the donor's freedom of disposition has been the subject of much scrutiny, the donee's freedom of inheritance has received substantially less attention. As such, this section describes the mechanics of freedom of inheritance and suggests potential rationales that might underlie this freedom.

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prospects. Just as an assortment of motives drives persons to produce wealth, so does a complex of motives and emotions stimulate persons to care for each other.").

<sup>49</sup> See *supra* notes 19–22 and accompanying text.

<sup>50</sup> See *supra* notes 23–28 and accompanying text.

<sup>51</sup> See Kelly, *supra* note 1, at 1135.

<sup>52</sup> See *supra* Part I.A.

<sup>53</sup> See *supra* Part I.B.

<sup>54</sup> See *supra* Part I.C.

<sup>55</sup> See *supra* Part I.

<sup>56</sup> Adam J. Hirsch, *Disclaimers and Federalism*, 67 VAND. L. REV. 1871, 1872 (2014).

<sup>57</sup> Others have described the donee's discretion to accept or reject a transfer from the donor's estate as a "freedom." See, e.g., *id.* (using the term "beneficiaries' freedom"); Joan B. Ellsworth, *On Disclaimers: Let's Renounce I.R.C. Section 2518*, 38 VILL. L. REV. 693, 698 (1993) ("The intended recipient's freedom to accept or refuse an inter-vivos or testamentary gift has long been recognized by the courts . . ."). However, the term "freedom of inheritance" has generally not been used in this context and, in fact, could be used in other contexts. See Hirsch & Wang, *supra* note 5, at 6 n.16. Furthermore, the use of the term "inheritance" could suggest that this freedom applies only to gifts that are transferred through intestacy. However, for the sake of simplicity this Article uses the term "freedom of inheritance" to refer to the discretion to accept or to reject all transfers that flow from the donor after death, whether through intestacy, a will, a nonprobate transfer, or other type of transfer, such as the forced spousal share and distributions to creditors.

*A. Mechanics*

When the donor exercises her freedom of disposition and directs a posthumous transfer of property to a donee, the donee has an option.<sup>58</sup> She can accept the transfer and take possession of the property.<sup>59</sup> Alternatively, she can reject the gift, or, in the parlance of inheritance law, she can “disclaim” her interest in the property.<sup>60</sup> Although freedom of inheritance is now expansive, the common law limited the donee’s discretion to disclaim posthumous gifts to those flowing through a will,<sup>61</sup> as such, the donee could not disclaim a gift received through intestacy.<sup>62</sup> However, all states have now adopted disclaimer statutes that supersede the common law and that extend the donee’s discretion to intestate transfers.<sup>63</sup> Furthermore, mirroring the expansion of the donor’s freedom of disposition into will substitutes, such as revocable trusts and life insurance,<sup>64</sup> the donee’s freedom of inheritance also extends to gifts flowing outside the probate system.<sup>65</sup> Thus, under modern law, the donee can accept or reject a posthumous gift regardless of the form of the transfer.

In addition to the donee’s general ability to disclaim posthumous gifts, whether under a will or through intestacy, freedom of inheritance also plays a role in the forced spousal share.<sup>66</sup> Although the donor generally enjoys broad freedom of

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<sup>58</sup> See Hirsch, *supra* note 7, at 588 (“The beneficiary of a gratuity may accept or reject it at his discretion.”).

<sup>59</sup> See Adam J. Hirsch, *Revisions in Need of Revising: The Uniform Disclaimer of Property Interests Act*, 29 FLA. ST. U. L. REV. 109, 110 (2001) (“In the usual course of events, most persons are inclined to accept any bequest of property that a testator has the good grace to leave them. However, nobler it is to give than to receive, receiving also has its charms.”).

<sup>60</sup> See DUKEMINIER & SITKOFF, *supra* note 3, at 140. “By traditional usage, an heir *renounces*; a beneficiary under a will *disclaims*. Today, the two words are used interchangeably as synonyms. The term disclaimer is the one more commonly used to describe the formal refusal to take by an heir or a beneficiary.” *Id.* at 140 n.81.

<sup>61</sup> See Hirsch, *supra* note 7, at 591.

<sup>62</sup> See Hirsch, *supra* note 56, at 1904 (“Intestate property was ‘cast’ upon the heir and could not be disclaimed under the common law . . .”). “The reason for this rule was that there must always be someone seised of the land who was liable for the feudal obligations, a reason of no importance today.” DUKEMINIER & SITKOFF, *supra* note 3, at 140.

<sup>63</sup> See Hirsch, *supra* note 56, at 1904 (explaining that the traditional common law rule “persisted in several American states as late as the 1990s but . . . is now superseded everywhere by statute.”).

<sup>64</sup> See *supra* notes 14–18 and accompanying text.

<sup>65</sup> See Ellsworth, *supra* note 57, at 706–07 (“Property passing by contract, rather than by gift, bequest or intestacy, may also be disclaimed. Life insurance proceeds and survivors’ benefits under employee plans are prime examples of such interests.”); Adam J. Hirsch, *The Uniform Acts’ Loophole in Fraudulent Conveyance Law*, 34 ESTATE PLANNING 20, 21 (2007) (“A ‘disclaimer’ constitutes the rejection of an inheritance offered under a benefactor’s will or will-substitute, or by virtue of intestacy law.”).

<sup>66</sup> Freedom of inheritance, as defined by this Article, also plays a role in the rights of creditors to the donor’s estate. In particular, creditors are not required to seek payment from the donor’s estate, but instead can choose not to file a claim against the donor’s estate.

disposition,<sup>67</sup> the surviving spouse of the donor is entitled to a share of the donor's estate regardless of the donor's intent.<sup>68</sup> Even if the donor attempts to disinherit a surviving spouse by leaving behind a legally effective will that does not provide for the spouse, the law allows the spouse to share in the donor's estate.<sup>69</sup> The surviving spouse need not, however, take the forced share. Instead, the surviving spouse can choose to take according to the terms of the donor's will.<sup>70</sup> Therefore, like a donee can accept or disclaim a gift that the donor intends to give, a surviving spouse can reject the transfer that the law requires the donor to offer to the surviving spouse. This option to reject the forced spousal share is evident in an alternate name that is sometimes used to describe this transfer: the elective share.<sup>71</sup> Indeed, this label perhaps better describes the rights of the surviving spouse, who is not forced to take the share but whom can elect to take the share if so inclined. Thus, by either accepting or declining her forced share, the surviving spouse exercises her freedom of inheritance.

When a donee exercises her freedom of inheritance by rejecting a transfer from the donor's estate, the donor does not select who should take the property in her place.<sup>72</sup> Instead, the law typically holds that the disclaiming donee is treated as having predeceased the donor, in which case the disclaimed property is distributed to an alternate donee.<sup>73</sup> If the donor specifically names an alternate donee who should take if the primary donee predeceases her, then the donor's express intent governs the disposition of disclaimed property.<sup>74</sup> If the donor does not provide for the contingency of a predeceasing donee, then the law provides rules of construction and interpretation to determine who should benefit instead of the named donee.<sup>75</sup> Under either scenario, a disclaiming donee does not have the power to specify who

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<sup>67</sup> See *supra* Part I.

<sup>68</sup> See DUKEMINIER & SITKOFF, *supra* note 3, at 512–16; see, e.g., UNIF. PROB. CODE § 2-201 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2010).

<sup>69</sup> See Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227, 1245 (“The power to devise is not complete in the separate property states . . . . In every separate property state, state law gives surviving spouses the right to make claims against their deceased spouses' estates, even if the deceased spouses explicitly disinherited them.”).

<sup>70</sup> See DUKEMINIER & SITKOFF, *supra* note 3, at 513.

<sup>71</sup> See *id.*

<sup>72</sup> See Hirsch, *supra* note 7, at 608 (“The disclaimant has no power to channel the inheritance to chosen takers in lieu of himself.”).

<sup>73</sup> See DUKEMINIER & SITKOFF, *supra* note 3, at 140.

<sup>74</sup> See Hirsch, *supra* note 59, at 163 (“In the absence of testamentary instructions, disclaimed property goes to whomever would have received it had the disclaimant predeceased the benefactor, as determined by the state's antilapse and intestacy statutes, but if a will does anticipate this contingency by naming a substitute beneficiary in the event that the primary beneficiary disclaims, that stipulation controls the devolution of the property.”). “Under UDPIA, a contingency clause specifying how a bequest will devolve in the event a beneficiary predeceases is broadly construed to govern the devolution of a bequest a surviving beneficiary disclaims.” *Id.* at 163 n.263.

<sup>75</sup> See DUKEMINIER & SITKOFF, *supra* note 3, at 351–52, 357–61.

should take in her place. Indeed, freedom of inheritance extends only to the donee's decision to accept or to reject a transfer from the donor's estate, and as such, the donee has no influence over the consequences of her decision to disclaim.

### B. Rationales

As explained previously, the law's grant of broad freedom of disposition is justified today as a way to maximize social welfare.<sup>76</sup> More particularly, freedom of disposition is explained as not only maximizing the utility of the donor but also placing incentives on donors and donees that increase social welfare.<sup>77</sup> Although freedom of inheritance has not been firmly placed within this welfare model, it can be seen as nicely complimenting the donor's freedom of disposition in furthering the law's social welfare maximization goal. Specifically, freedom of inheritance maximizes the donee's welfare by providing her discretion to select the testamentary transfers that increase her individual utility. It also either increases the donor's utility or does not affect her utility depending upon her reasons for giving. Finally, freedom of inheritance alleviates moral hazard problems and issues regarding imperfect information and transaction costs by allowing the donee to engage in postmortem estate planning.

#### 1. Donee Utility

The conventional rationale underlying freedom of inheritance focuses on individual autonomy and suggests that property should not be forced upon the donee.<sup>78</sup> For instance, the Uniform Disclaimer of Property Interests Act (the "UDPIA") explains that "the principle behind all disclaimers" (and therefore freedom of inheritance generally) is that "no one can be forced to accept property."<sup>79</sup> Although respect for the personal autonomy of the donee provides a specific rationale for freedom of inheritance, this explanation can be reframed so that the law's respect of the donee's autonomy is merely one of several mechanisms that the law employs to maximize social welfare.

As explained previously, the law's grant of broad freedom of disposition to the donor increases social welfare by maximizing the donor's utility.<sup>80</sup> Put simply, the

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<sup>76</sup> See *supra* Part I.B.

<sup>77</sup> See Kelly, *supra* note 1, at 1135.

<sup>78</sup> See Andrew S. Bender, *Disclaimer Law: A Call for Statutory Reform*, 2001 U. ILL. L. REV. 887, 892 ("The primary rationale was that an intended recipient could not have ownership thrust upon her. Essentially, recognition of disclaimers protected '[p]ersonal autonomy.'"); Hirsch, *supra* note 7, at 588 ("Personal autonomy and effectuation of intent have served as the traditional touchstones of this area of law.").

<sup>79</sup> UNIF. DISCLAIMER OF PROP. INTERESTS ACT § 5 cmt. (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2010). The UDPIA has been incorporated into the Uniform Probate Code. See UNIF. PROB. CODE §§ 2-1101 to 2-1117 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2010).

<sup>80</sup> See *supra* notes 32-35 and accompany text.

donor receives benefit from the ability to direct the disposition of property after death.<sup>81</sup> Just as the law's respect of the personal autonomy of the donor maximizes the donor's utility, the law's respect of the personal autonomy of the donee maximizes the donee's utility. The law's respect for the donee's autonomy to decide whether to accept or reject a transfer from the donor's estate allows the donee to independently assess the utility of the transfer.<sup>82</sup> Although oftentimes, if not most of the time, a transfer from the donor's estate is beneficial to the donee,<sup>83</sup> some transfers would negatively affect the donee's utility.<sup>84</sup> As the Supreme Court of Georgia explained long ago, "Property is a burden as well as a benefit, and whoever is unwilling to bear the burden for the sake of the benefit, is at liberty to decline both."<sup>85</sup> Freedom of inheritance therefore allows the donee to weigh the benefits and burdens of the transfer, and if she decides that acceptance of the transfer would produce a net negative change in her utility, she can disclaim her interest in the property.<sup>86</sup>

A donee might decide that a transfer from the donor's estate would detrimentally affect her utility for various reasons.<sup>87</sup> Most simply, the property might objectively be worthless. As Hirsch explains, "in the rare case where a bequest comprises property of negative value," freedom of inheritance allows the donee to avoid the burdens of property that "no one will agree to take . . . off the beneficiary's hands."<sup>88</sup> Alternatively, the donor might have subjective motivations, such as religious, moral, or political reasons, for deciding to disclaim an interest in the donor's estate.<sup>89</sup> As one New York court explains, "[I]nstitutions have been known

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<sup>81</sup> See Kelly, *supra* note 1, at 1147–50.

<sup>82</sup> See Bender, *supra* note 78, at 898 ("[T]he belief prevails that the disclaimant should not be forced to accept a gift if doing so would impose too great a burden on her. Essentially, there is a general agreement and recognition that any individual using a disclaimer in this manner possesses a valid motive.").

<sup>83</sup> See Ellsworth, *supra* note 57, at 694 ("One might think that very few sensible persons decide to reject a gratuitous transfer . . .").

<sup>84</sup> See Bender, *supra* note 78, at 898 ("[C]losely related to personal autonomy, is that disclaimers protect an intended beneficiary's need to reject burdensome property.").

<sup>85</sup> Daniel v. Frost, 62 Ga. 697, 707 (1879).

<sup>86</sup> See Hirsch, *supra* note 59, at 117 ("Only later, after feudal incidents were abolished, did British courts come to allow disclaimers by devisees, for the very different purpose of permitting beneficiaries to escape bequests that might be 'clothed in trust,' or otherwise entail burdensome responsibilities.").

<sup>87</sup> See Ellsworth, *supra* note 57, at 709 ("The overall effect of a particular disclaimer should be advantageous to the disclaimant; indeed, it is often extremely beneficial. One commentator offers a list of twenty-seven different practical uses of disclaimers in different contexts.").

<sup>88</sup> Hirsch, *supra* note 59, at 156 n.218; see Stephen E. Parker, *Can Debtors Disclaim Inheritances to the Detriment of Their Creditors?*, 25 LOY. U. CHI. L.J. 31, 32 (1993) ("[A] donee may want to reject a gift of property when the property is encumbered in an amount greater than its fair market value . . .").

