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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 TWO: UNIFORM PROBATE CODE SECTION 2-503 AND A COUNTERPROPOSAL

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I. INTRODUCTION

In July 1990, the annual Conference of Commissioners on Uniform State Laws approved and recommended for enactment in all the states a substantially revised version of Article 2 of the Uniform Probate Code (UPC).[1] One of the major innovations is a provision permitting defective wills executed with testamentary intent to be admitted to probate through application of a dispensing power[2] modeled on the South Australian harmless error rule and other similar provisions.[3] The comment to new UPC section 2-503 states that the provision "unifies the law of probate and non-probate transfers" by extending

1. UNIF. PROB. CODE art. 2 (1990).

2. *Id.* § 2-503 (creating a harmless error rule).

3. *See id.* § 2-503 comment. For discussion of these harmless error rules, see Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism — Part One: The Wills Act Formula, the Rite of Testation, and the Question of Intent: A Problem in Search of a Solution*, 43 FLA. L. REV. 167, 311-39 (1991).

to the wills act "the harmless error principle that has long been applied to defective compliance with the formal requirements for nonprobate transfers."[4]

Of course, adoption of a harmless error rule to cure defective wills does nothing to resolve the logical and practical inconsistencies of acknowledging 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. Further, 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.[5]

Perhaps understandably, the Commissioners yielded to the temptation to "pay more attention to bandaging small wounds [and] making small adjustments" than to "expound[ing] grand principles."[6] Nevertheless, the development of a logical, internally consistent system for transferring property at death is highly desirable. Further, this development 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.

Part one of this article, which was in a previous issue of the *Florida Law Review*,[7] reviews the substantial body of scholarly commentary, case law, and legislative history from which the new UPC section 2-503 has developed. In particular, part one focuses on John Langbein's seminal work on harmless error rules[8] in general and on the 1975

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

5. *See* Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1125-40 (1984) (discussing the lack of unity in the probate and nonprobate systems) [hereinafter Langbein, *Nonprobate Revolution*].

6. *See* Friedman, *The Law of the Living, the Law of the Dead: Property, Succession, and Society*, 1966 WISC. L. REV. 340, 373.

7. Miller, *supra* note 3.

8. *E.g.*, Langbein, *Crumbling of the Wills Act: Australians Point the Way*, 65 A.B.A. J. 1189 (1987) [hereinafter Langbein, *Crumbling Wills Act*]; Langbein, *Excusing Harmless Errors*

innovation in South Australian probate law[9] 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 the problem and focuses on various forms of harmless error rules.

Part two of this article analyzes the UPC harmless error rule and scrutinizes the two principal influences on its development: Langbein's functional substantial compliance doctrine[10] and the South Australian dispensing power statute.[11] Differences in scope and probable application are considered. The purpose of the inquiry is to consider whether and to what extent a harmless error rule is an appropriate solution to the problem of wills act formality and judicial formalism. The UPC harmless error rule is considered both in the broad context of the law of succession generally and as a solution to the present disunity between the law applicable to probate and nonprobate transfers.

II. THE HARMLESS ERROR SOLUTION

A. *Substantial Compliance, the South Australian Dispensing Power, and New Uniform Probate Code Section 2-503: Variations on a Theme*

1. The Functional Nexus

As the preeminent advocate of reform in American probate law, John Langbein[12] has been instrumental in the rethinking of the law of wills and of succession generally.[13] As a member of the committee

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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*]; Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489 (1975) [hereinafter Langbein, *Substantial Compliance*]; Langbein, *Nonprobate Revolution*, *supra* note 5.

9. Wills Amendment Act [No. 2] of 1975, § 9 (amending Wills Act of 1936, § 12(2), 8 AUSTL. STAT. 665 [hereinafter South Australian Wills Act § 12(2)]). For discussion of this provision, see Miller, *supra* note 3, at 311-19.

10. Langbein, *Substantial Compliance*, *supra* note 8; for discussion of "functional analysis," see Miller, *supra* note 3, at 255-89; for discussion of Langbein's doctrine, see *id.* at 302-11.

11. South Australian Wills Act § 12(2), *supra* note 9.

12. Chancellor Kent Professor of Law and Legal History, Yale since 1990. A.B., 1964, Columbia; LL.B., 1968, Harvard; LL.B., 1969, Ph.D., 1971, Cambridge University.

13. *E.g.*, Langbein, *Crumbling Wills Act*, *supra* note 8; Langbein, *Harmless Error Rules*, *supra* note 8; Langbein, *Living Probate: The Conservatorship Model*, 77 MICH. L. REV. 63 (1977) [hereinafter Langbein, *Living Probate*]; Langbein, *Nonprobate Revolution*, *supra* note 5; Langbein, *Substantial Compliance*, *supra* note 8; Langbein, *The Twentieth Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722 (1988) [hereinafter Langbein,

that drafted the revisions to article 2 of the UPC,[14] he has been to all appearances one of the prime movers behind certain of the specific reforms. The revisions to article 2 are described by the drafters as an attempt to unify the subsidiary law of probate and "nonprobate" transfers, an objective that Langbein has long favored.[15] In addition, the revisions to the UPC version of the wills act[16] bring the enforcement of wills and will substitutes ("nonprobate" transfers) closer to parity, a change Langbein recommends because he considers such transfers functionally equivalent.[17]

Functional analysis is fundamental to Langbein's consideration of the formalities of transfer, whether applied to disposition by will or to disposition by will substitute.[18] As current "dean" of the so-called "functional school,"[19] Langbein treats the formal requirements for the

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Family Wealth Transmission]; Langbein & Waggoner, *Redesigning the Spouse's Forced Share*, 22 REAL PROP., PROB. & TR. J. 303 (1987) [hereinafter Langbein & Waggoner, *Spouse's Forced Share*]; Langbein & Waggoner, *Reformation of Wills on the Ground of Mistake: A Change of Direction in American Law?*, 130 U. PA. L. REV. 521 (1982) [hereinafter Langbein & Waggoner, *Reformation*].

14. UNIF. PROB. CODE (1990) (Joint Editorial Board/Conference Representatives).

15. *See* Langbein, *Nonprobate Revolution*, *supra* note 5, at 1134-40; Langbein, *Substantial Compliance*, *supra* note 8, at 503-09, 520, 523-24. The comment to UPC § 2-503 specifically cites Langbein's 1987 article on South Australia's harmless error rule and obviously heavily relies on its interpretation of the South Australian dispensing power. *See* UNIF. PROB. CODE § 2-503 comment (1990) (citing Langbein, *Harmless Error Rules*, *supra* note 8). Langbein and Waggoner's article on reformation of wills containing mistaken terms, another ground-breaking article, is cited as the basis for the revision to § 2-601. Section 2-601 was intended to eliminate a potential obstacle to judicial adoption of a general reformation doctrine for wills. *See* UNIF. PROB. CODE § 2-601 comment (1990) (citing Langbein & Waggoner, *Reformation*, *supra* note 13).

16. *See* UNIF. PROB. CODE § 2-503 comment (1990); *id.* pt. 7 general comment.

17. *See* Langbein, *Nonprobate Revolution*, *supra* note 5, at 1109, 1131, 1134-40; Langbein, *Substantial Compliance*, *supra* note 8, at 503-09, 520, 523-24.

18. *See* Langbein, *Nonprobate Revolution*, *supra* note 5, at 1110-14, 1131-33; Langbein, *Substantial Compliance*, *supra* note 8, at 491-98, 515-24.

19. For discussion of functional analysis and the so-called "functional school," see Miller, *supra* note 3, at 255-74. *See, e.g.*, Langbein, *Crumbling Wills Act*, *supra* note 8, at 1194; Langbein, *Nonprobate Revolution*, *supra* note 5, at 1110-14, 1131-33; Langbein, *Substantial Compliance*, *supra* note 8, at 491-98.

Other commentators have routinely incorporated Langbein's interpretation of functional analysis into their work. *See, e.g.*, Lindgren, *Abolishing the Attestation Requirement*, 68 N.C.L. REV. 541, 544-45 (1990); Love, *Imperfect Gifts as Declarations of Trust: An Unapologetic Anomaly*, 67 KY. L.J. 309, 338-44 (1979); Maxton, *Execution of Wills: The Formalities Considered*, 1 CANT. L. REV. 393, 394-95 (1982); J. Miller, *Substantial Compliance with the Execution of Wills*, 36 INT'L & COMP. L.Q. 559, 564-66 (1987) [hereinafter J. Miller, *Execution of Wills*]; Nelson & Starck, *Formality and Formalism: A Critical Look at the Execution of Wills*, 6 PEPPERDINE L. REV. 331, 347-54 (1979).

disposition of property by will as meaningful only to the extent that they effectively serve (1) to effectuate the testator's intentions, (2) to obviate issues respecting the nature of the document, its authenticity, and its finality; and (3) to facilitate the disposition of property in the probate courts.[20] Of these three purposes, Langbein treats only the first two as having major substantive importance to the application of the substantial compliance doctrine.[21] His 1975 article proposes that the courts permit defectively executed wills to be deemed in substantial compliance with the wills act if the form of the will, despite the defect, satisfies the purposes served by the formalities and the circumstances surrounding the making of the will establish testamentary intent.[22] This proposal is founded on the assumption that the specific requirements of the wills act need not be strictly construed as such. Instead, the requirements may be deemed to be effectively met if the testator's failure to achieve literal compliance with the requirements does not raise any unresolvable issues that strict compliance with the wills act would have avoided.[23] In effect, Langbein argues that the proper question with respect to formalities of transfer is not whether the requirements have been strictly fulfilled, but whether the purposes or policies underlying the statutory standard have been served.[24]

Langbein's functional view of the wills act formalities demonstrably carries over into his interpretation of the South Australian dispensing power and, as the subsequent discussion will show, appears to a certain extent to have colored his account of that harmless error rule. His

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In addition, law reform commissions in a number of Canadian and Australian jurisdictions have extensively considered Langbein's functional analysis of the wills act in determining whether to recommend harmless error rules. *See, e.g.*, New South Wales Law Reform Commission, Report on Wills — Execution and Revocation 34-36, 68-71 (1986) [hereinafter New South Wales Report]; Law Reform Commission of British Columbia, Report No. 52 on the Making and Revocation of Wills 24-25 (1981) [hereinafter British Columbia Report]; Manitoba Law Reform Commission, Report on the "Wills Act" and the Doctrine of Substantial Compliance 14-16 (1980) [hereinafter Manitoba Report].

20. *See* Langbein, *Substantial Compliance*, *supra* note 8, at 513-26. For discussion, see Miller, *supra* note 3, at 302-11.

21. *See* Langbein, *Substantial Compliance*, *supra* note 8, at 513-26. For discussion, see Miller, *supra* note 3, at 302-11.

22. *See* Langbein, *Substantial Compliance*, *supra* note 8, at 513-16. It is not completely clear whether Langbein meant to treat these two requirements for application of the substantial compliance doctrine as independent criteria which must both be established in every case. *See id.* at 513-26.

23. For discussion, see Miller, *supra* note 3, at 302-11.

24. Langbein, *Substantial Compliance*, *supra* note 8, at 515-16. For discussion of the purposes of formality (functional analysis), see Miller, *supra* note 3, at 258-74 (attested wills); *id.* at 274-89 (holographic wills).

interpretation of the South Australian model has in turn been incorporated into the comment to the UPC dispensing power.[25] As a result, although the UPC adopts a harmless error rule essentially based on South Australia's broad dispensing power, there are intimations of functional analysis in the comment to the rule.[26] If legislatures adopt the new UPC harmless error rule based upon the interpretation provided in the comment, the legislative history will inevitably reflect the influence of Langbein's functional interpretation of the South Australian provision and case law, rather than the interpretation of the South Australian courts themselves. Courts construing the provision will likewise be influenced — perhaps without recognizing the source — by Langbein's conception of the appropriate scope and application of the dispensing power. Langbein's functional interpretation of the South Australian model may thus develop into a gloss on the UPC provision, with functional analysis providing the nexus between substantial compliance and the broadly worded UPC rule. Predicting application of the UPC rule therefore requires analysis and comparison of the relative scope and application of Langbein's functional substantial compliance doctrine, the South Australian dispensing power, and UPC section 2-503.

B. *Application of the Rules to Defects in Attestation*

1. Defects in the Attestation Ceremony

a. Langbein's Substantial Compliance Doctrine

In his 1975 article, Langbein states that a major purpose of the functional substantial compliance doctrine is to mitigate the harsh consequences that result when testators fail to comply with the minor formalities that contribute to the ceremoniousness of attestation, such as presence and publication.[27] Langbein argues that if a will has been signed and witnessed, the failure of the testator or witnesses to comply with the presence and publication formalities does not prevent the will from establishing testamentary authenticity.[28] According to Langbein's functional interpretation of the wills act formalities, presence

25. *See* UNIF. PROB. CODE § 2-503 comment (1990). For discussion, see Miller, *supra* note 3, at 339-44.

26. For discussion, see Miller, *supra* note 3, at 339-44.

27. *See* Langbein, *Substantial Compliance*, *supra* note 8, at 521. "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." *Id.*

28. *Id.*

and publication contribute incrementally but not indispensably to the intent-verifying and authenticating purposes.[29] Defective compliance with these minor formalities therefore raises no unresolvable issues that strict compliance would have obviated. Consequently, compliance with the presence and publication requirements is considered by Langbein to be relatively unimportant compared to compliance with more "fundamental" formalities such as attestation, signature, and the requirement that the will be in writing.[30]

Langbein argues that the presence and publication formalities were originally implemented to serve the so-called protective function,[31] a policy which Langbein characterizes as "an historical anachronism."[32] Like most proponents of functional analysis, Langbein considers the minor formalities associated with attestation to be mere vestiges of a policy adapted to the circumstances of a period when wills were frequently made by testators who, because they were on their deathbeds, were particularly susceptible to imposition.[33] Langbein argues that concern with protecting the testator from imposition does not justify strict construction of the technical requirements for attestation, because compliance with the presence and publication formalities does not in fact prevent fraud.[34] Because these requirements do not bear directly on testamentary intent or the authenticity of the writing, Langbein characterizes presence defects as "the most innocuous of the

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29. *Id.* at 516-17, 521.

30. *See id.* at 515-22.

31. *Id.* at 516-17, 521. For discussion of the protective function served by the various formalities for attested wills, see Miller, *supra* note 3, at 271-74.

32. Langbein, *Substantial Compliance*, *supra* note 8, at 496. For discussion of the presence and publication requirements, see Miller, *supra* note 3, at 265 n.502, 273 nn.520-21 (presence) and at 265 n.503 (publication).

33. Langbein, *Substantial Compliance*, *supra* note 8, at 497; *cf.* Lindgren, *supra* note 19, at 554-56. For discussion of the historical development of the attestation requirements, see Miller, *supra* note 3, at 199-204; for a comprehensive discussion of the development of formalities for both attested and holographic wills in historical context, see *id.* at 187-221.

34. Langbein, *Substantial Compliance*, *supra* note 8, at 496, 517.

> The attestation formalities are pitifully inadequate to protect the testator from determined crooks, and have not in fact succeeded in preventing the many cases of fraud and undue influence which are proved each year. . . . Protective formalities do more harm than good, voiding homemade wills for harmless violations. . . . [They] are not needed. [Since] fraud or undue influence may always be proved notwithstanding due execution, the ordinary remedies for imposition are quite adequate.

Id. at 496 (citing Gulliver & Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 9-13 (1941)).

recurrent execution blunders"[35] and publication blunders as equally peripheral and innocuous[36] (although publication blunders are less likely as a practical matter to create problems, since so few jurisdictions today require publication.)[37]

One issue that arises when applying functional analysis to the presence and publication requirements is to what extent extrinsic evidence would be necessary to establish final testamentary intent and authenticity in a case in which a noncomplying will appears valid on its face. In most cases, as Langbein points out, "the presumption of due execution that arises from a seemingly regular attestation clause forecloses inquiry into the actual circumstances of due execution."[38] Such defects may come to light, however, if the will itself "exhibits indicia of irregularity" or if the will does not contain an appropriate attestation clause.[39] In his 1975 article, Langbein states that substantial compliance "would permit the proponents to prove that in the circumstances of the case the testator executed the will with finality and that the execution is adequately evidenced notwithstanding the defect."[40] Arguably, however, a truly functional approach to the wills act would as a matter of logic abolish the presence and publication requirements as *meaningful* substantive requirements for an enforceable will, since neither formality serves any indispensable, fundamental wills act policy.[41] It is therefore not clear why application of the functional substantial compliance doctrine would require extrinsic evidence to establish either the testator's intent or the authenticity of the document if the *only* defect in execution were noncompliance with one of the "anachronistic" protective formalities. Even under current law, a will signed by the testator and the requisite number of witnesses may be admitted to probate in instances in which the witnesses are not available to testify concerning the execution of the document.[42] Under a functional construction of the wills act, a signed and attested will ought to be

35. Langbein, *Crumbling Wills Act*, *supra* note 8, at 1194; *see* Langbein, *Harmless Error Rules*, *supra* note 8, at 45.

36. *See* Langbein, *Substantial Compliance*, *supra* note 8, at 521.

37. For jurisdictions requiring publication, see Miller, *supra* note 3, at 207-08 n.191.

38. Langbein, *Harmless Error Rules*, *supra* note 8, at 17 n.66.

39. *Id.*

40. Langbein, *Substantial Compliance*, *supra* note 8, at 521.

41. *See id.* at 516-17, 521; Langbein, *Harmless Error Rules*, *supra* note 8, at 16-18, 40; *cf.* Lindgren, *supra* note 19, at 569-70.

42. *See* Bates, *A Case for Intention*, 124 NEW L.J. 380, 381 (1974) (quoted in Miller, *supra* note 3, at 268-69 n.509); Lindgren, *supra* note 19, at 570-71 (quoted in Miller, *supra* note 3, at 268-69 n.509).

sufficient to establish finality of intent and the authenticity of the document (in the absence of evidence of fraud or imposition) because such a document substantially serves the wills act purposes.

b. South Australia's Dispensing Power Provision

The South Australian wills act does not require publication.[43] The wills act does require that the testator sign the will in the presence of two witnesses and that the witnesses both sign in the testator's presence,[44] but does not require that the witnesses sign in each other's presence.[45]

According to Langbein, "the basic architecture" of South Australian probate procedure derives from nineteenth century English probate practice, when the ecclesiastical courts had jurisdiction over probate matters.[46] In contemporary common form probate, the registrar of probate "processes routine estates."[47] The registrar of probate may refer to the court of general jurisdiction for resolution of issues that arise during the process.[48] If such resolution requires factfinding, the court does not hear evidence but relies on affidavits of the witnesses.[49] Such common form probate "is the norm," but is available only for uncontested cases.[50] "[W]hen the validity of the will is in dispute probate must be in solemn form," with "ordinary adversary procedure" and examination of witnesses.[51] Very few of the section 12(2) cases have been contested cases.[52]

The court of general jurisdiction for section 12(2) cases is the South Australian Supreme Court, though Langbein explains that the court

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43. *See* Wills Amendment Act (No. 2) of 1975, § 5 (amending Wills Act of 1936, § 8(b), 8 S. AUSTL. STAT. 665 [hereinafter South Australian Wills Act § 8]).

44. *Id.*

45. *Id.* According to Palk, the South Australian Law Reform Committee that recommended § 12(2) mistakenly thought that the South Australian Wills Act included a requirement that the witnesses sign in the presence of each other. Palk, *Informal Wills: From Soldiers to Citizens*, 5 ADELAIDE L. REV. 382, 389 (1975) (citing Twenty-Eighth Report of the South Australian Law Reform Committee to Attorney General: Reform of the Law of Intestacy and Wills 10 (1974) [hereinafter South Australian Report]). For discussion of the legislative history of § 12(2), see Palk, *supra*; Miller, *supra* note 3, at 311-14.

46. Langbein, *Harmless Error Rules*, *supra* note 8, at 12. For discussion of ecclesiastical jurisdiction over probate matters, see Miller, *supra* note 3, at 197-98.

47. Langbein, *Harmless Error Rules*, *supra* note 8, at 12.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 12-13.

52. *Id.* at 13.

has delegated its section 12(2) dispensing power to the registrars of probate in cases involving small estates.[53] On first instance, the judges sit singly,[54] though any three of the fourteen judges may participate on a three-judge panel called the Full Court for cases on appeal,[55] and a first-instance judge may "refer a case of exceptional importance to a three-judge first-instance panel."[56] The section 12(2) case law is, however, "overwhelmingly the product of single-judge decisions rendered by a nonspecialist bench."[57]

In the first case decided under the section 12(2) dispensing power, *Estate of Graham*,[58] the defective execution resulted from the testator's failure to comply with the South Australian presence requirements.[59] At the time of execution, the testator had signed her will, then given it to her nephew, the principal beneficiary, with the request that he "get it witnessed."[60] The nephew had taken the document to two of the testator's neighbors for attestation, and had then returned the attested document to the testator.[61] Despite noncompliance with the presence requirements, the *Graham* court was satisfied by the evidence of the circumstances surrounding execution that the document had been executed with testamentary intent.[62]

The *Graham* court declined to read into section 12(2) any requirement that the proponent of a defective will show attempted compliance with the wills act.[63] Although the court specifically stated that the testator had not attempted to comply with the presence requirements,[64] the court was nevertheless satisfied beyond a reasonable

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53. *Id.*

54. *Id.*

55. *Id. See, e.g.*, Estate of Kelly, 34 S.A. St. R. 370, *aff'g* 32 S.A. St. R. 413 (1983) (discussed *infra* in text accompanying notes 102-17).

56. Langbein, *Harmless Error Rules*, *supra* note 8, at 13. *See, e.g.*, Estate of Williams, 36 S.A. St. R. 423 (1984) (discussed *infra* in text accompanying notes 311-28).

57. Langbein, *Harmless Error Rules*, *supra* note 8, at 13.

58. 20 S.A. St. R. 198 (1978).

59. *Id.* at 199, 201.

60. *Id.*

61. *Id.*

62. *Id.* at 201.

63. *Id.* at 205. For discussion of a proposed harmless error rule based specifically on "attempted compliance," see Miller, *supra* note 3, at 335-37 (discussing Law Reform Commission of Tasmania, Report No. 35 on Reform in the Law of Wills 9-10 (1983) [hereinafter Tasmania Report]).

64. *Graham*, 20 S.A. St. R. at 205 ("She herself signed the document in the absence of witnesses, and made no 'attempt' to have them present when she signed; and far from attempting to have them both sign in her presence, she arranged for them to sign in her absence.").

doubt that the testator had intended for the document to constitute her will.[65] The court, therefore, concluded that the will was valid under section 12(2).[66] However, while *Graham* indicated that application of section 12(2) does not require a showing that the testator attempted to comply with the *bungled formality*, dicta in the case seems to suggest that proof that the testator attempted to comply with the *wills act* is highly relevant to the determination whether to apply section 12(2).[67]

In deciding that the presence requirements could be dispensed with under the facts of *Graham*, the court suggested that a consideration in applying section 12(2) to save a defective will is the degree of the noncompliance with the requirements of the wills act. The *Graham* court stated, "I do not think that I could have reached that [required] state of satisfaction [with respect to testamentary intent] if the deceased had done no more than sign the will herself, without evidence of any other act of the kind envisaged by [the Wills Act]."[68] The court considered that the reasonable doubt standard of section 12(2) would ensure, "in most cases, [that] the greater the departure from the requirements of formal validity . . . , the harder will it be for the Court to reach the required state of satisfaction,"[69] and would thereby operate as a "significant restraint" on abuse of section 12(2).[70] The court suggested that the dispensing power could not be applied to an unattested will or even to an attested will as to which there had been total noncompliance with the presence requirements.[71]

Cases subsequent to *Graham* have frequently recited its dictum linking the degree of deviation from the wills act to the difficulty of the proponent's burden,[72] but in practice the courts have extended the scope of section 12(2) far beyond that projected in *Graham*, even to cases in which the evidence shows that the testator *deliberately* chose not to comply with the wills act.[73] The South Australian courts have

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65. *Id.* at 201. For discussion of the application of a statutory "substantial compliance" standard to presence defects, see Miller, *supra* note 3, at 329-35 (discussing the Queensland courts' extremely narrow application of the Queensland provision to presence defects).

66. *See Graham*, 20 S.A. St. R. at 205-06.

67. *Id.*

68. *Id.* at 205.

69. *Id.*

70. *Id.*

71. *Id.*

72. *See* Langbein, *Harmless Error Rules*, *supra* note 8, at 17.

73. *See, e.g.*, Estate of Hodge, 40 S.A. St. R. 398 (1986) (discussed *infra* in text accompanying notes 95-101); Estate of Kelly, 32 S.A. St. R. 413, *aff'd*, 34 S.A. St. R. 370 (1983) (discussed

not given this judicial gloss the functional interpretation suggested by Langbein, who read into the language an implication that application of section 12(2) depends on the nature of the specific defect and specifically on whether the defect involves a fundamental violation of the wills act purposes.[74] Contrary to Langbein's interpretation, it seems that the *Graham* court was suggesting a quantitative link between the overall degree of departure from the statutory standard and the ability of the proponent of the will to establish testamentary intent beyond a reasonable doubt rather than the qualitative functional analysis contemplated in Langbein's substantial compliance approach.[75] In any case, as the subsequent discussion will show, the South Australian courts have applied the dispensing power to excuse defects in execution that under Langbein's functional approach would clearly be characterized as "fundamental" and therefore outside the reach of the substantial compliance doctrine.

c. New Uniform Probate Code Section 2-503

UPC section 2-502(a), the revised version of the 1969 UPC provision for a formal will, does not significantly change the formal requirements for an attested will under the UPC.[76] The UPC has never required publication as a part of the attestation requirement.[77] The comment to the revised version seems to imply that "in-person" contact between testator and witnesses is not required.[78] Thus, strict com-

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infra in text accompanying notes 102-17); Langbein, *Harmless Error Rules*, *supra* note 8, at 19 (discussing unreported case, Estate of Franks, No. 10 of 1983 (S.A. Sup. Ct. Aug. 9, 1983)) and *id.* at 32-33 (discussing unreported case, Estate of Sierp, No. 173 of 1982 (S.A. Sup. Ct. Dec. 13, 1982)).

74. *See* Langbein, *Harmless Error Rules*, *supra* note 8, at 52-53.

75. For discussion of Langbein's "functional" approach, see Miller, *supra* note 3, at 302-11.

76. *Compare* UNIF. PROB. CODE § 2-502(a) (1990) *with* UNIF. PROB. CODE § 2-502 (1969). For text of the 1969 provision, see Miller, *supra* note 3, at 208-09 n.192. For history of the UPC, see *id.* at 206-11. Uniform Probate Code § 2-502(a), as recently revised, requires that every will 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
> (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.

UNIF. PROB. CODE § 2-502(a).

77. *See* UNIF. PROB. CODE § 2-502 (1969) (quoted and discussed in Miller, *supra* note 3, at 208-09 n.192).

78. *See* UNIF. PROB. CODE § 2-502(a) comment (1990); Miller, *supra* note 3, at 208-11.

pliance with the 1990 UPC attestation requirements could seemingly be accomplished if the testator were merely to sign the will, mail it to each of the witnesses, and acknowledge the signature to the witnesses by telephone.[79] Because the ceremoniousness of attestation has been reduced to a bare minimum under the UPC, the incorporation into the UPC of a harmless error rule would appear redundant if the sole purpose of such a rule is to permit courts to excuse technical defects in attestation.

2. Unattested Wills

a. Langbein's Substantial Compliance Doctrine

Langbein initially asserted that noncompliance with the attestation requirement is a "fundamental" error in jurisdictions that recognize only witnessed wills, so that application of the substantial compliance doctrine to allow enforcement of an unattested will would usually be precluded.[80] Langbein argues in his 1975 article that a jurisdiction that does not provide for the alternative unattested holographic form is making a "clear policy choice" favoring a high level of formality to achieve all of the wills act purposes.[81] If the wills act requires attestation,

> [t]he increment which attestation adds to the cautionary and especially to the evidentiary functions seems unlikely to be achieved by other means. As compared with the will substitutes and the holographic will, the attestation requirement may seem to set the level of cautionary and evidentiary functions unreasonably high, but that is the legislature's policy choice.[82]

In consequence, total failure of attestation in a jurisdiction that does not permit holographic wills by definition falls outside the reach of the functional substantial compliance doctrine. On the other hand,

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79. *See* Kossow, *Probate Law and the Uniform Probate Code: "One for the Money . . .",* 61 GEO. L.J. 1357, 1380 (1973) (suggesting that such conduct would meet the requirements of the original version of the UPC attested wills requirement, UPC § 2-502, but that construing the attestation requirement in this way would permit fraud); *see also* Estate of McGurrin, 113 Idaho 341, 743 P.2d 994 (Ct. App. 1987) (holding that Idaho's version of the UPC required "in-person contact" between testator and witnesses; telephone communication thanking witnesses for signing not sufficient). For discussion of this issue, see Miller, *supra* note 3, at 209-11.

80. Langbein, *Substantial Compliance, supra* note 8, at 521-22.

81. *Id.*

82. *Id.* at 521.

the experience in jurisdictions that also recognize the alternative holographic form indicates that attestation, however useful, is not *essential* to any wills act policy other than the protective policy.[83] "Only where the protective policy is still valued is it fair to characterize attestation as indispensable to the policies of the Wills Act."[84]

Langbein argues that a legislature's decision to permit unattested holographic wills undercuts most of the policies served by the attestation requirement.

> Handwriting has but one virtue: it provides superior evidence of genuineness. It does not serve the other Wills Act policies, all of which attestation does serve. The legislative decision to authorize holographic wills is, therefore, a fundamental one. It represents both an abandonment of the protective policy, and an acceptance of [a] significantly lowered level of formality for implementing the other Wills Act policies.[85]

Langbein concludes that since the decision to recognize unattested holographic wills reflects the legislature's tolerance for low levels of formality, a functional substantial compliance approach to statutory construction of the wills act should extend the doctrine to unattested wills in jurisdictions that permit holographic wills.[86] His argument suggests that total failure of attestation may be essentially harmless in a jurisdiction that has demonstrated its unconcern with the functions served by the attestation requirement by permitting unattested holographic wills because it violates no fundamental wills act policy.[87] Total failure of attestation in a holographic jurisdiction simply produces an unattested will that does not serve the authenticating purpose of the handwriting requirement, a purpose which might be fulfilled through admission of extrinsic evidence.[88]

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83. *Id.* at 498; Langbein, *Harmless Error Rules*, *supra* note 8, at 52; *cf.* Lindgren, *supra* note 19, at 550-51, 554-56.

84. Langbein, *Substantial Compliance*, *supra* note 8, at 498.

85. *Id.*

86. *See id.* at 521.

87. *See id.* at 498, 521; *cf.* Langbein, *Harmless Error Rules*, *supra* note 8, at 52.

88. *See* Langbein, *Substantial Compliance*, *supra* note 8, at 498, 521. For further discussion of Langbein's distinction between functional analysis as applied in jurisdictions that recognize holographic wills and jurisdictions that permit only attested wills, see *infra* notes 171-218 and accompanying text.

b. South Australia's Dispensing Power Provision

Despite dicta in *Graham* suggesting that a total failure of attestation might be too great a departure from the wills act requirements to be cured by evidence of testamentary intent,[89] the South Australian courts have since validated unattested wills so consistently, as Langbein comments, as to have had the effect of reducing attestation "from a requirement to an option."[90] As Langbein points out in his 1987 article, the South Australian courts have readily excused total failure of attestation, even in cases in which the testator's noncompliance with the wills act was apparently deliberate.[91] Although "[a]ttestation evidences finality,"[92] as Langbein maintains, so that when the formality is lacking the court must satisfy itself that the want of attestation does not indicate irresolution,[93] proponents have found it easy in practice to satisfy the South Australian courts beyond a reasonable doubt that unattested wills were intended to have testamentary effect.[94]

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89. *See Graham*, 20 S.A. St. R. at 205-06.

90. Langbein, *Harmless Error Rules*, *supra* note 8, at 23.

91. *See id.* at 18-23 (analyzing South Australian case law on failure of attestation); *supra* cases cited note 73.

92. *Id.* at 19.

93. *Id.*

94. *See, e.g.*, Estate of Smith, 38 S.A. St. R. 30 (1985) in which a signed but unattested will was admitted to probate. *Id.* at 31. The testator was 91 years old at the time of her death. *Id.* The printed form on which the testator had written the will provided clear instructions for executing it. *Id.* at 32. The testator presumably was aware of the requirements for due execution, since she had made a properly executed will some years before. *Id.* The court commented, however,

> [I]t must be acknowledged that it is odd that she did not procure the signature of witnesses to the document which I have admitted to probate. She retained her mental faculties until the end. She had a document which told her what to do. She had made an earlier will. One would have thought that she would have remembered something at least of the need for witnesses. On the other hand she was very old and rather secretive. . . .

