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Gerry W. Beyer

ARTICLES

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Gerry W. Beyer*

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* Professor of Law, St. Mary's University School of Law, San Antonio, Texas. B.A. 1976, Eastern Michigan University; J.D. 1979, Ohio State University; LL.M. 1983 & J.S.D. Candidate, University of Illinois. This article is adapted from Chapters 1, 2, and 3 of the working draft of the author's J.S.D. dissertation.

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I. Introduction

A. The Importance of Dying Testate

The individual who fails to take the initiative to acquire a comprehensive estate plan runs the risk that estate property will be distributed in a manner that ignores the individual's intent.[1] A properly drafted and executed will is one of the crucial elements of an effective estate plan. Failure to take affirmative steps to acquire a will may have great consequences. Estate property may not be distributed according to a plan customized to meet individual needs and circumstances; instead, state law may impose a generic plan upon the estate.

The most commonly imposed plan is set forth in the intestacy or descent and distribution statutes of each state. Intestate succession laws specify recipients for property not governed by a valid will or will substitute.[2] These statutes attempt to distribute estate property as individuals would have done had they taken the time to consider and properly formalize their desires. Among other provisions, the statutes grant inheritance rights to the surviving spouse, children, and other relatives, and provide a list of people to serve as managers of estate property and guardians of children.[3] These legislatively mandated plans are based on the presumed intent of the average person, not the actual intent of the decedent. Accordingly, these schemes often fail to carry out anyone's true desires; they merely represent an assumption, supported by public policy, that the decedent would have wanted property to pass to certain individuals and to have certain people serve as executors and guardians.[4] Evidence

1. *See* 1 PAGE ON THE LAW OF WILLS § 1.6, at 21 (W. Bowe & D. Parker ed. 1960) ("law leaves it primarily to each person . . . to determine for himself to whom his property shall pass . . . .").

2. *See, e.g.*, T. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 38 (2d ed. 1953); 1 PAGE ON THE LAW OF WILLS § 1.1 (W. Bowe & D. Parker ed. 1960); Note, *The Statutory Will: A Simple Alternative to Intestacy*, 35 CASE W. RES. L. REV. 307, 320 (1984). Will substitutes include trusts, multiple-party bank accounts (joint, trust, P.O.D.), life insurance, pension and retirement plans, joint and survivorship property, and other similar arrangements.

3. *See, e.g.*, E. SCOLES & E. HALBACH, JR., PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 12 (4th ed. 1987) ("Intestate succession . . . [is] calculated to approximate the probable wishes of most decedents."); 1 PAGE ON THE LAW OF WILLS § 1.1, at 1-2 (W. Bowe & D. Parker ed. 1960) (succession schemes based on "assumption as to the natural affections and probable wishes of the ordinary person, or majority of persons").

4. *See, e.g.*, E. SCOLES & E. HALBACH, JR., *supra* note 3, at 12 (intestacy plans are "unlikely to satisfy completely the wishes of any individual"); R. SCHWARTZ, WRITE YOUR OWN WILL 13-14 (1961) ("the disposition provided by law would not represent [decedent's] choice"); Comm. on Fiduciary Servs. for Small Estates & Conservatorships, Prob. & Tr. Div., *Proposed Uniform Acts for a Statutory Will, Statutory Trust and Statutory Short Form Clauses*, 15 REAL PROP. PROB. & TR. J. 837, 839 (1980) [hereinafter Comm. on Fiduciary

that the decedent actually intended otherwise is usually inadmissible; thus, the decedent's wishes may go unfulfilled.

B. Most Individuals Fail to Have Wills

Debate exists as to whether intestate succession is a matter of legislative grace[5] or a natural right.[6] The majority view, however, is that positive law grants individuals the right to control the disposition of property via wills.[7] Although state legislatures have granted to all competent adult individuals residing in the United States extensive power to exercise deadhand control of their estates by executing wills, the majority of Americans die without having even a simple will.[8] There are several reasons why many individuals forego the significant benefits of dying testate.

C. Reasons Individuals Fail to Prepare Wills

1. Unaware of Importance.—Many persons are unaware of the critical importance of having a valid will.[9] They either do not

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Servs.] ("Lawyers recognize that clients generally are not satisfied with the provisions made by intestacy laws for the surviving spouse. Lawyers also recognize that the necessity of legal guardianships for minors . . . are likewise generally not favored."); *cf. In re* Watson's Will, 262 N.Y. 284, 297, 186 N.E. 787, 790 (1933) ("No two persons are alike; neither are their wills. Every one has his own peculiar family history, temperament, duties, and responsibilities.").

5. *See* Irving Trust v. Day, 314 U.S. 556, 562 (1942) ("Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance."). *See generally* 1 PAGE ON THE LAW OF WILLS § 3.1 (W. Bowe & D. Parker ed. 1960).

6. *See* Nunnemacher v. State, 129 Wis. 190, 201, 108 N.W. 627, 629 (1906) ("from the very earliest times men have been acquiring property, protecting it by their own strong arm if necessary, and leaving it for the enjoyment of their descendants . . . ."). *See generally* 1 PAGE ON THE LAW OF WILLS § 3.1 (W. Bowe & D. Parker ed. 1960).

7. *See, e.g.*, Irving Trust v. Day, 314 U.S. 556, 562 (1942) ("Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction."); J. PROFFATT, THE CURIOSITIES AND LAW OF WILLS 30 (1876) (right to control succession "founded on convenience and concession"). *See generally* 1 PAGE ON THE LAW OF WILLS § 3.1 (W. Bowe & D. Parker ed. 1960).

8. *See, e.g.*, ADVOCATES FOR BETTER PLANNING, WILLS: A GUIDE TO BETTER PLANNING 1 (2d rev. 1983) ("Three out of four Americans die without a will."); E. SCOLES & E. HALBACH, JR., *supra* note 3, at 13 ("Despite the reasons for disposing of one's property by will or even by trust, most Americans die intestate."); *Isn't it Time You Wrote a Will?*, 50 CONSUMER REP., Feb. 1985, at 103, 103 ("more than two-thirds of all adult Americans die without wills"); *Where There's a Will, There's a Way*, YOUR LAW, Spring 1988, at 3 (70% of individuals do not have wills). *See generally* 1 PAGE ON THE LAW OF WILLS § 1.6 (W. Bowe & D. Parker ed. 1960) (discussion of studies and surveys demonstrating high percentage of intestate deaths). *Cf.* The Law Commission, *Distribution on Intestacy* 3 (Working Paper No. 108, 1988) (copy on file at the Dickinson Law Review office) ("about half the population [of England and Wales] die intestate").

9. *See* Weil, *Will Draftsmanship and the New York Statutes*, 28 N.Y. ST. B. BULL. 60, 60 (1956) ("The ignorance of laymen about wills is legendary."). *See generally Isn't it Time*

know what will happen to their estates upon death[10] or operate under incorrect assumptions about what will occur.[11] Laymen and attorneys alike often fail to appreciate estate problems and possible solutions.[12] As one commentator stated: "[I]t has been one of the surprises of my life to observe that a man who has accumulated his wealth through ability and foresight will often be found to have been astonishingly neglectful in providing for those he leaves behind."[13]

Even persons who have executed wills may not recognize the necessity of reviewing them periodically. Common changes in circumstances, such as births, deaths, adoptions, changes in property owned, marriages, divorces, estate and tax law changes, and changes in state of domicile often impact the effectiveness of a once satisfactory will.[14] Failure to recognize that these events may significantly distort a will's disposition scheme often results in frustration of the testator's expectations.

2. *Indifference.*—Apathy is also a reason why some individuals die intestate. Believing that "You can't take it with you," some people voluntarily forego providing for distribution of their property. These individuals may appreciate the importance of a will but simply do not wish to take advantage of the ability to exercise deadhand control over assets, the naming of fiduciaries, and other matters typically included in a will.

3. *Cost.*—Obtaining a comprehensive and individualized will

You Wrote a Will?, 50 CONSUMER REP., Feb. 1985, at 103, 103 (noting that most individuals, even wealthy and politically astute persons such as Howard Hughes and Presidents Lincoln, Jackson, Grant, and Garfield, die without wills).

10. R. SCHWARTZ, *supra* note 4, at 13 ("[i]t is an unusual person who is aware of what disposition will be made of his property, should he die without leaving a will").

11. For example, many people believe that all of their property will pass to the surviving spouse upon death. In reality, most state intestacy statutes provide that a significant portion of the estate passes to the children. *See, e.g.*, ILL. ANN. STAT. ch. 110 ½ para. 2-1(a) (Smith-Hurd 1987) (if surviving spouse and a descendant of decedent, one-half of the estate passes to the surviving spouse and one-half to the descendants per stirpes); TEX. PROB. CODE ANN. §§ 38(b) & 45 (Vernon 1980) (intestate's share of community property passes to descendants; intestate's separate property divided between surviving spouse and descendants with personal and real property treated differently); UNIF. PROB. CODE §§ 2-102 (1982) (if surviving issue of decedent are also issue of surviving spouse, surviving spouse takes first $50,000 plus one-half of balance; if one or more of decedent's surviving issue are not also issue of the surviving spouse, the surviving spouse receives one-half of the intestate estate).

12. *See* W. AYERS, WHAT YOUR HEIRS CAN NEVER TELL YOU 3 (1943).

13. *Id.* at 2.

14. *See, e.g.*, ILL. ANN. STAT. ch. 110½ para. 4-10 (Smith-Hurd 1978) (under some circumstances, child born after will execution entitled to share as if parent died intestate); TEX. PROB. CODE ANN. § 69 (Vernon 1980) (divorce after making will voids provisions in favor of ex-spouse); I.R.C. §§ 2001-2210 (West 1989) (potential estate tax liability for estates exceeding $600,000).

is often an expensive process, particularly if the testator makes extensive use of legal counsel.[15] Although some attorneys will provide simple wills for one hundred dollars or less, the fees for complex wills often run into thousands of dollars because of the preparation time involved.[16] These expenses place individualized wills out of financial reach for many people and increase the reluctance of those with sufficient resources to incur the cost of obtaining wills.

4. Time and Effort.—Preparation of a will requires significant time and effort. Many people are unwilling or unable to devote time to estate planning matters because the pressures of work and family are more immediate.

A significant investment of time is necessary for even a simple estate. The following typical scenario illustrates the time expended in making a will. Initially, the attorney meets with the client to gather the information needed to begin work on the will. Additional information is frequently needed from the client, either because the client does not have all of the necessary information and documents or has not organized them in a useable form. Also, the client may need to ponder and decide on various aspects of the will. At the second meeting, the attorney and client review a rough draft of the will and other estate planning documents, and engage in a more detailed discussion of possible options. For simple estates, this meeting may be the one at which estate planning documents are signed and other aspects of the plan are finalized. For more complex estates, additional meetings may be necessary. If the client's transportation and waiting time are included along with preparation and meeting time, it becomes apparent that creation of an estate plan requires an individual to sacrifice a sizeable amount of time and expend considerable effort.

Even those individuals who are interested in estate planning and are willing to take the time to make a will often procrastinate. There is a "natural preoccupation . . . with the accumulation and present enjoyment of their estate and from the illusion of continued life."[17] Because urgency is typically not present, it becomes very easy to

15. *See, e.g.*, Comm. on Fiduciary Servs., *supra* note 4, at 837 ("widespread recognition that the estate planning process has become too . . . costly for many persons"); *Isn't it Time You Wrote a Will?*, 50 CONSUMER REP., Feb. 1985, at 103, 108 (lawyer as the "hidden heir" in all estates); Note, *supra* note 2, at 307 (seeking legal assistance to prepare estate plans is costly). *Contra* 1 PAGE ON THE LAW OF WILLS § 1.6, at 25 (W. Bowe & D. Parker ed. 1960) (some people ignorant of fact that will drafting fees are usually nominal).

16. *See Isn't it Time You Wrote a Will?*, 50 CONSUMER REP., Feb. 1985, at 103, 103.

17. 1 PAGE ON THE LAW OF WILLS § 1.6, at 24 (W. Bowe & D. Parker ed. 1960).

postpone making a will.

5. *Complexity.*—The entire field of estate planning, including will preparation, is complex and continues to grow in intricacy. For example, relevant tax laws constantly change, the availability of will substitutes grows, the nature of assets change, and the needs of clients and their families expand.[18] Most people do not view this complexity as a stimulating challenge; rather, it tends to discourage them from making wills.[19]

6. *Lack of Property.*—Lack of property is a commonly cited reason for failure to have a will.[20] Many people are apparently unaware that there are other reasons to have a will besides merely designating the recipients of property. Even for small estates, especially if there is a spouse and children, it is important to prevent intestacy so that the surviving spouse's ability to deal with household items and other property is not subject to claims by the children. Another significant benefit is the testator's ability to nominate guardians for minor children upon the simultaneous death of the parents or upon death of the surviving parent.[21]

7. *Admission of Mortality.*—In the past, many people believed that they would not live long after executing a will, even if they were then in good health.[22] For many, this belief persists today. Thus individuals procrastinate the preparation of a will as a conscious or unconscious defense against admitting mortality.[23] "[P]ersonal death is a thought modern man will do almost anything

18. Note, *supra* note 2, at 333.

19. *See, e.g.*, Comm. on Fiduciary Servs., *supra* note 4, at 837 ("widespread recognition that the estate planning process has become too complicated . . . for many persons"); Perkins & Hughes, *Short Forms Legislation for Wills and Trusts*, 61 MASS. L.Q. 143, 143 (1976) ("The preparation of wills and trusts has become a more and more complicated business.").

20. *See* M. SUSSMAN, J. CATES & D. SMITH, THE FAMILY AND INHERITANCE 202 (1970) (lack of property most common reason given for not having will in Cleveland, Ohio survey). *Cf.* The Law Commission, *Distribution on Intestacy* 2-3 (Working Paper No. 108, 1988) (copy on file at the Dickinson Law Review office) ("likely that people [in England and Wales] with little property will be less likely to make a will").

21. *See generally* Shaffer, *Nonestate Planning*, 106 TR. & EST. 319 (1967) (discussion of reasons for impecunious person to have estate plan).

22. *See* 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 538-39 (5th ed. 1942); 2 PAGE ON THE LAW OF WILLS § 19.3, at 61 (W. Bowe & D. Parker ed. 1960).

23. *See* T. ATKINSON, *supra* note 2, § 38, at 160 ("A superstitious prejudice against wills is found in many persons past middle age. Apparently they think that testamentary preparation for disposition of their property at their death may somehow hasten their demise. While this attitude is a foolish one, it frequently cannot be altered by any amount of sound advice.").

to avoid,"[24] and it is easy for an individual to avoid such thoughts by postponing, usually indefinitely, the execution of a will.

D. Legislative Solutions

Although there are many significant advantages to dying testate, many people fail to prepare estate plans for reasons ranging from financial to psychological. Many state legislatures have recognized the problems that ensue when citizens die without valid wills. Most legislative efforts have not been intended to impose limitations, but to make estate planning techniques "more effective as a means of accomplishing individually formulated objectives."[25] These legislative responses encompass several different forms.

1. Extension of Governmentally Imposed Estate Plan.—Many jurisdictions reacted to the lack of individual will preparation by expanding the default estate plan, that is, the estate plan imposed on individuals who fail to prepare their own wills. Some jurisdictions have revised their intestate distribution schemes to reflect a more modern view of how property should descend.[26] Others have provided greater latitude for will substitute devices such as multiple-party bank accounts,[27] joint and survivorship property,[28] and retirement benefits.[29]

Some of these revisions represent significant progress toward carrying out individual intent. For example, Texas recently enacted a simplified procedure for spouses desiring to hold community prop-

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24. Shaffer, *The "Estate Planning" Counselor and Values Destroyed by Death*, 55 IOWA L. REV. 376, 377 (1969).

25. E. SCOLES & E. HALBACH, JR., *supra* note 3, at 12.

26. *See, e.g.*, 1982 Ala. Acts No. 82-399, § 2-113 (codified at ALA. CODE § 43-8-57 (1982)) (abolishing dower and curtesy); § 2-102 (codified at ALA. CODE § 43-8-41 (1982)) (providing for surviving spouse to receive significant portion of estate); 1986 Ohio Laws S.B. 248 (codified at OHIO REV. CODE ANN. § 2105.06 (Baldwin 1988)) (increasing share of surviving spouse); 1984 Pa. Laws 103, No. 21, § 1 (codified at 20 PA. CONS. STAT. ANN. § 2106(b) (Purdon Supp. 1988)) ("Any parent who, for one year or upwards previous to the death of the parent's minor or dependent child, has willfully neglected or failed to perform any duty of support owed to the minor or dependent child or who, for one year, has willfully deserted the minor or dependent child shall have no right or interest under [intestate succession] in the real or personal estate of the minor or dependent child"). *Cf.* The Law Commission, *Distribution on Intestacy* at vii (Working Paper No. 108, 1988) (copy on file at Dickinson Law Review office) (report of English Law Commission concluded that "reform [of intestacy laws] should probably be in the direction of giving more to the surviving spouse").

27. *See, e.g.*, UNIF. PROB. CODE §§ 6-101 to -113 (1982) (detailing survivorship rights in joint accounts, P.O.D. accounts, and trust accounts).

28. *Id.* § 6-201 (1982) (provisions in insurance policy, employment contract, bond, mortgage, promissory note, deposit agreement, pension plan, trust agreement, or conveyance regarding at death payment deemed nontestamentary).

29. *Id.*

erty in survivorship form.[30] Prior to this change, Texas mandated a complicated two-step procedure; failure to demonstrate technical compliance with the precise requirements resulted in the survivorship feature being rendered ineffective.[31] By contrast, however, changes to intestacy statutes,[32] and to other state and federal statutes,[33] mandate dispositions that accord with the deceased's presumed intent instead of actual intent. Such changes reflect a paternalistic approach, with the government deciding what a person would have intended based upon what society believes the intent ought to have been.

2. Statutory Wills.—An innovative approach taken by an increasing number of jurisdictions is to supply will forms by statute.[34] Legislatures have provided statutory will forms by using one of two basic methods, or a combination of both—incorporating terms by reference and fill-in-the-blank forms.

(a) Terms to be incorporated by reference.—Jurisdictions that follow the incorporation by reference approach do not provide a complete will form by statute; instead, the statute merely supplies provisions that the testator may incorporate by reference into the will. Incorporation by reference treats extraneous written material as if it were set forth in the will, although the material is not physically part of the will. For material to be incorporated by reference, four conditions must be satisifed: 1) the material to be incorporated must be in writing; 2) the will must demonstrate the testator's intent to incorporate the extraneous writing; 3) the incorporated material must be in existence at the time the will is executed; and 4) the will must identify the incorporated material with sufficient specificity so that no

30. TEX. PROB. CODE ANN. § 451 (Vernon Supp. 1990) ("At any time, spouses may agree between themselves that all or part of their community property, then existing or to be acquired, becomes the property of the surviving spouse on the death of a spouse.").

31. A partition of separate property into community property was required before the creation of survivorship rights. *See, e.g.*, Hilley v. Hilley, 342 S.W.2d 565 (Tex. 1961) (community interest of deceased spouse in stock held "as joint tenants with right of survivorship" passed to decedent's child by a former marriage, rather than surviving spouse, because the stock was not first partitioned into separate property).

32. *See supra* note 26 and accompanying text.

33. Although asset distribution matters are typically controlled by state law, federal law is also relevant. *See, e.g.*, Employee Retirement Income Security Act, 29 U.S.C.A. § 1055 (West Supp. 1988) (for pension plan to qualify under Act, spouse required to be a significant beneficiary).

34. *See, e.g.*, CAL. PROB. CODE §§ 6240-46 (West Supp. 1989) (forms for wills and wills with trusts); ME. REV. STAT. ANN. tit. 18A, § 2-514 (Supp. 1987) (will form); MICH. COMP. LAWS ANN. § 700.123c (West Supp. 1988) (will form); WIS. STAT. ANN. §§ 853.50-.62 (West Supp. 1988) (forms for wills and wills with trusts).

other material reasonably fits the description.[35] Legislatures have taken two considerably different approaches to the provision of will forms to be incorporated by reference.

(i) Automatic incorporation.—Under the automatic incorporation approach, the statute provides certain provisions that become part of a person's will unless the will expressly provides to the contrary.[36] This technique fills in the interstices of wills by "establishing definite rules to cover matters not settled by the instrument . . . ."[37] Because the statutory provisions are automatically incorporated into the will, the testator does not need to take steps to include them. Thus, the provisions provide effective gap-fillers when the testator has not given thought to the matters covered by the incorporated provisions. This approach is not a true incorporation by reference because there is no demonstrable express intent of the testator to have the provisions included. Instead, the incorporation is based on implied intent; the statute presumes that testators would have incorporated these provisions had they thought about the items.

(ii) Express incorporation required.—Other statutes reflect a more traditional approach by requiring an express incorporation of the statutory provisions.[38] The will is not deemed to contain the incorporated material unless the will contains language demonstrating an intent to incorporate and identifies with reasonable certainty the material to be incorporated.[39]

If express incorporation is required, it is less likely that material will be treated as part of a person's will without actual intent. A conscious effort to incorporate is required because the will must con-

35. *See* T. ATKINSON, *supra* note 2, § 80 (discussion of incorporation by reference with citations to English and American cases recognizing the doctrine); UNIF. PROB. CODE § 2-510 (1982) ("Any writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification.").

36. *See, e.g.*, UNIF. TRUSTEES' POWERS ACT § 2(a), 7B U.L.A. 745 (1964) ("trustee has all powers conferred upon him by the provisions of this Act unless limited in the trust instrument"); TEX. PROP. CODE ANN. § 112.055 (Vernon 1984) (governing instruments of certain private foundations, nonexempt charitable trusts, and others are considered to contain a list of five provisions geared toward assuring that the instruments comply with Internal Revenue Code provisions to achieve preferred tax status).

