

COMMENT

AN ANALYSIS OF THE HISTORY AND PRESENT STATUS OF AMERICAN WILLS STATUTES

I. INTRODUCTION

Virtually every civilized government which recognizes private property and the owner's right to transfer that property at his death, also prescribes definite formalities with which such an owner must conform. The device by which such an owner expresses his wishes is usually called a "will," and the prerequisites which he must meet are usually called "formalities of execution." It is traditionally said that these formalities are necessary to protect the owner from fraud¹ and to protect the state's interest in an orderly society.² But are all these technical requirements which were first explicitly stated in modern terms by the English Statute of Frauds in 1676,³ later redefined by the Wills Act of 1837⁴ and the Wills Act Amendment Act of 1852,⁵ and which exist in substantially their original form in all but one⁶ of the United States, still necessary today?

The purpose of this paper is to present an analysis of the state of the law today regarding the formalities of execution attendant to the transfer of property at death, with emphasis on the United States and Great Britain. Some foreign sources are discussed for the purpose of contrast. A brief history of the development of the English Will is presented, followed by a discussion of the law in the United States and several foreign countries. The next section combines a discussion of the ostensible objectives of the formal requirements with an analysis of the compatibility of these objectives with the present law, including judicial and statutory exceptions to the usual formalities. The paper concludes with a proposal for making these objectives and the present law more compatible.

II. DEVELOPMENT OF THE MODERN WILL

A. *Roman Beginnings*

The Roman mancipative or testamentum per aes et libram was the first form of private will. The testator made an inter vivos transfer of

¹ See Ritchie, "What is a Will," 49 Va. L. Rev. 759, 761 (1963).

² See Bigelow, "Theory of Post-Mortem Disposition: Rise of the English Will," 11 Harv. L. Rev. 69, 78-79 (1897).

³ 29 Car. 2, c. 3.

⁴ 7 Will. 4 & 1 Vict., c. 26.

⁵ 15 & 16 Vict., c. 24.

⁶ Louisiana is the exception. La. Rev. Stat. §§ 1570-94 (1952).

his property, in contemplation of death, to a "purchaser" or a "friend" who was requested to carry out the testator's distribution plans as stated to him by the testator. No writing was required. Later, this will took on its modern characteristics. The testator would write his will on a tablet, seal it, and then call five witnesses in whose presence he would verbally publish that this was his will. Then a fictitious transfer of all his property would be made to a "friend" who promised to carry out his will. This was all a formal transaction between friends and the testator retained the property during his life.⁷

After this period a new form of will appeared, the Praetorian Will. This was created by the Praetor (a kind of municipal judge or judicial magistrate possessing an extensive equitable jurisdiction)⁸ who declared that if the tablets of a will were attested by the seals of seven witnesses, he would grant the possession of the inheritance to the persons named in the will. This procedure alleviated the need for the transfer to a "purchaser" as was required by the mancipative will.⁹

The final phase of Roman wills law required that in order to make a valid will it was necessary to declare one's intentions in the presence of seven witnesses, or, in the case of a written will, to acknowledge it in the presence of seven witnesses and subscribe it. Then the seven witnesses were required to sign their names and affix their seals.¹⁰

The Romans also started the practice of making exceptions for soldiers and mariners by allowing testators in actual service to make holographic wills or to declare orally their testamentary intentions to witnesses specially summoned for that purpose.¹¹

Under Justinian's Code (533 A.D.) the procedure was that the testator wrote his will, sealed and signed it or if illiterate, had another sign for him. Then seven witnesses subscribed and attached their seals in the testator's presence and in the presence of each other. The failure of any one to subscribe and seal rendered the will invalid. Thus, an effort was made to keep the will secret and anyone who opened a will before a testator's death was liable to a heavy fine.

Generally persons who took under the will, as well as anyone under

⁷ See Burdick, *The Principles of Roman Law and Their Relation to Modern Law* 583-84 (1938).

⁸ Black's Law Dictionary 1338 (4th ed. 1950).

⁹ See Burdick, *supra* note 7 at 585-86.

¹⁰ *Id.* at 586-87. See also Dropsie, *The Roman Law of Testaments, Codicils and Gifts in the Event of Death* 19-22 (1892).

¹¹ See Burdick, *supra* note 7 at 587. "Under the Civil Law, as it existed in Ancient Rome, the testament of a soldier written in bloody letters on the shield or in the dust of the battlefield with his sword was valid as a military testament." Gopalakrishnan, *Law of Wills* 144 (1965).

their power, could not be witnesses to the will. Witnesses were also required to have the qualifications of witnesses in general. Also, subsequent disqualification of a witness did not affect the validity of the will.

As to codicils, there seem to have been no formal requirements for their execution, either as to signing or sealing. But in Roman law, there could be a codicil without a precedent or subsequent will. Since the primary purpose of a Roman will was to appoint an heir, if there was no will, the heir would be appointed intestate, and a codicil could be used to impose certain trusts or requests upon the heir. This of course is contrary to our present law, which requires that there be a will in order for a codicil to be valid.¹²

A kind of testamentary disposition was the "fideicommissa" which was merely a request, either oral or in writing made by a testator to his heir. These required almost no formalities and were used, in a manner similar to the English use, to enable testators to circumvent the law of wills. They were troublesome and of obvious unreliability.¹³

B. *English Development*

In England, the first wills and testaments appeared around the middle of the ninth century. These are the so-called Anglo-Saxon wills which Pollock & Maitland claim were very remotely, if at all, connected with the Roman testament.¹⁴

The *post obit gift* was the earliest type of "will" found among the Anglo-Saxons. It was not ambulatory, nor revocable and it did not really designate what modern law would call an heir or heirs. Rather, the *post obit gift* was an oral arrangement involving very little formality and in essence was a contractual gift between the quasi-testator and another for the benefit of the testator's chosen bounty. In order that the testator could continue to enjoy his property, performance of the arrangement was of course postponed until his death. Often a "charter" (writing) signed by a substantial number of witnesses was used to provide continuing evidence of the *post obit gift*.¹⁵ Land could be transferred by *post obit gift* by using the "royal land book" for a particular piece of property. This was similar to the exercise of a general inter vivos power of appointment of remainder, in that the testator designated according to the terms of the King's consent as stated in

¹² See Burdick, *supra* note 7 at 611-14.

¹³ *Id.* at 619-25. Such "fideicommissa" have been forbidden by the present Louisiana Code. *Ibid.*

¹⁴ See 2 Pollock & Maitland, *History of English Law* 316 (2d ed. 1923).

¹⁵ See Sheehan, *The Will in Medieval England* 24-31, 112-14, 181 (1963).

the land book, who should have the future use of the property, while at the same time he retained a life estate in himself.¹⁶

Whereas the *post obit gift* was essentially an inter vivos transaction, its contemporary, the death-bed distribution or *verba novissima* was usually made in extremis, as an effort to wipe out sin (the clergy had instilled in the minds of the populace that dying intestate was bad). This was probably the most commonly used will among Anglo-Saxons,¹⁷ mainly because life was very uncertain during those times, and people seldom lived long enough to give much consideration to planning for the distribution of their estate at death. Rather, the most a testator could usually accomplish was to orally instruct, from his death-bed, his priest or deacon (who usually was readily available to help a dying man make proper provisions for charitable gifts) how he wanted his property to be distributed. Like an executor, the priest supposedly carried out the decedent's wishes.¹⁸ All this usually transpired orally and with a minimum of formality. Whether this procedure was similar to gifts causa mortis is unclear because people rarely recovered from a situation which made death-bed distributions necessary.¹⁹

The final phase of the development of Anglo-Saxon wills was the merging of these two devices into the written *cwide* of the ninth, tenth and eleventh centuries. The *cwide* was much like the *post obit gift* in form and effect, but usually included several such gifts, each with a specific object and donee. Furthermore, testators began to use the *cwide* to arrange marriage settlements and contracts, payment of debts and occasionally, for a unilateral statement of a future gift. Overall, the *cwide* was an attempt to make in advance what would be a final and more or less universal arrangement for the enjoyment of the owner's property after his decease.²⁰

The formalities surrounding the execution of these Anglo-Saxon wills were relatively simple, even as late as the 12th and early 13th centuries. The fundamental requisite was a clear statement (usually oral) of the use that was to be made of the testator's property after his death.²¹ The witnesses were to be of an age and intelligence required to make them capable of a legal act. The priest or minister was almost always the executor, or at least a witness, because of the strong concern about the necessity of giving alms. His presence at this time made it

¹⁶ See 2 Pollock & Maitland, *supra* note 14 at 318.

¹⁷ *Id.* at 11-12.

¹⁸ *Id.* at 318-19.

¹⁹ See Sheehan, *supra* note 15 at 31-38, 115-18.

²⁰ *Id.* at 39.

