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Conditional Purging of Wills

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ARTICLES

CONDITIONAL PURGING OF WILLS

Mark Glover *

ABSTRACT

The laws of most states unconditionally purge a testamentary gift to an individual who serves as an attesting witness to the will. Under this approach, the will is valid despite the presence of an interested witness, but the witness forfeits all, some, or none of her gift, depending on the particularities of state law. While the outcome of the interested witness's gift varies amongst the states that adhere to this majority approach, the determination of what the interested witnesses can retain is the same. The only consideration is whether the beneficiary is also a witness; whether her gift is purged is conditioned on nothing else.

This Article illuminates a substantial, yet largely overlooked, minority approach to the purging of wills—an approach that, contrary to the majority approach, conditions a testamentary gift on considerations other than simply whether the beneficiary served as an attesting witness. This conditional approach to purging is of three types. First, some states condition an interested witness's gift on considerations related to the testator's subjective intent. Second, other states condition the purging of testamentary gifts on procedural considerations regarding how the testator executed the will or how the will was proven at probate. Finally, one state conditions

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gifts to an interested witness on considerations concerning the substance of the gift.

While generally ignored by legal scholars, conditional purging of wills has steadily grown in favor among policymakers, with ten states now following this approach, including California and Texas. Given state legislators' increasing appetite for conditional purging, a critical analysis of this minority approach is needed now, more than ever, to ensure that conditional purging statutes are founded upon sound policy considerations. To meet this need, this Article analyzes conditional purging statutes in light of the law of will's overarching goal of accurately and efficiently carrying out the testator's intended estate plan.

Ultimately, this Article argues that this minority trend is largely misguided because existing conditional purging statutes (1) do not protect the testator from wrongdoing aimed at undermining her intent, (2) make the probate court's task of administering the decedent's estate less efficient, and (3) have proven difficult for policymakers to clearly draft and for probate courts to predictably implement. State policymakers should therefore either adhere to the majority approach or more carefully tailor conditional purging statutes to further the policy goals of the law of wills.

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INTRODUCTION

An individual's ability to benefit from a will for which she served as an attesting witness has been at issue for centuries. In the seventeenth century, the involvement of an interested witness rendered a will invalid, thereby preventing not just the interested witness but every beneficiary from taking under the will.¹ In the eighteenth century, purging statutes were enacted, which validated a will that was witnessed by a beneficiary but that purged that witness's gift.² Other beneficiaries could therefore take under the will, but the interested witness was prevented from doing so.

By the nineteenth century, variations of the original purging statutes emerged.³ Instead of completely purging a gift to an interested witness like their predecessors, these purging statutes only partially purged the witness's gift, allowing the witness to take as much as she would have received had the decedent died without a will or as much as she would have received under the decedent's previous will.⁴ In the twentieth century the progression of the law reached its logical conclusion with some states eliminating the requirement that attesting witnesses be disinterested.⁵ Whereas in the late 1600s no one could benefit from a will that was witnessed by a beneficiary, by the late 1900s, increasingly anyone, including an interested witness, could take under such will.

The discussion of interested witnesses typically follows this general timeline,⁶ which starts with the complete invalidity of wills that was mandated by the Statute of Frauds in 1677 and ends with the total validation of wills that was first proposed by the inaugural version of the Uniform Probate Code ("UPC") in 1969.⁷ Between this beginning and end lie various iterations of purging statutes. Although this typical narrative serves as a simple summary, it

1. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.1 cmt. o (AM. L. INST. 1999).

2. See ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 157 (10th ed. 2017); Bridget J. Crawford, *Wills Formalities in the Twenty-First Century*, 2019 WIS. L. REV. 269, 282.

3. See *infra* note 40 and accompanying text.

4. See SITKOFF & DUKEMINIER, *supra* note 2, at 157.

5. See *id.* at 158.

6. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.1 cmt. o (AM. L. INST. 1999); SITKOFF & DUKEMINIER, *supra* note 2, at 157–58.

7. 29 Car. 2, c. 3, § 5; UNIF. PROBATE CODE § 2-505(b) (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1969) (amended 2019).

overlooks a significant facet of the law relating to interested witnesses. Largely absent from the discussion is a different type of purging statute that is in effect in a substantial minority of states,⁸ one that does not fit neatly within the linear progression of the law that spans from the Statute of Frauds to the UPC.⁹

These unconventional purging statutes fundamentally differ from the law found in the traditional narrative. The Statute of Frauds, the standard purging statutes, and the UPC each provide a definitive answer to whether the involvement of an interested witness affects the validity of a will.¹⁰ The variation in these approaches pertains to what extent an interested witness's involvement affects a will's validity. Under the Statute of Frauds, the will is completely invalid;¹¹ under the original purging statute, only the gift to the interested witness is invalid;¹² under modified purging statutes, an interested witness's gift is partially invalid;¹³ and under the UPC, the will is completely valid.¹⁴ While these various approaches produce different results, they all provide a conclusive outcome based solely on whether a beneficiary is a witness.¹⁵ No other considerations are relevant.

By contrast, nonstandard purging statutes do not provide a conclusive answer to whether the use of an interested witness in the execution of a will affects the will's validity. Instead, under these

8. These statutes are infrequently cited within legal scholarship and are rarely substantially discussed. *See, e.g.*, Stephen R. Alton, *Dr. Jekyll & Mr. Holmes: A Tale of Two Testaments*, 71 S.C. L. REV. 45, 69 n.131 (2019) (citing Texas's statute); Elizabeth R. Carter, *Tipping the Scales in Favor of Charitable Bequests: A Critique*, 34 PACE L. REV. 983, 989 n.45 (2014) (citing Connecticut's, Nebraska's, Washington's, Wisconsin's, and West Virginia's statutes); Kathleen R. Guzman, *Intent and Purposes*, 60 U. KAN. L. REV. 305, 368 n.263 (2011) (citing Washington's statute); Adam J. Hirsch, *Technology Adrift: In Search of a Role for Electronic Wills*, 61 B.C. L. REV. 827, 850 n.147 (2020) (citing Arizona's statute); John V. Orth, *Second Thoughts in the Law of Property*, 10 GREEN BAG 65, 71 n.24 (2006) (citing California's statute); Kent D. Schenkel, *Planning and Drafting Basics Under the New Massachusetts Uniform Probate Code*, 16 ROGER WILLIAMS U. L. REV. 535, 538 (2011) (discussing Massachusetts's statute).

9. *See infra* Part II.

10. *See* SITKOFF & DUKEMINIER, *supra* note 2, at 158 (explaining that traditional purging statutes "in effect create a conclusive presumption of invalidity to the extent of the witness's excess benefit").

11. 29 Car. 2, c. 3. § 5; *see infra* notes 26–34 and accompanying text.

12. 25 Geo. 2, c. 6 § I; *see infra* notes 35–38 and accompanying text.

13. *E.g.*, ARK. CODE ANN. § 28-25-102 (2022); 755 ILL. COMP. STAT. ANN. 5/4-6 (2022); *see infra* notes 40–45 and accompanying text.

14. UNIF. PROBATE CODE § 2-505(b) (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1969) (amended 2019); *see also infra* notes 46–53 and accompanying text.

15. *See* SITKOFF & DUKEMINIER, *supra* note 2, at 158.

statutes, an interested witness's gift is wholly or partially purged in some scenarios, and under other scenarios, an interested witness's gift is unaffected.¹⁶ Put differently, under these types of purging statutes, whether a beneficiary can retain her benefit is conditioned on circumstances other than merely whether she served as an attesting witness. Therein lies the fundamental difference between typical purging statutes and the atypical ones that are this Article's focus; the former unconditionally purge an interested witness's benefit while the latter conditionally purge the witness's benefit.

The progression of the conventional, unconditional approach to interested witnesses reflects changing thoughts regarding how to best fulfill the testator's intent. For instance, under the Statute of Frauds, an interested witness was considered to be a substantial threat of overreaching in the form of undue influence, duress, or fraud.¹⁷ If the testator is the victim of these types of overreaching, then the validation of the will does not carry out the testator's intent.¹⁸ By contrast, under the UPC, an interested witness is viewed as not presenting a significant risk of overreaching.¹⁹ If the testator is not a victim, then the validation of the will best carries out her intent.²⁰

Policymakers in states that have enacted conditional purging statutes have ostensibly expressed the belief that these statutes better balance the competing policy considerations than any of the unconditional approaches.²¹ By providing a more nuanced approach to purging than the unconditional approaches of the conventional law, these policymakers hope to better fulfill the testator's intent.²² This minority trend of conditional purging, however,

16. See *infra* Part II.

17. See *infra* notes 71–84 and accompanying text.

18. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3(b) (AM. L. INST. 2003).

19. See UNIF. PROBATE CODE § 2-505 cmt. (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1969) (amended 2019); see also *infra* notes 81–84 and accompanying text.

20. See Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 6 (1941) (explaining that the requirement of a will ensures that “testamentary intent [is] cast in reliable and permanent form”).

21. See SITKOFF & DUKEMINIER, *supra* note 2, at 158 (explaining the policy objectives of unconditional approaches to purging and suggesting that states that have enacted conditional purging statutes “have adopted a middle ground” approach).

22. See Roger W. Andersen, *Will Executions: A Modern Guide*, 18 AM. J. TRIAL ADVOC. 57, 68 n.79 (1994) (explaining that a conventional purging statute is “crude . . . because it invalidate[s] the gift in all cases, whether or not there [is] overreaching”).

is largely misguided. In particular, most conditional purging statutes do not actually strike a different balance of the competing policy considerations, and they also generally increase the likelihood the testator's estate will be the subject of costly litigation.²³ Ultimately, in light of these problems, this Article offers recommendations to policymakers regarding how conditional purging statutes can be crafted to better achieve their policy objectives.

This Article proceeds in four Parts. Part I provides important context to the minority trend of conditional purging by describing the doctrinal development and policy objectives of the law's conventional, unconditional approach to interested witnesses. Part II then explains the mechanics of conditional purging statutes or, more particularly, the scenarios under which an interested witness's gift is not purged. Part III analyzes the policy of conditional purging statutes. Specifically, this Part examines the objectives that state policymakers attempt to pursue by eschewing the unconditional approaches that are favored in most states and questions whether conditional purging statutes actually achieve the results that their proponents intend. Finally, informed by the historical context and policy analysis of the previous Parts, Part IV offers recommendations to policymakers as they consider conditional purging statutes.

I. THE PROGRESSION OF UNCONDITIONAL PURGING

Before one can appreciate conditional purging statutes, one must first understand the law's typical unconditional approach to purging an interested witness's gift. This traditional approach began in England with the enactment of the Statute of Frauds in 1677,²⁴ and it ended in the United States with the promulgation of the UPC in 1969.²⁵ For these two endpoints and various points in between, this Part describes the doctrinal development and policy goals of the law of unconditional purging.

23. See *infra* Part III.

24. 29 Car. 2, c. 3, § 5.

25. UNIF. PROBATE CODE § 2-505(b) (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1969) (amended 2010).

A. *Law*

British Parliament enacted the Statute of Frauds in 1677.²⁶ This statute not only established the formalities for the creation of a will in England but also served as a template for will-execution statutes in the United States.²⁷ In general, the Statute of Frauds required that a valid will be: (1) written, (2) signed by the testator, and (3) attested by witnesses.²⁸ Moreover, the statute made clear that any deviation from these prescribed formalities rendered a will invalid, as it specifically stated that any noncompliant will “shall be utterly void and of none effect.”²⁹ This requirement became known as the rule of strict compliance, and it remains the law in most American jurisdictions.³⁰

Although the Statute of Frauds did not expressly require that the attesting witnesses be disinterested, or put differently, that they receive no gift under the will, it did mandate that the attesting witnesses be “credible.”³¹ Applying common law principles regarding the credibility of witnesses, courts interpreted this language as requiring that the witnesses receive nothing under the will.³² Under this approach, only by being disinterested could an

26. See 29 Car. 2, c. 3.

27. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.1 cmt. f (AM. L. INST. 2003); SITKOFF & DUKEMINIER, *supra* note 2, at 142–43.

28. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.1 cmt. f (AM. L. INST. 1999); see also Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L.J. 643, 647 (2014).

29. 29 Car. 2, c. 3. § 5.

30. See SITKOFF & DUKEMINIER, *supra* note 2, at 146 (“Under traditional law, a will must be executed in *strict compliance* with all the formal requirement of the applicable Wills Act.”); John H. Langbein, *Substantial Compliance With the Wills Act*, 88 HARV. L. REV. 489, 489 (1975) (“The most minute defect in formal compliance is held to void the will, no matter how abundant the evidence that the defect was inconsequential.”); Bruce H. Mann, *Essay, Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1036 (1994) (noting that “[c]ourts have routinely invalidated wills for minor defects in form even in uncontested cases”).

31. 29 Car. 2, c. 3. § 5.

32. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.1 cmt. o (AM. L. INST. 1999) (“At that time, a person who was a party or had an interest in the outcome of litigation was disqualified from testifying as a witness because of that interest. In construing the Statute of Frauds, the courts carried over this incapacity of the testimonial witness to the attesting witness.”); Note, *Competency of a Witness to a Will*, 5 CONN. PROB. L.J. 369, 373 (1991) (“Under common law, a witness is incompetent if he has a personal interest in the will.”); James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 560 n.122 (1990) (“The Statute of Frauds required that witness be credible. This was interpreted to mean disinterested.”) (internal citation omitted).

individual credibly serve as an attesting witness.³³ The rule of strict compliance, therefore, dictated that a will that was witnessed by a beneficiary was invalid because it was not properly executed, and consequently, no one could take under such will.³⁴

In 1752, British Parliament altered the common law consequences of an interested witness's participation in the execution of a will.³⁵ With the enactment of what became known as a purging statute, the validity of a will did not depend upon whether an attesting witness was named as a beneficiary in the will.³⁶ The will was valid regardless of whether the witnesses were interested or disinterested because, as the statute stated, an individual who was named as a beneficiary under a will should "be admitted as a [witness] to the [e]xecution of [s]uch [w]ill . . . [notwithstanding] [s]uch [devise]."³⁷ However, although the will is valid under this statute, an interested witness's gift under the will is purged, and, as such, she receives nothing.³⁸ Many state policymakers followed the lead of their British counterparts and enacted substantially similar purging statutes, and, today, seven states retain purging statutes that substantively mirror the original purging statute of 1752.³⁹

By the nineteenth century, a new type of purging statute had emerged.⁴⁰ Instead of completely purging an interested witness's gift, thereby leaving the witness with nothing, these new purging statutes only partially purge an interested witness's gift.⁴¹ Fifteen

33. See Note, *supra* note 32, at 373 ("The courts reason that a person who stands to gain financially under the will is not credible and, therefore, is an incompetent witness.").

34. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.1 cmt. o (AM. L. INST. 1999); SITKOFF & DUKEMINIER, *supra* note 2, at 157.

35. 25 Geo. 2, c. 6, § 1 (1752).

36. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.1 cmt. o (AM. L. INST. 1999); SITKOFF & DUKEMINIER, *supra* note 2,.

37. 25 Geo. 2, c. 6, § 1 (1752).

38. See SITKOFF & DUKEMINIER, *supra* note 2, at 157; Lindgren, *supra* note 32, at 560–61.

39. GA. CODE ANN. § 53-4-23(a) (2022); NEV. REV. STAT. § 133.060 (2021); N.H. REV. STAT. ANN. § 551:3 (2022); N.C. GEN. STAT. § 31-10(a) (2022); OKLA. STAT. tit. 84, § 143 (2022); 33 R.I. GEN. LAWS § 33-6-1 (2022); VT. STAT. ANN. tit. 14, § 10 (2021).

40. For example, the 1851 Iowa Code contained the following provision: "[I]f, without a will, [an interested witness] would be entitled to any portion of the testator's estate, he may still receive such portion to the extent in value of the amount devised." IOWA CODE § 1283 (1851). Likewise, the 1887 Wyoming Revised Statutes provided that "if without a will [an interested witness] would be entitled to any portion of the testator's estate, such witness may still receive such portion to the extent and value of the amount devised." WYO. STAT. ANN. § 2237 (1887).

41. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.1 cmt. o (AM. L. INST. 1999).

states currently maintain such statutes.⁴² Of these states, six limit an interested witness's ability to take under a will to the amount that the witness would have received had the testator died intestate.⁴³ The other nine states that have partial purging statutes allow an interested witness to retain the amount that she would have received had the testator's will been invalid,⁴⁴ which could be either the amount that the witness would receive under intestacy or the gift that she would have received under the testator's prior will.⁴⁵

In 1969, the Uniform Law Commission promulgated the UPC,⁴⁶ which, in some respects, significantly diverged from the law of wills that was found throughout the states at that time.⁴⁷ Among the changes to the law of will-execution was the elimination of any requirement that an attesting witness be disinterested.⁴⁸ There was no reference to the requirement found in the Statute of Frauds that a witness be "credible."⁴⁹ Moreover, it included no purging statute

42. ARK. CODE ANN. § 28-25-102(b) (2022); 755 ILL. COMP. STAT. 5/4-6 (2022); IND. CODE § 29-1-5-2(c) (2022); IOWA CODE § 633.281 (2022); KAN. STAT. ANN. § 59-604 (2022); KY. REV. STAT. ANN. § 394.210(2) (LexisNexis 2022); LA. CIV. CODE ANN. art. 1582 (2022); MISS. CODE ANN. § 91-5-9 (2022); MO. REV. STAT. § 474.330(2) (2022); N.Y. EST. POWERS & TRUSTS LAW § 3-3.2 (LexisNexis 2022); OHIO REV. CODE ANN. § 2107.15 (LexisNexis 2022); S.C. CODE ANN. § 62-2-504 (2022); TENN. CODE ANN. § 32-1-103(b) (2022); W. VA. CODE § 41-2-1 (2022); WYO. STAT. ANN. § 2-6-112 (2022).

