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# Wich v. Fleming: The Dilemma of a Harmless Defect in a Will

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WICH V. FLEMING:  
THE DILEMMA OF A HARMLESS DEFECT IN A WILL

The Texas supreme court's decision in *Wich v. Fleming*<sup>1</sup> reaffirms its continuing requirement of strict compliance with the Texas Probate Code. Although thoroughly convinced that the testatrix intended to make a valid will, the court voided the document entirely, merely because the witnesses signed a self-proving affidavit in the will instead of an attestation clause.

This harsh, hypertechnical approach to will execution clashes head-on with modern trends allowing property disposition at death without will formalities. The *Wich* decision illustrates a need for a substantial compliance statute which would solve the dilemma faced by courts when a will has a harmless defect. This Note will first trace the historical development of the Texas will statutes; second, it will examine the *Wich* case and the basis for its reasoning; third, it will discuss the trend towards effectuating a transferor's intent through vehicles other than wills; and finally, it will examine the need for legislative reform in the law of wills by proposing a substantial compliance statute.

### I. DEVELOPMENT OF TEXAS WILL REQUIREMENTS

The current Texas will formalities are deeply rooted in English legal history. The 1540 Statute of Wills,<sup>2</sup> which repealed the common-law rule prohibiting a devise of lands, simply required that testamentary realty gifts be in writing. It did not require the testator himself to write or sign the will, nor did it require witnesses. Needless to say, this required writing did not strongly guarantee genuineness. The oral testament disposing of chattels was valid until the enactment of the Statute of Frauds in 1677.<sup>3</sup> This legislation required the devise of chattel property to be in writing. Further, to prevent fraud, the Act required a will disposing of land to be attested to by three or four subscribing witnesses. The testator was also required to sign the will.<sup>4</sup>

In 1840, the Congress of the Republic of Texas enacted a general statute of wills, copied almost literally from the Virginia statute of wills.<sup>5</sup> Since the Virginia statute closely followed the Statute of Frauds, and since no

<sup>1</sup>*Wich v. Fleming*, 652 S.W.2d 353 (Tex. 1983).

<sup>2</sup>2 Hen. VIII, c. 1, § 1 (1540), cited in 9 E. BAILEY, TEXAS LAW OF WILLS § 268 (Texas Practice § 268 (Texas Practice 1968)).

<sup>3</sup>29 Car. II, c. 3 § 5 (1677), cited in 9 E. BAILEY, TEXAS LAW OF WILLS § 268 (Texas Practice 1968).

<sup>4</sup>See generally 9 E. BAILEY, TEXAS LAW OF WILLS §§ 268, 276 (Texas Practice 1968).

<sup>5</sup>Act of Jan. 28, 1840, § 2 H. GAMMEL, LAWS OF TEXAS, 341 (1898) cited in 9 E. BAILEY, TEXAS LAW OF WILLS § 276 (Texas Practice 1968).

outstanding changes have been made in the Texas will statutes since 1840, it is correct to say that the modern Texas Wills Act follows the Statute of Frauds legislation. The only basic difference is that the Texas law prescribes the same formalities for devising personal property as it does for devising land.

The 1840 Texas Act's provision with respect to attesting witnesses remains virtually the same today as when originally enacted. Section 59 of the Texas Probate Code sets out three requirements for a will which is not wholly in the testator's handwriting: 1) the will must be in writing; 2) it must be signed by the testator or by another person for him by his direction and in his presence; and 3) two credible witnesses must attest to the will by signing their names to it in the presence of the testator.<sup>6</sup>

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<sup>6</sup> Every last will and testament, except where otherwise provided by law, shall be in writing and signed by the testator in person or by another person for him by his direction and in his presence, and shall, if not wholly in the handwriting of the testator, be attested by two (2) or more credible witnesses above the age of fourteen (14) years who shall subscribe their names thereto in their own handwriting in the presence of the testator. Such a will or testament may, at the time of its execution or at any subsequent date during the lifetime of the testator and the witnesses, be made self-proved, and the testimony of the witnesses in the probate thereof may be made unnecessary, by the affidavits of the testator and the attesting witnesses, made before an officer authorized to take acknowledgments to deeds of conveyance and to administer oaths under the laws of this State. Provided that nothing shall require an affidavit, acknowledgment or certificate of any testator or testatrix as a prerequisite to self-proof of a will or testament other than the certificate set out below. The affidavits shall be evidenced by a certificate, with official seal affixed, of such officer attached or annexed to such will or testament in form and contents substantially as follows:

THE STATE OF TEXAS

COUNTY OF \_\_\_\_\_

Before me, the undersigned authority, on this date personally appeared \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_, known to me to be the testator and the witnesses, respectively, whose names are subscribed to the annexed or foregoing instrument in their respective capacities, and, all of said persons being by me duly sworn, the said \_\_\_\_\_, testator, declared to me and to the said witnesses in my presence that said instrument is his last will and testament, and that he had willingly made and executed it as his free act and deed for the purposes therein expressed; and the said witnesses, each on his oath stated to me, in the presence and hearing of the said testator, that the said testator had declared to them that said instrument is his last will and testament, and that he executed same as such and wanted each of them to sign it as a witness; and upon their oaths each witness stated further that they did sign the same as witnesses in the presence of the said testator and at his request; that he was at that time eighteen years of age or over (or being under such age, was or had been lawfully married, or was then a member of the armed forces of the United States or of an auxiliary thereof or of the Maritime Service) and was of sound mind; and that each of said

In addition, since 1955, the statute has authorized use of a self-proving affidavit, signed by the testator and the witnesses. This affidavit allows the will to be admitted to probate without the witnesses' courtroom testimony as to the will's proper execution, thus facilitating the probate process. The statute provides the form of the self-proving affidavit in full. Texas was the second state to implement the use of the self-proving affidavit as a way to simplify probate.<sup>7</sup> Since wills are generally admitted to probate as a matter of routine, the procedure serves a useful function.