²¹ *Id.* at 177-78.

convenient for him to be sure that a sufficient portion of decedent's property was left to the church.²²

Thus, at the close of the pre-Norman period, the Anglo-Saxon will was primarily oral, even though some were later reduced to writing.²³ The *avides* were not in common use with the general populace who generally relied upon the *post obit gift*, retaining what we call a life estate in themselves, and used the death-bed distribution for their personalty. All in all the average man's "will" was in most cases merely a form of *inter vivos* gift, not ambulatory and usually irrevocable.

This situation changed little immediately after the Norman Conquest. However, The Ordinance of William the Conqueror of 1072 set into motion a division that was to take nearly 800 years to heal. This ordinance separated the ecclesiastical and the common-law courts, and resulted in a profound effect upon testaments of personalty and devises of realty.²⁴ Generally speaking, this ordinance precipitated the ecclesiastical courts' acquiring jurisdiction over personalty and the common-law courts' acquiring jurisdiction over realty. As a result of the division, formalities for executing wills, devising land, and testaments bequeathing personalty, soon drifted far apart.

With the Norman Conquest came feudalism and the notions of tenure and livery of seisin. Since the monks were usually present during a dying man's last hours, they prompted him to make gifts of his land and personalty to the church. Symbolic attempts at livery of seisin whereby the monks ran from the dying man's bedside to the monasteries carrying clumps of dirt were declared ineffectual. The common-law courts demanded actual livery of seisin,²⁵ thereby enabling them to slow down the rapidly growing ownership of land by the church, terminating the passing of land by devise. However this was circumvented by resorting to the use. Of course, the Statute of Uses (1535) eventually defeated this practice. Thus, from the onset of feudalism until 1540, when the first wills act²⁶ was passed, wills concerning land were entirely abolished in England, except for some local customs.

The Statute of Wills of 1540 was followed by "The Bill Con-

²² *Id.* at 180-81, 186-95.

²³ Commenting upon this period Pollock & Maitland conclude:

We cannot think that an instrument bearing a truly testamentary character had obtained a well-recognized place in the Anglo-Saxon folk-law.

Pollock & Maitland, *supra* note 14 at 320.

²⁴ See generally Reppy, *The Ordinance of William The Conqueror (1072)—Its Implications In the Modern Law of Succession* 7 (1955).

²⁵ See Pollock & Maitland, *supra* note 14 at 328-29.

²⁶ Statute of Wills, 1540, 32 Hen. 8, c. 1.

cerning the Explanation of Wills" (1542-43).²⁷ These two statutes permitted the transfer by a will or testament "in writing," of certain stated portions of the testator's freehold estate. No other formality was required, and lands which local custom permitted to be devised orally were not affected.²⁸

Nothing was said about the formalities for revocation, and the fraud practiced in the 1675 case of *Cole v. Mordaunt*²⁹ crystallized the necessity for standards similar to those required upon execution of a will. Parliament went much further than this and in 1676 a wills section was included in the Statute of Frauds. This statute required that:

all devises and bequests of any lands or tenements . . . shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express direction, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect.³⁰

Similar requirements were placed upon revocations. The statute also changed the formalities for nuncupative wills, and indirectly resulted in the prevention of holographic wills devising realty.

Two major issues arose under the 1676 statute: 1) whether a signature of a testator, made out of the presence of the witnesses, could be cured by the later acknowledgment of his signature by the testator in the presence of the witnesses; and 2) whether a will not signed at the foot or end thereof was valid. Both of these questions were answered affirmatively, the court in *Lemayne v. Stanley*³¹ going so far as to say that even a signature in the commencement of the will satisfied the statutory requirement.

The Statute of 25 George 2, c. 6 (1752) voided all legacies given to witnesses, thereby removing the possibility of their interest affecting their testimony. The same statute also established the competency of creditors as witnesses by making their testimony admissible and having their interest bear on their credibility only.³²

While the statutory law relating to wills passing realty was being developed, there was an independent but concurrent development of

²⁷ 34 & 35 Hen. 8, c. 5.

²⁸ Reppy & Tompkins, *The Law of Wills* 30 (1928).

²⁹ Stated in a note to *Mathews v. Warner*, 4 Ves. Jr. 186, 31 Eng. Rep. 96 (1798). Here a claimant fraudulently asserted that decedent by nuncupative will had revoked earlier wills and left all his property to her. Because of the lax formalities she almost succeeded.

³⁰ 29 Car. 2, c. 3.

³¹ 3 Lev. 1, 83 Eng. Rep. 545 (1681).

³² Reppy & Tompkins, *supra* note 28 at 35-36.

the passing of personalty, more commonly called the law of testaments. As mentioned previously, the early wills (*post obit gift*, death-bed distribution and the *cwive*) were primarily used to transfer personalty. Prior to the Statute of Frauds testaments could be oral or written. If oral, it was only necessary to prove the will by two witnesses. If written, proof that the document was the testator's will was all that was necessary. Furthermore, before the Statute of Frauds any person was free to make a valid oral declaration of his testamentary wishes, provided he was in extremis.³³ Naturally such a situation was an open invitation for fraud and because testaments were within the ecclesiastical courts the church usually received its share.

The Statute of Frauds limited nuncupative wills to the testator's last sickness and surrounded the execution and proof of them with very complicated safeguards. Exempted were estates of less than £ 30 and soldiers and mariners in actual service.³⁴ By omission, the statute left untouched the execution of written testaments.

The dual channels of personalty and realty formalities of execution and probate jurisdiction were united with the Wills Act of 1837.³⁵ This statute made wills of personalty and realty both subject to the same formalities of execution. It amended the Statute of Frauds by allowing the testator to acknowledge his signature to the witnesses if he did not sign in their presence; it required the testator's signature to be at the end or foot of the will; it reduced the number of attesting witnesses to two, and the attestation of each witness was to be in the presence of the testator. By stating that "no will shall be valid" unless executed as provided, the statute did away with nuncupative wills, except for mariners at sea or soldiers in actual service. These latter categories were permitted to dispose of their personal estate as before the statute, which in effect meant as at common-law. Also, the phrase "no will shall be valid" unless executed in the manner stated included a codicil, and every other testamentary disposition of both realty and personalty. Thereby, the act changed the cases which had held under the Statute of Frauds that a general charge of legacies by a will duly executed would include legacies afterward given by an unattested codicil.³⁶ This same phrase by implication also terminated the use of holographic testaments which had not been affected by the Statute of Frauds.

³³ *Id.* at 8-9.

³⁴ Paragraphs IXX, XX, XXI.

³⁵ 7 Will. 4 & 1 Vict. c. 26.

³⁶ See Sugden, An Essay on the Law of Wills as Altered by the 1 Victoria, c. 26, 26-27 (1837).

The 1837 Act also changed the treatment of witnesses receiving legacies under the will. The Act provided that gifts to witnesses or spouses of witnesses were void as to them and any person claiming under them. They were then eligible to prove the execution and validity of the will. It also provided that the incompetency of such a witness would not render the will invalid if it could be proved otherwise.³⁷ Furthermore, it also permitted any creditor or wife of a creditor to prove the execution of the will as an attesting witness where the debt was charged upon the property subject to the will. Finally, it provided that the executor was competent to prove the execution of the will.³⁸

The Wills Amendment Act of 1852³⁹ amended the 1837 Act by providing that the testator's signature did not have to be precisely at the end or foot of the will, but rather so placed in that general area so that "it shall be apparent on the Face of the Will that the Testator intended to give Effect by his Signature to the Writing signed as his Will."⁴⁰ But no effort would be given to dispositions coming after the testator's signature.

The Wills Act of 1918⁴¹ permitted soldiers and mariners to dispose of realty by using a nuncupative will according to the procedures allowed for personalty.

Basically, at this point is where the English law still remains today.^{41a}

C. *United States Development*

In this country the right to dispose of real and personal property by will has always existed.⁴² Feudal law was never adopted to any significant degree and the settlers probably prompted by their English heritage, almost universally, but with some variation, adopted the English wills statutes and the applicable English court interpretations of those statutes.⁴³

Nevertheless, such right is regarded, except perhaps in Wisconsin,⁴⁴ as exclusively a statutory right which is subject to complete legislative control.⁴⁵

³⁷ See Reppy & Tompkins, *supra* note 28 at 36.

³⁸ *Ibid.*

³⁹ 15 & 16 Vict. c. 24.

⁴⁰ *Ibid.*

⁴¹ 7 & 8 Geo. 5, c. 58.

^{41a} See generally Bailey, "Law of Wills" 42-57 (1957).

⁴² Reppy & Tompkins, *supra* note 28 at 47.

⁴³ *Id.* at 66.

⁴⁴ See Will of Ball, 153 Wis. 27, 31, 141 N.W. 8, 10 (1913).

⁴⁵ See Reppy & Tompkins, *supra* note 28 at 48. See also Bigelow, *supra* note 2 at 78-79.

American states recognize, to varying degrees, holographic and nuncupative wills. Louisiana alone, recognizes the mystic will, which is one sealed by the testator and delivered to a notary public, which act must be done in the presence of seven witnesses, who, with the notary, must subscribe their names on the outside of the sealed envelope.

