

ESTATE AND PROBATE LAW—TESTAMENTARY DISPOSITION OF NON-PROBATE ASSETS: WHETHER IRAS ARE COMPARABLE TO LIFE INSURANCE POLICIES AND WHETHER TESTATORS SHOULD BE ABLE TO CHANGE AN IRA BENEFICIARY BY WILL. *Nunnenman v. Estate of Grubbs*, 2010 Ark. App. 75, \_\_\_ S.W.3d \_\_\_.

## I. INTRODUCTION

Most courts have held that any attempt to change the beneficiary of a life insurance policy by will is ineffectual where the policy “specifies the manner in which the change may be made.”<sup>1</sup> Rather, a policyholder must adhere to the insurance company’s procedure for amending a beneficiary designation in order for a modification to be valid.<sup>2</sup> Contrary to the consensus of a vast majority of the states, Arkansas law recognizes testamentary changes to insurance beneficiaries as long as the insurance policy to be changed is specifically identified, and the testator’s intent to change the beneficiary is clear.<sup>3</sup> Arkansas courts, however, have not been confronted with the issue of whether this unique doctrine should be extended to other non-probate assets until recently. *Nunnenman v. Estate of Grubbs*<sup>4</sup> considered whether a purported amendment to a beneficiary designation by holographic will effectively changed the beneficiary of an individual retirement account (IRA).<sup>5</sup>

In *Estate of Grubbs*, the decedent named Nunnenman as the sole beneficiary of his IRA.<sup>6</sup> On the account, Nunnenman “was identified by name, social security number, and date of birth.”<sup>7</sup> Two years later, the decedent died following a brief hospitalization.<sup>8</sup> Significantly, days before his death,

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1. *Nunnenman v. Estate of Grubbs*, 2010 Ark. App. 75, at 3, \_\_\_ S.W.3d \_\_\_, \_\_\_ (citing Wanda Ellen Wakefield, Annotation, *Effectiveness of Change of Named Beneficiary of Life or Accident Insurance Policy by Will*, 25 A.L.R.4th 1164, 1167–68 (1992)).

2. *Id.*, \_\_\_ S.W.3d at \_\_\_.

3. *Allen v. First Nat’l Bank of Fort Smith*, 261 Ark. 230, 235, 547 S.W.2d 118, 121 (1977) (holding testamentary language purporting to devise all the testator’s “property and estate, real, personal and mixed wherever located” was insufficient to identify the insurance policies in question or establish the requisite intent). *See also Pedron v. Olds*, 193 Ark. 1026, 1030, 105 S.W.2d 70, 72 (1937) (reasoning that when a beneficiary “provision in the will conflict[s] with the provision in the policy,” the will should control because it is “the insured’s last expression on the subject”).

4. 2010 Ark. App. 75, \_\_\_ S.W.3d \_\_\_.

5. *Id.* at 1–2, \_\_\_ S.W.3d at \_\_\_. IRAs will be discussed in greater detail in Part II.C.

6. *Id.* at 1, 4, \_\_\_ S.W.3d at \_\_\_.

7. *Id.* at 4, \_\_\_ S.W.3d at \_\_\_.

8. *Id.* at 1, \_\_\_ S.W.3d at \_\_\_.

the decedent executed a last will and testament that left his entire estate to his mother, Shervena Grubbs.<sup>9</sup> Although the IRA was not specifically referenced in the will, Ms. Grubbs argued she was the rightful beneficiary.<sup>10</sup> She attempted to support her argument by proffering a handwritten note that purportedly changed the beneficiary designation on the decedent's IRA from Nunnenman to Ms. Grubbs.<sup>11</sup>

The appellate court refused to uphold the testamentary change to the decedent's IRA.<sup>12</sup> The importance of this case, however, rests in dicta where the court insinuates it would have affirmed the district court's extension of the law for insurance policies to IRAs if the handwritten note had qualified as a valid holographic will.<sup>13</sup> In her dissent, Judge Hart strongly urges that this is inappropriate due to important differences between IRAs and life insurance policies.<sup>14</sup>

The standard required to validate life insurance beneficiary changes by will seems relatively easy to satisfy: 1) specifically identify the account and 2) ensure that the testator's intent to change the beneficiary is clear.<sup>15</sup> Allowing testamentary changes to beneficiaries of non-probate assets can lead to many problems, including an increased risk of fraud and unnecessary litigation, which arguably defeats the purpose of non-probate assets. IRAs serve a different purpose than that of life insurance policies; therefore, the court's apparent willingness to directly extend the law applying to life insurance policies was in error. By comparing Arkansas's reasoning with that of other states as well as federal law, this note will show that if the courts wish to allow testamentary changes to IRAs and other non-probate assets, a much more coherent and strenuous test should be applied.<sup>16</sup> In order to encourage people to comply with company policies regarding beneficiary changes, testamentary disposition of non-probate assets should be the exception rather than the rule.

This note will begin by explaining the relevant reasoning in *Estate of Grubbs*.<sup>17</sup> Next, it will discuss the history and general agreement among other states with regard to the testamentary disposition of life insurance policy proceeds.<sup>18</sup> Then, the history of Arkansas's unique approach will be

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9. *Id.*, \_\_ S.W.3d at \_\_.

10. *Estate of Grubbs*, 2010 Ark. App. 75, at 1–2, \_\_ S.W.3d at \_\_.

11. *Id.*, \_\_ S.W.3d at \_\_.

12. *Id.* at 2, \_\_ S.W.3d at \_\_.

13. *See id.* at 3–6, \_\_ S.W.3d at \_\_ (“[T]he cases involving insurance policy beneficiaries, cited by appellant, are analogous and instructive.”).

14. *Id.* at 10–11, \_\_ S.W.3d at \_\_ (Hart, J., dissenting).

15. *E.g.*, *Allen v. First Nat'l Bank of Fort Smith*, 261 Ark. 230, 235, 547 S.W.2d 118, 121 (1977).

16. *See infra* Part III.B.

17. *See infra* Part II.A.