However, self-proving affidavits soon caused a significant problem. Some attorneys took short-cuts in drafting wills, usually with one of two results: 1) the testator would sign the will and the self-proving affidavit, while the witnesses signed only the latter; or 2) the testator and the witnesses signed only the self-proving affidavit.<sup>8</sup> Litigation challenging will validity followed, and in Texas, the shortcuts proved lethal. The recent case of *Wich v. Fleming*<sup>9</sup> reaffirmed Texas' hard-line, conservative position of voiding the will entirely due to strict construction of section 59 of the Probate Code, notwithstanding the testator's obvious intent.

witnesses was then at least fourteen years of age.

\_\_\_\_\_
   
Testator
   
\_\_\_\_\_
   
Witness
   
\_\_\_\_\_
   
Witness

Subscribed and acknowledged before me by the said \_\_\_\_\_, testator, and subscribed and sworn to before me by the said \_\_\_\_\_ and \_\_\_\_\_, witnesses, this \_\_\_\_\_ day of \_\_\_\_\_ A.D. \_\_\_\_\_.

(SEAL)

(Signed) \_\_\_\_\_
   
(Official Capacity of Officer)

A self-proved will may be admitted to probate without the testimony of any subscribing witness, but otherwise it shall be treated no differently than a will not self-proved. In particular and without limiting the generality of the foregoing, a self-proved will may be contested, or revoked or amended by a codicil in exactly the same fashion as a will not self-proved.

TEX. PROB. CODE ANN. § 59 (Vernon 1980).

<sup>7</sup>The earliest legislation was enacted in Nevada in 1953, followed by Texas in 1955. Most similar legislation in other states resulted after the approval of the affidavit in the Uniform Probate Code in 1969. Today, at least thirty states authorize the use of self-proved wills in some form. Schneider, *Self-Proved Wills—A Trap for the Unwary*, 8 N. Ky. L. Rev. 539 (1981).

<sup>8</sup>*Id.* at 542.

<sup>9</sup>652 S.W.2d 353 (Tex. 1983).

## II. WICH: THE COURT MANDATES STRICT COMPLIANCE

When one examines the facts in *Wich* and then looks at the supreme court's decision, it becomes obvious that the law has become a sword rather than a shield. As construed by this case and its predecessor decisions, the Texas statute becomes a trap for the unwary instead of protecting the testator.

Dr. Mabel Giddings Wilkin, a psychiatrist, executed her will at a bank in Brenham, Texas, in front of her attorney and a bank employee. She signed her name on the will's last page. The witnesses did not sign immediately below her signature as no spaces were provided on the will. Instead, they signed at the end of the self-proving affidavit located at the bottom of the *same page* in blanks marked "WITNESSES." Mrs. Wilkin also signed below the self-proving clause, as provided in section 59. The witnesses testified to these facts in lengthy depositions filed with the court, reiterating their intent to act as witnesses, after contestants brought suit on the form technicality. All parties to the lawsuit agreed that Dr. Wilkin and the witnesses believed they were validly executing the will.<sup>10</sup>

The county court denied probate, and the proponents appealed. In a common-sense decision, the court of appeals reversed the decision and ordered the will be admitted to probate.<sup>11</sup> The appeals court held the self-proving clause to be superfluous, thus validating the witnesses' signatures as proper will attestation.

The contestants asserted that *Boren v. Boren*<sup>12</sup> controlled the case's disposition. In *Boren*, the testator signed a one page will. The affidavit with the testator's signature and the witnesses' signatures was on a separate page.<sup>13</sup> In denying probate, the Texas supreme court held that the self-proving clause was not part of the will and that executing a valid will was a condition precedent to the usefulness of a self-proving affidavit. The court said the affidavit's only purpose was to dispense with witness testimony at probate.<sup>14</sup> The *Boren* decision spawned numerous progeny, all holding that an attached, witnessed self-proving affidavit could not validate an "unwitnessed will."<sup>15</sup> Two courts of appeals cases, *Cherry v. Reed*<sup>16</sup>

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<sup>10</sup>*Id.* at 354.

<sup>11</sup>*Fleming v. Wich*, 638 S.W.2d 31 (Tex. App. — Houston [14th Dist.] 1982), *rev'd* 652 S.W.2d 353 (Tex. 1983).

<sup>12</sup>*Boren v. Boren*, 402 S.W.2d 728 (Tex. 1966).

<sup>13</sup>*Id.* at 728.

<sup>14</sup>*Id.* at 729.