Id. at 32-33. The court considered it significant that the decedent had regarded the document as sufficiently important to take with her to the hospital and that she had apparently kept it with her valuable papers. *Id.* at 33. The court decided that there was no reasonable doubt of the testator's intent, based on the facts that: (1) the testator was very old; (2) she took the will (along with other valuable papers) to the hospital; (3) she told her grandniece that she had written a will; and (4) she provided for those for whom such provision was normal. *Id.* Langbein points out that *Smith* does not suggest a reasonable doubt standard equivalent to that applied in criminal cases, *see* Langbein, *Harmless Error Rules*, *supra* note 8, at 35 (suggesting that, in applying § 12(2), the South Australian courts have "fashion[ed] an unconventional meaning for the [reasonable doubt] standard"). *Cf.* Estate of Kelly, 32 S.A. St. R. 413, *aff'd*, 34 S.A. St. R. 370 (1983) in which the first-instance judge concluded that he had "no reasonable doubt"

In *Estate of Hodge*,[95] the South Australian court validated a will that the testator had deliberately left unattested. In *Hodge*, the testator had written the will in the back of a booklet that he had obtained from a "firm of funeral directors."[96] The testator's daughter, the sole beneficiary under the will, testified that she had warned him that a will must be attested by two witnesses,[97] but that the testator had replied that "he did not want to be bothered with that, it was perfectly plain, he had signed the document, he had dated it and all she had to do was take it to the bank manager and the bank account would be transferred to her. . . ."[98] Despite the testator's willful noncompliance with the attestation requirement, the court professed itself perfectly satisfied by the evidence that the testator had intended the writing to be his will.[99]

Interestingly, Langbein questions the result in *Hodge* on the ground that "[i]t is hard to say [that] a testator who deliberately sets out to breach the governing formalities . . . nevertheless intended the instrument to be effective as his will."[100] He suggests that if the evidence had shown that an "authoritative figure such as his lawyer" had warned the testator that attestation was required to make a will valid, the testator's deliberate failure to have the will attested might in that case have prevented application of the section 12(2) dispensing power to save the will.[101] It is unclear, however, why Langbein considers the deliberateness of the noncompliance relevant under a *functional* approach if there is truly no issue as to the testator's intention. While the testator in *Hodge* perhaps had no intention to make a proper will, *i.e.*, to comply with the wills act, the evidence seems unequivocal that he intended the document he did prepare to be enforced.

In *Estate of Kelly*,[102] the South Australian court applied the dispensing power to save an unattested will that had been prepared by a physician who comparatively late in life had studied law and been admitted to practice.[103] The will was prepared by the testator in Oc-

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respecting the testator's intentions, while conceding that the evidence was not "entirely clear." *Id.* at 417-18. For discussion of standard of proof under § 12(2), see *id.* at 33-37 and *infra* text accompanying notes 714-31.

95. 40 S.A. St. R. 398, 398 (1986).

96. *Id.*

97. *Id.* at 399.

98. *Id.*

99. *Id.* at 400.

100. Langbein, *Harmless Error Rules*, *supra* note 8, at 20.

101. *Id.*

102. 32 S.A. St. R. 413, *aff'd*, 34 S.A. St. R. 370 (1983).

103. *Id.* at 414, 418, *aff'd*, 34 S.A. St. R. at 372.

tober 1980 and was discovered by the testator's housekeeper in the back of a notebook that he had given to her for her household use.[104] The will, though unattested and framed in "somewhat cryptical language," was signed and dated.[105] Following the signature and date were the words, "Written as I have considerable cardiac pain and irregularity at time."[106] The evidence showed that between 1977 and the testator's death in 1981, he had prepared various testamentary documents, none of which were duly executed.[107] The first-instance judge determined that the October 1980 will was intended by the testator to be his final will, though "[t]he evidence is not entirely clear-cut and not entirely one way,"[108] since there was testimony tending to show that the testator believed that an earlier will was still in effect.[109]

On appeal, the court dismissed the appellant's argument that the testator had intended the document to be a conditional will that lapsed after his recovery from the illness that prompted it.[110] Although the facts suggested that the testator may actually have forgotten about the "will" by the time he gave the notebook to his housekeeper and that he believed on the day of his death that another, earlier will was still in effect,[111] the three-judge panel agreed with the first-instance court that *at the time the testator made the will*, he had intended for it to take effect.[112] In reaching this result, Judge Bollen remarked that the application of section 12(2) in previous cases had been "liberal and pragmatic, perhaps rather '*ad hoc*'" and that he saw "no fault in this approach," since the section was meant to have a "very significant practical effect" and was "a work-a-day provision."[113]

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104. *Id.* at 416, *aff'd*, 34 S.A. St. R. at 372-73, 388.

105. *Id.* at 416, *aff'd*, 34 S.A. St. R. at 372-73.

106. *Id.* at 416, *aff'd*, 34 S.A. St. R. at 374.

107. *See id.* at 414-17, *aff'd*, 34 S.A. St. R. at 374-77.

108. *Id.* at 417-18, *aff'd*, 34 S.A. St. R. at 377-78.

109. *Id.*

110. *Kelly*, 34 S.A. St. R. at 383 (Zelling, J.).

111. *See Kelly*, 32 S.A. St. R. at 417-18, *aff'd*, 34 S.A. St. R. at 393 (Bollen, J.).

112. *Kelly*, 34 S.A. St. R. at 382-83 (Zelling, J.); *id.* at 391-92 (Bollen, J.). The appellant argued that the proponent had failed to establish that the testator's intention that the document constitute his will had continued to his death. *Kelly*, 32 S.A. St. R. at 417-18; 34 S.A. St. R. at 382. The first-instance judge concluded that the only requirement under § 12(2) was the usual one of testamentary intent at the time of execution, *id.*, and the panel on appeal agreed. *Kelly*, 34 S.A. St. R. at 382-83, 391-92.

113. *Kelly*, 34 S.A. St. R. at 389 (Bollen, J.). *But see id.* at 380 (Zelling, J., stating that when he wrote the report that was the basis for § 12(2), he had no idea that the section, which was based on one of his ideas, would produce the amount of case law that it has).

Langbein characterizes *Kelly* as a hard case.[114] He argues that the handwritten document was most likely intended by the testator to be a conditional will, especially since the testator had had legal training and had not re-executed the will after the medical emergency subsided.[115] Langbein considers the *Kelly* decision particularly dubious in light of the "reasonable doubt" standard required by section 12(2) for application of the dispensing power.[116] "To say that *Kelly* is at best a close case is to call into question whether it could be correctly decided on so high a standard of proof."[117]

The State of Western Australia, which has enacted legislation modelled upon section 12(2),[118] applied its harmless error rule to save an unattested will in *Estate of Crossley*.[119] In that case, the testator's daughter testified that her father had been an astute businessman who would have known the requirements for executing a will.[120] The court concluded that the testator had in fact been aware of the attestation requirement.[121] "Such awareness, however, and failure to comply with the requirements [does] not result in the application of the section being inappropriate."[122] The court was satisfied beyond any reasonable doubt that the testator had intended the document to be his will.[123]

c. New Uniform Probate Code Section 2-503

Revised UPC section 2-502(a) minimizes the formalities for due execution of an attested will.[124] Section 2-502(b) incorporates the pro-

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114. Langbein, *Harmless Error Rules*, *supra* note 8, at 20-21, 33; *cf. Kelly*, 34 S.A. St. R. at 384 (Wells, J., stating that the case "has caused me considerable anxiety" but concluding that the court should not interfere with the opinion of the trial judge).

115. Langbein, *Harmless Error Rules*, *supra* note 8, at 20-21. Langbein points out that

> [w]hen a legally trained testator recites in the defectively executed instrument that he is making it on account of a medical emergency, his subsequent failure to procure evidence of attestation once events allow it is consistent with the view that it was intended at the time of its making to be provisional. Dr. Kelly's document is therefore open to interpretation as a conditional will, intended to take effect if he had died of the immediate peril, but allowed to lapse when not re-executed with Wills Act formality after the passing of the peril.

Id. at 21.

116. *Id.*

117. *Id.*

118. For discussion of Western Australia's version of the dispensing power, see Miller, *supra* note 3, at 323-35.

119. 1989 W.A.L.R. 227.

120. *Id.* at 230.

121. *Id.* at 231.

122. *Id.*

123. *Id.* at 232.

124. *See* UNIF. PROB. CODE § 2-502(a) (1990); *supra* notes 76-78 and accompanying text.

vision for unattested holographic wills formerly set out in section 2-503.[125] Applying Langbein's analysis,[126] a functional construction of the 1990 UPC wills formalities thus indicates that the drafters devalued the intent-verifying, authenticating, channeling, and protective purposes served by the attestation requirement,[127] since unattested holographic wills are permitted. The comment supports this interpretation.[128] Section 2-502(b) should therefore permit liberal application of the dispensing power to unattested wills.

Applying the section 2-503 harmless error rule to an unattested document that does not meet the UPC holographic will requirements raises several interesting characterization problems. If the unattested document is at least partly in the testator's handwriting, as in the case of a will handwritten on a will form, a threshold question would be whether the "material" provisions (including the signature) are entirely handwritten. If so, the document would be a valid holographic will.[129] If not, the document could be construed as: (1) an unattested will that the testator nevertheless intended to have testamentary effect, as in the *Kelly* case in South Australia;[130] (2) an attempted but bungled holographic will which, due to the testator's ignorance or inadvertence, fails to meet the section 2-502(b) requirement that all material provisions be handwritten by the testator;[131] or (3) an unexecuted draft never intended to take effect. To determine whether such a document was intended to be a will, the court might presumably consider the proportion of handwritten material to printed or typed material. The court might likewise consider where the handwriting appears in relation to the printed or typed material. For example, if the handwriting appears only in the blanks on the will form designed to be filled in by the testator, this juxtaposition suggests that the

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For discussion of the UPC attested will provision, see Miller, *supra* note 3, at 208-11; for discussion of the UPC's "minimalist" approach to the formalities, see *id.* at 289-90.

125. *Compare* UNIF. PROB. CODE § 2-502(b) (1990) *with* UNIF. PROB. CODE § 2-503 (1969).

126. For discussion of Langbein's analysis, see Miller, *supra* note 3, at 302-11.

127. For discussion of the wills act functions or policies, see *id.* at 258-74; for discussion of wills act functions and the attestation requirement, see *id.* at 262-63 n.496 (intent-verifying function); *id.* at 267 n.506 (authenticating function); *id.* at 269-71 (channeling function); *id.* at 273-74 (protective function).

128. UNIF. PROB. CODE § 2-503 comment (1990).

129. For discussion of the UPC holographic will requirements, see Miller, *supra* note 3, at 218-21.

130. *Kelly*, 32 S.A. St. R. at 413, *aff'd*, 34 S.A. St. R. at 370; for discussion, see *supra* notes 102-13.

131. For discussion of the UPC holographic wills requirements, see Miller, *supra* note 3, at 218-21.

testator intended to execute a form will. If the handwriting consists of interlineations or alterations to typed or printed material, this suggests that the document was merely a draft.[132]

Determining testamentary intent in order to determine whether the harmless error rule should be applied is likely to be more complicated in UPC jurisdictions than in jurisdictions which, like South Australia,[133] recognize only attested wills, because total failure of attestation under the UPC may simply signify that the testator intended to execute a holographic will.[134] According to functional analysis, defective compliance with the purely "evidentiary" handwriting requirement does not raise the issue of intent.[135] Therefore, if a partly handwritten document that does not meet the "material provisions" standard of the UPC is determined to be unambiguously testamentary on its face, logic would seem to suggest that its proponents need not adduce extrinsic evidence of testamentary intent.[136] Section 2-503 thus introduces an additional level of complexity to the familiar problem of distinguishing an intended holographic will from nontestamentary writings.[137]

The drafters of section 2-503 seem to have accepted Langbein's conclusion that the application of a broad dispensing power must for all practical purposes ultimately reduce the attestation requirement to an option.[138] The drafters note that "[t]he South Australian and Israeli courts 'lightly excuse' breaches of the attestation require-

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132. *See* Miller, *supra* note 3, at 215-18 (discussing factors considered by courts in determining compliance with the handwriting requirement in non-UPC jurisdictions under a surplusage theory); *id.* at 218-21 (discussing factors considered by courts in determining compliance with the handwriting requirement under the UPC holographic wills provision).

133. *See* South Australian Wills Act § 8, *supra* note 43.

134. *See* Langbein, *Harmless Error Rules*, *supra* note 8, at 22, 47 n.234 (discussing application of a dispensing power in Manitoba, a jurisdiction that recognizes holographic wills).

135. Miller, *supra* note 3, at 277-80; *id.* at 287-88 (discussing the view of commentators that the handwriting requirement serves only the authenticating (evidentiary) function and arguing that the requirement may also serve the protective function).

136. Unambiguously testamentary documents that meet the holographic will requirements are enforced as such, without any need for the court to consider whether the document was executed with testamentary intent. *Id.* at 280. If the document facially complies with the requirements but is unambiguously nontestamentary, the court will refuse to enforced it. For discussion, see *id.* at 280-82. If, however, a document that complies with the holographic will requirements is ambiguous on its face, courts may admit extrinsic evidence to establish the decedent's intentions. *Id.* at 282. For discussion of cases, see *id.* at 282-86.

137. For discussion of cases distinguishing holographic wills from informal documents such as letters or memoranda, see Miller, *supra* note 3, at 274-86.

138. *See* UNIF. PROB. CODE § 2-503 comment (1990) (citing Langbein, *Harmless Error Rules*, *supra* note 8, at 23).

ments."[139] Such a liberal application of a broad harmless error rule seemingly makes recognition of the holographic form superfluous, since its effect (as seen in South Australia) is to eliminate attestation as a meaningful substantive requirement for a valid will.[140] Application of a broad dispensing power must in any case inevitably blur the distinction between the attested and the holographic forms. New section 2-503 is therefore likely to achieve indirectly the objective that Lindgren recommends be achieved directly through a "two-tiered" wills act that would abolish attestation as a *substantive* requirement for a valid will.[141]

Lindgren argues that attestation is *always* dispensable, despite its utility in creating a document readily identifiable as a will and in ensuring an unequivocal manifestation of testamentary intent.[142] The ease with which the South Australian courts have dispensed with the attestation requirement tends to support Lindgren's argument. This result should not surprise, since holographic wills and the various will substitutes routinely are given effect without either attestation or extrinsic evidence of intent.[143]

3. Partial Failure of Attestation

a. Langbein's Substantial Compliance Doctrine

Langbein suggests that partial failure of attestation, such as "attestation by two witnesses where the statute calls for three, or by one where it asks for two," ought to be remediable even under wills acts that do not permit unattested holographic wills.[144] Langbein considers partial failure of attestation a less "fundamental" defect than total failure of attestation. According to Langbein, partial failure of attestation goes to the quantity, rather than the quality, of the evidence of testamentary intent,[145] since in such cases there has been at least

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139. *Id.*

140. *See* Langbein, *Harmless Error Rules*, *supra* note 8, at 21-22; *cf.* Lindgren, *supra* note 19, at 569-73 (proposing that attestation be abolished as a substantive requirement for due execution).

141. *See* Lindgren, *supra* note 19, at 546-47, 569-73.

142. *See id.* at 544-47, 560-73.

143. *See* Langbein, *Substantial Compliance*, *supra* note 8, at 503-12; UNIF. PROB. CODE § 2-503 comment (1990). The comment states that "[Section 2-503] reduces the tension between holographic wills and the two witness requirement for attested wills under Section 2-502(a)." *Id.* Section 2-503 extends to will formalities the harmless error principle "that has long been applied to defective compliance with the formal requirements for nonprobate transfers." *Id.*

144. Langbein, *Substantial Compliance*, *supra* note 8, at 521-22.

145. *Id.* at 522; *cf.* Langbein, *Harmless Error Rules*, *supra* note 8, at 22 (discussing partial attestation cases in South Australia).

one witness to the attempted execution of the will. He argues that in most cases involving partial attestation, other evidence of deliberation and finality of intent will readily establish that the failure to obtain the requisite number of witnesses was harmless to the statutory purpose.[146] In ranking the wills act formalities, he therefore concludes that failing to obtain the required number of witnesses is significantly less serious than failing to have the will witnessed at all.[147]

b. South Australia's Dispensing Power Provision

According to Langbein's 1987 article, the South Australian courts have applied the section 12(2) dispensing power to validate partially attested wills in several unreported cases.[148] Langbein discusses one such case, in which the testator had failed to obtain two witnesses due to an apparently widely held (but mistaken) belief that attestation by a justice of the peace, with no other witness, satisfies the South Australian attestation requirement.[149] These circumstances are peculiarly indicative of testamentary intent, despite the partial failure of attestation, because they evidence an unequivocal attempt to have the will executed, despite the testator's "mistaken reliance" on the incorrect belief of certain South Australian justices of the peace that their attestation standing alone satisfies the wills act.[150]

In *Estate of Slavinskyj*,[151] the court applied section 12(2) to a partially attested will that had been handwritten by the testator in "semiliterate" Russian on a plasterboard wall in his home.[152] The testator handwrote the will in the joint presence of two of his neighbors, explaining that he was writing his will because he was going into the hospital and wished to leave all of his estate to two nieces in the Soviet Union.[153] He then placed an envelope on which he had typed the address of one of his nieces in "a slit in the wall alongside the writing which he had written in the presence of the two witnesses."[154] One of the witnesses placed his signature on the wall as requested by the testator; the other, however, was illiterate and did not sign, although the testator asked her to do so.[155] The testator died in the

146. Langbein, *Substantial Compliance*, *supra* note 8, at 521-22.
147. *See id.*
148. Langbein, *Harmless Error Rules*, *supra* note 8, at 22.
149. *Id.* (discussing Estate of Phillips, No. 263 of 1983 (S.A. Sup. Ct. Feb. 13, 1984)).
150. *Id.*
151. 53 S.A. St. R. 221 (1988).
152. *Id.* at 228-29.
153. *Id.* at 228.
154. *Id.*
155. *Id.*

hospital without ever returning to his home.[156] Judge Legoe concluded that the writing on the wall was a partially attested document to which section 12(2) applied[157] and that this writing (in conjunction with the envelope) was a partially attested will embodying the testamentary intentions of the decedent.[158] Judge Legoe stated that "[in] cases of partial attestation this Court has experienced little difficulty in finding that the required higher standard of proof has been satisfied even where a single signature has been placed on a single document with the requisite animus testandi and even though the departure from the requirements of formal validity dictated by the Act may be quite substantial. . . ."[159]

c. New Uniform Probate Code Section 2-503

Consistent with the South Australian provision, UPC section 2-503 would permit the proponent of a partially attested will to establish by clear and convincing evidence that despite the partial attestation, the testator nevertheless executed the will with testamentary intent.[160]

C. *Application of the Rules to Holographic Wills*

Some of the issues raised by the application of a harmless error rule in a jurisdiction that recognizes unattested holographic wills are considered in the previous section.[161] According to Langbein, these issues arise because of a discrepancy between the legislative policies underlying recognition of attested and holographic wills.[162] Langbein and other proponents of functional analysis have argued that the holographic form is not designed to serve the intent-verifying and channeling functions served by attested wills.[163] Compliance with the attesta-

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156. *Id.*

157. *See id.* at 229-31.

158. *Id.* at 232-33.

159. *Id.* at 233 (citing *Graham*, 20 S.A. St. R. at 198, 205).

> There is no reasonable doubt that the deceased intended the writing on the wall and the envelope combined with the writing to constitute his last will and testament. This is a strongly compelling circumstance on the facts as established. The ceremonial calling in of the neighbours and announcements made to them, the placing of the envelope in the slit in the wall, all truly represented these intentions and made permanent his wishes in that regard.

Id. at 233-34.

160. *See* UNIF. PROB. CODE § 2-503 comment (1990) (suggesting that the measure may be freely applied to breaches of the attestation requirement).

161. For discussion, see *supra* notes 80-88 and accompanying text.

162. Langbein, *Substantial Compliance*, *supra* note 8, at 498, 521.

163. For discussion, see Miller, *supra* note 3, at 274-80.

tion requirements calls for a "virtually unmistakable testamentary act,"[164] and many common will substitutes require as a practical matter a relatively public, purposive act indicating the transferor's intent to give the disposition legal effect.[165] Compliance with holographic formality, on the other hand, does not require an objectively verifiable act or "ritual" unequivocally identifying the document as a will or serving the "cautionary" purpose of inducing the drafter to give careful consideration to the consequences of the disposition.[166]

Instead "[t]he gist of holographic formality is to dispense with attestation when the testator handwrites the will."[167] Langbein and other advocates of functional analysis have therefore generally agreed that holographic formality is "almost exclusively justifiable in terms of the evidentiary [authenticating] function."[168] This argument is supported by many cases in which courts have given effect to dispositions set out in holographic documents (such as letters or apparently informal memoranda) because the language used by the testator seemed to indicate testamentary intent, even though the writing enforced as a "will" appeared to have some purpose or purposes other than or in addition to communicating the testator's wishes respecting the disposition of property at death.[169] In many of these instances, it appears that the inclusion of testamentary language was an afterthought rather than the testator's primary purpose in preparing the writing.[170]

1. Langbein's Substantial Compliance Doctrine

As previously discussed, Langbein argues that recognition of the holographic form implies legislative disregard for the intent-verifying,

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164. Langbein, *Substantial Compliance*, *supra* note 8, at 494.

165. *See* Langbein, *Nonprobate Revolution*, *supra* note 5, at 1110-13, 1131-32 (discussing the various types of common will substitutes and the fact that most of these devices exhibit "alternative formality" serving the purposes of requirements of transfer); Langbein, *Substantial Compliance*, *supra* note 8, at 503-09 (describing some of the various will substitutes). *Cf.* Miller, *supra* note 3, at 180-85 (discussing the will substitutes).

166. Miller, *supra* note 3, at 276-80.

167. Langbein, *Harmless Error Rules*, *supra* note 8, at 21.

168. Gulliver & Tilson, *supra* note 34, at 13. For discussion of the functions served by holographic formality, see Miller, *supra* note 3, at 274-89.

169. Miller, *supra* note 3, at 282-86 (discussion of cases dealing with issue of when informal documents such as letters or memoranda are enforceable as holographic wills); *see, e.g.*, Estate of Blake, 120 Ariz. 552, 587 P.2d 271 (Ariz. Ct. App. 1978) (enforcing postscript to "thank you" letter as will); *In re* Button's Estate, 209 Cal. 325, 287 P. 964 (1930) (holding that testamentary language in lengthy letter written on day decedent committed suicide could be enforced as will); *In re* Kimmel's Estate, 278 Pa. 435, 123 A.2d 405 (1924) (enforcing testamentary language in rambling, semi-literate letter from decedent to his sons).

170. For discussion of relevant cases, see Miller, *supra* note 3, at 282-86.

channeling, and protective purposes fulfilled by attestation.[171] He therefore concludes that, by implication, recognition of the holographic form implies legislative tolerance for the increased burden on the court system that is necessarily entailed in requiring probate courts to give effect to testamentary language embodied in seemingly informal documents.[172] As we have seen, Langbein seems to maintain that legislative recognition of the holographic form actually undercuts the purposes served by the attestation requirement, which would otherwise limit the range of documents that could be admitted to probate to those which have been duly signed and attested.[173] From the standpoint of functional analysis, the legislative decision to authorize holographic wills represents a "fundamental" policy decision.[174] For this reason, whether the jurisdiction permits holographic wills "is a point of real consequence in the operation of the substantial compliance doctrine"[175] in those cases in which the testator has failed to have the document attested.[176]

In consequence, as previously discussed,[177] Langbein apparently considers that failure of attestation in a jurisdiction that does not permit unattested holographic wills would impose a severe burden on the proponent, who would have to satisfy the court that the testator intended the unattested document to be enforced despite the testator's noncompliance with the major formality distinguishing a will.[178] Indeed, Langbein goes so far as to suggest that application of the substantial compliance doctrine would be foreclosed in cases of total failure of attestation.[179] In contrast, a court in a jurisdiction that recognizes holographic wills would presumably apply the substantial compliance doctrine only to those unattested documents that do not meet that jurisdiction's requirements for a valid holographic will.[180] As remarked, such an application would appear to require several stages of analysis.[181]

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171. Langbein, *Substantial Compliance*, *supra* note 8, at 498, 521; for discussion, see *supra* notes 80-88 and accompanying text.

172. *See* Miller, *supra* note 3, at 278.

173. *See* Langbein, *Substantial Compliance*, *supra* note 8, at 498, 521.

174. *Id.* at 498; for quotation, see *supra* text accompanying note 85.

175. *Id.*

176. *Id.* at 520-21.

177. For discussion, see *supra* notes 80-88 and accompanying text.

178. Langbein, *Substantial Compliance*, *supra* note 8, at 521.

179. *Id.*

180. *See* Langbein, *Harmless Error Rules*, *supra* note 8, at 21-22, 47 n.234 (discussing application of the dispensing power in Manitoba, a jurisdiction that permits holographic wills).

181. For discussion, see *supra* text accompanying notes 129-34.

The first step for a court applying substantial compliance to an unattested will would be determination whether the unattested document is in fact a valid holographic will. As we have seen, courts have traditionally been satisfied with something less than strict compliance with the holographic will requirements even in jurisdictions that require holographic wills to be entirely in the testator's handwriting.[182] In some of these jurisdictions and in all jurisdictions with wills acts modelled on the UPC "surplusage" provision,[183] a threshold question in determining whether a document may be enforced as a holographic will is whether the signature and "material" provisions of the disposition are handwritten.[184] Application of the substantial compliance doctrine to an unattested document would not be required in a jurisdiction that has adopted or enacted the liberal "surplusage" approach unless the document falls outside the allowable range of variation from the strict statutory requirements.

If, however, some of the provisions deemed by the court to be "material" are not in the testator's handwriting, the unattested document does not meet the juristiction's holographic will requirements, and the substantial compliance doctrine comes into play. (An unattested will obviously violates no fundamental legislative policy if it meets the requirements for a valid holographic will.) Langbein considers that one major consequence of applying the substantial compliance doctrine to unattested wills that do not strictly comply with the requirements for a valid holographic will would be to eliminate the "large and ugly case law voiding wills which contain some innocuous printed matter" in jurisdictions that require holographic wills to be entirely handwritten.[185] Applying the doctrine "would permit the court to conclude . . . that the handwritten portions provided a large enough handwriting sample to satisfy the evidentiary purpose of the handwriting formality."[186] In jurisdictions that require only the "material" provisions of the will to be handwritten, the court would focus not on whether the

182. Miller, *supra* note 3, at 213-18 (discussing application of the intent and surplusage theories to traditional holographic wills provisions).

183. UNIF. PROB. CODE. § 2-503 (1969). Bird describes this UPC section as "a codification of the surplusage theory" approach. Bird, *Sleight of Handwriting: The Holographic Will in California*, 32 HASTINGS L.J. 605, 629 (1981). For discussion of this provision, see Miller, *supra* note 3, at 218-21.

184. Miller, *supra* note 3, at 219-20.

185. Langbein, *Substantial Compliance*, *supra* note 8, at 519. For discussion of holographic will provisions requiring the document to be entirely handwritten, see Miller, *supra* note 3, at 209-40.

186. Langbein, *Substantial Compliance*, *supra* note 8, at 519.

typed or printed matter is material to the will, but "whether the remaining handwriting sample is 'material' enough to evidence the genuineness of the document."[187]

Interestingly, Langbein further suggests that if the substantial compliance doctrine were carried to its limits, courts in jurisdictions that permit unattested holographic wills could extend the substantial compliance doctrine to validate "the wholly typed or typed-and-printed will, signed but unwitnessed,"[188] that is, an unattested will containing *no handwriting at all other than the testator's signature.* He reasons that in most legal transactions, the authenticating (evidentiary) function is sufficiently served by a handwritten signature.[189] Based on his assumption that the handwriting requirement for holographic wills in fact serves no other purpose than to establish the genuineness of the document, Langbein suggests that a handwritten signature might be considered sufficient under a functional harmless error rule to authenticate an unattested document once the court determines that the signature is the testator's.[190] Whereas an unattested document would rarely if ever be salvageable under a substantial compliance rule in a jurisdiction that does not permit holographic wills (because such a document violates fundamental wills act policies[191]), an unattested document would be salvageable in a jurisdiction that permits unattested holographic documents if the signature were authenticated, even in a case in which the testator has complied with the requirements for a valid holographic or a valid attested will.[192] Langbein seems to suggest that in applying the substantial compliance doctrine to such a docu-

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187. *Id.* at 519-20.

188. *Id.* at 520.

> The really difficult question is whether this analysis can be carried to its natural limit: the wholly typed or typed-and-printed will, signed but unwitnessed. Such instruments are routine in transfers effected by will substitutes . . . and they are virtually never challenged for want of genuineness, that is, forgery. The substantial compliance doctrine would achieve parity for wills if the proponents were permitted to prove that in the particular circumstances the signature constituted sufficient proof of genuineness. A signed, typewritten will may be better evidence of testamentary design than a fully handwritten letter of the *Kimmel* variety. Where the genuineness of a signed-but-typed will is contested, it should be open to the proponents in holograph jurisdictions to prove that the evidentiary purpose of the handwriting requirement has been otherwise achieved.

Id.

189. *Id.*

190. *Id.*

191. *Id.* at 498, 521. For discussion, see *supra* notes 80-90 and accompanying text.

192. Langbein, *Substantial Compliance*, *supra* note 8, at 520.

ment, the *only* issue would be whether the evidentiary function of handwriting has been otherwise achieved,[193] because the decision to permit unattested wills reflects a deliberate decision to leave the channeling[194] and intent-verifying[195] functions of formality minimally served.[196]

One result of Langbein's functional construction of the wills act requirements in a holographic jurisdiction would be to effectively eliminate any meaningful distinction between holographic and attested wills. Presumably, both total failure of attestation and total failure to comply with the handwriting requirement would be considered equally harmless to the wills act policies under a rule of functional substantial compliance in any case in which the genuineness of the document can be established. Of course, the court would have to address the issue of testamentary intent as a threshold question in every instance in which intent is not unambiguously expressed on the face of the document.[197] As the case law shows, even strict compliance with the requirements for a holographic will does not inevitably resolve this issue.[198]

Langbein argues that permitting unattested but signed wills to be deemed in substantial compliance with the wills act brings the wills acts requirements into line with the requirements for will substitutes.[199] He points out that will substitutes are typically executed on

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193. *See id.*

194. For discussion of the channeling function served by compliance with the requirements for an attested will, see Miller, *supra* note 3, at 269-71; for comparison to holographic wills, see *id.* at 274-80.

195. For discussion of the intent-verifying function served by compliance with the requirements for an attested will, see *id.* at 259-65; for comparison to holographic wills, see *id.* at 274-80.

196. Langbein, *Substantial Compliance*, *supra* note 8, at 520.

197. Miller, *supra* note 3, at 280. For discussion of cases holding that certain documents meeting the holographic wills requirements were unambiguously testamentary or unambiguously nontestamentary, see *id.* at 281-82.

198. For discussion of cases in holographic jurisdictions addressing the issue of testamentary intent with respect to ambiguous documents that meet the requirements of valid holographic wills, see *id.* at 282-86.

199. Langbein, *Substantial Compliance*, *supra* note 8, at 520; *cf.* Lindgren, *supra* note 19, at 556-57; Langbein, *Harmless Error Rules*, *supra* note 8, at 52; UNIF. PROB. CODE § 2-503 comment (1990) (suggesting that application of dispensing power to unattested will unify probate and nonprobate transfers).

> In devaluing attestation while insisting on signature and writing, the South Australian legislation and case law has brought the South Australian law of wills into a kind of alignment with the American law of will substitutes, that is, with our nonprobate system, where business practice has settled the forms for transfer.

Langbein, *Harmless Error Rules*, *supra* note 8, at 52.

forms that require only the transferor's signature and which are therefore analogous to an unattested but signed, typed or printed will.[200] This point is debatable. Except for the revocable declaration of trust,[201] virtually all of the will substitutes require as a practical matter that the transferor execute a contract with a financial institution, a transaction involving the exchange of consideration as well as the transferor's signature manifesting assent to the bargain. Such third-party beneficiary contracts do not depend only on formalities of transfer to give substance to intention.[202] Moreover, will substitutes, unlike wills, do not require court intervention in order to be effective, with the result that the channeling function[203] is of less importance with respect to will substitutes. The problem with applying substantial compliance or any other harmless error rule to a signed but unattested will is that such a document is the result of the purported testator's unilateral act and does not provide on its face any *unequivocal* evidence of intent that its terms be given final legal effect. The case law in jurisdictions that permit holographic wills effectively illustrates the problems involved in distinguishing intended wills from unexecuted drafts or even apparently random jottings;[204] signature alone, without more, is clearly *not* a reliable marker of finality. For the substantial compliance doctrine (or any other harmless error rule) to be applied to a signed but unattested document that does not meet the requirements of a valid holograph, a probate court must decide in *every instance* whether the testator intended the document to be given effect as a will.

Likewise debatable is Langbein's fundamental point that unattested holographic wills serve no important policy other than the purely evidentiary function of authenticating the document. Jurisdictions that recognize the holographic form permit it only as an *alternative* to witnessed wills,[205] enforceable *only if* all of the provisions to be given effect by the court meet the jurisdiction's handwriting requirement. Functional construction of holographic wills provisions does not compel the conclusion that jurisdictions that recognize such wills "devalue" attestation or the policies served by attestation. Instead, giving testators the option of executing a holographic will may reflect legislative

200. *See* Langbein, *Substantial Compliance*, *supra* note 8, at 520.

201. Miller, *supra* note 3, at 183 n.48, 184 n.53. The declaration of trust in personalty need not be embodied in a signed writing. *Id.* at 183 n.48.

202. *Id.* note 3, at 264-65.

203. For discussion of the channeling function, see *id.* at 269-71 (attested wills); *id.* at 274-86 (attested wills).

204. *Id.* at 282-86.

205. *Id.* at 211-12.

intent to permit a limited exception to the attestation requirement in order to promote flexibility in testation and to protect the occasional testator who is unable or unwilling to procure witnesses.[206] The ability of testators in holographic jurisdictions to execute an unattested holographic will arguably addresses the plight of isolated or dying testators whose circumstances prevent them from obtaining witnesses.[207] Similar considerations prompted the South Australian Law Reform Commission, whose report ultimately led to the enactment of section 12(2), to propose a dispensing power directed toward permitting unattested wills to be given effect under certain circumstances.[208] In addition, the policy of allowing holographic wills makes the execution of a will a private, unilateral act for those testators who would otherwise be subjected to imposition or duress if not permitted to execute wills without the knowledge of interested parties.[209] Although holographic wills provisions may encourage homemade wills that ultimately fail to meet the statutory requirements for a valid will,[210] the provisions promote freedom and flexibility in testation by expanding the range of documents potentially enforceable as wills.

