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# Forty Years of Codification of Estates and Trusts Law: Lessons for the Next Generation

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# **FORTY YEARS OF CODIFICATION OF ESTATES AND TRUSTS LAW: LESSONS FOR THE NEXT GENERATION**

*Mary Louise Fellows and Gregory S. Alexander\**

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We are honored to participate in this memorial Festschrift for Richard V. Wellman. Dick was our teacher, mentor, and friend. His death marks a loss for the estates and trusts profession and for us personally. We shall miss him. In writing this Essay, we have striven to follow Dick's example. Dick's scholarship was always constructive. His constant aim was to improve the law, rather than to score points. That is our purpose as well.

## I. INTRODUCTION

As others in this symposium have stated, Richard V. Wellman devoted his professional life to promoting legislation to make the law of estates and trusts responsive to the needs of a state's citizenry. As he saw it, his goal to make the law of donative transfers simpler, fairer, and less expensive depended upon new legislative proposals accompanied by a range of strategies to educate the bar and policymakers about them. Over the years, Dick's faith in statutory lawmaking only grew, because estate planning experts and legislators lauded the benefits achieved through enactment of the uniform laws he either drafted or supported. Dick's genius was twofold: He never glorified the past and always took the long view of law reform. He welcomed new ways of thinking about an old doctrine and appreciated that they would meet initial resistance from many estates and trusts experts. He had confidence, however, that over time, if those new approaches made the law simpler, fairer, and more efficient, they would find acceptance. In honor of the work of a man who, more than any other law professor, practicing attorney, or legislator, influenced the modern law of estates and trusts, we want to take this opportunity to explore the reception of uniform law reform in the area of wealth succession over the last forty years.

Our two-prong thesis theorizes Dick's approach to law reform. First, we argue that uniform law proposals that ask courts and practitioners to abandon revered legal traditions and ways of thinking about estates and trusts, even when they are intent-furthering proposals, face resistance until, in time, the glories of the past and the risks of a new legal regime fade in importance in legal thought. Second, we argue that, especially within an environment in which states seek to gain competitive advantage over each other, the glories of the past and the risks of a new legal regime fade fastest when a uniform law proposal limits the effect of intent-defeating rules.<sup>1</sup> Uniform laws tend to fall into three categories: (1)

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<sup>1</sup> See, e.g., Robert T. Danforth, *Rethinking the Law of Creditors' Rights in Trusts*, 53 HASTINGS L.J. 287, 287-88 (2002) (describing states' willingness to create asset-protection trusts to attract out-of-state business); Robert T. Danforth, *The Role of Federalism in*

statutes that usurp older statutory-based laws; (2) statutes, typically remedial in nature, that reverse the common law; and (3) statutes that predominantly codify the common law. We look at examples of each to show how the interplay between revered legal traditions and donative freedom affects the reception of uniform law proposals. We also pay particular attention to intent-defeating common law doctrines and the risks that uniform law drafters face when they attempt to codify them in an environment where there is stiff jurisdictional competition for estate planning business. This analysis of the reception of uniform laws includes strategies to assist the next generation of law reformers as they build on Richard Wellman's legacy.

## II. STATUTES REPLACING OLD STATUTORY LAWS: THE CASE OF WILL EXECUTION REQUIREMENTS

Legislation authorizes the right to make a will and also prescribes the formalities for will execution.<sup>2</sup> Will execution

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*Administering a National System of Taxation*, 57 TAX LAW. 625, 633 (2004) (stating that “[i]n the last several years, numerous states have abolished their rules against perpetuities, in many cases overtly for the purpose of attracting trust business from states that have retained the rule” and indicating that “[t]rust companies in these states promote the creation of so-called dynasty trusts”); Joel C. Dobris, *The Death of the Rule Against Perpetuities, Or the RAP Has No Friends—An Essay*, 35 REAL PROP. PROB. & TR. J. 601, 605-06 (2000) (stating that “local bankers and lawyers organize and lobby to gain an advantage” through particular estate-planning laws); Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303, 1315-16 (2003) (discussing competition for perpetual trusts); Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 360 n.4, 381-82, 381 n.76 (2005) (referring to arguments made by local law reformers and documenting their interest in pursuing laws that would give them competitive advantage over their counterparts in other states); Stewart E. Sterk, *Jurisdictional Competition to Abolish the Rule Against Perpetuities: R.I.P. for the R.A.P.*, 24 CARDOZO L. REV. 2097, 2097-98 (2003) (citing pressure from “entrepreneurial lawyers” to enact trust-related legislation). See generally Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131 (1996) (considering jurisdictional competition in economic analysis of NCCUSL's activities).

Jesse Dukeminier and James Krier cited fear of lawyer malpractice liability as a motivating force behind estates and trusts law reform. Dukeminier & Krier, *supra*, at 1310 n.26. We are skeptical of this theory. The 1990 UPC's harmless error rule (§ 2-503) and rule concerning survivorship of trust beneficiaries (§ 2-707) are rules that estates and trusts lawyers should support for exactly this reason, but in fact both provisions have encountered resistance from the estate planning bar.

<sup>2</sup> See, e.g., *Irving Trust Co. v. Day*, 314 U.S. 556, 562 (1942) (recognizing that “[r]ights of succession to the property of a deceased, whether by will or by intestacy, are of statutory

statutes have garnered considerable scholarly attention over the last forty years because of a general unease about their intent-defeating formalities.<sup>3</sup> Moreover, the growth of will substitutes, which have enjoyed the benign neglect of state regulation regarding execution formalities, makes the wills statutes' requirements appear both excessively onerous and unnecessary.<sup>4</sup> The Uniform Probate Code (UPC), originally promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 1969, had considerably fewer requirements for the execution of attested wills than most state statutes, which legislatures had modeled either on the Statute of Frauds or the even more formality-stuffed English Wills Act of 1837.<sup>5</sup> Gone were the requirements that the witnesses had to subscribe the will "in the presence" of the testator, that they had to be "credible" (meaning that the witness or spouse of the witness could not be a devisee of the will), that the testator had to make or acknowledge his signature in the presence of the witnesses all "present at the same time," and that the testator had to sign at the "end" of the will. Instead, the UPC required only that two

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creation, and the dead hand rules succession only by sufferance"); *In re Will of Ferree*, 848 A.2d 81, 83 (N.J. Super. Ct. Ch. Div. 2003), *aff'd*, 848 A.2d 1 (N.J. Super. Ct. App. Div. 2004) (stating that "the right to transfer property upon death, and the manner for effectively making such a transfer, is subject to legislative control").

<sup>3</sup> See John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 531 (1975) (urging adoption of "substantial compliance doctrine" instead of "literal compliance" doctrine).

<sup>4</sup> Many states require a writing for trusts in real property in accordance with the Statute of Frauds of 1677. RESTATEMENT (THIRD) OF TRUSTS § 20 cmt. a (2003). A few states have statutes that impose a writing requirement for lifetime trusts of personal property as well. *E.g.*, IND. CODE § 30-4-2-1(a) (2000); W. VA. CODE § 36-1-6 (2005); see also FLA. STAT. ANN. § 737.111(1) (West 2005) (providing that "[t]he testamentary aspects of a trust defined in s. 731.201(34) [meaning provisions that dispose "of the trust property on or after the death of the settlor"] are invalid unless the trust is executed by the grantor with the formalities required for the execution of a will"); N.Y. EST. POWERS & TRUSTS § 7-1.17(a) (McKinney 2002) (requiring every lifetime trust to be in writing and "executed and acknowledged by the initial creator and, unless such creator is the sole trustee, by at least one trustee thereof . . . or, in lieu thereof, executed in the presence of two witnesses who shall affix their signatures to the trust instrument").

The neglect of statutory execution formalities for will substitutes may seem hard to explain because will substitutes dispose of vast amounts of wealth. The absence of prescribed formalities for many of them probably owes at least something to the fact that they advance the donative intentions of both less wealthy and wealthier individuals and that the private parties have an interest in making sure that they have documented their arrangements well.

<sup>5</sup> Statute of Frauds, 1677, 29 Car. 2, c. 3 (Eng.); Wills Act, 1837, 7 Will. 4 & 1 Vict., c. 26 (Eng.).

people “witness[ ] either the signing or the testator’s acknowledgment of the signature or of the will” and that they sign the will.<sup>6</sup> As the comments indicated, the drafters intended “to validate wills which meet the minimal formalities of the statute.”<sup>7</sup>

Without question, the 1969 UPC’s will execution statute with its “minimal formalities” has saved many wills that deserved being saved. The case law, however, provides evidence of the difficulties uniform law reformers have faced in their efforts to dislodge the ritualized ceremony of will execution as a defining feature of wealth succession law.<sup>8</sup> For example, in the 1987 case of *In re Estate of Peters*, when the witnesses signed the decedent’s will after his death, the New Jersey Supreme Court refused to uphold the will under the state’s will execution statute, which had been modeled after the 1969 UPC version of § 2-502.<sup>9</sup> Even though nothing in the statutory language required the witnesses to sign before the decedent’s death, their post-death signatures breached the ceremonial apparatus that distinguished wills from all other legal documents in the minds of the justices.<sup>10</sup>

The facts of the case make the court’s insistence on adding formalities to the state’s will execution statute difficult to understand, unless an analysis of the court’s opinion takes into account the justices’ tenacious commitment to ritualism in will-making. Conrad Peters died five days after his wife, Maria, leaving

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<sup>6</sup> UNIF. PROBATE CODE § 2-502 (1969). The UPC’s choice-of-law rule also furthered validity by recognizing statutory will formalities of those states connected to the testator, including the state where the testator executed the will, the state where the testator resided at the time of execution, and the state where the testator resided at the time of death. *Id.* § 2-506.

<sup>7</sup> *Id.* § 2-502 cmt.

<sup>8</sup> Bar associations and legislatures are willing to support marginal incursions on the will execution formalities, such as UPC (1990) § 2-513, which authorizes the disposition of tangible personal property in an informally executed document. When first promulgated in UPC (1969) § 2-513, this provision gained the attention of many estate bar associations and legislatures and won widespread enactment. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.9 statutory note (1999) (indicating that over half of states have adopted either 1969 or 1990 version of UPC § 2-513). The fact that the 1969 version authorized an unsigned handwritten document (which the 1990 version of the UPC no longer permits) that could govern the disposition of a vast amount of wealth in the form of art and antique collections did not dampen the enthusiasm of the legal community, presumably because it left the will execution statute with its patina of formalism in place.

<sup>9</sup> *In re Estate of Peters*, 526 A.2d 1005, 1014-15 (N.J. 1987).

<sup>10</sup> *Id.* at 1011.

no heirs and survived only by his stepson.<sup>11</sup> Marie and Conrad Peters executed mutual wills more than a year before they both died. She left all of her estate to him, and he left all of his estate to her. At the death of the survivor, they both provided for Marie's son (Conrad's stepson) to inherit all their property.<sup>12</sup> Sophia M. Gall, an insurance agent, notary public, and Marie's sister-in-law prepared the wills while Conrad was recovering in the hospital from a stroke, which affected him physically but not mentally.<sup>13</sup> In the presence of Marie and Sophia's husband (Marie's brother), Sophia read the will to Conrad, who then agreed to its content and signed it.<sup>14</sup> When two of Sophia's employees arrived at the hospital later in the afternoon, Sophia reviewed the will again with Conrad, who, in the presence of the two employees, indicated his approval of it and acknowledged his signature.<sup>15</sup> Sophia signed the will at that time as notary, but neither of the two employees signed the will as witnesses.<sup>16</sup> The state of New Jersey, which would succeed to Conrad's estate if the court found his will invalid, challenged the will's execution.<sup>17</sup> The trial court upheld the will's validity by treating Sophia's signature as notary as a valid signature of a witness and by allowing one of the other employees to sign the will.<sup>18</sup> An intermediate appellate court reversed the trial court's ruling, and the Supreme Court of New Jersey affirmed.<sup>19</sup>

Conrad's stepson argued that "the elimination of the requirement that the witness sign in the presence of the testator indicate[s] that the Legislature intended that a witness could sign a will as a subscribing witness at any time after the testator has signed or acknowledged the will, even after the testator's death."<sup>20</sup> He also reasoned that "the lack of any other restrictions in the statute

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<sup>11</sup> *Id.* at 1006.