<sup>15</sup>*Shriners Hospitals for Crippled Children v. St. Jude Children's Research Hospital, Inc.*, 529 S.W.2d 767 (Tex. Civ. App. — Dallas 1981, no writ); *Rodgers v. Estate of King*, 614 S.W.2d 896 (Tex. Civ. App. — Waco 1981, no writ); *In re Estate of McDougal*, 552 S.W.2d 87 (Tex. Civ. App. — Tyler 1977, writ *ref'd n.r.e.*); *McLeroy v. Douthit*, 535 S.W.2d 771 (Tex. Civ. App. — Fort Worth), writ *ref'd n.r.e. per curiam*, 539 S.W.2d 351 (Tex. 1976); *In re Estate of Pettengill*, 508 S.W.2d 463 (Tex. Civ. App. — Amarillo 1974, writ *ref'd n.r.e.*).

<sup>16</sup>*Cherry v. Reed*, 512 S.W.2d 705 (Tex. Civ. App. — Houston [1st Dist.] 1974, writ *ref'd*

and *Jones v. Jones*,<sup>17</sup> held that even if the witnesses' signatures on the self-proving affidavit were on the will's last page, they still did not attest the will.

However, the court of appeals in *Fleming v. Wich* wisely declined to follow the *Boren* rule: "After careful consideration, we have concluded that to apply the *Boren* rule to the facts before us would be to exalt form over substance. The *Boren* rule should not be blindly applied to defeat the right of the testatrix to dispose of her estate as she desired."<sup>18</sup>

The court distinguished *Fleming v. Wich* from *Jones v. Jones* on the basis of strong evidence presented by the proponents in *Wich*.<sup>19</sup> The attorney who prepared the will and the bank's assistant cashier both swore that they signed as witnesses to the will execution at the request of Dr. Wilkin and in her presence. Also, Dr. Wilkin signed both the will and the self-proving provision. Thus, the high level of proof offered by the proponents significantly affected the court's ruling. In effect, the appeals court held that since witnesses had signed the instrument in the testatrix's presence, that an attestation *had* occurred.

The appeals court further bolstered its decision by citing the language in *Tucker v. Hill*.<sup>20</sup> In *Tucker*, the court said section 59 is "silent as to where the witnesses must sign a will."<sup>21</sup> Also, the "intent to act as a witness may be evidenced by the facts and circumstances surrounding the signing of the will."<sup>22</sup> Therefore, in *Fleming v. Wich*, the witnesses' signatures on the affidavit, coupled with testimony proving their intent, established that the will had indeed been attested.

Unfortunately, the Texas supreme court disagreed with this reasoning and reversed the court of appeals, invoking the *Boren* "condition prece-

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n.r.e.). The writing consisted of two pages. The first page contained will provisions, and two lines of the last paragraph carried over onto the second page. Following these lines was the self-proving clause, signed by the testatrix and the witnesses. The testatrix signed only the self-proving clause.

<sup>17</sup>*Jones v. Jones*, 630 S.W.2d 645 (Tex. Civ. App. — Dallas 1980, no writ). The testator signed an attestation clause, immediately followed by the self-proving affidavit which contained two sets of signatures. One set was on the same page as the end of the purported will. The court held that neither set was affixed to the will as required by *Boren* or section 59. The facts in this case most closely resemble those in *Fleming v. Wich*, but the *Jones* opinion makes no mention of witnesses' testimony or other evidence at the trial court.

<sup>18</sup>638 S.W.2d at 35-6.

<sup>19</sup>*Id.* at 36.

<sup>20</sup>*Tucker v. Hill*, 577 S.W.2d 321 (Tex. Civ. App. — Houston [14th Dist.] 1979, writ ref'd n.r.e.). The will consisted of two typewritten pages. The decedent signed her name at the bottom of the first page, while two witnesses signed below an attestation clause on the second page. Even though the attestation clause referred to the first page as the "foregoing instrument," the court concluded the clause to be part of the will and admitted it to probate.

<sup>21</sup>*Id.* at 322.

<sup>22</sup>*Id.* at 323. See also *Fowler v. Stagner*, 55 Tex. 393, 400 (1881). The court said it is not material in what part of the instrument the witnesses sign their names if it is done with the purpose of attesting the will as subscribing witnesses.

dent" language in voiding the will.<sup>23</sup> In doing so, the supreme court took a highly technical, mechanical approach towards the problem. The court reasoned that the will and the self-proving affidavit require different types of witness intent and that each clause serves different purposes: "The attesting witness is expressing his present intent to act as a witness. The witness executing a self-proving affidavit is swearing to the validity of an act already performed."<sup>24</sup>

In effect, the majority opinion created a new law of intent, holding that a witness cannot intend to attest to a will and execute a self-proving affidavit at the same time. This conclusion contradicts decisions which hold that a witness may indeed sign with dual intention. The Texas supreme court has repeatedly interpreted the term "subscribe" in section 59 to include a signature made as part of an affidavit or acknowledgment if the evidence shows the signer also intended to attest and subscribe. In *Franks v. Chapman*,<sup>25</sup> a witness signed below a writing containing an acknowledgment, while in *Saathoff v. Saathoff*,<sup>26</sup> a witness signed below a simple affidavit. Both signatures were held to be proper attestation, despite the fact that they were made to serve two purposes.

