

Legislative Lapses: Some Suggestions for Probate Code Reform in Washington¹

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I. INTRODUCTION

The first legislation on the subject of wills and probate in the State (then Territory) of Washington was enacted in 1854,³ and the first reported appellate case to consider the subject was handed down in 1860.⁴ Since those beginnings there have been numerous further enactments, in the form of amendments and wholly new codifications, and hundreds of cases interpreting and reinterpreting those enactments and the common law. It is, then, not surprising that in the course of more than a century there have been a few lapses in the continuity and consistency of both the legislative and the decisional law of wills. Many of these lapses have escaped notice over the years merely because the situations with which they deal have not arisen. Others have actually caused difficulties for practitioners and courts, but they have yet to be satisfactorily clarified or reconciled. While courts can, of course, use their ingenuity to avoid irrational results or to fill statutory gaps, it is far better that these problems be addressed by the legislature and resolved in a manner that takes into account more than the individual circumstances of the parties to a particular lawsuit.

The purpose of this Article is to point out a number of lapses in the law of wills which were encountered in the course of research for a treatise on that subject, and to suggest possible ways to reconcile or eliminate them. Because that research was probably the first attempt in some time to look at the entire law of wills in Washington as a unified whole, it

1. This article is based in part on material in M. REUTLINGER & W. OLTMAN, *WASHINGTON LAW OF WILLS AND INTESTATE SUCCESSION* (Butterworth 1985). Copyright 1985 by the author and by Butterworth Legal Publishers. Parts of this article also appeared in abbreviated form in the *WASHINGTON STATE BAR NEWS*, Mar. 1986, at 27.

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3. 1 Wash. Sess. Acts p. 315.

4. *Ward v. Moorey*, 1 Wash. Terr. 104 (Sup. Ct. 1860).

afforded the first opportunity in many years to discover and consider some of the more obscure (as well as the more obvious) lapses in the law. In addition, the Article will discuss areas of the law that are nominally consistent, but in my opinion are in need of rethinking in light of current social or legal developments.

II. AMBIGUOUS LANGUAGE

In several instances the legislature has used statutory language that is ambiguous or incomplete, or that seems to permit a reading which leads to a result that the legislature probably did not intend. Usually this has occurred when the statute was amended in some respect and the new language failed to express clearly the legislature's intention. The following are instances in which I believe the legislature did not say, or say clearly, what it meant to say; however, in the event the legislature meant just what it said, I am expressing disagreement with the legislature's position and suggesting an alternative approach.

A. *Interested Witnesses*

At common law, attesting witnesses to a will who were also named as beneficiaries, or had some beneficial interest, were considered incompetent to act as witnesses; therefore, if their signatures were necessary to make up the number of witnesses required by the statute, the will would fail.⁵ This rule has evolved to the point that under the Uniform Probate Code there is no such thing as an "interested witness": all otherwise-competent persons are eligible to sign a will.⁶ Under present Washington law, an interested witness is competent to witness a will, but his legacy is void unless one of two conditions is met: (1) there are "two other competent witnesses" to the will (in which case the interested witness is a supernumerary, and his entire legacy is valid); or (2) he would have been entitled to

5. State *ex rel.* Schirmer v. Superior Court, 143 Wash. 578, 581, 255 P. 960, 962 (1927); T. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 65 at 309 (2d ed. 1953) [hereinafter ATKINSON].

6. UNIFORM PROBATE CODE § 2-505 (1977) provides:

Who May Witness.—

(a) Any person generally competent to be a witness may act as a witness to a will

(b) A will or any provision thereof is not invalid because the will is signed by an interested witness.

some amount if the will were not established (in which case he receives that amount or the amount of the legacy, whichever is less).⁷ The first condition presents certain language problems.

1. "Witnesses" Required for Supernumerary Status

The statute requires signing by two other *competent* witnesses, but does not specify two other competent *subscribing* witnesses. This could be read, as it has been in other jurisdictions,⁸ to mean that if any two persons who are competent to testify observed the signing of the will, this suffices to render the interested witness a supernumerary. Such a reading is literally possible, but it would be incorrect for several reasons. First, there is a well-settled meaning of the word "witness" in the context of a will, and that meaning is *subscribing* witness, one who has signed the will.⁹ Second, the very next phrase in the statute uses the same term "competent witness," but in a context that clearly requires the interpretation "subscribing witness": "a mere charge on the estate of the testator for the payment of debts shall not prevent his creditors from being competent witnesses to his will."¹⁰ Because being a creditor would not ordinarily render one "incompetent" except arguably (if not for this proviso) in the sense of "incompetent to subscribe as an interested witness," the reference in this latter phrase must be to subscribing witnesses.¹¹ The ambiguity is cleared up easily by adding the word "subscribing" before "witnesses" in reference to those who render an interested witness a supernumerary.

7. WASH. REV. CODE § 11.12.160 (1985). The full text of the statute is:

All beneficial devises, legacies, and gifts whatever, made or given in any will to a subscribing witness thereto, shall be void unless there are two other competent witnesses to the same; but a mere charge on the estate of the testator for the payment of debts shall not prevent his creditors from being competent witnesses to his will. If such witness, to whom any beneficial devise, legacy or gift may have been made or given, would have been entitled to any share in the testator's estate in case the will is not established, then so much of the estate as would have descended or would have been distributed to such witness shall be saved to him as will not exceed the value of the devise or bequest made to him in the will; and he may recover the same from the devisees or legatees named in the will in proportion to and out of the parts devised and bequeathed to him.

8. See, e.g., *In re Johnson's Will*, 175 Wis. 1, 183 N.W. 888 (1921). See 2 W. BOWE & D. PARKER, PAGE ON WILLS § 19.104 (rev. ed. 1960) [hereinafter PAGE ON WILLS].

9. See *supra* note 8.

10. See *supra* note 7 for text of WASH. REV. CODE § 11.12.160.

11. See 2 PAGE ON WILLS § 19.96 at 8 (explains the origin of the creditor-incompetency rule).

2. Competency of Interested Witnesses

The statute does not specifically state that interested witnesses are competent to attest a will. As indicated above, at common law they were not, so this cannot be taken for granted. In fact, the aforementioned proviso regarding creditors lends credence to the interpretation that interested witnesses are not competent: by stating that the indirect interest of creditors will not render them incompetent, the statute seems to imply that other forms of interest may indeed have such an effect. Nevertheless, the statute would be meaningless if it did not contemplate the possibility of a valid will with competent but interested witnesses. If interested witnesses were incompetent, there would be no need to declare void the legacy of an interested, nonsupernumerary witness. Thus the statute has been interpreted to render interested witnesses competent.¹²

Unfortunately, including interested witnesses in the statute's definition of "competent" witnesses raises another difficulty caused by imprecise wording. The statute by its terms requires two other "competent," not "competent disinterested" witnesses to attest in order to render an additional interested witness a supernumerary. If interested witnesses are themselves competent, the following situation could well arise: a will attested by three witnesses, all of whom are interested. Each might point to the other two "competent" witnesses and declare himself a supernumerary under the literal language of the statute. Clearly the legislature did not contemplate such a result, which would award full legacies to each of three interested witnesses, but deny any legacy to both if there were only two. The obvious intent of the statute is to prevent an interested witness whose attestation is necessary to validate a will from taking under it any more than he would take without it. It is necessary, therefore, to view the witnesses as a group: if all three had not attested, the will would fail; and all three, viewed together, cannot (by definition) all be supernumeraries.¹³ It follows that what the statute means to require is two other competent *disinterested* witnesses.

This interpretation of the statute is consistent with the

12. *Schirmer*, 143 Wash. at 581, 255 P. at 961.

13. Compare the situation in which there are two disinterested and three interested witnesses. All three can be supernumeraries because elimination of all three together still leaves two valid witnesses.

clause discussed earlier which provides that the interest of creditors does not render them incompetent. Because no interest of a witness renders the witness incompetent in the sense of being unable to attest, the purpose of the creditor clause must be to make it clear that a witness/creditor is not prevented from taking under the will (*i.e.*, is not prevented from being treated as disinterested). It follows that when section 11.12.160 uses the term "competent," it does not mean "qualified to attest," but "disinterested."

Washington's legislature is not the first to create the sort of confusion illustrated above;¹⁴ but the fact that it has company does not mean that the confusion should be allowed to continue. The problem of the meaning of "competency" can be easily resolved by the simple addition of the words "and disinterested" following the word "competent" in the first phrase of section 11.12.160, and the words "considered both competent and disinterested" in place of the word "competent" in the second phrase.¹⁵ The better wording, then, would be

All beneficial devises, legacies, and gifts whatever, made or given in any will to a subscribing witness thereto, shall be void unless there are two other competent and disinterested witnesses to the same; but a mere charge on the estate of the testator for the payment of debts shall not prevent his creditors from being considered both competent and disinterested witnesses to his will.¹⁶

B. Revocation, Revival, and Republication

1. Revocation

Section 11.12.040 of the Revised Code of Washington refers to the manner in which a will can be revoked.¹⁷ The first such

14. See, *e.g.*, 2 PAGE ON WILLS, *supra* note 8, § 19.104 at 208; Note, SUPER-NUMERARY WITNESSES AND EVASIONS OF THE WILLS ACT, 53 HARV. L. REV. 858 (1940).

15. See, *e.g.*, Iowa Code Ann. § 633.281 (West 1964).

16. In suggesting amended language, no attempt has been made to modernize existing language (*e.g.*, the elimination of redundancies such as "devises, legacies, and gifts" and "made or given"), since every such change in isolation carries with it a potential inconsistency with other sections not so amended. However, if the legislature accepts this article's suggestion for a comprehensive review and redrafting of the probate code, such modernization should be a part of the process.

17. WASH. REV. CODE § 11.12.040 (1985) provides:

A will, or any part thereof, can be revoked

(1) By a written will; or

(2) By being burnt, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself or by

manner is "[b]y a written will." While this appears to be a simple enough method, it is an unnecessary source of potential confusion. True, a "written will" can, and usually does, revoke (in whole or in part) an earlier will, either expressly through a revocation clause or by implication through inconsistency. However, a "written will" need not do so: it may merely add provisions that neither state an intent to revoke nor are inconsistent with any provision of the earlier will. For example, the first will might give "my car to X," and have no residuary clause, leaving the rest of the testator's estate undisposed of. The second will might give "my house to Y," without purporting to affect the first disposition.¹⁸ Does the first revoke the second in any way? Surely not: both should be valid. While a contrary interpretation would not be likely, it is certainly possible.¹⁹ The statute should say exactly what it means, which presumably is that a will can be revoked by a written will "which revokes the prior will expressly or by inconsistency."²⁰ This language would also make it clear that inconsistency in a later will or codicil does revoke the former will by implication. A codicil, for example, might be said merely to "supersede," rather than "revoke," an inconsistent part of the will. This distinction can be significant in the context of the revival statute.

2. Revival

a. *Re-execution and Republication*

Washington has what is sometimes referred to as an "anti-revival statute." According to section 11.12.080 of the Revised Code of Washington,²¹ if after making a will the testator executes a "second will," the revocation (by physical act or other-

another person in his presence and by his direction. If such act is done by any person other than the testator, the direction of the testator and the facts of such injury or destruction must be proved by two witnesses.

18. Whether this second will is characterized as a "will" or a "codicil," its effect as not revoking the first should be the same. See *In re Whittier's Estate*, 26 Wash. 2d 833, 847, 176 P.2d 281, 288 (1947) ("whether a particular testamentary instrument is a codicil or a later will depends upon the intention of the testator or testatrix as indicated by the words used in the instrument together with the admissible evidence of the surrounding circumstances"). See also *infra* text accompanying notes 218-41.

19. See Holt, *Revocation by Subsequent Instrument in Alabama: The Strange Case of Bruce v. Sierra*, 20 ALA. L. REV. 66 (1967).

20. See UNIFORM PROBATE CODE § 2-507 (1977).

21. WASH. REV. CODE § 11.12.080 (1985) provides:

If, after making any will, the testator shall duly make and execute a second will, the destruction, cancellation, or revocation of such second will shall not revive the first will.

wise) of the second does not revive the first.²² While this effect of revoking a revoking will would seem counter-intuitive—simply not what the average testator tearing up his second will would expect—it is the law in a number of states. The theory is that revocation occurs instantly when the second will is executed, and subsequent destruction or revocation of the second cannot, therefore, revive the first.²³

Prior to its most recent amendment in 1965, the statute (in conformity with those in several other jurisdictions) specifically permitted revival if: (1) the testator's intent to revive the first will "appear[ed] by the terms" of the revocation of the second; or (2) the testator "duly republish[ed]" his first will.²⁴ The 1965 amendment to section 11.12.080 omitted both exceptions.

Given the absolute language of the present statute and the apparently deliberate omission of the qualifying language quoted above, it is not only clear that language of "intent to revive" in a revoking instrument or accompanying a revoking action will not have that effect, but it is also arguable that wills revoked by a "second will"²⁵ now cannot be revived at all, even by republication. This interpretation, however, would be difficult to defend. Republication by subsequent will or codicil is usually nothing more than the equivalent of an incorporation by reference of the earlier instrument in the later.²⁶ In

22. Presumably "second will" means "second will that revokes the first expressly or by implication." This is the same ambiguity as exists in § 11.12.040, discussed *supra* notes 17-19 and accompanying text.

23. 2 PAGE ON WILLS, *supra* note 8, § 21.54; *In re Estate of Neubert*, 9 Wash. 2d 678, 686, 369 P.2d 838, 843 (1962). The two other positions taken by American courts are, generally: (1) that a revoking instrument is ambulatory and of no effect until the testator's death, and so its revocation before then always leaves the first will unrevoked; and (2) that the first will is revived, but only if the testator so intended. See 2 PAGE ON WILLS *supra* note 8, § 21.54; ATKINSON, *supra* note 5, § 92. As will be seen, the latter is the position taken by Uniform Probate Code § 2-509. The Uniform Probate Code provision went through many transmigrations. When it took the form, at an early stage, of an anti-revival statute, the rationale given was simply that revival would require a showing of testator intent, that this would entail admission of parole evidence, and that such an approach "violates the whole policy" of "requiring testamentary intent to be established by a properly executed written document." National Conference of Commissioners on Uniform State Laws, UNIFORM PROBATE CODE § 2-508, Comment at 55 (Fourth Working Draft 1968). The drafters eventually overcame their reluctance to permit extrinsic evidence.

24. Rem. Rev. Stat. § 1405.

25. The statute does not purport to affect revival following revocation of the first will by physical act, for example, an attempt to erase cancellation lines previously drawn across the document.

26. ATKINSON, *supra* note 5, § 90-91; 2 PAGE ON WILLS, *supra* note 8, § 23.5.

fact, even if the second will has not been revoked, the traditional view is that a codicil to the first (revoked) will not only revives the first by republication, but it revokes, or "squeezes out," the second by implication.²⁷ Surely, a codicil to the first will should have this effect if the second has already been revoked.

What the legislature likely intended when it "streamlined" the revival statute was to make it clear that the mere act of revocation of the second, revoking will would not suffice to revive the first will. Read without any implication from the previous language, it does not (and should not) imply that other usual forms of revival (such as republication and re-execution) are no longer available.²⁸

b. *The "Second Will"*

Section 11.12.080 of the Revised Code of Washington prevents a will's revival whenever the testator has executed a "second will." There is no further definition or explanation of what constitutes a "second will" for these purposes. At present, the general definition of "will" in section 11.02.005(8) includes all documents executed "as required by [section] 11.12.020 and includes all codicils."²⁹ Taken literally, this means that whenever a testator executes a second will or codicil,³⁰ whether or not it purports to revoke any or all of the first

27. See, e.g., *In re Wilson's Estate*, 397 P.2d 805, 808 (Wyo. 1964); 2 PAGE ON WILLS, *supra* note 8, § 21.54 at 586.

28. This intention might be made clear by restoring some language to this effect, bringing the statute into conformity with the restrictive revival statutes in many other states. See, e.g., Bird, *Revocation of a Revoking Codicil: The Renaissance of Revival in California*, 33 HASTINGS L.J. 357 (1981) [hereinafter "Bird"]; Zacharias & Maschinot, *Revocation and Revival of Wills*, 25 CHI.-KENT L. REV. 185, 211-12 (1947) [hereinafter "Zacharias & Maschinot"]. However, as will be seen, a much more drastic alteration of the revival statute would be preferable.

