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SUBSTANTIAL COMPLIANCE WITH THE WILLS ACT

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Courts have long required literal compliance with the Wills Act formalities, automatically invalidating defectively executed wills. In this Article Professor Langbein argues for a functional rule of substantial compliance that would treat some such defects as harmless to the purposes of the Wills Act. He contrasts the functional analysis that excuses the principal will substitutes from compliance with Wills Act formalities, and he points to factors that make it likely that the substantial compliance doctrine would fit smoothly into existing practice without materially increasing the levels of probate litigation.

THE law of wills is notorious for its harsh and relentless formalism. The Wills Act prescribes a particular set of formalities for executing one's testament. The most minute defect in formal compliance is held to void the will, no matter how abundant the evidence that the defect was inconsequential. Probate courts do not speak of harmless error in the execution of wills. To be sure, there is considerable diversity and contradiction in the cases interpreting what acts constitute compliance with what formalities. But once a formal defect is found, Anglo-American courts have been unanimous in concluding that the attempted will fails.

This Article contends that the insistent formalism of the law of wills is mistaken and needless. The thesis, stimulated in part by relatively recent developments that have lessened the authority of the Wills Act, is that the familiar concept of substantial compliance should now be applied to the Wills Act. The finding of a formal defect should lead not to automatic invalidity, but to a further inquiry: does the noncomplying 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?

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I. THE LOGIC OF FORMALISM

A. *The Wills Act Formalities*

The formalities for witnessed wills originated in the Statute of Frauds of 1677,[1] the first Wills Act. The Wills Acts vary among common law jurisdictions in wording and detail, but in the broad outline they are similar. The statute authorizes as the primary or exclusive mode of testation the so-called "formal" or "witnessed" will. Its essentials are writing, signature, and attestation. The provisions of the will must be in writing, be it print, typescript or handwriting. The testator must sign the will in the presence of two (in a few states three) witnesses, who must then attest to the signing by their own signatures. Many statutes require the testator to "publish" the will to the witnesses, that is, to declare to them that the instrument is his will. Some statutes permit someone else to sign for the testator in his presence; most permit the testator to acknowledge to the witnesses a signature he has already made. Some statutes require that the testator subscribe or sign "at the end" of the will, raising difficulties when text follows the signature or when blank space intervenes between text and signature. A few statutes require the testator to call upon the witnesses at the execution ceremony to attest. The witnesses are often required to be "competent," meaning that they may not themselves benefit under the will. The witnesses must sign the will; they are commonly but not invariably required to sign in the testator's presence, after the testator, and in the presence of each other.[2]

In addition, the Wills Acts of somewhat more than one-third of American jurisdictions, mostly in the West and South, permit holographic wills,[3] an alternative formal system prominent in

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[1] 29 Car. II, c. 3 (1677).

The Statute of Wills of 1540, 32 Hen. VIII, c. I (1540), made most real property devisable at common law for the first time. Although the statute required a writing, it was not primarily concerned with the formal requirements for such transfers. There were no formal requirements for wills of personalty, including leaseholds, until 1677. The Wills Act of 1837, 7 Will. 4 & 1 Vict., c. 26, (1837), sometimes called the Statute of Victoria, separated the law of wills from the Statute of Frauds and unified the formal requirements for wills of realty and of personalty. *See generally* A. REPPY & L. TOMPKINS, HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS (1928).

[2] *See* Rees, *American Wills Statutes*, 46 VA. L. REV. 613, 856 (1960), somewhat updated in Kossow, *Probate Law and the Uniform Probate Code: "One for the Money . . .*", 61 GEO. L.J. 1357, 1394–400 (1973). *See generally* PAGE ON THE LAW OF WILLS (W. Bowe & D. Parker eds. 1960–65) [hereinafter cited as PAGE]; T. ATKINSON, HANDBOOK OF THE LAW OF WILLS (2d ed. 1953).

[3] As of 1970, 21 jurisdictions, including the populous states of California,

European law[4] but not recognized in England. While a holographic will may be unwitnessed, it must be "entirely" or "materially" in the handwriting of the testator, and must usually be dated by him. Holographic wills are likely to spread eastward in America in coming years as the states enact the newly promulgated Uniform Probate Code, which makes liberal provision for holographs.[5]

A third mode of testation widely authorized but seldom used is the nuncupative or oral will. Following the old Statute of Frauds,[6] most jurisdictions limit oral wills to very small estates of personalty, and to cases where the testator was surprised by the onset of his "last sickness." The testator must initiate the will by calling upon two or more hearers to bear witness that his words are his last will, and the terms of the will must generally be reduced to writing within a short period of time.[7] These and other restrictions have prevented the nuncupative will from achieving any practical importance.

B. The Purposes of the Wills Act Formalities

The first principle of the law of wills is freedom of testation. Although the state limits the power of testation in various ways,[8] within the province that remains to the testamentary power, virtually the entire law of wills derives from the premise that an owner is entitled to dispose of his property as he pleases in death as in life.[9] The many rules governing testamentary capacity[10] and the construction of wills are directed to two broad issues of testamentary intent: did the decedent intend to make a will, and if so, what are its terms?

A tension is apparent between this principle of "free testation

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Pennsylvania and Texas, had provision for unattested holographic wills. M. RHEINSTEIN & M. GLENDON, THE LAW OF DECEDENTS' ESTATES 181–82 (1971).

[4] *See* A. Reppy & L. Tompkins, *supra* note 1, at 24; p. 512 & note 95 *infra*.

[5] UNIFORM PROBATE CODE § 2–503.

[6] 29 Car. II, c. 3, §§ 19–23 (1677).

[7] A still more limited variety of nuncupative will is sometimes authorized for men in the military. *See* Atkinson, *Soldiers' and Sailors' Wills*, 28 A.B.A.J. 753 (1942).

[8] The most notable limits are through taxation, forced share or other family protection legislation, the rule against perpetuities, and various rules of public policy delimiting illegal purposes. *See* Friedman, *The Law of the Living, the Law of the Dead: Property, Succession, and Society*, 1966 WIS. L. REV. 340, 355–65.

[9] "A testator's right to bestow his property by will at death is as absolute as his right to convey it during his life time." *In re* Caruthers' Estate, 151 S.W.2d 946, 948 (Tex. Ct. Civ. App. 1941).

[10] Testamentary capacity in its broader sense includes not only sanity, but capacity as affected by imposition, fraud, undue influence and duress.

and the stiff, formal"[11] requirements of the Wills Act. The classic article by Gulliver and Tilson[12] pointed out that the Wills Act formalities were made necessary by the peculiar posture in which the decedent's transfer reached the court:[13]

> If all transfers were required to be made before the court determining their validity, it is probable that no formalities except oral declarations in the presence of the court would be necessary. The court could observe the transferor, hear his statements, and clear up ambiguities by appropriate questions. . . . The fact that our judicial agencies are remote from the actual or fictitious occurrences relied on by the various claimants to the property, and so must accept second hand information, perhaps ambiguous, perhaps innocently misleading, perhaps deliberately falsified, seems to furnish the chief justification for requirements of transfer beyond evidence of oral statements of intent.

When the court is asked to implement the testator's intention, he "will inevitably be dead"[14] and unable to authenticate or clarify his declarations, which may have been made years, even decades past. The formalities are designed to perform functions which will assure that his estate really is distributed according to his intention.

Several discrete functions can be identified and ascribed to the formalities;[15] however, we shall see that in modern practice they are not regarded as equally important.

1. The Evidentiary Function. — The primary purpose of the Wills Act has always been to provide the court with reliable evidence of testamentary intent and of the terms of the will;[16] virtually all the formalities serve as "probative safeguards."[17] The requirement of writing assures that "evidence of testamentary

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[11] Friedman, *supra* note 8, at 370.

[12] Gulliver & Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1 (1941).

[13] *Id.* at 3. A system in which the testator's wishes are declared orally to the court, so-called "living probate," has been urged as an alternative to out-of-court will-making, but not as an exclusive replacement. *See, e.g.*, Cavers, *Ante Mortem Probate: An Essay in Preventative Law*, 1 U. CHI. L. REV. 440, 444–50 (1934). European law provides for oral testation before a court or a quasi-judicial notary, as does Louisiana law. *See* M. RHEINSTEIN & M. GLENDON, *supra* note 3, at 198–99.

[14] Gulliver & Tilson, *supra* note 12, at 6.

[15] The following account is based heavily upon Friedman, *supra* note 8; Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941); and especially Gulliver & Tilson, *supra* note 12.

[16] The Latin *testatio* means "a calling to witness" or "a giving of evidence." W. SMITH, A SMALLER LATIN-ENGLISH DICTIONARY 752 (J. Lockwood ed. 1933). The first Wills Act, the Statute of Frauds of 1677, was titled in full "An Act for Prevention of Frauds and Perjuryes." 29 Car. II, c. 3 (1677).

[17] Gulliver & Tilson, *supra* note 12, at 6.

intent [will] be cast in reliable and permanent form." [18] The requirement that the testator sign the will is meant to produce evidence of genuineness. The requirement that he sign at the end prevents subsequent interpolation.[19]

The attestation requirement, the distinguishing feature of the so-called formal will, assures that the actual signing is witnessed and sworn to by disinterested bystanders. When the statute directs the testator to publish his will to the witnesses, he is made to announce his testamentary intent to the persons who may later "prove" the will. Those who survive the testator are available to testify in probate proceedings.[20] The requirement that they be competent, meaning disinterested, produces witnesses whose testimony is not self-serving.

In holographic wills the requirement of handwriting substitutes for that of attestation. Gulliver and Tilson think holographs "almost exclusively justifiable in terms of the evidentiary function." [21] A more ample handwriting sample results than mere signature, should the genuineness of the document be questioned.

Nuncupative wills are, of course, especially deficient from the evidentiary standpoint, lacking both the permanence of writing and the probative value of signature. The requirements that the oral declaration be made to two or more disinterested hearers and that it be promptly reduced to writing are evidentiary in function.[22] The relatively low ceiling on the amount of property permitted to pass under an oral will probably reflects the judgment that this mode of testation serves the evidentiary purpose of the Wills Act quite poorly; if the assets are substantial, it becomes important that testamentary intent be evidenced through a higher degree of formality.

2. *The Channeling Function.* — What Fuller calls the "channeling" function of legal formalities[23] in contract law is also an important purpose of the Wills Act formalities. Fuller likens the channeling function to the role of language: "One who wishes to communicate his thoughts to others must force the raw material of meaning into defined and recognizable channels . . . . " [24]

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[18] *Id.*

[19] *Id.* at 6–7.

[20] *Id.* at 8. The trend of modern statutes is toward so-called "self-proving" wills, in which a notarized attestation clause dispenses with the need to produce the witnesses for probate unless the will is contested. *See* UNIFORM PROBATE CODE § 2–504, & Comment.

[21] Gulliver & Tilson, *supra* note 12, at 13.

[22] *Id.* at 14.

[23] Fuller, *supra* note 15, at 801–03.

[24] *Id.* at 802.

The channeling function has both social and individual aspects. Friedman points to the relationship between the formalities and efficient judicial administration. "Formalities must be capable and fit for the job of handling millions of estates and billions of dollars in assets." [25] Compliance with the Wills Act formalities for executing witnessed wills results in considerable uniformity in the organization, language, and content of most wills.[26] Courts are seldom left to puzzle whether the document was meant to be a will.

Standardization of wills is a matter of unusual importance, because unlike contracts or conveyances, wills inevitably contemplate judicial implementation, although normally in nonadversarial litigation resembling adjudication less than ordinary governmental administration. Citizen compliance with the usual forms has, therefore, the same order of channeling importance for the probate courts that it has, for example, for the Internal Revenue Service. Under the principle of free testation, "[t]he *substance* of wills (what they actually say) cannot be standardized. It may be all the more important that the documents be standardized in form." [27]

The standardization of testation achieved under the Wills Act also benefits the testator. He does not have to devise for himself a mode of communicating his testamentary wishes to the court, and to worry whether it will be effective. Instead, he has every inducement to comply with the Wills Act formalities. The court can process his estate routinely, because his testament is conventionally and unmistakably expressed and evidenced. The lowered costs of routinized judicial administration benefit the estate and its ultimate distributees.