Further, the *Wich* court refused even to consider evidence of the witnesses' intent. The court held that the *Boren* rule applies even if the witnesses are available to prove proper execution when the will is offered for probate.<sup>27</sup> The court relied on *McGrew v. Bartlett*,<sup>28</sup> in which the will was denied probate because the witnesses signed only the self-proving affidavit, even though one witness testified that she and the other witness thought they were signing in the right places. The *Wich* majority stressed its view that "even clear evidence of intent cannot abrogate the mandatory provisions of the probate code."<sup>29</sup>

Justice Robertson's strong dissent points out that section 59 of the Probate Code requires only that witnesses attest the will.<sup>30</sup> It does not specify the signature location nor does it say that the self-proving affidavit cannot fulfill the function of an attestation clause.<sup>31</sup> Justice Robertson also

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<sup>23</sup>652 S.W.2d at 354.

<sup>24</sup>*Id.* at 313.

<sup>25</sup>*Franks v. Chapman*, 64 Tex. 159, 160 (1885).

<sup>26</sup>*Saathoff v. Saathoff*, 101 S.W.2d 910, 912 (Tex. Civ. App. — San Antonio 1937, writ ref'd).

<sup>27</sup>652 S.W.2d at 355.

<sup>28</sup>*McGrew v. Bartlett*, 387 S.W.2d 702 (Tex. Civ. App. — Houston 1965, writ ref'd). The *Wich* court ignores the factual basis for the *McGrew* decision. The testator and witnesses in *McGrew* signed only the self-proving affidavit, despite the fact that blanks were provided following the will. These unsigned blanks thus evidenced greater possibility of fraud. In *Wich*, the testatrix signed the will, and the witnesses signed following the self-proving affidavit in the only blanks provided for them. Thus, the *Wich* facts can be easily distinguished.

<sup>29</sup>652 S.W.2d at 353. See *Morris v. Morris*, 642 S.W.2d 448, 450 (Tex. 1982).

<sup>30</sup>652 S.W.2d at 356. (Robertson, J., dissenting).

<sup>31</sup>In effect, the supreme court has altered section 59 to read: "(witnesses) shall subscribe their names thereto above the text of a self-proving affidavit in their own handwriting in

suggested that the self-proving affidavit may serve the same function as an attestation clause, proving that the witnesses, at the testator's request and in his presence, have signed their names as witnesses to the testator's will.<sup>32</sup> In other words, the self-proving affidavit should be considered part of the will instead of a "separate" document, and affidavit signatures should be viewed as signatures to the will. In addition, the dissent pointed out that only one other state, Montana, has adopted *Boren's* reasoning.<sup>33</sup> Three states—Oklahoma, Kansas and Florida—have specifically held that *Boren* is not controlling in their states.<sup>34</sup> In these states, the Wilkin will would have been admitted to probate instead of totally voided.

The dissent emphasized that *Boren* has led to "harsh results and created a trap for the testator whose lips are forever sealed. The time has come to reexamine the hypertechnical compliance with the Probate Code as required by *Boren*."<sup>35</sup>

The *Wich* facts leave virtually no room for doubt as to the testatrix's intention to create a will. Unlike the "attached" self-proving affidavit in *Boren*, the self-proving affidavit in *Wich* was on the same page as the last provision of Dr. Wilkins. Justice Robertson stated:

The witnesses' signatures here are *less than six inches* beneath that of the textatrix, Dr. Wilkin. Had that six inches in which the self-proving affidavit is typed been left blank, there would be no dispute as to proper attestation. Here, there is clearly no evidence of fraud or undue influence to destroy the credibility of the witness' attestation. I would hold that a self-proving affidavit can satisfy the attestation requirements of Section 59 of the Probate Code, where, as here, witnesses testified unequivocally that they intended to attest the will of the testatrix. To hold otherwise is manifestly unjust. *Boren v. Boren* and its progeny should be overruled.<sup>36</sup>

The majority opinion evidences some uneasiness, stating that "if the requirements for disposing of property by will are to be altered, it is the

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the presence of the testator."

<sup>32</sup>652 S.W.2d at 356.

<sup>33</sup>Matter of Estate of Sample, 175 Mont. 98, 572 P.2d 1232 (1977).

<sup>34</sup>Matter of Estate of Petty, 227 Kan. 697, 608 P.2d 987 (1980) (court stated its policy was to uphold wills if the form of the will substantially complied with the requirement of the statute); In re Estate of Cutsinger, 445 P.2d 778, 782 (Okla. 1968) (court said the self-proving affidavit may serve as attestation of a will since the attestation clause need not be in any particular form); In re Estate of Charry, 359 So.2d 544, 545 (Fla. Dist. Ct. App. 1978) (court expressly rejected the *Boren* reasoning stating the "Texas view places form above substance and we decline to follow it.") Though not cited in the *Wich* dissent, a New York case held likewise. In re Leitstein's Will, 46 Misc.2d 656, 260 N.Y.S.2d 406 (N.Y. Surrogate's Ct. 1965).

<sup>35</sup>652 S.W.2d at 356 (Robertson, J., dissenting).

