Vanderbilt Law Review

Volume 67
Issue 6 *Issue 6 - November 2014*

Article 14

11-2014

Federalizing Principles of Donative Intent and Unanticipated Circumstances

Reid K. Weisbord

Federalizing Principles of Donative Intent and Unanticipated Circumstances

*Reid Kress Weisbord**

Commentary on Adam J. Hirsch, *Disclaimers and Federalism*[1]

I. INTRODUCTION

This Symposium identifies several areas of state wealth transfer law that intersect or conflict with federal law.[2] These intersections and conflicts represent a new frontier because, historically, the field of wealth transfer law was governed almost entirely by the states, with

* Vice Dean, Professor of Law, and Judge Norma L. Shapiro Scholar, Rutgers School of Law–Newark. This Comment was prepared in connection with the *Vanderbilt Law Review* Symposium on "The Role of Federal Law in Private Wealth Transfer" (February 21, 2014, Nashville, Tennessee). Funding for this Symposium was generously provided by the ACTEC® Foundation. The author is grateful for comments on earlier drafts from Gary Francione, George Thomas, and Stephen Urice.

1. Adam J. Hirsch, *Disclaimers and Federalism*, 67 VAND. L. REV. 1871 (2014).

2. For a survey of intersections of federal law and state inheritance law, see Lawrence W. Waggoner, *The Creeping Federalization of Wealth-Transfer Law*, 67 VAND. L. REV. 1635, 1661 (2014) (arguing that, in most areas where federal law disrupts state inheritance law rules, the results are unfavorable).

little to no interference by the federal system. Because the Supremacy Clause mandates that federal law prevail over conflicting state law, the absence of a comprehensive body of federal wealth transfer law creates a complex and unpredictable vacuum in cases implicating preemption. The contributions of this Symposium, therefore, articulate a compelling need for Congress, federal courts, and federal agencies to establish guiding principles for the development and interpretation of federal wealth transfer rules, which in some settings may benefit from the adoption of state law. These guiding principles are necessary to facilitate a just evaluation of the competing interests at stake, particularly when a federal interest requires that state wealth transfer law be displaced.[3] In adopting such principles, federal law need not always defer to state law, but the long history of the states' experience in this field may provide valuable information from which the federal system may greatly benefit.

This Comment identifies a central tenet of wealth transfer law that should guide federal actors when operating in this area: Wealth transfer law facilitates donative intent by responding to circumstances unanticipated by the donor. Wealth transfer law performs this intent-fulfilling function by supplying opt-outs, presumptions, and default rules to solve problems created by the donor's inability to predict or respond to future events. To illustrate that principle, this Comment will focus on one such rule, disclaimer rights, which refer to a donee's refusal to accept a donative transfer. In "Disclaimers and Federalism,"[4] Professor Adam J. Hirsch identifies several settings in which federal law improperly displaces or applies state law disclaimer rights. This Comment argues that many of the conflicts identified by Professor Hirsch could be transparently and fairly evaluated by considering principles of donative intent and unanticipated circumstances.

II. PRINCIPLES OF DONATIVE INTENT AND UNANTICIPATED CIRCUMSTANCES

The core function of wealth transfer law is to facilitate the donor's freedom of disposition, subject to the few restrictions necessary to protect certain parties, such as the decedent's surviving spouse,

3. In 2013, the Uniform Law Commission approved a set of general principles to guide the treatment of state law at the federal level. UNIF. LAW COMM'N, PRINCIPLES OF FEDERALISM (2013), *available at* http://www.uniformlaws.org/shared/docs/federalism%20and%20state%20law/2013aug_Federalism%20Principles.pdf, *archived at* http://perma.cc/ZK3J-KD6F.

4. Hirsch, *supra* note 1 (arguing that the term "federal disclaimer law" is a shorthand reference to the treatment of state law disclaimer rights at the federal level, not a body of federal statutes or common law governing disclaimer).

among others.[5] Implementing the donor's intent, however, presents challenges when the donative instrument fails to anticipate material future events that, when viewed in hindsight, might have caused the donor to reconsider her estate plan. This theme features prominently in the wealth transfer setting because donors often fail or forget to make necessary revisions upon the happening of estate-altering events. Omissions of this sort include lack of planning for the beneficiary's insolvency or disability and the failure to update a donative instrument following divorce or the birth or death of a child. In many cases, the problem becomes evident only after the donor's death. The passage of time between the donor's execution of a wealth transfer instrument and the actual transfer of property pursuant to that instrument increases the likelihood that an unanticipated change of circumstance will frustrate the donor's intent.

