Florida Law Review

Volume 43 | Issue 2 Article 1

April 1991

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VOLUME 43 APRIL 1991 NUMBER 2

WILL FORMALITY, JUDICIAL FORMALISM, AND LEGISLATIVE REFORM: AN EXAMINATION OF THE NEW UNIFORM PROBATE CODE "HARMLESS ERROR" RULE AND THE MOVEMENT TOWARD AMORPHISM

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PART ONE: THE WILLS ACT FORMULA, THE RITE OF TESTATION, AND THE QUESTION OF INTENT: A PROBLEM IN SEARCH OF A SOLUTION

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The author acknowledges his indebtedness to his colleague, Margaret Emanuel, B.A., 1978, J.D., 1983, Wake Forest University; Lecturer in Legal Drafting, University of Florida, for her invaluable assistance in the preparation of this article.

> Of all instruments a will is least governed by form, the form being unimportant, except as indicating intent.[1]

I. INTRODUCTION

Doubtless, it will surprise some people to learn that in at least one context the preceding statement is accurate: the form of a will does not require particular dispositive words such as "give," "devise," or "bequeath."[2] Stated differently, particular words are not essential or constituent elements of a will. The statement evokes surprise because the words formality and formalism are derivatives of the word "form"; it is widely and correctly understood that in every Anglo-American jurisdiction a will must conform to that jurisdiction's wills act (the concept of "formality"); and the courts historically have applied the doctrine of strict compliance in addressing the issue of whether a will complies with a particular jurisdiction's wills act (the concept of "formalism").

For some time, scholars and practitioners have perceived wills act formality and judicial formalism as troublesome, and they have often

1. Dixon v. Dameron's Adm'r, 256 Ky. 722, 724, 77 S.W.2d 6, 7 (1934).
2. *Id.*

suggested it would be desirable to reduce the former and relax the latter. As early as 1974, G.M. Bates was recommending that courts enforce defectively executed wills in the absence of "suspicious circumstances" surrounding the execution of the will in order to "give effect to the true intentions of the testator as expressed in the document."[3] Some foreign jurisdictions have enacted statutes to accomplish these ends. For example, in 1965 Israel enacted a statute granting courts the power to dispense with certain wills act formalities.[4] The Israeli statute is a harmless error rule which predates similar measures in common law countries by ten years.[5] Since 1975, the state of South Australia has granted probate courts the power to dispense with the requirement of strict adherence to the wills act in instances in which the proponent of the will can establish testator intent by other means.[6] Subsequently, other Australian states and Canadian provinces have followed suit.[7]

In July 1990, the annual Conference of Commissioners on Uniform State Laws approved and recommended for enactment in all the states, a provision modifying the Uniform Probate Code (UPC).[8] The provision incorporates within the UPC wills section a rule permitting defective wills executed with testamentary intent to be admitted to probate. Such wills are admitted under the new provision through application of a dispensing power[9] modeled on the South Australian harmless error rule and other similar provisions.[10] New UPC section 2-503 provides:

> Although a document or writing added upon a document was not executed in compliance with Section 2-502 [will execution requirements], the document or writing is treated as if it had been executed in compliance with [the execution requirements] if the proponent of the document or writing estab-

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3. Bates, *A Case for Intention*, 124 NEW L.J. 380, 382 (1974).

4. Succession Law 5725-1965 *in* Ministry of Justice, 19 Laws of the State of Israel 62, ch. 1, § 25 (1965).

5. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1, 48 (1987) [hereinafter Langbein, *Harmless Error Rules*].

6. For discussion of the 1975 changes in the South Australian Statute of Wills, see *infra* text accompanying notes 744-87. For text of rule, see *infra* text accompanying note 758.

7. For discussion of statutory harmless error rules in various foreign jurisdictions, see *infra* notes 788-924 and accompanying text.

8. UNIF. PROB. CODE § 2-503 (1990).

9. *Id.* (creating a harmless error rule).

10. *See id.* § 2-503 comment.

> lishes by clear and convincing evidence that the decedent intended the document or writing to constitute . . . the decedent's will. . . .[11]

The stated purpose of new section 2-503 is to extend "to will formalities the harmless error principle that has long been applied to defective compliance with the formal requirements for nonprobate transfers,"[12] (such devices as the revocable trust, the tentative or Totten trust, or the payable-on-death bank account).[13]

Any recommendation that a harmless error rule be incorporated into the wills act presupposes acceptance of certain assumptions respecting the role of wills act formality in general, and the various functions served by specific wills act formalities in particular. First and foremost, incorporation of a harmless error rule into a statute which sets out certain execution requirements raises serious questions about the underlying utility of the formalities to which the dispensing power or harmless error rule apply. Under the South Australian dispensing power, for example, the statute of wills requires the ceremony of attestation. However, because proponents are more or less routinely permitted to show that unattested wills were executed with testamentary intent, the attestation requirement as such essentially has been abolished.[14] Once a proponent demonstrates testamentary intent such wills routinely are upheld.[15] In South Australia, omitting attestation apparently has the effect of merely shifting the burden of proof to the proponent to show that the testator intended the document to be a will.[16]

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11. *Id.* § 2-503. The provision also applies to partial or complete revocations of wills, additions or alterations to wills, and partial or complete revivals of wills. *Id.*

12. *Id.* § 2-503 comment.

13. The American Law Institute has discussed incorporating a harmless error principle in its revisions to the wills provisions of the Restatement (Second) of Property.

> In view of the validity of various substitutes for a will that do not comply with the statutory formalities for a will, a donative document of transfer that is not intended to be legally operative during the donor's lifetime should be treated as though it met the statutory formalities for a will in the controlling jurisdiction, if it is established by clear and convincing evidence that the decedent intended the document of transfer as his or her will.

RESTATEMENT (SECOND) OF THE LAW OF PROPERTY § 33.1 comment g (Tent. Draft No. 12, Mar. 28, 1989) [hereinafter Draft Restatement 33.1].

14. Langbein, *Harmless Error Rules*, *supra* note 5, at 19 (discussing three South Australian cases in which courts admitted wills to probate despite their lack of attestation).

15. *See, e.g.*, Estate of Hodge, 40 S.A. St. R. 398 (1986); Estate of Kelly, 32 S.A. St. R. 413, *aff'd*, 34 S.A. St. R. 370 (1983). Courts in both the *Kelly* case and the *Hodge* case admit to probate wills that were deliberately left unattested.

16. *See* Langbein, *Harmless Error Rules*, *supra* note 5, at 19.

Attempts to formulate harmless error rules to save defective wills demonstrate the impossibility of creating an exception to formalism in applying the wills acts which does not by a logical and inevitable progression undermine the integrity of the statutes of wills. Moreover, adoption of a harmless error rule to cure defective wills does nothing to resolve the logical and practical inconsistencies of having two separate systems of passing property at death. Adoption of a harmless error rule resolves only the very narrow issue, specific to documents characterized as wills, of whether the rule of strict compliance with the formal requirements serves any policies that justify the refusal of courts to give effect to intent in cases in which the wills act requirements have not been observed. It does not address the issue of whether and to what extent requiring a higher level of formality to transfer property by will than is required to transfer property by various will substitutes serves any useful purpose. More important, it does not logically resolve the inconsistencies in the subsidiary law, such as the availability of assets transferred by will substitute rather than by will to claims of creditors or the spouse.[17] The newly revised UPC article II provisions do address the spousal issue through substantial revision of the elective share provisions to allow a surviving spouse to "recapture" certain donative dispositions as part of the "reclaimable estate."[18] The UPC thus looks beyond the narrow issue resolved by adoption of a harmless error rule toward a more unified approach to the law of donative transfers.

This two-part article has four purposes: first, to examine the problem of wills act formality and judicial formalism in historical context; second, to compare the UPC solution to other measures that have been adopted or proposed in mitigation of the problem; third, to evaluate the UPC solution in light of existing problems in the law of donative transfers; and finally, to suggest that the UPC solution is at best a quick fix for problems created by uncritical acceptance of the historical formalities for creating a will that is likely to result in further increasing the complexity, unreality, and incoherence of the present system.

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17. *See* Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984) (discussing the lack of unity in the probate and nonprobate systems) [hereinafter Langbein, *Nonprobate Revolution*].

18. *See* UNIF. PROB. CODE §§ 2-201 to -207 (1990) (treating certain transfers made within two years of the date of death, including transfers by means of the will substitutes, as the decedent's "reclaimable estate" for purposes of calculating the elective share and expanding the UPC concept of the "augmented estate"). *See generally* Langbein & Waggoner, *Redesigning the Spouse's Forced Share*, 22 REAL PROP., PROB., & TR. J. 303 (1987) (providing an influential discussion of forced-share statutes by the Director of Research for the Joint Editorial Board of the Uniform Probate Code and by one of its most eminent members).

It is my position that the development of a logical, internally consistent system for transferring property at death requires a rethinking of the doctrinal foundations of the present system, as opposed to the use of piecemeal "solutions" such as the incorporation of a harmless error standard into the wills act to solve the problem of wills act formality and judicial formalism. The very fact that a harmless error rule is needed to avoid injustice and to effectuate intent indicates that a comprehensive rethinking of the law of gratuitous dispositions is in order.

Part one of this article reviews the substantial body of scholarly commentary, case law, and legislative history from which new UPC section 2-503 has developed, with particular emphasis on Langbein's seminal work on harmless error rules in general and the 1975 innovation in South Australian probate law that provides the model for the UPC harmless error rule. In addition, part one examines in depth the problem of wills act formalism and the policies which support or perpetuate formalism. Finally, part one discusses proposed and adopted solutions to these problems with an emphasis on the various forms of harmless error rules.

Part two of this article, which will be in a subsequent issue of the *Florida Law Review*, analyzes the new UPC harmless error rule. Further, part two examines in detail Langbein's functional substantial compliance doctrine and the South Australian dispensing power statute that provides the model for new section 2-503 and the differences in their scope and probable application. The comments of the drafters of new section 2-503 are carefully scrutinized in light of the South Australian courts' interpretation of the provision upon which section 2-503 is modeled.

The combined purpose of parts one and two is to challenge the concept of a harmless error rule as an appropriate solution to the problem of wills act formalism. It is my belief that the perceived need for a harmless error rule indicates the need for a general revision of the law of donative transfers. If formality is primarily useful as a means of avoiding the need for every will proponent to put forth evidence that a particular document offered to probate was intended to transfer property at the decedent's death, a harmless error rule inevitably undermines that purpose. This is especially true since will substitutes can be enforced to achieve will-like results without requiring a high level of statutory formality[19] and therefore, without needing the creation of a power by statute to dispense with the requirements.

19. *See* UNIF. PROB. CODE § 2-503 comment (1990) (citing Annotation, *Change of Beneficiary in Old Line Insurance Policy as Affected by Failure to Comply with Requirements as to Manner of Making Change*, 19 A.L.R.2d 5 (1951)).

The drafters of the new UPC provisions state in the comment to section 2-503 that it "unifies the law of probate and nonprobate transfers" by extending to the wills act "the harmless error principle that has long been applied to defective compliance with the formal requirements for nonprobate transfers."[20] However, this statement does not accurately reflect reality, since the formalities involved in executing will substitutes generally are not a matter of statutory law so that, strictly speaking, no requirements exist. Defective execution of a will substitute prevents the device from being self-enforcing and requires court intervention to determine whether the maker intended it be given effect. In making this determination, the courts typically do not concern themselves with issues as to the harmlessness of the error, but strictly with the question of transferor intent.[21] Unification of the law of donative transfers would require that the standard of formality for wills and will substitutes and the consequences of error be given treatment that is consistent not only in effect, but consistent in principle and theory. The revised UPC provisions do not accomplish this end. If there is an issue as to when a court ought to permit the proponent of a document to put in evidence that the document was intended to transfer the property of a decedent, the law of donative transfers ought to be revised to address that issue directly. However, the law should not continue to require different standards for transferring property, depending on whether the transfer is classified as testamentary or as some other form of disposition. Although the UPC currently represents the most comprehensive approach to the present disunity in the law of donative transfers, the effect of the Commissioners' solution is to bridge, not repair, the chasm.

II. THE RITE OF TESTATION

A. *The Wills Act Formula and the "Nonprobate Revolution"*[22]

1. The Will as Magical Rite

A number of devices exist for implementing a decedent's wishes for disposing of property at death. The will, however, is the sole

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20. *Id. See generally* Langbein, *Nonprobate Revolution, supra* note 17, at 1134-40 (arguing for application of the subsidiary law of wills to nonprobate transfers).

21. *See* McGovern, *The Payable on Death Account and Other Will Substitutes*, 67 N.W. L. REV. 7, 9 (1972); Langbein, *Nonprobate Revolution, supra* note 17, at 1134-40; RESTATEMENT (SECOND) OF PROPERTY § 33.1 comment g (1989 draft). For full text of comment, see *supra* note 13.

22. Langbein, *Nonprobate Revolution, supra* note 17, at 1108 (quoting from the title of the article).

means by which a testator may "in a single stroke transmit real and personal property of every kind and description, wherever located, by means of a single document, with no requirement that the assets be assembled and transmitted,"[23] and with no obligation to the beneficiaries during the owner's lifetime. A will has literally no effect until the maker is dead, and is therefore commonly regarded as ambulatory and, in consequence, revocable.[24] Therefore, the maker of the will, the testator, retains all incidents of ownership in property disposed of by will until death, including the right to alter the will itself or to make inconsistent dispositions of the property. The will truly does not come into being until a probate court accepts it for implementation after the testator's death.

Even today, the will is the sole legitimate channel through which a deceased person may communicate his or her testamentary wishes to the living, with a court serving in the capacity of medium by interpreting and effectuating the decedent's intentions. Every jurisdiction in the United States recognizes some form of witnessed will.[25] The wills acts have "deep historical roots";[26] specific formal requirements

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23. Rohan, *The Continuing Question of Delivery in the Law of Gifts*, 38 IND. L.J. 1, 16 (1962). *See also* Friedman, *The Law of the Living, the Law of the Dead: Property, Succession, and Society*, 1966 WIS. L. REV. 340, 352-55 (discussing the attributes of wills and freedom of testation).

24. Bordwell, *Testamentary Dispositions*, 19 KY. L.J. 283, 283-84 (1931).

> A will may be defined as the means whereby one disposes of his property at his death or appoints an executor or a guardian for his orphan child or does any combination of these things. It does not affect the property until his death and is revocable until then. These two factors, ineffectiveness until death and revocability until that time, are in some respects different aspects of the same requirement that the disposition of the property to be testamentary must not bind the disposer until his death, but the two factors are by no means identical. The first relates to the effect of the transaction on the property itself while the second concerns the power . . . to revoke. The first relates to the property, the second to the person. . . . The two factors are summed up in the word ambulatory. The characteristic thing about a will as compared with other instruments is that it is ambulatory, binding neither the testator nor his property until his death. Whether a disposition of property is testamentary or not is said to depend on testamentary intent but testamentary intent goes back to these two factors. If the disposition of property is intended to bind neither the disposer nor his property until his death, the transaction is properly testamentary although no conscious thought of the act of disposition amounting to a will has entered the disposer's mind and its form be that of a deed or some other transaction quite different from a will.

Id.

25. For citations to various wills acts, see *infra* note 191.

26. Friedman, *supra* note 23, at 366.

for giving power over property to the dead can be traced to an English statute enacted in 1540 and subsequent amendments.[27]

In comparison to other statutory law, the wills acts have proved to be extraordinarily resistant to change. In most jurisdictions, the wills acts still closely resemble the original sources: the Statute of Wills of 1540, the Statute of Frauds of 1677, and the Statute of Wills of 1837.[28] It has been judicially observed that "[t]he statute concerning wills . . . is unique, in the fact that it stands as one of the few legislative products of an early generation which neither the reforming temper of advancing progress, nor the iconoclastic hand of an all-pervading cacoethes for improvement, has seen proper to disturb."[29] The first major innovation in probate reform, the 1969 UPC, retained the basic formula for executing a will set forth in the 1837 Statute of Wills, but reduced the ceremoniousness of the ritual or rite involved.[30] The 1969 UPC thus effectively demystified the process of will-making without analyzing to any great extent the practical or functional aspects of the retained formalities.

A fundamental requirement of magical or mystical rites is that the procedures are accepted with unquestioning faith and with the notion that only strict adherence to the formula will procure the desired result.[31] In order for the probate courts to give force to the words of a dead man or woman and preserve the power over property after

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27. The history of the Wills Act is discussed *infra* notes 64-203 and accompanying text.

28. *See infra* note 179 and accompanying text.

29. *In re* Hale's Will, 21 N.J. 284, 296, 121 A.2d 511, 518 (1956) (quoting *In re* Sage's Estate, 90 N.J.Eq. 580, 581, 107 A. 445, 445 (1919)). For discussion of *Hale's Will*, see *infra* notes 272-75 and accompanying text.

30. *See* UNIF. PROB. CODE § 2-502 (1969). For discussion of the UPC, see *infra* notes 183-203 and accompanying text (discussing attested wills) and *infra* notes 249-63 and accompanying text (discussing holographic wills).

31. *See* Friedman, *supra* note 23, at 373-74.

> In English history, one branch of the law of succession derives from ecclesiastical practice and ecclesiastical law. . . . A religious, magical element . . . had an impact upon the customary language of wills. Singsong, half-poetical phrases abound, such as "give, devise, and bequeath." The traditional manner in which wills used to open reflects a sense of mystery in phrases without any legal or economic significance: "In the name of God Amen . . . I commend my soul into the hands of God my Creator . . . and my body to the earth whereof it is made." The ceremony surrounding the execution of the will tries to be noble and solemn. In the office of a large law firm, the ceremony is likely to be brief, brisk, and accurate; nonetheless, many clients will giggle in an embarrassed way, and make some self-conscious joke touching on their close mortality.

Id. (footnote omitted) (quoting from Shakespeare's will, *reprinted in* V. HARRIS, ANCIENT, CURIOUS, AND FAMOUS WILLS 306 (1911)).

death, the law presently requires the decedent to adhere strictly to the statutory formula.[32] Other than in the Canadian and Australian jurisdictions that have enacted harmless error rules,[33] no principle of statutory construction in a common law jurisdiction presently provides the proponents of an improperly executed will with the opportunity to show that the violation of the legislative mandate is harmless error in light of the evidence of intention that is available.[34] If it is shown that the document through which the testator attempts to speak and act is flawed, the dead hand has no vitality and the testator's voice is not heard. Friedman speculates that there is a mystical or superstitious element underlying the traditional reverence for the principle that the formalities of the wills act must be strictly followed.[35]

Considered in this cabalistic fashion, the admission of a will to probate is akin to a seance, with the court serving as channeler. To some extent, the tendency of courts to close their eyes in holy dread and refuse to permit a testator's wishes to come through when confronted with documents not properly executed according to the ancient

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32. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 489 (1975) [hereinafter Langbein, *Substantial Compliance*]; Mann, *Self-Proving Wills and Formalism in Wills Adjudication*, 63 WASH. L.Q. 39 (1985); Nelson & Starck, *Formality and Formalism: A Critical Look at the Execution of Wills*, 6 PEPPERDINE L. REV. 331 (1979). *See generally* Friedman, *supra* note 23, at 370-71, 374 (explaining the economic and historical rationales for modern-day will formalities). For discussion of the rule of formalism applied to the wills acts, see *infra* notes 55-63 and accompanying text.

33. For discussion of statutory harmless error rules in Canadian and Australian jurisdictions, see *infra* notes 788-924.

34. Israel has had a harmless error rule in effect since 1965. Succession Law 5725-1965, *in* Ministry of Justice, 19 Laws of the State of Israel 62, ch. 1, § 25 (1965).

35. Friedman, *supra* note 23, at 373-74. Friedman states:

> [W]ills are more than economic documents, institutionally processed. They have a noneconomic, noninstitutional side. The will is an instrument of gift, the product of love and affection, or perhaps baser motives; in any event, a document of sentiment and emotion, embodying too (from the standpoint of the testator) a sense of mortality — the precision and proximity of death. . . . In the history of the law of wills, the magical and the economic natures of the document reinforced each other at least in one regard: they both tended toward standardization and uniformity of text and toward formality in execution and procedures. Undoubtedly, too, the sense of the supernatural in the law of wills reinforced the popularity of the document. . . . The will is the sole, authentic voice of a man who is dead. Its vitality begins when his life ceases. and it is an almost mystical extension of his personality after death. All the more reason why the text must be treated with great caution and not tampered with or explained by external, mundane testimony. Here too the emotional and the formal reinforced each other.

Id.

ceremonies set forth in the statute of wills, may be a product of some vestigial sense of the will as something qualitatively different from any other legally enforced transaction. Clearly, the threshold question in implementing a will today is not whether the testator intended it be given effect, but whether the testator has taken care to follow the statutorily described ritual and thus preserve a channel through which to communicate with the court.[36]

The purpose of the UPC's new section 2-503[37] is to temper the requirement of the execution provision — that every will must adhere to certain prescribed formalities — in those instances in which the evidence shows that the testator intended the defective will be given effect.[38] The effect of the new standard is to eliminate a traditional and demonstrably false assumption underlying the statute of wills: that formal compliance with the execution requirements of the statute of wills is the sole reliable criterion for determining whether a decedent intended to execute a will.

From a policy standpoint, incorporating a harmless error rule into the wills act effectively reverses a tradition which from its inception has tended to elevate form at the expense of substance. The formalism of the wills acts, the insistence of modern courts on strict compliance with formalities even in circumstances in which there is no issue either as to the authenticity of the document or the intent of the testator, has been characterized as a limitation on the principle of free testation[39] — a limitation that seems to serve no policy other than that of promoting efficiency in the probate process.[40] Furthermore, even the argu-

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36. This strict insistence on ritual has not always been an aspect of wills act jurisprudence. *See infra* notes 449-51 and accompanying text (providing an historical overview of the evolution of the formalities, illustrating fluctuations in the level of formality required for a disposition of property at death).

37. *See* UNIF. PROB. CODE § 2-503 comment (1990). For text of new § 2-503, see *supra* text accompanying note 11.

38. *See* UNIF. PROB. CODE § 2-503 comment (1990) and discussion *infra* notes 925-49 and accompanying text.

39. *See* Friedman, *The Law of Succession in Social Perspective*, *in* DEATH, TAXES, AND FAMILY PROPERTY 9, 12, 14 (E. Halbach, Jr. ed. 1977) (discussing the principle of free testation). *But see* Irving Trust Co. v. Day, 314 U.S. 556, 562 (1942) (stating that there is no constitutional right to pass property at death); Estate of McGurrin, 113 Idaho 341, 343, 743 P.2d 994, 996 (Idaho Ct. App. 1987) (recognizing the importance of the right of freedom of testation in American legal history but emphasizing that the right is legislative in origin and historically conditioned upon compliance with legislatively prescribed formalities); Halbach, *An Introduction to Chapters 1-4*, *in* DEATH, TAXES, AND FAMILY PROPERTY 3-6 (E. Halbach, Jr. ed. 1977) (pointing out that a private property system need not necessarily result in freedom of testation and discussing the arguments offered in support of the institution of inheritance).

40. Although a number of policy limitations on the privilege of free testation have been identified, see Friedman, *supra* note 23, at 357; Gaubatz, *Notes Toward a Truly Modern Wills*

ment that the rule of strict compliance promotes efficiency in the postmortem distribution of decedents' property to their selected successors is undercut by the emergence during this century of the so-called will substitutes and nonprobate devices for transferrring property at death.

2. The Rise of the Will Substitutes

Although generally courts strictly construe wills act requirements, many or perhaps most courts adopt any of several alternative rationales for achieving substantially all of the incidents of a will without the wills act formalities or the necessity of implementation through the probate court. Under present law, owners of property may select among a number of nominally inter vivos modes of donative disposition that permit them to retain virtually all of the incidents of ownership during their lives, yet still exercise the privilege of selecting their successors at death. These testamentary-like inter vivos donative transfers have the additional advantage of being self-enforcing, so that probate is not required to effectuate the transfer of property.

A will substitute exists when a property owner effectively creates a nontestamentary disposition that takes effect at death based on the theory that the owner relinquishes some infinitesimal fraction of power over the property. The so-called will substitutes[41] — revocable trusts,[42]

Act, 31 U. MIAMI L. REV. 497, 500-12 (1977), the purely formalistic limitation imposed by the doctrine of strict compliance is difficult to justify. The theory that the requirement actually accomplishes the traditionally cited purpose of preventing fraud is generally rejected by contemporary scholars. *See infra* notes 518-22 for a discussion of the protective function of formality.

Langbein suggests that strict compliance serves a role similar to that of the dead man statutes in the law of contracts in that strict compliance is intended to preclude extrinsic evidence of a decedent's intentions with respect to a will. Langbein, *Substantial Compliance*, *supra* note 32, at 501-03; for discussion, see *infra* notes 405-24 and accompanying text.

Mann suggests that the traditionally inferior status of the probate courts has had the effect of maintaining the policy of construing the wills act requirements strictly to avoid inferior courts engaging in factfinding on the issue of intent. Mann, *supra* note 32, at 77-83; for discussion, see *infra* notes 449-67 and accompanying text.

None of these grounds seems sufficient to account for the persistence of the rule of strict compliance as a limitation on free testation. Wills act formalism gives a very limited meaning to the concept of freedom of testation. *See* Friedman, *supra* note 23, at 365-66 (discussing the conflict between the freedom of testation and the highly formal nature of the American law of succession).

41. A number of very diverse devices are generally lumped together into the general category of will substitutes. With the exception of the revocable trust, all of the commonly used will substitutes inevitably involve a contract between the transferor and a corporate entity. The doctrinal origins of the various will substitutes differ substantially and may affect the applicable subsidiary law. For discussion of the origins of the will substitutes, see Browder, *Giving or*

Leaving — What is a Will?, 75 MICH. L. REV. 845 (1977); Gulliver & Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1 (1941); Langbein, *Nonprobate Revolution*, *supra* note 17, at 1108; Ritchie, *What is a Will?*, 49 VA. L. REV. 759 (1963). These differences in the subsidiary law may involve issues such as the access of spouses and creditors to the transferred property if the probate estate turns out to be insufficient to meet their claims. The 1969 UPC attempted to deal with the problem of the disinherited spouse through the concept of the "augmented estate." *See* UNIF. PROB. CODE § 2-202 (1969). The revised provision expands the concept to take in the decedent's "reclaimable estate," including certain transfers made by means of will substitute. *See* UNIF. PROB. CODE § 2-201 (1990).

The formalities for transfers by will substitutes have generally emerged from principles applicable to trusts and contracts; no uniform standard such as that applicable to wills exists. The forms of will substitutes can differ greatly in formality among themselves, from a very formal contract which can only be revoked in the manner set out within the document that is strictly construed by the courts (life insurance contract) to a purely oral declaration of trust that can be revoked in any manner specified by the transferor. The informality of the will substitutes is purely relative and in practice depends upon the specific device employed. However, Langbein argues that the applicable formalities for will substitutes are functionally equivalent to those required for will execution. Langbein, *Substantial Compliance*, *supra* note 32, at 505-09. Langbein also argues that the alternative formality of the will substitutes satisfies the purposes of the wills act. Langbein, *Nonprobate Revolution*, *supra* note 17, at 1130-32.

42. For discussion of revocable trusts, see, *e.g.*, 1 A. SCOTT, THE LAW OF TRUSTS § 57.1 (3d ed. 1967); Bordwell, *supra* note 24; Browder, *supra* note 41, at 870-74; Clark, *Inter Vivos Trust Valid Despite Testamentary Objections; the Border Line*, 3 KAN. B.A.J. 270 (1934); Gulliver & Tilson, *supra* note 41, at 24-25; Kornfield, *New York's Highest Court Lifts Injunction on Dacey's "How to Avoid Probate" Book*, 107 TR. & EST. 104 (Feb. 1968); Langbein, *Nonprobate Revolution*, *supra* note 17, at 1113; Langbein, *Substantial Compliance*, *supra* note 32, at 505-08; Love, *Imperfect Gifts as Declarations of Trust: An Unapologetic Anomaly*, 67 KY. L.J. 309 (1979); Lowe, *Some Remarks Concerning the Revocable Self-Declaration of Trust*, 32 MO. L. REV. 199 (1967); Lynn, *Estate Planning: Good-bye to Wills, Trusts, and Future Interests*, 39 OHIO ST. L.J. 717 (1978); Ritchie, *supra* note 41, at 763-65; Schuyler, *Revocable Trusts — Spouses, Creditors, and Other Predators*, 8 INST. ON EST. PLAN. § 74.1300 (1974); Scott, *The Effects of a Power to Revoke a Trust*, 57 HARV. L. REV. 362, 368-77 (1944); Scott, *Trusts and the Statute of Wills*, 43 HARV. L. REV. 521, 522 (1930) [hereinafter Scott, *Trusts*]; Seftenberg, *The Border Lines of Agency, Living Trusts, and Testamentary Disposition*, 5 WIS. L. REV. 321 (1930); Wellman, *The New Uniform Probate Code*, 56 A.B.A. J. 637 (1970) [hereinafter Wellman, *New UPC*]; Wellman, *The Uniform Probate Code: A Possible Answer to Probate Avoidance*, 44 IND. L.J. 191 (1969); Note, *The Uniform Probate Code — A Refreshing Approach to Probate Reform*, 46 N.D. L. REV. 327 (1970); Comment, *Will Substitutes in Mississippi*, 41 MISS. L.J. 177, 185-86 (1969); Comment, *Validity of Revocable Trusts in Kansas*, 11 U. KAN. L. REV. 375 (1963) [hereinafter *Revocable Trusts*]; Comment, *Will Substitutes in Kansas*, 23 WASHBURN L.J. 132, 157-58 (1983) [hereinafter *Will Substitutes*]. For discussion of revocable trusts, see *infra* notes 41-54 and accompanying text. For a more general discussion of revocable trusts, see T. ATKINSON, LAW OF WILLS 177-83 (2d ed. 1953); G. BOGERT, TRUSTS § 22 (6th ed. 1987).

For the work that is usually credited with setting off the "nonprobate revolution," by promoting use of revocable trusts, see the infamous N. DACEY, HOW TO AVOID PROBATE (1965) [hereinafter N. DACEY, *1965*]; N. DACEY, HOW TO AVOID PROBATE NEWLY UPDATED! (1980) [hereinafter N. DACEY, *1980*]. For responses by the legal profession to Dacey's attack, see Zartman, *How to Void Dacey 1980*, 17 LAW NOTES FOR GEN. PRAC. 73 (1981).

joint and survivor bank accounts,[43] tentative or Totten trusts,[44] pay-

43. The UPC recognizes joint accounts as one of three distinct forms of multi-party accounts. UNIF. PROB. CODE § 6-101(5) (1969). *See also id.* § 6-101 (defining joint account); § 6-103(a) (dealing with issue of lifetime ownership); and § 6-104(a) (dealing with rights of survivors). For discussion of joint accounts, see Annotation, *Creation of Joint Savings Account or Savings Certificate as Gift to Survivor*, 43 A.L.R.3d 971 (1972).

For further discussion of joint accounts, see T. ATKINSON, *supra* note 42, at 167-70; Boyce, *Joint Bank Accounts with Right of Survivorship: A Conceptual Maze*, 6 CAP. U.L. REV. 477 (1977); Browder, *supra* note 41, at 855; Hines, *Personal Property Joint Tenancies: More Law, Fact and Fancy*, 54 MINN. L. REV. 509 (1970); Kepner, *Five More Years of the Joint Bank Account Muddle*, 26 U. CHI. L. REV. 376 (1959) [hereinafter Kepner, *Joint Account Muddle*]; Kepner, *The Joint and Survivorship Bank Account — A Concept Without a Name*, 41 CALIF. L. REV. 596 (1953) [hereinafter Kepner, *Joint Account Concept*]; Langbein, *Nonprobate Revolution*, *supra* note 17, at 1112; Langbein, *Substantial Compliance*, *supra* note 32, at 504-05; McGovern, *supra* note 21, at 15-18; Virden, *Joint Tenancy with Right of Survivorship ("JTWROS") Accounts in Texas: Caveat Depositor*, 51 TEX. B.J. 455 (May 1988). *See generally* Note, *Probate — Person: Absent Clear and Convincing Evidence of a Different Intent, During the Lifetime of All Parties a Joint Account Belongs to the Parties in Proportion to the Net Contributions by Each to the Sums on Deposit, and Upon the Death of a Joint Tenant the Surviving Tenants Succeed to the Interest of the Decedent in Equal Shares, the Right of Survivorship Continuing Among Them*, In re *Estate of Thompson, 66 Ohio St. 2d 433, 423 N.E.2d 90 (1981)*, 50 U. CIN. L. REV. 852 (1981) [hereinafter Note, *Joint Account Ownership*]; Comment, *Texas Probate Code Section 439(A): Conclusive or Rebuttable Presumption of Survivorship?*, 35 BAYLOR L. REV. 837 (1983) [hereinafter Comment, *Presumption of Survivorship*].

44. The UPC recognizes the trust account as one of three distinct forms of multi-party accounts. UNIF. PROB. CODE § 6-101(5) (1969). *See also id.* § 6-101(14) (defining "trust account"); § 6-101(2) (defining "beneficiary"); § 6-103(c) (dealing with issue of lifetime ownership); § 6-104(c) (dealing with right of survivorship).

For discussion of trust accounts ("Totten" or "tentative" trusts), see T. ATKINSON, *supra* note 42, § 41, at 173-77, §§ 13.01(a)(4), 13-22-23; G. BOGERT, *supra* note 42, § 20, at 44-48; Bogert, *The Creation of Trusts by Means of Bank Deposits*, 1 CORNELL L.Q. 159 (1916); Browder, *supra* note 41, at 856; Clark, *supra* note 42, at 278-82; Cohan, *Pennsylvania Tentative Trusts: Problems and Problem Areas*, 110 U. PA. L. REV. 972 (1962); Estes, *In Search of a Less Tentative Totten*, 5 PEPPERDINE L. REV. 21 (1977); Friedman, *supra* note 23, at 368-69; Graubert, *Tentative Trust Deposits*, 39 DICK. L. REV. 37 (1934); Gulliver & Tilson, *supra* note 41, at 32-39; Langbein, *Substantial Compliance*, *supra* note 32, at 505-08; Langbein, *Nonprobate Revolution*, *supra* note 17, at 111; Larremore, *Judicial Legislation in New York*, 14 YALE L.J. 315 (1905); Lynn, *supra* note 42, at 10-12; Moynihan, *Trusts of Savings Deposits in Massachusetts*, 22 B.U.L. REV. 271 (1942); Scott, *Trusts*, *supra* note 42, at 540-44; Wittebort, *Savings Account Trusts: A Critical Examination*, 49 NOTRE DAME L. REV. 686 (1974); Note, *Bank Account Trusts*, 49 VA. L. REV. 1189 (1963); Note, *Disposition of Bank Accounts: The Poor Man's Will*, 53 COLUM. L. REV. 103 (1953); Note, *Savings Bank Trusts*, 8 TEMP. L.Q. 87 (1933); Note, *Tentative Trust Deposits*, 39 DICK. L. REV. 37 (1934); Note, *Testamentary Uses of Bank Accounts*, 81 U. PA. L. REV. 737 (1933); Comment, *Matter of Totten — An Anomaly in the Law of Trusts*, 6 DE PAUL L. REV. 117 (1956); Comment, *Revocable Trusts*, *supra* note 42, at 375; Comment, *Savings Bank Trusts in New York*, 37 YALE L.J. 1133 (1928); Comment, *Savings Deposit "in Trust" Creating Tentative Trust Not Testamentary in Character*, 85 U. PA. L. REV. 646 (1937); Comment, *Totten Trust: The Poor Man's Will*, 42 N.C.L. REV. 214 (1963); Comment, *Trusts — Deposit in Name of Depositor in Trust for Another — Testamen-*

able-on-death accounts,[45] insurance contracts,[46] pension plans,[47] and even oral trusts of personalty[48] — accomplish the primary effect of a

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tary Disposition, 14 MINN. L. REV. 701 (1930); Comment, *Trusts — Tentative Trust Doctrine — Cal Civ. Code (1931), Section 2280*, 7 S. CAL. L. REV. 116 (1933); Comment, *Trusts: Totten Trusts and the Viability of P.O.D. Dispositions as Non-Testamentary*, 14 WASHBURN L.J. 194 (1975) [hereinafter Comment, *Viability of P.O.D. Dispositions*]; Comment, *Will Substitutes*, *supra* note 42, at 153-57. *See generally In re* Totten, 179 N.Y. 112, 71 N.E. 748 (1904) (creating the Totten Trust).

45. The "P.O.D." account is one of the three forms of multi-party accounts recognized by the UPC. UNIF. PROB. CODE § 6-101(5) (defining "multiple-party account"); § 6 101(10) (defining "P.O.D." account); § 6-101(11) (defining "payee"); § 6-103(b) (dealing with issue of lifetime ownership); § 6-104(b)(1) (dealing with right of survivorship).

The "P.O.D." bank account is often denied recognition on the grounds that it is a testamentary disposition subject to the wills act. *See, e.g.*, Truax v. Southwestern College, 214 Kan. 873, 522 P.2d 412 (1974); Compton v. Compton, 435 S.W.2d 76 (Ky. 1968); Blais v. Colebrook Guaranty Sav. Bank, 107 N.H. 300, 220 A.2d 763 (1966). For discussion of P.O.D. accounts, see Annotation, *Payable-on-Death Savings Account or Certificate of Deposit as Will*, 50 A.L.R.4th 272 (1989). For additional discussion, see McGovern, *supra* note 21, at 7; Comment, *Viability of P.O.D. Dispositions*, *supra* note 44, at 194.

46. For discussion of insurance contracts, see T. ATKINSON, *supra* note 42, § 69, at 161-63; G. BOGERT, *supra* note 42, § 22 (life insurance trusts); M. CRAWFORD & W. BEADLES, LAW AND THE LIFE INSURANCE CONTRACT (6th ed. 1989); Browder, *supra* note 41, at 854, 872 (life insurance and insurance trusts); Gulliver & Tilson, *supra* note 41, at 25-26 (life insurance trusts); Kimball, *The Functions of Designations of Beneficiaries in Modern Life Insurance: U.S.A.* in LIFE INSURANCE LAW IN INTERNATIONAL PERSPECTIVE 74 (J. Hellner & G. Nord eds. 1969); Langbein, *Nonprobate Revolution*, *supra* note 17, at 1110-11; Langbein, *Substantial Compliance*, *supra* note 32, at 508-09; Mohan, *Life Insurance in Estate Planning — Taxation & Uses Today*, 35 DRAKE L. REV. 773 (1986/87); Vance, *The Beneficiary's Interest in a Life Insurance Policy*, 31 YALE L.J. 343 (1922); Note, *The Blockbuster Will: Effectuating the Testator's Intent to Change Will Substitute Beneficiaries*, 21 VAL. U.L. REV. 719, 723-24, 730-34 (1987); Note, *The Testamentary Life Insurance Trust*, 51 MINN L. REV. 1118 (1967); Comment, *Life Insurance Settlement Options and the Statute of Wills — A Survey and a Suggestion*, 50 N.W. U.L. REV. 796 (1956).

47. *See* Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722 (1988) (discussing use of pension plans as will substitutes); Lynn, *supra* note 42, at 725-26, 730-33.

48. Under present law, oral declarations of trust in personal property are generally permitted. The effect of the oral declaration of trust is to give to the beneficiary of the trust a revocable interest in the property that will come into the beneficiary's possession and enjoyment on the transferor's death. 1A. SCOTT, *supra* note 42, § 28; RESTATEMENT (SECOND) OF TRUSTS § 28. *See also* Love, *supra* note 42, at 317 (discussing the use of oral trusts as a rationale for upholding attempted but imperfect gifts that failed because the donor died before completing delivery).

Courts and commentators criticize oral trusts as a fictional transfer of an ethereal present interest. *See, e.g.*, Richards v. Delbridge, 18 L.R. Eq. 11 (1874) (stating that oral trusts are rare and trust law usually prevents courts from construing imperfect (undelivered) gifts as declarations of trust); Browder, *supra* note 41, at 876; Gulliver & Tilson, *supra* note 41, at 16-17 (suggesting that the oral declaration of trust in personal property without delivery is an abandonment of the policies served by formalities of transfer, but concluding that this device

will: the transfer of property to the owner's selected successor at death. The juridical fiction by which these transfers are upheld, even though they do not meet the formal wills act requirements, relates to the timing of the supposed transfer.[49] The will substitutes are treated as creating an interest in the intended transferee during the lifetime of the transferor, specifically at the time the transferor relinquishes the requisite fraction of control, notwithstanding the transferor's express or implied reservation of a virtually unlimited right to reclaim the interest that was transferred.[50] The will substitutes, characteristically revocable, are thus in effect also ambulatory because the transferee has neither possession, enjoyment, nor any ownership interest permitting any degree of practical control over the property.[51] This is true despite the ubiquitous fiction that an "interest" in the property is transferred at the time of the disposition.[52]

Courts regard the use of a will substitute to create a property interest in the owner's designated successor as the act of a living person. Thus, so goes the rationale, a will substitute can effectuate the owner's intentions respecting the disposition of property at death without the need for a will to channel these intentions or for a court to interpret them. The relatively informal procedures for transferring property by means of the will substitutes and the relatively flexible approach of courts in giving them effect,[53] makes the ritualistic em-

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is rarely employed "since laymen would not normally think of using a declaration of trust unless they had previously consulted an attorney, and, . . . the attorney would probably recommend that the trust be committed to writing").

49. Langbein, *Nonprobate Revolution*, *supra* note 17, at 1126-29.

50. *Id.*

51. *Id.*

52. *Id.* The actual dynamic involved in a disposition by will substitute seems to be relinquishment by the owner of some nominal fraction of the right to absolute control over the property, rather than the transfer of any identifiable property interest. *See, e.g.*, Farkas v. Williams, 5 Ill. 2d 417, 125 N.E.2d 600 (1955) (holding that all that is required to create a trust is some transfer of an immeasurably small amount of interest in property); *In re* Totten, 179 N.Y. 112, 71 N.E. 748 (1904). For discussion of will substitutes and their doctrinal foundations, see Browder, *supra* note 41, at 845; Gulliver & Tilson, *supra* note 41, at 1; Langbein, *Nonprobate Revolution*, *supra* note 17, at 1108; Ritchie, *supra* note 41, at 765.

53. The informality and flexibility are relative. Life insurance contracts, for example, are quite strictly construed. Oral declarations of trust, although permitted in theory, are seldom used in practice. Generally speaking, the transferor using a will substitute must have observed the procedures required to implement these transfers in order to ensure enforceability. *See* Langbein, *Nonprobate Revolution*, *supra* note 17, at 1130-33 (stating that will substitutes require "alternative formality"). Failure to observe the requisite formalities does not, however, automatically raise a *conclusive* presumption of invalidity as is the case for formally defective wills. For discussion of this presumption in its application to wills, see Langbein, *Substantial Compliance*, *supra* note 32, at 512, 520; Mann, *supra* note 32, at 59-62.

phasis on form when the transferor has elected to dispose of property by will seem unjust and irrational. Will substitutes allow property owners to select their successors at death without attempting to make a will, yet the individual who attempts to make a disposition by will must strictly comply with the requirements of the wills act or risk disposition under the state's scheme of succession.[54]

3. Formalism

In considering the insistence on strict formality that characterizes the law of wills, commentators distinguish the concepts of formality and formalism. Probate scholars generally concede that a certain level of formality in disposing of property serves the useful purpose of creating evidence of what property the owner specifically intended to give away, the conditions under which it was given, and the person or persons intended to benefit.[55] A number of eminent scholars convincingly argue that the form of a properly executed and witnessed will is well adapted to serve its primary functions, which are (1) to serve as a substitute for extrinsic proof of the testator's intent to make the disposition; and (2) to preserve reliable evidence of authenticity.[56]

The properly executed and attested will is immediately identifiable by its format and obviates the need for factfinding respecting the intentions of testators who can no longer speak for themselves. Although courts and commentators differ as to the optimum level of formality needed to accomplish these purposes, no one recommends abolishing the statutes of wills in favor of an approach which gives effect to intentions established solely by means of extrinsic evidence. Although some commentators ascribe to the minimalist philosophy of the UPC which reduces the procedures for executing attested and holographic wills to their bare essentials,[57] and one commentator pro-

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For articles discussing the impact of transferor's intentions on interpretation and enforcement of will substitutes, see Estes, *supra* note 44, at 23-24; Gulliver & Tilson, *supra* note 41, at 1; Love, *supra* note 42, at 309; McGovern, *supra* note 21, at 7; Virden, *supra* note 43, at 455; Comment, *Presumption of Survivorship*, *supra* note 43, at 852.

54. Langbein, *Nonprobate Revolution*, *supra* note 17, at 1134-35; Langbein, *Substantial Compliance*, *supra* note 32, at 504-05.

55. For discussion of the functions of the formalities of transfer, see *infra* notes 470-615 and accompanying text, especially *infra* notes 470-522.

56. For discussion of the role of formality as a substitute for proof of extrinsic circumstances, see *infra* notes 470-615 and accompanying text. For discussion of the role of formality in ensuring the authenticity of the transfer, see *infra* notes 505-11 and accompanying text.

57. The UPC provisions are discussed *infra* in notes 183-203 and accompanying text (discussing attested wills) and in notes 249-63 and accompanying text (discussing holographic wills). For articles discussing the minimalist philosophy of the UPC, see Kossow, *Probate Law and*

poses abolishing the attestation requirement altogether,[58] no one suggests a practical substitute for formality as evidence of intent and authenticity.

However, although scholars generally accept the utility of statutorily mandated standards of formality, they question the insistence of courts on strict, literal compliance with the wills act, particularly in instances in which the circumstances indicate the testator's error or omission does not raise any real issue as to the document's authenticity or the existence of testamentary intent.[59] The probate courts themselves and the appellate courts that supervise them and review their decisions are criticized severely for their "mechanical, literal" application of the wills act formalities.[60] The appellate courts in particular bear criticism for their reluctance to apply "techniques of judicial reasoning and statutory interpretation" to issues concerning due execution in wills cases.[61] While acknowledging the need for *formality* in wills execution, the commentators are very critical of *formalism* in the courts' interpretation of the requirements.

In considering the problem of wills act formalism, it seems that some attention should be given to the link between formality and formalism (the process by which the doctrine of strict compliance has developed in the courts). The extent of the problem also needs to be examined. While it is true that any defect in execution, no matter how minute, technically violates the requirements of the wills acts, courts frequently develop rationalizations, on a more or less ad hoc basis, for saving those instruments containing only slight departures from the strict requirements of the wills acts.[62] This approach only

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the Uniform Code: One for the Money. . . ., 61 GEO L.J. 1357 (1973); Kornfeld, *supra* note 42; Wellman, *New UPC*, *supra* note 42; Wellman, *Recent Developments in the Struggle for Probate Reform*, 79 MICH. L. REV. 501 (1981); Wellman & Gordon, *Uniformity in State Inheritance Laws: How UPC Article II Has Fared in Nine Enactments*, 1976 B.Y.U. L. REV. 357.

58. Lindgren, *Abolishing the Attestation Requirement*, 68 N.C.L. REV. 541 (1990).

59. *See, e.g.*, Langbein, *Harmless Error Rules*, *supra* note 5, at 1; Langbein, *Substantial Compliance*, *supra* note 32, at 489; Mann, *supra* note 32, at 39.

60. Mann, *supra* note 32, at 64-66.

61. *Id.* at 66.

62. Friedman, *supra* note 23, at 372-73 (explaining the willingness of some courts to avoid application of the strict compliance doctrine to wills). Friedman remarked that

> Students of the law of wills know, however, that many rigid rules are not quite so rigid as they seem . . . .
>
> How often and why do courts use this power of evasion? Hard statistics are not available. Over the course of the century there has been, perhaps, some decay in rigid rules of interpretation. We can speculate on the reasons. The mass, middle-class market for testation has led to a decline in the level of artifice necessary for drafting and administering the average will. The legal profession has lost its mastery

saves wills in those instances in which the court finds that the arguably defective conduct in fact achieves compliance with the intention of the statutory requirements, and differs radically from a harmless error rule that permits concededly defective wills to be admitted to probate if the document satisfies the testator's intent.[63] In the first instance, the court is relying on factual distinctions and statutory interpretation to find that marginal conduct in fact meets the wills act requirements. A harmless error rule, however, permits the court to dispense with the execution requirements if other evidence establishes the requisite intent.

B. *The Rule of Strict Compliance and the Function of Formality in the Law of Wills*

1. Historical Function of Formality

a. Attested Wills

(1) Origins and evolution of the statutes of wills[64]

(a) The Anglo-Saxon period

Very little is known about succession of property prior to the Norman Conquest, although scholars agree that the power to name

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> of the fine points of inherited property law. Both of these factors put pressure on courts and legislatures to continue only those formalities and rigidities which are or seem to be useful under the conditions of the market demand for the use of the law of succession. As far as the courts are concerned, their role in the legal system in general has changed; state courts in particular no longer are or can imagine themselves to be a major force in building up and maintaining legal doctrine. The temptation is therefore great to cease expounding grand principles and pay more attention to bandaging small wounds, making minor adjustments, correcting specific deficiencies, and curing tiny injustices in the particular case. Furthermore, the development and mass use of all sorts of will substitutes influence the legal system to adopt a relatively permissive attitude toward the formalities of any *one* of the accepted modalities of transfer.

Id. (emphasis in original) (citation omitted).

63. For discussion of "quantitative" substantial compliance as applied in the courts, see *infra* notes 320-94 and accompanying text. For discussion of "functional" substantial compliance as applied to deem execution defects harmless, see *infra* notes 695-712 and accompanying text. For comparison, see *infra* notes 713-15 and accompanying text.

64. For historical background of the wills acts and the evolution of the right of testation, see ANGLO-SAXON WILLS (D. Whitelock ed. 1930); T. ATKINSON, *supra* note 42, at 6-36; T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 712-46 (5th ed. 1956); 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 240-60, 314-63 (2d ed. 1968); A. REPPY & L. TOMPKINS, HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS 1-66 (1928); Bordwell, *The Statute Law of Wills*, 14 IOWA L. REV. 1 (1928); Hazeltine, *General Preface* to ANGLO-SAXON WILLS vii-xi (D. Whitelock ed. 1930);

successors to personal property was recognized during the Anglo-Saxon period.[65] The major issue was whether a property owner could deprive the heirs of the property by any form of transfer, regardless of whether it took effect inter vivos or at the death of the owner.[66] The modern concept of testation developed "in the realm of personalty";[67] there were different rules for land and chattels, "although the distinction was neither of the kind nor to the degree which developed after the Conquest."[68] The concept of the testament of personal property may have been an innovation derived from Roman law[69] introduced in Britain through the medium of the Roman Catholic Church,[70] although the form which these dispositions assumed were clearly not imported from Rome.[71] Instead, the Anglo-Saxons used devices that were already familiar to them — the contract, the grant of a revision, and the *post obit* gift[72] — and adapted documents based on Roman models to their native Germanic customs,[73] with their emphasis on "spoken words and manual acts."[74]

Nelson & Starck, *supra* note 32, at 332-47; Comment, *An Analysis of the History and Present Status of American Wills Statutes*, 28 OHIO ST. L.J. 293 (1967); *see also* Atkinson, *Brief History of English Testamentary Jurisdiction*, 8 MO. L. REV. 107 (1943); Helmholz, *Debt Claims and Probate Jurisdiction in Historical Perspective*, 23 AM. J. LEGAL HIST. 68 (1979).

65. For discussion of Anglo-Saxon "wills," see T. ATKINSON, *supra* note 42, at 11-12; T. PLUCKNETT, *supra* note 64, at 733-35; 2 F. POLLOCK & F. MAITLAND, *supra* note 64, at 314-22; A. REPPY & L. TOMPKINS, *supra* note 64, at 5-7; Atkinson, *supra* note 64, at 107-09. For examples of the Anglo-Saxon "will," see ANGLO-SAXON WILLS, *supra* note 64.

66. T. ATKINSON, *supra* note 42, at 11.

67. *Id.* at 15.

68. Atkinson, *supra* note 64, at 108.

69. *See* T. ATKINSON, *supra* note 42, at 9. Over time, the Roman will evolved into a written instrument, signed by the maker and seven witnesses, that was ambulatory and revocable. 1 W. BOWE & D. PARKER, REVISED TREATISE: PAGE ON THE LAW OF WILLS § 2.6 (1901). *But see* F. POLLOCK & F. MAITLAND, *supra* note 64, at 316-17. "[T]he connexion between the Anglo-Saxon will and the Roman testament is exceedingly remote. . . . The Anglo-Saxon 'will,' or *cwide* as it calls itself, seems to have grown up on English soil, and the Roman testament has had little to do with its development." *Id.*

70. T. PLUCKNETT, *supra* note 64, at 734.

71. *Id.*

> The eagerness of converts to endow the clergy of the new religion certainly induced them to seek for testamentary machinery, but it seems quite clear that they did not in fact import that machinery from abroad . . . [though the] Roman form was still common down to the ninth century on the continent.

Id. For discussion, see Hazeltine, *supra* note 64, at viii-ix. Hazeltine emphasizes the Germanic character of the Anglo-Saxon "will," with its "oral, formalistic, and symbolical features." *Id.* at ix.

72. T. PLUCKNETT, *supra* note 64, at 734. For discussion of the contractual aspect of Anglo-Saxon "wills," see *infra* note 93.

73. Hazeltine, *supra* note 64, at ix.

74. *Id.*

The earliest form of "will" was probably the *post obit* gift.[75] By modern standards, the *post obit* gift seems inherently ambiguous, consisting as it did as an irrevocable present gift of property which did not take effect until the death of the donor.[76]

The *verba novissima*, or deathbed distribution, developed later.[77]

> This consisted of a statement on the part of the dying man . . . usually made to his confessor, directing what disposition should be made of his property. As these dispositions depended, for effectiveness, upon the power of the Church, some portion of the dying man's chattels were usually given to the Church for pious uses.[78]

The deathbed distribution was part and parcel of the deathbed confession "with its accompanying effort to wipe out past sin."[79] The *verba novissima* differed from the *post obit* gift in that it was truly a deathbed disposition; whereas the maker of a *post obit* gift might reasonably have expected to live many years, the *verba novissima* "are essentially words spoken by one who knows himself to be passing away."[80] The disposition was oral and was part of the religious service performed for the dying.[81] In order to avoid challenges to the priest's account of the intended distribution, he was encouraged to "take with him one or two, so that in the mouth of two or three witnesses every word may be established, for perchance the avarice of the kinsfolk of the dead would contradict what was said by the clergy, were there but one priest or deacon present."[82]

During the ninth, tenth, and eleventh centuries, these two modes of disposition "coalesce[d] in the written *cwide*,"[83] the Anglo-Saxon

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75. A. REPPY & L. TOMPKINS, *supra* note 64, at 5; Hazeltine, *supra* note 64, at xi-x.

76. F. POLLOCK & F. MAITLAND, *supra* note 64, at 317. Hazeltine argues that the *post obit* gift is irrevocable because the donor contractually promises in making the will (an inter vivos transaction) that the donees are to have conveyed to them the subject-matter of the gift. "In the Germanic gift contract and conveyance are in truth closely interwoven; but in that species known as the *donatio post obitum* contract predominates." Hazeltine, *supra* note 64, at xi.

77. A. REPPY & L. TOMPKINS, *supra* note 64, at 6.

78. *Id.* The effect of this transaction was that the dying property owner appointed the confessor or some other person to see to the distribution of the chattels that were the subject of the *verba novissima*. The modern concept of the executor may have developed from this practice. *Id.*

79. F. POLLOCK & F. MAITLAND, *supra* note 64, at 318.

80. *Id.* at 319. For discussion, see Hazeltine, *supra* note 64, at xii.

81. F. POLLOCK & F. MAITLAND, *supra* note 64, at 319.

82. *Id.* at 318-19.

83. *Id.* at 319.

"will." The Anglo-Saxon concept of the *cwide* differed in several fundamental respects from "the later juridical meaning" of the term "will,"[84] but was nevertheless the predecessor of the modern will.[85] The Anglo-Saxon *cwide* seems to have been in essence an oral transaction;[86] the written documents were apparently mere memorials of the essential jural act in which the author of the intended disposition *cwaeth his cwide*, that is, says his say.[87] The written will "was an exotic in England,"[88] probably originating out of the desire of the church to preserve evidence of dispositions for the benefit of the church in a writing.[89]

The *cwide* was an "exceedingly formless instrument," usually written in the vernacular (or common tongue) rather than in the Latin typically used in ecclesiastical writings.[90] The language memorializing the dispositions of property is imprecise and extremely various.

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84. Hazeltine, *supra* note 64, at vii.

85. *Id.*

86. *Id.* at x, xiv-xv.

87. T. PLUCKNETT, *supra* note 64, at 733. "[T]hese words still survived into middle English as 'quoth,' and into modern English as 'bequeath' and 'bequest.'" *Id.*

> The oral character of the Anglo-Saxon will is proved by many statements found not only in the written wills, but also in documents which recount the history of transactions in regard to certain properties. The donor, using the vernacular, "bequeathes in spoken words"; and no doubt some of these words are spoken formally in order that the oral disposition may be strengthened or confirmed. The donor . . . "speaks his *cwide*": and his *cwide*, spoken in Anglo-Saxon, is reproduced in the written will. The very fact that the written wills are in the vernacular is some proof, although of course not conclusive proof, that the scribe has merely taken down what he heard. . . . In one way or another the written wills disclose to us the fact that the will itself, in contrast with the writing which enshrines it, is a will declared orally in the presence of witnesses: *the writing is merely documentation of the oral will.*

Hazeltine, *supra* note 64, at xiv-xv (emphasis added). For arguments in support of the oral character of Anglo-Saxon wills, see *id.* at vii-xi.

