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PROBATE LAW AND THE UNIFORM CODE:
"ONE FOR THE MONEY . . ."

Julian R. Kossow*

During the 1970's the new Uniform Probate Code is being considered intensively by state legislatures. Professor Kossow focuses on three provisions of the Code and examines their common law roots and the impact the Code will have on present law.

Little clairvoyance is needed to forecast the significant impact of the Uniform Probate Code within the next several years. In 1969 the Code was adopted by the National Conference of Commissioners on Uniform State Laws and by the House of Delegates of the American Bar Association. As of Spring 1973, the Code has been adopted in two states and currently is being considered by 21 other state legislatures. By the end of the decade, the Uniform Probate Code will be to probate law as the Uniform Commercial Code is to commercial law.

This article will probe three significant areas of the law of decedents' estates by analysing the current state of the law and then examining what changes, if any, the Uniform Probate Code makes. The topics chosen for analysis are (1) testamentary capacity, (2) formalities of execution of a will, and (3) elective share of the surviving spouse. The

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reason for the selection is that these topics, all fundamental to the law of decedents’ estates, have been altered, respectively, (1) not at all, (2) moderately, and (3) drastically by the Code and offer useful focal points for evaluating the law of decedents’ estates under the Code.

**Testamentary Capacity**

Freedom of testation is the keystone in the arch of the law of wills. The law, nevertheless, does impose certain constraints on a person’s right to dispose of his property at death. A major limitation to the execution of a valid will is that the testator must possess a minimum mental capacity. Just as legal standards of mental capacity must be met in order for a person to be able to enter into a valid contract or to be held responsible for a crime, so is there a legal standard for the mental ability requisite of one who executes a valid will. The primary purpose of this standard is to assist in the ascertainment of the testator’s intent, although an even more important reason for the standard has been suggested: to protect society and the family from testamentary acts of mental incompetents.

**Present State of the Law**

The standard of mental capacity frequently set forth in the statutes and cases is that of a “sound mind.” No short cut should be attempted in defining the term sound mind. The intricacies of the human mind are subtle and complex and thus the facts of each separate case must be determinative. Generally, however, a testator is considered to have legally sufficient mental capacity if he is capable of: (1) discerning the nature and extent of his property; (2) knowing those persons who would typically be the recipients of his testamentary beneficence; (3) comprehending the attempted disposition of his property pursuant to a rational plan; and (4) understanding of the above criteria in relationship to one

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4 The standards are, of course, different; one’s ability to negotiate a commercial contract involves considerations quite distinct from those which obtain in determining one’s ability to dispose of his property at death. Thus, a person may have capacity to execute a valid will, and at the same time be incapable of entering into a valid contract. Georgia, by statute, expressly states, “[a]n incapacity to contract may coexist with a capacity to make a will.” Ga. Code Ann. § 113-202 (1959); see In re Estate of Paris, 159 N.W.2d 417 (Iowa 1968); Weihofen, Mental Incompetency to Make a Will, 7 Nat. Res. J. 89, 91 (1967).


another. The essence of the capacity requirement is that the testator have sufficient mental ability to know the nature of his act, of his property and of his relations to the natural objects of his bounty.

It is important that the attorney who must deal with legal problems of capacity understand the medical profession's approach to this problem. Consequently, an eminent psychiatrist has explained the three elements of the capacity test as follows:

1. Knowledge of the nature of the act means that he must know that it is his will that he is signing. Evidence that at the time he was confused and talking incoherently or unable to talk at all, that he did not seem to recognize the people present, that his hand had to be guided in signing, and that he died soon afterward, would probably lead a doctor to conclude that he did not know he was executing a will.

2. Knowledge of the nature and extent of his property calls for a reasonably accurate comprehension of what he owns. A bequest of $100,000 to his sister Kate and the remainder to his wife, when his whole estate is not and never has been worth that much, would indicate that because of psychotic delusions of grandeur or other reasons he did not know the extent of his holdings. A specific devise of the old family homestead, which in fact he had sold ten years before, may lead us to conclude that senility has so far impaired his memory as to deprive him of capacity to know the nature and extent of his property.

3. Knowing his relations to the persons who are the natural objects of his bounty requires that he know who they are and what their legal or moral claims on him may be. If he insists that his children are all dead, or that the daughter who has been caring for him is not his daughter but an imposter, he is presumably incompetent under this third element in the criteria.

Thus, the two most pertinent questions are whether the participant understood the nature of the act and whether he was aware of his duties in connection with that act.

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7 See, e.g., In re Fritchi's Estate, 60 Cal. 2d 357, 384 P.2d 656, 33 Cal. Rptr. 264 (1963); Tarricone v. Cummings, 340 Mass. 758, 166 N.E.2d 737 (1960); In re Armijo's Will, 57 N.M. 649, 261 P.2d 833 (1953); In re Estate of Morton, 428 P.2d 725 (Wyo. 1967); W. Bowe & D. Parker, 1 PAGE ON THE LAW OF WILLS § 12.21, at 608 (2d ed. 1969) [hereinafter cited as W. Bowe & D. Parker]; Weihofen, supra note 4, at 89; Note, supra note 5, at 1124.


The testator's mental ability is the key to the test. Lack of knowledge of the extent of his property, or the formation of an apparently irrational plan, are not per se determinative of lack of capacity. The will of a testator who possesses capacity will not be invalidated even though its terms are manifestly unnatural or unjust. Conversely, natural and just provisions contained in the will of a person of unsound mind will not be given effect.

Mental incapacity, then, is a factual conclusion determined by the testator's inability to meet the previously discussed threshold requirements. In turn this inability emanates from the condition of the testator's mind. Consequently, courts must grapple with legal classifications of extremely complex medical situations. Nevertheless, for legal purposes, an inability to execute a will can be thought of as being the result of either a deficient or deranged mind. Mental deficiency is typically the product of organic brain disease, while mental derangement generally arises from some mental illness, as in the case of insane delusion. An individual may possess both conditions.

The deficient mind is typical of the mental condition of a person incapable of satisfying all or part of the described standard—knowing his next of kin, the nature of his property and how he wishes to dispose of it. Although deficiency is usually congenital, the condition also may result from age, disease, or injury. A person of very low intelligence, even one medically classified as a moron, may have enough mental ability to rise above the legal category of the deficient mind, but it is doubtful if one classified as an idiot or an imbecile could have testamentary capaci-

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10 Emerich v. Arendt, 179 Ark. 186, 14 S.W.2d 547 (1929).
12 Shirley v. Ezell, 180 Ala. 352, 60 So. 905 (1913).
14 T. Atkinson 234; W. Bowe & D. Parker § 12.25, at 622. The two categories are not mutually exclusive for one individual possibly may possess both types of mental conditions.
15 See Note, supra note 5, at 1135. See generally 1 W. Bowe & D. Parker § 12.25.
16 Green, supra note 11, at 272.
ty. Subnormal intellectual function now is encompassed medically under the term mental retardation, which is classified according to severity in five categories: borderline, mild, moderate, severe, and profound. Persons diagnosed as having borderline mental retardation probably would have capacity; those suffering from mild or moderate mental retardation would be questionable; and those with severe or profound mental retardation in all probability would not have capacity.

Age is often the most significant, and possibly the most vexatious factor. Old age frequently leads to senile psychosis, which classically is manifested by loss of memory, judgment, efficiency, consciousness, and orientation, and by possible delusions and hallucinations. The senile testator may be unable to concentrate sufficiently to form a testamentary plan, or he may be forgetful of members of his immediate family. The process of mental enfeeblement is very slow, and the decision whether the testator had capacity at the moment the will was executed is often extremely difficult. A large percentage of testators execute wills when they are quite elderly and at a time when their minds no longer function as well as in past years, but the courts wisely have been reluctant to conclude that elderly people are incapable of validly executing wills.

19 The most common types of senile psychosis are senile brain disease (dementia) and cerebral arteriosclerosis. It is estimated that 80 percent of mental health patients over age 65 suffer from either senile brain disease or arteriosclerotic brain disease. Busse, Brain Syndromes Associated with Disturbances in Metabolism, Growth, and Nutrition, in Comprehensive Textbook of Psychiatry § 19.2, at 727 (A. Freedman & H. Kaplan eds. 1972).
20 See Rothschild, Senile Psychoses and Psychoses with Cerebral Arteriosclerosis, in Mental Disorders in Later Life 299-301, 319-20 (2d ed. O. Kaplan 1956).
21 See McCrocklings' Adm. v. Lee, 247 Ky. 31, 56 S.W.2d 564 (1933). "[C]ourts will guard jealously this right to make wills in the aged and infirm." Waggener v. General Ass'n of Baptists in Ky., 306 S.W.2d 271, 273 (Ky. 1957). Even one afflicted with senile dementia or arteriosclerosis may be capable of executing a will, provided he meets the fundamental requirements. See, e.g., In re Dunson's Estate, 141 So. 2d 601 (Fla. Dist. Ct.
There is strong presumption that the testator has capacity, and those who contest the will on grounds of lack of testamentary capacity must meet a substantial burden of proof.

Persons with deranged minds usually possess the mental capability necessary to meet most of the requirements previously delineated, but because of mental illness, are unable to form a rational dispositive scheme. Such persons are often said to be suffering from an insane delusion, which may result from paranoia, schizophrenia or any one of several other possible causes. The insane delusion merits special attention because unless the delusion directly affects the contents of the will, the testator will not lack capacity. In addition, where the issue is insane delusion rather than general lack of mental capacity, the issue must be specially tried.

Although difficult to define, an insane delusion consists of a belief in the existence of certain facts which in reality do not exist, and which is held against all evidence, reason, or probability. Additionally, there must be conduct by the believer on the assumption of the verity of the delusion. However, the definition is of dubious value in any particular case. More important is the circumstantial flavor of each case combined

24 Even a prior adjudication of incompetency and placement under guardianship is not conclusive. See Hermann v. Crossen, 81 Ohio L. Abs. 322, 326-27, 160 N.E.2d 404, 409 (Ohio App. 1959). But the fact that the testator was under guardianship may raise a rebuttable presumption of incapacity. See In re Armijo's Will, 57 N.M. 649, 655, 261 P.2d 833, 837 (1953). A judicial order of commitment has even less effect than an adjudication of incompetency. Weihofen, supra note 4, at 94.


26 T. Atkinson 234. The delusion may affect testamentary capacity in several ways: it affects the instrument itself if, for example, the testator believes that he is being forced to sign it; the testator may be deluded as to the extent of his property; delusions often deal with the testator's relationship to his family, such as when he believes he is being poisoned. See Weihofen, supra note 4, at 101.

27 See, e.g., Malone v. Malone, 26 Ill. App. 2d 291, 167 N.E. 2d 703 (1959) (delusions must affect execution); In re Duron's Will, 395 Pa. 492, 150 A.2d 710 (1959) (delusion must have caused testator to make an entirely different will); Eason v. Eason, 201 Va. 246, 123 S.E.2d 361 (1962) (contestant must show that the delusion was insane and that the will was the product thereof). Even hallucinations will not destroy testamentary capacity unless they directly affect the disposition. See In re Morgan's Estate, 225 Cal. App. 2d 156, 37 Cal. Rptr. 160 (1964).