29. WASH. REV. CODE § 11.12.020 (1985) contains the formal requirements (writing, attestation, etc.) of a will.

30. "Codicil" is defined by WASH. REV. CODE § 11.02.005(9) (1985) as any instrument "validly executed in the manner provided by this title for a will and that refers to an existing will for the purpose of altering or changing the same . . ." Thus the term "will" literally means "will or codicil," either because a codicil is an instrument executed as required by § 11.12.020, or because (by § 11.02.005(8) (1985)) "will" expressly "includes all codicils." It is not clear whether the latter ambiguous phrase is intended to equate wills with codicils, or merely to state that where a will is referred to, all of its codicils are included in the reference. See the discussion *infra* note 36. If so, the addition of the word "its" where indicated would greatly lessen the confusion.

UNIFORM PROBATE CODE § 1-201(48) simply states that "'will' includes codicil . . ." It may be significant, as indicated in note 36, *infra*, that when the anti-revival

will, the first will is not "revived" by revocation of the second. Of course, if the second will did not "revoke" the first, there is no need for its revival.³¹ But it is unclear whether it was intended that all "second wills," including all codicils, "revoke" a superseded will (or will provision) so as to necessitate revival.³²

For example, if we assume that a will can be partially or totally revoked by a second will inconsistent with or partially modifying the first, but lacking an express revocation clause,³³ the statute apparently prevents revival of a first will so revoked. Moreover, if the second "will" is only partially inconsistent with or partially modifies the first, it is in effect only a codicil, at least if the testator intended both "wills" to stand together.³⁴ Does, then, such a subsequent codicil "revoke" an inconsistent part of a will so that the destruction of the codicil does not "revive" that part?

At common law, revocation of a codicil did reinstate the part of the will which had been altered, because the codicil was not effective until the testator's death.³⁵ If the testator gave his entire estate to A and then executed a codicil giving \$1,000 to B, the destruction of the codicil would leave standing the original gift to A. If "second will" in the Washington statute includes "codicil," then destruction of a codicil leaves revoked what the codicil had purported to alter. But it is possible to read "second will" as including only instruments that stand independently and dispose of the testator's entire estate, and thus not as including codicils.³⁶ If the legislature indeed wishes to prevent the "revival" of a part of a will altered by a later-

statute was last amended (1965), § 11.02.005(8) read simply: "[w]ill" includes all codicils."

31. See *supra* note 22.

32. Cf. *Timberlake v. State-Planters Bank of Commerce and Trusts*, 201 Va. 950, 957, 115 S.E.2d 39, 44 (1960) (no need to "revive" will revoked by subsequently-revoked instrument).

33. See, e.g., *In re Edwall's Estate*, 75 Wash. 391, 395, 405, 134 P. 1041, 1042, 1046 (1913); Annot., 59 A.L.R. 2d 11 (1958); ATKINSON, *supra* note 5, § 87; 1 PAGE ON WILLS, *supra* note 8, § 21.42. Again, the revocation statute should make this clear. See § B.1 above.

34. The codicil would have to meet the requirements of WASH. REV. CODE § 11.02.005(9). See text accompanying notes 231-41 *infra*.

35. See *In re Estate of Hering*, 166 Cal. Rptr. 298, 300, 108 Cal. App. 3d 88, 92 (1980); Annot., 7 A.L.R.3d 1143, 1153-55 (1966).

36. This is how the early New York and more recent California courts have interpreted similar statutes. See *Bird*, *supra* note 28, at 367-74. The courts apparently avoided the definitional problem that "will" includes "codicil" by reasoning that this only means that when the statute refers to a "will," it also refers to all of that will's

revoked codicil, it should adopt express language to that effect, as other states have done.³⁷ The frequency with which the legislature has made changes in the language of statutes in disregard of the effect of those changes on other statutes, as illustrated by much of this article, gives one pause before assuming that the legislature intended the apparent effect of applying all of the current revival/codicil language together. However, instead of advocating the addition of clarifying language to the anti-revival statute, I believe a totally different approach should be taken to the problem of revival.

c. A Better Approach to Revival

While some clarifying language would make the present anti-revival statute more certain, it might be better to abandon altogether the present statute.

A cogent argument can be made in favor of the "automatic revival" approach of the common law.³⁸ As stated earlier, the present statute is counter-intuitive. A lay testator who revokes his first will by making an inconsistent gift in a second will, and who then tears up the second, would most probably and most logically believe that his first will, no longer burdened by the now-extinct second will, stood as before.³⁹ Only a little less likely is the case of the testator who has revoked his first will

codicils; therefore a "second will" simply means "a second will and that will's codicils," rather than "a second will or codicil." *Id.*

Although the New York and California statutes apparently did not have the additional language found in present WASH. REV. CODE § 11.02.005(8) (1985), which includes in "will" all instruments executed with testamentary formalities, neither did Washington have that additional provision when § 11.12.080 was enacted: former § 11.02.005(8) (1965) stated simply that "[w]ill" includes all codicils." *See supra* note 30. Moreover, at that time the distinction between "will" and "codicil" had (and may still have) considerable significance. *See* text accompanying notes 231-41. It is thus unclear whether the legislature originally intended to exclude codicils from the amended section 11.12.080, and if so whether it intended to alter the meaning of that section to include them when it later amended section 11.02.005(8). The latter at least seems doubtful.

One early review of revival statutes declared flatly that the (former) Washington statute permits revival only of the "entire first will," because "partial revival is not mentioned." Zacharias & Maschinot, *supra* note 28 at 142. By this reasoning, codicils were not contemplated by the original revival statute at all.

37. *See, e.g.*, the New York statute, which refers to a subsequent will that "revokes or alters" the first will. N.Y. EST. POWERS & TRUSTS LAW § 3-4.6 (McKinney 1981).

38. *See* ATKINSON, *supra* note 5, § 92 at 475.

39. "It is natural, however, for one unfamiliar with the technicalities of the law to assume that any will which he has properly executed will be effective so long as it is the only will which he leaves on his death." Ferrier, *Revival of a Revoked Will*, 28 CALIF. L. REV. 265, 273 (1940) [hereinafter "Ferrier"].

by an express revocation clause in a second will.⁴⁰ (The testator who wished to revoke the second without reviving the first could do so by expressly revoking the first as well.) The automatic revival approach seems particularly desirable when applied to a codicil that merely modifies, without expressly revoking, a part of the will.⁴¹ As one court vividly expressed the problem:

Indeed, for one to meet the Grim Reaper with an intact will in his hand, which conflicts with no testamentary instrument then in existence, is, to say the least, a paradoxical approach to an intestate demise.⁴²

Nevertheless, it has been argued that the testator may have forgotten about his prior will, or have intended to die intestate despite his being in possession of the first will.⁴³ Although this criticism has little if any application to such cases as the true codicil, which expressly refers to and modifies the first will, experience in other jurisdictions has demonstrated the difficulty of attempting to apply different revival rules for "wills" and "codicils."⁴⁴ A separate rule for codicils would also doubtless raise the distinction between wills and codicils—already riddled with technicalities in Washington—to

40. As stated by the Virginia Supreme Court:

If a testator . . . puts a revocation provision in a will which he knows he may change at pleasure and which he knows will not be effective until he dies, it would seem to be wholly illogical to say that if he afterwards destroyed the will with intent to revoke it, he did not thereby destroy all of it, but that, regardless of his intention, the revocation clause, although without physical form or existence, remained alive and vital with power to destroy all the wills he had ever written.

Timberlake v. State-Planters Bank of Commerce and Trusts, 201 Va. 950, 957, 115 S.E.2d 39, 44 (1960).

One authority takes the position that, at least in such a case of express revocation, the lay testator would expect his first will to remain revoked. 2 PAGE ON WILLS, *supra* note 8, § 21.54 at 443. It is, of course, just such disagreement and uncertainty in the speculation as to "usual expectations" that makes proper formulation of an absolute rule such as § 11.12.080 so difficult.

41. See Ferrier, *supra* note 39, at 275. Interestingly, the original Uniform Probate Code proposal for a liberalized revival statute specifically required "clear and convincing evidence" of the testator's intent to revive, *unless* the second instrument was a codicil revoking the first by inconsistency, in which event the evidentiary burden was on the party asserting *lack* of intent to revive. National Conference on Commissioners of Uniform State Laws, Uniform Probate Code Section 2-508, Reporter's Note at 55 (Fourth Working Draft, 1968).

42. Poindexter v. Jones, 200 Va. 372, 383-84, 106 S.E.2d 144, 151 (1958).

43. 2 PAGE ON WILLS, *supra* note 8, § 21.54 at 443; Bird, *supra* note 28, at 377.

44. See Bird, *supra* note 28.

new heights of absurdity.⁴⁵ All in all, it seems preferable to accept the occasional inadvertently-revived will. At least one can be assured that the earlier will was *at one time* an expression of the testator's wishes;⁴⁶ and in any event, wherever possible the law favors constructions that avoid intestacy.⁴⁷

In the alternative, a compromise position could be adopted that attempts to take into account the intent of the testator in revoking the second will. The statute would create a presumption of revival (or non-revival), rebuttable by evidence—intrinsic or extrinsic—of a contrary intent. This is the approach of the Uniform Probate Code,⁴⁸ and it has been adopted in many other states.⁴⁹ Furthermore, it is a variation on the Washington statute as it existed before 1965.⁵⁰ This approach has the obvious appeal of eliminating the inflexibility of a rigid rule of either automatic revival or automatic non-revival, and of taking into account what the testator actually intended by his act of revocation.

The primary criticism of such a rule is that, to the extent it permits admission of extrinsic evidence of intent, there is a danger of fraud and false testimony.⁵¹ To some extent, this danger can be alleviated by imposition of a high, "clear, cogent, and convincing" standard of proof.⁵² But even if there is no way to achieve both flexibility and absolute safety from fraud,⁵³ there are factors that favor the admission of extrinsic

45. See the discussion of the definition of "codicil" *infra*, text accompanying notes 231-41.

Nor would it be a good idea for the statute to distinguish express from implied revocations. Not only would this exalt the happenstance of form over substance, it would do so in a context which would still be counter-intuitive for the lay testator.

46. See Ferrier, *supra* note 39, at 272-73.

47. 2 PAGE ON WILLS, *supra* note 8, § 30.14.

48. UNIFORM PROBATE CODE § 2-509.

49. 2 PAGE ON WILLS, *supra* note 8, § 21.55 at 444; ATKINSON, *supra* note 5, § 92 at 475-76.

50. See text accompanying note 24.

51. See, e.g., 2 PAGE ON WILLS, *supra* note 8, § 21.54 at 443; Bird, *supra* note 28, at 377. The drafters of the Uniform Probate Code were themselves torn between certainty and flexibility, with the latter finally prevailing. Bird, *supra* note 28, at 378.

Of course, this same conflict between an absolute rule and permitting extrinsic evidence of intent arises in many areas of probate law, including others discussed in this article. Each should be decided on its own particular merits, in context, and not by a general position of admission or exclusion for all circumstances.

52. See note 145 and accompanying text. See also the early draft of the Uniform Probate Code draft quoted in Note 41, *supra*.

53. "No rule can be worked out which will avoid the dangers of oral evidence on the one hand and which will give effect to the actual intention of the testator in the particular case, on the other." 2 PAGE ON WILLS, *supra* note 8, § 21.54 at 443.

evidence in this situation.

As a general matter, even if extrinsic evidence is not admitted to prove the testator's intent, under the present statute it is already admissible to prove that the testator did indeed execute a revoking second will, and then destroyed it, leaving his first will revoked. Here the opportunity for fraud is at least as great as, if not greater than, that accompanying the issue of intent.⁵⁴ Moreover, the admission of extrinsic evidence has ample precedent in present procedure when the second will was revoked by physical act. Under the Uniform Probate Code, if the revocation of the second will is by physical act, either the circumstances of revocation or the declarations of the testator (at the time or thereafter) are admissible to indicate an intent to revive the first will.⁵⁵ This is in keeping with the general policy of admitting extrinsic evidence of revocation by physical act because such an act is inherently ambiguous regarding the testator's intention.⁵⁶ Extrinsic evidence is commonly admitted to show that the testator's intent was "conditional" only and therefore the doctrine of dependent relative revocation should apply to nullify the revocation.⁵⁷ Thus, if the evidence shows that a testator revoked his second will under the mistaken belief that he was reviving his first, unaware that an anti-revival statute would prevent such a result, dependent relative revocation can be invoked to nullify the conditional ("dependent") revocation of the second will, leaving it intact.⁵⁸ The better use of that evidence (where applicable) is to revive the first will—the testator's actual intent—rather than return to the conditionally-revoked second will,

54. See, e.g., *Ferrier*, *supra* note 39, at 272; *Bird*, *supra* note 28, at 377. As one court has stated: "Under such a rule the most solemn and deliberate will of a testator may be refused probate on the testimony of a witness, . . . that he saw the testator write and sign a later will which revoked the will now proffered." *Timberlake v. State-Planters Bank of Commerce and Trusts*, 201 Va. 950, 957, 115 S.E.2d 39, 44 (1960).

This prospect is especially troubling when viewed against the Washington law of lost wills. Despite the strictness of the lost wills statute (WASH. REV. CODE § 11.20.070) regarding proof of a lost will's contents, apparently in Washington a lesser standard of proof will suffice to prove that the lost will revoked a prior will. See *In re Neubert's Estate*, 59 Wash. 2d 678, 686, 369 P.2d 838, 843 (1962).

55. UNIFORM PROBATE CODE § 2-509(a).

56. See *ATKINSON*, *supra* note 5, § 88 at 454-59; 2 *PAGE ON WILLS*, *supra* note 8, § 21.57 at 447.

57. *Id.*; *Crosby v. Alton Ochsner Medical Fdn.*, 276 So.2d 661, 667-68 (Miss. 1973).

58. See, e.g., *In re Estate of Alburn*, 18 Wis.2d 340, 118 N.W.2d 919 (1963). Of course, the doctrine should be applied only where there is reason to believe the testator would have preferred the second will to stand rather than die intestate.

which is merely the testator's assumed preference if his actual intent (the first will) cannot be carried out.⁵⁹

As for a written revocation of the second will by a third, the Uniform Probate Code limits evidence of intent to revive to that contained in the third will itself.⁶⁰ There may be some theoretical justification for this distinction. Some jurisdictions do not permit dependent relative revocation where the revocation was in writing, because there is not the "inherent ambiguity" of a physical act to permit the introduction of extrinsic evidence.⁶¹ No Washington court, however, appears to have taken this position. But whatever the theoretical parallel to physical revocation, the instance of the third will revoking the second, *where the third contains express language of intent to revive the first*, is really an instance of republication, or at least incorporation by reference of the first will into the third. As set out above in detail, this probably is still permissible under the present Washington statute (although here it would be accomplished by one document instead of two). If it is not permissible, it should be.

While an argument can be made for admitting extrinsic evidence even in the case of a written revocation,⁶² it is largely a moot point. If the third will contains a revocation clause, it likely will be one that revokes "all prior wills and codicils"—the standard opening to a modern will—and thus revokes the first will as well as the second. If the third expressly revokes the second *only*, and is not totally inconsistent with the first, this singling out of the second without affecting the first would seem to be a sufficient manifestation that the first was intended to be revived. If, finally, the third merely revoked the second by inconsistency, chances are good that the third is either inconsistent with the first as well, or that it largely repeats the latter's provisions and so in effect "revives" them.

This leaves only the question of whether the "presumption" in the absence of sufficient extrinsic evidence of intent

59. See NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM PROBATE CODE § 2-508, Comment at 97 (Third Working Draft 1967), quoted in Bird, *supra* note 28, at 379-80.