37. Lacovara, *"Unless Otherwise Provided" — Statutory Will Clauses and Other Drafting Opportunities*, 103 TR. & EST. 741, 743 (1964).

38. *See, e.g.*, UNIF. STAT. WILL ACT § 3 (1984) (express language incorporating by reference provisions of the act necessary); TENN. CODE ANN. § 35-50-109(a) (1984) (requires "a clearly expressed intention of the testator or settlor" to incorporate fiduciary powers by reference); Law of Property Act, 1925, 15 & 16 Geo. 5, ch. 5, § 179 (statutory will forms must be referred to, otherwise they are not deemed to be incorporated in a will).

39. *See* UNIF. STAT. WILL ACT § 3 (1984).

tain specific language. A potential weakness of this approach, however, is that incorporation language may be included in the boilerplate of a form will that was not read or understood by the testator. Thus, the testator might incorporate unintended provisions into the will.

(b) Fill-in-the-Blank forms.—The second technique utilized by legislatures to provide statutory will forms is the enactment of model fill-in-the-blank forms.[40] The user fills in the forms, which are sometimes accompanied by instructions, definitions, and other information.

E. Anglo-American Use of Statutory Wills

England's 1925 Law of Property Act[41] pioneered the use of statutory will forms by Anglo-American jurisprudence. One section of this comprehensive act authorized the Lord Chancellor to prescribe and publish forms that a testator could incorporate by reference into a will.[42] On August 7, 1925, Chancellor Cave prescribed and published these forms along with directions for their use.[43]

England's innovative approach to will preparation did not immediately cross the Atlantic. Although some states attempted to simplify certain aspects of will drafting by enacting statutes containing particular provisions designed to be incorporated by reference into a will,[44] there was little movement in the United States toward providing comprehensive will forms by statute.

In the middle to late 1970s, legal writers gave new impetus to the concept of statutory wills. These commentators recognized that the existing system of estate planning, which relied on expensive attorney-prepared wills and litigation-producing homemade wills, was failing to provide most people with a means for creating individualized estate plans. Several commentators offered suggestions that served to kindle interest in statutory wills. In a 1977 essay, Professor Edward C. Halbach urged the development of "standardized or par-

40. *See supra* note 34.
41. Law of Property Act, 1925, 15 & 16 Geo. 5, ch. 20, § 179.
42. *Id.*
43. Statutory Will Forms, 1925, S.R. & O. 780/L. 15.
44. *See, e.g.*, UNIF. TRUSTEES' POWERS ACT, 7B U.L.A. 741 (1964) (detailing fiduciary powers that are automatically incorporated into trusts and incorporated by express reference into other documents); MASS. GEN. LAWS ANN. ch. 184B, §§ 1-4 (West Supp. 1989) (providing three categories of fiduciary powers that may be incorporated by reference into a will or trust); TENN. CODE ANN. § 35-50-109(a) (1984) (listing fiduciary powers that may be incorporated by reference).

tially standardized arrangements which private individuals can . . . by a simple act of selection, utilize for transactions that now must either be individually tailored or go virtually unplanned."[45] Another approach was proposed in 1978 by Harold Marquis, Barbara Croft Hipple, and Judith M. Becker.[46] They suggested the use of a form will presented in a questionnaire format "with questions and answer blanks designed in such a way that it could be satisfactorily completed by the average layman with minimal or no supervision."[47]

One of the first significant American attempts at enacting comprehensive statutory will forms occurred in May 1979 when a fill-in will form was introduced into the New York State Legislature.[48] Despite the support of the Association of the Bar of the City of New York,[49] the measure failed.[50]

In 1980, the American Bar Association's Probate and Trust Division Committee on Fiduciary Services for Small Estates and Conservatorships proposed a statutory will act for adoption by state legislatures.[51] This act did not provide a form will; rather, the act contained provisions for a complete will that could be incorporated by reference into a will.[52] The National Conference of Commissioners on Uniform State Laws used the second revised draft of the ABA act as the starting point for drafting a uniform law.[53] Although the Commissioners made substantial changes to the ABA's draft, the general format remained the same.[54] The Commissioners evaluated

45. Halbach, *Probate and Estate Planning: Reducing Need and Cost Through Change in the Law*, in DEATH, TAXES AND FAMILY PROPERTY 165, 169 (E. Halbach ed. 1977). *See also* Est. Plan., Tr. & Prob. L. Sec. of the State Bar of Cal., *Possible Legislation — Statutory Will* 3 (Dec. 16, 1980) [hereinafter *Possible Legislation*] (copy on file at Dickinson Law Review office) (Halbach's article as inspiration for California statutory will).

46. Marquis, Hipple & Becker, *The Questionnaire Will: A Device to Facilitate Testamentary Freedom for the Less Affluent*, 30 U. FLA. L. REV. 669 (1978).

47. *Id.* at 677 (the development of the forms could be via free enterprise system or legislative enactment).

48. S.B. 5594, N.Y. Leg., 1979-80 Reg. Sess. (introduced by Senator H. Douglas Barclay, the Chairman of the Senate Judiciary Committee). *See* Shaw, *Benefits to Both Lawyers & Clients Could Result From Statutory Wills*, N.Y.L.J., Jan. 24, 1980, at 39, col. 1. The New York bill was inspired by Halbach, *Probate and Estate Planning: Reducing Need and Cost Through Change in the Law*, in DEATH, TAXES AND FAMILY PROPERTY 165 (E. Halbach ed. 1977). *See* Granelli, *Do-It-Yourself Wills Ready in Calif.*, Nat'l L.J., Nov. 1, 1982, at 7, col. 3.

49. The Ass'n of the Bar of the City of N.Y., *Legislative Memorandum in Support of . . . Creation of a Statutory Form of Will* (Mar. 2, 1979) [hereinafter *Legislative Memorandum*] (copy on file at the Dickinson Law Review office).

50. *See, e.g.*, Granelli, *Do-It-Yourself Wills Ready in Calif.*, Nat'l L.J., Nov. 1, 1982, at 7, col. 3; *California First with Statutory Wills*, CAL. LAW., Feb. 1983, at 17.

51. Comm. on Fiduciary Servs., *supra* note 4, at 837.

52. *Id.*

53. UNIF. STAT. WILL ACT prefatory note (1984).

54. *Id.*

the potential of using fill-in forms, a concept then being debated in California, but concluded that the incorporation by reference approach suggested in the ABA draft was preferable.[55] In 1984, the Conference approved the Uniform Statutory Will Act and recommended it to the states for enactment.[56] In 1987, Massachusetts became the first and, to date, only state to pass this uniform act.[57]

Meanwhile, the fill-in approach was receiving favorable consideration elsewhere, despite its rejection by both the American Bar Association and the Commissioners on Uniform State Laws. Four states recently enacted will forms embodied verbatim in the enabling legislation. In 1982, California became the first state to enact a statutory will form.[58] The California statute, which was developed by the State Bar of California,[59] was based on the failed New York proposal.[60] Redrafting was necessary not only to adapt the forms to California law but to phrase them "in plain English so the general public could understand the forms and the law."[61] The California provisions took effect on January 1, 1983.[62] Maine[63] and Wisconsin[64] passed similar legislation in 1983 and Michigan followed suit in 1986.[65]

F. Scope of Article

This Article begins with a comprehensive discussion of the history, contents, and operation of currently existing statutory wills. After examining the pioneering English legislation, this Article turns to the American experience with statutory wills. The Uniform Statutory Will Act is considered, followed by a review of the fill-in-the-

55. *Id.*
56. UNIF. STAT. WILL ACT historical note (1984).
57. MASS. GEN. LAWS ANN. ch. 191B, §§ 1-15 (West Supp. 1989).
58. CAL. PROB. CODE §§ 6240-48 (West Supp. 1989). *See, e.g.*, Granelli, *Do-It-Yourself Wills Ready in Calif.*, Nat'l L.J., Nov. 1, 1982, at 7, col. 3 (California has "the first state-approved, do-it-yourself plan in the nation"); *California First With Statutory Wills*, CAL. LAW., Feb. 1983, at 17 ("As of January 1 [1983], California became the first state to have a statutory will . . . .").
59. *See California First with Statutory Wills*, CAL. LAW., Feb. 1983, at 17, 17.
60. *See* Granelli, *Do-It-Yourself Wills Ready in Calif.*, Nat'l L.J., Nov. 1, 1982, at 7, col. 3.
61. *Id.*
62. 1982 Cal. Stat. ch. 1401 (codified at CAL. PROB. CODE §§ 6240-48 (West Supp. 1989)).
63. 1983 Me. Laws ch. 367 (codified at ME. REV. STAT. ANN. tit. 18A, § 2-514(a) (Supp. 1987)).
64. 1983 Wis. Laws Act 376 (codified at WIS. STAT. ANN. §§ 853.55-.62 (West Supp. 1988)).
65. 1986 Mich. Pub. Acts No. 61 (codified at MICH. COMP. LAWS ANN. § 700.123a-c (West Supp. 1988)).

blank statutory will forms.

The analysis of statutory wills is divided into two major sections. First, the Article examines the functions and purposes of will forms, as well as the potential difficulties arising from their use. Second, the Article analyzes the different types of statutory will methodologies. The incorporation by reference approach of the Uniform Statutory Will Act is compared and contrasted with the fill-in-the-blank approach. The Article concludes with recommendations on how these differing methodologies may be used to create effective statutory wills.

II. The English Statutory Will Forms

A. History

The 1925 Law of Property Act[66] was the enabling legislation for the English statutory will forms. Section 179 of the Act provided:

> The Lord Chancellor may from time to time prescribe and publish forms to which a testator may refer in his will, and give directions as to the manner in which they may be referred to, but, unless so referred to, such forms shall not be deemed to be incorporated in a will.[67]

In the same year, statutory forms and instructions were prescribed that applied to wills taking effect on or after January 1, 1926.[68] The forms have not since been amended despite changes in other relevant English law, such as the reduction of the age of majority.[69]

B. Description

The forms promulgated by the Lord Chancellor do not constitute a comprehensive will; rather, they provide particular provisions that the testator may incorporate by reference into the will as a means of shortening its length and reducing its complexity. The forms are divided into two categories: Part I forms, which may be incorporated by reference as a unit or individually, and Part II forms, which may only be incorporated one at a time by specific individual reference.[70]

In addition to form provisions, the Chancellor also provided an

66. Law of Property Act, 1925, 15 & 16 Geo. 5, ch. 20.
67. Law of Property Act, 1925, 15 & 16 Geo. 5, ch. 20, § 179.
68. Statutory Will Forms, 1925, S.R. & O. 780/L. 15, note.
69. *See* 23 THE ENCYCLOPAEDIA OF FORMS AND PRECEDENTS 799 n.1 (4th ed. 1972).
70. Statutory Will Forms, 1925, S.R. & O. 780/L. 15, § 2.

important rule of interpretation and a short definitional section. In case of conflict, any express language used by the testator in the will is deemed to prevail over the language of the incorporated provision.[71] Thus, a testator may incorporate a form and make any desired modifications to that form. Definitions of the terms "disposition,"[72] "dispose of,"[73] "the trustees,"[74] and "authorised investments"[75] are provided. Other terms either have the meanings given in the 1925 Law of Property Act or remain undefined.[76]

1. English Part I Forms—General or Specific Reference.—Six forms may be incorporated en masse or individually. To incorporate this group of forms, language such as the following is sufficient:

> All the forms contained in Part I of the Statutory Will Forms, 1925, are incorporated in my will [subject to the following modifications, namely . . .].[77]

To incorporate a specific form, the following language was suggested:

> The following forms contained in Part I of the Statutory Will Forms, 1925, shall be incorporated in my will: —
> Form _ (_____)
> Form _ (_____)
> [Subject to the following modifications, namely . . .].[78]

A brief description of each of the Part I forms follows.

(a) Form 1—Confirmation of settlements.—This form confirms the testator's settlements of property as they exist on the date of death.[79] In effect, this provision is an "anti-satisfaction" clause allowing beneficiaries to take under the will without accounting for property previously received from the testator.

(b) Form 2—Meaning of "personal chattels."—Form 2 provides a broad definition of "personal chattels." The term includes most items commonly considered to be personal chattels and ex-

71. *Id.* § 3(1)(i).
72. *Id.* § 3(1)(ii).
73. *Id.*
74. *Id.* § 3(1)(iii).
75. Statutory Will Forms, 1925, S.R. & O. 780/L. 15, § 3(1)(iv).
76. *Id.* § 3(1)(v).
77. Statutory Will Forms, 1925, S.R. & O. 780/L. 15, sched.
78. *Id.*
79. Statutory Will Forms, 1925, S.R. & O. 780/L. 15, Form 1.

pressly excludes any chattels used for business purposes at the time of the testator's death.[80] Regardless of use, money and securities for money are also excluded from the scope of the term.[81] The form also states that a specific disposition of personal chattels will prevail over a general disposition.[82]

(c) Form 3—Inventories and provisions respecting chattels.—This relatively detailed form governs bequests of chattels other than by absolute gift.[83] If the beneficiary is only entitled to the use or possession of the chattel, duplicate inventories must be prepared: one for the trustee and one for the beneficiary.[84] The form provides the methods for handling receipts for the property and gives instructions on how to proceed when changes to the property occur.[85] The liabilities of the trustees and beneficiaries with respect to the chattels are also described.[86]

(d) Form 4—Legacies to charities.—This form is the shortest of the statutory will forms. It states that the receipt of a charitable legacy by the treasurer, or other similar official, of a charitable beneficiary completely discharges the deceased's personal representative.[87]

(e) Form 5—Directions respecting annuities.—The fifth form provides the trustee with elaborate directions for dealing with annuities, which are defined to include "any periodical payment (not being a rentcharge) for life or other terminable interest."[88] Among other rules, these provisions direct how the funds are to be established, govern the relationship between the annuity fund and the estate, and define the responsibility of the trustee with respect to investments.[89]

(f) Form 6—Power of appropriation.—This form provides that the power of appropriation conferred by the 1925 Administration of Estate Act may be exercised by the personal representatives

80. Statutory Will Forms, 1925, S.R. & O. 780/L. 15, Form 2.
81. *Id.* at (1).
82. *Id.* at (2).
83. Statutory Will Forms, 1925, S.R. & O. 780/L. 15, Form 3.
84. *Id.* The beneficiary in this situation is called the "usufructuary."
85. *Id.* at (2)-(6).
86. The form allocates responsibility for, among other things, loss of the chattels, the acquisition of insurance, and management during the incompetency of the beneficiary. *Id.* at (7), (8).
87. Statutory Will Forms, 1925, S.R. & O. 780/L. 15, Form 4.
88. *Id.* at Form 5 at (8).
89. *Id.* at Form 5.

or trustees without any of the consents required by the Estate Act.[90] The objective of Form 6 is "to avoid an appropriation attracting *ad valorem* stamp duty."[91] The trustee, however, is still required to give notice to those normally required to give consent, if such notice is practicable.[92]

2. English Part II Forms—Specific Reference Required.—The four remaining statutory forms may only be incorporated by specific reference; they may not be incorporated as a group. To incorporate these forms, language such as the following is needed:

> Form ___ of the Statutory Will Forms, 1925, is incorporated in my will, and shall apply to . . . [subject to the following modifications . . .].[93]

A brief description of each of the Part II forms follows.

(a) Form 7—Trusts of a settled legacy.—Form 7 is one of the longer statutory forms and contains provisions used to establish a trust of liquid assets. If the testator indicates that this form is to apply to a legacy of money or investments, the property will be held in trust for the lifetime benefit of the named legatee.[94] After the legatee dies, the remainder is held in trust for the descendants of the legatee, appointed by deed or by will, until such descendants reach age twenty-one or marry.[95] The form also provides for disposition of the property should the legatee fail to exercise the power of appointment.[96] Additionally, the form contains sections governing when descendants must go into hotchpot to take additional shares,[97] what happens if the legatee has no descendants,[98] and the ability of the legatee to appoint the income of the trust to his spouse.[99]

(b) Form 8—Administration.—Incorporation of this form results in the application of standardized administration provisions for property disposed of by the will, other than by exercise of a special

90. Statutory Will Forms, 1925, S.R. & O. 780/L. 15, Form 6 at (1).
91. 23 THE ENCYCLOPAEDIA OF FORMS AND PRECEDENTS 803 n.5 (4th ed. 1972).
92. Statutory Will Forms, 1925, S.R. & O. 780/L. 15, Form 6 at (2).
93. Statutory Will Forms, 1925, S.R. & O. 780/L. 15, sched. (the schedule contains model forms for incorporating each of the Part II forms).
94. Statutory Will Forms, 1925, S.R. & O. 780/L. 15, Form 7.
95. *Id.* at (3).
96. *Id.*
97. *Id.* at (4).
98. *Id.* at (5).
99. Statutory Will Forms, 1925, S.R. & O. 780/L. 15, Form 7 at (6).

power.[100] For the most part, Form 8 lists fiduciary powers, including the ability to sell real and personal property,[101] to postpone a sale under proper circumstances,[102] to retain reversionary interests until they become possessory,[103] to pay funeral costs, debts, duties, other liabilities, and legacies,[104] and to make proper investments.[105] The form treats most receipts as income,[106] and also contains important provisions regarding the allocation of expenses between principal and income.[107]

(c) Form 9—Trusts for spouse for life.—This form establishes a trust for the surviving spouse for life with the remainder passing to the descendants appointed by the surviving spouse by deed or by will.[108] If the surviving spouse fails to exercise the power of appointment, the remainder passes to the testator's descendants.[109] The form also sets forth detailed trust provisions very similar to those in Form 7.[110]

(d) Form 10—Trusts for spouse and issue.—The last statutory form establishes a trust for the surviving spouse with a remainder to the testator's descendants.[111] This form is similar to Form 9 but does not grant the testator's surviving spouse a power of appointment.

C. *Experience*

When the English statutory forms were promulgated, there was hope for their widespread use.[112] From the beginning, however, the forms failed to achieve significant popularity. By 1929, only four years after the forms were published, English legal writers were already commenting that "the public [did] not seem very eager to avail themselves of such forms."[113]

100. Statutory Will Forms, 1925, S.R. & O. 780/L. 15, Form 8.
101. *Id.* at (1).
102. *Id.* at (2).
103. *Id.* at (3).
104. *Id.* at (4).
105. Statutory Will Forms, 1925, S.R. & O. 780/L. 15, Form 8 at (5).
106. *Id.* at (6).
107. *Id.* at (7).
108. Statutory Will Forms, 1925, S.R. & O. 780/L. 15, Form 9.
109. *Id.* at (2)(ii).
110. *Id.* at (2), (3).
111. Statutory Will Forms, 1925, S.R. & O. 780/L. 15, Form 10.
112. *See* Lacovara, *supra* note 37, at 743.
113. *Statutory Forms—Protective Trusts*, 167 LAW TIMES 327, 327 (1929) (statement based on experience of unnamed author).

In 1949, Joseph Trachtman investigated the "apparent desuetude" of the statutory forms.[114] Trachtman was

> puzzled by the lack of discussion of the statutory will forms in the English texts or current periodicals, of any reported litigation which might have arisen from inept use of the statutory forms, and of any amendments or amplification of the statutory will forms since their publication.[115]

He noted that English form books were brimming with will forms but contained little, if any, mention of the statutory forms.[116] Trachtman traveled to England and spoke with many practitioners;[117] his discussions confirmed that the forms were rarely used. As Trachtman explained:

> As I went on my rounds, what impressed me most was that so little attention was paid by anyone to the forms; that so many practitioners were either unaware of their existence (sometimes confusing them with printed forms sold by legal stationers) or if they knew about them, were quite content to let others use them if they wanted to.[118]

The disuse of the statutory will forms apparently continues.[119] A review of current English literature reveals little discussion of the statutory will forms, although some treatises and form books reprint them with minimal annotations.[120] These forms have not been modified or amended despite changes in other statutes and in the social climate. This lack of revision may be further evidence of the unpopularity of the forms. For example, although Form 3 details life estates in personal property,[121] testators rarely create such life estates.[122]

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114. Trachtman, *Statutory Will Forms — Survey of English Experience*, 88 TR. & EST. 640 (1949). Trachtman was then the newly elected chairman of the American Bar Association's Committee on Standards of Draftsmanship.

115. *Id.* at 640.

116. *Id.*

117. *Id.* at 641.

118. *Id.* Form 8, which sets forth administrative powers, appeared to be the most commonly used form; some of the other forms were occasionally used while others were rarely, if ever, used. *Id.*

119. *See* Lacovara, *supra* note 37, at 743 (the drafting habits of English practitioners were "not likely to have materially changed" since Trachtman's 1949 investigation).

120. *See, e.g.*, 23 THE ENCYCLOPAEDIA OF FORMS AND PRECEDENTS ch. 13 (4th ed. 1972) (statutory forms plus some annotations); 50 HALSBURY'S LAWS OF ENGLAND *Wills* ¶ 248 n.2 (4th ed. 1984); 3 T. JARMAN, A TREATISE ON WILLS 2093 (8th ed. 1951) (quoting statute without detailed discussion); TRISTRAM AND COOTE'S PROBATE PRACTICE 76, 1355-61 (24th ed. 1973) (mentioning and quoting statutory will forms); J. WILLIAMS, THE LAW RELATING TO WILLS 929-42 (3d ed. 1967) (quoting statutory forms).

121. *See supra* notes 83-86 and accompanying text.

122. *See* Trachtman, *supra* note 114, at 641.