28 See Lindley v. Lindley, 384 S.W.2d 676 (Tex. 1964).


30 In re Putnam's Estate, 1 Cal. 2d 162, 34 P.2d 148 (1934).

with what a consensus of society thinks is an irrational belief. For example, belief in a Supreme Being is obviously not an insane delusion. However, if an individual believed that he was the Supreme Being, this probably would be held to be an insane delusion. If that person, based on that belief, disinherited his immediate family and left all of his property to his “disciples,” his will probably would be vitiated for lack of capacity. If, on the other hand, he left his property to his wife and children, he may well not lack capacity because his delusion arguably did not affect the contents of his will. The delusion must affect the disposition.

Precedent may be of some limited value in determining what constitutes an insane delusion. Uncommon religious beliefs, faith in spiritualism, or mere eccentricities have not been considered delusions vitiating capacity. Factually, many cases have involved the testator’s relationship to his family. Since the line between mistaken belief and insane delusion is an amorphous one, the circumstances of the individual case are determinative. The testator who predicates his will upon a belief in his wife’s infidelity or his child’s illegitimacy may well be mistaken rather than deluded. Often, the difference is whether or not there is any evidence to support the testator’s belief. If so, such a belief, even if false, will not constitute an insane delusion. To constitute a finding of incapacity, the false belief must be one that is adhered to against all evidence or reason.

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32 See In re Elston’s Estate, 262 P.2d 148, 151 (Okla. 1953). But see In re City Nat’l Bank & Trust Co., 144 A.2d 338 (1958) (testator believed she was communicating with a fictitious person via a ouija board). However, if the testator believed that the disposition of his property was spiritually dictated, the contents of the will are affected and the will is invalid. See In re Sandman’s Estate, 121 Cal. App. 9, 13, 8 P.2d 499, 500 (Dist. Ct. App. 1912).

33 See Quellmalz v. First Nat’l Bank, 16 Ill. 2d 546, 158 N.E.2d 591 (1959); Ennis v. Illinois State Bank, 111 Ill. App. 2d 71, 248 N.E.2d 534 (1969). However, the cumulative effect of many eccentric acts may be evidence of incapacity. See Green, supra note 11, at 277.

34 See, e.g., McGrail v. Schmitt, 357 S.W.2d 111 (Mo. 1962) (testator’s belief that his daughter was illegitimate); In re Honigman’s Will, 8 N.Y.2d 244, 168 N.E.2d 676, 203 N.Y.S.2d 859 (1960) (testator believed wife of 40 years unfaithful); In re Riemer, 2 Wis. 2d 16, 85 N.W.2d 804 (1957) (testator believed husband planned to kill her).


36 In re Honigman’s Will, 8 N.Y.2d 244, 168 N.E.2d 676, 203 N.Y.S.2d 859 (1960). But see In re Wicker’s Will, 15 Wis. 2d 86, 112 N.W.2d 137 (1961) (insane delusion may exist even if there is some evidence from which testator might have based his judgment).

Some commentators maintain that the law of testamentary capacity is too rigid and that the legal definition of delusion has not kept pace with modern psychiatry.

Where there is evidence, however slight, that some factual basis existed, the courts are inclined to say that delusion was not present. Hardly any
Another variable in the question of mental capacity is the element of time. The rule is that the testator must have capacity at the time he executes the will. As long as the testator possesses sufficient mental ability when he makes the will, incapacity before or after the time of execution is not determinative, except for possible evidentiary effects. Conversely the will is invalid when the testator could normally meet the required standards but at the time of execution is temporarily incapacitated. This situation typically occurs where the testator is so highly intoxicated or so greatly under the influence of drugs that, at the time, he cannot satisfy the capacity requirements. Finally a will, if made during a period of incapacity, may be validly republished by codicil at a later time when the testator possesses sufficient mental ability to satisfy standards of testamentary capacity.

The elements of testamentary capacity not only include mental capacity but also the testator's age. In all jurisdictions, the age required for testamentary capacity is at least 18 years.


See, e.g., In re Jamison's Estate, 249 P.2d 859 (Cal. Dist. Ct. App. 1952); Legueue v. Succession of Duplechin, 260 So. 2d 37 (La. App. 1972); In re Cook's Estate, 231 Ore. 133, 372 P.2d 520 (1962); Weihofen, supra note 4, at 102-03. Whether the testator actually was lucid is a question of fact. See 1 W. Bowe & D. Parker § 12.36, at 643.


See In re Kell's Estate, 190 Cal. App. 2d 286, 11 Cal. Rptr. 913 (Dist. Ct. App. 1961) (testator drunk when will was executed); In re Estate of Cole, 205 So. 2d 554 (Fla. App. 1968) (drugs). To invalidate the will the testator must be so incapacitated by the drug or alcohol that he cannot meet the standard of testamentary capacity. Smith & Hager, supra note 22, at 422; see In re Rhode's Estate, 436 S.W.2d 429, 436-37 (Tenn. 1968); In re Krae's Estate, 374 P.2d 413 (Ala. 1962). Chronic alcoholism or drug addiction also may result in an actual mental deterioration. See, e.g., Price v. Marshall, 255 Ala. 447, 52 So. 2d 149 (1951) (drugs); Frank's Ex'r v. Bates, 278 Ky. 337, 128 S.W.2d 739 (1939) (drugs); McGrail v. Schmitt, 337 S.W.2d 111 (Mo. 1962) (alcohol).

for testamentary capacity is fixed by the statute and only persons of the requisite age may validly dispose of property by will. The clearly established trend is to set the minimum testamentary age at 18 for both real and personal property. Today, about half of the states have adopted this position, as has the Uniform Probate Code. Many other states require the testator to be twenty-one years of age; however, in most of these jurisdictions, the age minimum is relaxed in certain circumstances. No state imposes a maximum age limit.

By recognizing the signs of possible insane delusions or general lack of testamentary capacity, the lawyer can play a crucial role in avoiding litigation. Particularly in the case of an aged testator, the lawyer should prepare for a will contest by those persons who would benefit if the will were declared invalid. Commentators have recommended that anyone over 65 years old should undergo a physical and psychiatric examination before executing a will. Similarly, if the testator is retarded intelligence tests may also be necessary.

MENTAL CAPACITY AND THE CODE

Section 2-501 of the Uniform Probate Code merely states that, "[a]ny person 18 or more years of age who is of sound mind may make a will." Nothing in the comments sheds any light on what constitutes a sound mind. Nothing indicates that the drafters of the Code even considered the question of mental capacity. For example, what constitutes "sound mind" is not defined. Furthermore, the Code does not provide any guidance on how to determine testamentary capacity.

Some states have provided more guidance. For example, the Uniform Probate Code § 2-501 merely states that, "[a]ny person 18 or more years of age who is of sound mind may make a will." Nothing in the comments sheds any light on what constitutes a sound mind. Nothing indicates that the drafters of the Code even considered the question of mental capacity.

42 1 W. BowE & D. PARKER § 12.8, at 581.
44 Uniform Probate Code § 2-501.
45 See PA. STAT. ANN. tit. 20, § 1801 (b) (Supp. 1970) (persons eighteen or older who are married or in the armed forces); S.C. CODE § 19-201 (1965) (married and above 18).

Some statutes simply require the testator to be of "full age" or "of majority." See, e.g., IOWA CODE ANN. § 599.1 (1950); KAN. STAT. ANN. § 59-601 (1964); MASS. ANN. LAWS ch. 191, § 1 (1969). The full age requirement generally means age 21, but this may be relaxed if the testator meets other criteria. See IOWA CODE ANN. § 599.1 (1950) (full age means 21 or married). A small number of states also distinguish between the testamentary age necessary for the disposition of realty and personalty. ALA. CODE tit. 61, §§ 1, 2 (1960) (21 for realty; 18 for personalty).
46 See In re Cory's Estate, 169 N.W.2d 837 (Iowa 1969) (attorney 'prepared for will contest on issue of testamentary capacity). Some courts have held that a lawyer has a duty to determine that the testator has testamentary capacity. See Gilmer v. Brown, 185 Va. 630, 44 S.E.2d 46 (1947).
47 Smith & Hager, supra note 22, at 428, 430; Welhofen, supra note 4, at 95. The technique has been criticized because the mere fact that such an examination occurred may be used as evidence of incapacity by the contestors of the will. Smith & Hager, supra note 22.
48 Welhofen, supra note 4, at 97.
49 Uniform Probate Code § 2-501.
sidered changing or amplifying the traditional requirements. A tremendous opportunity has been lost by the failure to give needed guidance. In defense of the Code one hardly could imagine a more difficult task than articulating a new standard of testamentary capacity. But even the minimal standards of today sometimes are applied loosely or even misapplied by trial and appellate courts. At the very least the Code, if not in the text then certainly in the comments, could have influenced courts everywhere to forcefully apply the present minimal standards of mental capacity.

There is demonstrable need for such influence. The existing law of testamentary capacity has become increasingly rigid. Both the conceptual approaches to the problem and the legal terminology of capacity have crystallized. Such fossilization is particularly undesirable in an age of significant medical advancements in the understanding of the human mind.

Moreover, appellate courts, while declaring that they are limited by the clearly erroneous rule in the supervision of cases that are principally factual determinations, have failed to require trial courts to apply strictly the standard of testamentary capacity to the facts in each case. Thus trial courts can obfuscate their decisions and thereby are permitted to make determinations occasionally based on "gastronomical jurisprudence" and often supported by no more than a modicum of evidence. The following cases will serve, by way of illustration, to demonstrate that courts often fail to apply the criteria of capacity to the facts in any meaningful way.

Many Duplechin, the testator in Lejeune v. Succession of Duplechin, was described as mentally unsound. He had set fire to his bedding both while institutionalized at a tuberculosis hospital and while living in his mobile home. The only physician testifying at trial stated that the testator was suffering from senility and that lucid periods were not probable. Testimony at trial described the testator as being miserly, talking of cattle which he no longer owned as though he still had them, having no control of his bodily functions, and crying frequently. Despite the record, the Court of Appeal of Louisiana upheld the trial court's admission of Duplechin's will to probate. Although evidence was introduced which would support a finding of capacity, there is no discussion in the court's opinion whether the testator knew the natural

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52 Id. at 38.
53 Id. at 39.
objects of his bounty. Moreover, the court did not consider the fact
that a large portion of Many's estate was not contained in his will and
it is therefore questionable whether he knew the nature and extent of
his property. Instead of examining these criteria, the court simply con-
cluded that since there was some evidence of capacity, the trial judge
committed no manifest error in his factual conclusions and therefore
his judgment was affirmed.64

Elnora Duncan Brown was 81 years old when she died in 1968.65 She
had suffered a severe cerebral hemorrhage and was hospitalized in a
psychotic state. Yet only 18 days following her release from the hos-
pital, Mrs. Brown executed her will.66 A physician described Mrs.
Brown's condition as poor. She was bedridden, her mental functioning
was poor, and she was essentially helpless.67 The scrivener testified for
the proponents of the will that the testator wished to make a will and
understood what was going on.68 Again the court did not analyze
whether the decedent knew the nature and extent of her property or
was aware of the natural objects of her bounty. A more careful appli-
cation of proper standards was called for in such a case.