<sup>89</sup> See Hirsch, *supra* note 59, at 156 n.218.

to spurn gifts via trust which the institutions deemed subversive or hostile to their purposes or ideals. A like right extends to individuals.”<sup>90</sup>

Finally, the donee’s decision to disclaim an interest in the donor’s estate might be driven, not by concerns regarding the property, but by a desire to be self-reliant.<sup>91</sup> Under this scenario, the disutility of the transfer stems not from the particular object of the gift but from the donative transfer generally. Thus, a transfer from the donor’s estate might for various reasons be detrimental to the donee. Consequently, by allowing the donee to accept only those transfers that are beneficial to her, the law’s respect for the autonomy of the donee increases social welfare.

## 2. Donor Utility

In addition to maximizing the donee’s welfare by allowing her to assess the utility of accepting a transfer from the donor’s estate, freedom of inheritance maximizes the donor’s utility. This conclusion flows from the motivations that underlie the donor’s decision to direct property to the donee after death.<sup>92</sup> One reason a donor might give a gift is to increase the utility of the donee.<sup>93</sup> As Kelly explains, “A gift . . . may increase the donor’s happiness due to altruism. If a donor is altruistic, the donor’s utility is a function of the donees’ utility, i.e., the preferences of the donor incorporate the well-being of the donees.”<sup>94</sup> Put differently, under this scenario, the utility of the donor is tied to the utility of the donee. If the donee’s utility increases as a result of the transfer, the donor’s utility also increases, and, likewise, if the donee’s utility decreases, the donor’s utility decreases. Therefore, when the donor is motivated by altruism, freedom of inheritance maximizes social welfare because if the donee were forced to accept a burdensome gift, not only would the donee’s utility be diminished, but so too would the donor’s.

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<sup>90</sup> *In re Estate of Suter*, 142 N.Y.S.2d 353, 355 (N.Y. Sur. Ct. 1955). The court makes its point more eloquently: “Centuries ago, the Roman poet, Lucretius, enunciated the truism that, ‘What is food to one may be fierce poison to others.’ To [some] donee[s] [a] gift is not food, but a cup of hemlock which the law cannot force [them] to swallow.” *Id.*

<sup>91</sup> See Hirsch, *supra* note 7, at 629.

<sup>92</sup> See Barbara H. Fried, *Who Gets Utility from Bequests? The Distributive and Welfare Implications for a Consumption Tax*, 51 STAN. L. REV. 641, 656 (1999) (“The various motives for bequest savings . . . carry quite different implications for the utility derived from bequests . . .”); Louis Kaplow, *On The Taxation of Private Transfers*, 63 TAX L. REV. 159, 176 (2009) (“[V]ariations in donor’s motives for giving often do matter, both for predicting behavior and for performing welfare analysis.”).

<sup>93</sup> See SHAVELL, *supra* note 35, at 58 (“A major motivation of giving a gift is pure altruism: The donor cares about the well-being of the donee; that is, the donor obtains utility from the utility of the donee.”); Kaplow, *supra* note 92, at 176 (“One possibility is that donors are to an extent altruistic, which is to say that raising the utility of their donees increases their own utility. Altruism seems to be evidenced, for example, by parents’ hard work aimed to improve their children’s prospects in life.”).

<sup>94</sup> Kelly, *supra* note 1, at 1148–49; see Fried, *supra* note 92, at 665 (explaining the same concept).



Even if the donor is not motivated by altruism but is instead motivated by self-interest, freedom of inheritance likely increases social welfare. When self-interest drives the donor's decision to give a testamentary gift, the donor receives benefit from the mere act of giving and not necessarily from the increased utility that the donee experiences as a result of the gift.<sup>95</sup> The utility of the donor is not tied to the utility of the donee.<sup>96</sup> In this situation, freedom of inheritance allows the donee to maximize her utility by choosing which transfers from the donor's estate positively affect her well-being.<sup>97</sup> At the same time, the donee's option to reject the gift likely does not decrease the donor's utility because the disclaimed property will be distributed to an alternate donee.<sup>98</sup> The donor still receives the satisfaction of knowing that she is making a gift even if the identity of the donee might change. Thus, when the donor is motivated by self-interest, freedom of inheritance maximizes social welfare because the donor's utility is maximized and the donor's utility likely is unaffected.

A third potential motivation underlying the donor's decision to make a testamentary gift is that the donor feels obligated to make the transfer. Under this scenario, the donor's transfer is not necessarily donative in nature but is instead part of an exchange with the donee.<sup>99</sup> As Professor Barbara Fried explains,

The implicit contract hypothesized under the exchange motive theory assumes that the donor pays on the honor system for services rendered: Kids care for their aging parents for years, in exchange for an implicit promise from their parents to pay for their services on a deferred basis at the parents' death.<sup>100</sup>

Within this context, the donee's freedom of inheritance does not reduce the donor's utility because she receives the benefit of the implicit bargain regardless of whether the donee accepts or rejects a transfer from her estate. Indeed, if the donor is solely motivated by a perceived obligation to reciprocate a benefit conferred by the donee, the donor should be indifferent to whether the donor disclaims an interest in her

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<sup>95</sup> See Kaplow, *supra* note 92, at 176–77 (“Another motivation is that donors obtain pleasure not from the enhancement in their donees’ well-being but rather from the fact that they, the donors themselves, have made the gift. That is, they get utility from giving per se.”); Kelly, *supra* note 1, at 1148 (“If the happiness is related to mere self-interest, a donor obtains satisfaction from the act of giving itself.”).

<sup>96</sup> See SHAVELL, *supra* note 35, at 58 (“[T]he act of giving itself may supply utility to the donor, independently of the degree of satisfaction it renders the donee.”).

<sup>97</sup> See *supra* notes 82–86 and accompanying text.

<sup>98</sup> See *supra* notes 72–75 and accompanying text.

<sup>99</sup> See Kaplow, *supra* note 92, at 177 (“Another important possibility is that transfers are not true gifts but really only one side of an exchange transaction. For example, parents may give more to children as implicit or explicit compensation for services, such as in providing care and attention.”); Kelly, *supra* note 1, at 1148 (“Other types of self-interested giving may be based on exchange or reciprocity.”).

<sup>100</sup> Fried, *supra* note 92, at 652.

estate. Therefore, because the option to reject a transfer increases the donee's utility but does not decrease the donor's utility,<sup>101</sup> and may in fact increase the donor's utility,<sup>102</sup> freedom of inheritance maximizes social welfare.

### 3. Moral Hazard

In addition to increasing the individual utility of both the donor and the donee, freedom of inheritance maximizes social welfare by allowing the donee to engage in postmortem estate planning.<sup>103</sup> By providing the donee discretion to accept or reject a transfer from the donor's estate, the law allows the donee to make decisions regarding the ultimate distribution of the donor's property. To be sure, the donee cannot select who receives the disclaimed property; instead, the donee who would have taken the property had the disclaiming donee predeceased the donor enjoys the benefit of the transfer.<sup>104</sup> The donee does not select the alternate taker, but she does make the decision whether to accept the transfer, thereby withholding the property from the alternate taker, or to reject the transfer, thereby benefitting the alternate taker rather than herself. In this way, the donee can make decisions regarding the donor's property that amount to estate planning after the donor's death.

As explained previously, the law presumes that the donor is in the best position to evaluate the utility of particular transfers and therefore generally relies upon the donor to make decisions regarding her estate plan.<sup>105</sup> Why then should the law not unquestionably honor the donor's decisions regarding the disposition of her property? Put differently, why should the law allow the donee to second-guess the donor's exercise of freedom of disposition by granting her the ability to engage in postmortem estate planning? The answer to these questions is that, although the donor is in the best position to make decisions regarding her estate, there is no guarantee that she will actually make rational, informed decisions.<sup>106</sup> As Hirsch and Wang explain, "[T]he assumption that [donors] will in general use freedom of [disposition] to craft thoughtful schemes of distribution is not unproblematic . . . . [The donor] may *know* best; but, alas, we have no assurance that in practice he will *do* what is best."<sup>107</sup>

As such, the rationale behind allowing the donee to engage in postmortem estate planning is that, under certain circumstances, an estate plan is defective. As Professor Joan Ellsworth explains, "Sometimes pre-death planning for a decedent's estate is nonexistent, poorly done, antiquated and out-of-date, or unfair in the

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<sup>101</sup> See *supra* notes 95–100 and accompanying text.

<sup>102</sup> See *supra* notes 80–91 and accompanying text.

<sup>103</sup> See DUKEMINIER & SITKOFF, *supra* note 3, at 140 ("Disclaimers allow for post-mortem estate planning.").

<sup>104</sup> See *supra* notes 72–75 and accompanying text.

<sup>105</sup> See *supra* notes 36–39 and accompanying text.

<sup>106</sup> See Kelly, *supra* note 1, at 1138 ("Effectuating a donor's ex ante interests is not necessarily equivalent to maximizing social welfare.").

<sup>107</sup> Hirsch & Wang, *supra* note 5, at 13.

opinion of the surviving family members.”<sup>108</sup> Freedom of inheritance allows the donee to minimize the effect of these problems by tweaking the donor’s estate plan.<sup>109</sup> While the recognition that a donor does not always exercise her freedom of disposition so as to increase social welfare explains why the law allows the donee to engage in postmortem estate planning. It also raises the question of why the donor might not make optimal decisions regarding the disposition of her estate.

One explanation of why the donor does not always make the best choices regarding the distribution of her property upon death is that she will not bear the costs of poor decisions.<sup>110</sup> Because the donor will be dead at the time her decisions take effect, she will not be present for the aftermath of her ineffective estate plan. If her decisions produce results that are unfair or inefficient, she will not have to observe her family and friends deal with the consequences of her actions. She will not experience the frustration and disappointment of the people whom her decisions affect,<sup>111</sup> and she will not feel the regret of knowing that she could have avoided many of the problems flowing from her defective estate plan through proper planning. Because she will not bear the costs of her poor estate planning, the donor has less incentive to make thoughtful decisions and plan accordingly.<sup>112</sup>

This situation in which a decision-maker is shielded from the costs of her decisions is known as a moral hazard.<sup>113</sup> The paradigmatic example of a moral

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<sup>108</sup> Ellsworth, *supra* note 57, at 695; *see* Hirsch, *supra* note 59, at 156 n.218 (“[I]n a surprising number of cases — a beneficiary may seek to bring about a distribution that better accords with her understanding of what the testator wished but failed to accomplish, due to intestacy or a failure to update the will.”).

<sup>109</sup> *See* Hirsch, *supra* note 56, at 1884 (“As a form of postmortem estate planning, disclaimers preserve for poorly advised benefactors opportunities that their better-advised counterparts already enjoy, effectively correcting the will retroactively.”); Hirsch, *supra* note 59, at 157–58 (“Execution of a disclaimer serves to cure a defective estate plan; and, inevitably, the likelihood of poor estate planning increases in inverse proportion to the wealth of the benefactor.”).

<sup>110</sup> *See* Jeffrey G. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 99 U. ILL. L. REV. 1273, 1294 (1999) (“If we cede to the dead the power to tell the living what to do with material resources (that is, if we grant the right of testation), we encounter the obvious moral hazard problems that arise whenever an actor knows that she will suffer no consequences from her actions.”); *see also* David Horton, *Testation and Speech*, 101 GEO. L.J. 61, 102 (2012) (“[T]he consequence-free nature of testation creates a risk of moral hazard.”).

<sup>111</sup> *See* Harry Hirschman, *Whimsies of Will-Makers*, 66 U.S. L. REV. 362, 362 (1932) (“[A] will is a man’s one sure chance to have the last word. In it he can vent his spite in safety without his victims having a chance to answer back.”).

<sup>112</sup> *See* David Horton, *Indescendibility*, 102 CALIF. L. REV. 543, 572 (2014) (explaining that “the dead do not experience the consequences of their decisions” and consequently there is “the fear that people act less soberly in making decisions that will take effect only after their demise”).

<sup>113</sup> *See* PAUL KRUGMAN, *THE RETURN OF DEPRESSION ECONOMICS AND THE CRISES OF 2008* 63 (2009) (explaining that “the term,” moral hazard “refer[s] to any situation in which one person makes decisions about how much risk to take, while someone else bears the cost if things go badly”).

hazard problem involves insurance.<sup>114</sup> For instance, when an individual purchases a home, she is likely concerned about the possibility of loss due to fire. Consequently, she has an incentive to take precautions to minimize the risk of fire, such as purchasing a fire extinguisher or being careful when she uses the fireplace to heat her home. Above and beyond these precautions, the homeowner may also purchase insurance to protect against potential loss due to fire. The insurance provides the homeowner peace of mind that she will be compensated if her house burns down, but it also reduces her incentive to be vigilant against the risk of fire.<sup>115</sup> Knowing that she will not bear the cost of replacing her home if a fire occurs, she may be less concerned about having a fire extinguisher on hand or less careful when using the fireplace.<sup>116</sup> In this way, fire insurance creates a moral hazard because the homeowner has less incentive to protect against the risk of loss.

To understand how the moral hazard problem arises in the context of estate planning, contrast the cost of bad estate planning decisions with the cost of bad lifetime donative decisions. If a donor makes poor choices regarding how to transfer property during life, she will suffer the negative consequences of those choices.<sup>117</sup> She will see the imprudent donee squander her gifts. She will observe the individual whom she chose not to benefit, struggle financially. She will bear the unhappiness and frustration of disappointed individuals who did not benefit from her generosity. These potential costs of poor decision-making serve as a check on the lifetime donor and provide her an incentive to think carefully about her donative decisions. These costs, however, do not affect the donor who plans for the disposition of property upon death. As Hirsch explains, “[A] testator may lack incentives at death to distribute efficiently the assets he has amassed during life.”<sup>118</sup> This is true because “[w]hen persons act during their lifetimes, they must live with the consequences. But persons acting at the moment of death, quite literally, do not: They are free to

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<sup>114</sup> *Id.* at 62 (“The term ‘moral hazard’ has its origins in the insurance industry. Very early in the game providers of fire insurance, in particular, noticed that property owners who were fully insured against loss had an interesting tendency to have destructive fires.”).