18. *See infra* Part II.B.1.

established, followed by a brief section comparing and contrasting Arkansas law with that of other states.<sup>19</sup> After that, this note will examine the inherent differences between life insurance policies and IRAs and will argue that such distinctions require IRAs to be treated differently than life insurance policies by not allowing testamentary changes to IRA beneficiaries.<sup>20</sup> Alternatively, if Arkansas courts choose to allow testamentary changes to IRA beneficiaries, this note will propose that courts should require such changes to meet a more rigorous standard than the current standard used to validate testamentary changes to life insurance beneficiaries.<sup>21</sup> Finally, the note will conclude with a brief summary and restatement of the pertinent issue and arguments.<sup>22</sup>

## II. BACKGROUND

### A. The Court's Reasoning in *Estate of Grubbs*

As executrix of the estate, the decedent's mother, Ms. Grubbs, filed an injunctive action to freeze the assets of the decedent's IRA.<sup>23</sup> Ms. Grubbs asserted that a note she had discovered in the decedent's Bible effectively removed Nunnenman and named Ms. Grubbs as the beneficiary.<sup>24</sup> The handwritten note said, "I Donnie Grubbs want all of my estate [a]ll IRA and any SBC Telco and all other assets and worldly goods to go to my Mother Shervena Grubbs. Being of sound mind."<sup>25</sup>

The trial court found the note to be a valid will, and as such, it extended Arkansas's law for life insurance policies to the IRA.<sup>26</sup> Consequently, the court held that the note effectively changed the beneficiary of the decedent's IRA.<sup>27</sup> The Arkansas Court of Appeals reversed the trial court's decision, however, finding that the note could not possibly qualify as a valid will.<sup>28</sup> The court explained that because the note was not a valid will, "the

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19. See *infra* Part II.B.2.

20. See *infra* Part III.A.

21. See *infra* Part III.B.

22. See *infra* Part IV.

23. Nunnenman v. Estate of Grubbs, 2010 Ark. App. 75, at 1, \_\_ S.W.3d \_\_, \_\_.

24. *Id.* at 1-2, \_\_ S.W.3d at \_\_.

25. *Id.* at 5, \_\_ S.W.3d at \_\_.

26. *Id.*, \_\_ S.W.3d at \_\_.

27. *Id.* at 2, 5, \_\_ S.W.3d at \_\_.

28. *Id.* at 5-6, \_\_ S.W.3d at \_\_ ("[I]f the note is regarded as a holographic will, it was revoked by the express terms of decedent's last will and by operation of law pursuant to Ark. Code Ann. § 28-25-109(a)(1)."). In order to execute a valid will, a testator must be at least eighteen years old and must sign the end of the will in the presence of at least two attesting witnesses who must also sign the will at the request and in the presence of the testator. ARK. CODE ANN. § 28-25-101, -103 (LEXIS Repl. 2004). Arkansas statutory law recognizes holographic wills as valid where the entire will is written in the testator's handwriting, the testator

rule permitting change of beneficiaries in a will ha[d] no application to it, and [Ms. Grubbs] had the burden of proving that [the] decedent intended for the note to be a change of beneficiaries and did everything reasonably possible to effectuate a change of beneficiary.”<sup>29</sup>

Dissenting from the majority, Judge Hart argued that IRAs should be treated differently than life insurance policies because IRAs are a type of pay-on-death (POD) account.<sup>30</sup> This distinction is important because POD accounts are controlled by an entirely different statutory scheme than insurance policies.<sup>31</sup> Additionally, as a general rule, “life insurance policies *always* pay money to a designated beneficiary; that is their purpose. Conversely, a pay-on-death designation in an IRA is a contingency that few of us hope will occur.”<sup>32</sup>

#### B. Other States’ Laws Regarding Testamentary Changes to Beneficiaries of Life Insurance Policies as Compared with Arkansas Law

As with most written agreements, courts typically look to the language of the document to determine what rights the parties have and how they may exercise those rights.<sup>33</sup> Life insurance policies are no different.<sup>34</sup> Most policies specifically stipulate the method by which an insured may change the beneficiary of the policy. Some policy agreements expressly prohibit testamentary changes while others expressly allow them, and some policies do not directly address the issue.<sup>35</sup>

This section will begin by discussing the reasoning of other states regarding testamentary changes to life insurance policies. Next, it will explore the history of the Arkansas law that permits such testamentary alterations.

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signed the end of the will, and at least three credible, disinterested witnesses can testify that the handwriting and signature do in fact belong to the testator. *Id.* § 28-25-104. A holographic will needs no attesting witnesses to be valid. *Id.* Additionally, “[a] will or any part thereof is revoked by a subsequent will which revokes the prior will or part expressly or by inconsistency.” *Id.* § 28-25-109(a)(1).

29. *Estate of Grubbs*, 2010 Ark. App. 75, at 6, \_\_\_ S.W.3d at \_\_\_. The appellate court was also troubled by the fact that the only person who could benefit from the note’s validation was the person who supposedly discovered it. *Id.* at 5, \_\_\_ S.W.3d at \_\_\_.

30. *Id.* at 11, \_\_\_ S.W.3d at \_\_\_ (Hart, J., dissenting).

31. *Id.*, \_\_\_ S.W.3d at \_\_\_ (Hart, J., dissenting).

32. *Id.*, \_\_\_ S.W.3d at \_\_\_ (Hart, J., dissenting).

33. *Id.* at 2–3, \_\_\_ S.W.3d at \_\_\_. See also 16 RICHARD A. LORD, WILLISTON ON CONTRACTS § 49:14–49:15 (4th ed. 2000) (emphasizing that courts will seek to interpret the policy as a whole, giving meaning to every policy provision; however, if there are conflicting provisions, the court will seek to effectuate the intention of the parties, often construing the policy in favor of the insured).

34. See LORD, *supra* note 33, § 49:14.

35. See Wakefield, *supra* note 1, at 1167.

### 1. *Consensus Among Other States*

The view adopted by the vast majority of states requires life insurance policyholders to abide by methods set out in their policy in order to effectuate a change to the named beneficiary.<sup>36</sup> The general rationale behind this view is that the insurer only contemplates changes to the beneficiary designation during the insured's lifetime.<sup>37</sup> Once the insured dies, the beneficiary's interest in the proceeds becomes vested; therefore, because a decedent's will becomes effective at her death, any attempt to change the beneficiary provision by will would be ineffectual as the decedent would no longer have any interest in the proceeds.<sup>38</sup> In cases where the named beneficiary predeceases the insured, some courts have validated testamentary disposition of insurance proceeds, reasoning that the beneficiary's expectancy disappears when the beneficiary dies because the insured is still living, and she may elect to name a new beneficiary or even to let the policy expire.<sup>39</sup> If the insured has not named a new beneficiary by the time of her death, the proceeds of the life insurance policy revert to the insured's estate, making them subject to testamentary disposition.<sup>40</sup>

Another view is that testamentary changes to beneficiary designations are justified when the insurance company has "waived its policy requirement of strict compliance with the provisions for making a change of beneficiary."<sup>41</sup> For instance, in cases where an insurer has filed a bill of interpleader and deposited the insurance proceeds with the court, some courts have held that the insurer's actions constituted a waiver of the provisions of the policy that prescribe the procedure for amending the named beneficiary on the policy.<sup>42</sup> These courts have honored testamentary changes to benefi-

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36. *Id.* See e.g., *In re Bunnell*, 322 B.R. 331, 335–36 (Bankr. N.D. Ohio 2005) (citing *Stone v. Stephens*, 99 N.E.2d 766, 769 (Ohio 1951); *Rindlaub v. Travelers Ins. Co.*, 194 N.E.2d 577, 579–580 (Ohio 1963)) (“[U]nder Ohio law, any attempt to change the beneficiary of a life insurance policy through a will is generally not recognized. The only exception . . . is if such a change was authorized by the policy and then only if communicated to the insurer.”).