Though constrained by the clearly erroneous rule, not all appellate
courts are wary of questioning the decision of a trial court. In Paskyn
v. Mesich,69 an Alaska trial court found the decedent competent. A
guardian appointed for the testator testified that Mesich did not under-
stand anything even when spoken to in his native tongue, that he would
sign his own death certificate, and that “he didn’t know what was hap-
pening anymore than the man in the moon.” 60 An attorney who had

64 Id.
66 Id. at 466.
67 Id. at 467-468. As the court stated, “[a] fair analysis of Dr. Faust’s testimony as a
whole is that he considered that decedent did not possess testamentary capacity.” Id.
at 468.
68 Id. at 468. These cases are illustrative of countless others. In the following cases,
despite substantial evidence of incapacity, the validity of the will was upheld, without
considering whether the testator understood the nature and extent of his property,
natural objects of his benefice, or had a rational testamentary plan. See Holladay v.
Holladay, 294 Ky. 540, 172 S.W.2d 36 (1943) (testator thought it was safer to sit under
a tree rather than in the house during electrical storms; stood in the center of the
road at midnight and required motorists to go around him; bathed in a hog wallow); In
re Hall’s Will, 252 N.C. 70, 113 S.E.2d 1 (1960) (testator could not manage own
affairs; her mind wandered; she had an affair with a young man; imagined knocking at
the door, telephone ringing, and wiretapping; did not understand value of property;
said if she had a gun she would “go out killing”); cf. In re Estate of Teel, 483 P.2d 608
(Ariz. 1971) (testator with a mental age of 12 found competent).
70 Id. at 236.
done legal work for Mesich stated that he never could get a lucid story from him and that his mind was so confused that he could not grasp the significance of simple questions. Mesich did not recognize anybody and would respond only with a hello or a grunt upon encountering someone he knew. He was described as a vegetable. A physician testified that Mesich could not supply him with a satisfactory history of himself, that he had a definite pathology in his brain resulting from a head injury, and that his memory for old events was good but for recent events his memory was poor. The Supreme Court of Alaska concluded that the trial court had not given adequate weight to the depositions of witnesses who did not appear at trial. Since the judgment of the trial court rested primarily on written testimony, the appellate court did not hesitate to rule that the trial judge was clearly erroneous. However, even the Alaska court only recited the test and failed to relate the testimony directly to the standards for capacity.

As these cases demonstrate, appellate courts have for too long failed to insure strict application of the standards of testamentary capacity. The result has been confusion and misapplication. The existing standards are minimal, and the Uniform Probate Code has not augmented them. However, both the existing standard and the Code formula are capable of more consistent application than they now receive. States which adopt the Uniform Probate Code should consider inserting the criteria for testamentary capacity in the comments to section 2-501 to assure that those standards will be applied.

61 Id. at 236-37.  
62 Id. at 237.  
63 Id. at 240. See also In re Morgan’s Estate, 225 Cal. App. 2d 156, 37 Cal. Rptr. 160 (Dist. Ct. App. 1964) (testator saw snakes and worms in her bed, pigs on the floor, and elephants on ceiling; bequeathed residue of her estate to a sister who was dead when the will was executed; court concluded she did not understand the extent of her property or have a rational testamentary plan); In re Sanderson, 171 Cal. App. 2d 651, 341 P.2d 358 (Dist. Ct. App. 1959) (testator left entire estate to religious institutions; incapable of conversing normally; started fires in garden without reason; had “religious mania;” but rationally discussed his property and relatives with scrivener so court concluded that eccentricities did not bear on capacity); Webster v. Larmore, — Md. —, 299 A.2d 814 (1973) (testator locked herself out of her house, lost bank book, believed people were stealing her money; doctor testified that she was incompetent due to arteriosclerosis; but she understood the people who should be objects of her bounty and her testamentary plan was consonant with her assets); In re Johnson’s Estate, 308 Mich. 366, 13 N.W.2d 852 (1944) (decedent’s house filled with filth, refuse, and animal droppings; drowned a litter of kittens and burned them in the stove; court applied criteria and found capacity); McCrail v. Schmitt, 357 S.W.2d 111 (Mo. 1962) (testator doubted daughter’s legitimacy; dressed in women’s clothes; habitual alcoholic for 25 years; affirmed jury verdict that he did not satisfy criteria for capacity).
Formalities of Testamentary Transfer:

Ordinary, Formal Wills and Holographic Wills

Formalities of transfer have developed which buttress the reliability of an intended testamentary transfer and assure freedom of testation. Such formalities assist in the determination that a testamentary transfer was competently and freely made and that the expressed dispositions are an accurate reflection of the testator's intent.64

The formal requirements of testamentary transfer relevant to contemporary law began with the passage of the English Statute of Wills in 154065, wherein transfer of land by wills was permitted as long as the will was in writing. In 1677, the Statute of Frauds66 promulgated formalities not unlike present day requirements—devises of land had to be written, signed by the testator and attested in his presence by “three or four credible” witnesses.67 The English Wills Act of 183768 removed, inter alia, any discrepancies between real and personal property in testamentary dispositions. Today every state has a statute governing the formal requirements for the valid execution of a will. Modern statutes substantially are patterned after the Statute of Frauds and the English Wills Act. Compliance with these statutory requirements is the sine qua non of testamentary transfers.69

Present State of the Law

Formal Written Wills. With regard to formalities of transfer, little variation exists among American statutes.70 However, it must be emphasized that even slight differences can be critical in any given situation. Nevertheless, a consensus of statutes contains the following minimum requirements for the valid execution of an ordinary

64 Cases frequently indicate that the purpose of statutory formalities is to guard against mistakes, impositions, undue influence, fraud and deception. See, e.g., Panousseris' Will, 2 Storey 21, 151 A.2d 518, 527 (Del. Orphans Ct. 1959); Howard v. Gunter, 215 So. 2d 222, 224 (La. App. 1968); Wilson v. Polite, 218 So. 2d 843, 849 (Miss. 1969).
65 32 Hen. 8, c.1 (1540).
66 29 Car. 2, c.3, § V (1677).
67 Id.
68 7 Wm. 4 and 1 Vict., c.26, § III (1837).
69 See Wilson v. Polite, 218 So. 2d 843, 849 (Miss. 1969) (requisite to valid will is execution as prescribed by statute). Often, however, absolute compliance with requisites of a statute pertaining to the execution of the will is not required. See Hobbs v. Mahoney, 478 P.2d 956 (Okla. 1971).
70 The discussion of formalities of testamentary transfer is inapplicable to wills executed in Louisiana which has unique decedent's estates law. See La. Civ. Code Ann. arts. 1577-78 (West 1922) (nuncupative will by public act which is a will dictated to a notary public); id. art. 1581 (nuncupative will under private signature); id. art. 1584 (mystic will—testator presents closed and sealed will to notary and witnesses).
will: that the will be in writing; that the testator sign the will, or that another person sign in behalf of the testator but under the latter's direction and in his presence; and that the will be attested by at least two competent witnesses who sign in the presence of the testator. A substantial number of states have included some of the following variations: that the testator sign at the end of the will; that the testator sign in the presence of the witnesses or, alternatively, that the testator acknowledge his previously signed signature to the witnesses; that the testator declare that the instrument being executed is his will; that the witnesses be requested by the testator to sign the will; and that the witnesses sign in the presence of each other.

The first formality of testamentary transfer is the requirement that the will must be in writing, which is the rule in every state and is applicable to all testaments except nuncupative and military wills. Thus, oral testamentary dispositions generally are invalid. Judicial decisions have interpreted the writing requirement liberally. Typewritten wills, as well as those done by pen or pencil, or by filling in the blanks of a printed legal form, are common and acceptable. Law review articles and other periodicals contain accounts of cases accepting wills executed on a tractor fender, a nurse's petticoat, a stepladder rung, a matchbox, a sailor's brass identity disk, and even on an eggshell.

The question arises, at least in theory, of modern technological substitutes for a writing. Devices such as movies, video tapes, phonographs and tape recordings and computers, while perhaps being as reliable as

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11 See appendix, p. 1394 infra.
12 Id.
13 Id. Some states permit oral nuncupative and military wills, which are valid only in certain limited situations. However, section 2-502 of the Uniform Probate Code requires all wills to be in writing and therefore eliminates the use of oral wills. Consequently, a detailed consideration of the problems of oral testaments is beyond the scope of this article.
14 Thum v. McAra, 374 Mich. 22, 130 N.W.2d 887 (1963); see note 73 supra.
15 See Hopson v. Ewing, 353 S.W.2d 203 (Ky. 1962).
17 See Sears v. Sears, 77 Ohio St. 104, 82 N.E. 1067 (1907).
18 Note, 26 CAN. B. REV. 1242 (1948) (when the will was probated, the part of the tractor fender containing the will was required to be filed with the court).
20 Id. (probate denied because will found to be a forgery).
21 Id. (probate denied because will found to be a forgery).
traditional methods of executing a will, simply would not constitute compliance with statutory requirements as these formalities presently are envisaged. However, technological substitutes should not be precluded automatically although legislative blessings would be necessary in order to authorize such devices.\footnote{There have been at least two reported instances of wills being made with the use of a phonograph. The attorney who acted as a witness for one of the wills stated that a phonographic will would allow the judge to tell whether the testator was strong or weak from the tone of his voice as well as aiding the determination of mental competency by means of the testator's fluency or lack of fluency. In each instance, however, it was recognized that for the wills to be valid applicable state statutes would have to be amended to authorize such wills. \textit{See 27 Case & Com.} 1263 (1921).} Regrettably, the \textit{Uniform Probate Code} is silent on this matter.

The next essential formality is the universal requirement that ordinary wills must be signed by the testator. There has been a lot of litigation as to what constitutes a legally sufficient signing. Courts have concluded that almost anything that is intended by the testator to authenticate the will by serving as his complete signature is sufficient.\footnote{\textit{See Foster v. Tanner,} 221 Ga. 402, 144 S.E.2d 775 (1965).} Thus, cases have upheld the validity of wills where the testator signed by using his initials,\footnote{\textit{In re Shoemaker's Estate,} 47 Pa. D. & C. 337, 53 Dauph. Co. 324 (1943).} his nickname,\footnote{\textit{In re Button's Estate,} 209 Cal. 325, 287 P. 964 (1930).} his given name,\footnote{\textit{Succession of Cordaro,} 126 So. 2d 809 (La. App. 1961).} or his familial relationship to the legatees.\footnote{\textit{In re Guinane's Estate,} 65 Ill. App. 2d 193, 213 N.E.2d 30 (1965) ("Aunt Margaret"); \textit{In re Kling's Estate,} 12 Pa. D. & C. 2d 588 (1950) ("Pop").} One case sanctioned a will in which the testator signed by using his fingerprint; the court also recognized the general rule that a signature, if intended as such, may be printed, lithographed, or typewritten.\footnote{\textit{In re Guinane's Estate,} 65 Ill. App. 2d 193, 213 N.E.2d 30 (1965). \textit{In re McIntyre's Estate,} 335 Mich. 238, 94 N.W.2d 208 (1959). A mark is sufficient even if the testator is not illiterate. \textit{Quimby v. Greenhawk,} 166 Md. 335, 171 A. 59 (1934); \textit{Boone v. Boone,} 114 Ark. 69, 169 S.W. 779 (1914).} Illegible or misspelled\footnote{\textit{In re Romaniw's Will,} 163 Mich. 481, 296 N.Y.S. 925 (1937). \textit{In re Iverson's Estate,} 39 Wyo. 482, 273 P. 694 (1929).} signatures are acceptable, as is the testator's mark or cross.\footnote{\textit{In re Iverson's Estate,} 39 Wyo. 482, 273 P. 694 (1929). \textit{Boone v. Boone,} 114 Ark. 69, 169 S.W. 779 (1914).} Fourteen states require that the testator sign at the end of the will, while one state reaches that same result by declaring that the will must be subscribed by the testator.\footnote{\textit{In re Iverson's Estate,} 39 Wyo. 482, 273 P. 694 (1929). \textit{Boone v. Boone,} 114 Ark. 69, 169 S.W. 779 (1914).} Such seemingly clear language has generated a surprising amount of litigation. In states where signature at the end is required, failure to do so vitiates the will.\footnote{\textit{In re Guinane's Estate,} 65 Ill. App. 2d 193, 213 N.E.2d 30 (1965).} However the rule that any material provisions written below the signature have the effect of a signature has been adopted in some states.\footnote{\textit{In re Iverson's Estate,} 39 Wyo. 482, 273 P. 694 (1929). \textit{Boone v. Boone,} 114 Ark. 69, 169 S.W. 779 (1914).} There have been at least two reported instances of wills being made with the use of a phonograph. The attorney who acted as a witness for one of the wills stated that a phonographic will would allow the judge to tell whether the testator was strong or weak from the tone of his voice as well as aiding the determination of mental competency by means of the testator's fluency or lack of fluency. In each instance, however, it was recognized that for the wills to be valid applicable state statutes would have to be amended to authorize such wills. \textit{See 27 Case & Com.} 1263 (1921).
of invalidating the will is inapplicable to an attestation clause or other purely formal language. Writing below the signature is to be distinguished from the situation where language is added to a will at some time after the completed act of execution. Such language is simply of no effect, but does not invalidate an otherwise acceptable will. In the majority of states there is no requirement of a signing at the end. If the writing of the testator's name was intended to be his signature, its placement on the document is immaterial.