43. ARK. CODE ANN. § 28-25-102(b) (2022); IOWA CODE § 633.281 (2022); LA. CIV. CODE ANN. art. 1582 (2022); MO. REV. STAT. § 474.330(2) (2022); N.Y. EST. POWERS & TRUSTS LAW § 3-3.2 (McKinney 2022); TENN. CODE ANN. § 32-1-103(b) (2022).

44. 755 ILL. COMP. STAT. 5/4-6 (2022); IND. CODE § 29-1-5-2(c) (2022); KAN. STAT. ANN. § 59-604 (2022); KY. REV. STAT. ANN. § 394.210(2) (LexisNexis 2022); MISS. CODE ANN. § 91-5-9 (2021); OHIO REV. CODE ANN. § 2107.15 (LexisNexis 2022); S.C. CODE ANN. § 62-2-504 (2022); W. VA. CODE § 41-2-1 (2022); WYO. STAT. ANN. § 2-6-112 (2022).

45. See SITKOFF & DUKEMINIER, *supra* note 2, at 157.

46. See *id.* at 68–69; Richard V. Wellman, *The Uniform Probate Code: Blueprint for Reform in the 70's*, 2 CONN. L. REV. 453, 453 (1970).

47. See Lawrence H. Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 ALB. L. REV. 891, 896 (1992) ("Although inspired and initiated as a project to redraft and update the Model Probate Code, the eventual finished product turned out to be much more. It not only was more comprehensive in coverage but also exhibited greater innovation and imagination. In addition, many of its basic philosophies were different. Consequently, the Code offered a more viable package for influencing and affecting modern probate legislation."); Wellman, *supra* note 46, at 454 ("Bolstered by broad support, and challenged by the goal of framing rules meeting the diverse and idealistic demands of the Commissioners, the draftsmen sought to produce a truly useful guide to significant probate reform in the seventies.").

48. See Langbein, *supra* note 30, at 516; Lindgren, *supra* note 32, at 561.

49. Compare 29 Car. 2, c. 3, § 5, with UNIF. PROBATE CODE § 2-505 (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1969) (amended 2019).

of any kind.⁵⁰ Instead, the UPC expressly provided that an interested witness could serve as an attesting witness.⁵¹ In particular, the statutory language stated that “[a] will or any provision thereof is not invalid because the will is signed by an interested witness,”⁵² and the accompanying commentary clarified further that “[i]nterest no longer disqualifies a person as a witness, nor does it invalidate or forfeit a gift under the will.”⁵³

Since the UPC first proposed the elimination of the disinterested witness requirement five decades ago, eighteen states have enacted statutes that allow interested witnesses to retain the benefit they receive from a will.⁵⁴ Most of these states have adopted the UPC’s statutory language wholesale, but some have enacted non-uniform statutes that achieve the same substantive results.⁵⁵ Thus, the law generally takes an unconditional approach to deciding whether a donee retains a gift under a will that she witnessed.

50. UNIF. PROBATE CODE § 2-505 (NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 1969) (amended 2019); *see also* Reid Kress Weisbord & David Horton, *Inheritance Forgery*, 69 DUKE L.J. 855, 871–72 (2020).

51. UNIF. PROBATE CODE § 2-505 (NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 1969) (amended 2019); *see also* Crawford, *supra* note 2, at 282.

52. UNIF. PROBATE CODE § 2-505(b) (NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 1969) (amended 2019).

53. *Id.* § 2-505 cmt. (NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 1969).

54. ALA. CODE § 43-8-134(b) (2022); ALASKA STAT. ANN. § 13.12.505(b) (2021); COLO. REV. STAT. ANN. § 15-11-505(2) (2022); DEL. CODE ANN. tit. 12, § 203(b) (2022); FLA. STAT. ANN. § 732.504(2) (2022); HAW. REV. STAT. § 560:2-505(b) (2022); IDAHO CODE § 15-2-505(b) (2022); ME. REV. STAT. tit. 18-C, § 2-504(2) (West 2022); MICH. COMP. LAWS ANN. § 700.2505(2) (West 2022); MINN. STAT. § 524.2-505(b) (2021); MONT. CODE ANN. § 72-2-525(2) (2021); N.J. STAT. ANN. § 3B:3-8 (West 2021); N.M. STAT. ANN. § 45-2-505(B) (2022); N.D. CENT. CODE ANN. § 30.1-08-05(2) (2021); OR. REV. STAT. ANN. § 112.245 (2021); S.D. CODIFIED LAWS § 29A-2-505(b) (2022); UTAH CODE ANN. § 75-2-505(2) (LexisNexis 2022); VA. CODE ANN. § 64.2-405 (Cum. Supp. 2022).

55. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.1 statutory note 8 (AM. L. INST. 1999) (explaining that some states have “adopt[ed] a similar provision” to the UPC’s). *See, e.g.*, OR. REV. STAT. ANN. § 112.245 (2021); VA. CODE ANN. § 64.2-405 (Cum. Supp. 2022). In addition to the states that have express statutory provisions that eliminate the requirement that an attesting witness be disinterested, Maryland also permits a beneficiary to serve as an attesting witness. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.1 statutory note 8 (AM. L. INST. 1999). Maryland’s will-execution statute states that a will must be “[a]ttested and signed by two or more *credible* witnesses in: (i) [t]he physical presence of the testator.” MD. CODE ANN., EST. & TRUSTS § 4-102(3) (emphasis added). Moreover, Maryland’s probate code provides no express guidance regarding what attributes make an attesting witness credible. Maryland’s courts are therefore in a similar position as their earlier British counterparts, who were charged with interpreting the Statute of Frauds. *See supra* notes 26–34 and accompanying text. Maryland’s courts have, however, interpreted this language as not preventing a beneficiary from serving as an attested witness. *Leitch v. Leitch*, 79 A. 600, 601 (Md. 1911) (“[T]here is nothing in any of their requirements, formalities, or restrictions to the effect that an attesting witness cannot be a beneficiary under a will.”).

The Statute of Frauds,⁵⁶ the various iterations of typical purging statutes,⁵⁷ and the UPC,⁵⁸ each produce different outcomes, but these outcomes are conclusively reached solely on the fact that the beneficiary served as an attesting witness.⁵⁹

B. Policy

The progression of unconditional purging from the Statute of Frauds to the UPC reflects changes in the evaluation of relevant policy considerations. The requirement that attesting witnesses be disinterested was originally intended to serve as a safeguard against overreaching.⁶⁰ In particular, disinterested witnesses were thought to shield the testator from undue influence, duress, and fraud.⁶¹ Undue influence occurs when a wrongdoer induces the testator to make a gift through persuasion that overcomes the testator's free will.⁶² Relatedly, the testator is a victim of duress when a wrongdoer coerces the testator to make a gift through wrongful

56. See *supra* notes 26–34 and accompanying text.

57. See *supra* notes 35–45 and accompanying text.

58. See *supra* notes 46–55 and accompanying text.

59. While these approaches are appropriately characterized as unconditional, two aspects of conventional purging statutes could be characterized as not providing a conclusive resolution to the issue of interested witnesses based solely on the beneficiary's role as an attesting witness. First, the purging statutes that partially purge an interested witness's gift when the witness is either an heir or a beneficiary under a prior will could be characterized as conditional because in some scenarios an interested witness's gift is completely purged and in other scenarios an interested witness's gift is partially purged. See *supra* notes 40–45 and accompanying text. These statutes, however, are different than the conditional statutes that are this Article's focus in that the degree to which a gift is purged is not conclusively determined under the partial purging statutes and whether a gift is purged is not conclusively determined under the conditional purging statute. See SITKOFF & DUKEMINIER, *supra* note 2, at 157–58. Second, pursuant to conventional purging statutes, an interested witness's gift is not purged if the will is witnessed by two other disinterested witnesses. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.1 cmt. o (AM. L. INST. 1999); SITKOFF & DUKEMINIER, *supra* note 2, at 157. This aspect of conventional purging statutes can be characterized as conditional because in some scenarios an interested witness's gift is purged and in others the gift is not. This condition, however, is different than the conditions found in atypical, conditional purging statutes in that the interested witness is not needed to meet the requirements of the will-execution statute.

60. See Gulliver & Tilson, *supra* note 20, at 11 (noting that “[t]he purpose of the requirement that the attesting witnesses be competent has been stated by various courts to be protection of the testator against imposition at the time of the execution of the will “); Mann, *supra* note 30, at 1042 (“The traditional justification for attestation is not an evidentiary one related to the substance of the will. Rather, it is that the presence of disinterested witnesses at the execution ceremony guards that testator against various nefarious acts, such as fraud or undue influence.”).

61. See Mann, *supra* note 30, at 1042.

62. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3(b) (AM. L. INST. 2003).

conduct,⁶³ such as by threatening physical harm.⁶⁴ Finally, fraud occurs when a wrongdoer procures a testamentary gift by deceit.⁶⁵

The primary objective of the law of wills is to fulfill the intent of the testator.⁶⁶ When a testator executes a will while subject to undue influence, duress, or fraud, a court's validation of the will undermines this objective because the wrongdoer's conduct caused the testator to make gifts that she would not have made otherwise.⁶⁷ Policymakers consequently seek to minimize the risk that a court will validate testamentary gifts that were made under these scenarios.⁶⁸ The presence of two disinterested witnesses at the will-execution ceremony was mandated to minimize the risk of these scenarios.⁶⁹ Disinterested witnesses were thought capable of both evaluating whether the testator had been the victim of overreaching during the formulation of her estate plan and preventing the testator from last minute attempts of overreaching during the will's execution.⁷⁰ In sum, the rationale underlying the require-

63. See SITKOFF & DUKEMINIER, *supra* note 2, at 310.

64. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3 cmt. i (AM. L. INST. 2003).

65. See *id.* at § 8.3 cmt. j.

66. See *id.* § 10.1 cmt. a (“[T]he controlling consideration in determining the meaning of a donative document is the donor’s intention.”); Richard Lewis Brown, *The Holograph Problem—The Case Against Holographic Wills*, 74 TENN. L. REV. 93, 96 (2006) (“The primary goal of the American law of wills is the effectuation of the decedent’s testamentary intent.”); Gulliver & Tilson, *supra* note 20, at 2 (“One fundamental proposition is that, under a legal system of recognizing the individualistic institution of private property and granting the owner the power to determine his successors in ownership, the general philosophy of courts should favor giving effect to an intentional exercise of that power.”); Sitkoff, *supra* note 28, at 644 (“For the most part, . . . the American law of succession facilitates, rather than regulates, the carrying out of the decedent’s intent. Most of the law of succession is concerned with enabling posthumous enforcement of the actual intent of the decedent or, failing this, giving effect to the decedent’s probable intent.”).

67. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3 (AM. L. INST. 1999) (explaining that undue influence, duress, and fraud each results in the testator making a donative transfer that he or she would not otherwise have made); Mary Louise Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611, 621 (1988) (“The requirement[] that a property owner be . . . free from undue influence and fraud when making a donative transfer [is] viewed as logically necessary under a system of law designed to effectuate donative intent. Unless the property owner has . . . freedom to formulate subjective donative intent, the law has no interest in enforcing the transfer.”).

68. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3(a) (AM. L. INST. 2003).

69. See *infra* notes 70–71 and accompanying text.

70. See Gulliver & Tilson, *supra* note 20, at 11–12 (“The purpose of the requirement that the attesting witnesses be competent has been stated by various courts to be protection of the testator against imposition at the time of the execution of the will by surrounding him with a group of disinterested people who would not be financially motivated to join in a scheme to procure the execution of a spurious will by dishonest methods, and who therefore

ment that witnesses be disinterested was that when the witnesses who attest to a will's authenticity have nothing at stake, the court has greater assurance that it reflects the true intent of the testator and consequently the court can confidently validate the will.⁷¹

The experience with the Statute of Frauds, which entirely invalidated a will that was attested by an interested witness,⁷² however, led policymakers to believe that such an approach produced outcomes that undermined the testator's intent.⁷³ Although the presence of an interested witness raises concerns about whether the testator intended her to benefit, the interested witness's role in the execution ceremony does not raise the same level of concern regarding the gifts to other beneficiaries. Although the interested witness could have unduly influenced, coerced, or defrauded the testator into benefitting her, she less likely did so to benefit others.⁷⁴ The complete invalidity of the will, therefore, potentially undermined the testator's intent with respect to gifts to beneficiaries who are not witnesses.⁷⁵

This concern led to the enactment of the first purging statutes, which do not invalidate the entire will but instead invalidate only the interested witness's gift.⁷⁶ These statutes address the concerns raised by the interested witness's involvement in the execution ceremony but keep intact those portions of the testator's estate plan that likely were not influenced by the potential overreaching of the interested witness.⁷⁷ This change was intended to better fulfill the

presumably might be led by human impulses of fairness to resist the efforts of others in that direction.”).

71. See Langbein, *supra* note 30, at 496 (“Another . . . protective requirement is the rule that the witnesses should be disinterested, hence not motivated to coerce or deceive the testator.”); Thomas E. Simmons, *Wills Above Ground*, 23 ELDER L.J. 343, 353 (2016) (“[T]he two (ideally) disinterested witnesses provide some safeguards against greedy heirs substituting their wishes of wealth for that of the testator.”).

72. See *supra* notes 26–34 and accompanying text.

73. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.1 cmt. o (AM. L. INST. 1999) (“After a time, it came to be thought in England that the invalidity of the entire will was unnecessarily harsh on the other devisees.”).

74. See *id.* at § 8.3 cmt. c (“Typically, the wrongdoer procures a donative transfer for himself or herself.”). Such a scenario, however, is possible. See *id.* (“Sometimes . . . the wrongdoer procures the donative transfer for the benefit of another, such as a member of the wrongdoer’s family.”).

75. See Note, *supra* note 32, at 375 (“The harsh[] common law rule does not preserve the acceptable portions of the will.”); Lindgren, *supra* note 32, at 560 (“[T]his harsh rule caused the invalidation of many good wills leaving property to family and friends.”).

76. See *supra* notes 35–39 and accompanying text.

77. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.1 cmt. o (1999) (“After a time, it came to be thought in England that the invalidity of the entire

testator's intent by invalidating gifts that were more likely the product of overreaching and keeping in place those gifts that were likely not the product of overreaching.⁷⁸

Policymakers seemingly began to question whether the original purging statutes adequately balanced, on the one hand, the risk that a court will validate a gift that was the product of overreaching and, on the other hand, the risk that a court will invalidate a gift that was not. To strike a different balance, policymakers enacted partial purging statutes that allowed an interested witness to retain what she would have received had the will been invalid.⁷⁹ The rationale underlying these partial purging statutes is that the witness's incentive for overreaching is diminished by purging only the amount that she stands to gain by the will's validity and that the testator's intent is best fulfilled by allowing the witness to retain what she would have received had the will been invalid.⁸⁰

While the policymakers who enacted purging statutes had a slightly different view of the relevant policy considerations than the drafters of the Statute of Frauds, the members of the Uniform Law Commission who prepared the UPC weighed the policy considerations much differently. Indeed, the UPC's elimination of the requirement that attesting witnesses be disinterested reflects the idea that disinterested witnesses do not significantly reduce the risk of overreaching.⁸¹ This conclusion stems from the insight that

will was unnecessarily harsh on the other devisees."); Gulliver & Tilson, *supra* note 20, at 12 ("Impressed by the unfairness to the other legatees . . . many states have enacted statutes which purge the interest of the witness by rendering the gift to him void, but preserve the balance of the will.").

78. See Langbein, *supra* note 30, at 496 n.40 ("These statutes cut down on the mischief, frustrating the testator's wishes in part rather than in toto.").

79. See *supra* notes 40–45 and accompanying text.

80. See S. Alan Medlin, *The South Carolina Probate Code Patched and Refurbished: Version 2013*, 65 S.C. L. REV. 81, 120 (2013) ("The witness would profit to the extent the devise to that witness is greater under the will submitted for probate than what the witness would take if that will was not valid. The purging statute cleanses the witness of any interest by removing any profit."); Cynthia Ann Samuel, *The 1997 Successions and Donations Revision—A Critique in Honor of A.N. Yiannopoulos*, 73 TUL. L. REV. 1041, 1064 (1999) ("The theory is that the heir will not be allowed to better his position by acting as a witness to the will.").

81. See UNIF. PROBATE CODE § 2-505 cmt. (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1969) (amended 2019) ("The requirement of disinterested witnesses has not succeeded in preventing fraud and undue influence."); Lindgren, *supra* note 32, at 561 ("The best explanation for the *Uniform Probate Code's* approach is that testator's seldom need protection—and if they do, the attestation requirement doesn't provide enough protection to offset the damage it does to freedom of testation."); Weisbord & Horton, *supra* note 50, at 872 ("The UPC's drafters believed that purging statutes were more likely to punish innocent beneficiaries than to deter misconduct by interested beneficiaries against vulnerable testators.");

those attempting to unduly influence, coerce, or defraud the testator likely would be careful not to serve as an attesting witness.⁸² Instead, the testator's selection of a beneficiary to serve as an attesting witness could reflect the reality that the people whom the testator chooses to benefit, such as close friends and family members, are likely the same individuals that she trusts to serve as witnesses.⁸³ Accordingly, under the UPC's policy evaluation, the complete validity of the will, including the gifts to an interested witness, best carries out the testator's intent.⁸⁴

In sum, the progression of the law relating to interested witnesses from the Statute of Frauds to the various iterations of purging statutes to the UPC reflects changing policy evaluations regarding how to best fulfill the testator's intent. Under the Statute of Frauds, the risk of overreaching was considered so great that a will attested by a beneficiary is inherently invalid.⁸⁵ Under the

see also Stephanie J. Willbanks, *Parting is Such Sweet Sorrow, But Does It Have to be So Complicated? Transmission of Property at Death in Vermont*, 29 VT. L. REV. 895, 937–38 (2005) (“The prohibition against a beneficiary serving as a witness or losing his bequest if he does, has little to do with preventing fraud, duress, and undue influence.”).