Additionally, several forms keep property in trust for the legatee's or testator's descendants until they reach twenty-one, even though the age of majority was lowered to eighteen by the Family Law Reform Act of 1969.[123]

III. The United States Experience: The Uniform Statutory Will Act

A. History

1. American Bar Association Proposals.—The Uniform Statutory Will Act originated in the American Bar Association's Probate and Trust Division Committee on Fiduciary Services for Small Estates and Conservatorships.[124] The Committee recognized "that the estate planning process [had] become too complicated and too costly for many persons."[125] Moreover, the Committee was concerned that attorneys who are not estate planning experts take risks when they attempt to draft wills and trusts.[126] Errors could easily be made that might frustrate the testator's intent and expose the attorney to malpractice liability.[127] Accordingly, the Committee undertook to draft statutes that would provide "a broadly usable, quality, flexible, tax-competent and prudent dispositive and administrative scheme that may be easily adopted by a simple, cost-effective will."[128]

To accomplish this laudable goal, the Committee drafted three statutes, two of which pertained to wills.[129] One proposed statute was a statutory will act.[130] This act did not include a fill-in-the-blank will form; instead, it contained provisions that could be incorporated by reference.[131] Unlike the English statutory will forms, however, the Committee's form provided a comprehensive disposition and administrative framework. The form mandated the shares of the estate to be received by the surviving spouse and descendants.[132] The form

123. Family Law Reform Act, 1969, ch. 46, § 1.

124. *See* Comm. on Fiduciary Servs., *supra* note 4, at 837; *see also* UNIF. STAT. WILL ACT prefatory note (1984); Perkins, *The Uniform Statutory Will Act*, PROB. & PROP., Winter 1985, at 11, 11; Note, *supra* note 2, at 316.

125. Comm. on Fiduciary Servs., *supra* note 4, at 837.

126. *Id.*

127. *Id.*

128. Perkins, *supra* note 124, at 11.

129. The third proposed act concerned statutory custodianship trusts. *See* Comm. on Fiduciary Servs., *supra* note 4, at 837. *See generally* Note, *supra* note 2, at 316-19 (overview discussion of the three proposed uniform acts).

130. Comm. on Fiduciary Servs., *supra* note 4, at 842-46 (containing text of proposal).

131. *Id.* at 842 (§ 2-102).

132. *Id.* at 842-44 (§§ 3-101 to -104).

also provided rules governing powers of appointment,[133] survival,[134] disclaimers,[135] the allocation of death taxes,[136] and various administrative matters.[137]

Another proposal was a short form clauses for wills and trusts act.[138] This act was similar to the English statutory will forms in that it provided statutory form clauses that could be incorporated by specific reference into a will or trust.[139] These clauses concerned fiduciary powers,[140] disability discretion,[141] and discretion in the invasion and allocation of principal.[142]

The 1980 ABA Committee's report concluded by inviting all interested persons to submit comments and suggestions.[143] In response to public input, the Committee issued a second revised draft of the proposed statutory will on October 17, 1981.[144]

2. *Actions of Commissioners on Uniform State Laws.*—In the early 1980s, the National Conference of Commissioners on Uniform State Laws undertook consideration of possible uniform legislation for statutory wills.[145] The Special Drafting Committee for the Uniform Statutory Will Act decided to follow the general approach of the ABA draft, rather than the fill-in approach, and used the ABA's second revised draft as the starting point of initial discussions.[146] The Commissioners made substantial changes to the ABA's draft, but the goal and basic philosophy remained the same: "to provide a scheme of testamentary disposition of broad utility" by giving testators the ability to incorporate by reference the comprehensive statutory will provisions into a simple will.[147]

The Commissioners approved the final version of the Act in

133. *Id.* at 844 (§ 3-105).
134. *Id.* at 844 (§ 3-106).
135. Comm. on Fiduciary Servs., *supra* note 4, at 844 (§ 3-107).
136. *Id.* at 845 (§ 3-108).
137. *Id.* at 845-46 (application of other law, § 4-101; fiduciary powers, § 4-102; disability discretion, § 4-103; bond or surety, § 4-104).
138. *Id.* at 839-41, 850-53.
139. *Id.*
140. Comm. on Fiduciary Serv., *supra* note 4, at 850-52 (§ 3-101).
141. *Id.* at 852 (§ 3-102).
142. *Id.* at 852-53 (§ 3-103). The substance of this ABA proposal was enacted by Massachusetts in 1981. 1981 Mass. Acts ch. 688 (codified at MASS. GEN. LAWS ANN. ch. 184B, §§ 1-4 (West Supp. 1989).
143. Comm. on Fiduciary Servs., *supra* note 4, at 841.
144. UNIF. STAT. WILL ACT prefatory note (1984).
145. *Id.*
146. *Id.*
147. *Id.*

1984.[148] Detailed notes and commentary followed shortly thereafter. To date, Massachusetts is the only state to adopt the Uniform Statutory Will Act.[149]

B. *Description*

1. Definitions.—The Uniform Statutory Will Act begins with a section defining the meaning and usage of ten important terms. Many of these definitions reflect the usage of these words in other uniform acts, particularly the Uniform Probate Code.

(a) Child.—The Act provides an elaborate definition of the term child.[150] In general, the term means "a child of a natural parent whose relationship is involved."[151] An adopted person is treated as the child of the adopting parents and not as a child of the natural parents.[152] If a person is adopted by the spouse of a natural parent, however, the person is also deemed the child of both natural parents.[153] A person born out of wedlock is a child of the mother, but is a child of the father only if that person is openly and notoriously treated by the father as his child.[154] Stepchildren, foster children, grandchildren, and other more remote descendants are not treated as children.[155]

(b) Issue.—Issue is defined to include all lineal descendants of all generations.[156] The status of a child in each generation is determined in accordance with the Act's definition of child.[157]

(c) Personal representative.—The term personal representative is broadly defined to include an "executor, administrator, successor personal representative, special administrator, and a person who performs substantially the same functions relating to the estate of a decedent under the law governing their status."[158]

148. UNIF. STAT. WILL ACT historical note (1984). The author of the ABA Committee report was of the opinion that the approval of the Act carried "the original ABA program to a sound conclusion, providing an estate planning tool that will meet important needs of the public and the legal profession." Perkins, *supra* note 124, at 11.
149. MASS. GEN. LAWS ANN. ch. 191B, §§ 1-15 (West Supp. 1989).
150. UNIF. STAT. WILL ACT § 1(1) (1984).
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. UNIF. STAT. WILL ACT § 1(1) (1984).
156. UNIF. STAT. WILL ACT § 1(2) (1984).
157. *Id.*
158. *Id.* § 1(3) (1984).

(d) Property.—Property encompasses any interest in real or personal property, whether the interest be present or future, legal or equitable, vested or contingent.[159]

(e) Representation.—The Commissioners elected to provide a separate definition of the term representation, thereby avoiding the difficulties that frequently arise in interpreting the terms per capita and per stirpes. Representation means

> the estate is divided into as many equal shares as there are surviving issue in the nearest degree of kinship and deceased individuals in the same degree who left issue surviving the decedent, each surviving issue in the nearest degree receiving one share and the share of each deceased individual in the same degree being divided among issue of that individual in the same manner.[160]

(f) Statutory-Will estate.—The statutory-will estate is the testator's entire testamentary estate unless the will provides otherwise.[161] Thus, the statutory will may be used by a testator to dispose of the entire estate, or the testator may indicate that the Act is to apply only to a portion of the estate and may expressly dispose of other property in a different manner.[162]

(g) Surviving spouse.—In defining the term surviving spouse, the Act refers to the individual to whom the testator was married at the time of death, not the testator's spouse at the time of will execution.[163] In an attempt to effectuate the testator's probable intent, the Act places further requirements on a spouse for the spouse to qualify for treatment as a surviving spouse. For example, a spouse is not considered a surviving spouse if at the time of the testator's death separation existed pursuant to a court decree of separation or a written separation agreement signed by both spouses.[164] The definition also contains language dealing with conflicts of law problems regarding recognition of divorces, annulments, and marriages obtained in other jurisdictions.[165]

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159. *Id.* § 1(4) (1984).
160. *Id.* § 1(5) (1984).
161. UNIF. STAT. WILL ACT § 1(6) (1984).
162. *Id.* § 1(6) comment.
163. UNIF. STAT. WILL ACT § 1(7) (1984).
164. *Id.*
165.
An individual separated from the testator whose marriage to the testator contin-

(h) Testamentary estate.—The definition of testamentary estate is extremely broad, including "every interest in property subject to disposition or appointed by a will of the decedent."[166]

(i) Testator's residence.—The testator's residence is carefully defined to protect the testator's home(s) and to deal with different types of residential arrangements.[167] The testator's residence includes "one or more properties normally used at the time of the testator's death by the testator or the surviving spouse as a residence for any part of the year."[168] Thus, the definition encompasses both permanent homes and vacation or temporary homes.[169] This definition "attempts to reflect the probable intent of a lay person when referring to the person's 'residence' without further specific description of the property."[170] The comment to the section also notes that the term is not synonymous with the testator's "legal residence."[171] The Act provides special rules for cooperatives[172] and for property that is used partially for commercial, agricultural, or other business purposes.[173]

(j) Trustee.—The term trustee includes "an original, additional, or successor trustee, whether or not appointed or confirmed by the court."[174]

2. *Requirements to Execute a Statutory Will.*—The Uniform

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ues in effect under the law of this State solely because a judgment of divorce or annulment of the marriage is not recognized as valid in this State is not the testator's surviving spouse under this [Act]. An individual whose marriage to the testator at the time of death is not recognized in this State solely because a judgment of divorce or annulment of a previous marriage of either or both of them is not recognized as valid in this State is the testator's surviving spouse under this [Act].

Id.

166. *Id.* § 1(8).

167. *Id.* § 1(9).

168. UNIF. STAT. WILL ACT § 1(9) (1984).

169. *Id.*

170. *Id.* § 1(9) comment.

171. *Id.*

172. UNIF. STAT. WILL ACT § (1)(9) (1984) ("If the property used as a residence is a unit in a cooperative or other entity, it includes all rights and interests relating to that unit.").

173.

If the property is used in part for a commercial, agricultural, or other business purpose, the testator's residence is an area not exceeding [3] acres, which includes the structure used in whole or in part as a residence and structures normally used by the testator in connection with the dwelling and excludes structures and areas outside the dwelling used primarily for a commercial, agricultural, or other business purpose.

Id.

174. UNIF. STAT. WILL ACT § 1(10) (1984).

Act neither adds to nor subtracts from a state's usual requirements for executing a valid will. Only individuals with capacity under state law may execute a statutory will, and execution must comply with all other state law requirements.[175]

3. Incorporation by Reference.

(a) Basic idea.—As noted previously, the Uniform Act adopts an incorporation by reference approach rather than providing a fill-in form.[176] This permits the testator to adopt the Act's dispositive scheme in a simple will.[177] The will may incorporate by reference some or all of the provisions of the Act.[178] The testator may make modifications and additions to the incorporated material through appropriate will provisions; if a statutory provision should conflict with an express provision of the testator's will, the express provision prevails.[179]

(b) Date of incorporation and effect of amendments.—The version of the Act in effect at the date the testator executes the will is the version that controls the disposition and administration of the estate.[180] Subsequent changes to the Act have no effect unless the testator executes a codicil or otherwise republishes the will.[181]

(c) Method of incorporation by reference.—The Act contains sample language that is deemed sufficient to incorporate by reference the provisions of the Act. The following language is suggested:

> Except as otherwise provided in this will, I direct that my testamentary estate be disposed of in accordance with the [Enacting State's] Uniform Statutory Will Act.[182]

4. Disposition of Estate—Surviving Spouse and No Surviving Issue.—If the testator is survived by a spouse but no issue, the sur-

175. *Id.* § 2.
176. *See supra* note 147 and accompanying text.
177. UNIF. STAT. WILL ACT § 3(a) & comment (1984) (indicating that the will could be only one page in length).
178. *Id.*
179. *Id.*
180. UNIF. STAT. WILL ACT § 3(b) (1984).
181. *Id.* § 3(6) comment ("The policy assumption . . . is that the Statutory Will Act on the date the testator executes the will represents the testator's intent and the state does not alter the testator's will through subsequent amendments to the statute.").
182. *Id.* § 3(c).

viving spouse takes the entire statutory-will estate.[183]

5. Disposition of Estate—Surviving Spouse and Surviving Issue.—If the testator is survived by both a spouse and issue, the testator's estate is distributed as detailed below.

(a) Testator's residence and tangible personal property.—The testator's residence and tangible personal property pass to the surviving spouse regardless of the value of the property.[184] There is, however, no exoneration of mortgages; the surviving spouse must take the property subject to all liens and encumbrances.[185] In addition, under this clause, the surviving spouse does not take personal property held by the testator primarily for investment or for commercial, agricultural, or other business purposes.[186]

(b) Larger of $300,000 or one-half balance.—The surviving spouse also receives an outright interest in the greater of $300,000 or one-half of the balance of the statutory-will estate.[187] Significantly, the drafters did not mandate the $300,000 figure, but merely suggested it. The drafters contemplated that states, especially those with community property systems, might wish to use a different amount.[188]

(c) Balance of estate.—The remainder of the estate passes into a trust for the benefit of the testator's surviving spouse and issue[189] unless the personal representative determines that a trust would be uneconomical.[190] If such a determination is made, the entire statutory-will estate passes outright to the surviving spouse.[191]

The trust created with the balance of the estate is designed to provide ample opportunity for the reduction of federal estate taxes. Up to one-half of the trust may qualify for the unlimited marital

183. *Id.* § 5(a).
184. UNIF. STAT. WILL ACT § 5(a)(2)(i) (1984).
185. *Id.*
186. *Id.*
187. UNIF. STAT. WILL ACT § 5(a)(2)(ii) (1984).
188. *Id.* § 5(a)(2)(ii) comment (suggesting a smaller figure for community property states because the surviving spouse's interest in community property would not be a part of the testamentary estate and hence not governed by the statutory will).
189. UNIF. STAT. WILL ACT § 5(a)(2)(iii) (1984) (this remainder includes property that the surviving spouse would have received under § 5(a)(2)(i) & (ii) but which was disclaimed by the surviving spouse).
190. *Id.* § 5(b) & comment (the term "uneconomical" should be broadly construed to allow consideration of all relevant factors). If the personal representative is the testator's spouse, the personal representative may not make this determination.
191. *Id.*

deduction as qualified terminable interest property (QTIP) should the personal representative so elect.[192] Accordingly, post-mortem estate planning with both QTIP elections and disclaimers is possible.[193] This is especially important if the testator's estate grows substantially after the will is executed.[194]

The terms of the trust regarding the payment of income during the surviving spouse's life are as follows:

- The net income of the trust is paid to or applied for the surviving spouse's benefit at least quarterly.[195]
- On the surviving spouse's death, all accrued or undistributed net income is paid to the surviving spouse's estate.[196]
- The surviving spouse may compel the trustee to convert unproductive property to productive property.[197]

The terms of the trust regarding the payment of principal during the surviving spouse's lifetime are as follows:

- The trustee may make discretionary payments to the surviving spouse and issue of the testator for their health, education, support, or maintenance.[198]
- In determining the amount of support payments, the trustee must give reasonable consideration to the distributee's other resources.[199]
- If support payments are to be made, the principal must be administered as two separate shares, which were equal when the trust was created.[200]
- One share is deemed the surviving spouse's share and payments may not be made from that share to anyone other than the surviving spouse.[201]
- The trustee must give primary consideration to the needs of the surviving spouse and those children of the testator who are under age twenty-three or disabled.[202] Distributions may also be made to children over twenty-three.

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192. *Id.*; *see also* I.R.C. § 2056(b)(7) (Supp. 1988).
193. *See* Perkins, *supra* note 124, at 11.
194. *Id.* at 12.
195. UNIF. STAT. WILL ACT § 6(1) (1984).
196. *Id.*
197. *Id.* (the demand by the surviving spouse must be in writing).
198. UNIF. STAT. WILL ACT § 6(2) (1984).
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.* (The drafters placed the age in brackets to allow jurisdictions to choose higher or lower ages. The drafters believed that the deceased spouse would want children to complete college). In determining the needs of beneficiaries, the trustee may rely in good faith on written statements supplied by the beneficiary. *Id.*

- The trustee may pay expenses incurred before a beneficiary's death, and may also pay the beneficiary's funeral and burial expenses.[203]
- If the trustee is not the surviving spouse and determines that it is uneconomical to continue the trust, the trustee may terminate the trust and distribute the principal to the surviving spouse.[204]
- If the trustee determines it is equitable to do so, the trustee may reduce later distributions to the testator's issue by the amounts of principal paid.[205]
- If a beneficiary serves as the trustee, the trustee may only make self-distributions for personal health, education, support, or maintenance, and may not appoint property to the trustee's estate, personal creditors, or the creditors of the trustee's estate.[206]

The terms of the trust regarding payments after the death of the surviving spouse are as follows:

- If no beneficiary is under the stated age or is disabled,[207] the remainder of the principal is paid to the testator's children in equal shares.[208] If any of the testator's children are deceased, the property passes to the testator's then-living issue by representation.[209] If none of the testator's issue survive, then the property passes via applicable state intestate succession laws.[210]

6. Disposition of Estate—No Surviving Spouse.

(a) If surviving issue.—If the testator's spouse fails to survive but the testator is survived by all of his children, the statutory-will estate passes in equal shares to the children.[211] If any of the testator's children are deceased, the estate passes by representation to the surviving issue of the testator.[212]

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203. UNIF. STAT. WILL ACT § 6(2) (1984).

204. *Id.*

205. *Id.* This accounting may also be done in determining shares of ancestors and descendants of the testator's issue that received the distribution. *Id.*

206. *Id.* This provision was included to insure that the trustee's power is not deemed a general power of appointment under I.R.C. §§ 2041 & 2514.

207. UNIF. STAT. WILL ACT §§ 8, 9 (1984) (property to remain in trust if beneficiaries under stated age; special distribution rules apply if beneficiary under disability).

208. UNIF. STAT. WILL ACT § 6(3) (1984).

209. *Id.*

210. *Id.* To determine the intestate share, the law of the testator's state of domicile is applied as it exists upon the surviving spouse's death, not as the law existed at the time of testator's death. The location of the property is also irrelevant. *Id.* at comment.

211. UNIF. STAT. WILL ACT § 7(a)(1) (1984) (this distribution is subject to provisions creating a trust if a child is under a specific age (§ 8) or if the distributee is a disabled person (§ 9)).

212. *Id.*

(b) If no surviving Issue.—If there is no surviving spouse and no surviving issue, the testator's entire statutory-will estate passes under state intestacy laws.[213]

(c) If underage or disabled issue.—If a child of the testator is under a stated age or if the distributee is mentally or physically disabled, special distribution rules will normally apply.[214] These rules will not apply, however, if the personal representative determines that it would be uneconomical to create a trust.[215] If such a determination is made, the property passes to the issue free of trust.[216]

7. Trust for Underage Children.

(a) Creation.—If property is distributable to a child of the testator[217] who is under the age specified by the testator in the will, or age twenty-three if no age is specified,[218] all property distributable to the testator's issue must be held in trust.[219] In exercising distribution powers, the trustee must give primary consideration to the needs of the testator's children who are underage or under a disability.[220]

(b) Distribution when beneficiary underage.—If at least one of the testator's children is underage, the trustee is authorized to "pay the income and principal of the trust to or for the benefit or account of one or more of the issue of the testator in amounts the trustee deems advisable for their needs for health, education, support, or maintenance."[221] Undistributed income may be added to the principal of the trust.[222]

The trustee also has discretion to make advance distributions of

213. UNIF. STAT. WILL ACT § 7(a)(2) (1984) (this distribution is subject to provisions creating a trust if a child is under a specific age (§ 8) or if the distributee is a disabled person (§ 9)). In determining the intestate distribution, the property is treated as located in the state and the testator is treated as having died domiciled in the state. *Id.*

214. UNIF. STAT. WILL ACT §§ 8, 9 (1984).

215. *Id.* § 7(b). If the personal representative is one of the testator's issue, the personal representative may not make this determination. *Id.*

216. *Id.*

217. This may arise when a trust for a surviving spouse terminates or when there is no surviving spouse. UNIF. STAT. WILL ACT §§ 6(3), 7(a) (1984).

218. The drafters suggested age twenty-three "because it is an age when most children will have received their first degree from college." UNIF. STAT. WILL ACT § 6 comment (1984).

219. *Id.* § 8(a). Only one of testator's children need be underage for all property passing to testator's issue to be held in trust. *Id.* § 7(b). The trust will not be created if a non-spouse personal representative determines that the trust would be uneconomical. *Id.* § 8(f).

220. *Id.* § 8(a).

221. UNIF. STAT. WILL ACT § 8(b) (1984).

222. *Id.*

principal as if the trust were terminating.[223] The trustee may distribute all or part of the beneficiary's future share.[224] If the entire share is distributed, the trustee is prohibited from making future distributions of either principal or income to that distributee or his issue.[225] No standard governs the trustee's ability to make such an anticipatory distribution. The drafters contemplated that this type of distribution would be made "when the property in the trust exceeds an amount that will be necessary by any reasonable expectation to fulfill the primary responsibility for children under the specified age."[226]

(c) Distribution when trust terminates.—The trust terminates when none of the testator's children are underage or when the trustee determines that continuation of the trust would be uneconomical.[227] Upon termination, the remainder of the trust property is distributed to the testator's issue in proportion to the shares determined when the property became subject to the trust.[228] In computing each distributee's share, the trustee must charge the share with any advance distributions of principal made to that distributee.[229] In addition, the trustee has the discretion to charge the share of a distributee with any payments of income or principal previously made to or for the benefit of the distributee or the distributee's lineal relatives.[230] If any issue dies before receiving complete distribution, the deceased issue's share will be distributed to the issue's assignees, or, if none, to the issue's estate.[231]

(d) Issue as trustee.—If one of the testator's issue serves as trustee, the trustee may not terminate the trust on the ground that it is uneconomical.[232] In addition, the trustee's discretion may only be exercised to provide the issue/trustee's health, education, support, or maintenance; it may not be otherwise exercised for the trustee, the trustee's creditors, or creditors of the trustee's estate.[233]

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223. *Id.* § 8(c).
224. *Id.*
225. *Id.*
226. UNIF. STAT. WILL ACT § 8 comment (1984).
227. *Id.* § 8(d).
228. *Id.* § 8(e). If the testator's spouse survived the testator, these shares are determined in accordance with § 6(3); if not, these shares are determined according to § 7.
229. *Id.*
230. *Id.*
231. *Id.*
232. UNIF. STAT. WILL ACT § 8(f) (1984).
233. *Id.* This provision prevents the discretionary powers from being deemed a general power of appointment under I.R.C. §§ 2041, 2514. *Id.* § 8(f) comment.