<sup>115</sup> See Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 537 (1986) (“To the extent that insurance covers losses, actors have less incentive to avoid them, either by taking actions that diminish the probability of loss or by behaving in manner that reduces the amount of loss.”); A. Mitchell Polinsky, *Economic Analysis as a Potentially Defective Product: A Buyer’s Guide to Posner’s Economic Analysis of Law*, 87 HARV. L. REV. 1655, 1671–72 (1974) (“The owner of insurance tends to behavior in a way which increases the probability and magnitude of the adverse event against which he is insuring himself.”).

<sup>116</sup> See Kaplow, *supra* note 115, at 537 (“Fire insurance illustrates [the problem of moral hazard]: full, unconditional coverage diminishes incentives to install costly fire protection devices.”); Polinsky, *supra* note 115, at 1672 (“[A] homeowner with fire insurance is less likely to buy fire resistant rugs or curtains, install a home sprinkler system, or dispose of his oil-soaked rags.”).

<sup>117</sup> See Hirsch & Wang, *supra* note 5, at 13 (“Living persons suffer the consequences that follow their actions.”).

<sup>118</sup> Hirsch, *supra* note 7, at 639; see Hirsch & Wang, *supra* note 5, at 13 (“[A] testator may . . . lack inhibitions at death that tempered her course of conduct during life.”).

act ‘irresponsibly’ without paying any of the economic or interpersonal costs that living persons must bear for such behavior.”<sup>119</sup> This consequence of estate planning has been referred to as the “moral hazard of testation.”<sup>120</sup>

Thus, the same disincentives that insurance creates for the homeowner are created by the death of the donor. Under both scenarios, the decision-maker has less incentive to make appropriate choices because she will not bear the cost of poor decisions. The homeowner might not take proper precautions because she will not bear the cost of repairing or rebuilding her home. Likewise, the donor might not exercise her freedom of disposition with adequate thought and careful deliberation because she will be dead at the time her decisions take effect. The careless exercise of freedom of disposition can result in an estate plan that is suboptimal from a social welfare perspective. Without proper reflection, the donor might not consider how best to distribute her property or she might inaccurately assess the utility that her estate plan produces. Therefore, in part because the donor’s decision-making process is distorted by the moral hazard of testation, the law allows the donee to question the decisions that the donor has made. Indeed, the donee’s ability to assess the donor’s decisions and to disclaim property if alternate donees would receive greater utility from particular transfers allows the donee to increase the social welfare efficiency of the donor’s estate plan.

#### 4. *Imperfect Information*

In addition to alleviating the moral hazard problem that results from the donor making decisions that will take effect only after she dies,<sup>121</sup> postmortem estate planning through the exercise of freedom of inheritance maximizes social welfare by addressing issues of imperfect information. As just mentioned, the law relies upon the donor to make decisions regarding her estate plan because she likely has the best information to make such decisions.<sup>122</sup> However, because the donor makes estate planning decisions during her lifetime that do not become effective until after she dies, she sometimes makes these decisions without all the relevant information regarding the needs of her friends and family.<sup>123</sup> When the donor exercises freedom

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<sup>119</sup> Hirsch, *supra* note 7, at 639; see Hirsch & Wang, *supra* note 5, at 13.

<sup>120</sup> *E.g.*, Hirsch & Wang, *supra* note 5, at 13; Hirsch, *supra* note 7, at 639; Horton, *supra* note 112, at 572.

<sup>121</sup> See *supra* Part II.B.3.

<sup>122</sup> See Kelly, *supra* note 1, at 1136.

<sup>123</sup> See Richard C. Ausness, *Sherlock Holmes and the Problem of the Dead Hand: The Modification and Termination of “Irrevocable” Trusts*, 28 QUINNIPIAC PROB. L.J. 237, 295 (2015) (“According to one school of thought, imperfect information, particularly about future events and circumstances, may cause donors to make disposition of their property that they would not have made had they been better prognosticators. Unfortunately, once the donor is dead, such decisions cannot be reversed.”).

of disposition with imperfect information, she might craft an estate plan that is suboptimal from a social welfare perspective.<sup>124</sup>

Two specific examples of this general scenario illustrate the problem of imperfect information and the role that freedom of inheritance plays in postmortem estate planning. The first involves an insolvent donee.<sup>125</sup> Imagine a situation in which the donor directs a gift to a donee who has amassed significant debts. If, under this scenario, the donee could not disclaim the transfer, the donee's creditors would benefit from the transfer rather than the donee herself.<sup>126</sup> From the donee's perspective, the transfer might have greater utility when it is disclaimed and benefits an alternate donee, who is likely a close family member,<sup>127</sup> rather than when it is accepted and ultimately flows to the donee's creditors.<sup>128</sup> Certainly, the donee would receive the benefit of at least partially extinguishing her debts if she were to accept the transfer, but the same result is available to her through bankruptcy.<sup>129</sup> Therefore, if the donee considers the alternate donee's welfare, she would choose to disclaim the transfer if the alternate donee's increased utility is greater than her utility from foregoing bankruptcy.

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<sup>124</sup> See Kelly, *supra* note 1, at 1158 ("Future events are difficult to foresee and unanticipated contingencies may arise. As a result, a donor may dispose of property in a way that contradicts what the donor would have wanted with complete information."); see also David Horton, *Unconscionability in the Law of Trusts*, 84 NOTRE DAME L. REV. 1675, 1703 (2009) ("Even the savviest investor cannot predict how to allocate assets efficiently in the distant future."). A donee's mere willingness to disclaim a transfer from the donor's estate, suggests that the donor crafted her estate plan without the necessary information to make informed decisions regarding the disposition of her property. See Reid Kress Weisbord, *Federalizing Principles of Donative Intent and Unanticipated Circumstances*, 67 VAND. L. REV. 1931, 1936 (2014) ("Had the donor known of the circumstances causing the original beneficiary to disclaim, the donor presumably would have skipped the original beneficiary altogether in favor of the next eligible beneficiary.").

<sup>125</sup> See generally Hirsch, *supra* note 7.

<sup>126</sup> See Parker, *supra* note 88, at 32 ("[I]f the law did not allow disclaimers, the testator's property could end up in the hands of the devisee's creditors, thus clearly frustrating the testator's intent.").

<sup>127</sup> See Hirsch, *supra* note 59, at 116 ("By consulting the will or the intestacy statute, a beneficiary can predetermine who will take in her place should she choose to disclaim—often a close relative.").

<sup>128</sup> See Hirsch, *supra* note 7, at 632 ("A beneficiary who anticipates bankruptcy or a workout may be able to improve his position by disclaiming (and thereby preserving for his relatives or for surreptitious personal enjoyment) property that would otherwise go to satisfy his debts that will be discharged or forgiven away."). *But see* Weisbord, *supra* note 124, at 1936 n.22 ("[A]n insolvent beneficiary might not disclaim if the next to take is not a close relative. From the insolvent beneficiary's perspective, it would be better to retain the inheritance to repay creditors than to allow it to pass to an unrelated their party.").

<sup>129</sup> See Hirsch, *supra* note 56, at 1909 ("[T]he petition for relief in bankruptcy ordinarily marks the 'line of cleavage' between prepetition accumulations of property that the debtor must surrender to creditors and postpetition accumulations that a discharged debtor gets to keep as his or her 'fresh start' . . .").

Likewise, from the donor's perspective, a disclaimer by the insolvent donee likely increases the utility of the transfer because the donor's probable intent is fulfilled.<sup>130</sup> As Hirsch explains,

[T]he disclaimer fulfills the implicit intent of the benefactor, at least in those instances where the amount of the inheritance does not dwarf the debt. Few benefactors would want their savings to go [to] a beneficiary's creditors, given that the beneficiary can seek a discharge of his or her debts in bankruptcy, extinguishing them otherwise.<sup>131</sup>

Put differently, if presented this situation at the time she crafted her estate plan, the donor would have undertaken a comparative analysis of the utility that the primary donee would receive from the transfer and the utility that the alternate taker would receive from the transfer, and she likely would have concluded that the alternate donee should receive the transfer rather than the primary donee's creditors.<sup>132</sup>

Because the donor likely would not want her property to end up in the hands of a donee's creditors,<sup>133</sup> a donor who directs property to an insolvent donee likely possessed imperfect information at the time she crafted her estate plan. Either the donor did not know that the donee was insolvent at the time she made her decisions regarding her estate, or the donee was solvent at the time the donor crafted her estate plan but subsequently amassed significant debts. Under either scenario, the donor did not possess all relevant information necessary to craft her estate plan, and consequently the law allows the donee to disclaim her interest in the donor's estate as a way to address this problem of imperfect information.

The second specific scenario in which the donor might inaccurately predict the utility of a transfer because of the problem of imperfect information involves taxes. Imagine a scenario in which the donor dies leaving behind a will that gives her entire estate to her daughter *A* or, if *A* predeceases her, to *A*'s daughter, *B*.<sup>134</sup> *A* is well off

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<sup>130</sup> See Bender, *supra* note 78, at 898 ("The goal behind such a disclaimer is to avoid frustrating the wishes of the testator because of the beneficiary's outstanding obligations."); Hirsch, *supra* note 7, at 632 ("Along with the intent of the beneficiary, one has also to consider the intent of the benefactor. Several opinions defend the right of insolvent disclaimer on the ground that to compel acceptance would violate the 'probable intent' of the testator, who 'sought to benefit the distributee and not a public or private creditor.' In order to carry out the benefactor's probable intent, the beneficiary's right of disclaimer must be assured.").

<sup>131</sup> Hirsch, *supra* note 56, at 1884.

<sup>132</sup> *But see* Bender, *supra* note 78, at 901 ("[I]t is no less likely that a testator intends to help the devisee pay off debts and begin anew."); Hirsch, *supra* note 7, at 632 ("Conceivably, some patriarchs might see the matter differently. They might specifically intend that their legacies be used to stave bankruptcy, whether to avoid the resulting family stigma or simply out of 'old-time conscientiousness.'").

<sup>133</sup> See *supra* notes 130–132 and accompanying text.

<sup>134</sup> This is a variant of a simple example. See DUKEMINIER & SITKOFF, *supra* note 3, at 141. However, tax consequences can influence the donee's decision to disclaim in more complex situations. See Ellsworth, *supra* note 57, at 709–10.

and would prefer that *B*, who is young and not as financially secure, take the donor's estate instead. One option to accomplish this result is for *A* to accept the transfer from the donor and then to make a separate transfer to *B*. Another option is for *A* to disclaim the transfer in which case she will be treated as predeceasing the donor and *B* will take in her place. In this situation, the tax consequences of each scenario might affect *A*'s decision to accept or to reject the transfer from the donor.<sup>135</sup>

The transfer of wealth is subject to federal taxation, and *A*'s two options for directing the donor's estate to *B* have different tax consequences. If *A* chooses the first option and accepts the donor's estate, this initial transfer between the donor and *A* is subject to federal wealth transfer taxes; likewise, the secondary transfer between *A* and *B* will also be taxed.<sup>136</sup> Thus, *A*'s acceptance of the donor's estate ultimately produces two taxable transfers. By contrast, if *A* chooses the second option and disclaims the transfer from the donor, federal tax laws will treat the scenario as producing only one taxable transfer.<sup>137</sup> In this situation, the law views the estate as passing from the donor directly to *B*, and therefore, instead of being taxed twice, the transfer of the donor's property is only taxed once.<sup>138</sup> Therefore, under both options, the donor's estate ends up in the hands of *B*, but *A*'s disclaimer of the transfer is more efficient because it produces less tax liability than a separate transfer from *A* to *B*.<sup>139</sup>

When the donor leaves behind an estate plan that is inefficient from a tax perspective, there is a strong indication that the donor did not know the tax implications of the disposition of her property.<sup>140</sup> Perhaps tax laws changed in the time intervening the preparation of her estate plan and her death in ways that

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<sup>135</sup> See Ellsworth, *supra* note 57, at 710 (explaining that even if “the amount of . . . tax imposed . . . is insubstantial,” tax liability can influence the donee's decision to disclaim because “any amount of tax is important to family members”).

<sup>136</sup> See *id.* at 695–96 (“[A] valid disclaimer results in one gratuitous transfer (from the transferor to the substituted taker) while an invalid disclaimer, or no disclaimer, may occasion two transfers (from the transferor to the would-be disclaimant, and then from the disclaimant to the substituted taker).”).

<sup>137</sup> See I.R.C. § 2518(a) (West 2016) (“[I]f a person makes a qualified disclaimer with respect to any interest in property, this subtitle shall apply with respect to such interest as if the interest had never been transferred to such person.”).

<sup>138</sup> To avoid federal transfer tax liability in this situation, the disclaimer must be made within a specified timeframe. See *DUKEMINIER & SITKOFF, supra* note 3, at 141–42 (“To qualify under the federal tax code, the disclaimer must be made within nine months after the interest is created or after the donee reaches 21, whichever is later.”).

<sup>139</sup> See Hirsch, *supra* note 7, at 629 (“The most common modern inducement for disclaimer is family wealth planning.” By disclaiming, the donee “may succeed in skipping a generation's worth of inheritance taxes.”); Hirsch, *supra* note 59, at 116 (“Assuming [the donee] has ties of benevolence to [the alternate donee], she may calculate that a direct transfer from the benefactor to that alternative beneficiary, accomplished via a disclaimer, is from the standpoint of the family as a whole more tax efficient than, and possibly therefore preferable to, the transfer that would otherwise occur from the benefactor to herself.”).

<sup>140</sup> See Weisbord, *supra* note 124, at 1935–36.



rendered her estate plan inefficient.<sup>141</sup> Even if the donor knew or could have known of changes in the tax laws, the donor cannot know everything necessary to craft an efficient estate plan. As Ellsworth explains, “[t]wo important factors [that affect the tax efficiency of an estate plan] can never be known with certainty before a taxable transfer occurs: the timing of an individual’s death and the final value of a transferor’s estate.”<sup>142</sup> She argues that “hindsight is a valuable tool” to address this inherent uncertainty of estate planning and that the right to disclaim “gives family members and personal representatives the flexibility they need to take full advantage of various beneficial provisions in state and federal tax laws.”<sup>143</sup>

Thus, freedom of inheritance can be seen as a safeguard against the donor’s exercise of freedom of disposition with imperfect information. Because, at the time she crafts her estate plan, the donor cannot perfectly assess the ultimate utility of a transfer from her estate, the law allows the donee to reassess the transfer after the donor’s death. Put simply, the donee has better information, and consequently, the law allows the donee to adjust the donor’s estate plan to account for this better information.<sup>144</sup> With the benefit of hindsight, the donee can increase the utility of the transfer, and therefore, freedom of inheritance can be seen as a tool to maximize social welfare.