<sup>12</sup> *Id.* at 1007.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 1006.

<sup>18</sup> *Id.* at 1007.

<sup>19</sup> *In re Estate of Peters*, 509 A.2d 797 (N.J. Super. Ct. App. Div. 1986), *aff'd*, 526 A.2d 1005 (N.J. 1987).

<sup>20</sup> *Peters*, 526 A.2d at 1010.

relating to when witnesses may sign a will” indicates that “the procedure employed here was within the contemplation of the statute.”<sup>21</sup> The supreme court used the Code’s effort “to reduce the number and refine the scope of those formalities” as a reason for strictly construing the New Jersey statute modeled after it.<sup>22</sup> “[I]t is arguable that as the number of formalities have been reduced, those retained by the Legislature have assumed even greater importance, and demand at least the degree of scrupulous adherence required under the former statute.”<sup>23</sup>

Strict construction for the court meant adding requirements not otherwise in the statute.<sup>24</sup> The *Peters* court erroneously viewed the witnesses’ acts of signing as a manifestation of their having witnessed the testator’s act of signing or the testator’s act of acknowledging the signature or the will. The witnesses’ signatures, however, do not necessarily indicate anything at all about the acts they witnessed. Their signatures prove nothing one way or the other. Under the then-existing New Jersey statute, the right questions were: Is the witnesses’ identification of the will possible

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 1009.

<sup>23</sup> *Id.* at 1010-11.

<sup>24</sup> The court seemed to adhere closely to the statute when it stated that the “current statute . . . clearly requires the fulfillment of [a witness’s two] functions,” which the court called “observatory,” consisting of the observation “of the testator’s signature to or acknowledgment of the will,” and “signatory,” which “consists of the signing of the will by the persons who were witnesses.” *Id.* The court went on to say that “[t]he signatory function may not have the same substantive significance as the observatory function, but it is not simply a ministerial or precatory requirement. While perhaps complementary to the observatory function, it is nonetheless a necessary element of the witnessing requirement.” *Id.* at 1011. The court was correct in recognizing that the signatory act is not ministerial. The court stated that the signatory act is “perhaps complementary to the observatory” act, but it did not explore that point. If it had, it might have seen that the signature can complement the observatory act only if it is a signature to an attestation clause that describes the execution procedure followed. A mere signature on the will otherwise tells us nothing about the observatory act. The court merely hinted at what other functions the signatory act serves by referring to its significance as “an evidentiary requirement or probative element.” *Id.* By signing the document that Conrad acknowledged as his will, the witnesses would have identified that document as the one that Conrad had intended as his will. It is that evidentiary or probative element that was lost by the witnesses’ failure to sign the document at the time the acknowledgment took place.

For a similar judicial effort in which attention by a court to the ceremonial apparatus of will execution leads it to add formalities to the state’s will execution statute, see generally *Estate of McKellar*, 380 So. 2d 1273 (Miss. 1980).



if the signing occurs later, even after the testator's death? Does their act of signing make them remember the events they witnessed better? Even if it does (a debatable point), should this lead to denial of the will in cases when the witnesses did not sign contemporaneously or in close succession to the acts they observed? The court never got to these questions because it could not imagine construing New Jersey's will execution statute to validate a will in which a witness signed after the testator's death where more than eighteen months had passed between the acts the witness observed and the witness's signature on the will.

The court's failure of imagination seems to have stemmed from a preconceived image, or what cognitive psychologists refer to as a *schema*, of what constitutes a will execution.<sup>25</sup> The psychological literature defines a schema as "a cognitive structure that represents knowledge about a concept or type of stimulus, including its attributes and the relations among those attributes."<sup>26</sup> The court's will execution schema, i.e., those "attributes" it thought necessary for a document to constitute a will, likely led it to find that Conrad failed to execute a valid will. Given the incongruence between its schema and the requirements of the state's will execution statute, the court made only unconvincing attempts to justify its decision to invalidate the will.<sup>27</sup>

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<sup>25</sup> See SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION 98-105 (2d ed. 1991) (defining and giving examples of schemata); cf. Gregory S. Alexander, *A Cognitive Theory of Fiduciary Relationships*, 85 CORNELL L. REV. 767, 768-69 (2000) (making similar argument with regard to courts reviewing behavior of fiduciaries).

<sup>26</sup> FISKE & TAYLOR, *supra* note 25, at 98.

<sup>27</sup> The traditional schema of will execution has also played a role in the courts' resistance to the reduced formalities for unattested wills, which the 1969 UPC authorized. UNIF. PROBATE CODE § 2-503 (1969). The drafters of the UPC embraced unattested—also known as holographic—wills in an effort to maximize the opportunity for a state to give effect to written testamentary intentions. *See id.* at cmt. The early holographic will statutes required that the will be *entirely* written, signed, and dated in the testator's handwriting, which led many courts to hold holographic wills invalid. *E.g.*, *In re Bower's Estate*, 78 P.2d 1012, 1014-15 (Cal. 1938), *overruled by In re Baker's Estate*, 381 P.2d 913, 916 (1963); *In re Wolcott's Estate*, 180 P. 169, 171 (Utah 1919). UPC (1969) § 2-503 retained the signature requirement, omitted the requirement of a date, and replaced the requirement that the will be "entirely" in the testator's handwriting with the requirement that the "material provisions" be in the testator's handwriting. Some courts interpreted "material provisions" strictly and denied probate to wills because the handwriting alone did not demonstrate clear testamentary intent. *See, e.g.*, *Estate of Johnson*, 630 P.2d 1039, 1043 (Ariz. Ct. App. 1981) (interpreting statute modeled after UPC (1969) § 2-503); *In re Estate of Foxley*, 575 N.W.2d 150, 154 (Neb.

None of us should underestimate the strength of the will execution schema.<sup>28</sup> *Peters* itself provides proof of its tenacity. First, the facts in *Peters* would seem to cry out for a resolution that would not leave Conrad's stepchild with no inheritance at all and the state of New Jersey with the property of both his mother and stepfather.<sup>29</sup> Second, the court had to admit that its holding invalidating the will meant that it had to add a requirement to the will execution statute—namely, signatures by witnesses within a reasonable time of their observation of the testator's signing or the testator's acknowledgment of the signature or of the will:

We are thus satisfied that it would be unreasonable to construe the statute as placing no time limit on the requirement of obtaining two witnesses' signatures. By

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1998) (same); *In re Will of Ferree*, 848 A.2d 81, 88 (N.J. Super. Ct. Ch. Div. 2003), *aff'd*, 848 A.2d 1 (N.J. Super. Ct. App. Div. 2004) (same). *But see* *Estate of Muder*, 765 P.2d 997, 1000 (Ariz. 1988) (upholding will in which testator used preprinted form and filled in blanks with his own handwriting, effectively reversing *Johnson*, *supra*); *In re Estate of Gonzalez*, 855 A.2d 1146, 1149-50 (Me. 2004) (upholding will on preprinted form when applying holographic will statute modeled after UPC (1969) § 2-503). The *Johnson*, *Foxley*, and *Ferree* courts misread the statute by treating nonholographic material on a preprinted will form as part of the material provisions of the holographic will. Their will execution schema for holographic wills did not correlate with the statutory requirements, but their schema prevailed, which meant that they held the wills invalid. In response to cases like *Johnson*, UPC (1990) § 2-502(b) and (c) require only that "the material portions of the document" need to be in the testator's handwriting and that portions of the document that are not in the testator's handwriting, along with other extrinsic evidence, can be used to establish testamentary intent. Fourteen states have adopted either the 1969 or 1990 version of the UPC's holographic will statute. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.2 statutory note (1999).

<sup>28</sup> Another possible example of the force of schemata in estates and trusts law reform has to do with the 1997 Uniform Principal and Income Act and in particular the initial resistance of trust experts to its equitable adjustment provision § 104(a). *See* Joel C. Dobris, *Why Trustee Investors Often Prefer Dividends to Capital Gain and Debt Investments to Equity—A Daunting Principal and Income Problem*, 32 REAL PROP. PROB. & TR. J. 255, 257 n.2 (1997) (citing "inelastic capacity of the human mind" as one explanation for this resistance).

<sup>29</sup> The facts surrounding the will execution by Conrad are a bit problematic regarding the question of undue influence. He had suffered a stroke and his stepson's mother, aunt, and uncle played crucial roles in assuring that Conrad executed a will that benefited his stepson in the event Conrad survived his wife. *In re Estate of Peters*, 526 A.2d 1005, 1006-07 (N.J. 1987). Nevertheless, the state produced no evidence to suggest that the stepson or the stepson's relatives engaged in fraud or exercised undue influence on Conrad, *see id.* at 1013 (noting "absence of any allegations of fraud"), and no facts appear in the opinion to suggest why the stepson would not be an object of Conrad's bounty, especially since Conrad died without any living blood relatives.

implication, the statute requires that the signatures of witnesses be affixed to a will within a reasonable period of time from the execution of the will.<sup>30</sup>

The court tied the “requirement of subscription within a reasonable time” to the risk of fraud and undue influence.<sup>31</sup> It used the specter of fraud and undue influence as a justification for retaining the will execution schema and made any challenge to that schema a high risk proposition, i.e., the lack of a ritualized ceremony may lead to the judicial error of validating a fraudulent will or one which is the product of undue influence. The court, in its effort to explain away the legislature’s decision to reduce “the number of execution formalities,” emphasized the “significance of the formalities it [the legislature] retained,” but it assiduously refused to address the legislature’s interest in reducing the incidences of judicial error in which valid wills are held invalid.<sup>32</sup>

Yet a third piece of evidence of the strength of the will execution schema is that the court rejected the plaintiff’s argument that it “should validate the will in the absence of any allegation of fraud because it was in ‘substantial compliance’ with the statute.”<sup>33</sup> The court addressed the substantial compliance doctrine as set forth by John H. Langbein in his influential article *Substantial Compliance with the Wills Act*.<sup>34</sup> After referring to a number of the criticisms lodged against the doctrine by other scholars, the court rejected the opportunity to apply it in this case.<sup>35</sup> More than fifteen years after

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<sup>30</sup> *Id.* at 1011. NCCUSL ultimately enacted *Peters*’s reasonable-time rule when it revised the 1969 UPC in 1990. UPC (1990) § 2-502(a)(3) now requires that an attested will be “signed by at least two individuals, each of whom signed *within a reasonable time after* he [or she] witnessed either the signing of the will . . . or the testator’s acknowledgment of that signature or acknowledgment of the will.” UNIF. PROBATE CODE § 2-502(a)(3) (1990) (emphasis added). Under the same facts as *Peters*, a court interpreting UPC (1990) § 2-502(a)(3) may not find that a gap of eighteen months between the time an individual “witnessed” the testator’s signing of the will or the testator’s acknowledgment of that signature or acknowledgment of the will is unreasonable. If the court looks to the purposes of the signature and finds that they are met, then it may find that the will is valid. For a further discussion of the reasonable-time requirement, see *infra* notes 55-62 and accompanying text.

