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Death as Divorce for the Abandoned Spouse:
Davis v. Combes and the Cautious and Gender-Sensitive Judiciary

Saul Levmore*
December 2, 2019

I. *Davis v. Combes*¹

Brenda Combes was a highly-educated and well-employed mother and spouse who died at age 43, following some serious medical issues known to her family. At the time, her surviving spouse, David Combes, was employed in a less remunerative position, but in describing the facts of this marriage in *Davis v. Combes*, Judge Diane Wood, hearing on appeal a case about Brenda's life-insurance proceeds, notes that David was often unemployed. It is likely that David occasionally served as a stay-at-home father. The couple had two children, first a daughter, and then a son born shortly before his mother's death. The family's child-care arrangements are not revealed by Judge Wood or in the lower court decision she reverses. David Combes had an older child from a previous marriage, but we are also not told where this child resided. While David had child-support obligations arising from his earlier divorce, we know that he was able to get them suspended, at least during his period of unemployment.² Brenda and David seemed to keep their financial lives fairly separate, though David points to various things, like insurance policies and Brenda's rental of a bank vault, that he paid for by check or cash. It is plausible that the couple's separate accounting was motivated by the details of the termination of his first marriage. We are also not told whether Brenda died intestate, though it may not have mattered because the couple had no significant assets other than the life insurance proceeds. They had purchased a home, but we can assume that it was highly mortgaged.

After Brenda's death, and accompanied by Brenda's surviving sister, Linda Davis, David unlocked the bank vault that he knew contained his wife's various insurance policies. He was surprised to find it empty. Documents pertaining to Brenda's life insurance policies were now in Linda's hands. Brenda had recently changed, or tried to change, each of her three insurance policies to benefit Linda. These policies had previously named David and their daughter as beneficiaries. Perhaps Linda was coy, or eager to see her much disliked brother-in-law's reaction when he opened the empty vault and discovered that his financial situation had been drastically altered.

Without a doubt, David felt cheated and betrayed, and he eventually developed several legal arguments for his claim to the policy proceeds. First, he argued that he and Brenda had an agreement, or contract, to buy matching insurance policies in favor of the other. He produced no

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¹ *Davis v. Combes*, 294 F.3d 931 (7th Cir. 2002), reviewing *Davis v. Combes*, No. 98-C-1153, ECF No. 68 (N.D.Ill. Nov. 1, 2000).

² *Davis v. Combes*, No. 98-C-1153, ECF No. 68 at 14 (N.D.Ill. Nov. 1, 2000).

external or written evidence of this agreement, but he had, and had paid for, policies on his own life that continued to name Brenda as the beneficiary. At times these policies were more generous to Brenda than were hers to him. One policy named their first child, and this was consistent with an agreement to provide about equally for their children's welfare. No policy named the last-born child, but it is likely that this was because that child was born close to Brenda's death when the couple surely was attending to other matters. In any event, the lower court was convinced that David kept his part of the apparent but unrecorded bargain, and it found him – and not his sister-in-law, Linda – to be a credible witness regarding Brenda's intentions and other matters. It may seem surprising that the couple did not simply choose to each buy one or more policies on his or her spouse's life, with the purchaser as beneficiary, but some of the policies were employer based, so perhaps this was impractical. While Judge Wood does not seem interested in this, perhaps it is why she notes Brenda's serious illness. Anything other than a group policy would have required disclosures or a medical examination, and an individual life insurance policy would likely have been impossible to obtain. In any event, Brenda's various policies probably reflected the fact that she could only obtain modest coverage through her employment or alumni association, without regard to her medical history. All of these policies had initially named the couple's daughter and David as beneficiaries. The changed policies that Brenda had apparently handed to Linda suddenly named Linda as the sole beneficiary. David argued that the contract with him was breached by this change in beneficiaries, and that equity allows or even requires a court to reinstate the contract. If he had such a contract in writing, he would almost surely enjoy a quick victory under Estate law (as well as under the Employee Retirement Income Security Act, or ERISA).³