##### 5. *Transaction Costs*

In addition to addressing problems of moral hazard and imperfect information,<sup>145</sup> postmortem estate planning through the exercise of freedom of inheritance can reduce transaction costs. Imperfect information may render an estate plan ineffective because the donor might simply not know all the relevant considerations to accurately assess the utility of particular transfers.<sup>146</sup> However, an estate plan can be defective even when the donor possesses perfect information. For example, a donor might be aware that a donee is insolvent, and she might recognize that a transfer to an alternate taker would produce greater utility because the transferred property would not be used to satisfy the donee’s debts. Nevertheless,

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<sup>141</sup> See Ellsworth, *supra* note 57, at 712 (“Changes in the tax laws may also necessitate a disclaimer. A dispositive instrument is drafted based on existing conditions, and it cannot reflect laws enacted after its execution.”).

<sup>142</sup> *Id.* at 713 (suggesting that the problem of imperfect information can affect the donor’s ability “to maximize the benefit from such tax-saving techniques as equalizing spouses’ estates, adopting the alternate valuation date or utilizing the credit for tax on prior transfers.”).

<sup>143</sup> *Id.*

<sup>144</sup> See Weisbord, *supra* note 124, at 1935–36 (“Because most donors want to achieve efficient estate planning and protect their estates from collection by tax authorities and creditors, we presume a donor with full knowledge of the relevant circumstances at death would approve of or, more likely, prefer the beneficiary’s decision to disclaim rather take.”).

<sup>145</sup> See *supra* Parts II.B.3–4.

<sup>146</sup> See *supra* text accompanying notes 124–143.

the donor might not implement this change and direct the transfer away from the insolvent donee because she might incur transaction costs to do so.<sup>147</sup>

The donor's act of changing her estate plan involves the time and effort of executing a will or other donative document that reflects her new intent.<sup>148</sup> Oftentimes, this act also involves consultation with a lawyer,<sup>149</sup> which has monetary costs. The time, money, and effort of implementing a change to the donor's estate plan, represent the transaction costs of the donor's decision to redirect a transfer in a way that produces greater utility,<sup>150</sup> such as by directing a transfer away from an insolvent donee and to an alternate taker. In addition to transaction costs in the form of time and money, the act of changing an estate plan has psychological costs.<sup>151</sup> The donor must confront her own mortality when making decisions regarding the disposition of her property upon death,<sup>152</sup> and consequently, estate planning can produce fear, anxiety, and other negative psychological and emotional consequences.<sup>153</sup>

Therefore, even if the donor has perfect information with which to assess the utility of different transfers, she might not change her estate plan to implement transfers of higher utility. When making her decision, she will weigh the transaction costs of changing her estate plan with the benefit of the new transfer. If the increased

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<sup>147</sup> See Adam J. Hirsch, *Formalizing Gratuitous Transfers and Contractual Transfers: A Situational Theory*, 91 WASH. U. L. REV. 797, 834 n.182 (2014) (explaining that "transaction costs impede" the amendment of wills); Adam J. Hirsch, *Incomplete Wills*, 111 MICH. L. REV. 1423, 1426 (2012) (suggesting that there are "transaction cost[s] of executing a will").

<sup>148</sup> See Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of its Context*, 73 FORDHAM L. REV. 1031, 1039 (2004) ("For contractual theorists, default rules serve to minimize the expense of bargaining. Gratuitous transfers do not ordinarily involve bargaining, to be exact, but they do entail drafting and formalization, in the form of a will.").

<sup>149</sup> See Schenkel, *supra* note 10, at 179 ("The public in general perceives the will as a document that is formally technical enough that many people, if not most, seek the services of a lawyer in having one drawn up.").

<sup>150</sup> See Jessica A. Clarke, *Identity and Form*, 103 CALIF. L. REV. 747, 837 (2015) (explaining that estate planning "entails transaction costs, including estate planning lawyers and a significant time investment"); Weisbord, *supra* note 2, at 879 ("[T]he complexity of the will-making process deters the exercise of testamentary freedom by imposing substantial transaction costs, including the cost of professional counsel or the investment of time necessary to prepare a proper will . . .").

<sup>151</sup> See Hirsch, *supra* note 148, at 1050 ("[P]sychological barriers accompany transaction costs, conspiring to impede the testamentary process."); see also Mark Glover, *The Therapeutic Function of Testamentary Formality*, 61 U. KAN. L. REV. 139, 145 (2012) (explaining that the "antitherapeutic consequences" of estate planning "may dissuade the testator from completing her estate plan and may impair the testator's decision-making capabilities").

<sup>152</sup> See Gerry W. Beyer, *Statutory Fill-in Will Forms – The First Decade: Theoretical Constructs and Empirical Findings*, 72 OR. L. REV. 769, 778 (1993) ("Many persons are intellectually aware that estate planning is necessary, but find it emotionally difficult to confront the fragility of life and health.").

<sup>153</sup> See Glover, *supra* note 7, at 434–38; Hirsch, *supra* note 148, at 1047–50.

utility of the new transfer outweighs her transaction costs, she will change her estate plan. Conversely, if the transaction costs outweigh the increased utility of the alternate transfer, the donor will not make the change. Her estate plan will remain as is, and the higher utility transfer will not occur. The transaction costs associated with implementing an estate plan therefore may prevent the donor from distributing her property in a way that maximizes social welfare.

In part to address this issue, the law grants the donee freedom of inheritance. Indeed, postmortem estate planning can be seen as a mechanism that reduces the transactions costs of directing the donor's property in ways that increase the overall utility of her estate plan. Allowing the donee to adjust the donor's estate plan through the exercise of freedom of inheritance can reduce transaction costs in two ways. First, postmortem estate planning can reduce transaction costs because the costs borne by the donee after donor's death are likely smaller than the costs borne by the donor during life. The focus of a disclaimer is narrow, encompassing only the particular property flowing to the donee.<sup>154</sup> By contrast, the focus of a will is much broader, involving not only the disposition of potentially all of the donor's property but also other issues, such as the appointment of executors and guardians of minor children.<sup>155</sup> Because of a will's greater complexity and broader scope, the preparation of a disclaimer likely involves less time, effort, and money than the planning, drafting, and execution of a will.<sup>156</sup>

Additionally, the donee's transaction costs are likely smaller than the donor's because postmortem estate planning minimizes the psychological toll of estate planning. The donor's act of estate planning forces her to acknowledge the inevitability of death and therefore can produce negative psychological consequences.<sup>157</sup> By contrast, to undertake postmortem estate planning, the donee must not confront her own mortality. Instead, the donee must simply make a decision regarding the disposition of the donor's property. To be sure, the donee must make these decisions during a time when she might still be mourning the loss of a loved

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<sup>154</sup> See *supra* text accompanying notes 58–65.

<sup>155</sup> See Percy Bordwell, *Testamentary Dispositions*, 19 KY. L.J. 283, 283 (1931) (“A will may be defined as the means whereby one disposes of his property at his death or appoints an executor or a guardian for his orphan child or does any combination of these things.”).

<sup>156</sup> The donor may be able to reduce transaction costs by narrowly altering an estate plan through the execution of a codicil that amends a preexisting will. See Adam J. Hirsch, *Text and Time: A Theory of Testamentary Obsolescence*, 86 WASH. U. L. REV. 609, 614 (2009) (“Ordinarily, amending a will by codicil is simple and inexpensive . . .”). However, the transaction costs of a codicil may still prevent the donor from updating her estate plan. See Hirsch & Wang, *supra* note 5, at 13 (“Wills frequently mature years after they are executed, and the costs (both economic and psychological) of adding codicils may deter testators from updating estate plans to take into account changed circumstances. Estate plans become increasingly stale as time passes, and due to human inertia they tend to remain so.”).

<sup>157</sup> See *supra* text accompanying notes 151–153.

one.<sup>158</sup> However, the psychological and emotional consequences that the donee endures as a result of the donor's death occur whether or not she considers the utility of postmortem estate planning. Postmortem estate planning may add to these negative effects,<sup>159</sup> but this additional stress and anxiety is likely less than the donor experiences as a result of estate planning during life.<sup>160</sup>

Not only does postmortem estate planning likely reduce the transaction costs of a single act of estate planning, but it also decreases the need to undertake multiple acts of estate planning. In order for the donor to ensure that her estate plan is up-to-date, she must continuously amend her estate plan as circumstances change over the course of her life.<sup>161</sup> Each time she does, she incurs transaction costs, which can accumulate the longer that she lives and the more circumstances change. By contrast, the donee exercises freedom of inheritance after the donor's death. Circumstances affecting the utility of the donor's estate plan are not in flux when the donee assesses the utility of the transfer from the donor's estate,<sup>162</sup> and consequently the donee must bear the transaction costs of exercising her freedom of inheritance only once. The donee's single postmortem estate planning experience therefore likely produces fewer overall transaction costs than the successive line of estate planning events that the donor must undertake to ensure that her estate plan reflects current circumstances.

In sum, the donor's freedom of inheritance can be explained as a component of the law of succession that maximizes social welfare. It accomplishes this goal in various ways. First, the discretion to accept or to reject a transfer from the donor's estate increases the donee's utility.<sup>163</sup> In particular, freedom of inheritance allows the donee to independently assess the utility of a transfer and to accept only those transfers that she perceives to be worthwhile. If the donee determines that a transfer from the donor's estate would actually produce negative utility, she can reject the transfer. Second, the donee's freedom of inheritance can increase the donor's

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<sup>158</sup> See Hirsch, *supra* note 59, at 153 n.209 (“[D]isclaimers are contemplated at a time when the beneficiary is often gripped with emotions – in this case, grief brought on by her benefactor's death, or even feelings of guilt over receiving the inheritance . . .”).

<sup>159</sup> Any involvement that the donee has in the administration of the donor's estate can produce stress and anxiety during the grieving process. See Glover, *supra* note 7, at 442. However, the ability to engage in postmortem estate planning may actually reduce the donee's emotional toll because she can take comfort in knowing that her actions aided in the efficient distribution of the donor's estate.

<sup>160</sup> But see Hirsch, *supra* note 59, at 153 n.209 (suggesting that the donee's emotional discomfort is “at least as powerful as [that] experienced by the prospective donor of a gift.”).

<sup>161</sup> See *Walker v. Walker*, 14 Ohio St. 157, 173 (Ohio 1862) (“[T]he circumstances of a testator, and the character, fortunes and wants of the natural objects of his bounty, are subject to constant change. To-day a testator makes his will; to-morrow a daughter is widowed, or a son is crippled; and so, what would be reasonable in a will to-day, becomes unreasonable by the accident of to-morrow.”).

<sup>162</sup> The idea that changed circumstances are not a concern after the donor's death is related to the notion that the donee may have better information regarding the utility of the donor's estate plan after the donor's death. See *supra* notes 122–143 and accompany text.

<sup>163</sup> See *supra* Part II.B.1.

utility.<sup>164</sup> The donor's utility is frequently tied to the donee's utility, so that the donor's utility increases when the donee's utility increases. Consequently, the donee's ability to reject transfers that she determines to be detrimental may increase the donor's utility because the donor has assurance that a transfer from her estate will in fact benefit the donee. Finally, freedom of inheritance allows the donee to undertake postmortem estate planning.<sup>165</sup> The donee's ability to adjust the donor's estate plan after the donor's death addresses problems of moral hazard, imperfect information, and transaction costs.

### III. FACILITATING THE FREEDOM

Freedom of disposition is the fundamental principle of the modern law of succession because it is viewed as maximizing social welfare.<sup>166</sup> Therefore, the law's primary goal is to promote the donor's exercise of this freedom by carrying out her intended estate plan.<sup>167</sup> As the Restatement explains, "The main function of the law in this field is to facilitate rather than regulate. The law serves this function by establishing rules under which sufficiently reliable determinations can be made regarding the content of the donor's intention."<sup>168</sup> As the previous section argued,

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<sup>164</sup> See *supra* Part II.B.2.

<sup>165</sup> See *supra* Part II.B.3–5.

<sup>166</sup> See *supra* Part I.

<sup>167</sup> See Richard Lewis Brown, *The Holograph Problem—The Case Against Holographic Wills*, 74 TENN. L. REV. 93, 96 (2006) ("The primary goal of the American law of wills is the effectuation of the decedent's testamentary intent."); Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 2 (1941) ("One fundamental proposition is that, under a legal system recognizing the individualistic institution of private property and granting to the owner the power to determine his successors in ownership, the general philosophy of courts should favor giving effect to an intentional exercise of that power."); Melanie B. Leslie, *Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract*, 77 N.C. L. REV. 551, 553 n.1 (1999) ("Most scholars agree that giving effect to testamentary intent is the primary objective of wills law.").

<sup>168</sup> RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 10.1 cmt. c (AM. LAW INST. 2003); see UNIF. PROB. CODE § 1-102 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2010) (stating that one of the "underlying purposes and policies" of the law of succession is "to discover and make effective the intent of a decedent in distribution of his property"); RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 10.1 cmt. a (AM. LAW INST. 2003) ("This section implements this fundamental principle by stating two well-accepted propositions: (1) that the controlling consideration in determining the meaning of a donative document is the donor's intention; and (2) that the donor's intention is given effect to the maximum extent allowed by law."); see also DUKEMINIER & SITKOFF, *supra* note 3, at 1 ("Most of the law of succession is concerned with enabling posthumous enforcement of the actual intent of the decedent or, failing this, giving effect to the decedent's probable intent."); Weisbord, *supra* note 2, at 877–78 ("The polestar of American inheritance law, testamentary freedom is a right protected by the U.S. Constitution, and once it is exercised, courts go to great lengths to implement the decedent's intent by closely honoring and interpreting testamentary instructions."). Although the term

freedom of inheritance also plays an important role in maximizing social welfare.<sup>169</sup> As such, just as the law facilitates the donor's exercise of freedom of disposition, the law should also strive to facilitate the donee's exercise of freedom of inheritance. This section therefore analyzes how the law should facilitate the donee's exercise of this freedom, and it does so by placing the law's facilitative goal squarely within the social welfare model developed in previous sections of this Article. Specifically, this section examines three primary areas in which the law can facilitate freedom of inheritance, including (A) the process by which the donee exercises her freedom, (B) the timeframe during which the donee must make her decision whether to accept or to reject a transfer from the donor, and (C) the restrictions that the law places on the donee's freedom.<sup>170</sup>

#### A. Formalization

The law facilitates the exercise of freedom of disposition by providing a process through which the probate court can authenticate wills. If the court routinely validates inauthentic wills or conversely invalidates genuine wills, then freedom of disposition is undermined because the donor's property is distributed in unintended ways.<sup>171</sup> In turn, if property is distributed in unintended ways, then the social welfare benefits of freedom of disposition go unrealized. Traditionally, the law distinguishes authentic wills from inauthentic wills by requiring the donor to comply with a variety of will-execution formalities, such as the requirements that a will be written, signed, and witnessed.<sup>172</sup> If the donor complies with these formalities, the court presumes

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"testamentary intent" is commonly used to refer to the intent of the donor, the law is concerned with different types of intent in different contexts. *See generally*, Mark Glover, *A Taxonomy of Testamentary Intent*, 23 GEO. MASON. L. REV. 569, 581–99 (2016).