<sup>31</sup> *Peters*, 526 A.2d at 1011.

<sup>32</sup> *Id.* at 1011-12.

<sup>33</sup> *Id.* at 1013.

<sup>34</sup> *Id.* (citing Langbein, *supra* note 3, at 521).

<sup>35</sup> In doing so, the court stated:

*Peters*, some courts continue to reject the substantial compliance doctrine and strictly apply, even if they do not add, will execution requirements.<sup>36</sup>

Nevertheless, more than thirty-five years after the UPC began its effort to dislodge the ritualized ceremony of will execution as a defining feature of wealth succession law, case law provides significant evidence that courts seek reasons to uphold wills and do not give undue weight to the traditional ceremony reflected in statutory will formalities. The fact that will proponents make arguments based on the substantial compliance doctrine and that the *Peters* court and others have had to address it show the weakening hold of the traditional schema of will execution. Now, even when courts hold wills invalid, the majority may express regret at the result or signal to the legislature for authority to dispense with the statutory requirements, or a dissenting judge may criticize sharply the majority for its failure to adopt the substantial compliance doctrine.<sup>37</sup> More importantly, of course, is that courts have upheld wills by applying the substantial compliance doctrine.<sup>38</sup>

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To [adopt a substantial compliance doctrine] on the facts of this case would, in our view, effectively vitiate the statutory requirement that witnesses sign the will. We continue to believe that, as a general proposition, strict, if not literal, adherence to statutory requirements is required in order to validate a will, and that the statutory requirements must be satisfied regardless of the possibility of fraud in any particular case.

*Id.* at 1014 (footnote omitted). The court's rejection of the substantial compliance doctrine comes as no surprise, given the court's earlier addition of a requirement to the will execution statute. What is surprising, however, is how the will execution schema confused the court into thinking that it was "strictly" adhering to the legislative language.

<sup>36</sup> *E.g.*, *In re Estate of Korth*, No. E045346, 2005 WL 2600426, at \*4 (Cal. Ct. App. Oct. 14, 2005) (unpublished decision); *In re Estate of Iversen*, 150 S.W.3d 824, 826 (Tex. Ct. App. 2004); *see also In re Will of Ferree*, 848 A.2d 81, 90-91 (N.J. Super. Ct. Ch. Div. 2003), *aff'd*, 848 A.2d 1 (N.J. Super. Ct. App. Div. 2004) (refusing to apply substantial compliance doctrine to holographic wills).

<sup>37</sup> *In re Estate of Phillips*, No. 01-0879, 2002 WL 1447482, at \*1 (Iowa Ct. App. July 3, 2002) (unpublished opinion) (indicating that court needed statutory grant of authority); *In re Succession of Richardson*, No. 2005 CA 0552, 2006 WL 741520, at \*3 (La. Ct. App. Mar. 24, 2006) (stating reluctance to affirm lower court's decision holding notarial will invalid); *Stevens v. Casdorff*, 508 S.E.2d 610, 613 (W. Va. 1998) (Workman, J., dissenting) (arguing that majority "takes a very technocratic approach to the law, slavishly worshiping form over substance").

<sup>38</sup> For a recent case applying the substantial compliance doctrine to avoid invalidity based on a formality-filled will execution statute, *see Fischer v. Kinzalow*, 88 Ark. App. 307 (2004) (upholding trial court's determination that testator substantially complied with requirement

Four years after the *Peters* decision, the New Jersey Supreme Court embraced the substantial compliance doctrine in *Will of Ranney*.<sup>39</sup> In that case, Russell G. Ranney executed his will under the supervision of an attorney. By mistake, the two witnesses, one the attorney's law partner and the other his secretary, signed the self-proving affidavit rather than the will.<sup>40</sup> Russell's wife Betty, who received income interests in her husband's property for her life, challenged the will because it failed to comply with New Jersey's will execution statute.<sup>41</sup> The court agreed that Russell had failed to have his will validly executed, but went on to consider whether the "will may be probated if it substantially complies" with the will execution requirements.<sup>42</sup>

By the time of this case, NCCUSL had embraced the harmless error doctrine in UPC (1990) § 2-503, and the American Law Institute (ALI) had embraced the substantial compliance doctrine.<sup>43</sup>

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of declaring her will to witnesses and requirement that testator request her witnesses to sign). See also *In re Estate of Tolin*, 622 So. 2d 988 (Fla. 1993), in which the Supreme Court of Florida concluded that a constructive trust could be properly imposed to prevent unjust enrichment because of a "mistake of fact which prevented the testator from" properly revoking his codicil by physical act to the document. *Id.* at 990. The testator had been advised by his neighbor, a retired attorney, that he could revoke his codicil by tearing up the original. *Id.* at 989. The testator believed that when he tore up "the blue-backed photocopy" he was tearing up the original of the will. *Id.* The court held that the testator had not complied with the statutory requirements for revoking a will by physical act to the document, but went on to allow for an equitable remedy. *Id.* at 991. Revocation by act to the document lacks the solemnity associated with attested wills and, therefore, made it easier for the court to excuse the mistake. Nevertheless, the willingness of the court to extend the remedy of constructive trust to prevent unjust enrichment resulting from a mistake, rather than from fraud or undue influence, is significant. Although the court does not embrace the language of substantial compliance or harmless error in relation to the will revocation statute, that is clearly the effect of its holding. See *infra* notes 43-45 and accompanying text (explaining difference between substantial compliance and harmless error doctrines). Notably, UPC (1990) § 2-503 does not address this type of case, because it applies only to documents not executed in accordance with UPC (1990) § 2-502. It deals only with revocation to the extent that the testator fails to meet the will execution requirements necessary to revoke a will or a part of a will by subsequent instrument. UNIF. PROBATE CODE § 2-503(ii) (1990). But see *Allen v. Dalk*, 826 So. 2d 245, 248 (Fla. 2002) (refusing to extend reasoning of *Tolin* where testator failed to sign her will at her attorney's office because of oversight while signing at same time her health care directive and durable power of attorney).

<sup>39</sup> 589 A.2d 1339 (N.J. 1991).

<sup>40</sup> *Id.* at 1341.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 1343.

<sup>43</sup> UNIF. PROBATE CODE § 2-503 (1990). The Restatement refers to the "harmless-error rule," but embraces a substantial compliance rule in the absence of authorizing legislation.

UPC (1990) § 2-503 authorizes a court to treat a document as if it did meet the will execution requirements of UPC § 2-502 “if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute . . . the decedent’s will.”<sup>44</sup> Section 2-503’s harmless error rule differs from the substantial compliance doctrine considered in *Peters* and *Ranney* and adopted by the ALI in two important respects. First, it statutorily authorizes the court to ignore a decedent’s failure to meet the statutory will execution requirements. In contrast, the substantial compliance doctrine represents a judicial gloss on the will execution statute. Second, the harmless error rule asks the ultimate question of whether the decedent intended the document to be his or her will, whereas the substantial compliance doctrine requires a court to ask whether the decedent had substantially complied with a particular will execution requirement.<sup>45</sup> The NCCUSL and ALI developments influenced the *Ranney* court and led it to conclude that “courts and scholars have determined that substantial compliance better serves the goals of statutory formalities by permitting probate of formally-defective wills that nevertheless represent the intent of the testator.”<sup>46</sup>

As compared to the *Peters* court, the *Ranney* court engaged in a more thorough analysis of the legislative history concerning New Jersey’s will execution statute. It noted that the legislature had not only reduced the will execution formalities for attested wills, but also enacted a provision that allowed unwitnessed holographic wills

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It states that

the court should apply a rule of substantial compliance, under which a will is found validly executed if the document was executed in substantial compliance with the statutory formalities and if the proponent establishes by clear and convincing evidence that the decedent intended the document to constitute his or her will.

RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 33.1 cmt. g (1992).

<sup>44</sup> The statute also permits the proponent to establish that a document or writing constitutes a partial or complete revocation of the will, an addition to or alteration of the will, or a partial or complete revival of a formerly revoked will or of a formerly revoked portion of the will. UNIF. PROBATE CODE § 2-503(ii)-(iv) (1990).

<sup>45</sup> RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 (1999) embraces the harmless error language in recognition of the legislative trend.

<sup>46</sup> *Ranney*, 589 A.2d at 1343-44.

to be admitted to probate.<sup>47</sup> Although it concluded that the “approval of unwitnessed holographic wills, like the diminution of attestation requirements, reflects a more relaxed attitude toward the execution of wills” and that the legislature intended “to free will execution from the ritualism of the pre-Code law and to prevent technical defects from invalidating otherwise valid wills,” it nevertheless reinforced the formalism in New Jersey’s will execution procedure.<sup>48</sup> As it upheld the will, notwithstanding the witnesses’ failure to sign the will itself, the court stated:

The execution of a last will and testament . . . remains a solemn event. A careful practitioner will still observe the formalities surrounding the execution of wills. When formal defects occur, proponents should prove by clear and convincing evidence that the will substantially complies with statutory requirements. . . . Our adoption of the doctrine of substantial compliance should not be construed as an invitation either to carelessness or chicanery. The purpose of the doctrine is to remove procedural peccadillos as a bar to probate.<sup>49</sup>

Arguably, the facts in *Ranney* did not challenge the court’s schema of what constitutes a good will execution procedure. After all, the procedure met the ceremonial expectations typically associated with traditional will executions, except for the fact that the witnesses signed the wrong legal document. Notwithstanding the narrowness of the holding, however, the court felt obliged to reinforce its commitment to maintaining “a solemn event” and to disabuse anyone from thinking that they should not continue to exercise care when executing or supervising the execution of a will.<sup>50</sup>

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<sup>47</sup> *Id.* at 1345.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* (citation omitted).

<sup>50</sup> See *In re Will of Ferree*, 848 A.2d 81, 89-90 (N.J. Super. Ct. Ch. Div. 2003), *aff’d*, 848 A.2d 1 (N.J. Super. Ct. App. Div. 2004) (relying on narrowness of *Ranney* decision as basis for refusing to apply substantial compliance to holographic will). UPC (1990) § 2-504(c) bolsters the view that *Ranney* reinforced, rather than dislodged, the will execution schema. It provides that a “signature affixed to a self-proving affidavit attached to a will is considered a signature affixed to the will, if necessary to prove the will’s due execution.” UNIF. PROBATE

In 2004, the New Jersey legislature went a long way in disrupting the schema of will execution when it enacted a statute modeled after the UPC (1990)'s harmless error rule.<sup>51</sup> In *In re Estate of Denner*, the Superior Court of New Jersey denied a motion to dismiss a request, in accordance with the harmless error statute, to admit into probate as the decedent's will three alternative documents, none of which the decedent had signed.<sup>52</sup> After considering the comments to UPC (1990) § 2-503 and Langbein's article *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*,<sup>53</sup> it refused to adopt a per se rule to require a signature in all cases.<sup>54</sup> *Denner*

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CODE § 2-504(c) (1990). This subsection eliminates the need for proponents to prove by clear and convincing evidence that the decedent intended the document to be his or her will, notwithstanding that the witness or witnesses failed to sign the will. Instead, it automatically treats a signature on the self-proving affidavit as sufficient for purposes of UPC (1990) § 2-502.

<sup>51</sup> 2004 N.J. Laws ch. 132, § 10, ch. 160, § 3 (codified at N.J. STAT. ANN. § 3B:3-3 (West Supp. 2005) and effective Feb. 27, 2005).