Most states permit another person to sign in behalf of the testator if done under the testator's direction and in his presence. In this situation, ten statutes require that the person signing for the testator also sign his own name.

All states require that either the entire will or the testator's signature be authenticated which can always be accomplished by the testator's signing in the presence of the witnesses. Alternatively, the requirement of authentication is satisfied in many states by the testator's acknowledgment of his signature. Acknowledgment by the testator is his act of showing the will to the witnesses and stating to them that the signature signed previously out of their presence is, in fact, his.

In several states the concept of acknowledgment refers to an alternative method of authenticating the entire will, rather than just the testator's signature. Here, acknowledgment signifies an act or statement by the testator to the witnesses that the instrument in question is intended to be his will and to have legal force and effect. Generally in these states the witnesses need not see the testator's signature nor is it necessary

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96 In re Begun's Will, 123 N.Y.S.2d 782 (Sur. Ct. 1953) (rule applied here to a holographic will). New York and several other states have alleviated the difficulty of this rule by providing in their statutes that matter following the signature shall be given no effect and not invalidate the will. N.Y. ESTATES, POWERS AND TRUSTS LAW § 3-2.1 (McKinney 1967).


98 Parrot v. Parrott's Adm'r, 270 Ky. 544, 110 S.W.2d 272 (1937).

99 See Plemons v. Tarpey, 262 Ala. 209, 78 So. 2d 385 (1955); appendix, p. 1394 infra.

100 See appendix, p. 1394 infra.

101 See id. However, seven of these statutes also provide that noncompliance with this requirement does not affect the validity of the will. Id.

102 See id.

103 Two states do not allow acknowledgment, but it is an acceptable alternative in all of the other states. See id.

104 Parkinson v. Artley, 93 Idaho 66, 455 P.2d 310 (1969); In re Dunham, 334 Mass. 282, 134 N.E.2d 915 (1956). Acknowledgment may not be effective unless the witnesses had an opportunity to see the testator's signature. Wheat v. Wheat, 156 Conn. 575, 584, 244 A.2d 359, 364 (1968).

that he acknowledge his signature to the witness. The testator must merely acknowledge his will, and that he wishes the witnesses to sign.\footnote{106}

Publication, required by 14 states, is defined as making it known in the presence of witnesses that the instrument to be executed is the last will and testament of the testator.\footnote{107} The testator's tacit acceptance of someone else's statement that the instrument in question is the testator's will also may constitute publication.\footnote{108} In states requiring publication lack of sufficient publication renders the will fatally defective.\footnote{109} It seems indefensible for a will to be invalidated for failure to comply with a formality that so minimally buttresses the reliability of the intended testamentary transfer.

Closely related to the necessity of publication is the requirement in 13 states that the testator actually request the witness to attest the will.\footnote{110} The request has little relation to the reliability of the will and is largely unjustified. Fortunately, the courts have often implied the necessary request from other acts and statements of the testator. Implied requests have been found where the witnesses signed with the testator's knowledge and approval\footnote{111} or with his consent.\footnote{112}

Proper witnessing is a universal condition precedent to the execution of a valid will. All but one state require that a formal will be authenticated in writing by the signature of witnesses.\footnote{113} Two witnesses are normally sufficient; in six states, however, three witnesses are needed.\footnote{114}

\begin{footnotes}
\footnote{106} W. Bowe & D. Parker § 19.116 (1960).
\footnote{107} In re MacVicar's Estate, 251 Iowa 1139, 1143, 104 N.W.2d 594, 597 (1960); In re Estate of Moore, 166 Kan. 556, 561, 203 P.2d 192, 195 (1949); see appendix, p. 1394 infra. Irrespective of whether publication is required, subscribing witnesses need not know the contents of the will. See Wroblewski v. Yeager, 361 S.W.2d 108, 110 (Ky. 1962).
\footnote{108} In re Petkos, 54 N.J. Super. 118, 148 A.2d 320 (App. Dept' 1959); Howard v. Smith's Estate, 344 P.2d 260 (Okla. 1959). If because of the contents of the will the witnesses are aware that the document is the testator's will, and if the witnesses see him sign it or acknowledge his signature, this may be an effective publication. See Parkison v. Artley, 93 Idaho 66, 455 P.2d 310 (1969).
\footnote{110} See appendix, p. 1394 infra.
\footnote{111} Hollingsworth v. Hollingsworth, 240 Ark. 582, 401 S.W.2d 555 (1965).
\footnote{112} Ritchey v. Jones, 210 Ala. 204, 97 So. 736 (1923); see Johnston v. King, 250 Ala. 571, 35 So. 2d 202 (1948).
\footnote{113} The exception is Pennsylvania which does, however, require the will to be proved by two competent witnesses. Pa. Stat. Ann. tit. 20, § 180.4 (Supp. 1970).
\end{footnotes}
A will attested by fewer than the required number of witnesses is not valid.\textsuperscript{115}

Implicit in every wills statute is the requirement that a person, in order to be an acceptable witness, must be competent.\textsuperscript{116} Courts have universally interpreted the statutory requirement of a competent witness to mean a person who, at the time of execution of the will, could legally testify in court as to the facts of execution.\textsuperscript{117} Because of a common law belief that one with a financial interest in the matter tends to give erroneous testimony, the rule evolved that a legatee or devisee under a will cannot be a competent witness to the will.\textsuperscript{118} The rule also applied where the witness was the spouse of a legatee or devisee.\textsuperscript{119} The result was that many wills were denied probate for lack of a sufficient number of competent witnesses, which prompted England to enact the first "purging" statute in 1752.\textsuperscript{120} Its effect was to void the testamentary gift of a beneficiary who was also a necessary witness to a will. The validity of the will thus was upheld by making the witness competent.

Today, most states have similar purging statutes which void testamentary gifts to witness-beneficiaries unless there are enough competent witnesses without the attestation of the one financially interested in the will.\textsuperscript{121} Most purging statutes also have saving clauses which allow a witness-beneficiary who would have been an intestate successor to the


\textsuperscript{116} Many states use the term "credible" which is virtually synonymous with the term competent. \textit{See In re} Kent's Estate, 4 Ill. 2d 81, 85, 122 N.E.2d 229, 231 (1954); 2 W. Bowen & D. Parker § 19.79, at 179 & n.2.

\textsuperscript{117} \textit{See}, e.g., Strahl v. Turner, 310 S.W.2d 833 (Mo. 1958); Fazekas v. Gobozy, 78 Ohio L. Abs. 258, 150 N.E.2d 319 (Dist. Ct. App. 1958); 2 W. Bowen & D. Parker § 19.79, at 179-80. Most wills statutes do not have an age requirement for witnesses, and a minor is considered an acceptable witness if he could testify to the facts of execution. \textit{See In re} Tannenbaum's Estate, 154 Misc. 828, 278 N.Y.S. 253 (Sur. Ct. 1935).

\textsuperscript{118} Bruce v. Shuler, 108 Va. 670, 62 S.E. 973 (1908). Today a witness who has a financial interest in the matter may testify, but his interest will affect his credibility. \textit{See} 2 Wigmore on Evidence § 576 (3d ed. 1940); 3 id. § 966. At common law the testator's creditors were incompetent if the will specified that the debt be satisfied out of the proceeds of the estate. 2 W. Bowen & D. Parker § 19.96, at 197. Since modern legislation generally provides that the testator's debts are to be satisfied out of the proceeds of the estate, the issue of a creditor's competency has been obviated. \textit{Id.} at 198. Additionally, many states expressly provide that creditors are competent witnesses. \textit{See} appendix, p. 1394 \textit{infra}. A few statutes also declare that executors and other fiduciaries are competent to serve as witnesses. \textit{Id.}

\textsuperscript{119} Fisher v. Spence, 150 Ill. 253, 37 N.E. 314 (1894).

\textsuperscript{120} Statute of George II, 25 Geo. 2, c. 6, (1752).

\textsuperscript{121} \textit{See} appendix, p. 1394 \textit{infra}. Ten states extend the effect of the purging statutes to a witness whose spouse is a legatee or devisee. \textit{Id.}
decedent the equivalent of the witness’s intestate share, up to the amount actually bequeathed him in the will.\textsuperscript{122}

Witnesses must be competent at the time of execution of the will.\textsuperscript{123} If a valid witness later acquires an interest subsequent to the execution of the will, for example by marriage to a legatee, his competence is not affected.\textsuperscript{124} Conversely, if a witness is also a beneficiary under the will at the time of execution, but releases his interest before probate of the will, he is still incompetent.\textsuperscript{125} The rationale is that the testator should be protected at the time of execution by having financially disinterested witnesses who are able to testify as to the facts of execution of the will.\textsuperscript{126}

The usual rule is that the witness is disqualified if he receives any direct benefit.\textsuperscript{127} If the witness' benefit is indirect, the best rule is that the testamentary interest must be one that results “in an appreciable pecuniary gain to the witness.”\textsuperscript{128} Special problems may arise where the witness is a parishioner or a club member or a taxpayer and the gift is to a church,\textsuperscript{129} a club,\textsuperscript{130} or a municipality.\textsuperscript{131} Here, the witness is generally held to be competent on the theory that his interest is not of direct pecuniary benefit to him.\textsuperscript{132}