37. *Wakefield*, *supra* note 1, at 1167. This assumes the insured has reserved the power to designate a new beneficiary. *Id.*

38. See *id.* at 1169–70. Several states have adopted this approach, including California, Illinois, Indiana, Kansas, Kentucky, Michigan, Missouri, New Jersey, New York, Ohio, South Carolina, Tennessee, Texas, Washington, and Wisconsin. *Id.* at 1168–69.

39. See *id.* at 1172.

40. See *id.* Allowing the policy proceeds to revert to the insured's estate when the beneficiary predeceases the insured has the same effect as if the insured had made the life insurance policy payable to her estate in the first place.

41. *Id.* at 1173–74.

42. *Id.* at 1174. See also Curt A. Kramer, Comment, *In the Matter of the Estate of James B. Morse: Is A Testamentary Change Designating Another Beneficiary to an IRA Effective?*, 9 CONN. PROB. L.J. 131, 132–35 (1994) (discussing *In re Estate of Morse*, 568

ciaries.<sup>43</sup> On the other hand, courts that have held that this act does not constitute a waiver have invalidated testamentary changes to life insurance policies.<sup>44</sup>

## 2. *Arkansas Law*

The Arkansas rule allowing testamentary changes to life insurance beneficiaries is well established.<sup>45</sup> Currently, the rule is applied as follows: “Arkansas holds that a change of beneficiary can in fact be accomplished in a will so long as the language of the will is sufficient to identify the insurance policy involved and an intent to change the beneficiary.”<sup>46</sup> The Arkansas Supreme Court first endorsed this principle in 1937 with its decision in *Pedron v. Olds*.<sup>47</sup> In *Pedron*, the decedent had two policies of life insurance.<sup>48</sup> After he suffered a stroke of paralysis, the decedent’s wife separated from him.<sup>49</sup> His wife was listed as the beneficiary on both life insurance policies;<sup>50</sup> in his will, however, the decedent precisely described the two policies and instructed that the proceeds of each be paid to his daughter.<sup>51</sup>

The decedent never attempted to follow the provisions of the life insurance policies, which prescribed the manner and mode by which a change of

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N.Y.S.2d 689 (Sur. Ct. 1991) in which the court held testamentary changes to IRAs are allowed when the IRA account is identified “by exact title and number[ ] and where the custodian of the account waived the requirements of written notice to effectuate a change”). When the custodian of an account voluntarily deposits the funds of the account in court, it thereby becomes a stakeholder and forfeits its right to enforce the agreement. *Id.* at 138. If the court is in possession of the policy proceeds, the insurer is no longer susceptible to double liability, and, therefore, testamentary changes to the beneficiary designation are allowed. *Id.* at 135–36. Even though the account at issue was an IRA, the *Morse* court applied New York’s law regarding testamentary changes to life insurance policies to reach its conclusion.

43. Wakefield, *supra* note 1, at 1174. Missouri, Arizona, and New York’s case law establishes that such a waiver may allow testamentary disposition of life insurance proceeds. *Id.*; Kramer, *supra* note 42, at 135–36.

44. Wakefield, *supra* note 1, at 1173. Indiana, Kentucky, Michigan, South Carolina, and Texas have all rejected this principle of waiver. *Id.*

45. See generally *Allen v. First Nat’l Bank of Fort Smith*, 261 Ark. 230, 235, 547 S.W.2d 118, 121 (1977) (“While our cases recognize that a change of beneficiary can be accomplished by will . . . .”); *Eickelkamp v. Carl*, 193 Ark. 1155, 1158, 104 S.W.2d 814, 815 (1937) (recognizing the “insured might effect a change of beneficiaries by will”); *Pedron v. Olds*, 193 Ark. 1026, 1030, 105 S.W.2d 70, 72 (1937) (allowing beneficiary designation to be changed by will).

46. *Nunnenman v. Estate of Grubbs*, 2010 Ark. App. 75, at 3–4, \_\_\_ S.W.3d \_\_\_, \_\_.

47. 193 Ark. 1026, 105 S.W.2d 70 (1937).

48. *Id.* at 1026, 105 S.W.2d at 70.

49. *Id.* at 1027, 105 S.W.2d at 70.

50. *Id.* at 1026, 105 S.W.2d at 70.

51. *Id.* at 1027, 105 S.W.2d at 70–71.

beneficiary was to be effectuated.<sup>52</sup> The court reasoned that “the provisions in the policies . . . relating to change in beneficiary were made for the benefit and protection of the insurer, as well as for the benefit of the insured.”<sup>53</sup> The court went on to explain the purpose for having policy provisions requiring the insured to take certain steps in order to alter a beneficiary designation—to ensure the insurer pays the appropriate person when the insured dies.<sup>54</sup> The court cited authority that supported this public policy interest:

It is in the public interest that an insurance company may pay a loss to the beneficiary designated in the policy as promptly after the death of the insured as may reasonably be done. If there is uncertainty as to the beneficiary upon the death of [the] insured, in all cases where the right to change the beneficiary had been reserved there would always be a question as to whom the proceeds of the insurance should be paid. . . [I]t would be a risk that few companies would be willing to take, unless some specified time had elapsed after the death of [the] insured, or that there had been some court adjudication as to whom the proceeds should be paid.<sup>55</sup> Nevertheless, the court did not believe testamentary changes to beneficiary designations would significantly affect insurers’ interests.<sup>56</sup>

Rejecting the reasoning of other states that the named beneficiary’s interest becomes vested immediately upon the death of the policyholder, the court held that both the beneficiary designation and the testamentary clause were provisions that became operative upon the death of the insured.<sup>57</sup> The *Pedron* court noted, “The provision in the will conflicted with the provision in the policy designating [the] appellant as beneficiary, and this being the insured’s last expression on the subject, it ought to control.”<sup>58</sup>

In 1977, the Arkansas Supreme Court further defined the rule allowing testamentary changes to life insurance beneficiaries in *Allen v. First National Bank of Fort Smith*.<sup>59</sup> In *Allen*, the decedent’s ex-wife was the named beneficiary on several policies of insurance, which the decedent had ob-

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52. *Id.*, 105 S.W.2d at 71. The policy provided, “Every change of beneficiary must be made by written notice to the company at its home office accompanied by the policy for indorsement of the change thereon by the company, and unless so indorsed the change shall not take effect.” *Id.* at 1026, 105 S.W.2d at 70.