88. Hazeltine, *supra* note 64, at xii.

89. *Id.*

> At least from the beginning of the eighth century onwards ecclesiastical policy furthered the idea that spoken words were sufficient for gifts and contracts. Lest, however, spoken words fade from the memory, declare ecclesiastical draftsmen in the preambles to eighth-century Anglo-Saxon charters, it is best to have evidence of these words in a writing. To the proof of oral acts furnished by transactions-witnesses, which was already a feature of Anglo-Saxon law, there was now the added evidence of writings. . . .

Id.

90. F. POLLOCK & F. MAITLAND, *supra* note 64, at 319-20.

> So informal and untechnical are these documents that it is impossible to draw any certain conclusions as to their mode of operation. Frequently they merely say, "I give" this and that — without further qualification, although it is clear that the donor is not in fact immediately divesting himself of his property.[91]

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91. T. PLUCKNETT, *supra* note 64, at 733. "The structure of the Anglo-Saxon will is . . . variable. Sometimes it is in narrative form relating that 'this is the *quide* that Aelfric bequoth ere he fared over sea . . .' the substance following in the first person. Sometimes the whole document may be in the third person; frequently it is in the form of an address, and sometimes reads almost like a letter." *Id.*

> The several parts of the written will correspond in fact to the several stages in the oral and formal act of making the will. The declaration or announcement, characteristic of the opening part of the instrument, corresponds to the oral declaration or announcement; the written grant is a copy of the verbal grant; the written sanction is a report of the spoken sanction. The fluctuation in the personal pronoun and in the tense, which is a marked feature of the writings, is to be explained only if we remember that the scribe, acting a passive role, has sometimes taken down the words as from dictation; while, at other times, giving perhaps his own version of the transaction, he has indicated the grantor by using the third personal pronoun and has employed the past tense instead of the present in referring to the transaction as a whole.

Hazeltine, *supra* note 64, at xxx-xxxi.

In a typical Anglo-Saxon *cwide*, we find the property owner or donor giving

> his various lands specifically, providing for his kinsfolk, remembering his dependents, freeing some of his slaves and bestowing lands and rents upon various churches. He also makes gifts of specific chattels, his precious swords, cups and vestments are distributed. He says how many swine are to go with this piece of land and how many with that. He sometimes gives what we should describe as pecuniary legacies. . . . Occasionally . . . we see residuary gifts of chattels and lands.

F. POLLOCK & F. MAITLAND, *supra* note 64, at 320.

An example of a "typical" Anglo-Saxon "will" follows.

> Wynflaed declares how she wishes to dispose of what she possesses, after her death. She bequeathes to the church her offering — . . . and the better of her offering-cloths, and her cross; and to the refectory two silver cups for the community; and as a gift for the good of her soul a mancus of gold to every servant of God. . . .
>
> And she bequeathes to her daughter Aethelflaed her engraved bracelet and her brooch, and the estate at Ebbesborne and the title-deed as a perpetual inheritance to dispose of as she pleases. . . .
>
> And Wulfwaru is to be freed, and she is to serve whom she pleases. . . . And Wulfflaed is to be freed on condition that she serve Aethelflaed and Eadgifu. And she bequeathes to Eadgifu a woman-weaver and a seamstress. . . .
>
> And to Aelfwold her two buffalo-horns and a horse and her red tent. And she bequeathes to Eadmaer a cup with a lid, and another to Aethelflaed, and prays that between them they will furnish two fair goblets to the refectory for her sake, or augment her own ornamented cups . . . worth one pound. Then she would like half a pound of pence to be put into each cup, and that Eadwold should be given

It is often impossible to determine whether a given document was intended as a will, testament, grant, or gift.[92] Hazeltine argues that many or "perhaps most" of these transactions had a contractual aspect,[93] since the concepts of "grant" and "contract" were not clearly

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back his own two silver cups. And she bequeathes to him her gold-adorned wooden cup in order that he may enlarge his armlet with the gold, or that he may receive sixteen mancuses of red gold in exchange; that amount has been put on it. And she bequeathes to him two chests and in them a set of bed-clothing, all that belongs to one bed.

. . . .

And with regard to the estate at Chinnock, the community at Shaftesbury possess it after her death, and she owns the stock and the men; this being so, she grants to the community the peasants who dwell on the rented land, and the bondmen she grants to her son's daughter Eadgifu, and also the stock . . . and she wishes that six oxen and four cows with four calves be allowed to remain on the estate. . . .

And she bequeathes to Aetheflaed . . . Aelfhere's younger daughter, and her double badger-skin gown, and another of linen or else some linen cloth. And to Eadgifu two chests and in them her best bed-curtain and a linen covering and all the bed-clothing which goes with it, . . . and her best dun tunic, and the better of her cloaks, and her two wooden cups ornamented with dots, and her old filagree brooch . . . and a long hall-tapestry and a short one and three seat coverings. And she grants to Ceolthryth whichever she prefers of her black tunics and her best holy veil and her best headband; and to Aethelflaed the White her . . . gown and cap and headband, and afterwards Aethelflaed is to supply from her nun's vestments the best she can for Wulfflaed and Aethelgifu and supplement it with gold so that each of them shall have at least sixty pennyworth. . . . And there are two large chests and a clothes' chest, and a little spinning box and two old chests.

Then she makes a gift to Aethelflaed of everything which is unbequeathed, books and such small things, and she trusts that she will be mindful of her soul.

"The Will of Wynflaed," *reprinted in* ANGLO-SAXON WILLS, *supra* note 64, at 11-15.

92. A. REPPY & L. TOMPKINS, *supra* note 64, at 6.

93. Hazeltine, *supra* note 64, at xviii. Hazeltine argues that the line between contract and gift during Anglo-Saxon times was extremely vague. *Id.* at xix.

> In Anglo-Saxon law, as in other Germanic customary systems, gift is not gratuitous; gift requires counter-gift or counter-performance. When, therefore, lay folk and clerical folk bargain, they exchange gifts. The gift of the laymen is land; the gift of the clergy is the care of the soul by spiritual services. In these gifts and counter-gifts there is the intermingling of conveyance and contract; and sometimes these two inherent qualities, or aspects, of gift seem almost inextricably interwoven.

Id. at xx.

> [L]et us consider a notable feature of many wills. The writings in which wills are embodied prove to us that in fact many a donor, or *quasi*-testator, confirms by his will agreements which he has already concluded with . . . other persons, in regard to the devolution on their death of properties which belong to them. These contracts . . . were concluded orally in the presence of witnesses; and they were confirmed by the parties by formal acts, such as solemn promises to God and the saints or the mutual delivery of symbolic pledges (*wedd*). The written wills leave

distinguished during the period.[94] In any event, the Anglo-Saxon will was "concluded in such a way as to be not only capable of being heard and seen, but actually heard and seen by witnesses," and thus "complied with the general requirements of Germanic custom in regard to legal transactions."[95]

A fundamental difference between the *cwide* and the modern will is that in the *cwide* the dispositive act consisted in the oral disposition before witnesses.[96] The writing itself served a purely evidentiary function;[97] the writing or recording of the *cwide* was no part of the "ritual"[98] serving to affirm and effectuate the intent of the property owner to make the disposition. The document was therefore not an instrument of disposition in the sense of modern wills, but merely a memorial of a disposition[99] which, once spoken before witnesses,[100] seems to have been considered to be irrevocable.[101]

> us in no doubt as to the nature of these contracts: they were "spoken" agreements made binding by the use of formalities and symbols.

Id. at xxi.

94. *Id.* at xix. "In Anglo-Saxon times Grant, or Gift, included within itself both the idea of conveyance and the idea of contract. Conveyance and contract were aspects of Grant; and in some grants one or the other of these two characteristics predominated." *Id.*

95. *Id.* at xxi.

> Early Germanic custom demanded that these transactions be not only capable of being heard and seen, but that they be actually heard and seen; and, hence, spoken words and manual acts that were formal and symbolical dominated the law in regard to the formation of contracts and the conveyance of property.

Id. at ix. "[W]ith the firm support of the Church, the Anglo-Saxons continued on their own traditional Germanic course and made their wills, just as they concluded all their other jural acts, by word of mouth." *Id.* at xiv.

96. Hazeltine presents a number of arguments supporting the essentially oral character of the *cwide* in the "general preface" to Whitelock's translation of Anglo-Saxon wills. Hazeltine, *supra* note 64. "[T]heir very name, *cwide*, is a warning that whatever forms may clothe them, it is an oral institution which lies beneath." T. PLUCKNETT, *supra* note 64, at 734. *Cf.* F. POLLOCK & F. MAITLAND, *supra* note 64, at 320.

97. Hazeltine, *supra* note 64, at xxxi.

98. For discussion of the ritual function of formality, see *infra* notes 490-92 and accompanying text.

99. Hazeltine, *supra* note 64, at xxv; T. PLUCKNETT, *supra* note 64, at 733. "These documents were not the wills themselves, the dispositive acts in the law. The wills were the oral declarations before witnesses; the writings were merely evidentiary." Hazeltine, *supra* note 64, at xii.

100. *See* Hazeltine, *supra* note 64, at xii, xvii; F. POLLOCK & F. MAITLAND, *supra* note 64, at 318-20.

> It is . . . possible that in some cases the will in its written form was read out to those who had witnessed the making of the oral will; but under these circumstances the oral reading of the writing would appear to have constituted what one may

The nature of the dispositions contained in the *cwide* is uncertain. According to Pollock and Maitland, most of these dispositions lacked not only the quality of revocability, one of the fundamental characteristics of the modern will,[102] but also the characteristic ambulatoriness of truly testamentary dispositions.[103] The relative vagueness of concepts of property and contract that prevailed at the time may explain the considerable inconsistency and imprecision of the dispositive language.[104] The makers of at least some of the surviving documents seem to have contemplated dispositions that were not intended to become effective until death and that applied to property acquired after the time the *cwide* was made, or that could have been revoked at pleasure.[105] While many of the documents had some features of a modern will, it is questionable whether any one of them had all of the characteristics.[106]

> describe as a secondary orality which, although not part of the jural act of making the will, had as its purpose the strengthening of the earlier oral declaration, or announcement, of the will.

Hazeltine, *supra* note 64, at xvii.

101. T. PLUCKNETT, *supra* note 64, at 734; *see also* F. POLLOCK & F. MAITLAND, *supra* note 64, at 320. "[I]t seems that the majority of Anglo-Saxon wills were irrevocable whatever their form. Alfred indeed burnt his earlier wills — but he was a king; occasionally a subject expressly reserves the right to vary his will." T. PLUCKNETT, *supra* note 64, at 734.

102. *See* Bordwell, *supra* note 64, at 10-17 (discussing the fundamental aspects of a will). *But see* "The Will of Bishop Aelfsige," *reprinted in* ANGLO-SAXON WILLS, *supra* note 64, at 17, which concludes by invoking curses against anyone who interferes with the dispositions set out in the *cwide* "unless I myself change it" and "The Will of Aelfgar," *reprinted in* ANGLO-SAXON WILLS, *supra* note 64, at 9, which contains similar language.

103. F. POLLOCK & F. MAITLAND, *supra* note 64, at 320. "We must . . . assume that the Anglo-Saxon will was not in its nature ambulatory, and it is very rarely that a testator attempts to make it so." T. PLUCKNETT, *supra* note 64, at 734. *But see* "The Will of Wynflaed," *reprinted in* ANGLO-SAXON WILLS, *supra* note 64, at 10-15, *quoted in supra* note 91, in which Wynflaed appears to be making dispositions of her property that are not intended to be effective until her death, since in several instances the disposition is of the donee's choice of one or more of several items. The notion that after Wynflaed's death her successors are to choose what property they would like to have seems inconsistent with the notion of a present gift. In addition, the will contains a disposition of what seems to be the residue of her chattels, presumably including property acquired after the making of the *cwide*.

104. *See supra* notes 94-95 and accompanying text.

105. *See* A. REPPY & L. TOMPKINS, *supra* note 64, at 6; Hazeltine, *supra* note 64, at vii.

106. Hazeltine, *supra* note 64, at vii.

> The true will is not only a unilateral written disposition of property to take effect on the death of the testator; it possesses also the qualities of revocability and ambulatoriness; and, in addition, it names an executor. While the germs of one or more of these features of the later will are to be found in some of these Anglo-Saxon documents, no one of them possesses all the requisite qualities.

Id.

The *cwide* differed from the modern will in yet another important respect: the making of a *cwide* was a privilege that was extended to the maker outside the bounds of ordinary law.[107] Pollock and Maitland conjecture that the *cwide* was a practice which originated among the wealthy and important people of the day[108] and that to ensure that the *cwide* would "stand" at the property owner's death, the consent of the king had to be obtained in return for payment.[109] The language used by some of the property owners reflects apprehensiveness respecting the ultimate effectiveness of the disposition.[110] Some of the documents resemble supplicatory letters to the king or lord, asking that the will be carried out.[111] Many conclude with language asking the king or some other person to ensure that the property is distributed as the owner desired, and conclude by roundly cursing any person who interferes.[112]

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107. T. PLUCKNETT, *supra* note 64, at 734; F. POLLOCK & F. MAITLAND, *supra* note 64, at 321-22.

108. F. POLLOCK & F. MAITLAND, *supra* note 64, at 321. "With hardly an exception these wills are the wills of very great people, kings, queens, king's sons, bishops, ealdormen, king's thegns." *Id.* at 320. "It is plausible to suppose that the purely oral *novissima verba* served the purpose of ordinary folk, while the magnate would seek royal permission to use the written *cwide*." T. PLUCKNETT, *supra* note 64, at 735.

109. T. POLLOCK & F. MAITLAND, *supra* note 64, at 320. The devisability of real property depended on the king's consent; "[i]t was an exceptional privilege which the crown could grant or withhold. . . ." T. PLUCKNETT, *supra* note 64, at 735.

110. T. PLUCKNETT, *supra* note 64, at 733-34; *see* F. POLLOCK & F. MAITLAND, *supra* note 64, at 320-21. See, for example, "The Will of Aelfgar," *reprinted in* ANGLO-SAXON WILLS, *supra* note 64, at 7-9.

> This is Aelfgar's will. . . . Bishop Theodred and the Ealdorman Eadric told me, when I gave to my lord the sword which King Edmund gave to me, which was worth a hundred and twenty mancuses of gold and had four pounds of silver on the sheath, that I might have the right to make my will; and God is my witness that I have never done wrong against my lord that I may not have this right.

Id. at 7.

111. T. PLUCKNETT, *supra* note 64, at 733-34; F. POLLOCK & F. MAITLAND, *supra* note 64, at 320-21.

112. T. PLUCKNETT, *supra* note 64, at 734. See, for example, "The Will of Aelfgar" and "The Will of Bishop Aelfsige," *reprinted in* ANGLO-SAXON WILLS, *supra* note 64, at 7-9, 16-17. Aelfgar

> beseech[es] whoever may then be king, for the love of God and all his saints, that let my children do what they may, they may never set aside the will which I have declared for my soul's sake. And if anyone alter it, may he have to account for it with God and the holy saints to whom I have bequeathed my property, so that he who shall alter this will may never repent it except in the torment of hell, unless I myself alter it before my death.

Id. at 9. Bishop Aelfsige concludes:

(b) Wills after the Norman Conquest

(i) Succession to land

The Norman Conquest did not result in any sudden changes in the law of succession,[113] although one effect was the ultimate disappearance of the *cwide*.[114] "[A] complicated set of interdependent changes"[115] eventually resulted in the rules pertaining to succession. The establishment of the common law courts brought an end to the *post obit* gift of land because the king's court insisted that "a boundary must be maintained against ecclesiastical greed and the other-worldliness of dying men" and that in order to effectuate a disposition of property, there must be "a real delivery of real seisin."[116] With respect to land, the law evolved a rigid system of primogeniture succession of the freehold.[117] Glanville, writing in about 1188,[118] states that "only God, not man, can make an heir."[119] While the law permitted a person "to give freely in his lifetime a reasonable part of his land to whom he pleases,"[120] the dying were no longer permitted to do so on the grounds that they were likely to make unreasonable distributions of property not reflective of their intentions if they had been in a state of mind to deliberate.[121] Gifts of land by a last will were permitted only if made and confirmed with the assent of the heir.[122]

> Then I pray you, my dear friend Aelfheah, that [you] will watch both over the estates and those who are my kinsmen, and that you will never permit anyone to alter this in any way. If anyone do so, may God destroy him both soul and body, both here and in the future, unless I myself change it.

Id. at 17.

113. T. ATKINSON, *supra* note 42, at 13; F. POLLOCK & F. MAITLAND, *supra* note 64, at 323; A. REPPY & L. TOMPKINS, *supra* note 64, at 6.

114. T. PLUCKNETT, *supra* note 64, at 735.

115. F. POLLOCK & F. MAITLAND, *supra* note 64, at 325.

116. A. REPPY & L. TOMPKINS, *supra* note 64, at 7, 12-13. Wills were invalid because they lacked what had come to be regarded as the essential element of a gift, transfer of possession. *Id.* at 12.

117. T. ATKINSON, *supra* note 42, at 13-14; F. POLLOCK & F. MAITLAND, *supra* note 64, at 325.

118. Atkinson, *supra* note 64, at 110.

119. THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL 71 (G. Hall ed. 1965).

120. *Id.* at 70.

121. *Id.*

> [T]his liberty [to dispose of land] has not hitherto been extended to those about to die, because there might be an extravagant distribution of the inheritance if it were permitted to one who loses both memory and reason in the turmoil of his present suffering, a common enough happening. Therefore if anyone mortally sick

This limitation on the ability to transfer land by will resulted in "chicanery [being] employed to devise one's real property."[123] The equitable device known as the "use" permitted the property owner to get around the rule of primogeniture by conveying his property to eldest son A ("feofee") for the use of younger son B ("cestui que use"), whom the property owner wished to benefit. The equity courts would enforce such a conveyance against all but a bona fide purchaser on the theory that A had a moral and enforceable obligation to B in accordance with the provisions of the gift.[124] From the fifteenth to the early sixteenth century, the use was the most common form of ownership.[125] The rise of the use, however, deprived the king of the incidents of tenure, a reliable source of revenue.[126] In 1535 Parliament enacted the Statute of Uses,[127] which abolished the use and declared that the person for whom the use was created had full legal title.[128] The enactment of the Statute of Wills of 1540 was a direct result of the resentment of land owners at the loss of the power to determine succession to their land.[129]

(ii) Succession to chattels

In contrast, the right of property owners to make testaments of chattels was firmly established during this period, as the church asserted the right to protect and execute the dispositive plans of decedents.[130] During this period, jurisdiction over the probate of wills became vested in the ecclesiastical courts.[131] The evolution of the testa-

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began to distribute his land, which he had not in the least wished to do while he was well, this would be presumed to result rather from turmoil of the spirit than from deliberation of the mind.

Id.

122. *Id.*

123. Nelson & Starck, *supra* note 32, at 334.

124. *Id.*; A. REPPY & L. TOMPKINS, *supra* note 64, at 13-14.

125. T. ATKINSON, *supra* note 42, at 14; A. REPPY & L. TOMPKINS, *supra* note 64, at 14.

126. W. HOLDSWORTH, SOURCES AND LITERATURE OF ENGLISH LAW 66 (1925).

127. Statute of Uses and Wills, 1535, 27 Hen. 8, ch. 10, *reprinted in* A. REPPY & L. TOMPKINS, *supra* note 64, at 184-88.

128. T. ATKINSON, *supra* note 42, at 14.

129. W. HOLDSWORTH, *supra* note 126, at 66. "The Statute of Uses never represented popular desires and its stormy legislative history indicates that it was more a means of accumulating revenue than a concerted structuring of the property system." Nelson & Starck, *supra* note 32, at 335.

130. F. POLLOCK & F. MAITLAND, *supra* note 64, at 325.

131. T. ATKINSON, *supra* note 42, at 15; A. REPPY & L. TOMPKINS, *supra* note 64, at 7; Atkinson, *supra* note 64, at 109-10; *see* L. CROSS & G. HAND, RADCLIFFE AND CROSS — THE ENGLISH LEGAL SYSTEM 231 (5th ed. 1971). It is possible that the church courts exercised

ment of personalty in the ecclesiastical courts profoundly affected the development of formalities. The laity were under considerable pressure from the church to make testaments of personal property. During this period, there developed "an intense and holy" fear of intestacy.[132] To die intestate was considered a sin, tantamount to dying unconfessed.[133] The church was reluctant to insist on formalities for testaments of personalty, since technical defects would result in intestacy.[134]

Testaments of personalty could take a number of forms, from nuncupative wills to wills attested by a notary.[135] Written wills were usually in the first person; either the entire will or the attestation clause might be signed and sealed, although neither the signature nor seal was necessary if the will could be proved otherwise.[136] The will might be phrased in the form of a "solemn notarial instrument," a letter or request, or even a deed poll.[137] Apparently wills could be

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considerable testamentary jurisdiction from the time of the separation of ecclesiastical and lay jurisdiction by royal ordinance, although the exact date is unknown. Atkinson, *supra* note 64, at 109. The jurisdiction of the ecclesiastical courts over testaments of personal property seems to have developed over two hundred years. *Id.* at 110. *Cf.* F. POLLOCK & F. MAITLAND, *supra* note 64, at 341 (stating that "it seems probable that not until the age of Glanvill did the Christian courts succeed in establishing an exclusive right to pronounce on the validity of the will"). By the thirteenth century, the ecclesiastical courts seem to have obtained exclusive jurisdiction over testation. T. ATKINSON, *supra* note 42, at 15; L. CROSS & G. HAND, *supra*; F. POLLOCK & F. MAITLAND, *supra* note 64, at 341; A. REPPY & L. TOMPKINS, *supra* note 64, at 4.

132. F. POLLOCK & F. MAITLAND, *supra* note 64, at 356.

133. *Id.* The prevailing attitude was that "God's mercy is infinite; but we can not bury the intestate in consecrated soil." *Id.* Some of the lords argued that the goods of an intestate ought to be subject to forfeiture. *Id.* To say that someone had died intestate was considered a hideous insult. *Id.* at 358. One decedent was described as having been found "dead, black, stinking and intestate." *Id.*

134. T. PLUCKNETT, *supra* note 64, at 739. In considering medieval wills,

> [i]t is plain that the church has succeeded in reducing the testamentary formalities to a minimum. . . . The dread of intestacy induces us to hear a nuncupative testament in a few hardly audible words uttered in the last agony, to see a testament in the feeble gesture which responds to the skilful [sic] question of the confessor. . . .

F. POLLOCK & F. MAITLAND, *supra* note 64, at 337.

135. F. POLLOCK & F. MAITLAND, *supra* note 64, at 337; 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 538 (5th ed. 1942).

136. 3 W. HOLDSWORTH, *supra* note 135, at 538. "Sometimes it was stated that as the testator's seal was not well known the seal of some better known man had been affixed." *Id.*

137. *Id.* Plucknett notes:

> The nuncupative will was recognised, although not common among the upper classes of society. The written will might be in Latin, French or English. The higher clergy often had it drawn in notarial form, or at least attested by a notary, but this seems to have been in no way necessary. Signatures are, of course, very rare in the middle ages, and the usual mode of authentication was by the testator's

partly written and partly verbal, and a written will could be amended by a verbal codicil.[138] The nuncupative will was proved by the testimony of witnesses, preferably "two honest witnesses who can clearly depose to the testator's dispositions."[139] By the thirteenth century, a characteristic feature of wills was the appointment of an executor.[140]

(c) Development of the formal attested will

The original Statute of Wills, enacted in 1540,[141] seems to have resulted from popular resentment of the Statute of Uses in combination with political and economic changes tending to undermine feudal notions of land law.[142] In response to these pressures, the statute provided that real property could be devised by means of a writing. There was little emphasis on formalities of transfer, other than the requirement of a writing.[143] The writing was not truly ambulatory, in contrast to the testaments of personalty permitted in the ecclesiastical courts: although revocable and ineffective until death, it could not operate on property acquired after the time of execution.[144] It seems to have been treated as a conveyance evidencing a transfer of ownership.[145] Nuncupative testaments of personalty were still permitted after the 1540 Act,[146] though in practice most testaments were put in writing unless the testator was in extremis.[147]

> seal, sometimes accompanied by the seals of the executors or witnesses. Although there were no necessary formal clauses, most wills run on the same lines — the testator bequeaths his soul to God and the saints, his body to a particular church; there follow details of the funeral arrangements (often very elaborate). . . . [T]here was often an express direction for the payment of debts, sometimes with provisions as to how this was to be done; long lists of chattels bestowed on friends and relatives, . . . gifts of the residue of the estate only became frequent in the fifteenth century. . . .

T. PLUCKNETT, *supra* note 64, at 739-40. For discussion of the phrasing and substance of the medieval will, see 3 W. HOLDSWORTH, *supra* note 135, at 545-50; F. POLLOCK & F. MAITLAND, *supra* note 64, at 337-41.

138. 3 W. HOLDSWORTH, *supra* note 135, at 537-38.

139. *Id.* at 539.

140. *Id.* at 536-37; F. POLLOCK & F. MAITLAND, *supra* note 64, at 334-36. *Cf.* T. PLUCKNETT, *supra* note 64, at 741-42.

141. Statute of Wills, 1540, 32 Hen. 8, ch. 1, *reprinted in* A. REPPY & L. TOMPKINS, *supra* note 64, at 188-90.

142. W. HOLDSWORTH, *supra* note 126, at 66.

143. T. ATKINSON, *supra* note 42, at 18. The statute did not require attesting witnesses or require the testator to sign or handwrite the will. *Id.*

144. *Id.*

145. Nelson & Starck, *supra* note 32, at 336.

146. T. ATKINSON, *supra* note 42, at 19-20; A. REPPY & L. TOMPKINS, *supra* note 64, at 8.

147. T. ATKINSON, *supra* note 42, at 19.

The requirement of an attested will first appeared in 1677, the date of enactment of the statute to "prevent frauds and perjuries."[148] A major impetus for the Statute of Frauds appears to have been the complications connected with the enforcement of the nuncupative wills in personalty, which for obvious reasons were particularly vulnerable to fraudulent claims,[149] along with the rampant land sales fraud that apparently existed prior to the statute's enactment.[150] "By imposing writing requirements on real estate transactions and writing and witnessing requirements on wills, the Statute made it easier to determine who actually owned property."[151] Moreover, the Statute of Frauds set the standard of evidence required to prove the validity of a transfer by will, thereby providing for uniform enforcement.[152] The Statute of Frauds specifically stated that no disposition of property by will would be valid unless the testator complied with the statutory requisites.[153]

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148. Statute of Frauds, 1676, 29 Car. 2, ch. 3, *reprinted in* A. REPPY & L. TOMPKINS, *supra* note 64, at 195-97. The statute was the last of four attempts to draft a law preventing frauds and perjuries. For legislative history, see 6 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 380-84 (2d ed. 1937).

149. E. JENKS, A SHORT HISTORY OF ENGLISH LAW 269 (2d ed. 1922). The ecclesiastical courts were criticized for their "scandalous laxity" in permitting enforcement of oral wills. *Id.* Some scholars attribute the wills provisions of the Statute of Frauds, which makes it "practically impossible to make an oral will," Nelson & Starck, *supra* note 32, at 338, to the attempted fraud of an elderly decedent's young wife in the case of *Cole v. Mordaunt*, *discussed in* A. REPPY & L. TOMPKINS, *supra* note 64, at 9 (citing a note to Mathews v. Warner, 4 Ves. Jr. 186, 31 Eng. Rep. 96 (1798)). In that case an elderly testator had married a wife of questionable character. At his death he left a substantial portion of his property to charity. His wife produced nine witnesses who perjured themselves in an attempt to prove that he had made a nuncupative deathbed testament, leaving his entire property to her. The fraudulent scheme was exposed on appeal. At the hearing before the King's Bench, Lord Nottingham remarked that he hoped one day to see legislation enacted that would prevent revocation except in writing. *Id.* Nottingham is credited as one of the major authors of the Statute of Frauds, 6 W. HOLDSWORTH, *supra* note 148, at 384, which was enacted the following year. A. REPPY & L. TOMPKINS, *supra* note 64, at 9. Certain sections of the statute relating to testaments were supposedly designed to meet the dangers emphasized in *Cole v. Mordaunt*. *Id.*

150. Lindgren, *supra* note 58, at 550. There were few controls on the sale of land at this period: land was sometimes sold more than once by its owners, and sometimes by people who did not own it at all. Buyers had no means of determining whether they were actually purchasing an enforceable title. *Id.*

151. *Id.* at 551.

152. 6 W. HOLDSWORTH, *supra* note 148, at 388-89 (the Statute of Frauds made certain kinds of evidence necessary for the proof of certain transactions).

153. Statute of Frauds, 1676, 29 Car. 2, ch. 3, *reprinted in* A. REPPY & L. TOMPKINS, *supra* note 64, at 195-97. The Statute of Frauds applied both to realty and personalty.

> [A]ll *devises and bequests* of any *lands or tenements*, devisable either by force of the statute of will, or by this statute, or by force of the custom of *Kent*, or the custom of any borough, or any other particular custom, shall be in writing, and

The Statute of Frauds' formalities thus served two purposes: facilitating proof of wills[154] and reducing the chances of fraudulent claims against decedent's estates. Unfortunately, while the statute successfully eliminated "blanket assertions of nuncupative wills,"[155] the formal requirements of the statute also produced, very early on, instances in which well-intentioned wills were held invalid for failure to meet the technical requirements of the statute.[156] In 1757, Lord Mansfield wrote in the case of *Windham v. Chetwynd*[157] that he was convinced that more "fair wills have been overturned for want of the form, than fraudulent have been prevented by introducing it. I . . . hardly recollect a case of a forged or fraudulent will, where it has not been solemnly attested."[158]

By more or less limiting the oral will out of existence,[159] the Statute of Frauds was fairly successful in achieving the prophylactic purpose of eliminating fraudulent claims.[160] With oral wills eliminated and litigation over fraudulent conveyancing significantly reduced, the problem of the invalidation of well-intentioned but defective wills became paramount. Judicial manipulation of the Statute's formalities, particu-

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signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, *or else they shall be utterly void and of none effect.*

Id. (emphasis added). For discussion of the provisions of the statute, see 6 W. HOLDSWORTH, *supra* note 148, at 384-87.

154. 6 W. HOLDSWORTH, *supra* note 148, at 388-89.

155. Nelson & Starck, *supra* note 32, at 339. The circumstances in which a testator could make an oral will were severely limited. To be valid, a nuncupative will (limited to the testator's chattels) had to be made in the presence of three witnesses in the testator's own habitation or where the testator had been resident for ten days, unless the person was taken ill or injured suddenly while away from home. A. REPPY & L. TOMPKINS, *supra* note 64, at 9-10. The testimony of the three witnesses had to be received within six months of the making of the will, unless it had been committed to writing within six days after the execution of the will. T. ATKINSON, *supra* note 42, at 19-20; A. REPPY & L. TOMPKINS, *supra* note 64, at 9-10. No written will could be revoked by an oral will, unless certain requirements of the statute were observed. A. REPPY & L. TOMPKINS, *supra* note 64, at 10.

156. *See* Nelson & Starck, *supra* note 32, at 340.

157. 97 Eng. Rep. 377 (K.B. 1757).

158. *Id.* at 381. For discussion, see 6 W. HOLDSWORTH, *supra* note 148, at 394-95; Nelson & Starck, *supra* note 32, at 340.

159. H. SUGDEN, AN ESSAY ON THE LAW OF WILLS AS ALTERED BY THE 1 VICTORIA, ch. 26, 181 app. (1837).

160. *See* Lindgren, *supra* note 58, at 551 (stating that within a few decades the statute had accomplished its purpose, fraudulent real estate transactions and fraudulent conveyance actions became rare, and recording of deeds became commonplace); Nelson & Starck, *supra* note 32, at 339-40.

larly in the ecclesiastical courts, to give effect to intent in instances in which the testator had not observed the statutory mandate, produced enough confusion and distortion in the law to prompt a third reform: the Statute of Wills of 1837.[161] Before 1837, the English courts often took considerable liberties with the formalities of the Statute of Frauds in order to find defectively executed wills "in compliance" with the formal requirements of the statute.[162]

In *Windham*, Lord Mansfield went so far as to say that "Judges should lean against objections to the formality [of attestation]. They have always done so, in every construction upon the words of the statute. . . . And still more ought they to do so, if that system would spread a snare, in which many honest wills must unavoidably be entangled. . . ."[163]

The result of this concept of substantial compliance applied to the formalities of the statute was that in many cases the English courts, satisfied that testamentary intent existed, admitted to probate wills that were incomplete, unexecuted, or both.[164] In *Mathews v. Warner*,[165] the court said,

> [I]f such things are to be established as wills, it loudly requires the interference of the legislature to prevent such a latitude in that respect, as makes the disposing of all a man's fortune the most slight and trivial act, attended with much less of form, solemnity, and precision, than any act he could do with regard to any part of his property during his life.[166]

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161. Nelson & Starck, *supra* note 32, at 340 (citing E. EDWARDS, THE NEW STATUTE OF WILLS, 1 Vict. ch. 26, 2 (1846)). The 1837 Act represented a rethinking of the formalities required for making a will. Statute of Wills, 1837, 7 Will. 4 & 1 Vict. ch. 26, *reprinted in* A. REPPY & L. TOMPKINS, *supra* note 64, at 211-20. For relevant text, see *infra* note 172.

162. *See, e.g.*, Allen v. Manning, 162 Eng. Rep. 374 (1825) (upholding unexecuted draft will on the grounds that testator had only been prevented from executing by an "act of God" upheld in instance in which testator had given attorney instructions respecting intended will but died without executing it); Huntington v. Huntington, 161 Eng. Rep. 1123 (1814) (upholding draft will dictated to attorney by testator and specifically approved by him, though he died before he could execute it); Scott v. Rhodes, 161 Eng. Rep. 898 (1809) (upholding will though will was neither complete nor executed). The Chancery courts were likewise biased "against a too literal construction of the statute; and naturally that bias was also found in the decisions of judges like Lord Mansfield, who aimed at improving the law by the recognition of equitable principles." 6 W. HOLDSWORTH, *supra* note 148, at 393-94. As a result of this liberal construction of the Statute of Frauds, many exceptions to the strict requirements developed. *Id.*

163. *Windham*, 97 Eng. Rep. at 381.

164. *See supra* note 162 for examples.

165. 31 Eng. Rep. 96 (1798).

166. *Id.* at 106. Other judges also lamented the latitude with which the statute was applied in various contexts. 6 W. HOLDSWORTH, *supra* note 148, at 395.

In 1833, a royal commission (the Fourth Royal Commission) undertook to study wills and probate and to recommend changes in the law.[167] One purpose of the 1837 Wills Act was an amendment intended "to remove all doubt and latitude of interpretation" respecting procedures for executing wills.[168] Nelson and Starck note that the Commission's ultimate recommendations indicate that their primary concern was "to create practical formalities to assure adequate evidence would be available at the testator's death, while at the same time not unduly burdening the courts with formalities which would only serve to defeat true wills."[169] There was a shift in emphasis "from restrictions upon testation to formalities which are designed to implement and facilitate testamentary intent. . . . The only mention of the prevention of fraud and perjury as a realistic goal of the Statute was made when the Commission discussed its reasons for recommending the nonrecognition of holographic and nuncupative wills."[170]

The Commission's recommendations were incorporated in the Statute of Wills of 1837.[171] Section IX of the 1837 Act requires a writing subscribed by the testator and two witnesses, and signed or acknowledged by the testator in the presence of both in order for a will to be valid and enforceable.[172] Section II of the Act specifically repeals the Statute of Frauds provision authorizing nuncupative wills under certain circumstances.[173] The Commission stressed the importance of

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167. *See* H. SUGDEN, *supra* note 159, at 177 (setting out extracts from the reports of the Fourth Real Property Commission); *see also* 15 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 172 (1965) (discussing the Fourth Report).

168. E. EDWARDS, THE NEW STATUTE OF WILLS, 1 Vict. ch. 26, 2 (1846), *quoted in* Nelson & Starck, *supra* note 32, at 340 n.67.

169. Nelson & Starck, *supra* note 32, at 344.

170. *Id.* at 344-45.

171. *Id.* at 343.

172. Wills Act, 7 Will. 4 & 1 Vict., ch. 26, § IX, *reprinted in* A. REPPY & L. TOMKINS, *supra* note 64, at 215-16.

> [N]o will shall be valid unless it shall be in Writing and Executed in manner herein-after mentioned; (that is to say,) it shall be signed at the Foot or End thereof by the Testator, or by some other Person in his Presence and by his Direction; and such Signature shall be made or acknowledged by the Testator in the Presence of Two or more Witnesses present at the same Time, and such Witnesses shall attest and shall subscribe the Will in the Presence of the Testator, but no Form of Attestation shall be necessary.

Id. Publication was not required. *Id.* § XIII, at 216.

173. *Id.* § II, at 212-13. The Commission thought that "if nuncupative or irregular wills were allowed . . . the property of every person who died away from his family would be liable to be fraudulently taken from them by the perjury of persons who were, or might pretend to have been, near him at the time of his death. H. SUGDEN, *supra* note 159, at 182 (*reprinted in* Nelson & Starck, *supra* note 32, at 343 n.83).

having wills attested by two competent witnesses.[174] The Commission did, however, show concern about the possibility of invalidation of well-intentioned wills on technical grounds due to noncompliance with the formalities in proposing that the Statute of Frauds requirement that the witnesses sign the will in the presence of the testator be repealed.[175] The Commission thought that "the additional security which may be obtained by requiring the witnesses to sign in the testator's presence, is of so much importance as the burthen [sic] and danger of imposing such a restriction."[176] The legislature rejected this recommendation, however, and the requirement remained in force.[177]

(2) The Model Probate Code of 1946

Until promulgation of the 1969 UPC,[178] the formalities required in all United States jurisdictions for a formal will were those derived from an English model, either the Statute of Frauds of 1677 or the 1837 amendment of the Statute of Wills.[179] In 1941, the American Bar Association made a comprehensive attempt to reform American probate law through the Model Probate Code (MPC).[180]

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174. *See* H. SUGDEN, *supra* note 159, at 179-80, 187.

175. *Id.* at 183-84.

176. *Id.* at 184.

177. For text of the 1837 act, § IX, see *supra* note 172.

178. For discussion of the 1969 UPC attested wills' provisions, see *infra* notes 183-203 and accompanying text.

179. Nelson & Starck, *supra* note 32, at 345 (stating that "Today every state in the union and the District of Columbia have statutes requiring essentially the same formalities as the Statute of Wills of 1837."); *but see* T. ATKINSON, *supra* note 42, at 21 (stating that changes in English law after the Revolutionary War did influence American law but are not part of the American legal heritage and detailing various discrepancies).

180. L. SIMES & P. BASYE, PROBLEMS IN PROBATE LAW INCLUDING A MODEL PROBATE CODE (1946). In 1939, the Real Property, Probate, and Trust Law Section of the American Bar Association started a research project that culminated in the publication of the Model Probate Code of 1946 (MPC). *Uniform Probate Code Approved by Council*, 4 REAL PROP., PROB., & TR. J. 206, 207 (1969); Fratcher, *Toward Uniform Succession Legislation*, 41 N.Y.U. L. REV. 1037, 1038-39 (1966); Wellman, *New UPC*, *supra* note 42, at 637; *see* L. SIMES & P. BASYE, *supra* at 4-13. Under the direction of Professor Lewis Simes of the University of Michigan, the project was intended to modernize probate procedures among the states. *Uniform Probate Code Approved by Council*, *supra*, at 207; *see* L. SIMES & P. BASYE, *supra*, at 10-11; Fratcher, *supra*, at 1070-73; Wellman, *supra* note 42, at 637. The Real Property, Probate, and Trust Law section studied state probate statutes, legislative history, and case law to identify major problems in probate practice. In addition, they also considered and to some extent incorporated provisions adapted from other Model Acts, including a 1940 Model Act for execution of wills. L. SIMES & P. BASYE, *supra*, at 10-12. The MPC was intended to provide a guideline for the improvement

In many respects, the MPC was quite innovative; its provision for the execution and revocation of wills, however, was less than revolutionary. It preserved all of the traditional formalities — publication, testator signing in the presence of both witnesses, and attestation by the witnesses in the presence of the testator and each other — except the requirement that the will be signed at the end.[181] Mechem sharply criticized the provision and argued that the philosophy of the wills acts "should be to impose only such requirements as seem so unmistakably essential to a safe will-making process as to justify running the known risk of defeating meritorious wills through failure of testators to know or comply with the requirements."[182]

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of probate practice in the states. The MPC was not directed toward promulgation of uniform laws; its objective was "not the attainment of uniformity among the several states, but the improvement of probate procedure wherever revision of probate legislation is sought." *Id.* at 10. The MPC was intended to serve as "a reservoir of ideas, and of acceptable legislative formulations of those ideas," *id.*, and to this extent differed from the UPC, with respect to which eventual uniformity among the states has always been an objective. *See* Wellman, *supra* note 42, at 639.

No state adopted the MPC in its entirety, but several states enacted parts of it, and others were influenced by the MPC. Fratcher, *supra*, at 1039; *see* Wellman, *supra* note 42, at 637 (stating that the MPC had "significant effect" on probate code changes adopted in several states after 1966).

For background, see Atkinson, *Old Principles and New Ideas Concerning Probate Court Procedure*, 23 J. AM. JUDICATURE SOC'Y 137 (1939) (suggesting recommendations for improving the administration of estates); Atkinson, *Wanted — A Model Probate Code*, 23 J. AM. JUDICATURE SOC'Y 183 (1940) (calling for the drafting of a nationally uniform probate code).

181. MODEL PROB. CODE § 47, *reprinted in* L. SIMES & P. BASYE, *supra* note 180, at 81-82. The MPC attested wills' provision reads as follows:

> (a) Testator. The testator shall signify to the attesting witnesses that the instrument is his will and either
>
> (1) Himself sign, or
>
> (2) Acknowledge his signature already made, or
>
> (3) At his direction and in his presence have someone else sign his name for him, and
>
> (4) In any of the above cases the act must be done in the presence of two or more attesting witnesses.
>
> (b) Witnesses. The attesting witnesses must sign
>
> (1) In the presence of the testator, and
>
> (2) In the presence of each other.

MODEL PROBATE CODE § 47, *reprinted in* L. SIMES & P. BASYE, *supra* note 180, at 81-82. The Code included a provision for nuncupative wills similar to that in the Statute of Frauds of 1677, as well as a provision for holographic wills requiring that the signature and all the material provisions of a holographic will be in the testator's handwriting and that the handwriting be proved by two witnesses. MODEL PROB. CODE § 48 (holographic will) and § 49 (nuncupative will), *reprinted in* L. SIMES & P. BASYE, *supra* note 180, at 81-82.

182. Mechem, *Why Not a Modern Wills Act?*, 33 IOWA L. REV. 501, 503 (1947). In rebutting another commentator's description of the MPC as the product of "the fairness, the imagination,

(3) The Uniform Probate Code

In 1962, the American Bar Association Section of Real Property, Probate and Trust Laws appointed a special committee on revision of the MPC.[183] This committee joined with the Special Committee on Uniform Probate Code appointed by the National Conference on Uniform State Laws in 1962,[184] and the two committees agreed to revise the MPC with the objective of eventual promulgation by the National Conference of a Uniform Probate Code.[185] The wills execution provisions that eventually developed out of the work of these committees were designed according to a philosophy very similar to that expressed by Mechem.[186] The preface to the 1969 UPC announced: "If the will is to be restored to its role as the major instrument for disposition of wealth at death, its execution must be kept simple. The basic intent of these sections is to validate the will whenever possible."[187] Although

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the resourcefulness and the restrained audacity of the draftsmen," Niles, *Model Probate Code and Monographs on Probate Law: A Review*, 45 MICH. L. REV. 321 (1947), Mechem stated:

> The draftsmen here seem . . . to have displayed anything but imagination, resourcefulness, or audacity, restrained or otherwise. On the contrary, these provisions seem . . . almost incredibly reactionary, unimaginative, and timid. The Statute of Frauds was passed in 1677. One is asked to think either that that famous enactment was so perfect as to need no improvement or that the framers of the Code have learned nothing from the experience of the intervening 270 years.

Mechem, *supra*, at 501.

183. The process began with a preliminary study of the MPC. Fratcher, *supra* note 180, at 1039; *Uniform Probate Code Approved by Council*, *supra* note 180, at 207. For discussion of the development of uniform probate legislation by the Research Director in charge of the preliminary studies, see Fratcher, *supra* note 180, at 1037. For additional articles discussing the evolution of the UPC, see Langrock, *Uniform Probate Code: What Price Certainty?*, 6 TRIAL 23 (1970); Wellman, *New UPC*, *supra* note 42, at 637; Note, *supra* note 42, at 327.

184. Fratcher, *supra* note 180, at 1039; *Uniform Probate Code Approved by Council*, *supra* note 180, at 207.

185. Fratcher, *supra* note 180, at 1039; *Uniform Probate Code Approved by Council*, *supra* note 180, at 207.

186. For discussion of Mechem's views on the Model Probate Code, see *supra* text accompanying notes 181-82.

187. UNIF. PROB. CODE art. 2, pt. 5 general comment (1969). The Code was in part a response to growing criticism of the probate process. *See, e.g.*, N. DACEY, *1965*, *supra* note 42, at 1 (describing how to use will substitutes to avoid probate); Straus, *Is the Uniform Probate Code the Answer?*, 111 TR. & EST. 870 (1972); Wellman, *UPC and Probate Avoidance*, *supra* note 42, at 191; *see also* Bloom, *The Mess in Our Probate Courts*, READER'S DIGEST, Oct. 1966, at 102 (describing problems with our probate system).

188. *See* Wellman, *The Uniform Probate Code: Blueprint for Reform in the 70's*, 2 CONN. L. REV. 453 (1970); Wellman & Gordon, *supra* note 57, at 357. For other articles discussing the impact of the 1969 UPC, see, e.g., Crapo, *The Uniform Probate Code — Does it Really Work?*, 1976 B.Y.U. L. REV. 395; DuPont, *The Impact of the Uniform Probate Code on Court Structure*, 6 U. MICH. J.L. REF. 375 (1975); Kossow, *supra* note 57; Parker, *No-Notice Probate*

the UPC has not achieved universal acceptance during the twenty years following its inception, it has had a profound impact on probate law in every jurisdiction, and has continued slowly to gain ground over the years.[188]

To date, fifteen states have adopted the UPC.[189] Moreover, article II of the UPC has significantly influenced the interpretation of probate law and probate reform in virtually every state.[190] Today, only a few American common law jurisdictions retain the more arcane wills act formalities.[191] It is difficult to overstate the significance of the UPC to probate reform in the United States.

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and Non-Intervention Administration Under the Code, 2 CONN. L. REV. 546 (1970); Straus, *supra* note 187, at 870; Wellman & Clark, *Multiple Party Accounts: Georgia Law Compared with the Uniform Probate Code*, 8 GA. L. REV. 739 (1974); Zartman, *An Illinois Critique of the Uniform Probate Code*, 1970 U. ILL. L. REV. 413; Comment, *Non-Probate Transfers — Provisions Relating to Effect of Death: Will UPC § 6-201 Be "Effective" in Nebraska*, 12 CREIGHTON L. REV. 1173 (1979).

189. These states are Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Maine, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Dakota, South Carolina, and Utah. For statutory code sections, see *infra* note 191.

190. L. AVERILL, UNIFORM PROBATE CODE IN A NUTSHELL 8-9 (1987). Averill explains,

> The influence and the use of the Code is growing in a variety of ways. The laws of nearly all if not all states have been affected by the Code. The primary vehicles of influence are as follows:
>
> (1) Enactment as a Code in full with some amendments. . . .
>
> (2) Piece-meal enactment of segments or sections of the Code for inclusion into another probate code or law. Nearly all the other states have enacted some part or section of the Code. Sections of article 2 [Wills Act] have been particularly popular. . . .
>
> (3) Referred to as a model of modern policy by a court interpreting its own Code provision. . . .
>
> (4) Referred to as secondary or persuasive authority for determining proper rules of construction for the common law. . . . Even if comprehensive enactment does not continue, the Code's influence over the law of probate and related matters will continue to increase.

Id. at 8-9.

191. Fifteen states require essentially the same execution formalities as the 1969 UPC. ALA. CODE § 43-8-131 (1990); ALASKA STAT. § 13.11.155 (1990); ARIZ. REV. STAT. ANN. § 14-2502 (1990); COLO. REV. STAT. § 15-11-502 (1990); HAW. REV. STAT. § 560:2-502 (1990); IDAHO CODE § 15-2-502 (1990); ME. REV. STAT. ANN. tit. 18A, § 2-502 (1989); MICH. COMP. LAWS § 700.122(1) (1991); MINN. STAT. § 524.2-502 (1990); MONT. CODE ANN. § 72-2-302 (1990); NEB. REV. STAT. § 30-2327 (1989); N.J. REV. STAT. § 3B:3-2 (1990); N.D. CENT. CODE ANN. § 30.1-08-02 (Michie 1991); OR. REV. STAT. § 112.235 (1989); S.C. CODE ANN. § 62-2-502 (Law. Co-op. 1991). For the relevant text of UNIF. PROB. CODE § 2-502 (1969), see *infra* note 192.

Fifteen states require only that the will be in writing, signed by the testator and attested by two witnesses in the presence of the testator. CONN. GEN. STAT. § 45-161 (1990); DEL. CODE ANN. tit. 12, § 202 (1990); GA. CODE ANN. § 53-2-40 (1991); ILL. REV. STAT. ch. 110

The 1969 UPC provision for formal wills minimized the level of formality required for attestation.[192] Under the 1969 UPC provision,

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1/2, para. 4-3 (1989); MD. EST. & TRUSTS CODE ANN. § 4-102 (1990); MASS. GEN. LAWS ANN. ch. 191, § 1 (West 1991); MISS. CODE ANN. § 91-5-1 (1990); MO. REV. STAT. § 474.320 (1990); NEV. REV. STAT. § 133.040 (1989); N.H. REV. STAT. ANN. § 551:2 (1990); TEX. PROB. CODE ANN. § 59 (Vernon 1991); VT. STAT. ANN. tit. 14, § 5 (1990); WASH. REV. CODE ANN. § 11.12.020 (1990); WIS. STAT. ANN. § 853.03 (West 1990); WYO. STAT. § 2-6-112 (1991).

All but two statutes require two witnesses. VT. STAT. ANN. tit. 14, § 5 (1990); LA. CIV. CODE ANN. art. 1584 (West 1990).

Twenty-seven states require that the witnesses sign the will in the presence of the testator. ARK. STAT. ANN. § 28-25-103 (1991); CONN. GEN. STAT. § 45-161 (1990); DEL. CODE ANN. tit. 12 § 202 (1990); FLA. STAT. § 732.502 (1990); GA. CODE ANN. § 53-2-40 (1991); ILL. REV. STAT. ch. 110 1/2, para. 4-3 (1989); IND. CODE ANN. § 29-1-5-3 (Burns 1990); IOWA CODE § 633.279 (1989); KY. REV. STAT. ANN. § 394.040 (Michie 1991); MD. EST. & TRUSTS CODE ANN. § 4-103 (1990); MISS. CODE ANN. § 91-5-1 (1990); MO. REV. STAT. § 474.320 (1990); NEV. REV. STAT. § 133.040 (1989); N.H. REV. STAT. ANN. § 551:2 (1990); N.M. STAT. ANN. ch. 45 § 2-502 (1991); N.Y. EST. POWERS & TRUSTS LAW § 3-2.1 (McKinney 1991); N.C. GEN. STAT. § 31-3.3 (1991); OHIO REV. CODE ANN. § 2107.03 (Baldwin 1991); OKLA. STAT. ANN. tit. 84, § 56 (West 1990); S.D. CODFIED LAWS § 29-2-6 (1991); TENN. CODE ANN. § 32-1-104 (1990); TEX. PROB. CODE ANN. 59 (Vernon 1991); UTAH CODE ANN. § 75-2-502 (1991); VT. STAT. ANN. tit. 14, § 5 (1990); VA. CODE ANN. § 64.1-49 (1991); WASH. REV. CODE ANN. § 11.12.020 (1990); WIS. STAT. ANN. § 853.03 (West 1990).

Thirteen states require the testator to sign the will or acknowledge the signature in the presence of both witnesses. ARK. STAT. ANN. § 28-25-103 (1991); CAL. PROB. CODE § 6110 (West 1991); FLA. STAT. § 732.502 (1990); IND. CODE ANN. § 29-1-5-3 (Burns 1990); IOWA CODE § 633.279 (1989); KY. REV. STAT. ANN. § 394.040 (Michie 1991); N.M. STAT. ANN. ch. 45 § 2-502 (1991); R.I. GEN. LAWS § 33-5-5 (1990); S.D. CODIFIED LAWS § 29-2-6 (1991); TENN. CODE ANN. § 32-1-104 (1990); UTAH CODE ANN. § 75-2-502 (1991); VA. CODE ANN. § 64.1-49 (1991); W. VA. CODE § 43-1-3 (1991).

Eight states require that the witnesses sign in the presence of each other. ARK. STAT. ANN. § 28-25-103 (1991); FLA. STAT. § 732.502 (Supp. 1990); IND. CODE ANN. § 29-1-5-3 (Burns 1990); IOWA CODE § 633.279 (1989); KY. REV. STAT. ANN. § 394.040 (Michie 1991); N.M. STAT. ANN. ch. 45 § 2-502 (1991); TENN. CODE ANN. § 32-1-104 (1990); UTAH CODE ANN. § 75-2-502 (1991).

Seven states require the testator to sign the will at the end. ARK. STAT. ANN. § 28-25-103 (1991); FLA. STAT. § 732.502 (Supp. 1990); KAN. STAT. ANN. § 59-606 (1990); OHIO REV. CODE ANN. § 2107.03 (Baldwin 1991); OKLA. STAT. ANN. tit. 84, § 56 (West 1990); 20 PA. CONS. STAT. ANN. § 2502 (Purdon 1989); S.D. CODIFIED LAWS ANN. § 29-2-6 (1991).

In two states the witnesses must also sign at the end of the will. OKLA. STAT. ANN. tit. 84, § 56 (West 1990); S.D. COMP. LAWS ANN. § 29-2-6 (1991).

In eleven states the testator must publish the will. ARK. STAT. ANN. § 28-25-103 (1991); CAL. PROB. CODE § 6110 (West 1991); IND. CODE ANN. § 29-1-5-3 (Burns 1990); IOWA CODE § 633.279 (1989); LA. CIV. CODE ANN. art. 1584 (West 1990); N.C. GEN. STAT. § 31-3.3 (1990); OKLA. STAT. ANN. tit. 84, § 56 (West 1990); N.Y. EST. POWERS & TRUSTS LAW § 3-2.1 (McKinney 1991); 20 PA. CONS. STAT. ANN. § 2502 (Purdon 1991); S.D. CODIFIED LAWS ANN. § 29-2-6 (1991); TENN. CODE ANN. § 32-1-104 (1990).

192. UNIF. PROB. CODE § 2-502 (1969). The UPC requires the following for attestation:

> Every will shall be in writing signed by the testator or in the testator's name by

a will was validly executed if the testator: (1) put directions for property disposition, estate administration, or guardianship in writing; (2) signed the document or directed someone to sign the document in his or her presence; and (3) obtained the signatures of two witnesses each of whom had either witnessed the testator's signing of the will or the testator's acknowledgment of the signature.[193] The 1969 provision did not require the testator to sign the document at the foot or end, publish the will, or witness the signature of the witnesses.[194] The witnesses were not required to sign the will in one another's presence.[195]

One commentator suggests that the 1969 UPC requirements for a formal will might be literally fulfilled if the testator simply signed the will, acknowledged the fact by telephone to two friends, and then mailed the will to them to be signed.[196] An Idaho court recently construed Idaho's modified version of the 1969 UPC provision to require an "in-person contact" between the testator and witnesses, even though the original provision does not seem to require such contact.[197]

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some other person in the testator's presence and by his direction, and shall be signed by at least 2 persons each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will.

Id.