60. UNIFORM PROBATE CODE § 2-509(b).

61. See *Crosby*, 276 So. 2d at 667-68.

62. For example, a revocation of a second will without mention of whether this also is meant to revive a still-existing first will might be considered analogous to an ambiguous provision; extrinsic evidence is generally admissible to resolve ambiguities. See, e.g., *In re Estate of Torando*, 38 Wash. 2d 642, 645, 228 P.2d 142, 144 (1951).

should be one of revival or non-revival; or, put otherwise, whether the burden of proof by extrinsic evidence should be on the proponent of revival or of non-revival. Logically, it would seem best to presume what we believe the usual testator would have intended. While I have argued that the lay testator would expect revocation of a revoking will to result in revival of the prior will (especially if the revoking "will" was a codicil), we have seen that this is at least a debatable point.⁶³ Interestingly, the Uniform Probate Code presumes non-revival, despite the apparent opinion of at least some of the drafters that an expectation of revival would be the norm.⁶⁴ Obviously, there are other factors that can enter the debate.

Probably the best reason for the Uniform Probate Code position is that it is the closest to the restrictive (or anti-) revival statutes adopted in many states. It is a far smaller jump from no revival at all—or revival only upon republication—to revival only upon proof of the testator's intent, than to non-revival only upon such proof.⁶⁵ Also, those states already permitting proof of intent had generally taken the more restrictive position.⁶⁶ Clearly, those who consider revival of a will by extrinsic evidence of intent to "violate the whole policy" behind the formal requirements of execution⁶⁷ would view with even less favor a rule that permits revival without any evidentiary showing at all.

In my opinion, the most important step is to repeal the strict, totally inflexible anti-revival statute. Whatever compromise emerges to replace it—from the Uniform Probate Code version to automatic revival—will be a distinct improvement.

C. Abatement

1. The Common-Law Scheme

Abatement is the process whereby testamentary gifts are

63. See *supra* note 40.

64. See NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM PROBATE CODE § 2-508, Comment at 97 (Third Working Draft 1967), quoted in Bird, *supra* note 28, at 380.

65. Many of the drafters of the Uniform Probate Code also favored a rigid anti-revival statute, which in fact was in the draft of the Code prior to its final version. See, e.g., NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM PROBATE CODE § 2-509 (Fifth Working Draft 1969). The final version was thus a compromise that came closest to their position as well.

66. See, e.g., 2 PAGE ON WILLS, *supra* note 8, § 21.54; Zacharias & Maschinot, *supra* note 28.

67. See *supra* note 23.

reduced, according to some scheme of priorities, in order to make up some insufficiency in the payment of other obligations of the estate. At common law, and in most American jurisdictions, the order of priority for abatement is determined by the type of gift in question. Intestate property, which was not passed by the will, abates first; residuary gifts abate next; general gifts (“\$10,000 to Uncle John”) follow; and finally, specific gifts (“My blue Cadillac to Cousin Fred”) abate last. Demonstrative gifts (“\$5,000 to Bill, to be paid from proceeds of my IBM stock if available, otherwise from general funds”) usually abate together with specific gifts.⁶⁸ Thus, if it is necessary to raise funds to pay the estate’s taxes, property will be sold and gifts eliminated according to the abatement scheme: If all of the intestate and residuary property is exhausted, general legatees will lose their gifts next, and specific (together with demonstrative) legatees will lose nothing until all other sources of funds are first applied. Within a type of gift, abatement is usually ratable.⁶⁹ The statutory scheme of abatement is not mandatory; it may be changed by express provisions in the will.⁷⁰

Until modern times, it was commonly the rule that personalty abated before realty of whatever classification. The modern trend is away from this distinction,⁷¹ and as will be seen, it has been abolished in Washington.

The common-law scheme has the weight of history and familiarity behind it, as well as some degree of logic. However, in many instances the most important beneficiary of a testator, such as a spouse, will be the residuary beneficiary, while relatively unimportant beneficiaries are given general or specific gifts of money or property. For this reason, it is important that a testator be apprised of the possibility of abatement, and that his wishes in this regard (if they differ from the statutory scheme) be expressed in the will. This circumstance demonstrates also that the court should have some flexibility to alter the statutory abatement scheme when and if it clearly appears that the testator intended otherwise.

68. See generally ATKINSON, *supra* note 5, § 136; 6 PAGE ON WILLS, *supra* note 8, ch.53; see also UNIFORM PROBATE CODE § 3-902(a) (1978).

69. 6 PAGE ON WILLS, *supra* note 8, § 53.4.

70. *Id.* at § 53.2.

71. See ATKINSON, *supra* note 5, § 136; 6 PAGE ON WILLS, *supra* note 8, § 53.4.

2. The Washington Statutory Scheme

Washington, unfortunately, has one of the most confusing abatement schemes one can imagine, due in large part to a series of amendments over the years that have left the law in disarray. The statutory language is confusing or ambiguous, there is little consistency from section to section, and the relevant sections themselves are scattered throughout Title 11.⁷² Even if nothing is done to change the thrust of the statute, something must be done to clarify and consolidate its language.

Apparently, Washington generally follows the common-law priorities set out above, with some exceptions. (I say "apparently," because in several respects it is difficult to ascertain just what is intended, as will be seen.) However, the statute also appears to draw a distinction between priority of *disposition* (what property is sold first) and priority of *liability* (what property, or which beneficiary, bears the ultimate financial burden): while some statutes are directing sale or other disposition of certain types of property, others require contribution from those whose property remains.⁷³

Some of the problems with the statute are related to terminology. For example, code sections vary as to whether they speak in terms of "sale," "liability," or, more vaguely, "appropriation" of property. One contribution statute refers to property of the estate "sold" or "taken" to pay expenses,⁷⁴ while another refers to gifts "taken in execution" for payment,⁷⁵ although it seems unlikely that different classes of property were intended. Such variations and inconsistencies in language make interpretation of the provisions as an integrated scheme quite difficult.

Another major inconsistency is the priority of real over personal property. Originally, the code required the exhaustion of personal property before real property could be sold.⁷⁶ This requirement was seemingly removed in 1917,⁷⁷ but courts

72. Most of the relevant sections are in WASH. REV. CODE § 11.56 (1985). Compare, however, such other sections as WASH. REV. CODE § 11.12.200-210 (1985) (contribution among devisees and legatees, and enforcement of that contribution).

73. See WASH. REV. CODE § 11.56.170 (1985); WASH. REV. CODE § 11.12.200-210 (1985).

74. WASH. REV. CODE § 11.56.170.

75. WASH. REV. CODE § 11.12.200.

76. See [1854] Wash. Terr. Laws, §§ 100, 103, 104, 111, 123.

77. 1917 Wash. Laws § 135.

continued to apply it,⁷⁸ probably because the legislature neglected to remove the requirement from other parts of the statute in which it appeared.⁷⁹ The requirement was expressly laid to rest again in 1965, in section 11.56.015 of the Revised Code of Washington;⁸⁰ but again the legislature failed to change corresponding provisions, specifically section 11.56.140, which still appears to give priority to real property.⁸¹ (It has also been pointed out⁸² that while the distinction between realty and personalty has been abolished with respect to *sale* or other disposition of property, this may be a very different question from that of *abatement*, which concerns the type of property that is primarily liable for the debts.) Obviously the legislature should clarify this point once and for all, to make it clear that real and personal property are treated identically with respect to all matters of abatement, absent a contrary intention of the testator.

Another problem with the abatement statutes is simply one of ambiguity or uncertainty of language. For example, section 11.56.150 provides that if the provision made by the will "or the estate appropriated" is insufficient to pay estate obligations, the part of the estate "not . . . disposed of by the will, if any," is appropriated for that purpose. Apart from the question of what is meant by the phrase "or the estate appropriated,"⁸³ the phrase "not disposed of by the will" has caused difficulty. While it would appear to mean, at least literally, intestate property, it has been interpreted as meaning property passing under the residuary clause of the will, which of course

78. See, e.g., *In re Estate of Machlied*, 60 Wash. 2d 354, 357, 374 P.2d 164, 166 (1962).

79. See, e.g., 1917 Wash. Laws ch. 156, § 135 p. 682; REM REV. STAT. § 1505 (1932).

80. See Stewart & Steincipher, *Probate Reform in Washington*, 39 WASH. L. REV. 873, 880 (1965).

81. This whole sequence of events is set out in a nutshell in Fletcher, *Adapting the Uniform Probate Code to Washington Marital Property Law*, 7 GONZ. L. REV. 261, 290 n.115 (1970) [hereinafter "Fletcher"].

82. *Id.*

83. The phrase refers back to a section no longer in the code, which originally provided:

§ 124. If the testator shall make provision by his will, or designate the estate to be appropriated for the payment of his debts, the expenses of administration, or family expenses, they shall be paid according to the provision of the will, and out of the estate thus appropriated, so far as the same may be sufficient.

1 Wash. Sess. Acts § 124, p. 345 (1854). The present statute has no general provision for testator adjustment of the statutory scheme, although it does sanction it indirectly. See *infra* notes 86-87 and accompanying text.

is indeed "disposed of by the will."⁸⁴ If the legislature intended an instruction that residuary gifts abate before others, it certainly could have said so directly.

As for general and specific gifts, one section directs sale of realty generally devised instead of that specifically devised, unless "it appears necessary" to sell the latter.⁸⁵ The concept of "necessity" is not further defined, although, as will be seen in another section, it refers to testator intention.

Having directed none too clearly that residuary gifts (or intestate property, or both) abate first, and specific realty abates last, the legislature proceeds to direct that the entire estate is liable for expenses, "except that specific devises or legacies may be exempted, if it appears to the court necessary to carry into effect the intention of the testator."⁸⁶ If testator intention is removed and specific gifts are "exempt," we have what approximates the common-law scheme: residuary gifts abate first, specific gifts last, leaving general gifts in the middle. Demonstrative gifts are not mentioned, so it is unclear whether they abate with general or specific gifts. One assumes, of course, that the "exemption" of specific gifts lasts only until all others are exhausted. But the matter of testator intention then must be factored in again. The testator who does not state his intention seems to risk the possibility that a probate court will (or will not) find such intention and exempt (or not exempt) his specific gifts from abatement. This is the reverse of the usual scheme, which presumes that such gifts abate last but allows for alteration according to the testator's expressed (or clearly implied) intent. While Washington courts have found an intention to exempt specific gifts (and thus to follow the traditional scheme) quite readily,⁸⁷ the burden should be reversed and the presumption should be with the usual approach, not against it.

Even assuming a straightforward order of abatement, the

84. *In re Estate of Cloninger*, 8 Wash. 2d 348, 352-53, 112 P.2d 139, 141-42 (1941). See J. Steincipher ed., WASHINGTON PROBATE PRACTICE AND PROCEDURE, 394 (1966). See also, *In re Schiffner's Estate*, 174 Wash. 134, 140, 24 P.2d 434, 436 (1933) (property passing under the residuary provision of a will is not otherwise disposed of, and is subject to a widow's homestead claim).

85. WASH. REV. CODE § 11.56.050 (1985). The statute does not mention personal property, probably because at the time it was enacted all personal property abated before any real property.

86. WASH. REV. CODE § 11.56.160 (1985).

87. See, e.g., *In re Estate of Hickman*, 41 Wash. 2d 519, 528, 250 P.2d 524, 529 (1952).

present provisions for contribution make the result far from certain. Section 11.56.170 requires that when the testator's estate "given by any will" has been sold to pay debts and expenses, all devisees and legatees are liable for contribution to those whose bequests were taken. No exemption for specific, or any other, gifts is mentioned. Of course, if a legatee has escaped loss of his gift because of its priority of abatement, but then has to contribute to those whose lower-priority gifts were taken, we have a priority of sale but not a priority of liability. In effect, there is no abatement scheme at all.

As if to complicate matters still further, section 11.12.200 provides that if the testator shall "give any chattel or real estate" by will, and the same is "taken in execution for the payment of the testator's debts," all other beneficiaries must contribute a proportionate part of their share of the estate. Here is what appears to be a contribution statute limited to the reimbursement of specific gifts only. (Again, general and demonstrative gifts are not mentioned.) While it would be useful only where specific gifts have been sold out of order (because if they are sold last, there will be nothing left from which other beneficiaries can reimburse the specific legatees), at least it is consistent with the general scheme. This is how the appellate courts seem to have interpreted the contribution statutes, in that they have largely ignored them and have not attempted to reimburse residuary legatees whose gifts have been taken ahead of those of specific legatees.⁸⁸

3. Possible Solutions

The easiest and most straightforward solution to the problems of ambiguity and inconsistency set out above would be an adoption of the basic common-law abatement scheme, with necessary modifications for Washington circumstances. Not only does the common-law hierarchy have the imprimatur of history and familiarity, which are significant factors in the area of probate, but it is close to the present Washington abatement scheme. The Uniform Probate Code⁸⁹ adopts the common-law order of abatement, without distinction between realty and personalty. It treats demonstrative gifts as specific

88. See *Id.*; *In re Estate of Hickman, supra*; *In re Estate of Cloninger*, 8 Wash. 2d 348, 112 P.2d 139 (1941). This interpretation is by implication only, as the cases do not refer to the matter of contribution at all.

89. UNIFORM PROBATE CODE § 3-902 (1977).

to the extent charged on an available fund, and as general to the extent such a fund fails. It also provides for adjustment according to testator intent, either express or implied,⁹⁰ and it recognizes contribution only for preferred gifts sold out of order.

The basic common-law plan of the Uniform Probate Code would need to be modified at least to take into account such questions as abatement between community and separate property. The Code itself addresses the issue by substituting a ratable abatement of community property—apportionment according to relative value in the estate.⁹¹ One commentator has suggested that abatement should follow substantive law as to the liability of separate or community property for a particular class of debt, with the common-law scheme applying within a category.⁹² He also would adopt some form of the Uniform Probate Code's system⁹³ for subjecting certain non-probate transfers to probate debts and expenses.⁹⁴ These particulars are beyond the scope of this article, although they merit very serious consideration when the legislature reconsiders and reformulates abatement.⁹⁵ For present purposes it would be a considerable improvement merely to replace the numerous confusing pronouncements presently on the books with a simple, if unsophisticated, statement of the statutory order of abatement and the effect of testator intent as superseding that order.

D. *Partial Invalidity*

When a person has committed fraud upon or has exercised

90. While the Code speaks only of following an express order of abatement or avoiding a defeat of "the testamentary plan or the express or implied purpose of the devise," the Comment to section 3-902 makes it clear that as a general rule such gifts as a general devise to a spouse or to a person respecting whom the testator is *in loco parentis* should be given priority. It may be that testator preference for such gifts (and a few others commonly given preference by courts) is sufficiently widespread and likely that it should be written expressly into the statutory scheme, rather than left to case-by-case interpretation, with the presumption of priority still subordinate to an expressed or clearly implied contrary intent.

91. UNIFORM PROBATE CODE § 3-902A.

92. Fletcher, *supra* note 81, at 291-93.

93. *Id.* at 294. Professor Fletcher refers specifically to UNIFORM PROBATE CODE § 6-107, relating to multiple party bank accounts.

94. Fletcher, *supra* note 81, at 293-95.

95. The latter proposal, of course, is a part of the larger question of the proper relationship between probate and nonprobate transfers, on which the Uniform Probate Code has generally taken a very progressive approach.

undue influence over a testator, sometimes only a part of the will is affected by the malfeasance, and other parts remain as they would have been had the fraud or undue influence never occurred. Assume, for example, a testator who has drafted a testamentary plan that has not yet been executed and that excludes his son. The testator's son may unduly influence him to draft and execute a plan that is identical to his formerly expressed intention, except for the addition of a gift to the son. While upon proper evidence a court would and should declare the gift to the son invalid, it is less clear what should become of the rest of the will; that is, whether it should be declared totally invalid (and intestacy result) or whether it should be held to be partially valid, to the extent it is untainted by the son's acts. The majority of American jurisdictions permit probate of the part of the will that is not affected by the fraud or undue influence.⁹⁶

Although there is dictum in Washington to the effect that fraud may invalidate a will "either in whole or in part,"⁹⁷ in 1952 the supreme court expressed doubt that Washington law permitted partial invalidity. The court interpreted the two relevant statutes, sections 11.24.010⁹⁸ and 11.24.040,⁹⁹ as reducing the issue in a will contest to *devisavit vel non*: the validity or invalidity of the entire will.¹⁰⁰ On the other hand, partial invalidity has been recognized in the context of material alterations to the will.¹⁰¹

The minority position disallowing partial invalidity has little to recommend it, at least in a case in which the only evi-

96. See ATKINSON, *supra* note 5, § 61; 1 PAGE ON WILLS, *supra* note 8, §§ 14.3, 14.8.

97. *In re Estate of Bottger*, 14 Wash. 2d 676, 701, 129 P.2d 518, 528 (1942).

