THE MYTH OF TESTAMENTARY FREEDOM

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> For what can we bequeath, save our deposed bodies
> to the ground...? And nothing can we call our own
> but death, and that small model of the earth
> that serves as paste and cover to our bones
> (Richard II, Act III, Scene 2)

Courts and scholars often treat freedom of testation as if it were a fundamental tenet of our liberal legal tradition. Supposedly, "[t]he first principle of the law of wills is freedom of testation."[1] One has a right to distribute property upon death solely according to the dictates of one's own desires, unfettered by the constraints of society's moral code or the claims of others.[2]

Yet, "[t]he law of wills is notorious for its harsh and relentless formalism."[3] Traditional wills acts establish a gauntlet of formalities that must be run before a document may earn the name "Will." According to commentators, courts often insist on perfect performance of those formalities as a condition of validation. At least one commentator laments that courts void potential wills for "[t]he most minute defect in formal compliance,...no matter how abundant the evidence that the defect was inconsequential."[4] If, as Gulliver and Tilson first suggested, the "requirements of execution...seem justifiable only as implements for its accomplishment," and thus "should not be revered as ends in themselves, enthroning formality over frustrated intent,"[5] then a

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1. John H. Langbein, *Substantial Compliance with the Wills Act,* 88 HARV. L. REV. 489, 491 (1975). *See also* Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers,* 51 YALE L.J. 1, 2 (1941) (stating that "[o]ne fundamental proposition is that, under a legal system recognizing the individualistic institution of private property and granting to the owner the power to determine his successors in ownership, the general philosophy of the courts should favor giving effect to an intentional exercise of that power").

2. *See, e.g.,* Fischer v. Heckerman, 772 S.W.2d 642, 645 (Ky. Ct. App. 1989) ("[t]he right of a testator to make a will according to his own wishes is jealously guarded by the courts, regardless of a court's view of the justice of the chosen disposition"; reversing grant of summary judgment upholding a will that left the testator's estate to others than his family on the grounds that the "unnatural" bequest gave rise to an issue of fact).

3. Langbein, *supra* note 1, at 489.

4. *Id. See also* Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code,* 142 U. PA. L. REV. 1033, 1036 (1994) ("[t]he problem lies not with the formalities, but with judicial insistence on literal compliance with them").

5. Gulliver & Tilson, *supra* note 1, at 3.

paradox exists: a primary purpose of will formalities is to ensure that the testator's final, deliberate intent controls, but judicial insistence on strict compliance with those formalities frustrates the testator's intent by aborting transfers the testator clearly intended to make.

This perceived injustice led a choir of commentators to call for reform. Beginning with Professor John Langbein, who twenty years ago called for the adoption of a substantial compliance doctrine,[6] commentators have added their voices to the rondo, citing case after case where insistence on strict compliance with formalities allegedly frustrated testamentary intent.[7] The chant for reform crescendoed: "Intent-defeating formalism" must end.

The oratorio climaxed in a crashing finale that resulted in three types of reforms, two of which are reflected in both the original Uniform Probate Code (the "Former UPC"), and the 1990 revision ("the Revised UPC"). First, formalities have been simplified to increase the chances that testators will successfully comply with them. The most important reform, however, is an assault on formalism itself. The Revised UPC contains the revolutionary "dispensing power," currently championed by Langbein, which would enable courts to validate defectively executed documents when presented with clear and convincing evidence that the document reflects testamentary intent. Third, a few courts recently have expressly replaced the strict compliance doctrine with a doctrine of substantial compliance.[8]

In the reformers' world, courts—whose sole aim is to give effect to documents intended to be wills—are frequently though reluctantly bound by the thick, unyielding ropes of Wills Act formalities and the required insistence on strict compliance with those formalities. The Revised UPC and the substantial compliance doctrine replace ropes with rubber bands in the simplistic and misguided belief that granting courts more room to maneuver will ensure greater realization of testamentary intent.

A careful review of case law, however, reveals that many courts do not exalt testamentary freedom above all other principles. Notwithstanding frequent declarations to the contrary, many courts are as committed to ensuring that testators devise their estates in accordance with prevailing normative views as they are to effectuating testamentary intent.[9] Those courts impose upon testators a duty to provide for those to whom the court views as having a superior moral claim to the testator's assets, usually a financially dependent spouse or persons related by blood to the testator. Wills that fail to provide for those individuals typically are upheld only if the will's proponent can convince the fact-finder that the testator's deviation from normative values is morally justifiable. This unspoken rule, seeping quietly but fervently from the case law, directly conflicts with the oft-repeated axiom that testamentary freedom is the polestar of wills law.

Courts impose and enforce this moral duty to family through the covert manipulation of doctrine. To begin with, courts faced with an offensive will often use other doctrines ostensibly designed to ascertain whether the testator

6. Langbein, *supra* note 1, at 489.
7. *See, e.g., infra* note 22.
8. *See, e.g., In re* Will of Ranney, 589 A.2d 1339 (N.J. 1991).
9. Of course, when a will offered for probate is not contested, a court generally will not declare it invalid.

formulated testamentary intent—doctrines such as capacity, undue influence and fraud—to frustrate the testator's intent and distribute estate assets to family members. Moreover, this tendency to protect family members is evident in many cases that purport to determine only whether requisite will formalities have been met. Notwithstanding reformers' claims that courts always insist on strict compliance with will formalities, courts throughout this century often have accepted less than strict compliance when necessary to ensure fulfillment of a testator's moral duty. Conversely, courts are more likely to require strict compliance when a will's provisions can be viewed as a breach of that duty. At the end of the day, testamentary freedom exists for the vast majority of testators who happen to have the same sense of duty and moral obligation that the law implicitly imposes—but often not for those who hold non-conforming values.

In drafting and redrafting the formalities provisions of the UPC, the distinguished advisory committee apparently assumed that courts' primary objective is to effectuate testamentary intent. That assumption is especially peculiar in light of other UPC provisions (and various state statutes) that reflect competing principles. Moreover, the failure to recognize the persistence of objectives other than effectuating testamentary intent is prevalent in scholarship. Consider Langbein's influential recommendation that a dispensing power be included in the Revised UPC. Langbein concluded that the dispensing power had been a great success in foreign states that had adopted it, most notably South Australia.[10] Yet his analysis of South Australia's law all but ignores the fact that in South Australia, as in almost all jurisdictions adopting the dispensing power, the testator's family members and dependents have statutory remedies for disinheritance.[11] Those statutes give courts extraordinarily broad discretion to ignore the provisions of a will and distribute testators' estates to family or dependents on the ground that the testator has a moral obligation to provide for them. Because courts in those jurisdictions can stifle testamentary freedom forthrightly, they have little cause to use will formalities to ensure that the testator meets perceived moral obligations.

Thus, the success of the dispensing power in those states is irrelevant to an analysis of its impact in a jurisdiction—such as American jurisdictions—that provides the testator's relatives no express protection against disinheritance. There is no reason to believe that those courts will suddenly subordinate their concern with a testator's moral obligations to the principle of testamentary freedom; rather, courts merely will shift their focus to new doctrinal devices to

10. *See* John H. Langbein, *Excusing Harmless Errors In the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1, 1, 27–29, 33–34, 41, 45–53 (1987).

11. *See* South Australia's Inheritance (Family Provision) Act, 1972–1975 (Number 32 of 1972, as amended by Inheritance (Family Provision) Act Amendment Act, 1975, No. 91 of 1975 (repealing Testator's Family Maintenance Act, 1918, and Testator's Family Maintenance Act, 1943)). *See also* England's Inheritance (Provision For Family And Dependants) Act, 1975, ch. 63 (England's first Family Provision Act was enacted in 1938. *See* Mary Ann Glendon, *Eason–Weinmann Center for Comparative Law Symposium on Reflections on the Civil-Law Tradition in Louisiana: Agenda for the Twenty-First Century: Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1186–88 (1986)); Saskatchewan's Act Authorizing Provision for the Maintenance of Certain Dependants of Testators and Intestates (The Dependants' Relief Act), Revised Statutes of Saskatchewan, ch. D–25.

ensure fulfillment of the testator's duty to family. And of course, courts will still have the capacity, fraud and undue influence doctrines at their disposal if necessary to ensure satisfaction of perceived moral obligations.

Thus, there is no reason to believe that the dispensing power and other reforms will result in substantially greater judicial commitment to testamentary intent. Rather, the loosening of formalities will simply lead courts to use different pretexts for imposing their moral order.

To prove the point, I examine how courts enforce moral norms by manipulating doctrines designed to root out wills that lack testamentary intent and by selectively imposing the strict compliance doctrine. First, I explore the undue influence doctrine to show how courts will often invalidate even perfectly executed wills when necessary to ensure that the testator meets his or her familial duty. I then focus on cases construing the traditional Wills Act formality that requires two witnesses to sign the will in the testator's presence. I also explore cases that determine whether the signature requirement was satisfied when the testator was physically assisted in executing his or her will.

I then show that our law is no stranger to the concept of testamentary familial duty, and often imposes such a duty overtly. In fact, the urge to restrict testamentary freedom in favor of the family is almost universal; most legal systems expressly protect family members from disinheritance.

Finally, I demonstrate that the adoption of the Revised UPC will not necessarily lead to greater testamentary freedom. Simplifying will formalities may deprive creative courts of one weapon in the battle to assure that testators fulfill perceived moral obligations, but simplification will hardly make a dent in the judicial arsenal. When legislatures and courts have, in the past, simplified will formalities, courts have adapted by finding new bases for invalidating wills that previously would have been stricken for failure to comply with formalities. To illustrate, I examine a series of cases decided in jurisdictions that have purported to relax the traditional requirement that a testator's signature appear at the end of a document if it is to qualify as a will. Finally, I show that even the dispensing power will not dim courts' loyalty to family duty, and thus will not ensure greater testamentary freedom for those who wish to distribute their property in ways that may offend a court's normative values.

I. THE ARGUMENT FOR REFORM

At least since 1941, when Gulliver and Tilson wrote their seminal article on gratuitous transfers,[12] commentators have viewed courts' insistence on strict compliance with Wills Acts as the primary enemy of effectuation of testamentary intent.[13] The argument begins by noting that the primary function of the Wills Act is to ensure reliable evidence of a testator's final, deliberate intentions concerning the distribution of his or her estate. This is commonly

12. *See* Gulliver & Tilson, *supra* note 1, at 1.

13. The Wills Acts of most states require at that at least the following formalities be observed in executing a will: there must be a writing, signed by the testator and attested by two witnesses. Langbein, *supra* note 10, at 2. Additional requirements are imposed by most states. For example, New York law requires that the testator sign in the presence of two witnesses, that the testator announce to the two witnesses that the document is her will, and that the two witnesses attest the document in the testator's presence. N.Y. EST. POWERS & TRUSTS LAW § 3–2.1 (McKinney 1981 & Supp. 1996).

referred to as the "evidentiary function."[14] The Wills Act formalities also serve a "channeling function" (by creating a standardized formal will recognizable by courts),[15] a "cautionary function" (by warning the testator of the seriousness and finality of the event),[16] and a "protective function" (by attempting to protect the testator from imposition at the time the will is executed).[17]

Langbein asserts that all of those functions exist to help ensure that a testator's estate "really is distributed according to his intention."[18] For example, the fact that a testator's will follows a standardized form is evidence that he or she intended that the document function as a will. Similarly, we caution a testator of the seriousness and finality of the event because cautioning increases the chances that the document represents his or her final, deliberate wishes regarding the distribution of his or her estate, as opposed to some momentary whim.[19]

Langbein and others have argued strenuously that the intent-serving purposes of the Wills Act consistently have been frustrated by courts' insistence on strict compliance with formal requirements: "[t]he most minute defect in formal compliance is held to void the will, no matter how abundant the evidence that the defect was inconsequential."[20] Professor Bruce Mann laments that "[c]ourts have routinely invalidated wills for minor defects in form even in uncontested cases and sometimes even while conceding—always ruefully, of course—that the document clearly represents the wishes and intent of the testator."[21] Commentators overwhelmingly agree. Indeed, a review of writings on this subject shows that the dominant theme of estates law scholarship in the last few decades concerns the threat that formalism allegedly poses to testamentary freedom.[22]

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14. Gulliver & Tilson, *supra* note 1, at 6; Langbein, *supra* note 1, at 492.

15. Langbein, *supra* note 1, at 493–94.

16. *Id.* at 494–96.

17. *Id.* at 496–97; *see also* Gulliver & Tilson, *supra* note 1, at 5–13 (discussing the functions of Wills Act formalities).

18. Langbein, *supra* note 1, at 492. *See also* Langbein, *supra* note 10, at 3 (stating that "[t]he Wills Act is meant to assure the implementation of his testamentary intent at a time when he can no longer express himself by other means"). Langbein also states that

> [t]he requirement of written terms forces the testator to leave permanent evidence of the substance of his wishes. Signature and attestation provide evidence of the genuineness of the instrument, and they caution the testator about the seriousness and finality of his act. The requirement that the will be attested by disinterested witnesses is also supposed to protect the testator from crooks bent on deceiving or coercing him into making a disposition that does not reflect his true intentions.

Id.

19. Not everyone views formalities as functioning primarily to protect intent. *See infra* notes 23–25 and accompanying text.

20. Langbein, *supra* note 1, at 489.

21. Mann, *supra* note 4, at 1036.

22. *See* Jane B. Baron, *Intention, Interpretation, and Stories,* 42 DUKE L.J. 630, 635 (1992) ("Unfortunately, as has long been recognized, the doctrines created to serve the testator's wishes have the potential to undercut them. Will execution requirements...may deny effect to wishes due to minor defects of form."); J. Rodney Johnson, *Dispensing with Wills Act Formalities for Substantively Valid Wills,* VA. B. ASS'N J. 10, 13 (Winter 1992) (recommending that Virginia legislature pass dispensing power statute); James Lindgren, *The Fall of Formalism,* 55 ALB. L. REV. 1009, 1010 (1992) (arguing for even greater reduction of formalities than are present in the Revised UPC because "when formalism falls, intent rises"); James Lindgren, *Abolishing the Attestation Requirement for Wills,* 68 N.C. L. REV. 541, 546 (1990) (arguing that attestation requirements should be abolished because "[t]he law should set

The commentators are in unison: courts must be freed from the constraints of a formalistic approach to Wills Act formalities, so that the goal of effectuating testamentary intent may be attained. Society must be freed from the draconian results of "intent-defeating formalism."

Of course, formalities may have purposes other than or in addition to protecting testamentary intent. For example, Professor Bruce Mann has noted that

> [t]he statutory requirements for formal wills...take the vast array of testamentary things and channel them into a form that is readily recognizable as a will, thus easing the transfer of property at death. By imposing a standard form on testamentary writings, they enable probate courts to identify documents as wills solely on the basis of readily ascertainable formal criteria, thereby permitting probate to proceed in the

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requirements at a level that tends to enforce the testator's intent, not frustrate it"); Charles I. Nelson & Jeanne M. Starck, *Formalities and Formalism: A Critical Look at the Execution of Wills,* 6 PEPP. L. REV. 331, 354–56 (1979) (criticizing strict construction and advocating their own statutory solution that would allow courts more discretion in validating wills); Rosemary Tobin, *The Wills Act Formalities: A Need for Reform,* N.Z. L.J. 191 (June 1991) (arguing for adoption of dispensing power in New Zealand to ensure effectuation of testamentary intent); Lydia A. Clougherty, Note, *An Analysis of the National Advisory Committee on Uniform State Laws' Recommendation to Modify the Wills Act Formalities,* 10 PROB. L.J. 283 (1991) (suggesting new execution requirements to minimize the "risk of frustrating the testator's intent"); Kelly A. Hardin, Note, *An Analysis of the Virginia Wills Act Formalities and a Need for a Dispensing Power Statute in Virginia,* 50 WASH. & LEE L. REV. 1145, 1178–81 (1993) (arguing that dispensing power is necessary to effectuate testamentary intent); Melissa Webb, Note, *Wich v. Fleming: The Dilemma of a Harmless Defect in a Will,* 35 BAYLOR L. REV. 904 (1983) (urging Texas courts to adopt a substantial compliance approach to will construction). *See also* Bruce H. Mann, *Self-Proving Affidavits and Formalism in Wills Adjudication,* 63 WASH. U. L.Q. 39, 39 (1985) (criticizing courts for "routinely invalidat[ing] wills because of minor defects in execution, even when no one questions that the will represents the wishes and intent of the testator"). Mann also notes that other scholars "have roundly and persistently criticized such formalism," and that

> all of the major trusts and estates casebooks but one reprint excerpts from the Gulliver and Tilson article or from Langbein's article or from both. *See* E. CLARK, L. LUSKY, & A. MURPHY, CASES AND MATERIALS ON GRATUITOUS TRANSFERS: WILLS, INTESTATE SUCCESSION, TRUSTS, GIFTS AND FUTURE INTERESTS 271–77 (2d ed. 1977); J. DUKEMINIER & S. JOHANSON, WILLS, TRUSTS, AND ESTATES 183–86 (3d ed. 1984); S. KURTZ, PROBLEMS, CASES AND OTHER MATERIALS ON FAMILY ESTATE PLANNING 57–62 (1983); W. MCGOVERN, JR., WILLS, TRUSTS AND FUTURE INTERESTS: AN INTRODUCTION TO ESTATE PLANNING, CASES AND MATERIALS 105–06, 119–21 (1983); E. SCOLES & E. HALBACH, JR., PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 112–15 (3d ed. 1981); L. SOLOMON, TRUSTS AND ESTATES: A BASIC COURSE, PROBLEMS, PLANNING AND POLICY 201–04, 215, 233–39 (1981); R. WELLMAN, L. WAGGONER, & O. BROWDER, JR., PALMER'S CASES AND MATERIALS ON TRUSTS AND SUCCESSION 129–32 (4th ed. 1983); H. WILLIAMS, DECEDENTS' ESTATES AND TRUSTS: CASES AND MATERIALS 131–32 (1968).

Id. at 60 n.121. *See also* Celia Fassberg, *Form and Formalism: A Case Study,* 31 AM. J. COMP. LAW 627 (1983); Gulliver & Tilson, *supra* note 1, at 17–18 (noting that "[d]octrinal barriers to effectuation of intent are raised most frequently by the requirements of the statutes of wills..." and arguing for substantial performance approach to will construction); J.K. Maxton, *Execution of Wills: The Formalities Considered,* 1 CANTERBURY L. REV. 393 (1982). *See also* RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 33.1, cmt. g (1992) (noting that law reform organizations, some legislatures and commentators support use of harmless error rule, and recommending use of substantial compliance doctrine). *See generally* Langbein, *supra* note 10, at 1 (arguing for adoption of dispensing power).

vast majority of cases as a routine, bureaucratic process.[23]

However, as Mann also notes, "[t]he routinization of probate by means of the formalities, however convenient or efficient, comes at a cost. Some wills are found formally wanting, and therefore invalid, despite the conceded clarity of their testamentary intent."[24] Because formalities arguably serve purposes unrelated to their intent-serving ones, commentators disturbed by the triumph of formalism over intent have not called for a complete elimination of all formalities. Rather, the primary focus of many reformers is to attack "formalism rather than the formalities themselves."[25] Courts could adopt a less formalistic approach that would afford greater protection for testamentary intent while sufficiently preserving formalities to ensure the other benefits they afford.

Nevertheless, the reformers have sought to minimize both formalities and formalism to increase the effectuation of intent. Commentators have advocated that Wills Acts should be simplified, thereby increasing the odds that testators will successfully comply with those statutes when executing their wills.[26] Others have argued that courts should drop strict construction of the Wills Act in favor of a more flexible approach. Professor John Langbein has been the driving force behind implementing this latter program. Langbein first argued that courts should adopt a "substantial compliance doctrine," which would not reflexively invalidate a non-complying will, but would lead to a further question: "does the non-complying document express the decedent's testamentary intent, and does its form sufficiently approximate Wills Act formality to enable the court to conclude that it serves the purposes of the Wills Act?"[27] After analyzing Queensland's experience with the substantial compliance doctrine and proclaiming it "a flop,"[28] Langbein became an advocate of the so-called "dispensing power," a proposed statutory solution that would allow courts to forgive failure to comply with any formality as long as that court was satisfied, by clear and convincing evidence, that the decedent had intended the proffered document to be his or her will. Thus, the dispensing power "makes the testator's intent paramount and, more to the point, independent of form."[29] Citing South Australian courts' interpretation of the

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23. Mann, *supra* note 4, at 1036.

24. *Id.* at 1048.

25. *Id.* at 1036. Some commentators have, however, argued for the elimination of at least some formalities. *See* Lindgren, *Abolishing the Attestation Requirement for Wills*, *supra* note 22, at 543; *see also* the Revised UPC, which substantially reduces formal requirements for will execution.

26. *See* Former UPC, pt. 5, general cmt.; *see, e.g.*, Lindgren, *The Fall of Formalism*, *supra* note 22, at 1024–30 (arguing that the attestation requirements for wills should be abolished).

27. Langbein, *supra* note 1, at 489.

28. Langbein, *supra* note 10, at 1. According to Langbein, Queensland courts have interpreted the substantial compliance doctrine "so narrowly as to render it nearly useless." *Id.* at 41. Thus,

> In the hands of the Queensland bench, substantial compliance is no longer a means of discerning testamentary intent, it is a new formal requirement that must be established independently of testamentary intent. And the standard for this formality is essentially quantitative: compliance cannot be substantial unless the defect is minimal.

Id. at 44.

29. Mann, *supra* note 4, at 1036.

dispensing power, which in Langbein's view is a "triumph of law reform,"[30] Langbein predicts that a dispensing power will promote testamentary freedom in the United States as well.

Both versions of the UPC reflect the calls for reform. The will execution formalities delineated in the Former UPC were simpler than those in force in most states. For example, the Former UPC section 2–502 eliminated the traditional requirement that the testator sign the document at its end, and eliminated the requirement that attesting witnesses sign in the testator's presence.[31] These changes were made to ensure that courts would "validate the will wherever possible."[32] At last count, fifteen states had adopted the former UPC and many more states had enacted select portions of it.[33]

Langbein and Lawrence W. Waggoner point out that, "[t]he 1990 UPC strives in a variety of places to vindicate transferor's intent in circumstances in which the former law might have defeated it."[34] Revised section 2–502(a) further minimizes the formalities for due execution of a will with the purpose of "curing intent-defeating formalism."[35] More revolutionary, the UPC now includes the "dispensing power" championed by Langbein, which allows the court to excuse what Langbein refers to as "harmless error" by the testator.[36] Predicts one scholar, "[t]his new standard will change the outcome of the majority of cases involving will execution errors."[37]

According to the drafters of the Revised UPC, a reduction in the formal requirements will ensure more validly executed wills, and the dispensing power will enable courts to validate still more wills that are deficient but nevertheless embody testamentary intent. The dispensing power will "change the outcome of a majority of cases involving will execution errors,"[38] and "restore[] a measure of candor to the process of determining the formal sufficiency of testamentary writings."[39] Thus, "the cruelty of the old law"[40] will disappear and testamentary

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30. Langbein, *supra* note 10, at 1.

