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Dispensing with Wills' Act Formalities for Substantively Valid Wills

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Introduction

IT is elementary law that, although a writing may have been executed in accordance with all of the mechanical formalities of the statute of wills,[1] nevertheless the writing will be denied probate if it is the product of fraud, duress or undue influence. And this is the way it ought to be, no one should profit by such conduct. But is it not an appalling non sequitur to say that, even though clear and convincing evidence absolutely (i) negates any fraud, duress or undue influence, and (ii) establishes that the writing does represent the true testamentary intent of its author, nevertheless the writing will be denied probate solely because it was not executed in accordance with these mechanical formalities?

Our Supreme Court has stated that "(t)he purpose of the statutory requirements with respect to the execution of wills was to throw every safeguard deemed necessary around a testator while in the performance of this important act, and to prevent the probate of a fraudulent and suppositious will instead of the real one. To effectually accomplish this, *the statute must be strictly followed* (emphasis added)."[2] Unfortunately, as a consequence of strictly following the statute, the intended means (formalities) to an end (fraud prevention) have become ends themselves, and this has resulted in a number of substantively valid wills[3] being sacrificed on the alter of formality. This article argues that the time has come to stop throwing this baby out with the bath water, and it proposes the addition of a new code section that would enable courts to admit substantively valid wills to probate in clear cases, notwithstanding their failure to comply with every formality of the statute.

A Recent Case

The recent case of *Robinson* v. *Ward*[4] serves to illustrate one of the formality problems encountered in will executions. In this case, testatrix, shortly after becoming "ill with 'a violent headache' . . . directed [Katherine D.] Ward to obtain 'a legal pad.' . . . [And] '(w)rite exactly what I say, and do not interrupt me."[5] The first sentence written by Ward, at testatrix' dictation, was "'To Katherine D. Ward I leave everything I own for her life time.'"[6] Following the completion of the writing (which left the remainder of the estate to charities), testatrix "'read it over, signed her name, dated it [May 18, 1986],' and 'handed it back' to Ward."[7] Shortly thereafter, and while Ward was present, testatrix informed a friend that she had dictated her will and asked him to "'please read it and witness it—which he did.'"[8] Testatrix died the following day.

No issue of fraud, duress or undue influence was raised in this case; the trial court found that testatrix had testamentary capacity; and the parties conceded that the writing accurately expressed testatrix' intent. However, testatrix' heirs attacked the will on the ground that the statute of wills requires attestation by two witnesses and that Ward's name, written by her only in the opening sentence of the will, did not satisfy the statute's requirement for a second subscribing witness. Three dissenting justices agreed with the heirs.

But the four-judge majority concurred with the holding of the trial court that although "'(t)he words "Katherine D. Ward" written by her while not a signature when made were sufficient subscription under the unique facts of this case to constitute satisfactory compliance with the statute in question.'"[9] In concluding its opinion, the majority thought it appropriate to reiterate the following policy statement made by the Court in another 4-3 decision some 137 years earlier: "'Upon the whole, . . . there has been a reasonable and substantial, if not a literal, compliance with the requirements of the statute shown in this case, sufficient for all practical purposes, and which in favor of the testamentary right ought to be sustained. To reject the will . . . would be . . . to sacrifice substance to form, and the ends of justice to the means by which they are to be accomplished."[10]