53. *Pedron*, 193 Ark. at 1029, 105 S.W.2d at 71.

54. *Id.*, 105 S.W.2d at 71.

55. *Id.* at 1030, 105 S.W.2d at 72 (quoting *Wannamaker v. Stroman*, 166 S.E. 621, 623 (S.C. 1932)).

56. *Id.* at 1029, 105 S.W.2d at 71–72.

57. *See id.* at 1030, 105 S.W.2d at 72.

58. *Id.*, 105 S.W.2d at 72. This statement demonstrates Arkansas’s preference for satisfying the interests of the insured even at the expense of other interested parties, namely the beneficiary and the insurer.

59. 261 Ark. 230, 235, 547 S.W.2d 118, 121 (holding the policy must be sufficiently identified and testator must have had intent to effectuate a change of beneficiary).

tained during their marriage.<sup>60</sup> After the decedent and his ex-wife were divorced, he executed a written instrument, titled “Change of Beneficiaries of Life Insurance Policies,” that explicitly stated he wanted his ex-wife’s name removed from the beneficiary designation on the insurance policies and the proceeds to be payable to his estate.<sup>61</sup> This instrument was never given to the insurance company; rather, it stayed with the decedent’s lawyer.<sup>62</sup> The court held: (1) divorce did not automatically bar the ex-wife from receiving the insurance proceeds as a beneficiary;<sup>63</sup> (2) the written instrument left at the lawyer’s office did not constitute substantial compliance with the relevant policy provision;<sup>64</sup> and (3) the decedent’s will could not effectuate a change of beneficiary because it did not specifically identify the policies or demonstrate intent.<sup>65</sup>

There is a notable statutory exception to Arkansas’s approach.<sup>66</sup> Beneficiaries to life insurance policies obtained through a benefit society may only be changed in accordance with the laws or rules of the society.<sup>67</sup> Therefore, unless a benefit society’s policy expressly provides for testamentary disposition, an insured’s attempt to devise an interest in the proceeds of such an insurance policy is futile.<sup>68</sup>

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60. *Id.* at 232, 547 S.W.2d at 119.

61. *Id.* at 232–33, 547 S.W.2d at 119. The decedent wanted his estate to be distributed to a trust for the benefit of his three children. *Id.* at 233, 547 S.W.2d at 119–20.

62. *Id.* at 233, 547 S.W.2d at 120. Similar to the policy in *Pedron*, the relevant provision stated that

Any Insured who has not made an irrevocable designation of beneficiary may designate a new beneficiary at any time, without the consent of the beneficiary, by filing with the American Geriatrics Society a written request for such change, but such change shall become effective only upon receipt of such request at the Home Office of the Company. When such request is received by the Company, whether the Insured be then living or not, the change of beneficiary shall relate back to and take effect as of the date of execution of the written request, but without prejudice to the Company on account of any payment theretofore made by it.

*Id.*, 547 S.W.2d at 120.

63. *Id.* at 235, 547 S.W.2d at 120–21.

64. *Id.*, 547 S.W.2d at 121.

65. Allen, 261 Ark. At 235, 547 S.W.2d at 121.

66. See ARK. CODE ANN. § 23-74-402 (LEXIS Repl. 2004). This exception demonstrates that there are, and should be, limits to Arkansas’s rule allowing testamentary changes to insurance beneficiaries.

67. *Id.* See also *Cheatham v. Modern Woodmen of Am.*, No. 3:10cv00170 SWW, 2011 U.S. Dist. LEXIS 48544, at \*13–15 (E.D. Ark. May 4, 2011) (discussing the differences “in the contractual relationship between fraternal benefit societies and regular insurance companies,” which necessitates “a more formal process for members and policy holders . . . to change the beneficiary of an annuity certificate issued by a fraternal benefit society”).

68. ARK. CODE ANN. § 23-74-402; *Cheatham*, 2011 U.S. Dist. LEXIS 48544 at \*15–16 (citing *Gibson v. Moore*, 187 Ark. 897, 901, 63 S.W.2d 344, 346 (1933)).

### C. What Is an IRA and How Does It Compare to Other Non-probate Assets?

Generally speaking, an IRA<sup>69</sup> is a device individuals use for the “purpose of saving and investing for the future.”<sup>70</sup> A written instrument that establishes a trust or custodial account used to collect assets is necessary in forming an IRA, and typically, a bank acts as trustee.<sup>71</sup> “An IRA must be established for the exclusive benefit of an individual or his beneficiary,” and it must be maintained in strict compliance with the rules of the Internal Revenue Code.<sup>72</sup>

The concept of an IRA was established by the Employee Retirement Income Security Act of 1974<sup>73</sup> (ERISA), which sought to “enhance horizontal income tax equality by providing new vehicles for individual retirement savings, and to promote pension fund portability.”<sup>74</sup> Prior to the passage of ERISA, a relatively small percentage of the American population actually benefitted from the tax incentives of retirement savings programs: “overly restrictive age and service requirements for participants in corporate and self-employed plans . . . characteristically excluded many employees.”<sup>75</sup> The IRA provisions of ERISA were created with the purpose of allowing more Americans to take advantage of retirement savings tax benefits, encouraging the development of “the private retirement savings system,” and promoting mobility for American workers.<sup>76</sup>

This section will first address federal law concerning IRAs. Then, it will discuss Arkansas law concerning non-probate assets and their disposition.

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69. For a discussion of IRAs generally, see Louis A. Mezzullo, *The Basics of Retirement Plan Distribution*, PROB. & PROP. May–June 1989, at 43, 43–45. The beneficiary designation does not necessarily have to be an individual. *Id.* at 44. It is important to recognize the ability of an account owner to designate a trust as the IRA beneficiary, which can lead to an entire realm of other considerations. *Id.* As this is outside the scope of this note, these considerations will not be addressed.

70. Robert E. Craine, *Individual Retirement Accounts*, 11 TULSA L.J. 215, 216 (1975).

71. *Id.* at 216–17.

72. *Id.* at 217. There are different types of IRAs, including investment IRAs, individual retirement annuities and qualified retirement bonds, employer-sponsored IRAs, and rollover IRAs. *See generally id.* (discussing in detail the different types of IRAs).

73. 29 U.S.C. § 1001 (2006).

74. Craine, *supra* note 70, at 215 n.2.

75. *Id.* at 216.