<sup>169</sup> *See supra* Part II.

<sup>170</sup> This is, of course, not an exhaustive list of potential areas in which the law could facilitate the exercise of freedom of inheritance. *See* Adam J. Hirsch, *The Code Breakers: How States Are Modifying the Uniform Disclaimer of Property Interests Act*, 46 REAL PROP. TR. & EST. L.J. 325, 326 (2011) ("[D]isclaimer statutes must answer any number of subsidiary questions: How long after a benefactor dies can a disclaimer occur; what formalities must a beneficiary who wishes to disclaim follow; who, if anyone, can disclaim on a beneficiary's behalf; what events operate to bar a disclaimer; and what alternative devolution results from a disclaimer?"). For example, other areas in which the facilitative goal of the law should be explored include conditional disclaimers and ineffective disclaimers. *See id.* at 358–61.

<sup>171</sup> *See* DUKEMINIER & SITKOFF, *supra* note 3, at 148 (explaining that "[b]oth kinds of error dishonor the decedent's freedom of disposition" and that "[t]he former gives effect to a false expression of testamentary intent" while "the latter denies effect to a true expression of testamentary intent"); *see generally* Mark Glover, *Probate-Error Costs*, 49 CONN. L. REV. 613 (2016).

<sup>172</sup> *See* DUKEMINIER & SITKOFF, *supra* note 3, at 147–49; Mark Glover, *Formal Execution and Informal Revocation: Manifestations of Probate's Family Protection Policy*, 34 OKLA. CITY U. L. REV. 411, 423–25 (2009).

that she intended the will to be a legally effective expression of her estate plan, but if the donor does not comply, the court determines that the will is inauthentic.<sup>173</sup>

Similarly, if the court makes incorrect determinations regarding whether the donee accepted or rejected a transfer from the donor's estate, then the donee's freedom of inheritance is undermined and the social welfare benefits of the freedom are lost. The law therefore provides the donee a process through which she can reliably exercise her discretion to accept or to reject a transfer from the donor's estate.<sup>174</sup> In this regard, the manner in which the donee exercises her freedom of inheritance is comparable to the process by which the donor exercises her freedom of disposition. Because most donees want to benefit from the donor's estate,<sup>175</sup> the law presumes that a donee will accept a transfer from the donor, and consequently, the donee must take some affirmative steps to reject the transfer.<sup>176</sup> Similar to the formalities of will execution, the law requires the disclaimant to comply with certain formalities to exercise her discretion to reject an interest in the donor's property.<sup>177</sup> For instance, all states require that the donee express her intent to disclaim a gift in a written document,<sup>178</sup> and most states also require the donee to sign the document.<sup>179</sup> A small number of states require that the disclaimant comply with

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<sup>173</sup> When the decedent complies with the formalities of will execution, a rebuttable presumption of authenticity is triggered, meaning that the court will consider extrinsic evidence that suggests the decedent did not intend the will to be legally effective. See Mark Glover, *Minimizing Probate-Error Risk*, 49 U. MICH. J.L. REFORM 335, 363–66 (2016) [hereinafter Glover, *Probate-Error Risk*]. By contrast, when the decedent does not comply with the formalities of will execution, a conclusive presumption of inauthenticity is triggered, meaning the court will not consider extrinsic evidence that suggests the decedent intended the will to be legally effective. See Mark Glover, *Rethinking the Testamentary Capacity of Minors*, 79 MO. L. REV. 69, 97–98 (2014).

<sup>174</sup> See UNIF. DISCLAIMER OF PROP. INTERESTS ACT prefatory note (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2010) (explaining that “the new Act is an enabling statute”).

<sup>175</sup> See Hirsch, *supra* note 56, at 1873.

<sup>176</sup> See *In re Estate of Lyng*, 608 N.W.2d 316, 319 (S.D. 2000) (“There exists a generally recognized presumption of the acceptance of a beneficial testamentary gift. Therefore, the renunciation of such a gift must be clear and unequivocal.”) (citations omitted); *Tennant v. Satterfield*, 216 S.E.2d 229, 231–32 (W. Va. 1975) (“The general rule with regard to acceptance of benefits under a will is that a beneficiary who accepts such benefits is bound to adopt the whole contents of that will and is estopped to challenge its validity. Acceptance of a beneficial legacy or transfer is presumed, but the presumption is rebuttable by express rejection of the benefits or by acts inconsistent with acceptance.”) (citation omitted).

<sup>177</sup> See Hirsch, *supra* note 59, at 149–54; Hirsch, *supra* note 170, at 361–62.

<sup>178</sup> See Hirsch, *supra* note 59, at 149.

<sup>179</sup> See *id.* at 149 n.187. These additional requirements are typically incorporated into disclaimer formalities through a requirement that a disclaimer be acknowledged in the manner required for the recordation of deeds. For example, the Florida disclaimer statute provides: “To be effective, a disclaimer must be in writing, declare the writing as a disclaimer, describe the interest or power disclaimed, and be signed by the person making the disclaimer and witnessed and acknowledged in the manner provided for deeds of real

additional formalities, such as notarization or attestation by witnesses.<sup>180</sup> Moreover, in addition to formalizing a disclaimer in the prescribed manner, a donee must also deliver the disclaimer either to the probate court or to the donor's personal representative.<sup>181</sup>

In order to maximize social welfare, the law's goal should be to facilitate not only the donor's freedom of disposition but also the donee's freedom of inheritance.<sup>182</sup> As such, the formal processes that the donor and the donee must navigate would seem to contradict the law's facilitative goal because they limit the manner in which the donor can exercise freedom of disposition and the donee can exercise freedom of inheritance. After all, some donors and donees might want to exercise their respective freedoms in other ways, such as by oral declaration,<sup>183</sup> and requiring them to execute wills or to disclaim gifts in a prescribed manner would seem to restrict rather than facilitate the exercise of their freedoms. Because they limit the manner in which the donor can exercise freedom of disposition and the donee can exercise freedom of inheritance, the formalities for executing a will and disclaiming a gift should serve some purpose related to the maximization of social welfare.

Within the context of will execution, the primary purpose of the prescribed formalities is to further the law's facilitative goal by providing the court reliable evidence that the donor intended a will to be legally effective.<sup>184</sup> Because a will takes effect only after the donor's death, questions sometimes arise regarding whether the donor intended a particular document to constitute a legally effective will.<sup>185</sup>

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estate to be recorded in this state." FLA. STAT. ANN. § 739.104(3) (West 2017); *see also* C.G.S.A. § 45a-579(c) (West 2017); MINN. STAT. ANN. § 524.2-1107 (West 2017); W. VA. CODE ANN. § 42-6-5(c) (West 2017).

<sup>180</sup> *See* Hirsch, *supra* note 59, at 149 n.187.

<sup>181</sup> *See id.* ("State statutes also mandate either that beneficiaries file a written disclaimer with the court, or that they deliver it to the personal representative, or they are permitted to do either, or they are required to do both.").

<sup>182</sup> *See supra* Parts I.B. & II.B.

<sup>183</sup> Today, a minority of states recognizes oral wills as legally effective under very limited circumstances. *See* DUKEMINIER & SITKOFF, *supra* note 3, at 148 n.3. Similarly, "[u]nder the common law, a beneficiary could effect a binding disclaimer by mere oral declaration." Hirsch, *supra* note 59, at 149.

<sup>184</sup> *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 3.3 cmt. a (AM. LAW INST. 2003); ("The formalities are meant to facilitate [an] intent-serving purpose, not to be ends in themselves."); Champine, *supra* note 30, at 391-92 ("To facilitate realization of testamentary freedom, the law historically has required individuals to set forth dispositive desires in a written statement executed with formalities sufficient to identify to the individual executing the instrument and the world at large that the writing is intended to be a will.").

<sup>185</sup> *See* DUKEMINIER & SITKOFF, *supra* note 3, at 147 ("A will is a peculiar legal instrument . . . in that it does not take effect until after the testator dies. As a consequence, probate courts follow what has been called a 'worst evidence' rule of procedure. The witness who is best able to authenticate the will . . . is dead by the time the court considers such issues.").



Consider, for example, a scenario in which a donor dies, and her family discovers a handwritten note folded between the pages of the donor's diary.<sup>186</sup> The document appears to describe how the donor wanted her property distributed upon death. But how can the court be sure that the donor wanted her property distributed in the manner described in the note? Perhaps the note is a rough draft that the donor had no confidence in to truly reflect what she wanted.<sup>187</sup> Or perhaps the note was fraudulently prepared by someone attempting to benefit from the donor's estate.<sup>188</sup> Because the donor is dead, the court cannot simply ask her whether she intended the document to be a legally effective expression of her estate plan.<sup>189</sup>

To alleviate these evidentiary difficulties, the formal process of will execution provides courts an easy and efficient way to distinguish authentic wills from inauthentic wills.<sup>190</sup> Because most people would not go through the process of producing a written will, signing it, and having it witnessed without intending it to be legally effective, the donor's compliance with the prescribed formalities provides robust evidence that she intended the will to govern the distribution of her estate.<sup>191</sup> Furthermore, the requirements that a will be written, signed, and witnessed, reduce the likelihood of fraud.<sup>192</sup> Thus, when the donor complies with the formalities of will execution, the court can safely dispose of the donor's estate according to the will's terms with little risk that it is distributing property in an unintended manner.<sup>193</sup> The primary purpose of will-execution formalities is therefore to ensure that the donor's property is distributed according to the terms of a will that the donor intended to be legally effective,<sup>194</sup> and, in this way, the formal process of will execution can be seen as serving the law's overall facilitative goal.

In addition to providing evidence that the donor intended a will to be legally effective, the formalities of will execution also serve the secondary function of cautioning the donor.<sup>195</sup> As explained above, the law grants the donor broad freedom of disposition because she is in the best position to make decisions regarding the

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<sup>186</sup> This example is inspired by *In re Estate of Rigsby*, 843 P.2d 856, 857 (Okla. Civ. App. 1992).

<sup>187</sup> See Mark Glover, *Decoupling the Law of Will-Execution*, 88 ST. JOHN'S L. REV. 597, 614 (2014).

<sup>188</sup> See *id.* at 617.

<sup>189</sup> See Gulliver & Tilson, *supra* note 167, at 4 (“These difficulties are entitled to especially serious consideration in prescribing requirements for gratuitous transfers, because the issue of the validity of the transfer is almost always raised after the alleged transferor is dead, and therefore the main actor is usually unavailable to testify, or to clarify or contradict other evidence concerning his all-important intention.”).

<sup>190</sup> See Glover, *supra* note 187, at 614–16.

<sup>191</sup> See DUKEMINIER & SITKOFF, *supra* note 3, at 153.

<sup>192</sup> See Glover, *supra* note 187, at 617–18.

<sup>193</sup> See Glover, *supra* note 173, at 342–43.

<sup>194</sup> See RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 3.3 cmt. a (AM. LAW INST. 2003) (“The purpose of statutory formalities . . . is to determine whether the decedent adopted the document as his or her will.”).

<sup>195</sup> See Glover, *supra* note 187, at 621–23.

distribution of her estate.<sup>196</sup> However, even if the donor knows how best to distribute her property, she might not actually craft her estate plan in a way that maximizes social welfare.<sup>197</sup> Because the donor's decisions regarding the distribution of her estate take effect only after she dies, she will not bear the costs of poor choices.<sup>198</sup> This moral hazard of testation might cause the donor to not fully consider the consequences of her actions,<sup>199</sup> and, in turn, she might execute a will haphazardly and without proper consideration.<sup>200</sup> If the donor does not take the estate planning process seriously, she might not dispose of her estate in a way that maximizes social welfare.

The formal process of will execution provides a check against the donor exercising freedom of disposition without adequate thought and proper preparation. By requiring the donor to produce a written will, the law forecloses the possibility that the donor will dispose of property through a haphazard oral declaration.<sup>201</sup> Likewise, the signature and witnessing requirements remind the donor that the act of testation has legal significance and consequently encourages the donor to seriously consider the consequences of her decisions.<sup>202</sup> By transforming the will-execution process into a ceremony, the law cautions the donor that she is making important decisions.<sup>203</sup> Will-execution formalities therefore facilitate the exercise of freedom of disposition by attempting to at least partially alleviate the moral hazard concerns that arise because the donor will be dead at the time her decisions take effect.

The formalities with which the donee must comply to disclaim a transfer serve similar functions as the formalities with which the donor must comply to execute a legally effective will.<sup>204</sup> For instance, the formalities provide evidence of the donee's

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<sup>196</sup> See *supra* Part I.B.2.

<sup>197</sup> See Hirsch & Wang, *supra* note 5, at 13.

<sup>198</sup> See Sherman, *supra* note 110, at 1294.

<sup>199</sup> See *supra* Part II.B.3.

<sup>200</sup> See Hirsch & Wang, *supra* note 5, at 13.

<sup>201</sup> See Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800 (1941) (explaining that the requirement of writing "induc[es] [a] circumspect frame of mind"); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 495 (1975) ("The requirement[] of writing . . . [is a] primary cautionary formalit[y]. Writing is somewhat less casual than plain chatter. As we say in a common figure of speech, 'talk is cheap.'").