82. See UNIF. PROBATE CODE § 2-505 cmt. (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1969) (amended 2019) (“[I]n most cases of undue influence, the influencer is careful not to sign as a witness but to procure disinterested witnesses.”); Weisbord & Horton, *supra* note 81, at 872 n.107 (noting that “[t]he UPC drafters predicted that rational wrongdoers would want to avoid compromising the appearance of their own objectivity by keeping themselves at arm's length from the will-making process”).

83. See Iris J. Goodwin, *Access to Justice: What to Do About the Law of Wills*, 2016 WIS. L. REV. 947, 964 (“[K]ith and kin are not infrequently near to hand when it is time to execute a will and are accordingly asked to serve as witnesses. Unfortunately, those same people are often quite naturally beneficiaries of the will.”); Willbanks, *supra* note 81, at 938 (“Such testators are more likely to choose the people they know and trust to serve as witnesses, and these are precisely the people that the testators have also selected as their beneficiaries.”); see also UNIF. PROBATE CODE § 2-505 cmt. (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1969) (amended 2019) (“[T]he rare and innocent use of a member of the testator's family on a home-drawn will is not penalized.”); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.1 cmt. o (AM. L. INST. 1999) (“The main rationale for not disqualifying an interested witness is to prevent unjust results for home-made wills in which family members innocently serve as witnesses.”); Note, *Supernumerary Witnesses and Evasions of the Wills Act*, 53 HARV. L. REV. 858, 859 (“For obvious reasons such persons are frequent witnesses to wills, particularly of the homemade variety.”).

84. See Lindgren, *supra* note 32, at 560–61 (“[E]ven the purging statutes work a hardship, especially when an entire interest is purged. . . . To prevent such unfortunate consequences, the *Uniform Probate Code* scrapped the requirement that witnesses be disinterested in the will.”); see also Gulliver & Tilson, *supra* note 20, at 12 (noting that “reported decisions give the impression that the remedies are employed more frequently against innocent parties who have accidentally transgressed the requirement than against deliberate wrongdoers”); Willbanks, *supra* note 81, at 938 (“[T]he purging statute serves primarily as a trap for the unwary and unsophisticated testator who executes his or her will without the assistance of an attorney.”).

85. See *supra* notes 60–71 and accompanying text.

purging statutes, the risk that an interested witness would unduly influence, coerce, or defraud the testator to benefit someone else was thought to be minimal, and therefore only the gift to the interested witness should be invalid.⁸⁶ Finally, under the UPC, the disinterested witness requirement was seen as utterly ineffective in reducing the risk of overreaching, so that a will attested by a beneficiary should be wholly valid.⁸⁷

II. THE PROCESS OF CONDITIONAL PURGING

While the law traditionally provides a definitive answer to the question of whether a donee can benefit under a will that she witnessed,⁸⁸ the law in ten states does not. Instead, statutes in Arizona, California, Connecticut, Kentucky, Massachusetts, Nebraska, Texas, Washington, West Virginia, and Wisconsin conditionally purge an interested witness's gift.⁸⁹ Under these statutes, an interested witness's gift is purged under most circumstances, but the interested witness can retain her gift if she establishes that certain conditions are satisfied.⁹⁰

Precisely what conditions must be met for an interested witness to retain her gift varies amongst these ten states, but they fall into three general categories. First, purging statutes in some states include subjective conditions, which relate to the testator's personal mindset when executing the will.⁹¹ Second, some statutes have procedural conditions, which relate to the process by which the will is admitted to probate.⁹² Finally, one statute contains a substantive

86. See *supra* notes 72–78 and accompanying text.

87. See *supra* notes 81–84 and accompanying text.

88. See *supra* Part I.

89. See ARIZ. REV. STAT. ANN. § 14-2505(b)–(c) (2022); CAL. PROB. CODE § 6112(b)–(d) (Deering 2022); CONN. GEN. STAT. § 45a-258 (2021); KY. REV. STAT. ANN. § 394.210(2) (LexisNexis 2022); MASS. GEN. LAWS ch. 190B, § 2-505(b) (2022); NEB. REV. STAT. § 30-2330(b) (2022); TEX. EST. CODE ANN. § 254.002 (West 2021); WASH. REV. CODE § 11.12.160 (2022); W. VA. CODE § 41-2-1 (2022); WIS. STAT. § 853.07(2)(a)–(3)(b) (2022).

90. See ARIZ. REV. STAT. ANN. § 14-2505(b)–(c) (2022); CAL. PROB. CODE § 6112(b)–(d) (Deering 2022); CONN. GEN. STAT. § 45a-258 (2021); KY. REV. STAT. ANN. § 394.210(2) (LexisNexis 2022); MASS. GEN. LAWS ch. 190B, § 2-505(b) (2022); NEB. REV. STAT. § 30-2330(b) (2022); TEX. EST. CODE ANN. § 254.002 (West 2021); WASH. REV. CODE § 11.12.160 (2022); W. VA. CODE § 41-2-1 (2022); WIS. STAT. § 853.07(2)(a)–(3)(b) (2022).

91. See *infra* Section II.A.

92. See *infra* Section II.B.

condition, which relates to the substance of the estate plan that is contained in the will.⁹³

A. *Subjective Conditions*

The newest type of conditional purging statute purges an interested witness's gift unless the witness can establish that the testator subjectively intended the beneficiary to benefit from the will.⁹⁴ Typically, under these statutes, the presence of an interested witness in the execution ceremony triggers a presumption of undue influence or some other type of overreaching that invalidates the witness's gift.⁹⁵ For example, California's statute, which was enacted in 1983,⁹⁶ provides that "the fact that the will makes a devise to a subscribing witness creates a presumption that the witness procured the devise by duress, menace, fraud, or undue influence."⁹⁷ Massachusetts's statute, which became effective in 2012,⁹⁸ and Washington's, which became effective in 1995,⁹⁹ are substantially similar.¹⁰⁰

Normally, the law presumes that a validly executed will reflects the true and freely expressed intent of the testator or, put differently, that the testator was unfettered by undue influence, duress, and fraud when she executed her will.¹⁰¹ The burden is then on the will's opponent to establish that a testamentary gift should be invalidated because of overreaching.¹⁰² The purging statutes enacted in California, Massachusetts, and Washington, by contrast, shift

93. See *infra* Section II.C.

94. See CAL. PROB. CODE § 6112(b)–(d) (Deering 2022); MASS. GEN. LAWS ch. 190B, § 2-505(b) (2022); WASH. REV. CODE § 11.12.160 (2022); WIS. STAT. § 853.07(2)(a)–(3)(b) (2022).

95. See SITKOFF & DUKEMINIER, *supra* note 2, at 158.

96. 1983 Cal. Stat. 3049; see also CAL. L. REVISION COMM'N, RECOMMENDATION PROPOSING NEW PROBATE CODE 1423 (1990), <http://www.clrc.ca.gov/pub/Printed-Reports/Pub165.pdf> [<https://perma.cc/AJX4-YZN7>].

97. CAL. PROB. CODE § 6112 (Deering 2022).

98. 2008 Mass. Acts 1755; 2010 Mass. Acts 1396; see Schenkel, *supra* note 8, at 538.

99. 1994 Wash. Sess. Laws 1146–47.

100. MASS. GEN. LAWS ch. 190B, § 2-505 (2022) (providing that an interested witness's gift is purged unless "the interested witness establishes that the bequest was not inserted, and the will was not signed, as a result of fraud or undue influence by the witness"); WASH. REV. CODE § 11.12.160 (2022) ("[T]he fact that the will makes a [gift] to a subscribing witness creates a presumption that the witness procured the [gift] by duress, menace, fraud, or undue influence.").

101. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3 cmt. b (AM. L. INST. 2003).

102. See *id.* ("The burden of establishing undue influence, duress, or fraud . . . is on the party contesting the validity of a donative transfer.").

this burden from the will's opponent to the interested witness.¹⁰³ To retain her gift, an interested witness must present evidence that establishes the gift was freely made and actually intended to be effective and was therefore not the product of undue influence, duress, or fraud.¹⁰⁴

Wisconsin is the fourth state that has enacted a conditional purging statute that contains a presumption of invalidity that can be rebutted by evidence regarding the subjective intent of the testator.¹⁰⁵ Unlike California, Massachusetts, and Washington, which require the interested witness to present evidence that the testator was not the victim of undue influence, duress, and fraud,¹⁰⁶ Wisconsin's conditional purging statute is squarely framed in terms of the testator's intent.¹⁰⁷ In particular, the statute, which went into effect in 1999,¹⁰⁸ provides that an interested witness's gift is purged unless "[t]here is sufficient evidence that the testator intended the full transfer to take effect."¹⁰⁹ Whereas California, Massachusetts, and Washington require an interested witness to present evidence specifically related to undue influence, duress, or fraud,¹¹⁰ Wisconsin's statute is broader, allowing an interested witness to present any evidence related to the testator's intent.¹¹¹

By enacting this type of conditional purging statute, Wisconsin's policymakers essentially extended the UPC's harmless error rule to the interested witness requirement. The harmless error rule, which was introduced by the UPC in 1990, is a means by which a

103. CAL. PROB. CODE § 6112 (Deering 2022) (stating that if "the witness fails to rebut the presumption, the interested witness shall take such proportion of the devise made to the witness in the will as does not exceed the share of the estate which would be distributed to the witness if the will were not established"); MASS. GEN. LAWS ch. 190B, § 2-505 (2022) (stating that "the interested witness" must "establish[] that the bequest was not inserted . . . as a result of fraud or undue influence by the witness"); WASH. REV. CODE § 11.12.160 (2022) (stating that if "the interested witness fails to rebut" the presumption, "shall take so much of the gift as does not exceed the share of the estate that would be distributed to the witness if the will were not established").

104. CAL. PROB. CODE § 6112 (Deering 2022); MASS. GEN. LAWS ch. 190B, § 2-505 (2022); WASH. REV. CODE § 11.12.160 (2022).

105. WIS. STAT. § 853.07 (2022).

106. See *supra* notes 95–104 and accompanying text.

107. WIS. STAT. § 853.07 (2022); see Howard S. Erianger, *Wisconsin's New Probate Code*, 71 WIS. LAW. 6, 7 (Oct. 1998) ("Under the new code, th[e] limit on the rights of 'interested witnesses' is *presumed* to apply, but it is subject to rebuttal with evidence that the testator intended the witness to receive the full transfer.").

108. 1997 Wis. Sess. Laws 1453; see *generally* Erianger, *supra* note 107.

109. WIS. STAT. § 853.07(2)(c)(2) (2022).

110. See *supra* notes 95–104 and accompanying text.

111. WIS. STAT. § 853.07 (2022).

probate court can validate a will that does not comply with the prescribed will-execution formalities.¹¹² Under conventional law, a will generally must be written, signed by the testator, and attested by two witnesses and must also comply with other ancillary technicalities.¹¹³ Moreover, under the traditional rule of strict compliance, any deviation from these formalities renders the will invalid.¹¹⁴ The harmless error rule, by contrast, changes the consequences of a will's failure to strictly comply with the prescribed formalities.¹¹⁵

Under the harmless error rule, a noncompliant will is not necessarily invalid.¹¹⁶ Instead, noncompliance triggers a presumption of invalidity, which can be rebutted by clear and convincing evidence that the decedent intended the will to be legally effective despite its noncompliance.¹¹⁷ Similarly, under Wisconsin's conditional purging statute, an interested witness's gift is presumptively purged, and this presumption can be rebutted by evidence that establishes that the testator intended the donee to benefit despite her role as an attesting witness.¹¹⁸ Therefore, although the precise conditions vary, the purging statutes in California, Massachusetts, Washington, and Wisconsin all purge an interested witness's gift unless conditions related to the subjective mindset of the testator are satisfied.

112. UNIF. PROB. CODE § 2-503 (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1969) (amended 2019); see John H. Langbein, *Major Reforms of the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers*, 38 ACTEC L.J. 1, 9 (2012).

113. See RESTATEMENT (THIRD) OF PROP.: WILLS & DONATIVE TRANSFERS § 3.1 cmt. f (AM. L. INST. 1999).

114. See SITKOFF & DUKEMINIER, *supra* note 2, at 146; Langbein, *supra* note 30, at 489; see also *supra* notes 29–30 and accompanying text.

115. See John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1, 4 (1987) ("The central unsigned that underlies the argument for a harmless error rule is that the law could avoid so much of the hardship associated with the rule of strict compliance if the presumption of invalidity now applied to defectively executed wills were reduced from a conclusive to a rebuttable one.").

116. UNIF. PROB. CODE § 2-503 (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1969) (amended 2019).

117. See RESTATEMENT (THIRD) OF PROP.: WILLS & DONATIVE TRANSFERS § 3.3 cmt. b (AM. L. INST. 1999); Sitkoff, *supra* note 28, at 648.

118. See WIS. STAT. § 853.07 (2022). Whether the UPC's harmless error rule could be used to validate a gift to an attesting witness in a jurisdiction that maintains conventional purging statutes is uncertain. See Martin D. Begleiter, *Article II of the Uniform Probate Code and the Malpractice Revolution*, 59 TENN. L. REV. 101, 118-19 (1991).

B. *Procedural Conditions*

In five states, an interested witness's gift is purged unless procedural conditions are satisfied regarding the process by which the will is admitted to probate.¹¹⁹ Of these five states, three currently have procedural conditions that one commentator has characterized as "ambiguous."¹²⁰ In particular, Kentucky's statute purges an interested witness's gift if "the will cannot otherwise be proved,"¹²¹ and the purging statutes in Texas and West Virginia contain substantially similar language.¹²² These statutes are ambiguous because they are subject to two disparate interpretations. First, they could be interpreted to mean that an interested witness's gift is not purged if two additional disinterested witnesses also signed the will.¹²³ In most states, if an interested witness is supernumerary and therefore inessential to the will's validity, the purging statutes expressly allow the witness to retain her gift.¹²⁴ Some courts have interpreted statutory language, like the "otherwise be proved" provision found in Kentucky's statute,¹²⁵ as expressing the same substantive rule.¹²⁶

For example, Virginia previously had a statute that purged an interested witness's gift "if the will may not be otherwise proved,"¹²⁷ and the state's supreme court interpreted this language thusly:

In our judgment, the true view of the statute is, that the words, "if the will may not be otherwise proved," have reference to a case where the devisee or legatee is needed as an attesting witness to make up the

119. See ARIZ. REV. STAT. ANN. § 14-2505 (2022); KY. REV. STAT. ANN. § 394.210(2) (LexisNexis 2022); TEX. EST. CODE ANN. § 254.002(A) (West 2021); NEB. REV. STAT. § 30-2330 (2022); W. VA. CODE § 41-2-1 (2022).

120. Note, *Effect of Attesting Witnesses' Interests Under Legacy Purging Statutes*, 50 YALE L.J. 701, 703 (1941).

121. KY. REV. STAT. ANN. § 394.210(2) (LexisNexis 2022).

122. TEX. EST. CODE ANN. § 254.002(a) (West 2021) (purging an interested witness's gift if "the will cannot be otherwise established"); W. VA. CODE § 41-2-1 (2022) (purging an interested witness's gift "if the will may not be otherwise proved").

123. See Note, *supra* note 120, at 703-04; Recent Decisions, *Wills—Legacy to Attesting Witness Saved Through Avoidance of Testifying*, 41 COLUM. L. REV. 1130, 1131-32 (1941).

124. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.1 cmt. o (AM. L. INST. 1998); SITKOFF & DUKEMINIER, *supra* note 2, at 157; see, e.g., GA. CODE ANN. § 53-4-23(a) (2022); IOWA CODE § 633.281 (2021); NEV. REV. STAT. § 133.060 (2021).

125. KY. REV. STAT. ANN. § 394.210(2) (LexisNexis 2022).

126. See, e.g., *Clark v. Miller*, 68 P. 1071, 1072 (Kan. 1902); *Fowler v. Stagner*, 55 Tex. 393, 398-99 (1881).

127. Code of Virginia 1849, ch. 122, sec. 19 (repealed 1950).

number required by law, in which he is made a competent attesting witness by the avoidance of his interest, and he may also be called to testify at the probate of the will. And, conversely, a will may be otherwise proved when there is an extra or superfluous attesting witness, beyond the number required by the statute.¹²⁸

Although Virginia abandoned this type of purging statute in 1919,¹²⁹ Indiana and Mississippi currently maintain similar statutory language,¹³⁰ and their courts interpret this language in the same manner as Virginia's courts.¹³¹

Kentucky's, Texas's, and West Virginia's courts, by contrast, interpret this type of purging statute differently.¹³² Instead of focusing on the interested witness's role in the execution of the will during the testator's life, courts in these states focus on an interested witness's role in proving the will at probate after the testator's death.¹³³ For example, one court explained that, under Kentucky's purging statute, which has been in effect since Kentucky obtained statehood in the late eighteenth century,¹³⁴ "the penalty of [an interested witness] losing his bequest . . . ought to be enforced against him only when his testimony is required to establish the will . . ." ¹³⁵ Under this view, the act of signing the will does not result in the purging of an interested witness's gift, but instead, it is the witness's act of testifying in court regarding the authenticity of the will that results in the purging of her gift.¹³⁶ Texas's statute,

128. *Bruce v. Shuler*, 108 Va. 670, 676–77, 62 S.E. 973, 976 (1908) (quoting 4 Va. L. Reg. 327-329).