Anything that the witness intends to be his signature constitutes a legally sufficient signing.\textsuperscript{133} The witness' signature may appear anywhere on the instrument.\textsuperscript{134} However, the paper that the witnesses sign must be physically attached to the will.\textsuperscript{135} More than just the mere physical act of signing is required by law; the witness must intend to sign for the purpose of validating the testamentary document.\textsuperscript{136}

\begin{itemize}
\item \textsuperscript{122} Id.
\item \textsuperscript{123} See \textit{In re} Kent's Estate, 4 Ill. 2d 81, 85, 122 N.E.2d 229, 231 (1954).
\item \textsuperscript{124} See Berndtson v. Heuberger, 21 Ill. 2d 557, 173 N.E.2d 460 (1961); \textit{In re} Delavergne's Will, 259 Ill. 589, 102 N.E. 1081 (1913).
\item \textsuperscript{125} \textit{Caesar v. Burgess}, 103 F.2d 303 (10th Cir. 1939).
\item \textsuperscript{126} Holdfast d. Anstey v. Dowsing, 93 Eng. Rep. 1164 (K.B. 1746). It is usually stated that witnesses are to attest to the mental capacity of the testator, as well as to the facts of execution. Cf. \textit{Stormon v. Weiss}, 65 N.W.2d 475 (N.D. 1954).
\item \textsuperscript{127} \textit{In re Moody's Will}, 155 Me. 325, 154 A.2d 165 (1959) (bequest of five dollars to witnesses rendered them incompetent).
\item \textsuperscript{128} Appeal of Cox, 126 Me. 236, 239, 137 A. 771, 772 (1927).
\item \textsuperscript{129} \textit{In re Alken's Estate}, 103 Pa. Super. 279, 158 A. 190 (1932).
\item \textsuperscript{130} \textit{In re Ralston's Estate}, 290 Pa. 374, 139 A. 129 (1927).
\item \textsuperscript{131} Hitchcock v. Shaw, 160 Mass. 140, 35 N.E. 671 (1893).
\item \textsuperscript{133} Cf. notes 85-93 supra and accompanying text.
\item \textsuperscript{134} See \textit{In re} Lomineck's Estate, 155 So. 2d 561 (Fla. App. 1963); Boren v. Boren, 394 S.W.2d 704, 706 (Tex. Civ. App. 1965), rev'd on other grounds, 402 S.W.2d 728 (Tex. 1966).
\item \textsuperscript{135} \textit{In re} Panousiezer's Will, 2 Storey 21, 151 A.2d 518 (Del. Orphan's Ct. 1959).
\item \textsuperscript{136} Darmasy v. Halley's Ex'r, 306 Ky. 697, 208 S.W.2d 299 (1948).
\end{itemize}
One other problem with regard to the signatures of the testator and of the witnesses is the order of signing. Generally the testator's signing precedes that of the witnesses. The difficulty arises where the witnesses sign before the testator. Here, the majority American rule is that the will is valid only if all the signings take place as part of one continuous transaction. Therefore, the testator's signature at some later time, not contemporaneous with the earlier signings by the witnesses, vitiates the entire will.

One major formality of testamentary transfers is the requirement in almost every state that the witnesses must sign the will in the presence of the testator. The avowed purpose of the rule is to prevent the witnesses from fraudulently substituting another document in place of the testator's will. The requirement, however, is of questionable value in preventing such fraud, particularly when balanced against the number of wills that have been invalidated for failure to comply with this formality.

The difficulty lies in determining what constitutes compliance with this requirement. The decisions generally have fallen into two categories: cases which adhere to a strict standard of "presence" and those that follow the "conscious presence" rule. In jurisdictions applying a strict view of presence, the testator must be in physical proximity to the witnesses and be in such a position that he is able, if he wishes, to see both the will and the witnesses in the act of signing it. If, for example, the witnesses were in the next room, it would have to be proved as a question of fact that the testator was situated physically so that he could have seen both the will and the witnesses' signing of it.

Many cases have not interpreted the presence requirement literally and have followed a "conscious presence" rule in which the testator's awareness of what is being done and his ability to hear the witnesses as they attest is sufficient if all the signings are part of a single continuous

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137 See In re Machay's Estate, 45 Ill. 122, 54 N.E. 901 (1899); Robertson v. Robertson, 232 Ky. 572, 574, 24 S.W.2d 282, 283 (1930).
139 See appendix, p. 1394 infra. A few states also require that the witnesses sign in the presence of each other. See id. The same considerations apply to this situation as are applicable to the requirement that witnesses sign in the presence of the testator.
142 See, e.g., In re Palmer's Estate, 253 Iowa 428, 121 N.W.2d 920 (1963) (testator and witnesses in adjoining rooms; ability to see each other dependent on relative positions); In re Weber's Estate, 192 Kan. 258, 387 P.2d 165 (1963) (testator sat in car while witnesses signed in bank window); Poindexter's Adm'r v. Alexander, 277 Ky. 147, 125 S.W.2d 981 (1939) (witnesses signed will in a room adjoining that of the bed-ridden testatrix so that it was impossible for the testatrix to have observed the signing).
transaction. Conconscious presence requires that the witnesses be physically nearby and that the testator be cognizant of what is occurring. Holographic wills. Many states recognize that circumstances occasionally necessitate other types of testamentary transfer and have dispensed with the usual formalities in certain limited situations. One relaxation of formalities recognized in 19 states is the holographic will, which is a testament entirely handwritten and signed by the testator. As a general rule, these statutes dispense with the requirements of attestation and other formalities of execution, provided that the will is completely handwritten and signed by the testator. In the remaining states, the holographic nature of the will is immaterial, and all the formalities of ordinary wills must be met. In all of the states which recognize holographic wills, such wills are subject to the usual rules of testamentary capacity and intent. The blind testator presents a special problem. Some cases have adhered to the sight rule and have required that the blind testator be in such a position that he would have been able to see the witnesses if he were not blind. Welch v. Kirby, 255 F. 451 (8th Cir. 1918). However, it is preferable to allow the blind testator's other senses to substitute for his loss of sight. In re Allred's Will, 170 N.C. 153, 86 S.E. 1047 (1915). In re Tracy's Estate, 80 Cal. App. 2d 782, 182 P.2d 336 (Dist. Ct. App. 1947). In re Hoffman's Estate, 137 Cal. App. 2d 555, 290 P.2d 669 (Dist. Ct. App. 1955) (witnesses and testator were separated by only a few feet and perhaps a partly closed door); In re Lane's Estate, 265 Mich. 339, 251 N.W. 590 (1933) (witnesses signed in corridor outside the testator's hospital room). See appendix, p. 1400 n.23 infra. Eight states also require that the testator date the will. See Cal. Prob. Code § 53 (West 1956); La. Civ. Code Ann. arts. 1574, 1588 (West 1952); Mont. Rev. Code Ann. § 91-108 (1969); Nev. Rev. Stat. §§ 133.090, 136.190 (1967); N.D. Rev. Code § 56-0304 (Supp. 1971); Okla. Stat. tit. 84, § 54 (1970); S.D. Code § 29-2-8 (1967); Utah Code Ann. § 74-1-6 (1953). The date usually must be in the handwriting of the testator. In re Estate of French, 225 Cal. App. 2d 9, 36 Cal. Rptr. 908 (Dist. Ct. App. 1964). If part of the date is imprinted and the testator merely fills in the blanks, the will may be invalid. See Estate of Francis, 191 Cal. 600, 217 P. 746 (1923); In re Noyes' Estate, 40 Mont. 190, 103 P. 1017 (1909). But see In re Estate of Durlewanger, 41 Cal. App. 2d 730, 107 P.2d 477 (Dist. Ct. App. 1940), construing Cal. Prob. Code § 53 (West 1956) (printed matter not intended to be included in the will shall not invalidate the will). A few decisions have involved the use of a shorthand date, such as 4/14/07 or 10/3/50. The former is considered valid. See In re Estate of Chevallier, 159 Cal. 161, 170, 113 P. 130, 134 (1911). But the latter is invalid, because the date could mean either March 10 or October 3. See Succession of Mayer, 144 So. 2d 896 (La. App. 1962). An incomplete date renders the will invalid. Estate of Hazelwood, 249 Cal. App. 2d 263, 57 Cal. Rptr. 332 (Dist. Ct. App. 1967). But an incorrect date allows the will to be upheld. In re Estate of Moody, 118 Cal. App. 2d 300, 257 P.2d 709 (Dist. Ct. App. 1953). See Succession of Turner, 157 So. 2d 740 (La. App. 1963); Carr v. Radkey, 393 S.W.2d 806 (Tex. 1965). Payne v. Rice, 210 Va. 514, 171 S.E.2d 826 (1970); In re Briggs's Estate, 148 W. Va. 294, 134 S.E.2d 737 (1964).
The basic requirement that a holographic will must be entirely in the testator’s handwriting serves an evidentiary purpose in the prevention of fraud since holographic wills do not require witnesses. Yet, this formality has engendered a substantial amount of case law over what constitutes a completely handwritten document. A typewritten will signed by the decedent is fatally defective as not being entirely in his handwriting. Problems arise where the paper upon which the will is written contains printed, stamped, or typed language, or words written by someone other than the testator. This situation sometimes arises where the will is handwritten on hotel stationery, and the name and location of the hotel are imprinted on the paper. If it appears that the non-holographic matter was neither included nor incorporated into the handwritten language, the will is valid. Other cases have turned on the question whether or not the testator intended the imprinted words to be part of his will. If he did, the will is unacceptable; if he did not intend to include the imprinted words, the will, minus the non-holographic part, is valid. Other courts, more lenient in their treatment of non-holographic matter, hold that such printed or stamped language is immaterial, providing that the handwritten part is sufficient to constitute a coherent testament.

In every state which permits holographic wills, the testator must sign the document. The rules regarding the sufficiency of the testator’s signature on a formal will are equally applicable to holographic wills, except that no proxy signing should be allowed. In most states the testator’s requisite testamentary intent exists. See, e.g., In re Estate of Morris, 268 Cal. App. 2d 638, 74 Cal. Rptr. 32 (Dist. Ct. App. 1969); In re Estate of Wolfe, 260 Cal. App. 2d 587, 67 Cal. Rptr. 297 (Dist. Ct. App. 1968); In re Estate of Darns, 247 Cal. App. 2d 254, 55 Cal. Rptr. 463 (Dist. Ct. App. 1966).


153 Fairweather v. Nord, 388 S.W.2d 122 (Ky. 1965). One case went so far as to validate a holographic will where only the dispositive portions and the signature were written by hand in the blanks on a printed form. In re Parson’s Will, 207 N.C. 584, 178 S.E. 78 (1935). See also Uniform Probate Code § 2-503.

154 But in In re George’s Estate the court stated by way of dictum, “It is . . . settled in Mississippi that holographic wills must be ‘subscribed’ by the testator or another for him.” 208 Miss. 734, 749, 45 So. 2d 571, 572 (1950). This appears to be a misinterpretation of the Mississippi statute which allowed the testator to dispense with attesting witnesses only when the will is “wholly written and subscribed by himself or herself.” Miss. Code Ann. § 657 (Recomp. Vol. 1956) (emphasis added).
signature anywhere on the holographic will is permissible, as long as it appears that the writing represents a complete will.\textsuperscript{155}

\textbf{THE UNIFORM PROBATE CODE AND THE EXECUTION OF FORMAL AND HOLOGRAPHIC WILLS}

Section 2-502 of the \textit{Uniform Probate Code} states:

Except as provided for holographic wills, writings within Section 2-513,\textsuperscript{156} and wills within Section 2-506,\textsuperscript{157} every will shall be in writing signed by the testator or in the testator's name by some other person in the testator's presence and by his direction, and shall be signed by at least 2 persons each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will.\textsuperscript{158}

Pursuant to its policy of validating wills whenever possible, the \textit{Uniform Probate Code} has reduced the formalities of execution to a minimum.\textsuperscript{159} A testator's signature, plus the signatures of two witnesses\textsuperscript{160}

\textsuperscript{155} \textit{In re Jones} Estate, 44 Tenn. App. 323, 314 S.W.2d 39 (1957); see \textit{In re Estate of Phippen}, 238 Cal. App. 2d 241, 41 Cal. Rptr. 648 (Dist. Ct. App. 1965) (will was upheld where the only signature was at the end of the first six of twelve testamentary pages). A few states, for example Kentucky, require signature at the end of the will. \textit{See Fair-weather v. Nord}, 388 S.W.2d 122 (Ky. 1965).