Professor Hirsch, in discussing this "testamentary obsolescence," has observed that "[w]henever a court is called upon to apply the performative words of others, it must decide whether to read those words statically or dynamically, in spite of or in light of evolving facts."[6] Many areas of wealth transfer law seek to implement donative intent by applying rule-based presumptions about what a typical donor would have done with full and timely knowledge of the unanticipated circumstance. Professor Hirsch argues, persuasively, that when default rules of will interpretation mirror commonly held donative preferences, the law minimizes error by applying presumptions about probable intent that most closely approximate actual intent.[7] The same is true for default rules of wealth transfer outside the context of wills.[8]

It is important to understand why inheritance law responds to evolving facts unanticipated by the donor—it does so to protect the *donor's* freedom of disposition, not the beneficiary's interest in receiving a gift.[9] In contrast to European civil law inheritance rules mandating

---

5. *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. a (2003) ("The organizing principle of the American law of donative transfers is freedom of disposition . . . the donor's intention is given effect to the maximum extent allowed by law.").

6. Adam J. Hirsch, *Text and Time: A Theory of Testamentary Obsolescence*, 86 WASH. U. L. REV. 609, 611 (2009) (presenting a comprehensive theoretical framework for addressing the problem of testamentary obsolescence).

7. *See generally id.* (proposing a cost-minimizing default rule for the judicial handling of testamentary obsolescence).

8. *See* Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031, 1033 (2004) (arguing for the increased use of default rules in inheritance law given their established success in contract law).

9. Hirsch, *supra* note 6, at 632 ("[C]ourts defend the doctrine of implied revocation as 'anticipat[ing] that, upon undergoing a fundamental change in family composition . . . [testators] would most likely intend to provide for their new family members, and/or revoke prior provisions made for their ex-spouses.' " (alteration in original) (citation omitted)).

forced succession from one generation to the next, American inheritance and property succession law is almost exclusively organized around the power to transmit property, not the right to receive a gift or inheritance.[10] Although a transferee may benefit from rules implementing the donor's probable intent in light of changed circumstances, such benefit is collateral to the donor-centric function of those rules.

Consider, for example, the following illustration of a wealth transfer rule that implements donative intent by accounting for circumstances unanticipated by the donor: Suppose that thirty years after a testator executed her will, one of the beneficiaries—the testator's sister—died, but news of the death never reached the testator, who later died without updating her will. Who should receive the predeceased sister's share? The predeceased sister's own children; the predeceased sister's surviving spouse; or the testator's residuary beneficiary, her local synagogue? State antilapse rules account for this change of circumstance (a predeceased beneficiary who was a close blood relative) by allowing the sister's children to inherit the devise because that is probably what the testator would have wanted had she known about her sister's death.[11] This application of the antilapse rule confers a benefit on the predeceased sister's children, but not because those children are any more entitled or deserving than the sister's surviving spouse or the testator's synagogue. The sister's children inherit because the law assumes that most *testators* would want a lapsed devise to descend to that predeceased relative's own issue.

From a broader perspective, the antilapse rule is but one of many ways in which wealth transfer law facilitates donative intent by accounting for changed or unanticipated circumstances. Indeed, much of state wealth transfer law was either created to, or does in fact, effectuate donative intent by filling gaps created by the donor's inability to predict future events.[12] Other examples include the trust law

---

10. *See* Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 6–14 (1992) (surveying numerous justifications for granting the owner of property the freedom to determine its disposition at death).