31. Former UPC § 2–502 reads:

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

32. Former UPC, pt. 5, general cmt.; *see also* Nelson & Starck, *supra* note 22, at 354.

33. Lawrence H. Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 ALB. L. REV. 891, 900 (1992) (noting that, as of 1992, Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Maine, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Dakota, South Carolina, and Utah had enacted the Former UPC, and that "nearly all other states have enacted some part or section of the Code."); Carole O. Davis, Comment, *A Recommendation for Family Maintenance in the United States: A Comparative Study of Canadian and American Provisions for Support of Dependents*, 2 CAN.–AM. L.J. 151, 163 (1984) (noting that as of 1984, Colorado, Florida, Indiana, Minnesota, Montana and New Mexico had adopted modified versions of the UPC).

34. Langbein & Waggoner, *supra* note 33, at 874.

35. *Id.* at 873–74 (stating that "three grand themes are at work in the new UPC: changes in gender relations, curing intent-defeating formalism, and sensitivity to the nonprobate revolution", and that the Revised UPC "strives...to vindicate the transferor's intent in circumstances in which the former law might have defeated it").

36. One state has adopted UPC 2–505, and many states have followed the UPC's lead over the years and have simplified the formal requirements for making wills.

37. Lindgren, *The Fall of Formalism, supra* note 22, at 1016.

38. *Id.*

39. Mann, *supra* note 4, at 1040.

40. Langbein, *supra* note 10, at 1.

freedom will presumably reign supreme.

II. MANIPULATION OF DOCTRINE TO ENSURE FAMILY PREFERENCE

The argument for simplifying will formalities and forgiving "harmless errors" in execution rests on the premise that effectuating testamentary intent, and thus protecting testamentary freedom, is the primary goal of wills law. In fact, our culture often subordinates testamentary freedom to other principles. In this section, I explore how courts have used existing wills doctrine to promote ends other than the effectuation of testamentary intent. Although an examination of any number of doctrines would support my thesis, I have chosen three for illustrative purposes. First, I explore the doctrine of undue influence, which is infamous among teachers of estates law for the elasticity with which it is applied by courts to ensure a "just" distribution of testators' estates. Then I argue that the tendency toward family protection that is clearly evident in undue influence doctrine is also prevalent in case law purporting to determine whether a document complies with wills act formalities sufficiently to be deemed a "will," an inquiry traditionally viewed by many as an exercise undertaken by courts without regard to the will's dispositive provisions. For example, I explore a will formality imposed by traditional wills acts that requires two witnesses to sign a will in the testator's presence. I also examine how courts have determined whether the signature requirement has been met when a testator has been physically assisted in signing his or her will. In each case, judicial decisions show a marked tendency to use the formality or doctrine to protect the testator's family or dependents to the detriment of unrelated or "undeserving" beneficiaries of the testator's estate.

A. Undue Influence Doctrine

Many teachers of estates law suspect that undue influence doctrine vibrantly illustrates the role a court's moral code often plays in limiting testamentary freedom. Due in part to the large number of such cases litigated each year, the duty to family and implicit presumption of invalidity where a will benefits non-relatives is especially evident in this body of case law. To prove the point, I examined (within a randomly chosen five-year period) all reported cases that considered the undue influence issue in reviewing motions for summary judgment, directed verdict or judgment notwithstanding the verdict (160 cases total).[41] I then compared the results of the two most common types of cases: cases where contestant and beneficiary are both related to the testator by equal degree, and cases where family members have been disinherited in favor of non-relatives. The results reveal a great deal of judicial ambivalence about honoring testamentary intent.

Although the opinions studied habitually recited that a court's sole purpose is to effectuate the testator's true intentions, a closer inspection reveals that a significant number of courts employed a governing rule less concerned with divining testamentary intent than with determining whether the reason

41. I examined each case noted in the Westlaw topic number 409 (Wills), key numbers 154–66 (covering the elements of undue influence and related evidentiary and procedural issues) for the period between December 31, 1984 and January 1, 1990.

behind the disposition was justifiable in the court's view.[42] Courts were much more likely to honor testamentary intent when the will provided for family members as opposed to non-relatives.

Some background on undue influence doctrine is necessary to the discussion. The undue influence doctrine ostensibly safeguards testamentary freedom by dishonoring documents where the "will of the person exercising [undue influence] is substituted for the will of the testator," and thus "the resulting written testament expresses the intent and purpose of that person and not of the testator."[43] Thus, it is said, "an influence is not undue if it merely involves persuasion, pleas calculated to arouse the testator's sympathy, or the courting of favor, even with the intent to obtain benefits under a will."[44] Supposedly, the doctrine does not work to void a testamentary bequest that is

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42. At least 70 of the cases during the five-year period studied involved contestants and will beneficiaries that were related to the testator in equal or substantially equal degree (for instance, both contestants and beneficiaries were the testator's children, or both were siblings, nieces and nephews). In only 18 of those cases was a will denied probate on grounds of undue influence. In the remaining 52 cases, courts found that wills represented the true intent of the deceased, often overturning jury verdicts of undue influence in the process. *See infra* note 68.

Conversely, of the 36 cases where a testator's relatives contested wills that disinherited them in favor of non-relatives, fully 18, or 50%, of the wills in those cases were found to be the product of undue influence. *See infra* notes 80, 92.

The remaining 54 cases are less helpful to the analysis of the problem presented by this Article. Eight opinions were silent as to the relationship between the testator and the contestants and beneficiaries. *See* Saccetti v. McDermott, 538 So. 2d 127 (Fla. Dist. Ct. App. 1989); *In re* Estate of Paulk, 503 So. 2d 368 (Fla. Dist. Ct. App. 1987); Herman v. Kogan, 487 So. 2d 48 (Fla. Dist. Ct. App. 1986); Zeller v. Zelnick, 476 So. 2d 299 (Fla. Dist. Ct. App. 1985); *In re* Estate of Callahan, 547 N.Y.S.2d 113 (N.Y. App. Div. 1989); *In re* Estate of Kemble, 540 N.Y.S.2d 585 (N.Y. App. Div. 1989); *In re* Estate of Cioffi, 498 N.Y.S.2d 573 (N.Y. App. Div. 1986); Martin v. Phillips, 369 S.E.2d 397 (Va. 1988).

Eight pitted children of testators' first marriages against testators' second wives. *See* Hall v. Hall, 502 So. 2d 712 (Ala. 1987); Blits v. Blits, 468 So. 2d 320 (Fla. Dist. Ct. App. 1985); Noble v. McNerney, 419 N.W.2d 424 (Mich. Ct. App. 1988); Hodges v. Hodges, 692 S.W.2d 361 (Mo. Ct. App. 1985); Villwok v. Villwok, 413 N.W.2d 921 (Neb. 1987); *In re* Will of Gardner, 339 S.E.2d 455 (N.C. Ct. App. 1986); McKee v. Stoddard, 780 P.2d 736 (Or. Ct. App. 1989); *In re* Estate of Cooper, 506 A.2d 451 (Pa. Super. Ct. 1986).

Six others involved challenges by those who would have taken under a prior will of a testator with no heirs-at-law against the beneficiaries under an alleged final will. *See In re* Guardianship of Rekasis, 545 So. 2d 471 (Fla. Dist. Ct. App. 1989); Elson v. Vargas, 520 So. 2d 76 (Fla. Dist. Ct. App. 1988); *In re* Estate of Overton, 417 N.W.2d 653 (Minn. Ct. App. 1988); *In re* Estate of Tennant, 714 P.2d 122 (Mont. 1986); *In re* Will of Cromwell, 552 N.Y.S.2d 480 (N.Y. Surr. Ct. 1989); *In re* Estate of Younger, 508 A.2d 327 (Pa. Super. Ct. 1986).

Sixteen cases involved wills favoring relatives that were challenged by other relatives of varying degrees—the facts in those cases are too dissimilar to one another to be comparatively probative of the point explored here. *See* Parker v. Marshall, 549 So. 2d 463 (Ala. 1989); Langford v. McCormick, 552 So. 2d 964 (Fla. Dist. Ct. App. 1989); Blades v. Ward, 475 So. 2d 935 (Fla. Dist. Ct. App. 1985); Green v. Jones, 326 S.E.2d 448 (Ga. 1985); Succession of Sauls, 510 So. 2d 715 (La. Ct. App. 1987); Palmer v. Palmer, 500 N.E.2d 1354 (Mass. App. Ct. 1986); *In re* Estate of Moulton, 365 N.W.2d 335 (Minn. Ct. App. 1985); Blissard v. White, 515 So. 2d 1196 (Miss. 1987); Costello v. Hall, 506 So. 2d 293 (Miss. 1987); *In re* Will and Testament of Launius, 507 So. 2d 27 (Miss. 1987); *In re* Will of Polk, 497 So. 2d 815 (Miss. 1986); *In re* Estate of Gonzales, 775 P.2d 1300 (N.M. Ct. App. 1988); Doyle v. Schott, 582 N.E.2d 1057 (Ohio Ct. App. 1989); Dempsey v. Figura, 542 A.2d 1388 (Pa. Super. Ct. 1988); *In re* Estate of Linnell, 388 N.W.2d 881 (S.D. 1986); *In re* Estate of Elam, 738 S.W.2d 169 (Tenn. 1987). The remaining 16 cases involved ancillary issues, such as standing or evidentiary questions.

43. *In re* Estate of Rechtzigel, 385 N.W.2d 827, 833 (Minn. Ct. App. 1986).

44. EUGENE F. SCOLES & EDWARD C. HALBACH, JR., PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 652 (5th ed. 1993).

merely unfair, a result of bad judgment, or offensive to the prevailing moral code.[45]

Because a validly executed will is presumed to represent the true intent of the testator, courts allege that the burden of establishing undue influence is on the contestant.[46] In fact, however, determinations often are more dependent on courts' normative views of the relationships between the testator, beneficiary and contestant than by the actual presence or absence of factors often deemed indicative of undue influence.[47] A review of the five-year period shows that courts reveal primary loyalty to principles other than testamentary freedom in two basic ways: first, a significant number of courts confronted with wills that disinherited family members in favor of non-family members upheld or imposed findings of undue influence based on minimal evidence, or evidence that would be insufficient to meet the contestant's burden of proof in a case where the will's primary beneficiaries were non-relatives;[48] instead, courts implicitly relieved the contestant of the burden of proof, shifting the burden to the will's beneficiary. Such opinions often emphasize the beneficiary's inability to explain the "unnatural" nature of the bequest to the court's satisfaction and the good behavior of the contesting relative (as though a testator could not possibly have meant to disinherit a relative with whom he or she was on good terms). Second, courts in such cases were much more likely to expressly shift the burden of proof to the beneficiary, often by finding that a "confidential relationship" existed between testator and beneficiary.[49]

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45. As Lord Hannen admonished:

> A young man may be caught in the toils of a harlot, who makes use of her influence to induce him to make a will in her favor, to the exclusion of his relatives. It is unfortunately quite natural that a man so entangled should yield to that influence and confer large bounties on the person with whom he has been brought into such relation; yet the law does not attempt to guard against such contingencies.

Wingrov v. Wingrov, 11 P.D. 81 (1885) (cited in JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS AND ESTATES 160 (5th ed. 1995)).

46. *See, e.g.*, Sessions v. Handley, 470 So. 2d 1164, 1166 (Ala. 1985); Jones v. Walker, 774 S.W.2d 532, 534 (Mo. Ct. App. 1989); *In re* Estate of Collins, 510 N.Y.S.2d 940, 944 (App. Div. 1987); *In re* Estate of Beal, 769 P.2d 150, 154 (Okla. 1989); Gaines v. Frawley, 739 S.W.2d 950, 952 (Tex. Ct. App. 1987).

47. In determining whether the influence exerted was undue, courts generally explore the following factors:

– whether a "confidential relationship" existed between the alleged influencer and the testator (*see, e.g., Walker*, 774 S.W.2d at 534);

– whether the influencer was actively involved in procuring the will (*see, e.g.*, Succession of Hamiter, 519 So. 2d 341, 344–45 (La. Ct. App. 1988); *Walker*, 774 S.W.2d at 534; *Gaines*, 739 S.W.2d at 952–53);

– whether and to what extent the testator was susceptible to influence (*see, e.g.*, Heinrich v. Silvernail, 500 N.E.2d 835, 840 (Mass. App. Ct. 1986); Pace v. Richmond, 343 S.E.2d 59, 64 (Va. 1986));

– whether and the extent to which the testator obtained advice from other than the alleged influencer, either from a disinterested attorney or from other friends and family members (*see, e.g., Heinrich*, 500 N.E.2d at 842–43);

– the degree to which the business or financial affairs of the testator were controlled by the alleged influencer (*see, e.g., Hamiter*, 519 So. 2d at 344–45; *Heinrich*, 500 N.E.2d at 842); and

– the length of the relationship between the testator and the beneficiary (*see, e.g., Hamiter*, 519 So. 2d at 344–45).

48. *See infra* Section II.A.1.

49. *See infra* Section II.A.2.

In both instances, there is an unspoken presumption that a testator would always want to benefit family members as opposed to others;[50] thus, many of the opinions dealing with contested gifts to non-relatives concentrated not on whether the contestant had met his or her burden of proof on the issue of undue influence, but on whether, in the court's opinion, the gift to a non-relative was justifiable. In short, the court often substituted its judgment for the judgment of the testator; the issue became not whether the document represented the testator's intent, but whether the testator's intentions offended the courts' sense of justice or morality.

This approach is in stark contrast to the treatment of undue influence cases where both contestants and beneficiaries are related to the testator by approximately equal degree; in such cases, the courts generally held the contestants to a very high standard of proof.[51] Moreover, courts were less likely to define a testator/beneficiary relationship as "confidential."[52]

In the following sections, I will illustrate the differing rules and standards of proof that courts impose depending on the identity of the parties to the contest. I first illustrate that courts implicitly break the rule placing the burden of proof on contestants when a will's provisions favor non-relatives over those to whom the testator is perceived to owe some sort of duty. In those cases, the will is presumed invalid, and the beneficiary faces an uphill battle in convincing the court that the "unnatural" bequest is justifiable. Next, I show how courts in those cases also are more likely to term a testator/beneficiary relationship "confidential," which enables the court to shift expressly and legitimately the burden of proof to the beneficiary. Finally, I explore courts' tendencies to weigh the moral worthiness of the respective contestants and beneficiaries in determining whether to validate a will, and their willingness to allow non-traditional distributions only when they find the contestant undeserving. Although the moral worthiness of a beneficiary certainly might be probative of what the testator intended, courts often evaluate potential beneficiaries from their own perspective, as opposed to that of the testator, thus appearing less concerned with effectuating testamentary intent than in forcing the testator to distribute her or his estate in accordance with prevailing notions of morality.

1. Disinherited Relatives and the Presumption of Invalidity

Compare *In re Estate of Rechtzigel*,[53] with *Gaines v. Frawley*.[54] In

50. Mary Louise Fellows recognizes and approves of this presumption, and argues that it should be applied in all will construction cases since a majority of testators do in fact intend to benefit their immediate families. *See* Mary Louise Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611 (1988). In Professor Fellows' view, courts should use the majority's preferences as an interpretive tool, because it is not possible to ascertain a specific testator's subjective intent with certainty. Professor Fellows advocates imposing the presumption of family preference, together with the presumption that a testator would have wanted sound estate planning, as a means of ensuring testamentary freedom. In fact, it seems obvious that her proposal would render testamentary freedom less attainable for those who wish to make alternative dispositions.

51. *See infra* Section II.A.1 (discussion of *In re* Estate of Rechtzigel, 385 N.W.2d 827 (Minn. Ct. App. 1986)).

52. *See infra* Section II.A.2.

53. 385 N.W.2d 827 (Minn. Ct. App. 1986).

54. 739 S.W.2d 950 (Tex. Ct. App. 1987).

Rechtzigel, the testator's final will left his entire estate to his daughter to the exclusion of his son. In *Gaines*, the testator left her entire estate to a non-relative (her live-in boyfriend of five years) and disinherited her sons. Although the circumstances surrounding the making of the will in Rechtzigel were far more suspect than those in *Gaines*, the *Rechtzigel* will was upheld, and the *Gaines* will was denied probate.

In *Rechtzigel*, the testator's daughter successfully convinced her father to change his will, which had benefited his son and daughter equally, so that she would receive the entire residuary estate. An appellate court upheld the probate court's determination that the influence exerted by the testator's daughter was not undue, notwithstanding the following facts: first, substantial evidence demonstrated that the testator's mental condition had deteriorated[55] and that he was confused about the year of his wife's recent death and the extent of the property he owned;[56] the testator's nurse, who had seen him on the day the will was executed, described him as confused, disoriented and most likely unable to formulate and remember a testamentary plan;[57] moreover, a conservator had been appointed to manage the testator's affairs.[58] Second, the testator's two previous wills, one of which was executed only a year before the contested will, had left his estate to both children equally.[59]

There was substantial evidence that the daughter had repeatedly but unsuccessfully attempted to convince her father to change the disposition of his will; in fact, on one occasion she arranged a meeting between herself, her attorney and her father for that purpose,[60] and on another, she approached an attorney who refused to accede to her request to draft a new will for her father.[61]

Moreover, there was considerable evidence that the testator's daughter had actively procured the will; she engaged her own attorney to draft her father's will, and essentially dictated the terms of the residuary clause which left the entire residuary estate to her.[62] She also drove the testator to and from her attorney's office for the execution ceremony.[63] Finally, the attorney retained by the testator's daughter neither reviewed the will with the testator nor established that the testator possessed capacity at the time of the execution, preferring to leave that task to a witness.[64]

In determining that the influence exercised by the testator's daughter was not "undue," the court noted that the testator had, earlier in his life, sold a farm to his son for substantially less than its fair market value at the time of the will contest. The court determined that the bequest of the residuary estate to the daughter had the net effect of treating the testator's two children "approximately" equally,[65] which squared with his previously expressed

55. *Rechtzigel*, 385 N.W.2d at 831.
56. *Id.* at 830.
57. *Id.* at 831.
58. *Id.* at 829.
59. *Id.*
60. *Id.*
61. During that time, the testator had constantly insisted that his will treat his two children equally. *Id.*
62. *Id.* at 832.
63. *Id.*
64. *Id.* at 830–31.
65. *Id.* at 833.

intentions.[66]

The court was not disturbed by the fact that the testator's two previous wills dividing his estate equally had been executed substantially after his sale of the farm to his son. The court found merely that the daughter's forceful advocacy had served to change the testator's mind, but that she had not succeeded in supplanting his intentions with her own, stating: "[w]hile testator may have been influenced by respondent's behavior, the record does not demonstrate subordination of testator's will."[67]

Thus, *Rechtzigel* and other cases involving competing family members hold that a contestant must go far beyond showing that a beneficiary successfully influenced a testator to change his or her will provisions.[68] Rather,

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66. *Id.*

67. *Id.*

68. *See In re* Estate of Price, 388 N.W.2d 72 (Neb. 1986) (court reversed a jury's finding that a will devising testator's farm to his daughter was procured by daughter's undue influence, even though there was evidence to show that testator was confused about extent of his property and was weak and susceptible to undue influence; attorney testified that testator could have been susceptible to undue influence; testator had lost his leg and was physically dependent upon daughter to run errands and provide transportation; testator's daughter/beneficiary had authority to write checks on testator's account, paid all his bills and helped with his business affairs; she also chose the attorney who drafted testator's will and consulted with that attorney regarding the will's provisions on a number of occasions). *See also* Clifton v. Clifton, 529 So. 2d 980 (Ala. 1988) (validating will against disfavored son's charges of undue influence, noting that the daughter favored in the will had lived with and taken care of her sick parents and that the disinherited son had substantial debts against him, so the daughter "[c]learly...had a greater claim to her father's benevolence...than any of the other children"); Windham v. Pope, 474 So. 2d 1075 (Ala. 1985) (finding not even a "scintilla" of evidence that niece exerted undue influence, even though she took care of elderly testator, controlled his finances and paid his bills); *In re* Estate of Alexander, 749 P.2d 1052 (Kan. Ct. App. 1988) (upholding jury verdict in favor of will proponent, where testator's will left entire estate to son who took care of testatrix and disinherited testator's three other children, and wife of beneficiary was drafter of will); *In re* Estate of Bridges, 565 A.2d 316 (Me. 1989) (disinherited son lost will contest where will left estate to two of testator's nine children; disinherited son able to show that the beneficiaries took the testator to attorney's office and were present during at least part of meeting between testator and her attorney); *In re* Estate of Mikeska, 362 N.W.2d 906 (Mich. Ct. App. 1985) (court upheld the probate court's admittance of will to probate, finding lack of sufficient evidence of undue influence by testator's sons, although disinherited daughter was able to show that beneficiary sons locked father in house whenever they left, had constant access to father and were involved in procurement of will, and that testator had intended to include daughter in his will); *In re* Estate of Anderson, 379 N.W.2d 197 (Minn. Ct. App. 1985) (court reversed jury's verdict that codicil leaving house to testator's daughter was procured by undue influence of testator's daughter, even though evidence showed that daughter moved in with ill father/testator, obtained power of attorney, became joint tenant of father's checking account, took charge of all testator's business affairs, neglected to inform siblings that father was dying, encouraged testator's alcoholism by purchasing alcohol for him).