D. *France*

French law provides for three kinds of wills—holographic, “*par acte public*,” and mystic. The holographic is that found in § 790 of the Code Napoleon.⁴⁶ A will “*acte public*” or notarial will is one executed in the presence of two notaries or of one notary and two witnesses. In either case the testator dictates the contents of the will to the notary who records it. The will is then read, and the testator signs in the presence of the notary and the witnesses. The latter then sign. Such a will is kept by the notary. The final type of will is the mystic or secret will. Here the testator drafts his will himself or has someone do it for him. This is sealed in an envelope and taken to a notary in the presence of at least two witnesses, in whose presence the notary puts the will in yet another envelope. The testator acknowledges that this is his last will and testament signed by him. The notary writes this declaration upon the envelope and the testator, the notary and the witnesses all sign.⁴⁷ Special wills are provided for soldiers and mariners. All subsequent changes in the will must be made at least by an instrument authenticated by a notary.⁴⁸

E. *Germany*

German wills are of two types—holographic and public. The former need only be written and signed by the testator; outside evidence is admissible to prove date and place of execution. Public wills are open or sealed. They are presented to a notary or judge of district court. Usually, at least two witnesses are required. The testator may also declare his will orally, and the notary writes it in the record. Then the notary drafts a protocol which is read to the testator and the witnesses and they sign, followed by the notary. This is placed with the will in an envelope which is sealed and signed by the notary. The notary also certifies the identity and testamentary capacity of the testator and the qualification of the witnesses. Also special forms of

⁴⁶ “An holographic testament shall not be valid, unless it be written entirely, dated and signed by the testator with his own hand: it is subjected to no other form.”

⁴⁷ See generally Pellerin & Pellerin, *The French Law of Wills, Probate Administration and Death Duties* 22-24 (1958).

⁴⁸ *Id.* at 25.

wills are provided for emergencies and for soldiers and mariners. The Anglo-American will, executed by the testator in the presence of two or three witnesses is unknown in Germany.⁴⁹

F. *India*

India allows two classes of wills—privileged and unprivileged. Unprivileged wills are essentially the same as those allowed by the 1837 English Wills Act, except that the testator's signature shall be placed "so that it shall appear that it was intended thereby to give effect to the writing as a will."⁵⁰ A second difference is that there is no necessity for more than one witness being present at any one time.⁵¹ Codicils require the same formalities as a will, but may be valid even if pursuant to an earlier unattested will. Also a codicil may stand valid even though its subject will is revoked.⁵²

Indian privileged wills apply to soldiers and mariners. Very liberal formalities are required and the will may be oral or written, and if holographic need not even be signed. Such oral will must be proved by two witnesses who heard the declarations at the same time. Such wills may be revoked by the same formalities with which they are executed.⁵³

G. *Philippines*

Philippine law states that compliance with the statutory formalities for execution of a will is essential to its validity.⁵⁴ The law allows holographic and ordinary wills. The former must be entirely written, dated and signed by the hand of the testator himself and are subject to no other form. This is a verbatim adoption of § 790 of the Code Napoleon. Ordinary wills are generally governed by provisions similar to the 1837 English Wills Act. However, there are several modifications. The will must be signed at the end and on the left margin of each and every page by the testator himself or by someone else at his express direction and in his presence and by three or more credible witnesses in his presence and in the presence of each other. The testator may sign by thumbmark. All the pages must be numbered correlatively in letters ("one," "two," etc.) on the upper part of each page. The will must have an attestation clause stating the number of pages and the fact that all the formalities were satisfied in specific detail. If the

⁴⁹ See generally, Beecher, *Wills and Estates Under German Law* 24-26 (1958).

⁵⁰ See Gopalakrishnan, *Law of Wills* 85 (1965).

⁵¹ *Ibid.*

⁵² *Id.* at 34-35.

⁵³ *Id.* at 111-13.

⁵⁴ See Alvir, *The Law on Succession and Wills of the Philippines* 44 (1960).

testator is deaf or blind the will must be acknowledged and read to him before a notary public. Devises to witnesses or their immediate relations are void unless there are three other competent witnesses to the will. But the voiding of the gift does not preclude such witnesses from testifying. Creditors are competent witnesses.

In order to be valid, a codicil must be executed with the same formalities required for wills.⁵⁵

III. OBJECTIVES

At this point we have considered the development of the modern wills statutes. With this background in mind we shall move on to the objectives which these statutes are supposed to achieve.

"The abuses at which the statutes of wills are aimed are forgery, perjury, fraud, coercion, mistake, hasty and impulsive action and faulty memory. The safeguards provided by modern statutes of wills are, in the case of the ordinary attested will the requirements of writing, signing, witnessing and presence. In the case of the holographic will the safeguard is the requirement of the testator's handwriting. Only minimal safeguards are provided in the case of oral wills."⁵⁶

"Statutes [which] prescribe the observance of certain formalities in the execution of wills . . . are intended to prevent fraud and uncertainty in the testamentary disposition of property, by rendering it certain that the testator is cognizant of the nature of the instrument which he signs."⁵⁷

The court should be convinced that the testator was not acting in a casual or haphazard fashion, but rather intended the document before the court to be finally executed. The requirement of the testator's "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."⁵⁸ The requirements of signing at the end, that the testator publish the will, that he acknowledge his signature or that he request the witnesses to sign also seem to serve this purpose, since such actions indicate finality of intention.⁵⁹

The requirement that the will be in writing serves an incalculably valuable function, in that it provides reasonably permanent evidence of testamentary intent. Requiring the writing to be signed at the end

⁵⁵ *Id.* at 50-54, 59, 74.

⁵⁶ See Ritchie, "What is a Will," 49 Va. L. Rev. 759, 761 (1963).

⁵⁷ See Gopalakrishnan, *supra* note 50 at 84.

⁵⁸ See Gulliver & Tilson, "Classification of Gratuitous Transfers," 51 Yale L.J. 1, 5 (1941).

⁵⁹ *Id.* at 5-6.

helps prevent unauthenticated or fraudulent additions to the will made after its execution by either the testator or other parties.⁶⁰

The requirement of attestation preserves an opportunity to secure proof of the facts surrounding the execution. It provides a ready source for what the testator said and did, whether he had the requisite testamentary capacity and intent, and whether the will offered for probate is the same will the testator executed and the witnesses signed.

The courts have regularly asserted that the object of the almost uniform requirement that the witnesses attest in the testator's presence is to prevent the witnesses substituting some other paper for the will actually executed by the testator.⁶¹

"The purpose of the requirement that the attesting witnesses be competent has been stated by various courts to be protection of the testator against imposition at the time of the execution of the will by surrounding him with a group of disinterested people who would not be financially motivated to join in a scheme to procure the execution of a spurious will by dishonest methods, and who therefore presumably might be led by human impulses of fairness to resist the efforts of others in that direction."⁶²

These contemporary statements might be compared with some of the reasons given in legislative reports which were made before the enactment of the 1837 English Wills Act.

The Reports of the Real Property Commissioners and Ecclesiastical Commissioners suggest some of the reasons behind the provisions in the 1837 English Wills Act. The Commissioners believed that "there is no written instrument which stands so much in need of the protection afforded by the attestation of witnesses as a will."⁶³ They also concluded that opinions of handwriting experts are far inferior to the testimony of persons actually present at the execution of the will (this explains the omission of holographic wills). Finally, attestation by witnesses of numerous documents in the commercial world was found to be compelling reason for its value and reliability.⁶⁴ The presence of witnesses also facilitates proving testamentary capacity and minimizes the chances for fraud because of the difficulty of obtaining reliable co-conspirators.⁶⁵ This latter reason also prompted the requirement of at least two witnesses. Also, the more witnesses, the greater probability

⁶⁰ *Id.* at 7.

⁶¹ *Id.* at 10.

⁶² *Id.* at 11.

⁶³ See Sugden, *An Essay on the Law of Wills as amended by 1 Victoria, c. 26, 179 (1837)*.

⁶⁴ *Id.* at 232-34.