76. *Id.*

### 1. *Federal Law*

ERISA requires benefit plans to “specify the basis on which payments are made to and from the plan”<sup>77</sup> and commands fiduciaries to administer plans “in accordance with the documents and instruments governing the plan.”<sup>78</sup> It also expressly pre-empts state laws that relate to an ERISA plan.<sup>79</sup> State laws “relate to” an ERISA plan when they have “a connection with or reference to such a plan.”<sup>80</sup>

In *Egelhoff v. Egelhoff ex rel. Breiner*,<sup>81</sup> the Supreme Court of the United States held that a Washington statute was pre-empted by ERISA.<sup>82</sup> The statute provided that, upon divorce, there would be an automatic revocation of any beneficiary designation naming an ex-spouse as the beneficiary of a non-probate asset.<sup>83</sup> The Court reasoned that the statute implicated core ERISA concerns in three ways.<sup>84</sup> First, the statute ran counter to the plain language of ERISA.<sup>85</sup> Second, the statute interfered with nationally uniform plan administration.<sup>86</sup> If forced to comply with this state law, “administrators [could not] make payments simply by identifying the beneficiary specified by the plan documents,” rather, they would be forced to “familiarize themselves with state statutes so that they [could] determine

77. 29 U.S.C. § 1102(b)(4) (2006).

78. *Id.* § 1104(a)(1)(D).

79. *Id.* § 1144(a).

80. *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 147 (2001) (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983)).

81. 532 U.S. 141 (2001).

82. *Id.* at 146.

83. *Id.* at 143. For a discussion considering why revocation by divorce statutes should apply to life insurance policies and arguably other non-probate assets, see generally Alan S. Wilmit, Note, *Applying the Doctrine of Revocation by Divorce to Life Insurance Policies*, 73 CORNELL L. REV. 653 (1988) (reasoning that the policy behind revocation statutes revolves around the fact “that people have difficulty accepting their own death,” and it is comparable to the purpose and goals of life insurance policies). Forty-four states have enacted revocations statutes that provide in pertinent part, “[i]f after executing a will the testator is divorced or his marriage annulled, the divorce . . . revokes any disposition or appointment of property made by the will to the former spouse . . .” *Id.* at 653. Arkansas has adopted such a statute. See ARK. CODE ANN. § 28-25-109(b) (LEXIS Repl. 2004).

“The general rule is that divorce in no way affects the rights of an ex-spouse as a beneficiary of a husband’s nonprobate assets.” James F. Walsh, Note, *The Effect of Divorce on the Beneficiary Rights to a Nonprobate Asset*, 7 CONN. PROB. L.J. 163, 164 (1992). Nevertheless, some courts continue to look to property settlements and other actions by the parties to determine whether the owner intended for the ex-spouse to remain the beneficiary. *Id.* at 164–65. Still, other jurisdictions have resolved the issue altogether by enacting statutes that remove the ex-spouse from the beneficiary designation by operation of law. *Id.* at 165.

84. *Egelhoff*, 532 U.S. at 147.

85. *Id.*

86. *Id.* at 148.

whether the named beneficiary's status ha[d] been 'revoked.'"<sup>87</sup> Third, the congressional goal of minimizing expenses would be impaired if administrators were compelled to "master the relevant law of [fifty] [s]tates."<sup>88</sup> In the Court's opinion, "[D]iffering state regulations affecting an ERISA plan's 'system for processing claims and paying benefits' impose 'precisely the burden that ERISA pre-emption was intended to avoid.'"<sup>89</sup>

The Supreme Court of the United States again acknowledged that an ERISA plan must be administered in accordance with the written terms of the agreement creating the retirement asset in *Kennedy v. Plan Administrator for DuPont Savings and Investment Plan*.<sup>90</sup> *Kennedy* involved a man who failed to change the beneficiary designation on his savings and investment plan, which named his ex-wife as the beneficiary, following a divorce.<sup>91</sup> Although his ex-wife had signed an agreement specifically waiving her rights to his savings and investment plan,<sup>92</sup> the Court ruled that she was entitled to the proceeds.<sup>93</sup> According to ERISA, a qualified domestic relations order (QDRO) or disclaimer would have been recognized, which would have changed the outcome of this case.<sup>94</sup> However, the plan administrator of the retirement account did not recognize the waiver signed by the ex-wife, and a QDRO was never filed.<sup>95</sup>

The United States Court of Appeals for the Fifth Circuit rejected the ex-wife's waiver based on ERISA's anti-alienation provision that requires retirement plans to specify "that benefits provided under the plan may not be assigned or alienated."<sup>96</sup> Under this provision, if retirement plans provide that benefits cannot be "assigned" or "alienated," then any agreement,

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87. *Id.* at 148–49.

88. *Id.* at 149–50 (citing *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990)).

89. *Id.* at 150 (quoting *Fort Halifax Packing Co. v. Coyne*, 428 U.S. 1, 10 (1987)). The Court mentioned that some state statutes (such as "slayer" statutes) might not be pre-empted because they are relatively uniform across the nation and, therefore, arguably do not impose a burden on administrators. *Id.* at 152. The Court did not rule on this issue, however, as it was not before the Court. *Id.*

90. 555 U.S. 285, 288 (2009). See also Patricia L. Vannoy, Note, *R.I.P.: The Federal Common Law Waiver Approach to Retirement Plan Death Benefits Finally Rests in Peace After Kennedy v. Plan Administrator for DuPont Savings & Investment Plan*, 497 F.3d 426 (5th Cir. 2007), *aff'd*, 129 S. Ct. 865 (2009), 88 NEB. L. REV. 204 (2009) (discussing the Fifth Circuit's holding that extraneous documents and agreements, even if binding on the parties pursuant to state law, were not binding on the retirement plan at issue in *Kennedy*).

91. *Kennedy*, 555 U.S. at 289.

92. *Id.*

93. *Id.* at 304.

94. *Id.* at 296. The court made clear, however, that the ex-wife could not merely waive her right to collect the proceeds of the retirement plan with a QDRO. *Id.* Instead, she would have to redirect her interest to another beneficiary. *Id.* at 296–97.

95. *Id.* at 288.