The other cases during the five-year period studied where children, grandchildren, siblings, nieces or nephews unsuccessfully contested wills leaving estates to relatives of equal degree are: Weinberg v. Weinberg, 528 So. 2d 1136 (Ala. 1988); Heard v. Heard, 497 So. 2d 1109 (Ala. 1986); Smith v. Smith, 482 So. 2d 1161 (Ala. 1985); Whitfield v. Burttram, 471 So. 2d 401 (Ala. 1985); Eddleman v. Farmer, 740 S.W.2d 141 (Ark. 1987); Reddoch v. Blair, 688 S.W.2d 286 (Ark. 1985); *In re* Estate of Mann, 229 Cal. Rptr. 225 (Ct. App. 1986); Langford v. McCormick, 552 So. 2d 964 (Fla. Dist. Ct. App. 1989); Carter v. Carter, 526 So. 2d 141 (Fla. Dist. Ct. App. 1988); *In re* Estate of West, 522 A.2d 1256 (Del. 1987); *In re* Estate of Roll, 770 P.2d 806 (Idaho 1989); *In re* Estate of Rothenberg, 530 N.E.2d 1148 (Ill. App. Ct. 1988); Farner v. Farner, 480 N.E.2d 251 (Ind. Ct. App. 1985); *In re* Will of Pritchard, 443 N.W.2d 95 (Iowa Ct. App. 1989); Heinrich v. Silvernail, 500 N.E.2d 835 (Mass. 1986); *In re* Estate of Ristan, 399 N.W.2d 101 (Minn. Ct. App. 1987); *In re* Estate of Lange, 398 N.W.2d 569 (Minn. Ct. App. 1986); *In re* Estate of Novotny, 385 N.W.2d 841 (Minn. Ct. App. 1986);

a contestant must prove that the testator was incapable of exercising free will at the time of the will's execution,[69] or that he or she has a moral claim to the

In re Estate of Tourville, 366 N.W.2d 380 (Minn. Ct. App. 1985); *In re* Estate of Honey, 516 So. 2d 1359 (Miss. 1987); Mullins v. Ratcliffe, 515 So. 2d 1183 (Miss. 1987); Sacco v. Gordon, 515 So. 2d 906 (Miss. 1987); *In re* Estate of Polk, 497 So. 2d 815 (Miss. 1986); Trotter v. Trotter, 490 So. 2d 827 (Miss. 1986); Moyer v. Walker, 771 S.W.2d 363 (Miss. Ct. App. 1989); Smith v. Crites, 781 S.W.2d 189 (Mo. Ct. App. 1989); Watson v. Warren, 751 S.W.2d 406 (Mo. Ct. App. 1988); *In re* Estate of Watson, 738 P.2d 494 (Mont. 1987); Hogan v. Skelton, 708 P.2d 1018 (Mont. 1985); *In re* Estate of Peterson, 439 N.W.2d 516 (Neb. 1989); *In re* Estate of Kumstar, 496 N.Y.S.2d 414 (1985); *In re* Estate of Evanchuk, 536 N.Y.S.2d 110 (App. Div. 1988); *In re* Estate of Swain, 509 N.Y.S.2d 643 (App. Div. 1986); Doyle v. Schott, 582 N.E.2d 1057 (Ohio Ct. App. 1989); Birman v. Sproat, 546 N.E.2d 1354 (Ohio Ct. App. 1988); *In re* Estate of Nibert, 1988 WL 102420 (Ohio Ct. App. 1988); Larson v. Naslund, 700 P.2d 276 (Or. Ct. App. 1985); *In re* Estate of Mammana, 564 A.2d 978 (Pa. Super. Ct. 1989); *In re* Estate of Jakiella, 510 A.2d 815 (Pa. Super. Ct. 1986); *In re* Estate of Hicks, 327 S.E.2d 345 (S.C. 1985); *In re* Last Will & Testament of Smoak, 334 S.E.2d 806 (S.C. 1985); Smith v. Smith, 341 S.E.2d 804 (S.C. Ct. App. 1986); Owen v. Stanley, 739 S.W.2d 782 (Tenn. Ct. App. 1987); Hirdler v. Boyd, 702 S.W.2d 727 (Tex. Ct. App. 1985); *In re* Estate of Jones, 759 P.2d 345 (Utah 1988); Jarvis v. Tonkin, 380 S.E.2d 900 (Va. 1989); *In re* Estate of Raedel, 568 A.2d 331 (Vt. 1989).

69. The level of egregious behavior that most courts require to prove undue influence is exemplified in Disbrow v. Boehmer, 711 S.W.2d 917 (Mo. Ct. App. 1986). In *Disbrow*, the court determined that a relationship between a testator and her son was confidential based on the son's egregious behavior: Shortly after threatening to see that his sister was cut out of their mother's will, the son began a campaign to assert complete control over his mother's life. He removed her from the nursing home where she lived to an undisclosed location, leaving no forwarding address, had exclusive access to his mother and allowed no other visitors, drafted substantial checks to himself and his family for the testator's signature, was the primary contact with the attorney he hired to draft his mother's will, prevented his sister from contacting her mother and appeared to lie to his mother about his sister's activities and whereabouts. During this time, the testator drafted three successive wills, each leaving a greater share of her estate to her son, although she had told a nursing home attendant that she loved them both equally. The final will bequeathed 95% of her estate to her son and his wife. The appellate court upheld the jury's finding that none of the documents disinheriting the testator's daughter reflected her testamentary intentions.

Thus, in *Disbrow*, the daughter was successful because she was able to offer proof tending to show that every possible indicia of undue influence was present. Moreover (and perhaps more importantly), the beneficiary son presented no plausible reason why the testator would have disinherited her daughter.

Generally, as in *Disbrow*, when relatives are the contestants, and the contestants and beneficiaries are of approximately equal degree of relationship to the testator, courts generally uphold a finding of undue influence only on a very strong showing. *See, e.g.*, Warner v. Warner, 687 S.W.2d 856 (Ark. Ct. App. 1985) (son/beneficiary dictated terms of mother's will to attorney he chose, attorney never spoke to testator, son had mother, who had suffered a stroke, execute will in hospital by marking will with "X", son falsely represented to mother that other son had stolen her money); Sun Bank/Miami v. Hogarth, 536 So. 2d 263 (Fla. Dist. Ct. App. 1988) (finding undue influence where all traditional indicia present, including mentally deteriorated testator, beneficiary chose drafter and supervised execution, and beneficiary subsequently kept will secret from other family members); *In re* Estate of Moulton, 365 N.W.2d 335 (Minn. Ct. App. 1985) (undue influence found where feeble testator was fraudulently induced to give nephew/beneficiary more than $100,000 plus her townhouse prior to death and beneficiary drafted will leaving remainder of estate to him); *In re* Estate of Salvan, 518 N.Y.S.2d 154 (App. Div. 1987) (attorney son drafted his mother's will, falsely representing that best course of action was to leave all to him and promising that he would take care of sister); *In re* Estate of Dupree, 343 S.E.2d 9 (N.C. Ct. App. 1986) (upholding jury finding of undue influence where will left all to testator's nephew and wife, where testator was confused, disoriented, ill, delusional and incapable of managing affairs when will drafted, beneficiaries moved testator to their home, would not allow others to be alone with her, failed to inform other relatives of testator's illness, and had new and different attorney draft testator's final will without consulting testator's long-time attorney); *In re* Estate of Fields, 331 S.E.2d 193 (N.C. Ct. App. 1985) (finding that mother's will disinheriting daughter was procured by undue influence of

testator's assets superior to the claims of the testator's other heirs.[70] If the court can find what it views as a rational explanation for the bequest and the contestant has no special claim, the contestant will likely fail.

By contrast, in *Gaines*, the will was set aside on grounds of undue influence even though there were few of the traditional indicia of undue influence. The testator left her entire estate to her live-in boyfriend, and her adult sons successfully contested the will on the ground of undue influence. On appeal, the court rejected the beneficiary's argument that the jury verdict of undue influence was against the weight of the evidence.[71]

First, the court determined that there was sufficient evidence to indicate that the testator was susceptible to influence, based on the testator's history of emphysema and her development of cancer (apparently after she had executed the will). There was no evidence, however, of weakened mental capacity or incoherence, although her doctor guessed that her illness "could have had an effect upon the rationality of her thought processes and her personality."[72] The court cited no evidence that the testator was physically dependent on the beneficiary, and it was clear that she had constant contact with family members.

After determining that speculation about the possible effects of the testator's illness on her state of mind was sufficient to support a finding of susceptibility to undue influence, the court examined whether any influence exerted by the beneficiary had been "undue." In a nutshell, the court found support for the jury's verdict in the following facts: the testator and her

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testator's abusive husband to punish daughter for refusing father's sexual advances); *In re* Estate of Eubank, 749 P.2d 691 (Wash. Ct. App. 1988) (finding undue influence where testator's doctor testified he was not capable of understanding or executing legal document, couldn't understand who his relatives were, brother of testator had attorney draft will naming him beneficiary after obtaining testator's power of attorney, brother/beneficiary read all testator's private documents and discovered prior will, testator never read will or had it read to him, brother/beneficiary arranged and conducted execution ceremony without attorney/drafter's knowledge). *See also In re* Leone, 423 N.W.2d 652 (Mich. Ct. App. 1988); *In re* Estate of Larson, 394 N.W.2d 617 (Minn. Ct. App. 1986); *In re* Estate of Varvaris, 528 So. 2d 800 (Miss. 1988); *In re* Estate of Aageson, 702 P.2d 338 (Mont. 1985); *In re* Will of Everhart, 364 S.E.2d 173 (N.C. Ct. App. 1988); *In re* Estate of Seegers, 733 P.2d 418 (Okla. Ct. App. 1986); *In re* Estate of Bankovitch, 496 A.2d 1227 (Pa. Super. Ct. 1985). *Cf.* Edwards v. Strong, 465 So. 2d 368 (Ala. 1985) (finding that testator's signature on a promissory note loaning large sum of money to brother-in-law's business procured by undue influence).

70. Courts also find undue influence when doing so ensures distribution of the testator's estate in accordance with the testator's perceived moral obligations. *See, e.g., In re* Estate of Olson, 451 N.W.2d 33 (Iowa Ct. App. 1989) (finding testator's will leaving farm, which had been in her deceased husband's family for 160 years, to her nieces invalid; result—farm distributed to testator's husband's heirs to keep farm in family as he had intended); *In re* Estate of Opsahl, 448 N.W.2d 96 (Minn. Ct. App. 1989) (finding that testator's children unduly influenced her to change will that had benefitted daughter who had taken care of testator when other children had not); *In re* Estate of Everhart, 364 S.E.2d 173 (N.C. Ct. App. 1988) (invalidating second will leaving estate to other heirs and disinheriting nephew who took care of ill testator); *cf. In re* Estate of Vick, 557 So. 2d 760 (Miss. 1990) (affirming jury finding of undue influence where mother's will had devised all to daughters and disinherited sons in reliance on mistaken belief that her husband's will had provided only for sons).

71. The case had been tried three times. The first jury verdict finding undue influence was set aside when the trial court granted the beneficiary's motion for judgment notwithstanding the verdict. The sons were then given a new trial based on newly discovered evidence regarding the testator's capacity. The second trial ended in a hung jury. The third jury found undue influence, which finding is at issue here. 739 S.W.2d at 950.

72. *Id.* at 953.

companion drank heavily (as much as a fifth of liquor a day),[73] and had a stormy relationship with frequent arguments; her sons stated that the testator had been afraid of the beneficiary's temper; and the beneficiary had been married seven times. The court dwelt at length on the beneficiary's ugly personality, noting, for instance, that he had moved in with the testator while still married to his seventh wife. The court also treated as suspicious the fact that the testator and beneficiary had, like many couples, executed their wills on the same day, and that each had left their entire estates to the other.

Although the opinion begins its analysis by reciting that the burden of proof rests with the contestant,[74] the court cited no evidence that the beneficiary actively sought to influence the provisions of the testator's will, chose the lawyer that had drafted the will or prevented the testator from obtaining independent advice. Moreover, there was no evidence that the beneficiary had sole access to the testator's will or that the will had been kept secret. Neither was there evidence that the beneficiary sought to isolate the testator from her family—in fact, the testator continued her relationship with her sons and their wives and saw them frequently; and there was no evidence that the husband controlled the testator's financial affairs. Finally, noticeably absent from the court's opinion is any discussion of the evidence concerning the execution of the will, which apparently was drafted by an attorney. The court referred to no evidence indicating that the testator might have been coerced into signing her will or that she lacked capacity on that date.

How, then, did the court determine that the contestants had met their burden of proving that the beneficiary had actually asserted undue influence? The court simply concluded that the testator's "physical and mental incapacity" combined with her "susceptibility" to the influence of the beneficiary was sufficient to support a finding that the beneficiary actually had exercised undue influence.[75] In a triumph of circular reasoning, the court then determined that the will's provisions proved that the testator would not have executed the will but for the exercise of that influence.[76] Although the court implicitly shifted the burden of proof to the beneficiary to justify the will, it upheld the trial court's refusal to admit the testimony of all three of the beneficiary's witnesses.[77]

The *Gaines* opinion reveals a more likely explanation for its holding. First, the court emphasized the illicit nature of the relationship between testator and beneficiary and the seemingly repulsive personality of the beneficiary. The court briefly wrestled with the question of whether the testator and the beneficiary had had a common-law marriage, noting that "the formal relationship between testatrix and appellant is relevant to the issue of whether or not the disposition was natural."[78] The court then determined that, whether

73. *Id.* The court cites no evidence that the testator was intoxicated when she executed the will. *Compare In re* Estate of Villwok, 413 N.W.2d 921, 924 (Neb. 1987) (sustaining summary judgment for beneficiary on issue that testator lacked capacity because he was an alcoholic because contestants could not show intoxication on the day and at the time the will was executed).

74. *Gaines*, 739 S.W.2d at 952.

75. *Id.* at 954.

76. *Id.* at 954–55 (stating that the determination whether the will would not have been executed but for undue influence "is generally based on whether the will is unnatural in its disposition of property").

77. *Id.* at 956.

78. *Id.* at 951–52. The court also noted that the testator had not taken the beneficiary's

or not a common-law marriage had existed, the jury would have been justified in finding the bequest to the testator's boyfriend "unnatural" because the will excluded the testator's sons. Finally, the court stressed what it viewed as the injustice of the will provisions, emphasizing that the sons had gotten along well with their mother and had been frequent visitors to her home.[79] Thus, with substantially less evidence of undue influence than in *Rechtzigel*, where the beneficiary was related to the testator, the court invalidated the will.[80]

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name, apparently viewing that fact as probative on the question of whether the will's disposition was "unnatural." *Id.* at 955.

79. *Id.* at 955. The court appeared to be especially moved by the fact that the beneficiary would receive the land upon which the testator and the contestants' father had been buried if the will were upheld. *Id.*

80. Other cases where courts overlooked express statements or other evidence that a will represented the testator's intent and found or upheld findings of undue influence despite minimal evidence are: Crump v. Moss, 517 So. 2d 609 (Ala. 1987) (evidence that elderly female testator was hiding from physically abusive husband and attempted to ensure he could not receive any of her assets by creating inter vivos trust in favor of friends perceived by court to constitute evidence of undue influence by friends); Ahlman v. Wolf, 483 So. 2d 889 (Fla. Dist. Ct. App. 1986) (finding will leaving all to constant companion and attorney invalid, even though admitting that beneficiaries successfully rebutted presumption of undue influence created by confidential relationship); *In re* Estate of Dosset, 512 N.E.2d 807 (Ill. App. Ct. 1987) (reversing probate court's grant of directed verdict against testator's sister and in favor of beneficiaries, whom testator had known since they were children, although only evidence of undue influence was that beneficiaries, who had farmed testator's land for 20 years and took care of her, had paid the attorney/drafter's bill, and that testator was "depressed"); *In re* Estate of Dankbar, 430 N.W.2d 124 (Iowa 1988) (finding adult female testator's will, leaving all to a companion and her attorney and disinheriting her father, invalid, even though evidence showed that testator believed her father had ruined her life because he was an alcoholic who physically abused her); Smith v. Estate of Harrison, 498 So. 2d 1231 (Miss. 1986) (reversing lower court's admittance of will leaving estate to neighbors who took care of elderly testator and not to testator's adopted daughter who lived in another state for 40 years prior to testator's death; finding that trial court erred in holding that beneficiaries rebutted presumption created by confidential relationship, but did not say what facts, if any, showed undue influence); Smith v. Chatfield, 745 S.W.2d 199 (Mo. Ct. App. 1987) (female attorney testator's will leaving estate to attorney boyfriend successfully contested by testator's grand-niece, even though only evidence of undue influence was that in-house attorney who drafted will was subordinate of beneficiary and co-worker of testator); *In re* Estate of Villwok, 413 N.W.2d 921 (Neb. 1987) (court reversed grant of summary judgment for second wife, beneficiary of will; found issue as to whether second wife procured will via undue influence even though only "evidence" of undue influence was bad relationship between daughters from first marriage and second wife, wife made effort to be present whenever daughters visited (but testator visited privately with daughters nevertheless), testator drank heavily and all three daughters said he told them they would get his property); *In re* Estate of Delorey, 529 N.Y.S.2d 153 (App. Div. 1988) (finding undue influence where testator left all to attorney and nothing to various nephews and nieces, even though attorney had no involvement in will execution); *In re* Estate of Beal, 769 P.2d 150 (Okla. 1989) (upholding trial court's finding that will leaving male testator's estate to live-in female companion of eight years was invalid even though parties did not appeal trial court's finding that testator was competent at all times and the only evidence of procurement was that testator asked beneficiary her niece's name when dictating will to attorney).

Carpenter v. Horace Mann Life Ins. Co., 730 S.W.2d 502 (Ark. Ct. App. 1987), is especially illustrative. In *Carpenter*, a woman left her entire estate and the proceeds of seven life insurance policies to Carey Carpenter and the High Foundation, an organization that the testator believed was engaged in important spiritual work. The testator, formerly a devout Catholic, increasingly had experienced dissatisfaction with the emptiness both in her spiritual life and in her marriage to an atheist. The testator's increasing involvement with Carpenter's ideas, and the testator's donation of money she had earned to Carpenter's cause, caused serious marital problems, culminating in the couple's divorce. The testator then moved to the same town as Carpenter, his wife and his followers, relinquishing custody of her young son to her husband. Eager to enable Carpenter to continue devoting his time to teaching and writing, the testator, Monica, obtained work as a nurse, purchased seven insurance policies over a two-year period

2. Non-Relative Beneficiaries and the Confidential Relationship

Often the decisive factor in determining if undue influence was exerted is whether the court determines that a confidential relationship existed between the beneficiary and the testator. In many jurisdictions, a confidential relationship shifts the burden of proof to the beneficiary to explain the bequest to the court's satisfaction.[81] And, courts are much more likely to find a confidential relationship where the testator's will disinherits relatives in favor of non-relatives, and the non-relative cannot offer an explanation for the bequest that satisfies the court.

For example, in *In re Estate of Swain*,[82] an appellate court set aside a jury verdict of undue influence where a will expressly disinherited the testator's son in favor of a daughter with whom the testator had lived after suffering a stroke until testator's death. The jury's finding that the daughter had procured the favorable will through the use of undue influence was supported by evidence that the testator was mentally weakened and physically dependent on her daughter, and thus arguably susceptible. Moreover, the will's sole beneficiary had exclusive access to the testator during the time the will was executed (and thus had the opportunity to exercise influence).[83]

In reversing the Surrogate's failure to grant judgment notwithstanding the verdict, the court emphasized that "the Surrogate erred in charging the jury that an inference of undue influence arose from the confidential relationship between the testatrix and the petitioner," because the "sense of family duty is inexplicably intertwined in this relationship, which, under the circumstances,

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naming Carpenter as beneficiary, and drafted a will leaving her estate to him.

The court affirmed the trial judge's conclusion that the will, as well as the beneficiary designations on all seven insurance policies procured over a two-year period, were the products of undue influence. First, the court determined that Monica was susceptible to undue influence, not because she was ill or mentally debilitated, but because the contestant's experts testified that Monica was a "dependent personality" in search of a "father figure to care for her," that Carpenter "fit her needs perfectly," *id.* at 504, and that the will's "unnatural disposition" revealed a "mind easily susceptible to undue influence."

There was little if any evidence to show that Carpenter had actually used influence to convince the testator to purchase the life insurance policies and draft her will in his favor. Moreover, although the court acknowledged that, under Arkansas law, the contestant was required to prove that any influence exercised by Carpenter was "specially directed toward the object of procuring a will" benefitting Carpenter, it admitted that the contestant could not prove that point, noting that the contestant's own expert witnesses had testified that Carpenter had not "actually, knowingly" attempted to extort money from the testator. In short, all evidence indicated that Monica had voluntarily chosen to commit her life to Carpenter and his work.

Nevertheless, the very fact that the testator had neglected to provide for her son was viewed by the court as the most probative evidence of undue influence. The court trumpeted:

> Where the provisions of a will are unjust, unreasonable and unnatural, doing violence to the natural instinct of the heart, to the dictates of parental affection, to natural justice, to solemn promises, and to moral duty, such unexplained inequality is entitled to great influence in considering the question of testamentary capacity and undue influence.

Id. at 507.

The court concluded that Carpenter's explanation for the bequest (that the bequest was a gesture of love and appreciation to Carpenter to enable him to continue his work) was insufficient to rebut the presumption of undue influence.

81. *See, e.g.*, Birch v. Coleman, 691 S.W.2d 875, 877–78 (Ark. Ct. App. 1985).

82. 509 N.Y.S.2d 643 (App. Div. 1986).

83. The jury might have also viewed the testator's disinheritance of her son as evidence that undue influence was indeed exercised. Nevertheless, the court concluded that the trial court should have directed a verdict for the beneficiary. *Id.*

counterbalances any contrary legal presumption."[84] The court was also likely moved by the fact that the testator's son had failed to visit his mother after her stroke due to his soured relationship with the testator's daughter, thus justifying for the court the testator's decision to disinherit her son.[85]

Compare the result in *Swain* to *Birch v. Coleman*.[86] In *Birch*, the appellate court reversed a probate court's admission of the testator's will to probate. Yet in *Birch*, as in *Swain*, the testator left his entire estate to the caregiver with whom he lived. As in *Swain*, the testator had made the decision to leave all to his caregiver after he moved into her home. As in *Swain*, although the beneficiary helped the testator arrange to make a will, the evidence did not establish that the beneficiary was active in procuring the will or dictating its terms.[87] Moreover, in *Birch*—unlike *Swain*—there was no indication that the testator had weakened capacity. But in *Birch*, the beneficiary was not a daughter of the testator, but the testator's court-appointed guardian.[88]

In denying probate of the will and directing the admittance of a prior will leaving all to the testator's nephew, the court went so far as to hold that a bequest to a guardian is prima facie void "unless the guardian can show by a clear preponderance of the evidence that he took no advantage of his influence with the ward and that the ward's testamentary gift was of his own volition."[89] Then, instead of remanding for a new trial to give the beneficiary the opportunity to rebut the presumption, or reviewing the evidence that could have supported a probate court's determination that the presumption was rebutted, the court concluded by summarizing the evidence it viewed as tending to show undue influence, and denied probate of the will.[90]

Thus, the fact that the testator's daughter in *Swain* took care of her during the testator's final illness was insufficient to shift the burden of proof, and in fact was viewed by the court as tending to prove the validity of the will;[91] conversely, the care provided by the testator's guardian/beneficiary in

84. *Id.* at 645 (quoting *In re* Will of Walther, 159 N.E.2d 665, 670 (N.Y. 1959)); *see also* Moyer v. Walker, 771 S.W.2d 363 (Mo. 1989) ("[r]ecommending an attorney to a family member and transporting the family member to an attorney's office does not necessarily rise to the level of a confidential and fiduciary relationship").