⁶⁵ *Id.* at 178-80.

that some will be alive at the testator's death. This also eases the proof of a will without lessening its reliability.⁶⁶ The Commissioners admitted that holographic wills are of great reliability because of the difficulty in forging an entire will. Also the testator's style and mode of expression can be used to determine his capacity. Still they advised against these wills because of the great possibilities of mistake caused by any deviation from the uniformity of a rule, and because "the inconvenience of requiring the presence of two witnesses is very trifling and it will be unnecessary to let them know that they are attesting a will."⁶⁷

The nuncupative will provisions of the Statute of Frauds were found to have proved unworkable.⁶⁸ They also found that the only really justifiable time for nuncupative wills was in extremis, but it was decided that the chances of persons fraudulently pretending to have been near the testator at his death were far greater than the occasional instance where such an in extremis testator would thus die intestate⁶⁹ because he could not execute a will. This may help explain why gifts *causa mortis* are still allowed under English common-law, and were not expressly outlawed by statute. It was also hoped that such a chance of intestacy would prompt people to execute their wills earlier.⁷⁰

The Commissioners suggested that the Statute of Frauds provisions regarding attestations be changed so as to require that the testator sign or acknowledge his signature in the presence of both witnesses together at one time and that they should subscribe their names in the presence of each other or that the one, having signed first, should acknowledge his signature, and be present when the will is signed by the other.⁷¹ Only the first suggestion was specifically adopted by the 1837 Wills Act.⁷² The purpose of this requirement is to prevent imposition and fraud, to insure identity, to enable the testator to know that the witnesses have actually signed the instrument he intends as his will and to prevent the substitution of some other writing.⁷³

IV. ANALYSIS OF OBJECTIVES IN THE LIGHT OF PRACTICALITY, CONTEMPORARY SOCIETY, AND EXCEPTIONS TO THE USUAL FORMALITIES

Whether these objectives are adequately fulfilled by the statutes of wills of the various states is not clear. Furthermore, this does not,

⁶⁶ *Id.* at 178.

⁶⁷ *Id.* at 181.

⁶⁸ *Id.* at 182 n.c.

⁶⁹ *Id.* at 182.

⁷⁰ *Id.* at 235.

⁷¹ *Id.* at 183-84.

⁷² *Id.* at 14-20.

⁷³ See Gopalakrishnan, *supra* note 50 at 99.

according to some commentators, even ask the right question. Rather, the issue should be whether

a wills act . . . as far as is consistent with safety adopts itself to the knowledge (or ignorance), psychology, and habits of . . . people so as to create the minimum risk that their testamentary attempts will be frustrated by failure to have the witnesses attest in the presence of the testator or the like . . . [The] philosophy should be to impose only such requirements as seem so unmistakably essential to a safe will-making process as to justify running the known risk of defeating meritorious wills through failure of testators to know or comply with the requirements [of the wills statute].⁷⁴

Commenting upon section 47 of the Model Probate Code, Mechem states:

These provisions seem . . . almost incredibly reactionary, unimaginative, and timid. The Statue of Frauds was passed in 1677 [sic]. One is asked to think either that that famous enactment was so perfect as to need no improvement or that the framers of the Code have learned nothing from the experience of the intervening 270 years.⁷⁵

He attacks the entire section 47 as based upon "big law-office" philosophy:

[E]very testator must be forced to execute his will just as it would be done if the matter were being handled by a high-powered law firm. . . . This overlooks one very important fact, namely, that the only persons the execution of whose wills are likely to come into question are precisely those persons who do not have the job supervised by a high-powered law firm, but who instead have the matter looked after by some very bad lawyer or by the local J.P. or the local banker or the local real estate man or on the advice of those who happen to be gathered at some lonely deathbed. . . . A basic wills act should be very simple and should contain only the inescapable requirements of writing, signing, and attesting.⁷⁶

Mechem reaches this conclusion by citing the specious decisions reached to uphold meritorious wills in the light of the requirement that witnesses sign in testator's presence,⁷⁷ and by suggesting that the requirement that they also sign in each other's presence is "an unwise form of perfectionism in the light of the known habits of testators,"⁷⁸ and that the requirement of publication goes against the usual testator's desire to

⁷⁴ Mechem, "Why Not a Modern Wills Act?" 33 Iowa L. Rev. 501, 503 (1948).

⁷⁵ *Id.* at 501.

⁷⁶ *Id.* at 503.

⁷⁷ It has been held that witnesses are in the presence of a blind testator when they are where he could see them if he could see. *See* Mechem, *supra* note 74, at 504.

⁷⁸ *Id.* at 505.

keep his will a secret without offering any really worthwhile increase in the safety of the will's validity.

He then states: "Finally, is it necessary to persist in the mediaeval point of view that an interested party is bound to lie in the direction of his own interest? That is, is it necessary to provide that a legatee-attester must forfeit his legacy?"⁷⁹ He concludes that it is natural for a testator to call his trusted relations and friends, those same ones who are the object of his bounty, to attest his will. "If the will is contested, the attesting witnesses will be relatively unimportant as testifying witnesses. . ."⁸⁰

As a general comment for all of this, Mechem points out that anyone really designing to defraud a testator who is worth taking the trouble to defraud, will clearly make sure the will is executed according to the statutory prerequisites, whatever they may be. Thus, as Mechem sees it, really only the ignorant and innocent suffer by having otherwise meritorious wills defeated by a failure to meet the rigors of a faceless statute, drafted with a big law-office philosophy in mind.⁸¹

Several other commentators especially attack the requirement of competent witnesses. Only the innocent would sign the will when they are taking a share; a defrauder would never thereby point the finger at himself. Only in the rare case of a death-bed will, does the requirement of competent witnesses have some value, and even then it assumes that the testator will not recover. All these notions are left over from the pre-Statute of Frauds era when most people were illiterate, most made death-bed dispositions because life was so uncertain and thus they usually did not live long enough to think about a need for a will. "The wills with a forged signature, supported by perjured testimony, or long established domination which disinterested witnesses could scarcely detect in their brief observation at execution are more likely vehicles for the prosecution of improper claims."⁸² Against this kind of practice the requirement of competent (more specifically "disinterested") witnesses offers little protection.

The position of the courts should be compared with that taken by the commentators. As to whether the testator must actually sign his name, or instead use his mark or some other device, the courts have usually allowed a liberality approaching the general principle that

To constitute a signature that satisfies the statutory formality of execution, two elements are necessary: 1) some visible physical

⁷⁹ *Id.* at 506.

⁸⁰ *Ibid.*

⁸¹ See also Gulliver & Tilson, *supra* note 58.

⁸² *Id.* at 12.

name or mark must be placed upon the instrument by the testator, or by someone in his presence and at his direction; and 2) the name or mark must be placed on the instrument with the specific intent that it have executing effect. . . .⁸³

Of course the other statutory prerequisites must be met, although the testator usually need not have had a particular reason for not signing in longhand. Nevertheless, this generally shows that the courts are relying more heavily upon testimony of the witnesses, than upon cold statutory form, although some courts hold such "signatures" invalid unless the testator's name is actually written out by someone at his direction next to or after his mark.

The courts' definition of the word "presence" has created a good deal of confusion and has resulted in a harsh rule which often is likely to destroy meritorious wills without really providing any safeguard against fraud or overreaching. Consider the fact that the statutes generally only require that the testator acknowledge or sign in the presence of the witnesses, or that the witnesses sign in the presence of the testator or in the presence of each other. The English courts have interpreted this with a minimum standard that the testator must have been in a position where he could have seen them sign if he had wanted to do so. Usually the fact that signature takes place in the same room with the testator is considered sufficient to protect him from having the witnesses switch documents. If the signature takes place out of the room, then to be in his "presence" it must have been done in a place in his line of vision or where he could have seen by a slight move of his head or eyes.

On the other hand, the early American cases, and still the majority today, require that even if signing takes place in the same room with the testator, still the physical act must happen within his line of vision to be valid. It is suggested that this requirement developed primarily in death-bed type cases where the testator was so weak that he could see only what was in his view. Furthermore, the requirement seems to assume that the testator will not again have an opportunity to look at the will. Are not the chances of denying the last wishes of a testator because he or his witnesses did not understand all the shades given to the word "presence" so small that they are outweighed by the nebulous amount of protection against fraud which comes from a court's defining presence as meaning within the view of the testator at the time the physical signing occurred?⁸⁴

⁸³ *Kemp v. Matthews*, 89 Ohio L. Abs. 524, 527, 183 N.E.2d 259, 261 (1962), quoting from 2 Page on Wills 130 (4th ed. 1960). See generally, *Annot.* 98 A.L.R.2d 844 (1964).

⁸⁴ See generally, *Annot.*, 75 A.L.R.2d 318 (1961).

A more liberal view is that

their relative position to him at the time they are subscribing their names as witnesses, whether they are in the same room with him or not, must be such that he may see them if he thinks proper to do so, for the purpose of the law is not so much to secure signing of the name of witnesses in the actual view of the testator as to afford him an opportunity to detect and prevent the substitution of another will in the place of that which he has signed.⁸⁵

The area which the commentators most heavily attack is competency of witnesses. Such criticism seems well founded in light of a case like *In re Moody*⁸⁶ wherein the court held invalid a will because the testator had bequeathed five dollars to each of the attesting witnesses out of appreciation for their trouble. The Maine wills statute stated that if the witnesses were beneficiaries the will was void. The court justified its holding by stating that the statutory formalities were to be strictly met.