The value of requiring compliance with the handwriting requirement is precisely that holographic wills may be executed under circumstances that may leave some doubt as to their authenticity. To the extent that handwriting reliably indicates genuineness, the handwriting requirement ensures that the probate court will enforce only those testamentary dispositions that it can trace directly to the testator. While it may be true, as Gulliver and Tilson suggest, that a

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206. *Id.* at 287-88.

207. *Id.*

208. South Australian Report, *supra* note 45, at 11.

> 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.

Id. Palk has pointed out that the original reform contemplated by the Law Reform Commission with respect to compliance with the requirement of having the will witnessed was apparently intended to be narrowly limited to testators who were not able to comply. Palk, *supra* note 45, at 392-93. For discussion, see Miller, *supra* note 3, at 312-14.

209. Bird, *supra* note 183, at 609. For discussion, see Miller, *supra* note 3, at 287-88.

210. For discussion of the problem of homemade wills, see Bird, *supra* note 183, at 631-32; *Report of the Justice Committee on Homemade Wills* (1971) (discussing a British proposal to adopt a holographic wills provision).

holographic will "is obtainable by compulsion as easily as a ransom note,"[211] ransom notes are not in fact particularly easy to procure in the ordinary course of events. A signature to a typed or printed document might be far more easily procured by fraud, forgery, or imposition than an entire document handwritten by the purported testator. Although the finality of the testator's intent may not be unequivocally resolved by compliance with the requirements for a holographic will, handwriting the will both induces and evidences deliberation.[212] Even the liberal "surplusage approach" of the UPC's holographic wills provision ensures that all of the "material provisions" of the dispositive scheme — *i.e.*, those provisions that may be enforced as the testator's will — are unequivocally attributable to a *deliberate act* of the testator. To this extent, holographic wills may establish the authenticity of the will more effectively than duly attested wills.[213] In contrast, a wholly typed or printed unattested will raises questions about the authenticity of the dispositive scheme that the testator's compliance with the holographic will requirements would have obviated.

According to Langbein, courts should not apply the substantial compliance doctrine to validate a defective will if application of the doctrine would compromise fundamental policies served by the wills act.[214] In such cases, extrinsic evidence of testamentary intent would normally be insufficient to justify giving effect to the defective document as a will. As mentioned above, Langbein suggests that a wholly typed or printed will could be deemed in substantial compliance with the wills act in a jurisdiction that permits holographic wills, on the theory that an unattested will does not violate any policy served by the wills act in a jurisdiction that accepts the minimal holographic standard of formality. In so doing, Langbein appears to overlook the protective function effectively served by the handwriting requirement. Arguably, handwriting without more is a reliable indicator of genuineness only when there is enough of it. Under a functional standard of substantial compliance, the proponent of a signed but unattested typed or printed will in a holographic jurisdiction presumably ought to have a heavy burden of establishing the authenticity of the entire dispositive plan as well as establishing testamentary intent.

Langbein's discussion of substantial compliance as applied to holographic wills reveals the major weakness of the functional approach:

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211. Gulliver & Tilson, *supra* note 34, at 14.

212. Miller, *supra* note 3, at 264 n.498; Nelson & Starck, *supra* note 19, at 349.

213. Miller, *supra* note 3, at 287.

214. *See* Langbein, *Substantial Compliance*, *supra* note 8, at 515-26.

in contrast to a dispensing power permitting courts to excuse formal defects in a will if testamentary intention is otherwise demonstrated, a judicial doctrine of substantial compliance requires a functional reinterpretation of the wills act.[215] Because application of the substantial compliance doctrine requires statutory construction (however unconventional), the degree to which a particular defect in compliance with the statutory requirements is considered to undermine fundamental wills act policies seemingly must be a central consideration in a court's analysis of whether the doctrine ought to be applied in a particular case.[216]

As articulated in his 1975 article, Langbein's substantial compliance doctrine seems to contemplate that the difficulty for the proponent of meeting the burden of proof — *i.e.*, the *quantity* of evidence required to show testamentary intent — will vary depending on the nature of the defect.[217] If, however, a principle of harmless error is to be recognized at all, application ought arguably to depend solely on whether the proponent can adduce sufficient evidence to establish testamentary intent and authenticity to the satisfaction of the court. Whether the particular defect is considered to undermine some "fundamental" purpose or policy of the wills act seems in practice only marginally relevant to the proponent's ability to prove facts and circumstances that effectively resolve the issues raised by the defect in the will. For example, in a jurisdiction that does not permit unattested holographic wills, a partially attested will may be the consequence of a testator's last-minute decision not to execute the will, while a completely unattested (and therefore, according to Langbein, fundamentally defective) document may be the consequence of the testator's inability, due to infirmity, isolation, or exigent circumstances, to obtain the necessary witnesses rather than of any lack of testamentary intent.[218] In any particular case, the quality and credibility of the evidence showing testamentary intent, not the nature of the defect, should determine the outcome. The more recent South Australian cases applying section 12(2) have

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215. Miller, *supra* note 3, at 305-06.

216. *See* Langbein, *Harmless Error Rules*, *supra* note 8, at 17 (stating that "purposive approach" requires courts to distinguish between an error that impairs the wills act policies and one that does not).

217. *See* Langbein, *Substantial Compliance*, *supra* note 8, at 515-23; Langbein, *Harmless Error Rules*, *supra* note 8, at 17, 52-53 (applying a "purposive interpretation" to South Australia's § 12(2)).

218. For discussion, see *supra* notes 205-10 and accompanying text; Miller, *supra* note 3, at 287-88.

freely applied the dispensing power even to wills containing "fundamental" defects when satisfied by the evidence that the documents were intended to be given effect.

2. South Australia's Dispensing Power Provision

The South Australian courts' application of the section 12(2) dispensing power arguably eliminates the attestation requirement as a substantive requirement for a valid will for all practical purposes.[219] Although South Australia's wills act does not recognize unattested holographic wills,[220] the courts now routinely admit unattested documents to probate.[221] Langbein remarks that the South Australian case law implicitly devalues the function of attestation, ranking it as a formality that is generally dispensable.[222] In his 1987 review of the South Australian cases, Langbein seems to approve the results achieved by the courts under section 12(2).[223] Langbein suggests that the need for a dispensing power in South Australia is largely due to the fact that South Australia does not authorize holographic wills.[224] Manitoba, which has enacted a broad dispensing power provision inspired by South Australia's section 12(2),[225] does recognize the holographic form,[226] with the result that many cases that would evoke the dispensing power in South Australia are resolvable under the provision for holographic wills.[227]

3. New Uniform Probate Code Section 2-503

The language of the UPC's holographic wills provision frames the handwriting requirement in terms of an exception to the general requirement that every will be in writing, signed, and attested.[228] The

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219. *Cf.* Lindgren, *supra* note 19, at 542, 569.

220. *See* South Australian Wills Act § 8, *supra* note 43; Langbein, *Harmless Error Rules*, *supra* note 8, at 19, 22.

221. Langbein, *Harmless Error Rules*, *supra* note 8, at 23, 52; UNIF. PROB. CODE § 2-503 comment (1990) (stating that South Australian courts "lightly" excuse breaches of the attestation requirement).

222. Langbein, *Harmless Error Rules*, *supra* note 8, at 23, 52-53.

223. *See id.* at 52-53 (attestation makes "modest contribution," primarily protective, to wills act policies, but most people do not need protecting and most legal transactions do not require it).

224. *Id.* at 21-22.

225. The Wills Act, 1982-83-84 MAN. REV. STAT. ch. 31, § 23 (1983), Cap. W150 (1983) [hereinafter Manitoba Wills Act] (quoted in Miller, *supra* note 3, at 321 n.800). For discussion of the Manitoba provision, see Miller, *supra* note 3, at 319-23.

226. Manitoba Wills Act, *supra* note 225, § 23, Cap. W150.

227. Langbein, *Harmless Error Rules*, *supra* note 8, at 22, 47 n.234.

228. *See* UNIF. PROB. CODE § 2-503 (1990).

revised version of article 2 moves the formal requirements for due execution of a holographic will from section 2-503 (the new dispensing power provision) to section 2-502(b),[229] so that section 2-502 now governs wills formalities for both holographic and ordinary attested wills.[230]

The UPC standard for a holographic will requires only that the testator sign the will and write by hand all of the material provisions.[231] The comment to section 2-502(b) states that a holographic will executed on a printed will form is valid "if the material provisions of the devises are handwritten."[232] New section 2-502(c) expressly allows proponents to establish testamentary intent through "extrinsic evidence, including for holographic wills the printed, typed, or stamped portions of the form,"[233] *i.e.*, portions that are not in the testator's handwriting, when the will is formally valid. A possible, if strained, construction of section 2-502(c) might permit the proponent of an unattested holographic will executed on a will form to prove that the drafter intended the nonhandwritten portions of the form to be incorporated into the will, and therefore enforced, a result that would be consistent with the Arizona court's interpretation of its version of the present UPC holographic wills provision.[234]

Since the UPC permits both attested and holographic wills, and sets a *de minimis* standard of formality for both,[235] Langbein would presumably argue that functional construction of the UPC provisions indicates a "devaluation" of the attestation requirement. In consequence, failure of attestation in a UPC jurisdiction would be harmless to the purposes of the wills act and therefore readily curable through evidence of testamentary intent. For this reason, even if courts adopt the functional interpretation of the appropriate scope of a dispensing power that is incorporated in the comment to section 2-503, section 2-503 would presumably permit liberal application of the dispensing

229. *Id.* § 2-502(b).

230. *Id.* § 2-502 comment. The new holographic will provision states: "A will that does not comply with subsection (a) is valid as a holographic will, whether or not witnessed, if the signature and the material provisions are in the handwriting of the testator." *Id.*

231. *Id.* § 2-502(b). "This subsection authorizes holographic wills. It enables a testator to write his own will in his own handwriting. There need be no witnesses. The only requirement is that the signature and the material provisions of the will be in the testator's handwriting." *Id.*

232. *Id.* § 2-502(b) comment.

233. *Id.*

234. *See* Muder v. Muder, 159 Ariz. 173, 765 P.2d 997 (1988). For discussion of this case, see Miller, *supra* note 3, at 220-21, 235-36.

235. Miller, *supra* note 3, at 290.

power to unattested wills.[236] Furthermore, some execution defects that would require application of the dispensing power under a wills act that does not permit holographic wills would presumably result under the UPC in the document being enforced as a holographic, rather than an attested will,[237] so that the dispensing power would be expected to come into play only when the document failed to meet the requirements for both attested and holographic wills.

D. *Application of the Rules to Defective Compliance with the Signature Requirement*

1. Unsigned Wills

a. Langbein's Substantial Compliance Doctrine

Langbein identifies signature as the most reliable indicator that a testator intended for a document to have final effect as a will. [238] Indeed, parties to legal transactions universally recognize signature of a document as an implementing act, the usual means by which people signify that the document's terms are complete and intended to be enforced as written. "The signature [on a will] tends to show that the instrument was finally adopted by the testator . . . and to militate against the inference that the writing was merely a preliminary draft, an incomplete disposition, or haphazard scribbling."[239] An unsigned writing may raise unresolvable issues regarding the testator's final intent and the authenticity of the document.

Langbein characterizes signature as "the most fundamental of the Wills Act formalities," the formality that "separates the preliminary draft from the decided last 'will'" and provides "the primary evidence

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236. For discussion of the scope of § 2-503, see *id.* at 339-44.

237. *See* Langbein, *Harmless Error Rules*, *supra* note 8, at 22, 47 n.134.

238. *E.g.*, Langbein, *Substantial Compliance*, *supra* note 8, at 495 (stating that signature requirement shows intention to adopt document as will); *id.* at 518 (stating that signature is formality that distinguishes the final will from the draft); *id.* at 525 (stating that signature is "all but indispensable"); Langbein, *Harmless Error Rules*, *supra* note 8, at 52 (stating that leaving will unsigned raises grievous doubts about finality and genuineness of document; courts excuse failure to sign only in "extraordinary cases"); Langbein, *Crumbling Wills Act*, *supra* note 8, at 1194 (stating that signature as evidentiary and cautionary formality is "all but indispensable"). *Cf.* Gulliver & Tilson, *supra* note 34, at 5-6 (stating that unsigned will does not give impression of being finally executed). For discussion, see Miller, *supra* note 3, at 263 n.497 (discussing intent-verifying function of the signature requirement); *id.* at 267 n.507 (discussing the authenticating function of the signature requirement).

239. Gulliver & Tilson, *supra* note 34, at 5.

of the will's authenticity."[240] Langbein's 1975 article suggests that courts could apply substantial compliance to save an unsigned will only under rare and extreme circumstances.

> The substantial compliance doctrine would *virtually always* follow present law in holding that an unsigned will is no will; a will with the testator's signature omitted does not comply substantially with the Wills Act because it leaves in doubt all the issues on which the proponents bear the burden of proof. . . . *The formality of signature is so purposive that it is rarely possible to serve the purposes of the formality without literal compliance.* . . . Nevertheless, there may be rare cases where it would be appropriate to admit to probate an unsigned will. Consider the testator who publishes the document as his will to his gathered attesting witnesses and takes up his pen and lowers it toward the dotted line when an interloper's bullet or a coronary seizure fells him. *In such unique cases where there is persuasive evidence that the testator's intention to sign the will was final, and only a sudden impediment stayed his hand, the purposes of the Wills Act are satisfied without signature.*[241]

Langbein's analysis of substantial compliance applied to unsigned wills thus seems to identify the point at which a functional interpretation of the wills act, employed as a standard for determining when a formal defect "is harmless to the wills act policies," precludes application of the doctrine. As applied to unsigned wills, substantial compliance has a much narrower scope than a broad dispensing power. As the subsequent discussion will show, the South Australian cases under section 12(2) reveal many combinations of circumstances that the courts have considered sufficient to justify applying section 12(2) to validate an unsigned will. Application of the respective approaches to unsigned wills effectively illustrates the distinction between a judicial doctrine that interprets the wills act requirements functionally in order to enforce wills executed in substantial compliance with the wills act policies, and a statutory dispensing power that permits the courts to disregard the wills act requirements in order to effectuate the testator's intent. In his 1975 article, Langbein states that substantial compliance does not require for its application any specific minimum or threshold level of

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240. Langbein, *Substantial Compliance*, *supra* note 8, at 518; *cf.* Langbein, *Harmless Error Rules*, *supra* note 8, at 52-53 (stating that signature is formality that distinguishes between drafts and wills and is universal requirement of modern legal practice).

241. *Id.* at 518 (emphasis added).

formality to have been achieved.[242] His 1987 article characterizes as a "timid measure" a proposed provision requiring all wills to be in writing and signed as "threshold requirements" for application of the dispensing power.[243] While a dispensing power limited by such "threshold requirements" would unquestionably have a much narrower application than South Australia's broad dispensing power,[244] the substantial compliance doctrine as described in Langbein's 1975 article does not seem *in practice* to have a significantly broader scope. The interloper's bullet/coronary seizure scenario Langbein visualizes as an example of the rare case in which application of the substantial compliance doctrine to an unsigned will would be appropriate sets forth an extraordinary chain of events. Langbein's interloper's bullet/coronary seizure scenario requires not only a showing that the testator was permanently prevented (by death) from signing the will, but also that the will attested by his "gathered witnesses" at the time that the "sudden impediment stayed [the testator's] hand."[245] Whereas a "threshold requirements" approach contemplates liberal validation of signed but unattested wills,[246] the substantial compliance doctrine as originally envisioned by Langbein suggests that total failure of attestation would almost always be considered "fundamental defect" in any jurisdiction that does not permit unattested holographic wills.[247]

Langbein's conclusion that substantial compliance could rarely, if ever, validate an unsigned will is logically compelled by his characterization of the signature requirement as the most important of the intent-verifying (ritual and cautionary)[248] formalities.[249] This characterization, however, fails to take into account the fact that some additional implementing act (*e.g.*, attestation or exchange of consideration between parties to a third party beneficiary contract) normally gives substance to dispositions intended to take effect at death.[250] Cases in

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242. Langbein, *Substantial Compliance*, *supra* note 8, at 513. "The substantial compliance doctrine is a rule neither of maximum nor of minimum formalities. . . ." *Id.*

243. Langbein, *Harmless Error Rules*, *supra* note 8, at 47 (discussing recommendation of British Columbia Report, *supra* note 19).

244. *See* Miller, *supra* note 3, at 337-39 (discussing potential scope of British Columnia's proposed "threshold requirements" provision as compared to broad dispensing power).

245. Langbein, *Substantial Compliance*, *supra* note 8, at 518 (quoted *supra* in text accompanying note 241).

246. Miller, *supra* note 3, at 339.

247. For discussion, see *supra* notes 80-85 and accompanying text.

248. For discussion of the ritual aspect of the intent-verifying function of formality, see Miller, *supra* note 3, at 260-61; for discussion of the cautionary aspect, see *id.* at 261-65.

249. *See supra* note 238.

250. For discussion, see *supra* notes 199-204 and accompanying text; Miller, *supra* note 3, at 264-65. *See generally* Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941) (stating that requirement of consideration for contracts is the distinguishing feature serving to evidence

jurisdictions that permit holographic wills demonstrate that signature without more is often inconclusive to establish intent to implement a disposition.[251] Thus, Langbein's characterization of signature as a generally indispensable means of establishing finality of intent overlooks the fact that in practice it is *signature accompanied by some other implementing act manifesting intent* that serves to establish a transferor's intent that a donative disposition be given legal effect.

b. South Australia's Dispensing Power Provision

(1) The signature requirement

In his 1975 article, Langbein states that the proponents of an unsigned will would bear an "almost hopeless" burden of proof to establish substantial compliance with the wills act policies, so that such claims would be unlikely to be litigated.[252] In his 1987 article reviewing the South Australian cases under section 12(2), he concludes that the South Australian courts have implicitly adopted a functional (or "purposive") approach to the wills act formalities in applying the dispensing power, with the result that the courts would excuse the testator's failure to sign the will only in "extraordinary circumstances."[253] While dicta in some of the earlier section 12(2) cases suggest that application of the dispensing power to unsigned wills might be foreclosed[254] or foreclosed barring compelling circumstances,[255] the South Australian courts seem ultimately to have determined that the signature requirement is no less dispensable than attestation.[256]

Initially, the second reported case under section 12(2), *Baumanis v. Praulin*,[257] seemed to fulfill the suggestion in *Graham*[258] that the dispensing power could not be applied to save an unattested or unexecuted will.[259] In *Baumanis*, the will was neither attested nor signed;

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the intent of the parties for the transaction to have legal effect and to identify the transaction as a contract).

251. *See* Langbein, *Substantial Compliance*, *supra* note 8, at 520; Miller, *supra* note 3, at 264-65.

252. Langbein, *Substantial Compliance*, *supra* note 8, at 518.

253. Langbein, *Harmless Error Rules*, *supra* note 8, at 52.

254. *See, e.g.*, Baumanis v. Praulin, 25 S.A. St. R. 423 (1980); *Graham*, 20 S.A. St. R. at 205-06.

255. *See, e.g.*, Estate of Blakely, 32 S.A. St. R. 473, 479-80 (1983).

256. *See* Estate of Williams, 36 S.A. St. R. 423, 425 (1984) (King, C.J.).

257. 25 S.A. St. R. 423 (1980).

258. *Graham*, 20 S.A. St. R. at 205-06.

259. *See id.*; for discussion, *see supra* text accompanying notes 68-73.

the will was prepared in accordance with the testator's instructions, but he died before he could execute it. The testator, a patient in a hospital, had asked a clergyman to make his will for him.[260] The clergyman had taken down the testator's instructions and prepared a draft.[261] After the testator had approved the draft, the clergyman took the will away to be typed.[262] The testator reviewed the typed will, but requested two minor alterations.[263] The clergyman wrote the alterations on the typed draft and told the testator that he would re-type the will to incorporate the alterations.[264] The testator died an hour or two later, before the clergyman could return with the freshly typed will.[265]

The South Australian court, in what Langbein considers "an illuminating and fortunate precedent,"[266] refused to admit the unexecuted will to probate under section 12(2),[267] even though the court specifically recognized "that the document . . . represent[ed] what the deceased intended his will to contain and that he intended to sign as his last will and testament a document *in similar form* but with the minor variations."[268] The *Baumanis* court construed the dispensing power provision "to presuppose some form of execution,"[269] citing *Graham* as well as a decision under an Israeli harmless error rule.[270] (The Israeli court had concluded that "signature is the sole basis or indication of the testator's finality of purpose."[271]) The *Baumanis* court noted that "[s]ection 12(2) does not say that a document may be deemed to be a will of the deceased 'notwithstanding that it has not been executed' but 'notwithstanding that it has not been executed *with the formalities required by the Act*'. . . . I would think that some execution is necessary although it need not be execution in the manner prescribed by [the wills act]."[272] While the judge was convinced by the evidence

260. *Graham*, 20 S.A. St. R. at 424.

261. *Id.*

262. *Id.*

263. *Id.* at 425. The testator wanted to add a provision bequesting his books to the Latvian Relief Society and a provision specifically stating that the estate would pay the executor's expenses. *Id.*

264. *Id.*

265. *Id.*

266. Langbein, *Harmless Error Rules*, *supra* note 8, at 23.

267. *Baumanis*, 25 S.A. St. R. at 426.

268. *Id.* at 425 (emphasis added).

269. *Id.*

270. Gitah v. Administrator Gen. of Beer Sheva, Estate 39/70, 76 P.M. 156, 159. *Gitah* and the Israeli rule are discussed in Langbein, *Harmless Error Rules*, *supra* note 8, at 48-51.

271. *Baumanis*, 25 S.A. St. R. at 426 (quoting *Gitah*, 76 P.M. at 156, 159).

272. *Id.* at 425.

that the testator had intended to execute the will as altered,[273] the court did not consider that the facts established that the decedent had intended the *particular document* before the court to constitute his will.[274] The court concluded that "[i]n order to admit [a] document to probate [under section 12(2)] the court must be satisfied . . . that the deceased intended *that document*, not a document in similar form, to be his will."[275]

Although the *Baumanis* court's refusal to apply section 12(2) to an unexecuted will is consistent with the legislative history of the dispensing power provision,[276] its application of section 12(2) on these facts is problematic. According to the court's own account of the evidence, the altered document presented for probate in *Baumanis* incorporated the dispositive scheme that the decedent would have wished the court to implement as his will.[277] Although there was perhaps a possibility that the decedent might have asked the helpful clergyman to make further alterations to the final draft of the document, the court was apparently persuaded that the document set out the general dispositive scheme intended by the decedent.[278] Section 12(2) requires only that the court be satisfied that no *reasonable* doubt exists as to the testator's intent.[279] Even under a stringent interpretation of the reasonable doubt standard, the proponent need not prove that the document was the testator's final will beyond all possibility of dispute. As this discussion will show, subsequent cases under section 12(2) reflect a much more liberal view of the dispensing power as applied to unsigned wills.

Langbein approves the *Baumanis* decision because he considers the results consistent with a "purposive" or functional construction of the South Australian signature requirement.[280] Langbein considers that

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273. *Id.*

274. *Id.* at 426. "The evidence is quite to the contrary. He intended to execute another document in the like terms to the document but with variations which he required." *Id.*

275. *Id.* at 426.

276. *See* Palk, *supra* note 45, at 384-94 (discussing the potentially limited scope of provision as originally proposed). *Cf. Graham*, 20 S.A. St. R. at 205 (stating, in dictum, that § 12(2) probably would not extend to unattested wills or wills as to which there had been noncompliance with the attestation formalities). *See generally* Miller, *supra* note 3, at 311-14 (discussing legislative history of § 12(2)).

277. *Baumanis*, 25 S.A. St. R. at 425-26.

278. *Id.*

279. *See* South Australian Wills Act § 12(2), *supra* note 9.

280. *See* Langbein, *Harmless Error Rules*, *supra* note 8, at 23-24, 52.

the *Baumanis* court appropriately recognized the indispensability of the signature requirement in distinguishing a draft or memorandum from a document intended to be given legal effect.[281]

> Many a testator decides not to execute a will that has been prepared to his instructions. One of the things you can do with a draft will is decide you do not want to use it. Signature is the formality that permits us to distinguish between drafts and wills. Decide such a case the other way and the risk arises that any unsigned draft, any scrap of paper, can be argued to be an intended but unexecuted will.[282]

The problem with applying this reasoning to *Baumanis* is that the evidence in that case points away from the conclusion that the unexecuted will was a mere draft and compellingly suggests that the altered but unexecuted document represented the dying testator's final wishes for the disposition of his estate. If the court had limited application of section 12(2) to the facts of *Baumanis*, the decision could scarcely have been interpreted as precedent for extending the dispensing power to "any scrap of paper."

Langbein's "purposive" reading of the *Baumanis* case raises some interesting questions about the potential scope of a harmless error rule based on a functional interpretation of the formalities. The draft will in *Baumanis* was obviously *not* functionally equivalent to "any unsigned draft" or "any scrap of paper." Indeed, the *Baumanis* facts appear to be only one step removed from Langbein's interloper's bullet/coronary seizure paradigm for application of substantial compliance to validate an unsigned will. The *Baumanis* testator, like the testator in Langbein's example, doubtless did all that could be done under the particular circumstances to prepare to execute his will, though a "sudden impediment stayed his hand."[283] The major difference between the interloper's bullet/coronary seizure paradigm and the *Baumanis* facts is that the testator in Langbein's example dies while actually in the act of attempting to execute his will and immediately after the will has been duly attested, while the testator in *Baumanis* died before he could take any steps to execute the will.

Although the will in *Baumanis* was unattested as well as unsigned, unlike the will in Langbein's interloper's bullet/coronary seizure

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281. *Id.* at 23-24.

282. *Id.*

283. *See* Langbein, *Substantial Compliance*, *supra* note 8, at 518 (quoted *supra* in text accompanying note 241).

scenario,[284] there was credible testimony, which the court in fact believed,[285] that the altered will offered for probate reflected the testator's final intent. The *Baumanis* will therefore arguably did not raise any *unresolvable* issues respecting its authenticity or finality since the court seems to have been persuaded that the testator would have executed the altered and retyped will if he had lived a few hours longer.[286] The testator's failure to comply with the wills act does not seem on the *Baumanis* facts to have violated any fundamental policy that would have been served by due execution. If, as Langbein asserts in his 1975 article, the substantial compliance doctrine does not presuppose any minimum level of formality[287] (or threshold requirements)[288] for its application, the *Baumanis* will, though never actually executed, seemingly ought to fall within the range of documents that could be validated under a functional construction of the wills act.[289]

A troublesome conceptual problem with applying the substantial compliance doctrine to the *Baumanis* facts is that such an application would result in the court's deeming a *totally unexecuted will* in "substantial compliance" with the purposes of the wills act, a result which seems illogical on its face. This apparent conceptual limitation on the scope of the substantial compliance doctrine may not be inherent in Langbein's functional approach, but instead may be the consequence of his perhaps unfortunate selection of the term "substantial compliance" to designate what was essentially intended to be a principle for determining under what circumstances defective compliance with the wills act may be deemed harmless.[290]

(2) Mirror wills/switched signatures

In *Estate of Blakely*,[291] the South Australian court applied the

284. *Id.*

285. *Baumanis*, 25 S.A. St. R. at 425-26.

286. *Id.*

287. Langbein, *Substantial Compliance*, *supra* note 8, at 513.

288. *See* Langbein, *Harmless Error Rules*, *supra* note 8, at 47 (criticizing British Columbia's proposed dispensing power provision limiting application to signed documents as "a timid recommendation").

289. *But see* Langbein, *Substantial Compliance*, *supra* note 8, at 515-16. "The substantial compliance doctrine would admit to probate a noncomplying instrument that the court determined was meant as a will *and whose form satisfied the purposes of the wills act.*" *Id.* (emphasis added). To the extent that the proponent is required to establish *both* elements, application of the rule to unexecuted documents would appear to be foreclosed. *See* Miller, *supra* note 3, at 302-08 (discussing purpose, scope, and application of substantial compliance).

290. Miller, *supra* note 3, at 306-07 (discussing misconceptions produced by Langbein's choice of terminology).

291. 32 S.A. St. R. 473 (1983).

dispensing power to validate an unsigned will under circumstances that Langbein considered entirely appropriate.[292] *Blakely* was a switched wills case in which the testator's will had mistakenly been signed by the testator's wife in a joint execution ceremony, so that the testator's name appeared on his wife's will and her name on his will.[293] Such "mirror wills" traditionally have been treated as void because the law does not permit reformation of a will containing mistaken terms and because "mirror wills" indubitably violate the signature requirement.[294]

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292. Langbein, *Harmless Error Rules*, *supra* note 8, at 24.

293. *Blakely*, 32 S.A. St. R. at 474.

294. In the United States, the switched wills cases have usually been viewed as essentially involving a problem of reformation rather than a failure of due execution. *See* Langbein & Waggoner, *Reformation*, *supra* note 13.

> The switched-wills cases cause our subject of Wills Act execution blunders to overlap with an otherwise distinct doctrine, the rule forbidding reformation of wills afflicted with mistaken terms . . . . [T]here has been some willingness in American law in recent years to relax the no-reformation rule. There are signs in Australian law reform circles that the development of a harmless error rule for execution mistakes is encouraging a rethinking of the no-reformation rule. These developments raise the prospect that Anglo-American law will move to a unitary mistake doctrine for error of both types — mistake in the execution and mistake in the terms.

Langbein, *Harmless Error Rules*, *supra* note 8, at 25.

The major innovation in the rules applicable to switched wills in this country was the New York decision of *In re* Snide, 52 N.Y.2d 193, 418 N.E.2d 656, 437 N.Y.S.2d 63 (1981). In *Snide*, the testator had signed his wife's will at the time of executing the will. *Id.* at 194, 418 N.E.2d at 656, 437 N.Y.S.2d at 63. The wife offered for probate the will her husband had actually signed. *Id.* at 195, 418 N.E.2d at 656, 437 N.Y.S.2d at 63. The court concluded that the will could be reformed to substitute the wife's name wherever the husband's appeared. *In re* Snide, 96 Misc. 2d 513, 516, 409 N.Y.S.2d 204, 205 (1981) (construing N.Y. Sup. Ct. Proc. Act § 201 (McKinney 1967) as enlarging the surrogate's equity jurisdiction). The surrogate emphasized its obligation, particularly under a new statute broadening its equity powers, to ensure that the testator's intentions were not thwarted. *Id.* at 516, 409 N.Y.S.2d at 206. The will was therefore admitted to probate. *Id.* The appellate division reversed, and was reversed in its turn by the New York Court of Appeals. *In re* Snide, 52 N.Y. 2d 193, 418 N.E.2d 656, 437 N.Y.S.2d 63 (1981). The court of appeals held that the wills could be read together in order to resolve the ambiguity created by the mistake. *Id.* at 196-97, 418 N.E.2d at 657-58, 437 N.Y.S.2d at 64. The court emphasized that there was no evidence of fraud and that the decedent had fulfilled all of the formal requirements except that he signed the wrong will. *Id.* The court indicated that *Snide* was to be read very narrowly. *Id.* at 197, 418 N.E.2d at 658, 437 N.Y.S.2d at 65. The decision heavily emphasized the fact that there was no evidence of fraud. *Id. See* Langbein & Waggoner, *Reformation*, *supra* note 13, at 565-66; Note, *Mistakenly Signed Reciprocal Wills: A Change in Tradition After* In re Snide, 67 IOWA L. REV. 205 (1981).

The South Australian Supreme Court also discussed the switched-wills "no-reformation rule" problem:

> If ever there was . . . an obvious mistake, this is it. Mistakes like this have been

The *Blakely* court was obviously concerned about the implications of applying section 12(2) to save an unsigned will. Somewhat uneasily, the court concluded that section 12(2) would apply to the defectively signed will, based on the compelling evidence that the decedent had intended for the will to be executed and enforced.[295] The *Blakely* court essentially argued that in a "mirror wills" case, the testator has demonstrably attempted to comply with the spirit of the signature requirement, even though the signature is inadvertently affixed to the wrong document. The *Blakely* court distinguished the will that is unsigned because the testator neither attempted nor intended to execute it from the will that is unsigned because of a bungled attempt to execute it.[296] The court was satisfied beyond a reasonable doubt that the *Blakely* testator intended to sign his will because he in fact had attempted to meet all of the requirements for due execution.[297] The court reasoned that a will signed by a testator in disappearing ink in the presence of witnesses who could testify credibly that the testator had in fact signed the will would be admitted under section 12(2).[298] In *Blakely*,

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made before but the law has been unable to cope with them. The courts of England and Australia have refused to recognize unexecuted wills, while the courts of Canada have performed mental gymnastics to do what they can to recognise them. The general rule hitherto has been that when a testator executes a will prepared for another, the document is not his will, even if some of the provisions therein were intended by the testator.

Blakely, 32 S.A. St. R. at 474-75.

295. *Blakely*, 32 S.A. St. R. at 476-77.

296. *See id.* at 480.