85. 509 N.Y.S.2d at 644.

86. 691 S.W.2d 875 (Ark. Ct. App. 1985).

87. *Id.* at 878.

88. The guardian had control of the testator's funds and had spent money on herself, albeit allegedly with the testator's permission. *Id.* at 876.

89. *Id.* at 878.

90. *Id.* at 879.

91. Other courts also took this view. *See* Clifton v. Clifton, 529 So. 2d 980 (Ala. 1988) (upholding will against a disfavored son's charges of undue influence, noting that the daughter favored in the will had lived with and taken care of her sick parents and so "clearly...had a greater claim to her father's benevolence...than any of the other children"); Eddleman v. Estate of Farmer, 740 S.W.2d 141 (Ark. 1987) (affirming probate court's validation of will leaving bulk of estate to daughter who lived with and cared for testator as not a product of undue influence because the will was merely a result of testator's natural affection for daughter who took care of him); Farner v. Farner, 480 N.E.2d 251, 261 (Ind. Ct. App. 1985) (holding that "the presumption in favor of a will's validity should be increased, not diminished, by the fact that a bequest was made to one with whom the testator maintained an intimate and confidential relationship" (refusing to shift burden of proof where beneficiary was favored nephew)); *In re* Estate of Alexander, 749 P.2d 1052 (Kan. Ct. App. 1988) (upholding jury verdict in favor of will proponent, where testator's will left entire estate to son who took care of testatrix and disinherited testator's three other children, and wife of beneficiary was drafter of will); *In re* Estate of Anderson, 379 N.W.2d 197, 201 (Minn. Ct. App. 1986) (rejecting the argument that a

Birch created a confidential relationship and was therefore cause for presumptive invalidity.[92]

3. Judging Relatives' Worthiness

There are, of course, a number of cases decided within the five-year period upholding wills that left testators' estates to non-relatives. A close look at those cases, however, suggests that here, too, courts often are not influenced solely by a desire to effectuate testamentary intent, but equally by an urge to impose justice according to normative definitions.

During the relevant five-year period, half of the thirty-six wills that disinherited relatives in favor of non-relatives were upheld. In two-thirds of those seventeen cases, however, the courts emphasized or implied that the testator was justified in neglecting to provide for his or her relatives.[93] That factor was frequently more determinative of whether a will was admitted to probate than the amount or quality of evidence concerning whether undue influence was actually asserted.

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testator's caretaker/daughter had a confidential relationship with her father; "any evidence of intimacy or affection between blood relatives 'negatives rather than proves undue influence'"); *In re* Estate of Rechtzigel, 385 N.W.2d 827, 832 (Minn. Ct. App. 1986) ("[a]lthough a confidential relationship may be a factor proving undue influence, any evidence of intimacy or affection between blood relatives 'negatives rather than proves undue influence,'" quoting *Anderson*, 379 N.W.2d at 201); *In re* Estate of Peterson, 439 N.W.2d 516 (Neb. 1989) (testator's codicil increased proportion of estate left to one son, who had helped testator manage his farm; other sons lost will contest); *see also* Smith v. Smith, 482 So. 2d 1161 (Ala. 1985); Windham v. Pope, 474 So. 2d 1075 (Ala. 1985); *In re* Estate of Ristan, 399 N.W.2d 101 (Minn. Ct. App. 1987); Trotter v. Trotter, 490 So. 2d 827 (Miss. 1986); Watson v. Warren, 751 S.W.2d 406 (Mo. Ct. App. 1988); *In re* Estate of Hogan, 708 P.2d 1018 (Mont. 1985); *In re* Estate of Jakiella, 510 A.2d 815 (Pa. Super. Ct. 1986). *See also In re* Estate of Evanchuk, 536 N.Y.S.2d 110 (App. Div. 1988) (holding that there was no presumption of undue influence merely because testator's daughter and principal beneficiary had drafted the will, and, where testator had just lost his wife and other daughter, beneficiary had threatened to cut off contact with her father if he did not sign the will); *cf. In re* Estate of Opsahl, 448 N.W.2d 96 (Minn. Ct. App. 1989) (where testator left her estate equally to her seven children, except that she also left farm to child who took care of her, then in subsequent will changed bequest of farm to daughter/caretaker; found that other children unduly influenced testator not to leave farm to caretaker/daughter).

92. *See also* Smith v. Estate of Harrison, 498 So. 2d 1231 (Miss. 1986) (reversing lower court's admittance of will leaving estate to neighbors who took care of elderly testator and not to testator's adopted daughter who lived in another state for 40 years prior to testator's death; finding that trial court erred in holding that beneficiaries rebutted presumption created by confidential relationship, but did not say what facts, if any, showed undue influence); *In re* Estate of Beal, 769 P.2d 150 (Okla. 1989) (upholding trial court's finding that will leaving male testator's estate to live-in female companion who took care of him for eight years when he could not care for himself not valid even though parties did not appeal trial court's finding that testator was competent at all times); Mitchell v. Smith, 779 S.W.2d 384 (Tenn. Ct. App. 1989) (upholding jury's verdict that will favoring neighbors instead of daughter who refused to care for father was procured by undue influence); *cf. In re* Guardianship of Rekasis, 545 So. 2d 471 (Fla. Dist. Ct. App. 1989) (reversing lower court's determination that testator's niece's action against testator's nurse challenging a series of inter vivos transfers on grounds of undue influence not barred by statute of limitations). *But see* Sessions v. Handley, 470 So. 2d 1164 (Ala. 1985) (reversing trial court's failure to grant j.n.o.v. motion where jury found will disinheriting daughter and favoring neighbor who provided care to testator was product of undue influence). *See generally* Joseph W. deFuria, Jr., *Testamentary Gifts Resulting from Meretricious Relationships: Undue Influence or Natural Beneficence*, 64 NOTRE DAME L. REV. 200 (1989).

93. *See infra* note 104 and accompanying text.

For example in *Birch*, in reversing the probate court and finding the will invalid for undue influence, the court described in detail the genial relationship between the testator and his nephew (disinherited under the contested will), noting that the testator had treated the nephew "like a son."[94] The opinion also suggested that the nephew's own ill health had prevented him from visiting and caring for his uncle during his final illness.[95] In short, the court viewed the nephew as blameless, a factor that no doubt influenced its decision to overturn the finder of fact.

A comparison of *Birch* to *Pace v. Richmond*[96] is revealing. In *Pace*, a court upheld a will leaving the testator's entire estate to his neighbors, a married couple, although the testator's nephew was able to show evidence of the testator's paranoia, diminished mental capacity, dependence on his neighbors for conducting his affairs, and that the neighbors drove the testator to his attorneys for the purpose of making the will. The testator expressly disinherited his nephews, explaining that he did so because they "are able to look after themselves and...have paid little or no attention to me during the last ten years."[97] The attorney who drafted the will testified that the testator had told him he was very upset and distressed about how his nephews had treated him.[98] Thus, although the nephew was able to establish evidence comparable to that in *Birch*, the court's conclusion that the will was valid seemed to rely heavily on the fact that the testator expressed a reason for disinheriting his nephews that the court viewed as legitimate.

Also illustrative is a comparison of *In re Estate of Kern*,[99] and *In re Estate of Collins*.[100] In *Kern*, an elderly widow drafted a will leaving her entire estate to her lawyers of many years, a husband and wife team. In *Collins*, an elderly widow's will gave her entire estate to her accountant, who had been her friend for twenty years. In both cases, the beneficiaries were active in procuring the wills; in *Collins*, the beneficiary actually drafted the will, and in *Kern*, the lawyer beneficiaries (seemingly aware of the doctrine of undue influence)[101] chose the testator's scrivener and instructed him to prepare a will in accordance with a questionnaire they provided him that they maintained had been filled out by the testator. The beneficiaries in both cases chose the witnesses to the will. Moreover, the beneficiaries in both cases had had varying degrees of control over the respective testators' finances throughout their lives, and had the testators' trust and confidence.

The most striking difference between the two cases is the qualitative difference in the relationship between the contestants and the testators. In *Kern*, the niece contesting the will had not seen her aunt in thirty years, and had not contacted her even when her aunt lay ill and infirm. In fact, the niece could not testify as a witness concerning her aunt's capacity to make a will. In *Collins*, however, the court emphasized that the testator's nephews contesting the will

94. 691 S.W.2d 875, 879 (Ark. Ct. App. 1985).
95. *Id.*
96. 343 S.E.2d 59 (Va. 1986).
97. *Id.* at 60.
98. *Id.*
99. 716 P.2d 528 (Kan. 1986).
100. 510 N.Y.S.2d 940 (App. Div. 1987).
101. 716 P.2d at 539 (Schroeder, C.J., dissenting).

frequently visited and enjoyed "good relations."[102]

In *Kern*, the court affirmed a jury verdict upholding the will, but in *Collins*, the appellate court reversed the jury's verdict as against the weight of the evidence even though a review of the record in *Collins* reveals that the most damaging witness to testify against the beneficiary was the testator's former court-appointed conservator, who had struck a deal with the nephew/contestants entitling him to one-third of the testator's estate in the event the contest was successful.[103]

In sum, regardless of what courts declare, the presumption in favor of family members generally can be overcome only where the court views the testator's reason for disinheriting relatives as morally acceptable.[104] Thus,

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102. 510 N.Y.S.2d at 941.

103. The court instructed that, upon remand, the conservator "must withdraw from representing the objectants" because of his status as "key witness" in the case. *Id.* at 945. Exactly how the court thought that this instruction would erase the biased nature of the conservator's testimony is unclear. Presumably, the witness would have little incentive to give more accurate testimony at the risk of facing a perjury charge.

Moreover, the court chastised the beneficiary for failing to explain his actions in keeping the testator's will from the conservator until after the testator's death, *id.* at 944, despite the fact that the beneficiary was hard pressed to explain anything to the court's satisfaction since he was precluded from testifying on most issues by the dead man's statute in effect at the time. *But see In re* Will of Cromwell, 552 N.Y.S.2d 480 (Sup. Ct. 1989) (upholding $500,000 bequest to attorney/drafter, as well as nomination of drafter's firm as co-executor, even though firm had failed to inform testator of the more than $2 million impact on her $10 million estate, citing long, close relationship between attorney and testator; note that objection to bequest did not concern disinheritance of family member).

104. *See also* Wall v. Heller, 486 A.2d 764, 768 (Md. Ct. Spec. App. 1985) (affirming admittance of will disinheriting testator's nephew and only heir, noting that although contestant "testified that he had a close, loving relationship with the Testator,...[h]e admitted never writing or calling the Testator," he was unaware of his uncle's death until he saw a tombstone on a visit to the family burial plot and was unaware even of where testator had lived during the last 14 years of his life); *In re* Estate of DePriest, 733 S.W.2d 74 (Tenn. Ct. App. 1986) (reversing jury verdict that will disinheriting elderly testator's siblings was procured by undue influence by testator's housekeeper for faulty jury instructions; the court noted that testator was forced to live in a nursing home against her wishes when her siblings refused to take her in, and that testator subsequently left housekeeper her estate in exchange for room, board and care provided by housekeeper).

Of course, sometimes even evidence that strongly suggests immoral behavior on the part of relatives does not convince a court that the testator willingly disinherited that relative. *See, e.g.*, Crump v. Moss, 517 So. 2d 609 (Ala. 1987) (evidence of undue influence is similar to evidence in above cases, except that there was strong evidence that testator/settlor had wished to disinherit husband after years of emotional and physical abuse; court found will procured by undue influence of friends who took testator/settlor in and protected her from husband); *In re* Estate of Dankbar, 430 N.W.2d 124 (Iowa 1988) (finding adult female testator's will, leaving all to a companion and her attorney and disinheriting her father, invalid, because the court determined that testator's belief that father ruined her life by physically abusing her was delusional); Smith v. Chatfield, 745 S.W.2d 199 (Mo. Ct. App. 1987) (reinstating jury verdict that will leaving bulk of estate to female attorney testator's boyfriend and not her niece was procured by undue influence, because the beneficiary stated in answers to interrogatories that he was not aware whether testator had any reason to disinherit her relatives, and because, in the court's view, the testator had a good relationship with her grand-niece because they had phone or mail contact two to three times a year and on holidays, and because the only evidence of undue influence was that drafter was a co-worker of testator and a subordinate of beneficiary).

Other cases where courts expressly considered the worthiness of the contestant in determining whether a will was procured by a beneficiary's undue influence are: Baerlocker v. Highsmith, 730 S.W.2d 237, 238–39 (Ark. 1987) (upholding admittance of will leaving all to two charities instead of testator's siblings to probate, noting that testator had expressly informed attorney that she wished to disinherit siblings and that testator had not seen her sister, the

courts often focus more on the character of the disinherited contestant and his or her relationship with the testator than the quantity of evidence tending to show undue influence. Accordingly, testators who wish to distribute their property in a way that a court may view immoral, unjust or improper have limited freedom to do so.

B. Manipulation of Formalities

Courts' tendencies to manipulate doctrines such as capacity, undue influence and fraud to achieve normatively "just" results will come as no surprise to many. Some might argue, however, that the first phase of the probate process, the inquiry concerning whether a document complies with

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contestant, in 27 years); *In re* Estate of Coppock, 547 So. 2d 946, 949 (Fla. Dist. Ct. App. 1989) (upholding will leaving testator's estate to testator's friend and not his 92-year-old sister, noting that testator had explained to his attorney that he expected to outlive his sister and that "she was financially better off than he" and contestant could show none of the traditional indicia of undue influence); Heinrich v. Silvernail, 500 N.E.2d 835, 839–40 (Mass. App. Ct. 1986) (probate court denied probate even absent any of the traditional indicia of undue influence; appellate court reversed, emphasizing 1) the ethical behavior of the beneficiary, 2) that the testator gave his retarded brother, who could not handle financial matters, a life estate in the family farm in accordance with their deceased father's wishes, and 3) that the testator's other heir, a niece, had met the decedent only when very young, and that there had been little communication between them "including throughout his final illness"); *In re* Estate of Harris, 539 So. 2d 1040 (Miss. 1989) (upholding will favoring "neighbors and friends over distant nephews and nieces" who apparently did not visit or assist testator during final illness, as did neighbors and friends); Wright v. Kenney, 746 S.W.2d 626, 627 (Mo. Ct. App. 1988) (testator's cousin, beneficiary under first will written 40 years prior to testator's death, lost contest of testator's second will leaving all to testator's only friend, who was her caretaker and constant companion, with court noting that "[t]here is a dearth of evidence concerning contact between and the presence or absence of affection between the contestant and the testatrix"); *In re* Estate of Gearin, 517 N.Y.S.2d 339 (App. Div.) (affirming admittance of will leaving all to family friends with whom testator lived for the last five years of his life, emphasizing closeness of testator's relationship with those friends; the will disinherited testator's aged siblings, whom he apparently rarely, if ever, saw, and a niece, whom he visited with once a year), *appeal denied*, 524 N.Y.S.2d 432 (1987); Todd v. Woodward, 376 S.E.2d 276, 277 (S.C. 1989) (testator's cousin, beneficiary under testator's former will, contested will leaving all to testator's friend; reversing appellate court's denial of will, Supreme Court noted that testator had informed his attorney that "he felt abandoned by his relatives while [beneficiary] had cared for him during his illness"); *In re* Estate of Obra (Macaraeg v. Wilson), 749 P.2d 272, 277 n.9 (Wyo. 1988) (affirming summary judgment in favor of non-relative will proponent and against testator's collateral relatives living in the Philippines, noting that "There is an old axiom nurtured in practical realism: 'If you want the old codger to remember you by will, keep in close touch' for in fact, as with older ages of relatives, 'absence does not make the heart grow fonder.' Attention, as the elderly have little else, may not be something—it is near everything"); *cf. In re* Estate of McClenahan, 476 So. 2d 1289 (Fla. Dist. Ct. App. 1985). *But see* Sessions v. Handley, 470 So. 2d 1164 (Ala. 1985) (reversing trial court's failure to grant j.n.o.v. motion where jury found will disinheriting daughter and favoring neighbor who provided care to testator was product of undue influence); Arnau v. Cochran, 361 S.E.2d 173 (Ga. 1987) (upholding will leaving all to non-relative and disinheriting siblings for lack of undue influence); Dean v. Morsman, 327 S.E.2d 212 (Ga. 1985) (reversing lower court determination that testator's ex-wife's sister, with whom testator lived, procured will leaving all to her and not testator's daughter via undue influence, noting that testator was confident that beneficiary would take care of testator's children); Simm v. Adams (*In re* Will of Adams), 529 So. 2d 611, 615 (Miss. 1988) (supreme court reversed chancery court's nullification of will leaving all to testator's housekeeper and disinheriting grandchildren, noting that "[i]t is obvious to us from the facts of this case that the will at issue herein reflects the intent of [testator]", and emphasizing that there was absolutely no evidence that the beneficiary had been involved in the drafting or execution of the will); *In re* Estate of Angier, 552 A.2d 1121 (Pa. Super. Ct. 1989) (upholding denial of will disinheriting testator's only surviving daughter whom testator disinherited allegedly because he believed she was not his daughter, emphasizing that there was no evidence of undue influence).

wills act formalities and so constitutes a "will," is insulated from judges' views of the appropriateness of a will's dispositive provisions because that inquiry purely concerns form. Assume that courts approach proposed wills blindly, concerned only with whether formalities have been strictly complied with and paying no heed to the dispositive provisions of the will. If so, reformers might persuasively argue that reducing formalities and formalism in this phase of the probate process will lead to the admission of a greater number of wills to probate.

I propose, however, that the concerns with justice and morality that are so prevalent in undue influence doctrine are also evident in the first stage of the probate process. First, the degree to which courts impose normative values in undue influence cases is probative of whether they are able to abstain from doing so in determining formalities issues. After all, regardless of the issue in a will contest, the relative-contestant appears before the judge, as does the will's beneficiary. The judge is often readily able to perceive whether the beneficiary is related to the testator, the degree of relationship of the contestant to the testator, and may make inferences concerning other facts, for example, the degree to which the contestant was financially dependent upon the testator, or whether the contestant arguably had some other type of moral claim upon the testator's estate. Judges and juries are influenced by those factors in assessing an undue influence claim, and thus it seems reasonable to suppose that they might, consciously or subconsciously, consider those factors in formalities cases.

There are far fewer formalities cases litigated each year than cases that concern undue influence or similar issues. Thus, an empirical study of comparable factual cases in individual jurisdictions is difficult to compile. Nevertheless, my review of formalities cases suggests that even in the initial stages of probate, many courts are influenced by wills' dispositive schemes in assessing whether a testator complied with statutory formalities. Moreover, I suggest that the reformers' allegation that courts routinely insist on strict compliance with wills act formalities is somewhat exaggerated. As Bruce Mann has recognized, judicial adherence to the strict compliance doctrine is overstated because courts often pretend they are requiring strict compliance while actually accepting something less. For example, Mann writes that courts are

> more liberal in what they will consider attestation, particularly in terms of what constitutes 'presence'. Yet whenever courts stretch the definitions of signature and attestation, they always maintain that the variant they are accepting is compliance—not the functional equivalent, but actual compliance. Although often false, this stance is the only way that courts can soften the impact of a rule of strict compliance with every formality."[105]

Langbein himself, while insisting that courts require strict compliance, recognizes that "there is considerable diversity and contradiction in the cases interpreting what acts constitute compliance with what formalities."[106] Absent from the literature, however, is an examination of why or in what instances courts are likely to stretch the definition of compliance, or the reason for the "diversity and contradiction" in formalities law. I suggest that an important

105. Mann, *supra* note 4, at 1040–41.
106. Langbein, *supra* note 1, at 489.

factor in whether a court will require strict compliance is the identity and character of the parties involved in the will contest.

It should first be emphasized that many, if not the majority, of courts that have considered formalities cases are not likely to have a hidden agenda, because the testator's immediate family and/or dependents will be the primary beneficiaries no matter what the court's holding, as directed by either the will or the intestacy statutes. At most, the court's decision in those cases will affect the fractional shares of the bequests and may benefit or cut out a few relatives. In those instances, the impulse to stretch to validate the will or to insist on strict construction will depend on the degree of commitment the particular court has to honoring testamentary intent and the court's view of the relative worthiness of contestant and beneficiary.

But cases pitting the testator's family or dependents against distant or non-relatives are another matter. There, courts are more apt to find formalities lacking when the will's provisions violate the presumption in favor of the family and there appears to be no sufficient evidence to excuse the testator from his or her failure to provide for family members.

1. The Witness Presence Requirement

To illustrate that phenomena, explore the history of a particular formality imposed by most traditional Wills Act statutes; that two attesting witnesses must sign the will in the testator's presence. The purpose of the requirement is to "obviate any opportunity of the witnesses, committing a fraud upon the testator, by changing or altering the document."[107] But judicial construction of the requirement has had little to do with effectuating that purpose. Rather, the decisions often hinge on whether the testator has preferred distant or non-relatives over more immediate family and the court cannot infer a sufficient justification.

Cases from several jurisdictions illustrate the point. For example compare two Texas cases, *Morris v. West*[108] and *Nichols v. Rowan.*[109] In *Morris*, the testator had gone to his attorney's office on two different occasions to participate in formal execution ceremonies of his will and a codicil. Both times, the testator signed the will in the presence of two witnesses, who were secretaries working in the law office. Both times, the secretaries left the conference room with the document after observing the testator sign and went down the hall to their office, where they each signed. The testator waited in the conference room each time. The court found that the witnesses had failed to sign in the testator's "conscious presence" because the testator could see not the witnesses sign, nor could he have seen them with a "slightly altered position."[110] Because he would have had to open the door, walk down the hall and look into the secretaries' office, the court held that the conscious presence test was not satisfied.[111]

107. *In re* Estate of Demaris, 110 P.2d 571, 581 (Or. 1941) (quoting *In re* Estate of Shaff, 266 P. 630, 632 (Or. 1928)).

108. 643 S.W.2d 204 (Tex. Civ. App. 1982).

109. 422 S.W.2d 21 (Tex. Civ. App. 1967).

110. 643 S.W.2d at 206.