Colorado, Hawaii, Michigan, Montana, South Dakota, and Utah also have adopted statutes modeled on UPC (1990) § 2-503. COLO. REV. STAT. ANN. § 15-11-503 (West 2004) (deviating from UPC (1990) § 2-503 by omitting clauses (ii), (iii), and (iv)); HAW. REV. STAT. ANN. § 560:2-503 (LexisNexis Supp. 2004); MICH. COMP. LAWS. ANN. § 700.2503 (West 2002); MONT. CODE ANN. § 72-2-523 (2005); S.D. CODIFIED LAWS § 29A-2-503 (2004); UTAH CODE ANN. § 75-2-503 (Supp. 2005). Early judicial interpretations of UPC (1990) § 2-503 were troubling. In the first appellate decision under UPC (1990) § 2-503, *In re Estate of Brooks*, 927 P.2d 1024, 1027-28 (Mont. 1996), the court relied on the Montana statute modeled after it to hold that the proponents of a document had the burden to prove by clear and convincing evidence that the testator had the requisite mental capacity to execute a will. The dissent in *In re Estate of Kuralt*, 981 P.2d 771, 778 (Mont. 1999) (Turnage, J., dissenting), adopted similar reasoning regarding the question of testamentary intent. Both *Brooks* and the dissent in *Kuralt* fail to appreciate that the harmless error statute applies only to *formal* and not *substantive* will requirements. A proponent of a will should only have to prove intent, testamentary capacity, and freedom from undue influence and fraud by a preponderance of the evidence. Subsequent decisions applying statutes modeled on UPC (1990) § 2-503, however, have appropriately applied the statute to determine if a testator intended that a document, which fails to meet the will execution formalities, constitutes that testator's will. See, e.g., *In re Estate of Sky Dancer*, 13 P.3d 1231, 1234 (Colo. Ct. App. 2000) (denying probate to proffered document); *In re Estate of Hall*, 51 P.3d 1134, 1136 (Mont. 2002) (upholding proffered document as will); *In re Estate of Denner*, No. 0-3474, 2006 WL 510530, at \*2 (N.J. Super. Ct. Ch. Div. Feb. 28, 2006) (unpublished opinion) (distinguishing *Estate of Sky Dancer* and denying defendant's motion to dismiss claim that three unexecuted documents be admitted to probate as decedent's will).

<sup>52</sup> *Denner*, 2006 WL 510530, at \*4.

<sup>53</sup> 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 (1987).

<sup>54</sup> 2006 WL 510530, at \*2-3.



seems to provide clear evidence that, after thirty-five years, the schema of will execution no longer prevents courts from asking the ultimate question: Did the decedent intend this document to be his or her will?

The California appellate court case of *In re Estate of Sauressig* presents an appropriate coda to New Jersey's experience with will formalities. On facts similar to *Peters*, the court held a will valid under a will execution statute that was modeled after UPC (1969) § 2-502.<sup>55</sup> In *Sauressig*, the testator died about twenty months after he executed his will, which was signed by only one witness.<sup>56</sup> The court held that the requirements of the statute were met because a second witness to the execution was available to testify to the execution.<sup>57</sup> It reasoned that the legislature intended to "relax formalities" when it based its statute on UPC (1969) § 2-502.<sup>58</sup> It then went on to quote UPC (1990) § 2-502(a)(3), which adopts *Peters's* reasonable-time rule, and the comments to it.<sup>59</sup> Without acknowledging that the will execution statute in UPC (1990) imposed a new formality—signature by the witnesses within a reasonable time—the court emphasized the commentary stating that "[t]here is . . . no requirement that the witnesses sign before the testator's death."<sup>60</sup> It went on to conclude that there was "nothing in the language" of California's will execution statute "or in its inspiration [UPC (1969) § 2-502] . . . to preclude an otherwise qualified witness from signing a will after the death of the testator."<sup>61</sup> Once the *Sauressig* court assured itself that "[n]othing in these undisputed facts indicates fraud in the execution of the will" and, therefore, that the purpose of the requirement of two subscribing witnesses was "adequately satisfied . . . despite the fact that only one of the two individuals who witnessed the execution of

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<sup>55</sup> *In re Estate of Sauressig*, 19 Cal. Rptr. 3d 262, 265 (Cal. Ct. App. 2004), *petition for rev. granted*, 102 P.3d 903 (Cal. 2004); *see also* *Estate of Eugene*, 128 Cal. Rptr. 2d 622, 623, 625 (Ct. App. 2002) (validating will executed more than eight years before testator died, even though one witness did not sign will until after testator's death).

<sup>56</sup> 19 Cal. Rptr. 3d at 263.

<sup>57</sup> *Id.* at 267.

<sup>58</sup> *Id.* at 265.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

the will signed it before the testator's death," it held the will valid.<sup>62</sup> *Sauressig* stands in stark contrast to *Peters*. Richard Wellman taught us that the passage of time surely helped courts and legislatures to see the benefits of a statute with fewer formalities accompanied by a harmless error statute, but that alone probably was insufficient. It also required the persistent efforts of Richard Wellman, assisted greatly by the work of John Langbein and Lawrence Waggoner, to succeed in making courts and legislatures less comfortable with will execution rituals and more attentive to testamentary intent.<sup>63</sup>

### III. REMEDIAL STATUTES OVERRIDING THE COMMON LAW: THE CASE OF UPC (1990) § 2-707

As we have already noted, one major goal of the UPC is to reduce the discrepancies between estate plans executed by those who have the benefit of skilled estate planning attorneys and plans executed by those that have not had that benefit. Usually through some inadvertent misstep of unskilled attorneys or property owners themselves, those owners fail to accomplish their donative intent. The UPC relies primarily on remedial statutes in its effort to assist ill-advised or unadvised property owners. These statutes apply unless evidence, including language in the document and also other circumstances, indicates that the donor had a contrary intent.

Frequently a remedial statute of the UPC overrides the results produced by a common law rule, typically a rule of construction, such as is the case with UPC (1990) § 2-707. This provision rejects, as to future interests created in trusts, the traditional common law constructional norm that beneficiaries of future interests are not required to survive until the time of distribution.<sup>64</sup> Instead, it

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<sup>62</sup> *Id.* at 267. *Sauressig* raises the question of whether a twenty-month time gap between the time testator signed the will and he died would satisfy the reasonable-time requirement now imposed by UPC (1990) § 2-502(a)(3). Its validity under the 1990 UPC may require application of the harmless error rule of § 2-503.

<sup>63</sup> Lawrence Waggoner was Reporter for the 1990 UPC and for the *Restatement (Third) of Property: Wills and Other Donative Transfers*. John Langbein was Associate Reporter with Waggoner on the Restatement, and his scholarly contribution on will formalities is unmatched by any other scholar. See Langbein, *supra* note 53; Langbein, *supra* note 3.

<sup>64</sup> *E.g.*, *In re Ferry's Estate*, 361 P.2d 900, 904-05 (Cal. 1961); *Rosenthal v. First Nat'l*

presumptively imposes a survivorship requirement on all future interests held in trust and creates substitute gifts in the predeceased beneficiary's descendants who survive to the time of distribution. If no descendants survive, the statute provides for alternative substitute gifts to persons alive at the time of distribution, who, depending on the nature of the trust, may be the residuary takers named in the settlor's will or their lineal descendants, or the heirs of the settlor as determined at the time of distribution.<sup>65</sup> After its promulgation in 1990, UPC § 2-707 provoked debate.<sup>66</sup>

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Bank, 239 N.E.2d 826, 829 (Ill. 1968); *In re Bogart's Will*, 308 N.Y.S.2d 594, 594 (N.Y. Sur. Ct. 1970); *White v. Alexander*, 224 S.E.2d 617, 620-21 (N.C. 1976); *Peters v. Allison*, 814 N.E.2d 568, 571 (Ohio Ct. App. 2004); *In re Bomberger's Estate*, 32 A.2d 729, 730-31 (Pa. 1943); RESTATEMENT (FIRST) OF PROP. § 261 (1940). *Contra* *Rushing v. Mann*, 910 S.W.2d 672, 674 (Ark. 1995); *Lawson v. Lawson*, 148 S.E.2d 546, 546-57 (N.C. 1966) (appearing to be superceded by *White, supra*, although *White* does not make any reference to *Lawson*); *Jones v. Holland*, 77 S.E.2d 202, 204 (S.C. 1953).

<sup>65</sup> UNIF. PROBATE CODE §§ 2-707(d), -711 (1990). UPC (1990) § 2-707(e) provides for a comparable set of substitute gifts for future interests created by the exercise of a power of appointment.

<sup>66</sup> States that have enacted most of the 1990 revisions to Article 2 have adopted UPC (1990) § 2-707. *E.g.*, ALASKA STAT. § 13.12.707 (2004); COLO. REV. STAT. § 15-11-707 (2004); HAW. REV. STAT. ANN. § 560:2-707 (Supp. 2004); MONT. CODE ANN. § 72-2-717 (2005); N.M. STAT. ANN. § 45-2-707 (West 2003); N.D. CENT. CODE § 30.1-09.1-07 (1996); S.D. CODIFIED LAWS § 29A-2-707 (2004); UTAH CODE ANN. § 75-2-707 (Supp. 2005).

A statutory rule of construction that imposes a survivorship condition on future interests is not unique to the UPC. Pennsylvania and Tennessee have statutes that impose a survivorship requirement on class gifts. 20 PA. CONS. STAT. ANN. § 2514(5) (West 2005); TENN. CODE ANN. § 32-3-104 (West 2005). Illinois imposes a survivorship requirement on future interests created by will given to the testator's descendants. 755 ILL. COMP. STAT. 5/4-11 (1992). Iowa has a statute that imposes a survivorship requirement on all future interests in trust, but with numerous exceptions. IOWA CODE ANN. § 633A.4701 (West Supp. 2006). For arguments in favor of UPC (1990) § 2-707, see generally Edward C. Halbach, Jr., *Uniform Acts, Restatements and Trends in American Trust Law at Century's End*, 88 CAL. L. REV. 1877 (2000); Edward C. Halbach, Jr. & Lawrence W. Waggoner, *The UPC's New Survivorship and Antilapse Provisions*, 55 ALB. L. REV. 1091 (1992); Lawrence W. Waggoner, *The Uniform Probate Code Extends Antilapse-Type Protection to Poorly Drafted Trusts*, 94 MICH. L. REV. 2309 (1996). For criticisms of UPC (1990) § 2-707, see generally David M. Becker, *Eroding the Common Law Paradigm for Creation of Property Interests and the Hidden Costs of Law Reform*, 83 WASH. U. L.Q. 773 (2005); David M. Becker, *Uniform Probate Code Section 2-707 and the Experienced Estate Planner: Unexpected Disasters and How to Avoid Them*, 47 UCLA L. REV. 339 (1999) [hereinafter Becker, *Experienced Estate Planner*]; Laura E. Cunningham, *The Hazards of Tinkering with the Common Law of Future Interests: The California Experience*, 48 HASTINGS L.J. 667 (1997); Jesse Dukeminier, *The Uniform Probate Code Upends the Law of Remainders*, 94 MICH. L. REV. 148 (1995).