11. Under section 2-605 of the Uniform Probate Code (the antilapse provision), if the predeceased beneficiary were a grandparent or lineal descendant of a grandparent of the testator, then the devise would pass to the beneficiary's issue; otherwise, the devise to the predeceased beneficiary would lapse. UNIF. PROBATE CODE § 2-605 (amended 2010), 8 U.L.A. pt. I, at 261 (Supp. 2013); *see also* UNIF. PROBATE CODE § 2-707, 8 U.L.A. pt. I, at 299 (Supp. 2013) (corresponding rule applicable to interests in trust).

12. *See generally* Hirsch, *supra* note 6 (discussing current legal means available to honor donor intent in light of changed circumstances and proposing a comprehensive alternative).

modification doctrines;[13] powers of appointment;[14] the repose of discretion in a trustee;[15] doctrines of ademption, accession, satisfaction, and abatement;[16] rules governing pretermitted spouses and children;[17] the requirement of testamentary capacity;[18] and the slayer rule.[19]

One may understand another inheritance rule, a beneficiary's right of disclaimer, as a method of implementing donative intent by providing for changed circumstances. Disclaimer, the right to refuse a donative transfer, in effect, allows the donee to pass the disclaimed property to the next eligible beneficiary set forth in the donative instrument or intestacy statute.[20] Although most beneficiaries typically accept a gift or inheritance, in certain circumstances, the right to disclaim may be appealing for estate planning purposes. For example, if the next eligible taker is closely related to the original beneficiary, then disclaimer could keep inherited assets within the family while potentially yielding tax savings or protecting inherited assets from collection by the disclaimant's creditors.[21] Because most donors want to

---

13. These doctrines permit courts to modify a trust instrument in light of changed or unanticipated circumstances. *See, e.g.*, UNIF. TRUST CODE § 411 (amended 2010), 7C U.L.A., at 497–98 (Supp. 2006) (modification); § 412, 7C U.L.A., at 507 (Supp. 2006) (deviation); § 413, 7C U.L.A., at 509 (Supp. 2006) (cy pres).

14. Powers of appointment account for unanticipated circumstances by delegating to the donee of the power the decision of whether, when, and sometimes to whom to appoint the property. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 17.1 (2011) ("A power of appointment is a power that enables the donee of the power to designate recipients of beneficial ownership interests in or powers of appointment over the appointive property.").

15. Powers of appointment and the repose of discretion in a trustee allow the donor to postpone and delegate decisions regarding the selection of the beneficiary and timing and size of a transfer, thus relieving the donor of the impractical task of predicting future events.

16. These doctrines account for changes in the composition of property that comprises the testator's estate. *See, e.g.*, UNIF. PROBATE CODE § 2-605, 8 U.L.A. pt. I, at 261 (Supp. 2013) (accession); § 2-606, 8 U.L.A. pt. I, at 262 (Supp. 2013) (ademption); § 2-609, 8 U.L.A. pt. I, at 267 (Supp. 2013) (satisfaction); § 3-902, 8 U.L.A. pt. II, at 347 (Supp. 2013) (abatement).

17. UNIF. PROBATE CODE §§ 2-301 to -302, 8 U.L.A. pt. I, at 192, 194 (Supp. 2013).

18. UNIF. PROBATE CODE § 2-501, 8 U.L.A. pt. I, at 205 (Supp. 2013) ("An individual 18 or more years of age who is of sound mind may make a will."). The requirement of testamentary capacity accounts for the possibility that the testator might suffer from diminished cognitive capacity in the future, thus preserving the plan of disposition memorialized when the testator retained her mental faculties.

19. Section 2-803 of the Uniform Probate Code precludes the decedent's slayer from inheritance if the killing was intentional. UNIF. PROBATE CODE § 2-803, 8 U.L.A. pt. I, at 264–65 (Supp. 2013). This rule accounts for changed circumstance (the decedent's death by homicide) by applying a presumption that the decedent would not want the slayer to inherit from the slain.

20. *See, e.g.*, UNIF. PROBATE CODE §§ 2-1101 to -1117, 8A U.L.A., at 159–89 (Supp. 2013) (establishing general legal parameters for disclaiming property interests through a variety of instruments including wills and nontestamentary instruments).