111. The court failed to note precedent that emphasized the importance of the continuity of the execution ceremony in determining whether the presence test is satisfied. *See* Earl v. Mundy,

In *Nichols*, the will was not signed in a law office, but in a hospital bed. One of the witnesses testified that she had signed the document while standing at a nursing station out of the sight of the testator at the request of the other witness to the will.[112] Evidence indicated that the nurses' desk was separated from the testator's hospital bed by space and a five-foot cubicle, and could not have been seen by the ill testator unless he had been standing or sitting on the edge of his bed, which he had not been.[113] In *Nichols*, however, the court affirmed that the will had been validly executed. [114]

The contrast between the two cases cannot be explained by reference to the purpose of the witness presence requirement. In *Morris*, the testator was at his attorney's office on both occasions specifically to execute the will and codicil; on both occasions, he had ample opportunity to view the final executed document to ensure that no "will switching" or other fraud had occurred. The fact that both the will and the codicil were attested on two separate occasions by the same two secretaries in their office indicates that the testator's attorney might have routinely conducted will execution ceremonies in that way, and the failure of the testator to meet the presence requirement was attributable to his

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227 S.W. 716, 721 (Tex. Civ. App. 1921).

112. 422 S.W.2d at 23.

113. *Id.*

114. In *Nichols*, one witness had testified unequivocally that she had not signed in the testator's presence, and had not even spoken to the testator, who lay in a hospital bed. *Id.* A second witness could not remember whether the first witness had signed the will at the nurses' desk or beside the testator's hospital bed. *Id.*

The jury had two options: discount the witnesses' testimony and determine that the first witness had signed the document at the testator's bedside regardless of what she said, or, accept the first witness' testimony and determine that her signing of the document at the nurses' station fit the definition of "conscious presence." The location of the witness' signing was a question of fact; whether the signing at the nurses' station was sufficient to meet the "conscious presence" test, however, was a question of law. If, as Morris suggests, signing at the nurses' desk and out of the sight of the testator was insufficient to meet the "presence" test as a matter of law, then a jury verdict premised on the truth of the witnesses' testimony would have been erroneous as a matter of law. In submitting only one question to the jury, then, the trial court implicitly determined that the jury could find that the document was executed by the witnesses in the conscious presence of the testator either because the witness' testimony that she was in fact at the nurses' desk was not to be believed, or because signing at that location satisfied the conscious presence test, even though the testator could not see the desk unless he stood up or sat on the end of his bed, and even though he was bed ridden and may have been too ill to do so.

In upholding the validation of the will, then, the appellate court implicitly made two findings. An analysis of the opinion shows that it implicitly found, as a matter of law, that the jury could have believed the witnesses' testimony and found that the signing at the nurses' desk could satisfy the "conscious presence" test. If the conscious presence test could not, as a matter of law, have been satisfied by a finding that the witness signed at the nurses' desk, the court should have reversed the jury determination and remanded to ensure that any subsequent jury determination of validity was based on a finding that the will was witnessed at the testator's bedside.

The court, however, simply decided that there was a plausible reason to discount the witnesses' testimony and found that the boilerplate attestation clause, which recited that the will was validly executed, was sufficient evidence that the presence requirement had been met. Thus, it held that sufficient evidence existed to support the jury's verdict. Unless one reads the opinion as finding that the conscious presence test could have been satisfied by the witness' signing at the nurses' station, the court's reasoning is faulty; the possibility that the jury's decision could have hinged on an incorrect definition of presence would have made it necessary for the court to reverse the jury's determination and remand for a new trial requiring specific factual findings. Thus, although the appellate court attempted to skirt the issue concerning the definition of "conscious presence," perhaps because it would have necessitated invalidating a will clearly expressing the testator's intent, the attempt was unsuccessful.

attorney's carelessness. If anything, the facts in *Nichols*, where the ill, bedridden testator was confined to a hospital for three months, would seem to require greater protection against fraud.

The two cases can be reconciled by comparing the will provisions. In *Morris*, the testator's will and codicil, executed a year before his death,[115] left one-third of the residuary estate to the testator's former son-in-law and nothing to the testator's daughter to whom the son-in-law had been married. The testator had also disinherited a certain grandson (apparently the son of another of the testator's children). Thus, the invalidation of the will deprived the former son-in-law of any of the testator's property and provided for the testator's daughter and grandson. On the other hand, the will upheld in *Nichols* devised the childless testator's entire estate to a niece.

The *Morris* case reveals a court less concerned with effectuating testamentary intent than with forcing the testator to honor perceived moral obligations. First, the codicil was executed, at most, one year before the testator's death.[116] Thus, there is a strong possibility that the testator's daughter was divorced or contemplating divorce at the time the will was executed and the testator nevertheless intended to make the gift.[117] Furthermore, it is clear that the testator wished to disinherit his grandson. The court's strict insistence on compliance with the witness presence formality allowed it to frustrate testamentary intent in favor of competing principles.[118]

In fact, if the *Morris* court had wanted to sustain the will, it could have looked to a virtually identical case for support. *In re Estate of Demaris*,[119] is representative of a number of cases where courts stretched to find formalities satisfied long before notions of "substantial compliance" became popular.[120] In

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115. The civil appeals court had first issued an opinion reversing summary judgment for the daughter on July 10, 1980, which suggests that the daughter must have initiated a will contest some months prior to that date. The testator's codicil, which affirmed his will, was executed on February 20, 1979. Thus, it seems safe to assume that the testator died after February 20, 1979 and before, at the latest, June of 1980. It is not clear whether the daughter was divorced at the time the testator executed his will. Given the length of the typical divorce proceeding, it would seem that the testator might have been aware of an impending divorce.

116. *See supra* note 115.

117. In fact, the opinion indicates that the divorce had occurred prior to the will's execution, when it notes that the daughter's "one-third share of the residuary estate was given to her ex-husband." 643 S.W.2d at 205.

118. The Texas courts first grappled with the definition of "presence" in Earl v. Mundy, 227 S.W. 716 (Tex. Civ. App. 1921). There, the court determined that the witnesses signed the testator's codicil in the testator's presence even though they were across the room with their backs toward the testator, so that he was prevented from seeing them actually sign the will. The codicil, which increased the testator's bequests to his wife, was contested by the testator's nieces, nephews and a sister, who took less pursuant to the terms of the codicil than they would have under the will. In holding that the "presence" test was satisfied because the witnesses were in the same room as the testator, the court stressed the continuity of the ceremony:

> the testator had just had the codicil read to him...had then signed his name thereto in the presence of the...witnesses...and had then called upon the two to witness what he had said and done with reference to the paper. They immediately carried the paper from the bed on which the testator was lying to a table in the room...signed it, returned with the paper to the testator, and asked what he wanted done with it.

227 S.W. at 722.

119. 110 P.2d 571 (Or. 1941).

120. The *Demaris* court studied at length the following cases that had accepted less than strict compliance with the witness/presence requirement: Kitchell v. Bridgeman, 267 P. 26

Demaris, the Oregon Supreme Court found that the "conscious presence test" was satisfied even though the witnesses had attested the will out of the testator's sight, in a room twenty-five feet away from the testator's hospital bed that was separated by several doors and a waiting room.[121] That will bequeathed the bachelor testator's entire estate to Ida, one of his sisters, who had displayed a "tireless devotion" to the testator "throughout her entire life."[122] If the will were found invalid, the testator's estate would have been distributed to the estate of the contestant, the testator's father, who had survived him for a brief period of time. Due to a family dispute that had arisen after the divorce of the testator's parents, the testator's father's will completely disinherited Ida, who would thus be left unprovided for were the testator's will found invalid.[123]

In holding that the witnesses had indeed signed the will in the testator's presence, the court examined a range of cases from other jurisdictions, and concluded that the witnesses were in the "immediate nearness and vicinity of the testator" and within range of the testator's hearing because "[t]hese three small rooms, if combined, would make nothing more than one room of fair length but of narrow width."[124] In so holding, the court admitted that its holding had "gone as far as any of the precedents. But the circumstances repel any thought of fraud and speak cogently of the integrity of the instrument under review."[125] The court admitted that the will "failed to comply with the strict letter of the statute," but nevertheless found that because it "substantially complied with its requirements" the will was valid.[126] "To hold otherwise," the court observed, "would be to observe the letter of the statute as interpreted strictly, and fail to give heed to the statute's obvious purpose."[127] "Thus," the court continued, "the statute would be turned against those for whose protection it has been written."[128]

There can be no doubt that the court was motivated to apply the substantial compliance doctrine and validate the will out its own sense of justice, just as the *Morris* court was similarly motivated in refusing to find the presence test was satisfied. Thus, courts' famed insistence on strict compliance with Wills

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(Kan. 1928); *In re* Estate of Lane, 251 N.W. 590 (Mich. 1933); Cook v. Winchester, 46 N.W. 106 (Mich. 1890); Bradford v. Vinton, 26 N.W. 401 (Mich. 1886); Cunningham v. Cunningham, 83 N.W. 58 (Minn. 1900); Healy v. Bartlett, 59 A. 617 (N.H. 1904); *In re* Estate of Shaff, 266 P. 632 (Or. 1928).

121. 110 P.2d at 573–75.

122. *Id.* at 578–79.

123. The court's sympathy for the testator's sister is evident:

> It is true that her brothers and sisters are honest, industrious and splendid law-abiding citizens; but in sickness and distress, in good times and bad, she was the one who was always ready to sacrifice her own time and energy, whenever the testator, her brother, needed help. When he was sick, no matter where she might be, she was the one who was called upon to return, and care for him. Freely and gladly she answered the call and nursed him back to health. If he had not remembered her in his will, it would have appeared strange. While she is not old, she is no longer young, and is poor financially. He chose the honorable course, and it was only to be expected, that when he was stricken, and on his death-bed, and no doubt with a foreboding that he was approaching the end, his thoughts should turn towards his sister, who had been so unselfish and devoted to him.

Id. at 579.

124. *Id.* at 585.

125. *Id.* at 586.

126. *Id.*

127. *Id.*

128. *Id.*

Act formalities is overstated; the courts employ a more elastic approach when necessary to ensure that the testator fulfills his or her implied duty to those who are perceived to have a superior moral claim to the testator's assets.[129]

The pattern of requiring strict compliance with the witness presence formality to invalidate offensive wills and allowing substantial compliance with that formality when the court wishes to uphold a will is also illustrated by Michigan law. In 1890, that state's highest court gave its stamp of approval to the "substantial compliance" standard for evaluating presence issues in *Cook v. Winchester*.[130] In *Cook*, the court, reversing two lower courts,[131] directed that a will be admitted to probate even though the witnesses signed the will in the room adjacent to the room in which the bedridden testator lay, and the court admitted it was "physically impossible" for the testator to see the witnesses.[132] Similarly, in *In re Estate of Lane*,[133] the court allowed a will to be admitted to probate where the witnesses had signed in the corridor thirty-feet from the testator's hospital room, admittedly out of the testator's sight.[134] The court found the will executed in the testator's presence, emphasizing that there was no question that the testator intended that the document constitute his will.[135] The opinions in those cases are silent concerning the identity of the respective contestants and beneficiaries and their relationship to the testators. Nevertheless, both courts stressed the need for "justice" in the particular case in adopting the "liberal" rule of construction.[136] As the *Cook* court put it, "If the will is not sustained, the property will certainly go, under the law, where she did not wish it to go. It is therefore the duty of the courts to uphold it if possible."[137] These cases suggest that courts have long been willing to require less than strict compliance when they wish to uphold a will.

Nevertheless, in *In re Estate of Hill*,[138] and *In re Estate of Cytacki*,[139] two Michigan courts ignored the state's long-established adoption of a liberal construction rule and invalidated wills by applying a standard of strict compliance. In *Hill*, the court reversed a lower court's admittance to probate of the testator's will because the witnesses, two bank employees, had signed the will in a room located behind the bank teller's window, and the testator had

129. *See also, e.g., In re* Estate of Tracy, 182 P.2d 336 (Cal. Ct. App. 1947) (following *Demaris* in finding a valid revocation of a will in favor of a third party even though the witnesses signed in a different room, resulting in distribution of testator's estate to her husband); *In re* Will of Pridgen, 107 S.E.2d 160 (N.C. 1959) (finding will leaving all to testator's wife properly executed, even though witness admittedly signed will in adjoining room out of testator's sight, where rejection of will would have required testator's wife to share estate with testator's two sisters and eight nephews and nieces; *cf.* Taylor v. Taylor, 770 P.2d 163 (Utah Ct. App. 1989) (declining to adopt substantial compliance standard to validate alleged will that one witness signed after the testator's death; the will forgave a debt by the testator's brother and contained no other dispositive provisions; validation of that "will" would have been contradictory to subsequent will that left the testator's entire estate in trust to his wife and their children).

130. 46 N.W. 106, 109 (Mich. 1890) (holding that "this seems to us to have been a substantial compliance with the statute").

131. *Id.* at 107.

132. *Id.*

133. 251 N.W. 590 (Mich. 1933).

134. *Id.* at 591.

135. *Id.* at 591, 593.

136. *Cook*, 46 N.W. at 109; *Lane*, 251 N.W. at 593.

137. 46 N.W. at 106.

138. 84 N.W.2d 457 (Mich. 1957).

139. 292 N.W. 489 (Mich. 1940).

stood in front of the window.[140] The will immediately had been returned to the testator after the witnesses had affixed their signatures, and she had reviewed their signatures and the will, thus rendering any chance of fraud or will switching impossible, a fact found to be relevant to the *Cook* and *Lane* courts. Nevertheless, the court found the presence test unsatisfied. Although the court acknowledged that the testator could have seen the witnesses sign by simply changing her position, it found that point irrelevant since the testator had not in fact done so.[141] In so holding, the court acknowledged that it was violating the testator's clear intent.[142]

In finding the will invalidly executed, the *Hill* court cited *Cytacki* for support.[143] There, after the testator signed the will leaving all to a distant female relative with whom he lived, his niece immediately took the will nine feet away to the house next door, where the neighbors signed the will as witnesses. The testator's niece immediately returned the document to the testator, who was standing on his back porch awaiting its return. Although there was no evidence or allegation of fraud or will switching, the court found the presence test unsatisfied because the testator had not viewed the witnesses as they signed the document, and because the witnesses were too far away to be in the testator's conscious presence.[144]

Admittedly, finding the presence test satisfied in *Cytacki* would have been a stretch because the attestation occurred in a separate building. The facts in *Hill*, however, were certainly more akin to those of *Cook* and *Lane* than to those in *Cytacki*. Perhaps the most important similarity between *Hill* and *Cytacki* is unemphasized in both opinions: in each case, the contestant was the testator's apparently disinherited mother. Maybe this fact helps explain each court's refusal to acknowledge the *Cook* court's directive that substantial compliance with the presence requirement would suffice absent allegations of fraud or will switching. Clearly, the *Hill* and *Cytacki* courts were not reluctantly forced to invalidate the will due to a judicial tradition of insistence on strict compliance; rather, they chose to insist on a strict compliance requirement to achieve a particular purpose.

The tendency to manipulate the witness presence formality as exemplified by Texas, Michigan and Oregon law is evident in other jurisdictions as well.[145]

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140. 84 N.W.2d at 458–59.

141. *Id.* at 461.

142. The court stated that "the matter of Mrs. Hill's intent is not open to question. It was her purpose to execute a valid will." *Id.* at 459.

143. *Id.* at 460.

144. 292 N.W.2d at 490–91.

145. *See, e.g.*, *In re* Estate of Tracy, 182 P.2d 336 (Cal. Ct. App. 1947) (following *Demaris* in finding a valid revocation of a will in favor of a third party even though the witnesses signed in a different room, resulting in distribution of testator's estate to her husband); *In re* Estate of Weber, 387 P.2d 165 (Kan. 1963) (disregarding precedent stating that substantial compliance with formalities was sufficient, and finding will invalid where witnesses signed inside bank and could see testator, who remained in car, through the window but could not hear him—the invalid will had mistakenly left the testator's entire estate to his niece, though the testator had meant to leave 1/2 to his niece and 1/2 to his incompetent wife—invalidation of the will passed the entire estate to his wife); *In re* Will of Pridgen, 107 S.E.2d 160 (N.C. 1959) (finding will leaving all to testator's wife properly executed, even though witness admittedly signed will in adjoining room out of testator's sight, where rejection of will would have required testator's wife to share estate with testator's two sisters and eight nephews and nieces); Taylor v. Taylor, 770 P.2d 163 (Utah Ct. App. 1989) (declining to adopt substantial compliance standard

Of course, manipulation of the witness/presence formality is merely one example of the judicial manipulation of formalities to ensure estate distributions that comport with normative visions of justice. The following section explores the manipulation of another formality that occurs when courts must determine whether a testator who was assisted in signing his name fulfilled the signature requirement.

2. The Signature Requirement

Two Illinois cases concerning ill testators who had required assistance in signing their wills provide another example of judicial manipulation of formalities to enforce perceived moral duties. The wills in both *In re Estate of Weaver*,[146] and *Bailey v. Clarke*,[147] were signed while the bedridden, severely ill testators were confined to their hospital beds. The wills were both witnessed by the testators' close friends of long duration, who testified that the testators had capacity and understood the terms of the will.[148] There was testimony that each testator had been asked prior to signing if the will represented his intentions and each had shaken his head yes.[149] Both testators had trouble signing the will due to medical problems, and in both cases an attorney or witness assisted the testator in making his mark.[150] In *Weaver*, the testator signed his name;[151] in *Bailey*, the testator signed with an X.[152]

Both testators left only siblings and/or nieces and nephews as heirs-at-law. In *Weaver*, the testator's will benefited his four nieces and failure to validate the will would have resulted in the distribution of his assets to his wife's nephew through the default clause of a previous will drafted prior to his wife's death. In *Bailey*, however, the testator's will disinherited his closest relatives, his sister (with whom he lived) and a nephew, in favor of a cousin.[153]

Both courts considered the same issues: whether the testators had actually signed the wills and whether they had understood and acknowledged the wills' contents. The *Weaver* court reversed the trial court and found the will valid, emphasizing the light touch of the assister's hand (despite evidence to the contrary).[154] Noting that the testator had not expressly requested assistance, the court decried, "[w]ere we to hold to the contrary, we would be permitting a

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to validate alleged will that one witness signed after the testator's death. The will forgave a debt by the testator's brother and contained no other dispositive provisions; validation of that "will" would have been contradictory to subsequent will that left the testator's entire estate in trust to his wife and their children.); *cf.* Carlson v. Stover, 126 N.W.2d 784 (Minn. 1964) (upholding trial court's denial of will that was dated, signed, entirely in handwriting of testator and signed by two witnesses; will gave all to bachelor testator's female friend and her two children "who has been wondeful [sic] in helping us. By Cooking the Meals and taking care of all the Household Chores." Contestants, testator's brothers, took estate because there was no testimony that the will was witnessed in the testator's presence, even though the witnesses testified that they watched the testator draft and sign the will).

146. 365 N.E.2d 1038 (Ill. App. Ct. 1977).
147. 561 N.E.2d 367 (Ill. App. Ct. 1990).
148. *Weaver*, 365 N.E.2d at 1040–42; *Bailey*, 561 N.E.2d at 368–69.
149. *Weaver*, 365 N.E.2d at 1040; *Bailey*, 561 N.E.2d at 370.
150. *Weaver*, 365 N.E.2d at 1040–42; *Bailey*, 561 N.E.2d at 369–70.
151. 365 N.E.2d at 1040–42.
152. 561 N.E.2d at 369–70.
153. *Id.* at 368–69.
154. The court acknowledged that "at one point...the witness answered 'yes' to the leading question, 'Did he [Phillips] guide the signature?' However, this one response cannot be regarded as the single description of the signing transaction." 365 N.E.2d at 1043.

volunteer disinterested person, neither an attorney nor an agent designate to defeat the making of a will by the testator."[155]

The court also determined that the testator had acknowledged the document as his will, noting that an acknowledgment need not be a "verbal declaration."[156] Rather,

> if, in the presence of the testator, the instrument is spoken of by another as the testator's will and the witnesses are requested by such third person to sign, the presence and silence of the testator, if he is then of sound mind and memory, give consent to such declarations and amount to an acknowledgment by him of the will as his act and deed.[157]

Consequently, the testator's estate was distributed to his closest relatives.

Notwithstanding *Weaver*, the *Bailey* court affirmed the trial court's denial of probate. After discussing whether the testator had validly signed the will, the court failed to decide the issue, moving instead to the question whether the testator "acknowledged the instrument as his will or was aware of the contents of the document."[158] The court determined that the finding that the testator had not acknowledged his will was reasonable,[159] notwithstanding the following facts: on the day before he entered the hospital, the testator had visited his attorney's office with instructions for drafting his will; the testator's cousin and sister-in-law picked up the will from the attorney and brought it to a second attorney, who presided over the execution ceremony at the testator's bedside; there was apparently no allegation that the will signed by the testator was not the one that his attorney had prepared for him; all who had been present at the execution had testified that the testator was competent, alert and aware; at least two witnesses testified that they believed the testator understood the terms of the will, and no one testified that he had not.[160] The court itself found that sufficient evidence supported the jury's finding that the testator possessed testamentary capacity.[161] The *Bailey* court did not appear troubled by the broad acknowledgment rule of *Weaver*. It cleared that hurdle simply by neglecting to cite *Weaver* at all. Thus, Bailey's assets were distributed to his sister and nephew despite his clear intent to the contrary.

Other cases also indicate that courts addressing the signature requirement are influenced by the relationships of the parties to the testator, which often results in distribution of the decedent's estate in contravention of his or her intent.[162] Moreover, the two examples explored above are only examples of how courts often handle formalities issues.[163] Case law reveals that courts are

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155. *Id.*
156. *Id.* at 1044 (citing Bronson v. Martin, 51 N.E.2d 149, 152 (Ill. 1943)).
157. *Id.*
158. Bailey v. Clarke, 561 N.E.2d 367, 370 (Ill. App. Ct. 1990).
159. *Id.*
160. *Id.* at 368–69.
161. *Id.* at 369.
162. *See, e.g.*, *In re* Estate of DeThorne, 471 N.W.2d 780 (Wis. Ct. App. 1991) (finding testator's signature invalid where witness braced testator's hand so that he could finish writing his signature. Testator was lucid and aware, and his "intent to execute his will is undisputed." *Id.* at 784. However, the will left the entire estate to testator's second wife of six months and disinherited two daughters from his prior marriage; the opinion notes that testator's wife's will left the testator only a life estate in her property, and that the two had lived together without being married for two years. *Id.* at 781).
163. *See, e.g.*, *In re* Estate of Parsons, 163 Cal. Rptr. 70 (Ct. App. 1980) (finding devise of real property to testator's friend who witnessed the will invalid because other interested

often much more concerned with issues of familial obligation than testamentary freedom.

III. THE UNIVERSAL CONCERN FOR FAMILY PROTECTION

As the preceding sections show, although courts steadfastly proclaim their adherence to the concept of testamentary freedom, their reasoning quite often betrays a primary loyalty to other competing principles. My analysis reveals two overlapping organizing principles that can explain the vast majority of cases: first, testators have a duty premised on moral obligation to distribute their estate to family members; second, testators need protection from their own bad judgment or immoral instincts.