<sup>36</sup>*Id.* at 357-58 (emphasis added).



province of the Legislature, not this Court, to effect those changes."<sup>37</sup> The majority also notes that the legislature has amended section 59 twice since the *Boren* decision<sup>38</sup> without modifying the statutory requirements at issue. The court construed this as acquiescence in its statutory interpretation.<sup>39</sup>

Clearly, the supreme court totally disregarded the testatrix's intent, relying instead on the past interpretation given section 59. Through its sterile formalism and disregard of cases recognizing dual intent in signing, the court has extended the *Boren* rule to a case involving absolutely no suggestion of fraud. Certainly, in the case of "separate" self-proving affidavits attached to an unsigned will, there is more opportunity for fraud. (Even in the *Boren* case, however, it must be remembered that the testator signed the self-proving affidavit.) But in *Wich*, the self-proving affidavit was on the will's last page. Mrs. Wilkin had signed the instrument *twice*. Logic and reason suggest giving the will effect, especially since will execution formalities are designed to prevent fraud and foster the testator's intent. Legal formalities should not promote frustration of a testator's desires to dispose of his property. A lay person could not read section 59 and be assured that he could properly execute a will, given the *Wich* court's statutory construction. The result punishes a lay person or one with unknowledgeable counsel.

Why does the court demand such strict compliance with its statutory interpretation? Is the court seeking to fulfill the purposes underlying will formalities? These purposes are defined by Gulliver and Tilson in their seminal article:<sup>40</sup>

- 1) "ritual" function — to impress the transferor with the significance of his actions, ensuring the will was really intended to be a testament and not simply causal language;
- 2) "evidentiary" function — to prevent fraud, lapse of memory, perjury and forgery; and
- 3) "protective" function — to reduce undue influence and imposition upon the testator.<sup>41</sup>

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<sup>37</sup>*Id.* at 355.

<sup>38</sup>These ministerial reenactments consisted of first changing the age of majority to 18 and then restoring the last sentence of section 59, which had been mistakenly omitted.

<sup>39</sup>The court fails to recognize that this reasoning means that the legislature has also re-enacted *Franks v. Chapman*, 64 Tex. 159 (1885) (dual intent of witness in signing is permissible) at least five times since 1885.

<sup>40</sup>Gulliver and Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1 (1941).

<sup>41</sup>*Id.* at 3-5.

Taken together, these functions serve another end, the channeling function . . . when the formalities are complied with, they make testation routine, eliminate contest, reduce probate costs and court time, and facilitate good estate planning. When, however, there has been a mechanical blunder, it does not follow that the purposes of the wills act have been disserved.

Langbein, *Crumbling of the Wills Act: Australians Point the Way*, 65 A.B.A.J. 1192, 1194

None of these purposes justifies the *Wich* result. First of all, Dr. Wilkin believed the signing of the self-proving affidavit to be a valid will execution. She certainly understood the solemnity of her actions. Secondly, the physical evidence of attestation does not change with substituting an attestation clause for a self-proving affidavit. It should be noted that section 59 does not require an attestation clause, although most wills utilize one. Thus, the actual "subscription" by the witnesses satisfies any needed evidentiary protection.<sup>42</sup> Third, protecting against undue influence or imposition is not enhanced by denying probate since both the textatrix and witnesses subscribed this will exactly as they would any other attested will.

In summary, the basic purposes underlying the will statutes do not justify the *Wich* result.<sup>43</sup>

The supreme court's decision becomes especially harsh when contrasted with the modern trend of transferring property without will formalities.

### III. THE TREND AWAY FROM WILL FORMALITIES

#### A. Will Substitutes

There are at least three asset categories, known as nonprobate assets, which are not subject to will disposition or to intestate distribution rules. These categories have developed recently as society has become more flexible and less preoccupied with formal ceremony. In effect, these devices serve as will substitutes, transferring property at death without formal attestation requirements. Examples are:

- 1) property passing at death pursuant to terms of a contract, as in life insurance policies and under contributory retirement plans;<sup>44</sup>
- 2) property settled in a revocable inter vivos trust; and
- 3) property passing by right of survivorship, as in a valid joint

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(1979).

<sup>42</sup>Possibly, fraud could be more likely in a *Boren* set of facts where the signatures do not appear on the same paper but on one which is physically detached.

<sup>43</sup>One fundamental proposition is that, under a legal system recognizing the individualistic institution of private property and granting to the owner to determine his successors in ownership, the general philosophy of the courts should favor giving effect to an intentional exercise of that power. This is commonplace enough, but it needs constant emphasis, for it may be obscured in *inordinate preoccupation with detail or dialectic*. A court absorbed in purely doctrinal arguments may lose sight of the important and desirable objective of sanctioning what the transferor wanted to do, even though it is convinced that he wanted to do it . . . [*Will formalities*] should not be revered as ends in themselves, enthroning formality over frustrated intent.

*Gulliver and Tilson*, *supra* note 40, at 2-3 (emphasis added).

<sup>44</sup>*See* H.J. Mullins & Co. v. Thompson, 51 Tex. 7 (1879); Kirkland v. Kirkland, 359 S.W.2d 651 (Tex. Civ. App.—Fort Worth 1962, writ ref'd n.r.e.); Buehler v. Buehler, 323 S.W.2d 67 (Tex. Civ. App.—Texarkana 1959, writ ref'd n.r.e.).

bank account with right of survivorship.

These devices will be examined in detail to exemplify the trend towards effectuating a transferor's intent.

### B. *Life Insurance*

The dominant will substitute of modern practice is life insurance.<sup>45</sup> The only significant estate asset that many people have is life insurance proceeds. A beneficiary designation under the insurance contract has precisely the same function as a will. The transfer at death from the insured to his beneficiary takes place without regard to will formalities. This will substitute is legitimate in that, though it functions as a will, its forms adequately serve the functions of the will requirements. The insured signs a written purchase application in which he designates his beneficiary, and he also makes payments to the insurer. These "formalities" satisfy evidentiary and cautionary policies, though not in strict compliance with the wills statute.