Holographic wills serve the channeling function less well, because the required formalities are less likely to resolve whether the document was meant as a will. Whereas the formalities for witnessed wills call for a virtually unmistakable testamentary act, holographic will requirements are closer to the patterns of ordinary nontestamentary communication. The channeling function is still worse served by nuncupative wills, because their form is still closer to ordinary nontestamentary communication.

3. The Cautionary Function. — A will is said to be revocable and ambulatory, meaning that it becomes operative only on death. Because the testator does not part with the least incident of ownership when he makes a will, and does not experience the "wrench

[25] Friedman, *supra* note 8, at 368.

[26] The Wills Act forms produce highly standardized testaments in part because "they encourage the use of middlemen (lawyers) . . . ." *Id.*

[27] *Id.*

of delivery"[28] required for inter vivos gifts, the danger exists that he may make seeming testamentary dispositions inconsiderately, without adequate forethought and finality of intention. Not every expression that "I want you to have the house when I'm gone" is meant as a will. One purpose of many of the forms is to impress the testator with the seriousness of the testament, and thereby to assure the court "that the statements of the transferor were deliberately intended to effectuate a transfer."[29] They caution the testator, and they show the court that he was cautioned.[30]

The requirements of writing and signature, which have such major evidentiary significance, are also the primary cautionary formalities. Writing is somewhat less casual than plain chatter. As we say in a common figure of speech, "talk is cheap." More important than the requirement of written terms is that of written signature. "The signature tends to show that the instrument was finally adopted by the testator as his will and to militate against the inference that the writing was merely a preliminary draft, an incomplete disposition, or haphazard scribbling."[31]

The formalities associated with attestation also serve cautionary policies. The execution of the will is made into a ceremony impressing the participants with its solemnity and legal significance. Compliance with the Wills Act formalities for a witnessed will is meant to conclude the question of testamentary intent. It is difficult to complete the ceremony and remain ignorant that one is making a will.[32]

A principal objection to holographic wills is that they serve the cautionary function poorly. A particular writing may be casual and offhand or considered and testamentary. In the famous case of *Kimmel's Estate*,[33] the decedent wrote a short, half-literate letter to two of his sons. It began by advising them how to pickle pork, continued on to forecast a cold winter, and concluded with dispositions of his property "if enny thing hapens."[34] The Supreme Court of Pennsylvania held that the letter exhibited testamentary intent and ordered it admitted to probate as a holo-

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[28] *See* Mechem, *The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments*, 21 ILL. L. REV. 341, 348 (1926) (emphasis omitted).

[29] Gulliver & Tilson, *supra* note 12, at 3.

[30] The term is taken from Fuller, *supra* note 15, at 800, in preference to Gulliver & Tilson's "ritual function." Gulliver & Tilson, *supra* note 12, at 5 (footnotes omitted).

[31] Gulliver & Tilson, *supra* note 12, at 5.

[32] *But see* pp. 514–15 *infra*.

[33] 278 Pa. 435, 123 A. 405 (1924).

[34] *Id.* at 437, 123 A. at 405.

graphic will.[35] Not all holographs are so problematic. The inference of testamentary intent is far stronger when explicit testamentary language is used. Nevertheless, the cautionary value of the attestation ceremony is wanting.[36]

4. The Protective Function. — Courts have traditionally attributed to the Wills Act the object "of protecting the testator against imposition at the time of execution." [37] The requirement that attestation be made in the presence of the testator is meant "to prevent the substitution of a surreptitious will." [38] Another common protective requirement is the rule that the witnesses should be disinterested, hence not motivated to coerce or deceive the testator.

The Gulliver and Tilson article made a persuasive critique of the protective policy,[39] which has borne some fruit in the attestation requirements of the Uniform Probate Code. Sections 2–502 and 2–505 of the Code eliminate the presence and competency (disinterestedness) requirements. The official commentary to section 2–505, explaining the elimination of the competency requirement, repeats the principal arguments advanced by Gulliver and Tilson against the protective policy: (1) The attestation formalities are pitifully inadequate to protect the testator from determined crooks, and have not in fact succeeded in preventing the many cases of fraud and undue influence which are proved each year. (2) Protective formalities do more harm than good, voiding homemade wills for harmless violations.[40] (3) Protective formalities are not needed. Since fraud or undue influence may always be proved notwithstanding due execution, the ordinary remedies for imposition are quite adequate.

The protective policy is probably best explained as an historical anachronism. In the seventeenth century when the first

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[35] *Id.* at 439, 123 A. at 406.

[36] Because "talk is cheap," nuncupative wills serve the cautionary function as weakly as they do the evidentiary. The requirement that the testator call upon the hearers to bear witness to his will supposedly has some cautionary value, "since such a statement indicates that he intends a serious disposition and is not conversing in a purely haphazard manner." Gulliver & Tilson, *supra* note 12, at 14. Actually, it seems as hard to reconcile oral wills with the cautionary policy as with the evidentiary. Statutory provision for nuncupative wills is better viewed as an exception to the Wills Act formal purposes, permitted only when and because the worth of the property is minimal.

[37] *Id.* at 9.

[38] *In re* Estate of Weber, 192 Kan. 258, 263, 387 P.2d 165, 170 (1963).

[39] Gulliver & Tilson, *supra* note 12, at 9–13.

[40] It is common for the states to have so-called "purging statutes," which render the interested witness competent to validate the will, but void ("purge") his legacy. *See* Rees, *supra* note 2, at 629–34. These statutes cut down on the mischief, frustrating the testator's wishes in part rather than in toto.

Wills Act was written, most wealth was in the form of realty, and passed either by intestacy or conveyance. Will making could thus be left to the end, and the danger of imposition was greater because "wills were usually executed on the deathbed." [41] Today, "wills are probably executed by most testators in the prime of life and in the presence of attorneys." [42]

Because they lack attestation, holographic wills make no pretense of serving the protective function. "A holographic will is obtainable by compulsion as easily as a ransom note." [43] Nuncupative wills are required to be attested. Because they are in effect deathbed wills, they present the strongest case for continuing to attribute some protective policy to Wills Act formalities.

5. The Level of Formality. — Speaking of the role of formality in contract law, Fuller made an observation equally true of Wills Act forms. Although we can distinguish the several functions of the forms, "it is obvious that there is an intimate connection between them. Generally speaking, whatever tends to accomplish one of these purposes will also tend to accomplish the [others]." [44] Writing, signature and attestation each serves evidentiary, cautionary, and channeling functions.

The Wills Act policies do not call forth a finite set of formali-

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[41] Gulliver & Tilson, *supra* note 12, at 10; *see* authorities cited *id.* at 10 n.26. *See also* J. MARCH, AMICUS REIPUBLICAE: THE COMMON-WEALTHS FRIEND: OR AN EXACT AND SPEEDIE COURSE TO JUSTICE AND RIGHT, AND FOR PREVENTING AND DETERMINING OF TEDIOUS LAW-SUITS 155–60 (1651).

[42] Gulliver & Tilson, *supra* note 12, at 10; *id.* at 9: "[T]he makers of wills are not a feeble or oppressed group of people needing unusual protection as a class; on the contrary, as the owners of property, earned or inherited, they are likely to be among the more capable and dominant members of society."

A similarly discredited protective policy underlies the mortmain statutes, which limit or forbid gifts to charity in wills executed shortly before death. The Mortmain Act of 1736 was meant to prevent clergymen from terrorizing testators into inconsiderate deathbed devises. G. JONES, HISTORY OF THE LAW OF CHARITY 1532–1827, at 109–13 (1969). We no longer take that fear seriously, and mortmain statutes are on the decline in modern legislation and judicial interpretation. *See, e.g.*, Law of May 2, 1943, ch. 305, § 1, [1943] Cal. Laws 1296, *formerly* CAL. PROBATE CODE ANN. § 41 (West 1956), which was repealed in 1971 (Law of November 4, 1971, ch. 1395, § 1, [1971] Cal. Laws 2747) after being debilitated in the case law, notably in Estate of Haines, 76 Cal. App. 2d 673, 173 P.2d 693 (1946).

In 1837 the draftsmen of the Statute of Victoria, 7 Will. 4 & 1 Vict., c. 26, at 80–88 (1837), perceived it to be still the case that wills were "often made *in extremis*," 36 PARL. DEB. (3d ser.) 969 (1837) (Lord Langdale, M.R., moving the bill in the House of Lords, Feb. 23, 1837). Langdale was explaining why the draftsmen were unwilling to authorize probate "in cases where in the absence of the forms full and satisfactory evidence of the genuineness of the wills could be produced." Literal compliance was essential "to prevent the imposition of spurious wills . . . ." *Id.*

[43] Gulliver & Tilson, *supra* note 12, at 14.

[44] Fuller, *supra* note 15, at 803.

ties. The Wills Acts vary in numerous matters of detail, and each detail can be shown to serve one or more of the policies, however incrementally. Just as the Wills Act policies are not of equal weight, neither are the Wills Act formalities. The requirement that the will be signed is vastly more purposive than the requirement that the signature be "at the end."

Of the many formalities found in the different Wills Acts, two are universal.[45] A will must contain written terms, and the testator must sign it. Jurisdictions which continue to believe in the protective function impose a third requisite, attestation — the participation of bystanders.

Writing and signature are the minimum requirements which assure the finality, accuracy and authenticity of purported testamentary expressions. Long experience in jurisdictions which permit holographic wills confirms that attestation and the many lesser formalities associated with the attestation ceremony are not essential to the dominant evidentiary, cautionary and channeling purposes of the Wills Act. Only where the protective policy is still valued is it fair to characterize attestation as indispensable to the policies of the Wills Act.

We have said that holographic will requirements effectively substitute handwriting for attestation. From a functional standpoint, that is an odd substitution. Handwriting has but one virtue: it provides superior evidence of genuineness. It does not serve the other Wills Act policies, all of which attestation does serve. The legislative decision to authorize holographic wills is, therefore, a fundamental one. It represents both an abandonment of the protective policy, and an acceptance of a significantly lowered level of formality for implementing the other Wills Act policies. We shall see that this is a point of real consequence in the operation of the substantial compliance doctrine.

C. *Formality and Formalism*

What is peculiar about the law of wills is not the prominence of the formalities, but the judicial insistence that any defect in complying with them automatically and inevitably voids the will. In other areas where legislation imposes formal requirements, the courts have taken a purposive approach to formal defects. The common examples are the judicial doctrines which sustain transactions despite noncompliance with the Statute of Frauds — the main purpose and part performance rules.[46] The essential ra-

[45] We exclude nuncupative will requirements on account of the limited amount of property permitted to pass under them.

[46] *See generally* 2 A. CORBIN, CONTRACTS §§ 366–82, 420–43 (1950).

tionale of these rules is that when the purposes of the formal requirements are proved to have been served, literal compliance with the formalities themselves is no longer necessary. The courts have boasted that they do not permit formal safeguards to be turned into instruments of injustice in cases where the purposes of the formalities are independently satisfied.[47]

Why has the Wills Act not been interpreted with a similar purposiveness? There are factors which distinguish Wills Act defects from Statute of Frauds violations, but we submit that none of them really justifies the harsher treatment of Wills Act defects.

1. *Intestate Succession.* — Every Wills Act is backstopped by an intestate distribution statute. If a will fails on account of a formal defect (or for any other reason), the property which would have passed under the will is distributed according to the statute among the persons most closely related to the decedent by marriage and blood.[48] Judicial insistence on literal compliance with the Wills Act formalities would be intolerable if invalidity of the will were to result, for example, in forfeiture of the property. The intestate distribution statute reduces drastically the mischief which is worked when wills are declared invalid for formal defects.

The backstopping effect of the intestate distribution statute may help explain why rigid enforcement of Wills Act formalities can take place, but it hardly justifies the phenomenon. Freedom of testation is always said to be the preeminent value,[49] and the decedent's effort to make a will shows that he preferred his own plan of distribution to that of the statute. The argument is circular which says that the Wills Act can be rigidly enforced because intestate succession reduces the harm. Why inflict the harm in the first place?

A thinkable answer is that the courts may not really see the harm as a harm. It may be that their commitment to freedom of testation is less strong than they say. The intestate distribution statute can be viewed as an extension of the family protection provisions of the forced share statute, which requires that the surviving spouse receive a certain minimum share of the estate. The intestate distribution statute never decreases and

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[47] *E.g.*, Bader v. Hiscox, 188 Iowa 986, 993, 174 N.W. 565, 567 (1919) ("The purpose and intent of the statute of frauds is to prevent fraud, and the courts will, so far as possible, refuse to permit it to be made the shield for fraud.").