96. *Id.* at 290–91; 29 U.S.C. § 1056(d)(1) (2006).

whether it be direct or indirect, “whereby a party acquires from a participant or beneficiary a right or interest enforceable against the plan in, or to, all or any part of a plan benefit payment which is, or may become, payable to the participant or beneficiary” is invalid.<sup>97</sup> The Supreme Court held, however, that the waiver was not invalid as a result of ERISA’s anti-alienation provision, but that it was properly disregarded because it conflicted with the beneficiary designation in the plan documents.<sup>98</sup>

It is important to note that ERISA does not govern all IRAs. ERISA is only implicated when an employer maintains the plan. Furthermore, it is not applicable if all four of the following conditions are met.<sup>99</sup> First, the employer or employee association must not make any contributions to the IRA.<sup>100</sup> Second, the employee’s participation must be voluntary.<sup>101</sup> Third, the employer’s involvement must be *solely* to permit the plan’s sponsor to advertise the program to employees, collect contributions through payroll deductions, and forward employee contributions to the sponsor.<sup>102</sup> Fourth, the employer must not receive consideration “other than reasonable compensation for services actually rendered in connection with payroll deductions or dues checkoffs.”<sup>103</sup>

## 2. *Arkansas Law*

Several Arkansas statutes allow a decedent’s property to pass to his beneficiaries outside of probate. For example, Arkansas has enacted the Uniform Transfer on Death Security Registration Act, which allows the establishment of transfer-on-death (TOD) designations for securities.<sup>104</sup> Also, with respect to bank accounts, Arkansas statutory law provides that “[t]he designation of ownership interest contained in account documents shall be conclusive evidence in any action or proceeding involving the deposit account of the intention of all depositors to vest title to the deposit account in the manner specified in the account documents.”<sup>105</sup> With regard to investment accounts, however, a different rule applies, and Arkansas case law

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97. 26 C.F.R. § 1.401(a)-13(c)(1)(ii) (2011).

98. *Kennedy*, 555 U.S. at 288.

99. 29 C.F.R. § 2510.3-2(d) (2010).

100. *Id.* § 2510.3-2(d)(1)(i).

101. *Id.* § 2510.3-2(d)(1)(ii).

102. *Id.* § 2510.3-2(d)(1)(iii) (emphasis added).

103. *Id.* § 2510.3-2(d)(1)(iv). Generally, ERISA does not apply to traditional IRAs, but it does apply to employer-sponsored IRAs, Simplified Employee Pension plans (SEPs), Savings Incentive Match Plans for Employees (SIMPLE IRA), and deemed IRAs. *See* 6 SAL L. TRIPODI, *THE ERISA OUTLINE BOOK* 13A.16–13A.18 (2011 ed. 2011).

104. ARK. CODE ANN. § 28-14-104 to -107 (LEXIS Repl. 2004). TOD and POD designations are forms of beneficiary designations, which allow property to pass outside of probate.

105. ARK. CODE ANN. § 23-47-204(b)(3) (LEXIS Repl. 2000).

establishes that an account designation is only a presumption of the holder's intent.<sup>106</sup> Additionally, courts are permitted to accept parol evidence regarding the donative intent of a deceased with regard to an investment account, even in the absence of fraud.<sup>107</sup> *Hall v. Superior Federal Bank*<sup>108</sup> illustrates this rule.

In *Hall*, the decedent opened a savings account with Superior Federal Bank ("Superior").<sup>109</sup> The signature card included two names—the decedent's and Mrs. Hall's.<sup>110</sup> The names were listed "as joint tenants with right of survivorship and not as tenants in common, and not as tenants by the entirety."<sup>111</sup> After the decedent's death, Superior issued a check to Mrs. Hall "constituting the principal amount in the savings account plus unpaid and accrued interest."<sup>112</sup> Subsequently, upon discovering that the Pulaski Probate Court had issued an injunction prohibiting the bank from distributing the account funds, the bank contacted Mrs. Hall and told her "the check would not be honored."<sup>113</sup> A similar situation occurred when Mrs. Hall attempted to collect funds from a brokerage account with Merrill Lynch that had been designated as a joint tenancy with right of survivorship.<sup>114</sup> The trial court ruled that the decedent had a confidential relationship with Mrs. Hall, and the decedent never intended for the funds in either account to pass to Mrs. Hall.<sup>115</sup> Affirming in part, the Arkansas Supreme Court ruled that the Arkansas statute deeming account designation to be conclusive evidence of the account holder's intent does not apply to investment accounts.<sup>116</sup> Thus, the account designation on the Superior savings account was deemed conclusive evidence of the decedent's intent, but the account designation on the Merrill Lynch account was not.<sup>117</sup>

Additionally, it is worth noting that Arkansas, along with approximately half of the states, recognizes beneficiary deeds.<sup>118</sup> Arkansas statutes, such

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106. *Hall v. Superior Fed. Bank*, 303 Ark. 125, 131–32, 794 S.W.2d 611, 614 (1990).

107. *Id.* at 135–36, 794 S.W.2d at 616.

108. 303 Ark. 125, 794 S.W.2d 611 (1990).

109. *Id.* at 127, 794 S.W.2d at 612.

110. *Id.*, 794 S.W.2d at 612.

111. *Id.*, 794 S.W.2d at 612 (quoting the language on the security card).

112. *Id.* at 128, 794 S.W.2d at 612.

113. *Id.*, 794 S.W.2d at 612.

114. *Hall*, 303 Ark. at 127–28, 794 S.W.2d at 612.

115. *Id.* at 128, 794 S.W.2d at 613.

116. *Id.* at 131–32, 794 S.W.2d at 614.

117. *Id.*, 794 S.W.2d at 614–15.

118. ARK. CODE ANN. § 18-12-608 (LEXIS Supp. 2011). For a discussion of the advantages and disadvantages of beneficiary deeds, see generally Susan N. Gary, *Transfer-on-Death Deeds: The Nonprobate Revolution Continues*, 41 REAL PROP. PROB. & TR. J. 529 (2006). "Many people choose to avoid the probate process, either because of concerns about delays and cost or because of a desire for privacy." *Id.* at 531. Gary points out several advantages of transfer on death deeds including the ability of the owner to retain control of the

as the beneficiary deed statute, make it relatively easy for property to pass non-probate.<sup>119</sup> This statute expressly provides that “[a] beneficiary deed that complies with this section may not be revoked, altered, or amended by the provisions of the owner’s will.”<sup>120</sup>

### III. ARGUMENT

#### A. IRAs Are Inherently Different Than Life Insurance Policies and Thus Require Separate Treatment Under the Law

One scholar noted, “If *A* pays money to *B* and *B* in return promises to make payments on *A*’s death to *C*, the validity of this transaction in most states will turn on whether *B* is an insurance company, the United States, or a bank.”<sup>121</sup> The reason behind this outcome is that the applicable rules vary depending on the type of non-probate asset at issue. As Judge Hart explained in *Estate of Grubbs*, Arkansas courts should first address the inherent differences between IRAs and life insurance policies before a blanket extension of the rule allowing testamentary changes to life insurance beneficiaries is applied to IRAs and other non-probate assets.<sup>122</sup>

“The differences between a life insurance policy and an IRA with a pay-on-death designation are profound.”<sup>123</sup> First, IRAs and life insurance policies have different purposes. While individuals use IRAs to provide for themselves in the future,<sup>124</sup> life insurance policies are generally used to provide for the insured’s dependents in the event of the insured’s death.<sup>125</sup>

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property, reduced costs, and protection from dishonest relatives. *Id.* at 542–43. Among the disadvantages she recognizes are the opportunity for legal mistake if planners are not experienced; the challenges that may come after the owner’s death, which could result in additional litigation; the confusion that could result from conflicting documents purporting to dispose of the property; and the reality that selling the property may not be possible until such issues are resolved thus contributing to inconvenience and, potentially, increased costs. *Id.* at 543–46.