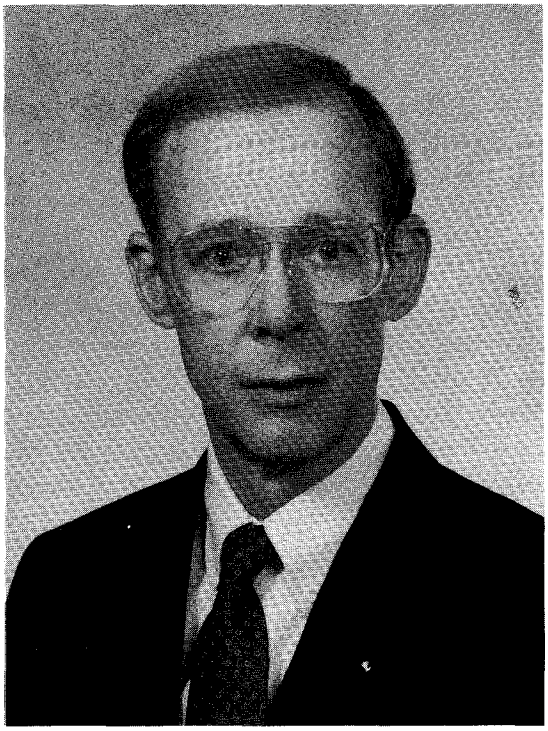
An Erroneous Premise

The typical person not encumbered by a legal education would probably agree with the outcome of the *Robinson* Case, and might be astonished at the suggestion that it could have been otherwise. However, the typical lawyer would probably have predicted a different result in *Robinson*, based on American and English precedents in formality cases. Why? Because the rules call for strictly following the statute. And why this rule of strict com-

pliance? Because it has long been believed that strict compliance with the formalities was the best way to prevent fraud. However, it is submitted that this "strict compliance" premise is fundamentally flawed for four fundamental reasons.

First, satisfaction of the statutory requirements is a rather simple matter for those who are aware of them, and therefore the schemer who seeks to procure a will through fraud, duress or undue influence will find it very easy to comply with these formalities. Second, none of these formalities are required in the case of holographic wills, and the literature contains no evidence that this dispensation has led to an increased incidence of fraud, duress or undue influence in such cases.[11] Third, the continuing revocability of a will is a testator's best protection against the success of such wrongful conduct.[12] Fourth, the courts' almost slavish veneration of the canon of strict construction has resulted in the destruction of countless wills which were free of fraud, duress or undue influence. The enormity of this needless destruction has caused the leading authority in this area to conclude that "(i)n dealing with these botched wills, Anglo-American courts have produced one of the cruelest chapters that survives in the common law."[13] Thus, it is submitted, the long-standing rule of strict compliance with the formalities of the statute of wills as a means of protecting a testator, though well-intentioned, is in fact counter productive and ought not to be required when dealing with clear cases of substantively valid wills.

By way of example, let us make a slight change in the facts of the *Robinson* Case that is discussed earlier in this article. Suppose that, instead of Katherine Ward, the local bishop was the one to whom testatrix dictated her will and who was also in the room when the friend later read and witnessed it, with all other facts remaining the same. What would be the outcome of the case? The equities in favor of the will being admitted to probate are certainly no less compelling than under the original facts. There is still no issue of fraud, duress or undue influence in the case; testatrix still has testamentary capacity; and the parties still concede that the writing accurately expresses testatrix' intent. Indeed, the layperson might see this as a stronger case for probate than the original facts because the interposition of the bishop, who is not a beneficiary, has eliminated any possible lingering concern about Katherine Ward serving as drafter/beneficiary/witness. But it is clear that this will would now be denied probate. Even the most benevolent court, applying an extremely liberal "substantial compliance" test, would be powerless to salvage this will—there is simply no way to get around the absence of a second witness subscribing in testatrix' presence. And therein lies the reason why progressing from a strict compliance to a substantial compliance rule is not sufficient; the needed remedy is a dispensation power that will enable a court to probate a substantively valid will even though one or more of the statutory formalities is entirely absent.



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Non-Probate Matters

For many years a will was the only vehicle available for making a testamentary disposition of property. Technically speaking, it still is. However numerous probate

avoidance mechanisms are available to the consumer in today's commercial market that enable one to make a *de facto*, if not a *de jure*, testamentary transfer of an unlimited amount of property, whether real or personal, tangible or intangible. Immediately coming to mind are such mechanisms as insurance policy beneficiary designations; joint or tenants by the entirety deeds to real estate with survivorship; joint, Totten Trust, and POD bank accounts; revocable and irrevocable inter vivos trusts; pension plan, IRA, and deferred compensation plan beneficiary designations; joint and survivor ownership of stocks, bonds, and brokerage accounts; life estate and remainder deeds to real estate; etc. It is instructive to note that none of these methods of transfer are surrounded with the number and variety of "safeguards" that are inflicted upon wills and that, where safeguards do exist, substantial compliance or dispensation is the rule of the day instead of strict compliance.