Proponents of the statute appreciated the difficulties they would face in convincing estates and trusts experts that § 2-707 was an intent-furthering provision. Waggoner, as Reporter for the 1990 UPC, in particular understood that the common law's constructional rule against implying a condition of survivorship until the time of distribution had strong support and was not viewed as an intent-defeating rule. He tried to blunt the resistance to abandoning the common law tradition by showing how "[m]omentum has long been building for a statute like section 2-707."<sup>67</sup> He argued that to the extent the common law rule of destructibility of contingent remainders and the common law Rule Against Perpetuities (the RAP or the Rule) justified the preference for early vesting, the abolition of the former and the liberalization of the latter have made the preference unnecessary.<sup>68</sup> He showed, moreover, how future interests not subject to a survivorship condition increased the costs of transmission in a world of state and federal transfer taxes and probate administration.<sup>69</sup> Finally, he relied on the early commentaries and the *Restatement (Second) of Property: Donative Transfers*, both of which critiqued the preference for early vesting, to persuade skeptics that UPC (1990) § 2-707 was doing no more than what others had been saying should be done for many decades.<sup>70</sup>

These arguments, however, have not overcome the resistance of some experts in the area of estates and trusts to the reversal of the familiar common law rule of early vesting. Beyond the "persistent celebration of the common law,"<sup>71</sup> which the title of Jesse Dukeminier's attack on UPC § 2-707—"The Uniform Probate Code Upends the Law of Remainders"—makes palpable,<sup>72</sup> this statutory

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<sup>67</sup> Waggoner, *supra* note 66, at 2321.

<sup>68</sup> *Id.* at 2321-22.

<sup>69</sup> *Id.* at 2322.

<sup>70</sup> *Id.* at 2322-25 (citing RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 27.3 cmt. a, b, e, i (1988); Edward C. Halbach, Jr., *Issues About Issue: Some Recurrent Class Gift Problems*, 48 MO. L. REV. 333, 367 n.142 (1983); Edward H. Rabin, *The Law Favors the Vesting of Estates. Why?*, 65 COLUM. L. REV. 467, 487, 479, 483-84 (1965); Daniel M. Schuyler, *Drafting, Tax, and Other Consequences of the Rule of Early Vesting*, 46 ILL. L. REV. 407, 427-29, 441 (1951)).

<sup>71</sup> Frederick Schauer, *The Failure of the Common Law*, 36 ARIZ. ST. L.J. 765, 765 (2004).

<sup>72</sup> Dukeminier, *supra* note 66.

reform was asking estate planners to accept the proposition that the literal language in the documents that they draft would not control the disposition of their clients' property. David M. Becker, a critic of UPC (1990) § 2-707, probably expresses the anxieties of many planners when he writes:

[E]xperienced lawyers must recognize that saying what they mean may not be enough to overcome § 2-707 and, therefore, enough to mean what they say . . . [and] that § 2-707's departure from the common law default system—a system that requires positive statements for the creation of interests and conditions—is profound and consequently problematic. Because under § 2-707 the platform from which lawyers draft trusts is no longer a blank slate but is instead one encumbered by statutorily implied interests and conditions, the logic and techniques used for drafting are radically changed to a system that requires one to know whether, when, and how to subtract carefully before one can begin the process of adding.<sup>73</sup>

Becker essentially equates the common law's constructional preference with legal logic itself. He attaches little or no weight to the argument that, as a default rule, UPC (1990) § 2-707 furthers the probable donative intent of the ill-advised or unadvised settlor. Instead, Becker's overriding concern is that when lawyers say "what they mean," that may not be "enough to mean what they say."<sup>74</sup>

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<sup>73</sup> Becker, *Experienced Estate Planner*, *supra* note 66, at 348.

<sup>74</sup> Arguments against UPC (1990) § 2-707 that honor lawyers' express language typically ignore the fact that courts have not consistently applied the traditional common law constructional norm regarding survivorship conditions on future interests. *See, e.g.*, *Lawson v. Lawson*, 148 S.E.2d 546, 457 (N.C. 1966) (imposing condition of survivorship on future interest subject to condition unrelated to survivorship); *In re Button's Estate*, 490 P.2d 731, 734 (Wash. 1971) (imposing condition of survivorship on remainder that followed life estate in settlor of revocable lifetime trust and then providing substitute takers for interest by applying state's antilapse statute, which by its terms only applied to devisees of wills). Also, courts have construed a remainder interest to a single-generation class (e.g., children) to mean issue. The effect of this construction is to impose a condition of survivorship until the time of distribution and provide a substitute gift to the lineal descendants of the predeceased class member. *See, e.g.*, *Edwards v. Bender*, 25 So. 1010, 1012 (Ala. 1899); *Cox v. Forristall*,

UPC (1990) § 2-707 also challenged estate planners in its complexity.<sup>75</sup> The variety of factual situations that can arise leads to an intricate statute. Its virtue is that it provides a clear and appropriate result to any case that arises. Its vice is that it leaves estates and trusts specialists skeptical that the problem demands such an intricate solution. Section 2-707 reflects the modern trend that Frederick Schauer has recently described as “precisification.”<sup>76</sup> This trend is one in which a “highly precise canonical statement of the law much more often associated with the civil law” is substituted for the common law, which places the judge at the

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640 P.2d 878, 884 (Kan. Ct. App. 1982); see also RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS §§ 14.1 cmt. g(1)-(4), 15.4 cmt. h (Tentative Draft No. 4, 2004) (discussing situations that warrant court's construing term “children” to mean “issue”); Waggoner, *supra* note 66, at 2318-21 (discussing *Edwards* and *Cox* cases within context of UPC (1990) § 2-707).

The drafters of UPC (1990) § 2-707, of course, contemplated that a settlor may not want the results provided under this section. See UNIF. PROBATE CODE § 2-707 cmt. (1990). The issue arises as to how best to accomplish the settlor's intent. Professor Becker suggests that an estate planner might use the following provision:

This trust fully disclaims and rejects all rules of construction expressed and imposed by Section (herein include the precise citation to the local statutory equivalent of § 2-707). This disclaimer includes, but is not limited to, the statutory requirement of survivorship to the time for distribution for all beneficiaries of future interests and the statutory substitute gift to the living descendants of beneficiaries who fail to satisfy such condition of survivorship.

Becker, *Experienced Estate Planner*, *supra* note 66, at 407. In our view, this is not a useful way of opting out of § 2-707. A boilerplate clause that refers to a statute and says that the statute is rejected does not inform a client of its import. Some clients may be prompted to ask what that clause is about and some would not. Even those who ask might be given an answer such as “Oh, that's just a technical provision we put in all of our trusts.” More useful to the client is a clause that gives the client clear notice of its significance. Thus, rather than drafting a future interest “to A's children,” following an interest in A for A's life and then inserting Becker's boilerplate language, we think clients are better served by a clause that says “To A's children whether or not any of A's children predeceases A and not to descendants of any of A's children who predecease A.” The client is much more likely to understand the legal effect of this clause than they would Becker's boilerplate clause. For further discussion of effect opting-out language having to do with antilapse statutes, see also RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 5.5 cmt. i (1999); Halbach & Waggoner, *supra* note 66, at 1102-04.

<sup>75</sup> See, e.g., Becker, *Experienced Estate Planner*, *supra* note 66, at 348-68 (noting that “§ 2-707 requires careful attention and study”); Dukeminier, *supra* note 66, at 156 (noting “complexities and convolutions” of § 2-707); see also Mark L. Ascher, *The 1990 Uniform Probate Code: Older and Better, or More Like the Internal Revenue Code?*, 77 MINN. L. REV. 639, 642 (1993) (criticizing complexities found in 1990 version of UPC, including its antilapse provision (§ 2-603), which has many similarities to UPC (1990) § 2-707).

<sup>76</sup> Schauer, *supra* note 71, at 768.

center of the “lawmaking process.”<sup>77</sup> Precisification may make § 2-707’s reversal of the common law preference for vesting more difficult to embrace. If the drafters of UPC (1990) § 2-707 had established broadly worded substantive directives that would have allowed judges to shape a solution that corresponded to the specific estate plan before it, the reversal of the preference for vesting and the provision for substitute takers may have had a better reception. As we saw earlier, however, UPC (1990) § 2-503’s harmless error standard has taken a long time to overcome the formalistic tradition associated with wills. Adoption of a substantive directive for the treatment of future interests in trusts probably would not have enjoyed a better reception than the current UPC (1990) § 2-707. UPC drafters probably would continue to face difficulties overcoming the primacy that estates and trusts experts traditionally have accorded to language found in governing instruments.

The ultimate success of the UPC (1990) § 2-707’s drafters to convince reluctant state bar associations that they are understating the harms caused by the common law tradition while overstating the risks of a new legal regime remains unclear. Since its promulgation, the *Restatement (Third) of Property: Wills and Other Donative Transfers* retained the common law rule of construction in its discussion of future interests involving class gifts, “because it is the rule best suited within the confines of the common-law tradition to approximate the likely preference of the transferor.”<sup>78</sup> Which is to say, it comes closest to approximating “the likely preference of the transferor” not to “disinherit a line of descent.”<sup>79</sup> This development should not be viewed as a setback for a statutory rule that would impose a condition of survivorship on all future interests in trust and provide substitute takers. On the contrary, the commentary supports legislative action in this area. As the commentary recognizes, “[i]t would probably be within the traditional technique of the common law to construe single-generation class gifts as presumptively being subject to an implied condition of survival of

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<sup>77</sup> *Id.* at 765.

<sup>78</sup> RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 15.4 cmt. c (Tentative Draft No. 4, 2004).

<sup>79</sup> *Id.*

the distribution date.”<sup>80</sup> It also recognizes, however, that “[u]nless a court is willing to couple a survival requirement with a blanket presumption creating a substitute gift to the descendants of a deceased class member, merely implying a condition of survival in all cases would extinguish the possibility of benefit to the deceased class member’s descendants.”<sup>81</sup> The commentary further states that a “rule better suited to the transferor’s purposes would recognize not only an implied condition of survival, but also an implied substitute gift to the descendants of a deceased class member who survive the distribution date.”<sup>82</sup> It is too early to know whether legislatures will give considerable weight to the ALI’s endorsement of a statute modeled after UPC (1990) § 2-707. What we do know from the difficulties uniform law reformers faced when they tried to dislodge the traditional schema for will execution is that fifteen years is too short a time to judge the success of a statute that challenges estates and trusts lawyers’ views about the sanctity of language in governing instruments.

#### IV. CODIFICATION AND MODIFICATION OF THE COMMON LAW: THE UNIFORM TRUST CODE AND THE UNIFORM STATUTORY RULE AGAINST PERPETUITIES

Up to now in the discussion of law reform we have discussed uniform laws that challenge traditional understanding of estates and trusts law for the purpose of furthering donative intent, especially for those who do not have the benefit of able legal advice. In this part of the Essay we want to focus on the challenges facing law reformers when they codify common law rules that limit donative freedom. During the last twenty years, NCCUSL has promulgated two significant codifications of the common law in the area of estates and trusts—the Uniform Trust Code (UTC) and the Uniform Statutory Rule Against Perpetuities (USRAP). The UTC provides us the opportunity to look at a codification that is likely to curb further legal developments. Specifically, we contrast the UTC’s

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<sup>80</sup> *Id.* at cmt. e.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at cmt. c.



codification of the spendthrift trust doctrine and the exceptions to it with USRAP's modification of the Rule Against Perpetuities. The UTC virtually codifies the common law's spendthrift trust doctrine and its exceptions.<sup>83</sup> In contrast, USRAP preserves the core of the RAP, but also makes a significant modification.<sup>84</sup> If a disposition violates the RAP, USRAP adopts a ninety-year wait-and-see period.<sup>85</sup> At that time, if any interests have not yet vested or failed, USRAP authorizes the courts to reform the disposition "in the manner that most closely approximates the transferor's manifested plan of distribution and is within the 90 years allowed."<sup>86</sup> When promulgated in 1986, USRAP enjoyed great success early, but, in more recent years, a significant number of legislatures have abolished the common law Rule altogether.<sup>87</sup> We explore the reasons for this volatile history. The comparison of the codification of the exceptions to the spendthrift trust doctrine and the RAP puts into sharp relief the risks involved when law reformers propose statutory solutions for intent-defeating common law rules.