297. *See id.*

298. The court went to some lengths to rationalize the result.

Let it be assumed that the husband did sign the correct will but with disappearing ink . . . which faded and finally disappeared at some time after the will was placed in its envelope. Let it be further assumed that witnesses saw him sign the will and themselves subscribed their names as witnesses by writing their signatures on the will with the same pen filled with disappearing ink with the result that their signatures likewise disappeared; and that, on the death of the testator, they gave evidence, believed by the court, of the fact of the execution by the testator and themselves. Although no signatures presently appeared on the will, I can see no reason why the court might nonetheless be satisfied that "there can be no reasonable doubt that the deceased intended the document to constitute his will." . . . Let it be assumed that someone, deliberately or inadvertently, placed a transparent piece of paper or plastic over a will, or over the attestation clause . . . so that the signatures . . . were never actually placed upon the will itself, but only on the transparent paper or plastic. Let it be further assumed that the unsigned will and the transparency bearing the signatures were together placed in an envelope until after the testator's death, whereupon they were taken out and submitted for a grant of probate. I would venture to think that, pursuant to s[ection]

likewise, there were witnesses to the testator's attempt to sign his will, although the signature ultimately appeared on the wrong will.

The *Blakely* court remarked that other section 12(2) cases "indicate that a minimum requirement" for application of section 12(2) is compliance with the signature requirement.[299] Further, the *Blakely* opinion contains dicta suggesting that such a fundamental defect as the testator's failure to sign the will at all would in most or perhaps all cases fall outside the scope of the court's dispensing power.[300] "It may be that the court will always or usually look for some signature somewhere in relation to the particular document as part of [the] high degree of proof [required for section 12(2) to apply]."[301] The court concluded, however, that section 12(2) should allow it to enforce a *totally unexecuted will* in cases factually similar to *Blakely* on the condition that the testator's intent that the particular document constitute his will be established "beyond doubt."[302] The court stated that it would be inappropriate to "fetter in advance the width of the discretion given to it under s[ection] 12(2) by declaring that a signature physically on the will is always necessary" regardless of the circumstances.[303]

> 12(2), there would be ample evidence to satisfy the court that the testator *intended* the unsigned document to *constitute* his will . . . .
>
> Just as the unsigned will and the signed transparency in the example could be notionally attached and read together, so here the husband's will and the husband's signature (on the wife's will but intended for his own will) can be notionally transposed and read together. The witnesses' signatures can be likewise transposed. Furthermore, the wife's signature can be expunged as irrelevant.

Id. at 476-77.

299. *Id.* at 474.

300. *Id.* at 479-80.

301. *Id.*

> Even if some signature by the deceased is thought to be necessary, it was sufficient, . . . if, as here, he placed his signature in some place from which his intention to constitute a particular piece of paper his will is beyond doubt. I hold that his signature on the wife's document (which he thought to be his will) was such a signature. . . . *He wrote his signature; he intended it to be appended to the engrossed, approved, and physically present will, the document now submitted for a grant of probate.*

Id. at 480 (emphasis added). *Baumanis* was distinguished on the ground that in that case the deceased never intended to sign *the particular will* presented to probate (which was a draft) at all. *Id.*

302. *Id.* The court stated that § 12(2) "should be wide enough . . . to cover *a totally unexecuted document*, at least where the lack of execution is due to circumstances such as this, provided always that the stringent requirement as to intention to constitute [a particular piece of paper the testator's] will is [beyond doubt]." *Id.* at 479 (emphasis added).

303. *Id.* at 480.

The *Blakely* court's decision to apply the dispensing power to switched wills is completely consistent with Langbein's functional analysis of the signature requirement in his 1975 article.[304] The *Blakely* court explicitly suggested that noncompliance with the signature requirement could rarely, if ever, be excused.[305] The court seemed to suggest that the proponent of an unsigned will would virtually always need to produce compelling if not overwhelming evidence that the testator had attempted to comply with the signature requirement in order to persuade the court that the testator intended the document to have final effect.[306] Similarly to Langbein's substantial compliance doctrine, the *Blakely* opinion declined to make signature a threshold requirement for application of the harmless error rule.[307] Instead, the court tied the fundamental nature of the signature formality to the proponent's ability to carry the burden of proof in instances in which the testator has failed to sign the will.[308] The *Blakely* court emphasized

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304. For Langbein's statements that signature is usually indispensable as a means of establishing the finality of the will, see *supra* note 238.

305. *See Blakely*, 32 S.A. St. R. at 479-80.

306. *See id.*

307. *Id.* For discussion of a harmless error rule making signature a threshold requirement for application of the dispensing power, see Miller, *supra* note 3, at 337-39 (discussing British Columbia's proposal for dispensing power that would apply only to signed documents). Although the *Blakely* court rejects the notion that signature is or could be considered indispensable to application of § 12(2), the opinion suggests that a writing is indispensable, since the wills act requires a will to be "[1] in writing and [2] executed, subject to this Act (section 12(2))." *Blakely*, 32 S.A. St. R. at 476. "A will could hardly be admitted to probate if it had not been reduced to writing of some kind, so the phrase 'Subject to this Act' must refer to the will being 'executed'. . . ." *Id.*

308. *See Blakely*, 32 S.A. St. R. at 478-79.

> Section 12(2) provides that a document may be deemed to be a will "notwithstanding that it has not been executed with the formalities required by this Act." Much depends upon the emphasis with which all or parts of that passage is read. If stress is laid upon the words "with the formalities," such stress does tend to suggest that there must at least be execution by the executor by placing his signature on the document. However, if no stress is laid on those three words in the whole sentence, of if an even stress is laid upon the whole sentence, one looks . . . to see what "the formalities required by this Act" are . . . . *The Act does not distinguish between the testator's signature and the witnesses' signatures when prescribing the formalities of execution.* Execution by or at the direction of the testator at the foot thereof . . . is as much a formality . . . as the signatures of the witnesses and their presence together with the testator when all sign . . . . In addition, the placement of the signature at the foot is not the only formality. *The most important formality is the placement of his signature on the document by the testator himself.*

that the testator had had *the exact will offered for probate* before him in its *final* form and that he had actually raised his pen in order to sign it though he had in fact mistakenly signed his wife's will.[309]

Fundamental to the *Blakely* court's reasoning were the facts that the will had been properly attested under circumstances producing an overwhelming inference that the testator had intended to comply with the signature requirement, that he had in fact made every effort to comply, and that the particular document offered for probate was the exact will he had attempted to execute. If *Blakely* represented the furthest extension of the section 12(2) dispensing power, Langbein's statement that there is little difference in effect between the "purposive" South Australian rule and his "purposive" substantial compliance doctrine would be essentially correct.[310]

(3) Attested, unsigned wills

In *Estate of Williams*,[311] a decision referred to the Full Court as a case of exceptional importance,[312] the three-judge panel applied section 12(2) to validate an unsigned will under circumstances that provided no evidence of any attempt by the testator to comply with the signature requirement.[313] In *Williams*, the testator and her husband had arranged for a joint execution ceremony at the testator's home.[314] Both wills were duly attested by neighbors; however, although the testator's husband signed his own will, the testator never signed hers.[315] The evidence set forth in the opinion strongly suggested that

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All of . . . [the Wills Act] is "Subject to this Act." . . . All of the formalities required by the Act may be dispensed with under s[ection] 12(2) . . . .

Id. (emphasis added).

309. *Id.* at 480.

310. *See* Langbein, *Harmless Error Rules*, *supra* note 8, at 53.

311. 36 S.A. St. R. 423 (1984).

312. Langbein, *Harmless Error Rules*, *supra* note 8, at 13 n.48. For discussion of South Australian procedure, see *supra* notes 53-57 and accompanying text.

313. *See Williams*, 36 S.A. St. R. at 427 (Legoe, J.).

314. *Id.* at 426 (Legoe, J.).

315. *Id.* at 426-27 (Legoe, J.). The wills had been prepared prior to a trip that the testator and her husband were planning. *Id.* at 426. The evidence indicated that it had been the testator herself who had raised the issue of the need to update their wills before departure; however, she and her husband had decided that there was insufficient time to consult a professional. *Id.* The testator and her husband therefore sat down together to write new wills for themselves, and then asked two neighbors to act as witnesses. *Id.* The neighbors arranged to meet with the testator and her husband the following morning. *Id.* All four sat down together at the kitchen table to execute the wills. *Id.* at 426-27. At probate, the witnesses confirmed their signatures but indicated that they had not noticed at the time of the attempted execution that the testator had failed to sign her will. *Id.* at 427. The witnesses stated that they believed that

the testator had intended to execute the will and perhaps had attempted to execute it, but not that she had actually attempted to sign it. Her intention to execute the particular document presented for probate was apparently inferred from her having participated actively in planning the joint execution of the wills, from the circumstances prompting the preparation of the wills, and from subsequent statements to her son.[316] *Williams* is thus distinguishable from *Baumanis*, since in *Baumanis* the testator died without attempting to execute the particular document that was actually presented for probate.[317]

The *Williams* court's application of the dispensing power to validate an unsigned will troubles Langbein,[318] who seems to suggest that application of section 12(2) to an unsigned will generally be limited to cases in which the evidence shows more purposive conduct — specifically, that the testator attempted to sign the will.[319] Langbein is not fully convinced that the circumstances surrounding the execution of the *Williams* will (in contrast to the circumstances in *Blakely*) compelled the conclusion that the testator intended to execute the will and that her failure to sign it was inadvertent.[320] He pointed out that she might conceivably have intended to "disarm [the will] without upsetting her husband. Under the beyond-reasonable-doubt standard, the burden of excluding such a possibility rests on the proponents and is very hard to discharge."[321]

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the testator had intended the document to be her last will and testament. *Id.* The testator's son said that subsequent to the execution of the wills and prior to the anticipated trip, his parents had asked him to read their wills, which his father had produced. *Id.* The son had not noticed at that time that the testator's will was unsigned. *Id.* He confirmed that the envelope in which the documents were contained had the word "Wills" written on it in his mother's handwriting. *Id.* He testified that when his father showed him the wills and the place where they were kept, his mother was present. *Id.* In contrast to the typical mirror wills case, the wills did *not* contain identical terms but were substantially different. *Id.*

316. *See id.* at 426-27, 434 (Legoe, J.). Judge King stated that "[i]t is clear from the deceased's subsequent conduct that she believed that the document was her will." *Id.* at 424 (King, J.).

317. *Baumanis*, 25 S.A. St. R. at 426. For discussion, see *supra* notes 257-90 and accompanying text.

318. *See* Langbein, *Harmless Error Rules*, *supra* note 8, at 26.

319. *See id.* at 26-27. Langbein does not suggest that in all cases absence of signature would place the will beyond the reach of § 12(2) (for example, he approved the *Blakely* decision, *see id.* at 24), but thought that in a case such as *Williams* in which there had been no attempt to sign at all, the burden of showing that the failure was not intentional ought to be extremely difficult to discharge under the "no reasonable doubt" standard. *Id.* at 26-27.

320. *Id.*

321. *Id.* at 27.

Although Langbein expresses discomfort with the *Williams* result, he accepts the narrow holding based on the evidence set forth in Judge Legoe's opinion.[322] Although not absolutely convinced that the evidence in *Williams* established beyond a reasonable doubt that the testator had intended to execute the will, Langbein apparently interprets the case as limiting application of the dispensing power to unsigned wills to cases in which there is compelling evidence of testamentary intent.[323] He considers that *Baumanis* would further limit *Williams*,[324] since he interprets *Baumanis* as barring application of section 12(2) to unsigned and unattested "draft wills."[325]

Langbein reads the South Australian signature and attestation cases as collectively producing an implicit ranking of the wills act formalities in order of importance, with attestation treated as readily dispensable and the testator's signature treated as generally indispensable.[326] Langbein notes that in *Williams* Judge Legoe gave careful attention to the conduct of the testator that tended to show testamentary intent.[327] Langbein interprets Judge Legoe's painstaking analysis of the *Williams* facts as indicating an implicit recognition that the fundamental importance of signature makes it necessary for the proponent of the will to produce compelling evidence of testamentary intent in any case in which the will has not been signed by the testator.[328]

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322. *See id.* at 25-26; *Williams*, 36 S.A. St. R. at 434. Judge Legoe reasoned that the testatrix had carried out unequivocal acts which satisfy the criteria of the section.

> She had done everything consistent with the formal and conclusive act of making (in this case writing it out in her own hand) and completing her last will except that she did not sign it. She set the whole stage for such a complete act. Her actions in writing out the document, contacting the witnesses, being present at the time of attestation . . . and writing the word "Wills" on the envelope in which the two documents were placed were in my opinion final and conclusive evidence of her clear intentions in relation to that document. Furthermore she was present and silently confirming the existence and the probative effect of the document which she believed to be her will when her son . . . was shown the will by her husband . . . .

Id. at 434 (Legoe, J.).

323. *See* Langbein, *Harmless Error Rules*, *supra* note 8, at 26-27.

324. *Id.* at 27, 52.

325. *Id.* at 52.

326. *Id.*

327. *See id.* at 26. "Thus, the [*Williams*] court concluded that the testatrix, in an addled moment, omitted to sign a will that she meant to sign, in circumstances in which her conduct was deliberate enough to satisfy the purposes of the formality." *Id.*

328. *Id.* at 52 (*Baumanis* limits application of § 12(2) except in compelling circumstances, such as the switched-wills cases).

That Judge Legoe intended to suggest that the signature requirement was intrinsically more "purposive" and less dispensable under section 12(2) than the other formalities is, however, debatable. Significantly, in *Estate of Vauk*, a later case, he indicated that in appropriate circumstances, a completely unexecuted will might be admitted to probate under section 12(2).[329] In *Williams*, he states that on those facts, the testator's failure to sign the will was "one step removed from complete compliance."[330] The determination whether doubt as to the testator's intentions is "substantial" rather than "fanciful" seems to depend, according to Judge Legoe's analysis, not upon the nature of the formality omitted (which would be consistent with a functional or "purposive" approach), but upon "the degree or extent of nonexecution of the document in accordance with the formalities."[331] Judge Legoe in *Williams* thus suggested that it is not the nature or quality of particular defect, but the overall degree (quantity) of noncompliance, that ultimately determines whether the evidence of intent adduced by the proponent is sufficient to establish testamentary intent beyond a reasonable doubt.[332] Judge Legoe specifically stated that under section 12(2), the courts may declare that an unsigned will is valid, "provided the criteria of the section have been otherwise met."[333]

All three opinions in *Williams* illustrate the flexibility of the South Australian judges in applying section 12(2) and their readiness to consider evidence of facts and circumstances showing testamentary intent. A close reading of the three opinions indicates that none of the judges adopted a functional approach in interpreting the signature requirement.

Judge King seems to have concluded that section 12(2) may be applied to any defectively executed will if the document purports to embody the decedent's intended testamentary scheme and the court is satisfied that there is no reasonable doubt that the decedent intended

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329. 41 S.A. St. R. 242, 248 (1986). For discussion, see *infra* notes 355-75 and accompanying text.

330. *Williams*, 36 S.A. St. R. at 434 (Legoe, J.).

331. *Id.* at 433 (Legoe, J.).

332. *See id.* at 433-34 (Legoe, J.). Judge Legoe points out that § 12(2) contains three criteria for its application: "namely a document that (a) embodies testamentary intentions, and which (b) has not been executed with the formalities required by the Act, and which (c) the court is satisfied is a document in respect of which there is no doubt that the decedent intended the document to constitute a will. In my judgement equal stress should be placed on all these criteria. . . ." *Id.* at 433. Judge Legoe then went on to say that the "circumstances regarding the contents" of the document "and all other relevant material establishing the testator's intention" could be taken into account in applying § 12(2). Proof required to establish that the document was a will included "the document itself and . . . the extrinsic evidence." *Id.*

333. *Id.* at 434.

it to be enforced.[334] Application of section 12(2) depends on the proponent's ability to prove that the document was intended to be effective as a will, not on the nature of the particular defect.[335] Judge King specifically rejected the argument that application of section 12(2) ought to be limited to signed wills,[336] along with the notion that signature is somehow more fundamental and therefore less dispensable than the other formalities.

> To execute a document is to do what the law requires to be done to give validity to the document. [The Wills Act] sets out the legal requirements or formalities for execution of a will. If those formalities are not complied with, there is no execution. Execution and signature are, of course, not synonymous . . . . Execution is the validation of a document by going through the formalities required by law for that purpose. The notion of execution of a will other than in accordance with the formalities prescribed by [the Wills Act], is therefore a self-contradictory notion. It follows that the saving effect of s[ection] 12 is only required and is only operative when the will has not been executed. *Signature is simply one of the formalities required by the Act for execution. There is no reason, as a matter of construction or logic, to differentiate between signature and any of the other formalities for execution required by [the Wills Act].*[337]

Judge King thus characterized the signature requirement as merely one aspect of execution.

Judges Legoe and Cox seem to have reached similar conclusions in *Williams* by somewhat different routes. After an extended analysis of section 12(2) and the cases applying it, Judge Legoe concluded that under section 12(2), "[t]he Court may . . . declare [that an unsigned] document should be a will provided the criteria of the section have been otherwise met."[338] Judge Legoe, more than the other two judges, analyzed the extent to which the circumstances in *Williams* could be considered to present a sufficiently objective manifestation of testamentary intent to compensate for the lack of a proper signature.[339]

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334. *Id.* at 425 (King, J.).

335. *Id.*

336. *Id.*

337. *Id.* (emphasis added). *Cf.* Estate of Ryan, 40 S.A. St. R. 423, 425 (1986) (adopting Judge King's reasoning).

338. *Williams*, 36 S.A. St. R. at 434.

339. See quote from Judge Legoe's opinion, *supra* note 322.

Moreover, Judge Legoe carefully reviewed opinions in prior cases under section 12(2) that had addressed the question of whether or to what extent the dispensing power could be applied to save an unsigned will.[340] Based on this analysis, Judge Legoe concluded that the critical question in any section 12(2) case is whether the facts satisfy the criteria for application of the dispensing power.[341] Judge Legoe's analysis in *Vauk*[342] is consistent with the insistence in *Williams* on careful attention to the facts, in applying section 12(2).[343] Neither case seems to support Langbein's view of signature as generally indispensable.

Judge Cox considered the language of section 12(2) ambiguous with respect to whether the dispensing power may be applied to unexecuted documents or whether its application requires "that the document must have been executed even though the execution did not meet the requirements of [the wills act]."[344] In contrast to Judge King,[345] Judge Cox considered that in the law of wills, "execution" has usually meant that the will should be signed by the testator.[346] Judge Cox concluded, however, that since section 12(2) was intended to be a remedial provision, the ambiguity should be resolved in favor of a liberal construction of the scope of the dispensing power.[347]

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340. *Williams*, 36 S.A. St. R. at 428-33.
341. For the three "criteria" identified by Judge Legoe, see *supra* note 332.
342. *Vauk*, 41 S.A. St. R. at 242.
343. For discussion of *Vauk*, see *infra* notes 355-75 and accompanying text.
344. *Williams*, 36 S.A. St. R. at 437 (Cox, J.).
345. *See id.* at 425 (King, J.).
346. *Id.* at 437 (Cox, J.).
347. Judge Cox stated:

> To execute something is to complete it or to carry it into effect, and in the law relating to wills the requirement of execution has generally meant that the intended will should be signed . . . . The words "notwithstanding that it has not been executed with the formalities required by this Act" . . . have been interpreted in different ways by different members of this Court. They may be read as implying that the document must have been executed even though the execution did not meet the requirements of . . . [the Wills Act], but they would also be, I think, an accurate way of referring compendiously both to a document that had not been executed at all and also to a document that, though executed, had not been executed with the formalities required by the Act. . . . I think this ambiquity should be resolved by giving a liberal construction to section 12(2).
>
> No doubt this goes a good way towards nullifying the effect of . . . the Wills Act. However, . . . [m]any years of experience with the old law led to the rules being tightened in the first half of the last century, and now all the years of experience under that regime has persuaded Parliament that much of the statutory rigidity should now be relaxed.

Id. at 437 (Cox, J.).

> I do not see any reason for supposing that Parliament intended to give relief where . . . there was an informality in the attestation clause but to deny it where . . . the would-be testator inadvertently omitted to sign the document. In my opinion, the availability of s[ection] 12(2) is not confined . . . to a document that bears the signature [of the testator].[348]

Judge Cox's view, more than that of the other judges is consistent with Langbein's notion of signature as more "fundamental" than the other formalities. Judge Cox's focus on the remedial purpose of section 12(2) suggests, however, a more liberal notion than Langbein's of the dispensability of the testator's signature under a broad dispensing power.

Despite language in *Williams* suggesting a contrary interpretation, Langbein apparently reads *Williams* and *Blakely* together with *Baumanis* to support his functional interpretation of the signature requirement as generally indispensable to establish testamentary intent, absent compelling evidence that the unsigned document was intended to have final effect.[349]

> If you leave your will unsigned, you raise a grievous doubt about the finality and genuineness of the instrument. An unsigned will is presumptively only a draft, as the landmark decision in *Baumanis v. Praulin* insisted, but that presumption is rightly overcome in compelling circumstances such as in the switched-wills cases.[350]

(4) Unexecuted wills

Since Langbein's 1987 article reviewing the South Australian case law and its early decision in *Baumanis*,[351] the South Australian courts have addressed the issue of whether the dispensing power can be applied to validate an unexecuted will. In *Estate of Vauk*[352] and *Estate of Richardson*,[353] the court concluded that section 12(2) could be applied to wills that had been neither signed nor attested if the evidence established that the documents in question were intended to have testamentary effect.[354]

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348. *Id.* (Cox, J.).

349. *See* Langbein, *Harmless Error Rules*, *supra* note 8, at 52.

350. *Id.*

351. *Baumanis*, 25 S.A. St. R. at 423. For discussion of *Baumanis*, see *supra* notes 257-90 and accompanying text.

352. *Vauk*, 41 S.A. St. R. at 242.

353. 40 S.A. St. R. 594 (1986).

354. *Vauk*, 41 S.A. St. R. at 248; *Richardson*, 40 S.A. St. R. at 596.

Vauk arose as the result of an application by the Registrar of Probate, who was seeking instruction as to whether a will prepared by the decedent and subsequently altered by him without wills act formalities should be admitted to probate.[355] Judge Legoe concluded that the alterations to the 1971 will did not appear to be made with the requisite intent,[356] but instead pointed to a draft will.[357] "I would consider that there is little if any evidence to support an application for the admission of the 1971 will as amended in pencil to be admitted to probate."[358] Instead, after carefully considering the facts surrounding the making of a later unexecuted will, Judge Legoe concluded that the executor should apply under section 12(2) to have the unexecuted will admitted to probate. If on application for admission of the document to probate the court was satisfied that there was no reasonable doubt of testamentary intent, the unexecuted document could be admitted to probate under the dispensing power.[359] He therefore directed that the common form application to admit the altered 1971 will be refused.[360]

The unexecuted will in *Vauk* had been prepared by the "Public Trustee" shortly before the testator's death in 1985, according to the testator's instructions.[361] The testator had committed suicide on the day before he was scheduled to meet with the Public Trustee to execute the will.[362] When the testator's body was discovered, a writing that appeared to refer to the draft will was found underneath his head.[363] The writing, so badly smudged that it was partially illegible, was a suicide note written in red ink on two pieces of paper. The note appeared to read: "There will the Pu Trustee (unsigned — changed: *to be valid!*".[364] The note was followed by a

355. *Vauk*, 41 S.A. St. R. at 243-44.

356. *Id.* at 246.

357. *Id.*

358. *Id.*

359. *Id.*

360. *Id.* "If the applicants wish to pursue their application for proof of that [1971] document then I direct that they should do so in solemn form." *Id.* at 248. For discussion of common form and solemn form probate, see *supra* text accompanying notes 46-57.

361. *Vauk*, 41 S.A. St. R. at 245.

362. *Id.* at 245, 248. The testator had given the wills office of the Public Trustee detailed handwritten instructions for preparing the will. *Id.* at 245. It was the usual practice of the Public Trustee not to require such instructions to be signed or executed, *id.*, a practice roundly criticized by Justice Legoe in this case. *Id.* at 250-51.

363. *Id.* at 245.

364. *Id.*

line drawn down the page with the word "Hans," the testator's name, written on the right side of the line.[365]

Judge Legoe determined that the 1971 will that the testator's sister and executor had found in a box containing his personal papers[366] was beyond the reach of section 12(2) because the pencilled alterations "point in the direction of a draft will rather than a final will."[367] Judge Legoe was not satisfied beyond a reasonable doubt that the alterations, which would have substantially affected the terms of the will, represented the final testamentary intention of the testator.[368]

Judge Legoe ultimately concluded that section 12(2) could potentially be applied to the unexecuted draft will that had been prepared by the Public Trustee based on the testator's handwritten instructions.[369] Judge Legoe considered that the suicide note found with the decedent's body was "a clear indication of what the deceased intended,"[370] and that what he had intended was for the unexecuted will prepared by the Public Trustee to be enforced.[371] "It clearly emerges that the underlining of the words 'to be valid' all point to his intentions that that will which he knew he was due to sign on the following day . . . was the will that he wished to provide for his estate. . . ."[372] For these reasons, Judge Legoe concluded that the executors should apply for admission of the unexecuted will to probate under section 12(2).[373] Judge Legoe, in reaching this conclusion, reiterated that the application of the dispensing power is not limited to documents bearing the signature of the testator.[374] Although Judge Legoe was not making a final determination of testamentary intent in *Vauk*, the opinion seems

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365. *Id.* The paper found under the testator's head was in two pieces. *Id.* The first piece was scribbled over on one side, apparently by a child, and had several pictures of animals glued to it. *Id.* On the other side was written "Give my love to Ingrid" (the testator's daughter) as well as the language set forth in the text. *Id.* Underneath these words was written "Des," followed by a comma. *Id.* The other piece of paper contained some lines, circles, and triangles marked "To Ingrid from Alix." *Id.* On the other side of the paper was written "so many things wrong, sorry I am a misfit sorry Serena I can't live up to your values." *Id.*

366. *Id.* at 244.

367. *Id.* at 246.

368. *Id.* For further discussion, see *infra* text accompanying notes 544-48.

369. *Id.* at 248.

370. *Id.* at 247.

371. *Id.* at 248.

372. *Id.*

373. *Id.*

374. *Id.* at 247 (quoting *In re* Ryan, 40 S.A. St. R. 305, 310 (1986)). Relatively little of the *Vauk* opinion is devoted to analysis of the signature requirement.

unequivocally to support application of the dispensing power to unexecuted wills in appropriate circumstances.[375]

In *Estate of Richardson*,[376] as in *Vauk*, the decedent had committed suicide without executing his will, but had left a suicide note that referred to the unexecuted will.[377] In *Richardson*, in contrast to *Vauk*, section 12(2) was actually applied to validate the unsigned and unattested will.[378] In *Richardson*, the handwritten will had been found in the testator's abandoned car after his death.[379] Although unexecuted, the document was captioned "Last will and testament, etc. [sic] of Nicholas Richardson."[380] Along with the unexecuted will was a suicide note, stating: "I have left a will with this. I hope things are taken care of with as little fuss as possible."[381] The opinion does not mention whether the suicide note was signed. The court concluded:

> A sequence of events has been established to my satisfaction beyond a reasonable doubt by the affidavits which are before me and from that sequence of events the only inference open is that, upset by a number of things which had happened to him, [the testator] decided to terminate his own life and in connection with that decision and in anticipation of carrying out that decision the [testator] wrote [this] document. . . .[382]

Significantly, the court stated that its finding that the decedent intended for the unexecuted will to be implemented *"flows from the nature and content of the document itself and from the extrinsic evidence of the circumstances in which it was found."*[383]

Whether *Vauk* or *Richardson* would support application of section 12(2) in less convincing circumstances is unclear. Both cases, in contrast to *Baumanis*, in which the court refused to apply section 12(2) to an unexecuted will, were uncontested.[384] (Langbein has suggested that the quality of the case law under section 12(2) may be tainted by the fact that South Australian probate law makes no provision for

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375. *Id.* at 247-48.
376. 40 S.A. St. R. 594 (1986).
377. *Id.* at 595.
378. *Id.* at 596.
379. *Id.*
380. *Id.* at 595.
381. *Id.*
382. *Id.*
383. *Id.* at 596 (emphasis added).
384. *Compare Richardson*, 40 S.A. St. R. at 596; *Vauk*, 41 S.A. St. R. at 248-49 *with Baumanis*, 25 S.A. St. R. at 426. *See* Langbein, *Harmless Error Rules*, *supra* note 8, at 13 n.46.

consensual suppression of a purported will.[385]) Both cases, moreover, involve circumstances tending to reinforce the finality of the unexecuted will. In both *Vauk* and *Richardson*, the apparent references to the "wills" in the suicide notes strongly supported the inference that at the time of preparing the documents immediately prior to their deaths, the respective decedents wished the unexecuted documents referred to in their notes to be enforced. These references to unexecuted wills thus established their finality. Moreover, the circumstances under which the suicide notes referring to the wills were discovered compellingly indicated finality of intent. The will in *Richardson* was found with the suicide note in the testator's abandoned car[386] and the note referring to the *Vauk* will, with the testator's body in the testator's car.[387] Moreover, the genuineness of the wills was demonstrated fairly conclusively since the unexecuted will in *Richardson* was in the decedent's handwriting[388] and the provisions of the will prepared by the Public Trustee in *Vauk* were consistent with the provisions of the earlier 1971 will as altered by the decedent.[389]

The facts in both *Vauk* and *Richardson* are similar to those in the unreported case, *Estate of Franks*,[390] discussed by Langbein in his 1987 article, in which section 12(2) was applied to validate a signed but unattested will drafted by the testator shortly before his suicide and referred to in the suicide note.[391] Interestingly, Langbein seems to approve the application of the dispensing power to the unattested will in *Franks*, remarking that "[t]he testator . . . appreciated the finality of his unwitnessed will,"[392] presumably because the will had apparently been prepared in contemplation of death.[393]

Neither *Vauk* nor *Richardson* devotes much attention to analysis of the signature requirement. In *Vauk*, Judge Legoe quoted from the opinion in *Estate of Ryan*[394] and referred to his own and Judge Cox's

385. Langbein, *Harmless Error Rules*, *supra* note 8, at 40-41.

386. *Richardson*, 40 S.A. St. R. at 595.

387. *Vauk*, 41 S.A. St. R. at 245.

388. *Richardson*, 40 S.A. St. R. at 595.

389. *Vauk*, 41 S.A. St. R. at 248.

390. Langbein, *Harmless Error Rules*, *supra* note 8, at 19 (citing Estate of Franks, No. 10 of 1983 (S.A. Ct. Aug. 9, 1983)). The will and the letter referring to it were apparently found in a table in the kitchen, where the testator had committed suicide by rifleshot. *Id.* In the letter, the testator remarked: "It may not be a true will in the legal sense but under the circumstances I think it will be legal and binding." *Id.*

391. *Id.* at 19.

392. *Id.*

393. *Id.*

394. *Vauk*, 41 S.A. St. R. at 425 (quoting *Ryan*, 40 S.A. St. R. at 310).

opinions in *Williams*[395] as support for his conclusion that application of section 12(2) is not limited to executed documents.[396] As in his *Williams* opinion, Judge Legoe painstakingly reviewed the *Vauk* facts. Implicit in his *Vauk* opinion is the view that the evidence of testamentary intent is sufficiently compelling to permit application of section 12(2) to the unexecuted will, though he was not actually determining the final outcome of the *Vauk* case.[397] The *Richardson* case, in contrast, is largely devoid of any analysis of either section 12(2) or of the specific facts. The court in *Richardson* unhesitatingly applied section 12(2) to the unexecuted will, stating that "I am satisfied beyond a reasonable doubt that the document in question is in the handwriting of the deceased, that the deceased intended the document to be an operative will."[398]

Whether Langbein would consider application of section 12(2) to the unexecuted wills in *Vauk* and *Richardson* to be justifiable on the particular facts of those cases is not clear. In discussing the disposition of the unreported *Franks* case, Langbein seems to concede that a court applying the section 12(2) dispensing power may reasonably determine that a *signed* document prepared in contemplation of suicide is executed with testamentary intent, even if the testator has failed to have the document attested.[399] In both *Vauk* and *Richardson*, however, the wills were totally unexecuted,[400] so that all evidence of testamentary intent had to be gleaned from the circumstances surrounding the preparation of the writings.

The *Vauk* facts are arguably closer to those of *Baumanis* than *Franks*. In both *Baumanis* and *Vauk*, the unexecuted draft will offered for probate was prepared by someone other than the testator and in both cases, the issue was the finality of the will.[401] The *Baumanis* court suggested that section 12(2) should not be applied to unexecuted wills[402] and concluded that in any event, the evidence in that case was insufficient to establish beyond a reasonable doubt that the decedent had intended the document actually offered to probate

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395. *Id.*

396. *See id.* at 246-48.

397. *See* text accompanying *supra* notes 355-58.

398. *Richardson*, 40 S.A. St. R. at 596.

399. Langbein, *Harmless Error Rules*, *supra* note 8, at 19.

400. *Vauk*, 41 S.A. St. R. at 244-45; *Richardson*, 40 S.A. St. R. at 595.

401. *Compare Vauk*, 41 S.A. St. R. at 244-45 *with Baumanis*, 25 S.A. St. R. at 423-25 (discussed in *supra* notes 258-90 and accompanying text).

402. *Baumanis*, 25 S.A. St. R. at 425 (language of § 12(2) seems to "presuppose" some form of execution).

to be given final effect.[403] In *Vauk*, in contrast, Judge Legoe was apparently convinced that an apparent (but quite equivocal) reference[404] to the unexecuted will in the decedent's partially illegible suicide note was evidence that the decedent intended for the unexecuted will to be given effect.[405] To this extent, Judge Legoe's analysis of the *Vauk* facts suggests a significantly more relaxed view of both the quality and quantity of evidence needed to establish testamentary intent than the opinion in *Baumanis*.