8. Disability of Non-Spouse Distributee.[234]

(a) Determination of disability.—A distributee is deemed to be under a disability if the individual has not yet attained the age specified in the will, or, if no age is specified, age twenty-three.[235] A distributee is also considered to be disabled if the personal representative or trustee determines that the distributee "cannot effectively manage or apply the property by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause."[236]

(b) Distribution options.—If a distributee is under a disability, the personal representative or trustee has the following distribution options:

- Distribute principal or income directly to the distributee.[237]
- Deposit or invest the property in the distributee's name or for that person's account.[238]
- Distribute to the distributee's guardian or conservator.[239]
- Transfer or keep the property in trust.[240] The trustee may then at any time distribute or apply the income and principal to or for the benefit of the distributee.[241] This trust terminates when the trustee distributes all the property, the distributee reaches the required age, the disability is removed, or the distributee dies.[242] Upon termination, the remaining trust property is given to the distributee or the personal representative of the distributee's estate.[243]

9. Powers of Appointment.—A statutory will must meet several requirements before the testator will be deemed to have exercised a power of appointment.[244] The testator's will must comply with any conditions imposed on the exercise of the power of appointment; the appointment must be within the scope of the power; and

234. The distribution options discussed in this section do not apply to distributions to the testator's surviving spouse. UNIF. STAT. WILL ACT § 9(c) (1984). This preserves the possibility that the surviving spouse's share will qualify for the marital deduction. *Id.* § 9(c) comment.

235. UNIF. STAT. WILL ACT § 9(a) (1984).

236. *Id.*

237. *Id.*

238. *Id.* This authorizes distributions to be made under the Uniform Gifts/Transfers to Minors Acts. *Id.* at comment.

239. UNIF. STAT. WILL ACT § 9(a) (1984).

240. *Id.*

241. *Id.*

242. *Id.* § 9(b).

243. *Id.*

244. UNIF. STAT. WILL ACT § 10(a) (1984).

the will must either expressly refer to the power of appointment or express an intent to exercise any power held by the testator.[245] These requirements are imposed to "preclude an inadvertent exercise of a power of appointment by a donee."[246] If the requirements are met, "the appointed property passes as part of the statutory-will estate unless the will provides otherwise."[247]

10. Survival.—The survival period established in the statutory will is thirty days.[248] Thus, an individual who does not outlive the testator by at least thirty days is deemed to have predeceased the testator.

11. Appointment of Fiduciaries.

(a) Testator designation.—Personal representatives and trustees designated by the testator may serve until no longer qualified.[249] The testator may also specify individuals to serve if the primary designatee is unable or unwilling to serve.[250]

(b) Failure of testator's designation of personal representative.—If the testator fails to designate a personal representative or the named person is unable or unwilling to serve, the priority for appointment is determined by the law of the state of the testator's domicile at time of death.[251]

(c) Failure of testator's designation of trustee.—If the testator fails to designate a trustee or the named person is unable or unwilling to serve, the personal representative may appoint a qualified person to serve as trustee.[252] This appointment does not require court approval, and the personal representative may even appoint himself to the position.[253]

(d) When acting fiduciary unable to continue.—Different rules apply when a currently serving fiduciary is unable to continue because of resignation, removal, lack of capacity, or death. If there is a

245. *Id.*
246. *Id.* § 10 comment.
247. *Id.* § 10(b).
248. UNIF. STAT. WILL ACT § 11 (1984). The drafters bracketed the number of days; jurisdictions may raise or lower the required survival period.
249. UNIF. STAT. WILL ACT § 12(a) (1984).
250. *Id.* § 12(b).
251. *Id.*
252. *Id.* § 12(c).
253. *Id.*

surviving spouse who is able and willing to act, the surviving spouse may appoint a qualified successor.[254] If there is no surviving spouse or the surviving spouse is unable or unwilling to act, a successor may be appointed by a majority of the testator's adult children.[255]

(e) Other cases.—In all other cases, fiduciaries must be appointed by the court.[256]

12. Fiduciary Powers.—The Act provides two distinct alternatives with respect to fiduciary powers. Alternative A grants fiduciaries all powers available under local law, unless the testator expressly indicated otherwise, and provides for a reference to local acts that grant powers to personal representatives and trustees.[257] This alternative works well in jurisdictions that already have statutes providing fiduciary powers.[258]

Alternative B provides a detailed list of fiduciary powers. Unless expressly limited by the testator's will, the trustee has all powers otherwise conferred by law as well as twenty-two enumerated powers.[259] These powers are extensive[260] and include an open-ended pro-

254. UNIF. STAT. WILL ACT § 12(d) (1984).
255. *Id.*
256. *Id.* § 12(e).
257. *Id.* § 13(a), (b), Alternative A.
258. *Id.* § 13 comment.
259. UNIF. STAT. WILL ACT § 13(a), Alternative B (1984).
260. The personal representative or trustee may

(1) retain property in the form in which it is received, including assets in which the trustee is personally interested;

(2) make ordinary or extraordinary repairs, store, insure, or otherwise care for any tangible personal property, and pay shipping or other expense relating to the property as the trustee considers advisable;

(3) abandon property the trustee determines to be worthless;

(4) invest principal and income in any property the trustee determines and, without limiting the generality of the foregoing, invest in shares of an investment company or in shares or undivided portions of any common trust fund established by the trustee;

(5) sell, exchange, or otherwise dispose of property at public or private sale on terms the trustee determines, no purchaser being bound to see to the application of any proceeds;

(6) lease property on terms the trustee determines even if the term extends beyond the time the property becomes distributable;

(7) allocate items of income or expense to income or principal, as provided by law;

(8) keep registered securities in the name of a nominee;

(9) pay, compromise, or contest claims or controversies, including claims for estate or inheritance taxes, in any manner the trustee determines;

(10) participate in any manner the trustee determines in any reorganization, merger, or consolidation of any entity whose securities constitute part of the property held;

(11) deposit securities with a voting trustee or committee of security holders even if under the terms of deposit the securities may remain deposited beyond

vision granting the trustee the power to "perform any other act necessary or appropriate to administer the trust."[261] The personal representative has the same powers plus the ability, under certain circumstances, to satisfy written charitable pledges of the decedent.[262]

13. Fiduciary Duties.—Personal representatives and trustees must "observe the standards in dealing with the estate which would be observed by a prudent person dealing with the property of another."[263] If a fiduciary possesses special skills or is named as a fiduciary because of a representation of expertise, the fiduciary must exercise this higher standard of care.[264] The fiduciary also has a duty to preserve marital deduction elections when exercising powers of allocation.[265]

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the time they become distributable;

(12) vote any security in person or by special, limited, or general proxy, with or without power of substitution, and otherwise exercise all the rights that may be exercised by any security holder in an individual capacity;

(13) borrow any amount the trustee considers advisable to obtain cash for any purpose of the trust, and in connection therewith, mortgage or otherwise encumber any property on any conditions the trustee determines even if the term of the loan may extend beyond the term of the trust;

(14) allot in or toward satisfaction of any payment, distribution, or division, in any manner the trustee determines, any property held at the then current fair market value;

(15) hold trusts and shares undivided or at any time hold them or any of them set apart one from another;

(16) enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;

(17) sell or exercise stock subscription or conversion rights;

(18) employ persons, including attorneys, auditors, investment advisers, or agents, even if associated with the trustee, to advise or assist the trustee in the performance of duties, act without independent investigation upon their recommendations, and instead of acting personally, employ agents to perform any act of administration, whether or not discretionary;

(19) continue any unincorporated business or venture in which the decedent was engaged at the time of death;

(20) incorporate any business or venture in which the decedent was engaged at the time of death;

(21) distribute property distributable to the estate of an individual directly to the devisees or heirs of the individual . . . .

Id.

261. *Id.* § 13(a)(22).

262. *Id.* § 13(b) (claims may be satisfied, even if not legally binding or properly presented, if the personal representative believes the testator would have wanted the pledges to be paid).

263. UNIF. STAT. WILL ACT § 13(c) (1984) (this subsection is identical in both alternatives).

264. *Id.*

265.

Except to the extent qualified property is not available, only property that qualifies for the estate tax marital deduction under the Internal Revenue Code, as

14. Bond or Surety.—Fiduciaries are presumed to serve without bond or surety.[266] The testator may provide otherwise in the will; also, the court may require bond or surety upon the application of an interested person.[267]

15. Sample Form.—Despite the Commissioners' distaste for fill-in-the-blank forms,[268] the drafters included a sample form for a complete will.[269] This form is very short and contains a limited number of blanks. The only spaces provided are those for the testator's name and residence, the name of the state whose statutory will provisions are to be incorporated, designation of primary and successor personal representatives and trustees, appointment of guardian for minor children, date of execution, testator's signature, witnesses' names and signatures, and notarial jurat.[270] In addition, optional language is provided for self-executions and executions by proxy, as well as to make appropriate reference to the testator's gender.[271]

C. *Experience*

Although the Uniform Statutory Will Act was approved by the Commissioners in 1984,[272] the only state to enact it has been Massachusetts.[273] Massachusetts approved the Act on July 23, 1987; the statute took effect ninety days thereafter.[274] Except for very minor and nonsubstantive differences,[275] the Massachusetts version is identical to the Uniform version. In each case in which the Uniform Act invites an enacting state to change particular terms, Massachusetts followed the Uniform Act's suggestions.[276] In the fiduciary powers

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amended, may be allocated to the surviving spouse under Section 5 or to the surviving spouse's share of principal in a trust established under Section 6.

Id.

266. UNIF. STAT. WILL ACT § 14 (1984).

267. *Id.*

268. *See* UNIF. STAT. WILL ACT prefatory note (1984).

269. UNIF. STAT. WILL ACT app. I (1984).

270. *Id.*

271. *Id.*

272. UNIF. STAT. WILL ACT historical note (1984).

273. 1987 Mass. Acts 319 (codified at MASS. GEN. LAWS ANN. ch. 191B, §§ 1-15 (West Supp. 1989)).

274. *Id.*

275. For example, Massachusetts moved § 15 of the Uniform Act dealing with the Act's short title into the definitional section. MASS. GEN. LAWS ANN. ch. 191B, § 1 (West Supp. 1989). The Uniform Act's modern use of "is" to indicate mandatory actions or results was changed to the traditional "shall be." *Compare* UNIF. STAT. WILL ACT § 5 (1984) ("share of the surviving spouse is") *with* MASS. GEN. LAWS ANN. ch. 191B, § 5 (West Supp. 1989) ("share of a surviving spouse shall be").

276. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 191B, § 5(a)(2)(ii) (West Supp. 1989) (if there is surviving issue, surviving spouse receives, inter alia, greater of $300,000 or one-half

section, Massachusetts chose to adopt the extensive list of fiduciary powers provided by alternative B.[277] The only amendments to the Massachusetts Act have been technical corrections made before the Act took effect.[278] Research has revealed no appellate case interpreting any of the Act's provisions.

IV. The United States Experience: Other Statutory Will Forms

A. History

Responding "to pressure to widen the distribution of essential legal services,"[279] New York became one of the first states to attempt the enactment of a fill-in will form.[280] A bill containing a fill-in form was introduced into the New York State Legislature in May 1979, but failed to obtain the support needed to pass.[281]

The State Bar of California reworked the New York fill-in proposal in an attempt to become the first state to enact a statutory will form.[282] The California State Bar's Estate Planning, Trust and Probate Law Section subcommittee on Pre-Death Estate Planning Techniques adapted the proposal to California law and phrased its provisions in plain English.[283] The bill passed the California Legislature and was signed into law by Governor Edmund G. Brown, Jr. in September 1982.[284]

In 1983, Maine[285] and Wisconsin[286] enacted fill-in will forms. The Maine statute took effect on April 24, 1984,[287] and the Wisconsin provisions took effect on May 2, 1984.[288]

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remainder of estate); *id.* § 8(a) (age twenty-three used as underage cut-off); *id.* § 11 (thirty day survival period required).

277. *Id.* § 13.

278. *See, e.g.*, 1987 Mass. Acts 465, §§ 51, 52 (correcting § 6); *id.* § 53 (correcting § 8); *id.* § 54 (correcting § 12); *id.* § 55 (correcting § 13).

279. *Possible Legislation*, *supra* note 45, at 1.

280. Shaw, *Benefits to Both Lawyers & Clients Could Result From Statutory Wills*, N.Y.L.J., Jan. 24, 1980, at 39, col. 1.

281. *See supra* notes 48-50 and accompanying text.

282. Granelli, *Do-It-Yourself Wills Ready in Calif.*, Nat'l L.J., Nov. 1, 1982, at 7, col. 3.

283. *'Fill-in-the-Blank' Wills, Crime Bills Approved*, L.A. Daily J., Sept. 28, 1982, at 2, col. 3; Granelli, *Do-It-Yourself Wills Ready in Calif.*, Nat'l L.J., Nov. 1, 1982, at 7, col. 3. The key developers of the statute included Irving Kellogg, Francis J. Collin, Jr., and Harold Boucher. *Possible Legislation*, *supra* note 45, at i.

284. *'Fill-in-the-Blank' Wills, Crime Bills Approved*, L.A. Daily J., Sept. 28, 1982, at 2, col. 3. The California law took effect on January 1, 1983. *Id.*

285. 1983 Me. Laws ch. 367.

286. 1983 Wis. Laws Act 376.

287. 1983 Me. Laws ch. 367 (codified at ME. REV. STAT. ANN. tit. 18A, § 2-514(a) (Supp. 1988)).

288. 1983 Wis. Laws Act 376 (codified at WIS. STAT. ANN. §§ 853.55-.62 (West Supp. 1988)).

In 1984, the chairman of the Michigan House Judiciary Committee introduced a bill providing for statutory wills.[289] The bill was prepared by the Probate and Trust Law Section of the Michigan Bar but was introduced too late to be enacted in 1984.[290] Similar legislation was introduced in a later session and passed into law, taking effect on July 1, 1986.[291]

B. Description

1. Basic Formats.—Three basic formats have been followed by the states that have enacted statutory fill-in form wills.

(a) Fill-in form that incorporates statutory provisions.—The California[292] and Wisconsin[293] statutory wills contain many provisions that are not found on the face of the form but are incorporated by reference into the will.[294] The incorporating language is located in a notice preceding the body of the will.[295] Three types of material are incorporated into these statutory wills.

Definitions and rules of construction constitute the first category of material that is incorporated by reference. In this respect, the California provision is somewhat more comprehensive than that of Wisconsin.[296]

The second type of incorporated material consists of statutory provisions that contain the full text of will provisions; these provisions are set forth in the actual will form in an abbreviated fashion.[297] These statutory provisions provide the details of dispositive provisions needed to prevent interpretative confusion or other

289. Lawrence, III & Sytsma, *Michigan Statutory Wills*, 64 MICH. B.J. 677, 677 (1985) (the bill was introduced by State Representative Perry Bullard).

290. *Id.*

291. 1986 Mich. Pub. Acts 61 (codified at MICH. COMP. LAWS ANN. § 700.123a-c (West Supp. 1988)).

292. CAL. PROB. CODE § 6222 (West Supp. 1989).

293. WIS. STAT. ANN. § 853.52 (West Supp. 1988).

294. The forms published by the State Bar of California contain all of the incorporated material on the back of the last page of the form. The forms published by the Wisconsin Legal Blank Co., Inc. have the incorporated material on a separate sheet of paper stapled to the will form.

295. CAL. PROB. CODE § 6240, notice 6 (West Supp. 1989); *id.* § 6241, notice 7; WIS. STAT. ANN. § 853.55, notice 5 (West Supp. 1988); *id.* § 853.56, notice 6.

296. CAL. PROB. CODE §§ 6200-10 (West Supp. 1989) (e.g., definitions of "testator," "spouse," "executor," "trustee," "descendants," and "person"; gender and number interpretation rules; construction of "shall" and "may"; manner of distribution to descendants); WIS. STAT. ANN. § 853.50 (West Supp. 1988) (e.g., definitions of "by right of representation," "children," "issue," "testator," and "trustee").

297. CAL. PROB. CODE §§ 6242-44 (West Supp. 1989); WIS. STAT. ANN. §§ 853.57-.59 (West Supp. 1988).

problems. For example, a California form provision provides that the testator's personal and household items pass to the surviving spouse, if living; otherwise, those items pass equally to the testator's surviving children.[298] The full text contained in the statute provides a more detailed explanation of the property encompassed by the term "household items" and includes additional rules.[299] The full text states, inter alia, that the executor is to use discretion to distribute these items to the testator's children in shares as nearly equal as is feasible, and that if the surviving spouse and all children predecease the testator, the items become part of the residual estate.[300]

The third category of automatically incorporated material consists of mandatory clauses.[301] These provisions deal mainly with various aspects of administration, such as powers of the executor[302] and powers of a guardian.[303] In addition, the clauses state that if the testator does not effectively dispose of the residuary estate, the residue passes under state intestacy statutes.[304] Additional provisions are incorporated if the form will includes a testamentary trust.[305]

Generally, these statutory wills include only the full text of the property disposition clauses and the mandatory clauses as they existed when the testator executed the will.[306] Subsequent amendments to the incorporated statutes do not affect previously executed wills.

(b) Fill-in form with self-contained definitions and additional clauses.—The second format includes definitions and additional clauses as part of the form, but segregated from the body of the will. The Michigan statute follows this approach. At the end of the Michigan statutory will, after the witnesses' signatures, two additional types of material are found that are applicable to the will. The first type of material consists of basic rules of construction and definitions

298. CAL. PROB. CODE § 6240, art. 2.1 (West Supp. 1989).
299. *Id.* § 6242.
300. *Id.*
301. CAL. PROB. CODE §§ 6245-46 (West Supp. 1989); WIS. STAT. ANN. §§ 853.60-.61 (West Supp. 1988).
302. CAL. PROB. CODE § 6245(b) (West Supp. 1989); WIS. STAT. ANN. § 853.60(2) (West Supp. 1988).
303. CAL. PROB. CODE § 6245(c) (West Supp. 1989); WIS. STAT. ANN. § 853.60(3) (West Supp. 1988).
304. CAL. PROB. CODE § 6245(a) (West Supp. 1989); WIS. STAT. ANN. § 853.60(1) (West Supp. 1988).
305. CAL. PROB. CODE § 6246 (West Supp. 1989); WIS. STAT. ANN. § 853.61 (West Supp. 1988).
306. CAL. PROB. CODE § 6247 (West Supp. 1989) (also contains special rules for statutory wills executed prior to effective date of recodification); WIS. STAT. ANN. § 853.62 (West Supp. 1988).

of terms commonly used in the will.[307] The second type consists of provisions dealing with the fiduciary powers of personal representatives, guardians, and conservators.[308] The last article of the body of the will provides that the "[d]efinitions and additional clauses found at the end . . . are part of [the] will."[309] This language effectively incorporates part of the statutory document into the will. Otherwise, an argument could be made that the additional material is not part of the will because it follows the testator's signature and the witnesses' attestation.

(c) Fill-in form only.—The third and simplest format merely provides a fill-in form. This is the approach adopted by Maine. The Maine statutory form stands alone, without reference to material outside of the statutory will document or outside of the body of the will.[310]

2. Contents—Statutory Wills Without Trusts.—This section compares and contrasts important provisions of the statutory fill-in forms adopted in California, Maine, Michigan, and Wisconsin.

(a) Notices and warnings.—Each of the statutory will forms begins with a list of notices and warnings to the prospective testator. The following warnings are found in each of the forms:

- Testator may need legal advice;[311]
- Statutory will does not control nonprobate assets;[312]
- Statutory will is not designed to reduce taxes;[313]
- Testator should not make alterations or additions to statutory form;[314]

307. MICH. COMP. LAWS ANN. § 700.123c (West Supp. 1988) (definitions of "assets," "jointly-held assets," "spouse," "descendants," "children," "heirs," and "person"; rules of construction providing for the method of determining shares of children and descendants, gender interpretation, and distinction between "shall" and "may").

308. *Id.*

309. *Id.* at art. 3.4.

310. ME. REV. STAT. ANN. tit. 18A, § 2-514(a) (Supp. 1988).

311. CAL. PROB. CODE § 6240, notices 1 & 5 (West Supp. 1989); ME. REV. STAT. ANN. tit. 18A, § 2-514(a), notices 1 & 10 (Supp. 1988); MICH. COMP. LAWS ANN. § 700.123c, notice 2, instruction 2 (West Supp. 1988); WIS. STAT. ANN. § 853.55, notice 11 (West Supp. 1988).

312. CAL. PROB. CODE § 6240, notice 2 (West Supp. 1989); ME. REV. STAT. ANN. tit. 18A, § 2-514(a), notice 2 (Supp. 1988); MICH. COMP. LAWS ANN. § 700.123c, notice 4 (West Supp. 1988); WIS. STAT. ANN. § 853.55, notice 1 (West Supp. 1988).

313. CAL. PROB. CODE § 6240, notice 3 (West Supp. 1989); ME. REV. STAT. ANN. tit. 18A, § 2-514(a), notice 3 (Supp. 1988); MICH. COMP. LAWS ANN. § 700.123c, notice 5 (West Supp. 1988); WIS. STAT. ANN. § 853.55, notice 2 (West Supp. 1988).