A second argument that might have made it easy for a judge to intervene in favor of the surviving and financially abandoned spouse and children was that Brenda submitted the most significant life insurance change to her employer's human resources department, but did not sign it, as the policy explicitly required.⁴ Linda argues that perhaps her sister did not know where the

³ Courts are inevitably mixed regarding the importance of adhering to formal requirements where life insurance contracts are concerned. As the text will explore, a failure to adhere to formal requirements thus gives courts a chance to do what they think necessary to avoid absurd results or to advance their conception of what makes for good law. When the contract is about death benefits or retirement payments governed by ERISA, the matter is slightly different because the ERISA statute is in various places explicit about the importance of certain formal requirements regarding signatures and attestations. Still, courts feel somewhat free to say when formalities can be overlooked. To insist that all formal requirements be met is, of course, to invite litigation, error, and over-investment in meeting the formal requirements. See *Burns v. Orthotek, Inc. Employees' Pension Plan & Trust*, 657 F.3d 571 (7th Cir. 2011) (overlooking some formal requirements in order to reach a reasonable result, and citing *Davis v. Combes* for doing the same in a non-ERISA case).

⁴ There have been other cases on this "formality" topic after the case. See, e.g., *Hall v. Metropolitan Life Ins. Co.*, 750 F.3d 995 (8th Cir. 2014) (affirming lower court's refusal to intervene in policy denial given policy's requirement for timely submission, where the decedent both changed his will saying that his wife should receive insurance proceeds and signed but failed to timely submit a change-of-beneficiary form). See also, e.g., *Kmatz v. Metropolitan Life Ins. Co.*, 232 Fed.Appx. 451 (6th Cir. 2007) (declining to intervene after finding that decedent's blank change-of-beneficiary form failed even to substantially comply with the policy's requirements). But see, *Connecticut General Life Ins. Co. v. Gulley*, 668 F.2d 325 (7th Cir. 1982) (finding substantial compliance where decedent left change-of-beneficiary form with his daughter instead of submitting it to his employer as required by the policy).

signature belonged on the form submitted to mark a change in beneficiary, and the fact that Brenda physically submitted the form naming Linda as the new beneficiary should be sufficient and dispositive. But Brenda had managed to correctly sign the other policies and their (identical) change-of-beneficiary forms. She was, in any event, not unsophisticated. There is the possibility that Brenda did not sign precisely because the form said that it was not binding until signed and dated, and she was hesitant about making these important changes. A signature denotes formality and closure; on the other hand, it is just a scribble that might be missed by someone who has just spent an hour going through forms with someone pointing to places where a signature, not to mention some certification or other, is “required.” At the risk of giving away where the argument here is headed, it is worth noting, or asserting, that Judge Wood (like most judges) is often comfortable with, and even very much inclined toward, formality and following statutes and rules when they are on point.⁵ It is one thing for important judges to rise to the occasion, and to draw on their experience and academic skill when statutes are evasive, or even when precedent is weak – in these situations, they are regularly criticized for making law, or to the contrary for declining to improve the world around them. It is quite another to do so when this requires casting aside constitutional or statutory language. As we will see, *Davis v. Combes* was a once-in-a-career opportunity to do something radical with regard to Estate, Insurance, and Divorce Law, and it was likely an opportunity to intervene on behalf of gender equality, or at least unfairly treated women, but it was an opportunity declined or perhaps unnoticed. In defense or in praise of Judge Wood, it should be noted that courts often face the question of whether to enforce contractual (or statutory) requirements or to bend a bit and attempt to discern the intent of the parties. It may be unusual for a circuit court to reverse a lower court on this matter, but here it is indeed more likely than not that Brenda intended to change the beneficiary designation from her husband and daughter to her sister. In legal language we can say that though Brenda did not comply with the stated requirements for changing the beneficiary, she did show “substantial compliance” by entering her sister’s name as the new beneficiary, delivering the document to her employer, and even by removing the document from her bank vault and giving it to her sister. To the extent that appellate cases become known for a single thing, Judge Wood may have decided that the future of the substantial compliance doctrine was the important matter at stake here.