### C. *Revocable Inter vivos Trusts*

Revocable inter vivos trusts are especially indicative of the movement away from strict compliance with the wills statutes. The past few decades have seen an increased use of the trust arrangement in settling family wealth; it has become an indispensable tool in estate planning.<sup>46</sup>

The typical revocable trust reserves to the settlor the right to trust income for life and the power to revoke or amend, and provides for the disposition of the trust principal on the settlor's death.<sup>47</sup> Several early cases held the transfers invalid as attempted testamentary dispositions not executed with the requisites of a will or as incomplete transfers due to the settlor's retention of control over the property.<sup>48</sup> However, in 1943, the Texas legislature enacted a statute providing that all trusts were revocable unless expressly made irrevocable.<sup>49</sup> The courts were reluctant to recognize the statute, but finally did so in 1968.<sup>50</sup> Thus, the use of revocable trust transfers, in which the settlor conveys legal title to a trustee, was definitely affirmed as a will substitute.

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<sup>45</sup>Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 508-09 (1975).

<sup>46</sup>See Johanson, *Revocable Trusts and Community Property: The Substantive Problems*, 47 TEX. L. REV. 537 (1969).

<sup>47</sup>*Id.* at 540.

<sup>48</sup>See *Fleck v. Baldwin*, 141 Tex. 340, 172 S.W.2d 975 (1943): "[One] cannot retain the use and full enjoyment of his property during his lifetime and provide that at his death it shall go to someone other than his legal heirs, *without making a will*, executed under the forms and solemnities provided by the statutes on the subject of wills." (emphasis added).

<sup>49</sup>TEX. REV. CIV. STAT. ANN. art. 7425b-41 (Vernon 1960).

<sup>50</sup>*Land v. Marshall*, 426 S.W.2d 841, 844 (Tex. 1968).

The trend towards revocable trusts developed even further, culminating in the landmark decision of *Westerfield v. Huckaby*.<sup>51</sup> *Westerfield* established the validity of revocable declarations of trust in Texas, despite the lack of will formalities. The *Westerfield* facts illuminate the testamentary nature of the transfer.

In 1966, Virginia Miller executed two declarations of trust and quit-claimed to *herself* as trustee certain real property. The trusts provided that properties in trust were for the use and benefit of a Mr. Huckaby and that upon the settlor's death, the successor trustee was to deliver the properties outright to Huckaby. Huckaby himself was named as the successor trustee.<sup>52</sup>

Mrs. Miller reserved the right to collect any income from the properties and also the power to revoke the trust at any time or to change beneficiaries.<sup>53</sup> In upholding the trust's validity, the court noted a marked shift in judicial decisions recognizing the validity of such property transfers.<sup>54</sup> The court distinguished this trust from a will by saying the trust took effect immediately, while a will becomes operative only upon death.<sup>55</sup> Practically, however, they serve the same purpose—to transfer property at death.

The opinion further delineated the advantages of the trust, saying that a document which can stand as a trust is not invalid because it avoids the need for a will.<sup>56</sup> If a property owner can find inter vivos means of property disposition that will render a will unnecessary, he has a right to use it. It is immaterial that the transfer motive is to obtain will advantages without making one.<sup>57</sup>

This Note does not quarrel with the validity of such trusts; indeed, they serve a valuable purpose in avoiding probate expenses and allowing flexibility in estate planning.<sup>58</sup> However, the trust document itself, simple in

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<sup>51</sup>*Westerfield v. Huckaby*, 474 S.W.2d 189 (Tex. 1971).

<sup>52</sup>*Id.* at 190-91.

<sup>53</sup>*Id.*

<sup>54</sup>*Id.* at 192. The court noted that, were it to follow the 1935 Restatement of Trusts, it would strike down the Miller trusts. However, the 1959 edition of the Restatement of Trusts expressly adopted such trusts as the better and prevailing rule.

<sup>55</sup>*Id.* at 193. The trust provided that, should Mrs. Miller become legally incapacitated, the successor trustee would be appointed in her place. Thus, conceivably, this trustee could be charged with fiduciary duties to the life beneficiary, Mrs. Miller. This is the slender thread the court used to call the transfer "non-testamentary."

<sup>56</sup>*Id.* It should be noted that the advantages of a living trust lessen because of independent administration of estates in Texas: the executor manages the probate estate without court supervision, just like the trustee of a revocable trust.

<sup>57</sup>*Id.*

<sup>58</sup>Section 58(a) of the Probate Code specifically authorizes pour-over trusts in which a settlor can state in his will that he devises his property to pass to the trustee of any existing trust, even though the settlor retains extensive control over the trust property. In other words, the probate estate pours over into the trust and the trust terms then control disposition of the assets.

form, *with no attestation*, obviously seeks to dispose of property at death, despite the court's theory of its being "presently operative." The court was satisfied that the written trust expressed Mrs. Wilkin's desires and took a common-sense approach to the trust, validating it as a will substitute. Thus, absent fraud, the court was willing to effectuate the transferor's intent.<sup>59</sup>

Mrs. Miller was able to dispose of property by drawing up a simple trust agreement and signing it, while the *Wich* will, though witnessed by two persons, was void due to form technicality. The reasoning of the cases is diametrically opposed.