Why this dispensation from such formalities for non-probate transfers? It certainly cannot be because these transactions are insignificant in terms of total wealth or number of transactions. Statistics are not at hand but it is believed the reader will admit the likelihood that the value of all non-probate transfers exceeds the value of property passing under wills,[14] and it can not be denied that the total of such transactions will exceed the number of wills actually admitted to probate by a significant multiple.[15] It is believed that the dispensation for non-probate transfers probably occurred as a consequence of experience, business practices, and market forces suggesting to the legal and business community that such excessive safeguards were both undesirable and unnecessary. But, regardless of the cause, the point to be made is that the dispensation has occurred. And again, as in the case of holographic wills cited above, the literature contains no evidence that this dispensation has created an increased incidence of attempted fraud, duress or undue influence in these areas.

A concern for protection against fraudulently alleged promises in a number of other inter vivos transactions resulted in the enactment of a statute of frauds at common law and in every American jurisdiction. Notwithstanding the universality of this concern, however, no jurisdiction's statute of frauds imposes the extensive restrictions that are found in the statute of wills. Generally speaking, the statute of frauds provides a defense against the enforcement of a promise in one of the prescribed categories unless the promise is (i) evidenced by a writing (ii) signed by the party to be charged. Of particular interest is the fact that both of these requirements may be dispensed with and an oral contract can be enforced under the doctrine of part performance. A reference to the annotations under Virginia Code §11-2 will give an indication of the settled nature of this dispensation and the number of its applications. Why this dispensation from the statutory safeguards under the statute of frauds? Because (i) the part performance establishes an equity on behalf of the performing party and, most importantly, (ii) the part performance tends to satisfy the goal of the statute by providing proof of the existence of the alleged promise. This is the substantive or goal-oriented type of solution that is denied under the statute of wills where, even though evidence would show satisfaction of the goal of the statute (no fraud, duress or undue influence), probate will be denied unless one has strictly complied with the specified means to that goal. Before leaving the statute of frauds, and the related statute of conveyances, it should also be noted that the Virginia General Assembly never saw fit to enact that part of the English legislation that made the statute of frauds applicable to oral trusts of real estate. Trusts are another form of will substitute, and it is clear that oral trusts in realty, as well as personalty, are permitted in Virginia.[16] No specific formality is required and the oral trust is enforceable if its terms are established by clear and convincing evidence. But, suppose the exact same terms of such an enforceable oral will-substitute were typed in a testamentary paper that was also signed by its author and notarized. Now the writing has become unenforceable. The additional fact that the writing's proponent can provide clear and convincing evidence of intent, terms, and lack of fraud would not be enough for its probate—strict compliance with the formalities of the statute of wills must be demonstrated, and the writing in question has only one witness (the notary). Although no responsible estate planner would recommend that a client use an oral trust as a will-substitute, the illustration demonstrates the inconsistency of Virginia law in parallel matters where the ultimate issue (protection from fraud) is the same.

There is a final consideration that might be raised from a public policy standpoint, even though it is not a property matter. In certain extreme cases, Virginia criminal law provides for the possibility of capital punishment. However, prior to depriving one of his life, the law demands that his commission of the alleged crime be proved beyond a reasonable doubt—*but it does not specify what evidence must be used to prove it*. There is no capital offense which, like a will, must be proved by two eyewitnesses. As an original proposition, how does one explain a system of laws that will sanction the taking of a person's life without a single eyewitness, but will not sanction the probate of his signed and substantively valid typewritten will unless there are two eyewitnesses (who also subscribe their signatures thereto in the person's presence)?