In contrast to the wills in *Baumanis* and *Vauk*, the wills in *Franks* and *Richardson* were apparently prepared by the testator himself in contemplation of suicide and were actually found with and specifically referred to in the respective suicide notes. The circumstances of *Franks* and *Richardson* support a stronger inference of finality than the circumstances of *Vauk* because of the considerably clearer connection between the preparation of the "wills" and the subsequent suicides.

Neither the analysis of the court in *Vauk* nor the opinion in *Richardson* seems to square with Langbein's interpretation of *Baumanis*. Langbein characterizes *Baumanis* as a "fortunate" precedent against applying the section 12(2) dispensing power to unexecuted "draft wills."[406] Although Langbein seems to agree with the decision in *Franks* on the ground that the facts of that case sufficiently evinced finality to justify application of the dispensing power to the unattested (but signed) will,[407] he does not seem to have anticipated *Richardson*'s unhesitating extension of section 12(2) to a *completely unexecuted* will. Contrary to Langbein's assertion that the South Australian courts implicitly take a purposive or functional approach in applying section 12(2) to particular types of defects, the *Richardson* decision seems to treat application of section 12(2) to the unexecuted will almost as a matter of course. Nor is there any suggestion in *Richardson* that application of section 12(2) to an unsigned will should be limited to factually similar cases. Judge Legoe's opinion in *Vauk* likewise provides no direct support for Langbein's argument that the South Australian case law under section 12(2) rests on an implicit ranking of the wills act formalities.[408] *Vauk*, like *Richardson*, focuses on the cir-

403. *Id.* at 426.

404. *Vauk*, 41 S.A. St. R. at 245 ("There will the Pu Trustee (unsigned -changed: *to be valid*!").

405. *Id.* at 247-48.

406. Langbein, *Harmless Error Rules*, *supra* note 8, at 23 (quoted in text accompanying *supra* note 282).

407. *See id.* at 19.

408. *Id.* at 52.

cumstances tending to show that the testator intended the unexecuted will to be given effect rather than on the significance to the wills act purposes or policies of the testator's total failure to comply with the wills act.

Considered thus, *Vauk* and *Richardson* arguably illustrate a point of divergence between a broad statutory dispensing power and a judicial doctrine of substantial compliance. A broad dispensing power is a power granted to the courts by the legislature to dispense with the wills act requirements, even for fundamentally defective wills, if the facts establish testamentary intent.[409] By contrast, substantial compliance is a judicially adopted rule that permits the courts to dispense with the strict compliance doctrine and admit a will to probate if the court determines that the functions, purposes, or policies underlying the requirements have been substantially served by the testator's conduct.[410] A judicial doctrine of substantial compliance presumably cannot reduce to a nonissue the question of whether a will conforms with the statutory requirements; the most that such a rule can accomplish is to redefine the meaning of "compliance."[411] Substantial compliance, in contrast to the dispensing power, can only enforce testamentary intent through the indirect route of functionally reinterpreting the statutory mandate of due execution so that proof of testamentary intent becomes relevant to the court's determination of whether the testator has substantively complied — that is, complied *in substance* — with the requirements.

c. New Uniform Probate Code Section 2-503

The drafters of the UPC's new harmless error rule apparently considered that the dispensing power generally will not save an unsigned will.[412] The comment to section 2-503 suggests that application of section 2-503 to unsigned wills is limited to unusual instances such

409. *See* Miller, *supra* note 3, at 305-06. For discussion of development of § 12(2) and other broad dispensing power provisions, see *id.* at 311-29.

410. *Id.* at 305-06. For discussion of the judicial doctrine of substantial compliance, see *id.* at 302-11. For discussion of a statute incorporating a substantial compliance standard purportedly based on Langbein's proposal, but reaching results inconsistent with Langbein's intentions, see Langbein, *Harmless Error Rules*, *supra* note 8, at 41-45 (discussing Queensland, Australia rule); Miller, *supra* note 3, at 329-35 (same).

411. *See* Miller, *supra* note 3, at 305-06.

412. *See* UNIF. PROB. CODE § 2-503 comment (1990) ("[T]he South Australian and Queensland courts . . . have been extremely reluctant to excuse noncompliance with the signature requirement.").

as the *Blakely* "switched wills" case.[413] The drafters apparently contemplated a considerably narrower scope for the UPC dispensing power than the South Australian courts have developed for section 12(2).

The drafters of section 2-503 seem to have accepted Langbein's view of the signature requirement as "fundamental,"[414] and therefore as a generally indispensable marker distinguishing draft wills from wills intended to be given effect.[415] They also seem to accept his interpretation of the South Australian signature cases, which does not take into account either *Vauk* or *Richardson* and which seems to overlook or discount language in Judge King's *Williams* opinion to the effect that the signature requirement is no more fundamental or less dispensable than the other formalities.[416] As the previous discussion demonstrates, the South Australian courts have liberally applied section 12(2) to unsigned wills.[417]

To the extent that the comment to section 2-503 is considered a guide to interpretation, the UPC dispensing power would presumably be more similar in scope to a substantial compliance approach than to South Australia's section 12(2). The switched wills cases resemble Langbein's interloper's bullet/coronary seizure scenario.[418] First, the facts in those cases raise no real issue of final testamentary intent. Second, the proponents are able to establish by overwhelming evidence of the testator's attempt to execute the will that the failure to sign was inadvertent. Moreover, as the *Blakely* court noted, a switched will is actually *not* unsigned, but simply signed in the wrong place; in such cases, the will is attested and otherwise properly executed.[419]

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413. *Id.* (citing *Blakely*, 32 S.A. St. R. at 473). "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 . . . and each [testator] mistakenly signs the will prepared for the other." *Id.*

Note that the revision to § 2-601 is intended to remove the impediment to reformation of wills when there is a mistake in the content of the will. *See* UNIF. PROB. CODE § 2-601 comment (1990) and discussion in *infra* notes 604-19 and accompanying text, and *supra* note 294. *See supra* notes 291-310 and accompanying text for discussion of the "switched wills" problem in South Australia.

414. *See* UNIF. PROB. CODE § 2-503 comment (1990).

415. *See id.*

416. *Id.* For Judge King's opinion, see *Williams*, 36 S.A. St. R. at 425 (quoted *supra* in text accompanying note 337).

417. *See supra* notes 351-411 and accompanying text for discussion.

418. Langbein, *Substantial Compliance*, *supra* note 8, at 518 (quoted in text accompanying *supra* note 241).

419. *Blakely*, 32 S.A. St. R. at 479-80 (quoted in *supra* note 301); for discussion, see *supra* notes 291-310 and accompanying text.

Proof that the testator actually signed the "mirror will" evidences that the testator intended to sign his or her own will and in fact attempted to do so. If available, the witnesses may provide further evidence of testamentary intent. A "switched will" could be considered a case of misplaced signature, which the substantial compliance doctrine would treat as a relatively minor error,[420] rather than an omitted signature.

Williams, *Vauk*, and *Richardson*, cases in which the testator failed to sign the will at all, are not mentioned in the 1990 comment to section 2-503.[421] It is therefore unclear whether the drafters would have considered extending section 2-503 to unsigned or unexecuted wills in light of these cases. Certainly, nothing in the language of section 2-503 precludes such a broad application in a case presenting sufficiently clear and convincing evidence of intent.[422] As previously remarked, the text of section 2-503 does not impose any requirement that the specific formalities be subjected to functional analysis or that the proponent's burden of satisfying the court vary depending on the nature of the defect,[423] though the comment seems to assume that application requires functional analysis.

The comment to section 2-503 does refer to the *Graham* dictum, the judicial gloss on section 12(2) that articulates a relationship between the proponent's burden and the testator's "degree of departure" from the wills act standard.[424] The significance of the drafters' reference to *Graham* is unclear. As previously discussed, Langbein characterizes the *Graham* dictum as "a profoundly purposive interpretation of section 12(2)."[425] He considers that this dictum requires the courts applying section 12(2) to "distinguish between a formal breach that impairs the purposes of the Wills Act and one that does not."[426] The more recent section 12(2) cases in South Australia, however, have not in fact treated the this dictum as a significant limitation on their power to dispense with any or all of the formalities in any case in which the court is satisfied that the defective instrument was prepared with testamentary intent.

To the extent that the section 2-503 comment incorporates the *Graham* dictum as interpreted by Langbein, section 2-503 seems to

420. *See* Langbein, *Substantial Compliance*, *supra* note 8, at 498; for discussion, see *infra* notes 427-33 and accompanying text.

421. *See* UNIF. PROB. CODE § 2-503 comment (1990).

422. For text of UNIF. PROB. CODE § 2-503 (1990), see *supra* note 2.

423. *See id.*

424. *Graham*, 20 S.A. St. R. at 205 (quoted in *supra* text accompanying note 69); Langbein, *Harmless Error Rules*, *supra* note 8, at 17, 52.

425. *See* Langbein, *Harmless Error Rules*, *supra* note 8, at 17.

426. *Id.*

contemplate a limiting functional "spin" on what otherwise appears to be a dispensing power fully as broad as South Australia's. If the comment to section 2-503 is disregarded, section 2-503 seems to authorize an equally broad dispensing power, that is, a dispensing power that could potentially be applied to unsigned or completely unexecuted wills. UPC section 2-502(a) essentially abolishes technical requirements for complying with the attestation requirement. Section 2-503 therefore seems moot unless the drafters intended it to be broad enough to save wills containing "fundamental" defects, including omission of the testator's signature, total failure of attestation, or (in appropriate circumstances) both.

2. Misplaced Signatures

a. Langbein's Substantial Compliance Doctrine

If the testator's signature appears anywhere on a document presented to probate as the testator's will, the substantial compliance doctrine would presumably permit the proponent to prove that the misplaced signature does not violate the purposes of the wills act even if the wills act expressly requires all wills to be signed "at the foot or end."[427] The original purpose of the subscription requirement was probably protective;[428] that is, the subscription requirement was originally incorporated into the statute of wills to ensure that forged or fraudulent material was not interpolated after execution between the signature and the body of the will.[429] Misplacement (as opposed to *omission*) of the signature is therefore not a fundamental defect in execution, according to Langbein's functional analysis of the wills act.[430] "The requirement that the will be signed is vastly more purposive than the requirement that the signature be 'at the end.'"[431] If the placement of the signature creates doubt as to the testator's intention

427. *See* Langbein, *Substantial Compliance*, *supra* note 8, at 498.

428. Miller, *supra* note 3, at 271-74 (discussing the protective function).

429. Nelson & Starck, *supra* note 19, at 351. Note that this formality has been justified for its intent-verifying value: "[S]ince 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 34, at 5-6. Nelson and Starck argue that the requirement that the will be signed "at the end" is an important intent-verifying formality, Nelson & Starck, *supra* note 19, at 349-50, but most commentators consider location of signatures to be a relatively minor and technical formality. *See* Miller, *supra* note 3, at 264 n.500 (discussing commentators' application of functional analysis to the requirement that the will be signed at the foot or end).

430. *See* Langbein, *Substantial Compliance*, *supra* note 8, at 498.

431. *Id.*

because it appears within the endorsement, within the body of the will, or anywhere other than at the end,[432] the substantial compliance doctrine would permit the proponents to show, through introduction of extrinsic evidence, that the testator intended the document to be enforced. As explained in part one of this article, there is authority under current law for validating wills signed in the wrong place even in the absence of a harmless error principle.[433]

b. South Australia's Dispensing Power Provision

According to Langbein, professionally drafted wills in South Australia that are longer than one page usually provide a space at the bottom of each page for the witnesses' and testators' signatures.[434] He discusses certain cases that have arisen under section 12(2) in which the testator signed some of the pages, but failed to sign at the foot or end of the document, as the South Australian wills act requires.[435] Langbein explains that prior to enactment of section 12(2) such wills were either invalidated or, if omission of only the signed portion did not distort the dispositive scheme, admitted to probate with only the signed pages enforced.[436] The South Australian courts now use section 12(2) to validate these wills, a result that Langbein highly approves.[437]

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432. *See* Miller, *supra* note 3, at 232-34 (discussing treatment of improperly signed wills in the courts).

433. *See id.*

434. Langbein, *Harmless Error Rules*, *supra* note 8, at 27.

435. South Australian Wills Act § 8, *supra* note 43; for cases, see, e.g., Estate of Roberts, 38 S.A. St. R. 324 (1985). "The facts are so straight-forward that their very recitation indicates 'there can be no reasonable doubt that the deceased intended the document to constitute his will.'" *Id.* at 324. In that case, the testator attempted to execute a two-page will, but signed only the first page, and neglected to sign the second. *Id.* at 325. The witnesses signed both. *Id.* "This was obviously an oversight. He had gathered his witnesses together and he had embarked on the task of 'execution' of the whole document in an effort to comply with the formalities necessary to secure its validity. . . ." *Id.* The court, following *Williams*, distinguished "execution" from placement of the signature on the page. *Id.* at 326 (citing *Williams*, 36 S.A. St. R. at 425 (opinion of King., C.J., quoted *supra* in text accompanying note 337)). Other misplaced signature cases and unsigned will cases are cited in Langbein, *Harmless Error Rules*, *supra* note 8, at 15 n.55.

436. Langbein, *Harmless Error Rules*, *supra* note 8, at 28. For discussion of the traditional approach of the South Australian courts to technical defects in execution and the rationales under which such wills were saved prior to § 12(2), see generally Palk, *supra* note 45; Ormiston, *Formalities and Wills: A Plea for Caution*, 54 AUSTL. L.Q. 451 (1980).

437. Langbein, *Harmless Error Rules*, *supra* note 8, at 28.

> I think these cases illustrate one of the great advantages of a harmless error rule: its tendency to displace sleight-of-hand and to promote candor. When I first wrote in 1975 about the likely consequences of a harmless error rule, I pointed out that

c. New Uniform Probate Code Section 2-503

The UPC has never required the testator to sign the will at the foot or end of the document.[438] The 1990 comment to the revision of section 2-502 states that "[t]here is no requirement that the testator's signature be at the end of the will; thus, if he or she writes his or her name in the body of the will and intends it to be his or her signature, this would satisfy the statute."[439] Because the intent of section 2-502 "is to validate wills that meet the minimal formalities of the statute"[440] and the provision does not mandate placement of the signature at the end of the will, misplaced signature cases presumably should not occur under the UPC will provision.

E. *Application of the Rules to Noncompliance with the Writing Requirement*

1. Langbein's Substantial Compliance Doctrine

In his 1975 article, Langbein lays great stress on the importance of the writing requirement. He clearly does not contemplate application of the substantial compliance doctrine to validate unwritten testamentary dispositions.[441] This limitation is somewhat surprising because many jurisdictions permit nuncupative wills under certain limited circumstances, along with the gift *causa mortis* and the oral declaration of trust in personalty. Although these devices are not widely used in practice, they do permit enforcement of oral dispositions of personal property that are essentially testamentary under certain circumstances.

If the goal of the substantial compliance doctrine is to enforce the testator's intent, logic would seem to require courts to apply functional

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> the traditional strict compliance rule tended to drive sympathetic courts into strained interpretations of what constituted compliance with the relevant formality. . . . [T]he rule of strict compliance may actually promote litigation, by inciting courts to bend the ostensible rules in ways that make the outcomes hard to predict.
>
> In the South Australian misplaced execution cases, the candid standard of section 12(2) — that is, well-proven testator's intent — has displaced . . . the devices that grew up to bend the strict compliance rule.

Id. at 127-28. For examples of such "bending" of the strict compliance rules, see Miller, *supra* note 3, at 232-34 (discussing treatment of improperly signed wills in the courts).

438. *See* UNIF. PROB. CODE § 2-502 (1969) (discussed in Miller, *supra* note 3, at 209). For text of the provision, see *id.* at 208 n.192.

439. UNIF. PROB. CODE § 2-502(a) comment (1990) (citing Estate of Siegel, 214 N.J. Super. 586, 520 A.2d 798 (App. Div. 1987)).

440. *Id.*

441. *See* Langbein, *Substantial Compliance*, *supra* note 8, at 518-19.

analysis to nuncupative will provisions and thus to permit extrinsic evidence to show that an oral disposition of personal property was made with testamentary intent, at least in every case in which the oral disposition would have qualified as a nuncupative will but for defective compliance with the requirements for a nuncupative will. In his 1975 article, Langbein notes that the restrictions on nuncupative wills have prevented them from "achieving any practical importance"[442] and that the substantial compliance doctrine "is not a back door to nuncupative testation."[443] Langbein argues that the policy supporting the continued recognition of nuncupative wills in limited circumstances is that the amount of property that can be passed by this device is so small that the legislature is willing to forego "truly purposive" formalities.[444] With respect to nuncupative wills, therefore, Langbein states that functional analysis "has no sphere."[445]

To the extent that the nuncupative will is recognized, however, application of the substantial compliance doctrine seemingly should require the court to address the policies supporting the legislature's decision to permit nuncupative wills in limited circumstances. The argument for extending functional analysis to oral testaments of personal property are even more compelling in jurisdictions that enforce oral declarations of trust in personalty or the gift *causa mortis*, since recognition of these devices implies judicial willingness to enforce dispositions that are "functionally equivalent" to an oral will. One commentator has recommended recognition of the oral declaration of trust in personalty as a substitute for delivery in instances in which the death of a donor prevents delivery of an intended gift.[446] Similar reasoning arguably ought to extend to enforcement of oral dispositions of personalty that do not meet the requirements for a nuncupative will under the substantial compliance doctrine in instances in which the proponent is able to carry the burden of showing testamentary intent and the court determines that wills act policies have been substantially served.

According to Langbein, adoption of the substantial compliance doctrine would not affect the traditional definition of a "writing."[447] "Although some modes of electronic communication can perform some of the functions of writing . . . they lack the solemnity and finality

442. *Id.* at 491.
443. *Id.* at 523.
444. *Id.*
445. *Id.*
446. *See generally* Love, *supra* note 19.
447. *See* Langbein, *Substantial Compliance*, *supra* note 8, at 518-19.

of a signed document."[448] Given contemporary advances in technology there is substantial ground for arguing that electronic or videotaped wills can serve all the functions of a written will and possibly even improve the intent-verifying and authenticating aspects of the traditional attested will.[449] The Indiana legislature specifically permits videotaped recordings of the execution ceremony to be admitted as evidence of due execution,[450] thus implicitly recognizing the value of electronic documentation as evidence of testamentary intent and the genuineness of the disposition.[451] Outside the backward-looking law of wills, in fact, there is clearly a movement toward admitting videotapes into evidence in a variety of judicial proceedings.[452]

At the time of Langbein's 1975 article, the technology for preparing tamper-resistant electronic wills was not widely available. Technological limitations may therefore have been a factor in Langbein's reluctance to consider electronic wills as falling within the potential scope of substantial compliance.[453] In his 1975 article, Langbein indicates that only in extremely narrow circumstances could such a document fulfill the wills act policies, even in jurisdictions that routinely enforce unattested holographic wills,[454] though he conceded that substantial compliance could "conceivably" apply to electronic wills.

> Consider the dying testator who dictates testamentary provisions on a dictabelt, declaring that if he does not live to sign the transcript he wishes the dictabelt to serve as his last will. Suppose further that he is in a holograph jurisdiction which permits handwriting to substitute for attestation; or that he dictates the will in the presence of sufficient witnesses whom he asks to attest on the dictabelt. The testator's recorded voice evidences authenticity as well as handwriting and signature would; the dictabelt has the permanence of writing; and his language shows unambiguous finality of intent. The purposes of the writing requirement have been achieved in a rare case where it would be unjust to insist on the formality.[455]

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448. *Id.* at 519.

449. Miller, *supra* note 3, at 299-302 (discussing use of videotapes as evidence of due execution and of "videowills").

450. *See* IND. CODE ANN. § 29-1-5-3(c) (Burns 1990); Miller, *supra* note 3, at 302 n.695.

451. Miller, *supra* note 3, at 301.

452. For discussion of videowills and citations to relevant articles, see *id.* at 299-300.

453. *See* Langbein, *Substantial Compliance*, *supra* note 8, at 519.

454. *Id.*

455. *Id.*

Like Langbein's interloper's bullet/coronary seizure scenario justifying application of substantial compliance to an unsigned will,[456] this situation involves a testator at the point of death and prevented by uncontrollable circumstances from complying with the wills act. Both scenarios contemplate extremely limited application of the doctrine, based not only upon unequivocal evidence of testamentary intent but also apparently upon evidence of the testator's attempted compliance with the wills act.

Other commentators argue that a videotaped will provides *superior* evidence of testamentary intent and authenticity.[457] Under a functional construction of the wills act, a videotaped will may potentially serve all of the policies served by a written and attested will.[458] Though Langbein suggests that substantial compliance could only be applied to an electronic will as an alternative to the attestation requirement (and therefore, only in a holograph jurisdiction),[459] the relevance of such a limitation under a functional interpretation of the attestation requirement seems problematic. Surely, even in a jurisdiction that permits only attested wills, a functional construction of the attestation requirement should permit the court to apply the substantial compliance doctrine to an electronic will that in fact effectively serves the intent-verifying and authenticating functions served by attestation.[460]

Moreover, it can be argued that even under current law, without resort to any harmless error principle, a court could conceivably validate a videotaped will or other electronic document through a broad construction of the writing requirement. This theory would treat a videotaped will as a "writing" based on a *quantitatively* substantial fulfillment of the writing requirement, on the theory that a videotape is in fact a "writing." As one commentator has noted,

> [T]he requirement that a will be in writing was created to assure a discernible record of the testator's intent and to avoid reliance on verbal reports by survivors. A videotape is as permanent a record as a paper will, perhaps more so because the material is less easily destructible . . . . At its best it may prove far superior. The videotape thus clearly meets the test of a writing and should be construed as such.[461]

456. *Id.* at 518.

457. Miller, *supra* note 3, at 301-02 (discussing use of videowills); *id.* at 300 n.681 (citing to articles arguing in favor of videowills or use of videotape to prove due execution of ordinary wills).

458. *Id.* at 301-02.

459. Langbein, *Substantial Compliance*, *supra* note 8, at 519.

460. Miller, *supra* note 3, at 301-02.

461. Nash, *A Videowill: Safe and Sure*, 70 A.B.A. J. 87, 88 (1984).

In a jurisdiction that permits holographic as well as attested wills, the authenticating purpose[462] of the handwriting requirement would be effectively served by having the testator actually appear on the screen and state his or her testamentary wishes.[463] Even without additional formalities, such a document is unlikely to raise any issues that courts in holographic jurisdictions are not prepared to address with respect to informal wills.[464] A videotaped will might be found in compliance with the writing requirement in a holographic jurisdiction so long as it effectively resolves any questions respecting the authenticity of the dispositive scheme, so that the minimal standard of formality is functionally served.[465] In a jurisdiction that permits only attested wills, reinterpretation of the writing requirement to include videotaped documents would, of course, address only one aspect of the wills act formalities. The testator presumably would still have to ensure some form of attestation in order to achieve literal compliance with the wills act, either by including some form of attestation ceremony as part of the videotaped execution, by having the videotaped document itself attested, or both.[466]

Langbein argues in his 1975 article that electronic wills do not exhibit the solemnity and finality of written wills.[467] Again, Langbein may simply have been considering the limitations of the technology available at the time. His 1975 article focuses primarily on audio recordings, which may indeed be less reliable as evidence of final testamentary intention than a carefully prepared videotaped will, since audio recordings are so frequently used as a substitute for notes or memoranda. It seems indisputable, however, that with current technology an electronic will could be prepared in such a way as to resolve all doubts as to genuineness and testamentary intent.[468] In fact, a testator's unequivocal attempt to dispose of property by a videotaped or other electronic will might actually raise fewer doubts respecting finality of intention than an informal holographic will.

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462. Miller, *supra* note 3, at 287 (discussing authenticating function of holographic formality).

463. *See* Nash, *supra* note 461, at 88.

464. *See* Miller, *supra* note 3, at 280-86 (discussing determination of testamentary intent with respect to problematic holographic "wills"); Langbein, *Substantial Compliance*, *supra* note 8, at 515 (discussing determination of testamentary intent with respect to homemade wills).

465. *Cf.* Langbein, *Substantial Compliance*, *supra* note 8, at 519-20 (discussing application of substantial compliance doctrine to unattested documents in jurisdictions that permit holographic wills).

466. Nash suggests the means of accomplishing attestation of a videotaped will. *See* Nash, *supra* note 461, at 88 (quoted in Miller, *supra* note 3, at 301 n.692).

467. *See* Langbein, *Substantial Compliance*, *supra* note 8, at 519.

468. *See* Miller, *supra* note 3, at 299-300 n.681 (citing articles dealing with procedures for preparing videotaped wills).

2. South Australia's Dispensing Power Provision

Many of the reported cases in South Australia state in dicta that section 12(2) does not apply to the requirement of a writing itself, but only to defective execution of the document;[469] in other words, that application of the dispensing power presupposes the existence of a writing (or document) to which the power can be applied. The clear import of the relevant dicta is that section 12(2) cannot be applied to an oral disposition of property.[470] Whether the South Australian courts could conceivably apply section 12(2) to validate an electronic document is less clear. In *Estate of Slavinskyj*,[471] Judge Legoe noted that in South Australia "'writing' includes any *visible* form in which words may be reproduced or represented"[472] and that "[t]here is no restriction on the material used for the purpose of writing,"[473] in concluding that a will written on a plasterboard wall in the testator's house was a document to which the section 12(2) dispensing power could be applied.[474] Unless the South Australian courts extend the definition of "writing" (or "document") to include alternative means of preserving the terms of the decedent's testamentary plan, section 12(2) would presumably not apply to an electronic will.[475]

The legislative history of section 12(2) indicates that the scope of the South Australian dispensing power has been extended considerably beyond the circumstances envisioned by the Law Reform Commission that originally proposed it.[476] Professor Palk suggests that the committee that proposed section 12(2) did not intend to abolish attestation as a substantive requirement for due execution, legitimize unsigned wills, or otherwise eliminate the formal requirements for due execution. On the contrary, section 12(2) was envisioned as a limited re-

469. *See, e.g.*, *Blakely*, 32 S.A. St. R. at 476.

470. *See, e.g.*, *id.* "A will could hardly be admitted to probate if it had not been reduced to writing of some kind. . . ." *Id.*

471. 53 S.A. St. R. 221 (1989).

472. *Id.* at 230 (emphasis added).

473. *Id.*

474. *Id.* at 229-30, 233-34. "'It is the wittiest partition that I ever heard discourse.'" *Id.* at 233 (quoting Shakespeare, *A Midsummer Night's Dream*).

475. *See id.* at 229-30 (explaining the meaning of "writing"). In *Blakely*, the court construed the South Australian Wills Act to require that a will be *both* (1) in writing; *and* (2) "executed." *See Blakely*, 32 S.A. St. R. at 478. The court suggested that "[a] will could hardly be admitted to probate if it had not been reduced to writing of some kind," so that § 12(2) must be limited to defectively executed *writings*. *See id.* For discussion of *Blakely*, see *supra* notes 291-310 and accompanying text.

476. *See generally* Palk, *supra* note 45 (discussing the legislative history of § 12(2)); Miller, *supra* note 3, at 311-14.

form.[477] The history of section 12(2) suggests that the intention of the South Australian Law Reform Commission was to give the courts flexibility in enforcing the attestation requirement in those circumstances in which attestation was impracticable or impossible, and to provide some discretion in dealing with minor technical violations of the wills act.[478]

The South Australian courts demonstrably have not allowed the legislative history of the dispensing power to prevent their interpreting section 12(2) as authorizing an extremely broad dispensing power. However, in *Slavinskyj*, the court did suggest that South Australia defines a "writing" in a way that may preclude extension of section 12(2) to electronic documents, unless the courts distinguish between a "writing" for purposes of determining whether there has been compliance with the wills act writing requirement and a "document" (in the sense of a reliable permanent record of an intended disposition) for purposes of section 12(2). Though at present "[w]riting . . . remains as the one essential positive formal requirement that cannot be dispensed with in South Australia,"[479] the courts could justify extending the dispensing power to nontraditional documents by distinguishing the terms "writing" and "document."

It is not clear that the liberal South Australian courts would refuse application to an electronic document in compelling circumstances, though certainly the various Australian and Canadian Law Reform Commissions that have considered the issue have been surprisingly resistant to proposing a redefinition of the writing requirement to include electronic documents.[480] While these reports do not distinguish between the definition of "writing" for purposes of determining compliance with the wills act and the meaning of "document" for the purpose of determining whether the dispensing power may be applied, the apparent hostility to videotaped or other electronic wills suggests the intention to limit application of harmless error rules to documents (however unconventional the materials used) that record the testator's words in visual form designed to be read and thus to exclude all documents recording the testator's dispositive plans by any other means.

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477. Palk, *supra* note 45, at 394; Miller, *supra* note 3, at 312-14.

478. *See* Palk, *supra* note 45, at 384-95; Miller, *supra* note 3, at 311-14.

479. J. Miller, *Execution of Wills*, *supra* note 19, at 572; *cf.* Langbein, *Harmless Error Rules*, *supra* note 8, at 52.

480. *See, e.g.*, Miller, *supra* note 3, at 328 (discussing proposal of Law Reform Commission of New South Wales); *id.* at 337 (discussing proposal of Tasmanian Law Reform Commission); *id.* at 337-38 (discussing proposal of British Columbia Law Reform Commission).

3. New Uniform Probate Code Section 2-503

Like South Australia's section 12(2), UPC section 2-503 may have been intended to preclude application of the dispensing power to oral dispositions of property. Section 2-503 applies only to "a document or writing added upon a document."[481] It is unclear whether the term "document" in section 2-503 could be extended to documents other than those that have been handwritten, typed, or printed on paper (or some other visual medium), or whether a court applying section 2-503 could legitimately distinguish between the "writing" for purposes of determining compliance with section 2-502 and "document" for purposes of applying section 2-503 to save a will that does not meet the writing requirement.

The comment to the 1988 discussion draft of revised section 2-502 stated flatly that videotaped or tape-recorded wills do not meet the writing requirement for purposes of due execution under section 2-502(a) or (b), though the comment went on to remark that a will that does not meet the section 2-502 requirements might still be valid under section 2-503.[482] The comment to section 2-503, however, noted that the South Australian and Israeli courts "have never excused noncompliance with the requirement that a will be in writing" through application of their harmless error rules.[483] The drafters apparently intended to suggest in the 1988 discussion draft that application of section 2-503 should be similarly limited. In the 1990 version of section 2-503, the drafters seem to have softened their stance on treating an electronic will as a "writing" under section 2-502(a), merely commenting that there is authority that a videotape is not a writing.[484] Arguably, even if a court applying section 2-503(a) were to determine that an electronic will does not in fact constitute a "writing" for purposes of compliance with that provision, the section 2-503 harmless error rule could conceivably be applied to an electronic will on the theory that it is a "document" for purposes of the section 2-503 dispensing power. Such a will might be salvageable if its proponent produced sufficiently clear and convincing evidence of testamentary intent. The drafters' use of inconsistent terminology in sections 2-502 and 2-503 arguably points to the more liberal interpretation. The comment to

481. UNIF. PROB. CODE § 2-503 (1990).

482. UNIF. PROB. CODE § 2-502(a) comment (Discussion Draft, July-Aug. 1988); for discussion, see Miller, *supra* note 3, at 343-44.

483. UNIF. PROB. CODE § 2-503 comment (Discussion Draft, July-Aug. 1988).

484. *See* UNIF. PROB. CODE § 2-502(a) comment (1990) (citing Estate of Reed, 672 P.2d 829 (Wyo. 1983)). For discussion of this case, see Miller, *supra* note 3, at 300.

section 2-503 is equivocal in this respect, however; moreover, it appears that the South Australian courts and the Law Reform Commissions that have proposed harmless error rules use the terms "writings" and "document" interchangeably.

If the drafters of section 2-503 did intend to limit its application to traditional writings, their rationale is difficult to discern or justify. The UPC has always recognized the often problematic and potentially overinclusive holographic will as an exception to or limitation on the attestation requirement.[485] Under such a provision, courts may admit to probate all manner of unconventional documents on the theory that despite nonstandard form or ambiguous language, they are valid holographic wills intended to settle the disposition of the testator's property at death.[486] With the widespread availability of video recorders today, the same testators who benefit from liberal provisions for holographic wills and from harmless error rules — *i.e.*, testators unassisted by counsel who contrive to make home-made wills — are very likely to view a videotaped will as a more reliable means than a conventional writing of preserving their testamentary wishes. A semiliterate or illiterate testator, or indeed any layperson with a foolhardy trust in common sense, might justifiably assume that a videotaped will provides a more convincing mode of conveying testamentary intent than an unattested holographic will.

If a legislature were to enact a provision modelled on the UPC harmless error rule, the scope of the provision would seem to depend to some extent on the degree to which the legislature or the courts applying the provision adopted the drafters' interpretation of section 2-502 and section 2-503 as a gloss on the provisions. Nothing in the language of section 2-502 actually precludes expansion of the writing requirement to an electronic document.[487] Moreover, section 2-503 expressly permits the proponent of any "document" that does not meet the section 2-502 requirements for due execution to attempt to establish testamentary intent and expressly permits the court to dispense with the section 2-502 execution requirements if satisfied that there is clear and convincing evidence of testamentary intent.[488]

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485. *See* Miller, *supra* note 3, at 218-21 (UPC holographic will provision).
486. *See id.* at 274-96 (discussing probate of holographic wills).
487. *See* UNIF. PROB. CODE § 2-502 (1990).
488. *See id.* § 2-503.

F. *Application of the Rules to Formally Defective Attempts to Alter the Will*

1. Langbein's Substantial Compliance Doctrine

Often a testator seeks to alter the testamentary scheme set forth in a duly executed attested or holographic will by (1) performing a physical act on the will; (2) revoking all or a portion of the executed will through a subsequent inconsistent disposition of the same property by means of a codicil or a new will; or (3) inserting new terms into the existing will. The wills acts generally require that additions to a will and subsequent writings intended to alter the existing testamentary plan be executed with wills act formality.[489] Ineffective attempts to revoke the existing terms and substitute new ones often overlap in instances in which testators attempt to achieve this result through deletion and interlineation.