One might wonder whether these statutes really provide any protection when they usually give the witness his intestate share limited by his bequest in the will. If his intestate share were larger than that given in the will, he would have the motivation to defeat the will, and certainly in such a case could not be seen as fraudulently attempting to enforce the will. On the other hand, when the will gives him more than he would have had intestate, he of course will want the will upheld, and it is in this kind of case only that the limiting of his gift to his intestate share might help prevent any possible fraud. Nevertheless, if the will was fraudulent, he would attempt to uphold it out of fear that his fraudulent scheme would be discovered. Only in the case of a non-intestate heir can the policy of voiding the gift to the witness make any sense. But, even in this case, the witness will attempt to support the will for fear that his fraud will be discovered. Furthermore, any defrauder going after any testator's estate worth the effort, is surely going to know the statutory formalities for execution and see that they are satisfied to the letter so as to make the fraudulent will as prima facie non-contestable as possible. Thus there would seem to be much merit in the argument presented by the commentators previously discussed⁸⁷ that the statutory treatment of beneficiary-witnesses pays a potentially high price by defeating otherwise meritorious wills for the rather specious protection it offers.

⁸⁵ *In re Pridgen*, 249 N.C. 509, 107 S.E.2d 160 (1959).

⁸⁶ 155 Me. 325, 154 A.2d 165 (1959).

⁸⁷ See notes 74 and 81 *supra*.

⁸⁸ See Comment, "The Unique Informality of Pennsylvania's Requirements Attendant to the Execution of Wills," 33 Temp. L.Q. 346 (1960).

Finally, in appraising the sufficiency of these formalities, one should consider the fact that Pennsylvania requires neither subscription nor attestation by witnesses. Furthermore any person otherwise competent is not made incompetent by the fact that he takes under the will. Rather this only goes to his credibility. It has been pointed out that this arrangement works quite well, and really no more need be required than for any inter vivos transfer subject to the Statute of Frauds.⁸⁸

Another problem which the wills statutes created from the beginning, and which has been left largely to judicial development is the problem that arises when the testator uses two or more sheets of paper in his will but fails to separately identify each sheet. No American wills statute requires that each page be executed in accordance with the wills statutes, or that the testator initial each page or that they be fastened together or even that with his signature he indicate how many pages there are in the will. The courts have expressed dissatisfaction with this gap in the statutory formalities, but nevertheless have followed long established precedents which have permitted such wills.⁸⁹ Such problems are solved by permanently fastening the pages together because there is a presumption that the will was executed in the form in which it is found at the testator's death.⁹⁰ Sentences can be specifically drafted and written so that they run-on from one page to the next. Or there can be internal references from one page or paragraph to another.

Cases have arisen where the testators and the witnesses sign different sheets, or one signs the will and the other signs the envelope containing the will. Without some evidence of integration between the two, courts have refused to hold that the statutory formalities were satisfied.⁹¹ Generally parol evidence is admissible to show that all the pages were present at the execution of the will and that the testator intended all of them to act as his will. In reference to the judicially created requirement of physical connection or connection by meaning and arrangement of the words and sentences used, Page states: "In the absence of fraud or attempted substitution of one sheet for another, the only result of these requirements is to defeat wills which express the actual intention of the testator; and to defeat them because of requirements of form which are not found in the statutes which regulate the execution of wills."⁹² Nevertheless, integration will usually be established only after it is shown by extrinsic evidence that the testator

⁸⁸ See *In re Wolfner*, 27 Ill. 2d 221, 188 N.E.2d 712 (1963).

⁸⁹ See *Maginn's Estate*, 278 Pa. 89, 122 Atl. 264 (1923).

⁹¹ See *Hall v. Edds*, 305 S.W.2d 317 (Ky. 1957).

⁹² See 2 Page, *Wills* § 19.14 (4th ed. 1960).

intended all sheets to be part of his will, and that all were in fact in the room at the time he executed his will and the witnesses signed.⁹³

The various attempts by the courts to find a reasonable means to determine whether all the paper sought to be admitted as decedent's will was actually intended by him to operate as such, could be alleviated in most instances by a statutory requirement that the testator number each page and then that he and the witnesses either initial or sign each individual page. Finally, included at the end of the will could be a statement of how many pages there are in total. It seems that the present state of this area presents opportunities for fraud and yet it is one in which the legislatures have taken no action. On the other hand such action might only make execution more technical and thereby create more chances for the defeat of otherwise meritorious wills. Perhaps this is the reason that the problem has been left to judicial control. If this is so, then one wonders why some of the other areas of execution (*e.g.*, competency of witnesses) might not be handled in the same manner.

Soldiers and sailors wills, while admittedly an exception to the wills statutes and also subject to considerable risks of fraud, nevertheless are allowed under the rationale that to do so raises the morale of troops thereby benefiting the Nation as a whole.⁹⁴

Another technicality required by a number of states, is that the will be signed at the end. The alleged purpose of this requirement is to prevent fraudulent additions to a will after its execution.⁹⁵ But, in practice such a requirement has often proved unwarranted.

Cases where wills have been altered after execution are very rare, as the records of the courts show, while cases where the intention of the testator has been wholly defeated by a rigid construction of the statute requiring subscription at the end of the will are alarmingly frequent . . . and it must be conceded that as to this supposed danger the remedy has proved in practice far worse than the disease.⁹⁶

This court concluded that form must not be allowed to govern substance and that a more liberal "mass of mankind" test should be applied to determine whether a particular will has been signed at the end. It may be argued, however, unless a court liberally applies the "signed at the end" doctrine, it is very likely that many otherwise meritorious wills

⁹³ Covington's Estate, 348 Pa. 1, 33 A.2d 235 (1943). Query: what affect on the availability of such evidence arises from the fact that only a handful of United States jurisdictions require publication as part of the formalities of execution?

⁹⁴ See generally Weiss, "Formalities of Testamentary Execution By Service Personnel," 33 Iowa L. Rev. 48 (1947).

⁹⁵ Estate of Young, 36 Misc. 2d 718, 233 N.Y.S.2d 922 (Surr. Ct. 1962).

⁹⁶ *In re Field*, 204 N.Y. 448, 454, 97 N.E. 831, 833 (1912).

will be defeated. Perhaps the legislature should follow the more moderate English rule, or at least make void only those dispositions following the testator's signature. In fact a good many states today follow the rule of *Lemayne v. Stanley*⁹⁷ and allow the testator's signature to appear anywhere in the will, so long as it can be established, either by the will itself or extrinsic evidence that when he wrote his name, or directed that it be written, he intended that to be his final signature to his will.⁹⁸

Although few statutes specifically state the order in which testator and the witnesses must sign, a good deal of controversy and confusion has arisen from the situation in which the witnesses sign first and then the testator immediately signs after them. Some courts have rigidly applied the language of the wills statutes and have concluded that a subscribing or attesting of the will by a witness includes the necessity of the will's already containing the testator's signature.⁹⁹ Page states the principle involved in this conflict, as well as any other involving judicial construction of a wills act: "The real question involved is whether the statutes which regulate the execution of wills . . . are to be construed as requiring a formal act or merely imposing certain safeguards to prevent fraud."¹⁰⁰ It is further suggested that "no possible opportunity for fraud is presented by permitting testator to sign or acknowledge immediately after the witnesses have signed or acknowledged and at the same transaction. . ."¹⁰¹ Page's rationale is sound, in this instance and in general. A court should not knowingly permit strict statutory form to defeat an otherwise meritorious will, especially when the procedure used by the testator presents no opportunities for fraud.

Soldiers' and mariners' wills are permitted in a number of states. Generally they take the form of pre-Statute of Fraud testaments, which could be entirely oral without any formal requirement of witnesses. Today's soldier or mariner is far less in need of such testamentary freedom than were his Roman and medieval predecessors. All branches of the armed forces provide legal services and thereby offer the soldier or mariner numerous opportunities to execute a will according to the formalities of his applicable jurisdiction. It would seem that the chances

⁹⁷ 3 Lev. 1, 83 Eng. Rep. 545 (1690).

⁹⁸ See generally 2 Page, Wills §§ 19.54-.56 (4th ed. 1960).

⁹⁹ Ohio has been quite liberal and has held valid a situation wherein the witnesses signed in the presence of the testator and then four days later he signed in their presence. "In the absence of an unequivocal statutory requirement for a particular order to be followed in the execution of a will, none will be presumed to have been intended by the Legislature." *Bloechle v. Davis*, 132 Ohio St. 415, 419, 8 N.E.2d 247, 249 (1937).

¹⁰⁰ See 2 Page, Wills § 19.139 at 263 (4th ed. 1960).

¹⁰¹ *Ibid.*

for fraud in the area of common-law soldiers' and mariners' wills are patent, and that no overriding necessity exists today for continuing an exclusion based upon notions developed centuries ago.

The protection offered by some of the provisions of the "modern" statutes of wills is further diluted by several doctrines which operate contemporaneously with the statutory formalities. These doctrines are gifts causa mortis, "incorporation by reference" and "independent significance."