Returning to the details of the case, my guess is that a lawyer arguing on behalf of a client, like David Combes, who was essentially dis-inherited by an unsigned document where a signature was required, would be especially pleased to draw Judge Wood as the decision-maker. In David’s case, where there is room to bypass the spirit of some of Illinois’ laws, it would be reasonable to prefer drawing Judge Wood rather than Judge Posner, for example. The latter might use the occasion to bring into being some new principles of contractual formality, inheritance law, insurance, or optimal intergenerational transfers, as discussed presently. The law in every state makes it quite difficult to disinherit a spouse,⁶ for example, and it is easy to imagine an aggressive judge extending this principle to its interpretation of life insurance policies, especially so when these policies contain the bulk of family assets. Where there is room to enforce the requirement that a document effectively dis-inheriting my client be signed, I

⁵ This tendency is evident from other Essays, in honor of Judge Wood, in this issue of *The University of Chicago Law Review*.

⁶ “49 of the 50 states and the District of Columbia limit freedom of testation vis-à-vis the surviving spouse,” whether by forced heirship, elective share, or community property. T.L. Turnipseed, *Community Property v. The Elective Share*, 72 *La. L. Rev.* 161, 162 (2011).

would want a judge known to enforce legal requirements, rather than one prone to creativity and to fashioning new law. It is only fair to note that Judge Wood may have simply felt bound by Illinois law, which strongly adopts the view that one can dispose of assets one possesses; it practically rejects the Uniform Probate Code's tendency to view a couple as a partnership. Still, David Combes, as a single parent with two young children and a low earned-income history (not to mention an older, but still minor, child for whom he had some responsibility), as well as testimony that a lower court found credible, is a sympathetic plaintiff, and one with the signature requirement on his side. It is not the ideal case to advance the cause of substantial compliance. To be clear, if Brenda had signed the documents favoring her sister over her surviving husband and child, and had told David of her changes, we could be sure Judge Wood would adhere to the Illinois statute's insistence on following the individual property owner's intentions and declarations. As a lawyer, my only hope would be to get Judge Posner rather than Wood, for only an aggressive judge would say that when all the life insurance and circumstances are added together, David had essentially been dis-inherited, and law does not and should not favor such an outcome. While one judge might say that a legislature that allowed a surviving spouse to elect against a will, in order to avoid complete dis-inheritance, signaled that it did not intend equivalent protection for a spouse who was dislocated by a change in insurance beneficiaries, a more aggressive judge might say that the same legislature showed that it wished to protect surviving spouses, and so that principle ought to apply to a case like *Davis v. Combes*. The latter sort of contextual judicial intervention would be easiest – or even only conceivable – when, as in *Davis v. Combes*, the dis-inheritance is accomplished in secrecy and thus does not allow room for a bargain between the spouses while they are alive. It is, after all, possible that had David known that Brenda changed the policies, he would have moved toward divorce, and through this means possibly have secured financial support for himself and the couple's children. To be sure, Brenda's death might have made this strategy of little value, but it is possible that a court supervising the divorce would have required a trust fund in the children's favor.

My suggestion about what an aggressive judge might do, brings us to what we might call a fourth and equally subtle argument in David's favor. It is that while our laws are less explicitly egalitarian than most of Europe's, we essentially have the spirit of dower (or even of forced heirship) in our country. We should not expect lawyers to ask courts to institute laws that are rejected by our legislatures, but it is worth thinking about the spirit of these statutes and their migration into American law. Many statutes (and even Illinois' divorce law) treat the family as a partnership, or simply reflect the view that survivors ought to be supported. Marriage typically promises the surviving spouse something between one-third and two-thirds of the family's estate, whether or not the decedent leaves a will, or even leaves a will that seeks to disinherit the surviving spouse. Even funds given away some time before death to a charity can be clawed back to the estate and subject to forced heirship, and the same is probably true for wealth given away just before divorce.