To state that simplifying formal requirements and forgiving "harmless errors" in execution will promote testamentary freedom is to overlook completely the ferocity with which the culture honors and demands duty to family and the fulfillment of perceived moral obligations, and its desire to discourage choices based on values it perceives as threatening to those principles.[164] In fact, Gulliver and Tilson's article, while advocating for the adoption of a "substantial performance" doctrine, straightforwardly announced that "other factors" (besides the extent of compliance with formalities),[165] including "the fairness of the disposition,"[166] "may and should influence" the decision whether to admit a will to probate.[167] As they put it, "[a] gift made by a person in a very decrepit state, shortly before his death, to someone who is not a natural object of his bounty will obviously not enlist as sympathetic an attitude as a *normal* and equitable disposition made in the prime of life."[168]

A. Cultural Adherence to Family Protection

That courts often value family protection over testamentary freedom should come as no surprise to the drafters of the Revised UPC. The desire to provide for dependent family members and to discourage unorthodox bequests has ancient roots,[169] and has long been evident in the laws of both the United States and most Western countries. Even though most early American

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witness' disclaimer, made after the will was executed, was ineffective; result: real property distributed to testator's relatives despite her clear intent that they not receive her estate); *compare In re* Pavlinko's Estate, 148 A.2d 528 (Pa. 1959), with *In re* Snide, 418 N.E.2d 656 (N.Y. 1981). In each case, husband and wife mistakenly executed the will of the other. The *Snide* court probated the improperly signed will, and the testator's property was distributed to his wife, the mother of his minor child. In *Pavlinko*, where probation of the will would have resulted in distribution of the testator's estate to a non-blood relative, the will was denied probate, and the property passed to the testator's next of kin.

164. *See* Deborah A. Batts, *I Didn't Ask to Be Born: The American System of Disinheritance and a Proposal for Change in a System of Protected Inheritance,* 41 HASTINGS L.J. 1197, 1231–43 (1990) (exhaustive exploration of various studies showing that most Americans believe that children should not be disinherited; for example, one study showed that 93.4% of Americans interviewed believed that parents should not be allowed to disinherit children under 21 years of age; 63.4% felt that parents should not be allowed to disinherit children over 21 years of age. *Id.* at 1233.).

165. Gulliver & Tilson, *supra* note 1, at 17–18.

166. *Id.*

167. *Id.*

168. *Id.* at 18 (emphasis added).

169. *See* Batts, *supra* note 164, at 1202–05 (asserting that, in the Roman era, children had a right to inherit that was based on the testator's moral obligation to his children).

revolutionaries advocated abolishing the fee tail and primogeniture, historians suggest that at least some believed that the purpose of this reform was to ensure a "more equitable distribution of property through inheritance, rather than abolition of inheritance altogether."[170] Today, most states have in place statutes that expressly negate intent to some degree to protect the testator's family. The most obvious examples are the traditional elective share statutes, which curtail "the decedent's testamentary freedom with respect to his or her title-based ownership interests.... No matter what the decedent's intent,"[171] to protect a dependent spouse.[172] Louisiana, a civil code state, has long prevented a testator from disinheriting a minor child except for cause.[173] And an Oregon statute provides that a court may "make necessary and reasonable provision" from a testator's estate for the support of the testator's spouse and dependent children.[174] Although the duration that such support payments may extend is unclear, it is apparent that the statute empowers courts to order maintenance for a period well beyond the period of estate administration.[175]

The drafters of the UPC themselves struggled with the tension between freedom of testation and the perceived testamentary obligation to support family. As one commentator notes, "[t]he formalism of the elective share is explicit in its disregard of the testator's intent."[176] The drafters themselves note that the revised elective share provision has two "driving force[s]," one of which is the "support theory."[177] Criticizing traditional elective share statutes for "disregard[ing] the survivor's actual need," the drafters recommend that "the spouses' mutual duties of support during their joint lifetimes should be continued in some form after death in favor of the survivor."[178] Thus, regardless of the testator's intentions concerning the distribution of his or her property, "the redesigned elective share system implements the support theory by granting the survivor a supplemental share amount related to the survivor's actual needs."[179] The duty of support owed by the testator is based on status, and therefore "arises at the time of marriage."[180] Similar concerns for the support of the testator's dependents are reflected in section 2–402 (the

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170. *Id.* at 1209 (citing Stanley N. Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 MICH. L. REV. 1, 18 (1977)). As Jefferson stated:

> legislatures cannot invent too many devices for subdividing property, only taking care to let their subdivision go hand in hand with the natural affections of the human mind. The descent of property of every kind therefore to all the children, or to all the brothers and sisters, or other relations in equal degree is a politic measure, and a practicable one.

Batts, *supra* note 164, at 1209–10 (citing 8 THE PAPERS OF THOMAS JEFFERSON 682 (J. Boyd ed. 1950)).

171. Art. II, UNIF. PROBATE CODE, general cmt.

172. *See* Batts, *supra* note 164, at 1246 n.291 (citing elective share laws in place in 46 states and the District of Columbia).

173. LA. CIV. CODE ANN. arts. 1493–97 (West 1989) (providing forced-share for children under 23 years of age).

174. OR. REV. STAT. tit. 12, § 114.015 (1993).

175. Comment, *Protection of the Surviving Spouse Under Oregon Probate Law*, 57 OR. L. REV. 135, 142–47 (1977).

176. Mann, *supra* note 4, at 1053.

177. The other is to redefine the concept of the testator's property to better reflect the partnership theory of marriage. UNIF. PROBATE CODE, pt. 2, Elective Share of Surviving Spouse, general cmt.

178. UNIF. PROBATE CODE, pt. 2, Elective Share of Surviving Spouse, general cmt.

179. *Id.*

180. *Id.*

Homestead Allowance), section 2–403 (Exempt Property) and section 2–404 (Family Allowance).

Thus, the cultural instinct to restrict testamentary freedom in favor of the testator's family is reflected in both statutes and commentary.[181] It should come as no surprise, then, that the same impulse is evident in the case-law as well.

B. Family Protection in Other Legal Systems

Most other Western countries expressly acknowledge a strong public policy of restricting freedom of testation to protect dependents, family members and others who are viewed as having a claim on a decedent's assets. Such policies are much broader than the limited protection afforded by elective share statutes in place in the United States. First, as Professor Ralph Brashier notes, "[m]ost of the civilized countries in the world provide direct protection from disinheritance to children of the testator."[182] The list of countries with statutory or civil-code protection for testators' children includes Argentina, Austria, Belgium, Brazil, France, Germany, Greece, Italy, Japan, Spain, Sweden and Switzerland.[183] Civil code countries have long provided spouses and children of testators with guaranteed shares of the decedent's estate.[184] France's system is illustrative: children can be prevented from receiving a portion of their parent's estate only for cause.[185] Because the testator's spouse is protected by the community property system, a testator can only disinherit his or her spouse of half of the marital property.[186]

Most common-law countries also restrict testamentary freedom in favor of policies protecting family and other dependents of the testator.[187] For example, least fifteen common-law jurisdictions, such as New Zealand, England, the states of Australia, and most of the Canadian provinces, have enacted statutes that give courts substantial discretion to deviate from the distributive scheme set forth in the testator's will to provide for the testator's dependents, even where the testator expressly clarified an intention to disinherit.[188] These statutes, generally known as Family Protection Acts or Testator's Dependents Acts, do not exist merely to keep the testator's dependents from becoming wards of the state. Rather, they are imbued with the

181. Commentators who have argued in favor of some form of restriction on testamentary freedom to serve various other principles include Deborah A. Batts. *See* Batts, *supra* note 164 (proposing statutory protection against disinheritance for children); Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69 (1990) (arguing that property rights should end at death to facilitate simple and quick disposition of a decedent's assets); Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83 (1994) (arguing for greater protection for disinherited children); Davis, *supra* note 33 (urging that the United States adopt a family protection statute similar to those in force in most Canadian jurisdictions).

182. Brashier, *supra* note 181, at 117 n.111.

183. *Id. See also* Batts, *supra* note 164, at 1211–13 (describing in depth the forced-inheritance provisions in place in many Western countries).

184. Brashier, *supra* note 181, at 117 n.111.

185. *See id.* at 83.

186. *Id.* at 117 n.111.

187. *See* Arthur Nussbaum, *Liberty of Testation*, 23 A.B.A. J. 183, 183–86 (1937) (noting "distinct symptoms" that common-law countries may move away from ideas of freedom of testation towards protection for family and dependents).

188. Joseph Laufer, *Flexible Restraints on Testamentary Freedom—A Report on Decedents' Family Maintenance Legislation*, 69 HARV. L. REV. 277, 282 (1955). Brashier, *supra* note 182, at 83 n.125. *See also* Davis, *supra* note 33, at 151 nn.10–11. *See, e.g.*, The Testator's Family Maintenance Act, N.Z. STAT. NO. 20 (1900).

idea that a testator owes a moral obligation to certain others, regardless of need.[189]

For example, in England, the country that has most influenced United States' wills laws and from which we have inherited our respect for testamentary freedom, the protection afforded runs not only to those related to the testator, but to anyone who can claim entitlement to the testator's assets, such as an ex-spouse or any person who can show they were maintained "in whole or in part" by the decedent.[190] Any qualifying individual is entitled to a "reasonable financial provision" from the testator's estate.[191] In determining what financial provision is "reasonable," the court is entitled to consider "all the circumstances," and may make an award "whether or not that provision is required for [the applicant's] maintenance."[192] Thus, the statute seems to be premised at least in part on the legislature's sense of a testator's moral duty.

British Columbia courts' interpretation of that province's family maintenance statute illustrates judicial tendencies not only to ensure that dependents are provided for but to impose normative moral judgments concerning the appropriateness of the testator's testamentary scheme. Section 2(1) of the Wills Variation Act of British Columbia bestows discretion on courts to provide for any spouse or child of the testator for whom the testator, in the court's view, failed to "make adequate provision" for "proper maintenance and support."[193] In a recent commentary, Professor Gordon Bale argues that although the wording of the statute requires the court to make a purely objective determination concerning the applicant's needs, the majority of courts have gone much further and have imposed a "moral obligation" on testators to provide for non-dependent applicants, regardless of their financial status.[194]

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189. *See, e.g.*, Brashier, *supra* note 181, at 121 n.125 (noting that the New South Wales statute states that its purpose is to benefit the testator's dependents, not to relieve public burden, and that a purpose of the New Zealand statute is to ensure that a testator's dependents are treated "justly").

190. Inheritance (Provision for Family and Dependents) Act 1975 § 1.

191. *Id.* §§ 2–3.

192. *Id.* §§ 2(a)–(b); *see also*, Brashier, *supra* note 182, at 129 n.151.

193. Section 2(1) reads as follows:

> 2(1) Notwithstanding any law or statute to the contrary, if a testator dies leaving a will which does not, in the court's opinion, make adequate provision for the proper maintenance and support of the testator's wife, husband or children, the court may, in its discretion, in an action by or on behalf of the wife, husband or children, order that the provision that it thinks adequate, just and equitable in the circumstances be made out of the estate of the testator for the wife, husband or children.

Wills Variation Act, R.S.B.C., c.435, § 2(1) (1979) (Can.).

194. *See* Gordon Bale, *Palm Tree Justice and Testator's Family Maintenance—The Continuing Saga of Confusion and Uncertainty in the B.C. Courts*, 26 E.T.R. 295 (1987) (copy on file with author). According to Bale, Walker v. McDermott, 1931 S.C.R. 94 (Can.), was the first case to impose the moral obligation gloss on the statute. There, the Canadian Supreme Court reversed an appellate holding and reinstated the trial court's award of one-quarter of the testator's estate to his adult married daughter, whom the trial court had determined was not in need of support, and whom the testator had supported and educated prior to her marriage. The testator had left his entire estate to his second wife, who had supported him while he was largely incapacitated by a drinking problem, given him the funds with which to purchase a hotel (his only substantial asset), paid the taxes on the hotel to stave off foreclosure proceedings and took care of him while he was bedridden during his final year. Nevertheless, the Supreme Court determined that the testator was morally obligated to provide for his daughter and reinstated the

Thus, a majority of British Columbia case law courts have adopted the view that the court should determine whether "the testator has been guilty of a manifest breach of that moral duty which a just, but not loving, husband or father owes towards his wife or towards his children."[195] Those courts redistribute the testator's estate to those he expressly disinherited even where the disinherited children were successful adults with no pecuniary need for the testator's assets.

The Supreme Court of Canada recently affirmed that "moral obligation" was an important consideration in interpreting the statute, holding that "the very structure of the Act makes it clear that the legislative scheme contemplates that the concept of moral duty is an essential element in the working of the Act."[196] The Court also stated that,

> If the [statute's] phrase "adequate, just and equitable" is viewed in the light of current social norms, much of the uncertainty disappears. Furthermore, two sorts of norms are available and must be addressed. The first are the obligations which the law would impose on a person during his or her life were the question of provision for the claimant to arise. These might be described as legal obligations. The second type of norms are found in society's reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards. These might be called moral obligations, following the language traditionally used by the courts. Together, these two norms provide a guide to what is "adequate, just and equitable" in the circumstances of the case.[197]

Thus, courts in British Columbia are required to rely on their interpretation of societal norms in determining whether to give effect to

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trial court's award in her favor.

195. Bale, *supra* note 194, at *17–18 (quoting Allardice v. Allardice, 29 N.Z.L.R. 959 (C.A. 1910), *aff'd* [1911] A.C. 730).

196. Tataryn v. Tataryn Estate, 116 D.L.R.4th 193, 201 (Can. 1994) (quoting Price v. Lypchuk Estate, 11 B.C.L.R.2d 371 (Can. 1987) (Esson J.A., dissenting). The Court's opinion completely disregarded the clearly expressed intent of the testator that one of his two adult sons be disinherited. The testator's will also gave his wife only a life estate in the marital home and designated her a beneficiary of a discretionary trust to be administered by the testator's favored son, stating:

> I have purposely excluded my son, John Alexander Tataryn, from any share of my Estate and purposely provided for my wife by the trust as set out above for the following reason: My wife Mary and my older son John have acted in various ways to disrupt my attempts to establish harmony in the family. Since John was 12 years old he has been a difficult child for me to raise. He has turned against me and totally ignored me for the last 15 years of his life. He has been abusive to the point of profanity; he has been extremely inconsiderate and has made no effort to reconcile his differences with me. He has never been open to discussion with a view toward establishing ourselves in unity. My son Edward is respectable and I commend him for his warm attitude towards me, his honesty, and is co-operation with me.

Id. at 195–96.

The court refused to honor the testator's direction to create a testamentary trust and redistributed the testator's entire estate to his wife with the exception of the couple's second home, in which she was given a life estate. The court then provided that upon the wife's death the second home would be distributed to the testator's two sons, making a meager concession to the testator's intent by giving the favored son a two-thirds share. The court justified the radical departure from the testator's intended scheme by viewing its role as to make a "just and equitable" provision that aligned with "current societal norms." *Id.* at 202–06.

197. *Id.* at 202–03.

testamentary intent.[198] Those courts are empowered to rewrite entirely a testator's will to ensure that the distribution of his or her estate is in accord with current social norms. As Bale emphasizes, such a determination is an extremely subjective process, which "must be based largely on the individual Judge's sense of the fitness of things. That sense may vary widely from person to person, depending upon such things as religious and cultural background, family history and attitudes, and personal experiences."[199] As a result, "[c]ourts which stress the moral obligation of the deceased give sympathetic consideration to applications by adult able-bodied children seeking a share of the parent's estate even though they have no claim to support during the parent's lifetime."[200]

A review of the British Columbia cases do not reveal many cases where a testator's will disinherits relatives in favor of non-relatives. Given that the Wills Variation Act has been interpreted, for more than sixty years, to impose a moral obligation in favor of family, the absence of case law is no surprise; individuals who wish to make an unorthodox disposition of their property are, in all likelihood, dissuaded by the knowledge that a court will simply rewrite the will at the request of a family member. Accordingly, the statute acts prophylactically to inhibit testamentary freedom.

Thus, while most of the civilized world recognizes the concept of testamentary freedom to some degree, it forthrightly balances that principle with concern for family members and ideas about morality and justice specific to the particular culture. The United States alone insists on paying lip service to the idea that testamentary freedom is preeminent. Given the practically universal urge to limit testamentary freedom with concerns for family protection and fulfillment of moral duty, it should come as no surprise that the same urges are at play in the common law of the United States. United States courts, however, honor those competing values surreptitiously and to greater and lesser degrees depending on the particular tribunal.

The axiom that wills law is designed only to effectuate testamentary intent is therefore false, and the idea that individuals enjoy complete testamentary freedom is a myth. Generally, individuals have "freedom" to distribute their property along carefully delineated channels in accordance with prevailing norms. Thus, there is the "freedom" to vary the amounts of bequests to children, as long as the primary beneficiaries are the testator's children. There is the "freedom" to disinherit adult children if one's reason for doing so is a reason that a court finds acceptable, and so on. Accordingly, a testator cannot rest assured that executing a will in accordance with the Wills Act will ensure that a court will carry out his or her intentions. In many cases, the intended beneficiary will be left to persuade the court that the will is appropriate, moral and fair.

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198. *See also* United Kingdom: Inheritance (Provision for Family and Dependents) Act 1975, § 1(2)(a) (directing that in determining whether a testator has made proper provision for a spouse, the court should consider "such financial provision as it would be reasonable in all the circumstances of the case for a husband or wife to receive, whether or not that provision is required for his or her maintenance").

199. Bale, *supra* note 194, at *13 (quoting Price v. Lypchuk Estate, 11 B.C.L.R.2d 371 (Can. 1987) (Esson J.A., dissenting)).

200. *Id.* at *15. Bale's article argues that courts that interpret the Wills Variation Act in the future must reject the moral duty gloss to restore "rationality and predictability" to the law.

IV. PREDICTING THE EFFECT OF UPC REFORMS

A. Reduction of Formalities

The Revised UPC prescribes fewer will execution formalities than do the will execution statutes in most states. By simplifying requirements, the drafters hoped to provide fewer grounds for courts to invalidate documents that were intended to be wills but failed to comply with some of the less crucial formalities. If courts valued testamentary freedom above all competing concerns, then simplified formalities might indeed lead to a greater number of validated wills. As I have shown, however, courts often invoke formalities to achieve goals that conflict with the concept of testamentary freedom. To the extent that courts use formalities as a vehicle for achieving other goals, simplifying formal requirements will not cause courts to abandon those goals. Rather, courts will likely use other doctrinal paths to reach the same result. And in fact, the elimination of some formalities in certain states has not prevented courts from protecting preferred beneficiaries against disinheritance, which suggests that elimination of some, or even all, formalities will not significantly further the cause of testamentary freedom.

For instance, examine the traditional Wills Act requirement that witnesses must attest the will in the presence of the testator. The UPC eliminates that requirement. However, to ensure that protection against will-switching and fraud is preserved, the UPC does require that the testator acknowledge his or her will or signature to the witness. Thus, a court faced with a document that formerly would have been denied probate on the witness presence ground could now find the will invalid because the testator did not make a sufficient acknowledgment to a witness who signed the will out of the testator's presence. Or, where the testator has clearly complied with simplified formalities, the analysis might shift to whether the testator possessed the requisite testamentary capacity or was the victim of undue influence.

The shifting-issue syndrome is exemplified by a study of the judicial response to one simplification suggested by the UPC: the elimination of the requirement that the testator's signature be located at the end of the will. Under the Revised UPC, the testator may sign the will any place within the document. With this simplification, the drafters believe they have removed a needless barrier to the probate of documents that embody testamentary intent.

Concededly, because a majority of testators' wills benefit dependents and other family members, the elimination of the signature-at-the-end requirement might cause an occasional formalist court to probate a will it formerly would have invalidated (although, as I have suggested, courts generally manipulate their analysis of formalities to effectuate intent where the will benefits the testator's close family members). If case law from jurisdictions that have eliminated the signature-at-the-end requirement is any indication, however, most courts confronted with offensive wills might find a new reason for invalidating them regardless of what the testator intended. Specifically, courts will find that the testator's name was not written with signatory intent.

Because several states long ago abandoned the signature-at-the-end requirement, a review of decisions in those jurisdictions sheds light on how courts would be likely to respond if a state were to adopt the Revised UPC and

abandon the signature-at-the-end requirement. Courts in those jurisdictions, when confronted with offensive wills that could not be invalidated for lack of a signature at the end, simply invalidated them on the ground that the testator's name, written elsewhere in the document, was not written with signatory intent, or the intent that it authenticate the document.

First, compare two Virginia cases, *McElroy v. Rolston*,[201] and *Slate v. Titmus*.[202] In those cases, both wills were entirely in the testators' handwriting and were unsigned at the end, but contained the testator's name at the top of the page as a title.[203] Because the wills were similar in all material respects, the inquiry should have been the same: did the testator write his or her name at the top of the page merely to identify the document, or to authenticate it as well?

The *McElroy* will left the bulk of the testator's estate to a hospital, only ten dollars to the testator's sister, and instructions to ensure that her nephew was paid for work he had done for her. The will disposed of all of the testator's estate and named an executor. The court denied probate to that will on the ground that the testator's name at the head of the document was not written with the requisite intent to authenticate the document because there was no intrinsic evidence within the will tending to show such intent.[204]

On substantially similar facts, however, the *Slate* court validated a will that left the bulk of the testator's estate to the testator's nephew-in-law, holding that the fact that the document was "complete" was sufficient evidence that the testator must have intended to authenticate it.[205] The court also relied on the final sentence of the will, which read, "Given under my hand this 25th day of October 1986," which it viewed as evidence that the testator regarded his name at written at the top of the will to serve as a signature.[206] Curiously, the *McElroy* testator's comparable, if less artfully phrased, statement, "This satment is writen buy my hand and it is as what I wont done" was given no such weight.[207] Thus, Virginia courts that cannot invalidate wills for failure to contain an ending signature can invalidate them for lacking the requisite intent to authenticate.[208]

The shifting-issue syndrome has appeared in Arkansas as well. For example, contrast two Arkansas cases, *Nelson v. Texarkana Society and*

201. 34 S.E.2d 241 (Va. 1945).
202. 385 S.E.2d 590 (Va. 1989).
203. The will in *Slate* began: "I, Garland B. Slate, Route 3–Box 456 Petersburg, Va. do hereby declare this to be my last will and testament." 385 S.E.2d at 591. The McElroy will commenced: "June 6, 1926. Alice Wright Mt Clinton Va This satment [sic] is writen [sic] buy [sic] my hand and it is as what I wont [sic] done." 34 S.E.2d at 241–42.
204. 34 S.E.2d at 243–44.
205. 385 S.E.2d at 591–92.
206. *Id.* at 591. An almost identical clause was viewed by another court as evidence that the testator had intended to affix an ending signature to the document and had not yet done so, and concluded that the document was not complete and had not been signed. In that case, however, the will benefitted the testator's ex-husband instead of her heirs, which was probably the determining factor. *See* Friedholm v. Fegley, 589 P.2d 80, 81–82 (Colo. Ct. App. 1978).
207. 385 S.E.2d at 241–42.
208. *See also* Hamlet v. Hamlet, 32 S.E. 2d 729 (Va. 1945) (denying probate to several holographic wills and letters, all of which clearly expressed the testator's wish to give certain real property to non-relatives); Dinning v. Dinning, 46 S.E. 473 (Va. 1904) (finding will leaving all to testator's siblings, nieces and nephews validly signed where the will ended, "I, William Denning, say this is my last will and testament").