21. 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):

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 than take.[22] Had the donor known of circumstances causing the original beneficiary to disclaim, the donor presumably would have skipped the original beneficiary altogether in favor of the next eligible beneficiary.[23] Thus, while the original beneficiary holds the right to disclaim, disclaimer arguably implements the *donor's* probable intent in light of unanticipated circumstances extant at the time of transfer.

III. APPLYING PRINCIPLES OF DONATIVE INTENT AND UNANTICIPATED CIRCUMSTANCES TO FEDERAL DISCLAIMER LAW

Professor Hirsch's contribution to this Symposium, "Disclaimers and Federalism," identifies three settings in which federal law displaces or intersects with state law disclaimer rights: (1) federal claims, (2) employee benefit plans governed by ERISA, and (3) bankruptcy proceedings. The balance of this Comment examines how the principle stated above—that wealth transfer law effectuates donative intent by responding to circumstances unanticipated by the donor—would facilitate a transparent and principled analysis of the competing interests at stake in these three settings.

A. Federal Claims

Professor Hirsch first examines whether an intestate heir with outstanding federal claims, such as federal tax or Medicaid liens, can disclaim an inheritance to avoid subjecting the inherited property to federal collection. This question implicates two competing interests: the federal government's power to collect on unpaid claims and the

---

Those beneficiaries who are so poor that they have become insolvent and anticipate bankruptcy may seek to disclaim to preserve an inheritance from creditors' claims, while still keeping the inheritance within the family. Alternatively, those beneficiaries who are so rich that they can do without an inheritance may prefer that it go instead to family members of the next generation who occupy a lower income tax bracket, sometimes avoiding transfer taxes in the bargain.

22. On the other hand, the beneficiary's decision *not* to disclaim may be contrary to the donor's presumed interest in some cases. For example, an 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 allow it to pass to an unrelated third party. But from the donor's perspective, it would have been preferable for the next beneficiary to take rather than allow creditors to collect from the inherited property.

23. This is, perhaps, not true in all cases. For example, the donor might not favor disclaimer if the original beneficiary owed child support. *See* discussion *infra* Part III.B.

decedent's interest in protecting her estate from an heir's outstanding obligations owed to the federal government.

In *Drye v. United States*, the United States Supreme Court held unanimously that state law disclaimer rights interfere with, and are therefore preempted by, the federal government's right to satisfy a tax lien under 26 U.S.C. § 6321, which attaches to all "rights to property" belonging to the taxpayer.[24] At issue was whether the right to disclaim an intestate inheritance represented a valuable, taxable property interest belonging to the tax-delinquent heir. The heir argued that the right to disclaim was an inseparable attribute of inherited property and that, because he received nothing from the intestate estate, the right to refuse an inheritance had no value. The IRS countered that the right to disclaim conferred upon the heir a right to channel the inheritance to the next available taker and that such right had value equal to the inherited property.[25] The Court agreed with the IRS and held that the disclaimer represented a valuable right to property that was not exempt from the federal tax levy. Further, because the disclaimant could ascertain the next eligible taker before deciding whether to disclaim,[26] he had exercised sufficient dominion and control over the intestate estate to treat him as holding a right to the inherited property.[27]

Hirsch finds the Court's analysis unsatisfying in at least two respects. First, determining whether the right to disclaim is a property attribute or, in effect, a preemptable state law exemption from a federal levy fails to yield helpful answers because the right to disclaim shares elements of *both* characterizations. On the one hand, "a right to decline gratuitous transfers of property[ ] represents a structural characteristic of property," suggesting that federal law should not interfere with the disclaimer because property interests arise under state law.[28] On the other hand, the practical workings of a disclaimer function "no less effectively than an express right of exemption from levy," implying that

---

24. 528 U.S. 49 (1999). Explaining the interplay between state and federal law, the Court stated, "The Internal Revenue Code's prescriptions are most sensibly read to look to state law for delineation of the taxpayer's rights or interests, but to leave to federal law the determination whether those rights or interests constitute 'property' or 'rights to property' within the meaning of § 6321." *Id.* at 52.

25. *Id.* at 56–59.

26. The disclaimant's daughter was the next eligible taker. Upon receiving the disclaimed inheritance, the daughter placed it in trust for the disclaimant's benefit. *Id.* at 52.