129. *See* *Recent Decisions*, *supra* note 1233, at 1131 n.12. Virginia's current statute states: "No person is incompetent to testify for or against a will solely by reason of any interest he possesses in the will or the estate of the testator." VA. CODE ANN. § 64.2-405 (2017). Other states also previously had similar statutes. *See* *Recent Decisions*, *supra* note 123, at 1131 n.12

130. IND. CODE § 29-1-5-2(c) (2022) (purging an interested witness's gift if the "will cannot be proved without [the interested witness's] testimony or proof of his signature thereto as a witness"); MISS. CODE ANN. § 91-5-9 (2022) (purging an interested witness's gift if "the will cannot otherwise be proven").

131. *See* *Wiley v. Gordon*, 104 N.E. 500, 503–04 (Ind. 1914); *Swanzy v. Kolb*, 46 So. 549, 550–51 (Miss. 1908).

132. *See* *infra* notes 133–42 and accompanying text.

133. *See* Note, *supra* note 120, at 703–04; *Recent Decisions*, *supra* note 123, at 1131–32.

134. *See* 2 C.S. MOREHEAD & MASON BROWN, A DIGEST OF THE STATUTE LAWS OF KENTUCKY, OF A PUBLIC AND PERMANENT NATURE, FROM THE COMMENCEMENT OF THE GOVERNMENT TO THE SESSION OF THE LEGISLATURE, ENDING ON THE 24TH FEBRUARY, 1834, WITH REFERENCES TO JUDICIAL DECISIONS 1537, 1541 (1834).

135. *Doyle v. Brady*, 185 S.W. 1133, 1135 (Ky. 1916).

136. *See* KENTUCKY PRACTICE SERIES, PROBATE PRACTICE AND PROCEDURE § 473 (2022).

which was enacted in 1955,¹³⁷ and West Virginia's statute, which was part of the inaugural iteration of the state's code in 1870,¹³⁸ each have been interpreted similarly.¹³⁹

The Kentucky court's explanation of its state's purging statute raises the question of what conditions would allow a will to be proved without the testimony of the interested witness. The process of proving a will entails establishing that the will was properly executed,¹⁴⁰ and the details of how this is achieved varies from state to state. For instance, the law in Kentucky, Texas, and West Virginia permits a will to be proved by the testimony of one of the attesting witness, even when both attesting witnesses are avail-

137. Acts 1955, 54th Leg., p. 88, ch. 55; see *Wilkerson v. Slaughter*, 390 S.W.2d 372, 374 (Tex. Civ. App. 1965) (“Sections 61 and 62 of the Texas Probate Code were amended in 1955. A [w]ill does not become void when a witness is a legatee or devisee, provided the will can be proven by other witnesses.”). The current iteration of Texas's statute was enacted in 2009 and became effective in 2014. TEX. EST. CODE ANN. § 254.002 (West 2021). For a comprehensive history of Texas's purging statute that extends earlier than 1955, see GERRY W. BEYER, 9 TEXAS PRACTICE SERIES, TEXAS LAW OF WILLS §§ 18:32–38 (4th ed. 2021).

138. Code of West Virginia 1870, ch. 77, sec. 18 (codified as amended at W. VA. CODE § 41-2-1).

139. The history of Texas's purging statute establishes this point. For instance, one case applying the 1955 iteration of the statute, quotes the official commentary to the statute, which stated that the statute was enacted to “repudiate the holding” in *Scandurro v. Beto* and to codify “the contrary holding” in *Ridgeway v. Keene*. *Wilkerson*, 390 S.W.2d at 373. In *Scandurro*, the court held that an interested witness's gift is purged even when the other attesting witness, who was disinterested, testified at probate to prove the will. See 234 S.W.2d 695, 698 (Tex. Civ. App. 1950). By contrast, in *Ridgeway*, the court held that an interested witness is not purged when the will is proved by the testimony of another attesting witness. See 225 S.W.2d 647, 648–49 (Tex. Civ. App. 1949). For West Virginia authority, see *Davis v. Davis*, 27 S.E. 323, 324 (W. Va. 1897) (noting that “it was certainly intended that a valid will should not be held void, in any of its provisions, if established by disinterested testimony”). New York previously had a similar statute. See *Current Legislation, Decedent Estate Law § 27—Validity of Bequest to Subscribing Witness*, 17 ST. JOHN'S L. REV. 50, 50 n.3 (1942). New York's courts interpreted this statute similarly to the courts of Texas and West Virginia. *In re Marks*, 33 N.E.2d 72, 74 (N.Y. 1941) (“The statute was not intended to outlaw gifts to a witness whose testimony is not required for the probate of the will. The Legislature did not intend to render unlawful a testamentary gift to a witness. On the contrary, it confined invalidity of such a gift to those cases where exclusion of a witness by reason of interest would prevent probate of the will.”). New York's current statute expressly provides that an interested witness's interest is purged unless there are two other disinterested witnesses. N.Y. EST., POWERS & TRUSTS LAW § 3-3.2(a)(1) (McKinney 2022). This change was expressly made to override courts' interpretation of the previous statute. *Id.* § 3-3.2 n.1; see THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS 317 n.57 (2d ed. 1953).

140. See Bruce H. Mann, *Self-Proving Affidavits and Formalism in Wills Adjudication*, 63 WASH. U. L.Q. 39, 40 (1985) (“To probate a will, even an uncontested one, the proponent must offer the testimony of one or more of the attesting witnesses. Their testimony, whether in person or by deposition, simply recapitulates the assertions of the standard attestation clause—that the testator signed the will freely in their presence or acknowledged his or her signature to them, that they signed the will in the testator's presence, and that the testator appeared to be of the requisite age and of sound mind.”).

able to testify.¹⁴¹ The reported cases involving these states' purging statutes makes clear that, if this process is followed and at least one disinterested witness testifies at probate, a gift to an interested attesting witness is not purged.¹⁴²

In addition to authorizing proof of a will through the testimony of the attesting witness, Kentucky, Texas, and West Virginia each authorize self-proving wills.¹⁴³ A will is self-proved if the testator and the attesting witnesses sign an affidavit before a notary public that states that the will was properly executed.¹⁴⁴ Self-proved wills can be proved through the affidavits of the witnesses rather than by their testimony, but they are generally treated the same as wills that are not self-proved.¹⁴⁵ As such, the outcomes under the purging statutes of Kentucky, Texas, and West Virginia should generally be the same regardless of whether a will that is attested by an interested witness is self-proved or not.¹⁴⁶

When a will is not self-proved, and the attesting witnesses are unavailable to testify, wills can be proved through other means. For example, in Kentucky, a will can be proved through the testi-

141. Kentucky and Texas's probate codes expressly provide that one witness can prove a will. KY. REV. STAT. ANN. § 394.210(3) (LexisNexis 2022) (noting that "[a] will may be proved by the testimony of one (1) of the subscribing witnesses without regard to the availability or competency of the other witness"); TEX. EST. CODE ANN. § 256.153(b) (West 2021) ("A will [that is not self-proved] may be proved by the sworn testimony or affidavit of one or more of the subscribing witnesses to the will taken in open court."). In West Virginia, the same proposition is established by case law. *Webb v. Dye*, 18 W. Va. 376, 389 (1881) ("A will must be subscribed, but need not be proven by two attesting witnesses.") (citing *Cheatham v. Hatcher*, 71 Va. 56, 30 Gratt. 56 (1878)); see also *Nelson v. Ratliffe*, 69 S.E.2d 217, 221 (W. Va. 1952) (explaining that "[s]ubsequent cases decided in this jurisdiction have not departed from" the holding in *Webb*).

142. For Kentucky's case law, see *Lockard v. McGraw*, No. 2011-CA-001185-MR, 2012 Ky. App. Unpub. LEXIS 706, at *3-4 (Ky. Ct. App. Sept. 28, 2012); *Stewart v. Noble*, No. 2006-CA-000588-MR, 2007 Ky. App. Unpub. LEXIS 776, at *20 (Ky. Ct. App. Apr. 6, 2007); *Barnes v. Graves*, 82 S.W.2d 297, 303 (Ky. 1935); *Calvert v. Calvert*, 271 S.W. 1082, 1082 (Ky. 1925); *Doyle v. Brady*, 185 S.W. 1133, 1134-35 (Ky. 1916). For Texas's case law, see *Brown v. Traylor*, 210 S.W.3d 648, 672-73 (Tex. App. 2006); *Rollins v. Simmons*, 2002 Tex. App. LEXIS 8496, at *7 (Tex. App. Nov. 27, 2002); *In re Estate of Livingston*, 999 S.W.2d 874, 877 (Tex. App. 1999). For West Virginia's case law, see *Davis v. Davis*, 27 S.E. 323, 324 (W. Va. 1897).

143. KY. REV. STAT. ANN. § 394.225 (LexisNexis 2022); TEX. EST. CODE ANN. § 251.101 (West 2021); W. VA. CODE § 41-5-15 (2022).

144. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.1 cmt. r (AM. L. INST. 1999).

145. See UNIF. PROB. CODE § 2-504 cmt. (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1969) (amended 2019) ("A self-proved will may be admitted to probate . . . without the testimony of any attesting witness, but otherwise it is treated no differently from a will not self-proved.")

146. *But see infra* notes 297-320 and accompanying text.

mony of individuals who were present at the will-execution ceremony but who did not sign the will as attesting witnesses.¹⁴⁷ In Texas, a will may be proved by the testimony of witnesses that establishes the authenticity of “the signature or the handwriting evidenced by the signature of one or more of the attesting witnesses; or the testator.”¹⁴⁸ Pursuant to provisions like these, an interested witness’s gift will not be purged because the will is proved without the witness’s testimony.¹⁴⁹ Thus, as illustrated by these provisions, the “otherwise proved” procedural conditions that are found in the purging statutes of Kentucky, Texas, and West Virginia do not specifically delineate the precise situations under which an interested witness’s gift is not purged. Instead, to understand when a will can be otherwise proved, one must turn to the state’s case law and other provisions of the state’s probate code.¹⁵⁰

Although the “otherwise proved” procedural conditions of Kentucky, Texas, and West Virginia do not expressly delineate the precise conditions under which an interested witness’s gift is not purged, some states have crafted procedural conditions that are more specific. For instance, in addition to the “otherwise proved” condition, Texas’s purging statute includes a second procedural condition, which provides: “If the testimony of [an interested] witness . . . proving the will is corroborated by at least one disinterested and credible person who testifies that the [interested witness’s] testimony is true and correct,” then “the bequest to the [interested] witness is not void.”¹⁵¹ An interested witness’s gift is, therefore, not necessarily purged even when she is required to testify at probate. Instead, the plain language of the statute suggests that if the interested testimony is substantiated by the testimony of an individual who was present at the will-execution ceremony but who did not sign the will as an attesting witness then the interested witness’s gift is not purged.¹⁵² In such a situation, the disinterested corroborator, alone, cannot prove the will because she did not serve as an attesting witness, but, under Texas’s condi-

147. See *Thompson v. Hardy*, 43 S.W.3d 281, 286 (Ky. Ct. App. 2000) (“[P]ersons who were present during the executing of a will, but who did not serve as attesting witnesses, may offer sufficient evidence to establish due execution.”).

148. TEX. EST. CODE ANN. § 256.153(c)(2) (West 2021).

149. See KY. REV. STAT. ANN. § 394.210(1), (3) (LexisNexis 2022); TEX. EST. CODE ANN. § 254.002(c) (West 2021); W. VA. CODE § 41-2-1 (2022).

150. See *supra* notes 133–149 and accompanying text.

151. TEX. EST. CODE ANN. § 254.002(c) (West 2021).

152. See *id.* § 254.002(a), (c).

tional purging statute, her testimony can save the gift to the interested attesting witness, whose testimony is sufficient to prove the will.

In addition to Texas's purging statute, the two most recently adopted conditional purging statutes contain procedural conditions that provide more specific guidance regarding the circumstances that satisfy the condition.¹⁵³ For instance, in 2019,¹⁵⁴ the Arizona legislature enacted the latest statute that allows an interested witness to take if certain procedural conditions are satisfied.¹⁵⁵ Specifically, the statute permits an interested witness to retain a gift if "the will is made self-proved."¹⁵⁶ If the will is proved through the self-proving mechanism, then an interested witness's gift is not purged,¹⁵⁷ and, although there are no reported cases applying this new conditional purging statute, it would seem to preserve gifts to witnesses even if both attesting witnesses are interested.

Over four decades earlier, in 1977, Nebraska's conditional purging statute became effective.¹⁵⁸ This statute provides that an interested witness's gift is purged "[u]nless there is at least one disinterested witness to [the] will."¹⁵⁹ Although there have been no reported cases that provide guidance on the application of this provision, the statute appears unambiguous. If both attesting witnesses were named as beneficiaries under the will, then the interest of each is purged. By contrast, if one attesting witness is disinterested, then an interested witness can take under the will.¹⁶⁰ Nebraska's conditional purging statute therefore stands alongside those of Arizona, Kentucky, Texas, and West Virginia as conditional purging statutes that contain procedural conditions.

153. See ARIZ. REV. STAT. § 14-2505 (2022); NEB. REV. STAT. § 30-2330 (2022).

154. 2019 Ariz. Sess. Laws 230.

155. See ARIZ. REV. STAT. § 14-2505 (2022).

156. *Id.* § 14-2505(B).

157. *Id.*

158. 1974 Neb. Laws, LB 354, § 52; see Committee on Significant Current Legislation, Probate and Trust Division, *1974 Legislation on Trusts and Estates*, 10 REAL PROP. PROB. & TR. J. 74, 94 (1975).

159. NEB. REV. STAT. § 30-2330 (2022).

160. In contrast to the previously discussed procedural conditions, this condition is not strictly related to the process of proving a will after the testator's death because it does not refer to an interested witness's act of testifying at probate. Instead, this condition is better characterized as related to the process by which the testator executes the will during her life, as it simply refers to the interested witness's role in attesting the will.

C. *Substantive Conditions*

One state, namely Connecticut, currently has a conditional statute that contains a condition related to the substance of the will.¹⁶¹ Specifically, Connecticut's statute, which was enacted in 1808,¹⁶² provides: "Every devise or bequest given in any will or codicil to a subscribing witness . . . shall be void . . . unless such devisee or legatee is an heir to the testator."¹⁶³ Under this statute, the gifts of most interested witnesses are purged, but some gifts to interested witnesses are not.¹⁶⁴

Which gifts are not purged is determined by the court looking to the substance of gift and, in particular, the identity of the beneficiary.¹⁶⁵ If the interested witness is an heir of the testator, or put differently, if the interested witness would benefit from the decedent's estate had the decedent died without a will, the interested witness can retain the gift.¹⁶⁶ If the interested witness would not benefit if the decedent died without a will, then her gift is purged.¹⁶⁷ In sum, Connecticut's substantive condition along with the procedural conditions that are found in Arizona, Kentucky, Nebraska, Texas, and West Virginia and the subjective conditions that are found in California, Massachusetts, Washington, and Wisconsin constitute the three general types of conditions that are found in conditional purging statutes.

161. CONN. GEN. STAT. § 45A-258 (2021). Although Connecticut is the only state that currently has a conditional purging statute that contains a substantive condition, Vermont previously had a statute that was substantially similar to Connecticut's current statute. See *Clark v. Clark's Estate*, 54 Vt. 489, 492 (1882); Willbanks, *supra* note 81, at 938 (2005). Interestingly, Vermont's current purging statute raises questions regarding whether it is a conditional purging statute, as the statute states that a gift to an interested witness is "voidable." VT. STAT. ANN. tit. 14, § 10 (2017). The use of the word "voidable" rather than the word "void" suggests that there could be situations in which an interested witness's gift is not void; however, there are no reported cases applying this new statute.

162. See *Fortune v. Buck*, 23 Conn. 1, 8–9 (1854) (describing the statute as applying to wills executed after January 1, 1808).

163. CONN. GEN. STAT. § 45a-258 (2021).

164. See *id.*

165. See KATE MCEVOY, 20 CONNECTICUT PRACTICE SERIES: CONNECTICUT ELDER LAW § 4:4 (2022) (explaining that a gift is not purged unless "the devisee or legatee is also an heir to the testator").

166. § 45a-258; see SITKOFF & DUKEMINIER, *supra* note 2, at 67 ("A's heirs can be identified only by reference to the applicable intestacy statute at the moment of A's death.").

167. § 45a-258.