314. CAL. PROB. CODE § 6240, notice 4 (West Supp. 1989); ME. REV. STAT. ANN. tit. 18A, § 2-514(a), notice 4 (Supp. 1988); MICH. COMP. LAWS ANN. § 700.123c, notice 3 (West

- Statutory will may be revoked or amended;[315]
- Testator must abide by rules regarding attestation by witnesses;[316]
- Testator should store will in a safe deposit box or some other secure location;[317]
- Special rules exist regarding adopted children;[318] and
- Testator should make a new will upon change in marital status.[319]

The following warnings are found in some, but not all, of the statutory will forms:

- Testator may need tax advice (California, Maine, Wisconsin);[320]
- Effect of improper alterations or additions (California and Michigan);[321]
- Definitions, rules of construction, full text of dispositive provisions, and mandatory provisions are incorporated into the will (California and Wisconsin);[322]
- If testator has children under age twenty-one, a different type of will should be considered, such as a statutory will form containing a testamentary trust (California and Wisconsin);[323]

Supp. 1988); WIS. STAT. ANN. § 853.55, notice 4 (West Supp. 1988).

315. CAL. PROB. CODE § 6240, notice 4 (West Supp. 1989); ME. REV. STAT. ANN. tit. 18A, § 2-514(a), notice 4 (Supp. 1988); MICH. COMP. LAWS ANN. § 700.123c, notice 8 (West Supp. 1988) (speaking only to ability to make a new will); WIS. STAT. ANN. § 853.55, notice 4 (West Supp. 1988).

316. CAL. PROB. CODE § 6240, notice 7 (West Supp. 1989); ME. REV. STAT. ANN. tit. 18A, § 2-514(a), notice 8 (Supp. 1988); MICH. COMP. LAWS ANN. § 700.123c (West Supp. 1988) (notice found immediately before attestation clause rather than at beginning of will); WIS. STAT. ANN. § 853.55, notice 6 (West Supp. 1988).

317. CAL. PROB. CODE § 6240, notice 8 (West Supp. 1989); ME. REV. STAT. ANN. tit. 18A, § 2-514(a), notice 9 (Supp. 1988); MICH. COMP. LAWS ANN. § 700.123c, notice 7 (West Supp. 1988) (also indicates ability to file will in probate court for safekeeping); WIS. STAT. ANN. § 853.55, notice 7 (West Supp. 1988).

318. CAL. PROB. CODE § 6240, notice 9 (West Supp. 1989); ME. REV. STAT. ANN. tit. 18A, § 2-514(a), notice 5 (Supp. 1988); MICH. COMP. LAWS ANN. § 700.123c, notice 6 (West Supp. 1988) (also includes rule regarding some children born out of wedlock); WIS. STAT. ANN. § 853.55, notice 9 (West Supp. 1988).

319. CAL. PROB. CODE § 6240, notice 10 (West Supp. 1989); ME. REV. STAT. ANN. tit. 18A, § 2-514(a), notice 6 (Supp. 1988); MICH. COMP. LAWS ANN. § 700.123c, notice 8 (West Supp. 1988); WIS. STAT. ANN. § 853.55, notice 8 (West Supp. 1988).

320. CAL. PROB. CODE § 6240, notice 3 (West Supp. 1989); ME. REV. STAT. ANN. tit. 18A, § 2-514(a), notice 3 (Supp. 1988); WIS. STAT. ANN. § 853.55, notice 2 (West Supp. 1988).

321. CAL. PROB. CODE § 6240, notice 4 (West Supp. 1989); MICH. COMP. LAWS ANN. § 700.123c, notice 3 (West Supp. 1988).

322. CAL. PROB. CODE § 6240, notice 6 (West Supp. 1989); WIS. STAT. ANN. § 853.55, notice 5 (West Supp. 1988).

323. CAL. PROB. CODE § 6240, notice 11 (West Supp. 1989); WIS. STAT. ANN. § 853.55, notice 10 (West Supp. 1988).

- A new will should be made if the testator has a child after the statutory will is executed (Maine);[324]
- Testator should advise family members where the statutory will is stored (Michigan);[325]
- The statutory will may be inappropriate in complex family or business situations (Wisconsin);[326]
- Testator must comply with rules regarding the execution ceremony (Michigan);[327] and
- Read the entire statutory will carefully before completing it (Michigan).[328]

(b) Revocation of prior wills and codicils.—The statutory fill-in wills of each state contain language expressly revoking the testator's prior wills and codicils.[329] Wisconsin's form also provides a plain English definition of codicil.[330]

(c) Testator's residence.—Only the Michigan statutory fill-in will provides for a statement of the testator's residence.[331]

(d) Designation of spouse.—Michigan is the only state to provide for an express statement of the name of the testator's spouse.[332] This ties the distribution made by the statutory will to the person who is the testator's spouse at the time of the will's execution.[333] The other statutory forms may allow interpretation of the term spouse to mean the testator's spouse at time of death.[334]

(e) Listing of children.—Michigan is the only state to request that the testator list living children by name.[335]

(f) Gifts of personal property to named beneficiaries.—The California statutory will places significant restrictions on the testa-

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324. ME. REV. STAT. ANN. tit. 18A, § 2-514(a), notice 7 (Supp. 1988).
325. MICH. COMP. LAWS ANN. § 700.123c, notice 7 (West Supp. 1988).
326. WIS. STAT. ANN. § 853.55, notice 3 (West Supp. 1988).
327. MICH. COMP. LAWS ANN. § 700.123c, instruction 1 (West Supp. 1988).
328. *Id.* at instruction 2.
329. CAL. PROB. CODE § 6240, art. 1 (West Supp. 1989); ME. REV. STAT. ANN. tit. 18A, § 2-514(a), art. 1 (Supp. 1988); MICH. COMP. LAWS ANN. § 700.123c, art. 1 (West Supp. 1988); WIS. STAT. ANN. § 853.55, art. 1 (West Supp. 1988).
330. WIS. STAT. ANN. § 853.55, art. 1 (West Supp. 1988).
331. MICH. COMP. LAWS ANN. § 700.123c, art. 1 (West Supp. 1988).
332. *Id.*
333. *Id.* at definition (c).
334. *But see* CAL. PROB. CODE § 6202 (West Supp. 1989) (defining "spouse" to mean spouse at time of will execution).
335. MICH. COMP. LAWS ANN. § 700.123c, art. 1 (West Supp. 1988).

tor's ability to make specific gifts of personal property. The testator is permitted to make only one cash gift to either a person or a charity.[336] The form requires the testator to name the beneficiary, indicate the amount of the gift in numerals and words, and separately sign that portion of the will.[337] No gift is made if the named individual predeceases the testator or if the charity does not accept the gift; the gift is not saved for the issue of the individual beneficiary via an anti-lapse statute, and the court may not apply cy pres to locate an equitably equivalent charitable beneficiary.[338] The form also provides that death taxes are not to be apportioned against this gift.[339]

The Maine statutory will provides a testator with opportunities to make five gifts of personal and household items to named individuals[340] and three cash gifts to named charitable organizations or institutions.[341] Each gift is made by listing the name of the recipient, describing the item or stating the amount of the gift, and separately signing each bequest.[342] Various options available under the residuary clause allow the testator to make cash gifts to specific individuals.[343] Specific instructions are not provided with respect to a named beneficiary of a gift of a specific item who predeceases the testator, suggesting that Maine's normal anti-lapse statute would probably apply.[344] If a charitable organization or institution no longer exists or does not accept the legacy, lapse occurs and the court may not exercise cy pres to save the gift.[345]

The Michigan statutory will provides some opportunity for making specific bequests. The testator may make one or two cash gifts to named persons or charities.[346] To effectuate such gifts, the testator must state the beneficiary's name, address, and the amount of the gift in figures and words; in addition, the testator must separately sign each legacy.[347] The form states that these cash gifts are not subject to tax apportionment.[348] The statutory will makes no provision for specific bequests of items of personal property. However, the

336. CAL. PROB. CODE § 6240, art. 2.2 (West Supp. 1989).
337. *Id.*
338. *Id.*
339. *Id.*
340. ME. REV. STAT. ANN. tit. 18A, § 2-514(a), art. 2.2 (Supp. 1988).
341. *Id.* at art. 2.3.
342. *Id.* at arts. 2.2 & 2.3.
343. *Id.* at art. 2.4. For a more detailed discussion of the residuary estate, *see infra* notes 357-73 and accompanying text.
344. ME. REV. STAT. ANN. tit. 18A, § 2-605 (1981).
345. ME. REV. STAT. ANN. tit. 18A, § 2-514(a), art. 2.3 (Supp. 1988).
346. MICH. COMP. LAWS ANN. § 700.123c, art. 2.1 (West Supp. 1988).
347. *Id.*
348. *Id.*

form does explain the testator's right to leave a separate list or statement making gifts of specific books, jewelry, clothing, automobiles, furniture, and other personal and household items. This statement must be made in the testator's handwriting or be signed at the end.[349]

The Wisconsin statutory will provides a unified approach to specific gifts. The testator may make up to five specific gifts of cash, personal property, or real property.[350] The testator must describe cash gifts in both numerals and words, and each gift designation must be separately signed in a box provided on the form.[351] The testator is directed to write the phrase "not used" in boxes left empty.[352] The form also provides that lapse occurs if a named beneficiary predeceases the testator or if a charity does not accept the gift.[353] Thus, neither an anti-lapse statute nor cy pres are available to save any of the gifts.

(g) Gifts of real property to named beneficiaries.—In two states, the testator may make specific gifts of real property via a statutory will. Maine's statutory will provides a separate section for up to five specific gifts of real property to named beneficiaries.[354] The Wisconsin statutory will accommodates up to five specific gifts, any or all of which may be of real property.[355]

(h) Disposition of personal and household items not specifically bequeathed.—The statutory fill-in wills uniformly mandate that all personal and household items not specifically bequeathed pass to the surviving spouse; if there is no surviving spouse, the property passes equally to the testator's surviving children.[356]

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349. *Id.* at art. 2.2.

350. WIS. STAT. ANN. § 853.55, art. 2.2 (West Supp. 1988).

351. *Id.*

352. *Id.*

353. *Id.*

354. ME. REV. STAT. ANN. tit. 18A, § 2-514(a), art. 2.1 (Supp. 1988) (separate signature required for each gift).

355. WIS. STAT. ANN. § 853.55, art. 2.2 (West Supp. 1988).

356. CAL. PROB. CODE § 6240, art. 2.1 (West Supp. 1989) (the full text of this provision is found in CAL. PROB. CODE § 6242 (West Supp. 1989)); ME. REV. STAT. ANN. tit. 18A, § 2-514(a), art. 2.1 (Supp. 1988); MICH. COMP. LAWS ANN. § 700.123c, art. 2.2 (West Supp. 1988) (adding that any inheritance tax due is not to be paid from this property); WIS. STAT. ANN. § 853.55, art. 2.2 (West Supp. 1988) (the full text of this provision is found in WIS. STAT. ANN. § 853.57 (West Supp. 1988)). The statutes provide varying definitions or descriptions of personal and household items. *Compare* CAL. PROB. CODE § 6242 (West Supp. 1989) ("books, jewelry, clothing, personal automobiles, household furnishings and effects, and other tangible articles of a household or personal use") *with* WIS. STAT. ANN. § 853.57 (West Supp. 1988) ("books, jewelry, clothing, personal automobiles, recreational equipment, household furnishings and effects, and other tangible articles of a household, recreational or personal use,

(i) Residuary estate.—The California statutory will provides three options for distribution of the residuary estate. The first alternative gives the residue to the surviving spouse. If there is no surviving spouse, the residue passes to the testator's children and the descendants of any deceased child.[357] The second alternative leaves the entire residue to the testator's children and the descendants of any deceased child.[358] This alternative excludes the surviving spouse from distribution of the residuary estate. The third alternative allows the testator to elect to have the residue distributed as if he died intestate.[359] To adopt any one of these options, the testator must sign in a box located next to the desired distribution plan and write "not used" in the remaining boxes.[360]

The Maine statutory will also contains three distribution options for the residuary estate. The first option allows the testator to leave all remaining property to the surviving spouse or, if there is no surviving spouse, in equal shares to the testator's children and the descendants of any deceased child.[361] The second option leaves a stated dollar amount to the surviving spouse and the rest in equal shares to the children and the descendants of any deceased child.[362] The third option gives the testator the opportunity to make up to five gifts of designated sums of money to named persons.[363] To select one of these options, the testator must initial a box located in front of the desired clause and sign at the end of the clause.[364] If the testator fails to follow these requirements, the residue passes via intestacy.[365] The testator also may prescribe the distribution of property that does not pass under the other sections of the statutory will.[366]

The Michigan statutory will provides far less flexibility than those of California and Maine. The testator has no discretion as to

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together with all policies of insurance insuring any such items").

357. CAL. PROB. CODE § 6240, art. 2.3(a) (West Supp. 1989). The full text of this provision is found in CAL. PROB. CODE § 6243(a) (West Supp. 1989).

358. CAL. PROB. CODE § 6240, art. 2.3(b) (West Supp. 1989). The full text of this provision is found in CAL. PROB. CODE § 6243(b) (West Supp. 1989).

359. CAL. PROB. CODE § 6240, art. 2.3(c) (West Supp. 1989). The full text of this provision is found in CAL. PROB. CODE § 6243(c) (West Supp. 1989).

360. CAL. PROB. CODE § 6240, art. 2.3 (West Supp. 1989). If the testator signs in more than one box or fails to sign in any box, the residue is distributed as intestate property. *Id.*

361. ME. REV. STAT. ANN. tit. 18A, § 2-514(a), art. 2.4A (Supp. 1988).

362. *Id.* at art. 2.4B. If there is no surviving spouse, the amount designated for the surviving spouse is distributed in equal shares to the testator's children and the descendants of any deceased child. *Id.*

363. ME. REV. STAT. ANN. tit. 18A, § 2-514(a), art. 2.4C (Supp. 1988).

364. *Id.*

365. *Id.* (e.g., failure to sign and initial only one choice).

366. *Id.* at art. 2.5. A separate signature is required for this designation to be effective. *Id.*

distribution of the residuary estate in most situations. The surviving spouse takes the entire residuary estate; if there is no surviving spouse, the residue passes to the testator's children and the descendants of any deceased child.[367] A testator has two options for distribution of the residue if there is no surviving spouse, children, or descendants of children. The first option is to have one-half pass to the testator's heirs under intestacy and the other half pass to the spouse's heirs as if the spouse had died intestate immediately after the testator.[368] The second option, which is also the default choice, is to have the entire residuary estate pass via intestacy.[369] The testator selects an option by signing below the text of the appropriate provision.[370]

The provisions of the Wisconsin statutory will are also more restrictive than those of California and Maine. The testator has only two choices for disposition of the residuary estate. The first choice is to have the entire residue pass to the surviving spouse or, if there is no surviving spouse, to the testator's children and the descendants of any deceased child by right of representation.[371] The second choice, which is also the default option, is for the residue to pass via intestacy.[372] To make a selection, the testator must sign opposite the desired provision and write the words "not used" opposite the other clause.[373]

(j) Nomination of personal representative.—Each statutory will form allows the testator to nominate a personal representative. California,[374] Maine,[375] and Wisconsin[376] permit designation of one primary and two alternative personal representatives. The Michigan form provides for one primary and only one alternative personal representative; in addition, it has a place for the personal representative's address and contains a brief explanation of that individual's duties.[377] No state's form accommodates the appointment of co-per-

367. MICH. COMP. LAWS ANN. § 700.123c, art. 2.3 (West Supp. 1988).
368. *Id.*
369. *Id.*
370. *Id.*
371. WIS. STAT. ANN. § 853.55, art. 2.3(a) (West Supp. 1988). The full text of this provision is found in WIS. STAT. ANN. § 853.58(a) (West Supp. 1988).
372. WIS. STAT. ANN. § 853.55, art. 2.3(b) (West Supp. 1988). The full text of this provision is found in WIS. STAT. ANN. § 853.58(b) (West Supp. 1988).
373. WIS. STAT. ANN. § 853.55, art. 2.3 (West Supp. 1988).
374. CAL. PROB. CODE § 6240, art. 3.1 (West Supp. 1989).
375. ME. REV. STAT. ANN. tit. 18A, § 2-514(a), art. 3.3 (Supp. 1988).
376. WIS. STAT. ANN. § 853.55, art. 3.1 (West Supp. 1988).
377. MICH. COMP. LAWS ANN. § 700.123a, art. 3.1 (West Supp. 1988).

sonal representatives.[378] Maine is the only state to require separate signing of each personal representative nomination.[379]

The Michigan form provides a brief description of the powers of the personal representative and a list of related definitions at the end of the will, following the attestation clause.[380] Wisconsin lists these provisions in the body of the will.[381] California[382] and Wisconsin[383] expand upon the powers of the personal representative in clauses that are mandatorily incorporated into all statutory wills.

(k) Nomination of guardian or conservator.—The statutory will forms of each state permit the testator to designate a guardian or conservator for minor children. California,[384] Maine,[385] and Michigan[386] allow the testator to designate different persons as guardian of minor children and as guardian/conservator of their estates. The Wisconsin form requires that the same person serve in both capacities.[387] The California[388] and Maine[389] forms allow designation of one primary and two alternative nominations. The Michigan[390] and Wisconsin[391] forms permit nomination of only one primary and one alternate. The Michigan form also requires the nominee's address,[392] and the Maine form requires separate signing of each nomination.[393] Each of the statutory forms explains the purpose and function of these fiduciaries and provides other information regarding nomination and selection.[394] California[395] and Wisconsin[396] also provide in-

378. *See generally* Letter from Francis J. Collin, Jr. to John L. McDonnell, Jr. at 3 (Dec. 9, 1980) (copy on file at Dickinson Law Review office) ("possible permutations that are introduced once co-fiduciaries are possible would lead to an excessively long list of alternatives, would add unnecessary length and complexity to the Statutory Will, and would be misunderstood by many testators.").

379. ME. REV. STAT. ANN. tit. 18A, § 2-514(a), art. 3.3 (Supp. 1988).

380. MICH. COMP. LAWS ANN. § 700.123c, definitions, additional clause (a) (West Supp. 1988).

381. WIS. STAT. ANN. § 853.55, art. 3.1 (West Supp. 1988).

382. CAL. PROB. CODE § 6245(b) (West Supp. 1989) (e.g., powers conferred by law, enumerated powers such as the ability to sell assets at public or private sale, powers regarding distributions to minors, powers regarding partition when assets are distributed).

383. WIS. STAT. ANN. § 853.60(2) (West Supp. 1988) (substantially the same as California provision, *see supra* note 382).

384. CAL. PROB. CODE § 6240, art. 3.2 (West Supp. 1989).

385. ME. REV. STAT. ANN. tit. 18A, § 2-514(a), arts. 3.1 & 3.2 (Supp. 1988).

386. MICH. COMP. LAWS ANN. § 700.123c, art. 3.2 (West Supp. 1988).

387. WIS. STAT. ANN. § 853.55, art. 3.2 (West Supp. 1988).

388. CAL. PROB. CODE § 6240, art. 3.2 (West Supp. 1989).

389. ME. REV. STAT. ANN. tit. 18A, § 2-514(a), arts. 3.1 & 3.2 (Supp. 1988).

390. MICH. COMP. LAWS ANN. § 700.123c, art. 3.2 (West Supp. 1988).

391. WIS. STAT. ANN. § 853.55, art. 3.2 (West Supp. 1988).

392. MICH. COMP. LAWS ANN. § 700.123c, art. 3.2 (West Supp. 1988).

393. ME. REV. STAT. ANN. tit. 18A, § 2-514(a), arts. 3.1 & 3.2 (Supp. 1988).

394. CAL. PROB. CODE § 6240, art. 3.2 (West Supp. 1989) (same person may serve as

formation regarding the powers of guardians in clauses that are statutorily incorporated by reference.

(l) Bond.—Of the four fill-in statutory will forms, only the Maine form fails to address the issue of bond.[397] The other three forms address the issue of bond in various ways, but none permit the testator to deal with each fiduciary designation separately; bond must either be required of all fiduciaries or waived for all of them. The California statutory will explains the purpose of bond and permits the testator to waive bond by signing in a box; bond is required if not specifically waived.[398] The Michigan form also explains the purpose of bond, and requires the testator to sign below either a statement requiring bond or a statement waiving bond.[399] The statute does not indicate the consequences if neither statement is signed.[400] The Wisconsin form does not explain the purpose of bond. The form gives the testator the opportunity to require bond by signing in a box; if no signature, bond is deemed waived.[401]

(m) Execution.—Each statutory will requires the testator's signature and the date of execution.[402] The California, Maine, and Wisconsin forms also provide spaces for the testator to indicate the city and state where the will is executed.[403] The Michigan form requires no such statement.[404]

(n) Attestation.—Each statutory will contains attestation clauses that comply with applicable state law.[405] California[406] and

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both guardian of person and property; institution may serve only as guardian of property); ME. REV. STAT. ANN. tit. 18A, § 2-514(a), arts. 3.1 & 3.2 (Supp. 1988) (if no conservator named, guardian acts as conservator); MICH. COMP. LAWS ANN. § 700.123c, art. 3.2 & additional clause (b) (West Supp. 1988) (because spouse may predecease, testator should nominate guardian and conservator); WIS. STAT. ANN. § 853.55, art. 3.2 (West Supp. 1988) (testator should name a guardian for children under age eighteen).

395. CAL. PROB. CODE § 6245(c) (West Supp. 1989) (same authority as custodial parent plus powers conferred by law).

396. WIS. STAT. ANN. § 853.60(3) (West Supp. 1988) (all powers conferred by law).

397. *See* ME. REV. STAT. ANN. tit. 18A, § 2-514(a) (Supp. 1988). Bond will not be required in most circumstances because the will does not expressly require it. *Id.* § 3-603.