Museum,[209] and *Smith v. MacDonald*.[210] In *Nelson*, the testator's name appeared only in the body of the holographic will, and the testator had gone to the trouble of obtaining the signatures of two witnesses. The bulk of the testator's estate was left to a museum, with gifts to friends, the testator's maids and a cousin. The testator's closest relatives, her nieces and nephews, contested the will.

The *Nelson* court found that the testator had not intended her name in the body of the will to have authenticating effect.[211] In the face of substantial testimony, the court admitted that the evidence proved that the testator considered the document her will.[212] Notwithstanding proof of testamentary intent, however, the court determined that "[i]t would be sheer speculation to assume that those circumstances indicated that she intended her name in the body of the will to be her signature thereto."[213] Thus, the testator's intent was frustrated despite her clear intent and the absence of an ending signature requirement.

In deciding *Nelson*, the Arkansas Supreme Court ignored its own reasoning in a similar case decided just two years prior. In *Smith*, the same court upheld the admittance to probate of a holographic will where the testator's name appeared only in the exordium clause, the title, and on the envelope in which the document was found. In determining whether to admit the unsigned will, the court emphasized that the controlling question was whether the decedent had intended the document to be his will.[214] The court then found that the will's completeness, combined with extrinsic evidence showing that the testator had identified the document to his attorney as his will, sufficiently established the testator's intention to authenticate the document when he wrote his name at the top of the will.[215]

Although the *Nelson* court did not overrule *Smith*, it ignored *Smith's* directive that the key inquiry was whether testamentary intent could be established. Instead, the *Nelson* court expressly insisted that question of testamentary intent had no bearing on the question whether the testator had intended to authenticate the document.[216] *Nelson* and *Smith* can be reconciled only by examining each will's dispositive provisions. The *Nelson* testator disinherited the testator's closest relatives for no apparent reason. In *Smith*, however, the contestants were the testator's collateral relatives, who are not ordinarily viewed by courts as having a moral claim to the testator's assets. Thus, the fact that Arkansas had no signature-at-the-end requirement for

209. 516 S.W.2d 882 (Ark. 1974).
210. 481 S.W. 2d 741 (Ark. 1972).
211. 516 S.W.2d at 884.
212. *Id.*
213. *Id.*
214. 481 S.W.2d at 748.
215. *Id.*
216. 516 S.W.2d at 884. In drawing that sharp distinction, the opinion was internally consistent. Emphasizing the purpose of the signature requirement, the court noted that "[t]he legislature had a sound basis for requiring that a holographic will be signed by the testator, because that signature is the best and most reliable indication that the signer means for the instrument to be his will." *Id.* Thus, the inconsistency: the court insisted on evidence of intent to adopt the written name as a signature because the purpose of the statute is to provide solid evidence of testamentary intent; yet this court disregarded other, stronger evidence that established such intent with clarity.

holographic wills did little if anything to further the cause of testamentary freedom.[217]

The preceding case study is not exhaustive, but illustrative. Other courts in jurisdictions that do not have an signature-at-the-end requirement also have refused to validate wills, even where testamentary intent is clear, on similar grounds.[218] California, for example, has a well-established tradition of generally validating holographic wills when the testator simply writes his or her name anywhere in the document, especially where failure to validate a will would result in benefiting someone other than the testator's dependents or closest relatives.[219] Those same courts have been far less liberal in construing

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217. The pattern is confirmed by other Arkansas cases. For instance, in Peevy v. Ritcheson, 552 S.W.2d 218 (Ark. 1977), the court found a will incomplete and thus unsigned in large part because the testator had neglected to provide for his wife, and the court found it unlikely that he would "overlook mentioning her when he drafted his last will and testament." *Id.* at 221. And in David Terrell Faith Prophet Ministries v. Varnum, 681 S.W.2d 310 (Ark. 1984), the same court upheld the invalidation of a will bequeathing the testator's estate to an unorthodox "minister" where the testator's name appeared only in the exordium clause. 681 S.W.2d at 311.

218. *See, e.g.*, Friedholm v. Fegley, 589 P.2d 80 (Colo. Ct. App. 1978) (citing *Bloch* and upholding denial of probate of document purporting to devise testator's estate to her ex-husband because testator's name in the exordium clause not written with intent to authenticate—will ended "witness my hand this 16th day of September, 1976," which court viewed as proving that testator had intended but neglected to sign at end); Estate of Erickson, 806 P.2d 1186 (Utah 1991) (upholding lower court's denial of probate to notecards purporting to leave estate primarily to family except for a valuable piece of real estate, which was devised to a non-relative—insufficient evidence to establish that document was "complete," citing several California cases and Smith v. MacDonald, 481 S.W.2d 741 (Ark. 1972)); *but see* Nicely v. Nicely, 276 S.W.2d 497 (Tenn. Ct. App. 1954) (upholding jury verdict validating will that left testator's estate to her two nephews and bequeathing only one dollar to her brother; will found valid even though written in pencil and testator's name was written only in exordium clause because record contained sufficient evidence of testator's intent to leave estate to nephews who visited her daily while she was in the hospital as opposed to brother, who neglected her).

219. *See, e.g., In re* Estate of MacLeod, 254 Cal. Rptr. 156, 158–59 (1988), where the court's failure to validate a will benefiting the female testator's blood relations would have benefited the testator's step-son, who had already been amply provided for by his father's estate. Consequently, the court validated a six-page draft document, written in various ink colors and replete with interlineations and margin notations and unsigned at the end, despite evidence that the testator knew how to make a valid will. The court found that the testator, in writing her name in the exordium clause, had intended that that writing both identify her as the will's maker and authenticate the document. *See also In re* Estate of Bloch, 248 P.2d 21 (Cal. 1952) (upholding will devising certain bonds to provide for education of minor nephews and nieces as complete and thus properly executed where failure to uphold will would have caused bonds to be distributed to female testator's presumably non-dependent husband); Kinney v. Gardella, 104 P.2d 782 (Cal. 1940) (upholding will devising properly to testator's sister rather than her presumably non-dependent husband); *In re* Estate of Wallace, 223 P.2d 284 (Cal. Ct. App. 1950) (finding document "complete" and thus properly signed where failure to validate the will would have left the testator's wife and child without support). I should note here that the California courts implicitly treat husbands who contest wills differently than other relative-contestants. This may be due in part to California's status as a community property state, and to society's traditional view that husbands are not or should not be financially dependent on their wives.

The above courts emphasized that the "completeness" of the document indicated that the testator had intended the document to be his or her final will, and thus, the testator must have intended to sign it. Accordingly, the courts reasoned, the testator's name written anywhere in the document must have been written to authenticate the document in addition to any other purpose it was meant to serve.

It is important to emphasize that wills denied probate could not be said to be any less "complete" than the wills that were admitted (*see infra* note 221 and cases cited therein). For example, in *Wallace*, where failure to uphold the will would have left the testator's wife and

the signature-at-the-end requirement, however, when the will's provisions disinherit the testator's heirs, even when they are convinced that the document was intended by the testator to be his or her will.[220] The message of the cases is clear: simplifying formalities will not induce courts to validate offensive wills, because courts will find other paths to invalidation.

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child without support, the court found the requisite completeness based upon the following factors:

– the will disposed of the testator's entire estate;

– there was testimony that the decedent first wrote the document in ink, then retraced it in pencil;

– the line drawn below the final words of the document evidenced finality; and

– there was room at the end of the will should the testator have wished to add any provisions.

Similarly, the *Bloch* court upheld the admittance of a writing on the front and back of an envelope as a valid will, even though the testator's name appeared only in a clause describing certain bonds owned by her, as follows: "Bonds belonging solely to Helene I. Bloch...8000 + 5300 = 13300. In case of my death these are to be distributed to the following [nieces and nephews] for their education...." The court admitted that it could not determine whether the document even ended with a period. Finally, in *Kinney*, the court admitted to probate a one-page handwritten document that had no residuary clause and did not appoint an executor, where the testator's name was written only in the exordium clause. The purported will consisted of a one-page document in the testator's handwriting that bequeathed her entire estate to her four sisters. A margin of over two inches remained at the bottom of the page. The writing was found in an envelope, on the outside of which was written "the will of Mrs. Anna Leona Graves Kinney." The *Kinney* court found that the requisite "completeness" existed despite the lack of a residuary clause and appointment of an executor, citing as compelling evidence the two-inch space at the document's end, the interlineation and correction of the date, and the testator's act of copying her sisters' addresses onto the page. (Those meager facts are generally viewed as tending to prove the opposite conclusion. *See, e.g., In re* Estate of Leonard, 32 P.2d 603, 603–04 (Cal. 1934) (testator's name not written with intent to authenticate because document ended several inches from the bottom of the page and had no residuary clause, and thus was not complete)).

Other California cases following this line of precedent are: *In re* Estate of England, 259 P. 956 (Cal. Ct. App. 1927) (upholding admittance of will, with testator's name in only caption of will, to probate on grounds that the will was "complete" because it disposed of all the testator's property); *In re* Estate of McMahon, 163 P. 669 (Cal. 1917) (court found the requisite intent to authenticate where the last sentence of the will read, "I do hereby publish and declare the foregoing entirely written, dated and signed by my own hand, to be my last will and testament.").

220. For example, in one case a California court failed to find that the testator's hand-written name in the exordium clause was written with intent to authenticate. Interestingly, the testator in that case had attempted to disinherit her closest relatives. In *Leonard*, the unmarried, childless testator attempted to disinherit her siblings, nephews and nieces. Her will included a detailed explanation of her reasons for failing to provide for her family. In refusing to find that the testator had intended to sign her will, the court determined that the will was "incomplete" and thus indicated that the testator had intended to sign at the end but had not yet done so. In support of that finding, the court emphasized that the will's ending—"we had our suit, and he got licked"—lacked a period, the date had been corrected, and space remained on the bottom of the page, despite that that last fact had been viewed by other courts as evidence of completeness. Thus, the testator's estate was distributed to her family despite her clear animosity toward them. 32 P.2d at 604.

Similarly, in *In re* Estate of Manchester, 163 P. 358 (Cal. 1917), the testator's brother convinced the court that the testator had not written her name in the exordium clause and on the front of the envelope containing the will with intent to authenticate the document. The will began, "I, Matilda Manchester, leave and bequeath all my estate and effects, after payment of legal, funeral & certain foreign shipment expenses (as directed) to the following legatees...." *Id.* at 359. The envelope in which the will was found read, "My will, Ida Matilda Manchester." *Id.* In so finding, the Manchester court emphasized that the decedent actually had intended the document to serve as her will, but found that fact irrelevant to the question whether she had intended to authenticate her will: "her belief that it was a valid will, properly executed, does not make it so." *Id.*

B. The Dispensing Power

In their quest to protect testamentary freedom, the drafters of the Revised UPC did more than just simplify formal will requisites. They also enacted section 2–503, known as the "dispensing power," a fail-safe measure designed to ensure that courts give effect to wills where testamentary intent is clear and convincing, even if the testator has failed to comply with the simplified formalities.

The following section shows that the dispensing power will fail to protect or expand testamentary freedom in any significant way. First, I illustrate that Langbein and others who have supported the adoption of the dispensing power have based their recommendation on a flawed analysis of other countries' experience with the power. Consequently, the "success" of the dispensing power in those countries is irrelevant to the question whether the power will serve to protect testamentary freedom in this country. Second, this section shows that freeing courts from strict adherence to formal requirements will not cause them to cease implementing values other than testamentary freedom. That point is illustrated by an examination of cases where the courts' task was to determine whether testamentary intent existed, specifically, cases that considered whether letters written by a decedent were intended to constitute his or her will. That analysis shows that courts twist their analysis to give effect to competing principles in the search for intent, just as they do in determining whether formalities have been satisfied or whether the decedent was unduly influenced.

1. A Faulty Comparison

The most revolutionary change in the UPC is section 2–503, the so-called "dispensing power."[221] Section 2–503 would alter the tradition of strict construction of Wills Act formalities by requiring that a court admit a deficiently executed will to probate when there is clear and convincing evidence that the testator intended that the document be his or her will. According to the drafters, "[s]ection 2–503 means to retain the intent-serving benefits of Section 2–502 formality without inflicting intent-defeating outcomes in cases of harmless error." [222] If the drafters' assumption that courts' primary concern is to effectuate testamentary intent were correct, then presumably the dispensing power would result in the probate of large numbers of wills that previously would have been denied probate for failure to comply with formalities. But as we have seen, that assumption is fundamentally flawed. Here too, the drafters' assumption that giving courts more room to maneuver will result in a greater judicial commitment to testamentary freedom is misplaced.

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221. Section 2–503 reads:

> Writings Intended as Wills, etc.
>
> Although a document or writing added upon a document was not executed in compliance with Section 2–502 [execution requirements], the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute (i) the decedent's will, (ii) a partial or complete revocation of the will, (iii) an addition to or an alteration of the will, or (iv) a partial or complete revival of his [or her] formerly revoked will or of a formerly revoked portion of the will.

UNIF. PROBATE CODE § 2–503 (1990).

222. UNIF. PROBATE CODE § 2–503, cmt., at 117.

In adopting a dispensing power, the revisers undoubtedly were influenced by Langbein's determination that the dispensing power had proved successful in South Australia and other countries that had adopted it. But in assuming that what has allegedly worked in other countries will work in the United States, Langbein and others overlooked a crucial difference in the law: almost every state or country that has adopted the dispensing power[223] also has a statute similar to British Columbia's Wills Variation Act that vests discretion in courts to redirect the distribution of an estate where the testator has breached a moral obligation to his or her dependents.[224]

For example, in assessing the viability of the dispensing power, Langbein studied the forty-one South Australian cases that applied the dispensing power after its enactment in 1975,[225] and determined that "this statute has produced a triumph of law reform."[226] Other commentators followed suit, calling Australia's statute a "rousing success."[227] What Langbein and others failed to consider, however, was the interplay between South Australia's Inheritance (Family Provision) Act[228] and the dispensing power. Examination of the relationship between the two statutes shows why the dispensing power would succeed in South Australia, and why South Australia's experience sheds no light on whether the power would meet with similar success in the United States.

The Inheritance (Family Provision) Act has existed in varying forms since 1918.[229] The statute grants a cause of action to a testator's spouse, ex-spouse, child, step-child or parent for whom the testator has made "an inadequate provision."[230] The statute bestows upon courts extremely broad discretion to make a provision as "the court thinks fit"[231] for the "maintenance, education or advancement"[232] of the person so entitled. The term "advancement"[233] has been construed broadly—for example, it was held to

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223. As of this writing, the Canadian provinces of Manitoba and Saskatchewan have enacted a dispensing power, as have several states in Australia and Israel.

224. All Canadian provinces except the civil law country of Quebec have some form of dependents' relief statutes in place. Davis, *supra* note 33, at 151 n.10.

When the Canadian province of Manitoba enacted a dispensing power in 1983, a "Dependents Relief Act" was already firmly in place. *Compare* The Dependents Relief Act, ch. 42, Bill 47 (1990) with § 23 of the Wills Act (1983); Saskatchewan Wills Act, § 35.1 (a dispensing power) with The Dependents' Relief Act, ch. D-25 (1991).

225. Section 12(2) of the South Australian Wills Act reads:

> A document purporting to embody the testamentary intentions of a deceased person shall, notwithstanding that it has not been executed with the formalities required by this Act, be deemed to be a will of the deceased person if the Supreme Court, upon application for admission of the document to probate as the last will of the deceased is satisfied that there can be no reasonable doubt that the deceased intended the document to constitute his will.

South Australian Wills Act, § 12(2), *reprinted in* Langbein, *supra* note 10, at 9.

226. Langbein, *supra* note 10, at 1.

227. *See, e.g.*, Mann, *supra* note 4, at 1039.

228. Inheritance (Family Provision) Act, 1972, No. 32 of 1972, as amended by Inheritance (Family Provision) Act Amendment Act, 1975, No. 91 of 1975 (repealing Testator's Family Maintenance Acts of 1918 and 1943) (hereinafter referred to as "Inheritance (Family Provision) Act, 1972–75").

229. Davis, *supra* note 33, at 151.

230. Inheritance (Family Provision) Act, 1972–75, § 7(1)(b); *see also* Langbein, *supra* note 10, at 11.

231. Inheritance (Family Protection) Act, 1972–75, § 7(1).

232. *Id.*

233. In former versions of the statute, the phrase was "advancement in life."

justify the provision of capital for an applicant's poultry-farming business.[234] Thus, it is not necessary that the applicant establish a financial dependence on the testator to be entitled to a distribution under the statute. In omitting that requirement, the statute appears based on concepts of moral obligation.[235] The theme of moral obligation appears elsewhere in the Act, such as the provision that allows the Court to decide against an applicant based on his "character or conduct," or "for any other reason that the Court thinks sufficient."[236]

The Inheritance (Family Provision) Act affects the exercise of the dispensing power in two ways. First, because some form of the Act has been in effect since the turn of the century, South Australian testators undoubtedly plan with the law in mind: few will execute wills disinheriting people who can claim under the Act when a court has power to ignore the will and make a distribution that comports with the court's own sense of justice. Better, then, to provide for non-relatives through non-probate transfers and to draft a will that prefers family and increase the chances that the will shall be honored in its entirety. South Australian courts, then, are unlikely to face many wills "unjustly" disinheriting family members and will therefore have little cause to invent deficits in order to protect a testator's family.

Second, where a will does appear to favor non-relatives over dependents without cause, there is a direct remedy for the problem: the court may, upon application, forthrightly rectify any perceived injustice under the Act. Again, courts will not be tempted, as they appear to be in the United States, to right perceived wrongs through the manipulation of doctrine. Because South Australian courts may completely ignore the testator's will if they find it necessary to ensure that the testator fulfills the duty to dependents, there is also less need to manipulate doctrines such as undue influence to invalidate a will that was perfectly executed.[237] As one commentator stated in evaluating the effect of New Zealand's very similar legislation,

> family maintenance has in substance been transformed in New Zealand from a mere limitation on testamentary power into a general principle of the law of succession: the rules of intestate succession or the provisions of a will...become operative only after maintenance of the decedent's

234. Lambeff v. Farmers Co-operative Executors & Trustees, Ltd., 56 SASR 323, 327 (Supreme Court 1991).

235. For example, in *Lambeff*, the court made a large provision for a daughter who had been abandoned at a young age by the testator, her father. Although the testator's intended beneficiaries, his two sons, had "little in the way of assets" and "families to support," and the disinherited daughter had a secure, well-paid job, equity in her home and stood to inherit from her mother and step-father, the court ordered the provision because the daughter had "done nothing to disentitle herself," and "would have done better with proper support for her advancement in life." 56 SASR at 328.

236. Inheritance (Family Provision) Act, 1972–75, § 7(3).

237. Langbein does mention the Testator's Family Maintenance Act as a reason why South Australian courts might be more likely to adopt the substantial compliance doctrine. In his view, "the long experience with judicial discretion in probate law under [Testator's Family Maintenance] may help explain why in Australia rather than somewhere else the legal system found the confidence to experiment with judicial discretion to excuse Wills Act execution blunders." Langbein, *supra* note 10, at 12. While he notes that Testator's Family Maintenance limits rather than implements testamentary intent, he neglects to examine the impact of those divergent objectives on the interpretation of the dispensing power. I suspect that the motivating factor for lawmakers in enacting the dispensing power had less to do with their faith in the judiciary's ability to handle discretion wisely than it did the fact that Testator's Family Maintenance serves as a powerful curb on testamentary freedom.

dependents out of his estate has been adequately safeguarded.[238]

Thus it is no surprise that the dispensing power has been a "resounding success." Jurisdictions that have enacted both testators' dependents acts and the dispensing power have not necessarily shown a greater commitment to testamentary freedom. Rather, they are simply allowing "freedom" within narrowly prescribed channels. Hence, those states accomplish overtly what courts in the United States do covertly or subconsciously.[239]

For example, although the Canadian province of Saskatchewan enacted a dispensing power in 1989,[240] it has had in place for thirty years The Dependants' Relief Act, which allows an application by a spouse, minor child, common-law spouse or adult child who is disabled or can show other "circumstances" that entitle him or her to greater provision to the testator's estate than is made under the will.[241] The play is in the definition of what "circumstances" are sufficient to qualify an applicant for "dependent" status. The definition is construed quite broadly, and appears to depend less on actual financial dependency than on ideas of moral obligation.

For instance, in *In re Parkanski*,[242] the court made a provision for the adult son of the testator who lived in Hungary and had never seen his father, and for whom the testator's will had neglected to provide. The court awarded the entire estate (less a $2,500 payment to the testator's intended beneficiary) to the son, payable in annual installments, to aid the son in emigrating to Canada

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238. Laufer, *supra* note 188, at 284.

239. Testator's Family Maintenance aside, Langbein's study of South Australian case law is insufficient to inform us of whether the dispensing power actually promotes testamentary freedom. His analysis of the case law omits important facts such as the identities of the will beneficiaries and contestants and their respective relationship to the testator. Thus, it is difficult to tell whether courts in those cases actually validate wills that make unconventional bequests or whether the result of invalidating the wills would be unjust in the court's view. Moreover, a majority of the cases studied were uncontested. *See* C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism*, 43 FLA. L. REV. 599, 607 (1991). Accordingly, we can presume that no hardship or breach of moral obligation was incurred by validation of the wills.

240. Chapter W–14, § 35.1 of the Saskatchewan Wills Act reads:

> "Substantial Compliance"
> Where, on application, if the court is satisfied that a document or any writing on a document embodies:
> (a) the testamentary intentions of a deceased; or
> (b) the intention of a deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will;
> the court may, notwithstanding that the document or writing was not executed in compliance with all the formal requirements imposed by this Act, order that the document or writing, as the case may be, be fully effective as though it had been executed in compliance with all the formal requirements imposed by this Act as the will of the deceased or as the revocation, alteration or revival of the will of the deceased or of the testamentary intention embodied in that other document, as the case may be.