Revocation—A Parallel Concern

The preceding will-execution discussion is also relevant in will-revocation cases because, in addition to revocation by physical act, Virginia law provides for revocation of a will by a writing executed "in the manner in which a will is required to be executed,"[17] thereby incorporating by reference the execution formalities of the statute of wills into revocation cases. This incorporation carries with it the concept of strict compliance with these formalities, as demonstrated by a leading national case from Virginia, *Thompson* v. *Royall*.[18] In this case the testatrix, in the presence of her attorney, the executor named in her will, and a third party, told her attorney to destroy her will and a codicil thereto. Her attorney suggested that it might be better to revoke by a writing, instead of by destruction, so that the original text might be available for possible assistance in writing any future will. Upon testatrix' agreement, her attorney wrote the following words upon the back of the will's manuscript cover: "This will null and void and to be only held by [the executor], instead of being destroyed, as a memorandum for another will if I desire to make same. This 19 Sept 1932."[19] After her attorney had completed this writing on her behalf, testatrix signed it. Testatrix died thirteen days later.

These facts were uncontroverted, and no issue of intent, capacity, fraud, duress, or undue influence was raised in the ensuing litigation to determine the efficacy of testatrix' intended revocation. If the notations had been written by testatrix, instead of by her attorney, they would have qualified as effective holographic revocations. But, as the writings were not in her hand, the revocation statute (incorporating the wills' act formalities) required her signature to be attested in her presence by two subscribing witnesses. As testatrix' signature wasn't so witnessed, the attempted written revocation clearly failed. This case further serves to demonstrate how deeply the rule of strict compliance is entrenched, because the lack of compliance was so obvious in this case that counsel on appeal did not even attempt to argue the issue.[20]

Again the question is asked—Why must it be so? What aspect of the law is being served by such results? Assuming for the sake of argument that strict compliance with these formalities was required by the necessities of an earlier day when wills were frequently deathbed-documents, it is submitted that the time has now arrived to grant the courts a dispensation power. Such a dispensation power would allow the courts to waive statutory formalities in execution and revocation cases where petitioner establishes, by clear and convincing evidence, that the writing accurately expresses its author's intent, that its author had the required capacity, and that it was not the product of fraud, duress or undue influence.

The Proposed Remedy

Following up on a recommendation made by the National Advisory Committee on Uniform State Laws several years earlier, the National Conference of Commissioners on Uniform State Laws added a new Section 2-503 to the Uniform Probate Code as a part of its 1990 revision. The text of this section, as modified to fit in the Code of Virginia,[21] reads as follows:

> §64.1-__. Writings intended as wills, etc.—Although a document or writing added upon a document was not executed in compliance with §64.1-49, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute (i) the decedent's will, (ii) a partial or complete revocation of the will, (iii) an addition to or an alteration of the will, or (iv) a partial or complete revival of his [or her] formerly revoked will or of a formerly revoked portion of the will.
>
> The remedy granted by this section is applicable only in proceedings before the court; it is not applicable in proceedings before clerks or their deputies.
>
> This section shall apply to all documents and writings of decedents dying after June 30, 1992, regardless of when such documents or writings came into existence.

It is submitted that the rather straight forward language of this dispensation power represents an excellent solution to the problem at hand. It does not eliminate any of the formalities as such, and its existence will not cause any relaxation of existing will execution practices by knowledgeable attorneys. Lawyers who are aware of the formalities will continue to do their best to strictly follow them in order that their wills might continue to qualify for the informal ex parte probate that is available in the clerk's office. However the document not so executed, because of a lack of awareness of the formalities (whether by counsel or consumer), would not necessarily be fatally flawed as is presently the case. The dispensation statute would allow the proponent of this paper the opportunity to prove, by clear and convincing evidence, what would be presumed if the statutory requirements had been met. And, if such clear proof was forthcoming it would demonstrate that the underlying purpose or goal of the statute of wills had been served and thus justify the admission of the document to probate.