[48] Unless, of course, there is a prior will.

[49] *See* p. 491 *supra*. Contrary dicta can be found in older cases, *e.g.*, Reed v. Roberts, 26 Ga. 294, 300–01 (1858) ("Why a desire to favor the wills of testators made *in extremis*, should exist in this State, we do not very well understand. Ordinarily, our statute of distribution makes the fairest disposition of a dead man's property.").

sometimes increases that share; and it awards the remainder to the closest blood relatives, typically the children. Perhaps the courts implement a disguised policy preference for the family protection system of the intestate distribution statute when they construe strictly against the will.

The difficulty with that view is that the practice of voiding those wills with formal defects while sustaining the others is not functionally related to the family protection policy. Moreover, Dunham and later investigators have established that most wills serve the family protection policy better than the intestate distribution statute, because they grant to the surviving spouse a larger share than she or he would take by intestacy.[50] A systematic bias toward invalidity would, therefore, contravene the family protection policy.

The judicially developed constructional presumptions in the law of wills strongly favor validity, further reflecting the subsidiary status of the intestate succession scheme. Such fundamental requisites as the testator's capacity and testamentary intent are presumed from due execution, subject of course to disproof.[51] Witnesses who later contradict their own attestation seldom overcome the presumption of validity from due attestation.[52] Blind and illiterate testators are generally presumed to have known and uttered the contents of their duly executed wills.[53] There is, indeed, an express "presumption against intestacy."[54] We can, therefore, confidently reject the notion that judicial insistence on literal compliance with the Wills Act formalities is a surrogate for unexpressed hostility to free testation.

To be sure, one often suspects that in construing whether particular conduct amounted to compliance with a required formality, the courts are silently looking to other factors, including the testator's "fairness" to his family and others.[55] When, however, a formal defect is manifest, the courts have denied themselves all flexibility, no matter how sympathetic the frustrated

[50] Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 251–63 (1963); M. SUSSMAN, J. CATES, & D. SMITH, THE FAMILY AND INHERITANCE 83–120 (1970).

[51] *E.g.*, Merrill v. Boal, 47 R.I. 274, 132 A. 71 (1926).

[52] *E.g.*, *In re* Estate of Thomas, 6 Ill. App. 3d 70, 284 N.E.2d 513 (1972).

[53] 1 PAGE, *supra* note 2, § 5.9, at 182–84.

[54] *E.g.*, *In re* Estate of Gibson, 19 Ill. App. 3d 550, 312 N.E.2d 1 (1974).

[55] *See In re* Estate of Weber, 192 Kan. 258, 387 P.2d 165 (1963), where the ostensible ground of decision was the presence defect in the attestation ceremony. What troubled the court was that the nonlawyer draftsman had, contrary to the testator's instructions, accidentally disinherited the testator's wife, and the testator signed without noticing the error. By insisting on enforcing the technicality, the court was surreptitiously doing what it would not have done explicitly: it was voiding a will for mistaken terms.

legatees, and no matter how remote and undeserving the intestate takers. Conversely, the rule of literal compliance with Wills Act forms admits to probate many an "unfair" but duly executed will. Granting that courts can sometimes give silent play to the equities, the rule of literal compliance inflicts constant and mostly uncontrollable inequity. It appears much more to dominate the courts without regard to result than to be a vehicle of covert and sympathetic result-oriented adjudication.[56]

2. *The "Dead Man" Policy.*— We have previously emphasized the unique aspect of testamentary transfers: the testator is dead and unable to guide the court when it is supposed to effect the transfer according to his intention. We shall find it convenient to borrow a label for this concern and name it after the so-called "dead man" statutes, which govern litigation against decedents' estates in most American jurisdictions. These statutes exclude "the testimony of the survivor of a transaction with a decedent, when offered against the latter's estate." [57] Dead man statutes are normally held to be inapplicable to proceedings for the probate of a will. The testator's will is not deemed a "transaction" with his legatees,[58] and on questions concerning the validity or construction of a will courts do receive evidence of the decedent's statements. Nevertheless, the dominant concern behind both the dead man statute and the Wills Act is the same. The "chief justification" [59] for the Wills Act formalities, like the dead man statutes, is that the testator must inevitably be unavailable at the time of litigation to authenticate or clarify his intention. This factor justifies the formalities; the present question is whether it justifies formalism, that is, whether it also mandates the rule of literal compliance with the formalities.

The rule of literal compliance with Wills Act formalities usually operates to relieve the courts from having to engage in fact-finding concerning decedents' intentions. When due execution is found, testamentary intent is presumed. When defective execu-

[56] *E.g.*, the recent case of *Re* Beadle, [1974] All E.R. 493, involving a will which was signed at the top rather than at the end, although sealed in an envelope which the testatrix also signed. Goff, J. "regretfully" declared it invalid, admitting "that there is no question of identification and no possibility of anything having been altered after the envelope had been sealed and put away." *Id.* at 494–95. The case has provoked one commentator to suggest a solution close to the substantial compliance doctrine. "If one or more of [the Wills Act] formalities is not observed, then the court should nevertheless give effect to the true intentions of the testator as expressed in the document, in the absence of suspicious circumstances." Bates, *A Case for Intention*, 124 NEW L.J. 380, 382 (1974).

[57] 2 J. WIGMORE, EVIDENCE 695 (3d ed. 1940) (emphasis omitted).

[58] *E.g.*, Taylor v. McClintock, 87 Ark. 243, 112 S.W. 405 (1908); *cf.* Annot., 115 A.L.R. 1425 (1938). *See also* note 101 *infra*.

[59] Gulliver & Tilson, *supra* note 12, at 3.

tion is found, testamentary intent is forbidden to be proved. If the conduct and intention of a dead man are matters thought to be impossible of fair proof, then the judicial insistence on due execution may be welcomed as serving for the probate of wills the function which the dead man statutes serve elsewhere.

It becomes important to notice, therefore, that the dead man statutes are widely condemned among commentators and practitioners. To Wigmore, "the exclusion is an intolerable injustice," since "cross-examination and the other safeguards for truth are a sufficient guaranty against frequent false decision." [60] As long ago as 1938 the American Bar Association's Committee on the Improvement of the Law of Evidence voted disapproval of dead man statutes by the margin of forty-six to three, following a national survey of professional and judicial opinion.[61]

The dead man policy must inevitably concern the courts in administering the Wills Act. But it does not follow that because the testator will not be present to state his intention, the courts should refuse to attempt to ascertain his intention according to ordinary rules of proof.

Although the dead man policy does not warrant the rule of literal compliance with the Wills Act, it probably has had much to do with producing that rule. Paradoxically, it is precisely the fact that the testator is dead which has made it easier to overlook or dismiss the hardship resulting from literal enforcement of the formalities in wills cases. The testator who has committed a formal breach is beyond suffering, and his frustrated legatees are only volunteers. By contrast, the plaintiff who alleges past performance of an oral contract in order to avoid the Statute of Frauds has undergone irreversible change of position at the inducement of the defendant. The injustice of nonpurposive insistence on the formalities is clearer than in the case of the frustrated legatee. In this curious way, the dead man policy has led the courts both to exaggerate the danger of formal noncompliance and to disregard the injustice of their rule of literal compliance.

3. Inferior Status of Probate Courts. — There is an institutional ground of distinction between Wills Act formalities and those in contract and conveyancing. In many states the court which administers the Wills Act "is a separate court . . . rele-

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[60] 2 J. WIGMORE, *supra* note 57, at 696.

[61] *Id.* at 700-01. The ABA Committee was following the recommendation of an earlier committee of judges and professors favoring legislation of the type in force in Connecticut, "which permits the survivor to testify but also admits the declarations or memoranda of the deceased." *Id.* at 701 (emphasis omitted). The earlier committee had surveyed Connecticut judges and lawyers, who reported contentment with the operation of their statute by a great margin. *Id.* at 699.

gated to an inferior position in the judicial organization of those states." [62] The downgrading of probate courts naturally affected their staffing. As of 1944 it was estimated that in half the states probate judges were not required to be legally trained. "The probate court of one such state has been characterized as 'a court that is not required to know any law and that does not know any more than the law requires.' " [63]

It is open to argument that the rule of literal compliance with the Wills Act formalities is the doctrinal consequence of the inferior status of the probate courts. Such courts cannot be trusted with anything more complicated than a wholly mechanical rule.

That argument would not, of course, explain why the rule of literal compliance has been enforced equally in jurisdictions whose probate courts were not debased. More fundamentally, the argument overlooks the simple truth that every jurisdiction has had to provide for competent adjudication in disputes arising out of the probate of wills. The existing doctrinal structure of the law of wills requires extensive factfinding and law-applying.[64] A particular state may prefer to allocate that function away from its probate courts, but provision for the function elsewhere in the judicial system is inevitably made.

II. THE DECLINE OF THE WILLS ACT

A. *The Will Substitutes*

The low estate of the probate courts has greatly influenced the question we are discussing, but in an odd and indirect manner.

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[62] Simes & Basye, *The Organization of the Probate Courts in America: I*, 42 MICH. L. REV. 965, 995 (1944). Although the recent trend is to upgrade the probate courts to the status of courts of general jurisdiction, *see* UNIFORM PROBATE CODE §§ 1-302, 1-304, 1-308, 1-309, the practice is and has been quite varied. As a result:

> In some states provision is made for a full and complete hearing in the court of probate powers, followed by a review in another court, often in the court of last resort. In other states there are provisions for appeals in which the issue may be changed and new evidence may be introduced; provisions for separate proceedings in contest; and provisions for review by intermediate courts and finally by courts of last resort . . . .

3 PAGE, *supra* note 2, § 26.10, at 24-25. The inferior status of the probate courts owes to a variety of causes. The common law was historically hostile to the ecclesiastical courts where wills of personalty were formerly probated. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 740-43 (5th ed. 1956). Further, probate proceedings are generally administrative and noncontentious.

[63] Simes & Basye, *The Organization of the Probate Courts in America: II*, 43 MICH. L. REV. 113, 137 (1944), *quoting* Caron v. Old Reliable Gold Mining Co., 12 N.M. 211, 226, 78 P. 63, 67 (1904). It is said that in 1966, in Florida's 67 counties, 22 county court (*i.e.*, probate) judges were nonlawyers. Bostick, *The Revocable Trust: A Means of Avoiding Probate in the Small Estate?*, 21 U. FLA. L. REV. 44, 50 n.37 (1968).

[64] *See* pp. 514-16, 521, 522-23, *cf.* pp. 527-29 *infra*.

Public and professional awareness of the delay, expense, inefficiency and occasional corruption in the probate courts has been the dominant factor in bringing about the proliferation of the so-called "will substitutes" — modes of gratuitous transfer of property by which the death of the donor operates to raise in the donee property interests theretofore enjoyed by the donor, but which are exempted by judicial decision or by statute from compliance with the Wills Act. It is the flexibility and comparative informality of the will substitutes which is making the rule of literal compliance with Wills Act formalities ever more incongruous and indefensible.

Some will substitutes are easily distinguished from transfers by will. For example, the common law joint tenancy of real property often serves the function of a will. If *A* owns Blackacre in fee simple, and by proper conveyancing [65] transfers to *B* an undivided joint interest, *A* and *B* become joint tenants with right of survivorship. On *A*'s death *B* acquires the entire fee simple which *A* originally owned, as would have happened if *A* had retained the fee simple until death and devised it to *B* under the Wills Act. However, the incidents of the transfer by joint tenancy in fact differed significantly from a devise. While he was still alive, *A* surrendered his absolute ownership. He gave *B* a present estate with right of survivorship. The law of gifts governed rather than the law of wills: the process of conveyancing achieved the "wrench of delivery" and served the evidentiary, cautionary and channeling purposes which the Wills Act formalities are meant to serve for *post obit* transfers.