193. *See id.*

194. *Id.*

195. *Id.*

196. Kossow, *supra* note 188, at 1380. Kossow considered such a construction to be undesirable because "the possibility of fraud or substitution of the wrong document would render unreliable the document being offered to probate" and would "negate the basic policy of the Statute of Frauds." *Id.*

197. Estate of McGurrin, 113 Idaho 341, 743 P.2d 994 (Ct. App. 1987). The testator dictated his will while in the hospital and asked the person who prepared the writing to take it to her home and have it witnessed by her mother and sister. This was done, and the testator then telephoned the intended witnesses and thanked them. *Id.* at 342, 743 P.2d at 995. The Idaho court distinguished between the "signatory" and "observatory" functions of witnesses. *Id.* at 345, 743 P.2d at 998 (citing Estate of Peters, 107 N.J. 263, 526 A.2d 1005 (1987), discussed *infra* notes 198-99 and accompanying text). The court said that although the Idaho Legislature had intended by adopting the UPC requirement "to eliminate several burdensome requirements found in many state statutes," they still retained the requirement that the witnesses sign in the presence of the testator. *Id.* The court cited legislative history indicating that the Idaho Legislature deliberately drafted the provision to clarify the need for "in person contact" and for some act by the testator that could be actually "witnessed" in order for the will to be valid. *Id.* "[W]itnessing meant more than merely perceiving the existence of a document and signing it. Witnessing meant perceiving an act of the testator — signing or acknowledging the will — and memorializing this perception by subscribing the document." *Id.* The court concluded that Idaho testators are required to declare their acknowledgments in the presence of their witnesses, even though they are not actually required to sign in the presence of the witnesses. *Id.*

A further question left unanswered by the language of the 1969 provision is whether the witnesses are required to sign the will at the time that they witness the testator's signature or acknowledgment. Cases have arisen in which the witnesses did not actually sign the will until after the testator's death. A New Jersey court recently suggested that such wills may be valid if the witnesses sign the will within a "reasonable period of time" after witnessing the testator's signature or acknowledgment,[198] though the court held that fifteen months after the testator died was too long a delay to be reasonable.[199]

The 1990 UPC provision for formal wills[200] resolves certain interpretation issues, but does not alter significantly the formalities required by the 1969 provision. However, new section 2-502(a) does subject its requirements to the new harmless error rule in section 2-503, thus creating in section 2-503 an exception to the execution requirements of section 2-502.[201] New section 2-502(a) requires every formal will to be:

> (1) in writing,
> (2) signed by the testator or in the testator's name by some other individual in the testator's conscious presence and by his [or her] direction, and

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198. Estate of Peters, 107 N.J. 263, 275, 526 A.2d 1005, 1011 (1987). For discussion of this case, see Note, *Failure of Witnesses to Sign Otherwise Valid Will Within a Reasonable Time After Testator's Execution Bars Admission to Probate*, 19 SETON HALL L. REV. 772 (1989).

199. *Peters*, 107 N.J. at 283, 526 A.2d at 1011. The trial court found that the will had been signed by the testator in the presence of two witnesses. The trial court considered the fact that the witnesses did not sign the will until 15 months after the testator's death, "a mere quirk, which should not be allowed to frustrate the obvious testamentary intent." *Id.* at 268, 526 A.2d at 1007.

The court of appeals disagreed, holding that the legislature did not intend to eliminate the requirement that the execution of a will be witnessed. *Id.* at 274, 526 A.2d at 1010. The court distinguished the "observatory" and "signatory" functions of witnesses to a will and held that in this instance the signatory function was not met. The court concluded that "the statute requires that the signatures of witnesses be affixed to a will within a reasonable period of time from the execution of the will." *Id.* at 275, 526 A.2d at 1011.

In determining that the time period in this case was unreasonable, the court considered two factors: "(1) the fact that the witness signed after the testator's death; and (2) the fact that some eighteen months passed between the observatory and signatory functions of the witness." *Id.* at 278, 526 A.2d at 1012. The court found that "the interval between the signing of the testator and the signing of the witnesses was too long to have been reasonably within the contemplation of the statute." *Id.* at 279, 526 A.2d at 1013.

200. UNIF. PROB. CODE § 2-502(a) (1990).

201. *Id.* § 2-502(a) (In addition, UPC § 2-502(a) is expressly subject to § 2-513, which provides that a writing disposing of tangible personal property not disposed of by will is admissible at probate despite noncompliance with the execution requirements under certain circumstances, and to § 2-506 which determines choice of law in wills cases.). *Id.*

> (3) signed by at least two individuals, each of whom signed within a reasonable time after he [or she] witnessed either the signing of the will as described in paragraph (2) or the testator's acknowledgment of that signature or acknowledgment of the will.[202]

The revised version requires that the witnesses sign the will "within a reasonable time" after the witnessed act, but does not expressly address the issue of whether the witness must be in the testator's presence at the time of the testator's signature or acknowledgment. The comments imply that "in-person contact" between the testator and the witnesses is not required; whether this is intended depends on what is meant by the requirement that the signing or acknowledgment be witnessed — in other words, on the interpretation of the verb "witness."[203]

b. Holographic wills

(1) Traditional statutes

Holographic wills represent an alternative mode of testation derived from the civil law.[204] The holographic form is not recognized in

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202. *Id.*

203. UNIF. PROB. CODE § 2-502(a) comment (1990). The comment elaborates on the meaning of "to witness."

> The testator may sign the will outside the presence of the witnesses, if he or she later acknowledges to the witnesses that the signature is his or hers (or that his or her name was signed by another) or that the document is his or her will. An acknowledgment need not be expressly stated but can be inferred from the testator's conduct. . . . The witnesses must sign as witnesses . . . within a reasonable time after having witnessed the signing or acknowledgement. There is, however, no requirement that the witnesses sign before the testator's death.

Id.

For a discussion of the interpretation of "witness" by the 1969 courts, see *supra* text accompanying notes 196-99.

204. Bird, *Sleight of Handwriting: The Holographic Will in California*, 32 HASTINGS L.J. 605 (1981).

> The more remote origins of the holographic will are obscure; however, scholars are sure that it is a fairly ancient legal device with its roots in civil rather than common law. The holographic testament was recognized under certain circumstances in Roman law; by the seventh century, the Visigoths had developed a form substantially identical to the modern version. Thereafter, the holograph dropped out of use for several centuries, reappearing in the customary law of France. It found its way into the *Code Napoleon*, and thence to the New World, where it initially surfaced in Louisiana and Virginia.

Id. at 606 (citations omitted).

England or in common law jurisdictions that have a purely English tradition; during the deliberations that produced the Wills Act of 1837, the Fourth Real Property Commission rejected the notion of permitting holographic wills.[205] Apparently, due to the influence of French and Spanish civil law in North America, certain jurisdictions in the United States and Canada have traditionally permitted the holograph.[206] Where authorized, the holographic form is invariably allowed as an *alternative* to the formal attested will.[207] One policy underlying civil law recognition of the holographic form was apparently to prevent the invalidation of wills that were left unattested because the testator was for some reason either unwilling or unable to procure witnesses.[208]

Traditionally, a holographic will was a signed but unattested testamentary document written *entirely* in the testator's own hand.[209]

For a history of holographic wills, see Parker, *History of the Holographic Testament in the Civil Law*, 3 JURIST 1 (1943); Comment, *Holographic Wills and their Dating*, 28 YALE L.J. 72 (1918).

205. H. SUGDEN, *supra* note 159, at 342.

206. Fratcher, *supra* note 180, at 1053. At present, twenty-six states permit some form of holographic will. ALASKA STAT. § 13.11.160 (1990); ARIZ. REV. STAT. ANN. § 14-2503 (1990); ARK. STAT. ANN. § 28-25-104 (1991) (added requirement of three witnesses and entire document must be handwritten); CAL. PROB. CODE § 6111 (West 1991); COLO. REV. STAT. § 15-11-503 (1990); IDAHO CODE § 15-2-503 (1990); KY. REV. STAT. ANN. § 394.040 (Michie 1991) (entire document must be handwritten); LA. CIV. CODE ANN. art. 1588 (West 1990) (entire document must be handwritten); ME. REV. STAT. ANN. tit. 18-A, § 2-503 (1989); MD. EST. & TRUSTS CODE ANN. § 4-103 (1990) (only permits soldiers and sailors to make holographic wills); MICH. COMP. LAWS § 700.123 (1991); MISS. CODE ANN. § 91-5-1 (1990) (entire document must be handwritten); MONT. CODE ANN. § 72-2-303 (1990); NEB. REV. STAT. § 30-2328 (1989); NEV. REV. STAT. § 133-090 (1989) (entire document must be handwritten); N.J. REV. STAT. § 3B:3-3 (1990); N.Y. EST. POWERS & TRUSTS LAW § 3-2.2 (McKinney 1991); N.C. GEN. STAT. § 31-3.4 (1991); N.D. CENT. CODE § 30.1-08-03 (1976); OKLA. STAT. ANN. tit. 84, § 54 (West 1990) (entire document must be handwritten); S.D. CODIFIED LAWS § 29-2-8 (1991) (entire document must be handwritten); TENN. CODE ANN. § 32-1-105 (1990); TEX. PROB. CODE ANN. § 60 (Vernon 1991) (entire document must be handwritten); UTAH CODE ANN. § 75-2-503 (1991); VA. CODE ANN. § 64.1-49 (1987); W. VA. CODE § 41-1-3 (1991) (entire document must be handwritten); WYO. STAT. § 2-6-113 (1991) (entire document must be handwritten).

207. For discussion of policies supporting holographic formality, see Bird, *supra* note 204, at 609; Gulliver & Tilson, *supra* note 41, at 14; Langbein, *Substantial Compliance*, *supra* note 32, at 511-12, 519; Maxton, *Execution of Wills: The Formalities Considered*, 1 CANT. L. REV. 393, 396-99 (1985); Note, *Validity of Signature for Holographic Wills*, 28 ARK. L. REV. 521, 521-22 (1975).

208. *See* Bird, *supra* note 204, at 609 n.22.

209. T. ATKINSON, *supra* note 42, at 355. The following states require that the entire document be handwritten: ALASKA STAT. § 13.11.160 (1990); KY. REV. STAT. ANN. § 394.040 (Michie 1991); LA. CIV. CODE ANN. art. 1588 (West 1990); MISS. CODE ANN. § 91-5-1 (1990); NEV. REV. STAT. § 133-090 (1989); N.C. GEN. STAT. § 31-3.4 (1991); OKLA. STAT. ANN. tit. 84, § 54 (West 1990); S.D. CODIFIED LAWS ANN. § 29-2-8 (1991); TEX. PROB. CODE ANN. § 60 (Vernon 1991); VA. CODE ANN. § 64.1-49 (1991); W. VA. CODE § 41-1-3 (1991); WYO. STAT. § 2-6-113 (1991).

Strict construction of the handwriting requirement could invalidate a holograph containing typed or preprinted matter, even if the nonhandwritten material was unrelated to the substance of the will.[210] Langbein has remarked that "[s]tatutes directing that the will be 'entirely' in the testator's handwriting have produced a large and ugly case law voiding wills which contained some innocuous printed matter."[211] In the case of holographic wills, however, the courts have often permitted less than literal compliance with the handwriting requirement. In jurisdictions requiring that the will be entirely handwritten, the courts typically have applied one of two theories to determine the validity of holographic wills containing nonhandwritten matter — either the "intent theory" or the more recently developed "surplusage theory," each of which is discussed below.

(a) Nonliteral compliance with the handwriting requirement: "the intent theory"

If a court determines that the testator did not intend for the portion of the document which is not written in his or her hand to be a part of the will itself, the "intent theory" permits the court to treat the document as valid.[212]

Courts apply the intent theory to save wills written on hotel or letterhead stationery, and in other very limited circumstances.[213] A court applying this approach examines the language of the will to determine whether the testator intended the printed inclusions to be part of the will.[214] Although the courts speak in terms of "intent," most courts seem to apply an objective rather than subjective standard.[215]

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210. Comment, *The New Holographic Will in California: Has it Outlived its Usefulness?*, 20 CAL. W.L. REV. 258, 258 (1984); Langbein, *Substantial Compliance*, *supra* note 32, at 519. *See* T. ATKINSON, *supra* note 42, at 357-59. *See generally* Bird, *supra* note 204 (discussing cases construing holographic wills).

211. Langbein, *Substantial Compliance*, *supra* note 32, at 519.

212. Bird, *supra* note 204, at 621.

213. *E.g.*, Estate of Baker, 59 Cal. 2d 680, 381 P.2d 913, 31 Cal. Rptr. 33 (1963) (upholding holographic will written on hotel stationery when testator had crossed out name of the hotel but not the address, finding the testator had no intent to incorporate the address and the address was irrelevant to the validity of the will). *But see* Estate of Thorn, 183 Cal. 512, 192 P. 19 (1920) (invalidating holographic will on the basis that it was not entirely in the testator's hand when testator had written will by hand but had used a rubber stamp bearing the name of a piece of property when referring to that property).

214. *See* Bird, *supra* note 204, at 621.

215. *Id.* at 623.

In determining whether the testator "intended" the nonhandwritten matter to be incorporated into the will, courts typically have considered factors such as the location of the nonhandwritten matter and whether the handwritten portions of the will referred to the nonhandwritten matter.[216] Under a holographic wills provision that since has been amended,[217] the California Supreme Court in *Estate of Bernard*[218] refused to enforce a holographic will because the testator had handwritten the will on letterhead stationery and the handwritten date appeared on the same line as the nonhandwritten matter in the letterhead material.[219] The *Bernard* court concluded that the nonhandwritten words had been "incorporated in and doubtless were intended to be made a part of the heading of the document"[220] and were therefore "part and parcel of the will."[221] Obviously, unattested, handwritten, signed, and dated dispositions of property executed without witnesses on preprinted will forms routinely would meet the same fate under the *Bernard* court's application of the intent theory.[222]

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216. *See, e.g.*, Estate of De Caccia, 205 Cal. 719, 273 P. 552 (1928) (upholding will entirely handwritten on stationery with preprinted words "Oakland, California," finding the testator did not intend the preprinted words as part of the will because there was no reference to the preprinted words).

217. CAL. CIV. CODE § 1277 (1872) (repealed 1931) (permitting a holographic will if "entirely written, dated, and signed by the hand of the testator himself"). The statute was repealed in 1931 and replaced by CAL. PROB. CODE § 53 (West 1956). Section 53 was itself repealed by Stats. 1983, C.842, § 18, operative Jan. 1, 1985. The repealed section, pursuant to § 6103 of this Code, continues to apply to estates of decedents who died before Jan. 1, 1985. CAL. PROB. CODE § 53 (West 1984). The new statute provides that an unattested will is valid if the signature and material provisions are handwritten. CAL. PROB. CODE § 6111 (West 1991). The new rule is a "surplusage statute" along the lines of UNIF. PROB. CODE § 2-503 (1990). For a discussion of the surplusage approach and the UPC provision, see *infra* notes 226-40 and notes 249-63 and accompanying text.

218. 197 Cal. 36, 239 P. 404 (1925).

219. *Id.* at 42, 239 P. at 406.

220. *Id.*

221. *Id. But see* Estate of De Caccia, 205 Cal. at 724-25, 273 P. at 554 (holding that placement of date in relation to the nonhandwritten matter is factor of slight importance standing alone and would not support conclusion that decedent intended to make nonhandwritten words part of the document); Estate of Durwelanger, 41 Cal. App. 2d 750, 107 P.2d 477 (1940) (upholding will in case in which testator used paper on which the first two digits of the date were printed and handwrote the last two).

222. *See, e.g.*, Estate of Bower, 11 Cal. 2d 180, 181-82, 78 P.2d 1012, 1013-15 (1938) (invalidating a document offered for probate which was handwritten on a preprinted will form, finding that writing in the blanks "definitely indicate[d] that the decedent intended to include and incorporate in his will the printed portions among which the written inserts appear").

For discussion of preprinted will forms as holographs, see Bird, *supra* note 204, at 617-18.

The intent theory predictably has produced a case law which is based upon arbitrary and tenuous distinctions.[223] Although application of the intent theory operates in some instances to save a will from invalidation despite the inclusion of extraneous nonhandwritten matter, the testator's intent to incorporate nonhandwritten material into the will in violation of the statute is often inferred from such arbitrary factors as the testator's choice of stationery and the placement of the words on the paper. Prior to a recent amendment to the California holographic wills provision,[224] the convolutions of the rule in California for unattested wills containing nonhandwritten material was explained as follows:

> The presence of printed (that is, nonhandwritten) matter will not invalidate a holographic will in California, provided that no more than the first two digits of the date are printed, and the printed matter appears wholly above or wholly below the handwritten provisions and is not in the same line as any handwritten words, unless the printed matter is an address, in which case juxtaposition is immaterial.[225]

(b) Nonliteral compliance with the handwriting requirement: the "surplusage theory"

An alternative approach to extraneous nonhandwritten matter in holographic wills is the so-called surplusage theory. This theory permits the probate court to disregard nonessential typed or printed material in an otherwise properly executed holographic will.[226] According to the surplusage theory, a court considers only the handwritten portions of the document to be the actual will.[227] If the nonhandwritten matter does not affect the sense of the operative provisions and if the essential or material elements of a holographic will are present and in the testator's handwriting, a court applying the surplusage theory

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223. *See* Langbein, *Substantial Compliance*, *supra* note 32, at 519-20.

224. CAL. PROB. CODE § 6111 (West 1991). For a discussion of the California law on holographic wills, see *supra* note 217 and accompanying text.

225. Bird, *supra* note 204, at 620-21.

226. T. ATKINSON, *supra* note 42, at 358-59; Bird, *supra* note 204, at 628-29; Comment, *supra* note 210, at 260-61.

227. Comment, *supra* note 210, at 260-61 (stating that no part of the document that is not handwritten may be treated as the actual will and all of the elements of the will must be identifiable in the handwritten provisions). *See generally* Estate of Black, 30 Cal. 3d 880, 641 P.2d 754, 181 Cal. Rptr. 222 (1982) (finding a valid holographic will although testator incorporated some of the preprinted language on the stationery). For further discussion of this case, see *infra* text accompanying notes 238-40.

would treat the nonhandwritten portion as surplusage and read it out of the will, thus treating only the handwritten matter as the actual will.[228] This theory, liberally applied, can be used to validate dispositions on printed will forms as long as the essential provisions are handwritten[229] that is, as long as the portion that is necessary to make out the will is entirely handwritten.

The surplusage approach significantly expands the range of documents that a court can validate under a statute that *literally* requires wills to be entirely handwritten. It does not, however, prevent invalidation of instruments executed with testamentary intent in which any of the essential provisions or terms are not in the testator's hand.[230] The court must be able to make out all of the elements of a valid holographic will without reference to any typed or printed matter.

Atkinson noted two principal objections to the application of the surplusage doctrine to save partially handwritten and unattested wills: first, the surplusage theory "makes hash of the statute . . . if [the statute] requires that the will be *entirely* in the handwriting of the testator";[231] second, "while the courts may carefully omit the nonholographic words on probate, they may be tempted to give them effect in the process of construction."[232] Moreover, the rule raises an issue as to what sort of provisions are "essential" or "material" with the inevitable consequence that "[w]hat is surplusage to one court may be essential to another."[233]

Courts applying the surplusage theory have differed, for example, as to whether preprinted administrative provisions are an essential

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228. *See* T. ATKINSON, *supra* note 42, at 358.

229. The "surplusage theory" actually grew out of a reformulation of the "intent approach." *See* Bird, *supra* note 204, at 616, 623-24; Comment, *supra* note 210, at 258-59, 263-64. In Estate of Baker, 59 Cal. 2d 680, 381 P.2d 913, 31 Cal. Rptr. 33 (1963), the California Supreme Court laid the foundation of the surplusage theory by tying the issue of intent to two questions: (1) relevance of the nonhandwritten matter to the substance of the document; and (2) materiality of the nonhandwritten matter. The court concluded in *Baker* that immaterial, irrelevant matter "may not be held to have been incorporated so as to render the document ineffectual as a will and thereby defeat the decedent's declared testamentary intent." *Id.* at 684, 381 P.2d at 913, 31 Cal. Rptr. at 35. *But see* Estate of Black, 30 Cal. 3d 880, 641 P.2d 754, 181 Cal. Rptr. 222 (1982). For discussion of *Black*, see *infra* text accompanying notes 238-40; Comment, *supra* note 210, at 265, 267-70. For further discussion of *Baker*, see Comment, *supra* note 210, at 263-65, 267-70 and discussion *supra* note 213.

230. *See infra* notes 234-40 and accompanying text.

231. T. ATKINSON, *supra* note 42, at 358 (emphasis in original).

232. *Id.*

233. Bird, *supra* note 204, at 629.

or material part of the will.[234] In *Estate of Christian*,[235] a California appeals court held that "[s]ince the nomination of a personal representative to carry out the terms of a will is exceedingly important to a testator, and because the nomination is effective at death and is pertinent to the administration of the testator's estate, it must be deemed a part of the will . . . ."[236] The *Christian* court said that the administrative provisions in question, designating a personal representative, made no sense unless the preprinted portion was read into the will. Further, the court said that the designation of the personal representative is "exceedingly important" to a testator. The court consequently held that the decedent intended the preprinted matter to be part of the will, with the result that the will was invalid.[237]

In *Estate of Black*,[238] however, the California Supreme Court rejected the reasoning of the *Christian* court, and upheld the validity

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234. *See* Comment, *supra* note 210, at 263-65. The surplusage rule can be "invoked to disregard printed words in a clause, giving effect to the remaining written words, or [the court] may disregard the entire clause." *Id.* at 267. "In the former [situation], . . . courts are forced to make a case by case determination as to whether the written words, standing alone, are sufficient to be given effect. If the written words are intelligible after the court's editing, they will be given effect." *Id.* 267-68. If the testator uses a preprinted will form, the court may read out the entire clause if it contains insufficient handwritten matter to be subject to interpretation after the printed matter is disregarded. *Id.* The type of distinctions these cases turn on are the nature of the form (such as, what blanks are left open for the testator to fill in) and the testator's inclination to rely on the words in the form. *See id.*

The court can read out "immaterial" printed matter, but the definition of what is "material" wavers, and contrary results are reached within the same court regarding the materiality of a printed executor clause. *Id.* at 269-70. "[I]f courts cannot agree on the test to be used in determining materiality, it is doubtful whether their decisions will have any semblance of uniformity. As a result, the validity of a holograph will often depends on the court in which the instrument is offered for probate." *Id.* at 270.

> If a court determines that a certain clause is or is not "material," the court is forced to substitute its judgment and biases for that of the decedent. . . . The importance of clauses in a will may vary in importance to the validity of the will. However, seemingly insignificant clauses may be of utmost importance to the decedent. . . . Every clause in a will must be considered . . . important to the decedent or they would not have been included.

Id.

235. 60 Cal. App. 3d 975, 131 Cal. Rptr. 841 (1976). For discussion, see Comment, *supra* note 210, at 265, 267-70.

236. 60 Cal. App. 3d at 983, 31 Cal. Rptr. at 845.

237. *Id.* at 981, 131 Cal. Rptr. at 844. The court concluded that applying the surplusage approach did not mean that a court could "exclude as surplusage any provision not pertinent to the decedent's disposition of his property or essential to the validity of the document as a will." *Id.* at 982, 131 Cal. Rptr. at 845.

238. 30 Cal. 3d 880, 641 P.2d 754, 181 Cal. Rptr. 222 (1982).

of a holographic will executed on a will form containing preprinted language relating to the appointment of an executor.[239] "[T]he 'testatrix' use of the printed clause referring to a personal representative is patently irrelevant to the 'substance' — or dispositive provisions . . . of her will and is not essential to its validity. In the absence of such a designation, the probate court will name an administrator. . . ."[240]

(c) The date requirement

Traditional holographic will statutes sometimes require that the document include a handwritten date as well as a signature.[241] It is generally accepted that the principal reason for requiring a date is to "establish the sequence of instruments if the testator leaves multiple conflicting wills."[242] In instances in which this rule applies, the document must be dated to be valid and (at least in a jurisdiction that applies the intent theory), the date must be entirely handwritten.[243]

In older cases, the courts tended to be strict with respect to the "entirely handwritten" requirement.[244] The rule is very complex and failure to include a "complete" and unambiguous date has sometimes led courts to invalidate the document.[245] Langbein observed that the dating requirement has produced a "notorious case law, in which holographic wills have been voided for abbreviated or omitted dating."[246] The date need not be correct and it may appear anywhere on the document,[247] but if it is omitted or incomplete, the will is not valid.[248]

(2) The Uniform Probate Code holographic will provision

The 1969 UPC holographic will provision essentially incorporated the reasoning behind the surplusage theory into its definition of a

239. *Id.* at 885, 641 P.2d at 757.

240. *Id.* Both *Black* and *Christian* were decided under a California statute requiring that holographic wills be entirely handwritten. CAL. PROB. CODE § 53 (West 1956) (repealed 1983). This statute has since been amended. CAL. PROB. CODE § 6111 (West 1991). For discussion of the statute, see *supra* note 217.

241. T. ATKINSON, *supra* note 42, at 359; *see* Bird, *supra* note 204, at 612-14; Note, *Holographic Wills: Extrinsic Evidence Admissable to Prove Uncertain Date*, 21 LOY. L. REV. 973 (1975).

242. Langbein, *Substantial Compliance*, *supra* note 32, at 512.

243. T. ATKINSON, *supra* note 42, at 359; Bird, *supra* note 204, at 612-14.

244. *See* Bird, *supra* note 204, at 613.

245. *See* T. ATKINSON, *supra* note 42, at 360.

246. Langbein, *Substantial Compliance*, *supra* note 32, at 512.

247. T. ATKINSON, *supra* note 42, at 360.

248. *Id.*

holographic will.[249] One commentator observes that this provision represented a "codification of the surplusage theory in its most liberal form" because it required only that the material provisions of the will and the signature be in the testator's handwriting and eliminated the date requirement.[250] Section 2-503 of the 1969 UPC dispensed with the traditional requirement that the document be written entirely in the testator's hand.[251] Further, it expanded the definition of a holographic will to include unattested documents executed on printed will forms if the material provisions were handwritten and the court could discern the testamentary plan without reference to any typed or preprinted matter.[252]

The substance of the UPC holographic will provision has not been revised; however, the drafters shift the provision from section 2-503 to section 2-502(b) to accommodate the new harmless error rule.[253]

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249. The following states require only the material provisions of the will to be handwritten: ALASKA STAT. § 13.11.160 (1990); ARIZ. REV. STAT. ANN. § 14-2503 (1990); CAL. PROB. CODE § 6111 (West Supp. 1991); COLO. REV. STAT. § 15-11-503 (1990); IDAHO CODE § 15-2-503 (1990); ME. REV. STAT. ANN. tit. 18-A, § 2-503 (1989); MICH. COMP. LAWS ANN. § 700.123 (1991); MONT. CODE ANN. § 72-2-303 (1990); NEB. REV. STAT. § 30-2328 (1989); N.J. REV. STAT. § 30:3-3 (1990); N.D. CENT. CODE ANN. § 30.1-08-03 (Michie 1991); TENN. CODE ANN. § 32-1-105 (1990); UTAH CODE ANN. § 75-2-503 (1991).

250. Bird, *supra* note 204, at 629. Langbein is critical of the elimination of the dating requirement, commenting that

> [t]he main reason for requiring dating is to establish the sequence of instruments if the testator leaves multiple conflicting wills. The dating requirement has given rise to a notorious case law, in which holographic wills have been voided for abbreviated or omitted datings, even when there was no question of sequence or genuineness. The UPC draftsmen, caught in the dilemma between no formality or literal enforcement, opted for no formality and eliminated the requirement of dating altogether. . . . [U]seful formal requirements such as dating need not be eliminated if the proponents are permitted to validate a defective instrument by proving that the defect is functionally harmless. The UPC has confused the formality with the formalism, and needlessly sacrificed the former for failure to remedy the latter.

Langbein, *Substantial Compliance*, *supra* note 32, at 512.

251. UNIF. PROB. CODE § 2-503 (1969). The "material provisions" language of the Code should permit a holding for holographic wills executed on printed will forms if the printed portions can be eliminated and the testamentary scheme made out from the handwritten portions. *See* Bird, *supra* note 204, at 629 n.127 (quoting UNIF. PROB. CODE § 2-503 comment (Working Draft No. 5, 1969)) (recommending elimination of holographic wills in the interest of uniformity and simplicity because they are not recognized in the majority of jurisdictions and result in frequent litigation). Further consideration of the issue resulted in § 2-503 of the UPC on the grounds that "for persons of modest means who may anticipate no likelihood of controversy, and for persons who are unable to secure professional assistance, the holographic will may be valuable." *Id.*

252. UNIF. PROB. CODE § 2-503 (1969).

253. UNIF. PROB. CODE §§ 2-502(b), 2-503 (1990).

New section 2-502(b) provides: "A will that does not comply with subsection (a) [requirements for an attested will] is valid as a holographic will, whether or not witnessed, if the signature and material portions of the document are in the testator's handwriting."[254] Under this provision, a holographic will is valid even if "immaterial parts such as the date or introductory wording are printed, typed, or stamped"[255] or if written on a printed will form, "if the material portions of the document are handwritten."[256]

Standing alone, the UPC holographic will provision is subject to the same objections that arise when the surplusage theory is applied to traditional entirely handwritten writing requirements.[257] Determining whether the nonhandwritten portions of a document can be disregarded and the handwritten portions enforced as the testator's will obviously requires a case-by-case determination. The UPC provision provides no reliable guide for determining whether nonhandwritten provisions are material.

Random factors such as the testator's choice of will form and the way that the testator fills in the blank spaces may still determine validity, because some will forms may not encourage a sufficient degree of handwriting. In such cases, the court may hold that it cannot interpret the will without reference to the preprinted matter, and thus hold the will invalid.[258] The major impact of the UPC provision is to qualify a wider range of conduct as due execution of a holographic will. Defective compliance still invalidates the document; however, the provision, although liberalized, is therefore under-inclusive to the extent it still permits documents executed with testamentary intent to fall through the statutory cracks.

In *Muder v. Muder*,[259] the Arizona Supreme Court solved the problem of under-inclusiveness by holding that the printed portions of a will form could be incorporated into the handwritten portions if testamentary intent was clear.[260] The *Muder* court stated that the handwritten provisions may "draw testamentary context from both the printed and the handwritten language on the form."[261] The *Muder*

254. *Id.*

255. *Id.* comment b.

256. *Id.*

257. For discussion of problems with the surplusage approach, see *supra* notes 226-40 and accompanying text.

258. *See supra* notes 233-40 and accompanying text (for discussion of these difficulties).

259. 159 Ariz. 173, 765 P.2d 997 (1988).

260. *Id.* at 176, 765 P.2d at 1000.

261. *Id.*

court saw "no need to ignore the preprinted words when the testator clearly did not, and the statute does not require us to do so."[262] New UPC section 2-502(b) does not expressly permit the court to give effect to the nonhandwritten portions of a holographic will even if the court determines that the document was executed with testamentary intent. However, the effect of section 2-502(b), the section 2-503 harmless error rule, and new section 2-502(c), which permits a proponent to establish testamentary intent by reference to the preprinted portions of a holographic will, could have a similarly expansive result in cases in which a court determines that a testator intended to integrate the preprinted portions of an unattested form will into the actual will.[263]

2. The Doctrine of Strict Compliance: Application and the Sufficient Compliance Principle

a. Formalism and Borderline Conduct

The purpose of harmless error rules, such as new UPC section 2-503, is to prevent invalidation on purely formal grounds of documents demonstrably intended by testators to operate as wills. Harmless error rules make it possible for the proponent of a formally defective will to present evidence showing that the testator intended the document be given effect, despite the testator's failure to comply with the statute. The well-intentioned and often creative attempts of courts to avoid the rule of strict compliance in order to implement testator intent have inevitably resulted in "a vast, contradictory, unpredictable and sometimes dishonest case law. . . ."[264] The rule of strict compliance "occasions silly and sometimes dishonest litigation to determine whether particular conduct constitutes compliance. . . ."[265] The effects of the strict compliance rule on the law of donative transfers forcefully illustrates the truth of the maxim "hard cases make bad law."

In his seminal 1975 article proposing that courts adopt a standard of substantial compliance, Langbein describes the consequences of the

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262. *Id.* The majority pointed out that the present version of the Arizona wills statute states that one of its purposes is "to discover and make effective the intent of a decedent in distribution of . . . property." *Id.* (citing ARIZ. REV. STAT. § 14-1102(B)(2) (1990)). The dissenting judge, however, said that he was "unable to discern such expansiveness in the statute," and that reading the statute so broadly defeated legislative intent. *Id.* at 178-79, 765 P.2d at 1002-03 (Moeller, J., dissenting).

263. UNIF. PROB. CODE § 2-502(c) (1990). For discussion of the effect of applying a harmless error rule to a defective holographic will, see *supra* notes 203-42 and accompanying text.

264. Langbein, *Substantial Compliance*, *supra* note 32, at 525.

265. Mann, *supra* note 32, at 64.

strict compliance doctrine as "harsh and relentless."[266] He notes, however, that courts vary to a great extent in how strictly they apply the doctrine.[267] In cases involving minor violations of the statute, the courts in some jurisdictions loosely interpret the statutory requirements in order to save dispositions that otherwise would be invalid because of the testator's failure to comply with the wills act.[268] Similarly, will substitutes, and the so-called nonprobate system, arose largely as the product of judicial attempts to avoid applying the wills acts to essentially ambulatory dispositions that do not comply with the wills acts.[269]

The 1969 UPC did not address the strict compliance rule and thus, did nothing to alleviate the problem of formalism. Prior to the 1990 adoption of the UPC harmless error rule, the UPC approach was merely to simplify the will-making process to minimize the likelihood of formal defects, but not to provide any device for saving defective wills.[270] Only to the extent that the UPC reduced the number of defective wills could it be said to have solved the problem of formalism. That testators in UPC states nevertheless manage to commit error in meeting the formal requirements of both attested and holographic wills is amply demonstrated by the case law.[271]

(1) Application of the strict compliance doctrine to specific errors or omissions

(a) Attested and holographic wills

(i) Defects in attestation

Cases dealing with ordinary attested wills sometimes turn on purely technical noncompliance with the attestation formalities. In these cases, there is no question as to the testator's intent, but probate is denied because of the testator's failure to comply with presence or publication formalities. In the famous case of *In re Hale's Will*,[272] the testator, who was eighty-eight years old and physically infirm, had assembled witnesses at his attorney's office, signed the will in their

266. Langbein, *Substantial Compliance*, *supra* note 32, at 489.

267. *Id.*

268. For discussions of cases in which courts have saved wills containing formal defects, see *infra* notes 320-94 and accompanying text.

269. For discussion of will substitutes, see *supra* notes 41-54 and accompanying text.

270. Langbein, *Substantial Compliance*, *supra* note 32, at 510-12.

271. *See supra* notes 183-203 (discussing attested wills) and notes 249-63 (discussing holographic wills).

272. 21 N.J. 284, 121 A.2d 511 (1956).

presence, and observed the witnesses signing the will, but had not declared to the witnesses that the document was his will.[273] The *Hale* court held the will invalid, stating that "[a] literal construction of the statute with regard to the formal requisites is demanded and we have no right to accept anything short of positive proof of conformity with the statutory requirements."[274] The New Jersey court in *Hale* further stated that strict compliance with the publication requirement ensures "knowledge by the testator that his solemn act is a testamentary disposition of his bounty," and thus serves three purposes: (1) to forestall "fraud by the living upon the dead," (2) "to discourage imposition upon the unwary," and (3) to give "the person who is being compelled consciously against his will an opportunity to cry out."[275]

In re Estate of Wait[276] is a particularly egregious example of strict enforcement of the presence requirements. In *Wait*, the testator was old, feeble, and, at the time her will was witnessed, unable to complete the signature because her hand was shaking.[277] She signed the will a day or so later and showed the will to one of the witnesses, remarking, "At last I got to where I could control my hand and I signed this will."[278] Although there was no doubt that the testator signed the document and intended it to be enforced as her will, the Tennessee court held that it was invalid because she did not sign it in the presence of the witnesses.[279]

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273. *Id.* at 291, 121 A.2d at 514.

274. *Id.* at 295, 121 A.2d at 518 (citations omitted). The court found the will invalid because there was no "proof that there was some communication from the mind of the testator to the minds of *both* witnesses present at the same time, of the event about to take place," even though both witnesses seemed to have understood the document was the testator's will. *Id.* at 299, 121 A.2d at 519-20.

275. *Id.* at 297, 121 A.2d at 519.

276. 43 Tenn. App. 217, 306 S.W.2d 345 (Tenn. Ct. App. 1957).

277. *Id.* at 221, 306 S.W.2d at 347.

278. *Id.* at 222, 306 S.W.2d at 347.

279. *Id.* at 226-27, 306 S.W.2d at 349. In invalidating the will, the court stated,

> [W]e think the evidence shows that [the testator] complied with a portion of the statute by signifying to the attesting witnesses that the paper writing was her will and that she then set about to sign the will by writing her usual signature thereon; that due to her physical infirmity her hand shook so that she decided to defer her signature until a later date and asked the attesting witnesses to go ahead at that time and sign their names to the will which they did; that the testatrix did not consider that she had signed the will until after the attesting witnesses had signed the will and had left her presence. At some later date her hand became more steady and she did actually sign the will but not in the presence of either attesting witness though at a later date she did acknowledge her signature to one of the attesting witnesses.

Id. at 226, 306 S.W.2d at 349.

The latitude courts have exhibited with respect to the presence requirements has varied widely over the years and among various jurisdictions.[280] *In re Weber's Estate*[281] is a classic case of strict compliance applied to the presence requirements. In *Weber*, a 1963 decision, the Kansas Supreme Court held by a four-to-three margin that the proximity between the testator and witnesses was not sufficient to establish "presence."[282] The seriously ill testator in *Weber* was en route to a hospital and attempted to make a will while in his car parked in front of a bank.[283] The president of the bank had prepared the will on a printed form from notes taken while talking with the testator.[284]

Three bank employees stood at a closed window in the bank to watch the testator sign the will.[285] The testator waved to them to indicate that he saw them, and the witnesses waved back.[286] The testator placed the purported will on the steering wheel where the witnesses could see it and signed.[287] The purported will then was taken into the bank and signed by the witnesses, who were still standing in front of the window.[288] The *Weber* court held the purported will invalid, stating:

> The table upon which the signing occurred was against the window but the table top was a foot to a foot and a half beneath the window sill. Hence [the decedent] could see the witnesses in the window as they signed but could not see the pen or the purported will on the table at the time of signing. Only that portion of the body of each witness in the window could be seen by him.[289]

The *Weber* court stated that the Kansas statute required (1) that the will be attested and subscribed by two witnesses in the presence of the testator, *and* (2) that the witnesses either must have seen the testator subscribe or heard the testator acknowledge the will.[290] The

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280. *See infra* notes 328-44 and accompanying text (discussing decisions which take a more liberal approach).

281. 192 Kan. 258, 387 P.2d 165 (1963).

282. *Id.* at 264-65, 387 P.2d at 170.

283. *Id.* at 259-60, 387 P.2d at 167-68.

284. *Id.* at 259, 387 P.2d at 167.

285. *Id.* at 259-60, 387 P.2d at 167-68.

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.* at 260, 387 P.2d at 168.

290. *Id.* at 261, 387 P.2d at 169.

Weber court concluded that this means there must be presence and sight, or presence and hearing.[291] "Presence only, sight only, hearing only, or sight and hearing only are not sufficient";[292] to establish presence, "[t]he testator must be able to see the witnesses attest the will."[293]

The minimal formality required for an attested will under the UPC has been fairly successful in preventing the invalidation of wills due to technical defects in the attestation ceremony, although such cases do exist. In *In re Estate of Peters*,[294] for example, a New Jersey court remarked that "it is arguable that as the number of formalities have been reduced, those retained by the Legislature have assumed even greater importance, and demand at least the degree of scrupulous adherence required under the former statute."[295] In a recent Idaho case, however, the court invalidated a will executed under a wills provision modeled on the UPC because the testator had not signed the will nor acknowledged the will or signature in the presence of the witnesses, but merely had someone take the will to the witnesses to be signed and then telephoned the witnesses afterward to thank them.[296]

(ii) Defective signature

Although courts typically do not require literal compliance with the handwriting requirement for holographic wills, court have invalidated holographic wills due to the testator's failure to include a date, even in instances in which failure to date the will raised no issues respecting intent or authenticity, and no other documents were offered for probate.[297]

Courts also have invalidated both holographic and attested wills because of a testator's failure to sign the will at the end of the disposi-

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291. *Id.*

292. *Id.* For other decisions strictly construing the presence requirements, see Jefferson's Will, 349 So. 2d 1032 (Miss. 1977) (one witness signed in presence of testator, the other did not); Morris v. Estate of West, 643 S.W.2d 204 (Tex. Ct. App. 1982); *In re* Hill's Estate, 349 Mich. 38, 84 N.W.2d 457 (1957); *In re* Palmer's Estate, 255 Iowa 428, 122 N.W.2d 920 (1963).

293. 192 Kan. at 263, 387 P.2d at 170.

294. 107 N.J. 263, 526 A.2d 1005.

295. *Id.* at 274, 526 A.2d at 1010.

296. *In re* Estate of McGurrin, 113 Idaho 341, 342, 743 P.2d 994, 995 (Ct. App. 1987), *cert. denied*, 113 Idaho 499, 746 P.2d 85 (1987); *contra* Estate of Peters, 107 N.J. 263, 265, 526 A.2d 1005, 1007 (1987) (testator signed the will and acknowledged the signature in the presence of witnesses; however, witnesses never signed the will).

297. *See* T. ATKINSON, *supra* note 42, at 359-60; *supra* notes 241-48 and accompanying text (discussing the date requirement).

tive provisions. A number of statutes specifically require that the will be signed at the end or subscribed.[298] Decisions in these jurisdictions require that the decedent's signature appear at the logical end of a material or dispositive provision.

Pennsylvania courts have been notoriously strict in this respect.[299] In *In re Coyne's Estate*,[300] a 1944 case, the Pennsylvania Supreme Court appeared uncomfortable with the consequences of applying the strict compliance doctrine to an improperly signed will, but reasoned:

> It is perhaps unfortunate that decedent's testamentary intentions are frustrated. The strictness with which this section of the Wills Act must be enforced is a matter of legislative mandate. . . . "The Wills Act requires signing at the end. *The purpose of the Act was to remove all possibility of fraud.* . . . Even if the testamentary intention of this particular testatrix is frustrated, it is much wiser to refrain from weakening the sound and well established mandate of the legislature. Were we to do so, we might in future cases, facilitate fraudulent or unauthorized alterations or additions to wills."[301]

Therefore, the *Coyne* court held that the question in the case as to *whether decedent signed the writing at the end thereof* is not one of decedent's intention but of what decedent actually did or failed to do.[302]

Later cases continued to follow this rationale. In *In re Estate of Weiss*,[303] the Pennsylvania Supreme Court invalidated a will that had been signed by the testator in the left-hand margin next to the dispositive provisions.[304] In *In re Estate of Proley*,[305] a 1980 case, the testator signed only the portion of a printed will form normally intended merely to identify the will when properly folded.[306] As a result, her name

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298. *See supra* note 191 for a discussion of Wills Act formalities in various states.

299. *See, e.g., In re* Estate of Knupp, 428 Pa. 409, 430, 235 A.2d 585, 586-87 (1967) (The will was subscribed by the witnesses but never signed by the testator. The court held a will found in an envelope bearing the testator's signature which had been signed by her in the middle of the attestation clause did not comply with the Wills Act and that to honor it would be to violate legislative intent.).

300. 349 Pa. 331, 37 A.2d 509 (1944).

301. *Id.* at 334, 37 A.2d at 510-11 (emphasis added) (citing *In re* Brown's Estate, 347 Pa. 244, 46, 32 A.2d 22, 23 (1943)).

302. *Id.* at 334, 37 A.2d at 510.

303. 444 Pa. 126, 279 A.2d 189 (1971).

304. *Id.* at 127, 279 A.2d at 190.

305. 492 Pa. 57, 422 A.2d 136 (1980).

306. *Id.* at 58, 422 A.2d at 137.

appeared only beneath the words "Will of" in the endorsement section of the document. The Pennsylvania Supreme Court invalidated the will due to the testator's failure to comply with the requirement that the will be signed at its foot or end.[307] An evenly divided *Proley* court stated that "[t]he frustration of decedent's apparent testamentary intent by her own failure to observe the proper formalities may seem at first a harsh result, but it is a result that is required by our Legislature and which this Court may not alter."[308] Some courts adopt a modified approach, insisting on strict compliance with the requirement only to the extent of invalidating provisions which follow the signature.[309]

In all of these instances, the strict interpretation of the holographic wills statutes leads to under-inclusiveness, because the courts refuse to enforce wills even when they have no doubt as to the testator's intent.

(b) Self-proving wills

In a notorious line of cases, Texas courts invalidated self-proving wills because the testator or witnesses mistakenly signed only the affidavit intended to make the will self-proving and failed to execute the will itself.[310] These cases are particularly disturbing, because in

307. *Id.* The dissenting judge stated that because the will form was ambiguous concerning where the testator should sign, the will should have been held valid. *Id.* at 66-67, 422 A.2d at 140 (Flaherty, J., dissenting); *cf. In re* Panousseris's Will, 52 Del. 21, 151 A.2d 518 (Orphans' Ct. 1959) (Delaware court invalidated a will executed in Greece because, although it satisfied Greek law, the signatures of the witnesses on the sealed envelope containing the will were not part of the will under Delaware law).

308. 492 Pa. at 59, 422 A.2d at 138. The dissenting judge remarked that the lower court's holding was understandable in light of its findings that "[i]n the instant case, the decedent substantially complied with the requirements of the Wills Act. There is no doubt in the court's mind that this was intended to be her Last Will and Testament. The sole defect is that she signed the document in the wrong place." *Id.* at 66, 422 A.2d at 140 (Flaherty, J., dissenting) (quoting the lower court's opinion). The dissenting judge continued:

> Apart from a rather blatant frustration of testatrix's intent, the case demonstrates as well the inadequacy of the strict compliance rule in that, applying the rule, we find ourselves unable to agree with the judgment of the Orphan's Court Division . . . that the will was not signed at the end. Where reasonable minds thus disagree on this issue, the rule itself presents obvious difficulties of application.

Id. In a subsequent case, the court stated that "*Proley* is the product of an evenly divided court and is of no precedential value." *In re* Estate of Hopkins, 391 Pa. Super. 211, 218, 570 A.2d 1058, 1061 (Pa. Super. Ct. 1990).

309. *E.g.*, Fenton v. Davis, 187 Va. 463, 47 S.E.2d 372 (1948).

310. For a discussion of self-proving wills, see *infra* notes 644-58, 720-26 and accompanying text. The Texas cases arose under self-proving wills statutes contemplating what Mann calls a "two-step" procedure in which first the testator, then the witnesses, sign the will itself after the attestation clause, then all sign the appended affidavit (which often simply reiterates the

every instance the document had been signed by the testator and the witnesses in the presence of one another and in the presence of a notary.

In *Wich v. Fleming*,[311] the defect in wills act compliance occurred because instead of signing the attestation clause, the testator's witnesses had signed only the self-proving affidavit, which was located on the same page as the attestation clause and phrased in almost identical language.[312] The Texas Supreme Court treated the will and the attached affidavits as two entirely separate documents, each requiring separate execution in order to be effective.[313] The will in the *Wich* case was not executed under this standard and thus, according to the *Wich* court, was not properly witnessed.[314] The *Wich* court, therefore, held the will invalid.[315]

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language of the attestation clause in the past tense as a *fait accompli*). For discussion of this two-step procedure, see also Effland, *Self-Proved Wills*, 16 ARIZ. B.J. 31 (Feb. 1981); Schneider, *Self-Proved Wills — A Trap for the Unwary*, 8 N. KY. L. REV. 539 (1981); Note, Wich v. Fleming: *The Dilemma of a Harmless Defect in a Will*, 35 BAYLOR L. REV. 904 (1983). Although the procedure for making wills self-proving is fairly uncomplicated, serious problems can occur at the time for probate if, as in these cases, it turns out that the witnesses and the testator have failed to execute the will itself. Under the "two-step" provisions which make execution of the will and the affidavit separate acts, attempts by testators and their attorneys to achieve "simultaneous execution" of both will and affidavit by executing only one document has sometimes led to unenforceability. Mann, *supra* note 32, at 41-42; Schneider, *supra*, at 342-43. Failure to execute the will may occur if the will itself contains no attestation clause but instead goes directly to the affidavit or if the eye of the officiating notary or attorney is insufficiently "watchful." It may also occur if the witnesses and testator are misled by the attorney or notary as to the proper procedure for achieving due execution. Mann observes that witnesses are likely to defer to the apparent authority of the person in charge of the execution ceremony, and to assume that one set of signatures is legally sufficient. Mann, *supra* note 32, at 41-42.

311. 652 S.W.2d 353 (Tex. 1983).

312. *Id.* at 354.

313. *Id.*

314. *Id.* at 354-55 (following Boren v. Boren, 402 S.W.2d 728 (Tex. 1966), holding that the existence of a will is a "condition precedent" to the use of a self-proving provision and distinguishing between the intent of a witness to attest a will and the intent of a witness to execute an affidavit affirming the will has been self-proved). *See also* Orrell v. Cochran, 695 S.W.2d 552 (Tex. 1985) (holding testator's signature invalid when testator, on advice of the notary, signed only in the space for the witnesses on the self-proving affidavit). The *Cochran* court thus reversed the court of appeals, which had distinguished *Boren* on the grounds that in *Cochran*, the self-proving affidavit on the form will was never signed by the witnesses, and that testator had placed his signature in the part of the form that could be used as an affidavit by mistake, and not for any non-testamentary purpose. Orrell v. Cochran, 685 S.W.2d 461, 461 (Ct. App.), *rev'd*, 695 S.W.2d 552 (Tex. 1985).

315. 652 S.W.2d at 356.

Although the Texas approach was not universally accepted,[316] it was followed in several other jurisdictions,[317] and ultimately prompted a 1975 revision to the UPC permitting one-step or simultaneous execution.[318] Mann has termed the Texas approach "a triumph of formalism," and the result, essentially converting the provision for making the will self-proving into "a new separate formality" requiring strict compliance at the risk of invalidating the whole will, "unforgivable."[319]

(2) Borderline compliance and the quantitative standard of substantial compliance ("sufficient" compliance)

Despite the ubiquitousness of the strict compliance doctrine, there is, as Langbein states, "considerable diversity and contradiction in the cases interpreting what acts constitute compliance with what formalities."[320] As the subsequent discussion will show, the courts sometimes have gone to great lengths to hold that borderline conduct fulfills the requirements of the wills acts. In certain cases, the courts may apply a quantitative principle of substantial compliance, reasoning that

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316. *See infra* notes 734-43 and accompanying text (for discussion of cases rejecting the Texas rule).

317. *E.g.*, *In re* Estate of Sample, 175 Mont. 93, 95-96, 572 P.2d 1232, 1233-34 (1977) (invalidating will in case in which testator signed will and self-proving affidavit but witnesses signed only self-proving affidavit; the court held purpose of self-proving affidavit is to expedite probate, not to cure defective wills); *In re* Estate of Mackaben, 126 Ariz. 559, 600-01, 617 P.2d 765, 766-67 (Ct. App. 1980) (invalidating will in case in which testator and witnesses signed at end of will and in the self-proving affidavit because will lacked attestation clause disclosing that testator signed or acknowledged her will in the presence of the witnesses and self-proving affidavit did not state that this formality was met); *In re* Estate of Ricketts, 54 Wash. App. 221, 221-22, 773 P.2d 93, 94 (1989) (invalidating will in case in which witnesses signed only self-proving affidavit attached to codicil; court said language in self-proving affidavit negated any intention of the witnesses to attest and subscribe the execution of a codicil).

318. UNIF. PROB. CODE § 2-504(a) (1975). The 1990 UPC permits a will to be "simultaneously executed, attested, and made self-proved, by acknowledgement thereof by the testator and affidavits of the witness according to the form set out in section 2-504(a)." Section 2-504(c) specifically provides that "[a] signature affixed to a self-proving affidavit attached to a will is considered a signature affixed to the will, if necessary to prove the will's due execution." UNIF. PROB. CODE § 2-504(c). Section (c) was added to "counteract the unfortunate judicial interpretation of similar self-proving will provisions . . . under which a signature on the self-proving affidavit has been held not to constitute a signature on the will, resulting in invalidity in cases where the testator or witnesses got confused and signed only on the self-proving affidavit." *Id.* § 2-504 comment (quoting Mann, *supra* note 32).

319. Mann, *supra* note 32, at 47. The strict construction of these statutes in some jurisdictions indicates that self-proving wills, while eminently useful as a concept, may indeed prove to be a trap for the unwary in those jurisdictions that still retain the two-step procedure. *See* Schneider, *supra* note 310, at 542-48.

320. Langbein, *Substantial Compliance*, *supra* note 32, at 489.

marginal conduct is sufficient to meet the requirements of the wills acts.[321] The courts in these cases sometimes give effect to wills despite less than literal compliance with the statutory requirements on the theory that the testator has achieved compliance with the wills act formalities. This means that in the court's view, the testator's conduct has achieved a sufficiently high level of conformity with the requirements as interpreted by the court to be in compliance with the wills act. In effect, courts in these cases must determine that there was no defect or omission in the testator's execution of the will.

(a) Attested and holographic wills

(i) Defects in attestation

Court interpretations as to what circumstances meet the publication and presence requirements may vary widely. In *In re Estate of Burke*,[322] the court considered whether the testator had met Oklahoma's presence and publication requirements. The testator signed her will while sitting in a pickup truck and then handed the will out the window to the witness, who signed the will after placing it on the hood of the truck.[323] Although the testator never said anything about the will directly to the witnesses, both were requested to act as witnesses to the testator's will by a third party who was also present at the execution.[324] The witnesses had heard the third party read the document aloud to the testator and discuss some of the provisions with her immediately before the execution of the will.[325] The Oklahoma court found that the witnesses "knew why they were there and what they were doing."[326] The court held that the testator had sufficiently complied with the statute requiring that the testator subscribe the will in the presence of attesting witnesses, that the testator acknowledge that the instrument was her will, and that the witnesses sign the will at the testator's request and in the testator's presence.[327]

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321. Langbein specifically distinguishes the substantial compliance principle that courts apply when "borderline conduct is close enough to the prototype to be deemed in compliance" from a harmless error principle permitting "concededly defective conduct" to be deemed in compliance with the wills act on the ground that the defect is harmless error. *Id.* at 526 n.127.

322. 613 P.2d 481 (Okla. Ct. App. 1980).

323. *Id.* at 484.

324. *Id.* at 483.

325. *Id.* at 483-84.

326. *Id.*

327. *Id.* For decisions applying a liberal construction to the presence requirements, see, *e.g.*, Glenn v. Mann, 234 Ga. 194, 214 S.E.2d 911 (1975) (In *Mann*, the court upheld the will although testator did not acknowledge his signature to witness, witness did not see testator

In *In re Estate of Perkins*,[328] the Kansas Supreme Court applied the principle of substantial compliance with the wills act in affirming a lower court decision upholding a will,[329] despite the testimony of one witness that she did not actually see the testator sign the will or hear the testator acknowledge the will.[330] Although the witness was "seated across the room with her back to the wall," both witnesses and the testator were in the same room at the time of the execution of the will; both witnesses had seen each other sign the document; and both witnesses knew that they were witnessing the testator's will.[331] Therefore, the supreme court held that the presence requirement was met because the testator and both witnesses "were all within the presence, sight, and hearing of each other."[332]

In some states, courts apply a "conscious presence" rule to validate wills if the testator has not actually seen the witnesses sign, but "(1) the witnesses . . . sign within the testator's hearing, (2) the testator . . . know[s] what is being done, and (3) the signing by the witnesses and the testator . . . constitute one continuous transaction."[333] In *In re Demarris' Estate*,[334] the Oregon court was "convinced that any of the senses that a testator possesses, which enable him to know whether another is near at hand and what he is doing, may be employed by him in determining whether the attesters are in his presence as they sign his will."[335] Therefore, the *DeMarris* court would not require that the witnesses attest the will within the testator's "range of vision" or even within the same room.[336] "If they are so near at hand that they

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sign, and witness was seated 13 feet from testator in a position from which he could not see her sign. Acknowledgement of signature was deemed sufficient since third party told witness in testator's range of hearing that the document was testator's will and asked her to sign it. The requirement that witness sign in testator's presence was deemed met because circumstances were such that testator, in his actual position, might have seen her sign.); *In re* Lane's Estate, 265 Mich. 539, 251 N.W. 590 (1933) (In *Lane's Estate*, the court upheld the will although witnesses signed at a table 30 feet from where the testator was lying and out of his sight. The court applied a "liberal" construction of the presence requirement based on the inference that the testator understood why the witnesses left the room and what they were doing — the witnesses were "in his call. . . .").

328. 210 Kan. 619, 504 P.2d 564 (1972).
329. *Id.* at 624, 504 P.2d at 568 (citing Kitchell v. Bridgeman, 126 Kan. 145, 267 P. 26 (1928)).
330. *Id.* at 622, 504 P.2d at 568.
331. *Id.*
332. *Id.*
333. *In re* Tracy's Estate, 80 Cal. App. 2d 782, 783-84, 182 P.2d 336, 337 (1947).
334. 166 Or. 36, 110 P.2d 571 (1941).
335. *Id.* at 71, 110 P.2d at 585.
336. *Id.*

are within range of any of his senses, so that he knows what is going on, the requirement has been met."[337]

Historically, courts that have applied a substantial compliance standard have drawn ultra-fine distinctions between conduct that is sufficient to satisfy that standard and conduct that is not. In a recent decision, the Virginia Supreme Court described its approach somewhat differently — as one of "rigid insistence" upon "substantial compliance."[338] In *Robinson v. Ward*,[339] the Virginia court held a will valid and its execution in substantial compliance with witness subscription requirements even though the witness, who was also the beneficiary, wrote her name on the document while acting as scribe to the testator without any intention of acting as a witness.[340] In the view of the *Robinson* court, the statutory safeguards were not designed "to make the execution of wills a mere trap and pitfall, and their probate a mere game."[341] Hence, although the court stated that the statute must be strictly followed, it determined that the provisions must "not be construed in a manner which would 'increase the difficulty of the transaction to such an extent as to practically destroy' the right of the uninformed lay person to dispose of property by will."[342] Applying its "rigid insistence upon substantial compliance" standard,[343] the *Robinson* court held that the witness had sufficiently subscribed the will within the meaning of the statute.[344]

(ii) Defective signature

Occasionally a testator's signature will appear in the body of the will or somewhere other than at the end of the dispositive provisions. This circumstance may raise questions of whether the writing of the

337. *Id.*; *see also Lane's Estate*, 265 Mich. at 539, 251 N.W. at 590; *Glenn*, 234 Ga. at 194, 214 S.E.2d at 911.