#### A. CODIFICATION OF THE SPENDTHRIFT TRUST DOCTRINE

UTC § 502 embraces *Broadway National Bank v. Adams*, which established the primacy of the settlor's power over the rights of the beneficiary of a trust.<sup>88</sup>

The founder of this trust was the absolute owner of his property. . . . His intentions ought to be carried out, unless they are against public policy. . . .

It is argued that investing a man with apparent wealth tends to mislead creditors, and to induce them to give him credit. The answer is, that creditors have no

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<sup>83</sup> UNIF. TRUST CODE § 502, 503 (amended 2005).

<sup>84</sup> UNIF. STATUTORY RULE AGAINST PERPETUITIES, 8B U.L.A. 321 (1990).

<sup>85</sup> *Id.* § 1(a)(2), (b)(2), (c)(2).

<sup>86</sup> *Id.* § 3.

<sup>87</sup> See *infra* notes 110-11 and accompanying text.

<sup>88</sup> *Broadway Nat'l Bank v. Adams*, 133 Mass. 170, 174 (1882). For a discussion of how the idea of freedom of disposition creates a "dead hand dilemma" because it can be invoked by both the settlor and the beneficiary, see Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189, 1193 (1985).

right to rely upon property thus held, and to give him credit upon the basis of an estate which, by the instrument creating it, is declared to be inalienable by him, and not liable for his debts. . . .

The rule of public policy which subjects a debtor's property to the payment of his debts, does not subject the property of a donor to the debts of his beneficiary, and does not give the creditor a right to complain that, in the exercise of his absolute right of disposition, the donor has not seen fit to give the property to the creditor, but has left it out of his reach.<sup>89</sup>

Notwithstanding flaws in the court's reasoning, the spendthrift trust doctrine has generally flourished in the United States, and the UTC provision follows the lead of a great number of states that have codified *Broadway National Bank*.<sup>90</sup> Given the common law tradition to promote donative freedom and the widespread popularity of the spendthrift trust doctrine itself, the difficult question facing the UTC drafters was not whether to follow *Broadway National Bank*, but what, if any, limits they should place on the doctrine.

UTC § 503 sets out the four traditional common law exceptions to the rule that a settlor can prevent creditors from reaching the interests of a trust beneficiary. The following creditors can reach an interest held in trust: the beneficiary's child for support, the beneficiary's spouse or former spouse for support, a judgment creditor who has provided services for the protection of the beneficiary's interest in the trust, and claims of the state or of the United States to the extent the state or the United States

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<sup>89</sup> *Broadway Nat'l Bank*, 133 Mass. at 173-74.

<sup>90</sup> For a state-by-state compilation, see 2A AUSTIN W. SCOTT, *THE LAW OF TRUSTS* § 152.1 (William F. Fratcher ed., 4th ed. 1987 & Supp. 2003). For criticism and policy discussions of the spendthrift trust doctrine, see generally JOHN CHIPMAN GRAY, *RESTRAINTS ON THE ALIENATION OF PROPERTY* (1883); JOHN CHIPMAN GRAY, *RESTRAINTS ON THE ALIENATION OF PROPERTY* (2d ed. 1895); ERWIN N. GRISWOLD, *SPENDTHRIFT TRUSTS* (2d ed. 1947); Mary Louise Fellows, *Spendthrift Trusts: Roots and Relevance for Twenty-First Century Planning*, 50 REC. ASSN. B. CITY N.Y. 140 (1995); Adam J. Hirsch, *Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives*, 73 WASH. U. L.Q. 1 (1995).

statutorily authorizes.<sup>91</sup> As Edward C. Halbach, Jr., the Reporter for the *Restatement (Third) of Trusts*, observes about this traditional list of preferred creditors, “lengthy and vigorous debates in the last few years have eventually led to no significant changes or trends in rules identifying privileged claimants who can penetrate the spendthrift shield.”<sup>92</sup>

The most obvious omission from the list are tort creditors of a beneficiary. *Broadway National Bank*’s own reasoning suggests that the law should make an exception for tort creditors because, like spouses and children, they do not have the opportunity to “exercise . . . proper diligence . . . [and] ascertain the nature and extent of” a beneficiary’s estate.<sup>93</sup> The UTC drafting committee debated this issue and ultimately decided not to include tort creditors in the list of preferred creditors.<sup>94</sup> With *Broadway National Bank* as a starting point, the question that appears appropriate is how much can the law protect the power of settlors to control their property without violating public policy. The question that appears inappropriate is how much should the law further public policy by protecting the creditors of beneficiaries from restraints on alienation placed on the trust interests owned by the beneficiaries.

UTC §§ 502 and 503 clarify the common law spendthrift trust doctrine and its exceptions.<sup>95</sup> To use Carol Rose’s term, these provisions *crystallize* the law.<sup>96</sup> Crystallization, however, can have two effects. First, it can provide a roadmap for further statutory changes. Alternatively, it can lead to an ossification of the common law and prevent any further development.<sup>97</sup> With respect to UTC §§

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<sup>91</sup> UNIF. TRUST CODE § 503 (amended 2005).

<sup>92</sup> Halbach, *supra* note 66, at 1894.

<sup>93</sup> *Broadway Nat’l Bank*, 133 Mass. at 173; *see also* SCOTT, *supra* note 90, § 157.5, at 220 (observing that “[a] man who is about to be knocked down by an automobile has no opportunity to investigate the credit of the driver of the automobile and has no opportunity to avoid being injured no matter what the resources of the driver may be”).

<sup>94</sup> *See* UNIF. TRUST CODE § 503 cmt. (amended 2005).

<sup>95</sup> *Id.* §§ 502, 503.

<sup>96</sup> Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 577 (1988).

<sup>97</sup> In GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982), the author argues that the “statutorification” of American law ultimately leads to obsolescent statutes and proposes a “judicial common law review of statutes” in response to that obsolescence. *Id.* at 1-7, 81-90. We argue that, although ossification of the law can occur, codification also can

502 and 503, crystallization probably will not lead to an expansion of the exceptions to the spendthrift trust doctrine. At best, it will lead legislatures simply to adhere to § 503's limited list of preferred creditors. Even more troubling is that a crystallized codification of the list of preferred creditors probably will prevent judicial development of further exceptions, such as tort creditors, to the common law's spendthrift trust doctrine.<sup>98</sup> It may even lead some legislatures to eliminate preferred status for one or more of the classes of creditors currently on the list.

The drafting committee could have pursued three different approaches to the issue of preferred creditors. First, it could have decided not to codify the spendthrift trust doctrine and left it to common law development. The committee did this with respect to the common law development of the secret trust doctrine, which concerns the remedy available to a beneficiary when a trustee breaches a promise to carry out the terms of a trust that fails to meet the formality requirements of the Statute of Frauds or the Statute of Wills.<sup>99</sup> Second, it could have included tort creditors on the list of preferred creditors. This choice would have met considerable resistance from bankers and trust attorneys.<sup>100</sup> In any

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lead to yet further statutory change. The consequences of any particular codification depend on the relationship of the legal rule to the area of law in which it operates. In the area of estates and trusts, the high regard for donative freedom and jurisdictional competition for estate planning business may lead to further modifications and sometimes even abolition of intent-defeating statutes.

<sup>98</sup> See *Scheffel v. Krueger*, 782 A.2d 410, 412 (N.H. 2001) (holding that statutory rule precluded adoption of tort creditors exception); see also *Duvall v. McGee*, 826 A.2d 416, 430 (Md. 2003) (rejecting adoption of tort creditor exception to state's court-created spendthrift doctrine). *Sligh v. First Nat'l Bank*, 704 So. 2d 1020, 1028 (Miss. 1997) held that a tort creditor could reach interests in a spendthrift trust. In response, the Mississippi legislature enacted MISS. CODE ANN. § 91-9-503 (2004), which provides that an interest subject to a spendthrift clause "may not be transferred and is not subject to the enforcement of a money judgment until paid to the beneficiary." For criticism of the *Sligh* case, see Charles D. Fox IV & Michael J. Huft, *Asset Protection and Dynasty Trusts*, 37 REAL PROP. PROB. & TR. J. 287, 351 (2002) (noting that "the decision could herald a significant erosion of the spendthrift trust doctrine"); Charles D. Fox, IV & Rosalie Murphy, *Are Spendthrift Trusts Vulnerable to a Beneficiary's Tort Creditors?*, TR. & EST., Feb. 1998, at 57, 60 (doubting "existence of public policy exception" to spendthrift provisions as cited by *Sligh* court).

<sup>99</sup> See RESTATEMENT (THIRD) OF TRUSTS § 18 (2003) (discussing secret trusts and consequences of trustee's failure to perform).

<sup>100</sup> Evidence of the reaction that the drafting committee could have expected is the response of a Michigan estate planning practitioner to *Sligh*. For further discussion of this case, see *supra* note 98. He wrote: "The Mississippi Supreme Court abused basic trust,

case, the alternative of adding tort creditors to the list of preferred creditors also has the effect of curtailing further judicial development because, although it expands the list of preferred creditors, it remains a finite list.

A third available approach would have been to adopt the spendthrift trust doctrine except when a creditor or assignee could show that the doctrine would lead to an unconscionable result. The primary advantage of this third approach is that it leaves room for judicial development while acknowledging by statute the spendthrift trust doctrine and the intent-furthering tradition it embodies. In Rose's terms, this would be a *muddy* codification of the common law.<sup>101</sup> The Uniform Commercial Code's use of an unconscionability test in § 2-302 provides an apt analogy.<sup>102</sup> In contract law, it has resulted in what one might call (borrowing John Rawls's term) a form of "reflective equilibrium," in this case meaning a norm-developmental process going back and forth over time between legislatures and courts.<sup>103</sup> A similar approach has the potential to

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property and contract law by creating a common law exception to the spendthrift doctrine for a beneficiary who engages in gross negligence and intentional torts." Allan J. Claypool, *Asset Protection Overview: Techniques in the United States and Offshore*, 24 ACTEC NOTES 302, 312 (1999).

Although it decided not to expand on the traditional list of preferred creditors, that does not mean that the committee consistently deferred to the pressures to limit intent-defeating rules. When the drafting committee decided to codify the common law rule that prevents settlors from having protection from their creditors through the establishment of a trust, it decided that the public policy arguments outweighed the risk that the UTC would not gain the support of the trust bar. UNIF. TRUST CODE § 505 cmt. (amended 2005). It also decided not to create a rule of construction that would treat all trusts as spendthrift trusts unless the instrument or surrounding circumstances indicated that the settlor did not intend to restrain the voluntary or involuntary alienation of beneficial interests. Although a default rule in favor of spendthrift trusts would probably further the intent of many settlors, the drafting committee determined that, given the public policy arguments against the doctrine, it should only permit, and not encourage, the creation of spendthrift trusts.

<sup>101</sup> See Rose, *supra* note 96, at 578-79.

<sup>102</sup> U.C.C. § 2-302 (amended 2003). For examples of scholarly discussion of the doctrine of unconscionability in contract law, see generally Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1 (1993) (using distinction between property rules and liability rules in developing criteria for deciding questions of unconscionability in contract law); Robert A. Hillman, *Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302*, 67 CORNELL L. REV. 1 (1981) (developing framework that relies on common law doctrines, such as duress and undue influence, but leaving room for "pure unconscionability" cases).