Outside of Louisiana, our states do not have forced heirship statutes, but they have all taken some steps in the direction of treating a family, and certainly marriage, as a partnership of sorts.⁷ They have Homestead Allowances, for example, so that the survivor is not left without a place to

⁷ La. Civ. Code art. 1493 (2019).

sleep.⁸ Most also ensure that the survivor receives an amount sufficient to support the couple's previous lifestyle for the larger portion of a year.⁹ Community property states treat property acquired during the marriage as equally owned, and divide it accordingly upon death or divorce. Most significantly, nearly all the other states give the survivor the right to *elect against the will*.¹⁰ If the will disinherits the surviving spouse by giving \$1, for instance, the survivor has some months to think about it and then to decline the \$1 and elect to receive one-third or one-half of the "estate." In some states this is the probate estate and in some it is the enhanced, or augmented, estate.¹¹ For our purposes, the details are not important except for two things. First, life insurance is *not* included in the probate estate, and Illinois, the Combes' home state, is neither a community property state nor one that augments estates.¹² In Illinois, one can take a step toward disinheriting a spouse by buying a large amount of life insurance, and naming someone other than the spouse as beneficiary. Note that even in states that, unlike Illinois, claw-back life insurance to the estate, the claw-back applies to expenditures made to purchase insurance, rather than to the proceeds of an insurance policy.¹³ In any event, recall that the battle in our case is not (yet) about a probate or enhanced estate. It is fair to deduce that David and his young children's only hope for money was for the proceeds of the insurance policies.¹⁴

Before putting Judge Wood and the role of the judiciary at the center of the story, it is worth emphasizing the omitted and unknown variables. Perhaps Brenda knew that her sister would be a better caregiver for her children than would David, though it is worth repeating that the lower court found Linda evasive and not credible as a witness; there is no hint that she would be the superior caregiver, and she refused the idea of putting the insurance proceeds in a trust for the children.¹⁵ Still, Brenda may have had faith in Linda, or fears about David's future intentions. She may have sought to change her life insurance policies in order to give her sister funds to help

⁸ For the Illinois version, protecting the surviving spouse (and minor child) while living in the home, see 735 Ill. Comp. Stat. 5/12-901 and 5/12-902 (2019).

⁹ In Illinois, 755 ILCS 5/15-1, the protection is for the cost of living for a nine-month period, with a minimum of \$20,000, and significantly more where there are dependent children.

¹⁰ Georgia, the exception, offers instead a "year's support in the form of property" to a decedent's surviving spouse and minor children. Ga. Code Ann. § 53-3-1 (2018).

¹¹ While an issue of some historic debate, the Uniform Probate Code and the 22 states which follow it include life insurance in the augmented estate. Unif. Probate Code § 2-202–205, 2-208 (amended 2010); see also G. Michael Bridge, Note, *Uniform Probate Code Section 2-202: A Proposal to Include Life Insurance Assets Within the Augmented Estate*, 74 Cornell L. Rev. 511 (1988-1989).

¹² See generally, James J. Carroll, *The Interplay of Probate Assets and Nonprobate Assets in the Administration of a Decedent's Estate*, 25 DePaul L. Rev. 363 (1976). Illinois law does not include life insurance proceeds in the elective share. 755 Ill. Comp. Stat. Ann. 35/2-8 (West 2019).

¹³ Thus, if A buys a policy and names his new partner, G, as the beneficiary of a million-dollar policy, A's surviving spouse, B, might claw back the \$50,000 premium paid for the policy, but not the entire \$1 million dollars payable to G. See Carroll, *supra* note 11.

¹⁴ Students of Trusts and Estates Law may want to know whether David could have elected against the will, if there was one; not least given that Illinois is not a community property state. We can avoid the details here, and note the important point that there were at least three ways for a judge to decide in David's favor, and against Brenda's sister. Most of these methods would have split the difference between the surviving spouse and the named sibling, because the unsigned change-of-beneficiary form affected only one of three insurance policies.