In his 1975 article, Langbein states that the substantial compliance doctrine could be applied to any failure of the testator to comply with the wills act requirements for alteration of the will through execution of a subsequent document or through deletion and interpolation.[490] He describes the requirement that alterations to existing wills be executed with wills act formality as "an unwise mutuality concept whose reexamination the purposive substantial compliance doctrine should facilitate."[491] The question for a court applying substantial compliance to a testator's apparent attempt to alter the existing, duly executed testamentary scheme without complying with the requirements for effective alteration is whether the informal document or writing on the existing document was intended to be effective.[492] Langbein recognizes that extending the substantial compliance doctrine to informal attempts to alter duly executed wills presents a risk that memoranda, notes, and casual statements in letters will routinely be offered to probate to vary the testamentary scheme.[493] He points out, however, that courts in jurisdictions that permit holographic wills and codicils must often address and resolve this issue.[494]

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489. *See* Langbein, *Substantial Compliance*, *supra* note 8, at 522.

490. *Id.*

491. *Id.* n.117.

492. *See id.*

493. *Id.*

494. *Id.* For discussion of such cases, see Miller, *supra* note 3, at 523-615 and accompanying text.

Langbein considers that the strong presumption against admitting a subsequent informal document to probate to vary all or part of an existing will would prevent a flood of cases seeking enforcement of formally defective alterations.[495] Under current law, potential proponents of such documents in most instances "correctly perceive the hopelessness of setting them up against formal wills" and do not attempt to convince the probate court that the informal document was intended to alter the duly executed testamentary scheme.[496] The proponent's burden of establishing the alteration is onerous.[497] The presumption against enforcement would be retained under the substantial compliance doctrine and would limit its application, presumably to instances in which the proponents were able to produce compelling evidence that the purported alteration to the existing will was intended to be given effect.

2. South Australia's Dispensing Power Provision

On its face, South Australia's section 12(2) dispensing power provision applies solely to the defective *execution* of wills, not to defective attempts to alter wills.[498] In *Estate of Standley*,[499] however, Judge Legoe concluded that section 12(2) may be applied to validate alterations to part of the will,[500] and this precedent has "captured the field."[501]

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495. *See* Langbein, *Substantial Compliance*, *supra* note 8, at 522-23.

496. *Id.* at 522.

497. *Id.* (citing *In re* Estate of Moore, 443 Pa. 477, 277 A.2d 825 (1971)). Langbein points to *Moore* as an example of the onerousness of the proponent's burden under current law of establishing the validity of a subsequent informal document. In that case, the court refused to enforce as a valid holographic will a handwritten, signed, and dated but unmailed letter found in the testator's safe deposit box after her death and instructing her attorney with respect to altering her existing will. *Id.* at 522-23.

498. *See* South Australian Wills Act § 12(2), *supra* note 9.

499. 29 S.A. St. R. 490 (1982).

500. *Id.* at 494. "In my judgment the provisions of s[ection] 12(2) can apply to a 'part' only of a document, such as an alteration, provided that part in the form of an alteration otherwise complies with or comes within the general ambit of s[ection] 12(2)." *Id.*

501. Langbein, *Harmless Error Rules*, *supra* note 8, at 30. *But see* Estate of Kurmis, 26 S.A. St. R. 449 (1981), in which the court refused to apply § 12(2) to enforce an addition to an existing will, even though the court considered that the new language had been added with the intention that it become part of the will. *See id.* at 450. The addition was neither signed nor attested. *Id.* Relying on *Baumanis*, 25 S.A. St. R. at 423, the court stated that § 12(2) could not be applied to the alteration, even though "[e]xtraneous facts . . . leave me with no doubt that [the alteration] was added . . . by the testator with the intention that that addition should form part of the will." *Id.*

Langbein considers that the court should have distinguished *Baumanis*. Langbein, *Harmless Error Rules*, *supra* note 8, at 30.

Langbein remarks that in applying the dispensing power to attempted alterations, the courts have not distinguished between formalities for revocation and formalities for substitution of new terms.[502] Typically, they focus on "the new language being inserted rather than the old language being struck"[503] in determining whether the alteration was intended to have testamentary effect.

In *Standley*, the altered will, written by the testator on a printed will form, was not in fact executed in accordance with the wills act because the testator had not complied with the presence requirements.[504] After preparing the will, she had subsequently attempted to alter it by (1) lining through the name of the person originally named as executor and substituting the name of a different person;[505] and (2) lining through the surname of one of the beneficiaries and inserting a different name.[506] The first alteration did not comply with the requirements for altering the will or for obliterating existing provisions.[507] The second alteration was initialled by the testator and attested by one witness.[508] Judge Legoe determined that the will should be enforced as altered under section 12(2).[509]

Langbein approves of the result in *Standley* and the extension of the precedent to subsequent alterations cases[510] on the ground that section 12(2) appropriately applies in those instances in which the testator intended the alteration to "relate back" to the prior executed will in form as well as in substance.[511] In such cases, the error is in

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> [T]here is a material difference between a case like *Baumanis*, where the testator never signs the will, and *Kurmis*, where he attempts to amend an instrument that he has previously executed properly. The testator in *Baumanis* had never taken the step of executing his will. He had not crossed the line from draft to will. In *Kurmis*, by contrast, the testator had long since taken that step . . . .

Id. In *Williams*, Judge Legoe suggested that *Kurmis* (in contrast to *Williams*) involved a situation in which the evidence actually was insufficient to establish beyond a reasonable doubt that the addition made by the testator "in unknown circumstances" was intended to have testamentary effect. *Williams*, 36 S.A. St. R. at 434 (Legoe, J.). To the extent, however, that *Kurmis* was not distinguishable from or reconcilable with the decision in *Williams*, Judge Legoe declined to follow it. *Id.*

502. *Id.*
503. *Id.*
504. *Standley*, 20 S.A. St. R. at 492.
505. *Id.*
506. *Id.* at 491.
507. *See id.* at 493.
508. *Id* at 491.
509. *Id.* at 495.
510. *See* Langbein, *Harmless Error Rules*, *supra* note 8, at 30-31.
511. *Id.* at 31.

the testator's belief that the prior execution continues in effect and such an error is harmless when the circumstances show that there is no fraud or imposition surrounding the alteration.[512]

Subsequent alterations cases usually have been consistent with *Standley*. In *Estate of Bennet*,[513] the court extended section 12(2) to an ineffective attempt to partially revoke a will by a physical act,[514] which South Australia does not permit.[515] The testator deleted a devise in favor of a friend by crossing through it, then wrote the date and her signature immediately under it.[516] She did not have the deletion attested.[517] Since South Australia does not have a statute permitting partial revocation by physical act, the revocation would have been ineffective if not for section 12(2),[518] though the evidence in *Bennet* of her intention to alter her will was particularly strong, because the friend whose gift had been deleted himself produced the altered will and testified in his affidavit that she had informed him of her intention to cut him out of her will.[519]

Similarly, in *Estate of Lynch*,[520] section 12(2) was applied to prevent application of the South Australian rule automatically revoking a testator's will at the time the testator marries unless the will is reexecuted.[521] The testator had executed the original will in compliance with the wills act.[522] After her marriage, she made several changes to her name in the will, apparently in an attempt to revive it.[523] When she showed the altered will to her son, he advised her to initial the alteration to the heading, which she accordingly did in his presence.[524] The court applied section 12(2) in concluding that the original will, which otherwise would have been revoked by her marriage, was effectively revived by her alterations.[525]

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512. *Id.*
513. 40 S.A. St. R. 350 (1986).
514. *Id.* at 351.
515. Langbein, *Harmless Error Rules*, *supra* note 8, at 32.
516. *Bennet*, 40 S.A. St. R. at 351.
517. *Id.* at 352.
518. Langbein, *Harmless Error Rules*, *supra* note 8, at 32.
519. *Bennet*, 40 S.A. St. R. at 351. "In effect, put very colloquially, the [testator] at one time thought that she would like to give [her friend] a legacy. She did not like his being away from home for a long time, long periods. She told him that if he was going to be away for a long time she would cut him out of her will. He was away from home for a long time. She made the alteration . . . when he was in the Middle East." *Id.* at 352-53.
520. 39 S.A. St. R. 131 (1985).
521. Langbein, *Harmless Error Rules*, *supra* note 8, at 32 n.148.
522. *Lynch*, 39 S.A. St. R. at 132-33.
523. *Id.* at 133.
524. *Id.*
525. *See id.* at 136.

In *Estate of Possingham*,[526] the court applied section 12(2) to what would otherwise have been a botched attempt at partial revocation through physical act,[527] in a case in which the will form contained "the standard provisions for revocation of former wills" instructing the testator as to the proper procedures.[528] Subsequent to execution, the testator had attempted to delete certain provisions without complying with the instructions printed on the will.[529] Instead, he wrote in the margin, "Deletions authorised by me" followed by his signature, then initialled these alterations where they occurred.[530] In determining that section 12(2) should be applied, the court noted that the testator had signed the alterations, that the document as altered was left in the custody of his bank as his last testamentary document, and that "the alterations give effect to changes in the decedent's lifetime which affected his original testamentary dispositions."[531] Based on its evaluation of the circumstances, the court reached the "inescapable conclusion that the irregular alterations in fact disclose the testator's final testamentary intentions."[532]

In his 1987 article, Langbein discusses an interesting unreported case in which the South Australian court extended section 12(2) to a will containing completely unexecuted alterations through cross-out and interlineation, despite evidence that the testator had had actual knowledge of the requirement that alterations be signed and witnessed to be given effect.[533] In *Estate of Sierp*,[534] the testator had attempted to alter his professionally drafted will without observing the proper formalities.[535] Subsequently, the testator's solicitor warned him that the alterations were not effective.[536] The solicitor had drafted a new will for the testator, but the testator never had the new will executed despite the solicitor's repeated reminders.[537] Despite the testator's

526. 32 S.A. St. R. 227 (1983).

527. *See* Langbein, *Harmless Error Rules*, *supra* note 8, at 32.

528. *Possingham*, 32 S.A. St. R. at 228.

529. *Id.* at 352.

530. *Id.* at 228.

531. *Id.* at 229.

532. *Id.*; *see, e.g.*, Estate of Ryan, 40 S.A. St. R. 305 (1986) (applying § 12(2) to validate a form will altered by interlineations without proper formalities).

533. Langbein, *Harmless Error Rules*, *supra* note 8, at 32-33.

534. No. 173 of 1982 (S.A. Sup. Ct. Dec. 13, 1982), *cited in* Langbein, *Harmless Error Rules*, *supra* note 8, at 32.

535. *Id.*

536. *Id.*

537. *Id.*

seemingly deliberate noncompliance with the alteration formalities, the court applied section 12(2) to enforce the altered will.[538]

Langbein finds the result in *Sierp* troubling, analogizing it to *Kelly*,[539] "that difficult unattested will case."[540] Langbein argues that the most likely inference from a testator's failure to comply with the wills act after having been informed that such compliance is necessary is that the testator did not intend to make an effective alteration.[541] Langbein considers that *Sierp* is distinguishable from *Kelly*, however, because in *Sierp* the testator did not learn of the wills act requirements until after he had taken steps to alter his will. Langbein notes that in the law of wills testamentary intent is determined by the testator's state of mind at the time of executing the will.[542] In *Kelly*, in contrast to *Sierp*, the testator knew of the requirements for executing a valid will at the time he prepared the document that was ultimately admitted to probate under section 12(2), a result which Langbein considers inconsistent with the high standard of proof required for application of the dispensing power.[543]

The court in *Vauk*[544] considered whether section 12(2) could be applied to a will containing substantial pencilled alterations.[545] Judge Legoe noted that "the alterations . . . point in the direction of a draft will rather than a final will."[546] There was evidence in *Vauk* that the will as altered was intended to be a draft: the changes had actually been incorporated into a later will, though the testator died before he was able to execute it.[547] Judge Legoe concluded that the application for admission of the altered will to probate in common form should be refused, and that if the executors wished to prove the altered will, the proof would require probate in solemn form.[548]

In contrast, the court in *Estate of Sutton*[549] applied section 12(2) to a will that had apparently been altered to exclude the testator's

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538. *Id.*

539. *Kelly*, 32 S.A. St. R. 413, *aff'd*, 34 S.A. St. R. 370 (1983). For discussion, see *supra* notes 104-19 and accompanying text.

540. Langbein, *Harmless Error Rules*, *supra* note 8, at 33.

541. *Id.* at 32-33.

542. *Id.* at 33.

543. *Id.*

544. 41 S.A. St. R. 242 (1986). For discussion, see *supra* notes 355-75 and accompanying text.

545. *Id.*

546. *Id.*

547. *Id.* at 248.

548. *Id.* For discussion of the distinction in South Australia between solemn and common form probate, see *supra* text accompanying notes 46-52.

549. 51 S.A. St. R. 150 (1989).

son from the will, then later altered to reinstate him as a result of a reconciliation.[550] The will, signed and executed, had been handwritten by the testator on a will form.[551] The earlier alterations were in black ink; through cross-out the testator had deleted the language in the original will that would have given his son a share of his estate. The testator also appended "an emphatic statement" to the end of the operative clauses that he intended the son to be so excluded.[552] The exclusionary paragraph was signed and dated, but not attested.[553] The deletions and interlineations by which the testator reinstated his son were written in blue ink. In the margins of the will, the testator placed his signature and a date, but did not have the alterations attested.[554] Judge White found that by signing his name in the margin, the testator had intended to sign all of the blue ink alterations.[555]

Citing *Williams*,[556] Judge White pointed out that section 12(2) might allow enforcement of a will "notwithstanding the absence of any signature on the document."[557] Based on the evidence in *Sutton*, Judge White was satisfied beyond a reasonable doubt that the signed blue ink alterations reinstating the son were "a deliberate expression of testamentary intention and not mere preparation of a draft for further typing up and execution and not just a sign of irresolution about his testamentary intentions" and that the testator had "intended these changes to be *the final form* of a document which he intended to be his last will."[558] Because of the high standard of proof required under section 12(2), Judge White asked a handwriting expert to evaluate the printed clause reinstating the son and "after some delay . . . was provided with convincing independent expert evidence that the printing is under the hand of the deceased."[559]

In the 1990 case, *Estate of Kirs*,[560] Judge Legoe refused to apply section 12(2) to enforce as part of the will certain deletions, interlineations, and marginalia apparently made by the testator.[561] The testator

550. *Id.* at 151-52.
551. *Id.* at 151.
552. *Id.*
553. *Id.* at 152.
554. *Id.*
555. *Id.*
556. 36 S.A. St. R. 423 (1984) (Full Court), discussed *supra* notes 316-55 and accompanying text.
557. *Sutton*, 51 S.A. St. R. at 153.
558. *Id.*
559. *Id.*
560. 55 S.A. St. R. 61 (1990).
561. *Id.* at 63-64, 68.

had attempted to delete some of the provisions of the original will and to substitute new terms. The additions related to the maintenance of the testator's dog Poiss and the testator's sister, both of whom had predeceased him. Some of these alterations had been subsequently altered, presumably to reflect that the dog and the sister had died.[562] The testator had made a marginal notation to that effect, had signed his name, and had crossed out some of his own additions to the will.[563] There was no evidence to indicate the time at which the testator had made the various alterations.[564]

Quoting extensively from Langbein's 1987 article,[565] Judge Legoe nevertheless distinguished *Kirs* from *Standley* and other cases analyzed by Langbein. He believed that reasonable doubt existed as to whether the testator intended any of the alterations to modify his will. Judge Legoe therefore determined that the attempted revocations and additions were without effect and that the will could be enforced in its original, unrevoked form.[566] "I have no doubt whatsoever that the alterations could not be proved under section 12(2)."[567]

3. New Uniform Probate Code Section 2-503

New section 2-503 expressly permits the proponent to prove by clear and convincing evidence that the testator intended to alter, revoke, or revive a will, despite the testator's noncompliance with the formalities required by section 2-502.[568]

III. THE UNIFORM PROBATE CODE HARMLESS ERROR SOLUTION AND THE UNIFICATION OF THE LAW OF SUCCESSION

A. *The 1990 Revisions and the Unification of the Subsidiary Law of Wills and Will Substitutes*

1. Narrowing the Gap Between Wills and Will Substitutes

Section 2-503 is one of many revisions to UPC article 2 purportedly designed to clarify the UPC wills requirements and to make the law of wills and will substitutes more consistent. According to its drafters,

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562. *See id.* at 63-64.

563. *Id.* at 65.

564. *Id.*

565. *Id.* at 66-67 (quoting with approval Langbein, *Harmless Error Rules*, *supra* note 8, at 29, 31).

566. *Id.* at 67.

567. *Id.* at 69.

568. UNIF. PROB. CODE § 2-503 (1990).

section 2-503 attempts to unify the law of wills and will substitutes by bringing the treatment of defectively executed wills more into line with the treatment of will substitutes.[569] The comment discussing the intended scope and application of the section 2-503 dispensing power reflects the influence of Langbein's 1987 analysis of the South Australian dispensing power provision.[570] In his 1987 article, Langbein recommends adoption of a dispensing power provision similar to South Australia's as an appropriate solution to some of the persistent problems in American succession law.[571] Langbein bases his recommendation on his extensive review of the South Australian case law under section 12(2) and of the other forms of harmless error rules (including the statutory substantial compliance provision enacted in Queensland[572]). Langbein considers that one important effect of the adoption or enactment of a harmless error rule would be to foster consistency in the enforcement of wills and will substitutes.[573]

In recommending enactment of a harmless error rule modelled on South Australia's dispensing power, Langbein is chiefly concerned with eliminating the traditional insistence on strict compliance with the formalities of transfer set out in the wills act. Langbein persuasively argues that the virtually universal recognition of relatively informal devices for achieving results indistinguishable from a transfer by will undercuts any policy that might be served by the strict compliance rule for wills, and produces unjust and irrational results in penalizing transferors who elect to dispose of their property by will, but who inadvertently fail to achieve strict compliance with the formalities.[574]

One of Langbein's stated objectives is resolution of some of the disparities in the subsidiary law applicable to wills and will substitutes. Langbein points out that "[m]ost rules of the law of wills are rules of

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569. *See* UNIF. PROB. CODE § 2-503 comment (1990).

570. *See id.*

571. *See* Langbein, *Harmless Error Rules*, *supra* note 8, at 51-54. "The abiding lesson that emerges from the . . . experience with the harmless error rule in South Australia is that the rule works." *Id.* at 51.

572. *Id.* at 41-45; for discussion of the Queensland provision, see Miller, *supra* note 3, at 329-35.

573. *See, e.g.*, Langbein, *Harmless Error Rules*, *supra* note 8, at 52-53.

574. *See* Langbein, *Substantial Compliance*, *supra* note 8, at 503-04, 523-24; Langbein, *Harmless Error Rules*, *supra* note 8, at 52-53. *See generally* Langbein, *Nonprobate Revolution*, *supra* note 5 (discussing the increasing popularity and juridical foundations of the will substitutes); Langbein, *Family Wealth Transmission*, *supra* note 13, at 722 (discussing changes in methods of transferring private-sector wealth at death resulting from the rise of the nonprobate system and fundamental changes in the nature of wealth).

subsidiary law that apply only when a will is silent or unclear."[575] For example, most jurisdictions typically provide that the testator's divorce extinguishes the divorced spouse's interest in the testator's estate, even if the testator dies without modifying his or her will.[576] Similarly, the law of wills specifically addresses such issues as the status of adopted children, the effects of lapse or ademption, the rights of creditors to property within the probate estate, and the protection of the family from disinheritance by the testator from creditors of the estate.[577] Some of these issues arise with respect to will substitutes; others do not.[578] While some of these principles have been extended in some jurisdictions to certain of the will substitutes, the law applicable to these devices — all products of judge-created exceptions to the wills acts — is relatively unsystematic and undeveloped.[579]

Neither Langbein nor the drafters of the revised UPC propose eliminating the most fundamental consequence of the transferor's choice to dispose of property by wills rather than will substitutes: *i.e.*, property disposed of by will is subject to the probate system, while property disposed of by will substitute is not. The UPC is of course a *probate* code, from its inception primarily concerned with simplifying and streamlining the probate process.[580] Langbein sees no inconsistency in permitting an alternative system for disposing of property at death without the intervention of the probate courts, and in fact, has consistently supported recognition of the "nonprobate" system.[581] The 1990 revisions to the UPC attempt to bring the law of wills and will substitutes more into line while leaving the probate and nonprobate systems essentially intact and separate.

One of the most important contributions of the UPC to promoting consistency in the treatment of wills and will substitutes has been the

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575. Langbein, *Nonprobate Revolution*, *supra* note 5, at 1135.

576. *See id.*

577. *See id.* at 1135-39.

578. *See id.* at 1137 (pointing out, for example: (1) that the financial institutions that primarily operate the nonprobate system typically avoid the lapse problem by encouraging the testator to name contingent beneficiaries and stipulate payment to the estate if none survive; and (2) that the "asset-specific" character of the will substitutes obviates the probability of ademption).

579. *See* Miller, *supra* note 3, at 180-85 (discussing the development of the will substitutes).

580. *See id.* at 204-11 (discussing history of UPC and its predecessor, the Model Probate Code).

581. *See, e.g.*, Langbein, *Nonprobate Revolution*, *supra* note 5 (discussing increasing popularity of will substitutes and the policies that support them); Langbein, *Substantial Compliance*, *supra* note 8, at 505-09 (discussing the various will substitutes as "functionally equivalent" to wills).

development of the augmented estate concept,[582] giving a surviving spouse access to assets transferred by will substitutes and, therefore, outside the probate system. The UPC's forced share scheme "provides a dramatic example of the integration of probate and nonprobate transfers. The UPC's forced-share scheme . . . extends the spouse's elective share to virtually all the will substitutes, and it charges probate and nonprobate assets in proportion to their value."[583] The 1990 revisions have significantly refined the provisions for the protection of the surviving spouse.[584] A further step in promoting consistency between the law of wills and will substitutes has been the UPC's recent extension of certain principles of construction traditionally applicable to wills to the will substitutes.[585]

The 1990 revisions to the UPC unquestionably represent considerable progress toward unified, consistent treatment of all donative dispositions that produce essentially testamentary effects, though the UPC does not and by definition cannot resolve the disparity resulting from the choice to dispose of property by will rather than by will substitute.[586] The limited scope of the UPC both assumes and implies the existence of a separate, nonprobate system for transferring property at death.

2. Devaluation of the Attestation Requirement

The UPC's proposed section 2-503 harmless error rule was intended by its drafters to narrow the gap between wills and will substitutes by "extending to will formalities the harmless error principle that has long been applied to defective compliance with the formal requirements for nonprobate transfers."[587] Enactment of a provision modelled on section 2-503 would permit courts to enforce wills demonstrably intended to be implemented.

As the South Australian case law shows, a side effect of the application of a broad dispensing power provision is the virtual elimination of attestation — the one distinguishing requirement of the wills for-

582. *See* UNIF. PROB. CODE § 2-202. For discussion, see Miller, *supra* note 3, at 249-51.

583. Langbein, *Nonprobate Revolution*, *supra* note 5, at 1139.

584. *See* UNIF. PROB. CODE art. II, pt. 2 (1990) (revised elective share provisions). For discussion, see Miller, *supra* note 3, at 249-51.

585. *See* UNIF. PROB. CODE art. II, pt. 7 (1990) ("Rules of Construction Applicable to Donative Dispositions in Wills and Other Governing Instruments"). "Some of the sections in Part 7 are revisions of sections contained in Part 6 of the pre-1990 Code. Although these sections originally applied only to wills, their restricted scope was inappropriate." *Id.* general comment.

586. *See* Langbein, *Nonprobate Revolution*, *supra* note 5, at 1139.

587. UNIF. PROB. CODE § 2-503 comment (1990).

malities[588] — as a substantive requirement for validity.[589] Virtually all variations of the dispensing power (as opposed to a "substantial compliance" or "attempted compliance" harmless error standard[590]) permit courts to dispense with the attestation requirement if testamentary intent can be otherwise established.[591] To the extent that a particular version of the dispensing power permits courts to dispense routinely with the attestation requirement, the dispensing power effectively though indirectly redefines the level of formality necessary for due execution. South Australia's broad dispensing power has in fact been applied more or less routinely to save completely unattested wills.[592] Even the narrower "threshold requirements" variant proposed in British Columbia, limiting application of the dispensing power to *signed* writings, would permit courts to dispense with the attestation requirement if testamentary intent can be otherwise established.[593]

Application of a dispensing power provision such as UPC section 2-503 may thus have the effect of virtually abolishing attestation as a meaningful requirement for a valid will. Under such a provision, the practical effect of the testator's noncompliance with the attestation requirement is to shift the burden of proof to the proponent to establish that the unattested will was nevertheless executed with testamentary intent.[594] As Langbein suggests, consistent enforcement of unattested wills under a dispensing power effectively reduces the attestation "requirement" to an option.[595] As discussed above, the practical result is seemingly equivalent to Lindgren's proposed multi-tiered standard of

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588. Langbein, *Substantial Compliance*, *supra* note 8, at 493.

589. *Cf.* Lindgren, *supra* note 19, at 543, 569.

590. *See* Miller, *supra* note 3, at 329-37 (discussing statutory "substantial compliance" and "attempted compliance" standards).

591. *See id.* at 319-39 (discussing proposed and enacted variants of harmless error rules and their consequences). Harmless error rules based on a principle of substantial compliance, such as the Queensland provision, or upon a principle of attempted compliance, such as Tasmania's proposed provision, are less likely to permit validation of attested wills. *See id.* at 329-35 (discussing statutory substantial compliance); *id.* at 335-37 (discussing attempted compliance standard).

592. *See* Langbein, *Harmless Error Rules*, *supra* note 8, at 23, 52. For discussion of South Australian cases, see *supra* notes 89-117, 219-27 and accompanying text.

593. *See* Miller, *supra* note 3, at 337-39 (discussing application of British Columbia's proposed "threshold requirements" provision).

594. *Cf.* Lindgren, *supra* note 19, at 571. For discussion of Lindgren's proposed abolition of the attestation requirement, see Miller, *supra* note 3, at 290-91.

595. Langbein, *Harmless Error Rules*, *supra* note 8, at 23. But "[N]oncompliance [with the attestation requirement] is hardly an enticing option . . . since (if detected) it throws one's estate into litigation." *Id.*

formality for due execution,[596] with failure of attestation operating as a burden-shifting device.

The revised UPC seems to contemplate a multi-tiered approach to due execution. At the highest level of formality, execution of a self-proved will in accordance with section 2-504 produces a powerful inference of testamentary intent and authenticity.[597] At the next level of formality, a testator's compliance with the attestation requirement and other formalities of section 2-502(a) produces a strong inference of testamentary intent, though instances may infrequently arise in which the duly attested will is challenged as a "sham" will.[598] At the next level down, a valid holographic will complying with section 2-502(b) produces a strong inference of the authenticity if the handwriting requirement has been met;[599] however, if the holographic document is ambiguous with respect to testamentary intent, extrinsic evidence of testamentary intent may be required to show that the holographic document was intended to be given effect as a will.[600] Finally, section 2-503 may permit the court to enforce as a will a document that does not comply with section 2-504, section 2-502(a), or section 2-502(b), if the proponent produces clear and convincing evidence that the testator intended the document to be enforced as a final disposition of his or her property.[601]

The section 2-503 dispensing power thus eliminates the strict formalism of the wills acts[602] while retaining the statutory standards for due execution. Enactment of a dispensing power modelled on section 2-503 would move the treatment of wills in the probate court closer on the continuum to the relatively informal treatment accorded to will substitutes. The comment to section 2-503 states that the addition of the dispensing power strengthens "the purpose of validating wills whenever possible."[603] Enactment of a dispensing power would consequently imply a legislative preference for the policy favoring enforcement of well-intended though formally defective testamentary disposi-

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596. Lindgren, *supra* note 19, at 546-47, 569-71.

597. UNIF. PROB. CODE § 2-504 (1982). For discussion of self-proving wills, see Miller, *supra* note 3, at 294-95.

598. Miller *supra* note 3, at 275-76 (discussing "sham wills" cases).

599. *See id.* at 287.

600. *Id.* at 282 (discussing determination of testamentary intent in holographic wills cases in which the document is ambiguous on its face); *see* Langbein, *Substantial Compliance*, *supra* note 8, at 515.

601. *See* UNIF. PROB. CODE § 2-503 comment (1990).

602. For discussion of the concept of "formalism," see Miller, *supra* note 3, at 185-87.

603. *See* UNIF. PROB. CODE art. II, pt. 5, general comment.

tions over the policy of preventing increased costs and delay in the probate process, and avoiding the need for adjudication in the probate courts.

3. Abrogation of the Rule Forbidding Reformation of Wills

Another major source of disparity between the current treatment of wills and will substitutes that the 1990 revisions to the UPC attempt to address is the rule forbidding reformation of wills. Langbein and Waggoner suggest that this rule reflects some of the same underlying policies as the strict compliance doctrine.[604] They argue that a judicial reconsideration of the "no-reformation rule," which is "peculiar to the law of wills," is long overdue.[605]

As Langbein and Waggoner point out, courts in fact routinely reform mistakes "in deeds of gift, inter vivos trusts, life insurance contracts and other instruments that serve to transfer wealth to donees on decedents' death."[606] Their 1982 article proposes a judicial reformation doctrine that would enable a court to rectify material mistakes in a will[607] when "the alleged mistake involves a fact or event of particularity"[608] if the proponent of the reformation establishes the mistake by clear and convincing evidence.[609] Their proposed reformation rule would apply to wills containing mistakes in execution, such as those in *Blakely* and other switched wills cases,[610] and to those wills containing terms contrary to the testator's wishes.[611]

A broad dispensing power such as South Australia's obviates the need for a judicial reformation doctrine to rectify mistakes *in execution.* In *Blakely*,[612] the South Australian courts applied the dispensing power in a switched wills case to cure mistaken execution.[613] The comment to section 2-503 cites *Blakely* as an appropriate application of the UPC's dispensing power.[614]

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604. *See* Langbein & Waggoner, *Reformation*, *supra* note 13, at 524.

605. *Id.*

606. *Id.* "Courts have been willing to use their equity powers in these nonprobate situations, because a case of well-proven mistake necessarily invokes the fundamental principle of the law of restitution: preventing unjust enrichment." *Id.*

607. *Id.* at 578. *See id.* at 580-81 for discussion.

608. *Id.* at 578.

609. *Id.*

610. *See id.* at 580-86. For discussion of *Blakely*, see *supra* notes 291-310. For discussion of the rule forbidding reformation in the American courts, see *supra* note 294.

611. Langbein & Waggoner, *Reformation*, *supra* note 13, at 580-86.

612. *Blakely*, 32 S.A. St. R. at 473.

613. *Id.* at 480.

614. UNIF. PROB. CODE § 2-203 comment (1990).

Section 2-503 is likewise directed toward curing harmless errors in the execution of a will and does not apply to mistakes in the substance of the will. The drafters attempt to address this problem with a revision to UPC section 2-601.[615] Specifically, the drafters delete from section 2-601 the following language: "The intention of a testator as expressed in his will controls the legal effect of his dispositions."[616] The provision now states: "*In the absence of a finding of a contrary intention*, the rules of construction in this part control the construction of a will."[617] According to the drafters' comment to section 2-601, one purpose of altering the original language was to make it clear that evidence extrinsic to the will as well as the will itself is admissible for purposes of rebutting the part 6 rules of construction.[618] A further purpose for the revision was to prevent "a possible, though unintended reading [of section 2-601] precluding the judicial adoption of a general reformation doctrine for wills as advocated in the Langbein-Waggoner article."[619]

The Scope of New Uniform Probate Code Section 2-503

1. The Judicial Doctrine of Substantial Compliance Compared with the Dispensing Power

a. Rationales

Section 2-503 is a dispensing power provision rather than a rule of substantial compliance.[620] In his 1987 article, Langbein explains the difference between the rationales supporting these alternative "strategies" for excusing harmless error:[621] a court applying the substantial compliance doctrine deems the noncomplying will to be in compliance with the wills act, while a court applying the dispensing power excuses noncompliance if the proponent shows testamentary intent.[622] In his 1987 article, Langbein compares the practical effects of the South Australia's dispensing power and Queensland's statutory version of the substantial compliance provision. Langbein concludes that statutory substantial compliance has been "a flop" in Queensland.[623] He is disappointed by the Queensland's courts' interpretations

615. *See id.* § 2-601 comment.
616. UNIF. PROB. CODE § 2-603 (1990).
617. *Id.* § 2-601 (emphasis added).
618. *Id.*
619. *Id.* (citing Langbein & Waggoner, *Reformation*, *supra* note 13).
620. *See* Langbein, *Harmless Error Rules*, *supra* note 8, at 1.
621. *Id.* at 6-8.
622. *Id.*
623. *Id.* at 1. For discussion of the Queensland provision, see Miller, *supra* note 3, at 329-35.

of substantial compliance as a quantitative rather than a functional standard.[624] The article ultimately favors the statutory dispensing power approach,[625] which Langbein correctly conjectured would be the alternative preferred in most jurisdictions.[626]

Because it is based on an express legislative grant of authority to excuse deviation from the requirements with the wills act, the dispensing power would seem by definition to give the courts broader discretion than the judicial doctrine of substantial compliance proposed in Langbein's 1975 article. In contrast to a dispensing power, substantial compliance requires the courts to determine whether there has been functional, substantive compliance with the wills act.[627] The doctrine is necessarily premised on construction of the wills act formalities mandated by the legislature. In his 1987 article, Langbein states that "in theory there [is] little [difference] between the *purposive* South Australian dispensing power and the *purposive* substantial compliance doctrine."[628] A review of the South Australian cases, however, suggests that Langbein's "purposive" interpretation of the South Australian cases does not invariably comport with what the South Australian courts appear to be saying and doing. To the contrary, Langbein's review of the South Australian cases under section 12(2) appears colored by his functional interpretation of the wills act formalities. Like the 1975 article (proposing a judicial substantial compliance doctrine founded on functional analysis), the 1987 article (reviewing the impact of the section 12(2) dispensing power on enforcement of defective wills in South Australia) seems to focus on the relative "harmlessness" of various formal defects in execution (such as presence defects, failure of attestation, lack of signature, and total failure of execution) as a fundamental issue in applying the harmless error rule.