III. THE POLICY OF CONDITIONAL PURGING

The primary policy objective of the law of wills is to carry out the donor's intent.¹⁶⁸ The law relating specifically to interested witnesses should therefore be analyzed from this perspective, and, in particular, conditional purging statutes should be scrutinized regarding whether they better fulfill the donor's intent than the unconditional approaches to purging that are favored in most states. Although the accuracy of conditional purging statutes in carrying out the donor's intent should be of primary concern to state policy-makers, the efficiency of the process of determining the donor's intent is also a relevant consideration.¹⁶⁹

Making accurate determinations of the donor's intent can generate costs, as the relevant parties must litigate the issue by producing and presenting evidence to the court.¹⁷⁰ Additionally, the process itself—of transitioning the law from the conventional, unconditional approach to purging to the unconventional, conditional approach—can be costly because state legislatures must craft conditional purging statutes that fit their policy preferences and courts must interpret and apply unfamiliar law related to interested witnesses.¹⁷¹ Policymakers should therefore consider whether the costs of implementing reform and making more

168. See *supra* notes 66–68 and accompanying text.

169. See Peter T. Wendel, *Wills Act Compliance and the Harmless Error Approach: Flawed Narrative Equals Flawed Analysis?*, 95 OR. L. REV. 337, 384–85 (2017) (“An economic analysis focuses on marginal costs and benefits. Whether one should enter into a proposed transaction, or adopt a proposed law, depends on whether the marginal benefits of the proposed transaction or law exceed the marginal costs of the proposed transaction or law. The proposed transaction/law is efficient if the marginal benefits exceed the marginal costs.”) (emphasis omitted); Adam J. Hirsch, *Testation and the Mind*, 74 WASH. & LEE L. REV. 285, 367 (2017) (“Like other landscapes, the legal landscape is an environment of scarce resources. The success and even wisdom of a rule depends in no small measure on its frugality.”).

170. See C. Frederick Beckner, III & Steven C. Salop, *Decision Theory and Antitrust Rules*, 67 ANTITRUST L.J. 41, 46 (1999) (explaining that “gather[ing] and consider[ing] additional information” can “reduce the risk of error” and increase the likelihood of “mak[ing] a better decision”); Michael Owens, Comment, *A Cure for Collusive Settlements: The Case for a Per Se Prohibition on Pay-for-Delay Agreements in Pharmaceutical Patent Litigation*, 78 MO. L. REV. 1353, 1380 (2013) (“The more intensive the process of gathering and using additional information, the more likely a court can reach a correct . . . determination.”).

171. See generally Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789 (2002).

accurate determinations of the donor's intent outweigh the benefits of increased accuracy.¹⁷²

The discussion of this calculus can be simplified by referring to the relevant considerations as error costs, decision costs, and transition costs. Firstly, error costs are the negative effects of inaccurate decisions.¹⁷³ In the context of evaluating the law related to interested witnesses, error costs occur when the law produces inaccurate determinations regarding whether the testator intended to benefit an interested witness. Secondly, decision costs are the costs of making a decision, and in particular, these costs occur when the law generates litigation to make the decision of whether an interested witness's gift should be purged.¹⁷⁴ Thirdly, transition costs are the costs of changing the law.¹⁷⁵ These costs entail the legislative effort to initially formulate and subsequently refine new laws and the judicial effort of implementing these reforms.¹⁷⁶ State policymakers should implement reform of the law related to interested witness by enacting a conditional purging statute only if the reform minimizes the sum of error costs, decision costs, and transition costs.

172. See Beckner & Salop, *supra* note 170, at 46 (“The efficiency of gathering and using additional information depends on the cost of the information versus the benefits.”); Van Alstine, *supra* note 171, at 858 (“The proper role of a sensitivity to legal transition costs . . . is as one important input in a reasoned decision-making process. Substantive benefit may remain the principal focus in the politics of legal change. As the likely extent of transition costs increases, however, this input suggest that lawmakers should proceed with increasing care in weighing any particular law reform proposal.”).

173. See Keith N. Hylton & Michael Salinger, *Tying Law and Policy: A Decision-Theoretic Approach*, 69 ANTITRUST L.J. 469, 502 (2001) (“Decision theory implies that the best legal rule minimizes the overall expected costs of error. The three important factors suggested by the analysis are the base rate probability of harm, the ratio of the false conviction to the false acquittal probability (relative error rates), and the ratio of the false conviction to the false acquittal cost (relative error costs.”); Todd J. Zywicki, *Institutional Review Boards as Academic Bureaucracies: An Economic and Experiential Analysis*, 101 NW. U. L. REV. 861, 864 (2007) (“Error costs are minimized by the joint minimization of the costs of Type I and Type II errors, as measured by their frequency and the severity of harm that results from their occurrence.”).

174. See Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 111 (2000) (“‘Decision costs’ is a broad rubric that might encompass direct (out-of-pocket) costs of litigation to litigants and the judicial bureaucracy, including the costs of supplying judges with information needed to decide the case at hand and formulate doctrines to govern future cases; the opportunity costs of litigation to litigants and judges (that is, the time spent on a case that could be spent on other cases); and the costs to lower courts of implementing and applying doctrines developed at higher levels.”).

175. See Van Alstine, *supra* note 171, at 816–52.

176. See *id.*

A. *Error Costs*

Again, the primary objective of the law of wills is to carry out the donor's intent,¹⁷⁷ and this principle extends to the law relating specifically to interested witnesses.¹⁷⁸ Consequently, conditional purging statutes should be evaluated to determine how well they resolve the issue of whether the testator intended to benefit an attesting witness. If conditional purging statutes are more accurate than unconditional purging statutes, then they decrease the error costs of the probate process. On their face, it would seem like the more nuanced approaches to purging that are found in conditional purging statutes would better fulfill the testator's intent than the all-or-nothing approaches to purging that are favored by most states. After all, it is reasonable to conclude that, in some cases, the testator truly intended to benefit an interested witness and, in other cases, the testator did not. Allowing an interested witness to benefit in some scenarios but not in others would therefore seem to reduce error costs. Whether conditional purging statutes actually produce more accurate outcomes, however, is far from clear.

Consider, for instance, the conditional purging statutes that contain subjective conditions.¹⁷⁹ As explained previously, there are currently two types of subjective conditions in effect. One type purges an interested witness's gift unless the witness can establish that her gift was not the product of undue influence, duress, or fraud.¹⁸⁰ The other type purges an interested witness's gift unless the witness can establish that the testator truly intended to benefit her.¹⁸¹ Permitting the interested witness to rebut the presumption of purging would seem to increase the law's accuracy in fulfilling the testator's intent because some interested witnesses undoubtedly do not engage in overreaching. As such, error costs are reduced if an interested witness can prevent purging by establishing her innocence. However, the significance of this reduction in error costs is questionable because an innocent, interested witness might not pursue the opportunity to rebut the presumption of purging.

177. See *supra* notes 66–68 and accompanying text.

178. See *supra* Section I.B.

179. See *supra* Section II.A.

180. See *supra* notes 95–104 and accompanying text.

181. See *supra* notes 105–118 and accompanying text.

Litigating the issue of overreaching can be costly for the interested witness.¹⁸² For an interested witness to be willing to bear these costs, the expected benefit of attempting to rebut the presumption of overreaching must offset those costs.¹⁸³ The interested witness's expected benefit of litigating the issue of overreaching is the product of two considerations. The first is the size of the gift that she stands to receive under the will.¹⁸⁴ The second is the likelihood that the interested witness will prevail in her attempt to rebut the presumption of overreaching.¹⁸⁵ The interested witness's expected benefit is calculated by multiplying the benefit that she is given in the will by her chances of success in rebutting the presumption of purging.¹⁸⁶

Both variables in the interested witness's expected benefit calculation can impede her attempt to rebut the presumption of purging. First, even if an interested witness were certain to prevail in her attempt to rebut the presumption of purging, the size of the witness's gift under the will could be too small to warrant the expense of litigation. With little to gain if she ultimately prevails, an interested witness will be reluctant to bear the expense of rebutting the presumption of purging. Second, if an interested witness's gift is substantial, she still might not attempt to rebut the presumption of purging because the chances of doing so successfully are likely slim.

182. See *infra* Section III.B.

183. See Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 920 n.199 (2008) ("A plaintiff will file suit if the expected benefit exceeds the expected cost. This can be expressed mathematically as follows. Let p be the plaintiff's probability of trial success, w be the likely trial award if the plaintiff is successful, and c be the plaintiff's anticipated cost of litigating through trial. The plaintiff will file suit if $p \times w > c$."); Dustin E. Buehler, *Jurisdictional Incentives*, 20 GEO. MASON L. REV. 105, 121 (2012) ("Generally, a plaintiff will file suit when her expected benefit exceeds her litigation costs.").

184. See Bone, *supra* note 183, at 911 nn.169 & 171, 920 n.199; Buehler, *supra* note 183, at 121.

185. See Bone, *supra* note 183, at 911 n.171, 920 n.199; Buehler, *supra* note 183, at 121.

186. See Bone, *supra* note 183, at 920 n.199 ("An expected benefit . . . is just the benefit . . . discounted by the probability it will materialize."); Buehler, *supra* note 183, at 121 ("The 'expected benefit' of suit is the amount the plaintiff will gain from the litigation process, multiplied by the probability that she will prevail.").

Given the paucity of direct evidence related to undue influence¹⁸⁷ and the inherent difficulty of proving a negative,¹⁸⁸ a party that bears the burden of establishing the absence of undue influence typically finds it challenging to prevail.¹⁸⁹ Similarly, because direct observation of the testator's subjective intent is impossible¹⁹⁰ and the best evidence of that intent is unavailable at probate,¹⁹¹ an interested witness who is charged with establishing that the testator truly intended to benefit her could have difficulty in carrying this burden. This uncertainty in successfully rebutting the presumption of purging, when coupled with the possibility of a small gift, produces a potentially minimal expected benefit for an interested witness in attempting to rebut the presumption. Therefore, although conditional purging statutes nominally provide an inter-

187. See SITKOFF & DUKEMINIER, *supra* note 2, at 282 (“[D]irect evidence of undue influence is rare”); Margaret Ryznar & Angeliqve Devaux, *Au Revoir, Will Contests: Comparative Lessons For Preventing Will Contests*, 14 NEV. L.J. 1, 4 n.25 (2013) (“By its nature, undue influence is difficult to detect and prove, often requiring circumstantial evidence.”); Trent J. Thornley, *The Caring Influence: Beyond Autonomy as the Foundation of Undue Influence*, 71 IND. L.J. 513, 517 (1996) (“[P]roof of undue influence tends to be circumstantial and indirect.”).

188. See Lawrence A. Frolik, *The Biological Roots of the Undue Influence Doctrine: What's Love Got To Do With It?*, 57 U. PITT. L. REV. 841, 844 (1996) (“Given . . . the difficulty of proving a negative . . . , the doctrine is particularly worrisome to lawyers attempting to successfully admit a will to probate.”); *Breach of Ethical Rule as Creating Private Right of Action*, 35 EST. PLAN. 45, 45 (noting that “[r]ebutting the presumption of undue influence is a difficult evidentiary burden as it essentially involves proving a negative”).

189. See *In re Estate of Carpenter*, 253 So .2d 697, 703–04 (Fla. 1971) (noting that “[b]ecause it is frequently as difficult to disprove undue influence as to prove it, the practical effect of shifting the burden of proof is to raise the presumption virtually to conclusive status and require a finding of undue influence”); see also Thornley, *supra* note 187, at 522 (“[I]n states where the presumption of undue influence is available, plaintiffs may employ a powerful legal tool in order to set aside the testator’s will.”). An interested witness might more easily overcome presumptions of fraud and duress because direct evidence might be available. However, current conditional purging statutes include a presumption of fraud, duress, and undue influence. CAL. PROB. CODE § 6112 (Deering 2022); MASS. GEN. LAWS ANN. ch. 190B, § 2-505 (2022); WASH. REV. CODE ANN. § 11.12.160 (2022).

190. See Fellows, *supra* note 67, at 656 (referencing “the impossible search for subjective intent”); Hirsch, *supra* note 169, at 287 (“The mind of a testator teems with data, but data that is difficult to access, and assess, without risk of inaccuracy or misrepresentation.”); see also Jan Klabbers, *How to Defeat a Treat’s Object and Purpose Pending Entry into Force: Toward Manifests Intent*, 34 VAND. J. TRANSNAT’L L. 283, 303 (2001) (“[A]s a philosophical truism, it may be well-nigh impossible to identify someone else’s subjective intent; to paraphrase an ancient maxim, not even the devil knows what is inside a man’s head.”).

191. Sitkoff, *supra* note 28, at 647 (“A will is a peculiar legal instrument . . . in that it does not take effect until after the testator dies. As a consequence, probate courts follow what has been called a ‘worst evidence’ rule of procedure. The witness who is best able to authenticate the will, to verify that it was voluntarily made, and to clarify the meaning of its terms is dead by the time the court considers such issues.”).

ested witness an opportunity to retain her gift, the meaningfulness of this opportunity is uncertain.¹⁹²

Like the conditional purging statutes that contain subjective conditions, those that contain procedural conditions could, on their face, more accurately fulfill the testator's intent than the conventional, unconditional approaches to purging. If the procedural safeguards that these conditional purging statutes contain reduce the risk of overreaching, then error costs will be reduced because gifts to interested witnesses that the testator truly intended to be effective will not be purged. However, whether the procedural conditions that are currently in place are effective is unclear.

Consider the "otherwise proved" conditional purging statutes in effect in Kentucky, Texas, and West Virginia.¹⁹³ As explained previously, these statutes purge an interested witness's gift only if the witness's testimony is necessary to prove the will.¹⁹⁴ The rationale of these statutes is that the need to protect against wrongdoing is lesser when a beneficiary serves as an attesting witness than when she testifies as a witness at probate.¹⁹⁵ This negative assessment of the protective benefit of disqualifying a beneficiary from participating in the will-execution ceremony as an attesting witness is not unique, as the UPC's unconditional approach to purging permits a beneficiary to retain her gift even if she serves as an attesting witness.¹⁹⁶

192. See Schenkel, *supra* note 8, at 540–41 (analyzing Massachusetts's conditional purging statute and stating: "Given that the interested witness bears the burden of proof here, . . . [t]he potential expense and risk of bringing a suit under these circumstances would mean that for practical purposes, at least in most cases, the [conventional, unconditional] purging statute remains in effect.").

193. KY. REV. STAT. ANN. § 394.210(2) (LexisNexis 2022); TEX. EST. CODE ANN. § 254.002(a) (West 2021); W. VA. CODE. § 41-2-1 (2022).

194. See *supra* notes 133–139 and accompanying text.

195. See *Doyle v. Brady*, 185 S.W. 1133, 1135 (Ky. 1916) (finding that "[t]he penalty of losing his bequest . . . ought to be enforced against [an interested witness] only when his testimony is required to establish the will, which accomplishes the purpose of the law to avoid chance for fraud or perjury upon his part"); Note, *supra* note 120, at 704–05 ("In judging the correctness of these two alternative interpretations of the statutes, consideration must be given to the extent of the different evils at which each interpretation aims. The probate view [is] formulated to prevent possible gains by an attesting legatee from perjury on the witness stand. . . . On the other hand, the toll of the attestation view in gifts invalidated irrespective of merit is much greater than that of the probate view. Since under the attestation interpretation, which causes the greater interference with testatorial intent, the statute removes possible gain from fraud or undue influence at the execution of a will, a choice of interpretations . . . [that] hinges in large measure on the degree of undue influence and fraud which disinterested attestation could prevent.").

196. See *supra* notes 81–84 and accompanying text.

However, the “otherwise proved” conditional purging statutes differ from the UPC in that they purge gifts when a beneficiary testifies at probate. Whether these statutes generate fewer error costs than UPC’s unconditional approach therefore depends upon the protective efficacy of prohibiting a beneficiary from testifying at probate to prove a will. In this regard, the protective benefit of the “otherwise proved” conditional purging statutes is questionable,¹⁹⁷ as the same the doubts regarding the protective benefit of barring beneficiaries from serving as attesting witness equally apply to prohibiting beneficiaries from testifying at probate.¹⁹⁸ Thus, it is unclear whether the “otherwise purged” conditional purging statutes generate fewer error costs than the UPC’s unconditional approach, which permits interested witnesses to retain their gifts.

Also consider the related conditions that are found in Arizona, Nebraska, and Texas. In Arizona, a gift to a witness is purged unless the will self-proved.¹⁹⁹ In Nebraska, an interested witness’s gift is purged unless at least one disinterested witness attested the will,²⁰⁰ and in Texas, a gift to an interested witness, whose testimony is required to prove the will, is purged unless the witness’s testimony is corroborated by a disinterested individual.²⁰¹ The apparent rationale for these procedural conditions is that the presence of one disinterested individual at a will’s execution, whether a notary, an attesting witness, or someone else, provides assurance that an interested witness has not engaged in overreaching. If these procedural safeguards actually reduce the risk of overreaching, then permitting an interested witness under these conditions to retain her gift might better fulfill the testator’s intent than any of the unconditional approaches to purging.

There is good reason, however, to question whether one disinterested individual, who is present at a will’s execution, can protect against or even identify attempts by an interested witness to unduly influence the testator. Undue influence typically occurs over

197. See Gulliver & Tilson, *supra* note 20, at 12–13 (“The accomplishment of the stated purpose [of protecting the testator from wrongdoing] is . . . defeated in individual states . . . by a statutory requirement that the operation of the purging statute be determined by whether the will may be proved without the testimony of the witness.”).

198. See *supra* note 82 and accompanying text.

199. ARIZ. REV. STAT. ANN. § 14-2505 (2022); see *supra* text accompanying notes 154–157.

200. NEB. REV. STAT. § 30-2330 (2022); see *supra* text accompanying notes 158–62.

201. TEX. EST. CODE ANN. § 254.002(c) (West 2021); see *supra* text accompanying notes 151–152.

long periods of time and entails subtle influence that is not easily detectable.²⁰² The disinterested individual required under some conditional purging statutes would therefore have particular difficulty in discerning undue influence in the brief timeframe of the will-execution ceremony.²⁰³ Moreover, an informed wrongdoer could recruit an individual who satisfies these conditions to participate in the overreaching.²⁰⁴ Given the questionable protective value of one disinterested individual, these conditional purging statutes do not clearly generate fewer error costs than the UPC's unconditional statute that simply permits interested witnesses to retain their gifts.