98. WASH. REV. CODE § 11.24.010 (1985) provides in part:

Issue shall be made up, tried, and determined . . . respecting the competency of the deceased to make a last will and testament, or respecting the execution by a deceased of such last will and testament under restraint or undue influence of fraudulent representations, or for any other cause affecting the validity of such will.

99. WASH. REV. CODE § 11.24.040 (1985) provides that if

. . . the will is for any reason invalid . . . the will and probate thereof shall be annulled and revoked, and thereupon . . . the powers of the executor or administrator with the will annexed shall cease . . .

100. *In re Dand's Estate*, 41 Wash. 2d 158, 165-66, 247 P.2d 1016, 1021 (1952). The court did not have to resolve the matter finally, because it determined that under the circumstances partial invalidity would have been inappropriate in any event. See also *In re Ganjian's Estate*, 55 Wash. 2d 360, 362, 347 P.2d 891, 892-93 (1959) (partial invalidity doctrine rejected where entire will tainted).

101. *In re Campbell's Estate*, 47 Wash. 2d 610, 616, 288 P.2d 852, 856 (1955) (*Dand* was not cited).

dence of wrongdoing does not touch the remainder of the will or cast doubt in any way on its validity. In such an instance, rejecting the entire will not only "throws out the baby with the bathwater," but possibly leaves the result farther from the testator's intent than would declaring the entire will valid and ignoring the misconduct. The minority position has been strongly criticized, as has the narrow (though arguable) reading of the statute on which it purports to be based.¹⁰²

The simplest solution would be the addition of the words "or a part thereof" after "will" at the end of section 11.24.010 and the beginning of section 11.24.040, and "or part" before "and probate" in the latter section. This should result in clear adoption of the majority position permitting probate of that part of a will unaffected by fraud or other impropriety.

III. "HOLES IN THE STATUTE"

Another category of legislative lapses concerns areas in which the legislature, more by oversight than by design, has failed to address a matter at all, or has addressed it in insufficient detail for the guidance of court or practitioner. Some of these lapses have already caused difficulty; others are still lurking in the shadows awaiting discovery.

A. *Determining the Applicable Law*

Interjurisdictional choice of law problems arise in probate as well as other fields; but in the world of probate law, temporal choice of law not only appears as well, but it takes on a particular significance because of the long time-frame of a will. The Washington statutes address both jurisdictional and temporal choice of law, but with respect to the latter, they do so only in a vague and unsatisfactory way.

1. Jurisdictional Choice of Law

Washington law provides that, with respect to the mode of a will's execution, if the will has been executed outside of Washington, the law of the place of execution or of the testator's domicile controls its validity.¹⁰³ What the statute does not

102. See, e.g., ATKINSON *supra* note 5, § 61 at 290; Note, *Recent Case Notes*, 32 Yale L.J. 283, 294 (1923).

103. WASH. REV. CODE § 11.12.020 (1985). Presumably domicile at the date of execution is intended. As a matter of procedure, however, if the will was executed elsewhere but no foreign law is proved at trial, it will be assumed that the law of the

seem to cover is the will that was executed inside the state, by a testator domiciled in some other state. This could easily occur if, for example, a New York domiciliary testator executed his will while visiting his children in Washington. The omission creates a curious anomaly not necessarily intended by the legislature: if that New York testator had executed his will while visiting his children anywhere else in the world except Washington, the Washington courts would apply New York law (or that of the place of execution) to the will; but because he executed the will in Washington, the law of his domicile cannot be applied.

The choice of Washington law when a will is executed in Washington might be understandable as a preference for the familiar *lex fori* whenever some connection with the state can be found. This motivation, however, is inconsistent with the result where a Washington domiciliary has executed his will while visiting in New York, in which event New York law apparently can be applied. A better rule would be to give the testator a choice of execution- or domiciliary-state law whenever the two diverge. The Uniform Probate Code has such a provision, and it also extends the choice of law to the place of abode or nationality, at either the time of execution or the time of death.¹⁰⁴

2. Temporal Choice of Law

Even if the only jurisdiction involved in the execution of a will is Washington, there is another potential choice-of-law problem that can arise: the effect of a change in the law following the date of execution. The law may require, for example, two witnesses to a will at the time of execution, but be changed to require three (or only one) before the date of death or probate. Which requirement governs the validity of the will?

If a change in the law occurs after the death of the testator, and therefore after rights have vested or accrued, it is

place of execution is identical with that of Washington. *In re Estate of Nelson*, 85 Wash. 2d 602, 606, 537 P.2d 765, 769 (1975).

104. UNIFORM PROBATE CODE § 2-506 (1969). In *In re Chappell's Estate*, 124 Wash. 128, 213 P. 684 (1923), the court acknowledged the general desirability of applying to a will of personalty the law of the decedent's domicile, but (with respect to the validity of distributive provisions) it applied the law of Washington to a will executed in Washington by a presumed California domiciliary. However, the court based its choice-of-law decision on the clear intent of the testator that Washington law apply. See also Annot., 169 A.L.R. 554 (1947). Choice-of-law rules differ, of course, where real property is involved.

clear that the change cannot apply retroactively, and the law prevailing at the death of the testator applies.¹⁰⁵ But the result is less clear if the change in the law occurs between the time of execution and the time of death. To use the previous example, let us suppose that the testator executed a will in 1930 and had it attested by two competent witnesses; that the applicable Washington statute in 1930 required only two witnesses to validate a will; that in 1990 the legislature changed the law to require attestation by *three* witnesses; and that the testator died in 1991, unaware of the change in the law. Is the will valid?

The modern majority rule in the above situation is that absent an indication to the contrary, it is presumed that a will's validity is unaffected by legislative changes occurring subsequent to its execution, at least with respect to such formalities as the number of witnesses.¹⁰⁶ This is an extension of the settled rule that a statute will be presumed to apply only prospectively if there is no clear indication that it is to be applied retroactively.¹⁰⁷ It seems to be a salutary approach, requiring our testator only to comply with the law as it existed at the time he executed his will, and not voiding his will because of a change of mind by the legislature some sixty years later, on a mere matter of form, and without much likelihood that the testator would have actual notice of the change or its effect on his will.

Early Washington cases seemed to diverge from the majority rule, or at least left the question open. In *Strand v. Stewart*,¹⁰⁸ the court applied the law relating to notice to creditors in effect at the testator's death, rather than that in effect at the date of execution.¹⁰⁹ While the case did not involve the formalities of execution but only those of the later probate, the court stated in broad terms that since wills are ambulatory and remain until the testator's death subject to the will of both the testator and the legislature, and since a will speaks as of the date of death and not of execution, the law applicable is that

105. WASH. REV. CODE § 11.99.020 (1985). See *In re Estate of Wind*, 32 Wash. 2d 64, 69, 200 P.2d 748, 751 (1948); *Strand v. Stewart*, 51 Wash. 685, 687-88, 99 P. 1027, 1028-29 (1909); *In re Estate of Buhakka*, 4 Wash. App. 601, 602-03, 484 P.2d 463, 464-65 (1971).

106. See 1 PAGE ON WILLS, *supra* note 8, § 3.4 at 71-72.

107. *Id.* See *In re Estate of Wind*, *supra* note 105, at 751.

108. 51 Wash. 685, 99 P. 1027 (1909).

109. *Id.* at 687-88, 99 P. at 1028-29.

existing at the date of death.¹¹⁰ Then in *In re Estate of Ziegner*,¹¹¹ the court retroactively applied a statute that automatically revoked a gift to a divorced spouse. The will in that case had been executed (and a divorce had taken place) before the passage of the statute. The court cited *Strand* and professed not to be bound under the circumstances by the general rule regarding prospective application of statutes. It did, however, make a point of stating that the issue was *not* one of the formalities of execution, propriety of witnesses, or other such matters over which the courts "greatly differ," but instead went to the "substance" of the will; and it expressly limited its holding to such cases.¹¹² Thus the effect of a change of law on the formalities of execution and attestation remained unresolved, and the broad language of *Strand* remained unrestricted.

The only statute that addresses the question of the applicability of Title 11 is section 11.99.010, which states that the procedures of Title 11 govern "all proceedings in probate brought after the effective date of the title" and all proceedings "then pending," except where the court finds that their application would, in a particular case, "not be feasible or would work injustice, in which event the former procedure shall apply." If the exception clause refers to all proceedings, and not just pending ones, which is not clear from the syntax, a court may have some flexibility in individual cases; but the general rule stated is one of total retroactivity of all of Title 11. A similar provision, rendering retroactive the 1974 amendments to the Code, is found in section 11.02.080.

The only case to date that interprets section 11.99.010 is *In re Estate of Buhakka*.¹¹³ That case concerned the question whether a widow could be made an award in lieu of homestead (under section 11.52.010 of the Revised Code of Washington) from the decedent's separate property, something allowed by the statute in effect at the decedent's death, but not by that in effect at the time of the will's execution. The court seemed to assume that the statute requires displacement by Title 11 of all of the law in effect at the date of execution. However, the court emphasized the beneficial policy furthered by the partic-

110. *Id.*

111. 146 Wash. 537, 264 P. 12 (1928).

112. *Id.* at 539, 264 P. at 13.

113. 4 Wash. App. 601, 484 P.2d 463 (1971).

ular statute in issue, and the salutary result of applying it to cases such as that before it, taking something of a case-by-case approach. Moreover, the court relied on a precedent, *In re Estate of Wind*,¹¹⁴ in which the statute in effect at the testator's death was applied, but in preference to one passed *after* his death. Not only was there no earlier, date-of-execution statute involved in *Wind*, but the court reaffirmed the settled doctrine that retroactive application requires a clear indication of legislative intent.¹¹⁵ Finally, the *Buhakka* court also relied on a statement in Page on Wills that, as it recognized,¹¹⁶ refers to application of the law of the date of death *only* with respect to "restrictions on the power of the testator to make some certain type of disposition."¹¹⁷ The question of validity is not such a restriction.

Whatever may have been the legislature's intention in promulgating the broad language of section 11.99.010, there is a need to rethink and clarify the question of temporal choice of law, as to existing legislation and especially as to any future changes in the law governing validity of a will. While it may make good sense to look to the law existing at the time of death for such questions as spousal rights and creditor protection, or perhaps even the construction of the will's language,¹¹⁸ the question of validity, and in particular the formalities of execution, are a different matter. If the requirements for validity have been increased since the execution of the will,¹¹⁹ even the most carefully executed will might fail simply because the testator did not periodically consult an attorney to ensure that the law had not changed since the date of execution. On the other hand, if the requirements for validity decrease, a will invalid when executed might become valid if

114. 32 Wash. 2d 64, 69, 200 P.2d 748, 751 (1948).

115. *Id.*

116. 4 Wash. App. at 602, 484 P. at 464-65.

117. 4 PAGE ON WILLS, *supra* note 8, § 30.27. An example is a statute governing restraints on alienation. *Id.* at note 14.

118. See 4 PAGE ON WILLS, *supra* note 8, § 30.27, indicating that while the courts are split on the question, the majority rule favors application of the law of the date of execution to matters of construction.

119. Even though in recent years most if not all of the changes in the law respecting formalities of execution have been in the direction of greater liberalization of those requirements, this need not always be true. In the past there have been instances of the legislature adding rather than deleting requirements. For example, an earlier version of WASH. REV. CODE § 11.12.020, which now provides that attesting witnesses must subscribe their names to the will "by [the testator's] direction or request," contained no such requirement. Code 1881, § 1319.

the subsequent change were applied. Because in modern times formal requirements for wills are generally being liberalized rather than tightened,¹²⁰ the latter is the more likely circumstance. Here there seems far less reason not to apply the subsequent, validating law, since the testator has fulfilled all that the legislature now deems necessary for his and society's protection, and there would seldom be unfairness to the testator, who presumably thought all along that the will was valid.¹²¹ Nevertheless, the majority rule seems to be that in all cases the law at the date of execution controls.¹²² This is a reasonable, straightforward approach that might be justified by noting that a testator who did not satisfy the formalities of the then-current law had no legitimate expectation of validity, and perhaps should not have validity "thrust upon him" by a subsequent change in legislative thinking.¹²³

In my view, the legislature should specifically state which law applies to the question of validity, rather than give the same treatment to the matter as to all other aspects of Title 11, most of which present somewhat different issues. Among the alternatives is that found in the Uniform Probate Code,¹²⁴ which provides that a will is valid if its formalities comply with current local law or "with the law *at the time of execution*" of the place of execution, domicile, abode, or nationality. This in effect creates a preference for validity, whether under current law or that of the date of execution. It recognizes that the ritual of will execution is not a perfect formula, and that more injustice is likely to occur by restricting the court to the "old"

120. For example, the Uniform Probate Code contains many provisions regarding execution of wills that are more liberal than their traditional counterparts. *See, e.g.*, § 2-502 (witnesses need not sign in testator's or each other's presence; testator need not publish will; testator may sign outside of presence of witnesses, with later acknowledgment; signature need not be at end of will); § 2-503 (only "material provisions" of holographic will need be in testator's handwriting); § 2-505 (interested witnesses competent and will not forfeit applicable legacies); § 2-513 (disposition of certain tangible personal property by informal writing).

121. Indeed, some courts do apply such a distinction, looking to the subsequent law only where it has reduced the requirements for validity. *See* 1 PAGE ON WILLS *supra* note 8, § 3.5.

122. 1 PAGE ON WILLS, *supra* note 8, § 3.4.

123. It is even possible that a testator, fully aware that he had not yet fulfilled all of the formal requirements of validity, had no present intention of doing so and certainly no expectation that his uncompleted will would later be considered valid under new, more liberal standards.

124. UNIFORM PROBATE CODE § 2-506 (1969).

or "new" legislature's formula than by allowing for a choice of either.

Thus, at least two options are available to the Washington legislature, other than leaving the matter, as at present, for judicial discretion on a case-by-case basis. First, formalities of execution could be governed by the law in effect at the time of execution. This would conform to the majority position, avoid unfairness to testators and their heirs, and provide a fixed, predictable, and easily-applied standard. In the alternative, the approach of the Uniform Probate Code could be adopted, validating a will if the formalities required by either current or date-of-execution law were satisfied. Either would be workable, fair, and a definite improvement over the current state of the law. Finally, either would be subject to alteration in specific statutes by language to that effect.¹²⁵

B. Effect of Divorce on a Will

Divorce generally ends any direct testamentary relationship between the testator and the divorced spouse. Washington's "post-testamentary spouse statute," section 11.12.050 of the Revised Code of Washington, revokes a will as to a spouse following divorce, taking from the divorced spouse any benefits under the will. Because the statute revokes the will only "as to the divorced spouse," the will remains valid and effective as to any other beneficiaries: one deletes the divorced spouse's share, and divides the rest among the remaining beneficiaries, or if there are none, among the intestate takers. But here complications can arise. Consider the following gift under a typical will:

"I give to my wife Wilma all of my bonds; but if my wife fails to survive me, I give such property to my friend Fred."

The testator's son is the residuary beneficiary or the intestate taker of all property not otherwise devised by the will. The testator and Wilma have been divorced, but Wilma is still alive at the testator's death; the gift to her is revoked by operation of law, and she takes nothing. Who takes the bonds?