The South Australian courts, as demonstrated, do not seem to analyze execution defects in functional terms. While *Baumanis* and dicta in some of the other opinions indicate that a signed writing may be generally indispensable for enforcement of a will even in light of section 12(2),[629] the South Australian courts have in most cases focused on the available evidence of testamentary intent rather than on

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624. *See* Langbein, *Harmless Error Rules*, *supra* note 8, at 44-45.

625. *Id.* at 7, 45.

626. Miller, *supra* note 3, at 319-39 (discussing various proposed and enacted harmless error rules).

627. *See* Langbein, *Harmless Error Rules*, *supra* note 8, at 6-7; Langbein, *Crumbling Wills Act*, *supra* note 8, at 1194. For discussion, see Miller, *supra* note 3, at 305-08.

628. Langbein, *Harmless Error Rules*, *supra* note 8, at 53.

629. For discussion, see *supra* notes 257-350 and accompanying text.

analysis of the seriousness of a particular defect, and have been liberal in finding that proponents of even unexecuted wills have met the burden of proof. As the cases involving unexecuted wills show, the South Australian courts have not *in practice* tended to treat any one formality as less dispensable than any other, but have freely permitted even defects that Langbein characterizes as "fundamental" to be cured or excused in instances in which the proponent clearly can prove testamentary intent.[630]

b. Ramifications of Alternative Approaches

The substantial compliance doctrine as Langbein originally conceived it and South Australia's dispensing power are similarly directed toward enforcing testamentary intent. It appears, however, that the two approaches would actually require a court to focus on somewhat different issues in determining whether to apply the rule. In his 1975 article, Langbein seems to identify two issues that must apparently be addressed in order for a court to deem a defective will in substantial compliance with the purposes of the wills act. To apply the judicial doctrine of substantial compliance, the court must apparently determine *both* that the purported will was intended to have testamentary effect[631] *and* that "[the] form [of the document] satisfie[s] the purposes of the Wills Act."[632] To the extent that these factors represent separate criteria for applying the doctrine, Langbein's harmless error rule contemplates a narrower range of instances in which extrinsic proof of intent can overcome the presumption of invalidity produced by the testator's failure to comply with the formalities of the wills act than a dispensing power approach that looks only to whether the facts establish testamentary intent. Langbein's emphasis on the distinction between application of the substantial compliance doctrine in jurisdictions that recognize holographic wills and in jurisdictions that require all wills to be attested[633] suggests that he considered enforcement of the wills act policies to be the *primary* goal of substantial compliance.

Indeed, it would presumably be inappropriate for a *judicially* adopted harmless error rule such as substantial compliance[634] to enforce testamentary intent without reference to the testator's compliance with the requirements of the wills act, even if the meaning of "com-

630. For discussion, see *supra* notes 352-411 and accompanying text.
631. Langbein, *Substantial Compliance*, *supra* note 8, at 513, 514-15.
632. *Id.* at 513, 515-16.
633. *See id.* at 521-22; for discussion, see *supra* notes 80-90, 174-84 and accompanying text.
634. *See* Langbein, *Harmless Error Rules*, *supra* note 8, at 7.

pliance" is functionally interpreted by the court applying the doctrine.[635] The most that a judicially adopted substantial compliance doctrine could seemingly achieve would be substitution of a functional for a literal construction of the wills act. Such a functional construction would permit courts to consider conduct other than the actual execution of the will in determining whether the defective document could be *deemed* to be in compliance with wills act formalities,[636] though, as noted, judicial doctrine of substantial compliance would presumably not permit the court to dispense with the requirement of compliance.

It is instructive to compare Langbein's articulation in his 1975 and 1987 articles of the central issues raised by a testator's failure to achieve strict compliance with the wills act. In comparing the application of the rule of the traditional strict compliance standard to the application of a functional substantial compliance standard, he writes in the 1975 article that "[t]he courts now purport to ask . . . : did the particular conduct constitute literal compliance with the formality? The substantial compliance doctrine would replace that awkward, formalistic question with a more manageable question: *did the [testator's] conduct serve the purpose of the formality?*"[637] The 1975 article discusses the comparative seriousness of various types of common execution defects, and the extent to which the substantial compliance doctrine could cure those defects[638] in those cases in which the proponent could adduce sufficient extrinsic evidence of intent to meet the preponderance standard.[639] Langbein considers that a testator's failure to frame the testamentary scheme in a traditional writing, to sign the will, or (in a jurisdiction that does not permit holographic wills as an exception to the attestation requirement) to have the will attested, would usually place the defective will beyond the reach of the substantial compliance doctrine.[640] In such instances the proponent would usually not be able to carry the burden of persuading the court that the execution defects are harmless to the wills act policies.[641]

In 1987, impressed by the intent-enforcing bent of the South Australian courts, Langbein wrote that

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635. *See* Miller, *supra* note 3, at 305-06.

636. Langbein, *Harmless Error Rules*, *supra* note 8, at 6.

637. Langbein, *Substantial Compliance*, *supra* note 8, at 525-26 (emphasis added).

638. *Id.* at 515-24.

639. Langbein, *Crumbling Wills Act*, *supra* note 8, at 1194; Langbein, *Harmless Error Rules*, *supra* note 8, at 37.

640. Langbein, *Substantial Compliance*, *supra* note 8, at 518 (failure to sign will); *id.* at 518-19 (failure to set out scheme in traditional writing); *id.* at 521-22 (failure to have will attested in jurisdiction that does not permit holographic wills).

641. *Id.*

> [w]hen presented with a defectively executed will, South Australian courts are now allowed to ask *the right question*, which is *whether the document embodies the unequivocal testamentary intent of the decedent.* As so often happens in the law, if you get the question right, it is much easier to get the answer right.[642]

Based on his review of the South Australian cases, Langbein seems more inclined to concede that extrinsic evidence might overcome even serious defects in execution (such as total failure of attestation or failure of the testator to sign the will)[643] though he expresses discomfort with the application of section 12(2) in hard cases such as *Kelly*,[644] *Williams*,[645] and *Sierp*.[646] On the other hand, he concludes that despite such "quibbles," the section 12(2) case law has been "overwhelmingly successful."[647]

The cases under the section 12(2) dispensing power generally turn on the proponent's ability to establish testamentary intent beyond a reasonable doubt. As Langbein's analysis reflects, the South Australian courts have been disposed to be satisfied of testamentary intent in most cases, despite the extremely high level of proof contemplated by section 12(2). Even in *Hodge*[648] and *Kelly*,[649] two relatively early cases involving total failure of attestation, the courts were convinced beyond a reasonable doubt that the respective testators intended the documents to be given effect, though the evidence indicated *deliberate* noncompliance with the wills act formalities.[650] As Langbein remarks, "The courts would not have imposed serious criminal sanctions on evidence of the quality seen in *Kelly* . . . ."[651] Langbein suggests that

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642. Langbein, *Harmless Error Rules*, *supra* note 8, at 34 (emphasis added).

643. *See id.* at 18-23 (discussing application of § 12(2) to unattested wills) and *id.* at 23-27 (discussing application of § 12(2) to unsigned wills).

644. *See id.* at 20-22 (discussing Estate of Kelly, 32 S.A. St. R. 413, *aff'd*, 34 S.A. St. R. 370 (1983)); for discussion, see *supra* notes 102-17 and accompanying text.

645. *See* Langbein, *Harmless Error Rules*, *supra* note 8, at 25-27 (discussing Estate of Williams, 36 S.A. St. R. 423 (1984)); for discussion, see *supra* notes 311-55 and accompanying text.

646. *See* Langbein, *Harmless Error Rules*, *supra* note 8, at 32-33 (discussing Estate of Sierp, cited *id.* at 32)); for discussion, see *supra* notes 534-43 and accompanying text.

647. Langbein, *Harmless Error Rules*, *supra* note 8, at 34.

648. 40 S.A. St. R. 398 (1986); for discussion, see *supra* notes 95-101 and accompanying text.

649. 32 S.A. St. R. 413, *aff'd*, 34 S.A. St. R. 370 (1983); for discussion, see *supra* notes 102-17 and accompanying text.

650. For discussion, see *supra* notes 95-117 and accompanying text.

651. Langbein, *Harmless Error Rules*, *supra* note 8, at 35.

the extreme liberality of the South Australian courts may be due to the fact that most of the cases arising under section 12(2) are uncontested.[652]

Although continuing to consider the nature of the defect in compliance with the wills act highly relevant to the issue of intent, Langbein seems to acknowledge in the 1987 article (though somewhat reluctantly) that the proponent of a defectively executed will might conceivably succeed in establishing testamentary intent even in some instances in which the testator had deliberately failed to comply with fundamental requirements of the wills acts.[653] Influenced by the South Australian case law, he appears to extend his conception of the appropriate scope for a harmless error rule based on a dispensing power significantly beyond the limits he had envisioned for the substantial compliance doctrine in his 1975 article.

2. Application of Section 2-503

a. Specific Defects in Execution

A legislature which enacts the UPC's new section 2-503 without modification impliedly endorses a policy of enforcing testators' intentions at the expense of an increased burden on the probate system. Section 2-503 appears to embody a broad dispensing power. The language of section 2-503 closely resembles the language of the Manitoba provision,[654] which one commentator characterized as "the most radical" of the various forms of dispensing power provisions.[655] Arguably, the scope of the section 2-503 dispensing power is as broad or broader than the South Australian provision and arguably could be extended even to unexecuted or nontraditional (*i.e.*, electronic) documents in appropriate circumstances.[656] In any case in which the proponent succeeds in producing clear and convincing evidence of testamentary intent, section 2-503 on its face grants the court power to dispense with any or all of the wills act formalities.[657]

The comment to section 2-503 seems to reflect a more limited intention. While section 2-503 may be applied to excuse such defects as failure of attestation, defective attestation, defective compliance

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652. *Id.* at 40-41.

653. *See id.* at 20-21; *but see id.* at 32-33.

654. The Wills Act, 1982-83, MAN. REV. STAT. 387, ch. 31, § 23, Cap. W150 (1983); for text of the provision, see Miller, *supra* note 3, at 321 n.800; for discussion, see *id.* at 319-23.

655. Maxton, *supra* note 19, at 412.

656. For discussion, see *supra* notes 481-88 and accompanying text.

657. *See* UNIF. PROB. CODE § 2-503 (1990).

with the handwriting requirement and defective signature, the comment to section 2-503 indicates that the drafters considered that the provision would usually not be extended to unsigned wills (whether attested or unattested). Moreover, both the comment to section 2-503 and the language of section 2-506 suggest that the dispensing power should only be applied to traditional writings.[658]

The comment to section 2-503 may indicate that its drafters assumed that courts would apply a functional approach in determining whether a particular defect in execution, alteration, revocation, or revival would invalidate the will. The drafters may have assumed that application of the power would turn upon the nature of the defect and its harmlessness to the wills act purposes in light of the available evidence of testamentary intent.[659] Specifically, the comment to section 2-503 states that "[t]he larger the departure from Section 2-503 formality, the harder it will be to satisfy the court that the instrument reflects the testator's intent."[660] The comment thus incorporates the language derived from *Graham*[661] relating the proponent's burden of persuading the court that a defective will was executed with testamentary intent to the degree of the testator's departure from the wills act.[662] As previously discussed, Langbein interprets this language as a judicial gloss on section 12(2) imposing a functional or purposive limit on the scope of the dispensing power.[663] If the comment is construed as incorporating a functional standard, the UPC's section 2-503 dispensing power presumably would only in unusual and compelling circumstances excuse a fundamental deviation from the wills act (such as failure of the testator to sign the will at all) because the proponent would be unable to persuade the court of the harmlessness of the error.

Another reading of the *Graham* dictum than that suggested by Langbein is indicated by the South Australian courts' actual application of section 12(2). A review of South Australia's section 12(2) case law,

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658. *See id.* § 2-503 comment; *id.* § 2-506 (dealing with choice of law). For discussion of the drafters' position with respect to unsigned wills, see *supra* notes 412-26 and accompanying text. For discussion of their views on electronic wills, see *supra* notes 481-88 and accompanying text.

659. *See* UNIF. PROB. CODE § 2-503 comment (1990).

660. *Id.*

661. *Graham*, 20 S.A. St. R. 205. For discussion of *Graham*, see *supra* notes 58-75 and accompanying text.

662. For relevant language from *Graham*, see *supra* text accompanying note 69.

663. Langbein, *Harmless Error Rules*, *supra* note 8, at 17, 52.

especially those cases involving unexecuted wills,[664] suggests that the South Australian courts have interpreted the language in *Graham* flexibly rather than functionally. In *Williams*, for example, Judge King expressly declined to construe the dispensing power as requiring the court to consider any *particular* formality (other than the requirement of a "document"[665]) as intrinsically more essential and therefore less dispensable than any other formality.[666] Judge King's interpretation has in turn been incorporated into a number of other section 12(2) opinions. The language incorporated into section 12(2) seems to be interpreted in South Australia to mean that the evidence of testamentary intent must be more compelling in order to convince the court that the testator intended to create a will in cases in which the *overall* level of formality observed by the testator departs significantly from the South Australian wills act requirements. In any event, the *Graham* dictum obviously has not hindered extension of section 12(2).

Although in his 1987 article Langbein comes down in favor of the dispensing power approach, he seems to consider that the scope of even a broad dispensing power should be limited. For example, Langbein argues courts only rarely should accept extrinsic evidence of intent to establish an unsigned document as a completed will.[667] Although Langbein concludes in his 1987 article that only the writing requirement is treated as indispensable to the purposes of the wills acts in South Australia ("[f]ailure to give permanence to the terms of your will is not harmless"),[668] he asserts that omission of the testator's signature "raise[s] a grievous doubt about the finality and genuineness of the instrument."[669] As previously discussed, Langbein questions the South Australian court's application of section 12(2) to validate the unsigned will in the *Williams* case, even though the unsigned document had been attested by witnesses in the presence of the testator and her husband in what was intended to be a joint wills execution ceremony.[670] In analyzing the South Australian cases, Langbein conjectures that *Baumanis v. Praulin*[671] would prevent application of the

664. For discussion of these cases, see *supra* notes 352-416 and accompanying text.

665. For discussion of the requirement of a document in South Australia, see *supra* notes 469-80 and accompanying text.

666. *Williams*, 36 S.A. St. R. at 425 (King, C.J.) (quoted *supra* in text accompanying note 337).

667. *See* Langbein, *Harmless Error Rules*, *supra* note 8, at 52.

668. *Id.*

669. *Id.*

670. *Id.* at 26-27. For discussion, see *supra* notes 311-55 and accompanying text.

671. 25 S.A. St. R. 423 (1980). For discussion, see *supra* notes 257-90 and accompanying text.

dispensing power to save unsigned wills in most cases.[672] The comment to section 2-503 may indicate that the drafters held similarly restrictive views respecting the appropriate scope of the dispensing power when applied to an unsigned will and that they in fact accepted Langbein's interpretation of the South Australian cases as incorporating a functional standard.[673] As remarked, the comment to UPC section 2-503 states that the South Australian courts have been "extremely reluctant to excuse noncompliance with the signature requirement."[674] The drafters do not cite *Williams*, *Richardson*, or *Vauk*.[675] The comment states that the new section 2-503 should be applied to unsigned wills mainly in "the recurrent class of cases in which two wills are prepared for simultaneous execution by two testators . . . and each mistakenly signs the will prepared for the other."[676]

The UPC drafters cite Langbein's 1987 article as authority for the proposition that "the South Australian . . . courts lightly excuse breaches of the attestation requirements."[677] The comment is, to this extent, consistent with Langbein's apparent modification of his views respecting the fundamental nature of attestation in nonholographic jurisdictions,[678] as exemplified in his ready acceptance of South Australia's liberal application of section 12(2) to unattested wills.[679] The South Australian experience in applying the dispensing power to attestation apparently persuaded Langbein that the formality may be dispensable even in jurisdictions that do not recognize unattested holographic wills.[680] Although, as we have seen, Langbein originally viewed attestation as serving a fundamental policy in jurisdictions that do not permit the holographic form,[681] he now characterizes South Australia's attestation requirement as serving a "more modest" function in a context in which "most people do not need protecting."[682] In this respect, Langbein's analysis of the role of attestation in South Australia is

672. Langbein, *Harmless Error Rules*, *supra* note 8, at 23-24, 27, 52.
673. *See* UNIF. PROB. CODE § 2-503 comment (1990).
674. *Id.*
675. *See id.*
676. *Id.*
677. *Id.*
678. Langbein, *Substantial Compliance*, *supra* note 8, at 521-22.
679. *See* Langbein, *Harmless Error Rules*, *supra* note 8, at 23, 52.
680. *Compare id.* at 52 *with* Langbein, *Substantial Compliance*, *supra* note 8, at 521 ("Attestation . . . has been nearly as fundamental in the statutory schemes as signature and writing.")
681. Langbein, *Substantial Compliance*, *supra* note 8, at 498, 521-22.
682. Langbein, *Harmless Error Rules*, *supra* note 8, at 52.

consistent with Lindgren's argument that attestation is dispensable as a substantive requirement for due execution,[683] despite its effectiveness in serving both the ritual and cautionary aspects of verifying testamentary intent,[684] and in serving the authenticating[685] and channeling functions.[686]

The drafters of section 2-503 remark in the comment that one effect of enacting the UPC version of the dispensing power would be to reduce "the tension between holographic wills and the two-witness requirement for attested wills under section 2-503(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."[687] The comment to section 2-503 reflects Langbein's view that insistence on strict compliance with the attestation requirement is inconsistent with the recognition of informal devices for achieving essentially the same result.[688]

The comment to section 2-503 thus in most respects seems to incorporate Langbein's views respecting the appropriate scope of a harmless error rule, including his modified view (based on his review of the South Australian cases) of the indispensability of attestation in a jurisdiction that does not recognize holographic wills and his insistence on the indispensability of the signature requirement in establishing testamentary intent and authenticity, and in "channeling" the will to the probate court. The comment also seems to contemplate the essentially functional approach that Langbein's 1987 article purports to find implicit in the South Australian courts' application of the dispensing power.[689] Again, however, although Langbein's interpretation of the South Australian case law seems reflected in the comment to section 2-503, the actual language used in section 2-503 does not limit its potential application by incorporating a functional or "purposive" standard or otherwise than by imposing a "clear and convincing" standard of proof for application of the rule.[690] Perhaps the drafters of

683. Lindgren, *supra* note 19, at 542, 544-40.

684. For discussion of the role of attestation in establishing testamentary intent, see Miller, *supra* note 3, at 262 n.496, 274-80.

685. For discussion of the role of attestation in authenticating the will, see *id.* at 267 n.506.

686. For discussion of the channeling function of attestation, see *id.* at 274-80.

687. UNIF. PROB. CODE § 2-503 comment (1990).

688. *See* Langbein, *Substantial Compliance*, *supra* note 8, at 504.

689. *See, e.g.*, Langbein, *Harmless Error Rules*, *supra* note 8, at 17, 52 (discussing "purposive" dictum from *Graham*, 20 S.A. St. R. at 205).

690. *See* UNIF. PROB. CODE § 2-503 (1990).

section 2-503, like Langbein, assumed that a functional standard of formality is inherent in the concept of a power to dispense with formalities in certain instances.

The comment to section 2-503 in fact seems to indicate that the drafters of section 2-503 not only accepted Langbein's functional interpretation of the South Australian case law, but also perhaps even considered that such an interpretation must ineluctably flow from the language of section 2-503. "[N]ew 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*. . . ."[691] As previously explained, the evolution of the South Australian case law under section 12(2) reveals that such an assumption is not necessarily correct.

b. Deliberate Noncompliance with the Wills Act

In contrast to the South Australian courts, Langbein seems to remain convinced that the testator's knowledge of the requirements for a valid will ought to be relevant to application of a harmless error rule. In his 1987 article, Langbein remarks that "[w]hen the testator's blunder is a knowing one, our inclination is to say that the error is not harmless. If the testator knew that he [or she] was not complying with the wills act, the likely inference is that he [or she] did not want to comply. Intentional noncompliance belies testamentary intent."[692]

As previously remarked, the South Australian courts have not in practice treated the testator's knowledge of the wills act requirements as a serious obstacle to application of section 12(2). In both *Hodge* and *Kelly*,[693] the courts applied the section 12(2) dispensing power to unattested wills in circumstances indicating that the testator was aware of the attestation requirement, but had made no attempt to comply. In *Sierp*,[694] an unreported case involving defective alteration of a will, the court applied section 12(2) even though the testator's solicitor had informed him that his altered document would not be

691. *Id.* § 2-503 comment (emphasis added).

692. Langbein, *Harmless Error Rules*, *supra* note 8, at 32-33.

693. *Hodge*, 40 S.A. St. R. at 398; *Kelly*, 32 S.A. St. R. at 413, *aff'd*, 34 S.A. St. R. at 370. For discussion, see *supra* notes 95-117 and accompanying text.

694. Langbein, *Harmless Error Rules*, *supra* note 8 (citing Estate of Sierp, No. 173 of 1982 (S.A. Sup. Ct. Dec. 13, 1982)); for discussion, see *supra* notes 534-43 and accompanying text.

enforceable and that he needed to re-execute his will.[695] In *Vauk*,[696] Judge Legoe suggested that a court could apply section 12(2) to an unexecuted will even though the testator was obviously aware that the law required certain formalities for due execution, since prior to his suicide he had taken his will to the Public Trustee to be drafted and had made an appointment to have the will executed.[697]

Consistent with Langbein's analysis, the drafters of section 2-503 apparently considered the testator's knowledge of the wills act requirements to be an important factor for a court applying the dispensing power. The comment seems to suggest that section 2-503 is appropriately applied when the testator's noncompliance with the wills act is inadvertent. For example, the drafters interpreted the South Australian dispensing power case law as suggesting that the dispensing power should be applied to unattested or partially attested wills "[w]hen the testator *misunderstands* the attestation requirements of Section 2-502(a) and neglects to obtain one or both witnesses. . . ."[698] With respect to the application of section 2-503 to defectively altered wills, the drafters remark that "[l]ay persons *do not always understand* that the execution and revocation requirements . . . call for fresh execution in order to modify a will."[699] Similarly, the switched-wills case that the section 2-503 drafters conclude exemplifies sufficiently compelling circumstances to justify application of the dispensing power to a (technically) unsigned will is a paradigm case of mistaken execution.[700]

c. Attempted Compliance as a Threshold Requirement for Application of the Dispensing Power

It is not clear from the language of section 2-503 or from the comment whether the provision could be appropriately applied in a case in which the evidence shows that the testator understood the requirements of the wills act and intentionally for one reason or another did not attempt to comply, as in *Hodge*, *Kelly*, *Sierp*, and *Vauk*. Langbein suggests in his 1987 article that attempted compliance with the formalities ought to be "a factor of fundamental importance" in determining whether the document was executed with testamentary

695. Langbein, *Harmless Error rules*, *supra* note 8, at 32.

696. *Vauk*, 41 S.A. St. R. at 247-48; for discussion, see *supra* notes 352-411 and accompanying text.

697. *Vauk*, 41 S.A. St. R. at 245, 248.

698. UNIF. PROB. CODE § 2-503 comment (1990) (emphasis added).

699. *Id.* (emphasis added).

700. For discussion of the switched wills cases, see *supra* note 294.

intent.[701] "Attempt is purposive. Defective compliance is not as good as perfect compliance, but it is much better than (and much different from) noncompliance."[702] Langbein notes with approval Judge Legoe's emphasis in the *Williams* case on the testator's conduct both before and after the will was executed. In concluding that the unsigned will in *Williams* should nevertheless be enforced, Judge Legoe pointed out that the testator had "done everything consistent with the formal and conclusive act of making . . . and completing her last will except that she did not sign it. She set the stage for such a complete act."[703] Langbein, who acknowledges having reservations about the application of section 12(2) in *Williams*, was somewhat reassured by Judge Legoe's emphasis on the circumstances surrounding the bungled execution tending to show that the testator took steps to execute the will, though she never attempted to sign.[704] Similarly, in *Vauk*, Judge Legoe's apparent disposition to be convinced that the unexecuted will was intended by the testator to be enforced was clearly influenced by the testator's having taken steps to have a new will prepared by the Public Trustee (though he killed himself without attempting to execute it),[705] and by other circumstances (such as the suicide note apparently referring to the unexecuted will[706]) that tended to show that the testator had done all he could do to indicate that he wanted to have the will enforced.

Although *Graham*,[707] the earliest South Australian case, expressly rejected attempted compliance as a determinative factor or threshold requirement for applying the dispensing power,[708] Langbein points out that proof of attempted compliance with the formalities logically implies testamentary intent.[709] Langbein seems to consider attempted compliance to be a pivotal factor in those cases in which the defect is fundamental — for example, if the testator fails to sign the document at all. While he questions the application of section 12(2) in *Hodge* and *Kelly*, cases in which the testators deliberately made no attempt to comply with the attestation requirement, he appears less concerned about the effect of extending the dispensing power to unat-

701. Langbein, *Harmless Error Rules*, *supra* note 8, at 26.
702. *Id.*
703. *Williams*, 36 S.A. St. R. at 434.
704. *See* Langbein, *Harmless Error Rules*, *supra* note 8, at 26-27.
705. *See Vauk*, 41 S.A. St. R. at 245, 248.
706. *See id.* at 245.
707. 20 S.A. St. R. 198 (1978). For discussion, see *supra* notes 58-75 and accompanying text.
708. *Graham*, 20 S.A. St. R. at 205.
709. *See* Langbein, *Harmless Error Rules*, *supra* note 8, at 26.

tested wills in such instances than in the case of an unsigned will.[710] It is somewhat unclear in any case what Langbein means by "attempted compliance." A soft spot in his 1987 article is his failure to distinguish attempted compliance with the wills act (which might produce a seriously defective will in the case of an unsophisticated testator) from attempted compliance *with the specific formalities* (which could potentially produce a defectively signed or defectively attested will, but not an unsigned, unattested, or unexecuted will). The question raised by Langbein's analysis is whether the proponent of a defective will should be *required* to prove that the testator attempted to comply with the wills act in order to establish the validity of a gravely defective will. Langbein apparently considers attempted compliance with the formalities to be highly relevant to application of any harmless error rule, though he expressly states in the 1975 article that the substantial compliance doctrine does not contemplate any minimum or threshold level of formality for its application.[711]

It is unclear whether and to what extent the drafters of section 2-503 intended a court applying a dispensing power based on that provision to consider the testator's attempted compliance with the formalities. They may have assumed, based on Langbein's interpretation, that attempted compliance should be considered one factor in determining the appropriateness of applying the dispensing power. It is apparent, however, that they did not contemplate any minimum or threshold requirements for application of section 2-503.[712]

d. Weighing the Evidence of Testator's Compliance with the Wills Act Formalities

The comment to section 2-503 states that "[s]ection 2-503 means to retain the intent-serving benefits of Section 2-502 formality without inflicting intent-defeating outcomes in case of harmless error."[713] If one reads section 2-503 in light of both its history and the drafters' appended comment, it appears that section 2-503 is a hybrid provision falling somewhere on the continuum between South Australia's broad dispensing power and Langbein's functional substantial compliance doctrine.

Section 2-503 raises the standard of proof needed to rebut the presumption that a defective will was not executed with testamentary

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710. *Compare id.* at 26-27 (unsigned will) *with id.* at 20-22 (unattested wills).
711. Langbein, *Substantial Compliance*, *supra* note 8, at 513.
712. *See* UNIF. PROB. CODE § 2-503 comment (1990).
713. *Id.*

intent from the civil preponderance standard Langbein apparently contemplates in his 1975 article[714] to the more onerous "clear and convincing evidence" standard he recommends in his 1987 article.[715] The drafters remark that "by placing the burden of proof upon the proponent of a defective instrument, and by requiring the proponent to discharge that burden by clear and convincing evidence, section 2-502 imposes procedural standards appropriate to the seriousness of the issue."[716]

That the South Australian courts have taken a very easy attitude toward the question of what constitutes sufficient evidence to persuade them "beyond a reasonable doubt" of the existence of testamentary intent has presumably been established by review of the case law. This expansiveness may, as Langbein suggests, be due in part to a requirement of South Australian probate law disallowing consensual suppression of the will,[717] with the result that even uncontested cases have to be litigated.[718] Langbein suggests in his 1987 article that in applying section 12(2), the South Australian courts have fashioned "an unconventional meaning" for the reasonable doubt standard of proof that is more appropriate to the civil than the criminal context.[719] Perhaps because so many of the section 12(2) cases have been uncontested,[720] South Australia's courts seem strongly disposed to enforce purported wills in any case in which there is sufficient evidence of testamentary intent to tilt the scales in favor of the proponent. (*Williams*,[721] *Vauk*,[722] and *Richardson*,[723] for example, were all uncontested cases, while *Baumanis*[724] was contested.[725])

Langbein points out in his 1987 article that substitution of a "clear and convincing" standard of evidence for the traditional preponderance standard would raise the standard of proof beyond that required in ordinary civil cases without imposing the onerous burden of proof

714. *See* Langbein, *Crumbling Wills Act*, *supra* note 8, at 1194; Langbein, *Harmless Error Rules*, *supra* note 8, at 37.

715. Langbein, *Harmless Error Rules*, *supra* note 8, at 35-37.

716. UNIF. PROB. CODE § 2-503 comment (1990).

717. Langbein, *Harmless Error Rules*, *supra* note 8, at 38-41.

718. *Id.* at 38.

719. *Id.* at 35.

720. *Id.* at 13 n.46, 38.

721. *Williams*, 36 S.A. St. R. at 423.

722. *Vauk*, 41 S.A. St. R. at 242.

723. *Richardson*, 40 S.A. St. R. at 594.

724. *Baumanis*, 25 S.A. St. R. at 423.

725. Langbein, *Harmless Error Rules*, *supra* note 8, at 13 n.46.

appropriate to a criminal proceeding or requiring the sort of refashioning of the criminal standard that has occurred in South Australia.[726] The drafters of the South Australian statute were intentionally seeking a higher standard of proof than usually applies in civil cases because they were "inviting litigation about an issue of great importance;"[727] Langbein considers the reasonable doubt standard inappropriate to the context.[728] Arguably, however, the "clear and convincing" standard incorporated into section 2-503 will produce a *less* liberal application of the dispensing power than has actually occurred under South Australia's extremely loose "reasonable doubt" standard. For example, a problematic case such as *Kelly*[729] might well go the other way under a conventional "clear and convincing" standard, since in *Kelly* there was evidence that the unattested will offered for probate was intended only as a conditional will.[730] The drafters of section 2-503 remark that

> [b]y placing the burden of proof upon the proponent of a defective instrument, and by requiring the proponent to discharge that burden by clear and convincing evidence (*which courts at the trial and appellate levels are urged to police with rigor*), section 2-503 imposes procedural standards appropriate to the seriousness of the issue.[731]

e. Potential Scope Contemplated for Section 2-503 Compared to Scope of Other Forms of the Dispensing Power

The section 2-503 comment projects a scope for section 2-503 that is ultimately more consistent with a functional or qualitative substantial compliance approach than with the primarily intent-enforcing approach of the South Australian courts. To the extent that section 2-503 is viewed as incorporating a functional interpretation of the wills act formalities, it presumably contemplates a considerably narrower application than either South Australia's or Manitoba's version of the dispensing power.[732] While section 2-503 is potentially broader than the dispensing power subject to threshold requirements that was proposed in British Columbia,[733] the section 2-503 comment suggests that the

726. *Id.* at 36.
727. *Id.*
728. *Id.*
729. *Kelly*, 32 S.A. St. R. 413, *aff'd*, 34 S.A. St. R. 370 (1983).
730. *See Kelly*, 34 S.A. St. R. at 383.
731. UNIF. PROB. CODE § 2-503 comment (1990).
732. *See* Miller, *supra* note 3, at 339-46.
733. For discussion of British Columbia's "threshold requirements" approach, see *id.* at 337-39.

drafters agreed with Langbein's position that failure to sign or execute the will at all would normally fall outside the reach of the dispensing power because such errors raise unresolvable issues of intent or authenticity.[734] Despite Langbein's assertion in the 1975 article that substantial compliance is neither a rule of "maximum" nor of "minimum" formalities, the effect of a functional standard of compliance with the wills acts appears, as demonstrated, to set a threshold of practicability for the proponent who wishes to prove that an unsigned or completely unexecuted will was executed with testamentary intent.