Although the statute is entitled "substantial compliance," the wording and interpretation of the statute bears less relation to Langbein's original substantial compliance doctrine and is more akin to the dispensing power enacted in § 2–503.

241. An Act Authorizing Provision for the Maintenance of Certain Dependants of Testators and Intestates ("The Dependants' Relief Act"), Revised Statutes of Saskatchewan, ch. D–25, §§ 2(1)(c), 9(1).

242. 56 D.L.R. 2d 475 (Saskatchewan Queen's Bench 1966).

on the ground that a "judicious father" would have made such a provision. In *Parkanski*, the court was less concerned with whether the applicant was actually financially dependent upon the testator than with whether the testator owed a moral obligation to his son. Because the court could correct a perceived injustice directly, it had no need to search for a pretext for invalidating the will.

The Saskatchewan statute mirrors the United States' common-law preference for family in another way. The Saskatchewan statute permits a will's proponent to rebut the presumption in favor of family members on one of two grounds. First, the court may be convinced that the testator's reasons for his or her treatment of dependents is justifiable.[243] Second, the court may "refuse to make an order in favor of a person whose character or conduct is or has been such as in the opinion of the court to disentitle him or her to the benefit of an order under this Act."[244] Thus, the court can refuse to provide for family members based solely on its own subjective assessment of the applicant's character. Again, what the Saskatchewan court accomplishes with the legislature's blessing, the United States courts accomplish more covertly.

Thus, with the exception of Israel, all foreign jurisdictions that have enacted a dispensing power also have a statutorily imposed family preference system. Interestingly, Israel is the only state that Langbein criticizes regarding its courts' application of the dispensing power.[245] Despite the pronouncement that the dispensing power has served to "limit the battleground" to the search for intent, it is unclear whether and to what extent courts in Israel consistently manipulate the intent analysis to accommodate concepts of moral duty.

2. Manipulating the Process of Determining Intent

In endorsing section 2–503, Professor James Lindgren states that "under the dispensing power, the issues litigated will change for the better. Litigation

243. Chapter D–25, § 9(7) provides:

> The court shall also have regard to the testator's reasons, so far as ascertainable, for making the dispositions made by his will, or for not making any provision or any further provision, as the case may be, for a dependant, and the court may accept such evidence of those reasons as it considers sufficient, including a statement in writing signed by the testator and dated, provided that in estimating the weight, if any, to be attached to any such statement the court shall have regard to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement.

244. Chapter D–25, § 9(8).

245. Koenig v. Cohen, C.A. 86/79, 35 P.D. 176 (1981); F.H. 40/80, 36 P.D. 708 (1982), discussed by Langbein in *Excusing Harmless Error, supra* note 10, at 49–51, suggests that the Israeli courts may manipulate the search for intent in light of perceived moral duties. In *Koenig*, the court refused to validate an unsigned holographic will written immediately prior to the testator's jumping out the window to her death with her infant daughter. The decedent, who had been unsuccessful in obtaining a divorce from her husband, left several notes, one explaining her motivations for committing suicide, another instructing that her husband be kept away from her funeral and another asking that her property be distributed to her four brothers. The Supreme Court twice affirmed the probate court's denial of probate to the note on the ground that the failure to sign the note was too serious a defect of compliance with formalities to justify validation of the will. "*Koenig v. Cohen* is wrong," states Langbein, noting that in response to the case the legislature amended Israel's holographic will statute to allow probate of an unsigned holograph. Langbein does not analyze why the Surrogate and Supreme Courts may have held as they did; perhaps concepts of morality were involved in the courts' decision: if the testator was not entitled to a divorce under Israeli law, perhaps the court felt that neither was she entitled to disinherit her husband.

about formalities will lessen; litigation about testamentary intent will increase."[246] But there is no indication that changing the focus of the court's analysis will result in greater realization of intent; many courts will continue to implement ideals of moral obligation under a different guise.

In his article on section 2–503, Lindgren appears to concede that the dispensing power's focus on intent will not necessarily lead to more predictable or systematized case law. He notes that "whether an informal document has testamentary intent is difficult to determine under current law."[247] His answer to the dilemma is to hope for "more sensible judging."[248]

Even Langbein has expressed some apprehension: in *Excusing Harmless Error*, a sliver of doubt slices through his generally optimistic view concerning courts' ability to determine testamentary intent. In his discussion of *Williams*, a South Australian case, he notes that a husband and wife prepared wills and invited the neighbors over for the execution ceremony. The wife, busy making preparations for an upcoming trip, neglected to sign her will, although it was signed by witnesses. The court applied the dispensing power and validated the will, which caused Langbein to comment:

> I have reservations about the decision to validate the unsigned will in this case....[T]he question in *Williams* is whether the testatrix' conduct was purposive enough, whether she really was attempting to sign the will....An explanation other than inadvertence can be suggested for the testatrix' failure to sign the will. She might, for example, have had reservations about the will, and she may craftily have left it unsigned in order to disarm it without upsetting her husband.[249]

Thus, it seems unquestionable that limiting the inquiry to the question of testamentary intent is no neat resolution to the problem. In fact, there already exists a substantial body of law that concerns the search for testamentary intent. An examination of that law reveals that even here courts continue to honor principles other than testamentary freedom. Specifically, in jurisdictions that allow holographic wills, the question often arises whether a letter, memo, note or other document written by the testator was intended by the testator to serve as his or her will. In such cases, the primary task before the court is to determine from an examination of intrinsic and extrinsic evidence whether the document represents merely a casual or unfinished statement or a final disposition.

For ease of comparison, the following section examines a subset of those cases: letters offered for probate by those to whom they were written, with the claim that such letters are holographic wills benefiting the addressee. An analysis of those cases shows that even here, where courts are ostensibly concerned only with divining and satisfying the testator's intent, allegiance to other principles often controls the ultimate outcome.

First, an exploration of the cases reveals the usual pattern: by an overwhelming majority, California courts found that letters evinced the requisite testamentary intent where the letters arguably satisfied the testator's

246. Lindgren, *The Fall of Formalism, supra* note 22, at 1016.

247. *Id.* at 1018. Lindgren is so disturbed by the current state of the law regarding intent that he devotes several pages of his article to devising an approach that he thinks will clarify this area of the law. *Id.* at 1017–18.

248. *Id.* at 1020.

249. Langbein, *supra* note 10, at 26–27.

moral obligations and/or where the distribution according to the intestacy statute arguably would have been "unjust."[250] Conversely, courts often found that letters lacked the requisite testamentary intent where to have so found arguably would have constituted a breach of the testator's moral obligation to dependents or preferred those unrelated or barely related to the testator over closer family members.[251] Notably, in only one case in this subclass did the court find that a letter written to the decedent's friends was intended to be a will where such a result disinherited the testator's siblings for no apparent reason.[252]

The language of the opinions reveals an overriding concern for principles other than testamentary freedom. In *In re Estate of Golder*,[253] for

250. Courts found that the letters possessed sufficient indicia of testamentary intent where such a finding insured that: 1) a retarded grandchild abandoned by his father would be provided for (*see In re* Estate of Crick, 41 Cal. Rptr. 120 (Ct. App. 1964)); 2) a father with custody of his minor children would receive his wife's estate to help with their care (*see In re* Estate of Button, 287 P.2d 964 (Cal. 1930)); 3) a testator's children from a first marriage would benefit instead of the testator's apparently malicious third wife of whom the court disapproved (*In re* Estate of Smilie, 222 P.2d 692 (Cal. Ct. App. 1950)); 4) the testator's siblings would receive her estate instead of her husband (*In re* Estate of Cook, 160 P.2d 553 (Cal. 1916)); 5) the son of the testator's brother would receive certain real property instead of collateral heirs apparently unknown to the testator (*In re* Estate of Wolfe, 67 Cal. Rptr. 297 (Ct. App. 1968)); 6) the testator's home was devised to the daughter who lived with and cared for her instead of to her children equally (*In re* Estate of French, 36 Cal. Rptr. 908 (Ct. App. 1964)); 7) the testator's home would have gone to her stepchildren, distributees of the rest of her estate, instead of to the testator's brother; and 8) the entire estate would be distributed to the decedent's cousin, who was also his lifelong friend and business partner, instead of to his siblings with whom he rarely had contact (*In re* Estate of Miller, 17 P.2d 181 (Cal. Ct. App. 1932) (finding that two letters, separately insufficient to constitute a holographic will, together formed a will)).

251. Courts found a lack of testamentary intent where to have found such intent would have: 1) disinherited the testator's wife and minor child (*In re* Estate of Golder, 193 P.2d 465 (Cal. 1948)); 2) devised a building to a non-relative of the testator instead of to family (*In re* Estate of Spencer, 197 P.2d 351 (Cal. Ct. App. 1948)); 3) preferred one of testator's nephews, whom the testator had seen once in his entire life, and against whom fraud was alleged, over 13 others to whom he had originally bequeathed his estate (*In re* Estate of Tillman, 288 P.2d 892 (Cal. Ct. App. 1955)); 4) distributed the decedent's entire estate to the IWW for purposes of "organization and propaganda" instead of to the testator's family (*In re* Estate of Anthony, 131 P. 96 (Cal. Ct. App. 1913)); 5) given the testator's estate to a hospital instead of to the testator's brother and nephew (*In re* Estate of Pagel, 125 P.2d 853 (Cal. Ct. App. 1942)); and 6) preferred certain siblings over others for no discernable reason. *See In re* Estate of Branick, 157 P. 238 (Cal. 1916); *In re* Estate of Richardson, 29 P. 484 (Cal. 1892).

Not mentioned in this or the preceding footnote is *In re Estate of Henning*, 199 P. 39 (Cal. 1921), because the opinion does not indicate to whom the testator's estate passed by virtue of the court's failure to admit to probate a letter written to the testator's brother stating that "I want you to have everything."

252. *See* Estate of Salmonski, 238 P.2d 966 (Cal. 1951). In *Salmonski*, the testator executed a formal will that made his brother and sister the primary beneficiaries of his estate, provided that each made proof of survivorship within one year of decedent's death (the decedent had not spoken to his siblings, who lived in Poland, since the war had begun). The will further provided that should that condition not be met, the estate would pass to two of the testator's good friends. Five days after the execution of the will, the testator wrote a note to one of the alternate beneficiaries that read: "[I]n case of my death kindly sell the stocks and divide everything that belongs to me between yourself and Mrs. Leocadia Butkin. This is my last wish." The letter was signed with the decedent's full name.

Although the testator's brother and sister did prove survivorship within the one-year period, the court held that the provisions of the formal will benefiting the siblings were revoked by inconsistency in the letter. The Supreme Court upheld the probate court's determination that the will was a valid holographic codicil on the ground that no appeal had been taken from the order admitting the will to probate.

253. 193 P.2d 465 (Cal. 1948).

example, the court upheld the trial court's denial of a letter to probate where the alleged testamentary language would have left a sailor's entire estate, valued at under $3,000, to his mother to the exclusion of his ex-wife and minor child.[254] There was evidence that the letter represented the testator's true intentions: the evidence revealed a close relationship between the decedent and his mother, and he enclosed in the letter all of his important documents for safekeeping, instead of leaving them with his wife.[255] The court, however, focused on the fact that the letter discussed other topics that could not be said to be testamentary, and suggested that it was not clear whether the language of the letter indicated a bequest or merely an intent to make a will in the future. The most determinative factor in finding the letter non-testamentary, however, appeared to be the fact of the designation itself: As the court noted, "the trial court could, and no doubt did, take into consideration the fact that no provision was made for his child or his wife...."[256] Further, "the savings and stocks referred to in the letter constituted substantially Golder's entire estate, and if the expressed wish of Golder were held to be testamentary, it would mean that the child was left unprovided for by the will,"[257] and that "it would seem strange that he would ignore her if he were disposing of everything that he had."[258]

The court thus held that the decedent had died intestate and that his entire estate would pass to his son. The court's inability to conceive that a father would benefit his mother more than his dependent child tipped the balance in favor of finding lack of testamentary intent.

Two years later, however, in *In re Estate of Smilie*,[259] a sentence in a letter very similar to the one in *Golder* was found to embody testamentary intent, with even less extrinsic evidence of such intent—in fact, the holding seems to fly in the face of the testator's clearly expressed intentions. In *Smilie*, the testator had drafted a formal will leaving everything to his third wife, Jewel, and expressly making no provision for his three children from his first marriage.

Nine years later, the testator and Jewel apparently encountered some

254. The letter, dated in 1941, was written while the testator was stationed in the United States Navy. After briefly commenting that because of "unsettled conditions" he was trying to convince his wife to move to California, where the decedent's mother lived, the decedent enclosed "for safekeeping" his bank stock, life insurance, and a letter of credit for $475 on a new automobile. The letter's postscript read as follows: "I have a surprise coming for you and I hope it works out. This is all I can tell you. My insurance is made out to Alyse [his wife] so should I get in this war and not come back I want my savings and stocks to go to you. Keep in touch with Alyse.—1516 Lehigh Ave., Phila. Pa." *Id.* at 465–66.

255. He later moved his mother in with him and his wife; his wife moved out because she could not get along with his mother. She then moved to Nevada to establish residency and obtain a divorce; when the testator wrote the letter indicating a desire to give his estate to his mother, he apparently believed that a $1,000 life insurance policy he had purchased in his child's name was sufficient support for the child, even though his estate was worth two to three times that amount. Moreover, the letter itself disclosed a concern for settling his affairs prior to being shipped overseas. Finally, after the letter was written, he had purchased a $9,000 life insurance policy naming his mother beneficiary, but had not purchased additional life insurance for his wife or child, which could be viewed as evidence of a greater concern for his mother's well being than for his child's. *Id.* at 467.

256. *Id.*

257. *Id.*

258. *Id.*

259. 222 P.2d 692 (Cal. Ct. App. 1950).

marital difficulties that involved Jewel's daughter, Dot, and Dot's husband, Philip. Sometime thereafter, the testator exchanged harsh words with Philip, which culminated in Philip striking the testator. Upon his return home that evening, the testator wrote a friend a letter describing how Jewel and Dot had "had [him] beat up," and telling his friend "I want you to see that all of my bills are paid and that Dot does not get a thing. I want you to have all of my after my bill are [sic]."[260] The testator later committed suicide.

In admitting the letter to probate, the court dealt with the problem of the letter's vagueness with a simple act: it chopped off a portion of the testamentary sentence. This emendation allowed the court to read the letter as saying, "I want you to have all."[261]

On appeal, Jewel argued that the document lacked all the usual indicia of intent.[262] The appellate court, however, found a basis for the trial court's finding in an astounding attack on Jewel. The court emphasized that Jewel and her husband had acquired property in her name after their marriage, and dismissed with obvious scorn Jewel's claim that such property was acquired with her own funds.[263] The court then faulted her for having "considerable difficulty remembering where she had obtained her divorce from her previous husband" and what property she had received from him pursuant to their settlement.[264] It noted with suspicion that the decedent had given Jewel "considerable" sums of money during their married life.[265] Although Jewel had run the decedent's electrical business, managed his several ranches, collected rents and invested the proceeds during their nine-year marriage, the court apparently did not find those facts as sufficient explanation as to why the decedent might have left her his entire estate. Rather, the court blamed Jewel for the decedent's desire to disinherit his children, stating that shortly after their marriage "[Jewel] *had the deceased make a will* in which she was the sole

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260. The letter in its entirety read:

> July 2–49
> Dear Max—
> Well Jewel and Dot had me beat up today. I did not think Phip [sic] would do that.
> Jewel & Dot have been raising hell for two weeks. So today they had Phip [sic] beat me up. I did not think Phip would do thing like that [sic]. This was done at the farm today about 2:30 P.M.
> I have asked Jewel a number of times to let us devind up, but she will not do any.
> I want you to see that all by bills are paid and that Dot does not get thing. I want you to have all of my after my bill are.
> I am told Dot is going to move back to Knemore so she can look after thing.
> Love to all
> L.B. Smilie.
> This is all over money Dot wants it all.

222 P.2d at 694.

261. *Id.* at 695.

262. Specifically, Jewel emphasized that there was no evidence that the decedent was contemplating death when he wrote the letter, he did not discuss in the letter the previous will or any intent to revoke it, the fact that he made no provision for his wife and did not discuss what provision, if any, he wished to make for his children from his first marriage, and that the wording of the document did not establish with certainty a testamentary purpose. Finally, she noted that the fact that the testator previously had made a formal will indicated that he knew how to make a will, and would have made one if he intended to. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

beneficiary to the exclusion of his natural heirs."[266] However, no evidence of lack of capacity or undue influence was offered. The court also focused on the decedent's "great dislike" of Dot,[267] Jewel's daughter, his desire that she take none of his property, and the fact that the testator had expressed a desire to divide up the marital property.

As a result of the court's decision, most, if not all, of the testator's estate was distributed to his children by his first marriage, whom he had expressly disinherited in his former will.[268] The court's need to blame the testator's wife for the disinheritance reflects how its own normative views colored its view of the facts; the court's view that the children had greater claim to the testator's assets arguably took precedence over the testator's own wishes.

Thus, even in holographic wills, which require only the most minimal formalities, courts do not necessarily strive to effectuate intent. It is equally unlikely that courts will drop their concerns for moral duty and family preference when construing the dispensing power. Rather, the manipulation of formalities shall now become a manipulation of the search for intent.

Refer back to *Williams*, the South Australian case that gave Langbein pause.[269] Perhaps the explanation for the court's willingness to infer intent, even where the testator failed to sign the document, stems from the will's provisions. Most likely, the will provided in some measure for her husband and/or her children (given the effects of Testator's Family Maintenance and that the husband had subsequently reviewed the will provisions with this son). The court no doubt viewed such a disposition as appropriate, and that viewpoint colored its estimation of what the testator intended.

Conversely, there is no reason to think that a will that a court finds morally offensive will be given effect under the dispensing power even given clear and convincing evidence of the testator's intent. Take an easier case, one involving a will attested by only one witness. Langbein points out that South Australian courts have had no trouble admitting such wills to probate regardless of the blunder.[270] Examination of a recent United States case shows that the same result will not necessarily follow in this country.

In *In re Estate of Voeller*,[271] the court affirmed a trial court's refusal to give effect to a codicil because it was signed by only one witness. The codicil altered the testator's estate plan, which left his estate to his five children, by bequeathing shares of his estate to a neighbor and his wife. Although the neighbor beneficiary claimed to have been present at the codicil's execution and thus could have signed as a witness, the court refused to find that the will substantially complied with the Will's Act. Given the will's disposition, there is no reason to believe that the court would have validated the will under the

266. *Id.* (emphasis added).
267. *Id.*
268. Although the letter purported to leave all to the testator's friend, admittance of the letter to probate ensured that the children received most of the estate as pretermitted heirs, because the letter did not refer to them. Because the testator's first, formal will had excluded the children expressly, they would not have been entitled to a portion of the testator's estate under California's pretermitted child statute. Thus, the proponent of the letter was not the friend to whom it was addressed, but the testator's children from his first marriage. *Id.* at 693–96.
269. *See supra* note 250 and accompanying text.
270. Langbein, *supra* note 10, at 22.
271. 534 N.W.2d 24 (N.D. 1995).

dispensing power if it had the option. More likely, the court's disapproval of the codicil's provisions would have influenced its view of whether the testator intended the codicil to be effective.

One could predict that a similar result would follow in witness-presence cases as well. In support of his proposition that presence defects would cease to be fatal, Langbein examines a South Australian presence case, *In re Estate of Graham*.[272] There, the court used the dispensing power to validate a will even though the witnesses signed the will in the house next door to the testator and out of his presence. However, there is no reason to think that the availability of the dispensing power would have changed the result in *In re Estate of Cytacki*,[273] a factually identical case discussed in Section II of this Article. Such an assumption overlooks the effect of South Australia's Testator's Family Maintenance, which ensures distribution to relatives that the court finds deserving. Given that there is no such statute in the United States, the lower court in *Cytacki* would have simply found the requisite testamentary intent lacking, or would have found for the contestant, the testator's mother, on an undue influence claim.

CONCLUSION

As I have shown, the "strict compliance" approach so abhorred by reformers is something of a straw man. Courts have not strained to get around the strict compliance rule for the sole purpose of effectuating testamentary intent. Rather, many courts throughout this century have allowed substantial compliance, or strained to find compliance while paying lip service to "strict compliance," when they found it necessary to ensure a subjectively just distribution of a testator's estate. Conversely, insistence on strict compliance often proved a useful tool for invalidating problematic wills. Finally, when a will unquestionably complies with formalities, courts often resort to other doctrines to invalidate wills that do not conform to societal norms.

As Professor Langbein has noted, the problem with the manipulation of doctrine in this manner "is that it is so hard to predict whether the equities in a particular case will prove sufficiently appealing to inspire the court to indulge in their pretense."[274] Langbein argues that "the rule of strict compliance may actually promote litigation, inciting courts to bend the ostensible rules in ways that make the outcomes hard to predict."[275]

Yet, the solution offered by Langbein and the other reformers will do little to lessen litigation and promote a more uniform body of case law. Granted, simplified requirements and the dispensing power might cause the occasional purely formalist court to validate a will it previously would not have. But because most courts are deeply concerned with competing principles, the Revised UPC simply will induce them to shift their analysis from one issue to another to find grounds on which to invalidate an offensive will. Similarly, although Langbein promises that the dispensing power will tend "to displace sleight-of-hand and to promote candor," it will probably do neither to any

272. Langbein, *supra* note 10, at 16–18 (discussing *In re* Estate of Graham, 20 S.A. St. R. 198 (1978)).
273. 292 N.W. 489 (Mich. 1940).
274. Langbein, *supra* note 10, at 28.
275. *Id.*

significant degree. Courts will simply manipulate the search for testamentary intent, which, as I have shown, is easily done.

Meaningful reform cannot occur until scholars recognize and consider competing principles in wills law. Analysis must start with an exploration of whether and to what extent testamentary freedom is to be valued above all other principles. We must recognize our culture's strong concern for familial duty, and determine forthrightly whether that duty has a place in the law of donative transfers. If we conclude that it does, we need to explore the extent and limits of that duty. We must also confront and explore prejudices that may prevent courts from understanding others' desires to make bequests for non-traditional reasons.

Absent that, courts will continue covertly to manipulate formalities and doctrine to effectuate desired ends. Thus, the Revised UPC will do little to diminish litigation or produce a more predictable body of wills law. The drafters' failure to consider competing themes in wills law has resulted in reforms that will do little to achieve their stated purpose.