\textsuperscript{156} It is beyond the scope of this article to discuss the concept of incorporation by reference. However, section 2-513 of the \textit{Uniform Probate Code}, by adding a new dimension to the law of wills, should be mentioned. This section is part of the basic attempt of the \textit{Code} to insure effectuation of the testator's intent and at the same time relax the formalities of execution. Section 2-513 permits a testator to dispose of certain items of tangible personal property by referring to a separate document which contains his testamentary disposition and which may be prepared after the execution of his will and which may be altered from time to time. The only requirement is that the writing be in the testator's handwriting or be signed by the testator.

\textsuperscript{157} Section 2-506 enunciates the \textit{Code}'s choice of law rule as to execution and therefore will become of only minimal importance once the \textit{Code} is uniformly adopted throughout the United States. Section 2-506 provides that a will which does not meet the requirements of section 2-502 or section 2-503 is nevertheless valid if it is valid at the time it is executed under the law of the place of execution. In addition, it makes provision for validating a will in the code state if the will had been validly executed according to the law of the place where the testator is domiciled, has an abode, or is a national either at the time of execution or at the time of his death.

\textsuperscript{158} \textit{Uniform Probate Code} § 2-502.

\textsuperscript{159} \textit{Id.} Part 5 General Comment.

\textsuperscript{160} The \textit{Code} simplifies the law relating to the competency of witnesses: "Any person generally competent to be a witness may act as a witness to a will." \textit{Id.} § 2-505. An interested witness is no longer disqualified, nor is a gift to an interested witness invalidated or forfeited. The Comments to Section 2-505 state that permitting interested witnesses to testify and retain their bequest will not increase the opportunity for fraud. The law of undue influence sufficiently safeguards against fraud and illegality. However, to avoid
usually will satisfy the requirements of execution. There are, however, some problems in the concept of witnessing. The Code Comments to section 2-502 state that, "[e]ach of the persons signing as witnesses must ‘witness’ any of the following: the signing of the will by the testator, an acknowledgment by the testator that the signature is his, or an acknowledgment by the testator that the document is his will." But there is no definition of the term witness in the Code. In fact, the Comment to section 2-502 declares that, "[t]here is no requirement . . . that the witnesses sign in the presence of the testator or of each other." Conceivably 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. If this is correct, the possibility of fraud or substitution of the wrong document would render unreliable the document being offered for probate. In this same context, the Code would negate the basic policy of the Statute of Frauds. The only Code language that may prevent such interpretation is the word “witnessed.” In the absence of further definition, a court confronted with this problem probably would look to state law to interpret what constitutes the act of witnessing, as that term is used in section 2-502. However, some form of presence is expressly required by every state statute, and therefore the Code’s elimination of the presence requirement will limit the applicability of state law. It would be preferable to require that the witnessing of the testator’s signature, or the testator’s acknowledgment of the signature or of the will itself be done in the testator’s conscious presence.

The Code retains the universal requirement that the will be in writing and signed by the testator. The Code specifically states that signing by mark, or by another on behalf of the testator, provided that person is acting at the direction of the testator and in his presence, constitutes a valid signature. The necessity of publication, a formality which only minimally has served to buttress the reliability of intended testamentary transfers, has been deleted. Nor is there a requirement in the Code of a request to witnesses. If the testator signs outside the presence of the witnesses, later he merely must acknowledge that the signature is his or that the document is his will, and have them sign as witnesses. Finally, the testator need not sign the will at the end. A signature in the body of the will, which is intended to constitute execution, would satisfy the Code.

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1 See appendix, p. 1394 infra.
2 Uniform Probate Code § 2-502, Comment.
3 Id.
If the Code has reduced the formalities of execution of an ordinary will to a minimum, the safeguards required of a holographic will have been virtually obliterated. Section 2-503 declares that "[a] will which does not comply with Section 2-502 is valid as a holographic will, whether or not witnessed, if the signature and the material provisions are in the handwriting of the testator."\(^{164}\) The usual requirements that the holographic will be entirely handwritten and dated are eliminated, as of course, is the need for attestation. All that is necessary now is that the testator sign and that the material provisions be in his handwriting.

In evaluating the section governing holographic wills two basic policies—maximum opportunity to execute a will and testamentary safeguards—collide. The Code's rationale is that "[f]or persons unable to obtain legal assistance, the holographic will may be adequate."\(^ {165}\) The importance of this policy hardly could be overstated. However, safeguards have been reduced to the point where testamentary intent may itself be in question and where opportunities for fraud abound. Nevertheless, the Code policy favoring maximum testamentary freedom is more significant and should be effectuated.

Although the Code may be criticized because of problems raised by the failure to explain what constitutes witnessing and because of the drastic reduction of holographic will safeguards, these criticisms are relatively minor and are far outweighed by the benefits to be gained from universal adoption of the Code. Many of the common law requirements of testamentary transfer are outmoded or no longer serve a valid function and should be eliminated. Other formalities make the execution of a will unduly complicated, and the strict enforcement of some requirements results in the denial of probate to many wills. Finally, in view of the tremendous mobility of modern society, uniformity and consistency in the formalities of testamentary transfer certainly are desirable.

**Protection of the Surviving Spouse**

The desire to protect a surviving spouse from disinheritance and concomitant destitution has produced some of the major limitations on the general policy favoring freedom of testation. The purpose of this section of the article is to evaluate the need for protection of the surviving spouse, to describe the various forms that such protections have taken prior to the advent of the Uniform Probate Code, and to analyze the extreme changes wrought by the Code.\(^ {166}\)

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\(^{164}\) Id. § 2-503.

\(^{165}\) Id. § 2-503 & Comment.

\(^{166}\) It should be noted that most of the methods of protecting the surviving spouse discussed herein apply to the widower as well as the widow.
Dower.

English-speaking peoples first began to respond to the plight of the disinherited spouse in feudal times. Since land was the principal wealth, it was decided that a widow should be entitled to a one-third life interest in all lands of which her husband was seised during the marriage. The wife's interest dated from the time of the marriage and included all lands acquired during the conjugal relationship. The dower interest was inchoate in that it existed before a husband's death but did not become a possessory interest unless and until she survived her husband. The inchoate interest remained attached to the land even if the husband were to transfer it to another. The wife's claim could be exercised against beneficiaries or creditors of the estate, irrespective of the creditors' knowledge of the existence of the interest. The wife's interest became consummate on the death of her husband. One-third of the estate would be set off and she could live on that land and derive the benefits which arose from it. If this were impractical, the widow would receive one-third of the income produced by the land for her life.

Common law dower's major drawback was its exclusive applicability to land. Since our present system of wealth is oriented far more toward intangible property, such as stocks, bonds and cash, dower is now of limited assistance to the disinherited spouse. Moreover, today's investments in land are often in such a form as to be treated as personalty and therefore are not subject to dower.

Another drawback to the effectiveness of dower is the ease with which the inchoate interest can be lost by the wife's "voluntary" relinquishment of her right. The inchoate power to veto a transfer in lands

167 See T. Atkinson 104-05; 2 Powell on Real Property § 209, at 140 (1971). Curtesy, a device similar to dower, entitled the husband to possession or profits of all lands of which his wife was seised during marriage, dependent upon the birth of issue. T. Atkinson 105.

168 2 Powell, supra note 167, § 202[2], at 154-55; 1 C. Sarnesker, Treatise on the Law of Dower 602 (1883). In Westfall v. Hintze, the defendant applied to plaintiff for a mortgage and represented that he was unmarried. When plaintiff attempted to foreclose, the court held that the wife's dower interest was superior to that of the mortgagee, despite the fraud. 7 Abb. N. Cas. 236 (N.Y. Sup. Ct. 1878).

169 At common law there was a presumption that unless otherwise specified, bequests in the will were in addition to dower. However, a husband could compel his widow to choose between a provision in the will and her dower interest. Stevenson, Does Dower Still Lurk in Election to Take Under the Will?, 30 U. Cin. L. Rev. 172, 176 (1961).

170 Note, Perfection of the Spouse's Share under Elective Share Statutes, 18 Vand. L. Rev. 2090, 2091 (1965). The Statute of Distribution in 1670 gave the widow a share in her husband's personalty. 22 & 23 Car. 2, c. 10 (1670). But this interest could be avoided by inter vivos transfer and was also subject to the husband's creditors. T. Atkinson 105.
also can be a serious impediment to the sale of realty. The failure to accomplish the purpose for which it was created and the impediment to real estate transactions have caused most states to abolish dower entirely, to modify it to include personalty, or to enact statutes providing for a minimum forced share.

The Forced Share and the Right of Election. The right of election is the right to renounce the will of a deceased spouse and take in its stead a statutory percentage of the estate, usually one-third or one-half of the net probate assets, both real and personal. In most jurisdictions the election must be made within a specified time period, be in writing, and be filed with the court having jurisdiction.

The forced share is quite different from dower. In the first place, it operates on all real and personal property which make up a decedent's probate estate. Secondly, the wife's interest in the property does not exist until the death of her husband. The "inchoate" aspect of dower is absent and the property owner, within limits, can dispose of it during his life. Unlike dower, creditors are generally superior to the statutory share of the surviving spouse. Finally, the widow has a fee interest in the property rather than the life interest she receives under a dower system. This makes valuation of her interest simpler, protects her from claims of waste by a remainderman, eases alienability of the property, and increases the market value of her interest. On its face the forced share seems to be an efficient and adequate means of protecting the surviving spouse. The widow is given what in most instances is a greater interest, she is given it outright, and the potential inhibition of land transactions is eliminated. The husband who wishes to disinherit his wife and leave his property to others seemingly is thwarted.

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171 Dower rights cloud the title of every piece of land that has been owned by a married person. Expensive title searches are complicated by problems such as the exact date of a marriage or the validity of a divorce. M. Rheinsteiner, Cases on Decedent's Estates 67 (1955).

172 Dower has been retained in 15 states and modified in eight states to grant a fee interest rather than a life estate. Two states, North Dakota and South Dakota, have eliminated all protection of the spouse. The remaining states give the surviving spouse a fixed percentage of the entire estate. W. Bowe & D. Parker § 3.13, at 97.


175 See notes 178-181 infra and accompanying text.
However, the forced share met a fate similar to that of many new laws. No sooner was it a part of a state's decedents' estates law than attorneys began to find ways for their clients to get around it. The key to the avoidance of a forced share statute is that only the assets which pass through the formal probate estate are subject to the statute's reach. Therefore, assets transferred by way of any one of several will substitutes would not be included in the source from which the surviving spouse's election is made. There is a plethora of will substitutes available for this purpose.\textsuperscript{196} Joint property with right of survivorship passes the property by operation of law to the surviving joint tenant, bypassing the surviving spouse. Life insurance passes directly to the named beneficiary by means of contract and never becomes part of the assets of the estate. Savings bank trusts or Totten trusts pass directly to the beneficiary assets remaining in the bank account after the depositor's death; the depositor retains control over the property and can withdraw any or all of the funds at any time. Yet what remains at his death may elude the reach of his surviving spouse. This is the common thread in all substitutes: the husband can deplete his estate, and leave nothing against which to assert the election.