27. *Id.* at 60–61.

28. Hirsch, *supra* note 1, at 1889 (emphasis omitted). Hirsch opines that, as a policy matter, deference to state law would prevent federal law from reconfiguring state-created property interests in ways that could impose arbitrary tax liens on property owners who did not contribute to the delinquency.

the federal power to collect on tax liens should preempt state law disclaimers.[29]

Second, Professor Hirsch argues that the Court's observations about the degree of control exercised by the disclaimant are inconsistent with other applications of federal law in the disclaimer context. For example, the federal gift tax applies to the transfer of property over which a donor exercises dominion and control, but qualified disclaimers are excluded from the gift tax because "the disclaimed interest in property is treated as if it had never been transferred to the person making the disclaimer. Instead, it is considered as passing directly from the transferor of the property to the person entitled to receive the property as a result of the disclaimer."[30] As Professor Hirsch asks, "Why, then, does the disclaimant's degree of dominion applicable to the collection of back taxes differ from the degree of dominion applicable to the assessment of *front* taxes?"[31]

I join in Professor Hirsch's critique and offer another. The Court's focus on the beneficiary's right to disclaim and degree of control misinterprets the functional purpose of disclaimer. If, as I contend, the primary justification for disclaimer is to carry out the donor's probable intent in light of unanticipated circumstances, then the disclaimant's own conduct and rights should be irrelevant. Under the principle of donative intent, the inquiry is reduced to whether federal law should allow the *donor* to bypass a tax-delinquent beneficiary in her estate plan. What if the decedent in *Drye*, who had started to prepare an instrument disinheriting her tax-delinquent son entirely, had lived long enough to execute it? More broadly, should federal law displace the donor's right to disinherit an heir with outstanding tax liens? As Professor Hirsch notes, the Court briefly discussed this point at oral argument, but the opinion does not address it.[32] Noting that the decedent came "within a hair's breadth of effectuating the outcome she would have preferred," Professor Hirsch opines that this focus on donor intent "might have proven the most potent [argument] in [the taxpayer's] arsenal, and he should have led with it."[33]

---

29. *Id.*

30. Treas. Reg. § 25.2518-1(b) (as amended in 1997).

31. Hirsch, *supra* note 1, at 1893.

32. At oral argument, Justice Ginsburg made the following passing comment to the taxpayer's attorney: "I'm just curious about why the taxpayer, Mr. Drye being in this situation, he didn't have his mother write a will leaving the estate to the daughter." The attorney stated that the ninety-two-year-old decedent had an appointment to make a will on the date of her death. Transcript of Oral Argument, Drye v. United States, 528 U.S. 49 (1999) (No. 98-1101), 1999 WL 1050103, at *14.

33. Hirsch, *supra* note 1, at 1894.

Principles of donative intent and unanticipated circumstances might have yielded a more satisfying analysis than the Court's inquiry into the characterization of property rights and the beneficiary's dominion and control. That is, if state disclaimer rights can be understood as effectuating donative intent in cases where the donor fails to anticipate an heir's insolvency, then preemption should turn on whether federal tax law overrides the donor's right to have that intent effectuated at all, regardless of whether the heir chooses to disclaim.

Under current law, the freedom of disposition holds that a donor has an absolute right to disinherit insolvent or tax-delinquent heirs (unless, unrelated to insolvency or tax delinquency, the heir is also the donor's surviving spouse).[34] If, however, the federal interest in the collection of outstanding tax liens were sufficiently great, then federal law could impose a restriction on the *donor's* freedom of disposition by precluding donors from disinheriting tax-delinquent heirs.[35] This approach would treat donors who address the possibility of tax-delinquent heirs by disinheriting them similarly to donors who fail to anticipate that possibility. Such an approach would, in effect, create a neutral rule of forced succession for donors survived by tax-delinquent heirs notwithstanding the adequacy or inadequacy of the donor's estate plan. A federal limitation on the freedom of disposition in this area would also further the interests of uniformity by treating tax liens alike in all jurisdictions.