Gifts causa mortis were well known in Roman law and have changed little as to basic principles since that time.¹⁰² There is also some controversy as to whether the Anglo-Saxon wills were really gifts causa mortis.¹⁰³ Although little critical thought was given to such gifts before 1676, the passage of the Statute of Frauds in that year, and its imposition of strict formalities upon nuncupative wills, resulted in the rise of such transfers to significant importance.¹⁰⁴ Adding impetus to their use was the fact that English courts also held that they had not been destroyed by the 1837 Wills Act, even though that Act did not permit even the kind of nuncupative wills allowed under the Statute of Frauds.¹⁰⁵

Although the Roman will expressed in Justinian's Code required that the execution of such gifts take place in the presence of five witnesses,¹⁰⁶ the present law states no exact number of witnesses, but rather that all the elements must be established by clear and unmistakable proof.¹⁰⁷ However Justinian's concise definition is still used by courts today: "A gift causa mortis is when a person wishes that he himself should have the gift in preference to the donee, but that the donee should have it in preference to the heir."¹⁰⁸

The basic elements of a valid gift causa mortis are as follows:

- 1) They are generally limited to personalty;¹⁰⁹

¹⁰² See generally Dropsie, Roman Law of Testaments, Codicils and Gifts in the Event of Death 177-83 (1892).

¹⁰³ See text accompanying note 19 *supra*.

¹⁰⁴ See 1 Page, Wills § 7.2 (4th ed. 1960).

¹⁰⁵ *Id.* at § 7.3.

¹⁰⁶ See *Gano v. Fisk*, 43 Ohio St. 462, 469, 3 N.E. 532, 534 (1885).

¹⁰⁷ *Id.* at 473.

¹⁰⁸ See *Foster v. Reiss*, 18 N.J. 41, 45, 112 A.2d 553, 556 (1956). This case presents one of the most comprehensive discussions of gifts causa mortis that one could hope to find.

¹⁰⁹ *But cf.* 1 Page, Wills § 7.3 (4th ed. 1960) wherein the author discusses cases which have upheld gifts of land by delivery of a deed. In theory there is no reason why this should not be permitted, especially since the use of the deed (writing) combined with delivery provides more protection against fraud than is found in the usual causa mortis transfer.

- 2) Must be made in contemplation of death;
- 3) Delivery of the item, in kind if possible is absolutely essential;
- 4) The donor, at the time of the gift must have had sufficient mental capacity to be able to understand the nature of the transaction;
- 5) Donor must have had a definite intention to pass a present gift—not a future one;
- 6) The donee must prove that all the prerequisites for a valid gift *causa mortis* were present.¹¹⁰

However, there are also several conditions automatically implied by law, as described in the leading American case, *Basket v. Hassell*:¹¹¹

[A] *donato mortis causa* must be completely executed, precisely as required in the case of gifts *inter vivos*, subject to be divested by the happening of any of the conditions subsequent, that is upon actual revocation by the donor, or by the donor's surviving the apprehended peril, or outliving the donee, or by the occurrence of a deficiency of assets necessary to pay the debts of the deceased donor. These conditions are the only qualifications that distinguish gifts *mortis causa* and *inter vivos*. On the other hand, if the gift does not take effect as an executed and complete transfer to the donee of possession and title, either legal or equitable, during the life of the donor, it is a testamentary disposition, good only if made and proved as a will.

Lord Hardwicke, in the leading English case, *Ward v. Turner*,¹¹² after complaining that "it was a pity the statute of frauds did not set aside all these kinds of gifts,"¹¹³ concluded that the requirement of delivery was the only replacement for the requirements of the Statute of Frauds.¹¹⁴ Furthermore, he found this especially distasteful because a gift *causa mortis* could also vitiate the Statute of Frauds provisions applying to revocation of wills in that such a gift effectively took the property transferred away from the estate subject to the decedent's will.¹¹⁵

Probably this, like the technical requirements of the statutes of wills, is a procedure beyond the knowledge of many average laymen,

¹¹⁰ *Id.* at §§ 7.4-32.

¹¹¹ 107 U.S. 602, 609-10 (1883).

¹¹² 2 Ves. Jr. 431, Dickens 170 (1751).

¹¹³ *Id.* at 437.

¹¹⁴ *Accord*, on the absolute essentiality of a delivery: *Foster v. Reiss*, *supra* note 109 at 52, 112 A.2d at 560 ("A gift *causa mortis* . . . differs from a legacy only in the requirement of delivery. Delivery is in effect the only safeguard imposed by law upon a transaction which would ordinarily fall within the statute of wills. To eliminate delivery from the requirements for a gift *causa mortis* would be to permit any writing to effectuate a testamentary transfer, even though it does not comply with the requirements of the statute of wills."); *Millers v. Jeffress*, 45 Va. (4 Grat.) 472 (1848).

¹¹⁵ *Supra* note 112 at 444.

especially when they are dying. The result is that the cases rarely present very clear application of the *causa mortis* doctrine, and cases of successful gifts *causa mortis* are difficult to find. A court will often spend considerable energy outlining all the prerequisites and then conclude that the proponent of the gift in the case before it failed to meet his burden of proof.¹¹⁶ Another more specific ground of rejection is that the donor retained too much dominion and control over the property, that he made vesting of title in the donee a condition *precedent* to his own death.¹¹⁷

Why should a court enforce a gift *causa mortis*? In some of the cases upholding gifts *causa mortis*¹¹⁸ there are statements which indicate the courts' awareness of an occasional need for an "escape valve" in order to effectuate the testator's intentions without requiring him to meet the formalities of the statutes of wills.¹¹⁹ If the court has sufficient evidence from which it can conclude what the testator intended it will enforce the gift unless to do so would prevent the decedent's dependents from otherwise receiving an adequate share for their support.¹²⁰ It is

¹¹⁶ See, e.g., *Johnson v. Goodballet*, 46 F.2d 934 (8th Cir. 1931); *Kling v. McCabe*, 36 F.2d 337 (8th Cir. 1929); *Foster v. Reiss*, *supra* note 109; *Renee v. Sanders*, 102 Ohio App. 21, 131 N.E.2d 846 (1956); *Ward v. Turner*, *supra* note 112. It is worth noting that in all these cases the fact that the decedent was either a businessman, or lawyer, or a man of substantial property interests prompted the court to point out that if the decedent had intended to make such dispositions he would certainly have used a formally executed will. Query whether this necessarily follows. Is an "educated" man less subject to change of mind when death is near? Or perhaps this is the real situation which the court is trying to prevent from happening. The Ohio Supreme Court went so far in *Adams v. Fleck*, 171 Ohio St. 451, 172 N.E.2d 126 (1961) as to point out that no Ohio reported decision has ever actually held that gifts *causa mortis* are valid in Ohio.

¹¹⁷ See *Bowers v. Hathaway*, 337 Mass. 88, 148 N.E.2d 265 (1958) (" . . . [I]f the gift does not take effect as an executed and complete transfer to the donee of possession and title, either legal or equitable, during the life of the donor, it is a testamentary disposition. . . . and, because obnoxious to the statute of wills, utterly void.") *Id.* at 91-92, 148 N.E.2d at 267; *Adams v. Fleck*, *supra* note 116.

¹¹⁸ See *Berl v. Rosenberg*, 169 Cal. App. 2d 125, 336 P.2d 975 (1959); *Ridden v. Thrall*, 125 N.Y. 572, 26 N.E. 627 (1891); *In re Richards*, 1 Ch. 513 (1921).

¹¹⁹ See, e.g., *Miller v. Jeffress*, *supra* note 114: "A donato *causa mortis* is of a mixed character, being partly testamentary and partly donative: from an indulgence to the nature of the emergency, the law dispenses with the solemnities of a testament; and for that very reason requires the essentials of a gift." *Id.* at 479. See also *Foster v. Reiss*, *supra* note 109 at 57, 112 A.2d at 563 where the dissent points out that such gifts are a kind of escape valve from the statutes of wills when "the facilities for executing the more formal testamentary disposition are not available, or the death of the donor is so imminent in point of time as to preclude preparation of the formal documents."