338. Robinson v. Ward, 239 Va. 36, 387 S.E.2d 735 (1990).

339. *Id.*

340. *Id.* at 39-40, 387 S.E.2d at 737. The Virginia Supreme Court stated that the purpose of the statute in requiring subscription of the will by competent witnesses in the presence of the testator is to prevent "fraud, deception, mistake, and the substitution of a surreptitious document. . . ." *Id.* at 41, 387 S.E.2d at 738 (quoting Ferguson v. Ferguson, 187 Va. 581, 591, 47 S.E.2d 346, 352 (1948)). These requirements, however, "are not intended to restrain or abridge the power of a testator to dispose of his property. They are intended to guard and protect him in the exercise of that power." *Id.* at 39, 387 S.E.2d at 737 (quoting French v. Beville, 191 Va. 842, 848, 62 S.E.2d 883, 885 (1951)) (citations omitted).

341. *Id.* (quoting Bell v. Timmins, 190 Va. 648, 657, 58 S.E.2d 55, 59-60 (1950)).

342. *Id.* (quoting Savage v. Bowen, 103 Va. 540, 546, 49 S.E. 668, 669-70 (1905)).

343. *Id.* (quoting Bell v. Timmins, 190 Va. 648, 657, 58 S.E.2d 55, 59-60 (1950)).

344. *Id.* at 44, 387 S.E.2d at 740.

testator's name by the testator was intended to function as a signature, whether the will was regarded by the testator to be in final form, and whether there were subsequent additions to the document. As the subsequent discussion will show, unless the wills act specifically requires that the will be signed at the end or subscribed by the testator, courts usually will not read into the wills act the additional requirement that the testator sign the will at the end. Usually the courts will hold that the signature may appear anywhere in the document and is effective if the testator signed the document with the intent to authenticate and adopt it as the testator's will.

For example, in *Estate of MacLeod*,[345] a California case, the testator's will was found on her bedside table after she had suffered a stroke.[346] The will was undated, written in several colors of ink, and marred by interlineations, corrections, and writing in the margin.[347] The testator's name appeared only on the top of the first page, where she had written in a superscription added to the will by means of a caret mark, "Being of sound mind, I, Margaret MacLeod Horwitz."[348] Although no signature appeared at the end of the document,[349] the *MacLeod* court held that the inserted superscription met the signature requirement.[350]

Other jurisdictions have permitted signatures in places other than at the logical or sequential end of the will, despite statutory language requiring the will to be signed at the end. For example, in *Scritchfield v. Loyd*,[351] the testator's signature appeared in the attestation clause of the will. The Arkansas Supreme Court stated that although

> [t]here is a distinct conflict among the authorities as to whether a signature in the attestation clause qualifies as a signature "at the end." . . . [W]e believe the better rule to

345. 206 Cal. App. 3d 1235, 254 Cal. Rptr. 156 (1988).
346. *Id.* at 1238, 254 Cal. Rptr. at 157.
347. *Id.*
348. *Id.* at 1239, 254 Cal. Rptr. at 157.
349. *Id.*
350. *Id.* at 1243, 254 Cal. Rptr. at 160. The court noted:
> While not the most presentable of documents, and while not dated or subscribed, the instrument here did contain a statement by Margaret that it was her will. Margaret signed it, albeit at the beginning, and the document can reasonably be interpreted as a complete device for the disposition of her property.

Id. at 1243, 254 Cal. Rptr. at 159. *But see In re* Estate of Proley, 492 Pa. 57, 422 A.2d 136 (1980) (invalidating a will written on a printed will form which was signed only in the endorsement section of the form).
351. 267 Ark. 24, 589 S.W.2d 557 (1979).

> be that where the testator places his signature in the attestation clause because he believes that it belongs there and with the requisite testamentary intent, it constitutes a sufficient compliance with the statute requiring the signature to be "at the end."[352]

An Oklahoma court of appeals reached the same conclusion on similar facts in *In re Estate of Burke*.[353]

In *Kajut Will*,[354] the Pennsylvania Orphan's Court, a court of first instance, considered whether the execution of a will by a blind testator substantially complied with a statutory requirement that the name of a testator who signs by mark be subscribed to will in the testator's presence.[355] In *Kajut*, the testator's name had been typed on each of the three pages of the will outside the testator's presence.[356] Although the attorney, who also acted as a witness,[357] called the testator's attention to the typed signature immediately before the testator made his mark, the will was not actually subscribed in the testator's presence.[358] The court pointed out that "whatever authority is inherent in having the testator 'see' his signature subscribed in his presence has no meaning in this case because of the testator's blindness."[359] The court concluded that "under the particular circumstances of this case, . . . the requirements of [the Pennsylvania Wills Act] were met."[360]

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352. *Id.* at 25, 589 S.W.2d at 559; *see also In re* Morey's Estate, 75 Cal. App. 2d 628, 171 P.2d 131 (1946) (upholding will although testator signed form will in a blank space following the attestation clause rather than at the end of the will; court said testator affixed signature with intention of executing the will); *In re* Schiele's Estate, 51 So. 2d 287 (Fla. 1951) (stating that signature appearing in attestation clause rather than at end of the dispositive provisions sufficiently complies with requirement that will be signed at end if placed there with intention of executing the will; not error to require trial court to hear testimony as to whether signature placed on will with testamentary intent). For discussion of the conflict among authorities as to whether a signature in the attestation clause qualifies as a signature "at the end," see Annotation, *Wills: When is Will Signed at "End" or "Foot" as Required by Statute?*, 44 A.L.R.3d 701 (1990).

353. 613 P.2d 481 (Okl. App. 1980).

354. 2 Pa. Fiduc. 2d 197, 22 Pa. D. & C.3d 123 (Orphans' Ct. 1981).

355. *Id.* at 202, 22 Pa. D. & C.3d at 129.

356. *Id.* at 201, 22 Pa. D. & C.3d at 135.

357. *Id.*

358. *Id.* at 203, 22 Pa. D. & C.3d at 131.

359. *Id.* The court's reasoning in *Kajut* indicated that the court considered the execution of the will under the circumstances to be *quantitatively* sufficient to meet the wills act standard. *Id.* at 202-04, 22 Pa. D. & C.3d at 131-36. For further discussion of the *Kajut* court's application of the "substantial compliance" principle, see *infra* notes 729-33 and accompanying text.

360. *Id.* at 202, 222 Pa. D. & C.3d at 131.

(iii) Defective compliance with the handwriting requirement

The development and application of the intent and surplusage theories in jurisdictions that require holographic wills to be entirely handwritten exemplifies statutory interpretation that is intended to permit marginal conduct to satisfy strict statutory requirements.[361] As previously discussed, holographic will provisions have produced a large volume of cases that have been decided on ultra-fine factual distinctions. Although holographic will provisions typically are not strictly construed, differing court interpretations of their requirements have produced a largely arbitrary case law.

An essentially quantitative standard usually is applied to determine whether the handwriting requirement is met when the instrument contains nonholographic matter. The issue is the sufficiency of the testator's compliance; the objective is to set a standard for determining what conduct is sufficient to meet the requirements of the statute. The result in a particular case may depend upon whether the intent or surplusage theory is applicable. The cumulative result is a body of case law turning on such factors as the testator's choice of will form or stationery, placement of date, or method of filling in blanks on a printed will form. Even under the more liberal surplusage theory, the amount and nature of printed matter contained in a will often determines its validity.[362]

The Arizona Supreme Court no longer applies a sufficiency standard to determine compliance with the handwriting requirement. In *Muder v. Muder*,[363] the court interpreted the Arizona "material provisions" or "surplusage" statute to permit the printed portions of a will form to be "incorporated" into the handwritten portion of the holographic will as long as the decedent's testamentary intent was clear and the

361. For discussion of the application of the "intent" and "surplusage" theories in jurisdictions requiring that holographic wills be entirely handwritten, see *supra* notes 212-40 and accompanying text.

362. *See, e.g.*, Estate of Johnson, 129 Ariz. 307, 630 P.2d 1039 (Ct. App. 1981) (invalidating holographic will executed on printed form; court said that only the printed portions of the will, which may not be considered under Arizona's version of the UPC holographic wills statute, contained language from which testamentary intent could be inferred.). For discussion of decisions under a "surplusage" approach, see *supra* notes 249-63 and accompanying text. For discussion of the "surplusage" theory and decisions under the UPC's surplusage-type holographic will provision, see *infra* notes 226-40 and accompanying text (surplusage rule applied to wills that are entirely handwritten) and *infra* notes 257-63 and accompanying text (UPC holographic wills provisions).

363. 159 Ariz. 173, 765 P.2d 997 (1988).

protection afforded by requiring the material provisions to be handwritten is achieved.[364] The *Muder* court stated:

> We see no need to ignore the preprinted words when the testator clearly did not, and the statute does not require us to do so. . . . If testators are to be encouraged by a statute like ours to draw their own wills, the courts should not adopt upon purely technical reasoning a construction which would result in invalidating such wills.[365]

In reaching this result, *Muder* rejects a quantitative or sufficiency standard of validity in favor of a "functional" or "purposive" analysis similar to the qualitative substantial compliance concept proposed by Langbein.[366]

(b) Self-proving wills

In contrast to the Texas line of cases in which self-proving wills have been invalidated because the testator or the witnesses signed the affidavit but not the will itself,[367] the courts of Oklahoma,[368] Kan-

364. *Id.* at 176, 765 P.2d at 1000. The court pointed out that the purposes and policies of the wills statute are "[t]o discover and make effective the intent of a decedent in distribution of his property." *Id.* (citing ARIZ. REV. STAT. ANN. § 14-1102(B)(2) (1988)). In this case, the court was certain of the testator's intent and therefore held "that a testator who uses a preprinted form, and *in his own handwriting* fills in the blanks by designating his beneficiaries and apportioning his estate among them and signs it, has created a valid holographic will." *Id.* (emphasis in original). *But see* Estate of Johnson, 129 Ariz. at 311, 630 P.2d at 1043 (stating that Arizona has "stringent requirements for finding that a document which might appear in a thousand different forms, is a valid and authentic holographic will").

365. *Id.* The dissenting judge wrote:

> The majority reads into the statute a provision that printed portions of a form may be "incorporated" into the handwritten provisions so as to meet the statutory requirements. I am unable to discern such expansiveness in the statute. . . . I am sympathetic to the majority's desire to give effect to a decedent's perceived testamentary intent. However, the legislature has chosen to require that testamentary intent be expressed in certain deliberate ways before a document is entitled to be probated as a will. Whether the holographic will statute should be amended to take into account the era of do-it-yourself legal forms is a subject within the legislative domain. I suspect the ad hoc amendment engrafted on the statute in this case will prove to be more mischievous than helpful. Because I believe there has been no compliance with the statute on holographic wills, I respectfully dissent.

Id. at 178, 765 P.2d at 1002 (Moeller, J., dissenting).

366. For discussion of Langbein's concept of "substantial compliance," see *infra* notes 695-748 and accompanying text.

367. For discussion of the Texas cases, see *supra* notes 310-19.

368. *See, e.g.*, Dillow v. Campbell, 453 P.2d 710 (Okla. 1969) (witnesses signed only self-proving affidavit, not codicil; the court held that under these circumstances, signature of affidavit was sufficient to meet requisites of formality in execution); Estate of Cutsinger, 445 P.2d 778

sas,[369] and Florida[370] have held that the attestation requirement is met even if only the self-proving affidavit is signed, leaving the will itself technically unexecuted.[371] In *In re Estate of Petty*,[372] the Kansas Supreme Court stated that

> [t]he mere fact that the attestation, in form, resembled an affidavit, does not destroy its validity. Here the sworn statement was on the same page of paper as the last article of the will and may be said to have been incorporated into the will by words of reference therein. The evidence is undisputed that the will was signed by the testator . . . in the presence of each of the subscribing witnesses and that they signed the will, as subscribing witnesses, at his request and in his presence and in the presence of each other . . . It has been the policy of this court to uphold wills if the form of the will substantially complies with the requirements of the statute.[373]

In *In re Estate of Charry*,[374] a Florida appellate court reached a similar conclusion. The court stated that "the better view is that attestation clauses and self-proof affidavits are not necessary or essential parts of a will but when incorporated into a will they are not improper parts of it. The Texas view places form above substance and we decline to follow it."[375]

(Okla. 1968) (witnesses failed to sign attestation clause but signed self-proving affidavit; the court held that since the statute requires no particular form of attestation and the affidavit was treated as an attestation clause, witnesses substantially complied with the Oklahoma statute).

369. *See, e.g., In re* Estate of Petty, 227 Kan. 697, 608 P.2d 987 (1980) (the testator signed the will, but the witnesses signed only the self-proving affidavit; the court held that "no particular form of attestation is required in Kansas" and the mere fact that the attestation resembled a self-proving affidavit in form does not destroy its validity).

370. *See, e.g., In re* Estate of Charry, 359 So. 2d 544 (Fla. 4th D.C.A. 1978) (witnesses signed the self-proving affidavit, but failed to sign the codicil; the court held that witnesses' signatures performed the function of attestation and therefore, the will was valid).

371. The decisions upholding improperly executed self-proving wills reach their results by determining that the signature in the affidavit is sufficient to achieve compliance with the attestation requirements. These courts therefore are applying what is in effect a quantitative standard in holding that marginal compliance is sufficient to satisfy the requirements of the wills acts. *But see* Hopkins v. Hopkins, 708 S.W.2d 31 (Tex. App. 1986) (signature of witnesses to self-proving affidavit cannot validate unattested will). *See infra* notes 720-28 and accompanying text (comparing the rationale applied in these cases to the "substantial compliance" harmless error rationale).

372. 227 Kan. 697, 608 P.2d 987 (1980).

373. *Id.* at 702-03, 608 P.2d at 992-93.

374. 359 So. 2d 544 (Fla. 4th D.C.A. 1978).

375. *Id.* at 545. The *Charry* court noted that

(c) The Louisiana Statutory Will

Louisiana courts apply the principle of sufficient compliance to execution of Louisiana statutory wills.[376] The statutory will is a modification of the rigidly formal Louisiana wills act requirements which were derived from civil law.[377] The innovative statutory will was adopted from the common law in order to avoid those requirements,[378] though the Louisiana statutory will is significantly more formal than an ordinary attested will and is comparable to a self-proving will. The statute requires that the testator sign the will in the presence of a notary public and two witnesses, publish the will, and sign it on every page.[379]

The legislative history of the Louisiana statutory will indicates that it was intended to provide the testator with a "simplified means . . . to express his testamentary intent and to assure, through his signification and his signing in the presence of a notary and two witnesses, that the instrument was intended to be his last will."[380] The courts have therefore required what they call a liberal construction and application of the statutory will requirements, and have held that a will's validity is to be maintained "if at all possible, as long as it is in *substantial compliance* with the statute."[381] In determining whether a testator has substantially complied with statutory requirements, the courts have indicated that they will look to the purpose of the statutory requirements — "to guard against fraud."[382] This focus on the purpose

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> [t]here is no requirement [in the Florida Statute] that the witnesses sign at any particular place or with any particular mental intent. To require that a witness have any specific mental intent when he subscribes a will would make the validity of every will subject to the testimony of any witness that he did not have the requisite intent when he signed. We decline to add this dangerous concept to the requirements of the statute.

Id.

376. LA. REV. STAT. § 9:2442 (1964).

377. Parker, *supra* note 204, at 23-24.

378. Succession of Guezuraga, 512 So. 2d 366, 368 (La. 1987); Succession of Porche v. Mouch, 288 So. 2d 27, 28 (La. 1973); *see generally* Note, *Donations — Imperfect Compliance with the Formal Requirements of the Statutory Will*, 15 LOY. L. REV. 362 (1968-69) [hereinafter *Statutory Will*]; Note, *Louisiana Statutory Will: the Role of Formal Requirements*, 32 LA. L. REV. 452 (1972).

379. *Compare* LA. REV. STAT. § 9:2442 (1964) *with* CAL. PROB. CODE § 56-6240 (providing a less formal procedure which involves a form for the testator to fill in, sign, and have attested by two witnesses in accordance with the printed instructions). *See generally* Note, *supra* note 210 (discussing the California statutory will provision).

380. *Porche*, 288 So. 2d at 30.

381. *Guezuraga*, 512 So. 2d at 368 (emphasis added).

382. *Id.* One commentator has stated that

> [w]here the departure from form has nothing whatsoever to do with fraud, ordinary

of the requirements suggests that Louisiana courts will validate wills containing technical defects if there is no evidence that the defect raised any issue of fraud, a functional or purposive notion of substantial compliance rather than a quantitative sufficient compliance standard.[383] To the extent that the Louisiana courts' substantial compliance principle permits courts to enforce concededly defective wills,[384] the principle is more akin to a harmless error rule than to the typical notion of substantial compliance in the United States; that is, substantial compliance as a rationalization for holding that borderline conduct *in fact* meets the wills act requirements.[385] In application, however, court decisions show that substantial compliance in Louisiana is a narrow quantitative standard, under which courts will enforce wills only if the degree of deviation from the wills act requirements is marginal.[386]

> common sense dictates that such departure should not produce nullity. It was the intent of the legislature to reduce form to the minimum necessary to prevent fraud. *It is submitted that in keeping with this intent, slight departures from form should be viewed in the light of their probable cause.* If they indicate an increased likelihood that fraud may have been perpetrated they would be considered substantial and thus a cause to nullify the will. If not, they should be disregarded. Thus testators and estate planners will have the security that the legislature intended to give them.

Note, *Statutory Will*, *supra* note 378, at 371 (emphasis added).

383. For discussion of Langbein's concept of "functional" substantial compliance, see *infra* notes 695-748 and accompanying text.

384. *See* Langbein, *Substantial Compliance*, *supra* note 32, at 126 n.7.

385. *Id.*

386. *See id.* at 526 n.127 (distinguishing "substantial compliance" as typically applied in the courts from substantial compliance as a harmless error rule to save concededly defective wills). *See, e.g.*, Succession of Porche v. Mouch, 288 So. 2d 27 (La. 1973); Succession of Guezuraga, 512 So. 2d 366 (La. 1911); Succession of Marcello, 532 So. 2d 230 (La. App. 1988).

In *Marcello*, the notary mistakenly signed the will at the end of the dispositive provisions, where the testator ordinarily signs. *Marcello*, 523 So. 2d at 231. The testator's signature appeared at the bottom of the first page of the will and after the attestation clause, where the signatures of the notary and witnesses also appeared. *Id.* The appeals court held that the will met the requirements of the statute. *Id.* at 233. Although the statute requires the will to be signed "at the end," the court pointed out that the statute does not state that the signature must appear before the attestation clause. *Id.* at 232.

In *Porche*, the will did not include the requisite declaration above the signature of the testator in the attestation clause to the effect that the testator had published and signed the will in the presence of the notary and witnesses. *Porche*, 288 So. 2d at 28 (This provision was amended in 1974 to require that these facts be evidence by a declaration signed by the notary and witnesses, making it clear that the testator need not sign at the end of the will. *Guezuraga*, 512 So. 2d at 369.). The will did include a statement directly above the signature of the testator that he had published the will in the presence of the witnesses and notary and a statement in the attestation clause that in their presence the testator had signed and published the will (which statement was signed by the witnesses and the notary, but not the testator). *Id.* at 28-29. The court held that the will substantially complied with the formalities for a statutory

Louisiana's substantial compliance concept has failed to save statutory wills containing defects which appear under the circumstances to raise no actual issues of fraud or testamentary intent.[387]

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will, since the evidence as a whole (taking into account the signed statement of the testator and the signed statement of the witnesses and notary together) showed that the formalities were satisfied. *Id.* at 29. "[W]e see no reason why technical variations in the attestation clause — which is designed merely to *evidence* compliance with the formalities — should defeat the dispositive provisions of an otherwise valid will." *Id.* (emphasis in original). The court noted that under the common law on which the statutory will provision is (purportedly) based, "the statutes on the subject of the execution of a will should not be construed technically or rigidly if the testator has attempted, in good faith to make a will." *Id.* at 30 (quoting 2 W. BOWE & D. PARKER, PAGE ON WILLS § 19.4 (1960)).

In *Guezuraga*, application of a substantial compliance principle again saved a statutory will. In this instance, the violation was the testator's failure to sign the will at the end and on each separate page, as required by LA. REV. STAT. §§ 9:2442-:2449 (West 1990) (the current version of these sections is identical to the version analyzed in *Guezuraga*) of the statutory will provision. *Id.* at 366. The testator had signed the first page of the will, which contained all of the dispositive provisions and the beginning of the attestation clause, but did not sign the page containing the conclusion of the attestation clause. *Id.* The court held that the will was executed in substantial compliance with the requirements for a statutory will, since the Louisiana statutory will provision does not require the testator to sign following the attestation clause. *Id.* at 369. The court remarked that in most common law jurisdictions, the testator may sign either before or after the attestation clause, since it is not regarded as a part of a will. *Id.* The court also remarked in a footnote that although the statutory will "is derived from the common law," Louisiana is the only state requiring a signature on each separate page of the document. *Id.* at 366 n.2.

387. *See, e.g.*, Succession of English, 508 So. 2d 631 (La. App. 1987); Succession of Malone, 509 So. 2d 659 (La. App. 1987); Succession of Holloway, 511 So. 2d 1274 (La. App. 1987).

In *English*, the will was defective due to the omission of the attestation clause. 508 So. 2d at 631-32. The will did not include the requisite language respecting compliance with the formalities. *See id.* However, at the time of probate, the notary and witnesses who had participated in the execution of the will signed an affidavit before another notary and two witnesses. In the affidavit, the notary and witnesses who had executed the will declared that the formalities were duly observed at the time of execution. *Id.* at 632. The trial court held that the document was a valid statutory will. *Id.* The appellate court reversed on the ground that there is no substantial compliance when the attestation clause required by the statute is completely omitted and the dispositive provisions do not prove that the statutory formalities had been complied with or the date of execution. *Id.* at 633. The court held that the affidavit could not "cure" the omission of the attestation clause. *Id.* "To hold the probate affidavit can supply a complete lack of an attestation clause, or for a complete failure of the dispositive provisions of the testament to supply the requirements necessary to substantially comply with the statute, would be to judicially rewrite the statute and carve out an exception which its language does not support." *Id.*

In *Malone*, the court invalidated the statutory will of an illiterate testator who had signed by mark. 509 So. 2d at 663. In that case, the testator's attorney did not know at the time that he drafted the will that the testator was illiterate, *id.* at 659, and the attestation clause did not recite that the will had been read aloud in the presence of the testator or that the testator had declared that he could not sign his name and the reason for his inability, as required by LA. REV. STAT. § 9:2443 (West 1990) (provision for execution of a statutory will by an illiterate or sight-impaired testator; the current version of § 9:2442 and § 9:2443 is identical to that analyzed

(3) Consequences of the quantitative standard of substantial ("sufficient") compliance

In general, courts validate wills which could not be admitted to probate under a strict construction of the wills act on the rationale that the conduct has been close enough to that required by the wills act statute to be considered in compliance.[388] The substantial compliance rule, as applied in United States courts, is not a harmless error rule permitting *defective* wills to be deemed in compliance with the wills act when the defect does not raise any issues of authenticity or intent,[389] but is a yardstick measure of sufficiency.[390] Under a quantitative or sufficiency principle of substantial compliance, courts may refuse to validate a will even if unequivocal indicia of testamentary intent and authenticity exist unless the testator has attempted to

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in *Malone*). *English*, 509 So. 2d at 660-61. The facts indicated that the attorney's secretary, a notary, proceeded to execute the will in compliance with LA. REV. STAT. § 9:2442 (West 1990), which requires a literate testator. *English*, 509 So. 2d at 659. When it came time for the testator to sign, the notary discovered that the testator was illiterate, stopped the proceeding, and informed the attorney. *Id.* The attorney took over, reading the will aloud in the presence of the testator and three witnesses. *Id.* at 660. The testator published the will and signed his mark in the presence of the notary and the attorney and the witnesses signed under the attestation clause. *Id.* The court held that the will was not in substantial compliance with the applicable statute, since the document failed to show on its face (in the provisions or attestation clause) that it had been executed in compliance with the statute. *Id.* at 662. Moreover, the record showed that the three witnesses had not actually followed the notary's reading of the testament on copies of the will and that in fact the witnesses did not have copies of the will as the statute required. *Id.* This omission was held to be "fatal" to the validity of the will, despite the fact that the will had been read aloud in the presence of the testator and witnesses. *Id.* The court said that the procedure for execution of statutory wills for illiterate testators gives the testator "reasonable assurance that his desires are in fact reflected in the document." *Id.* Failure of the witnesses to follow the reading on copies frustrates that purpose. *Id.*

In *Holloway*, the sole defect in the statutory will was the omission of the date from the attestation clause. 511 So. 2d at 1275. The court noted that the statute states that the attestation clause *shall* be dated as provided in the statutory form and that the word "shall" is mandatory. *Id.* at 1276. The dispositive language of the document did not reveal the date of execution. *Id.* at 1277. The court held that "substantial compliance with the statutory scheme has never been interpreted to authorize the total absence of a mandatory requirement. . . . Rather, substantial compliance has been found when there is some technical variation in the mandated formalities but the instrument as a whole shows that the relevant formalities have been reasonably satisfied." *Id.* at 1276.

388. *See* Langbein, *Substantial Compliance*, *supra* note 32, at 526 n.127.

389. *See, e.g.*, *Malone*, 505 So. 2d at 659; *Kajut Will*, 2 Pa. Fiduc. 2d 197, 203, 22 Pa. D. & C.3d 123, 135 (Orphans' Ct. 1981).

390. *See* Langbein, *Substantial Compliance*, *supra* note 32, at 526 n.127; *see also* Rudd's Estate, 140 Mont. 170, 177, 369 P.2d 526, 530 (1962) ("This court has previously stated in effect that substantial compliance means only that a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which it was adopted.").

comply with every formality of the wills act and the court concludes that any conduct challenged as problematic can be considered to meet the wills act requirements.

An examination of the legal contortions that courts have employed in order to save improperly executed wills from invalidation reveals that courts hesitate to assume dispensing powers in order to excuse noncompliance with the wills act,[391] yet at the same time are reluctant to invalidate the testamentary plans of decedents when no doubt exists as to authenticity or intent. Whether the courts are hobbled by respect for the "dead man policy,"[392] a perceived need to limit the factfinding authority of probate courts,[393] superstitious reverence for the wills act, garden-variety judicial inertia produced by the force of precedent, or some combination of these factors, application of the strict compliance doctrine produces many hard cases turning on imperceptible factual differences and, therefore, much bad law. Because testators frequently bungle the formalities of will-making, the result is an "undignified spectacle of the courts indulging in schizophrenia, sometimes bending backwards to save a will despite formal defects, and sometimes standing firm on trivial and highly technical defects. . . . Such judicial acrobatics may be entertaining, but hardly make for certainty or clarity in the law."[394] The inflexible presumption against the validity of a defectively executed will and the attempts of well-intentioned judges to avoid harsh consequences in particular cases, produces a law of wills characterized by a lack of uniformity.

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391. *See, e.g., In re* Estate of Fernandez, 173 N.J. Super. 240, 413 A.2d 998 (1980). In *Fernandez*, the testator did not publish the will, although the wills were signed and attested. *Id.* at 241-43, 413 A.2d at 999-1000. The court refused to find substantial compliance with the wills act, on the grounds that to do so would be to break new ground — "a role more appropriate to appellate courts." *Id.* at 245, 413 A.2d 1001 (citing "Langhelm's" [sic] article, Langbein, *Substantial Compliance*, *supra* note 32, at 489 and other authorities). The court held the will valid on the ground that the new statute diminishing the requirements for will execution and eliminating the publication requirement was controlling. *Id.* at 245-48, 413 A.2d at 1001-02.

Langbein discusses this case in Langbein, *Harmless Error Rules*, *supra* note 5, at 7. Langbein felt that the judge was "obviously sympathetic to the substantial compliance doctrine," *id.*, although it is not clear from the opinion that the trial court distinguished substantial compliance as applied to save defective wills from the quantitative substantial compliance principle as typically applied in the courts, as distinguished by Langbein in the 1975 article, Langbein, *Substantial Compliance*, *supra* note 32, at 526 n.127.

392. For discussion of the "dead man policy," see Langbein, *Substantial Compliance*, *supra* note 32; *infra* notes 405-24 and accompanying text.

393. For discussion of the inferior status of probate courts, see *infra* notes 449-67 and accompanying text.

394. A. MELLOWS, THE LAW OF SUCCESSION 46 (3d ed. 1977).

b. Policies Perpetuating Underlying Wills Act Formalism

In 1975, Langbein published an article premised on the notion that the law of wills is "notorious for its harsh and relentless formalism."[395] Although the case law suggests that the "relentlessness" of the courts in applying the strict compliance rule may vary from jurisdiction to jurisdiction, and from case to case, the policy of requiring strict compliance clearly is responsible for an unacceptably high level of arbitrariness, distortion and disharmony in the law of wills specifically, and the law of donative dispositions generally. This distortion and disharmony is due to the machinations of courts straining to avoid "harsh" and "relentless" consequences in particular cases. It is inevitable that many property owners will attempt to make gratuitous dispositions without attending to the applicable standard of formality.[396]

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395. Langbein, *Substantial Compliance*, *supra* note 32, at 489. Mann explains the purpose and limitations of formalism.

> Formalism is not, of course, necessarily evil. The statutory requirements for formal wills ease the transfer of property at death by taking the vast array of testamentary things and channeling them into a form that is easily recognizable as a will. The requirements for writing, signature, and attestation impose a standard form on testamentary instruments that permits probate courts to identify documents as wills solely on the basis of readily ascertainable formal criteria. The formalities thus routinize probate in the large majority of cases. The problem lies not with the formalities but with judicial insistence on literal compliance with them. The only legitimacy of the formalities is that they signify that functions deemed essential to the process have been fulfilled. Whether or not the functions have been served is, or at least should be, a separate question from whether the formalities have been met. The latter is only evidence, albeit presumptive evidence, of the former. Since the presumption is not conclusive, it seems a rather shaky foundation upon which to rest a judicial requirement of strict compliance with the formalities. Courts, however, routinely invalidate wills on formal grounds, despite ample evidence that the document offered for probate accurately represents the testator's intent.

F. MANN, *supra* note 32, at 59-60.

396. *See* Palk, *Informal Wills: From Soldiers to Citizens*, 5 ADEL. L. REV. 382 (1975). Palk explains that

> [s]uch cases have occurred because, although the statutory requirements on the formal validity of wills and codicils are relatively clear and precise, testators have proved singularly incapable of obeying these simple instructions . . . . Testators have restlessly wandered their houses while witnesses have signed. Witnesses have come and gone like the ebb and flow of the tide. Attestation clauses have travelled north, south, east and west across the page. Weird and mysterious scratchings have appeared in the place of signatures. Codes have been employed, no doubt for fear the will may fall into enemy hands. Egg-shells have proved almost more popular than paper.
>
> Doubtless not all the errors made can be laid at the door of human folly. People are struck down with sudden illnesses and, with no will made, mistakes occur in

From a policy standpoint, the insistence on literal compliance with the requirements of the wills act as the threshold test for enforcing a will is difficult to justify. Although the act of testation is considered a privilege granted to property owners by the state rather than a concomitant of the right to private property protected by the Constitution,[397] the principle of free testation is deeply rooted in both United States property law and in the common law from which such property law is predominantly derived.[398] What is the rationale underlying judicial formalism which perseveres even in instances in which the defect in the document or its execution does not raise even a single issue that compliance with statutory formalities would have resolved?

(1) Historical precedent

The history of the English Statute of Wills indicates that its drafters were well aware of the function of formality not only as a means of preventing fraud, but also as a means of establishing testamentary intent and authenticity. Formal compliance with the Statute of Wills thus substituted for proof of intent and authenticity. The 1837 Act amending the Statute of Wills seems to have been in part a response to the practice of the ecclesiastical courts in enforcing wills that did not formally comply with the statute in instances in which the courts nevertheless were satisfied as to testamentary intent and authenticity.[399] It is clear, therefore, that the doctrine of strict compliance has not always been applied to wills.

Lindgren points out that the wills act formalities for attested wills and many related principles and corollaries have survived centuries longer than the conditions that were responsible for bringing them

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> the urgency to make one. Pieces of paper have conspired to be just the wrong size for what the testator wanted to say. Moreover the printed will-form has ironically not made life easy for the Do-It-Yourself testator. But whatever the cause, and whether they have had professional legal advice or not, people have made errors or committed irregularities in endeavoring to satisfy the formal requirements for a valid will.

Id. at 382-83.

397. Irving Trust Co. v. Day, 314 U.S. 556, 562 (1942). The *Day* court held the
> [r]ights 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. 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 jurisdictions.

Id. at 562. *See supra* note 39 (for discussion of the privilege of free testation).

398. For discussion of the privilege of free testation, see *supra* note 39.

399. Nelson & Starck, *supra* note 32, at 340-44.

into being.[400] One such change is the reversal of the common law presumption against testacy in dispositions of real property.[401] The old common law presumption produced the maxim that the courts should not construe wills to disinherit heirs or to "thwart the dispose which the law makes of the land."[402] It could be argued that the rule of strict compliance is consistent with a system which favors the state's forced succession scheme,[403] rather than a system which favors the "individualistic institution" of private property[404] and the principle of free testation.

(2) The "Dead Man" policy

One explanation for the doctrine of strict compliance is that courts have "a deep and abiding anxiety about attempting to divine the intent of people now dead."[405] Presently, all existing wills acts seem to be based on an assumption that formal compliance with the requirements replaces the need for extrinsic evidence to prove intent and authenticity.[406] Langbein analogizes the irrebuttable presumption that improperly executed wills are invalid to the "dead man" statutes that disqualify witnesses from testifying concerning transactions with a decedent, when the decedent's estate is a party to the suit.[407] The presumption that improperly executed wills are invalid and the rule forbidding reformation[408] of mistake or defects in the will, operate in combination to prevent courts or survivors from varying or interpreting the expressions of a decedent who is permanently absent from the jurisdiction.[409]

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400. Lindgren, *supra* note 58, at 550-56.

401. *Id.* at 552-54.

402. *Id.* at 553 (quoting Gardner v. Sheldon, 124 Eng. Rep. 1064, 1066 (1671)).

403. For discussion of the relationship between strict compliance and the family protection system promoted by the intestate succession statutes, see *infra* notes 425-48 and accompanying text.

404. Gulliver & Tilson, *supra* note 41, at 2.

405. Mann, *supra* note 32, at 61.

406. For discussion of the functions of the wills act formalities, see *infra* notes 470-522 and accompanying text.

407. Langbein, *Substantial Compliance*, *supra* note 32, at 501-02. For discussion of the Dead Man Statutes, see C. MCCORMICK, EVIDENCE § 65, at 159-61 (3d ed. 1984); 2 J. WIGMORE, EVIDENCE §§ 575-80 (Chadbourn Rev. 1979); 3 J. WIGMORE, EVIDENCE, § 1576, at 323-27 (2d ed. 1923) [hereinafter 3 J. WIGMORE 1923].

408. For an excellent discussion of the recent developments respecting the rule forbidding reformation and recent developments in the law, see Langbein & Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV. 521 (1982); Note, *Mistakenly Signed Reciprocal Wills: A Change in Tradition After* In re Snide, 67 IOWA L. REV. 205 (1981).

409. *See* Friedman, *supra* note 23, at 373-74; Langbein, *Substantial Compliance*, *supra* note 32. For Friedman quote, see *supra* note 31.

Similarly, the dead man statutes are premised upon the notion that decedents' intentions with respect to their lifetime transactions are peculiarly unsusceptible to reliable proof, because decedents cannot speak for themselves and the testimony of witnesses is likely to be colored by self-interest.[410] Although wills are not "transactions" to which the dead man statutes apply, Langbein suggests that a similar policy is implicit in the requirement of strict compliance.[411] Just as the dead man statutes prevent oral proof of a decedent's intentions, the wills requirements force decedents to set out their testamentary wishes in a permanent and reliable form to avoid the problems created by permitting proof of oral wills. One of the rationales for requiring strict compliance with the formalities is to avoid the hardship and fraud that doubtless would be a consequence of permitting surviving parties or interested persons to testify as to intent and authenticity.[412] This rationale is sometimes also cited as justification for the dead man statutes.

Langbein criticizes the "dead man" policy that is implicit in the strict compliance rule, and argues that

> [i]f the conduct and intention of a dead man are matters thought to be impossible of fair proof, then the judicial insistence on due execution may be welcomed as serving for the probate of wills the function which the dead man statutes serve elsewhere. It becomes important to notice, therefore, that the dead man statutes are widely condemned among commentators and practitioners.[413]

In his treatise, McCormick characterizes the policy underlying traditional "dead man" statutes as "a seductive argument."[414] However, McCormick along with most commentators,[415] practitioners,[416] and courts,[417] rejects the reasoning behind the rule.[418]

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410. C. MCCORMICK, *supra* note 407, at 159; 3 J. WIGMORE 1923, *supra* note 407, at 324-25.

411. Langbein, *Substantial Compliance*, *supra* note 32, at 501-02. *See* Gulliver & Tilson, *supra* note 41, at 6. Gulliver and Tilson likewise state that oral testimony may be particularly unreliable in the case of a will or other donative disposition when the issue of intent is raised after the death of the transferor. *Id.* Not only is the main actor dead, but there may have been an extended lapse of time between the time of execution and the time of probate. *Id.*

412. Langbein, *Substantial Compliance*, *supra* note 32, at 501.

413. *Id.* at 502.

414. C. MCCORMICK, *supra* note 407, at 159.

415. *Id.* at 160. McCormick and most commentators agree that

> the expedient of refusing to listen to the survivor is, in the words of Bentham, a "blind and brainless" technique. In seeking to avoid injustice to one side, the

Courts will address the issue of testator intent in probate proceedings if a purported holographic will appears to be ambiguous on its face, if an apparently valid formal will is challenged as a sham, or if wills are ambiguous and provisions require construction. Such instances require an inquiry into the testator's intent. In conducting this inquiry, courts have clearly demonstrated that they are capable of dealing with extrinsic evidence and of making the factual determi-

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> statute-makers ignored the equal possibility of creating injustice to the other. The temptation to the survivor to fabricate a claim or defense is obvious enough, so obvious indeed that any jury will realize that his story must be cautiously heard. A searching cross-examination will usually, in case of fraud, reveal discrepancies inherent in the "tangled web" of deception. In any event, the survivor's disqualification is more likely to balk the honest than the dishonest survivor. One who would not balk at perjury will hardly hesitate at suborning a third person, who would not be disqualified, to swear to the false story.

Id.

See also 3 WIGMORE 1923, *supra* note 407, at 325 ("The policy of disqualifying the survivor . . . [is] unenlightened and unpractical, and is . . . thoroughly to be condemned."). For further discussion of the dead man rules, see Ladd, *The Dead Man Statute*, 26 IOWA L. REV. 207 (1941); Ray, *Dead Man's Statutes*, 24 OHIO ST. L.J. 89 (1963).

416. *See* Langbein, *Substantial Compliance*, *supra* note 32, at 502 (stating that the American Bar Association recommended as early as 1938 to abrogate the rule excluding testimony of the decedent); *see also* C. MCCORMICK, *supra* note 407, § 65, at 160 n.7 (discussing 1938 ABA recommendation to abrogate rule excluding testimony of a decedent); 2 WIGMORE 1979, *supra* note 407, § 578 (discussing 1938 ABA recommendation and 1922 Commonwealth Fund in Connecticut, a committee of judges, practitioners, and professors, concluding that rule does not protect against false claims, but obstructs "thorough investigation of truth").

417. The concern of courts with excluding testimony of survivors in these cases goes back many years. Extracts from several nineteenth century cases are quoted in 7 WIGMORE 1923, *supra* note 407, at 324.

> I have not the least hesitation in saying that I think it would be a highly desirable improvement in the law if the rule was that all statements, made by persons who are dead, respecting matters of which they had a personal knowledge, and made "ante litem mortem," should be admitted. There is no doubt that by rejecting such evidence we do reject a most valuable source of evidence.

Id. (quoting Sugden v. St. Leonards, L. R. 1 P. D. 154 (1876) (Mellish, L.J.)). "I regret that according to the law of England any statement made by the deceased should not be admissible." *Id.* (quoting R. v. Bedingfield, 14 Cox. Cr. 342 (1879) (Cockburn, L.C.J.)).

> No doubt there are many countries . . . where the law permits declarations of persons who are dead to be given in evidence in all cases where they were made under circumstances in which such evidence ought properly to have been admitted if the person had been living; and there is much to be said for that law as compared with our own.

Id. (quoting Woodward v. Goulstone, L.R. 11 App. Cas. 469 (1886) (Herschell, L.C.)).

418. *See* C. MCCORMICK, *supra* note 407, at 160 (stating that lawmakers and courts are starting to see "the blindness of the traditional survivor's evidence acts" and "liberalizing changes" are being adopted).

nations necessary to identify intent. No magic is required. The "divination is not one that requires resort to occult aids, such as tea leaves or entrails."[419]

Langbein points out that courts have exhibited a higher degree of flexibility when confronting instances of defective compliance with the formalities required by the statute of frauds for execution of an enforceable contract.[420] As a consequence, courts have developed principles for enforcing formally defective contracts if the party wishing to avoid application of the statute has experienced an "irreversible change of position at the inducement of the defendant."[421] Langbein suggests that the disinclination toward similar leniency when a testator's compliance with wills act formalities has been defective may be due partly to the fact that a disappointed beneficiary, unlike the plaintiff in a contract action, is a mere volunteer.[422]

The revised UPC provisions seem to signify an unequivocal rejection of the application of the "dead man policy" to wills. First, new UPC section 2-503 permits evidence to show a decedent's intent that defectively executed wills, alterations or additions to wills, revocations, or revivals be implemented.[423] Second, revised UPC section 2-502(c) expressly permits introduction of extrinsic evidence to establish testamentary intent.[424]

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419. Mann, *supra* note 32, at 61 n.126; *see* Langbein, *Substantial Compliance*, *supra* note 32, at 502.

420. Langbein, *Substantial Compliance*, *supra* note 32, at 502-03.

421. *Id.*

422. *Id.* at 502. Langbein remarks that in cases of noncompliance with the statute of frauds the courts apply the main purpose doctrine and part performance rules to enforce agreements that otherwise would be void under the statute. *Id.* at 498-99. He argues that the courts follow a purposive or functional analysis to the Statute of Frauds formalities. *Id.*

> The essential rationale of these rules is that when the purposes of the formal requirements are proved to have been served, literal compliance with the formalities themselves is no longer necessary. *The courts have boasted that they do not permit formal safeguards to be turned into instruments of injustice in cases where the purposes of the formalities are independently satisfied.*

Id. (emphasis added).

As Fuller has suggested, the requirement of consideration in contract cases is the distinguishing feature serving to evidence validity and to identify the transaction as a contract. *See* Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941). Theoretically, the reason that wills act formalities are needed is to give substance to what would otherwise be an empty promise respecting succession to property. *See id.*

423. UNIF. PROB. CODE § 2-503 (1990) (dealing with defective execution of writings intended as wills).

424. *Id.* § 2-502(c). "Intent that the document constitute the testator's will can be established by extrinsic evidence, including, for holographic wills, portions of the document that are not in the testator's handwriting." *Id.*

(3) Family protection and the Intestate Succession Acts

Langbein identifies family protection as a further rationale underlying the predisposition of courts to insist on strict compliance with the wills acts. Noting that the wills acts are backstopped by intestate succession statutes, which invariably include family protection measures,[425] Langbein suggests that application of the doctrine of strict compliance may be a mechanism through which "the courts implement a policy preference for these family protection measures."[426] Langbein argues that application of the strict compliance doctrine would be "intolerable . . . if invalidity of the will were to result . . . in forfeiture of the property,"[427] but that in actuality its effect is simply to implement the states forced succession scheme, with its emphasis on the family.[428] Courts use the strict compliance doctrine to invalidate wills perceived as containing "unnatural" dispositions; that is, wills contrary to family interests in cases in which "unnatural" wills contain formal defects.[429]

The UPC attempts to strike a balance between the principle of free testation and the policy underlying provisions favoring family protection. For example, the recent UPC revisions to the elective share provisions[430] have been designed in line with the modern view

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425. Langbein, *Substantial Compliance*, *supra* note 32, at 499.

426. *Id.* at 500. *See* Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 251-63 (1963) (suggesting that testation actually serves the "family protection" policy more effectively than the intestate succession acts because most testators leave a larger share to a surviving spouse than would be available through intestacy, although the same study also may indicate that many people believe that there should be greater limits on free testation, especially where there are minor children); Gaubatz, *supra* note 40, at 507-09, 520-28 (discussing the conflicting policies that contribute to the tendency of courts to invalidate marginally defective wills); *see also* M. SUSSMAN, J. CATES & D. SMITH, THE FAMILY AND INHERITANCE 83-108 (1970) (showing that most testators prefer to leave all property to a surviving spouse, even when there are surviving lineals and if there is no surviving spouse, to relatives who are in need or who have rendered services to testator); Ward & Beuscher, *The Inheritance Process in Wisconsin*, 1950 WIS. L. REV. 393, 413 (showing that in almost 40% of cases, testators left all of their estates to the surviving spouse and that practically all testators transfer "within the family"; authors observe that a significant number of wills accomplish transfers substantially identical with intestate succession).

427. Langbein, *Substantial Compliance*, *supra* note 32, at 499.

428. *See generally* Gaubatz, *supra* note 40, at 517-47, 543 (discussing (1) the failure of present intestate succession schemes to achieve the goal of family protection; and (2) the irrelevance, to the policy of family protection, of application of strict compliance doctrine to invalidate wills for technical defects).

429. *Id.* at 516-20 (discussing impact of strict compliance doctrine on family protection policy).

430. UNIF. PROB. CODE §§ 2-201 to -207 (1990).

of marriage as an economic partnership[431] and with increased recognition of the surviving spouse's need for support.[432]

Revised section 2-201(a) implements the "partnership theory" by increasing the survivor's entitlement to a portion of the assets in the augmented estate if the marital assets were disproportionately titled in the decedent's name and is decreasing or eliminating the entitlement if the marital assets were evenly titled or disproportionately titled in the survivor's name.[433] The new provision also takes into account the length of the marriage in determining the entitlement of the surviving spouse, increasing the entitlement of the survivor of a long-term marriage and decreasing or eliminating the entitlement of the survivor of a short-term marriage[434] (on the theory that the survivor of a short-term marriage is unlikely to have contributed significantly to the acquisition of the decedent's wealth).[435]

A further family protection policy implemented by the revised elective share provisions is predicated on the notion that the deceased spouse's lifetime duty of support "should be continued in some form after death in favor of the survivor, as a claim on the decedent's estate."[436] The revised elective share provisions provide for a "supplemental" elective share amount in section 2-201(b) based on the needs of the survivor.[437] Section 2-201(b) now permits the survivor to receive up to $50,000 *in addition to* the portion of the decedent's estate that he or she is entitled to under section 2-201(a) if the surviving spouse's "assets and other entitlements are below this [$50,000] figure."[438]

The surviving spouse is further protected from the consequences of lifetime transfers that have the effect of reducing the probate estate by a redesign of the UPC's "augmented estate" concept.[439] The concept of the augmented estate requires assets in addition to those nominally titled in the decedent's name to be taken into account in determining the amount to which the surviving spouse is entitled.[440] This result is

431. *Id.* at general comment to part 2.

432. *Id.*

433. *Id.*

434. *Id.* § 2-201(a).

435. *Id.* at general comment to part 2. "[T]he effect is to deny a windfall to the survivor who contributed little to the decedent's wealth and ultimately to deny a windfall to the survivor's children by a prior marriage at the expense of the decedent's children by a prior marriage." *Id.*

436. *Id.*

437. *Id.*; *see id.* § 2-201(b). "In implementing a support rationale, the length of the marriage is quite irrelevant." *Id.* at general comment to part 2.

438. *Id.* § 2-201(b), § 2-201(b) comment.

439. *Id.* § 2-202.

440. *Id.* at general comment to part 2; *see id.* § 202(b).

accomplished by adding to the value of the decedent's net probate estate the value of the decedent's "reclaimable estate."[441] The decedent's "reclaimable estate" includes so-called "will substitute" inter vivos transfers[442] made by the decedent during the marriage to people other than the surviving spouse,[443] and property subject to a general power of appointment that is presently exercisable by the decedent.[444] The concept of the "augmented estate" has thus been strengthened by the closing of several loopholes previously left open,[445] including that of purchasing life insurance naming someone other than the surviving spouse as beneficiary.[446]

In refining the provisions relating to rights of survivors[447] while implementing a "harmless error" principle intended to prevent invalidation of testamentary plans for formal defects in execution,[448] the revised UPC attempts to ensure the problem of ensuring the protection of the family by some other means than invalidation of well-intentioned wills on technical grounds.

(4) Inferior status of the probate courts

Mann suggests another explanation for the inflexibility of courts in interpreting the wills acts: wills can be implemented only through the medium of a court of traditionally inferior ministerial status.[449]

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441. *Id.* § 2-202(b).

442. For discussion of the will substitutes, see *supra* notes 41-54 and accompanying text.

443. UNIF. PROB. CODE general comment to part 2 (1990); *see id.* §§ 2-201(b)(2); 2-201(b) comment.

444. *Id.* § 2-202(b)(2)(i).

445. *See id.* at general comment to part 2.

446. *Id.* § 2-202 comment.

447. For discussion of the ways in which current elective share provisions fail to provide an effective solution to the problem of protecting the family, see Gaubatz, *supra* note 40; Langbein & Waggoner, *supra* note 18.

448. UNIF. PROB. CODE § 2-503 (1990).

449. *Id.* (discussing the inferior status and limited, largely ministerial functions of probate courts). For discussion of the origins of the probate courts, see Atkinson, *supra* note 64. The "inferiority" of probate courts in the United States may derive from the suspicion and hostility with which the English ecclesiastical courts, where wills of personalty were proved and the probate process originated, were regarded by the common law courts. *See id.* at 107 (finding the roots of United States probate courts in the ecclesiastical courts); 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 304-05, 476 (5th ed. 1942) (hostility of common law courts to ecclesiastical courts); E. JENKS, *supra* note 149, at 269 (criticizing ecclesiastical courts for "scandalous laxity" in wills matters).

The English ecclesiastical courts were abolished in 1857. 20 & 21 Vict., c. 77 (1857). After Parliament abolished the ecclesiastical courts, it created a new Court of Probate with power to grant probate, letters of probate and letters of administration, effective as to real and personal property for wills disposing of both land and chattels. Atkinson, *supra* note 64, at 124; *see* 3 W. HOLDSWORTH, *supra* note 135, at 689.

"The requirement of strict compliance with the wills act formalities limits discretionary interpretation of the formalities by discouraging anything other than mechanical, literal application of them."[450] Considered thus, the strict compliance doctrine is an effective means of controlling inferior courts which are not equipped to engage in detailed factfinding or to adjudicate extrinsic evidence.[451]

In determining whether an instrument is a will as defined by the wills act, courts use a "fundamentally different mode of analysis" from that used to determine whether an instrument is a will based on evidence of testamentary capacity, intent, and absence of mistakes, fraud, or imposition;[452] that is, analysis requiring "discretionary adjudication."[453] Mann argues that the strict compliance doctrine relegates the probate courts, at least in those jurisdictions that do not recognize holographic wills, to the essentially ministerial function of "rubber stamping" duly executed wills and refusing to enforce wills that are defectively executed, without regard to circumstances indicating testamentary intent.[454]

> [T]he administrative decision of what constitutes a will is guided solely by whether or not the document meets the stipulated requirements of form. Those requirements — the wills act formalities — are a set of formally rational criteria for determining what constitutes a will. The rationality of the rules is formal, not logical.[455]

The strict compliance requirement permits the fundamental issue of intent to be treated as a purely formal matter by probate courts. Thus, formal compliance with the wills act establishes testamentary

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450. Mann, *supra* note 32, at 64; *see* 3 W. HOLDSWORTH, *supra* note 135, at 689.

451. Mann, *supra* note 32, at 64-65. The strict compliance doctrine and the related presumptions "prevent probate courts of limited jurisdiction from hearing contested matters fully, either by removing such matters to a court of general jurisdiction or by empowering the superior court to try the case again on the merits rather than limit its review to the questions appealed." *Id.*

In 1943 Atkinson wrote that the Probate Division of the High Court of Justice in Britain "has no business regarding succession except to grant, contest, or revoke probate and administration." Atkinson, *supra* note 64, at 125.

452. Mann, *supra* note 32, at 64-65.

453. *Id.* Application of the strict compliance doctrine converts wills act formalities into a set of mechanical criteria for determining, without reference to "the legally relevant characteristics of the facts of execution through logical analysis of their meaning," whether or not the document is a will. *Id.* at 65.

454. *See id.* at 64-65.

455. *Id.* at 65.

intent. If a contestant disputes that the decedent intended the document as a will notwithstanding formal compliance with the wills act, the contest should take place in a different forum to preserve the routine of probate, since the vast majority of wills are not contested.[456]

Mann remarked that one anomalous consequence of the strict compliance doctrine is that appellate courts apply the same mechanical standard applied by probate courts in the initial administrative decision of whether to deny admission to probate due to formal defects in the will.[457] In construing the wills acts, appellate courts substitute the strict compliance standard for "techniques of judicial reasoning and statutory interpretation."[458] To the extent that they do not typically apply "discretionary adjudication" in wills cases,[459] the appellate courts cannot effectively ensure doctrinal consistency in the probate courts or prevent abuse of discretion by "a class of judges who are not trained to exercise it or whom the supervisory courts perceive as not qualified to exercise it."[460] Mann suggests that upgrading the probate courts to enable them to deal with the factual issues raised by defective execution might be one step toward eliminating formalism.[461] However, Mann's theory does not account for the ubiquity of the strict compliance doctrine (which, as Langbein observes, persists even in jurisdictions in which the probate courts have not been historically debased)[462] and Mann does not deal with the administrative difficulties involved in increasing the powers of the probate courts.

Since the advent of the UPC, many states have upgraded the status and functions of their probate courts.[463] Since its inception, the UPC has endowed probate courts with subject-matter jurisdiction.[464] The UPC consolidates the probate court as a division of the state's trial court of general jurisdiction, with power to adjudicate issues of fact.[465] Under the UPC, probate courts are expressly empowered to

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456. *Id.*
457. *Id.*
458. *Id.*
459. *Id.*
460. *Id.* at 67.
461. *Id.* at 67-68. Mann concedes, however, that "the probate process will not lose its stigma of inferiority merely by judicial fiat." *Id.*
462. Langbein, *Substantial Compliance*, *supra* note 32, at 503. Mann's response to that argument is that "formalism became embedded in wills adjudication when the traditional structure of probate was all but universal. Reforms in probate jurisdictions, particularly reforms that are so recent, would not necessarily root out formalism unless they removed the stigma of inferiority from the probate process itself, which they have not." Mann, *supra* note 32, at 63.
463. L. AVERILL, *supra* note 189, at 8-9.
464. UNIF. PROB. CODE § 1-302(a) (1990).
465. *Id.* §§ 1-301 to -304.

take "all necessary and proper" action with respect to matters before them.[466] As Mann remarks, however, the UPC changes "are relatively recent, and they have not always applied to all probate districts within a state. Probate courts and judges in many states still follow the traditional model of limited jurisdiction and inferior status to at least some degree."[467]

III. FORM, FORMALITY, FORMALISM, AND THE IDENTIFICATION OF INTENTION: THE FUNCTIONAL COUNTER-ANALYSIS OF THE WILLS ACTS

A. *Strict Compliance and the Presumption of Intention*

The implementation of a harmless error rule presupposes that compliance with wills act formalities is not the only conduct by which a testator may evidence testamentary intent. Revised UPC section 2-503 sets out a harmless error rule which, in combination with new UPC section 2-502, permits wills that do not comply with execution formalities to be admitted to probate if the proponent can carry the burden of establishing by clear and convincing evidence that the decedent intended the writing to constitute a will.[468] Introduction of extrinsic evidence to prove testamentary intent is specifically authorized by new UPC section 2-502(c).[469]

The new UPC harmless error rule, or any similar provision permitting the proponent of a defective will to prove that the decedent executed it with testamentary intent, necessarily assumes that the most significant function of formal compliance with the wills act is to produce a document evidencing intent and authenticity, and that a defect in the document may be cured by presentation of evidence on those issues. Implementation of a harmless error rule depends upon acceptance by legislatures and courts of two basic principles: first, that the wills acts formalities are not magical rites indispensable to the process of testation; and second, that the formalities are not indispensable safeguards against fraud and overreaching. Indeed, adoption of a harmless error rule implicitly requires the conclusion that wills act formalities are useful only to the extent that the testator's com-

466. *Id.* § 1-302(b).