Clearly, if one follows the literal language of the will, the

125. An example of such language used to limit retroactive effect to a specific date is found in WASH. REV. CODE § 11.12.010, which states in part: "All wills executed subsequent to September 16, 1940, and which meet the requirements of this section are hereby validated and shall have all the force and effect of wills executed subsequent to the taking effect of this section."

son takes the bonds as undevised property. Since the testator's wife did in fact "survive" the testator, the contingency upon which his friend would take (failure of the testator's wife to survive him) has not occurred. And yet, we cannot help but wonder whether that is what the testator had in mind when he made his friend the recipient should his wife not survive; and our dilemma is increased if we postulate variations in which, for example, the substitute taker Fred is Wilma's brother or child by a former marriage, or the intestate taker is a disfavored child intentionally omitted from the will. Should death and divorce have the same, or different, effects upon such a contingent gift?

Washington courts faced with this dilemma have done their best to develop a coherent approach, but ultimately only legislation can offer a satisfactory resolution. The first case to address the question, *Peiffer v. The Old National Bank & Union Trust Co.*,¹²⁶ concerned a gift of the testator's entire estate to his "beloved wife" if she survived him for three months, and to his son if she did not. The testator's daughter was expressly disinherited. The testator divorced his spouse, who then survived him by more than three months. The divorce revoked the former wife's share by operation of law; but the effect of that revocation on the son's contingent gift was unclear. By the literal language of the gift, the former wife had indeed "survived," defeating the son's contingent gift and passing one-half of the estate to the disinherited daughter by intestacy. The court recognized that this result would have been contrary to the clear intent of the testator, and to avoid such a result the court focused on the term "beloved wife" used by the testator: while the ex-wife survived, she did not survive as his "beloved wife," and therefore the son's gift took effect.¹²⁷ The difficulty with this narrow "terminology" approach is obvious: if the testator had used his spouse's first name only, instead of "beloved wife," the court would have been forced to award half of the estate to the disinherited daughter, or to find another theory.

In the next case, *In re Estate of McLaughlin*,¹²⁸ the testator used the term "she," referring back to a prior naming of his wife, in the survival clause; and again, following a divorce the

126. 166 Wash. 1, 6 P.2d 386 (1931).

127. *Id.* at 6, 6 P.2d at 388.

128. 11 Wash. App. 320, 523 P.2d 437 (1974).

former spouse survived the testator. Here, however, the substituted taker was the former wife's son, the testator's stepson, and the court determined that the testator would not have wished the stepson to take under the circumstances that occurred.¹²⁹ In *McLaughlin*, the court did not, to its credit, merely distinguish *Peiffer* on the basis of the different words used by the testator, recognizing that this would be a "rather technical distinction." However, the test the court did apply was little better: it held that the "plain meaning" of the "express condition" was that the survival of the former wife should negate the stepson's gift, and therefore the stepson could not take. Again the difficulty seems clear: had the former wife happened to predecease the testator, a purely fortuitous circumstance, by the court's reasoning the stepson would have taken, whether or not this would have been the testator's intent. (Did the testator favor the stepson on his own merits, or only because of his closeness to the testator's then-beloved wife? Was the contingent gift a favor to his wife, or an expression of concern for the stepson?) A subsequent case, *In re Estate of Harrison*,¹³⁰ followed *McLaughlin* on similar facts.

Both the "terminology" test of *Peiffer* and the "plain meaning" test of *McLaughlin* are inadequate responses to the problem raised by the statute, at least to the extent that they seem to depend upon the vagaries of language or the happenstance of survival. A test merely following the testator's intent might be desirable, but that intent is often difficult to ascertain, especially when dealing with circumstances that most testators do not (and do not wish to) anticipate.

The easiest solution to the problem is a small addition to the language of the statute. Following the revocation of any provisions for a divorced spouse, the statute need only add that, "except as otherwise provided in the will, property shall pass as if the former spouse had predeceased the testator." This is the approach taken by the Uniform Probate Code,¹³¹ and it has the advantage of certainty, at the admitted sacrifice of some flexibility. However, since the basic provision for revocation upon divorce is absolute and unaffected by the testator's (unexpressed) intent, it does little violence to the scheme to include the defeat of those gifts conditional upon the

129. *Id.* at 322-23, 523 P.2d at 438-39.

130. 21 Wash. App. 382, 585 P.2d 187 (1978).

131. UNIFORM PROBATE CODE § 2-508 (1977).

spouse's survival. More importantly, both effects of divorce seem to be in keeping with what the average testator would prefer. If there will be an occasional defeat of a testator's true intent,¹³² at least there will be the opportunity for the testator to include some other scheme in his will and avoid the statutory choice.¹³³

IV. MATTERS OF POLICY

It is not always, or even usually, by mistake that the legislature promulgates a statute that is found to create difficulties of interpretation or application. Often the statute represents a deliberate choice by the drafters based upon their perception of policy, utility, or other motivation. If in present context the statute seems either unworkable or counterproductive, or we can now see that it contains the potential for future difficulty or unfairness, there is need to reexamine the purpose and pres-

132. For example, the testator's intent probably would be defeated in a case like *McLaughlin*. An alternative approach would be to amend the statute to follow the testator's intent, to admit extrinsic evidence of that intent if necessary, and to presume the spouse's death only if a contrary intent cannot be ascertained. Many jurisdictions have taken an "intent" approach. See, e.g., *Porter v. Porter*, 286 N.W.2d 649 (Iowa 1979) and cases cited therein. However, this would create the kind of uncertainty and difficulties of proof that presently characterize the cases in this area. A desire to disinherit both the spouse and the alternative taker will likely be exceptional; and presumably, if the statute is amended as suggested in the text, the testator's attorney will inform him of the consequences of a divorce and can easily draft appropriate language to fit any contrary desire of the testator. The present language, being silent on the question, does not alert either the testator or his attorney to the potential problem.

133. This proposal would also parallel the disclaimer statute, WASH. REV. CODE § 11.86.050 (1985), which treats disclaimants as if they had predeceased the testator with respect to the disclaimed interest, unless otherwise provided. At least two states, Arizona and Utah, take a compromise position in their statutes, treating the former spouse as predeceased, but also revoking the interests of that spouse's issue who are not also issue of the testator. 6 ARIZ. REV. STAT. ANN. § 14-2508 (West 1975); 8A UTAH CODE ANN. § 75-2-508 (Michie Supp. 1986). It may be that the drafters of these provisions considered step-children (-issue) of the testator to be the only persons (other than the former spouse) whom the usual testator would not want to benefit following divorce. By this scheme, they lose outright gifts as well as those conditioned on the former spouse's nonsurvival. The former spouse's other relatives (the testator's "in-laws"), however, are not precluded from taking either outright or as substitute takers.

These statutes, like the Uniform Probate Code § 2-508 upon which their basic provisions are modeled, also reinstate the revoked gifts upon the testator's remarriage to the divorced spouse. This resolves another potential problem that has occasionally arisen and that a comprehensive rewriting of the Washington statute probably should address.

ent implications of that legislative choice. The following are just such examples.

A. Proof of Lost Wills: The "Two Witness" Requirement

Section 11.20.070 of the Revised Code of Washington is the "lost wills" statute.¹³⁴ It provides that proof of a lost or destroyed will may be made by following certain procedures, all of them obviously designed to ensure that a will that cannot now be produced did in fact contain the language that the proponent of the will suggests. The requirements are quite strict, as they should be in a situation fraught with opportunities for fraud or mistake.

The lost will requirements have always given courts and legislatures trouble. For example, the common requirement that the will be shown to have been "in existence" at the time of the testator's death or "fraudulently destroyed" before his death often led (in Washington and elsewhere) to the anomalous situation in which a will was destroyed by the testator without an intention to revoke,¹³⁵ and so was neither "in (physical) existence" nor "fraudulently (without the testator's knowledge) destroyed." As a result, a will that was perfectly valid and unrevoked could not be probated, despite adequate proof of its contents.¹³⁶ Eventually the legislature addressed the problem and changed the statute, but not until at least one Washington case had reached the unfortunate result indicated.¹³⁷

Perhaps we can head off another highly questionable result before a court is forced to reach it. One requirement for proving a lost will is that the will's provisions must be "clearly

134. WASH. REV. CODE § 11.02.070 (1985) provides:

Upon the death of a decedent, a one-half share of the community property shall be confirmed to the surviving spouse, and the other one-half share shall be subject to testamentary disposition by the decedent, or shall descend as provided in chapter 11.04 RCW. The whole of the community property shall be subject to probate administration for all purposes of this title, including the payment of obligations and debts of the community, the award in lieu of homestead, the allowance for family support and any other matter for which the community property would be responsible or liable if the decedent were living.

135. For example, the testator might have had only a conditional intent to revoke, and the condition being unfulfilled, the revocation would have been ineffective. This circumstance invokes the doctrine of dependent relative revocation. *See, e.g., In re Estate of Kerckhof*, 13 Wash. 2d 469, 125 P.2d 284 (1942); Atkinson, *supra* note 5, § 88.

136. *Kerckhof*, 13 Wash. 2d at 475-484, 125 P.2d at 286-90.

137. *Id.*

and distinctly proved by at least two witnesses."¹³⁸ As interpreted over the years, this requirement is mandatory, and the court cannot waive it no matter how great the quantity or weight of any other evidence of the will's contents.¹³⁹ The "witness" referred to "means a person who is sworn and testifies in a cause and not a document or paper merely,"¹⁴⁰ and each witness must testify to the contents from personal knowledge, in the manner of witnesses generally.¹⁴¹ It is this rigid requirement of live witnesses and personal knowledge that seems misplaced and is a potential source of injustice.

It should first be noted that the "two witness" requirement is given a somewhat liberal interpretation where this seems appropriate. For example, in *In re Estate of Gardner*,¹⁴² the only witnesses to a lost will were the named executor, who had read and could recall it, and the wife of the testator's nephew. The nephew, however, was the one responsible for fraudulently destroying the will, having taken it from its custodian and shown it to his wife, who scanned it looking for her own name before the nephew burned it. The court obviously did not want the nephew to accomplish the very result he had sought because of the unavailability of two witnesses to the contents. It thus held that the wife's somewhat vague testimony, aided by her only slightly clearer pretrial deposition, was sufficiently supportive of the executor's recollection on key elements to satisfy even the "clear and distinct proof" requirement of the statute.¹⁴³ The court also quoted a statement that the witnesses need not be able to testify to the will's "exact language but only to the substantive provisions."¹⁴⁴

Suppose, however, that the only evidence of the lost will's contents were the testimony of one witness who had seen and now recalled the contents, and of another witness who had

138. WASH. REV. CODE § 11.20.070 (1985).

139. *In re Estate of Peters*, 43 Wash. 2d 846, 858, 264 P.2d 1109, 1115 (1953); *Harris v. Harris*, 10 Wash. 555, 561, 39 P. 148, 151 (1895).

140. *Harris*, 10 Wash. at 562, 39 P. at 151.

141. *In re Estate of Peters*, 43 Wash. 2d at 858, 264 P.2d at 1115; *In re Estate of Calvin*, 188 Wash. 283, 289, 62 P.2d 461, 463 (1936); *In re Estate of Needham*, 70 Wash. 229, 234, 126 P. 429, 431 (1912).

142. 69 Wash. 2d 229, 417 P.2d 948 (1966).

143. *Id.* at 232, 237, 417 P.2d at 950, 953. The court referred to the Illinois rule permitting proof by only "slight evidence" if the will is opposed by the person who fraudulently destroyed it.

144. *Id.* at 236, 417 P.2d at 953 (quoting *In re Estate of Gabriel*, 59 Ill. App. 2d 388, 394, 210 N.E.2d 597, 601 (1965)).

seen it, had placed a copy in his safe at the time, and could now produce that copy but could not state the terms from memory. Such evidence would seem to be not only "clear and distinct," but if anything better than the distant memories of two witnesses alone. It even satisfies the evidentiary "best evidence rule," provided the original is sufficiently proven to be unavailable, whereas under traditional American doctrine the oral testimony alone would not.¹⁴⁵

The supreme court was almost faced with this situation in *In re Estate of Auritt*.¹⁴⁶ The proponents of the lost will submitted a carbon copy of the will together with the testimony of the attorney who drafted it and his stenographer that *from personal knowledge* they could state that the document was in fact an exact copy of the will. Because of the allegation of personal knowledge of the contents, the court was able to distinguish cases in which a copy had not had such testimonial support.¹⁴⁷

The question is whether such personal knowledge of the contents ought to be required where some other form of authentication, which might be even more reliable, is available. For example, the copy might be proven to have been initialed by the decedent, made simultaneously with or immediately after the original, placed in safekeeping by a custodian able to account for its whereabouts until removed from its repose and submitted to the court, and at no time subject to an opportunity for alteration of its contents. In fact, this is precisely the sort of testimony one would expect when submitting a copy of a will. Most wills are drawn by an attorney; the original is given to the testator, while a copy is kept in the attorney's file. What would be unusual would be the attorney's (or his secretary's) ability to recall from memory (of their "personal knowledge") the substance of each such will drafted over the period of several decades. When such a witness later does so testify after having seen a copy, it is doubtful that the basis for the testimony is always genuine present recollection, as opposed to certainty that the copy must in fact be correct. The emphasis should be on the quality of the evidence, and not upon a rigid requirement of a particular type of evidence,

145. MCCORMICK, EVIDENCE 721 (3d ed. 1985).

146. 175 Wash. 303, 27 P.2d 713 (1933).

147. *Id.* at 306, 27 P.2d at 715. See also, *In re Estate of Peters*, 43 Wash. 2d 846, 856-61, 264 P.2d 1109, 1114-17 (1953).

which may in a given instance be less probative than other evidence that is available.

One possible approach is that taken in New York. There a statute specifically permits an authenticated copy of the will to substitute for one of the required two witnesses to the will's contents.¹⁴⁸ An alternative, sometimes reached by interpretation of a New York-type statute, is to require either two witnesses to the contents or an authenticated copy plus one witness *either* to the contents or to the authenticity of the copy.¹⁴⁹ The problem with either such approach is the same as with the present Washington statute: a mechanical, "this-way-or-not-at-all" formula is adopted that, if it cannot be fulfilled because of circumstances beyond the testator's (or anyone's) control, absolutely prevents probate of the will.

Far better would be a recognition that what is at stake here is simply an evidentiary requirement, which should be resolved as are other similar problems. We want to be as certain as possible that the purported lost will not only existed and was lost, but had the provisions that its proponent alleges. If that is our purpose, our solution should be couched in terms of certainty, not mechanics.

The mechanical approach, in fact, offers little assurance of certainty in many cases in which it would be applied. As indicated, while a witness might purport to recall all of the salient terms of the lost will 20 years after having once read the document, more often than not the memories of even two such witnesses, no doubt "refreshed" in the meanwhile by a variety of extrajudicial methods, would be of questionable reliability.¹⁵⁰ In the usual case in which we desire greater certainty on an issue, we raise the standard of proof to a level that gives us sufficient assurance that a finding will not be made lightly. Thus in Washington probate law, the usual standard for invalidating a will for undue influence is that the evidence be "clear,

148. N.Y. SURROGATE'S COURT PROCEDURE LAW, § 1407 (McKinney, 1986) (for a detailed analysis of this statute and the substitution of witnesses, see *In re Estate of Kleefeld*, 55 N.Y.2d 253, 433 N.E.2d 521, 448 N.Y.S.2d 456 (1982)).

149. See the discussion in *In re Estate of Kleefeld*, 433 N.E. 2d 521, 525-31 (1982) (dissenting opinion of Meyer, J.).

150. Compare, e.g., *Kahn v. Hoes*, 35 N.Y.S. 273 (1895) ("After a lapse of seventeen years he shows the same remarkable recollection of details, even to the phraseology of the will and the physical appearance of the draft which is in evidence, which . . . tends to deepen rather than allay doubts which have arisen respecting the facts."), quoted in *In re Estate of Kleefeld*, 55 N.Y. 2d at 262, 433 N.E. 2d at 527, n.2.

cogent, and convincing,"¹⁵¹ rather than simply "more probable than not," the ordinary civil standard. A similar standard would help to ensure that a finding as to the contents of a lost will would require more than the usual preponderance of evidence, but would be based on particularly cogent evidence of a quality somewhere between a preponderance and "beyond a reasonable doubt."