398. CAL. PROB. CODE § 6240, art. 3.3 (West Supp. 1989).

399. MICH. COMP. LAWS ANN. § 700.123c, art. 3.3 (West Supp. 1988).

400. *Id.*

401. WIS. STAT. ANN. § 853.55, art. 3.3 (West Supp. 1988).

402. CAL. PROB. CODE § 6240 (West Supp. 1989); ME. REV. STAT. ANN. tit. 18A, § 2-514(a) (Supp. 1988); MICH. COMP. LAWS ANN. § 700.123c (West Supp. 1988); WIS. STAT. ANN. § 853.55 (West Supp. 1988).

403. CAL. PROB. CODE § 6240 (West Supp. 1989); ME. REV. STAT. ANN. tit. 18A, § 2-514(a) (Supp. 1988); WIS. STAT. ANN. § 853.55 (West Supp. 1988).

404. MICH. COMP. LAWS ANN. § 700.123c (West Supp. 1988).

405. CAL. PROB. CODE § 6240 (West Supp. 1989); ME. REV. STAT. ANN. tit. 18A, § 2-

Michigan[407] recommend use of a supernumerary witness, and provide appropriate blank spaces for the extra witness' signature, printed name, and address.

3. Contents—Statutory Wills With Trusts.—California[408] and Wisconsin[409] each provide an additional statutory form that may be used to create a will containing a testamentary trust. Although an early proposal of the Michigan statutory will contained testamentary trust provisions, the provisions were not enacted.[410] The forms for statutory wills with trusts are similar to the forms for wills without trusts. The forms containing trust provisions, however, also include special warnings, provide for distribution of the residuary estate and nomination of a trustee, and specify trustee powers and implied terms.[411]

(a) Notices and warnings.—The California and Wisconsin statutory wills with trust forms contain notices warning the testator that the form should not be used unless a trust is intended.[412] The Wisconsin form also contains a conspicuous warning in the body of the will that the available trust options may not achieve the best possible tax results, particularly for testators possessing substantial estates.[413] The Wisconsin form also advises the testator to consult a competent tax advisor.[414]

(b) Distribution of residuary estate.—The California statutory will with trust form gives the testator two options regarding distribution of the residuary estate. The first option gives the residue to the surviving spouse; if there is no surviving spouse, the residue passes

514(a) (Supp. 1988); MICH. COMP. LAWS ANN. § 700.123c (West Supp. 1988); WIS. STAT. ANN. § 853.55 (West Supp. 1988).

406. CAL. PROB. CODE § 6240 (West Supp. 1989).

407. MICH. COMP. LAWS ANN. § 700.123c (West Supp. 1988).

408. CAL. PROB. CODE § 6241 (West Supp. 1989).

409. WIS. STAT. ANN. § 853.56 (West Supp. 1988).

410. *See* Lawrence, III & Sytsma, *supra* note 289, at 682-83.

411. CAL. PROB. CODE § 6241 (West Supp. 1989); WIS. STAT. ANN. § 853.56 (West Supp. 1988).

412. CAL. PROB. CODE § 6241, notice 1 (West Supp. 1989); WIS. STAT. ANN. § 853.56, notice 1 (West Supp. 1988).

413. WIS. STAT. ANN. § 853.56, art. 2.3 (West Supp. 1988).

414. *Id. See generally* Erlanger & Crowley, *Trust B of the Wisconsin Basic Will May Be a Hazardous Estate Plan*, WIS. B. BULL., Jan. 1986, at 17, 17-18 (concluding that the second trust option should not be contained in a do-it-yourself will because "(1) the instructions do not explain the significance of the choice and thus create the possibility that the testator will make a choice with unintended consequences; and (2) under certain circumstances, [the trust] has uncertain and potentially costly income tax consequences").

into a single trust for the support and education of the testator's children and descendants of any deceased child until each of the testator's living children are at least twenty-one years old.[415] The form does not detail the provisions of the trust; instead, the full text of the provisions are set forth in the California Probate Code.[416] The most significant dispositive provision reads as follows:

> As long as any child of mine under 21 years of age is living, the trustee shall distribute from time to time to or for the benefit of any one or more of my children and the descendants of any deceased child (the beneficiaries) of any age as much, or all, of the (i) principal or (ii) net income of the trust, or (iii) both, as the trustee deems necessary for their health, support, maintenance, and education. Any undistributed income shall be accumulated and added to the principal. "Education" includes, but is not limited to, college, graduate, postgraduate, and vocational studies, and reasonably related living expenses. Consistent with the trustee's fiduciary duties, the trustee may distribute trust income or principal in equal or unequal shares and to any one or more of the beneficiaries to the exclusion of other beneficiaries. In deciding on distributions, the trustee may take into account, so far as known to the trustee, the beneficiaries' other income, outside resources, or sources of support, including the capacity for gainful employment of a beneficiary who has completed his or her education.[417]

Under the second option, the entire residuary estate may be used to create a trust for the testator's descendants. This trust is governed by the same section of the California Probate Code.[418] This option may be chosen without reference to whether the testator is survived by a spouse.[419]

The testator must adopt one of the alternatives by signing in a box next to the appropriate provision,[420] and writing "not used" in the box by the provision not chosen.[421] If the testator fails to sign either box, or signs both, the residue will be distributed via intestacy.[422]

The Wisconsin statutory will with trust form also provides the

415. CAL. PROB. CODE § 6241, art. 2.3(a) (West Supp. 1989).
416. CAL. PROB. CODE § 6244(a) (West Supp. 1989).
417. *Id.* § 6244(a)(2)(A).
418. CAL. PROB. CODE § 6241, art. 2.3(b) (West Supp. 1989).
419. *Id.*
420. CAL. PROB. CODE § 6241, art. 2.3 (West Supp. 1989).
421. *Id.*
422. *Id.*

testator with two choices. Unlike the California scheme, however, the choices differ significantly and allow a greater degree of individualization. The first Wisconsin option is the same as the first California option; the residuary estate passes to the surviving spouse or, if there is no surviving spouse, into a trust for the testator's children and descendants of deceased children.[423] This trust normally ends when the testator's youngest living child reaches age twenty-one.[424] Unlike the California form, however, the Wisconsin form permits the testator to specify termination of the trust at any age over eighteen years.[425] As with California, the full text of the trust is set forth in the enabling statute.[426] Under Wisconsin law, however, the trustee is given greater latitude with respect to final distribution: if a distributee is under a disability, the trustee has discretion to keep the property in trust and make appropriate distributions for the benefit of the disabled distributee.[427]

The second option allows the testator to place the entire residuary estate in trust for the surviving spouse and children.[428] The terms of the trust supplied by the full text of this provision are substantially similar to the terms of the trust created under the first option. The second provision, however, mandates that the welfare of the surviving spouse be the primary consideration when distributions are made.[429] The trust does not terminate until the surviving spouse dies and all of the testator's living children attain the age of twenty-one.[430] As with the first option, the testator may redesignate the age at which the trust terminates to an age over eighteen years.[431] The testator selects one of the trust options in the same manner as that adopted by the California form.[432]

(c) Nomination of trustee.—The California and Wisconsin provisions regarding nomination of trustees for the statutory will trusts are virtually identical. Each state allows the testator to name one primary trustee and two successor trustees.[433]

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423. WIS. STAT. ANN. § 853.56, art. 2.3(a) (West Supp. 1988).
424. *Id.*
425. *Id.*
426. WIS. STAT. ANN. § 853.59(a) (West Supp. 1988).
427. *Id.* § 853.59(a)(2)(B).
428. WIS. STAT. ANN. § 853.56, art. 2.3(b) (West Supp. 1988).
429. *Id.* § 853.59(b)(1)(A).
430. *Id.*
431. WIS. STAT. ANN. § 853.56, art. 2.3(b) (West Supp. 1988).
432. WIS. STAT. ANN. § 853.56, art. 2.3 (West Supp. 1988).
433. CAL. PROB. CODE § 6241, art. 3.2 (West Supp. 1989); WIS. STAT. ANN. § 853.56, art. 3.2 (West Supp. 1988).

(d) Trustee powers.—The California and Wisconsin statutory forms do not list the powers of the trustee. Rather, trustee powers are set forth in provisions that are automatically incorporated by reference into the form. Both the California and Wisconsin provisions provide that the trustee may exercise any powers conferred by law, may hire and pay agents, may exercise various options with respect to the distribution of assets from the trust, and may, upon termination of the trust, distribute assets to a custodian for a minor beneficiary in accordance with the terms of the Uniform Gifts/Transfers to Minors Acts.[434]

(e) Other trust provisions.—By virtue of nearly identical automatically incorporated provisions, the forms for both California and Wisconsin are deemed to contain several additional trust provisions.[435] These implied trust terms include a spendthrift clause,[436] a provision guaranteeing the right of the trustee to reasonable compensation,[437] and an exculpatory provision binding all interested persons to discretionary determinations made by the trustee in good faith.[438]

4. Other Provisions of Enabling Legislation.—This section examines other important provisions of statutory will form legislation.

(a) Printing and distribution instructions.—Each state that has adopted statutory wills has enacted provisions governing the printing and distribution of the form. California,[439] Michigan,[440] and Wisconsin[441] require notices that precede the body of the will to be printed in ten-point boldface type. Maine mandates that statutory will forms must "be provided at all Probate Courts for a cost equivalent to the reasonable cost of printing and storing the forms."[442] Michigan requires anyone printing and distributing the form to reproduce it exactly as it appears in the statute.[443] The Wis-

434. CAL. PROB. CODE § 6246(b) (West Supp. 1989); WIS. STAT. ANN. § 853.61(2) (West Supp. 1988).

435. CAL. PROB. CODE § 6246(c) (West Supp. 1989); WIS. STAT. ANN. § 853.61(3) (West Supp. 1988).

436. CAL. PROB. CODE § 6246(c)(1) (West Supp. 1989); WIS. STAT. ANN. § 853.61(3)(a) (West Supp. 1988).

437. CAL. PROB. CODE § 6246(c)(2) (West Supp. 1989); WIS. STAT. ANN. § 853.61(3)(b) (West Supp. 1988).

438. CAL. PROB. CODE § 6246(c)(3) (West Supp. 1989); WIS. STAT. ANN. § 853.61(3)(c) (West Supp. 1988).

439. CAL. PROB. CODE §§ 6240-41 (West Supp. 1989).

440. MICH. COMP. LAWS ANN. § 700.123b (West Supp. 1988).

441. WIS. STAT. ANN. §§ 853.55, 853.56 (West Supp. 1988).

442. ME. REV. STAT. ANN. tit. 18A, § 2-514(a)(b) (Supp. 1988).

443. MICH. COMP. LAWS ANN. § 700.123b (West Supp. 1988).

consin enabling legislation requires a signature line to be printed on each page of the printed document.[444]

(b) Other rules regarding the statutory will.—Additional rules appear in the enabling legislation for each state's statutory will. Because Michigan's form places definitions and additional clauses in the form, the Michigan statute contains little additional material.[445] The Maine statute also contains scant additional material, but authorizes the testator to fill in blank spaces in his own handwriting or with a typewriter.[446]

The California and Wisconsin statutes contain considerable additional material. The statutory wills of each state incorporate by reference definitions, rules of construction, full texts of dispositive provisions, and other clauses.[447] California's enabling legislation governs testamentary capacity,[448] the execution procedure,[449] attestation,[450] improperly completed forms,[451] interpretation of will section titles,[452] revocation,[453] additions or deletions,[454] and the effect of dissolution or annulment of the testator's marriage.[455] The Wisconsin statute is less extensive, but does govern statutory will execution,[456] improperly completed forms,[457] revocation,[458] and additions or deletions.[459]

C. *Experience*

1. California.—The original California statutory will provisions were enacted in 1982 and took effect on January 1, 1983.[460]

444. WIS. STAT. ANN. § 853.52(4) (West Supp. 1988) (validity of will not affected, however, by failure of the printer to include such a line and/or failure of the testator to sign the line).

445. MICH. COMP. LAWS ANN. § 700.123a-c (West Supp. 1988).

446. ME. REV. STAT. ANN. tit. 18A, § 2-514(b) (Supp. 1988) (other rules deal with markouts and failure to sign individual provisions).

447. *See supra* notes 292-306 and accompanying text.

448. CAL. PROB. CODE § 6220 (West Supp. 1989).

449. *Id.* § 6221.

450. *Id.* § 6221.5.

451. *Id.* § 6223.

452. *Id.* § 6224.

453. CAL. PROB. CODE § 6225 (West Supp. 1989).

454. *Id.*

455. *Id.* § 6226 (dissolution or annulment revokes gifts to spouse and nominations of spouse as a fiduciary and property passes as if spouse had predeceased testator; legal separation insufficient to remove spouse as a beneficiary or fiduciary).

456. WIS. STAT. ANN. § 853.51 (West Supp. 1988).

457. *Id.* §§ 853.53, 853.54(3).

458. *Id.* § 853.54(1).

459. *Id.* § 853.54(2).

460. 1982 Cal. Stat. ch. 1401; *see also supra* notes 282-84.

Several groups took immediate action to make the forms widely available to the general public. On December 18, 1982, the Board of Governors of the State Bar of California approved publication and distribution of the statutory forms.[461] The forms became available in March of 1983 to both attorneys and the public for $1.00 each, provided a self-addressed, stamped, legal-sized envelope accompanied the request.[462] Discounts were available for bulk purchases.[463] The California Bar sold 175,000 copies of the forms in the first year.[464]

Private publishers also acted quickly to make the forms available. One month after the statutory will legislation took effect, a California publisher sold 15,000 will without trust forms and 10,000 will with trust forms.[465] Although this publisher noted that many attorneys requested bulk lots of the forms, laymen accounted for the majority of sales.[466]

The large volume of sales within a relatively short period of time clearly demonstrates the public's acceptance of and interest in the forms. Publicity surrounding the legislation aroused increased awareness of the will form and the estate planning process.[467] Commentators often recommended that individuals contemplating the use of a statutory form consult with an attorney to be certain of the form's suitability.[468] At least initially, however, it did not appear that the public consulted with attorneys about the form wills.[469]

California substantially overhauled its Probate Code and a new

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461. *Board Approves Publication, Distribution of Statutory Will*, CAL. LAW., Mar. 1983, at 57.

462. *Will Forms Available*, CAL. LAW., Mar. 1983, at 58.

463. *Id.* (10 for $5.00; 25 for $8.75; 50 for $12.50, or 100 for $25.00). Current prices are $1.00 each, 25 for $15.00, and 100 for $50.00. The State Bar of Cal., Order Form (Aug. 1986) (copy on file at Dickinson Law Review office).

464. *California Bar Sells 175,000 Will Forms*, B. LEADER, Jan.-Feb. 1984, at 7.

465. Girdner, *State's Consumers Snapping Up Wills Under New Statute*, L.A. Daily J., Jan. 27, 1983, at 1, col. 6 (Wolcotts, Inc.).

466. *Id.* at 16.

467. Girdner, *State's Consumers Snapping Up Wills Under New Statute*, L.A. Daily J., Jan. 27, 1983, at 1, col. 6, at 16, col. 1 (head of probate section of San Diego County Bar Association stated that there was a high level of public interest during public talks; vice-president of form publisher believed sales due to publicity as well as public perception that the new form wills replaced old handwritten wills).

468. *See, e.g.*, Kellogg, *Adapting Your Practice to the New Statutory Wills*, CAL. LAW., Feb. 1983, at 14 (recommending that attorney send explanatory/warning letter to clients); *California First With Statutory Wills*, CAL. LAW., Feb. 1983, at 17, 17 ("[i]deally, the statutory will should be used with a lawyer's help"); *Possible Legislation*, *supra* note 45, at 5 (form should be "sufficiently complex to discourage its use unless a California lawyer supervises it").

469. Girdner, *State's Consumers Snapping Up Wills Under New Statute*, L.A. Daily J., Jan. 27, 1983, at 1, col. 6 (author's interviews with probate attorneys throughout California revealed no case in which a client had asked for advice regarding statutory form in the first month after the statutory will provisions took effect; head of probate section of San Diego Bar Association had not received inquiries from individuals).

revision and recodification of the statutory will provisions took effect on January 1, 1985.[470] Most of the changes merely integrated these provisions into the overall scheme of California probate law, and had little effect on the substance of the statutory will provisions. The only significant change to the forms was the addition of language to the bond articles explaining the term and its operation.[471] Although technical amendments were made to the statutory will probate code provisions in 1984, 1985, and 1987, none changed the language of the statutory forms.[472] Research has not revealed any appellate cases involving the statutory will statutes or forms.

Recent reports from California indicate that the statutory will forms are often improperly completed or are not properly executed.[473] This has led some probate specialists to conclude that the statutory forms should be abolished.[474] They believe that "mistakes will continue as long as consumers are encouraged to execute their own wills without a lawyer's help."[475] It appears, however, that most probate attorneys think that the statutory forms are a good tool for consumers and thus should be retained.[476]

In an attempt to simplify the forms as well as to give consumers a greater opportunity to individualize the statutory will form, the Estate Planning, Trust and Probate Law Section of the California Bar is revising the statutory forms.[477] The most current draft reflects the following significant changes:

- Provision of important information in question and answer format at the beginning of the form;[478]
- Increased alternatives for disposition of property;[479]
- Elimination of the statutory will with trust;[480]

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470. CAL. PROB. CODE §§ 1-2 (West Supp. 1989).

471. 1983 Cal. Stat. ch. 842, § 55 (codified at CAL. PROB. CODE §§ 6240-41 (West Supp. 1989)).

472. 1984 Cal. Stat. ch. 892, §§ 33, 35, 36, 37, 38; 1985 Cal. Stat. ch. 359, § 5; 1987 Cal. Stat. ch. 923, §§ 85.3, 85.7.

473. *See* Rice, *Too Little Too Late*, CAL. LAW., June 1989, at 36, 36 (Alameda County Court Commissioner Barbara J. Miller stated that most statutory wills are not completed correctly; one-half of statutory wills offered for probate in Los Angeles County are rejected because they are improperly completed or not signed).

474. *Id.* (Alameda County Court Commissioner Barbara J. Miller indicated that the public may be better off without statutory will option).

475. Rice, *supra* note 473, at 36.

476. *Id.* at 36-37.

477. *Id.* at 36; *see also* Vollmer, *California Statutory Will Revisions Being Considered: Your Comments Requested*, EST. PLAN. TR. & PROB. NEWS, Fall 1989, at 1, 5-9.

478. Vollmer, *supra* note 477, at 5-6.

479. *Id.* at 1, 6-9.

480. *Id.* at 1 ("[Statutory will with trust] is too complex for consumers and has income tax and other problems associated with it. The advantages and disadvantages of family pot

- Improved wording of attestation clause;[481] and
- Recommendations to typeset the form, use color for signature boxes, and prepare a Spanish language version.[482]

2. *Maine.*—Maine's statutory will provisions took effect on April 24, 1984.[483] The only changes to the original statute were minor technical corrections made before the effective date of the statute.[484] Little has been written about Maine's experience with its statutory will.[484.1] No appellate case involving any aspect of the Maine statutory will has been reported.

3. *Wisconsin.*—The Wisconsin statutory will provisions became effective on May 2, 1984.[485] The forms remain as originally enacted, and the mandatory clauses incorporated by reference were amended only once with a minor technical addition.[486] The Center for Public Representation published a nontechnical guide to the statutory wills.[487] In addition, the Wisconsin Bar Bulletin published an article criticizing the second trust option, which provides a trust for the surviving spouse and children. The authors of this article concluded that use of this trust option may lead to unintended results and unfavorable tax consequences.[488] Research located no appellate case addressing statutory will concerns.

4. *Michigan.*—Michigan is the most recent jurisdiction to enact a fill-in statutory will form. The Michigan provisions took effect on July 1, 1986.[489] Neither the form nor the statutory provisions

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trusts should be carefully explained to consumers by an attorney.").

481. *Id.* (changes made so that will is considered self-executing even if the witnesses cannot be found).

482. *Id.*

483. 1983 Me. Laws ch. 376.

484. 1983 Me. Laws ch. 816, § A,7 ("spouse" substituted for "wife" and "that" for "her" in art. 2.4(B) of the form).

484.1 One written Probate Court decision was found interpreting a statutory will in which the testator added a restriction to a gift of real property that the land "must be occupied for ten years by any of the three [named beneficiaries] before being sold." The probate judge found that the restriction was an illegal restraint on alienation and, in effect, would be ignored. Thus, the statutory will gave fee simple interests to the beneficiaries. Estate of John S. Manna, No. 87-43 (Waldo County P. Ct. Me. June 9, 1987).

485. 1983 Wis. Laws act 376, § 1.

486. 1987 Wis. Laws act 191, § 2 (added reference to Uniform Transfers to Minors Act in provisions that mention Uniform Gifts to Minors Act).

487. M. KLUG & H. ERLANGER, THE BASIC WILLS HANDBOOK: A GUIDE TO THE WISCONSIN BASIC WILLS (1985).

488. Erlanger & Crowley, *Trust B of the Wisconsin Basic Will May Be a Hazardous Estate Plan*, WIS. B. BULL., Jan. 1986, at 17, 17-18.

489. 1986 Mich. Pub. Acts No. 61, § 1.

have been amended, despite proposals for a statutory will with trust form.[490] A 1985 article urged passage of statutory will legislation,[491] but little has been written concerning the current status of statutory wills.[492] There is some evidence that the forms are popular, although a perception exists among some Michigan practitioners that the forms create more problems than they solve.[493]

5. Other Jurisdictions.—The Ohio Legislature considered statutory will legislation in 1983, but failed to pass the bill.[494] There is currently some interest in statutory wills in New York and Texas.[495]

V. Analysis—Will Forms in General

Attention must be directed to the potential benefits and difficulties of will forms before the various statutory will form methodologies may be properly analyzed.