The conveyance in joint tenancy may often have the effect of a will,[66] but it cannot be attacked as "testamentary" (a term of legal conclusion in the context of will substitutes, meaning void if not executed with Wills Act formalities). For unlike a will, the joint tenancy passes a present interest, neither ambulatory nor revocable. In our example, *B*, the donee, acquired from the date of the conveyance a present right of ownership in Blackacre as large as the remaining interest of *A*, the donor, who could not thereafter revoke. Likewise, joint and survivor accounts of personalty with banks and brokerage houses (an especially prevalent will substitute) provide equal rights of ownership for either party to the account.[67]

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[65] *See* 4A R. POWELL, THE LAW OF REAL PROPERTY § 616, at 669–71 (P. Rohan ed. 1973).

[66] This does not suggest that it always serves as well as a will. *See* Wehringer, *Joint Ownership — No Substitute for a Will*, 39 N.Y.B.J. 301 (1967).

[67] Joint and survivor accounts produce a surprising amount of litigation, usually on the constructional question of whether the transferor did by his acts and lan-

There are, however, other will substitutes which are much harder to distinguish from ordinary wills. Some are of tremendous importance in modern practice, employed both by professional estate planners and by untutored laymen.[68] Each has the functional characteristics of a will, yet operates without Wills Act formalities.

1. *Revocable and Tentative Trusts.* — Revocable trusts are frequently created and now invariably sustained as valid and nontestamentary.[69] The settlor characteristically retains nothing

guage manifest the intent to create a survivorship account. Although banks and brokerage houses, as stakeholders, are generally well protected, they have tried to smooth out the field by requiring both parties to a joint account to sign a declaration of its terms. Merrill, Lynch, Pierce, Fenner & Smith currently has its joint account customers sign a printed form saying: "Dear Sirs: With respect to our joint account with right of survivorship we confirm that: 1. In all matters pertaining to the account you may act upon orders from either of us. 2. Upon the death of either of us, all securities, funds and property in the account shall be the sole property of the survivor." (Form. no. Code 107 R6-67.) It should be remarked that such joint accounts "differ from the true joint tenancies as defined in property law, for by the privilege of withdrawal either [cotenant] may consume the account, while under property law the right of the cotenants is confined to a common use." R. BROWN, THE LAW OF PERSONAL PROPERTY 217 (2d ed. 1955) (footnote omitted).

[68] We omit from the following discussion the gift *causa mortis*, perhaps the hardest of the will substitutes to reconcile with the Wills Act, because it is not a staple of modern estate planning.

[69] 1 A. SCOTT, THE LAW OF TRUSTS § 57.1, at 474-77 (3d ed. 1967).

In the leading cases of Farkas v. Williams, 5 Ill. 2d 417, 125 N.E.2d 600 (1955), the settlor bought four blocks of mutual fund stock "as trustee" for the beneficiary whom he designated, a faithful employee who did not know of the purported trusts during the settlor's lifetime. The declarations of trust provided that the purchaser-settlor retained the right to revoke the trust, to change beneficiaries, and to receive the income for life. The trusts would be automatically revoked if the beneficiary predeceased the testator. The declarations were not executed with Wills Act formalities. The lower courts held them testamentary, hence invalid, reasoning that the beneficiary had no enforceable interest during the lifetime of the settlor. 3 Ill. App. 2d 248, 121 N.E.2d 344 (1954).

The Illinois Supreme Court reversed, concluding that the settlor's declaration passed a present interest to the beneficiary. The court conceded that "[i]t is difficult to name this interest . . . . " 5 Ill. 2d at 422, 125 N.E.2d at 603. In truth the terms of the instrument did permit the owner to behave as if he owned the property absolutely, since it left him both full enjoyment during his lifetime and complete freedom to dispose of the property on his death by changing trust beneficiaries or by revoking the trust. The single evanescent property right which was said to pass inter vivos to the beneficiary was the potential liability of the settlor as trustee to the beneficiary for any breach of fiduciary duty affecting the beneficiary's remainder interest. Acknowledging that the beneficiary would never sue while the settlor was alive for fear of revocation, 5 Ill. 2d at 432, 125 N.E.2d at 608, the court maintained that the beneficiary could wait for the settlor to die and then sue the settlor's estate in respect of the breach of fiduciary duty.

Actually, it is extremely doubtful that this ingeniously imagined "contingent equitable interest in remainder" would ever be enforceable. In most cases, the

short of absolute ownership: the life estate, the power to invade corpus, and the power to direct disposition upon his death by revoking the trust or by changing the beneficiary designation. A yet more blatant contravention of the Wills Act is that prevalent American version of the revocable trust with retained life interest known as the tentative trust, often called the Totten or savings bank trust, and more revealingly, the "poor man's will." [70] When the settlor deposits money in a bank account in his own name as trustee for another, he is presumed to have intended a trust with the following incidents:[71] (1) He may withdraw any or all of the money for his own use, notwithstanding the words of trust, without liability to the designated beneficiary. (2) He may revoke the trust, even if he fails expressly to reserve a power of revocation. (3) On his death, "the presumption arises that an absolute trust was created as to the balance on hand" [72] for the benefit of the beneficiary. (4) The trust terminates automatically if the beneficiary predeceases the settlor.

For every purpose other than compliance with the Wills Act, the property in revocable and tentative trusts is treated as property of the settlor. The settlor's creditors may reach it;[73] it is included in his estate for federal estate tax purposes;[74] under the newer forced share statutes, it is included in computing the sur-

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settlor's estate would have a potent defense of laches: the beneficiary's delay in suing to recover for the settlor's breach of duty induced the settlor to leave the trust unrevoked. Although laches might not defeat the claim of a beneficiary who, like the employee in *Farkas*, did not knowingly delay, *see* 3 A. SCOTT, *supra*, § 219.4, at 1763 & n.2, the cause of action is improbable on the merits. Under a trust instrument which expressly immunizes what is normally the most egregious breach a trustee can commit — appropriation of the corpus for his own benefit — it is hard to envision what lesser acts of management might still constitute breach. If such a lawsuit were brought, the estate of the settlor-trustee would contend that the interest he retained under the trust agreement was so great that he owed no duty of care to those to whom he might have left something. Even were that not so, the court's argument is fundamentally self-frustrating. If the beneficiary's sole present interest in the trust property is as miniscule and perishable as this, it is as a practical matter nonexistent.

[70] "It would be more accurate to call it a middle-class will." Friedman, *supra* note 8, at 369.

[71] RESTATEMENT (SECOND) OF TRUSTS § 58 (1957); Ritchie, *What is a Will?*, 49 VA. L. REV. 759, 762–63 (1963).

[72] *In re* Totten, 179 N.Y. 112, 125–26, 71 N.E. 748, 752 (1904).

[73] Nineteenth-century case law tended to protect the revocable trust remainder from attack by the settlor's creditors during the settlor's lifetime, but as the revocable trust became more common the opposite result has been directed by statute in a number of states and under § 70(a) of the Federal Bankruptcy Act, 11 U.S.C. § 110(a), (1970). 4 A. SCOTT, *supra* note 69, § 330.12, at 2614–16; *cf.* 2 *id.* 156, at 1190–97; for tentative trusts, see 1 *id.* 58.5, at 543–44.

[74] INT. REV. CODE OF 1954, § 2038.

vivor's share, and in some circumstances may be applied to satisfy that share.[75]

In some jurisdictions, notably New Jersey and Massachusetts, the courts voided tentative trusts for Wills Act noncompliance well into the twentieth century, but at present even these states have ceased to resist.[76] The *Restatement (Second) of Trusts*, under the influence of the leading New York case law, sustains tentative trusts against the Wills Act,[77] although the reporter, Scott, concedes in his treatise that if the "general principles" governing whether a transfer is testamentary were applied to tentative trusts, "it would seem quite arguable that they are testamentary dispositions . . . . "[78] Scott concludes, however, that "there seems to be no sufficiently strong policy to invalidate these trusts," since "the amount involved [is] usually comparatively small, . . . it is easy to identify, and there is no great danger of fraudulent claims resulting from the absence of an attested instrument."[79] Thus, he contends in essence that the tentative trust, although not in compliance with the Wills Act, fulfills the purposes of the Wills Act. Friedman writes in a similar vein that the tentative trust "is volitional, formal, and solidly backed by business practice."[80] That smallish sums are typically involved bears on the cautionary policy. The channeling policy is well served in the out-of-court routine of bank practice. The cautionary and evidentiary policies are thought to be served by "the interview with the bank officer and the execution of the signature card . . . [which] would seem to discourage hasty and impulsive action and to reduce the danger of forgery, fraud and coercion to a minimum."[81]

Ordinary revocable trusts can be similarly justified. In practice the declaration of trust is inevitably in writing and signed by the settlor. It is usually in standardized unambiguous language, whether specially drafted by a lawyer or obtained by the settlor from a form book, bank, investment company or wherever. Signature and writing serve the evidentiary policy, manifesting intent to transfer and specifying the terms of the transfer. The channeling policy is also well served in a standardized trust instrument, which can be processed out of court or in a perfunctory

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[75] *See* UNIFORM PROBATE CODE §§ 2-202, 2-207; N.Y. ESTATES, POWERS & TRUST LAWS § 5-1.1(b)(1) (McKinney 1967); I A. SCOTT, *supra* note 69, § 58.5, at 544-48. For a characteristic recent authority, see Montgomery v. Michaels, 54 Ill. 2d 532, 301 N.E.2d 465 (1973).

[76] 1 A. SCOTT, *supra* note 69, § 58.3, at 531-35.

[77] RESTATEMENT (SECOND) OF TRUSTS § 58 & Explanatory Notes (1957).

[78] 1 A. SCOTT, *supra* note 69, § 58.3, at 526.

[79] *Id.* at 527.

[80] Friedman, *supra* note 8, at 360.

[81] Ritchie, *supra* note 71, at 763.

equity proceeding. Signature and writing also serve the cautionary policy somewhat, requiring the settlor to sign a technical trust instrument whose seriousness is as palpable as a will's. However, without the somber ceremony of attestation, the forms of transfer are closer to those of everyday routine; as with holographic wills, the primary impact of the want of attestation is upon the cautionary policy.[82] Because subsequent modifications are also unattested, the settlor may revoke the trust and the Totten trust depositor may draw on or add to the account without ceremony.

2. *Cash Value Life Insurance.* — The dominant will substitute of modern practice is life insurance, as Kimball's useful account underlines:[83]

> The only significant assets of the estates of most people are the proceeds of one or more life insurance policies. For such people, constituting a majority of the population, determination of the distribution of that "property" through the designation of a beneficiary under the insurance contract not only has precisely the same function as a will, but constitutes a much more important "testament" than the will. In view of the numbers of people involved, the life insurance beneficiary designation is the principal "last will and testament" of our legal system. . . . A properly designated beneficiary will receive the proceeds of the insurance without regard to compliance with the formalities required in the law of wills.

Although some life insurance can be distinguished from a transfer by will, so-called "ordinary," or "whole" life insurance cannot. It combines both term insurance and a savings element.[84] Under a term policy, the policyholder has only an expectancy

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[82] Without attestation the will substitutes serve the discredited protective function scarcely at all. Like a holographic will, they are "obtainable by compulsion as easily as a ransom note." Gulliver & Tilson, *supra* note 12, at 14.

[83] Kimball, *The Functions of Designations of Beneficiaries in Modern Life Insurance: U.S.A.*, in LIFE INSURANCE IN INTERNATIONAL PERSPECTIVE 74, 76 (J. Hellner & G. Nord eds. 1969). As of mid-1969, 83% of American household units had at least one member covered with a legal reserve life insurance company. LIFE INSURANCE FACT BOOK 1974, at 11 (1974). At the end of 1973, 145 million individual policyholders had $1.8 trillion of life insurance in force. *Id.* at 19. Total assets of life insurance companies in 1973 totaled $252.4 billion. *Id.* at 9.