In addition to purging statutes that contain subjective conditions and those that contain procedural conditions, purging statutes that contain substantive conditions could reduce error costs if properly structured. If something about the identity of the interested witness or the nature of her gift suggests that the gift was not the product of overreaching, then validating the gift could better fulfill the testator's intent than unconditionally purging the gift. The trouble for policymakers, of course, is identifying which substantive characteristics of the testators will actually reduce the risk of overreaching.

Consider, for instance Connecticut's conditional purging statute, which is the sole statute that currently contains a substantive condition.²⁰⁵ This statute purges an interested witness's gift unless the interested witness is heir of the testator.²⁰⁶ A possible rationale for

202. See *Long v. Long*, 125 S.W.2d 1034, 1036 (Tex. 1939) ("Undue influence is usually a subtle thing, and by its very nature it usually involves an extended course of dealings and circumstances."); see also *In re Burke*, 441 N.Y.S.2d 542, 548 (N.Y. App. Div. 1981) (concluding that "[u]ndue influence is seldom practiced openly, but it is, rather, the product of persistent and subtle suggestion"); *Gulliver & Tilson*, *supra* note 20, at 13 ("[I]n the more normal course of undue influence, [a wrongdoer] would simply have secured such emotional domination over the testator that he could take him for execution before innocent and disinterested witnesses who would not detect any imposition.").

203. See *Gulliver & Tilson*, *supra* note 20, at 12–13 (noting that long established domination can be "scarcely detect[ed]" by disinterested witnesses "in their brief observation at execution").

204. See *id.* at 13 (explaining that a prospective wrongdoer "may . . . if contemplating physical compulsion, conclude a secret agreement to bribe others, not named in the will, to join in his scheme by acting as the attesting witnesses"); see also *Weisbord & Horton*, *supra* note 50, at 896–97 ("Scholars have argued that attestation fails to prevent fraud because wrongdoers usually know enough about Wills Act formalities to procure or fabricate witness signatures. Notarization seems to suffer from, if not exacerbate, the same defect.").

205. CONN. GEN. STAT. § 45a-258; see also *supra* Section II.C.

206. CONN. GEN. STAT. § 45a-258.

this substantive condition is that, as an heir and therefore a relative of the testator,²⁰⁷ the interested witness has less motivation to engage in overreaching than someone who does not have a familial connection with the testator. This diminished motive could be due to the fact that the heir would benefit from the testator's estate in the absence of a will,²⁰⁸ or it could be due to the more intimate relationship that an heir might have with the testator.²⁰⁹ If heirs are less likely than non-heirs to engage in overreaching, then permitting interested witnesses who are heirs to take and denying those who are non-heirs from benefiting could reduce error costs.

However, although heirs might have less motivation to engage in overreaching than non-heirs, they generally have greater opportunity to do so.²¹⁰ Family members might also have greater access to the testator, enjoy greater trust with the testator, and better understand the testator's weaknesses than non-relatives. This access, trust, and knowledge makes an heir's task of overreaching easier than that of a non-heir.²¹¹ Because heirs have greater opportunity to engage in overreaching than non-heirs, it is uncertain whether the fact that an interested witness is an heir reduces the likelihood that her gift was the product of overreaching.²¹²

In sum, whether conditional purging statutes are more accurate in carrying out the testator's intent than the conventional, unconditional approaches to purging is dubious. Each of the three types of conditional purging statutes present difficulties to policymakers in their attempt to craft reforms that minimize error costs. First, constructing a presumption of purging that provides an interested witness a meaningful opportunity to rebut the presumption by presenting evidence regarding the subjective mindset of testator has

207. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.1 cmt. a (AM. L. INST. 1999).

208. See Willbanks, *supra* note 81, at 938 ("The apparent rationale for this exclusion is that the witness-beneficiary-heir would acquire the property in the event that the will was invalid.")

209. See Gulliver & Tilson, *supra* note 20, at 12 (suggesting that "members of the family" who are present at the time a testator signs a will "are normally devoted" to the testator).

210. See Mann, *supra* note 30, at 1042 (suggesting that "family members [who serve as attesting witnesses] are well-placed to commit the acts they are supposed to prevent").

211. See *In re Burke*, 441 N.Y.S.2d 542, 548 (N.Y. App. Div. 1981) (explaining that undue influence involves "the exploitation of a relationship of trust and confidence").

212. See Willbanks, *supra* note 81, at 938 ("Heirs . . . are as likely, if not more likely, than non-heir-beneficiaries to have an interest in the will or to engage in fraud, duress, or undue influence. Neither the purging statute nor the prohibition against a beneficiary serving as a witness provide any additional protection for decedents.").

proven difficult.²¹³ Second, it is unclear which procedural safeguards actually reduce the risk of overreaching.²¹⁴ Finally, whether particular substantive characteristics of the testator's substantive estate plan truly suggest that an interested witness's gift was not the product of overreaching is tentative at best.²¹⁵

B. *Decision Costs*

Because effectuating the testator's intent is the prime objective of the law of wills,²¹⁶ error cost minimization should be of significant concern to policymakers as they craft the law related to interested witnesses.²¹⁷ Error cost minimization, however, comes at a cost. The information that increases accuracy must be collected, presented, and evaluated.²¹⁸ Time, money, and effort must be expended in the process of litigating the issue of testamentary intent.²¹⁹ These expenditures can be referred to as decision costs,²²⁰ and, for the pursuit of greater accuracy to be worth the effort, the marginal decrease in error costs must be greater the marginal increase in decision costs.²²¹

The conventional, unconditional purging statutes minimize the decision costs of determining whether an interested witness's benefit is purged.²²² Each type of unconditional statute makes the court's task easy. Under the Statute of Frauds, the presence of an interested witness renders the will invalid.²²³ Under the conventional purging statutes, the will is valid, but the interested witness's gift is void.²²⁴ Under the UPC, the will is valid, and the interested witness retains her gift.²²⁵ Because none of these approaches require the parties to produce evidence outside of the four

213. See *supra* notes 179–192 and accompanying text.

214. See *supra* notes 193–204 and accompanying text.

215. See *supra* notes 205–212 and accompanying text.

216. See *supra* note 66 and accompanying text.

217. See *supra* Section III.A.

218. See Beckner & Salop, *supra* note 170, at 46.

219. See Mark Glover, *The Timing of Testation*, 107 KY. L.J. 221, 224 (2018).

220. See Vermeule, *supra* note 174, at 111.

221. See Wendel, *supra* note 169.

222. See *infra* note 224 and accompanying text; *supra* notes 35–45 and accompanying text.

223. See *supra* notes 26–34 and accompanying text.

224. See *supra* notes 35–45 and accompanying text.

225. See *supra* notes 46–55 and accompanying text.

corners of the will and because the court need not evaluate such evidence, decision costs are minimized.

The conditional purging statutes that contain subjective conditions stand in stark contrast to the conventional law in this regard. In fact, the mechanics of these purging statutes create obvious risk of increased decision costs. As explained previously, these statutes create rebuttable presumptions of purging that the interested witness can rebut by presenting evidence that establish certain aspects of the testator's subjective intent.²²⁶ In California, Massachusetts, and Washington, the interested witness is specifically required to establish that the testator was not the victim of wrongdoing.²²⁷ In Wisconsin, by contrast, the interested witnesses must establish that the testator truly intended to make a gift to the interested witnesses.²²⁸ Both of these types of subjective conditions require an interested witness to produce and the court to consider evidence regarding the testator's subjective intent.²²⁹ By establishing these rebuttable presumptions of invalidity, these conditional purging statutes invite litigation that the conventional law's unconditional approach to purging prohibits.

While conditional purging statutes that contain subjective conditions, like those in effect in California, Massachusetts, Washington, and Wisconsin, present obvious risk of increased litigation, the "otherwise proved" purging statutes in effect in Kentucky, Texas, and West Virginia do not produce significant decision costs in most situations. After all, a will is proved at probate regardless of whether an interested witness is involved in the will's execution, and therefore no additional evidence must be produced or evaluated to determine whether an interested witness can retain her

226. See *supra* Section II.A.

227. CAL. PROB. CODE § 6112(c) (Deering 2022); MASS. GEN. LAWS ch. 190B, § 2-505(b) (2022); WASH. REV. CODE § 11.12.160 (2022); see *supra* notes 95–104 and accompanying text.

228. WIS. STAT. § 853.07 (2022); see also *supra* notes 105–118 and accompanying text.

229. See Daniel B. Kelly, *Toward Economic Analysis of the Uniform Probate Code*, 45 U. MICH. J.L. REFORM 855, 881, 894 (2012) (explaining that "[r]egarding decision costs, one concern with harmless error . . . is that th[is] doctrine[] might increase litigation costs" and adding "[b]ecause they often involve open-ended standards, will contests base on undue influence or fraud can be especially difficult for courts to adjudicate, which may result in higher litigation and decision costs"). In any given case, these costs might not be realized because the interested witness may not choose to rebut the presumption because the cost of litigation might outweigh her benefit under the will. See *supra* notes 183–192 and accompanying text.

gift.²³⁰ As such, typically, no additional decision costs are generated under the “otherwise proved” purging statutes rather than under the unconditional approaches to purging of the conventional law.

By contrast, Texas’s related procedural condition that permits an interested witness to retain her gift if her testimony is corroborated by a disinterested individual can increase decision costs. Without this procedural condition, the interested witness’s gift would be purged because her testimony is used to prove the will.²³¹ However, if the interested witness produces and the court considers additional evidence, specifically in the form of supplementary testimony, then the interested witness’s gift will not be purged.²³² The production and consideration of this additional evidence generates decision costs that would not be generated in the absence of Texas’s conditional purging statute.²³³

Like the “otherwise proved” conditions, the procedural conditions found in Arizona’s and Nebraska’s conditional purging statutes do not add decision costs to the probate process. Consider Arizona’s statute, which purges an interested witness’s gift unless the will is self-proved.²³⁴ The court can determine whether a will is self-proved simply by viewing the affidavits attached to the will.²³⁵ Similarly, Nebraska’s statute purges an interested witness’s gift unless there is at least one disinterested attesting witness.²³⁶ To establish whether this condition is satisfied, the court must simply look at the face of the will.²³⁷ Because the procedural conditions found in Arizona’s and Nebraska’s purging statutes do not require the court to consider evidence extrinsic to the will, these conditions do not generate decision costs.

Like the procedural conditions found in Arizona’s and Nebraska’s conditional purging statutes, the substantive condition found in Connecticut’s purging statute does not produce significant

230. See Michael J. Millonig, *Electronic Wills: Evolving Convenience or Lurking Trouble?*, 45 EST. PLAN. 27, 35 (2018) (“The derivation of the word ‘probate’ means ‘to prove’ or ‘to admit a will to proof.’ Probate is the procedure of proving a will to the satisfaction of the court. The end result of the will then is that it must be proven in probate.”).

231. TEX. EST. CODE ANN. § 254.002(c) (West 2021).

232. *Id.*

233. See *supra* notes 230–32 and accompanying text.

234. ARIZ. REV. STAT. ANN. § 14-2505(B) (2022).

235. See SITKOFF & DUKEMINIER, *supra* note 2, at 161.

236. NEB. REV. STAT. § 30-2330(B) (2022).

237. See *id.*

decision costs. All the court must do is to identify whether an interested witness is an heir of the testator.²³⁸ Who qualifies as an heir is statutorily defined based upon easily identifiable familial relationships.²³⁹ Moreover, the task of identifying heirs typically is completed at probate regardless of whether an interested witness is involved in the will's execution.²⁴⁰ Therefore, because the court need not decide an additional issue, the substantive condition found in Connecticut's conditional purging does not increase the decision costs of the probate process.

In sum, some conditional purging statutes increase the decision costs of the probate process, and others do not. Conditions that require the court to decide issues that it otherwise would not invite litigation and consequently increase decision costs. The subjective conditions found in Arizona, California, Massachusetts, and Washington most obviously fall within this category, but other types of conditions can also increase decision costs under some scenarios. By contrast, the procedural and substantive conditions found in current conditional purging statutes do not increase decision costs in most cases.

C. *Transition Costs*

Even if conditional purging statutes minimize the sum of error costs and decision costs, policymakers in states that maintain conventional, unconditional statutes should not necessarily change the law. Reform can generate costs associated with the process of transitioning from old to new approaches to the law.²⁴¹ These costs are referred to as transition costs, and they include the legislative and judicial efforts to craft and implement new law.²⁴² If transition costs are significant, then the benefits of reform in reducing error costs and decision costs will be diminished.²⁴³ Transition costs are therefore an important variable in the cost-benefit analysis of conditional purging statutes. Without an understanding of the transition costs that reform entail, state policymakers cannot make an

238. CONN. GEN. STAT. § 45a-258 (2021).

239. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.1 cmt. a (AM. L. INST. 1999).

240. See *infra* notes 261–62 and accompanying text.

241. See generally Van Alstine, *supra* note 171.

242. See *id.* at 816–52.

243. See *id.* at 858.

informed decision regarding whether to pursue a conditional approach to purging.

Most purging statutes, including both the conventional, unconditional statutes and the non-standard, conditional variants, are relatively straightforward to craft and apply, and as such, they impose few transition costs. For instance, unconditional purging statutes simply require the court to determine whether an attesting witness is named as a beneficiary in the will.²⁴⁴ Most of the time, this determination is easy because the interest that the witness receives is clear on the face of the will in the form of a direct gift.²⁴⁵ Sometimes, however, issues arise regarding whether something other than a direct gift to a witness constitutes an interest that must be purged.²⁴⁶ For example, some courts have had to decide whether a witness whom is named as the executor of the testator's estate or is appointed as a trustee of a trust that is created by the terms of the will is an interested witness.²⁴⁷ Yet, state legislatures typically find it easy to clearly craft conventional, unconditional purging statutes, and probate courts generally have little difficulty in implementing them.²⁴⁸

Similarly, conditional purging statutes that contain subjective conditions do not necessarily entail significant transition costs. For example, in California, Massachusetts, and Washington, an interested witness's gift is presumed to be the product of overreaching.²⁴⁹ An interested witness's gift is consequently purged unless she can establish that her gift was not the product of overreaching.²⁵⁰ The mechanism by which a presumption of wrongdoing is triggered is familiar to probate courts. In most states, similar

244. See *supra* Section I.A.

245. See *Drosos v. Drosos*, 103 N.W.2d 167, 173 (Iowa 1960) (explaining that “[t]he interest which disqualifies a witness must be of a definite and legal nature” and not “remote, indirect and uncertain”).

246. See, e.g., *Belledin v. Gooley*, 60 N.E. 706, 707–08 (Ind. 1901) (deciding whether a gift to a witness's spouse rendered the spouse an interested witness); *Hawkins v. Hawkins*, 6 N.W. 699, 700–01 (Iowa 1880) (also examining whether a gift to a witness's spouse rendered the spouse an interested witness).

247. See, e.g., *In re Longworth*, 222 A.2d 561, 565–66 (Me. 1966); *Fontaine v. Fontaine*, 277 S.W. 867, 868 (Ark. 1925); see also *In re Estate of Rehard*, 143 N.W. 1106, 1107 (Iowa 1913).

248. See ATKINSON, *supra* note 139, at § 65 (“To the extent that these statutes apply, they relieve all doubts as to the competency of the interested attestors.”).

249. CAL. PROB. CODE § 6112 (Deering 2022); MASS. GEN. LAWS ch. 190B, § 2-505 (2022); WASH. REV. CODE § 11.12.160 (2022).

250. See *supra* notes 95–104 and accompanying text.

presumptions of wrongdoing are triggered by various other circumstances besides the fact that a beneficiary served as a witness.²⁵¹ Courts are, therefore, generally familiar with presumptions of overreaching, and consequently purging statutes that contain this type of subjective condition should not be difficult for probate courts to implement.

Likewise, purging statutes that contain procedural conditions do not necessarily raise serious concerns regarding transition costs. For instance, in Nebraska, an interested witness's gift is purged unless the will is attested by at least one disinterested witness.²⁵² Determining which witnesses are interested and which are not is a relatively straightforward task,²⁵³ and given the long history of purging statutes, courts have much experience with making this determination.²⁵⁴ Consequently, the transition costs of state policymakers adopting Nebraska's version of conditional purging statute are low. Similarly, in Arizona, an interested witness's gift is purged unless the will is self-proved.²⁵⁵ Like the determination of whether an attesting witness is interested, identifying which wills are self-proved and which are not is a relatively straightforward task,²⁵⁶ and, although self-proving wills have not been part of the law of wills as long as the general requirement that attesting witness be disinterested, courts in most states have decades of experience in identifying self-proving wills.²⁵⁷ As such, courts should

251. In most states, a presumption of undue influence is triggered when a gift to beneficiary who is in a confidential relationship with the testator is made under suspicious circumstances. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3 cmt. f (AM. L. INST. 2003). In some states, a gift to a lawyer to who prepared the will triggers a presumption of undue influence. See SITKOFF & DUKEMINIER, *supra* note 2, at 303. In other states, some gifts to a caregiver of the testator triggers a presumption of undue influence. See *id.* at 289–90.

252. NEB. REV. STAT. § 30-2330 (2022).

253. See *supra* notes 247–51 and accompanying text.

254. See *supra* notes 35–45 and accompanying text.

255. ARIZ. REV. STAT. § 14-2505(B) (2022).

256. See Mann, *supra* note 140, at 40 (“As an evidentiary device [self-proving affidavits], are elegantly simple.”). The UPC provision authorizing self-proved wills, which has been adopted in many states, contains a self-proving affidavit form that estate planning lawyers are encouraged to use and that courts can easily identify. See UNIF. PROBATE CODE § 2-504 (NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 1969) (amended 2019).