<sup>103</sup> JOHN RAWLS, A THEORY OF JUSTICE 20, 48-51 (1971) (discussing the method of reflective equilibrium). See generally Alan Schwartz & Robert E. Scott, *The Political Economy*

enhance the future development of the law of trusts and the spendthrift trust doctrine in particular. Of course, it is entirely possible that this approach would have met considerable resistance because it also undermines the settlor's power to control the disposition of interests in trust.

#### B. CODIFICATION AND MODIFICATION OF THE RULE AGAINST PERPETUITIES

The RAP, with its internal logic, provided legal certainty as to the validity or invalidity of a future interest at its creation and, therefore, easily qualifies as a crystal rule. Nevertheless, difficulty in its application (law students, lawyers, and courts have struggled as they have tried to determine whether a particular disposition violated the RAP) led to the RAP taking on the attributes of a muddy rule.<sup>104</sup> Over time, the RAP no longer commanded the

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*of Private Legislatures*, 143 U. PA. L. REV. 595 (1995) (investigating structure of ALI and NCCUSL generally and, in particular, considering influences that lead ALI or NCCUSL to adopt rules rather than standards).

<sup>104</sup> In a malpractice suit against the drafting attorney for his drafting a trust provision violating the RAP, the court in *Lucas v. Hamm*, 364 P.2d 685 (Cal. 1961), *cert. denied*, 368 U.S. 987 (1962), held that the attorney was not liable, stating:

Of the California law on perpetuities and restraints it has been said that few, if any, areas of the law have been fraught with more confusion or concealed traps for the unwary draftsman . . . .

In view of the state of the law relating to perpetuities and restraints on alienation [which included confusing California legislation pertaining to perpetuities] and the nature of the error, if any, assertedly made by defendant in preparing the instrument, it would not be proper to hold that defendant failed to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly exercise.

*Id.* at 690. *But see* *Wright v. Williams*, 121 Cal. Rptr. 194, 199 n.2 (Ct. App. 1975) (stating that "[t]here is reason to doubt that the ultimate conclusion of *Lucas v. Hamm* is valid in today's state of the art. Draftmanship to avoid the rule against perpetuities seems no longer esoteric."). The prevailing view that estate planners will and should be held to a standard of practice that includes knowledge of the RAP generally means that estate planners should know enough to insert effective perpetuity savings clauses:

The common-law Rule Against Perpetuities should be and for the most part is less fearsome to practicing estate planning lawyers than it is to law students and law graduates studying for the bar examination. This is not because estate planning lawyers have found that the Rule becomes more understandable with experience, but because they have discovered a secret: They need not be greatly concerned about the technicalities of the Rule because they use perpetuity savings clauses.

consensus that the classical lawyers of the nineteenth century once gave it. Agreement grew that its ruthless application interfered too greatly with donative freedom.<sup>105</sup> USRAP muddies the RAP by introducing wait-and-see with the opportunity for court reformation in the event that an interest does not vest or fail within ninety years. At the same time, however, USRAP crystallizes the law's constraint on perpetual trusts by adopting the ninety-year period and eliminating the need to search for measuring lives—an issue at the center of earlier versions of the wait-and-see approach.<sup>106</sup> USRAP made the common law RAP more accessible with its ninety-year wait-and-see period. Crystallization, however, has not led to an ossification of the common law as modified. In retrospect, abolition of the RAP emerges as a risk of its statutory crystallization, given the general hostility in estates and trusts law for intent-defeating rules.

When first promulgated in 1986, the attack on USRAP mirrored the attacks on UPC (1990) §§ 2-503 (harmless error) and 2-707 (survivorship imposed on all future interests in trust). Commentators, most notably Jesse Dukeminier, charged that USRAP, with its ninety-year wait-and-see rule, represented a radical departure from the common law.<sup>107</sup> That argument did not

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LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 19-28 (4th ed. 2006).

<sup>105</sup> See RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS, ch. 1, Introductory Note (1983) (describing various jurisdictions' modification to Rule); W. Barton Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721, 747-48 (1952) (calling for legislation to modify rule).

<sup>106</sup> See KY. REV. STAT. ANN. § 381.216 (LexisNexis 2002) (adopting permissible vesting period measured by life of persons who have "causal relationship" to vesting or failure of interest); 1954 MASS. ACTS 337, codified at MASS. ANN. LAWS ch. 184A, § 1 (repealed by 1989 MASS. ACTS 1114) (measuring permissible vesting period by length of one or more life estates in persons in being at creation of interest); 20 PA. CONS. STAT. ANN. § 6104(b) (West 2005) (presupposing common law perpetuity period); RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 1.3(2) (1983) (using predetermined list of lives to determine permissible vesting period).

<sup>107</sup> Jesse Dukeminier, *The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo*, 34 UCLA L. REV. 1023, 1024 (1987) [hereinafter Dukeminier, *Ninety Years in Limbo*]. For other articles concerning USRAP, see generally Ira Mark Bloom, *Perpetuities Refinement: There is an Alternative*, 62 WASH. L. REV. 23 (1987); Jesse Dukeminier, *Wait and See: The Causal Relationship Principle*, 102 L.Q. REV. 250 (1986); Jesse Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648 (1985); Mary Louise Fellows, *Testing Perpetuity Reforms: A Study of Perpetuity Cases 1984-89*, 25 REAL PROP. PROB. & TR. J. 597 (1991); Amy

prevail, and USRAP enjoyed a substantial number of enactments soon after NCCUSL first promulgated it.<sup>108</sup> Within a climate in which the Rule stood as a paradigm example of a trap for the unwary and served for many years as the punch line for jokes among law students and law professors alike, relief from the Rule's harshness received a generally warm reception.<sup>109</sup> This atmosphere contrasts sharply with the situation surrounding UPC (1990) § 2-503 in which the uniform law reformers had to overcome a mindset of attorneys and judges that hold will execution formalities in high regard. Similarly, it contrasts with the initial response to UPC (1990) § 2-707—a response born of a mindset that rejects legislative insertion, albeit only presumptive insertion, of language into trust instruments. USRAP intended to solve a problem that everyone recognized, whereas UPC (1990) §§ 2-503 and 2-707 intended to solve problems that people did not perceive existed or did not perceive as sufficiently bothersome to warrant a change in the traditional law of estates and trusts. No one could effectively rebut the USRAP proponents' argument that the statute provided relief from an intent-defeating common law RAP. Opponents to UPC §§ 2-503 and 2-707, however, could show how will formalities and the common law's constructional preference for vesting were likely to be intent-effectuating.

USRAP's initial success has not assured its long-term viability. In 1986, only Idaho, South Dakota, and Wisconsin had either

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Morris Hess, *Freeing Property Owners from the RAP Trap: Tennessee Adopts the Uniform Statutory Rule Against Perpetuities*, 62 TENN. L. REV. 267 (1995); Ronald C. Link & Kimberly A. Licata, *Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts*, 74 N.C. L. REV. 1783 (1996); Lawrence W. Waggoner, *The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90-Year Waiting Period*, 73 CORNELL L. REV. 157 (1988); Lawrence W. Waggoner, *Perpetuity Reform*, 81 MICH. L. REV. 1718 (1983). For more debate and reform proposals, see T.P. Gallanis, *The Future of Future Interests*, 60 WASH. & LEE L. REV. 513, 563-74 (2003) (arguing that duration of future interests should be unrelated to vesting and providing draft Uniform Future Interests Act to implement this and other reforms); Paul G. Haskell, *A Proposal for a Simple and Socially Effective Rule Against Perpetuities*, 66 N.C. L. REV. 545, 562 (1988) (arguing for replacement of both validating and invalidating sides of common law Rule with statutory rule requiring vesting in possession no later than 125 years after creation).

<sup>108</sup> For a list of adoptions as of 2005, see Sitkoff & Schanzenbach, *supra* note 1, at 430-33.

<sup>109</sup> See, e.g., JESSE DUKEMINIER ET AL., *WILLS, TRUSTS, AND ESTATES* 674 (2005) (referring to study of RAP as "the magic garden of perpetuities").



actually or effectively abolished the Rule. By 1998, Alaska, Arizona, Delaware, and Illinois joined the other three and, by 2005, fourteen additional states did the same.<sup>110</sup> As we write, jurisdictional competition for trust dollars through repeal of the RAP continues to occupy the attention of banks and trust attorneys.<sup>111</sup> Just at the moment that proponents of USRAP successfully prevailed over attacks that the ninety-year wait-and-see approach significantly weakened the common law Rule, they found others dismissing USRAP and arguing for outright repeal of the RAP. As each of us has written elsewhere, the impetus for perpetual trusts emanates from a strong Anglo-American tradition of dead hand control and a nearly singular focus on the rights of settlors to control beneficiaries' enjoyment of their trust interests.<sup>112</sup> The RAP, in fact, stands nearly alone as an intent-defeating common law rule that recognizes donees as property owners who at some point (a life in being plus twenty-one years) have the right to a transferable interest. In most other respects, trust law in the United States has given way to a settlor's dynastic impulse.<sup>113</sup>

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<sup>110</sup> Sitkoff & Schnazenbach, *supra* note 1, at 375-77, 430-33.

<sup>111</sup> *See id.* at 416-18 (finding that competition among states "has influenced the situs of trust funds totaling roughly \$100 billion").

<sup>112</sup> Alexander, *supra* note 88, at 1189-90; Fellows, *supra* note 90; Mary Louise Fellows, *Why the Generation-Skipping Transfer Tax Sparked Perpetual Trusts*, 27 CARDOZO L. REV. (forthcoming 2006).

<sup>113</sup> Two possible counter examples are worth brief consideration. The first concerns the *Clafin* doctrine, which holds that beneficiaries cannot compel a trust's premature termination if it would defeat a material purpose of the trust. *See Clafin v. Clafin*, 20 N.E. 454, 456 (Mass. 1889) (refusing to terminate trust providing for distribution on installments). UTC § 411 codifies the common law version of that doctrine, as its comment states. UNIF. TRUST CODE § 411 cmt. (amended 2005). Section 411(c), however, appears to relax the original version of the doctrine with respect to one aspect of the material purpose requirement. It provides that "[a] spendthrift provision in the terms of the trust is not presumed to constitute a material purpose of the trust." *Id.* § 411(c). Under the common law version of the *Clafin* doctrine, courts treated a spendthrift provision as a material purpose that would prevent termination of a trust. The purpose behind subsection (c), however, was not to defeat or inhibit the settlor's intent, but in fact to promote that intent. Lawyers frequently insert spendthrift clauses as part of a trust's "boilerplate," with little or no discussion with the settlor. In this context, § 411(c)'s reversal of the presumption represents an effort to prompt judicial investigation of the settlor's actual intent. *See id.* § 411 cmt. (calling for "some showing of a particular concern or objective" of settlor). In this sense, then, the provision continues U.S. trust law's traditional allocation of control over the trust to the settlor rather than to the beneficiaries. It is worth noting, however, that the *Restatement (Third) of Trusts* does substantially revise the *Clafin* doctrine. Section 65 of the Restatement provides that the court may authorize premature trust termination "if it determines that the

In recent years, competitive considerations have played an increasing role in the profession of estate planning. Within this environment, when federal transfer tax law, through the generation-skipping transfer (GST) tax exemption, invited the creation of dynastic trusts, the RAP, even in its more benign USRAP form, looked more like an unwarranted impediment to trust business for estate planners and institutional trustees, and less like a statement of good public policy.<sup>114</sup> The GST tax rules, which, when enacted in 1986, allowed settlors to exempt up to \$1 million from the GST tax and, as of 2006, allows them to exempt up to \$2 million, created a considerable incentive for settlors to establish dynastic trusts.<sup>115</sup> In accordance with the GST tax, once a settlor creates a GST tax-exempt trust, the trust beneficiaries do not have to pay any federal transfer taxes on their interests that remain in trust, regardless of how much it appreciates or how long it remains in trust. When

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reason for termination outweighs the material purpose.” RESTATEMENT (THIRD) OF TRUSTS § 15 (2005). The comment goes on to state that neither spendthrift provisions nor discretionary provisions create a presumption that the trust is a material purpose trust. *Id.* at cmt. e.