[84] Industry spokesmen who have been resisting the current movement for compulsory price disclosure have recently begun to contest the long established analysis which separates "ordinary" life insurance into savings (cash value) and protection (insurance) components. *See, e.g.*, THE NATURE OF THE WHOLE LIFE CONTRACT (1974) ("A research report by the Institute of Life Insurance for the Task Force on Life Insurance Cost Comparisons, National Association of Insurance Commissioners"). For a short and convincing rebuttal, drawn from industry sources, see Kimball & Rapaport, *What Price "Price Disclosure"? The Trend to Consumer Protection in Life Insurance*, 1972 WIS L. REV. 1025, 1027–29.

that upon his death the insurer will create the property, so to speak, by paying the face amount of the policy to whomever he has designated. If the policyholder outlives the term of the policy, neither he nor his beneficiary will receive anything. By contrast, the holder of an ordinary life policy pays a higher premium for the same face amount of insurance, and under the contract he acquires rights in his savings which resemble the rights of a savings bank depositor. These savings, including interest earned, are the cash value of the policy. The policyholder is entitled to demand the cash value from the insurer substantially as the bank depositor may withdraw his balance. Cash value life insurance is property to the policyholder. If he leaves the cash value with the company until death, that property (together with the insurance increment) will be paid to his beneficiary, whom the policyholder has had the power to change at his pleasure.

The transfer on death from the insured to his beneficiary of cash value life insurance takes place without Wills Act formalities. It is no more reconcilable with the Wills Act than is a transfer by Totten trust. In either case the owner transfers his savings at death.

Once again, what legitimates this will substitute is that, although it functions as a will, its own forms adequately serve the purposes of the Wills Act. The insured signs a written purchase application in which he also designates his beneficiary, and he makes at least one, usually dozens, of payments to the insurer. Business practice serves the channeling policy, generally effecting the transfer entirely out of court. Writing, signature and payment serve the evidentiary and cautionary policies, but at the lowered cautionary level already remarked for tentative and revocable trusts.[85]

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[85] Although the will substitutes appear to be exceptional when viewed from the perspective of the Wills Act formalities, it is really the Wills Act formalities which are the exceptions in the actual practice of testation. The overwhelming majority of decedents' estates are distributed privately, without formality and without judicial supervision. A probate court decree may be essential to restore a decedent's real property to marketability within the recording system. But when the decedent owns no real property, the family ordinarily divides up the estate in private. Neither the Wills Act nor the intestate distribution statute comes into play. The decedent expresses his wishes to his survivors, and his wishes are carried out or not as they decide. The transfer never comes to the attention of the probate court, because no one entitled to demand a judicial proceeding under a will or under the intestate distribution law feels aggrieved enough to do so.

The empirical studies which document this phenomenon are conveniently collected in Fletcher, Book Review, 46 WASH. L. REV. 619, 624–25 n. 14 (1971). In contrast to England, where Fletcher computes that about half of all deaths produce testate or intestate administration, "probate studies in the United States show a

B. *Reforming the Wills Act: The UPC*

Although the primary concern of the Uniform Probate Code (UPC) of 1969 is its admirable simplification of probate procedures, the Code also propounds a model Wills Act [86] whose preface announces the draftsmen's guiding principle: "If the will is to be restored to its role as the major instrument for disposition of wealth at death,[87] its execution must be kept simple. The basic intent of these sections is to validate the will whenever possible." [88] The Code implements this principle in two main ways. It authorizes holographic wills, and it reduces the number of formal requirements for both attested and holographic wills below the minimum levels customary in previous American Wills Acts.

Whereas the argument of the present article is for a rule of reduced formalism in enforcing whatever formalities the Wills Act requires, the UPC approach is to reduce the number of required formalities. Although both techniques work generally in the same direction, they will produce different results in many cases if the UPC's "minimal formalities" [89] are to be enforced with the same literalism as before.

1. Witnessed Wills. "The formalities for execution of a witnessed will have been reduced to a minimum," [90] asserts the of-

much lower ratio of probates to deaths, running from about 15% to a high of about 40%." *Id.* at 624.

Legislatures have encouraged this "private probate" of small estates in various ways, most notably by statutes which authorize the state motor vehicle registrars to transfer title to decedents' automobiles without a probate decree, merely on the next-of-kin's affidavit that the owner is deceased and that the estate is not being probated. *E.g.*, CAL. VEHICLE CODE § 5910 (West 1971).

The major will substitutes — revocable trusts, life insurance, and joint and survivor accounts — resemble the private probate system in that, unless challenged, they operate without judicial supervision. Such challenge may be brought either by a distributee contesting the out-of-court distribution or by a stakeholder interpleading in the face of a threatened contest. *See* note 132 *infra*. Unlike private probate, however, the will substitutes do have formalities which resemble Wills Act formalities. For just as courts cannot process "millions of estates and billions of dollars in assets," Friedman, *supra* note 8, at 368, without formalities, neither can banks and insurance companies. Written terms and signed declarations to evidence the transferror's intent are equally indispensable to the ordinary institutional channels either of probate administration or of business practice.

[86] UNIFORM PROBATE CODE, art. 2, pt. 5.

[87] This is an odd goal, and the Wills Act an odd means. The case has not been made that the growth of the will substitutes is undesirable, nor is there any reason to believe that reform of the Wills Act would have any effect upon testators' preference for will substitutes. Will substitutes are not used for the purpose of avoiding Wills Act formalities, but in order to avoid the probate process. The will substitutes offer what no Wills Act can: an alternative to the delay, expense and occasional corruption of probate.

[88] UNIFORM PROBATE CODE, art. 2, pt. 5, General Comment.

[89] *Id.* § 2-502, Comment.

[90] *Id.*

ficial commentary to UPC section 2-502. The will must be in writing and the testator must sign or acknowledge it to two witnesses. There is no requirement that the testator "publish" the will, or that the witnesses sign it in his presence, or that he sign it "at the end," or that the witnesses be competent (disinterested). The Code repudiates the protective function[91] by abolishing the competency and presence requirements which implement it. Inspired by the will substitutes, the draftsmen have markedly weakened the ceremonial value of attestation. Because the testator need not publish the will to the witnesses, and they need not sign in his presence, one commentator thinks it possible that "a testator could sign his will and acknowledge this fact by telephone to two friends and then mail them the will for their signatures as witnesses, and still comply with the terms of the Code." [92]

Doubtless the draftsmen balanced the injustice brought about by technical violations of the publication and presence requirements and decided that the incremental cautionary value of those two former requisites was not worth the price in wills invalidated for defective compliance. Like the will substitutes, the Code's requirements for attested wills suggest that it is primarily the evidentiary and channeling purposes of the Wills Act which survive in modern times.

2. *Holographic Wills.* — The UPC's liberal provision for holographic wills also underscores the modern primacy of the evidentiary and channeling policies.

The UPC eliminates the conventional requirements that the holograph be "entirely" in the testator's hand, and that he date it. It requires only that "the signature and the material provisions [be] in the handwriting of the testator." [93] What this Code change invites is spelled out in the official commentary. "A valid holograph might even be executed on some printed will forms if the printed portion could be eliminated and the handwritten portion could evidence the testator's will." [94] The court would deem only the handwritten fill-ins "material" and then consult the printed matter as mere extrinsic evidence. In this circular fashion an unattested printed-form will, executed in private on a sheet obtained from a stationery store, drugstore, or gasoline station, is brought within the Wills Act.

The Code has reduced the formal requirements for a holographic will to the level of the will substitutes. The citizen may

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[91] *See* p. 496 *supra.*

[92] Kossow, *supra* note 2, at 1380.

[93] Uniform Probate Code § 2-503.

[94] *Id.,* Comment.

now make a will in Code jurisdictions in the same way he buys life insurance or sets up a Totten trust: "fill in the blanks and sign on the dotted line."

The danger that holographic wills can impair the channeling function of the Wills Act is actually minimized under the UPC provision. Like the will substitutes that the Code seems to be imitating, the unattested printed-form wills it invites serve the channeling policy especially well. Unlike Mr. Kimmel's wandering letter, printed-form wills are completely unambiguous in character. They are captioned "Last Will and Testament" or whatever, and their content is exclusively and manifestly testamentary.

Less spectacular yet perhaps less defensible than the allowance of printed-form wills is the Code's elimination of the usual requirement that the testator date the holographic will. The main reason for requiring dating is to establish the sequence of instruments if the testator leaves multiple conflicting wills. The dating requirement has given rise to a notorious case law, in which holographic wills have been voided for abbreviated or omitted dating, even when there was no question of sequence or genuineness. The UPC draftsmen, caught in the dilemma between no formality or literal enforcement, opted for no formality and eliminated the requirement of dating altogether. Contrast the German solution to this question:[95]

> If a testament does not contain a statement as to the time of its execution and if such failure results in doubts as to the validity of the instrument, the testament is to be held invalid unless the time of its execution can be established by extrinsic evidence.

The German statute shows that useful formal requirements such as dating need not be eliminated if the proponents are permitted to validate a defective instrument by proving that the defect is functionally harmless. The UPC has confused the formality with the formalism, and needlessly sacrificed the former for failure to remedy the latter.

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[95] BGB (Civ. Code) § 2247(5), *translated in* M. RHEINSTEIN & M. GLENDON, *supra* note 3, at 197; *see* note 127 *infra*.

The Italian Civil Code has devised a similar but more restrictive solution: "The date shall contain an indication of the day, month and year. Proof of the inaccuracy of the date is admitted only when the capacity of the testator, the priority of date among multiple instruments, or other questions to be decided on the basis of the time of the will, are in dispute." C. Civ. art. 602 (Giuffrè 1972) (author's translation). By contrast, French law has remained strict: "The holographic will shall be invalid if it is not written, dated and signed entirely in the hand of the testator . . . ." C. Civ. art. 970 (73e ed. Petits Codes Dalloz 1973-74) (author's translation).

III. The Elements of the Substantial Compliance Doctrine

The substantial compliance doctrine is a rule neither of maximum nor of minimum formalities, and it is surely not a rule of no formalities. It applies to any Wills Act, governing the consequences of defective compliance with whatever formalities the legislature has prescribed. Our major theme is that substantial compliance fits easily into the existing doctrinal structure and judicial practice of the law of wills.

Proper compliance with the Wills Act, so-called due execution, is the basis in modern law for certain presumptions which shift the burden of proof from the proponents of a will to any contestants. Unless the contestants advance disproof, the proponents need establish no more than due execution. Because there are usually no contestants, the effect of the presumptions is to limit the proofs in the probate proceeding to the question of due execution, and there are further presumptions which allow due execution to be easily inferred from seeming regularity of signature and attestation.[96]

These presumptions are extremely wise and functional. They routinize probate. They transform hard questions into easy ones. Instead of having to ask, "Was this meant to be a will, is it adequately evidenced, and was it sufficiently final and deliberate?," the court need only inquire whether the checklist of Wills Act formalities seems to have been obeyed. In all but exceptional cases, a will is simply whatever complies with the formalities.

The substantial compliance doctrine would permit the proponents in cases of defective execution to prove what they are now entitled to presume from due execution — the existence of testamentary intent and the fulfillment of the Wills Act purposes. The substantial compliance doctrine necessarily impairs something of the channeling function of the Wills Act, because it permits the proponents to litigate issues which would otherwise be foreclosed. We shall see, however, that there is considerable reason to believe that the doctrine would also prevent species of probate litigation which now abound. This important question of the doctrine's impact on the level of probate litigation is best deferred until we have discussed the basics. Our immediate concern is with the feasibility of adjudicating the issues now pre-

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[96] *E.g.*, Martin v. Martin, 334 Ill. 115, 124, 165 N.E. 644, 647 (1929) ("every reasonable presumption will be indulged in favor of . . . due execution and attestation"). *See* Annot., 40 A.L.R. 2d 1223 (1955); *cf.* Uniform Probate Code § 3-407 & Comment.

sumed from due execution, and how they should be handled under the substantial compliance doctrine.

A. *Proof of Testamentary Intent*

The substantial compliance doctrine would permit the proponents to prove that the noncomplying document was nonetheless meant to be a will. It is therefore significant that in current practice the presumption of testamentary intent arising from due execution is not regarded as conclusive. Validly executed wills can be challenged when extrinsic circumstances have put testamentary intent in doubt, although such cases are not frequent. In a variety of situations our courts have shown themselves able to adjudicate whether a purported will was actually intended to be a will.

The practice is nicely illustrated by a group of cases raising the question whether the decedent really intended as a will a document he executed with Wills Act formalities as part of his initiation into the Masonic Order, whose initiation rite obliged members who had not previously made a will to do so during the rite.[97] The cases differ in result according to the particular circumstances; it is the mode of analysis which is revealing. When evidence is adduced to rebut the presumption of testamentary intent the courts decide that question on the merits. A Texas court said:[98]

> Testamentary intent on the part of the maker is essential to constitute an instrument a will, regardless of its correctness in form. And the issue of such intention is not limited to the language of the instrument alone. The facts and circumstances surrounding its execution may be looked to in determining whether the maker intended it to be a testamentary disposition of his property or merely to be used for some other purpose.