<sup>202</sup> See Glover, *supra* note 187, at 622 ("[B]y introducing outsiders into the testamentary experience, the formality of attestation sets the execution of a will apart from ordinary transactions."); John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1, 3 (1987) ("Signature . . . caution[s] the testator about the seriousness and finality of his act.").

<sup>203</sup> See C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism*, 43 FLA. L. REV. 167, 261–62 (1991) ("A secondary aspect of formality is its tendency to induce deliberation and reflection on the part of the testator. Formality thus prevents enforcement of casual statements and unpremeditated action . . .").

<sup>204</sup> See Hirsch, *supra* note 59, at 151 ("As a matter of public policy, what degree of formality should the law require for a binding disclaimer? Our starting point for such an

intent to disclaim.<sup>205</sup> When the donee expresses her intent to reject a transfer from the donor's estate in writing and perhaps also complies with additional formalities,<sup>206</sup> the court has assurance that she actually intended to renounce the gift. More particularly, formal requirements for effective disclaimers limit the opportunity for fraud that would be present if the law did not prescribe a process through which the donee can effectively disclaim a gift.<sup>207</sup> The Supreme Court of Virginia recognized this evidentiary function of formality in the context of both executing a will and disclaiming a gift when it explained, "The law requires wills to be executed with certain solemnities; and it would present a strange anomaly, if a devise, required to be in writing and executed with such solemnities, could be defeated, and in effect abrogated, by the testimony of a single witness proving some verbal disclaimer."<sup>208</sup> Thus, the formal requirements for disclaiming a transfer are intended to prevent fraud and to provide robust evidence of the donee's intent.

Furthermore, like the donor's decision-making process might be distorted by the moral hazard of testation,<sup>209</sup> the donee's decision-making process might be affected by what is known as the endowment effect.<sup>210</sup> The endowment effect refers to the psychological phenomenon that people tend to value property that they possess more than equivalent property that they do not possess.<sup>211</sup> As a result of the

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analysis is the recognition that, in its substantive attributes, a disclaimer is itself a kind of gratuitous transfer . . . . Accordingly, the principles governing formalization of a gift would appear pertinent.").

<sup>205</sup> See Hirsch, *supra* note 170, at 361 (explaining the formalities "ease the evidentiary task of determining whether a beneficiary intended a purported disclaimer as binding upon him or her").

<sup>206</sup> See *supra* notes 177–83 and accompanying text.

<sup>207</sup> See Hirsch, *supra* note 59, at 152 ("[I]f gifts required nothing beyond a parole, lawmakers would render their enforcement vulnerable to fraud. [This] polic[y] is equally apropos to declarations of disclaimer."); Hirsch, *supra* note 170, at 361 ("As a matter of substantive law, courts have noted the policy against fraudulent assertions of a disclaimer to change distributions.").

<sup>208</sup> *Bryan v. Hyre*, 40 Va. 94, 105 (Va. 1842).

<sup>209</sup> See *supra* Part II.B.3.

<sup>210</sup> See Hirsch, *supra* note 59, at 152–53.

<sup>211</sup> See Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1228 (2003) ("The much studied 'endowment effect' stands for the principal that people tend to value goods more when they own them than when they do not. Move a person from a city house to a country house and, low and behold, he is quite likely to prefer the country house more than he did when he resided in the city. A consequence of the endowment effect is the 'offer-asking gap,' which is the empirically observed phenomenon that people will often demand a higher price to sell a good that they possess than they would pay for the same good if they did not possess it at present."); Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1150 (1986) ("Social psychologists have demonstrated that people sometimes value things once they have them much more highly than they value the same things when they are owned by others."). See generally WARD FARNSWORTH, *THE LEGAL ANALYST: A TOOLKIT FOR THINKING ABOUT THE LAW* 209–17 (2007) (explaining that "things seem more valuable to people once they own them," due to the endowment effect).

endowment effect, individuals tend to overvalue property that they own and to undervalue property that they do not.<sup>212</sup> The distortions of the endowment effect are directly applicable to the donee's decision to either accept or to reject a transfer from the donor's estate.<sup>213</sup> Because the donee does not yet own the property that she must decide whether to disclaim, she might underestimate the utility that she would receive from the donor's gift and consequently might not adequately consider the consequences of disclaiming.

One rationale for allowing the donee to reject a gift is that she can increase the utility of the donor's estate plan by engaging in postmortem estate planning.<sup>214</sup> However, this rationale is undermined if the donee does not accurately value the donor's gift because her decision-making process is distorted by the endowment effect. In fact, if the donee does not make rational decisions, then freedom of inheritance could actually decrease social welfare. As such, the law should require the donee to comply with certain formalities to disclaim a gift to remind her that she is making important decisions that warrant careful and thoughtful consideration.<sup>215</sup> Much like will-execution formalities encourage the donor to make deliberate and informed decisions regarding how to distribute property upon death,<sup>216</sup> disclaimer formalities encourage the donee to make deliberate and informed decision regarding whether to accept or to reject a gift from the donor's estate. In this way, formalities combat both the moral hazard of testation and the endowment effect by encouraging the donor to exercise freedom of disposition and the donee to exercise freedom of inheritance in ways that maximizes social welfare.<sup>217</sup>

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<sup>212</sup> See Charles B. Craver, *The Negotiation Process*, 27 AM. J. TRIAL ADVOC. 271, 286 (2003) ("People who own goods that others wish to purchase tend to overvalue those items, while individuals who are thinking of buying goods possessed by others tend to undervalue those items."); Debra Pogrund Stark et al., *Complex Decision-Making and Cognitive Aging Call for Enhanced Protection of Seniors Contemplating Reverse Mortgages*, 46 ARIZ. ST. L.J. 299, 338 (2014) (explaining that "endowment effects" occur when "consumers overvalue things that they already own and undervalue things that they do not").

<sup>213</sup> See Hirsch, *supra* note 59, at 152–53. ("Because she has not yet taken possession, a disclaiming beneficiary may well view the transaction not as a (painful) loss, but rather as a (relatively painless) forgoing of a gain. In consequence, the possibility that she will disclaim without due deliberation looms larger . . ."); Hirsch, *supra* note 37, at 36 ("How might the endowment effect affect the treatment of inherited wealth? Well, that depends. If the beneficiary fails to conceptualize an inheritance as really being 'her' property, she might be less averse to risking or dissipating it . . . This phenomenon, I suspect, may help explain the high frequency of *disclaimers* of inheritances.").

<sup>214</sup> See *supra* Sections II.B.3–5.

<sup>215</sup> See Hirsch, *supra* note 59, at 152–53 (suggesting that the possibility that the donee's decision-making process might be distorted by the endowment effect "underscor[es] the importance of formal requirements such as a writing that tend to promote reflection"); Hirsch, *supra* note 170, at 361 (explaining that "courts have also observed the usefulness of a writing to clarify to beneficiaries that a disclaimer is a legally performative act").

<sup>216</sup> See *supra* notes 195–200 and accompanying text.

<sup>217</sup> Formalities do not directly cause the donor to internalize all of the costs of her decisions, nor do they directly cause the donor to accurately assess the utility of the donor's

Will-execution formalities and disclaimer formalities therefore serve similar functions. In particular, they provide evidence of the donor's and the donee's intent, including evidence that wills and disclaimers are not the product of fraud, and they caution the donor and the donee to make reasoned decisions regarding how to distribute property upon death and regarding whether to disclaim a transfer from the donor's estate. But just because disclaimer formalities serve similar purposes as will-execution formalities does not mean that the law should require the same formalities in both contexts. Indeed, because formalities limit the manner in which the donee can exercise freedom of inheritance, policymakers should tailor the prescribed formalities to fit the specific context of disclaimers.

With this need for tailoring in mind, should the law require the donee to comply with the same formalities that the donor must satisfy in order to execute a valid will, namely a signed and witnessed writing, as some states currently mandate?<sup>218</sup> Or should the law follow the lead of other states and require fewer formalities, such as a signed writing or perhaps merely a written document without the need of a signature?<sup>219</sup> To decide which formalities are appropriate, policymakers must evaluate both the difficulty that courts have in deciphering the donee's intent to disclaim, including the risk of fraud, and the possibility that the donee will disclaim a gift without adequately considering the costs and benefits of her decisions. If the evidentiary difficulties and risk of haphazard decision-making are high, then formality levels should be high, but if these concerns are low, then formality levels should also be low.

The evidentiary difficulties associated with deciphering the donee's intent is the first issue that policymakers should consider when selecting the formalities that the donee must satisfy to effectively disclaim a gift. When compared with the difficulties of identifying the donor's intent, the court's task of deciding whether the donee intended to disclaim a transfer from the donor's estate appears relatively easy. The court's task of deciding whether a donor intended a will to be legally effective presents problems because a will only becomes legally effective after the donor dies,<sup>220</sup> and as such the donor need not directly communicate her intent to anyone during her life.<sup>221</sup> As a result, questions sometimes arise regarding whether the donor intended a document found after her death to be a legally effective expression of her estate plan.<sup>222</sup> The signature and witnessing requirements reduce these evidentiary

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gift. However, formalities at least encourage the donor and the donee to seriously consider their decisions, which might indirectly correct the moral hazard and endowment effect distortions that affect their decision-making processes.

<sup>218</sup> See *supra* note 180 and accompanying text.

<sup>219</sup> See *supra* notes 178–179 and accompanying text.

<sup>220</sup> See *DUKEMINIER & SITKOFF*, *supra* note 3, at 147.

<sup>221</sup> See *Farkas v. Williams*, 125 N.E.2d 600, 608 (Ill. 1955) (“[A] will is ordinarily an expression of the secret wish of the testator”); Karen J. Sneddon, *Speaking for the Dead: Voice in Last Wills and Testaments*, 85 ST. JOHN'S L. REV. 683, 740 (2011) (“Due to the ambulatory nature of wills, many provisions and terms remain secret until the testator's death.”).

<sup>222</sup> See *supra* notes 184–189 and accompanying text.

difficulties because few people would satisfy these requirements without intending the will to be legally effective.<sup>223</sup> By contrast, fewer evidentiary difficulties arise in the context of disclaimers because the donee must affirmatively express her intent to disclaim to either the probate court or the donor's personal representative.<sup>224</sup> This affirmative act of communication provides reliable evidence that the donee unequivocally intended to disclaim the gift from the donor,<sup>225</sup> and consequently fewer formalities are needed to provide evidence that the donee intended to disclaim a transfer from the donor's estate.

Additionally, the risk of fraudulent disclaimers is likely less than the risk of fraudulent wills. Because a will can distribute property to anyone, the population of potential perpetrators of fraud in the context of wills is large.<sup>226</sup> Indeed, the impact of a fraudulent will on the distribution of the donor's estate could be significant. By contrast, the population of potential perpetrators of fraud in the context of disclaimers is relatively small because a disclaimer has only a minor effect on the distribution of the donor's property. When the donee disclaims a gift, an alternate donee takes the property instead of the primary donee.<sup>227</sup> The identity of the alternate donee is set by decisions that the donor made in her estate plan,<sup>228</sup> and consequently a disclaimer has no effect on the identity of the alternate donee. Instead, a disclaimer simply substitutes one donee that the donor selected for another donee that the donor selected. Because fewer people have a motive to perpetrate fraud in the context of disclaimers than in the context of wills,<sup>229</sup> fewer formalities are needed to protect the donee from wrongdoing.

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<sup>223</sup> See *DUKEMINIER & SITKOFF*, *supra* note 3, at 153.

<sup>224</sup> See Hirsch, *supra* note 59, at 149 n.187.

<sup>225</sup> This rationale is similar to the rationale that lifetime gifts of personal property must be delivered to the donee. See *RESTATEMENT (THIRD) OF PROP: WILLS AND OTHER DONATIVE TRANSFERS* § 6.2 cmt. b (AM. LAW. INST. 2003) ("Delivery . . . constitutes an event that supplies objective evidence [of a gift]"); Hirsch, *Formalizing Transfers*, *supra* note 147, at 818 ("[D]elivery clarifies that the donor intended an enforceable gift and avoids misunderstanding by the donee."); Chad A. McGowan, *Special Delivery: Does the Postman Have to Ring at All—The Current State of the Delivery Requirement for Valid Gifts*, 31 *REAL PROP. PROB. & TR. J.* 357, 367 (1996) ("Delivery serves as evidence supporting the donee's claim of gift. In other words, possession by an alleged donee would greatly increase the likelihood that the donee was telling the truth. If the donee actually possessed the thing given, the donor could be said to have actually intended to part with it.").

<sup>226</sup> See Glover, *Probate-Error Costs*, *supra* note 171, at 641–42 ("[T]he wrongdoer specifies the gifts that are made through the terms of the fraudulent will, and therefore the wrongdoer has wide latitude to describe an estate plan that significantly departs from the decedent's intended estate plan.").

<sup>227</sup> See *DUKEMINIER & SITKOFF*, *supra* note 3, at 140.

<sup>228</sup> See Hirsch, *Revisions*, *supra* note 59, at 163; see also *supra* note 72–75 and accompanying text.

<sup>229</sup> The person with the greatest motivation to produce a fraudulent disclaimer is the alternate donee, who stands to directly benefit. However, others might also have a motive to produce a fraudulent disclaimer, including anyone who would prefer the alternate donee to benefit rather than the primary donee. By contrast, anyone could have a motive to produce a

In addition to the evidentiary difficulties of identifying the donee's intent, policymakers should also consider the risk that the donee will exercise her right to disclaim without appropriate consideration. One purpose of will formalities is to remind the donor that she is making important decisions that warrant careful reflection.<sup>230</sup> Disclaimer formalities serve the same purpose;<sup>231</sup> however, fewer formalities are necessary in the context of disclaimers because, again, the donee must directly communicate her intent to either the probate court or the donor's personal representative.<sup>232</sup> In essence, the requirement that the donee deliver a disclaimer serves as a formality that cautions her to make careful decisions. This cautioning effect of delivery is recognized in the context of lifetime gifts. To make a gift of personal property during life, the donor need not produce a signed and witnessed writing.<sup>233</sup> Instead, the donor must deliver either the property or something that symbolizes the property to the donee.<sup>234</sup> The donor's act of relinquishing the property serves as a formality that cautions her to make thoughtful decisions.<sup>235</sup> Similarly, the requirement that the donee deliver a disclaimer, which symbolizes the property that she is renouncing, provides the donee an opportunity to step back and reconsider her decision to disclaim. And because the donee must deliver a disclaimer to the probate court or to the donor's personal representative,

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fraudulent will because anyone can directly benefit. An additional wrinkle regarding fraudulent disclaimers is that, under some circumstances, the donee must disclaim a gift within a specific timeframe. *See infra* Section III.B. In these instances, the primary donee might have a motive to produce a fraudulent disclaimer in order to satisfy the timeliness requirement, and consequently disclaimer formalities might be needed to protect against this type of fraud. *See Hirsch, Code Breakers, supra* note 170, at 361 ("By requiring a written record, the authors of federal tax law probably sought to preclude fraudulent claims of timely disclaimers.").