A. Functions and Purposes of Will Forms

Proper use of legal forms plays "an integral part in the smooth operation of the private and public sectors of American society."[496] There is widespread use of legal forms in the modern legal community, in areas ranging from abandoned property to zoning.[497] The use of forms has become so routine that the functions and purposes

490. *See* Lawrence, III & Sytsma, *supra* note 289 (original proposal contained will with trust form); Letter from Fredric A. Sytsma to Gerry W. Beyer (Oct. 24, 1988) (copy on file at Dickinson Law Review office) (current proposal to enact will with trust form).

491. Lawrence, III & Sytsma, *supra* note 289. The statutory will legislation that eventually passed is significantly different from the proposal discussed in this article; the enacted version does not contain provisions for a statutory will with trust. *Id.*

492. A recent Michigan article on drafting estate documents in plain language does not mention the statutory form. Cumming, *Estate Planning Documents Clients Can Understand*, 67 MICH. B.J. 54 (Jan. 1988).

493. Letter from Fredric A. Sytsma to Gerry W. Beyer (Oct. 24, 1988) (copy on file at Dickinson Law Review office).

494. H.B. 483, 115th Gen. Assembly, Reg. Sess. (1983). The Executive Committee of the Ohio State Bar Association voted to oppose the bill as drafted but expressed approval of the statutory will concept. *See generally* Note, *supra* note 2, at 307 (comparing certain aspects of Ohio proposal to Uniform Act, A.B.A. proposal, and California act).

495. American College of Probate Counsel, *Board of Regents Report* 2 (Oct. 1988). *See* Letter from C. Terry Johnson to Robert M. Brucken (Dec. 28, 1983) (copy on file at Dickinson Law Review office). In Texas, statutory probate judges appear to be opposed to statutory wills. *See* Letter from Kent H. McMahan to Gerry W. Beyer (Nov. 17, 1988) (copy on file at Dickinson Law Review office). There is also some evidence that New Jersey considered statutory will legislation. *The Limits to a Do-It-Yourself Will*, CHANGING TIMES, Nov. 1984, at 82, 84.

496. 11 THE GUIDE TO AMERICAN LAW 4 (1985).

497. *See* Index, WEST'S LEGAL FORMS (2d ed. 1986) (first and last entries in 666 page index to 29-volume series).

served by such forms are easily overlooked or forgotten.[498] Following are some of the reasons supporting the use of form wills.

1. Reduction of Preparation Time.—Use of previously prepared form wills is an efficient method of reducing the time and effort needed to draft a will.[499] A substantial amount of time may be saved in routine estates requiring little or no original material. For example, a form will may benefit a testator wishing to leave a modest estate to his spouse. Some wills require preparation of new material, but the time required to draft the will may be significantly reduced by utilizing a form as a starting point. The drafter, typically an attorney, may use the time saved to handle nonroutine matters.

In addition to reducing the time spent in drafting, the use of form wills saves considerable clerical time.[500] Secretaries may complete wills rapidly by using preprinted wills containing blank spaces for the insertion of relevant information. The speed at which wills may be assembled and printed dramatically increases with the use of computers capable of storing and retrieving large quantities of text.[501]

2. Lower Cost of Legal Services.—As a direct result of the professional and clerical time saved through proper use of form wills, the cost of legal services may be lowered.[502] This reduction in cost produces a widespread benefit — those who could not previously af-

498. *See The Legal Blank*, 30 LAW NOTES 124 (1926) ("Few lawyers realize how deeply they are indebted to that humble assistant, the legal blank.").

499. *Legislative Memorandum, supra* note 49, at 1; Tilton & Tilton, *Basic Considerations in Designing Forms*, PRAC. LAW., July 15, 1980, at 55, 56 ("A lawyer who uses standard forms . . . will inevitably save some time . . . ."); *The Legal Blank*, 30 LAW NOTES 124 (1926) ("If every paper drawn . . . had to be prepared de novo the labor . . . involved would be surprisingly great . . . .").

500. *See The Legal Blank*, 30 LAW NOTES 124 (1926) ("surprisingly great" amount of labor involved if each document prepared de novo).

501. *See, e.g.*, Dew, *Bloodied But Unbowed - Horror Stories From Legal Computing*, COMPUTERS & LAW, Sept. 1985, at 15; Evans, *A Formula for Forms*, CAL. LAW., Jan. 1985, at 51 (discussion of benefits of computerized forms supplied by commercial publishers); F. RHOADS & J. EDWARDS, LAW OFFICE GUIDE TO SMALL COMPUTERS § 9.02 (1984).

502. *See Legislative Memorandum, supra* note 49, at 1; Blattmachr, *"Statutory Will" Positive Development*, TR. & EST., Jan. 1984, at 8, 8 ("Even lawyers with the most sophisticated word processing equipment find that the simplest of wills costs hundreds of dollars to prepare"); *see also* Dew, *Bloodied But Unbowed — Horror Stories From Legal Computing*, COMPUTERS & LAW, Sept. 1985, at 15, 15 (key benefit of certain computer systems is the "[r]eduction in typing costs . . . [s]ince lawyers make very heavy use of precedent [forms] material"); Hillman, *Private Ordering Within Partnerships*, 41 U. MIAMI L. REV. 425, 437 (1987) ("[f]orm books, scissors, and paste lower costs"). *Cf.* Eidelman, *Teach Your Computer to Draft Documents: Substantive Systems for Lawyers*, in FROM YELLOW PADS TO COMPUTERS 89, 89 (1987) (attorneys using computers to produce documents are "making more money with less work" as well as producing better documents for clients).

ford a will may be better able to acquire one; those who can afford to pay higher prices are less burdened by legal expenses.[503]

3. Increased Predictability of Results.—Because form wills contain standardized provisions, the user may safely rely that the language of each form will be the same every time the form is used.[504] Care must still be taken, of course, when adapting the form to particular situations. This uniformity allows the user to confidently predict the results that will flow from the use of the form. Past personal experience with the form, legislation, and judicial decisions assist the user in anticipating whether the will form will function as intended.

4. Lessened Opportunity for Error.—By using a well-designed will form, the drafter decreases the chance of undetected clerical and legal errors.[505] "If every paper drawn . . . had to be prepared de novo . . . the possibility of error, such as the accidental omission by a stenographer of a line or two, which would easily pass unnoticed in signing and serving a formal paper [executing a will], would be greatly multiplied."[506] In addition, a form will serves as a checklist preventing the inadvertent omission or misstatement of essential terms.[507]

5. Decreased Cause for Litigation.—Prudent use of form wills increases the predictability of results and lessens the opportunity for error. Accordingly, litigation concerning wills should decrease. The user has a greater chance of obtaining the intended result because the probable outcome may be predicted with reasonable certainty, and errors are less likely to occur.

Use of a form may allow the drafter to "concentrate on any legal questions which may be involved in the matter of substance to be filled into the blank."[508] Because greater attention may be given to substantive matters, it is less likely that problems will arise after

503. *See* Blattmachr, *supra* note 502, at 8.

504. Tilton & Tilton, *supra* note 499, at 56 ("A lawyer who uses standard forms . . . can depend on the . . . text to be always . . . the same."); *see also* 11 THE GUIDE TO AMERICAN LAW 3 (1985).

505. *Legislative Memorandum, supra* note 49, at 1.

506. *The Legal Blank*, 30 LAW NOTES 124, 124 (1926).

507. *See, e.g.*, P. BROIDA, A GUIDE TO MERIT SYSTEMS PROTECTION BOARD LAW & PRACTICE ch. 19, § B (1987) (forms used as references to ensure essential element not omitted); Tilton & Tilton, *supra* note 499, at 56 ("Standard forms also increase a lawyer's efficiency because they serve as a checklist so that nothing vital is omitted.").

508. *Advantages of Uniform Land Mortgage Act*, 30 LAW NOTES 123, 124 (1926) (statement made in support of passage of Uniform Land Mortgage Act).

the testator's death, when it is too late to take corrective measures without litigation.

B. Potential Difficulties in Using Will Forms

Although the benefits of will forms are great, there are inherent difficulties involved in the use of the forms. Moreover, abuse of the forms may cause problems.

1. Lack of Individualization.—By nature, form wills are generic. They are not designed with any particular testator in mind, and may be difficult to adapt to the facts of a specific situation. This is especially true when a testator uses a preprinted form with fill-in blanks. No two cases are exactly alike and a form that is too rigid may not accommodate the individualized adjustments needed in a particular situation.[509]

2. Improper Selection.—The user of a form will must exercise great care in selecting the proper form because use of the wrong form could have disastrous effects. Some form wills are drafted to leave the testator's estate to the children. If such a form is used when the testator wishes to leave everything to the spouse, testamentary intent is frustrated.

Improper selection could result from mere inadvertence or haste, such as by taking the wrong form from a file. Improper selection may also be due to lack of knowledge on the part of the person selecting the form will.[510] This may occur when a layman, or an attorney with little experience in estate planning, leafs through various forms and selects a form that may appear proper. A form selected without proper knowledge or training may yield unexpected results.

Selection problems also arise because of differences in law between the states. A form will meeting the requirements of one state may fail to meet the requirements of another.[511] Likewise, a form will that has been used with excellent results for years may suddenly become dangerous if the user is unaware of recent legislative

509. *See, e.g.*, P. BROIDA, *supra* note 507, at ch. 19, § B (form "must be tailored to the circumstances of a case"); 19 A. LEOPOLD, G. BEYER & D. PARK, WEST'S LEGAL FORMS at v (2d ed. 1986) ("No forms will fit every factual possibility."); Note, *supra* note 2, at 327.

510. *See* Fejfar, *Insight into Lawyering: Bernard Lonergan's Critical Realism Applied to Jurisprudence*, 27 B.C.L. REV. 681, 701 (1986) ("In many instances the lawyer has not researched the law relating to the particular form which she intends to use.").

511. *See* E. LEE, STANDARD LEGAL FORMS at v (1919) ("each state may have its own special forms . . . and the reader should always seek for these first").

changes or judicial decisions.[512] These problems are exacerbated when individuals without legal training attempt self-help by selecting and using a form will.[513]

3. Improper Completion.—A form will, no matter how simple, may be completed improperly. Improper completion often occurs because the person completing the form does not understand what is required. This is especially likely if that person is not trained in legal matters. Improper completion may also occur after the will has been executed if spaces originally left empty are filled in. This could be done by a user who is unaware of the consequences of altering the will. Alternatively, the improper completion could be performed by someone desiring to obtain an advantage by dishonest means.

Inappropriate completion defeats the user's intent by causing problems that are often difficult and costly to correct. In some situations, discovery of the error will come so late that no remedy will be available. For example, an improperly completed will may lack the necessary elements imposed by law for the document's validity.[514]

4. Potential for Misuse and Abuse by Attorneys.—Despite specialized training, attorneys may select and complete form wills improperly, may be too hurried to ascertain whether a particular form is appropriate, or may neglect to make necessary changes.[515] Use of form wills normally requires less time and effort than drafting a will from scratch. Desire for increased efficiency may cause some attorneys to become careless and lazy in their use of the forms. A form may be used because the attorney does not "care to take the time to think through a transaction and develop [her] own paperwork."[516] Similarly, a form will may be used without sufficient research into the validity and effect of the form under current case

512. *See* Florida Bar v. American Legal & Business Forms, Inc., 274 So. 2d 225, 227 (Fla. 1973) (noting danger of legal forms used by the public because "law changes from time to time regarding the subject matter of such forms, not only by the change of the statute on the subject but in court opinions").

513. *See* Comm. on Fiduciary Servs., *supra* note 4, at 837 (statutory will form without legal advice likely to encourage dangerous misuse).

514. *See, e.g.*, Boren v. Boren, 402 S.W.2d 728 (Tex. 1966) (signatures of witnesses on self-proving affidavit form did not remedy lack of witnesses' signatures on will despite clear intent for document to be will).

515. *See* AMERICAN JURISPRUDENCE LEGAL FORMS at v (2d ed. 1971) ("impossible to provide legal forms which an attorney could copy verbatim and which would cover the *exact* fact situation with which he is confronted").

516. P. BROIDA, *supra* note 507, at ch. 19, § B; *see also* Hillman, *supra* note 502, at 437 (form books may negate actual bargaining between partners during preparation of partnership agreements).

and statutory law.[517] Proper selection of a form will requires detailed knowledge of substantive law and the facts of the particular transaction. A lawyer may mistakenly rely on a will form merely because the form has "the halo of publication."[518] Such lack of ordinary and reasonable care may subject the attorney to malpractice liability. In addition, the bar may discipline the attorney for failing to act with reasonable diligence.[519]

Prepared will forms may also allow an unscrupulous attorney to take advantage of a naive client. A client who desires a will may not realize that the attorney is merely using a form will that requires little or no original effort to prepare.[520] The attorney may charge as if the will had been drafted especially for this client, and the client may pay the bill without suspecting the perpetrated fraud.[521]

5. Promotion of Unauthorized Practice of Law.—The practice of selling form wills to laymen may promote the unauthorized practice of law.[522] The mere act of printing or selling a form will to a nonattorney does not usually constitute the unauthorized practice of law if no oral or written advice is given.[523] The unauthorized practice of law may occur, however, if oral or written advice for complet-

517. *See* 19 A. LEOPOLD, G. BEYER & D. PARK *supra* note 509, at v ("It is the sincere hope of the authors that the use of the forms will not be attempted until the requirements of the subject matter and needs of the client are clearly understood.").

518. 1 J. RABKIN & M. JOHNSON, CURRENT LEGAL FORMS WITH TAX ANALYSIS at ix (1988) (noting that forms are good tools for good lawyers, not *substitutes* for good lawyers). *See also* Fejfar, *supra* note 510, at 701 (lawyers use form books on basis of belief which "is not due to immanently generated knowledge"); *cf.* P. BROIDA, *supra* note 507, at ch. 19, § B (forms may appear in form books because they were unclear and thus were the subject of litigation and judicial interpretation).

519. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1983) ("A lawyer shall act with reasonable diligence . . . in representing a client.").

520. *See* Leiter & Hartman, *How to Avoid Malpractice When Using Computers*, in FROM YELLOW PADS TO COMPUTERS 199, 201 (1987) (discusses billing problems caused by use of computer generated forms).

521. An attorney's fee must be reasonable. Factors to be considered include the time and labor required, the novelty of the questions involved, and the skill needed to perform the service properly. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5 (1983). *See generally* Reed, *Value Billing*, LEGAL ECON., Sept. 1988, at 20 (report from ABA's Section of Economics of Law Practice task force on proper methods of billing).

522. D. MELLINKOFF, THE LANGUAGE OF THE LAW 198, 233 (1963) (discussing 1736 English book and 1818 American book).

523. *See, e.g.*, Florida Bar v. American Legal & Business Forms, Inc., 274 So. 2d 225, 227 (Fla. 1973) ("We perceive no harm to the public . . . in having printed legal forms . . . available, *provided* they do not carry with them what purports to be instructions on how to fill out such forms or how they are to be used"); Palmer v. Unauthorized Practice Comm. of the State Bar of Tex., 438 S.W.2d 374, 376 (Tex. Civ. App. - Houston [14th Dist.] 1969, no writ) (court implied that sale of lease and deed forms by stationery store is permitted; court held that sale of will form coupled with various attachments was unauthorized practice of law because form was almost will itself).

ing the will accompanies the sale.

The propriety of the sale of self-help kits to the public by laymen is frequently litigated. If the advice accompanying the will is general and not directed to any specific person, such as the sale of an instruction book accompanying the will forms, most courts hold that the sale is not the unauthorized practice of law.[524] Some courts have held such sales improper, however.[525] If personalized instructions or advice is given by the nonlawyer, American courts uniformly hold that such conduct constitutes the unauthorized practice of law.[526]

VI. Analysis—Statutory Will Form Methodology

Assuming that the benefits of will forms counterbalance the disadvantages, it is important to consider which forms are most appropriate for a given state. This section compares and contrasts the various methodologies and policies underlying statutory will forms. Examination of these methodologies and policies requires analysis of several interrelated issues. The first concerns the advisability of the incorporation by reference approach used by the Uniform Statutory Will Act vis-á-vis the fill-in-the-blank approach presently used by four of the five jurisdictions with statutory will legislation. The second issue requires an examination of the variations within the fill-in-

524. *See, e.g.*, *In re* Thompson, 574 S.W.2d 365, 369 (Mo. 1978) (sale of divorce kits not unauthorized practice of law); New York County Lawyers' Ass'n v. Dacey, 21 N.Y.2d 694, 234 N.E.2d 459 (1967) (sale of book containing approximately 55 pages of text and 310 pages of forms and instructions by layman to general public held not to constitute the unlawful practice of law); Oregon State Bar v. Gilchrist, 538 P.2d 913, 919 (Ore. 1975) (publishing and selling divorce kits not the practice of law).

525. *See, e.g.*, Florida Bar v. Stupica, 300 So. 2d 683 (Fla. 1974) (sale of divorce kit containing numerous forms coupled with instructions and advice held unauthorized practice of law; limited by Florida Bar v. Brumbaugh, 355 So. 2d 1186, 1193-94 (Fla. 1978) in which the court retreated from its firm position by holding that the sale of sample forms and instructions would be permitted under certain circumstances); Palmer v. Unauthorized Practice Comm. of the State Bar of Tex., 438 S.W.2d 374 (Tex. Civ. App. - Houston [14th Dist.] 1969, no writ) (sale of will forms along with attachments and advertisements that gave instructions and warnings constituted practice of law).

526. *See, e.g.*, Florida Bar v. Teitelman, 261 So. 2d 140 (Fla. 1972) (completion of real estate closing documents as practice of law); Brammer v. Taylor, 338 S.E.2d 207, 212 (W. Va. 1985) (advising another person how to draft a will is practice of law). *But see* Florida Bar re Amendment to Rules Regulating Fla. Bar (ch. 10), 510 So. 2d 596 (Fla. 1987) (court approved definition of unlicensed practice of law which states that

> it shall not constitute the unlicensed practice of law for nonlawyers to engage in limited oral communications to assist individuals in the completion of legal forms approved by the Supreme Court of Florida. Oral communications by nonlawyers are restricted to those communications reasonably necessary to elicit factual information to complete the form(s) and inform the individual how to file such form(s).

The court also held that "nonlawyers can give information regarding routine administrative matters.").

the-blank approaches. The third issue concerns the substantive contents of the form will, particularly those dispositive provisions that are either mandatory or subject to modification.

It must be recognized that although the incorporation by reference approach and the fill-in-the-blank approach are significantly different, both techniques are directed toward the same objective. Both seek to increase the number of people who die with valid wills that effectuate demonstrated intent.[527] These approaches differ only in the way in which they strive to effectuate this goal.

A. Attorney vs. Individual Administration

A fundamental philosophical difference between the incorporation by reference and fill-in approaches is the focus on the immediate user of the statutory provisions. The Uniform Act is designed primarily for use by attorneys; the fill-in forms anticipate use by laymen.

The drafters prepared the Uniform Act with the legal practitioner in mind: there was no intent "to provide a form for use by non-lawyers without the benefit of legal advice."[528] This intent is further evidenced by the following language from the Act's prefatory note:

> The approach of this Act is to provide attorneys a simple will embodying an estate plan workable for many clients, a will that can be prepared quickly, that can be adapted easily to special situations, and that guards against common drafting errors, all at minimum cost to the client and productive use of the lawyer's time. Although the Act is thus helpful to the legal profession, its intended and true beneficiaries are the public in terms of economical and expeditious legal services.[529]

The drafters expressly rejected the fill-in approach due to the lack of confidence in the public's ability to use such forms correctly. The drafters were deeply concerned that fill-in forms would "be used without consulting an attorney and if used that way, the forms [would be] fraught with opportunities for misunderstanding and mis-

527. *See, e.g.*, UNIF. STAT. WILL ACT prefatory note (1984) (goal of presenting a widely usable "simple will"; dispositive scheme "will fit the needs and desires of a broad segment of persons as an alternative to intestate succession and perhaps particularly many of that large number of persons who may otherwise die without a will"); *California Bar Sells 175,000 Will Forms*, B. LEADER, Jan.-Feb. 1984, at 7, 7 ("impetus for [statutory will] came from lawyers who felt that the testamentary needs of the middle class and people with simple estates were not being met").

528. Perkins, *supra* note 124, at 14.

529. UNIF. STAT. WILL ACT prefatory note (1984).

take by the unwitting."[530] The drafters of the Uniform Act further believed that the incorporation approach would reduce the risk of error by both attorney and lay users.[531]

Jurisdictions adopting fill-in forms demonstrate greater confidence that the average individual will complete the forms properly. A person need only be "able to read and possessed with the intelligence to understand the printed word"[532] to complete the form properly. Although each statutory form begins with a conspicuous warning that the user should seriously consider obtaining legal advice,[533] the forms contain instructions and plain language provisions sufficient to allow the user to prepare the will without outside assistance. Each form warns users not to exercise creativity by making additions or alterations. Users are also notified of the possible untoward results of such conduct.[534]

The ultimate question concerns which approach actually leads to a greater number of people executing valid wills. The Uniform Act has been enacted in only one state, and only for a relatively short period of time.[535] Therefore, empirical evidence is not yet available to indicate the success or failure of this approach. However, there has been a large public response in favor of statutory wills.[536]

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530. UNIF. STAT. WILL ACT prefatory note (1984). *But see* UNIF. STAT. FORM POWER OF ATTORNEY ACT § 1 (1988) (fill-in form for power of attorney approved and recommended).

531. *Id.*

532. Author unknown, *California Statutory Will - The People Will: Setting the Record Straight* 1 (copy on file at the Dickinson Law Review office).