The second possible counter-example to the deference accorded settlors is the UTC’s codification of the “benefit-the-beneficiaries” principle in § 404, which states that a “trust and its terms must be for the benefit of its beneficiaries.” The provision may appear to dislodge the central role of the settlor under trust law doctrine. The commentary to UTC § 404, however, considerably limits its breadth by first acknowledging that the “settlor has considerable latitude in specifying how a particular trust purpose is to be pursued,” and then referring only to “administrative and other nondispositive trust terms” when applying the test that the trust terms must “reasonably relate” to a trust’s purpose “and not divert the trust property to achieve a trust purpose that is invalid, such as one which is frivolous or capricious.” UNIF. TRUST CODE § 404 cmt. (amended 2005). The commentary goes on to refer to UTC § 412(b), which provides that, even if a settlor has anticipated the change in circumstances that have occurred, a court may modify a trust’s administrative terms, such as investment directions, if they become “impracticable or wasteful or impair the trust’s administration.” Within the framework of the UTC, the “benefit-the-beneficiaries” doctrine essentially is a “change-of-circumstances doctrine” limited to administrative provisions. *Id.* §§ 404 cmt., 412(b) cmt.; John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1110-11, 1119 (2004).

The respect for a settlor’s dynastic impulse in the United States explains the fundamental difference between the trust law in the United States and England. Alexander, *supra* note 88, at 1192 n.8; *see also* Paul Matthews, *The Comparative Importance of the Rule in Saunders v. Vautier*, 122 LAW Q. REV. 266, 280-92 (2006) (comparing U.S. approach to trust law and England’s in light of changes to perpetuity rules); Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 658-63 (2004) (discussing *Clafin* doctrine).

<sup>114</sup> Sitkoff & Schanzenbach, *supra* note 1, at 360 n.4.

<sup>115</sup> I.R.C. § 2010(c) (Supp. III 2003); *id.* § 2631(c) (2000 & Supp. II 2002).

Congress enacted the GST tax, neither they nor the experts who testified before them seemed to have contemplated an estate planning world without the RAP.<sup>116</sup> With full recognition that banks and estate planners would conduct a heavy marketing campaign promoting GST tax-exempt trusts, everyone agreed that the generous, and, for some, significantly flawed, GST tax exemption had an end point—the RAP or its statutory counterpart, USRAP.<sup>117</sup>

As Max M. Schanzenbach and Robert H. Sitkoff have shown through empirical analysis of data assembled from annual reports to federal banking authorities by institutional trustees, the “GST tax sparked the movement to abolish the Rule and the rise of the perpetual trust.”<sup>118</sup> Without question, the GST tax has played a central role in engendering enthusiasm for repeal of the RAP and USRAP. Nevertheless, it remains important to recognize that it only can play that role in an environment receptive to perpetual trusts—the GST tax spark fell on dry tinder.<sup>119</sup> That environment includes the tradition of dead hand control and the growth in the commerce of estate planning.

Paradoxically, as a result of the clarity produced by the ninety-year wait-and-see rule, USRAP itself also may be contributing inadvertently to the estate planning environment that supports perpetual trusts. Dukeminier came close to predicting as much when he wrote, “[the] Uniform Statute is a radical remedy for what ails the Rule against Perpetuities. It is a long step towards

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<sup>116</sup> STAFF OF J. COMM. ON TAXATION, 109TH CONG., OPTIONS TO IMPROVE TAX COMPLIANCE AND REFORM TAX EXPENDITURES 394 (Comm. Print 2005), available at <http://www.house.gov/jet/s-2-05.pdf>; *Generation-Skipping Transfer Tax: Hearing Before the H. Comm. on Ways and Means*, 98th Cong. 335, 336 (1984) (statement of Raymond H. Young, Chairman, Generation-Skipping Transfer Tax Subcommittee, Boston Bar Association) [hereinafter Young Testimony].

<sup>117</sup> See Young Testimony, *supra* note 116, at 336, 338; see also Jesse Dukeminier, *The Uniform Statutory Rule Against Perpetuities and the GST Tax: New Perils for Practitioners and New Opportunities*, 30 REAL PROP. PROB. & TR. J. 185 *passim* (1995) (discussing interaction of RAP, USRAP, and GST tax grandparenting provisions); Dukeminier & Krier, *supra* note 1, at 1313 (stating that Congress “probably assumed that most states would continue to adhere to the Rule against Perpetuities in one or another variation, but this has proved unfounded”).

<sup>118</sup> See Max M. Schanzenbach & Robert H. Sitkoff, *Perpetuities of Taxes: Explaining the Rise of the Perpetual Trust*, 27 CARDOZO L. REV. (forthcoming 2006).

<sup>119</sup> Fellows, *supra* note 112 (analyzing components that make up “dry tinder”).

abolishing the Rule against Perpetuities itself.”<sup>120</sup> Where Dukeminier was wrong, however, was in his belief that the Rule would die because it could not “survive 90 years of desuetude.”<sup>121</sup> With the widespread adoption of USRAP, the Rule lost its mystique—a mystique based on the view that the Rule had its own internal logic of legal certainty. Without that mystique, proponents of some limitation on dynastic trusts would no longer be able to rely on common law traditions that honor formalism.<sup>122</sup> Lewis M. Simes in his attack on wait-and-see in the 1950s perhaps came closest to capturing this idea when he wrote that “[i]f the ‘wait-and-see’ doctrine is generally adopted . . . the common law rule against perpetuities, in anything like the form in which we know it, will cease to exist.”<sup>123</sup> Arguably, on the strength of the GST tax exemption alone, the movement to abolish the Rule (as applied to trusts) would have occurred. Yet, the promulgation of the USRAP, which stripped the Rule of its mystique, also may have made it easier for bankers and trust attorneys to move toward perpetual trusts.

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<sup>120</sup> Dukeminier, *Ninety Years in Limbo*, *supra* note 107, at 1024.

<sup>121</sup> *Id.* at 1026. Ultimately, writing with Krier, Dukeminier did not attribute the abolition movement to USRAP at all, but to the GST tax exemption and jurisdictional competition:

The reason [why states are permitting perpetual trusts] has little if anything to do with some wish on the part of wealthy people to control the lives of their unknown descendants; rather, it has to do with their interest in saving on federal transfer taxes imposed at the descendants’ deaths, and on competition among the states to cater to that interest.

Dukeminier & Krier, *supra* note 1, at 1314-15.

<sup>122</sup> Dukeminier and Krier made a similar point:

[N]otwithstanding that ninety years might equal the period one could accomplish under the Rule, ninety is on its face a number and not a principle. The drafters of USRAP, no doubt unintentionally, made an arguably damaging reductionist move. To reduce matters to “ninety years” is to obscure the *purposes* of restrictions on dead-hand control, especially in the minds of those people (which is to say just about everybody) who do not quite understand control of perpetuities in the first place. USRAP makes a mere number the salient thing, the topic of debates, the target of reforms, the subject of marginal alterations—extensions by a few years, by a few decades, by a couple of centuries or so.

*Id.* at 1310.

<sup>123</sup> Lewis M. Simes, *Is the Rule Against Perpetuities Doomed? The “Wait and See” Doctrine*, 52 MICH. L. REV. 179, 190 (1953).

USRAP remains the best and most workable statutory reform proposal addressing the problems caused by the operation of the common law Rule. The problem facing uniform law reformers in the case of USRAP is explaining convincingly why the underlying purpose of the intent-defeating RAP has continuing relevance. Time will tell whether USRAP will retain its current dominance in the United States. If, as the staff of the Joint Committee on Taxation has proposed, Congress amends the law to eliminate the generation-skipping tax advantages of perpetual trusts, the current interest in such trusts may subside.<sup>124</sup> The interest may also subside if Congress permanently repeals the federal estate tax and the GST tax.<sup>125</sup> Either event may lessen the pressure for abolition of the RAP and repeal of USRAP.

With interest in perpetual trusts having been sparked by Congress, however, one wonders whether the stakeholders in the business of estate planning will continue to find reasons to promote the continuation of existing trusts and create more of them. Notably, Schanzenbach and Sitkoff seem to raise an alarm about perpetual trusts. They indicate that liberal rules of trust modification and termination, along with trust provisions allowing each generation of beneficiaries to decide to continue the trust or bring it to an end through the exercise of nongeneral powers of appointment, are necessary to control the potential problems that perpetual trusts create.<sup>126</sup> Whether these tools will prove sufficiently robust to address anticipated and unanticipated problems remains uncertain. In any case, the need for estate planners to rely on these anti-perpetuity mechanisms suggests that even the most ardent supporters of perpetuity trusts actually may have concerns about settlors' retaining control over their property for centuries upon centuries. If that is true, this is yet another reason to predict that the current quest for perpetuity trusts may

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<sup>124</sup> See STAFF OF J. COMM. ON TAXATION, *supra* note 116, at 392-95 (proposing limitation of one generation skip to avoid "perpetual dynasty trust").

<sup>125</sup> See Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, §§ 501, 901, 115 STAT. 38, 69, 150 (2001) (codified in scattered sections of I.R.C.) (repealing estate and generation-skipping transfer taxes after December 31, 2009 and reinstating those taxes after December 31, 2010).

<sup>126</sup> See Schanzenbach & Sitkoff, *supra* note 118.

wane. In other words, in the long run, USRAP may garner broad support as the most appropriate approach for balancing the donative freedom of the current generation and the donative freedom of future generations.

## V. CONCLUSION

Statutory reform has made and will continue to make the law of estates and trusts simpler, fairer, and less expensive. As law reformers, and NCCUSL especially, go forward to build on Richard Wellman's legacy, we urge them to remain mindful of the last forty years of legal change. That history teaches four important lessons. First, they need to appreciate the residual power of schemata and evaluate whether and how they can disrupt these mental images to assure the full potential of the proposed statutory reform. Second, they need to appreciate that the reception of new rules of construction depends on whether a consensus among estates and trusts experts emerges that the current law fails to further donative intent. Third, law reformers must proceed most cautiously when dealing with intent-defeating common law rules. Crystallization of an intent-defeating rule can stunt further doctrinal development to enhance the rule's potency, or it can lead to further statutory change that will undermine its effectiveness. Given the intent-furthering traditions of estates and trusts law, codification of intent-defeating rules risks establishing a one-way path in which pressure will build solely to ratchet down the rule's vitality or even to eliminate it completely. Fourth, law reformers should not shy away from legislative reform merely because it may not garner significant support at the outset. Legislative reform often takes an extended period of time to gain acceptance. In the estates and trusts field, continuing and persistent efforts are necessary to overcome the residual force of traditional schemata and the deference to the language of governing instruments. These four lessons together hold the promise that the modern law of estates and trusts will follow Richard Wellman's wise lead and remain responsive to the needs of every state's citizenry.