467. Mann, *supra* note 32, at 63. Mann reports that when several years ago he called on the judge of a small probate district in Connecticut, he was informed that "[t]he probate judge, Joe, was performing surgery on a Volkswagen." *Id.* at 62 n.129.

468. UNIF. PROB. CODE § 2-502(a)-(b) (setting out formal requirements for attested and holographic wills, respectively); § 2-503 (1990) (setting out new harmless error rule).

469. *Id.* § 2-502(a). For quote from this section, see *supra* note 292.

pliance obviates the need for extrinsic evidence to prove intent and authenticity. In default of strict compliance with the wills act requirements, such rules permit the court to look beyond the document to determine the meaning of the testator's conduct.

B. *Functional Analysis of the Wills Act Formalities*

1. Evolution of the "Functional Approach"

Courts routinely accept the formal limitation on the enforceability of wills without delving into the issue of whether the requirements, "each particular aspect [of which] can be traced to some antecedent stage where formality served a more palpable function,"[470] continue to have any utility. Even in instances in which the courts have upheld wills in cases in which there has been less than literal adherence to the strict letter of the wills act, the courts usually have done so on the theory that the testator *in fact* sufficiently complied with the specific requirement alleged to have been violated, not on the theory that the deviation from the requirement was harmless.[471] Commentators who have considered the issue generally maintain that the formal requirements of wills acts, as well as other formalities of transfer, such as the delivery requirement and the statute of frauds, still serve certain palpable functions. During the latter half of this century, commentators began to consider the formalities of transfer pragmatically. For example, advocates of the so-called "functional school"[472] identify several purposes or policies served by the requirement that property owners observe a prescribed standard of formality in executing wills and in otherwise directing the disposition of property to their successors.

The major premise underlying this functional analysis of formality is that the formalities of transfer endure because they effectively serve at least two important purposes or policies:[473] (1) ensuring some means

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470. Friedman, *supra* note 23, at 366.

471. For discussion of the courts' treatment of borderline conduct and the quantitative principle of substantial compliance, see *supra* notes 321-94.

472. *See* Rohan, *supra* note 23, at 4-7.

473. *See infra* text accompanying notes 470-522 (for discussion of the functions of the wills act formalities). The advocates of functional analysis reject the notion that the sole force maintaining the requirements of formalities in the law of succession is inertia; they consider that the formalities have survived because they serve certain essential purposes in facilitating transactions between parties. *See* Rohan, *supra* note 23, at 6. Friedman remarks that since most medieval legal institutions are "gone with the wind," it is reasonable to infer that those that persist have "survival value." Friedman, *supra* note 23, at 366.

The earliest application of functional analysis was limited to the delivery requirement in the law of gifts. *See* Mechem, *The Requirement of Delivery in Gifts of Chattels and of Choses in*

of determining the genuineness or authenticity of claimed dispositions; and (2) requiring some objective manifestation of the transferor's intent so that a court need not rely entirely on the statements of witnesses for assurance that the transferor intended to implement the disposition.[474] Advocates of functional analysis argue that if the transferor's

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Action Evidenced by Commercial Instruments, (pt. 1), 21 U. ILL. L. REV. 341, 358 (1926). Mechem's thesis was that the continued vitality of the delivery requirement "is attribut[able] to several desiderata which are achieved by the prerequisite of delivery, perhaps without the courts being conscious of their existence or of the role of delivery in securing them." Rohan, *supra* note 23, at 4-5. Mechem identified three desiderata or functions that are served by "the wrench of delivery": (1) delivery makes the significance of the gift "vivid and concrete" to the donor; (2) it provides unequivocal evidence of the transaction to any witnesses who might be present; and (3) it provides the donee with prima facie evidence of the gift. Mechem, *supra*, at 354.

In 1941, Gulliver and Tilson applied a similar "functional analysis" to the requirements of transfer generally. Gulliver & Tilson, *supra* note 41. In considering the purposes served by the formalities of transfer, Gulliver and Tilson treat desiderata identified by Mechem as aspects of what they term the "ritual" and "evidentiary" functions of formality. In addition, they identify a third "protective" function. *Id.* at 3-4; *see* Rohan, *supra* note 23, at 4-5.

In the same year Fuller, discussing the purposes served by formality (with special emphasis on the role of consideration in the law of contracts), also employed a form of functional analysis. Fuller, *supra* note 422. Fuller likewise identified three functions of formality: the "evidentiary" function, the "cautionary" function (overlapping to some extent with Gulliver and Tilson's "ritual" function) and the "channeling" function. *Id.* at 800-01.

In his 1975 article applying functional analysis specifically to the wills acts, Langbein identified four purposes served by wills act formalities that synthesize and incorporate the concepts identified by previous commentators: (1) "ritual" or "cautionary" (Gulliver & Tilson, Fuller, and Mechem); (2) "evidentiary" (Gulliver & Tilson, Fuller, and Mechem); (3) "protective" (Gulliver & Tilson); and (4) "channeling" (Fuller). Langbein, *Substantial Compliance*, *supra* note 32, at 491-97. Commentators writing after Langbein have tended to adopt his analysis. *See, e.g.*, Love, *supra* note 42; Nelson & Starck, *supra* note 32.

474. *See* Rohan, *supra* note 23, at 3-6. Functional analysis applies to save formally defective transfers in instances in which the facts and circumstances establish that the purposes served by the formal requirements have been met. *See* Gulliver & Tilson, *supra* note 41; Langbein, *Substantial Compliance*, *supra* note 32; Love, *supra* note 42; Mechem, *supra* note 473. Functional analysis in effect treats the requirements of transfer as meaningful *formal*, not *substantive*, requirements. Rohan, *supra* note 23, at 6. The advocates of functional analysis generally agree that an important rationale for the retention of formalities is to safeguard against the enforcement of impulsive promises and to serve as an evidentiary tool for the transferee, third party witness, or both. *Id.*

For applications of functional analysis to various problems in the law of succession and gratuitous transfers, see, e.g., Gulliver & Tilson, *supra* note 41 (discussing ambulatory and revocable transfers not executed in accordance with the wills acts); Langbein, *Substantial Compliance*, *supra* note 32 (discussing defectively executed wills); Love, *supra* note 42 (discussing delivery in the law of gift/oral declarations of trust); Mechem, *supra* note 473 (discussing delivery in the law of gift); Nelson & Starck, *supra* note 32 (discussing defectively executed wills); Rohan, *supra* note 23 (discussing delivery requirement in the law of gift).

conduct effectively has achieved the purposes that the formalities of transfer were designed to serve, a court should enforce the transfer even if the transferor's conduct falls short of the standard. In effect, they suggest that courts should have a form of dispensing power permitting them to enforce formally invalid transfers in cases in which the transferor has failed to do what the law requires but in which there are no unresolvable issues respecting intent and authenticity.[475]

The most important recent adaptation of the functional approach is Langbein's proposed use of the substantial compliance doctrine to save defectively executed wills.[476] In his influential 1975 article, Langbein argues that when a defect in a will is "harmless to the purposes of the wills act" — when the bungled or omitted formality does not raise fundamental issues of intent or authenticity — the document should be deemed "in substantial compliance" with the wills act and should be admitted to probate.[477] The concept of substantial compliance as a litigation rule converting the irrebuttable presumption that a formally defective will is unenforceable into a rebuttable presumption[478] obviously differs profoundly from the substantial compliance concept sometimes referred to by United States courts in cases determining

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475. Mechem, *supra* note 473, at 354. Mechem argues that the delivery requirement in the law of gift should not be strictly applied in instances in which the purposes of the requirement have been effectively met, because in some instances literal compliance — manual tradition — is impracticable or impossible; in such instances, the gift should be upheld. *Id.*; *see also* Rohan, *supra* note 23 (reexamining Mechem's arguments and reaching a similar conclusion).

In their seminal article on classification of gratuitous transfers, Gulliver and Tilson argue that courts should uphold testamentary dispositions made by decedents who fail to comply with the wills act if there is compliance with formalities appropriate to some inter vivos form of gratuitous transfer. Gulliver & Tilson, *supra* note 41, at 17. Gulliver and Tilson consider that all of the formalities of transfer serve the same or similar functions, and that the intentions of a decedent who uses an inappropriate mode of transfer should not be disregarded if the conduct of the transferor raises no unresolvable issues that would have been resolvable by compliance with the wills acts. *Id.* In a recent article, Langbein argues that the essentially testamentary will substitutes (or "nonprobate transfers"), traditionally classified as inter vivos dispositions, require "alternative formalities" that effectively fulfill the functions of the wills act requirements and that it is this fact, rather than the spurious inter vivos classification of these transfers, that justifies their exemption from the wills act requirements. Langbein, *Nonprobate Revolution*, *supra* note 17, at 1130-32.

Love argues for treating imperfect gifts as enforceable oral declarations of trust in instances in which the donor dies before completing delivery and the circumstances show that the donor intended the gift to be given effect. *See* Love, *supra* note 42.

476. *See* Langbein, *Substantial Compliance*, *supra* note 32.

477. *See id.* For discussion of the substantial compliance doctrine, see *infra* notes 696-743 and accompanying text.

478. Langbein, *Substantial Compliance*, *supra* note 32, at 513.

that arguably defective wills in fact comply with the wills act requirements allegedly violated.[479]

Langbein's functional interpretation of wills act formalities and his proposal that the strict compliance doctrine be replaced with a rule permitting implementation of certain defective wills is the first *systematic* formulation of a harmless error rule applicable to wills.[480] Langbein's analysis, which greatly influenced the development of UPC section 2-503 and harmless error legislation in other countries, is very much the product of the theory that wills act requirements can be analyzed and ranked in terms of their utility in establishing testamentary intent or preserving evidence of authenticity. Langbein's substantial compliance harmless error rule is grounded upon certain assumptions about the functions of formal requirements for due execution.[481] Further, the comments to the new UPC harmless error rule indicate that the drafters contemplated that courts would apply functional analysis reasoning when addressing section 2-503.[482]

2. Four Functions of Formality

a. Attested Wills

Functional analysis is founded on the premise that the transfer requirements represent a meaningful formal, as opposed to substantive, requirements.[483] As the subsequent discussion shows, the advocates of functional analysis generally assume that it is entirely rational to retain formal transfer requirements as a safeguard against enforcement of casual promises and unpremeditated action as well as a means of preserving evidence of the intention to make a gratuitous transfer.[484] The gravamen of the functional approach, however, is that enforce-

479. For discussion of cases holding that testator's conduct was in substantial compliance with wills acts, see *infra* notes 729-42 and accompanying text.

480. Although the South Australian provision that eventually became the model for most harmless error rules today, including UPC § 2-503, was under discussion during the period that Langbein's article was in press, the legislative history of the South Australian statute seems to indicate that its drafters neither anticipated nor intended the broad construction eventually given to it by the courts. *See infra* notes 744-87 and accompanying text. *Cf.* Bates, *supra* note 3 (anticipating the advent of the harmless error debate, but not providing a systematic analysis of the problem and its solution).

481. For discussion of the substantial compliance doctrine, see *infra* notes 696-743 and accompanying text.

482. UNIF. PROB. CODE § 2-503 comment (1990). For discussion of UPC § 2-503, see *infra* notes 925-49 and accompanying text.

483. Rohan, *supra* note 23, at 6.

484. *Id.*

ability of gratuitous transfers (including transfers by will) should not depend on exact compliance with the formalities, but on the effectiveness of the parties' conduct in establishing the transferor's intent to implement the purported transaction.

Functional analysis is useful in addressing the problem of strict compliance with the wills acts because it focuses attention on individual wills act formalities and their relationship to the problems of establishing (1) whether the document is genuine; and (2) whether the maker of the document intended it to be given effect as a will. In his 1975 article, Langbein synthesizes the analysis of the commentators who previously addressed the problem of strict compliance and identifies four major categories of purposes, policies, or functions that are served by wills act compliance.[485] Although in many significant respects the following analysis of the categories and functions differs from Langbein's analysis, his 1975 article has been the point of departure for all subsequent discussion by scholars, including the discussion that follows.

(1) "Intent-verifying" function

In this article, the term "intent-verifying function" refers to the role that compliance with transfer formalities serves to produce an objective manifestation of the transferor's intent. According to Mechem, the first scholar to look at formality functionally, formal standards effecting a transfer serve to make the nature of the transferor's act "vivid and clear" to any witnesses to the transfer, to a court called upon to enforce the transfer, and to the transferor.[486] Mechem thus discerned two aspects of the intent-verifying function. These aspects were later identified, although not generally clearly differentiated, by other commentators as (1) the "ritual" aspect of formality that produces an objective manifestation of intent on the part of the transferor to implement the transfer,[487] and (2) the "cautionary" aspect of formality, resulting from the requirement that the transferor perform prescribed acts as a condition of an effective transfer that impresses on transferors the seriousness of their actions and induces deliberation.[488] Although most commentators, including Langbein, seem to use the terms "ritual function" and "cautionary function"

485. *See* Langbein, *Substantial Compliance*, *supra* note 32, at 491-97.
486. Mechem, *supra* note 473, at 354.
487. Gulliver & Tilson, *supra* note 41, at 3-4.
488. Fuller, *supra* note 422, at 800.

interchangeably, a careful examination of the literature reveals that two distinct functions are actually considered to be comprehended within the statutory requirements for due execution.[489]

(a) The ritual aspect of formality

Legal statutory requirements designed to produce an objective manifestation of intent through the use of ritual serve the intent-verifying purpose by requiring of the transferor some form of conduct that reliably distinguishes transactions intended to have legal effect from casual statements or rash promises.[490] The wills acts ritual that contributes most to the intent-verifying purpose is attestation, because it induces the testator to select witnesses to the testament and otherwise to engage in deliberate, premeditated conduct that unequivocally signifies the intent to make a will.[491] Although all of the acts required

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489. *See* Langbein, *Substantial Compliance*, *supra* note 32, at 495 n.30 (although Langbein does not explicitly distinguish between these concepts, his analysis reveals recognition of both aspects).

490. Gulliver and Tilson look primarily to the usefulness of formality in identifying dispositions intended to be enforced — in other words, at the objective *ritual* aspect of the intent-verifying function of formality.

> [A] court needs to be convinced that the statements of the transferor were deliberately intended to effectuate a transfer. People are often careless in conversation and in informal writings. Even if the witnesses are entirely truthful and accurate, what is the court to conclude from testimony showing only that a father once stated that he wanted to give certain bonds to his son, John? Does this remark indicate finality of intention to transfer, or rambling meditation about some possible future disposition? . . . Possibly the remark was inadvertent, or made in jest. . . . The court is far removed from the context of the statements, and the situation is so charged with uncertainty, that even a judgment of probabilities is hazardous. Casual language, whether oral or written, is not intended to be legally operative, however appropriate its purely verbal content may be for that purpose. Dispositive effect should not be given to statements which were not intended to have that effect. The formalities of transfer therefore generally require the performance of some ceremonial for the purpose of impressing the transferor with the significance of his statements and thus justifying the court in reaching the conclusion, if the ceremonial is performed, that they were deliberately intended to be operative. This purpose of the requirements of transfer may conveniently be termed their *ritual function.*

Gulliver & Tilson, *supra* note 41, at 3-5 (emphasis added). Gulliver and Tilson further state that "[c]ompliance with the total combination of requirements for the execution of formal attested wills has marked ritual value, since the general ceremonial precludes the possibility that the testator was acting in a casual or haphazard fashion. The ritual function is also specifically emphasized in individual requirements." *Id.* at 5.

491. *See id.* at 5; Langbein, *Substantial Compliance*, *supra* note 32, at 520-21.

to execute a will serve to promote the "ritual" aspect of formality to some extent, fulfillment of the traditional requirements for attestation "set[s] wills apart from the other activities of daily life."[492]

(b) The cautionary aspect of formality

A secondary aspect of formality is its tendency to induce deliberation and reflection on the part of the testator. Formality thus prevents enforcement of casual statements and unpremeditated action, and thus serves a subjective *cautionary* as well as an objective *ritual* function.[493] Virtually all of the wills act formalities serve the cautionary aspect of the intent-verifying function. Even the bare act of reducing the testamentary scheme or intended disposition to written form induces deliberation and reflection.[494] The ritual and cautionary aspects of formality reinforce one another: on the one hand, ritual tends to induce deliberation and reflection; and on the other hand, fulfillment of the ritual function indicates premeditation and deliberation.[495] Together,

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492. Lindgren, *supra* note 58, at 544. Lindgren agrees that attestation does serve this purpose, but does not consider that its ritual value justifies retention of what he considers to be an obsolete requirement. *See id.* at 569-73.

493. Fuller focuses on the effect of compliance with formality on the transferor's subjective intentions:

> A formality may . . . perform a cautionary or deterrent function by acting as a check against inconsiderate action. The seal . . . fulfilled this purpose remarkably well. . . . [It] was an excellent device for inducing the circumspective frame of mind appropriate in one pledging his future. To a less extent any requirement of a writing, of course, serves the same purpose, as do requirements of attestation, notarization, etc.

Fuller, *supra* note 422, at 800.

494. *See* Gulliver & Tilson, *supra* note 41, at 14; Nelson & Starck, *supra* note 32, at 349.

495. As Langbein comments:

> A will is said to be revocable and ambulatory, meaning that it becomes operative only on death. Because the testator does not part with the least incident of ownership . . . the danger exists that he may make seeming testamentary dispositions inconsiderately, without adequate reflection and finality of intention. . . . One purpose of many of the forms is to impress the testator with the seriousness of the testament, and thereby to assure the court "that the statements of the transferor were deliberately intended to effectuate a transfer." They *caution the testator* [cautionary function], and they *show the court that he was cautioned* [ritual function].

Langbein, *Substantial Compliance*, *supra* note 32, at 494-95 (citations omitted) (emphasis added). "The execution of the will is made into a ceremony impressing the participants with its solemnity and legal significance. . . . It is difficult to complete the ceremony and remain ignorant that one is making a will." *Id.* at 495.

> Formalities which caution the transferor of the significance and finality of his act are desirable since they force upon him the opportunity to reflect on its significance;

the ritual and cautionary aspects of formality contribute to produce the inference that the testator or transferor followed the statutory requirements to signify an intention that the disposition be given effect.

Generally speaking, formalities that serve *only* the cautionary function will not produce a strong inference of intent because without a ritual or implementing act signifying the finality of the transferor's intention, the issue of whether the disposition should be implemented remains in doubt. Of the wills act formalities, only attestation *unequivocally* signifies that the will is complete and intended to be enforced.[496]

> they also indicate to the court that the action was taken with deliberation. By limiting judicial recognition to transfers which comply with such formalities, the courts reduce the chance of giving legal import to words carelessly spoken or to idle ruminations about actions to be taken in the future.

Love, *supra* note 42, at 339-40.

Nelson and Starck suggest that the goals of the wills act formalities include providing the court with the following assurances:

> (1) . . . the testator has thought seriously about the nature and value of his property, those who have natural claims upon the testator for support, and how those claims can be satisfied; [and] (2) . . . the testator reached a final decision on the disposition of the assets. Although it is not necessary that the testator make complete disposition, it is desirable that the testator's state of mind be final on the disposition made in the will.

Nelson & Starck, *supra* note 32, at 348. Although Nelson and Starck refer only to the "ritual" function, their discussion focuses mainly on the subjective cautionary aspect of what is here referred to as the intent-verifying function.

> It is perhaps true that facing the reality of death and its attendant consequences is one of the most difficult responsibilities in life. While the consequences of death are inherently the focus of the execution of a will, a will is normally executed at a time when death is not imminent. Coupled with the fact that normally the testator does not part with the least incident of ownership upon execution of the will, such execution may not achieve the goal of careful consideration of property and obligations. The process of ritual or ceremony is thought to assure that the testator is aware of the solemnity of the act and its attendant consequences. . . . It is believed that the sum and substance of . . . formalities is that few persons could realistically avoid the conclusion that this is a solemn act which will have significant consequences.

Id. at 348-51.

496. Gulliver & Tilson, *supra* note 41, at 5. An attested will on its face provides strong evidence of testamentary intent and finality. "Compliance with the total combination of requirements for the execution of formal attested wills has a marked ritual value, since the general ceremonial precludes the possibility that the testator was acting in a casual or haphazard fashion." *Id.* Gulliver and Tilson appear to regard attestation as primarily serving the evidentiary function, which may be open to question. *See id.* at 4.

The signature[497] and writing[498] formalities serve the intent-verifying function to some extent, but standing alone, are not sufficiently final

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Langbein recognizes the importance of the attestation formalities to the intent-verifying function as means of enforcing awareness of the import of the testator's acts and as a manifestation of intention.

> The execution of a will is made into a ceremony impressing the participants with its solemnity and legal significance. Compliance with the Wills Act formalities for a witnessed will is meant to conclude the question of testamentary intent. It is difficult to complete the ceremony and remain ignorant that one is making a will.

Langbein, *Substantial Compliance*, *supra* note 32, at 495.

> When the Wills Act requires attestation, it directs that persons additional to the testator participate in the execution of the will. Their participation is the major factor in ceremonializing the execution, and those who survive the testator will be able to testify to due execution. The increment which attestation adds to the cautionary . . . function[ ] seems unlikely to be achieved by other means. . . . Attestation, unlike the ceremonies associated with it [presence and publication] has been nearly as fundamental in the statutory scheme as signature and writing.

Id. at 521.

But see Langbein, *Harmless Error Rules*, *supra* note 5, at 52 (attestation serves a modest protective function, but it is usually not necessary because "there is usually strong evidence that want of attestation did not result in imposition"); Langbein, *Substantial Compliance*, *supra* note 32, at 498 ("Only where the protective policy is still valued is it fair to characterize attestation as indispensable to the policies of the Wills Act."); Lindgren, *supra* note 58, at 544-46 (arguing that while attestation contributes to the "ritual" function, it is nevertheless dispensable).

497. Gulliver and Tilson discuss the signature requirement and the ritual function:

> [The ritual function] furnishes one justification for the provision that the will be signed by the testator himself or for him by some other person. Under the English Statute of Wills of 1540, specifying a will "in writing," no signature was expressly required. In construing this statute, the courts gave effect to various informal writings of the testator, even though the circumstances furnished no assurance that the testator intended them to be finally operative. These decisions are said to have been influential in the enactment of the provision of the Statute of Frauds, which were the first to require a signature. The signature tends to show that the instrument was finally adopted by the testator as his will and to militate against the inference that the writing was merely a preliminary draft, an incomplete disposition, or haphazard scribbling. The requirement existing in some states that the signature of the testator be at the end of the will has also been justified in terms of this function; since it is the ordinary human practice to sign documents at the end, a will not so signed does not give the impression of being finally executed.

Gulliver & Tilson, *supra* note 41, at 5-6. The requirement that a will be signed at its end has also been said to serve a similar function. *Id.*

According to Langbein, signature is the primary intent-verifying formality. "More important than the requirement of written terms is that of written signature." Langbein, *Substantial Compliance*, *supra* note 32, at 495. "Of the many formalities found in the different Wills Acts, two are universal. A will must contain written terms and the testator must sign it. . . . Writing and signature are the minimum requirements which assure the finality, accuracy, and authenticity of purported testamentary expression." *Id.* at 498. Langbein points out that "[m]ost people

and unequivocal to establish the testator's intent to adopt the will. An unsigned writing evidences deliberateness, but the lack of an unambiguous implementing act leaves open the issue of finality of intention.[499] Further, a signature alone may not unequivocally establish finality. Signed writings produced for probate in jurisdictions that permit unattested holographic wills often leave in doubt whether the testator intended the writing to be a will or whether it was merely a draft, a letter, or some other informal or incomplete writing.[500] Even

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would not lightly sign anything captioned 'Last Will and Testament.' . . . Signature separates the preliminary draft from the decided 'last will.'" *Id.* at 518. "If you leave your will unsigned, you raise a grievous doubt about the finality and genuineness of the instrument." Langbein, *Harmless Error Rules*, *supra* note 5, at 52. "Signature is the formality that distinguishes between drafts and wills." *Id.* at 23. "Evidentiary and cautionary formalities such as signature and writing are all but indispensable. . . ." Langbein, *Crumbling of the Wills Act: Australians Point the Way*, 65 A.B.A. J. 1189, 1194 (1987) [hereinafter Langbein, *Crumbling Wills Act*]. With respect to the indispensability of signature to the policies of the wills acts, see Langbein, *Substantial Compliance*, *supra* note 32, at 518-19.

498. Gulliver and Tilson state that an unsigned writing does not indicate finality. Gulliver & Tilson, *supra* note 41, at 5. Nelson and Starck, however, consider that the act of writing has cautionary value to the extent that it induces deliberation.

> Writing has always been regarded as the most solemn form of expression and is far less susceptible to a claim that it was tentative instead of final. The requirement of writing cannot, of course, assure the desired degree of solemnity. Holographic wills, though required to be in writing, are often cast in very conversational tones which have the reader wondering whether the expression was nothing more than a segment of the writer's "stream of consciousness" instead of a finalized act.

Nelson & Starck, *supra* note 32, at 349.

The better view is that the act of reducing one's testamentary plans to writing indicates deliberation but that the intent to have the disposition enforced cannot be said to be final absent some implementing act such as signature or attestation. *See* Fuller, *supra* note 422, at 803-04.

499. *See* Fuller, *supra* note 422, at 803-04.

500. *See infra* notes 523-615 and accompanying text (for discussion of holographic wills and the problem of "overinclusiveness").

One formal requirement found only in a few jurisdictions that has some bearing upon the meaning of the testator's signature for the testator and for the probate court is the requirement that the will be signed at the foot or end. A number of cases have arisen because the testator placed the signature somewhere other than at the end of the document; and courts in those instances have had to struggle with the question of whether the apparent signature was actually affixed with the intention to signify adoption of the terms of the will. Most commentators do not treat placement of the signature as fundamental to the wills act purposes. *See* Langbein, *Substantial Compliance*, *supra* note 32, at 498 (stating that the "requirement that the will be signed is vastly more purposive than the requirement that the signature be 'at the end.'"). Mechem, *supra* note 182, at 504 (stating that the requirement that signature be at the end of the document is dispensable and approving its elimination from the Model Probate Code).

But see Nelson & Starck, *supra* note 32, at 349-50 (emphasizing the ritual value of the requirement that the will be signed at the foot; failure to require the signature at the end of the will raises two problems: (1) whether its placement elsewhere was an adoption of the will by the testator; and (2) whether the document is final).

will substitutes, which need not include attestation to be effective, generally are only effective if some objective act on the part of the transferor (such as formation of a contract with a financial institution or insurance company) finalizes and implements the document.

Langbein observes that the increasing use of the signature in unimportant transactions has diminished its cautionary value.[501] To some extent, the fact that signature is the implementing act for many transactions reduces the degree of reflection and deliberation which is induced by the wills act signature requirement. Perhaps people who routinely sign their names are less likely to be impressed by the significance of signing their will. However, it could be argued that the routine use of signature as an implementing act in ordinary business transactions may enhance its "ritual" impact, because the omission of a signature from a document produces an inference of a lack of finality of intention. The formalities that contribute to the ceremoniousness of attestation — presence[502] and publication[503] — contribute to some extent to both the ritual and cautionary aspects of the intent-verifying function.[504]

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501. Langbein, *Substantial Compliance*, *supra* note 32, at 518.

502. Most commentators consider that the presence requirements (requirements that testator sign in the presence of the witnesses, that the witnesses sign or acknowledge the will in the presence of the testator, or that the witnesses sign in the presence of each other) contribute little to the intent validating or authenticating functions of the wills act. To the extent that they increase the ceremoniousness of the process of will-making, presence requirements may enhance the cautionary or ritual functions, but their primary purpose seems to be prevention of fraud. *See infra* notes 520-21 and accompanying text.

503. "The occasional provisions that the testator publish the will or that he request the witnesses to sign [the will] . . . seem chiefly attributable to this purpose, since such actions indicate finality of intention." *See* Gulliver & Tilson, *supra* note 41, at 6. Langbein considers that publication increments the intent-validating function by contributing to the ceremoniousness of will-making by "warning the testator of its seriousness," and "fix[ing] the execution in the memory of those who may testify to it." Langbein, *Substantial Compliance*, *supra* note 32, at 521. However, Langbein regards publication as one of the minor formalities and as therefore dispensable under a substantial compliance rule. *See id.* at 521.

Nelson and Starck consider that publication plays an important role in serving the ritual and cautionary functions: "[t]he completion of the act in the presence of witnesses definitely adds formality to the ceremony and prevents the testator from regarding the act as whimsical or capricious." Nelson & Starck, *supra* note 32, at 350-51.

The UPC of 1969 eliminated the publication requirement. *See supra* notes 183-203 and accompanying text.

504. *See* Lindgren, *supra* note 58, at 544 (stating that virtually all the formalities that one could imagine, including a password or a secret handshake, would serve the ritual function "because they would set wills apart from the other activities of daily life").

(2) "Authenticating" function

The wills act formalities also serve to create reliable evidence of the authenticity of the purported will and of the specific disposition of property intended by the testator.[505] For attested wills, this function

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505. Gulliver and Tilson note:

> The requirements of transfer may increase the reliability of the proof presented to the court. The extent to which the quantity and effect of available evidence should be restricted by qualitative standards is, of course, a controversial matter. Perhaps any and all evidence should be freely admitted in reliance on such safeguards as cross-examination, the oath, the proficiency of handwriting experts, and the discriminating judgment of courts and juries. On the other hand, the inaccuracies of oral testimony owing to lapse of memory, misinterpretation of the statements of others, and the more or less unconscious coloring of recollection in the light of the personal interest of the witness or of those with whom he is friendly are very prevalent; and the possibilities of perjury and forgery cannot be disregarded. These difficulties are entitled to especially serious consideration in prescribing requirements for gratuitous transfers, because the issue of validity of the transfer is almost always raised after the alleged transferor is dead, and therefore the main actor is usually unavailable to testify, or to clarify or contradict other evidence concerning his all-important intention. At any rate, whatever the ideal solution may be, it seems quite clear that the existing requirements of transfer emphasize the purpose of supplying satisfactory evidence to the court.

Gulliver & Tilson, *supra* note 41, at 4. Obviously, in the case of a will, the transferor will always be unable to clarify intent.

> [T]he testator will inevitably be dead and therefore unable to testify when the issue [of the validity of the will] is tried. . . . [A]n extended lapse of time, during which the recollection of witnesses may fade considerably, may occur between a statement of testamentary intent and the probate proceedings. Both factors tend to make oral testimony even less trustworthy than it is in cases where there is some likelihood of the adverse party being an available witness and where the statute of limitations compels relative promptness in litigation. The statute of wills may therefore reasonably incorporate unusual probative safeguards requiring evidence of testamentary intent to be cast in reliable and permanent form.

Id. at 6.

Fuller refers to the authenticating or "evidentiary" function as "[t]he most obvious function of a legal formality." Fuller, *supra* note 422, at 800. It is likewise emphasized by Mechem (with respect to the delivery requirement specifically); that formalities of transfer may make the transfer "unequivocal" to witnesses and may serve to preserve evidence of the intent to have the transfer take effect. *See* Mechem, *supra* note 473, at 354.

Langbein states that "[t]he primary purpose of the Wills Act has always been to provide the court with reliable evidence of testamentary intent and the terms of the will; virtually all the formalities serve as 'probative safeguards.'" Langbein, *Substantial Compliance*, *supra* note 32, at 492.

Nelson and Starck appear to agree with Langbein in identifying the authenticating function of wills as primary.

> All wills acts have as a primary function the providing of evidence from which the court can, with certainty, ascertain the testator's wishes. . . . It cannot be said

is served by the attestation[506] and signature[507] requirements. For un-

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with certainty that [the] goal will be achieved by [the] formalities. Interpolation of a signed and witnessed will is not impossible since there is no requirement that the testator sign every page and there is certainly no requirement that the witnesses know what is in the instrument. The fact that they promote achievement of the goals is, however, sufficient to warrant their inclusion in the statute.

Nelson & Starck, *supra* note 32, at 351. Nelson and Starck point out that the wills act formalities help to ensure "[t]hat there be a record of the scheme of disposition which is free from alteration or substitution by others." *Id.* at 348.

506. To probate a witnessed will, the proponent is usually required to offer the testimony of at least one of the attesting witnesses, if either is available. T. ATKINSON, *supra* note 42, at 496. Mann states:

> [The witnesses'] testimony, whether in person or by deposition, simply recapitulates the assertions of the standard attestation clause — that the testator signed the will freely in their presence or acknowledged his or her signature to them, . . . and that the testator appeared to be of the requisite age and of sound mind. If, as often happens, the witnesses are themselves dead or otherwise unavailable, there are statutory provisions for proving the will without their testimony.

Mann, *supra* note 32, at 40. Although the procedure varies, the general pattern is consistent with the above description. *Id.* at n.4. Attestation serves to authenticate the will by providing a procedure for having witnesses testify that the document offered for probate originated with the testator and was not the product of forgery. Many states today have procedures for making a will "self-proving" so that the proponent need not call the witnesses and the will is presumptively valid on its face. *See infra* notes 644-58 and accompanying text.

> The important requirement that . . . [the] will be attested obviously has great evidentiary significance. It affords some opportunity to secure proof of the facts of execution, which may have occurred long before probate, as contrasted with the difficulties that might arise if an unattested paper purporting to be the will executed, according to its date, thirty or forty years before, were found among the papers of the testator after his death. Of course, this purpose is not accomplished in every case, since all of the attesting witnesses may become unavailable to testify because of death or some other reason, and their unavailability will not defeat probate of a will. The high evidentiary value placed by the courts and legislatures on the testimony of those chosen by the testator as attesting witnesses is shown by the requirement, unusual under the philosophy of the general rules of evidence, which leave the calling of witnesses to the initiative of the parties, but regularly accepted for wills, that one or more of the attesting witnesses must be produced at probate if available. The provision existing in some states that the will be signed or acknowledged by the testator in the presence of the attesting witnesses may be justified as having some evidentiary purpose in requiring a definitive act of the testator to be done before the witnesses, thus enabling them to testify with greater assurance that the will was intended to be operative.

Gulliver & Tilson, *supra* note 41, at 8-9; *see also* Langbein, *Substantial Compliance*, *supra* note 32, at 493 ("[t]he attestation requirement, the distinguishing feature of the so-called formal will, assures that the actual signing is witnessed and sworn to by disinterested bystanders"). *But see* Nelson & Starck, *supra* note 32, at 351-52 (placing less emphasis on attestation as a formality serving the evidentiary or authenticating policy).

507. The requirement that the testator sign the document often has evidentiary value in that it helps identify the author of the document.

attested holographic wills, the handwriting requirement provides evidence of genuineness.[508]

Although many commentators consider attestation to be the major evidentiary formality, its utility in that respect is problematic. Given the passage of time that may occur between will attestation and probate, and given the mobility of contemporary testators, the attestation formality may be of little or even no value as evidence of authenticity. By the time a will reaches probate, witnesses may be dead or outside the court's jurisdiction. Further, because of the time lapse between attestation and probate, witnesses may have forgotten the actual event and may give testimony that calls into question formal compliance with execution requirements.[509] Only adoption of mandatory self-prov-

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> The requirement of the testator's signature . . . has evidentiary value in identifying, in most cases, the maker of the document. While the typical statutory authorization of a signature made by another for the testator, and the generally recognized rule that the testator's signature need not be his correct name, both indicate lack of complete adherence to this purpose, such cases are probably quite rare in view of the usual custom in a literate era of signing documents with a complete name. The possibility of a forged signature must be controlled by the abilities of handwriting experts. There is judicial support for the theory that the requirement that the will be signed at the end has an evidentiary purpose of preventing unauthenticated or fraudulent additions to the will made after its execution by either the testator or other parties.

Gulliver & Tilson, *supra* note 41, at 7. This is true even though generally the testator does not have to sign the correct name and may in fact be authorized by statute to have another sign in proxy. *Id.* The requirement that the will be signed at the end also has the evidentiary purpose of preventing fraudulent additions to the will. *Id.*

Langbein places great importance on the evidentiary value of the testator's signature. *See* Langbein, *Substantial Compliance*, *supra* note 32, at 495. Signature, according to Langbein, has "major evidentiary significance." *Id.* "The signature authenticates the document as being that of the testator. The requirement that the signature be at the end with subsequent attestation assures completeness, prevents interpolation and infers [sic] finality. . . ." Nelson & Starck, *supra* note 32, at 351.

508. Langbein, *Substantial Compliance*, *supra* note 32, at 498. For discussion of the policies served by the handwriting requirement and holographic formality generally, see *infra* notes 523-615 and accompanying text.

509. In discussing attestation formality, Lindgren states:

> Under current law, the attesting witnesses are part of the substantive law of wills, part of the formal requirements for a valid will. No matter how many witnesses were actually present at execution, at least two must have signed the will. If they do not sign, the will isn't valid. It's not essential that the witnesses ever give testimony in court. If when probate is begun the attesting witnesses are absent or unavailable, the will may be proved by other testimony. Furthermore, the competency or credibility of the attesting witnesses is measured at the time the will is executed, not at the time it is to be admitted to probate. Accordingly, witnesses to a will are not necessarily witnesses in court, and witnesses in court are not necessarily witnesses to a will.

ing procedures will restore the attestation requirement to the role it served in the days when wills were often executed on testators' deathbeds[510] of ensuring reliable evidence of authenticity.[511]

(3) Channeling function

The wills act formalities collectively interact to create a format for a disposition by will that probate courts can readily identify. The formalities also provide procedures that an individual can rely upon to create an effective will.[512] Fuller identifies two aspects of the so-called channeling function of formalities: (1) to facilitate court enforcement of transactions by creating a standardized or characteristic format that unequivocally identifies a conforming document; and (2) to facilitate transactions between parties by creating a consistent and reliable procedure for giving effect to intent.[513]

To the extent that the wills acts promote standardization, they serve the channeling function of formality by routinizing probate.[514]

Lindgren, *supra* note 58, at 569-70 (citations omitted).

See also Bates, *supra* note 3, at 381 ("There is no difference in the effect of a will, the witnesses to which have disappeared, from one which never had any witnesses in the first place. Again, proof of the testator's identity is no longer necessary in a society which is enslaved by vigourous documentation procedure.").

510. *See* Lindgren, *supra* note 58, at 570. The UPC provides a procedure to make a will self-proving by means of a heightened execution ceremony in the presence of a notary. UNIF. PROB. CODE § 2-504 (1990). For discussion of the UPC provision, see *infra* notes 656-58 and accompanying text. In addition, some non-UPC states have provisions for self-proving wills. For citations, see *infra* notes 646-47. Lindgren explains:

> The easiest way to prove a will in probate is to offer an affidavit of the attesting witnesses, swearing that they witnessed the execution of the will and that the testator was of sound mind and free from undue influence. In most jurisdictions, this affidavit may be executed at the same time the will is executed and made part of the will itself. This procedure is called a self-proved or self-proving will. It contains not only the signatures of the testator and the attesting witnesses needed for formal validity, but also the sworn, notarized testimony of the testator and the witnesses used to prove the will in court. Self-proving wills are optional. The affidavit isn't necessary for formal validity. It simply makes the will easier to prove after death.

Lindgren, *supra* note 58, at 570.

For discussion of self-proving wills, see *infra* notes 644-58 and accompanying text. For discussion of problems arising from application of the strict compliance rules to self-proving wills, see *supra* notes 310-19 and accompanying text.

511. *See* Lindgren, *supra* note 58, at 570.

512. *See* Fuller, *supra* note 422, at 801-02.

513. *Id.*

514. Langbein, *Substantial Compliance*, *supra* note 32, at 493-94.

This aspect of the channeling function is particularly important for dispositions by will because a probate court must implement the disposition and the testator's compliance with the formalities allows the probate court to avoid examining issues of authenticity and intent in every case.[515] Standardizing the form for wills eliminates the need for judicial diagnosis of the nature of the transaction.[516]

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515. Friedman notes:

> In general, formalities of execution, rule, and administration in the law of succession standardize and guide the process of transmitting billions of dollars of assets from generation to generation; they help make the process smooth, uniform, and efficient. Uniformity and efficiency are otherwise difficult to achieve under the principle of free testation. The *substance* of wills (what they actually say) cannot be standardized. It may be all the more important that the documents be standardized in form. . . . Formalities must be capable and fit for the job of handling millions of estates and billions of dollars in assets.

Friedman, *supra* note 23, at 368. [emphasis in original].

> Compliance with the Wills Act formalities for executing witnessed wills results in considerable uniformity in the organization, language, and content of most wills. Courts are seldom left to puzzle whether the document was meant to be a will. Standardization of wills is a matter of unusual importance, because unlike contracts or conveyances, wills inevitably contemplate judicial implementation, although normally in nonadversarial litigation resembling adjudication less than ordinary governmental administration. Citizen compliance with the usual forms has, therefore, the same order of channeling importance for the probate courts that it has, for example, for the Internal Revenue Service. . . . The lowered costs of routinized judicial administration benefit the estate and its ultimate distributees.

Langbein, *Substantial Compliance*, *supra* note 32, at 493-94.

"Human behavior which utilizes the proper legal form for achieving a desired end is 'channeled behavior.' The desirability of encouraging behavior thus channeled has two aspects. It signals to those who administer the law that a legally effective transaction was intended and what sort of legal transaction was intended. . . . " Love, *supra* note 42, at 340-41.

> The advantage of channeling the act of testation into the formalities of the wills act is limited largely to the ease of judicial administration which is thereby made possible. Since wills by their very nature contemplate judicial administration, the volume of cases that probate courts must handle requires as much standardization in form as possible.

Id. at 341.

Nelson and Starck identify ensuring "[t]hat the testator's choices be expressed in language and form which enables the implementation of those choices on a routine basis" as one of the purposes of the wills act formalities. Nelson & Starck, *supra* note 32, at 348. They state further:

> [I]t is important to put wills into recognizable forms in order to minimize the time and effort required to ascertain their purpose. Presumably, the more an instrument looks like a will and speaks like a will, the less likely it is that litigation will result with consequent depletion of the estate and prolonged or delayed distribution. To the extent that formalities force a will into a set form, they have served the function of effecting a routine transmission of wealth. However, the critical factor is not whether the testator created something which looked like a will, but whether

In addition to this social and objective aspect, the channeling function of formality has an individual and subjective aspect. The channeling function sets the standard of conduct for testation and thus provides testators with reliable guidelines for executing their wills.[517]

(4) Protective function

As previously discussed, the wills act formalities originated as measures intended to limit the opportunities for fraud and imposition. Most scholars agree that the wills act formalities are unlikely to be particularly effective in preventing fraud in the execution of a will

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the language of the transmission was adequate to express the testator's intent. Formalities, as they are presently structured, do not prescribe language of transmission, but only the requirements surrounding execution.

Id. at 353.

516. Fuller compares the formalities of transfer and their aspect of aiding judicial diagnosis to the stamp on a coin. Fuller, *supra* note 422, at 801-02.

> Just as the stamp on a coin relieves us from the necessity of testing the metallic content and weight — in short, the value of the coin (a test which we could not avoid if the uncoined metal were offered to us in payment), in the same way legal formalities relieve the judge of an inquiry *whether* a legal transaction was intended, and — in case different forms are fixed for different legal transactions — *which* was intended.

Id. (quoting R. IHERING, II GEIST DES ROMISCHEN REICHTS 494 (8th ed. 1923)) (emphasis in original).

517. Guidelines are needed to bridge the gap between the conceptual outline of the will and the limited mechanisms for creating a will. As Fuller points out,

> [o]ne who wishes to communicate his thought to others must force the raw material of meaning into defined and recognizable channels; he must reduce the fleeting entities of wordless thought to the patterns of conventional speech. One planning to enter a legal transaction faces a similar problem. His mind first conceives an economic or sentimental objective, or, more usually a set of overlapping objectives. He must then . . . cast about for the legal transaction . . . which will most nearly accomplish these objectives.

Fuller, *supra* note 422, at 802.

> The [will's] channeling function has both social and individual aspects. . . .
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> . . . .
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> The standardization of testation achieved under the Wills Act also benefits the testator. He does not have to devise for himself a mode of communicating his testamentary wishes to the court and to worry whether it will be effective. Instead, he has every inducement to comply with the Wills Act formalities. The court can process his estate routinely because his testament is conventionally and unmistakably expressed and evidenced.

Langbein, *Substantial Compliance*, *supra* note 32, at 494. *See also* Love, *supra* note 42, at 340-41 ("Form is a means of communicating to other participants the legal significance which one wants a transaction to have. It is just as important to have generally accepted forms for this expression as it is to have a common language for communicating thoughts.").

and that they are totally ineffective against subtler forms of fraud, undue influence, and duress.[518] Two of the most influential advocates

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518. Gulliver and Tilson first identified the protective function of formality. Gulliver & Tilson, *supra* note 41, at 4, 9. "Some of the requirements of the statutes of wills have the stated prophylactic purpose of safeguarding the testator at the time of the execution of the will, against undue influence or other forms of imposition." *Id.* at 4-5. Gulliver and Tilson suggested that "the value of this objective and the extent of its accomplishment are both doubtful." *Id.*

> In spite of the benevolent paternalism expressed in some of the decisions interpreting these requirements, the makers of wills are not a feeble or oppressed group of people needing unusual protection as a class; on the contrary, as the owners of property, earned or inherited, they are likely to be among the more capable and dominant members of our society. . . . The protective provisions first appeared in the Statute of Frauds, from which they have been copied, perhaps sometimes blindly, by American legislatures. While there is little direct evidence, it is a reasonable assumption that in the period prior to the Statute of Frauds, wills were usually executed on the death bed. A testator in this unfortunate situation may well need special protection against imposition. His powers of normal judgment and of resistance to improper influences may be seriously affected by a decrepit physical condition, a weakened mentality, or a morbid or unbalanced state of mind. Furthermore, in view of the propinquity of death, he would not have as much time or opportunity as would the usual inter vivos transferor to escape from the consequences of undue influence or other forms of imposition. Under modern conditions, however, wills are probably executed by most testators in the prime of life and in the presence of attorneys. If this assumption is correct, the basis for [the protective formalities] disappears. . . . While the provisions of the statutes of wills seeking to fulfill the protective function must be reckoned with doctrinally as part of our enacted law, this function is not sufficiently important in the present era to justify any more emphasis than these provisions require. . . .

Id.

"The protective policy is probably best explained as an historical anachronism. In the seventeenth century when the first Wills Act was written, most wealth was conveyed in the form of realty, and passed either by intestacy or conveyance. Will making could thus be left to the end and the danger of imposition was greater. . . ." Langbein, *Substantial Compliance*, *supra* note 32, at 496-97.

> In the early years after the first enactment of a Wills Act in England, there may have been a justifiable concern that testators were old, weak, and susceptible victims for greedy and unscrupulous persons. However, this is probably not an accurate stereotype of the testator today. The legitimacy of the protective functions, questioned by Gulliver and Tilson, is not universally accepted.

Love, *supra* note 42, at 342.

> [With respect to the protective function] . . . the formalities requirements may have failed to live up to their purposes. While fraud may be practiced at the time of the execution of the will, undue influence usually occurs over a much longer period of time. . . . [F]ailure to adhere to the formality can result in the will being disallowed probate even where the court is satisfied that no fraud or undue influence has occurred. The courts have recognized that these formalities are overly harsh. . . . Fraud and undue influence are usually the results of objective acts which may be proven at probate and which do not usually require the testator's presence.

Nelson & Starck, *supra* note 32, at 352-53.

of functional analysis, Gulliver and Tilson, sum up the prevailing view of the utility of protective formalities as follows:

> [T]hese remedies seek to diminish the possibility of a testator being forced or influenced to execute a will when surrounded only by those who are interested financially in having it executed. Any such possibility seems largely imaginary in terms of a hale and hearty testator making his will in the prime of life; such imposition would probably not be attempted . . . or successful if attempted, since its consequences could easily be nullified by subsequent revocation . . . unless the testator were kept in some physical or emotional durance vile for the remainder of his days on earth. The situation thus viewed with alarm must, therefore, presumably be that of a failing or decrepit testator, probably bedridden, who finds himself in the hands of a greedy group of malefactors compelling him to sign a will in their favor, and who then conveniently expires before he can call for help. But, while this may conceivably occur, is it not also rather fanciful in terms of general experience? Is there not a greater likelihood of the presence of a doctor, nurses, some members of the family who are normally devoted and, in any event, would probably be disinherited by such a will, or loyal friends? Must we adopt such a pessimistic view of human nature to assume that many people are so lonely and friendless in dying? The supposed danger really seems fictional in terms of general probabilities.[519]

Because the protective function generally is considered to be only marginally served by wills act compliance, most commentators suggest that the presence requirements serve no critical function.[520] Accord-

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519. Gulliver & Tilson, *supra* note 41, at 12.

520. *See id.* at 10 (stating that the original purpose of the presence rules was "to prevent the witnesses substituting some other paper for the will actually executed by the testator"); Mechem, *supra* note 182, at 504-05.

> [T]he best the cases have been able to suggest is that it [the presence requirement] is intended to "prevent fraud" by keeping the witnesses from taking the will out of T[estator]'s presence and substituting a spurious one. However often this may be repeated, and by however reputable courts, it is still preposterous. It assumes a group of witnesses (and possibly an attorney as well) who have carefully prepared in advance an elaborate scheme of forgery and deception. It assumes a testator who is too unconscious or too indifferent to identify his own will when it is brought back to him; it assumes that he either dies at once or never bothers to look at his will after its execution. And finally, it involves the super-absurdity of assuming that a group of expert criminals who are capable of executing such a scheme and have located a suitably incompetent victim, could be frustrated in their fell designs

ingly, new UPC section 2-502(a) eliminates any requirement that an attested will be either signed or acknowledged in the presence of the witnesses, or that the witnesses sign in the presence of the testator or each other.[521]

The primary protective formality is the writing requirement. The Statute of Frauds of 1677 substantially decreased the number of fraudulent wills because it required testators to reduce testamentary dispositions to writing.[522] The writing requirement not only preserves evidence of the terms of the disposition, but also serves as evidence that the testator actually intended such a disposition.

b. Holographic Formality, Extrinsic Evidence of Intent, and the Problem of Over-Inclusiveness

(1) "Intent-verifying" and channeling functions

It is axiomatic that courts rarely consider direct statements of intent by the testator on the issue of testamentary intent if the document under consideration is a properly executed and attested will.[523] Of course, evidence to prove lack of mental capacity or the existence of undue influence and some species of fraud and mistake is relevant

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by the existence of a statutory provision requiring the will to be attested in the presence of the testator!

Id., at 505. "It has often been remarked that the likelihood of crooks attempting that trick [substitution of the will] is remote. By forbidding the proponents to prove that no substitution of the will in fact occurred, the law is made to presume irrebuttably that this farfetched plot transpired." Langbein, *Substantial Compliance*, *supra* note 32, at 517. Note that presence defects are unlikely to be discovered if the will appears valid on its face (for example, is signed by the testator and two witnesses) because of the "presumption of due execution that arises from a seemingly regular attestation clause [and generally] forecloses inquiry into the actual circumstances of execution." Langbein, *Harmless Error Rules*, *supra* note 5, at 17 n.66.

"Functionally, the presence of multiple parties acts as a check against imposition by third parties and by parties present at the signing of the will. It is here, however, that the formalities requirements may have failed to live up to their purpose." Nelson & Starck, *supra* note 32, at 352.

521. UNIF. PROB. CODE § 2-502(a) comment (1990). Langbein considers the presence requirements dispensable even in jurisdictions that still require them. "[O]mitted protective formalities, like the simultaneous presence of attesting witnesses, are easily shown to have been needless in the particular case." Langbein, *Nonprobate Revolution*, *supra* note 17, at 1194.

522. For discussion of Statute of Frauds, see *supra* notes 80-89 and accompanying text. The statute required even nuncupative wills to be reduced to writing by the witnesses within six months of the disposition. T. ATKINSON, *supra* note 42, at 19-20.

523. *In re* Cook, 44 N.J. 1, 6, 206 A.2d 865, 867-68 (N.J. Sup. Ct. 1965) ("Though direct statements by the testator as to his intentions are still being excluded by most courts, other utterances by him which may bear on the construction of his will are sensibly being received more and more freely by the courts.").

to the issue of testamentary intent and will be considered; however, a duly signed and attested will produces a powerful inference of validity by creating a presumption that the recitals in the signature and attestation clauses are true.[524] As the following case shows, by reason of this presumption (sometimes in combination with elements of the parol evidence rule), courts often will not permit contestants to present evidence that a decedent who executed a document in testamentary language and attested form did not intend it as a will.

The exceptional cases in which extrinsic evidence typically is admitted to controvert the validity of a properly executed and attested will are those in which a document is challenged as a sham or specimen will.[525] In *In re Sharp's Estate*,[526] for example, the Florida Supreme Court held that the probate court erred in refusing to admit extrinsic evidence in a contest regarding a purported will executed by the decedent as part of a ceremony required to obtain a "degree in Masonry."[527] The court said that the record showed ample evidence that the execution of the "wills" by the twenty novitiates was "a mere ceremonial"[528] and that initiation into the Masons was the "dominating and controlling purpose of the evening."[529] The court stated that "it was essential that all the evidence which could have any bearing whatsoever upon the true nature of the transaction should have been received by the court."[530]

Although there is nothing in the *Sharp* opinion to suggest that the purported will was not executed in compliance with statutory formalities, the court observed that the purported will did not contain testimonium or attestation clauses and therefore did not "carry the indicia of a *regularly* executed will."[531] The court observed that even a duly executed document should not be enforced if the "dominating purpose" of execution was not the "calm, solemn, and momentous purpose of disposing of the estate"[532] but was merely a ritual designed

524. *See, e.g.*, Jones v. Whitely, 533 S.W.2d 881 (Tex. Civ. App. 1976); Estate of Thomas, 6 Ill. App. 3d 70, 284 N.E.2d 513 (1972); *In re* Estate of Campbell, 47 Wash. 2d 610, 288 P.2d 852 (1955).

525. *See, e.g.*, Fleming v. Morrison, 187 Mass. 120, 72 N.E. 499 (1904) (holding properly executed will invalid based on evidence that testator had said that the will was a fake, executed in order to induce the beneficiary to sleep with him).

526. 133 Fla. 802, 183 So. 470 (1938).

527. *Id.* at 805, 183 So. at 471.

528. *Id.*

529. *Id.*

530. *Id.*

531. *Id.* at 808, 183 So. at 472 (emphasis added).

532. *Id.* at 803, 183 So. at 470.

for some other purpose.[533] Other courts have reached similar conclusions.[534] In most instances, however, the existence of a duly executed and attested will effectively resolves the issue of a testamentary intent.

Compliance with the formal requirements for unattested holographic wills, in contrast, does not produce an equal presumption of testamentary intent. The holographic will requirements are less effective in discharging the channeling function primarily because the holographic will statutes do not require specific conduct or "ritual" that unequivocally manifests an intention to make a will, as distinguished from an intention to execute some other document.[535] The formalities required for attested wills demand a virtually unmistakable testamentary act, whereas the formalities required for holographic wills closely resemble patterns of common communication.[536]

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533. *Id.* at 803-04, 183 So. at 470.

534. *E.g.*, Vickery v. Vickery, 126 Fla. 294, 170 So. 745 (1936) (stating that a duly executed will should be presumed to be executed with testamentary intent, even if executed pursuant to initiation into the Masons; in this instance, however, the will was properly denied admission to probate since the will was improperly signed "Vickey" rather than "Vickery" and "uncertainty and doubt were shown to have surrounded the making of the will"); Shiels v. Shiels, 109 S.W.2d 1112 (1937) (stating that facts and circumstances should be considered in determining testamentary intent in the case in which decedent executed a will under protest pursuant to initiation into Masonic Order; testamentary intent is necessary "to constitute an instrument a will, regardless of its correctness in form," but mere fact that it was executed pursuant to initiation rite does not establish lack of testamentary intent); Gooch v. Gooch, 134 Va. 21, 113 S.E. 873 (1922) (admitting to probate a will and a codicil which were executed pursuant to initiation into Masons after considering purported codicil to will showing continued testamentary intent); *In re* Watkin's Estate, 116 Wash. 190, 198 P. 721 (1921) (stating that a will executed pursuant to initiation into Masons was executed with testamentary intent based on testimony of a surviving witness, despite "somewhat meager evidence" of intent; a will may be executed pursuant to initiation into Masons); *but see* Succession of Torlage, 202 La. 693, 12 So. 2d 683 (1943) (Louisiana court denying probate to a holographic will written as part of initiation into Masons without considering extrinsic circumstances because the will was undated, the language of the document did not reflect present intent to make a will, and because the testator executed it in compliance with a ritual rather than with intention to make a will).