B. ERISA

Professor Hirsch next examines the state law right to disclaim nonprobate transfers at death governed by ERISA. The interplay between ERISA and state disclaimer law draws upon another intersection between ERISA and state wealth transfer law providing for unanticipated circumstances: revocation by operation of state law upon divorce. In *Egelhoff v. Egelhoff*, the United States Supreme Court held that ERISA preempted a Washington state statute revoking, by operation of law, nonprobate beneficiary designations in favor of a former spouse.[36] The Court reasoned that deference to state law would frustrate ERISA's goal of achieving national uniformity with regard to

34. In most states, a disinherited surviving spouse may elect against the decedent's estate. UNIF. PROBATE CODE § 2-202 (amended 2010), 8 U.L.A. pt. I, at 149–50 (Supp. 2013).

35. Alternatively, federal law could apply the state-law prohibition on collusive disclaimers. As Hirsch explains, this would have allowed the government to unwind the disclaimer in *Drye* because the disclaimant's daughter placed the inheritance in trust for the disclaimant's benefit. Hirsch, *supra* note 1, at 1894–95.

36 532 U.S. 141 (2001).

the administration of employee benefits.[37] State statutes revoking beneficiary designations in favor of a former spouse anticipate the commonplace problem of a donor's failure to update a donative instrument, such as a will or nonprobate death beneficiary designation, upon divorce.[38] In *Egelhoff*, federal preemption required the employee benefit plan administrator to abide solely by the terms of the ERISA-governed plan documents, not the revocation-on-divorce statute, thereby allowing the decedent's former spouse to claim the life insurance and retirement benefits. Applying *Egelhoff*'s rationale, federal circuit courts have also held that ERISA preempts state law disclaimer rights where an ERISA plan explicitly addresses the right to disclaim.[39] But what about cases in which the ERISA plan is silent on the question of disclaimer? Documenting the lack of governing precedent, Professor Hirsch concludes that the answer remains unclear.[40]

Professor Hirsch observes that, while uniformity is typically cited as the federal interest justifying ERISA preemption, the problems associated with lack of uniformity are less acute with regard to disclaimers.[41] Proceeding on the assumption that ERISA may therefore implicitly incorporate some law of disclaimer, Hirsch then turns to whether disclaimer law in the ERISA context should come from existing state law or through development of federal common law. Both alternatives tend to yield inconsistent outcomes: "recourse to state disclaimer law would cause indistinguishable plans to become subject to different rules of disclaimer," but "introducing a federal law for qualified pension plans means that different forms of property will come under separate rules of disclaimer."[42] The formidably slow task of developing a federal common law of ERISA disclaimer suggests that incorporating features of state disclaimer law would be the simpler approach. Professor Hirsch correctly notes that a slow and meandering development of federal common law in this area would almost surely (and undesirably) lead to widespread uncertainty given the absence of federal ERISA disclaimer law.

37. *Id.* at 151.

38. *See, e.g.*, UNIF. PROBATE CODE § 2-804, 8 U.L.A. pt. I, at 330–32 (Supp. 2013) (establishing a default rule which, upon divorce or annulment, revokes any revocable disposition of property to a former spouse stipulated in any governing instrument, cancels any conference of power of appointment, and negates any nomination as a fiduciary).

39. Nickel v. Estate of Estes, 122 F.3d 294, 297–98 (5th Cir. 1997).

40. Hirsch, *supra* note 1, at 1899.

41. *Id.* at 1902–03.

42. *Id.* at 1907.

Principles of donative intent and unanticipated circumstances are consistent with the legislative purposes of ERISA, which seek to safeguard the management and distribution of employee retirement benefits.[43] Plan participants have an interest in ensuring that their retirement assets are properly distributed during life and in accordance with their donative intent at death. ERISA intricately regulates the administration and distribution of retirement assets during the employee's life, but as Professor Hirsch observes, it lacks a comprehensive framework regulating the disposition of covered assets at death. Development of that framework at the federal level, whether by statute, regulation, or judicial decision, would benefit from consideration of state rules effectuating the donor's intent in the face of unanticipated circumstances.