119. ARK. CODE ANN. § 18-12-608.

120. *Id.* at § 18-12-608(d)(4). By making it easy for people to plan for their property to pass non-probate, the legislature is arguably expressing a preference for the non-probate disposition of property. Furthermore, one could argue that Arkansas should amend its existing law to prohibit life insurance policies from being changed by will, thus bringing life insurance in line with all of the other types of non-probate transfers. That argument would require a different approach and is outside the scope of this note.

121. William M. McGovern, Jr., *The Payable on Death Account and Other Will Substitutes*, 67 NW. U. L. REV. 7, 10 (1972–1973).

122. See *Nunnenman v. Estate of Grubbs*, 2010 Ark. App. 75, at 10–11, \_\_\_ S.W.3d \_\_\_, \_\_\_ (Hart, J., dissenting).

123. *Id.*, \_\_\_ S.W.3d at \_\_\_ (Hart, J., dissenting).

124. Craine, *supra* note 70, at 216.

125. See Carl Richards, *Why Life Insurance Is Not an Investment*, N.Y. TIMES, April 12, 2010, available at <http://bucks.blogs.nytimes.com/2010/04/12/why-life-insurance-is-not-an->

Second, IRAs and life insurance policies have different tax consequences.<sup>126</sup> Third, and most importantly, IRAs are unique non-probate assets because certain IRAs are subject to federal legislation.<sup>127</sup> As a result, IRAs are inherently different from life insurance policies. For example, the benefits of life insurance policies, even those established under ERISA, are freely alienable.<sup>128</sup> Conversely, when ERISA applies, IRA benefits are not. While some state rules are certainly applicable to the distribution of IRA assets, it is worthwhile to note that IRAs are generally governed by “principles of contract law and banking law rather than by principles of wills law.”<sup>129</sup>

Additionally, courts should be hesitant to extend a rule that would blur the line between probate and non-probate administration. As evidenced by sections 18-12-608(d)(1) and 23-47-204(b)(3) of the Arkansas Code, Arkansas law favors the non-probate disposition of beneficiary deeds and multiple party deposit accounts.<sup>130</sup> Similarly, federal law prevents the testamentary disposition of IRA benefits when the plan is controlled by ERISA. For these reasons, IRAs warrant treatment separate from life insurance policies under the law.

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investment/. “It’s not for education savings. It’s not for retirement savings, or to provide a tax-free loan later in life.” *Id.*

126. Compare I.R.C. § 408(d) (2011), with § 101(a)(1).

127. See *supra* Part II.C.1.

128. See *Kennedy v. Plan Adm’r for DuPont Sav. & Inv. Plan*, 497 F.3d 426, 429 (5th Cir. 2007), *aff’d*, 555 U.S. 285 (2009) (citing *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 836–37 (1988)).

129. Mary F. Radford, *Wills, Trusts & Administration of Estates*, 54 MERCER L. REV. 583, 605 (2002) (discussing *SunTrust Bank, Middle Ga., N.A. v. Harper*, 551 S.E.2d 419 (2001) in which the Georgia appellate court reversed a trial court decision that gave effect to the change of an IRA beneficiary designation). *Harper* involved an instance of guardianship in which the IRA owner’s “power to make contracts, the power to buy or sell property, and the power to enter into any other business or commercial transaction” had been removed. *Id.* at 603. The court-appointed guardian took the IRA owner to the bank and had him change the beneficiary designation on the account. *Id.* at 604. The trial court found that the change was effective because it was testamentary rather than contractual in nature, and the power to make a will had not been removed from the IRA owner in the guardianship proceeding. *Id.* at 605. “The court of appeals reversed the trial court’s holding, finding that the IRA was governed by general principles of contract law and banking law rather than by principles of wills law.” *Id.*

130. ARK. CODE ANN. § 18-12-608(d)(1) (LEXIS Supp. 2011) (prohibiting testamentary disposition of beneficiary deeds); § 23-47-204(b)(3) (LEXIS Repl. 2004) (making any designation purporting to transfer property at the account holder’s death conclusive evidence of intent).

B. Courts Should Require Testamentary Changes to IRA Beneficiaries to Meet a More Rigorous Standard Than That Used for Life Insurance Policies

Extending the law regarding testamentary changes to beneficiaries of life insurance policies to IRAs would not only run contrary to the law of other states, it would impose an undue burden on courts, individuals, and financial institutions. As the *Egelhoff* Court explained, state laws affecting an administrator's ability to identify the beneficiary from the plan documents implicate core ERISA concerns.<sup>131</sup> According to ERISA, certain IRAs must be administered "in accordance with the documents and instruments governing the plan."<sup>132</sup> Arkansas's rule allowing testamentary changes to life insurance policies cannot be extended to IRAs governed by ERISA because, even if applicable under state law, it is pre-empted by federal law. Additionally, Arkansas's rule should not be applied to IRAs that are unaffected by ERISA because it would be cumbersome for courts, individuals, and financial companies to attempt to apply different rules to different types of IRAs. As a result, all IRAs should be administered according to the plan documents.

The relevant plan provision in *Estate of Grubbs* read as follows:

I understand that if I designate "my will" or some variation thereof as my Beneficiary, that the Custodian shall interpret this term as my estate and that if I do not designate any Beneficiary, my Beneficiary shall also be deemed to be my estate. I understand that I may revoke this beneficiary designation at any time by completing and submitting a new beneficiary designation, which shall supersede all prior beneficiary designations. Such replacement designation shall be submitted on either a form provided by the Custodian for this purpose and/or in some other manner deemed acceptable to the Custodian.<sup>133</sup>

The plan provision did not intend for the decedent to have the ability to change the beneficiary designation without notifying the custodian of the account. In fact, the provision required approval by the custodian of the account to make an effective change to the beneficiary designation in some manner other than by submission of a replacement designation form.

The Arkansas Court of Appeals, however, did not decide *Estate of Grubbs* with regard to this argument—the plan provision was merely mentioned with no elaboration as to its consequences or application to the facts of this case.<sup>134</sup> Instead, the appellate court found that the decedent's last will and testament, which was executed shortly before his death, was insufficient

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131. *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 147 (2001).