¹²⁰ See *In re Richards*, 1 Ch. 513 (1921) where very adequate provision for all

the author's opinion that the courts are proceeding upon an *ad hoc* basis whereby they look at what went on, decide, within the general principles of the gift *causa mortis* rationale, whether the intention of the testator is clearly displayed, and if it is, they enforce the gift. It is also submitted that regardless of the kind of wills statute present in a particular jurisdiction the courts should be permitted to continue this occasional exercise of discretion. Furthermore, "[B]y requiring some positive act of relinquishment such as manual transmission of the subject of the gift, the significance of the donor's act is forcefully brought home to him, and he is thus protected from ill-considered or impulsive donations of his property."¹²¹

The second exception to the wills statutes is the doctrine of incorporation by reference. This is different from integration in that the instrument, the terms of which are incorporated into the will, is itself non-testamentary and thus need not be present at the time the will is executed. The doctrine was enunciated in its modern form by the English case of *Allen v. Maddock*.¹²² In this case the testatrix drafted a will in 1851 which was not executed according to the 1837 Wills Act. In 1856 on her death-bed she executed a codicil headed "This is a codicil to my last Will and Testament." No other references to the 1851 will were made. The codicil was executed as required by the 1837 Wills Act. The issue thus arose as to whether the 1856 codicil incorporated by reference the 1851 will, thereby making it a valid testamentary disposition. The court found a valid incorporation stating, *inter alia*, "A reference by a testator to his last Will, is a reference in its own nature to one instrument, to the exclusion of all others; if so, the description identifies the instrument."¹²³ The theory is that the court always admits evidence to enable it to ascertain or construct the intention of the testator using the words he expresses in his will. The reference to a prior document raises enough ambiguity to admit parol evidence to identify and explain it, in the context of the testator's language. In the words of the court, "[W]here there is a reference to any written document, described as then existing, in such terms that it is capable of being ascertained, parol evidence is admissible to ascertain it, and the only question then is, is the evidence sufficient for the purpose."¹²⁴ Further defining what it means, the court said, "[T]he question has always been,

of a testator's family had already been made, and holding the gift valid did not materially affect these provisions.

¹²¹ See *Berl v. Rosenberg*, 169 Cal. App. 2d 125, 132, 336 P.2d 975, 979 (1959).

¹²² 11 Moore P.C. 427 (1858).

¹²³ *Id.* at 445.

¹²⁴ *Id.* at 454-55.

what reference in the valid paper is sufficient to let in evidence to identify the invalid paper.¹²⁵

The court stated its rule in final form as

[W]hen there is a reference in a duly-executed testamentary instrument to another testamentary instrument by such terms as to make it capable of identification, it is necessarily a subject for parol evidence, and that when the parol evidence sufficiently proves that, in the existing circumstances, there is no doubt as to the instrument, it is no objection to it that, by possibility, circumstances might have existed in which the instrument referred to could not have been identified.¹²⁶

The leading American case is *Baker's Appeal*.¹²⁷ In this case after the fourth of eight paragraphs the will stated "see next page." At the bottom of this page the will was signed and witnessed and on the next page was another paragraph of dispositions. The scrivener testified that the last paragraph was definitely written before the will was signed and attested. Pennsylvania law required that wills be signed at the end. The court cited and followed *Allen v. Maddock*, and concluded that the incorporated matter should be inserted at the point of reference, thereby making the will signed at the end. Parol evidence may be admitted to establish the identity of the incorporated matter.

A small minority of states have rejected the doctrine on the grounds that no testamentary disposition is entitled to enforcement unless executed according to the Statute of Frauds.¹²⁸

The doctrine of incorporation by reference is generally stated in this manner:

If a will, executed and witnessed as required by statute, incorporates in itself by reference any document or paper not so executed and witnessed, whether the paper referred to be in the form of a will or codicil, or of a deed or indenture, or of a mere list or memorandum, the paper so referred to, if it was in existence at the time of the execution of the will and is identified by clear and satisfactory

¹²⁵ *Id.* at 457.

¹²⁶ *Id.* at 461. See also *Habergam v. Vincent*, 2 Ves. Jr. 204 (1793), the leading case under the Statute of Frauds:

I believe, it is true, and I have found no case to the contrary, that, if a testator in his will refers expressly to any paper already written, and has so described it, that there can be no doubt of the identity, and the will is executed in the presence of three witnesses, that paper, whether executed or not, makes part of the will; and such reference is the same as if he had incorporated it; because words of relation have a stronger operation than any other . . .

Id. at 227-28.

¹²⁷ 107 Pa. 381 (1884).

¹²⁸ See *Hatheway v. Smith*, 79 Conn. 506, 65 Atl. 1058 (1907).

proof, as the paper referred to therein, takes effect as part of the will and should be admitted to probate.¹²⁹

Today the doctrine is generally accepted in the United States. Its compatibility with the various wills acts is questionable, especially since there are obvious opportunities for fraud. Consider *Baker's Appeal*; would it not have been fairly easy for the scrivener to have substituted the incorporated page in that case? What about the numerous other possible cases wherein the testator incorporates a document and then places them away together? Might not anyone alter or substitute the dispositive provisions contained in the incorporated document? Is not the only real protection in these cases the court's control over the standard of proof required to establish the existence and contents of the incorporated document? The fact that courts and legislatures have been willing to allow the doctrine to continue under these circumstances¹³⁰ is some indication that it works without undue hardship. Can this not also be taken as an indication that less stringent formalities of execution would *not* open the door to fraudulent practices so long as the courts maintained control over the standard of proof required? Restated, perhaps a less stringent wills statute would enable the courts to enforce obviously meritorious testamentary dispositions which, for instance lacked one witness, or were not technically signed at the end, without, at the same time, sacrificing sufficient safeguards against fraud.

If the wills statutes in their present form are really so necessary to protect against fraud, then it is difficult to explain the fairly recent proliferation of cases and statutes permitting pour-over, revocable, amendable trusts. This same difficulty arises in regard to the doctrine of "acts of independent significance."

One might assume a trust instrument which, if taken as initially drafted, might satisfy all the prerequisites of the incorporation by reference doctrine. Nevertheless, an included power to alter and revoke the trust is in essence a power to change the will indirectly and without satisfying the usual requirements of the statutes of wills. Absent statutory help, some courts have upheld such incorporation where the power to amend was never exercised after the execution of the will.¹³¹

But, where the power has been exercised, or the fact of non-

¹²⁹ See *Newton v. Seamen's Friend Society*, 130 Mass. 91, 93 (1881).

¹³⁰ Ohio in fact has provided for the doctrine by statute: "An existing document, book, record, or memorandum may be incorporated in a will by reference, if referred to as being in existence at the time the will is executed . . ." Ohio Rev. Code Ann. § 2107.05 (Page 1953).

¹³¹ See *Montgomery v. Blankenship*, 217 Ark. 357, 230 S.W.2d 51 (1950).

exercise is not singled out as a basis of distinguishing the case, the courts are faced with three alternatives: 1) enforce the trust as amended; 2) enforce the trust as it existed at the time of the incorporation; 3) hold the entire incorporation invalid.¹³² Professor Scott argued that such amendable pour-over trusts should be incorporated into the will and upheld as they read at testator's death using the doctrine that any amendment of the trust is a fact having significance independent of the property being distributed.¹³³ Several courts have substantially followed Scott's rationale without statutory help.¹³⁴ In *Second Bank-State St. Trust Co. v. Pinion*¹³⁵ the court stated:

We agree with modern legal thought that a subsequent amendment is effective because of the applicability of the established equitable doctrine that subsequent acts of independent significance do not require attestation under the statute of wills. . . . The underlying purpose of the statute of wills against frauds is secured in the formalities attendant upon the execution of trusts and the solemnity of the actual transfer of property to trustees.¹³⁶

This last quotation is particularly significant because it clearly shows the court's belief that the formalities required for the execution of a trust and the transfer of property thereto are adequate protection for testamentary dispositions. At most such formalities would require only a memorandum signed by the party to be charged (and perhaps the trustees) and satisfying the other prerequisites of the Statute of Frauds applicable to inter vivos transfers. The vast proliferation of new statutes permitting the use of pour-over trusts¹³⁷ also supports a general inference that state legislatures see sufficient testamentary protection in the inter vivos requirements of the Statute of Frauds.

The doctrine of independent significance is not new, and in fact is

¹³² See 1 Scott, Trusts § 54.3 (1956).

¹³³ *Ibid.*

¹³⁴ See *Canal Nat'l Bank v. Chapman*, 157 Me. 309, 171 A.2d 919 (1961); *Second Bank-State St. Trust Co. v. Pinion*, 341 Mass. 366, 170 N.E.2d 350 (1960).

¹³⁵ *Supra* note 136.

¹³⁶ *Id.* at 369, 371, 170 N.E.2d at 352-53.

¹³⁷ See Bogert, Trusts § 22 at 41 (4th ed. 1963): "The great majority of the decisions in this field have held these trusts to be true living trusts as to the remainder interests and therefore valid, even though not drawn with the formalities of wills. Possibly an influential factor in inducing the courts to take this position has been that the trusts have almost universally been evidenced by written instruments of admitted genuineness which have been signed and delivered, and that there is no danger of fraud, perjury or forgery [all the elements against which the wills statutes are aimed]. To deny effectiveness to these documents because they do not purport to be wills and lack witnesses and testimonium clauses may seem to give too much effect to formality and technicality."

used in the enforcement of most wills. "So common is it to use extrinsic evidence to identify the beneficiaries who are to take or the amount or nature of the property given that such use is not always clearly viewed as an application of the doctrine. . ."¹³⁸ Nevertheless, when the testator makes a gift of the contents of a receptacle, or to a person who should support him, or to his servant, or to his employees, the court will admit evidence of the state of these facts at the testator's death in order to give effect to his dispositions. The major difference in the receptacle cases, and especially the pour-over trust cases is that the testator has control over the changes made in the receptacle or trust instrument before his death.