If some objective criteria were still deemed desirable, as a "guide" to the trial court, the statute might be amended to require, for example, the following: "clear, cogent, and convincing evidence of the contents of the will, consisting at least in part of either the testimony of a witness familiar with the contents, or an authenticated copy of the will." Such a statute would seem to give a court the flexibility of accepting one of the two evidentiary alternatives alone, or requiring more when neither is sufficiently convincing by itself. While the statute would retain some rigidity by requiring a particular type of evidence, it would be a rare case in which "clear, cogent, and convincing" evidence could be produced in the absence of either a copy of the will or oral testimony of one with personal knowledge of its contents.

B. *The Pretermitted Heir Statute*

Washington's pretermitted heir statute, section 11.12.090 of the Revised Code of Washington, needs both a reformation of the ambiguity of its present language and a re-evaluation of the statute's overall approach to accomplishing its ends. For convenience, both aspects of the problem are covered in the present context. I will deal first with a matter merely of ambiguity, then with one of ambiguity exacerbated by a questionable policy, and finally with that policy itself, proposing a wholly new statute.

It is helpful first to set out the statute and its basic interpretation, before discussing both in more detail. Section 11.12.090 provides as follows:

If any person make his last will and die leaving a child or children or descendants of such child or children not named or provided for in such will, although born after the making

151. See, e.g., *In re Estate of Reilly*, 78 Wash. 2d 623, 639, 479 P.2d 1, 11 (1970); *In re Soderstran's Estate*, 35 Wash. 2d 448, 464, 213 P.2d 949, 958 (1950). Not all jurisdictions demand this high a standard. See ATKINSON, *supra* note 5, § 101 at 549; 3 PAGE ON WILLS, *supra* note 8, § 29.81.

of such will or the death of the testator, every such testator, as to such child or children not named or provided for, shall be deemed to die intestate, and such child or children or their descendants shall be entitled to such proportion of the estate of the testator, real and personal, as if he had died intestate, and the same shall be assigned to them, and all the other heirs, devisees and legatees shall refund their proportional part.

There has never been any question, in Washington or elsewhere, as to what is the intended goal of the pretermitted heir statute: it is meant *only* to protect against *inadvertent* omission (pretermission) of certain of the testator's heirs.¹⁵² It is not intended to prevent or even discourage the intentional disinheritance of children or any other heirs. Nevertheless, despite this clear dependence upon the intent of the testator, Washington's statute has been interpreted to be of the "Missouri type," which means that extrinsic evidence of the testator's true intent in omitting the child in question is absolutely excluded.¹⁵³ As will be seen, these sometimes-conflicting policies can create difficulties for courts in applying the statute to carry out its professed legislative policy.

1. Applicability to Descendants of Children

At first glance, it would appear that the statute protects not only children of the testator who are omitted from his will, but also "descendants of such child or children" who are omitted. However, the statute has been construed as not applying to such descendants. In *In re Estate of Hastings*,¹⁵⁴ the supreme court, adopting the analysis of an earlier court,¹⁵⁵ broke the statute down into its three component parts: the "conditional" clause, the "intestacy" clause, and the "resulting" clause.¹⁵⁶ Although the term "descendants" is found in the first and third clauses, it is missing from the "intestacy" clause, and

152. See, e.g., *Bower v. Bower*, 5 Wash. 225, 227, 31 P. 598, 599 (1892); *In re Estate of Hastings*, 88 Wash. 2d 788, 792, 567 P.2d 200, 204 (1977). See generally *Nicholson v. Sorensen*, 517 P.2d 766, 770 (Alaska, 1973); ATKINSON, *supra* note 5, § 36 at 141; 2 PAGE ON WILLS, *supra* note 8, § 21.105 at 529; Annot., 88 A.L.R.2d 616, 623 (1963). Statutes vary in the heirs whom they protect: some (like Washington's) protect only children of the testator, whereas others protect a broader range of heirs.

153. See, e.g., *In re Estate of Marshall*, 27 Wash. App. 895, 621 P.2d 187 (1980); Atkinson, *supra* note 5, § 36 at 141.

154. 88 Wash. 2d 788, 567 P.2d 200 (1977).

155. *In re Estate of Phillips*, 193 Wash. 194, 74 P.2d 1015 (1938).

156. 88 Wash. 2d at 796, 567 P.2d at 204.

therefore there can be no intestacy as to a pretermitted descendant of a child. This, the court found, was a deliberate change by the legislature when it amended the former statute, which did include descendants in the intestacy clause.¹⁵⁷

The problem with this analysis is not its result, which seems to be in keeping with the legislative intent, but its circuitous route necessitated by the statute's language. The legislature presumably left the term "descendants" in the first and third clauses to make it clear that if a pretermitted child predeceased the testator, his (the child's) descendants could take his intestate share by representation, an interpretation which the court has adopted.¹⁵⁸ However, this could have been accomplished by direct statement, rather than by implication. If the legislature had written a new statute, instead of merely tinkering with the language of the "intestacy" clause and leaving the rest of the statute as it was, the present confusion could have been avoided. The statute should be restated to cover only omitted "children" (if that is what the legislature desires), and a sentence should be added to the effect that, "if a child of the testator who would have been entitled to an intestate share under this section dies before the testator leaving issue who survive the testator, those issue shall take the intestate share which the child would have taken, by right of representation."¹⁵⁹

2. The Naming "Qua Child" Dilemma

Another matter of ambiguity, but one more easily resolved by a general change in the statutory approach (to be discussed below) than by direct language, is the effect of "naming" a child in fact, but not "qua child." The background of this dilemma begins in 1899 with the case of *In re Estate of Gorkow*.¹⁶⁰

In *Gorkow* the court held that a gift to a misnamed illegiti-

157. *Id.* at 796-97, 567 P.2d at 204.

158. *Id.* at 797, 567 P.2d at 204-05.

159. Note that if a descendant of an omitted predeceased child is otherwise provided for in the will, that person could end up with both his own share and that of his omitted ancestor. (It is not clear whether or not the present wording of the "conditional" clause is intended to address this question.) This is not so much illogical as troubling, because it seems so unlikely that when a grandchild has been provided for, the grandchild's parent has been totally forgotten. Thus this situation should be addressed in the area of determining whether the omission of the child was in fact inadvertent, to be discussed below.

160. 20 Wash. 563, 56 P. 385 (1899).

mate child (reference to a son Arthur as "Otto") described merely as the son of a woman also mentioned in the will, would not render him a pretermitted child. The court pointed out that the woman had only one son, and that that child was "in the testator's mind" when he executed the will, which is all that the statute requires.¹⁶¹ This seemed to be a sensible approach to the "named or provided for" requirement of the statute. But later courts, with respect to the requirement of "naming," began to read into the statute a requirement that a child not just be "in the testator's mind," but be referred to *as the testator's child*, or at least not be referred to in any other capacity.

In *In re Estate of Hamilton*,¹⁶² the testator executed a will giving one dollar to his "step-daughter" S, describing her as such, together with a like amount to his (second) wife and his stepson. (The bulk of his estate went to his natural son and daughter, by his deceased first wife.) Four years later, the testator formally adopted S. He did not alter his will following the adoption. The court held that the naming of S was not sufficient to prevent the application of the pretermitted heir statute, because the testator did not name her (in fact, could not name her) *as his "child,"* since she did not become his "child" for purposes of the statute until she was adopted.¹⁶³ There was no indication on the face of the will that the testator had contemplated, at the time of execution, the subsequent adoption of S. As a result, S took an intestate share of the estate, probably the same amount as passed under the will to the natural children. It is unclear whether the same result would have followed had S been named without reference to her as a "step-daughter," and without any other description. *Gorkow* would seem to argue that such naming is sufficient.

The *Hamilton* decision may be an example of "hard cases making bad law." To avoid the prospect of leaving the testator's adopted daughter with one dollar, the court seems to have laid a formidable trap for the unwary testator. Consider the case of stepdaughter D, who, together with all of the testator's natural children, is expressly (qua "step-daughter") disinherited, perhaps because the testator is confident that his widow will provide for the children. Four years later, D is adopted,

161. *Id.* at 571, 56 P. at 388.

162. 73 Wash. 2d 865, 441 P.2d 768 (1968).

163. *Id.* at 867, 441 P.2d at 770.

and the testator, still of the same mind, does not see any reason to change his will. (Even a testator who has been warned that omitted children will take a share of his estate would be likely to consider D to have been included in the will.) If the *Hamilton* case is followed, D will not have been "named," although the other children will, with the dubious result that D receives her intestate share of the testator's estate (as the testator did not intend, and as he thought he had expressly avoided), while the other children receive nothing.

The *Hamilton* interpretation renders the pretermitted heir statute inconsistent with the similarly worded (and intentioned) post-testamentary spouse statute.¹⁶⁴ The latter has been construed to require mention of a spouse not *qua* spouse (or, as some jurisdictions require, "in contemplation of marriage"), but merely in fact.¹⁶⁵ The *Hamilton* court rejected this authority as inapplicable, involving "a wife, and not a child, and a statute considerably different from RCW 11.12.090. . ." ¹⁶⁶ While the statutes are "different," the differences are not considerable and do not seem to relate to the question at hand. Both statutes are intended to prevent only unintentional omission.¹⁶⁷ The pretermitted heir statute requires that the child be "named," while the post-testamentary spouse statute requires that the spouse be "mentioned . . . as to show an intention not to make such provision." (If anything, the case for going beyond mere naming seems stronger in the latter instance.) Not only did the court fail to address why the two are not to be treated alike, but it ignored the fact that the primary authority on which it relied, the New York case of *In re*

164. WASH. REV. CODE § 11.12.050 (1967) provides that:

If, after making any will, the testator shall marry and the spouse shall be living at the time of the death of the testator, such will shall be deemed revoked as to such spouse, unless provision shall have been made for such survivor by marriage settlement, or unless such survivor be provided for in the will or in such way mentioned therein as to show an intention not to make such provision, and no other evidence to rebut the presumption of revocation shall be received.

165. Thus, mention of a woman merely by name was sufficient to avoid the statute, although the testator married her after execution of the will. *In re* Estate of Steele, 45 Wash. 2d 58, 273 P.2d 235 (1954). See also, *In re* Estate of Adler, 52 Wash. 539, 100 P. 1019 (1909) (provision for wife described merely as "friend"). Although the testator in *Steele* was already engaged to the named woman at the time of execution, this fact was not mentioned in the will, and the court gave it no weight in its reasoning (nor could it, the fact being prohibited extrinsic evidence).

166. 73 Wash. 2d at 868, 441 P.2d at 770.

167. See, e.g., Estate of Nelson, 85 Wash. 2d 602, 612, 537 P.2d 765, 772 (1975).

Estate of Guilmartin,¹⁶⁸ based its own decision on a direct analogy to New York's post-testamentary spouse statute, finding the two statutes to be indistinguishable, and their policies "identical."¹⁶⁹ Unlike Washington, however, New York at that time interpreted its post-testamentary spouse statute as requiring reference to the spouse *as spouse*, and the *Guilmartin* court merely adopted that interpretation for the pretermitted heir statute. The *Hamilton* decision, in contrast, creates an anomalous divergence between similarly, if not identically, grounded statutes.

Relying on *Hamilton*, the court of appeals in *In re Estate of Marshall*¹⁷⁰ held that a testatrix's niece, J, who had been adopted *before* the execution of the will, but who was described in the will by name but *as a niece*, was a pretermitted heir because she had not been named as a child. Although misdescription of a child who is already of that status is as likely a sign of inadvertent disinheritance as is misdescription due to subsequent adoption (as in *Hamilton*), logic would seem to point the other way. Here, however, there was the complicating factor that the testatrix had also stated in the will that she had no children, natural or adopted. In other words, the testatrix clearly had J "in mind," but possibly did not recall whether the child's relationship to her was that of niece or adopted daughter.¹⁷¹ It is not entirely clear whether the result would have been different had the testatrix simply mentioned her "niece J," without a statement that she had no children. Especially because (unlike *Hamilton*) there was no later change in status, naming J without mention of her status as a child presumably would—and clearly should—have sufficed.¹⁷²

An important variation on this theme is found in *In re Peterson's Estate*.¹⁷³ As in *Marshall*, the testator expressly stated that he had no children. In fact, however, he had

168. *In re Estate of Guilmartin*, 156 Misc. 699, 282 N.Y.S. 525 (1935). The court's other authority, *In re Estate of Reed*, 19 N.J. Super. 387, 88 A.2d 690 (1952), concerned a very differently worded statute, and itself relied heavily upon *Guilmartin*.

169. *In re Estate of Guilmartin*, 156 Misc. at 704, 282 N.Y.S. at 529.

170. 27 Wash. App. 895, 621 P.2d 187 (1980).

171. In fact, the testatrix's uncertainty as to whether J had been adopted (but with no indication that this affected the testatrix's opinion as to how J should be treated in the will) was supported by extrinsic evidence that the court ruled inadmissible. *Id.* at 899, 621 P.2d at 189.

172. Compare *Gorkow's Estate*, discussed at text accompanying notes 160-61, *supra*.

173. 74 Wash. 2d 91, 442 P.2d 980 (1968).

fathered a child, only legitimate because he had married the mother (under threat of prosecution for seduction) just before the child's birth, and had divorced her just after. The testator never further acknowledged the existence of the child (even in the divorce proceedings), despite attempts by the mother to convince him to do so. He obviously desired to have no connection with the child whatsoever, and followed that policy for the almost 40 years between the birth of the child and the testator's death. (He did make a financial settlement with the mother that included there being no further demands on him respecting her or the child.) The court refused to consider the statement that the testator had "no children" to be a sufficient "naming" of this child and thus the child took the entire estate.¹⁷⁴ Instead of the required description (by class) coupled with an expression of a clear intention to disinherit, the court found this to be a mere "mistaken denial" of having children.¹⁷⁵

In *In re Estate of Bouchat*,¹⁷⁶ Division One of the Washington Court of Appeals (the division that decided *Marshall*) appeared to repudiate its earlier premise. In *Bouchat* the testator left his entire estate to an unrelated person, stating in his will that he had "no children now living," but that his "wife, now deceased had two children by a prior marriage . . .," whom he named. He then expressly disinherited those named (step-) children, Franklin and Lilly.¹⁷⁷ In fact, however, Franklin and Lilly were the testator's natural children, with whom he had not communicated in over 40 years.

Under the reasoning of *Marshall*, *Hamilton*, and *Peterson*, the *Bouchat* children should have been deemed pretermitted, because from all that appears on the face of the will, the testator mistakenly believed that he had no natural children and

174. *Id.* at 94-95, 442 P.2d at 983.

175. While the *Peterson* result may have been inevitable, given the Washington court's refusal to admit parol evidence as to the testator's true intent, it raises an interesting dilemma for the practitioner. In *Peterson* the child was legitimate, but apparently only because of a "shotgun wedding," and the testator clearly knew of but wished in no way to acknowledge the child's existence. But even had the child been illegitimate, and the testator thus presumably even more reluctant to acknowledge its existence, and no matter what provision outside of the will had already been made for it, the result would have been the same. A practitioner is thus faced with the twofold dilemma that the testator in such a circumstance may not volunteer the fact of the unwanted child's existence, or if he does (spontaneously or after delicate inquiry), he may refuse to acknowledge the child in a public document such as his will.

176. 37 Wash. App. 304, 679 P.2d 426 (1984).