132. 29 U.S.C. § 1104(a)(1)(D) (2006). *See also supra* Part II.C.1.

133. *Nunnenman v. Estate of Grubbs*, 2010 Ark. App. 75, at 4, \_\_\_ S.W.3d \_\_\_, \_\_\_.

134. *Id.*, \_\_\_ S.W.3d at \_\_\_.

to effectuate a change of beneficiary because the IRA was not specifically identified.<sup>135</sup>

The next issue addressed by the appellate court was whether a note, found by the decedent's mother, was an effective holographic will that changed the beneficiary designation on the IRA.<sup>136</sup> Although the court ultimately ruled that the validity of the handwritten note was irrelevant,<sup>137</sup> this reasoning, in effect, runs contrary to that of the Supreme Court of the United States. In *Egelhoff* and *Kennedy*, the Court applied federal law to hold that the beneficiary should be determined from the plan documents,<sup>138</sup> while the Arkansas Court of Appeals seemingly extended a rule unique to the state. Without further explanation and consideration of the distinctive characteristics of IRAs and the federal laws that pre-empt state laws in some circumstances, the Arkansas court's application of the law in *Estate of Grubbs* was incorrect.

While the Arkansas courts may not be totally barred from allowing a testamentary change to an IRA beneficiary, such an exception should be required to meet elements more strict than the lenient test necessary to effectuate a change of beneficiary for life insurance policies.<sup>139</sup> For instance, the

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135. *Id.*, \_\_\_ S.W.3d at \_\_\_.

136. *Id.* at 5, \_\_\_ S.W.3d at \_\_\_.

137. *Id.* at 5–6, \_\_\_ S.W.3d at \_\_\_.

138. *See supra* Part II.C.1.

139. Testamentary disposition of non-probate assets puts the popularity of non-probate administration in jeopardy, prevents financial intermediaries from distributing non-probate assets quickly, and exposes financial intermediaries to liability for erroneous disbursements if testamentary dispositions of non-probate assets can override "previous disbursements made by financial intermediaries." Mark L. Kaufmann, Note, *Should the Dead Hand Tighten Its Grasp: An Analysis of the Superwill*, 1988 U. ILL. L. REV. 1019, 1027 (1988). *Contra* Roberta Rosenthal Kwall & Anthony J. Aiello, *The Superwill Debate: Opening the Pandora's Box?*, 62 TEMP. L. REV. 277, 310–15 (1989) (arguing that the laws protect financial institutions such as banks and life insurance companies from wrongful payment lawsuits and situations where the financial institution pays the designated beneficiary on a non-probate asset prior to receiving notice of the testamentary disposition); Kent D. Schenkel, *Testamentary Fragmentation and the Diminishing Role of the Will: An Argument for Revival*, 41 CREIGHTON L. REV. 155 (2008). Schenkel argues that the non-probate system itself frustrates efficiency in post-death asset disposition simply because it cannot possibly dispose of all assets; the only document able to dispose of an entire estate is the will, and therefore the will, rather than non-probate documents, should be the primary tool for the disposition of assets. *Id.* at 156.

Testamentary transfer legislation and techniques should focus on brevity, simplicity and efficiency. These goals can be best achieved only by unifying the process of testamentary transfer under a single instrument. Fortunately, a unifying instrument already exists. Only by executing a will can a person, without taking any further legal steps, transfer all of a wide variety and number of property interests, effective on death, by way of one legal document.

*Id.* Schenkel further points out that unless legislation specifically eradicates the will, it will never completely go away. *Id.* at 178. Since this is unlikely to happen, Schenkel argues that estate planning should utilize wills to create a unified administration of asset disposition. *Id.*

custodian of the IRA should receive notification of the testator's intent to change the beneficiary on the policy. Substantial compliance with the plan provisions would promote public policy that favors holding parties accountable for the agreements that they make.<sup>140</sup>

Furthermore, substantial compliance would minimize the opportunity for fraud because, at the very least, the testator would have taken steps toward changing the beneficiary in accordance with the plan documents. Such action would allow parties to more definitively establish the testator's intent in court according to the rules of evidence. Also, the administrator of the account is more likely to be on notice of the account holder's intent to change the beneficiary if substantial compliance is required. Finally, it is unlikely significant injustice will result from requiring plan participants to substantially comply with plan provisions because "[t]he importance of keeping your beneficiary designations current is not a secret reserved for the nation's ERISA experts; it is a common topic"<sup>141</sup> familiar to the general public.

#### IV. CONCLUSION

If the law permitting a change to the beneficiary of a life insurance policy by will is extended to IRA accounts, it is reasonable to assume that Arkansas could expand this rule to include other non-probate assets, such as POD accounts, TOD accounts, and beneficiary deeds. Such an expansion would arguably obliterate one of the purposes of non-probate assets and muddy the distinction between probate and non-probate administration. The federal government's pre-emptive regulation of certain IRAs seeks to achieve uniformity among the states in retirement accounts' creation, maintenance, and disposition. If Arkansas extends its unique approach to beneficiary changes for life insurance policies to IRAs, the federal government's aim at uniformity will be frustrated.

Under Arkansas law, all that must be shown in order for a court to validate a testamentary change to a life insurance beneficiary is that the document purporting to make the change satisfies the necessary requirements to be a valid will, the policy to be changed is clearly identified, and the testator's intent to effectuate a change in beneficiary is clear. Because the Arkansas test required to effectuate testamentary changes to life insurance be-

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140. For a discussion of how probate and non-probate procedures affect third parties such as creditors, see generally Elaine H. Gagliardi, *Remembering the Creditor at Death: Aligning Probate and Nonprobate Transfers*, 41 REAL PROP. PROB. & TR. J. 819 (2007) (arguing there is an obvious need to unify conflicting property distribution rules so that creditors' rights to certain assets are clearly understood, which would in turn promote efficiency and diminish unnecessary costs by reducing the need for litigation).

141. Vannoy, *supra* note 90, at 227.

neficiaries does not require substantial compliance with the policy provisions, the test is too lenient to extend to IRAs.

At the very least, contestants of the beneficiary designation should be required to show that the testator substantially complied with the policy provisions by demonstrating (1) the testator made significant steps to attempt to change the IRA beneficiary by the manner and mode prescribed in the policy, and (2) but-for his death, the testator would have complied with the policy provisions. This more demanding test would ensure the overall nature of the non-probate asset remains intact. Furthermore, it would encourage account holders to comply with the policy provisions that established the IRA account in the first place, thus keeping in line with the spirit of federal policy objectives.

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