The Masonic will cases belong in a larger category of cases in which the decedent executes a purported will "only with the intent that it be a model, or a specimen, or a joke, or with the intention declared to the witnesses that it might or might not be [his] will depending on later circumstances . . . ."[99]

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[97] Vickery v. Vickery, 126 Fla. 294, 170 So. 745 (1936); Shiels v. Shiels, 109 S.W.2d 1112 (Tex. Ct. Civ. App. 1937); *In re* Estate of Watkins, 116 Wash. 190, 198 P. 721 (1921).

[98] Shiels v. Shiels, 109 S.W.2d 1112, 1113 (Tex. Ct. Civ. App. 1937).

[99] 1 PAGE, *supra* note 2, § 5.10, at 185 (footnote omitted). The leading English case of Lister v. Smith, 3 Sw. & Tr. 282, 164 Eng. Rep. 1282 (P. Ct. 1863), determined that "if the fact is plainly and conclusively made out, that the paper which appears to be the record of a testamentary act, was in reality . . . never seriously intended as a disposition of property, it is not reasonable that the court should turn it into an effective instrument." The court reached its result notwithstanding "[t]he momentous consequences of permitting parol evidence . . . to place all wills

The more common occasion in modern law for explicit judicial consideration of the existence of testamentary intent is when the language of the document leaves in doubt whether it was intended as a will, although executed with sufficient formality to satisfy the Wills Act. These cases usually involve homemade wills. Holographic wills are disproportionately prominent among such cases, because the level of required formality is so low. When any handwritten and dated letter satisfies the Wills Act, cases like *Kimmel* are bound to arise in which the court must decide whether the decedent meant the writing to be a will.[100] There is a considerable body of reported case law, much of it concerning California holographic wills, in which the court confidently reviews the evidence whether the particular document was meant to be a will.[101]

Another relatively common occasion for the courts to decide whether a purported will expresses testamentary intent is when the document, although executed with Wills Act formality, expresses an intention to make a further will or disposition in the future. The document may be a will, or it may be merely a memorandum of intent to make a future will; the trier of fact determines which.[102]

B. Fulfilling the Purposes of the Wills Act

The substantial compliance doctrine would admit to probate a noncomplying instrument that the court determined was meant

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at the mercy of a parol story that the testator did not mean what he said." *Id.* at 288, 164 Eng. Rep. at 1285. That concern is inevitably reflected in the burden of persuasion of those who contest a duly executed will. It has also troubled American courts, where there is a division among jurisdictions on whether to follow *Lister v. Smith* in admitting extrinsic evidence to contradict testamentary intent when the will is duly executed. 1 PAGE, *supra*, § 5.10, at 185-87; *cf.* Annot., 21 A.L.R.2d 319, 343-47 (1952).

[100] *In re* Estate of Major, 89 Cal. App. 238, 241, 264 P. 542, 543 (1928) ("the true test is whether the maker executed the document with *animus testandi*") (quoted language differs slightly in the Pacific Reporter version).

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> When words which may be construed as testamentary are used in an informal document such as a letter and it is not entirely clear that the writer intends thereby to dispose of his property at his death, extrinsic evidence may be considered in determining such intent.

In re Estate of Taylor, 119 Cal. App. 2d 574, 579, 259 P.2d 1014, 1017 (1953) (footnote omitted). Some courts have distinguished between "latent" and "patent" ambiguity and admitted extrinsic evidence only to clarify the latter. On the decline of that effort, see Note, *Ascertaining the Testator's Intent: Liberal Admission of Extrinsic Evidence*, 22 HASTINGS L.J. 1349 (1971); Note, *Extrinsic Evidence and the Construction of Wills in California*, 50 CAL. L. REV. 283 (1962). The rule restricting the admissability of extrinsic evidence in construing a will is predicated upon the existence of a duly executed will; it would be inapplicable to the substantial compliance issue of whether a defectively executed instrument may nevertheless be validated as a will.

[102] *See* Annot., 46 A.L.R.3d 938 (1972).

as a will and whose form satisfied the purposes of the Wills Act. Just as the courts have shown themselves competent to determine whether an instrument was uttered with testamentary intent, they are also accustomed in a variety of contexts to examine whether the particular purposes of the Wills Act have been fulfilled. The substantial compliance doctrine merely extends an established judicial technique.

1. The Protective Function. — Of the several Wills Act functions, it is the protective one that the courts have been least willing to treat as concluded by Wills Act compliance. A principal argument used to discredit the protective policy of the Wills Act formalities is that the courts have paid so little heed to Wills Act compliance when evidence of imposition was adduced. "Experience teaches that the courts will permit evidence of fraud, undue influence, trust, and probably mistake no matter what the statute says." [103] It is, therefore, reprehensible that a defect in compliance with the protective formalities is made to void a will automatically, even when the proponents can show that the defect was harmless and did not in fact result in imposition. The law of wills permits evidence of imposition to overcome due execution. The substantial compliance doctrine would permit evidence of no imposition to overcome defective execution.

The Uniform Probate Code simply abolishes the two protective formalities; witnesses need not be disinterested, nor need they sign in the testator's presence. The official commentary explains the abolition of the competency requirement: "A substantial gift by will to a person who is one of the witnesses to the execution of the will would itself be a suspicious circumstance, and the gift could be challenged on grounds of undue influence." [104] In jurisdictions which retain the competency requirement, the substantial compliance doctrine would have a similar effect, except that the burden of proof would be on those seeking to validate the will. The proponents [105] would have to show that the attesting witness who benefitted under the will had not in fact worked any imposition on the testator. When the witness takes only a token benefit, that fact alone should rebut the inference of imposition.[106] A showing that the will revoked an earlier

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[103] Wellman, *The Joint and Survivor Account in Michigan — Progress through Confusion*, 63 MICH. L. REV. 629, 676 (1965).

[104] UNIFORM PROBATE CODE § 2-505, Comment.

[105] Or in the case of an operative purging statute, *see* note 40 *supra*, the witness who stands to lose his legacy.

[106] *But see In re* Moody's Will, 155 Me. 325, 154 A.2d 165 (1959) (will held invalid for requesting that witnesses receive nominal sum as token of appreciation).

will attested by other witnesses and containing the same or similar provision for the interested witness would likewise be persuasive of no imposition.[107] The surrounding circumstances taken together may rebut the suspicion of imposition arising from the use of interested witnesses. If the will was made in the prime of the testator's life, rather than on his death bed, and if he left it unrevoked for a long interval, then his conduct evidences freedom from imposition.

The other common protective formality is the requirement that the witnesses sign in the presence of the testator. The protective purpose is "to prevent the substitution of a surreptitious will" [108] by the witnesses or intermediaries. It has often been remarked that the likelihood of crooks attempting that trick rather than more subtle means of imposition is remote. By forbidding the proponents of the will to prove that no substitution in fact occurred, the law is made to presume irrebuttably that this farfetched plot transpired. Under the substantial compliance doctrine the scrivener or others familiar with the executed instrument could identify it, negativing surreptitious substitution. When the legatees are natural ones, not acquainted or not well acquainted with the witnesses or intermediaries, they would be able to sustain the inference that the will was not the product of conspiracy and surreptitious substitution.

2. *The Cautionary and Evidentiary Functions.*—We have seen that virtually all the Wills Act formalities contribute, though in differing increments, to both the cautionary [109] and evidentiary policies.[110] Writing, signature, and the various incidents of the attestation ceremony all contribute to the solemnity of the occasion, thereby warning the testator of the seriousness of testation and encouraging him to act with deliberation. From the evidentiary standpoint, signature evidences genuineness, writing gives permanence to the expression, and the ceremony of attestation means to fix the event in the memory of persons who may survive to "prove" the will.

Just as the Wills Act formalities do not conclude the questions whether the instrument was meant as a will and whether the testator was the victim of imposition, there are numerous points in the existing law where due execution does not resolve cautionary and evidentiary issues. For example, the law governing revocation of wills by physical act involves the courts with

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[107] This result is sometimes reached under the doctrine of dependent relative revocation. *See* LaCroix v. Senecal, 140 Conn. 311, 99 A.2d 115 (1953).

[108] *In re* Estate of Weber, 192 Kan. 258, 263, 387 P.2d 165, 170 (1963).

[109] *See* pp. 494–95 *supra.*

[110] *See* pp. 492–93 *supra.*

difficult determinations whether particular mutilations evidence the testator's deliberate attempt to revoke his will. Likewise, there is a large body of case law dealing with the proof of lost wills. The proponents are permitted to prove, necessarily from extrinsic evidence, that there was a validly executed will now gone astray, and what its terms were. The present task is to examine how the substantial compliance doctrine would handle cautionary and evidentiary issues arising on account of defective compliance with the Wills Act formalities.

(*a*) *Signature.* — Although the growing use of signature in routine petty transactions has reduced its cautionary value, signature is still the most fundamental of the Wills Act formalities. Most people would not lightly sign anything captioned "Last Will and Testament." Our courts rely upon signature as the most important evidence of finality of intention. Signature separates the preliminary draft from the decided "last will." Signature is also the primary evidence of the will's authenticity.

The substantial compliance doctrine would virtually always follow present law in holding that an unsigned will is no will; a will with the testator's signature omitted does not comply substantially with the Wills Act, because it leaves in doubt all the issues on which the proponents bear the burden of proof: the formation of testamentary intent, deliberate and evidenced. The formality of signature is so purposive that it is rarely possible to serve the purposes of the formality without literal compliance. Because the proponents of an unsigned purported will bear an almost hopeless burden of proof, it is unlikely that people would litigate such claims in any number.

Nevertheless, there may be rare cases where it would be appropriate to admit to probate an unsigned will. Consider the testator who publishes the document as his will to his gathered attesting witnesses and takes up his pen and lowers it toward the dotted line when an interloper's bullet or a coronary seizure fells him. In such unique cases where there is persuasive evidence that the testator's intention to sign the will was final, and only a sudden impediment stayed his hand, the purposes of the Wills Act are satisfied without signature.[111]

(*b*) *Writing.* — The substantial compliance doctrine would

[111] Where a wrongdoer by fraud or force prevents the making or remaking of a will, the weight of modern authority is to allow the intended legatees to recover in tort or by way of constructive trust. *See* Comment, *Tort Liability for Interference with Testamentary Expectancies in Decedent's Estates*, 19 U. KAN. CITY L. REV. 78 (1951); Latham v. Father Divine, 299 N.Y. 22, 85 N.E.2d 168 (1949) (following RESTATEMENT OF RESTITUTION § 184 (1936)). In the case of the interloper's bullet, the substantial compliance doctrine, by validating the intended but unexecuted will, would merely do directly what is now done circuitously.

have no practical effect on the requirement that wills be in writing. Written terms, written signature, and — where mandated — written attestation comprise a group of formalities whose omission could scarcely be insubstantial. Although some modes of electronic communication can perform some of the functions of writing — videotape provides permanence and evidences authenticity — they lack the solemnity and finality of a signed document. Estate planners who fear a contest based on the testator's capacity may use tape and film to supplement, but never to supplant, the Wills Act formalities.[112]

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

The substantial compliance doctrine would inevitably relax the requirement of handwriting for holographic wills. We have seen that the evidentiary policy is the only serious one in the holograph formalities. As cases like *Kimmel* illustrate, the holograph may serve cautionary and channeling policies quite poorly. The protective policy it completely abandons.[113]

Statutes directing that the will be "entirely" in the testator's handwriting have produced a large and ugly case law voiding wills which contained some innocuous printed matter.[114] The substantial compliance doctrine would permit the court to conclude in such cases that the handwritten portions provided a large enough handwriting sample to satisfy the evidentiary purpose of the handwriting formality. Because it emphasizes that purposive standard, the doctrine would also apply to those statutes which require only the "material" portions of the will to be handwritten.

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[112] *See* Jaworski, *The Will Contest*, 10 BAYLOR L. REV. 87, 93 (1958). *Cf.* Belfield v. Coop, 8 Ill. 2d 293, 134 N.E.2d 249 (1956) (tape recording of execution ceremony held admissible in probate contest).