Application and History

How far might the courts go in dispensing with statutory formalities if such a statute is passed? First, it is clear that the statute requires that there always be a writing. Could the court dispense with the testator's signature? Literally, yes, but it is not expected that this would occur often because of the difficulty in proving by clear and convincing evidence that an unsigned paper was intended to be a final legal document. There are the clear, if unlikely, cases mentioned by Professor Langbein where one with pen poised to execute a will is felled by a coronary or an assassin's bullet. A more realistic instance where signature dispensation might occur is the surprisingly large number of cases where wills prepared for husband and wife are reversed during the signing ceremony and each signs the other's will.[22] A second instance in which signature dispensation might occur is where a will is to be made self-proving and, although the self-proving affidavit is signed by the testator and witnesses, the signature lines on the will itself are left blank. In other cases, the difficulty of proving finality of an unsigned document by clear and convincing evidence is likely to be fatal. Accordingly, the greatest opportunity to use the dispensation power can be expected to arise in the attestation cases involving number of witnesses, signatures of witnesses, testator signing in witnesses' presence, and witnesses signing in testator's presence.

There may be a concern that the enactment of a dispensation statute could stimulate a significant amount of needless probate litigation, with numerous potential "beneficiaries" besieging the courts with a variety of alleged testamentary writings. Although no American jurisdiction has thus far adopted such a statute, the evidence is all to the contrary from several foreign jurisdictions that have. Israel enacted a dispensation statute in 1965, followed by South Australia in 1975, and both of these statutes are similar to the one contained in the 1990 Uniform Probate Code that is set forth in this article. After studying the results in these countries, the National Conference of Commissioners on Uniform State Laws concluded as follows:

> Experience in Israel and South Australia strongly supports the view that a dispensing power like Section 2-503 will not breed litigation. Indeed, as an Israeli judge reported to the British Columbia Law Reform Commission, the dispensing power 'actually prevents a great deal of unnecessary litigation,' because it eliminates disputes about technical lapses and limits the zone of the dispute to the functional question of whether the instrument correctly expresses the testator's intent.[23]

Professor Langbein concludes this aspect of his exhaustive report of South Australia's experience by noting that "the litigation levels have been astonishingly low. The reform has not engendered trumped-up claims."[24]

Conclusion

This article's thesis is that if it can be established by clear and convincing evidence (i) that a writing was intended to be a will, (ii) that the putative testator had the requisite capacity, and (iii) that the writing was not the product of fraud, duress or undue influence, then the writing ought to be admitted to probate as a will, even though it might fail to comply with some of the formalities contained in the statute of wills. Those who accept this thesis will agree that the present practice of requiring strict compliance with the formalities of the statute of wills is a dysfunctional aspect of the wealth transfer process that should be eliminated. It is submitted that (i) a dispensation power like that contained in the Uniform Probate Code is the only realistic solution to this problem, and that (ii) the courts of the Commonwealth can be trusted to exercise such a power with the same discernment they presently exercise in the numerous other instances where they have extensive control over the life, liberty and fortunes of the people. Accordingly, the language of the dispensation statute included herein is respectfully submitted to the Virginia General Assembly for its consideration in the 1992 Session.

FOOTNOTES

1. Virginia's statute of wills (with the provisions relating to holographic wills omitted) reads as follows: "No will shall be valid unless it be in writing and signed by the testator, or by some other person in his presence and by his direction, in such manner as to make it manifest that the name is intended as a signature; and moreover, . . . the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses, present at the same time; and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary...." Va. Code Ann. §64.1-49 (Repl. Vol. 1991).

2. *Savage* v. *Bowen,* 103 Va. 540, 546 (1905). It is also generally recognized that the statute of wills serves a ceremonial function (i.e., putting one on notice of the seriousness of the matter) and an evidentiary function. The following discussion regarding the protection against fraud function is also applicable to these other functions.

3. The term "substantively valid will" is intended to mean a testamentary writing (i) that expresses the true intent of its author, and (ii) that is not the product of fraud, duress or undue influence.

4. 239 Va. 36 (1990).

5. *Id.* at 39.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 41.