For example, suppose an intestate decedent leaves behind an ERISA-governed life insurance policy naming her only son as the sole death beneficiary. The decedent's son is insolvent, has four children (three by his current spouse, one by a former spouse), and owes child support exceeding the death benefit to his former spouse. The son disclaims in an attempt to pass the insurance proceeds through the decedent's probate estate to the four grandchildren in equal shares, thereby channeling three quarters of the proceeds into his household free of child support liability. Under state law, distribution would depend on whether the decedent's jurisdiction recognizes an insolvent disclaimer exception for child support. In a jurisdiction with such an exception, the disclaimed interest would be subject to the child support claim and the entire amount would pass to the former spouse in satisfaction of that claim; in a jurisdiction without this exception, the disclaimed interest would pass to the decedent's four grandchildren in equal shares. Should ERISA, which is silent on the issue, apply or displace state disclaimer law in this setting?

Principles of donative intent and unanticipated circumstances provide useful guidance. States vary on whether an insolvent beneficiary's right to disclaim is effective against an exception for outstanding child support claims; a few states recognize an exception, but most do not.[44] Applying principles of donative intent, one could understand state law disclaimer exceptions for child support claims as implementing the *donor's* probable intent in light of unanticipated

43. *See* 29 U.S.C. § 1001 (2012) (stating that the primary policy goals of ERISA are to protect interstate commerce, the federal taxing power, and the beneficiaries of employee benefit plans).

44. Hirsch, *supra* note 1, at 1910. For jurisdictions recognizing the exception, see ALASKA STAT. § 13.70.110(f)(1) (2013); IND. CODE ANN. §§ 32-17.5-8-2.5, 32-17.5-8-6 (West 2014); TEX. EST. CODE ANN. § 122.107(a) (West 2013).

circumstances concerning the beneficiary's family.[45] That is, had the donor known of the beneficiary's unpaid child support claims, would the donor have wanted the beneficiary to disclaim? Arguably, states recognizing an exception give effect to the donor's presumed intent to favor the child support claimant over the next eligible taker.[46] By contrast, states that do not recognize an exception effectuate the donor's intent to favor the next eligible taker over the insolvent disclaimant's children and former spouse with unpaid support claims.

This analysis helps to distill the competing interests at stake. On the one hand, ERISA's concern for uniformity serves the interests of plan custodians in achieving efficient administration of employee retirement benefits.[47] On the other hand, state disclaimer law serves the interests of plan participants by carrying out state law presumptions about their probable intent in light of unanticipated circumstances. Upon balancing these interests, one might decide that Congress's concern for uniformity and efficient plan administration must yield if ERISA's primary legislative purpose is ensuring the distribution of retirement benefits in accordance with the plan participant's intent.

C. Bankruptcy Proceedings

Professor Hirsch last examines whether bankruptcy law recognizes a state law disclaimer filed by an insolvent debtor. The Bankruptcy Code provides that inherited property disclaimed by the debtor during the bankruptcy proceeding is returned to the bankruptcy estate available to creditors.[48] However, state law generally governs disclaimers that occur *before* the debtor files for bankruptcy, so the bankruptcy estate's inclusion of property disclaimed before filing of the bankruptcy petition turns on whether the state in which the decedent

---

45. Alternatively, child support exceptions could also be understood as grounded in the *state's* public policy protecting children, but a donor could easily avoid the state's public policy by disinheriting beneficiaries with outstanding child support claims.

46. This approach is consistent with similar presumptions underlying antilapse rules discussed above—that the interest of a predeceased beneficiary related to the donor by blood should pass to the beneficiary's own children who are also blood relations of the donor. Thus, the law presumes the testator intended the lapsed share to pass to the predeceased beneficiary's own children rather than the next eligible taker. *See* Hirsch, *supra* note 6 and accompanying text.

47. *See* Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 9 (1987) ("An employer that makes a commitment systematically to pay certain benefits undertakes a host of obligations . . . . The most efficient way to meet these responsibilities is to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits.").