[113] *See* p. 497 *supra*.

[114] *E.g., In re* Estate of Thorn, 183 Cal. 512, 192 P. 19 (1920). *See also* Annot., 89 A.L.R.2d 1198 (1963).

The proper question is not whether a typewritten or printed provision is "material" to the will, but whether the remaining handwriting sample is "material" enough to evidence the genuineness of the document.[115] Hence, the substantial compliance doctrine would eliminate the need for the sleight of hand contemplated by the Uniform Probate Code — deeming only the fill-ins on a drugstore will "material."

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

We do not doubt that the legislature could insist on making handwriting (or anything else) indispensable no matter how well its purposes are otherwise achieved. But we should be slow to attribute nonpurposiveness to private law legislation. The legislative determination to require no attestation of holographic wills deliberately leaves the cautionary and channeling functions poorly served. When in the circumstances of the case the proponents can prove that the remaining evidentiary function of handwriting has been otherwise achieved, the purpose of the statute is satisfied and the document should be validated. Literal compliance produces a routine and trouble-free transfer according to the legislative design, but it does not follow that defective compliance should result in nullification if the purpose of the formality is independently fulfilled.

The requirement of written dating of holographs is another formality which is both sensible and dispensable. The statutes provide for dating to prevent controversy about issues such as the sequence of conflicting instruments. In cases where the omitted or defective date raises no ambiguity or difficulty, the

[115] *See* p. 511 *supra*. The remote possibility that a forger could interpolate non-handwritten matter on the holograph would exist. Those jurisdictions which do not require witnessed wills to be "subscribed" or signed "at the end" have long been running the identical risk.

substantial compliance doctrine would excuse the error as harmless to the purpose of the statute. In cases of multiple wills the substantial compliance doctrine would simply follow the existing practice for attested wills, which do not require dating. The proponent of an undated or same-dated document bears the burden of proving that that document was the last. If satisfactory evidence of sequence is wanting, all the documents will be refused probate.[116]

(*c*) *Attestation.* — A principal achievement of the substantial compliance doctrine should be to relieve against the invalidation of wills in whose execution some of the minor formalities surrounding the attestation ceremony have been omitted or deficiently performed. These are formalities for witnessed wills which the Uniform Probate Code altogether eliminates. The testator in a Code jurisdiction need not publish his will to the witnesses, nor call upon them to witness, nor be in their presence when they sign. The witnesses need not sign in the presence of one another. Where these requirements survive even partially, they do possess incremental cautionary and evidentiary value. Each adds further solemnity to the ceremony of execution, warning the testator of its seriousness, and each helps fix the execution in the memory of those who may testify to it. The substantial compliance doctrine would permit defective compliance with such ceremonials to be evaluated purposively. It would permit the proponents to prove that in the circumstances of the case the testator executed the will with finality and that the execution is adequately evidenced notwithstanding the defect.

Attestation itself, unlike the ceremonies associated with it, has been nearly as fundamental in the statutory schemes as signature and writing. When the Wills Act requires attestation, it directs that persons additional to the testator participate in the execution of the will. Their participation is the major factor in ceremonializing the execution, and those who survive the testator will be able to testify to due execution. The increment which attestation adds to the cautionary and especially to the evidentiary functions seems unlikely to be achieved by other means. As compared with the will substitutes and the holographic will, the attestation requirement may seem to set the level of cautionary and evidentiary functions unreasonably high, but that is the legislature's policy choice. The legislature which refuses to permit holographic wills forecloses the substantial compliance doctrine in cases of total failure of attestation. On the other hand, partial failure of attestation ought to be remediable under the substantial

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[116] *See* Annot., 17 A.L.R.3d 603, 607 (1968).

compliance doctrine. Attestation by two witnesses where the statute calls for three, or by one where it asks for two, is a less serious defect, because the execution of the will was witnessed and the omission goes to the quantity rather than the quality of the evidence. Other evidence of finality of intention and deliberate execution might then suffice to show that the missing witness was harmless to the statutory purpose.

(*d*) *Subsequent Modifications.* — The Wills Act formalities are also required for instruments which revoke or modify duly executed instruments.[117] The purposive rationale of the substantial compliance doctrine would extend to formal defects in them. The danger thereby emerges that casual writings would be deemed to be in substantial compliance with the Wills Act, hence accidentally and mistakenly to revoke or modify properly executed wills. Where holographs are permitted, the fear is that offhand remarks in the testator's letters that "I mean to leave the house to you" or "I want you to have the house when I'm gone" will be taken to supersede his former will.

The practical question is whether the later document was meant as a will. This issue is not the creature of the substantial compliance doctrine. It comes up in existing law and is handled by a presumption "strongly adverse" [118] to the later informal document. The reports do not teem with such cases; the potential proponents of casual documents correctly perceive the hopelessness of setting them up against formal wills. The substantial compliance doctrine would not make it any easier for the proponents to sustain their burden of proof on the issue.

A recent decision [119] of the Supreme Court of Pennsylvania illustrates how onerous the proponents' burden of proof is. In 1964 Edith Moore wrote, signed and dated in her own hand a document instructing her attorney: "I wish to change Article 2

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[117] The requirement that revoking instruments be executed with Wills Act formality is an unwise mutuality concept whose reexamination the purposive substantial compliance doctrine should facilitate. The requirement rests upon a fallacy similar to that of the contracts doctrine of Foakes v. Beer, 9 App. Cas. 605 (1884) — the rule assuming that discharge of a contract should require the same level of formality (*i.e.*, consideration) as the formation of a contract.

The requirement of Wills Act formality for revoking instruments is incongruous when contrasted with the permitted alternative mode of revocation by physical act. An unwitnessed revoking instrument usually serves the evidentiary, cautionary and channeling policies far better than unwitnessed physical mutilation. Mutilation can always be accidental. For an instance of a senseless result which the substantial compliance doctrine would reverse, see Harchuck v. Campana, 139 Conn. 549, 95 A.2d 566 (1953). *See generally* Annot., 22 A.L.R.3d 1346 (1968).

[118] *In re* Will of Pagett, 364 S.W.2d 947, 952, 51 Tenn. App. 134, 144 (1962).

[119] *In re* Estate of Moore, 443 Pa. 477, 277 A.2d 825 (1971).

of my Will dated July 13–1959 to read: . . . ." Dispositive matter followed. She did not send this document to the attorney, but kept it in her safe in her home until her death a year and a half later. She kept her will in a safe deposit box in a bank. The supreme court affirmed a lower court finding that the document was not a holographic codicil. It was an unsent letter of instructions asking her attorney to draft modifications for her will which she might or might not have finally decided to execute.

(*e*) *Nuncupative Wills.* — We have already seen that the requirements of written terms and written signature are so purposive that it is difficult and pointless to attempt to serve the function without the formalities. The substantial compliance doctrine is not a back door to nuncupative testation.

The substantial compliance doctrine would also have little or no effect on the formalities presently required for nuncupative wills in jurisdictions which permit them. We have seen that the formalities for nuncupative wills serve all of the Wills Act functions poorly. The real justification for nuncupative wills is that the amount of property permitted to pass is so small that it is not worth the trouble of imposing truly purposive formalities. Because the nuncupative will formalities are already below functional levels, the functional analysis of the substantial compliance doctrine has no sphere.

3. The Channeling Function. — If the substantial compliance doctrine can do individual justice only at the price of disorder and uncertainty in the patterns of transfer and testation, the gain may not be worth the cost. It must be shown that the substantial compliance doctrine would not confuse the channels, nor clog them with significantly increased litigation.

(*a*) *The Will Substitutes.* — We have seen that the substantial compliance doctrine has been suggested in great part by the functional analysis used to sustain the will substitutes against the contention that they are void for noncompliance with the Wills Act formalities. It can be argued that the substantial compliance doctrine would erase the line between wills and will substitutes: because the substantial compliance doctrine would extend to the Wills Act that functional analysis which in the past has been used to exempt will substitutes from the Wills Act, all will substitutes would become wills. A Totten trust, for example, could satisfy the substantial compliance doctrine as well as an attempted will with a defect in the attestation ceremony.

That argument overlooks, however, an essential distinction. Will substitutes may have the effect of wills, but they are not intended to be wills. They lack testamentary intent because they intend their noncompliance with the Wills Act. The use of a will

substitute involves a crucial decision about channeling: the donor elects to use a nonprobate mode of transfer. The substantial compliance doctrine requires intent to use the probate system, intent to make a will. For this reason, the doctrine would never recapture for probate those transfers which the donor put into such well-marked channels as life insurance and trust. To the contrary, the substantial compliance doctrine would reinforce the independence of the will substitutes by legitimating the functional analysis for the Wills Act itself. If literal compliance with the Wills Act ceased to be a magnetic imperative for testation, the tension between the functionalism of the will substitutes and the formalism of the Wills Act would be relaxed. The will substitutes would finally become immune to attacks based on Wills Act noncompliance.

(*b*) *Litigation.* — The Wills Acts govern the transmission of "millions of estates and billions of dollars in assets." [120] The substantial compliance doctrine must necessarily impair something of the channeling function, because it permits the proponents of noncomplying instruments to litigate the question of functional compliance, an issue which the rule of literal compliance presently forecloses. If testation were transformed from routine administration into routine adjudication, the social cost and the cost to estates and distributees would be intolerable.

We assert therefore a fundamental point when we say that the substantial compliance doctrine would have no effect whatever upon primary conduct. The incentive for due execution would remain. Precisely because the substantial compliance doctrine is a rule of litigation, it would have no place in professional estate planning. Today lawyers in holograph jurisdictions have their clients' wills executed as attested wills; that is, they opt for maximum formality, in order to be in the best possible position to defend the will against any claim of imposition or want of finality. The counselor's job is to prevent litigation. Only when the lawyer has bungled his supervision of the execution of a will would he have occasion to fall back on substantial compliance.

Hence, the substantial compliance doctrine would apply overwhelmingly to homemade wills. We know from long and sad experience that the rule of literal compliance with the Wills Act does not deter laymen from drafting and executing their own wills without professional advice. The substantial compliance doctrine would not attract the reliance of amateurs, nor increase the number of homemade wills. Anyone who would know enough about the probate process to know that the substantial compliance

[120] Friedman, *supra* note 8, at 368.

doctrine existed would know enough not to want to rely upon it.[121]

The substantial compliance doctrine would pertain not to every will, but to that fraction of wills where the testator, acting without counsel or with incompetent counsel, has failed to comply fully with the Wills Act formalities. Two important factors would operate to diminish the incidence and the difficulty of such litigation. First, by no means would every defectively executed instrument result in a contest. On many issues the proponents' burden of proof would be so onerous that they would forego the trouble and expense of hopeless litigation; and on certain other issues the proponents' burden would be so light that potential contestants would not bother to litigate. Evidentiary and cautionary formalities like signature and writing are all but indispensable, whereas omitted protective formalities like competence of witnesses are easily shown to have been needless in the particular case.

Second, the litigation which would occur would for the most part raise familiar issues which the courts have demonstrated their ability to handle well. We have seen that the elements of the substantial compliance doctrine arise in other contexts in current litigation when courts examine whether purported wills evidence testamentary intent and were executed freely and with finality.

The substantial compliance doctrine would not simply add to the existing stock of probate litigation, but would to some extent substitute one type of dispute for another. The rule of literal compliance can produce results so harsh that sympathetic courts incline to squirm. Many of the formalities have produced a vast, contradictory, unpredictable and sometimes dishonest case law in which the courts purport to find literal compliance in cases which in fact instance defective compliance. Is a wave of the testator's hand a publication[122] or an acknowledgement? [123] Was the signature "at the end"? [124] When the attesting witnesses were in the next room, were they in the testator's presence? [125] The courts now purport to ask in these cases: did the particular

[121] The substantial compliance doctrine compares favorably in this respect with the analogous doctrines which relieve against the Statute of Frauds. A party to a contract may have an incentive to avoid writing, even if he knows it is required, when the deal is fragile and a demand for writing could scare the other party away. By contrast, the testator never has an incentive to avoid due execution, since it costs him nothing to comply, and due execution reduces the risk that his intentions will be frustrated or his estate thrown into litigation.

[122] Annot., 60 A.L.R.2d 124 (1958).

[123] Annot., 7 A.L.R.3d 317 (1966).