#### D. *Bank Accounts with Survivorship Rights*

The second will substitute category consists of property passing by right of survivorship. This includes joint bank accounts with survivorship provisions, P.O.D. accounts, and Totten trusts. In 1979, the Texas legislature passed Chapter XI of the Texas Probate Code, the first attempt to comprehensively codify rules dealing with non-probate transfers at death. It dealt with account agreements between depositors and financial institutions.<sup>60</sup> Chapter XI, which deals with multiple-party accounts, exemplifies the legislature's willingness to provide useful tools for expediting access to funds at death through various vehicles other than wills. Again, no will formalities are required.

"Joint accounts" are defined as accounts payable on request to one or more of two or more parties whether or not there is a right of survivorship.<sup>61</sup> If a party who dies has previously signed a written agreement providing that his share will "survive" to the surviving party, the sums remaining on deposit are owned by the surviving party.<sup>62</sup> Thus, a joint account with right of survivorship essentially acts like a will, transferring the decedent's share to the survivor.<sup>63</sup> Once again, no will formalities are mandated for these transfers other than the deceased person's signature on an account card.

The P.O.D. account, newly introduced by Chapter XI, is billed by some as the "Poor Man's Will" and promises to provide a very useful tool for

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<sup>59</sup>Johanson points out that revocable trusts do not satisfy the three functions underlying will formalities, especially as regards the evidentiary function. He notes that the informality attending the making of such trusts could be a cause for concern. Johanson, *supra* note 46, at 550-53.

<sup>60</sup>McLaughlin, *Joint Accounts, Totten Trusts, and the Poor Man's Will*, 44 TEX. B.J. 871 (1981).

<sup>61</sup>TEX. PROB. CODE ANN. § 436(4) (Vernon Supp. 1982-1983).

<sup>62</sup>TEX. PROB. CODE ANN. § 439(a) (Vernon Supp. 1982-1983).

<sup>63</sup>Section 441 of the Probate Code, however, gives effect to the account transfers on a contract theory, specifically stating the transfers are not to be considered testamentary.

effecting simple, expeditious transfers at death.<sup>64</sup>

During the original payee's lifetime, P.O.D. accounts are owned and payable to him. When the original payee dies, the account is owned by and payable to the P.O.D. payee or payees who are then surviving.<sup>65</sup> These accounts are also basically death-transfer vehicles, with rights to final withdrawal attaching at death.

Another death transfer vehicle, the Totten trust, has gained statutory recognition in Texas in Chapter XI.<sup>66</sup> These "A in trust for B" accounts are treated basically as revocable gifts owned beneficially by the designated trustee and payable to him during his lifetime. If the beneficiary survives the trustee, he owns and may withdraw the account unless there is clear and convincing evidence of a contrary intent.<sup>67</sup> Again, the legislature has streamlined account handling through withdrawal rights, seeking to give effect to the transferor's intent.

In coming years, the joint accounts, P.O.D. accounts and Totten trusts are likely to become popular tools in asset disposition. The new statutes clarify and simplify ownership transfer rules for depositors, and allow property transfer at death without a need for will compliance.<sup>68</sup>

The above concepts can be easily illustrated by a hypothetical. Mrs. Miller, an elderly woman, sets up a valid P.O.D. account with a \$250,000 deposit, payable to Mr. Huckaby when she dies. She merely signs an account card at the bank. She then draws up a will leaving property worth \$400 to her Aunt Lou. (Mrs. Miller has her life-long attorney help her write the will.) Mrs. Miller and two witnesses go through a formal execution ceremony, Mrs. Miller signing the will and the self-proving clause, and the witnesses signing only the self-proving clause. Under current Texas law, the \$250,000 is Mr. Huckaby's when Mrs. Miller dies. But under the *Wich* decision, even though the court believes Mrs. Miller intended to make a valid will, the will is void and the \$400 will pass by intestate succession. The disparities and inequities are obvious.

What, then, is the remedy for the *Wich* dilemma? The supreme court has reaffirmed its technical statutory interpretation of section 59 through the *Wich* decision, despite persuasive arguments against the *Boren* rule. The court is unwilling to relax its stringent view of will formality requirements; at the same time, it emphasizes the legislature's right to effect changes in will requirements.<sup>69</sup>

Thus, the resolution of the *Wich* dilemma clearly will not be found in the judiciary; the remedy must instead be found in legislatively reform-

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<sup>64</sup>McLaughlin, *supra* note 60, at 874.

<sup>65</sup>TEX. PROB. CODE ANN. §§ 438(b), 439(b), 446 (Vernon Supp. 1982-1983).

<sup>66</sup>McLaughlin, *supra* note 60, at 874.

<sup>67</sup>TEX. PROB. CODE ANN. § 439(c) (Vernon Supp. 1982-1983).

<sup>68</sup>McLaughlin, *supra* note 60, at 875.

<sup>69</sup>652 S.W.2d at 355.

ing the law of wills. This is a reform whose time has come, given the trends towards effectuating a transferor's intent.

#### IV. THE NEED FOR LEGISLATIVE REFORM IN THE LAW OF WILLS

##### A. *Doctrine of Substantial Compliance*

When a formal will defect is found, as in *Wich*, the Texas courts have denied themselves all flexibility, no matter how sympathetic the devisees or how remote and undeserving the intestate takers.<sup>70</sup> Countless hardships have been worked on those whose devises have been voided due to "harmless" errors.