533. CAL. PROB. CODE § 6240, notices 1 & 5 (West Supp. 1989); ME. REV. STAT. ANN. tit. 18A, § 2-514(a), notices 1 & 10 (Supp. 1988); MICH. COMP. LAWS ANN. § 700.123c, notice 2, instruction 2 (West Supp. 1988); WIS. STAT. ANN. § 853.55, notice 11 (West Supp. 1988). A considerably stronger warning appeared in a draft of the California will: "YOU SHOULD NOT USE THIS CALIFORNIA STATUTORY WILL WITHOUT THE HELP OF A CALIFORNIA LAWYER . . . ." *Possible Legislation, supra* note 45, at 3 (draft of statutory will).

534. CAL. PROB. CODE § 6240, notice 4 (West Supp. 1989); ME. REV. STAT. ANN. tit. 18A, § 2-514(a), notice 4 (Supp. 1988); MICH. COMP. LAWS ANN. § 700.123c, notice 3 (West Supp. 1988); WIS. STAT. ANN. § 853.55, notice 4 (West Supp. 1988).

535. The Uniform Act was enacted in Massachusetts in 1987. 1987 Mass. Acts 319 (codified at MASS. GEN. LAWS ANN. ch. 191B, §§ 1-15 (West Supp. 1989).

536. *See, e.g., California Bar Sells 175,000 Will Forms*, B. LEADER, Jan.-Feb. 1984, at 7 (within a year after the effective date of statutory will legislation, State Bar of California sold 175,000 statutory will forms); Girdner, *State's Consumers Snapping Up Wills Under New Statute*, L.A. Daily J., Jan. 27, 1983, at 1, col. 6 (within a month after the statutory will provisions took effect, one private forms publisher sold 15,000 statutory forms); Rice, *Too Little Too Late*, June 1989, CAL. LAW., at 36, 36 ("bar officials estimate more than half a million have been ordered by attorneys or consumers"); Letter from Fredric A. Sytsma to Gerry W. Beyer (Oct. 24, 1988) (copy on file at Dickinson Law Review office) (reflecting belief that the Michigan statutory will form is "very popular"); Blattmachr, *supra* note 492, at 8 (belief that statutory will is a great service to Bar and public). *Contra* Lustgarten, *Against*

The future success of the Uniform Act remains the subject of considerable speculation. It is unclear whether the existence of the Uniform Act's provisions will cause Massachusetts attorneys to attract more estate planning clients or to serve existing clients more effectively. It is possible that the provisions of the Act may be deemed appropriate and placed into actual use if more clients are attracted by the lure of a cheaper will. It is also speculative whether the initial interest will continue in jurisdictions using fill-in forms. Finally, it is possible that the completed forms will lead to additional litigation.

B. Intestacy Alternative vs. Individualization

The second fundamental difference between the two approaches is the amount of individualization encouraged by their respective structures. The Uniform Act is proposed as "an optional alternative to intestacy"[537] that "will fit the needs and desires of a broad segment of persons . . . particularly many of that large number of persons who may otherwise die without a will."[538] The Act takes a paternalistic approach by providing a distribution scheme viewed by the drafters as preferable to the government's intestacy plan.[539]

In theory, the testator has great latitude to adjust the distribution plan to his individual situation. The Uniform Act clearly provides that a specific provision of the will overrides a contrary provision in the Act.[540] The prefatory note to the Act states that the will "can be adapted easily to special situations"[541] and that it can "apply to a portion of the testator's estate as part of a will which includes other devises."[542]

The Uniform Act's statements of the testator's ability to individualize may, however, be misleading. The Act is designed to operate as a single unit. Substantial changes could prevent the will from adequately functioning to protect the family or achieve tax benefits. The form contained in the appendix to the Act is evidence of the drafter's intent to discourage modification. The only discretion given to the testator is in the selection of fiduciaries. The form does not

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Such Wills, TR. & EST., Jan. 1984, at 9, 9 (belief that "statutory will would do great disservice to the families of persons availing themselves of it").

537. UNIF. STAT. WILL ACT prefatory note (1984).
538. *Id.*
539. *Id.*
540. UNIF. STAT. WILL ACT § 3(a) (1984).
541. UNIF. STAT. WILL ACT prefatory note (1984).
542. *Id.*

even permit the testator to leave a family heirloom to his favorite child or to make a gift to charity.[543]

By contrast, the fill-in forms permit considerable individualization. The testator has the opportunity to make specific gifts and to choose the method for distributing the residuary estate. The jurisdictions vary greatly in the amount of discretion given to the testator to alter the default disposition plan. Nevertheless, all of the fill-in forms appear to provide greater latitude than the Uniform Act's form.[544] Individualization of the fill-in forms, however, is limited to the confines specified in the form and the enabling legislation.[545] The Uniform Act, by contrast, permits the individualization of all provisions of the statutory will.[546]

C. *Degree of Family Protection*

1. Family vs. Non-Family.—An issue closely related to the amount of individualization allowed by the forms is the degree to which each form encourages testators to protect the natural objects of their bounties. The Uniform Act's default distribution scheme makes the entire estate available to the surviving spouse, unless the estate is large enough to include the testator's issue.[547] If no spouse or issue survive, the enacting state's intestacy statute controls. The intestacy statutes also attempt to keep the testator's property within the family by providing for parents and siblings.[548] The sample form provided in the Act accords no opportunity for the testator to alter this plan except to make gifts to other beneficiaries by separate express provisions.[549]

The fill-in forms facilitate a testator's preference of unrelated persons or charities over family members. The Maine form affords the testator the greatest ability to leave property outside of the family. The testator may leave five specific gifts of real property, five

543. UNIF. STAT. WILL ACT app. I (1984). In addition, this form does not permit the testator to designate an alternative guardian for his children should the original nominee be unable or unwilling to serve. *Id.*

544. *See generally supra* notes 311-438 and accompanying text.

545. *See, e.g.*, MICH. COMP. LAWS ANN. § 700.123c, notice 3 (West Supp. 1988) ("Warning! It is strongly recommended that you do not add or cross out any words on this form except for filling in the blanks because all or part of this will may not be valid if you do so."); WIS. STAT. ANN. § 853.54(2) (West Supp. 1988) ("Any additions to or deletions from the face of the form of the Wisconsin basic will or basic will with trust, other than in accordance with the instructions, shall be ineffective and shall be disregarded.").

546. UNIF. STAT. WILL ACT § 3(a) (1984) ("To the extent an express provision of a will conflicts with this [Act], the will governs.").

547. UNIF. STAT. WILL ACT §§ 5-7 (1984).

548. *Id.* § 7(a)(2).

549. UNIF. STAT. WILL ACT § 3(a) & app. I (1984).

specific gifts of personal and household items, multiple cash gifts, and the residuary estate to non-family beneficiaries.[550] The Wisconsin form provides considerably less latitude than the Maine form, authorizing only five specific gifts. Gifts to non-family beneficiaries may consist of real property, personal property, or cash.[551] The California and Michigan forms are the strongest in protecting the family, permitting only a limited number of cash gifts to leave the family. Michigan allows two such gifts,[552] and California allows only one.[553] Because no limits are placed on the size of the cash gifts, however, such gifts could be large enough to deplete all or a significant portion of the estate.

It may appear that the forms' protection of the family is motivated by a public policy favoring family members. The limits may actually be based on entirely different considerations, however. The drafters of the California form were of the opinion that dispositive provisions to beneficiaries other than family members should be limited for three reasons: (1) "significant risk that non-family members would be misnamed or could not be located;"[554] (2) "difficult to provide for logical substitutional gifts if the named beneficiary predeceases the testator;"[555] and (3) "[s]tatutory [w]ill forms may be easier to forge or may be more susceptible to abuse by 'artful and designing persons.' "[556] The limitation to family members does, however, reduce the number of people who may find the statutory will a useful estate planning tool. For example, the California form would be of limited value to unmarried individuals who have no children, or to elderly persons whose spouses are deceased and whose children have abandoned them.

2. Surviving Spouse vs. Children.—The forms also vary in the degree of protection given the surviving spouse in relation to the testator's children and other descendants. The Uniform Act demonstrates a considerable bias in favor of the surviving spouse. Under the Act, the spouse receives the testator's residence, tangible nonbusiness personal property, and the greater of $300,000 or one-half of the statutory-will estate. The balance, if any, is held in trust for

550. ME. REV. STAT. ANN. tit. 18A, § 2-514(a), arts. 2.1-2.5 (Supp. 1988).
551. WIS. STAT. ANN. § 853.55, art. 2.2 (West Supp. 1988).
552. MICH. COMP. LAWS ANN. § 700.123a, art. 2.1 (West Supp. 1988).
553. CAL. PROB. CODE § 6240, art. 2.2 (West Supp. 1989).
554. Letter from Francis J. Collin, Jr., to John L. McDonnell, Jr., at 3 (Dec. 9, 1980) (copy on file at Dickinson Law Review office).
555. *Id.*
556. *Id.*

the spouse's benefit.[557] This preference reflects the drafters' belief that "clients often are not satisfied with the provisions made by intestacy statutes for the surviving spouse."[558] The provision also attempts to counter the common misconception that intestacy statutes give priority treatment to the surviving spouse.

Each fill-in form is also slanted in some way toward giving greater protection to the surviving spouse. The Michigan form is the strongest in favoring the surviving spouse over the testator's children. The surviving spouse is entitled to the entire estate with the possible exception of two cash gifts and personal nonbusiness property left via a separate writing.[559] The California form favors the surviving spouse with respect to personal and household items but allows the testator to exclude the spouse from sharing in the residual estate.[560] The Wisconsin and Maine forms allow the testator to effectively disinherit the spouse in favor of the children. In Wisconsin, the testator may make significant specific gifts or choose an intestate distribution for the residuary.[561] In Maine, the testator may simply choose to exclude the spouse as a recipient.[562]

3. Availability of Trust Protection.—The Uniform Act provides trust protection for underage and disabled beneficiaries, and in some circumstances, for the surviving spouse and nondisabled adult children.[563] The California and Wisconsin forms also permit the testator to elect trust protection. California testators may choose to have the residuary estate pass into trust for the testator's children.[564] Wisconsin testators may also include the surviving spouse as a beneficiary of the trust.[565]

D. Understandability

Another fundamental difference between the incorporation and fill-in approaches is the level of sophistication a person must possess to comprehend relevant material.

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557. UNIF. STAT. WILL ACT § 5 (1984).
558. *Id.* at prefatory note.
559. MICH. COMP. LAWS ANN. § 700.123c, arts. 2.1-2.3 (West Supp. 1988).
560. CAL. PROB. CODE § 6240, arts. 2.1, 2.3 (West Supp. 1989).
561. WIS. STAT. ANN. § 853.55, arts. 2.2-2.3 (West Supp. 1988).
562. ME. REV. STAT. ANN. tit. 18A, § 2-514(a), arts. 2.1-2.5 (Supp. 1988).
563. UNIF. STAT. WILL ACT §§ 6-8 (1984). *See generally supra* notes 184-243 and accompanying text.
564. CAL. PROB. CODE § 6241, art. 2.3 (West Supp. 1989). *See generally supra* notes 408-38 and accompanying text.
565. WIS. STAT. ANN. § 853.56, art. 2.3 (West Supp. 1988). *See generally supra* notes 408-38 and accomanying text.

1. Reference vs. Full Text.—One problem that inevitably accompanies statutory will forms is the possibility that the testator will not thoroughly read or understand a form. Jurisdictions adopting statutory will form legislation must make the forms easily understood by the general public. To function properly, however, the forms must also contain all necessary legal material. The Uniform Act and each of the fill-in jurisdictions take different approaches to resolve this conflict.[566]

The Uniform Act's reliance on incorporation by reference may discourage testators from actually reading the incorporated material. Some testators may not wish to make the effort to obtain and study the additional material. A testator may be less likely to be aware of the full contents of the Uniform Act's will than a self-contained form will. Accordingly, a testator may not fully understand and consent to the contents of the will.

Each of the fill-in jurisdictions has endeavored to make its form as simple as possible. No state has placed lengthy clauses, definitions, or rules of construction within the text of the will. The forms provide only brief explanations and basic options. The Maine statute reflects a belief that further explanations are not needed;[567] the remaining three states provide extensive additional material. California and Wisconsin incorporate statutory provisions by reference.[568] Michigan includes such material after the will's attestation clause.[569]

2. Legalese vs. Plain Language.—Although the Uniform Act is relatively straightforward, a layman would probably find it difficult to understand. The Act contains complicated references and conditions that could frustrate many readers. For example, one of the distribution provisions reads as follows:

> The share of the surviving spouse is . . . if there is a surviving issue . . . subject to subsection (b), an interest in the remaining portion of the statutory-will estate, including any property that would pass under subsection (a)(2)(i) or (a)(2)(ii) but disclaimed by the surviving spouse, in a trust upon the terms set forth in Section 6.[570]

Thus it is clear that the Act was not designed to be read or comprehended by the general public.

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566. *See supra* notes 292-310 and accompanying text.
567. *See supra* note 310 and accompanying text.
568. *See supra* notes 292-306 and accompanying text.
569. *See supra* notes 307-09 and accompanying text.
570. UNIF. STAT. WILL ACT § 5(a)(2)(iii) (1984).

On the other hand, the fill-in forms were designed to be read and understood by the average individual.[571] These forms contain simple language, explanations, and directions enabling a person of average intelligence and reading skills to properly complete the form. Some of the forms, however, contain language that is likely to cause problems for laymen.[572]

E. Tax Planning vs. No Tax Planning

The two approaches also differ in the amount of emphasis placed on tax planning. The drafters of the Uniform Act were tax conscious, as reflected in the following excerpt from the prefatory note:

> While it is recognized that this Act may be used most often by persons with small to medium-sized estates, the statutory-will scheme is not limited to estates with any particular cap in size. If the testator's estate at death should be substantially larger than the testator perhaps anticipated when the will was executed, some estate planning concepts are provided in this statutory-will scheme that will reduce the detrimental tax effects that might result in intestacy.[573]

The Act is carefully drafted to permit post-mortem tax planning.[574]

By contrast, the fill-in wills are designed with few or no tax planning features. The potential benefits of complicated tax provisions were deemed to be outweighed by the goal of keeping the form simple and understandable by laymen.[575] Each form warns its user that the form will is not designed to reduce taxes.[576] Indeed, use of some forms may lead to unfavorable tax consequences.[577] This may not be a significant problem, however, because most estates are not

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571. *See, e.g., Possible Legislation, supra* note 45, at 5 ("An attempt has been made to write the Statutory Will in layman's language in order to encourage its use and to respond to public pressure for 'plain English' legal documents.").

572. For example, the Wisconsin form uses the phrase "by right of representation" without explanation. WIS. STAT. ANN. § 853.56, art. 2.3 (West Supp. 1988). This phrase is defined by provisions which are incorporated by reference, *see id.* § 853.50(1).

573. UNIF. STAT. WILL ACT prefatory note (1984).

574. *See, e.g.*, UNIF. STAT. WILL ACT § 6 (1984) (trust for spouse and issue); Perkins, *supra* note 124, at 12-13 (discussing how Uniform Act may be used in reducing federal estate tax).

575. *Possible Legislation, supra* note 45, at 5-8.

576. CAL. PROB. CODE § 6240, notice 3 (West Supp. 1989); ME. REV. STAT. ANN. tit. 18A, § 2-514(a), notice 3 (Supp. 1988); MICH. COMP. LAWS ANN. § 700.123c, notice 5 (West Supp. 1988); WIS. STAT. ANN. § 853.55, notice 2 (West Supp. 1988).

577. Erlanger & Crowley, *supra* note 414, at 18 (second option in statutory will with trust form has, under certain circumstances, "uncertain and potentially costly income tax consequences").

large enough to require tax planning.[578]

VII. Recommendations

A. Coexistence of Uniform Act and Fill-in Forms

The Uniform Act and the fill-in forms operate differently and may be used by different segments of the population. The Uniform Act may assist attorneys who already have estate planning clients with average needs by permitting the will preparation service to be handled less expensively, more efficiently, and more effectively. The fill-in forms may serve people with simple estates and traditional disposition desires who would not hire an attorney to prepare their wills. These people may not wish to pay an attorney because the nominal fee of a form is considerably less than an attorney advised will. It is also possible that these persons simply may not wish to take the time or effort needed to consult an attorney.

The most advantageous solution may thus be for each jurisdiction to have both types of provisions. The Uniform Act would help individuals indirectly by using the attorney as a conduit; the fill-in forms would directly help individuals who wish to use the forms themselves. The drafters of the Uniform Act recognized this possibility. In a comment to the repealer section the drafters stated: "A statutory-form type statutory-will statute and this Act can both be enacted by a state without presenting a conflict."[579]

A state wishing to enact a fill-in type of statutory will must determine how that statute should be designed. The state must also decide whether the self-contained approach should be taken, or whether incorporation by reference is preferable. Finally, the state legislature must draft the contents of the will form.

B. Synthesis of Self-Contained and Incorporated Material

Drafters of a will form statute should not lose sight of the statute's primary goal of increasing the number of people who die testate. A long, multi-optioned, and complex self-contained fill-in form may make the document too cumbersome and intimidate potential users.[580] Conversely, a form that is too short provides for less individualization and contingency planning and thus may be less likely to

578. *See, e.g., Possible Legislation, supra* note 45, at i ("Probably 90% of all estates do not have sufficient assets to require the filing of a federal estate tax return.").

579. UNIF. STAT. WILL ACT § 18, comment (1984).

580. *Possible Legislation, supra* note 45, at 7 (clauses adding complexity will discourage use).

effectuate the testator's intent. When provisions are incorporated by reference, it is difficult to ascertain whether the extrinsic material has actually been read and understood by the testator and intended to be part of the will. Further, "[t]here is less danger of wrong clauses finding their way into a will if one has before him an instrument that is complete in itself, that can be read from beginning to end without having to refer to other documents."[581] Of course, there is no guarantee that a testator will read and understand the provisions of a fill-in will.

The form should provide all material reasonably necessary to allow the testator to make fully informed disposition and administrative choices. Additional material necessary to resolve technical or legal matters that do not concern the average testator may be incorporated by reference. Material should be strategically placed in the form, however, so the form is as self-contained as possible. The potential testator should have all relevant material accessible. This material will then be available to those who must read and interpret the will. The availability of all relevant material also allows the potential testator to see what the will actually contains and to make knowledgeable decisions.

After concluding that the form should be as self-contained as possible, it is necessary to resolve what particular material is required and where it should be located. Traditional attorney caution leans toward supplying any additional material that could be needed. The policy of full disclosure to the testator would indicate inclusion on the form. Incorporation by reference keeps the form uncluttered, however, encouraging general public use of the form.

Each additional provision must be examined critically to make a proper decision. Any material reasonably necessary for the testator should be provided on the form. In addition, all applicable rules should be fully disclosed to the testator. Provisions regarding dispositions of property and the nominating of fiduciaries should be set forth on the form. Only in this manner can the will truly reflect the testator's wishes. However, this included material should not be isolated at the end of the document as is done on the Michigan form. The better approach is to situate the additional material in the will itself in the place where such information is needed. The document will necessarily be longer, but careful organization and the use of plain English can make it straightforward and easy to follow.

Clauses that are less important to a testator, such as boilerplate

581. Trachtman, *supra* note 114, at 641.

lists of fiduciary powers, may be incorporated by reference. These provisions, however, must be incorporated in a manner that clearly draws the testator's attention to the fact that there is more to the will than meets the eye. The significance of each incorporation should be carefully explained. Vague or general references, such as those in the California and Wisconsin forms, should be avoided.[582]

C. *Provide Adequate Opportunity for Individualization*

The ultimate goal of estate planning is to ascertain and effectuate the intent of each individual to the fullest extent possible within legal bounds.[583] Statutory forms are designed to facilitate the creation of wills that carry out the testator's distribution wishes. The use of form wills is preferable to distribution determined by a state's intestacy laws.[584] Accordingly, a statutory form should not directly or indirectly mandate a particular mode of disposition. Although most testators will want to favor their spouses and children, and public policy favors the protection of family members, statutory forms should leave such decisions in the hands of testators. Individuals should not be coerced into leaving portions of their estates to spouses or children to use statutory forms. Instead, sufficient options should be provided on the form so testators are in full command of the dispositive scheme. A form should not cause testators to "alter an intended distribution pattern simply to fit it into the form's set pattern."[585]

582. CAL. PROB. CODE § 6240, notice 6 (West Supp. 1989); WIS. STAT. ANN. § 853.55, notice 5 (West Supp. 1988).

583. *See, e.g.*, W. CASEY, NEW ESTATE PLANNING IDEAS 1 (1958) (estate planning "involves the selection, arrangement and disposition of family assets in a way best calculated, not only to save death taxes, but to fit the needs and the aptitudes of family beneficiaries"); E. GERTZ, T. GERTZ & R. GARRO, A GUIDE TO ESTATE PLANNING ix (1983) ("Estate planning is really a lifetime process of arranging assets (property) so that a person may dispose of them during his lifetime and at his death in a manner that best carries out his desires for his family (or other objects of his bounty) consistent with a minimizing of income, gift, and death taxes, and an easing of transfer."); H. TWEED & W. PARSONS, LIFETIME AND TESTAMENTARY ESTATE PLANNING 1 (1959) (estate planning is "the process of working out for a client the best ways of using and disposing of all of his properties during his life and after his death, having in mind his wishes and the welfare of his family"); *cf.* University of Illinois, *College of Law Catalog* 1 (1987-89) (attorney should develop "an ability to find solutions to human problems"). *See generally* 1 PAGE ON THE LAW OF WILLS § 1.6 (W. Bowe & D. Parker ed. 1960) (discussing possible advantages to family of dying testate).

584. *See supra* note 527 and accompanying text.

585. Lawrence, III & Sytsma, *supra* note 289, at 678.