¹⁵ *Davis v. Combes*, No. 98-C-1153, ECF No. 68 at 16, 22 (N.D.Ill. Nov. 1, 2000).

with the task of caring for the surviving children. A philosophically interesting possibility is that Brenda resented and feared David's obligation or inclination to care for the child from his previous marriage. The child was a teenager at the time of Brenda's death and, with the cost of college in mind, Brenda may have been concerned that the family's assets, which she might well have thought of as generated by her rather than by David, would be directed unfairly to that first child. In short, Brenda may have been just the sort of person Illinois law (and then Judge Wood) sought to empower. To be sure, she could have set up a trust in favor of her children, in order to exclude David's first child from access to her assets, but this involves effort and requires some thought about other unforeseen events. If her sister were trustworthy, it would be easier to direct assets to her, and to direct Linda about appropriate expenditures. These seem like reasonable possibilities that might have influenced Judge Wood and the lower court. Without explicit evidence, one or all the involved courts may have hesitated to explain the reasoning in print. On the other hand, it seems unlikely that Judge Wood would reverse the lower court – for it too was aware that Illinois law required a high level of proof before imposing a constructive trust – inasmuch as it knew more about the parties than she would likely have known simply from reading their lawyers' papers.

II. The Role of Gender

I think it is plausible, or perhaps likely, that if the genders were reversed, Judge Wood would have decided the case differently. In an unscientific poll, I have tried these inverted facts on many law professors, educated citizens, and a few elected officials. I ask them, and now my readers, to imagine the case of a well-employed husband, Brian, who has several young children and a stay-at-home wife, Dina, who has occasionally been employed, but who earns much less income than does Brian. The couple does not have much savings, but each has life insurance policies. If Dina dies, Brian will need to hire a child-care person and, if Brian dies, Dina will be quite stressed and will need to replace Brian's income, look for a better-paying job than she has at present, and find enough money to pay for child-care. She will be a single mother with two very young children. Now imagine that not only does Brian die, but also that Dina discovers, when it is too late to react, that he secretly changed the beneficiaries of his life insurance policies to someone other than his spouse. Fortunately for his spouse, one of the changes he sought to make was unsigned, and a signature was required. Lawyers, and even non-lawyer citizens accustomed to secure property rights, tend to like the idea that a person who made money gets to decide how to spend it, but virtually everyone I have asked thinks that – even in Illinois – a court should and will take advantage of the fact that one form was unsigned in order to give the surviving and surprised spouse, Dina, some money. About half of the respondents think courts should find a way to give Dina the proceeds of all the insurance policies, and not just the one that had an unsigned change-of-beneficiary form. Essentially, they find the forced heirship norm attractive, and might even go beyond the rules found around the world. They think of the family as a team, and especially so because Dina was occupied at home in the interest of the family, we might presume, when she could have been out earning money and advancing her own career. If Brian sought to divorce her, everyone thinks that a court should award her (and the children) considerable resources at least until the children are of age. But he did not seek divorce, and instead he died (in this hypothetical) – and secretly changed his insurance policies to disfavor his surviving spouse. It is hard to see why Dina should do any worse in these circumstances than she would have in the event of abandonment and divorce by Brian. Most who think that Brian's

sibling, or another third party, is entitled to one or two of the life insurance policies' proceeds, because Brian is entitled to do with "his" money as he likes, and especially so in Illinois where this intuition is written into the statute, also think the sibling-recipient is morally bound to apply much of the money to the upbringing of Dina's children.

Before turning to the forced heirship principle more directly, it may be useful to restate the point implicitly made here. It is that Judge Wood has been influenced by evolving sentiments about gender. If the surviving spouse had been female, I think it quite likely that the decision would have drawn on at least two out of three of the arguments advanced by David. There was the failure to sign one of the documents, and then the argument that Brenda broke an implicit agreement. She may even have committed fraud, inducing her spouse to buy life insurance on his own life with her as the beneficiary, but then failing to keep her side of the bargain and, for all we know, planning on this all along. The fact that by all accounts she sought to change the beneficiary without informing David, adds significantly to this version of the story.