257. A precursor to modern self-proving will statutes was enacted in West Virginia in 1932. See David F. Cavers, *Ante Mortem Probate: An Essay in Preventive Law*, 1 U. CHI. L. REV. 440, 449 n.29 (1934). Modern iterations of self-proving will statutes began emerging in the 1950s; the UPC, which contained a self-proving affidavit provision, was promulgated in 1969; and by the early 1980’s, thirty states had some type of self-proving will statutes. See Frederick R. Schneider, *Self-Proved Wills – A Trap for the Unwary*, 8 N. KY. L. REV. 539, 539 (1981). By the dawn of the twenty-first century, only three states had failed to authorize

have little problem implementing Arizona's type of conditional purging statute.

Likewise, conditional purging statutes that contain a substantive condition likely generate few transition costs.²⁵⁸ For instance, the only substantive condition currently in place is found in Connecticut's purging statute, which purges an interested witness's gift unless the gift is an heir of the testator.²⁵⁹ Identifying heirs is a straightforward process because who constitutes an heir is statutorily defined.²⁶⁰ Moreover, courts have much experience with this undertaking, as heirs must be identified anytime a donor dies intestate.²⁶¹ Heirs are also frequently identified when a donor dies with a will, so that they can be provided notice of the probate proceedings and be given an opportunity to challenge the will.²⁶² Because courts have extensive experience in interpreting and construing the substantive provisions of wills, implementation and application of a conditional purging statute that contains a substantive condition should be relatively easy.²⁶³

While most purging statutes pose little risk of transition costs, two of the currently enacted conditional purging statutes could. First, Wisconsin's purging statute, which contains a procedural condition that requires the interested witness to establish that the testator truly intended to make a gift to the witness,²⁶⁴ could prove difficult to implement. As explained previously, Wisconsin's statute essentially extends the UPC's harmless error rule to the requirement that attesting witnesses be disinterested.²⁶⁵ On its face, this extension of the harmless error rule to a purging statute raises questions regarding precisely what an interested witness must establish to prevent the purging of her gift. Specifically, it is unclear whether Wisconsin's statute is limited to the issue of wrongdoing, such as undue influence, duress, and fraud, or is instead broader.

self-proving wills. See Betsy Dupree-Kyle, Comment, *Michigan Self-Proved Wills: What Are They and How Do They Work?*, 2000 L. REV. MICH. ST. U. DET. C.L. 829, 830 n.2 (2000).

258. See *infra* notes 260–66 and accompanying text.

259. See *supra* Section II.C.

260. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.1 cmt. a (AM. L. INST. 1999).

261. See *id.* § 2.1(b).

262. See UNIF. PROB. CODE § 3-403(a) (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1969) (amended 2019).

263. See *supra* notes 260–62 and accompanying text.

264. WIS. STAT. § 853.07(2) (2022).

265. See *supra* notes 105–118 and accompanying text.

On the one hand, the policy justification of purging statutes is generally based upon the risk of overreaching that interested witnesses present.²⁶⁶ If Wisconsin's purging statute is founded upon similar policy considerations, then it would seem that an interested witness can satisfy her burden of establishing the testator's intent by presenting evidence that establishes she did not engage in wrongdoing. Under this interpretation, Wisconsin's conditional purging statute is substantively equivalent to those in effect in California, Massachusetts, and Washington. More particularly, although Wisconsin's legislature framed the statutory language broadly in terms of the testator's intent, the statute is focused specifically on the situation in which this testator's intent is undermined by an interested witness's overreaching.

On the other hand, the UPC's harmless error rule, which the Wisconsin legislature integrated into the state's purging statute,²⁶⁷ is not specifically focused on the issue of wrongdoing. Instead, the harmless error rule is designed to better fulfill the testator's general intent by allowing a proponent of a will to present evidence that the testator intended a will to be effective despite that the will does not strictly comply with prescribed will-execution formalities.²⁶⁸ In particular, the harmless error rule permits the court to validate a will because the testator's failure to comply with will-execution formalities was due to mistake or ignorance of the law.²⁶⁹ If Wisconsin's purging statute truly integrates this approach to harmless error, then the interested witness would be required to present evidence beyond that which is both specifically related to the absence of overreaching and is more generally related to the testator's intent.

There are no reported cases in which Wisconsin's courts have applied the state's conditional purging statutes, so the state of law on this issue is uncertain. This issue, however, likely will result in litigation to determine exactly what an interested witness must do to prevent the purging of her gift. Moreover, if Wisconsin's courts ultimately find that the state's conditional purging statute is substantively different than those statutes that include a presumption of overreaching and instead determine that the statute is more

266. See *supra* Section II.B.

267. See *supra* notes 105–118 and accompanying text.

268. See UNIF. PROB. CODE § 2-503 (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1969) (amended 2019).

269. See *id.* § 2-503 cmt.

similar to the UPC's harmless error rule, as the statute's plain language suggests, then additional transition costs could occur.

In contrast to the probate courts' familiarity with the presumption of wrongdoing that is found in some conditional purging statutes, courts have no experience in applying Wisconsin's type of purging statute.²⁷⁰ Because no other state has enacted a conditional purging statute similar to Wisconsin's, no case law exists that can provide guidance regarding how this type of statute is implemented. The case law of states that have enacted a version of the UPC's harmless error rule, however, illustrates the difficulty that courts have encountered with a harmless error rule that is focused on will-execution generally.²⁷¹ It seems likely that probate courts would encounter similar difficulties when implementing a harmless rule that is concerned specifically with the inclusion of interested witnesses in the execution ceremony.

In addition to Wisconsin's purging statute, which contains a subjective condition, the purging statutes that contain the "otherwise proved" procedural condition raise concerns regarding transition costs. The long history of these conditional purging statutes reveals the implementation difficulty that they pose. As explained previously, several states have at times had purging statutes that contained the "otherwise proved" language; however, due to the condition's ambiguity, numerous cases across jurisdictions were required to litigate the precise meaning of the statute, and still no uniform interpretation emerged.²⁷² The line of cases litigating this meaning of the condition and the lingering uncertainty surrounding it represents the transition costs associated with this type of purging statute.

Even within a single jurisdiction, the doctrinal development of the "otherwise purged" condition reveals its implementation difficulties. Consider Texas's experience in implementing its conditional purging statute. Texas's purging statute originated with the initial Texas Wills Act of 1840,²⁷³ and each iteration of the statute

270. See *supra* notes 105–111 and accompanying text (explaining that Wisconsin is the only state with this type of statute and it has only been in effect since 1999).

271. See Mark Glover, *A Taxonomy of Testamentary Intent*, 23 GEO. MASON L. REV. 569, 603–11 (2016); Mark Glover, *Incremental Change in Wills Adjudication*, 49 FLA. ST. U. L. REV. (forthcoming 2023) (manuscript at 21–30) (on file with author).

272. See *supra* notes 120–139 and accompanying text.

273. See BEYER, *supra* note 137, §§ 18:32, 18:34 n.1. ("In the 1840 act the phrase was: 'if the will cannot be otherwise proved.'").

has contained language substantially similar to the current statute, which provides that an interested witness's gift is purged if "the will cannot be otherwise established."²⁷⁴ The first reported decision construing this statutory language appeared in 1873 with the case of *Nixon v. Armstrong*.²⁷⁵ In this case, the will was attested by three interested witnesses, and one of witness was willing to disclaim his gift and testify at probate so that the other witnesses were not needed to prove the will.²⁷⁶ Despite that these two interested witnesses did not participate in proving the will, the Supreme Court of Texas nonetheless required that their gifts be purged.²⁷⁷

Ostensibly in response to the *Nixon* decision, the Texas legislature amended the state's purging statute in 1875.²⁷⁸ This amendment added a clarifying sentence to the existing statute, which provided that a "will may be proved by the evidence of the subscribing witnesses, corroborated by the testimony of one or more other disinterested and credible persons . . . in which event the bequest to such subscribing witnesses shall not be void."²⁷⁹ This language suggested that if there were at least one disinterested witness available to prove the will, then other interested witnesses could retain their gifts.²⁸⁰ Despite this plausible interpretation of the additional statutory language, the Supreme Court of Texas held in 1881 in *Fowler v. Stanger* that an interested witness's gift is purged regardless of whether her testimony is required to prove the will.²⁸¹

Questions regarding the appropriate interpretation of Texas's purging statute persisted after the *Fowler* decision because whether the court interpreted the statute as it existed before or

274. TEX. EST. CODE ANN. § 254.002 (West 2021).

275. 38 Tex. 296 (1873).

276. *See id.* at 298.

277. *Id.* at 301; *see* BEYER, *supra* note 137, § 18:35.

278. *See* BEYER, *supra* note 137, § 18:36.

279. In 1879, this amendment became a separate code article but maintained the same statutory language. TEX. REV. CIV. STAT., art. 4873 (1879); BEYER, *supra* note 137, § 18:36.

280. This amendment seems to authorize both attesting witnesses to retain their gifts if another person, who need not be an attesting witness, testifies consistently with the attesting witnesses. *See* BEYER, *supra* note 137, § 18:36. Likewise, it would seem that if both attesting witnesses, one of who is interested and the other of who is not, testify at probate, then the interested witness could retain her gift because her testimony was corroborated by the testimony of the disinterested witness.

281. 55 Tex. 393, 399 (1881) (finding that "[t]he language of the section quoted, if the will cannot otherwise be proved, must be understood as meaning if the will cannot otherwise be established as a valid will; not that proof of its execution by one witness would dispense with proof of its attestation by two competent witnesses") (internal citations omitted).

after the 1875 amendment was uncertain.²⁸² Texas Civil Appeals Courts consequently continued to grapple with the interpretive challenges of the state's purging statute well into the twentieth century.²⁸³ For instance, in the case of *Ridgeway v. Keene*, which was decided in 1949, one Texas Civil Appellate Court reached a conclusion contrary to the *Fowler* decision by ruling that an interested witness could retain a gift when the will was established by the testimony of a disinterested witness.²⁸⁴ By contrast, one year later in 1950, another Texas Civil Appellate Court in the case of *Scandurro v. Beto* ruled consistently with *Fowler* by holding that an interested witness's gift is purged regardless of whether they testify at probate.²⁸⁵

Perhaps in response to the split amongst appellate courts regarding the appropriate interpretation of the 1875 version of the statute, the Texas legislature altered the provision relating to the purging of interested witnesses' gifts in the 1955 Texas Probate Code.²⁸⁶ This new iteration maintained the language that provided an interested witness's gift is purged "if the will cannot be otherwise established,"²⁸⁷ but it changed the language that first appeared in 1875, which clarified the situations in which an interested witness could retain a gift.²⁸⁸ This iteration, which is effective today in substantially similar language,²⁸⁹ provides that a "bequest to [a] subscribing witness shall not be void if his testimony proving the will is corroborated by one or more disinterested and credible persons . . . , and such subscribing witness shall not be regarded as an incompetent or non-credible witness"²⁹⁰ for purposes of the requirement that a will must "be attested by two [(2)] or more credible witnesses."²⁹¹

By specifically referencing the state's statutory provision regarding the requirement that wills be witnessed, this new clarifying provision seems to make plain that a beneficiary's gift is not

282. See BEYER, *supra* note 137, § 18:36.

283. See *id.*

284. 225 S.W.2d 647, 648–49 (Tex. Civ. App. 1949).

285. 234 S.W.2d 695, 695, 698 (Tex. Civ. App. 1950).

286. See BEYER, *supra* note 137, § 18:38.

287. TEX. PROB. CODE ANN. § 61 (West 2011) (current version at TEX. EST. CODE ANN. § 254.002 (West 2021)).

288. See BEYER, *supra* note 137, § 18:38.

289. See EST. § 254.002(c).

290. PROB. § 62 (current version at EST. § 254.002 (c)).

291. *Id.* § 59 (current version at EST. § 251.051).

purged simply by serving as an attesting witness,²⁹² and the statutory commentary that accompanied the new language made clear that the legislative intent of the new provision was to codify the holding in *Ridgeway* and to reject the holding in *Scandurro*.²⁹³ In 1965, the Texas Court of Civil Appeals quoted this commentary and held that a will which gave everything to two interested witnesses was valid and the witnesses could retain their gifts because the will was proved by a third, disinterested witness.²⁹⁴ Although the Supreme Court of Texas has not confirmed this interpretation of the new statute, the reported cases since 1965 have been decided consistently with this proclamation and have purged an interested witness's gift only if her testimony is required to prove the will.²⁹⁵ Thus, while the law now largely seems settled, Texas's decades of difficulty in implementing its conditional purging statute, including the litigation that the various iterations of the purging statute produced and the legislative refinement that followed, exemplifies the implementation costs that should be considered when evaluating the utility of conditional purging statutes.

Although the function of "otherwise proved" purging statutes is generally understood, some questions persist regarding how they operate in certain situations. This uncertainty can trigger additional transition costs as these questions are answered through either judicial or legislative resolution.²⁹⁶ Consider first, the scenario in which a self-proved will is attested by an interested witness.²⁹⁷ In West Virginia, the self-proving will statute provides that the affidavits of the attesting witnesses are treated as if they were sworn testimony before the court.²⁹⁸ As such, regardless of whether a will is proved through the testimony of attesting witnesses or is self-proved, it would seem that the consequences of one of the witnesses being named as a beneficiary are the same.

292. See BEYER, *supra* note 137, § 18:38.

293. See *Wilkerson v. Slaughter*, 390 S.W.2d 372, 373 (Tex. Civ. App. 1965).

294. See *id.* at 373–74.

295. See *Brown v. Traylor*, 210 S.W.3d 648, 672–73 (Tex. App., 2006); *Rollins v. Simons*, No. 01-00-00669-CV, 2002 Tex. App. LEXIS 8496, at *7–8 (Nov. 27, 2002); *Estate of Livingston v. Nacim*, 999 S.W.2d 874, 877 (Tex. App., 1999).

296. See *infra* notes 297–334 and accompanying text.

297. See *supra* notes 143–146 and accompanying text.

298. W. VA. CODE § 41-5-15 (2022) (“[T]hey shall be admissible in evidence and have the same probative value as if the affiants had appeared in court or before the clerk thereof and testified to the facts stated in the affidavit.”).

The language of Kentucky's and Texas's self-proving will statutes differs from the statutes in West Virginia. In particular, Kentucky's statute provides: "A self-proved will may be admitted to probate without the testimony of any subscribing witness, but otherwise treated no differently from a will not self-proved."²⁹⁹ Likewise, Texas's statute contains nearly identical language.³⁰⁰ This type of statutory provision could express the same substantive idea as West Virginia's self-proving will statutes, namely that the witness's affidavits are simply a substitute for their testimony in court. Under this interpretation, if a self-proved will is attested by at least one disinterested witness, then an interested witness's gift is not purged because the will is proved by the affidavit of the disinterested witness.³⁰¹

This same statutory language, however, could arguably be interpreted to mean that the self-proving mechanism is a separate and distinct method of proving a will, rather than the affidavit simply being a substitute for the witnesses' testimony. Because a will can be proved by the testimony of one attesting witness in Kentucky and Texas,³⁰² this interpretation would produce the same result in the scenario in which a will is attested by one disinterested witness and one interested witness. Specifically, the interested witness's gift will not be purged.³⁰³ By contrast, consider the scenario in which two interested witnesses attest a will. If such will is not self-proved, then the will cannot be proved through the testimony of either witness. However, if the self-proving mechanism is a separate method of proving a will, then it is possible that a self-proved will that is attested by two interested witness can be "admitted to probate" pursuant to Kentucky's and Texas's self-proving will statutes and is therefore "otherwise . . . proved" or "otherwise established" pursuant to their purging statutes because the witness's testimony in court is not required.³⁰⁴ If this is the case, then purging will not occur in Kentucky and Texas when a self-proved will

299. KY. REV. STAT. ANN. § 394.225(4) (LexisNexis 2022).

300. See TEX. EST. CODE ANN. § 251.102 (West 2021) ("A self-proved will may be admitted to probate without the testimony of any subscribing witness[]," but "[a] self-proved will may not otherwise be treated differently than a will that is not self-proved.").

301. See *supra* note 298 and accompanying text.

302. KY. REV. STAT. ANN. § 394.210(3) (West 2022); TEX. EST. CODE ANN. § 256.153(b) (West 2021).

303. See *supra* notes 141–142 and accompanying text.

304. KY. REV. STAT. ANN. § 394.210(2); TEX. EST. CODE ANN. § 254.002; *Stewart v. Noble*, No. 2006-CA-000588-MR, 2007 Ky. App. LEXIS 776, *20 (Apr. 6, 2007).

is attested by two interested witnesses. In essence, under this construction, Kentucky's and Texas's broad conditional purging statutes include the specific procedural condition found in Arizona's narrower conditional purging statute.³⁰⁵

The only available Kentucky case relevant to this issue is an unpublished opinion, which involved a self-proved will that was attested by one interested witness and one disinterested witness.³⁰⁶ Because the will was attested by one disinterested witness, the court unsurprisingly held that the interested witness's gift should not be purged.³⁰⁷ Although this case did not involve the situation in which a will is attested by two interested witnesses, the court's reasoning hints at what the outcome would be under this scenario.³⁰⁸ The court particularly focused not upon the fact that the will was self-proved, but instead upon the fact that the will was attested by one disinterested witness.³⁰⁹ Moreover, the court stated that "the fact [that] this will was a self-proved will is [in]significant to our review of this issue."³¹⁰

This statement suggests that self-proving wills are treated the same under Kentucky's purging statute as wills that are not self-proved, and more directly to the issue at hand, it suggests that the self-proving mechanism simply substitutes the witness's affidavits for their testimony. Under this construction, one of the interested witness's gifts would need to be purged in order for a self-proved will that is attested by two interested witnesses to be admitted to probate.³¹¹ Nonetheless, because there is no case law directly on point, precisely how Kentucky's purging statute applies to self-proving is unclear.