<sup>230</sup> *See supra* notes 201–203 and accompanying text.

<sup>231</sup> *See Hirsch, Revisions, supra* note 59, at 152–53; *see also supra* notes 214–217 and accompanying text.

<sup>232</sup> *See Hirsch, Revisions, supra* note 59, at 149 n.187.

<sup>233</sup> *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 6.2 (AM. LAW. INST. 2003). Gifts of real property, however, do require certain formalities. *See id.* § 6.3.

<sup>234</sup> *See Hirsch, supra* note 147, at 815 ("Under the traditional view, delivery must be 'manual,' a literal movement of the gift corpus into the hands of the donee . . . unless manual delivery is impossible or impracticable. In that event, the donor can substitute an alternative form of delivery—either constructive delivery of something (such as a key) that opens up access to the gift, or delivery of a writing describing the gift. The modern view, acknowledged nowadays by many courts, permits these alternative forms of delivery irrespective of the ease of manual delivery.").

<sup>235</sup> *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 6.2 cmt. b (AM. LAW. INST. 2003) ("Delivery impresses on the donor that the donor is parting with dominion and control . . ."); McGowan, *supra* note 225, at 367 (explaining that one "purpose of delivery is to caution the donor of the magnitude and consequences of the donor's act"); Philip Mechem, *The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments*, 21 ILL. L. REV. 341, 348 (1926) ("[D]elivery makes vivid and concrete to the donor the significance of the act he doing.").

but does not need to communicate her intent to anyone during life, fewer formalities are necessary to serve the cautionary function when a donee disclaims a gift than when a donor executes a will.

Thus, disclaimers seem to present fewer evidentiary difficulties and less risk of haphazard decisions than wills. Consequently, the law should require fewer formalities for the validity of a disclaimer than for the validity of a will. Specifically, because they impede the exercise of freedom of inheritance and are not needed to serve an evidentiary or cautionary function, the attestation and notarization requirements that some states impose upon disclaimers should be eliminated.<sup>236</sup> By contrast, the writing and signature formalities are less burdensome and therefore do not substantially impede the donee's exercise of freedom of inheritance. At the same time, these requirements also fulfill the diminished evidentiary and cautionary needs within the context of disclaimers.<sup>237</sup> Indeed, a signed writing, or at least a simple writing, is needed so that the donee can deliver something to the probate court or to the donor's personal representative that symbolizes her relinquishment of the disclaimed property.<sup>238</sup> In sum, by weighing the evidentiary and cautionary concerns of disclaimers along with the potential impediment to a disclaimer's validity that formalities represent, policymakers can facilitate the donee's exercise of freedom of inheritance in a way that maximizes social welfare.

### B. Timeliness

Another way policymakers facilitate freedom of inheritance is by delineating a timeframe during which the donee must either accept or reject a gift. Traditionally, most disclaimer statutes have imposed a fixed deadline by which the donee must exercise her right to disclaim.<sup>239</sup> If the donee does not disclaim within the prescribed

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<sup>236</sup> Similar arguments have been made in the context of will execution reform. See James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 573 (1990) ("By continuing to insist on attestation, our current legal system does not protect testators from others. Instead, it protects many testators from effectuating their own estate plans."). The merit of eliminating witnessing requirements is debatable. See Glover, *Probate-Error Risk*, *supra* note 173, at 373–77. However, the argument seems to be stronger in the context of disclaimers.

<sup>237</sup> See Langbein, *supra* note 201, at 498 ("Writing and signature are the minimum requirements which assure finality, accuracy and authenticity of purported testamentary expressions.").

<sup>238</sup> A related issue that is beyond the scope of this Article is whether a "writing" should be limited to a physical document or whether electronic mediums should satisfy the writing requirement for valid disclaimers. See UNIF. DISCLAIMER OF PROP. INTERESTS ACT § 5 cmt. (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2010) (acknowledging that "a disclaimer may be prepared in forms other than typewritten pages with a signature in pen" and authorizing electronic disclaimers); Hirsch, *supra* note 170, at 362 (explaining that "five jurisdictions have modified this provision of UDPIA to permit only disclaimers that a beneficiary executes in a signed writing" and suggesting that "[t]his modification appears justified as a matter of public policy, although the issue is debatable").

<sup>239</sup> See Hirsch, *supra* note 170, at 335–36.



time, she must accept the gift.<sup>240</sup> A timeliness requirement for an effective disclaimer would seem to undermine the social welfare maximization goal of the law because it serves as yet another hurdle that the donee must navigate in order to effectively disclaim a gift. Some donees who want to reject a transfer from the donor's estate will fail to do so within the prescribed timeframe, and in these instances the social welfare benefits of a disclaimer will not be realized.<sup>241</sup>

Furthermore, one rationale for granting the donee freedom of inheritance is that the donor may have had imperfect information at the time she crafted her estate plan. Without the ability to fully understand the future needs of her family, the donor likely cannot make decisions regarding the disposition of her property that perfectly account for changing circumstances between the time she crafts her estate plan and the time that she dies.<sup>242</sup> As such, the donor might make decisions that fail to maximize the social welfare generated by the distribution of her estate. However, freedom of inheritance allows the donee to assess the utility of the donor's estate plan at the time of the donor's death, and consequently the donee has better information regarding familial needs.<sup>243</sup> If, based on the circumstances that exist at the time of the donor's death, the alternate donee would benefit more from the donor's property than the primary donee, the primary donee can increase the utility of the donor's estate plan by exercising her right to disclaim.<sup>244</sup> A disclaimer deadline would therefore seem to limit a donee's ability to address the problems created by the donor's exercise of freedom of disposition with imperfect information. After all, the longer the donee has to decide whether to accept or to reject the transfer from the donee, the greater the opportunity the donee has to acquire better information.

Because a deadline represents a potential stumbling block for the effectiveness of a disclaimer and also limits the donee's ability to acquire information regarding the utility of accepting or rejecting a gift, a timeliness requirement could diminish the social welfare benefits of freedom of inheritance. Consequently, policymakers should impose a deadline only in specific scenarios in which a timeliness requirement serves an important purpose. For instance, federal tax law imposes a nine-month timeliness requirement for effective disclaimers that starts at the donor's death.<sup>245</sup> If the donee does not disclaim within this timeframe, a disclaimer will not

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<sup>240</sup> *See id.*

<sup>241</sup> *See id.* at 336 (“[A] deadline for disclaiming discriminates against more poorly counseled beneficiaries, who stand at greater risk of overstepping the time limit as a result of ignorance or possibly indecision.”). In this regard, a timeliness requirement resembles the formalities with which the donee must comply to effectively disclaim a gift from the donor. *See supra* notes 182–183 and accompanying text. Both present the possibility that a disclaimer will be ineffective despite that the donee truly intended to disclaim a gift.

<sup>242</sup> *See supra* Part II.B.4.

<sup>243</sup> *See Hirsch, supra* note 56, at 1892–93; Weisbord, *supra* note 124, at 1936.

<sup>244</sup> *See supra* notes 125–143 and accompanying text.

<sup>245</sup> *See* I.R.C. § 2518(b)(2)(A) (West 2017). For donees who are under the age of twenty-one, the deadline is nine months after reaching the age of twenty-one. *See id.* § 2518(b)(2)(B).

be effective for federal tax purposes.<sup>246</sup> As explained above, a prolonged disclaimer period in this context might have social welfare benefits,<sup>247</sup> however, it also has the potential cost of disrupting the federal tax system.<sup>248</sup>

To illustrate, an open-ended disclaimer period could hinder timely and accurate tax reporting. If the donor's executor were allowed to delay filing the donor's estate tax return indefinitely while a donee decides whether to accept or to reject a gift, administration of the federal wealth transfer tax system would become slow and inefficient. Likewise, allowing the donee to disclaim a gift after the executor files the donor's estate tax return would inject confusion and inconsistency within the tax system.<sup>249</sup> As Professor Grayson McCouch explains,

[R]equiring that a disclaimer generally be made promptly . . . facilitates orderly administration of federal transfer taxes . . . . [Conversely,] [p]ermitt[ing] a transferee to make a tax-free disclaimer after the expiration of the limitation period for assessing tax on the original transfer would create uncertainty and severely disrupt transfer tax administration.<sup>250</sup>

Thus, although a disclaimer deadline generally would seem to undermine the social welfare goal of the law, such a deadline for tax purposes may actually increase social welfare by fostering an efficient tax system.<sup>251</sup>

Although a disclaimer time limit might serve an important purpose for tax purposes, such a deadline likely does not increase social welfare outside the realm of tax-motivated disclaimers. Unlike its effect on the federal wealth transfer tax

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<sup>246</sup> For a discussion of the effect of disclaimers within the context of federal wealth transfer taxes, see *supra* notes 134–139 and accompanying text.

<sup>247</sup> See *supra* notes 241–244 and accompanying text.

<sup>248</sup> See Hirsch, *supra* note 59, at 125; Hirsch, *supra* note 170, at 336.

<sup>249</sup>

For example, the transfer may qualify for a marital deduction if the interest passes to the transferor's spouse, or it may be subject to special gift tax valuation rules if the transferee is a 'member of the transferor's family,' or it may avoid triggering a generation-skipping transfer tax if the transferee is a 'non-skip person.' In each case, however, a disclaimer by the original transferee might shift the interest to another person and produce dramatically different tax results.

Grayson M.P. McCouch, *Timely Disclaimers and Taxable Transfers*, 47 U. MIAMI L. REV. 1043, 1054–55 (1993).

<sup>250</sup> *Id.*; see Hirsch, *supra* note 170, at 336 (explaining that a disclaimer deadline "facilitates timely tax reporting").

<sup>251</sup> Within the context of the federal tax system, a fixed disclaimer deadline may also have other benefits. See Hirsch, *supra* note 59, at 125 ("Within the tax sphere, a short deadline on disclaimers serves the purpose of maintaining the fiscal integrity of the estate tax, by ensuring the beneficiary's opportunity to engage in postmortem tax planning does not exceed those that the benefactor could have exploited at the time of death.").

system,<sup>252</sup> an unlimited disclaimer period would not significantly disrupt the probate process. Indeed, a prolonged delay in the donee's decision either to accept or to reject a gift would likely only inconvenience the alternate donee who must endure the uncertainty regarding whether she will receive disclaimed property.<sup>253</sup> Other donees within the donor's estate plan will not be affected, as they can accept property as soon as the executor is ready to commence the distribution of the donor's estate.<sup>254</sup>

Thus, although a time limit on disclaimers may serve important purposes for tax purposes,<sup>255</sup> policymakers should eliminate any general deadline for the donee to decide whether to accept or to reject a transfer from the donor's estate because doing so would likely increase social welfare.<sup>256</sup> An unlimited timeframe for disclaimers would make the disclaimer process simpler and increase the likelihood that a donee who wants to disclaim will do so effectively.<sup>257</sup> In turn, the social welfare benefits of disclaimers will more likely be realized. Furthermore, without the need to disclaim within a prescribed period, the donee has a greater opportunity to collect information regarding the utility that would be produced by either accepting or rejecting the gift. By exercising freedom of inheritance with better information, the donee can increase the welfare generated by the disposition of the donor's estate.<sup>258</sup> Thus, the elimination of a general disclaimer deadline would facilitate the donee's exercise of freedom of inheritance and would not significantly disrupt the probate process.

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<sup>252</sup> See *supra* notes 245–251 and accompanying text.

<sup>253</sup> See Hirsch, *supra* note 59, at 126 n.89 (“One might argue that alternative beneficiaries . . . bear part of the cost of the delay, although anything they gain from a disclaimer is, from their perspective, a windfall.”). Of course, a delay in the donee's decision to accept or to reject a gift could also inconvenience the donee herself. See *id.* at 126 (“[T]he only persons inconvenienced by the delay are the undecided beneficiaries themselves. And when the cost of further delay outweighs the benefit of indecision, then presumably they will make their election.”). A prolonged disclaimer period could also raise other concerns. See Hirsch, *supra* note 170, at 337 (“The key issue is whether a protracted right of disclaimer might permit beneficiaries to deceive a potential lender into extending credit on the strength of an inheritance that they then decline to accept. This danger appears illusory. So long as they have not taken possession of an inheritance, beneficiaries are not ostensible owners.”).

<sup>254</sup> See Hirsch, *supra* note 59, at 126 (“If beneficiaries procrastinate over the question of whether or not to accept an inheritance, the personal representative will have to hold the estate open until they come to a decision. Yet, on reflection, the costs thereby occasioned appear inconsequential, for the personal representative can proceed with dispatch to distribute the balance of the state . . .”).

<sup>255</sup> See *supra* notes 246–251 and accompanying text.

<sup>256</sup> The UDPIA has suggested such a reform. See UNIF. DISCLAIMER OF PROP. INTERESTS ACT prefatory note (1999) (“It does not . . . include a specific time limit on the making of any disclaimer. Because a disclaimer is a refusal to accept, the only bar to a disclaimer should be acceptance of the offer.”).

<sup>257</sup> See Hirsch, *Revisions*, *supra* note 59, at 124 (explaining that “the benefit of UDPIA's innovation is one of *simplification*: By eliminating the time limit . . . [the UDPIA] increase[s] the probability that the beneficiary will disclaim effectively.”).

<sup>258</sup> See *supra* Part II.B.4.

*C. Restrictions*

Perhaps the most straightforward way that the law facilitates both the donor's freedom of disposition and the donee's freedom of inheritance is by limiting the restrictions it places on such freedoms. For instance, the law denies courts the general ability to second-guess the merits of the donor's and the donee's decisions. As the Restatement explains, "American law does not grant courts any general authority to question the wisdom, fairness, or reasonableness of the donor's decisions about how to allocate his or her property."<sup>259</sup> Likewise, the UDPIA suggests that courts should not question the donee's decisions when it explains that the donee's ability to disclaim a gift is "comprehensive" and that the law is "[generally] designed to allow every sort of disclaimer."<sup>260</sup> Thus, a general principle of the modern law of succession is that the court should honor the donor's and the donee's respective freedoms by carrying out their intent.