Finally, the most significant method of statutory share avoidance is the use of the revocable or irrevocable inter vivos trust. Those who heeded the warning in \textit{King Lear} not to part entirely with their wealth nevertheless can enjoy most of the benefits of their property and still circumvent the forced share. Assets are placed in trust, and the husband retains a life interest in all income and the power to invade corpus. At his death the principal is distributed. The surprised widow learns that she is not the trust beneficiary and that the assets do not make up part of her late husband's probate estate. Before the advent of certain state legislation and of the \textit{Uniform Probate Code} the widow's only hope was to call upon the courts to prevent avoidance of her statutory share. The courts have attempted to help but with mixed success.

The major case which seeks to protect the widow's share is \textit{Newman v. Dore}.\textsuperscript{197} Three days before his death, a wealthy testator transferred all of his real and personal property to a trust over which he retained the right to income, the power of revocation, and control over the trustees. The New York Court of Appeals ruled that the transfer was

\begin{thebibliography}{9}
\bibitem{197} 275 N.Y. 371, 9 N.E.2d 966 (1937).
\end{thebibliography}
"illusory"—the testator had not made an actual divestiture of the property because he retained too much control over the corpus of the trust.\textsuperscript{178} Other courts, however, have found the illusory transfer test difficult to administer. Opinions are inconsistent as to what transfers were illusory and which were not. The New York court had framed the standard in objective terms, but evidence of the testator's intent and state of mind crept into opinions.\textsuperscript{179} Some courts have refused to adopt the illusory transfer standard and instead use a "fraud or intent" test. Under this standard any transfer made with the intent to deprive the widow of her share constitutes a fraud.\textsuperscript{180} The burden of proof under this standard is difficult to meet, and guidelines are necessarily difficult to apply; thus many courts have decided cases on the fairness of the transfer.\textsuperscript{181} The majority rule still remains that even if the purpose of an inter vivos transfer is to deprive the surviving spouse of her statutory share, the transfer is valid if it is an actual transfer of an interest in the property.\textsuperscript{182}

\textbf{Community Property.} In the United States, community property is a statutory creature which has been adopted in differing forms by eight states.\textsuperscript{183} Despite the differences which do exist, community property laws in the United States are similar to the type developed in Spain.

\textsuperscript{178} Id. at 381, 9 N.E.2d at 969. The court also held that the intent to disinherit was not relevant to the decision. Id. at 379, 9 N.E.2d at 968.

\textsuperscript{179} Compare Kerwin v. Donaghy, 317 Mass. 559, 59 N.E.2d 299 (1945) (testator placed property in name of child with stipulation that child held property for him) and Edgar v. Fitzpatrick, 377 S.W.2d 314 (Mo. 1964) (gift in trust to children of prior marriage but settlor retained all incidents of ownership) and Bolles v. Toledo Trust Co., 144 Ohio St. 195, 58 N.E.2d 381 (1944) (settlor reserved income and right to revoke or amend) with Allender v. Allender, 199 Md. 541, 87 A.2d 608 (1952) (settlor transferred stock in trust to children but continued to vote shares and receive dividends; held not illusory).

\textsuperscript{180} See, e.g., Mushaw v. Mushaw, 183 Md. 511, 39 A.2d 465 (1944); Merz v. Tower Grove Bank & Trust Co., 344 Mo. 1150, 130 S.W.2d 611 (1939); Hamm v. Piper, 105 N.H. 418, 201 A.2d 125 (1964); Sherrill v. Mallicote, 417 S.W.2d 798 (Tenn. App. 1967). See also Payne v. Tatum, 236 Ky. 306, 33 S.W.2d 2 (1930) (if a substantial portion of an estate is placed in trust without wife's knowledge there is presumption of improper motive). Some courts have required actual fraudulent intent, which is more than mere intent to deprive the widow of her share. See Frey v. Wubbena, 26 Ill. 2d 61, 185 N.E.2d 850 (1962); In re Rynier's Estate, 347 Pa. 471, 32 A.2d 736 (1943); De Noble v. De Noble, 331 Pa. 273, 200 A.77 (1938).

\textsuperscript{181} Factors to consider in determining whether the transfer was completed with fraudulent intent include: the size of the transfer in relation to the total assets of the estate; the time of the transfer in relation to the husband's death; relations between husband and wife at the time of the transfer; and the source of the property. Sherrill v. Mallicote, 417 S.W.2d 798, 802 (Tenn. App. 1967).

\textsuperscript{182} See, e.g., Holzbeierlein v. Holzbeierlein, 91 F.2d 250 (D.C. Cir. 1937); Kerwin v. Donaghy, 317 Mass. 559, 59 N.E.2d 299 (1945); In re Estate of Jeruzal, 269 Minn. 183, 130 N.W.2d 473 (1960).

\textsuperscript{183} California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington.
In general, the husband and the wife become co-owners of property acquired by either during their marriage as a result of their labor or industry.\textsuperscript{184} Property owned individually before the marriage and property received as a result of a gift, bequest, or devise to only one of the spouses is unaffected by community property laws and retains the characteristics of individually owned property.\textsuperscript{186} The co-ownership operates as a conjugal partnership with managerial responsibilities in the husband.\textsuperscript{188} Community property cannot be given away without the consent of both partners and upon the death of a marriage partner, one-half passes directly to the spouse and the other half according to the will of the decedent.\textsuperscript{187} Thus, each spouse is assured of receiving the financial security inherent in ownership of one-half of the family's assets.

Despite a presumption that property is held by the community, a loophole exists in the system. Property acquired through labor and industry by one partner while domiciled in a non-community property state may remain under separate ownership when the couple moves to a community property state.\textsuperscript{188} A second major defect in the community property system is that property inherited by one spouse is not considered the community property of both.\textsuperscript{189} As a result, in a family which depends upon the income derived from inherited property, a spouse is left with little community property from which to derive her share. Some states have ameliorated this problem by providing that income derived from inherited property during the marriage is community property despite the fact that the source of the income derives solely from one spouse. These problems are indicative that community property does not provide air tight protection for the surviving spouse. However, as a result of resistance on the part of representatives from community property states, the provisions of the \textit{Uniform Probate Code} dealing with the elective share of a surviving spouse will not apply in those states.\textsuperscript{190}

\textit{Major Statutory Reforms Before the Uniform Probate Code.}

In 1947 the state of Pennsylvania took steps to close holes existing in

\textsuperscript{184} W. Bowe & D. Parker \$ 16.9, at 778.
\textsuperscript{190} See \textit{Uniform Probate Code}, Part 2, General Comment; notes 201-221 infra and accompanying text.
forced share legislation. Pennsylvania enacted a deceptively simple piece of legislation: to the extent that a transferor has retained a power of revocation or consumption over the principal or a power of appointment over the corpus of the trust, the surviving spouse may treat that transfer as testamentary and include it among the assets against which she may assert her election. The statute applies to all trusts except those whose corpus is composed of an insurance policy. Assets in fact received by a spouse through testamentary substitutes are not credited against the spouse's share.

Unfortunately the simplicity of the statute has been its major drawback. A good deal of litigation has arisen in attempts to clarify the meaning of phrases such as "conveyance of assets" or "power of consumption." From the existing litigation, future cases likely will turn on the technical nature of the transfer involved. For example, a wife may successfully go against a joint tenancy because her husband has the power of consumption over it. But, where a husband has retained only the right to income from a trust he has created and the principal is beyond his control, the transfer is insulated from attack. By permitting form to dominate substance Pennsylvania's attempted reform falls short of the mark.

The New York statute is more complicated and more effective than its Pennsylvania counterpart. Under New York law, the widow is permitted to elect against her husband's will and claim a percentage of what the New York legislators have termed the net estate. This net estate is composed of all probate assets plus the capital value of the following substitutes: a gift causa mortis; a Totten trust created in any bank or savings and loan association, domestic or foreign, on deposit at death; a joint savings account plus all dividends credited thereon at the time of death; property in joint tenancy or tenancy by entirety with rights of survivorship to the extent that the funds were supplied by the decedent; and property placed in trust over which the decedent retained either alone or in conjunction with another the power to revoke the trust or to consume or invade the principal. The net estate does not include, inter alia, life insurance, pension plans, annuities, health insurance, and

192 Life insurance specifically was excluded by a later amendment to the statute. Id.
196 Id.
197 Id. § 5-1.1 (b) (1).
U.S. savings bonds. Additionally, if a wife is the beneficiary of any testamentary substitute other than life insurance, that property is counted against her share in computing the net estate.\(^{198}\)

The New York statute, to a great extent, accomplishes its purpose and closes the holes in forced share legislation. Avoidance, however, is still possible through conversion of the husband's assets into insurance, annuities, pensions or savings bonds. Furthermore, the husband could transfer his property in trust retaining the right to income and giving the power to invade principal to a friendly but technically adverse party. These are rather small loopholes but they prevent the New York law from being a completely satisfactory solution.\(^{199}\)

With a few exceptions, existing methods for protecting the spouse from disinheritance have been rather ineffective. The law of wills is still haunted by the spectre of the disinheritred widow left out in the cold by a cruel and heartless spouse.\(^{200}\)

**UNIFORM PROBATE CODE**

Part 2 or article 2 of the *Uniform Probate Code*, entitled "Elective Share of Surviving Spouse" is a massive legislative undertaking designed to solve the problem of securing to the surviving spouse a proper share of the decedent's estate. The response to two policy questions underlies the *Code*’s solution. The first is whether a need actually exists for uniform legislation to protect against the decedent's disinheritance of his surviving spouse. The *Code* recognizes that commentators have questioned such a need and responds by pointing out that nearly every state offers some form of protection to the surviving spouse. The existing forms of protection—dower, statutory share, community property and the miscellaneous individual state legislative solutions—all have their shortcomings. Yet, to merely cite the prevalence of such protective devices really does not answer the question of the need for them. A higher degree of justification should be required for an infringement of freedom of testation. Furthermore, disinheritance of surviving spouses is an infrequent occurrence.\(^{201}\) However, the need for effective protection of

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198 Id. § 5-1.1 (b) (2).


200 *See* Haskell, *supra* note 176, at 508.

201 A recent study of probate proceedings in Cook County, Illinois, concluded that when there was a surviving spouse, 27 out of 28 wills left the entire estate to the spouse. *Plager, supra* note 173, at 712. But another commentator has concluded that although presently the number of evasion cases is not large, the number is likely to increase,
the surviving spouse, as a societal matter, outweighs infringement upon
the individual decedent's power to transfer his property as he pleases. Disinheritance of the surviving spouse is like leprosy; it may not occur
often, but when it does its treatment is crucial.

The second policy issue is to determine the quantity of the surviving
spouse's share. The choices are either to give to the surviving spouse an
amount sufficient to meet that person's personal needs or to make the
elective share a percentage of the decedent's assets. The Code utilizes
the percentage method both because it is the traditional answer and be-
cause determining the needs of the surviving spouse would be difficult to
forecast and to administer. Close judicial supervision of every case
would be required. Moreover, questions of subjective versus objective
needs arise, the answers to which inevitably would lead to political and
social matters far more significant than the original questions them-

The concern with the size of the elective share also relates back to
the marital situation itself. The concept of married persons owning, en-
joying and using their property in concert should be encouraged. Con-
certed ownership necessarily raises factors of reliance and expectation
during the marriage, which should be buttressed by statute. The Code's
traditional view in meeting this concern is well founded. The answer to
the problem of the amount of the spouse's share is and should be a rea-
sonable proportion of the decedent's assets.