[124] Annot., 44 A.L.R.3d 701 (1972).

[125] Annot., 75 A.L.R.2d 318 (1961).

conduct constitute literal compliance with the formality? The substantial compliance doctrine would replace that awkward, formalistic question with a more manageable question: did the conduct serve the purpose of the formality? By substituting a purposive analysis for a formal one, the substantial compliance doctrine would actually decrease litigation about the formalities. The standard would be more predictable, and contestants would lose their present incentive to prove up harmless defects.

The Wills Act does not serve the channeling function conclusively, precisely because it does not and cannot serve the other Wills Act policies conclusively. Disputes which put in issue the cautionary, evidentiary and protective functions of the Wills Act need constantly to be litigated. It is unthinkable that "millions of estates and billions of dollars in assets" [126] will invariably pass trouble free. We expect the channeling function to be impaired in some fraction of cases. The choice is not between litigation and no litigation. In cases of defective compliance the important choice is between litigation resolved purposefully and honestly under the substantial compliance doctrine, or irrationally and sometimes dishonestly under the rule of literal compliance.

IV. Substantial Compliance in Action

The doctrine of substantial compliance with the Wills Act presently awaits its first adherents among common law courts.[127]

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[126] Friedman, *supra* note 8, at 368.

[127] Courts occasionally sustain wills on the announced ground of substantial compliance, but the meaning is different. The term is presently used to mean that borderline conduct is close enough to the prototype to be deemed in compliance, but not that concededly defective compliance is permissible on purposive grounds. For cases finding so-called substantial compliance with the publication requirement, see Annot., 60 A.L.R.2d 124, 136–138 (1958). Nevertheless, such cases contain dicta which are helpful to the functional doctrine being urged here. *E.g.*, *In re* Rudd's Estate, 140 Mont. 170, 177, 369 P.2d 526, 530 (1962) (citation omitted): "This court has previously stated in effect that substantial compliance means only that a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which it was adopted. The intent of the legislation being the elimination of fraud [*sic*]."

West Germany does have a limited substantial compliance doctrine of the variety urged here, pursuant to BGB (Civ. Code) § 2247(5). *See* note 95 *supra*. The proponents are permitted to prove that defective compliance with the requirements that holographic wills recite their date and place of execution are harmless in the particular case. The commentaries suggest that no unusual difficulties have resulted in the more than three decades that the provision has been in force. T. Kipp, Lehrbuch des bürgerlichen Rechts: Erbrecht 133–38 (12th ed. H. Coing ed. 1965) [hereinafter cited as Kipp-Coing]; O. Palandt, Bürgerliches Gesetzbuch 1837–39 (33d ed. 1974); 5 H. Soergel & W. Siebert, Bürgerliches

Nevertheless, when the courts begin to apply the doctrine, they will find it supported not only in logic but in practice. We have previously pointed to Kimball's account that "the life insurance beneficiary designation is the principal 'last will and testament' of our legal system." [128] It is therefore of tremendous consequence that in this field of modern law closest in function to the Wills Act a purposive substantial compliance doctrine has triumphed.[129]

Life insurance contracts invariably impose formal conditions upon the policyholder's power to change beneficiaries. They require a "written request in form satisfactory to the Company," [130] which in practice means that the policyholder must complete, sign, and deliver a printed request form provided by the company. The contract is also likely to stipulate that the "change of designation shall become operative only when such request is filed by the Company at the Home Office; provided that the Company may, before filing such request, require submission of the policy for endorsement of such . . . change of designation." [131] On the one hand, change of beneficiary clauses mean to benefit the company. They force policyholders to conform to company channels of business practice, and they reduce the company's exposure to double liability when both the former and the substituted beneficiary claim the proceeds. On the other hand, these formal requirements benefit the policyholder and his truly intended beneficiary. They require that his intent to designate a beneficiary be deliberate and well evidenced. The courts enforce these "alternative . . . formalities required by the contract . . . as a kind of *quid pro quo* for freedom from the wills statute . . . ." [132]

GESETZBUCH 348–53 (9th ed. 1961); 5 J. v. STAUDINGER, KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH 1230, 1250–55 (1960 ed.).

[128] Kimball, *supra* note 83, at 76.

[129] "By the great weight of authority, a change of beneficiary under a policy containing the usual change-of-beneficiary clause can be accomplished without strict or complete compliance therewith." Annot., 19 A.L.R.2d 5, 30 (1951).

The courts also speak of substantial compliance with the formalities for joint and survivor accounts. *See, e.g.*, Ratliff v. Ratliff, 237 Ark. 191, 372 S.W.2d 216 (1963). *Compare* Berl v. Rosenberg, 169 Cal. App. 2d 125, 336 P.2d 975 (1959), *with* Tibbels v. Tibbels, 232 Ark. 857, 340 S.W.2d 590 (1960).

[130] Prudential Insurance Company contract reproduced in W. YOUNG, CASES AND MATERIALS ON THE LAW OF INSURANCE 719 (1971).

[131] *Id.*

[132] Kimball, *supra* note 83, at 77; *cf.* Annot., 19 A.L.R.2d 5, 33 (1951). In most litigation concerning change of beneficiary clauses, the company is not a party in interest. The company interpleads, which preserves its protection from double liability but otherwise waives its right to demand enforcement of the formal requirements of the contract. The lawsuit goes forward as a dispute between the former and the substituted beneficiaries, similar to a will contest between proponents of conflicting instruments.

In deciding whether to validate a defectively executed change of beneficiary designation courts must determine two issues which parallel those to be determined where the substantial compliance doctrine would be applied to a defectively executed will. First, there must be intent to change beneficiaries. Second, there must be conduct sufficient to satisfy the cautionary and evidentiary functions of the forms. As with the Wills Act, due execution of the change of beneficiary forms all but concludes these issues; defective execution puts in issue whether the transfer was intended and deliberate. The substantial compliance doctrine permits the proponent of the defective change of beneficiary designation to prove that in the circumstances of the particular case these formal purposes were served without formal compliance.

The easy cases are those in which the policyholder has done everything he could do to comply with the requirement. When he dies before the home office has received the executed form or recorded it on company records or endorsed the change on the policy, or when the policyholder is unable to find or retrieve the policy in order to submit it to the company for endorsement, the courts dispense with the omitted requirements. "[T]here was an intent to transfer the benefits of the policy from the old to a new beneficiary and that intent was plainly manifested by acts as complete as the circumstances would admit of . . . ." [133]

When the policyholder has "failed to do all which might reasonably have been possible to effectuate his wishes," [134] the substantial compliance doctrine will not be applied, because his conduct has left the cautionary and evidentiary policies in doubt. It is well settled that when the policyholder merely writes the company asking for a change of beneficiary form, his final intention to execute the form is not evidenced. When the policyholder executes the form but retains it unsent among his personal papers, it is treated as was Mrs. Moore's unsent holographic letter to her attorney:[135] "the assured had not definitely determined to effectuate such a change, inasmuch as he made no attempt to forward the executed form to the company although it is clear that he knew such a procedure was necessary . . . ." [136]

Even when the policyholder has not done everything he could have done, compliance will be found where there is evidence which permits the court to conclude that his intention was de-

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[133] New York Life Ins. Co. v. Cannon, 22 Del. Ch. 269, 272, 194 A. 412, 413 (1937).

[134] *In re* Estate of O'Neill, 143 Misc. 69, 76, 255 N.Y.S. 767, 775 (Sur. Ct. 1932).

[135] *See* pp. 522–23 *supra*.

[136] Sun Life Assur. Co. of Canada v. Secoy, 72 F. Supp. 83, 85 (N.D. Ohio 1947).

liberate and final. In *Tibbels v. Tibbels* [137] the policyholder wrote and signed a letter to the Metropolitan Life Insurance Company explaining: "As my wife and I are divorced I would like to have my beneficiary changed to my mother," whose name and address he supplied.[138] The letter was postmarked 11:00 a.m.; the policyholder was killed in an automobile accident at 1:30 p.m. that day. He was dead before he could receive or act upon the company's standard response, asking him to complete a request form and return it with the policy as the terms of the contract required. The Supreme Court of Arkansas affirmed the lower court's determination of substantial compliance:[139]

> In these circumstances we think there was a sufficient compliance. The weight of authority is that if the insured has done everything reasonably possible to effect a change in beneficiary, a court of equity will decree that to be done which ought to be done. True, the insured could have sent his policy to the insurance company along with his letter requesting a change in beneficiary, but there is no showing that Tibbels was an expert on insurance matters or realized the necessity of sending in the policy.

The insurance cases point the way to a similar treatment of Wills Act formalities. The arguments which might seem plausible when advanced against an untried doctrine turn out to be groundless when tested against the identical doctrine operating in the functionally identical sphere of the major will substitute. First, the substantial compliance doctrine does not seriously impair the channeling function. Policyholders routinely comply with the formal requirements in the vast proportion of cases; testators would continue to comply fully with the Wills Act in like proportions. Second, the life insurance litigation which does arise is sensibly decided, because unlike the wooden jurisprudence under the rule of literal compliance with the Wills Act, the substantial compliance doctrine provides a workable, functional principle of decision. Third, the rule of literal compliance is not an indispensable surrogate for judicial inability to adjudicate purposively. The doctrine of substantial compliance which works so well in the life insurance cases operates in the manner we have been urging for wills cases: it construes against validity unless the proponents discharge their burden of proving that despite defective execution the transferor's intention was final and genuine.

There is but a single significant factor which might distinguish

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[137] 232 Ark. 857, 340 S.W.2d 590 (1960).

[138] *Id.* at 858, 340 S.W.2d at 591.

[139] *Id.* at 859-60, 340 S.W.2d at 592.

the formal requirements in life insurance change of beneficiary designations from those in the Wills Act for purposes of the substantial compliance doctrine: the former originate in contract, the latter in statute. Hence, although the two sets of formal requirements serve identical purposes, the Wills Act rests on a different and imperative base of authority. What the legislature commands is not to be questioned in purpose but obeyed to the letter. Perhaps the classic expression of this positivist argument is Jhering's:[140]

> The object which the statute had in eye can be many sided . . . . Whether this object is actually achieved through the form, whether it is also achievable in other ways, and whether the parties have actually achieved it in other ways, is irrelevant. The legislature was unwilling to remit the concern for achieving this object to the judgment and free decision of the parties, but rather it has itself taken the matter in hand and made exclusive and indispensable the means which seemed to it apt for achieving the object.

The positivist argument is dubious even as a general principle. Statutes are not meant to work in isolation. So fundamental a proscription as that against homicide is made subject to the various judicially developed doctrines of defense and exception which result from a purposive interpretation of the statute. Similarly, the courts routinely override the Wills Act on purposive grounds. When a will is voided for imposition or for want of testamentary intent, the court is refusing validation because due execution lacks its normal purposive significance. Although there may be instances in public law where the legislative object is too complex for the court to fathom, Jhering's premise is surely unsound when applied to form-imposing private law legislation. The purposes of the Wills Act, like the Statute of Frauds, are finite and widely understood. Anglo-American practice under the Statute of Frauds belies any notion that when formalities originate in statute, cases of defective compliance are beyond purposive judicial analysis and validation. The substantial compliance doctrine would do little more than bring the Wills Act into parity with the Statute of Frauds, where the part performance and main purpose rules apply a functional standard to the statutory formalities for contract and conveyance.

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[140] 2 R. v. JHERING, GEIST DES RÖMISCHEN RECHTS pt. 1, at 475 (5th ed. 1891), *quoted in* Kipp-Coing, *supra* note 127, at 93 (author's translation).

V. CONCLUSION

The rule of literal compliance with the Wills Act is a snare for the ignorant and the ill-advised, a needless hangover from a time when the law of proof was in its infancy.[141] In the three centuries since the first Wills Act we have developed the means to adjudicate whether formal defects are harmless to the statutory purpose. We are reminded "that legal technicality is a disease, not of the old age, but of the infancy of societies." [142] The rule of literal compliance has outlived whatever utility it may have had. The time for the substantial compliance doctrine has come.

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[141] *See* J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE 180, 430–31 (1898).

[142] H. S. MAINE, EARLY LAW AND CUSTOM 170 (1883), *quoted in* Thayer, *The Older Modes of Trial*, 5 HARV. L. REV. 45, 46 (1891).