10. *Id.* at 44, quoting from *Sturdivant* v. *Birchett,* 51 Va. (10 Gratt.) 67, 89 (1853). These two cases, both of which were decided 4-3, are the only ones in which the Virginia Supreme Court has talked in terms of substantial compliance. Although having initial appeal as a possible solution to the problems discussed herein, the

substantial compliance concept is significantly inferior to the dispensation approach that is discussed later in the article.

11. To the argument that the requirement for a holographic will to be entirely in the testator's hand provides a parallel protection against fraud, duress or undue influence, one need only consider the volition of a person writing a ransom note at a captor's "request."

12. For the benefit of laypersons reading this article it should be noted that lack of access to a specific will does not hinder its author's ability to revoke it. The testator need only write "I revoke my will dated January 1, 1991." on a sheet of paper and, if this is in the testator's own hand, it needs no witnesses or other formalities, only the testator's signature to be effective as a revocation of the offending will.

13. Langbein, John H., *Crumbling of the Wills Act: Australians Point the Way*, 65 American Bar Association Journal 1192, 1193 (August 1979). For documentation on this point, and the exhaustive discussion of the entire subject matter of this article, see: Langbein, John H., *Substantial Compliance with the Wills Act*, 88 Harvard Law Review 489 (1975); and Langbein, John H., *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 Columbia Law Review 1 (1987).

14. One available fact will be of interest in this regard. In 1989, approximately 8.7 trillion dollars worth of life insurance was in force in the United States. This translates into $93,600 of life insurance per household, or $115,500 per insured household. American Council of Life Insurance, 1990 Life Insurance Fact Book, p. 5 (1990).

15. This conclusion is based on the following: (i) a national study which found that "only 27 percent of the adult population had wills at the time of the survey," [Curran, Barbara A., *Survey of the Public's Legal Needs*, 64 American Bar Association Journal 848, 849 (1978)]; (ii) "(s)tudies indicate that the large majority of people dies intestate," [Dukeminier and Johanson, *Wills, Trusts and Estates* 73 (Little, Brown and Co. 1990)]; and (iii) popular knowledge that the typical person has property in more than one of the above-described probate-avoidance vehicles.

16. *Burns* v. *The Equitable Associates,* 220 Va. 1020 (1980).

17. Va. Code Ann. §64.1-58.1 (Repl. Vol. 1991).

18. 163 Va. 492 (1934). This case appeared in five of the seven casebooks used at the University of Richmond Law School in the past twenty years; it was a principal case in four of them.

19. *Id.* at 494. The same words were written by her attorney on the back of the codicil, except her attorney's name was substituted in place of her executor's name. Testatrix signed this notation also.

20. The only issue on appeal was whether the writing might satisfy the statutory requirements for a revocation by physical act, i.e., cancellation. It was held not to because, for revocation of a will by cancellation, the "canceling" language, lines, marks, etc. must physically touch the words of the will, itself, and here the language was on the back of the will (and codicil). This is a further illustration of the strict compliance approach negating a testator's substantively valid intent and act.

21. These modifications are (1) the change of the internal reference to the correct Code of Virginia section, (2) the addition of the next-to-the-last sentence, to restrict the exercise of the dispensation power to the court, and (3) the addition of the final sentence to provide for an effective date.

22. It is of interest to note that no American case provided relief in such a situation until 10 years ago when the New York Court of Appeals, in a 4-3 decision, concluded that "(u)nder such facts it would indeed be ironic—if not perverse—to state that because what has occurred is so obvious, and what was intended so clear, we must act to nullify rather than sustain this testamentary scheme." *In re Snide,* 52 N.Y.2d 193, 196, 418 N.E.2d 656, 657, 437 N.Y.S.2d 63, 64 (1981).

23. 1990 Uniform Probate Code, Section 2-503, Commissioners' Official Comment. This comment concludes by also reporting that "(t)he rule of this section is supported by the Restatement (Second) of Property (Donative Transfers) §33.1 comment g (as approved by the American Law Institute at the 1990 annual meeting).

24. Langbein, John H., *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 Columbia Law Review 1, 51 (1987).