The Code proposes a significantly new approach to the problem of
the surviving spouse's share. Section 2-201 establishes the right to an
elective share for any married person whose predeceased spouse was
domiciliary of the state. The elective share of the surviving spouse is set
largely as a result of an increase in family disharmony. W. MacDonald, Fraud on the
Widow's Share 8 n.9, 10-15 (1960).

202 In England, if the court is of the opinion that the will did not make reasonable
provision for the maintenance of a surviving spouse, periodic payments in an amount
designated by the court may be ordered. Inheritance (Family Provision) Act of 1938,
1 & 2 Geo. 6, c. 45. However, the maintenance provisions require that the court familiar-
ize itself with the decedent's estate and his family affairs, and that it exercise great
discretion in determining the spouse's needs. Plager, supra note 173, at 683.

203 See Clark, The Recapture of Testamentary Substitutes to Preserve the Spouse's
Elective Share: An Appraisal of Recent Statutory Reforms, 2 Conn. L. Rev. 513, 543

204 "If a married person domiciled in this state dies, the surviving spouse has a right
election to take an elective share of one-third of the augmented estate under the
limitations and conditions hereinafter stated." Uniform Probate Code § 2-201(1).
Whether or not the surviving spouse elects against the will, she is entitled to homestead,
family allowances and exempt property. 2 Uniform Probate Code Notes 7 (Oct., 1972).
at one-third of the decedent's augmented estate, offset by property derived from the decedent.

Section 2-202, the key section dealing with the spouse's share, defines the augmented estate. The foundation of the augmented estate is the net probate estate to which is added the value of property transferred for less than full consideration by the decedent while married, where such transfers did not benefit the surviving spouse. All of this applies only to transfers to which at least one of the following classifications is applicable: (1) the decedent retained possession, enjoyment or right to income from the transferred property; (2) the decedent, alone or in conjunction with another person, retained the power to revoke or to use or allocate principal; (3) retention by the decedent and another person at the time of decedent's death of a survivorship right in transferred property; or (4) any transfer made by decedent within two years of his death to any one donee in excess of §3,000 in either of said two years. By adding back into the augmented estate property transferred inter vivos by the decedent where he retained benefit from or control over the assets, the Code's purpose is to thwart the decedent's deliberate attempt to use will substitutes in order to defeat the elective share of his surviving spouse. The testator still can use outright transfers, such as gifts or irrevocable trusts with no retained benefits to deplete the estate and thus to reduce the elective share, but this is less likely to occur where the transferor keeps neither benefit nor control of the transferred assets.

Another large category of property included in the augmented estate is property derived from the decedent in any way other than by inheritance, owned by the surviving spouse at the time of the decedent's death, and for which the survivor gave less than full consideration. This property, even if no longer owned by the surviving spouse at the time of the decedent's death, is includable in the decedent's augmented estate if the property has been transferred by the surviving spouse in such a way as to be a part of the survivor's augmented estate had the survivor died first. In effect, the Code includes in the decedent's augmented estate the value of any property given by the decedent to his surviving spouse. Property thus acquired then becomes a credit against

205 Uniform Probate Code § 2-202(1). But any transfer made with the written consent of the spouse is valid. Id. § 2-202(2).
206 Id. § 2-202(3).
207 Id. § 2-202(3) (iii).
208 The Code does not distinguish between gifts and property the surviving spouse acquired in the form of support payments, household goods, or necessaries. See Clark,
the elective share.\textsuperscript{209} The Code's purpose here is to prevent the surviving spouse from electing a share of the probate estate when the spouse has received a fair share of the total wealth of the decedent either during the lifetime of the decedent or at death by life insurance, joint tenancy assets and other nonprobate arrangements.\textsuperscript{210}

For example, assume that the decedent's probate assets after payment of all debts and taxes amount to $80,000. This net probate estate is called the $x$ factor. Decedent's will leaves his net estate to his brother. Assume further that the decedent and his brother held property worth $40,000 in joint ownership with right of survivorship. The joint property will substitute (or perhaps evasion element) will be called the $y$ factor. Finally, assume that the surviving spouse receives, upon the death of her husband and because of premiums paid by him, life insurance proceeds in the amount of $30,000. This property derived from the decedent will be called the $z$ factor. The Code formula is as follows:

\[
\text{Elective share} = \frac{1}{3} (x^{212} + y^{218} + z^{214}) - 2^{215}
\]

\[
= \frac{1}{3} ((80,000 + 40,000 + 30,000) - 30,000)
\]

The elective share is $20,000 and the survivor keeps the life insurance proceeds. Therefore, the surviving spouse will take a total of $50,000.

Had the decedent also named his brother as beneficiary of the life insurance, the result in the example should be the same, but it is not.\textsuperscript{216} Section 2-202 excludes life insurance from the $y$ factor, the category of transfers to other persons.\textsuperscript{217} Further, any transfer to which the surviving spouse consents in writing is also excluded from the augmented estate. Finally, the right of election is personal to the surviving spouse\textsuperscript{218} and may be waived either before or after marriage.\textsuperscript{219}

\textit{supra} note 203, at 543 n.81. Nor does the Code distinguish between transfers made before or after marriage. See Uniform Probate Code § 2-202, Comment.

\textsuperscript{209} Uniform Probate Code § 2-207 (a).
\textsuperscript{210} Id. § 2-202, Comment.
\textsuperscript{211} Id. § 2-201.
\textsuperscript{212} Id. § 2-202.
\textsuperscript{213} Id. § 2-202 (1) (iii).
\textsuperscript{214} Id. § 2-202 (3) (i).
\textsuperscript{215} Id. § 2-207.
\textsuperscript{216} Wife will take one-third of ($80,000 + $40,000) = $40,000.
\textsuperscript{217} Life insurance proceeds payable to the surviving spouse are considered property derived from the decedent and are included in the equation as the $z$ factor. Uniform Probate Code § 2-202, Comment.
\textsuperscript{218} Id. § 2-203 and Part 2, General Comment.
\textsuperscript{219} Id. § 2-204. The provision permitting waiver is desirable so that parties to a second or third marriage can insure that property derived from a prior spouse will pass to the issue of the prior spouse rather than to the new spouse. Id. § 2-204, Comment.
Perhaps the provision in the *Code* that will give state legislatures the most concern is the contribution section. The *Code* mandates that gratuitous transferees of property subject to the spouse's elective share are liable, pro rata, for contribution to make up that elective share. While potentially troublesome, no better way of enforcing the elective share of the surviving spouse is apparent.

In evaluating the *Uniform Probate Code*’s new approach to the problem of the elective share of the surviving spouse, it is interesting to note that the *Code*’s introductory Comment admits that, “almost every feature of the system described herein is or may be controversial.” Professor Clark writes that, “it appears that the authors did not approach their work with full confidence in the enterprise.” In the course of arguing that the elective share statute should not be adopted, Clark goes on to say that “… in the end the Code provisions are fatally deficient, as are those of New York and Pennsylvania, because every family presents a different set of problems and no single prescription can cure them all.”

The new system will indeed be controversial and will engender a great deal of discussion, as well it should. But in the final analysis, the *Uniform Probate Code* should be adopted.

Legislation is needed to protect the surviving spouse from disinher- itance. The “every family has a different set of problems” rationale could be used to argue against nearly every piece of legislation. Since past efforts to protect the surviving spouse have been shown to be inadequate, the drafters of the *Code* have tried to close the loopholes and they have come closer than anyone else. At the same time, by adding into the augmented estate and then crediting against the elective share the value of property that the surviving spouse has derived from the decedent, the *Code* strikes an important balance between protection of the surviving spouse and preventing elections where the survivor already has gotten a fair share of the deceased partner’s assets. For this reason alone, legislatures should be receptive to this section of the *Code*.

To be sure, the *Uniform Probate Code* has flaws. When calculating the augmented estate life insurance is excluded from a transfer made by the decedent to other persons which is a clear invitation to a testator determined to avoid his spouse’s elective share. Another potential problem is the release factor. Coerced waiver of dower rights is a major defect in existing systems, and the same problem is possible under the *Code*. Some further requirement such as noticing or witnessing a waiver would

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220 Id. §§ 2-205(d), 2-207.
221 Clark, supra note 203, at 541-42.
222 Id. at 542.
be a salutary protection. Overly complex problems will arise because of the *Code's* presumption under section 2-202 (3) (iii) which makes it necessary for the surviving spouse to establish that the property in question was derived from another source rather than from the decedent, and places the burden of proof on the surviving spouse.

The answer to the charge that the *Code* will produce massive administrative problems lies in the Pennsylvania and New York experiences to the contrary. The *Code's* authors believe that, "... it should not complicate administration of a married person's estate in any but very unusual cases."

In closing, it should be reiterated that the entire subject of the surviving spouse's elective share is difficult, subtle and permits of no easy solution. The matter needs careful study by the several state legislatures now considering the *Uniform Probate Code*. One vote aye, here.

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223 In a recent speech in New York, Professor Richard Wellman, one of the principal authors of the *Uniform Probate Code* commented: "it would not have been possible from a political point of view, to offer a uniform probate code to replace existing state schemes without including provisions to replace existing probate devices for protecting spouses. So [the drafters] had to frame a scheme that we knew would be unsatisfactory from many points of view." 4 *Uniform Probate Code Notes* 3 (March, 1973). It is unfortunate that the drafters view their solution to the problem of the protection of the surviving spouse with a negative attitude:

"Faint heart never won fair lady!
Nothing venture, nothing win —"

W. S. Gilbert, *Iolanthe*, Act II
### APPENDIX

#### Requirements for the Execution of Formal Wills

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<th>JURISDICTIONS AND STATUTES</th>
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1) Matter following testator's signature does not invalidate will.
2) Procedure need not be followed in any precise order.
3) Formalities must be completed within a 30-day period.

Witnesses need not sign in each other's presence.
| TESTATOR | WITNESSES | MISC. | JURISDICTIONS

| TESTATOR | WITNESSES | MISC. | JURISDICTIONS

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**KEY TO CHART—REQUIREMENTS FOR THE EXECUTION OF FORMAL WILLS**

1. Not in principal execution section, but in a supplemental section.
2. Must be 14 years or older.
3. Not expressly stated, but implicit in language.
4. Expressly authorizes signature by mark.
5. Person subscribing testator's name must state that he did so at the request of the testator.
6. Competent to be a witness generally.
7. Expressly provides that a violation of this requirement will not affect the validity of the will.
8. Witnesses must be present at the same time.
9. Requires "express direction."
10. Acknowledgment of the will is necessary.
11. Expressly provides that the procedure for formalities need not be followed in any precise order; the formalities must be completed within 30 days.
12. Should give his residence. He shall not be counted as one of the witnesses.
13. Expressly provides that the matter following testator's signature does not invalidate the will; no effect shall be given to matter following the testator's signature or matter added after signing.
14. Expressly states that this may be done before the witnesses separately.
15. Subscriber of testator's name must also write that he signed at testator's request.
16. Provides that the matter following testator's signature will not invalidate that which comes before.
17. When signature is made by mark.
18. When signature is made by another.
19. When witnesses are necessary.
20. No will shall be valid unless proved by oaths or affirmations by two witnesses.
21. Testator must sign in such a manner as to make it manifest that the name is intended as a signature.
22. Person subscribing the testator's name must state that he did so at the testator's request; this is not required if testator makes his mark on the will.
23. Permit holographic wills.