177. *Id.* at 305, 679 P.2d at 427.

that Franklin and Lilly were only his step-children. The children apparently so argued; but the court, in a footnote, rejected the notion that *Marshall* "establish[ed] an inflexible rule that children must be named *as children* in a will or else be deemed pretermitted."¹⁷⁸

The *Bouchat* court attempted to distinguish *Marshall* on the ground that in the latter case the erroneous description was just "one indicia [sic] of the child's pretermitted status. That the adopted child was not explicitly disinherited was another indicia."¹⁷⁹ In fact, according to *Bouchat*, "*Marshall* was simply another in a long line of cases which resolved this question by attempting to discern the intent of the testator."¹⁸⁰ It seems that *Bouchat* reached the proper result, on the proper basis—discerning the testator's true intent with respect to the specific individuals in question. The court, however, did so by a questionable reading (in fact a seeming repudiation) of *Marshall*, and with no attempt to deal with the implications of the supreme court's still-existing decision in *Hamilton*. Because in *Bouchat* the testator specifically stated that he had "no children," and named his children as step-children only, the only real distinction in terms between *Marshall* and *Bouchat* would seem to be that, as the *Bouchat* court noted, in *Marshall* the niece had not been expressly disinherited—she had simply been acknowledged and then given nothing. This difference in language is a shaky foundation on which to build a doctrine, and it is far from convincing. The only distinction should be, as the *Bouchat* court stated, whether from all of the will's "indicia" it appears that the testator had his children in mind and intended to disinherit them, and thus did not do so through "inadvertence or oversight."¹⁸¹ In other words, the proper question is whether, had the testator recalled that Franklin and Lilly were his natural children (if indeed he had actually forgotten this fact),¹⁸² he still would have disinherited them. It seems quite likely that he would have, and the trial and appellate courts agreed when they found neither the chil-

178. *Id.* at 306 n. 1, 679 P.2d at 427. Of course, if there was such a "rule," it was established by *Hamilton*, not *Marshall*. *Hamilton*, perhaps distinguishable because it concerned an adoption after execution of the will, was not mentioned in *Bouchat*.

179. *Id.*

180. *Id.*

181. *Id.* at 306, 679 P.2d at 427.

182. The trial court's opinion implied that after 40 years he simply "did not think of them as 'his' children." *Id.* at 309, 679 P.2d at 428.

dren pretermitted nor the testator incompetent for mislabeling them.

Unfortunately, as *Marshall* illustrates, discovery of the testator's true intent from the face of the will (extrinsic evidence being disallowed) can be quite difficult; and this difficulty is what makes mechanical rules so attractive to courts. At the very least, extrinsic evidence should be admissible where the terms of the will, by both naming the testator's children and denying their existence or their status as children, leaves the intention behind their disinheritance ambiguous.

Bouchat not only repudiated the rigid "*qua child*" analysis of *Marshall*, but it also indicated that an express statement that the testator has "no children," when in fact he has children living, will not necessarily render the children pretermitted, even (or at least?) when combined with a misdescription of them. However, it may be too soon to consider the "*qua child*" doctrine defunct. The supreme court applied the doctrine in *Hamilton*¹⁸³ (a case in which, unlike either *Marshall* or *Bouchat*, the child was adopted after the date of execution), seemingly reinforced its "mistaken denial" aspect in *Peter-son*,¹⁸⁴ and has not had an opportunity to consider this latest interpretation. No petition for hearing was filed in *Bouchat*; and the court in *Bouchat* did not really analyze the problem in a convincing fashion, preferring to sidestep it by retreating from *Marshall's* broad implications. Nevertheless, *Bouchat* is an important application of what Washington (and other) courts have long acknowledged—that a proper interpretation of the pretermitted heir statute seeks the testator's true intent, and deems "pretermitted" only those children omitted from a will through "inadvertence or oversight."¹⁸⁵

The "*qua child*" dilemma could be resolved by inserting into the statute a proviso that "a child need not be named in its capacity as child in order to satisfy the requirement that it be 'named.'" (Of course, if the legislature wished to adopt the *Hamilton* court's position, it could substitute "must" for "need not.") There may, however, be a better way, one that retains protection for the child who in fact would have been given a

183. 73 Wash. 2d 865, 441 P.2d 768.

184. 74 Wash. 2d 91, 442 P.2d 980.

185. In an even more recent case, Division Two followed the "testator's intent" approach to "naming" where the child was misdescribed, although the court (because it found a "provision" for the child) had no need to pursue the matter in detail. *In re Estate of Davidson*, 37 Wash. App. 886, 683 P.2d 620 (1984).

greater share of the estate qua child than in its named capacity. If, as suggested below, the legislature changes the statute to limit its effect to children born or adopted after the execution of the will and to permit the admission of extrinsic evidence of the testator's intent, most of the cases of this nature would resolve themselves without further language. Children adopted before the execution of the will (as in *Marshall*) would not be considered pretermitted. Children adopted after execution but "named" in another capacity in the will (as in *Hamilton*) would be included, although usually extrinsic or intrinsic evidence (as in *Bouchat*) would indicate whether continued omission after adoption was likely to have been inadvertent or intentional. Specific language relating to the capacity in which a child must be named could also be added to cover the rare case unresolved by either provision.

3. Changing the Statute's Approach

Washington's pretermitted heir statute has been referred to as "a legal quagmire of fortuitous and subterranean tampering with the power of testamentary disinheritance of children."¹⁸⁶ It is certainly a statute that seems in its present configuration and under present interpretation to serve poorly its professed purpose.

As indicated earlier, the only supposed purpose of the pretermitted heir statute is to protect children from *inadvertent* omission from a parent's will.¹⁸⁷ While this policy of countenancing intentional disinheritance might be criticized as ill-advised,¹⁸⁸ I proceed on the premise that Washington, like most other states, will continue for the foreseeable future to espouse that policy, and therefore continue to require a statute which permits intentional and prevents only inadvertent disinheritance. Upon this premise, the present statute can be evaluated in terms of how well it accomplishes that goal.

a. *Application Only to Children Born After Execution*

The Washington pretermitted heir statute applies to chil-

186. Rein, *A More Rational System for the Protection of Family Members Against Disinheritance: A Critique of Washington's Pretermitted Heir Statute and Other Matters*, 15 Gonz. L. Rev. 11, 23 (1979) [hereinafter *Rein*].

187. See, e.g., *Bower v. Bower*, 5 Wash. 225, 227, 31 P. 598, 599 (1892); *In re Estate of Hastings*, 88 Wash. 2d 788, 792, 567 P.2d 200, 202 (1977).

188. See generally *Rein*, *supra* note 186.

dren born either before or after execution of the testator's will.¹⁸⁹ Yet it has been pointed out with some justification that in these times of professionally drawn wills, small families, and modern communication and travel, a truly inadvertent omission of a living child, due to either mistake or forgetfulness, is akin to "misplacing a house—not very likely."¹⁹⁰ In fact, such a lapse of memory could, under some circumstances, cast doubt on the testator's testamentary capacity, his ability to recall the "natural objects of his bounty."¹⁹¹ The supreme court has agreed that "reason would tell us that, if a child is omitted from a will, the omission is most likely intentional rather than an oversight."¹⁹² In other words, in the great majority of the relatively few cases in which a testator has omitted any reference whatsoever to a living child, that omission will likely have been intentional.

On the other hand, failure to mention a child who is born after execution of the will is quite understandable. In fact, even the testator who wishes to disinherit afterborn children by express provision is limited to a general reference to a class because there are not yet individuals who can be "named."¹⁹³ Therefore if the statute is to presume inadvertent omission from failure to disinherit expressly, and from that fact alone,¹⁹⁴ this seems justifiable only in the case of afterborn children.

It might be argued that it is worth giving an intestate share to an occasional omitted child who was intended to be disinherited, in order to prevent disinheritance of even the rare child who was omitted by true inadvertence. The effect of giving that "occasional" omitted child a share, however, can be

189. *In re Estate of Hastings*, 88 Wash. 2d 788, 789 n.1, 567 P.2d 200, 201 n.1 (1977). It does not, however, apply to children already deceased at the time of execution. *Id.* at 788, 567 P.2d at 200.

190. Rein, *supra* note 186, at 24-25. See also *In re Estate of Hastings*, 88 Wash. 2d 788, 796, 567 P.2d 200, 204 (1977); Evans, *Should Pretermitted Issue be Entitled to Inherit?*, 31 CALIF. L. REV. 263, 269 (1943); Matthews, *Pretermitted Heirs: An Analysis of Statutes*, 29 COLUM. L. REV. 748, 752 (1929).

191. ATKINSON, *supra* note 5, § 38; Rein, *supra* note 186, at 25.

192. *In re Estate of Hastings*, 88 Wash. 2d 788, 796, 567 P.2d 200, 204 (1977).

193. Such a naming by class will suffice, at least if coupled with language indicating an intention either to provide for or to disinherit them. See *Gehlen v. Gehlen*, 77 Wash. 17, 137 P. 312 (1913); *In re Peterson's Estate*, 74 Wash. 2d 91, 442 P.2d 980 (1968).

194. See *supra* note 152 and accompanying text. If extrinsic evidence were available to elucidate the testator's intent in such cases, there would be greater justification for including existing children.

devastating on the testator's overall testamentary plan. Suppose, for example, that testator T wishes to treat his wife more favorably than either of his children, A and B, except he wants his favored child A to have the family home. The rest of his separate estate T leaves to his wife W. The separate estate is valued at \$400,000, including the home worth \$100,000. If T forgets to, or out of delicacy does not, expressly name or disinherit B, then B will take his intestate share of the estate, one-quarter or \$100,000.¹⁹⁵ Under Washington's pretermission statute, the other gifts would abate ratably, with B's \$100,000 taken ratably from A and from W. The result is that B would end up with more than A, and A with only a share of the family home or its proceeds.¹⁹⁶

Another problem with including existing children has already been discussed: the question whether "naming" in some capacity other than as child (adopted child C named as "stepchild C") is sufficient to avoid pretermission. If only those children born or adopted after execution of the will were included, many of these cases would be moot; only where a child was named in some other capacity and then adopted after execution of the will would there still be a need for extrinsic evidence or a presumption of pretermission.

An analogy might be drawn to the post-testamentary spouse statute, section 11.12.050, which as indicated has the same purpose of avoiding unintentional omission as does the pretermitted heir statute.¹⁹⁷ The spouse statute applies only to marriages occurring after the execution of the will. While it is more likely that a testator will forget he has a child than a spouse, and while it is possible that a testator will inadvertently fail to mention either, both possibilities seem sufficiently unlikely to warrant a presumption against, rather than for, such an eventuality.

The modern approach to the coverage of pretermitted heir statutes is represented by section 2-302 of the Uniform Probate Code, which limits the statute's effect to children born or adopted after execution of the will.¹⁹⁸ This confines the stat-

195. WASH. REV. CODE § 11.04.015 (1985).

196. WASH. REV. CODE § 11.12.090 (1985). This is at least better than the result in those jurisdictions which apply the general abatement scheme to such cases, so that B's entire share might come from that of whoever has a general or residual gift, whether A or, as in this case, W.

197. See *supra* note 167 and accompanying text.

198. UNIFORM PROBATE CODE § 2-302(b) (1983) does include the living child

ute's operation primarily to the testator who fails to provide for (or "name") such afterborn children and who also neglects to amend his will to take them into account after their birth—the most likely case for truly inadvertent pretermission.

b. Admission of Extrinsic Evidence

As mentioned above, Washington is considered to have a "Missouri-type" statute, which precludes the introduction of extrinsic evidence of the testator's actual intent in omitting a child.¹⁹⁹ This interpretation, which is usual among states with similarly-worded statutes, is based on the fact that the statute has no express reference to the testator's intent, and no provision for admission of extrinsic evidence.²⁰⁰ In contrast, statutes that provide for a pretermitted heir "unless it appears that omission was intentional," so-called "Massachusetts-type" statutes, are generally construed to permit the admission of extrinsic evidence.²⁰¹ Thus the current state of the law is not a matter of express legislative directive, but of settled statutory construction. There is reason to believe that it is time for a new directive; the courts are unhappy with, but consider themselves unable to change, the present construction.²⁰² The legislature should amend the statute to permit the admission of extrinsic evidence of the testator's intent to disinherit, *especially* if the statute continues to apply to existing children. If the statute does not continue as it is, there is arguably less need for extrinsic evidence because most cases of omission without mention will likely be unintentional. However, if admission of extrinsic evidence is combined with a limitation to afterborn children, such a provision would properly create, in effect, a rebuttable presumption of unintentional omission in circumstances in which lack of intent is likely, but not certain, and therefore such a presumption is appropriate.

The attitude of early Washington courts was that the "sins of avarice and false swearing would receive an impetus not hitherto dreamed of in connection with decedents' estates" if

omitted solely because he was believed by the testator to be dead; however, the problems of proof and possible false claims of such an error would seem to argue against such a specialized exception.

199. See *supra* note 153.

200. See, e.g., ATKINSON, *supra* note 5, § 36 at 141; *In re Estate of Hastings*, 88 Wash. 2d 788, 794-95, 567 P.2d 200, 203 (1977).

201. ATKINSON, *supra* note 5, § 36 at 141.

202. See *infra* text accompanying notes 203-11.

parol evidence of the testator's intent to disinherit were admitted.²⁰³ Yet such prophecies of doom seem misplaced in light of the long-standing operation of "Massachusetts-type" statutes in so many jurisdictions,²⁰⁴ especially in an era of changes in the law of evidence that increase rather than decrease the ease of admissibility of hitherto suspect categories of proof.²⁰⁵

More recently, courts have viewed the prohibition of extrinsic evidence with less favor. Sometimes a court has attempted to avoid the prohibition by applying a different evidentiary rule, as when the court in *In re Harper's Estate*²⁰⁶ invoked the rule admitting extrinsic evidence to interpret the meaning of ambiguous or uncertain language to determine whether a gift to the testator's "heir" was meant to include the testator's child.²⁰⁷ (*In re Estate of Ridgway*²⁰⁸ later disapproved the *Harper* approach as inconsistent with the requirement that the language itself convey the testator's intent.²⁰⁹)

The clearest recent indication of judicial disagreement with the current state of the law is found in *In re Estate of Hastings*.²¹⁰ The supreme court there made it clear that in its opinion the policy of protecting against only a truly inadvertent omission was not furthered by the current statute as pres-

203. *Hill v. Hill*, 7 Wash. 409, 412, 35 P. 360, 361 (1893).

204. See generally, ATKINSON, *supra* note 5, § 36 at 141-43; Annot., 88 A.L.R.2d 616 (1963).

205. Examples of liberalized admissibility include the rules of evidence regarding interest, authentication, and hearsay. See MCCORMICK, EVIDENCE 159-61, 700-01, 914-18 (3d ed. 1984). Courts and legislatures have become more willing to let the potential for fraud or falsity be addressed by the adversarial trial process, rather than by outright exclusion. *Id.* Interestingly, the UNIFORM PROBATE CODE, § 2-302 (1986) confines evidence of intentional omission to the will, except that extrinsic evidence may be used to prove that a transfer outside the will was intended to be in lieu of a testamentary gift. (It is unclear what evidence is admissible to prove that the testator incorrectly believed his child to be dead, under § 2-302(b)). Whatever the merits of the prohibition of extrinsic evidence, it creates far less difficulty (and is far more logical) in a statute applying only to children born after execution of the will. The post-testamentary spouse statute, WASH. REV. CODE § 11.12.050 (1985), expressly prohibits extrinsic evidence which rebuts the presumption of revocation upon subsequent marriage. However, that statute applies only to the far stronger presumption which attaches to omission of a spouse whom the testator married *subsequent* to execution; it also reflects the greater concern the probate law has generally had with protection of a spouse, who can then be relied upon to protect the children.

206. 168 Wash. 98, 10 P.2d 991 (1932).

207. *Id.* at 106-07, 10 P.2d at 993-94.

208. 33 Wash. 2d 249, 205 P.2d 360 (1949).

209. *Id.* at 253-54, 205 P.2d at 363 (citing *Gehlen v. Gehlen*, 77 Wash. 17, 137 P. 312 (1913)).