While the state of the law in Kentucky regarding whether a self-proved will that is attested by two interested witness can be admitted to probate without the purging of an interested witness's gift remains uncertain, Texas case law fails to provide a clearer picture.³¹² Indeed, the Supreme Court of Texas has described the

305. See *supra* notes 154–157 and accompanying text.

306. *Stewart*, 2007 Ky. App. Unpub. LEXIS 776, at *1.

307. *Id.* at *18–21.

308. *Id.* at *18–19.

309. *Id.* at *20–21.

310. *Id.* at *21 (adding that "the foregoing discussion is equally applicable to a self-proved will" as it is to a will that is not self-proved).

311. See KY. REV. STAT. ANN. § 394.210 (LexisNexis 2022).

312. See *infra* notes 314–20 and accompanying text.

self-proving will statute in subtly conflicting ways.³¹³ For instance, in 1964, the court explained that “the self proving provisions have only the effect of authorizing the *substitution of affidavits in lieu of testimony* offered before the court.”³¹⁴ This explanation suggests that, in order for an interested witness to retain a gift under a self-proved will, at least one disinterested witness must have attested the will. The general statute relating to the proving of wills states that “[a] will . . . may be proved by the sworn testimony . . . of one . . . of the subscribing witnesses to the will taken in open court.”³¹⁵ If the self-proving statute simply substitutes the affidavits for the witnesses’ testimony, then it would seem that, to admit a self-proved will to probate, one of the affidavits must have either been made by a disinterested witness or by an interested witness whose gift is purged.

However, just two years later in 1966, the court described the self-proving will statute as “an *alternative mode* of proving a will.”³¹⁶ This description suggests that the general statute relating to proving a will should be considered separate and distinct from the self-proving will statute.³¹⁷ It would seem therefore that a self-proved will that is attested by two interested witnesses can be admitted to probate without either witness forfeiting a gift. After all, the self-proving will statute provides that “[a] self-proved will may be admitted to probate without the testimony of any subscribing witness[]”³¹⁸ If the self-proving will statute truly is “an alternative mode of proving a will,”³¹⁹ then a self-proved will can be admitted to probate based solely on the affidavits; the will is consequently “otherwise established” pursuant to Texas’s purging statute,³²⁰ and the witnesses’ gifts need not be purged.

These two cases did not involve interested witnesses, so the Supreme Court of Texas likely was not focused on the nuanced

313. See *infra* notes 314–20 and accompanying text.

314. *In re Estate of Price*, 375 S.W.2d 900, 903 (Tex. 1964) (emphasis added).

315. TEX. EST. CODE ANN. § 256.153(b) (West 2021).

316. *Boren v. Boren*, 402 S.W.2d 728, 729 (Tex. 1966) (emphasis added).

317. The separateness of the two statutes is bolstered by the text of the statutes. Compare EST. § 251.102 (“A *self-proved will* may be admitted to probate without the testimony of any subscribing witness[].”) (emphasis added), with EST. § 256.153(a)–(b) (“An *attested will* . . . that is not *self-proved* . . . may be proved by the sworn testimony . . . of one or more of the subscribing witnesses.”) (emphasis added).

318. EST. § 251.102.

319. *Boren*, 402 S.W.2d at 729.

320. EST. § 254.002.

distinction between its subtly different interpretations of the self-proving wills statute or the ramifications of each interpretation for interested witnesses. Moreover, no reported cases exist in Texas that involve interested witnesses to self-proving wills. Consequently, uncertainty in the law remains, and the risk of additional transition costs lingers.

The second aspect of the “otherwise proved” conditional purging statutes that have created uncertainty in the law, and that could consequently generate transition costs is whether an interested witness must testify to prove a will when she is available to do so. As described earlier, states provide alternate modes of proving a will when the witnesses are unavailable to testify because, for example, they are dead or reside out of state.³²¹ Whether these additional methods of proving a will are permitted in situations where an interested witness is available to testify but is unwilling to do so because she wants to retain a gift pursuant to a conditional purging statute seems clear in some states but uncertain in others.

For instance, Texas law provides some clarity to the issue. Texas’s statute uses permissive language when it provides that a will “*may* be proved by the sworn testimony . . . of one or more of the subscribing witnesses.”³²² Its purging statute, however, seems to impose an affirmative obligation for interested witnesses to testify when available and needed to prove a will when it states that “the subscribing witness *shall be . . . compelled* to appear and give the witness’s testimony in the same manner as if the bequest to the witness had not been made.”³²³ This language suggests that an interested witness must testify if she is available to do so.

Like Texas, Kentucky’s statute regarding the proving of a will provides that a will “*may* be proved by the testimony” of one attesting witness.³²⁴ However, unlike Texas, Kentucky’s purging statute is silent regarding whether an interested witness must be compelled to testify.³²⁵ This silence has caused uncertainty in the law. For example, in one case, a will was attested by one interested witness and one disinterested witness, and at the time of probate, the disinterested witness was dead and therefore unavailable to prove

321. See *supra* notes 147–49 and accompanying text.

322. EST. § 256.153(b) (emphasis added).

323. *Id.* § 254.002(a)(2) (emphasis added).

324. KY. REV. STAT. ANN. § 394.210(3) (LexisNexis 2022) (emphasis added).

325. See *id.* § 394.210.

the will.³²⁶ The interested witness was alive and residing within the state, but she claimed that an illness prevented her from testifying.³²⁷ As such, the trial court permitted the will's proponent to prove the will by presenting witnesses who testified that the signatures of the testator and the attesting witnesses were genuine.³²⁸ Because this method of proving the will did not require the testimony of the interested witness, Kentucky's conditional purging statute would have allowed the witness to retain her gift under the will.³²⁹

On appeal, however, the Kentucky Court of Appeals held that the lower court should not have permitted this alternative method of proof.³³⁰ Specifically, the court stated:

[T]his court has never held . . . that a will may be probated without the evidence of one or more of the attesting witnesses if they be living and within the jurisdiction of the court. In this case . . . an alleged attesting witness[] is shown to have been living at the time of the trial and within the jurisdiction of the court. Her testimony should have been obtained and other evidence ought not to have been received to prove the execution of the will so long as she continued to reside within the jurisdiction of the court, and was competent to testify.³³¹

This statement plainly suggests that an interested witness does not have the option to simply decline to testify in an attempt to retain a gift pursuant to Kentucky's conditional purging statute.

Yet, despite this suggestion, that alternative methods of proving a will are unavailable when an interested witness is alive and residing within the state; subsequent case law accordingly questions this proposition.³³² In particular, in a case that entailed a will that was attested by one interested witness and one disinterested witness, the Kentucky Court of Appeals held that the will was properly proved by the affidavit of the disinterested witness.³³³ The court suggested, however, that the will could have been proved through other means, when it stated: "In this case, the will may 'otherwise be proved' by [the disinterested] witness In

326. See *Tackett v. Tackett*, 265 S.W. 336, 336–37 (Ky. 1924).

327. See *id.* at 337.

328. See *id.*

329. See KY. REV. STAT. ANN. § 394.210(1).

330. See *Tackett*, 265 S.W. at 338.

331. *Id.*

332. See *infra* notes 333–34 and accompanying text.

333. See *Stewart v. Noble*, No. 2006-CA-000588-MR, 2007 Ky. App. Unpub. LEXIS 776, at *8 (Ky. Ct. App. Apr. 6, 2007); see also *supra* notes 306–310 and accompanying text.

addition, [the drafting attorney] and his secretary . . . were also present at the execution and could, if necessary, offer sufficient evidence to establish due execution.”³³⁴ This suggests that if the will could not have been proved through the affidavit of the disinterested witness, the interested witness’s testimony would not necessarily be required. Instead, the will could be established through other means, even though the witness was available to testify.

Uncertainty, therefore, persists regarding how Kentucky’s purging statute functions under some scenarios. This uncertainty may produce future litigation that may or may not provide definitive answers, or it might lead to legislative refinement that again may or may not successfully provide certainty to the law. This lack of clarity and the costs associated with it should be part of the cost-benefit analysis of potential changes to the law. As explained previously, these costs are referred to as transition costs,³³⁵ and, as the foregoing discussion demonstrates, some types of conditional purging statutes have historically, and continue presently, to pose a significant risk of transition costs.

IV. THE POSSIBILITIES OF CONDITIONAL PURGING

As Part III explains, whether conditional purging statutes represent a prudent alternative to the unconditional approach to purging that is favored in most states depends upon whether such reform reduces the sum of error costs, decision costs, and transition costs.³³⁶ The ability of conditional purging statutes to minimize these costs, however, is questionable. As currently constructed, whether these statutes reduce error costs is uncertain,³³⁷ and there is good reason to think that the statutes that contain subjective conditions increase decision costs, while some statutes that contain procedural conditions generate transition costs.³³⁸ Given the dubious efficacy of the current statutes, the question becomes whether policymakers can craft a different type of conditional purging statute that more clearly reduces error costs that at the same time minimizes both decision costs and implementation costs.

334. *Stewart*, 2007 Ky. App. Unpub. LEXIS 776, at *20–21.

335. *See supra* notes 175–176 and accompanying text.

336. *See supra* Part III.

337. *See supra* Section III.A.

338. *See supra* Sections III.B, III.C.

The answer to this question is that the variant of the conditional purging statute that is most likely to be successful in reducing the sum of error costs, decision costs, and transition costs is one that contains a substantive condition. Unlike subjective conditions and procedural conditions,³³⁹ substantive conditions appear to generate neither decision costs nor transition costs.³⁴⁰ The task then is to identify substantive conditions that reduce error costs. The sole substantive condition that is currently in effect is found in Connecticut's purging statute, which purges an interested witness's gift unless the witness is an heir of the testator.³⁴¹ As explained previously, the problem with this condition is that an heir does not necessarily pose a reduced risk of overreaching as compared with non-heirs.³⁴² Thus, while Connecticut's statute does not generate decision costs and transition costs, because it doesn't require the parties to litigate issues that they otherwise would not and is easy to craft and apply, it does not necessarily reduce error costs.

Connecticut's statute exemplifies the difficulty that state policymakers face in determining who is more or less likely than others to engage in overreaching. Therefore, instead of focusing on the identity of the beneficiary, perhaps a conditional purging statute that contains a substantive condition should focus on the type of gift that the beneficiary receives. While policymakers might not be capable of identifying particular subpopulations of individuals who are less likely to engage in wrongdoing, perhaps they can successfully identify certain types of gifts that are less likely the product of overreaching. In this regard, wrongdoers are unlikely to include one particular type of gift in their schemes of undue influence, duress, or fraud.

Specifically, one who is engaged in wrongdoing is unlikely to use her influence or deception to produce a nominal gift. A wrongdoer does not necessarily have sufficient control over the testator to dictate the specific terms of her gift, but she is likely motivated to use her dominion to maximize her personal benefit.³⁴³ Indeed, a wrong-

339. See *supra* notes 226–236, 249–257, 264–269 and accompanying text.

340. See *supra* notes 238–40, 259–62 and accompanying text.

341. CONN. GEN. STAT. ANN. § 45a-258 (2022).

342. See *supra* notes 205–212 and accompanying text.

343. See Manuel A. Utset, *Digital Surveillance and Preventive Policing*, 49 CONN. L. REV. 1453, 1458 (2017) (“Under the economics approach to criminal law, rational offenders are driven by a particular, rather generic, goal: to maximize their utility or overall happiness. Rational offenders commit crimes that give them a net gain in utility, or alternatively crimes

doer's work in planning and implementing a scheme of overreaching might not be worth the effort to induce a minimal gift. The size of an interested witness's gift might therefore be correlated with the likelihood that it is the product of overreaching; that is the larger the gift, the greater the likelihood. If structured correctly, a purging statute that contains a substantive condition that focuses on the size of the witness's gift could therefore reduce error costs by separating those gifts to interested witnesses that are more likely the product of overreaching from those that are less likely.

The difficulty of crafting this type of substantive condition is selecting the appropriate valuation threshold above which gifts to interested witnesses are purged and below which such gifts are not. The threshold that minimizes error costs is the one at which gifts above the threshold are likely the product of overreaching and gifts below the threshold are likely not.³⁴⁴ If the valuation threshold is set at this level, then the correct determination regarding whether an interested witness induced her gift through overreaching would be reached more often than not. Which valuation threshold minimizes error costs is therefore an empirical question, which would be difficult, if not impossible, to answer with any degree of specificity. Despite this difficulty in identifying the appropriate valuation threshold, state policymakers who have either maintained some form of conventional purging statute or followed the UPC's lead and eliminated the disinterested witness requirement have in essence attempted to do so.

On the one hand, statutes that unconditionally purge an interested witness's gift set the valuation threshold at zero.³⁴⁵ Under this approach, all gifts to interested witnesses are considered more likely than not the product of overreaching, and therefore purging these gifts fulfill the testator's intent more often than not. On the other hand, statutes like the UPC, which do not purge an interested witness's gift, have an infinite valuation threshold.³⁴⁶ Under this approach, no gifts to interested witnesses are considered more likely the product of overreaching than not; as such, keeping these

whose expected benefits exceed their expected costs. An offender's benefits from misconduct may include increasing his wealth.").

344. See Hirsch, *supra* note 169, at 297 ("We ordinarily set presumptions to accord with the balance of probabilities—that way, in the absence of evidence, the presumption minimizes errors costs.").

345. See *supra* notes 35–42 and accompanying text.

346. See *supra* notes 44–55 and accompanying text.

gifts intact best carries out the testator's intent. Because it is difficult to identify the precise valuation threshold that minimizes error costs, policymakers in states that adhere to these two approaches might legitimately hesitate to adjust their valuation thresholds away from the extreme ends of the spectrum.

Policymakers in states that have conventional purging statutes, which set the valuation threshold at zero, however, should be comfortable with at least a slight increase in the valuation threshold. As explained above, small gifts of ten dollars, a hundred dollars, or even a thousand dollars seem unlikely to be the product of overreaching because wrongdoers would want to exert their dominion over the testator to induce a larger gift.³⁴⁷ A purging statute with a *de minimis* gift exception would validate small gifts that are likely not the product of overreaching but would continue to purge gifts that are more likely the product of overreaching. Thus, by slightly increasing a conventional purging statute's valuation threshold, state policymakers can decrease error costs. Such an increase would transform an unconditional purging statute into a conditional purging statute and, in particular, a conditional purging statute that contains a substantive condition relating to the size of an interested witness's gift.

CONCLUSION

The law relating to interested witnesses to wills is richer and more diverse than is generally understood. Typically, the discussion of this law focuses on the unconditional statutes that are favored in most states.³⁴⁸ Under these statutes, the law provides a definitive answer to whether an interested witness can retain her gift.³⁴⁹ In some states, the law purges all or a portion of the witness's gift,³⁵⁰ and in others, the law permits the witness to retain her gift.³⁵¹ Neither approach requires the court to consider anything other than the fact that the witness is a beneficiary. No other considerations or conditions are relevant.

347. See *supra* notes 343–345 and accompanying text.

348. See RESTATEMENT (THIRD) OF PROP.: WILLS & DONATIVE TRANSFERS § 3.1 cmt. o (AM. L. INST. 1999); SITKOFF & DUKEMINIER, *supra* note 2, at 157–58.

349. See *supra* Section I.A.

350. See *supra* notes 35–45 and accompanying text.

351. See *supra* notes 46–55 and accompanying text.

Although most states follow this unconditional approach to the law related to interested witnesses, a significant and largely overlooked minority pursues a different approach.³⁵² In these states, whether an interested witness can retain her gift is conditioned upon circumstances other than the simple fact that she is both a beneficiary under the will and an attesting witness.³⁵³ Conditional purging statutes fall within one of three categories. First, statutes that contain subjective conditions purge an interested witness's gift unless the witness can establish either that the testator was free from overreaching or that the testator truly intended to benefit the interested witness.³⁵⁴ Second, statutes that contain procedural conditions purge an interested witness's gift unless the will was either executed or proved according certain processes.³⁵⁵ Third, statutes that contain substantive conditions purge an interested witness's gift unless the substance of the gift meets specified criteria.³⁵⁶

By purging gifts to interested witnesses under some circumstances and keeping such gifts intact in other circumstances, conditional purging statutes take a more nuanced approach to purging than the unconditional approaches that are favored in most states. As such, these statutes ostensibly express some policymakers' belief that a more refined approach to purging is preferable from a policy perspective. This belief, however, is largely mistaken. Most conditional purging statutes either fail to better fulfill the testator's intent than unconditional approaches to purging or generate costly litigation that undermines any benefits that a greater nuance in the law might produce.³⁵⁷

Although the policy foundations of current conditional purging statutes are shaky at best, a conditional approach to purging should not be dismissed outright. State policymakers should instead use this Article's analytical framework to evaluate alternative types of conditional purging statutes. Through greater scrutiny of conditional purging statutes and deeper exploration of their possibilities, state policymakers can increase the law's accuracy in fulfilling the testator's intent, while minimizing the costly

352. *See supra* Part II.

353. *See supra* Part II.

354. *See supra* Section II.A.

355. *See supra* Section II.B.

356. *See supra* Section II.C.

357. *See supra* Part III.

litigation that these statutes generate in their implementation and application.