The rule of literal compliance with will formalities operates to relieve the courts from having to engage in fact-finding concerning decedents' intentions. When due execution is found, testamentary intent is presumed.<sup>71</sup> This presumption is certainly functional. It simplifies probate since the court need only inquire as to whether the formal checklist has been met. It establishes prima facie evidence that the will was validly executed. However, when an execution defect is found, proof of testamentary intent is absolutely forbidden, often leading to harsh, inequitable results.

The comparative informality of will substitutes renders the literal compliance rule more indefensible than ever.<sup>72</sup>

Commentators have espoused benefits of a doctrine called "substantial compliance."<sup>73</sup> This doctrine would enable proponents of a defectively executed will to prove that the particular defect was harmless to the purposes of the will formalities. Thus, the proponents would be permitted to prove in cases of defective execution what they are now entitled to presume in cases of due execution — the existence of testamentary intent and the fulfillment of Wills Act purposes.<sup>74</sup> The doctrine would admit to probate a noncomplying instrument that the court determined was truly a testator's attempt at a valid will.

The wills statutes would be retained in their present form, with this additional amendment.

In any case where the (here insert either "court" or "jury" depending upon the desires of the legislature) is convinced that a document signed by a testator represents in whole or in part his good faith attempt to devise his property at death, then such document shall be enforced according to its terms. This section applies on-

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<sup>70</sup>Langbein, *supra* note 45, at 500-01.

<sup>71</sup>*Id.* at 501-02.

<sup>72</sup>*Id.* at 504.

<sup>73</sup>*Id.* See also Comment, *An Analysis of the History of Present Status of American Wills Statutes*, 28 OHIO ST. L. J. 293 (1967).

<sup>74</sup>Langbein, *supra* note 45, at 513.

ly to testamentary documents, which, except for the requirement of the testator's signature

- 1) are found not to be executed according to section 59 of the Probate Code; and
- 2) the deficiency mentioned in 1) above is the only barrier preventing such testamentary document from otherwise being enforced according to its terms.

The phrase "testamentary document" includes any writing which, under applicable law, would normally be required to be executed according to the Probate Code.<sup>75</sup>

With such a substantial compliance doctrine, the courts, on an ad hoc basis, would be able to validate clearly meritorious wills without strict compliance with the statute of wills.<sup>76</sup> Wills now denied probate, solely because of technical errors, could thus be given effect. Evidentiary formalities such as the testator's signature would remain indispensable, whereas "misplaced" witness signatures, as in *Wich*, could easily be shown to be harmless.

The incentive for due execution would remain by requiring high standard of proof. Lawyers generally opt for maximum formalities in order to be in the strongest position to defend the will. The substantial compliance statute would pertain only to those wills where the testator, acting without counsel or with incompetent counsel, has failed to comply fully with the Wills Act formalities.<sup>77</sup>

Certainly, not every defectively executed instrument would result in a contest. The proponents' burden of proof on many issues would be so heavy that they would forego the trouble of pointless litigation; on other issues, the proponents' burden would be so light that potential contestants would not bother to litigate.<sup>78</sup> South Australia, a common-law jurisdiction, enacted a substantial compliance statute in 1976. The statute is functioning smoothly and has not increased litigation.<sup>79</sup>

#### B. *Savings Statute for Defective Self-Proved Wills*

Alternatively, if the legislature is unwilling to enact such a broad substantial compliance statute, at the very least it should enact a savings statute specifically designed for self-proved wills which are defectively exe-

<sup>75</sup>Comment, *supra* note 73, at 322.

<sup>76</sup>*Id.*

<sup>77</sup>*Id.*

<sup>78</sup>Langbein, *supra* note 45, at 525. An equivalent substantial compliance doctrine has been functioning smoothly in the sphere of the major will substitute, life insurance, for decades, in situations where there are technical violations of the testament-like formalities for change of beneficiary designations. *Id.* at 527-29.

<sup>79</sup>*Id.* at 525.

<sup>80</sup>Langbein, *supra* note 41, at 1194-95.



cuted. The statute could validate wills where the witnesses signed only the self-proving clause, but did so with the intent to attest to the will. Like the substantial compliance doctrine, the savings statute would cast the burden of proof upon the will proponents to show that the documents expressed the testator's true intentions. This proof could be accomplished through credible testimony of attesting witnesses. If the court believed that the misplaced signatures were a harmless defect, the will then could be admitted to probate just as though duly executed. Surely the law should protect a testator who thought he did everything that was necessary to execute a valid will. A savings statute would not lead to fraud if the courts maintained control over the standard of proof required.<sup>80</sup>

#### V. CONCLUSION

The decision in *Wich v. Fleming* exemplifies the Texas Supreme Court's rigid view toward compliance with the statute of wills. When contrasted with the informalities of present-day will substitutes, the result appears even more inequitable.

The court has shown itself unwilling to adopt a more flexible, common-sense approach towards will formalities, thus the legislature must solve the dilemma. A substantial compliance statute would enable the courts to adjudicate whether or not formal defects are harmless. At the very least, a savings statute should be enacted for self-proved wills with misplaced signatures. The legislature should recognize the court's undue preoccupation with technicality and reform the law of wills.

*Melissa Webb*

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<sup>80</sup>See Schneider, *supra* note 7, at 551-52.