48. 11 U.S.C. § 541(a)(5). Under Chapter 7 of the Bankruptcy Code, this rule applies to inheritances received within the first 180 days after the petition. *Id.* Under Chapters 12 and 13, this rule applies to any inheritance received during the proceeding. §§ 1207(a)(1), 1306(a)(1).

was domiciled at death permits insolvent disclaimers.[49] Only a minority of states prohibit insolvent disclaimers, so in most states the timing of the debtor's disclaimer (before or after the bankruptcy petition) determines whether bankruptcy law recognizes the disclaimer.[50] In states that permit insolvent disclaimers, the debtor can shield inherited property from creditor collection by filing a disclaimer before filing for bankruptcy.[51]

With regard to prepetition disclaimers, Professor Hirsch maintains that the Bankruptcy Code's treatment of insolvent disclaimers is unprincipled because it permits strategic timing of disclaimers to avoid creditor claims in the majority of states that allow insolvent disclaimers; this tenuous position, he contends, is the result of Congressional oversight, not deliberate policy.[52] With regard to postpetition disclaimers, Professor Hirsch explains that the relevant statutory provision, Bankruptcy Code Section 541(a), does not explicitly address disclaimers and its textual history does not support an inference that Congress intended it to foreclose postpetition disclaimers.[53] Hirsch argues that "lawmakers need to coordinate sections 548 [prepetition disclaimers] and 541(a)(5) [postpetition disclaimers] so that they operate seamlessly, observing either state law or a federal rule of insolvent disclaimer."[54]

A federalized principle of donative intent and unanticipated circumstances would, again, provide guidance. Most donors presumably prefer to avoid subjecting their estates to creditor claims asserted against the beneficiary, so the beneficiary's insolvency, if anticipated *ex ante*, would cause the donor to protect those assets from creditor collection or select a different beneficiary. The most common asset protection technique for this purpose is the discretionary spendthrift trust, which renders trust assets immune to most of the beneficiary's creditors.[55] Bankruptcy law recognizes third party discretionary spendthrift trusts that are otherwise valid under state law, thus

---

49. Hirsch, *supra* note 1, at 1910.

50. *Id.*

51. Of course, in the inheritance context, the donor would also have to die first. Might this rule create an incentive for a depraved debtor in financial distress to hasten the donor's death? Probably not. Presumably the donor, if approached by the debtor, would simply agree to amend her estate plan.

52. Hirsch, *supra* note 1, at 1916–17.

53. *Id.*

54. *Id.* at 1920.

55. UNIF. TRUST CODE §§ 502–503 (2000), 7C U.L.A., at 523–25 (Supp. 2006) (modification).

precluding creditors of the beneficiary from collecting on property held in trust.[56]

Under the principle of donative intent, if bankruptcy law recognizes the freedom of disposition for donors who anticipate the beneficiary's insolvency by establishing a discretionary spendthrift trust, then it should permit insolvent disclaimers to recognize the same freedom of disposition for donors who fail to anticipate the beneficiary's insolvency. Recognition of insolvent disclaimers, to the extent permitted by state law, would place the donor who fails to anticipate the beneficiary's potential insolvency in a more comparable position to the donor who anticipates the circumstance. Deference to state law would leave intact state policies regarding insolvent disclaimers and restore consistency between the Bankruptcy Code's treatment of insolvent disclaimers and discretionary spendthrift trusts.

On the other hand, if a federal interest mandated that creditor rights override the donor's interest in protecting gifted assets from claims against the beneficiary, then bankruptcy law should foreclose both insolvent disclaimers *and* discretionary spendthrift trusts. Further, if lawmakers deemed creditor rights of paramount concern, federal law could also impose a restriction on the donor's freedom to transfer property to an insolvent beneficiary. Either way, consideration of principles of donative intent and unanticipated circumstances would permit a more transparent and principled analysis of the treatment of insolvent disclaimers under federal law.

IV. CONCLUSION

The federalization of wealth transfer law creates potential for harmful disruptions to settled and well-considered substantive state law policies governing inheritance, property succession, and wealth transfer. As federal actors increasingly operate in this area, they might minimize disruptions by due consideration of the most important guiding principle of state wealth transfer law—that the law facilitates donative intent by responding to circumstances unanticipated by the donor. This principle may not always succeed in harmonizing state and federal interests in this area, but it would at least permit a more principled and transparent evaluation of those interests.

56. 11 U.S.C. § 541(c)(2) (2012).