It is inappropriate and even beside the point to insist that Judge Wood was wrong and influenced by gender, even though law claims to be neutral about this characteristic. But appellate court decisions are meant to be followed, and it should be noted that the next time a case like *Davis v. Combes* arises, it will likely be a single mother who is left unmoored and without money. On the other hand, as noted presently, perhaps Judge Wood had other fish to fry.

III. Protecting the Abandoned Spouse: Treating Widows as Well as Divorced Parties

I turn now to the observation that the decision in *Davis v. Combes* goes about as far as it can to distance itself from the idea of forced heirship. Again, as a technical matter, the case is not about forced heirship or its American second-cousin, electing against the will (a descendant of dower), because Illinois law does not recapture life insurance into the estate subject to the no-disinheritance principle.¹⁶ Still, it is worth thinking about the comparison among three ways to disappoint, or even cheat, an abandoned spouse. These are: (1) Divorce, followed by a battle over assets and future earnings; (2) Death – where the decedent attempts to dis-inherit the surviving spouse; (3) Death – where there is no will or simply few assets, and where the abandoned spouse is surprised to learn that she or he has been removed as the beneficiary of the insurance policy. I will refer to these three cases as (1) Divorce, (2) Dis-inheriting, and (3) Dis-insuring. It is apparent that the word "abandoned" can be thought of as financial as well as physical abandonment. *Davis v. Combes* is obviously an example of case (3). Case (1) is the most common of the three, and has accordingly received the most statutory and judicial attention. Case (2) falls in between the other two, because of the ability to elect against the will and otherwise ensure a spousal share of the estate. I have already signaled that the major goal of this Part is to advance the argument for treating the three cases alike, based on arguments about equality, partnership, ethical sensibilities, and the potential that (2) and (3) could be turned into (1), by bargain or by preemptory action, unless the fact of (2) or (3) is kept secret. The suggestion is that secrecy is a kind of fraud, and where there is secrecy there is an even stronger

¹⁶ 755 Ill. Comp. Stat. Ann. 30/1-401 (West 2019) ("The designation in accordance with the terms of any insurance... shall not be subject to or defeated or impaired by any statute or rule of law governing the transfer of property by will, gift, or intestacy.")

case for treating the abandoned, or surviving, spouse as well as she (or he) would have been treated in the event of (1), a court supervised divorce.

One problem with this approach is that (2) and (3) are quite different from (1) because in the event of divorce the abandoning spouse enjoys future earnings and these are obviously not available in the event of death. To be sure, the divorcing spouse also has future living costs, especially in the event of a second marriage to someone without wealth or with children to support. For the most part, this difference between abandonment by life or death raises a set of efficiency concerns. It is unwise or politically unacceptable to discourage re-marriage by either spouse or to discourage either from continuing a career or seeking higher earnings, because the income is to be shared. This is a familiar problem in family law, and there is no reason to rehash it here. Here, as in the optimal tax literature, it seems ideal to have an immediate once-and-for-all allocation based perhaps on expected future earnings and costs, but as a practical matter this is difficult. I hope it is acceptable to insist that the allocations normally made in divorce law, or for that matter in forced heirship jurisdictions, are good enough. That is, there may be more money available because the abandoning spouse continues to work, and has not died, but we can imagine that it all works out. Thus, in the case of divorce we might imagine that the abandoned spouse receives half of present wealth as well as half of future income for a period of years (often depending on the age of the children), while the abandoning party can live or develop another family with the remaining half. Meanwhile, if the marriage ends because of death rather than divorce, there is no future income or subsequent family to consider but, somehow, we can imagine that the abandoned family again gets about half (of the smaller amount now available), while the abandoning party is free to allocate the other half as he likes, thus half-satisfying the widely-held view that one who makes money is entitled to dispose of it. It is a sloppy fallback position to be sure, but again it can be superseded by contract or in most cases by a decision to divorce rather than to trust the partner or require a formal trust instrument.