Although the law typically defers to the donor's decisions regarding how property should be distributed upon death, it restricts the donor's freedom of disposition in certain circumstances.<sup>261</sup> As explained previously,<sup>262</sup> the law generally requires the donor to transfer a portion of her estate to her surviving spouse.<sup>263</sup> Regardless of whether the donor unequivocally expresses the intent to disinherit her surviving spouse, the law prevents her from doing so.<sup>264</sup> Because this forced spousal share restricts, rather than facilitates, the donor's freedom of disposition, its place within the law of succession should be based upon important policy considerations. Indeed, if freedom of disposition is justified as a mechanism for maximizing the utility generated by the distribution of the donor's estate, any restriction on this freedom should be founded upon a social welfare rationale.

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<sup>259</sup> RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. LAW INST. 2003); see RAY D. MADOFF, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD 6–7 (2010) (explaining that under "American law . . . freedom of testation is paramount and the courts have no power to deviate from a person's will").

<sup>260</sup> UNIF. DISCLAIMER OF PROP. INTERESTS ACT prefatory note (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2010); see Bender, *supra* note 78, at 892 ("Traditionally, courts could not examine the motivation behind a disclaimer."); Ellsworth, *supra* note 57, at 703 ("Ordinarily, the purpose for which a disclaimer is made has no bearing on its validity."); see also Hirsch, *supra* note 56, at 1872 ("Under most circumstances today, beneficiaries are free to accept or reject an inheritance as they see fit."); Hirsch, *supra* note 7, at 588 ("The beneficiary of a gratuity may accept or reject it at his discretion.").

<sup>261</sup> See RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 10.1 cmt. c (AM. LAW INST. 2003) ("American law curtails freedom of disposition only to the extent that the donor attempts to make a disposition or achieve a purpose that is prohibited or restricted by an overriding rule of law."); Kelly, *supra* note 1, at 1138–40.

<sup>262</sup> See *supra* notes 66–71 and accompanying text.

<sup>263</sup> See DUKEMINIER & SITKOFF, *supra* note 3, at 512–16; see, e.g., UNIF. PROB. CODE § 2-201 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2010).

<sup>264</sup> See Rosenbury, *supra* note 69, at 1245.

In this regard, the forced spousal share can be justified as a way to limit the negative externalities produced by the donor's estate plan. Although the donor is in the best position to make decisions regarding how to dispose of property after death,<sup>265</sup> certain aspects of estate planning suggest that the donor might not make decisions that maximize social welfare.<sup>266</sup> One of these considerations is that the donor can make decisions that produce costs that she does not internalize.<sup>267</sup> If the donor bears the costs of her estate plan, then decisions that maximize the donor's individual utility likely also maximize overall social welfare because the donor can weigh all the costs and benefits of certain decisions and make choices that generate the greatest utility. However, if the donor's decisions have costs that are born by others, an estate planning decision that maximizes the donor's individual utility might not maximize social welfare.<sup>268</sup> These external costs, which are known as negative externalities, might warrant the law's imposition of certain restrictions on freedom of disposition in order to further its social welfare maximization goal.<sup>269</sup>

Consider again the forced spousal share. The donor generally is in the best position to decide what portion of her estate to give to her surviving spouse and what portion of her estate to give to others. Thus, if the donor internalizes all of the costs of the decision to disinherit her surviving spouse, the law can rely upon the donor to maximize the utility generated from her estate plan. However, the donor might not internalize all of the costs produced by her decision to disinherit a surviving spouse.<sup>270</sup> For instance, without an inheritance from the donor, the surviving spouse may need to seek support from social services programs, and the cost of the surviving spouse's care could consequently fall on society as a whole, rather than on the donor as an individual.<sup>271</sup> Because the donor might not consider these potential costs when she is crafting her estate plan, a donor's decision to disinherit a surviving spouse might not maximize social welfare. The law therefore imposes the forced spousal share, in part, to ensure that the donor's estate plan does not

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<sup>265</sup> See *supra* Part I.B.2.

<sup>266</sup> See Kelly, *supra* note 1, at 1158 (“[T]here are several theoretical reasons why effectuating the donor’s express wishes may diverge from what is socially optimal, including (1) imperfect information, (2) negative externalities, and (3) intergenerational equity.”); see also SHAVELL, *supra* note 35, at 70–71 (including “the cost and impracticality of making highly refined arrangements for dead hand control,” “harmful external effects,” and “inherent inequality in the wealth of the present generation versus that of future generations” among the “[v]alid arguments against dead hand control of property”).

<sup>267</sup> See Kelly, *supra* note 1, at 1161–63 (“Externalities . . . may arise because of a disposition of property at death.”).

<sup>268</sup> See *id.* at 1161 (explaining that “an owner (here, the donor) may have an incentive to undertake activity (in this case, a gift at death) if the ‘activity’s private benefits exceed its private costs even though, as a result of the externality, the activity is undesirable as its social costs exceed its social benefits”).

<sup>269</sup> See *id.* at 1161–63.

<sup>270</sup> See *id.* at 1162.

<sup>271</sup> See *id.*; SHAVELL, *supra* note 35, at 65.

generate negative externalities, which in turn increases the likelihood the donor's estate planning decisions maximize social welfare.<sup>272</sup>

Just as certain restrictions of freedom of disposition might increase the utility generated from the distribution of the donor's estate, some restrictions of freedom of inheritance might also maximize social welfare. Although the donee is in the best position to decide whether to accept or reject a gift from the donor,<sup>273</sup> certain circumstances suggest that she might not exercise her freedom of inheritance in a way that maximizes social welfare. One of these situations involves Medicaid eligibility. Medicaid is a governmental assistance program that provides health care benefits to individuals with limited financial resources.<sup>274</sup> A donee's decision whether to accept or to reject a gift from the donor can affect the donee's Medicaid eligibility. For instance, a donee who is receiving Medicaid benefits might become ineligible if she were to accept a gift from the donor. In such a situation, the donee has a choice: she can accept the gift and lose her Medicaid eligibility or she can reject the gift and maintain her Medicaid eligibility.<sup>275</sup>

Although the law typically defers to the donee to make such choices, the law restricts the donee's freedom of inheritance in this situation. While the donee can reject a gift while receiving Medicaid benefits, the law includes the disclaimed property within the donee's Medicaid eligibility calculation.<sup>276</sup> Thus, the law does not directly limit the donee's freedom of inheritance in this situation because the donee can still choose whether to accept or to reject a gift; however, it indirectly limits freedom of inheritance by eliminating some of the benefit that the donee receives from disclaiming. The rationale underlying this restriction on freedom of inheritance is similar to the rationale of the forced spousal share,<sup>277</sup> as both are designed to address a problem of negative externalities. Just as the donor will not bear all of the costs of her decision to disinherit her surviving spouse, the donee will not bear the costs of her decision to maintain Medicaid eligibility by disclaiming a gift.<sup>278</sup> Under either scenario, the cost of support falls on society as a whole, rather

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<sup>272</sup> See Kelly, *supra* note 1, at 1162.

<sup>273</sup> See *supra* Part II.B.4.

<sup>274</sup> See John A. Miller, *Medicaid Spend Down, Estate Recovery and Divorce: Doctrine, Planning and Policy*, 23 ELDER L.J. 41, 46–47 (2015).

<sup>275</sup> See Hirsch, *supra* note 56, at 1896 (“Medicaid provides medical benefits to citizens in financial distress. An inheritance relieves that distress and can cause a citizen to become ineligible. In turn, a beneficiary might disclaim an inheritance in an effort to maintain his or her eligibility.”).

<sup>276</sup> See *id.* at 1897 (“With few exceptions, state courts testing the issue . . . have judged disclaimers ineffective to render beneficiaries eligible for Medicaid. Wherever courts have allowed them, state legislators have reacted promptly to overturn the decisions. No federal court has yet spoken to the matter.”); see, e.g., *Troy v. Hart*, 697 A.2d 113, 118 (Md. 1997).

<sup>277</sup> See *supra* notes 270–272 and accompanying text.

<sup>278</sup> See Hirsch, *supra* note 7, at 602 (“[D]isclaimers by the devisee would have resulted in her continued dependence upon Medicaid payments, whereas ‘the purpose of [Medicaid is] to aid only the economically disadvantaged persons: the economic viability of the Medicaid program itself can be maintained only if the eligibility requirements are diligently observed.’” (quoting *In re Scrivani*, 455 N.Y.S.2d 505, 509 (Sup. Ct. 1982) (citations

than on the individual decision-maker. As a result, the decision-maker, whether the donor or the donee, might not make decisions that maximize social welfare, and the law therefore restricts both freedom of disposition and freedom of inheritance in ways that are designed to limit the negative externalities that are produced by the exercise of these freedoms.

In sum, because freedom of inheritance plays an important role in furthering the law's overarching objective of maximizing social welfare,<sup>279</sup> the law should be designed to facilitate the donee's exercise of this freedom. Specifically, when both prescribing the form that a valid disclaimer must take and the time period during which the donee must express her intent to disclaim, policymakers should balance the benefits of disclaimer formalities and deadlines with the social welfare benefits of freedom of inheritance.<sup>280</sup> Likewise, policymakers should consider the law's social welfare maximization goal when crafting restrictions on freedom of inheritance. Because restrictions on freedom of inheritance hinder the facilitative function of the law, they should be analyzed from a social welfare perspective to ensure that such restrictions aim to increase the utility created by the donor's estate plan.<sup>281</sup>

#### CONCLUSION

The donor is not the sole decision-maker regarding the disposition of her property upon death. To be sure, the donor enjoys broad freedom to craft an estate plan to her liking.<sup>282</sup> But when the donor decides to make a gift to a particular donee, the donee must also make a decision. Specifically, she must decide either to accept the gift from the donor or to reject it.<sup>283</sup> The donee's discretion to accept or to reject a transfer from the donor's estate can be labeled "freedom of inheritance"<sup>284</sup> and stands alongside the donor's freedom of disposition as important elements of the modern law of succession.

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omitted)); Hirsch, *supra* note 56, at 1898 ("In crafting the law, the rationale for suppression of Medicaid planning is clear. The program exists to benefit the 'truly needy,' not those who 'created their own need,' as one court has put it. If allowed to determine Medicaid eligibility, disclaimers would impose an 'unnecessar[y] . . . burden on taxpayers.'" (quoting *Molloy v. Bane*, 631 N.Y.S.2d 910, 913 (App. Div. 1995); *Tannler v. Wis. Dep't of Health & Soc. Sers.*, 564 N.W.2d 735, 741 (Wis. 1997) (citations omitted)).

<sup>279</sup> See *supra* Part II.

<sup>280</sup> See *supra* Parts III.A–B.

<sup>281</sup> See *supra* Part III.C.

<sup>282</sup> See *supra* Part I.

<sup>283</sup> See *supra* Part II.A.

<sup>284</sup> See *supra* note 5.

The donee can exercise freedom of inheritance in a number of ways. For instance, when a donee accepts a transfer from the donor's estate, she exercises freedom of inheritance.<sup>285</sup> Likewise, when a surviving spouse elects to take the forced spousal share, she exercises this freedom.<sup>286</sup> Conversely, when a donee declines to take a share of the donor's estate, either by disclaiming her interest in the donor's property or by opting not to take the forced spousal share, she also exercises freedom of inheritance.<sup>287</sup>

Although legal scholars have explained that the donor's freedom of disposition plays an important role in maximizing social welfare,<sup>288</sup> little attention has been paid to the role that the donee's freedom of inheritance plays in maximizing the utility generated from the donor's estate. The donor is generally in the best position to evaluate the needs of her friends and family,<sup>289</sup> and consequently the law typically defers to her to make decisions that place property in the hands of donees who will benefit the most. However, there is no guarantee that the donor will accurately assess the utility of her estate plan or that she will actually make the best decisions.

The donee's freedom of inheritance acts as a check on the donor's freedom of disposition that increases the likelihood that the distribution of the donor's estate will maximize social welfare. For instance, by reviewing the donor's decision to give her a gift at the time the donor dies rather than at the time the donor crafts her estate plan, the donee likely has better information regarding the utility of the transfer.<sup>290</sup> With this better information regarding the circumstances at the time the donor's property is distributed, the donee can increase the utility of the donor's estate plan by rejecting the gift if an alternate donee would derive greater benefit from the property. Freedom of inheritance therefore maximizes social welfare by alleviating the problem of imperfect information that exists when the donor makes her estate planning decisions, and indeed, the donee's ability to decide for herself whether to accept or to reject a gift from the donor can increase the social welfare benefits of the donor's estate plan in numerous other ways.<sup>291</sup>

Because freedom of inheritance plays an important role in maximizing social welfare, the law should facilitate the donee's exercise of this freedom. When crafting the requirements for valid disclaimers, policymakers should balance the policy objectives of these requirements, such as the formalities with which the donee must comply and the timeframe during which the donee must exercise her right to disclaim, with the social welfare benefits of broad freedom of inheritance.<sup>292</sup> Similarly, policymakers should analyze the explicit restrictions that they place on the donee's freedom of inheritance from a social welfare perspective to ensure that a limitation on the donee's discretion to accept or to reject a gift increases the utility

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<sup>285</sup> See *supra* note 59 and accompanying text.

<sup>286</sup> See *supra* notes 68–71 and accompanying text.

<sup>287</sup> See *supra* notes 60–71 and accompanying text.

<sup>288</sup> See *supra* Part I.B.; see, e.g., Kelly, *supra* note 1, at 1135.

<sup>289</sup> See *supra* Part I.B.2.

<sup>290</sup> See *supra* Part II.B.4.

<sup>291</sup> See *supra* Part II.B.

<sup>292</sup> See *supra* Parts III.A–B.



generated from the transfer of the donor's estate.<sup>293</sup> In sum, like the donor's freedom of disposition, the donor's freedom of inheritance plays an important role in pursuing the law's social welfare maximization goal, and policymakers should be aware of this role when crafting the law of succession.

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<sup>293</sup> *See supra* Part III.C.