Moreover, the scope of section 2-503 is arguably even *narrower* than the substantial compliance doctrine as originally envisioned by Langbein due to the adoption of the clear and convincing standard rather than the civil preponderance standard Langbein originally envisioned.[735] Langbein, however, remarks that "[c]omplying substantially necessarily involves conduct that evinces unmistakable testamentary intent. On the other hand, for precisely that reason, little harm would be done if an explicit [clear and convincing] standard were superimposed upon the substantial compliance doctrine."[736]

IV. THE HARMLESS ERROR SOLUTION: ISSUES, OBJECTIONS, AND ANSWERS

A. *Litigation of the Issue of Intent in the Probate Courts*

It is axiomatic that the adoption of any form of a harmless error rule either by judicial fiat or legislative enactment must inevitably have an impact on the probate practice of the jurisdiction in which the rule is adopted or enacted. The wills act formalities have procedural as well as substantive aspects. The formalities serve not only to establish testamentary intent and the authenticity of the document, but also to facilitate identification of the document as a will by the probate court and to obviate the need for the court to adjudicate issues of intent.[737]

Since the Statute of Frauds was enacted in 1677,[738] the law of wills has had to balance the privilege of free testation[739] against the state's

734. *See* UNIF. PROB. CODE § 2-503 comment (1990).

735. *See* Langbein, *Crumbling Wills Act*, *supra* note 8, at 1194; Langbein, *Harmless Error Rules*, *supra* note 8, at 37.

736. Langbein, *Harmless Error Rules*, *supra* note 8, at 37.

737. For discussion of the functions served by the wills act formalities, see Miller, *supra* note 3, at 258-88.

738. *Id.* at 200. For history of the wills formalities, see *id.* at 187-221.

739. *See id.* at 179-80, 244.

interest in protecting the probate system from burdensome litigation. The history of the wills act formalities and their construction in the courts reflects the perpetual tension between the testator's privilege of free testation and the perceived need to limit the issues that must be resolved after the testator's death.[740] In a property system mandating judicial intervention for enforcement of testamentary dispositions, the avoidance of excessive costs and delay is of necessity a fundamental policy. This policy must inevitably be compromised by the adoption or enactment of any form of harmless error rule.

The law of succession, as distinct from the law of wills, sometimes permits property owners to avoid probate and its associated costs and issues.[741] The will substitutes have evolved into an alternative nonprobate system that does not require judicial intervention unless the disposition is challenged.[742] Moreover, the formalities required to effectuate dispositions by will substitute have been established by business practice (as in the case of third party contracts with financial institutions or insurance companies), or by reference to the writing and signature requirements of the statutes of frauds (as in the case of revocable trusts).[743] Depending on the device in question, the formalities typically observed may (though not *necessarily*) resolve the question of the transferor's intentions.[744] The case law addressing transferor intent in cases in which dispositions by means of will substitutes have been challenged reveal a degree of flexibility in the courts' consideration of the nature of the disposition and the intentions of the transferor that is totally alien to the law of wills.[745] The question is whether such flexibility is desirable or even obtainable in the very different context of the probate system, which has traditionally been designed to avoid the need for courts to engage in fact-finding respecting the intentions of testators.

The drafters of section 2-503 concluded that

> [e]xperience in Israel and South Australia strongly supports the view that a dispensing power . . . will not breed litigation

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740. *See id.* at 244-54.

741. *Id.* at 180-85. *See generally* Langbein, *Nonprobate Revolution*, *supra* note 5 (discussing the role of the will substitutes and the nonprobate system).

742. Miller, *supra* note 3, at 180.

743. *See supra* notes 201-04 and accompanying text.

744. *See id.*

745. For discussion of the courts' resolution of intent issues with respect to will substitutes, see, e.g., McGovern, *The Payable on Death Bank Account and Other Will Substitutes*, 67 NW. U.L. REV. 7, 15-18 (1972); Comment, *Texas Probate Code Section 439(a): Conclusive or Rebuttable Presumption of Survivorship?*, 35 BAYLOR L. REV. 837 (1983).

> . . . [but] "actually prevents a great deal of litigation" because it limits disputes about technical lapses and limits the zone of the dispute to the functional question of whether the instrument correctly expresses the testator's intent.[746]

It is difficult, however, to see how a harmless error rule could fail to bring about an initial increase in probate litigation since only through application by the courts can the precise parameters of such a power be determined. Adoption of a harmless error rule in one of the jurisdictions in which the probate courts retain their traditional low status and limited powers[747] would compel the legislature to broaden the probate courts' powers, since application of even a narrow harmless error rule forces a court to adjudicate the factual issue of testamentary intent, a further burden on the probate system.

Only if it is conceded that the *primary* goal of the property system is to enforce the intentions of property owners whenever possible is the so-called "channeling" policy of expediting the probate process an insufficient justification for the consequences of the strict compliance doctrine. Great Britain's Law Reform Commission concluded that the costs to the system of a harmless error rule outweighed the potential benefits because

> by making it less certain whether or not an informally executed will is capable of being admitted to probate, [a harmless error rule] could lead to litigation, expense and delay, often in cases where [expense and delay] could least be afforded, for it is the home-made wills which most often go wrong.[748]

Langbein suggests that implementation of a harmless error rule would not present insurmountable channeling difficulties for courts in jurisdictions that recognize holographic wills, since in those jurisdictions, the channeling policy is routinely compromised by the enforcement of unconventional wills.[749] In those jurisdictions,

> the litigation which would occur would for the most part raise familiar issues which the courts have demonstrated

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746. UNIF. PROB. CODE § 2-503 comment (1990).

747. *See* Mann, *Self-Proving Wills and Formalism in Wills Adjudication*, 63 WASH. U.L.Q. 39, 62-68 (1985). For discussion of the relationship between the strict compliance doctrine and the inferior status of probate courts in some jurisdictions, see Miller, *supra* note 3, at 251-54.

748. Law Reform Committee, *The Making and Revocation of Wills*, 1980, 22d Report, Comnd. No. 7904, at 4 [hereinafter British Report].

749. Langbein, *Substantial Compliance*, *supra* note 8, at 494, 515; for discussion, see Miller, *supra* note 3, at 274-86.

> their ability to handle well. . . . [T]he elements of the substantial compliance doctrine arise in other contexts in current litigation when courts examine whether purported wills evidence testamentary intent and were executed freely and with finality.[750]

The drafters of section 2-503 remark that one effect of the dispensing power would be to equalize treatment of holographic and defectively attested or unattested wills under the Code.[751]

B. *Disrespect for the Wills Act Requirements and the Potential for Uncertainty in the Law*

A potential objection to a harmless error rule with both institutional and practical implications is that permitting the courts to validate defective wills may eventually undercut the standard set by the wills act.[752] In response to this argument, Langbein asserts as "a fundamental point" that adoption of a harmless error rule "would have no effect whatever upon primary conduct" of testators.[753] According to Langbein, no testator would deliberately violate the wills act in reliance on a harmless error rule.[754] Since a harmless error rule does not guarantee that the proponents of a defectively executed will will succeed in establishing testamentary intent, adoption or enactment of such a rule would not encourage *intentional* noncompliance with the wills act. Informed testators and professional estate planners would still do everything possible to ensure due execution of the will by careful adherence to the statutory requirements in order to avoid the potential expense and delay involved in adjudication of intent.[755] "The incentive for due execution would remain. . . . Anyone who would know enough about the probate process to know that the [harmless error rule] existed would know enough not to want to rely on it."[756]

In an article written at a time when only fifteen cases had been decided under South Australia's section 12(2), J.G. Miller comments

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750. Langbein, *Substantial Compliance*, *supra* note 8, at 525.

751. UNIF. PROB. CODE § 2-503 comment (1990).

752. *See* J. Miller, *Execution of Wills*, *supra* note 19, at 575.

753. Langbein, *Substantial Compliance*, *supra* note 8, at 524.

754. *Id.* at 524-25.

755. *Id.*

756. *Id.* Anyone sophisticated enough to be aware of the harmless error rule would presumably understand that its application means throwing the estate into litigation. *See* Langbein, *Harmless Error Rules*, *supra* note 8, at 23 (stating noncompliance with the wills act in South Australia not an "enticing option").

that South Australia's dispensing power provision "did not seem to reveal any weakening in the attitude toward formalities."[757] Miller speculates, however, that "increased familiarity may breed some contempt for the prescribed formalities . . . . [although] human instinct is more likely to lead to a desire to do things properly."[758] Miller concludes that adoption or enactment of even a broad harmless error rule would not increase uncertainty in the law of wills to an unacceptable extent.[759] He notes that judges often distort the law or facts in order to enforce intent.[760] According to Miller, distortion is more likely to result from enforcement of a strict compliance rule than from application of a harmless error rule.

> [T]here are doubtful documents under the present system. . . . There are always likely to be doubtful documents, but a dispensing power would enable the validity of such documents to be determined on the basis of the real issue — the testator's intention — rather than on whether the formalities can be stretched to cover the actual facts.[761]

Like Miller, Langbein concedes that some degree of imprecision in the law is inevitable under a harmless error rule. Langbein likewise argues that any such imprecision created by application of a harmless error rule would ultimately be less damaging to the system than the imprecision created by the strict compliance doctrine.

> It is unthinkable that "millions of estates and billions of dollars in assets" will invariably pass trouble free. We expect the channeling function to be impaired in some fraction of cases. The choice is not between litigation and no litigation. In cases of defective compliance the important choice is between litigation resolved purposefully and honestly . . . or irrationally and sometimes dishonestly under the rule of literal compliance.[762]

In determining to recommend a very broad dispensing power modelled on South Australia's section 12(2), the Manitoba Law Reform Commission concluded that even a broad harmless error rule would

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757. J. Miller, *Execution of Wills*, *supra* note 19, at 575.
758. *Id.* at 577.
759. *Id.* at 579-80.
760. *Id.* at 581.
761. *Id.*
762. Langbein, *Substantial Compliance*, *supra* note 8, at 526.

not unduly impair "performance of all the valuable functions" served by the formalities.[763] Like Langbein, the Manitoba Law Reform Commission considered trouble-free resolution of all probate matters to be an unattainable goal.[764] In contrast, British Columbia's Law Reform Commission, considering whether to recommend enactment of a dispensing power, expressed concern that a broad rule would "result in a multiplicity of forms of wills."[765] The British Columbia Law Reform Commission considered the potential for undermining the wills act requirements to be "the most difficult argument to overcome for proponents of a dispensing power."[766] British Columbia's solution was to propose a rule that limits application of the dispensing power to signed writings.[767]

C. *Substantial Increase in Litigated Documents*

Arguing in favor of a broad dispensing power, Western Australia's Law Reform Commission suggested that any increase in litigation over defectively executed wills under such a provision would be offset by "a diminution in the number of, or at least in the complexity of, proceedings brought by persons who would benefit if a will, apparently valid on its face, could be shown to have been invalidly executed."[768] Similarly, in addressing the British Columbia Law Reform Commission's decision not to recommend enactment of a dispensing power, J.G. Miller contends that over the long term "[t]he literal compliance approach . . . provides an invitation to seize upon some technical defect to defeat the intention of the testator. This would be less likely to occur if there was a dispensing power where the parties might be forced to litigate the real issues between them . . . ,"[769] though Miller, nevertheless, concedes that enactment of a harmless error rule would produce an *initial* increase in litigation.[770]

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763. Manitoba Law Reform Commission, Report on "The Wills Act" and the Doctrine of Substantial Compliance 19-20 (1980).

764. *See id.* at 19-21.

765. British Columbia Report, *supra* note 19, at 47.

766. *Id.* The report remarks, however, that experience in South Australia shows that even where the court may exercise a dispensing power, "a premium is still placed upon executing a will in the traditional form." *Id.*

767. *Id.* at 51-54.

768. Law Reform Commission of Western Australia, Project No. 76, pt. 1, Discussion Paper on Wills: Substantial Compliance § 4.7 (1984).

769. J. Miller, *Execution of Wills*, *supra* note 19, at 578.

770. *Id.* at 577-78.

> [I]n as much as an application to the court would have to be made before the dispensing power could be exercised, this would indeed suggest that there would be an increase in litigation. Certainly, some documents which are now not even presented for probate because of some obvious defect would be made the subject of an application, though it is probably going too far to say that *every* defective will is likely to be propounded.[771]

Miller conjectures that requests for application of a harmless error rule in "hopeless cases" would decrease as the case law under the statute developed because "[i]n some cases, the necessary evidence will not be available and, even if some 'hopeless' cases come before the courts in the early years, the basic limits of the power should soon become apparent."[772]

Langbein concedes that converting the probate process "from routine administration to routine adjudication" would create an intolerable burden on the system[773] and that such a result, achieved "at the price of disorder and uncertainty in the patterns of transfer and testation," would not be worth the cost.[774] He argues, however, that the functional construction of the wills act required by a substantial compliance approach would prevent such a result.

> [B]y no means would every defectively executed instrument result in a contest. On many issues the proponents' burden of proof would be so onerous that they would forego the trouble and expense of hopeless litigation; and on certain other issues the proponents' burden would be so light that potential contestants would not bother to litigate.[775]

Langbein argues that a functional approach "would not simply add to the existing stock of probate litigation, but would to some extent substitute one type of dispute for another. . . . The standard would be more predictable, and the contestants would lose their present incentive to prove . . . harmless defects."[776] Langbein concludes that a "purposive analysis" would eventually actually *decrease* litigation about the formalities.[777]

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771. *Id.* at 577.
772. *Id.* at 577-78.
773. Langbein, *Substantial Compliance*, *supra* note 8, at 524.
774. *Id.* at 523.
775. *Id.* at 525.
776. *Id.* at 525-26.
777. *See id.*; Langbein, *Harmless Error Rules*, *supra* note 8, at 51.

In his 1987 article, Langbein takes the position that South Australia's experience has refuted the slippery slope argument against even a broad dispensing power.[778] He suggests that the apparent "litigation boomlet" under section 12(2) has been the result of South Australia's quirky "no-waiver" rule prohibiting suppression of wills in uncontested cases.[779] As he points out, very few of the section 12(2) cases have actually involved contested wills.[780] In a jurisdiction that does not have such a "no-waiver" rule — that is, most Anglo-American jurisdictions — such uncontested wills would not be litigated.

D. *Delay and Increased Costs in Probating the Will*

Miller acknowledges that enactment of a harmless error rule would inevitably produce delay and increased costs to the probate estate in some instances.

> [I]t has to be acknowledged that where an application for exercise of the dispensing power [is] contested there [will] be delay in the administration of the estate. . . . Again, such a disadvantage must be balanced against the benefits which the introduction of a dispensing power would confer — in particular a distribution which [is] probably more in accord with the deceased's intentions.[781]

In mitigation of this argument against enactment of a dispensing power, Miller remarks that in most cases under a harmless error rule there would be no undue delay because application to probate would be by consent.[782] The British Columbia Law Reform Commission noted that such a provision would not significantly extend the probate period in most instances beyond limits considered acceptable in that jurisdiction for protection of other interests or policies.[783] "Even if it does, we think that the execution of the testator's actual intent is a more important consideration."[784]

The policy favoring avoidance of increased costs and delay in administration traditionally has been subordinated to policies regarded by the legislatures as more fundamental to the interests of the state. In

778. *See* Langbein, *Harmless Error Rules*, *supra* note 8, at 38-39.
779. *Id.* at 38-40.
780. *Id.* at 37-38, 13 n.46.
781. J. Miller, *Execution of Wills*, *supra* note 19, at 581.
782. *Id.*
783. British Columbia Report, *supra* note 19, at 48.
784. *Id.*

balancing the policy of avoidances of increased costs and delay in administration against the policy favoring protection of the family, legislatures have concluded that the family protection policy takes precedence. For example, all common law states make some provision to protect the surviving spouse, despite the fact that implementing their "forced share" or "forced heirship" provision slows the process of settling the estate. In states that have adopted the UPC, the inclusion of certain dispositions technically outside the probate system in the "augmented estate" available to the spouse under the UPC elective share provisions produces delay not only in the probate system but in the nonprobate system as well.[785] It can be argued that implementation of a harmless error rule merely gives equivalent protection to the policy favoring freedom of testation.

V. A COUNTERPROPOSAL TO THE HARMLESS ERROR SOLUTION

A. *Determining Harmless Error in the Courts*

Professor Mann characterizes Langbein's conception of substantial compliance as an "elegantly simple" solution to excessive formalism in the courts.[786] If the strict compliance doctrine is considered in the abstract, Mann's assessment is entirely accurate. Insistence on strict compliance with the wills formalities has demonstrably produced cases that seem not only harsh and unfair, but absurd.[787] A prime example of such a result is the line of Texas cases, such as *Boren*, invalidating self-proving wills.[788] Courts in other jurisdictions faced with the same issue have avoided results reached in *Boren* and its progeny by tacitly applying a version of functional analysis.[789] In the self-proving wills cases, with which Mann is chiefly concerned, functional analysis works elegantly and reasonably simply because the departure from the statute is trivial and the evidence of testamentary intent, incontrovertible.

Even under a narrow harmless error rule, the self-proving wills cases would present no real issue of testamentary intent. In all of the *Boren* line of cases, the purportedly defective document revealed *on its face* that the testator had made every effort to execute a valid will but had bungled the technical requirements for making an executed

785. For discussion, see Miller, *supra* note 3, at 249-59.

786. Mann, *supra* note 747, at 61 n.123.

787. For discussion of such cases, see Miller, *supra* note 3, at 222-29.

788. For discussion of the Texas cases, see *id.* at 227-29. For discussion of self-proving wills generally, see *id.* at 294-95.

789. For discussion of cases rejecting the Texas rule, see *id.* at 236-37.

will self-proving.[790] For a court to hold such a document valid requires little or no reflection on the nature of the defect or the circumstances indicating testamentary intent.

Functional analysis is less simple and less elegant when the conduct evincing testamentary intent is more problematic. The flaw in any harmless error rule (such as substantial compliance) that depends upon a functional construction of the wills act to assess the proponent's extrinsic proof of intent is that the "purposes," "functions," or "policies" served by any particular formality are not as obvious as many scholars imply. It is not self-evident, for example, which "functions" are served by the attestation requirement or how indispensably.

Any harmless error rule that is tied to a functional construction of the wills act formalities seemingly contemplates that either the legislature that enacts the rule or the courts that apply it will rank the formalities or develop some standard for ranking them in order to determine their respective functions in promoting the wills act policies. In applying such a rule to a particular case, a court must determine whether the bungled or omitted formality in question can be appropriately dispensed with in light of its importance to the wills act policies and whether under the particular circumstances dispensation would be appropriate. Reasonable courts or legislatures may differ, however, with respect to the significance of the individual formalities.

Developing a *reliable* standard for identifying and ranking the functions of the formalities is not essential to scholarly discussion of the merits of a harmless error rule. A court, however, would be unavoidably and urgently concerned with the practical aspects of functional analysis if required to apply a harmless error rule that contemplates such an approach. Since no wills provisions, including those of the UPC, are phrased in functional terms, interpretation of what on its face appears to be a mandatory standard for due execution of a will would depend on the ability of courts applying a functional approach to determine what each formality is "for."

Unless the legislature sets out threshold requirements for validity or actually ranks and analyzes the formalities, the courts must be responsible for making these determinations. British Columbia's proposed rule conditions application of the dispensing power on the testator's compliance with certain "threshold requirements."[791] This re-

790. For discussion, see *id.* at 227-29.
791. For discussion, see *id.* at 337-39.

commendation represents a legislative resolution of the problem of ranking the relative dispensability of the formalities. Other proposals and enactments leave this question for the courts to resolve.

In the past, courts that have tacitly applied a quantitative substantial compliance standard as a means of validating marginal but well-intended wills have tended to focus on the protective character of compliance with the formalities as the means to prevent fraud and imposition.[792] The advocates of functional analysis have generally rejected this analysis.[793] Although Langbein seems to assume that the relative importance of the formalities in relation to one another is self-evident, he seems to have revised his analysis of the individual formalities since his 1975 article.

As Langbein suggests, any functional or "purposive" analysis of the wills act must produce a ranking of the formalities in terms of their general dispensability as evidence of testamentary intent and the genuineness of the will.[794] A harmless error rule that requires the courts to analyze the respective functions of the wills act formalities in order to determine whether the testator's conduct substantially serves the purposes of the wills act assumes that the court will correctly recognize the implications of the defect. Again, however, the appropriate ranking of the wills act formalities is subjective rather than self-evident. Langbein, who seems to assume that the South Australian courts look at the wills acts requirements purposively in applying the section 12(2) dispensing power,[795] nonetheless questioned their decision to apply the dispensing power in *Williams* to excuse noncompliance with the signature requirement[796] he characterizes as fundamental.[797] Langbein's otherwise brilliant exposition of the substantial compliance doctrine is soft on the question of the practical implications of a court's analysis and ranking of the wills act formalities. At times, he seems to be saying that certain types of defects (notably noncompliance with the signature and writing requirements) create such fundamental issues of intent and authenticity as to preclude any cure through the introduction of extrinsic evidence;[798] at other points, however, he seems to suggest that the determination of harm-

792. *Id.* at 223, 226.

793. *Id.* at 271-74.

794. *See* Langbein, *Harmless Error Rules*, *supra* note 8, at 52.

795. *See id.* at 17, 52.

796. *See id.* at 25.

797. *Id.* at 23-24, 52.

798. *See* Langbein, *Substantial Compliance*, *supra* note 8, at 525 (stating that signature and writing are "all but indispensable").

less error turns solely on the proponent's ability to produce evidence of purposive conduct to show testamentary intent. It is unclear in the article how individual courts applying a substantial compliance doctrine would go about ranking the formalities and to what extent such ranking might vary from case to case.

The South Australian courts have addressed the problem of ranking the formalities without resolving it. As we have seen, even substantial deviation from the statutory standard has not produced insuperable difficulties for the proponents of unsigned, unattested, and unexecuted wills, despite lip service to the limiting language in *Graham*.[799]

In analyzing the supposed ranking of the wills act formalities in South Australia, the drafters of section 2-503 incorrectly imply that the South Australian courts treat attestation as dispensable under section 12(2) only when the testator "misunderstands" the requirements[800] and that proponents of unattested wills must prove "that the defective execution did not result from irresolution or from circumstances suggesting duress and trickery."[801] On the contrary, South Australia's courts have found extrinsic evidence establishing that the testator *deliberately* failed to have the will attested sufficient to justify application of section 12(2) in instances in which the evidence established testamentary intent.[802] The South Australian courts have likewise admitted wills to probate in cases such as *Vauk*, *Kelly*, and *Williams* in which the finality of the testator's decision to execute a will was at best doubtful.

Similarly, the drafters of the section 2-503 comment incorrectly state that the South Australian courts have been "'extremely reluctant' to excuse noncompliance with the signature requirement."[803] Even if one could argue that in *Baumanis*,[804] the South Australian courts adopted a narrow functional or purposive approach to the signature requirement,[805] they have since opted for a broad intent-enforcing policy.

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799. *Graham*, 20 S.A. St. R. at 205; for discussion, see *supra* notes 67-75 and accompanying text.

800. UNIF. PROB. CODE § 2-503 comment (1990).

801. *Id.*

802. For discussion, see *supra* notes 692-700, 707-10 and accompanying text.

803. UNIF. PROB. CODE § 2-503 comment (1990).

804. 25 S.A. St. R. 423 (1980); *see* Langbein, *Harmless Error Rules*, *supra* note 8, at 23-24, 52.

805. For discussion of *Baumanis*, see *supra* notes 257-90 and accompanying text.

B. *Reforming the Statute of Wills: The UPC's Multi-Tiered Adaptation of the Functional Approach and a Modest Proposal for Reform*

The UPC's approach is multi-tiered, in that it shifts the burden of proving testamentary intent based on the level of compliance with the statutory guidelines. Such an approach would seem to present a solution to the problem of formalism[806] if the advocates of the harmless error approach are correct in thinking that the potential objections and pitfalls to such an approach are either spurious or outweighed by the policy favoring enforcement of the property owner's intentions.

Lindgren recommends such an approach in his article proposing abolition of the attestation requirement as a substantive requirement for a valid will.[807] Among other proposals, Lindgren essentially suggests that the attestation requirement be recast as a burden-shifting device. Whether the testator has complied with the attestation requirement would determine which party should bear the burden of establishing the validity of the will, what standard of proof should apply, or possibly both.[808]

It can be argued that both the South Australian dispensing power and UPC section 2-503 achieve similar results through less direct means. The effect, if not the purpose, of both provisions is to reformulate the standard for due execution by converting the formalities from mandatory requirements for an enforceable disposition into guidelines for ensuring due execution. UPC section 2-502(a), requiring attestation, is expressly subject to sections 2-502(b) and 2-503, which are treated as exceptions to the attestation requirement.[809] Likewise, UPC section 2-506, dealing with choice of law as to execution, states that a written will is valid if executed in compliance with *either* section 2-502 *or* section 2-503, thus treating section 2-503 as if it set out an alternative standard for determining the validity of a will in cases in which the document does not meet either of the section 2-502 standards.[810] To this extent, the testator's departure from the formalities merely increases the uncertainty of the disposition. Even substantial departures from the requirements, such as failure to sign the will,

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806. For discussion of the UPC's "multi-tiered" approach, see *supra* notes 594-602 and accompanying text.

807. *See* Lindgren, *supra* note 19, at 546-47, 569-71 (discussing proposals to implement abolition of attestation requirement). For discussion, see Miller, *supra* note 3, at 290-91.

808. *See* Lindgren, *supra* note 19, at 570-77.

809. *See* UNIF. PROB. CODE § 2-503 (1990).

810. *See id.* § 2-506.

may apparently (in an appropriate case and under sufficiently compelling circumstances) be excused, according to the language of the section 2-503 dispensing power. UPC section 2-503 thus retains the notion of a consistent statutory standard for due execution while simultaneously authorizing violations of the standard in certain instances.

The flaw in such a multi-tiered harmless error approach is that it retains the existing standard for due execution and then invites the courts to disregard it, without squarely addressing the issue of whether the standard itself should be revised. A more direct, less disingenuous approach would be for the legislature to reformulate the wills act itself along the lines first recommended by Lindgren for reformulation of the attestation requirement.[811] Such a provision might directly address the relationship between compliance with the statutory guidelines for execution of the will and the burden of proving the validity of the will. In addition to shifting the burden of showing testamentary intent to the proponent in cases in which the testator has failed to observe the guidelines for a self-proving, attested, or holographic will, such a provision might also vary the standard of proof required depending on the degree of formality achieved.[812]

C. *Toward a Unified Succession Act: An Immodest Proposal*

The recent revisions to the UPC implicitly acknowledge a need to reform the present law to eliminate some of the existing disparities between wills and will substitutes that have resulted from the fictional classification of will substitutes as inter vivos rather than testamentary dispositions — *i.e.*, as trusts, gifts, or third-party beneficiary contracts. Because the UPC is a probate code, the drafters stop short of proposing a unified procedure for dealing with testamentary transfers other than those made or attempted to be made by wills. Outside the parameters of a probate code such a unified approach could be achieved by a legislative formulation of a multi-tiered provision incorporating all ambulatory and revocable donative dispositions of property — *i.e.*, all essentially testamentary dispositions. Such a provision would expressly set out the effects in *any context* of a transferor's compliance with the formalities of transfer and would treat the level of formality actually achieved as determinative of the burden of proof in any instance in which there was a challenge to the validity of the transfer. Formulation of such a flexible standard would require a principled

811. Lindgren, *supra* note 19, at 546-47, 569-72. For discussion of Lindgren's proposed "two-tiered" approach, see Miller, *supra* note 3, at 291.

812. *Cf.* Lindgren, *supra* note 19, at 571.

determination of what acts are sufficient to establish "testamentary" intent, specifically whether and to what extent particular patterns of conduct support an inference of intent. Ranking of the individual formalities would not be necessary under such a standard; instead, the focus would be on the level of formality observed as objectively manifesting the transferor's intent.

Implementation of a unified guideline for effectuating donative dispositions would not, standing alone, eliminate the distinction between "probate" and "nonprobate" transfers, though one consequence of its application would be a blurring of the lines between traditional wills and will substitutes. The legislature might permit certain simple dispositions to be "self-enforcing" without court intervention, but under a unified standard, the need for administration of the transferor's property under a court's auspices would presumably turn on the nature and extent of the property transferred, rather than on the characterization of the disposition as a will or a will substitute. Ideally, a unified system would be designed to limit court intervention in the administration and distribution of the transferor's property except to the extent necessary to address specific issues such as the claims of surviving spouses and creditors, clearing title to real property, ademption, lapse, subsequent inconsistent disposition, and other matters requiring application of law to the facts.

A unified approach to formalities of transfer would eliminate the need to maintain the juridical fiction of the "present interest" test as a justification for treating the will substitutes as valid transfers despite their noncompliance with the wills acts. Abolishing the statute of wills in favor of a flexible provision addressing the consequences of a transferor's compliance with "alternative formality"[813] would effectively eliminate the need for distinguishing the standard of formality for wills and will substitutes.

As remarked, formulation of unified guidelines for effective execution of wills and will substitutes would necessarily entail a rethinking of the probate and "nonprobate" systems, since the form of the disposition would no longer be determinative of its classification. Though property owners tend to try to avoid probate, the probate process in some cases benefits the testator's successors in certain respects.[814] However, to the extent that probate may serve a useful purpose in administration of the property of some decedents, it seems absurd that the form of a transfer dictates whether the property is subject

813. *See* Langbein, *Nonprobate Revolution*, *supra* note 5, at 1131-32.
814. *See id.* at 1116-20.

to probate. Successors of a testator disposing of personal property by will might actually benefit less from the title-clearing effects of probate than would successors of a transferor who disposes of real property in a revocable trust. With the changes in the ways in which wealth is being held and transmitted,[815] it may be time for a drastic rethinking of the law of succession that would establish procedures for expediting post-mortem dispositions in appropriate instances and provide for court intervention when, but only when, such intervention is needed to resolve disputes.

The harmless error solution and the movement toward unification of the subsidiary law of wills and will substitutes contemplated by the UPC revisions merely continue the process of piecemeal reform of the law of succession and does not directly address any of the fundamental issues raised by the existence of two separate systems for disposing of property at death. In order to eliminate some of the present incongruity in the two systems, the Code's drafters have blurred the parameters of the law of wills, without dealing with the fundamentals. The harmless error approach eliminates formalism at the expense of form by setting up a system for undermining the wills acts, thus pushing the law of succession further in the direction of amorphism.

The 1990 revisions to the UPC will not eliminate judicial arbitrariness in interpreting the wills acts. In actuality, the UPC revisions are setting a standard for determining when its "requirements" are not in fact required.

VI. CONCLUSION

Much of what could be stated in conclusion has been stated previously in exposition. At the risk of redundancy, I have concluded that the problem of wills act formality and of judicial formalism is the product of a system of donative transfers of property that has largely adapted to, rather than evolved from, a series of statutes enacted as many as 450 years ago. The result has been a series of disparate and often unfortunate "developments" in the law of donative transfers of property in which artifice masquerades as clarity.

Under the current system, the first step in determining the validity of documents is to distinguish between wills and will substitutes — to distinguish between arrangements for the disposition of property

815. *See, e.g.*, Langbein, *Family Wealth Transmission*, *supra* note 13 (discussing the changing face of probate law); Lynn, *Estate Planning: Good-bye to Wills, Trusts, and Future Interests*, 39 OHIO ST. L.J. 717 (1978) (discussing the effect of societal change on the law of gratuitous transfers).

on death which are deemed to be testamentary and therefore which are "wills," and those which are deemed to effect a pre-death transfer of a property interest and therefore which are "will substitutes." The second step is a consequence of the first — to require that wills comply with wills act formalities as a prerequisite to effectiveness, but to excuse will substitutes from so complying because by definition the applicable law is not the law of wills, but the law of contracts, property, or trusts. The new, progressive, and "unifying" third step is to excuse certain wills from literal compliance with wills act formalities if those wills are deemed to be in "substantial compliance" or if defects in compliance are excused in the light of extrinsic evidence demonstrating testamentary intent.

Why not come full circle? Under the current system, we are required to pretend that will substitutes are lifetime transfers that fall outside the ambit of the wills acts, even though most are revocable by the donor and the donor retains complete control and dominion over the property. We indulge in this pretense despite the fact that in some cases the "interest" of the donee is so tenuous that it cannot even be named or may be no more than an "evanescent hope."[816] Through the UPC, the Commission on Uniform State Laws now recommends that the current system be revised to enable us to pretend that compliance with the wills act is unimportant as long as the proponent of the defective document can establish by "clear and convincing" evidence of testamentary intent that the error is harmless. Perhaps it is time just to acknowledge that the present configurations of the wills acts have outlived their usefulness.

In my opinion, it would be best to finally unify the law of donative transfers, rather than piecemealing certain of its elements. At present, the prospects for adoption of such a system by any legislature are practically nil. After more than twenty years, the UPC, a much less radical reform, has been enacted in a minority of states. Commentators and legislatures confronting the formalism problem in the law of wills are not questioning the necessity of setting out purely formal criteria for determining the enforceability of wills. Instead, they are focusing on ways to authorize the courts to interpret the statutory requirements flexibly so that errors in execution may be excused in appropriate cases.

The underlying premise of any harmless error rule is that some uniform standard for valid and enforceable wills is necessary, although failure to comply with the standard might be excused in individual

816. *See, e.g.*, Farkas v. Williams, 5 Ill. 2d 417, 422, 125 N.E.2d 600 (1955).

cases. There is a seeming irrationality to setting a standard for enforceability by statute, but authorizing the courts to disregard it if the intentions of the testator have been otherwise sufficiently manifested. This incongruity does not trouble the proponents of harmless error rules, nor does it lead them to question the standard's necessity or sufficiency.

In this article I have examined the problem of wills act formality and judicial formalism and concluded that the approaches proposed or adopted to alleviate the problems are troubling. During this examination, it has become clear that the fundamental question is really whether in a contemporary society the traditional wills acts should continue to play their historically important role in the law of donative transfers. It has been said that "criticism comes easier than craftsmanship," and my counter proposal is not yet fully developed. What is fully developed, however, is the clear sense that the proposal is worthy of full development if for no other reason than because a direct solution to the problem would be preferable to the indirect approach that presently dominates our attention.