But, one writer has stated:

To classify the settlor's probable use of his control over such a trust as independent or non-testamentary would appear to be somewhat facetious. In fact, it is difficult indeed to envisage any change in the terms of such a trust except as a reflection of the settlor-testator's altered attitudes regarding the devolution of his property on his death.¹³⁹

If this is in fact the case, then courts and legislatures are indeed indirectly lessening the requirements of the wills statutes. Perhaps a further justification for this is the fact that any testator who has a large enough estate to make effective use of a pour-over trust is very likely to seek assistance of counsel with whom he will discuss his plans in detail and finally execute a trust instrument in conjunction with a will. Then any subsequent amendments will be made on further advice of counsel, attended by written instruments. This all necessitates the involvement of numerous people, several of whom are acting in "a fiduciary capacity," and thereby precludes more than minimal chances for fraud.

CONCLUSIONS AND PROPOSALS

Is substantial loosening of the present formalities of execution necessary or even desirable? A major problem is a vast lack of data as to whether these formalities are too stringent for the average layman who executes his own will, and whether they really are necessary in present form to provide adequate safeguards.

In making proposals one must realize that most testators with reasonably substantial estates will make an effort, either on their own or with the help of counsel, to see that their wills and estate plans are

¹³⁸ 2 Page, *Wills* § 19.34 at 120 (4th ed. 1960).

¹³⁹ Flickinger, "The Pour-Over Trust and the Wills Statutes; Uneasy Bedfellows," 52 *Ky. L.J.* 731, 741 (1964).

drafted in a manner which meets the legal requirements, regardless of what they might be. The problems arise with uneducated, or eccentric or indigent testators—people who attempt to make testamentary dispositions according to formalities they have learned by rumor, imagination or merely insufficient or misleading information, *e.g.*, by using a do-it-yourself wills kit, or filling out a “store boughten” will form. These latter people are the most likely ones to have their otherwise meritorious wills defeated by a failure to strictly meet the statutory formalities. And they are really the ones who will derive the benefit or detriment from any loosening or tightening of the statutory formalities of execution.

Therefore, while keeping this in mind several conclusions and proposals are in order.

Gifts *causa mortis* should be retained in their present form. They offer courts an opportunity to effectuate testamentary intentions which are clearly established, but which nevertheless are not executed according to the wills statutes. In these cases the probate court and the trier of fact can have before them all the relevant facts surrounding the attempted distribution and therefrom decide whether the testator’s intention has been sufficiently established, within the general principles of such gifts, to entitle the particular gift in issue to be effectuated.

The doctrine of incorporation by reference should be retained with the assumption that courts will continue to maintain a standard of proof regarding the existence and content of the incorporated document which is stringent enough to eliminate most attempts at fraud, forgery and substitution.

The doctrine of independent significance is a necessary tool if courts are to have sufficient leeway to reasonably determine the objects of a testator’s bounty as depicted in his will. The fact that the doctrine might have been over-extended in the initial acceptance of pour-over trusts has been made virtually moot by the recent enactment of pour-over statutes by all but seven states. Such trusts have definite estate planning advantages and are fairly well insulated from fraud by their very nature and by the formalities which usually attend them. The general common-law remedies for fraud, duress, undue influence and mistake should be adequate protection in this area for the policies behind the wills acts.

As to the wills acts themselves, it is recommended that they be retained substantially in their present form, but that the following new section be added in order to authorize courts to exercise a similar kind of discretion in their application of the wills acts as they are now exercising under the three aforementioned doctrines:

In any case where the [here insert either "court" or "jury" depending upon the desires of the adopting legislature] is convinced beyond a reasonable doubt that a document signed by a testator represents in whole or in part said testator's bona fide attempt to prescribe the devolution of his property at death, then such document shall be enforced according to its terms. This section applies only to testamentary documents which, except for the requirement of the testator's signature

1) are found not to be executed according to this jurisdiction's statute of wills; *and*

2) the deficiency mentioned in 1) above is the only barrier preventing such testamentary document from otherwise being enforced according to its terms.

The phrase "testamentary document" includes any writing which, under applicable law, would normally be required to be executed according to this jurisdiction's statute of wills.

This proposed statute should enable the courts, on an *ad hoc* basis, to give effect to testamentary dispositions which are clearly meritorious, but do not strictly meet the formalities required by the statutes of wills. Because of the high standard of proof, only those wills, the denial of which would clearly be a matter of form over substance, should be affected. Anyone aware of the law will have adequate motivation to satisfy the usual statutes of wills requirements because he will want to avoid risking the high standard of proof applicable to improperly executed wills, under this statute. Furthermore, the proposal is in keeping with the almost universally accepted principle that the intention of the testator is of primary importance.

The requirement of the testator's signature is maintained because there is little doubt that this greatly adds to the reliability of any writing purported to be that of the person whose signature appears thereon. But any further requirement of execution would be defeating the purpose of the proposed statute.

Also, the statute would, in effect, permit holographic wills in all jurisdictions, provided of course that the proponent of the will could meet the strict standard of proof. Moreover, it is recommended that holographic wills be adopted in general. The difficulty of forging an entire will with enough dexterity to fool modern handwriting experts is an adequate safeguard against fraud.

Nuncupative wills act somewhat like gifts causa mortis in that they provide a moderate escape valve against the usual formalities of execution requirements. However, it might be argued that they are subject to such complicated formalities themselves that unless a testator is familiar with the law, he is unlikely to be successful. The same can be said regarding gifts causa mortis. Notwithstanding this argument, it

seems fairly clear that any lessening of their prerequisites would make the probability of fraudulent practices rise considerably.

The most difficult problem is that concerning competency of witnesses. Should any changes be made in the present state of the law? Mechem's criticisms¹⁴⁰ seem quite reasonable and convincing—perhaps too much so because people are not especially reasonable when they see the chance of obtaining something for nothing. It is common knowledge among attorneys that relatives of a dying man often become extremely selfish once they realize that the testator might not distribute his estate the way they would like. Wills executed at such a time with beneficiaries as witnesses are especially good candidates for the policies behind the competency requirements of the wills statutes. This is especially true when the will gives most or all of the estate to the interested witness, but such witness is too far removed from the testator to take much as an intestate heir. By limiting the gift to the intestate share, any selfish motives of such witnesses are frustrated. On the other hand does not such a result also run the risk of destroying a testator's bona fide intention that such beneficiary-witness actually receive the gift delineated in the will? Certainly in some cases it does.

But here is the rub of the problem. How can we determine whether the cases in which a testator's definite intention will be frustrated sufficiently outnumber the cases where the only thing really frustrated will be the fraud-inducing selfish motives of the beneficiary-witnesses? If we assume that the statutes of descent and distribution reasonably represent the intentions of most testators we can answer the problem by concluding that limiting the beneficiary-witness' gift to his intestate share so long as it does not exceed the gift given in the will will seldom frustrate the testator's intention, but will usually frustrate any fraudulent motives which the witness might have had. This seems to be the only really acceptable rationale, because once it is assumed that the statutes of descent and distribution do not represent most testator's intentions, the thread which ties together the general policy of effectuating testamentary intent and the policy behind the competency of witness requirements of the wills acts is lost. That is to say, to always prevent beneficiary-witnesses from taking anything from the estate ignores entirely the very real possibility that the only reason the testator sought them as witnesses was because he trusted them and was unaware of the provisions of the applicable wills act. Such a rule becomes especially unrealistic when the witness is a very close relative thereby raising a significant probability that the testator honestly viewed the witness as an object of his bounty. In such a case,

¹⁴⁰ See text accompanying notes 79-81 *supra*.

giving the witness his statutory share limited by the gift in the will substantially removes the witness' interest in whether the will is held valid, while at the same time it gives substantial support to what was probably the testator's intent.

The proposed statute will provide relief under the statutes of wills which entirely void an otherwise meritorious will because of its attestation by beneficiary-witnesses. This result will protect the testator's intent and at the same time the high standard of proof will maintain the policy safeguards behind the present reasons for voiding such a will. On the other hand, the proposed statute should not change the outcome in states which give the beneficiary-witness his intestate share limited by the will. This result maintains the policies behind the treatment of such witnesses and will not substantially frustrate the testator's intention (assuming of course that the statutes of distribution represent the intention of most testators).

To go all the way, as Mechem suggests, without having any really detailed and reliable information concerning the necessity of protecting the testator against such witnesses seems to be acting in an experimental and speculative manner when reasonably more reliable methods are available.

Finally, it is suggested that common-law soldiers' and mariners' wills be eliminated. They are so wrought with possibilities for fraud and perjury that even the exigencies of war do not justify them in today's world. This becomes fairly obvious when one considers that most service men have ample opportunity before they actually enter the battlefield to consult the legal officer assigned to their unit in order to draft a will which satisfies the wills act of their applicable jurisdiction.

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