210. 88 Wash. 2d 788, 567 P.2d 200 (1977).

ently construed. However, while it approved of those cases that had given "de facto" consideration to the testator's intent, it did not overrule the more rigid cases confining evidence of intent to the four corners of the will.²¹¹ Instead, the *Hastings* court took the approach of construing the statute so as to achieve the result the testator probably intended. Clearly the better alternative would be to permit the use of whatever evidence might be available in order to construe the will to achieve that result. The need to avoid speculation as to the intent of a testator no longer able to explain it for himself, and the possibilities of fraud that this raises, can be addressed by careful application of the high standard of proof required in will contests.

C. Absentee Beneficiaries

Chapter 11.80 of the Revised Code of Washington deals with appointment of a trustee for the conservation and ultimate distribution of property that belongs to a person determined to be absent from the county in which the property is located. Included are provisions for final distribution of the property if the absentee has not been located within seven years, in essence as if the absentee were deceased.²¹² This chapter contains various safeguards intended to give the absentee notice and to ensure that a diligent search has been made before his property is distributed.²¹³ While there are questions that can be raised as to the constitutionality of these provisions in light of current notions of due process,²¹⁴ for present purposes it will be assumed that these safeguards are sufficient to protect the absentee and his heirs. Two questions arise, however, with respect to absentees who are themselves beneficiaries under the will of a deceased testator. Both questions derive from a lack of clarity or consistency in the applicable statutory language.

1. The Absentee Beneficiary

Under section 11.12.120 of the Revised Code of Washington,²¹⁵ if a gift to a beneficiary is subject to an express condi-

211. *Id.* at 795-98, 567 P.2d at 204-05.

212. WASH. REV. CODE § 11.80.080-.110 (1985).

213. See WASH. REV. CODE § § 11.80.010, .080, .100 (1985).

214. See M. REUTLINGER & W. OLTMAN, *supra* note 1, at 388-90.

215. WASH. REV. CODE § 11.12.120 (1985) provides:

Whenever any person having died leaving a will which has been admitted to

tion that he survive the testator, failure of proof within three years of probate that he did in fact survive creates a lapse. This is no surprise, because even if there is no express survival condition, a gift to a beneficiary who predeceases the testator lapses, unless saved by section 11.12.110,²¹⁶ the anti-lapse statute. Section 11.12.130,²¹⁷ however, provides that *in the case of an express survival contingency*, if within the three-year period it is proven that the beneficiary did survive but is an "absentee" within chapter 11.80, the gift is distributed to a trustee under that chapter, as for any other absentee. A scheme of notice and hearing procedures similar to that of chapter 11.80 is set out in section 11.12.150.²¹⁸ Note that these provisions for distribution appear to apply *only* to beneficiaries subject to an express survival contingency, as defined in section 11.12.120, and this is where the difficulty begins.

It is quite possible that even a beneficiary not subject to an express condition of survival might be alive at the testator's death but be an absentee at the time of distribution, and in fact there are provisions which seem to address this situation. Chapter 11.76 of the Revised Code of Washington relates to the settlement of estates and contains a series of steps to be taken when an estate, in the language of section 11.76.200, "has been or is about to be distributed" to "any person who has not been located."²¹⁹ Such a missing person would seem also to be within the broader definition of "absentee" under chapter

probate or established by an adjudication of testacy, shall by said will have given, devised or bequeathed unto any person, a legacy or a devise upon the condition that said person survive him, and not otherwise, such legacy or devise shall lapse and fall into the residue of said estate to be distributed according to the residuary clause, if there be one, of said will, and if there be none then according to the laws of descent, unless said legatee or devisee, as the case may be, or his heirs, personal representative, or someone in behalf of such legatee or devisee, shall appear before the court which is administering said estate within three years from and after the date the said will was admitted to probate or established by an adjudication of testacy, and prove to the satisfaction of the court that the said legatee or devisee, as the case may be, did in fact survive the testator.

216. For the text of § 11.12.110, see note 227, *infra*.

217. WASH. REV. CODE § 11.12.130 (1985) provides:

If it shall be made to appear to the satisfaction of said court within the time fixed by RCW 11.12.120 that such legatee or devisee, as the case may be, did in fact survive the testator, but that such legatee, or devisee, is an absentee within the meaning of chapter 11.80, then and in that event the court shall by appropriate order direct the said legacy or devise to be distributed to a trustee appointed and qualified as provided for in said chapter 11.80.

218. See *supra* notes 212-14 and accompanying text.

219. WASH. REV. CODE § 11.76.200 (1985).

11.80, and it is not clear why the legislature did not adopt the latter definition, as it did in section 11.12.130. As it stands, the treatment of "unlocated" beneficiaries under chapter 11.76 does not refer to, and apparently is not governed by, the provisions of chapter 11.80. It provides merely for distribution to an "agent" who is appointed for the purpose²²⁰ and who must post a bond,²²¹ delivery to the county treasury after three years,²²² and either probate proceedings or escheat if there is no claim by the absentee after four more years.²²³ What chapter 11.76 does not seem to contain is any provision for notice to the absentee, or procedures to ensure a diligent search, as found in both chapter 11.80 and section 11.12.150. Even if this is not a constitutional problem of due process (and it may well be),²²⁴ it certainly is one of unexplained inconsistency with the other absentee provisions. The explanation, such as it is, may be that until 1955, chapter 11.76 was devoted not to "unlocated" beneficiaries, but to "nonresident" distributees,²²⁵ and the question of absence in the sense of "missing" was not paramount.

It is not clear whether the provisions of chapter 11.76 apply to the absentee beneficiary whose gift was subject to an express survival contingency. If such a person has survived the testator but is an "absentee," section 11.12.130 would seem to direct distribution under chapter 11.80. Yet if he "has not been located," chapter 11.76 seems to apply as well. Here the answer may be that because of the provisions of section 11.12.130, there is no time at which the estate will be "about to be distributed" to such an absentee/unlocated person, and therefore section 11.76.200 will never apply to him.²²⁶

That leaves only the absentee who is not subject to an express survival contingency, and who appears to be dealt with in a manner different from his survival-contingency counterpart. If he "has not been located" at the time of distribution, with no indication of what if any procedures are to be followed in an attempt to locate him, his gift seems to fall under the

220. *Id.*

221. WASH. REV. CODE § 11.76.210 (1985).

222. WASH. REV. CODE § 11.76.220 (1985).

223. WASH. REV. CODE §§ 11.76.240-250 (1985). It is not clear whether the probate would be of the entire estate of the absentee or only of the unclaimed proceeds.

224. *See supra* note 214.

225. REM. REV. STAT. § 1535.

226. Of course, if he is not shown to have survived, there can be no distribution for three years, and at the end of that time the gift will lapse under WASH. REV. CODE § 11.12.120 (1985), and again section 11.76.200 will not apply.

"agency" rules of chapter 11.76. There is no apparent reason to treat this class of beneficiaries differently from those whose gift was subject to an express survival contingency. Even if there were, there is no reason to have two different sets of procedures for absent beneficiaries, especially when one provides far more protection for the absentee and his successors than does the other. If the provisions of chapter 11.80 are appropriate to deal with the property of missing persons generally, they should be appropriate to deal with missing beneficiaries.

2. Lapse and the Absentee Beneficiary

One of the strangest inconsistencies produced by the "absentee" provisions of chapter 11.76 is the insertion in the 1955 amendments of a separate "anti-lapse" provision for "unlocated" beneficiaries. Washington has a fairly standard anti-lapse statute, section 11.12.110,²²⁷ under which a gift to a designated beneficiary will not lapse if the beneficiary predeceases the testator but leaves lineal descendants who can take in his place. The class of designated beneficiaries includes only a "child, grandchild, or other relative of the testator," and specifically does not include a spouse. One would expect that this limitation to blood relatives, intended to restrict the statute's abrogation of the doctrine of lapse to those instances in which substitution of another taker would most likely follow the testator's intent,²²⁸ would apply whether or not the beneficiary had been "located" at the time of initial distribution of the estate. One would, however, be incorrect.

Under section 11.76.240 of the Revised Code of Washington, if, during the seven years the property of an "unlocated" beneficiary is held by the court-appointed agent or the county treasury, "it clearly appears that such person died prior to the decedent in whose estate distribution was made to him, but

227. WASH. REV. CODE § 11.12.110 (1985) provides:

When any estate shall be devised or bequeathed to any child, grandchild, or other relative of the testator, and such devisee or legatee shall die before the testator, having lineal descendants who survive the testator, such descendants shall take the estate, real and personal, as such devisee or legatee would have done in the case he had survived the testator; if such descendants are all in the same degree of kinship to the predeceased devisee or legatee they shall take equally, or if of unequal degree, then those of more remote degree shall take by representation with respect to such predeceased devisee or legatee. A spouse is not a relative under the provisions of this section.

228. See, e.g., *Ruchert v. Boyd*, 56 Wash. 2d 266, 352 P.2d 216 (1960); *In re Renton's Estate*, 10 Wash. 533, 39 P. 145 (1895).

leaving lineal descendants surviving, such lineal descendants may claim." Because this language refers to "such absentee person," and because the absentee is "any person who has not been located," what results is a special anti-lapse statute, applicable only to absentees,²²⁹ and applying to *all such beneficiaries, regardless of whether or not they are "relatives" of the testator*. In effect, the descendants of a nonrelative beneficiary of the testator cannot take the share which their ancestor would have received had he not predeceased the testator, *unless* to their good fortune their ancestor cannot be "located" at the time of distribution. In such a circumstance, the descendants will take (to the exclusion of the testator's residuary beneficiaries) when the fact of their ancestor's prior death is later discovered.²³⁰

The solution to this problem is quite simple: either the anti-lapse language of section 11.76.240 should be eliminated altogether, or it should incorporate, expressly or by reference, the limitations of the general anti-lapse statute.

D. The "Catch-22" Codicil

My final point illustrates the kind of confusion even a seemingly straightforward definition can create. Washington's probate code not only defines "will" as including codicils,²³¹ but it defines "codicil" also, as an instrument that meets the formal requirements of a will and that "refers to an existing will for the purpose of altering or changing the same."²³² Unfortunately, instead of being a helpful guide for anyone unfamiliar with probate terminology, this definition has created at best a source of unnecessary confusion, and at worst a serious trap for the unwary draftsman.

It was early decided that any document that did not meet the definitional requirements for a codicil, including at the time that it refer to and be "attached" to the will, could not be probated as a codicil.²³³ This was a logical enough conclusion.

229. That is, those not located at the time of distribution, but apparently not known then to have predeceased the testator.

230. While it is not likely that this scenario would be deliberately orchestrated, it makes no more sense as an inadvertent than as a deliberate result of the described circumstances.

231. WASH. REV. CODE § 11.02.005(8) (1985). See *supra* notes 29-30, 36 and accompanying text.

232. WASH. REV. CODE § 11.02.005(9) (1985).

233. State *ex rel.* Schirmer v. Superior Court, 143 Wash. 578, 255 P. 960 (1927), explained in *In re Whittier's Estate*, 26 Wash. 2d 833, 851, 176 P.2d 281, 290 (1947).

It was further held, however, that if the second instrument was *intended* to be a codicil (that is, was intended to dispose of only part of the testator's estate and not intended to be his *only* will), it could be probated *as a codicil only*, and not as a "will."²³⁴ As a result, the court in *In re Whittier's Estate*²³⁵ reached the absurd position that an instrument executed with all of the formalities of a will, but intended to dispose of only a part of the testator's estate, and which would have been valid if it had been the first or only will of the testator, was invalid *either as a will or as a codicil* because there already existed another will, to which the second instrument neglected to make reference.²³⁶ The document was caught in limbo because it looked like a will, but was intended as a codicil, and so qualified as neither.²³⁷

Whittier has not been overruled, and the legislature apparently adopted the court's position when it enacted a definition of "codicil" which includes a requirement of reference to the earlier will. However, by a later amendment to the code the legislature expanded the definition of "will" to include any instrument "validly executed as required by RCW 11.12.020,"²³⁸ which would seem to accommodate the type of instrument in *Whittier*, which purports only to dispose of part of the estate but does not qualify as a "codicil" because it does not refer back to an existing will.²³⁹ Does this latest amendment permit probate of such an instrument as a "will," even if not as a codicil? The answer is uncertain. The decision in *Whittier* not to probate the codicil turned not on the definition of "will," but on the definition of "codicil," specifically the requirements of attachment and reference to an earlier will. When it originally adopted the "reference to the will" part of the *Whittier* definition, the legislature apparently intended to retain the rule

234. *In re Whittier's Estate*, 26 Wash. 2d at 847-48, 176 P.2d at 288.

235. See *supra* note 233.

236. *Whittier's* definition of "codicil" as requiring reference to the earlier will was derived not from a statute, but from various secondary sources. 26 Wash. 2d at 846-47, 176 P.2d at 288.

237. One is reminded of the Virginia cases of *Noble v. Tipton*, 76 N.E. 151 (Va. 1905), and *Noble v. Fickes*, 82 N.E. 950 (Va. 1907), in which an instrument (an undelivered deed) was first denied effect as a deed because it was intended as a testamentary disposition, and then denied probate as a will because, on its face, it lacked testamentary intent.

238. WASH. REV. CODE § 11.02.005(8) (Supp. 1986). The change was part of the 1982 probate code amendments, which primarily addressed the law of trusts.

239. The previous definition did not so clearly include such an instrument. See *supra* note 36.

denying probate to a "codicil" lacking such reference.²⁴⁰ It is less clear that by later expanding the definition of "will" the legislature intended to change the rule. It should do so in clear terms now.

To deny probate to a testamentary instrument, otherwise validly executed, because it is not the testator's only will but fails to conform to the technical definition of a codicil, exalts form over substance and lays a formidable trap for the unwary, all without any compensating benefit to testators, their heirs, or the probate system.²⁴¹

The matter should not be left to be resolved by implication from the current definition of "will." The simplest way to avoid further difficulty would be for the legislature to amend the definition of codicil to delete the requirement of reference to an existing will, or to add a statement that to be entitled to probate, a subsequent testamentary instrument need not qualify as a "codicil" if it meets the formal requirements of a will. Only then can we be certain we will not see a repetition of the "catch-22" result in *Whittier*.

IV. CONCLUSION

As indicated at the outset, many of the problems discussed in this article are a result of the legislature's tendency to make changes in one statute or another over time, without always considering the effects of those changes on other parts of the probate law. Other problems are the result of deliberate choices by the legislature that reflect policies now in need of re-examination. It would be tempting for the present legislature, to the extent it agrees that some or all of the above criticisms are well-founded, to continue to "patch" the law with amendments addressing only the narrow points raised, hoping not to create new problems elsewhere. Indeed, I have attempted wherever possible to suggest language that would

240. See Stewart & Steincipher, *supra* note 80, at 881. But this apparently was not the legislature's primary purpose. See *supra* note 80.

241. One benefit the legislature may have sought was to make it easier to construe will and codicil as one document. Stewart & Steincipher, *supra* note 80. But this benefit hardly seems worth the cost of frustrating a testator's intent as set out in an otherwise-valid and properly executed testamentary instrument. The legislature purported to eliminate the unpleasant "surprise" caused by inadvertent violation of the attachment requirement (*Id.*); but it retained the equally objectionable surprise relating to reference to the will.

make corrections with the least amount of change and disruptive effect.

Another alternative, however, would be to embark on a more comprehensive review of the probate law of the state and to draft a new probate code, incorporating the language of the present statutes only where, after thorough reconsideration, present law still seems appropriate in terms of both clarity and policy. This should not mean substantial changes in the law, because much of it will be found to be in no need of change. Not only is much of current law already "up to date," but in the area of probate law it would seem advisable to give considerable deference to precedent because expectations based on existing law and the estate plans which they reflect extend over such a long period of time, both past and future. Nevertheless, every isolated correction carries the danger of further unanticipated conflict or confusion with other unconsidered provisions or policies. A comprehensive approach, integrating new and old language and policy in a logical statutory framework, is more likely to obviate the early need for further patchwork.

Consideration and correction of the "legislative lapses" set out here would be a good start. Perhaps, however, now that the legislature has for the moment exhausted the attention and resources given such well-publicized and politically volatile proposals as tort and sentencing reform, there will be an opportunity to consider the more mundane, but potentially far-reaching, subject of probate reform.