Another, perhaps legalistic, problem is that the suggestion that these three cases ought to be treated alike ignores the existence or absence of implied contracts, signatures on insurance documents, and so forth. The argument here comes close to saying that it should not matter whether Brenda Combes signed or intended to sign the change-of-beneficiary form at her disposal. If her marriage was a partnership, and her partner is entitled to at least half of the available money, then we are close to the forced heirship norm, and far from the American understanding of contract and property law. One response to this (decidedly old-fashioned) objection is that deception makes all the difference. If Brenda had informed David of her decision, he could have sought divorce or agreed to a contract or trust document that would have ensured that the available money was used for the benefit of the couple's children rather than for the benefit of his first child or even to support a lifestyle he might seek with a new spouse after Brenda's death. We do not know Brenda's motivations, and it may be that our ethical sentiments would be on her side rather than David's, if she had reason to fear one of these possibilities. But a legal rule that forces information from her might be a good thing, or even a worthy compromise. The same might be said of many cases of dis-inheritance. The legal way to say this is that deception is a kind of fraud in these cases, and that law can discourage it with a rule that treats the abandoned spouse in cases (2) and (3) about the same as it would in case (1), that of divorce. On the other hand, if there is full disclosure and time to negotiate or seek divorce, then there is a good argument for respecting a decision like that which Brenda made. My argument

for treating (1), (2), and (3) about the same, might be limited for the time being to instances where there is deception at the expense of the abandoned party.

Most lawyers, and certainly Judge Wood, would regard most of the arguments here with some incredulity because these arguments avoid the question of the balance of decision-making authority between legislatures and judge. As we have seen, Illinois law is unfriendly to David Combes, and likely much on Judge Wood's mind. Still, the argument here is made possible by the fact that Brenda failed to sign an important document, and she arguably defrauded her husband and denied him the opportunity to bargain or seek divorce. All this gives a judge the opportunity to innovate. But as for the larger picture, legislatures have worked hard to fashion one's ability to elect against a will, and they have clearly chosen not to fully follow the European model of forced heirship. Similarly, the Illinois legislature could have said that case (3) is to be equalized with case (1), and the rules of division in the event of divorce could be more or less delegated to courts, depending on the legislature's view.

And yet there are important areas of law where the common-law process, even in modern times, has exerted great influence, and judges reason that the legislature can always overrule them with explicit statutes. Thus, comparative negligence came about in some states through aggressive and innovative judges, perhaps motivated by a sense of ethical sensibilities in their surrounding societies.¹⁷ It would be easy to slow down here and just point to the fact that the decedent did not sign her change-of-beneficiary form as required, or that she was party to an implicit or even an explicit contract. But I prefer the more aggressive conclusion that cases (1), (2), and (3) should be treated alike, and that judges can rise to the occasion and make them so, knowing that their judge-made law can be reversed by legislatures or even by state constitutions. In any event, Judge Wood missed an opportunity to be innovative or to explain why this was the wrong case to move law in a direction that seems both ethical and efficient to most observers. It would also have been a direction that would have benefited women in the long run but, unfortunately, the case that came before her involved an abandoned man rather than an abandoned and sympathetic woman.

Finally, it may well be that Judge Wood thought of all this and decided that creating a precedent about formalities, and the substantial compliance doctrine, was more important than the possibilities suggested here. She did, in the end, send the Seventh Circuit firmly in the direction of the substantial compliance doctrine,¹⁸ so that a failure to sign, for example, is not dispositive, and lower courts are encouraged not to take contractual, and perhaps statutory, requirements too seriously. This Essay has suggested that there was something far more interesting and important than substantial compliance at stake in *Davis v. Combes*, but the suggestion may be wrong. Diane Wood is not, of course, a judge to be underestimated.

¹⁷ See John G. Fleming, *Comparative Negligence at Last—By Judicial Choice*, 64 Cal. L. Rev. 239 (1976); William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 Ga. L. Rev. 851 (1981).

¹⁸ *Davis v. Combes*, 294 F.3d 931, 941 (7th Cir. 2002) (“We see no reason not to apply the substantial compliance notion to this issue just as we do in other ERISA-related disputes.”)