535. Langbein, *Substantial Compliance*, *supra* note 32, at 494. *See* Fuller, *supra* note 422, at 803-04.

> [S]ome minimum satisfaction of the desideratum of channeling is necessary before measures designed to prevent inconsiderateness can be effective. . . . The necessity of reducing the testator's intention to his own handwriting would seem superficially to offer, not only evidentiary safeguards, but excellent protection against inconsiderateness as well. Where the holographic will fails, however, is as a device separating the legal wheat from the legally irrelevant chaff. The courts are frequently faced with the difficulty of determining whether a particular document — it may be an informal family letter which happens to be entirely in the handwriting of the sender — reveals the requisite "testamentary intention." This difficulty can be eliminated by a formality which performs adequately the channeling function,

Compliance with the attestation requirement produces a "virtually unmistakable testamentary act"[537] and a standardized format readily identifying a writing as a will. Compliance with the requirements for a holographic will often fails to distinguish the writing intended to be given effect as a will from the signed and dated letter, memorandum, or draft containing statements about the disposition of the decedent's property.[538] Since a holographic will "need not assume any particular form or be couched in language technically appropriate to its testamentary character,"[539] and may deal with extraneous matters unrelated to its testamentary purpose,[540] courts sometimes do enforce letters and other informal writings as holographic wills.[541] The test is whether

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some external mark which will signalize the testament and distinguish it from non-testamentary expressions of intention. It is obvious that by a kind of reflex action the deficiency of the holographic will from the standpoint of channeling operates to impair its efficacy as a device for inducing deliberation.

Id. at 803-04.

536. Bird, *supra* note 204, at 632; Langbein, *Substantial Compliance*, *supra* note 32, at 494.

If a document has been executed with the usual testamentary formalities [attestation and signature], a court can be reasonably certain that it was actually executed by the decedent; that it was seriously intended as a will; what its contents are; and that the testator was free from at least immediate duress at the time of its execution. Only the first of these functions is served by the holographic statute, and even that not very effectively. Because the holographic form does not serve these other essential purposes it leaves these matters open to doubt and hence to litigation.

Bird, *supra* note 204, at 631-32.

537. Langbein, *Substantial Compliance*, *supra* note 32, at 494.

538. *See id.* at 493-94; Friedman, *supra* note 23, at 368.

539. *In re* Estate of Logan, 489 Pa. 29, 35, 413 A.2d 681, 683 (1980); *see also In re* Spencer's Estate, 87 Cal. App. 2d 591, 197 P.2d 351 (1948) (holding that a writing is not inoperative as a will merely because it discusses matters unrelated to testamentary purpose, though inclusion of extraneous matter may be considered in determining intent); *In re* Hughes' Estate, 140 Cal. App. 97, 35 P.2d 204 (1934) (holding that there are no definite forms or fixed terms that invariably determine testamentary character of an instrument); *In re* Button's Estate, 209 Cal. 325, 287 P. 264 (1930) (holding that no particular words are necessary to show testamentary intent if it appears that the writing is intended to dispose of property after death).

540. *E.g.*, *In re* Spencer's Estate, 87 Cal. App. 2d 591, 594, 197 P.2d 351, 352 (1948); *In re* Button's Estate, 309 Cal. 325, 287 P. 964 (1930) (holding that testamentary language included in suicide note otherwise appealing to husband to care for children, expressing regret for actions, and affirming affection for husband was testamentary); *In re* Kimmel's Estate, 287 Pa. 435, 123 A. 405 (1924) (holding that language included in letter to sons otherwise dealing with the testator's views about the weather and pickling pork was testamentary).

541. Mann remarks:

Holographs are, by definition, unattested. As statutory creations, they represent a legislative judgment, albeit a tacit one, that attestation is a dispensable requirement, at least when the document meets other requirements. Those other requirements . . . are sufficiently minimal that the cases on holographs are often ludicrous.

the testator intended to make an ambulatory and revocable disposition of property, not whether the testator subjectively understood that the disposition was a will;[542] the testator's failure to recognize the disposition as a will and characterize it as such within the writing, or otherwise to use "appropriate" language and form does not determine the nature of the document.

Courts in jurisdictions that permit holographic wills often end up having to address the issue of whether a signed and handwritten writing should be enforced as a will because of the lack of any objective ritual or implementing act comparable to testation. Signature alone clearly does not achieve the intent-verifying and channeling purposes in those cases in which the testator uses unconventional language or format; people often write their names on draft documents and memoranda that have no legal significance, and most people who write letters routinely sign them. Despite the high value that Langbein and other commentators place on the intent-verifying function of the signature requirement,[543] the large number of cases in which signed holographic writings produce controversy up to the appellate level on the issue of testamentary intent strongly suggests that signature alone does not effectively serve this purpose.

Nor does the handwriting requirement effectively fulfill the intent-verifying and channeling functions of attestation. While it could be argued that requiring testators to handwrite testamentary dispositions fulfills the cautionary aspect of the intent-verifying function to the extent that it forces deliberation,[544] the lack of an unambiguous testamentary ritual leaves open the issue of whether the decedent reached

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> Alongside the perfectly serious, well-considered holographic wills, courts have accepted suicide notes, chili recipes, and inscribed tractor fenders. . . . The key inquiry in virtually all holograph litigation is whether the testator wrote the document with testamentary intent. If the court finds that the testator did, and if the holograph satisfies the statutory requirements, then the instrument is a will, however bizarre its form.

Mann, *supra* note 32, at 50 (citations omitted). For examples of "ludicrous" and "bizarre" holographic wills, see Gerhart, *Two Cheers for the Jolly Testator*, 111 TR. & EST. 127 (Feb. 1972); Gest, *Some Jolly Testators*, 8 TEMPLE L.Q. 297 (1934); Million, *Wills: Witty, Witless, and Wicked*, 7 WAYNE ST. L. REV. 336 (1960).

542. For quote setting forth definition of "will," see *supra* note 24, at 283-84; *see also* Browder, *supra* note 41, at 849-50 (providing definition of "will"); *see generally* Ritchie, *supra* note 41 (discussing characteristics distinguishing wills from other types of gratuitous transfers).

543. For discussion of the intent-verifying function of the signature requirement, see *supra* note 497.

544. *See* Fuller, *supra* note 422, at 803-04; Gulliver & Tilson, *supra* note 41, at 3-4.

a final decision to implement the dispositions.[545] Langbein considers the sole value of the handwriting requirement to be in the "superior evidence" it provides of the authenticity of the disposition;[546] he considers it an odd substitute for attestation.[547]

Several commentators have argued that legislative recognition of holographic wills is logically inconsistent with judicial insistence on strict compliance with the attestation requirement;[548] the result is that testators are punished for unsuccessful attempts to meet the higher standard required for execution of an attested will even when there is no question about the testator's intentions, while formally adequate but substantively problematic holographic documents are often enforced, even though the writing itself or the circumstances surrounding its execution may be ambiguous.[549] Equally illogical is the strict insistence on compliance with the handwriting requirement to invalidate unequivocally testamentary holographic dispositions because of the inclusion of printed matter.[550] Application of the strict compliance doc-

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545. "While there is a certain ritual value in writing out the document, casual offhand statements are frequently made in letters." Gulliver & Tilson, *supra* note 41, at 14.

> People are often careless in conversation and in informal writings. . . . [S]uppose that the evidence shows, without more, that a writing containing dispositive language was found among the papers of the deceased at the time of his death? Does this demonstrate a deliberate transfer, or was it merely a tentative draft of some contemplated instrument, or perhaps random scribbling?

Id. at 3.

546. Langbein, *Substantial Compliance*, *supra* note 32, at 498; *see also* Nelson & Starck, *supra* note 32, at 351-52 (stating that even if handwriting is the best form of evidence, the premise that establishing authenticity of handwriting is justification for the holographic form is "highly suspect").

547. Langbein, *Substantial Compliance*, *supra* note 32, at 498.

548. *Id.*; Lindgren, *supra* note 58, at 495-96; Mann, *supra* note 32, at 49-50.

> [S]lavish attention to form on matters of attestation is anomalous in a jurisdiction that accepts . . . holographic wills. . . . Although courts have drawn the line at [holographic] wills written on eggshells, one nonetheless must question the "logic" of accepting such informal "wills" while rejecting on formal grounds the wills of testators who tried to follow the directives of the wills act but whose lawyers botched the job.

Mann, *supra* note 32, at 49-50. "Requiring attestation for formal wills is difficult to reconcile with the increasing acceptance of holographic wills." Lindgren, *supra* note 58, at 558. Lindgren and Langbein agree that the existence of holographic wills undercuts the policies served by attestation in those jurisdictions that recognize witnessed wills as well. *Id.*; Langbein, *Substantial Compliance*, *supra* note 32, at 495-98.

549. *See* Mann, *supra* note 32, at 50.

550. For discussion of the application of the strict compliance doctrine to the handwriting requirement, see *supra* notes 204-40 and accompanying text.

trine to the formalities for attested and holographic wills produces under-inclusiveness in defeating many obviously well-intentioned wills, while the inadequacy of holographic formality to distinguish intended wills from other documents raises the question of over-inclusive enforcement of writings never intended to be given legal effect.

(a) Determination of testamentary intent in holographic wills cases

A writing, however informal, will be enforced as a holographic will if it meets the requirements for a holographic will and is unambiguously testamentary on its face; that is, if it shows that the testator intended to make an ambulatory and revocable disposition of property.[551] If the court determines that the writing is unambiguously testamentary, extrinsic evidence of circumstances showing that the testator lacked testamentary intent is not admissible.[552] On the other hand, if a writing that meets the requirements for a holographic will is unambiguously nontestamentary, the courts will not admit extrinsic evidence of circumstances showing testamentary intent.[553] If the allegedly testamentary language is sufficiently ambiguous that the court cannot tell by reference to the writing alone whether it was prepared with testamentary intent the court may admit extrinsic evidence to resolve this issue.[554] It is well established that in such a case a court may consider the conditions under which the instrument was written to determine what was in the mind of the party when it was written.

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551. *See, e.g.*, *In re* Button's Estate, 209 Cal. 325, 287 P. 964 (1930); *In re* Estate of Nelson, 250 N.W.2d 286 (S.D. 1977); *In re* Estate of Blake, 120 Ariz. 552, 587 P.2d 271 (Ariz. Ct. App. 1978); *In re* Estate of Brown, 507 S.W.2d 801 (Tex. Ct. App. 1974).

552. *See, e.g.*, *In re* Holmes Estate, 191 Cal. App. 2d 285, 12 Cal. Rptr. 629 (1961); *In re* Estate of Hogan, 146 N.W.2d 257 (Iowa 1966); *In re* Estate of Logan, 489 Pa. 29, 413 A.2d 681 (1980).

553. *See, e.g.*, *In re* Estate of Hogan, 146 N.W.2d 257 (Iowa 1966); Maxey v. Queen, 206 S.W.2d 114 (Tex. 1947). *Cf. In re* Will of Smith, 108 N.J. 257, 528 A.2d 918 (1987) (stating that no presumption of testamentary intent arises with respect to a holographic will and burden of proof is on proponent to prove intent by a preponderance of the evidence; court further stated that this rule is "consistent with the general rule in other states").

554. *See, e.g.*, David Terrell Faith Prophet Ministries v. Varnum, 284 Ark. 108, 681 S.W.2d 310 (1984); *In re* Estate of Spencer, 87 Cal. 2d 951, 97 P.2d 351 (1948); *In re* Estate of Laurin, 492 Pa. 477, 424 A.2d 1290 (1980); *In re* Estate of Nelson, 250 N.W.2d 286 (S.D. 1977); Guaranty Nat'l Bank v. Morris, 342 S.E.2d 194 (W. Va. 1986); *In re* Estate of Beebee, 118 Cal. App. 851, 258 P.2d 1101 (1953); *In re* Hughes' Estate, 140 Cal. App. 97, 35 P.2d 204 (Cal. Ct. App. 1934); *In re* Estate of Brown, 507 S.W.2d 801 (Tex. Civ. App. 1974); Maxey v. Queen, 206 S.W.2d 114 (Tex. Civ. App. 1947). *Cf. In re* Will of Smith, 108 N.J. 257, 528 A.2d 918 (1987) (stating that no presumption of testamentary intent arises with respect to a holographic will and burden is on proponent to establish that the writing was prepared with testamentary intent).

The considerations that determine the nature of the writing offered for probate vary from case-to-case.[555] "There are no definite forms or fixed terms which will invariably determine the testamentary character of an instrument. The same expressions may lead the court to determine one instrument as testamentary in character which, under different circumstances, would lead the same court to determine another instrument to be not testamentary in character."[556]

In *Maxey v. Queen*,[557] for example, the writing in question was a letter written by an uneducated decedent, in which she had written, "I am sick in the horse pittle. I have been sice for some times have been able to get down to the corthouse I wont my deads male to my sister. Ola May Maxey."[558] After considering the decedent's choice of words, the Texas Court of Civil Appeals concluded that the language was unambiguously nontestamentary;[559] the writing could not be enforced as a will.

In *In re Estate of Laurin*,[560] on the other hand, the dated and signed writing in issue stated: "I, Frances L. Laurin, give all properties and personal belongings to my daughter Beatrice L. Sprowls Denk."[561] The contestants argued that the language selected by the decedent was not consistent with an intention to make a disposition by will, but that it was either an attempted lifetime disposition that was never perfected or a memorandum intended to instruct the decedent's attorney respecting testamentary plans that were never executed.[562] The *Laurin* court said that although the document contained no testamentary language and was not testamentary on its face, the word "give" was sufficiently ambiguous to justify the lower court's admission of extrinsic evidence to determine intent.[563] The court concluded that the evidence in the record was sufficient to establish that the writing was in fact intended by the decedent to be her will.[564]

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555. For discussion of factors sometimes considered by courts, see *infra* notes 557-68 and accompanying text.

556. *In re* Hughes' Estate, 140 Cal. App. 97, 100, 35 P.2d 204, 205 (Cal. Ct. App. 1934).

557. 206 S.W.2d 114 (Tex. 1947).

558. *Id.* at 116.

559. *Id.* at 119. The court pointed out that an executor of the estate could not execute a deed in the decedent's name and that for the executor to carry out her instruction, that is, to mail the deeds to her sister, would not be effective in passing title. *Id.* at 118.

560. 492 Pa. 477, 424 A.2d 1290 (1981).

561. *Id.* at 480, 424 A.2d at 1292.

562. *Id.* at 481, 424 A.2d at 1292.

563. *Id.* at 482-83, 424 A.2d at 1293.

564. *Id.* at 483, 424 A.2d at 1294.

The rule limiting admissibility of extrinsic evidence to determine whether a decedent intended a writing meeting the criteria for a holographic will to be treated as such is a reasonable means of preventing courts from having to determine the validity of every random scribbling of a decedent that happens to comply with requirements for a holographic will and that arguably bears a relation to the disposition of property at death. In *Straw v. Owens*,[565] the holographic "will" offered for probate consisted of "words and figures scrawled across the back of what appears to be a page of three adjoining deposit slips torn from the back of a checkbook"[566] that was "arguably" written in the decedent's handwriting and signed by him.[567] The court held that the writing was nontestamentary on its face and that in any case, no amount of extrinsic evidence could have justified admitting such a writing to probate.[568]

(b) Probate of holographic document ambiguous on its face

Once courts determine that a writing offered for probate as a holographic will is ambiguous on its face, they may admit extrinsic evidence of the circumstances surrounding the preparation of the document to establish the intentions of the decedent.[569] In determining whether an ambiguous writing was intended to operate as a will, courts may consider a number of factors, including the intelligence, education, and character of the testator,[570] the testator's knowledge of the formalities involved in executing a will,[571] the circumstances

565. 746 S.W.2d 345 (Tex. App. 1988).

566. *Id.* at 346.

567. *Id.*

568. *Id.*

569. For citations to cases setting forth this principle, see *supra* note 7. For discussion of issues relating to the admission of extrinsic evidence in wills cases, see Note, *Ascertaining the Testator's Intent: Liberal Admission of Extrinsic Evidence*, 22 HASTINGS L.J. 1349 (1971); Note, *Extrinsic Evidence and the Construction of Wills in California*, 50 CALIF. L. REV. 283 (1962); Comment, *A Letter as a Will or Codicil: Testamentary Intent in California*, 2 U.S.F. L. REV. 367 (1968).

570. Comment, *supra* note 569, at 370-71. *See, e.g., In re* Will of Smith, 108 N.J. 257, 528 A.2d 918 (1987) (court considered intelligence, business sense, and meticulousness of testator in concluding that writing torn from a note book was not intended to be a holographic will). *But see In re* Estate of MacLeod, 206 Cal. App. 1235, 254 Cal. Rptr. 156 (1988) (contestant unsuccessfully argued that decedent was "a well-educated, formal, and punctilious woman" who would not have intended an unsubscribed, scribbled, and interlineated document to be her will).

571. Comment, *supra* note 569, at 371. *See, e.g., In re* Will of Smith, 108 N.J. 257, 528 A.2d 918 (1987) (court considered decedent's knowledge of wills formalities in concluding that

under which the decedent prepared the writing,[572] the relationship between the decedent and those who would benefit by having the writing enforced as a will,[573] the existence and details of any prior testamentary dispositions,[574] and where the writing was found after the decedent's death.[575]

(c) Determination of intent when informal writing offered

In some instances, courts have had to determine whether cryptically worded but formally adequate notes or memoranda should be

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unattested paper was intended as a draft or as instructions to attorney and not as a will). *But see In re* Estate of MacLeod, 206 Cal. App. 3d 1235, 254 Cal. Rptr. 156 (1988) (contestant unsuccessfully argued that decedent was aware of formality for making a will and would not have intended unsubscribed, scribbled, interlineated document to be her will).

572. *See* Comment, *supra* note 569, at 371. *See, e.g., In re* Button's Estate, 209 Cal. 325, 287 P. 964 (1930) (holding that lengthy letter containing testamentary language written to decedent's husband on day she committed suicide, written in contemplation of suicide, was intended to serve as will); *In re* Estate of Laurin, 492 Pa. 477, 424 A.2d 1290 (1981) (court considered fact that writing prepared by testator while she was ill, one month before her death, and just after she had been discharged from the hospital in determining that writing was prepared with testamentary intent); *In re* Estate of Nelson, 250 N.W.2d 286 (S.D. 1977) (holding that writing was prepared with testamentary intent in case in which decedent who was afraid of flying said she would not get on airplane without making her will and prepared writing before doing so). *But see In re* Estate of Spencer, 87 Cal. 2d 591, 197 P.2d 351 (1948) (holding that mere references to death in letter with no sign of real apprehension and five years before testator died were not sufficient to show testamentary intent).

573. *See* Comment, *supra* note 569, at 371. *E.g., In re* Estate of MacLeod, 206 Cal. App. 1235, 254 Cal. Rptr. 156 (1988) (decedent had "strong personal feelings" for the farm she left to her nephew and wanted it to remain in the family); *In re* Button's Estate, 287 P. 209, 964 Cal. 325 (1930) (letter will left everything to decedent's husband, who was the custodial parent of her sons, and for whom she expressed abiding affection); *In re* Estate of Laurin, 492 Pa. 477, 424 A.2d 1290 (1981) (writing left all property to the daughter who lived with her and cared for her several months prior to her death).

574. *See* Comment, *supra* note 569, at 371. *E.g., In re* Estate of Hicks, 3 Cal. App. 3d 312, 83 Cal. Rptr. 499 (1970) (court considered fact that writing was integrated into will by detailed references to page and line numbers of the will, followed by words such as "add," "out," and "remain," in determining that it was valid codicil); *In re* Estate of Hughes, 140 Cal. App. 97, 35 P.2d 204 (1934) (court contrasted informality of letter offered as codicil with "care and circumstance" with which will was drawn in holding that letter was not executed with testamentary intent).

575. *E.g., In re* Estate of MacLeod, 206 Cal. App. 3d 1235, 254 Cal. Rptr. 156 (1988) (writing found on decedent's bedside table following her death); *In re* Estate of Hicks, 3 Cal. App. 3d 312, 83 Cal. Rptr. 499 (1970) (writing found in envelope labeled "WILL" inside a metal box that had been delivered to decedent's attorney); *In re* Estate of Button, 964 Cal. 325, 287 P. 209 (1930) (letter found in same room with decedent's body after her suicide); Guaranty Nat'l Bank v. Morris, 342 S.E.2d 194 (W. Va. 1986) (writing found in decedent's bedroom in the place where she kept her important papers); *In re* Estate of Brown, 507 S.W.2d 801 (Tex. Civ. App. 1974) (writing found with decedent's private papers after her death).

admitted to probate as wills or codicils.[576] Occasionally a court will hold that it is appropriate to resort to extrinsic evidence to determine the significance of such a writing. For example, in *In re Estate of Brown*,[577] the writing offered as a codicil was "a cryptic note written on an envelope":[578] "This certafice [sic] from Ada B. Brown — Goes to Josephine May Benton."[579] Inside the envelope was a certificate of deposit payable to Ada B. Brown.[580] The court concluded that extrinsic evidence was properly admitted to clarify the meaning of "from" and "goes to" as used by the testator in order to establish whether she intended to make an ambulatory and revocable disposition of the certificate of deposit, as opposed to an unperfected inter vivos gift.[581] The evidence showed that the decedent had said that she wanted the beneficiary of the transfer to have the money "if anything happens to me and I don't need it" and that she had not delivered the certificate of deposit to the beneficiary, but had kept it in her private papers until she died, thus indicating that she intended to make an ambulatory and revocable disposition of the certificate of deposit.[582]

Similarly, in *Matter of Estate of Nelson*,[583] the South Dakota Supreme Court held that it was appropriate to admit extrinsic evidence respecting the circumstances leading up to the preparation of the allegedly testamentary writing that merely said "To you — Cornie and Richard Ostercamp [sic] my all and my all to you."[584] The court considered the fact that the writing was prepared immediately before the decedent, who was afraid of flying, boarded a plane, and that she had taken the further step of having two witnesses sign the will.[585]

In *Matter of Will of Smith*,[586] the writing offered for probate was a note addressed to decedent's attorney, written on a five by seven

576. According to a famous article on homemade wills, the Pennsylvania court once gave effect to dispositive language appended to a recipe for chili sauce. Gest, *supra* note 541, at 301. The writing admitted to probate read as follows: "4 quarts of ripe tomatoes, 4 small onions, 4 green peppers, 2 teacups of sugar, 2 quarts of cider vinegar, 2 ounces ground allspice, 2 ounces cloves, 2 ounces cinnamon, 12 teaspoonfuls salt. Chop tomatoes, onions, and peppers fine, add the rest mixed together and bottle cold. Measure tomatoes when peeled. In case I die before my husband I leave everything to him." — (signed) Maggie Nothe." *Id.*

577. 507 S.W.2d 801 (Tex. Civ. App. 1974).

578. *Id.* at 802.

579. *Id.*

580. *Id.*

581. *Id.* at 805.

582. *Id.*

583. 250 N.W.2d 286 (S.D. 1977).

584. *Id.* at 287.

585. *Id.* at 288. The opinion does not explain why the document was not a valid attested will.

586. 108 N.J. 257, 528 A.2d 918 (1987).

piece of paper that the decedent had torn from a notebook: "My entire estate is to be left *jointly* to my step daughter."[587] Evidence was admitted to show that the testator was an intelligent, businesslike woman who was knowledgeable about the formal requirements of a will.[588] The court concluded that the writing was intended as a draft, and not as a final will.[589]

In other cases, courts have simply concluded that the note or memorandum offered for probate was unambiguously testamentary or nontestamentary and have refused to allow evidence to show otherwise. In *In re Moore's Estate*,[590] the writing offered for probate was a piece of tissue paper that the decedent's mother had found in the pocket of one of decedent's coats wrapped around one of her rings.[591] On the tissue paper the decedent had written "July 4, 1948 Mother Here is my ring. I leave you this and all that is mine. Mike is provided for. Dont grieve for me. I love you. I'll leave a Will."[592] The California court held that the words "I'll leave a Will" rendered the writing unambiguously nontestamentary, since it was clear that even if decedent had intended to leave her property to her mother, the words "I'll leave a Will" unequivocally showed that she had not prepared that particular writing with testamentary intent.[593]

(d) Determination of intent when letter offered for probate

In a number of instances courts have considered whether to permit probate of a letter or letters written by the decedent. These letters often deal with matters other than the decedent's testamentary plans.

For example, in *Estate of Blake*[594] the relevant language was contained in the postscript to a letter written by the decedent to his niece, thanking her and her husband for their hospitality during a recent visit.[595] The postscript stated simply: "P.S. You can have my entire estate. s/Harry J. Blake (SAVE THIS)."[596] The Arizona court concluded that the writing was prepared with testamentary intent,

587. *Id.* at 259, 528 A.2d at 918-19.
588. *Id.* at 260, 528 A.2d at 919-20.
589. *Id.*
590. 102 Cal. App. 2d 672, 228 P.2d 66 (Cal. Ct. App. 1951).
591. *Id.* at 672-73, 228 P.2d at 66-67.
592. *Id.* at 673, 228 P.2d at 66-67.
593. *Id.* at 673-75, 228 P.2d at 67-68.
594. 120 Ariz. 552, 587 P.2d 271 (Ariz. App. 1978).
595. *Id.* at 553, 587 P.2d at 272.
596. *Id.*

based on such factors as the decedent's use of the word "estate," the definiteness of the dispositive language, the fact that the beneficiaries were instructed to "SAVE THIS," and the fact that while the letter itself was signed "your uncle Harry," the dispositive language in the postscript was formally signed with the decedent's name.[597]

In *Estate of Meade*,[598] the writing offered for probate was a letter written by Euthanasia Meade to her undertaker, informing him of her wish to be cremated because of her "most absolute abhorrence of being put in the ground to decay and rot" and otherwise generally discussing her philosophy respecting "money thrown away in useless parade of the dead."[599] The testator's brother argued that the last sentence of the letter referring to him as the administrator of her estate, was written with testamentary intent.[600] The California court concluded that the letter was not intended by the decedent as a will, stating "[i]t is plain that the main question in the deceased's mind was the disposition of her body . . . it is hardly conceivable that [the deceased] should have so indistinctly and inappropriately expressed her wishes, [regarding her brother] if the making of a will was in her mind."[601]

One of the most famous "letter wills" is the one upheld by the Pennsylvania court in *In re Kimmel's Estate*,[602] in which the testamentary language was embedded in a letter dealing with the testator's expectation of a hard winter as well as his views on the proper method of pickling pork.[603] In addition to these extraneous matters, the letter stated "if I come I have some very valuable papers I want you to keep fore me so if enny thing hapens all the scock money in the 3 Bank liberty lones Post office stamps and my home on Horner St. goes to George Darl & Irvin."[604] The court took note of the fact that the letter advised the sons to "Kepp this letter lock it up it may help you out"[605] in concluding that the dispositive portion of the letter was prepared with testamentary intent.[606]

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597. *Id.* at 554, 587 P.2d at 273.

598. 118 Cal. 428, 50 P. 541 (1897).

599. *Id.* at 429, 50 P. at 541.

600. "My brother . . . will take charge of my estate, and be the sole administrator . . . to trade, sell, or occupy, as may seem to him fit." *Id.* at 430, 50 P. at 542.

601. *Id.* at 431, 50 P. at 542.

602. 278 Pa. 435, 123 A.2d 405 (1924).

603. *Id.* at 437, 123 A. at 405.

604. *Id.*

605. *Id.*

606. *Id.* at 439, 123 A. at 406.

(2) "Authenticating" function

Most commentators agree that the holographic form materially serves only the authenticating (or evidentiary) function of establishing the genuineness of the transfer.[607] The effectiveness of holographic wills to accomplish this result depends, however, on the ability of courts to verify testators' handwriting. Generally, identifying the handwriting is not much of a problem, despite the fact that holographic wills (unlike most will substitutes and all attested wills), may be executed unilaterally so that the *only* evidence of authenticity is the testator's handwriting.[608]

Assuming that forgery of another's hand is indeed difficult to accomplish, a holographic will clearly provides more security from forgery than an attested will bearing only the testator's handwritten signature (especially if someone else signed the will on the testator's behalf, as the wills acts generally permit). Holographic formality may be a more reliable method of establishing the authenticity of a writing than attestation, since attestation depends upon the availability and memory of witnesses at the time the will is offered for probate.

(3) Protective function

Some commentators assert that holographic formality does not serve the protective function, because "[a] holographic will is obtainable by compulsion as easily as a ransom note."[609] One advantage of holographic wills, however, is that such wills can be executed as a private, unilateral act. In a jurisdiction that recognizes holographic wills, testators who are strong enough to put pen to paper have an advantage over testators in a jurisdiction requiring witnessed wills: if victimized by unscrupulous relatives or otherwise imposed upon or subjected to duress, testators can secretly execute a will revoking any prior wills procured through improper means.

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607. *See, e.g.*, Gulliver & Tilson, *supra* note 41, at 13.

608. *See* Estate of Dreyfus, 175 Cal. 417, 165 P. 841 (1917). The court stated:

> From time immemorial, . . . it has been a well-known fact that each individual who writes . . . acquires a style of forming, placing, and spacing the letters and words which is peculiar to himself and which, in most cases, renders his writing easily distinguishable from that of others. . . . The provision that a [holographic] will should be valid . . . is the ancient rule on the subject. There can be no doubt that it owes its origin to the fact that a successful counterfeit of another's handwriting is exceedingly difficult, and that, therefore, the requirement that it should be in the testator's handwriting would afford protection against a forgery of this character.

Id. at 419, 165 P. at 941.

609. Gulliver & Tilson, *supra* note 41, at 14.

> [A] dying person who wishes to dispose of his property, may find it impossible to resort to . . . witnesses in order to make it in authentic form. Moreover, to refuse to a sick person the faculty of making a testament in the holographic form is to encourage all those interested in seeing that he does not make any dispositions, to prevent him from doing so illegally, as it were.[610]

The option of executing a holographic will ensures that testators will have the opportunity to reflect on their testamentary plans and the flexibility to modify or redraft their wills at their leisure. It may be argued that far from representing an abandonment of the protective policy,[611] holographic will provisions may actually prevent fraudulent dispositions in a limited number of cases.[612] Holographic wills serve the protective function to the extent that they ensure a property owner's ability to execute a will free from outside interference or pressure.

(4) Holographic will as alternative to common law will

Assuming that respect for the wishes of private property owners to select the successors to their property is a more fundamental policy objective than the efficient functioning of the implementing courts,[613] holographic wills are a useful alternative to the common law attested wills.[614] The most troubling aspect of holographic wills provisions is their tendency, in combination with the strict compliance doctrine, to be simultaneously over-inclusive and under-inclusive in practice. The problem of over-inclusiveness raised by the enforcement of informal documents as holographic wills may be less of a matter for concern than the problem of under-inclusiveness raised by the strict enforcement of the handwriting and date requirements. Application of the strict compliance doctrine to holographic wills is troubling to the extent

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610. C. AUBREY & C. RAU, DROIT CIV. FRANCAIS, 3 Civ. L. Trans. 135 n.1 (C. Lazarus Trans. 1969), *reprinted in* Bird, *supra* note 204, at 609 n.22.

611. *See* Langbein, *Substantial Compliance*, *supra* note 32, at 519, 520-22.

612. *See* Bird, *supra* note 204, at 609.

613. *See* Gulliver & Tilson, *supra* note 41, at 2.

614. The drafters of the UPC clearly thought so since the UPC has always permitted holographic wills. *See* UNIF. PROB. CODE § 2-503 (1969) (original UPC holographic will section); UNIF. PROB. CODE § 2-502(b) comment (1990) (revised holographic wills provision). For discussion of the UPC holographic wills provision, see Lindgren, *supra* note 58, at 558-60 (suggesting trend is to embrace holographic wills even though handwriting affords little protection to the integrity of the testamentary writing); Langbein, *Substantial Compliance*, *supra* note 32, at 511-12 (discussing UPC's liberal provision for formalism in wills).

that writings which unambiguously demonstrate testamentary intent may be rejected for probate because they contain nonhandwritten material, even though the handwritten portions sufficiently establish the document's authenticity.[615] The courts' consideration of extrinsic evidence in the case of "letter wills" and other informal documents seems unreasonable only in light of their refusal to give equal consideration to documents that bear all of the indicia of testamentary intent.

IV. PROPOSED SOLUTIONS TO THE PROBLEM OF FORMALISM

A. *Reformulating the Formalities*

1. Minimizing formality

a. The Uniform Probate Code Provisions for Attested and Holographic Wills

In his critique of the 1946 Model Probate Code,[616] Mechem states that wills act formalities should comprise "only such requirements as seem so unmistakably essential to a safe will-making process as to justify running the known risk of defeating meritorious wills through failure of testators to know or comply with the requirements."[617] Mechem points out that testators whose wills are most likely to be overthrown by execution defects

> are precisely those persons who do not have the job supervised by a high-powered law firm, but who instead have the matter looked after by some very bad lawyer or by the local J.P. or the local banker or the local real estate man or on the advice of those who happen to be gathered at some lonely deathbed. . . . [T]he governing philosophy should be to design a wills act that as far as is consistent with safety adapts itself to the knowledge (or ignorance), psychology, and habits of such people so as to create the minimum risk that their testamentary attempts will be frustrated by failure to have the witnesses attest in the presence of the testator, or the like.[618]

The 1969 UPC abandoned "the big law office philosophy" deplored by Mechem.[619] The intended effect of the 1969 UPC provisions was to

615. *See* Langbein, *Substantial Compliance*, *supra* note 32, at 519-20 (discussing the problem of determining when there is "sufficient" handwriting).

616. L. SIMES & P. BASYE, *supra* note 180.

617. Mechem, *supra* note 182, at 503.

618. *Id.*

619. *See* UNIF. PROB. CODE § 2-502 (1969) (dealing with attested wills); § 2-503 (dealing with holographic wills). For discussion of the history of the UPC, see *supra* notes 183-203 and accompanying text.

make it as difficult as possible for the testator who attempted to execute either an attested will or an unattested holographic will to fail.

To that end, the 1969 UPC wills provisions eliminated most of the minor formalities associated with attestation. Furthermore, it liberalized the requirements for holographic wills by codifying the liberal "surplusage" approach applied under traditional statutes.[620] The revisions to the UPC wills execution provisions continue to reflect the original policy favoring minimal formality.[621] The minimalist approach of the 1969 UPC provisions eliminated some, but not all, of the issues that arise under traditional statutes. It is not inevitable that courts in UPC states take a less stringent approach to the UPC formalities than courts interpreting more complex provisions.[622] The comment to the new article II provisions states that "the purpose of validating wills whenever possible has been strengthened by the addition of . . . section 2-503, which allows a will to be upheld despite a harmless error in its execution."[623]

b. Abolition of Attestation as a Substantive Requirement

In a recent article, Lindgren proposes abolishing the attestation requirement as part of the substantive law of wills.[624] Lindgren believes that the value of attestation in the modern property system is substantially outweighed by the problems created for testators who fail to comply with the attestation requirements.[625] Like Mechem, he argues that the standard of conduct required for due execution should include only those formalities necessary to show the intent to make a disposition of property.[626] Like Langbein, Lindgren argues that the recognition of holographic wills in a majority of the states and the increased use of will substitutes indicate that the formality of a signed writing alone is sufficient for this purpose.[627]

Lindgren thus contends that even the minimal formalities required for a witnessed will under the UPC are not essential and that such

620. UNIF. PROB. CODE § 2-503 (1969).

621. UNIF. PROB. CODE § 2-502(b) (1969), for text of this section, see *supra* text accompanying note 254.

622. *See supra* notes 197-99 and accompanying text.

623. UNIF. PROB. CODE, art. II, pt. 5, general comment (1990).

624. Lindgren, *supra* note 58, at 569.

625. *Id.* at 572.

626. *Id.* at 545-46.

627. *Id.* at 556-60. *See also* Langbein, *Nonprobate Revolution*, *supra* note 17, at 1109-15; Langbein, *Substantial Compliance*, *supra* note 32, at 503-09 (discussing "the decline of the wills act" due to increasing popularity of will substitutes).

requirements should be abolished.[628] He recommends a principle of "parsimony" in setting the standard of formality required for dispositions by will,[629] observing that:

> [T]he problem with looking at just the advantages of formalities is that it can lull us into thinking that more formalities are better, into thinking that proliferation is good. Nearly any formality that one could imagine would to some extent serve at least one of the accepted purposes. . . . We shouldn't ask whether this or that formality serves the ritual function? Practically any would. Thus, determining the *wisdom* of a particular formality such as attestation isn't as simple as asking whether it serves any of the purposes of formalities. It does. The question instead is whether the formality promotes the primary goal of our system of testation — effectuating the intent of the testator at an acceptable administrative cost.[630]

Lindgren concludes that attestation is an obsolete requirement that fails to achieve this primary goal of the modern property system.[631]

Although the title of Lindgren's article suggests that he proposes to abolish altogether the attestation requirement for wills, and a large part of the article addresses the dispensability of attestation, Lindgren recognizes that unattested wills may raise unresolvable issues of intent and authenticity.[632] He suggests various possibilities for a "two tiered" approach that would preserve attestation as a means of establishing the validity of a will, while at the same time eliminating the conclusive presumption that an improperly attested or unattested will was executed without testamentary intent, so that unattested wills could still be admitted to probate.[633]

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628. Lindgren, *supra* note 58, at 561. He points out that the attestation requirement provides little protection to the testator if the witnesses can take under the will and that in having "scrapped" the requirement that witnesses be disinterested, the UPC requirements have diluted any of the protective value of attestation, as contemplated by the original Statute of Frauds. *Id.* at 560-61. "The best explanation for the *Uniform Probate Code*'s approach is that testators seldom need protection — and if they do, the attestation requirement doesn't provide enough protection to offset the damage done to freedom of testation." *Id.* at 561.

629. *Id.* at 545-46.

630. *Id.* at 544 (emphasis added).

631. *Id.* at 573.

632. *Id. passim.* For discussion of the function of attestation, see *supra* notes 497, 506, 509-11 and accompanying text.

633. Lindgren, *supra* note 58, at 546-47, 569-71. Lindgren proposes that: (1) courts and legislatures encourage optional procedures for making a will self-proving as a way of facilitating

2. Maximizing Formality

a. Notarial Wills and Self-Proving Wills

In some civil law jurisdictions, witnessed wills executed in the presence of an expert trained in legal paperwork, the notary, produce a powerful presumption of testamentary intent.[634] In European jurisdictions that recognize the notarial will, the notary is "a fully qualified lawyer and sworn officer of the state" and an "expert in legal paperwork."[635] The notarial will is "virtually immune from attack on asserted . . . Wills Act noncompliance" because the notary supervises the execution and a powerful presumption of validity arises from the highly formalized execution ritual.[636]

A committee that considered the problems arising from home drafted wills in Britain suggested that requiring notarial wills would

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proof of the will; (2) legislatures draft statutes requiring attestation without making it essential to the validity of the will; (3) legislatures draft statutes making attestation a duty of "the scrivener," so that the lawyer or professional who drafts the will without supervising attestation would be liable for a fine or for the costs of litigation resulting from proof of the will in probate; (4) courts or legislatures to require "special proof" to establish unwitnessed wills; (5) courts or legislatures to vary the standard of proof for a will depending upon whether the will is unattested or attested. *Id.* at 569-71. Most of Lindgren's proposals appear to raise difficult problems of enforcement. His proposals that proponents of unattested wills be forced to overcome a presumption that the will was not genuine or that the standard of proof be raised for an unattested will to a clear and convincing standard, *id.* at 571, would produce results similar to the substantial compliance doctrine or a dispensing power. (For discussion of these harmless error rules, see *infra* notes 744-849 and accompanying text.) *But see* Lindgren, *supra*, at 568 (stating that dropping the attestation requirement would automatically eliminate most of the defects that substantial compliance and dispensing power doctrines are designed to cure).

634. Langbein, *Living Probate: The Conservatorship Model*, 77 MICH. L. REV. 63, 69-70 (1978) [hereinafter Langbein, *Living Probate*]; *see Report of the Justice Committee on Homemade Wills* at 4-5 (1971) (hereinafter *Report*].

635. Langbein, *Living Probate*, *supra* note 634, at 69-70. Langbein explains:

> A main function of the notary in the European legal systems is to provide for official safekeeping of notarized documents. Notarial deposit of a will serves (in combination with relatively strict rules for revoking such wills) to discourage the testator from ineffective attempts at altering or revoking the will, and it prevents accidental destruction, unauthorized tampering, or outright forgery from occurring subsequent to the authenticated execution.
>
> The Continental notary . . . is obliged when conducting the procedure for authenticated testation to satisfy himself of the identity of the testator and to oversee the testator's compliance with the formalities. European law attaches to the authenticated will an extremely strong (although nominally rebuttable) presumption of validity, on the very reasonable supposition that this expert in legal paperwork will have taken his statutory responsibilities seriously.

Id.

636. *Id.* at 70-71.

reduce instances of defective execution by maintaining a single high standard of formality to discourage testators from unassisted attempts to draft their own wills.[637] The Committee mused that "the relative lack of formality required for the making of an English will is in fact a serious disadvantage because it conceals from the ordinary testator the difficulties inherent in disposing of his estate."[638] However, the Committee ultimately concluded that such a provision would be impracticable in Great Britain except as an *alternative* to the witnessed will.[639] Langbein notes that the notarial will in Europe is in fact "an optional and relatively seldom used mode of testation."[640] The major drawback to the notarial will is that "the full benefits to be expected from a notarial system will not be achieved if it is introduced only as an alternative to the present system."[641] On the other hand, as the British committee recognized, revising the present system to require notarial execution would probably create public confusion and increase the number of invalid wills.[642] Moreover, to implement such a system would require fundamental changes in the probate system, since it is the special status and training of the notary in civil law jurisdictions that gives the notarial will its probative force.[643]

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637. *See Report, supra* note 634, at 4.

638. *Id.* at 6. In the Report, the Justice Committee stated:

> The principle advantage of the notarial system, in our view, is that the need to have a will formally executed in the presence of a Commissioner for Oaths or probate official would indirectly lead more testators to take proper legal advice before executing their wills. In addition, the problems of formal invalidity would be completely eliminated, and while a notary could not be expected to make any serious investigation of the state of mind or circumstances of the testator we think his presence would still form a more effective barrier against the more blatant forms of undue influence than the present system provides.

Id.

For discussion of notarial wills, see Brown, *The Office of the Notary in France*, 2 I.C.L.Q. 65 (1953); Maxton, *Execution of Wills: The Formalities Reconsidered*, 1 CANT. L. REV. 393, 396 (1982); Miller, *Substantial Compliance with the Execution of Wills*, 36 INT'L & COMP. L.Q. 559, 562-63 (1987).

639. *Report, supra* note 634, at 6. The committee noted that making notarial execution of wills compulsory would (1) increase the cost of will-making (though probably to a negligible extent); (2) preclude deathbed wills in some cases; and (3) confuse the public and thus result in an increased number of invalid wills. The Committee suggested that the notarial will be adopted as an alternate system of testation to the ordinary witnessed will for a ten-year period. *Id.* at 6-8.

640. Langbein, *Living Probate, supra* note 634, at 71 n.31.

641. *Report, supra* note 634, at 6.

642. *Id.*

643. Miller, *supra* note 638, at 562; *see* Langbein, *Living Probate, supra* note 634, at 69-70. For discussion of the role of the notary in France, see Brown, *supra* note 638.

In the United States, provisions for self-proving wills permit an alternative system of testation under which the attesting witnesses sign an affidavit stating that they witnessed the execution of the will, and that the testator was of sound mind and free from undue influence.[644] Although most self-proving wills legislation was influenced by UPC section 2-504,[645] Nevada has recognized self-proving wills since 1953[646] and Arkansas and Texas, since 1955.[647] The major purposes of self-proving will provisions are to relieve will proponents of the necessity of locating the witnesses[648] and to "guard against the lapses in memory that can occur when witnesses try to recall a ceremony that may have taken place years earlier."[649]

Self-proving wills do not prevent will contests and may not necessarily discourage them.[650] "A self-proving affidavit buttresses the presumptive value of the attestation clause, but it does not make the attestation clause conclusive evidence of due execution."[651] The affidavit creates sworn evidence of due execution, and in the absence of evidence of forgery, imposition, or lack of testamentary capacity,

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644. *See, e.g.*, UNIF. PROB. CODE § 2-504 (1990).

645. *See* UNIF. PROB. CODE § 2-504 (1969).

646. NEV. REV. STAT. § 133.050 (1953).

647. ARK. STAT. ANN. § 60-417 (1955); TEX. PROB. CODE ANN. § 59 (1971). Other provisions authorizing self-proving wills include, *e.g.*, ARIZ. REV. STAT. § 14-2504 (1990); COLO. REV. STAT. § 15-11-504 (1990); DEL. CODE ANN. tit. 12, § 1305 (1990); FLA. STAT. ANN. § 732.503 (1990); HAWAII REV. STAT. § 560:2-504 (1990); IDAHO CODE § 15-2-504 (1990); IND. CODE ANN. § 29-1-5-3 (Burns 1990); IOWA CODE ANN. § 633.279(2) (1989); KAN. STAT. ANN. § 59-606 (1990); KY. REV. STAT. § 394.225 (Michie 1990); ME. REV. STAT. ANN. tit. 18-A, § 2-504 (1989); MASS. ANN. LAWS ch. 192, § 2(ii) (West 1991); MINN. STAT. § 524.2-504 (1990); MONT. CODE ANN. § 72-2-304 (1990); NEB. REV. STAT. § 30-2329 (1989); N.H. REV. STAT. ANN. § 552:6-a (1979) (repealed in 1985); N.M. STAT. ANN. § 45-2-504 (1991); N.C. GEN. STAT. § 31-11.6 (1991); N.D. CENT. CODE ANN. § 30.1-08-04 (Michie 1991); OKLA. STAT. ANN. tit. 84, § 55(5) (West 1990); 20 PA. CONS. STAT. ANN. § 3132.1 (Purdon 1989); S.D. CODIFIED LAWS ANN. § 29-2.6.1 (1991); UTAH CODE ANN. § 75-2-504 (1991); VA. CODE § 64.1-87.1 (1991); WYO. STAT. § 2-6-114 (1991).

648. Lindgren, *supra* note 58, at 570; Mann, *supra* note 32, at 41; Schneider, *supra* note 310, at 542.

649. Mann, *supra* note 32, at 41. However, because the procedure is optional, many testators do not take advantage of it, significantly diluting its utility. Miller, *supra* note 638, at 562. Lindgren considers that procedures for making wills self-proving (thus eliminating the need for the testimony of witnesses at probate) is the best means of establishing the authenticity of a will. *See* Lindgren, *supra* note 58, at 569. "We could keep attestation routine by retaining witnesses for a self-proving will while eliminating the attestation requirement for the validity of wills." *Id.* at 570.

650. Mann, *supra* note 32, at 41.

651. *Id.*

raises a conclusive presumption that the signature requirements for valid execution have been met and a rebuttable presumption that the other requirements also have been met.[652]

The experience in Texas and other jurisdictions that apply the strict compliance doctrine to self-proving wills make it clear that heightened formality does not prevent defects in execution.[653] The problems created in those jurisdictions when testators or witnesses signed only the self-proving affidavit and not the will itself led to a 1975 reform permitting a "one-step" execution of both the will and self-proving affidavit in addition to the traditional "two-step" separate execution of the will and the self-proving affidavit.[654]

Revised section 2-504(a) of the UPC provides that "[a] will may be simultaneously executed, attested, and made self-proved" and provides a form for a self-proving will.[655] A new subsection (c) has been added to counteract the Texas interpretation,[656] specifically stating that affidavit is considered affixed to the will for purposes of proving due execution.[657] The section also permits subsequent execution of a self-proving affidavit by the testator and affidavits of a previously executed witnessed will.[658]

b. Antemortem ("Living") Probate

One way to avoid a postmortem inquiry into testamentary intent is to implement an antemortem procedure for settling the issue at the time the will is executed. Existing antemortem probate procedures are designed primarily to prevent will contests and separate actions at law or in equity that are based on such grounds as lack of testamentary capacity, undue influence, or other imposition,[659] but any antemor-

652. Schneider, *supra* note 310, at 542.

653. For discussion of Texas cases, see *supra* notes 310-19 and accompanying text. For articles discussing formalism as applied to self-proving wills under the Texas rule, see Effland, *supra* note 310; Mann, *supra* note 32; Schneider, *supra* note 310; Note, Wich v. Fleming: *The Dilemma of a Harmless Defect in a Will*, 35 BAYLOR L. REV. 906 (1983).

654. *See* UNIF. PROB. CODE § 2-504 (1983). Mann, *supra* note 32, at 42 n.11. "Will mavens refer to the liberalized procedure as the 'one-step' version and to the more cumbersome procedure as the 'two-step' version. The one-step procedure eliminates the difficulties . . . . It has not swept the field, however." *Id.*

655. UNIF. PROB. CODE § 2-504(a) (1990). Subsection (b) provides the procedure for making a previously attested will self-proving. *Id.* § 2-504(b).

656. *Id.* § 2-504(a) comment.

657. *Id.* § 2-504(c).

658. *Id.* § 2-504(a).

659. For general discussion of antemortem probate, see Alexander & Pearson, *Alternative Models of Ante-Mortem Probate and Procedural Due Process Limitations on Succession*, 78

tem adjudication of those issues also would resolve any issue of intent and genuineness. Thus, any issues about due execution could be conclusively resolved while the testator is still available "to testify, or to clarify or contradict other evidence concerning his [or her] all-important intention."[660] If, at an antemortem probate proceeding, "the technical execution of the will were found wanting, it could be corrected, rather than having the issue arise after the testator's death when a flaw in the execution of the will would result in its failure."[661]

Although Michigan enacted legislation in 1883 authorizing antemortem probate,[662] only a few states today permit such a procedure.[663] One problem with the concept of an antemortem proceeding to settle all questions respecting will enforceability is that antemortem probate raises difficult, if not unresolvable, constitutional issues. The Michigan antemortem provision was struck down in 1885, two years after its enactment. In *Lloyd v. Wayne Circuit Judge*,[664] the Michigan Supreme Court held that the antemortem provision was unconstitutional because it failed to provide the testator's spouse with notice and an opportunity to be heard.[665] The concurring opinion raised the additional argument

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MICH. L. REV. 89, 89-90 (1979); Fink, *Antemortem Probate Revisited: Can an Idea Have a Life After Death?*, 37 OHIO ST. L.J. 264, 266 (1976); Langbein, *Living Probate*, *supra* note 634.

660. Gulliver & Tilson, *supra* note 41, at 4.

661. Fink, *supra* note 659, at 266. Fink explains:

> The proceeding would take place while the testator is alive and able to testify, not by deposition but in direct view of the court or jury which would determine his capacity and his freedom from influence and which would decide if the will were properly drawn and witnessed. These findings would be binding upon all those validly made parties to the action or represented in the action, by operation of the doctrines of collateral estoppel, res judicata, and virtual representation.

Id. at 267.

662. 1883 MICH. PUB. STAT. 17, *reprinted in* Fink, *supra* note 659, at 268-69.

663. *See, e.g.*, ARK. STAT. ANN. §§ 62-2134 to - 2137 (1991); N.D. CENT. CODE ANN. §§ 30.1 to .04 (Michie 1991); OHIO REV. CODE §§ 2107.081-.085 (Baldwin 1990). For discussion of antemortem probate provisions and related problems, see Edwards, *Antemortem Probate and Judicial Power to Render or Refuse Declaratory Relief*, 7 OHIO N.U.L. REV. 189 (1980); Comment, *The Antemortem Alternative to Probate Legislation in Ohio*, 9 CAP. U.L. REV. 717 (1980) [hereinafter *Antemortem in Ohio*]; Comment, *Contemporary Ante-Mortem Statutory Formulations: Observations and Alternatives*, 32 CASE W. RES. L. REV. 823 (1982) [hereinafter *Observations and Alternatives*].

664. Lloyd v. Wayne Circuit Judge, 56 Mich. 236, 23 N.W. 28 (1885). Lloyd's will, which excluded one son and his wife, was refused probate. *Id.* at 237, 23 N.W. at 28. A circuit judge upheld the refusal on the grounds that the statute did not provide the wife with notice and a hearing. *Id.* Lloyd, seeking to enforce the statute, brought a mandamus action against the judge which the Michigan Supreme Court denied. *Id.* at 239, 23 N.W. at 29. *See* Fink, *supra* note 659, at 268-74 (discussing the *Lloyd* case).

665. *Lloyd*, 56 Mich. at 243, 23 N.W. at 31.

that the case was beyond judicial competence because no justiciable controversy existed.[666] "The broadest definition ever given to the judicial power confines it to controversies between conflicting parties in interest, and such can never be the condition of a living man and his possible heirs."[667] The concurring judge pointed out that the adjudication could only be effective

> in the single case of the establishment of the will and subsequent death without revocation or alteration, and leaves it open to the testator to make any subsequent arrangement which he may desire, or to oust the jurisdiction by a change of residence, or to leave the will once rejected open to probate in the usual way after death.[668]

The court seems to have viewed the proceeding with disfavor on both practical and policy grounds.[669]

Scholars periodically have considered the feasibility of antemortem probate. In the 1930s, several articles proposed antemortem probate as a solution to many of the problems arising under the wills acts.[670] In 1932, a committee of the National Conference on Uniform State Laws drafted an antemortem probate provision, but the committee apparently abandoned the project stating that "since there was then no law on the subject on the books of any state, the Commissioners would be in the position of advocating new legislation rather than

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666. *Id.* (Campbell, J., concurring).

667. *Id.* (Campbell, J., concurring).

> Our statutes have never undertaken, and do not in this case undertake, to give to the heirs any interest which will even be fixed by this probate, or which may not be cut off at any time by their own death, or by . . . new will or conveyance. It is by no means free from doubt what classes of probate proceedings under our system are to be treated as judicial proceedings in the proper sense of that term; and it is not important here to consider that question, because this proceeding is not even a suit for probate.

Id. (Campbell, J., concurring).

668. *Id.* at 240, 23 N.W. at 29 (Campbell, J., concurring).

669. *Id.* at 241, 23 N.W. at 30 (Campbell, J., concurring).

> It is a singular, and in my judgment, a very unfortunate spectacle to see a man compelled to enter upon a contest with the hungry expectants of his own estate, and litigate while living with those who have no legal claims whatever upon him, but who may subject him to ruinous costs and delays in meeting such testimony as is apt to be paraded in such cases.

Id. (Campbell, J., concurring).

670. *See, e.g.*, Cavers, *Ante Mortem Probate: An Essay in Preventive Law*, 1 U. CHI. L. REV. 440 (1934); Kutscher, *Living Probate*, 21 A.B.A. J. 427 (1935); Redfearn, *Ante-Mortem Probate*, 38 COM. L.J. 571 (1933).

reforming existing legislation."[671] In Mechem's 1941 critique of the Model Probate Code, he reproved the MPC drafters for failing to explore the option of antemortem probate.[672]

The first notable revisitation of antemortem probate appeared in Fink's 1976 article.[673] Fink proposed "a state statute providing for a declaratory judgment as to the validity of a will and the capacity of its maker, to be brought by the testator himself, against all those who would, upon the testator's death, be able to challenge the will," settling issues of capacity, undue influence, and due execution.[674] Fink's proposal spawned a series of articles, many written by eminent scholars, debating the constitutionality and practicality of the antemortem proceeding and proposing a variety of models for resolving the due process and justiciability issues raised by antemortem will adjudication.[675]

A detailed discussion of antemortem probate, the constitutional and other issues, and the various models recommended by scholars or adopted by legislators is beyond the scope of this article. The antemortem proceeding is directed mainly toward resolving the questions that tend to be the basis of will contests rather than resolving the threshold question of formal validity.[676] Antemortem proceedings are most likely to be invoked by testators realistically concerned about postmortem challenges to the will (such as, testators intending to make "unnatural dispositions," leaving their property away from their heirs).[677] It seems unlikely that a testator would go through a court proceeding merely to obtain an adjudication as to the formal validity of the will, particularly since, depending on the statutory model adopted in that jurisdiction, antemortem adjudication might conceiv-

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671. Fink, *supra* note 659, at 288-89 (citing Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings 143 (1931) (statement of Mr. Imlay)).

672. Mechem, *supra* note 182, at 521.

673. Fink, *supra* note 659.

674. *Id.* at 266.

675. *E.g.*, Alexander, *The Conservatorship Model: A Modification*, 77 MICH. L. REV. 86 (1978); Alexander & Pearson, *Alternative Models of Ante-Mortem Probate and Procedural Due Process Limitations on Succession*, 78 MICH. L. REV. 89 (1979); Edwards, *supra* note 663; Fellows, *The Case Against Living Probate*, 78 MICH. L. REV. 1066 (1980); Langbein, *Living Probate*, *supra* note 634; Comment, *Antemortem in Ohio*, *supra* note 663; Comment, *Observations and Alternatives*, *supra* note 486.

676. *See* Fink, *supra* note 659, at 265.

677. *See id.* Devices presently available to testators in many jurisdictions are the *in terrorem* clause making loss of bequests the penalty for unsuccessful contests, perpetuation of testimony by the testator during his or her lifetime, and a self-proving will in which the testator asserts capacity and freedom from undue influence at the time of execution. *Id.* at 266.

ably be construed to limit the testator's freedom to alter, amend, or revoke the adjudicated will.[678]

Despite the proliferation of models, the constitutionality of antemortem probate remains quite problematic. No single approach seems to be entirely satisfactory both constitutionally and practically.[679] The National Conference of Commissioners on Uniform State Laws has recently considered a model draft for an antemortem probate proceeding.[680] Even if a workable model is adopted, antemortem probate is unlikely to be used by testators who are not apprehensive of will contests and is therefore unlikely to have any meaningful impact on the problem of formalism.

c. Videotaped Wills

A fairly recent proposed reformulation of the statute of wills would permit courts to admit videotaped wills to probate either as duly executed "videowills" or, in the alternative, as evidence to prove due execution.[681]

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678. Alexander & Pearson, *supra* note 659, at 118-19. Alexander and Pearson suggest that there is indeed some basis for concern that an antemortem proceeding will limit the testator's subsequent freedom and suggest that there is a need in framing such a statute "to be clear about the availability of revocation and its procedure if only to avoid the appearance of making the will irrevocable through court approval." *Id.* at 118. Langbein states,

> I doubt that the point would have practical importance, because most testators who are at once sufficiently prudent and well-counseled to have used living probate procedure and sufficiently aged or decrepit to have needed it will not lightly venture out of the safe harbor that they will have achieved. The testator who uses living probate procedure will almost always be making his true "last will." Further, if the need for modification does become inevitable, he and his lawyer are likely to understand that the circumstances that made the use of living probate advisable in the first place are persisting, and that the procedure ought to be used again despite the nuisance and expense.

Langbein, *Living Probate*, *supra* note 634, at 81.

679. *See generally* Edwards, *supra* note 663 (describing various living probate proposals, pointing out the weaknesses of each, and suggesting an alternative which concentrates on eliminating the expense and uncertainty of a mental capacity requirement for executing a valid will; Fellows, *supra* note 675 (discussing the application of the "case or controversy" requirements of Ohio's Declaratory Judgment Act to an Ohio antemortem statute).

680. *See* National Conference of Commissioners on Uniform State Laws, UNIFORM ANTE-MORTEM PROBATE OF WILLS ACT, DRAFT B (submitted for discussion in 1980).

681. Beyer, *Video Requiem: Thy Will be Done*, 124 TR. & EST. 24 (1985) [hereinafter Beyer, *Video Requiem*]; Beyer, *Videotaping the Will Execution Ceremony — Preventing Frustration of the Testator's Final Wishes*, 15 ST. MARY'S L.J. 1 (1983) [hereinafter Beyer, *Preventing Frustration*]; Buckley, *Devising Videotaped Will Statutes: A Primer*, 7 A.B.A. J. 37 (Spring

> If our legal principles are to keep pace with the progress surrounding them, legislators and judges must eventually decide how to incorporate society's new tools into our reservoir of legal precedents. . . . When few could write, courts had to rely on . . . oral testimony. With increased literacy came the admission of written evidence. Eventually, science developed techniques that preserved information on film and magnetic tape, and gradually photographs and audio recordings were permitted at trial. In recent years the use of videotape in the legal arena has become more widespread. However, there are some areas of the law, such as probate, which have been slow to recognize the merits of this medium.[682]

At present, none of the states have expanded wills provisions to include the videowill as a substitute for a written will.[683] In *In re Estate of Reed*,[684] the Wyoming Supreme Court rejected the contention that an audio recording could serve as a will, absent explicit legislative authorization.[685] The *Reed* court declined to "enlarge, stretch, expand, or extend the holographic will statute to include a testamentary device not falling within the express provisions of the statute."[686]

In his 1975 article, Langbein rejects the concept of an electronically recorded will, arguing that such a recording "lack[s] the solemnity and finality of a signed document."[687] The comments to section 2-502(c) and section 2-503 in the draft versions of the recent revisions to the UPC indicate that the drafters were similarly prejudiced in favor of

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1986) [hereinafter Buckley, *A Primer*]; Buckley, *Indiana's New Videotaped Wills Statute: Launching Probate into the 21st Century*, 20 VAL. U.L. REV. 83 (1985) [hereinafter Buckley, *Launching Probate*]; Buckley, *Videotape Wills: More than a Testator's Curtain Call*, TR. & EST. 48 (Oct. 1987) [hereinafter Buckley, *Testator's Curtain Call*]; Buckley & Buckley, *Videotaping Wills: A New Frontier in Estate Planning*, 11 OHIO N.U.L. REV 271 (1984); Nash, *A Videowill: Safe and Sure*, 70 A.B.A. J. 87 (1984); Comment, *supra* note 69.

For discussion of the use of electronic media in court proceedings, see McCrystal & Maschari, *Will Electronic Technology Take the Witness Stand?*, 11 TOL. L. REV. 239 (1980); Note, *Admission of Videotapes*, 38 MISS. L. REV. 111 (1973); Note, *Videotape as a Tool in the Florida Legal Process*, 5 NOVA L.J. 243 (1981); Note, *Videotape Depositions: An Analysis of Use in Civil Cases*, 9 CUMB. L. REV. 195 (1978).

682. Buckley & Buckley, *supra* note 681, at 271-72 (citations omitted).

683. Buckley, *A Primer*, *supra* note 681, at 37; Comment, *supra* note 54, at 139. *See supra* note 191 for citations to current wills provisions.

684. 672 P.2d 829 (Wyo. 1983).

685. *Id.* at 833.

686. *Id.*

687. Langbein, *Substantial Compliance*, *supra* note 32, at 518-19.

the medieval methods of executing wills.[688] The comments to the final (1990) revision of these provisions, however, is equivocal with respect to the status of videotaped wills; though the comment notes that "[a] tape recorded will has been held not to be 'in writing,'"[689] it does not state, as does an earlier version, that a video or audio recording is not a writing,[690] nor does the comment to section 2-503 specifically state that the UPC harmless error rule cannot be applied to validate such a recording if it is shown that it was prepared with testamentary intent.[691] Certainly a case can be made that a carefully contrived videotape could be designed to serve all of the purposes of the wills act and indeed in such a way as to provide superior evidence of testamentary intent and authenticity.[692]

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688. UNIF. PROB. CODE § 2-502(a) comment (1988 Discussion Draft). The discussion draft states that "[t]he will must be in writing. Any reasonably permanent record is sufficient; but a tape-recorded or video-taped will is not 'in writing.'" *Id.* (citing *Estate of Reed*, 672 P.2d 829 (Wyo. 1983)). It is unclear whether the drafters considered that a videotaped will could be admitted under the § 2-503 harmless error rule. *See id.*

689. UNIF. PROB. CODE § 2-502(a) comment (1990) (citing *Estate of Reed*, 672 P.2d 829 (Wyo. 1983)).

690. *See id.* Beyer has pointed out that there is judicial and legislative authority in other contexts for extending the definition of a "writing" beyond the narrow meaning of words printed or written on paper. Beyer, *Preventing Frustration*, *supra* note 681, at 52-54. Beyer points out that the Uniform Commercial Code, the Uniform Rules of Evidence, the Federal Rules of Evidence, and the California Evidence Code all have expanded the term beyond its usual meaning. *Id.* (citing U.C.C. § 1-201(46) (1987); UNIF. R. EVID. 1001(1) (1989); FED. R. EVID. 1001(1); CAL. EVID. CODE § 250 (West 1991)). The California Evidence Code specifically defines writing as "handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, symbols, or combinations thereof." CAL. EVID. CODE § 250 (West 1991).

691. *See* UNIF. PROB. CODE § 2-503 comment.

692. Nash describes some of the techniques that the maker of a videowill could employ to satisfy the purposes of an attested will:

> The signature requirements can be handled in a number of ways. The testator can simply sign his name in view of the camera, perhaps on a sheet of paper or cardboard, and acknowledge it to the witnesses who can do likewise. The camera can zoom in close to show the signatures. Actually, however, if the purpose of the signatures is to authenticate the instrument, the signing of names in view of the camera is superfluous. The appearance of the testator himself, rather than just his signature, certainly identifies him positively. The videowill shows his person, allows the viewer to hear his voice and note his demeanor and his mannerisms. The same holds true for the witnesses. Most important, the actual appearance of the testator is unlikely to be copied as a signature might be.
>
> Because the signing requirement is also intended to signal that the testator is finished with the dispositive provisions and that he intends to adopt them as his

Commentators argue that even if courts do not recognize the concept of a "videowill," a videotape of the execution of a will is eminently well-adapted to resolve a number of issues that may arise at probate. "A carefully prepared videotape that records both visually and audibly the entire will execution procedure may prove indispensible [sic] should the will subsequently be contested. This procedure . . . allows a ready determination as to whether the various . . . statutory requirements for a valid will were satisfied."[693] By showing the testator actually in the process of executing the will, a videotape might provide "practically irrebuttable evidence" of testamentary intent.[694] Indiana has recently enacted legislation permitting courts to admit videotapes of the execution ceremony as evidence of due execution.[695]

B. *Harmless Error Rules*

1. Langbein's "Functional" Substantial Compliance Doctrine

a. Purpose of the Doctrine

Langbein is generally considered to be the first scholar to have presented a comprehensive and detailed argument in support of the

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> last will, the testator might simply make a short statement declaring just that. The witnesses also might declare that they are acting as witnesses, thus "signing" the will. They also might, for safety's sake, subscribe their names in view of the camera. In this manner, a videotape can be executed in full accordance with [the purpose of] every requirement of a present-day statute of wills.

Nash, *supra* note 681, at 88.

693. Beyer, *Preventing Frustration*, *supra* note 681, at 5. Other purposes that Beyer believes a videotape may serve at probate include: (1) preserving evidence of testamentary intent; (2) recording the testator's demeanor as a means of helping to establish lack of duress, fraud, imposition, or undue influence; and (3) providing contemporaneous statements by the testator to assist in will interpretation and construction. *Id.* at 5-7.

694. *Id.* at 6-7.

695. IND. CODE § 29-1-5-3(c) (Burns 1990). "The amendment . . . marked the official acceptance of videotaped wills as evidence." Comment, *supra* note 69, at 150. The provision "specifically allows videotape to be admitted during probate to document that a will was executed according to statutory mandates." Buckley, *Launching Probate*, *supra* note 681, at 83-84. "This precept restricts videotape to modest evidentiary tasks primarily because the legislature was hesitant, on its maiden enactment, to authorize videotaped wills without written counterparts." Buckley, *A Primer*, *supra* note 681, at 37. The videotape is admissible only to prove correct execution. "The written will still speaks for itself." Buckley, *Launching Probate*, *supra* note 681, at 88.

Some courts have admitted audio recordings as evidence at the probate proceeding. *See, e.g.*, Belfield v. Coop, 8 Ill. 2d 293, 134 N.E.2d 249 (1956) (admitting audio recording as evidence of testamentary capacity and lack of undue influence); Hultquist v. Ring, 301 S.W.2d 303 (Tex. Civ. App. 1957) (admitting dictaphone recording as evidence of error in transcription in order to resolve latent ambiguity in the provisions of the will).

judicial abandonment of the strict compliance rule in wills cases in favor of a flexible "functional" approach to defectively executed wills.[696] The thrust of Langbein's substantial compliance doctrine, as he originally envisioned it,[697] seems to be that a court should deem a formal defect in a will to be a harmless error and permit the will to be admitted to probate if the proponent can demonstrate that the defect does not raise unresolvable issues of authenticity or testamentary intent.[698] Application of the doctrine depends on the substitution of a functional interpretation of the statutory formalities for due execution that would consider the nature of the defect in execution in light of extrinsic evidence of testamentary intent for the traditional strict construction of the wills formalities as legislatively mandated criteria for validity.[699] Langbein characterizes substantial compliance as essentially a litigation doctrine[700] that permits the proponents of a defective will to rebut the traditionally irrebuttable presumption of invalidity arising from defective execution[701] by producing extrinsic evidence of the facts and circumstances surrounding execution sufficient to prove testamentary intent by a preponderance of the evidence.[702] In contrast to the

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696. *See* Langbein, *Substantial Compliance*, *supra* note 32. The scope of substantial compliance seems to be extended beyond its original limits in Langbein's 1987 article. *See* Langbein, *Harmless Error Rules*, *supra* note 5. For detailed discussion of the substantial compliance doctrine, see Miller, pt. 2, 43 FLA. L. REV. ____ (1991).

For a proposal that courts effectuate the intentions of testators by enforcing defectively executed wills in the absence of "suspicious circumstances" surrounding execution that preceded Langbein's "substantial compliance" proposal, see Bates, *supra* note 3. Bates' article, sketching out the parameters of a form of harmless error rule, was published while Langbein's 1975 article, *supra* note 32, was already in press. Langbein, *Crumbling Wills Act*, *supra* note 347, at 1194.

697. Langbein, *Substantial Compliance*, *supra* note 32.

698. *See id.* at 513-26.

699. *See id.*

700. Langbein, *Crumbling Wills Act*, *supra* note 497, at 1194.

701. *Id.* at 1194; Langbein, *Harmless Error Rules*, *supra* note 5, at 6-7; Langbein, *Substantial Compliance*, *supra* note 32, at 513.

702. Langbein, *Crumbling Wills Act*, *supra* note 497, at 1194. Langbein states that "[t]he substantial compliance doctrine would permit the proponents in cases of defective execution to prove what they are now entitled to presume from due execution — the existence of testamentary intent and the fulfillment of the Wills Act purposes." Langbein, *Substantial Compliance*, *supra* note 32, at 513. Miller explains:

> Professor Langbein argues that the finding of a formal defect in the execution of a will should lead not to automatic invalidity, but to a further inquiry. This further inquiry should be concerned with whether the non-complying document expresses the deceased's testamentary intent and whether its form sufficiently approximates to Wills Act formality to enable the court to conclude that it serves the purposes of the Wills Act. It is pointed out that although a presumption of testamentary intent arises from due execution, this may be rebutted by evidence that the document was not intended to be a will. In the same way, it should be open to the

quantitative or sufficiency notion of substantial compliance sometimes applied in the courts,[703] application of the functional substantial compliance doctrine does not depend on the court's determining that the conduct of the testator or witnesses was sufficiently close to the statutory standard to be deemed in actual compliance with the wills act.[704]

b. Scope of the Doctrine

The substantial compliance doctrine as explained in Langbein's 1975 article generally would save wills containing minor technical defects in execution and also, in some cases, wills containing more serious errors or omissions such as partial attestation or (in jurisdictions that permit unattested holographic wills) no attestation.[705] Substantial compliance would validate holographic wills containing typed or printed matter, even in instances in which material provisions (and possibly even substantial portions) of the will are not handwritten; for example, wills that would be formally invalid even under the relatively liberal "surplusage" theory.[706] It also would save defectively revoked or modified wills if the proponent could show the intention of the testator to revoke or alter the earlier document.[707]

Application of the substantial compliance doctrine presupposes that courts can identify the functions served by the individual wills act formalities and can evaluate their relative significance in resolving questions about the testator's intent and the genuineness of the document offered for probate.[708] An essential premise of substantial compliance is that the failure to comply with the fundamental formalities of writing and signature almost always will raise issues of testamentary intent and authenticity that no amount of extrinsic evidence is likely to resolve.[709] Langbein suggests that the proponent of an unsigned

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> propounders of a document to show that, though there is some defect of execution, it was, nonetheless, intended to be a will.

Miller, *supra* note 638, at 564-65.

703. For discussion of substantial compliance applied to borderline conduct, see *infra* notes 264-394 and accompanying text.

704. *See* Langbein, *Substantial Compliance*, *supra* note 32, at 526 n.127. "The substantial compliance doctrine is a rule neither of maximum nor of minimum formalities . . . ." *Id.* at 513.

705. Langbein, *Substantial Compliance*, *supra* note 32, at 521-22. For detailed discussion of application of substantial compliance to wills containing various execution defects, see Miller, pt. 2, *supra* note 696.

706. Langbein, *Substantial Compliance*, *supra* note 32, at 519. For discussion of the "surplusage" theory applied to holographic wills, see *supra* notes 226-40 and accompanying text.

707. Langbein, *Substantial Compliance*, *supra* note 32, at 522.

708. *See* Langbein, *Harmless Error Rules*, *supra* note 5, at 52.

709. Langbein, *Substantial Compliance*, *supra* note 32, at 518.

document almost never would be able to show sufficient evidence to rebut the presumption that the document was not intended to be a will except in the extraordinary case in which the evidence shows that the testator died during the execution of the will.[710] Moreover, the substantial compliance doctrine "would have no practical effect on the requirement that wills be in writing."[711] As a practical matter, the testator's omission of one or more of the formalities required for will-making (as opposed to a mere bungling of the formality, such as failing to publish the will to the witnesses, to comply with the presence requirement, or to sign the will at the end),[712] supports a determination that the testator did not in fact intend to make a will. The further the document offered for probate deviates from the standard of formality set by the wills act, the less likely it is, according to Langbein, that extrinsic evidence will be able to supply proof of the requisite intent.[713]

c. Application to the Formalities

For a court to apply Langbein's substantial compliance rule to validate a document that does not comply with the requirements of the wills act depends on an unconventional "functional" approach to the statute of wills. To apply substantial compliance, the court must reject a literal interpretation of the statute of wills as a provision setting out the minimum criteria for an enforceable will in favor of a view of the wills act requirements as a substitute for the need to produce evidence of the genuineness of a purported will and of its maker's intention that it be enforced as such. Substantial compliance is a judicial doctrine designed to place the traditional requirement of strict compliance with the literal requirements of the wills act by redefining the notion of "compliance" in functional terms; thus, if the proponents

710. *See id.* (signature so fundamental that proponents of an unsigned will bear an "almost impossible" burden of proof).

Langbein suggests that the proponents of an unsigned will might be able to carry the burden of showing testamentary intent in a case in which the testator died or was killed after the witnesses had attested the will but before the testator was able to sign — the "interloper's bullet" scenario. *Id.*

711. *Id.* at 518-19. He does observe that "conceivably" the doctrine might be applied to an electronic will if (1) the jurisdiction permits unattested wills in holographic form or the testator dictates the will in the presence of witnesses who "attest" on the recording; and (2) the testator is in extremis and so unable to comply with the writing requirement. But application of substantial compliance to validate such a "will" would be the "rare case." *Id.* at 519.

712. *See* Langbein, *Substantial Compliance*, *supra* note 32, 516-22.

713. *See* Langbein, *Harmless Error Rules*, *supra* note 5, at 17.

of a formally defective will can carry the burden of proving through the introduction of extrinsic evidence that the purported testator did in fact intend the defective document to be given effect, the purpose of the statutory requirements is effectively served and the will is deemed to be in compliance, despite the defect.[714]

Substantial compliance is thus distinguishable from a statutory dispensing power authorizing a court to disregard a violation of the wills act if the proponent of a defective will can prove that it was executed with testamentary intent.[715] A dispensing power depends upon legislative authorization to excuse noncompliance with the statutory mandate in cases in which the proponent can show that the defective document was intended to be given effect.[716] It does not require a reinterpretation of the statute of wills to permit courts to deem that documents failing to meet the literal requirements of the statute nevertheless "functionally" comply.

Langbein characterizes substantial compliance as a "judicial doctrine" that may be adopted by courts in place of the traditional strict compliance rule without authorization from the legislature.[717] "I take the position that the existing literal compliance rule is a judicial creation and that the courts can abandon it when experience and reflection reveal that its harsh results are not essential to the good order of the probate system."[718] Because the rationale supporting the substantial compliance doctrine is a functional reinterpretation of the wills act rather than a power to dispense with its requirements, substantial compliance is the only form of harmless error rule that a court could adopt by judicial fiat.[719]

d. "Functional" versus "Sufficient" Compliance

Langbein's selection of the term "substantial compliance" to describe his harmless error principle may have been an unfortunate

714. *See* Langbein, *Substantial Compliance*, *supra* note 32, at 515-16.

715. *See* Langbein, *Harmless Error Rules*, *supra* note 5, at 6-7.

716. *Id.* at 45.

717. *See id.*

718. Langbein, *Crumbling Wills Act*, *supra* note 497, at 1195. *But see* Estate of Fernandez, 173 N.J. Super. 240, 413 A.2d 998 (Sup. Ct. 1980), in which a court of first instance cited "Langhelm's" [sic] article but refused to adopt a standard of substantial compliance because "I would be breaking new ground, a role more appropriate to the appellate courts." *Id.* at 245, 413 A.2d at 1001. For discussion of this case, see Langbein, *Harmless Error Rules*, *supra* note 5, at 7-8.

719. *See* Langbein, *Harmless Error Rules*, *supra* note 5, at 45.

choice, given the usual meaning of the term when applied by courts.[720] "Substantial compliance" implies a quantitative or yardstick standard of compliance which if not achieved is not "substantial."[721] The ambiguity of the term had unfortunate results in Queensland, Australia, whose legislature in 1987 enacted a statutory harmless error rule purportedly based on Langbein's substantial compliance doctrine.[722] The Queensland courts have interpreted the term so restrictively that "[i]n the hands of the Queensland bench, substantial compliance . . . is a *new formal requirement* that must be established independently of testamentary intent. And the standard for this formality is essentially quantitative: compliance cannot be substantial unless the defect is minimal."[723] An Idaho court, commenting on Langbein's substantial compliance doctrine (but refusing to apply it), gave it a similarly restrictive interpretation.[724]

Since Langbein's substantial compliance doctrine is predicated on the "compliance" of an otherwise defective execution with the functions of the wills act formalities as the test for determining whether the defect should be treated as harmless error,[725] a more descriptive and less misleading term would be "functional compliance."

In his 1975 article, Langbein hopefully observes that "substantial compliance . . . presently awaits its first adherents among common law courts."[726] A review of existing case law reveals that courts addressing the problem of giving effect to wills in cases in which the testator's intent is clear but compliance is marginal often take into consideration the purpose of the arguably bungled formality in deciding

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720. For discussion of the meaning of substantial compliance in cases of borderline compliance in the courts, see *supra* notes 264-94 and accompanying text.

721. *See* Miller, *supra* note 638, at 586; Nelson & Starck, *supra* note 32, at 355. "The expression 'substantial compliance' is . . . ambiguous. Although potentially wide in scope as used by Professor Langbein, it may be interpreted restrictively or quantitatively . . . ." Miller, *supra* note 638, at 586. Nelson and Starck have also criticized Langbein's terminology for its ambiguity. Nelson & Starck, *supra* note 32, at 355.

Compare Maxton, *supra* note 638, at 402-03 (stating that Langbein's "narrow approach" to substantial compliance "requires both testamentary intent and its evidence in the form of an attempt at due execution") *with* Langbein, *Substantial Compliance*, *supra* note 32, at 513 (stating that substantial compliance does not rest on either maximum or minimum formalities).

722. For discussion of the Queensland provision, see *infra* notes 850-87 and accompanying text.

723. Langbein, *Harmless Error Rules*, *supra* note 5, at 44 (emphasis in original).

724. *In re* Estate of McGurrin, 113 Idaho 341, 348, 743 P.2d 994, 1001 (Idaho Ct. App. 1987).

725. *See* Langbein, *Substantial Compliance*, *supra* note 32, at 513-26.

726. *Id.* at 526.

to enforce the document.[727] These decisions are obviously not applications of a substantial compliance rationale as defined by Langbein, because they do not turn on a determination that the proponents of a concededly defective will have rebutted the presumption of invalidity arising from defective execution;[728] instead, they are predicated on a determination that no defect in execution exists. Nevertheless, an emphasis on function rather than form is often implicit in decisions finding arguably defective conduct sufficient under the wills acts.

e. Functional Analysis in the Courts

In his 1987 article, Langbein states that the only American precedent that has "squarely validated a concededly defective will on the ground that substantial compliance satisfied the purposes of the Wills Act"[729] is the Pennsylvania decision in *Kajut Will*.[730] In *Kajut*, a Pennsylvania court of first instance found that a will signed by mark was valid despite noncompliance with a requirement that the testator's name be subscribed in the testator's presence.[731] In finding that the will "substantially complied" with the requirements for execution of a will by a testator who is unable to sign, the court emphasized that (1) the testator's attorney, who was also one of the witnesses, told the testator before he affixed his mark to the will that his name had previously been typed on it; and (2) even if the name had been subscribed in the testator's presence, the testator would not have been able to see the subscription because he was blind.[732] The court thus applied a form of purposive analysis to validate a will that the court conceded did not meet the requirements of the wills act because the conduct was *sufficient under the circumstances* to serve the purpose of the bungled formality.[733]

Courts upholding the validity of self-proving wills in cases in which the witnesses sign the self-proving affidavit but fail to sign the will itself, leaving the will technically unexecuted,[734] apply a form of func-

727. For discussion of the courts' application of a quantitative substantial compliance standard to borderline conduct, see *infra* notes 320-21 and accompanying text.

728. *See* Langbein, *Substantial Compliance*, *supra* note 32, at 526 n.127.

729. Langbein, *Harmless Error Rules*, *supra* note 5, at 8.

730. Estate of Kajut, 22 Pa. D. & C.3d 123 (C.P. Westmoreland County 1981). For discussion of *Kajut*, see *supra* text accompanying notes 355-61.

731. *Id.* at 131.

732. *Id.* at 130-31.

733. *Id.* at 130.

734. For discussion of cases, see *supra* notes 310-17 and accompanying text (discussing cases holding self-proving wills invalid for lack of due execution in cases in which the testator or witnesses failed to sign the will but signed the affidavit instead) and notes 644-58 and

tional analysis in reasoning that the failure to attest the will is not fatal to validity if the signatures appear on a self-proving affidavit executed at the same time as the will.[735] In reaching this result, the courts essentially reject the Texas rationale that the purpose of attestation and the purpose of affirming attestation in an affidavit differ fundamentally, requiring the court to invalidate a will that has not been properly signed and attested even if the signatures appear on an affidavit that was executed at the same time.[736] The courts that uphold such wills do so based on a determination that execution of the self-proving affidavit substantially serves the purpose of attestation.[737]

In *In re Charry*, for example, a Florida appellate court specifically declined to follow the Texas courts' strict interpretation of attestation on the ground that to do so would exalt form over substance.[738] Similarly, the Oklahoma court held in *Estate of Cutsinger* that in signing the affidavit the witnesses had substantially complied with the attestation requirement.[739] Implicit in these results is a recognition that the defect in execution was harmless in light of the clear intention of

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accompanying text (discussing cases holding self-proving wills valid despite failure of testator or witnesses to execute the will when the signatures appeared on a self-proving affidavit executed at the time the will was made).

735. *E.g.*, Estate of Cutsinger, 445 P.2d 778 (Okla. 1978). In *Cutsinger*, the testator signed the will and affidavit, but the witnesses only signed the affidavit. The court held that the Oklahoma statute "does not require the attestation clause to be in any particular form. . . . [W]e hold that the attestation of the will involved here was in substantial compliance [with the wills act]." *Id.* at 781.

736. For discussion of the Texas rule, see *supra* notes 310-17 and accompanying text.

737. *See* Estate of Charry, 359 So. 2d 544 (Fla. 4th D.C.A. 1978) (holding that witnesses' signatures sufficiently served purpose of attestation in case in which testator signed will and affidavit but witnesses signed only affidavit); Estate of Petty, 608 P.2d 987, 227 Kan. 697 (1980) (holding that since Kansas requires no particular form of attestation, signatures appearing on affidavit substantially comply with Kansas requirements in case in which testator signed will and affidavit; witnesses signed only the affidavit); Dillow v. Campbell, 453 P.2d 710 (Okla. 1969) (holding that no particular form of attestation is required and signatures on affidavit meet requirements in case in which testator signed codicil and affidavit; witnesses signed only affidavit).

738. 359 So. 2d 544 (4th D.C.A. 1978).

739. *Cutsinger*, 445 P.2d at 782. *Contra* Hopkins v. Hopkins, 708 S.W.2d 31 (Tex. Ct. App. 1986) (rejecting the argument of proponents that the signature of the witnesses on the affidavit substantially complied with the attestation requirement). "The proponent suggests that substantial compliance with the Probate Code is sufficient when the testator's intent is clear and the interested parties are in agreement. We conclude that we cannot apply a different standard in such cases. Such a departure from Code requirements would lead to confusion and uncertainty, which the Code seeks to avoid." *Id.* at 32.

the testator to execute a will; the failure of the witnesses to sign the will itself raised no issues of intent and authenticity that would have been resolved by strict compliance with the attestation requirement.[740]

Indicia of functional analysis appear in many instances in which the courts have applied a principle of "substantial compliance" by reinterpreting the wills act requirements in a less than literal fashion. Courts have permitted wills to be admitted to probate despite unconventional signatures or signatures affixed in unexpected places in cases in which the courts determined that the purpose of the requirement was sufficiently served.[741] Courts holding that presence requirements have been met under unconventional circumstances must (implicitly or explicitly) consider the purpose of the requirements in determining that the conduct of the testator and witnesses satisfied the presence requirements.[742] Many of the old cases dealing with sufficiency of pub-

740. Schneider points out that these decisions in fact violate the literal requirements of statutes that require the affidavit and the will to be separately executed, although he approves of the result. Schneider, *supra* note 310, at 549-51.

741. In holding that the name was placed on the will as a signature, the courts consider whether it was affixed to the document for the purpose of authenticating it or adopting it as a will. *See, e.g.*, Estate of MacLeod, 206 Cal. App. 3d 1235, 254 Cal. Rptr. 156 (1988) (holding that testator's name at the beginning of holographic will was placed there with intention to authenticate the will); *In re* Bloch's Estate, 39 Cal. 2d 570, 248 P.2d 21 (1952) (Traynor, J., dissenting) (holding that testator's name appearing within the body of the will as part of the identification of certain bonds constituted a valid signature); *In re* Button's Estate, 209 Cal. 325, 287 P. 964 (1930) (holding that "Love from 'Muddy'" written in margin of last page was signature and was intended to serve as token of execution); *In re* Dodson's Estate, 119 Mich. App. 427, 326 N.W.2d 532 (1982) (holding that testator's signature on attested will, directly above place at the beginning of the will where his name was typed, was written there in a manner indicating testamentary intent); *In re* Kimmel's Estate, 278 Pa. 435, 123 A. 405 (1924) (holding that letter signed "Father" containing dispositive language addressed and mailed to testator's sons was validly signed). *See generally* Note, *Validity of Signature for Holographic Wills*, 28 ARK. L. REV. 521 (1975) (discussing Nelson v. Texarkana Historical Soc'y & Museum, 257 Ark. 394, 516 S.W.2d 882 (1974), and reviewing development of signature requirement in Arkansas as applied to holographic wills). *See also* Robinson v. Ward, 239 Va. 36, 387 S.E.2d 735 (1990) (holding that there was a sufficient subscription of the will by a witness who, when the testator was dictating the will to her, wrote her name in the body of the will as a beneficiary).

742. *See, e.g., In re* Rudd's Estate, 140 Mont. 170, 369 P.2d 526 (1962), in which the facts showed that the testator could not see one of the witnesses or the will at the time the witness attested it and that the testator had not signed or acknowledged the will in the presence of the witnesses. *Id.* at 175, 369 P.2d at 529. Despite its conviction that the strict rule of construction promotes justice by lessening the opportunity for fraud and that all of the formalities "stand as of equal importance, and all must be observed," *id.* at 176-77, 369 P.2d at 529-30, the court applied a form of functional analysis to hold that the will substantially complied with the requirements. "[S]ubstantial compliance means . . . that a court should determine whether the statute has been followed sufficiently . . . to carry out the intent for which it was adopted." *Id.* at 180,

lication have permitted less than literal compliance with the requirement.[743]

2. Statutory Harmless Error Rules

a. South Australia's Broad Dispensing Power

(1) Intended scope of section 12(2)

Legislatures in some common law jurisdictions in Canada and Australia have recommended or enacted harmless error rules for defective wills.[744] While Langbein's 1975 article was still in press,[745] the state

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369 P.2d at 530-31. The court concluded that there was not even a remote possibility "that John Rudd was doing or thought he was doing anything other than executing a will" and the legislative purpose of eliminating fraud was sufficiently served. *Id.*

743. *E.g.*, *In re* Rudd's Estate, 140 Mont. 170, 369 P.2d 526 (1962) (holding that the will was in substantial compliance with the publication requirement though the testator did not declare to the witnesses that the document was his will or request them to sign as witnesses). For a lengthy annotation dealing with the various ways that courts have interpreted the publication requirements, see Annotation, *Sufficiency of Publication of Will*, 60 A.L.R. 124 (1968). For courts applying substantial compliance to the publication requirement, see *id.* at 136-38.

744. For articles analyzing various forms of harmless error legislation, see, e.g., de Groot, *Will Execution Formalities — What Constitutes Substantial Compliance?*, 20 QUEENSLAND LAW SOC'Y J. 93 (Apr. 1990); Lang, *Formality v. Intention — Wills in An Australian Supermarket*, 15 MELBOURNE U.L. REV. 82 (1985); Langbein, *Crumbling Wills Act*, *supra* note 498; Langbein, *Harmless Error Rules*, *supra* note 5; Maxton, *supra* note 638; Miller, *supra* note 638.

A number or jurisdictions that have enacted or considered harmless error legislation have produced recommendations. For reports recommending adoption of harmless error rules, see, e.g., New South Wales Law Reform Commission, Report on Wills — Execution and Revocation (1986) [hereinafter New South Wales Report]; Law Reform Commission of Western Australia, Project No. 76, pt. 1, Report on Wills: Substantial Compliance (1985) [hereinafter Western Australia Report]; Law Reform Commission of Western Australia, Project No. 76, pt. 1, Discussion Paper on Wills: Substantial Compliance (1984) [hereinafter Western Australia Discussion Paper]; Law Reform Commission of Tasmania, Report No. 35 on Reform in the Law of Wills (1983) [hereinafter Tasmania Report]; Law Reform Commission of British Columbia, Report No. 52 on The Making and Revocation of Wills (1981) [hereinafter British Columbia Report]; Manitoba Law Reform Commission, Report on "The Wills Act" and the Doctrine of Substantial Compliance (1980) [hereinafter Manitoba Report]; Northern Territory Law Reform Committee, Relating to the Attestation of Wills by Interested Witnesses and Due Execution of Wills (1979) [hereinafter Northern Territory Report]; Queensland Law Reform Commission, A Report of the Law Reform Commission on the Law Relating to Succession (1978) [hereinafter Queensland Report]; Twenty-Eighth Report of the South Australia Law Reform Committee to the Attorney-General, *Reform of the Law of Intestacy and Wills* (1974) [hereinafter South Australia Report].

But see Law Reform Committee, The Making and Revocation of Wills, 1980, 22d Report, Comnd. No. 7904 at 4 (England) [hereinafter English Report], recommending that a dispensing power not be adopted.

> While the idea of a dispensing power has attractions, most of us were impressed by the argument against it, namely that by making it less certain whether or not

of South Australia was in the process of considering legislation destined to create, in Langbein's words, "a tranquil revolution in probate law."[746] The South Australian harmless error rule originated as part of legislation designed to reduce intestacy.[747] The original premise was that intestacy would be reduced if courts had the power to validate wills despite certain technical defects in execution.[748]

The provision became effective in 1975.[749] The legislative history indicates that the Commission that proposed the recommendation contemplated a limited reform. Professor Palk, an Australian scholar who extensively analyzed the background and probable scope of the section 12(2) dispensing power shortly after its enactment, identified two principal concerns addressed by the Commission: (1) invalidation of wills containing minor technical defects in execution;[750] and (2) the problem of the dying or isolated testator who is unable to procure witnesses.[751] Palk pointed out that the Commission proposed distinct standards to be applied to these two categories of execution errors. First, with respect to technical defects in compliance with the presence and signature requirements, they recommended that courts confronted with such documents be given a power "to declare that the will in question is a good and valid testamentary document *if . . . satisfied that the document does in fact represent the last will and testament of the testator.*"[752] Second, with respect to testators who are in extremis or

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> an informally executed will is capable of being admitted to probate, it could lead to litigation, expense, and delay, often in cases where it could least be afforded, for it is the home-made wills which most often go wrong.

Id.

745. Langbein, *Crumbling Wills Act*, *supra* note 497, at 1194.

746. Langbein, *Harmless Error Rules*, *supra* note 5, at 1.

747. South Australian Report, *supra* note 744; Lang, *supra* note 744, at 105; Langbein, *Harmless Error Rules*, *supra* note 5, at 9; Palk, *supra* note 396, at 384-85.

748. South Australian Report, *supra* note 744, at 10-11; Langbein, *Harmless Error Rules*, *supra* note 5, at 9; Palk, *supra* note 396, at 384-85.

749. Wills Act Amendment Act (No. 2) of 1975, § 9 amending Wills Act of 1936, § 12(2), 8 S. AUSTL. STAT. 665.

750. *See* Palk, *supra* note 396, at 384-92.

751. *See id.* at 392-93.

752. *Id.* at 385 (citing South Australia Report, *supra* note 744, at 10) (emphasis added). Palk suggested that this reform was probably not an urgently needed means of limiting intestacies, because invalidation of wills on purely technical grounds was not a major problem prior to the enactment of the dispensing power; South Australian courts were inclined to be liberal in validating wills containing such defects. With respect to misplaced signatures, the courts would usually expand "the concept of signatures being placed at the end of the will in the notion of space, to the concept that the signature of the testator is placed at the end, either in time or in the intention of the testator." *Id.* at 387. Thus, in most (though not all) cases, a misplaced

isolated so that witnesses to the will are difficult or impossible to procure, the Commission concluded that a court should have power to declare the unattested will valid if *"satisfied that for some good and sufficient reason it was impracticable or impossible to obtain witnesses to the will."*[753]

Palk observes that if the South Australian Legislature had picked up the distinction between the standard to be applied to technical defects in execution and the standard to be applied to unattested wills, the section 12(2) dispensing power provision would indeed have introduced a very narrow reform.[754] Proponents of unattested wills would

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signature would not invalidate the will. *Id.* at 389. With respect to defective compliance with the presence requirement, "[a]s long as there has been no fundamental error in attestation, and there has been a *substantial attempt* to comply with the formalities," the courts would usually (though not invariably) validate the will. *Id.* at 392 (emphasis added).

Another Australian commentator also questioned the need for the § 12(2) dispensing power. "[I]t seems to me that . . . Australian courts have been extraordinarily generous to testators who have executed their wills in the most quaint and eccentric ways." Ormiston, *Formalities and Wills: A Plea for Caution*, 54 AUST. L.J. 451, 452 (1980). Ormiston was highly critical of § 12(2), particularly because of his concern with evidentiary problems involved in proving the intent of the decedent. *Id.* at 456. Ormiston states

> [t]here should not be any general dispensing power or rule of "substantial compliance," whether devised by the courts or enacted by legislation; but I see no objection to a power of dispensation being enacted and given to the courts limited to failure to comply with the rules as to the manner of attestation. . . .

Id. at 457.

753. Palk, *supra* note 396, at 393 (citing South Australia Report, *supra* note 744, at 11) (emphasis added). The South Australian Committee expressed concern that

> [a] person dying of thirst in the desert or a person in the icefields of Australian Antarctica may well scratch out what is without doubt his last will and testament but there is no hope at all of his having or obtaining witnesses to that will and yet there is no doubt that what is recorded is in fact his last will. The position becomes of greater importance today as people cease to live in families and elderly people in particular are left to fend for themselves in the cities. They too may have no way of summoning somebody to attest their will.

Palk, *supra* note 396, at 393 (citing South Australia Report, *supra* note 744, at 11).

Palk questioned the realism of "a somewhat romantic view of the modern Australian as a noble savage in constant battle with the forces of nature. . . . One might of course expect intelligent persons to make wills before they disappear into arid deserts and frozen wastes." Palk, *supra* note 396, at 393. He further remarked that "it is difficult to conceive of older folk, sane enough to have testamentary capacity and being seized of an acute desire to make a will, who in these days of the welfare state are not in touch with somebody." *Id.* He pointed out that the problem of the will left unattested by an isolated or dying testator could be simply resolved by "a limited extension to the notion of privileged wills." *Id.*

754. Palk, *supra* note 396, at 395. In one case that arose under the provision, the Chairman of the Law Reform Commission, Justice Howard Zelling, remarked: "I had no idea that what is now s[ection] 12(2), which came from one of the ideas I incorporated in the report, would produce the amount of case law that it has." Estate of Kelly, 34 S.A. St. R. 370, 380 (1983).

have had to convince the court that it was impracticable or impossible for the testator to obtain witnesses.[755] Moreover, although proponents of wills as to which there were minor defects in execution would only have to satisfy the court that the testator had intended the defective document to be a will, Palk argues that the proponent would be able to succeed only in instances in which there had been "a substantial performance" of the formalities.[756] The adoption of the broader standard for minor defects in execution was intended "to stop technical arguments in these cases reaching the court, and the only cases to reach the court are those where there has been a substantial performance of the formalities, so that a grant of probate could be possible."[757]

(2) Actual scope of section 12(2)

The legislature that enacted section 12(2) did not incorporate the Law Reform Commission's distinction between standards to be applied to technical defects in execution and standards to be applied to unattested wills. Section 12(2) makes the validity of all wills, regardless of the nature of the defect, turn on the ability of the proponent to prove testamentary intent. Section 12(2) provides:

> A document purporting to embody the testamentary intentions of a deceased person shall, notwithstanding that it has not been executed with the formalities required by [the Wills Act], be deemed to be a will of the deceased person if the Supreme Court, upon application for admission of the document to probate as the last will of the deceased, is satisfied that there can be no reasonable doubt that the deceased intended the document to constitute his will.[758]

The power to apply section 12(2) to save defectively executed wills was given to the supreme court, a court of general jurisdiction, though for small estates the supreme court has delegated its discretion to the

755. Palk, *supra* note 396, at 394. "It can scarcely be imagined . . . that the [Commission] would look with equanimity on a person who in civilisation does not try to obtain . . . witnesses. . . ." *Id.*

756. *Id.* "In speaking of 'technical failure to comply with the Wills Act,' the [Commission] seems to imply something different from a total failure to comply with the Wills Act, and there is no suggestion in the Report that they were seeking to promote any new modes of will-making." *Id.*

757. *Id.*

758. Wills Act Amendment Act [No. 2] of 1975, § 9 amending Wills Act of 1936, § 12(2), 8 AUSTL. STAT. 665 [hereinafter South Australia Wills Act § 12(2)].

registrar of probate through a published rule.[759] Most of the section 12(2) cases have been decided by a single judge.[760]

The South Australian Supreme Court has given section 12(2) an extremely broad construction.[761] Initially, there was some question whether section 12(2) required the proponent to show that the decedent had attempted to comply with the wills act in order for the dispensing power to be applied.[762] Such an "attempted compliance" limitation would have significantly narrowed the potential scope of the provision.[763] Early on, however, the court in *Estate of Graham*[764] held that section 12(2) does not require attempted compliance by the testator.[765]

Since then, the South Australian Supreme Court has applied the dispensing power to save even fundamentally defective wills if the proponent can demonstrate to the court's satisfaction that the testator executed the flawed document with testamentary intent. Although the standard of proof adopted by the legislature incorporates the criminal "reasonable doubt" standard and despite language in some of the earlier cases suggesting that certain omissions might be outside the reach

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759. Langbein, *Harmless Error Rules*, *supra* note 5, at 13. *See* Estate of Vauk, 41 S.A. St. R. 242 (1986) (addressing application of dispensing power by registrar of probate in case in which the will was unexecuted). According to Langbein, the supreme court judges usually sit singly, Langbein, *Harmless Error Rules*, *supra* note 5, at 13, though very important cases might be referred to a panel of three judges referred to as "the Full Court." *Id.* at 13 n.48; *see* Estate of Williams, 36 S.A. St. R. 423 (1984).

760. Langbein, *Harmless Error Rules*, *supra* note 5, at 13.

761. Western Australia Discussion Paper, *supra* note 744, at 33 (South Australian provision is very wide in scope); British Columbia Report, *supra* note 744, at 50 (South Australian provision broad enough to apply even when no attempted compliance with wills act); Maxton, *supra* note 638, at 408 (South Australian provision is "the boldest step yet taken in any effort to make a testator's intentions effective"); Miller, *supra* note 638, at 25 (South Australian approach is "the widest in scope of all the remedial provisions in this area"). The scope of § 12(2) is discussed in detail in the second part of this article.

762. *See* Palk, *supra* note 396, at 393.

763. *See* New South Wales Report, *supra* note 744, § 6.16, at 70 (a rule requiring "attempted compliance" is "excessively narrow" because it would automatically exclude ignorant testators unless they happen by chance to have complied with the formalities); Miller, *supra* note 638, at 583 (characterizing "attempted compliance" as a "narrow approach"). For discussion of a proposal for a dispensing power incorporating an attempted compliance standard, see Tasmania Report, *supra* note 744; for discussion of this proposal, see *infra* notes 884-904 and accompanying text.

764. 20 S.A. St. R. 198 (1978).

765. *See id.* at 205.

of section 12(2),[766] courts in South Australia have applied the statute to save attested but unsigned documents,[767] signed but unattested documents,[768] and completely unexecuted documents.[769] A compulsively quoted judicial gloss on section 12(2) is that "in most cases, the greater the departure from the requirements of formal validity . . . that is to say, to the extent that those requirements have not been . . . observed, the harder will it be for the Court to reach the required state of satisfaction [that the document was executed with testamentary intent]."[770] Nevertheless, in practice the courts do not seem to find such satisfaction difficult to achieve, even when the deviation from the wills act requirements is substantial.

It is unlikely that the South Australian dispensing power could be extended further to permit proof of an oral will. Professor J.G. Miller has observed that one requirement that is still indispensable in South Australia is that the dispensing power be applied to a "document."[771]

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766. *E.g.*, Estate of Blakely, 32 S.A. St. R. 473, 474 (1983) (noting that dicta in other cases suggest that § 12(2) generally would not apply to unsigned wills); Baumanis v. Praulin, 25 S.A. St. R. 423, 425 (1980) (unexecuted will of testator who died before he was able to sign could not be validated); Estate of Graham, 20 S.A. St. R. 198, 205-06 (1978) (suggesting that dispensing power would not normally apply to unattested will unless decedent unable to get witness because in extremis).

767. *E.g.*, Estate of Williams, 36 S.A. St. R. 423 (1984) (testator and husband asked neighbors to witness their wills; at probate, testator's will found to be unsigned; court applied § 12(2) based on evidence of testamentary intent).

768. *E.g.*, Estate of Hodge, 40 S.A. St. R. 398 (1986) (testator balked when told by his daughter that a will had to be witnessed and refused to comply; will executed with testamentary intent and admitted to probate under § 12(2)).

769. *E.g.*, Estate of Richardson, 40 S.A. St. R. 594 (1986) (section 12(2) applied in uncontested case to unexecuted document found in abandoned car of testator who had committed suicide).

770. *Graham*, 20 S.A. St. R. at 205. Langbein has interpreted this judicial gloss as requiring functional analysis of the formalities and a "purposive" approach in applying the dispensing power. Langbein, *Harmless Error Rules*, *supra* note 5, at 17. The comments to the new UPC dispensing power provision incorporate this language. UNIF. PROB. CODE § 2-503 comment (1990). For discussion of the interaction of a functional approach to the formalities and a broad dispensing power, see Miller, pt. 2, *supra* note 696.

771. *See* South Australia Wills Act § 12(2), *reprinted supra* text accompanying note 758; New South Wales Report, *supra* note 744, § 6.28, at 73 (stating that "document" is "threshold requirement" under South Australian dispensing power and avoids "uncertainty and difficulties of oral wills"); Langbein, *Harmless Error Rules*, *supra* note 5, at 52 (stating that writing is the one indispensable requirement remaining in South Australia because § 12(2) requires a "document"; oral wills not enforceable); Miller, *supra* note 638, at 572 (stating that writing remains as "the one essential positive formal requirement that cannot be dispensed with in South Australia").

Miller thought that the dispensing power would not be extended to an unexecuted will because the judicial gloss limiting application of the dispensing power would make it "very

Arguably, however, the provision could be extended to give effect to a videotaped document if the court were satisfied beyond a reasonable doubt that it was executed with testamentary intent. The legislative history of section 12(2) potentially favors a broad interpretation of "document," since one of the concerns of the Law Reform Commission was the plight of the "person dying of thirst in the desert or . . . in the icefields of Australian Antarctica" who "scratch[es] out" a last will and testament.[772]

Commentators (including law reform commissions in other jurisdictions) have been critical of the reasonable doubt standard imposed by section 12(2) as inapposite to probate proceedings.[773] Langbein argued that a more suitable standard of proof would be a "clear and convincing evidence" standard, and new UPC section 2-503 reflects his influence.[774] The Manitoba Law Reform Commission likewise rejected the reasonable doubt standard as an unnecessary limitation on the scope of the dispensing power and as generally inconsistent with other areas of probate law;[775] the Manitoba Commission recommended the preponderance of the evidence standard normally applied in probate matters.[776] The New South Wales Law Reform Commission preferred a "clear and convincing" standard.[777]

In practice, the high standard of proof required under section 12(2) has not prevented even unexecuted wills from being validated under

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unlikely the court would be satisfied that [a document unsigned by that person or by any witness] was intended to be his will." *Id. But see* Western Australia Discussion Paper, *supra* note 744, at 33 (South Australian dispensing power may be wide enough "to validate a document in which none of the formalities [have] been complied with"). In fact, the South Australian courts might admit unexecuted documents to probate under § 12(2). *See* Estate of Richardson, 40 S.A. St. R. 594 (1986); Estate of Vauk, 41 S.A. St. R. 242 (1986).

772. South Australian Report, *supra* note 744, at 11. The primary concern of the Commission was, of course, with the inability of such persons to get their wills attested. *See id. But see* New South Wales Report, *supra* note 744, § 6.28, at 73 (emphasis added) ("To those who say that [the document requirement] condemns the person dying of thirst in a desert or of cold in the icefields of Antarctica to die intestate or without the opportunity of revoking an earlier will, we answer that such is a reasonable price to pay to avoid the problems inherent in disputes about *oral wills*.").

773. *E.g.*, Manitoba Report, *supra* note 744, at 27-28, 29; New South Wales Report, *supra* note 744, § 6.34, at 74; Lang, *supra* note 744, at 112; Langbein, *Harmless Error Rules*, *supra* note 5, at 34-37; Maxton, *supra* note 638, at 408-09. *But see* Miller, *supra* note 638, at 587 (standard does not appear to have caused difficulties in South Australia).

774. Langbein, *Harmless Error Rules*, *supra* note 5, at 53. The UPC harmless error rule requires "clear and convincing evidence" of testamentary intent. *See* UNIF. PROB. CODE § 2-503 (1990), *reprinted in* text accompanying *supra* note 11.

775. Manitoba Report, *supra* note 744, at 27-28.

776. *Id.* at 28.

777. New South Wales Report, *supra* note 744, § 6.34, at 74.

the dispensing power.[778] Langbein has identified "a quirk" in South Australian probate law that may explain the liberal construction of section 12(2) as well as the large number of cases applying the provision:[779] South Australian probate law does not permit waiver of a purported will by the interested parties.[780] Personal representatives must present wills for probate, and since section 12(2) now permits formally defective documents to be validated if executed with testamentary intent, these documents now must also be submitted even if the interested parties would be willing to suppress them.[781] As a result, most of the section 12(2) cases have been uncontested.[782] In *Estate of Kolodnicky*,[783] the court complained of having to decide "this 'first time up' question of interpretation" after hearing "one counsel, putting one argument" and of having then to "rely on the muscular strength that I could gain from arguing with myself."[784]

Langbein comments that the application of section 12(2) to uncontested wills has "impaired" the quality of the case law.[785] He suggests that the South Australian courts would have been less likely to have

778. Estate of Richardson, 40 S.A. St. R. 594 (1986); Estate of Vauk, 41 S.A. St. R. 242 (1986).

779. Langbein, *Harmless Error Rules*, *supra* note 5, at 53.

780. *See id.* at 38-40. Langbein points out that most of the cases under § 12(2) have been uncontested, due to South Australia's lack of a rule permitting "consensual suppression of a purported will." *Id.* at 38. Even if the parties would prefer to settle, the personal representative has to produce a "plausible" will at probate. *Id.* at 39. Since § 12(2) permits defective wills to be enforced, the personal representative has to "bring forward" documents that in the past could not have been enforced. *Id.* Langbein suggests that many of the cases that have been litigated under § 12(2) would not arise under a similar provision in a United States court because the law usually permits beneficiaries to waive their rights in a will so that the estate may pass through intestacy or under a prior will. *Id.* (citing Annotation, *Family Settlement of Testator's Estate*, 29 A.L.R.3d 8, 102-10 (1970); Annotation, *Family Settlement of Intestate Estates*, 29 A.L.R.3d 174, 190, 228-29 (1970)). In many cases the persons entitled to contest a defective will would be willing to "disregard" the defect. *Id.* Similarly, once it is settled that application of the dispensing power "routinely leads to validation" of wills containing a particular type of execution error, litigation would be unlikely because people usually do not bring "hopeless" lawsuits. *Id.*

781. *Id.*

782. *See* Western Australia Report, *supra* note 744, at 56-57; Langbein, *Harmless Error Rules*, *supra* note 5, at 38-39 for discussion and citations to cases. *See, e.g.*, Estate of Richardson, 40 S.A. St. R. 594, 596 (1986), in which the fact that the will was uncontested seems to have played a role in the court's decision to apply § 12(2) to the unexecuted will of a suicide.

783. 27 S.A. St. R. 374 (1981).

784. *Id.* at 376 (Legoe, J.). For discussion of this case, see Langbein, *Harmless Error Rules*, *supra* note 5, at 40.

785. Langbein, *Harmless Error Rules*, *supra* note 5, at 40.

determined that unsigned, unattested, or unexecuted documents were nevertheless executed with testamentary intent *beyond a reasonable doubt* in vigorously contested cases.[786] The expansive interpretation of section 12(2) may therefore be to some extent a function of South Australian procedure rather than inherent in the dispensing power itself. This "quirk" in South Australian probate procedure may also explain the "flood" of cases under section 12(2), as Langbein suggests.[787]

b. Examples of Proposed and Enacted Statutory Variants of Harmless Error Rules Pre-Dating Uniform Probate Code Section 2-503

(1) Broad dispensing powers

Other jurisdictions have enacted or considered provisions based on South Australia's broad dispensing power. Australia, Western Australia and the Northern Territory have enacted provisions closely modeled on South Australia's section 12(2).[788] Dispensing power provisions in New South Wales and Manitoba represent variations on the broad South Australian model.[789]

(a) Manitoba

In recommending a broad harmless error rule, the Manitoba Law Reform Commission reasoned that,

> It is futile to try to foresee every type of mistake and every type of formality that testators might employ in the making of a will. The variety of human beings and their transactions is too great. The provision instituted should be broad enough to encompass all such possibilities. . . . The only control necessary on such a remedial provision is already provided for in the wisdom of the courts.[790]

The Commission therefore concluded that South Australia's broad dispensing power represented the optimal approach.[791] Significantly, the

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786. *Id.*

787. *See id.*

788. *See* Northern Territory Wills Amendment Act of 1984, § 12(2) [hereinafter Northern Territory Wills Act § 12(2)]; Western Australia Wills Amendment Act of 1987, § 34, Amending Wills Act of 1970 [hereinafter Western Australia Wills Act § 34].

789. *See* The Wills Act, 1982-83 MAN. REV. STAT. 387, ch. 31, § 23, Cap. W150 (1983) [hereinafter Manitoba Wills Act § 23]; de Groot, *supra* note 744, at 93-94 (discussing New South Wales Wills Act § 18A).

790. Manitoba Report, *supra* note 744, at 25.

791. *Id.* at 27.

Manitoba Commission understood the South Australian provision to "empower[ ] a court to overcome *any technical defect or absence of formality* in giving effect to the testator's intention."[792] In contrast to the South Australia Law Reform Commission, the Manitoba Law Reform Commission expressly recommended an extremely broad scope for the dispensing power. "The introduction of limitations defeats the purpose of the provision without serving any necessary function."[793] The Report specifically rejects any requirement of attempted compliance with the wills act as a prerequisite to application of the dispensing power to validate a document prepared with testamentary intent.[794]

The Commission's recommendation varies from the South Australian model in several important respects. First, the Commission proposed eliminating the reasonable doubt standard of proof in favor of a preponderance standard.[795] Second, and as a consequence of reducing the standard of proof, the Commission recommended a further revision to the South Australia model. The South Australia rule permits application of the dispensing power if the court is *satisfied* of testamentary intention beyond a reasonable doubt.[796] The Manitoba Commission thought that "satisfaction" "connotes subjective analysis by the judiciary and . . . not . . . an objective examination of the sufficiency of the evidence. The exact level of proof required to "satisfy" a judge would be unclear and perhaps subject to variation."[797] The Commission concluded that requiring the judge to be "satisfied" would create uncertainty and perhaps create difficulty in appealing decisions under the dispensing power provision.[798] The Commission further recom-

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792. *Id.* at 25 (emphasis added).

793. *Id.* at 27.

794. *See id.* at 22 (discussing Queensland statutory "substantial compliance" standard).

795. *Id.* at 27. The Commission noted that the preponderance standard is normally applied in Manitoba probate courts and that introduction of a different standard would create inconsistency. *Id.* Further, the Commission considered that the preponderance standard "serves its function well," requiring proof showing that "a conclusion sought is the most probable view of the facts. This does not entail just a mechanical weighing of probabilities. Rather it necessarily involves a careful consideration of the possibilities in the context of the factors of the case." *Id.* at 27-28. Moreover, any suspicious circumstances surrounding the execution of the will would "cast[ ] an additional burden on the propounders of the will to remove the suspicion by affirmative evidence." *Id.* at 28.

796. *See supra* text accompanying note 758 (setting out text of South Australia Wills Act § 12(2)).

797. Manitoba Report, *supra* note 744, at 28. *See also* Estate of Graham, 20 S.A. St. R. 198, 205 (1978), in which the court stated that the ability of the proponent to "satisfy" the court of testamentary intent would be tied to the degree of deviation from the wills act requirements. For discussion, see *supra* notes 766-72 and accompanying text.

798. Manitoba Report, *supra* note 744, at 28. The Commission proposed rewording the provision to read that a will that does not comply with the statutory requirements may "be

mended that the dispensing power provision be "very clearly worded" to cover defective revocation and alteration, as well as defective execution.[799]

The provision as finally enacted incorporates the civil standard of proof and expressly extends to defective revocation or alteration, but retains the "satisfaction" language.[800] Interestingly, the statute is entitled "Substantial Compliance in Execution of Wills," even though the Law Reform Commission suggested that the term is ambiguous and likely to be interpreted in its most literal sense, as requiring "a substantial or large amount" of formal compliance.[801] It is worth noting, however, that the Manitoba Commissioners were very evidently impressed by Langbein's functional analysis of the wills act; they applied such an analysis to support the conclusion that the Manitoba formalities

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deemed to be a will of the deceased person if *it is proved* upon application for admission of the document to probate as the last will of the deceased, that the deceased intended the document to constitute his will." *Id.* at 28-29. The Commission thought that this wording "creates a much more objective standard." *Id.* at 29.

799. *Id.* at 29. In fact, the South Australian dispensing power rule has been applied to save defectively altered and revoked wills. *See, e.g.*, Estate of Bennett, 146 S.A. St. R. 350 (1986) (revocation); Estate of Lynch, 39 S.A. St. R. 131 (1985) (revival); Estate of Standley, 29 S.A. St. R. 490 (1982) (alteration). *But see* Estate of Vauk, 41 S.A. St. R. 242 (1986) (altered will not admitted to probate because evidence indicated it was intended to be a draft).

A fourth recommendation of the Commission was that "[a] further section should be enacted to allow the probate court to save a gift to a beneficiary who has signed for the testator or as a witness to a will, where the court is satisfied that no improper or undue influence was employed." Manitoba Report, *supra* note 744, at 30.

800. Manitoba Wills Act, *supra* note 789, § 23. The statute provides as follows:

> Where . . . the court is satisfied that a document or any writing on a document embodies
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> (a) the testamentary intentions of a deceased; or
>
> (b) the intention of a deceased to revoke, alter, or revise a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will; the court may, notwithstanding that the document or writing was not executed in compliance with all the formal requirements imposed by this Act, order that the document or writing, as the case may be, be fully effective as though it had been executed in compliance with all the formal requirements imposed by this Act as the will of the deceased or as the revocation, alteration or revival of the will of the deceased or of the testamentary intention embodied in that other document, as the case may be.

Id.

801. Manitoba Report, *supra* note 744, at 22. The Commission obviously understood the distinction between the quantitative standard applied in Queensland, see *infra* notes 850-87 and accompanying text for discussion, and the "functional" or "purposive" standard Langbein contemplated. *Id.* (stating that Langbein uses the word "in the sense of complying in substance as opposed to form").

"serve valid purposes in probate" and the decision that the proper approach was not to reduce or eliminate the formalities, but to modify the approach taken to them.[802]

Although the Report reiterates the intention of the Commission to recommend a broad approach with no limitations on the power of the courts to validate defective wills, the intended application of the rule is not certain. Some parts of the Report suggest that the Commissioners were assuming a functional interpretation of the formalities in the application of the dispensing power. Although they rejected a "substantial compliance" approach because of concern that courts would apply it quantitatively so that "the doctrine might be inapplicable to a document which had a major defect such as a forgotten signature,"[803] they subsequently suggest that the likelihood is small that invalidation of an unsigned document would defeat the decedent's intent.[804] The Report strongly suggests that the Commissioners viewed functional analysis as inherent in the application of any remedial provision.[805] If "functional analysis" of the formalities is an element of a harmless error rule, the result is a narrowing of its potential scope in instances in which "fundamental" formalities are omitted, since in such a case the proponent will have a far greater task to prove through introduction of extrinsic circumstances that the omission was "harmless error."[806] The Report does not appear to distinguish clearly between Langbein's "purposive" substantial compliance and a dispensing power

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802. *See id.* at 14-17.

803. Manitoba Report, *supra* note 744, at 22 (discussing Queensland statutory substantial compliance).

804. *See id.* at 23 (discussing British Columbia report recommending "threshold requirements" for application of dispensing power). As an example of an unsigned will that should be given effect, the Commissioners cite Langbein's interloper's bullet scenario, an extraordinarily unlikely situation. *Id.*

805. *See id.* at 18.

806. The Report states that "the essential concept" of a harmless error rule is that

> the finding of a formal or execution defect would not lead to automatic invalidation of the will. Rather the proponents of the document would be given the opportunity to establish that the defect is a harmless one. This would entail satisfying the court that, despite the defect, the document represents the intent of the testator *and satisfies the purposes of "The Wills Act."* For once the intent of the testator is established, *and the purposes "are proved to have been served, literal compliance with the formalities is no longer necessary."* In effect a functional analysis would be allowed. . . . It is submitted that introduction of such a remedial provision would alleviate the difficulties that currently exist.

Id. at 18 (citations omitted) (emphasis added).

807. *Id.* at 22. The Commissioners did remark on the distinction between Langbein's purposive "substantial compliance" and a quantitative standard. *See id.*

such as South Australia's.[807] The provision as finally enacted does not specifically require the court to determine that the specific error in execution, revocation, or alteration was harmless to the purposes of the wills act, but the "substantial compliance" concept incorporated in the title of the provision potentially suggests such a "purposive" or "functional" approach.

In *In re Pouliot*,[808] the court stated that despite its title, the Manitoba provision does not contemplate application of a "substantial compliance" standard.[809] The court stated that "[t]he exercise of the power in s[ection] 23 is not contingent upon substantial compliance with the formalities of the Wills Act. The threshold requirement is the expression of a testamentary intention in some form of document."[810] This reading of the statute comports with the South Australian approach rather than either a quantitative or functional substantial compliance standard.

The *Pouliot* court interpreted the Manitoba provision as giving the court very broad discretion[811] and certainly such an interpretation is consistent with the expressed intention of the Law Reform Commission that recommended it. Its full potential scope in application is, however, still uncertain. *Pouliot* does suggest that, as in South Australia, the statutory requirement of a "document" is in effect a threshold requirement for the dispensing power.[812]

(b) Western Australia and the Northern Territory

Western Australia and the Northern Territory have enacted dispensing power provisions virtually identical to South Australia's section 12(2).

The Western Australia Law Reform Commission decided to recommend the broad South Australian rule for two reasons: (1) the South

808. 30 Man. R. 178 (1984) (applying the dispensing power to save a defectively altered will).

809. *Id.* at 179.

810. *Id.*

811. *Id.* Maxton describes the Manitoba approach as "radical" in scope in comparison to other enactments and recommendation. Maxton, *supra* note 638, at 412. In *In re* Briggs, 1 W.W.R. 719 (Man. 1985), the only other reported case at this time, § 23 was applied to a holographic will that would otherwise have been invalidated because it was signed at the beginning rather than at the end. *Id.* at 724. Since this case involves a minor technical error that would be remedied under virtually all harmless error rules, it does not resolve the issue of the potential scope of the Manitoba dispensing power.

812. For discussion of South Australian requirement of a "document," see *supra* notes 771-72 and accompanying text. Maxton suggests that the Manitoba legislature should have taken the further step of permitting oral wills in in extremis situations. Maxton, *supra* note 638, at 411.

Australian provision "gives the court power to save wills in cases in which . . . justice requires that effect should be given to the testator's intentions, and in which, under the present law, the court is prevented from so doing";[813] and (2) the provision had been in effect long enough for "[l]awyers and other persons dealing with wills [to] be able with confidence to rely on the South Australian precedents."[814] The Commission clearly recognized the extremely broad scope of the South Australian provision, "which permits probate to be granted of a will which does not meet *any of the required formalities, even where the testator made no attempt to meet those formalities.* . . ."[815] In an earlier discussion paper, the Commission distinguishes between Langbein's substantial compliance doctrine and the South Australian dispensing power provision, stating that the dispensing power "is in fact much wider."[816]

The Commissioners recommended retention of the reasonable doubt standard of proof.[817] While the Commission "recognize[d] the merit of the Manitoba Commission's argument" against applying the reasonable doubt standard in probate matters,[818] they were persuaded that the higher standard would prevent "a flood of fraudulent or unmeritorious applications."[819] In addition, they thought that the reasonable doubt standard would be likely to discourage any reduction in the standard of care for execution of wills and that it would "operate as a psychological barrier to courts being unduly easily persuaded."[820] The Commission further considered that adoption of a different standard of proof would create uncertainty as to the relevance of the South Australian decisions under the Western Australia rule.[821]

The Commission did recommend that the Western Australia provision follow the Manitoba provision in specifically extending the dispens-

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813. Western Australia Report, *supra* note 744, at 45.

814. *Id.*

815. *Id.* at 50 (emphasis added).

816. Western Australia Discussion Paper, *supra* note 744, at 15-16. The Commission contested Langbein's characterization of the dispensing power as a "substantial compliance" provision. *Id.* at 15 n.2 (citing Langbein, *Crumbling Wills Act*, *supra* note 497, at 1194). "With the exception that the will must be in documentary form, it appears to enable the court to validate a testamentary statement where the deceased observed none of the formalities." *Id.* at 16. The Commissioners appear to have understood the distinction between a narrow quantitative standard and the "purposive" or functional approach recommended by Langbein. *See id.* at 22.

817. Western Australia Report, *supra* note 744, at 51.

818. *Id.* at 51.

819. *Id.* (quoting White, J. in Estate of Blakely, 32 S.A. St. R. 473, 479 (1983)).

820. *Id.* at 52.

821. *Id.*

ing power to defective alteration, revocation, and revival.[822] The legislature rejected this recommendation;[823] however, since the Western Australia provision has been held to be *in pari materia* with the South Australian provision,[824] it can be anticipated that the Western Australia courts will follow South Australia in extending the dispensing power to these situations.[825]

It is unclear how strictly the Western Australia courts will interpret the requirement of a "document" (which apparently remains a prerequisite for application of the dispensing power in South Australia).[826] A broad dispensing power could presumably extend to videowills and electronic wills so long as the evidence sufficiently establishes testamentary intent "beyond a reasonable doubt."

(c) New South Wales

Like Manitoba, the Australian state of New South Wales has enacted a broad dispensing power provision based on South Australia's, but which attempts to improve upon the model in several respects. The New South Wales provision: (1) extends to alterations and revocations; (2) rejects the reasonable doubt standard in favor of a preponderance standard of proof; and (3) expressly authorizes the court to look beyond the document itself in determining testamentary intent.[827]

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822. *Id.* at 52-55. The Commission remarked that South Australian case law was extending the dispensing power to cover alterations, revocations, and revivals, but nevertheless recommended that the Western Australia provision specifically address these situations. *Id.*

823. *See* Western Australia Wills Act, *supra* note 597 § 34, which reads:

> A document purporting to embody the testamentary intentions of a deceased person is a will of that person, notwithstanding that it has not been executed in accordance with [the wills act], if the Supreme Court in a probate action is satisfied that there can be no reasonable doubt that the deceased intended the document to constitute his will.

Id.

824. Estate of Crossley, 1989 W.A.L.R. 227, 229. "In my opinion there is no distinction of substance between the South Australian provision and s[ection] 34 of the Act and I will therefore turn to decisions in the Supreme Court of that State in the course of these reasons." *Id.*

825. *See, e.g.*, Estate of Bennett, 146 S.A. St. R. 350 (1986) (revocation); Estate of Lynch, 39 S.A. St. R. 131 (1985) (revival); Estate of Standley, 29 S.A. St. R. 490 (1982) (alteration).

826. For discussion of the South Australian document requirement, see *supra* notes 771-72 and accompanying text.

827. de Groot, *supra* note 744, at 93-94 (discussing New South Wales Wills Act § 18A). *See* New South Wales Report, *supra* note 744, § 6.25, at 72. The Commission recommended that the Wills Act be amended to

> confer on the Supreme Court power to admit to probate or otherwise treat as valid any will, alteration to a will or document expressing an intention to revoke a will, notwithstanding that it has not been executed with the statutory formalities, provided that the court is satisfied that the deceased intended the will, alteration

The New South Wales Law Reform Commission recommended the "relaxation" of certain of the basic wills formalities[828] in conjunction with a "general dispensing power . . . designed to provide an *ad hoc* examination in other areas where there has been non-compliance with the requisite formalities so that, subject to appropriate safeguards, only those documents which the court is satisfied represent the testator's true 'will' can be admitted to probate."[829] The Commission further proposed that the dispensing power provision expressly provide for the admission of declarations of the testators to prove testamentary intent.[830]

The New South Wales Commission rejected Langbein's substantial compliance model in favor of the South Australian approach because (1) the South Australian alternative functions well and has generated a "growing body of practical and judical experience which can be drawn upon"; and (2) the substantial compliance model may be construed literally by a court to require attempted compliance or a high level of compliance, rather than "compliance with substance as distinct from form" as Langbein intended.[831] While the Commission appreciated the distinction between Langbein's substantial compliance model and a narrow quantitative standard,[832] they were concerned that courts applying a statutory "substantial compliance" doctrine might follow the Queensland courts in interpreting such a provision as a narrow

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> or revocatory document to take effect as such. Extrinsic evidence, including statements made by the testator should be admissible as to the manner of execution and the testator's intention.

Id.

828. *See, e.g.*, New South Wales Report, *supra* note 744, §§ 4.26-.31, at 50-51 (recommending that the requirement that the will be signed at the end be revised to require that it appear ("on the face of the will or otherwise") that the testator intended to give effect to the will by signing or by directing someone else to sign on testator's behalf); *id.* § 4.43, at 54 (recommending that the requirement that the witnesses sign in the presence of each other be eliminated); *id.* § 5.9, at 61 (recommending changes in requirements for effective revocation).

829. *Id.* § 6.27, at 72-73.

830. *Id.* § 6.35, at 74.

> The principles of evidence dealing with declarations made by testators in relation to their wills are rigid and beset by technicalities. The use of such declarations as a means of proof is severely limited by the application of the hearsay rule. . . .
>
> This Commission . . . recommends that extrinsic evidence including evidence of statements made at any time by the testator as to the manner of execution of a testamentary instrument should be admissible." *Id.* §§ 6.35, .37, at 74-75.

831. *Id.* § 6.16, at 70-71.

832. *See id.* § 6.15, at 69.

quantitative standard.[833] "The 'substantial compliance' doctrine, at least in the form enacted in Queensland, provides no guidance as to the types of non-compliance which are substantial."[834]

The Commissioners recommended retention of the South Australian requirement that a court be "satisfied" of the decedent's testamentary intent as a prerequisite to application of the dispensing power,[835] but recommended abandoning the reasonable doubt standard of proof, which they characterized as "anomalous and contrary to the principles applied in civil litigation, including probate litigation . . . ."[836] They also were concerned that for a court to apply a reasonable doubt standard to defects in execution and a civil standard to will contest issues would create confusion.[837] They regarded it as improbable that a court would exercise the dispensing power without carefully weighing the evidence and therefore concluded that a preponderance standard would provide "sufficient safeguards."[838] They considered that the South Australian courts had weighed the evidence and applied the dispensing power "cautiously and responsibly" in cases arising under the South Australian provision.[839]

The Commission expressly declined to revise the wills act formalities to permit either holographic or videotaped wills;[840] moreover, they specifically stated that a videotape or sound tape is not a "writing" for purposes of the wills act, though virtually any permanent form of *visual representation* would qualify as such. It seems clear that they

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833. *Id.* For discussion of statutory substantial compliance in Queensland, see *infra* notes 850-87 and accompanying text.

834. New South Wales Report, *supra* note 744, § 6.16, at 71.

835. *Id.* § 6.32, at 73. "It appears to work well, there is a body of judicial exegesis and there is merit in uniformity." *Id.*

836. *Id.* § 6.34, at 74. They conceded, however, that the South Australian experience did not disclose any difficulty with the application of the reasonable doubt standard. *Id.*

837. *Id.*

838. *Id.*

839. *Id.* § 6.27, at 73.

840. *Id.* § 4.23, at 49 (holographic wills should not be introduced); *id.* § 4.16, at 46 (videotaped wills should not be introduced). With respect to holographic wills, the Commission pointed out that holographic wills have not been permitted in Australia and that relaxation of the attestation requirement could mislead testators to think that any homemade will (included a printed form) was valid without witnesses. *Id.* § 4.23, at 49. They rejected videowills as having "one of the substantial disadvantages of oral wills in that there is likely to be less attention to accuracy of expression and detail." *Id.* § 4.16, at 46. They also considered that videowills would undermine the "channeling function" of formality (see *supra* notes 512-17 and accompanying text for discussion) because they would take longer for a probate court to review than a written will. *Id.* They did indicate that testators could make videotapes in addition to the will to preserve evidence of testator's physical and mental condition. *Id.*

intended the dispensing power they were recommending to be broad enough to extend to unwitnessed holographic wills, since they reject any threshold requirement (including signature)[841] other than the requirement of a "document."[842] It is not clear whether they intended the dispensing power to extend to "videowills" or other electronic wills. The issue is whether the Law Reform Commission intended the word "document" (recommended as a "threshold requirement" for application of the dispensing power)[843] to be a broader term than "writing." If so, it would be possible for a taped will to be admitted to probate as a "document" executed with testamentary intent, despite the testator's failure to comply with the writing requirement. Such an interpretation would be consistent with what is otherwise a very broad conception of the dispensing power.

The New South Wales Commission recommended that signature not be made a threshold requirement for application of the dispensing power.[844] They thought that the dispensing power could appropriately be applied not only in the narrow circumstances Langbein originally thought would be appropriate for application of the substantial compliance doctrine, but also in cases in which a testator "simply overlooked signing a document he or she proceeded to have witnessed,"[845] or in which "mirror wills were accidentally swapped and signed by the wrong testator."[846] It is not clear whether the Commission would have approved South Australia's extension of the dispensing power to wills that are completely unexecuted,[847] although the language of the recommendation (conferring power on the Supreme Court to apply the dispensing power to a document "notwithstanding that it has not been executed with the statutory formalities")[848] suggests that they were recommending a provision broad enough to apply to unexecuted

841. *Id.* § 6.29, at 73.

842. *Id.* § 6.28, at 73.

843. *Id.*

844. *Id.* § 6.29, at 73.

845. *Id. See* Estate of Williams, 36 S.A. St. R. 423 (1984) (testator invited neighbors to witness her will before going on a trip but neglected to sign it herself; court held that there was sufficient evidence of testamentary intent for will to be admitted to probate).

846. New South Wales Report, *supra* note 744, § 6.29, at 73. *See* Estate of Blakely, 32 S.A. St. R. 473 (1983) (testator mistakenly signed spouse's will and she signed his; dispensing power applied to save technically "unsigned" will).

847. *See* Estate of Richardson, 40 S.A. St. R. 594 (1986); Estate of Vauk, 41 S.A. St. R. 242 (1986) (both cases holding that the dispensing power may be applied to save an unexecuted will if the court is satisfied beyond a reasonable doubt of the decedent's testamentary intentions).

848. New South Wales Report, *supra* note 744, § 6.25, at 72.

documents. The New South Wales Law Reform Commission further recommended that the South Australian model be modified to specifically extend to alterations and revocations.[849]

(2) Statutory substantial compliance

The legislature of Queensland, Australia enacted a statutory harmless error rule recommended by its Law Reform Commission as a codification of Langbein's substantial compliance standard.[850] The Queensland provision permits the court to admit to probate "a testamentary instrument executed in substantial compliance with the formalities prescribed by [the wills act] if the Court is satisfied that the instrument expresses the testamentary intention of the testator."[851] The ambiguity of the term "substantial compliance" seems to have produced results directly contrary to what Langbein had in mind in proposing a functional or purposive concept of compliance with the wills acts.[852] The Queensland courts have interpreted the statute as a narrow quantitative substantial compliance standard so strictly limited in scope that even wills containing minor deviations from the presence requirements have been held beyond the reach of the dispensing power.[853]

Langbein, whose 1975 article provided the impetus for the Queensland enactment, has been extremely critical of its application by the courts, characterizing the measure as "a flop."[854] The legislative history

849. *Id.* The South Australian case law has accomplished this result under § 12(2). *See, e.g.*, Estate of Bennett, 146 S.A. St. R. 350 (1986) (revocation); Estate of Lynch, 39 S.A. St. R. 131 (1985) (revival); Estate of Standley, 29 S.A. St. R. 490 (1982) (alteration). *But see* Estate of Vauk, 41 S.A. St. R. 242 (1986) (will with alterations not admitted to probate because evidence indicated it was intended to be a draft).

850. Wills Amendment Act 1987 § 9, amending Wills Act 1970 [hereinafter Queensland Wills Act § 9].

851. *Id.*

852. Miller, *supra* note 638, at 583 (stating that the term "substantial compliance" can refer to compliance with substance rather than form of wills act or it can mean substantial in amount); New South Wales Report, *supra* note 744, § 6.16, at 70-71 (stating that "substantial compliance" is an ambiguous term and Queensland provision provides no guidance as to types of non-compliance that are substantial). Both Maxton and the Law Reform Commission of British Columbia seem to have understood Langbein's proposed doctrine as a narrow quantitative standard. Maxton, *supra* note 638, at 404 (stating that Queensland provision "adopts Langbein's narrow approach to the doctrine of substantial compliance, and, in fact, was specifically seen and approved of by Langbein"); British Columbia Report, *supra* note 744, at 41-42 (stating that Langbein proposed substantial compliance doctrine to remedy "technical defects" in execution; substantial compliance doctrine presumes attempted execution that fails due to technical defect and would usually save only wills "closely resembl[ing] a standard form will").

853. *See, e.g., In re* Johnston, [1985] 1 Q.R. 516; *In re* Grosert, [1985] 1 Q.R. 513.

854. Langbein, *Harmless Error Rules*, *supra* note 5, at 1.

of the provision, however, indicates that the Queensland courts' application of the statute's substantial compliance doctrine is consistent with both the recommendations of the Law Reform Commission and with the plain meaning of the provision as drafted by the legislature.

The Queensland Law Reform Commission, with whom the provision originated, misconceived Langbein's substantial compliance doctrine, and the standard they intended to recommend was not Langbein's flexible concept of substantial (in the sense of substantive)[855] functional compliance. After recommending that a "relaxed" standard of substantial compliance be enacted, the Commission stated that

> [i]t will be for the court to work out what it understands by substantial compliance, but it is envisaged that the courts will be cautious in their approach to the latitude given, and that *only in cases of accident and minor departures will it be possible to give effect to the obvious intention of the testator*, as in cases where the court has hitherto wished to admit an instrument to probate but has felt unable to do so because of the shackles of its policy of meticulous compliance.[856]

The provision as finally enacted perpetuates the Commission's misconception of substantial compliance.[857] In contrast to a functional substantial compliance standard, the Queensland statute appears on its face to require the court to make *two determinations* in order to validate a defective will: (1) that the execution of the document complied with substantially all of the formal requirements; and (2) that the document was executed with testamentary intent.[858]

The Queensland courts have narrowed the statute further by their failure to incorporate a flexible functional approach in the determination of harmless error in deciding under what circumstances the dispensing power may be applied to a defective will. A fundamental aspect of Langbein's approach is analysis and "ranking" of the for-

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855. *See* Miller, *supra* note 638, at 566-67, 583.

856. Queensland Report, *supra* note 744, at 7 (emphasis added).

857. The Commissioners noted in their report that Langbein had "seen and approves of" their recommendation. *Id.*

858. *See* de Groot, *supra* note 744, at 96 (stating that Queensland requires more than the court be satisfied the document was executed with testamentary intent; court must also be satisfied that the testator substantially complied with will-making formalities); Langbein, *Harmless Error Rules*, *supra* note 5, at 44 (stating that substantial compliance in Queensland is a separate requirement that must be established independently of testamentary intent and is a quantitative standard applicable only to minimal defects).

malities in terms of their importance to the wills act purposes;[859] whether defective execution can be cured through proof of testamentary intent depends on the nature of the defect and whether the error or omission prevents the document from fulfilling the purposes of the wills act.[860] Langbein and virtually all of the commentators who have applied functional analysis to the wills act have concluded that the least "fundamental" formalities are those (such as the presence and publication requirements associated with attestation) that serve primarily a "protective" function.[861] In his 1975 article, Langbein wrote that "[a] principal achievement of the substantial compliance doctrine should be to relieve against the invalidation of wills in whose execution some of the minor formalities surrounding the attestation ceremony have been omitted or deficiently performed."[862] He considers it "reprehensible" that a defect in strictly complying with these formalities automatically invalidates the will in instances in which the proponents could show that the document was executed with testamentary intent, that is, the error did not in fact result in fraud.[863]

The Queensland courts have not incorporated functional analysis into their interpretation of the Queensland statute. In *In re Johnston*,[864] for example, the court concluded that defective compliance with the presence and publication requirements put the will beyond the reach of the substantial compliance statute, even if the court had been convinced that the document was executed with testamentary intent.[865] The *Johnston* court asserted that the failure of the testator to comply with the publication and presence requirements revealed "substantial

859. *See* Langbein, *Harmless Error Rules*, *supra* note 5, at 52 (stating that South Australian case law has produced implicit "ranking" of formalities in terms of their importance to the wills act purposes); Langbein, *Substantial Compliance*, *supra* note 32, at 515-26 (analyzing the wills formalities and evaluating the relative importance of each to the four wills act purposes).

860. *See* Langbein, *Substantial Compliance*, *supra* note 32, at 515-26 (stating that substantial compliance would admit noncomplying document to probate if court determined it was meant as a will and its form satisfied the purposes of the wills act, but omission of fundamental formalities will usually make it difficult or impossible for proponents to carry burden of proof of showing that document was intended to be a will). For discussion of the substantial compliance doctrine, see *supra* notes 696-43 and accompanying text and Miller, pt. 2, *supra* note 696.

861. *See* Langbein, *Harmless Error Rules*, *supra* note 5, at 17 (stating that presence defects are almost always innocuous because they are peripheral to the main policies of the wills act); Langbein, *Substantial Compliance*, *supra* note 32, at 516-17, 521-22 (stating that the "protective function" is poorly served by formalities; though attestation may be "fundamental," the minor ceremonies associated with it are not).

862. Langbein, *Substantial Compliance*, *supra* note 32, at 521.

863. *Id.* at 516.

864. 1 Q.R. 516 (1985).

865. *Id.* at 519.

departures *from even the basic formal requirements.*"[866] The court said that "[t]he two criteria necessary to permit the court to [grant probate] are substantial compliance with the prescribed formalities, and satisfaction that the document expresses the testamentary intention of the testator."[867] The court distinguished the scope of the Queensland substantial compliance statute from the South Australian dispensing power, stating that "[t]he South Australian section, although more stringent in the requirement of proof of the testamentary intention, does not require substantial compliance with the formalities. Consequently, the South Australian courts have concentrated attention upon proof of testamentary intention on the part of the testator."[868] The court said that if the Queensland statute had been *in pari materia* with the South Australian statute, "I should willingly come to the same result as that reached [in the South Australian presence cases]. However, I am afraid that the Queensland legislation requires a slightly different approach."[869]

The Queensland court cited Langbein in support of its analysis in *Johnston*, specifically "Langbein's comment that 'the substantial compliance doctrine is a rule neither of maximum nor minimum formalities, and it is surely not a rule of no formalities.' Clearly a question of degree is involved."[870] But the court also said that "[t]here must of course be a limit on what can amount to substantial compliance,"[871] an essentially quantitative qualification of the concept. The court

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866. *Id.* (emphasis added). In *Johnston*, the process of getting the will witnessed seems to have involved a time lag of several days. When the second witness signed, the decedent's signature was already on the will. *Id.* at 516-17. The court said:

> It is difficult to hold that this will was executed in substantial compliance with the formalities prescribed. The testatrix did not sign in the presence of either the attesting witnesses, and the respective attesting witnesses were never together at the same time. Instead of the single occasion envisaged by [the Wills Act], there were three separate occasions when the execution and attestation procedures took place. . . . Neither attesting witness saw the form of the document. In each case a folded piece of paper was produced and the "witness" did not see any of the contents. In particular they did not see whether it had been filled out and they could not say whether it is now in the same condition as when they signed. In Mrs. Marshall's case the testatrix said that it was a will, but in Mrs. Porter's case she simply described it as a "document" and asked her to witness it. In neither case did the witness know . . . that it was a will.

Id. For discussion of the *Johnston* case, see Miller, *supra* note 462, at 567.

867. *Johnston*, 1 Q.R. at 517-18.

868. *Id.* at 519.

869. *Id.*

870. *Id.* at 518 (quoting Langbein, *Substantial Compliance*, *supra* note 32, at 513).

871. *Id.*

thought that the reenactment of the wills act formalities indicated that the legislature did not intend the substantial compliance statute to be construed in a way that would significantly undermine the reenacted wills act.[872]

The courts deciding *In re Grosert*[873] and *In re Henderson*,[874] reach similar results applying similar reasoning. In *Grosert*, the court, though convinced that "there can be no doubt that the instrument expresses the testamentary intention of the testator,"[875] concluded that defective compliance with the presence requirements violated "what I would regard as a most important provision [of the wills act] . . . ."[876] The court held that if there has not been substantial compliance with the formalities, testamentary intention is irrelevant.[877] In *In re Henderson*, the court was satisfied that a document executed under a misconception that the attestation of one witness was sufficient providing that the witness was a justice of the peace and the document was executed with testamentary intent. However, the court held that the error was beyond the reach of the substantial compliance statute on the grounds that the statute requires "cumulative substantial compliance."[878]

Langbein bitterly remarked in his 1987 article that after *Grosert*, "[i]t is now hard to imagine in what circumstances the Queensland courts might find an execution defect insubstantial, since they have . . . declared the most innocuous of the recurrent execution blunders, presence defects, as 'most important.'"[879] In the 1988 case *In re Mat-*

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872. *Id.*

873. 1 Q.R. 513 (1985).

874. No. 860 of 1985 (Queensl. Sup. Ct. Sept. 27, 1985) (Macrossan, J.), *aff'd full court* (May 13, 1986), *appeal denied* [1986], 17 Leg. Rep. S.L. 4.

875. 1 Q.R. at 515.

876. *Id.* at 514-15.

877. *Id.* at 515.

878. *Henderson*, No. 860 of 1985, *slip op.* at 5. For discussion of this case, see Langbein, *Harmless Error Rules*, *supra* note 5, at 44-45. Langbein points out that South Australia has applied the dispensing power to save a partially attested will executed under identical circumstances. *Id.* at 22, 44-45 (citing Estate of Phillips, No. 263 of 1983 (S.A. Sup. Ct. Feb. 13, 1984) (White, J.)).

879. Langbein, *Harmless Error Rules*, *supra* note 5, at 45. There have been unreported cases applying the Queensland statute to save defective wills. Langbein discusses *In re* McIlroy in his 1987 article. *Id.* at 42-43 (citing *In re* McIlroy, No. 375 of 1984 (Queensl. Sup. Ct. Nov. 2, 1984) (McPherson, J.)). In that case, the Queensland statute was applied to excuse a presence defect. The case was decided without an opinion, however, and as Langbein remarks, "was wholly overlooked in the . . . subsequent cases . . . that appear to have buried the reform." *Id.* at 42.

thews,[880] a Queensland court distinguished *Johnston* and *Grosert* in holding that a partially attested will had been executed in substantial compliance with the wills act and had been executed with testamentary intent.[881] The court gave special consideration to the fact that at the time of execution only one witness was reasonably available,[882] remarking that, "This is only to say again that each case will depend on its own facts and that . . . substantial compliance will remain a matter of degree."[883]

The reasoning in *Matthews* is consistent with Langbein's functional approach. The court, in effect, excused the testator's failure to have the will attested by two witnesses in light of circumstances clearly demonstrating testamentary intent and the court deemed the will to be in substantial compliance with the wills act. A more recent case, however, distinguishes *Matthews*, relying on the rule in the earlier cases in holding that a codicil was not executed in substantial compliance with the Queensland Wills Act.[884] The court said that a party relying on substantial compliance to excuse a defect in attestation bears the onus of establishing "with some degree of precision what happened and when [with respect to the attestation of the document]."[885]

Langbein concluded in his 1987 article that the Queensland experience would be likely to deter other jurisdictions from adopting harmless error legislation based on a substantial compliance standard.[886] He stated that,

> The capsule lesson that will be taken from Queensland is that statutory substantial compliance was tried and found

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In *In re* Gaffney, discussed in de Groot, *supra* note 744, at 95, the court excused the failure of the testator to sign the will at the end, noting "a court may admit to probate a testamentary instrument executed in substantial compliance with the prescribed formalities if the court is satisfied that the instrument expresses the testamentary intention of the testator. I am so satisfied." *Id.* (citation omitted).

880. 1 Q.R. 300 (1989).

881. *See id.* at 301-03.

882. *Id.* at 303. The court said that it would be "unduly harsh . . . to deny efficacy to a testator's expressed testamentary intention merely because he had only one witness available and not two. One can readily perceive of circumstances in which . . . only one witness is available at a time when it is of central importance to a testator to express his testamentary wishes." *Id.*

883. *Id.*

884. *In re* Eagles, 2 Q.R. 501 (1990). In *Eagles*, the two attesting witnesses to a codicil were not present at the same time. One signed with the testator, but there was uncertainty about the time lapse before the other signed the codicil. *Id.*

885. *Id.* at 506.

886. Langbein, *Harmless Error Rules*, *supra* note 5, at 45.

> wanting. . . . Although the substantial compliance doctrine will continue to be the only means of remedy available in jurisdictions where legislative reform has not yet taken place, future legislation will take the guise of the dispensing power.[887]

(3) Attempted compliance

The Law Reform Commission of the Australian State of Tasmania recommended an interesting variant of the substantial compliance rule.[888] The Tasmanian Commission proposed that the courts of that jurisdiction be granted a general power to declare a defectively executed will valid "*only* where the deceased has at least attempted to comply with [the wills act] requirements" and "the defect is *so inconsequential* and *harmless to the purpose of the formalities* that the court is satisfied that it can give effect to the intentions of the testator without defeating the purpose of [the wills act]."[889] The power could be applied to wills defectively executed "by mistake, accident, or other reasonable cause."[890] The Commission characterized its proposal as "a doctrine of substantial compliance."[891] The Tasmanian "attempted compliance" variant was conceived as "a relaxation of the technical requirements" intended to make it easier for people without "the time, or opportunity, or inclination" to prepare a formal will.[892]

The intended scope of the Tasmanian recommendation is uncertain. "Attempted" compliance, like "substantial" compliance, is an ambiguous concept. Miller has pointed out two possible interpretations of the Tasmanian standard. One possibility is that the proponent of a defectively executed will seeking to establish "attempted compliance" would be required to show that the testator understood the formalities but failed through mistake or inadvertence to comply.[893] Such an interpre-

887. *Id.* (citation omitted). For a recent article recommending reconsideration of the Queensland approach so that "elements of [Langbein's] concept [of substantial compliance] may yet be incorporated into our approach . . . in terms of the development suggested in *In re* Matthews," see de Groot, *supra* note 744, at 99.

888. Tasmania Report, *supra* note 744, at 10.

889. *Id.* (emphasis added).

890. *Id.*

891. *Id.*

892. *Id.* at 9. The Commission declined to recommend any change in that jurisdiction's requirements for due execution. *Id.* "The formalities serve several functions: they help to identify the testator, reduce the possibility of coercion, and prevent forgery. They also introduce an element of ceremony into the disposal of assets and choice of representatives which is appropriate for such an important occasion; and help to guard against the making of hasty or ill-considered decisions. . . ." *Id.* at 10.

893. Miller, *supra* note 638, at 584.

tation is consistent with the Commission's reference to "mistake" and "accident" as circumstances in which the rule could appropriately be applied.[894] It is unclear whether the rule would extend to the case of the testator who did not understand the formalities but who attempted to execute a will based on his or her notions of the requirements.[895] The Commission recommended that the rule apply to the defective execution; however, one must query whether ignorance of the requirements of the law would constitute "reasonable cause." (Arguably, the Commission considered "reasonable cause" to cover a very broad range of circumstances, including the defectively executed wills of persons who "did not have the time, or opportunity, or *inclination* to prepare a formal will. . . ."[896])

As the Commission recognized, an "attempted compliance" standard could be construed as broadly as the South Australian dispensing power, assuming that it is construed to require only that the testator attempted to *execute a will* rather than that the testator attempted *to comply with the wills act formalities*. If all that is required under such a standard is for the proponent of a defective will to establish that the testator attempted to execute a will, "attempted compliance" could be applied to cases such as *Hodge*[897] in which the testator deliberately failed to comply with the South Australian wills act requirements.[898] However, the Tasmanian Commission specifically rejected a standard that would permit a defective will to be validated "if it represented a genuine attempt to express the testator's wishes . . . irrespective of whether the deceased had attempted to comply with the formalities."[899]

The Commission considered that such an approach had produced "uncertain litigation" in South Australia.[900] The Commission preferred a rule that "preserves the spirit of the formalities, if not the letter"[901] by requiring the proponent of a defectively executed will to establish that the defect is "inconsequential and harmless to the purpose of the formalities."[902] Here also the recommendation is ambiguous. It is unclear whether the Commission meant that the proponent ought to

894. *See* Tasmania Report, *supra* note 744, at 10.
895. *See* Miller, *supra* note 638, at 584.
896. Tasmania Report, *supra* note 744, at 9 (emphasis added).
897. 40 S.A. St. R. 398 (1986).
898. *Id.* at 399.
899. Tasmania Report, *supra* note 744, at 10.
900. *Id.*
901. *Id.*
902. *Id.*

have to show that the defect is harmless to the purposes of the wills act and therefore by definition, inconsequential (an interpretation that would be completely consistent with Langbein's substantial compliance doctrine), or whether the Commission meant that the proponent ought to have to show *both* that the defect is "inconsequential" in the sense of trivial or technical *and* that it is harmless to the wills act purposes (an interpretation that would seemingly produce results similar to Queensland's restrictive quantitative substantial compliance standard).

The Tasmanian Law Reform Commission concluded that the formalities themselves should not be minimized or otherwise altered.[903] They specifically decline to recommend extending the writing requirement to include recordings on the ground that "the potential for fraud outweighs any benefits that such a proposal might have."[904]

(4) Threshold requirements

The British Columbia Law Reform Commission, after careful review of the various forms of harmless error rules and their underlying policies, proposed a modified form of dispensing power statute applicable only to defects in attestation.[905] The proposed statute would explicitly require a document signed by the testator as a threshold requirement for application of the provision,[906] but application would not depend on whether the decedent had attempted to comply with the wills act.[907]

In defining "threshold requirements," the Commission expressly declined to recommend expanding the definition of "writing" to include videotapes, tape recordings, floppy disks, and other devices that do not reproduce words in a "visible form" that can be executed.[908] While

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903. *Id.*

904. *Id.*

905. British Columbia Report, *supra* note 744, at 42-50. The Commission recommended the following provision:

> Notwithstanding Section 4, a document is valid as a will if
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> (a) it is in writing,
>
> (b) it is signed by the testator,
>
> (c) the testator dies after this section comes into force, and the court is satisfied that the testator knew and approved of the contents of the will and intended it to have testamentary effect.

Id. at 54.

906. *Id.* at 51-53.

907. *Id.* at 50.

908. *Id.* at 51-52.

they conceded that enlarging the definition of writing may be necessary in the future, they concluded that at present such a step is premature[909] because the technology is still in a state of development and "we are not prepared to attempt to identify any new and acceptable medium for recording testamentary intentions."[910]

In requiring signature as a threshold requirement for application of the dispensing power, the Commission rejected the view "that the possibility of an interloper's bullet, or other similar and equally unlikely possibilities warrant the deletion of the requirement of a signature."[911] They considered that to permit unsigned documents to be considered would lead to litigation over every draft or memorandum.[912] They pointed out that signature serves the evidentiary and channeling functions and that "the harm which would ensue from relaxing this particular requirement outweighs any benefit which would accrue from its abolition."[913] The effect of this approach is to permit unattested, partially attested, or defectively attested wills to be cured by application of the dispensing power if testamentary intent is established.[914]

The British Columbia Law Reform Commission rejected the South Australian reasonable doubt standard of proof in favor of "the civil litigation standard of proof on the balance of probabilities" usually applied in probate matters.[915] The Law Reform Commission suggested that substance as well as form might be considered in determining testamentary intent — the court's suspicion may be aroused if a will involves "unusual types of dispositions, or legatees whose inclusion as objects of the testator's bounty is unexpected."[916] Ultimately, "[t]he less the document resembles a standard will, the stricter the proof that will be required."[917]

Langbein dismissed the British Columbia proposal as "a timid recommendation."[918] Maxton also suggested that the measure does not

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909. *Id.* at 52.

910. *Id.*

911. *Id.*

912. *Id.* at 52-53.

913. *Id.* at 53.

914. *See* Miller, *supra* note 638, at 585.

915. British Columbia Report, *supra* note 744, at 53. "A consideration . . . was the fact that the civil litigation standard is not in itself immutable. In a lawsuit 'proof' is inextricably intertwined with 'belief,' and the readiness of a court to be persuaded of the existence of a certain state of affairs will depend upon factors other than the mere mechanical weighing up of evidence. . . . " *Id.*

916. *Id.* at 54.

917. *Id.*

918. Langbein, *Harmless Error Rules*, *supra* note 5, at 47.

go far enough.[919] Miller, on the other hand, analogized the effect of the proposal to the minimizing of formalities under the UPC,[920] stating that

> [s]uch an approach reaffirms the importance and value of the standard formalities, but provides an escape route from the limitations of literal compliance in certain circumstances. There can, of course, be no relaxation in the threshold requirements laid down, so they remain a limiting factor with a potential for frustrating the testator's intention.[921]

It is questionable whether the British Columbia approach would in fact apply more narrowly than substantial compliance as originally conceived by Langbein. In his 1975 article, Langbein conjectures that substantial compliance would rarely validate unsigned wills except in extraordinary circumstances, because omission of the signature so gravely undermines the purposes of the wills act that the proponent rarely would be able to carry the burden of proof.[922] He also suggests that the doctrine rarely would save unattested wills (unless the jurisdiction permitted unwitnessed holographic wills) because attestation is "nearly as fundamental in the statutory schemes as signature and writing."[923] He writes that in states that do not permit unwitnessed holographic wills, "the legislature . . . forecloses the substantial compliance doctrine in cases of total failure of attestation."[924] A threshold requirements provision may actually have broader application to attestation defects than substantial compliance since it would presumably permit unattested wills to be given effect in appropriate circumstances. However, it would not save a mistakenly signed will in a "switched wills" situation or in a case in which the testator died at the moment of signing, even if there was no doubt of the decedent's intentions.

3. Uniform Probate Code Section 2-503

The harmless error provision adopted by the Commissioners on Uniform State Laws is modeled on South Australia's broad dispensing

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919. Maxton, *supra* note 638, at 410-11.
920. Miller, *supra* note 638, at 585.
921. *Id.*
922. Langbein, *Substantial Compliance*, *supra* note 32, at 518.
923. *Id.* at 521.
924. *Id.*

power statute, as modified by the Manitoba version.[925] The drafting committee states in the comment to section 2-503 that the purpose of the provision is to allow the probate court "to excuse a harmless error in complying with the formal requirements for executing or revoking a will."[926]

The UPC provision permits a probate court to treat as a will "a document or writing added upon a document" that has not been executed in compliance with the section 2-502 requirements for an attested or holographic will "as if it had been executed in compliance with that section." This is applicable if the proponent produces "clear and convincing evidence that the decedent intended the document or writing to constitute" a will, a revocation or alteration of an existing will, or a partial or complete revival of a revoked will.[927] The comment to section 2-503 reflects the drafters' intention that the application of the provision to defectively executed wills be limited to wills containing attestation defects and certain defects in the signature of the testator.[928]

The Commissioners therefore seem to envision a narrower interpretation of the dispensing power than that of the South Australian courts.

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925. UNIF. PROB. CODE § 2-503 comment (1990). The drafting committee states that the measure is intended to accord with legislation in force in Manitoba and several jurisdictions in Australia. *Id.* For relevant portions of the text of the provision, see *supra* text accompanying note 11.

926. UNIF. PROB. CODE § 2-503 comment (1990).

927. *Id.* § 2-503.

928. *Id.* § 2-503 comment. The measure also applies to defective, revoked or altered wills. *Id.* The drafters considered that

> [e]vidence from South Australia suggests that the dispensing power will be applied mainly in two sorts of cases. When the testator misunderstands the attestation requirements of Section 2-502(a) and neglects to obtain one or both witnesses, new Section 2-503 permits the proponents of the will to prove that the defective execution did not result from irresolution or from circumstances suggesting duress or trickery — in other words, that the defect was harmless to the purpose of the formality. By excusing attestation errors, the measure reduces the tension that formerly existed between the attestation-free world of Section 2-502(b)-type holographic wills and the two-witness requirement for attested wills under Section 2-502(a). Ordinarily, the testator who attempts to make an attested will but blunders will still have achieved a level of formality that compares favorably with that permitted for holographic wills under the Code.
>
> The other recurrent class of case in which the dispensing power has been invoked in South Australia entails alterations to a previously executed will. . . . Lay persons do not always understand that the execution and revocation requirements of Section 2-502 call for fresh execution in order to modify a will; rather, lay persons often think that the original execution has continuing effect.

Id. (citing Langbein, *Harmless Error Rules*, *supra* note 5, at 15-33).

In South Australia, courts have applied section 12(2) to save wills that were not only unattested but also unsigned;[929] however, the comment to section 2-503 implies that the provision would seldom, if ever, save unexecuted or oral wills.[930] This view of the scope of a broad dispensing power is consistent with Langbein's view, which does not take into account the unexecuted will cases in South Australia.[931]

In *Estate of Richardson*,[932] section 12(2) was applied to an unsigned, unattested will;[933] and in *Estate of Vauk*,[934] a subsequent case, the court concluded that the registrar of probate could admit an unexecuted will if convinced beyond a reasonable doubt that the testator intended the document to constitute a will.[935] Both opinions appear to

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929. *See, e.g.*, Estate of Richardson, 40 S.A. St. R. 594 (1986); Estate of Vauk, 41 S.A. St. R. 242 (1986).

930. The comment incorporates the judicial gloss which was imposed on South Australia's section 12(2) and which was cited by Langbein as an important limitation on the probate court's ability to enforce unexecuted or unwritten wills. *See supra* notes 775-76. The comment states:

> The larger the departure from Section 2-502 formality, the harder it will be to satisfy the court that the instrument reflects the testator's intent. Whereas the South Australian and Israeli courts lightly excuse breaches of the attestation requirements, they have never excused noncompliance with the requirement that a will be in writing, and they have been extremely reluctant to excuse noncompliance with the signature requirement. . . . The main circumstance in which the South Australian courts have excused signature errors has been in the recurrent class of cases in which two wills are prepared for simultaneous execution by two testators, typically husband and wife, and each mistakenly signs the will prepared for the other.

UNIF. PROB. CODE § 2-503 comment (1990) (citations omitted). The Commissioners appear to be unaware of, or to have disregarded, the other South Australian cases in which a probate court has (1) admitted evidence of the testator's intent despite the testator's failure to sign the will at all; and (2) held that the proponent succeeded in proving "beyond a reasonable doubt" that the testator intended the unsigned document to constitute a will.

The apparent suggestion of the Commissioners that section 2-503 could not be applied to save an unwritten will is reinforced by the Comment to section 2-502, which states that "[a]ny reasonably permanent record is sufficient [to satisfy the requirement for a 'writing']; but a tape-recorded or video-taped will is not 'in writing.'" UNIF. PROB. CODE § 2-503 comment (Discussion Draft, 1988) (citing Estate of Reed, 672 P.2d 829 (Wyo. 1983)). Langbein suggests in his 1975 article that a recorded will is less effective in satisfying the "ritual function," but does indicate that substantial compliance might be applied to validate a tape recorded will in a holographic jurisdiction under certain narrow circumstances, and the UPC does recognize holographic wills. Langbein, *Substantial Compliance*, *supra* note 32, at 519.

931. For Langbein's analysis of cases decided under the South Australian dispensing power, see Langbein, *Harmless Error Rules*, *supra* note 5, at 33-41.

932. 40 S.A. St. R. 594 (1986).

933. *Id.* at 595-96.

934. 41 S.A. St. R. 242 (1986).

935. *Id.* The court's discussion of the facts strongly implies that the registrar of probate should be convinced by the facts to admit the will to probate. *See id.*

take for granted the applicability of the dispensing power to unexecuted wills. The *Richardson* court reaches this conclusion with virtually no analysis; the court in *Vauk*, however, reviewed both the law and the facts in some detail in an opinion addressed to the registrar of probate.[936] Although the comment to the 1988 draft does not specifically state that section 2-503 could never save an unsigned will, the committee quotes the judicial gloss derived from *Estate of Graham*,[937] which Langbein and the *Graham* court assert would ordinarily prevent application of the dispensing power to unexecuted wills.[938]

The comment to section 2-503 suggests that its application could potentially be limited to cases in which (1) the testator has either attempted to comply with the wills act but "blundered" in carrying out the requirements; or (2) the testator "misunderstands" the requirements.[939] The South Australian courts clearly have not limited applicability of the dispensing power to such cases. In *Estate of Hodge*,[940] for example, section 12(2) was applied to a will that the testator deliberately left unexecuted after having been advised that the will required witnesses to be valid. In *Estate of Kelly*,[941] the court enforced an unattested will that had been prepared by a testator who had studied law. In neither of these instances, was a blunder or a misunderstanding of the formalities involved. The UPC comment seems to reflect Langbein's interpretation of the South Australian cases, whereas the later cases appear to focus solely on intent.

The comment to section 2-503 focuses on instances in which the testator "misunderstands" the requirements for due execution or effective amendment or else attempts to comply (as in the "switched wills" cases in which the testator mistakenly signs a spouse's will), but bungles the execution.[942] This language seems to incorporate a notion of "attempted compliance" as a major factor in determining applicability

936. The *Vauk* court stressed the fact that the testator prepared the documents shortly before committing suicide under circumstances showing the intention to prepare a will. *Id.* at 247-48.

937. 20 S.A. St. R. at 205. For discussion of this case, see *supra* text accompanying note 770.

938. *See supra* note 770 and accompanying text.

939. *See* UNIF. PROB. CODE § 2-503 comment (1990) (dispensing power most likely to apply in two sorts of cases: (1) cases in which the testator misunderstands the attestation requirements; and (2) testator misunderstands the requirements for altering a will).

940. 40 S.A. St. R. 398 (1986).

941. 34 S.A. St. R. 370 (1983).

942. *Id.*

of the dispensing power.[943] In addition, the Commissioners indicate that application of section 12(2) to a defectively executed will may require the proponents to prove that "the defect was harmless to the purpose of the formality."[944] Both "attempted compliance" and the emphasis on harmlessness to the purposes of the formality are more characteristic of Langbein's analysis than of the South Australian courts' analysis.[945] The comments to section 2-503 thus seem to reflect Langbein's view of the appropriate scope of the dispensing power rather than the actual scope of the power as applied in South Australia.[946]

It is not clear whether section 2-503 could be applied in any case to videotaped or recorded wills.[947] The revised requirements for an attested or holographic will have not been expanded to permit videotaped wills. In addition, the comment to the 1988 draft of the provision indicates that such documents do not meet the requirement that a will be "in writing."[948] The final (1990) version of the comment is equivocal on this point. In contrast to the 1988 draft, the 1990 comment merely states that there is a case holding that a videotaped will is not "in writing."[949] Whether section 2-503 could validate such a will if

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943. *Id.* For discussion of a recommended harmless error rule specifically requiring "attempted compliance," see Tasmania Report, *supra* note 744, discussed *supra* notes 888-904 and accompanying text.

944. UNIF. PROB. CODE § 2-503 comment (1990). Harmlessness to the wills act purposes means that "the defective execution did not result from irresolution or from circumstances suggesting duress or trickery." *Id.*

945. *Compare* Langbein, *Substantial Compliance*, *supra* note 32, at 515-22 (stating that in applying substantial compliance doctrine, court considers whether despite the defect in execution, the court must determine whether the will "satisfied the purposes of the wills act" by considering the importance of the purposes served by the formality) *with* Estate of Williams, 36 S.A. St. R. 423, 425 (1985) (King., C.J.) (holding that there is no reason to suppose that the legislature intended to limit circumstances in which section 12(2) would operate or that the formality of signature is less dispensable than the other formalities). *Compare* Langbein, *Harmless Error Rules*, *supra* note 5, at 26-27 (discussing the *Williams* case and concluding that the opinion of Judge Legoe properly emphasized the testator's attempt at compliance as a factor of "fundamental importance," because attempted compliance indicates that inadvertence rather than irresolution produced the defect) *with* Estate of Graham, 20 S.A. St. R. 198 (1978) (holding that attempted compliance was not required for application of section 12(2); and applying provision to save a will in which testator "made no 'attempt'" to satisfy the presence requirements).

946. *See* Langbein, *Harmless Error Rules*, *supra* note 5, at 15-41 (analyzing South Australian cases and concluding with suggestions for "reforming the reform"); *supra* notes 758-87 and accompanying text (discussing scope of South Australian dispensing power provisions).

947. *See* UNIF. PROB. CODE § 2-503 comment (1990).

948. *See* UNIF. PROB. CODE § 2-502(a) comment (Discussion Draft 1988).

949. *See* UNIF. PROB. CODE § 2-502(a) comment (1990) (citing Estate of Reed, 672 P.2d 829 (Wyo. 1983)).

the court was convinced that the document was prepared with testamentary intent is not completely clear. However, the comment to the 1990 version of section 2-502(a) states that a will not meeting the requirements of section 2-502(a) may be valid under section 2-503[950] and the general comment to section 5 states that section 2-503 is to be applied to further the purpose of validating wills whenever possible.[951]

V. CONCLUSION

The UPC harmless error rule is the product of a rethinking of one aspect of the law of succession. What is innovative about the reform originating in the work of John Langbein and the South Australian courts' experiment with the dispensing power is the notion of using the formal requirements of the statutes of wills as a means to an end rather than ends in themselves.

The problem with the reform contemplated by UPC section 2-503 and some of the other 1990 revisions to the UPC is that they do not address the conflict between the premises underlying the wills act and the emergence of a separate but parallel system for disposing of property at death that Langbein categorically refers to as the "nonprobate system."[952] The increasingly widespread impact of the "nonprobate system" has resulted in an unsystematic, judicially-created reform of the law of succession. Although the UPC attempts to harmonize the "nonprobate" and probate systems, the reform does not erase the disparity in the treatment of testamentary transfers depending upon their classification as wills or will substitutes.

Section 2-503 makes it possible for the proponent of a defective will to prove that the testator intended to give it effect,[953] but it does not produce consistency between the procedures required for execution of a will and a will substitute. Wills still are distinguished as documents requiring compliance with a laundry list of statutorily-determined formalities as a prerequisite to their enforcement without judicial factfinding. The "formalities" required for will substitutes remain largely a matter of business practice and convention, except when the statute of frauds applies. They are self enforcing devices subjected to the scrutiny of a court only if their validity is challenged.

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950. *Id.*
951. *See* UNIF. PROB. CODE art. II, pt. 5 general comment.
952. *See* Langbein, *Nonprobate Revolution*, *supra* note 17, at 34.
953. UNIF. PROB. CODE § 2-503 (1990).

The harmless error rule thus brings the two systems more into alignment without questioning the fundamental illogic of having separate systems for determining succession of property at death. The UPC continues to determine into which system a transfer falls based solely on its classification as a will or a "nonprobate" disposition (will substitute). Surely if the system needs reform to accommodate developments in the law of succession, it also needs to address the more fundamental issue of the continued viability of the probate system itself.

Moreover, the "harmless error" rule raises some troubling issues. By definition, such a rule implies that the wills act "requirements" are in fact no longer required. The UPC now in effect permits four types of testamentary transfers to be enforced as "wills": self-proving wills,[954] attested wills,[955] holographic wills,[956] and wills established by extrinsic evidence under section 2-503.[957] The last category of wills need not comply with the formalities required of the other three; they are not subject to any legislatively determined standard of formality. The UPC drafters instead have delegated to the courts the power to decide which formalities can be dispensed with and under what circumstances.

The UPC approach to the problem of giving effect to testamentary intent is a "quick-fix" solution to a problem that has resulted from a fundamental shift away from traditional notions of testation and testamentary conduct. The UPC retains the statutory laundry list of formal "requirements" and continues to phrase these requirements in mandatory terms. Radical measures, however, require radical methods. The drafters of section 2-503 should have considered eliminating the "requirements" as such in favor of standards for determining under what circumstances the burden of proving will validity falls on the person contesting its validity and under what circumstances it should fall on the will's proponent. Such a provision would be consistent with Lindgren's conception of a "two-tiered" approach to the formalities.

The UPC revisions contemplate several reforms, some of which are unlikely to achieve widespread acceptance. If the purpose of the revisions was to articulate principles for reform of the law of succession, the drafters could have gone much further. The UPC should be

954. *Id.* § 2-504.
955. *Id.* § 2-502(a).
956. *Id.* § 2-502(b).
957. *Id.* §§ 2-502(c), 2-503.

fundamentally revised and the revisions should not be limited to principles of technical probate. A model *succession* act is needed. Section 2-503 and the other recent revisions to the UPC represent piecemeal adjustments likely to create additional pressure on the probate system without addressing the fundamental question of whether the existing probate system continues to serve the function it served at a time when probate was virtually synonymous with the law of succession.